Insincere Rules

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Abstract

Rule-makers can choose between sincere rules, meaning rules that direct parties to behave in ways the rule-maker wants them to behave, and insincere rules, meaning rules that direct parties to behave in other ways. To illustrate, suppose a legislator wants automobiles to travel no faster than 55 miles per hour. She could adopt a sincere rule—a speed limit of 55—or an insincere rule, such as a speed limit of 45. Insincere rules can improve the behavior of regulated parties; they get the law in books “wrong” but can get the law in action “right.” This happens through two mechanisms, one punitive and the other deceptive. The former operates when insincere rules turn minor violations of law into major ones that carry a severer sanction. The latter operates when insincere rules convey to regulated parties a false eagerness to enforce the law. The paper analyzes both mechanisms and provides plausible examples of insincere rules.

1. Introduction

Rules and rulemaking are ubiquitous features of life. Legislators enact speed limits, bureaucrats establish pollution caps, managers forbid smoking at work, and parents impose curfews on their children. Rules often do not implement themselves, so enforcement is common as well. 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. We observe such gaps every day. Signs indicate that the speed limit is 65 miles per hour, but drivers zoom past at 74. Managers forbid smoking, but workers occasionally light up with impunity. Scholars have long been aware of such gaps. As Roscoe Pound wrote a

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century ago, a lawmaker may “put his views of all the details of legal and judicial administration into sections and chapters,” but “the law upon the statute books will be far from representing what takes place actually” (1910, p. 34).

One might be tempted to conclude that rule-makers can never get what they want, but that is not quite right. When enforcement is cheap and frequent, rule-makers can get exactly what they ask for. Most drivers obey speed limits if they see officers at every turn, and most teenagers do not sneak out after dark if they know their parents are watching. In such circumstances, the gap between books and action disappears. More interestingly, rule-makers can get what they want even when the gap persists. They can do so by asking for something other than what they want.

Rule-makers can choose between “sincere” rules, meaning rules that direct parties to behave in ways the rule-maker wants them to behave, and “insincere” rules, meaning rules that direct parties to behave in other ways. To illustrate, suppose a legislator wants automobiles to travel no faster than 55 miles per hour. She could adopt a sincere rule—a speed limit of 55—or an insincere rule, such as a speed limit of 45 or 65. When a legislator adopts an insincere rule she does not ask for what she wants. Nevertheless, she may get what she wants when certain conditions hold. Later I will explore those conditions in depth, but for now I will use examples to clarify the intuition.

Suppose you wish to meet your friend, who always runs 15 minutes late, for dinner at 6:00 p.m. You could tell your friend to arrive at the restaurant at 6:00, and that would be sincere because 6:00 is when you want to meet, or you could tell your friend to arrive at 5:45. That would be insincere, but it could yield the optimal result: your friend arrives at 6:00. Consider one more. Suppose your child likes to draw on your deck and
on the exterior walls of your home with chalk. You favor some chalk drawing because seeing your child’s work brings pleasure, but too much chalk on the walls is difficult to clean. You could permit your child to “draw only one picture on the wall,” but he may interpret that capaсiously and draw more than you like. Alternatively, you could tell him to “draw only on the deck,” in which case he may reduce but not eliminate his drawing on the walls, just as you hoped.

Life imitates art, and law might too. Diners may give insincere directives to their friends, and lawmakers may impose insincere rules on regulated parties. They may mandate harsh criminal penalties, not because they support the penalties but because they expect under-enforcement by police, prosecutors, and judges. It takes harsh penalties in books to get moderate penalties in action (Stuntz 2001, pp. 511, 530-31, 570-71; Barkow 2005, p. 728; Casper and Brereton 1984, pp. 124-25). Likewise, lawmakers may adopt too-demanding environmental standards (Farber 1999, pp. 315-16), too-low speed limits (Schauer 2013, p. 778), too-onerous tax requirements (Zorn 1995, pp. 47-50), and too-absolute constitutional rights (Calabresi 1982, pp. 173-77; Black 1961). They may do so for a simple, strategic reason: by making the law in books “wrong,” they can get the law in action “right.”

Insincere rules can improve compliance through two mechanisms, one punitive and the other deceptive. The former operates when insincere rules turn minor violations of law into major ones that carry a severer sanction. The latter operates when insincere rules convey to regulated parties a false eagerness to enforce the law. Insincere rules do not always deceive, of course, and that can make their use risky. When regulated parties
recognize insincerity, they may respond more to the latent sincere rule than to the announced insincere rule, and that can harm rule-makers.

Insincere rules may be common, and the analysis shows why rule-makers have an incentive to use them. The analysis may also cast light on other topics and phenomena. It may explain why rule-makers routinely adopt laws they cannot enforce and why enforcement strategies sometimes remain fixed as rule-makers with contradictory preferences replace one another. It provides a new explanation for omnipresent gaps between law in books and law in action and shows that such gaps are consistent with optimal policymaking. It suggests that constitutional designers and judges who interpret their work may not literally mean what they say. Finally, the analysis uncovers a paradox of democracy. Laws in books that citizens oppose may reflect the handiwork of unrepresentative politicians or the handiwork of perfectly representative technocrats who get the law in action right.

The paper proceeds as follows. Section 2 reviews relevant literatures. Section 3 defines insincere rules, analyzes their punitive element, and considers when rule-makers will use them. Section 4 uses simple formal models to analyze the deceptive elements of insincere rules. Section 5 discusses examples consistent with insincere rules and relates the analysis to other topics. Section 6 concludes.

Before proceeding, the terminology deserves mention. I use the words “rule” and “law” synonymously, in part for variety and in part because “law” seems inapt for describing directives that do not involve the state—for example, directives from parents to children. I do not use the term “rule” to distinguish laws that are precise (for example, speed limits of 55 miles per hour) from laws that are vague (drive at “reasonable and
prudent speeds”). All are rules for my purposes. For clarity, the examples involve precise laws, but the logic should extent to imprecise like laws as well.

2. Literature Review

Scholars have developed three bodies of work that set the stage for an analysis of insincere rules: the literatures on gap studies, on public enforcement of law, and on the distinction between conduct and decision rules.

Observers have long understood that law has two faces. Llewellyn (1930) differentiated “paper” rules from “real” or “working” rules. Ehrlich (1936) distinguished legal propositions from “living” law. Johnston (1987) contrasted “nominal” and “administered” rules. Farber (1999) referred to “slippage,” meaning breaks between what law mandates and what actually happens. In a classic formulation, Pound (1910) distinguished “law in books” from “law in action.” These writers and many others addressed the same phenomenon: the gap between “the rules that purport to govern the relations of man . . . and those that in fact govern” (Ibid., p. 15).

