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AGAINST CERTAINTY

*Shawn J. Bayern**

I. INTRODUCTION

In legal argumentation, appeals to certainty and predictability have enormous rhetorical power. This Article argues that their use outstrips their legitimate role in legal analysis. The Article is not literally “against certainty” in the sense that it promotes uncertainty as a good thing in itself;¹ it is just a skeptical consideration of the role of appeals to certainty in legal theory. The Article’s principal contention is that arguments about certainty are often mistaken, that certainty itself is often misunderstood, and that many defenses of certainty in legal rules are tautological, irrelevant, or substantively overstated.²

There are many reasons that certainty has at least a superficial appeal in legal reasoning. For one thing, it may comport with analytical philosophers’ desires for conceptual clarity; a pragmatic or pluralist mode of analysis may appear unprincipled, intellectually incoherent, or simply unhelpful to those who promote formal argumentation.³ For

* Assistant Professor, Florida State University College of Law. I thank Mel Eisenberg and Mark Seidenfeld for helpful discussions that at least tangentially related to this Article. I also thank a workshop at the University of Florida and a local workshop at Florida State for helpful feedback. Nonetheless, all errors reflect my own uncertainty.

1. For example, it does not promote (or for that matter oppose) uncertainty or unpredictability in the law as an affirmative means to achieve a particular communicative or instrumental goal, such as a chilling effect on an undesired activity. *Cf.* Leigh Osofsky, *The Case Against Strategic Tax Law Uncertainty*, 64 *TAX. L. REV.* 489, sec. III (2011) (critiquing a line of scholarship that suggests intentional uncertainty promotes efficient compliance with tax laws); Mike Schaps, Comment, *Vagueness as a Virtue: Why the Supreme Court Decided the Ten Commandments Cases Inexactly Right*, 94 *CALIF. L. REV.* 1243, 1245 (2006) (“[T]he existing standard’s vagueness [in applying the Establishment Clause] creates a chilling effect on government endorsement of religion.”).

2. The Article’s focus is the common law. Its principles may extend to questions of constitutional and statutory interpretation, but I leave those questions beyond the scope of this Article.

3. Though writing from a perspective grounded in economics rather than analytical philosophy, Alan Schwartz and Robert Scott summarize the force of this claim: “Since courts or legislatures are likely to be involved when the relevant social propositions or values arguably favor more than one type of litigant or interest group, pluralist theories . . . tend to be least helpful when they are most needed.” Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of*

another, it appears to comport with a variety of political theories that emphasize the limited role of courts,⁴ the superiority of rules over human judgment,⁵ and formally equal treatment of equals under the law.⁶ It also tends to appeal to legal economists, though perhaps interestingly for multiple distinct and unrelated reasons.⁷

This Article surveys and critiques a variety of arguments that promote certainty. Part II briefly examines and critiques the general landscape of the jurisprudential debate in this area. Part III addresses situations—surprisingly common—where courts and commentators make appeals to certainty but neglect or ignore substantive nuance that makes the arguments irrelevant, in context, to the moral or political considerations underlying those appeals. The discussion in Part III proves nothing in general; it just demonstrates that arguments aiming to promote certainty are often hollow, and it serves as a call for those arguments to be evaluated with regard to their context—that is, to the certainty or other desirable characteristics they provide in the real world.

Contract Law, 113 YALE L.J. 541, 543-44 n.2 (2003). For a detailed discussion of monism and pluralism in legal theory (as applied to contract law), see STEVEN J. BURTON, ELEMENTS OF CONTRACT INTERPRETATION 214-18 (2009).

4. See, e.g., Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491, 1534 (2002) (“The theory of judicial minimalism, another account of judicial review that appears to have resonated widely with the academy and courts, uses the political theory of deliberative democracy to suggest a greatly curtailed role for courts in the protection of liberty, particularly on socially divisive moral issues.” (footnote omitted)).

5. See Larry Alexander, “*With Me, It’s All er Nuthin’*”: *Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 530 (1999) [hereinafter *All er Nuthin’*] (“I maintain that the problem law is meant to solve is that of information, not immoral motivation—that men are not gods, rather than that men are not angels. To solve this problem, law must consist of determinate rules. Standards are unhelpful.”).

6. See Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1431 (2004) (“So long as one is committed to the principle of equal liberty under law, then mercy [with its attendant uncertain application] is unattractive within a properly liberal criminal justice system.”).

7. Compare Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847, 848 (2000) (“[A] rigorous application of the common-law plain meaning and parol evidence rules [would] preserve the value of predictable interpretation . . .”), and Richard A. Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary*, 62 STAN. L. REV. 455, 521 (2010), with Schwartz & Scott, *supra* note 3, at 587-88 (defending formal rules in contract law on the grounds that they would decrease litigation costs). Professor Epstein noted:

[I]t is important to be aware that the so-called “formal” rules of property law have strong functional justifications, deriving from the simple maxim, “coercion no, cooperation yes,” which cautions against the use of forced transactions in both areas. Only a system of definite rights that are neither increased nor decreased through voluntary transfers can achieve that end. The strongest elements of the legal system are those which adhere to that simple maxim in all areas. Unfortunately, modern academic thought all too often seeks to deconstruct the rules for tangible property, rendering the field more opaque and less coherent than it should be.

Epstein, *supra*, at 521.

Part IV considers the circularity of arguments that define “rule of law” values to be consistent only with certain, rather than uncertain, legal rules or that otherwise tie the nature or purpose of law to certainty; these arguments include both the analytical-philosophical and the political-theoretic. Part V briefly examines economic and other instrumental arguments in favor of certainty. Part VI concludes.

II. THE BACKDROP TO DEBATES ABOUT CERTAINTY

A. Defining “Certainty”

For the purposes of this Article, a legal rule⁸ is “certain” to the extent that it proceeds to a definite legal conclusion without reliance on contextual judgment. By *contextual judgment*, I refer to three kinds of flexibility in the law—that is, three related features that a legal system will exhibit if it is not absolutely “certain” in this Article’s sense. First, contextual judgment may be at least partly case- and fact-dependent; there is, for example, typically no way to enumerate in advance every possible way in which someone can behave “unreasonably” under tort law’s negligence standard, and, as a result, the negligence principle exhibits uncertainty under my definition. Second, contextual judgment requires *judgment*, rather than mechanical application of a logical template to a set of facts; for example, even if all the facts in a negligence case are known, a determination of a defendant’s negligence depends on some further analysis or interpretation of the defendant’s actions in view of prevailing social notions of reasonableness, and often this analysis or interpretation depends on community standards. Similarly, social notions may compete or conflict—for example, social morality may oppose efficiency in a particular case—and prudential judgment may be needed to resolve the conflict.⁹ Third, contextual judgment extends to the choice of a rule to govern a legal case; a legal system is more certain, under my definition, if its rules can never be modified.

This Article’s argument, in short, is that legal systems should exhibit the three kinds of uncertainty that correspond to these three types of contextual judgments. It is desirable, in other words, for legal systems to recognize (1) that unexpected facts may properly change legal results, (2) that facts require interpretation and social judgment, and (3) that such

8. For reasons I will describe shortly, I use the term “rule” generally to include what others refer to as “standards” in addition to what others refer to as “rules.”

9. MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 14-19 (1988) [hereinafter *NATURE OF COMMON LAW*].

social judgments may require that a formerly prevailing rule of law be changed.

To be clear, these three desirable properties promote “uncertainty” only as a matter of definition. Common law courts that can address new facts and that can change doctrine may well provide greater real-world predictability than those that cannot.¹⁰ For example, it may never occur to contracting parties that a private or trade-specific meaning they apply to a written word in their contract might mean something else to the rest of society; formal rules of contract interpretation that rely on the public “plain meaning” of a written contractual term may, in turn, provide less real-world predictability and comport less well with the parties’ expectations, even though the rule permits interpretive decisions to be made with less regard for factual context.¹¹ Doctrinal stability, similarly, may either enhance or frustrate real-world predictability—depending, for example, on the content of an old rule and on whether parties have relied on it in their planning.¹²

To illustrate the first type of uncertainty—that is, sensitivity to facts and context—consider Oliver Wendell Holmes’s enterprise in tort cases like *Baltimore & Ohio Railroad Co. v. Goodman*.¹³ In *Goodman*, Justice Holmes decided that when the driver of an automobile crossing a railroad track “relies upon not hearing the train or any signal and takes no further precaution he does so at his own risk” and thus is (contributorily) negligent for the crash.¹⁴ Holmes had defended this enterprise in his earlier classic book, *The Common Law*,¹⁵ noting that

10. See *infra* note 123 and accompanying text.

11. See Ofer Raban, *The Fallacy of Legal Certainty: Why Vague Legal Standards May Be Better for Capitalism and Liberalism*, 19 B.U. PUB. INT. L.J. 175, 182 (2010); see also Melvin Aron Eisenberg, *Strict Textualism*, 29 LOY. L.A. L. REV. 13, 22-23 (1995) (describing other circumstances in which “strict textualism actually becomes an instrument of uncertainty”). Professor Raban noted:

Whether we consider external evidence or whether we blindly follow the literal text, there is always the risk of frustrating the parties’ predictions and expectations. But in the former case, we at least consciously deliberate about our decision: we purposely seek to align the legal outcome with the parties’ predictions.

Raban, *supra*, at 182. Indeed, two leading economic commentators in contract formalism have made a related observation the centerpiece of their argument: they recognize that reliance on text alone increases uncertainty, and their argument for interpretive formalism is that the administrative cost (primarily in the form of litigation expenses) to decrease this uncertainty is not justified. See Schwartz & Scott, *supra* note 3, at 572-74.

12. See *infra* Part III.A.

13. 275 U.S. 66 (1927). Robert Rabin has described the tension between Holmes’s and Cardozo’s Supreme Court tort opinions, both in his excellent casebook, MARC A. FRANKLIN ET AL., TORT LAW AND ALTERNATIVES: CASES AND MATERIALS 60-64 (9th ed. 2011), and recently in Robert L. Rabin, *The Pervasive Role of Uncertainty in Tort Law: Rights and Remedies*, 60 DEPAUL L. REV. 431, 432-35 (2011).

14. *Goodman*, 275 U.S. at 70.

