ARTICLES

THE DECEPTIVE NATURE OF RULES

LARRY ALEXANDER† & EMILY SHERWIN‡

Modern society lives under rules. Rules organize our morality, our social behavior, our religious activities, and our legal relations.

Much has been written about the allegedly fictitious nature of rules. Some say rules are deeply indeterminate and function only as cover for relations of power. Others (more in keeping with the attitude of those who live under rules) reply that rules have

† Professor of Law, University of San Diego.
‡ Professor of Law, University of San Diego. J.D. 1981, Boston University.

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sufficient meaning to act as restraints both on those who follow them and on those who apply them.2

We do not intend to enter that debate; we shall assume that rules have determinate meaning. Our point is that rules work best when they are understood in a way that is not quite true. In other words, rules are most successful when they are taken to be "serious rules." A serious rule, as opposed to a rule of thumb, is one that dictates the course of action to be taken in all cases that fall within its terms. For example, suppose there are rules in effect that tell us not to park in private driveways and not to appear in public without clothes. If we take these as serious rules, we take them to mean that we should follow them without further thought—that respecting private property, or wearing clothes, is the right choice for all of us in every case. And sometimes, at least, we do follow rules in this unthinking way.

In fact, rules do not identify the best course of action in every case: they are overgeneralizations, and often quite consciously so. Yet rule-makers seldom explain the character of rules, and they expect, or at least hope, that the audience of rule-followers will accept them as serious rules. In this sense, rule-makers "lie" to rule-followers, a fact with serious practical and moral consequences.

We use the term "lie" loosely, but deliberately. The promulgation of a rule is not a lie in the ordinary sense, and the public certainly does not take all rules as "true." Indeed, rules, as such, cannot be true or false: they are norms, not propositions. Yet the promulgation of every serious rule, such as "In all cases of F, do A," is accompanied by the implicit proposition, "It is right all things considered that . . . ." That proposition does have truth value; and it is false. Nonetheless, as we shall explain, rule-makers have reasons to hope that rule-followers will take this false proposition to be true and misunderstand the nature of serious rules.

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We have chosen strong terms, such as "lie" and "deceive," because they capture in a dramatic way the relation between authority and subject within a system of rules and the moral dilemma that such a system poses. The problem we are interested in is really one of esoteric government, in which the governed are not fully aware of the nature of the system that governs them. At least in a society that values publicity and accessibility of government, it seems fair to place such an esoteric strategy of governance in the category of deception.

The best way to explain how and why rules deceive their subjects is to describe rules from two different perspectives: that of a governing authority designing a system of rules, and that of an individual who is expected to conform to the rules. In the discussion that follows, we often contrast these two perspectives to show why a governing rule-making authority might want individuals to approach decisions differently from how the authority itself would. We recognize that the notion of an authority's consciously manipulating rules in the ways we suggest is somewhat artificial. In the practical world it would be quite unusual to find an authority possessed of clear vision and a definite political theory, issuing rules from behind a screen. The process of social and political organization is more likely to proceed without such firm centralized control. Thus, the phenomenon we are describing is really one of half-conscious self-deception: should we resist rules and reexamine them as we apply them in particular settings? Or are we better off following them without much thought? This characterization of the issue does not alter our conclusion that rules are deceptive; it only makes the deception more difficult to evaluate.

We will speak most often of legal rules because they provide the simplest examples of the points we want to make. But much of what we say may apply to social, moral, and religious rules as well.

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5 See Schauer, Playing by the Rules, supra note 2, at 130-33 (discussing the "asymmetry of authority"). By a governing authority, we mean any entity that issues rules intended to govern the conduct of actors within its jurisdiction. We assume nothing about the scope or subject matter of the authority's rule-making power. The authority might be a government that engages in substantial regulation of private activity and redistribution of wealth; or it might be a libertarian state concerned primarily with delineating and protecting a framework of individual rights. For that matter, it might be a monarch, or a synod, or a law school dean.

I. HOW AND WHY RULES LIE: SERIOUS RULES

At the simplest level, our proposition is that rule-makers lie by employing rules. Before we can explain what we mean by this, we need a working definition of a rule. Setting aside some problems that do not immediately affect us, a "rule" is a prescription for conduct, applicable to a range of actors, which is designed to promote an end or protect a right, but does not simply recite its objective.

To serve its purpose effectively, a rule of this sort must claim to be something other or more than it is. This is easiest to see when the rule at issue rests on consequentialist grounds. For example, suppose a lawmaking authority has determined that its objective is to maximize the happiness of its subjects, or, more modestly, to promote safe automobile travel. Suppose, too, that most of the people the lawmaker presides over endorse these goals. Still, the authority may believe that it can better serve its goals by issuing a rule that requires drivers to stop at intersections than by directing them to drive safely or to drive in a way that will maximize happiness.


For a careful definition, similar to our own, see SCHAUER, PLAYING BY THE RULES, supra note 2, at 1-12, 23-27 (focusing on "regulative rules" as a subclass of "prescriptive rules").

Our definition excludes rules that have no purpose other than to establish a convention. If the prescription is to drive on the right, and there are no reasons why driving on the right might be thought better or worse than driving on the left, it does not seem to entail any deception of the sorts we will discuss. But this set of rules, if it exists at all, is very small. Most conventions are thought to serve some function, yet that function may not justify following them in all the cases they govern. For example, a legislature might require seals on land contracts not only to establish a procedure for contract formation, but also because it judges that the affixing of a seal will protect against false claims more often than it will defeat the intent of unsophisticated parties.

Traffic rules are a simple (perhaps oversimple) example from the domain of law. An example from the nonlegal world to which our arguments might apply is a typical
The authority is likely to be correct on this point. Individual drivers pursuing a goal of safe driving are subject to several kinds of error that do not affect the authority in its design of a rule. For example, they may lack information available to the authority, such as data on the frequency of travel. They may overestimate the value of particular interests of their own in relation to the general goal. They may be unwilling to contribute to joint action that will further the goal without assurance that others will contribute as well. If so, the authority may rightly conclude that it can produce a better sum of results by means of a rule, although the rule (by definition) is not perfectly tailored to its goal and will sometimes miss the mark.

set of rules issued by an academic institution, setting forth minimum grade point averages for graduation, good standing, and so forth. Rules of this sort, governing the conduct of administrators, attempt to distinguish between students who have mastered sufficient materials and skills and those who have not; yet such rules undoubtedly miss their marks in one direction or another or both. (Our best guess is that in the present era of grade inflation, few students flunk out who have learned very much, but many students graduate who have learned very little.)

See ROLF SARTORIUS, INDIVIDUAL CONDUCT AND SOCIAL NORMS 54-55 (1975) (arguing that legal prohibitions will not permit a blanket appeal to consequences as justifying their violation); SCHAUER, PLAYING BY THE RULES, supra note 2, at 131-33, 149-55 (arguing that authority may properly dissuade a subject from exercising her judgment); Larry Alexander, Law and Exclusionary Reasons, 18 PHIL. TOPICS 5, 9-11 (1990) (stating that authority has reasons to require subjects to follow rules even when the rules are not ideal); see also RAZ, supra note 8, at 53 (defining the normal justification thesis).

The usefulness of indirect strategies, such as serious, deceptive rules, is not restricted to the implementation of moral principles in a world of imperfectly rational actors. For example, in the realm of prudential action, if one wants to be a rational maximizer, one may have to become a constrained maximizer—that is, someone who is not a fully rational maximizer. See DAVID GAUTHIER, MORALS BY AGREEMENT 157-89 (1986). If one wants to be a rational deterrer of others' threatening acts, one may have to become irrational. See THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 18-19 (1960); Gregory S. Kavka, The Toxin Puzzle, 43 ANALYSIS 33, 33-36 (1983). Or, in the realm of the moral, if one wants to do what is right one may have to become morally corrupt. See Gregory S. Kavka, Some Paradoxes of Deterrence, 75 J. PHIL. 285, 285-302 (1978). These strategies do not involve deception; rather, they involve self-transformation of a sort that prevents the new self from comprehending its originating motivation. But pursuit of self-interest may also involve true self-deception: consider Thomas Schelling's rather representative example of how we sustain pleasure in reading certain books or watching movies by avoiding noticing how many pages or time is left. See Thomas C. Schelling, The Mind as a Consuming
None of this is new. The more interesting point is that if the authority does reach this conclusion and selects a rule such as "stop at intersections," it will not want individual drivers to view the rule in the way it does, as an imperfect means to an end. To prevent individual errors effectively, the rule must establish itself in the mind of the actors it governs as a reason for action that preempts further consideration of how to act.\textsuperscript{10} It must assert that whenever an actor confronts facts that fit within the terms of the rule, the action the rule demands is the action the actor should take. We might call a rule of this sort a "serious" rule, to distinguish it from a rule of thumb.

