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The Perils of Forgetting Fairness

Michael B. Dorff
*Southwestern Law School*

Kimberly Kessler Ferzan
*University of Pennsylvania Carey Law School*

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A physicist, a chemist, and an economist are shipwrecked on a desert island. Starving, they find a case of canned pork and beans on the beach, but they have no can opener. So, they hold a symposium on how to open the cans. The physicist goes first:

“I’ve devised a physical solution. We find a pointed rock and propel it at the lid of the can at, say, 25 meters per second—”

The chemist breaks in:

“No, I have a chemical solution: we heat the molecules of the contents to over 100 degrees Centigrade until the pressure builds to—”

† Associate Dean for Research & Irwin R. Buchalter Professor of Law, Southwestern Law School.
‡ Associate Dean for Academic Affairs, Professor of Law, & Co-Director, Institute for Law and Philosophy, Rutgers University, School of Law.

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The economist, condescension dripping from his voice, interrupts:

"Gentlemen, gentlemen, I have a much more elegant solution. Assume we have a can opener..."

That’s funny. But now consider our addition of the newest participant in the symposium on the island: the legal economist. The legal economist argues that the pork and beans should be distributed in a wildly controversial way, ultimately arguing that this is the most efficient distribution of the goods. He advocates the creation and destruction of legal structures in the name of maximizing the happiness of all who love pork and beans. His ideas are creative. They are controversial. They are counterintuitive. But, he says, they are welfare maximizing.

But there’s a problem: there is no can opener. And there’s just nothing funny about the legal economist.

One significant problem with legal economists’ methodology is that they believe that they are entitled to the same assumptions that economists are. That is, they are entitled to extract out difficult variables in making their calculations. They are entitled to make certain types of assumptions. But they are not.

Legal economists make far reaching and extraordinarily visible policy prescriptions. They seek to influence the law. They seek to change the law. And thus, they are not entitled to ignore the elephants in the room, nor are they entitled to any can opener presumptions. Specifically, they are not entitled to ignore fairness concerns.

In recent years, economists have made some controversial proposals, and here are just a handful: execute minors,² punish the innocent,³ settle cases by lottery,⁴ allow women to sell their babies,⁵ permit racial discrimination,⁶ and allow insider trading.⁷ Legal

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³ Thomas J. Miceli & Kathleen Segerson, Punishing the Innocent Along with the Guilty: The Economics of Individual versus Group Punishment, 36 J. LEGAL STUD. 81 (2007) (group punishment).
⁷ Dennis W. Carlton & Daniel R. Fischel, The Regulation of Insider Trading, 35 STAN. L.
economists have argued that each of these activities should be legalized in the service of welfare maximization. Indeed, these are just a few of the legions of contrarian proposals advanced by legal economists as efficient. Such proposals are at least counterintuitive, and perhaps even shocking. Economists argue that people’s intuitive reactions to proposed legal rules are irrelevant; all that matters is efficiency. But in searching for welfare-maximizing policy proposals, the authors of these works have overlooked the negative externalities that also accompany avant-garde positions. Legal rules that strike most people as unjust may upset community expectations and undermine the efficiency of the very rules proposed. In short, such rules may not prove welfare maximizing at all.

In this Article, we argue that legal economists’ failure to include people’s preferences for fairness undermines their policy prescriptions, even by economists’ own consequentialist standards. The assumptions that may be acceptable for an economist are simply impermissible for the legal economist. It is important to note that this Article is not another contribution to either the behavioral law and economics movement or the growing scholarship on happiness. Rather, our claim is far simpler and far more pronounced: Fairness counts as a preference. And forgetting that fairness counts will have drastic ramifications with respect to welfare-maximizing abilities of the very law and legal system that the legal economist hopes to influence. Part I discusses three prominent counterintuitive proposals from legal economists. Our purpose here is not to engage the authors’ arguments in detail, but rather to provide a context for the rest of our discussion. Part II discusses the relationship between welfare and fairness. Here, we discuss the empirical evidence of people’s preferences for fair rules and argue that, given this evidence, it is methodologically unacceptable for legal economists to fail to include (and to give sufficient weight to) these preferences within their calculations. Part III discusses the likely costs of actually adopting rules that are broadly perceived as surprising and unfair. We point out that such rules are likely to defeat reasonable expectations, instigate resistance, and undermine the overall legitimacy of the legal system. As a result, we believe these proposals fail even on their own welfare-maximizing terms.

I. A Few Salient Examples

Law and economics literature is rife with examples of proposals that would strike most non-economists as unfair, immoral, or at least unexpected. In this section, we highlight a few prominent examples to concretize the phenomena and ground our subsequent discussion. Specifically, we discuss the recommendations to legalize baby selling, racial discrimination, and insider trading.

A. Baby Selling

In 1978, Richard Posner and Elisabeth Landes proposed that baby selling (their term, not ours) be legalized.\(^8\) They argued that creating an open and legal market permitting an adoptive parent to pay a natural mother for the right to adopt her child would have numerous positive effects. Paying mothers for their children would reduce the number of abortions, eliminate the shortage of babies available for adoption, and decrease the number of unadopted children kept in foster care.\(^9\) Their article employed sophisticated mathematical modeling and statistical data to bolster their argument that legalizing baby sales would produce these beneficent policy outcomes.

Posner and Landes acknowledged that many people would consider a market in children “undesirable.”\(^10\) They cited commentators who referred to such a market as “dealings in human flesh” and a “taint on civilized society.”\(^11\) They also admitted that permitting natural parents to sell their children might “smack of slavery”\(^12\) and produce “moral outrage.”\(^13\) But they argued that these objections were not well-founded. Unlike slaves, children sold through their system would retain the protections of legal prohibitions on child abuse and neglect, though these protections might admittedly prove inadequate.\(^14\) Also, while a market system would not screen parents for suitability the way the current system does, they doubted the value of such screening and proposed requiring some “minimal background investigation” for buyers in the baby market, a sort of driver’s license for baby purchasers.\(^15\) Landes and Posner took comfort in their faith that people do not generally buy expensive

\(^8\) Landes & Posner, supra note 5.
\(^9\) Id. at 325, 327.
\(^10\) Id. at 339.
\(^11\) Id.
\(^12\) Id. at 344.
\(^13\) Id. at 345.
\(^14\) Id. at 343.
\(^15\) Id.
items in order to damage them, analogizing adoption of a child to the purchase of a television set.\textsuperscript{16}

Perhaps their most telling point is their analysis of the likely costs of babies in the newly legalized market. Although the black market for babies resulted in very high prices, they argued that in a legal market babies would be relatively affordable.\textsuperscript{17} They had several supportive arguments, but the most interesting for our purposes involved the amount necessary to compensate the natural mother for giving up her baby rather than aborting the pregnancy or raising the child herself. Landes and Posner contended that the net cost in this category would be quite low because the costs to the natural mother would be substantially identical to those saved by the adoptive mother in not bearing a child herself.\textsuperscript{18} Although this theory might have some validity when applied to medical costs,\textsuperscript{19} we think most mothers would find quite surprising the proposition that the amount they would demand to give up their children consists mostly of the medical costs they incurred during pregnancy and birth. The emotional toll of giving up a baby is not a cost the adoptive mother would face if she bore the child. The authors also fail to account for society’s parallel abhorrence at the selling of human beings. Landes and Posner’s argument highlights the problem we are illustrating—that legal economists frequently ignore most people’s feelings about what the law should be. This tendency may have sharply deleterious consequences, as we argue below.

