Rules, Rationality, and the Significance of Standpoint

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Conventional wisdom holds that when an all-things-considered best course of action diverges from an action dictated by a rule, it is irrational rule-worship to follow the rule. The author, expanding on his previous work, challenges this traditional view by arguing that even if we assume that rule-following is irrational from the perspective of a rule-subject, it can still be rational for a rule-maker or rule-enforcer to impose the rule on him. To see this we must differentiate between the rationality of compelling behaviour in others and the rationality of engaging in one's own behaviour. Though it may be irrational to follow rules to mistaken conclusions, this implies little about those who make, apply, interpret and enforce rules. A rule-maker must predict a range of future behaviours when making a rule and may conclude that its benefits outweigh the costs of bad outcomes on particular occasions. In such a case, it is irrelevant whether the rule-maker has superior information or expertise—the only relevant aspect is whether she thinks she does. Objective mistakes will not be apparent to the rule-maker; hence, from her perspective, it would be irrational not to impose rules in given situations. In making rules, the rule-maker attempts to maximize control over multiple mistaken subjects acting on a belief that rule-subjects are mistaken about the lack of their own error. The author argues that the approach outlined in his paper addresses the traditional reluctance to looking at rule-following from the perspective of rule-makers. If this new perspective on the rationality of rule-following is taken more seriously, greater insight into the connection between rule-following and coercion can be achieved.

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Introduction

Can it ever be rational to follow a rule? Without doubt it may be rational for a person to follow a rule if she is subject to some sanction for failing to do so, and equally without doubt it is often rational to do what a rule happens to require even if one is not doing it because of the rule. But is that all there is to it? If no punishment or other sanction is likely to result, and if one's rule-independent judgment is inconsistent with what the rule commands, is it rational to follow the rule when one's best all-things-considered judgment would indicate an action or decision different from the action or decision indicated by the rule?

A rich philosophical and jurisprudential literature has tended to answer this question in the negative. When a genuinely all-things-considered course of action diverges from the action dictated by a rule, it is often argued, then it is nothing more than irrational rule-worship to follow the rule, or even to take the fact that the rule has indicated a course of action as a reason, even if not a conclusive one, for taking that course of action. Indeed, this rule-skeptical position has not only been the conventional philosophical and jurisprudential wisdom, but it has also informed a great deal of practical thinking about how legal actors should, sanctions aside, understand the effect of a rule that they believe in their heart of hearts is producing an erroneous outcome.

My goal in this paper is to challenge that conventional wisdom, but not by showing how it might be rational for a subject of a rule to follow it to its seemingly mistaken outcome. That view has been espoused influentially in recent years by Joseph Raz, Edward McClennen, Alan Goldman, and others, and I have no wish to walk on these well-trodden paths. Rather, I want to further develop an argument that I have suggested more briefly (and more shallowly) in earlier writing. I argue that even if we assume the irrationality of rule-following from the perspective of the subject of a rule, it can still be rational for the maker or enforcer of a rule to impose a rule on a subject whose rational behaviour would lead her to disregard it. In this respect, rationality is in the eye of the beholder, not in the sense that rationality is not in theory
objective,¹ but in the sense that the question of the rationality of compelling behaviour in others is very different from the question of the rationality of one's own behaviour.²

I. On the Irrationality of Rule-Following

For many years conventional wisdom held that rule-following was irrational. As a preliminary, therefore, it will be useful to be as precise as possible about just what such a seemingly skeptical claim entails. Initially, we should put aside the question of punishment and other types of sanctions for rule-breaking.³ Although it is true that prudential considerations such as these loom large in most people's decisions about whether or not to follow a rule, there are many instances in which such considerations are absent.⁴ The frequency of such instances could be the

