Behavioral Equity

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I. Introduction

In many situations legal systems use ambiguous standards and moral language in instructing people to behave. In the realm of the common law, much of this ambiguous, morally inflected legal component is associated with "equity." In civil law systems, something similar goes under the banner of "abuse of right" or "abuse of law." According to this approach, part of the presumed advantage of equity is related to its ability to prevent opportunism by limiting the ability of people to exploit loopholes in specific rules to their advantage. Most of the current research on ambiguity and vagueness in the law follows a rational choice approach, where ambiguity is expected to increase the cost of deciding how to behave. This increase in the cost of learning on how to behave is intended to nudge people toward greater compliance, assuming a certain risk aversion on their part. Another assumption of this perspective is that ambiguity is more likely to harm opportunistic and "bad" individuals than "good" people because the former have greater difficulty circumventing an ambiguous law.

The present paper challenges these behavioral assumptions and the legal paradigms that are based on them. We use the findings of psychology, behavioral economics, and behavioral ethics to revisit three main related assumptions of the rational choice approach to equity, by developing three main points: first, not only bad people try to circumvent the law; second, behavior depends on the relationship between specificity, trust, and the type of motivation triggered; and, third, moral priming has a different effect on good versus bad people.

Based on these three modifications of rational choice assumptions about the law versus equity distinction, we suggest two normative prescriptions: first, we offer a dynamic "acoustic separation" model that attempts to examine the effect of law versus equity on both good and bad people; and second, we offer an initial taxonomy of the optimal mixture of law versus equity.

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II. Law versus equity

As mentioned, one of the main attributes of equity is that it tends to use ambiguous standards when instructing people how to behave in legally relevant situations. According to this approach, part of the presumed advantage of equity is related to its ability to prevent opportunism by limiting the ability of people to exploit loopholes in specific rules to their advantage.

The first assumption that we will challenge is that *only* bad people try to circumvent the law. We show that, according to a rich literature, many of the bad deeds that we care about can be attributed to behaviors lacking both full intention and an awareness that the law is being violated. We argue further that to some extent, in contrast to the classic risk aversion argument, legal ambiguity can lead to lower levels of compliance.

The second, somewhat contradictory point focuses on the relationships between specificity, trust, and the type of motivation triggered. We suggest that in some contexts the type of motivation is important for the likelihood that one will engage in performance that is better than mere compliance. We argue further that ambiguity can at times cause good people to behave better rather than worse, for example, when specificity would crowd out intrinsic motivation.

The third behavioral point focuses on the difference in the effect of moral language on good versus bad people. We argue that the effect of equity on increased performance, compliance, and a reduction in attempts at evasion accounts not only for its equity's ambiguity but also for its moral language. We argue further that because behavioral research suggests that not all people are expected to respond to moral language in a similar way, using such language may be used to trigger different motivations for compliance.

Based on these modifications of the assumptions of rational choice regarding the role of equity, we proceed in two directions. First, we show that for good people ambiguity should focus on granting discretion ex ante (no crowding out); subsequently, specific rules are expected to constrain unintentional motivated reasoning. By contrast, for bad people ambiguity provides specific rules ex ante, while letting them know about the discretion of the courts to review behavior ex post, which is intended to prevent them from exploiting the law. We offer a dynamic "acoustic separation" model to examine the effect of law versus equity on both good and bad people, and explore the possibility that by using equity in a behaviorally informed way we can provide different messages to both types of people at the same time. We suggest a richer model than the current rational choice approach, because in our model a combination of ambiguous standards, specific rules, and moral language can help manage the behavior of people with multiple motivations rather than merely that of bad people who are intentionally looking for ways to evade the law.

Second, we replace the common dichotomy between compliance and noncompliance with a three-way dichotomy between three dimensions of behavior: performance, compliance, and evasion. Performance is the most desired level of behavior; to achieve it, ambiguity must reduce crowding out of intrinsic motivation. Compliance is the second desired dimension, referring mostly to people following specific rules in a concrete way. Evasion is the least desired behavior, which is likely to happen intentionally or unintentionally. We show that the models accounting for the interplay between law and equity can be improved. For example, only when recognizing the difference between compliance and performance is it possible to recognize the risk of crowding out the motivation of people by overly-specific rules.

Part of the taxonomy that we present below recognizes that for different legal contexts, the balance between evasion, compliance and performance should be different. This balance is different for good and bad people, but we suggest that the basic mixture of law versus equity can handle this three-way trade-off by sending the "same" message at times to good and bad people alike, who will "receive" it as different messages. As far as good people are concerned, the move from specific rules to ambiguous ones decreases the likelihood of performance and increases that of evasion, and we must first decide which looms larger in a given situation, the benefits of better performance or the perils of evasion. In areas in which the costs of more evasion are greater than the benefits of better performance, as in much of the area of taxation for example, narrower rules should be chosen most of the time. Naturally, such taxonomy also takes into account the likelihood of enforcement and the ability to measure behavior, which make specific rules that target compliance more feasible, everything else being equal. Note that the relevant differences in the scenarios falling under a useful taxonomy are not necessarily between two types of people but between two types of motivation. Moreover, motivations can change in various situations in reaction to the framing of different rules. For this purpose we develop a dynamic model according to which some combination of rules and equity standards communicates a variety of partially "overlapping" messages to good and bad people. In particular, messages that are highly ambiguous and morally inflected aim for performance on the part of good people (avoiding crowding out) and at the same time serve as a weapon aimed at evasion or opportunism by both bad and good people engaged in motivated reasoning.

III. Current views of law versus equity

Traditionally, the issue of specificity in the law was framed in part as law versus equity. At one time, separate courts in the Anglo-American world meted out a special, individualized, morality-based justice, following a tradition of equity going back to Aristotle, who developed the idea of a special equitable kind of justice. In the *Nicomachean Ethics*, Aristotle declared that equity corrects "law where law is

defective because of its generality."[1] Commentators adopted this idea when explaining equity as a branch of the law (broadly conceived). The courts have also cited this tradition. Aristotle drew an analogy between equity to the leaden rather than iron measuring rulers of the builders of Lesbos, which bend according to the shape of the stone and allow the selection of a stone that fits. Courts also invoke this image when they are inclined to dispense individualized, *ex post* justice. Equity is specific and ex post, but it is couched in vague ex ante terms based on principles such as good faith, clean hands, and not profiting from one's own wrongdoing.

This view of equity as necessarily more ex-post-specific than the law because the law is defective owing to its generality leaves open many questions. Exactly how and when does the law fail on account of its generality? A broad version of equity would hold that legislators cannot anticipate the future, and therefore every time a law does not accord with the intent of the legislator, equity should intervene to make things right. A much narrower version of equity would regard it as a device to use against opportunists, "gamers" and loophole seekers using their knowledge, which is superior to that of the legislator or of a contractual partner, to take unintended and difficult-to-foresee advantage of the law. To forestall these activities, equity must be specific, but only in an ex post way. Ex ante, the language of equity is general and the proxies it uses, such as disproportionate hardship, are not completely tailored to the problem they are intended to target: opportunism.[2] Interestingly, Aristotle's equity can be interpreted as directed against opportunists who take advantage of the gap between the law and its purpose.[3] Various intermediate positions are also possible, according to which equity is aimed at preventing misuse of the law, where misuse is based on moral concepts. All these versions of equity, save perhaps the most general ones, share a notion that equity is aimed at particular people acting inequitably out of illegitimate motives. In other words, if equity courts are "courts of conscience," the motivation of the actors matters.

In our opinion equity is much broader than ambiguity because it focuses also on the discretion of the courts, the types of argument they can consider, and moral language, but ambiguity is clearly the main concept through which we can communicate with the current literature.

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[1] ARISTOTLE, NICOMACHEAN ETHICS 317 (G.P. Goold ed., H. Rackham trans., Harvard Univ. Press 1982).

[2] Henry E. Smith, *An Economic Analysis of Law Versus Equity*, October 22, 2010 (working paper), available at: http://www.law.yale.edu/documents/pdf/LEO/HSmith_LawVersusEquity7.pdf.

[3] Dennis Klimchuk, Is the Law of Equity Equitable in Aristotle's Sense? 4 (June 2011) (unpublished manuscript), available at http://www.law.ucla.edu/workshops-colloquia/Documents/Klimchuk.%20Is%C20the%C20Law%C20of%C20Equity%C20Equitable%C20in%C20Aristotles%Sense.pdf ("Correction is sometimes necessary because all law is universal and, owing to its universality, can lead to error in particular cases").

A. Rules versus standards

There are few paradigms that address the notion of optimal specificity. The most familiar parallel to the law versus equity distinction is that of rules versus standards. In law and economics, the distinction between rules and standards is manifest on one dimension: the timing of decision making,[4] which captures the differential cost of creating and enforcing directives and the role of ex post discretion. The technique espoused by those interested in institutional design focuses on how best to design rule systems to take advantage of the various capacities of legal decision makers. For example, Sunstein argues that because legislatures cannot anticipate all of the circumstances in which they will affect people, judges use a process of analogical *casuistry* to ensure that the proper result is achieved in each case.[5] In particular, Sunstein has suggested a system of privately adaptable rules, in which an initial allocation of entitlements and rights is subject to flexible change by affected parties.[6] By contrast, a highly influential movement in legal academia has vigorously argued against conferring discretion on judges because it prevents the law from being predictable.[7] Rather than focus on certain aspects of rules or standards and on how much trust to place in different actors in the system, another group of scholars has emphasized the overall costs and benefits of applying rules or standards, usually through economic models.[8] Kaplow's paradigm and the follow-up studies have focused mainly on the rational choice view of human nature, translating the notion of optimal specificity mainly into optimization of information costs. Many legal scholars have written about the relative benefits of rules and standards,[9] although little of the literature has focused on the effect of the choice of standards or rules on how legal actors make decisions. Beyond the classic arguments – namely, that flexible standards tend to be better tailored for precisely targeting behavior, hard-edged rules that encapsulate clear entitlements encourage market transactions, and decisions based on rules are easier to adjudicate – most of the scholarship has consisted of careful economic analyses of the costs and benefits of rule-based laws or of theoretical discussions inspired largely by political theory and institutional design.

