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Steroids and Legal Ethics Codes: Are Lawyers Rational Actors

Fred C. Zacharias

STEROIDS AND LEGAL ETHICS CODES: ARE LAWYERS RATIONAL ACTORS?

*Fred C. Zacharias**

A TRIBUTE TO FRED ZACHARIAS†

During the editing of this Article, on the afternoon of November 11, 2009, Professor Fred Zacharias died at the age of 56.

Professor Zacharias devoted his entire adult life to professional responsibility issues, both as an attorney and as a scholar. During the past two decades, he wrote over sixty leading law review articles in this field. Professor Zacharias's influence on the development and exploration of legal ethics issues was immense and multifaceted.

Wholly beyond his academic contributions to the field, as an individual, Professor Zacharias was a person of consummate integrity. That quality defined him. Fred not only valued the search for truth and the improvement of justice, but unerringly sought these ends. Moreover, he did so not only when these goals were convenient and popular, but even when they were not.

Fred was his own man. He did not follow trends. He did not vote with the crowd. He thought deeply and came to his own conclusions. And was not afraid to voice them.

What follows is the last law review article Professor Zacharias wrote. In September, Fred came to the conclusion that his battle with cancer would likely be over by year's end, and that he would accordingly be unable to complete the editing process of this piece, and asked us if we were willing to complete his final work. It is a testament to, and typical of, Professor Zacharias that even in the final days of his life, he wanted to complete his academic work and fulfill what he felt were his obligations to the law review students who had accepted his piece.

There are few individuals who share the commitment and integrity of Professor Zacharias. He will be sorely missed.

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* Herzog Endowed Research Professor, University of San Diego School of Law. Many thanks go to Professors Larry Alexander, David McGowan, Frank Partnoy, Steven D. Smith, and Chris Wonnell for commenting on earlier drafts of this Article and to Alex Chien and Alexander Guiha for their research assistance.

† This tribute was written by Professors Shaun P. Martin and Frank Partnoy, colleagues and friends of Professor Zacharias.

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INTRODUCTION

Over time, legal ethics codes have become increasingly specific and enforceable.[1] Yet at root, they remain a mixture of hortatory and concrete mandates, some never enforced, most rarely enforced, and none universally enforced.[2] Law and economics scholars—and other observers who internalize a "bad man" theory of human behavior[3]—assume that ethics provisions that do not result in discipline have little, or perhaps even counterproductive, effects;[4] hortatory or generalized codes allegedly do not create incentives producing appropriate lawyer conduct.[5]

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1 *See generally* Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1250–51 (1991) (discussing the increasing legalization of ethics codes over time).

2 *See* Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 245–46 (1993) (discussing the effects of code provisions of varying specificity on enforcement).

3 *See* Tanina Rostain, *Ethics Lost: Limitations of Current Approaches to Lawyer Regulation*, 71 S. CAL. L. REV. 1273, 1282 (1998) (discussing the application of Holmes's "bad man" analysis to professional ethics).

4 The most explicit discussion of this phenomenon is found in Eli Wald, *An Unlikely Knight in Economic Armor: Law and Economics in Defense of Professional Ideals*, 31 SETON HALL L. REV. 1042, 1049–54 (2001) (discussing economists who "simply assume that professional ideals do not influence the conduct of lawyers"). *See also* RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 189 (1999) (arguing that the legal profession's "altruistic pretense" may simply reflect an attempt to "conceal the extent to which its members are motivated by financial incentives"); George Rutherglen, *Lawyer for the Organization: An Essay on Legal Ethics*, 1 VA. L. & BUS. REV. 141, 142 (2006) ("Without the prospect of effective sanctions, the rules of ethics are in danger of being simply ignored under the competitive pressure on the practice of law today."); *cf.* L. Ray Patterson, *The Function of a Code of Legal Ethics*, 35 U. MIAMI L. REV. 695, 725 (1981) ("The ultimate function of a code of legal ethics is the same as that of any set of ethical rules: it is to keep within reasonable bounds the law of self-interest that operates at all times and in all places."); Martha Elizabeth Johnston, Comment, *ABA Code of Professional Responsibility: Void for Vagueness?*, 57 N.C. L. REV. 671, 671–72 (1979) ("[T]he ABA . . . adopted various disciplinary rules that are written in such broad, general terms that they fail to prescribe any intelligible course of conduct.").

5 *See* Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 643–44 (1981) ("Rules are less likely to influence behavior the more they mandate conduct opposed to self-interest and then create loopholes for those intent on evasion . . . ."). Eli Wald suggests that economists come to this conclusion in part because they tend to adopt a demand-side perspective of professional rules and ideals, focusing largely on their effect on clients based on the assumption that lawyers will follow their clients' wishes. Wald, *supra* note 4, at 1052; *see also* Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 889

Despite these perspectives, the American Bar Association (ABA) and state code drafters continue to rely upon mixed rulemaking. One explanation might be self-interest; by maintaining the illusion of self-regulation through provisions that sound high-minded, the bar sometimes avoids external regulation that might have bite.[6] Another is the inability of code drafters to achieve consensus on the substance of rules, resulting in compromised provisions that allow lawyers to acknowledge ideals but to engage in a range of conduct.[7]

This Article suggests a third explanation. Although underenforced ethics provisions have costs,[8] they can also serve a valuable function. They address and guide the conduct of a segment of the bar that does not act entirely upon financial and reputational incentives in ordering its affairs. Some lawyers, for a variety of reasons, simply are willing to follow the rules even if doing so may be economically disadvantageous.

The law and economics response would likely take one of two forms. First, true economists would suggest that any reason for obeying a rule, including psychic benefits, can be characterized as "economic" and therefore fit into the economic analyses of legal ethics rules.[9] Second, some observers assuming a "bad man" vision might

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(1990) (asking whether clients will "allow lawyers to be gatekeepers"). Wald argues, "The reality is more complex because lawyers exercise a significant influence over clients' demand for their services." Wald, *supra* note 4, at 1052.

6 Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147, 1150–52 (2009) (discussing code drafters' often misplaced desire to preempt external regulation).

7 *See* Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265, 313 (2006) (discussing compromise provisions).

8 See Fred C. Zacharias, *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971, 1005–09 (2002) (identifying and analyzing the costs of underenforced rules).

9 *See, e.g.*, Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1552 (1998) (noting that law and economics "long ago abandoned the model of hyperrational, emotionless, unsocial, supremely egoistic, nonstrategic man (or woman) that [some behavioral economists sometimes] ascribe to it" (footnote omitted)); *id.* at 1554 (explaining why so-called "irrational behavior" does not undermine rationality analysis); *cf.* Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 GEO. L.J. 67, 81 (2002) ("[W]hen the legal decision theorists say that some legally relevant behavior is supposedly 'nonrational,' 'quasi-rational,' or 'irrational,' they simply mean that a legal actor failed to apply the proper rules or norms for arriving at a judgment or decision, not that the action taken has an irrational purpose or unwise goal."). As Jeffrey Harrison has suggested, when the rational actor approach is expanded to include psychic costs and benefits, it tends to become tautological or to lose its explanatory value. Jeffrey L. Harrison, *Piercing Pareto Superiority: Real People and the Obligations of Legal Theory*, 39 ARIZ. L. REV. 1, 2 (1997); *see also* Christine Jolls et al.,

simply deny that people (including lawyers) ever act, or should act, on non-financial or non-quantifiably economic incentives.[10]

This Article calls these perspectives into question by drawing from the recent history of steroid use in baseball a series of character traits that prompted baseball players to use or avoid performing-enhancing drugs.[11] One can be fairly confident that a range of attitudes toward rules forbidding steroid use has existed, causing some players to employ steroids, others to dabble, and yet others to religiously avoid them.[12] This Article suggests that the bar consists of lawyers with the same range of approaches to legal ethics rules. If that is correct, hortatory rules cannot fairly be criticized for failing to sanc-

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A Behavioral Approach to Law and Economics, 50 STAN. L. REV. 1471, 1488–89 (1998) ("[T]he term 'rationality' is highly ambiguous and can be used to mean many things. . . . [S]o high a degree of flexibility leaves the theory with few a priori restrictions."); Tanina Rostain, *Educating* Homo Economicus*: Cautionary Notes on the New Behavioral Law and Economics Movement*, 34 LAW & SOC'Y REV. 973, 977 (2000) ("When the content of a rational actor's preferences is left open, however, the theory is too indeterminate to yield many empirically falsifiable predictions.").

10 *See* Philip Pettit, Virtus Normativa*: Rational Choice Perspectives*, 100 ETHICS 725, 726–27 (1990) ("It will be in [people's] economic interest . . . if the direct self-interested benefit of honoring the norms, in particular the sort of benefit that can be assigned monetary value, exceeds the cost; it will be in their social interest if honoring the norms promotes the esteem, affection, or pleasure with which they are viewed and this indirect self-interested benefit exceeds the cost. . . . No choice of a kind they commonly make is likely to undermine both their economic and social prospects."); *cf.* Stephen McG. Bundy & Einer Elhauge, *Knowledge About Legal Sanctions*, 92 MICH. L. REV. 261, 274–75 (1993) (noting the limitations of "rational actor accounts" that employ a baseline assumption that "actors are sanction optimizers"); *id.* ("[Holmesian "bad men" consider] only the actual level of expected legal sanctions and give[ ] no independent weight to the fact that the conduct is legally prohibited or required" (footnote omitted)).

11 To be clear: this Article does not suggest that perfect law and economics modeling would fail to account for the behavioral considerations the Article emphasizes. The instinct to follow the law, for example, while not a conscious choice made by a rational actor, still can fit into economic models if it is deemed to reflect the actor's implicit preference for engaging in law-abiding behavior. This Article merely suggests that behavioral considerations often are given short shrift in the application of economic models and that these can explain and justify some ethics rules that rational-actor theorists criticize. *Cf.* Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 23 (1989) ("[P]ractitioners [of law and economics] should increasingly look to psychology and sociology in order to enrich the explanatory power and normative punch of economic analysis"); *id.* at 25 ("The trade-off between theoretical simplicity and predictive power is a difficult one.").

12 To avoid falsely accusing players who have come under the shadow of the steroid scandals, this Article avoids pointing fingers at individual players unless they have openly admitted steroid use or been clearly shown to have transgressed.

tion "bad man" lawyers, because those lawyers may not be the targets of the rules.[13] Ethics code drafting, however, can be faulted for failing to adequately identify the categories of lawyers that particular rules are designed to influence.

Three caveats should be noted at the outset. First, this Article focuses on ethics regulation that addresses conduct in which lawyers must accommodate their own interests or client demands against potentially contrary interests of clients, courts, specified third parties, or society as a whole. The codes include provisions that serve a host of secondary functions, including facilitating communications among lawyers and the courts,[14] setting defeasible default rules that lawyers and clients can contract around,[15] reducing agency costs,[16] and enhancing efficiency in the legal system.[17] Market forces (including the desire for reciprocal cooperation) and judicial enforcement of

13 George Cohen has suggested broadly, and perhaps correctly as a descriptive matter, that law and economics theory and traditional assumptions underlying the professionalism movement have been inconsistent. George M. Cohen, *When Law and Economics Met Professional Responsibility*, 67 FORDHAM L. REV. 273, 275 (1998) ("[A]t first blush, the two fields take diametrically opposed positions on the topic [of self-interest]."); *see also* Gilson, *supra* note 5, at 871 ("Both views—economists' indifference to the lawyers' public oriented vision of professionalism and the disdain students of the legal profession often display for economic analysis—are incomplete . . . ."). While law and economics focuses on reconciling regulation with actors' self-interested behavior, Cohen notes that the "working assumption" of professional theory "has often been that ethics or professionalism requires lawyers to resist self-interest, and the relevant question has been thought to be simply what the nature of this resistance—that is, the content of ethical behavior—should be." Cohen, *supra*, at 275. Cohen recognizes, however, that ethics rules sometimes take self-interested behavior into account and that neither law and economics nor professional responsibility theory is "as wedded to [its] basic assumptions as it purports to be." *Id.* This Article attempts to explain and justify that apparent dichotomy.

14 *See* Zacharias, *supra* note 2, at 266 (discussing communication facilitation and other functions of legal ethics codes).

15 *See* Richard A. Epstein, *The Legal Regulation of Lawyers' Conflicts of Interests*, 60 FORDHAM L. REV. 579, 590–91 (1992) (analyzing conflict of interest rules as default rules necessary because contracts between lawyers and clients "are often incomplete, and do not specify the exact consequences that flow if and when a conflict of interest emerges"); Richard W. Painter, *Rules Lawyers Play By*, 76 N.Y.U. L. REV. 665, 674–92 (2001) (discussing professional responsibility rules that contemplate contracting between lawyers and clients); Fred C. Zacharias, *Integrity Ethics*, 22 GEO. J. LEGAL ETHICS 541, 586–87 (2009) (analyzing when ethics rules should be treated as defeasible).

16 *See, e.g.*, Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707, 1708 (1998) ("An important, though not the only, function of ethical rules is reducing agency costs between lawyers and clients.").

