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CHANGES IN AMERICAN VENERATION FOR THE RULE OF LAW

*James L. Gibson**

INTRODUCTION

This Article examines the degree to which the rule of law is secure in the contemporary United States. Rather than focusing on institutions or public policies, it analyzes a number of nationally representative surveys that provide a glimpse into the hearts and minds of American citizens. Do Americans support the rule of law today? Has their support wavered over the turbulent last decade of American politics? This Article will establish that support for the rule of law is widespread—especially compared to other nations—and will show that support has not diminished in the last decade. In fact, even in light of threats to security and social order, Americans continue to support the rule of law, as well as public policies preserving civil liberties.

For centuries, if not longer, political analysts have placed confidence in the rule of law as an antidote to tyranny. Because the essence of tyranny is arbitrary rule and its myriad consequences, one barrier to tyranny is consistency in the law. To the extent that a political system is governed by the rule of law, democracy has a chance to develop and mature. The rule of law and democracy are not equivalent, nor are they inextricably connected, but most believe successful democracies must rule through law.

The rule of law contributes to effective democracy by constraining the discretion of both leaders and citizens. The rule of law is not a set

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of substantive values or desiderata; it is a set of procedures by which governance takes place. With its emphasis on proceduralism, the rule of law constrains the actions of individuals and limits what government can do. Neither citizens nor leaders are free to act in any way they please; instead, they must act according to law. To the extent that law needs to change, the rule of law requires that it does so only through a set of established procedures. Thus, the rule of law emphasizes universalism over particularism; political action must be principled—not determined by short-term self-interest or whim.

It should not be surprising, then, to find many observers who believe that the rule of law is the *sine qua non* of effective democratic government, and that the rule of law is particularly crucial to the success of democratic transitions.¹ Emerging democracies typically suffer from tattered institutions, deep political divisions, strong feelings of historical injustice, and the widespread availability of arms. Learning to manage conflict through the rule of law, rather than on the battlefield, is essential to the success of these transitions.²

Nonetheless, rule of law controversies continue to crop up even in well-established democracies. Consider the case of the United States, where many rule of law disputes currently percolate. When law is too cumbersome to provide security for the nation, should it be set aside with relative impunity? Should President George W. Bush be allowed to order domestic wiretapping without judicial review in his war on terrorism? To what degree are U.S. foreign policy actions governed by law—domestic or international? Should immigration to the United States be regularized and legalized? Should illegal immigrants have state-issued driver's licenses, state-subsidized tuition at universities, or access to social services? Should extant regulations regarding the marriage of individuals be "interpreted" by public officials to include gay and lesbian marriages? To what degree does judicial activism, seen by some to be widespread and excessive, abrogate the rule of law? Should activist judges be allowed to make law or should they be reined in? These controversies are complicated and do not necessarily

1. See, e.g., James L. Gibson, *The Evolving Legitimacy of the South African Constitutional Court*, in JUSTICE AND RECONCILIATION IN POST-APARTHEID SOUTH AFRICA (Antje du Bois Pedain & Francois du Bois eds., forthcoming 2007); James L. Gibson, *Russian Attitudes Towards the Rule of Law: An Analysis of Survey Data*, in LAW AND INFORMAL PRACTICES: THE POST-COMMUNIST EXPERIENCE 77 (Denis J. Galligan & Marina Kurkchyan eds., 2003) [hereinafter Gibson, *Russian Attitudes*]; James L. Gibson & Gregory A. Caldeira, *The Legal Cultures of Europe*, 30 LAW & SOC'Y REV. 55 (1996); James L. Gibson & Amanda Gouws, *Support for the Rule of Law in the Emerging South African Democracy*, 49 INT'L SOC. SCI. J. 173 (1997).

2. See generally JAMES L. GIBSON, OVERCOMING APARTHEID: CAN TRUTH RECONCILE A DIVIDED NATION? (2004) (deeming support for the rule of law to be one of the pillars necessary for reconciliation in South Africa).

suggest that the rule of law is waning. Nonetheless, each of the issues raises serious questions about the degree to which actions and policies are regulated by laws that are clear and predictable. Whether the rule of law will prevail in the United States thus remains a socio-political issue of considerable importance.

Part II begins with a discussion of how the rule of law relates to democratic theory. It then explains why I examined the beliefs, values, attitudes, and behavior of ordinary citizens when analyzing the extent of the American commitment to the rule of law. Part III presents the empirical analysis. Relying on surveys of the American general public conducted in 1995, 2001, and 2005, I report the nature of attitudes toward the rule of law. A portion of this analysis relies on cross-national comparisons, which put the commitment to the rule of law in the United States in broader perspective. I also examine change in support for the rule of law over the course of the last decade. Part IV discusses the degree to which attitudes toward the rule of law have consequences for policy preferences, with particular emphasis on the willingness of individuals to trade liberty for greater security. Part V concludes the analysis with speculation about the importance of a rule of law culture in sustaining democratic institutions and processes.

II. THE RULE OF LAW AND DEMOCRATIC THEORY³

Democratic theorists have long placed significant emphasis on the rule of law as a crucial component of effective democracy.⁴ In its simplest form, the rule of law is little more than proper procedure. In a democracy, rulers are bound to follow established procedures and legal rules, which significantly constrain their discretion. From this perspective, the rule of law implies little substantive content.⁵ Instead, it emphasizes consistency:

3. Since this theoretical stance on the rule of law is well-trodden territory—and since the primary contribution of this Article lies in its empirical evidence rather than in theoretical innovation—I provide only a cursory review of the theory linking the rule of law to democratic governance.

4. See, e.g., Grażyna Skapska, Commentary, *The Rule of Law from the East Central European Perspective*, 15 *LAW & SOC. INQUIRY* 699 (1990).

5. The Secretary-General of the United Nations offered this view of the rule of law: [The rule of law] refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and *which are consistent with international human rights norms and standards*. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of pow-

Where power is arbitrary, personal, and unpredictable, the citizenry will not know how to behave; it will fear that any action could produce an unforeseen risk. Essentially, the rule of law means: (1) that people . . . will be treated equally by the institutions administering the law—the courts, the police, and the civil service; and (2) that people and institutions can predict with reasonable certainty the consequences of their actions, at least as far as the state is concerned.⁶

A primary function of the rule of law is to impede tyranny. The logic is simple and compelling: both the masses and the elite are often confronted with circumstances in which their interests are at odds with the requirements of democratic politics. For example, the masses may wish to stifle political expression by unpopular minorities;⁷ the elite may seek to undermine the effectiveness of their political challengers. The rule of law is designed to protect against these arbitrary intrusions on individual liberty.