\textbf{B. Racial Discrimination}

In his landmark book, \textit{Forbidden Grounds},\textsuperscript{20} Richard Epstein relied on economic arguments to explain why the laws prohibiting racial discrimination in employment should be repealed.\textsuperscript{21} Epstein claimed that laws prohibiting racial discrimination actually harm racial minorities (along with everyone else) and that repealing these laws would benefit everyone.\textsuperscript{22} Epstein premised his case on the notion that discrimination may sometimes reduce agency costs and

\begin{itemize}
  \item \textsuperscript{16} \textit{Id.}
  \item \textsuperscript{17} \textit{Id.} at 339–41.
  \item \textsuperscript{18} \textit{Id.} at 340.
  \item \textsuperscript{19} Even when applied to medical costs, we actually doubt the theory’s validity. Presumably, mothers giving up their children would tend to be of much lower economic status than adopting mothers, and therefore much less likely to have adequate medical insurance.
  \item \textsuperscript{20} \textbf{EPSTEIN, supra note 6.}
  \item \textsuperscript{21} Epstein also argued against laws prohibiting gender, age, and disability discrimination.
  \item \textsuperscript{22} \textit{Id.} at 9. \textbf{EPSTEIN, supra note 6.}
  \item \textsuperscript{23} \textit{Id.} at 57–75.
\end{itemize}
therefore prove efficient.\textsuperscript{23} Governance costs rise as the tastes of the firm’s members and employees diverge.\textsuperscript{24} One way to reduce agency costs and promote harmony within the firm, then, is to hire employees with similar tastes.\textsuperscript{25} Employees who share the same tastes in music, Epstein illustrated, will not quarrel over what type of music to play in a common workspace.\textsuperscript{26} Finding workers with similar tastes will often result in hiring a disproportionate number of some particular racial minority, whose members may be more likely to share some tastes than the components of a more diverse group.\textsuperscript{27}

Another way to reduce agency costs is to recruit through a third party referrer who implicitly bonds the workers’ performance.\textsuperscript{28} For an example, Epstein drew on the case of the Daniel Lamp Company.\textsuperscript{29} The Daniel Lamp Company established relationships with two Hispanic groups, the Spanish Coalition and the Latino Youth Organization, which each recommended unskilled workers for employment.\textsuperscript{30} The organizations then had a vested interest in ensuring that the workers they recommended were of high quality, since otherwise the company would stop trusting them for referrals and they would lose a valuable opportunity for their members.\textsuperscript{31} This system resulted in cheap bonding for the workers and an inexpensive source of reliable labor, helping to maximize the company’s earnings.\textsuperscript{32} The system also resulted in the company hiring mostly Hispanic workers and commensurate liability under the antidiscrimination laws.\textsuperscript{33}

Finally, Epstein pointed out that if bigots concentrated themselves in firms that discriminated against racial minorities, firms that did not discriminate would end up relatively bigot-free.\textsuperscript{34} Without the interference of antidiscrimination laws, this would be likely to occur. Bigots would likely seek out firms that discriminated, since they strongly preferred to avoid contact with racial minorities. By means of the bigots’ self-selection, firms that did not discriminate would have few bigots, even if the companies themselves were indifferent as
to whether their employees were bigots.\textsuperscript{35} Firms without bigots should be easier to manage and therefore face lower governance costs.\textsuperscript{36}

Epstein fully understood that his proposal was alarming. On the very first page of his book he stated, “[t]here is little question that a broad antidiscrimination principle lies at the core of American political and intellectual understandings of a just and proper society, not only in employment but also in housing and public accommodations, medical care, education, indeed in all areas of public and private life.”\textsuperscript{37} He reiterated this point several times in different ways, stating that the antidiscrimination statutes command “enormous support” from U.S. elites,\textsuperscript{38} quoting President George Herbert Walker Bush vilifying discrimination as a “‘fundamental evil that tears at the fabric of our society,'”\textsuperscript{39} and claiming that even as strong and independent an institution as the United States Supreme Court could not “withstand the pounding that would result if it undertook a frontal assault on the basic antidiscrimination norm.”\textsuperscript{40} Nevertheless, he concluded that the antidiscrimination statutes should be repealed.\textsuperscript{41} Discrimination should be legal because it was often rational and efficient.\textsuperscript{42}

\section*{C. Insider Trading}

Dennis Carlton and Daniel Fischel, in an article published in the \textit{Stanford Law Review}, argued that insider trading should be legalized.\textsuperscript{43} Carlton and Fischel acknowledged that many consider insider trading unfair,\textsuperscript{44} but concluded that the practice was efficient nonetheless.\textsuperscript{45} They argued that insider trading would, at least in some

\begin{thebibliography}{45}
\end{thebibliography}
cases, promote more accurate securities prices. Insider trading provides an alternative avenue of communication from the firm to investors. When the market detects insiders trading, it adjusts the company's stock price accordingly, bidding the price up higher if insiders are buying and reducing the price if insiders are selling. The end result, under ideal conditions, may approach the effect of actually disclosing the inside information. Companies may prefer to disclose through insider trading for a number of reasons, such as when disclosure would destroy the value of the information (such as the presence of oil under land the company is considering buying) or when the information is uncertain and the company wishes to avoid liability for a false disclosure if the information turns out to be incorrect. Accurate pricing is efficient for a number of reasons, but chiefly because correct prices permit investors to reduce their investments by discovering improperly valued securities.