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[4] Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 Duke L.J. 557 (1992).
[5] Cass R. Sunstein, *Problems with Rules*, 83 Cal. L. Rev. 953, 958, 1006 (1995).
[6] *Id.* at 1016.
[7] *See, e.g.*, LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW (2001); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 115 (1989).
[8] *See, e.g.*, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 Duke L.J. 557 (1992); Louis Kaplow, *A Model of The Optimal Complexity of Legal Rules*, 11 J.L. Econ. & Org. 150 (1995); Michael F. Ferguson & Stephen R. Peters, But I Know it When I See it: An Economic Analysis of Vague Rules (January 2000), available at SSRN: http://ssrn.com/abstract=218968..
[9] Some classical works that propose various frameworks for thinking about the difference between rules and standards are: Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685 (1976) (arguing in particular that rules are connected to the ideology of individualism, whereas standards are connected to that of altruism); Kathleen Sullivan, *The Supreme Court, 1991 Term – Foreword: The Justice of Rules and Standards*, 106 Harv. L. Rev. 4 (1994) (showing how the rule/standard dichotomy is used rhetorically in American constitutional adjudication); Pierre Schlag, *Rules and Standards*, 33 UCLA L. Rev. 279 (1985).

B. The benefits of vagueness versus chilling

The rational choice view of the effect of vagueness or ambiguity on legal compliance is for the most part one of chilling, leading individuals to engage in over-compliance (e.g., Kyle Logue[10] notes theoretically that risk aversion is possible in the tax world, where there is legal uncertainty and a high penalty; see also Garoupa 2003). These models of the chilling effect of vagueness are of two sorts. In one model, vagueness is chilling and undesirable but carries with it tightly correlated benefits, like raising litigation costs. Thus, parties may even choose to include vague terms in their contracts if these make litigation non-cost-effective.[11] Thus, sending such a signal may be profitable by tying the parties' hands against litigation. In this case, better targeting of the vague terms is pointless because the benefits of vagueness are in the imposition of costs. The question is the balance between the costs and the benefits.

Another class of models based on rational actors regards vagueness as causing chilling behavior and raising information costs, but considers the benefits it brings in regulating behavior to be at least separable to some extent. That is, these models do not see the benefits of vagueness as flowing directly from the costs it imposes, but rather as arising despite its costs. Models that see a benefit in using vague standards against seekers of loopholes consider the main trade-off to be between punishment and the chilling effect on legitimate behavior.[12] This trade-off is made worse by the fact that vagueness cannot be targeted against opportunists. To the extent that it can – and that it is perceived that it can – the chilling effect can be reduced.[13] In particular, if ordinary, garden variety actors have higher information costs for figuring out whether contractual performance is not merely valuable but also technically compliant, they are vulnerable to cross-subsidies for opportunists who can sue for satisfactory but not technically compliant performance. Equity, if it is targeted at the latter but not so broad as to invite its own form of opportunism, can deter opportunism sufficiently so that the garden variety actors will be willing to contract, thereby achieving a "substantive compliance" equilibrium, in which less costly

[10] Kyle D. Logue, *Optimal Tax Compliance and Penalties When the Law Is Uncertain*, 27 Va. Tax Rev. 241 (2007)

[11] *See, e.g.*, Albert Choi & George Triantis, *Completing Contracts in the Shadow of Costly Verification*, 37 J. Legal Stud. 503 (2008); Albert Choi & George Triantis, *Strategic Vagueness in Contract Design: The Case of Corporate Acquisitions*, 119 Yale L.J. 848 (2010); George G. Triantis, *The Efficiency of Vague Contract Terms*, 62 La. L. Rev. 1065 (2002).

[12] Michael F. Ferguson & Stephen R. Peters, But I Know it When I See it: An Economic Analysis of Vague Rules (January 2000), available at SSRN: http://ssrn.com/abstract=218968. Ferguson and Peters assume that the same rule will govern both ordinary actors and loophole seekers and that it will be received by each group in a similar, chilling way. The authors show that nevertheless an Orwellian equilibrium can be more efficient than one with clear rules.

[13] Oren Bar-Gill & Omri Ben-Shahar, *An Information Theory of Willful Breach*, 107 Mich. L. Rev. 1479 (2009).

equally valuable but technically nonconforming performance can be achieved.[14] Equity is thus a safety valve. It remains to be determined empirically how good the proxies for opportunism are.

Both types of models, the ones in which vagueness is inextricably bound up with chilling and those in which multiple audiences can be affected in various ways, are consistent with the rational actor paradigm. Even the models that distinguish between types of actors do so based on their costs of information. Moreover, actors are mostly risk averse, and even the ones facing high information costs treat the future as a matter of risk rather than uncertainty (ambiguity). Actors can assess a set of possible outcomes and assign at least a default probability to them. Ambiguity, a case in which an actor cannot quantify probabilities or identify the state space, does not figure in these models.[15]

We argue that there is a way out of the dilemma between tractability and psychological realism. The law has long differed along various dimensions, with apparently different audiences of actors and different situations in focus at various points. One such dimension is specificity: should the law announce its directives in general or in specific terms? The view that we try to advocate here, according to which ambiguity leads to less compliance, was recognized in the literature. For example, some applied research has identified the dilemma associated with optimal specificity of law even before the research on behavioral ethics. Nelson (2003)[16] focuses on two dimensions associated with the specificity of rules: their ability to communicate clear information and their ability to constrain behavior. Nelson suggests that opportunistic behavior is more likely to be constrained by broader standards because highly specific rules call for finding various types of safe harbors. Bratton (2003)[17] also argues that systems of principles are more costly because they lack certainty.[18] A sophisticated approach appears in the seminal work of Braithwaite (2002) on rules and principles.[19] Braithwaite suggests that too many specific rules create subjectively an overall lack of certainty that harms the law in the long term.

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[14] Kenneth Ayotte, Ezra Friedman & Henry E. Smith, A Safety Valve Model of Equity as Anti-Opportunism (Draft, March 30, 2013) Northwestern Law & Econ Research Paper No. 13-15, available at SSRN: http://ssrn.com/abstract=2245098.

[15] For an argument that uncertainty rather than risk is at the heart of the problem of opportunism, Henry E. Smith, *An Economic Analysis of Law Versus Equity*, October 22, 2010 (working paper), available at: http://www.law.yale.edu/documents/pdf/LEO/HSmith_LawVersusEquity7.pdf. Oliver Williamson identifies uncertainty as an opening for opportunism. *See* Oliver E. Williamson, The Economic Institutions of Capitalism: Firms, Markets, and Relational Contracting 3-4, 56-59 (1985).

[16] Nelson, M.W. 2003. Behavioral evidence on the effects of principles- and rules-based standards. Accounting Horizons (March): 91–104.

[17] William W. Bratton, *Enron, Sarbanes-Oxley and Accounting: Rules Versus Principles Versus Rents*, 48 Vill. L. Rev. 1023 (2003).

[18] His argument is more complex and depends on various other factors.

[19] John Braithwaite, *Rules and Principles: A Theory of Legal Certainty*, 27 Austl. J. Leg. Phil. 47 (2002).

C. The rational choice approach: Equity as an enforcement tool against bad individuals

According to the rational choice assumption about compliance, an individual will violate the law "if and only if his expected utility from doing so, taking into account his gain and the chance of his being caught and sanctioned, exceeds his utility if he does not commit the act."[20] The decision is based on the individual's preference for risk, the probability of punishment, and the income expected with and without punishment.[21] Under the rational choice theory, optimal enforcement over-deters; policy makers must take into account the costless deterrence of risk aversion.[22]

Consistent with the rational actor paradigm, equity can be seen as a mode of decision making aimed at discouraging opportunism.[23] The various features of equity work in tandem to act as a safety valve for relatively simple structures of law.

Opportunism is near-fraud in two senses. It covers situations in which some proxy for fraud is present, and we intervene to deter actual fraud. In addition, covers situations in which actual fraud may be absent but someone uses deception by taking unforeseen and unfair advantage of the letter of the law or of another rule to gain a larger share of a smaller surplus.

Equity as a safety valve is multi-dimensional. In addition to the timing of decision making, at least three other dimensions are crucial to anti-opportunism: moralism, domain of foreseeability, and local application.

Equity is based on moral notions. Opportunism is considered immoral. Basing equity on moral consensus makes it more predictable. The use of moral standards is consistent with using on/off remedies (injunctions, disgorgement), or sanctions as opposed to prices.[24] Appeals to morality may seem vague, but morality itself may need to be a little vague to prevent evasion, although not so vague to those with background knowledge.

Key to equity is good faith, which often means nothing more than notice. The same action carried out by someone in possession of an item of knowledge may be completely different from the same action taken by someone without that knowledge. The evidence that the actor has the knowledge is a proxy for fraud or unforeseen rent seeking.

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[20] A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement Law* 1 J. Econ. Lit. 3 (2000).
[21] *See* Nuno Garoupa, *The Theory of Optimal Law Enforcement* 11 J. Econ. Surveys, 267, 268 (1997).
[22] *See id.* at 279 (quoting a result by Polinsky and Shavell).
[23] Kenneth Ayotte, Ezra Friedman & Henry E. Smith, A Safety Valve Model of Equity as Anti-Opportunism (Draft, March 30, 2013) Northwestern Law & Econ Research Paper No. 13-15. Available at SSRN: http://ssrn.com/abstract=2245098; Henry E. Smith, *An Economic Analysis of Law Versus Equity*, October 22, 2010 (working paper), available at: http://www.law.yale.edu/documents/pdf/LEO/HSmith_LawVersusEquity7.pdf.
[24] *See* Robert Cooter, *Prices and Sanctions*, 84 Colum. L. Rev. 1523 (1984).

