

# LAW FOR THE COMMON MAN: AN INDIVIDUAL-LEVEL THEORY OF VALUES, EXPANDED RATIONALITY, AND THE LAW

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## I

### INTRODUCTION

What does the law mean to the common person? Such a broad question could be answered in more than one way, depending on one's vantage point, disciplinary background, and so forth. From an economic-analysis perspective, an individual actor would consider the law as a system of incentives. In this view, incentives provide—indeed, constitute—reasons for action. The focus thus shifts from incentives in isolation to the mechanism that engenders such incentive-sensitive behavior. In the traditional neoclassical economic account, individuals respond to incentives with a motivation to maximize their expected utility—also known as rational preferences. Economic analysis of law that subscribes to the rationality assumption thus treats the law as a price system of sorts.

That the traditional rationality assumption fails systematically in predicting people's behavior in important circumstances is not much in dispute anymore. Research on bounded rationality in behavioral economics harnesses insights primarily from cognitive psychology to suggest directions for developing an organizing framework for non-standard preference formation. This research addresses major aspects in which actual behavior diverges from the behavior predicted by the traditional rationality-based model. However, because economics still lacks a general theoretical account that could replace the rational preference workhorse, legal applications of behavioral economics tend to be more specific than general, at least at the level of generality reflected in

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the question that opens this article: What does the law mean to the common person?

This article makes an admittedly bold attempt at outlining an analytical framework for addressing this question. Instead of looking at the legal implications of bounded rationality—an exercise highly worthy in its own right—this article advances a theory of expanded rationality. This theory retains the element of rationality in that people respond to incentives in an attempt to attain utility, and it does not question the observation that decision-making is often bounded due to various factors. The main thrust of the present theory is to expand the concept of personal utility such that it comprises personal values. This theory might be useful for economics in general, but it could be particularly beneficial for elaborating law-and-economics accounts of legal issues that have been restricted by the traditional model of rationality.

Defined as conceptions of the desirable, values guide the way individuals select actions, evaluate people and events, and explain or justify their actions and evaluations. Values thus operate as arguments in individuals' personal utility functions, underlie the construction of preferences, and provide reasons for reason-based choice. The present theory expands the conception of rationality by incorporating a set of motivational goals that is richer than the standard depiction of self-interestedness, yet avoids tautology. This expanded, values-based account of preferences and incentives lends itself to illuminating fundamental questions about legal design and the role of law in society.

The remainder of this article describes the theoretical underpinnings of the expanded rationality model and its application to the law. Part II provides a brief introduction to the theory of values as it has developed in psychology. Part III reviews two central strands in the economic literature on rationality and demonstrates how the theory of values can serve to develop a general account of expanded rationality. Part IV applies this theory to four fundamental legal problems: (1) the link between values and the content of laws, (2) the role of values in law abidingness, (3) the effect of value diversity in groups on legal design, and (4) the crucial aspect of value conflict in the application of law.

## II

### VALUES: CONCEPTUALIZING THE DESIRABLE

#### A. The Nature of Values

For several decades, research in social psychology has developed and refined theories on individual values. Although economists and law-and-economics scholars cannot be accused of ignoring psychology, this branch of psychological research has been virtually overlooked despite its considerable potential; thus, this part presents with some detail the currently dominant

theory.<sup>1</sup> According to Shalom Schwartz, a consensus has emerged among social scientists about how to conceptualize basic values. This conception includes six features:

1. *Values are beliefs* that are linked inextricably to affect. When values are activated, they become infused with feeling. People for whom independence is an important value become aroused if their independence is threatened, despair when they are helpless to protect it, and are happy when they can enjoy it.
2. *Values refer to desirable goals* that motivate action. People for whom social order, justice, and helpfulness are important values are motivated to promote these goals.
3. *Values transcend specific actions and situations.* Obedience and honesty, for example, are values that may be relevant at work or in school, in sports, business, and politics, with family, friends, or strangers. This feature distinguishes values from narrower concepts like norms and attitudes that usually refer to specific actions, objects, or situations.
4. *Values serve as standards or criteria.* Values guide the selection or evaluation of actions, policies, people, and events. People decide what is good or bad, justified or illegitimate, worth doing or avoiding, by considering the effects on attaining their cherished values.
5. *Values are ordered by importance* relative to one another. The ordered set of values forms a system of value priorities. Societies and individuals can be characterized by their systems of value priorities. Do people attribute more importance to achievement or justice, to novelty or to tradition? This hierarchical feature also distinguishes values from norms and attitudes.
6. *The relative importance of multiple values guides action.* Any attitude or behavior typically has implications for more than one value. For example, attending church might express and promote tradition, conformity, and security values for a person at the expense of hedonism and stimulation values. The trade-off among relevant, competing values is what guides attitudes and behaviors. Values contribute to action to the extent that they are relevant in the context (hence likely to be activated) and important to the actor.<sup>2</sup>

Schwartz has advanced a comprehensive theory of individual-level values that represent universal requirements of human existence—namely, biological needs, coordination of social interaction, and group functioning—as motivational goals.<sup>3</sup> Since its introduction, this has been the predominant theory of individual values in psychology.<sup>4</sup> Table 1 provides definitions of the ten values distinguished by the theory and value items that reflect them.

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1. The following draws liberally on Shalom H. Schwartz, *Value Orientations: Measurement, Antecedents and Consequences Across Nations*, in MEASURING ATTITUDES CROSS-NATIONALLY: LESSONS FROM THE EUROPEAN SOCIAL SURVEY 169 (Roger Jowell et al. eds., 2007).

2. *Id.* at 170–71 (citations omitted) (emphasis in original).

3. See Shalom H. Schwartz, *Universals in the Content and Structure of Values: Theoretical Advances and Empirical Tests in 20 Countries*, in ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 1 (Mark Zanna ed., 1992); Shalom H. Schwartz, *Are There Universal Aspects in the Content and Structure of Values?*, J. SOC. ISSUES, Winter 1994, at 19.

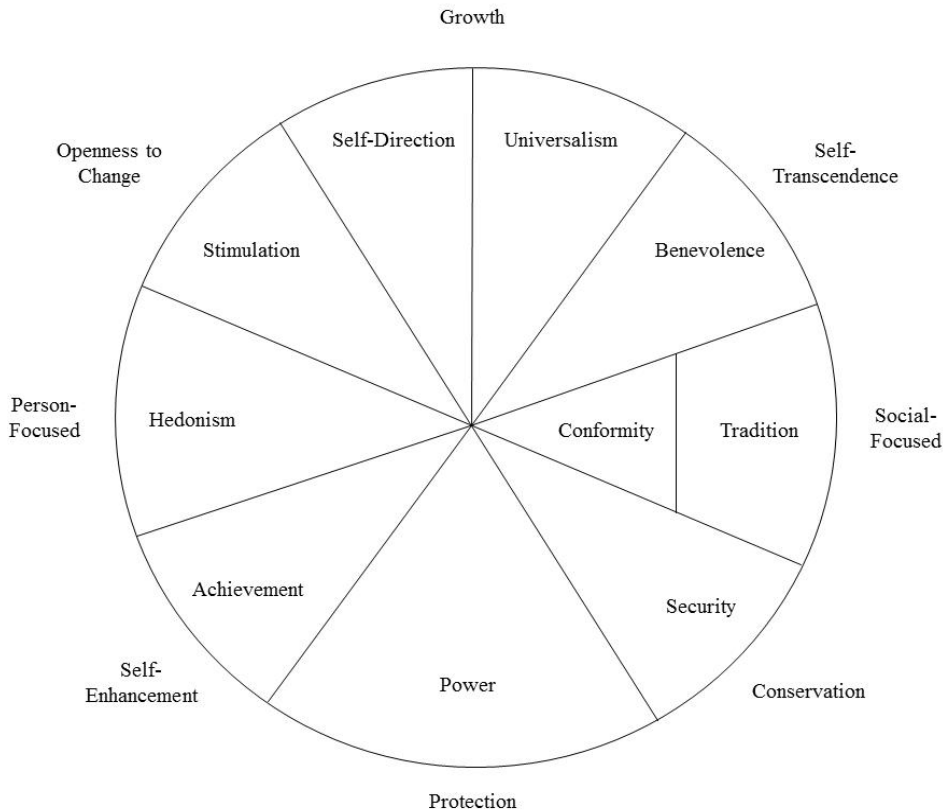
4. See PETER B. SMITH, MICHAEL HARRIS BOND & CIGDEM KAGITCIBASI, UNDERSTANDING SOCIAL PSYCHOLOGY ACROSS CULTURES ch. 2 (3d ed. 2006); Steven Hitlin & Jane A. Piliavin, *Values: Reviving a Dormant Concept*, 30 ANN. REV. SOC. 359 (2004). For earlier theories, see Clyde Kluckhohn, *Values and Value-Orientations in the Theory of Action*, in TOWARD A GENERAL THEORY OF

Table 1: The Schwartz Individual Value Types and Values that Represent Them

<b>Self-Direction</b>	Independent thought and action-choosing, creating, exploring (creativity, freedom, independent, curious, choosing own goals)
<b>Stimulation</b>	Excitement, novelty and challenge in life (daring, a varied life, an exciting life)
<b>Hedonism</b>	Pleasure and sensuous gratification for oneself (pleasure, enjoying life)
<b>Achievement</b>	Personal success through demonstrating competence according to social standards (successful, capable, ambitious, influential)
<b>Power</b>	Social status and prestige, control or dominance over people and resources (social power, authority, wealth)
<b>Security</b>	Safety, harmony and stability of society, of relationships and of self (family security, national security, social order, clean, reciprocation of favors)
<b>Conformity</b>	Restraint of actions, inclinations and impulses likely to upset or harm others and violate social expectations or norms (self-discipline, obedient, politeness, honoring parents and elders)
<b>Tradition</b>	Respect, commitment and acceptance of the customs and ideas that traditional culture or religion provide (accepting my portion in life, humble, devout, respect for tradition, moderate)
<b>Benevolence</b>	Preservation and enhancement of the welfare of people with whom one is in frequent personal contact (helpful, honest, forgiving, loyal, responsible)
<b>Universalism</b>	Understanding, appreciation, tolerance and protection for the welfare of all people and for nature (broadminded, wisdom, social justice, equality, a world at peace, a world of beauty, unity with nature, protecting the environment)

Schwartz's theory further specifies the structural interrelations among values. These values can be drawn as segments of a circle. Figure 1 depicts this spatial arrangement. Adjacent values are conceptually close to one another, whereas opposing values express conceptually diametrical goals in life. Thus, individuals who put a high emphasis on values of universalism (social justice, equality) would also tend to emphasize benevolence values (helpful, honest, et cetera). People who emphasize universalism and benevolence would tend to de-emphasize values that belong to opposing value types (achievement, for example).