Carlton and Fischel also contended that insider trading would constitute a more efficient way to compensate and hire managers. Shareholders desire compensation schemes that will induce managers to seek out and implement high expected value opportunities. Legalizing insider trading may produce the correct incentives. Insider trading rewards managers who discover good opportunities and put them into effect by permitting them to trade in advance of public knowledge of the company's imminent success. Insider trading may prove a cheaper method of incentivizing managers than renegotiating each time a corporate opportunity arises or structuring complicated incentives contracts ex ante. In addition, insider trading may turn out to be a valuable screening tool in selecting managers who will work hard and will take efficient levels of risks. Because insider trading rewards hard-working managers who create profitable opportunities for the corporation, only such managers should be willing to accept insider trading as a substantial component of their

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46 Id. at 865–68.
47 Id. at 868.
48 Id.
49 Id.
50 Id.
51 Id. at 866–67.
52 Id. at 869–72.
53 Id. at 869–71.
54 Id. at 870–71.
55 Id.
56 Id.
57 Id. at 871–72.
compensation.\textsuperscript{58} These are precisely the managers corporations generally want to hire.\textsuperscript{59}

Carlton and Fischel acknowledged that insider trading might not always be efficient for every corporation.\textsuperscript{60} They discussed numerous concerns that might render insider trading disadvantageous for some companies in some circumstances, such as the moral hazard problem and issues concerning disclosure timing.\textsuperscript{61} The inherent unfairness of insider trading to non-insider market participants, however, received short shrift. In a few short paragraphs, the authors argued that if insider trading is efficient, and therefore increases the total resources to be divided, then it benefits both insiders and outsiders as a class.\textsuperscript{62} In other words, because insider trading makes even outsiders wealthier than they would be without insider trading, the practice cannot be unfair.

These three examples—baby selling, employment discrimination, and insider trading—highlight the tendency of legal economists to treat fairness concerns as largely irrelevant to their policy recommendations. In our view, they assume the can opener. As we argue below, fairness preferences are part of welfare calculation and cannot be ignored by legal economists who wish to influence the law.

II. WELFARE AND FAIRNESS

In this section, we introduce a methodological difficulty: legal economists discount people’s preferences for fairness, at most mentioning that their proposals run contrary to these tastes. We argue that there is robust empirical evidence of people’s preference for fairness and that this preference cannot be ignored in legal economists’ welfare calculations.

A. Fairness as a Preference

Within welfare economics, an actor’s concern for fairness is simply one preference among others. Hence, to the extent that citizens express a preference for fairness, this preference—like preferences for money or happiness—must be taken into account. Some welfare economists label this preference for fairness a “taste for a notion of fairness.”\textsuperscript{63}

\begin{itemize}
  \item \textsuperscript{58} Id.
  \item \textsuperscript{59} Id.
  \item \textsuperscript{60} Id. at 861–66.
  \item \textsuperscript{61} Id. at 872–82.
  \item \textsuperscript{62} Id. at 880–82.
  \item \textsuperscript{63} As described by Louis Kaplow and Steven Shavell, individuals may have “a taste for a
For our purposes here, we will use the term “fairness” as a rough proxy for other-regarding preferences that deviate from the presumption that individuals prefer those things in their rational pecuniary self-interest. That is, individuals may have fairness preferences in equality and proportionality, but they may also be motivated by altruism or envy.64

Because this Article is an internal critique of law and economics, we will take seriously the claim that fairness concerns are simply preferences. But before doing so, we wish to note two ways in which fairness may be more than simply a preference.

First, welfare economists must make initial determinations about how to aggregate preferences. Does everyone count? Does everyone count equally? These questions cannot be answered without making value judgments. Moreover, a selection among distributive approaches will have an effect on the outcome of the social welfare function. For example, a decision to count everyone’s preferences equally yields a very different result than counting only the preferences of white males. Crucially, the decision between these possibilities must be made by a criterion outside of the welfare counting mechanism itself. Welfare economists must therefore make a critical decision—how to aggregate social welfare—on the basis of some value other than efficiency (such as “fairness”) in order to perform any economic analysis.65

Second, many theorists believe that fairness concerns may trump otherwise welfare-maximizing rules. In the hypothetical case "Surgeon,"66 a surgeon seeks to cut up one healthy individual and distribute his organs to five sick individuals.67 Theorists argue that even if this rule were welfare maximizing,68 cutting up one individual

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64 For an empirical attempt to distinguish among these preferences, see Jeremy Clark, *Fairness in Public Good Provision: An Investigation of Preferences for Equality and Proportionality*, 31 CANADIAN J. ECON. 708 (1998).


67 For the argument that such a rule would not be Pareto superior, see Kimberly Kessler Ferzan, *Some Sound and Fury from Kaplow and Shavell*, 23 LAW & PHIL. 73, 82 (2004).

68 That is, assuming that this would not lead to great social instability and so forth (the very repercussions we discuss below).
would be impermissible because doing so would be appropriating him. 69

At this point, however, we would like to put these two (substantial) concerns to the side. For the remainder of this Article, we will try to assess the strength of the “taste for fairness” and argue that, even when fairness is viewed as a taste, economists are paying too little attention to how this taste may undermine not only the legal rule that they are proposing but also the legal regime as a whole.

B. Evidence of the Preference for Fairness

A thorough empirical calculation must include all factors that could influence the result. Of course, some factors may not be statistically significant and, depending upon one’s discipline and the need for exact calculations, some factors may be ignored. However, the mere lip service that is given to the taste for fairness within the legal economist’s typical empirical conclusions is utterly unacceptable. The taste for fairness is pervasive, and the preference for fairness is very strong.

At the outset, we note that we do not need to rely on empirical studies to make this claim. The taste for fairness is patent within our society. Children complain if a rule is “unfair,” but not if it is inefficient. We teach our children what it means to deserve praise and blame. And, we teach our children not to discriminate against people of different sexes, races, or religions; to believe that humans may not be bought or sold; and to value fair play. We should not be surprised, then, that when these children grow to adulthood they continue to take fairness values seriously.

However, we can make our case beyond even these obvious observations. The taste for fairness runs deep. Consider first the capuchin monkey. 70 Scientists conducted tests in which they gave capuchins food in exchange for rocks. 71 Capuchins like cucumbers and happily exchange rocks for cucumbers. 72 However, capuchins prefer grapes to cucumbers. 73 (Who wouldn’t?) During the test, the scientists gave some of the monkeys grapes for rocks, and gave other monkeys cucumbers for rocks. 74 The cucumber-receiving monkeys

71 Id. at 299.
72 Id.
73 Id.
74 Id.
stopped exchanging the rocks for food or refused to eat the cucumber—"a directly accessible food that they readily accept and consume under almost any other set of circumstances."

From this, the researchers concluded that capuchins "measure reward in relative terms, comparing their own rewards with those available, and their own efforts with those of others." Thus, to a monkey, it is not simply about how many rewards one may receive, but how well off one is compared to others.

Among human beings, the scientific documentation of the taste for fairness is robust. Individuals have tastes for fairness that run contrary to rational actor assumptions. One study asked individuals how tickets should be distributed in a case in which demand exceeded supply. The subjects' clear order of preferences was standing in line, then a lottery, then an auction. Of course, economic predictions run in the exact opposite order—favoring auctions (he who values the ticket most will pay most) and disfavoring lines (which are wasteful).

