ESSAY

INSINCERE RULES

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INTRODUCTION

RULES are ubiquitous. Speed limits, pollution caps, prohibitions on smoking, and curfews—among countless others—regulate behavior. Rules generally do not implement themselves, so enforcement is also common. Agents fine contaminating factories, and parents ground wayward teenagers. Because enforcement takes resources, and because resources are limited, gaps materialize between the law in books and the law in action. Signs establish a speed limit of 65 miles per hour, but drivers race by at 74. Managers forbid smoking, but workers occasionally light up with impunity. Scholars have long known of such gaps. As Roscoe Pound wrote a century ago, a lawmaker may "put his views of all the details of legal . . . administration into sections and chapters," but "the law upon the statute books will be far from representing what takes place actually."[1]

Rule-makers can improve compliance by improving monitoring. Most drivers obey speed limits, and most teenagers stay in after dark, if the authorities are watching. Likewise, rule-makers can improve compliance by raising sanctions. Most factories do not pollute if fines are expensive. In such circumstances, the gap between law in books and law in action disappears.

This Essay introduces a new technique for improving compliance, one that operates even when the gap between books and action persists: insincere rules. Rules are sincere when they mandate the rule-maker's preferred behavior. If a legislature concludes that the optimal driving speed is 55 miles per hour, and if a parent decides that the opti-

[1] Roscoe Pound, Law in Books and Law in Action, 44 Am. L. Rev. 12, 34 (1910).

mal bedtime is 8:00 p.m., then a speed limit of 55 and a bedtime of 8:00 are sincere rules. Rules are insincere when they mandate behavior that differs from what the rule-maker prefers. In the prior example, a speed limit of 45 and a bedtime of 7:30 would be insincere. When rule-makers adopt an insincere rule, they do not mandate what they want, yet they may still get it. Many drivers seeing a speed limit of 45 will go 55, and many children facing a bedtime of 7:30 will turn off their lights by 8:00.

Insincere rules can improve compliance through two mechanisms, one punitive and the other deceptive. The punitive mechanism operates when insincere rules turn minor violations of a rule into major ones that carry a more severe sanction. In general, the penalty for driving 56 miles per hour increases when the speed limit drops from 55 to 45. The deceptive mechanism operates when insincere rules convey a false sense of the governing law. Suppose children face a 7:30 bedtime, and suppose their parents do not get angry until the children stay up 30 minutes longer than their parents prefer. The parents prefer that the children go to bed at 8:00. If the children believe (incorrectly) that their parents favor the 7:30 bedtime—the rule is sincere—they will go to bed by 8:00, just what the parents want. Of course, deception may fail. If the children believe (correctly) that the parents favor a bedtime of 8:00—the rule is insincere—they will stay up until 8:30.

This analysis provides a novel explanation for many features of the legal landscape. Lawmakers adopt overly demanding criminal laws,[2] environmental standards,[3] speed limits,[4] and tax requirements,[5] and they establish constitutional rights that are too absolute.[6] Contracts stipulate behavior that differs from what contracting parties want and expect.[7]

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[2] See Rachel E. Barkow, Administering Crime, 52 UCLA L. Rev. 715, 746–54 (2005); Jonathan D. Casper & David Brereton, Evaluating Criminal Justice Reforms, 18 Law & Soc'y Rev. 121, 125–26 (1984); William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505, 512–23 (2001).

[3] See Daniel A. Farber, Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law, 23 Harv. Envtl. L. Rev. 297, 325 (1999).

[4] See Frederick Schauer, Thinking Like a Lawyer: A New Introduction to Legal Reasoning 13–18 (2009) [hereinafter Schauer, Thinking Like a Lawyer].

[5] See Stephen A. Zorn, The Federal Income Tax Treatment of Gambling: Fairness or Obsolete Moralism?, 49 Tax Law. 1, 2–4 (1995).

[6] See Guido Calabresi, A Common Law for the Age of Statutes 178–81 (1982); Charles L. Black, Jr., Mr. Justice Black, the Supreme Court, and the Bill of Rights, Harper's Mag., Feb. 1961, at 63, 67–68.

[7] See Lucian A. Bebchuk & Richard A. Posner, One-Sided Contracts in Competitive Consumer Markets, 104 Mich. L. Rev. 827, 827–28 (2006); Jason Scott Johnston, The Return of

Prominent scholars decry "the legislative habit of writing statutes that overshoot."[8] More generally, the law in books—in just about all settings at just about all times—deviates from the law in action. All of this is consistent with the strategic use of insincere rules: By making the law in books wrong, lawmakers can get the law in action right.

Insincere rules have a broad but still limited domain. Rule-makers are more likely to use them when laws, politics, or morals preclude large sanctions that could induce perfect compliance—say, a fine of $500 for exceeding the speed limit by a single mile per hour. They are more likely to use them when regulated parties do not dutifully obey the law in books but, like Holmes's "bad man,"[9] violate it to the extent they can. Finally, rule-makers are more likely to use insincere rules when they prioritize the law in action, that is, when they care less about the strict appearance of a rule than the behavior it elicits. This point uncovers a paradox of representation. Strict laws in books that citizens oppose may reflect the handiwork of unrepresentative lawmakers *or* of perfectly representative lawmakers who use insincerity to induce optimal behavior.

Before proceeding, four points merit attention. First, I focus on insincere rules in a public enforcement setting—a government makes and enforces the law. However, the logic carries to many private enforcement settings as well, such as when a private party sues over a breach of contract. Second, for the sake of realism, I focus on rule-makers with "mixed" objectives: They care about social welfare but also self-interest. In other words, the government cares about the public good, but it also cares about the fine revenue that enforcing the law generates. This differs from the conventional approach, which assumes that the government cares solely about the public good, but the analysis holds either way.[10] Third, I use the words "rule" and "law" synonymously. I do not use the term "rule" to distinguish laws that are precise (speed limits of 55 miles per hour) from laws that are vague (drive at "reasonable and prudent speeds").[11] The examples involve precise laws, but the logic ex-

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Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers, 104 Mich. L. Rev. 857, 858 (2006).

[8] Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry 165 (Greenwood Press 1980) (1969).

[9] Oliver Wendell Holmes, Jr., The Path of the Law, 10 Harv. L. Rev. 457, 459–61 (1897).

[10] See infra Part II.

[11] I am referring to the common distinction between imprecise laws called standards and precise laws called rules. See, e.g., Colin S. Diver, The Optimal Precision of Administrative Rules, 93 Yale L.J. 65, 65–66 (1983); see also Schauer, Thinking Like a Lawyer, supra note

tends to imprecise laws as well. Fourth, and for the sake of clarity, I focus on rules with a "continuous" range. The speed limit, for example, can be set anywhere between 0 and 100. Insincere rules may be easiest to use when the range is continuous, but they can be used when it is noncontinuous too.[12]

This Essay will proceed as follows. Part I will review the literature, including Meir Dan-Cohen's distinction between conduct and decision rules.[13] As I will explain, that distinction does not track the distinction between sincere and insincere rules. Part II will develop the theory of insincere rules. Part III will provide examples of insincere rules and describe the circumstances in which rule-makers will use them. Part IV will extend the analysis to a few discrete topics, including constitutional law. The Conclusion will consider the normative case for insincere rules: Can their use, including by judges, be justified?

I. BACKGROUND: LAW IN BOOKS AND LAW IN ACTION

Scholars have long understood that law has two faces. Karl Llewellyn differentiated "paper" rules from "real" or "working" rules.[14] Eugen Ehrlich distinguished legal propositions from "living" law.[15] Jason Johnston contrasted "nominal" and "administered" rules.[16] In a classic formula-

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4, at 15–16 (discussing Montana's attempt to implement a system requiring drivers to maintain "reasonable and prudent" speeds).

[12] To illustrate, many states forbid possession of burglars' tools. This can be understood as a kind of insincere rule analogous to a government setting the speed limit at 45 when it prefers that drivers go 55. Instead of mandating exactly what it wants—no burgling—and attaching a heavy sanction, the government mandates more than what it wants—no possession and no burgling—and attaches a relatively small sanction to each crime. A burglar under the first approach commits one crime with a large sanction and under the second approach commits two crimes with smaller sanctions that sum to a large sanction. This example may be clearer after reading Parts II and III.

[13] Meir Dan-Cohen, Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law, 97 Harv. L. Rev. 625, 626–27 (1984).

[14] Karl N. Llewellyn, A Realistic Jurisprudence—The Next Step, 30 Colum. L. Rev. 431, 439 n.9 (1930).

[15] Eugen Ehrlich, Fundamental Principles of the Sociology of Law, at xxvii (Walter L. Moll trans., Russell & Russell, Inc. 1962) (1936).

[16] Jason S. Johnston, Bayesian Fact-Finding and Efficiency: Toward an Economic Theory of Liability Under Certainty, 61 S. Cal. L. Rev. 137, 139 (1987). In another example, Dan Farber referred to "slippage," meaning breaks between what law mandates and what actually happens. See Farber, supra note 3, at 298.

tion, Pound distinguished "law in books" from "law in action."[17] These writers and others addressed the same phenomenon: the gap between "the rules that purport to govern the relations of man . . . and those that in fact govern."[18]

Scholars have long studied these gaps.[19] To illustrate, research from the 1980s describes how drunk drivers were required to spend 48 hours in jail but most did not.[20] A new study by Mila Versteeg and David Law shows that constitutions around the world systematically promise more rights than they deliver.[21] Many scholars lament these gaps and seek to close them.[22] Versteeg and Law label constitutions that overpromise "shams."[23] Pound blamed gaps on "our machinery of justice" that is "too

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[17] Pound, supra note 1, at 14–15; cf. Murray Edelman, The Symbolic Uses of Politics (1964) (arguing that much of what politics accomplishes, and aims to accomplish, is symbolic rather than concrete or real).

[18] Pound, supra note 1, at 15.

[19] Notable works on these gaps include, among many others, William K. Muir, Jr., Prayer in the Public Schools: Law and Attitude Change 1–3 (1967) (analyzing the practical effects of *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), which prohibited religious exercises in public schools, on religious tolerance and attitudinal biases); Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? 420–29 (2d ed. 2008) (concluding that courts have limited capacity to effect substantial social change); Jerome H. Skolnick, Justice Without Trial: Law Enforcement in Democratic Society 16–21 (Christine Cardone ed., Macmillian Coll. Publ'g Co. 3d ed. 1994) (1966) (discussing disconnect between practical applications of law and ideas of order and the role of the police); Thomas W. Merrill, Golden Rules for Transboundary Pollution, 46 Duke L.J. 931, 937–67 (1997) (comparing the promises of transboundary pollution control measures and their ineffectiveness in practice); Maimon Schwarzschild, Variations on an Enigma: Law in Practice and Law on the Books in the USSR, 99 Harv. L. Rev. 685, 686–87 (1986) (book review) (comparing Soviet law "on the books" versus "law in practice"); Michael Wald et al., Project, Interrogations in New Haven: The Impact of *Miranda*, 76 Yale L.J. 1519, 1575–78 (1967) (discussing the failure of *Miranda* warnings to protect those who might otherwise exercise their constitutional rights).

[20] H. Laurence Ross & James P. Foley, Research Note, Judicial Disobedience of the Mandate to Imprison Drunk Drivers, 21 Law & Soc'y Rev. 315, 315 (1987) (analyzing the results of two empirical studies of mandatory sentencing laws for repeat-offender drunk drivers).