1. Whether one should actually be a non-objectivist about rationality is an interesting topic in philosophy and in law as well, but it is not my topic here.
3. And so too with respect to potential rewards for rule-following. John Austin, who is most associated with the view that the normative force of a rule is a function of the sanctions attached to violating it (John Austin, The Province of Jurisprudence Determined, Wilfrid E. Rumble, ed. (Cambridge: Cambridge University Press, 1995) at 21-25), drew a sharp distinction between threatened sanctions and promised rewards, at 23-24. However, such a distinction seems unfaithful to the realities of human behaviour and motivation. Throughout this paper, therefore, I will treat the threat of punishment for non-compliance and the promise of reward for compliance as minor distinctions within the larger category of prudential reasons for complying with a rule.
4. International law is a particularly salient example, but there are numerous others, large and small, local and global. One of the most important domains in which the
topic for interesting research, but there should be little doubt that there are some such instances, and in any event the literature with which I engage here tends largely to put the questions of rewards and punishments to one side.\footnote{Whether it is a mistake to ignore sanctions in legal theorizing is an important question, although not one on which I focus in this paper. See Danny Priel, "Sanction and Obligation in Hart’s Theory of Law" (2008) 21 Ratio Juris 404; Ekow N. Yankah, "The Force of Law: The Role of Coercion in Legal Norms" (2008) 42 U. Rich. L. Rev. 1195; Frederick Schauer, "Was Austin Right After All?: On the Role of Sanctions in a Theory of Law" 23 Ratio Juris [forthcoming in 2010] [Schauer, "Was Austin Right After All"].}

Prudential considerations and tangible incentives aside, the question before us is whether people should follow the rules that law or society (or some particular institution) has set out. To understand this question, we must distinguish between following (or obeying) a rule and engaging in behaviour that just happens to be consistent with a rule.\footnote{See P.H. Nowell-Smith, \textit{Ethics} (Oxford: Blackwell, 1957) at 198.} When we follow a rule we do something because of the rule,\footnote{See Joseph Raz, "The Obligation to Obey: Revision and Tradition" (1984) 1 Notre Dame J.L. Ethics & Pub. Pol’y 139; Donald H. Regan, "Reasons, Authority, and the Meaning of "Obedy": Further Thoughts on Raz and Obedience to Law" (1990) 3 Can. J.L. & Jur. 3.} but many instances of rule compliance do not fit this mould. I assume that my state—the Commonwealth of Virginia—prohibits cannibalism, but whether it does or not is of no moment to me, because the existence of the prohibition has no effect on my activity. Even if cannibalism were entirely legal, it is simply not an activity in which I could imagine engaging. More realistically, most people refrain from rape, murder, assault, larceny, fraud and the like because they find these behaviours morally wrong and personally unappealing. For such people, the fact that there is a legal rule prohibiting these activities is of no consequence. For the rationally normal sanctions for rule-breaking or rule-following are absent is constitutional law, where it is often the case that high legislative and executive officials who violate constitutional rules are subject to no sanctions (other than the potential nullity of what they have done). See Frederick Schauer, "Ambivalence About the Law" (2007) 49 Ariz. L. Rev. 11. Much the same can be said about judges, whose asserted obligation to follow a seemingly binding legal rule is not backed by sanctions of any conventional sort. See Leslie Green, "Positivism and the Inseparability of Law and Morals" (2008) 83 N.Y.U.L. Rev. 1035.

5. Whether it is a mistake to ignore sanctions in legal theorizing is an important question, although not one on which I focus in this paper. See Danny Priel, "Sanction and Obligation in Hart’s Theory of Law" (2008) 21 Ratio Juris 404; Ekow N. Yankah, "The Force of Law: The Role of Coercion in Legal Norms" (2008) 42 U. Rich. L. Rev. 1195; Frederick Schauer, "Was Austin Right After All?: On the Role of Sanctions in a Theory of Law" 23 Ratio Juris [forthcoming in 2010] [Schauer, "Was Austin Right After All"].
and morally motivated agent, the existence of legal rules prohibiting irrational or immoral conduct has no effect on the agent’s decisional calculus. As a result, the important and interesting cases of putative rule-following are those in which the existence of a rule might actually make a difference in the deliberation and decision-making of the rule-subject. The clearest examples of rule-following (or not) are thus ones where the subject believes that the best all-things-considered course of action is one other than that indicated by the rule.\(^8\) To follow a rule is, most clearly, to take the prescriptions of the rule as providing a reason for doing something. Such reasons may be omnipresent, but they will make the most difference, and be most apparent, when there are reasons, including otherwise determinative ones, for doing something other than what the rule indicates.