Of course, pernicious schemes can be implemented through the democratic process,⁸ but this process typically requires open debate and the agreement of the majority. The rule of law requires that schemes of repression be implemented openly, rather than simply pronounced by a ruler or a mob, thereby making repression more difficult. In addition, legal procedure slows down disputes, allowing cooler heads and more reasoned and principled ideas to prevail.⁹

ers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, ¶ 6, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 3, 2004) (emphasis added). Thus, the Secretary-General disagrees with my understanding of the rule of law by imposing substantive requirements. Because it is so much easier to get agreement from competing sides in politics on procedures rather than on substantive issues, my definition is a minimalist (and pragmatic) one.

6. Seymour Martin Lipset, *The Social Requisites of Democracy Revisited: 1993 Presidential Address*, 59 AM. SOC. REV. 1, 15 (1994).

7. It should not be assumed that all violations of the rule of law necessarily go against the perceived self-interest of the majority. For instance, Professor Peter Solomon points to instances in the former Soviet Union in which ordinary citizens *demand*ed that the authorities dispense with the rule of law in dealing with suspects in notorious criminal cases. Peter H. Solomon, Jr., *Legality in Soviet Political Culture: A Perspective on Gorbachev's Reforms*, in *STALINISM: ITS NATURE AND AFTERMATH: ESSAYS IN HONOUR OF MOSHE LEWIN* 260 (Nick Lampert & Gábor T. Rittersporn eds., 1992). There were many instances in which South African "people's justice" had little to do with the rule of law—and perhaps not that much to do with justice either. It is easy to imagine that runaway crime is a circumstance in which the majority may be willing to sacrifice the rule of law for more expedient remedies.

8. For example, South Africa's apartheid was a legal edifice properly enacted by the country's parliament through nominally democratic procedures.

9. No better example of this exists than the controversy in Skokie, Illinois, surrounding a public demonstration by a small group of neo-Nazis. Professor Richard Bingham and I have argued that moving the dispute into the courts created a delay which allowed passions to cool,

Within this context, the rule of law constrains both rulers and the ruled. The rulers must act according to legal procedure, which means they must rule through legislatures and courts. The ruled are obliged to follow and acquiesce to these laws. When the self-interests of the rulers and the ruled conflict with the law, the law must prevail, at least until it is changed through legitimate democratic procedures.

Thus, the essential ingredient of the rule of law is *universalism*—the law should be universally heeded. If a law generates an undesirable outcome, it ought to be changed through established procedures; it should not be manipulated or ignored. Willingness to abide by the law is pivotal to the concept.

The antithesis of universalism is *particularism*, which is typically based on either expedience or the substitution of some sort of moral judgment for legal rules. Some may believe that law should be set aside or bent in favor of solving problems quickly or efficiently, while others may be unwilling to accept legal outcomes that, by some standards, are “unjust.”¹⁰ To the extent that people are willing to follow the law *only* if it satisfies some external criterion, the rule of law is compromised. Respect for the rule of law thus means that following the law (universalism) is accorded more weight than other values that might trump legality (particularism).

I must acknowledge, however, that freedom is often lost under the guise of law; not all authoritarian governments necessarily reject the rule of law. Professor Martin Krygier reminds us that “[t]here was, after all, a Nazi jurisprudence, and it was a horrible sight.”¹¹ Much of the early Nazi attack on German Jews was accomplished under the authority of law, just as South Africa’s apartheid was a system of

making a democratic outcome to the controversy more likely. JAMES L. GIBSON & RICHARD D. BINGHAM, CIVIL LIBERTIES AND NAZIS: THE SKOKIE FREE-SPEECH CONTROVERSY 39–41 (1985). Some refer to this as giving political conflicts a “sober second thought.” See, e.g., SAMUEL A. STOFFER, COMMUNISM, CONFORMITY, AND CIVIL LIBERTIES: A CROSS-SECTION OF THE NATION SPEAKS ITS MIND 13 (1955); James L. Gibson, *A Sober Second Thought: An Experiment in Persuading Russians to Tolerate*, 42 AM. J. POL. SCI. 819 (1998).

10. Earlier research has used a similar conceptualization of universalism and particularism. See MARTIN A. LEVIN, URBAN POLITICS AND THE CRIMINAL COURTS 5–6 (1977); JAMES Q. WILSON, VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES 283–84 (1968); Gibson, *Russian Attitudes*, *supra* note 1, at 80; James L. Gibson, *Truth, Reconciliation, and the Creation of a Human Rights Culture in South Africa*, 38 LAW & SOC’Y REV. 5, 10–11 (2004); Gibson & Caldeira, *supra* note 1, at 60; Gibson & Gouws, *supra* note 1, at 175; Martin A. Levin, *Urban Politics and Judicial Behavior*, 1 J. LEGAL STUD. 193, 205 (1972).

11. Martin Krygier, *Marxism and the Rule of Law: Reflections After the Collapse of Communism*, 15 LAW & SOC. INQUIRY 633, 646 (1990).

law.¹² No government would repudiate the rule of law openly because it is a powerful means of legitimizing authority. The rule of law may be essential to democratic governance, but it can, under some circumstances, serve dictators as well as democrats—especially if it is enconced only in the formal institutions of a country.

A. *A Cultural Definition of the Rule of Law*

In an effective democracy, the rule of law must be manifest in the political institutions of the country.¹³ Clearly defined, predictable procedures for making and implementing law must exist, and these procedures must be perceived as legitimate.

But the rule of law is more than a set of institutions, a constitution, or a book of statutes. Indeed, perhaps the most important manifestation of the rule of law is its representation in a nation's culture—the beliefs, expectations, values, and attitudes held by the populace of a country.¹⁴ For instance, when we speak of corruption as antithetical to the rule of law, we are often referring to a set of norms and expectations about whether corrupt behavior is acceptable within a polity. This refers to “ways of doing business,” which are institutionally determined but also culturally legitimized.¹⁵ While acknowledging that institutions are important, Krygier points to “something far vaguer but fundamentally more important: a widespread assumption within society that law *matters* and should matter.”¹⁶ Thus, we can speak of

12. This contrasts with political systems in which rule is based on the whims of the leader. Some would likely put Saddam Hussein's Iraq, General Franco's Spain, and Josef Stalin's Soviet Union in this category. Government that is arbitrary and constrained by few formal institutions differs from government that implements its repressive schemes through law.

