

FLOUTING THE LAW

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What happens when a person's common sense view of justice diverges from the sense of justice he or she sees enshrined in particular laws? In particular, does the perception of one particular law as unjust make an individual less likely to comply with unrelated laws? This Article advances the Flouting Thesis – the idea that the perceived legitimacy of one law can influence one's willingness to comply with unrelated laws – and provides original experimental evidence to support this thesis. This Article presents new, original evidence that one's willingness to disobey the law can extend far beyond the particular unjust law in question, to the flouting of unrelated laws commonly encountered in everyday life (such as traffic violations, petty theft, and copyright restrictions). A second experiment demonstrated that when exposure to a perceived unjust outcome made gender salient by highlighting an instance in which the law fails to punish a male perpetrator involved in a crime of violence against a female victim, the relationship between perceived injustice and compliance was affected by group identity. Finally, the Article explores the relationship between perceived injustice and flouting and offers several possible explanations, including the role of law in American popular culture, and the expressive function of the law in producing compliance.

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INTRODUCTION

Do ordinary citizens flout the law in response to a specific instance of perceived injustice? The idea that general lawbreaking can emerge from one unjust legal doctrine or decision has intuitive appeal. For example, Professor David Cole has argued that constitutional doctrines that allow untrammelled police discretion -- such as that which led to the brutal beating of Rodney King in Los Angeles or the tragic police shooting of Amadou Diallo in New York -- can undermine the public's perception of the legitimacy of law enforcement generally.¹ This loss of legitimacy and distrust of the fairness of the legal system, Cole argues, can in turn lead to more widespread lawbreaking.²

The Rodney King example is instructive in this regard. In 1992, the acquittal of the four police officers who beat Rodney King touched off the worst civil unrest seen in any American city in nearly 30 years. The streets of Los Angeles became the site of chaos and lawlessness for four days, as city residents looted stores, destroyed property, assaulted and shot one another, and set fires to buildings. When it was over, more than fifty people were dead,³ over 12,000 people were arrested,⁴ and over 800 buildings were burned to the ground.⁵ Undoubtedly, the causes contributing to the expression of community frustration during this time are numerous and complex. However, there is no doubt that the perceived injustice of the acquittals of the police officers was a "proximate" cause of the 1992 civil unrest in Los Angeles.⁶

¹ See David Cole, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 Geo. L.J. 1059, 1090-91 (1999); see also DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN AMERICAN CRIMINAL JUSTICE SYSTEM 169-80 (1999). Indeed Cole argues that for people who distrust the legal system, violation of the law is often "romanticized, idealized, condoned, or even celebrated." *Id.* at 1091.

² *Id.*

³ See Washington Post, April 28, 1997, at A04, Scars Remain Five Years After Los Angeles Riots, by Lou Cannon.

⁴ See The Boston Globe, May 5, 1992, at 13, Life Regains its Bustle in Los Angeles, by Diego Ribadeneira.

⁵ See Washington Post, *supra* note 3.

⁶ The initial beating incident and subsequent trial were both widely publicized; the videotape of the beatings was played repeatedly in the months leading up to the trial; the jury's decision to acquit the police officers was widely held to be unjust.

The 1992 Los Angeles example is an extreme one to be sure. At the same time, it suggests further, more general questions – questions that are at bottom empirical -- about whether and under what circumstances citizens' perceptions of injustice lead to diminished deference to the law generally. Does perceived injustice in our legal system -- whether in the form of wrongful convictions or acquittals, excessive punitive damage awards, outmoded public morals statutes, crack/powder cocaine sentencing disparities, mandatory minimum sentencing regimes -- lead to greater willingness to flout the law in the everyday lives of ordinary people? Further, assuming that this is the case, does flouting typically manifest itself not in mass unrest but in more subtle, lower-level, harder-to-detect ways, such as littering, tax cheating, theft of services, and jury nullification?

The idea that there is a relationship between perceived injustice of specific laws and diminished general compliance with the law has been either proposed or assumed by many theorists in a variety of contexts.⁷ For the purposes of discussion in this Article, I call this idea the Flouting Thesis. Despite its prominence, there is, however, a glaring absence of empirical evidence regarding the Flouting Thesis, which has been widely assumed but never proven.⁸ Investigating the possibility that lawbreaking can flow from perceived injustice is central to our understanding of how to secure citizen cooperation and compliance with legal rules, and so the lack of empirical investigation regarding the Flouting Thesis is puzzling. This Article begins to fill this void by presenting the first experimental evidence for the Flouting Thesis, and by empirically

See The Economist, April 22, 1992, Page 22, World Politics and Current Affairs; American Survey. For some, these feelings of injustice were so strong that they led to extreme frustration and anger, as evidenced by the sharp increase in lawbreaking over the next few days.

⁷ See *infra* Section II.

⁸ Although different but related theories have been tested empirically – see Section II *infra* – an exhaustive literature search revealed no experimental test of the thesis that there is a relationship between perceived injustice of legal rules or decisions and reduced compliance with the law generally. In other work, I have emphasized the importance, as a general matter, of reducing arbitrariness in the application of the law. See Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153; Janice Nadler & Mary R. Rose, *Victim Impact Testimony and the Psychology of Punishment*, 88 CORNELL L. REV. 419 (2003).

confirming that perceived⁹ legal injustices can have subtle but pervasive influences on a person's deference to the law in his or her everyday life. In this Article, I argue that Americans are culturally attentive to law, and feel concerned when they notice injustice in the legal system. When a person evaluates particular legal rules, decisions, or practices as unjust, the diminished respect for the legal system that follows can destabilize otherwise law-abiding behavior. Because there are reasons for obeying the law apart from the threat of sanctions, obedience to law is vulnerable to diminished respect produced by perceptions of injustice.¹⁰

The broader focus of this Article is on the ways in which law can influence citizen behavior other than through threatened punishment. As such this Article is part of a broader movement emerging in legal scholarship that examines theories of expressive law.¹¹ For example, Cass Sunstein and others have argued that, in addition to influencing behavior directly, law also can make a statement that strengthens desirable norms and weakens undesirable norms.¹² For example, anti-discrimination laws may have weakened the norm of racial discrimination; laws that require clean-up after one's pet may strengthen the norm of cleaning up, even in the absence of enforcement.¹³ Others, such as Richard McAdams have focused on the mechanisms through which the values the law expresses can induce compliance, quite independently from the

⁹ I use the term "perceived injustice" throughout the paper because my focus is on the psychology of justice, and more specifically, on the justice perceptions of ordinary people. I do not address in this paper philosophical issues regarding justice, and I make no assumptions about the actual justness of the underlying legal rules or legal outcomes that I discuss.

¹⁰ In addition to providing original experimental evidence for the Flouting Thesis, a key objective of this Article is to draw attention to the necessity for further empirical and theoretical investigation.

¹¹ The idea that law has a symbolic function apart from directing behavior by imposing punishment on violators is fundamental to the law and society literature. See, e.g., JOHANNES ANDENAE, PUNISHMENT AND DETERRENCE 112 (1974).

¹² See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996). Similarly, Lawrence Lessig has argued that law can change the norms that underlie the social meaning associated with the behavior regulated. See Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181 (1996).

¹³ See Sunstein, *supra* note 12, at 2032, 2043.

sanctions the law threatens.¹⁴ For example, laws banning smoking signaled to smokers a new societal consensus that exposing others to smoke is offensive and antisocial, triggering smokers to refrain from smoking in certain public places for fear of enduring objections from people nearby.¹⁵ The anti-smoking values expressed by law induced smokers to comply with minimal state enforcement of anti-smoking ordinances. More closely related to the topic of this Article, scholars focusing on compliance with criminal law have also noted that the expressive power of law can backfire when a law inadvertently generates disrespect. For example, a well-publicized government crackdown on tax cheating can implicitly send the message that everyone cheats, thereby generating more cheating than would be observed without the crackdown.¹⁶ More generally, these scholars argue that when law is perceived as failing to accurately reflect popular notions of justice, then citizens will be less likely to view the law as a moral authority that guides their own behavior.¹⁷ It is this theory of expressive law that I test empirically in this Article.

Before presenting the evidence that injustice can encourage lawbreaking, I first discuss in Part I the theoretical and empirical underpinnings of the Flouting Thesis, including the reasons for believing that perceived unjust laws can generate general disrespect and increased lawbreaking. In Part II, I report the results of two original laboratory experiments which suggest that perceived legal injustice can indeed reduce people's willingness to obey laws in their everyday lives, like speed limits and copyright restrictions, and can also reduce citizens' willingness to follow the law in their role as jurors in the courtroom. In Part III of the Article I explore potential explanations for why perceived injustice in the legal system might

¹⁴ See Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 355 (1997). See also Peter H. Huang & Ho-Mou Wu, *More Order Without More Law: A Theory of Social Norms and Organizational Cultures*, 10 J.L. ECON. & ORG. 390, 401-02 (1994), ("The route by which laws create and maintain order is through the creation or alteration of social norms . . . Our thesis is that decentralized order is accomplished by internalizing as social norms those laws that are just and perceived to be fair.").

¹⁵ See McAdams, *supra* note 14, at 405.

¹⁶ See Dan M. Kahan, *Trust, Collective Action, and Law*, 81 B.U.L. REV. 333 (2001).

¹⁷ See Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U.L. REV. 453 (1997).

cause citizens to have less deference for the law; in Part IV I discuss possible remedies.