[21] David S. Law & Mila Versteeg, Sham Constitutions, 101 Calif. L. Rev. 863 (2013).

[22] For example, Max Rheinstein called pervasive differences between law and practice "inan[e]." Max Rheinstein, Marriage Stability, Divorce, and the Law 351–53 (1972). In a review of Rheinstein's book, Richard Abel states that early gap studies "were frequently directed by the belief that the gap, once revealed, could and should be eliminated." Richard L. Abel, Law Books and Books About Law, 26 Stan. L. Rev. 175, 188 (1973) (book review). Law and Versteeg conclude that for countries with gaps between their constitutional rights and practices, "[i]t remains to be seen whether and by what means the gap between parchment and practice can be narrowed." Law & Versteeg, supra note 21, at 935.

[23] Law & Versteeg, supra note 21, at 935.

slow, too cumbersome and too expensive" and argued that lawyers must "make the law in action conform to the law in the books."[24]

Why do gaps arise? The literature on enforcement has answers.[25] The expected sanction for violating a law equals the probability of detection multiplied by the sanction.[26] The government can increase an expected sanction, and deter more violations of law, by increasing the sanction itself.[27] To illustrate, one can deter more littering by changing the penalty from a fine to imprisonment. However, morals and politics may place an upper limit on sanctions, and sympathy may prevent severe sanctions from being imposed, undermining their usefulness.[28] (How many judges would imprison someone for leaving a napkin in the park?) Alternatively, the government can increase the probability of detection by hiring more officers, installing more security cameras, and so forth. That requires resources that may be better used elsewhere. Given this tradeoff, "optimal enforcement tends to be characterized by some degree of un-

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[24] Pound, supra note 1, at 35–36. Unlike Pound, some scholars accept gaps as inherent in legal systems. See, e.g., Richard L. Abel, Redirecting Social Studies of Law, 14 Law & Soc'y Rev. 805, 828 (1980) (critiquing the sociological study of law for focusing on the attainment of the declared goals of a law as a measure of effectiveness); Jon B. Gould & Scott Barclay, Mind the Gap: The Place of Gap Studies in Sociolegal Scholarship, 8 Ann. Rev. L. & Soc. Sci. 323, 331–32 (2012) (describing modern gap studies that recognize relationships between legal meaning and social practice).

[25] For articles providing a concise overview of such literature, see Nuno Garoupa, The Theory of Optimal Law Enforcement, 11 J. Econ. Survs. 267, 267–68 (1997); A. Mitchell Polinsky & Steven Shavell, The Economic Theory of Public Enforcement of Law, 38 J. Econ. Lit. 45, 45 (2000) [hereinafter Polinsky & Shavell, Economic Theory of Public Enforcement of Law]; and A. Mitchell Polinsky & Steven Shavell, Public Enforcement of Law, *in* 5 The New Palgrave Dictionary of Economics 38 (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed. 2008).

[26] See Jeremy Bentham, An Introduction to the Principals of Morals and Legislation 317 (Oxford, Clarendon Press 1879) (1789) (describing the efficacy of punishments in directing behavior in a utilitarian framework); Gary S. Becker, Crime and Punishment: An Economic Approach, 76 J. Pol. Econ. 169 (1968).

[27] Relatedly, the government can improve regulated parties' *perceptions* of the expected sanction. For example, the government can make clearer when particular parties have permission to violate the law. Doing so prevents others who observe permitted violations from concluding that they too can violate the law. See Bert I. Huang, Shallow Signals, 126 Harv. L. Rev. 2227, 2234–35 (2013) (analyzing the phenomenon of actors violating the law by imitating others who, for one reason or another, do not violate law when they engage in the same or closely related behavior).

[28] See James Andreoni, Reasonable Doubt and the Optimal Magnitude of Fines: Should the Penalty Fit the Crime?, 22 RAND J. Econ. 385, 385 (1991) (arguing that the magnitude of a penalty and the probability of conviction are not independent in practice).

derdeterrence . . . , because allowing some underdeterrence conserves enforcement resources."[29]

Regulated actors do not always know the expected sanctions for various behaviors.[30] Drivers facing a speed limit of "reasonable and prudent speeds" may not know just how fast they can go.[31] Uncertainty has crosscutting effects.[32] It may suggest that particular behaviors, including safe ones, may be sanctioned, and that can lead to overcompliance (driving too slow). Alternatively, it may suggest that particular behaviors, including extreme ones, may not be sanctioned, and that can lead to undercompliance (driving too fast).

Separate from enforcement costs and uncertainty, scholars have another explanation for gaps: Rule-makers may prefer that rules *not* be enforced.[33] If a new government inherits restrictive immigration laws, and if that government would prefer more immigration, it may reduce the en-

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[29] Polinsky & Shavell, Economic Theory of Public Enforcement of Law, supra note 25, at 70. The dominant strand in the enforcement literature assumes that the state maximizes social welfare. See, e.g., Becker, supra note 26, at 207; Polinsky & Shavell, Economic Theory of Public Enforcement of Law, supra note 25, at 49. A second line, growing from public choice theory, examines enforcement when the state is self-interested. See, e.g., David Friedman, Why Not Hang Them All: The Virtues of Inefficient Punishment, 107 J. Pol. Econ. 259, 262 (1999); Nuno Garoupa & Daniel Klerman, Optimal Law Enforcement with a Rent-Seeking Government, 4 Am. L. & Econ. Rev. 116, 116–17 (2002). In both cases, enforcement costs can limit enforcement.

[30] Huang, supra note 27, presents an interesting analysis of the relationship between sanctions and behavior. He explains that regulated parties, upon seeing another party violate the law, often think they too can violate it (they expect a sanction of zero) when in fact they cannot.

[31] Cf. Robert E. King & Cass R. Sunstein, Doing Without Speed Limits, 79 B.U. L. Rev. 155 (1999) (examining the consequences of Montana's elimination of a numerical speed limit on interstate highways in favor of a "reasonable and prudent" standard).

[32] See John E. Calfee & Richard Craswell, Some Effects of Uncertainty on Compliance with Legal Standards, 70 Va. L. Rev. 965 (1984) (analyzing how uncertainty regarding a legal standard can lead actors to both "undercomply" and "overcomply"); John E. Calfee & Richard Craswell, Deterrence and Uncertain Legal Standards, 2 J.L. Econ. & Org. 279 (1986) (same).

[33] George J. Stigler, The Optimum Enforcement of Laws, *in* Essays in the Economics of Crime and Punishment 55, 66–67 (Gary S. Becker & William M. Landes eds., 1974) (attributing the apparent lack of rational criteria for the enforcement of laws to the need for flexibility in public policy to react to social pressures); see also Elisabeth R. Gerber et al., Stealing the Initiative: How State Government Responds to Direct Democracy 15–25 (2001) (describing circumstances in which state governments do not enforce laws enacted through direct democracy).

forcement budget or otherwise instruct its officers not to enforce the law in books.[34] That may be easier than changing the law.

In a related vein, rule-makers may adopt laws for purely expressive or aspirational reasons. They do not prefer that the laws go unenforced, but they acknowledge they cannot be enforced and do not even try. The purpose of such laws may be to express society's ideals, to shape social norms, to educate people, and so forth.[35] But the purpose is not to provoke immediate legal action by the state.

Meir Dan-Cohen provides another take on gaps.[36] He distinguishes "conduct" rules, which direct the public on how to behave, from "decision" rules, which direct officials on how to treat persons whose behavior violates the law.[37] To illustrate, a conduct rule forbids theft, and a decision rule instructs judges to punish theft unless committed under duress. Under conditions of "acoustic separation," the public does not perceive decision rules, only conduct rules, and that can improve incentives.[38] Persons who do not know that duress provides a defense should commit fewer thefts, and when thefts do occur judges can excuse them under exceptional circumstances (for example, theft to prevent starvation). In ways like this, gaps between books and action—theft is forbidden but sometimes excused—can be explained.[39]

Rule-makers may try to achieve acoustic separation,[40] just as they might strategically adopt insincere rules. In this regard Dan-Cohen's work and mine are related. But the two projects diverge in important respects, including this: Whereas a rule-maker with acoustic separation might almost always want persons to follow the law in books (conduct

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[34] Cf. Kate Andrias, The President's Enforcement Power, 88 N.Y.U. L. Rev. 1031, 1066–67 (2013) (discussing changes in enforcement of immigration laws under President Obama).

[35] There is a large literature on expressive laws and enforcement. For a thorough overview and original contributions, see Richard H. McAdams, The Expressive Powers of Law: Theories and Limits (2015).

[36] See Dan-Cohen, supra note 13, at 625–26.

[37] Dan-Cohen traces his work to Bentham. See id.; see also Gerald J. Postema, Bentham and the Common Law Tradition 408, 448–52 (1986) (explaining Bentham's distinction between the law directing social interaction and the law providing parameters for adjudication).

[38] See Dan-Cohen, supra note 13, at 630–34.

[39] Technical language may also explain gaps. "Dozen" means twelve, except in certain situations (say, in a bakery) where it takes on a technical meaning of thirteen. Likewise, "theft is forbidden" means what it says, except in law, where it means "theft is usually forbidden." When technical language explains a gap, the gap is not between books and action but between meaning and understanding.

[40] Dan-Cohen himself did not make this claim. See Dan-Cohen, supra note 13, at 635–36.

rules), the rule-maker I consider never wants persons to follow the law in books (insincere rules).

II. THE LOGIC OF INSINCERE RULES

Legal scholarship generally assumes that rules are sincere, meaning that they mandate rule-makers' preferred behaviors. Congress forbids health insurers from denying coverage to certain persons, and agencies require employers to take steps to improve workplace safety. Parents insist that their teenagers come home by 10:00 p.m. In all cases, we ordinarily assume the rule-makers have weighed the costs and benefits of different behaviors, identified which ones they want, and adopted rules mandating exactly those behaviors.[41]

Sincere rules have benefits. They make clear to regulated parties exactly what is expected of them, and they signal to a broader audience the preferences of the rule-maker. Sincere rules may also have intrinsic value. In governing and parenting, there is merit in honesty. But sincere rules come with a cost. When enforcement is costly, and when regulated parties who wish to violate the rule know this, they will violate the rule, at least to some degree. Employers will not take every required step to improve safety, and teenagers will arrive home at 10:15. So sincere rules get the law in books right but the law in action wrong.

Now consider insincere rules. Such rules do not reflect rule-makers' preferred behaviors. They direct regulated parties to do something *other* than what the rule-maker wants. This does not mean that rule-makers would prefer a different rule, it means they would prefer behavior that differs from what the rule demands. To illustrate, suppose legislators want drivers to go 55 miles per hour, and suppose they adopt an insincere speed limit of 45 miles per hour. They do not prefer a different rule—say, a limit of 55 miles per hour—but they do prefer behavior that deviates from the rule. They want drivers to go 55.

To be clear, whether a rule is sincere or insincere does *not* depend on regulated parties' knowledge. If the speed limit is 45, and if the rule-maker wants drivers to go 55, then the rule is insincere. That is true even if drivers know the rule-maker wants them to go 55. The touchstone of

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[41] In a world without constraints, sincere rules are expressive rules in that they express the rule-maker's preferences about first-best behavior. With constraints, sincere rules cease to be expressive, but they remain sincere in that they mandate what the rule-maker considers second-best behavior.

insincerity, then, is not a disjunction between the rule-maker and parties' beliefs about the rule-maker. Rather, the touchstone is a disjunction between rule-maker and rule.[42] To restate this simply, rules can be insincere, and improve compliance, even when regulated parties see through the insincerity. However, insincere rules work better when parties do not see through the insincerity, as I will show.