But if rules, including legal rules, require their subjects to do something other than what they would otherwise have done, then why (sanctions aside) should those subjects follow the rule? The easy answer is that the properly motivated subject of a rule will recognize that rules have value as rules, such as by promoting desirable predictability, reliance and uniformity. The properly motivated (rationally and morally) subject will consequently take the value of having a rule \textit{qua} rule into account when deciding whether to follow it. She will, for example, recognize that departing from the rule may encourage others to depart from it as well, even when their reasons for doing so are less noble. In calculating the harm of departing from the rule, therefore, the rational subject will not only consider her own proper (\textit{ex hypothesi}) departure from the rule, but will also take into account any predicted improper departures from the rule that her proper departure may cause.\(^9\) Indeed, the thoughtful subject of a rule will also consider the

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\item \textit{8.} I say “clearest examples” because these are not the only examples. One can follow a rule by taking the indications of rules as reasons for action even if on some (or, conceivably, all) occasions those reasons are outweighed by other reasons, and as a consequence the resultant behaviour is not consistent with the rule. (I am indebted to Bruce Chapman for raising this issue and for profitable discussions of it.)
\item \textit{9.} Thus it is important for the putative rule-breaker to consider slippery slope effects, dangerous precedent effects and the even larger phenomenon of path-dependence. See Frederick Schauer, “Slippery Slopes” (1985) 99 Harv. L. Rev. 361; Gregory Trianosky, “Rule-Utilitarianism and the Slippery Slope” (1978) 75 J. Phil. 414.
\end{itemize}
effects of departing from the rule on her own future behaviour.\textsuperscript{10} If I violate traffic laws only when I believe that I have genuinely and accurately calculated that it is wise, all things considered, to do so, will these justified violations make it psychologically easier for me, in the future, to violate traffic laws when it is unwise? Will I violate traffic laws, for example, when I am simply in a hurry rather than impelled by a genuine emergency? The sophisticated rationalist as rule-subject will thus take into account not only the costs and benefits for her of following or violating the rule on this occasion, but will also take into account the full range of secondary or downstream costs and benefits that her behaviour with respect to the rule on this occasion will produce.\textsuperscript{11}

But suppose we now consider the maximally sophisticated rule-subject—the one who takes into account in every case all possible negative secondary effects of violating the rule,\textsuperscript{12} but still concludes that on balance it is best on this occasion to violate it. It is at this point in the analysis—the point at which the rule-subject understands and accounts for the value of having rules—that the traditional view holds that under these circumstances it would be irrational to follow the rule, and would

\textsuperscript{10} See Thomas Schelling, "Enforcing Rules on Oneself" (1985) 1 J.L. Econ. & Org. 357.
represent little more than blind rule-worship. Having factored into the decisional calculus all of the defeasible reasons for having rules, and all the secondary effects of not following the rule, and having nonetheless concluded that it is correct not to follow the rule on this occasion, only an irrational reification of rules qua rules would lead the rational rule-subject blindly to follow the rule to what she is convinced, all things considered, is the wrong conclusion. Or so it is commonly argued.

Although much of the existing literature about the supposed irrationality of rule-following has been directed to the abstract question of the role of rules in utilitarian or otherwise consequentialist moral theory, a parallel literature makes essentially the same claims of irrationality in the more concrete context of the alleged obligation to follow the rules of law. If we substitute “law” for “rules” in the philosophical rule-following literature, the structure of the issue remains the same. Thus, when the law tells its subjects to do something that on the particular occasion appears to them to be wrong, and if after taking into account the value of having law, and if again taking into account all of the secondary effects of a particular act of law-breaking, the action the


14. In addition to the authorities cited ibid., see Nowell-Smith, supra note 6 at 198-213.
law commands is still thought to be wrong, then, it is said, it is irrational law-worship to follow the law rather than to do the right thing.\textsuperscript{15}

Whether in the context of particular rules or with respect to those systems of rules we call "law", therefore, a longstanding view has challenged the rationality of rule-following. Proponents of this view recognize the important heuristic\textsuperscript{16} and coordinating\textsuperscript{17} functions of rules, as they do for authority in general and law in general. However, for them the value of a rule is set and bounded by its heuristic value and coordinating value. For example, heuristics are, after all, under- and over-inclusive generalizations, and as such they will not necessarily indicate the correct result on every occasion. When we know from information, other than that supplied by the heuristic itself, that the heuristic does not point to the optimal outcome on a particular occasion, then we should not be committed to the result indicated by the heuristic. This is especially so given that the heuristic (or "rule of thumb")\textsuperscript{18} is, only a tool to get us to the optimal result. When we have


\textsuperscript{18}See Schauer, \textit{Playing By the Rules}, supra note 12, at 104-11. See also D. S. Shwayder, \textit{The Stratification of Behaviour: A System of Definitions Propounded and Defended} (London:
good reason to believe that with other tools we have identified the
optimal result without using the heuristic, and despite the indications of
the heuristic, then following the heuristic is the height of irrationality.
Or so a long-standing tradition believes.