In this Article I describe two experiments in which I expose people to instances of legal injustice, and then measure their willingness to break the law in their everyday lives. Together, these two experiments contemplate two different prototypes of perceived injustice in the law that can have consequences that reach beyond the rule or case in question. The first (examined in Experiment 1) is a legal rule that is viewed by most people as being ill-conceived, such as a rule permitting the government to seize the property of an innocent farmer whose land is used by a marijuana grower. The second (examined in Experiment 2) is a legal result whereby the law does not punish a person who is viewed by most people as deserving of punishment.¹⁸ The results of these two experiments show empirically that discrepancies between common sense justice and legal practices have behavioral consequences, as well as advance the discussion about how to reduce these discrepancies by selectively harmonizing legal rules and social norms.

I. THEORIES OF LEGAL COMPLIANCE AND PERCEIVED INJUSTICE

As noted earlier, perceived legal injustice can take a variety of forms. The 1992 Los Angeles civil unrest arose as a response to public outrage about acquittals in a widely-publicized criminal trial. Decisions of the U.S. Supreme Court that clash with strongly held popular beliefs are a second form of perceived injustice. Indeed, certain Justices of the U. S. Supreme Court at various times have assumed the truth of the Flouting Thesis when faced with the prospect that the Court's announced decision will be at odds with commonsense justice. For example, in discussing the permissibility of police wiretapping without a search warrant, Justice Brandeis argued in his famous dissent in *Olmstead v. United States*: "If the Government becomes a lawbreaker, it breeds contempt for law; it

¹⁸ There are undoubtedly many other types and sources of perceived legal injustice. Accordingly, this Article does not aspire to enumerate the all of the boundary conditions of the relationship between perceived injustice and lawbreaking – there are many possible circumstances under which the law can inadvertently generate disrespect, and this Article does not seek to catalog them here.

invites every man to become a law unto himself; it invites anarchy."¹⁹ Similarly, in discussing the application of antitrust laws to baseball, Justice Marshall expressed concern that the Court's decision would undermine respect for law:

...[T]he jurist concerned with public confidence in, and acceptance of the judicial system might well consider that, however admirable its resolute adherence to the law as it was, a decision contrary to the public sense of justice as it is, operates, so far as it is known, to diminish respect for the courts and for law itself.²⁰

Perceived injustice can also arise from criminal punishment schemes that do not accurately reflect commonsense notions of desert. A variety of criminal law theorists and philosophers of law have recognized the possibility that disproportionate punishments can promote lawbreaking among citizens. For example, H. L. A. Hart argued that, in designing a morally acceptable system of criminal punishment, we should draw upon common sense notions regarding appropriate punishment given the gravity of the offense in question. He contended that if legally defined gradation of crimes differed sharply from the commonsense consensus, "there is a risk of either confusing common morality or flouting it and bringing the law into contempt."²¹ Similarly, Kent Greenawalt has proposed that punishment schemes based on retributive principles can promote compliance with the law:

The idea is that since people naturally think in retributive terms, they will be disenchanted and eventually less law-abiding if the law does not recognize that offenders should receive the punishment they "deserve."²²

¹⁹ 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

²⁰ *Flood v. Kuhn*, 407 U.S. 258, 293, n.4 (1972) (Marshall, J., dissenting) (quoting Szanton, *Stare Decisis; A Dissenting View*, 10 HASTINGS L. J. 394, 397 (1959)).

²¹ H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 25 (1968).

²² Kent Greenawalt, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 359 (1983). Scholars of law and society have long recognized the possibility of the Flouting Thesis. For example, in 1975, Lawrence Friedman wrote:

If a person sees unfairness or illegitimacy or unworthiness of trust in one instance, how far does his disillusionment extend? How much of his attitude spills over into other areas and into his actual

Paul Robinson and John Darley have offered the most comprehensive theoretical treatment of the “utility of desert”: the notion that by tying criminal liability and punishment to community-based notions of justice and desert, public compliance with the law will increase.²³ Robinson and Darley argue that when the criminal law gains a reputation for assigning liability and punishment in ways that track the intuition of the community as a whole, it is more likely to be viewed as morally authoritative. As a result, people are more likely to defer to the commands of the law generally.²⁴ Robinson and Darley argue that most people obey the law as a general matter not so much because they are deterred by the possibility of being caught and punished, but because they either fear disapproval from their social group or they want to do the morally correct thing (or both).²⁵ But the norms held by one’s social group are themselves influenced and strengthened by the criminal law. Every criminal adjudication offers an opportunity to remind the public of the underlying norm that prohibits the conduct in question.²⁶ Legislative proposals for new criminal law rules provide an occasion for public debate that strengthens the shared understanding of what conduct is prohibited. Further, if the law has moral credibility, it can guide behavior in situations in which the harm underlying the prohibition is not immediately obvious.²⁷

According to Robinson and Darley, then, the moral credibility of the law can strengthen social norms and increase compliance. Because moral credibility plays a key role here, it is important to

behavior? The hypocrisy and unfairness of Prohibition, it is said, brought the whole legal system into disrepute. Legal scholars claim that marijuana laws ‘hasten the erosion of respect for the law.’ But how much ‘erosion of respect’? And where? And what are the consequences?

Lawrence Friedman, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* 119 (1975). It is the answers to these open questions that I investigate experimentally in this Article.

²³ Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 *Nw. U.L. Rev.* 453 (1997).

²⁴ *Id.* at 457.

²⁵ *Id.* 468-69.

²⁶ *Id.* at 472.

²⁷ *Id.* at 475-76.

understand how the law comes to be viewed as a moral authority in the first place. Robinson and Darley contend that the criminal law gains moral credibility from imposing liability and punishment only on conduct that deserves moral condemnation, and, conversely, from not imposing liability or punishment for conduct that does not deserve moral condemnation.²⁸ When a particular criminal rule conflicts with the moral intuitions of the governed community, the power of the criminal law as a whole to induce compliance is in jeopardy, because it is no longer viewed as a trustworthy source of information regarding which actions are moral and which are not.²⁹ In sum, this version of the Flouting Thesis derives from the claim that adopting desert-based (retributive) notions of criminal liability and punishment that closely track community intuitions has the advantage of promoting compliance.³⁰

It is worthy to note at this point that all of the variations on Flouting Thesis reviewed so far share an important feature – they have never been tested. Although related theories have been tested empirically,³¹ an exhaustive literature search revealed no experimental test of the thesis that there is a relationship between perceived injustice of particular legal rules or decisions and reduced compliance with the law generally. In the next Part, I present the results of two experiments designed to test this claim.

II. EXPERIMENTAL EVIDENCE FOR THE FLOUTING THESIS

A. Background: Related Theories and Evidence

Whereas there is no existing empirical evidence examining the connection between perceived injustice of a particular legal rule or decision and general noncompliance, there is evidence on associated questions. This evidence shows that first, people are most likely to obey laws that prohibit conduct they already view as morally reprehensible. For example, people who feel strongly that an activity

²⁸ *Id.* at 477-78. There are separate questions of how a person decides which conduct deserves moral condemnation. These questions about the psychology of assigning blame and punishment is beyond the scope of this Article.

²⁹ *Id.*

³⁰ *Id.*

³¹ See Section II.A. *infra*.

prohibited by a particular criminal offense (for example, larceny) is morally wrong are least likely to report having committed that offense; likewise, people who feel less strongly that the offense is morally wrong are most likely to report having committed the offense.³² In addition to moral attitudes about specific crimes, moral attitudes about the legal system in general predict compliance with particular laws. For example, feelings of obligation to obey the law in general (for example, the belief that "people should obey the law even if they disagree") predict whether people will comply with laws governing everyday acts such as littering, making noise, parking, and the like.³³ Note that this is a different question than the question of interest in this Article: variations in feelings of obligation to obey the law generally can arise for many different reasons, including pre-existing variations across individuals (due to personality, political and moral values, and the like). By contrast, the question of interest in this Article focuses on the problem of a particular legal doctrine, rule, decision, or practice viewed by an entire community as unjust, and the subsequent effects on not only feelings of obligation to obey the law, but also on behavioral compliance with laws in general.

³² See Matthew Silberman, *Toward a Theory of Criminal Deterrence*, 41 AM. SOC. REV. 442, 445 (1976). Similarly, Grasmick & Green surveyed people about their compliance with eight different criminal laws and obtained similar findings; they found that the people with high levels of moral commitment toward a particular law are more likely to report compliance with that law. Harold G. Grasmick & Donald E. Green, *Legal Punishment, Social Disapproval, and Internalization as Inhibitors of Illegal Behavior*, 71 J. CRIM. L. & CRIMINOLOGY, 325, 334 (1980).

³³ TOM TYLER, WHY PEOPLE OBEY THE LAW 41-68 (1990) (perceived legitimacy of legal authorities promotes compliance with the law). Compliance with the law in Tyler's study was associated with two main factors -- the extent to which people felt that the particular conduct prohibited by the law is morally wrong (consistent with the results reported by Silberman (1976) and Gramick & Green (1980), *id.*), and the extent to which people felt generally that the law is something that deserves respect and ought to be obeyed. The first factor -- moral attitude toward the conduct underlying a particular law -- was associated with compliance with the law only to the extent that a person's moral attitude converged with the law with respect to the conduct in question. In this sense, moral judgments about particular laws can motivate people to comply with the law, but only selectively. To the extent that moral attitudes and the law diverged with respect to any particular conduct, compliance is less likely to follow.

