

LEGAL DESIGN FOR THE “GOOD MAN”

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Consequentialist analysts of legal rules tend to focus their attention on Holmes’s “bad man,” who conforms to legal rules only out of fear of legal sanctions. On this view, legal rules should be designed to give self-interested legal subjects sufficient reason to choose socially optimal actions. But many people conform to legal rules simply because they are the rules, even when their self-interest dictates doing otherwise.

At first glance, this focus on the bad man seems to make sense. Lawmakers, it is plausible to suppose, don’t have to worry about the “good man” when designing legal rules because he will do what they want him to do anyway by conforming to the law. In other words, good man analysis of law is simple and so can be safely ignored.

But good man analysis of law is much more complex than scholars have previously supposed, and ignoring the good man will therefore lead consequentialist lawmakers to err. People are motivated to comply with legal rules for various different kinds of reasons, and this variety matters for their behavior by affecting both their short-run responses to legal rules and their long-run attitudes towards the law. A lawmaker ought to design legal rules in a way that attends to this variety if her aim is to design socially optimal rules.

This Article systematically analyzes the problem of legal design in the face of the diversity of motivational types that exist in the population of legal subjects. Part I develops a typology of good persons by ex-

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ploring the causes and consequences of legal norm internalization—the ways in which a person’s preferences are transformed such that he comes to value complying with legal rules for the sake of the rules. Part II argues that a good person’s type matters for his behavior in a number of important ways. For example, it affects the way in which he chooses among actions that conform to legal norms and the ways in which he responds to the various kinds of uncertainty to which the legal system exposes him. Part III derives normative implications of my analysis for consequentialist lawmakers, while also addressing the converse worry that good man analysis of law is too complex to be tractable. The overall aim is to systematically examine the ways in which a diversity of motivations in the population complicates the problem of legal design for legislators, judges, and administrative officials, and to develop an organizing framework that can be used to think about the problem rigorously, which I illustrate by exploring some examples.

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INTRODUCTION

OLIVER Wendell Holmes, Jr. famously argued that in order to understand the law we must view it from the perspective of the “bad man.”¹ Holmes’s bad man is a rational, self-interested actor who isn’t motivated to conform with the law because it is the law. Rather, he is motivated to conform only insofar as he fears that negative material consequences may result from defiance, typically in the form of legal sanctions.² Designing legal rules for the bad man, therefore, means creating a system of legal sanctions that ensures that it is in each person’s self-interest to do what the lawmaker wants him to do.

This bad man approach to legal design has come to dominate the consequentialist analysis of legal rules in the guise of the economic analysis of law.³ According to the economic analysis of law, maximizing social welfare—the aggregate welfare of all members of society—is the objective our legal rules ought to be designed to serve.⁴ In conjunction with the Holmesian premise, this entails that legal rules and their associated sanctions ought to be designed to give rational, self-interested persons—that is, persons who resemble Holmes’s bad man—incentives to take actions that maximize social welfare.⁵

Suppose, for example, a lawmaker is trying to solve a pollution problem that is threatening the health of many members of society. How should she go about designing a set of laws to solve it? The usual answer

¹ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 459 (1897).

² See *id.* (the “bad man . . . cares only for the material consequences which . . . knowledge [of the law] enables him to predict”).

³ Cass R. Sunstein, *Introduction to Behavioral Law and Economics* 1, 1 (Cass R. Sunstein ed., 2000); Tom R. Tyler, *Why People Obey the Law* 20–21 (2006).

⁴ Steven Shavell, *Foundations of Economic Analysis of Law* 2–3 (2004).

⁵ Richard A. Posner, *Economic Analysis of Law* 32–33 (8th ed. 2011); Louis Kaplow & Steven Shavell, *Economic Analysis of Law*, in 3 *Handbook of Public Economics* 1665, 1666 (Alan J. Auerbach & Martin Feldstein eds., 2002).

offered by those in the utilitarian tradition is that she should design a system of penalties that would give people self-interested reasons to reduce their polluting activities to socially optimal levels.⁶ On this view, the prescriptive content of legal rules matters only insofar as it specifies the conditions under which a person will be exposed to sanctions.⁷

But many people don't resemble Holmes's bad man. Many legal subjects are not exclusively motivated by self-interest,⁸ and few are perfectly rational.⁹ And when it comes to legal rules, many people are motivated to conform to legal rules because they are the rules, not simply by virtue of the sanctions that may result if they fail to comply.¹⁰ For such persons, the prescriptive content of the rules matters quite apart from any attendant sanctions.

What has become of these "good men"—or, rather, "good persons"—who are motivated to comply with the rules for the sake of the rules? At first glance, the neglect of good persons by economic analysts seems odd. If our ultimate goal is to design legal rules that maximize social welfare, we should care about the behavior of all legal subjects, not just the bad men.

On closer inspection, however, the neglect is less puzzling. The usual assumption has been that good persons can be viewed as a homogenous category of persons who simply do what the lawmaker wants them to

⁶ Shavell, *supra* note 4, at 473.

⁷ On this view, rules that purport to impose duties on legal subjects are nothing more than "fragments of larger rules that direct legal officials to impose sanctions in specified circumstances." Stephen A. Smith, *The Normativity of Private Law*, 31 *Oxford J. Legal Stud.* 215, 221 (2011).

⁸ For evidence that people are not exclusively self-interested, see Colin Camerer & Richard H. Thaler, *Anomalies: Ultimatums, Dictators and Manners*, 9 *J. Econ. Persp.* 209, 210 (1995); Herbert Gintis, Samuel Bowles, Robert Boyd & Ernst Fehr, *Moral Sentiments and Material Interests: Origins, Evidence, and Consequences*, in *Moral Sentiments and Material Interests: The Foundations of Cooperation in Economic Life* 3, 8–22 (Herbert Gintis et al. eds., 2005); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 *Stan. L. Rev.* 1471, 1489–97 (1998); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 *Calif. L. Rev.* 1051, 1126–43 (2000).

⁹ For evidence that people are not perfectly rational, see Jolls et al., *supra* note 8, at 1477–79, 1548–50; Korobkin & Ulen, *supra* note 8, at 1075–126; Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in *Judgment Under Uncertainty: Heuristics and Biases* 3, 3 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982).

¹⁰ For theory and evidence that people are motivated to conform to the law for its own sake, see *infra* note 41.

do.¹¹ This is a natural assumption to make given that all such persons, by definition, exhibit a disposition to comply with legal rules.

This Article argues that this assumption is wrong. The behavior of good persons is more complex than it first appears. There is a variety of deeper reasons why persons might be internally motivated to comply with legal rules.¹² Moreover, this variety matters for their behavior. In the short run, these deeper reasons determine the particular ways in which people respond to legal rules. In the long run, these reasons determine the conditions under which people are willing to adopt an internal point of view towards legal norms in the first place. By treating good persons as a homogenous category, we obscure these important differences. There is, in short, much more to be said about the behavior of good persons than that they exhibit a disposition to comply with legal rules. And this additional layer of complexity significantly complicates the problem of legal design. Laws that give the bad man incentives to behave well won't necessarily motivate good persons to take socially optimal actions.¹³ Therefore, lawmakers ought to be sensitive to all of the various types of good persons as well as the bad men when they are designing legal rules. Otherwise, their attempts to design legal rules that maximize social welfare will misfire.

This Article systematically disaggregates the category of good persons to highlight the different ways in which a person may not resemble Holmes's bad man and show that this heterogeneity matters for legal design. My contributions are threefold. First, I develop a taxonomy of good persons, which isolates the different reasons why someone may be internally motivated to comply with legal rules.¹⁴ Second, I argue that

¹¹ Frederick Schauer exemplifies this tendency throughout his recent book by contrasting the bad man with persons who are simply motivated to obey “law qua law.” See generally Frederick Schauer, *The Force of Law* (2015); see also Smith, *supra* note 7, at 227 (arguing that it is straightforward for the utilitarian lawmaker to take account of internally motivated agents in the subject population because it is straightforward to predict what such agents will do).

¹² As Hart suggests, “allegiance to the [legal] system may be based on many different considerations: calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do.” H.L.A. Hart, *The Concept of Law* 203 (2d ed. 1994).

¹³ Thus, while I agree with many of Stephen Smith's criticisms of the bad man view of the law, see Smith, *supra* note 7, at 223–29, I disagree with his assumption that it is simple for the utilitarian lawmaker to design laws for good men, *id.* at 227.

¹⁴ See *infra* Part I.

the different types of good persons respond differently to legal rules.¹⁵ Third, I derive from this analysis some general prescriptive implications with a view to showing the ways in which a tendency to ignore good persons can lead consequentialist analysts of legal rules astray.¹⁶ The overall aim is to systematically examine the ways in which a diversity of motivations in the population of legal subjects complicates the problem of legal design for legislators, judges, and administrative officials, and to develop an organizing framework that can be used to think about the problem rigorously, which I illustrate by exploring some examples.

Suppose our society includes the following four people: Betty, Ivan, Dan, and Polly. Betty is, like Holmes's bad man, perfectly rational and self-interested. She cares only about herself, and, since she is perfectly rational and knows it, she always chooses the action that best furthers her self-interest.

Ivan, by contrast, is morally motivated and likes to conform to legal rules even when doing so runs counter to his self-interest, because he believes that complying with legal rules has intrinsic value.¹⁷ For example, he may believe that the rules have been promulgated by democratically sound procedures such that conforming to them is a way of evincing respect for his fellow citizens.¹⁸

Dan and Polly are also morally motivated and willing to comply with legal rules even when a self-interested calculus would dictate acting otherwise. Unlike Ivan, however, they don't think that there is anything intrinsically valuable about complying with legal rules. Instead, they believe that doing so is a good way of furthering other values that they care about. Crucially, in contrast to Betty, they are not perfectly rational.¹⁹ Rather, they are boundedly rational and know it: Their decision making is both costly in time and effort, and prone to error, and since they are aware of these limitations, they are modest about their ability to figure out what action will best further the values they care about.²⁰ This awareness, moreover, leads them to believe that complying with the law is a better way of furthering their own objectives than trying to figure

¹⁵ See *infra* Part II.

¹⁶ See *infra* Part III.

¹⁷ I will therefore refer to agents like Ivan as *intrinsic* internalizers. See *infra* Section I.B, Section I.E, Figure 1, and Appendix.

¹⁸ See *infra* notes 95–96 and accompanying text.

¹⁹ See *infra* Section I.B.

²⁰ For a discussion of the theory of and evidence about bounded rationality, see *infra* notes 80–86 and accompanying text.

things out for themselves.²¹ For Dan, this is because he thinks that behind the law lies a good judgment about what he has most reason to do. He resolves to comply with legal rules as a way of deferring to that judgment.²² Polly simply believes that the usual consequences of defying legal rules are sufficiently bad that, given her bounded rationality, it makes better sense for her to simply comply with the law rather than engage in a complex exercise of balancing the benefits and costs.²³ Thus, like Dan, Polly adopts the policy of complying with legal rules in order to simplify her decision making. Betty, like Polly, cares about the consequences of noncompliance—specifically, she cares about avoiding consequences that harm her self-interest. But Betty pursues the more complex strategy of weighing the (self-interested) costs and benefits of compliance when figuring out what to do.²⁴

Ivan, Dan, and Polly behave similarly in an important respect that makes them different from Betty: They are all predisposed to comply with legal norms even when defiance would be in their self-interest. But there are important differences in their behavior, including how they choose among a set of actions that all conform to the rules.²⁵

Return to our lawmaker’s pollution problem and suppose that Ivan, Dan, Polly, and Betty own factories that generate pollution. It would be in each subject’s self-interest to produce 150 units of pollution. Thus, Betty produces 150 units, as her self-interest prescribes. Ivan, Dan, and Polly, however, each produce only 50 units, because they believe that it would be morally wrong to produce more than 50 units and they are motivated to do what morality requires of them.

Now suppose that the lawmaker tries to solve the problem by prohibiting pollution in excess of 100 units and imposing a fine on anyone who pollutes more than that amount. How does the law affect our four subjects’ behavior? Betty will reduce her pollution to 100 units so long as the expected fine is large enough. And it *seems* that the law won’t

²¹ I therefore refer to agents like Dan and Polly as *epistemic* internalizers. See *infra* Section I.C, Figure 1, and Appendix.

²² I therefore refer to agents like Dan as *deferential* epistemic internalizers. See *infra* Section I.C, Figure 1, and Appendix.

²³ I therefore refer to agents like Polly as *proxy* epistemic internalizers. See *infra* Section I.C, Figure 1, and Appendix.

²⁴ For a discussion of where Betty and Polly fit within my taxonomy of “good persons,” see *infra* notes 76–79 and accompanying text, Figure 1, and Appendix.

²⁵ See *infra* Section II.C.

change the behavior of Ivan, Dan, or Polly. By continuing to produce 50 units, they conform to both the law and morality.²⁶

When we look more closely, however, there is a reason to suppose that Dan's behavior might change. Dan, recall, is motivated to comply with the law because he believes that behind the law lies an expert judgment about what he has most reason to do. Suppose, in addition, that Dan believes that this judgment reflects a comprehensive determination by the legal authority of what subjects need to do to solve the pollution problem. That is, suppose he believes that the legal authority has determined that polluting less than 100 is *all* each subject is morally required to do for the problem to be solved. In that case, Dan may decide that, contrary to his prior beliefs, it is actually morally unproblematic for him to pollute up to 100 units. In other words, he may suppose that complying with the law is also a way of fully discharging his moral duties, leaving him free to pursue his self-interest subject to complying with the law. If he makes such a determination, then the law will, perversely, *increase* the amount he pollutes by "crowding out" his own moral motivation to pollute no more than 50 units.²⁷

But there is no reason to think that Ivan's or Polly's moral motivations will be crowded out by the law in this way. Ivan complies with the law because he believes that his compliance is intrinsically valuable, not because he believes that the law embodies an expert judgment about what he has most reason to do. Because all actions generating pollution of up to 100 units conform to the law, this intrinsic value is realized by choosing any such action. Because Ivan also believes that morality prohibits pollution in excess of 50 units, by continuing to pollute no more than 50 units, Ivan both conforms to the demands of morality as he perceives them and realizes the intrinsic value he associates with complying with the law.

²⁶ I assume that the existence of the law doesn't change the content of anyone's moral duties. This is a reasonable assumption if each person is the sole producer of pollution in his local area and the pollution only has local effects. Often, however, producers' decisions will be interdependent such that each producer's duty not to pollute may depend on what others are doing. In such circumstances, when others pollute less, the social costs created by an additional unit of pollution may be higher or lower, in which case a producer's moral duty would arguably be to pollute less or more, respectively, after enactment of a law that causes some to change their behavior.

²⁷ The social science literature identifies several mechanisms by which "crowding out" of virtuous motivations may occur. For a discussion of the literature on crowding out, see *infra* notes 120–21 and accompanying text.

Likewise, Polly complies only to avoid bad consequences that result from noncompliance with the law, not out of deference to the judgment behind the law. But since continuing to produce 50 units is a conforming action, it doesn't threaten those bad consequences. As was the case with Ivan, there is no reason to suppose that the law alters Polly's perception of what morality requires of her given that she conforms to the law. So she too should continue to produce 50 units of pollution.

This example shows that legal rules have the potential to crowd out the moral motivations of good persons.²⁸ It also shows that whether they will do so depends on whether the motivations of those good persons resemble those of Dan as opposed to those of Polly or Ivan. If the lawmaker wants to discourage crowding out and she faces a population in which subjects like Dan are prevalent, then we have an argument for regulation by standards rather than rules. Whereas rules specify what actions a subject must take to conform to them, standards require subjects to exercise their moral judgment in order to figure out how to conform. To conform to the standard of due care in tort law, for example, subjects must ask themselves what it is to act reasonably.²⁹ Thus, when an internalizer is subject to a standard, he will exercise his own moral judgment in deciding what to do, making crowding out less likely.³⁰

But there is a further twist. Polly and Dan, recall, adopt a policy of complying with legal rules when doing so is a simpler and less error-prone way of serving their own objectives. Because it is harder for subjects to figure out what the law requires of them when legal norms take the form of standards rather than rules, the process of attempting to comply with the law will also be more cognitively costly and error-prone. And this may undermine the willingness of people like Polly and Dan to comply with legal rules.³¹ Thus, the lawmaker faces a trade-off: Reducing the risk of crowding out of the moral motivations of subjects like Dan by regulating by standards instead of rules also increases the

²⁸ For a discussion of the empirical evidence, see *infra* notes 126–29 and accompanying text.

²⁹ See John C.P. Goldberg, Anthony J. Sebok & Benjamin C. Zipursky, *Tort Law: Responsibilities and Redress* 206–12 (3d ed. 2012) (discussing the duty of reasonable care in tort law); see also *infra* note 161 (discussing the relationship between standards and moral deliberation).

³⁰ See *infra* Subsections II.D.2, III.B.2.

³¹ See *infra* Subsection II.D.2.

risk that subjects like Dan and Polly are no longer internally motivated to conform to the law.³²

There is, of course, an extensive literature on norm compliance that recognizes that fear of legal sanctions cannot be the exclusive driver of conformity to legal rules.³³ Some scholars take a reductive approach, explaining compliant behavior that isn't motivated by fear of legal sanctions without supposing that anyone desires to comply with legal rules for the rules' own sake.³⁴ My approach, by contrast, is nonreductive. I assume that for many people legal norms are directly motivating and so can explain these people's behavior simply because they desire to comply with them.³⁵ My focus, in other words, is on the causes and consequences of legal norm internalization—the processes by which persons' preferences are transformed such that they come to directly value complying with legal rules.