13. See RICHARD ROSE, WILLIAM MISHLER & CHRISTIAN HAERPPER, *DEMOCRACY AND ITS ALTERNATIVES: UNDERSTANDING POST-COMMUNIST SOCIETIES* 32–33 (1998).

14. For the inception of research on political culture, see GABRIEL A. ALMOND & SIDNEY VERBA, *THE CIVIC CULTURE: POLITICAL ATTITUDES AND DEMOCRACY IN FIVE NATIONS* (1963).

15. Professor Erik Hoffmann asserts, in the case of the former Soviet Union, that “[t]he transformation of democratic *forms* into democratic *norms* . . . is crucial for democracy to take root throughout Russia.” Erik P. Hoffmann, *Democratic Theories and Authority Patterns in Contemporary Russian Politics*, in *CAN DEMOCRACY TAKE ROOT IN POST-SOVIET RUSSIA?: EXPLORATIONS IN STATE-SOCIETY RELATIONS* 105, 148 (Harry Eckstein et al. eds., 1998). Scholar Larry Diamond has echoed this understanding:

Political competitors must come to regard democracy (and the laws, procedures, and institutions it specifies) as “the only game in town,” the only viable framework for governing the society and advancing their own interests. At the mass level, there must be a broad normative and behavioral consensus—one that cuts across class, ethnic, nationality, and other cleavages—on the legitimacy of the constitutional system, however poor or unsatisfying its performance may be at any point in time.

LARRY DIAMOND, *DEVELOPING DEMOCRACY: TOWARD CONSOLIDATION* 65 (1999).

16. Krygier, *supra* note 11, at 646.

the rule of law both in terms of formal institutions and a rule of law *culture*. Without a culture that rejects the sublimation of law to other more pressing objectives, the rule of law cannot function effectively. Understanding how a political or legal system operates always requires more than an understanding of the structure and function of institutions, but when it comes to understanding the meaning of the rule of law, culture is paramount.¹⁷

Analyses of cultural norms and values have a long and distinguished legacy within the social sciences. But they have recently gained great currency among economists and legal analysts concerned with social norms. Professor Amitai Etzioni has written about the importance of these norms:

[I]t is widely held that strong social norms reduce the burden on law enforcement; that laws supported by social norms are likely to be significantly more enforceable; and that laws that are formulated in ways that are congruent with social norms are much more likely to be enacted than laws that offend such norms.¹⁸

In essence, Etzioni asserts that if we are to understand how law and politics actually operate within a polity, we need to look beyond institutions to examine the cultural norms and values that undergird them and shape the behavior of individual citizens. That is precisely the purpose of this Article.

B. Expectations About American Attitudes Toward the Rule of Law

The conventional wisdom, defined in part by the observations of Alexis de Tocqueville, is that American politics is strongly and broadly characterized by the rule of law.¹⁹ He observed that “one is bound to notice that all classes show great confidence in their country’s legislation, feeling a sort of paternal love for it.”²⁰ Indeed, for many, a defining attribute of the American political culture is its veneration for law.

But many threats to the rule of law have emerged in the last decade, threats that may have contributed to an undermining of support for the rule of law. Most important are the attacks of 9/11 and their aftermath. In response to these events, many people, including President

17. Empirical research on legal cultures and their consequences is vast. See, e.g., Gibson & Caldeira, *supra* note 1; Herbert M. Kritzer & Frances Kahn Zemans, *Local Legal Culture and the Control of Litigation*, 27 LAW & SOC’Y REV. 535 (1993).

18. Amitai Etzioni, *Social Norms: Internalization, Persuasion, and History*, 34 LAW & SOC’Y REV. 157, 159 (2000).

19. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (J.P. Mayer ed., George Lawrence trans., Anchor Books, Doubleday & Co. 1969) (1835).

20. *Id.* at 241.

Bush, have argued that strict adherence to the rule of law may threaten national security. In pursuit of the war on terrorism, they argue, it may be necessary to suspend strict enforcement of the rule of law. The rule of law makes the defense of the nation difficult and cumbersome; for instance, executive officers must convince an independent judge that it is necessary to intrude into the civil and political liberties of the citizenry. Thus, to the extent that deviation from the strict application of the rule of law has been legitimized by important American elites, it would not be surprising to find that the American people's adherence to the rule of law (and their unwillingness to tolerate exceptions to it) has diminished in the wake of 9/11. This Article attempts to provide an empirical answer to that conjecture.

III. EMPIRICAL ANALYSIS

A. *Research Design*

The research presented in this Article is based primarily on a nationally representative sample of people interviewed from May 2005 to July 2005. In all, 1001 interviews were conducted, with a response rate of 40.03%.²¹ No respondent substitution was allowed and up to six call-backs were executed. The average length of an interview was 83.8 minutes (with a standard deviation of 23.9 minutes). The median length of an interview was 77 minutes. The difference between the mean and the median is due to a few, extremely long interviews. The data were subjected to some minor poststratification, with the proviso that the weighted number of cases corresponds to the actual number of completed interviews. Interviews were offered in both English and Spanish, and the Spanish version of the questionnaire was prepared through conventional translation/back-translation procedures. Samples such as this have a margin of error of approximately $\pm 3.08\%$.²²

What can a survey of ordinary Americans tell us about the rule of law in the United States? Cultural orientations toward the rule of law are important because they influence how rule of law institutions actually function. Such cultural orientations can be ascertained through interviews with ordinary citizens—so long as the samples upon which the interviews are based are representative of the nation as a whole. In focusing on ordinary people, I do not deny that elite attitudes and values, especially those of legal elites, are important. But the general

21. This rate was calculated using AAPOR Response Rate #3. AM. ASS'N FOR PUB. OPINION RESEARCH, STANDARD DEFINITIONS: FINAL DISPOSITIONS OF CASE CODES AND OUTCOME RATES FOR SURVEYS (2000) [hereinafter AAPOR STANDARD DEFINITIONS].