A rule of thumb is not really a rule at all: it is a piece of information or advice.\textsuperscript{11} For example, the authority might announce a rule, "stop at intersections," together with instructions that citizens should view this rule as a well-informed opinion about how they can produce the best result. The problem with this method of governance is that the individuals who live under rules are rational creatures. They may not reason perfectly, but as human

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\textsuperscript{10} See RAZ, supra note 8, at 38-42 (explaining the preemptive theory); JOSEPH RAZ, THE AUTHORITY OF LAW 21-22, 30-33 (1979) (characterizing legal rules as exclusionary reasons); SCHAUER, PLAYING BY THE RULES, supra note 2, at 4-6, 121-22 (discussing rules as reasons for action).

\textsuperscript{11} We are using the term "rule of thumb" to describe any rule that is transparent in the sense that the addressees understand that the rule is only a blunt formula designed to serve other purposes. Cf. Regan, supra note 10, at 1004 (discussing various usages of "rule of thumb"). For varying accounts of nonserious rules of thumb, see RAZ, supra note 8, at 28-31 (using the term "recognitional" authority); SCHAUER, PLAYING BY THE RULES, supra note 2, at 104-11 (using the term "rules of thumb"); Hurd, supra note 10, at 1615-17 (using the term "influential" authority); John Rawls, Two Concepts of Rules, 64 PHIL. REV. 3, 19-24 (1955) (using the term "summary" rules); Regan, supra note 10, at 1003-13 (using the term "indicator" rules).
beings they are naturally inclined to apply whatever powers of reason they possess to the decisions that confront them. If an individual driver understands that his objective is happiness, or safe travel, and that the governing rule is only a rough calculation of how to reach that end, he has no rational choice but to make an independent assessment. At that point, the risks of error the rule was designed to avoid are reintroduced in the decision-making process. Some drivers will decide correctly to deviate from the rule, but it is possible that more will make this decision incorrectly, and that travel will be less safe than it might have been if all had followed the rule.

To some extent, the very announcement of a rule alters the balance of reasons for action. When the rule is issued, the gap between the rule and its underlying purpose immediately narrows, because now any violation will undercut the coordinating effect of the rule. In other words, enactment of the rule creates decisive reasons for doing what it requires in some cases in which, without enactment, the reasons for taking such action would be outweighed. Yet as long as the rule serves some purpose beyond mere coordination, and is not a perfect mirror of that end, the gap between what the rule demands and its underlying goals will never disappear, and the assertion that actors should obey the rule in every case will never be quite true.

Correspondingly, individual calculations will change when a rule is announced, even if it is announced as a rule of thumb. An individual actor (depending on the level of her understanding) may credit the rule as an informed calculation of right action, and she may take into account that her own disobedience could foster disobedience by others. Yet as long as she understands that the

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12 See Hurd, supra note 10; Regan, supra note 10.
13 See Alexander, supra note 9, at 7-8 (arguing that law affects one's reasons for acting because of "considerations of coordination, disobedience, and sanctions"); Postema, supra note 8, at 179-82 (discussing the way in which obligatory conventions resolve coordination problems); Powers, supra note 5, at 1271-72 (arguing that utilitarians will obey a law because questioning the law's ability to maximize utility would cost time, energy, and anguish); Regan, supra note 10, at 1023-31 (arguing that rules solve coordination problems because they "change" the actor's reasons for action).
14 See Alexander, supra note 9, at 9, 15-16 ("[T]here can be no guarantee that any particular decision corresponds to what the subjects have on balance reason to do."); Larry Alexander, The Gap, 14 HARV. J.L. & PUB. POL'Y 695, 695-701 (1991) (explaining the existence of this gap and arguing that "any plausible legal system" will contain it).
15 Frederick Schauer refers to this form of decision-making as "rule-sensitive
rule differs from its end, she will sometimes decide to violate the rule. If all individuals proceed in this way, and enough of them decide wrongly to offset the gains achieved by appropriate violations, the rule will not achieve what it was intended to achieve in the way of error correction and coordination.

Thus, a rule often will be most effective, and its purpose best served, if it is understood as a serious rule—that is, as a statement of right action. A serious rule implies that it represents the correct balance of reasons in every case it covers, when in fact it is only a calculation of the best course of action for all actors to follow over a run of cases. There will be cases in which the actor's own calculation is right and the rule is wrong; but if actors in general know this, they will be wrong more often than they are right. Under appropriate conditions, a rule works best if it lies.

This line of reasoning is not limited to rules designed on consequentialist principles: it applies to right-based rules as well. For example, suppose the governing authority conceives the prohibition of murder as an expression of deontological right: it is fundamentally wrong to kill a person without her consent. Because this authority accords great importance to autonomous choice, it also believes that it is permissible to assist a person who competently decides she wishes to die. But evidence suggests that individuals are much more likely to mistake temporary dejection for a wish to die than to mistake a genuine wish to die for temporary dejection. So the authority adopts a rule that overstates the prohibition against unwanted killing: Thou shalt not kill.

In this case there is a different and possibly stronger reason for individual actors to disobey the rule if they understand how and why it was adopted. Suppose the authority explains to its citizens that the rule against killing is a rule of thumb—an overstatement designed to prevent errors. A particular actor may understand that errors are likely; yet if he believes he is dealing with someone who

particularism.” SCHAUER, PLAYING BY THE RULES, supra note 2, at 96-100, 124-26; see also SCHAUER, Rules and the Rule of Law, supra note 2, at 649-50. SCHAUER acknowledges that rule-sensitive particularism undercuts the potential value of rules. See SCHAUER, PLAYING BY THE RULES, supra note 2, at 98-99, 128-34. He proposes, instead, a method of decision-making he calls “presumptive positivism,” in which rules have “a degree of strong but overridable priority.” Id. at 204; see also SCHAUER, Rules and the Rule of Law, supra note 2, at 674-79. Yet it is hard to see how presumptive positivism could differ in practice from rule-sensitive particularism. If human beings cannot consciously eschew rational judgment, neither can they consciously presume against rational judgment. See Gerald J. Postema, Positivism, I Presume? . . . Comments on SCHAUER’s “Rules and the Rule of Law,” 14 HARV. J.L. & PUB. POL’Y 797, 813-17 (1991).
genuinely wishes to die, then the conflicting principle of respect for autonomous choice may give him conclusive reasons to assist that person. The rational course is to break the rule and follow his own judgment. But if he and others take this course and continue to err systematically in favor of death, then the rule and the principle it reflects will be undermined. To avoid this, the rule must be understood as a correct and complete statement of right action, though in doing so it is not stating the truth.

At this point some may ask, how can a rule hold itself out to be a different sort of reason than it is? It prescribes a course of action; then it is up to the citizen to make of the prescription what she will. But a legal authority (or for that matter a religious authority or dominant social group) has additional resources it can bring to bear on a citizen’s decisional process.

One possibility is to announce that the rule is backed by sanctions: those who violate the terms of the rule will be punished without further inquiry into the relation between their actions and the purposes of the rule. The effect of this threat is to alter the balance of the citizen’s reasons for action. Avoiding punishment is a powerful reason to decide in favor of a particular course of action. When this new reason is added to a rational citizen’s deliberation, he is likely to act as if the rule were a statement of right action, whether or not he believes this is true.

Yet sanctions alone are a risky strategy. For one thing, it is difficult to see how officials could be persuaded to impose punishment after the event on individuals who in fact (or in the judgment of the official) acted rightly in violating the rule. If the official understands the true character of the rule (if she understands it is only a rule), and if she is rational herself, she will have difficulty punishing action she believes to have been right. Of course, a

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16 Cf. Claudia Mills, Persuasion and Autonomy 8-9 (1993) (unpublished paper, on file with authors; presented to the Pacific Division of the American Philosophical Association) (arguing that it is up to the listener to separate bad arguments from good).

17 This entails a rejection of what Rolf Sartorius calls the “reflection principle.” SARTORIUS, supra note 9, at 56-57. The reflection principle (which Sartorius criticizes as naive) holds that: “Where an individual has correctly decided that he ought to do X, any higher-order judgment about his decision to do X or his actual act of doing it ought to license or approve of, rather than disapprove of or penalize, the decision and/or the act itself.” Id.