Insincere rules have costs. They fail to indicate the rule-makers' desired behaviors, though regulated parties may not know this. They send inaccurate signals to a broader audience about the rule-makers' preferences. They are in a sense dishonest. But insincere rules have a valuable upside: They can engender better behavior. Many drivers seeing a speed limit of 45 will travel at 55, and many teenagers facing a curfew of 9:30 will arrive home by 10:00. In cases like those, insincere rules come with the opposite tradeoff of their sincere counterparts: They get the law in books wrong but the law in action right.

This discussion has introduced insincere rules. The following sections refine the analysis by distinguishing two mechanisms through which insincere rules can improve compliance, one punitive and the other deceptive. I discuss the mechanisms independently, but both could operate at the same time.

A. Punitiveness and Insincere Rules[43]

The sanction for violating a law generally increases with the severity of the violation. For example, in Missouri, the fine for exceeding the speed limit by 5 miles per hour equals \$20, while the fine for exceeding it by 10 miles per hour equals \$30.[44] In circumstances like this, a rule-maker can increase the penalty for speeding—and elicit safer driving—

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[42] This language might make one think that all rules are insincere because all rules are under- and overinclusive, at least to some degree, and that implies a disjunction between the rule and the rule-maker's preferences. But that is not quite right. In general, neither underinclusive nor overinclusive rules deliberately penalize the behavior the rule-maker most wants. Insincere rules do exactly that. To put this differently, the overinclusiveness of a sincere rule (the rule penalizes some behavior the rule-maker favors) harms the rule-maker, while the overinclusiveness of an insincere rule helps the rule-maker.

[43] The ideas in this Section are examined more formally in Appendix A.

[44] See Charge Codes for Traffic Offenses as of 8/28/14, Mo. St. Cts., http://www.courts. mo.gov/file.jsp?id=2721, archived at https://perma.cc/H9W2-4ZU2?type=source (last visited Jan. 31, 2015). The gradations continue. The fine for exceeding the limit by 11–15 miles per hour equals \$55, and the fine for exceeding it by 16–19 miles per hour equals \$80. Id. Note that the actual fines are all 50 cents greater than I have reported, but I ignore that for simplicity.

in one of two ways. She can directly increase it by changing the fine schedule: Instead of paying $20 for going 5 miles per hour over the limit, speeders must pay $30. Now the fine for going 60 in a 55 mile per hour zone is $30 instead of $20. Alternatively, she can increase the penalty indirectly by changing the rule. She can leave the fine schedule alone but drop the speed limit from 55 to 50. Now a driver going 60 exceeds the limit by 10 miles per hour rather than 5, so now the driver must pay $30 rather than $20. Both the direct and indirect ways of increasing the penalty yield the same outcome: The fine for driving 60 equals $30. But only the second way involves an insincere rule—the rule-maker wants drivers to go 55, but she makes the speed limit 50. This insincere rule is *punitive*. It improves compliance by (indirectly) raising the penalty associated with a particular violation of law.

The driving example develops the intuition behind the punitive mechanism. The next example, which is more detailed, aims to crystallize it. Suppose a factory (the regulated party) wishes to emit as much pollution as possible. The government (the rule-maker) wishes to limit the factory's emissions to the level it considers optimal. The government will adopt an emissions cap (the rule), and it can then enforce the cap, but enforcement is costly. Enforcement results in a fine—a transfer from the factory to the government—of $1 for every unit of emissions above the cap. The government will only enforce if the fine exceeds the enforcement cost. This implies that the government's objective function is "mixed": It cares about social welfare (optimal emissions) and also its revenue (it only enforces if the monetary gains from doing so cover the enforcement cost).[45] The factory does not want to have the law enforced against it. The question for the government is what emissions cap to adopt.

To begin, assume the government adopts a sincere rule, as indicated in Figure 1. The horizontal axis shows pollution levels, and the vertical axis shows the government's payoff from enforcement. The point R reflects the government's ideal level of emissions, and the point B_s reflects the law in books, meaning the emissions cap. That cap is equivalent to the government's ideal point ($B_s = R$), so the rule is sincere, hence the subscript "s." The bracketed length labeled e shows the fixed cost the government pays every time it enforces the law. The line labeled EP_{s1}, which stands for enforcement payoff of the sincere rule, shows the re-

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[45] Garoupa & Klerman, supra note 29, at 126.

turn to the government of enforcing the law at every emissions level above the cap. Emissions just above B_s violate the law, but the government will not enforce, as the measly fine revenues coupled with the enforcement cost yield a net negative payoff. The equilibrium level of emissions is A_{s1}, where A stands for the law in action. That is the most the factory can emit without triggering enforcement when the sincere rule governs. This demonstrates the basic tradeoff with sincere rules. They get the law in books right ($B_s = R$), but they get the law in action wrong ($A_{s1} > R$).

Figure 1: Sincere Rules
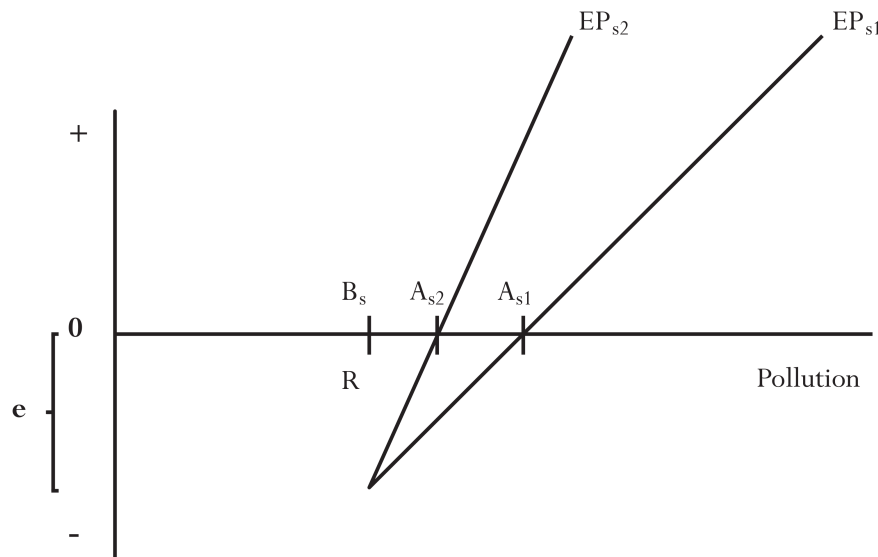
How can the government improve compliance? One conventional strategy is to improve monitoring so that the probability of detecting the factory's violations of law increases. That may require costly investments such as sensors on smokestacks. I assume that the government already observes the factory's emissions, so it cannot benefit from additional monitoring. The second conventional strategy is to increase the fine directly. Rather than charging $1 for every unit of emissions emitted above the cap, the government could charge $10 or $100 or more. Raising the fine would increase the slope of the enforcement payoff line in

Figure 1, moving it (for example) to EP_{s2}. That would shift the equilibrium level of emissions to A_{s2}, reducing the gap between the books and action. Further increases to the fine would further increase the slope of the line and eventually induce compliance.

Now consider another enforcement strategy: an insincere rule. Suppose that the fine remains $1 for every unit of emissions above the cap, and suppose the government adopts a cap of B_i, as depicted in Figure 2. That rule differs from the rule-maker's ideal point, R, so the rule is insincere, hence the subscript "*i*." Any emissions level above B_i constitutes a violation of law, meaning the government has the option to enforce and collect the fine. The enforcement payoff line, now labeled EP_i, has shifted accordingly. The equilibrium level of emissions is now A_i, equivalent to the rule-maker's ideal point. This illustrates the promise of the insincere rule: It gets the law in books wrong, but it gets the law in action right.

Figure 2: Insincere Rules (Punitive)
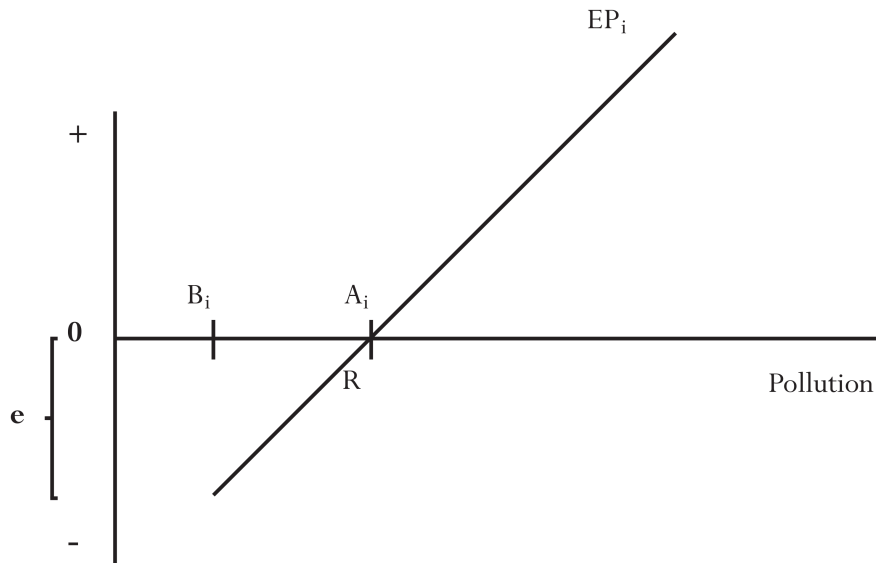
The insincere rule works through a punitive mechanism, albeit an indirect one. The rule does *not* increase the fine schedule. It does not convert a minor violation that used to carry a small sanction into a minor violation that carries a large sanction. That would be the conventional

approach discussed above. Instead, the rule increases the seriousness of the violation. It converts what used to be a minor violation (emissions just above R under the sincere rule) into a major one (emissions just above R under the insincere rule). More intuitively, it converts something like a misdemeanor into something like a felony. Because felonies carry larger fines, the insincere rule indirectly enhances punishment. Insincere rules have a punitive element whenever the sanction for a violation of law increases with the seriousness of the violation.[46]

So far, I have assumed that the government cares about social welfare (emissions) as well as revenues. That seems sensible as a description of reality, and it leads to the figures that (one hopes) clarify the ideas. But this conflicts with the conventional analysis of enforcement, which assumes the state maximizes social welfare and does not care about its revenues.[47] Even under the conventional assumption, however, insincere rules can improve compliance. Some notation will help show why.

Under the conventional approach, the optimal fine, f, equals h/d, where h is the social harm of the crime and d is the probability of detection.[48] The intuition is simple: As crime causes more harm, and as detecting criminals gets harder, fines should increase. That should deter the crime. To simplify, I assumed above that the government always observes the factory's emissions. That is equivalent to assuming that the probability of detection is one. That means d drops out of the equation, and now the optimal fine, f, equals h. Now suppose the fine can be represented with $m(p - l)$, where $m > 0$ is the penalty for every unit of pollution emitted above the limit (m is a penalty multiplier), p is the number of units emitted, and l is the limit. To demonstrate with an example, if the law limits emissions to 25, if the factory emits 30, and if the penalty is \$2 for every unit over the limit, the fine equals $2(30 - 25)$, or \$10. Now the optimal fine can be expressed as $m(p - l) = h$. As

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[46] In the example, fines increase linearly with the severity of the infraction. In practice, penalties are often noncontinuous. To illustrate, the fine for going 11 or 14 miles per hour above the speed limit may be the same. This makes it harder to use insincere rules to achieve perfect compliance, but it does not undermine the central insight that such rules can *improve* compliance.