15. OLIVER WENDELL HOLMES, JR., THE COMMON LAW (Am. Bar Ass’n 2009) (1881).

judges ought to notice patterns in jury decisions and eventually remove decisional authority from juries once they learned how reasonable juries would decide particular issues.¹⁶ His approach stands in contrast to Benjamin Cardozo's in the later, factually similar, case of *Pokora v. Wabash Railway Co.*,¹⁷ in which the Court declined to decide general factual questions about a driver's care near a railroad track and instead referred the matter to a jury.¹⁸

Holmes's approach is more certain under my definition than Cardozo's, both because it is context-insensitive and because it eliminates judgment. It is context-insensitive, because it identifies particular facts that matter and at least purports to be insensitive to other facts: a driver who does no more than assume that an approaching train ought to make an audible signal is, on that basis alone, negligent.¹⁹ It eliminates judgment, because there is no further role for a judge or jury once it is found that a driver assumed there was no train because he could not hear one.²⁰ Moreover, Cardozo's effective overruling of Holmes²¹ exemplifies doctrinal change—the other feature of an “uncertain” system of common law.

B. *Rules and Standards, Maximalism, and Minimalism*

These three features of certainty touch on a variety of related jurisprudential debates, such as those concerning the proper political role of the judiciary (often manifested in modern literature as a debate

16. *Id.* at 83-84. Of course, in *Goodman*, Holmes went further and took decisional authority away from a trial court judge who, presumably, had more recent contact with juries than Holmes did as a justice of the U.S. Supreme Court. *See Goodman*, 275 U.S. at 70.

17. 292 U.S. 98 (1934).

18. Compare *Goodman*, 275 U.S. at 70 (removing decisional authority from the jury), with *Pokora*, 292 U.S. at 100-01 (referring the question of whether plaintiff was contributorily negligent to the jury).

19. *Goodman*, 275 U.S. at 69-70.

20. *Id.*

21. As so often in Cardozo's opinions, his overruling of *Goodman* was couched in terminology and principles that suggested elaboration rather than overruling:

There is no doubt that the opinion in that case is correct in its result. *Goodman*, the driver, traveling only five or six miles an hour, had, before reaching the track, a clear space of eighteen feet within which the train was plainly visible. With that opportunity, he fell short of the legal standard of duty established for a traveler when he failed to look and see. This was decisive of the case. But the court did not stop there. It added a remark, unnecessary upon the facts before it, which has been a fertile source of controversy. “In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look.”

Pokora, 292 U.S. at 102 (footnote omitted) (quoting *Goodman*, 275 U.S. at 70).

between “rules” against “standards”²²—and occasionally between judicial “minimalism” and “maximalism”).²³ The purpose of this Article, however, is not to engage those particular debates directly. Instead, this Article offers two separate kinds of analysis. First, it highlights areas (in Part III) where arguments about certainty are simply irrelevant, or at least where the rhetoric of certainty outstrips the substantive applicability of certainty-related arguments. Second, it critiques (in the rest of the Article) a series of broad arguments based in philosophy, political theory, and economics. These arguments all promote a very general kind of certainty, and I believe they are all mistaken. My argument is not that certainty is never desirable, only that it is often overplayed as a goal of law and jurisprudence.

One reason I want to sidestep the discussion of rules and standards, and of judicial minimalism and judicial maximalism, is that those debates tend to be too general for particular application to the common law. To put it bluntly, it is difficult to decide concrete common law questions based on general propositions about a judge’s political role or abstract conclusions about how specific common law rules ought to be. The enterprise is appropriately more pragmatic than abstract reasoning permits.

To be clear, this Article’s argument is not specifically for standards over rules or for any particular thesis about the role of judges. Standards indeed tend to be less “certain” than rules under my definition, but the distinction between rules and standards does not exhaust the questions of certainty with which I am concerned. Consider, as an example, the rule in contract law that donative promises are not enforceable unless the promisee relies on them.²⁴ In the vast majority of cases, this rule is relatively simple to apply, and it is not prone to especially unpredictable application; it is a “rule” rather than a “standard.” It can be set in opposition, for instance, to a more general standard like “donative promises are enforceable where justice requires.” Nonetheless, certainty and predictability are likely not significant goals of the rule, and it is difficult to evaluate the rule by evaluating its certainty. For one thing,

22. See, e.g., Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 381-83 (1985).

23. See CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3-4 (1999); see also Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 5-6 (2009) (describing “minimalism” in this context as “a term coined by Cass Sunstein”). Related terms, of course, have a long and interesting history in legal and political commentary; for example, Jeremy Bentham self-consciously created the terms “minimize” and “maximize.” See JEREMY BENTHAM, PAPERS RELATIVE TO CODIFICATION AND PUBLIC INSTRUCTION 103 n.* (London, Jeremy Bentham 1817); see also 9 THE OXFORD ENGLISH DICTIONARY 497, 815 (2d ed. 1989).

24. RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. a, illus. (1979).

promisors would be on shaky moral ground if they were to insist that the law guarantee that their promises were not enforceable, even after having created the impression to promisees that the promises were sincere. Even more significantly, in practice, donative promisors cannot rely on the unenforceability of their promises, because the law will compensate the promisee for losses he incurs in reasonable reliance on the promise.²⁵ And just as a rule like this can be unpredictable, standards can be quite predictable—if, for example, there is a clear social consensus that a particular kind of behavior is unreasonable.

In any event, as those who participate in debates between rules and standards recognize, there is a spectrum between the two; the debate is not between endpoints but is, appropriately, a matter of sensitive degree.²⁶ The terminology of “rules” and “standards” ignores this spectrum and encourages more abstraction than is warranted.

More specifically, this Article avoids arguing for a specific amount of certainty or uncertainty, or for a specific mix of rules and standards, because many questions in the common law can benefit from focused analysis and the application of principles that are essentially matters of social consensus. A general problem from which both the minimalism/maximalism debate and the rule/standard debate sometimes suffer is that they appear to assume, at least implicitly, that the point of legal commentary must be only, or at least largely, to make a choice about the best legal response given a particular constant state of confusion about the right doctrinal approach. In other words, they appear often to start with the premise that we are substantially unsure how to address a particular category of cases; given that, appellate judges and academic commentators (who often seem to imagine themselves as appellate judges) must either throw up their hands in despair and refer the matter to a jury or trial judge or, alternatively, adopt an admittedly imperfect wholesale rule.

For example, a commentator analyzing the contract-law doctrines concerning unexpected circumstances (such as impossibility, impracticability, and frustration) might consider problems in those areas and, from the perspective of a judicial minimalist or maximalist, make

25. *Id.* § 90.

26. See, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 561-62 (1992). Professor Kaplow notes:

The language of this Article will follow the common practice of referring to rules and standards as if one were comparing pure types, even though legal commands mix the two in varying degrees. One can think of the choice between rules and standards as involving the extent to which a given aspect of a legal command should be resolved in advance or left to an enforcement authority to consider.

Id. (footnote omitted).

respectively a pronouncement like “the doctrine should not exist because it undermines the certainty of parties’ rights and duties” or “judges should have discretion to do justice as they see fit.” Perhaps we would have to pick one of those two approaches if we were required to give up further attempts to analyze the morality and policy of contract cases that raise unexpected-circumstances concerns, but we are almost never barred from increasing our reasoned understanding of particular categories of cases. Instead of a meta-theoretical and almost anti-substantive debate about the right level of generality of contract-law rules, the debate about unexpected circumstances should proceed along substantive lines. Commentators should aim to categorize cases, find salient principles of morality and policy that distinguish some cases from others, and adopt other modes of reasoning that at least aim to provide positive-sum improvements in legal understanding rather than to allocate the costs of preexisting analytical confusion.²⁷ If nothing else, this Article seeks to encourage productive analysis of substantive law rather than essentially distributive analysis about what to do given confusion about the best solutions to doctrinal problems.²⁸

27. For an example of an article that engages in precisely this sort of positive-sum improvement in analytical methods in the context of unexpected circumstances, see generally Melvin A. Eisenberg, *Impossibility, Impracticability, and Frustration*, 1 J. LEGAL ANALYSIS 207 (2009). The discussion in the text is in some ways an answer to the challenge that Robert Scott and Alan Schwartz pose regarding the difficulties of pluralist legal theories—that they “tend to be least helpful when they are most needed,” Schwartz & Scott, *supra* note 3, at 542-43 n.2, because they are most needed where values are in conflict and a weighing of them is necessary. Developing legal rules is indeed often difficult precisely because it puts our values in conflict—for example, because it pits efficiency against morality—or because it sets the interests of different groups of people in conflict. But addressing these difficulties without considering the conflicting substantive values tends to misfire precisely because it does not address the root of the difficulties. Problems remain difficult until we resolve or at least address conflict, either through reasoning or through an acceptable political process. And some problems may remain difficult indefinitely. My view is that this is better than pretending that difficult problems are easy.

28. Thus, for example, I perhaps share some of the frustration expressed by Professor Schlag: Much of legal argument tracks the dialectic. This dialectic cannot be anchored in matters of substance. Indeed, the very attempt to explain this aspect of form in terms of substance succeeds in doing quite the reverse: It puts us on the road to explaining substance by means of form. The short of it is that much of legal argumentation is simply an exercise in the formalistic mechanics of a dialectic which doesn’t go anywhere. The point of further study ought to be to ascertain why and how it is that we allow such silly games to have such serious consequences. Schlag, *supra* note 22, at 430. But I believe I am more optimistic than Professor Schlag when it comes to the role of context-sensitive analysis. As exemplified in Mel Eisenberg’s work, *see, e.g.*, Eisenberg, *supra* note 27, my belief is that sensitive analysis of cases and categories in common law subjects can shed meaningful light on solutions to complex problems.

III. CONTEXTUALLY IRRELEVANT CERTAINTY

Surprisingly often, courts and commentators urge certainty in areas where it is almost entirely unjustified by any notion of morality or efficiency—or, indeed, where the certainty of a legal rule has essentially no consequences at all on its own.²⁹ To put it differently, a surprisingly common pattern in legal argumentation is the assertion that some course of action would promote uncertainty and is undesirable on that basis alone, when in fact it is virtually impossible to discern any plausible moral or instrumental detriment from the claimed uncertainty. This is not, again, to say that uncertainty is desirable on its own, but only that the claimed certainty provides no social advantages—and thus that whatever legal question is being asked should be decided on other grounds.