18 See SCHAUER, PLAYING BY THE RULES, supra note 2, at 133; Alexander, supra note 4, at 324-25. For a contrary suggestion, see SARTORIUS, supra note 9, at 65-66 (referring to guilt and social sanctions).
higher authority can impose similar sanctions on officials who refuse to impose sanctions, but these too must be administered, and at some point the ladder of sanctions will fail. Thus, in the end, an

Assume our judge understands the value of rules as a means of reducing the overall level of error. She will easily see that she is justified in punishing a rule violator when the balance of reasons, apart from the value of rules, favored violation of the rule, but an unpunished violation will have systemic effects that outweigh the benefits of violation. In that case, the violation was not justified, and punishment presents no problems.

In some cases, however, punishment can transform what would have been an unjustified violation (if unpunished) into a justified violation (when punished). To see how this can be, we need to shift back to the perspective of the actor, and to assume that the actor himself understands and accepts the value of rules. In the actor’s calculation of reasons, his own future punishment cancels most or all of the negative systemic effects of a violation. Therefore, the anticipated punishment may tip the balance of reasons in favor of violation. Specifically, it will tip the balance if the actor accords a higher negative value to the systemic effects of unpunished violation than to the negative effects of punishment, and if the difference between the two is enough to change the tally from negative to positive.

For the judge, this means that punishment is rational and correct. At the same time, she will have difficulty in imposing it, because as soon as she does she will be punishing a morally correct act. This is the paradox of justified punishment of a justified act.

Alternatively, suppose the negative effects of punishment on the actor are greater than the negative systemic effects of an unpunished rule violation. Suppose, too, that the benefits of rule violation are greater than the systemic effects of an unpunished violation, but smaller than the negative effects of punishment. In that case, punishment may not be justified in the particular case at hand. Yet judges too may err in their calculations, and the authority may therefore conclude that a rule of enforcement-in-every-case will produce the best results overall.

Interestingly, Heidi Hurd has labored mightily to demonstrate that those who justifiably violate justifiable rules cannot justifiably be punished. See Heidi M. Hurd, Justifiably Punishing the Justified, 90 Mich. L. Rev. 2203 (1993). She argues that there must be a correspondence between the justifiability of acts and the justifiability of punishing those acts. See id. at 2295-301. As explained above, we believe her argument fails because some rule violations (perhaps many violations) are justifiable only if punishment of the actor is among their consequences. For Hurd’s attempt to deal with the problem, see id.

What is most significant about Hurd’s argument for our purposes is that she accepts the possibility of justified violations of justified rules. The notion of a justified violation of justified rules implies two conditions. First, the rule must claim that obedience is justified in some circumstances where it is not justified (otherwise either the violation would not be justified or there would be no violation). Second, the rule must be an ideal rule from the rule-maker’s perspective (otherwise, the rule would not be a justified rule). Therefore, if Hurd accepts, as she does, the possibility of justified violations of justified rules, then she accepts the legitimacy of rules’ making untrue claims. In other words, while she requires correspondence between punishment and the justifiability of acts, she does not require correspondence between the claims of rules and truth. To insist on the latter correspondence would of course preclude the possibility of justified serious rules.
authority that relies solely on sanctions to command obedience to its rules runs the risk that its sanctions will not be enforced.\(^{19}\)

Moreover, sanctions do not engender belief in rules; they simply coerce action that simulates the action citizens would take if they believed in the rules.\(^{20}\) What the authority needs to do is to convince citizens that its rules are correct statements of the action they should take in every case. It must teach them to exaggerate, in their own minds, the wisdom and comprehensiveness of rules.\(^{21}\)

A program of public education may seem far-fetched, but formal education of citizens probably is unnecessary in a modern liberal society. Citizens of liberal democracies tend to assume that political authorities are the products of their own choice, that they act in reliable ways, and that the rules they issue express whatever principles the political process has generated. These citizens also tend to be busy with their lives and are therefore quite content to accept authoritative statements of how they should act in many of the ordinary situations they face.\(^{22}\) Against this background of ready acceptance, little is required to induce citizens to take rules seriously. The authority needs only to issue its rules in categorical terms, without disclaimer or qualification, and perhaps encourage the informal processes by which respectful attitudes toward rules are passed along in society.

Thus it seems fair to say both that rules lie—because they imply that they describe right action in all cases they cover—and that they often are believed. Later we will consider what practical and moral issues these conclusions raise. But first, we will complicate the problem by mentioning some of the more intricate ways in which rules may deceive their audiences.

\(^{19}\) To some extent, the authority may be able to counteract this tendency, but only if it is willing to engage in another, potentially more damaging, set of lies regarding future enforcement of rules. See infra notes 26-32 and accompanying text.

\(^{20}\) See Postema, supra note 15, at 819 ("[S]anctions introduce extraneous and potentially distorting considerations into the decision process.").

\(^{21}\) See SCHAUER, PLAYING BY THE RULES, supra note 2, at 133-34; cf. Postema, supra note 15, at 820-22 (critically assessing the educational role of sanctions).

\(^{22}\) Jerome Frank certainly thought that authority had powerful psychological forces on its side, preventing even the best legal minds from detecting the uncertainty of legal rules. See JEROME FRANK, LAW AND THE MODERN MIND 14-21 (1930) (positing that individuals seek "unrealizable certainty" in law because they "have not yet relinquished the childish need for an authoritative father").
II. How Rules Lie: Some Further Complexities

The type of deception we have described so far results from the generality of rules: rules (as we have defined them) cover a variety of situations that are not identical. They can never be perfectly fitted to all the cases they purport to cover, yet they must represent that they are perfectly fitted in order to command a level of obedience that will improve the sum of outcomes.

When we locate these general rules within actual systems of governance, further elements of deception begin to emerge. First, in a formally administered system, the governing authority may find it expedient to present primary rules of conduct without reference to various secondary rules that affect their application. Second, the organizing philosophy of the system may require, for its own preservation, a degree of misunderstanding by citizens.

A. Secondary Rules of Change and Enforcement

When rules are put into motion in a mature legal system, there are more opportunities for the rules to deceive their audience, and more reasons why the authority that issues them may want to engage in deception. Some of these opportunities and reasons have to do with legislative change, and some with interpretation and enforcement of primary rules through adjudication.

To begin with perhaps the least important point, a legal system cannot operate successfully over a period of time unless it has the means to amend and supplement its primary rules of conduct. Yet the rules themselves rarely include a warning that they are subject to change. This is not much of a lie, both because most actors understand that laws evolve, and because an effective system will protect its own reliability by limiting the retroactive effect of amendments. Nevertheless, the governing authority cannot reasonably limit itself to perfectly prospective changes. You may marry, understanding that at your death your wife or husband will have a one-third forced share of whatever you own at the time. Thirty years later, the state may pass a community property act that

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23 See HART, supra note 2, at 89-94 (noting that secondary rules are necessary to permit changes in primary rules).

24 See LON L. FULLER, THE MORALITY OF LAW 51-62 (2d ed. 1969) (noting that retroactive laws are necessary and desirable under some circumstances). For a legal realist view suggesting that prospective law is wholly illusory, see FRANK, supra note 22, at 46-51.
gives your husband or wife one-half of whatever you earn from that moment forward. At this point it may be too late to change your mind. Family property rules could be written to alert private actors in advance that something of this sort might occur, but it probably is better for the health of the system if actors are encouraged to accept the current rules as written and not think too hard about the possibility of amendment.  

A more serious form of dissembling involves the retrospective application of rules to individual actors. A mature legal system must enforce its rules, and it probably will employ both criminal and civil remedies. Because of the generality of rules, this process entails both interpretation (to determine whether a particular dispute is covered by the rule) and a certain amount of tailoring of remedies to fit the practical and moral positions of the parties.

Suppose we have a rule such as “do not kill,” or “perform your contracts,” or “the property of a person who dies intestate passes to the decedent’s next of kin.” Suppose also that the rule is enforceable by criminal or civil remedies. It is fair to say that a rule of this sort contains an implicit representation that the officials who administer sanctions will evaluate individual conduct according to the terms of the rule.

Yet because of the generality of rules, there is pressure on judges to default on this implied promise at the point of enforcement. Even the best drafted rule will be underinclusive and overinclusive when measured against the end it was designed to promote, precisely because it is a rule. Further, because the drafters of rules are not omniscient, rules are likely to sweep in situations that the drafters did not intend to cover. As a result, judges may find themselves presiding over individuals who have acted rightly by the moral standards of the system yet have violated the applicable rules. They also may encounter individuals who have acted wrongly but do not bear moral responsibility for their actions.