Figure 1: The Structure of Relations Among Individual Values



The relationships between the ten values can be summarized in two basic conflicts: self-enhancement versus self-transcendence and openness-to-change versus conservation. Self-enhancement values focus on self-interest through the pursuit of control over people and resources (power), and of competence and success (achievement). These values conflict with self-transcendence values that reflect concern for close others (benevolence) and for all people and nature (universalism). Openness-to-change values reflect openness to what is new: excitement and novelty (stimulation), and autonomy of thought and action (self-direction). These values conflict with conservation values, which reflect a strong preference to preserve the status quo through a commitment to past beliefs and customs (tradition), adherence to social norms and expectations (conformity), and stability for self and close others (security). Hedonism values share elements of both openness-to-change and self-enhancement.

An alternative, more recent two-dimensional structure classifies values into ones that regulate the expression of personal characteristics and interests (person-focused: self-direction, stimulation, hedonism, achievement, and

power) versus those that regulate relations with others and effects on them (social-focused: universalism, benevolence, tradition, conformity, and security).<sup>5</sup> Simultaneously, this classification groups values into those that express anxiety-free self-expansion (growth values: self-direction, universalism, benevolence, stimulation, and hedonism) versus those that express anxiety-based self-protection (protection values: security, power, achievement, conformity, and tradition).

The ten basic values are intended to include all the core values recognized in cultures around the world. Analyses of numerous samples from scores of countries in every inhabited continent supported the discrimination of the ten basic values and the two-dimensional structure, indicating that the model provides an excellent representation of the average individual value structure across literate cultures.<sup>6</sup>

## B. Values, Behavior, and Other Factors

A growing number of studies link value priorities to behavior and social roles. Several factors may be involved in mediating or moderating the causal link from values to action.<sup>7</sup> Yet, overall, as research on values progresses, it becomes evident that people tend to make decisions and behave consistently with their values. Although most of the evidence in this regard is correlational, recent important studies show that activating values *causes* behavior.<sup>8</sup>

The types of behavior that exhibit relations with individuals' value priorities range from the very mundane to principled choices to life-changing decisions. Similarly, conceptual consistency between value priorities and behavior has been observed in experimental settings, among lay and professional samples, and in national representative samples. In particular, value priorities correlate with people's daily behaviors.<sup>9</sup> Values systematically associate with voting for

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5. Shalom H. Schwartz, *Basic Values: How They Motivate and Inhibit Prosocial Behavior*, in PROSOCIAL MOTIVES, EMOTIONS, AND BEHAVIOR 221, 226–28 (Mario Mikulincer & Phillip R. Shaver eds., 2009).

6. See Shalom H. Schwartz & Klaus Boehnke, *Evaluating the Structure of Human Values with Confirmatory Factor Analysis*, 38 J. RES. PERSONALITY 230, 232 (2004) (outlining a previous analysis of over 200 samples from over sixty countries that identified the ten values in countries across the world). For earlier stages of this project, see sources cited *supra* note 3.

7. A vast literature on judgment and decision-making analyzes the role of factors of this sort, including boundaries on cognitive processes that may engender bounded rationality. For good introductory sources, see HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT (Thomas Gilovich et al. eds., 2002); DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (2008); Robyn M. Dawes, *Behavioral Decision Making and Judgment*, in 1 HANDBOOK OF SOCIAL PSYCHOLOGY 497 (Daniel T. Gilbert et al. eds., 4th ed. 1998).

8. Bas Verplanken & Rob W. Holland, *Motivated Decision-Making: Effects of Activation and Self-Centrality of Values on Choices and Behavior*, 82 J. PERSONALITY & SOC. PSYCHOL. 434 (2002); Lilach Sagiv, Noga Sverdlik & Norbert Schwarz, *To Compete or to Cooperate? Values' Impact on Perception and Action in Social Dilemma Games*, 41 EUR. J. SOC. PSYCHOL. 64 (2011).

9. Anat Bardi & Shalom H. Schwartz, *Values and Behavior: Strength and Structure of Relations*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 1207 (2003).

political parties whose agendas reflect voters' values.<sup>10</sup> The values that people hold dear are compatible with their vocational interests and with their choices between entrepreneurial self-employment versus salaried jobs.<sup>11</sup> Board members in public corporations exhibit a preference for strategic business decisions that are consistent with their values.<sup>12</sup> Finally, several studies link value priorities with consumption choices and behaviors that are more environmentally sensitive.<sup>13</sup> Anecdotally, even buying an iPad associates with a certain value profile.<sup>14</sup>

Finally, it deserves emphasizing that values also relate systematically to a set of fundamental psychological factors mentioned here only in passing. Values thus have been conceptualized as the core of personal identity.<sup>15</sup> Value priorities are associated with personality traits according to the "Big Five" model.<sup>16</sup> Value priorities correlate systematically with the need for cognitive closure.<sup>17</sup> Finally, value priorities correlate (modestly) with individual social axiom beliefs.<sup>18</sup>

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10. See Shalom H. Schwartz, *Value Priorities and Behavior: Applying a Theory of Integrated Value Systems*, in 8 THE PSYCHOLOGY OF VALUES: THE ONTARIO SYMPOSIUM 1, 10 (Clive Seligman, James M. Olson & Mark P. Zanna eds., 1996); Marina F. Barnea & Shalom H. Schwartz, *Values and Voting*, 19 POL. PSYCHOL. 17 (1998); Gian Vittorio Caprara et al., *Personality and Politics: Values, Traits, and Political Choice*, 27 POL. PSYCHOL. 1 (2006).

11. See Florian Noseleit, *The Entrepreneurial Culture: Guiding Principles of the Self-Employed*, in ENTREPRENEURSHIP AND CULTURE 41 (Andreas Freytag & Roy Thurik eds., 2010); Lilach Sagiv, *Vocational Interests and Basic Values*, 10 J. CAREER ASSESSMENT 233 (2002). On the link between value acquisition in the family and career choices, see Steven Hitlin, *Parental Influences on Children's Values and Aspirations: Bridging Two Theories of Social Class and Socialization*, 49 SOC. PERSP. 25 (2006).

12. Renée B. Adams, Amir N. Licht & Lilach Sagiv, *Shareholders and Stakeholders: How Do Directors Decide?*, STRATEGIC MGMT. J. (forthcoming 2011).

13. See generally Suzanne C. Grunert & Hans Jorn Juhl, *Values, Environmental Attitudes, and Buying of Organic Foods*, 16 J. ECON. PSYCHOL. 39 (1995); Annika M. Nordlund & Jorgen Garvill, *Values Structures Behind Proenvironmental Behavior*, 34 ENV'T & BEHAV. 740 (2002); John Thøgersen & Folke Ölander, *Human Values and the Emergence of a Sustainable Consumption Pattern: A Panel Study*, 23 J. ECON. PSYCHOL. 605 (2002). See also Judith I.M. de Groot & Linda Steg, *Value Orientations to Explain Beliefs Related to Environmental Significant Behavior: How to Measure Egoistic, Altruistic, and Biospheric Value Orientations*, 40 ENV'T & BEHAV. 330 (2008).

14. MYTYPE, THE PERSONALITY, VALUES AND DEMOGRAPHICS BEHIND CONSUMER OPINIONS OF THE IPAD (2010), available at <http://www.scribd.com/doc/34438276/iPad-Opinion-Profile-by-MyType-July-2010>.

15. Steven Hitlin, *Values as the Core of Personal Identity: Drawing Links Between Two Theories of Self*, 66 SOC. PSYCHOL. Q. 118 (2003).

16. Sonia Roccas et al., *The Big Five Personality Factors and Personal Values*, 28 PERSP. SOC. PSYCHOL. BULL. 789 (2002). On the Big Five model, see generally ROBERT R. MCCRAE & PAUL T. COSTA, JR., PERSONALITY IN ADULTHOOD: A FIVE-FACTOR THEORY PERSPECTIVE (2d ed. 2003).

17. Renee B. Adams, Amir N. Licht & Lilach Sagiv, *Shareholderism: Board Members' Values and the Shareholder-Stakeholder Dilemma* (European Corp. Governance Inst., Finance Working Paper No. 204/2008, 2008), available at <http://ssrn.com/abstract=1118664> (explaining that, specifically, conservation values correlate positively with need for closure, and openness-to-change values correlate negatively with it).

18. Kwok Leung et al., *Social Axioms and Values: A Cross-Cultural Examination*, 21 EUR. J. PERSONALITY 91 (2007).

## III

## EXPANDED RATIONALITY: RECONCEPTUALIZING THE PREFERRED

During the past several years, the field of economics has reached a new stage in the study of the boundaries of rationality. The field has grown in scope such that “bounded rationality” and “behavioral economics” denote closely related, but often independent, lines of work.<sup>19</sup> In addition to documenting ever more behavioral deviations from the predictions of the standard model and suggesting models that might account for these deviations, writers growingly call for theorizing at a higher level of generality. “For the field to advance further,” argues one leading economist, “it should devote more attention to the foundations of its models, and develop unified explanations for a wider range of phenomena.”<sup>20</sup>

Efforts toward more general theorizing have proceeded on several fronts. This part of the article presents two developments: (1) classifying the numerous behavioral deviations from the standard model into broad categories of non-standard preferences and (2) identifying processes that may systematically give rise to variance of preferences.

## A. Non-Standard Preferences

“Non-standard preferences” has become the standard term for the slew of well-documented departures from the preference profile underlying the standard model.<sup>21</sup> Within this broad category, three to four objects of non-standard preferences stand out: time, risk, ambiguity, and others. Not all commentators refer to the full set, however, as preference (or aversion) toward ambiguity is the least-discussed type.<sup>22</sup> This section reviews advances in the

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19. Glenn Ellison, *Bounded Rationality in Industrial Organization*, in 2 ADVANCES IN ECONOMICS AND ECONOMETRICS: THEORY AND APPLICATIONS, NINTH WORLD CONGRESS 142, 142 (Richard Blundell, Whitney K. Newey & Torsten Persson eds., 2006); Drew Fudenberg, *Advancing Beyond “Advances in Behavioral Economics,”* 44 J. ECON. LITERATURE 694 (2006).