17 *See* Jonathan R. Macey & Geoffrey P. Miller, *An Economic Analysis of Conflict of Interest Regulation*, 82 IOWA L. REV. 965, 966 (1997) (noting the code-drafting goal of "adopting economically efficient [ethics] rules that reduce costs").

these rules increase lawyers' willingness to adhere to them. Such rules are not this Article's primary concern; it addresses those provisions that law and economics critics intuitively might consider ineffective—generalized, hortatory, or underenforced standards that typically relate to morality or professionalism concerns.

Second, this Article does not address the moral questions of whether and when lawyers might be justified in violating professional rules.[18] This Article considers the separate, more practical question of whether professional rulemakers can reasonably expect hortatory or unenforced regulation to influence the bar.[19]

Finally, this Article does not claim to describe the actual intentions of ABA or state code drafters or to justify particular professional rules.[20] It simply addresses the general criticism that underenforced rules are universally ineffective. When code drafters feasibly can, or should, employ such rules is a question that this Article leaves for another day.

I. THE LESSONS OF THE STEROID ERA

Classic law and economics analysis considers the incentives produced by regulation of unwanted behavior. If a law or rule outlaws particular conduct, but there is a benefit to be achieved by engaging in the conduct, the rule's effectiveness will depend on the likelihood of being caught, the sanctions, and the actor's risk-averseness.[21] The

18 There is substantial philosophical literature addressing the rationality of following generally sound legal rules when, in an individual case, a person governed by the rules perceives that disobedience would be personally or socially beneficial. *See e.g.*, LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES 54 (2001); Edward F. McClennen, *The Rationality of Being Guided by Rules*, *in* THE OXFORD HANDBOOK OF RATIONALITY 222, 222–35 (Alfred R. Mele & Piers Rawling eds., 2004); Scott J. Shapiro, *The Difference that Rules Make*, *in* ANALYZING LAW 33, 33–62 (Brian Bix ed., 1998).

19 Stated more generally, it asks how a rule is likely to operate collectively when some targets will be guided by the rule, others will not, and yet others may be affected by the manner in which people in the first two groups act.

20 Thus, this Article neither lays claim to know whether the code drafters adopted the rules discussed below based on the rationales the Article suggests nor entertains the issue of whether the rules represent a manifestation of the bar's self-interest.

21 *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 7.1, at 218 (7th ed. 2007) (arguing that, to provide effective deterrence, the damages must equal the harm caused by the act divided by the probability of actually being caught and forced to pay); Jeff T. Casey & John T. Scholz, *Beyond Deterrence: Behavioral Decision Theory and Tax Compliance*, 25 LAW & SOC'Y REV. 821, 823 (1991) ("In the simplest compliance model, compliance is treated as the status quo, and the [potential lawbreaker] compares the advantage of noncompliance if not detected . . . with the disadvantage if detected . . . after discounting each by its probability."); Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232,

rational actor will continue to engage in the conduct despite the prohibition if the rule is not enforced or weakly enforced, the benefits of violating the rule (on average) exceed the likely sanctions, and there are no other costs associated with violations.[22]

The key to this risk-rewards analysis is the notion that "no other costs" associated with violating the law or rule exist. Law and economics freely acknowledges the existence of real non-financial costs, assuming that these must be factored into any balance.[23] The costs may include culturally produced byproducts of regulated conduct, including reputational effects and personal psychological impacts of violating a law or being caught. When the other costs are sufficiently high, a rational actor may forebear from violating a law or rule even if he is likely to get away with the violation or the tangible benefits associated with the violation far exceed the probable sanction.

Consider the history of performance-enhancing drugs in baseball. At least for drugs that could not be procured without a lawful prescription, steroid use was always impermissible.[24] At some point, baseball instituted a formal policy forbidding steroid use, but did not enforce it.[25] Then, limited drug testing was instituted, somewhat

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1235 (1985) (describing the theoretical balancing conducted by potential lawbreakers).

22 *See* POSNER, *supra* note 21, § 7.2, at 219 ("A person commits a crime because the expected benefits exceed the expected costs."); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 176–77 (1968) (stating that people will commit crimes if their expected utility, including probability of and severity of punishment, exceeds the expected utility of alternate activities); Casey & Scholz, *supra* note 21, at 821 ("Especially since the development of expected utility (EU) theory by von Neumann and Morgenstern (1944), [law] compliance has been analyzed using models of decisionmaking under risk and uncertainty in which the EU of the potential gains is balanced against the potential legal, social, and internalized personal sanctions from participating in illegal behavior . . . ."); *cf.* Ronald L. Akers, *Rational Choice, Deterrence, and Social Learning Theory in Criminology: The Path Not Taken*, 81 J. CRIM. L. & CRIMINOLOGY 653, 655 (1990) (positing that "the primary concepts and valid postulates of deterrence and rational choice [theories] are subsumable under general social learning or behavioral principles").

23 *See, e.g.*, JEFFREY L. HARRISON, LAW AND ECONOMICS IN A NUTSHELL 64–65 (4th ed. 2007) (discussing how the framing of sanctions can affect peoples' "tastes," which in turn must be taken into account when evaluating preferences); Mark P. Gergen, *The Logic Of Deterrence: Corporate Tax Shelters*, 55 TAX L. REV. 255, 262 (2002) (modeling tax law compliance so as to include the factors of reputational concerns and "distaste for tangling with the government").

24 *See, e.g.*, Federal Food, Drug, and Cosmetic Act § 503(b), 21 U.S.C. § 353(b) (2006) (forbidding use of all prescription drugs except when their use is determined to be proper and is supervised by a licensed medical practitioner).

25 Anabolic steroids have been expressly listed among baseball's prohibited substances since 1991, but the Major League Baseball Players Association (the "Players

increasing the risk of apprehension, but not significantly.[26] Eventually, penalties increased and became mandatory, and more stringent testing procedures were implemented.[27]

At each stage, in theory, rational-actor baseball players had to make a choice: employ steroids and risk sanction or forgo the performance-enhancing benefits. As the penalties grew, the imposition of sanctions became regularized, and as the likelihood of apprehension through testing increased, the incentives to demur increased as well. Throughout the period, however, some rational players determined that the benefits of taking steroids warranted the risks.

For ease of analysis, one can categorize the players into five groups.[28] The categories are summarized for reference purposes in Table 1, but are described more fully below.

Association") did not agree to this policy, thus retaining the ability to challenge decisions by the Commissioner to impose discipline for violations of the policy. GEORGE J. MITCHELL, REPORT TO THE COMMISSIONER OF BASEBALL OF AN INDEPENDENT INVESTIGATION INTO THE ILLEGAL USE OF STEROIDS AND OTHER PERFORMANCE ENHANCING SUBSTANCES BY PLAYERS IN MAJOR LEAGUE BASEBALL 25 (2007).

26 In 2002, Major League Baseball and the Players Association agreed on a joint drug program that led to survey testing and the possibility of mandatory random testing, but which did not provide for automatic discipline of first-time offenders. *Id.* at 50–55.

27 The union-approved drug program was strengthened in 2005. The new policy added human growth hormones and performance-enhancing "compounds" to the banned substances list and led to automatic punishments of fifty-game suspensions for first-time offenders, one-hundred-game suspensions for second-time offenders, and a permanent ban for third-time offenders. *Id.* at 57–58.

28 Different categorizations are possible. One could, for example, treat the first two categories—the "cheaters" and "complementary rational actors" who decide the costs outweigh the benefits—as "pure rational actors." One could also treat the third category, which emphasizes more esoteric or long-term costs and benefits, as pure rational actors as well. The categorizations above are neither more nor less accurate; they are useful simply as a means of labeling and separating the groups.

TABLE 1. CATEGORY PROCLIVITY

1. Cheater	Classic "bad man"
2. Complementary Rational Actor	Rational, but is prone to fearing the costs or being dubious about the benefits of outlawed behavior
3. Nuanced Rational Actor	Considers the full range of costs, especially reputational effects of outlawed behavior
4. Clean Rational Actor	Values behaving properly and in law-abiding fashion
5. Socialized Person	Follows rules, largely unquestioningly

First, there are the players who took performance-enhancing drugs. These are the "rational actor cheaters" or "bad men," such as José Canseco,[29] Jason Giambi,[30] and probably Barry Bonds.[31] They simply measured the rewards of taking steroids—including improved performance and the resulting contractual and marketing benefits—against the likely costs, choosing to pursue the benefits. Some may have even taken pleasure, psychologically, in adopting a "win-at-all cost" approach, believing that this one-track mindset made them

29 In an interview with *60 Minutes* prior to the release of his tell-all book *Juiced*, José Canseco admitted to using steroids and human growth hormones for his entire career. He stated that he would never have been a Major League–caliber player without steroids and that he was willing to try everything possible to become the best player in the world. David Hancock, *Steroid-User Canseco Names Names*, CBS NEWS, Feb. 13, 2005, http://www.cbsnews.com/stories/2005/02/10/60minutes/main673138.shtml.

30 Giambi admitted to Senator George Mitchell that he began using anabolic steroids in 2001 and that in December 2002 or January 2003 he began following a program of performance enhancement which included human growth hormones and designer substances such as the "cream" and the "clear." MITCHELL, *supra* note 25, at 130–33.

31 Based on the overwhelming evidence, it appears that Bonds used banned substances, but that has yet to be proven in court. *See generally* MARK FAINARU-WADA & LANCE WILLIAMS, GAME OF SHADOWS 142–44 (2006) (reporting the suspicious circumstances surrounding Bonds's denials of steroid use). According to one telling conversation that occurred around the time that Bonds allegedly started his steroid use, Bonds was influenced by the success of other "cheaters." He reportedly stated:

> As much as I've complained about McGwire and Canseco and all of the bull with steroids, I'm tired of fighting it. I turn 35 this year. I've got three or four good seasons left, and I wanna get paid. I'm just gonna start using some hard-core stuff, and hopefully it won't hurt my body. Then I'll get out of the game and be done with it.

Jeff Pearlman, *For Bonds, Great Wasn't Good Enough*, ESPN MAG., Mar. 27, 2006, *available at* http://sports.espn.go.com/mlb/news/story?id=2368395 (internal quotation marks omitted) (quoting Bonds).

attractive in the mold of aggressive winners such as Vince Lombardi,[32] Leo Durocher,[33] and Pete Rose.[34]

Ken Caminiti, the first player to publicly admit using steroids, is a good example. Up to his death, Caminiti defended his decision to rely on performance-enhancing drugs. "If a young player were to ask me what to do," Caminiti said, "I'm not going to tell him it's bad. Look at all the money in the game: You have a chance to set your family up, to get your daughter into a better school."[35] Caminiti continued with a view to the competition: "[I] can't say, 'Don't do it,' not when the guy next to you is as big as a house and he's going to take your job and make the money."[36]

The next two categories of players fit the rational-actor mold as well. For our purposes, these players can be considered intermediate rational actors. They engaged in the same type of calculations as the cheaters or bad men but reached different conclusions—either because they assessed the costs differently or considered a wider range of costs.

One might call the first intermediate group "complementary rational actors," because these players were the flip side of the cheaters. They evaluated the potential sanctions and risks of testing positively (or being caught in other ways) and concluded that the cost of taking steroids, including the health dangers, outweighed the benefits. The category of complementary rational actors may simply have been more risk-averse than the so-called bad men.[37] Alternatively, something about the specific situations of the players in this category

32 In Lombardi's words, "Winning isn't everything, it's the only thing." VINCE LOMBARDI, WHAT IT TAKES TO BE #1, at 271 (2003).

33 Durocher, known as an ultracompetitive player and manager, is most famous for saying, "Nice guys finish last." But he also said, "How you play the game is for college boys. When you're playing for money, winning is the only thing that matters." LEO DUROCHER & ED LINN, NICE GUYS FINISH LAST 11, 14 (1975).

34 Pete Rose—baseball's "Mr. Hustle"—was known for doing everything possible to win. In his own words, he would "'walk through hell in a gasoline suit to keep playing baseball.'" Mike Wise, *Charlie Hustle is Hustling, Quietly*, N.Y. TIMES, Mar. 30, 2003, at SP7 (quoting Rose).

35 Tom Verducci, *Totally Juiced*, SPORTS ILLUSTRATED, June 3, 2002, at 36 (reporting interview with Ken Caminiti).

36 *Id.* (quoting Ken Caminiti).

37 *Cf.* BEHAVIORAL LAW & ECONOMICS 5–6 (Cass R. Sunstein ed., 2000) (discussing the significance of "loss aversion" in actors' calculations); Daniel Kahneman & Amos Tversky, *Conflict Resolution: A Cognitive Perspective*, *in* BARRIERS TO CONFLICT RESOLUTION 44, 54 (Kenneth J. Arrow et al. eds., 1995) (positing that people emphasize potential losses over potential gains); Paul Slovic et al., *Regulation of Risk: A Psychological Perspective*, *in* REGULATORY POLICY & THE SOCIAL SCIENCES 241, 248–56 (Roger G. Noll ed., 1985) (discussing reasons for variations in people's evaluations of risk).

may have affected their calculations. A player who did not have easy access to steroids, for example, would have faced a greater risk of being apprehended when seeking a source than would a player who was already in contact with a supplier or other knowledgeable procurement agent.[38] Other players, such as Greg Maddux, may have believed their playing or workout styles did not lend themselves to significant improvement through the use of steroids.[39]

Some baseball players who avoided performance-enhancing drugs probably engaged in a more complex risk-reward calculation than the athletes in the first two categories. The "nuanced rational actors" in this third category focused on the potential adverse effects of steroid use on their images and long-term earning power, emphasizing the reputational impact of being caught or being rumored to be a user. One might expect the nuanced rational actor category to have included players who already played at a high level of competence and had to assess whether marginally improved performance would improve their marketability.[40] It also may have included some marginal but secure players who had to consider whether a hint of impropriety would cost them their jobs.[41] As testing and publicity about steroid use became more prominent, nuanced rational actors would have become increasingly hesitant to continue any use of banned substances.