Scholars have produced scores of studies identifying gaps in different areas of law (see, for example, Muir 1967; Skolnick 1967; Wald 1967; Schwarzchild 1986; Rosenberg 1991; Merrill 1997; Law and Versteeg 2013). To illustrate, one study describes how detained drunk drivers were required to spend at least 48 hours in jail but most did not (Ross and Foley 1987), while another shows that many states fail to enforce laws enacted through direct democracy (Gerber et al. 2001). Many scholars lament the gaps and seek

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2 I am referring here to the common distinction between imprecise laws called “standards” and precise laws called “rules” (see, for example, Diver 1984).
to close them.\textsuperscript{3} Pound (1910, pp. 35-36) for example, blamed gaps on “our machinery of justice” that is “too slow, too cumbersome and too expensive” and argued that lawyers must “make the law in action conform to the law in the books.” Others do not seek to close the gaps but accept them as inherent in legal systems (Abel 1980, p. 828; Gould and Barclay 2012, p. 332).

Why do gaps arise and persist? The literature on public enforcement provides answers.\textsuperscript{4} The expected sanction for violating a law equals the probability of detection multiplied by the sanction, whether a fine, imprisonment, or both (Bentham 1789; Becker 1968). Society can increase an expected sanction, and plausibly deter more violations of law, by increasing the sanction itself. However, morals and politics may place an upper limit on sanctions, and sympathy may prevent severe sanctions from being imposed, undermining their usefulness (Andreoni 1991). Alternatively, society can increase the probability of detecting violations of law by hiring more officers, installing more security cameras, and so forth. That requires resources—resources that may not be available or may be better used elsewhere. Consequently, “[o]ptimal enforcement tends to be characterized by some degree of underdeterrence . . . because allowing some undeterrence saves enforcement resources” (Polinsky and Shavell 2000, p. 70).

Much of the literature on enforcement presupposes that regulated actors know the expected sanctions, if any, for various behaviors. But that is not always so. Drivers

\textsuperscript{3} For example, Rheinstein (1972, pp. 351, 353) called pervasive differences between law and practice “inane.” Abel (1973, p. 188) states that early gap studies “were frequently directed by the belief that the gap, once revealed, could and should be eliminated.” Law and Versteeg (2013, p. 935) argue that countries with gaps between their constitutional rights and practices have “sham constitutions” and conclude, “It remains to be seen whether and by what means the gap between parchment and practice can be narrowed.”

\textsuperscript{4} Polinsky and Shavell (2008, 2000) and Garoupa (1997) provide concise overviews of the literature.
facing an imprecise speed limit such as “reasonable and prudent speeds” may not know exactly how fast they can go before subjecting themselves to sanctions. They do not know what the law requires—is 75 miles per hour reasonable and prudent?—and, regardless of what law requires, they do not know if an officer will ticket them or if a judge will believe them. Uncertainty has cross-cutting effects (Calfee and Craswell 1984; Craswell and Calfee 1986). On one hand, it implies that particular behaviors, including extreme ones, may not be sanctioned, and that can lead to under-compliance (in the example, driving too fast). On the other hand, it implies that particular behaviors, including safe ones, may be sanctioned, and that can lead to over-compliance (driving too slow).

Separate from enforcement costs and uncertainty, scholars have offered at least two other explanations for the persistence of gaps. One relates to the preferences of rule-makers and their agents: they may prefer that rules not be enforced. If a new government inherits a speed limit of 55 miles per hour, and if that government would prefer a higher limit, it may reduce the enforcement budget or otherwise instruct its officers not to enforce the law in books. That may be easier than changing the law (Stigler 1974, pp. 66-67; see also Gerber at al. 2001, pp. 15-25). The recent, public decision of President Obama to soften enforcement of immigration laws follows this logic.

Another explanation for gaps relates to social values. Dan-Cohen (1984) distinguished “conduct” rules, which direct the public on how to behave, from “decision” rules, which direct officials on how to treat persons whose behavior violates law. To

Dan-Cohen traces the work to Bentham (Dan-Cohen 1984, p. 626; see also Postema 1986, pp. 408-408, 448-452).
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. Persons who do not know that duress provides a defense should commit fewer thefts than persons who do. Acoustic separation also permits judges to excuse thefts committed under exceptional circumstances (for example, theft to prevent starvation), improving the fairness of the legal system. In ways like this, gaps between books and action—theft is forbidden but sometimes excused—can further important values. Dan-Cohen’s work has generated a rich line of scholarship (see, for example, Nesson 1985; Robinson 1990; Steiker 1996; Bowers 2010).

One could argue that rule-makers deliberately try to achieve acoustic separation, just as I argue that they might strategically adopt insincere rules. In this regard and others Dan-Cohen’s work and mine relate. 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 rules), the rule-maker I consider never wants persons to follow the law in books (insincere rules).

This brief discussion suggests that gaps between law in books and law in action are common. The gaps may result from deliberate under-enforcement by rule-makers and their agents who do not favor the law in books. The gaps may result from differences in conduct rules and decision rules that persist because of acoustic separation. But the principal explanation is that gaps result from limitations in enforcement resources, meaning rule-makers get less than they want. Can rule-makers act strategically to do better?

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6 Dan-Cohen himself did not make this claim (see Dan-Cohen 1984, pp. 635-636).
3. The Logic of Insincere Rules

The literature on enforcement, and legal scholarship in general, presupposes that rules are sincere, meaning that rules accurately reflect rule-makers’ preferred behaviors. Congress forbids health insurers from denying coverage to certain persons, and agencies require employers to take certain steps to improve workplace safety. Parents require children to turn off their lights at 8:30 p.m. In all cases, we ordinarily assume the rule-makers have weighed the costs and benefits of different behaviors, identified which ones are in some sense optimal, and adopted rules mandating exactly those behaviors.