22. This Article also relies upon earlier surveys focused on the rule of law. Details of these surveys are provided in the appendix to this Article.

public constitutes an important form of political capital in conflicts among elites, and what ordinary people prefer and accept is a crucially important variable in determining the outcome of political disputes.²³ It is therefore essential that any inquiry into the rule of law in the United States considers how much value the American people attach to the concept of the rule of law.

B. *Measuring American Support for the Rule of Law*

Few people are likely to reject the rule of law in principle. Survey questions that ask people whether they agree that rulers should not act arbitrarily or capriciously, or that citizens should be free to ignore the law, are unlikely to be of much use in tapping popular commitments to the rule of law. Instead, the difficult test of support for the rule of law involves the juxtaposition of law and some other valued principle. This forces people to weigh the relative value of conflicting principles.²⁴ Only when support for the rule of law comes at some cost can we begin to gauge how much citizens really value it.

Consequently, this survey asked people to agree or disagree on a 5-point Likert scale, ranging from agree strongly to disagree strongly, with statements pitting the rule of law against another value. One such example juxtaposes the rule of law with expediency:²⁵

- Sometimes it might be better to ignore the law and solve problems immediately rather than wait for a legal solution.

Some of those who oppose the rule of law also do so on grounds of pragmatism, arguing that the rule of law can be unnecessarily rigid and confining. Law must be flexible if it is to be effective. We therefore asked the respondents their opinions of the following statement:

23. Professors Gregory Caldeira, Lester Spence, and I argue this same point in our analysis of the Supreme Court intervention in the contested 2000 presidential election. Because the Supreme Court has such great legitimacy among the American people, most accepted its ruling in *Bush v. Gore*, 531 U.S. 98 (2000), which denied the Democrats the essential political capital necessary for continuing to fight the election. Institutional legitimacy—grounded in the beliefs and preferences of ordinary people—constitutes a crucial part of the political culture of a country. James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *The Supreme Court and the U.S. Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535 (2003).

24. For a similar analysis of the relative value Americans ascribe to security and liberty, see Darren W. Davis & Brian D. Silver, *Civil Liberties vs. Security: Public Opinion in the Context of the Terrorist Attacks on America*, 48 AM. J. POL. SCI. 28 (2004).

25. Professor Brian Tamanaha provides a useful analysis of the concept of the rule of law. He identifies three major themes in how the rule of law has been understood: government limited by law; formal legality; and rule of law, not man. Although these do not map directly onto the statements I use to measure rule of law attitudes, my empirical approach nonetheless fits well with his conceptualization. BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* (2004).

- The government should have some ability to bend the law in order to solve pressing social and political problems.

Another statement paired the rule of law with fairness:

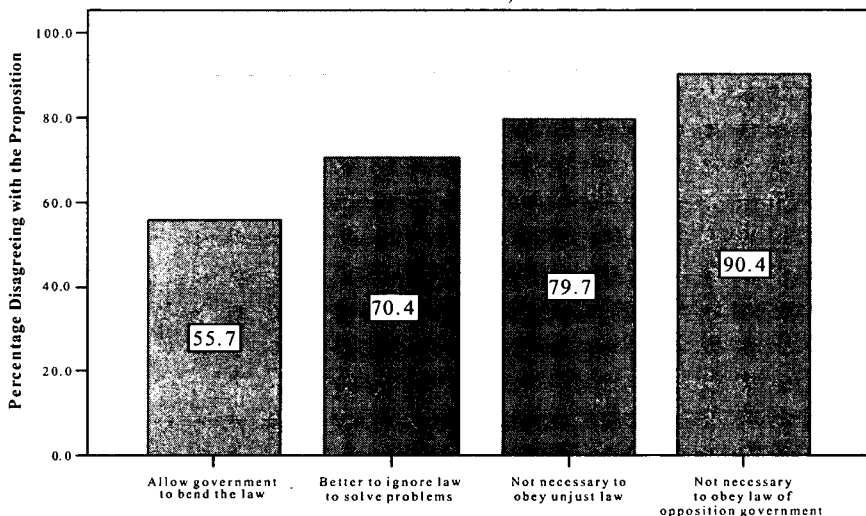
- It is not necessary to obey a law you consider unjust.

Finally, many believe that elections provide legitimacy to governments and the laws they make. Conversely, law made by a government one opposes may not be deemed worthy of support. We tested this idea with the following statement:

- It is not necessary to obey the laws of a government that I did not vote for.

Figure 1 reports the responses to these four propositions for 2005.²⁶

FIGURE 1. SUPPORT FOR THE RULE OF LAW IN THE UNITED STATES, 2005



The respondents gave widely variable responses to these statements.²⁷ At one extreme, slightly more than half of Americans disagree with

26. Obviously, the more questions one asks about the rule of law, the more reliable the resultant indices are. As in all surveys, this study was constrained by how much interview time could be devoted to the rule of law. Given the experience we have accumulated in measuring such attitudes, this small set of items represents an efficient, yet valid and reliable, approach to measuring the value people attach to the rule of law.

27. To reiterate, the rule of law is a multidimensional concept, and there are other dimensions that are not explicitly considered here. We explored some of these in our pretesting, but our pretest results revealed such widespread support for some aspects of the rule of law that we felt it would be wasteful to devote questions to what are essentially universally held views. Especially when propositions are phrased in the abstract, very few people believe that judges ought to be subservient to politicians, that governments ought to have the power to ignore the law at will, and that law ought to be applied in an idiosyncratic, particularistic fashion. On the contrary, the

the statement that bending a law is acceptable, while a considerable minority approves of getting around the law. At the other extreme, nearly all (90.4%) of the respondents disagree with the view that one is not obliged to obey a law adopted by an opposition-party government. Across the set of four statements, the average number of responses favoring the rule of law is three, which seems to indicate substantial commitment to law even when paired against other values.²⁸ Although it is difficult to judge whether these survey responses indicate high, medium, or low support for a political value, the tentative conclusion at this point is that Americans exhibit reasonably strong support for the rule of law.