See FRANK, supra note 22, at 243-51 (discussing the views of Demogue and Wurzel).

Laurence Tribe discusses the possibility that government might circumvent constitutional limitations on changes in rules—such as the Takings and Contract clauses—by announcing that all property and contract rights are subject to the government’s superior power to change them. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 615-17 (2d ed. 1988).

Alternatively, we might say that a serious rule implies two things: (1) that the action it requires is right action in all cases it governs, and (2) that official enforcement of the rule will reflect the rightness of the action.
In either case, it will be difficult for judges to adhere to the terms of rules.  

There are several ways in which judges adjudicating under rules may deviate from enforcing what appeared at the time of conduct to be the governing rule. One obvious course is simply to disregard the rules; however, this does not yet seem to have been accepted among judges as proper behavior, and the public would quickly lose faith in law if it were. More conservatively, a judge might rely on an exception that is also among the announced rules of the system but is not as well known as the principal rule. Or he might modify the consequences of the rule by choosing a limited remedy. Or he might interpret the rule in such a way that it conforms to the unstated background principles of the system.

When judges use any of these devices to soften the application of a rule, the original rule is, in a sense, a lie. The actor's conduct is judged according to a standard that differs from what the actor reasonably understood to be both the rule of conduct and the rule of decision. This type of deception may seem benign when the court has acted to reduce or eliminate the consequences of violating the rule. But remember that in some cases, the setting is a civil

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27 See supra note 18.

28 See supra note 18.

29 For example, punishment for murder may be excused when the murderer acted under duress. See Dan-Cohen, supra note 28, at 632-34; see also MODEL PENAL CODE § 3.02(1) (Proposed Official Draft 1962) (discussing the "lesser evils" defense, in which conduct that the actor believes to be necessary to avoid harm is justifiable if the harm or evil sought to be avoided is greater than that sought to be prevented by the law defining the offense charged).

30 For example, the court may refuse for "equitable" reasons to order specific performance of a contract, and instead limit the promisee to an unsatisfactory damage remedy. See Emily L. Sherwin, Law and Equity in Contract Enforcement, 50 MD. L. REV. 253, 300-14 (1991).

31 For example, the rule "property passes to the decedent's next of kin," might be read to contain an implicit condition, "unless the next of kin murdered the decedent." This would conform the enacted rule to the principle that one should not profit from a wrong. See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22-45 (1977).
dispute in which the effect of excusing one party is to place a loss on the other. Further, even when the only result is to acquit a criminal defendant, a discrepancy between rules as announced and rules as enforced affects the conduct of others who are moved by the threat of punishment to comply with the rule, but who might be eligible for a similar acquittal.

B. Paradoxical Political Principles

Some of the most attractive theories of social and political organization are subject to logical difficulties that can only be resolved by keeping the foundational (or "constitutive") norms of the system out of the sight of those they govern. In a sense, this problem is quite different from the problem of rules because it is not primarily a problem of how to govern imperfect reasoners. It arises instead from paradoxes internal to particular political theories, which bring those theories into conflict with the ideal of publicly accessible government. Yet there is common ground here with the problem of rules insofar as the paradoxes we identify can most easily be resolved through esoteric governance.

The need to conceal or mischaracterize foundational norms affects an interesting range of political theories, though the dissembling required is different in each case. Utilitarianism is a good place to begin, because its public endorsement is often thought to be self-defeating. To illustrate: a utilitarian authority might calculate that social activity will produce the most happiness, or the most efficient allocation of resources, if the society recognizes and respects individual entitlements. Private rights will

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33 Ronald Dworkin distinguishes the "constitutive positions" of a political theory or program from "derivative positions that are valued as strategies, as means of achieving the constitutive positions." RONALD DWORKIN, A MATTER OF PRINCIPLE 184 (1985) (footnote omitted).


increase incentives for productivity and overcome various problems of coordination. But here the authority encounters several problems. First, it is unclear how it can work out an initial distribution of entitlements without great expense or wide dissent. Second, the notion of entitlement will be meaningless unless the members of society treat the rules that define entitlements as side constraints that preempt full consideration of the utilitarian consequences of obeying them. If individuals were left free to recalculate the utility of respecting each property right they confronted, and if they erred in the usual ways, property rights would not produce utility after all.

As a solution to both these problems, the utilitarian authority might endorse an explanation of property rights based on natural law. One is naturally entitled to one's labor and hence to the product that results when one mixes one's labor with unowned resources. Now, this may be nonsense to a utilitarian; but if believed by citizens, it will give property rights the moral force they must have to fulfill their utilitarian objectives. Thus, the utilitarian authority has reason to advertise its property rules as rooted in natural law when it knows them to be based on utility.

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36 Arguments for private property are well stated and nicely illustrated in Robert C. Ellickson, Property in Land, 102 YALE L.J. 1315 (1993).
37 This problem is explored in Richard A. Epstein, Possession as the Root of Title, 13 GA. L. REV. 1221 (1979).
41 For more general discussions of indirect strategies in pursuit of utilitarian or other consequentialist ends, see, e.g., Alexander, supra note 4; Kent Greenawalt, Utilitarian Justifications for Observance of Legal Rights, in ETHICS, ECONOMICS, AND THE LAW, supra note 34, at 139, 142-47; R.M. Hare, Utility and Rights: Comment on David Lyons's Essay, in ETHICS, ECONOMICS, AND THE LAW, supra note 34, at 148; J.J.C. Smart, An Outline of a System of Utilitarian Ethics, in UTILITARIANISM, supra note 34, at 1, 42-57; Williams, supra note 34, at 118-35 (criticizing Smart's position).
42 A genuine libertarian does not appear to face this problem insofar as liberty itself is thought to give moral force to property rights. But even a libertarian cannot escape the basic problem of rules. A libertarian authority (a minimal state) must employ rules that define the natural rights it was established to protect. See F.A. Hayek, The Constitution of Liberty 148-61 (1960). These rules in turn will be addressed to an audience of individuals who are not perfect reasoners. As a result,
Utilitarianism is not the only political principle that is obliged to dissemble in its use of rules. Suppose, for example, that the governing authority subscribes to a particular brand of communitarianism. Specifically, it believes that the existence of a community is essential to personal identity and successful social organization, and that a community is constituted by the shared moral values of its members.\textsuperscript{42} It follows that any political community is entitled (and bound) to enforce its constitutive morality against dissenting individuals in order to maintain its own integrity as a community.\textsuperscript{43}

As a generally applicable political theory, this communitarian view must entail that the shared morality of each community is valid and enforceable within that community, although it differs from the moralities that prevail in other places.\textsuperscript{44} But here is the problem: if a large portion of the community participated in the underlying...
communitarian theory, they would come to see their communal morality as a contingent local fact. This would tend to undermine their belief in the truth of their morality, which in turn would endanger the integrity of the community the theory seeks to preserve. To avoid this result, the authority must mischaracterize the nature of the moral rules it enforces; it must present them as universal moral principles when its own theory holds that there are no such things.

"Pragmatic" theories run into similar problems. Suppose our authority endorses a form of pragmatism in which any principle must be treated as true if and to the extent it serves a fluid notion of human well-being in the context of a fluid world. Now here is a theory that ought not trap itself since all its tenets are contingent. Yet it does insist on contingency, and this can lead it into a difficulty much like that of the communitarian.

To illustrate, suppose the pragmatic authority encounters a principle that purports to be universal and timeless (noncontingent), and also appears to be useful to human life. The pragmatic authority must endorse this principle, though of course the endorsement cannot encompass its timelessness and universality. But suppose further that part of what makes this principle contingently useful is its claim to timelessness and universality. For example, free speech might be a good pragmatic principle, but only if it is understood to protect all speech whether or not such protection is pragmatically warranted. If so, the pragmatic authority must encourage its subjects to understand the principle as a

45 See Jeremy Waldron, Particular Values and Critical Morality, 77 CAL. L. REV. 561, 574-79 (1989). "We are aware that some other societies do not agree with [our moral views], but we cannot simply say, '[t]hat's appropriate for them' without appearing halfhearted about the status or epistemology of our own shared commitments." Id. at 577.

46 See, e.g., WILLIAM JAMES, PRAGMATISM 9-44, 106-13 (Frederick H. Burkhardt et al. eds., Harvard Univ. Press 1975) (1907); RICHARD RORTY, Pragmatism, Relativism, Irrationalism, in CONSEQUENCES OF PRAGMATISM 160 passim (1982); Margaret J. Radin, The Pragmatist and the Feminist, 63 S. CAL. L. REV. 1699, 1706-07 (1990). For a good critique of the significance of pragmatist theories of law, see generally Steven D. Smith, The Pursuit of Pragmatism, 100 YALE L.J. 409 (1990) (claiming that the function of pragmatism is to serve as a reminder of things judges and lawyers already know).

