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Rule Violations and the Rule of Law: A Factorial Survey of Public Attitudes

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RULE VIOLATIONS AND THE RULE OF LAW: A FACTORIAL SURVEY OF PUBLIC ATTITUDES*

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Where law ends, tyranny begins.
—William Pitt, the younger, British Prime Minister (1783–1801, 1804–1806)

Good people do not need laws to tell them to act responsibly, while bad people will find a way around the laws.
—Plato

INTRODUCTION

The rule of law is no simple subject; it is not even easy to define what the rule of law means. Yet people go to great lengths to demonstrate their adherence to the principles of the rule of law. An underlying assumption of those who advocate a formal view of the rule of law is that there is an *inherent* value in adhering to rules. But is that assumption valid? Of what importance are rules, and what consequences do those who violate rules suffer in the eyes of others?

In this Article, we present the findings of a factorial survey exploring questions about the rule of law. Part II provides background on the theory, nature, and meaning of the rule of law, as each area informed our study. Part III describes the survey, in which respondents answered general questions about the rule of law and evaluated particular situations in which rules were violated for different reasons. Parts IV and V present and explain the study's findings.

Although respondents expressed nearly unanimous support for the general importance of the rule of law, their reactions to the case scenarios showed a strong sensitivity to the particular facts of each situation—especially the purposes that motivated the violations. These findings lend support to the view that whatever the cultural or psycho-

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logical preference for rules over outcomes, or strict equality over fairness, there may be circumstances in which most people are willing to make situation-specific assessments of what is just.

II. THE RULE OF LAW IN POLITICAL RHETORIC AND LEGAL THEORY

Invocations of the rule of law abound in contemporary culture. It seems we cannot open a newspaper or turn on the news without hearing how some government initiative or decision either complies with or violates it. Pundits, of course, will argue both sides. As public debates rage over the federal government's antiterrorism efforts, one thing remains constant—everyone claims to have the rule of law on their side.[1] The question is why? What is it about the rule of law that makes pundits and politicians believe that it matters? What do they think will happen, and what do they hope to achieve when they claim something violates it?[2]

The desire to justify or criticize deeply contested actions and policies by resort to the rule of law is neither new nor surprising. The rule

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1. The Bush administration's decision to engage in warrantless wiretapping to combat domestic terrorism is the most recent example of the rule of law being invoked to both condemn and support a program. Some criticized the President for "ignor[ing] the rule of law." Maxine Waters, *President's Wiretapping Ignores the Constitution*, ROLL CALL, Feb. 13, 2006, at 10. Others criticized the President for his willingness "to trample the rule of law and constitutional guarantees." Stephen Dinan, *Patriot Act Wins Senate Approval: House Likely to Pass Measure*, WASH. TIMES, Mar. 3, 2006, at A1 (quoting Senator Russell D. Feingold). The response from the administration's supporters also sought justification in legality. Attorney General Alberto Gonzales, for example, appeared before Congress and on numerous media programs, arguing that the program was in perfect accord with the rule of law. According to Gonzales's testimony, "The terrorist surveillance program is necessary, it is lawful, and it respects the civil liberties that we all cherish." Michael Bowman, Debate About Terrorist Wiretapping Continues (Feb. 20, 2006), http://www.voanews.com/english/archive/2006-02/Debate-About-Terrorist-Wiretapping-continues.cfm. In August 2006, a federal district court ruled that the surveillance was unconstitutional. *See* ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006). The decision has been appealed.

2. *See, e.g.*, James G. Wilson, *The Role of Public Opinion in Constitutional Interpretation*, 1993 BYU L. REV. 1037. Professor Wilson noted President Abraham Lincoln's approach:

> Abraham Lincoln, who had earlier glorified the rule of law, became a Humean political analyst, asserting that "[o]ur government rests in public opinion. Whoever can change public opinion, can change the government, practically, just so much." While President, Lincoln justified his aggressive tactics against the Southern rebellion, such as jailing hostile Maryland legislators and other dissidents, because the public would retain the last word about the validity of these actions through the electoral and impeachment processes. At critical points, constitutional trust is more important than constitutional law.

Id. at 1080–81 (alteration in original) (citations omitted); *accord* PATRICIA J. WILLIAMS, THE ROOSTER'S EGG 69 (1995) ("There are any number of junctures in history where a shift in the boundaries of law or some political movement has been signaled by very particular uses of rhetoric, peculiar twists of the popular imagination.").

of law has been a tool of political rhetoric for centuries, and it has been employed in many ways.[3] Its "will-o'-the-wisp"[4] nature may explain its prevalence and persistence. The rule of law can mean different things to different people: one can allege violations of the rule of law to attack both foreign governments and the President of the United States, for abuses of authority and personal indiscretions. As a result, many use the rule of law in a partisan fashion—not as a real normative complaint about a given action.

Such uses generally invoke the idea that people should "follow the rules." Accusing someone of violating the rule of law *simpliciter* is tantamount to calling that person a rulebreaker and, therefore, someone to be mistrusted, condemned, or punished. In addition, accusing an institution or administration of disregarding the rule of law is clearly an attempt to delegitimize that institution in the eyes of the public.[5] Conveying the idea that one does or does not follow the rules is often the point of rule of law criticisms.[6] Viewing the rule of law in

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3. *See, e.g.*, BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 60–72 (2004); Jonathan Rose, *The Rule of Law in the Western World: An Overview*, 35 J. SOC. PHIL. 457, 457 (2004) ("The various ideas contained in Rule of Law are very old . . . ."). Most trace the origins of the modern conception of the rule of law to Professor A.V. Dicey. Dicey explained his vision:

> We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land.
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> . . . .
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> We mean in the second place . . . not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 179–85 (5th ed. 1897) (citation omitted). These basic components of the rule of law have been echoed in numerous other theories. *See, e.g.*, Arthur L. Goodhart, *The Rule of Law and Absolute Sovereignty*, 106 U. PA. L. REV. 943, 945 n.4 (1958); Todd J. Zywicki, *The Rule of Law, Freedom, and Prosperity*, 10 SUP. CT. ECON. REV. 1, 3 (2003) (summarizing Dicey's theory in three points: "(1) the supremacy of regular law as opposed to arbitrary power, i.e., the rule of law, not men; (2) equality before the law of all persons and classes, including governmental officials; and (3) the incorporation of constitutional law as a binding part of the ordinary law of the land").

4. Lillian R. BeVier, *Civilization, Progress, and the Rule of Law*, *in* THE RULE OF LAW IN THE WAKE OF CLINTON 19, 22 (Roger Pilon ed., 2000) (arguing that formal theories of the rule of law "pursue a will-o'-the-wisp"); Allan C. Hutchinson & Patrick Monahan, *Democracy and the Rule of Law*, *in* LAW AND MORALITY: READINGS IN LEGAL PHILOSOPHY 340, 343 (David Dyzenhaus & Arthur Ripstein eds., 2d ed. 2001) ("In short, [the rule of law] is the will-o'-the-wisp of constitutional history.").

5. This seems true even if the critic believes, on principled ground, that the institution or administration has acted in violation of the rule of law.

6. The question of institutional legitimacy in legal theory and its link to issues of legitimacy has been explored mainly in the social psychology literature. *See infra* notes 8–30 and accompanying text; *cf.* Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399 (2005) (suggesting that people react to a single law they view as unjust by losing respect for and flouting other, unrelated

these terms makes the rhetorical claims of its supporters clear. It is a battle over legitimacy and popular support. This presumes that the public views rulebreaking as a wrong in itself, and would be willing to withdraw its support from those who break rules, regardless of why rules are broken or what is accomplished by breaking them.