The domain of equity has to do with foreseeability. Opportunism is a problem because an actor has found an unforeseen and ex ante unforeseeable way to take advantage.[25] As related to foreseeability, equity requires widening the contextual frame. If an opportunist steps outside the domain of the foreseeable to take advantage, equity must widen the frame to include this context. For example, if someone brings up a technicality such not being an adult in order to void a contract, equity will not enjoin the jilted contractual partner from interfering with the opportunist's new contract.[26]

Equity applies locally. It is a safety valve. Traditionally it applied *in personam*. For example, an injunction is directed at specific persons before the court and at those acting in concert with them. Equity was not intended to disrupt general rules, and it often enforces customs that apply only locally in a certain industry or community.

These four dimensions – timing of decision making, moralism, domain of foreseeability, and local application – are all related and reinforce each other, although this systemic aspect is more difficult to show. The vagueness and judicial discretion are necessary in order to "keep up" with the opportunist, and equity can do this better by being the second-mover.

The safety valve perspective assumes that a hybrid system of generally applicable rules provides firm entitlements on which good-faith actors can rely, and judges who can employ equitable standards in particular disputes to sanction opportunists taking advantage of the over- or under-inclusiveness of the rules.[27] (The concept of acoustic separation seems to fit here too, because the public is given a general rule on which to rely, but judges hear individual cases in order to apply the rule equitably.)[28]

IV. Behavioral modifications: Extending the effect of the law versus equity debate to good people

The law is often seen as treating human beings as interchangeable recipients of legal commands. This is especially true of traditional law and economics. The problem is not only the narrowness of some versions of the rational actor paradigm. Some critics fault the rational actor paradigm with taking preferences as given: surely, external factors, including the law itself, can shape preferences. Others point to

[25] The problem of opportunism may be an example of ambiguity (uncertainty) rather than a quantifiable risk. Henry E. Smith, An Economic Analysis of Law Versus Equity, October 22, 2010 (working paper), available at: http://www.law.yale.edu/documents/pdf/LEO/HSmith_LawVersusEquity7.pdf.
[26] Carmen v. Fox Film Corp., 269 F. 928 (2d Cir. 1920).
[27] Henry E. Smith, An Economic Analysis of Law Versus Equity, October 22, 2010 (working paper), available at: http://www.law.yale.edu/documents/pdf/LEO/HSmith_LawVersusEquity7.pdf.
[28] *See* Cass Sunstein, *The Problem with Rules*, 83 Cal. L. Rev. 988, 1006-07 (1995).

motivations other than material gain and loss, or to motivations other than external constraints such as fear of punishment, as important in shaping human behavior. The most sophisticated of these critiques recognize that different people may be motivated differently, or that the same person may be motivated differently in different situations. But if we allow preferences to change, people to vary, and individuals' motivations to reflect contextual cues, the factors influencing people turn out to be many and to point in many, often opposing directions. Human behavior seems to be chaotic.

Below we briefly present the relevant findings of behavioral scholarship on the topic and try to resolve the puzzle about the conflicting effect of ambiguity that arises in the literature by paying closer attention to predictions that may be generated from the theories.

The limitations of the rational choice theory were recognized by law and economics scholars themselves. For example, Shavell, one of the founding fathers of law and economics, has shown in his paper on law versus morality as regulators of conduct (2001) that morality has many advantages over external sanctions mostly because it is likely to provide more accurate sanctions for every misconduct. Nevertheless, for the most part Shavell's focus is on individual morality rather than on designing laws in a way that appeals to morality. Cooter, another leading scholar in law and economics, has focused in much of his writing on the expressive function of law and on the importance of intrinsic motivation in legal compliance. Cooter recognized that when compliance is based on intrinsic motivation it is more likely to lead to a stable equilibrium.[29]

Moving from rational choice accounts of motivation and compliance to the behavioral literature, we can make better use of some recent developments in the behavioral literature on human rationality, which provide useful paradigms for revisiting this question. In the behavioral literature, as in the rational choice literature, we find conflicting predictions about the effect of ambiguity. On the one hand, theories such as crowding out, trust, monitoring and control all support *less* specificity, and on the other hand, theories such as elastic justification, dishonesty, and motivated reasoning all support *more* specificity.

We attempt to solve this tension by suggesting a possible variation in the effect of ambiguity on two aspects of behaviors that the law seems to care about: performance and compliance. Most current research suggests that ambiguity is expected to increase performance but decrease compliance. Based on these theoretical accounts and on empirical findings, we present a broader perspective of the effects of legal ambiguity on individuals allowing us to improve the integration of equity-

[29]Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 Va. L. Rev. 1577 (2000).

related concepts in law. Because the psychological perspectives on equity are too numerous to be included in a model, we focus on three components:

1. Ambiguity as blurring the difference between good and bad people.
2. Specificity as crowding out intrinsic motivation and therefore leading people from evasion to compliance, but undermining performance. According to this perspective, the combination of good people, moral language, and ambiguity can increase the likelihood that the good people would engage in performance.
3. Morality as more likely to improve the behavior of good than of bad people.

We will show that three trends of the recent literature on motivation and cognition can draw also the treatment of good people rather than just on the opportunistic individuals.

Differential specificity according to motivation serves as our starting point. In the face of the potential welter of situations, motivations, and types of legal commands, we ask whether certain combinations of generality and specificity in well-known types of situations are called for in light of recent results in the study of motivation. As the common law tends to do, we work from the bottom up.

A. Ambiguity, good people, and evasion

In recent years, many behavioral ethics scholars have documented that good people are the ones responsible for most bad deeds.[30] Although some accounts of human nature by writers such as Lynn Stout[31] and Yochai Benkler[32] try to argue for a greater focus on good people, the majority of the literature seems to focus on the reverse side, where bad deeds are done by good people who fail to recognize that their deeds are bad (e.g., Bazerman and Terbenusal (2011),[33] Banaji and Greenwald (2013)). Importantly in this verin, Bandura applies a moral disengagement paradigm to the area of employee misbehavior. Bandura (1999) suggests this paradigm not in

[30] The Dishonesty of Honest People: A Theory of Self-Concept Maintenance (Mazar, Amir, & Ariely 2008), Why Good People Sometimes Do Bad Things: Motivated Reasoning and Unethical Behavior (Bersoff 1999); How Good People Make Tough Choices: Resolving the Dilemmas of Ethical Living (Kidder 2009); When Good People do Wrong: Morality, Social Identity, and Ethical Behavior (Pillutla 2011); Why Good People Do Bad Things: Understanding Our Darker Selves (Hollis 2008); see also Blindspot: Hidden Biases of Good People (Banaji & Greenwald 2013). Many others do not use the term "good people" in their titles but make the same argument in the text (for example, De Cremer 2011). *See* Feldman, Bounded ethicality and the law for a review of good-people focus in recent literature.

[31] LYNN STOUT, CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE (2011).

[32] YOCHAI BENKLER, THE PENGUIN AND THE LEVIATHAN: THE TRIUMPH OF COOPERATION OVER SELF-INTEREST (2011).

[33] MAX H. BAZERMAN & ANN E. TENBRUNSEL, BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT (2011)

the context of ethics in the organization, but with reference to the active role that the self plays in allowing people to engage in inhumane behavior. Bandura offers eight mechanisms by which individuals are able to convince themselves that their actions are not immoral, thereby preventing the self-sanctions that individuals would normally apply to keep their actions consistent with their personal ethical standards. The mechanism relevant to ambiguity is the use of euphemistic labeling to reclassify an action like stealing into a more innocuous one like "shifting resources." Moore et al. (2012) make more concrete application of the self-deception mechanisms that people employ to justify their bad behaviors. Their work arguably relates to legal ambiguity, in that exploiting ambiguity in rules is central to people's ability to justify immoral behavior. A similar view appears in the works of Ayal and Gino (2011) and of Ashforth and Anand (2003), who focus on creative ways people use to justify doing wrong.

One of the main techniques people use to justify unethical behaviors to themselves is to engage in constructing self-serving interpretations of the legal and organizational requirements they must follow. Psychological processes such as self-deception, elastic justification, moral wiggle room, moral disengagement, and motivated reasoning support the view that people may be able to exploit legal ambiguity to behave unethically without feeling that they are in violation of the law. Two relevant concepts that support this notion come from Haisley and Weber (2008), who find that people prefer to take ambiguous risks when this allows them to justify unfair behavior, and from Dana et al. (2005), who find that people are less generous in situations in which they can appeal to moral ambiguity in explaining their actions. Similarly, Hsee (1995) has found evidence that people make choices that satisfy their preferences, at the cost of best achieving an assigned goal, if they can exploit existing ambiguity about which decision may complete the assignment.

Much of recent research on bounded ethicality has suggested various competing paradigms such as the blind spot, the dishonesty of honest people, and moral wiggle room to account for how people use various psychological mechanisms to change the meaning of what they do. Elsewhere (Feldman & Teichman, 2009, 2011, 2013) one of us has shown that people use legal ambiguity strategically to formulate a minimal interpretation of what is required from them by laws or contracts.