20. Fudenberg, *supra* note 19, at 694. *See also* Colin E. Camerer, *Behavioral Economics*, in 2 ADVANCES IN ECONOMICS AND ECONOMETRICS: THEORY AND APPLICATIONS, NINTH WORLD CONGRESS 181, 191 (Richard Blundell, Whitney K. Newey & Torsten Persson, eds., 2006); Colin F. Camerer & George Loewenstein, *Behavioral Economics: Past, Present, Future*, in ADVANCES IN BEHAVIORAL ECONOMICS 3, 14 (Colin F. Camerer et al. eds., 2004); Wolfgang Pesendorfer, *Behavioral Economics Comes of Age: A Review Essay on Advances in Behavioral Economics*, 44 J. ECON. LITERATURE 712, 720 (2006).

21. *See* Stefano DellaVigna, *Psychology and Economics: Evidence from the Field*, 47 J. ECON. LITERATURE 315 (2009).

22. *See id.*; Sendhil Mullainathan & Richard H. Thaler, *Behavioral Economics*, in 2 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 1094 (2001) (focusing on time, risk, and other-regarding preferences); George F. Loewenstein & Ted O’Donoghue, *Animal Spirits: Affective and Deliberative Processes in Economic Behavior* (May 2005), available at <http://www.arts.cornell.edu/econ/edo1/will.pdf> (discussing time, risk, and other-regarding preferences); Camerer, *supra* note 20 (focusing on the time, risk, ambiguity, and self-interest preferences).



study of other-regarding preferences and of ambiguity preferences, as they are most pertinent to the theory of values.

### 1. Other-Regarding Preferences

Though a good deal has been written in the behavioral law and economics literature about possible legal implications of various behavioral biases (endowment, availability, et cetera), the legal discourse has been most affected by progress in behavioral economic research on other-regarding preferences. For most legal scholars, homo economicus—that notorious expected-utility maximizing (straw) man—is first and foremost a keenly self-interested person and, only secondly, an exponentially time-discounting one. And this is perfectly understandable. The standard model of rationality is not merely a descriptive model; it is also a normative theory about how people should behave if they are to be deemed rational (by the criteria of this theory, that is). As such, one could justifiably see the standard model as challenging other normative theories of behavior based on morality and ethics, which are so central to the law.

A large body of evidence shows that people may systematically incur substantial costs to promote other people's interests or just "to make a point."<sup>23</sup> Stated otherwise, people regularly seem to care about others in the society—hence the terms "social preferences" and "other-regarding preferences."<sup>24</sup> Particular other-regarding preferences have been dubbed "fairness," "reciprocity," et cetera.<sup>25</sup> At the basis of this literature lies a general postulate: that other people's utility enters into one's own utility function in a non-trivial way. In order to avoid tautology, economists need to suggest functional forms that represent the content, or structure, of other-regarding preferences. Joel Sobel, in a survey of other-regarding preferences, argues that the notion of preferences should be expanded by relaxing the assumption of individual greed.<sup>26</sup> Sobel writes a simple general expression of individual utility that reflects this notion— $u_i(O(s); \alpha(s; \theta))$ —where  $\theta$  (theta) is the pivotal variable

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23. See generally Colin Camerer & Ernst Fehr, *When Does "Economic Man" Dominate Social Behavior?*, 311 SCI. 47 (2006); Matthew Rabin, *A Perspective on Psychology and Economics*, 46 EUR. ECON. REV. 657 (2002).

24. Many economic discussions confusingly employ "social preferences" to denote "other-regarding preferences." This usage intermixes preferences of individuals with regard to other members of society with preferences of social groups. The latter type of preferences is highly problematic from an economic theory perspective, if not utterly denied. Yet this is not the case from the vantage point of psychology or other social sciences even if one prefers not to ascribe faculties of choice, tastes, and preferences to social groups. I, therefore, prefer the neutral term other-regarding preferences.

25. See, e.g., Joyce Berg, John Dickhaut & Kevin McCabe, *Trust, Reciprocity, and Social History*, 10 GAMES & ECON. BEHAV. 122 (1995); Matthew Rabin, *Incorporating Fairness into Game Theory and Economics*, 83 AM. ECON. REV. 1281 (1993).

26. Joel Sobel, *Interdependent Preferences and Reciprocity*, 43 J. ECON. LITERATURE 392, 392 (2005).

as it describes personal characteristics.<sup>27</sup> This expression allows for an individual's utility to depend on outcomes that take into account interdependent utilities; it could also include elements that cannot be measured directly, "like a warm glow from giving."<sup>28</sup> Theta formalizes the idea that people differ in the utility they derive from different (broadly defined) outcomes. Furthermore,  $\theta$  may be interpreted as equivalent to the concept of identity.<sup>29</sup>

A common approach for demonstrating other-regarding preferences is to theorize a utility function from intuitive principles and support it with consistent experimental results.<sup>30</sup> Ernst Fehr and Klaus Schmidt advance a model featuring an aversion toward less equal outcomes.<sup>31</sup> In this model, people are willing to give up some material payoff to move in the direction of more equal outcomes. Gary Charness and Matthew Rabin conceptualize people's preference for fairness as consisting of their own individual utility and two additional components.<sup>32</sup> One component is a Rawlsian maxim in care for the least advantaged in the society; the second component represents a universalistic concern for the total income of all societal members, equally weighted. The latter component may be viewed as a preference for general efficiency or social welfare. A third component based on reciprocity is added to account for retaliatory actions. We return to Sobel's  $\theta$  and to these functional forms below.

## 2. Preferences Over the Unknown: Uncertainty and Ambiguity Aversion

Individuals' behavior under uncertainty exhibits systematic departures from the standard model of rational choice. Uncertainty is defined as the category of unknown events about which one does not have an estimate of the probabilities of their occurrence.<sup>33</sup> Research indicates that people have an ambiguity

27. In this formulation,  $\alpha$  is a parameter;  $s = (s_1, \dots, s_i)$  is strategy profile (that is, individual  $i$  chooses  $s_i$ );  $O(s)$  denotes those generalized consumption goods whose production does not depend on  $\theta$  and  $\alpha(s; \theta)$ . *Id.* at 402.

28. *Id.* See generally James Andreoni, *Impure Altruism and Donations to Public Goods: A Theory of Warm-Glow Giving*, 100 *ECON. J.* 464 (1990); James Andreoni, *Privately Provided Public Goods in a Large Economy: The Limits of Altruism*, 35 *J. PUB. ECON.* 57 (1988). See also Uzi Segal & Joel Sobel, *Tit for Tat: Foundations of Preferences for Reciprocity in Strategic Settings*, 136 *J. ECON. THEORY* 197 (2007).

29. For an economic modeling of identity, see George A. Akerlof & Rachel E. Kranton, *Economics and Identity*, 115 *Q.J. ECON.* 715 (2000). See also Roland Bénabou & Jean Tirole, *Identity, Morals and Taboos: Beliefs as Assets*, 126 *Q.J. Econ.* (forthcoming 2011), available at [http://idei.fr/doc/by/tirole/identity2010\\_june.pdf](http://idei.fr/doc/by/tirole/identity2010_june.pdf).

30. See Ernst Fehr & Klaus Schmidt, *The Economics of Fairness, Reciprocity and Altruism—Experimental Evidence and New Theories*, in 1 *HANDBOOK OF THE ECONOMICS OF GIVING, ALTRUISM AND RECIPROCITY* 615 (Serge-Christophe Kolm & Jean Mercier Ythier eds., 2006).

31. Ernst Fehr & Klaus M. Schmidt, *A Theory of Fairness, Competition and Cooperation*, 114 *Q.J. ECON.* 817 (1999). See also Gary E. Bolton & Axel Ockenfels, *ERC: A Theory of Equity, Reciprocity, and Competition*, 90 *AM. ECON. REV.* 166 (2000).

32. Gary Charness & Matthew Rabin, *Understanding Social Preferences with Simple Tests*, 117 *Q.J. ECON.* 817 (2002). See JOHN RAWLS, *A THEORY OF JUSTICE* 154–56 (1971) (discussing the maxim in care principle).

33. FRANK H. KNIGHT, *RISK, UNCERTAINTY AND PROFIT* 19–20, 227 (1921).

aversion, also referred to as uncertainty aversion, which is distinguished from risk aversion.<sup>34</sup> When asked to choose among future outcomes, people ascribe lower utilities to outcomes about which they do not know the probability of risk levels.<sup>35</sup> Furthermore, a theoretical distinction has been made between objective rationality and subjective rationality in connection with ambiguity.<sup>36</sup> Which rationality holds may depend on the individual's culture or personality.<sup>37</sup>

Ambiguity aversion leads people to behave more conservatively.<sup>38</sup> Another important outcome of ambiguity aversion, among numerous others, is incomplete contracts.<sup>39</sup> Interestingly, contract incompleteness associates directly with bounded rationality based on the insight that designing contractual covenants is cognitively costly.<sup>40</sup> But ambiguity aversion also reflects a (negative) taste or preference for the unknowable; the ambiguous may be threatening and had rather be avoided.

## B. Constructed Preferences

Another major challenge to the standard model of rational choice is the discovery that individuals' preferences are context-contingent. They are constructed in a contingent fashion, rather than being fixed, comprehensive, and well-ranked.<sup>41</sup> Moreover, preference construction may have an underlying mechanism such that there could be factors that may systematically cause people to resort to certain modes of decision-making.<sup>42</sup> In the present context, we are interested in a special category of strategies for preference construction that involve reason-based choices. Here, individuals seek reasons to justify their choices and explain them to others. In a more general account of reason-based choice, individuals address difficult decisions—ones that involve conflict

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34. See, e.g., Uzi Segal, *The Ellsberg Paradox and Risk Aversion: An Anticipated Utility Approach*, 28 INT'L ECON. REV. 175 (1987).

35. See Yoram Halevy, *Ellsberg Revisited: An Experimental Study*, 75 ECONOMETRICA 503 (2007).

36. Itzhak Gilboa, Fabio Maccheroni, Massimo Marinacci & David Schmeidler, *Objective and Subjective Rationality in a Multiple Prior Model*, 78 ECONOMETRICA 755 (2008).

37. *Id.* at 756.

38. Sujoy Mukerji, *A Survey of Some Applications of the Idea of Ambiguity Aversion in Economics*, 24 INT'L J. APPROXIMATE REASONING 221, 222 (2000).