That said, it has never been sufficient to merely rely on arguments that a given action or policy is within the rules. To shield various actions from criticism, proponents and critics often lay claim to other expediencies; a given action may be morally correct, motivated by national security concerns, or otherwise "necessary"—whether legal or not.[7] We can safely assume that these considerations are invoked because they too are believed to influence public opinion about the legitimacy or wisdom of a given action.

The interplay between legality and expediency raises further questions. Do rules matter more than justifications? Are we more likely to condemn conduct because it violates rules than if it does not? Do we value adherence to rules more than good conduct, however that is defined? More broadly, how do rules influence attitudes about the acceptability of official decisionmaking? Are we more likely to agree with actions that conform to rules, to ideological or philosophical justifications, or to plain common sense? In short, does the adherence to rules carry independent normative force, or is it a second-order consideration in determining the appropriateness or desirability of a given action or policy?

The role that rules play in influencing people's perceptions about the rule of law, legitimacy, and justice is an empirical question that has received little attention to date. The lack of empirical research on the precise question has not prevented some in the legal profession from making strong claims about people's preferences. Legal scholars have

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laws, and offering experimental evidence in support of people's expressed intentions to obey or flout everyday laws, as well as evidence that mock jurors who view one law as unjust are more willing to nullify other laws).

7. Almost invariably, officials acting in violation of the law justify their conduct by alleging some necessity or socially desirable result that is served by not honoring the rule. This was evident to British Prime Minister William Pitt: "Necessity is the plea for every infringement of human freedom. It is the argument of tyrants; it is the creed of slaves." William Pitt, Prime Minister, Speech to the House of Commons on the India Bill (Nov. 18, 1783). It is further evident in the current debate over President George W. Bush's ordering of electronic eavesdropping of communications into and out of the United States. Defenders of the President's conduct point predominantly to the socially desirable consequence sought to be achieved—national security. Critics of the President's conduct point to its lawlessness—that it violates the Fourth Amendment, the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801–1811, 1821–1829, 1841–1846, 1861–1862 (2000), and the Supreme Court's most relevant holding in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), which agreed with the President's goals, but argued that he could have, and should have, conducted himself within the law.

often made predictions about the value that rules have in the public's mind, and have based theories of the rule of law on their intuitions about people's innate preferences. It is these claims we seek to test through our empirical research.

A. Rules, Legitimacy, and the Rule of Law in Legal Theory

One of the principal challenges of conducting empirical research on the rule of law is the difficulty of defining the concept. The rule of law has been the subject of intense theoretical inquiry for much of the last century. Its precise parameters have been so hotly debated that, to many, the rule of law is now incapable of precise definition. As one scholar put it, "[W]e are never quite sure what we mean by the rule of law."[8] Despite the inherent imprecision in the term, it is possible to set out some basic theories while admittedly glossing over much of the complexity.

The poles of the debate are generally cast in terms of a "thin" or "formalist" version of the rule of law and a "thick" or "substantive" version. For a thorough discussion of the intricacies of the thin and thick versions, we strongly recommend works that take a more comprehensive approach.[9] It is sufficient for our purposes, though, to focus on those aspects of the debate that implicate rhetorical and empirical uses. To this narrow end, we concentrate primarily on the writings of Justice Antonin Scalia and other scholars who argue for a "formalist" version of the rule of law.

Whatever the difference among legal theorists, they agree that *rules* are the basis of the rule of law. In addition, there is substantial consensus that certain conditions must be imposed on rules in order to serve the rule of law: rules must be clear, general, public, prospective, and stable.[10] In addition to these formal criteria, there is a general

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8. GEORGE P. FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT 12 (1996) (internal quotation marks omitted); *accord* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 1 (1997) (stating that the rule of law "has always been contested"); Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 791 (1989) ("[T]he Rule of Law . . . is deeply ambiguous, a contested concept."). The rule of law is probably an "essentially contested concept," incapable of universal definition or understanding. *See* W.B. GALLIE, PHILOSOPHY AND THE HISTORICAL UNDERSTANDING 157–91 (1964).

9. *See generally* T.R.S. ALLAN, CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW (2001); TAMANAHA, *supra* note 3.

10. Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 968 (1995). Professor Sunstein has catalogued the various conditions necessary for a legal system to be considered under the rule of law:

> (1) clear, general, publicly accessible rules laid down in advance; (2) prospectivity and a ban on retroactivity; (3) a measure of conformity between law in the books and law in the world; (4) hearing rights and availability of review by independent adjudicative

view—less widely held—that the system of laws must take into account the shared values and understandings of the society it governs.[11] The battleground for competing theories of the rule of law is generally found in this latter point, as theorists depart dramatically on the nature of the values and understandings that the rules must reflect.

It is difficult, if not impossible, to identify widely shared values or understandings within our pluralistic society. In the past, most theorists argued that natural law traditions—often reflecting a Christian ethic—were sufficiently widespread that the law could and should reflect such values. The breakdown of natural law values has led to an erosion of the ideal that legal rules embody higher moral principles. Today, "no fact seems to be plainer in the modern world than the extent and depth of moral disagreement, often enough disagreement on basic issues."[12] Even so, "[a] society which aims to achieve long-term peace and stability must craft its laws in harmony with established understandings and shared values."[13]

In the place of the more substantive or thick version of the rule of law, contemporary theorists have increasingly adopted a more formalist or thin version.[14] The formalist ideal of the rule of law places tremendous importance on reducing the tension between administering the law and imposing personal values on it. The key to this reduction

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officials; (5) separation between law-making and law-implementation; (6) no rapid changes in the content of law; and (7) no contradictions or inconsistency in the law.

Id. (citation omitted); *accord* GEOFFREY DE Q. WALKER, THE RULE OF LAW: FOUNDATION OF CONSTITUTIONAL DEMOCRACY 24–42 (1988) (offering twelve conditions).

The view that rules must be known, understood, and capable of being followed is characteristic of every theory of the rule of law. JOSEPH RAZ, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210, 213 (1979) (arguing that the rule of law must satisfy two goals: "(1) that people should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it"); *see also* Radin, *supra* note 8, at 785 (stating that "there must be rules" and "those rules must be capable of being followed"). Professor T.R.S. Allan summarized Lon Fuller's view of the rule of law: "Rules should not merely be general, in the sense that they should apply to all citizens and all events falling within appropriately specified conditions, but their terms should be clear and capable of obedience. Rules should therefore normally be prospective, and should be reasonably stable in content . . . ." T.R.S. Allan, *The Rule of Law as the Rule of Reason: Consent and Constitutionalism*, 115 LAW Q. REV. 221, 226 (1999); *see also* LON L. FULLER, THE MORALITY OF LAW (rev. ed. 1969).

11. *See* Allan, *supra* note 10, at 231 ("At the heart of the ideal of the rule of law, properly understood, is a principle requiring governmental action to be rationally justified in terms of some conception of the common good.").

12. Alasdair MacIntyre, *Theories of Natural Law in the Culture of Advanced Modernity*, *in* COMMON TRUTHS: NEW PERSPECTIVES ON NATURAL LAW 91, 93 (Edward B. McLean ed., 2000).