The fourth category of players consisted of what can best be termed "clean rational actors." Although proving the negative is impossible, we know intuitively that many baseball players avoided

38 Thus, for example, players on the New York Mets may have downplayed the risk of apprehension because a clubhouse attendant provided easy access to performance-enhancing drugs. *See* MITCHELL, *supra* note 25, at 141–44 (describing the activities of Kirk Radomski); *cf. id.* at 152–158 (describing the process by which Larry Bigbie learned about steroids and found a supplier).

39 Maddux, who used finesse and strategy to pitch his way into eight All-Star games, is perhaps the quintessential example of a player whose style of play did not lend itself to significant improvement by steroid use. *See generally* George F. Will, *The Artistry of Mr. Maddux*, NEWSWEEK, Apr. 25, 2005, at 84 (describing Maddux's pitching style).

40 Clean-cut Yankee captain Derek Jeter, who has consistently denied any use of steroids, may arguably fit this category. Considered by business experts to be baseball's most marketable player, Jeter derives great financial benefit from not only his level of play but also his clean image. *See* David Sweet, *Jeter, A-Rod Baseball's Most Marketable*, MSNBC.COM, Mar. 27, 2008, http://www.msnbc.msn.com/id/2380297; *see also* Mark Feinsand, *Rodriguez Could Take Hit on Any Ad Deals*, N.Y. DAILY NEWS, Feb. 9, 2009, at 5 (describing potential damage to Alex Rodriguez's marketing revenue from revelation of his steroid usage).

41 Players on the bubble of making their clubs, in contrast, would need to weigh whether steroid use would help or hurt them more in the quest for a roster position.

performance-enhancing drugs for reasons that were not economic in the ordinary sense of that term. They did not act out of fear of sanctions or a calculation of the potential effects of drug use on their reputations for marketing purposes, but rather placed a great psychological value on being perceived as drug-free. The clean rational actors may have derived a personal sense of moral superiority at succeeding in baseball without the benefit of performance-enhancing drugs.[42] Tony Gwynn, for example, explained his decision to forgo performance-enhancing drugs in this way: "The thrill of the game for me was being able to go out and perform at a higher level than other people. That was my drug."[43] Other players, including Ken Griffey, Jr., wished to inspire other players with their moral rectitude or desired the appreciation of peers, friends, and the media for their rule-abiding behavior.[44]

Although not significant in analyzing the baseball context, it is important to note that the clean rational actor can represent two kinds of people. The first is influenced by the legal norms prescribing correct behavior. Thus, a baseball player might have chosen to avoid steroids precisely because the rules so instructed him; the rules set the terms of the game which the player honored. The second kind of clean rational actor, in contrast, is largely unaffected by rules, following his own moral code and abiding by the prescribed norms only when they are consistent with his personal code.[45] As will be discussed

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42 *See, e.g.*, Cass R. Sunstein, *Social Norms and Social Rules*, 96 COLUM. L. REV. 903, 945 (1996) (arguing that people often act in a way that supports a self conception of themselves as contributing to the perceived social good).

43 Tony Gwynn, *Steroids Taint Caminiti's Career*, ESPN.COM, May 29, 2002, http://static.espn.go.com/mlb/columns/gwynn_tony/1388401.html (reflecting on Ken Caminiti's admissions of steroid use).

44 Griffey explained his rationale as follows:

> If I can't do it myself, then I'm not going to do it. . . . . When I'm retired, I want them to at least be able to say, "There's no question in our minds that he did it the right way." I have kids. I don't want them to think their dad's a cheater.

Pearlman, *supra* note 31 (quoting Ken Griffey, Jr.) (internal quotation marks omitted); *cf.* Ellickson, *supra* note 11, at 43 ("The reality of pervasive *third-party* social controls is not inconsistent with the standard economic model because an other-regarding egoist would give weight to acclaim, ostracism, and other forms of social sanctions."); Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175, 1186 (1997) (arguing that rational actors may nonetheless sacrifice their self interest in order to appear fair to members of their communities).

45 *See* ALEXANDER & SHERWIN, *supra* note 18, at 54 (arguing that even a good rule "inevitably will dictate erroneous results in some of the cases it covers, and it is neither rational nor morally correct for individuals to follow the rule when they believe that

in Part II of this Article,[46] in non-sports contexts that present inherent moral issues, this type of actor may present the same problem for rulemakers as bad men because his conduct also is determined by non-rule factors.[47]

The final category of baseball player probably did no cost-benefit analysis at all.[48] He was a well-socialized person who assumed, consciously or intuitively, that laws or rules should be followed whether or not enforced.[49] In the words of career minor-leaguer Shawn Garrett: "There's right and there's wrong. Those guys [who use steroids] have to look themselves in the mirror."[50] This type of player simply implemented a core, arguably religious, belief in obedience to the rules—in playing baseball the right way and adhering to the established order.[51]

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its prescription is wrong for the circumstances in which they find themselves" (footnote omitted)).

46 *See infra* text accompanying note 65.

47 Where a rule addresses behavior that is morally debatable, this actor may—like the cheater—violate the rule. The only difference is that he departs from society's requirements for moral rather than selfish reasons.

48 *See* Milton C. Regan, Jr., *Moral Intuitions and Organizational Culture*, 51 ST. LOUIS U. L.J. 941, 943 (2007) (discussing the "notion that conscious deliberation typically plays but a minor role in shaping behavior"). For a philosophical analysis of whether it is rational for an actor to act on a prior commitment to pursue particular conduct (e.g., a legal requirement) even though the action at the time may be counter to the actor's benefit, see David Gauthier, *Rethinking the Toxin Puzzle*, *in* RATIONAL COMMITMENT AND SOCIAL JUSTICE 47, 49–53 (Jules L. Coleman & Christopher W. Morris eds., 1998), and McClennen, *supra* note 18, at 224–26.

49 *See* Alan H. Goldman, *The Rationality of Complying with Rules: Paradox Resolved*, 116 ETHICS 453, 457–59 (2006) (discussing a range of reasons other than the potential for sanctions why a person might rationally comply with a rule); *cf.* FREDRICK SCHAUER, PLAYING BY THE RULES 145–46 (1991) ("[W]hen a decision-maker decides according to the rules and therefore relies on decisions made by others, she is partially freed from the responsibility of scrutinizing every substantively relevant feature of the event."); Shapiro, *supra* note 18, at 36 (noting that sometimes a rational actor may be guided by a rule "because it affects his beliefs about his preferences despite the fact that . . . he actually prefers not to conform to the rule").

50 Rick Reilly, *A Lot of Guys in the Minors Got Hosed by Steroids. They Should Sue*, ESPN.COM, Sept. 8, 2008, http://sports.espn.go.com/espnmag/story?id=3565273.

51 Former player Chad Curtis, for example, has said:

> There are two things that might stop a person from using steroids: a moral obligation—they're illegal—and a fear of the medical complications. I was 100 percent against the use of steroids. But I must tell you, I would not fear the medical side of it. I fully agree you can take them safely.

Verducci, *supra* 35, at 48 (internal quotation marks omitted) (quoting Curtis). As discussed *supra* note 9, law and economics theorists would argue that these players engaged in an implicit cost-benefit analysis in which they placed great weight on their preferences for law-abiding behavior. However the phenomenon is characterized, there seems little doubt that some actors are affected by "social norms and moral

Looking from the outside, it is difficult to distinguish among the nuanced rational actor baseball players, the clean rational actors, and the socialized athletes. Players who came out of the steroids period with pure reputations—the Tony Gwynns and Ken Griffey Juniors of the world—may have done so in order to preserve their image for economic reasons, to encourage adulation, or simply because they were following their own code of proper behavior.

Cynical observers might also doubt that any variance in behavior actually occurred. Just because some players denied steroid use does not necessarily mean they practiced as they preached; a classic bad man would have used performance-enhancing drugs and then denied it.[52] Arguably, therefore, the number of nuanced, clean, or socialized actors might in fact have been small and the effect of outlawing steroids minimal. Nevertheless, most observers' intuition is that there was a broad spectrum of conduct and that, although substance abuse was prevalent, many players followed the rules. This Article proceeds on that assumption.

In order to assess the effects of changes in baseball's policies and regulations on the players, it is important to consider the players within their categories, because the effects of regulation will have varied. Initially, when steroids were banned (i.e., unlawful) but no testing was done and the likelihood of being caught was small, the cheaters, complementary rational actors, and nuanced rational actors all had strong temptations to violate the ban; the benefits of violation were substantial and the incentives for compliance relatively small.[53] Clean rational actors who independently had a distaste for performance-enhancing drugs or who valued the psychological benefits of rectitude would have avoided steroids. For socialized players, there was no choice.

In the ensuing period, penalties increased but the absence of meaningful testing meant that the likelihood of avoiding apprehension remained strong. The changes in the regulatory sanction scheme

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commitment to following the law." Note, *Rule Porousness and the Design of Legal Directives*, 121 HARV. L. REV. 2134, 2135 (2008) (footnote omitted); *see also* Sunstein, *supra* note 42, at 906, 958–59 ("[T]here is a general norm in favor of obeying the law.").

52 As, for example, appears to have been the case with Roger Clemens and Barry Bonds. MITCHELL, *supra* note 25, at 128.

53 There is a serious question about the significance of health concerns in players' minds arising from the use of performance-enhancing drugs. Information concerning the risks tended to be inconsistent and, because steroids often were obtained from persons other than doctors, was not always conveyed to, or brought to the attention of, the potential users. *Cf.* Casey & Scholz, *supra* note 21, at 840–41 (describing studies suggesting that potential lawbreakers' "decisions are sensitive to how risk information is presented").

and the publicizing of criminal investigations into steroid use by athletes may have influenced the more risk averse among the complementary rational actors, but many cheaters and nuanced rational actors stayed the course. The insubstantiality of the risk of disclosure meant that the benefits still outweighed the costs.

Only after mandatory penalties and a relatively rigorous testing regime were approved by the players' union did the balance shift. Then, even bad men players—the committed cheaters—necessarily developed reduced expectations of obtaining benefits that justified suspension or loss of employment costs. The changes in regulation clearly impacted the complementary and nuanced rational actors, who, by definition, adjust their behavior according to the prevailing costs and benefits. The clean rational actors and socialized players would have continued to be unaffected by the regulatory amendments.

In a law and economics sense, all five categories represent rational decisionmaking. Even the socialized player can be characterized as one who values his moral code (i.e., following the law) so highly that the benefits of complying with regulation outweigh the costs. But the psychological benefits emphasized by the clean rational actors and socialized players are inputs that are more difficult to quantify and prove than the level of sanctions, the likelihood of enforcement, and the financial benefits of noncompliance. It is also harder to predict when such inputs will take priority in an actor's economic evaluation, because the inputs appear to be inflexible but at some point might be overcome if most other competitors break the rules.[54] For practical reasons, therefore, the psychological considerations often are assumed away, or left out, in the application of traditional law and economic models of rule compliance.[55]

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54 This phenomenon is discussed *infra* text accompanying note 149.

55 *See* Jolls et al., *supra* note 9, at 1473 ("The absence of sustained and comprehensive economic analysis of legal rules from a perspective informed by insights about actual human behavior makes for a significant contrast with many other fields of economics, where such 'behavioral' analysis has become relatively common."); Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499, 1500 (1998) ("[B]oth psychology and sociology have suffered from the inability to generate a unified behavioral model rivaling the simplicity, elegance, and testability of the economist's utility-maximizing rational actor."); *see also* Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53, 70 (1986) (noting that gatekeepers, including lawyers, would be willing to be corrupted by their clients "if [they] had no scruples," but largely omitting the effect of scruples from the subsequent analysis); *cf.* Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1527 (1984) (assuming away non-self-interested behavior for purposes of the author's economic analysis).