C. *Change in Support for the Rule of Law*

How has support for the rule of law changed over the last decade in the United States? Because three of these rule of law questions were asked of representative samples of Americans in 1995 and 2001, we can compare them with the 2005 data. Table 1 reports the findings from these three surveys.²⁹ These data show little evidence of change in support for the rule of law in the United States. The average number of statements endorsed (of three) hovers around 2.1. Only a small fraction of Americans supports none of the expressions of rule of law principles, while a sizable plurality supports all three statements. Although aggregate-level stasis can easily mask considerable individual-level change,³⁰ the appropriate conclusion from these data is that public support for the rule of law has remained constant in the United States over the last decade.

This finding of consistent support for the rule of law is important. One might have expected diminished reverence for the rule of law in light of the significant challenges brought about by the 9/11 attacks,

key idea over which people seem to divide is the degree to which law ought to be followed *even when* it produces seemingly undesirable results.

28. This set of items has reasonably good psychometric properties. Cronbach's alpha is 0.63, with an average inter-item correlation of 0.30. With such a small number of items, it is difficult to achieve large alphas, so this coefficient should be interpreted as indicating moderate reliability. Factor analysis reveals a strongly unidimensional structure, with an eigenvalue of 1.91 (47.6% of the variance explained) for the first factor extracted via Common Factor Analysis, and an eigenvalue for the second factor of 0.85 (accounting for 21.2% of the residual variance). The correlation between the factor score produced by the factor analysis and a simple summated index of responses to the four items is 0.97.

29. See app. A (detailing these additional U.S. surveys).

30. Although aggregate-level percentages such as the ones presented here may suggest little change, change may nevertheless be widespread but compensatory at the individual level (e.g., pro-rule of law change balanced by anti-rule of law change). Unless true panel data are available (in which the same individual is interviewed repeatedly), conclusions about change must be cautious.

TABLE 1. SUPPORT FOR THE RULE OF LAW, UNITED STATES, 1995–2005

	Percentage			Support for the Rule of Law		
	Agree–Not Support	Uncertain	Disagree–Support	Mean	Std. Dev.	N
<i>Not Necessary to Obey Unjust Law</i>						
1995	13.1	6.2	80.7	3.84	0.90	807
2001	13.9	4.4	81.6	4.21	1.21	1417
2005	15.8	4.5	79.8	3.82	0.99	999
<i>Better to Ignore Law, Solve Problems</i>						
1995	21.7	7.6	70.7	3.60	1.00	806
2001	26.7	6.8	66.6	3.76	1.37	1418
2005	23.5	6.3	70.2	3.62	1.06	996
<i>Allow Government to Bend the Law</i>						
1995	31.2	10.0	58.8	3.42	1.14	808
2001	32.0	5.9	62.1	3.59	1.46	1414
2005	34.7	9.6	55.7	3.29	1.12	995
<i>Average Number of Rule of Law Ideas Endorsed</i>						
1995	—	—	—	2.09	0.87	810
2001	—	—	—	2.10	0.90	1418
2005	—	—	—	2.05	0.97	999
<i>Percentage Endorsing All Three Rule of Law Ideas</i>						
1995	—	—	38.0	—	—	—
2001	—	—	39.6	—	—	—
2005	—	—	40.6	—	—	—
<i>Percentage Endorsing No Rule of Law Ideas</i>						
1995	5.1	—	—	—	—	—
2001	5.9	—	—	—	—	—
2005	9.0	—	—	—	—	—

the highly disputed presidential election of 2000, and the American invasions of Afghanistan and Iraq. Particularly noteworthy in these data is the lack of change in Americans' *unwillingness* to allow the government to "bend the law" to solve pressing problems. One might have predicted that with the exigencies of terrorism and war, this percentage would have declined markedly. It has not. Throughout all these controversial and contentious actions, Americans appear to have remained relatively steadfast in their commitments to the rule of law.

D. Cross-National Comparisons

The support of Americans for the rule of law seems to be widespread. In order to gain a clearer perspective on the case of the United States, it is useful to compare these data to comparable surveys from other countries. Three of the statements used in the United States have also been included in surveys I conducted in other parts of the world. Table 2 reports the comparative data from the three American surveys and surveys conducted in six other countries in 1995 and various surveys in South Africa. We asked the following questions of the respondents:

- Sometimes it might be better to ignore the law and solve problems immediately rather than wait for a legal solution.
- The government should have some ability to bend the law in order to solve pressing social and political problems.
- It's all right to get around the law as long as you don't actually break it.

Although a great deal of information is presented in Table 2, one conclusion stands out clearly: Americans are quite distinctive in their level of commitment to the rule of law. For instance, in 2005, 70.2% of Americans believed it undesirable to suspend law even to solve pressing social problems, while the percentages in none of the other countries exceeded 50%. Similarly, a substantial majority of Americans rejects the view that unjust laws ought not to be followed, which is twenty percentage points higher than the next most supportive country. Only concerning the right of the government to bend the law to solve problems do we see any degree of comparability between the American responses and those of the other surveys. Table 2 is remarkable in the degree to which it documents Alexis de Tocqueville's view of "American exceptionalism" when it comes to attitudes toward the rule of law.³¹ The commitment of the citizens of these countries to the rule of law pales in comparison to that of Americans.

On the question of whether to bend the law, support for the rule of law in countries such as France and Germany is roughly half of American support. While large majorities in the United States assert that law should not be ignored in order to solve problems, only in Portugal, Italy, and Great Britain can majority support for this view be found.³² The findings are stunning in their portrayal of American veneration for the rule of law.

31. DE TOCQUEVILLE, *supra* note 19.

32. Caution must always be exercised when making cross-national comparisons of survey data. In this case, however, the overwhelming evidence suggests that the value Americans attach to law is remarkably and unusually strong.

