BYU Law Review

Volume 2007 | Issue 5 Article 2

12-1-2007

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> [A] bad man has as much reason as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law. A man who cares nothing for an ethical rule which is believed and practised by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can.
>
> -Oliver Wendell Holmes[1]

> [U]pon the stage of life, while conscience claps, let the world hiss! On the contrary if conscience disapproves, the loudest applauses of the world are of little value.
>
> -John Adams[2]

I. INTRODUCTION

Over the past two decades, legal scholarship has shown a growing interest in the relationship between law and the human conscience. With the rise of the law and norms movement, scholars have begun to abandon Holmes's classic archetype of the "bad man"—for whom the law is no more than a system of external punishments and rewards—and instead explore the possibility that ethical and moral beliefs are affected by law. These scholars have recognized, as John Adams did, that an individual's normative

* Appellate Staff, Civil Division, U.S. Department of Justice. J.D., Yale Law School, June 2004. Thanks to Dan Kahan, Alvin Klevorick, and especially Robert Ellickson for their advice and encouragement during the development of this work. The views expressed in the following pages are solely those of the author, and do not express the opinion or policy of the Department of Justice or any other governmental agency.

1. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897), *reprinted in* 78 B.U. L. REV. 699, 700 (1998).

2. DAVID MCCULLOUGH, JOHN ADAMS 38 (2001), *quoting* 1 PAPERS OF JOHN ADAMS 12 (Robert J. Taylor ed., 1983).

commitments often provide a stronger bond than the constraints of law or society. They have accordingly set out to evaluate the law not merely as a method of deterrence, but also as a way to shape the moral codes of bad men for the better.

This research has led some authors to conclude that the law can promote both deterrence and desirable moral commitments at the same time. If this is so, then legal enforcement can provide benefits twice over: it can compel bad men to forego their bad deeds (a la Holmes), while simultaneously molding individuals' internal preferences to make bad acts inherently less attractive. Under such a view, the "legalization" of morals would be a particularly effective tool for achieving compliance.

This Article suggests that such a notion may be mistaken. Modern developments in psychology demonstrate that the hopeful assumption of synergy between law and morality, while a step forward from the immutable Holmesian "bad man," remains an incomplete picture of law's influence. Indeed, acting upon such an assumption may undermine the very compliance that the law seeks to promote.

Drawing on psychological research—in particular, "cognitive evaluation theory" (CET)—this Article offers a model of legal influence that reveals the often-hidden tension between society's attempts to promote a common morality and its attempts to enforce a legal regime. Contrary to a substantial portion of the law and norms literature, this model predicts that society may face an unenviable choice between enforcing a desired behavior through state sanctions and cultivating that behavior through moral commitments, because the former technique will work to the detriment of the latter. As a result, legal enforcemeut may produce a weaker effect than traditional cost-benefit analysis would suggest, and in extreme cases may even increase society-wide deviauce.[3]

Part II locates the Article's theoretical model within the current law and norms debate. It describes the work of scholars who have suggested a positive relationship between law and normative commitments, as well as the theories of skeptics who have taken the

3. This is not to suggest that the cultivation of morality or preferences is necessarily a desirable or appropriate function for the state. The focus of this Article is merely descriptive: it seeks to assess the different reasons that individuals may comply with law, and to determine how these various motivations interact when legal regimes change.

opposite view. Both of these perspectives contribute certain elements to the Article's model, and Part II serves to illuminate those contributions while distinguishing the new model from those that have preceded it.

Part III defines the contours of CET and builds the Article's model accordingly. The Part begins by briefly examining the studies supporting cognitive evaluation theory. It then sets forth the simple cost-benefit analysis typically used to predict the law's effect on individual choice, and expands that model to consider how first-party normarive commitments can encourage or discourage compliance. The result is a new model rhar can account for the psychological interaction between law and first-party norms, offering a fuller picture of individual decisionmaking that incorporates not only external incentives, but also law's effect on the internal pangs of conscience.

Part IV tests the validity of the model by applying it in two contexts: mandatory voting and tax compliance. As the new model predicts, but the typical deterrence model does not, both of these legal regimes appear to face a tension between law and first-party preferences. Increased enforcement yields a smaller increase in compliance than might be expected under the traditional model, and in some instances yields a net decrease in compliance notwithstanding the harsher new legal regime.

Part V draws upon the significant prior work of law and norms scholars to consider two scenarios where the new model, undergirded by CET, appears to break down: the development of non-smoking norms in public spaces and the efficacy of seat belt laws. This Part uses both examples to develop an understanding of the limits of CET as a predictive theory. These examples help to illustrate how the negative effects of CET can be avoided and its positive effects harnessed, providing a richer role for CET in discourse regarding the choice and details of legal regimes.

II. CET'S PLACE IN LAW AND NORMS SCHOLARSHIP

The interaction between law and norms has only recently come to the forefront of legal scholarship. Preceded by rational choice theory and the law and economics movement, both of which generally took preferences to be exogenous to the legal model, law

and norms scholarship truly began to flourish only over the last two decades.[4] Even in this short time, however, numerous studies have reinforced that the law can have an impact—potentially a significant one—on the formation, preservation, or destruction of norms. As a result, the central question for law and norms scholars quickly shifted from whether the law could alter norms to how it could effect such a change.[5]

Many theorists displayed a profound optimism on this score, focusing on the law's potential to create or cement first-party normative commitments for the greater good. Other scholars, however, alleged a more sinister side to the law's effects, suggesting that new legal regimes might undermine the more informal methods that society often uses to prompt desired behaviors.

The psychological model of this Article represents a synthesis of these two veins of law and norms scholarship. Like the more optimistic theorists, the psychological foundation on which this Article relies—"cognitive evaluation theory" (CET)—addresses first-party effects, examining how individuals internalize their own normative commitments rather than how they interact with others in society. At the same time, this Article's first-party focus yields results in accord with the more skeptical works in the field. The distinct nature of this thesis is best understood in contrast to the theories that came before it. Accordingly, this Part examines prior law and norms scholarship and explains where the Article's new model fits into the larger framework of the law and norms debate.

A. The Law's Support of Internalized Norms

Many early law and norms theorists argued that the law could exert a positive influence on normative commitments, and a number of recent scholars have advanced a similar view. Although the details

4. For early works in this vein, see, for example, Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986) (arguing that norms and extra-legal sanctions, rather than law, govern interaction and dispute settlement among closely knit groups), and Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986) (addressing the potential effect of legal enforcement on private preference orderings).

5. *See, e.g.*, Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603, 1626–30, 1633–37, 1647 (2000) (criticizing the law and norms movement for not offering more empirically testable methods to assess how norms and preferences are altered).

of their hypotheses vary, all of these authors' theories share a common thread: their focus is on the law's relationship to individual preferences. The law is able to reinforce desired behaviors, these scholars suggest, by prompting individuals to internalize them as first-party commitments over time.

1. Norm internalization through law's punishments and rewards

Relying either implicitly or explicitly on the principles of operant conditioning,[6] the earliest law and norms theorists posited that the law's use of punishments and rewards could have a direct effect on individuals' preferences. Kenneth Dau-Schmidt, for example, focused on law's ability "to promote various social norms of individual behavior by shaping the preferences of criminals and the population at large."[7] Dau-Schmidt acknowledged the traditional deterrence goals of criminal punishment,[8] but focused primarily on criminal law's unexamined potential to shape preferences through sanctions and rewards.[9]

Cass Sunsrein identified a similar effect, suggesting that preferences could be shaped by the opportunities that law and social institutions provided. By foreclosing certain options from society, argued Sunstein, the law could cause citizens to develop "adaptive preferences"—preferences for activities or outcomes that coincided with their current state of affairs. This "sour grapes" phenomenon would shape norms in a way that conformed to the force of law: to stomach their obedience, Sunstein argued, individuals would come to believe that their constrained actions reflected what they truly preferred.[10]

This earliest theory of norm-creation was perhaps the least elaborate of those ultimately advanced by law and norms scholars. Nonetheless, it was also one of the most powerful: if law could alter

6. *See, e.g.*, B.F. SKINNER, BEYOND FREEDOM AND DIGNITY (1971).

7. Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 2.

8. *Id.* at 9–14.

9. *Id.* at 14–22, 25–38.

10. Sunstein, *supra* note 4, at 1146–50. Sunstein addressed this effect primarily in contexts where the results of a former law merited undoing, such as the vestiges of discriminatory legal regimes. *Id.* at 1147–48. But he also appeared to acknowledge that the same effect could be used to shape preferences in support of desired legal reforms, such as desegregation or certain labor rights. *Id.* at 1149–50.

norms merely by exerting (or even threatening) punishment, the opportunities for doing so would be effectively limitless. But perhaps because of its simplicity, or perhaps due to the difficulties of measuring such an effect separately from the raw, uninternalized deterrence effect of legal sanctions,[11] this theory's influence had waned by the time the law and norms movement reached its prime.

2. Law as third-party coordinator

Later law and norms scholars, continuing in the tradition of the movement's founders, examined the law's ability to provide a common focal point around which society could create or strengthen a norm. Richard McAdams's work analogizes to oarsmen synchronizing their strokes, drivers seeking to avoid collision, or individuals wishing to find one another.[12] Unlike the "prisoners' dilemma," in which it behooves participants to defect—producing an inferior outcome for both players—the parties in coordination games wish to cooperate but require some way of determining how to do so.

Such games need not have a single solution: each party may prefer a different coordinated outcome. But the primary result to be avoided is an asymmetrical choice. Of a couple meeting at a restaurant, for example, the husband may prefer Chinese while the wife may prefer Thai; neither, however, wants to stand outside in expectation of the other, who has gone to eat elsewhere. Both parties gain through agreement, and the gain is merely split among the two parties differently depending on the agreed-upon outcome.

Both McAdams and Robert Cooter suggest that this need for a determined consensus creates a significant role for law.[13] Not only can law increase societal well-being by coordinating citizens, but because citizens are better off regardless of which outcome is selected, the law may also choose which coordination equilibrium to promote. Individuals will initially abide by this choice because it is in

11. *E.g.*, Dau-Schmidt, *supra* note 7, at 24 (stating that there is "considerable ambiguity" as to whether any given effect of punishment is due to deterrence or the creation of norms).

12. Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1652–56 (2000).

13. *See id.*; Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 594–95 (1998).

their best interests. But eventually, these theorists argue, citizens will adopt the preferred result as their own—either because they experience greater satisfaction by doing so,[14] or because, over time, their consistent behavior will be internalized.[15] The law is thus free to decide whether people will drive on the left or right side of the road, whether pedestrians or cars will have the right of way, and so forth. Simply by selecting a rule where the "better" action is indeterminate, the law can create "focal points"[16]—an expectation of others' behavior that benefits everyone and ultimately becomes an internalized preference.

3. Law as social expression

Closely tied to coordination theory is the law's role as an expression of moral judgment. When coordination is no longer in everyone's self-interest, the law's ability to signal moral sentiment becomes an essential tool to promote conformity, and thus to maintain and create norms. McAdams argues, for example, that because a legal rule indicates social consensus, any violation of the law exposes an individual to the risk of shame—the external withdrawal of esteem by fellow citizens.[17] This shame, he claims, may turn to guilt over time, internalizing a norm that at its inception was not held by the individual (and perhaps not even by the majority of society).[18] What starts as a "focal point" with only the backing of the legal system can, in time, become the selected behavior of the citizens themselves.