Perhaps most closely addressing the specific question that this Article addresses -- that of the relationship between perceived injustice in the law in a particular instance and more general attitudes about respect for the law and compliance -- is a survey study of tax compliance.³⁴ In the survey, people reported on both their own experiences with the IRS, and on second-hand information about friends, neighbors, and coworkers' experiences with the IRS. Especially revealing were the attitudes of people who reported that a friend, neighbor, or coworker's contact with the IRS resulted in that person paying more taxes than they supposedly owed. This type of vicarious experience with the IRS was associated with lower perceptions of the fairness of tax laws generally, and increased intentions to cheat on taxes in the future.³⁵

The results of the tax study suggest that exposure to reports of an unjust legal outcome in a particular situation might lead to lower perceived fairness of the law more generally, which in turn can lead to non compliance with the law in the future. The conclusions to be drawn from the tax survey results are, however, limited in several important respects. First, the data were correlational, so that the causal direction (if causation can be inferred at all) of the connection between exposure to a perceived unjust outcome and lower intentions to comply with the law is ambiguous. It might be, for example, that a person's intention to cheat her own taxes produced an evaluation that others' experiences with the IRS were unfair.

Second, the tax survey study addressed only the limited question of whether the justice of an outcome relating to one law (or set of laws) is associated with lower future compliance with that same law (or set of laws) -- in this case, tax laws.³⁶ The claim I test in this Article, by contrast, is a stronger one: perceived injustice of a particular law diminishes respect for the law in general, which is manifested in lower levels of compliance with other laws, even those distinct from and unrelated to the source of the perceived injustice. The experimental data reported below show empirically that legal injustice can trigger diminished compliance, not only with respect to

³⁴ See, Karyl A. Kinsey, *Deterrence and Alienation Effects of IRS Enforcement: An analysis of Survey Data*, in *WHY PEOPLE PAY TAXES: TAX COMPLIANCE AND ENFORCEMENT* 264-276 (Joel Slemrod ed., 1992).

³⁵ *Id.*

³⁶ *Id.*

the unjust law in question, but also with respect to other unrelated laws. In the remainder of this Part, I use original empirical results to show that perceived injustice in a legal rule can generate broader flouting of the law in everyday life.

B. Experiment 1: Testing the Flouting Thesis via Intentions to Comply

1. *Background*

To test the plausibility of the Flouting Thesis, I identified a specific underlying hypothesis and tested it experimentally. According to the Flouting Thesis, the belief that a particular law is unjust increases the likelihood of flouting the law in one's own daily life (even laws that are unrelated to the unjust law in question); conversely, the absence of perceived injustice should not increase flouting behavior. In the experiment, I presented a set of ostensible proposed legislation designed to be interpreted as either just or unjust. By carefully varying the description of the ostensible legislation, I ensured (through pilot testing) that participants perceived the laws in question as basically unjust (treatment group) or as basically just (control group). According to the Flouting Thesis, the participant's attitude regarding the perceived justice of laws should diminish his or her willingness to comply with different, unrelated laws.

The predictions of the Flouting Thesis focus essentially on a set of behavioral results: compliance with the law. At the same time, the predictive variable of the Flouting Thesis is a set of attitudes (about the injustice of specific laws). Generally speaking, however, the relationship between attitudes and behavior is not always straightforward.³⁷ One of the factors upon which the relevant behavioral response depends is the accessibility in memory of the attitude in question. The more easily an attitude is called to mind,

³⁷ Indeed, the conditions under which people exhibit consistency between their attitudes and their behavior is a question that social psychologists continue to debate. See, e.g., Icek Ajzen, T.C. Brown, & F. Carvahal, *Explaining the Discrepancy Between Intentions and Actions: The Case of Hypothetical Bias in Contingent Valuation*. 30 PERSONALITY AND SOCIAL PSYCHOLOGY BULLETIN, 1108 (in press); R. LaPiere, *Attitudes and Actions*. 13 SOCIAL FORCES 230 (1934).

the more likely it is to influence the cognitive structure of the behavioral event in question, and thus the more likely a response will follow that is behaviorally congruent with the attitude.³⁸ In the context of perceptions of the law, the extent to which an attitude about the justice of a particular law affects compliance behavior may depend on the extent to which that attitude is accessible.³⁹

Thus, for the purposes of this experiment, it was important to ensure the salience in memory of the attitudes in question, here the perceived justice of the laws presented. For this reason, this study used a priming method in which the attitude is called to mind, and is accessible at the time compliance behavior is measured.⁴⁰

2. *Experimental Method*

The experiment consisted of two parts. First, participants were exposed to a set of laws (perceived as either just or unjust) in the form of newspaper stories. Participants read six news stories, three of which focused on a legal issue, and the remaining three did not. The three news stories describing legal statutes were interspersed with the non-legal news stories, thus focusing attention away from the purely legal nature of the task. Then, in an ostensibly separate study, the same people indicated their willingness to flout a set of unrelated laws in the future. Willingness to disobey the law (flouting) was measured using a questionnaire focusing on intentions to engage in fairly common, but legally prohibited, acts.

Newspaper stories were chosen to present the laws of interest in the first part of the experiment for several reasons. First, material presented in a newspaper story format has inherent appeal as a current event item and is therefore more likely to engage people's interest when compared to the sometimes dense language used in legal statutes. Indeed, other research has demonstrated that in reading newspaper stories about current events can increase a

³⁸ See Russell H. Fazio, *How do Attitudes Guide Behavior?* IN HANDBOOK OF MOTIVATION AND COGNITION: FOUNDATIONS OF SOCIAL BEHAVIOR 204-243 (Richard M. Sorrentino & E.Tory Higgins eds., 1986).

³⁹ In other words, the more salient an attitude is in memory, the more likely the resulting behavioral response will be attitudinally congruent.

⁴⁰ A prime is a means of accessing or activating stored thoughts and concepts.

person's societal-level concern about the problem at hand.⁴¹ Second, newspaper stories provided a convenient cover story for the first part of the experiment. Participants were told that the researchers were interested in their emotional reactions to the quality of the writing and the style of journalism in the news stories. In the absence of such a cover story, participants have been left to speculate about the purpose of reading legal statutes.

The participants were 98 undergraduate students.⁴² Upon entering the laboratory and signing a consent form, participants were informed that they would be participating in a study on the role of emotions in attitudes about news stories. Participants each read a set of six articles that were ostensibly newspaper stories.⁴³ Three of these were filler stories (on NASA, oil drilling, and movie ushers), which were identical in content for all participants. Three were stories describing legislation, for which there were two versions – one set of stories was designed to elicit a perception that the laws described therein are just (Just Prime condition), and the other set was designed to elicit a perception that the laws described therein are unjust (Unjust Prime condition). The content of each version varied slightly from its counterpart, depending on the experimental condition. The basic topics of the law-related stories are illustrated in Table 1. Perceived justness was manipulated by varying each story's emphasis, as follows:

⁴¹ See, Tom R. Tyler & Fay L. Cook, *The Mass Media and Judgments of Risk: Distinguishing Impact on Personal and Societal Level Judgments*, 47 J. PERS. & SOC. PSYCHOL. 693 (1984).

⁴² Of these participants, there were 54 females, 44 males, 27 African-Americans, 24 Asians or Asian-Americans, 23 Hispanics, 22 whites, and 2 self-designated as "other".

⁴³ The length of all stories was kept constant at approximately 500 words.

TABLE 1. CONTENT OF NEWSPAPER STORIES CONTAINING PRIMES

NEWS STORY	General Emphasis (both versions)	Just Prime Version	Unjust Prime Version
Civil Forfeiture	Purpose and application of (actual) laws permitting the government to seize property under certain circumstances	Emphasized the law-enforcement benefits of civil forfeiture laws	Emphasized the civil liberties concerns surrounding civil forfeiture laws
Income Tax	Proposed legislation ostensibly pending before Congress that would affect the amount of income tax paid by middle-class taxpayers	Emphasized positive effects of income tax paid by middle-class people	Emphasized negative effects of income tax paid by middle-class people
Landlord/Tenant	Proposed legislation ostensibly pending before the state legislature that would permit landlords to conduct warrantless searches of tenants' apartments under certain circumstances	Emphasized importance of empowering landlords to evict drug dealing tenants	Emphasized the civil liberties and privacy concerns in permitting searches of tenants' apartments

A pilot test of the materials using different participants⁴⁴ indicated that the legal rules described in the three law-related newspaper stories presented in the Just Prime condition were perceived to be significantly more just, on average, than those presented in the Unjust Prime condition.⁴⁵

Participants were randomly assigned to the Just Prime or Unjust Prime condition. After reading each of the six stories, participants answered a "quiz" question, to ensure they actually read the story. In addition, following each story participants filled out a questionnaire assessing their opinion of the journalistic quality

⁴⁴ The participants in the pilot test were drawn from the same undergraduate population as those in the experiment itself.

⁴⁵ Eighty-eight undergraduate psychology students participated in the pilot study. Each participant read one version of each of the three articles, and rated the extent to which the law described in the article was either just or unjust (1=extremely unjust; 9=extremely just). Mean ratings in the Just Prime condition ($M=5.05$) were significantly higher than mean ratings in the Unjust Prime condition ($M=2.95$); $t(86) = -9.25$; $p < .0001$. Most participants (39 out of 44) in the Just Prime condition assigned ratings of 5 or above to the stories; nearly all participants (43 out of 44) in the Unjust Prime condition assigned ratings of below 5.

of the story they just read.⁴⁶ The experimenter then collected all materials, thanked the participants, and left the room.