47 See JAMES, supra note 46, at 31-32, 37; RORTY, supra note 46, at 170-75; Radin, supra note 46, at 1718-19.

48 See JAMES, supra note 46, at 40-41 ("If theological ideas prove to have a value for concrete life, they will be true . . . in the sense of being good for so much."); Radin, supra note 46, at 1715-16 (discussing James's rejection of the "eternal").
THE DECEPTIVE NATURE OF RULES

noncontingent absolute, which of course the subjects cannot do if they also accept the pragmatic premise that all rules are contingent. The only solution for the authority is to keep its pragmatic theory in the background and lie to its subjects about the nature of the principle.49

As a last example, consider liberalism as a principle of social organization. Most liberals would agree that one of the central features of liberal theory is an ideal of tolerance toward conflicting definitions of the good.50 Individuals should be free to construct their own visions of a good life and to pursue those visions by any means that are consistent with a corresponding freedom for others. This is the principle that allows individuals to live together in society without seeking to destroy one another.

Thus, by its own tenets, a liberal authority must be impartial toward and among the various moral positions held by individual members of the society it governs. Yet some of those individuals are sure to hold beliefs that are not liberal—that is, beliefs that are not tolerant of other individuals’ conceptions of the good. For example, some may believe that it is right to condemn and punish the private sexual conduct or religious beliefs of others because the moral quality of their own lives depends in part on the conduct or beliefs of those around them.51 If the liberal authority wishes to

49 Cf. RORTY, supra note 46, at 174-75 (acknowledging “the criticism that the Socratic virtues cannot, as a practical matter, be defended save by Platonic means, that without some sort of metaphysical comfort nobody will be able not to sin against Socrates”).

Similarly, pragmatism rejects the proposition that tradition is valuable for its own sake; yet a pragmatic authority may have to proclaim tradition to be valuable in order to realize its pragmatic goals. See Smith, supra note 46, at 420-24; see also Mark D. Mercer, On a Pragmatic Argument Against Pragmatism in Ethics, 30 Am. Phil. Q. 163, 164-72 (1993) (describing the use of ethical norms within a pragmatic framework).


51 The notion of moral interdependence is true of some religious groups (such as Calvinists). See Gail L. Heriot, The New Feudalism: The Unintended Destination of Contemporary Trends in Employment Law, 28 Ga. L. Rev. 167, 176-79 (1993). It also may be true of Ronald Dworkin, who mixes his liberalism with the notion that the moral quality of one’s life is affected by the extent to which the society in which one lives has achieved distributive justice. Moreover (though this is less clear), the distributive justice that counts appears to be distribution in accordance with Dworkin’s own definition of justice. Compare Ronald Dworkin, Liberal Community, 77 Cal. L. Rev. 479, 491-92 (1989) with id. at 501-04.
preserve its authority (or even to preserve the coherence of liberal theory), it cannot be genuinely impartial toward a view of this kind. It may tolerate public expression of illiberal views, but it cannot admit the possibility that they are true without undoing its own philosophy.52

The problem is that, relative to other, illiberal conceptions of the good, liberalism is itself only a partisan conception of the good. The ideal of tolerance, and the social opportunity it produces, are part of a liberal's notion of what is essential to a good life. Further, the liberal's beliefs have no special epistemological status that distinguishes them from other contrary beliefs such that liberalism can be true in some special sense that does not render opposed beliefs false.53 Therefore, liberals cannot maintain that the ideals they uphold are truer than those of their rivals and at the same time urge tolerance of rival ideals on the ground that the latter may be true.54

This conclusion brings us around to the problem of deceptive rules. The only way a liberal authority can avoid the consequences of the paradox it faces is to characterize its rule of tolerance (or neutrality) as a metaprinciple that mediates among conceptions of the good. It must convince its subjects that liberal tolerance is not simply another notion of the good, but a special organizing idea that leaves all individual moral visions intact. Only if it can separate itself in this way from the moral fray can it secure the voluntary (or even hypothetical) assent that liberalism often claims.55 If liberalism is seen to be just one sectarian position among many, then it can only prevail by showing the falsity of all the other sectarian positions about which it purports to be neutral. Thus, the liberal authority, too, will fare best if it misrepresents the nature of its central organizing rule.

53 See id.
54 See id.
55 See RAWLS, supra note 50, at 11-12 (discussing the original position). For arguments that Rawls's original position itself assumes at least some elements of a conception of the good, see RAZ, supra note 8, at 117-33; SANDEL, supra note 42, at 59-65; Thomas Nagel, Rawls on Justice, in READING RAWLS: CRITICAL STUDIES ON RAWLS' A THEORY OF JUSTICE 1, 7-16 (1975).
III. CONSEQUENCES

We have outlined several ways in which rules deceive those they govern, beginning with the simple observation that they purport to state how people should act in every case. The various forms of deception we have discussed are useful; they contribute to orderly and fruitful social organization. Even so, the notion of deceit by government is troubling.\textsuperscript{56} In this Section, we will consider just what harm there may be in the deceptive use of rules.

This question is somewhat academic because effective government depends on rules and obedience to rules. Yet to a certain extent, and at a certain cost, deception by rules could be controlled. The governing authority could preface each rule with a warning that it represents only a calculation of what action will produce the best overall results if uniformly followed. In other words, serious rules could be replaced by advisory information issued by a well-informed central body.\textsuperscript{57} The new "rules" would not work as well, particularly in solving the problem of uncoordinated choice; however, they would have some epistemic effect on individual decisions.

The authority also could adopt a strict principle of enforcement: judicial decisions must match the terms of conduct rules. This might not succeed entirely because judges might not always comply.\textsuperscript{58} But the benefits of general obedience to rules would give judges reason to enforce rules most of the time.

In the matter of foundational norms, the authority could commit itself to a publicity principle—that is, a requirement that the organizing principles of the system must be explained in full to those who live under them.\textsuperscript{59} Those principles that could not survive public exposure would be disqualified and discarded. This might rule out some political theories that have served human beings well, but it would further the interest of truth.

\textsuperscript{56} See Williams, supra note 34, at 138-40. For negative responses to judicial dissembling, see David L. Shapiro, In Defense of Judicial Candor, 100 HARV. L. REV. 731, 736-38 (1987) (arguing that judicial candor is "the sine qua non" of all other restraints on judicial power); Richard Singer, On Classism and Dissonance in the Criminal Law: A Reply to Professor Meir Dan-Cohen, 77 J. CRIM. L. & CRIMINOLOGY 69, 86 (opposing "selective transmission" in criminal law). But see Dan-Cohen, supra note 28, at 665-77 (arguing that "selective transmission" of certain legal rules to the public may have a beneficial effect).

\textsuperscript{57} See supra notes 11-15 and accompanying text.

\textsuperscript{58} See supra note 18 and accompanying text.

\textsuperscript{59} See RAWLS, supra note 50, at 133 (discussing the importance of the publicity principle).
We will proceed, then, to consider what arguments there may be for restricting the forms of rule deception we have discussed. We assume, at least initially, that the “authority” we refer to has good intentions: it wishes to advance the interests of those it governs. This is risky, because there is always a danger that the authority will be mistaken about the interests of its subjects, or that the habit of esoteric decision-making will lead to abuse. At this point, however, our question is only whether deception by means of rules can be part of a good political system. Thus, we will start with the assumption that the authority is benevolently disposed. The question of legitimacy (which differs from benevolence) will arise later.

A. Practical Difficulties

One problem with deception is that it may be detected, and if detected, it may be met with resentment and future distrust. This is true between people and rules, just as it is between two people. First, the discovery that a rule is not what it claims can undermine the efficacy of the rule. If citizens learn that rules are not statements of right action in all cases, but only statistical calculations of right action over a range of cases, they will be more likely to exercise their own judgment in particular cases, and errors will increase.60

If the governing authority responds with sanctions, it risks damage to the overall system of governance. We have already mentioned the problem of enforcement, but suppose that judges do their part and enforce the rules. If citizens understand that rules do not always describe right action and also know that all violations are punished, they will have difficulty in perceiving the rules as good rules. Or more accurately, they may think that the rules are sound on the whole, but they will deeply resent the outcome of particular cases in which the applicable rule is a poor fit.61 Never mind that this is an incoherent position; it nevertheless may affect public faith in the system.