II. BASEBALL AND LEGAL ETHICS CODES

The baseball context is not unique. One can point to examples throughout society in which informal influences beyond legal sanctions drive personal conduct, including the desire for self-esteem, reputational effects, and a sense of honor. Classic economic theory might predict that college students would never follow unenforced or loosely enforced honor codes, but that does not seem to be the case; cheating may be prevalent, but many students nevertheless obey the rules. Likewise, economic analysis might suggest that customers of restaurants, taxis, and other services would never tip the service-provider unless they are likely to be repeat customers[56] and that taxpayers would uniformly violate unenforced tax provisions;[57] again, that does not appear to be what happens. As a behavioral matter, people do not always act as classic bad men.[58]

In an article based on a fascinating set of empirical studies, Nina Mazar, On Amir, and Dan Ariely suggest that people's ability to rationalize dishonest or unlawful conduct as honest, and their unconscious inattention to moral and legal standards, help explain the variations in behavior.[59] This explanation has some force in the baseball context, in which players may have justified steroid use to themselves on the basis of such considerations as "everyone does it" and "fans and the powers-that-be want us to violate the rules in order to hit more home runs." To the extent players followed the lead of steroid-users or trainers in the clubhouse, they also may have taken the substances unthinkingly, or without fully considering the moral or regulatory standards governing the behavior (including the fact that obtaining steroids violated the law). Although the Mazir-Amir-Ariely analysis is potentially relevant to the subject at hand, this Article limits itself to the more general issue of whether it makes sense to treat lawyers uniformly as economically rational actors.[60]

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56 Arguably, tipping may be an example of serving the collective self-interest in encouraging good service. *See infra* note 90 (discussing the notion that rational actors sometimes will set aside immediate personal self-interest on the benefit that they will benefit in the long term from collective compliance with a social norm).

57 *See* Goldman, *supra* note 49, at 453–54 (discussing the rationality of taxpaying).

58 Rostain, *supra* note 9, at 1001–02 ("Experimental research . . . seems to suggest that most people are not either fundamentally self-interested or altruistic, but, instead, have a mix of motivations, which different situations can elicit.").

59 Nina Mazar et al., *The Dishonesty of Honest People: A Theory of Self-Concept Maintenance*, 45 J. MARKETING RES. 633, 633–35 (2008).

60 One could, again, incorporate the Mazar-Amir-Ariely approach into rational choice theory simply by treating individuals' self-concept, and the effect of conduct on that self-concept, as a cost of particular courses of action. *See supra* text accompa-

Not surprisingly, in a bar consisting of a variety of human beings,[61] lawyers have the same diversity in attitudes toward professional regulation as baseball players.[62] For some attorneys, the rules do not matter. They will always do what is in their personal best interest, taking into account the potential costs of violating the governing codes. Two separate sets of attorneys are likely to be more obedient. Some (socialized) lawyers simply have a taste for following the rules, even when the mandates are inconsistent with selfish interests. One psychological study suggests that lawyers' moral reasoning generally tends to be formed with reference to laws, rules, and the goal of maintaining social order.[63] Other lawyers follow the rules because the rules inform their view of appropriate behavior or because their own moral codes coincide with the rules. These "clean rational actors" may obey the codes despite their economic self-interest and would act similarly even in the absence of any rules.[64]

The key group, for purposes of professional code drafting, are the lawyers who lie somewhere in between—the groups that, in the baseball context, this Article has termed "complementary" and "nuanced" rational actors. These actors are susceptible to acculturation by regulation and influence by the extreme groups. One might

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nying notes 9, 54. That perspective, however, may downplay the external factors that law and economics analysts prefer to emphasize. Mazar, Amir, and Ariely seem to treat their self-concept theory as a form of behavioral analysis separate from rational choice. *See* Mazar et al., *supra* note 59, at 633–35.

61 *See generally* Fred C. Zacharias, *The Humanization of Lawyers*, 2002 PROF. LAW. SYMP. ISSUES 9, 10 (discussing the historical tendency of the bar and society to act as if attorneys are different than other citizens).

62 The few empirical studies suggest that lawyers do not respond to professional rules in uniform fashion. *See generally* Susan Daicoff, *(Oxymoron?) Ethical Decisionmaking by Attorneys: An Empirical Study*, 48 FLA. L. REV. 197, 202–21 (1996) (analyzing ethical decisionmaking by attorneys); Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 661–62 (1990) (discussing lawyer implementation of rules prohibiting misrepresentation to and full communication with clients); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 382–96 (1989) (analyzing lawyer responses to the confidentiality rule and exceptions).

63 *See* Lawrence J. Landwehr, *Lawyers as Social Progressives or Reactionaries: the Law and Order Cognitive Orientation of Lawyers*, 7 LAW & PSYCHOL. REV. 39, 48–50 (1982) (finding that lawyers conform to Kohlberg's "Stage 4" reasoning). *But cf.* Daicoff, *supra* note 62, at 201 (discussing a study finding that "attorneys did not rely on laws, rules, and regulations as the reasons for their decisions more often than they relied on other rationales").

64 *See* Harrison, *supra* note 9, at 2 (suggesting that the assumption of persons acting on rational self-interest sometimes breaks down because there are "context[s] in which norms and principles push people to do things that seem to make no sense if self-interest is the only goal").

view them as sheep potentially following either herd.[65] They will follow the rules when failing to do so will adversely affect their reputations and when membership in the community of rule-followers (i.e., socialized and clean lawyers) matters. They will follow the cheater herd in situations in which financial self-interest is particularly strong, when the cheaters so dominate their field that rule violations are necessary in order to compete, or when it is unclear that obedience to the rules will have meaningful benefits, reputational or otherwise. Central to the calculus is an empirical question about which theorists and code drafters may disagree; namely, how many lawyers populate the extreme groups? That issue is critical to whether an extreme group (and which extreme group) has the critical mass necessary to influence the intermediate lawyers. It is also germane to whether the group represents a sufficiently important community that the intermediate lawyers will want to be associated with it.

Before undertaking an analysis of past and current regulation of lawyers, one should note that, in the lawyer context, one set of actors who were not particularly significant in the baseball context may play a role. There may be lawyers (some of whom fit into the clean rational actor group) who act—or in some circumstances act—based on their personal view of what is moral, rather than on what the rules tell them. These lawyers engage in this type of moral discretion encouraged by the scholarship of David Luban and others, treating the ethics codes as informative but not dispositive.[66] They sometimes follow the rules—either because they agree with the rules or because they understand that the rules produce good overall results that might be undermined if individuals violate them routinely.[67] But these lawyers reserve the right to violate even good rules when they perceive that doing so would be moral in context.

As Table 2 suggests, our model therefore should be revised to acknowledge this additional category of actor—the "moral cheater"—

65 For a discussion of studies examining the concept of following the herd, and their application in the context of "choice architecture," see RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE 53–71 (2008).

66 *See, e.g.*, DAVID LUBAN, LAWYERS AND JUSTICE, at xxii (1988) (advocating "moral activism" by lawyers); WILLIAM H. SIMON, THE PRACTICE OF JUSTICE 9 (1998) (urging a "[c]ontextual [v]iew" that encourages lawyers to "take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice").

67 Thus, for example, a lawyer in this category might conclude that violating an attorney-client confidentiality rule in a particular case would be moral (e.g., because it would protect the interests of a third person), but that doing so would, when the disclosure is publicized, undermine the ability of the legal profession to achieve the benign purpose of the confidentiality rule—namely, obtaining information from other clients who are secure in the promise of attorney-client secrecy.

who violates the professional rules for moral rather than economic reasons.

TABLE 2. CATEGORY PROCLIVITY

1. Cheater	Classic "bad man"
2. Complementary Rational Actor	Rational, but is prone to fearing the costs or being dubious about the benefits of outlawed behavior
3. Nuanced Rational Actor	Considers the full range of costs, especially reputational effects of outlawed behavior
4. Clean Rational Actor	Values behaving properly and in law-abiding fashion
5. Socialized Person	Follows rules, largely unquestioningly
6. Moral Cheater	Violates rules when doing so would be moral

The new category could be placed at the top or the bottom of Table 2, as it completes the cycle of possible human behavior. For legal-ethics code drafters, the moral cheater presents the same problem as the bad man cheater, because professional rules that are not strictly enforced often will have little impact on his behavior. All the code drafters can do to encourage the moral cheater's compliance is to write good rules that correlate to solid moral principles and are sufficiently discretionary or nuanced to allow the moral cheater to take moral issues into account in individual cases.

That brings us to the essential question: which category of actor have the legal ethics codes traditionally focused upon? The 1908 Canons of Ethics,[68] the first significant code,[69] was a hortatory document that primarily targeted the well-intentioned lawyer: the moral cheater, clean rational actor, or socialized attorney. It called for ideal behavior, such as "obey[ing one's] own conscience and not that of [the] client,"[70] selecting and managing cases so as to serve justice,[71] and restraining clients' questionable conduct,[72] expecting that at least some attorneys would set aside selfish incentives to further these

68 ABA CANONS OF PROF'L ETHICS (1908).

69 The honor of developing the very first legal ethics code was Alabama's, in 1887. *See* Carol Rice Andrews, *The Lasting Legacy of the 1887 Code of Ethics of the Alabama State Bar Association*, *in* CAROL RICE ANDREWS ET AL., GILDED AGE LEGAL ETHICS 7, 7–36 (2003) (discussing the Alabama code).

70 ABA CANONS OF PROF'L ETHICS Canon 15 (1908).

71 *Id.* Canon 31.

72 *Id.* Canon 16.

goals.[73] The Canons were not backed by disciplinary authority,[74] so bad men and complementary rational actor lawyers had little to fear from violations of the rules. Nuanced rational actors who especially valued their reputations might have paid attention to those aspects of the Canons that were universally approved or the violation of which would secure significant public opprobrium.[75] However, during much of the period in which the Canons dominated, little agreement about proper lawyer behavior existed,[76] so a Canon alone was unlikely to set significant reputational standards. For every Canon prescribing aggressive lawyering there was a countervailing Canon mandating other-regarding behavior.[77]

Since the late twentieth century, ethics codes have become increasingly specific,[78] with the goal of making the codes more enforceable.[79] Disciplinary authority and resources have increased dramatically.[80] These enhancements, in effect, have targeted comple-

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73 Elaborating on the events leading to the adoption of the Canons, James Altman notes that the ABA committee report proposing a set of rules expected the Canons to educate lawyers and to motivate them through "'high resolve'" and "'moral suasion'" to "'aspire to conduct themselves in accordance with their special obligations as 'officers of the court.'" James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395, 2414 (2003) (quoting *Report of the Comm. on Code of Prof'l Ethics*, 29 A.B.A. Rep. 600, 603 (1906)).

74 Proponents of the Canons, however, undoubtedly hoped that states would adopt and implement the Canons and thus wrote some of its provisions with enforcement in mind. *See id.* at 2491–99 (describing the drafters' expectations).

75 For example, using client funds without the client's permission (in violation of Canon 11) or committing a crime (in violation of Canon 15). *See* ABA CANONS OF PROF'L ETHICS Canons 11, 15 (1908).

76 *See* Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 3–5 (2005) (discussing the nineteenth and early twentieth century debates over the proper roles of lawyers).

77 *Compare* ABA CANONS OF PROF'L ETHICS Canon 15 (1908) (mandating that a lawyer give "[his] entire devotion to the interest of the client"), *with* Canon 22 (imposing obligations on lawyers as officers of the court), *and* Canon 30 (imposing gatekeeping obligations on lawyers), *and* Canon 31 (same).

78 *Compare* MODEL CODE OF PROF'L RESPONSIBILITY (1983) (outlining vague recommendations), *with* MODEL RULES OF PROF'L CONDUCT (2009) (defining more specific roles with more authoritative tone).

79 *See* Hazard, *supra* note 1, at 1249–52 (discussing the reasons for the legalizations of the codes).

80 *See, e.g.*, Vincent R. Johnson, *Justice Tom C. Clark's Legacy in the Field of Legal Ethics*, 29 J. LEGAL PROF. 33, 70 (2005) (noting substantially increased funding for disciplinary agencies since 1979); Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1, 4 (1998) ("Lawyer discipline systems are better funded . . . than they used to be." (citation omitted)).

mentary and nuanced rational actors by changing the calculus of whether violations represent economically intelligent risks. Such lawyers are most likely to respond to an increasing risk of being identified as unprofessional and thus, punished.

Even the most specific of the modern model codes,[81] however, have not focused on cheaters or win-at-all-cost lawyers, though some of these actors' actions are penalized through unambiguous code provisions and criminal law that the regulators are willing to enforce.[82] It is simply too easy for cheaters to circumvent most ethics requirements; limitations in disciplinary resources prevent the prosecution of routine violations.[83] Moreover, cheaters are sensitive to the corresponding benefits of breaking the rules, including rewards that particular clients offer (such as payment for silence in the face of disclosure obligations).[84] These benefits increase when few lawyers are willing to cheat.

Thus, for example, rules explicitly forbidding solicitation,[85] providing financial assistance to prospective clients,[86] and sharing legal

81 *E.g.*, MODEL RULES OF PROF'L CONDUCT (2009).

82 Professional rules requiring lawyers to safeguard client funds and criminal laws against misappropriating those funds are enforced relatively strictly when instances of misappropriation come to light. *See, e.g.*, *In re* Wilson, 409 A.2d 1153, 1154–55 (N.J. 1979) (implementing a bright-line disbarment rule for misappropriation of client funds).

