duty which it implicitly assumed. In our own century we have witnessed what it does not seem to fanciful to describe as a socialization of our theory of contract.

My purpose is to examine the relationship between the first and last sentences of the quoted passage. What is the connection between the "*erosion of the rigid rules* of the late nineteenth century theory of contractual obligation" and the "*socialization* of our theory of contract?" I will begin by investigating the formal concept of a rigid rule.

I. The Jurisprudence of Rules

The jurisprudence of rules is the body of legal thought that deals explicitly with the question of legal form. It is premised on the notion that the choice between standards and rules of different degrees of generality is significant, and can be analyzed in isolation from the substantive issues that the rules or standards respond to.[4]

A. Dimensions of Form

1. Formal Realizability. — The first dimension of rules is that of formal realizability. I will use this term, borrowed from Rudolph von Ihering's classic *Spirit of Roman Law*, to describe the degree to which a legal directive has the quality of "ruleness." The extreme of formal realizability is a directive to an official that requires him to respond to the presence together of each of a list of easily distinguishable factual aspects of a situation by interven-

[4] The principal sources on the jurisprudence of form with which I am acquainted are: 6 J. Bentham, The Works of Jeremy Bentham 60–86, 508–85 (Bowring ed. 1839); 2 Austin, Lectures on Jurisprudence 939–44 (4th ed. 1873); 3 R. von Ihering, Der Geist des Romsichen Recht § 4, at 50–55 (1883) [available in French translation as R. von Ihering, L'Esprit du Droit Romain (Meulenaere trans. 1877); future citations are to French ed.]; 2 M. Weber, Economy and Society 656–67, 880–88 (Ross & Wittich eds. 1969); Pound, *The Theory of Judicial Decision, III*, 36 Harv. L. Rev. 940 (1923); Fuller, *Consideration and Form*, 41 Colum. L. Rev. 799 (1941); von Mehren, *Civil Law Analogues to Consideration: An Exercise in Comparative Analysis*, 72 Harv. L. Rev. 1009 (1959); Macaulay, *Justice Traynor and the Law of Contracts*, 13 Stan. L. Rev. 812 (1961); Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 Harv. L. Rev. 755 (1963); Friedman, *Law, Rules and the Interpretation of Written Documents*, 59 Nw. U.L. Rev. 751 (1965); Macaulay, *supra* note 2; Dworkin, *The Model of Rules*, 35 U. Chi. L. Rev. 14 (1967); K. Davis, Discretionary Justice: A Preliminary Inquiry (1969); P. Selznick, Law, Society and Industrial Justice 11–18 (1969); Kennedy, *Legal Formality*, 2 J. Leg. Stud. 351 (1973); R. Unger, Law in Modern Society 203–16 (1976); A. Katz, *Vagueness and Legal Control of Children in Need of Supervision*, in Studies in Boundary Theory (unpublished manuscript on file at Harvard Law Review, 1976).

ing in a determinate way. Ihering used the determination of legal capacity by sole reference to age as a prime example of a formally realizable definition of liability; on the remedial side, he used the fixing of money fines of definite amounts as a tariff of damages for particular offenses.[5]

At the opposite pole from a formally realizable rule is a standard or principle or policy. A standard refers directly to one of the substantive objectives of the legal order. Some examples are good faith, due care, fairness, unconscionability, unjust enrichment, and reasonableness. The application of a standard requires the judge both to discover the facts of a particular situation and to assess them in terms of the purposes or social values embodied in the standard.[6]

It has been common ground, at least since Ihering, that the two great social virtues of formally realizable rules, as opposed to standards or principles, are the restraint of official arbitrariness and certainty. The two are distinct but overlapping. Official arbitrariness means the sub rosa use of criteria of decision that are inappropriate in view of the underlying purposes of the rule. These range from corruption to political bias. Their use is seen as an evil in itself, quite apart from their impact on private activity.

Certainty, on the other hand, is valued for its effect on the citizenry: if private actors can know in advance the incidence of official intervention, they will adjust their activities in advance to take account of them. From the point of view of the state, this increases the likelihood that private activity will follow a desired

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[5] *See* 1 R. VON IHERING, *supra* note 4, at 51–56.