Perhaps the most famous endorsement of fairness is the ultimatum game. In the ultimatum game, two subjects are told that they will split a sum of money. One subject proposes how the two will split the money. The second subject then either accepts or rejects the offer. If the offer is accepted, the money is split according to the offer's terms. If the offer is rejected, neither subject receives anything. Purely rational actors in the proposing role would offer a split in which the offeror receives nearly all the money and the offeree receives next to nothing. Purely rational offerees would accept these offers because even very little money is better than nothing. Each subject plays the game only once, so there are no incentives to cooperate stemming from a repeat play strategy.

In a result surprising only to economists, across many cultures offerors often propose a roughly even split (around 40 percent on average), and offerees faced with drastically unfair proposals frequently reject the offer. In other words, the ultimatum game

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75 Id. at 298.
76 Id. at 299.
78 Id. at S288.
80 Joseph Henrich et al., In Search of Homo Economicus: Behavioral Experiments in 15 Small-Scale Societies, 91 AM. ECON. REV. 73 (2001); Hessel Oosterbeek et al., Cultural Differences in Ultimatum Game Experiments: Evidence From a Meta-Analysis, 7 EXPERIMENTAL ECON. 171 (2004) (although exact percentages vary quite a bit, the average of
demonstrates robustly that people willingly sacrifice their pecuniary self-interest to promote other values such as fairness. These are but a few of the empirical studies that clearly demonstrate that individuals have a strong preference for fairness. Indeed, this preference is sometimes stronger than any preference individuals have to act in their rational self-interest. Because individuals weigh fairness so heavily, any policy that seeks to enhance their welfare must take account of their fairness preferences.

C. Responses to Fairness

Given the empirical evidence of the taste for fairness, one should expect that fairness significantly figures into social welfare calculations made by legal economists. This, however, is not the case. Rather, legal economists seem to adopt one of two strategies. Some have simply ignored it. Others have attempted to explain fairness away.

More often than not, fairness is simply ignored. As Daniel Kahneman, Jack Knetsch, and Richard Thaler, have noted:

The economic agent is assumed to be law-abiding but not "fair"—if fairness implies that some legal opportunities for gain are not exploited. This nonfairness assumption expresses a resistance to explanations of economic actions in moral terms that has deep roots in the history of the discipline. The central insight that gave rise to modern economics is that the common good is well served by the free actions of self-interested agents in a market.  

As Kahneman, Knetsch, and Thaler note, there are two possible reasons for this neglect—one substantive and one methodological. The substantive claim is that one may believe that there is no real substantive content to fairness. If fairness concerns are really just charades for self-interest then there is no need to account for fairness needs separately. The methodological claim is simply this—things just get too complicated when theorists must take into account
fairness calculations.\textsuperscript{84} If the benefit of economic modeling is answers, the more factors, the more complicated the model, the harder those answers are to come by.

Taking the methodological rationale first, we simply believe that this factor cannot be ignored. \textit{Legal} economists are presumably making policy recommendations that they believe \textit{should become the law}. The calculations may be complicated. However, if a theorist is going to advocate for a particular position as the welfare-maximizing one, then that policy should truly—all things considered—maximize welfare. They cannot assume the can opener.

As for the substantive claim, it seems to us that the burden is on legal economists to \textit{show}—through empirical data—that the impact of fairness is not statistically significant or is simply self-interest in disguise. However, given the current data that exists, the taste for fairness runs deep and must be accounted for, not ignored.

Some legal economists attempt to undermine the role of fairness by explaining our attachment to it. For instance, Harvard legal economists Louis Kaplow and Steven Shavell present a two-step argument against fairness.\textsuperscript{85} First, they link fairness theories to social norms.\textsuperscript{86} Here, they assert a causal thesis to explain why the reader is attracted to fairness, arguing that the attachment to fairness theories comes from their similarity to social norms that are inborn (via evolution) or inculcated.\textsuperscript{87} Second, Kaplow and Shavell argue that social norms themselves should not provide an independent basis for making legal policy decisions. They claim that social norms serve as rules of thumb for advancing social welfare and have evolved or were indoctrinated for this purpose; hence, because welfare economics can calculate social welfare directly, reliance on these social norm proxies is unnecessary.\textsuperscript{88}

There are two problems with this argument. First, a causal explanation of a belief does not undermine the truth of that belief. As Jules Coleman noted, “the view that the existence of a causal explanation of the fact that someone holds or asserts a particular claim undermines the truth of the claim asserted simply cannot be sustained.”\textsuperscript{89} Indeed, as Coleman notes, even if evolution selected for

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{84} Id.
\item \textsuperscript{85} KAPLOW \& SHAVELL, supra note 63, at 3–5, 63, 136–39, 357–59.
\item \textsuperscript{86} Id. at 63, 134–38, 204, 207, 242.
\item \textsuperscript{87} Id. at 136–37, 357–58.
\end{itemize}
\end{footnotesize}
beliefs, why would it select for false beliefs over true ones? Second, Kaplow and Shavell’s move from the observation that social norms enhance welfare to the claim that they were inculcated for this purpose is a non sequitur. There are other alternative explanations for why fairness beliefs may often be welfare enhancing. Fairness beliefs and social norms may be linked by a common morality, and, even if not aimed at maximizing welfare, it would be a very short-lived morality that did not somehow enhance it.

Ultimately, taking Kaplow and Shavell’s claim to its logical conclusion would lead to a complete refusal to count fairness at all. Although Kaplow and Shavell claim to be willing to include fairness as a preference (when empirically demonstrated, though they doubt this will often be the case), their argument—that fairness is just a rough proxy for a welfare-enhancing standard—amounts to an argument that fairness is just a mistaken preference. That is, people, were they to know how a legal rule would affect them, would no longer prefer the fair rule. However, given that Kaplow and Shavell claim that mistaken preferences are not entitled to any weight, it seems that they cannot give any weight to fairness.

III. THE PERILS OFignoring Fairness

In this section we argue that when theorists fail to take fairness into account, their results may not be welfare maximizing. The rule itself may not maximize welfare because it defeats reasonable expectations or even instigates resistance. Additionally, the legal rule may have significant negative externalities—it may undermine the legal system as a whole.

A. The Failure of the Legal Rule to Maximize Social Welfare

1. Defeating Reasonable Expectations

For small-scale transactions, those where the value does not justify paying for sophisticated legal assistance, the participants are likely to rely primarily on their intuitions as to the content of the governing background rules. At the time they enter into their transaction, both

90 Id. at 1534.
91 Ferzan, supra note 67, at 93.
92 See id. at 95–101.
93 KAPLOW & SHAVER, supra note 63, at 11–12, 78, 431–36.
94 Id. at 23.
95 Such transactions are vital to the economy. In the first eight months of 2008, for example, personal consumption expenditures amounted to an annualized rate of some
parties likely think the governing rule is the intuitive rule. That rule allocates rights to the parties in a way they both understand and consider to be fair. They build the transaction around the rule as they think it to be, and price the deal accordingly. They also take whatever steps they think prudent to ensure performance and to insure against risk based on their understanding of how the law will allocate each party’s rights and duties.