Sincere rules have benefits. They make clear to regulated parties exactly what is expected of them, and that may have instrumental value insofar as it guides parties’ behavior. It may also have instrumental value insofar as it signals to a broader audience the opinions and aspirations of the rule-maker. Members of Congress signaled something about their politics when they limited the ability of health insurers to deny coverage. Sincere rules may also have intrinsic value. In governing and in parenting, there is merit in honesty. But sincere rules come with a cost, too. 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 workplace safety, and children will turn off their lights at 8:40. 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 rule different from the
insincere rule, it means they would prefer behavior that differs from what the insincere rule demands. To return to the opening example, legislators who want drivers to travel at 55 miles per hour may strategically adopt an insincere speed limit of 45 miles per hour. They do not prefer a different rule—say, a 55 mile-per-hour limit—but they do prefer behavior that deviates from the rule. They want drivers to go 55.

Insincere rules have costs. They fail to indicate the rule-makers’ desired behaviors, though parties who believe the rule to be sincere will not know this. They send inaccurate signals to a broader audience about the rule-makers’ opinions and aspirations. They are in a sense dishonest. But insincere rules have a valuable upside: they can engender better behavior. They can even lead to behavior the rule-maker considers optimal. Many drivers seeing a speed limit of 45 will travel at 55, and many children facing an 8:15 p.m. bedtime will turn off their lights by 8:30. In cases like that, insincere rules come with the opposite virtue and vice 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.

3.1. Punitiveness and Insincere Rules

Suppose the government adopts a speed limit of 55 mph, and suppose it can enforce the limit against speeding drivers at a cost of $10. Enforcement results in a fine—a transfer from the driver to the government—of $1 for every mile-per-hour that the driver exceeded the speed limit. The government will only enforce if the fine exceeds
the $10 enforcement cost, which means drivers can go up to 65 miles per hour without risking a ticket. The probability of the government observing any particular speeding driver is 0.5, and all drivers prefer to go at least 65. All of this is common knowledge. Under these conditions, the expected fine for driving 65 mph is zero, the expected fine for driving 75 mph is $10, and so forth. All drivers can go 65 with impunity, and some may go faster yet.

Suppose the speed limit is sincere, meaning the government wants drivers to go 55 and no faster. Then the law in books is right but the law in action is wrong. The government could close the gap by improving monitoring. Increasing the probability of detection from 0.5 to 1 would increase some expected fines—drivers going 75 mph, for example, would expect a fine of $20 instead of $10. That would deter some speeders, but it would require costly investments (officers, patrol cars, radar guns), and drivers could still go 65 without getting ticketed. Alternatively, the government could increase the fine. If the fine were $11 or more for every mile-per-hour that a driver exceeded the speed limit, then the government would always enforce, even if a driver exceeded the limit by just one mile-per-hour. Large fines combined with even a small probability of observing speeding could ensure that most or all drivers go exactly 55. Increasing fines does not require costly investments.

Now consider a third possibility: an insincere rule. Suppose that instead of adopting a 55 mph limit the government adopted a 45 mph limit. All other stipulations...
from above remain the same: enforcement costs $10, the fine is $1 for every mile-per-hour above the limit, the government will only enforce if doing so is cost-justified, the probability of detection is 0.5, and drivers prefer to go at least 65. Now the expected fine for driving 65 mph is $10 instead of zero, the expected fine for driving 75 mph is $15 instead of $10, and so on. All drivers will go at least 55 mph, the government’s ideal speed. If the expected fines for going faster are not sufficiently high, some drivers will go faster yet. The government could mitigate that problem by raising the fine—or by making the speed limit 35 instead of 45.

This illustrates the punitive element of insincere rules. Lowering the speed limit from 55 to 45 raises the expected sanction associated with particular illegal speeds. In this way it substitutes for an increase in the fine. Rather than directly enhancing the punishment for a particular act, it makes the particular act more serious, which indirectly enhances punishment. Insincere rules have a punitive element whenever the sanction for a violation of law increases with the seriousness of the violation.

To illustrate precisely, suppose the expected sanction for speeding is $-pf(s - l)$, where $p$ is the probability of being observed by the government, $f > 0$ is the fine for every mile-per-hour that a driver exceeds the speed limit, $s$ is the driver’s speed, and $l$ is the limit. The government can raise the expected sanction for speeding by increasing $p$, by increasing $f$, or by reducing $l$.

Why might a rule-maker prefer an insincere rule to a higher fine? Higher fines may be difficult to impose. Suppose the government is disaggregated; legislators make rules, but police, prosecutors, judges, and juries, many with preferences that differ from

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9 Insincere rules can also substitute for a decrease in the fine when they are more permissive than the sincere rule.
the legislators’, enforce the law. If those actors hesitate to impose harsh sanctions for minor violations of law—$500 fines for exceeding the speed limit by 10 mph—and if regulated parties know this, then high fines do not deter (see Andreoni 1991). 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. Insincere rules may deter better.

Rule-makers may not have the option to increase sanctions. The Eighth Amendment’s prohibition on cruel and unusual punishment has been used to limit damages awards and criminal and civil sanctions (Karlan 2004; Sanders 2007). Likewise, due process operating through the Fifth and Fourteenth Amendments limits punitive damages awards (see BMW of North America v. Gore, 517 U.S. 559 [1996]). Insincere rules may offer a workaround to such limits.

Insincere rules may be fairer than high fines. Polinsky and Shavell (2000) consider socially optimal enforcement policy when individuals care about fairness. Individuals in their model lose utility when crimes are committed and when criminals receive punishments perceived to be unfairly harsh. Given this tradeoff, the socially optimal fine lies below the level needed for full deterrence: the gains from fairness outweigh some losses from under-deterrence. But this means that 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 mph 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 mph would result in the same sanction for going 55—and that sanction may now seem fairer. To the extent rule-makers care about fairness, they may prefer insincere rules.
In the same vein, rule-makers may prefer insincere rules for political reasons. A street vendor in New York received a $2,250 fine for using a table that was an inch too tall and two inches too close to a store entrance (Goldenberg 2012). California Governor Jerry Brown complained publicly about his state’s expensive traffic fines (Herdt and Hernandez 2011). A judge ordered a graduate student to pay $675,000 for illegally downloading and sharing 30 songs (Lavoie 2012). Instances like those can put political pressure on legislators. Replacing sincere rules and high fines with insincere rules and lower fines may yield the same deterrence and reduce political pressure.

Section 5 provides plausible examples of insincere rules, and such rules may be widespread. But confirming that presents a challenge. The benefits of insincere rules—easier to enforce, perceived to be fairer, less politically costly—may fade if rule-makers publicize their reasoning. A judge reluctant to impose a hefty fine for a minor violation of law may be equally reluctant when it comes to a major violation if he knows the law is insincere. Legislators facing political resistance to stiffer penalties may face equal resistance to stricter rules if the public understands their motivation. So rule-makers may have an incentive to keep quiet, to pretend insincere rules are sincere.