[6] *See* H. HART & A. SACKS, *supra* note 1, at 126–29; Friedman, *supra* note 4, at 753–54; Dawson, *Unconscionable Coercion: The German Version*, 89 HARV. L. REV. 1041, 1042–47 (1976). The extent to which particular words or categories are regarded as sufficiently "factual" to serve as the basis of formally realizable rules changes through time, is subject to dispute at any particular time, and is a matter of degree. For example, the idea of competition may appear to one writer to be capable of generating precise and predictable answers to particular questions of antitrust law, while another may regard it as no more than a standard, unadministrable except though a further body of per se rules. *Compare* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and the Market Division*, 74 YALE L.J. 775 (1965), *with* Turner, *The Principles of American Antitrust Law*, in COMPARATIVE ASPECTS OF ANTITRUST LAW IN THE UNITED STATES, THE UNITED KINGDOM AND THE EUROPEAN ECONOMIC COMMUNITY 9–12 (Int'l & Comp. L.Q. Supp. Vol. 6, 1963). "Best interests of the child" has been subject to a similar dispute. *See* Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 1975 LAW & CONTEMP. PROB. 226. The grandfather of such controversies in Anglo-American law is the "objectivism" issue. Late nineteenth century legal thought claimed that "subjective intent" was no more than a standard, and that legal directives dependent on its determination should be recast as rules referring to "external" aspects of the situation. *See* Kennedy, *supra* note 4, at 364 n.22.

pattern. From the point of view of the citizenry, it removes the inhibiting effect on action that occurs when one's gains are subject to sporadic legal catastrophe.[7]

It has also been common ground, at least since Ihering,[8] that the virtues of formal realizability have a cost. The choice of rules as the mode of intervention involves the sacrifice of precision in the achievement of the objectives lying behind the rules. Suppose that the reason for creating a class of persons who lack capacity is the belief that immature people lack the faculty of free will. Setting the age of majority at 21 years will incapacitate many but *not all* of those who lack this faculty. And it will incapacitate some who actually possess it. From the point of view of the purpose of the rules, this combined over- and underinclusiveness amounts not just to licensing but to requiring official arbitrariness. If we adopt the rule, it is because of a judgment that this kind of arbitrariness is less serious than the arbitrariness and uncertainty that would result from empowering the official to apply the standard of "free will" directly to the facts of each case.

2. Generality. — The second dimension that we commonly use in describing legal directives is that of generality vs. particularity. A rule setting the age of legal majority at 21 is more general than a rule setting the age of capacity to contract at 21. A standard of reasonable care in the use of firearms is more particular than a standard of reasonable care in the use of "any dangerous instrumentality." Generality means that the framer of the legal directive is attempting to kill many birds with one stone. The wide scope of the rule or standard is an attempt to deal with as many as possible of the different imaginable fact situations in which a substantive issue may arise.[9]

The dimensions of generality and formal realizability are logically independent: we can have general or particular standards, and general or particular rules. But there are relationships between the dimensions that commonly emerge in practice. First, a general rule will be more over- and underinclusive than a par-

[7] While certainty is now praised through the formal language of efficiency, the idea has been familiar for centuries. Montesquieu put it as follows, speaking of the peasants of the Ottoman Empire in the eighteenth century: "Ownership of land is uncertain, and the incentive for agricultural development is consequently weakened: there is neither title nor possession that is good against the caprice of the rulers." C. DE MONTESQUIEU, LETTRES PERSANES 64 (1721). *See* Kennedy, *supra* note 4, at 365–77.

[8] R. VON IHERING, *supra* note 4, at 54–55.

[9] *See generally* Friedman, *Legal Rules and the Process of Social Change*, 19 STAN. L. REV. 786, 832–35 (1967); Leff, *Contract as Thing*, 19 AMER. U.L. REV. 131, 131–37 (1970). For an illustration of how the issue arises in legal argument, see Meinhard v. Salmon, 249 N.Y. 458, 472, 164 N.E. 545, 549 (1928) (Andrews, J., dissenting). *See also* note 10 *infra*.