[47] For example, see Becker, supra note 26, and Polinsky & Shavell, Economic Theory of Public Enforcement of Law, supra note 25. This approach conceptualizes fine revenues as transfers from the regulated party to the government. Those revenues do not increase the "size of the pie" but merely reallocate slices. The government is assumed to care only about the former.

[48] Polinsky & Shavell, Economic Theory of Public Enforcement of Law, supra note 25, at 50.

harm increases, the socially optimal fine (the term on the left side of the equation) rises. This can be achieved by increasing m (the conventional approach—the penalty for an infraction increases) or by decreasing l (using an insincere rule—the seriousness of an infraction increases). Whether the government maximizes social welfare or not, insincere rules can improve compliance.

B. Preferences and Enforcement

Nothing in the prior discussion turned on the factory's information about the sincerity of the pollution cap. Returning to Figure 2, the factory's optimal emission level is A_i regardless of whether it believes the rule is sincere or insincere. So the punitive mechanism of an insincere rule can operate, and improve compliance, regardless of whether the rule deceives.[49] But insincere rules can do extra work if they deceive. To explain why requires an analysis of the relationship between preferences and enforcement.

Rule-maker preferences about activity levels can be irrelevant to enforcement decisions. To illustrate, suppose the government caps emissions of a harmful pollutant at 50 units, and suppose it can enforce the limit against polluting factories at a cost of $10. Enforcement results in a fine of $1 for every unit emitted above the limit, which the government values (once again, the government's objective function is mixed, but this will shortly become irrelevant). Critically, suppose that enforcement does not change the future behavior of factories. Under these conditions, the government will enforce the law against a factory if it emits 61 or more units of pollution, and it will do so regardless of whether the law is sincere. The government will follow that strategy whether its optimal emission level is 50, 10, or 115.

The logic is clearest in one-period games: The factory pollutes, the government decides whether to enforce the law, and the interaction ends. Then the harm is a sunk cost; factories have already polluted, and they will not pollute again. The government's emissions preferences are irrelevant. The sole question is whether the monetary gains from enforcement outweigh the costs.

The same logic carries to repeat interactions when the critical condition holds: Enforcing the law does not change regulated parties' future

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[49] They can also do independent work if they deceive. The punitive and deceptive mechanisms can operate independently or together.

behavior. If regulated parties' behavior is invariant to enforcement, then rule-maker preferences are irrelevant to enforcement. The rule-maker cannot change the factories' behavior, so in every period the only question is whether the monetary gains from enforcement outweigh the costs.

Of course, enforcing the law often *does* change regulated parties' future behavior. Enforcement can change expectations about the likelihood of future enforcement. Drivers ticketed today for double parking and teenagers grounded tonight for sneaking out may hew more closely to the rules tomorrow because of a belief, correct or incorrect, that the odds of getting caught are greater than previously supposed. Enforcement can also change future behavior through injunctions. A factory caught emitting more than 50 units of pollution today may be fined and enjoined from emitting more than 50 units tomorrow.

When enforcement changes future behavior, rule-maker preferences affect the enforcement decision. Consider again the pollution example, and suppose enforcement comes with an injunction. If the 50-unit limit on emissions is sincere, and if a factory emits 65 units, enforcement not only yields fine revenues for the government today ($15), the injunction yields behavior tomorrow that aligns with the government's preferences (emissions of 50). If the limit is insincere—the government prefers, say, 70 units of pollution[50]—then enforcement yields fine revenues today but behavior tomorrow that the government opposes. The government is less apt to enforce in the second scenario, even though the law, the sanctions, and the cost of enforcement have not changed. Rule-maker preferences affect the enforcement decision.[51]

When rule-maker preferences drive enforcement, regulated parties become interested in rule-maker preferences—and rule-makers may wish to mask them. This leads to the deceptive element of insincere rules.

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[50] The government may prefer more pollution not because it values pollution itself but because it values the products of pollution-emitting factories.

[51] This example assumes the rule-maker has a mixed objective function, but the logic operates even under the conventional assumption that the rule-maker aims to maximize social welfare. If enforcement is costly and implies an injunction, the government is more apt to enforce if the rule is sincere (it requires activity levels consistent with the government's welfare-maximizing preference) than if the rule is insincere (it requires non-welfare-maximizing activity levels).

C. Deception and Insincere Rules[52]

Consider this thought experiment. Suppose a prior government adopted an emissions limit of 50 units, and suppose that rule remains on the books. Suppose further that enforcement of the rule results in an injunction, meaning a factory that violates the rule must, in the event of enforcement, limit its emissions to 50 units. If today's government favors the rule, it will be inclined to enforce it, as doing so would drop emissions to its preferred level of 50. That is equivalent to saying enforcement costs are low (or, roughly, the benefit of enforcement is high). If enforcement costs are low, the factory can only violate the rule to a small degree—emitting no more than, say, 55 units—without triggering enforcement. Alternatively, if today's government *opposes* the rule—it prefers, say, 60 units—then it will not be inclined to enforce it. Doing so would drop emissions to 50, which is 10 below its preferred level of 60. That is equivalent to saying enforcement costs are high (or, roughly, the benefit of enforcement is low). If enforcement costs are high, the factory can violate the rule to a greater degree—emitting, say, 70 units—without triggering enforcement.

Given all of this, the factory faces a choice: If it believes it faces the government that favors the rule, it should emit 55, and if it believes it faces the government that opposes the rule, it should emit 70.

Suppose the factory concludes that it faces the former government and plans to emit 55. But that is a mistake; the latter government, the one that opposes the rule, is actually in charge. Should the government try to signal to the factory that it opposes the rule, or should it pretend that it favors the rule? The answer is the latter—it should *deceive* the factory. Then the factory emits 55, which is only 5 units away from the government's preferred emissions of 60. Had the government "outed" itself, the factory would have emitted 70, which is 10 units away from the government's preferred emissions. Honesty would have left the government worse off.

This thought experiment provides some intuition about the deceptive element of insincere rules. The following analysis makes things precise. Consider Figure 3, which depicts pollution on the horizontal axis and the government's payoff on the vertical axis. The government's ideal emissions are R_H, and it will adopt a cap on pollution. As in the thought experiment, assume that enforcement implies an injunction only (that is,

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[52] The ideas in this Section are examined more formally in Appendix B.

there are no fines).[53] This implicates the utility "curves" below the horizontal axis. The curve labeled $U_H^{\sim e}$ reflects the utility the government gets from different levels of pollution when it does not enforce the cap. Emissions equal to the government's ideal point yield the highest possible payoff (the high point on $U_H^{\sim e}$): zero. As emissions get farther from R_H, the government's payoff declines. The curve labeled U_H^e, which is lower by e, reflects the utility the government gets from different levels of pollution when it does enforce the cap.

Figure 3: Enforcement with Injunctions
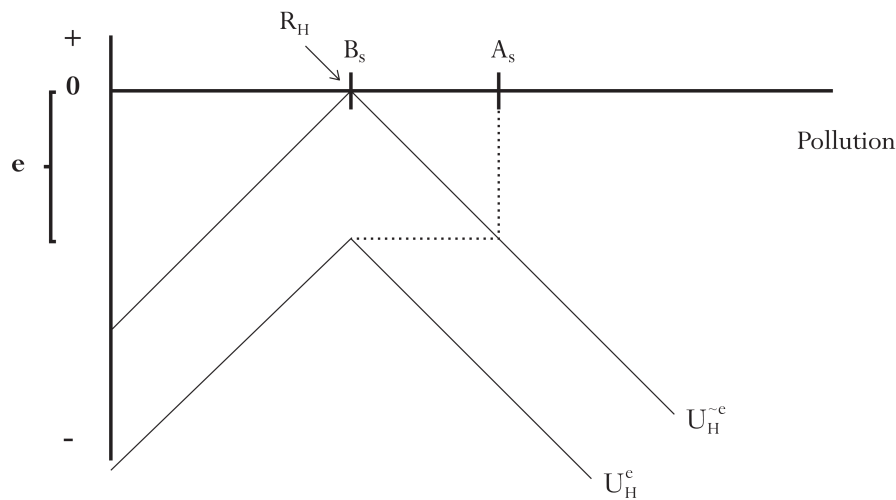
Suppose the government adopts a sincere rule, B_s. If the factory violates that cap, and if the government enforces, then the injunction requires the factory to reduce its emissions to B_s. The government's payoff will be -e (the apex of the curve U_H^e). To clarify the intuition behind this, enforcement means the government gets exactly the emissions it wants, R_H, yielding a payoff of zero, but enforcement also means the government pays the cost of enforcement, -e, leaving it with a total payoff of -e.

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[53] This collapses the distinction between governments with mixed objectives (they value fines) and governments that maximize social welfare only (they do not value fines).

If the payoff to the government of nonenforcement is $-e$ or greater, the government will not enforce. This is because it is better off with too many emissions and no enforcement costs than optimal emissions and some enforcement costs. Assuming the factory knows all of this, then the factory will emit A_s. That is the most the factory can emit without triggering enforcement. At that point the government is indifferent between enforcement and nonenforcement. This raises the usual tradeoff: A sincere rule like B_s gets the law in books right but the law in action wrong.

Now consider Figure 4, which introduces a second government, this one with ideal point R_L. Both governments have the same enforcement costs, and both governments' utility curves have the same shapes (only one of the new government's curves is pictured, U_L^e). The factory knows all of this as well as the locations of both governments' ideal points. However, the factory does not know which government it faces.

Figure 4: Insincere Rules (Deceptive)
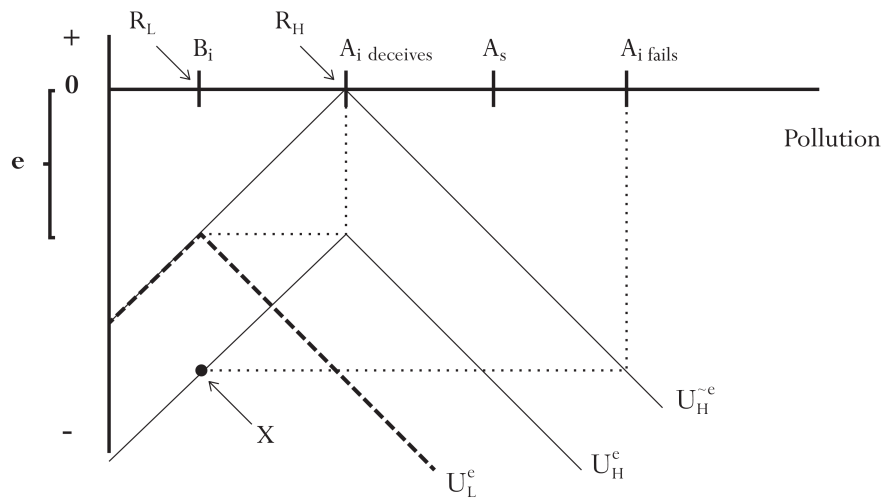
Suppose the rule B_i gets adopted. The government's ideal point is R_H, so this rule is insincere, hence the subscript "i," but the factory does not know this. It assumes the government's ideal point is R_L, making the rule sincere. The payoff of enforcement to the government that prefers R_L is $-e$ (the apex of the curve U_L^e). Following the logic above, the fac-

tory will emit $A_{i\ deceives}$. That is the most the factory can emit without triggering enforcement by the government that prefers R_L, which is the government the factory assumes it faces. Emissions at the point $A_{i\ deceives}$ are exactly equal to R_H, the real government's ideal point. This illustrates the promise of the insincere rule: It gets the law in books wrong, but it gets the law in action just right.