The Article proceeds in three parts. Part I systematically explores the variety of possible grounds of a preference to comply with legal rules—the variety of different types of reasons why a person's preferences might be transformed by legal norms. *Epistemic* internalizers are distinguished from *intrinsic* internalizers. Intrinsic internalizers resemble Ivan. They comply with legal rules because they believe that there is something intrinsically valuable about such compliance. Epistemic internalizers resemble Dan and Polly. They comply with legal rules be-

³² See *infra* Subsection III.B.2.

³³ For a review of this literature, see Richard H. McAdams & Eric B. Rasmusen, Norms and the Law, in 2 Handbook of Law and Economics 1573, 1575, 1609–10 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

³⁴ Eric Posner, for example, reduces the desire to comply with legal rules to self-interest. He argues that legal subjects comply with legal norms to signal to potential partners in cooperative endeavors that they are relatively trustworthy. Eric A. Posner, Law and Social Norms: The Case of Tax Compliance, 86 Va. L. Rev. 1781 (2000). Richard McAdams argues that persons comply with legal rules because they care that others approve of their behavior and legal rules, at least legal rules that are democratically produced, are good indicators of popular attitudes. Richard H. McAdams, An Attitudinal Theory of Expressive Law, 79 Or. L. Rev. 339 (2000).

³⁵ For other work employing a nonreductive approach to the internalization of norms, see Robert Cooter, Expressive Law and Economics, 27 J. Legal Stud. 585 (1998) [hereinafter Cooter, Expressive Law and Economics]; Robert Cooter, The Intrinsic Value of Obeying a Law: Economic Analysis of the Internal Viewpoint, 75 Fordham L. Rev. 1275 (2006) [hereinafter Cooter, Intrinsic Value of Obeying a Law]; Lewis A. Kornhauser, The Normativity of Law, 1 Am. L. & Econ. Rev. 3 (1999). My approach takes inspiration from this work. Cooter and Kornhauser don't, however, explore behavioral and legal design implications of the diversity of reasons why people might exhibit a preference to conform to legal rules.

cause, given their bounded rationality, complying with legal rules is a better way of furthering their ends than trying to figure things out for themselves. Epistemic internalizers are further divided into *deferential* and *proxy* types. Deferential internalizers like Dan care about conforming to the judgments embodied in legal norms because they believe that those judgments embody practical wisdom about what they have most reason to do. Proxy internalizers like Polly are motivated to comply with legal norms not because they care about conforming to the judgments that lie behind legal norms, but because defiance of legal rules is correlated with certain bad consequences that they wish to avoid. Betty, our Holmesian bad man, is also concerned about negative consequences of defiance—specifically, the self-interested consequences, which typically take the form of legal sanctions. But she, unlike Polly, is perfectly rational and so prefers to weigh the costs and benefits of defiance herself when deciding whether to comply. In other words, Betty is an *externalizer*. Proxy internalizers, by contrast, adopt a standing policy of conformity instead of weighing the costs and benefits of compliance, because such a policy is usually a good way of avoiding bad consequences and they believe that their bounded rationality means that weighing the costs and benefits themselves will be more costly and error-prone than simply following the rules.

Part II argues that the particular grounds of an internalizer’s disposition matter for his behavior. They matter, first, because they determine the *mode* by which he internalizes legal norms. That is, they determine the particular attitude he adopts towards legal norms and thus the particular way in which he responds to them. For example, only deferential internalizers are prone to exhibit crowding out when choosing among conforming actions. The grounds of an internalizer’s disposition also matter by affecting his *propensity* to internalize norms—the conditions under which he is willing to adopt an internal point of view towards legal norms in the first place. This is because the grounds of his disposition might render his disposition contingent on certain characteristics of the legal environment such that only when those conditions obtain is he internally motivated to conform to the law. For example, as I suggested above, regulation by standards as opposed to clear rules may make an epistemic internalizer less willing to internalize legal norms. Thus, even though all internalizers exhibit a tendency to comply with legal rules, the behavior of the different types differs in ways that may matter to a consequentialist lawmaker.

Part III derives normative implications for legal design from the analysis in the previous Parts. For example, as I have already suggested, this analysis points to a new way of thinking about the question whether regulation should be by rules or by standards. More generally, it suggests that the additional layer of complexity that is introduced by disaggregating the category of good men makes it important for a lawmaker to tailor her design of legal rules to the context. Traditional economic analysis of law, with its exclusive focus on Holmes's bad man, pursues a transsubstantive approach to the analysis of law: No matter what the area of law, we derive the optimal rules simply by figuring out the incentive effects of the possible rules and thus the consequences for social welfare.³⁶ But once we introduce good persons into the mix, it is important to know which motivational types are likely to be dominant in a particular subject population and whether and how the lawmaker might be able to influence the relative proportions of these different types. All of this is likely to depend on the context.

My aim is not to deny the usefulness of the traditional economic project of figuring out the incentive effects of legal rules. After all, many legal subjects undoubtedly do resemble Holmes's bad man at least some of the time.³⁷ My aim is rather to argue that the all-things-considered prescriptions of a consequentialist lawmaker ought to explicitly consider the fact that many legal subjects are often willing to act as the law directs them to do, even when it is in their self-interest to defy the rules, and to provide a framework that will allow us to think about how these prescriptions are altered by the motivational diversity I identify.

³⁶ See Posner, *supra* note 5 (applying traditional economic analysis across domains of law including torts, property, contracts, procedure, and criminal law); Kaplow & Shavell, *supra* note 5 (same).

³⁷ There may be some contexts, especially market contexts in which the stakes are high and repeat play is possible, in which aggregate behavior may be consistent with a model where all agents are rational and self-interested. See, e.g., John A. List, Does Market Experience Eliminate Market Anomalies? The Case of Exogenous Market Experience, 101 *Am. Econ. Rev. (Papers & Proc.)* 313, 315–16 (2011) (finding experimental evidence that market experience attenuates the gap between the willingness to accept (“WTA”) and willingness to pay (“WTP”) measures of value); Charles R. Plott & Kathryn Zeiler, The Willingness to Pay–Willingness to Accept Gap, the “Endowment Effect,” Subject Misconceptions, and Experimental Procedures for Eliciting Valuations, 95 *Am. Econ. Rev.* 530, 532 (2005) (finding experimental evidence that the WTP-WTA gap is eliminated when procedures are used to eliminate subjects' misconceptions); Vernon L. Smith & James M. Walker, Monetary Rewards and Decision Cost in Experimental Economics, 31 *Econ. Inquiry* 245, 259–60 (1993) (surveying experimental studies that suggest that higher stakes tend to reduce the incidence of nonrational behavior).

For simplicity I often assume the perspective of a utilitarian lawmaker who seeks to maximize aggregate social welfare. But the insights of the Article should also be relevant to a lawmaker who adopts a nonwelfarist metric for evaluating the possible consequences of legal rules.³⁸

I. MOTIVATIONAL COMPLEXITY

One justification for the bad man assumption is its relative simplicity.³⁹ No one disputes that rational self-interest is an important driver of behavior and it is easy to model, while there is a wide variety of non-self-interested motivations.⁴⁰ Yet the motivation to obey the law seems, on first glance, to be on a par with that of rational self-interest in these respects. It is an important driver of behavior, and it has predictable implications, causing people to comply with legal rules even when non-compliance is unlikely to result in legal sanctions.⁴¹ In this Part, I explore the variety of reasons why people may exhibit a preference to conform to the law for its own sake.

A. *Internalizers and Externalizers*

What does it mean to be an “internalizer” (as opposed to an “externalizer”) of a legal norm?⁴² I propose the following definitions. A person is an *internalizer* of a legal norm on a particular occasion when he exhibits

³⁸ Consequentialism is the view that actions and policies should be evaluated entirely in terms of the resulting states of affairs. Utilitarianism adds that those states of affairs should be evaluated entirely in terms of the aggregate welfare they produce. See Amartya Sen, *Choice, Welfare and Measurement* 28 (1982).

³⁹ Kaplow & Shavell, *supra* note 5, at 1761–62.

⁴⁰ See Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 *Stan. L. Rev.* 1551, 1559–60 (1998) (arguing that the “descriptive accuracy” of behavioral law and economics is “purchased at . . . the price [of] loss of predictive power”).

⁴¹ Many view this as obviously true. See, e.g., Hart, *supra* note 12, at 88–91; Smith, *supra* note 7, at 223. For empirical evidence that many citizens act on a belief that they have an obligation to obey the law, see Tyler, *supra* note 3. For evidence that levels of compliance with the tax laws can’t be fully accounted for using the standard economic model, see, for example, James Andreoni, Brian Erard & Jonathan Feinstein, *Tax Compliance*, 36 *J. Econ. Literature* 818, 850 (1998); Joel Slemrod, *Cheating Ourselves: The Economics of Tax Evasion*, 21 *J. Econ. Persp.* 25, 38–41 (2007). For theory and evidence that people comply with the tax laws because they believe themselves morally bound to do so, see, for example, Philipp Doerrenberg & Andreas Peichl, *Progressive Taxation and Tax Morale*, 155 *Pub. Choice* 293 (2013); James P.F. Gordon, *Individual Morality and Reputation Costs as Deterrents to Tax Evasion*, 33 *Eur. Econ. Rev.* 797 (1989).

⁴² In Hart’s terms, we would say: What does it mean to adopt an “internal” as opposed to “external” point of view towards a legal norm? Hart, *supra* note 12, at 90–91.

a preference to comply with it for all possible configurations of his option set, even if he wouldn't exhibit a preference for actions that conform to it in the absence of the legal norm.⁴³ An *externalizer* of a legal norm is someone who doesn't exhibit such a preference with respect to that norm.⁴⁴ By a person's "preferences," I mean the rankings that he imposes on his options for the purpose of choosing among them or evaluating his choices. Preferences are different from reasons or desires. Reasons and desires influence an agent's preferences. But his preferences reflect the balance of all the considerations that determine how he makes or evaluates his choices.⁴⁵

Notice that my definition of an internalizer excludes those who happen to exhibit a preference to conform only because their *nonlegal preferences*—the preferences they would exhibit in the absence of the norm—happen to rank conforming actions above nonconforming ones.⁴⁶ For example, a person—call him Martin—who conforms to the prescriptions of the criminal law only because they happen to coincide with his

⁴³ An "option" is a probability distribution over the possible consequences associated with an action that is available for an agent to choose, where those consequences are defined without reference to legal norms.

⁴⁴ Notice that the definitions are norm specific. A person might be an internalizer of some legal norms and an externalizer of others. The definitions are also tied to a particular moment of deliberation. One might internalize a legal norm on one occasion but not on the next. In practice, however, the preferences of internalizers are likely to be reasonably stable across legal norms of a certain type and across occasions of deliberation. See *infra* notes 88, 92.

⁴⁵ This definition of preferences is consistent with the standard economic usage of the term. See Sen, *supra* note 38, at 78–79 (discussing certain moralized preference orderings). But I do not suppose, as economists often do, that an agent's preferences provide a measure of his individual welfare. That is, I don't equate his preferences with his self-interest. See *id.* at 66–67 (noting the pervasiveness of this assumption); McAdams & Rasmusen, *supra* note 33, at 1594 ("The logic of conventional welfare economics, with its criteria of efficiency or wealth maximization, requires . . . that norms enter [welfare analysis] via their effects on utilities."). This is because I take it to be self-evident that persons' choices sometimes reflect other-regarding reasons. Those who suppose that the only reason people voluntarily comply with moral and legal norms is fear of the negative emotions they experience when they don't might deny this. See *infra* note 54 and accompanying text. But it is implausible to suppose that people always choose actions that most advance their own self-interest, even taking their fears of such negative emotions into account. Acts of heroism are obvious counterexamples, but it is also implausible to suppose that everyday acts of kindness and apparent selflessness are always driven by self-interest. See the discussion of "commitment" in Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 *Phil. & Pub. Aff.* 317, 326–29 (1977).

⁴⁶ See Schauer, *supra* note 11, at 6, 48–50 (explaining the importance of distinguishing compliance with law qua law from conforming behavior that results from a person's desire to engage in that behavior anyway); Tyler, *supra* note 3, at 25–26 (same).

view about what morality demands of him anyway is not an internalizer.⁴⁷ Were his moral beliefs otherwise, he might not exhibit a preference to conform to those prescriptions.⁴⁸ Martin is therefore an externalizer of the criminal law, albeit a morally motivated one.⁴⁹

The qualification that an internalizer prefers options that conform to the norm over options that don't *for all possible configurations of his option set* is important, for it is also true that Betty, our Holmesian bad man, will sometimes prefer conforming actions. If she does so, however, it is not because she has internalized a legal norm. It is because the law has transformed her options by attaching penalties to nonconforming actions. Betty is therefore an externalizer on my definition, because she only prefers conforming actions for some configurations of her option set—namely, those in which the likely penalties give her a sufficient self-interested reason to conform. Ivan, Dan, and Polly, by contrast, conform to the law even if the penalties attached to noncompliance don't give them sufficient self-interested reasons to conform.

Likewise, a person—call her Jane—who conforms to the law only insofar as she believes that her defiance of legal norms will have sufficiently bad consequences for society—say, by undermining legal institutions and thus the ability of society to produce just outcomes—is not an internalizer, even though her motives are not self-interested.⁵⁰ She is not an internalizer because her tendency to conform to legal norms can, like Betty's, be explained in terms of the effect of legal norms on her options. It is the fact that defiance of legal norms has bad consequences for society that gives rise to her motivation to conform. Whenever such defiance won't have those bad consequences, she won't be motivated to conform.⁵¹

Finally, consider the plight of a person—call him Guillaume—who conforms to the law only because, as a result of indoctrination by his

⁴⁷ Thus, the internal point of view is more likely to explain why people refrain from conduct that is *malum in prohibitum* (wrong only because illegal) than conduct that is *malum in se* (wrong regardless of its illegality). McAdams & Rasmusen, *supra* note 33, at 1591.

⁴⁸ See Tyler, *supra* note 3, at 26 (explaining that it is precarious for a legal authority to rely on subjects' senses of personal morality to promote compliance with legal rules).

⁴⁹ Figure 1 and Appendix illustrate how Martin fits into my taxonomy.

⁵⁰ Liam Murphy, *What Makes Law: An Introduction to the Philosophy of Law* 129 (2014) (“The moral reason to obey the law is that it will do (if it will) more good than not obeying. For individuals, the good that it may do is that it will support the institutions of the state and promote what, through law, the state is trying to achieve.”); see also John Rawls, *A Theory of Justice* 334 (1971) (explaining that there is a moral duty to support just institutions).

⁵¹ Figure 1 and Appendix illustrate how Jane fits into my taxonomy.

parents from a young age, he experiences excruciating feelings of guilt if he fails to conform to the law.⁵² Now that he is an adult, he sees no particular reason why he ought to conform to the law, except insofar as he can't shake these unpleasant feelings of guilt when he doesn't. Guillaume is not an internalizer for the same basic reason why Jane and Betty are not: Legal norms cause him to conform to them only when his option set is also transformed because he experiences guilt when he takes legally prohibited actions. If, for some reason, taking legally prohibited actions didn't prompt such emotions, his motivation to conform to the law would disappear.⁵³

My claim that Guillaume isn't really an internalizer might seem counterintuitive. Indeed, economists often equate internalization of norms with a propensity to feel certain negative emotions like shame and guilt when defying those norms: The agent suffers "internal" sanctions when he defies a norm alongside the "external" sanctions that the legal system imposes.⁵⁴ But this is to confuse something that is closely correlated with the phenomenon of internalization with the phenomenon itself. Those who have internalized legal norms will often experience guilt when they defy them, because guilt is a natural emotional response to the belief that one has done what one ought not to do.⁵⁵ But it is the belief that they ought to conform that drives their compliance, not the guilt that they experience when they don't. The former and not the latter, in other words, is the fundamental driver of their behavior. Indeed, it is this belief that also causes them to feel guilty in the event that they don't

⁵² See, e.g., Korobkin & Ulen, *supra* note 8, at 1130–31 (discussing the view that one of the costs of violating social norms is "guilt or shame for doing something the actor experiences as 'wrong'"); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 *Mich. L. Rev.* 338, 407–08 (1997) (discussing how his esteem theory can explain why guilt may arise from noncompliance with legal norms); Steven Shavell, *Law Versus Morality as Regulators of Conduct*, 4 *Am. L. & Econ. Rev.* 227, 231–32 (2002) ("Enforcement [of moral rules] comes about through the internal incentives of virtue for obeying the rules and of guilt for not doing so.").

⁵³ Figure 1 and Appendix illustrate how Guillaume fits into my taxonomy.

⁵⁴ See, e.g., Louis Kaplow & Steven Shavell, *Moral Rules, the Moral Sentiments, and Behavior: Toward a Theory of an Optimal Moral System*, 115 *J. Pol. Econ.* 494, 494–96 (2007); Raúl López-Pérez, *Aversion to Norm-Breaking: A Model*, 64 *Games & Econ. Behav.* 237, 238 (2008); McAdams & Rasmusen, *supra* note 33, at 1579; Shavell, *supra* note 52, at 230–31.