As a rough analogy, it is easy to see how a chess player is wronged if tournament authorities change the rules of chess in the middle of a game. It is also easy to speak in generalities based on this example and to make a claim like: “The proper administration of chess tournaments requires certainty, because the very point of the tournament is to test players’ ability to compete according to particular rules; their strategizing is pointless without reliable rules.” This generalization carries a good degree of sense, particularly with regard to the kinds of certainty that those who state it would probably have in mind, like sudden, pointless changes to the rules of chess. It would be wrong to take this call for certainty, however, to extend to the precise color of the pieces on the chessboard or the precise location of the games in the tournament. A player might feel at most inconvenienced, but not wronged, to be told that because of a water leak, a scheduled game had been moved to the second floor instead of the third floor of a building. The only way to distinguish the cases in which certainty is relevant from those in which it is not is by considering the context of any proposed change through the lens of substantive considerations—that is, those concerned with morality, planning, and so on. The reason that a move from Room 203 to Room 303 does not matter is that it does not defeat players’ reasonable strategic planning in the way that a reduction in the number of pawns, or a material decrease in the time allowed for play, does. The proper resolution of borderline cases, like the size or abstractness of the pieces’ shapes or the permitted amount of background noise during gameplay, depends on the same substantive concerns, as

29. See *infra* Part III.A.

filtered through propositions of practical experience. Certainty itself is not the final goal; it is a way of achieving particular substantive goals.

The same is true of law, and the same generalization in law—that certainty is always or generally demanded by order or planning or some other singular factor—is wrong for the same reasons. This Part illustrates the problem over several categories of cases. The central argument in this Part is that any argument for certainty needs to be evaluated with respect to its context and ultimately justified (or rejected) using particular notions of morality, efficiency, or some other substantive social proposition.³⁰ Because it is difficult to show the importance of context in the abstract, the discussion in this Part walks through several categories of examples of arguments in which the context is forgotten or ignored. The point is to suggest the importance of a focused analysis of legal certainty.

Broadly speaking, this Part highlights categories of cases in which one or both of the following properties is true: (1) no parties will in fact benefit from any claimed certainty, because the factual situations governed by the legal rule at stake do not engender reliance or planning, either because they are unexpected or because reliance is not valuable or appropriate in particular contexts; (2) any parties who seek certainty can easily achieve it using a mechanism that complements the legal rule at issue in the particular contexts in which the rule applies. For ease of exposition, however, the Part is organized as follows: First, I discuss the supposed certainty that comes from doctrinal stability. Second, I discuss the certainty associated with substantive common law rules themselves.

A. *Irrelevant Doctrinal Stability*

Doctrinal stability can be a weighty goal, but only where it matters. The chief reason doctrinal stability matters is that parties might rely on existing doctrine in planning their affairs.³¹ Productive and fair reliance on doctrine is a serious consideration that needs to be weighed against other serious considerations, such as the improvement that might come from a new, superior rule.³²

30. As a background matter, I take it as a basic premise of the modern analysis of common law that common law principles must be justified at bottom by morality, policy, and experience. *See* NATURE OF COMMON LAW, *supra* note 9, at 43.

31. *See id.* at 48 (“[S]tare decisis makes planning on the basis of law more reliable and private dispute-settlement on the basis of law easier. The most salient aspect of this role of stare decisis is the protection of justifiable reliance.”).

32. For a discussion of the overruling of precedent, see *id.* ch. 7.

My argument here is not that doctrinal stability is never desirable;³³ it is just that such stability is often overplayed, and that it needs to be evaluated in view of the particular reliance it permits in the real world. Often, to the contrary, doctrinal certainty is claimed as a good thing in itself,³⁴ either explicitly or—because no particular benefit from doctrinal certainty is stated—implicitly.

There is perhaps one general way in which doctrinal stability may indeed be a good thing in itself, without any context-specific benefit: Overturning doctrine in one area may conceivably signal to private parties that legal doctrine as a whole is not as certain as they thought. As a result, overruling of precedent may undermine general planning. Mel Eisenberg treats this possibility as a form of what he calls “general reliance” on legal doctrine: courts “may be concerned that failure to follow [a particular] precedent [at issue] may be likely to make actors insecure about the reliability of other precedents.”³⁵ I am skeptical, however, that general reliance of this type is an especially weighty consideration in the real world for the simple reason that if courts can reliably identify cases in which specific reliance is impossible and consider precedent less weighty in those areas, those following the courts’ decisions have little reason to fear that precedent will be compromised in cases where reliance *is* plausible.

To elaborate this argument, it will be helpful to consider an example. Despite its age, the classic English contract case of *Foakes v. Beer*³⁶ is a useful example, because it exhibits very clearly (1) an undesirable precedent, and (2) a decision that rests almost entirely on a hollow appeal to the certainty of doctrinal stability. When examined carefully, it serves as a demonstration of the importance of context-sensitive analyses of certainty in legal reasoning. Cases of the type in *Foakes*—a recurring pattern in contract cases—present a situation in which doctrinal stability is almost entirely irrelevant because it can lead to no fair or useful reliance or planning.

The facts of *Foakes* were relatively straightforward. After Julia Beer had received a judgment of a little more than £2090 against John Weston Foakes, the two parties entered into an agreement that modified the schedule and terms on which Dr. Foakes would pay the judgment.³⁷

33. For example, I would not seriously suggest undermining the certainty of the free civilmoign system. *Cf., e.g.,* Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 638-39 (1949).

34. See NATURE OF COMMON LAW, *supra* note 9, at 47-48.

35. *Id.* at 48.

36. [1884] 9 App. Cas. 605 (H.L.).

37. *Id.* at 605.

Specifically, Dr. Foakes agreed to make a present payment of £500 and future installments of £150 every six months until the original sum was paid off, and Ms. Beer agreed to accept that stream of payments as satisfaction of the judgment.³⁸

This agreement ran afoul of a formal rule of classical contract law³⁹ known as the legal-duty rule. The force of the legal-duty rule is that a promise to discharge an existing legal obligation cannot serve as consideration for a promise given in exchange.⁴⁰ For example, suppose *A* already owes *B* \$4500, and *A* promises to pay that preexisting debt in exchange for a promise of something new from *B*. (Suppose *B* offers something new to induce *A* to live up to his existing obligation and pay the debt.) Under the classical legal-duty rule, *A*'s promise to pay the existing debt does not serve as valid consideration for the new bargain between *A* and *B*, and that new bargain will, accordingly, not be enforced (at least, not without some other, independent reason for enforcement).

The new arrangement between Dr. Foakes and Ms. Beer implicated the legal-duty rule because, in promising to pay £500 followed by installment payments of £150, Dr. Foakes was promising to do something he already had a legal obligation to do—namely, to pay Ms. Beer £2090 in total.⁴¹ Ms. Beer, on the other hand, gave something up under the new contract; specifically, she agreed to accept total payments of £2090 to satisfy her debt, thereby forgoing her right to interest payments.⁴²

The case arose because Ms. Beer sought to rescind the agreement and insist on her original rights to interest payments.⁴³ In the House of Lords, the Earl of Selborne, Lord Chancellor, disposed of the case largely on doctrinal grounds, observing that regardless of the legal-duty rule's merits, it was too late in history to change the doctrine:

The doctrine itself, as laid down by Sir Edward Coke, may have been criticised, as questionable in principle by some persons whose opinions are entitled to respect, but it has never been judicially overruled; on the contrary I think it has always, since the sixteenth century, been accepted as law. If so, I cannot think that your Lordships would do

38. *Id.* at 605-06.

39. I use the term "classical contract law" to refer to the historical formal body of rules consistent with Samuel Williston's analyses and the original *Restatement of Contracts*. See P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 405-06 (1979); NATURE OF COMMON LAW, *supra* note 9, at 78.

40. See RESTATEMENT OF CONTRACTS § 76 (1932).

41. See *Foakes*, 9 App. Cas. at 605-06.

42. *Id.*

43. *Id.* at 606.

right, if you were now to reverse, as erroneous, a judgment of the Court of Appeal, proceeding upon a doctrine which has been accepted as part of the law of England for 280 years.⁴⁴

What is striking about Lord Selborne's doctrinal, stability-oriented defense of the legal-duty rule is how poorly it addresses the circumstances in which that rule operates. It does not indicate how the parties might have relied on the existing rule, how they would be harmed if the rule were to change, or why in context it matters how long the rule has been "accepted."

To be clear, I reiterate that doctrinal stability can be an important consideration in deciding legal cases. When parties have relied on legal rules, it can be unfair and might potentially disrupt their ability to plan for the future efficiently if the rules change suddenly, without notice, for no good reason. The frustration of planning should count at least as a reason, though not necessarily a decisive reason, to avoid changes that disrupt settled doctrine. But as Lord Selborne's analysis in *Foakes* suggests, courts and commentators often appeal to doctrinal stability without regard for the role that stability might play—or not play—in particular cases.

Consider, to begin with, that the practical force of the legal-duty rule is to prevent some kinds of contract modifications.⁴⁵ As a result, we might expect that if parties had relied on the rule, they would simply not have entered into modifications of contracts or debts. If Dr. Foakes and Ms. Beer were both honest negotiators, both fully aware of the legal-duty rule, and both certain that the rule was an unshakeable part of the legal regime that governed them, then their only plausible actions in reliance on the rule would have been either: (1) to recognize that the rule takes away a potentially valuable opportunity to modify their debt and resign themselves, accordingly, to the terms of the original debt, or (2) to find some technical way to escape the force of the rule.⁴⁶

Importantly, the parties took neither of these paths. That is, they attempted to modify their contract without using any special

44. *Id.* at 612.

45. The rule itself is questionable on substantive grounds and has been significantly eroded under modern law; if it ever served a useful role, it was probably as a crude proxy for a rule striking down unconscionable contracts in a legal system that did not yet have such a rule. See NATURE OF COMMON LAW, *supra* note 9, at 117-18, 155-56; Melvin Aron Eisenberg, *Probability and Chance in Contract Law*, 45 UCLA L. REV. 1005, 1034-41 (1998).

46. For example, as a matter of substantive contract law in late nineteenth-century England, the parties might have avoided the force of the legal-duty rule by using the formality of the "seal" to ensure the enforceability of their promise. See *Foakes*, 9 App. Cas. at 611. They might also have attempted to have Dr. Foakes provide some form of nominal consideration to Ms. Beer. See *id.* at 611-12.

technicalities to avoid the force of the legal-duty rule.⁴⁷ That attempt alone makes it hard to say that Dr. Foakes and Ms. Beer relied on the legal-duty rule—or that future parties similarly situated will rely on the rule, at least if they are honest.

Of course, not everyone is honest. Thus, another possibility is that Ms. Beer knew about the legal-duty rule and Dr. Foakes did not, so that she attempted to get him to comply with a payment schedule by offering a modification that she knew would be unenforceable. In that case, however, it becomes difficult to develop either a moral or a policy-based rationale to support the application of the legal-duty rule, or a more general principle of doctrinal stability, to *Foakes*. If Ms. Beer knew her promise to modify the debt was unenforceable, and if she was simply attempting to mislead Dr. Foakes to encourage him to pay his debt (rather than, for example, to declare bankruptcy), it would have been immoral for her to make that promise. Indeed, it would probably amount to promissory fraud.⁴⁸ To put it differently, Ms. Beer could indeed have relied on the legal-duty rule when agreeing to restructure Dr. Foakes's debt, but only if she were relying on the rule specifically to deceive Dr. Foakes. If that is the sort of reliance that the rule permits, then doctrinal stability becomes simply an excuse for fraud (or, at the very least, sharp and unfair dealing)—and all the moral and instrumental problems associated with fraud.