83 *See, e.g.*, STANDING COMM. ON CLIENT PROT., AM. BAR. ASS'N, 2009 SURVEY OF UNLICENSED PRACTICE OF LAW COMMITTEES 1 (2009), *available at* http://www.abanet.org/cpr/clientpro/09-upl-survey.pdf (survey finding that insufficient funding has made enforcement of unauthorized practice of law rules difficult and reporting six jurisdictions that conceded stated enforcement to be inactive or nonexistent); Lisa G. Lerman, *A Double Standard for Lawyer Dishonesty: Billing Fraud Versus Misappropriation*, 34 HOFSTRA L. REV. 847, 891 (2006) ("Most bar counsel's offices don't have enough money or staff to do more than handle what comes across the transom [i.e., what is reported to them].").

84 *See, e.g.*, Fred C. Zacharias, *Coercing Clients: Can Lawyer Gatekeeper Rules Work?*, 47 B.C. L. REV. 455, 476–78 (2006) (discussing corporate lawyers' likely responses to clients who would not wish them to reveal information subject to a confidentiality exception).

85 *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 7.3(a) (2009) ("A lawyer shall not . . . solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.").

86 *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.8(e) (2009) ("A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter . . . ."); MODEL CODE OF PROF'L RESPONSIBILITY DR 5-103(B) (1980) ("A lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation . . . provided the client remains ulti-

fees with non-lawyers[87] together appear to be designed to foreclose the use of runners and the payment of benefits to persons who bring lawyers lucrative cases or enable lawyers to file fee-generating work. In moral terms, these rules target relatively neutral conduct, except in extreme cases.[88] Recent events involving the Milberg Weiss law firm have illustrated how lawyers following a pure risk-reward approach can and do circumvent the rules.[89] That does not mean, however, that these disciplinary rules—which have rarely been enforced—are without effect on the bar. Many lawyers take the prohibitions to heart; they are clean rational actors and socialized lawyers who simply assume they should follow the rules.[90]

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mately liable for such expenses." (footnote omitted)); CAL. R. PROF. CONDUCT R. 4-210 (1992) (forbidding a lawyer to "directly or indirectly pay or agree to pay É the personal or business expenses of a . . . client," but allowing costs, "the repayment of which may be contingent on the outcome of the matter").

87 *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 5.4(a) (2009) ("A lawyer or law firm shall not share legal fees with a non-lawyer . . . ."); MODEL CODE OF PROF'L RESPONSIBILITY DR 3-102 (1980) (same); CAL. R. PROF. CONDUCT 1-320 (1992) ("Neither a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer.").

88 In other words, there are good arguments that, in the ordinary situation, soliciting, providing money to clients, and sharing fees benefit clients and enhance the availability of legal services. Of course, when this conduct is used as a form of duress or to trick laypersons, the conduct can be offensive.

89 The principals of the Milberg Weiss firm, the preeminent plaintiffs' securities class action law firm, were prosecuted and pled guilty to numerous instances involving securing cases by sharing fees with class plaintiffs without disclosure to the court, despite clear prohibitions in the rules against such behavior. *See, e.g.*, Plea Agreement for Defendant David J. Bershad at 2–3, United States v. David J. Bershad, No. CR 05-587 (C.D. Cal. 2007); *Last Defendant in Milberg Case Pleads Guilty*, N.Y. TIMES, July 15, 2008, at C2.

90 An alternative theory explaining why these rules may be effective in producing compliance is that, as a group, the rules limit competition among lawyers (i.e., in the process of obtaining business) and therefore serve the collective long-term self-interest of the bar as a whole. *Cf.* Sean J. Griffith, *Ethical Rules and Collective Action: An Economic Analysis of Legal Ethics*, 63 U. PITT. L. REV. 347, 350 (2002) (arguing that the current ethical regime can be viewed as method for aligning the incentives of individual lawyers with the collective interest of the profession). Complying lawyers may deem the value of obedience (and therefore maintaining the anti-competitive collective standard) as trumping the cost of business lost to "cheaters" who obtain clients by violating the rules.

One cannot simply conclude that any rule that serves lawyers' collective self-interest can be dispensed with because lawyers will engage in (or avoid) the specified behavior in the absence of any rule. Collective self-interest differs from individual self-interest. Here, for example, in the absence of rules that forbid the purchasing of, or providing inducements for, clients' causes of actions, lawyers will compete for the business. The rules thus arguably serve the purpose of providing a standard embody-

Indeed, many code provisions implicitly acknowledge the possibility of bad men behavior and, interpreted most plausibly,[91] are designed mainly to create a culture in which winning at all costs is not the dominant custom.[92] By offering lawyers discretion, the codes seek to produce a situation in which clean rational actors and socialized lawyers can take the lead in setting the professional norms for the bulk of the bar.[93] This is accomplished by asserting ideals, emphasizing integrity rules that permit moral behavior, and reinforcing external law.

Consider, for example, rules that allow but do not require lawyers to reveal confidential information to prevent a client from committing future harms or crimes.[94] The core confidentiality provisions serve lawyers' economic interests,[95] but the exceptions probably do

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ing collective self-interest that makes it easier for the bulk of lawyers to engage in parallel forbearance.

This Article agrees that code drafters might reasonably consider the possibility of a collective self-interest in compliance when framing particular rules—both in determining whether the potentially anti-competitive effects are justifiable and in assessing how lawyers will respond. The Article suggests, however, that the collective self-interest factor is only one of several that must be taken into account in determining the likely impact of regulation. *See infra* text accompanying note 153.

91 As discussed previously, this Article does not purport to know or describe the actual intentions of the many and distinct code drafters. By using terms referring to the apparent design of particular rules, this Article attempts to offer a plausible explanation for them, which the Article then analyzes with reference to the categories of potential targets previously described. Overall, this Article suggests that the general approach of code drafters in employing a mixture of general and specific (or hortatory, enforceable, and enforced) provisions is justified, but does not attempt to support or reject the precise language of any particular rule.

92 *See, e.g.*, John A. Bargh & Tanya L. Chartrand, *The Unbearable Automaticity of Being*, 54 AM. PSYCHOLOGIST 462, 462 (1999) (arguing that actors' choices are determined largely by "mental processes that are put into motion by features of the environment and that operate outside of conscious awareness and guidance").

93 *See* Green & Zacharias, *supra* note 7, at 282–83 (discussing various possible purposes of according lawyers discretion in the rules); Sunstein, *supra* note 42, at 907, 909 (arguing that "behavior is pervasively a function of norms; that norms account for many . . . anomalies in human behavior" and that when people "appear not to maximize their 'expected utility'—it is often because of norms") (footnote omitted).

94 *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2009) (allowing lawyers to reveal confidential information where necessary "to prevent reasonably certain death or substantial bodily harm"); MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101(C) (1980) (allowing disclosure of "the intention of his client to commit a crime").

95 By allowing lawyers to promise secrecy, confidentiality rules provide lawyers with a competitive advantage over accountants and other service providers who cannot do the same. *See* Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 5–6 (1998) (arguing that confidentiality should be abolished because of its anti-

not. The exceptions anticipate that lawyers will exercise discretion in each covered case, based on a variety of factors, including the potential harm of disclosure or nondisclosure to the client and threatened person, the likely effect of disclosure on attorney-client relationships involving this and other clients, and the nature of the case.[96] Under strict economic analysis, the "bad man" lawyer would sell his right to disclose if the client is willing to pay for it.[97] The lawyer probably could avoid anyone learning of his nondisclosure and likely would never be disciplined for nondisclosure because of the ambiguities in the governing disciplinary rules.[98]

Nevertheless, rules involving confidentiality exceptions have been among the most fiercely debated in the code-drafting process;[99] lawyers seem to care about them a lot. That may be, in part, because discretionary confidentiality exceptions give lawyers a competitive advantage over other professions by allowing them to promise clients secrecy across the board.[100] Yet in practice, lawyers are sometimes prepared to disclose, or threaten to disclose, information against their clients' interests[101] and in accordance with the rules' hortatory purposes. The explanation for this phenomenon goes beyond the exis-

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competitive effects); *see also* Louis Kaplow & Stephen Shavell, *Legal Advice About Information to Present in Litigation: Its Effects and Social Desirability*, 102 HARV. L. REV. 565, 599 (1989) (arguing that confidentiality is in the legal profession's interest); *cf.* Stephen Lubet & Cathryn Stewart, *A "Public Assets" Theory of Lawyers' Pro Bono Obligations*, 145 U. PA. L. REV. 1245, 1246 (1997) (arguing that the ability to promise clients confidentiality is a valuable "commodity" which society gives lawyers in exchange for the right to impose certain social obligations on lawyers).

96 *See* Zacharias, *supra* note 62, at 370–71 (discussing drafter expectations regarding confidentiality exceptions).

97 *See* Kraakman, *supra* note 55, at 70 (positing that wrongdoers and gatekeepers would proceed with misconduct whenever its payoff exceeded their pooled penalties); David McGowan, *Why Not Try The Carrot? A Modest Proposal to Grant Immunity to Lawyers Who Disclose Client Financial Misconduct*, 92 CAL. L. REV. 1825, 1827–28 (2004) (assuming that lawyers implement confidentiality exceptions based on personal economic incentives); Zacharias, *supra* note 84, at 478–480 (suggesting situations in which organizational lawyers will sell or signal their willingness not to implement confidentiality exceptions); *cf.* Kaplow & Shavell, *supra* note 95, at 611 n.120 (assuming that lawyers respond to disclosure rules based exclusively on self-interest factors).

98 Confidentiality exceptions under most ethics codes are framed in discretionary terms, making it difficult for disciplinary authorities to claim a violation as a result of nondisclosure. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.6 (2009).

99 *See* Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 703–23 (1989) (describing the intense lobbying concerning the confidentiality provisions in the 1983 Model Rules).

100 *See supra* note 95.

101 *See* Zacharias, *supra* note 62, at 391–94 (discussing an empirical study showing some lawyers' willingness to disclose information to prevent future harms).

tence of socialized lawyers who follow the rules, because the exceptions do not explicitly *require* disclosures. The driving forces must be the nuanced and clean rational actors, who value conduct that will be approved by the outside world—either for marketing or reputational purposes or because of a desire for respectability.[102] Some socialized lawyers also may implement the confidentiality exceptions because they interpret the provisions according to their underlying spirit or because they look more broadly to the external or moral standards that the discretion in the disciplinary provisions allow (or encourage) them to honor.[103]

In short, drafters of the confidentiality exceptions undoubtedly understand that cheaters and complementary rational actors will take advantage of the exceptions' discretion. The exceptions, however, target the other categories of lawyers. Whether or not the exceptions work as intended is subject to debate.[104] But they clearly seem to be designed to create a setting in which professional norms can develop without being purely legislative in nature.[105] The automatic compliance of clean actor and socialized lawyers is expected to have a "trickle-down" effect by reinforcing a socially popular standard that all lawyers aspiring to join the community of respected attorneys will come to follow.

Other rules, however, apparently hope to influence complementary and nuanced rational actors by creating specific positive incentives or counteracting dangerous incentives that would otherwise be too tempting by increasing the costs associated with inappropriate behavior. Many of the lawyers in the intermediate categories, like marginal baseball players without many endorsements or outside

102 Behavioral economists might explain this conduct as acting in accordance with "bounded self-interest"—the notion that even rational actors "care, or act as if they care, about others, even strangers, in some circumstances." Jolls et al., *supra* note 9, at 1479; *cf.* Posner, *supra* note 9, at 1557 (acknowledging and explaining altruism as "a form of rational self-interest").

103 *See* BEHAVIORAL LAW & ECONOMICS, *supra* note 37, at 8 (arguing that traditional law and economics undervalues the fact that people sometimes "want to be treated fairly and to act fairly"); Zacharias, *supra* note 62, at 403–07 (discussing the possible purposes of according lawyers discretion in the rules).

104 *See* McGowan, *supra* note 97, at 1853–54 (arguing that more of a "stick" is required if confidential exceptions are to be effective in encouraging disclosures).

105 *See* Zacharias, *supra* note 2, at 231–38 (explaining the legislative purposes of codes as setting out clear, enforceable standards that will constrain lawyers' behavior); *see also* Ellickson, *supra* note 11, at 43–44 ("[M]ost law and economics scholars have tended to underestimate [the] importance" of "informal third-party rewards and punishments."); *cf.* Green & Zacharias, *supra* note 7, at 276–86 (noting alternative explanations for permissive confidentiality exceptions).

income, are dependent on continuing in the game, which makes them prone to changes in the risk of punishment.[106] Their reputations can be important for attracting clients (though there is some question about when reputations for professional behavior will help business[107]). They certainly value the maintenance of their licenses. The greater the possibility of enforcement of particular disciplinary rules, the likelier these lawyers are to comply.[108]

The best examples of this phenomenon are rules governing lawyer trust accounts. In the absence of strict, enforced provisions governing the commingling, accounting for, and use of funds held on behalf of clients, lawyers would still be constrained by agency principles and fiduciary requirements. Yet there would be opportunities to interpret the legal obligations loosely, in ways that might benefit lawyers without subjecting them to discipline.[109] Here, the code drafters ostensibly have made the judgment that the danger of abuse by cheaters, complementary, and nuanced rational actors and the risk of misunderstanding by all, even socialized lawyers, is too great. Setting clear trust account rules informs the bar of the nature of each lawyer's obligations. Enforcing the rules strictly controls the actions of most of the complementary and nuanced rational actors, who cannot risk a reputation for misappropriating client funds. The cheaters might be constrained, but again only if the rewards of misappropriation do not justify the abuse in any given case; the cheaters simply are not the targets of the rules.