II. Challenging the Traditional View

The traditional view has come under frequent attack for almost as long
as it has been around, but the frequency of these attacks appears to have
accelerated in the last several decades. Perhaps this acceleration is a
consequence of the fact that following rules seems to be such a large part of
our decision-making existence that rejecting them as irrational appears
counter-intuitive. And perhaps the challenge to some of the skepticism
about the moral or rational force of rules *qua* rules has come simply from
the recognition that defending the rationality of rule-following also has a
long and distinguished provenance, such that it is now difficult to say
whether it is rule-following or so-called philosophical
[philosophical anarchism](#)
that is best characterized as the conventional wisdom.

With respect to that aspect of rule-following focused specifically on
following the rules of law—the obligation to follow the law just because it
is the law—the tradition that it is both rational and right to do so dates back
at least as far as Plato. In the Apology and the Crito, Socrates acknowledges
the obligation to obey even those laws that he fervently believes have
produced an erroneous outcome in his own case.

More recently, a host of more modern political and philosophical contributions have also defended
the principle that there is a *prima facie* moral obligation to obey the law.
This principle is sometimes defended on the grounds that such obligations

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Routledge & Kegan Paul, 1965) at 235, n. 4; B.J. Diggs, “Rules and Utilitarianism” (1964)
1 Am. Phil. Q. 32; Smart, supra note 11 at 348-54.
19. ‘Philosophical anarchism’ is the perhaps infelicitous label commonly applied to the
view that there is no obligation, not even *prima facie*, to obey the law *qua* law, or with
the demands of the political state. Simmons, supra note 15, and Smith, supra note 15, are
central examples. Wolff, supra note 13, is responsible for the label.
by Benjamin Jowett (New York: The Colonial Press, 1900) at 11; Plato, “Crito; or, the
Duty of a Citizen” in Jowett, *ibid.* at 41.
are implicit in the social contract, and sometimes by arguing that they arise out of a contract-independent obligation of fair play or mutual respect. More recently, arguments for accepting a prima facie obligation to obey the law just because it is the law have been based on the Hobbesian idea that law can help to solve the problems of cooperation and coordination without which the political state would function much less effectively, if at all.

Many of these arguments for recognizing a moral obligation to obey the law, have close affinities with another body of contemporary literature, arguing that it is rational in multi-player or intrapersonal settings to follow rules even when we think they are mistaken, or have generated erroneous outcomes on particular occasions. Other arguments focus on how it can


be rational for an individual subject to follow rules blindly when he has reason to believe that the rules were made by a person or institution sharing the subject's goals and is better situated to determine what actions and decisions will best serve those goals. These various arguments are important and challenging, and may well establish that from the perspective of the rule-subject it can indeed be rational to follow rules even when it appears, all things considered, that to do so will produce the wrong outcome or the wrong decision. Nevertheless, in what follows I will assume that these arguments are unsuccessful and that from the perspective of the subject it is in fact irrational and sometimes immoral to follow rules or laws when it appears that doing so will generate an irrational, morally erroneous or otherwise bad result. I make this assumption of the irrationality of rule-following not only to make the task that follows more challenging, but also, and more importantly, because the view that legal rules that generate silly, absurd, immoral or otherwise erroneous results ought not to be followed is these days so much the dominant position.

promises or the rationality of abiding by our intentions. See, e.g., Michael Bratman, *Intentions, Plans, and Practical Reason* (Cambridge: Harvard University Press, 1987); David Gauthier, "Assure and Threaten" (1994) 104 Ethics 690. Thus for Bratman and others the arguments for abiding by plans or rules are as applicable to intrapersonal intertemporal choice as they are to interpersonal intertemporal choice.


26. I assume that morality is a subset of rationality and not coextensive with it, but this is a contested view, albeit not one relevant here. For discussion and sources, see Larry Alexander & Frederick Schauer, "Law's Limited Domain Confronts Morality's Universal Empire" (2007) 48 Wm. & Mary L. Rev. 1579, 1580, n.1 [Alexander & Schauer, "Law's Limited Domain"].