⁵⁵ See Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 *J. Legal Stud.* 537, 539–40 (1998) ("According to the standard sociological account, socialization brings about the internalization of norms, which an individual then enforces on himself by means of self-administered feelings of guilt and pride.").

comply. Guilt, in other words, is downstream of their basic preference to comply. If they didn't experience guilt, they would still be motivated to comply. Guillaume is different. He hasn't internalized the underlying legal norm. He doesn't think it is wrong or irrational to defy legal norms. Contingencies of his personal history rather than his sense of right and wrong cause him to experience guilt when he does so.⁵⁶ And so he is not truly an internalizer, because he exhibits no preference to conform with the law as such—only a preference to conform when failing to do so prompts feelings of guilt.

It is notable that economists who reduce internalization of norms to a desire to avoid negative emotions like guilt don't treat self-interested reasons in the same way. But just as we may experience guilt or shame when we defy a norm that we have internalized, we may also experience shame or remorse when we do something that runs counter to our self-interest. Yet we don't conclude from observations like this that our motivation to do as our self-interest demands is driven by a desire to avoid such negative emotions. Rather, we see that those negative emotions arise from the belief that we did something irrational. It is the desire to further our self-interest that drives both our actions and our emotional responses to them.

Detaching our understanding of internalizers from any propensity to experience guilt means that collective entities, not just natural persons, can be internalizers.⁵⁷ There is nothing odd about supposing that a collective agent, like a corporation or government entity, responds to reasons of a certain kind.⁵⁸ Through its governance structures and procedures, the individual participants collectively determine how decisions will be made on the collective entity's behalf.⁵⁹ There is, however, something odd about supposing that a collective entity could experience emotions like shame and guilt. The individuals who comprise the entity at a particular moment in time might experience emotions of this kind

⁵⁶ For discussions of the psychological experience of guilt without perceived fault or wrongdoing, see P.S. Greenspan, *Subjective Guilt and Responsibility*, 101 *Mind* 287, 289–90 (1992); John Sabini & Maury Silver, *In Defense of Shame: Shame in the Context of Guilt and Embarrassment*, 27 *J. Theory Soc. Behav.* 1, 4–5 (1997).

⁵⁷ See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *Yale L.J.* 2599 (1997) (arguing that nation-states internalize international legal norms).

⁵⁸ See *id.* at 2648 (explaining how a treaty norm was internalized into legislation and executive branch policy).

⁵⁹ See Schauer, *supra* note 11, at 161 (explaining how the structure of a corporation resembles a legal system).

when they take certain actions on the entity's behalf, but these emotions cannot straightforwardly be attributed to the entity itself.⁶⁰

B. *Intrinsic versus Epistemic Internalizers*

We have seen that a person internalizes a legal norm when he has a preference to conform to it that cannot be reduced to his nonlegal preferences for all possible configurations of his option set. But *why* might he exhibit such a preference?

Answering this question entails ascertaining the reasons that ground his willingness to internalize legal norms. For the moment, I will set aside the various specific motivations a person might have for internalizing legal rules, whether these be moral, self-interested, or even nonrational, and distinguish between two types of internalizers: intrinsic and epistemic. *Intrinsic internalizers* are like Ivan, one of the internalizers I described in the Introduction.⁶¹ They regard legal norms as reasons in and of themselves, because they believe that complying with the law has intrinsic value. *Epistemic internalizers*, by contrast, are like Dan and Polly.⁶² They treat legal norms as reasons because complying with them is an indirect way of satisfying other reasons that they care about.⁶³ Because they treat legal norms as genuine reasons, they, unlike externalizers, might comply even if the balance of those other reasons suggests acting otherwise. But, like externalizers, they don't believe that conforming to legal rules has any intrinsic value; they comply because they believe that doing so is a way of serving those other reasons.

These definitions can be made more precise by distinguishing between a person's true preferences and his actual preferences. A person's *true preferences* perfectly reflect the balance of reasons that he ultimately cares about and so would be motivated by if he were perfectly rational. A person may not be perfectly rational and so may not have a full understanding or awareness of his true preferences.⁶⁴ But if he had infinite

⁶⁰ See Dennis F. Thompson, *Criminal Responsibility in Government*, in *Criminal Justice* 201, 211–12 (J. Roland Pennock & John W. Chapman eds., 1985) (arguing that organizations can be morally blameworthy, even though subjective mental states cannot be straightforwardly ascribed to them).

⁶¹ See *supra* text accompanying notes 17–18.

⁶² See *supra* text accompanying notes 19–24.

⁶³ There is a connection between the epistemic internalizer and Joseph Raz's theory of authority, which I explore in Section I.C *infra*.

⁶⁴ See *supra* notes 19–24, *infra* notes 80–86 and accompanying text.

time and cognitive resources to devote to decision making, his true preferences would determine his choices. A person's *actual preferences*, by contrast, reflect the reasons that actually motivate him, given his cognitive and motivational constraints, when he is deciding how to act.⁶⁵

Suppose that Dan is deciding how much to pollute in the face of a law prohibiting pollution in excess of 25 units. Dan, recall, wants to do what morality requires of him. Thus, his true preferences rank actions in accordance with the requirements of morality. If Dan were perfectly rational, he would simply ascertain what morality requires and act accordingly. To do this, however, he must make complex factual determinations—What are the social costs and benefits of additional units of pollution? How costly would it be to develop technology that would reduce pollution? Etc.—and complex evaluative judgments about what he ought to do in light of these facts.

But Dan is boundedly rational: Making decisions is difficult and time-consuming for him and he is prone to making errors.⁶⁶ He also knows that he suffers from these limitations. This gives him grounds to look for strategies that will enable him to simplify his decision making and reduce the likelihood that he will err. If following the law is usually a good way of doing what morality requires of him, then it may be rational for Dan to elect to pursue the simple strategy of following the law rather than trying to figure out by himself what morality requires of him. If he pursues this strategy, then the legal rules will determine the content of his actual preferences, thus dictating how he chooses among his available options.

⁶⁵ In a similar vein, Cooter distinguishes between higher- and lower-order preferences: “If a person's lower-order preferences determine his opportunities, then he might choose his lower-order preferences so that the resulting opportunities maximize his higher-order preferences.” Robert Cooter, *Do Good Laws Make Good Citizens?: An Economic Analysis of Internalized Norms*, 86 Va. L. Rev. 1577, 1596 (2000). But he uses the distinction differently from the way in which I do here. He argues that when people are unsure about their higher-order preferences, they will internalize norms, thereby changing their lower-order preferences, whenever doing so yields a “Pareto self-improvement.” *Id.* at 1595–96. That is, they will internalize norms whenever doing so makes them better off relative to both their initial and transformed lower-order preferences by increasing their opportunities (a possibility that arises if the state is able to reward those of a more “virtuous” disposition). *Id.* at 1596–97. By contrast, I suggest that an agent internalizes rules because he believes that they embody some practical wisdom that makes it more likely that his transformed actual preferences will approximate his true preferences. Thus, he may internalize rules even if his resulting actions wouldn't be judged better by the metric of his initial actual preferences and thus wouldn't represent a Pareto self-improvement.

⁶⁶ For more on the significance of bounded rationality, see *infra* Section I.D.

We can now state more precisely the difference between intrinsic and epistemic internalizers. Although both kinds of internalizers exhibit an actual preference to conform to legal norms, the grounds of their preferences differ. The intrinsic internalizer exhibits an actual preference to conform because he has a true preference to do so. For example, an intrinsic internalizer might exhibit a true preference, and therefore also an actual preference, to conform to democratically promulgated norms because he believes that such norms instantiate principles of fairness making conformity valuable in and of itself.⁶⁷ In contrast, the epistemic internalizer exhibits an actual preference to conform even though he may not have a corresponding true preference to do so. Even if his true preferences would sometimes require him to defy legal rules, it makes sense for him to exhibit an actual preference to conform to legal rules, so long as conforming is more likely to result in the satisfaction of his true preferences than attempting to satisfy his true preferences directly.

C. Two Types of Epistemic Internalizer

We have just seen that a person should become an epistemic internalizer of a legal rule when complying with the rule is a better way of satisfying his true preferences than trying to satisfy those preferences directly. There is an obvious parallel with Joseph Raz's claim that legal subjects ought to comply with the law when by doing so they are more likely to conform to the demands of the reasons that apply to them than by trying to balance those reasons themselves.⁶⁸ In Raz's terms, legal norms operate like "exclusionary reasons" for an epistemic internalizer.⁶⁹ They take the place of his true preferences when he is deciding what he is going to do.⁷⁰

Raz's theory addresses a different question from the one I address here. His concern is an expressly normative one about the scope of legitimate authority, meaning the conditions that must be satisfied for legal subjects to be rendered duty-bound to comply with the state's edicts.⁷¹

⁶⁷ See *infra* note 96 and accompanying text.

⁶⁸ Joseph Raz, *The Problem of Authority: Revisiting the Service Conception*, 90 *Minn. L. Rev.* 1003, 1013–15 (2006).

⁶⁹ *Id.* at 1018–19, 1022; see also Joseph Raz, *Practical Reason and Norms* 39–40 (1999 ed.) (introducing the idea of an exclusionary reason).

⁷⁰ See Kornhauser, *supra* note 35 (evaluating the usefulness of Raz's notion of an exclusionary reason for understanding the preferences of those who internalize legal rules).

⁷¹ Raz, *supra* note 68, at 1003.

For Raz these conditions are satisfied when, by following those edicts, subjects are more likely to comply with reasons that *already apply to them* than by trying to figure out what those reasons require of them on their own.⁷² Thus, the state has legitimate authority in the Razian sense over Dan’s decision as to how much to pollute, if Dan is more likely to conform to the demands of morality by complying with the pollution laws than by trying to figure out for himself what morality demands of him. These moral demands are reasons that already apply to Dan because in the absence of the law he has a moral duty not to pollute too much. It is just that the legal authority may be better able to figure out what that duty entails than Dan himself.

But the existence of a law often also creates *new* reasons to comply with it, most obviously by penalizing nonconforming conduct. The state doesn’t acquire a power to make its subjects duty-bound to comply with its edicts when new reasons for subjects are created in this way, even if, given their bounded rationality, subjects would be more likely to comply with those reasons by pursuing the strategy of following the law rather than weighing the reasons in favor of and against compliance themselves. If it had such a power, then the state could turn itself into a legitimate authority simply by coupling its edicts with sufficiently severe sanctions—a form of bootstrapping that Raz’s theory surely rules out.⁷³

My aim, however, is descriptive rather than normative—to ascertain the conditions under which subjects are in fact likely to internalize legal rules. The question whether the state has legitimate authority over legal subjects is not pertinent to this inquiry. Indeed, an agent can be an epistemic internalizer even if the ultimate ground of his disposition—as reflected in his true preferences—is a desire to avoid the risk of legal sanctions or negative consequences for society that result from noncompliance.

Thus, even a self-interested agent could be an epistemic internalizer of legal norms. Such an agent—call him Paul—is an internalizer if in addition to being self-interested, like Betty, he is also, unlike Betty,

⁷² *Id.* at 1014.

⁷³ Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* 233 (2008) (“Authority is legitimate [according to Raz] . . . to the extent that obeying it brings about better compliance with reasons that are *independent of the authority*.” (emphasis added)); Raz, *supra* note 68, at 1014 (“The suggestion of the service conception is that . . . the subject would better conform to *reasons that apply to him anyway* . . . if he intends to be guided by the authority’s directives than if he does not.” (emphasis added) (footnote omitted)).

boundedly rational, and given his bounded rationality and the usual likelihood of sanctions that result from noncompliance, he is more likely to satisfy his true (self-interested) preferences by pursuing the simple strategy of complying with legal rules rather than the more complex strategy of weighing the self-interested benefits and costs.⁷⁴

We can therefore distinguish epistemic internalizers like Dan who are motivated to comply with legal norms because they believe that legal authorities are legitimate authorities in Raz's sense (such that deferring to legal rules is a good way of satisfying reasons they care about in the absence of law) from epistemic internalizers like Polly and Paul who decide to comply with the rules because doing so is an effective way of avoiding certain bad consequences that usually result from noncompliance with legal rules. I refer to the former group as *deferential epistemic internalizers* (*deferential internalizers* for short) because they are motivated to defer to the *judgment* of the legal authority that is embodied in legal norms. I refer to the latter group as *proxy epistemic internalizers* (*proxy internalizers* for short) because they treat legal rules as proxies for certain bad consequences that usually result from noncompliance. The dispositions of both types of epistemic internalizers are grounded in bounded rationality, but only deferential internalizers treat legal rules as embodying authoritative judgments about what they ought to do. It makes sense to distinguish epistemic internalizers from proxy internalizers because, as we will see, whether an epistemic internalizer treats legal rules as authoritative judgments about what he ought to do can matter for his behavior.⁷⁵

It might appear that Paul doesn't meet my original definition of an internalizer,⁷⁶ given that his preference to conform is grounded in part on the way in which the law usually alters his options by attaching legal penalties to some of them. Like Betty, Paul complies with legal rules to avoid legal sanctions. However, unlike Betty, Paul will exhibit an actual preference to comply even on an unusual occasion in which expected sanctions are low (e.g., because there is a high chance any noncompliance will go undetected) such that, were he to rationally weigh the benefits and costs of compliance himself as Betty would, he would see that his self-interest prescribes noncompliance. In other words, while it may

⁷⁴ Figure 1 and Appendix illustrate how Paul fits into my taxonomy.

⁷⁵ See *infra* Part II.

⁷⁶ For the definition, see *supra* Section I.A.

make sense for a boundedly rational agent like Paul to pursue the simplified strategy of conforming to the law, such a strategy isn't sensitive to the way in which expected penalties vary from decision to decision, and so it may lead him to comply on occasions when the self-interested benefits of defiance exceed the self-interested costs.⁷⁷

Likewise, our morally motivated proxy internalizer, Polly, is motivated to conform to legal rules because she worries about the negative consequences of her defiance for society. She is a genuine internalizer of legal norms, unlike Jane,⁷⁸ because she believes that these negative consequences are usually sufficiently bad to make it morally required for her to conform, and, given her bounded rationality, it makes sense for her to pursue the simplified strategy of complying, rather than trying to figure out for herself whether those consequences are in fact sufficiently bad to warrant conformity.⁷⁹

D. The Significance of Bounded Rationality

Why would anyone internalize a rule that only approximates the balance of reasons that he truly cares about? A perfectly rational agent like Betty, our Holmesian bad man, won't see any reason to do so. But a boundedly rational agent has two shortcomings relative to Betty that may make it rational for him to follow legal rules. First, he has limited cognitive resources, which means that his decision making is costly and

⁷⁷ For instance, even if the sanction is the same, the probability of getting caught may vary depending on the context in which noncompliance occurs.

⁷⁸ See *supra* note 50 and accompanying text.

⁷⁹ The difference between Polly and Jane, and between Paul and Betty, resembles the difference between act utilitarians and rule utilitarians. Act utilitarians always choose the action that best maximizes aggregate happiness. Rule utilitarians, by contrast, follow the rule that, if consistently followed, maximizes aggregate happiness. Brad Hooker, *Rule Consequentialism* § 4, *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta et al. eds., 2014), <http://plato.stanford.edu/archives/fall2014/entries/consequentialism-rule/>.

Arguably, any defensible version of rule utilitarianism will collapse into act utilitarianism at the level of ideal theory, because the optimal rules will have so many conditions attached to them that the “rules” that must be followed will end up being reducible to the act-utilitarian principle. See *id.* § 8 (articulating this objection to what Hooker calls “rule” and “act” consequentialists and providing a response). Nonetheless, a boundedly rational utilitarian may do better by following certain simple rules that aren't derivable from the principle that you should act to maximize aggregate happiness.

prone to error.⁸⁰ Second, his motivational resources are limited, such that he might be imperfectly motivated to act in accordance with decisions that he believes to be rationally required—a phenomenon sometimes referred to as “bounded self-control.”⁸¹ The two might also interact. An agent might, for example, fail to identify the rational course of action because of his tendency to evaluate his options in a self-serving way.⁸²

These shortcomings may make rule following rational for two reasons. First, they make it more likely that the agent will err when trying to determine the rational course of action,⁸³ or that he will lack the self-control to choose the rational course when he succeeds in identifying it.⁸⁴ Following legal rules may reduce the likelihood or magnitude of these errors.⁸⁵ Second, his shortcomings increase the effort he has to devote to solving practical problems and resisting any temptation to depart

⁸⁰ The idea that cognitive resources are scarce was first introduced by Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 *Q.J. Econ.* 99 (1955). For further discussion, see John Conlisk, *Why Bounded Rationality?*, 34 *J. Econ. Literature* 669, 671, 682–83 (1996); Jolls et al., *supra* note 8, at 1477–78 (citing Simon, *supra*).

⁸¹ For evidence that self-control is a limited resource, see Mark Muraven, Dianne M. Tice & Roy F. Baumeister, *Self-Control as Limited Resource: Regulatory Depletion Patterns*, 74 *J. Personality & Soc. Psychol.* 774 (1998). For further discussion, see Roy F. Baumeister & Kathleen D. Vohs, *Self-Regulation, Ego Depletion, and Motivation*, 1 *Soc. & Personality Psychol. Compass* 115, 115–18 (2007); Jolls et al., *supra* note 8, at 1479.

⁸² For evidence that self-serving biases distort behavior in negotiations, see Linda Babcock et al., *Biased Judgments of Fairness in Bargaining*, 85 *Am. Econ. Rev.* 1337 (1995); Linda Babcock, Xianghong Wang & George Loewenstein, *Choosing the Wrong Pond: Social Comparisons in Negotiations that Reflect a Self-Serving Bias*, 111 *Q.J. Econ.* 1 (1996); George Loewenstein, Samuel Issacharoff, Colin Camerer & Linda Babcock, *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 *J. Legal Stud.* 135 (1993); Alvin E. Roth & J. Keith Murnighan, *The Role of Information in Bargaining: An Experimental Study*, 50 *Econometrica* 1124 (1982). For further discussion, see Jolls et al., *supra* note 8, at 1502–04.