In a similar vein, Lawrence Lessig suggests that the law can shape norms by associating popular meanings with certain behaviors. Such "semiotic techniques" reinforce or obfuscate the collective meaning attributed to an activity: by representing popular opinion, the law

14. Cooter calls such changes in preferences "Pareto self-improvements." Cooter, *supra* note 13, at 598–605.

15. This conclusion is not self-evident. It may be unlikely, for example, that Americans who drive on the right side of the road for coordination purposes will feel dissonance when driving on the left side of the road in Britain. Some coordination behaviors may be sufficiently non-normative—that is to say, mechanical—that they do not produce any true internalization, or do so only in the limited cultural circumstances in which they operate.

16. McAdams, *supra* note 12, at 1663; Cooter, *supra* note 13, at 593.

17. Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 380–81 (1997).

18. *Id.* at 381.

can label actions in a way that encourages their further pursuit (and potential internalization) or discourages them in equal measure.[19]

Dan Kahan has also argued in favor of the expressive value of law as a means of moral education. Condemnation of an act, he argues, yields an internalized norm against the act among both the condemners and the condemned.[20] Because the law's treatment of crimes—both through enforcement and punishment—signals a general social consensus about the morality of such behaviors, Kahan claims that the law is able to generate law-abiding or law-defying norms through its ability or inability to deter crime. If deterrence is high and citizens perceive few others violating the law without punishment, Kahan argues that their concern for approbation or stigma when violating the laws will increase, leading them to follow and ultimately internalize a law-abiding norm.[21] Conversely, if a citizen sees others violating the law with regularity and impunity, a higher-level norm of reciprocity may encourage him to do the same to avoid being the "sucker" who exercises self-restraint while his peers do not.[22]

Other authors have forwarded similar theories. Sunstein posits that expressive law can achieve what he calls "norm cascades": if the law signals high reputation costs of violating a norm, that norm may be adopted and ultimately internalized throughout the population.[23] Even if enforcement of the law is lax, argues Sunstein, the mere expression of society's judgment, signaled by the popular will implicit in the law's enactment, may be enough to tip the citizenry into adopting the norm as its own. Richard Hasen has made a similar claim that "enactment affects internalization, whereas enforcement affects only the instrumental calculus."[24] If these and other theories of expressive law are correct, the resources devoted to legal enforcement may be less effective than one might otherwise expect.

19. Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1009–12 (1995).

20. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 603–04 (1996).

21. Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 354–56 (1997).

22. *Id.* at 356–58; Kahan, *supra* note 20, at 604.

23. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2032–33 (1996).

24. Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135, 2168 (1996).

Depending on how much weight the expressive power of law holds, it is possible that very little of a law's true power lies in its ability to deter individuals from noncompliance.

B. The Law's Conflict with Norms

While many theories of law's influence express a hope that law and norms can operate in a mutually reinforcing manner, some recent scholarship has offered a more pessimistic view. Rather than focus on norms as an expression of individuals' beliefs or preferences, these theories evaluate the use of norms as a method of communication among society's members. Eric Posner, for example, argues that deterrence undermines a primary purpose of norms—to provide an unambiguous signal of reliability and trustworthiness—and thus decreases the likelihood that individuals will internalize them. Kahan has also argued that pushing deterrence too hard may backfire: he asserts that increasing legal sanctions may discourage obedience by signaling that deviance from the law is rampant, thus prompting citizens to reciprocate and disobey the law more frequently.

1. Posner's objection—law's interference with signaling

Norms, argues Posner, are simply a way for individuals to signal their desirability as partners for interaction or commerce. A person may value immediate gain over long-term benefit (in economic terms, have a high discount rate), or may prefer to postpone immediate gratification and seek greater benefits in the future (a low discount rate). All else being equal, a long-term outlook fosters greater cooperation and trust, and is thus more desirable in a partner.

Because individuals cannot easily display their discount rate to others, Posner suggests, they must find another way to show that they are long-term "types." Norms, which typically produce a societal or long-term benefit at a short-term cost to the individual, provide one way to achieve this goal. By incurring a short-term cost for a long-term gain, an individual who adheres to a norm demonstrates that he is a long-term type, desirable as a partner.[25]

25. Eric A. Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 VA. L. REV. 1781, 1786–89 (2000).

Under Posner's theory, norms are thus a social signal: they must be public because they serve to reveal information that is otherwise private.

When the law introduces an independent reason (typically, sanctions) to engage in a certain norm, Posner argues that this weakens the correlation between that norm and one's type, and thus makes adherence to the norm less desirable by robbing the norm of its signaling value.[26] The law disrupts the function that norms typically serve by confusing the signal that compliance conveys. As a result, rather than reinforcing a norm, the law may undermine it by decreasing its worth as a means to secure third-party cooperation and benefits.

2. Kahan's objection—law's unintentional signaling

In his work on the expressive function of law, Kahan theorizes that as long as the law clearly conveys society's moral sentiments, it can reinforce the desirable norms that it is designed to supplement. But like Posner, Kahan suggests that the benefits from legal enforcement can be undercut by the mixed messages that legal deterrence conveys.

Basing his argument on the assumption that individuals have a strong norm to reciprocate both generous and selfish behavior, Kahan expresses concern that the law's external incentives can blur the line between gratuitous compliance and compliance induced by threat of the law's sanction.[27] Kahan agrees with Posner that enforcement may prevent individuals from reaping the full reputational benefits of their behavior, potentially undermining existing norms.[28] He also argues, however, that the law's threat of force itself sends an unintended signal—namely, that subjects would not willingly comply with a norm absent an external incentive. Because "[c]onspicuous rewards and punishments can imply that others aren't inclined to cooperate voluntarily," increased deterrence may suggest that society is more deviant than previously thought, leading those who would otherwise cooperate to act selfishly

26. *Id.* at 1790–91, 1796–97.

27. Dan M. Kahan, *Trust, Collective Action, and Law*, 81 B.U. L. REV. 333, 338 (2001).

28. *Id.*

instead.[29] Every citizen will be less likely to abide by a social norm that he no longer believes to be active, and less likely to reciprocate by obeying a rule that he believes no one else embraces. Legal enforcement thus undermines the willingness of citizens to comply with the norm in question, and stifles its adoption across society.

C. Examining the Law's Effect on Individuals' Self-Perception

Posner and Kahan's theories serve to complicate the law's potential effect on norms by arguing that legal intervention dilutes or distorts an individual's ability to accurately perceive and understand the behavior of others—behavior that an individual considers when determining his norms and actions. By focusing on this external, society-wide determinant of behavior, Posner and Kahan question the expressive function of law by pointing out that, in fact, the law's expressions on behalf of society may be more mixed than originally believed.

But although these theories deftly question the expressive function of law, they do not address another facet of norm-formation that other law and norms literature has emphasized: the individual's understanding of *his own* actions as a means of norm internalization. Both the preference-shaping theory of criminal punishment put forth by Dau-Schmidt and Sunstein and the coordination theory of Cooter and McAdams rely on this idea of personal perception to support their mechanisms of norm internalization. Thus, although the theories of Posner and Kahan may question the relationship of law and norms in general, they do not attack the specific premises on which these other two sets of theories are based.

The model that this Article forwards, based upon cognitive evaluation theory, strives to do just that. It takes up the cause of Posner and Kahan, seeking to question previous scholarship's assertion that a positive relationship exists between law and norms. But it does so from an individual or "inner-directed" level, thus challenging the theories of Cooter, McAdams, Dau-Schmidt, and Sunsrein in a way that the "other-directed" theories of Posner and Kahan cannot.[30]

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29. *Id.* at 334, 342.

30. For more general discussion of the "inner-directed"/"other-directed" distinction, see DAVID RIESMAN, THE LONELY CROWD: A STUDY OF THE CHANGING AMERICAN

The thesis of this Article is closely related to those of Kahan and Posner, both of whom argue that individuals, when judging the actions of others who are subject to potential legal sanctions, may attribute those *others' behavior* to the threat of such sanctions. CET suggests a strikingly similar result for self-perception: an individual, subject to potential legal sanctions, may attribute *his own behavior* to such sanctions. When an individual perceives himself to be acting for an external reason (the law's threat of punishment), that attribution will come at the expense of an internal, norm-based explanation. The external motivation will accordingly tend to replace the weakened, internal motivation that previously prompted compliance.

CET thus predicts that the law, when enforced, may weaken preexisting norms through a first-party mechanism that is distinct from the explanations forwarded by Kahan and Posner. Support for such a proposition, however, requires a model that is able to distinguish between the third-party effects described by Posner and Kahan and the first-party effects posited by CET. It is to the development of such a model that this Article now turns.

III. CET'S PLACE IN THE ANALYTIC MODEL

As Part II made clear, cognitive evaluation theory fills a void in the existing law and norms scholarship: it strives to question the positive effect of law upon normative commitments, while maintaining a focus on inner-directed or first-party behavior and motivations. This Part provides the conceptual framework for such an inquiry by describing the conditions in which CET operates and incorporating that theory into the classical deterrence model. Section A establishes the contours of CET, briefly summarizing the results of psychological studies that describe the phenomenon and its limits. Section B integrates these first-party effects into the traditional cost-benefit analysis of legal deterrence. The result is a fuller description of law-abiding behavior that will serve as the foundation for evaluating and understanding the empirical evidence of CET's influence—the topic addressed in Parts IV and V.

A. Psychological Theory and Studies of CET

Originally a product of psychological studies and developments

CHARACTER (1950).

in the mid-1960s and throughout the 1970s, cognitive evaluation theory shares much in common with the cognitive dissonance theory of Leon Festinger[31] and Richard de Charms's theory of personal causation.[32] According to CET, external stimuli address two aspects of intrinsic motivation: a desire for self-determination and a desire for competence.[33] Certain incentives, particularly rewards and punishments, can satisfy the latter desire but tend to frustrate the former. Because such stimuli are outcome-based, they provide feedback about individuals' ability to manipulate their environments; but because they affect individuals' incentives for behavior, the same stimuli can also infringe upon subjects' sense of autonomy. Individuals who experience controlling external stimuli tend to attribute their actions to those stimuli, and the internal justification for their actions weakens as a result. Subjects who are initially interested in playing with a puzzle, for example, seem to engage in the activity less in their free time if they have previously been paid for it.[34] Similarly, children who are warned not to play with a toy when left unsupervised, upon threat of severe punishment, exhibit a greater tendency to play with the toy months later.[35] Extrinsic incentives can adversely affect not only individuals' choice of tasks, but also their creativity and performance.[36]

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31. LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957).

32. RICHARD DE CHARMS, PERSONAL CAUSATION: THE INTERNAL AFFECTIVE DETERMINANTS OF BEHAVIOR (1968).

33. *See* Edward L. Deci, *Notes on the Theory and Metatheory of Intrinsic Motivation*, 15 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 130, 136–37, 142 (1975). *See generally* EDWARD L. DECI & RICHARD M. RYAN, INTRINSIC MOTIVATION AND SELF-DETERMINATION IN HUMAN BEHAVIOR (1985).

34. Edward L. Deci, *Effects of Externally Mediated Rewards on Intrinsic Motivation*, 18 J. PERSONALITY & SOC. PSYCHOL. 105, 110 (1971) (noting that students who were offered a monetary reward for their success at a puzzle game during the second of three sessions chose to play with the puzzle game less during subsequent "free choice" periods than other students in a control group who were offered no such reward, although the effect was not statistically significant in light of the small sample size).