Shortly after the first experimenter left, a different experimenter entered the room and asked participants to sign a different consent form, explaining that they would be asked to participate in a second short experiment. After completing a short filler task, participants completed the Likelihood of Criminal Behavior Questionnaire. In this questionnaire, participants were asked to indicate the likelihood (from 0% to 100%) that they would engage in a variety of illegal behaviors. These items consisted of: drunk driving; parking in a no-parking zone; failing to pay required taxes; making illegal copies of software; eating a small item without paying in the grocery store; exceeding the posted speed limit; drinking alcohol under age 21; and taking home office supplies for personal use.⁴⁷

3. *Experimental Results*

An analysis of each individual questionnaire item reveals that, there is an overall trend:⁴⁸ participants exposed to unjust laws indicated a greater likelihood of engaging in each criminal behavior compared to those exposed to just laws. This is illustrated in Figure 1.⁴⁹

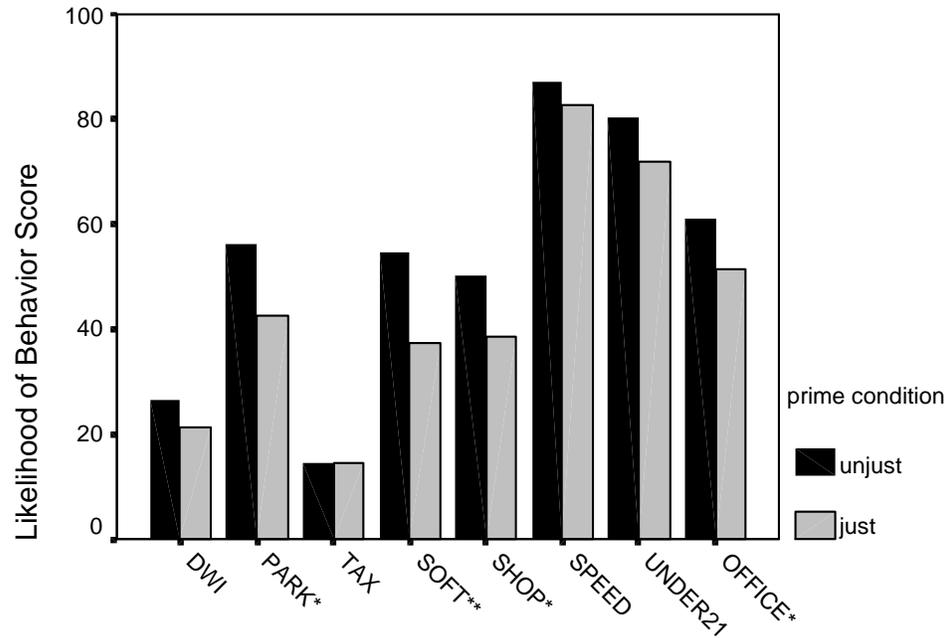
⁴⁶ Participants were asked to indicate the story's clarity, conciseness, level of interest, and so forth.

⁴⁷ I chose these particular crimes to maximize variation in responses. Considering the range of acts that are prohibited by the criminal law, the six that I tested are fairly common among those who consider themselves law abiding citizens. Had I chosen relatively more serious crimes such as murder or robbery, the responses would have likely been clustered near 0%, making it difficult to detect any differences attributable to the unjust prime.

⁴⁸ The tax item is the only item in Figure 1 in which there is no apparent difference between those primed with Just laws and those primed with Unjust laws. Note, however, that participants were undergraduate students, with a mean age of 18.7. Most of them probably have had little or no experience in filing an income tax return.

⁴⁹ In Figure 1, the scores are presented in raw, rather than standardized, form, for ease of presentation and interpretation. Item labels marked with one asterisk are associated with a test statistic with a p-value less than 0.10; two asterisks indicate a p value less than .05.

FIGURE 1: WILLINGNESS TO FLOUT AS A FUNCTION OF EXPOSURE TO UNJUST LAWS



* $p < .10$

** $p < .05$

Figure 1 indicates that, consistent with the Flouting Thesis, people exposed to the three newspaper stories describing perceived unjust laws are more willing to park illegally, copy unlicensed software, consume grocery items without paying, and pilfer office supplies, compared to those exposed to perceived just laws.⁵⁰

A reliability analysis (Cronbach's Alpha) indicated that the eight questionnaire items could be combined into a single measure

⁵⁰ For DWI, speeding, and underage drinking, the patterns were consistent with the Flouting Thesis, but the apparent differences did not reach conventional levels of statistical significance. Note that attitudes toward drunk driving have shifted fairly dramatically in the last decade or so, coinciding with moral campaigns against drunk driving (the most well-known proponent is Mothers Against Drunk Driving (MADD)). See, e.g., Dan Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 634 (2000). Because of the stigma currently associated with drunk driving, participants may have been reluctant to admit to doing it, and as a result, and there may be a "floor effect" here (the ability to detect differences is limited because all scores are low). Also note possible ceiling effects (all scores are high) with speeding and underage drinking.

of Likelihood of Criminal Behavior,⁵¹ which was computed by summing scores across items.⁵² The standardized⁵³ Likelihood of Criminal Behavior Index scores ranged from a low of -11.95 to a high of 12.38. Overall, participants exposed to newspaper stories describing laws perceived as unjust indicated a significantly⁵⁴ greater mean willingness to engage in criminal behavior ($M = 1.15$) compared to participants exposed to laws perceived as just ($M = -0.97$).⁵⁵ Thus, exposure to a legal rule generally perceived to be unjust leads to personal estimations of a greater likelihood of

⁵¹ Cronbach's $\alpha = .82$. Chronbach's alpha is a measure of the reliability and internal consistency of a scale. Possible values range from 0 to 1. See WILLIAM L. HAYS, STATISTICS FOR THE SOCIAL SCIENCES 230-66 (3d ed. 1981).

⁵² Prior to being debriefed, participants completed an Exit Questionnaire designed to determine whether they were suspicious that the two parts of the experiment were related. The questionnaire asked participants to indicate how many studies they participated in during the course of the hour, the purpose of the studies, and the possible relationship between the studies. An examination of the Exit Questionnaire responses revealed that none of the participants were suspicious as to the priming function of the first part of the experiment. Specifically, in response to the question about how many experiments they had participated in, 100% of the participants indicated that they had participated in two experiments. In response to the question about the purpose of the studies, 0% of the participants indicated they thought there was any possible connection between the two tasks. Finally, in response to the question about whether they thought their responses in the first study could have affected their judgments in the second study, all but two participants responded "No." These two respondents were nevertheless unable to articulate any basis of substantive influence of the first study on their responses in the second study. Moreover, excluding their data does not change the pattern of results reported.

⁵³ Scores were standardized prior to being combined to account for differences in measurement scales across variables. Standardizing scores distributes them across the same metric with Mean=0 and Standard Deviation=1. See WILLIAM L. HAYS, STATISTICS FOR THE SOCIAL SCIENCES 230-66 (3d ed. 1981).

⁵⁴ Throughout this Article, "significantly" refers to statistical significance, which denotes the rejection of the null hypothesis - the possibility of no differences between the various groups - at a probability level indicated by the p value reported. Thus, "p" is defined as the probability of finding a difference or relationship between two groups as large as that observed if there were, in fact, no difference or relationship between them. See WILLIAM L. HAYS, STATISTICS FOR THE SOCIAL SCIENCES 230-66 (3d ed. 1981).

⁵⁵ $t(96) = 2.02$; $p < .05$. The t statistic reported throughout this Article tests for differences between two independent parametric samples. *Id.*

expressed willingness to engage in unrelated future criminal behavior.⁵⁶

C. Experiment 2: Testing the Flouting Thesis via Juror Behavior

1. *Background*

The results of Experiment 1 suggest that when people are exposed to unjust laws they are more willing to engage in everyday lawbreaking, such as traffic and software violations. The method used in Experiment 1 relies on self-reports -- after being exposed to just or unjust legal rules, participants estimated the likelihood that they would break the law in the future. These self-reports suggest that the prime had differential effects on participants' *attitudes*; yet we cannot definitively predict *behavior* from such responses.⁵⁷ In particular, measuring behavioral compliance with the law is difficult because of the ethical and practical problems inherent in such an inquiry. Ethically, difficulties arise if participants have been induced or encouraged to violate the law.⁵⁸

⁵⁶ It is notable that the exposure to perceived unjust laws was minimal in this experiment -- the task of reading all six news items, and answering the quiz and filler questions was completed in less than 35 minutes. Yet, this short exposure was sufficient to significantly influence people's expressed willingness to engage in unlawful behaviors in their everyday lives. In addition, participants were apparently unaware of the influence that the newspaper stories had on their willingness to comply with the law: when explicitly asked whether the newspaper articles affected their judgments about compliance with the law, they denied such a connection. It is also important to note here that the laws that people were willing to disobey were unrelated to the laws they read about previously in the newspaper stories. The effect observed here spreads from the specific to the general.

⁵⁷ See ALICE H. EAGLY & SHELLEY CHAIKEN, *THE PSYCHOLOGY OF ATTITUDES* 155 (1993) (the correlation between attitudes and behavior is moderate but not perfect).