TABLE 2. CROSS-NATIONAL COMPARISONS OF ATTITUDES
TOWARD THE RULE OF LAW

	Percentage			Support for the Rule of Law		
	Agree-Not Support	Uncertain	Disagree-Support	Mean	Std. Dev.	N
<i>Better to ignore law, solve problems</i>						
Russia, 1995	34.3	39.4	26.4	2.90	0.90	759
France, 1995	50.8	18.8	30.4	2.73	1.31	762
Bulgaria, 1995	32.3	30.7	37.1	3.08	1.26	1184
South Africa, 2001	44.7	14.5	40.8	2.93	1.31	3726
Hungary, 1995	34.1	23.4	42.5	3.13	1.16	783
Poland, 1995	27.4	26.7	45.9	3.28	1.22	813
South Africa, 1996	36.4	17.0	46.6	3.18	1.27	2559
South Africa, 2004	38.0	15.0	47.0	3.19	1.27	4079
Spain, 1995	35.3	15.8	49.0	3.18	1.10	768
United States, 2001	26.7	6.8	66.6	3.76	1.37	1418
United States, 2005	23.5	6.3	70.2	3.62	1.06	996
United States, 1995	21.7	7.6	70.7	3.60	1.00	806
<i>Government should bend law to solve problems</i>						
Hungary	77.4	14.3	8.3	2.06	0.92	784
South Africa, 2001	58.9	19.2	21.9	2.48	1.18	3724
South Africa, 1996	51.1	24.9	23.9	2.66	1.14	2560
South Africa, 2004	45.6	24.9	29.5	2.83	1.18	4032
France	50.5	13.2	36.2	2.84	1.42	756
Poland	40.1	23.0	36.9	3.02	1.32	816
Russia	28.6	28.6	42.8	3.19	1.04	759
Russia, 1998	29.2	22.7	48.2	3.21	1.07	1319
Russia, 1996	24.4	26.4	49.2	3.28	0.96	1395
Russia, 2000	28.8	21.7	49.5	3.25	1.04	1396
Spain	29.4	17.5	53.1	3.41	1.20	770
Bulgaria	18.4	26.4	55.3	3.61	1.27	1188
United States, 2005	34.7	9.6	55.7	3.29	1.12	995
United States, 2005	31.2	10.0	58.8	3.42	1.14	808
United States, 1995	31.2	10.0	58.8	3.42	1.14	808
United States, 2001	32.0	5.9	62.1	3.59	1.46	1414
<i>Not necessary to follow unjust law</i>						
Bulgaria, 1995	25.1	26.4	48.5	3.31	1.33	1192
Russia, 1995	24.1	25.6	50.3	3.28	1.00	767
Spain, 1995	28.0	17.8	54.2	3.31	1.07	768
Poland, 1995	27.7	17.8	54.5	3.43	1.33	816
Russia, 1996	21.6	22.5	55.9	3.40	1.00	1392
Hungary, 1995	25.4	16.9	57.7	3.44	1.24	782
Russia, 2000	21.1	20.7	58.2	3.44	0.98	1394
Russia, 1998	20.6	19.7	59.7	3.47	0.97	1320
France, 1995	25.2	14.2	60.6	3.52	1.30	759
United States, 2005	15.8	4.5	79.8	3.82	0.99	999
United States, 1995	13.1	6.2	80.7	3.84	0.90	807
United States, 2001	13.9	4.4	81.6	4.21	1.21	1417

Note: Within each statement, the countries are sorted according to the percentage of respondents giving a response supportive of the rule of law.

The percentages are calculated on the basis of collapsing the 5-point Likert response set (e.g., "agree strongly" and "agree" responses are combined), and total across the three rows to 100% (except for rounding errors). The means and standard deviations are derived from the uncollapsed distributions. Higher mean scores indicate greater support for the rule of law.

The statements read:

- Sometimes it might be better to ignore the law and solve problems immediately rather than wait for a legal solution.
- It's all right to get around the law as long as you don't actually break it.
- The government should have some ability to bend the law in order to solve pressing social and political problems.

E. Summary

These data clearly support three important conclusions. First, support for the rule of law is widespread in the United States. Second, in comparison to the available evidence from Europe and South Africa, Americans are highly unusual in the degree to which they express support for the rule of law. Finally, despite the serious threats to the rule of law that have emerged in American politics in the last decade, American reverence for the rule of law has not wavered.

IV. SUPPORT FOR THE RULE OF LAW AND WILLINGNESS TO RESTRICT CIVIL LIBERTIES

I argued above that one possible consequence of the 9/11 attacks is that the commitment of American citizens to the rule of law may have diminished. Based on the findings presented above, this does not seem to be the case. This question, however, is important enough to warrant additional inquiry.

To what degree does support for the rule of law stand as a bulwark against tyranny? One way to approach this question is to ask whether those who support the rule of law are exceptional in their commitment to protecting civil liberties—even in times of terrorist threats. As I argued above, one way in which the rule of law is threatened in the contemporary United States is by the argument that the war on terrorism cannot be won if the United States is forced to pursue it through strictly legal means. We are told that exceptions, such as wiretapping and the suspension of habeas rights, must be made. If domestic attitudes toward the rule of law have political substance, then perhaps those more strongly committed to the rule of law are less willing to sacrifice individual liberty for the sake of greater social order and security. Fortunately, this is a hypothesis that can be tested empirically with the data at hand.

In the 2005 survey, we measured opinions toward a variety of proposals that would restrict civil liberties in the United States. These items represent important policy positions often debated in this country.³³ We asked the respondents to express their approval or disapproval of the following policy proposals:

- Requiring everyone to carry a national identity card at all times to show to a police officer on request.