35. Jonathan L. Freedman, *Long-Term Behavioral Effects of Cognitive Dissonance*, 1 J. EXPERIMENTAL SOC. PSYCHOL. 145, 149–51 (1965) (finding that when one group of children was instructed by a departing experimenter not to play with a robot because it was "wrong," while another was further warned that the experimenter would "be very angry" if a child played with the robot, and that he would "have to do something about it" if the child disobeyed, children in the latter group played with the robot more frequently in a second session roughly one to two months later in which no threat was introduced).

36. *See, e.g.*, Arie W. Kruglanski et al., *The Effects of Extrinsic Incentive on Some Qualitative Aspects of Task Performance*, 39 J. PERSONALITY 606, 609, 611–13 (1971) (finding

Although these findings endured attack in the mid-70s from psychologists who predicted that external stimuli would complement intrinsic motivation rather than supplant it,[37] the following decades of research yielded further evidence that extrinsic incentives could decrease intrinsically motivated task interest.[38] By the 1990s, scholars had conducted a number of meta-analytic studies, assessing journal articles, unpublished research, and dissertations, to support CET's validity.[39] A particularly extensive study conducted by Edward Deci and others in 1999 found CET to be well supported by the

extrinsic motivation to have a negative effect on high school students' creativity and recall).

37. Some critiques questioned the research methodology used by cognitive theorists. *E.g.*, W. Clay Hamner & Lawrence W. Foster, *Are Intrinsic and Extrinsic Rewards Additive: A Test of Deci's Cognitive Evaluation Theory of Task Motivation*, 14 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 398 (1975); Bobby J. Calder & Barry M. Staw, *Interaction of Intrinsic and Extrinsic Motivation: Some Methodological Notes*, 31 J. PERSONALITY & SOC. PSYCHOL. 76 (1975). Others attacked the theoretical underpinnings of CET, both by questioning the soundness of a distinction between intrinsic motivation and extrinsic stimulus and by emphasizing the failure of cognitive theorists to provide a coherent definition of "intrinsic motivation." *E.g.*, W.E. Scott, Jr., *The Effects of Extrinsic Rewards on "Intrinsic Motivation": A Critique*, 15 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 117 (1975).

38. These studies employed a variety of incentive schemes and subjects of various ages. For a summary, see Richard M. Ryan et al., *Relation of Reward Contingency and Interpersonal Context to Intrinsic Motivation: A Review and Test Using Cognitive Evaluation Theory*, 45 J. PERSONALITY & SOC. PSYCHOL. 736, 739–41 (1983). Some studies also critiqued the methodology of CET's opponents and argued that their evidence did not undermine the validity of CET. *E.g.*, Mark R. Lepper & David Greene, *On Understanding "Overjustification": A Reply to Reiss and Sushinky*, 33 J. PERSONALITY & SOC. PSYCHOL. 25 (1976).

39. Amy Rummel & Richard Feinberg, *Cognitive Evaluation Theory: A Meta-Analytic Review of the Literature*, 16 SOC. BEHAV. & PERSONALITY 147, 152, 159 (1988) (examining eighty-eight effect sizes across forty-five separate studies to find a statistically significant overall effect consistent with CET); Shu-Hua Tang & Vernon C. Hall, *The Overjustification Effect: A Meta-Analysis*, 9 APPLIED COGNITIVE PSYCHOL. 365, 371, 373, 379 (1995) (examining 50 studies containing 256 comparisons and demonstrating that, in line with the predictions of CET, task-contingent and performance-contingent rewards undermined intrinsic motivation). Opposing meta-studies called some of these conclusions into question. *See* Judy Cameron & W. David Pierce, *Reinforcement, Reward, and Intrinsic Motivation: A Meta-Analysis*, 64 REV. EDUC. RES. 363, 374, 393–95 (1994) (examining ninety-six studies to conclude that free-period task interest is increased by verbal rewards and decreased only by tangible rewards that are not outcome dependent, while attitudinal measures are affected only by verbal rewards); Robert Eisenberger & Judy Cameron, *Detrimental Effects of Reward: Reality or Myth?*, 51 AM. PSYCHOLOGIST 1153, 1162–64 (1996) (similar). More recently, however, these studies have themselves been criticized for certain methodological flaws and omissions. *See, e.g.*, Alfie Kohn, *By All Available Means: Cameron and Pierce's Defense of Extrinsic Motivators*, 66 REV. EDUC. RES. 1 (1996); Mark R. Lepper et al., *Intrinsic Motivation and Extrinsic Rewards: A Commentary on Cameron and Pierce's Meta-Analysis*, 66 REV. EDUC. RES. 5 (1996); Richard M. Ryan & Edward L. Deci, *When Paradigms Clash: Comments on Cameron and Pierce's Claim That Rewards Do Not Undermine Intrinsic Motivation*, 66 REV. EDUC. RES. 33 (1996).

investigations conducted to date.[40]

The most recent of these meta-analytic studies also supports an important distinction in CET between tangible and intangible stimuli. Tangible rewards are typically seen as controlling: society generally perceives benefits such as money and goods to be payments in exchange for undertaking a certain behavior. Because of this "quid pro quo" aspect of tangible rewards, CET predicts a general decrease in intrinsic motivation when such rewards are used to prompt behavior. By contrast, external stimuli that serve only an informational function, providing feedback without offering an alternative justification for behavior, should have no such effect. Verbal reinforcement, for example, will typically yield no decrease in intrinsic motivation for just this reason.[41] Although exceptions may exist when verbal praise is expected or particularly important (for example, an annual work evaluation), generally such "rewards" are not seen as extrinsic reasons to engage in a behavior, and thus do not generate a decrease in intrinsic motivation. Indeed, while the 1999 study found that most tangible rewards significantly undermined both free-choice behavior and self-reported interest in intrinsically motivated tasks, verbal rewards tended to *increase* both free-choice behavior and reported interest.[42]

The potential relevance of CET to legal enforcement should now be clear. If the theory applies, tangible rewards or punishments—the traditional tools of legal regimes—should be perceived as controlling, and may accordingly decrease subjects' intrinsic motivation to comply with the law. This prediction is at the very heart of CET, but creates a difficulty for the general theory of deterrence upon which our legal system is based. The enforcement of a law may undercut norms that might otherwise reduce the need

40. Edward L. Deci et al., *A Meta-Analytic Review of Experiments Examining the Effects of Extrinsic Rewards on Intrinsic Motivation*, 125 PSYCHOL. BULL. 627 (1999). While Deci has been a supporter of CET since its inception, *see* Deci, *supra* note 34, a number of other recent studies have found similar results. *See supra* note 39 and accompanying text.

41. Deci et al., *supra* note 40, at 638–40, 656–57. Verbal promises of tangible rewards or punishments, of course, remain controlling because the underlying incentive is tangible. The child told that he must refrain from playing with a robot, and that the supervising adult will "be very angry" and "have to do something about it" if he does not comply, will experience a decrease in intrinsic motivation from the threat of tangible stimulus notwithstanding that the threat is verbally conveyed. *See* Freedman, *supra* note 35, at 149, 155.

42. Deci et al., *supra* note 40, at 638–39. The effect of verbal reinforcement on free-choice behavior was found to be significant for college students, but not for children. *Id.*

for the state to act at all. To more fully appreciate these consequences, and to permit their empirical testing, the following Section develops a model to describe more precisely how CET might alter the classical model of legal enforcement.

B. Adding CET to Classical Deterrence

CET, like other law and norms theories, calls one of the basic premises of the classical model of deterrence into question by suggesting that law can alter individuals' first-party preferences. This complicates the typical cost-benefit model of legal deterrence, but can nonetheless be incorporated into that model through a slight change in its parameters. Just as under the classical model, individuals' choices can still be analyzed as a function of the expected benefits and costs of their behavior. But by adding potential first-party punishments to the original set of third-party sanctions on which the classical model relies, a new model can be developed that is capable of evaluating the impact of CET along with the traditional effects of a change in law.

1. The classical model of deterrence

To elaborate, let us assume—as the classical model assumes—that an individual will attempt to disobey the law when the expected benefits of deviance, as compared to compliance, exceed the expected costs of deviance as compared to compliance.[43] "Comparative" expected benefits in this classical model will consist of the expected tangible rewards and expected third-party benefits that an individual would anticipate from deviance as compared to compliance.[44] Comparative expected costs will consist of both the expected costs (social or tangible) of attempting deviance as opposed to compliance, and the relative expected costs of the resulting ourcome.

43. Such a model finds support, for example, in the writings of Bentham and Beccaria. *See generally* CESARE BECCARIA, ON CRIMES AND PUNISHMENTS (David Young trans., 1986) (1764); JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds., 1996) (1789).

44. The expected benefit of an action (here, deviance or compliance) is the average of all possible benefits that could result from the action, weighted by their likelihoods. Expected benefit will thus depend both on the magnitude of various potential gains and on the probability that such gains will be attained.

Under this model, a common method to reduce deviance is to increase its comparative expected costs—either by raising the likelihood of an unfavorable outcome (for example, through more aggressive enforcement), or by increasing the potential punishments for discovered deviance (e.g., through harsher mandatory fines or sentences). Authorities can also attempt to harness the informational role of law, publicly identifying deviants to increase the likelihood that they will face social sanctions for their behavior.[45] Or officials may try to use the expressive role of law to shape society's views, thereby increasing expected third-party sanctions for deviance and decreasing its social benefits.

Changes outside of the law can also affect deviant activity. If legal alternatives to deviance become more lucrative or more readily available, increasing the expected benefit of compliance, the comparative benefits of deviance will lessen. Similarly, if the items or skills needed to engage in deviant activity become more costly to acquire, the expected costs of attempting deviance will increase. These shifts can be caused by changes in law, but they are often prompted instead by exogenous factors (such as an upswing in the economy) that influence the level of deviance only by happenstance.

In short, the classical model presents a number of ways to alter the incidence of deviance, through law and otherwise. But CET proposes that at least some of these efforts may have further effects that the current model fails to capture. When the level of punishment for deviant activity is increased, for example, the classical model predicts that the change will provide a greater incentive to obey the law. But if extrinsic incentives can also alter intrinsic motivations, as CET posits, then the classical model does not offer a full account of the law's effects. Another category of costs and benefits, arising from an individual's obedience to (or defiance of) his own normative commitments, must be added to understand the complete consequences of legal enforcement.

2. The addition of normative commitments

The framework provided by the classical deterrence model can accommodate the addition of normative commitments with relative

45. This approach may also increase other would-be deviants' perceived likelihood of failure, thereby increasing the expected costs of deviance.

ease. If acting inconsistently with one's commitments creates a degree of moral dissonance, that result can be treated as an additional expected cost to be borne by a deviant individual.

As with the tangible and third-party costs of the classical model, the first-party costs of deviance consist of two factors. The first is the comparative expected cost of undertaking a deviant action, whether it succeeds or fails. This element represents the "guilt" of knowing that one has striven to violate a normative commitment, whether or not one's efforts are ultimately successful.

The second element of first-party costs depends on the result of the attempted deviance. Just as tangible and social costs can vary depending on the degree of deviance achieved, the first-party costs that a law-breaking individual will experience may likewise depend on the distribution of his possible outcomes. An individual who fails to snatch a purse, for example, may feel less remorse than an identical purse-snatcher who succeeds. The relative vulnerability or sympathetic nature of the victim (if his identity is not known beforehand) may also affect first-party costs, as may any collateral damage caused by the deviance.[46]

With these two factors added to the classical model, we now have a framework with which to test CET's effect in the legal sphere. An individual's choice between deviance and compliance will depend upon the two sides of a simple inequality. On one hand are the expected tangible and social benefits of deviance, compared to compliance; on the other, the comparative expected costs (tangible, social, and normative) of deviance. Represented graphically:

46. Although the law and a would-be deviant's normative commitments are often in tandem, rather than in opposition, this need not be so. If an individual disagrees with a legal regime, deviance from that regime may create first-party benefits rather than dissonance. In such a case, the expected first-party costs of deviance as compared to compliance would be negative (i.e., deviance would yield a comparative benefit).