⁸³ See Simon, *supra* note 80, at 104 (“[T]here is a complete lack of evidence that, in actual human choice situations of any complexity, [the computations required by the classical concepts of rationality] can be, or are in fact, performed.”).

⁸⁴ See Jolls et al., *supra* note 8, at 1479 (discussing lapses of self-control).

⁸⁵ Legal rules serve, in effect, as heuristics that simplify subjects’ decision making. See Conlisk, *supra* note 80, at 671 (“For a boundedly rational individual, heuristics often provide an adequate solution cheaply whereas more elaborate approaches would be unduly expensive.”); Jolls et al., *supra* note 8, at 1477–78 (“[S]omeone using . . . a rule of thumb may be behaving rationally in the sense of economizing on thinking time, but such a person will nonetheless make forecasts that are different from those that emerge from the standard rational-choice model.”).

from the prescriptions that result.⁸⁶ Following legal rules reduces these effort costs.⁸⁷

It won't always be rational for a boundedly rational agent to allow legal rules to displace his true preferences. Given the right circumstances, he will be able to do better by weighing the relevant considerations himself. Sometimes it will simply be obvious that complying with a legal rule won't satisfy his true preferences. Or he may find that he has more time and energy to devote to the problem than usual, thus reducing his need to rely on legal rules. At most, therefore, bounded rationality grounds a disposition to accord presumptive weight to legal rules.⁸⁸

Is it necessary to postulate that agents are boundedly rational in order to rationalize an epistemic internalizer's preferences? It might be thought that a legal authority's informational advantage alone, absent any bounded rationality on the part of a legal subject, could ground the subject's disposition to internalize legal rules. Indeed, a fully rational but imperfectly informed agent like Betty or Jane will extract the information that is contained in the legal directive and combine it with other evidence at her disposal when deciding what to do. But even if this causes her to conform to the directive more often than she would in its absence, she does not thereby exhibit a genuine preference for conformity to the norm. The rule doesn't transform her actual preferences; she simply looks to it for information about which action is likely to best satisfy her true preferences.⁸⁹ The norm, in other words, makes a practi-

⁸⁶ See Conlisk, *supra* note 80, at 682 (“If rationality is scarce, good decisions are costly. There is a tradeoff between effort devoted to deliberation and effort devoted to other activities”); Fritz Strack, Lioba Werth & Roland Deutsch, Reflective and Impulsive Determinants of Consumer Behavior, 16 *J. Consumer Psychol.* 205, 207 (2006) (“Impulsive buying is often accompanied by arousal and emotions, and cognitive resources are necessary to control its execution.”). For further evidence that exercises of control consume resources, see sources cited *supra* note 81.

⁸⁷ See *supra* note 85.

⁸⁸ Even though a boundedly rational agent won't always internalize legal rules, his bounded rationality ought to make his preference to follow legal rules relatively stable over a range of rules and occasions of deliberation. This is because making a decision whether to internalize legal rules rule-by-rule and deliberative-occasion-by-deliberative-occasion increases decision-making costs. It is more likely that a boundedly rational agent will make a wholesale decision to comply with a set of rules for the indefinite future.

⁸⁹ We might say that a rational agent's true preferences should reflect his response to the uncertainty he faces, perhaps in accordance with the dictates of expected utility theory (though the extent to which expected utility theory describes how an agent rationally ought to respond to uncertainty is open to challenge). Rachael Briggs, Normative Theories of Rational Choice: Expected Utility, *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta

cal difference but only insofar as it reveals information about her available options.⁹⁰

E. Intrinsic Internalizers

Why would anyone rationally be disposed to accord legal rules intrinsic significance? Indoctrination might make people disposed to follow the law regardless, but dogmatic compliance with the law just because it is the law hardly seems rational, at least if we subscribe to a sufficiently capacious theory of what makes something law.⁹¹

But it is possible to be intrinsically motivated to comply with legal norms, even though the motivation is grounded in a deeper reason, so long as there is a one-to-one correspondence between complying with the norm and the realization of the underlying value.⁹² For example, a subject's preference to comply might be premised on the Kantian idea that positive law is constitutive of a system of just entitlements—that in the absence of centrally defined and publically proclaimed legal norms that the authority has committed to enforcing, we have no way of ensuring that reciprocal limits on everyone's freedom are secure.⁹³ Although such a subject is ultimately motivated by a desire to respect others' rights, his disposition to internalize legal norms is not an instrumental

et al. eds., 2014), <http://plato.stanford.edu/archives/fall2014/entries/rationality-normative-utility>. In that case, new information would not modify his preferences. It would simply alter his beliefs about the state of the world.

⁹⁰ Indeed, it is possible, if the significance of a law to an agent is limited to its information content, that the enactment of the law would make a fully rational externalizer more likely to defy its prescriptions. Suppose that the government bans a drug on the grounds that it would produce serious side effects if taken by ninety-nine percent of the population. A doctor is deciding how to treat a patient who has a condition that consistently causes him to react to drugs differently from that ninety-nine percent: Drugs that tend to have adverse effects on the ninety-nine percent tend to have beneficial effects on him. If the doctor knows nothing about the drug other than the information that he can infer from the government ban, then he will rationally infer that the banned drug is likely to benefit his patient. And so the enactment of the law gives the doctor a reason to defy the ban by giving the drug to his patient.

⁹¹ See Schauer, *supra* note 11, at 95–96 (supposing that the rules of morally reprehensible governments count as “law”). But see Mark Greenberg, *The Moral Impact Theory of Law*, 123 *Yale L.J.* 1288 (2014) (defending a theory of law according to which legal norms are whatever moral norms flow from the activities of legal officials).

⁹² Agents who internalize legal rules for the intrinsic reasons canvassed here are likely to exhibit preferences to comply with legal norms that are relatively stable across different legal rules and across time insofar as those reasons apply to the legal system considered as a whole or to a large subset of the legal system's norms.

⁹³ See Arthur Ripstein, *Authority and Coercion*, 32 *Phil. & Pub. Aff.* 2, 32 (2004) (discussing this Kantian idea).

one, for his preferences are transformed by this desire only in the presence of positive legal norms. Thus, his compliance with legal norms is not a way of furthering an independently existing value. It is a way of realizing a value that cannot exist in the absence of law.⁹⁴

Alternatively, a subject might be motivated to comply with legal norms because he believes that there is something good about their provenance—because, for example, he believes that they have been promulgated by democratic or procedurally just procedures.⁹⁵ Such a person exhibits an intrinsic motivation to comply with those rules if the relationship between the rules and the underlying procedural values is one of instantiation rather than causation. If he complies because he thinks that doing so tends to promote democracy or procedural justice, say by buttressing the perceived legitimacy of democratic institutions, then his motivation is instrumental rather than intrinsic. But if he complies because he believes that respect for his fellow citizens requires him to follow norms that were promulgated by fair procedures, regardless of whether doing so tends to buttress the perceived legitimacy of democratic institutions,⁹⁶ then he is an intrinsic internalizer.

Others may be motivated to conform out of a sense of fair play. They may view the benefits they derive from the existence of a legal system and others' compliance with that system as giving rise to a duty to comply with legal norms. Such a motivation for internalizing norms is psychologically plausible in light of evidence suggesting that evolutionary mechanisms have made humans disposed towards strong reciprocity.⁹⁷

⁹⁴ Even though the transformation of his preferences depends, in part, on the fact that the law transforms subjects' options by constructing an apparatus to enforce the entitlements it proclaims, the transformation of the agent's preferences cannot be fully explained in terms of transformations of his options. Even if, on a particular occasion, he knows the law won't be enforced, so long as there is a generally efficacious enforcement apparatus in place, he will exhibit a preference to respect the legally enshrined entitlements. To put it another way, his preference to conform is not contingent on a transformation of his option set on a particular occasion.

⁹⁵ For evidence that such considerations motivate people to obey the law, see Tyler, *supra* note 3, at 57–68, 104–08.

⁹⁶ See Christiano, *supra* note 73, at 244 (arguing that because democratic decisions are made by processes that embody public equality, citizens have duties to obey such decisions).

⁹⁷ For an overview of the evidence, see Gintis et al., *supra* note 8, at 8–18. Though psychologically plausible, fair-play theory probably doesn't provide a plausible account of the moral duty to obey the law given that the conferral of benefits on a person isn't usually sufficient to generate a duty when the person had no opportunity to opt out of receiving the benefits. Mark Greenberg, *The Standard Picture and Its Discontents*, in 1 *Oxford Studies in Philosophy of Law* 39, 100 (Leslie Green & Brian Leiter eds., 2011).

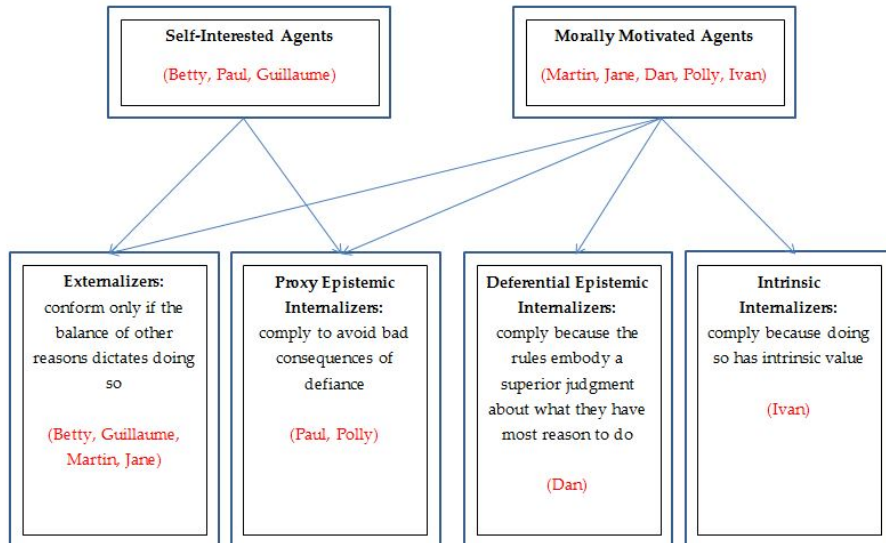
There are other possibilities too, of course.⁹⁸ But these examples suffice to show how the decision to comply with legal rules for their own sake need not be unthinking.⁹⁹

Figure 1 illustrates the multitude of motivations and attitudes towards the law that subjects may exhibit. For simplicity, it subdivides subjects into self-interested agents and morally motivated agents. In reality, subjects may be some combination of the two.¹⁰⁰

⁹⁸ An interesting further possibility is a morally motivated agent who subscribes to Mark Greenberg's moral impact theory of law, according to which legal norms are just those moral obligations that flow from the activities of legal institutions. Greenberg, *supra* note 91. Such an agent satisfies my definition of an internalizer, even though a legal obligation on this theory will sometimes result from the way in which the activities of legal institutions transform an agent's option set, as they do when, for example, they coordinate behavior by announcing that everyone must drive on the right. This is because on Greenberg's view, there is a legal duty to drive on the right only if the announcement actually succeeds in transforming the agent's option set—that is, only if it succeeds in coordinating behavior such that driving on the right is the morally required course of action. If, for some reason, the announcement failed to have this effect—suppose, for example, that there is an entrenched social norm that everyone drives on the left—then the agent's option set wouldn't be transformed (driving on the left would remain the least hazardous course of action). But in that case no legal norm requiring driving on the right would come into existence, because there would be no moral duty to drive on the right in such circumstances. Thus, it is not possible to find a configuration of the agent's option set such that a legal norm exists and the agent feels no moral duty to conform to it.

⁹⁹ As I discuss elsewhere, the weight an agent places on complying with legal rules relative to the other considerations he cares about is likely to depend on the grounds of his disposition to internalize legal rules. Epistemic internalizers should regard legal rules as substituting entirely for the balance of considerations that the agent believes those legal rules approximate, while for intrinsic internalizers, the weight placed on compliance will depend on the weight the internalizer assigns to the underlying values that the legal rules instantiate. See Rebecca Stone, *Economic Analysis of Contract Law from the Internal Point of View*, 116 *Colum. L. Rev.* (forthcoming 2016).

¹⁰⁰ There is plenty of evidence of such heterogeneity. See, e.g., Christoph Engel, *Dictator Games: A Meta Study*, 14 *Experimental Econ.* 583, 607 (2011) (explaining that in experimental dictator games “63.89% [of subjects] violate the income maximisation hypothesis, [while] 36.11% do not”); Norman Frohlich, Joe Oppenheimer & Anja Kurki, *Modeling Other-Regarding Preferences and an Experimental Test*, 119 *Pub. Choice* 91, 91–92 (2004) (reporting results of experiments suggesting there is variation in persons' motivations to give others what they deserve); Werner Güth & Hartmut Kliemt, *What Ethics Can Learn from Experimental Economics—If Anything*, 26 *Eur. J. Pol. Econ.* 302, 308 (2010) (“If one looks at actual raw data rather than statistical aggregates . . . then in economic experiments heterogeneity is ‘all over the place.’”).

Figure 1: Different Types of Legal Subject

Moral motivations can ground the preferences of all four types of agent. Self-interested motivations will ordinarily ground only the preferences of an externalizer or a proxy internalizer. Regarding a law as intrinsically worthy of respect involves non-self-interested motivations. And usually a self-interested agent won't be a deferential internalizer, since most laws aren't designed to further the complying subject's self-interest.¹⁰¹

Subjects need not fall exclusively into one of the boxes. Someone could be an internalizer of some legal norms and an externalizer of others.¹⁰² Similarly, someone might be an intrinsic internalizer of some legal norms and an epistemic internalizer of others.

Nonetheless, the different types of agents I have identified are idealized in the sense that I haven't allowed for the possibility that an agent might have mixed motives with respect to the *same* legal norm, thus rendering his disposition to comply with legal rules overdetermined.

¹⁰¹ Paternalistic laws that purport to tell subjects what is in their long-run self-interest are exceptions, since boundedly rational, self-interested agents might have reason to defer to the judgments embodied in such norms.

¹⁰² See supra note 44.

There is nothing incoherent about believing that there are both intrinsic and epistemic reasons to comply with legal rules. Nor is there anything incoherent about believing both that a legal rule embodies a superior judgment about what one has most reason to do, and that the typical negative consequences of defying a legal rule justify compliance with it. The presence of mixed motives in the subject population adds an extra layer of complexity to the lawmaker's problem, but it doesn't fundamentally complicate the analysis. The primary issue for the lawmaker is how to deal with the heterogeneity of motivations in the subject population and my focus on idealized types adequately captures that.¹⁰³

II. BEHAVIORAL IMPLICATIONS

Does this motivational variety matter for subjects' behavior? This Part argues that while all internalizers will behave similarly in some respects—most notably, by complying with the law—the grounds of an internalizer's disposition predictably affect his behavior in two important ways. First, they affect the *mode* by which he internalizes legal norms by affecting the particular way in which he responds to legal norms. Second, they affect his *propensity* to become an internalizer in the first place by altering the likelihood that he internalizes legal rules.

A. What Norms Do Internalizers Internalize?

An important preliminary question to ask is what norms do internalizers internalize? The answer that they internalize legal norms is not satisfactory, because there is disagreement about what makes something a valid legal norm.¹⁰⁴ Many disagree about the interpretative methodology that ought to be employed to determine the legal effects of statutes and constitutions: Originalists spar with nonoriginalists, textualists spar with purposivists, and so on.¹⁰⁵ And even when there is agreement about methodology, there can be disputes about how that methodology is cor-

¹⁰³ For further discussion of overdetermined agents, see *infra* note 199.

¹⁰⁴ See Ronald Dworkin, *Law's Empire* 4–6 (1986) (describing such theoretical disagreements).

¹⁰⁵ See Scott J. Shapiro, *The "Hart-Dworkin" Debate: A Short Guide for the Perplexed*, in Ronald Dworkin 22, 42–43 (Arthur Ripstein ed., 2007) (describing theoretical disagreements "between originalism and dynamism, textualism and purposivism, documentarianism and doctrinalism").

rectly applied.¹⁰⁶ More generally, those with positivist intuitions take the view that the content of law depends on social facts about the provenance of rules and not on their merits.¹⁰⁷ Legal norms are whatever rules have been promulgated in accordance with the secondary rules that legal officials generally accept to be the rules that govern the procedures by which laws are made and changed.¹⁰⁸ Antipositivists and natural law theorists, by contrast, believe that the status of a norm as law sometimes depends on its content as well as on the way in which it was promulgated.¹⁰⁹

In light of these disagreements, it is possible that the norms many internalizers believe to be legal norms don't correspond to the true legal norms—that is, the legal norms as adjudged by a correct application of the true theory of law. In theory, then, our lawmaker needs to know not only what types of internalizer he faces, but also the theories of law to which each subscribes and how each applies his theory.

This often won't matter much to our consequentialist lawmaker. Most lay people don't think deeply about these issues. To the extent that they do, there will be a great deal of agreement about the content of legal norms notwithstanding their theoretical differences, because different theories give the same answer to many legal questions.¹¹⁰

Sometimes, however, different theories of law will reach different conclusions about the content of the law.¹¹¹ Whenever there is more than one contender for the title of “applicable legal norm,” which of the possible norms an agent ends up internalizing may matter for his behavior.