27. And thus I enthusiastically subscribe to the view that one of the hallmarks of intellectual honesty is the effort to make things as difficult as possible for one's own ideas.

But that it may be irrational to follow rules to their mistaken conclusions says little about the status of rules from the perspective of those who make, interpret and enforce them, and it is to that that I now turn.

III. On the Rationality of Doing What Seems Irrational

So let us assume, sanctions aside, that when the rule indicates an erroneous result, and after discounting for the possibility of mistake, and after taking into account various secondary effects of rule violation, following the rule (from the perspective of the subject) is simply irrational. What then does this say about or to those who make, apply, interpret and enforce rules?

The short answer, I want to claim, is—nothing. But the short answer needs arguments and deserves elaboration. So let us imagine first the case not of a rule, but of direct and particularized intervention in the behaviour of another. Suppose, for example, that I am at one end of a subway platform late in the evening. A man and a woman are at the other end of the platform, and there is no one else to be seen. It appears to me that the man and the woman are acquainted with each other and that the man is commencing a physical assault on the woman. I must decide whether to intervene, and let us assume that, perhaps for reasons of imprudence or perhaps because I am more physically formidable than the assailant, I disregard questions of personal safety. Still, it might be the right thing to intervene, or it might be the wrong thing. The man and the woman might, after all, only be playing, or rehearsing for a theatrical production, or there might be some other way in which I have misperceived the situation. But after considering all of these possibilities, I come to the conclusion, discounting for the probability of my own error, that an assault with bad consequences for the victim is commencing, and I must consider whether to intervene in order to prevent it. But of course in doing so I will be intervening in, and

Press, 1991); Lon L. Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart" (1958) 71 Harv. L. Rev. 630.
interfering with, the choices, decisions and behaviour of another, the apparent perpetrator of the assault.

Once we put aside considerations of personal safety, this scenario is not what most people would consider a difficult case. It seems plainly morally correct to intervene, and it seems rational as well, at least if we assume a non-hedonistic definition of rationality that allows (and probably commands) us to consider the aggregate welfare consequences of any decision and not simply the consequences to ourselves. Thus we start with the straightforward proposition that intervening in the decisions of others—or preventing them from carrying out their chosen actions—is sometimes the right thing to do.

But although it is sometimes right to intervene in the decisions of others and keep them from carrying out their plans, we of course lack the faculties of an omniscient observer. Thus, what may appear to potential interveners as an irrational, immoral and dangerous action by another may appear to the one against whom we are considering intervention as a rational action on the basis of all relevant factors. 29 From the intervener’s perspective the actor’s judgment is erroneous, but from the actor’s perspective the intervener’s decision to intervene is erroneous. 30 Lacking an omniscient observer, the hardly unfamiliar scenario is one in which some behaviour appears all-things-considered rational to the actor, but all-things-considered irrational to the potential intervener. Indeed, the claim is in fact a stronger one. If intervening will produce more good than non-intervening, it is irrational not to intervene to prevent behaviour that the actor (erroneously, from the intervener’s perspective) believes is compelled by rationality.

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29. Nothing of consequence for the argument turns on whether there is a third party involved or not. The question is whether intervention is right or wrong, rational or irrational, moral or immoral. It would be the same question even if, from somewhat different (but irrelevant here) philosophical perspectives, we were considering intervening to keep someone from harming himself.

30. The claim in the text is compatible with the possibility that the intervener and the actor simply have different goals rather than each perceiving the other as behaving irrationally. Even if the actor is rationally pursuing his goals, the intervener will rationally intervene if the actor’s rational pursuit of his goals is inconsistent with the intervener’s rational pursuit of her goals.
This scenario presents an individual case not governed by rules, but we can understand the same issue, and the same asymmetry, in the context of rules. When a rule-maker makes a rule, she predicts a range of future behaviours on the part of the rule-subjects. Those behaviours may well include multiple instances in which the rule-subjects believe that the rule produces a bad outcome in some particular case, but in which the rule-maker, were she there, would conclude that the rule-subject's belief that the outcome is a bad one is itself erroneous.