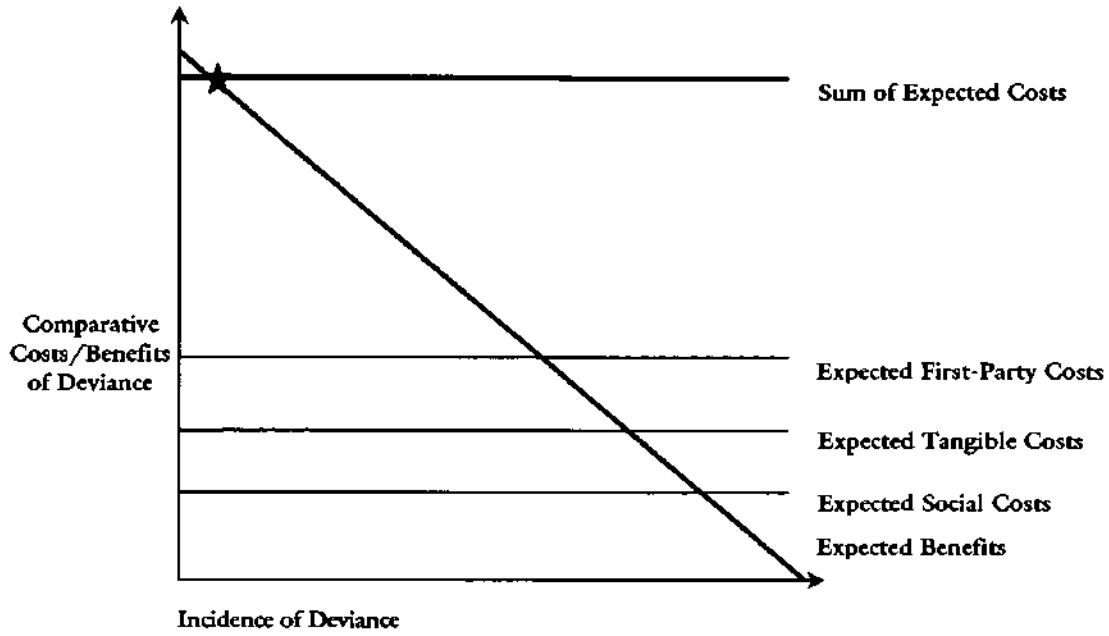

Figure 1: The New Compliance Model

The two heavy lines represent the total magnitudes of comparative costs and benefits. Their intersection (indicated by the star) is the equilibrium point at which costs and benefits of the marginal individual are equal, making him indifferent whether or not to engage in deviant behavior. Accordingly, this equilibrium point represents the number of individuals who can be expected to deviate across society.

The three lighter lines represent the separate comparative expected costs of deviance: social, tangible, and first-party. Each of these three quantities is assumed to be constant across all individuals. By contrast, the comparative expected benefits of deviance differ according to the tangible and social benefits that each individual will gain by deviating from the legal norm. Because the highest-benefit individuals will be the first to engage in deviance, the expected benefits curve is downward-sloping.[47]

47. While a more sophisticated (and perhaps more realistic) model might vary both costs and benefits across individuals, to do so would require further assumptions about the relationship between these variables—namely, the degree to which costs and benefits are directly or inversely related. Across all situations and all deviant actions, the assumption of fixed costs may be of dubious validity; nonetheless, the indeterminacy of how such costs are distributed counsels against adopting a more specific model that may yield even greater error.

With this model, we can now use traditional comparative statics analysis to measure CET's relevance to law. When a legal change occurs, it may affect one or more of the quantities illustrated above. By predicting how CET would alter compliance under the new model and comparing those predictions to empirical observations, we can begin to understand whether and how CET affects legal regimes.

IV. TESTING FOR CET'S EFFECTS WITH THE NEW MODEL

Part III set forth a new model of legal compliance, a model that incorporates not only the third-party costs and benefits of adhering to the law's commands, but also the costs of deviating from one's own first-party commitments. It is uncommon, however, for the law to attempt to change such first-party norms directly. More often, in line with the classical model, the law focuses on enforcement mechanisms designed to increase the likelihood of detection or the costs of deviance. In such cases, any effect on first-party commitments is often unintended.

As Part III suggests, such secondary effects may still be significant. More worrisome, they may detract from state enforcement by weakening individuals' commitments to non-deviant behavior. And if these first-party effects are sufficiently large, greater enforcement may do more harm than good: the net effect may be to undermine compliance rather than foster it.

This Part provides two examples of legal regimes in which the effects of CET can be inferred by measuring the effect of enforcement on compliance. The first example consists of other countries' experiences with mandatory voting. These cases suggest

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This difficulty affords ample reason to adopt instead the simplifying assumption that costs are constant across individuals for any given act of deviance.

At least one author has explicitly eschewed this assumption, proposing that individuals' social and moral costs in the context of vice laws vary inversely with the expected tangible benefits of deviance. Jonathan M. Barnett, *The Rational Underenforcement of Vice Laws*, 54 RUTGERS L. REV. 423, 451–52 (2002). But this alternative assumption, however accurate in the context of vice laws, does not necessarily hold more broadly. Tax evasion, for example, may provide the greatest benefits to those who stand the most to gain—i.e., those with the greatest amounts of income—yet these same individuals may also endure the greatest social and moral sanctions as a result of deviance. For other behaviors, deviance may yield an even more complex (and correspondingly less determinate) relationship between benefits and costs. This potential indeterminacy drives the model's lack of greater specification of costs across individuals.

how law can be undermined, but not wholly undone, by its negative effects on first-party norms. The voting laws in question achieve increased compliance through enforcement, but not as effectively as the classical deterrence model would predict. Instead, the effect appears to be muted by an accompanying decrease in first-party norms.

The second example is a common one in the law and norms literature: tax enforcement. As with mandatory voting, increased tax enforcement appears to produce a measurable decline in first-party commitments. But unlike mandatory voting, the decline in commitments to tax compliance is sufficiently large that the net effect of greater enforcement can be greater deviance. State-enforced sanctions appear to deter tax evasion less than the loss of normative commitments appears to promote it. As a result, this second example portrays an even starker case of the potential effects of CET, in which greater enforcement causes exactly the opposite outcome from what the state may hope or anticipate.

A. Distinguishing Alternative Explanations

As Section II.B made clear, this Article is not the first to predict a perverse result of state enforcement: both Dan Kahan and Eric Posner have also hypothesized that increasing enforcement may increase noncompliance. As a result, the task of this Part is not merely to provide examples of inverse relationships between enforcement and compliance. It must also draw those examples from contexts in which neither Posner's "signaling" theory nor Kahan's "reciprocity" theory can provide an alternative explanation of the results.

The data in this Part are selected specifically to provide contexts in which Posner's and Kahan's theories cannot apply. To eliminate the alternative explanation of signaling provided by Posner's theory, the two examples considered in this Part are both *private* behaviors. Voting and tax compliance typically cannot be detected by other individuals, and the punishment for deviance in both contexts is generally unobservable by third parties.[48] Accordingly, compliance in

48. It is true that, at least in the case of criminal tax evasion, the penalty for noncompliance can be publicly observed. However, insofar as civil recovery and fines are concerned, tax evasion is generally a deviant behavior that is not disclosed to the public at large. *See* Dan M. Kahan, *Signaling or Reciprocating? A Response to Eric Posner's* Law and

these situations will not carry the signaling function that Posner's theory requires, and any increase in deviance cannot be attributed to his hypothesis.

Similarly, the explanatory power of Kahan's theory is minimized by ensuring that both of the legal regimes presented in this chapter—mandatory voting and tax enforcement—do not produce signals that evoke reciprocity norms. In the case of mandatory voting regimes, Kahan's assumption of a reciprocity norm does not apply: unlike a traditional common good, such as abstention from criminal behavior, a legal actor is not benefited by others' compliance with a pro-voting regime. Because an individual's influence in an election is inversely proportional to the number of other participating voters, a reciprocity norm would seem inappropriate for the context of voting. Rather than spur an individual to vote, others' participation in the electoral process may encourage an individual to do precisely the opposite.[49]

In the case of tax compliance, Kahan's theory of reciprocity holds more sway. If citizens understand an increase in enforcement to indicate that others are shirking their societal obligations by evading taxes, compliant citizens may be more tempted to defect as well. That result will occur, however, only if increased enforcement indicates that a higher level of deviance exists. If increased enforcement does not carry such a connotation, then it will not invoke a reciprocity norm and Kahan's theory will have no force.

To avoid conflating the effects of CET with those of reciprocity-based norms, the only "change" in tax enforcement examined below is a temporary and experimental increase in auditing rates, applied to a randomly selected segment of the population. The measure is thus indicative of neither long-term policy nor citizens' overall compliance; rather, it is framed as an experimental design with no implications about the overall level of tax evasion. It is possible that some of the participants may have extrapolated from the study that

Social Norms, 36 U. RICH. L. REV. 367, 378 (2002). As far as voting behavior is concerned, while there may be a non-zero probability of individual detection through public voter rolls, this likelihood—to the extent it exists at all—would generally seem so small for the average individual as to be negligible. *But see infra* notes 91–92 and accompanying text (discussing Italy's mandatory voting system).

49. It is possible that an individual's pleasure from voting might be greater if others were to vote as well. It is questionable, however, at what level of participation such effects would be implicated, if at all.

the government was considering increasing auditing rates, and that this, in turn, indicated that the level of tax evasion was higher than they had previously assumed. But such a claim is attenuated at best. It seems more likely that an experimental manipulation of enforcement strategy, when explicitly framed as an experiment to participants, does not carry sufficient expressive weight to indicate anything about overall compliance rates, and thus does not invoke the sort of reciprocity backlash that Kahan's theory predicts.

B. Mandatory Voting

1. Fitting the theoretical model

While the United States has never required its citizens to vote,[50] a number of other countries throughout the world have implemented mandatory voting systems, including Belgium, Brazil, Argentina, Australia, and Costa Rica.[51] Sanctions for noncompliance range from small to moderate fines, as in Australia and Belgium, to ineligibility for government office or even disenfranchisement.[52]

Such systems have been criticized as undermining individuals' rights to dissent and free expression, and that critique may offer one explanation why mandatory voting has not been implemented in the United States.[53] But CET provides another, more practical concern with mandatory voting. State-created incentives designed to encourage voter turnout may also undermine individuals' normative commitment to voting, and may do so undetected even as the law's external compulsion increases turnout overall.

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50. Some states have entertained suggestions of compulsory political participation, but the proposals have had little traction. North Dakota and Massachusetts amended their constitutions to permit mandatory voting in the nineteenth and early twentieth centuries, respectively, but their state legislatures declined to implement such systems. HAROLD F. GOSNELL, WHY EUROPE VOTES 206–07 (1930). Georgia and Virginia operated compulsory voting systems even earlier, but it is not clear how stringently they were enforced. *See* Hasen, *supra* note 24, at 2173–74 & n.154.