B. Ambiguity, good people crowding out, and performance

Some scholars have shifted the focus from analyzing the costs and benefits of applying rules or standards, and from making certain baseline assumptions about how actors will behave (usually in their rational best interest), to making substantive inquiry into the process through which actors grapple with legal rules and standards before making a decision. For example, Alexander and Sherwin have argued that when rules are not serious – that is, they do not in all situations accurately dictate

what an actor *should* do – people are less likely to follow the letter of the law.[34] In this tradition of moral education, Shiffrin has argued that vague standards that incorporate moral concepts encourage "moral deliberation," a more careful decision making mode in which actors grapple with moral concepts, promoting stronger community morals and democratic engagement with the substance of the law.[35] However, to the extent that the moral component of law can be subsumed into typical rationality analysis,[36] these considerations do not directly answer the question of how the specificity of a rule (or the vagueness of a standard) affects an actor's behavior.

Other legal scholars have advocated a similar favorable view of legal ambiguity, but based more on the psychological process of decision making. For example, Feldman and Lifshitz[37] focus on the advantages to people's authenticity of masking the certainty of legal benefits, that is, focusing theoretically and empirically on the injunction effect triggered by legal uncertainty. Similarly, Dagan and Fisher[38] suggest that legal ambiguity is one way of avoiding the commodification effects of the law. These views are also supported behaviorally by recent research by Chou et al.[39] on the negative behavioral effects of the specificity of contracts on people's cooperation and trust. Following a series of studies that examine how people perceive specific contracts, the authors argue that a crowding out effect is associated with specificity. A preference for incomplete contracts is also demonstrated in the work of Fehr[40] and supported by an earlier study by Messic and Terbenusell (1999),[41] whose broader point is that strict enforcement, sanctions, and specificity can harm cooperation. A similar view is supported by Falk and Kosfeld,[42] who demonstrated

[34] Larry Alexander & Emily Sherwin, *The Deceptive Nature of Rules*, 142 U. Penn. L. Rev. 1191, 1212 (1994) ("If citizens learn that rules are not statements of right action in all cases, but only statistical calculations of right action over a range of cases, they will be more likely to exercise their own judgment in particular cases, and errors will increase").

[35] Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 Harv. L. Rev. 1214, 1222–25 (2010); *see also* Sunstein, *supra* note __, at 995–96 (1995) (arguing that participation in a hearing, in addition to giving a claimant individual treatment, furthers the goal of democratic participation of those affected by rules); Smith, *supra* note __, at __ (arguing that an essential part of the system of equity is the moral component of equitable adjudication).

[36] *See* Steven Shavell, *Law Versus Morality as Regulators of Conduct*, 4 Am. L. & Econ. Rev. 227 (2002) (making such an attempt). *See also* Louis Kaplow & Steven Shavell, Moral Rules, the Moral Sentiments, and Behavior: Toward a Theory of an Optimal Moral System, 115 J. Pol. Econ. 494 (2007)).

[37] Yuval Feldman & Shachar Lifshitz, *Behind the Veil of Legal Uncertainty,* 74 J. Law and Contemporary Problems 133 (2011).

[38] The State and the Market, on file with authors.

[39] LESS SPECIFIC CONTRACTS STIMULATE INTRINSIC MOTIVATION, BUILD RELATIONSHIPS, AND ENHANCE TASK PERFORMANCE, Academy of Management Journal (on file with the authors).

[40] E. Fehr, Fairness and Retaliation: The Economics of Reciprocity.

[41] Ann E. Tenbrunsel & David M. Messick, *Sanctioning Systems, Decision Frames, and Cooperation*, 44 Admin.Sci. Q. 684-707 (1999).

[42] Armin Falk & Michael Kosfeld, *The Hidden Costs of Control*, 96 Am. Econ. Rev. 1161 (2006).

this broader point using a principal-agent experiment in which participants could either let the agent decide the production amount or set a lower boundary. In settings in which a lower boundary was set, agents produced less than in those in which the principal left the decision about the production amount entirely in the hands of the agents. In *post-hoc* questioning, agents said that they regarded the lower boundary as a sign of distrust and were therefore less cooperative. Many of the studies on the crowding out effect of incentives and on enforcement are summarized by Bowles (2008).[43]

Note, however, that there are some conflicting lines of reasoning which suggest that imposing a formal sanction improves intrinsic motivation rather than crowding it out. For example, focusing on the various effects of sanctions, criminologists Zimring and Hawkins[44] suggest a much wider effect that seems to contradict the crowding out effect of sanctions. They show that punishment, which is traditionally associated with a price that can teach right and wrong,[45] is habit building, teaches respect for the law, and promotes conformity.[46] Similarly, Schwartz et al., who studied the relationship between social duty and fear of punishment, have shown that those in a fear-of-punishment group were more likely to feel normative obligations to pay taxes. Possibly, a way to reconcile the two conflicting lines of research has to do with the distinction between the effect of law and that of equity that we wish to make in the present paper. For good people, external sanctions can lead to a crowding out effect, but for bad people they may also serve as a tool for policy makers to communicate moral values.[47]

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[43] S. Bowles, Policies Designed for Self-Interested Citizens May Undermine "The Moral Sentiments:" Evidence from Economic Experiments Science 2008; see also Yuval Feldman, *The Complexity of Disentangling Intrinsic and Extrinsic Compliance Motivations: Theoretical and Empirical Insights from the Behavioral Analysis of Law*,[Symposium --For Love or Money], Wash. U. J. L. & Policy 11 (2011).

[44] FRANKLIN E. ZIMRING & GORDON J. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL 74-88 (1973).

[45] On page 108, Fuller questions this perspective: "The notion that its authorization to use physical force can serve to identify law and to distinguish it from other social phenomena is a very common one in modern writing." Although Fuller himself does not take this view, he admits that the ability to use force is part of what distinguishes a legal norm from a social one. This means that people must perceive the deterrence to some extent to realize that there is a law and to treat the announcements of the law as legal acts. Fuller does not think that the ability to coerce should be regarded as one of the characteristics of the law. He argues that focusing on hierarchies of law and on the application of force does not take into account the important aspects of internal morality of the law, such as what should be the right solution, etc.

[46] In their earlier writings, Zimring and Hawkins attempted to speculate about the possible means by which price, morality, and consensus interact from a perspective of state-initiated social control (Frank Zimring & Gordon Hawkins, *The legal threat as an instrument of Social Change,*27 J. Soc. Issues 33 (1971); Kirk R. Williams & Richard Hawkings, *Perceptual Research on General Deterrence: A Critical Review,* 20 L. & Soc'y Rev.545 (1986)). Research about the effect of formal sanctions on behavior examines also the relationship between deterrence (formal cost), normative validation (internalization), and social deterrence (social cost).

[47] Although it is possible that sanctions are less effective in the case of good people, at least perceptually being a good person makes one more likely to fear sanctions for various reasons. For example, Scholz and Pinney (John Scholz & Neil Pinney, *Duty Fear and Tax Compliance: The*

C. Moral language, good people versus bad people

If specificity can crowd out both motivation and cognition, in mirror fashion moral language can "crowd in" intrinsic motivation, especially among good people. Tom Tyler (1990), in his research on why people obey the law and in various follow-up studies,[48] has shown the importance of non-instrumental motivation, such as fairness in accounting, for compliance and performance. Some of the studies conducted in this tradition seem to build the behavioral foundation for the possibility of using the differences between types of people, in particular the differential likelihood that morality in the law has an effect on their behavior. The leading paper in this line of reasoning is by Aquino (2009), who demonstrates that people who are high on moral identity (in our terminology, good people) are likely to be affected by moral priming, whereas moral priming was found to have no effect on people who are low on moral identity (in our terminology, bad people).

V. Integrative principles

Admittedly, the connection between morality and specificity is not necessarily one way, but the traditional perception is that these two forces move in the same direction. Based on psychological accounts, and by combining them, we propose a taxonomy that provides the legal policy maker with a set of guidelines regarding the areas in which the costs of ambiguity exceed its benefits. Among the factors that we explore are the importance of the quality of compliance, the ability to measure and monitor compliance, the risk to society from noncompliance, and the differences in the level of intrinsic motivation of the target audience of the regulation.

Simply put, opportunistic people can have only one type of motivation, and that is to maximize their individual welfare without being sanctioned by courts. Their attempt to bypass the law is intentional and calculated. Thus, two things are known about them. First, it is unlikely that the law can achieve anything beyond compliance from them (no high performance), and therefore society should focus on obtaining at least compliance, without being concerned with crowding out effects, because no intrinsic motivation is assumed to exist in the first place. Second, because their bad behavior is likely to be intentional, society need not worry about the ability of ambiguity to cause them to engage in mindless evasion, the assumption being that they intend to behave badly.

Heuristic Basis of Citizenship Behavior, 39 Am. J. Pol. Sci. 490 (1995)) have found that people with a stronger sense of duty to pay taxes had a higher estimation of the chance of being caught.

[48]Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in their Communities?*, 6 OHIO ST. J. CRIM. LAW 231 (2008); Michael Wenzel, *The Impact of Outcome Orientation and Justice Concerns on Tax Compliance: The Role of Taxpayers' Identity*, 87 J. OF APPLIED PSYCHOL. 629 (2002); James L. Gibson, *The Legitimacy of the U.S. Supreme Court in a Polarized Polity*, 4 J. EMPIRICAL LEGAL STUD. 507 (2007). For an empirical demonstration of the limits of traditional economic models in the context of legal compliance, *see* Yuval Feldman & Doron Teichman, *Are all Legal Probabilities Created Equal?*, N.Y.U. L. REV. (2009).

Parts of the law, especially those with their origins in equity (Chancery), are often couched in ambiguous terms sounding in morality. For bad actors, this is an effective anti-evasion or anti-opportunism device, but the same directives, when processed by a good person, sound like common sense morality and do not crowd out intrinsic motivation. The idea is that equity – in that it preserves reasonable expectations, rewards good faith, extends mercy to good people, and fixes problems – works in favor of the good people and does not displace their intrinsic motivation but reinforces it if it is expressive, and ensures high performance. Bad actors may need to realize that the ambiguous equitable directive is exceptional, but the good person can naively take it as being general.