The next step a governing authority could take is to correct the inaccuracies of rules at the point of enforcement. But as we have

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60 See Postema, supra note 28, at 453-57 (critiquing Bentham’s theory of adjudication insofar as it assumes that judicial decisions will not be fully publicized).
described, this means conduct rules must lie about decisional standards, creating a new set of practical consequences.\textsuperscript{62} If citizens discover that conduct rules are not fully enforced, they will obey the rules less often. Moreover, they will see that the governing authority has deceived them, not just in the inevitable way that accompanies the use of general rules, but deliberately and avoidably. This places an even greater strain on public confidence.

We have mentioned another category of deception, which entails the disguise or mischaracterization of foundational principles within particular political theories. The practical problem raised by this type of deception is not how to keep the truth from citizens, for how would they know? Instead, the problem is how to maintain the undisclosed theory. Unless it is somehow preserved by the members of an elite governing group (not likely in a modern democracy), the "true" organizing principles will be lost in the shuffle.\textsuperscript{63}

**B. Autonomy**

Suppose we can devise a system that disguises the inaccuracy of rules in a reliable way, or suppose we decide that the benefits of deception outweigh its negative impact on the credibility of the system. We still should consider whether it is fundamentally wrong for a governing authority to lie to its subjects through the medium of rules.

Lying is often condemned for the harm it causes to autonomy: misinformation restricts the recipient's ability to design a moral life for himself, or at least to act on that design.\textsuperscript{64} It might be argued that autonomy cannot depend on perfect information since none of us has perfect information. Therefore, a lie does not destroy the

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\textsuperscript{62} See supra text accompanying notes 26-32.

\textsuperscript{63} See Williams, supra note 34, at 134-35 ("[U]tilitarianism's fate is to usher itself from the scene."); see also Walzer, supra note 44, at 380 (arguing that political philosophers must by nature remain intellectually detached from the state).

\textsuperscript{64} See, e.g., SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 18-22 (1978) (discussing the coercive effect of lies on choice); GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 14, 104 (1988) (distinguishing coercion and deception, and seeing deception as impinging on autonomy without impinging on privacy); CHARLES FRIED, RIGHT AND WRONG 62-69 (1978) (noting how lies injure a person's "moral personality" by restricting her capacity for judgment and choice); IMMANUEL KANT, On a Supposed Right to Lie from Altruistic Motives, in A CRITIQUE OF PRACTICAL REASON AND OTHER PHILOSOPHICAL WRITINGS 346-50 (Lewis W. Beck trans., 1949) (stating that lying "harms mankind generally, for it vitiates the source of law itself"); see also Dan-Cohen, supra note 28, at 671-73 (discussing possible effects of selective transmission of legal rules on autonomy).
condition of autonomy; it is only one more bit of external clutter with which the autonomous being must contend. Yet even if a lie does not destroy autonomy, it certainly meddles in the exercise of autonomous choice. Moreover, the impediment is not just circumstantial: one individual (or institution) has deliberately attempted to alter the ethical choices of a supposedly autonomous being. At the very least, it appears that one who manipulates another’s decisions in this way fails to respect the other’s autonomy.

It may not follow, however, that deception practiced by a political authority acting in the interests of its subjects is an unjustifiable infringement of their autonomy. A series of points can be made in the authority’s defense. First, even in individual relations, a requirement of perfect candor conflicts with common moral intuitions. For example, most people would agree that it is necessary and appropriate to simplify moral instructions for children, though the simplification is surely deceptive. This type of deception is acceptable because children are thought to lack the moral and intellectual sophistication necessary to exercise autonomy in an effective way, and because the “deceitful” parent is thought to have her child’s best interest in mind. If we admit this much, it becomes difficult to say categorically that it is wrong to simplify when speaking to someone who seems to lack information or cognitive ability. And if a gap in reasoning skills or information between speaker and audience can justify deception, a political authority may be justified in issuing unqualified rules.

Among minimally competent adults, it might be wise to prohibit deception based on differences in reasoning skills in order to protect against miscalculation of others’ skills. On the other hand, there may be reasons to except a rule-making authority from this precautionary rule. Under the assumptions we have made, the authority is not a person, but a social institution that has no interests of its own. By virtue of its impartiality and central location, it has certain decision-making advantages over citizens. Individual citizens err because they lack information and cannot overcome prisoners’ dilemmas; both of these defects interfere with

65 See Mills, supra note 16, at 4-5.
66 See FRIED, supra note 64, at 64-68.
67 Note that this prohibition itself is a rule.
68 On the special moral position of public institutions, see THOMAS NAGEL, Ruthlessness in Public Office, in MORTAL QUESTIONS 75, 83-90 (1979).
their exercise of autonomy. The authority is in a position to decrease their rate of error by issuing serious general rules. In this respect—and for this limited purpose—the relation of a rule-making authority to its citizens is more like that of parent to child than of individual to individual.

One problem with this argument is that while it may generally be true that rules correct defects in the conditions of individual decision-making, they do not have this effect in every case. Sometimes they miss the mark, and in those instances they will hamper rather than assist autonomous choice. This raises the question whether, for the purpose of assessing the morality of deceptive rules, it is permissible to aggregate autonomy. In other words, can an overall improvement in the conditions for autonomous choice justify an occasional worsening of the conditions for autonomous choice?

Again, it is important to consider that we are discussing the conduct of a social or political institution toward its subjects rather than the conduct of one individual to another. Surely liberty can be aggregated for political purposes: one person's freedom of action can be restrained in the interest of the freedom of others, at least if all have the same abstract reciprocal rights. If no such trade-offs in liberty were allowed, there could be no social organization. There is no clear reason why the conditions of autonomous choice cannot be summed and divided in a similar way.

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69 On the situational advantages of an authority, see Powers, supra note 5, at 1268-93 (focusing on the law's centrality, coercive power, and formality). See also RAZ, supra note 8, at 57-62, 70-80 (discussing the preemption thesis, by which the judgment of authority is deemed more reliable than the judgment of its subjects, and the normal justification thesis, by which governmental authority is legitimized on similar grounds).

A similar but indirect argument could be made on behalf of secondary decision rules that permit judges to depart from the terms of conduct rules at the stage of conduct. These rules make conduct rules less true because they falsify the implicit promise that courts will apply them in evaluating conduct. They do this, however, in order to make the system of general conduct rules more palatable, which in turn protects the ability of conduct rules to curb error.

70 See, e.g., HAYEK, supra note 41, at 21 (discussing the justification of coercion by the state); LOCKE, supra note 40, at 204, 256; RAWLS, supra note 50, at 204 (arguing that "various liberties can be broadened or narrowed according to how they affect one another").

71 See RAZ, supra note 8, at 419, 425 (arguing that restrictions on a person's autonomy may be justified in the interest of greater autonomy for himself or another); see also Schauer, supra note 41, at 422-30 (defending rules and their trade-offs).
For those who are unhappy with the notion of summing conditions related to autonomy, we might try another approach, which is both more direct and more controversial. The example of parent and child suggests that the autonomy does not require perfect candor in every case. From this starting point we might argue that deception can be justified, despite its effect on autonomous choice, if it is necessary to advance other important human objectives.

This is a different sort of argument because it suggests not only that particular exercises of autonomy can be impaired in the general cause of autonomous choice, but that respect for autonomy can be traded against other values. Those who view autonomy as an absolute value that cannot be compromised in pursuit of other ends will surely find this approach unacceptable. Yet the absolute position is difficult to maintain in the face of examples. To illustrate: suppose a prison guard controls the fate of a large number of innocent prisoners. You cannot persuade the guard to let them go because he sees no wrong in punishing the innocent (a moral error). But you can fool him into it by telling him an order has been signed for their release. What would you do? And if you would lie, is it less acceptable for a political authority to deceive error-prone citizens about rules in order to produce better outcomes? In fact, might not a political authority be better situated to make such a choice than an individual, who may be tempted to think that his own favored ends justify him in interfering with the decisions of others?

The answer may depend on how much importance the deception under consideration has to human life. Rules produce only small gains in specific cases; yet the overall benefits of governance by rules may be immense. At least according to the gloomier views of human nature (which have yet to be disproved), people cannot live together successfully without rules.

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72 For a view that approves trade-offs of this kind, see DWORKIN, supra note 64, at 32, 114-15 (arguing that promoting other fundamental values, such as dignity and security, may necessitate sacrificing some autonomy).

73 For a nearly absolute position, see FRIED, supra note 64, at 69-78 (arguing that lies are justified only when addressed to those who abuse the institution of truth-telling).