51. *See* CONST. ARG. § 37; DE BELGISCHE GRONDWET [Constitution] art. 62 (Belg.); CONSTITUIÇÃO FEDERAL [C.F.] [Constitution] art. 14, ¶ 1 (Braz.); CONSTITUCION POLITICA art. 93 (Costa Rica); Commonwealth Electoral Act 1918, § 245 (Austl.).

52. *See* Simon Jackman, *Voting: Compulsory*, *in* INT'L ENCYCLOPEDIA OF THE SOC. & BEHAV. SCI. 16,314, 16,315 (Neil J. Smelser & Paul B. Baltes eds., 2001).

53. *See, e.g.*, Hasen, *supra* note 24, at 2173–78; Katherine M. Swenson, Note, *Sticks, Carrots, Donkey Votes, and True Choice: A Rationale for Abolishing Compulsory Voting in Australia*, 16 MINN. J. INT'L L. 525, 536–44 (2007).

An initial challenge to supporting this claim is one often encountered in comparative statics analysis: it is difficult to differentiate a large increase in voting participation due to external incentives, dampened by a decrease in first-party norms, from a small externally motivated increase that is uninfluenced by intrinsic motivation. Put in the terms of Part III's model, if a legal shift produces only a small increase in the tangible costs of deviance, the ultimate incidence of deviance may look the same as if the change had produced a large increase in tangible costs accompanied by a relatively smaller decrease in the first-party costs of deviance:

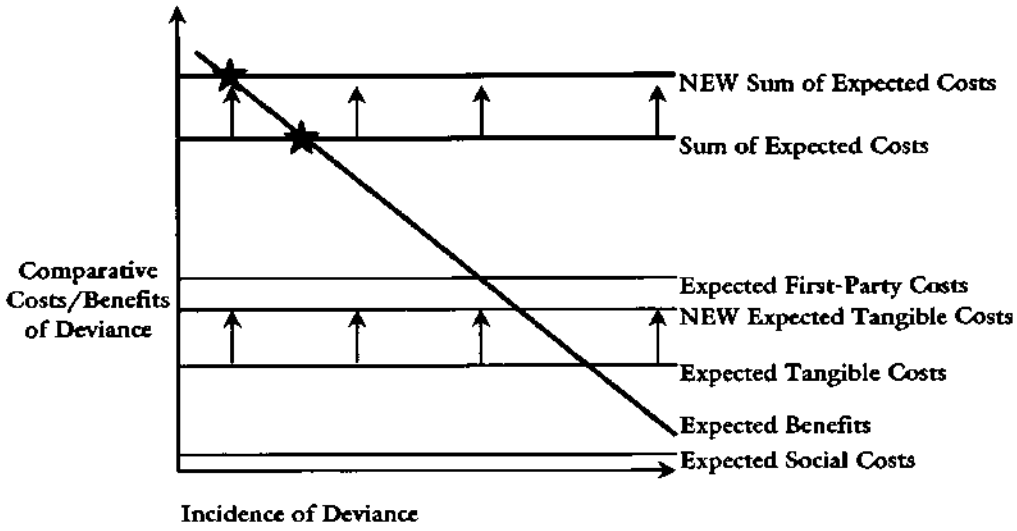

Figure 2: Scenario 1—Tangible Costs Increase Slightly

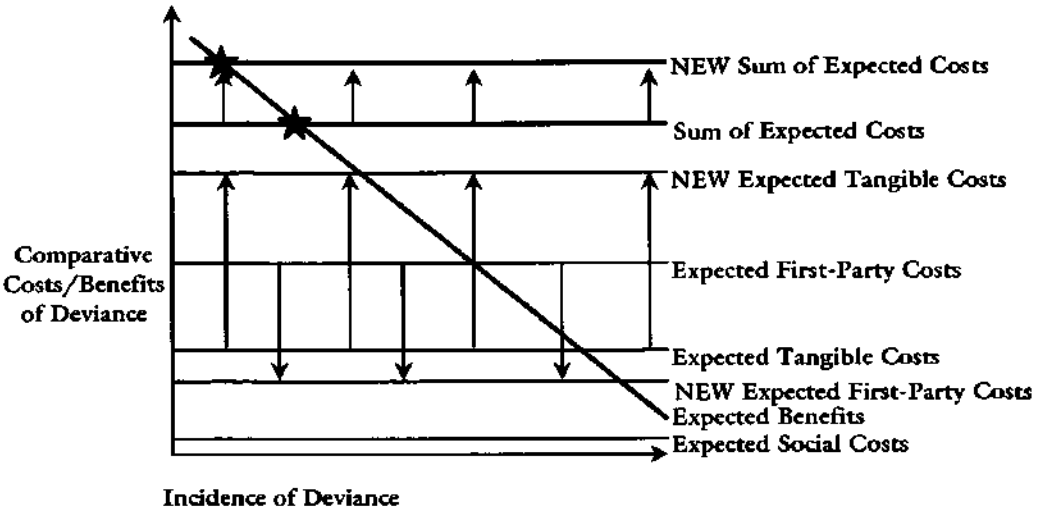

Figure 3: Scenario 2—Tangible Costs Increase Greatly, but First-Party Costs Decrease as Well

Two techniques are available to distinguish between these alternative explanations in the context of mandatory voting. First, if the state ultimately lifts its sanctions, one can compare the subsequent level of compliance with the level of compliance prior to the start of mandatory voting. If Scenario 1 accurately describes the law's effects on incentives, then there should be no difference in compliance before sanctions are introduced and after they are removed. All that will have changed over time are the tangible costs of deviance, which will have reverted to their original levels yielding no net change. If Scenario 2 accurately describes the law's effects, however, one should see a lower level of compliance after the enforcement regime is removed than before it was instituted. Tangible costs will not differ between the two periods, but the first-party incentives for compliance will have decreased over time, yielding an overall decrease in compliance. Indeed, this is a common method to test for the effects of CET: experimenters measure the level of compliance before an enforcement regime is instituted, and then again after that regime has been implemented and subsequently removed.

Another method to separate out the effects of state enforcement from internal motivation is to chart the level of compliance over time. The bulk of an increase in compliance resulting from greater tangible punishments should be immediate, but the decline of first-

party incentives may be gradual.[54] If that is the case, the reduction of first-party commitments under Scenario 2 may not yield an immediate drop in compliance, but rather a slow decrease from its peak shortly after state enforcement begins.

The turnout figures for certain countries' experiences with mandatory voting display each of these two patterns—a lower level of compliance after the regime's repeal than before it was instituted, and a gradual decrease in compliance even when the regime remains. More specifically, the case of Venezuela illustrates the former trend while Australia shows the latter. Not all countries with mandatory voting share these results; nor are the data free from alternative explanations. Nonetheless, the examples suggest a possible decrease in intrinsic motivation prompted by law, and accordingly raise questions about the value of using law to mandate behavior that citizens may initially perceive as inherently worthwhile.

2. Empirical support

a. Before and after: The case of Venezuela. From 1958 to 1993, voting in Venezuela was compulsory.[55] Punishment for noncompliance included ineligibility for certain types of government employment.[56] Certainly, political conditions and popular sentiments in Venezuela have changed across that span of time, and a comparison between voter participation in the late 1950s and the early 1990s does not present an ideal candidate for a natural experiment to test the law's effect on intrinsic motivation. Nevertheless, as a first approximation of how legal shifts can alter normative commitments on a national level, Venezuela provides an opportunity to examine how voting behavior changes when the state institutes a new enforcement mechanism, relies on it for a significant

54. One can imagine exceptions. For example, the state may become more adept over time at administering new deterrence mechanisms, or society may only come to fully comprehend the new level of costs or likelihood of detection after a regime has been in place for some number of years. Either of these scenarios would lead to a more extended period during which the effects of tangible costs would become manifest. Nonetheless, neither of these situations seems particularly likely in the voting context; and in any event, because CET posits that these increases in tangible costs would themselves prompt further decreases in first-party costs, one would still expect to see first-party effects play out more gradually than tangible ones.

55. Arend Lijphart, *Unequal Participation: Democracy's Unresolved Dilemma*, 91 AM. POL. SCI. REV. 1, 9 & n.16 (1997).

56. Jackman, *supra* note 52, at 16,315.

period of time, and then removes it—all in the course of a single generation.[57] If the hypothesis of this Article is correct, and legal enforcement does prompt a decrease in normative commitments, then we should see evidence of Scenario 2 described above: Venezuela in 1993 should demonstrate a lower level of voter participation than the level of participation before mandatory voting's start in 1958.

The Venezuelan data exhibit just such a pattern. Mandatory voting initially increased Venezuela's participation rates: approximately 52% of the voting-age population cast ballots in the parliamentary elections of 1947, as compared to 80% in 1958,[58] and a similar result obtained in the country's presidential elections.[59] Despite a decline in these rates over the following decades, participation remained above 70% through the end of the 1980s.[60]

But when Venezuela withdrew the mandatory requirement to vote in 1993, participation exhibited a significant drop. Unsurprisingly, a lower percentage of voting-age individuals voted in the next set of parliamentary elections than under mandatory voting. But the percentage of participants was also lower than before mandatory voting had been instituted—just under 50% in 1993, and decreasing still further to 43% within the following five years.[61]

There are certainly other factors at play in Venezuela's voting data. Indeed, the stark downward trend displayed in 1998 abated

57. Other countries, such as the Netherlands, have enforced compulsory voting for longer than one generation before abolishing it. In these countries, intergenerational effects may complicate the analysis even further. Because CET studies the effect of extrinsic incentives on individuals over time, rather than on generations of individuals, Venezuela provides a more appropriate sample for the purposes of this Article's hypothesis.

58. International Institute for Democracy and Electoral Assistance, *Voter Turnout: Venezuela*, http://www.idea.int/vt/country_view.cfm?CountryCode=VE (last visited April 4, 2007) [hereinafter *Voter Turnout: Venezuela*]. The data for 1947 are approximate, but closely track the participation rate in the presidential election of the same year. The dataset does not include information on the percentage of registered voters who cast ballots in either of the 1947 elections.

59. *Id.* (showing participation in presidential elections increasing from 52% in 1947 to 81% in 1958). The figure for 1947 includes only valid votes, meaning that it actually underestimates the voter participation for that year. If the percentage of invalid votes in later years is a guide, a conservative estimate of the true 1947 participation rate may be closer to 55%—a fact that merely strengthens the observation in note 61, *infra*, and accompanying text.

60. *Id.*

61. The number of votes cast in 1993 is approximate, although the number is roughly equal to the presidential votes cast for that year. *Id.* Participation in presidential elections experienced a similar decrease to 48.5% in 1993, and 47% thereafter. *Id.*

somewhat in 2000.[62] But at first glance the statistics provide at least rough support for the proposition that forcing individuals to vote may generate a decrease in the normative value placed upon that activity. Similarly intriguing is the percentage of invalid votes (i.e., votes cast but ineligible to be counted, such as a double-punched card or a blank ballot) before and after Venezuela's mandatory voting regime. Invalid votes are often viewed as a rough indication of disenchantment with the political process, and with the practice of voting in particular.[63] In 1958, before Venezuela instituted mandatory voting, invalid votes comprised 3.9% of all votes cast; in 1998, after the system was removed, such votes exceeded 14% of the ballots.[64] That statistic may reflect any number of one-time explanations. But it may also support the hypothesis that CET applies in the context of mandatory voting.

b. Decreased compliance during enforcement: The case of Australia. Unlike Venezuela's compulsory voting laws, Australia's have not been limited to half a century, but have been in place since 1924 and still exist today.[65] Enforced by a system of modest fines,[66] the Australian regime has maintained a significantly higher rate of political participation than most countries with voluntary voting, including the United States. In 1998, nearly 82% of voting-age Australians cast votes; by contrast, just shy of 35% of Americans did the same.[67]

But while cross-sectional, cross-country data on voter turnout suggest that the Australian regime has been a success, an intra-

62. *Id.* (showing that approximately 46.5% of the voting-age population cast ballots in the 2000 parliamentary and presidential elections).