The insincere rule works through a deceptive mechanism (hence the subscript "deceives"). The government deceives the factory into believing that the rule is sincere. When the factory concludes the rule is sincere, it emits the most it can without triggering enforcement from the government that prefers R_L. The factory bases its emissions on an erroneous belief about the government's preferences, and it delivers exactly the emissions the real government wants.

Insincere rules may not always deceive. Returning to Figure 4, suppose the rule B_i gets adopted, and suppose the factory believes, correctly, that the rule is insincere because the government's ideal point is R_H. If the government enforces, it will be on utility curve U_H^e, and because of the injunction, the factory will emit B_i, less than the government would like. The point X indicates this outcome. Knowing this, the factory in equilibrium will emit $A_{i\ fails}$. This time the insincere rule has gotten the law in books as well as the law in action wrong. Insincere rules perform better than sincere ones when they deceive but worse when they fail.

Because the deceptive element of an insincere rule comes with risks, rule-makers will only try to use it when two conditions are satisfied. The first condition involves the relative preferences of the rule-makers. Consider Figure 5, which matches Figure 4 with one exception: The governments' ideal points are farther apart. If the government that prefers R_H adopts a sincere rule, the factory will emit A_s.[54] If instead the government adopts an insincere rule equal to R_L, and if the factory is deceived, the factory will emit $A_{i\ deceives}$. These emissions levels are equidistant from R_H, making the government indifferent between them. When the governments' ideal points are sufficiently far apart,[55] insincere rules, even when they successfully deceive, carry no upside for the government that prefers R_H. They do, however, carry a downside. If the factory understood the rule to be insincere—if it knew that the government

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[54] If the government announces a rule equivalent to R_H, the factory will know the government prefers R_H (the rule is sincere) because the government that prefers R_L would never adopt such a rule. For an explanation, see Appendix B.

[55] Specifically, when $R_H \geq R_L + 2e$. See Appendix B for an explanation.

enacted B_i but preferred B_s—then it would know that the government is unlikely to enforce. This is because enforcement would lead to an injunction, and the injunction would lead to emissions of B_i. The government does not want emissions of B_i (this would yield an outcome like the point *X* in Figure 4). Consequently, the factory would know that it could safely emit far more than A_s. The factory could emit a lot before prompting the government to pay the cost of enforcement and get stuck with emissions of B_i.

In this scenario, the insincere rule has a downside but no upside, so the government will not use it. This leads to a general proposition: A rule-maker trying to deceive a regulated party will not adopt an insincere rule that differs greatly from its true preference, where "greatly" depends on enforcement costs. To put this more precisely, the maximum distance between a rule-maker's true preference and a deceptive insincere rule increases as enforcement costs increase and vice versa. To restate this in yet another way, if enforcement costs are low, a government may try to deceive with an insincere rule, but the insincere rule will not differ a lot from the sincere rule (that is, from the government's ideal point). If enforcement costs are high, a government may try to deceive with an insincere rule, and that rule may differ a lot from the sincere rule.

Figure 5: When Insincerity Cannot Pay
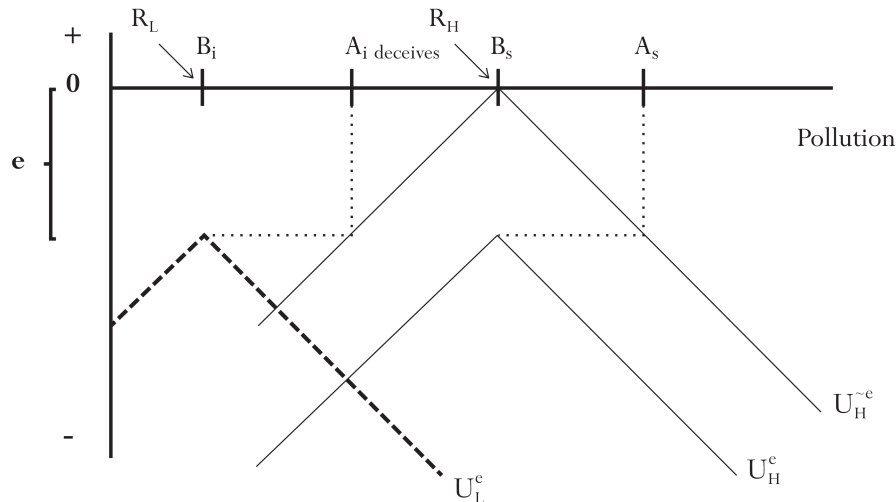
I have explained the first condition that must be satisfied before a rule-maker will use an insincere rule. The second condition involves the

regulated party's assessment of which rule-maker it faces. If the factory believes the government prefers R_L, then a government that actually prefers R_H can adopt an insincere rule and successfully deceive. If the factory believes the government prefers R_H, then a government that actually prefers R_H cannot deceive and would do better with a sincere rule. A regulated party's beliefs may depend on the rule-maker's reputation. A rule-maker known for forthrightness will find it easier to deceive than a rule-maker known for dishonesty. A rule-maker's reputation may turn on many factors: past practice, turnover among officials (when an agency gets a new leader its reputation may reset), the ability and incentives of regulated parties to communicate honestly with one another about the rule-maker, and so forth. Of course, even a dishonest rule-maker may successfully deceive some of the time. A regulated party may doubt the sincerity of a rule but still treat it as sincere if the consequences of a mistake—treating it as insincere when it is sincere—are grave. Relatedly, a rule-maker with a sterling reputation may not try to deceive if failure, however unlikely, and the corresponding reputational damage would impose high costs on him.

For clarity, the foregoing analysis has assumed that enforcement implies a perfect injunction, one that elicits exact compliance with the law in books. But a perfect injunction is not necessary. As long as enforcement causes regulated parties to move closer to the rule-maker's ideal point, even if only by an incremental amount, then rule-makers can use the deceptive element of insincere rules to improve behavior.[56]

III. THE DOMAIN OF INSINCERE RULES

So far the discussion has focused on theory, but evidence suggests that insincere rules are real. Stuntz argues that criminal liability keeps broadening, leading to a "world in which the law on the books makes everyone a felon."[57] Farber characterizes many environmental standards as "threat points in negotiation," noting "the criticism that regulatory standards are too harsh loses some of its force, once it is recognized that the standards are often only partially implemented."[58] Scholars routinely

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[56] Appendix C demonstrates this.

[57] Stuntz, supra note 2, at 510–11. To be clear, Stuntz and the other authors I cite did not claim that rules are insincere. Instead, they pinpointed rules and activities for which they had one explanation and for which I have another: Rule-makers were crafting insincere rules.

[58] Farber, supra note 3, at 315–16. Both Stuntz and Farber understood that overly strict laws carry advantages for lawmakers. See id.; Stuntz, supra note 2, at 510. As Farber writes,

observe discrepancies between what strict contract terms demand and how parties to those contracts are actually expected to behave.[59] IRS procedures require extensive records for some tax purposes, but in practice taxpayers have "been held to a somewhat less rigorous standard."[60] A New Jersey legislator recently proposed a bill that would double fines for speeding and then, when it failed, proposed a bill that would reduce speed limits.[61] Municipalities, schools, and parents combine early curfews with grace periods rather than late curfews without them.[62] A federal court reasoned that jurors should not be instructed on their power to nullify—to ignore law and decide on the basis of conscience—because such instruction would cause juries to exercise the power too often:

> The majority proposed a speed limit analogy: if the posted limit is 65 mph, drivers might drive at 75 mph but not 95 mph. But if there were absolutely no speed limits, a type of "chaos" might ensue, where each driver would decide individually just how fast to drive. The court's majority reasoned that using judicial instructions which permit or entertain nullification would be like having no posted speed, inviting chaos in the courtroom.[63]

All of those examples are consistent with the use, or attempted use, of insincere rules. They cut across fields, suggesting that an understanding of insincere rules may illuminate many corners of the legal landscape

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"[O]ptimum 'standards' . . . may well be quite different from (and often harsher than) the ultimate performance level that we wish to attain." Farber, *supra* note 3, at 315–16. Similarly, Schauer states, "The divergence between paper and real rules . . . may thus be a function not only of administrative discretion and other nonrule factors, but also of the paper rule itself." Fredrick Schauer, *Legal Realism Untamed*, 91 Tex. L. Rev. 749, 778 (2013). Davis notes the "legislative habit of writing statutes that overshoot." Davis, *supra* note 8, at 165. My analysis develops, explains, and generalizes those observations.

[59] For example, see Bebchuk & Posner, *supra* note 7, at 828, and Johnston, *supra* note 7.

[60] Zorn, *supra* note 5, at 48.

[61] David Levinsky, *Asking Motorists to Slow It Down*, Burlington County Times, May 16, 2013, at A1.

[62] The city of Wyoming, Ohio, imposes a curfew on minors of 11:00 p.m. but has a 30-minute grace period in many circumstances. See Curfew Ordinance, City of Wyoming, http://www.wyoming.oh.us/curfewlaw.cfm, archived at http://perma.cc/E7Y7-NVRU (last visited Sept. 4, 2015). The website for Southern Adventist University summarizes different curfew times, different grace periods, and the penalties for minor and major violations. See Resident Resources, S. Adventist U., https://www.southern.edu/talge/Pages/residentresources.aspx (last visited Aug. 18, 2015).

[63] Irwin A. Horowitz, *Jury Nullification: An Empirical Perspective*, 28 N. Ill. U. L. Rev. 425, 435 (2008) (footnote omitted).

and the rule-making process generally. Yet there are reasons to believe that the domain of insincere rules is at least somewhat limited. Recall from Section II.C that the deceptive mechanism can only operate when two slightly technical conditions are satisfied: (1) the regulated party believes the rule-maker prefers (or is sufficiently likely to prefer) behavior different from what he actually prefers, or in other words, the regulated party is likely to be deceived; and (2) the real rule-maker's preferences do not differ greatly from those of the rule-maker he pretends to be. This Part discusses more general limitations on insincere rules, whether they operate through the punitive mechanism, the deceptive one, or both.

Recall that a rule-maker can, in theory, elicit compliance with a rule by punishing violations with a large sanction. Assuming rule-makers find it easier to adjust sanctions than to carefully calibrate insincere rules, then we would only expect to observe insincere rules when rule-makers cannot raise sanctions to the level needed to achieve compliance.

To develop this idea, consider the distinction between a total sanction and a sanction per unit of violation. If the total sanction for driving 65 when the speed limit is 55 equals $100, then the sanction per unit of violation (where "unit" is a mile per hour) equals $10—the driver owes $10 for every mile per hour he drove above the limit. In some circumstances, a sanction per unit of violation may be capped while a total sanction is not. To put this more intuitively, the government may be unable to assess a large fine for a minor infraction of law but able to assess it for a major infraction. The punishment must fit the crime.