Rules are by definition general, controlling multiple instances of conduct or decision. But from the perspective of a rule-subject, the generality of the rule is both invisible and (arguably) irrelevant. This is because what the rule-subject perceives is a particular conflict between what she believes is the all-things-considered (including the value of having a rule) correct thing to do on this occasion and what the rule, erroneously from her perspective, is telling her to do. Yet seen from the vantage point of a rule-maker, rule-applier, rule-interpreter or rule-enforcer—a potential intervener—the generality of the rule is not invisible. Intervention is different from rule-following (or non-following) because intervention is not inevitably particularistic. The potential intervener may perceive or foresee numerous opportunities for intervention in order to prevent the harmful actions of those whose assessments of the rationality of their actions are, as seen by the intervener, mistaken. As a practical matter, individual interventions against all of those potential intervention targets would be difficult, if not impossible, and that is one of the reasons we have rules in the first place. The intervener, by using a rule, is choosing to intervene with respect to a group of activities—to intervene wholesale rather than retail—and this wholesale intervention is exactly what rule-making is.

Now we can see the issue of rule-following in a different light. The question is no longer about whether a rational rule-subject should follow a rule on a particular occasion, and not even any longer about whether a potential intervener should intervene on a particular occasion. Rather, it is about the use of force, power or incentives to intervene with respect to predicted multiple acts of harmful behaviour, and thus about how that force, power and incentive-providing capacity will be

31. This is the central theme of Schauer, "Was Austin Right After All", supra note 5.
used against multiple irrational (as perceived by the rule-maker) subjects of control. But because rules are generalizations, and thus both under- and over-inclusive across a range of instances, the rational intervener will impose rules even though she recognizes that such rules will mistakenly intervene on some occasions and mistakenly fail to intervene on others. Thus, the rule-maker or enforcer or applier will look at behaviour in terms of types and not of tokens, to use the conventional philosophical terminology. She will make and enforce rules whenever she perceives that the benefits to be gained by imposing the rules in the area of their accurate application will exceed the costs of making and enforcing rules in the area of their inaccurate application.

The foregoing builds on and expands arguments I have made earlier, and it also, more importantly, bears some affinity to arguments developed by Larry Alexander and Emily Sherwin; but there are two crucial differences between my point and their arguments. First, and most importantly, the existing literature, including my own contributions to it, adopts the standpoint of the institutional designer, and assumes that there is a fact of the matter regarding the comparative expertise or knowledge between the rule-maker (or rule-enforcer) and the rule-subject. Thus, Alexander and Sherwin talk about the rule-maker’s “information [being] superior to that of most of his subjects”, and insist that it is the rule-maker’s “expertise” which gives following or enforcing a rule its “epistemic value”. Such language presupposes a fact of the matter, knowable by the institutional designer, and knowable in theory by the omniscient observer. Although such knowledge may indeed exist, and may properly inform the decisions of the institutional designer or the omniscient observer, the view I offer here (although not inconsistent with these views if we are considering the question of institutional design) is different if we are looking at the issue entirely.

34. Alexander & Sherwin, Rule of Rules, ibid. at 55.
35. Ibid. at 61.
from the perspective of the rule-maker or rule-enforcer. From this perspective, it does not matter if the rule-maker or rule-enforcer in fact has superior information or expertise. All that matters is that the rule-maker or rule-enforcer thinks she does. For even if the rule-maker or rule-enforcer happens to be objectively mistaken about this information and expertise, that will by stipulation not be apparent to her. Thus from the standpoint of the rule-maker or rule-enforcer, it will be irrational not to impose rules and enforce them (more or less) rigidly, even if it would be wrong to do so from the standpoint of the omniscient institutional designer who in fact had superior information and expertise. Indeed, the rational rule-maker will try to avoid the constraints of the institutional designer. Just as a rational rule-subject will, sanctions aside, have no reason to follow what she perceives to be mistaken rules, so too will a rational rule-enforcer, sanctions aside, have no reason to submit to the institutional constraints of what she perceives to be the mistaken doubts that the institutional designer has about the rule-enforcer’s comparative expertise.