13. Sean Coyle, *Positivism, Idealism and the Rule of Law*, 26 OXFORD J. LEGAL STUD. 257, 286 (2006).

14. TAMANAHA, *supra* note 3, at 111 ("[F]ormal legality is the dominant understanding of the rule of law among legal theorists . . . .").

is emphasizing the importance of rules over discretion. As one commentator noted, "To fulfill this role . . . legal rules must embody authoritative, determinate standards essentially *distinct from* the interpretive principles pursued in open-ended moral discussion."[15]

The debate is whether the rule of law is best served by rules or standards. The difference, simply put, is the amount of discretion placed in the hands of decisionmakers. Rules are generally considered clearer articulations of the law and, as a result, serve the goals of the thin version of the rule of law. Standards, on the other hand, provide greater discretion to decisionmakers, allowing them to include more substantive considerations in the law's application and enforcement. A classic example is the difference between a standard that states "drivers of automobiles may not operate their vehicles at unsafe speeds," and a rule that declares "drivers of automobiles may not exceed fifty-five miles per hour." In the former, the standard gives the decisionmaker the discretion to seek individualized justice or fairness by considering other factors—weather conditions, the skill of the driver, traffic, etc. In the latter, the certainty of the rule promotes the goals of the thin version by ensuring the subject of the law understands exactly what constitutes a violation and leaving the decisionmaker without discretion.[16] The focus on the clarity of rules is an attempt to cabin the discretion of decisionmakers to interfere with what adherents to the thin version of the rule of law continue to argue are the preeminent values of our legal and political systems—consistency and equality.

The most influential proponent of this version of the rule of law in contemporary debate is Justice Scalia. The elevation of rules in his theory is made clear by his formulation of "the rule of law as a law of rules."[17] Scalia thinks that "only clear legal rules can further the rule of law."[18] This formalist view—that rules are the paramount method for upholding the rule of law—is essential to restrict, as he sees it, the danger that decisionmakers in legal systems will impose their view of what is fair in given circumstances. The problem with seeking fairness is that it comes at the cost of consistency.[19] According to Scalia,

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15. Coyle, *supra* note 13, at 264–65 (emphasis added).

16. This assumes that the rule contains an equally clear and unequivocal standard of proof and punishment.

17. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) [hereinafter Scalia, *Law of Rules*].

18. Eric J. Segall, *Justice Scalia, Critical Legal Studies, and the Rule of Law*, 62 GEO. WASH. L. REV. 991, 999 (1994).

19. Scalia argues that the mandate of "consistency over fairness" is even more important in judge-made law:

"Consistency is the very foundation of the rule of law."[20] Consistency is nothing less than the maxim that "persons similarly situated should be similarly treated—that is to say, the principle that the law must be consistent."[21] Thus, in a system of law that values fairness, the rule of law is synonymous with equality and consistency.

It is fair, then, to ensure that like cases are treated alike—not to aim for the best moral outcome in a given case. Scalia is unequivocal: "The rule of law is *about* form. . . . Long live formalism. It is what makes a government a government of laws and not of men."[22] Scalia and others understand consistency and equality either as a moral requirement of the rule of law or as a condition of justice.

Even advocates of a more substantive or thick conception of the rule of law agree that rules are important.[23] In addition, they generally agree about what kinds of rules are necessary to achieve the rule of law—a consensus that reflects, almost perfectly, the conception contained in the thin version. The main difference is that advocates of the thicker version of the rule of law require that the outcomes of their systems meet an exogenous moral standard. One way to consider the difference is to view the conditions imposed on rules as important to advocates of the thick theory, yet essential to advocates of the thin theory. In other words, to proponents of the thick version, rules *should* be general, stable, and prospective, provided adherence to these principles does not interfere with other moral values, such as

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> When [a rule as contained in an] elaborate intellectual structure produces a result that seems to the judge patently "unfair" or contrary to governing text, it is not acceptable for him to disregard the structure . . . . If he cannot [formulate a compatible rule-based rationale for his deviation], then (the theory of our system holds) his notions of fairness . . . are simply out of whack, and he must subordinate them to the law.

Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 589 (1989–1990) [hereinafter Scalia, *Contemporary Legal Analysis*].

20. *Id.* at 588.

21. *Id.*

22. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 25 (1997). Professor Brian Tamanaha has described the connection between the rule of law and legal formalism as follows:

> It is of paramount significance to recognize that the rule of law understood in terms of formal legality boils down to the nature of rules. . . . "Law" in essence is comprised of rules . . . . The function (and definition) of rules is to serve as general guides of behavior. . . . Rules are formal by nature; so law is formal by nature; so the rule of law is formal by nature.
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> . . . In the end there is nothing distinctive about the formal rule of law as a separate ideal. It is about (legal) rules.

TAMANAHA, *supra* note 3, at 96–97.

23. TAMANAHA, *supra* note 3, at 102 ("All substantive versions of the rule of law incorporate the elements of the formal rule of law, then go further, adding on various content specifications.").

justice, distributive equity, or democracy. To proponents of the thin version, any attempt to circumvent rules for other substantive values is, by definition, a violation of the rule of law because it results in inconsistent or unequal treatment of citizens. Thus, rules *must* meet these conditions.

In the end, however, "[t]here is no academic consensus regarding what kind or how much of a substantive component the rule of law requires,"[24] and the bases of disagreement are normative rather than empirical. Finally, advocates of the substantive theory implicitly agree that the rule of law should focus more on outcomes than on whether the decisions were reached in some formally acceptable manner.

To Scalia, the principles of equality and consistency are at once normative and instrumental. The lack of agreement on substantive moral outcomes that Scalia and others see in modern society means that justice, as a goal of any version of the rule of law, must be served by other values. Scalia's declaration that "[t]he Equal Protection Clause epitomizes justice more than any other provision of the Constitution"[25] reveals his view of which values must be served. Professor T.R.S. Allan has echoed Scalia's belief that equality and consistency are necessary conditions for justice: "The idea of the rule of law is also inextricably linked with certain basic institutional arrangements. The fundamental notion of equality, which lies close to the heart of our convictions about justice and fairness . . . may today be taken to be a central strand of the rule of law."[26]

Yet, the thin version of the rule of law requires equality and consistency for reasons beyond their normative connection to justice. Of particular significance for our research is the claim that equality and consistency are not just moral considerations, but are also linked to people's intuitive sense of fairness. According to Scalia, one aspect of this claim is historical: "[Y]ou will search long and hard to find anyone, in any age, who would reject the fundamental principle underlying the equal protection clause: that persons similarly situated should be similarly treated . . . ."[27] This historical claim is, for Scalia, evidence that equality and consistency are psychologically driven imperatives, and always have been. Professor Kent Greenawalt has made

24. Segall, *supra* note 18, at 996.

25. Scalia, *Law of Rules*, *supra* note 17, at 1178.

26. T.R.S. ALLAN, LAW, LIBERTY, AND JUSTICE: THE LEGAL FOUNDATIONS OF BRITISH CONSTITUTIONALISM 22 (1993); *accord* Allan, *supra* note 10, at 231 ("The formal equality ensured by the regular and impartial application of rules to all those within their purview is supplemented by a more substantive equality, or notion of equal citizenship.").