39. Sujoy Mukerji, *Ambiguity Aversion and Incompleteness of Contractual Form*, 88 AM. ECON. REV. 1207 (1998).

40. Jean Tirole, *Cognition and Incomplete Contracts*, 90 AM. ECON. REV. 265 (2009).

41. Paul Slovic, *The Construction of Preferences*, 50 AM. PSYCHOL. 364, 369 (1995) ("As a result of [ ] mental gymnastics, decision making is a highly contingent form of information processing, sensitive to task complexity, time pressure, response mode, framing, reference points, and numerous other contextual factors."). See also Gregory W. Fischer et al., *Goal-based Construction of Preferences: Task Goals and the Prominence Effect*, 45 MGMT. SCI. 1057 (1999); Dan Ariely et al., *Tom Sawyer and the Construction of Value*, 60 J. ECON. BEHAV. & ORG. 1 (2006).

42. The obligatory citation is to Herbert A. Simon, *Rational Choice and the Structure of the Environment*, 63 PSYCHOL. REV. 129, 130 (1956) (describing a mental process dubbed "satisficing" that may stem from one's needs, drives, or goals; this process is applicable to any organism). For further sources, see *supra* note 7.

between several good options or conflicting reasons for competing options—by seeking reasons to decide in a particular way.<sup>43</sup> When people make decisions, they consider not only their preferences for different alternatives, but also guiding principles and behavioral rules. In other words, they follow “rationales”—meta-rules and principles.<sup>44</sup> Importantly, rules relate to social norms, which may be seen as sitting higher in the hierarchy of reasons than preferences.

Finally, in a conceptual paper that also deals with hierarchies of motivations, Keith Stanovich recently defined a “master rationality motive” (MRM) as a distinctive thinking disposition at a high level of generality. The MRM is the “motive that drives the search for rational integration across our preference hierarchies.”<sup>45</sup> The MRM is the “desire to act in accordance with reasons, a desire that produces behavior, in your name, by adding its motivational force to that of whichever motives appear to provide the strongest reasons for acting.”<sup>46</sup> The MRM does not refer to how well people satisfy the choice axioms of utility theory, which may be called a “thin theory of rationality.”<sup>47</sup> Rather, the MRM refers to a “broad theory of rationality” that encompasses self-criticism of one’s own desires and beliefs.<sup>48</sup>

### C. Toward Expanded Rationality

The scholarly advances mentioned above point to the need for expanding the standard notion of rationality and, in fact, show that economists are already making progress in this direction. These “new rational preferences” are more individually subjective than the preferences postulated by the standard model. These new preferences are also more socially sensitive, as they take others more systematically into account. They are contextual, depending on the informational environment as well as on the social environment of norms and shared beliefs. These new preferences, moreover, seem to be linked to deep mental processes that may be common to several phenomena. These new preferences thus turn the focus from rationalizing choice decisions on formal bases to justifying them with good reasons.

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43. Eldar Shafir, Itamar Simonson & Amos Tversky, *Reason-Based Choice*, 49 *COGNITION* 11 (1993).

44. On Amir & Dan Ariely, *Decisions by Rules: The Case of Unwillingness to Pay for Beneficial Delays*, 44 *J. MARKETING RES.* 142, 143 (2007).

45. Keith E. Stanovich, *Higher-Order Preferences and the Master Rationality Motive*, 14 *THINKING & REASONING* 111, 119 (2008).

46. *Id.* (quoting J.D. Velleman, *What Happens When Somebody Acts?*, 101 *MIND* 461, 479 (1992)).

47. *Id.* at 121.

48. Stanovich’s idea of contingent ordering of motivations according to a higher-level ranking is reminiscent of Amartya Sen’s concept of meta-ranking; namely, a ranking of sets of preference orderings according to some moral principle. See AMARTYA SEN, *CHOICE, WELFARE AND MEASUREMENT* 100–01 (1982); AMARTYA SEN, *RATIONALITY AND FREEDOM* 17–18 (2002).

Behavioral economics, however, so far has failed to consider a general framework for analyzing individuals' motivational goals—what may be called “the desirable.” For those who seek such a framework in their pursuit of a more general theory of rationality, values may be the Holy Grail, sweeping as this assertion must sound. As conceptions of the desirable, values may provide a good framework for expanding the concept of rationality beyond the confines of the traditional model, while preserving parsimony and theoretical rigor and allowing for deriving testable hypotheses. This section suggests aspects in which the theory of values complements current accounts in behavioral economics and aspects in which the former may be used to expand the latter.

### 1. Values-Based Utility

One will find it difficult to miss the remarkable overlap between the nature of values and the grounds that behavioral economists seek for expanding the frontiers of rationality. The values model appears to satisfy the requirement mentioned above for psychological observations that apply generally. The theoretical model provides a concise yet complete model of human motivational goals. The ten values and their interrelations may point the way toward a unifying theory of human motivation—a way for organizing the different needs, motives, and goals proposed by other theories.<sup>49</sup> The model transcends situations, well beyond economic exchanges, and has been validated to hold nearly universally.

The values model thus can mesh well in, and further enrich, current economic models. Consider Sobel's  $\theta$ .<sup>50</sup> Theta comprises the individual's personal characteristics—in particular, how one assesses different outcomes and the utility one derives from these outcomes. Yet  $\theta$  is only a receptacle; it should be written  $\theta(\cdot)$  to denote that it has arguments. To be meaningful,  $\theta(\cdot)$  must encompass a comprehensive, yet final, set of goals and criteria with which to assess outcomes. This is precisely the role of values. Representing the set of conceptions of the desirable, the distinct ten values in the values model can be seen as ten distinct arguments in individuals' utility functions—as thetas with ten different subscripts. This article will also generalize Sobel's account from one dealing only with other-regarding preferences to a full account of all the individual motivational goals.<sup>51</sup>

The contribution of the values theory lies in defining a finite set of arguments that are both universal and comprehensive. It may enable a modeler to avoid the pitfalls of tautology—namely, allowing anything and everything into the definition of utility, or writing a different model for each case. Granted, there may be many issues that different people in different social groups may

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49. Schwartz, *supra* note 5.

50. Sobel, *supra* notes 26, 27.

51. Additional subscripted thetas could refer to other universal individual factors, for example, beliefs. See Leung, *supra* note 18.

consider important, desirable, legitimate, and so forth. The theory and evidence indicate that these issues would fall into one of the ten domains in the model—that is, that there is “no motivation left behind.” In tandem, many particular values may be idiosyncratic to certain national or local groups (thus falling into different domains in samples from different groups), and therefore should not be used in a general model. In such cases, the model would indicate that these values—and the respective preferences they correlate with—may be inappropriate for analytical use beyond those groups.

In addition to identifying motivationally distinct values, the theory also specifies a structure of values, namely, the dynamics of conflict and congruence among them. These dynamics are backed by concrete cross-correlation matrices. Economists seeking to make their models more attuned to insights from psychology thus may want to incorporate this feature into the models. For example, consider a purely altruistic behavior: making an anonymous donation to a non-governmental organization that runs a clinic in a developing country. Such behavior will be more likely among people high in universalism. The structural features of the model suggest that this behavior will be less likely among individuals who put a high priority on power, which also encompasses wealth attainment. This highlights the fact that values may operate both as “pull” (positive valence) factors for behaviors that are conceptually compatible, and as “push” (negative valence) for incompatible behaviors. The model further suggests that this behavior will be unrelated to security values, for instance, and to value priorities on the conservation versus openness-to-change dimension more generally.

## 2. Other-Regarding Preferences

It requires little effort to observe the conceptual link between self-transcendence values and other-regarding preferences, or the link between self-enhancement values and self-utility in the traditional expected-utility maximization model. The values theory again may enrich the economic accounts through its structural features. Self-regarding preferences comprise seeking pure pleasure for oneself, which corresponds with hedonistic values, as well as other forms of attaining both material and non-material utility, which is covered by achievement and partially by power values. So these issues are related, as one would expect, but also distinct from one another.

On the opposite pole of this dimension, the values theory distinguishes two types of other-regarding motivations. Altruistic preferences directed to particular others from one’s in-group are conceptually compatible with benevolence values. More open-ended other-regarding preferences are compatible with Schwartz’s universalism. Among current models of other-regarding preferences, Charness and Rabin’s model better captures the notion of universalism, especially through the factor of caring for the total utility and

welfare in society, but also through the Rawlsian caring for a (presumably random) least-advantaged member of society.<sup>52</sup> This model nonetheless fails to consider utility derived from caring for impersonal objects such as the environment. The values theory and evidence suggest that similar motivations may lie behind this type of utility. In comparison, Fehr and Schmidt's model revolves around the inequality between an individual's income and the income of others.<sup>53</sup> This model is silent on the question whether the "others" whose income one considers do or do not belong to one's in-group. Indeed, the model fits results from anonymous Ultimatum and other games. It therefore fails to reflect the difference between benevolence and universal motivations.

### 3. Uncertainty and Ambiguity Aversion

Next, consider uncertainty and ambiguity aversion. This type of preference is conceptually compatible with high priority on conservation values, while lower ambiguity aversion is compatible with openness-to-change. People who, relative to others, put a high priority on having new experiences (stimulation) and on independently guiding their own life (self-direction) would be more willing to face unforeseeable contingencies. In contrast, people for whom security, stability, and order (security, tradition) are of high importance would see the unpredictable as threatening and aversive. The emphasis on preserving the status quo—whether real or an imaginary ideal-type (for example, "protecting family values")—is especially clear in such value items as respect for tradition, honoring parents and elders, and social order. The preference for certainty and stability over ambiguity and change is also reflected in seemingly innocuous value items, like cleanliness, that convey a sense of clarity.<sup>54</sup>

More broadly, values that express prevention-of-loss goals stand against values expressing promotion-of-gain goals (see Figure 1). This distinction draws on a theory of regulatory focus.<sup>55</sup> In this theory, hedonic preferences are not continuous. Rather, the domain of losses—in particular, loss avoidance—is distinct from the domain of gains, specifically, gain approach.<sup>56</sup> (The link to Kahneman and Tversky's prospect theory had been noted.)<sup>57</sup> This broad distinction parallels another distinction—between anxiety-based values and anxiety-free values. The values theory thus suggests that uncertainty and

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52. Charness & Rabin, *supra* note 32.