Understanding the targets of particular ethics rules helps explain, or justify,[110] the ABA tradition of employing a mixture of provisions in

106 Psychologists like Tversky and Kanhneman established long ago that a "framing" principle exists: as a behavioral matter, persons are likely to fear a loss of an existing benefit more than they value an equivalent foregone gain. Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. BUS. S251, S257–62 (1986); *see also* Kraakman, *supra* note 55, at 70 (noting that lawyers "make attractive legal gatekeepers in part because they have large and vulnerable investments in licenses and reputations; they stand to lose too much if their corruption is detected").

107 *See* Fred C. Zacharias, *Effects of Reputation on the Legal Profession*, 65 WASH. & LEE L. REV. 173, 179 (2008) (discussing situations in which lawyers may benefit from a reputation for rule-violating behavior).

108 *Cf.* Cohen, *supra* note 13, at 291 ("[L]egal [ethics] regulation may enhance reputational effects by publicizing misconduct and providing more accurate information about it than would otherwise exist.").

109 For example, lawyers might feel justified in putting funds into their own interest-bearing office accounts with appropriate accounting records and keeping the interest.

110 *See supra* text accompanying note 20.

its model codes, few of which are so clear and routinely enforced that they capture bad man lawyers' activities. There are costs to drafting a highly specific code. Over-specificity tends to limit the scope of code provisions, minimize the importance of introspection by lawyers, and result in a race to the bottom in identifying standards to which everyone can agree.[111] If clean rational actors and socialized lawyers exist and will follow hortatory rules, then culture-setting code-drafting sometimes makes sense. The rules may encourage lawyers to think in terms of principles (e.g., loyalty) rather than legal requirements[112] and can help establish baselines for lawyers' reputations—which in turn will affect, if not determine, the conduct of nuanced rational actors. The law and economics contention that hortatory rules are uniformly valueless therefore is misguided.

At the same time, the recognition that not all lawyers are clean rational actors or socialized also justifies a law-and-economics focus on the real incentives created by the rules. The existence of many complementary and nuanced rational actors means that complete reliance on Canon-like ideals will affect only a limited segment of the bar. The intermediate lawyers may internalize the broad principles taught by the codes, such as lawyers' fiduciary duty and obligations of candor to the courts. But these lawyers' willingness to adjust behavior based on the enforceability and enforcement of the rules and the nature of average practice (which affect how rule violations impact reputations and client-gathering) means that a threat of enforcement at least sometimes needs to be present if the codes are to influence the bar.

Which leads to an essential question: why not simply take a bludgeon-like approach to ethics violations which would encompass all potential targets, as in the current steroids situation in baseball? For example, ban violations, test for steroids, and enforce the rules against violators? Some of the reasons already have been mentioned. First, investigating (i.e., proactively looking for) and prosecuting all violations would be overly resource-intensive. Second, the codes are designed in part to produce morally diligent lawyers, not automatons who follow only specific prohibitions. But rules promoting introspection—the consideration of what behavior is morally appropriate—tend to leave room for disagreement and therefore are difficult to

111 *See* Zacharias, *supra* note 2, at 258–64 (discussing some of the dangers of specificity in code-drafting).

112 *See* Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1, 34–39 (2009) (discussing the ramifications of regulating prosecutorial misconduct through bright-line rules).

enforce.[113] Third, if code drafters attempt to reduce all undesirable behavior to enforceable rules, the number of rules will increase, but at the same time many types of inappropriate behavior currently banned under general proscriptions (e.g., forbidding disloyalty or lack of diligence) will not be expressly forbidden. That may teach lawyers the lesson that the unproscribed conduct is legitimate.

Most important, however, is the reality that ethics codes are a significant factor in creating professional and cultural norms for how lawyers should behave. Here we see a striking difference in the comparison to baseball. The sport's general culture derives from the history of the game and media attention to athletes' behavior. Steroid use, for example, has come under scrutiny because the improved performance of players—which in some sense seems desirable[114]—undermines the comparison to past athletic performance. The media has highlighted this dichotomy for the fans. The resulting demand for cleaner athletes has produced a set of moral or cultural standards that organized baseball, including players, have been forced to follow at pain of losing their fans.

There are no corresponding economic pressures on attorneys. Indeed, the sociology of law is dramatically different. To the extent the media and lay observers focus on the bar, lawyers are quick to point out that obligations to clients trump any moral obligations to engage in other-regarding behavior.[115] The history of legal practice bears out this cultural view, at least to some extent.[116] Thus, in the absence of an ethical culture developed through peer standards and regulation, lawyers can simply hew to client demands or engage in

113 In other words, the more general or open-ended rules are, in order to cover many situations and make lawyers think about how to implement moral or systemic principles, the less likely they are to proscribe conduct specifically enough to satisfy due process requirements or be susceptible to easy proof of violations.

114 Baseball fans, for example, were enamored of the increase in home runs during the steroid era even after some fans came to believe that steroids were the cause of the increased production of sluggers.

115 Lawyers may, for example, use the role of lawyers and strict confidentiality rules as shields against criticism for failing to disclose information about clients that society wishes them to reveal. *See* CHARLES WOLFRAM, MODERN LEGAL ETHICS § 6.1.4, at 243–44 (1986) (discussing self-protective uses of confidentiality rules); Zacharias, *supra* note 62, at 373 ("When questioned about particular decisions, lawyers can hide behind the shield of the rules."). In some circumstances, the codes serve the very function of reinforcing the ability of lawyers to act in ways their role demands that would otherwise seem immoral. *See* Zacharias, *supra* note 15, at 544 ("[A]s a result of systemic needs, the rules must inform [lawyers] of what the extraordinary behavior should include.").

116 *See, e.g.*, LUBAN, *supra* note 66, at xx ("The adversary system . . . excuses lawyers from common moral obligations to nonclients.").

behavior that clients will pay for—behavior that may be socially acceptable, but not always.

The best use of ethics codes therefore is to identify situations in which natural incentives and external constraints (including tort, contract, fiduciary, and criminal law) fail to set a baseline that encourages lawyers to behave in the way moral citizens ordinarily would act, understanding the constraints imposed by lawyers' functions.[117] In these situations, professional rules can help establish socially desirable cultural norms for the bar. General or hortatory rules should be sufficient to induce compliance in the clean rational actor and socialized communities. Whether the standards set by these lawyers' compliance will encourage intermediate lawyers to comply as well may depend on how many lawyers are in the complying group and the magnitude of the immediate incentives towards noncompliance in the category of conduct in question.[118] It may also depend on how morally contestable the standards are[119] and on whether particular rules, if followed by enough lawyers, will serve the self-interest of lawyers as a whole even though cheaters may occasionally benefit from violations.[120] Code

117 *See generally* Zacharias, *supra* note 2, at 226–36 (discussing the role of ethics codes in reinforcing moral behavior by lawyers). When the bar's self-interest already is consistent with the general norms, specific codification and discipline may be unnecessary. Intermediate lawyers will follow self-interested rules, judging that, in the long term, compliance will benefit all lawyers more than it will cost them individually in lost short-term opportunities. *See supra* note 90.

118 Ronald Gilson has analyzed rules requiring lawyers to avoid frivolous litigation partly from the latter perspective. He assumes that some clients will want to engage in strategic litigation and inquires whether lawyers will forgo "income—fees from pursuing strategic litigation on behalf of a client–[or] virtue [through following the rules]." Gilson, *supra* note 5, at 886. He concludes that, historically, lawyers engaging in a cost-benefit analysis often have valued the "public good" over their "private interest," *id.* at 888, but that they can comfortably do so only when informational asymmetries "limit clients' ability to prevent lawyers from acting as gatekeepers." *Id.* at 899. Gilson predicts that, as client sophistication increases, lawyers' financial incentives to please clients will become so strong that fewer lawyers will be willing to emphasize virtue. *Id.* at 901.

119 The closer a professional rule is to a restatement of a universally accepted moral principle—such as, "lawyers should not steal from clients"—the higher the number of clean rational actors there will be (because the rule will comport with the lawyers' internal codes of conduct) and the likelier that intermediate rational actors will follow the lead of clean and socialized lawyers. In these situations, the reputational costs of violations are obvious and dramatic. The concept of "shame" may become meaningful. *See* Sunstein, *supra* note 42, at 942–46 (discussing the influence of shame). External regulation reinforcing the moral command (e.g., criminal or fiduciary law) is also likelier to exist.

120 *See supra* note 90; *see also* Wald, *supra* note 4, at 1050 (discussing the "Posner-Fischel position . . . that professional ideals are created because they serve the inter-

drafters must consider when more precise codes and their implementation through discipline are necessary to prod the less socially conscious lawyers—the complimentary and nuanced rational actors—to obey the aspired-to cultural norms. The committed bad men or cheaters, for the most part, are beyond the reach of ethics codes; the codes apply to them, but only as a mechanism to sanction or delicense them in the event their abuses come to light.[121]

III. RAMIFICATIONS OF TARGETING IN ETHICS CODE-DRAFTING

The analysis above suggests that there are benefits inherent in employing a mix of generalized and specific rules in legal ethics codes. That is not because law and economic theory is wrong, but rather because, in applying it, economists tend to undervalue the culture-based, psychological effects that make many lawyers "good" or rule abiding, even in the absence of stringent disciplinary enforcement of the rules.[122] The developing field of behavioral law and eco-

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ests of the bar and that ideals serve no additional purpose except for the self-interest of the bar"). It is important to note that the fact that an idealistic rule benefits the bar—for example by helping it exact noncompetitive rents—does not always mean the rule is illegitimate or bad. It may also provide social benefits, for example by enhancing the quality of representation or helping lawyers dissuade or prevent socially undesirable client conduct. *See* R.C.O. Matthews, *The Economics of Professional Ethics: Should the Professions be More Like Business?*, 101 ECON. J. 737, 743–46 (1991) (discussing potentially justifiable professional regulation that has anticompetitive effects); *cf.* POSNER, *supra* note 4, at 198 ("Glendon is correct that increased competition . . . makes it less likely that a lawyer will subordinate his client's interests to the lawyer's conception of 'higher' social interests; but it also makes it less likely that the lawyer will subordinate his client's interests to his own selfish interests." (citing MARY ANN GLENDON, A NATION UNDER LAWYERS 79–91 (1994))).

121 *See* Fred C. Zacharias, *The Purposes of Lawyer Discipline*, 45 WM. & MARY L. REV. 675, 685–86 (2004) (discussing the administrative licensing function of attorney discipline).

122 *See* Jolls et al., *supra* note 9, at 1479 ("Self-interest is bounded in a much broader range of settings than conventional economics assumes . . . ."); *cf.* Rostain, *supra* note 3, at 1302 (noting that law and economics-oriented "regulatory legal ethics . . . excludes from consideration lawyers who have internalized legal or moral norms—individuals who, for example, follow rules not because of their desire to avoid sanctions but because they are principally committed to obeying the law").

One excellent exception is Donald Langevoort's and Robert Rasmussen's analysis of whether lawyers overstate legal risks because of their own interests, which would violate rules against incompetence, communication, and conflicts of interest. Langevoort and Rassmussen first analyze the issues in pure law and economics terms, concluding that "asymmetric information allows the lawyer to charge more [by overstating the risks] than she would in a market with complete information" and that the agency costs differ with respect to various payment arrangements. Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmit-*

nomics[123] is beginning to focus scholars on the psychological reasons why targets of regulation act, but behavioral economic analysis has yet to be applied systematically to the personal conduct of lawyers.[124]

Some inducements to improper lawyer behavior—like the added speed and power steroids offered baseball players—may be so powerful that they can change the fundamentals of the game, including lawyers' willingness to abide by professional rules.[125] When ethics code drafters identify such inducements, there is particular reason for them to employ a stringent penalty and enforcement scheme. This will be truest in situations in which lawyers *routinely* have incentives to violate fiduciary obligations, practitioners can justify to themselves that their conduct would be moral, and vague rules are subject to misunderstanding or misinterpretation.

The classic example is conflict of interest rules. Lawyers have financial incentives to accept cases despite a conflict of interest in virtually every instance in which a conflict presents itself. In all but the most egregious conflict situations,[126] lawyers can convince themselves that they can represent multiple clients competently, on the theory that they are able to manage psychological pressures through the exercise of professional detachment.[127] And when conflict rules

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ting Legal Rules, 5 S. CAL. INTERDISC. L.J. 375, 381–82 (1997). They then go further, however, to analyze psychological and sociological reasons why lawyers might overstate risk without being selfishly motivated. *See id.* at 413–36. Langevoort's and Rasmussen's behavioral analysis reinforces the conclusions based on the law and economics approach, leading them to suggest that lawyers and regulators should focus more on the economic, social, and psychological influences on lawyers in assessing and addressing their behavior. *Id.* at 439–40.