That gives rise to a paradox. Suppose rule-makers, or at least those in a governmental setting, place weight on both the law in books, which many citizens observe, and the law in action, which most citizens do not observe. They care about the books because they wish to maximize their vote share, or, alternatively, because they believe law should express society’s aspirations. This pushes them to identify and adopt laws that are popular, perhaps tracking the preferences of a representative citizen. They care about the action because they care about policy outcomes. This may push them to
adopt insincere rules that stray far from the representative citizen’s preferences. Call rule-makers who place more weight on the books “politicians” and rule-makers who place more weight on the action “technocrats.”

If many citizens prefer to be governed by technocrats, then questions of accountability become very hard. Laws in books that most or even all citizens perceive to be too strict could be the work of a poor politician—or the work of a perfectly representative technocrat, many citizens’ ideal.

For this paradox to arise, citizens must observe the law in books but not the law in action. However, regulated parties can—and in the driving example, do—observe the law in action, which pinpoints a feature of insincere rules. They need not be entirely secretive. Rule-makers may have reasons not to publicize the insincerity of their rules, but if regulated parties catch on, their knowledge does not necessarily help them. The expected sanction for driving 65 in a 45 mph zone is the same regardless of whether the 45 mph limit is known to be sincere. So insincere rules are punitive, and therefore do work, regardless of whether they deceive. But they can do extra work if they deceive.

3.2. Deception and Insincere Rules

Rule-maker preferences 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. 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

10 These types track Pitkin’s (1969) distinction between descriptive and substantive representation.
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 interactions: the factory pollutes, the government decides whether to enforce the law, and the game ends. Then the harm is a sunk cost; factories have already polluted, and they will not pollute a second time (again, it is a one-period game). 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 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, as above, is whether the monetary gains from enforcement outweigh the costs.

Of course, enforcing the law does change regulated parties’ future behavior, sometimes and maybe often. 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. If the injunction has teeth—monitoring devices on smokestacks, officials on site—then the factory will comply.
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—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. Emissions preferences drive the enforcement decision.

When rule-maker preferences drive enforcement decisions, 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. Suppose that the sanction for a rule violation is fixed and so does not depend on the severity of the violation. Drivers caught speeding, for example, pay the same fine whether they exceed the limit by 10, 25, or 50 miles-per-hour. Because the sanction is fixed, the punitive mechanism of insincere rules cannot operate. But the deceptive mechanism can.

Suppose enforcement is costly for the rule-maker, and suppose that enforcement comes with an injunction so that regulated parties must thereafter do what the law mandates. If the rule is sincere, then enforcement draws future behavior to the rule-maker’s ideal point. This necessarily raises the rule-maker’s future payoffs,11 which is tantamount to lowering the rule-maker’s enforcement costs. The rule-maker is more

11 I assume rule-makers’ utility functions are single-peaked, so there is a unique sincere rule for every rule-maker that mandates behavior corresponding to the peak.
prone to enforce. Because of this, regulated parties cannot and will not stray so far from the rule. If, on the other hand, the rule is insincere, then enforcement does not draw future behavior to the rule-maker’s ideal point. It may even lead to behavior that is worse from the rule-maker’s point of view than the status quo. That effectively raises the cost of enforcement, making the rule-maker less apt to enforce. Consequently, regulated parties can stray further from the rule. If a rule-maker adopts an insincere rule and does not want regulated parties to stray far, he has an incentive to deceive, to convince parties that the rule is sincere so they will hew closely to it.

An example may clarify. Suppose a harsh rule-maker prefers drivers to go 55 and adopts a sincere speed limit of 55. Suppose enforcement costs him 5, and suppose that every mile-per-hour that a driver deviates from 55 costs him 1. Suppose (unrealistically) that enforcement comes with an injunction, so after enforcement drivers must travel at 55. If a driver goes 70, the rule-maker’s payoff from non-enforcement is -15 (55-70). The payoff from enforcement is -5 (enforcement costs 5, and the driver goes 55 because of the injunction). The rule-maker will enforce. Given these payoffs, drivers can go up to 60 without triggering enforcement.

Now imagine a relatively lenient rule-maker who prefers drivers to go 60. He adopts an insincere speed limit of 55. Enforcement costs him 5, and every mile-per-hour that a driver deviates from 60 costs him 1. Enforcement comes with an injunction, so drivers must travel at 55. If a driver observes the speed limit of 55 and believes he faces the harsh rule-maker, he will travel at 60. The payoff to the lenient rule-maker is 0.

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12 To simplify, I am collapsing into one period what is in fact a multi-period interaction. Section 4 makes (and justifies) the same move in the context of a formal model.
However, if a driver believes he faces the lenient rule-maker, he will travel at 70. At that speed, the lenient rule-maker is indifferent between non-enforcement (60-70 for payoff -10) and enforcement (enforcement costs 5, and the driver goes 55 because of the injunction).

If the lenient rule-maker successfully deceives, he gets his maximum payoff, 0. Therein lies the virtue of an insincere rule: when it successfully deceives, it can elicit behavior the rule-maker considers optimal. But if the rule-maker fails to deceive, he gets a payoff of -10. In that case he would have been better off with a sincere rule of 60 miles per hour: drivers would have traveled at 65, giving the rule-maker a payoff of -5. This reveals a tradeoff with insincere rules. When they deceive they perform better than sincere rules, but when they fail to deceive they can perform worse.

4. Modeling Insincere Rules

The punitive element of insincere rules is intuitive, but the deceptive element is not. This section tries to clarify and generalize by modeling the deceptive element. It begins with a model in which enforcement of law comes with an injunction, and it concludes with a general model without injunctions.

4.1. Model 1: Deception and Injunctions

Consider a simple game with two players: A factory owner ($F$) whose factory emits a pollutant, and a rule-maker ($R_\tau$) that regulates emissions of that pollutant. The rule-maker is one of two types, $R_H$ or $R_L$. $R_H$ prefers a high level of emissions ($H$), and $R_L$ prefers a relatively low level of emissions ($L$). $F$ prefers the maximum possible level
of emissions, which is more than either rule-maker prefers and which is assumed to be 1. So \(0 \leq L < H < 1\).