Another possibility is that neither of the parties knew about the legal-duty rule. Indeed, this seems most likely under the circumstances, particularly if we give Ms. Beer the moral benefit of the doubt. In that case, of course, the parties' ignorance of the rule would suggest they did not rely on it at all and, accordingly, that they would not be harmed if the doctrine were overturned.

A final possible mechanism for reliance on the existing legal-duty rule remains, which is that in whatever transaction originally led to the £2090 debt, the parties at least implicitly relied on the future operation of the legal-duty rule to refuse to allow modifications to that debt. To put it differently, when parties enter into a contract (or otherwise do anything that results in the possibility of a legal duty), they might theoretically set the price or other terms of the contract (or otherwise adjust their activity) in the shadow of the legal-duty rule, secure in the knowledge that the rule will prevent various types of contractual modifications from taking

47. See *id.* at 605-06.

48. See Ian Ayres & Gregory Klass, *Promissory Fraud Without Breach*, 2004 WIS. L. REV. 507, 522-24.

effect. But this sort of reliance is extremely unlikely for the following two reasons.

First, though probably less importantly, the legal-duty rule does not apply only to contract modifications.⁴⁹ For example, it would have applied if Ms. Beer's judgment against Dr. Foakes had been for medical malpractice rather than, as it was, the result of a commercial dispute.⁵⁰ Had the debt arisen in tort, it is implausible that the parties relied on the legal-duty rule at the time the initial debt was established. The court could, at least theoretically, have set the initial judgment with the legal-duty rule in mind, although in practice such specific reliance seems unlikely.

Second, more decisively, under English law at the time, the legal-duty rule did not prevent all modifications to debts or contracts; it prevented only modifications that failed to observe other technical requirements of contract law, like the seal—originally a stamp of hot wax or something similar to authenticate a document and serve as evidence of the deliberation behind and solemnity of a legal undertaking.⁵¹ (In *Foakes*, the parties' agreement to structure a settlement of Dr. Foakes's debt was not made under seal.)⁵² Other mechanisms could have made the agreement to modify the debt unambiguously enforceable.⁵³ Accordingly, Ms. Beer (or the judge that issued her order) could not have relied on a guarantee, backed by the stability of legal doctrine, that her original debt could not be modified; there were indeed many ways in which it could have been modified. That the legal-duty rule prevented one of those ways would almost certainly have been of exceedingly little or no value, practical or otherwise, to her or anyone else at the time the initial debt came into effect.

While *Foakes* may be distinctive in presenting such a clear combination of a bad rule and an adherence to that rule for unconvincing reasons of doctrinal stability, significant domains of the common law

49. See *Foakes*, 9 App. Cas. at 610-12.

50. See *id.*; see also *Beer v. Foakes*, [1883] 11 Q.B. 221, 221 ("In August, 1875, the plaintiff recovered judgment against the defendant for 2090*l.* in an action on certain bills of exchange accepted by the defendant.").

51. See *Foakes*, 9 App. Cas. at 611; Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800-01 (1941) (discussing the seal and its formal role in contract law).

52. *Foakes*, 9 App. Cas. at 611 ("Not being under seal, it cannot be legally enforced against the respondent, unless she received consideration for it from the appellant. . . ." (emphasis added)).

53. See *id.* (recognizing that a modification is enforceable if, "though without consideration, it operates by way of accord and satisfaction, so as to extinguish the [original] claim for interest"). Moreover, Ms. Beer could, at some point during the operation of the newly agreed payment schedule, simply have given Dr. Foakes an executed gift in the amount of the interest.

have characteristics similar to the pattern presented in that case. Specifically, there are many instances in which productive reliance on existing doctrine is impossible, or at least that the capacity for it is grossly exaggerated. For example, in contract-law cases involving unexpected circumstances, or in tort-law cases that purport to direct productive incentives to individuals who often have very little conception of the specifics of tort law,⁵⁴ it is hard to see how justifiable reliance would be undermined by doctrinal evolution.

In short, it is important to determine the reasons that doctrinal stability might matter in particular cases. Without a sensitive context-specific analysis that applies substantive knowledge of the law and analyzes the features of particular cases to which that substantive law applies, it is impossible to determine precisely how important reliance is.

B. Irrelevant Rule-Certainty

There are two main substantive categories of cases in which the certainty of legal rules is overlaid and in which it should probably be ignored or at least significantly deemphasized. First, in many situations, private parties may not desire certainty from the law, because institutions complementary to courts (and their default rules) provide whatever certainty is needed. Second, in some situations, advance planning is either impossible or only marginally plausible.

*Roessler v. Novak*⁵⁵ nicely represents the first kind of case—and it serves as another example of an invocation of certainty that seems initially persuasive but is less practically applicable after a focused analysis of the factual situation. The case is not doctrinally significant, but it appears in at least one influential torts casebook⁵⁶ and some torts scholarship by leading torts commentators because of a concurring opinion's powerfully written argument against uncertainty.⁵⁷

54. See Shawn J. Bayern, *The Limits of Formal Economics in Tort Law: The Puzzle of Negligence*, 75 BROOK. L. REV. 707, 708 (2010) (“[I]t is common to see arguments that injurers do not respond to incentives in the way economists predict because people are simply not rational, are not aware of the law, or have more pressing concerns than distant and relatively weak financial incentives.”); see also HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 556-58 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (discussing “unfair surprise” by constructing an imaginary dialogue between a potential injurer under the pre-*MacPherson* rule of tort duty and that injurer’s counsel, showing the implausibility of specific reliance on the older rule). See generally Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377 (1994) (surveying the state of arguments that tort law does not influence behavior in the way economists suggest).

55. 858 So. 2d 1158 (Fla. Dist. Ct. App. 2003).

56. FRANKLIN ET AL., *supra* note 13, at 24-28.

57. See, e.g., Rabin, *supra* note 13, at 441-42.

The facts of the case are straightforward.⁵⁸ Based on abdominal scans, a radiologist diagnosed the plaintiff, Klaus Roessler, with visceral perforation—a serious condition requiring immediate surgery.⁵⁹ The surgery led to significant complications, including renal failure and brain abscesses; these required Mr. Roessler to spend about two months in the hospital.⁶⁰ His lawsuit alleged that the radiologist had misinterpreted the abdominal scans and was negligent in failing to consider the possibility of an abdominal abscess,⁶¹ evidently a much less significant condition that would not have required immediate surgery. He sued (among other parties) the radiologist who diagnosed him, the radiological group in which that radiologist was employed, and the hospital where the radiologist worked.⁶²

The question on appeal concerned the vicarious liability of the hospital.⁶³ The hospital claimed that the negligent radiologist was not its employee; he was merely an employee of the radiology group, which was in turn an independent contractor of the hospital.⁶⁴ The appellate court nonetheless reversed the trial court's grant of the hospital's summary judgment motion, finding that even if the radiologist was not the hospital's employee, the jury could have found that he acted with the "apparent authority" of the hospital.⁶⁵ This use of the concept of apparent authority may be confusing to those aware of agency law.⁶⁶ The

58. See *Roessler*, 858 So. 2d. at 1160.

59. *Id.*

60. *Id.*

61. *Id.*

62. See *id.* at 1158-62.

63. *Id.* at 1160-61.

64. *Id.* at 1161-62.

65. *Id.* at 1162-63.

66. The terminology of apparent authority is normally used in a contractual or at least transactional setting as a description of the power of someone who is not an agent to bind a principal because of manifestations the principal has made about the agent's contractual authority. See RESTATEMENT (SECOND) OF AGENCY § 8 (1958) ("Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons."). *The Restatement (Second) of Agency* also provides:

[A]pparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.

Id. § 267. In agency law, there is a separate concept of an "apparent servant," or one who is held out to be a servant (for the purposes of vicarious liability in tort law) even though he or she is not:

One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.

Id. The *Roessler* court appears to have applied the latter principle, though its terminology is unclear.

case is easier to understand in view of the principle of vicarious liability in tort law that the negligence of those held out to be employees can be treated as employees by those who rely on their employment status, as a patient might when evaluating the medical advice of a doctor in a hospital.⁶⁷ This concept is similar to, but not the same as, the traditional agency concept of apparent authority.⁶⁸

For our purposes, the holding of the case is not particularly important; the case has entered teaching and scholarship because of the fiery concurring opinion of Chief Judge Altenbernd, which criticizes the approach of the majority because it is uncertain:

I concur because precedent requires me to do so. I believe, however, that our twenty-year experiment with the use of apparent agency as a doctrine to determine a hospital's vicarious liability for the acts of various independent contractors has been a failure. Patients, hospitals, doctors, nurses, other licensed professionals, risk managers for governmental agencies, and insurance companies all need to have predictable general rules establishing the parameters of vicarious liability in this situation. Utilizing case-specific decisions by individually selected juries to determine whether a hospital is or is not vicariously liable for the mistakes of a radiology department, an emergency room, or some other corporate entity that has been created as an independent contractor to provide necessary services within the hospital is inefficient, unpredictable and, perhaps most important, a source of avoidable litigation. Our society can undoubtedly function well and provide insurance coverage to protect the risks of malpractice if there is either broad liability upon the hospital for these services as nondelegable duties or if liability is restricted to the independent contractor. The uncertainty of the current system, however, does not work. The supreme court or the legislature needs to simplify the rules of liability in this area.⁶⁹

To evaluate this argument, it is important to understand what specific consequences result from an imposition of vicarious liability, or not, in cases like *Roessler*. Crucially, the rule at issue does not dictate which of the various defendants will ultimately be left with the economic responsibility for the plaintiff's loss; that is, it does not dictate the *incidence* of that liability. Vicarious liability simply provides the plaintiff with a potential option for direct recovery from parties other than those who have directly wronged him.⁷⁰ Because of the likelihood

67. See *Roessler*, 858 So. 2d. at 1162-63.

68. See *supra* note 66.

69. *Roessler*, 858 So. 2d. at 1163 (Altenbernd, C.J., concurring).

70. See *id.* at 1161 (majority opinion).

of indemnification and contribution consequent to the plaintiff's judgment, the certainty of the liability rule at stake in *Roessler* becomes economically irrelevant in many real cases.