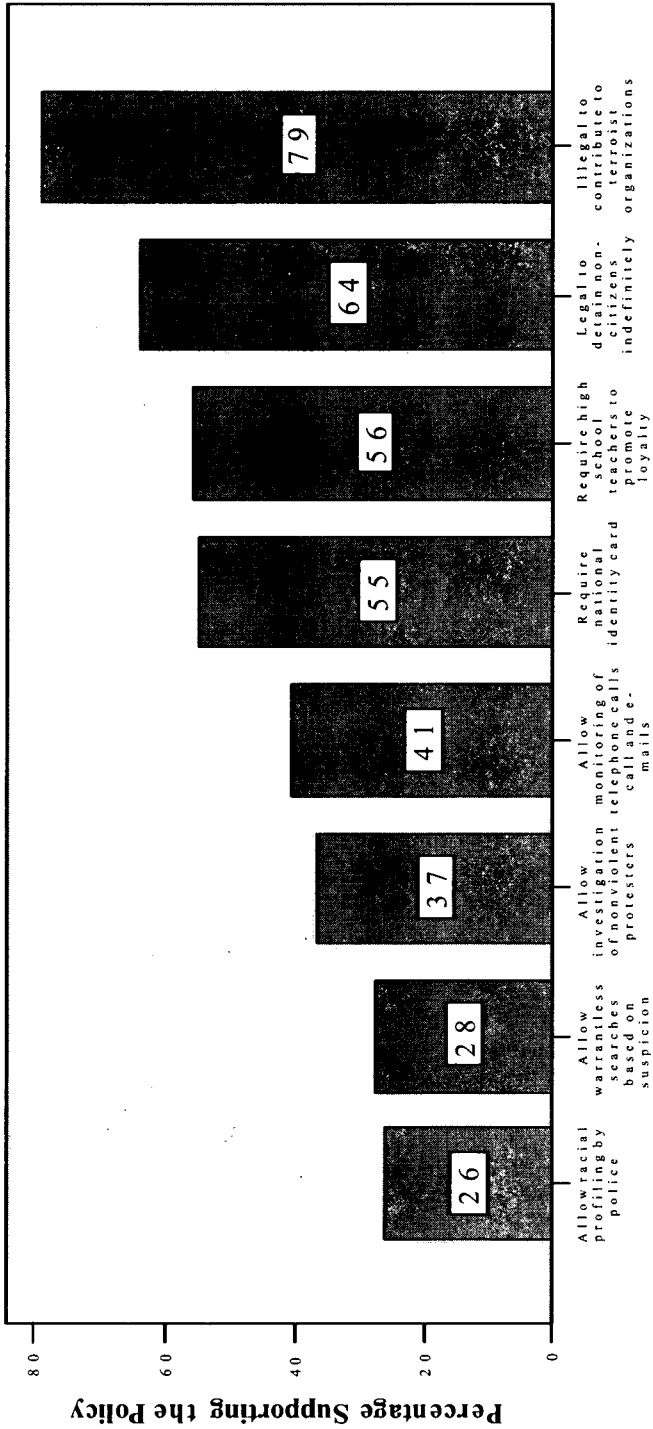
33. These propositions are to some degree patterned after the questions asked by Professors Darren Davis and Brian Silver, although a different response format was employed. Davis & Silver, *supra* note 24, app. at 44–45.

- Making it illegal for anyone to belong to or contribute money to any organization that supports international terrorism.
- Making it legal for the government to be able to arrest and detain a non-citizen indefinitely if that person is suspected of belonging to a terrorist organization.
- Allowing law enforcement officials to stop or detain people of a different race if these groups are thought to be more likely to commit crimes.
- Requiring that high school teachers defend America's policies in order to promote loyalty to our country.
- Allowing law enforcement officials to search a property without a warrant solely on the suspicion that a crime or a terrorist act is being planned there.
- Allowing the government to record telephone calls and monitor e-mail in order to prevent people from planning terrorist or criminal acts.
- Allowing law enforcement officials to investigate people who participate in nonviolent protests against the United States government.

Figure 2 reports the percentage of respondents agreeing with each of the suggested policies. These data reveal a great deal of variability in how Americans feel about proposed restrictions on their individual liberty. At one extreme, a vast majority (79.0%) of the American people would support making it illegal for Americans to contribute to organizations supporting terrorism, a finding that is not at all unexpected. At the other extreme, only 26.2% would favor allowing law enforcement officials to use racial profiling in criminal investigations. A few of the findings are somewhat surprising. For instance, 27.8% of Americans would allow searches to be conducted that were grounded only in suspicion—even when there is a possibility of terrorist acts. On the other hand, 55.7% support the proposal that high school teachers be required to defend American policies and promote citizen loyalty. Across the set of proposals, the responses are fairly evenly divided, with more than half supporting four of the policies and less than half favoring the other four.³⁴ Although data on policy preferences over time do not exist, making it impossible to judge how preferences might have changed, these survey data suggest that no overwhelming tendency to sacrifice liberty for greater security exists among the American people.

34. Responses to these items are relatively intercorrelated, with an average Pearson correlation coefficient of 0.33, which is fairly strong for survey data. Cronbach's alpha is 0.80, which indicates a high level of internal consistency in the responses. Factor analysis results indicate that the set of items tend strongly toward unidimensionality, although there is a slight suggestion that the policies pertaining to international actors differ somewhat from the other items, and they would likely form a significant second factor were a sufficient number of related items asked of the respondents.

FIGURE 2. ATTITUDES TOWARD POLICIES RESTRICTING CIVIL LIBERTIES



A central hypothesis of this research is that support for the rule of law is associated with the rejection of policies restricting civil liberties. Table 3 reports the results of regressing the policy preferences index on the four rule of law items.

TABLE 3. THE CONNECTION BETWEEN RULE OF LAW ATTITUDES AND CIVIL LIBERTIES POLICY PREFERENCES

Predictor (High scores indicate more support for the rule of law)	r	b	s.e.	β
Need not obey unjust laws	-.07	-.03	0.01	-0.13***
Ignore the law, solve problems	-.00	-.00	0.01	-0.02
Government may bend the law to solve problems	0.17	0.03	0.01	0.17***
Need not obey laws from government not voted for	0.09	0.03	0.01	0.10**
Intercept		0.42	0.04	
Standard Deviation–Dependent Variable		0.21		
Standard Error of Estimate		0.21		
R ²				0.05***
N		989		

Note: Standardized regression coefficients (β): *** $p < 0.001$ ** $p < 0.01$ * $p < 0.05$

The findings in Table 3 are revealing. First, neither the signs on the bivariate nor multivariate coefficients are consistent across the four rule of law items, as I expected at the outset. Consider first the two questions explicitly mentioning restrictions on the government. Those who believe that the government should not be allowed to bend the law tend to favor the protection of civil liberties quite significantly, even at the expense of some loss in national security. A weaker but similar relationship exists with the rule of law proposition addressing the legitimacy of actions by an opposition government. These findings indicate that support for the rule of law among ordinary Americans is associated with a predisposition against suspending or weakening civil liberties as part of the war on terrorism.

The question about ignoring the law in order to solve problems has no influence on policy preferences, perhaps primarily because the implied referent in the question is the citizen, not the government. But the first variable in Table 3 is interesting because those who assert that disobeying unjust laws is justifiable are also *more likely* to value civil liberties highly. In this case, support for the rule of law is connected to a lesser attachment to civil liberties. Thus, the finding for this variable runs directly counter to the findings for the last two variables in the table.