¹⁰⁶ See, for example, Justice Scalia's disagreement with Justice Stevens over the original meaning of the Second Amendment in *District of Columbia v. Heller*. Compare 554 U.S. 570, 576–619 (2008) (majority opinion), with *id.* at 640–76 (Stevens, J., dissenting).

¹⁰⁷ Leslie Green, Legal Positivism, *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta et al. eds., 2009), <http://plato.stanford.edu/archives/fall2009/entries/legal-positivism>.

¹⁰⁸ Hart, *supra* note 12, at 79–99.

¹⁰⁹ See Ronald Dworkin, *Taking Rights Seriously* 40 (1978) (“The origin of [some norms] as legal principles lies not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time.”). For a more extreme view, see Greenberg, *supra* note 91 (arguing that legal norms are whatever moral norms flow from the activities of legal officials).

¹¹⁰ The theories most likely only yield significantly divergent answers to the small proportion of legal questions that end up getting litigated at the appellate level. Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. Chi. L. Rev. 1215, 1226–27 (2009).

¹¹¹ See, e.g. Dworkin, *supra* note 104, at 16 (discussing theoretical disagreement in the case of *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889)); *id.* at 20–21 (discussing theoretical disagreement about the meaning of the Endangered Species Act of 1973, 16 U.S.C. §§ 1531–44 (2012)).

But notice that an internalizer's beliefs about which of the contender norms is the "true" legal norm is not necessarily relevant to the consequentialist lawmaker's analysis. What is relevant is which of the contender norms our internalizer is motivated to internalize, since it is those norms that influence his behavior. And an internalizer might be motivated to internalize a norm that he doesn't believe has the status of "law."

Consider, for example, the distinction between the "law on the books" and the "law in action." The "law on the books" refers to the content of statutes, regulations, and judicial decisions. The "law in action" refers to regularities describing how legal authorities enforce the "law on the books" and the behavioral responses exhibited by the population at large.¹¹²

Intrinsic internalizers believe that there are intrinsic reasons to comply with legal norms (or the subset of such norms that have intrinsic value).¹¹³ Thus, they will only internalize norms that count as true legal norms according to their preferred theory of law, at least insofar as they believe that the legality of a norm is a necessary condition for it to have intrinsic value.¹¹⁴

This won't necessarily be true of epistemic internalizers. Deferential internalizers like Dan, recall, internalize norms when they believe that the judgment behind the norm embodies a superior judgment about how to satisfy their true preferences.¹¹⁵ Thus, even if their theory of law told them that in this particular case the "law in action" was the applicable legal norm, they would be more likely to internalize the "law on the books," since the "law on the books" embodies a clearer judgment about what they ought to do.

For a proxy internalizer, by contrast, everything depends on whether the "law in action" is a better predictor of the consequences he is trying to avoid than the "law on the books." If our proxy internalizer is self-

¹¹² See Roscoe Pound, *Law in Books and Law in Action*, 44 *Am. L. Rev.* 12 (1910) (introducing the distinction).

¹¹³ A proceduralist, for example, might internalize legal norms only if they have a democratic pedigree. A Kantian might internalize legal norms only if they are sufficiently determinate or sufficiently just.

¹¹⁴ It is possible that a person might believe that conforming to nonlegal norms has intrinsic value while conforming to the true legal norms as he perceives them lacks intrinsic value. Such an agent won't regard himself as an internalizer of the law, though he would be an accidental intrinsic internalizer of the law if the norms that he ended up internalizing turned out to be legal norms according to the true theory of the law.

¹¹⁵ See *supra* Section I.C.

interested like Paul, then he will internalize a rule if he believes that his self-interest is better served by doing so than by trying to figure out for himself what his self-interest demands.¹¹⁶ And given a choice of such rules, he will internalize whichever rule better serves his self-interest. For example, he may choose to internalize the “law in action” rather than the “law on the books” if the “law on the books” is enforced (or underenforced) in such a predictable way that it is straightforward for him to demarcate categories of cases in which it will usually be in his self-interest to defy the “law on the books.” Table 1 summarizes.¹¹⁷

Table 1: What Does an Internalizer Internalize: Law on the Books or Law in Action?

Type of Agent	What is Internalized?
Intrinsic Internalizer	Whichever is the true legal norm under his theory of law
Deferential Internalizer	“Law on the books”
Proxy Internalizer	Whichever is the better proxy of the consequences he wishes to avoid

¹¹⁶ See supra notes 76–77 and accompanying text.

¹¹⁷ It is clear that one who endorses a positivist theory of law could be an epistemic internalizer of the norms that qualify as law under such a theory given the close association between the idea of an epistemic internalizer and Raz’s theory of authority, see Section I.C, and the association of the latter with exclusive legal positivism, see Joseph Raz, *Authority, Law and Morality*, 68 *Monist* 295 (1985). Those who endorse nonpositivist theories of the content of legal norms probably won’t be epistemic internalizers of legal norms as they understand them, though they might be epistemic internalizers of the decisions of legal officials that are correlated with the true legal norms. For a Dworkinian, for example, the true legal norms are those that emanate from the set of principles that best justifies the past legal and political decisions of the community. See generally Dworkin, supra note 104. Thus, divining the set of true legal norms is an extremely complex task, and so a boundedly rational Dworkinian agent might internalize the norms that are embodied in the past legal decisions of the community instead of trying to discern the true legal norms himself, if he believes that in doing so he is more likely to comply with the true legal norms.

B. Legal Form

For an externalizer, legal form matters only derivatively—only insofar as it alters the expected consequences of his actions. For an internalizer of any type, legal form matters even when the consequences of his actions are held constant. If the law says “do not pollute,” the internalizer won’t pollute, while if the law doesn’t prohibit polluting but instead requires polluters to pay a tax per unit of pollution, the internalizer will feel free to pollute as much as he wishes (or as much as he believes morality permits if he is morally motivated), subject to paying the appropriate amount of tax. Sometimes determining whether the law prohibits some action or permits it subject to the payment of a tax or fee or compensation will require an exercise of interpretation,¹¹⁸ and so the lessons of the previous Section may apply. But once that question has been resolved, the form of the legal norm will influence the internalizer’s behavior directly.

By contrast, the externalizer’s choice of pollution level will depend on a complex cost-benefit calculus. If he is self-interested like Betty, he will weigh the self-interested benefits of polluting against the self-interested costs. If he is morally motivated, he will add moral reasons for and against polluting to this calculus. If the law takes the form of a prohibition enforced by a fine, the expected self-interested costs will include the fine multiplied by the probability of detection and punishment. If the law takes the form of a tax, these costs include the tax multiplied by the likelihood that he will be caught (and penalized) if he doesn’t voluntarily pay the tax. In this way, he will treat the prohibition much as he does the tax—as imposing an effective price for nonconformity.

C. Choice Among Conforming Actions

Internalizers of all types exhibit an actual preference for conforming actions over nonconforming actions. But what about their preferences

¹¹⁸ The structure of the legal penalties might be relevant to this interpretative enterprise. See Cooter, *Intrinsic Value of Obeying a Law*, *supra* note 35, at 1280 (“Whenever the law imposes quantity surcharges for recidivism or intentionality, the law signals that breaking the law in question is intrinsically wrong. . . . In contrast, when the law does not impose quantity surcharges, the law gives ambiguous signals about whether or not breaking the law is intrinsically wrong.”); see also Robert Cooter, *Prices and Sanctions*, 84 *Colum. L. Rev.* 1523 (1984) (discussing the structural differences between prices and sanctions).

among conforming actions: Will those preferences be altered by their internalization of legal rules?

On first glance, the answer to this question seems to be no. The hallmark of an internalizer is his preference to comply with legal norms, which seems to tell us nothing about his preferences among conforming actions. Surely, he will just choose the conforming action that best serves his nonlegal preferences.

As the example in the Introduction shows, however, the answer turns out to be less obvious than it seems.¹¹⁹ It is possible that an internalizer’s deference to the law will alter his choice among conforming actions by inducing him to ignore moral considerations that would otherwise influence his decision making—a form of “crowding out.”¹²⁰

Whether such crowding out will occur, however, depends, in part, on the internalizer’s type.¹²¹ Proxy internalizers like Polly, recall, follow legal norms because they are boundedly rational and believe that noncompliance usually results in worse consequences than compliance.¹²² Because they give no weight to the judgment that lies behind the norm, they don’t look to the norm to tell them what they should do given that they end up complying.

Likewise, intrinsic internalizers like Ivan are unlikely to exhibit crowding out of this kind, because they don’t defer to the judgment behind the norm either. They believe that compliance with the norm has intrinsic value, but this tells them nothing about the relative value of conforming actions.¹²³

But a deferential epistemic internalizer like Dan believes that legal norms reflect an authoritative judgment about the balance of moral reasons that he would like to conform to anyway.¹²⁴ Thus, if he also believes that the legal authority has, in fashioning a legal norm, weighed the applicable moral reasons in a sufficiently comprehensive fashion,

¹¹⁹ See *supra* notes 25–27 and accompanying text.

¹²⁰ For a review of evidence on crowding out, see Samuel Bowles & Sandra Polanía-Reyes, *Economic Incentives and Social Preferences: Substitutes or Complements?* 50 *J. Econ. Literature* 368 (2012); Samuel Bowles, *Policies Designed for Self-Interested Citizens May Undermine “The Moral Sentiments”*: Evidence from Economic Experiments, 320 *Science* 1605 (2008).

¹²¹ Note that crowding out does not appear to be a unitary phenomenon. See Bowles & Polanía-Reyes, *supra* note 120. So not all documented instances of crowding out resemble the crowding out that I am positing here.

¹²² See *supra* notes 23, 78–79 and accompanying text.

¹²³ See *supra* Section I.E.

¹²⁴ See *supra* Section I.C.

then he might conclude that complying with that norm gives him license to ignore those moral reasons entirely. Accordingly, as I explain further in Subsection III.B.1, it will sometimes seem to an internalizer like Dan that the legal regime has done the necessary moral work for him in devising the rules, such that, so long as he complies with the rules, he has permission to act self-interestedly when deciding what to do. In the example discussed in the Introduction, the promulgation of the law prohibiting pollution in excess of 100 units causes Dan to pollute *more* than he did previously, because he believes that complying with the law is sufficient to discharge his moral obligations. The legal norm thus crowds out his prior motivation to comply with a more restrictive moral norm prohibiting pollution in excess of 50 units, even though it would be possible to comply with both simultaneously.¹²⁵

The behavior of the parents in a famous experiment on an Israeli daycare center might be an example of crowding out of this kind.¹²⁶ Imposing a small fine on parents for picking up their children late perversely *increased* the number of parents arriving late.¹²⁷ It was as if the parents viewed the payment of the fine as fully discharging their moral duties to the daycare center not to be late.¹²⁸ A more prohibitive moral norm not to be late appeared to be crowded out by a less prohibitive official norm requiring parents simply to pay a price for being late.¹²⁹

A premise of this discussion has been that rules are the objects of internalization, not their underlying rationales. But someone might plausibly argue that a true internalizer is a person who embraces the spirit as

¹²⁵ See *supra* note 27 and accompanying text.

¹²⁶ Uri Gneezy & Aldo Rustichini, *A Fine Is a Price*, 24 *J. Legal Stud.* 1 (2000).

¹²⁷ *Id.* A concern about crowding out of this kind may also lie behind the refrain that market-based schemes for controlling pollution—schemes that price pollution instead of prohibiting it—may encourage pollution among those willing to pay the price. See Bruno S. Frey, *Pricing and Regulating Affect Environmental Ethics*, 2 *Env'tl. & Res. Econ.* 399 (1992); Robert E. Goodin, *Selling Environmental Indulgences*, 47 *Kyklos* 573 (1994) (likening the trading of emissions rights to the sale of papal indulgences).

¹²⁸ Consistent with this explanation, the tone in which the fine was announced made it sound more like a price or tax than a “fine” intended to prohibit lateness. Gneezy & Rustichini, *supra* note 126, at 16.

¹²⁹ Alternatively, parents might have perceived that an official norm prohibiting lateness was in place prior to the introduction of the fine, and that the new scheme replaced that prohibitive official norm with a more permissive norm that simply priced lateness. If so, then the increase in lateness may have resulted from altered perceptions of the prevailing official norm rather than crowding out of a moral norm. There are other possible explanations of the change in the parents’ behavior. See, e.g., *id.* at 10–11 (discussing an explanation consistent with parents being rational and self-interested).

well as the letter of the rules.¹³⁰ If this is the hallmark of an internalizer, then internalizers are much less likely to exhibit crowding out. For when a rule does not tell them exactly what they should do in a particular situation—that is, when there are multiple ways of conforming to the rule—they will look to its rationale to see if that provides them with any guidance. Of course, all types of internalizers might contemplate the rationale of a rule when resolving interpretative questions about the content of the rule.¹³¹ But once such interpretative questions are resolved, a further question confronts the internalizer: To what extent should he conform to the rationale of rules as a way of conforming to the rules?

Suppose that instead of prohibiting pollution beyond 100 units, our lawmaker instead imposes a tax of \$100 per unit of pollution produced, having determined that \$100 quantifies the harm that one unit of pollution imposes on the local community. The lawmaker’s apparent purpose in imposing the tax is thus to force polluters to internalize the costs they impose on the local population.¹³² So an agent who is seeking to conform to the rationale behind the rule might try to conform to the following principle: “Pollute up to the point at which the benefit to me of an additional unit of pollution equals the cost that unit imposes on the local community and pay the cost multiplied by the number of units produced in taxes.” If he then determines that \$100 is an overestimate of this cost, his attempt to conform to the rationale will lead him to pay less in tax than the rule requires of him, giving rise to a conflict between rule and underlying rationale.¹³³

We should suppose that an internalizer will resolve conflicts like this one in favor of the rule. If, instead, the internalizer were to resolve the conflict in favor of the rationale, what would stop him from looking be-

¹³⁰ See Grahame R. Dowling, *The Curious Case of Corporate Tax Avoidance: Is It Socially Irresponsible?*, 124 *J. Bus. Ethics* 173, 174–76 (2014) (discussing the view that companies should adhere to the spirit and not merely the letter of the tax laws when deciding how much to pay in taxes). But see Erich Kirchler, Boris Maciejovsky & Friedrich Schneider, *Everyday Representations of Tax Avoidance, Tax Evasion, and Tax Flight: Do Legal Differences Matter?*, 24 *J. Econ. Psychol.* 535, 549–50 (2003) (finding that among fiscal officers, business students, business lawyers, and small business owners, while tax evasion was perceived negatively, tax avoidance was perceived positively—being associated with, among other words, “legal,” “cleverness,” and “a good idea”).

¹³¹ See *supra* Section II.A.

¹³² See Shavell, *supra* note 4, at 94 (discussing the use of taxes reflecting anticipated harm as a mechanism for controlling externalities).

¹³³ See *id.* at 82 (“[I]t will be socially advantageous for a factory to eliminate [a unit of pollution] if the cost of so doing . . . is less than the harm to the people living nearby.”).

hind that rationale to a deeper rationale? Here, for example, a deeper rationale seems to be the principle “choose efficient actions.” But behind such a principle we can find an even deeper rationale—the utilitarian principle that we should always act to maximize aggregate welfare. And that principle is rooted in the more fundamental principle that we should do what morality requires.¹³⁴ If internalizers were always seeking to conform to a deeper rationale, the law would cease to operate as any kind of constraint on their behavior at all.

What if it is possible to conform to both rule and rationale? In our example, suppose that the agent believes that \$100 is an underestimate of the cost a unit of pollution imposes on the community, such that conforming to the rationale of the rule would lead him to pay more tax than the rule demands. For Dan, our deferential internalizer, this shouldn’t make any difference to his behavior, because Dan believes that the judgment that lies behind the norm is, given his own bounded rationality, superior to his own.¹³⁵ Similarly, a proxy internalizer like Polly seems unlikely to pay much attention to the rationales of rules, so long as the bad consequences that flow from noncompliance tend to be associated more with defiance of the rules than defiance of their rationales.¹³⁶ Furthermore, it is usually much simpler to conform to a rule than its underlying rationale, at least when the content of the rule is clear, which should make both Dan and Polly, as boundedly rational agents, more inclined to follow rules rather than their rationales.¹³⁷ And following rules rather than their more indeterminate rationales is a way of exercising self-control and limiting the effects of self-serving biases, which is also important for boundedly rational agents.¹³⁸

¹³⁴ See Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* 76 (1991) (discussing this feature of rules and their rationales).

¹³⁵ See *supra* Section I.C.

¹³⁶ See *supra* Section I.C.

¹³⁷ See *infra* Subsection II.D.2 for a related discussion of the problem of normative uncertainty.

¹³⁸ See George Ainslie, *Précis of Breakdown of Will*, 28 *Behav. & Brain Sci.* 635, 640–41 (2005) (discussing rule following as a method of self-control). On the ways in which indeterminacy and ambiguity exacerbate self-serving biases, see Jason Dana, Roberto A. Weber & Jason Xi Kuang, *Exploiting Moral Wiggle Room: Experiments Demonstrating an Illusory Preference for Fairness*, 33 *Econ. Theory* 67 (2007); Emily C. Haisley & Roberto A. Weber, *Self-Serving Interpretations of Ambiguity in Other-Regarding Behavior*, 68 *Games & Econ. Behav.* 614, 623 (2010); and sources cited *supra* note 82.