74 Indeed, would you be willing to compound the guard’s moral error through sophistry if this would lead to his freeing the prisoners? See Alexander, supra note 4, at 328-29.

75 See HAYEK, supra note 41, at 148; THOMAS HOBBES, LEVIATHAN ch. 13, at 88 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651); LOCKE, supra note 40, at 249-
Of course, the force of any defense of deceptive rules will vary with the type of rule, as well as the type of deception. In the legal world, for example, there are (1) rules that establish conventions (drive on the right); (2) default rules for private transactions (the mailbox rule); (3) rules that restrain conduct for the protection of others (do not kill); (4) rules that restrain conduct mainly or partly for the protection of the actor (no prostitution, no cross-collateralized consumer financing); and (5) rules that define individual rights within a political system (free exercise of religion). The first two categories should not present problems: rule form is unavoidable, the deception it involves is minimal, and the effect is to expand the range of choice and action open to individuals.

The more interesting comparison is between the third and fourth categories. Assume (as we have assumed all along) that we are dealing with actors who generally will do what they believe to be right, but who will obey a rule that purports to state the best course of action. In other words, we are not concerned with bad actors. Looking at the third category of rules, we see that serious rules of this sort preempt the actor's judgment in order to reduce errors that threaten third parties' pursuit of their own autonomously generated plans. In the fourth category, serious rules preempt judgment to reduce the errors that threaten the actor's pursuit of what the authority believes would have been the actor's autonomously generated plans had she not been operating under conditions that preclude autonomous choice. In this case, it is difficult to separate the actor's decisional "errors" from the substantive end of the rule. Moreover, preempting the actor's judgment means

52. For the view that benevolent as well as Hobbesian people need constraining rules, see SARTORIUS, supra note 9, at 58-59.

76 See 1 E. ALLAN FARNSWORTH, CONTRACTS § 3.22 (1990).

77 See, e.g., Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449-50 (D.C. Cir. 1965) (remanding case to trial court to determine whether cross-collateralized consumer financing system employed by defendant was unconscionable).

78 We do not mean to suggest that there is a clean divide between these two categories of rules. To one accustomed to a liberal view of social life, the distinction seems clear, and the question is whether paternalistic regulation is appropriate. But others might say that the behavior or economic condition of others around them affects vital interests of their own.

79 One interesting example of such a rule is "do not lie." Assume this rule was enacted to promote respect for autonomy. If the authority that enacted it believes that some lies, such as moral simplification for children, do no harm to the value of autonomy, the rule in essence itself lies by asserting that it is always wrong to lie. It does so, however, in order to protect autonomy by preventing mistaken individual judgments about the relation of lying to autonomy.
preempting her evaluation of her own interests—or in other words, her evaluation of what she deems to be good. This seems a more substantial infringement of autonomy than a rule that only preempts judgment about the means to an uncontroversial end.\(^\text{80}\)

The fifth category—rules defining rights within a political system—places the problem of autonomy in the context of political debate, which is the subject of our final Section.

### C. Public Debate

So far we have focused on the effect of deceptive rules on decisions about individual conduct. If the deceptive character of rules is discovered, the rules will not succeed in ordering conduct. If it is not, and rules are generally believed and obeyed, the authority that enacts them may be transgressing the autonomy of its citizens.

Another, perhaps more serious, problem relates to social and political debate about rules. Rules that purport to be something they are not tend to preclude or distort debate, both about the rules themselves and about the ends to which they are directed. To some extent this is true of any general rule that is offered as a statement of right action rather than as a calculation of what action will produce the best set of results if subjects all comply. This sort of mischaracterization is likely to confuse or oversimplify debate about the rule. The confusion increases when announced rules of conduct are modified by decision rules that are kept obscure or phrased in ways that limit their precedential value.\(^\text{81}\) When the deception relates to the organizing philosophy of the system of governance, the effect on public debate is even more dramatic.

For example, suppose the authority establishes a set of property rights. It does so for reasons of utility, but it treats the rights as side-constraints and does not discourage the notion that they may be grounded in natural law. It proceeds in this way because if property rights were identified as utilitarian devices, they would

\(^{80}\) See Dworkin, *supra* note 51, at 484-87 (distinguishing between "volitional" paternalism, designed to assist people in realizing their chosen ends, and "critical" paternalism, designed to steer people to new ends); see also Joel Feinberg, *Legal Paternalism*, 1 CAN. J. PHIL. 105, 111-24 (1971) (assessing differences between weak and strong paternalism).

\(^{81}\) For a careful discussion of the relation between adjudication and public criticism of laws, see Postema, *supra* note 28, at 459-62.
unravel in the process of individual calculation. If the lesson about rights is well taught, any debate about property will assume these rights as premises and will not refer back to utility. If the authority is entirely right in its choice of ends and its overall assessment of means, this is all for the best. But if the authority has erred on the general level, the deceptive nature of its rules will postpone or preclude a reassessment.

Thus, successful deception by rules preempts decision-making at two levels: the particular level, where the question is how individuals should respond to rules; and the general level, where the question is what rules the system should adopt. To justify preemption at either level, there must be some objective reason why the authority's decisions should have priority over those of citizens.

At the particular level—whether to follow rules—the authority can claim advantages in reasoning skills by virtue of its central location. Its position allows it to act prospectively and impartially, and to coordinate the conduct of many individuals. To the extent these special skills can improve results, there is a plausible case for preempting individual judgment.

At the general level of decision-making—which rules to adopt—the authority has no situational advantage. In fact, there is reason to think that public decisions made after full debate will be superior to the decisions of a political authority. At least if the impartial appeal of the outcome is a measure of its success, the epistemic advantage now lies with the public. A process of public debate and decision ensures (or at least makes it likely) that a range of views will be aired, that arguments will be oriented toward universal values, and that varying interests will be accommodated in the result.

At this point, the problem becomes one of political authority. If the authority cannot claim epistemic superiority in the choice of

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82 See supra text accompanying notes 35-41.  
83 See supra note 69.  
Nino makes the important point that the ideal of impartiality, and hence the epistemic superiority of democratic decision-making, is limited to issues of social or intersubjective morality. Democratic decision-making does not have the same advantages in resolving questions of personal virtue, which are not and should not be the subjects of impartial judgment. See Nino, supra, at 835-38.
rules, the only way it can justify using rules in ways that prevent full public debate is to establish some further source of political legitimacy. Depending on one’s theory of legitimate political authority, it may be appropriate for a properly constituted authority to withdraw some questions from public decision. On the other hand, most modern theories of legitimate political authority place some limits on what can be withdrawn. The acceptability of serious rules depends on the extent to which their deceptive (and therefore preemptive) character exceeds the scope of legitimate authority or distorts the processes that confer legitimacy.

To work this through, one must identify a theory of authority and determine what political value that theory places on public debate. For example, rules will not fare well under a comprehensive majoritarian theory—one that requires that all contestable questions of social interaction be submitted to the public for majority decision. The majoritarian position may be based on a strong presumption of epistemic superiority: in matters of public concern (including the definition of private rights) collective decision-making produces the best outcomes because it accounts for the widest range of views. Alternatively, it may rest on a notion of political right: human autonomy dictates a right of self-government, or at least a right to participate in the process of government. Either of these views would seem to preclude any practice that limited public understanding of the content or nature of rules of conduct.

Managed democracy in the modern civic republican style also seems to require ongoing public debate (though its principal sponsors seem willing to engage in a substantial amount of esoteric decision-

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85 Cf. Raz, supra note 8, at 80-105 (discussing possible rationales for political authority that exceed the scope of the normal justification thesis).
86 See Michael Walzer, Spheres of Justice: A Defense of Pluralism and Equality 284 (1983); Nino, supra note 84, at 819-24; see also Aristotle, supra note 84, bk. III, ch. 11. A somewhat different epistemic claim is made by civic republicans who believe that public debate (under controlled conditions) can yield a notion of the common good that cannot be ascertained in any other way. See, e.g., Frank Michelman, Law’s Republic, 97 Yale L.J. 1493, 1504-05, 1513-15 (1988); Cass R. Sunstein, Beyond the Republican Revival, 97 Yale L.J. 1539, 1548-58 (1988).
87 See, e.g., Jeremy Waldron, A Right-Based Critique of Constitutional Rights, 13 Oxford J. Legal Stud. 18, 36-38 (1993) (recognizing a right to political participation); Walzer, supra note 44, at 383-84 (stating that law, in order to be legitimate, must be a product of its subjects' free will); see also Aristotle, supra note 84, bk. I, ch. 2 (discussing the political nature of man).
88 Waldron insists on candor. See Waldron, supra note 87, at 35 (suggesting that political theorists should make their thoughts accessible to the general public).
making in order to free the debate from (bad) exogenous preferences.  