⁵⁸ Laboratory experiments in which subjects are induced to engage in unethical or unlawful conduct to further scientific understanding of human behavior has a colorful history in social psychology and related disciplines. Perhaps the most well-known example is the set of studies conducted in the 1960s by Stanley Milgram in which volunteers were led to believe they were administering electric shocks to other volunteers. Milgram sought to understand why average, otherwise law-abiding citizens could engage in atrocities such as those that occurred in Nazi Germany. In his obedience studies, Milgram demonstrated that most people could be persuaded to administer (what appeared to be) painful and harmful electric

One alternative method for measuring compliance uses a mock trial paradigm. Participants play the role of jurors, and after hearing the trial evidence and the judge's instructions on the law, they select an individual verdict preference of Guilty or Not Guilty. The trial materials can be designed so that the evidence is uncontroverted (either in favor of conviction or acquittal). Thus, in this carefully constructed situation, if participants are to follow the law as given to them by the judge, then they must select the decision required by the uncontroverted evidence. Selection of the other verdict indicates that the juror has decided to engage in juror nullification – i.e., to not comply with the law as explained by the judge. This method of measuring compliance was employed in the present experiment, and is described in further detail below.

2. *Experimental Method*

a. Participants and Materials

Participants were 228 undergraduate students.⁵⁹ Participants were exposed to a story that functioned as a prime that consisted of a videotaped news story from the television program "60 Minutes." The focus of the program was on David Cash, an 18-year-old who watched as his friend abducted a 7-year-old girl in the women's bathroom in a Nevada casino. Upon seeing his friend restrain the girl, Cash walked out of the bathroom and did nothing while his friend raped and murdered the girl.⁶⁰ Cash and the friend spent the next two days gambling, and Cash bragged about the crime to friends upon their return home to Los Angeles.

shocks to another person by applying surprising little social pressure. Milgram's work on obedience to authority undoubtedly advanced our understanding of what Hanna Arendt has called "the banality of evil"; at the same time, the psychological harm experienced by human subjects in these studies (deriving from the knowledge about one's own capability and willingness to inflict harm on another person) is now considered by most in the scientific community to be ethically problematic.

⁵⁹ Of these participants 152 were female; 30 were African-American, 36 were Asian or Asian-American, 26 were Hispanic, and 136 were white.

⁶⁰ Cash claimed that he did not know a crime was in progress until after it was too late. He stated, however, that his friend admitted to the crime immediately after emerging from the bathroom.

The 60 Minutes videotape was followed by a written story, which appeared to participants to be a newspaper account, but was actually fictional. Participants read one of two versions of the follow-up story. In the Just Outcome story, David Cash is prosecuted for being an accessory to the murder after the fact, and receives a sentence of one year in prison. In the Unjust Outcome story, David Cash receives no punishment.⁶¹

In the second part of the experiment, participants served as mock jurors in a case unrelated to the David Cash story. The written materials described a homeless defendant accused of stealing a shopping cart he used to store his personal belongings. Participants were informed that stealing a shopping cart is a felony. The case materials indicated that the defendant had two prior felony convictions, and that the jurisdiction has a "three strikes and you're out" rule. The materials made clear that the defendant, if found guilty, must be sentenced to life in prison with no possibility of parole.

The undisputed facts of the case together with the judge's instructions unambiguously indicated that the law requires a verdict of Guilty. The judge explicitly instructed the jurors that they must follow the law as it is given to them, and must not let sympathy or prejudice bias their decision. Thus, participants who rendered a Not Guilty "verdict" did so despite the judge's explicit instruction that they were required to apply the law to the facts of the case, regardless of how they might feel personally about the law -- that is, they engaged in juror nullification.⁶² Each subject's verdict

⁶¹ Pilot testing (with different participants) revealed that on average, participants believed that a sentence of about a year imprisonment was a fair punishment for David Cash. Pilot test participants were also asked to rate the justness of the punishment in the David Cash story for each prime condition, on a scale from 1 (extremely unjust) to 7 (extremely just). Participants rated the just prime punishment (one year in jail for David Cash) ($M = 4.21$) significantly more just than the unjust prime (no punishment for David Cash) ($M = 2.87$), $t(57) = -3.11$, $p < .01$. There were no significant differences based on participant race or gender in the justness ratings of the prime (all F 's < 1).

⁶² The evidence presented makes clear that the homeless defendant who stole the shopping cart is undoubtedly guilty. It was nonetheless expected that some participants would be tempted to render a Not Guilty decision in this case because many people would view imposing a punishment of life in prison with no parole for a relatively minor theft offense as disproportionate and excessive. There is room for disagreement here, of course, as evidenced by the popular support for

preference of Guilty or Not Guilty thereby served as the measure of compliance or non-compliance with the law.

b. Procedure

Participants were randomly assigned to the Just Outcome or Unjust Outcome condition. Upon entering the laboratory, they were presented with the David Cash news story video, and were then presented with a follow-up newspaper story in which David Cash either was punished (Just Outcome) or was not punished (Unjust Outcome). A cover story was provided to ensure that the prime was assimilated into the later judgment: the putative purpose of the study was to assess participants' judgments about the quality of the journalism represented in the story. Participants were asked to provide ratings of the 60 Minutes program, as well as of the follow-up newspaper item reporting the outcome of the case. Questionnaires elicited participants' opinions concerning the extent to which the news item was clear, in-depth, well-organized, etc. The questionnaires served as filler tasks.

As part of the cover story, participants were then greeted by a different experimenter and taken to a different room to participate in a "second" experiment. After signing a separate consent form, participants were informed that they would act as mock jurors whose task was to render a verdict in a criminal case. Participants read the trial materials, and then privately indicated their personal verdict preference of Guilty or Not Guilty.

3. Experimental Results

For the mock trial data, non-compliance rates were measured by the proportion of all participants who made Not Guilty decisions. The higher the proportion of Not Guilty decisions, the level of noncompliance. According to the Flouting Thesis, observing legal injustice leads to non-compliance. It was expected, therefore, that

the "three strikes and you're out" sentencing policies that exist in several states. See TOM R. TYLER, ET AL., SOCIAL JUSTICE IN A DIVERSE SOCIETY (1997). The possibility of different reactions to the shopping cart theft case makes it particularly useful for these purposes, because the variation in responses permits detection of differences that are attributable to the justice prime.

compared to those primed with a Just Outcome, participants primed with an Unjust Outcome in the David Cash case would exhibit a greater rate of non compliance, in the form of a higher proportion of Not Guilty decisions in the case of the homeless man.⁶³ This flouting hypothesis is directly contrary to another plausible effect of the justice prime: it might be that participants told that David Cash was not punished (Unjust Prime) would seek more punishment in the case of the homeless man, compared to participants told that David Cash was punished (Just Prime). This is because people who witness an injustice sometimes become more punitive as a result.⁶⁴ This experiment, therefore, pits the Flouting Thesis against an alternative hypothesis that predicts the opposite outcome.

Analysis of the data revealed that, in fact, and contrary to my hypothesis, there was no statistically significant difference overall between Just and Unjust prime groups in proportion of Not Guilty decisions.⁶⁵ This failure to detect a difference between the two primed groups suggests a boundary condition on the Flouting Thesis, so that perceptions of injustice might not influence compliance with the law in the context of juror decision making. To explore this possibility further, I separated the participants into two groups based on gender.⁶⁶ This generated a total of four groups:

⁶³ A total of 21 participants indicated that they had heard of the David Cash story before. An analysis of the data excluding these participants did not change the results reported here.

⁶⁴ See Jennifer S. Lerner, Julie H. Goldberg & Philip E. Tetlock, *Sober Second Thought: The Effects of Accountability, Anger, and Authoritarianism on Attributions of Responsibility*, 24 PERSONALITY & SOCIAL PSYCH. BULL. 563 (1998) (Participants who watched a film about a bully who beats up someone were more likely to behave punitively toward a tort defendant in an unrelated matter, compared with participants who did not watch the film).

⁶⁵ Participants primed with an Unjust Outcome chose a verdict preference of Not Guilty 55.2% of the time, while participants primed with a Just outcome chose a verdict preference of Not Guilty 44.8% of the time. This apparent difference does not reach statistical significance. $\chi^2(1) = 0.19$; $p = .66$.

⁶⁶ The nature of the David Cash case suggested examining whether gender moderates the role of the injustice prime on compliance behavior. This is because the case involved a rape, with a female victim and male perpetrators. The nature of this crime may well have activated gender stereotypes that differentially influence male and female participants. See Sheila T. Murphy, *The Impact of Factual Versus Fictional Media Portrayals on Cultural Stereotypes*, 560 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 165, 165 (1998) (demonstrating that

males primed with a Just Outcome, males primed with an Unjust Outcome, females primed with a Just Outcome, and females primed with an Unjust Outcome.

Next, the effects of both gender and prime, as well as the interaction between gender and prime, on verdict preference were examined.⁶⁷ The Technical Appendix summarizes the logistic regression⁶⁸ models described herein. A model that included Prime, Gender, and Prime x Gender as independent variables revealed that the Prime x Gender interaction had a significant effect on verdict, as illustrated in Figure 2.⁶⁹ The patterns are suggestive: women were more likely to choose a Not Guilty verdict preference in the Unjust Prime condition (45.8%), than in the Just Prime condition (31.9%).⁷⁰ On the other hand, men were more likely to choose a Not Guilty verdict preference in the Just Prime condition (56.8%) than in the Unjust Prime condition (38.5%).⁷¹

exposure to gender stereotypic portrayals can influence subsequent interpretations of unrelated events).