By contrast, because intrinsic internalizers care about conforming to the law for the law’s sake rather than as an indirect way of pursuing other ends, the rationales of rules are more likely to figure in their deliberations when choosing among conforming actions. Only by conforming to the spirit as well as the letter of the rules, intrinsic internalizers plausibly might suppose, does an agent really respect the rules. Even so, some kinds of intrinsic internalizers might not believe that there is intrinsic value in conforming to the rationales behind the rules. The proceduralist, for example, cares about conforming to rules that have a certain kind of provenance,¹³⁹ and he may regard the rationales behind the rules as lacking the institutional pedigree of the rules themselves, unless those rationales have been explicitly promulgated (in, say, a preamble to a statute).¹⁴⁰ Table 2 summarizes the main conclusions of this Subsection.

Table 2: Agents’ Choices Among Conforming Actions

Agent Type	Crowding Out?	Influenced by Rationales of Rules?
Intrinsic Internalizer	No	Depends
Deferential Internalizer	Sometimes	Unlikely
Proxy Internalizer	No	Unlikely
Externalizer	No	No

D. Uncertainty

In this Section, I examine the implications of uncertainty of various kinds for the behavior of internalizers and externalizers. I first derive implications of *enforcement uncertainty*—uncertainty about whether a given legal norm will be enforced. I then evaluate the effects of *normative uncertainty*—uncertainty about the content of legal norms. Finally, I consider how subjects respond to *uncertainty about their own future be-*

¹³⁹ See supra notes 95–96 and accompanying text.

¹⁴⁰ See Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 17–18 (1997); Jeremy Waldron, *Law and Disagreement* 86, 108–09 (1999); Jeremy Waldron, *Can There Be a Democratic Jurisprudence?* 58 *Emory L.J.* 675, 690–91 (2009).

havior that arises from the possibility that they might inadvertently fail to comply with a norm.

1. Enforcement Uncertainty

The short-run implications of enforcement uncertainty are relatively clear. Externalizers will be sensitive to the likelihood that their noncompliance will be detected and sanctioned.¹⁴¹ Internalizers of all types will be insensitive to this likelihood, because they care about conforming to legal norms regardless of the way in which the law alters their options.¹⁴²

The long-run implications of enforcement uncertainty for internalizers are less clear because enforcement patterns can alter the willingness of subjects to become internalizers in the first place. Recall that boundedly rational, self-interested subjects will become proxy internalizers, like Paul, if they are more likely to err or incur greater deliberation costs by trying to weigh the costs and benefits of noncompliance themselves than by simply resolving to comply with the law.¹⁴³ More severe and unpredictable enforcement makes this process of weighing costs and benefits more costly and error-prone and so makes the simpler strategy of complying with the law more attractive.

Morally motivated subjects of the deferential variety like Dan internalize legal rules when they believe that doing so is a better way of discharging their underlying moral duties than trying to figure things out for themselves.¹⁴⁴ So the effects of enforcement uncertainty on their willingness to internalize legal norms may depend on the nature of those underlying duties. Moral duties that are conditioned on others doing their part—moral duties to contribute to some social programs, perhaps—have force only when enough others comply.¹⁴⁵ And so subjects

¹⁴¹ See Shavell, *supra* note 4, at 244 (explaining that a lower probability of a lawsuit reduces the expected sanction and therefore the incentive of self-interested agents not to engage in nonconforming behavior).

¹⁴² Enforcement patterns might also influence internalizers' preferences by changing their interpretations of prevailing norms, raising the considerations addressed in Section II.A. For example, neglect of the law on the books by enforcement officials might rise to such a level that the agent concludes that the legal norm ceases to exist as a genuine legal norm. Hart, *supra* note 12, at 115–17.

¹⁴³ See *supra* notes 76–77 and accompanying text.

¹⁴⁴ See *supra* Section I.C.

¹⁴⁵ There is evidence that perceptions that others are complying is a determinant of compliance with the tax laws. James Alm, Betty R. Jackson & Michael McKee, Estimating the Determinants of Taxpayer Compliance with Experimental Data, 45 *Nat'l Tax J.* 107, 110–11

like Dan may internalize legal norms that reflect such duties only on the condition that enough others conform to them. Thus, enforcement that encourages self-interested agents to conform might reinforce the willingness of subjects like Dan to internalize legal norms.

Whether the willingness of morally motivated, would-be proxy internalizers like Polly to internalize norms will be corroded by enforcement uncertainty depends on how the societal consequences of noncompliance change with the intensity of enforcement of a norm.¹⁴⁶ If defying systematically underenforced norms has few repercussions for society at large, because noncompliance is more likely to go unnoticed, then Polly will be less likely to internalize such norms.

As for intrinsic internalizers, much will depend on the particular grounds of their dispositions. It is unlikely that a proceduralist’s disposition will be sensitive to enforcement uncertainty, given that what matters to him is the democratic provenance of a norm.¹⁴⁷ But a Kantian internalizer might believe that capriciously enforced norms lack intrinsic value.¹⁴⁸ And a fair-play internalizer might cease to exhibit a preference to comply with legal norms if he gets the sense that few others are doing their part.¹⁴⁹ Table 3 summarizes the conclusions of this Subsection.

(1992); John T. Scholz & Mark Lubell, Trust and Taxpaying: Testing the Heuristic Approach to Collective Action, 42 Am. J. Pol. Sci. 398 (1998).

¹⁴⁶ See supra Section I.C.

¹⁴⁷ See supra notes 95–96 and accompanying text.

¹⁴⁸ See supra notes 93–94 and accompanying text.

¹⁴⁹ See supra note 97 and accompanying text.

Table 3: Effects of Enforcement Uncertainty

Type of Agent	Sensitive to Enforcement Uncertainty in Short Run?	Dependence of Disposition on Enforcement Uncertainty?
Intrinsic Internalizer	No	Depends
Deferential Internalizer	No	Yes if morally motivated, and legal norms approximate moral norms that are conditioned on widespread compliance
Proxy Internalizer	No	Yes if self-interested; possibly if morally motivated
Externalizer	Yes	N/A

2. Normative Uncertainty

For a self-interested externalizer like Betty, uncertainty about the prescriptive content of legal rules is, in essence, no different from uncertainty about the enforcement regime. It changes the probability that she will be sanctioned for certain conduct, which is all that she cares about.¹⁵⁰ For a morally motivated externalizer like Jane, matters may be more complex.¹⁵¹ If, for example, blatant defiance of legal norms is more threatening to the legitimacy of legal institutions than arguable defiance, then ambiguity about the content of the rules would reduce the negative societal consequences that flow from apparent noncompliance. But externalizers of all types will care about normative uncertainty only insofar as it has an effect on the bottom line—the probability that negative consequences will materialize if they take certain actions.

For internalizers, the implications of normative uncertainty are more complex. Because they care about compliance for its own sake, uncer-

¹⁵⁰ See Shavell, *supra* note 4, at 244 (explaining that self-interested agents care about this probability).

¹⁵¹ See *supra* note 50 and accompanying text.

tainty as to whether the rules render some action impermissible should matter to them. Accordingly, normative uncertainty ought to affect their behavior even when the expected consequences of noncompliance are held constant.¹⁵²

How exactly does normative uncertainty affect an internalizer’s behavior? Consider Dan, our deferential internalizer, who regards legal norms as expressing expert judgments about what he has most reason to do.¹⁵³ Since he cares about conforming to the law insofar as it embodies this expertise, he ought to strive to resolve the uncertainty in a manner that is faithful to what the lawmaker intended.¹⁵⁴

Exactly what this entails will depend on the nature of the legal uncertainty. First, suppose that the legal norm is uncertain because it takes the form of a standard rather than a rule. Standards are inherently indetermi-

¹⁵² It follows that so long as there are some internalizers in the subject population, normative uncertainty will have a greater impact on aggregate behavior than enforcement uncertainty by affecting both externalizers and internalizers, while enforcement uncertainty only affects externalizers. For evidence that normative uncertainty has a larger effect on aggregate behavior than enforcement uncertainty, see Yuval Feldman & Doron Teichman, *Are All Legal Probabilities Created Equal?* 84 N.Y.U. L. Rev. 980 (2009).

¹⁵³ See *supra* Section I.C.

¹⁵⁴ In theory, a deferential internalizer might subscribe to a theory of law that requires him to look to something other than the lawmaker’s intent to resolve interpretative disputes. This would be an odd posture for him to take, given that it is the judgment behind legal norms that he ultimately believes has value. Cf. Andrei Marmor, *Interpretation and Legal Theory* 176–84 (1992) (arguing that on a Razian account of the authority of law, interpretations of legislation should focus on predicting the lawmaker’s intent). It would mean that the deferential internalizer would sometimes be motivated to conform to norms (those that best reflect the authority’s judgment) that don’t perfectly correspond with his view of the true legal norms.

But even if he operates with a theory of interpretation that diverges from his view about the authority of legal norms, uncertainty about the content of norms is likely to remain after this exercise of interpretation, and he should at least resolve that uncertainty by appealing to the intentions of the lawmaker. It is clear that uncertainty will remain if he subscribes to a positivist theory of the law given the absence of official agreement on the right way to go about legal interpretation. See Leiter, *supra* note 110, at 1222 (explaining that on Hart’s view, theoretical disagreements should be resolved by looking to “the actual practice of officials and their attitudes towards that practice” (emphasis omitted)). In theory, uncertainty won’t remain if he subscribes to a Dworkinian theory of law, since the principles that best justify past legal and political decisions of the community should lead to a right answer. See Dworkin, *supra* note 109, at 283–84 (defending the “right answer” thesis). But, of course, from the perspective of a legal subject, uncertainty is likely to remain because ascertaining the right answer is such a difficult task. See *id.* at 284 (noting that legal training is required to ascertain the right answers); *supra* note 117 (explaining that a Dworkinian might be an epistemic internalizer of the norms that are embodied in the past legal decisions of the community).

nate because what they require depends on the circumstances and so often can't be elaborated in advance.¹⁵⁵ What is required by tort law's duty of reasonable care, for example, depends on what is reasonable care in light of the nature of the options that are available to the potential tortfeasor, including how burdensome it would be to take an available precaution and the reduction in risk that would result if the precaution is taken.¹⁵⁶ In clear cases, those that a court would resolve as a matter of law, the answer will be obvious.¹⁵⁷ But many cases are more murky, and will be left for the jury,¹⁵⁸ so that precedent can only have a limited role in reducing the uncertainty in advance.¹⁵⁹ Thus, Dan will view a legal standard as directing him to exercise his moral judgment to determine what it requires in the circumstances in which he finds himself.¹⁶⁰ And so, whereas an externalizer will simply try to predict how the adjudicator he is likely to face will resolve the uncertainty, Dan will conform to his own best judgment about what is required.¹⁶¹ Deferential internalizers

¹⁵⁵ See Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 139–40 (1994) (explaining that standards not only postpone “[the] decision until the matter can be judged from the perspective of the point of application,” they also avoid “even at that point the imprisonment of general judgment in any precise verbal formula”).

¹⁵⁶ Kenneth S. Abraham, *The Forms and Functions of Tort Law* 72–73 (4th ed. 2012).

¹⁵⁷ *Id.* at 97–98.

¹⁵⁸ See *id.* at 98 (explaining that the tendency in negligence law has been “to leave juries with even greater discretion and to grant fewer directed verdicts”).

¹⁵⁹ See *Pokora v. Wabash Ry. Co.*, 292 U.S. 98, 104–06 (1934) (“Standards of prudent conduct are declared at times by courts, but they are taken over from the facts of life. . . . Extraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the common-place or normal. In default of the guide of customary conduct, what is suitable for the traveler caught in a mesh where the ordinary safeguards fail him is for the judgment of a jury.”).

¹⁶⁰ This understanding of a standard differs from Louis Kaplow's more reductive analysis: “[T]he only distinction between rules and standards is the extent to which efforts to give content to the law are undertaken before or after individuals act.” Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 *Duke L.J.* 557, 560 (1992) (emphasis omitted).

¹⁶¹ This is in line with arguments that standards promote moral deliberation. Seana Valentine Shiffrin, *Essay, Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 *Harv. L. Rev.* 1214 (2010); Jeremy Waldron, *Vagueness and the Guidance of Action*, in *Philosophical Foundations of Language in the Law* 58 (Andrei Marmor and Scott Soames, eds., 2011). And Yuval Feldman and Henry Smith argue that equitable standards in the law promote the intrinsic motivation of “good-faith” actors while undermining the efforts of “bad-faith” actors to evade the law. Yuval Feldman & Henry E. Smith, *Behavioral Equity*, 170 *J. Inst. & Theoretical Econ.* 137, 151–52 (2014). Their “bad-faith” actors resemble self-interested externalizers. Their “good-faith” actors, however, are different from my internalizers. They are primarily morally motivated individuals who “want to know merely that the law accords with their sense of what is right.” *Id.* at 152.

with different moral beliefs will make different moral judgments and so behave differently from one another. Externalizers, by contrast, will focus on what an average adjudicator will do, irrespective of their normative beliefs, and if they are risk averse, they will hedge their bets.

Now suppose that the legal norm is a rule rather than a standard, but that the content of the rule is unclear or inchoate, because although the lawmaker intended to set out a definite requirement, she failed to do so. Faced with such a rule, courts will clarify its content as they are called on to apply it.¹⁶² And if the rule has yet to be clarified by a court, Dan will look to the intent of the lawmaker to resolve the uncertainty, because this intent embodies the judgment that he believes he ought to defer to.¹⁶³ Thus, his focus is still likely to be different from that of an externalizer. Whereas an externalizer will focus on the (possibly idiosyncratic) ways in which particular officials will resolve the uncertainty, Dan will seek out the content that the lawmaker intended.

What will Dan do if there is no clear intent to discern? At that point, the norm ceases to provide much helpful practical guidance. One strategy would be to comply with the most likely intent behind the law. But if he does that, he consciously risks erring. And, given his bounded rationality, it will be cognitively costly to figure out what the most likely intent behind the law is.¹⁶⁴ Another strategy would be to conform to all the possible meanings that the lawmaker might have intended. If, for example, there are two possible meanings, this would mean choosing actions that conform to both rather than actions that result in defiance of one of them. But, of course, such a risk-averse approach also comes with costs by further constraining his freedom of action: Complying with multiple rules is more constraining than complying with one. Uncertain rules, moreover, are less likely to constitute an effective self-disciplining device for an agent who suffers from bounded self-control, because his resolution of the uncertainty is more likely to be influenced by his self-serving biases.¹⁶⁵ In short, as the rules become more uncertain, the strategy of following them becomes a less effective way of satisfying his true

¹⁶² See Hart & Sacks, *supra* note 155, at 139–40 (an “inchoate rule” is “a partial postponement of the authoritative determination of public policy as to the matters left uncertain”).

¹⁶³ See *supra* note 154 and accompanying text.

¹⁶⁴ See *supra* Section I.D.

¹⁶⁵ See *supra* notes 82, 138 and accompanying text.

preferences, and it is more likely to be rational for Dan to weigh the relevant considerations himself.

This is also likely to be the case when it will be difficult for Dan to determine what is required to satisfy a standard. The standard may help to some extent by focusing his attention on certain moral categories. Yet standards still require agents to exercise their judgment.¹⁶⁶ And the harder Dan has to work to figure out what a standard demands of him, the less likely it is that he will regard the norm itself as embodying useful practical wisdom or a helpful self-disciplining device.

When it comes to legal norms that take the form of standards, moreover, a deferential internalizer like Dan may have to contend with the prospect of being legally sanctioned despite doing exactly as the law directed him to by exercising his moral judgment to resolve the uncertainty. The law, that is, may expose him to the risk of coercive sanctions even when he does his best to comply with it. To see why, notice that many legal standards—consider, for example, the duty to exercise reasonable care in tort law—are objective standards, and doing one’s best to conform to an objective standard doesn’t constitute conformity to it.¹⁶⁷ The prescriptive content of such standards is therefore determined without reference to the deliberative burdens that they impose on agents who are doing their best to comply with them.¹⁶⁸ In other words, the likelihood that Dan might be held liable when doing his best to conform to a standard of this kind is not an interest that he may weigh in the balance

¹⁶⁶ See *supra* note 161 and accompanying text.

¹⁶⁷ For a famous precedent holding that the reasonable person standard of negligence law is an objective standard, see *Vaughan v. Menlove* (1837) 132 Eng. Rep. 490, 493; 3 Bing. (N.C.) 468, 475 (“Instead, therefore, of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe.”). See also Oliver Wendell Holmes, *The Common Law* 86 (1963) (“The law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men.”). The definition of good faith in the Uniform Commercial Code combines both subjective (“honesty in fact”) and objective (“the observance of reasonable commercial standards of fair dealing”) elements. U.C.C. § 1-201(b)(20) (Am. Law Inst. & Unif. Law Comm’n 2014).

¹⁶⁸ For a discussion of the meaning of reasonable care, see *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.) (“[T]he . . . duty . . . to provide against resulting injuries is a function of three variables: (1) The probability of [harm]; (2) the gravity of the resulting injury . . . ; [and] (3) the burden of adequate precautions.”); Goldberg et al., *supra* note 29, at 206–12. For a discussion of the meaning of good faith in contract law, see E. Allan Farnsworth, *Contracts* 488–500 (4th ed. 2004).

when determining what it requires. And so he is effectively instructed to ignore an aspect of his situation that is highly salient to him and likely reflected in his true preferences—the likelihood that he will face sanctions despite trying his best to conform to the standard. At some point, therefore, he might start to doubt that conforming to the norm is a good way of satisfying his true preferences.