Where even good people may rationalize lack of compliance, the law must be specific even in the case of good people. But in order not to displace intrinsic motivation, which is the general mechanism at work in the case of good people, the directive should be narrow and exceptional as well as specific, and perhaps understood to be so by the good people. As for the bad people, the specific directive is sufficient if it does not allow for evasion. If it does allow too much room for opportunism, the backstop of equity aimed at the bad people takes effect. Thus, it is important to make specific directives seem narrow to good people. This may not be difficult because there is a specific-trumps-general principle at work in the law and in everyday reasoning.[49] For example, the general rule in property law is that an invasion of the column of space defined by the boundary around a parcel of land (ad coelum) is a trespass. But this rule is displaceable by specific rules like the doctrine of necessity, the public easement for air navigation, and private easements for driveways. More generally, specificity in the law can be understood as the general case for bad people, because like all specific directives it is backed by ambiguous anti-evasion devices. Bad people pay a great deal of attention to the letter of the law anyway, so additional specific directives will not change this. They merely join the general mass of specific laws that are protected against opportunism by the ambiguous ex post equitable standards.

As mentioned in the introduction, however, the present paper uses the principles of equity to improve the behavior of good people, not only to counter the opportunism of bad people. This task is a complex one because in contrast to the case of bad people, the ability of equity to improve the behavior of good people depends on their more complex motivational and cognitive predispositions toward the law. But this focus is more promising because it includes the possibility for variation in the effect of law on behavior, with the combination of moral language and ambiguity used to maximize performance rather than simply to ensure compliance.

[49] Henry E. Smith, *On the Economy of Concepts in Property*, 160 U. Pa. L. Rev. 2097, 2109-11, 2120-24 (2012)

We would like to note that even the mere distinction between good and bad people can vary according to which legal doctrine is at issue. In some cases, people's motivation aligns with the law, making them good, whereas at other times their motivation may not be aligned with the law, making them more likely to behave as bad people. When intrinsic motivation is aligned with the purposes of the law and specific rules could crowd out motivation, the purpose of equity is to prevent this from happening. When intrinsic motivation is not aligned with the purposes of the law, even good people may want to evade the law, and the combination of self-serving mechanisms and ambiguity could make it easier for them to do so. Hence, preventing an unintentional self-serving interpretation of the law is especially needed when motivation is not aligned with the law. Below we use the terms "bad" and "good" to designate the extremities of a spectrum of motivation on which particular actors may find themselves under different circumstances. One goal of a refined model is to analyze the notions of good and bad by examining them in detail.

A. Refined law and equity model

In this part we develop a model of law and equity that makes crucial use of the insights of behavioral psychology. We go beyond the rational actor paradigm by allowing ambiguity to have a different effect on good and bad people and to vary in the extent of its effect within each group, depending on factors such as whether the law is aligned with the purposes of the group. To obtain this resolution requires unpacking motivation in a way that the classic rational actor paradigm avoids. At first, such an approach may appear unpromising because the psychological literature seems to imply that the ambiguity of legal directives has to do with very fine-grained cues that point in different directions, making them useless for designers of legal directives. We argue that law and equity, traditionally and even more so as a functional theme in the law, permit one to thread the needle between the level of grain in motivation to benefit from the mechanisms identified in the psychology literature on one hand, and to implement its insights in a sufficiently simple way so as to be realistic on the other.

Both behavioral economics and behavioral ethics point to the need to analyze situations with a finer grain keyed to the actors' motivations, and indicate that the nature of the legal directive, including its specificity and moral content, induce different behavior in different actors. This seems like a counsel of despair. Especially dispiriting is the idea that the legal directive may disturb initial motivation, making the consequences of specificity and moral language in a directive difficult to follow through. One may think that the law, if it is to deal on this level at all and not simply ignore the problem, would have to differentiate situations very finely based on a variety of features, including those of the actors involved in those situations, and issue directives one by one to cover a vast and varied field. This is not an appealing prospect, both because such a system would be costly to devise and update, and because it runs the risk of sending confused messages to legal actors. How does the

law target narrow types of situations and particular types of actors with their varied motivations in this situation-by-situation fashion?

We suggest that there is a way out of this problem, and it involves combining the notion of acoustic separation with the behavioral considerations that inform our taxonomy. Managing the complex psychological problem with the relatively simple legal technology relies on a cluster of ideas about how different legal actors receive the messages of the law. Central to our model is the idea that the same message can have a different impact on different legal actors, depending on their motivations and focus. Legal directives are intended to reach an audience. Not all members of the audience are similar in relevant respects. At the most basic level, a recipient of a message extracts more or less information from a given message depending on how much information the recipient already has.[50] For example, if A knows that C lives in Illinois but B does not know it, and both A and B receive the message that C lives in Springfield, A knows where C lives but B does not. In the legal system, information directed at knowledgeable actors can be more compressed and skeletal because of the information the actor already possesses.[51] Thus, patent law presupposes more knowledge in duty holders than does copyright, and by extension, the duties under a contract are allowed to be much more detailed and idiosyncratic than is the content of in rem property rights.

Sometimes the division of law into audiences can lead to separate messages being received by multiple audiences without excessive interference between the messages, even if there is tension between them. This has been dubbed "acoustic separation" by Meir Dan-Cohen, who has explored the idea in the area of criminal law. In Dan-Cohen's model, the law can in principle send two separate messages to two separate audiences.[52] Thus, the law consists of conduct rules directed at primary actors (the public) and decision rules aimed at guiding legal decision makers (especially judges). Criminal law may be couched in what sounds like a categorical way to the ordinary observer, but that signals to judges when leniency is called for. According to Dan-Cohen, the linguistic form of a rule does not determine its function, and the two functions can be served by different rules as long as there is not too much cross-talk – in other words, if there is acoustic separation between the two audiences.

For the present paper, the multiple potential audiences are groups of primary actors rather than primary actors versus official decision makers. Moreover, we argue that the same literal message is received by both groups, but what they derive from it depends on their motivation and focus. In our understanding, the problem that

[50] *See* FRED I. DRETSKE, KNOWLEDGE & THE FLOW OF INFORMATION 43 (1981) ("What one learns, or can learn, from a signal... and hence the information carried by that signal, depends in part on what one already knows about the alternative possibilities").
[51] Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105,1148–57(2003).
[52] Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 Harv. L. Rev. 625 (1984).

behavioral considerations pose is the potential for too many types of rules and audiences, with the greater attendant danger of acoustic non-separation. Dan-Cohen explores the fact that criminal law can consist of conduct rules and decision rules that are different: for example, "let no man steal" is a conduct rule, whereas "let the judge cause whoever is convicted of stealing to be hanged" is a decision rule. Dan-Cohen resists the idea that one can be reduced to the other. He notes that according to Austin, judges merely "apply" conduct rules, and that Kelsen tried to collapse conduct rules into decision rules, on the assumption that primary actors respond to the prospect of legal decision makers following the decision rule. But in principle conduct rules and decision rules need not be the same; they can be independent.

Below we build into our model a special kind of acoustic separation. We assume that some actors are aware of both the conduct rule and the decision rule, whereas others are aware of the conduct rule. In the extreme, evasion is a problem where bad actors are aware not only of the conduct rule but also of the consequences of behavior as far as the decision rule is concerned, and they are focused on both. They are ready to game the system as a whole, and they have the requisite knowledge for such gaming.

What about the good people at their best, who are not aware of the decision rule or at least are not focused on it? These garden variety people can receive a good deal of leniency without upsetting the system because they are not evaders. In Dan Kahan's terms, the law can afford not to achieve exact compliance for this group of people.[53] The legal system should afford a safe harbor for these actors, who generally sense that by following their moral inclinations they are not likely to run afoul of the law.

Unlike classic acoustic separation, however, we add a new twist that makes the legal system better able to juggle the two audiences: the same literal message can serve as an anti-evasion device for bad actors while not interfering with the intrinsic motivation of the good actors, or even promoting it. As we have seen, equity is couched in moral terms (clean hands, not profiting from one's own wrong, equity as a court of conscience). To the evaders, the system sends a message that it is reserving the second move in order to counteract evasionary behavior, even if it appears in a new guise. The same moral norms will have an appeal to the good people not as a legal message but as reinforcement of existing moral norms. Thus, equity avoids crowding out intrinsic motivation, and in some cases can even promote moral deliberation.[54]

[53] Dan M. Kahan, *Ignorance of the Law* Is *an Excuse – But Only for the Virtuous*, 96 Mich. L. Rev. 127 (1997).
[54] Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 Harv. L. Rev. 1214 (2010).

To further specify the nature of the different audiences, we draw on the notion of regulatory focus. In Higgins's theory, "regulatory focus" refers to the orientation of primary actors either to the promotion of a desirable state or to the prevention of an undesirable one.[55] The promotion focus corresponds to an active and engaged stance and a tendency toward taking greater risk; the prevention focus is associated with an orientation to preservation, greater caution, and risk avoidance.

In four experiments, Francesca Gino and Joshua Margolis have found that they can induce regulatory focus in such a way that subjects who were primed for a promotion focus were more likely to cross an ethical line than were subjects primed for a prevention focus.[56] The promotion focus encourages risk-seeking behaviors, including ethical stretches. In another study, Francesca Gino and Dan Ariely found that more creative people were more likely to engage in dishonest acts because they were better able to engage in divergent thinking to devise new tricks and more cognitively flexible about integrating the unethical behavior into their positive moral self-image (the authors tested for the latter).[57] In our model, bad people can be seen as having a prevention focus when in compliance mode and a promotion focus as evaders. Evasion is a matter of bad creativity. What about good people receiving the "same" equitable message? We can say that they are in promotion mode, but their focus is not on the law but on the moral norm itself.