To see why, it is important to recognize that doctors are generally liable for their malpractice regardless of vicarious-liability rules.⁷¹ Rules of *respondeat superior* merely hold their employers—in this case, the radiology group for which the allegedly negligent radiologist worked—liable as well.⁷²

That is, the existence of vicarious-liability rules does not ordinarily prevent a plaintiff from recovering against a wrongdoer; vicarious-liability rules simply provide opportunities to recover from other parties.⁷³ Likewise, the possibility of recovery against a third-party non-employer who has held out an independent contractor as an employee (as the court allowed for in *Roessler*) does not ordinarily prevent a plaintiff from recovering from a wrongdoer's employer.⁷⁴

Accordingly, from the perspective of the doctor and the radiology group, little or no practical certainty is to be gained from a definite rather than an uncertain rule in cases like *Roessler*. The doctor knows he may be liable for his own negligence, and his employer knows that it may be liable for its employee's negligence. They will each almost certainly carry insurance, and the premium they pay will account for the possibility of their liability. And if they do not carry insurance, they each know that they face the risk of enough liability to bankrupt them. Accordingly, even Judge Altenbernd's proposed rule would probably not bring the doctor and his employer greater certainty in practice. At the

71. See, e.g., DAN B. DOBBS, 1 LAW OF REMEDIES § 3.10(3) (2d ed. 1993). As Dobbs puts it: Indemnity issues (and similar issues of contribution) commonly arise in tort cases. In the traditional tort case, one person is primarily responsible for an injury to a victim, but another person is actually held liable to the victim (or settles the victim's full claim). For example, a victim might be negligently injured by A's employee acting in the scope of his employment. If the victim recovers from A on the basis of vicarious liability, A is entitled to indemnity from the employee. Or a seaman is injured in the service of the ship so that the ship is strictly liable to pay for medical attention and support. If the injury was negligently caused by T, then the ship, having paid the obligation that should fall primarily on the negligent person, is entitled to indemnity. In such cases it is easy to find a right of indemnity in favor of one who is held strictly liable for practical reasons and against one who is actually negligent, and indemnity of this kind carries with it the recovery of attorney fees incurred.

Id. (footnotes omitted).

72. *Roessler*, 858 So. 2d. at 1162 (noting that the radiologist "was an employee of SMH Radiology on the date he interpreted Mr. Roessler's scans"); RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006).

73. See *supra* note 71.

74. See *supra* note 71.

start, then, we have ruled out many of the potential beneficiaries of certainty that Judge Altenbernd listed.

It might seem, however, that at least the hospital will care about the certainty of the vicarious-liability rules imposed on it; that is, most of the force of Judge Altenbernd's argument in favor of certainty would seem to apply to the hospital and its insurer. Even to the hospital, however, the importance of certainty may be illusory.

To begin with, the certainty of the vicarious-liability rule at stake affects only whether the plaintiff can recover *directly* from the hospital. Ordinarily, the hospital (and its insurer) can seek reimbursement from the radiology group (and its insurer)—and, at least in theory, from the doctor (and his or her insurer) as well—for any judgments they pay to the plaintiff.⁷⁵ As above, the availability of vicarious liability does not ordinarily exonerate the wrongdoer or those closest to the wrongdoer.⁷⁶

To put it differently, the certainty that Judge Altenbernd proposes seems, ultimately, to implicate only the certainty in *allocating* liability among the doctor, his employer, his hospital, and their various insurers.⁷⁷ But default rules of contribution and indemnification already go a long way toward providing certainty to those parties about that particular allocation, regardless of whether the plaintiff can include the hospital as an additional defendant.

Of course, if the plaintiff can recover against the hospital, the hospital may conceivably face—if nothing else—litigation costs (although indemnification usually addresses this concern as well). But as to these and any other costs, the hospital—and generally speaking, all insurers with a stake in the outcome of cases like *Roessler*—can easily achieve whatever greater certainty they desire by simply contracting with one another for it. Again, it is worth emphasizing that all that is usually at stake in a case like *Roessler* is allocation of liability among contractually related insurers, not the presence of liability in the first instance.

Regardless of whether the plaintiff has a 0% chance, a 20% chance, a 50% chance, or a 100% chance of being able to receive a judgment from the hospital in cases like *Roessler*—or indeed regardless of whether the likelihood of such a judgment is simply uncertain and unknown⁷⁸—

75. See DOBBS, *supra* note 71, at § 3.10(3).

76. See *id.*

77. See *supra* text accompanying note 69.

78. For a discussion of the differences between probability and uncertainty, see Shawn J. Bayern, Essay, *Rational Ignorance, Rational Closed-Mindedness, and Modern Economic Formalism in Contract Law*, 97 CALIF. L. REV. 943, 961-62 (2009) and Sarah B. Lawsky, *Probably? Understanding Tax Law's Uncertainty*, 157 U. PA. L. REV. 1017, 1026-27 (2009).

the hospital and the radiology group (or again, more likely, their insurers) can easily allocate the ultimate responsibility for the plaintiff's loss however they see fit, and they can provide among themselves whatever simplified dispute-resolution procedures they desire to reduce or substantially eliminate litigation costs.⁷⁹ Doing this eliminates the importance of certainty in the default vicarious-liability rule.

Note that the barriers parties face in shifting the incidence of liability by contract is not high in this case; in all likelihood, it would amount to little more than a standard form term inserted into a contract between sophisticated insurers. In some sense, then, this observation is just an application of the Coase Theorem to demonstrate that the underlying legal rule in a given area does not reduce costs when the transaction costs faced by those who would bargain around it are low.⁸⁰ But if so, it is a useful specific application of that theorem for two reasons.

First, it is important to recognize that the Coase Theorem (contrary, perhaps, to the way it is often conceived) need not require certainty in underlying legal rules. To the extent the Coase Theorem applies to a situation, it diminishes the importance not just of the particular substantive legal decisions at issue, but also of their certainty. Thus, for example, a Coasean railroad that might burn down a cornfield can still, in all likelihood, negotiate with the cornfield owner even where neither of the parties knows the precise standard of reasonableness in tort law that will govern them.⁸¹ To my knowledge, this point has rarely, if ever, been made, and the rhetorical power of appeals to certainty suggests it is not widely understood.

Second, the Coase Theorem is particularly helpful in contexts where a legal rule is urged to benefit sophisticated parties already in a contractual relationship with each other, like the various insurers covering different activities within the same hospital. To put it differently, it rings hollow to call for certainty on behalf of parties who do not need it because they could trivially achieve it on their own (and might already have done so).⁸²

Moreover, the need for certainty in cases like *Roessler* is diminished by the fact that insurers are in the business of addressing risk

79. As a matter of casual empiricism, insurers seem very likely to at least consider the possibility of contribution and indemnification in this context, though I am unaware of hard statistical data on the matter in cases like *Roessler*.

80. See generally R.H. Coase, *The Problem of Social Cost*, J.L. & ECON., Oct. 1960, at 1 (discussing harmful effects of business firms).

81. See *id.* at 31-34.

82. Indeed, it is quite possible that the various practice groups in a hospital will all have the same insurer anyway.

in the first place. Presumably, what matters to them most is the aggregate imposition of liability. Certainty in particular cases is likely irrelevant in the long run.

The matter is little different from the plaintiff's perspective. The plaintiff will be able to recover as long as the doctor and his or her employer are either solvent or insured, which covers nearly all cases of hospital-based doctors. From the plaintiff's perspective, the underlying vicarious-liability rule concerning hospitals does not add any uncertainty—even if the rule itself is entirely unpredictable—unless all of the following are true: (1) the negligent doctor is uninsured; (2) the negligent doctor is insolvent; (3) the doctor's direct employer carries no insurance; (4) that direct employer is, itself, insolvent too; and (5) notwithstanding (1) through (4), the hospital is either solvent or insured.⁸³ In most cases of hospital-based care, it is dramatically unlikely that these five possibilities are all true.

In my view, Judge Altenbernd's opinion is at its strongest when referring to the costs of litigation.⁸⁴ Surely it can be wasteful to litigate the hospital's liability, even if the ultimate incidence of that liability is likely to be shifted elsewhere. Indeed, it is somewhat hard for me to explain—if everything I have said is true—precisely why the particular issue that Judge Altenbernd's panel decided was appealed in the first place. Possibly the hospital was simply seeking to remove itself from the case at the earliest opportunity to avoid further litigation costs. If so, and if this was indeed a recurring pattern, it could have diminished these costs in the future with a smarter contract with the radiologists' insurer. Possibly the hospital was not confident in the practice group's (or its insurer's) solvency, though there too, it can prevent that problem in the future—and again, achieve certainty if it truly desires it—using contractual means. In any event, regardless of the hospital's reason for litigating this case, any benefit of a more certain rule to parties in the hospital's position remains elusive.

More generally, of course, just because litigation *can* be wasteful doesn't mean that it *is*. I do not necessarily disagree with Judge Altenbernd that cases like *Roessler* should not be litigated or appealed—but whether that is true or not depends on a weighing of the relative costs and relative benefits of a less sensitive rule. To put it differently, even if it were easier to identify a clear beneficiary of a more certain rule in

83. To the contrary, it is typical for states to require physicians to demonstrate financial responsibility or obtain insurance. *See, e.g.*, FLA. STAT. ANN. § 458.320 (West 2007). Admittedly, these statutes are imperfect and plausible claims may often exceed the amounts they require.

84. *See* *Roessler v. Novak*, 858 So. 2d 1158, 1163 (Fla. Dist. Ct. App. 2003) (Altenbernd, C.J., concurring).

cases like *Roessler*, the mere *presence* of that benefit is not decisive; the benefit must be weighed against what are essentially the costs of error that arise from a less nuanced rule.

The other major category of cases in which rule-certainty is overplayed is that where the parties cannot rely on a legal rule, however certain or uncertain it may be. For example, perhaps they simply do not know about the rule; for the same reasons that doctrinal stability is likely not significant in such areas,⁸⁵ the certainty that a rule provides may be irrelevant when parties cannot factor it into their advance planning. For example, if someone does not know about the rule in many states that she may be vicariously liable for the negligence of a driver who drives her car,⁸⁶ the potential uncertainty of that rule (for example, if it were inconsistently applied) is likely irrelevant to her, because it did not affect her planning. A separate reason that reliance may not be important is that a rule covers only unexpected conditions—as do, for example, rules concerning frustration and impossibility in contract law.⁸⁷ Given that these rules specifically address unexpected conditions, the notion that parties are harmed by additional uncertainty in the rules themselves is implausible in most cases.⁸⁸

Similarly, as I will later discuss, in many cases parties do not care about the certainty of a legal *rule*, only about the predictability of a *result* in the real world.⁸⁹ I leave a fuller discussion of that topic to the next section.