What about proxy internalizers? An internalizer of this type will not be inclined to resolve normative uncertainty in a way that is most faithful to the legal rule.¹⁶⁹ If he is self-interested like Paul, he ultimately cares about not being found liable, and so he cares about being judged to have complied by legal officials with the power to sanction him.¹⁷⁰ If he is morally motivated like Polly, he ultimately cares about the negative consequences for society that result when legal institutions are undermined by noncompliance.¹⁷¹ In that case, he presumably cares about being perceived by members of the public to have conformed to the law.¹⁷² Accordingly, it seems likely that both Polly and Paul will be inclined to make *predictive* judgments about what will be deemed by the legal regime or perceived by the public at large to count as noncompliance.

To the extent that uncertainty remains after making such predictive judgments, proxy internalizers will, like their deferential counterparts, either follow a prediction that carries a risk of error or pursue a risk-averse strategy that minimizes the chance that they will be found not to have complied. And so the remaining uncertainty is also likely to make these internalizers less inclined to internalize legal norms in the first place.¹⁷³

How will normative uncertainty alter the preferences of those like Ivan who believe that there are intrinsic reasons to conform to legal norms?¹⁷⁴ Faced with a legal standard, intrinsic internalizers, like deferential epistemic internalizers, will exercise their moral judgment to figure out how to comply, because by doing so, they do what the standard

¹⁶⁹ Indeed, even if they subscribe to a legal theory that prescribes a particular theory of legal interpretation, they won't necessarily be motivated to resolve uncertainty as that theory of interpretation demands.

¹⁷⁰ See *supra* notes 76–77 and accompanying text.

¹⁷¹ See *supra* Section I.C.

¹⁷² This assumes that it is public perceptions of noncompliance as opposed to noncompliance *per se* that tends to undermine the legitimacy of legal institutions.

¹⁷³ See *supra* text accompanying notes 164–65.

¹⁷⁴ See *supra* Section I.E.

asks of them.¹⁷⁵ Faced with an unclear rule, they will attempt to resolve the uncertainty in a normatively plausible way given the theory of interpretation to which they subscribe.¹⁷⁶ If they cannot easily resolve the uncertainty, they will be motivated to comply with all possible resolutions of the uncertainty. So a lack of clarity about the rule's prescriptive content seems likely to encourage intrinsic internalizers to avoid choosing any actions that risk violating the rule—behavior that is likely to be excessively risk averse from the perspective of social-welfare maximization.¹⁷⁷

Whether the intrinsic internalizer's willingness to internalize legal norms will be undermined by normative uncertainty depends on the particular grounds of his disposition. There is no obvious reason why the proceduralist's disposition to conform would be undermined by normative uncertainty insofar as his motivation to comply is driven by the democratic provenance of the norm.¹⁷⁸ But a Kantian internalizer might believe that laws that leave too much to the judgment of private parties cannot ground claims of justice, so that conforming to them lacks intrinsic value.¹⁷⁹ If so, then laws will have to exceed a threshold of determinacy in order to command the respect of such internalizers. Table 4 summarizes the conclusions of this Subsection.

¹⁷⁵ They might inadvertently fail to comply with the standard if their judgment goes awry—in which case the lessons of the next Subsection will apply.

¹⁷⁶ See *supra* Section II.A.

¹⁷⁷ The extent to which an intrinsic internalizer will care about avoiding this risk will depend on the weight he places on compliance with legal rules relative to the other considerations he cares about. See *supra* note 99.

¹⁷⁸ See *supra* notes 95–96 and accompanying text.

¹⁷⁹ See *supra* notes 93–94 and accompanying text.

Table 4: Consequences of Normative Uncertainty for Different Types of Agent

Type of Agent	Attitude Towards Normative Uncertainty		Dependence of Disposition on Degree of Normative Uncertainty?
	Unclear Rules	Standards	
Intrinsic Internalizer	Look for a normatively plausible interpretation	Exercise moral judgment	Possibly beyond a certain threshold
Deferential Internalizer	Discern the lawmaker’s intent	Exercise moral judgment	Yes
Proxy Internalizer	Predict how legal officials or the public will resolve it	Predict how legal officials or the public will resolve it	Yes
Externalizer	Predict how legal officials will resolve it	Predict how legal officials will resolve it	N/A

3. *Uncertainty About Future Conduct*

Internalizers intend to comply with the law. But they might inadvertently fail to conform, even in the absence of any normative uncertainty.¹⁸⁰ A driver’s mind might wander and cause him to swerve into a pedestrian, even if he previously resolved to pay full attention. A taxpayer might accidentally forget about a source of income when filing his taxes, even though he intends to report all his income. A doctor might accidentally misdiagnose a patient or prescribe the wrong drug, despite having the best of intentions.¹⁸¹

¹⁸⁰ A person can fall short of a standard of care by being careless or inattentive, by being foolish, or by being selfish. Abraham, *supra* note 156, at 60–61. Here I am focused on the first kind of shortcoming.

¹⁸¹ Jennifer Arlen & W. Bentley MacLeod, *Malpractice Liability for Physicians and Managed Care Organizations*, 78 N.Y.U. L. Rev. 1929, 1949 (2003).

There is nothing special about this kind of uncertainty from an externalizer's point of view. When deciding what to do, he will take into account the effect his actions have on the likelihood that he will inadvertently fall short of legal norms triggering legal sanctions or other negative consequences.¹⁸² He may take precautionary actions to reduce this likelihood—for instance, by making sure he has had enough sleep before he drives, by keeping ongoing records of his income, and, if he is a doctor, by ensuring that he keeps abreast of the latest developments in medical science. But he will only do so to the extent that the external benefits of doing so outweigh the costs.

The way in which internalizers will react to this kind of uncertainty will once again depend on their type. Consider intrinsic internalizers like Ivan first.¹⁸³ Because they attribute intrinsic value to compliance with legal norms, the prospect of inadvertently failing to comply with those norms will encourage them to take precautionary measures to reduce the likelihood that they will inadvertently fall afoul of legal norms over and above those they would take if they were only concerned with the external benefits and costs.¹⁸⁴ Thus, it seems likely that an intrinsic internalizer will take more precautions than would his externalizing counterpart.

The same seems likely to be true of proxy internalizers like Polly and Paul. Such subjects believe that complying with the simple rule—avoid noncompliance—is, given their bounded rationality, a better way of avoiding certain negative consequences that often flow from noncompliance than weighing the costs and benefits of their available options.¹⁸⁵ And so they too are likely to take more precautionary measures than externalizers to ensure that they won't inadvertently defy the rules.

The calculus seems likely to be different for deferential internalizers like Dan—those who regard legal rules as embodying an authoritative judgment about what they have most reason to do.¹⁸⁶ For the problem here is really *the absence of such a judgment*. The legal norm that one

¹⁸² See *id.* at 1979–86 (analyzing the effects of tort liability for inadvertent noncompliance within a standard economic analysis of law framework).

¹⁸³ See *supra* Section I.E.

¹⁸⁴ The effects on their behavior are similar in this respect to the effects of normative uncertainty. See *supra* text accompanying notes 175–77. The extent to which they will care about avoiding the risk of inadvertent noncompliance will depend on the weight they place on compliance with legal rules relative to the other (external) considerations they care about. See *supra* note 99.

¹⁸⁵ See *supra* Section I.C.

¹⁸⁶ See *supra* Section I.C.

should not be inadvertently negligent proscribes certain conduct—inadvertent negligence—but, by definition, it doesn’t provide subjects with any practical guidance as to how they should avoid it. Inadvertent negligence is, after all, conduct that the actor didn’t intend to happen.¹⁸⁷ Thus, Dan’s attitude towards norms of this kind should resemble that of an externalizer. He will simply invest in cost-effective precautions to minimize the risk of legal sanctions (and, if he is morally motivated, the risk to others of his inadvertent noncompliance).¹⁸⁸ Table 5 summarizes the conclusions of this Subsection.

Table 5: How the Prospect of Inadvertent Noncompliance Affects the Behavior of Different Types of Agent

Type of Agent	Level of Precautions
Externalizer	Precautions that balance expected liability against costs of precautions
Intrinsic Internalizer	High relative to externalizer
Deferential Internalizer	Same as externalizer
Proxy Internalizer	High relative to externalizer

III. PRESCRIPTIVE IMPLICATIONS

Part II suggests that we can’t defend bad man analysis of law on the ground that the good man will simply do as the lawmaker wants him to do anyway. There is much more to be said about the behavior of good persons than that they are inclined to follow legal rules. But this complexity raises a different kind of worry about introducing the good man into the consequentialist analysis of legal rules, namely that it renders the analysis intractable.

¹⁸⁷ See Arlen & MacLeod, *supra* note 181, at 1982 (explaining that physicians can’t simply avoid liability for inadvertent error by taking “due care”).

¹⁸⁸ In the medical malpractice context, this means investing in a cost-justified level of “expertise.” *Id.* at 1982–83.

I will try to deflate this concern here, by arguing that it is possible to find enough order in this complexity to begin the process of extracting some prescriptive implications for consequentialist lawmakers. Section III.A sets out the problem. Section III.B considers what prescriptive implications may be extracted from the analysis in Part II for a lawmaker who lacks detailed knowledge of subjects' preferences. Finally, Section III.C considers some other strategies that the lawmaker could employ to simplify the problem.

A. The Complexity of the Legal Design Problem

The legal design problem is complex, because agents have heterogeneous preferences on a multitude of dimensions in ways that matter for their behavior. First, agents ultimately care about different things. Some are self-interested.¹⁸⁹ Others are morally motivated. Many are some combination of the two.¹⁸⁹

Second, agents exhibit different attitudes towards legal rules. There are internalizers and externalizers.¹⁹⁰ Legal norms have special significance for internalizers, while they only have significance for externalizers insofar as bad consequences tend to flow from their defiance. Thus, uncertainty about the content of a legal norm is significant to externalizers only insofar as it adds to the uncertainty surrounding the consequences of their actions. By contrast, internalizers treat normative uncertainty differently from enforcement uncertainty (and exactly how they do so depends on their particular type).¹⁹¹

Internalizers, moreover, are not a monolithic category.¹⁹² For epistemic internalizers, complying with the law is an indirect way of satisfying their true preferences. Their propensity to internalize legal norms is ultimately grounded in their bounded rationality, and so depends on the complexity of the normative problem that the law is purporting to solve, the accessibility of the applicable legal norms, and the likely consequences of defiance.¹⁹³ Intrinsic internalizers, in contrast, believe that complying with legal norms is intrinsically valuable. Thus, they are less likely to be influenced by these kinds of considerations.¹⁹⁴

¹⁸⁹ See *supra* note 100 and accompanying text.

¹⁹⁰ See *supra* Section I.A.

¹⁹¹ See *supra* Subsection II.D.2.

¹⁹² See *supra* Section I.B.

¹⁹³ See *infra* Subsection III.B.1.

¹⁹⁴ See *supra* Section I.B.

Epistemic internalizers can be further subdivided into deferential internalizers, who treat the judgments that lie behind legal norms as authoritative, and proxy internalizers, who comply with legal norms because doing so is a good way of avoiding the negative consequences that often result from defiance.¹⁹⁵ In some respects, the attitudes of proxy internalizers resemble those of intrinsic internalizers. Neither type attaches special significance to the judgment that lies behind a legal norm. Thus, while deferential epistemic internalizers will exhibit crowding out of a particular kind under certain circumstances, neither proxy internalizers nor intrinsic internalizers will do so.¹⁹⁶ And, whereas deferential internalizers will regard norms prohibiting inadvertent noncompliance as devoid of action-guiding implications, such norms will tend to prompt intrinsic and proxy internalizers to take greater precautions than their externalizing counterparts.¹⁹⁷

Finally, intrinsic internalizers vary depending on the specific grounds of their disposition.¹⁹⁸ This means that the conditions that have to be met for them to accord intrinsic value to complying with legal rules will vary with those grounds.¹⁹⁹

B. Prescriptive Implications When Subjects’ Preferences Are Unknown

Ideally, our lawmaker would design different laws for different types of subjects. But doing so would require extensive knowledge of subjects’ preferences. Moreover, rule of law norms requiring that laws be generally applicable may hinder efforts to design laws for different

¹⁹⁵ See supra Section I.C.

¹⁹⁶ See supra Section II.C.

¹⁹⁷ See supra Subsection II.D.3.

¹⁹⁸ See supra Section I.E.

¹⁹⁹ What about an agent whose preference to comply is overdetermined? See supra text accompanying note 103. This often won’t matter because one of the agent’s motives will often win out. Consider, for example, a deferential internalizer who determines that legal norms reflect authoritative determinations of the balance of certain reasons. Suppose that he also determines that complying with those norms obviates the need for him to consider those reasons entirely and so exhibits crowding out. It is not obvious that anything will change if he also believes that there are proxy or intrinsic reasons to comply with legal rules. This is because the latter kinds of reasons don’t speak to the question of how to choose among conforming actions. So when choosing among conforming actions, deferential reasons will prevail. Likewise, when it comes to the problem of inadvertent noncompliance, intrinsic and proxy reasons to take greater precautions should prevail, given that deferential reasons don’t provide the agent with reasons to take precautions to prevent inadvertent noncompliance.

types.²⁰⁰ Thus, in this Section, I ask whether we can say anything determinate about how the legal system can achieve its ends even when it cannot tailor its laws in this way.

1. The Significance of Regulatory Transparency and Crowding Out

We have seen that deferential internalizers (but not other types of internalizers) exhibit crowding out when choosing among conforming actions if they determine that legal rules comprehensively reflect the balance of moral reasons.²⁰¹ This raises the question of what features of the legal regime make it more likely that subjects will make such a determination.

In some settings it will be relatively obvious that the law intends only to set a minimum standard. Common sense suggests, for example, that speed limits don't reflect all the safety considerations that a motorist ought to attend to when selecting his speed. Thus, speed limits shouldn't crowd out a deferential internalizer's consideration of reasons to drive more safely when he is selecting a speed below the limit.

But it would be reasonable for subjects to suppose that a detailed set of environmental regulations is supposed to specify in full what they should do to solve a pollution problem. Likewise, when a law appears designed to put a price on permissible conduct, say by imposing a pollution tax, subjects might reasonably suppose that the price reflects the legal authority's determination of the total social costs of the activity.²⁰² Subjects might therefore conclude that complying with the law is a way of *fully* discharging their moral duties not to pollute too much, thus crowding out the view of their moral duties that they held prior to enactment of the law.

Notice that if the lawmaker actually intends to regulate behavior in a comprehensive fashion, crowding out could be a *desirable* effect of the scheme. For example, if a pollution tax really does capture the full marginal social costs of pollution, then social welfare is maximized if subjects produce pollution just up to the point at which the marginal bene-

²⁰⁰ See Joseph Raz, *The Authority of Law* 215–16 (2d ed. 2009) (explaining that particular legal orders run counter to the rule of law except insofar as they are enacted within a framework set by general laws).

²⁰¹ See *supra* Section II.C.

²⁰² See Shavell, *supra* note 4, at 94 (discussing the use of taxes reflecting anticipated harm as a mechanism for controlling externalities).

fits equal those costs.²⁰³ An internalizer who exercised his independent moral judgment when deciding how to comply with such a scheme could end up polluting less than this amount, which would be suboptimal from a social-welfare-maximizing standpoint.

But not all taxes are carefully designed to quantify the full social costs of an activity.²⁰⁴ Under these conditions, crowding out could do more harm than good by discouraging deferential internalizers from reducing their activity levels for moral reasons.

This suggests that transparency about the goals of regulatory schemes enables lawmakers to control the extent to which those schemes end up crowding out certain forms of other-regarding behavior. Indeed, empirical evidence suggests that when lawmakers are clear that a scheme is simply setting a minimum standard, there might even be *crowding in* of other-regarding behavior—that is, agents might be *more* willing to conform to certain moral reasons than they otherwise would have been. Thus, a small tax on plastic grocery bags that was implemented in Ireland in 2002 dramatically reduced plastic bag consumption and so appeared to heighten rather than crowd out citizens’ sense of their social obligations. The tax was accompanied by information that made it clear that payment of the tax was not intended to be a substitute for reducing one’s consumption.²⁰⁵

Of course, transparency will only make a difference in this respect when there are significant numbers of deferential internalizers like Dan in the subject population. But since there is no reason to suppose that greater transparency will affect the behavior of other subjects, the lawmaker can use transparency to discourage (or promote) crowding out without worrying that doing so will negatively affect anyone else’s behavior.

2. *Rules versus Standards*

Thinking about the behavior of internalizers sheds new light on the relative advantages and disadvantages of rules over standards.²⁰⁶ First,

²⁰³ In doing so, they would fully internalize the externality they impose on society. *Id.*

²⁰⁴ The plastic bag tax discussed below clearly wasn’t designed in this way.

²⁰⁵ Bowles & Polanía-Reyes, *supra* note 120, at 417.

²⁰⁶ For a traditional economic analysis, see Kaplow, *supra* note 160. For an analysis inspired by behavioral economics, see Russell B. Korobkin, Behavioral Analysis and Legal Form: Rules vs. Standards Revisited, 79 *Or. L. Rev.* 23 (2000). For a critical legal studies

the danger of crowding out gives lawmakers one reason to prefer standards. This is because while rules exhibit the virtues of simplicity and clarity, they often do so only at the cost of imperfectly implementing the purposes that they were designed to serve.²⁰⁷ Thus, complying with the rules doesn't necessarily mean acting in accordance with their underlying rationales.²⁰⁸ And if the conditions are ripe for crowding out, deferential internalizers will act self-interestedly within the bright lines created by rules, even if they would otherwise be inclined to do what they believe is morally right.²⁰⁹ Thus, for example, a tax code that contained only rules might encourage even morally motivated taxpayers to avoid paying taxes by constructing tax shelters that comply with the literal letter of the law.²¹⁰

The same problem doesn't beset standards, for standards typically implement the lawmaker's purpose directly. Instead of directing subjects to act in a particular way, they lay down evaluative standards, like a requirement to act reasonably, so that many internalizers will exercise their moral judgment in order to figure out how to conform to them.²¹¹ The cost is that boundedly rational internalizers might not be good at exercising their moral judgment.²¹² So opportunism is diminished, but at the cost of a greater risk of large moral errors.