63. *See, e.g.*, Wolfgang Hirczy, *The Impact of Mandatory Voting Laws on Turnout: A Quasi-Experimental Approach*, 13 ELECTORAL STUD. 64, 67 (1994).

64. *Voter Turnout: Venezuela*, *supra* note 58. The dataset does not contain rates for the 1993 or 2000 parliamentary elections, or for the 2000 presidential election. The 1993 presidential election, however, reflects an invalid voting rate in line with that of the earlier mandatory voting regime. *Id.*

65. MARIA GRATSCHEW, *Compulsory Voting*, *in* RAFAEL LÓPEZ PINTOR ET AL., VOTER TURNOUT SINCE 1945: A GLOBAL REPORT 105, 105 (2002), *available at* http://www.idea.int/publications/vt/upload/VT_screenopt_2002.pdf.

66. Jackman, *supra* note 52, at 16,315.

67. International Institute for Democracy and Electoral Assistance, *Voter Turnout: Australia*, http://www.idea.int/vt/country_view.cfm?CountryCode=AU (last visited April 4, 2007) [hereinafter *Voter Turnout: Australia*]; International Institute for Democracy and Electoral Assistance, *Voter Turnout: United States*, http://www.idea.int/vt/country_view.cfm?CountryCode=US (last visited April 4, 2007).

country comparison of the system over time is more ambiguous. Since World War II, voter turnout in Australia has shown a gradual but steady decline. While participation among voting-age Australians was as high as 92% in 1946, it had declined to 85% within the next twenty years, and to 82% by the close of the twentieth century.[68] This trend is not reflected among Australia's registered voters, who have maintained a participation rate of roughly 95% throughout the period in question. But there are other reasons to suspect that Australians' intrinsic motivation to vote may be decreasing. The percentage of invalid votes, which has also shown a gradual increase over time, suggests such a result.[69] More impressively, in Australia's first encounter with national voluntary voting in over a half-century, a mere 47% of enrolled voters participated in electing delegates to the country's 1998 Constitutional Convention.[70]

As in the case of Venezuela, such statistics are obviously not sufficient to draw any ultimate conclusions about the efficacy of mandatory voting regimes, or about CET more broadly. Data from other nations that use compulsory voting underscore this need for caution. A number of these countries do not show a linear decrease, or any decrease, in voter participation during the life of their mandatory voting laws.[71]

Experimental studies or more detailed survey analysis may provide a fuller understanding of the effects of mandatory voting. At

68. *Voter Turnout: Australia*, *supra* note 67.

69. *Id.*

70. Simon Jackman, *Non-compulsory Voting in Australia?: What Surveys Can (and Can't) Tell Us*, 18 ELECTORAL STUD. 29, 38 n.10 (1999). The election was implemented through postal voting, which typically increases voter participation because of its relative ease. *See* Mark N. Franklin, *Electoral Engineering and Cross-National Turnout Differences: What Role for Compulsory Voting?*, 29 BRIT. J. POL. SCI. 205 tbl.4 (1999) (finding a positive and significant effect of postal voting on turnout). The 47% figure may thus overstate the voluntary participation rate that a traditional election in Australia would produce.

71. The Netherlands, for example, maintained a relatively steady (indeed, slightly increasing) level of voter participation during the life of its mandatory voting regime. *See* International Institute for Democracy and Electoral Assistance, *Voter Turnout: Netherlands*, http://www.idea.int/vt/country_view.cfm?ConntryCode=NL (last visited April 4, 2007); Hirczy, *supra* note 63, at 70 fig.2. Argentina's voting participation rates appear to show a downward trend among registered voters in recent years, but the picture among the voting-age population at large is more ambiguous. *See* International Institute for Democracy and Electoral Assistance, *Voter Turnout: Argentina*, http://www.idea.int/vt/country_view.cfm?Country Code=AR (last visited April 4, 2007).

most, the current examination of Venezuela and Australia offers an interesting suggestion that, under some conditions, mandatory voting laws may be less effective than the classical model would predict. Better controlled, more rigorously analyzed data are needed to explore CET's implications further. Fortunately, such data can be readily found in studies of tax enforcement.

C. Tax Enforcement

1. Fitting the theoretical model

Unlike mandatory voting, tax compliance and tax evasion are phenomena with which the American legal system is intimately familiar. How to design a tax system capable of producing maximal compliance with minimal costs has been the subject of many an academic and legislative endeavor, and studies on the topic are extensive. As relevant here, recent research suggests that the threat of punishment is not the only motivation behind individuals' tax compliance.[72] A variety of factors, including both social and personal motivations, appear to be responsible for preventing a great deal of tax evasion that might otherwise act to overwhelm the system.[73]

Increased audits and penalties may decrease these other motivations for tax compliance, but that does not distinguish CET's hypothesis from Kahan's. Rather, such a result is consistent with both theories: the former posits that more draconian enforcement may decrease participants' intrinsic motivation to comply; the latter predicts that a harsher legal regime will signal lower overall compliance across society, decreasing individuals' desire to reciprocate and fairly contribute to their tax burden.[74] To separate these two effects, a study is needed in which tax enforcement does not convey a message about society-wide activity. In such a case,

72. *See, e.g.*, Steven Klepper & Daniel Nagin, *The Criminal Deterrence Literature: Implications for Research on Taxpayer Compliance*, *in* 2 TAXPAYER COMPLIANCE 126, 140–46 (Jeffrey A. Roth & John T. Scholz eds., 1989); Micale G. Allingham & Agnar Sandomo, *Income Tax Evasion: A Theoretical Analysis*, 1 J. PUB. ECON. 323 (1972).

73. *See, e.g.*, James Alm et al., *Deterrence and Beyond: Toward a Kinder, Gentler IRS*, *in* WHY PEOPLE PAY TAXES: TAX COMPLIANCE AND ENFORCEMENT 311, 313 & n.6, 314–15 (Joel Slemrod ed., 1992); Steven E. Kaplan & Philip M.J. Reckers, *A Study of Tax Evasion Judgments*, 38 NAT'L TAX J. 97 (1985).

74. For the latter of these two views, see Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71, 83 (2003).

taxpayers will not change their perceptions of others' tax compliance; they will not feel compelled to alter their reciprocal behavior; and Kahan's theory will not afford a possible explanation for any resulting changes in deviance.

Two experimental designs lend themselves to this purpose: a study using 1980–85 IRS data to examine the compliance of individuals who had experienced recent audits,[75] and a 1994 Minnesota study examining the compliance of a small pool of individuals selected for an experimental auditing procedure.[76] Because the former design involved no change in enforcement (it merely examined the effect of a recent audit) and the latter design explicitly informed subjects of its experimental nature, neither study afforded its participants any cause to draw broader conclusions about the level of compliance among society. The results are accordingly free from the confounding explanation typically provided by Kahan's reciprocity thesis, and permit a more rigorous examination into the effect of state enforcement on first-party normative commitments.

2. Empirical support

a. The IRS survey. A first approximation of how tax enforcement can affect normative commitments comes from a study of 1980s IRS data, conducted to examine the relationship between audits and tax compliance. The study classified subjects by whether or not the IRS had audited them in the recent past, and then measured the difference in subsequent tax reporting between the two groups. The result roughly measured how effectively a one-time application of "enforcement" (an IRS audit) could prompt compliance on later occasions.

The analysis revealed that, after controlling for other variables, individuals who had experienced recent audits reported less income

75. Brian Erard, *The Influence of Tax Audits on Reporting Behavior*, *in* WHY PEOPLE PAY TAXES, *supra* note 73, at 95, 98–100.

76. STEPHEN COLEMAN, THE MINNESOTA INCOME TAX COMPLIANCE EXPERIMENT: STATE TAX RESULTS (1996), *available at* http://www.taxes.state.mn.us/legal_policy/research_reports/content/complnce.pdf. Kahan invokes this study for support in a number of his reciprocity-oriented writings, but his focus is on a different portion of the study in which subjects received a letter emphasizing the high, broad-based compliance that the tax system enjoys. *See, e.g.*, Kahan, *supra* note 74, at 83. Although the letter had a positive effect on compliance, that effect was not statistically significant, and resulted in an average increase of twelve dollars in payment from the control group. *See* COLEMAN, *supra*, at 18–19.

than those who had not, in accord with CET's hypothesis.[77] That finding, however, was statistically significant only for one group of subjects within the sample.[78] Moreover, as the study's author acknowledged, the non-random nature of the IRS audit selection process calls this result somewhat into question, because individuals selected for a prior audit may be predisposed to future noncompliance. After attempting to correct for this bias, the study found that the audit effect was reversed.[79]

Given these limitations of the IRS survey data, one would expect a more robust result from an experimental design where the "treatment" of enforcement could be randomly distributed across a greater variety of subjects. In fact, just such a result is provided by a later study in Minnesota.

b. The Minnesota experiment. In 1994, the Minnesota Department of Revenue undertook an extensive study to determine what methods would best secure tax compliance among its citizens. One method was to audit subjects' returns. Experimenters gave randomly selected taxpayers prior notice through an "audit letter" that their returns would receive more searching scrutiny as part of a study on taxpayer behavior.[80] These subjects accordingly faced a greater probability of detection, failure, and punishment if they attempted to engage in tax evasion. Put differently, the experiment increased the expected tangible costs of deviance, while decreasing its expected tangible benefits.

CET predicts that this increased enforcement also should have decreased subjects' intrinsic motivation to engage in tax compliance. If the experiment had nonetheless revealed a net decrease in deviance, that finding would present the same analytic problem as in the case of mandatory voting: it would be impossible to tell whether the outcome was the result of a large deterrent effect dampened by a lesser decrease in first-party commitments, or of an undiminished deterrent effect that was simply small to begin with. But the

77. Erard, *supra* note 75, at 106–11.

78. *Id.* The finding was significant across the entire 1985 sample, which did not distinguish whether subjects' recent audits had been completed by that time. A prior year's samples, as well as a more limited 1985 sample excluding subjects who had not yet completed their audits, did not produce a statistically significant effect.

79. *Id.* at 110–12. The attempted correction involved introducing a variable to express previously audited subjects' potential predisposition toward further noncompliance.

80. COLEMAN, *supra* note 76, at 48.

Minnesota experiment provided a less ambiguous result. Tax evasion did not appear to decrease among individuals subjected to the increased-auditing treatment. Rather, high-audit individuals overall displayed no significant difference in tax payments.[81] Moreover, relative to the previous year, those in the upper income portions of the audit sample reported substantially *less* income than control subjects—$1945 less on average—and paid an average of $228 less in taxes.[82]

This is exactly as CET would suggest. Although the tangible costs of deviance have increased and the expected benefits of deviance have decreased, these effects may be outweighed by a greater shift in first-party commitments. As a result, reported income—a strong indicator of tax compliance[83]—decreases. Or put differently, tax deviance increases:

81. *Id.* at 11–12.