Taking a step away from any specific figure in Table 3, these data seem to indicate that the American people are more likely to favor rule of law constraints on the government than they are to favor con-

straints on their own behavior. In this sense, attitudes toward the rule of law are to some degree multidimensional, at least at the conceptual level.³⁵ Thus, the data suggest that the limiting factors for a rigid adherence to the rule of law in the United States are circumstances under which law is at odds with individual conceptions of justice. Although Americans are extremely supportive of the rule of law, there are some exceptions to American exceptionalism. Generally, however, attitudes supportive of binding government to the rule of law are associated with policy preferences for greater protections of civil liberties.

V. CONCLUSION

The distinguished American jurist Learned Hand observed the importance of the citizens' view of liberty:

I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it.³⁶

The same could be said of the rule of law. Unless ordinary people come to value the rule of law, institutions grounded in legal universalism cannot function well. Thus, regular efforts to monitor cultural commitments to the rule of law are necessary.

It is important to remember this caveat: whether democracy thrives in the United States depends upon more than the rule of law, and whether the rule of law continues to be preserved depends upon more than the preferences of the general public. I do not assert this because attitudes do not determine behaviors—they do³⁷—but because, over the course of American history, elites have demonstrated their ability to hijack democracy regardless of what ordinary people prefer.³⁸ The opinions of the general public are not unimportant in processes of democratization, but neither are they dispositive.

How might threats to democracy materialize in the United States? A familiar scenario involves competition among various elite factions.

35. Since this possibility was not anticipated in the design of the questions for these surveys, it is not possible to consider this matter further from an empirical viewpoint. This should be an important priority for future research on cultural attachments to the rule of law.

36. LEARNED HAND, *The Spirit of Liberty*, in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 189, 189–90 (Irving Dilliard ed., 1952).

37. Stephen J. Kraus, *Attitudes and the Prediction of Behavior: A Meta-analysis of the Empirical Literature*, 21 *PERSONALITY & SOC. PSYCHOL. BULL.* 58 (1995).

38. See, e.g., James L. Gibson, *Political Intolerance and Political Repression During the McCarthy Red Scare*, 82 *AM. POL. SCI. REV.* 511 (1988).

Threats to democracy often materialize under the leadership of antidemocratic entrepreneurs. A scenario like the following is possible. Marginal elites make a bid for power. They do so on the basis of an issue (such as crime) that appeals to the general public. Support from the general public is a crucial source of the political capital necessary for such gambits to succeed. Some argue that considerations such as expediency and fairness make it necessary to at least bend the law, if not suspend it. The extent to which this argument is persuasive depends in part upon the degree to which ordinary people are committed to the rule of law. In this sense, a general public committed to the rule of law can stand as a bulwark against antidemocratic ploys.

The most important conclusion of this analysis is that in the contemporary United States, evidence suggests that efforts to manipulate the rule of law would meet substantial resistance from the general public. Beliefs that the government must be circumscribed by law are common, and even the 9/11 attacks have not generated widespread willingness to suspend civil liberties in this country. Threats to the rule of law will no doubt continue to materialize in American politics, but at present, it seems unlikely that a significant majority of the American people would be willing to sacrifice the rule of law even in pursuit of other valued objectives. This should be welcome news to those favoring democratic governance grounded in the rule of law in the United States.

APPENDIX A: SURVEY DESIGN OF THE
2001 AND 1995 SURVEYS

The 2001 survey was conducted by the Center for Survey Research (CSR) at Ohio State University. The survey was based on a typical Random-Digit-Dial (RDD) sample of the American general public and an oversample of African-Americans. The fieldwork in the primary sample was conducted from January 5, 2001 to January 19, 2001, with 1006 interviews completed during this period. Telephone interviewing was employed, utilizing an RDD sample purchased from Genesys Sampling Systems. The sample is representative of English-speaking households in the forty-eight contiguous states and Washington, D.C. Within households, respondents were selected by the "last birthday" technique.³⁹ The median length of an interview was about twenty minutes.

Using the American Association for Public Opinion Research 2000 (AAPOR) standards, several response rates were calculated.⁴⁰ According to AAPOR Response Rate 5, our survey had a rate of 35%; according to Response Rate 1, the rate was 26%. Using AAPOR's Cooperation Rate 3, our "cooperation rate" was 49%; modifying this rate by taking into account all households in which it is certain that an interviewer spoke with the selected respondent, the cooperation rate climbs to 78%.

We also surveyed an oversample of African-Americans. We sampled from census tracts in which the concentration of African-American households was 25% or greater. The field work was conducted from January 22, 2001 to February 12, 2001. The methods employed in the oversample were identical in all respects to those employed in the primary sample.

A total of 409 interviews with African-American respondents were completed in the oversample. The response rates for the oversample were as follows: AAPOR Response Rate 1: 30%; AAPOR Response Rate 5: 40%; AAPOR Cooperation Rate 3: 55%; and Modified AAPOR Cooperation Rate 3: 80%.

We have weighted these data to adjust for the unequal probabilities of selection (i.e., the oversample) and nonresponse.⁴¹

39. See PAUL J. LAVRAKAS, *TELEPHONE SURVEY METHODS: SAMPLING, SELECTION, AND SUPERVISION* 111-13 (2d ed. 1993).

40. AAPOR STANDARD DEFINITIONS, *supra* note 21.

41. This follows the convention of the American National Election Study as prepared by the Sampling Section Division of Surveys and Technologies, see Univ. of Mich. Inst. for Soc. Research, *Post-stratified Cross-Sectional Analysis Weights for the 1992, 1994, and 1996 NES Data* (1998).

The 1995 survey was part of a seven-nation study of legal values.⁴² Representative samples of the general public were interviewed face-to-face in Bulgaria, Hungary, Poland, Russia, France, and Spain, and by telephone in the United States. Noninstitutionalized residents of each country who were at least eighteen years old were eligible to be interviewed.

42. James L. Gibson, *Putting up with Fellow Russians: An Analysis of Political Tolerance in the Fledgling Russian Democracy*, 51 POL. RES. Q. 37 (1998). The Russian survey was conducted over the period from November 1995 through January 1996, and the U.S. survey was conducted in 1995 and 1996 as well. Since such a small percentage of the respondents were interviewed in 1996, we refer to these surveys as generally having been conducted in 1995.