⁶⁷ Because of the small number of non-white participants, the possible interaction of participant race and prime could not be examined reliably.

⁶⁸ Logistic regression is a statistical technique for testing relationships between variables when the dependent variable (here, verdict preference) is dichotomous or contains ordered categories (here, there are two possible verdict preferences, Guilty or Not Guilty). The chi-squared test statistic reported here indicates the overall fit of the model. See JACOB COHEN, ET AL., APPLIED MULTIPLE REGRESSION/CORRELATION ANALYSIS FOR THE BEHAVIORAL SCIENCES 504 (3rd ed. 2003).

⁶⁹ $\chi^2(1) = 5.31$; $p < .05$

⁷⁰ $\chi^2(1) = 3.02$; $p = .08$. Note that this comparison of "simple main effects" did not reach conventional levels of statistical significance at $p < .05$. The overall Model 3 including the interaction, however, is statistically significant at $p < .05$. *Id.*

⁷¹ $\chi^2(1) = 2.52$; $p = .11$. Note that this comparison did not reach conventional levels of statistical significance at $p < .05$. The overall Model 3 including the interaction, however, is statistically significant at $p < .05$. *Id.*

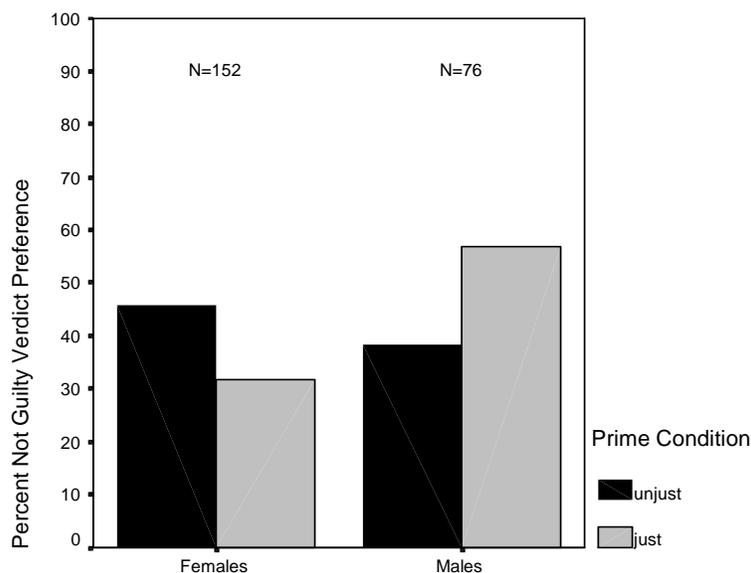


Figure 2. Non-Compliance Rate as a Function of Gender

For female participants, the effect of Prime was similar to that observed in Experiment 1: exposure to a perceived unjust outcome in the David Cash case led to greater willingness to engage in non-compliance, compared to exposure to a perceived just outcome. But for male participants, the pattern was reversed: exposure to a perceived just outcome in the David Cash case led to greater willingness to engage in non-compliance. Male participants exposed to a perceived unjust outcome in the David Cash case tended to comply more, and to indicate a verdict preference of Guilty, as required by the application of the judge's instructions in the shopping cart theft case.

The reasons for these gender differences are unclear,⁷² but may stem from differences in attitudes between males and females because of their historical position in the legal system.⁷³ These

⁷² The gender difference observed here was unexpected, and a definitive explanation for this difference requires further study.

⁷³ See, e.g., Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2154-57 (1995) ("Criminal law is -- and has been for centuries -- a system of rules conceived and enforced by men, for men, and against men"); Mary Becker, *The Social Responsibility of Lawyers: Access to Justice for Battered Women*, 12 WASH. U. J.L. & POL'Y 63 (2003) ("Our legal system routinely fails women who live

attitudinal differences may have been primed by the nature of the materials in the case, because the case involved a crime of violence against a female victim committed by male perpetrators. Consider first the responses of male participants who learned of a gender-related injustice in the legal system (i.e., David Cash receives no punishment). The exposure to an unjust result in the David Cash case may have motivated male participants to reaffirm (or even strengthen) the legal system, and their belief that males and females are equally protected by it. As a result, in the subsequent task, they are more likely to vote Guilty in the homeless case, thereby complying with the judge's instructions and upholding the rule of law. That is, if men feel more invested in the legal system compared to women, then they might be more strongly motivated to uphold the legitimacy of the system in the face of a threat. This motivation to affirm the legal system might have been exaggerated in this case because male participants were faced with a threat to the legitimacy of the legal system that raised the possibility that the law systematically fails to punish male perpetrators who in fact deserve punishment. Thus, the unjust failure of the law to punish David Cash caused male participants to follow the law in the subsequent task and find the homeless defendant Guilty. By contrast, consider the male participants who learned that the legal system imposed on David Cash the punishment he was perceived to have deserved. A perceived just outcome may have confirmed for male participants that the legal system indeed works to serve and protect its all of its citizens, and in the absence of any threat to the legitimacy of the legal system, male participants subsequently may have felt they had license to bend the rules in the name of justice for the homeless defendant in the second task.

Contrast this pattern of responses with those of female participants, who may have had prior doubts about the legitimacy of

with domestic violence..."); Susan Estrich, *REAL RAPE: HOW THE LEGAL SYSTEM VICTIMIZES WOMEN WHO SAY NO* (1987) (arguing that the legal system fails women who say no); Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 *YALE L.J.* 1331, 1389 (1997) (arguing that the law of provocation as mitigation to murder is in fact biased against women despite being facially neutral); Victoria Nourse, *The "Normal" Successes and Failures of Feminism and the Criminal Law*, 75 *CHI.-KENT L. REV.* 951 (2000) (arguing that feminist reforms in the criminal law have failed in certain areas).

the legal system that were confirmed by exposure to a perceived unjust outcome in the David Cash case. The unjust outcome in this case may have made these doubts especially salient because the injustice involved a crime against a female victim. A prior belief that the legal system has not adequately served and protected the female participants' ingroup (i.e., females) was confirmed in the Unjust Outcome condition, leading female participants in that experimental group to feel a lesser obligation to comply with the law when it would lead to yet another injustice in the case of the homeless defendant who stole the shopping cart. In the Just Outcome condition where David Cash was punished, there was no such priming of prior beliefs about the historical failure of the legal system with respect to women, so that female subjects who see the legal system imposing on David Cash the punishment he deserved perhaps felt some obligation to uphold the legal system; in this case the legal system is affirmed by complying with the law in the case of the homeless man who stole the shopping cart, regardless of the disproportionate punishment that resulted.

It must be acknowledged that without more evidence it is not yet possible to provide a complete explanation for the different responses of men and women observed in Experiment 2. Recall that, as revealed in the pilot data, male and female subjects perceived a similar level of injustice in the Unjust Outcome version of the David Cash story - there were no significant differences in gender in the Likert scale ratings of the justness of no punishment for David Cash. Thus, the observed differences in male and female participants' non-compliance rates in the second part of the experiment were unlikely caused by different, gender-based attitudes of the justness of the David Cash story prime. On the other hand, the results are consistent with prior research that demonstrates that men and women react quite differently when exposed to media portrayals involving female stereotypes.⁷⁴ Moreover, the pattern of results obtained in Experiment 2 is consistent with both of the two rival hypotheses

⁷⁴ See J. Gerard Power, Sheila Murphy, & Gail Coover, *Priming Prejudice: How Stereotypes and Counter-Stereotypes Influence Attribution of Responsibility and Credibility Among Ingroups and Outgroups*, 23 HUMAN COMM. RES. 36 (1996) (finding that, compared to women, when men are primed with a female stereotype, they exhibit larger shifts in credibility assessments of women's accounts of sexual harassment, rape, and spouse abuse).

presented earlier: the compliance behavior of female participants supports the Flouting Thesis; the compliance behavior of male participants supports the anger-blame hypothesis posited by Lerner and colleagues.⁷⁵

Despite the preliminary nature of the inferences to be drawn from the results of Experiment 2, several features of both experiments are noteworthy. First, the duration of exposure to perceived legal injustice in the two experiments presented here was exceedingly brief – in some ways artificially so. In both experiments participants exposure to perceived legal injustice lasted no more than 20 minutes. Perceived legal injustice that people observe outside of the laboratory is sometimes longer in duration and more intense in its experienced effects.⁷⁶ How could it be the case that brief exposure to unjust legal rules causes people to be less willing to comply with unrelated laws that regulate their everyday behavior? In the next section, I consider explanations for the influence of perceived injustice on general diminished compliance.

III. PERCEIVED INJUSTICE IN THE LAW AND ITS CONSEQUENCES

Can perceived legal injustices result in lower respect for the law generally? The experimental evidence presented here suggests that it can. Real life events also suggest that this is the case. Consider, for example, the O.J. Simpson verdict, considered to be just by some, but strongly opposed by many others. Opponents of the verdict expressed strong sentiments after the verdict was publicized:

The guy is as guilty as sin. . . . This trial was a big fraud.⁷⁷

O.J. Simpson got to go home to his big king size bed where he used to beat his wife. . . . I'm getting to a

⁷⁵ See Jennifer S. Lerner, Julie H. Goldberg & Philip E Tetlock, *Sober Second Thought: The Effects of Accountability, Anger, and Authoritarianism on Attributions of Responsibility*, 24 PERSONALITY & SOCIAL PSYCH. BULL. 563 (1998).

⁷⁶ See the example of the O.J. Simpson trial, discussed *infra* in Part III.