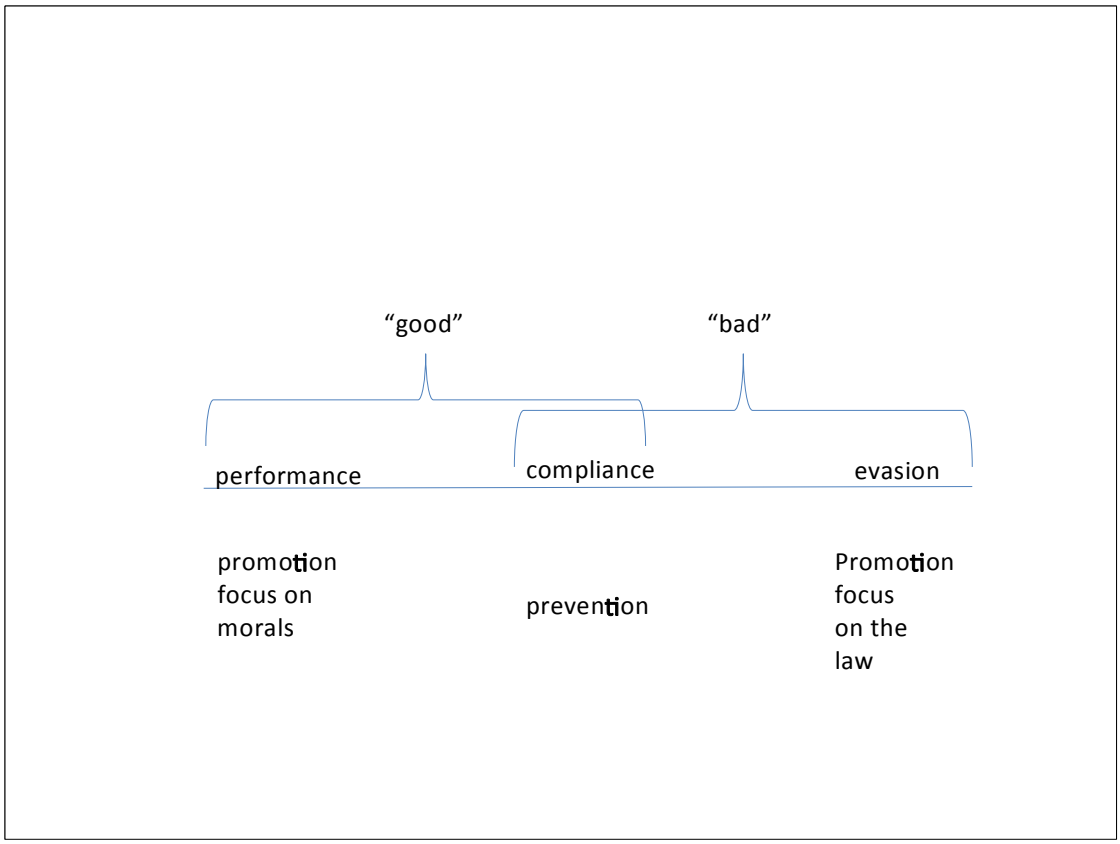
We therefore consider how the same literal message can have a differential effect on good and bad people (or people in good and bad mode). The law is ambiguous and morally inflected exactly where there is a crucial overlap in the literal message in our model. If designed properly, such messages reinforce intrinsic motivation in good people, thereby promoting high performance. At the same time, the ambiguous morally infused message serves as a warning to opportunists that they can be sanctioned even if they evade the letter of specific provisions of the law (if they engage in opportunistic evasion of the directives of the law). We call this dual-function set of non-specific morally inflected commands "behavioral equity."

Our model rests on an assumption that good and bad people have different information about the law and a different orientation toward it. Bad people have information about the law, both as conduct rules and as decision rules. (This includes otherwise good people who are induced by some factor to engage not only in motivated reasoning but outright conscious evasion.) Bad people respond to the content of specific directives, thus promoting compliance. When they have too much information about loopholes ex ante they also have sophisticated knowledge about the

[55] E. Tory Higgins, *The "Self Digest" Self-Knowledge Serving Self-Regulatory Functions*, 7 J. of Personality and Social Psych. 1062 (1996).
[56] Francesco Gino & Joshua D. Margolis, *Bringing Ethics into Focus: How Regulatory Focus and Risk Preferences Influence (Un)ethical Behavior*, 115 Organizational Behavior and Human Decision Processes 145 (2011).
[57] Francesca Gino & Dan Ariely, *The Dark Side of Creativity: Original Thinkers Can Be More Dishonest*, 102 J. Personality & Social Psych. 445 (2012).

role of equity as an ex post device to counter their evasive moves. Thus behavioral equity is vague ex ante but specific, as a second mover, ex post.[58] By contrast, the good people regard the law from a less detailed perspective and want to know merely that the law accords with their sense of what is right. They do not need or want to know much detail, and in some circumstances can be expected to fill it in with their own sense of morality. For these actors it is important for the law not to intrude with too much specificity, especially specific information that may seem to conflict with basic extra-legal morality.

We take from the acoustic separation model the notion that a legal directive can do double duty: the same literal message can be received in different and even contradictory ways by different audiences, without one communication interfering with the other.



[58] Although the ex ante perspective is often associated with law and economics, the role of equity as intervening ex post can be captured in the rational actor model. Kenneth Ayotte, Ezra Friedman & Henry E. Smith, A Safety Valve Model of Equity as Anti-Opportunism (Draft, March 30, 2013) Northwestern Law & Econ Research Paper No. 13-15, available at SSRN: http://ssrn.com/abstract=2245098. The opportunists are crucially aware ex ante about what might happen ex post if they engage in opportunism. The garden variety good people have a simpler ex ante perspective that the law accords with their moral outlook, and for our present purposes one might identify their ex ante perspective with intrinsic motivation along with the promotion focus on morality.

The hypothesis is that both specific and especially ambiguous directives do double duty, and there is acoustic separation in the sense that good and bad people are intended to interpret a given directive differently with regard to its generality.

Thus, specific commands are directed to those with a prevention focus, who do not want to be on the wrong side of the law. Here, with the actors depicted in the center of the figure, the emphasis is on compliance rather than performance. The audience is not especially "good" or "bad" and approximates the picture of actors in the rational actor models. On the left in the figure, vague moral directives elicit high performance from actors who have a promotion focus on morality. The vague moral directives do not crowd out and if anything dovetail with and reinforce the actor's moral sense. These actors can be thought of as especially "good" or motivated in a positive, moral way. On the right hand side of the figure are the evaders. They are those with a promotion focus on the law, willing to use their knowledge of law as a set of conduct and decision rules to further their narrow interests. These are the "bad" actors who are creative but in a socially destructive fashion. Vague moral directives – the "same" ones that are aimed at the "good" people – will to the evaders with their promotion focus on the law be interpreted as decision rules that reserve second mover status for legal decision makers who will thwart and counter the evaders using moral standards. The left and right ends of this spectrum are the joint target of behavior equity with its special kind of acoustic separation.

Our model also suggests reasons why it has been difficult to observe behavioral equity at work in the law, even if implicitly. The assumption of uniform legal actors, or at least simply rational ones, has tended to obscure how legal directives can do double duty. In our model, law and equity do double duty in different ways. Equity sends a non-specific moral message to two different groups, the good and the bad, with different effects, enhancing performance and discoursing evasion, respectively. The "law," in the narrow sense, as distinguished from equity, uses specific commands that are not necessarily moral (positivistically, one may say) but have a similar effect on similar people. That is, when good people are engaged in motivated reasoning, it sometimes makes sense to lump them in with the bad. The law as a set of specific commands seems to be paradigmatic because it is directed at "everyone" some of the time. This seeming comprehensiveness may make it appear that specific law is all there is to real law, and that the law is really directed at the Holmesian "bad man."[59] The good people and the evaders then end up being peripheral embarrassments. Behavioral equity can bring these actors back into the picture, in one fell swoop.

Consider an illustrative example of behavioral equity, from the field of trespass and building encroachments. The basic message in this case is "keep off,"

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

and the law tracks basic morality.[60] It also shades off into a more cooperative morality when it comes to nuisances and problems like overhanging trees (the law of neighbors).[61] The traditional rule has been that equity does not enjoin a mere trespass.[62] This is somewhat startling at first because trespass has often been regarded as the basic rule delineating legal things and giving them their most stringent protection. It is not even required to show harm for there to be a trespass, and punitive damages and restitution (disgorgement) have been used as remedies for trespass. On closer look, however, trespass saves its real firepower for the bad actor while sending a seemingly strict and morally inflected message to good people. Someone who engages in a related, continuous trespass is subject to a fairly automatic injunction.[63] In *Jacque v. Steenberg Homes*,[64] $100,000 in punitive damages were imposed on the trespasser precisely because it was gaining the system: the company's foreman knew that delivering a mobile home across the snow field of the elderly farming couple would not cause much measurable damage and he found overriding their objections to be amusing.

Ordinary good people can go about their business not committing trespasses or committing *de minimis* ones without worrying about liability (although technically there is liability in the latter case). The law sends a reassuring message that property rights are important, but normal good behavior will not be penalized. But those who know too much about the rules and who might be tempted to take opportunistic advantage of leniency for minor trespasses will find that the strict message of the law will indeed be upheld strictly in their case. The evasionary and the motivated receive the same literal message as the moral or "good" actors but take away a different meaning: there is acoustic separation supporting behavioral equity.