When the punishment must fit the crime, insincere rules become valuable to rule-makers. To illustrate, suppose the government cannot charge more than $10 per unit of violation when it comes to speeding. This means the government cannot charge $100 for exceeding the speed limit by one mile per hour—it can only charge $10. If it takes a fine of $100 to deter speeding—or more precisely, if drivers will keep speeding up until they reach a velocity associated with a $100 fine—then the government cannot achieve optimal driving speed with a sincere rule. It may want drivers to go 55, it may adopt a sincere speed limit that says as much, but drivers, knowing they can go 56 without paying $100, will go 56—or faster. What can the government do? Adopt an insincere rule. By setting the speed limit 10 miles per hour below the optimal speed, the fine for exceeding the optimal speed can be set at $100. Drivers will travel at the optimal speed.

What could require the punishment to fit the crime? In other words, what could limit the sanction per unit of violation? The Eighth Amendment's prohibition on cruel and unusual punishment and due process operating through the Fifth and Fourteenth Amendments limit damages and sanctions in different settings.[64] Stipulated damages, tort reforms, limited liability, and other legal mechanisms could likewise prevent assessing necessary sanctions. When such limits are present, insincere rules should become more appealing to rule-makers.

Politics may force punishment to fit the crime. A street vendor in New York recently received a $2,250 fine for using a table that was an inch too tall and two inches too close to a store entrance.[65] California Governor Jerry Brown complained publicly about his state's expensive traffic fines.[66] A jury ordered a graduate student to pay $675,000 for illegally downloading and sharing 30 songs.[67] Instances like these can put political pressure on rule-makers. Replacing sincere rules and high sanctions per unit of violation with insincere rules and lower sanctions per unit of violation may reduce that pressure.

Agency problems may require the punishment to fit the crime. So far the analysis has assumed that the rule-maker is monolithic, but suppose instead (and more realistically) that it is disaggregated: Legislators make rules, but police, prosecutors, judges, and jurors—many with preferences that differ from the legislators'—enforce the law. If those actors hesitate to impose harsh sanctions for minor violations of law—$100

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[64] For further discussion on this topic, see generally BMW of N. Am. v. Gore, 517 U.S. 559, 568 (1996) (holding that a two-million-dollar award was excessive due to the Due Process Clause of the Fourteenth Amendment); Pamela S. Karlan, "Pricking the Lines": The Due Process Clause, Punitive Damages, and Criminal Punishment, 88 Minn. L. Rev. 880, 881–82 (2004) (discussing the limitations the Constitution places on sentences and damages); and Amy Kristin Sanders, When Is Enough Too Much? The Broadcast Decency Enforcement Act of 2005 and the Eighth Amendment's Prohibition on Excessive Fines, 2 Duke J. Const. L. & Pub. Pol'y Sidebar 75, 77 (2007) (discussing how the Eighth Amendment's limitation on fines could affect broadcasting legislation).

[65] Sally Goldenberg, Street Vendor Selling Cellphone Cases Fined 2G Fine for Inches, N.Y. Post (Oct. 8, 2012, 4:00 AM), http://nypost.com/2012/10/08/street-vendor-selling-cellphone-cases-fined-2g-fine-for-inches, archived at http://perma.cc/E5Q4-4Z45.

[66] Timm Herdt & Raul Hernandez, Brown: Expensive Traffic Fines Are Getting Out of Hand, Ventura County Star (Sept. 8, 2011, 5:37 PM), http://www.vcstar.com/news/brown-expensive-traffic-fines-are-getting-out-of, archived at http://perma.cc/KY8M-BW4N.

[67] Denise Lavoie, Joel Tenenbaum Boston University Student Download Fine: Court Won't Reduce $675,000 Penalty, Huffington Post (May 21, 2012, 11:10 AM), http://www.huffingtonpost.com/2012/05/21/joel-tenenbaum-boston-uni_n_1533319.html, archived at http://perma.cc/45RG-8KLB.

fines for exceeding the speed limit by 1 mile per hour—and if regulated parties know this, then high fines do not deter.[68] Those actors may not hesitate to impose harsh sanctions for more serious violations of law, such as exceeding the speed limit by 20 or 30 miles per hour.[69] Insincere rules may be more common when agency problems like this are present.

In addition to limits on sanctions, a second factor should affect the domain of insincere rules: the presence of "internalizers."[70] Some "bad m[e]n,"[71] like the regulated parties analyzed above, always violate the law to the extent they can. Others, however, may internalize law, meaning they obey out of a sense of duty or respect. Internalizers introduce a cost to insincere rules. Because they follow the rules, and because insincere rules do not align with rule-makers' preferences, internalizers behave contrary to rule-makers' wishes. To illustrate, suppose the government wants drivers to travel at 55 miles per hour and adopts an insincere speed limit of 45. That rule may cause bad men to go 55, which benefits the government, but it will cause internalizers to go 45, which harms the government.

This suggests that insincere rules become less attractive to rule-makers, and so we should expect them less often, as the ratio of internalizers to bad men grows. That may generally be true, but perhaps the point should not be taken far. Internalizers may be few and far between.[72] Moreover, rule-makers do not always have symmetric preferences. In many cases, they may have asymmetric preferences, by which I mean the harm they suffer from undercompliance exceeds the harm from overcompliance. To illustrate, driving 10 miles per hour above the

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[68] See Andreoni, supra note 28, at 386.

[69] This relates to Polinsky & Shavell, Economic Theory of Public Enforcement of Law, supra note 25. They consider socially optimal enforcement when individuals care about fairness. Individuals in their model lose utility when crimes are committed and when criminals receive punishments perceived to be too harsh. Given this tradeoff, the socially optimal fine lies below the level needed for full deterrence, and more illegal conduct takes place than necessary. Insincere rules could mitigate the dilemma. Suppose that speeding results in a fine of $50 for every mile per hour that a driver exceeds the limit. A driver going 55 in a 45 mile per hour zone would owe $500, a high fine that deters speeding but strikes many as unfair, reducing utility. Halving the fine and changing the speed limit to 35 miles per hour would result in the same sanction for going 55, and that sanction may now seem fairer.

[70] Cf. H.L.A. Hart, The Concept of Law 172–73 (3d ed. 2012) (developing the concept of people motivated by internal reasons to follow rules rather than external consequences for failing to do so).

[71] Holmes, supra note 9, at 459.

[72] See generally Fredrick Schauer, The Force of Law (2015) (arguing that compliance with law depends more on coercion than internalization).

speed limit may harm rule-makers and the society they represent much more than driving 10 miles per hour below it. Parents who prefer an 8:30 bedtime may suffer much more if their children turn off the lights at 9:00 than if they turn them off at 8:00. When rule-makers have such preferences, insincere rules may remain attractive even in the presence of many internalizers.

A final factor limiting the domain of insincere rules pertains to the sources of rule-makers' satisfaction. Thus far, the analysis has assumed that rule-makers care about regulated parties' behavior. They do not mind adopting an insincere rule—the wrong law in books—if doing so delivers the right law in action. But sometimes rule-makers may care about the law in books. An elected official, perhaps seeking to maximize his vote share, may prefer to adopt a sincere rule that matches his and the median voter's ideal—in short, a popular rule—to an insincere rule that many citizens consider too strict. The insincere rule may elicit law in action that the rule-maker and voters would prefer, but if most voters would not observe the action, the rule-maker would not get political credit. If political credit is what he seeks, he may prefer a popular, sincere, and ineffective rule to an unpopular, insincere, effective one.

To simplify this idea, call rule-makers who care more about the law in books "politicians" and rule-makers who care more about the law in action "technocrats."[73] Insincere rules should be more common among technocrats, and this gives rise to a paradox. If citizens prefer to be governed by technocrats, and if they generally cannot observe the law in action, then questions of accountability become very hard. Laws in books that citizens perceive to be too strict could be the work of a poor politician, one who tries to adopt popular laws but fails. Or they could be the work of a perfectly representative technocrat, one who delivers exactly the law in action that citizens seek.

The trouble runs deeper yet. Voters who prefer to be governed by technocrats will, when evaluating candidates for a particular office, try to distinguish the technocrats from the politicians. To attract those voters' support, technocratic candidates have an incentive to differentiate themselves from the politicians. To give a silly but clear example, a technocrat in a debate may state, "I do not care if the law expresses soci-

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[73] These types track Pitkin's distinction between descriptive and substantive representation. See generally Hanna Fenichel Pitkin, The Concept of Representation, *in* Representation 1 (1969).

ety's ideals; I care if it causes lawbreakers to behave better." But this strategy creates trouble. First, if the politicians in the debate believe that voters in the audience prefer technocrats, they may pretend to be technocrats themselves, repeating the line above. Now those voters cannot distinguish the true technocrat from the rest. Second, if the politicians do *not* believe voters favor technocrats, they will not repeat the line above, and the technocrat will be distinguishable from the rest. But if the technocrat wins the election, he will be at a disadvantage. Signaling his technocratic character helped him earn votes, but it also told regulated parties to be wary. Factory owners, for example, know that this new leader is prone to use insincere rules. That does not matter for punitive insincere rules, as their effectiveness does not vary with the factory's knowledge about rule-maker preferences. But it *does* matter for deceptive insincere rules: The leader will find it hard to deceive.

IV. INSINCERE RULES EXTENDED

The prior parts developed the theory of insincere rules, identified circumstances in which rule-makers have an incentive to use them, and cast light on rules and rule-making. That constitutes the core of this Essay. This Part tentatively extends the ideas to some discrete topics.

A. Make Laws You Can't Enforce

Conventional wisdom holds that you should never make a rule that you cannot enforce. One can find this maxim in discussions of parenting, coaching, pet policies, building inspections, and other topics.[74] Such a rule will be violated, the argument seems to go, and anyone who observes the subsequent failure to enforce will have less respect for, and be

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[74] A pamphlet from Action for Children called When Your Child Stays Home Alone states, "[D]on't make rules you can't enforce." Action for Children, When Your Child Stays Home Alone . . . Issues for Families with School-Age Children 13 (3d ed. 1999), available at http://www.actionforchildren.org/up_doc/Action_for_Chidren_When_Child_can_Stay_Home_Alone.pdf, archived at http://perma.cc/YM96-43CT. A coaching guide called Developing an Elite Program Off the Court states, "Don't make rules you won't enforce." Developing an Elite Program off the Court, Coach Jackson's Pages 1 (May 20, 2014), http://coachjacksons pages.com/developing-an-elite-program-off-the-court/, archived at http://perma.cc/B99X-CGZ2. On pet policies, see Pamela Dittmer McKuen, Make Sure You're Barking up the Right Tree with Pet Policy, Chi. Trib., Jan. 4, 2002, at 12, available at http://articles.chicagotribune.com/2002-01-04/business/0201040299_1_pet-condominium-buildings, archived at http://perma.cc/QA6J-HFAR. On building inspections, see Op-Ed., Laws Useless Without Means to Enforce Them, Gloucester Daily Times, Jan. 16, 2008, at B4.

less apt to comply with, that rule and others too. Translating into the language of this Essay, observing gaps between law in books and law in action causes regulated parties to update their expectations about enforcement—specifically, to assume that enforcement is costlier than previously supposed, which prompts more rule violations.