53. Fehr & Schmidt, *supra* note 30.

54. Cf. John T. Jost et al., *Political Conservatism as Motivated Social Cognition*, 129 PSYCHOL. BULL. 339, 346 (2003).

55. E. Tory Higgins, *Beyond Pleasure and Pain*, 52 AM. PSYCHOL. 1280 (1997).

56. *Id.* See also Vered Halamish et al., *Regulatory Focus Effects on Discounting over Uncertainty for Losses vs. Gains*, 29 J. ECON. PSYCHOL. 654 (2008); Lorraine Chen Idson, Nira Liberman & E. Tory Higgins, *Distinguishing Gains from Nonlosses and Losses from Nongains: A Regulatory Focus Perspective on Hedonic Intensity*, 36 J. EXPERIMENTAL SOC. PSYCHOL. 252 (2000); Leigh Ann Vaughn, Jolie Baumann & Christine Klemann, *Openness to Experience and Regulatory Focus: Evidence of Motivation from Fit*, 42 J. RES. PERSONALITY 886 (2008).

57. Higgins, *supra* note 55, at 1293.

ambiguity will be more threatening among individuals who, relative to others, emphasize power, security, conformity, and tradition. These people will be more likely to prefer actions and policies that promise to sustain order and avoid the need to face uncertainty. The opposite will be true for people who are high on self-direction and universalism.<sup>58</sup>

This broad distinction can be further extended to values that express complexity aversion versus values that express comfort with complexity.<sup>59</sup> The pivotal observation here is that complex situations involving many alternatives or several conflicting considerations resemble ambiguous situations. Decision-making in such situations is more cognitively taxing.<sup>60</sup> In the context of political ideology, Philip Tetlock defined individuals' integrative complexity as the extent of differentiation among multiple perspectives or dimensions and the higher order integration or synthesis of these differentiated components.<sup>61</sup> In the economic literature, too, complexity in choice decisions has been shown to invoke negative responses.<sup>62</sup>

The foregoing suggests that uncertainty, ambiguity, and complexity overlap somewhat. With too many moving parts to follow, people lose focus, the picture blurs, and ambiguity reigns supreme. Since everybody is cognitively bounded, everybody, at some point, "satisfices" when facing a complex or ambiguous situation. We can therefore consider self-transcendence and openness-to-change as high-complexity values, as they call for contemplating numerous (sometimes conflicting) objects, and for accommodating uncertainty and ambiguity. Conservation and self-enhancement can be considered as low-complexity values, as they call for focusing on fewer objects—primarily oneself—and for avoiding uncertainty and ambiguity.

People indeed differ in their modes of addressing ambiguous or complex situations. These differences stem from individual traits and from situational factors. A series of studies demonstrated the effect of both channels. Individuals' dislike of integratively complex alternatives correlates positively

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58. The link to political ideologies has been surveyed extensively. See Jost et al., *supra* note 54.

59. Amir N. Licht, *The Maximands of Corporate Governance: A Theory of Values and Cognitive Style*, 29 DEL. J. CORP. L. 649, 668 (2004).

60. JOHN W. PAYNE, JAMES R. BETTMAN & ERIC J. JOHNSON, THE ADAPTIVE DECISION MAKER 29–41 (1993). See also James R. Bettman, Eric J. Johnson & John W. Payne, *A Componential Analysis of Cognitive Effort in Choice*, 45 ORG. BEHAV. & HUM. DECISION PROCESSES 111 (1990).

61. See Philip E. Tetlock, *Cognitive Style and Political Ideology*, 45 J. PERSONALITY & SOC. PSYCHOL. 118 (1983); Philip E. Tetlock, *Cognitive Style and Political Belief Systems in the British House of Commons*, 46 J. PERSONALITY & SOC. PSYCHOL. 365 (1984).

62. See Doron Sonsino & Marvin Mandelbaum, *On Preference for Flexibility and Complexity Aversion—Experimental Evidence*, 51 THEORY & DECISION 197 (2001); Doron Sonsino, Uri Benzion & Galit Mador, *The Complexity Effects on Choice with Uncertainty—Experimental Evidence*, 112 ECON. J. 936, 937 (2002).



with a higher need for cognitive closure<sup>63</sup> and with conservative political ideologies.<sup>64</sup> A higher level of integrative complexity correlates positively with higher priorities on self-transcendence values and negatively with emphasizing self-enhancement values.<sup>65</sup> Higher need for closure correlates highly positively with conservation values (security, tradition, and conformity) and highly negatively with openness-to-change values (stimulation and self-direction).<sup>66</sup> Moreover, as the level of need for cognitive closure rises, people are more likely to fall back on “standard solutions” to problems suggested by their culture. In ambiguous, complex social interactions, cultural norms provide easily accessible heuristics for reaching satisfactory solutions because they can be easily justified.<sup>67</sup>

#### 4. Preference Construction and Related Mechanisms

Let us now turn to the remaining issues identified in the literature as developments in, or challenges to, the standard model of rationality. The values theory provides a general framework, within which one can situate the concept of preference construction and related concepts. To the extent that preference construction is guided by reasons or principles, and behavioral rules informed by culture and social norms, values define both the vocabulary for, and the intensity of, these factors.

Recasting Stanovich’s MRM in a values mold yields particularly fruitful observations. At the heart of this “desire to act in accordance with reasons,” there lies a process seeking “that of whichever motives appear to provide the strongest reasons for acting.”<sup>68</sup> What makes the MRM unique is its meta- (“master”) rationality character—the ability to engage in self-criticism, to consider conceptually conflicting goals, and to apply higher-order preferences to them.<sup>69</sup> As trans-situational goals or criteria, values define higher-order preferences. The values theory—in particular, the circular model of values—provides structure to the notion of conflicting goals and low-level preferences as it postulates the relationships of conflict and congruence among values. When

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63. See ARIE W. KRUGLANSKI, LAY EPISTEMICS AND HUMAN KNOWLEDGE: COGNITIVE AND MOTIVATIONAL BASES 14 (1989) (defining the need for cognitive closure as “the desire for a definite answer on some topic, any answer as opposed to confusion and ambiguity”).

64. Philip E. Tetlock, *Cognitive Biases and Organizational Correctives: Do Both Disease and Cure Depend on the Ideological Beholder?*, 45 ADMIN. SCI. Q. 293 (2000).

65. Liisa Myrsky, *Everyday Value Conflicts and Integrative Complexity of Thought*, 43 SCANDINAVIAN J. PSYCHOL. 385 (2002).

66. Adams, Licht & Sagiv, *supra* note 17.

67. See Chi-yue Chiu, Michael W. Morris, Ying-yi Hong & Tanya Menon, *Motivated Cultural Cognition: The Impact of Implicit Theories on Dispositional Attribution Varies as a Function of Need for Closure*, 78 J. PERSONALITY & SOC. PSYCHOL. 247 (2000); Jean H.Y. Fu et al., *Epistemic Motives and Cultural Conformity: Need for Closure, Culture, and Context as Determinants of Conflict Judgments*, 92 J. PERSONALITY & SOC. PSYCHOL. 191 (2007).

68. Stanovich, *supra* note 45.

69. *Id.* at 121–22.

the MRM mulls over conflicting goals, it essentially deliberates which actions are more in line with the values one cherishes.

In tandem, the MRM theory explicates how the values model can support a theory of expanded rationality notwithstanding the fact that this model does not satisfy the requirement for consistency as stipulated in the traditional model of procedural rationality.<sup>70</sup> Both the values and the MRM theories indeed repudiate this requirement. Both theories postulate that, in situations laden with meaning—a category that is far broader than those situations whose outcome can be quantified in some commensurable way—conflicting motivations may point to conflicting (or at least inconsistent) behaviors. Which motivation will prevail may depend on peripheral circumstances, in breach of the traditional model but in keeping with the values and the MRM model. For example, an individual may cherish her personal independence as part of her special emphasis on self-direction. But when this individual's security is threatened (including through experimental priming) she may forego a self-expressing behavior to preserve security. This would not prove that she is irrational. It would suggest, as Stanovich emphasizes, that she is meta-rational and demonstrate the usefulness of the expanded rationality framework advanced here.

#### IV

##### LAW: UNDERSTANDING THE REQUIRED

Drawing on the analytical framework developed in the preceding parts, this part argues that a values-based theory of expanded rationality can make a significant contribution to our understanding of the law. The key point is that the law deals with the desirable. Jurisprudence scholars have been discussing the relations between law and morality, the greater good, or religious injunctions for generations. This is not the subject of the present discussion. Without going into too much detail, it appears reasonable to assume that the law expresses a stance about the way things ought to be, including the structure of social institutions and individuals' behavior. The law is a system of prescriptive norms, not descriptive ones. There is therefore a close conceptual proximity between the law and values as conceptions of the desirable. The better we understand how individuals perceive and deal with the desirable, the better we can analyze the law as the central social institution intended for guiding people's behavior toward socially desirable goals; a fortiori for economic analysis of law.

This part demonstrates the link between values, expanded rationality, and the law through a number of central issues concerning both the content of the law and its operation. Specifically, this part deals with legal rules of conduct, law abidingness, implications of value diversity in society, and value conflict. It

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70. I am grateful to Avishalom Tor for raising this important point.

will demonstrate the potential contribution of this mode of analysis to understanding how the law operates. As will become clear below, the present account is not a normative theory, among other things, because the present account clarifies that what people consider normative or desirable may depend on their values. Furthermore, it should be emphasized that the present discussion concentrates on the individual level of analysis. This part deals with the way individuals perceive the desirable (through values) and the individual perspective to the law—that is, “law for the common man.” References to forming legal policy will be from this perspective as well. One could discuss the content of the law and the rule of law—as opposed to law abidingness—as social institutions at the societal level of analysis, but this would be a separate and different analysis from the present one.<sup>71</sup>

#### A. Values and the Content of Law

Similar to the general economic literature, the law and economics literature relies on the narrow, yet theoretically sound, foundations of the standard model. The values-based expanded rationality approach presented here does not dispute the basic premise that people respond to incentives. A standard economic analysis of a legal issue seeks to investigate how different legal mechanisms may guide behavior. Such an analysis might help private parties to better plan their moves and assist lawmakers in designing legal reform with a view to influence individuals’ behavior, for example, in order to maximize total social welfare, effect a more just distribution of resources, or some other normative criterion.

A values-based expanded rationality expands, in a structured manner, the notion of individual utility and the incentives one faces by defining a diverse set of potentially desirable values. This diversity allows for diversity of goals within individuals and groups. For individuals, a diversity of values enables one to analyze incentives in light of the conceptual meaning of the law, and not only in light of its material cost or benefit or the hedonic pleasure or pain that it may bring about. When an individual faces a certain legal rule, that rule affects her payoffs according to the values that it invokes and the individual’s preferences with regard to such values.