However, if the parties later have a dispute arising from the transaction, the court will declare victory for one party over the other on the basis of the actual legal rule in effect. When the legal rule produces a different result from the rule the parties thought applied, their preparations are likely to go awry. Plus, the surprised victor will gain a windfall at the expense of the dismayed loser. The parties agree to the contract price with a common understanding that they are allocating certain entitlements to each. When the court reverses the parties’ distribution, it essentially forces the losing party to pay for the entitlement twice: once as part of the contract price and a second time as damages from the litigation.\textsuperscript{9}

Although high-value transactions guided by expensive counsel seem less vulnerable to this phenomenon, rules governing obscure or rare aspects of the transaction may suffer from a similar dynamic. Even experienced lawyers are unlikely to be aware of rules that cover relatively rare situations. A lawyer uncertain about the law could expend resources in research to discover the truth, but that search will occur only when the lawyer is aware of his or her ignorance. In the more likely situation in which a lawyer is unaware that a special exception exists, that exception may be ignored until it is too late, again defeating expectations.

To understand this dynamic more concretely, imagine that a state adopted a law reinstating the doctrine of \textit{caveat emptor} (buyer beware) for a narrow class of contracts only, say contracts dealing with the sale of used cars by used car dealers. Ignoring the expectation problems described in this section, such a rule might be efficient. In such sales, both parties can easily be placed on roughly equal footing. While the seller possesses more information about the car’s history, that advantage can easily be eliminated by the buyer’s $10\text{ trillion. See Press Release, Bureau of Econ. Analysis, Personal Income and Outlays: August 2008, at 7 (Sept. 29, 2008), available at http://www.bea.gov/newsreleases/national/pi2008/pdf/pi0808.pdf.}\textsuperscript{96} See Ian Ayres & Robert Gertner, \textit{Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules}, 101 \textit{Yale L.J.} 729, 759–63 (noting efficiency complexities once one drops the assumption that contracting parties are fully informed of the operative legal rule).
hiring a mechanic to inspect the car or making the sale contingent on a complete disclosure of the car’s maintenance records. In this context, then, there may not be any great need to overcome legal economists’ usual presumption, illustrated by all three of our introductory examples, that freedom of contract should triumph over any regulatory impulses to protect one side or the other in a transaction. Our claim is not that such a rule would actually be efficient—we can certainly see some arguments that alternative rules might be better, such as the advantages of imposing liability on the party with more information ex ante—but only that there are sufficiently strong arguments in its favor that it is reasonable to suppose it might be efficient.

Once we consider the rule’s effects on settled expectations, however, the rule’s efficiency becomes much more doubtful. For example, in the last few generations, American consumers have increasingly come to expect a certain level of fairness protection in their transactions, especially in their transactions with relatively sophisticated counterparties. In fact, this caveat emptor proposal would represent a significant change in the existing law of most states. The sale of a car is regulated by Article 2 of the Uniform Commercial Code, since cars are movable goods. Article 2 applies certain implied warranties in the absence of express disclaimers. One of these is the Implied Warranty of Merchantability, which provides that, unless excluded, a warranty is implied in the sale of goods by a merchant (such as a used car dealer) that the goods will be “merchantable,” meaning essentially that they are fit for the ordinary purposes for which such goods are used. Many states provide even more protection in the form of “lemon laws,” which provide enhanced remedies when dealers sell consumers cars that are in particularly poor shape and cannot be adequately repaired. The proposed caveat emptor rule, by contrast, would not imply any warranties at all. Instead, the background default rule would provide that buyers of

97 See U.C.C. § 2-102 (1977) (stating that Article 2 applies to contracts for the sale of goods); id. § 2-105 (defining goods as all things that are movable, with certain exceptions not relevant here).
98 See, e.g., id. § 2-314 (Merchantability); id. § 2-315 (Fitness for a Particular Purpose).
99 Id. § 2-314.
used cars took them on a strictly "as-is" basis, even if they turned out not to run.

The *caveat emptor* rule, then, would represent a sharp diversion from consumers' current expectations. Consumers buying used cars from dealers expect a certain level of basic protection. While at one time this may not have been true—witness the still lingering reputation of used car dealers as untrustworthy—we suspect Article 2 and the passage of lemon laws in many states have largely changed consumers' expectations. Consumers now are much less likely to take precautions when buying a used car from a dealer, such as having the car inspected by a mechanic or insisting on a written warranty. Should the law change to a regime of *caveat emptor*, these consumers would go unprotected and often end up with a "lemon" without recourse against the dealer. Over time, consumer groups might manage to educate the public about the new need to take greater care, but until then (and for many consumers, even after then), consumers as a group would likely suffer a substantial loss from the adoption of the new rule. This loss detracts greatly from the proposal's efficiency, perhaps enough to outweigh whatever gains might be made from the increased freedom of contract. At a minimum, legal economists have paid insufficient attention to the effect on settled expectations, an important factor in measuring a proposal's efficiency.

2. Instigating Resistance

Legal economists tend to think of people's attitudes towards rules as reflective of their underlying pecuniary interests. Corporations care about maximizing their profits; individuals care about maximizing their income. Both corporations and individuals will support policies that enhance their financial prospects and oppose those policies that will likely cause them economic harm. But actual human beings often care most about concerns that are entirely non-pecuniary and will sometimes willingly suffer financial losses in order to further other interests.\(^\text{101}\) Although it would be trite to state this in any non-economic context, human beings often care deeply about justice,

\(^{101}\) See Jeremy A. Blumenthal, *Does Mood Influence Moral Judgment? An Empirical Test With Legal and Policy Implications*, 29 LAW & PSYCHOL. REV. 1, 5 (2005) (stating that behavioral economists have documented behavior that violates economic norms when subjects perceive unfair behavior); John Bronsteen et al., *Hedonic Adaptation and the Settlement of Civil Lawsuits*, 108 COLUM. L. REV. 1516, 1524 (2008) (arguing that since people often act against their interest in the ultimatum game, they care about values other than economic self-interest, such as fairness).
equality, freedom, fairness, and religion, to name but a few of humanity’s core non-pecuniary concerns. \(^{102}\)

Non-pecuniary interests are often the most powerful motivators of human behavior, and social engineers, such as legal economists, ignore them at their peril. In particular, individuals who find a particular law offensive may actively attempt to circumvent it and undermine its enforcement even when such opposition is costly. This behavior may impair the efficiency benefits that would come from broad compliance.