The game begins with nature selecting a rule-maker. The probability that \(R_r = R_H\) is \(\beta\), and the probability that \(R_r = R_L\) is \(1 - \beta\). \(F\) does not know which rule-maker nature selects. Everything else, including the values of \(L\) and \(H\), is common knowledge.

After selection, the rule-maker adopts a law, \(l \in [0,1]\), limiting emissions of the pollutant. \(F\) observes the law (the signal) and then announces how much pollution, \(a\), he will emit.\(^{13}\) If \(a \leq l\), then \(F\) complies with the law, and the rule-maker cannot take any enforcement action. If \(a > l\), then \(F\) will violate the law, which can trigger enforcement. Because \(F\) wants to emit as much as possible, subject to the risk of having the law enforced, he will never emit less than \(l\). So \(a \in [l,1]\).

If \(a > l\), \(F\) violates the law, and the rule-maker must decide whether to enforce. Enforcement imposes a cost on the rule-maker of \(e > 0\). I assume that enforcement does not imply a fine; \(F\) does not have to pay, and the rule-maker does not collect. This assumption suppresses the punitive element of insincere rules—fines cannot vary with the seriousness of the violation if they do not exist—and places the focus solely on the deceptive element.

\(^{13}\) In reality, a factory would not (and probably could not credibly) announce its pollution plans. Instead, it would actually emit some amount, and if that amount violated the law the government might enforce. Modeling that more realistic scenario requires a more complicated multi-period 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.
If the rule-maker enforces, then $F$ must comply with the letter of law, emitting pollution levels ($p$) of $p = l$. This follows from the assumption that enforcement imposes an injunction. If the rule-maker does not enforce, then $F$ emits the same amount as announced, so $p = a$.

After $F$ pollutes, the game ends and the players collect their payoffs. If the rule-maker is type $R_H$, then the payoff of non-enforcement is $-|H - a|$, and the payoff of enforcement is $-|H - l| - e$. The negative sign in front of $e$ implies that enforcement is costly for the rule-maker. If the rule-maker is type $R_L$, then the payoff of non-enforcement 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 $l - 1$.

To summarize, nature selects a rule-maker, $R_t \in \{R_L, R_H\}$. Then the rule-maker adopts a law, $l \in [0,1]$. Then $F$ announces the amount of pollution he will emit, $a \in [l,1]$. If $a = l$, then $F$ complies with the law, the rule-maker cannot enforce, and $F$ emits pollution ($p$) in the amount $p = a$. If $a > l$, then the rule-maker can enforce at cost $e$, forcing $F$ to emit pollution in the amount $p = l$. Otherwise $F$ emits pollution $p = a$.

After $F$ emits, all players receive their payoffs, which are linear functions of the distance between $p$ and players’ ideal points and, for the rule-maker in the case of enforcement, the fixed cost of enforcement, $e$.

The question is under what circumstances a rule-maker would adopt an insincere rule. Specifically, does a pooling equilibrium exist under which both rule-makers adopt law $l = L$, which is an insincere rule for $R_H$? Suppose $F$ observes $l = L$. If the rule-
maker is type $R_L$, then $F$ can pollute more and more (that is, announce a larger and larger $a$) until the payoff to $R_L$ of enforcement just equals the payoff of non-enforcement:\footnote{I assume that the rule-maker does not enforce when indifferent between enforcement and non-enforcement.}

\[-|L - l| - e \leq -|L - d|\]. If the rule-maker is $R_L$, then $l = L$. That reduces the expression to \(-e \leq -|L - d|\). Solving for $a$ yields $L - e \leq a \leq L + e$. $F$ can announce any $a$ in that range without provoking enforcement from $R_L$, and because he prefers to emit as much as possible, he would announce $a = L + e$.

If instead of $R_L$ the rule-maker is $R_H$, then $F$ can announce $a$ such that the payoff to $R_H$ of enforcement just equals the payoff of non-enforcement: \(-|H - l| - e \leq -|H - d|\). Substituting $L$ for $l$ and solving for $a$ yields $L - e \leq a \leq 2H - L + e$. $F$ can announce any $a$ in that range without provoking enforcement from $R_H$, and because he prefers to emit as much as possible, he would announce $a = 2H - L + e$.

Note that $2H - L + e > L + e$. Consequently, $F$ can emit more if he faces $R_H$ rather than $R_L$. The expected payoff to $F$ of emitting as if he faces $R_L$ is $L + e - 1$, and the expected payoff of emitting as if he faces $R_H$ is $\beta(2H - L + e - 1) + (1 - \beta)(L - 1)$. $F$ prefers to announce $a = L + e$ when

\[
\frac{e}{2(H - L) + e} \geq \beta
\]  

\footnote{I assume that the rule-maker does not enforce when indifferent between enforcement and non-enforcement.} $F$ is more likely to announce the lower amount—i.e., behave as if the rule-maker is type $R_L$—as $H$ decreases and $L$ increases. This is intuitive; as either or both of those variables change as indicated, the payoff to $F$ of emitting as if the rule-maker is type $R_L$ increases.
Likewise, $F$ is more likely to announce the lower amount as $\beta$ decreases (meaning the rule-maker is more likely to be type $R_L$) and as $e$ increases.

Suppose equation (1) holds, meaning $F$ announces $a = L + e$. Would $R_L$ ever deviate from law $l = L$ and adopt law $l = H$? No, because $F$ upon observing that law would either assume he faces rule-maker type $R_L$ and announce $a = L + e$, leaving $R_L$ in the same position as before, or he would assume he faces rule-maker type $R_H$ and announce $a = 2H - L + e$, which is greater than $a = L + e$ and therefore worse for $R_L$.

Would $R_H$ ever deviate from the insincere rule $l = L$ adopt a sincere rule $l = H$? No if 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 $L < H < L + 2e$.

So a pooling equilibrium exists under which both rule-makers adopt rule $l = L$, $F$ emits as if $R_t = R_L$, and neither rule-maker enforces. This holds as long as $H < L + 2e$, that is, as long as the rule-makers’ ideal points are sufficiently close together.

This equilibrium demonstrates the deceptive mechanism of insincere rules. $R_H$ can use an insincere rule, $l = L$, to induce, from his point of view, better behavior from $F$ than a sincere rule would induce. If equation (1) holds, meaning $F$ announces $a = L + e$, and if $H < L + 2e$, then the only equilibrium is a pooling equilibrium. $R_H$ in this circumstance would never adopt a sincere rule.