For example, consider a law imposing a sales tax on automobiles. In terms of material payoffs, the tax sets an identical incentive for all individuals in the society as a regular monetary cost (putting aside differences in income levels and marginal utility of income). This is the standard economic analysis. Now

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71. For a theoretical analysis, see generally Amir N. Licht, *Social Norms and the Law: Why Peoples Obey the Law*, 4 REV. L. & ECON. 715 (2008). For empirical evidence on the link between cultural values and the content of law and the rule of law, see generally Amir N. Licht, Chanan Goldschmidt & Shalom H. Schwartz, *Culture, Law, and Corporate Governance*, 25 INT’L REV. L. & ECON. 229 (2005); Amir N. Licht, Chanan Goldschmidt & Shalom H. Schwartz, *Culture Rules: The Foundations of the Rule of Law and Other Norms of Governance*, 35 J. COMP. ECON. 659 (2007).

assume that this tax is a “green tax” such that higher polluting automobiles and those with less efficient gas consumption are subject to it. In the standard economic analysis, nothing changes unless we add an ad hoc tautological assumption about a special taste for environmental protection. In contrast, a values-based expanded rationality points to an additional utility deriving from universalism values, which encompass the environment—an effect that a regular sales tax does not engender. Andrew Green, in fact, argues that monetary incentives in the form of subsidies may “crowd out” (dampen) the impact of environmental values and that environmental protection norms should be internalized through values.<sup>72</sup>

In fact, a substantial part of the law—perhaps most of it—may be perceived by individuals as only marginally relevant from a pecuniary point of view but of utmost significance in other respects. Defining the utility that people derive from numerous laws cannot persuasively be based on the standard model. The quintessential example for this kind of law is the freedom of expression. In the vast scholarly and jurisprudential discussion on freedom of expression, two major rationales for its legal protection have been advanced: one dealing with the public aspect<sup>73</sup> and one that focuses on the individual aspect. Courts and scholars have conceptualized the individual-based rationale as “self-fulfillment” or “individual self-realization.”<sup>74</sup> Citing a powerful line of authorities, Justice Stevens recently summarized the individual-based rationale: “One fundamental concern of the First Amendment is to ‘protec[t] the individual’s interest in self-expression.’ Freedom of speech helps ‘make men free to develop their faculties,’ it respects their ‘dignity and choice,’ and it facilitates the value of ‘individual self-realization.’”<sup>75</sup>

In term of its conceptual content meaning, freedom of expression reflects primarily the value of self-direction. Freedom of expression is conceptually consistent with notions of independence, liberty, creativity, and curiosity, which reflect this value in the Schwartz model. Freedom of expression, in its bolder version—for example, in artistic works—also expresses the value of stimulation, which is reflected in notions of novelty, excitement, and variety. Justice Stevens’s proposition constitutes a descriptive, empirical assertion that self-

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72. Andrew Green, *You Can't Pay Them Enough: Subsidies, Environmental Law, and Social Norms*, 30 HARV. ENVTL. L. REV. 407, 408 (2006).

73. The public rationale for freedom of expression relates to its pivotal role in the democratic process and is often associated with the metaphor of market of ideas. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1960).

74. See Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878–87 (1963) (self-fulfillment); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982) (self-realization). See also Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978) (liberty); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972) (autonomy).

75. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 972 (2010) (Stevens, J., dissenting) (internal citations omitted).

direction is a universal value—one that is recognized and appreciated by all individuals—as well as a normative claim that the law should protect people’s ability to realize this value. Freedom of expression may have socially beneficial implications—for example, for the democratic process—and it may also have material implications, such as for commercial purposes, as in the market for artworks. But the latter facets do not exhaust the values of self-direction and stimulation such that any analysis of the freedom of expression that ignores these values will be lacking and will likely yield skewed policy implications.

These two examples—the “green” tax and freedom of expression—demonstrate how the content of the law may reflect different values. These examples refer to values located on the two higher-level dimensions in the values circle: universalism on the self-transcendence pole and self-direction on the openness-to-change pole. Other laws may reflect other values, and in many cases, more than one value. The circular model of values suggests that when a certain law more powerfully expresses (that is, is conceptually consistent with) a particular value, it is more likely to similarly express, albeit more weakly, the adjacent values on the circle and be conceptually opposed to the values located on the opposite part of the circle.

## B. Values and Obeying the Law

One of the most successful propositions in the economic analysis of law is Gary Becker’s seminal model of deterrence.<sup>76</sup> Becker has shown how law abidingness (avoidance of crime) may depend positively on the magnitude of the sanction imposed for the offense and on the probability of imposing this sanction, namely, the probability of finding the perpetrator, convicting, and punishing her. Becker’s model is purely economic—a model of incentives. Becker’s article spawned voluminous scholarship on economic analysis of criminal law, which need not be surveyed here as it shares with Becker’s original article the basic reasonable premise that, like any other activity, criminal activity responds to incentives. This holds true for negative incentives that are either material, such as fines, or hedonic, such as incarceration. Notwithstanding the model’s solid internal logic, which renders it so convincing, some empirical evidence questions the effectiveness of deterrence in engendering legal compliance. For instance, Robert MacCoun has found that deterrence may account for only five percent of the variability of criminal activity.<sup>77</sup>

Starting in the mid-1990s, law and economics began, and has continued, to expand the analysis of compliance by referring to social incentives of shaming

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76. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

77. Robert J. MacCoun, *Drugs and the Law: A Psychological Analysis of Drug Prohibition*, 113 PSYCHOL. BULL. 497 (1993).

and stigma.<sup>78</sup> The central idea motivating this discourse is that, even in the absence of material or hedonic incentives—when standard deterrence for fear of the law is unlikely because fines are negligible and the probability of arrest and conviction is low—people may nonetheless obey the law in order to avoid public shame. In contrast with regular enforcement mechanisms of police forces and prisons, shaming is cheap. On its face, shaming does not require any resources—especially not state resources—beyond means for disseminating information about the shameful conduct.

Shaming could either serve as a substitute for standard enforcement through deterrence or as a complement to it.<sup>79</sup> Be that as it may, however, from the standpoint of the potential shamer, who must deliberate whether to shame someone because the latter has breached the law, the key question is whether one should obey the law. Even if one assumes that the cost of shaming is zero, or close to that—indeed, especially when no material incentives exist—one should still point to the motivational factors that cause societal members actually to shame offenders. Even an economic analysis that is not based on regular deterrence has to identify a mechanism that motivates legal compliance and engenders a perception of legal compliance as desirable in the eyes of societal members, who are expected to obey the law—especially in the eyes of potential shaming agents and their audience.<sup>80</sup>

Lawrence Kohlberg has related law abidingness with stages of moral development.<sup>81</sup> At the pre-conventional stage of Kohlberg's theory, children obey for fear of punishment, which is similar to the standard deterrence-based

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78. See, e.g., Roland Bénabou & Jean Tirole, *Incentives and Prosocial Behavior*, 96 AM. ECON. REV. 1652 (2006); Patricia Funk, *On the Effective Use of Stigma as Crime Deterrent*, 48 EUR. ECON. REV. 715 (2004); Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733 (1998); Toni M. Massaro, *The Meanings of Shame Implications for Legal Reform*, 3 PSYCHOL. PUB. POL'Y & L. 645 (1997). For an analysis of the limits of enforcement through stigma, see Alon Harel & Alon Klement, *The Economics of Stigma: Why More Detection of Crime May Result in Less Stigmatization*, 36 J. LEGAL STUD. 355 (2007).

79. For economic analyses of such substitute–complementary relations between the law and social norms, see, for example, Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585 (1998); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997); Yoshinobu Zasu, *Sanctions by Social Norms and the Law: Substitutes or Complements?*, 36 J. LEGAL STUD. 379 (2007).

80. The problem of the motivation to obey the law does not change when we add incentives to the mechanisms that promote compliance through social sanctions, provided that sanctions are costly. Social sanctioning through shaming is common, especially in close-knit or well-defined communities. See, e.g., Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001). In such communities, there may be an additional incentive to build reputation, but, as noted, the empirical evidence suggests that even in a looser social environment, many people are willing to bear a personal cost in order to punish transgression or to make a point.

81. See generally LAWRENCE KOHLBERG, *THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STAGES AND THE IDEA OF JUSTICE* (1981); Lawrence Kohlberg, *The Development of Children's Orientations Toward a Moral Order: Sequence in the Development of Moral Thought*, 51 HUM. DEV. 8 (2008). Each of the three stages mentioned in the text consists of two sub-stages, which I abstract from here.

model. At the conventional stage, adults view law abidingness as necessary for preserving social order. At the post-conventional stage, individuals may give priority to personal moral considerations over law abidingness. Research by Tom Tyler and his colleagues empirically examines the question of why people obey the law and answers, in brief, that they do so when the procedure is fair.<sup>82</sup> In his original pioneering study, Tyler has shown that people who were indicted in a local traffic court in Chicago were more likely to comply with injunctions against them when they perceived the legal procedure as fair. This was especially the case when people were given an opportunity to participate in the process, when the process was neutral, and when they were treated with respect. Tyler's procedural justice theory thus focuses on the link between law abidingness and aspects of identity and the extent to which an individual may view legal compliance as a conduct that stems from oneself rather than one that is forced upon one through deterrence.

The values theory, as a general theory of motivational goals, may provide additional directions toward a better understanding of legal compliance. The key point, again, is that legal compliance would be perceived by the individual as desirable, right, and legitimate. Of particular interest is the issue of obeying the law as such "because it's the law." Greater compliance when the conceptual content of the law is consistent with the values that the individual holds dear may be analyzed in the framework presented in the preceding section on values and the content of laws. Compliance in that case will reflect a positive response to incentives according to the proposed definition of expanded rationality. This is compliance "because it is worthwhile." Explaining compliance with the law as such when the individual is indifferent to the content of the law is more challenging because one would need to point out a motivation that is strong enough to overcome the cost of legal compliance in the absence of deterrence. Hence, the hypothesis would be that individuals will be more likely to support obeying the law—by themselves or by others—if legal compliance is per se consistent with their value preferences.

Which value preferences may support law abidingness? The answer depends on the role the law plays in the eyes of the individual, and it appears that this answer may vary depending on her value preferences. Individuals whose worldview emphasizes elements of protection, stability, and anxiety will tend to see the law as a framework that creates a social foundation, provides certainty, protects against threats, and is anchored in past traditions and received wisdom. One may expect, generally, that such people will view obeying the law as the very essence of this conduct—compliance for the sake of compliance—and will consider it as right and desirable. In contrast, individuals whose worldview emphasizes change, self-development, and lack of anxiety may find value in the law mainly as an instrument—either for protecting personal interests (such as

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82. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2d ed. 2006).

property, reputation, or privacy) or for promoting moral ideas (such as equality).