As an example of this problem, let us imagine that Congress adopted Richard Epstein’s proposal to eliminate the antidiscrimination statutes. Epstein argued that permitting discrimination would be efficient mostly because it would permit companies to reduce agency costs. \(^{103}\) He posited that some companies would choose to hire primarily members of a particular race as a way to unify workers’ tastes and make the business easier to govern. \(^{104}\) Other companies that did not discriminate would also benefit from this rule, because the discriminating companies would siphon off most of the bigots, who presumably are difficult to manage in racially diverse companies. \(^{105}\)

But what would actually happen to a company that adopted an expressly discriminatory hiring policy? Anti-discrimination norms have taken deep roots in the past two generations. Under these conditions, who would do business with a company that blatantly discriminated in hiring? Even a company that adopted its discrimination policy quietly would risk exposure every time an applicant of a disfavored race was rejected despite excellent qualifications. In fact, it would be difficult for a company to reap the benefits Epstein identified without making some public statement of its policy, so that members of the favored race would know to apply in greater numbers (not to mention the bigots). Once a company’s discrimination policy was revealed to the public, it would no doubt face immediate public condemnation and boycotts organized by groups representing the excluded races. Indeed, the boycotts would likely be joined by groups representing every race and religious group, since no race (and no representative group) would want to be seen as condoning racial discrimination. It is difficult to imagine that

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\(^{103}\) See EPSTEIN, supra note 6, at 61–69.

\(^{104}\) See id. at 63–69.

\(^{105}\) See id. at 74.
any company that stuck to an expressly discriminatory hiring policy could long survive, regardless of the policy’s legality. The apparent efficiencies Epstein argued could be gained evaporate once we take into account people’s likely resistance to laws they strongly oppose.\footnote{Epstein might contend that our analysis proves his point, that laws forbidding racial discrimination are unnecessary, since the same result—nondiscriminatory hiring—can be achieved without them. But this is not how he justified his argument in *Forbidden Grounds*. Instead, there he relied on the efficiencies that would result from permitting discrimination. *See Epstein, supra* note 6. More importantly, our purpose is not to argue the merits of any particular policy proposal but to demonstrate that legal economists frequently overlook the important consequences that result from individuals’ strong opposition to some legal rules.}

Epstein’s proposal represents perhaps an extreme, in that nearly everyone at least publicly expresses opposition to racial discrimination. Other proposals might be less universally condemned and therefore receive less effusive opposition. But our point holds true for any policy that a sizable group passionately disapproves of on principled grounds. A sufficiently outraged opposition will take steps to undermine the law it disputes, even when such opposition’s expense far outweighs any anticipated material benefits from a policy change.\footnote{See Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641, 1664 (2003) ("[A] substantial number of the experimental subjects are willing to punish unfair behavior even though the action is costly to them."); *see also* Larry E. Ribstein, *Are Partners Fiduciaries?*, 2005 U. ILL. L. REV. 209, 233 (citing experimental evidence that people reward fair behavior and punish unfair behavior).} The resulting costs should be taken into account when determining if a proposed law is truly welfare maximizing.

**B. The Hidden Externalities of Unfair Rules: Undermining Moral Norms and Legitimacy**

1. *Why Citizens Obey the Law*

Why do people obey the law? This question poses a difficult puzzle, especially for economists. For example, there are many goods and services we would very much enjoy consuming but which, as academics, we cannot easily afford. Why do we refrain from simply taking them? Why, in short, do we obey the law prohibiting us from stealing?

Economists’ answers focus on deterrence. The law induces obedience by establishing appropriate incentives. We obey the law because the law ensures that it is in our interests to do so.\footnote{See generally Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).} The law
can set up these incentives either by promising rewards for compliance or by threatening punishment for disobedience.

The law’s success in coaxing obedience depends on the credibility of the threatened punishment, which in turn hinges on both the likelihood of detection and the magnitude of punishment.\(^{109}\) If we believe we are almost certain to be caught and punished, we are much less likely to steal than if we believe we are likely to escape with the stolen goods. Deterrence is costly. To make the threat of punishment credible, a government must invest heavily in police, courts, and prisons, both to increase the perceived risk of capture and to actually imprison those who are caught and convicted. For this reason, economists’ vision of the law’s goal is not necessarily to achieve perfect deterrence—and therefore perfect obedience—but rather to find the point at which the next dollar spent on deterring crime yields less than one dollar’s worth of crime prevention.\(^{110}\) The goal, in other words, is an efficient level of crime.

Though the workings of deterrence are fine in theory, in practice an efficient level of crime is elusive. As Paul Robinson and John Darley have documented, there is little reason to believe that criminal law deters (at least through this mathematical formula).\(^{111}\) Given the low chances of being caught, convicted, and sentenced to prison, the prison sentence itself is unlikely to have a strong deterrent effect.

Indeed, although economists believe that citizens obey the law because they are threatened into obedience, other scholars who have studied this question take a broader view of the possible causes of obedience.\(^{112}\) Sociologists, social psychologists, and political scientists argue that important factors in addition to deterrence include peer attitudes towards crime, internal moral norms, and the legitimacy of the government institutions that create, administer, and enforce the law.\(^{113}\) Deterrence and peer attitudes are both externally imposed methods of achieving obedience, whereas internal moral norms and legitimacy are internally motivated sources of compliance.\(^{114}\) These four sources of obedience are interrelated, so

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\(^{109}\) See id. at 176.

\(^{110}\) See id. at 170; see also Keith N. Hylton, The Theory of Penalties and the Economics of Criminal Law, 1 REV. L. & ECON. 175, 176 (2005) (reconciling Becker’s optimal level of crime approach with Posner’s full deterrence approach).


\(^{114}\) See TYLER, supra note 112, at 23–26.
that a change in one may have a greater or lesser impact through resulting changes in the others.

In some cases, deterrence is a factor. Material incentives are an important determinant of human behavior. Not surprisingly, because economists favor deterrence, incentives are the factor least likely to be directly affected by the choice of counterintuitive or apparently unfair rules. As long as the incentives are clear and well-known, they should tend to make the desired behavior more likely (and the undesired behavior less likely). But the results frequently will be less straightforward than economists predict, depending on the remaining three factors.

Peer attitudes towards compliance with the law, in contrast, may tend to undermine obedience of rules that are surprising or seem unfair. Tom Tyler’s seminal Chicago study of legal adherence demonstrates that people distinguish among different laws when asked whether their peers would disapprove if they were arrested for committing one of a series of crimes. Although only about half of respondents felt that their peers would disapprove if they were arrested for making too much noise, littering, speeding, or parking illegally, the vast majority of respondents predicted their peers would disapprove if they were arrested for drunk driving (86 percent) or shoplifting (89 percent). Tyler’s study showed that anticipated peer attitudes vary with the seriousness or moral blameworthiness of the crime. Crimes that appear less blameworthy, either because they cause less harm or do not violate a core moral precept, garner less peer censure than those likely to cause great harm (such as drunk driving) or to violate fundamental moral principles (such as the prohibition against theft). Laws that outlaw conduct that appears harmless or innocent are unlikely to provoke much peer criticism when they are violated. These rules are consequently less likely to be obeyed. Economists who focus solely on material incentives in predicting compliance will therefore greatly overstate the likelihood of observance of counterintuitive or seemingly unfair rules.