⁷⁷ Al [last name withheld]. Interviewed on NPR's All Things Considered, 10/12/95.

point where I even question my belief in God.⁷⁸

Because of the intense media interest focused on the case, many people had a strong opinion about the justice of the verdict. For those who perceived the verdict as unjust, these perceptions were associated with broader perceptions about the criminal justice system and the law. For example, a Los Angeles Times poll conducted just after the Simpson verdict indicated that 70% of Los Angeles residents had “only some” or “very little” confidence in the criminal justice system.⁷⁹

Consider also another case that provoked widespread assessments of legal injustice: the public reaction to the acquittal of the police officers who beat Rodney King. One half of Californians surveyed shortly after the trial said they had confidence in the court system as a result of the acquittals.⁸⁰ The polling data following verdicts in this case as well as in the O.J. Simpson case suggest that perceived injustice in the law can lead to lowered respect for and compliance with the law. Similarly, the experimental evidence presented in this Article suggests that cases perceived as having been wrongly decided, and laws perceived to be poorly conceived or downright foolish, can lead to lowered respect for law generally and greater willingness to flout it, even in unrelated domains.

In this Part, I suggest several different possibilities to explain the influence of perceived injustice on willingness to flout the law in everyday life. Because the empirical evidence presented in this Article in many ways represents an initial foray into previously uncharted territory, the arguments that follow are presented in the spirit of conjectures designed to generate discussion and debate; more work needs to be done to demonstrate persuasively the nature and extent of specific factors contributing to the connection between perceived unjust laws and reduced compliance generally with the

⁷⁸ Cheryl [last name withheld]. Interviewed on NPR's All Things Considered, 10/12/95.

⁷⁹ Los Angeles Times, October 8, 1995, at S2, *The Simpson Legacy*, by Cathleen Decker. See also, Los Angeles Times, October 4, 1995, at A1, *Half of Americans Disagree with Verdict*, by Cathleen Decker & Sheryl Stolberg (reporting similar lack of confidence in the criminal justice system in a national poll not limited to Los Angeles residents).

⁸⁰ *The Recorder*, December 11, 1992, at 1, *Poll Shows Courts Rate Low in Public Opinion*, by Alexander Peters.

law. Nonetheless, I discuss several potential explanations which are at least plausible given the experimental evidence.

A. The Influence of Popular Culture on Attention to Perceived Legal Injustice

In the United States, popular culture is heavily influenced by law and the legal system. Even as early as the nineteenth century, Alexis de Tocqueville noted the close connection between American law and American culture:

As most public men are or have formerly been lawyers, they bring the usages and the turn of ideas that are their own into the handling of affairs. The jury serves to familiarize all classes with them. Judicial language thus becomes in a way the vulgar tongue; the spirit of the lawyer, born inside the schools and the courts, therefore spreads little by little beyond their precincts; it so to speak infiltrates all society, it descends into the lowest ranks...⁸¹

The propensity of the law to inhabit the popular imagination in the United States is more evident today than ever before.⁸² Hundreds of movies involve portrayals of trials.⁸³ A substantial proportion of television programs focus exclusively on law, lawyers, or criminal justice, and television news magazines (for example 60 Minutes, 20/20) also regularly focus on legal topics. Included in ABC's fall 2004 lineup is a seven-part documentary depicting a real jury deciding a real capital criminal case.⁸⁴ There is at least one cable television station (Court TV) that is devoted entirely to legal topics. Many best-selling novels are based on legal topics, and print news magazines and newspapers also devote a significant portion of space to law related stories.⁸⁵ In sum, stories and shows about the law have a broad popular appeal in the United States.

⁸¹ Alexis de Tocqueville, *DEMOCRACY IN AMERICA*, eds. Harvey C. Mansfield and Delba Winthrop (Chicago: University of Chicago Press, 2000), p. 258.

⁸² See Chase, *Toward a Legal Theory of Popular Culture*, 1986 WIS. L. REV. 527 (1986); Macaulay, *Images of Law in Everyday Life: The Lessons of School, Entertainment, and Spectator Sports*, 21 LAW & SOC'Y REV. 185 (1987). Richard Sherwin has argued that law and popular culture have become so intertwined that the distinction between

Law related television dramas, news shows, newspapers articles, and novels tend to highlight certain aspects of the law (for example, violent crime, consumer fraud, trials, prisons) and ignore others for dramatic effect.⁸⁶ As a result, there is a natural focus on whether justice is done. Viewers and readers naturally want to know, did the person or people depicted get what they deserve? The interests of justice are focal regardless of whether the story is criminal or civil. In either case, people notice whether the legal system is depicted as regulating behavior in a way that makes sense, or conversely, whether it is portrayed as imposing arbitrary demands or unfairly exempting people from punishment.⁸⁷ When the legal system is portrayed as failing to serve the interests of justice

reality and fiction has, to a large extent, collapsed. Richard K. Sherwin, *WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE* ix-x (2000). Sherwin illustrates his point with the example of the videotaped grand jury testimony of President Clinton in which he defended himself against charges that he lied under oath about his sexual conduct with a young White House intern. The television broadcast of the testimony, viewed by millions of people, was featured in an article in the *New York Times* the following day, written by the paper's movie critic, who drew comparisons between the President's testimony and the film *My Dinner With Andre*. (The *New York Times*, September 22, 1998, Section A; at 16, *The Testing of a President: In the Camera's Eye—Critic's Notebook*, by Caryn James).

⁸³ For an incomplete list, see <http://www.usfca.edu/pj/index.html>.

⁸⁴ See

http://abcnews.go.com/sections/us/ABCNEWSspecials/in_the_jury_room.html, last visited August 27, 2004.

⁸⁵ Occasionally, a case captures the popular imagination (or at least the imagination of television producers and newspaper editors) and garners an extraordinary amount of coverage. For example, for the nine months that the O.J. Simpson trial lasted, an ordinary citizen was hard pressed to avoid the case. The trial itself was broadcast on every major television network on a daily basis for 133 days (displacing devotees of soap operas and other popular daytime shows). *Time*, May 29, 1995 Volume 145, No. 22, *Soap Operas: The Old and the Desperate*, by Gina Bellafante. Coverage of the trial was recapped on the news nearly every night, newspapers covered the trial on a daily basis, and at the moment the verdict was announced, 150 million people were glued to their tv sets (even though it occurred in the middle of the work day).

⁸⁶ See, e.g., Michael Asimow, *When Lawyers Were Heroes*, 30 U.S.F. L. REV. 1131 (1996).

⁸⁷ See Carolyn Hafer, *Do Innocent Victims Threaten the Belief in a Just World? Evidence From a Modified Stroop Task*. 79 J. PERSONALITY & SOCIAL PSYCH., 165 (2000) (demonstrating that small scale negative events can heighten concern for fairness).

(whether in a drama or in news reporting on real laws or cases), the effects might reach farther than the particular law or legal procedure that is the focus of the show or news story.⁸⁸ A portrayal of injustice in the legal system may cause people to question the integrity of not only the particular law, or judge, or jury, or attorney portrayed, but may also cause them to call into question the integrity of the legal system itself.

The cultural influences that lead people to question the integrity of legal system might also have consequences that emerge behaviorally – that is, people might violate the law more than they would have if they did not question the law’s integrity. In the next section, I will argue that compliance decisions are supported and sustained by community norms of commonsense justice. In the context of a general perception that the legal system is generally just, these norms nourish a baseline level of behavioral compliance with the law. But if the delicate balance that encourages compliance is disturbed, these same community norms can provide the impetus to flout the law.

B. Expressive Law, Perceived Injustice, & Compliance

The delicate balance that promotes compliance is assisted enormously by the fact that much of the time, the law accurately reflects prevalent mores about permissible behavior.⁸⁹ Thus, criminal law prohibits murder, rape, robbery, larceny, and a host of other acts, the propriety of which almost everyone agrees. The general convergence of the requirements of the law and commonsense justice means that most people comply with the law most of the time, because they would have refrained from doing the prohibited act, whether it is murder, rape, or robbery, quite apart from the existence of its legally prohibited status.

⁸⁸ See Jennifer S. Lerner, Julie H. Goldberg & Philip E Tetlock, *Sober Second Thought: The Effects of Accountability, Anger, and Authoritarianism on Attributions of Responsibility*, 24 PERSONALITY & SOCIAL PSYCH. BULL. 563 (1998); J. Gerard Power, Sheila Murphy, & Gail Coover, *Priming Prejudice: How Stereotypes and Counter-Stereotypes Influence Attribution of Responsibility and Credibility Among Ingroups and Outgroups*, 23 HUMAN COMM. RES. 36 (1996).

⁸⁹ See Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 375 (2000).

On the other hand, people also refrain from legally prohibited acts that they may be genuinely tempted to engage in, such as certain traffic offenses (for example, driving through a red light at an empty intersection), or offenses against other persons (for example, punching someone who they feel really deserves it). Democratically produced legislation, for example, can be perceived as a signal of community norms about behavior.⁹⁰ In declaring conduct to be prohibited, the law expresses social disapproval of that conduct, which can itself strengthen people's commitment to acting legally—even when the fear of punishment is absent.⁹¹ Such moral commitments can operate even on people who have not internalized them, through social pressure to avoid the loss of esteem in others' eyes that would result from engaging in prohibited conduct.⁹² In this

⁹⁰ See McAdams, *supra* note 28.