Rules are easier to justify under a theory of authority that rests on the presumed consent of individuals to consign the function of enforcing rights to a political authority. For example, suppose we adopt a libertarian theory, in which insecurity leads individuals to submit to a limited government designed to maintain order, secure private property, and manage goods that are not amenable to private ownership, such as streets or national defense. Democracy is the preferred method of decision-making on matters that fall within the discretion of government because it serves as a check on abuse of power by government officials.

A theory of this sort appears to leave room for the use of serious rules, and perhaps for deception about foundational norms as well. To maintain order and secure private property, the authority must prohibit force and fraud, and it can do this most effectively by means of serious conduct rules. To the extent that these rules misrepresent their own moral force in particular cases, or claim to rest on natural right rather than expediency, they may distort public understanding of the system of conduct regulation. Yet if the function of democracy is to prevent abuse, this distortion will not urgently require public debate. Rules cannot disguise the scope and outcome of government activity. The deception entailed in rules affects only the means by which rights are enforced, and offers little opportunity for abuse of power. As long as the government keeps to its designated ends, and the rules it issues serve those ends, there is no special need for democratic oversight.

Although libertarianism does not appear to require public debate over rules, it may present a problem for the use of serious rules at the particular level of decision-making because it is a deontological theory. Serious rules are justified by their conse-

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89 See Sunstein, supra note 86, at 1543-44, 1548-50; see also Michelman, supra note 86, at 1526-28 (discussing limits on the process of lawmaking).

90 See Epstein, supra note 39, at 7-16; Hayek, supra note 41, at 140-47; Nozick, supra note 38, at 12-15, 333.

91 See Epstein, supra note 84, at 1641.

92 See Epstein, supra note 39, at 9-18; Nozick, supra note 38, at 118-19, 280-92; Epstein, supra note 84, at 1639-42. But see Hayek, supra note 41, at 108-09 (suggesting that public debate on issues of government is necessary for the education of citizens, which in turn will assist the progress of thought).
quences even when protecting deontological rights. The question is whether, when put to use in a deontological system, they run afoul of side-constraints that block consequentialism, particularly the side-constraint forbidding deception. If so, the implications are enormous, not just in moral theory, but in practice: we cannot employ serious rules, no matter how beneficial.

These are only sketchy examples of the possible implications of deceptive rules within different theories of authority. We do not intend to endorse a particular theory, nor to consider what all possible theories might have to say about rules. Our purpose is only to point out the issues rules raise at the general level of decision-making. Rules can distort public debate; yet deceptive rules may be part of what allows us to maintain a complex society and an ideal of mutual tolerance.

CONCLUSION

The various forms of deception we have discussed stem from what Frederick Schauer calls the "asymmetry of authority." Whenever we imagine the processes that are supposed to generate justifiable moral principles—ideal speech situations, original positions, a congress of moral legislators proposing principles that cannot reasonably be rejected—we image a situation in which all participants are equally rational, informed, linguistically and rhetorically competent, energetic, and so forth. But when we imagine ourselves in the positions of a rule-promulgating authority, we must confront the asymmetry between governors and governed in regard to rationality and information.

The question then becomes, what is the moral significance of this asymmetry of authority? To what extent do the moral principles we might arrive at in ideal situations forbid their own implementation by means of rules and other devices that involve deception (of ourselves or others) about the relation of those devices to the principles that justify their use? After all, these ideal

93 See Schauer, supra note 41, at 425-27.
95 See JÖRGEN HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY 91 (Thomas McCarthy trans., 1979); JÖRGEN HABERMAS, LEGITIMATION CRISIS (1973).
96 See RAWLS, supra note 50, at 17-22.
situations are most plausibly viewed, not as situations we must actually attain in order to have justifiable beliefs, but as ways of modeling what the solitary monologue of the philosopher must simulate—in particular, the core substantive impartiality of morality. Indeed, taking this point a bit further, if one could not justifiably act on any principle unless that principle were totally transparent to all affected by one's act, one could never act. The language by which we communicate our principles to others is imprecise, and others' linguistic competencies vary, as do their cognitive abilities. Information can never be totally shared. Moreover, communication requires resources and time; yet not to act on principles during the time required to communicate them, or because we lack the resources for communication, is to allow the contraries of those principles to prevail by default. For these reasons, most philosophers view idealized dialogues or public justifications as expressions of the substantive requirements of moral principles derived monologically rather than as actual procedural constraints to which all morally justified action must adhere.

98 See, e.g., BRIAN BARRY, THEORIES OF JUSTICE 290-92 (1989) (arguing that a public justification/reasonable rejection test is a test of a principle's substantive impartiality, not a description of the actual process of its adoption); see also CHARLES R. BEITZ, POLITICAL EQUALITY 99-100 (1989) (outlining the theory of "complex proceduralism," by which a procedural regime is judged ideal if it is "equally justifiable" to each of its members); IRIS M. YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 104-07, 112-13 (1990); Grace Clement, Is the Moral Point of View Monological or Dialogical?, 33 PHIL. TODAY 159, 169-71 (1989) (discussing limitations of the requirement that moral norms be grounded in real discourse); Richard H. Fallon, Jr., What Is Republicanism, and Is It Worth Reviving?, 102 HARV. L. REV. 1695, 1728-33 (1989) (examining the problems inherent in republicanism; namely, that the theory involves ambiguous concepts like "empathy" that cannot be defined procedurally, but involve substantive decisions in themselves); Carlos S. Nino, The Communitarian Challenge to Liberal Rights, 8 LAW & PHIL. 337, 346 (1987).

99 See, e.g., Richard Arneson, Neutrality and Utility, 20 CAN. J. PHIL. 215, 224 (1990) (arguing that the ideal speech act ethic is consistent with acting on principles others do not accept but would accept if fully informed); Richard J. Arneson, Socialism as the Extension of Democracy, 10 SOC. PHIL. & POL'Y 145, 170-71 (1993) (discussing the "ideal of deliberative democracy"); J. Donald Moon, Constrained Discourse and Public Life, 19 POL. THEORY 202, 224-27 (1991) (discussing the ideal model of public discourse); Michael Walzer, A Critique of Philosophical Conversation, 21 PHIL. F. 182, 184-95 (1989); Walzer, supra note 44, at 389 (comparing the philosopher's "perfect meeting" attended only by himself and resulting in what he believes is right, with actual democratic debate among many and resulting only in agreement); see also Kevin R. Davis, Kantian "Publicity" and Political Justice, 8 HIST. PHIL. Q. 409, 418-20 (1991) (arguing that Kant's principle of publicity does not contemplate actual disclosure or debate, but rather an a priori test of the moral acceptability of a proposal as measured against an ideal rational public); Terrance Sandalow, A Skeptical Look at Contemporary Republicanism, 41 FLA. L. REV. 523, 542 (1989) (suggesting that real
Are there nevertheless some moral principles, such as respect for autonomy, that can never be indirectly implemented through devices that deliberately obscure or deceive regarding their relation to justifying moral principles? Or does even the value of autonomy require only that the deception involved be deception that autonomous individuals would accept as justifiable were they in the situation of the rule-making authority?\(^{100}\) If, given the perspective of a rule-making authority, we would endorse the authority's lying to ourselves as rule-subjects, are the demands of autonomy fully satisfied?\(^{101}\) If not, how can we explain the acceptability of "lying rules" for children and imbeciles?\(^{102}\)

It is doubtful that requirements that appear problematic for serious rules and similar devices—such as the requirement that moral principles be capable of being publicized—are problematic for metaethical reasons. That is, if serious rules are morally problematic, it is not by virtue of what morality is, but by virtue of what morality requires. The moral principles that serious rules implement are capable of being publicized to the fully informed and rational. Indeed, any philosopher who endorses an esoteric morality believes that its principles would be publicizable to—and agreed to, or not reasonably rejected by—everyone who is as fully informed and rational as the philosopher.\(^{103}\) Conversely, no philosopher believes that moral principles are justifiable only when everyone subject to them, no matter how ill-informed or irrational, has actually endorsed them. (Can we even tell when a person has
actually endorsed a principle the implications of which he may not fully understand?)

The more plausible view is that objections to esoteric morality must themselves be moral, not metaethical. But anyone who finds esoteric or asymmetric morality morally objectionable must dispense with serious rules and all other similar indirect moral strategies.\textsuperscript{104}