27. Scalia, *Contemporary Legal Analysis*, *supra* note 19, at 588.

similar claims about the "deep-rooted feelings" of people in Western society towards concepts of equality and consistency.[28]

The claim that people inherently view equality and consistency as synonymous with justice is, ultimately, an intuition that Scalia and others have about human psychology. This intuition is articulated by Scalia:

> [O]ne of the most substantial . . . competing values [to perfection in legal decisionmaking] . . . is the appearance of equal treatment. As a motivating force of the human spirit, that value cannot be overestimated. Parents know that children will accept quite readily all sorts of arbitrary substantive dispositions . . . . But try to let one brother or sister watch television when the others do not, and you will feel the fury of the fundamental sense of justice unleashed.[29]

Allan is more explicit, detailing how "[t]he ideal of equality and rationality of which the rule of law truly consists does not, however, amount to a controversial conception of social justice or even a theory of democracy."[30] It sidesteps these more "controversial conceptions" precisely because it is deeply rooted in the psyche of the governed.

To summarize, we have noted that the rule of law has been in crisis since the breakdown of natural law theories. Second, we have discussed how theorists of the rule of law continue to hold the view that our system of laws should or must reflect commonly held values. Third, these values are equality and consistency, and are best served by restraining discretion while promoting formal application of rules. Finally, these notions of equality and consistency, integral to the adoption of formal theories of the rule of law, are grounded mainly in intuitive judgments about the nature of human psychology.

Our research is concerned primarily with this last point. Scalia and others have made claims about the nature of human psychology based on intuition and historical observation. They have cited no authority for this claim, but nonetheless allege that these psychological preferences are the key to understanding the rule of law as a preference for rules over outcomes. In short, if Scalia and others are correct that we elevate equality over other values, then a formal application of rules is not only theoretically preferred, but practically necessary. Legal insti-

28. Kent Greenawalt, *"Prescriptive Equality": Two Steps Forward*, 110 HARV. L. REV. 1265, 1273 (1997).

29. Scalia, *Law of Rules*, *supra* note 17, at 1178. Interestingly, like Scalia, Greenawalt also uses stories of child-rearing to make his point. Greenawalt, *supra* note 28, at 1265–66 (telling a story of his son's desire to take violin lessons because "he did not want to be denied a benefit given to [his brother], and we, his parents, thought that his desire for equal treatment had some kind of force").

30. Allan, *supra* note 10, at 224.

tutions that do not strictly apply "rules" will violate notions of equality and, as a result, lose public support.

B. An Empirical Study of the Rule of Law

The present study is certainly not the first empirical research with implications for the rule of law. But because the rule of law is a large and complex phenomenon, any particular study or research touches only a part of the whole. The rule of law invokes procedural rules as well as substantive rules, and ranges from the means of adopting a rule to its interpretation, application, adjudication, and enforcement. There is a risk, then, that we might overgeneralize from one set of findings and think we know more than we actually do; we may also find that what appear to be conflicting findings really address different aspects of the rule of law.

Different empirical studies touch on different parts of that large and complex problem. For example, research collected under the general rubric of procedural justice has been concerned not only with formal procedures and, to a lesser extent, the outcomes of those proceedings,[31] but also with the general treatment of people by those with the authority to make decisions or to take action—what we might call collateral procedures—when outcomes are ambiguous.[32] Other research has focused on people's satisfaction with outcomes and processes, especially when the participants have been made experimentally omnis-

31. *See generally* JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975).

32. *See generally* Jason Sunshine & Tom Tyler, *Moral Solidarity, Identification with the Community, and the Importance of Procedural Justice: The Police as Prototypical Representatives of a Group's Moral Values*, 66 SOC. PSYCHOL. Q. 153 (2003) (reporting findings based on more abstract feelings of shared values with legal authorities, and contending that marginal members of society are even more concerned about procedural justice); Tom R. Tyler, *The Psychology of Procedural Justice: A Test of the Group-Value Model*, 57 J. PERSONALITY & SOC. PSYCHOL. 830 (1989) (noting that noncontrol factors—group-value variables such as neutrality, trust, and social standing—have an independent impact on judgments of procedural justice); Tom R. Tyler, *Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Institutions?*, 19 BEHAV. SCI. & L. 215 (2001) (offering an alternative procedural justice based model of public trust and confidence in police and courts to views about the manner in which legal authorities treat the public, and drawing support from psychological research about public evaluations of institutions and authorities); Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103 (1988) (reporting the findings of a study in which hundreds of citizens were interviewed about their personal experiences with police and courts, and finding that procedural justice has a major influence on satisfaction with outcomes and the evaluation of legal authorities); Tom R. Tyler et al., *Maintaining Allegiance Toward Political Authorities: The Role of Prior Attitudes and the Use of Fair Procedures*, 33 AM. J. POL. SCI. 629 (1989) (finding that people's experiences with government agencies affect their broader attitudes toward government, and that this process is not dominated by the favorability of the outcome of the prior encounters).

cient about the "correct" outcome.[33] Although that research is voluminous, it touches only a small portion of the rule of law. It has not dealt with the substance of legal rules but only with process—often not even with the existence of procedural rules in any formal sense.

Our study is similarly narrow in focus, though it asks a new question: How do people react to substantive violations of a rule by an official actor? We vary the level of obligation the rule imposes—from absolute to advisory—and the actor's purpose in violating the rule. Do individuals uniformly disapprove of rulebreakers, or might they look past the violation toward some greater good?

III. A FACTORIAL SURVEY

A. Survey Design

Our research was conducted using a factorial survey in which respondents were randomly assigned to receive different information that reflects different cells of an experimental design. Our experiment used a 3x3x2 factorial design: three experimental variables were tested, including three levels of the rule's mandatory/discretionary nature (Rule Strength) and three different purposes for the actor's violation (Purpose).[34] The final variable, a demographic attribute that distinguishes between lawyers and nonlawyers, was employed as part of the sampling design.[35]

Our respondents were presented with a short scenario that described a blind-grading policy that had been recently adopted with unanimous public and professional support within a fictitious school district.[36] In this way, the rule is in accord with basic notions of the

33. *See, e.g.*, Elizabeth Mullen & Linda J. Skitka, *Exploring the Psychological Underpinnings of the Moral Mandate Effect: Motivated Reasoning, Group Differentiation, or Anger?*, 90 J. PERSONALITY & SOC. PSYCHOL. 629 (2006) (finding that the "moral mandate effect" is driven by people's anger (or pleasure) at seeing their nonpreferred (or preferred) outcomes materialize); Linda J. Skitka & David A. Houston, *When Due Process Is of No Consequence: Moral Mandates and Presumed Defendant Guilt or Innocence*, 14 SOC. JUST. RES. 305 (2001) (demonstrating that procedural fairness affects judgments of trial outcomes only when the true guilt or innocence of a defendant is unknown); Linda J. Skitka & Elizabeth Mullen, *Understanding Judgments of Fairness in a Real-World Political Context: A Test of the Value Protection Model of Justice Reasoning*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 1419 (2002) (suggesting that satisfaction with procedures is dependent upon outcomes that are in accord with one's moral values).

34. This created a total of nine unique conditions.

35. Additional demographic variables—political and geographic—were included in the survey but are beyond the scope of the present study.

36. The subject of our rule—blind grading of exams—was deliberately mundane and apolitical so that we might sidestep the prejudices and predilections of our respondents regarding controversial topics currently in the news.

rule of law: it is general, public, prospective, enacted through appropriate measures, and even, although not required by the rule of law, with the explicit acceptance of the actor in question.

In line with the aforementioned experimental variables, we created three versions of the blind-grading policy that composed our Rule Strength manipulation: an "absolute" version, where blind grading is mandatory; an "opt-out" version, where blind grading is required, but where case-by-case exemptions are recognized; and a "recommended" version, where blind grading is strongly encouraged but optional.