Rules cannot be enforced when enforcement costs are high. In such a circumstance, a rule-maker could follow the wisdom and not adopt a rule. Alternatively, a rule-maker could try to lower enforcement costs. Insincere rules have the effect of lowering enforcement costs—the punitive mechanism increases the fines the government collects from enforcement, and the deceptive mechanism, when it succeeds, signals that the rule-maker is anxious to enforce. This leads to a paradoxical prediction. When enforcement is costly, rule-makers will not adopt rules, *or* they will adopt insincere rules. Precisely because enforcement capacity is limited, rule-makers have an incentive to adopt demanding, insincere rules.

This may help explain why the maxim is often ignored, why rule-makers do make laws they cannot enforce. It may help explain why the White House recently called for stricter gun control laws while quietly admitting that the government lacks the resources to enforce existing laws.[75] More generally, it may help explain "the legislative habit of writing statutes that overshoot" and the common intuition that "full enforcement of present statutes would truly be intolerable."[76]

B. Politicians Always Enforce

Rule-makers do not always make their own rules. Some they inherit. This is true of presidents, judges, agency heads, board members, and babysitters, to name a few. When rule-makers inherit rules they oppose, they can try to change them, but that may be difficult. Alternatively, rule-makers can refuse to enforce rules they oppose. Presidents Bush and Obama have followed that strategy, softening enforcement of environmental and immigration laws, respectively.[77] One might expect to see that strategy often, yet many enforcement practices remain constant. The

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[75] Caroline May, Biden to NRA: We 'Don't Have the Time' to Prosecute Gun Buyers Who Lie on Background Checks, The Daily Caller (Jan. 18, 2013, 12:44 AM), http://dailycaller.com/2013/01/18/biden-to-nra-we-dont-have-the-time-to-prosecute-people-who-lie-on-background-checks, archived at http://perma.cc/AR9S-MPGD.

[76] Davis, supra note 8, at 165.

[77] See Andrias, supra note 34, at 1062–63, 1066–67.

administrative state does not appear to undergo a wholesale change in enforcement policy every time a new President takes office. Officers do not obviously ticket more or fewer drivers following turnover of local officials. The preceding analysis may help to explain why.

Recall that rule-maker preferences are irrelevant to enforcement decisions when enforcement does not change behavior. That may provide a partial explanation by itself. If behavior does not change, then rule-makers (assuming they value revenues) will always enforce when fine revenues exceed enforcement costs, regardless of whether they favor the rule or the regulated parties' behavior.

But enforcement does change behavior, at least some of the time. Recall that technocrats prioritize the law in action, while politicians prioritize the law in books. Politicians (again, assuming they value fine revenues) do not ignore enforcement.[78] On the contrary, because they do not care about law in action, they do not care about regulated parties' behaviors—or about whether enforcement changes those behaviors. Politicians, then, resemble rule-makers whose enforcement decisions do not change behavior: They always enforce when fine revenues exceed enforcement costs. It follows that we should expect consistent enforcement practices when enforcement does not change behavior *and* when it does but rule-makers do not care. We should expect consistency in such circumstances even as rule-makers with different preferences replace one another.

C. Inferences from Gaps

A large body of socio-legal scholarship, including Pound's famous article, identifies gaps between law in books and law in action.[79] Early work lamented the gaps and sought to close them, in part because gaps seemed incompatible with a "rational" legal order.[80] Some contemporary work arguably follows in this vein, finding gaps and critiquing them.[81]

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[78] Not under the assumptions in this Essay, anyway. One could imagine different assumptions under which rule-makers care about the law in action, not because they themselves have preferences about the action, but because regulated parties do, and rule-makers want to keep them happy. Under those assumptions, all rule-makers, regardless of their underlying preferences, might adopt popular laws in books and then ignore enforcement.

[79] See supra Part I; see also David Nelken, The "Gap Problem" in the Sociology of Law: A Theoretical Review, 1 Windsor Y.B. Access Just. 35 (1981) (reviewing the debate over gap studies and proposing ways forward).

[80] See Gould & Barclay, supra note 24, at 324–26.

[81] See, e.g., Law & Versteeg, supra note 21, at 897–912.

Other work is more circumspect. Scholars have argued that before identifying a gap, one first has to understand what law in books, which is often vague, requires or aims to achieve,[82] and they have noted that gaps do not imply that law in books has no effect.[83] In light of these and other insights, Austin Sarat has argued that scholars should move from the question of why law in books departs from law in action and towards the question of how law in books influences action.[84]

This Essay provides some answers. Law in books often determines not just illegality itself but also the degree of illegality. Whether driving 85 miles per hour is a serious or only minor offense depends on the speed limit. If the punishment for violating a rule turns on the seriousness of the violation, then law in books plays a critical role in determining the expected sanctions for different behaviors. This illustrates one channel through which law in books can influence actions, and it exposes the incentive to adopt insincere rules. Law in books also can influence action through the other channel discussed above. When enforcement changes behavior, the law in books can influence the enforcement decision, the expectation of which in turn influences parties' actions.

These ideas show that the existence of gaps does not by itself give rise to strong inferences. Gaps may imply that enforcement is costly—or that the current rule-maker opposes the rule and enforcement would cause regulated parties to comply more closely with it. Gaps when the law in books is "popular" or "right" imply that the law in action is wrong or suboptimal. But whether the rule-maker (a politician, in the language above) merits criticism depends in part on whether she is motivated by a desire for votes or a belief that law should express society's aspirations. Gaps when the law in books is "wrong" do not mean that law in action is also wrong; they can reflect successful efforts to get the law in action right. Gaps by themselves do not reveal much, and gaps can be perfectly consistent with a "rational" legal order.

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[82] See Malcolm M. Feeley, The Concept of Laws in Social Science: A Critique and Notes on an Expanded View, 10 Law & Soc'y Rev. 497, 498–500 (1976).

[83] See Casper & Brereton, supra note 2, at 130–38.

[84] See Austin Sarat, Legal Effectiveness and Social Studies of Law: On the Unfortunate Persistance of a Research Tradition, 9 Legal Stud. F. 23, 30–31 (1985).

D. Constitutional Law and Language

Some scholars distinguish constitutional meaning from constitutional doctrine.[85] For example, the Equal Protection Clause might mean that the government generally cannot treat persons differently, while the doctrine implementing that clause consists of the tiers of scrutiny: rational basis review for some classifications, strict scrutiny for others. The doctrine does not overlap perfectly with the meaning,[86] and so the doctrine under- and overenforces the Constitution. To illustrate, the Constitution does not *mean* that officers must deliver the *Miranda* warning, but constitutional doctrine requires it. That doctrine overenforces the Fifth Amendment.[87]

Roosevelt provides explanations for why courts might adopt an overenforcing doctrine.[88] For example, he argues that courts seeking to minimize adjudicatory errors might adopt strict scrutiny for classifications based on religion.[89] That approach overenforces the Fourteenth Amendment, as it invalidates nearly all religion-based classifications, including some (possibly) constitutional ones. But that doctrine outperforms alternatives like intermediate scrutiny, which would uphold some religion-based classifications, including some unconstitutional ones. Strict scrutiny under this conceptualization is a sincere rule. Judges have considered different doctrines and embraced one they consider best, and they want regulated parties to follow it. They do not want governments to classify on the basis of religion unless they can show a compelling interest and narrow tailoring.

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[85] For example, see Mitchell N. Berman, Constitutional Decision Rules, 90 Va. L. Rev. 1 (2004); Richard H. Fallon, Jr., Judicially Manageable Standards and Constitutional Meaning, 119 Harv. L. Rev. 1274 (2006); Henry P. Monaghan, Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1 (1975); Kermit Roosevelt III, Constitutional Calcification: How the Law Becomes What the Court Does, 91 Va. L. Rev. 1649 (2005); Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212 (1978). But see Daryl J. Levinson, Rights Essentialism and Remedial Equilibration, 99 Colum. L. Rev. 857, 858 (1999) (arguing that "pure constitutional value[s]" do not exist, but instead are intertwined with the "judicial application of the right in the course of constitutional adjudication").

[86] This reflects the truism that rules do not and cannot always further their underlying purposes. See generally Schauer, Thinking Like a Lawyer, supra note 4, at 16, 18 (discussing the characteristics of rules).

[87] Berman, supra note 85, at 116–32.

[88] Roosevelt, supra note 85, at 1658–67.

[89] Id. at 1683–84.

This Essay provides a different take. Strict scrutiny and many other constitutional doctrines may be insincere rules. Enforcing the Fourteenth Amendment is costly. The discriminatory effects of laws may be difficult to discern, collective action problems may stymie litigation, lawsuits take time and money, and so forth. States that understand that, like drivers who know officers are busy, can stray somewhat from the law without provoking enforcement. Judges may respond by making constitutional doctrine more demanding.

The logic extends from doctrine to constitutional meaning. Black argued that rights can never be absolute. Yet, it may make sense to draft them in absolutes—Congress *shall not* abridge the freedom of speech—because such language reduces rights violations.[90] Similarly, Calabresi argued that "use of . . . 'technically incorrect' language"—the First Amendment says Congress shall not abridge speech, but sometimes it does—"can bring us closer to the desired result than would use of more precise language."[91] Both scholars attributed this to psychology rather than logic: "If we admit that the state can regulate religion, we are psychologically . . . more likely to allow such regulation than if we say that there can be no regulation of religion and then from time to time" nevertheless regulate it.[92]

This Essay provides a logical, rather than psychological, footing for those ideas. If enforcement, and therefore law in action, depends on law in books, then constitutional designers may intentionally draft overly strict constitutional law in books, as doing so may draw the law in action closer to their ideal. Under this account, absolute statements of rights are strategic rather than expressive, and constitutional meaning deviates from constitutional language by design.

CONCLUSION: JUDGING INSINCERE RULES

Insincere rules are dishonest in important ways. They endorse one set of preferences and values when rule-makers, including elected ones, hold another. They instruct regulated parties, under penalty of law, to do something that rule-makers do not want done. Dishonesty of those sorts

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[90] Black, supra note 6, at 67–68.
[91] Calabresi, supra note 6, at 173.
[92] Id.

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may yield good consequences,[93] but it may also yield bad ones, and it runs into deontological objections. These drawbacks may be particularly acute in one area, judicial decision making.

A rich literature addresses the merits of judicial candor and sincerity.[94] Much of that work debates whether judges should provide complete accounts of their reasons for reaching decisions, or whether instrumental gains—preserving judicial collegiality, for example—justify doing less. Among other arguments, proponents of candor claim that transparent decision making makes judges accountable to law and strengthens courts' legitimacy.[95]

This Essay adds a new dimension to the debate. Judges often make rules; their precedents guide and constrain lower courts, government officials, and litigants. Most courts rely on executives to enforce their decisions, and higher courts cannot review every decision by lower courts. Consequently, judges have high enforcement costs, and that creates an incentive to use insincere rules. They may, for example, issue insincere interpretations of statutes that, if followed to the letter, would produce outcomes that they do not favor and that conflict with law. They may do so without admitting their insincerity—without being candid—as transparency would weaken the benefit of insincerity. Yet that lack of candor would not necessarily undermine their accountability to law or the legitimacy of courts. Insincere rules, by bringing the law in action closer to laws' objectives, could improve judges' accountability to law, or at least their fidelity to it. By aligning the law in action with the aim of the statute, insincere rules could enhance the legitimacy of courts, at least among those who know the law and observe the action. Insincere rules, then, do not raise all of the problems caused by a lack of candor. They scramble some intuitions by showing that lying can promote the rule of law.