The foregoing analysis also explains why the “perspectivalism” that Heidi Hurd challenges is in fact a quite different claim, and one that may not fully deserve the label that Hurd gives it. Hurd addresses the important question of whether it is justified to punish the justified—whether the legal system should punish those whose disobedience of law is, all things considered, morally justified. In arguing that it is not justified to punish the justified, Hurd attacks the view that judges and other legal actors have a “role morality” that obliges them to punish violations of law without regard to the ultimate morality of the law-violating act. Hurd’s argument is a powerful one, and may even be correct, but the debate in which she is engaged is one that assumes that the subject of law or a rule has in fact acted with sound moral justification. That is often the case, but it is a very different problem from one in which the putative punisher, like my hypothetical intervener on the subway platform, believes that the subject’s actions were wrong, morally as well as legally. The argument I advance here, therefore, is not based on any kind of role morality. It is simply the claim that when the potential intervener believes, taking into account

the possibility of her own error, that the subject of the intervention (or of a rule) is behaving wrongly, then the fact that the subject believes otherwise is of no consequence. My concern is with the morality and rationality of intervention against wrongful acts. The question of whether it is ever right to intervene against justified acts is a different question from a quite different debate.

In addition, and relatedly, the argument I offer here is independent of questions of "authoritative settlement". 37 There should be little denying that settlement for settlement's sake is in fact a value worth pursuing, even if it is not the only value worth pursuing. 38 But the value of authoritative settlement is simply one component of the question of whether, all things including the value of having a rule considered, a rule should be followed. And because this will be a value that is part of the rational calculation of both the rule-subject and the rule-enforcer, it is not germane to the question whether the rule-enforcer should rationally enforce a rule once we understand that the rational subject, as well as the rational rule-maker, will take into account the value of having a rule.

Thus, in making and enforcing rules, the rational rule-maker and rule-enforcer will be attempting to maximize her control over multiple mistaken (from her perspective) subjects. Because those subjects are mistaken, from their perspective they will have reason to disregard the rule, assuming that they have already discounted for the possibility of their own error. The rational imposer of a rule will believe, after taking into account the possibility of her own error, that the rule-subjects are mistaken in believing that they are not mistaken, and thus the rule-maker and enforcer is acting on what to her is the rational belief that others are acting irrationally. The imposition of rules is thus rational when the rule-maker and rule-enforcer believe that the rule-subjects are likely to act irrationally, but the disobedience of rules is no less rational

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38. "[I]n most matters it is more important that the applicable rule of law be settled than that it be settled right." Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 412 (1932) (Brandeis J., dissenting).

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when the rule-subjects believe that the rule-maker’s belief in the subjects’ irrationality is erroneous (and thus irrational).

IV. The Question of “Government House Utilitarianism”

The claim I make here is not a totally unfamiliar one, and the standard rebuttal often uses a phrase coined by the philosopher Bernard Williams. It is “Government House utilitarianism”, Williams quipped, to take an action on the basis of the perceived superior knowledge (or rationality) of the actor, at least as compared to that of the subjects of that action.\(^3\) For Williams, the assumption of superior rationality was akin to the assumption of superior knowledge and intelligence (and everything else) adopted by the residents of Government House, the generic term for the residence and office of colonial governors during the height of the British Empire. Is it thus not arrogant for a rule-maker or rule-enforcer to assume that her knowledge is superior to that of the rule-subject, which is exactly what the foregoing analysis presupposes?\(^4\)

There can be no denying that arrogance is a bad thing. It seems plain as well that the European colonial powers of the eighteenth, nineteenth and early twentieth centuries were the embodiments of an extreme and usually unjustified sense of intellectual and moral superiority. Insofar as the lesson of the charge of Government House utilitarianism is a caution against arrogance and in favour of humility, it is difficult to quarrel with. Nevertheless, the charge is a peculiar one, at least in this and related contexts.\(^4\) First of all, it is hard to see why the charge of