123 *Cf.* Jolls et al., *supra* note 9, at 1476 (defining the "task of behavioral law and economics" as "explor[ing] the implications of *actual* (not hypothesized) human behavior for the law," and asking "[h]ow do 'real people' differ from *homo economicus*?"). *See generally* BEHAVIORAL LAW & ECONOMICS, *supra* note 37 (collecting some of the core findings of behavioral economics).

124 *But see* Leonard E. Gross, *Are Differences Among the Attorney Conflict of Interest Rules Consistent with Principles of Behavioral Economics?*, 19 GEO. J. LEGAL ETHICS 111, 115–21 (2006) (considering whether lawyers implementing conflict of interest rules act in accordance with economics principles).

125 This is especially true because "human beings often take actions that they know to be in conflict with their own long-term interests." Jolls et al., *supra* note 9, at 1479. Thus, even rational actors may give in, emotionally, to powerful immediate incentives even though their choice is, for reputational or other reasons, not wise in the long term.

126 The egregious conflict cases are discussed *infra* text accompanying note 129.

127 *See* Gross, *supra* note 124, at 113 ("[S]ocial science literature suggests that a lawyer will rationalize his behavior as being ethical because of the innate human tendency to rationalize one's self-interest as being consistent with morality."); *cf.* Daicoff, *supra* note 62, at 241 (suggesting that lawyers may evaluate questionable ethical

accord lawyers discretion, lawyers may assume that the drafters are leaving to them the entire decision of whether they should take the case.[128] Under these circumstances, it would be foolhardy for ethics code drafters to rely on hortatory or open-textured rules, because all lawyers—from cheaters to clean rational actors and socialized lawyers—would be drawn to dangerous conduct and would not be held back by countervailing influences.

The existing conflict rules acknowledge this reality in part, by providing a laundry list of specific potential conflicts of interest that provisions like Model Rule 1.8 forbid lawyers to undertake.[129] In other respects, however, the drafters of conflict regulation ill-advisedly provide high-minded rules addressed primarily to clean and socialized lawyers—rules that intermediate lawyers can abuse. The basic conflict provision, Model Rule 1.7, allows lawyers to seek client consent to most conflicts and predicates the operation of the rule to cases involving a "significant risk" of impacted representation.[130] The rule also does not signal any independent obligation of the lawyer to avoid seeking consent when a waiver would be unwise for the client.[131] Because the rule's ambiguity reduces the adverse reputational effects of violations, the result is not surprising: intermediate lawyers frequently interpret conflict rules in a way that favors their economic interests. Satellite litigation regarding the substantiality of conflicts has become routine.

There is a separate aspect of the basic conflict of interest provision that has never been adequately considered. Some potential conflicts are so obvious or egregious that virtually all lawyers (except perhaps the first category of bad man lawyers) would agree that accepting the representation would be immoral and improper; for example, representation of adverse clients with confidential information relevant to the other's case. In cases involving such conflicts, the

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behavior more flexibly when it involves their own, rather than another person's behavior).

128 *Cf.* Fred C. Zacharias, *Waiving Conflicts of Interest*, 108 YALE L.J. 407, 432–33 (1998) (arguing that lawyers have an obligation not to accept some cases in which representation seems to be allowed under the conflict rules).

129 Leonard Gross has suggested that the "disparate treatment [in these rules] stems in part from the *Model Rules'* drafters' perception that some conflicts are more likely to cause a lawyer to take advantage of a client than others." Gross, *supra* note 124, at 112.

130 MODEL RULES OF PROF'L CONDUCT R. 1.7 (2009).

131 *See* Fred C. Zacharias, *The Preemployment Ethical Role of Lawyers: Are Lawyers Really Fiduciaries?*, 49 WM. & MARY L. REV. 569, 580–82 (2008) (discussing the potential fiduciary obligation of lawyers to seek consent from prospective clients only when that would be in the clients' best interests).

number of attorneys willing to follow the rule will be significant. One theory explaining this phenomenon may be that the category of clean actors has expanded for this sphere of conduct. Another plausible account is that, because the moral implications are so clear, the reputational impact of violations increases. Whatever the explanation, for these types of conflicts, external constraints—including agency and fiduciary law—reinforce the inclination of lawyers to obey the rules' letter and spirit.

When consensus moral principles and other law (e.g., enforced criminal or agency law), external regulation, or the market already impose constraints on lawyer behavior, the need for strict professional regulation and enforcement is diminished. Indeed, when external constraints are *fully* effective,[132] it makes sense to dispense with disciplinary rules altogether.[133] A rule forbidding lawyers to engage in criminal conduct,[134] for instance, arguably adds nothing.

Yet even where external constraints exist, hortatory or generalized rules may sometimes make sense as a means for developing a culture of introspection and generally moral behavior[135] or as a means of clarifying for lawyers (or reminding them) that their client-

132 One can dispute what "fully effective" means. For example, a disciplinary rule punishing a lawyer for being convicted of a crime is necessarily duplicative but may provide supplemental deterrence. It also makes it easier for the bar to exercise its licensing function through suspensions or disbarment. Whether such a rule is necessary or appropriate depends largely on what one believes are the purposes of discipline. *See* Zacharias, *supra* note 121, at 696–98 (discussing the issue of whether lawyers should be subject to professional discipline for conduct that does not suggest an inability to represent clients well).

133 The existence of such rules may have costs in diverting enforcement resources toward conduct already adequately deterred, disappointing lay observers when violations are not duplicatively punished through discipline, and giving rise to theoretical arguments that the rules somehow change, or weaken, the applicability of the external constraints on lawyers.

134 *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 8.4(b) (2009). *But see* Zacharias, *supra* note 121, at 687.

135 An interesting example is the professional mandate that prosecutors "serve justice." *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2009) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1980) (requiring government lawyers "seek justice"). There is a serious question of whether this general mandate makes sense as written. *See, e.g.*, Zacharias, *supra* note 2, at 248 (discussing the likely effects of the justice requirement). On the best view, however, it encourages prosecutors to consider their ethical obligations more broadly than limited explicit prohibitions on particular conduct. *Cf.* Zacharias & Green, *supra* note 112, at 13 (noting that disciplinary agencies have failed to use the justice requirement "with an eye toward developing prosecutorial standards").

oriented role does not obviate moral behavior.[136] For example, no lawyer would deny that one who assists his client in committing a crime is punishable as an aider and abettor or co-conspirator. A professional rule that forbids assisting illegal conduct, however—even if never enforced because criminal law does the heavy lifting—may serve to remind lawyers that their client-oriented role does not relieve them of the ordinary obligation of law compliance. To the extent code drafters wish to exert influence specifically on intermediate categories of lawyers who are tempted to overemphasize role-differentiation, occasional random enforcement of the professional rule can be as effective as a strict disciplinary regime.

Of course, there is a range of lawyer-practices about which lawyers do disagree substantively; here, the issue is not lawyers' willingness to abide by the codes, but rather a debate about whether the activity is proper. For the most part, clarity in the rules rather than heavy enforcement is needed to resolve such issues—as in the case of rules against lawyers' acquisition of media[137] and other pecuniary interests in their clients' cases[138] or rules forbidding engaging in sexual relationships with clients,[139] all of which lawyers might reasonably justify to themselves as legitimate behavior.[140] Again, a random enforcement policy can reinforce the regulators' intentions, but even that might not be necessary; only the "bad man" lawyer and "moral cheater" are likely to violate an unambiguous, clarifying rule involving these matters.[141]

This Article's analysis concedes a sad fact. Few ethics rules will work to constrain the worst type of potential offenders—the cheaters or complementary rational actors who have strong financial incentives to commit violations. Moral cheaters also are largely beyond the influ-

136 *See* Zacharias, *supra* note 2, at 227–33 (discussing ways in which code provisions can counteract false assumptions, or misguided natural tendencies, that become engrained in lawyers when they internalize their general role).

137 *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.8(d) (2009) ("[A] lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.").

138 *See, e.g., id.* R. 1.8(i) ("A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation . . . .").

139 *See, e.g., id.* R. 1.8(j) ("A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.").

140 *See supra* text accompanying notes 85–87.

141 In effect, the informative bright-line rule serves to reduce the costs of decision making on a case-by-case basis by individual lawyers. *See* McClennen, *supra* note 18, at 231 (discussing "rule[s] of nondeliberation").

ence of the regulators. Yet hortatory rules and standards can affect some lawyers. And to the extent a culture of professional behavior flourishes among clean rational actors and socialized lawyers, the adverse reputational effect of rule violations becomes more significant. In the long run, this may positively influence the conduct of complementary and nuanced rational actors.[142]

Nevertheless, in selecting among code-drafting options, it is important to recognize that there can be a synergistic effect in the behavior of the different categories of actors. Just as rule compliance by clean actors and socialized lawyers can have a cultural effect on intermediate lawyers, so also can the behavior of cheaters.[143] As in the example of the baseball athletes, if a large number of lawyers cheat because doing so generates better contracts or fees, the incentives increase for other lawyers to violate the rules in order to compete.[144] Likewise, if a few cheaters dominate a particular field of practice—as, for example, the Milberg Weiss firm was able to dominate plaintiffs' securities class actions—other lawyers in the field may increasingly feel the need to level the playing field.[145]

Code drafters therefore cannot focus exclusively on the presence of clean rational actors and socialized lawyers and simply hope their compliance will generate a professional cultural climate across the board.[146] The drafters must realistically assess how the bar is divided in the contexts governed by particular rules and must evaluate the

142 *See* Rostain, *supra* note 3, at 1303 ("[T]he success of a regulatory project depends on . . . an infrastructure of shared commitments to law and legal institutions among lawyers and regulators . . . [including] social norms.").

143 *Cf. id.* at 1321 ("[S]ocial norms are just as likely to undercut as to reinforce legal norms.").

144 *See* Gregory S. Kavka, *The Toxin Puzzle*, 43 ANALYSIS 33, 35 (1983) (analyzing how, as a moral matter, a commitment to pursue (or avoid) particular conduct is affected by the relationship between intention and reason); *see also* Reed Elizabeth Loder, *Tighter Rules of Professional Conduct: Saltwater for Thirst?*, 1 GEO. J. LEGAL ETHICS 311, 328 (1987) (arguing that "even lawyers who believe in the ethical superiority of a certain course of conduct will engage in substandard behavior if they perceive other lawyers will so behave without sanction" and that they would otherwise suffer "professional disadvantage").

145 In other words, competing lawyers feel the need to match the cheating law firms in order to identify and enlist class plaintiffs by offering them financial incentives (e.g., a share of the fees) and promising never to collect expenses from them even though the ethics rules in some jurisdictions require clients to remain responsible for the costs of litigation. *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 5-103(B) (1980); *supra* note 86.

146 *See* Langevoort, *supra* note 55, at 1499–500 ("Judges, policymakers, and academics invoke mental models of individual and social behavior whenever they estimate the desirability of alternative rules, policies, or procedures . . . . [I]f these

likely effects of any proposed reform. The more that the regulators can anticipate that lawyers in the complementary and nuanced rational actor categories will fear reputational effects of rule violations and side with the clean rational actor and socialized lawyers, the more the regulators can risk unenforced or underenforced rules.[147] If the drafters anticipate that particular provisions will operate differently with respect to various practice areas, the drafters need to consider adopting more specialized rules.[148]

An interesting example of the synergistic effect of lawyer behavior involves rules limiting legal advertising.[149] For a variety of reasons, these rules are not well enforced.[150] As an empirical matter, cheaters—particularly cheaters in the segment of the bar that represents individual clients in criminal, personal injury, matrimonial, and bankruptcy matters—have little fear of sanctions.[151] This has put significant pressure on lawyers who would compete with the cheaters to advertise improperly as well; non-enforcement both reduces the potential costs of rule-violations for complementary and nuanced rational actors and, by making cheating easier, emphasizes the benefits of violations. Depending on how much business cheaters siphon away, the incentives of intermediate rational actors to compete may become greater than the impetus to preserve reputation and abide by

predictions are naive and intuitive, without any strong empirical grounding, they are susceptible to error and ideological bias.").

147 Predicting reputational effects may require a sophisticated analysis of particular fields of practice and types of lawyers. Zacharias, *supra* note 107, at 181–83. The nature of the reputations sought by lawyers, for example, may differ among lawyers representing corporations and individuals. *Id.* at 190–91; *see also* Gilson, *supra* note 5, at 901–03 (discussing corporate clients' increasing sophistication in evaluating legal work). Some sets of potential clients may have access to lawyers' reputations in the legal community, others may rely on manufactured reputations (such as advertised reputations), and others may not rely on reputations at all.

148 *See* Fred C. Zacharias, *The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation*, 44 ARIZ. L. REV. 829, 840 (2002) (discussing the "fiction" that all lawyers and clients should be governed by the same rules); Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. WASH. L. REV. 169, 207–08 (1997) (suggesting consideration of specialized codes or other lawyer regulation).

149 Although the Model Rules now limit advertising restrictions to "false or misleading" communications, see MODEL RULES OF PROF'L CONDUCT R. 7.1 (2009), some states continue to regulate legal advertising as much as is constitutionally permissible. *See e.g.*, CAL. RULES OF PROF'L CONDUCT R. 1-400 (2008); FLA. RULES OF PROF'L CONDUCT R. 4-7 (2008); OHIO CODE OF PROF'L RESPONSIBILITY DR 2-101 (2003).