None of that implies that insincere rules are good, but it does imply that they may not be so bad when used by judges or other rule-makers.

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[93] But cf. Henry Sidgwick, The Methods of Ethics 16–17 (Macmillan & Co. 1st ed. 1874) (arguing that various officials are not morally obligated to proceed honestly and, indeed, society may work better if they do not).

[94] For example, see Scott C. Idleman, A Prudential Theory of Judicial Candor, 73 Tex. L. Rev. 1307 (1995); Micah Schwartzman, Judicial Sincerity, 94 Va. L. Rev. 987 (2008); David L. Shapiro, In Defense of Judicial Candor, 100 Harv. L. Rev. 731 (1987).

[95] Schwartzman also mentions these arguments and traces them to Paul Gewirtz. Schwartzman, supra note 94, at 989.

APPENDIX A: MODEL OF PUNITIVE INSINCERE RULES

This Appendix provides a simple game-theoretic analysis of the punitive mechanism of insincere rules.

A rule-maker, R, prefers pollution emissions of $r \in [0,1)$. A factory, F, prefers emissions of 1. R announces a pollution cap of $l \in [0,1)$. F observes the cap and emits pollution of $p \in [l, 1]$. If $p > l$, R can enforce at cost e. In that case, F pays, and R receives, a fine of $s = m(p - l)$, where $m > 0$ is the penalty multiplier. As the penalty for every unit of pollution emitted above the limit rises, the value of m increases. R's payoff without enforcement is $-|r - p|$, and R's payoff with enforcement is $-|r - p| + s - e$. F's payoff without enforcement is $p - 1$, and F's payoff with enforcement is $p - 1 - s$. It follows from these assumptions that F wants to emit as much as possible without triggering enforcement.

R only enforces if the payoff from doing so exceeds the payoff of nonenforcement, or if $s > e$. Consequently, the most F can emit without triggering enforcement is $p = l + {}^e/_m$. In equilibrium, F emits exactly this amount, yielding a payoff for R of $-|r - l - {}^e/_m|$.

R can maximize his payoff by aligning actual emissions (p) with his preferred emissions (r), that is, by making $l + {}^e/_m$ equal to r. R can achieve this with a sincere rule $(l = r)$ and a large fine multiplier $(m \approx \infty)$. Alternatively, R can achieve this with an insincere rule $(l = r - {}^e/_m)$. If m cannot assume a value approaching ∞, and so ${}^e/_m > 0$ then R must adopt the insincere rule to maximize his payoff, $l = r - {}^e/_m$.

APPENDIX B: MODEL OF DECEPTIVE INSINCERE RULES WITH INJUNCTIONS

This Appendix provides a simple game-theoretic analysis of the deceptive mechanism of insincere rules. It assumes enforcement comes only with an injunction.

Nature selects a rule-maker, $R_\tau \in \{R_L, R_H\}$ where R_H prefers pollution emissions of $H \in (0,1)$, and R_L prefers pollution emissions of $L \in [0, H)$. The probability that $R_\tau = R_H$ is β, and the probability that $R_\tau = R_L$ is $1 - \beta$. A factory, F, prefers emissions of 1. The rule-maker adopts a pollution cap of $l \in [0,1)$. Then F announces[96] the amount of pollution he will emit, $a \in [l, 1)$. If $a = l$, then F complies with the cap and emits pollution, p, in the amount $p = a$. If $a > l$, then the rule-maker can enforce at cost e, and the resulting injunction forces F to emit $p = l$. If $a > l$ and the rule-maker does not enforce, then $p = a$. F does not know which rule-maker nature selects, but everything else is common knowledge. After F pollutes, the game ends, and the players collect their payoffs. If the rule-maker is type R_H, then the payoff of nonenforcement is $-|H - a|$, and the payoff of enforcement is $-|H - l| - e$. If the rule-maker is type R_L, then the payoff of nonenforcement is $-|L - a|$, and the payoff of enforcement is $-|L - l| - e$. The payoff to F if the rule-maker does not enforce is $a - 1$, and the payoff if the rule-maker enforces is $l - 1$.

Suppose $l = L$. If the rule-maker is R_L, then F can pollute more (announce a larger a) until the payoff to R_L of enforcement just equals the payoff of nonenforcement[97]: $-|L - l| - e \leq -|L - a|$. F can announce up to $a = L + e$ without enforcement from R_L. If the rule-maker is R_H, then F can announce a, so the payoff to R_H of enforcement equals the payoff of nonenforcement: $-|H - l| - e \leq -|H - a|$. F can announce up to $a = 2H - L + e$ without enforcement from R_H.

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[96] In reality, a factory would not (and probably could not credibly) announce its pollution plans. Instead, it would emit some amount, and if that amount violated the law the government might enforce, in which case the injunction would take effect. Modeling that scenario requires a multiperiod game. Assuming that the factory announces its plans—and that the government makes its enforcement decision on the basis of that announcement—converts the interaction to a simpler, one-period game without sacrificing the core insights.

[97] The rule-maker does not enforce when he is indifferent between enforcement and nonenforcement.

The expected payoff to F of emitting as if $R_\tau = R_L$ is $L + e - 1$, and the expected payoff of emitting as if $R_\tau = R_H$ is $\beta(2H - L + e - 1) + (1 - \beta)(L - 1)$. F prefers to announce $a = L + e$ when

$$\frac{e}{2(H - L) + e} \geq \beta. \qquad (1)$$

If equation (1) holds, then F announces $a = L + e$, the rule-maker (regardless of type) does not enforce, and F emits $p = a$. R_L would not deviate from this equilibrium by adopting $l = H$, as that would decrease his payoff.[98] R_H would not deviate from this equilibrium by adopting $l = H$ as long as the payoff to R_H of the insincere rule exceeds the payoff of the sincere rule: $-|H - (L + e)| > -|H - (H + e)|$. This holds when $L < H < L + 2e$.

In sum, when equation (1) holds, a pooling equilibrium exists under which both rule-makers adopt rule $l = L$ (which is an insincere rule for R_H), F emits as if $R_\tau = R_L$, and neither rule-maker enforces. In this case, the only equilibrium is a pooling equilibrium, as R_H would not separate and adopt a sincere rule.

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[98] The payoff to R_L under the equilibrium described in the text (F emits $L + e$) is $-e$. Suppose R_L adopts $l = H$ instead. Whether $R_\tau = R_H$ or $R_\tau = R_L$, F emits $a = H + e$. R_L receives $-|L - H| - e$ if he enforces or $-|L - H - e|$ if he does not. Both payoffs are smaller than $-e$. Note that R_L would not adopt a stricter insincere rule ($l < L$) either. With only two rule-maker types and with no punitive mechanism in operation, the sole purpose of such a rule would be to signal that he is R_L, but F already assumes he is R_L.

APPENDIX C: MODEL OF DECEPTIVE INSINCERE RULES WITHOUT
INJUNCTIONS

This Appendix provides another game-theoretic analysis of the deceptive mechanism of insincere rules. Rather than assuming an injunction, it assumes that enforcement (1) reveals the rule-maker's type; and (2) causes regulated parties to move closer to the rule-maker's ideal point.[99] The first assumption simplifies without sacrificing the insight about deception. The second drives the model. Rule-makers will not mask their preferences unless their preferences affect enforcement, and preferences only affect enforcement when enforcement changes regulated parties' behavior.

This model mirrors the one in Appendix B with one exception. Following enforcement, F does not emit l as an injunction would require but instead emits the amount the rule-maker prefers plus s for slack. For example, if the rule-maker is R_H, enforcement causes F to emit $H + s$.[100] If the rule-maker is R_H, then the payoff of nonenforcement is $-|H - a|$, and the payoff of enforcement is $-|H - (H + s)| - e$. If the rule-maker is R_L, then the payoff of nonenforcement is $-|L - a|$, and the payoff of enforcement is $-|L - (L + s)| - e$. The payoff to F if the rule-maker does not enforce is $a - 1$, and the payoff if the rule-maker enforces is either $H + s - 1$ or $L + s - 1$.

Suppose $l = L$. If the rule-maker is R_L, then F can pollute more (announce a larger a) until the payoff to R_L of enforcement equals the payoff of nonenforcement: $-|L - (L + s)| - e \leq -|L - a|$. F would announce $a = L + s + e$. If the rule-maker is R_H, then F can announce a so the payoff to R_H of enforcement equals the payoff of nonenforcement: $-|H - (H + s)| - e \leq -|H - a|$. F would announce $a = H + s + e$.

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[99] One could imagine different mechanisms by which enforcement causes regulated parties to move closer to the rule-maker's ideal point. Perhaps enforcement changes parties' preferences by convincing them that behavior the rule-maker prefers also serves their own interests. Perhaps rule-makers, as part of enforcement, threaten or cajole regulated parties into changing their behavior, like a partial injunction. Perhaps enforcement introduces a psychological cost to rule violation or otherwise makes rule-violators more cautious. Think of drivers who get a speeding ticket, recognize that the ticket has no effect on the likelihood or expected cost of future enforcement, and nevertheless drive slower than before.

[100] Where $H + s < a$. An equivalent condition holds if the rule-maker is R_L.

The expected payoff to F of emitting as if $R_\tau = R_L$ is $L + s + e - 1$, and the expected payoff of emitting as if $R_\tau = R_H$ is $\beta(H + s + e - 1) + (1 - \beta)(L + s - 1)$. F prefers to announce $a = L + s + e$ when

$$\frac{e}{H - L + e} \geq \beta. \qquad (2)$$

If equation (2) holds, F announces $a = L + s + e$. The rule-maker (regardless of type) does not enforce, and F emits $p = a$. R_L would not deviate from this equilibrium by adopting $l = H$, as that would not increase his payoff.[101] R_H would not deviate by adopting $l = H$ if the payoff of the insincere rule exceeds the payoff of the sincere rule: $-|H - (L + s + e)| > -|H - (H + s + e)|$. This holds when $L < H < L + 2(s + e)$.

In sum, when equation (2) holds, a pooling equilibrium exists under which both rule-makers adopt rule $l = L$ (which is an insincere rule for R_H), F emits as if $R_\tau = R_L$, and neither rule-maker enforces. In this case, the only equilibrium is a pooling equilibrium, as R_H would not separate and adopt a sincere rule. This demonstrates the deceptive mechanism of insincere rules in a general setting without injunctions.

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[101] The payoff to R_L under the equilibrium described in the text (F emits $L + s + e$) is $-s - e$. Suppose R_L adopts $l = H$ instead. If F assumes $R_\tau = R_H$, then F emits $H + s + e$, and if F assumes $R_\tau = R_L$, then F emits $L + s + e$. The payoff to R_L of nonenforcement in these scenarios is $-|L - (H + s + e)|$ and $-|L - (L + s + e)|$, respectively. The payoff to R_L of enforcement is still $-|L - (L + s)| - e$. None of these payoffs exceeds $-s - e$, so R_L cannot do better by adopting $l = H$. Note that R_L would not adopt a stricter insincere rule ($l < L$) either. With only two rule-maker types and with no punitive mechanism in operation, the sole purpose of such a rule would be to signal that he is R_L, but F already assumes he is R_L.

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