If equation (1) does not hold, then $F$ behaves as if the rule-maker is type $R_H$ and announces $a = 2H - L + e$. That leaves $R_H$ with a lower payoff than a sincere rule would have yielded.\(^\text{15}\) This illustrates the risk of insincere rules: they deliver a high

\(^{15}\) This is so because $-|H - (2H - L + e)| < -|H - (H + e)|$. 


payoff when they deceive but a low payoff when they fail. When insincere rules fail to deceive, the pooling equilibrium unravels and rule-makers separate.\(^\text{16}\)

4.2. Model 2: Deception without Injunctions

The deceptive element of insincere rules seems clearest in the case of injunctions, but that is a special case. Enforcement typically does not come with an injunction; a parking ticket today does not prevent a driver from selecting the forbidden spot again tomorrow. Even when the law mandates an injunction, officials may not fully enforce it. This section accounts for that. Rather than assuming an injunction, I assume that enforcement (1) reveals the rule-maker’s type and (2) causes regulated parties to move closer to the rule-maker’s ideal point. The first assumption simplifies the analysis without sacrificing the core insight: rule-makers can use uncertainty about their type to induce better behavior from regulated parties. The second assumption makes the model tick. Rule-makers will not mask their preferences (i.e., their type) unless their preferences affect regulated parties’ expectations about enforcement, and, as discussed, rule-maker preferences only affect those expectations when enforcement changes regulated parties’ behavior.

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

\(^{16}\text{Likewise, the rule-makers separate when } H > L + 2e.\)
violators more cautious. Think of drivers who get a speeding ticket, recognize that the ticket has no affect on the likelihood or expected cost of future enforcement, and nevertheless drive slower than before.

The model accounts for the new assumptions by changing the behavior of $F$ following enforcement. Rather than emitting $l$, as required by an injunction, he emits the amount the rule-maker prefers plus $s$ (for slack). So if the rule-maker is $R_H$, enforcement causes $F$ to emit $H + s$. The smaller $s$ gets, the better $F$ behaves, from $R_H$'s point of view, following enforcement and vice versa.

To summarize the model, nature selects a rule-maker, $R_\tau \in \{R_L, R_H\}$. Then the rule-maker adopts a law, $l \in [0,1]$. Then $F$ announces the amount of pollution he will emit, $a \in [l,1]$. If $a = l$, then $F$ complies with the law, the rule-maker cannot enforce, and $F$ emits pollution ($p$) in the amount $p = a$. If $a > l$, then the rule-maker can enforce at cost $e$. Enforcement reveals the rule-maker’s type and causes $F$ to emit pollution in the amount $p = L + s$ or $p = H + s$, depending on that type. If the rule-maker does not enforce, $F$ emits pollution $p = a$. After $F$ emits, all players receive their payoffs. If the rule-maker is type $R_H$, then the payoff of non-enforcement is $-|H - a|$, and the payoff of enforcement is $-|H - (H + s)| - e$. If the rule-maker is type $R_L$, then the payoff of non-enforcement 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 $L + s - 1$.

The question under this more general model is whether a rule-maker would adopt an insincere rule. Specifically, does a pooling equilibrium exist under which both rule-
makers adopt law \( l = L \), which is an insincere rule for \( R_H \)? Suppose \( F \) observes \( l = L \).

If the rule-maker is type \( R_L \), then \( F \) can pollute until the payoff to \( R_L \) of enforcement equals the payoff of non-enforcement: 
\[
-|L - (L + s)| - e \leq -|L - a|.
\]

\( F \) would announce 
\[
a = L + s + e.
\]

If instead of \( R_L \) the rule-maker is \( R_H \), then \( F \) can announce \( a \) such that the payoff to \( R_H \) of enforcement just equals the payoff of non-enforcement:
\[
-|H - (H + s)| - e \leq -|H - a|.
\]

\( F \) would announce 
\[
a = H + s + e.
\]

The expected payoff to \( F \) of emitting as if he faces \( R_L \) is \( L + s + e - 1 \), and the expected payoff of emitting as if he faces \( R_H \) is \( \beta(H + s + e - 1) + (1 - \beta)(L + s - 1) \). \( F \) prefers to announce \( a = L + s + e \). when
\[
\frac{e}{H - L + e} \geq \beta
\]

As before, \( F \) is more likely to announce as if the rule-maker is type \( R_L \) as \( H \) decreases, \( L \) increases, \( \beta \) decreases, and \( e \) increases.

Suppose equation (2) holds, meaning \( F \) announces \( a = L + s + e \). \( R_L \) would never deviate and adopt law \( l = H \). \( F \) upon observing that law would either assume he faces \( R_L \) and announce \( a = L + s + e \), leaving \( R_L \) in the same position as before, or he would assume he faces rule-maker type \( R_H \) and announce \( a = H + s + e \). \( R_L \) would then enforce for a payoff of 
\[
-|L - (L + s)| - e
\]
the same payoff he would have gotten by not deviating from \( l = L \).

Would \( R_H \) ever deviate from the insincere rule \( l = L \) and adopt a sincere rule, \( l = H \)? No if the payoff to \( R_H \) of the insincere rule exceeds the payoff of the sincere rule: 
\[
-|H - (L + s + e)| > -|H - (H + s + e)|.
\]

This holds when \( L < H < L + 2(s + e) \).
So a pooling equilibrium exists under which both rule-makers adopt rule $l = L$, $F$ emits as if $R_\tau = R_L$, and neither rule-maker enforces. This demonstrates again the deceptive mechanism of insincere rules, even in a general setting without injunctions. If enforcement causes regulated parties to behave better, even if only by a marginal amount, and if the rule-makers’ ideal points are sufficiently close together, then $R_H$ would not adopt a sincere rule.

The temptation to use insincere rules is even stronger in this general setting than in the injunction setting. Here such rules have no downside. If $R_H$ adopts law $l = L$ and successfully deceives, he does better than if he had adopted a sincere law $l = H$. If he fails to deceive, then $F$ announces $a = H + s + e$, emitting the same amount he would have admitted if $R_H$ had been sincere.