150 *See* Zacharias, *supra* note 8, at 984–95 (discussing the enforcement of legal advertising rules).

151 *See id.* at 1005–15 (discussing the empirical effects of underenforcement of legal advertising rules).

the cultural norm set by the rules and the clean rational actor and socialized lawyers.

Regulators who continue to believe in the advertising limitations can respond to the obvious cheating in several ways.[152] They can strengthen the prohibitions in the rules. But advertising proscriptions already tend to be fairly clear. The regulators can enhance enforcement, even if only on a selective or area-of-practice basis, both to increase the costs of violations and to reinforce the reputational consequences of cheating. They can make the judgment that the number of cheaters is not sufficient to produce a behavioral race to the bottom—for example, because the advertising prohibitions, in general, serve the self-interest of the bar as a whole.[153] Or they can adopt a wait-and-see attitude, and evaluate the empirical effects of cheating over time. Under any of these options, the drafters must at some point make an assessment of how, given the demographics of the bar and the power of the economic incentives specifically at issue, suggestible lawyers respond to cheating, on the one hand, and rule-abiding conduct by cleaner members of the bar, on the other.

Because incentives vary among segments of the bar and with respect to different kinds of practice behavior, no single approach to rulemaking can be effective. In the end, ethics codes probably need to represent a considered mix of specific and general rules. Yet it is important that the code drafters remain conscious of why they are taking particular approaches to any given situation; they need to analyze the incentives on lawyers that would exist in the absence of proposed rules, the existing external constraints, and the reputational effects of conduct both in the absence of ethics proscriptions and under different possible formulations of the rules. Both hortatory

152 *See* Note, *supra* note 51, at 2134 (noting that "rulebreaking may be an important feature of rule design"). An alternative, of course, is for regulators simply to recognize that regulating anything but false legal advertising is futile and to do away with the prevailing rules. *See* Fred C. Zacharias, *What Direction Should Legal Advertising Regulation Take?*, 2005 J. PROF. LAW. 45, 66–67 (arguing against restrictive advertising rules).

153 If followed by most lawyers, advertising limitations may reduce overall competition and all lawyers' advertising costs. Intermediate rational actor lawyers therefore may be willing to comply even if that gives a competitive advantage to some cheaters on the theory that, long-term, compliance will make them better off. The viability of this approach may depend on the particular area in which a lawyer practices, because the number of potential cheaters and the remaining business available for compliant lawyers may vary from field to field. Hence, criminal or personal injury practitioners may, for example, assess the benefits of compliance differently than corporate attorneys. This, in turn, might justify rulemakers in differentiating among fields of practice in promulgating the standards.

and incentive-changing provisions sometimes make sense in light of the range of lawyers the rules govern and the overall effects new rules may have on the tenor of the codes as a whole.

CONCLUSION

Ethics regulators, including code drafters and disciplinary authorities, need to be more conscious of whom their regulation targets. Often, new regulation follows or responds to media reports involving sensational misconduct by lawyers, because such reports cause a public furor and demand for change. For example, in the aftermath of the Enron scandals, the bar considered new rules governing the disclosure of confidential information and the obligations of organizational attorneys.[154] Media reports, however, tend to focus on the activities of bad man lawyers, who are unlikely to be affected by any form of new rule that is likely to be adopted.[155] Given the limited investigative and disciplinary resources available to the bar, ethics codes are an unlikely vehicle for counteracting the behavior of cheaters. In the post-Enron example, the new rules that were adopted—a discretionary exception to confidentiality and a rule requiring organizational lawyers to go up the ladder unless doing so would not be in their clients' interests—would not have changed the conduct of the Enron lawyers one whit had they been in force.[156]

This Article has suggested that, in fact, ethics provisions fruitfully can, and frequently do, target categories of lawyers other than the

154 For a full discussion of the ABA proposals, see Susan P. Koniak, *When the Hurlyburly's Done: The Bar's Struggle with the SEC*, 103 COLUM. L. REV. 1236, 1254–56, 1263–64 (2003). *See also* Roger C. Cramton, *Enron and the Corporate Lawyer: A Primer on the Legal and Ethical Issues*, 58 BUS. L.J. 143, 173–76, 180–82 (2002) (explaining the systemic nature of misconduct and reporting problems post-Enron and recommending that state courts implement ABA proposals).

155 In other words, bad-man lawyers will engage in lucrative improper conduct unless the chances of being detected and punished exceed the likely gains.

156 *See* Koniak, *supra* note 154, at 1247 ("The ethics rules prohibit 'knowing' assistance of illegality. Can lawyers ever 'know' that *x* behavior will violate the law?"); *Developments in the Law: Corporations and Society*, 117 HARV. L. REV. 2227, 2246 (2004) (arguing that, because the post-Enron SEC and ABA rules are permissive, "lawyers will have few incentives to exercise their reporting right; indeed, lawyers will have strong economic incentives to please the managers of their current or potential clients by refraining from reporting, even if their inaction allows questionable activity to go unchecked"); *cf.* Raxak Mahat, *A Carrot for the Lawyer: Providing Economic Incentives For In-House Lawyers In a Sarbanes-Oxley Regime*, 21 GEO. J. LEGAL ETHICS 913, 922–25 (2008) (arguing that the Sarbanes-Oxley regulations do not provide in-house corporate lawyers with sufficient incentives to carry out their ethical duties); Regan, *supra* note 48, at 941–42 (noting the predominant importance of organizational culture in determining the behavior of lawyers with the organization).

"bad men." Rules sometimes are explicitly premised on high-minded claims by drafters—for example, that attorneys naturally will act loyally to their clients and that specific prohibitions against disloyal acts therefore are unnecessary. These idealistic sentiments actually make sense when the rules in question target categories of well-intentioned lawyers or those with preexisting (e.g., client-driven) incentives that are consistent with loyalty. But such targeting is justified only if the code drafters have made a conscious assessment that well-intentioned lawyers are sufficiently numerous or influential that their behavior will set a cultural norm that rational actors who are not strictly "bad men" will follow. Code drafters should be more careful than they have been in the past to identify their empirical or calculated assumptions about who intermediate lawyers are most likely to emulate (i.e., cheaters or socialized lawyers).[157]

As in the baseball context, one cannot overemphasize the importance of the empirical calculations. A well-intentioned but unenforced or underenforced regulatory policy that leaves most of the rewards in the hands of cheaters can be worse than no policy at all; it may drive intermediate actors into the cheating camp while creating the impression that the issues are being addressed. On the other hand, avoiding regulation because a few bad men might benefit from it can be equally short sighted. There is no easy answer to the question of when informal, hortatory, or underenforced rules will have their desired effect. In theory, there may be a tipping point—or "optimal level of deviation just below the threshold at which collective harm begins to set in"[158]—but rulemakers cannot hope to identify that tipping point accurately in every case. They can only be aware of the countervailing considerations and recognize the significance of the behavioral and numerical issues.

Identifying the targets of regulation can help determine how economic incentives, and which incentives, need to be changed with respect to particular provisions. A direct focus on intermediate lawyers—the risk-averse complementary rational actors and nuanced

157 One could recharacterize the questions this Article addresses as: What is rational behavior? Do lawyers really act as self-interested rational actors? When is it appropriate to allow individual lawyers not to follow the rules? However one frames the issues, the bottom line is the same. One should not deem rules automatically invalid simply because they do not have full coercive force. This conclusion leaves a horrific empirical question open for rulemakers; namely, how to evaluate the likely effects of hortatory or unenforced rules and, therefore, when to use such rules. But without a realistic view that this is the key question that needs deciding, the rulemakers have no hope of producing meaningful professional rules.

158 Goldman, *supra* note 49, at 455.

rational actors—may prompt a particular rule formulation. That approach sometimes will suggest the need for wording that can change the risk assessment of calculating lawyers. More often, however, it will suggest something about enforcement of the principles underlying a rule, which in turn will give rise to a different kind of language that the rule should include.

Unfortunately, code drafters historically have divorced the substance of the rules from enforcement considerations in their thinking. When they have considered enforcement at all, they have limited themselves to determining how specific rules should be. In fact, there are many ways in which language in the rules can enhance enforcement possibilities. The rules can express the code drafters' intentions about how the rules are to be interpreted, particularly when they encompass lawyer discretion.[159] The codes can include requirements that facilitate evidence gathering[160] or proof of violations.[161] Comments can identify and clarify what behavior is inappropriate.

What makes the code-drafting enterprise complicated is the existence not only of various categories of lawyers, but also the fact that lawyers within categories may respond in varying ways to rules (and enforcement of rules) governing different contexts. The analogy to baseball is again apt. Some players and managers work their way into baseball lore by finding ways to take full benefit of favorable rules[162] and by cheating on a day-to-day basis.[163] Yet Tony LaRussa, the cur-

159 *See* Green & Zacharias, *supra* note 7, at 312 (analyzing the difficulty in identifying the code-drafting intentions underlying discretionary rules).

160 *See, e.g.*, Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1366–73 (1995) (arguing that including a professional requirement that lawyers memorialize conversations with their clients about ethical limitations on partisanship would facilitate proof of how lawyers actually behaved).

161 *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4) (2009) (requiring that lawyers provide information and obtain consents to conflicts of interest in writing).

162 Perhaps no modern manager has been more willing to use the rules to his advantage than Billy Martin. *See* Derek Zumsteg, *Billy Martin: A Cheater's Cheater*, ESPN.COM, Aug. 13, 2007, http://sports.espn.go.com/espn/cheat/news/story?id=2967031 (describing Billy Martin's manipulation of the rules and willingness to violate them); *see also* Rick Weinberg, *Moment 67: Pine Tar Nullifies Home Run So Brett Goes Ballistic*, ESPN.COM, http://sports.espn.go.com/espn/espn25/story?page=moments/67 (last visited Dec. 10, 2009) (describing Martin's nullification of a winning home run by George Brett on the basis of a violation of an obscure rule that limited pine tar on bats to eighteen inches from the bottom).

163 Perhaps the best example of cheating behavior is that of the 1890s Baltimore Orioles, who used to hide a baseball in the long grass and, when a ball in play rolled past a player in a poorly lit stadium, would use the hidden substitute to throw or tag out a runner. *See* DAVID NEMEC, THE OFFICIAL RULES OF BASEBALL ILLUSTRATED 104 (2006) (describing the practices of the Baltimore Oriole outfielders); Am. Cultural

rent manager of the St. Louis Cardinals, received equally favorable attention for acting as a clean rational actor by not taking advantage of a rule that should have caused the ejection of the opposing pitcher in a key game. LaRussa believed that such action would not have been in the spirit or tradition of the World Series.[164] Likewise, throughout the history of baseball, players have been glorified for aggressive (and theoretically illegal) play that, viewed realistically, has placed other players in danger—for example Ty Cobb's slides with spikes high[165] and Bob Gibson's pitches at an opposing batter's head[166]—while other players are more socially minded about risking other players' health.

The regulators of lawyers must deal with a parallel situation in which they must predict how lawyers will receive and respond to regulatory mandates in a variety of situations, without assuming that all attorneys act in the "bad man" mold. As Donald Langevoort has written, "Nearly all interesting legal issues require accurate predictions about human behavior to be resolved satisfactorily."[167] Context, lawyers' personalities, and fields of practice all affect the calculus, in addition to economic incentives. This reality calls for flexibility in professional rulemaking. It also helps explain the mixed nature of the prevailing ethics codes.

Studies Program, Bowling Green State Univ., The Baltimore Orioles, http://www.bgsu.edu/departments/acs/1890s/baseball/orioles.html (last visited Dec. 8, 2008) ("The Baltimore Orioles would do anything to win whether or not it was legal."); *see also* Baseball-Bats.net, Baseball Bat Memories, http://www.baseball-bats.net/baseball-bats/baseball-bat-memories/index.html (last visited Nov. 29, 2009) (describing Albert Belle's use of an illegally corked bat and his team's attempt to steal the bat from the umpires' locker room before it could be tested).

164 Suspecting that opposing pitcher Kenny Rogers had a banned substance, such as pine tar, on his hand, Tony LaRussa requested between innings that he wash his hands rather then having his hands inspected during play, which would have resulted in Rogers' ejection and likely suspension. Ethics Scoreboard, Tony Larussa's World Series Ethics, Oct. 26, 2006, http://www.ethicsscoreboard.com/list/larussa.html.

165 *See, e.g.*, DAN HOLMES, TY COBB, at xxi, 126 (2004) (describing Ty Cobb's willingness to deliberately collide with or spike fielders in order to dislodge a baseball).

166 *See* Jonah Keri, *Forty Years Later, Gibson's 1.12 ERA Remains Magic Number*, ESPN.COM, Feb. 7, 2008, http://sports.espn.go.com/espn/blackhistory2008/columns/story?page=keri/080221 ("[D]ig into the box against Gibson, and he'd stuff a fastball in your ear.").

167 Langevoort, *supra* note 55, at 1499.