Equity also touches upon excuses, which resonates with the notion of leniency in criminal law. As in Kahan's account of mistakes and lenity in criminal law, equity offers its excuses differentially. To continue with the law of trespass, the "general" rule in building encroachments is that they are continuing trespasses and therefore subject to injunction. Nevertheless, a small encroachment done in good faith (by mistake) is often partially excused in the sense that the remedy is damages rather than an injunction.[65] This solution is often placed under the heading of undue or

[60] Thomas W. Merrill & Henry E. Smith, The Morality of Property, 48 Wm. & Mary L. Rev. 1849 (2007).
[61] *Id.*
[62] *See* Justices of Pike Cnty. v. Griffin & W. Point Plank Rd. Co., 11 Ga. 246, 250 (1852) ("It is well understood that Equity will not interfere in a case of a mere trespass").
[63] Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 235-37 (2012).
[64] 563 N.W.2d 154 (Wis. 1997).
[65] *See* Golden Press, Inc. v. Rylands, 235 P.2d 592 (Colo. 1951); Raab v. Casper, 124 Cal. Rptr. 590 (Cal. Ct. App. 1975) (California Good Faith Improver Act); Kelvin H. Dickinson, *Mistaken Improvers of Real Estate*, 64 N.C. L. Rev. 37, 42-49 (1985).

disproportionate hardship,[66] so that if the injunction inflicted far greater harm on the enjoined party (the violator) than it would benefit the moving party (whose rights were violated), a court can exercise its discretion, and it regularly does so, to lessen the remedy to damages. But if the encroachment was carried out in bad faith, the full injunctive remedy applies, regardless of the amount of hardship. This is acoustic separation in behavioral equity. Society wants the good people to try their best within reason, without being paranoid about the boundary in the form of over-compliance.[67] There is a low cost of ex post monitoring in this case (locating the boundary), the assumption being that most people are good (non-opportunistic) and in a promotion mode, focused on morality. The doctrine announces a set of directives that accords with everyday morality and sends the general message that reasonable behavior never leads to dire consequences. For those in prevention mode and focused on the law, the message is equally clear: obtain a good survey. But as soon as there is reason to suspect someone of evasion, the law is unyielding. Thus, the same message is delivered to people along the entire good-bad spectrum with differential behavioral effect.

B. Tentative taxonomy

Depending on the domain of law, ambiguity can be shown to have conflicting effects on optimal performance. What factors are important when thinking about the optimal specificity of law and the need to use moral language? Based on our previous arguments, it seems that there are four main factors that must be taken into account:

1. Relative costs and benefits of performance, compliance, and evasion
2. Cost of measurement and monitoring
3. Ratio of opportunists to good people
4. Alignment of specific doctrine with intrinsic motivation

For example, in corporate criminal liability, the combination of uncertain standards and high-risk sanctions leads to over-compliance by corporations.[68] In contrast, with contracts, ambiguous terms improve performance, potentially by engendering trust

[66] Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM.L.REV.203, 226 (2012); Henry E. Smith, An Economic Analysis of Law Versus Equity, October 22, 2010 (working paper), available at: http://www.law.yale.edu/documents/pdf/LEO/HSmith_LawVersusEquity7.pdf; Douglas Laycock, The Neglected Defense of Undue Hardship (and the Doctrinal Train Wreck in *Boomer v. Atlantic Cement*), 4 J. Tort L., no. 3, 2012, at 1, 4-5.

[67] *See* Stewart W. Sterk, *Property Rules, Liability Rules, and Uncertainty about Property Rights*, 106 Mich. L. Rev.1285 (2008); *see also* Vincenzi Denicolò et al., *Revisiting Injunctive Relief: Interpreting eBay in High-Tech Industries with Non-Practicing Patent Holders*, 4 J. Competition L. & Econ. 571 (2008).

[68] *See* V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 Harv. L. Rev. 1477, 1514 (1996); *see also* Kyle Logue, *Optimal Tax Compliance and Penalties When the Law Is Uncertain*, 27 Va. Tax Rev. 241 (2007) [draft p. 22 (Univ. of Mich., Working Papers 2003-2010. Working Paper 66, 2006)]

between the parties,[69] and by encouraging flexibility and cooperation.[70] We can only sketch out here some possible applications of the theory of behavioral equity:

(i) *Driving*: At first glance driving looks simple because speed limits are among the laws that everyone is familiar with. Behavioral equity helps explain why driving is mostly but not entirely about compliance.

In the case of driving, a second factor, the cost of measuring performance, together with some other salient dimensions, is relatively low; therefore, the familiar picture of law as rules commanding behavior and backed up with punishments to deter non-compliance seems close to capturing the reality. Perhaps the best-known traffic rules involve speed limits, which are easily measurable. It is true that a stock example from the literature on rules versus standards contrasts numeric speed limits with mandates to drive reasonably.

Upon closer inspection of driving, interest in performance sometimes joins the interest in compliance, but in a way that may not be legally salient and that does not involve much of the acoustic separation in equity. Even with respect to speed, the law usually combines a numeric maximum speed limit with a command to drive reasonably under the circumstances. In addition, tort law requires drivers to act non-negligently. This potentially involves many dimensions of behavior, of which the law tends to focus on a few.[71] Moreover, insurance companies, which are the channel for much of the deterrence of tort law, employ rules of thumb for assigning fault. For example, in rear-end collisions the driver of the second car is deemed at fault. Some drivers may be aware of this and others not, but these rules are probably successful because they are difficult to evade.

On our spectrum, most behavior falls under a promotion focus on morals or a prevention focus on the law, with a promotion focus on the law being relatively rare. Under these circumstances, we expect the law to address some detachable issues like speed with numeric targets, backed by a combination of rules and standards, responding to such standard considerations from law and economics as whether ex ante specification is cost-effective depending on the frequency of the type of behavior, and the like.[72] The behavioral model adds the idea that drivers may require rules aimed at compliance when they have more of a prevention focus on the law.

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[69] *See* Eileen Y. Chou et al., The Relational Costs of Complete Contracts, 11-12 (IACM 24th Annual Conference Paper, 2011)

[70] *See* Yadong Luo, *Contract, Cooperation, and Performance in International Joint Ventures*, 23 Strat. Mgt. J. 903, 905-906 (2002)

[71] James M. Anderson, *The Missing Theory of Variable Selection in the Economic Analysis of Tort Law*, 2007 UTAH L. REV. 255 (2007); Giuseppe Dari-Mattiaci, *On the Optimal Scope of Negligence*, 1 REV. L. & ECON. 331 (2005); Henry E. Smith, *Modularity and Morality in the Law of Torts*, J. TORT L., no. 2, art. 5, 2011.

[72] *See* Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 Duke L.J. 557 (1992).

What makes driving special is that the legal interventions seem not to involve much cross-talk. In general, we may worry about how well rules such as speed limits and the rear-end collision insurance rule of thumb can be separated from the general message to act responsibly. It is worth asking whether numeric speed limits, in a form of crowding out, induce people not to take rainy conditions as seriously as they might otherwise. But overall, the law appears to reflect a judgment that treating driving as a matter of compliance does not interfere with performance. What we seem not to need in the case of driving is a special acoustic separation in equity. The lore about driving does not seem to include outright opportunists looking for loopholes in rules like speed limits. Thus, the right hand part of our spectrum largely falls out of the picture in the case of driving. Overall, when it comes to what explicit law (as opposed to car commercials) suggests, driving is more about compliance than performance.

(ii) *Service contracts*: Contracts for services cover much ground, and we cannot do more than hint at directions for further work. Many of the equitable maxims and defenses are employed in contract cases, including clean hands and the requirement that one who seeks equity must do equity. These moralizing maxims can be used to counteract opportunism, but they also directly restate what someone with a promotion focus on morality would see as common sense.

Some contracts involve performance that is difficult to measure. In relational contract theory, as elaborated by Oliver Williamson, opportunism arises when uncertainty is at its greatest. Although transaction cost economics has primarily focused on ex ante contractual devices, ex post devices can be used to deal with some opportunism.[73] Even without acoustic separation, the greater the proportion of opportunists, the stronger the case for equitable intervention.[74] In general, the more relational or multidimensional the contract is, the greater the concern about the impact of performance measures on intrinsic motivation. But behavioral equity can partially overcome this trade-off because it is couched in non-specific moral terms that need not displace the intrinsic motivation of those with a promotion focus on morality.

To take a prominent example, good faith has always been considered a prime manifestation of equity. It is often said that the doctrine of good faith, which is at the heart of contract law, is designed to protect people's (especially consumers')

[73] OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING (New York: Free Press 1985). Williamson mentions how the excuse doctrine can be used ex post to counteract opportunism. Oliver E. Williamson, *Cooperative Economic Organization: The Analysis of Discrete Structural Alternatives*, 36 Administrative Science Quarterly 269, 272 (1991). For further discussion, see Kenneth Ayotte, Ezra Friedman & Henry E. Smith, A Safety Valve Model of Equity as Anti-Opportunism (Draft, March 30, 2013) Northwestern Law & Econ Research Paper No. 13-15, available at SSRN: http://ssrn.com/abstract=2245098.

[74] *Id.*

legitimate expectations.[75] Now it is more clear why. It is consistent with behavioral equity and its acoustic separation.

The problem of fiduciaries can be seen as an extreme case of a service contract vulnerable to opportunism. Some view the fiduciary as a particular type of service contract in which the agent is particularly difficult to monitor. Moreover, the separation of the function of the fiduciary from its other interests leads to the potential for opportunism.[76] The problem of opportunism is extreme here, leading to a near-mandatory equity regime.

Overall, we suggest that applying behavioral equity to contracts reveals the importance of performance, even when it comes to legal intervention. This is an important supplement to the rational actor paradigm, and even to transaction cost economics that incorporates bounded rationality, because it points to the importance of protecting intrinsic motivation and the possibility of addressing good people and opportunists differently with the same equitable message.