The main dimension over which we would expect to observe variability in the link between law abidingness and values thus will be conservation versus openness-to-change. Law abidingness correlates most strongly with higher conformity and security, as well as tradition, because law often has historical roots. On the self-enhancement versus self-transcendence dimension, opposite factors may actually affect compliance. A preference for self-enhancement values is consistent with law abidingness only insofar as it may serve the individual's interests—something that the law may do, as noted above. However, individuals with a strong preference for power values might also view the law as a constraint and obstruction to personal aggrandizement. Self-transcendence values emphasize the legitimacy of law and of legal compliance due to their egalitarian quality. At the same time, however, such values may support a critical attitude toward the law inasmuch as it provides a formal approval to a morally reprehensible conduct or hinders following a moral injunction that one personally holds dear. People located on both poles of this dimension thus may obey the law grudgingly or conditionally—possibly under the shadow of deterrence—more than from internal motivation.

This brief analysis is consistent with Kohlberg's approach and with Tyler's findings. It should be noted that in Kohlberg's theory, law abidingness is not always desirable. Obeying the law as such characterizes the conventional middle stage. Compliance as a convention, in order to be in line with the general social order, reflects values of conformity and tradition. In contrast, the higher, post-conventional stage legitimizes breaking the law for ethical, extra-legal reasons that each individual is supposed to assess independently.<sup>83</sup>

Tyler's findings, too, are in line with the present argument. The measures found to contribute to legal compliance trigger universalism values—by enhancing equality in the process, and self-direction values—by providing individuals an opportunity to express themselves. These measures may affect the set of marginal, or swinging, individuals. People who are high in conformity and in conservation values more generally will tend to obey the law due to their consistent internal motivations. They do not need any procedural encouragement. People who are especially high on power values may see their personal welfare as the supreme interest. In extreme cases, no amount of voice or fair process would change this motivation (deterrence, too, has limits). People high on universalism or self-direction, however, may be influenced if the content meaning of the process is consistent with these values. Elements of participation, neutrality, and respect thus may reflect the equality facet of universalism. Providing an opportunity for substantive voice may cause a

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83. Kohlberg's examples mostly refer to helping others—for example, stealing a medicine for a sick child—and thus reflect benevolence and universalism values that might justify breaking the law "in the right circumstances."



person to view the process as something she could direct, at least in part, and thus enhance its legitimization and compliance by the individual and by others.<sup>84</sup>

A study by Ella Daniel and Ariel Knafo reports findings in line with the present theory.<sup>85</sup> These authors investigated value preferences and attitudes toward law abidingness in samples of Israeli students and youths, including immigrants.<sup>86</sup> The study's central hypothesis, that law abidingness will correlate positively with conformity values, received strong support in all the participant groups. In addition, participants exhibited a negative correlation between law abidingness on the one hand and universalism and self-direction values on the other. Interestingly, the authors also report a weak but significant negative correlation between power and achievement values and attitudes in support of law abidingness. This finding is in line with the above hypothesis, that individuals who give special emphasis to self-enhancement may perceive the law as an unwelcome obstacle to pursuing their self-interest.

### C. Value Diversity in Groups

The analysis in the preceding section on different attitudes toward legal compliance is a specific aspect of the broader issue concerning legal design in an environment of diversity in value preferences within groups. From the vantage point of policy and lawmakers, the theory of values-based expanded rationality points to the need to consider a variety of value preferences in the population. This point invokes an old bone of contention in the economic literature—namely, whether, for economic analysis purposes, one may assume that preferences are uniform. George Stigler and Gary Becker, who are among the prominent proponents of the standard model of rationality, famously argued that an economic analysis may concentrate only on differences in prices or income in order to explain differences or changes in behavior, based on the assumption that individuals' preferences are uniform: “[T]astes neither change capriciously nor differ importantly between people. On this interpretation one does not argue over tastes for the same reason that one does not argue over the Rocky Mountains—both are there, will be there next year, too, and are the same to all men.”<sup>87</sup>

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84. This analysis resembles Robert Cooter's analysis of creating beneficial social norms by influencing the marginal members in the population. Cf. Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577 (2000); Robert D. Cooter, *Models of Morality in Law and Economics: Self-Control and Self-Improvement for the Bad Man of Holmes*, 78 B.U. L. REV. 903 (1998); Robert D. Cooter, *Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization*, 79 OR. L. REV. 1 (2000).

85. Ella Daniel and Ariel Knafo, *Values and Attitudes Toward Law Abidingness*, ISRAEL J.L. & BUS. (forthcoming 2010) (in Hebrew).

86. This study did not investigate actual behavior.

87. George J. Stigler & Gary S. Becker, *De Gustibus Non Est Disputandum*, 67 AM. ECON. REV. 76, 76 (1977).

Doubtless, the assumption that preferences are uniform is a convenient one for policymakers and not only for economic modelers. Adopting this assumption allows the policymaker to propose measures such that the marginal individual in the population will respond only to changes in prices, income, or wealth. As the economic research on non-standard preferences developed, however, it became necessary also to address the distribution of these preferences in the population. Fehr and Schmidt thus analyze the distribution of other-regarding preferences in light of empirical data on this subject.<sup>88</sup> As we expand the set of arguments in the personal utility function, and the notion of rationality more generally, economists and policymakers influenced by economic analysis will have to take this aspect into consideration. In this context, too, the values-based model provides a framework for theoretical analysis and empirical testing.

Suppose that in order to increase the likelihood that a certain law will enjoy voluntary compliance, lawmakers (be they legislators or judges) would like to design the law such that it fits the taste of the majority of people. In other words, the content meaning of the law should be in line with the value preferences of the majority of the population or at least with that of the median member. Such a law will be viewed by the populace as legitimate, right, and desirable. Consequently, there will be less need to rely on people's willingness to obey the law as such, or on deterrence, in order to ensure compliance. One may further assume that politicians are skilled in identifying the public's value preferences and in addressing the public in value terms in order to trigger the responses they want—from electing them to office<sup>89</sup> to supporting a particular legislation.<sup>90</sup>

Diversity of value preferences within the population, however, may cause difficulties in legal design. This may be the case when there is a difference between the value preference distribution among the general public and the

88. Fehr & Schmidt, *supra* note 31, at 833–44. For a formal model that incorporates diversity in prosocial tendencies (altruism), see Bénabou & Tirole, *supra* note 78. On preference distribution and personality traits, see Bryan Caplan, *Stigler–Becker versus Myers–Briggs: Why Preference-Based Explanations Are Scientifically Meaningful and Empirically Important*, 50 J. ECON. BEHAV. & ORG. 391 (2003).

89. Consider the closing remarks in the first Bush–Kerry presidential debate:

BUSH: But I just know how this world works, and that in the councils of government, there must be certainty from the U.S. president. Of course, we change tactics when need to, but we never change our beliefs, the strategic beliefs that are necessary to protect this country in the world . . . .

KERRY: But let me talk about something that the president just sort of finished up with. Maybe someone would call it a character trait, maybe somebody wouldn't. But this issue of certainty. It's one thing to be certain, but you can be certain and be wrong.

Presidential Debate Transcript (Sept. 30, 2004), available at <http://www.debates.org/index.php?page=september-30-2004-debate-transcript>. As an exercise, the reader is invited to identify which values are expressed in each of the candidates' statements.

90. For a survey, see Stanley Feldman, *Values, Ideology, and the Structure of Political Attitudes*, in OXFORD HANDBOOK OF POLITICAL PSYCHOLOGY 477 (David O. Sears ed., 2003).

distribution among a sub-group of the population toward which the law is directed and that is expected to comply. In this situation, lawmakers may face a tension between the need to achieve legitimization—perhaps even authority—from the general public and the desire to design an effective law—one that triggers values that are endorsed by the group to which this law is directed.

To see this point, consider a fundamental subject in corporate law—the objectives of the corporation. Corporate fiduciaries must act, in unbending loyalty and due care, in the best interest of the corporation. Since the corporation is a purely legal construct, this doctrine hinges on the question of to which real parties corporations ultimately owe their fiduciary duties. In the United States and in most other common law jurisdictions, the answer traditionally has been the shareholders.<sup>91</sup> Nevertheless, a debate has been raging for decades between this view, known as either the shareholder wealth maximization norm or the shareholder primacy norm, and an opposite view—known as the stakeholder approach—which calls on corporate fiduciaries to also take into account the interests of multiple other constituencies, including employees, creditors, customers, the community, and more.<sup>92</sup>

Analyzing the basic positions in this debate in light of the values theory indicates that each position is consistent with a different profile of value.<sup>93</sup> On the self-enhancement versus self-transcendence dimension, the shareholder-primacy approach is consistent with values of power and achievement, while the multiple-stakeholder approach is consistent with emphasizing universalism. On the conservation versus openness-to-change dimension, there may be opposite factors at play. On the one hand, giving primacy to a single constituency—the shareholders—sets a clear, bright-line rule and is thus consistent with aversion to ambiguity and complexity, which is linked to security values. A multiple-stakeholder rule suggests a mirror image: complexity and uncertainty, which are consistent with self-direction and stimulation. On the other hand, giving primacy to shareholders reflects a preference for entrepreneurship and expresses the nature of the business corporation as a vehicle for venturing. It is therefore linked conceptually to self-direction and openness-to-change more generally. As noted above, board members and chief executive officers (CEOs) of business corporations exhibit a positive correlation between a general pro-shareholder stance and entrepreneurial values—power, achievement, and self-direction—and a negative link to universalism. Moreover, board members and

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91. *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939). In the United Kingdom, see *Companies Act*, 2006, § 172 (U.K.). *But see* in Canada, *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560 (Can.).