The scenario described an instance in which a teacher willfully violated the blind-grading rule despite the fact that, in all cases, the teacher was both aware of the rule and had supported its creation. Again, we created three versions of this portion of the scenario, each representing a different reason for the rule violation: a "good purpose," where the teacher needed to violate the blind-grading rule in order to correct a scoring error; an "ambiguous purpose," where the teacher wanted to adjust the grades based on a subjective evaluation of the student's performance in the course; and a "bad purpose," where the teacher was simply looking to raise the grade of a favored student and lower the grade of a disliked student. These three variations composed our Purpose manipulation. One example of these scenarios is outlined in Appendix A.

The three Rule Strengths were then matched with one of the Purposes in all possible combinations, resulting in the creation of nine separate scenarios.[37] In all cases, respondents were exposed to a single scenario and, as a result, were not aware of the other variations. After reading the scenario, the respondents were first presented with a brief questionnaire that asked them to assess the appropriateness of the teacher's conduct. The respondents were then given another set of questions asking their views on rule of law values and dilemmas more generally. Finally, respondents answered a third set of questions seeking demographic information: age, gender, occupation, etc. A copy of the questionnaire is provided in Appendix B.

B. Data Collection

Over the span of two months, 4574 email invitations were sent to potential respondents in four major urban counties in the United

37. An additional nine scenarios were created that included variations on whether the teacher actively or passively violated the rule in question. Due to space and time limitations, we leave our findings on the active versus passive violation for another time. It should be noted, however, that the active versus passive manipulations did not affect the results of the research presented here.

States: Philadelphia County, Pennsylvania; Cook County, Illinois; Dallas County, Texas; and Maricopa County, Arizona. These invitations introduced the study and included a link to the webpage that hosted our survey. After reading a brief instruction page, the respondents clicked another link that randomly assigned them to one of our nine experimental conditions. Depending on the specific condition to which they were assigned, respondents viewed one of the nine scenarios, followed by the questionnaire. Once they had completed the questionnaire, the respondents submitted their responses and the data were recorded in our database. Although we collected various demographic data, respondents otherwise remained anonymous.

Of the email invitations sent, half targeted lay respondents while the other half targeted lawyers. Potential lay respondents were identified through email directories at major universities located within each of our target counties. Research assistants compiled lists of the email addresses of noninstructional staff members—accountants, administrative assistants, maintenance workers, technical staff, etc.[38] Lawyers' email addresses were identified through online legal directories. Of the 4574 emails that were sent, 1432 of them were returned as undeliverable. We received 402 completed survey responses, resulting in a response rate of 12.8%.[39] A roughly equal number of responses came from lawyers (n = 192) and lay people (n = 202).[40] The respondents averaged forty-one years of age (ranging from nineteen to sixty-nine years), and both genders were represented approximately equally (49% female and 51% male).

IV. RESULTS

A. *Measures of Appropriateness*

We provided the respondents with four questions that asked them to rate the appropriateness of the teacher's actions without drawing attention to either the Rule Strength or Purpose manipulations. The responses to these four questions were examined with an exploratory factor analysis,[41] which confirmed that the four items were actually

38. To help ensure that our respondents represented a diverse range of education levels, socioeconomic statuses, and ages we did not target faculty or students; however, a small number of respondents did identify themselves as college instructors or students.

39. This is typical of unsolicited email surveys, which have average response rates ranging from about 4% to 10%. Oak Web Works, LLC, http://www.oakwebworks.com/portfolio/e-marketing/emails-stats.htm (last visited Dec. 22, 2006).

40. Eight respondents did not indicate their occupation and were excluded from subsequent analyses.

41. This is a statistical technique that identifies groups of items that are highly interrelated, suggesting that those items are measuring the same underlying construct. For a detailed expla-

measuring the same general concept.[42] Accordingly, for each respondent, the responses to each of the four items were then averaged into a single measure of "perceived appropriateness" ranging from 1 (least appropriate) to 7 (most appropriate).[43]

B. *Effect of the Purpose Manipulation*

A preliminary analysis revealed that the gender of the respondents affected several of our variables, so we included gender as a factor in all subsequent analyses.[44] We conducted a series of statistical tests on our 3x3x2x2 design (including gender) and discovered several statistically significant effects.[45] By a wide margin, the largest influence on the perceived appropriateness of the teacher's actions was the Purpose manipulation—the teacher's motivation for breaking the rule.[46] In the cases where the teacher violated the blind-grading rule for nefarious or ambiguous purposes, respondents' appropriateness ratings were quite low (M = 1.80 and 2.01, respectively, on the 7-point scale).[47] However, when there was a good reason for violating the rule, the teacher's actions were rated as significantly more appropriate (M = 4.37).[48] This effect existed across all other conditions in the study, and within all strata of every demographic variable. This potent effect overshadowed all others in the study, and exceeded the strength of most empirical relationships in social, economic, or biological science.[49]

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nation of factor analysis, see BARBARA G. TABACHNICK & LINDA S. FIDELL, USING MULTIVARIATE STATISTICS (4th ed. 2001).

42. These questions were items numbered one to four on our questionnaire, which is attached as an Appendix. Exploratory principal-axis factor analysis extracted a single factor accounting for 76.4% of the total variance. Because only one factor was present, no factor rotation was necessary. The measured reliability of the four items (Cronbach's Alpha) was 0.916.

43. For the purposes of these analyses, the individual values of the responses are less important than their relative differences; an appropriateness rating of 3 means little in absolute terms, but when comparing a rating of 3 to a rating of 6, the difference in perceived appropriateness is clear.

44. In our sample, gender and occupation were related: our lawyer respondents were roughly 60% male, and our nonlawyer respondents were roughly 60% female. By including gender as a factor in all analyses, it was possible to separate differences in responses due to gender from the differences in responses due to occupation.

45. We used a 3x3x2x2 between-subjects analysis of variance. For an overview of analysis of variance tests, and all subsequent statistical tests—e.g., simple effects, main effects, post-hoc tests—see WILLIAM L. HAYS, STATISTICS (5th ed. 1994).

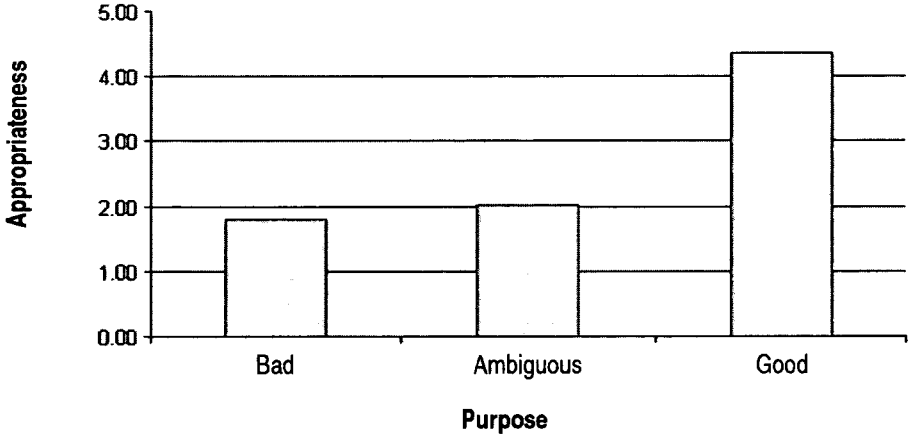
46. F (2,351) = 94.37, $p < 0.0001$; $eta^2 = 0.35$.