Like peer attitudes, internal moral norms are less likely to lead to enforcement of odd or immoral laws. Tyler’s Chicago study demonstrates that most people feel that breaking the law is morally wrong, and that this is one of the major reasons why people tend to obey the law. To the extent people do not feel a particular law parallels their personal morality, then, internal moral norms are far

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115 See id. at 44.
116 See id.
117 See id. at 56.
less likely to induce compliance. This effect should prove particularly powerful when people believe a law opposes their morality. We see a dramatic example of this effect in abortion foes who bomb clinics. Although they know that destruction of property is illegal, they proceed because they believe their actions serve a higher moral purpose: that of preventing what they perceive to be legally sanctioned murder. They choose to violate laws they presumably agree with (those banning destruction of others' property) in order to prevent enforcement of laws they virulently oppose (those legalizing abortion). Although this is an extreme example, it does illustrate the guiding principle: people are less likely to obey a law that is not reinforced by their internal moral norms.

The fourth and final source of obedience comes from a law's legitimacy. "Legitimacy" refers to the perceived obligation to obey. Citizens may feel an obligation to obey a law or a legal authority (such as a leader, judge, or police officer) when that law or authority stems from a process or institution that they feel creates an adequate justification for obedience. For example, Americans may feel that a statute passed by both the House and the Senate and signed by the President should be obeyed even if they disagree with the statute's substance. The institutions that promulgated the law are rooted in a principle—representational democracy—that most Americans feel rightly demands their obedience. As a result, those institutions have a great deal of legitimacy in American political culture and can often induce compliance even from those who dissent from particular policy decisions.

Legitimacy is a variable sociological characteristic, however, not a physical constant. The legitimacy of sources of law and those who enforce it may decline if the laws seem wrong or bizarre. As a result, people may stop obeying even laws that do not seem strange because the overall legitimacy of the system is undermined. Sociological studies support this notion that those who oppose the decisions of legal institutions also feel those institutions are less legitimate.

118 The Chicago Study also found that the vast majority of respondents said that people should obey a law even if it goes against what they think is right. Id. at 46. This finding, however, must be read in conjunction with the studies that demonstrate that this measure of legitimacy declines among people who disagree with the government's substantive policy choices. See infra note 121.


120 See TYLER, supra note 112, at 28.

121 See id. at 30; see also Anke Grosskopf & Jeffery J. Mondak, Do Attitudes Toward Specific Supreme Court Decisions Matter? The Impact of Webster and Texas v. Johnson on Public Confidence in the Supreme Court, 51 POL. RES. Q. 633, 647 (1998); Valerie J. Hoekstra, The Supreme Court and Local Public Opinion, 94 AM. POL. SCI. REV. 89, 96–98 (2000); Walter
Legitimacy thus provides some maneuvering room for governmental agents to advance policies that may not be popular, but legitimacy is ultimately linked to a government's ability to fulfill its people's desires. A government that advances laws that appear immoral or strange may find its legitimacy undermined. Legal economists should consider these risks when arguing for such proposals, because the harmful effects on the government's legitimacy may far outweigh any marginal efficiency gained by adopting counterintuitive rules. Counterintuitive and/or unfair rules may sometimes prove welfare maximizing. But that calculation is far more complex than most legal economists have heretofore acknowledged. Such rules may have nuanced effects on social welfare through their effect on expectations, their conflict with non-pecuniary interests, and their deleterious impact on citizens' tendency to obey the law.

Applying the findings of Tyler and others, Paul Robinson and John Darley contend that the criminal law is best served by conforming to citizens' perceptions of just desert. As they argue, criminal law serves an essential function in both shaping and enforcing moral norms. When citizens perceive a rule to be unfair, this may undermine the criminal law's legitimacy and the willingness of citizens to defer to the law in unclear cases. As Robinson and Darley forcefully argue, legal economists' prescriptions to deviate from desert are far from costless, and may instead significantly undermine crime control.

2. The "Flouting Thesis"

Very little has been done to test the empirical assumption that unfair rules will undermine overall faith in the justice system. Still, it seems that any theorist who argues that his counterintuitive rule is efficient is implicitly (albeit unwittingly) making the claim that, even taking into account the extent to which this rule undermines citizen respect for the law, it is still the best rule. And, because the legal economist is making such a claim, the burden lies on the economist to


122 See Tyler, supra note 112, at 30.
123 Robinson & Darley, supra note 113, at 454.
124 Id. at 457.
125 Id. at 487.
126 Id. at 478.
address and to refute any arguments that this rule will be more
detrimental than beneficial.

Moreover, preliminary research does confirm that the legal
economist must take these concerns seriously. One theorist who has
attempted to understand the extent to which an unfair rule will
undermine overall faith in the system is Janice Nadler. Nadler
recently examined the assumed but unproven "Flouting Thesis."
"When a person evaluates particular legal rules, decisions, or
practices as unjust," she explained, "the diminished respect for the
legal system that follows can destabilize otherwise law-abiding
behavior." In one experiment, subjects were exposed to many newspaper
stories including a series of stories that portrayed laws as just or
unjust. Then, for an ostensibly unrelated purpose, the subjects were
asked to participate in filling out a questionnaire on their likelihood of
criminal behavior. The questionnaire listed "borderline" crimes
such as drinking underage, taking home office supplies for personal
use, and making illegal copies of software. As predicted, those
subjects exposed to stories discussing unjust laws indicated a greater
willingness to break the law than those exposed to news stories about
just laws.

Nadler also conducted two experiments involving mock trials. In
the first experiment, undergraduate students served as subjects. They watched a news story that depicted either a just or an unjust
outcome. They were then asked to participate in a (supposedly
unrelated) mock trial. In this mock trial, the defendant stole a
shopping cart and was clearly guilty; however, subjects also knew
that, because this was his third felony, the defendant would receive a
life sentence with no possibility of parole. In this study, the
Flouting Thesis was not confirmed. There was no statistically
significant correlation between the just or unjust prime and the
decision to nullify.

128 Id. at 1401.
129 Id. at 1411–12.
130 Id. at 1413–14.
131 Id. at 1414.
132 Id. at 1415.
133 Id. at 1417.
134 Id.
135 Id. at 1418.
136 Id.
137 Id. at 1420.
Nadler then conducted the study with different participants. She sent an email to over a thousand participants, ultimately yielding subjects that were 60 percent female, 82 percent white, and had a mean age of 37, with 66 percent of the subjects residing in the United States. These subjects read the news story (rather than watching it on television) and then read a description of the mock trial, and were asked for their verdicts. Under these conditions, the Flouting Thesis was confirmed.