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40. Including the context in which Williams first suggested it, that being a critique of Henry Sidgwick’s non-transparent brand of utilitarianism in which the governors were to make decisions for the governed on the basis of utilitarian principles, but in which the
arrogance and insufficient humility and respect is not as applicable to rule-subjects as to rule-makers. It may well be arrogant for a rule-maker to assume lesser wisdom on the part of the rule-subject, but just as arrogant for the rule-subject to assume lesser wisdom on the part of the rule-maker. In the traditional irrationist story about rule-following, the rule-subject’s own decision-making processes are implicitly privileged vis-à-vis those of the rule-maker and rule-enforcer, and the view that rule-following is irrational assumes, in part, that the rule-subject has it right and the rule-maker is mistaken. This may often be true, but in terms of a charge of arrogance or unjustified superiority it is no different from the view that the rule-maker has it right and the rule-subject is mistaken.\footnote{Indeed, although there are well-known reasons for being distrustful of government (see e.g. John Hart Ely, \textit{Democracy and Distrust} (Cambridge: Harvard University Press, 1980) and of group decision-making processes. See e.g. Chip Heath & Dan Heath, \textit{Made to Stick: Why Some Ideas Survive and Others Die} (New York: Random House, 2007); Charles MacKay, \textit{Extraordinary Popular Delusions and the Madness of Crowds} (Wells: Fraser Publishing Co., 1966); Sushil Bikhchandani, David Hirshleifer, & Ivo Welch, "A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades" (1992) 100 Journal of Political Economy 992. There are also good reasons to be distrustful of individual as opposed to aggregate decision-making processes. See e.g. Cass R. Sunstein, \textit{Infotopia: How Many Minds Produce Knowledge} (New York: Oxford University Press, 2006); James Surowiecki, \textit{The Wisdom of Crowds: Why the Many are Smarter than the Few and How Collective Wisdom Shapes Business, Economies, Societies and Nations} (New York: Doubleday, 2004). Determining which of these pathologies is dominant in which settings is no easy task, but the larger point is that there is no reason to suppose at the outset that individual decision-making should be privileged over the collective or institutional decision-making processes that we sometimes label as “law”.}

In addition, the traditional reluctance to look at rule-following from the perspective of the rule-maker or the rule-enforcer may suffer from what we can call an “inaction bias”. This is the assumption that doing nothing and not intervening is the default, with the burden of justification on those who would justify action or intervention. The subjects were to be given access neither to the principles of utilitarianism nor to the decision-making processes of the governors. See Henry Sidgwick, \textit{The Methods of Ethics}, 7th ed. (London: Macmillan & Co, 1907). For a somewhat similar perspective, see the more recent R.M. Hare, \textit{Moral Thinking: Its Levels, Method and Point} (New York: Cambridge University Press, 1981) at 44, infelicitously distinguishing the preferred reasoning processes of the “archangels” from those of the “proles”.
distinction between acts and omissions pervades the law, but in some contexts it may be worthwhile to question why we treat the harms of mistaken inaction as being presumptively less than the harms of mistaken inaction. As the example of the assault on the subway platform shows, mistaken failure to intervene may often be serious, and mistaken intervention much less so. This will of course not always or even usually be true, but neither does it appear warranted to treat mistaken intervention as generally more serious than mistaken non-intervention. If we understand this, we may be more reluctant to focus so much attention on the perspective of the rule-subject (who is assumed to be justified in concluding that the rule has generated an erroneous result on this occasion) as opposed to the rule-maker, who may (more often than the existing literature supposes) be correctly attempting to prevent a rule-subject from erroneously believing that the rule-generated outcome is in error.

V. The Implications for Law

Most of the existing literature on rule-following, and perhaps even more of the literature on law-following, not only assumes the perspective of the subject, but assumes the perspective of the subject who is right and the law that is wrong. Gandhi, Thoreau and King are pervasive presences in this literature, but it is at least an open question whether the morally and rationally admirable subject of a bad rule or a bad law is as much of a contemporary problem as the (sometimes) morally motivated but mistaken subject of a wise law wisely applied. Whether it be the case of the Mbeki administration’s resistance to the South African Constitutional Court’s rulings on providing anti-retroviral medications for HIV and AIDS sufferers, or the Bush Administration in the United States disregarding the laws against torture and domestic surveillance in the service of national security, or any of a

host of other examples, it is hardly clear that the real problem of rule-following is the problem of a bad rule or the bad application of a good rule, as opposed to the good application of a good rule in the face of a misguided rule-subject who believes honestly and deeply but wrongly that the rule has generated a poor outcome on a particular occasion.

To the extent that this is true, it may be time to take a new perspective on the rationality of rule-following. Rather than focus all of our attention on the irrationality of rule-following, it may be wise to focus at least a bit more on the rationality of rule-enforcing against subjects who think themselves rational, but who are mistaken in doing so. If we can spend as much time on the rationality of rule-imposition as on the rationality of rule-following, we may wind up with greater insight, greater connection between the literature on rule-following and the literature on coercion, and, perhaps, a greater degree of following of those rules and laws that even skeptics about rule-following would like to see have greater influence.