47. Ratings did not significantly differ between the "bad" and "ambiguous" purpose conditions.

48. Paired-comparisons using Tukey's HSD Post-hoc Test, $ps < 0.001$. *See* fig.1.

49. The effect size expressed as a simple correlation would be 0.59.

FIGURE 1. MEAN APPROPRIATENESS RATINGS BY PURPOSE CONDITION



C. *Effects of the Rule Strength Manipulation*

Although there was a significant main effect of the Rule Strength variable (absolute, opt-out, recommended),[50] the effect was moderated by the respondents' occupation.[51] A simple effects analysis examined the impact of the Rule Strength manipulation within each of our occupation categories—lawyers and nonlawyers. This analysis revealed that lay people in our sample were insensitive to the relative strength of the rule governing the blind-grading policy.[52] That is, their judgment of the violation was not affected by the mandatory versus advisory nature of the rule. However, the lawyers in our sample did respond to the Rule Strength manipulation[53] and did so in the expected way: the teacher's actions were rated most inappropriate when the rule was absolute (M = 2.29), less inappropriate when the rule included an opt-out provision (M = 2.62), and most appropriate when the rule was merely recommended (M = 3.34).[54]

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50. Main effect of Rule Strength, F (2,351) = 3.14, $p < 0.05$; eta^2 = 0.02.

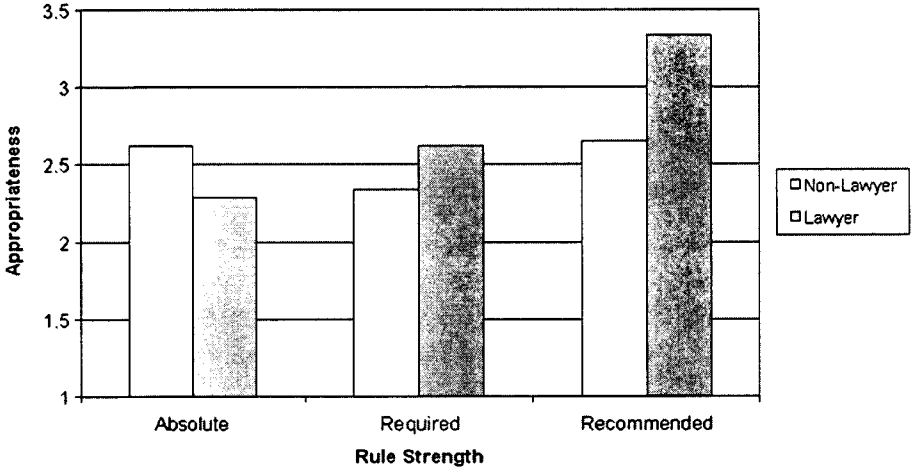
51. A significant Rule Strength by occupation interaction (F (4,351) = 3.84, $p < 0.05$; eta^2 = 0.02) suggested that the Rule Strength variable was affecting members of one occupation differently from the other.

52. Nonlawyer respondents' judgments did not differ as a function of the Rule Strength manipulation, F (2,351) = 0.72, p = ns.

53. Significant simple effect of Rule Strength within lawyer respondents, F (2,351) = 9.97, $p <$ 0.001.

54. *See* fig.2. In addition to the interaction with occupation, our Rule Strength conditions interacted with the gender of our respondents. Rule Strength by Gender interaction, F (2,351) = 5.08, $p < 0.01$. Male respondents were more likely to base their judgments on the Rule Strength (simple effect of Rule Strength within male respondents, F (2,351) = 11.01, $p < 0.0001$) than their

FIGURE 2. APPROPRIATENESS RATINGS BY RULE STRENGTH AND OCCUPATION



D. *Attitudes Toward Observance and Violation*

Respondents were also asked questions about their general attitudes toward rules when the violation of rules is necessary to achieve desirable outcomes.[55] Taken as a whole, these questions measure the extent to which our respondents feel it is proper to follow rules regardless of circumstance or outcome—a measure of "Rule Abidingness." When examining the reactions to our scenarios, we found, as one might expect, that respondents' measured endorsement of Rule

female counterparts (simple effect of Rule Strength within female respondents, F (2,351) = 2.47, p = ns).

Furthermore, the Rule Strength manipulation interacted with the Purpose manipulation, but the specific pattern of the interaction differed between the genders, F (4,351) = 3.06, $p < 0.05$. A simple effects analysis of this interaction revealed that males responded uniformly to the Rule Strength manipulation across all three purposes. In other words, males rated conduct more appropriate as the purpose for the violation became better and those judgments did not vary as a function of the absolute versus advisory nature of the rule, F (4,351) = 2.13, p = ns. However, this was not the case with female respondents, F (4,351) = 3.67, $p < 0.01$. For female respondents, the Rule Strength manipulation had an effect on judgments of acceptability but only when there was a good reason for violating the blind-grading rule. The simple effect of Rule Strength within the female subset of respondents was insignificant when the purpose was bad (F (2,351) = 0.47, p = ns) or ambiguous (F (2,351) = 1.22, p = ns). However, the effect was significant within the good purpose condition, F (2,351) = 8.73, $p < 0.001$. Curiously, it was not the violation of the absolute rule that was most frowned upon; rather, it was the opt-out version of the rule. In fact, the respondents in this condition rated violations of the absolute and recommended rules as equally acceptable (M = 5.14 and 5.00, respectively); however, violations of the required rule received significantly less support (M = 3.18). Indeed, reactions to this condition were the principal difference between male and female judgments.

55. These were items five through eight on our questionnaire. *See* app. B.

Abidingness was significantly correlated with their appropriateness ratings.[56] Those respondents who felt more strongly inclined to follow rules rated the teacher's violation as less appropriate.[57]

Examining each question individually provides some insight into our respondents' general attitudes toward rules and rule violations. In answering the question, "How important is it for people to abide by legitimate/proper/legal/morally correct rules?", the mean response was 6.38 (on a 7-point scale) (SD = 0.81), with 55% of respondents choosing the most extreme response available and 85.5% choosing the two most extreme responses.[58] These results suggest that there exists a remarkably strong consensus on the importance of obeying rules in the abstract. On all other questions, responses averaged close to the midpoint. These reflect a diverging dissensus: respondents spread themselves quite widely across the spectrum of views.

On the question, "How important is it for people to make sure their actions produce only good outcomes?", the mean was 4.62 (SD = 1.68).[59] Because of the wide dispersion of responses, this does not reflect a consensus that people consider the outcomes of conduct to be only moderately important; people's views may simply diverge, with more of them favoring a concern for good outcomes. Moreover, on this question, a gender gap emerged: although both sexes leaned toward good outcomes, women (M = 4.85) valued them more than men (M = 4.39).[60]

On the question, "In general, is it more important to follow the rules or make sure that your actions bring about good outcomes?", respondents, though again spread widely, tilted toward the value of following rules (M = 4.49, SD = 1.80)[61] over ensuring good outcomes. Again, a marginally significant gender gap emerged: although both genders leaned toward the importance of following rules, men leaned further (M = 4.62) than women (M = 4.34) did.[62]

Responses to the preceding questions suggest an unresolved—and perhaps unresolvable—tension between the value of obeying proper

56. For the purpose of this analysis, the four general attitude items were combined into a single composite score using principal-axis factor analysis, r = -0.377, $p < 0.01$.

57. The measure of Rule Abidingness accounted for 10.6% of the variability in appropriateness ratings, second only to the Purpose manipulation.

58. That is, 85.5% of respondents indicated either a 6 or 7 on the 7-point scale. A t-test was conducted to compare the average response to the midpoint (a neutral response). The responses to this item differed significantly from the midpoint, t (399) = 59.43, $p < 0.001$.