82. *Id.* at 11. It should be noted that these dollar values, obtained by linear regressions of the study data, have little meaning due to large fluctuations in income among high-income participants over the two years of the study. Controlling for such fluctuations, the effect of the audit threat remains negative and is statistically significant. *Id.* at 13. But an accurate measure of the dollar value of the audit effect, independent of income fluctuations, cannot be determined with precision.

83. One might suspect that at least a part of the decrease in reported income could be explained by the tendency of high-income individuals to respond to the threat of an audit by hiring tax advisors, who in turn might pursue more aggressive tax strategies that would result in lower reported income levels. The Minnesota study, however, compiled statistics on just this question, and found that the use of tax practitioners did not significantly affect the results for those high-income individuals who were exposed to the audit threat. *Id.* at 15.

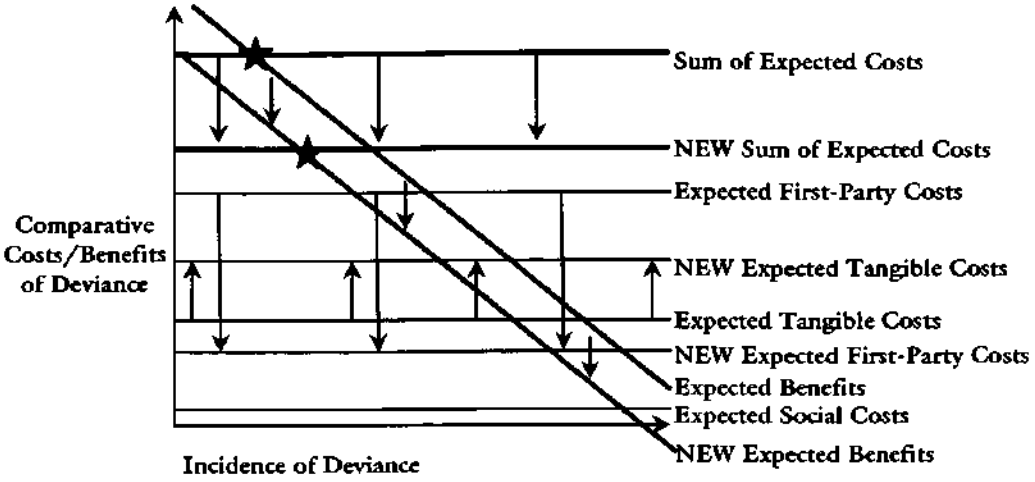

Figure 4: First-Party Effects Dominate over Tangible Costs and Expected Benefits

Figure 4 models the results of the Minnesota study. The first-party costs of deviance decrease more than tangible costs increase, and the total costs of deviance therefore decrease. This decrease in costs is sufficient to increase the overall level of deviance, notwithstanding that the lower likelihood of succeeding at tax evasion has also decreased deviance's comparative benefits. This result supports the strongest form of CET's hypothesis, in which secondary effects on first-party commitments outweigh the greater tangible deterrence of a new enforcement regime. The design of the Minnesota study is able to identify this result by measuring its effects separately across subjects' income levels. In particular, high-income individuals have the greatest expected benefits of deviance by virtue of their higher marginal tax rates. Because these subjects already have the greatest incentive to attempt to hide their income, they are the most likely to display a change in behavior due to CET's effects. This is indeed what the Minnesota tax study suggests.

This result, like the others discussed in this Part, implies that CET may have some application in the legal realm. But such results do not obtain in all enforcement regimes. Indeed, many of the founding scholars of the law and norms movement described scenarios in which new laws did not undermine compliance, but rather were able to reinforce it. If the first-party effects of enforcement are not uniform, where does the line between virtuous and vicious deterrence lie? When can policymakers operate with a

free hand to discourage deviance, and when should they think twice before doing so?

V. QUESTIONING THE NEW MODEL

The prior Part examined legal regimes in which the deterrent effects of enforcement appeared to be undermined by an accompanying decline in first-party norms. But the legal literature of the past two decades also contains examples where law and norms go hand in hand, rather than at each other's throats. The works of Lawrence Lessig[84] and Robert Cooter,[85] for example, cite scenarios where law appears to create internalized norms—or at the very least, does not undermine them. This Part is an effort to engage those scholars' examples and explain how they are consistent with the framework of CET.

In particular, this Part examines two of the most popular examples in the early law and norms literature, non-smoking regimes and seat belt laws, and demonstrates how those examples fit within CET's model just as readily as the legal regimes discussed in Part IV. Public smoking restrictions provide an example of "social laws"—laws that often afford little or no tangible penalties but instead rely on enforcement through reputational sanctions administered by third-party citizens. Seat belt statutes are "low-commitment laws"—laws that target underdeveloped norms so that any decrease in first-party compliance is minimal. Rather than undermine the validity of the CET model, these two permutations demonstrate its resilience. Perhaps more importantly, the examples may also provide valuable lessons on how to avoid the potentially counterproductive scenarios suggested in Part IV. Armed with an understanding of CET, a new legal regime may not only avoid a conflict between law and conscience, but in some instances may harness a synergy between the two, achieving even greater compliance than the classical model of deterrence alone would suggest.

A. "Social Law"—The Example of Public Non-Smoking Areas

Smoking behavior in the United States has changed significantly

84. *E.g.*, Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661 (1998); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995).

85. *E.g.*, Cooter, *supra* note 13.

over the past half-century. In a trend that might have been unimaginable one or two decades earlier, many major cities have banned or are considering banning smoking in restaurants and similar establishments. This shift against lighting up in public has been encouraged by many factors, not the least of which may be a greater public awareness of the health hazards of smoking (and second-hand smoke). But there is more to the change as well: shifting attitudes toward public smoking were accompanied by legal regimes working to stop such behavior.

Why, then, did those laws not prompt the same deleterious effects suggested by mandatory voting and tax evasion? The key difference, for the purposes of CET, may be that in contrast to typical mandatory voting and tax compliance efforts, public non-smoking laws relied primarily upon third-party social sanctions. The state expressed a default rule, but generally permitted enforcement by individuals in society to do the rest.[86]

This difference between a "shaming" or "stigma" method of deterrence and the tangible sanctions of fines or imprisonment is significant.[87] Recall that CET distinguishes between tangible rewards, which are perceived as controlling (and thus undermine intrinsic motivation) and intangible or verbal rewards, which are not. Indeed, intangible rewards occasionally increase intrinsic motivation.[88]

If "social laws" are enforced primarily by citizens' approbation and disdain, free from coercive punishments of the state, then we should expect no decrease in intrinsic motivation from the implementation of such laws. The CET model will instead predict an increase in compliance due to both an increase in extrinsic motivation—namely, third-party social sanctions—and a potential (albeit small) increase in intrinsic motivation:

86. One exception is the government's regulation of the tobacco industry. Because such regulation does not operate directly upon individuals—and thus would not implicate CET—it is not discussed in greater detail here. But precisely because such laws do not invoke CET, industry regulation may provide an additional explanation for why societal anti-smoking norms have developed over the past half-century without the deleterious effects suggested in Part IV.

87. It is true, of course, that fines and imprisonment also often carry a level of social sanction. But this was not so in the cases examined in Part IV: because the examined behaviors (and punishment regimes) were relatively private in nature, public knowledge of deviance was close to zero, and the social sanctions attached to deviance were therefore minimal.

88. *See supra* notes 41–42 and accompanying text.

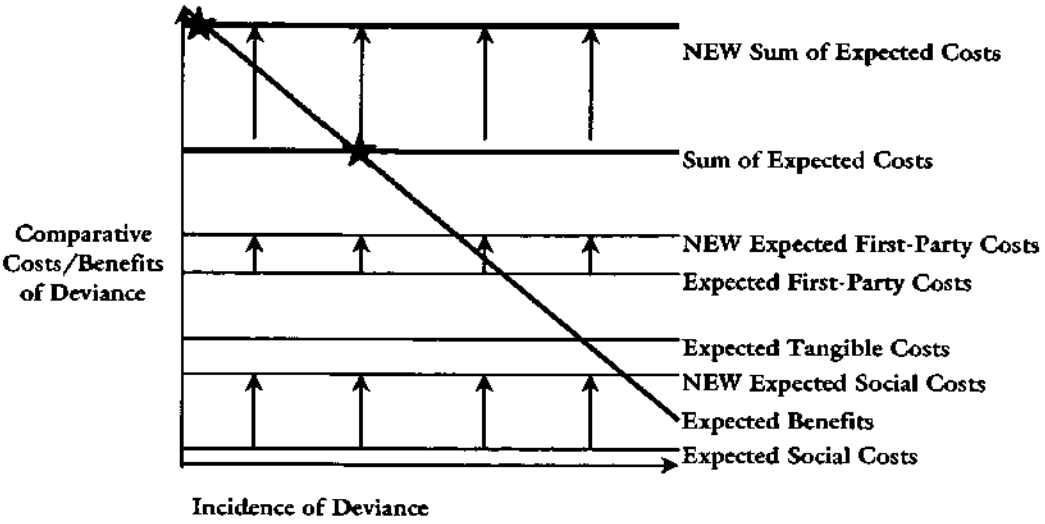

Figure 5: Social Costs Increase Significantly; First-Party Costs Increase Slightly

The law can promote such social laws in at least two ways. First, it can highlight a particular activity or rule around which society can focus its blame and social stigma.[89] Second, it can provide more information to citizens to facilitate social shaming, making traditionally private behavior public—for example, by releasing names of "Johns" to deter prostitution or publicizing the identities of tax evaders or parents who do not pay child support.[90]

Anti-smoking campaigns have focused primarily on the first of these tactics, encouraging public sentiment against smoking and promoting a default presumption (by signage, for example) that smoking is prohibited in certain areas. Other legal regimes have achieved similar success with the second approach. Italy's government, for example, administers no tangible punishment for nonvoting; instead, the state reveals nonvoters' identities to the public.[91] The classical deterrence model suggests that such an approach should have limited success compared to the more draconian regimes discussed in Part IV, but in fact Italy's practice has

89. *See, e.g.*, Cooter *supra* note 13, at 593.

90. This latter system is employed even in the private sector. Supermarkets, for example, may post bounced checks on the side of their cash registers not only to remind the cashier not to accept further such checks, but also to provide information about deviant parties to other shoppers in the hopes of preemptively shaming would-be swindlers into compliance.

91. *See* Jackman, *supra* note 52, at 16,315 (observing that sanctions in Italy consist of "social embarrassment, with non-voting noted on official documents").

yielded participation rates comparable to Australia's or Venezuela's.[92] Under CET, this result makes sense: a social approach to enforcement can create third-party costs similar to those administered by the state, while at the same time maintaining or even increasing subjects' first-party commitments.

Governments have turned to similar measures in other contexts. In Mumbai, India, the state has sought to discourage employees from spitting by posting offenders' photographs, names, and titles on public bulletin boards.[93] In Thailand, police officers who act irresponsibly by littering or showing up to work late may be forced to wear a pink "Hello Kitty" armband designed to embarrass them.[94] Although the goals of these programs are different, the intuition behind them is the same: by assigning the law an informational role and permitting third parties to oversee enforcement, the state may be able to provide effective sanctions while also encouraging normative commitments to the desired behavior.[95] As the earliest law and norms scholars recognized, social regimes such as non-smoking campaigns or Italy's voting laws can yield both compliance and norm development. That conclusion fits squarely within the CET framework, and it is particularly notable when compared with the

92. Despite significant increases in the size of its voting-age population over the past sixty years, Italy's voter turnout rate has ranged from 85% to 95%. Data from the past two decades, however, reflect a decrease in participation and an upward trend in the percentage of invalid votes cast. International Institute for Democracy and Electoral Assistance, *Voter Turnout: Italy*, http://www.idea.int/vt/country_view.cfm?CountryCode=IT (last visited April 4, 2007).