4.3. Extension 1: Politicians and Technocrats Revisited

So far the analysis has assumed that rule-makers care solely about the law in action. They do not mind adopting the “wrong” law in books if through deception it delivers the “right” law in action. But now suppose they also care about the law in books, either because they wish to maximize their vote share by adopting popular laws or because they believe law should express society’s aspirations. As rule-makers care more about the books, they can be characterized as politicians, and as they care more about the action they can be characterized as technocrats. This raises the same tradeoff identified earlier. If citizens prefer to be governed by technocrats, then evaluating the law in books becomes very difficult. Relatively extreme laws in books could be the work of poor politicians or perfectly representative technocrats.
Recall that in the model in section 4.2, a circumstance could arise in which $R_H$ would always adopt an insincere rule: if the rule deceived he received a higher payoff, and if it failed to deceive he received the same payoff he would have gotten with a sincere rule. That picture can change if $R_H$ cares about the law in books. An insincere rule that fails to deceive yields the same payoff as a sincere rule with respect to law in action, but it may yield a lower payoff with respect to law in books. Insincere rules become risky.

4.4. Extension 2: Obeyers and Non-Obeyers

So far the analysis has assumed that regulated parties always violate the law in books. That may be wrong. Some regulated parties may internalize law, meaning they obey pollution and speed limits out of a sense of duty. Such “obeyers” introduce a cost to insincere rules. Because they follow the rules, and because the rules do not align with the rule-makers’ preferences, they reduce the attractiveness of the rules. To illustrate, suppose the government wants drivers to travel at 55 mph and introduces an insincere limit of 45 mph. That rule will cause the kind of “non-obeyers” examined above to slow down and approach 55 mph, which benefits the government. But obeyers will go 45, ten miles-per-hour slower than the government would like. The losses to the government from such behavior may outweigh its gains from slowing the non-obeyers.

If there are relatively few obeyers, then this problem may be minor. Even if there are many obeyers, the problem may still be minor if the government has asymmetric preferences. If driving faster than the optimal speed is costlier to the government than driving slower than the optimal speed, then the government will accept slow driving by
many obeyers to reduce the speed of a few non-obeyers. As another example, suppose parents would be happiest if their two children went to sleep at 8:30. They do not mind if the children go to sleep at 8:00, but they definitely do not want them to go to sleep at 9:00. An insincere bedtime of 8:00 that causes one child to go to sleep at 8:00 and the other at 8:30 would be preferable to a sincere bedtime of 8:30 that causes one to go to sleep at 8:30 and the other at 9:00.

5. Summary, Examples, and Discussion

The models in section 4 may have obscured some main points, so here is a brief summary. Rules are insincere when the behavior they demand from regulated parties does not correspond to behavior the rule-maker most prefers. Insincere rules get the law in books “wrong,” but they can get the law in action “right.” They can do the latter through their punitiveness. By raising the sanction associated with different illegal behaviors, they substitute for increases in fines and discourage such behaviors. Insincere rules can also help get the law in action right through their deceptiveness. When enforcement changes regulated parties’ future behavior, rule-makers can use insincere rules to deceive regulated parties into believing that they would welcome those changes in future behavior—and therefore are apt to enforce. In this way, successful deception substitutes for a decrease in enforcement costs. But deception can be a dangerous strategy for rule-makers. If regulated parties see through it, they will not temper their behavior. The rule-maker could elicit the same or better law in action with a sincere law in books.
So far the discussion has focused on theory, but evidence suggests that insincere rules are real. Stuntz (2001, p. 511) argues that criminal liability keeps broadening, leading to a “world in which the law on the books makes everyone a felon.” Farber (1999, pp. 315-316) 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.”

A New Jersey legislator recently proposed a bill that would double fines for speeding and then, when it failed, proposed a different bill that would reduce speed limits (Levinsky 2013). Municipalities, schools, and parents combine early curfews with grace periods rather than late curfews without them. The D.C. Circuit Court of Appeals reasoned that jurors should not be instructed on their power to nullify—that is, to ignore law and decide a case 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 (Horowitz 2008, p. 435).

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17 Stuntz and Farber understood that overly strict laws carry advantages for lawmakers. As Farber (1999, pp. 315-316) wrote, “optimum ‘standards’ . . . may well be quite different from (and often harsher than) the ultimate performance level that we wish to attain.” Similarly, Schauer (2013, p. 778) states, “The divergence between paper and real rules . . . may thus be a function not only of administrative discretion and other nonrule factors, but also the paper rule itself.” Davis (1969, p. 165) notes the “legislative habit of writing statutes that overshoot.” My analysis develops, explains, and generalizes those observations.

18 Wyoming imposes a curfew on minors of 11:00 p.m. but has a 30-minute grace period in many circumstances. The website for Southern Adventist University summarizes different curfew times, different grace periods, and the penalties for minor and major violations. https://www.southern.edu/talge/Pages/residentresources.aspx.
All of those observations and actions are consistent with the use, or attempted use, of insincere rules.

Insincere rules could be widespread, though that is difficult to verify. Rule-makers may not want to publicize their insincerity, as doing so could reduce the benefits therefrom. Furthermore, the deceptiveness of insincere rules can only operate with relatively technocratic rule-makers, and rule-makers might have that character in technocratic areas of law—environmental emissions, banking regulations, mining rules—that do not attract much publicity.

To the extent insincere rules exist, this analysis helps makes sense of the legal landscape. It also casts light on other legal phenomena and academic debates.

5.1. Make Laws You Can’t Enforce

Conventional wisdom holds that one should never make a rule that one cannot enforce. One can find this maxim in discussions of parenting, coaching, pet policies, building inspections, and other topics. Such rules will be violated, the argument seems to go, and anyone who observes the subsequent failure to enforce will have less respect for, and be less apt to comply with, other rules. Translating into the language of this paper, 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.

That logic may be sound, at least under certain conditions, and it provides an interesting twist on insincere rules. It suggests rule-makers may wish to adopt insincere rules that are too lenient, that demand exactly the behavior regulated parties prefer—in the discussion above, an emissions limit of 1. Observers would see no gap between books and action and, perhaps believing that enforcement costs are very low, comply with other laws.

That possibility merits more attention, but focus now on the conventional wisdom. Making rules that cannot be forced, or enforced perfectly, may signal that enforcement is costly. One could negate that signal by not making the rule or by making the rule and lowering enforcement costs. One could lower enforcement costs by adopting a strict, insincere rule, which through its punitiveness and deceptiveness keeps regulated parties closer to the law in books. Insincere rules, then, can effectively lower enforcement costs, and that leads to a paradoxical prediction. When enforcement is costly, rule-makers will either not adopt rules or they will adopt insincere rules. Precisely when—precisely because—enforcement capacity is limited, rule-makers have an incentive to craft demanding laws.