59. This number differed significantly from the midpoint, t (400) = 7.94, $p < 0.001$.

60. F (1,385) = 5.06, p = 0.025.

61. Again, this number differed significantly from the midpoint, t (401) = 5.58, $p < 0.001$.

62. F (1,385) = 3.49, p = 0.062.

rules and the value of ensuring that actions produce good outcomes. The final question pitted these two values even more directly against each other:

> If you were faced with the choice of obeying a legitimate rule that in the circumstance will produce a bad outcome, versus violating the rule in order to bring about a good outcome, would you produce a good outcome regardless of the rule or obey the rule regardless of the outcome?

Though the mean came close to the midpoint of the scale ($M = 3.86$, $SD = 1.86$),[63] the real lesson here is how widely people's responses diverged. The "obey the rule" side of the balance contained 41.4% of responses, while 36.9% of responses were on the "produce a good outcome" side, with the remaining 21.7% of respondents sitting on the fence.

V. Discussion and Conclusion

The purpose for which a rule was violated made a dramatic difference to respondents of all types—lay people and lawyers, men and women—and in all Rule Strength conditions. The effect size is impressive. People found the violation of the blind-grading rule—a rule adopted out of a widely recognized need and supported by the entire community, including the person who ended up violating the rule—to be decidedly more appropriate when the rule was broken in an effort to achieve a socially desirable goal than when it was broken for less noble purposes.

This finding suggests that people are concerned about more than simply following a rule for the sake of obeying the rule. People are apparently attentive to particularized circumstances and respect the pursuit of the "right" outcome. Where that requires violation of the rule, people appear willing to tolerate, forgive, or even approve of the violation. This result seems inconsistent with the assumptions of those, such as Justice Scalia, who believe that the thin rule of law is sufficient to enlist the support of the populace. Thus, for example, while the law treats intentional unlawful killings that are performed with premeditation and deliberation as acts of first degree murder for the purpose of establishing criminal liability—regardless of motive—the public appears ready to make a major distinction between a mercy

63. Although it tilts toward the rules, the mean response does not differ significantly from the midpoint (a neutral response), t (400) = 1.42, $p = 0.15$.

killing of a beloved parent and a killing motivated by a greedy desire to accelerate one's inheritance.[64]

Respondents did not, however, heartily approve of rule violations.[65] The proper way to test whether the ratings reflect some degree of disapproval of the violation would be to have a control condition in which the teacher followed the rule, enabling us to see whether that condition was rated as being significantly more appropriate than a violation for even the best purposes. Alternatively, we might discover that obedience to the rule is, under some conditions, regarded as less appropriate than violation to achieve a more valued, socially desirable end.

Where the goals of the law address weightier matters, such as obeying criminal laws, we might find people less willing to tolerate departures from it. Also, where the purpose for the departure becomes increasingly weighty, the violation might be viewed as increasingly justified. Even then, the central message is that people are paying attention to both the nature of the rule and the circumstances of the violation, rather than blindly insisting on adherence to the rule.

The second experimental variable tested differences in people's reactions to violations of a rule when that rule was either mandatory, contained an opt-out provision, or was merely advisory. Lay people were insensitive to those differences: the violation of a mandatory rule was regarded as no more inappropriate than the violation of what amounted to a mere suggestion. Attorneys' ratings of the appropriateness of the violation, however, showed significant differences as a function of the mandatoriness of the rule. But even attorneys were more sensitive to the purpose for the violation than they were to the mandatoriness of the rule.

Thus, the goals motivating the rule violation were far more important to judgments of appropriateness than the mandatoriness of the rule—even for lawyers, who clearly treated violation of a mandatory rule as more troubling than violation of an advisory rule. This certainly was so for lay people, for whom the degree of mandatoriness of the rule made no difference at all.

When we asked people more abstract questions about the obligation to obey proper rules and the value of pursuing socially desirable outcomes that may conflict with the rule, we see an interesting shift.

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64. For findings consistent with this notion, see NORMAN J. FINKEL, COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW (1995) and PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW (1995).

65. Even when the teacher had a good purpose for violating the rule, the measure of appropriateness was still close to the midpoint.

We found that the answers given in response to abstract questions are quite different from the answers obtained by observing people's reactions to more concrete dilemmas.

People overwhelmingly endorsed the importance of abiding by legitimate, proper, legal, and morally correct rules.[66] They were much less definitive about the importance of making sure that one's actions produce only good outcomes. Still, people leaned more toward endorsing this value than rejecting it—hinting at the potential conflict between these two values.

These findings, however, fly in the face of the judgments these same people made when presented with a concrete scenario. There, they readily forgave the violation of a legitimate, proper, legal, morally correct rule in deference to the attempt to produce a good outcome. Their abstract pronouncements of devotion to obedience of rules are contradicted by their readiness to forgive violations when the violation occurred in the pursuit of a good outcome.[67]

Next, the dilemma was posed explicitly, asking people whether it was more important to follow the rules or to make sure that actions brought about good outcomes, and whether it was more appropriate to obey a legitimate rule that in the circumstance would produce a bad outcome or to violate the rule in order to bring about a good outcome.[68] This dilemma produced collective uncertainty, with people spreading themselves across the spectrum, whether endorsing one extreme or the other, or sitting themselves right in the middle. Whether this reflects individual differences (some lean toward obeying rules and others lean toward pursuing good outcomes) or individual indefiniteness (the group distribution reflecting the uncertainties of most individuals) is indeterminable from our data. Once again, it is apparent that the seeming dilemma did not translate itself into the judgments people made in the more concrete situation, where outcomes seemed to matter more.

Individual differences were also noted. Lawyers were sensitive to the obligation to obey under the rule's own terms while laypeople were not. Although men and women leaned in the same directions, women leaned further than men toward the value of producing good outcomes while men leaned further than women toward the social ob-

66. The proper way to test whether this rating reflects some degree of disapproval would be to have a control condition in which the teacher follows the rule.

67. The index of general attitudes accounted for only about one-third as much of the variance in appropriateness ratings as did the experimentally manipulated Purpose variable.

68. On this item, recall that there was no significant tilt in either direction; respondents were in equipoise.

ligation to obey rules. And, perhaps most telling for the rule of law, differences in the endorsement of the importance of following rules predicted their judgments of the appropriateness of the rule violation in our scenarios.

It may be, of course, that with changed rules or consequences—involving weightier matters—the concrete scenarios would suggest greater fidelity to rules over outcomes. But the present findings, like those in other areas of social and behavioral research, suggest that people's abstract rhetoric does a poor job of predicting their judgments in concrete situations.[69] People follow a much more flexible situational ethic than they admit or even realize.

If these findings could be extrapolated to the conduct of political leaders, they would suggest that whether a leader can safely disregard the law depends on the justifications the leader can persuasively offer for committing the violation. Moreover, when sanctions for the violation are in the hands of the electorate, forgiveness and even approval may be readily available, depending on the actor's ostensible purposes. Even the legal class would readily appreciate the justificatory purposes of the violation, though they would treat it less forgivingly if the rule was obligatory.

In a larger sense, are these findings an indication that the legal class is more rigid and inflexible than the political class, whose useful expediencies rule the day and benefit the populace? Or do the findings suggest that an important function of law and lawyers is to serve as a gyroscope that resists volatile or ill-considered changes of direction that can flow from unlimited discretion? Perhaps the only answer is that society benefits most from finding an effective balance between continuity and change.