93. *Indian City Punishes Spitting Workers*, Associated Press, Sept. 5, 2007, *available at* http://www.redorbit.com/news/oddities/1056214/indian_city_punishes_spitting_workers/index.html. Punishment also includes a fine of approximately five dollars.

94. Seth Mydans, *Cute Kitty Is Pink Badge of Shame in Bangkok*, N.Y. TIMES, Aug. 8, 2007, at A7. A previous policy, which used a less embarrassing plaid armband, was unsuccessful because officers kept them as souvenirs—an outcome that simply underscores how difficult it can be for the state to shape or control the meaning of its sanctions.

95. To achieve this result, of course, the norm must be one that society deems appropriate for non-state enforcement. Moreover, society must be able to appropriately enforce the norm at issue. Because illegal activities are occasionally experienced differently across various strata of society, social enforcement may not be viable in some instances. If, for example, the negative effects of deviance are borne primarily by one portion of society, other groups may not fully internalize the costs of failing to deter the undesirable behavior, leading to society-wide underdeterrence. The opposite problem may also arise: if certain communities enforce a norm too zealously because the costs of deviance are particularly acute for them, those groups may generate social sanctions that deter not only prohibited behavior but also related, wholly legitimate behavior.

less encouraging results produced by the more stringent regimes examined in Part IV.

B. "Low-Commitment Laws"—Comparing Primary and Secondary Enforcement Regimes for Seat Belt Statutes

In recent years, many states have enacted strong mandatory seat belt laws. Generally speaking, these laws fall into two categories: "primary enforcement" laws permit officers to stop and ticket an individual solely for not wearing his seat belt, while "secondary enforcement" laws allow ticketing for infractions only when an officer stops a vehicle for another violation. As of 2006, twenty-five states employed primary enforcement regimes; twenty-four used secondary enforcement.[96]

Like smoking laws, seat belt laws are often cited as an example of how legal enforcement and values have developed in tandem.[97] Part of the explanation for this result may be that, like smoking, seat belt usage is a public action that can provoke social sanctions for noncompliance, most typically from other occupants of a car (particularly those concerned for the wearer's safety). Accordingly, some of the effect that the literature has identified may be due to third-party social sanctions rather than first-party norms. If so, a portion of the increase in seat belt usage over time can be explained in a manner similar to the "social laws" discussed above.

But seat belt laws do often carry serious, and sometimes highly publicized, penalties. In contrast to the innocuous (and ubiquitous) "no smoking" sign, seat belt signs range in their forcefulness from the simple exhortation to "buckle up for safety" to specific citations of the punishments for noncompliance. This difference in approach is a significant one for CET: if seat belt enforcement is not limited to third-party social sanctions, intrinsic motivation for the behavior should still decrease. The puzzle thus remains as to why seat belt laws can make use of tangible punishments and yet not suffer any apparent detrimental effects to first-party norms that would dampen

96. Larry Copeland, *Federal Safety Funding Sways Few States*, USA TODAY, Apr. 13, 2006, http://www.usatoday.com/news/nation/2006-04-13-safety-funding_x.htm. New Hampshire's law, which the article excludes from either category, requires only individuals less than eighteen years of age to wear seat belts. N.H. REV. STAT. ANN. § 265:107-a (2007).

97. *See, e.g.*, Cass R. Sunstein, *Social Norms and Big Government*, 15 QUINNIPIAC L. REV. 147, 157 (1995).

enforcement.

The answer may be that seat belt usage is the behavioral equivalent of cheap talk—a low-cost activity for which individuals hold little first-party commitment.[98] Seat belt statutes are "low-commitment laws": they operate in a realm where there is little or no normative stance on the behavior that the law seeks to encourage. When the law demands that citizens undertake such action, there may be little or no intrinsic motivation destroyed by that external justification.

Put in the terms of CET, the first-party costs of noncompliance prior to the new law are nearly zero: citizens do not have an intrinsic commitment one way or the other to their behavior. Therefore, as Figure 6 shows, a decrease in first-party costs is unlikely to significantly lessen the overall effect of compliance:

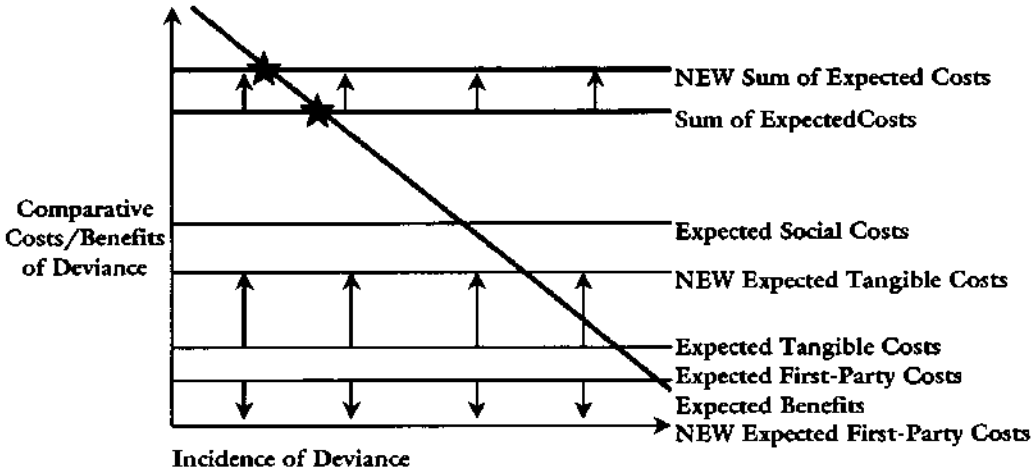

Figure 6: Tangible Costs Increase Significantly; Previously Low First-Party Costs Decrease to Zero

Because little or no intrinsic motivation exists to begin with, a new law will generate little loss to first-party incentives even under CET.

The distinction between secondary and primary enforcement provides a method to test this claim. If there were substantial first-party commitments to seat belt usage, one would expect a significant

98. This is not to suggest that individuals do not have strong *tangible* incentives to wear seat belts, given the benefits that such an action can have in the event of an accident. Rather, the point is that individuals have no strong normative commitment to seat belt usage.

difference in outcomes between the two types of enforcement regimes. Specifically, one would expect a greater decrease in first-party norms from primary regimes (where the external motivation is stronger, and thus more prone to destroying intrinsic commitments) than from secondary regimes.

For reasons discussed previously, a direct comparison between primary and secondary enforcement regimes will not be sufficient to play out this distinction. Although such comparisons will show a difference in the raw level of compliance between the two regimes, that alone will reveal nothing about whether intrinsic motivation has decreased more severely under one regime than the other: primary enforcement regimes may still produce greater overall compliance, because the effect of a harsher sanction may outweigh any potential decrease in intrinsic motivation.[99] Indeed, the data do show a higher degree of compliance under primary enforcement regimes than under secondary ones. Primary enforcement regimes raise seat belt usage by 22%, while secondary enforcement laws yield only an 11% increase.[100]

The majority of states with primary enforcement laws, however, were once states with secondary enforcement.[101] Because primary enforcement laws, as a harsher legal regime, should have a more powerful effect upon intrinsic motivation than a secondary enforcement mechanism, those states with well-established primary enforcement laws should show a greater decrease in intrinsic motivation than a secondary enforcement state that has recently switched to primary enforcement. Although the two compliance rates should converge over time, the latter rate should exceed the former at the outset, since the full effect of CET will not have had time to set in. Thus, if there is a great deal of intrinsic motivation to be destroyed, the difference between the results of these two regimes should be significant, at least for some period following the switch

99. As the reader will recall, this was also a concern in studying the voting regimes of Part IV.B, *supra*.

100. Alma Cohen & Liran Einav, *The Effects of Mandatory Seat Belt Laws on Driving Behavior and Traffic Fatalities* 4, 42 tbl.4 (Harvard, John M. Olin Ctr. for Law, Econ., & Bus., Discussion Paper No. 341, 2002), *available at* http://papers.ssrn.com/abstract=293582.

101. *See id.* at 39 tbl.1 (listing only eight such states that had never implemented a secondary enforcement regime); Copeland, *supra* note 96 (noting that twenty-five states employed primary enforcement regimes as of 2006).

from secondary to primary enforcement. But if the amount of intrinsic motivation is small, as the model above suggests, then the difference should also be insignificant.

The data support the latter proposition. Switching from a secondary enforcement regime to a primary one yields an average increase of 13.5% in compliance, for a total increase (as compared to no enforcement) of just under 25%.[102] The result is similar to that of an established primary enforcement regime, which yields an average compliance increase of just under 22%. The difference, moreover, is not statistically significant, and neither effect diminishes over time.[103] These data appear to confirm the hypothesis that there is little intrinsic motivation underlying seat belt usage, and that the effects of CET in this context will accordingly be minimal.

This carves out another important (if somewhat obvious) scenario in which CET poses little challenge to traditional legal enforcement. When a legal regime governs a behavior to which there is little or no normative commitment, the effects of CET ought not to concern lawmakers. Similarly, law and norms scholars ought not to be surprised when greater legal enforcement in such a context produces no countervailing decrease in intrinsic motivation to dampen or destroy the law's positive effects. Like the example of public non-smoking laws, seat belt laws provide a legal setting in which the conclusions of Part IV are not echoed. But unlike non-smoking laws, which exploit the benefits of CET to the advantage of lawmakers, seat belt laws—as well as other contexts in which individuals' normative commitments start out low to begin with—barely affect first-party costs at all. Lawmakers in such a context may operate free from concern over CET's potentially perverse effects on compliance, precisely because no norms exist where the law seeks to tread.

VI. CONCLUSION

This Article has suggested that in certain circumstances the law may undermine the very behaviors it seeks to encourage, by replacing internal justifications for compliance with external motivations for obedience. When this is the case, legal enforcement

102. Cohen & Einav, *supra* note 100, at 24, 42 tbl.4.

103. *Id.* at 25.

may do more harm than good. At the very least, enforcement may have a hidden price: individuals may begin to engage in desired behavior more to avoid punishment, and less for its own sake.

Yet the state does not merely choose whether to enforce a regime, it also chooses the contours of punishment and enforcement. Should children's good performance at school be rewarded with praise, or with cash?[104] Is taxing plastic shopping bags the best way to encourage consumers to use their own?[105] State enforcement may sometimes be the most feasible way to secure compliance, and in such instances legal sanctions may be sensible or necessary. But we should also be cognizant of the potential tradeoff between normative commitments and deterrence: government-administered punishments may not be the best solution to every social problem. With this awareness comes a certain pessimism about the law's potential as a panacea for social ills. But with it also comes an opportunity for meaningful discussions about what, if not the law, should fill that role, and when such a substitution is necessary.

104. *See* Joseph Berger, *On Education; Some Wonder if Cash for Good Test Scores Is the Wrong Kind of Lesson*, N.Y. TIMES, Aug. 8, 2007, at B9 (discussing a New York City pilot program awarding fourth- and seventh-grade students $100 to $500 for exam performance, and citing the World Bank's financing of $1.2 billion worth of similar incentive programs in twelve countries).

105. *See* Brian Lysaght, *London Officials Considering Ban, Tax on Plastic Shopping Bags*, BLOOMBERG, Sept. 14, 2007, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aD03gPxAJXVk.