92. For reviews, see D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277 (1998); Licht, *supra* note 59.

93. This is only a schematic description. For a detailed analysis, see Adams, Licht & Sagiv, *supra* note 12.

CEOs emphasize these entrepreneurial values more strongly than a representative sample of the population.<sup>94</sup>

The foregoing discussion may shed light on the design of the legal regime on this subject. While the general doctrine in the United States gives clear priority to shareholders,<sup>95</sup> some state legislatures recognize the concurrent legitimacy of other constituencies, and some courts have entertained this idea as well. In Canada, the Supreme Court has endorsed a multiple-stakeholder approach more broadly.<sup>96</sup> Calls on corporations to exhibit greater “corporate social responsibility”—one of the versions of a multiple-stakeholder approach—are often heard from politicians and other social activists. Furthermore, many subscribe to the view that such an approach is a sound business strategy, which, in the long run, will also benefit shareholders.<sup>97</sup>

Thus, while there exist two possible legal strategies for regulating this corporate fiduciary duty, at least in common law jurisdictions, the shareholder-primacy doctrine is given clear priority. But why? First, the link between each legal strategy and a particular profile of value preferences suggests that, for each strategy, there exists a group of individuals in the population that views this strategy as right and desirable because of the values that these individuals in general hold as guiding principles in their life.<sup>98</sup> This is the reason why the shareholder–stakeholder debate will never be settled—because it cannot be, since people may always differ on their primary goals in life.<sup>99</sup>

Second, continuing this debate *ad infinitum* is a luxury that residents of the ivory tower may afford. Lawmakers must reach a resolution and provide guidance about the prevailing doctrine. Endorsing the shareholder-primacy norm has two advantages in this regard. First, this doctrine stipulates a clear rule, which is (relatively) easy to implement and is (relatively) easy to verify in court. Second, the shareholder-primacy norm is consistent with the value profile more commonly found among managers than in the general population. Consequently, it may be easier to apply this norm to all managers even if as a second best. As the law must impose a uniform regime—that is, one for all managers (and all judges)—a legal strategy of the second best is not only

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94. *Id.*

95. AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01 (1994).

96. BCE Inc. v. 1976 Debentureholders, [2008] 3 S.C.R. 560 (Can.).

97. The seminal work is R. Edward Freeman, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH (1984). For an empirical meta-analysis, see Joshua D. Margolis, Hillary Anger Elfenbein & James P. Walsh, *Does it Pay to be Good? A Meta-Analysis and Redirection of Research on the Relationship Between Corporate Social and Financial Performance* (Working Paper, 2007), available at <http://stakeholder.bu.edu/2007/Docs/Walsh,%20Jim%20Does%20It%20Pay%20to%20Be%20Good.pdf>.

98. See Roland Bénabou & Jean Tirole, *Individual and Corporate Social Responsibility*, 77 *ECONOMICA* 1 (2010).

99. Licht, *supra* note 59.

reasonable, but practically inevitable. There is reason to believe that Adolf Berle—the pioneering scholarly proponent of the shareholder-primacy norm—had realized this much nearly eighty years ago. Personally, Berle thought that business corporations should be managed for the benefit of all social constituencies. But as a practical legal matter, Berle realized that the multiple-stakeholder approach cannot be implemented as a legal doctrine with sufficient clarity, leading him to support shareholder primacy as a second best option in an imperfect world.<sup>100</sup>

#### D. Values Conflict and the Application of Law

Finally, this section addresses the link between values conflict and the law. While this issue may be less directly related to the discussion of rationality, it touches upon a fundamental legal problem—in particular, one that arises in constitutional jurisprudence. The following discussion, therefore, cannot be considered as more than just scratching the surface of the subject and is intended mostly to reveal its link to the general analytical framework presented here. A fuller treatment must await another opportunity.

A long-standing debate in constitutional jurisprudence deals with the proper role of values. While some scholars deliberately avoid providing a positive definition of public values,<sup>101</sup> Owen Fiss holds that “[t]he task of the judge is to give meaning to constitutional values. . . . He searches for what is true, right, or just.”<sup>102</sup> Concurring with William Eskridge that “[p]ublic values have a gravitational force,”<sup>103</sup> Aharon Barak nonetheless conjectures that “[l]egal science has not yet developed a satisfactory ‘theory of values,’ and it is questionable whether such a theory could ever be developed.”<sup>104</sup>

Even if legal science may not have yet developed a satisfactory theory of values, it seems that psychological science has made considerable inroads toward dispelling the doubt as to whether such a theory could ever be

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100. See, e.g., A.A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1365–67 (1932) (“Now I submit that you can not abandon emphasis on ‘the view that business corporations exist for the sole purpose of making profits for their stockholders’ until such time as you are prepared to offer a clear and reasonably enforceable scheme of responsibilities to someone else.”). Tellingly, the issue is discussed in the fifth chapter of A.A. BERLE, JR., *THE 20TH CENTURY CAPITALIST REVOLUTION* 164 (1954), which is entitled “Corporate Capitalism and ‘The City of God.’” For a detailed analysis, see Licht, *supra* note 59.

101. See, e.g., Cass Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1694 (1984) (arguing that a public value can be defined as any justification for government action that goes beyond the exercise of raw political power). Mark Tushnet noted that “the appeal [to public values] rarely gives content to the public values it invokes.” Mark V. Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502, 1540 (1985).

102. Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 9 (1979).

103. William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1018 (1989).

104. Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 19, 90 (2002).

developed. In fact, former Justice Souter recently put forward a crisp account of values' role in constitutional law, which sounds remarkably close to the psychological theory of values:

The explicit terms of the Constitution, in other words, can create a conflict of approved values, and the explicit terms of the Constitution do not resolve that conflict when it arises . . . . A choice may have to be made, not because language is vague but because the Constitution embodies the desire of the American people, like most people, to have things both ways. We want order and security, and we want liberty. And we want not only liberty but equality as well. These paired desires of ours can clash, and when they do a court is forced to choose between them, between one constitutional good and another one.<sup>105</sup>

Souter echoes Fiss's understanding of values as ideas about what is true, right, and just—a direct parallel to the definition of values as conceptions of the desirable. By observing that people desire “to have things both ways,” Souter points to the fact that nearly all values are desirable and that they come in pairs of inherently conflicting goals, thus capturing the interrelations between values that the psychological theory postulates. Souter thus echoes Isaiah Berlin's famous observation, that “[t]he need to choose, to sacrifice some ultimate values to others, turns out to be a permanent characteristic of the human predicament.”<sup>106</sup> Souter further identifies prominent values that represent both of the dimensions in the Schwartz model: security versus liberty on conservation versus openness-to-change, and equality (in universalism) on self-enhancement versus self-transcendence.<sup>107</sup> Finally, in a rather piercing remark, Souter identifies the link between ambiguity aversion and the preference for security:

I have to believe that something deeper is involved, and that behind most dreams of a simpler Constitution there lies a basic human hunger for the certainty and control that the fair reading model seems to promise. And who has not felt that same hunger? Is there any one of us who has not lived through moments, or years, of longing for a world without ambiguity, and for the stability of something unchangeable in human institutions?<sup>108</sup>

Not all lawyers may subscribe to the general vision reflected in these passages. In fact, the mainstream approach in U.S. constitutional law endorses using categorical classifications as a means for deciding between conflicting rights or interests. Stated in general terms, a categorical approach seeks to hold that particular cases are governed by a particular category—say, a certain constitutional right—such that, by implication, competing categories

105. Justice David H. Souter, Remarks at Harvard Commencement (May 27, 2010), available at <http://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/>.

106. ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY*, li (1969) (also stating that “The simple point which I am concerned to make is that where ultimate values are irreconcilable, clear-cut solutions cannot, in principle, be found. To decide rationally in such situations is to decide in the light of general ideals, the over-all pattern of life pursued by a man or a group or a society.” *Id.* at l.).

107. Notwithstanding his skepticism about legal science, Barak's writing and judicial decisions as the President of the Israeli Supreme Court reflect similar views. See generally Aharon Barak, *Proportional Effect: The Israeli Experience*, 57 U. TORONTO L.J. 369 (2007); Barak, *supra* note 104.

108. Souter, *supra* note 105.

(competing rights or interests) do not apply. Free speech and public security are the standard examples.

This debate is particularly prominent in constitutional law because constitutional rights are typically “big”—free speech, privacy, property—so that, together with their political origins, these rights have exceptional normative power. Yet, the debate about rights conflict is more fundamental. In the philosophical discourse on the nature of rights in general, two positions have emerged that resemble the constitutional discourse.<sup>109</sup> Some argue that a right must have well-defined boundaries within which it is absolute—that is, no other right can contradict or overcome it. It thus follows that the proper response to an alleged conflict between rights is to better delineate their realms such that they will integrate rather than overlap.<sup>110</sup> Others maintain, however, that such a definition of rights is unrealistic and that there can always be some overlap—and hence, conflict—between rights.<sup>111</sup>

In the present context, we do not have to take a stand in this debate because, among other things, rights are a more rigid concept than values. Rights are based on values.<sup>112</sup> What these separate discourses share, however, is the need to address the interrelations between conceptions of the desirable in different discussions about the desirable—in psychology, law, or philosophy. Research in psychology cannot refute, or even limit, the development of notional constructs in law or philosophy. Pure analytical theories are not bound by reality and do not need to be validated empirically. A theory of values that has been validated empirically nonetheless may contribute to assessing such notional constructs or suggest directions for further development. For example, the universal values identified at the individual level may help develop a universal theory of rights. The insight that individuals can analyze cognitive representations of the desirable and find different balancing points between them in different circumstances could help in assessing means for resolving

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109. The following text draws on Jonathan Crowe, *Explaining Natural Rights: Ontological Freedom and the Foundations of Political Discourse*, 4 N.Y.U. J.L. & LIBERTY 70 (2009); Leif Wenar, *Rights*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Sept. 8, 2010), available at <http://plato.stanford.edu/entries/rights/>.

110. See JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980); HILLEL STEINER, AN ESSAY ON RIGHTS (1994); GRÉGOIRE C. N. WEBBER, THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS ch. 4 (2009); Russ Shafer-Landau, *Specifying Absolute Rights*, 37 ARIZ. L. REV. 209 (1995). Hence the term “specificationism” by Shafer-Landau and the adjective “compossible” for rights by Steiner.

111. See Joel Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, in RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY 221, 225 (1980); A. JOHN SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS 24–28 (1979); JUDITH JARVIS THOMSON, THE REALM OF RIGHTS (1990).

112. See Alon Harel, *Theories of Rights*, in THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 191, 202–03 (Martin P. Golding & William A. Edmundson eds., 2005) (“It is only the full awareness of the meaningfulness of these practices [recognizing rights] which facilitate access to these values, and such an awareness is nourished by the judicial reiteration of the role the values have in justifying the right and dictating its scope.”).

conflicts between rights—for example, a proportionality test or other approaches.

## V

### CONCLUSION

This article has surveyed central developments in the theory of values in psychology and in economic research on rationality. An attempt was made to show that there exists substantial commonality among these disciplines in regard to conceptions of the desirable, which may facilitate the development of an expanded theory of rationality. Finally, this article has demonstrated how this analytical framework may be utilized to shed new light on basic legal issues. Needless to say, these are only first steps, which one hopes others will find worthy of consideration.