Moreover, standards expose agents to a form of normative uncertainty that rules do not, which may weigh against the use of standards.²¹³ Rules can be unclear or inchoate. But unclear rules are more readily disambiguated over time by courts and should eventually crystalize into clear rules.²¹⁴ Standards, by contrast, not only postpone "decision until the

perspective, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *Harv. L. Rev.* 1685 (1976).

²⁰⁷ See Schauer, *supra* note 134, at 31–34 (explaining how rules imperfectly implement their underlying rationales).

²⁰⁸ See *supra* Section II.C.

²⁰⁹ In Stone, *supra* note 99, I argue that the possibility that formalistic rules could crowd out internalizing subjects' motivations to conform with prevailing commercial norms provides a justification for contemporary contract law's preference for standards.

²¹⁰ See Mark Kelman, *A Guide to Critical Legal Studies* 35 (1987) ("[I]t is surely also the case that some of what we call 'shelter abuse' is rather like working the rules too hard, walking the line carefully but counterpurposively.").

²¹¹ Shiffrin, *supra* note 161, at 1222–23; *supra* Subsection II.D.2; see also *supra* note 161.

²¹² See *supra* Section I.D.

²¹³ See *supra* Subsection II.D.2.

²¹⁴ See Hart & Sacks, *supra* note 155, at 139–41 (arguing that inchoate rules delegate power to a future decision maker to resolve the uncertainty).

matter can be judged from the perspective of the point of application,” they also avoid “even at that point the imprisonment of general judgment in any precise verbal formula.”²¹⁵ So when the legal system enacts standards, it more permanently exposes subjects who fully intend to comply with the law to the risk of legal liability.²¹⁶ This may discourage agents who believe that there are deferential reasons to internalize legal rules from becoming internalizers in the first place.²¹⁷

Standards may also expose even subjects who have every intention of doing their best to comply with the law by exercising their moral judgment to some chance of liability. And this may make deferential internalizers less likely to internalize legal norms in the first place.²¹⁸ The extent to which this poses a problem for the legal system depends on the circumstances. When there is widespread moral agreement, disputes between judges and citizens about what a standard requires won’t often arise, which makes it more likely that the deferential internalizer will be happy to defer to the official resolution of the controversy in the event of disagreement. As the value systems of officials and subjects diverge, however, disputes will become more frequent, and deferential internalizers may lose their faith that following legal norms is a good way of satisfying their true preferences. This will undermine their willingness to internalize legal norms in the first place.²¹⁹

3. The Importance of Minimizing the Normative Uncertainty Inherent in Inchoate Rules

Reducing the normative uncertainty inherent in inchoate rules is likely to be beneficial when there are internalizers in the subject population. Such uncertainty is costly in the short run, at least from a social-welfare-maximizing standpoint, because it may cause intrinsic and proxy internalizers to act with excessive caution to minimize the likelihood that

²¹⁵ *Id.* at 140.

²¹⁶ Past decisions addressing similar questions may help to resolve some of the uncertainty, but such decisions have limited precedential value. See Kelman, *supra* note 210, at 15; *supra* text accompanying notes 153–60.

²¹⁷ See *supra* Subsection II.D.2.

²¹⁸ See *supra* notes 167–68 and accompanying text.

²¹⁹ Cooter’s models generate similar prescriptions. Cooter, *supra* note 65, at 1600 (arguing that the state can promote respect for the law by ensuring that law and morality are aligned); Robert Cooter, *Normative Failure Theory of Law*, 82 *Cornell L. Rev.* 947, 979 (1997) (arguing that enforcement will enjoy more support from citizens when there is a “close alignment of law with morality”).

they fail to conform to the law.²²⁰ It is also costly in the long run because it may undermine the willingness of epistemic internalizers to internalize legal rules in the first place.²²¹

4. Enforcement Uncertainty as a Tool to Promote Internalization

One way in which a lawmaker can encourage some subjects to become internalizers of the law is by making enforcement of the law more uncertain. The harder it is to determine whether defiance of a legal norm will trigger legal sanctions, the more it makes sense for a self-interested but boundedly rational agent to simply conform to the rules. This, in turn, will encourage morally motivated subjects to internalize legal rules insofar as they believe that the duties that the legal rules approximate have a reciprocal structure. A countervailing force is that intrinsic internalizers might believe that norms that are too arbitrarily enforced lack intrinsic value, thus undermining their willingness to internalize norms in the first place.²²²

5. Regulation of Inadvertent Conduct

Precautionary measures that agents employ to prevent themselves from inadvertently failing to comply with legal norms protect others from their inadvertence but are also costly. Thus, there is an optimal level of precautions from a social-welfare-maximizing standpoint. We should therefore ask whether regulating inadvertent conduct will cause internalizers to over- or underinvest in precautionary measures.

As we have seen, intrinsic internalizers and proxy internalizers prioritize conforming to prohibitions on inadvertent conduct. Thus, such prohibitions will tend to cause them to overinvest in precautions regardless of the level of damages. Deferential internalizers, by contrast, will react to such prohibitions in the same way as externalizers, because simple prohibitions on inadvertent conduct don't provide them with useful guidance about what they should do to minimize the risk of inadvertence.²²³

How should the law regulate inadvertent conduct in light of this diversity? Consider first of all what would be optimal if faced with a

²²⁰ See *supra* Subsection II.D.2.

²²¹ See *supra* Subsection II.D.2.

²²² See *supra* Subsection II.D.1.

²²³ See *supra* Subsection II.D.3.

population of externalizers and deferential internalizers. It is well known that there is no risk of overdeterrence of rational self-interested agents when liability is imposed for an agent's failure to utilize the optimal standard of care. So long as the standard of care is fixed correctly, that is, at the efficient level, such an agent will choose that level of care, so long as damages are set sufficiently high. He has no reason to choose a higher level of care, since by choosing at least the efficient level, he can ensure that he will avoid liability.²²⁴

But this assumes that he will always choose the level of care that he intends to choose, an assumption that doesn't hold when an agent might inadvertently breach the standard of care, thus incurring liability even when intending to conform. Thus, when inadvertent noncompliance is possible, it is important that the level of damages be set correctly to ensure that the subject doesn't overinvest in precautions.²²⁵ The agent's expected damages must give him enough of an incentive to select an efficient level of care, but they must not exceed the expected social cost of inefficient care, because that will cause him to overinvest in precautions. In effect, the legal system should try to ensure that subjects face the correct price for their investments in precautions.²²⁶

Setting damages at this level will not, however, quell an intrinsic internalizer's or proxy internalizer's tendency to overinvest, so long as each continues to believe that he is under a legal duty not to be inadvertently negligent. This is because, to the extent that each has internalized the rule that he should not be inadvertently negligent, he will take precautions that minimize the risk of such inadvertence regardless of the cost of such precautions.²²⁷

In theory, simply holding subjects strictly liable for the costs they impose on others regardless of fault should solve both overdeterrence problems at once, so long as internalizers get the message that the regime is pricing permissible conduct rather than prohibiting inadvertence. But the reality of imperfect enforcement would mean that perfect deterrence of internalizers would come at the cost of underdeterrence of self-interested

²²⁴ Shavell, *supra* note 4, at 180–81.

²²⁵ Arlen & MacLeod, *supra* note 181, at 1983–84; Jennifer Arlen & W. Bentley MacLeod, Torts, Expertise, and Authority: Liability of Physicians and Managed Care Organizations, 36 *RAND J. Econ.* 494, 509 (2005).

²²⁶ In contrast to a pure strict liability regime, he is only held liable when he inadvertently chooses an inefficient level of care. Thus, optimal damages don't simply equal the harm he causes. See sources cited *supra* note 225.

²²⁷ See *supra* Subsection II.D.3.

externalizers. This is because the price that externalizers respond to is not their actual expected liability, but rather their liability discounted by the probability that the legal system forces them to pay what they in fact owe.²²⁸ Internalizers, by contrast, will feel duty-bound to fully compensate a victim for the harm, even if the legal system won't force them to do so.²²⁹

Alternatively, the legal regime could try to regulate the precautionary investment decision directly by, for example, relieving agents who chose optimal precautions of liability for the harm they cause downstream by inadvertent violations of their duties. Internalizers of all types will get the message that they have only a limited duty to invest in a certain level of precautions—as opposed to a duty to avoid inadvertent negligence whatever the cost. Externalizers won't overinvest even if potential damages are high, because they can avoid liability by investing the optimal amount. Regulation of this kind, of course, would require the lawmaker to know the optimal level of precautions.²³⁰ It would also require that factfinders be able to distinguish between inadvertent and deliberate breaches of the duty of care.

In short, both externalizers and internalizers exhibit tendencies towards overinvestment. But because the mechanisms underlying these tendencies differ, it might be difficult to get all types to simultaneously invest the optimal amount.

C. Mechanisms for Finding Order in the Complexity

The lawmaker might be able to more easily navigate this complexity if the populations that are subject to regulation in particular domains are less heterogeneous than the entire subject population. This could happen for two reasons. First, certain types of agents might be more prevalent in some regulatory domains than others. Second, certain kinds of regulatory schemes might transform subjects' preferences.

1. Variation of Types Across Regulatory Domains

It is plausible to suppose that certain regulatory domains may contain a more homogenous pool of subjects. For instance, in corporate law

²²⁸ See *supra* Subsection II.D.1.

²²⁹ See *supra* Subsection II.D.1.

²³⁰ Shavell, *supra* note 4, at 180–81.

company directors are primary targets of regulation,²³¹ and it is a reasonable simplification to suppose that such actors are primarily motivated by self-interest.²³² Likewise, where the primary targets of regulation are corporations,²³³ it is reasonable to suppose that the regulated entities seek to maximize shareholder value.²³⁴ In these domains, the population may, at least to a first approximation, consist of rational, self-interested externalizers like Betty and self-interested proxy internalizers like Paul—boundedly rational agents who find that complying with legal rules is a better way of serving their self-interest than weighing the benefits and costs of their options themselves.²³⁵

Deferential internalizers like Dan are also more likely to be prevalent in some regulatory domains than others. The more complex the normative problem that the law is trying to solve, the more likely it is that compliance with the law will be a better way of furthering an agent’s true preferences than trying to satisfy those preferences directly.²³⁶ Thus, it is more likely that deferential internalizers will predominate in realms regulated by complex areas of law like securities law and environmental law than in the realm, say, of criminal law.

Finally, morally motivated proxy internalizers like Polly will be more prevalent in domains where noncompliance is more likely to undermine the legitimacy of legal institutions.²³⁷ And so, for example, they may be

²³¹ See John Armour, Henry Hansmann & Reinier Kraakman, *What is Corporate Law?*, in *The Anatomy of Corporate Law* 1, 2 (Reinier Kraakman et al. eds., 2d ed. 2009) (explaining that corporate law addresses, inter alia, agency conflicts between managers and shareholders).

²³² See Oliver Hart, *Corporate Governance: Some Theory and Implications*, 105 *Econ. J.* 678, 681 (1995) (explaining the “danger that the managers of a public company will pursue their own goals at the expense of those of shareholders”).

²³³ See, e.g., 26 U.S.C. § 11(a) (2012) (“A tax is hereby imposed for each taxable year on the taxable income of every corporation.”); Pollution Prevention Act of 1990 § 6602, 42 U.S.C. § 13101 (2012) (enacted to encourage industry “to reduce or prevent pollution at the source”).

²³⁴ See Jacob M. Rose, *Corporate Directors and Social Responsibility: Ethics versus Shareholder Value*, 73 *J. Bus. Ethics* 319, 319–20 (2007) (explaining that managers and directors are driven by federal regulation, corporate charters, and stock exchange listing requirements to maximize shareholder wealth).

²³⁵ See *supra* Section I.C.

²³⁶ See *supra* Section I.C.

²³⁷ See *supra* Section I.C.

more prevalent in regulatory domains in which noncompliance is more likely to be widely publicized.²³⁸

2. *Endogeneity of Types*

It is also possible that by manipulating the legal environment, a lawmaker can alter the composition of the subject population in a particular regulatory domain. For example, a lawmaker can make it more or less likely that internalizing legal rules is a rational strategy for boundedly rational, self-interested agents like Paul. The easier it is to learn what the legal norms are and the harder it is to predict the nature and intensity of government enforcement efforts, the more likely it is that internalizing legal rules is rational for Paul.²³⁹ Of course, the project of designing optimal incentives for externalizers like Betty may be undermined by efforts to make enforcement unpredictable. But, to the extent that a legal regime transforms self-interested agents into internalizers of legal rules, there is less reason to worry about the creation of optimal incentives.

We have also seen that reducing normative uncertainty is a way of encouraging morally motivated agents to become deferential internalizers.²⁴⁰ And more heavily publicizing instances of noncompliance will encourage morally motivated subjects to become proxy internalizers, if such publicity tends to worsen the social consequences of defiance of legal rules.²⁴¹ Finally, a lawmaker can encourage morally motivated subjects to become deferential internalizers of legal rules by making sure that the values that the legal system promotes are close to the values of the subject population.²⁴²

CONCLUSION

The analysis developed here suggests that introducing the good man into consequentialist analysis of the law significantly complicates the task of designing optimal rules. There are a multitude of internalizer types: intrinsic internalizers, who believe there are intrinsic reasons to conform to legal rules; deferential internalizers, who, given their bound-

²³⁸ This assumes that it is the public perception of noncompliance that tends to corrode the legitimacy of legal institutions.

²³⁹ See *supra* Subsections II.D.1, II.D.2.

²⁴⁰ See *supra* Subsection II.D.2.

²⁴¹ See *supra* Subsection II.D.2.

²⁴² See *supra* note 219 and accompanying text.

ed rationality, believe that deferring to the judgment embodied in legal rules is a better way of satisfying their true preferences than trying to satisfy those preferences themselves; and proxy internalizers, who, given their bounded rationality, believe that conforming to legal rules is a better way of avoiding certain bad consequences that tend to result from defying legal rules than attempting the cost-benefit analysis themselves. These different types of internalizers, moreover, will respond to features of the legal environment in predictably different ways.

The existence of internalizers in the subject population thus greatly increases the epistemic demands on lawmakers. Determinate prescriptions sometimes fall out of the analysis. For example, if lawmakers are clear about the purposes of their rules, they can prevent (or encourage) crowding out by deferential internalizers without having an effect on the way other types choose among conforming actions.²⁴³ Regulatory problems may also be more tractable in regulatory domains in which there are more homogenous pools of subjects.²⁴⁴ And insofar as subjects' types depend on certain manipulatable features of the legal environment, lawmakers may be able to exert some control over the composition of the subject population.²⁴⁵

But often the presence of the different types means that lawmakers will face complex trade-offs. Thus, for example, it may be difficult for a lawmaker to design rules to regulate inadvertent conduct that lead all types of agent to invest optimally in precautions against such inadvertence.²⁴⁶ In such circumstances, she will need to know the proportion of types in the subject population as well as quantitative information on exactly how they are likely to respond to different rules.

When lawmakers lack the information to optimally resolve such trade-offs, it is plausible to suppose that they should give priority to features of the legal regime that alter the willingness of subjects to internalize legal rules in the first place, given the regulatory benefits, in particular reduced enforcement costs, that flow from having large numbers of internalizers in the subject population. Indeed, it may be a particularly serious error to focus too much energy on designing laws for the bad man in accordance with the traditional prescriptions of the economic analysis of law. Subjects may view such a design choice as a global sig-

²⁴³ See *supra* Subsection III.B.1.

²⁴⁴ See *supra* Subsection III.C.1.

²⁴⁵ See *supra* Subsection III.C.2.

²⁴⁶ See *supra* Subsection III.B.5.

nal that the legal system expects them to behave self-interestedly, and this may corrode their willingness to internalize legal rules: would-be deferential internalizers, because it is then much less likely that the legal system is weighing all the reasons that are relevant to them when devising legal norms; would-be proxy internalizers, because it seems less likely that defying legal norms will undermine valuable legal institutions when those institutions take as their guiding principle that people are not inclined to comply with legal rules anyway; and would-be intrinsic internalizers, because it is more difficult to view as intrinsically valuable rules that are designed with only a self-interested subset of the population in mind.

APPENDIX: CAST OF CHARACTERS

Character	True Preferences	Externalizer/ Internalizer?	Type of Internalizer
Betty	Self-interested	Externalizer	N/A
Ivan	Morally motivated	Internalizer	Intrinsic
Dan	Morally motivated	Internalizer	Deferential Epistemic
Polly	Morally motivated (to avoid bad consequences of defiance for society)	Internalizer	Proxy Epistemic
Martin	Morally motivated (to abide by moral norms)	Externalizer	N/A
Jane	Morally motivated (to avoid bad consequences of defiance for society)	Externalizer	N/A
Guillaume	Self-interested (but experiences guilt when defies certain norms)	Externalizer	N/A
Paul	Self-interested	Internalizer	Proxy Epistemic