85. See *supra* note 54 and accompanying text.

86. 57A AM. JUR. 2D *Negligence* § 310 (2004).

87. See, e.g., *Dixon v. Wells Fargo Bank, N.A.*, 798 F. Supp. 2d 336, 349 (D. Mass. 2011) (“Without question, this is an uncertain result. But the ‘type of life-situation’ out of which the Dixons’ case arises—a devastating and nationwide foreclosure crisis that is crippling entire communities—cannot be ignored.”).

88. There are many other cases in which parties simply could not plausibly rely on a legal rule, and thus absolute certainty is beside the point. See, for example, Mel Eisenberg’s discussion of cases involving adventitious rescue, where by hypothesis the parties did not rely on a legal rule:

In more general terms, the recovery in distress cases involving an adventitious rescuer should not only compensate the promisee for all costs, tangible and intangible, but should also include a generous bonus to provide a clear incentive for action and compensation for the benefit conferred. Recovery measured in this way admits of no great precision, but that is not fatal in situations in which, by hypothesis, planning is not important.

Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 761 (1982).

89. See *infra* note 123 and accompanying text.

IV. DERIVATIONS OF CERTAINTY'S IMPORTANCE FROM THE NATURE OR PURPOSE OF LAW

A. Law as Coordination

Larry Alexander has offered an influential formal view of law that highlights law's ability to coordinate behavior. Based in part on philosopher Gregory Kavka's insights that even morally perfect people would need governments,⁹⁰ Professor Alexander offers the evocative observation "that the problem law is meant to solve is that of information, not immoral motivation—that men are not gods, rather than that men are not angels."⁹¹ Others, including my colleague Curtis Bridgeman, have recently drawn on Professor Alexander's insights to justify formal rules in particular domains of the common law, such as contract law.⁹²

Alexander's argument is subtle and raises a variety of interesting problems for jurisprudence in general. For example, Alexander recognizes a tension between a wholly formal vision of law and more informal visions of morality,⁹³ leading to what Alexander fears may be "the impossibility of law" itself.⁹⁴ A general critique of Professor Alexander's argument is beyond the scope of this Article, however. For now, I want to respond only to a piece of it—specifically, to the notion that because one of law's goals is to coordinate among even well-meaning actors, law must essentially be formalistic and must provide certainty (under my definitions in Part II) wherever it has an opportunity to do so.⁹⁵

90. See generally Gregory S. Kavka, *Why Even Morally Perfect People Would Need Government*, 12 SOC. PHIL. & POL'Y 1 (1995) (arguing that the need for government survives the morally perfect).

91. *All er Nuthin'*, *supra* note 5, at 530; Lawrence Alexander, *Law and Formalism* 1 (Univ. San Diego Sch. of Law, Research Paper No. 07-18, 2005), available at <http://ssrn.com/abstract=829327>.

92. See, e.g., Curtis Bridgeman, *Why Contracts Scholars Should Read Legal Philosophy: Positivism, Formalism, and the Specification of Rules in Contract Law*, 29 CARDOZO L. REV. 1443, 1478 (2008). Professor Bridgeman notes:

Recall once again Professor Alexander's point that we have laws not just because people disagree about which principles apply, but also because people disagree about how those principles apply in given cases. Surely we all accept that we ought to do what is reasonable under the circumstances, yet we still have countless contract disputes despite (perhaps even because of) this universally accepted rule.

Id. (footnote omitted).

93. *All er Nuthin'*, *supra* note 5, at 551-55. See generally Larry Alexander, *The Gap*, 14 HARV. J.L. & PUB. POL'Y 695 (1991) (discussing "[t]he heart of the problem of rules and law").

94. *All er Nuthin'*, *supra* note 5, at 565.

95. See *id.* at 551.

Alexander begins by positing a community of people who share a rough consensus about moral and practical propositions and who also will tend generally to observe those moral and practical propositions.⁹⁶ As Alexander puts it: “[I]magine not that everyone in this community is a saint, but that everyone will honor his moral obligations as he sees them almost all the time. In other words, the members of this community are strongly motivated to act morally toward one another.”⁹⁷ The fundamental premise of Alexander’s argument is that even such a community, “idyllic”⁹⁸ though it may be, requires rules to coordinate conduct and resolve even well-meaning disagreement:

[E]ven when they agree about the formulation of moral rights and duties, [people] might disagree about the facts that govern when and how those moral rights and duties apply. For example, although they may agree that no one should put dangerous pollutants in the water supply, they may disagree over whether a certain pesticide is a dangerous pollutant. Or, if they agree that those in irreversible comas should be regarded as “dead,” they may disagree over whether a certain physical condition constitutes an irreversible coma.

These disagreements can produce considerable strife and turmoil, even among people of good will. Indeed, the road to the nasty, brutish, and short lives of the Hobbesian state of nature does not require people motivated solely by selfishness and predatory opportunism. Moral disagreement over concrete courses of conduct, coupled with the motivation to do the right thing, can lead to the Hobbesian state of affairs as expeditiously as naked self-interest.⁹⁹

An illustration from Alexander may be helpful. Consider, for example, how a speed limit might be set:

Suppose, for example, that Agnes and Ben [two well-meaning actors in Professor Alexander’s hypothetical community] are trying to decide how fast they should drive and they take their concern to Lex [the lawmaker]. They will not be satisfied if Lex promulgates any of the following “rules” in response: “Drive at a reasonable speed”; “Drive safely”; “Drive so as to maximize total social utility”; or “Drive consistently with maximum equal liberty for all.” They will say to Lex, “If we knew what was safe, or reasonable, or utility-maximizing, and so forth, we would not need to have you settle how fast we should drive; we could decide for ourselves and achieve coordination, expertise, and efficiency.” In other words, these posited norms do not

96. *Id.* at 531-32.

97. *Id.* at 532 (emphasis omitted).

98. *Id.*

99. *Id.*

settle for Agnes and Ben the particular question they need to have settled in order to coordinate desirably and efficiently.¹⁰⁰

Given this need for coordination, Alexander concludes that certainty is necessarily advantageous over uncertainty:

If Agnes and Ben . . . cannot resolve for themselves efficiently, expertly, and consistently the applications of the moral principles to which they both subscribe at a more abstract level—then they will not be helped by [the law's] promulgating standards. For the standards do not improve their ability to determine what they need to determine.¹⁰¹

It is this particular conclusion that I question, for two distinct reasons. First, it appears to assume that one plausible purpose of law must be its exclusive purpose; just because coordination of behavior among well-meaning parties may be one function of law does not, however, imply that it is the only function. Indeed, coordination is useful only in view of more fundamental social propositions, such as morality or efficiency, and it is those goals that drive the evaluation of a rule's success at coordinating behavior, motivate the selection of one out of many rules that might coordinate behavior equally well, and mediate between the value of coordination (on one hand) and other goals (on the other).¹⁰² Second, certain rules do not always coordinate behavior better than uncertain rules; whether they do or not depends on a variety of context-specific factors. To put it differently, the ability of certain rather than uncertain rules to coordinate behavior is an empirically testable fact, not one that can necessarily be derived from axiomatic understandings of the human situation or of the attributes of possible legal rules.

1. Formalism and Certainty as the Restriction of Goals

In previous work, I have described legal formalism as an attempt at a kind of “rational ignorance” in analyzing law.¹⁰³ On that view, legal formalism is characterized by its restriction of appropriate legal criteria to a subset of those that otherwise might matter, usually in order to achieve certainty or predictability.¹⁰⁴ My chief response to Professor Alexander's argument is that while coordination among well-meaning

100. *Id.* at 543.

101. *Id.*

102. Mel Eisenberg has made a point that is broadly similar in comparing social propositions (like those concerning fairness and efficiency) with doctrinal propositions in the common law. *See NATURE OF COMMON LAW*, *supra* note 9, at 43-49.

103. Bayern, *supra* note 78, at 949-50.

104. *Id.*

individuals can indeed be a plausible justification for legal rules, it is clearly not the only one; just because law can coordinate by providing certain rules does not mean that it must always do so.

To begin with, rarely does any area of life require the optimization of a singular goal. In our personal lives and in most group endeavors, such as political deliberation, we seek to balance multiple goals. It is hard to see why law should be the unique exception to the pluralism that Mel Eisenberg has noted applies to human decision-making generally:

Part of the human moral condition is that we hold many proper values, some of which will conflict in given cases. Part of the human social condition is that many values are relevant to the creation of a good world, some of which will conflict in given cases. Contract law should not attempt to escape these moral and social conditions. In contract law, as in life, all meritorious values should be taken into account, even if those values may sometimes conflict.¹⁰⁵

Commentary that seeks to divine a single purpose for law, or even for an area of law like tort law or contract law, tends to carry an air of argumentative circularity: nothing has justified the assumed singularity of purpose. Legal commentary that deduces a single purpose of law through a narrow interpretation of cases rings hollow in the same way it would seem odd to hear a foreign observer put forth an argument about homebuilding like the following: (1) I have studied thousands of homes in your country, and I have come to the conclusion that their purpose is to provide shelter to their occupants; this is evident from their general tendency to be waterproof, to provide insulation, and so forth; (2) unbroken walls provide better shelter than windows, which permit light to enter residences and also serve as suboptimal thermal insulators; (3) therefore, you should improve your homes by removing windows from them.¹⁰⁶

Admittedly, this argument about homebuilding is a caricature; I doubt anyone would actually offer it. But it illuminates a problem with goal-monism in law in that it works only if something about the context dictates a single purpose, as it almost never does.

One simple interpretation—admittedly also, probably, a caricature—of Professor Alexander's argument is that whenever a lawmaker (such as a legislator or a common law judge) has the opportunity to decide between two rules, it should choose the one that is

105. Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CALIF. L. REV. 1743, 1747 (2000).

106. Compare Eisenberg's critique of interpretive theories of law in NATURE OF COMMON LAW, *supra* note 9, at 151-57.

more certain (under this Article's definitions of certainty). Clearly, such an approach could never get off the ground. "No courts" and "no legal liability" are extremely certain rules, yet no commentator would seriously believe they are desirable in all circumstances—despite Grant Gilmore's wry characterization of classical contract law as a manifestation of the proposition that "no one should be liable to anyone for anything."¹⁰⁷ Alexander, of course, doesn't argue for the absence of all liability as a way to promote certainty; indeed, given his view of law as coordinating the activities of largely well-meaning individuals,¹⁰⁸ the absence of courts would presumably be strictly worse than a system of courts that engages in active coordination of some kind.