There is certainly more empirical work to be done. Nadler’s research confirms, however, that the “Flouting Thesis” is not just a matter of theoretical concern. Unfair rules may ultimately undermine the law itself.

Let us return to the proposals with which we began. Imagine that laws were enacted that allowed for baby selling, discrimination, and insider trading. We now see that these sorts of laws may undermine the law’s overall legitimacy. If most people believe that discrimination is acutely wrongful, then they will view the law as making a profound moral mistake in allowing for discrimination. As mentioned above, it is entirely possible that they would then be less willing to defer to the law as a source of moral advice when they are unsure of what to do. Thus, even if these laws are welfare maximizing in the individual case, they may ultimately have significant external costs that do not render them welfare maximizing when considering the legal system as a whole.

3. Undermining Rule of Law Values

There is one final way in which the law may lose its power. The legal rule may undermine the social norm and the fairness belief itself. That is, even assuming that Kaplow and Shavell are correct and fairness rules are but imperfect proxies for complex social welfare standards, the economist cannot ignore the value of having rules. When legal economists urge that we look beyond fairness beliefs to see whether, in any particular case, a rule is maximizing, they are choosing between the value of rules and the value of standards. This trade-off must also be accounted for in their calculations.

The rules versus standards question is perhaps most famously embodied in the debate between Justices Oliver Wendell Holmes and Benjamin Cardozo. To Justice Holmes, the “featureless generality” of

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138 Id. at 1423.
139 Id. at 1424.
140 Id. at 1424–25.
141 See supra note 88 and accompanying text.
negligence would ultimately give way to specific per se rules, such as "stop, look, and listen." But Justice Cardozo had the last word, holding that such per se rules could not take into account all the circumstances so as to adjudicate negligence liability correctly in future cases.

There are values to having rules as opposed to standards. First, rules can solve physical coordination problems. In situations in which there are several different (and incompatible) ways to resolve a problem (for example, which side of the street to drive on), a rule can offer a solution. Rules can also solve social coordination problems. To the extent that the morally right thing to do turns in part on what others are likely to do (for instance, a prisoner's dilemma), rules provide a basis for prediction.

But rules have other values as well. The rule promulgator may have greater moral or factual knowledge than a citizen. Additionally, rules help avert errors. When a complex decision must be made, actors who must decide under a standard—analyzing a multitude of factors—may simply get the calculations wrong. And, by having a rule, decision-making costs are reduced. As Larry Alexander and Emily Sherwin have explained, "[t]he quality that identifies a rule and distinguishes it from a standard is the quality of determinateness. . . . [A] rule is a posited norm that fulfills the function of posited norms, that is, that settles questions of what ought to be done."

As just one example, consider speed limits. If a law simply said, "drive safely," individual citizens would have to calculate at what speed to drive. Some would drive faster than they should because they would miscalculate the safe speed. Hence, the government tells citizens to drive fifty-five miles per hour because (1) it has more factual information and (2) ex ante it is less likely to make mistakes than an individual driver at the time he is driving. The speed limit rule

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145 See Alexander & Sherwin, supra note 144, at 56; Schauer, supra note 144, 162–66.
146 See Alexander & Sherwin, supra note 144, at 57–58.
147 Schauer, supra note 144, at 55.
148 Id. at 150.
149 Id. at 137.
is thus an imperfect proxy (imperfect because some people may safely drive at fifty-six miles per hour) for the general standard to "drive safely."

Despite the values of rules, the problem is that rules may be over-inclusive.151 This is, of course, Kaplow and Shavell's complaint.152 If the standard is welfare maximization, and a fairness rule is but a rough proxy, the rule may sometimes be wrong.153 Interestingly, however, rules are effective only because citizens do not frequently question whether they should follow a rule in any particular case.154

For our purposes, what is essential to note is that even if fairness rules only serve a proxy function, undermining that function may have devastating effects in cases in which we want citizens to follow the rule. Ultimately, the value of legal rules is consequentialist. We pursue the Good through indirect rules, rather than through direct calculations, because we are more likely to achieve the Good indirectly.155 Thus, the stability of these sorts of rules is required for us to be able to achieve the Good in the vast majority of cases.156 Hence, even if the underlying consequentialist standard (assuming this is what underlies the rule, of course) dictates that discrimination, or cheating, or baby selling is the appropriate course in one specific set of circumstances, this sort of deviation from the norms of fairness and equality may undermine the value of the rules themselves. A legal economist cannot afford to ignore such consequences.

In other words, once legal economists teach citizens to look behind the rule for the action that is welfare maximizing in the individual case then citizens will begin to disregard rules and make their own calculations in other cases. But this defeats the very purpose of having rules, which serve the very purpose of avoiding individual calculations and mistakes. If "don't cheat" becomes "it is okay to cheat sometimes," then society loses the benefit of the social norm against cheating and it may encourage citizens to make their own (often mistaken) calculations in other instances as well.

151 Rules may also be underinclusive. That is, the reason that justifies prohibiting conduct type a may also extend to conduct type b, but the rule may apply only to conduct type a. SCHAUER, supra note 144, at 32–33.
152 KAPLOW & SHAVELL, supra note 63, at 244.
153 ALEXANDER & SHERWIN, supra note 144, at 35; SCHAUER, supra note 144, at 32.
155 See Larry Alexander, Pursuing the Good—Indirectly, 95 ETHICS 315, 317–19 (1985) (arguing that we need "indirect consequentialism" because for some practices pursuing the good directly would be self-defeating).
156 This still creates the paradox of what to do when the rule does not promote the Good in an individual case. See id. at 319–21.
CONCLUSION

In this Article, we have sought to urge legal economists to take fairness concerns seriously. There is robust evidence that individuals have a preference for fair rules. Without taking these strong preferences into account, a legal economist cannot be sure that his proposal is actually welfare maximizing. Moreover, even if a proposal is discretely maximizing, an unfair rule may do significant damage to the value of the rule of law itself. In the face of this empirical evidence, legal economists who fail to take fairness preferences into account are ignoring a variable essential to their calculations.

Perhaps the failure to include fairness concerns reflects the legal economists' fear that so doing would be to abdicate their calculators for armchairs. The economist, who seeks data, may find the prospect of navel gazing about fairness to be the antithesis of his discipline. But the legal economist need not fear. Rather, just as the legal economist may wish to empirically discover the best legal rule, he may also empirically test the strength of individuals' tastes for fairness. Indeed, some studies have found that the citizenry's taste for fairness (or lack thereof) may not coincide with initial expectations.157 But it is time for the legal economist to get empirical. He cannot afford to lie on the beach, dreaming of can openers. He is starving.

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157 Kahneman, Knetsch & Thaler, supra note 77, at S295.