(iii) *Taxes*. In taxation, ambiguity can lead to over-compliance. In the corporate context, ambiguity leads to corporations overpaying by spending vast resources preparing for potential legal battles with the IRS.[77] Individuals arguably overpay as well, with as much as 91.7% of income properly reported despite fewer than 1% of returns being audited.[78]

Tax evasion has a long history of being studied under an amoral actor theory, where it is assumed that taxpayers make their decision on how much income to report based on the likelihood of detection and the size of the fine.[79] But recent research indicates that an amoral actor theory cannot account for the high rate of compliance, and experimental research shows that there are moral considerations underlying it.[80] Because enforcement is costly, optimal enforcement and actual enforcement rely on leaving low probabilities of detection and increasing the cost of the sanction well

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[75] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981) ("Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party...").

[76] *See, e.g.*, Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character And Legal Consequences*, 66 N.Y.U. L. Rev. 1045, 1048-51 (1991); Ming Wai Lau, The Nature of the Beneficial Interest – Historical and Economic Perspectives, working paper, available at: http://www.law.harvard.edu/programs/about/privatelaw/related-content/the_nature_of_the_beneficial_interest-historical_and_economic_perspectives.pdf; Henry E. Smith, Property as Platform: Coordinating Standards for Technological Innovation (Draft April 18, 2013).

[77] *See. e.g.*, Rachelle Holmes, *Forcing Cooperation: A Strategy for Improving Tax Compliance*, 79 U. Cin. L. Rev. 1415 (2011).

[78] *See* James Andreoni et al., *Tax Compliance*, 36 J. Econ. Lit. 818, 822 (1998).

[79] *See, e.g.*, Michael Allingham & Agnar Sandmo, *Income Tax Evasion*, 1 J. Pub. Econ 323 (1972)

[80] *See* Benno Torgler, *Speaking to Theorists and Searching for Facts*, 16 J. Econ. Surv. 657, 662-663 (2002)

above the actual cost of the crime.[81] With tax, it is also important to study the effects not merely of over-compliance, as just noted, but also of intrinsic motivation, motivated reasoning, and evasion. Klepper and Nagin find some support that the presence of ambiguity encourages under-compliance, as people enjoy plausible deniability for having made a mistake, thus lowering the likelihood that they will be sanctioned. Sol Picciotto notes three levels of ambiguity that affect tax law: (a) the social nature of constructing language, which can especially lead to ambiguity where there is no physical referent such as income tax; (b) the notion that the broader the penumbra of a rule, the more difficult it becomes to know how it applies at the edges; and (c) ambiguity in the underlying values that animate the legal standards themselves.[82] Picciotto looks at solutions that begin by establishing overall purposive principles that are binding, and then elaborating rules that may or may not themselves be binding, in order to help lend clarity to when this system applies.[83] [84]

Behavioral equity allows us to get beyond the familiar debate over performance models and more recent compliance models. Instead, we start from the possibility that taxpayers have different motivations[85] and that they may have different motivations in different contexts. The problem with evasion is too much knowledge, which can provide a rationale for standards.[86] Anti-evasion doctrines like the sham doctrine, substance-over-form, or the step-transaction doctrine can be aimed at the evaders who have a promotion focus on the law and who exercise their creativity in a bad way. At the same time, these doctrines are unknown to those with a promotion focus on civic duty, or the doctrines simply dovetail with their moral expectations. If the evasion problem is not large enough, specific rules can be and are used. In this case, specificity causes compliance among non-evaders, i.e., people without a promotion focus on the law, including those with a *prevention* focus on the law (in the middle of the spectrum). Good people's mild efforts at evasion (shading) are unintentional, and therefore they do not think about the courts or about enforcement but focus on trying not to think about what the law wants from them. Likelihood of enforcement is more important for bad people than for good people. Hence, for example, higher punishment for lack of good faith is especially important to curb evasion by bad people and not by good people. Moreover, the easier the rule is to monitor and the lower the ratio of opportunists to other people, the more feasible this approach is. In other words, whether a compliance or a performance model is more important depends on factors suggested by the psychological theory. In

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[81] *Id.* at 40.
[82] *See* Sol Picciotto, *Constructing Compliance,* 29 Law & Pol'y 11, 15-16 (2007).
[83] *See id.* at 25-26.
[84] *See* Steven Klepper & Daniel Nagin, *The Anatomy of Tax Evasion*, 5 J. L. Econ. & Org. 1, 6 (1989)
[85] Alex Raskolnikov, *Crime and Punishment in Taxation: Deceit, Deterrence, and the Self-Adjusting Penalty*, 106 Colum. L. Rev. 569 (2006).
[86] *See, e.g.*, David A. Weisbach, *Formalism in the Tax Law*, 66 U. Chi. L. Rev. 860 (1999); *see also* Stanley S. Surrey, *Complexity and the Internal Revenue Code: The Problem of the Management of Tax Detail*, 34 L. & Contemp. Probs. 673, 707 n.31 (1969); *see also* Sarah B. Lawsky, *Probably? Understanding Tax Law's Uncertainty*, 157 U. Pa. L. Rev. 1017, 1032 (2009).

addition, in acoustic separation the message sent to the worst actors has little chance of crowding out the intrinsic motivation of the best ones.

In sum, behavioral equity captures both the importance of evasion on the one hand and the tension between performance and compliance on the other. Most intriguingly, it suggests how vague ex ante and moral ex post intervention can address the worst evaders without unraveling performance by honest people.

VI. Limitations and conclusion

In the present paper we attempted to revisit some of the rational choice models of the interaction between equity and law. We suggested that adding insights from behavioral economics and behavioral ethics would allow us to offer a richer and more accurate model of the optimal specificity of law and of the employment of moral language and sanctioning. The works reviewed in this paper have enabled us to make accurate predictions about the behavior of people, accounting for differences between them, their motivations regarding the law, and the likely effect of various forms of law on their behavior. The behavioral perspective also allowed us to compare intentional and unintentional misconduct, compliance and performance, and ability and measurement issues associated with different legal situations. Based on these insights we offered some tentative ideas for incorporating a hybrid approach that accounts for both rational and behavioral aspects of the effect of equity on people's behavior.

In behavioral equity, the law uses vague moral directives to reach two groups simultaneously: the "good" people with a promotion focus on morality and the "bad" people (opportunists, evaders) with a promotion focus on the law. Behavioral equity can simultaneously promote performance and avoid crowding out intrinsic motivation for the former, while holding a sword of ex post intervention against the latter. The evaders with their promotion focus on the law have knowledge of how equity will be used ex post as a rule of decision as well as of conduct, whereas actors with an ethical focus will regard the law as consisting of conduct rules that dovetail with their moral expectations. Specific rules are used for actors, whether we regard them as good or bad, who have a prevention focus on the law. Specific rules here aim for compliance, in areas where motivation for performance is not as important. We offered some illustrative examples, from driving, service contracts, and tax, to show how this model of behavioral equity and the richer taxonomy on which it draws can offer explanations for and pointers to improvement in the various mixed forms that legal directives take in different areas of the law.

We naturally had to make some compromises to produce usable models. For example, for purposes of simplicity we separated people into good and bad. There is much to be said about the feasibility of this dichotomy from various angles. Many

other bodies of theory categorize people into three groups. For example, Kelman[87] presents a threefold model of the various processes of social influence[88] that includes compliance, identification, and internalization. Those are somewhat related to Kohlberg's cognitive approach to moral development. According to Kohlberg,[89] there are six stages divided into three levels: pre-conventional, conventional, and post-conventional.[90] MacCoun[91] suggests that those at the pre-conventional level care mostly about deterrence, the conventional person cares mostly about norms, and the post-conventional person cares mostly about intrinsic motivation and is less concerned with fear of the law.

Opening the rational choice assumption to a richer typology of people extends also to other aspects that are not entirely clear, such as the stability of preferences and motivations to comply, the likelihood that intrinsic motivation is aligned with the law without external intervention, and the ability to correlate aspects such as morality, risk perception, and reputation concerns of people designated as good and bad. Further theoretical and experimental work is needed to better capture the dichotomy advocated here. This would improve the ability of the law to base the optimal specificity of law and equity on a richer dichotomy than that presented in this paper. Using such an approach, the use of equity could be tailored more accurately to the need to reduce evasion by some people and to increase performance and commitment by others.

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[87] The original model was formulated by Kelman in 1958, Herbert C. Kelman *Compliance, Identification And Internalization Three Processes Of Attitude Change*, 2 Journal of Conflict Resolution 51 (1958). For a more developed discussion of the theoretical justification of the view that these models are separate, and for an outline of their relationships with other models, *see* Herbert C. Kelman, *Process of Attitude Change*, 25 Public Opinion Quarterly 78 (1961); HERBERT C. KELMAN & LEE HAMILTON, CRIMES OF OBEDIENCE 103 (1989).

[88] While Kelman, *id*, focuses on the qualitative differences that may activate different processes, we are interested in a reasoned action model, in which the individual needs to make a decision about a specific scenario. In this case, all factors seem to be relevant to the decision, the main question being whether or not these factors have an independent effect.

[89] *See*, for example, Lawrence Kohlberg, *Moral development and identification*, in H.W Stevenson (ed.) Child psychology, The sixty-second yearbook of the natural society for the study of education, Chicago: University of Chicago Press. Lawrence Kohlberg, The psychology of moral development: the nature and validity of moral stages (Harper and Row 1984).

[90] These levels are sometimes referred to in the context of obedience to law as rule obeying, rule maintaining, and rule making. June Louin Tapp & Lawrence Kohlberg, Developing senses of law and justice, Pages 89-105 in June Louin Tapp and Felice J. Levine, eds., Law, Justice, and the Individual in Society 89, 92 (New York: Holt, Rinehart and Winston1977).

[91] Robert J. MacCoun, *Drugs and the Law: A Psychological Analysis of Drug Prohibition*, 113 PSYCHOLOGICAL BULLETIN 497 (1993).