But the recognition that a legal regime can be absolutely certain and yet undesirable, even on Alexander's terms, does pose what I believe is a significant problem for Alexander's argument. The total absence of courts is not the only example of a legal regime that is undesirable because of social propositions unrelated to legal certainty, such as concerns about the moral undesirability of letting everyone get away with their wrongs and the inefficiency that would arise from the complete absence of legal incentives.

Consider, for example, a still fanciful but somewhat more realistic interpretation of Alexander's argument. Suppose private actors in his hypothetical community have constructed a two-way road and want legal rules to help them decide how the road can support two-way traffic. They find the road unusable in the absence of legal rules because some actors (suppose) come from the United Kingdom and some from the United States, so their instincts differ about the appropriate side of the road on which to drive. Lex, Alexander's hypothetical lawmaker,¹⁰⁹ has available many candidate rules that are absolutely certain from a legal perspective and comport perfectly well with formalism and law's coordinating role. For example, Lex could say "Drive on the right side if your surname starts with A–M and on the left side if your surname starts with N–Z. And drive no more than three miles per hour." But those would be bad rules, even though certain, because of substantive features that concern roads—their safety and efficiency at various speeds and so on. Again, to say that a rule is desirable because it eliminates uncertainty presupposes that uncertainty is the only reason a rule exists, when in fact reducing uncertainty is just one goal that rules might serve, even in the hypothetical angelic but not godlike society that Alexander envisions.¹¹⁰

107. GRANT GILMORE, *THE DEATH OF CONTRACT* 14 (1974).

108. See *All er Nuthin'*, *supra* note 5, at 549.

109. *Id.* at 536-37.

110. See *id.* at 549.

Even absolutely certain rules can fail because of the various potential social justifications for traffic rules.

Perhaps Alexander means to suggest that certainty is a constraint but that within that constraint we can optimize for other goals. For example, given a choice between “always drive on the left side of the road” and “drive on the right side if your surname starts with A–M and on the left side if your surname starts with N–Z,” a lawmaker should choose the former because of substantive criteria. But this, too, cannot work in the general case: for the same reasons that rules are judged to be desirable or undesirable in view of substantive social criteria (like road safety and the efficiency of various traveling speeds), a significant improvement along another socially desirable axis can easily compensate for a trivial, or even a moderate, decrease in certainty. As an example, “drive at fifty-five miles per hour unless it is raining, in which case drive at a lower speed” is almost certainly more desirable a rule than “drive at fifty-five miles per hour” (or “drive at ten miles per hour, for that is the maximum speed that is safe in all generally prevailing weather conditions”); similarly, “drive at fifty-five miles per hour unless you can justify a greater speed consistent with relatively safe conduct because of a life-threatening emergency” is probably more desirable than an absolutely fixed speed limit, although some of the details may be debatable based on empirical evidence and other socially relevant criteria.

There is a different way to state this objection to Alexander’s argument: even if we assume that coordination among private actors is the paramount goal of law, that does not imply (either logically or practically) that law must always coordinate. That is, even putting aside (for the sake of argument) other social justifications for law, ignoring other ways to evaluate law, and assuming that coordination is *often* important, coordination may still not *always* be needed. Recall Alexander’s hypothetical citizens’ objections to a rule of law that was not entirely certain: “If we knew what was safe, or reasonable, or utility maximizing, and so forth, we would not need to have you settle how fast we should drive; we could decide for ourselves and achieve coordination, expertise, and efficiency.”¹¹¹ As Alexander puts it, uncertain rules “do not settle for Agnes and Ben the particular question they need to have settled in order to coordinate desirably and efficiently.”¹¹² But who is to say that the hypothetical citizens needed coordination *as to the specific question being considered*? Even if

111. *Id.* at 543 (internal quotation marks omitted).

112. *Id.*

private actors need a good deal of coordination from law, that does not imply that they require law to coordinate *all* their behavior. Perhaps traffic rules are an area where standards of reasonable conduct are sufficient to provide effective coordination. With due respect, Professor Alexander's argument here appears to reduce to the circular proposition that if parties need formalistic rules in a particular domain to coordinate their behavior, then they need formalistic rules in that domain to coordinate their behavior. That parties faced coordination problems "that led them to seek Lex's determination in the first place"¹¹³ does not imply that they sought formalistic legal rules for every possible issue they might face.

The danger here is not unlike the one faced by the excessively concerned parent or the micromanaging supervisor. Just because children and employees need some guidance does not mean that those in power should take every opportunity to offer guidance. Sometimes, there is no need for authoritative guidance because coordination emerges naturally or through some alternative mechanism, like social norms.¹¹⁴ Sometimes, the guidance would simply be counterproductive in the real world. And sometimes, it is not worth whatever we would need to give up to achieve it.

2. The Potentially Ineffective Coordination of Formal Rules

My second general concern with Professor Alexander's argument is that it appears to assume, without empirical justification, that formal rules in fact better coordinate behavior than less formal ones.¹¹⁵ On its own terms, Alexander's argument rests on a "cognitive"¹¹⁶ proposition—namely, that even well-meaning private parties do not have, or could not process, all relevant moral information in order to determine the best course of conduct, all things considered.¹¹⁷ This is what Alexander means when he suggests that "the problem law is meant to solve is that of information, not immoral motivation—that men are not gods, rather than that men are not angels."¹¹⁸

A foundational empirical question in evaluating Alexander's argument is simply the degree to which these informational constraints matter in the real world. Surely they do sometimes, but the question is

113. *Id.*

114. *See generally* ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991) (discussing the interaction between law and social norms).

115. *See All er Nuthin'*, *supra* note 5, at 550.

116. *Id.* at 549.

117. *Id.*

118. *Id.* at 530.

whether, for any particular legal question, they demand an absolutely certain response to eliminate coordination problems among private parties. Alexander does not directly answer this question, but in my view his argument seems to assume that the answer favors formalism. I am not so sure, however, that it does.

Consider, again, Alexander's example of well-meaning drivers that want coordination so that they can use the roads. Alexander argues that "standards"—that is, uncertain laws—"do not improve their ability to determine what they need to determine" in order to drive safely."¹¹⁹ But even the vaguest standards might be helpful, at least in the simple Bayesian sense that all new information can update people's conditional probabilistic assessments of the world. A rule like "drive reasonably" (a "pure standard"¹²⁰ with little certainty in direct application) still gives the parties information, even on Alexander's terms: it might mean "your judgment is fine here, even if you might not always be able to rely on it in the general case." Alexander admits that a standard that incorporates a list of factors (and excludes others) provides some information to the parties,¹²¹ but—for the same reason—the lawmaker's choice of a standard in a particular context can serve as an aid to coordination (even while addressing other goals of law not related directly to coordination).¹²²

Moreover, "reasonableness" isn't the only possible basis for a standard; the law might have chosen to apply some other judgmental mode (like morality or sensitivity to motive), or propose a different tradeoff or emphasis. Road signs often say something that amounts to little more than "drive safely here," when presumably safe driving is always desirable; those signs still provide information, or at least reminders. Even very vague standards can do the same.

More generally, experience tells us that people do not always know the law, that they cannot always process its specific directives easily, and so on. Whether a rule will be understood or known, whether it can easily be followed, and what incentives it will provide in the real world are of course important criteria in determining how well it coordinates behavior—even, again, were coordination the only goal of legal rules.

119. *Id.* at 543.

120. *Id.* at 543-44.

121. *See id.* Alexander distinguishes a "pure standard" like "drive reasonably" from one that focuses the attention of private parties on a few considerations, such as "[d]rive reasonably, considering *only* the weather, visibility, traffic, and condition of the road." *Id.* (internal quotation marks omitted). Alexander claims that a more specific standard at least gives the parties "more than they already knew." *Id.* at 544.

122. *See id.*

And to the extent that real-world coordination is a goal of law, it is important to recognize that private parties care not about the certainty of *legal rules* but about the certainty of their real-world *results*. Mel Eisenberg put it best:

First, many people plan on the basis of law implicitly rather than explicitly, because they do not know the law. For these people, planning on the basis of law consists of acting on the implicit belief that if a person conducts himself in a way that society regards as proper, he will be deemed to have acted lawfully, and if a person is injured by conduct that society regards as wrongful, he will have the law's protection. An overemphasis on certainty can make this type of planning less reliable.

Second, even actors who do explicitly plan on the basis of law don't need certainty. If certainty was necessary for planning there would be no planning, because life is uncertain. . . .

Moreover, to the extent that certainty is needed for planning, what is needed is not certainty of rule, but confidence in result. A lawyer can often predict a result with confidence even if he is uncertain about the legal rule. Usually a lawyer can determine not only that the legal rule is probably rule A, but that the only likely alternative is rule A₁. Frequently the lawyer can conclude that whether the rule is A or A₁, the result in a given case will be the same.¹²³

B. *Law and Democracy as Formal Rules*

Often, commentators reach results similar to Alexander's but without as precise an argument. They may derive the result that law requires formalism from very general propositions about freedom or democracy, for example. It is hard to evaluate these arguments because so often they appear entirely circular, or at least as unsupported assertions. For example, Friedrich Hayek wrote: "Nothing distinguishes more clearly conditions in a free country from those in a country under arbitrary government than the observance in the former of the great principles known as the Rule of Law."¹²⁴ So far, perhaps, so good. But Hayek then defined the "Rule of Law" as follows:

Stripped of all technicalities, [the Rule of Law] means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the

123. NATURE OF COMMON LAW, *supra* note 9, at 157-58.

124. FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 72 (1944).

authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.¹²⁵

If Hayek meant to emphasize that the certainty is needed only when the alternative would be unfair, there is little to object to in his definition, although it is the rare case that requires an absolutely fixed rule in order to avoid unfairness.¹²⁶ At least, determinations that the law is unfair simply because it is context-sensitive, or simply because precedent that is no longer desirable can be overruled, would require a specific context-sensitive showing that is almost always absent in the abstract argumentation that characterizes most discussion of political theory. Too often, the opposite of absolute certainty seems to be presented as arbitrary lawlessness, rather than context-sensitive lawmaking that relies on the judgment of sophisticated judges. Thus, for example, Robert Summers presents the following two alternatives: "A Government may govern largely through law publicly laid down in advance, or it may govern largely through *ad hoc*, un-coordinated, non-uniform, and sometimes even retrospective decisions and decrees."¹²⁷

More generally, Hayek's principle is not usually restricted to matters of fairness. Often, judges and commentators claim that something (although it is never clear exactly what) essential in law or democracy requires all uncertainty to be eliminated. Often, once again, this drive to certainty is framed as a distinction between the rule of law and a rule of arbitrary human tyranny. Thus, for example, Justice Antonin Scalia has written: "Long live formalism. It is what makes a government a government of laws and not of men."¹²⁸ Historian A. Whitney Griswold, however, pointed out that there is no such thing in the abstract as a government made exclusively of "laws," or at least of

125. *Id.*

126. *Cf.* NATURE OF COMMON LAW, *supra* note 9, at 159 ("The fairness aspect of the concept of the rule of law is satisfied, even in the absence of a fixed and previously announced substantive legal rule, by the consistent application of the institutional principles that generate substantive legal rules.").