That logic may help explain why the maxim is often ignored, why rule-makers do make laws they cannot enforce. It may help explain why Vice President Biden called for new and stricter gun control laws even as he admitted that the government lacks the resources to enforce existing laws (May 2013). 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” (Davis 1980, p. 165).
5.2. 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 disaggregation can make that costly; governors, for example, need legislative approval to amend laws. 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 (see Andrias 2013).

One might expect to see that strategy more often, as rule-makers across settings routinely inherit laws they oppose and cannot easily change. Yet many enforcement practices remain constant. The 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 analysis above 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 will always enforce when enforcement is cost-justified, regardless of whether they support or oppose the rule.

But enforcement does change behavior, at least sometimes. Recall that politicians focus on the law in books; they place little or no weight on the law in action. That does not mean they ignore enforcement.\(^{20}\) On the contrary, because politicians do not care

\(^{20}\) Not under the assumptions in this paper, 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
about 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 doing so is cost-justified. That means that we should expect consistency in enforcement when enforcement does not change future behavior and when it does but rule-makers do not care. We should expect consistency in such circumstances even as rule-makers with different underlying preferences replace one another.

5.3. Inferences from Gaps

As discussed, a large body of socio-legal scholarship identifies gaps between law in books and law in action. Early work lamented the gaps and sought to close them, in part because gaps seemed incompatible with a “rational” legal order (see Gould and Barclay 2012). Some contemporary work arguably follows in this vein, finding gaps and critiquing them (see, for example, Law and Versteeg 2013). Other work is more circumspect. Scholars have argued that before identifying a gap one first has to understand what often-vague law in books requires or aims to achieve (see Feeley 1976), and they have noted that gaps do not imply that law in books has no effect (see Casper and Brereton 1984). In light of these and other insights, Sarat (1985, pp. 30-31) argues 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.

This paper provides some answers. Law in books often determines not just illegality itself but also the degree of illegality. Whether driving 85 mph 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 action is wrong. 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.

5.4. Constitutional Law and Language

Some scholars distinguish constitutional meaning from constitutional doctrine (see, for example, Monaghan 1975; Sager 1978; Fallon 1997; Berman 2004; Roosevelt 2005; but see Levinson 1999). For example, the Equal Protection Clause might mean that the government generally cannot treat persons differently, while the doctrine
implementing that consists of the tiers of scrutiny: rational basis review for some classifications, strict scrutiny for others, and so on. The doctrine does not overlap perfectly with the meaning, an instantiation of the truism that rules do not and cannot always further their underlying purposes (see generally Schauer 2009). As a result, doctrine under and over-enforces the Constitution. To illustrate, the Constitution does not mean that officers must deliver the Miranda warning, but constitutional doctrine requires it. That doctrine over-enforces the Fifth Amendment (Berman 2004, pp. 116-132).

Roosevelt (2005, pp. 1658-1667) offers explanations for why courts may intentionally adopt over-enforcing doctrine. For example, he argues that courts seeking to minimize adjudicatory errors may adopt strict scrutiny for classifications based on race. That approach over-enforces the Fourteenth Amendment, as strict scrutiny invalidates nearly all race-based classifications, including some (possibly) constitutional ones. Nevertheless, that doctrine probably outperforms alternatives like intermediate scrutiny, which would uphold many race-based classifications, including some unconstitutional ones.

Strict scrutiny under this conceptualization is a sincere rule. Judges have considered the pros and cons of different doctrines and embraced the one they consider best. And they want regulated parties to follow it. Judges only permit governments to classify on the basis of race when they can show a compelling interest and narrow tailoring, even though that approach will occasionally squelch laws that comply with the Constitution.
This paper 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 to see through, 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 to constitutional meaning as well. Black (1961) argued that even though rights never can be absolute, it may make sense to draft them in absolutes—Congress shall not abridge the freedom of speech—because such language tends to reduce, if not eliminate, rights violations. Similarly, Calabresi (1982, p. 173) 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.” 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 (Ibid.).

This paper 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. Under this account, constitutional meaning deviates from constitutional language by design.
6. Conclusion: Judges and the Morality of Insincere Rules

The paper has analyzed insincere rules, shown that rule-makers sometimes have incentives to use them, and argued that such rules may help to explain real-world phenomena. It has not, however, championed insincere rules. Such 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, and instruct them under penalty of law, to do something that rule-makers do not want done. Dishonesty of those sorts may yield some good consequences (cf. Sidgwick 1874), but all things considered it may yield bad ones, for rule-makers and for society generally. It also runs into deontological objections.

I conclude by pinpointing an area in which they are particularly acute, judicial decisions. A rich literature addresses the merits of judicial candor and sincerity (see, for example, Shapiro 1987; Idleman 1995; Schwartzman 2008). Much of that work debates whether judges should provide complete accounts of their reasons and beliefs for reaching decisions, or whether instrumental gains—preserving judicial collegiality, for example—justify doing less. Among other arguments, proponents of greater candor claim that transparent decision-making makes judges more accountable to law and strengthens the legitimacy of courts.21

This paper adds a new dimension to the debate. Many judges are rule-makers; their precedents guide and constrain lower courts, government officials, and litigants. Courts must rely on executives to enforce their decisions, and they cannot review every

21 Schwartzman (2008, p. 989) mentions these arguments and traces them to Gewirtz (1983).
decision by lower courts. Consequently, judges have high enforcement costs, sometimes and maybe often, and that creates an incentive to use insincere rules. They may, for example, issue strict or harsh interpretations of statutes that they know conflict with legislative intent. When doing so, they surely would not admit the reasons for their decision, as that would lessen the advantage of the insincere rule. In other words, judges using insincere rules would not be candid. Yet that lack of candor would not necessarily undermine their accountability to law or the legitimacy of courts. By bringing the law in action closer to legislators’ ideal, insincere rules could improve judges’ accountability to law, or at least their fidelity to it. By aligning the law in action with the purpose 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, even if characterized by a lack of candor, 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 by other rule-makers.

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22 As a possible example, the Supreme Court in Allen v. State Board of Elections, 393 U.S. 544 [1969], construed Section 5 of the Voting Rights Act to extend to many structural aspects of elections, not just the right to vote. That decision significantly expanded the reach of the Act, and it did so despite evidence that the enacting Congress never contemplated such an expansion. (See Holder v. Hall, 512 U.S. 874 [1995], Thomas, J., concurring.)
References


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