69. For similar phenomena in other areas of inquiry, see Michael J. Saks, *Public Opinion About the Civil Jury: Can Reality Be Found in the Illusions?*, 48 DEPAUL L. REV. 221 (1998) and the studies discussed therein.

APPENDIX A

Please read the following story carefully and answer the questions that follow.

In 1999, after a series of high-profile cases of teachers inflating student-athletes' grades, Central High School (CHS) began exploring the adoption of a "blind-grading" policy. In full consultation with parents, teachers, students, and other members of the community, in 2000 the CHS School Board adopted the following policy:

Final Examination Policy

1. "Blind-Grading" is a method for avoiding potential grade abuse by preventing teachers from knowing the identities of their students prior to submitting final grades to the Principal.

2. All final examinations shall be blind-graded. There are no exceptions to this rule. No instructor may, under any circumstance, know the identity of any student prior to submission of final examination grades to the Principal.

3. Students will be assigned anonymous "examination codes" prior to taking the final and will only use those codes on their finals. Names should not appear anywhere on the final examination.

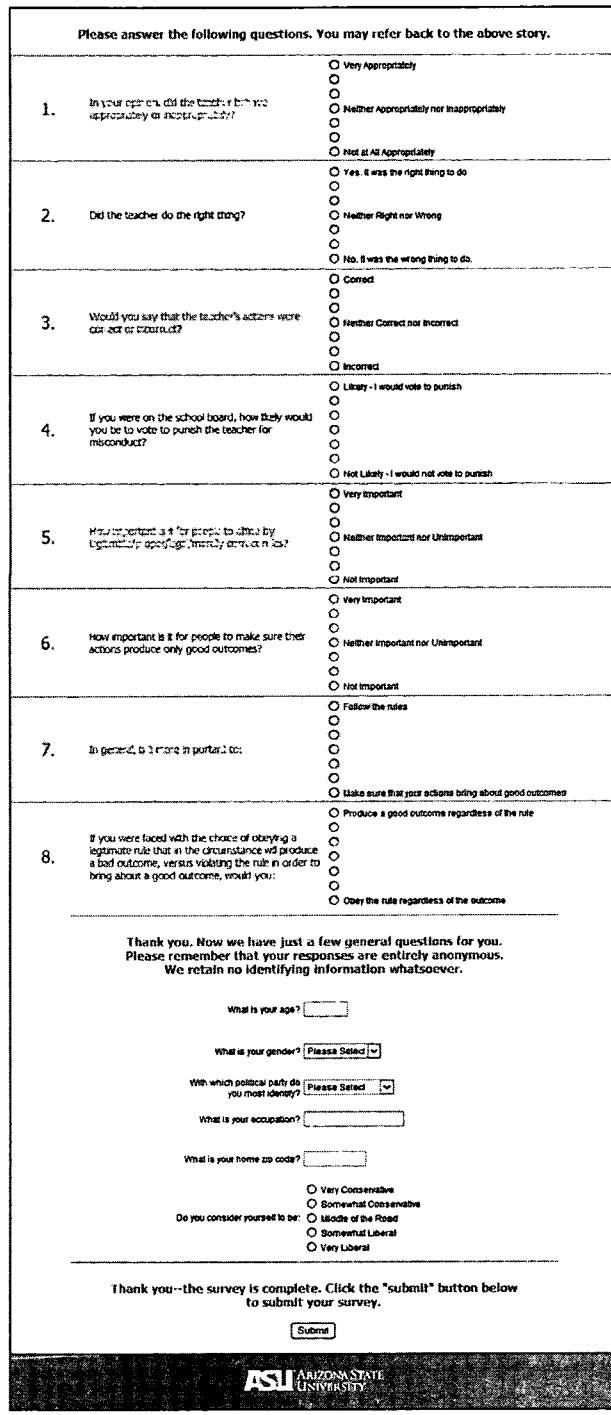
The final examination policy had been recommended unanimously to the School Board by all teachers. One of the teachers at CHS, Lee Flowers, taught a Grade 12 course in "American Politics and Legal Institutions." Flowers voted in favor of the final examination policy and was aware of its requirements when classes began in 2000. From 2000-2004, Flowers followed the policy for all final examinations.

But 2005 was a difficult year because of two students. Morgan Brown and Pat Johnson were both students in Flowers' class but they were very different from each other. Morgan was very argumentative, consistently showed up late for class, and was generally disruptive. Pat, on the other hand, was helpful in class, always on time, and was Flowers' favorite student. According to Flowers, "Pat was not a better student than Morgan. I just liked having Pat in class far more than Morgan."

At the end of the school year, Flowers handed out the final examination and announced that the final examination policy would be in force. Despite announcing that the final examination policy would be followed, when the examinations were graded but not yet submitted to the Principal, Flowers was curious to know how Morgan and Pat had done. As luck would have it, the school secretary in charge of exams had accidentally left the list of examination codes on a desk. Flowers, seeing the list, quickly figured out what codes were assigned to Morgan and Pat and then checked the examinations to see how they had done. Flowers was upset to see that Morgan, the disliked student, had received 92 points on the exam, while Pat, the favorite, had only received 88 points out of 100.

Flowers then changed the grades, deducting 10 points from Morgan and adding 10 to Pat. When later asked about the change, Flowers merely said: "Since the final examination was worth most of their overall grade, I think the altered grades better reflect the kind of students I thought they were."

APPENDIX B



Please answer the following questions. You may refer back to the above story.

1.	In your opinion, did the teacher's behavior appropriately or inappropriately?	○ Very Appropriately ○ ○ ○ Neither Appropriately nor Inappropriately ○ ○ ○ Not at All Appropriately
2.	Did the teacher do the right thing?	○ Yes, it was the right thing to do ○ ○ ○ Neither Right nor Wrong ○ ○ ○ No, it was the wrong thing to do.
3.	Would you say that the teacher's actions were correct or incorrect?	○ Correct ○ ○ ○ Neither Correct nor Incorrect ○ ○ ○ Incorrect
4.	If you were on the school board, how likely would you be to vote to punish the teacher for misconduct?	○ Likely - I would vote to punish ○ ○ ○ ○ ○ ○ Not Likely - I would not vote to punish
5.	How important is it for people to abide by legitimate, specific, morally correct rules?	○ Very Important ○ ○ ○ Neither Important nor Unimportant ○ ○ ○ Not Important
6.	How important is it for people to make sure their actions produce only good outcomes?	○ Very Important ○ ○ ○ Neither Important nor Unimportant ○ ○ ○ Not Important
7.	In general, is it more important to:	○ Follow the rules ○ ○ ○ ○ ○ ○ Make sure that your actions bring about good outcomes
8.	If you were faced with the choice of obeying a legitimate rule that in the circumstance will produce a bad outcome, versus violating the rule in order to bring about a good outcome, would you:	○ Produce a good outcome regardless of the rule ○ ○ ○ ○ ○ ○ ○ Obey the rule regardless of the outcome

Thank you. Now we have just a few general questions for you.
Please remember that your responses are entirely anonymous.
We retain no identifying information whatsoever.

What is your age? [ ]

What is your gender? [Please Select]

With which political party do you most identify? [Please Select]

What is your occupation? [ ]

What is your home zip code? [ ]

Do you consider yourself to be:
○ Very Conservative
○ Somewhat Conservative
○ Middle of the Road
○ Somewhat Liberal
○ Very Liberal

Thank you--the survey is complete. Click the "submit" button below to submit your survey.

[Submit]

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