127. Robert S. Summers, *The Formal Character of Law*, 51 CAMBRIDGE L.J. 242, 257 (1992). Alexander Pope addressed the need for the sort of nuance I am suggesting in a famous poem about the tension between avarice and profusion. He described an avaricious father whose son became a spendthrift:

Not so his Son, he mark'd this oversight,
And then mistook reverse of wrong for right.
(For what to shun will no great knowledge need,
But what to follow, is a task indeed.)

ALEXANDER POPE, *Epistle III to Allen Lord Bathurst: Of the Use of Riches*, in THE POEMS OF ALEXANDER POPE, 570, 580 (John Butt ed., 1963) (1733).

128. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 25 (1997).

formal rules: “Laws are made by men, interpreted by men, and enforced by men, and in the continuous process, which we call government, there is continuous opportunity for the human will to assert itself.”¹²⁹ The question cannot be whether the human will is suppressed in all government; the question should instead be whether that will is applied to right or wrong ends or to good or bad policies.

I admit a vague unease with my repeated resort to substantive judgment of what is “right” or “good.” I recognize that reliance on judgment, unbounded, has the potential to lapse into the sort of extreme legal realism that Lon Fuller feared but, I suspect, was also drawn to.¹³⁰ It is telling, perhaps, that in his brilliant fictional cases in *The Problems of Jurisprudence*,¹³¹ the most pragmatic, “realist” judge was also the most caricatured.¹³² It is also perhaps notable that the example he did not have time to elaborate, *The Case of the Interrupted Whambler*,¹³³ both (1) presents a more compelling pragmatic realist, and (2) more directly reflects the kind of reasoning in the common law, as opposed to constitutional or statutory reasoning.¹³⁴ Interestingly, as Ofer Raban has observed, Hayak ended up similarly distinguishing statutes from cases later in life and tolerating greater uncertainty in the common law.¹³⁵

129. A. Whitney Griswold, *The Basis of a Rule of Law*, in *LIBERAL EDUCATION AND THE DEMOCRATIC IDEAL AND OTHER ESSAYS* 124 (1959). Similarly, as I have previously written:

To argue that judges’ interpretive discretion be narrowed because the rule of law requires it is a somewhat empty argument. Perhaps things will work out better in some cases if judges’ discretion is cabined, but the argument should be put in those terms rather than as an appeal to law, as if the nature of law decides the question one way or the other.

Shawn J. Bayern, *Case Interpretation*, 36 *FLA. ST. U. L. REV.* 125, 133 n.25 (2009).

130. For example, commenting on the Harvard Law School of the 1940s, Fuller wrote to a former colleague of Harvard’s formalism:

I have never taught in any school where I was more free from the fear that I might lead the students too far down the paths of realism and juristic nihilism. There is not much on the other end of the scales here, and I can throw my own little counters on my end and listen to them ring with unadulterated joy.

ROBERT S. SUMMERS, *LON L. FULLER* 6 (1984) (internal quotation marks omitted). In another letter, he added that he saw himself as “serving as a sort of counterpoise to the excessively legalistic and conceptualistic approach of some of my colleagues.” *Id.* (internal quotation marks omitted).

131. LON L. FULLER, *THE PROBLEMS OF JURISPRUDENCE* (temp. ed. 1949).

132. See, for example, the imaginary opinion of Chief Judge Truepenny in Fuller’s *The Case of the Interrupted Whambler*. *Id.* at 628.

133. *Id.*

134. *See id.*

135. *See Raban, supra* note 11, at 190.

V. SOME IMPLICATIONS OF CERTAINTY ON EFFICIENCY

As I noted previously, it is common to see legal economists favor certainty, though often for distinct and sometimes contradictory reasons.¹³⁶ Often, however, there is little economic or other instrumental reason for absolute certainty in the law.

Perhaps what motivates the bulk of economic commentary on certainty is the notion that *needlessly* uncertain rules inhibit the efficient allocation of resources. Thus, for example, a system of property law that left ownership up to pure chance, or a system of contract that enforced contracts based on the flip of a coin, would clearly complicate both productive planning and litigation strategy.¹³⁷ For obvious reasons, however, there is little or no significant argument in favor of needless uncertainty. Clearly, there is little to be said for making law arbitrary even though courts and commentators are settled on an appropriate non-arbitrary principle to apply.

Uncertainty typically arises because of a certain rule's basic incapacity to address the variety of social considerations that the law deems important, at least in particular adjudicative contexts. Thus, for example, courts may apply a broad standard of reasonable behavior to judge people's behavior in negligence law because they believe a specific rule would miss some salient features of cases. The uncertainty, then, results from the limits of our knowledge or analysis in a particular area; it can be reduced only at the cost of introducing significant errors or undesirable judgments into law.¹³⁸

There are at least two significant, broad reasons that economic reasoning ought to avoid promoting the arbitrary elimination of all uncertainty that is not needless uncertainty. This Part outlines those reasons briefly. The point of this Part is not to engage in specific economic modeling, which is beyond the scope of this Article; it is simply to suggest reasons that uncertainty does not lead to economic inefficiency in a variety of cases.

Most economic reasoning concerns the development of rational responses to an uncertain world; thus, for example, the notion of *expected* utility is fundamental to most practical economic reasoning.¹³⁹ Maximizing certainty does not by itself maximize expected utility; indeed, less predictability just implies more variance in utility without necessarily affecting expected utility at all.

136. See *supra* note 7 and accompanying text.

137. See Bayern, *supra* note 78, at 955.

138. See, e.g., Kaplow, *supra* note 26, at 591-95.

139. See ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 38 (6th ed. 2012).

Alan Schwartz and Robert Scott have offered a view of contract interpretation that rests on the distinction between expected utility and variance.¹⁴⁰ The general form of their argument is easy to state: parties that are risk-neutral, like perhaps some large corporations, care only about the average result of a legal rule; they do not care about the variance in that legal rule.¹⁴¹ I have previously critiqued this argument as applied to contract interpretation specifically,¹⁴² but I believe the form of the argument is extremely useful in some other contexts. That is, in cases where a legal rule's uncertainty truly increases only the variance from a mean result, then at least risk-neutral parties will likely not be harmed from the uncertainty.

For example, suppose that a rule of damages in tort law is uncertain, but that its average is generally well understood: large companies that potentially injure people (or the large companies that agree to insure a potential injurer) might face anywhere between \$1 million and \$3 million for causing a particular kind of injury, with the average known to be about \$2 million. When uncertainty—really just *risk* in this context—is modeled in this way, it is true that a risk-neutral party will not benefit from certainty alone. Accordingly, in evaluating certainty in economic terms, it may be helpful to consider precisely *what* is uncertain; if the uncertainty is simply in variance on a linear scale, then there are many plausible cases where it matters only to parties who are not risk-neutral.

Similarly, it is often helpful to consider offsetting effects of certainty. For example, often one party's certainty is the focus of analysis; it is claimed that one type of actor will suffer if a legal rule is not absolutely certain. Even accepting that this may be true for argument's sake, however, one party's certainty is often another party's uncertainty, and determining the efficient legal rule will need to consider the costs for both parties.

As an example, a purpose of the classical negligence rule that plaintiffs could not sue for emotional harms a wrongdoer who unleashed physical forces unless those forces had a physical impact on the plaintiff¹⁴³ was that the impact gave appropriate notice of a potential suit to the wrongdoer. At bottom, this is an argument about certainty; the tortfeasor's world is inappropriately uncertain, the argument goes, if he or she faces unknown suits from every instance of his or her negligence. This might, in turn, chill potentially dangerous activity like driving

140. See Schwartz & Scott, *supra* note 3, at 550-54.

141. *Id.*

142. See generally Bayern, *supra* note 78 (critiquing Alan Schwartz and Robert Scott's view of contract interpretation).

143. See RESTATEMENT OF TORTS § 312 (1934).

automobiles. But however powerful (or not) this argument is, there is an equally powerful (or not) argument for certainty on the victim's side: if the rule forecloses all liability, people will face uncertain prospects when putting themselves in situations where they might be emotionally injured by near-miss automobile accidents, and they may inefficiently be chilled from those activities.

VI. CONCLUSION

Certainty is not a goal to seek at all costs. Even those who think certainty is the law's central or exclusive function do not seem willing to use law to stifle, for example, social, political, or technological change in order that private parties can know exactly where they stand. If absolute certainty were a goal that the law sought to impose, it could achieve it by preventing change in all areas of life: it could prevent technology companies from being formed, scientific research from advancing, and political sentiment from changing. No modern arguments, of course, seem to go that far.

Far from being a singular, fixed goal of law, certainty is at best subordinate to particular social propositions like the unfairness alleged by those who have reasonably relied on an existing rule. Certainty provides benefits, if at all, in substantive terms.

Those benefits need to be weighed in context; countervailing social propositions, like the morality or efficiency of a better rule that might replace an old one, may well be more significant than those served by certainty. Perhaps surprisingly, courts and commentators are often entirely blind to the particular contexts in which their arguments about certainty operate; thus, for example, a court might decline to change an undesirable doctrine even though nobody (or at least nobody acting morally) could plausibly have relied on it.¹⁴⁴ Or a judge might cry out for certainty even though the parties themselves would seem to have little reason, except self-serving rhetorical reasons, to care about it.¹⁴⁵

This Article has served as a call for context-specific evaluations of arguments in favor of certainty. The specific examples offered in Part III do not show, in the general case, anything more than the error into which courts sometimes fall when they overemphasize certainty. Nonetheless, those examples serve to highlight the kinds of factual contexts that may weaken general, abstract calls for certainty in law. The remainder of the

144. *See supra* Part III.A.

145. *See supra* Part III.B.

Article critiqued various abstract arguments for certainty and tried to show, at the very least, that they do not meet the persuasive burden that ought to be necessary for arguments that seek to exclude legal decision makers from considering context in evaluating the merits of arguments.