⁹¹ *Id.*

⁹² See JOHANNES ANDENAES, PUNISHMENT AND DETERRENCE 112 (1974); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 355 (1997). McAdams argues that we generally seek the esteem (good opinion, respect) of others. So long as there is a consensus about the esteem-worthiness of engaging in a particular behavior, and so long as people know that there is some risk of detection if they engage in that behavior, then a social norm can arise governing the behavior. There is some empirical support for this notion. The threat of peer disapproval exerts a significant influence on self-reported decisions to engage in a criminal offense. See Grasmick & Green, *supra* note 7.

This idea of norm-regulated behavior is also captured in social psychological theories, such as Fishbein & Ajzen's theory of reasoned action, which takes into account "subjective norms" in modeling the attitude-behavior relation. According to the theory of reasoned action, the most important predictor of behavior – intention -- is in turn determined by a person's attitude toward the behavior and by the subjective norm. The subjective norm is simply the person's perception that relevant others in the social environment expect him or her to behave in a certain way. Thus, if a person behaves in a manner contrary to social expectations, he or she can expect negative social consequences. See MARTIN FISHBEIN & ICEK AJZEN, BELIEF, ATTITUDE, INTENTION, AND BEHAVIOR: AN INTRODUCTION TO THEORY AND RESEARCH (1975).

Of course, social norms vary across cultures and populations. The sociologist Elijah Anderson has argued that among inner-city African-American youth, there is a code of the street that is centered on the issue of respect. See Elijah Anderson, *Code of the Street: Decency, Violence, and the Moral Lie of the Inner City*, 273 ATLANTIC MONTHLY 81, 88 (1999). As a result, a person must maintain an appearance (including clothing, gait, facial and verbal expression) that communicates willingness to engage in violence when necessary, must be willing to engage in the violent resolution of disputes, and must be willing to seek revenge

way, the law itself informs people's ideas about moral and immoral behavior.

To some extent, people also obey the law because they feel they owe a general obligation to legitimate authority.⁹³ If the law is generally seen as accurately reflecting community norms, it is intuitively plausible that people will be more inclined to defer to it as a moral authority.⁹⁴ Under these circumstances, the very labeling of a certain act as criminal might make people more aware of the socially harmful quality of that act.⁹⁵ For example, before the existence of severe criminal punishments for drunk driving, many people were unaware that drunk driving had such grave consequences. It may be that drunk driving is increasingly considered in moral terms precisely because it has been labeled criminal.⁹⁶

Thus, laws that plausibly signal community attitudes result in deference and compliance, even if the value expressed had not been previously internalized by all members of the community, as in the drunk driving example. Severe punishment for drunk driving signals the risk of severe harm associated with the act; the previously established moral credibility of the law generally ensures that the signal will be heeded. However, laws that are perceived as

in the event of a threat to one's self-esteem, all to ensure that respect is secured and maintained.

As another example, norms motivated by fear of peer stigma regarding honor and violence are very different in the Southern U.S., compared to the Northern U.S. See Dov Cohen et al., *When You Call Me That, Smile! How Norms for Politeness, Interactions Styles, and Aggression Work Together in Southern Culture*, 62 SOC. PSYCHOL. Q. 257 (1999). Southern white males follow norms of honor, whereby they feel that if they do not respond to an insult, others will view them as less manly. Because this Southern culture of honor has features that involve undercurrents of violence, norms of politeness and hospitality have evolved in the South that function to keep conflicts below the surface. Thus, the behavioral ritual of using anger, rudeness, biting humor, and insults as warning mechanisms for curbing others' offensive behaviors is more commonly observed in the North. In sum, although there may be variation in social norms across sub-populations, they nonetheless play an important causal role in explaining factors that motivate behaviors that are observed with regularity within a community. *Id.*

⁹³ See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 41-68 (1990).

⁹⁴ See Robinson & Darley, *supra* note 5 at 476.

⁹⁵ See Andenaes, *supra* note 30.

⁹⁶ But in the example of drunk driving, it also might be the case that law followed changes in social norms. See Dan Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000).

completely implausible signals of community attitudes -- that is, laws that strike people as so far off the mark that they could not possibly represent what the community believes or values -- are likely to have different effects. If the law is seen as imposing unjust or immoral obligations, then rather than signaling community attitudes, the law instead might be perceived as irrelevant, and intuitively, there would be little reason to defer to it as a moral authority.⁹⁷ For example, if the criminal law were to prohibit all sexual intercourse between unmarried couples, most people would view that law as discrepant from their own personal moral views about sexual intercourse; as a result, they would be willing to disobey the law. Further, such a law might have an even broader effect. It might cause people to view the law generally in a different light -- as a set of irrelevant and arbitrary rules rather than a coherent expression of community values.⁹⁸

IV. IMPLICATIONS AND PRESCRIPTIONS

Recognition of initial sources of perceived injustice is a necessary condition for controlling the general diminished compliance it triggers.⁹⁹ The sources of perceived injustice that are discussed in this Article generally fall into two categories: perceived unjust legal decisions, such as jury verdicts, and perceived unjust legislation. The problem of perceptions of unjust jury verdicts is perhaps the more difficult problem from a policy perspective. Criminal jury verdicts that are perceived to be unjust oftentimes are

⁹⁷See Robinson & Darley, *supra* note 5 at 476.

⁹⁸ See Robinson & Darley, *supra* note 5 at 473-476. See also Cooter, *supra* note 8. It is worth noting that perceptions of injustice might vary by community, where legal rules that govern issues that are of particular importance within a particular community are subject to closer scrutiny. If a legal rule seems outrageously unjust to members of a community, this might cause a decline in the moral authority of the law in that community and not in other communities. Thus, a legal rule mandating English-Only might be perceived as unjust by Latino communities; a set of legal rules that mandate harsher prison sentences for cocaine in crack form than cocaine in powder form might be perceived as unjust by African-American communities; a legal rule prohibiting free downloading of music via the Internet might be perceived as unjust by communities of music fans; a legal rule prohibiting possession of firearms might be perceived as unjust by the citizenry in discrete parts of the country.

⁹⁹ See Robinson & Darley, *supra* note 5 at 488.

indeed unjust from a narrow distributive justice perspective: factually guilty people are sometimes acquitted by juries, and as a result, people who have in fact committed a criminal act sometimes do not receive their just desert. Likewise, factually innocent people are sometimes convicted by juries. Of course, acquittals represent a judgment on the part of the fact finder (i.e. the jury or judge) that the prosecution has not met its burden of proof, and so many acquittals that appear unjust from a narrow distributive justice perspective are morally defensible when procedural justice considerations are taken into account. Nevertheless, many people find it difficult to give proper weight to procedural justice considerations once they have made an assessment about the “correct” outcome from a distributive perspective. For example, from the point of view of a person who believes that O.J. Simpson did in fact kill two people without justification or excuse, there is little solace in the prospect that the jury held reasonable doubts about the prosecution having proved every element of each crime – the distributive justice worry overwhelms procedural justice concerns in this context.¹⁰⁰ In sum, because information about jury verdicts is, and should be,¹⁰¹ available to the public, perceived unjust jury verdicts are bound to occur, and to cause general diminished compliance in the ways outlined in this Article.

A second prototype of perceived legal injustice is legislation or other legal rules that conflict with commonsense notions of what justice requires. Perhaps the most salient historical example is the prohibition on the manufacture, distribution or sale of alcoholic

¹⁰⁰ See *infra* notes 72-74 and accompanying text.

¹⁰¹ It is possible that televising criminal trials may exacerbate feelings of perceived injustice regarding verdicts in notorious cases. On the other hand, televised trials provide a unique opportunity to educate the public about the importance of procedural and other safeguards that sometimes lead to verdicts that are unjust from a narrow distributive perspective but that serve the interests of justice in other ways. The considerations weighing in favor of and against the televising of criminal trials are numerous and extend beyond the scope of this Article. See, Ruth Ann Strickland & Richter H. Moore, Jr., *Cameras in State Courts: A Historical Perspective*, 78 JUDICATURE 128, 135 (1994); Kelly L. Cripe, *Comment: Empowering the Audience: Television's Role in the Diminishing Respect for the American Judicial System*, 6 UCLA ENT. L. REV. 235 (1999); David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785 (1993).

beverages imposed by the Eighteenth Amendment. During the period when the Eighteenth Amendment was in force, the law prohibiting alcohol was notoriously disobeyed.¹⁰² Toward the end of the prohibition era, prominent leaders worried that such widespread lawlessness had weakened respect for the law generally, leading to widespread diminished compliance with laws unrelated to prohibition – that is, they worried about the Flouting Thesis.¹⁰³ Contemporary examples are not always associated with the same extent of widespread disobedience, but these examples provoke controversy and heated discussion nonetheless. These include particular aspects of drug laws (such as the crack/powder cocaine sentence disparity implicit in the Federal Sentencing Guidelines),¹⁰⁴ mandatory minimum sentences of incarceration for certain crimes,¹⁰⁵ sodomy statutes,¹⁰⁶ foster care regulations,¹⁰⁷ and smoking ordinances,¹⁰⁸ to name just a few.

Laws that are enacted with the intention to change social norms and behavior sometimes are met with resistance if the law departs too substantially from the view of ordinary people.¹⁰⁹ Outside of courtroom verdicts, many discrepancies between laws and attitudes represent avoidable sources of lawbreaking, because perceptions of injustice and the diminished respect for the legal system that follow can destabilize the law-abiding behavior of

¹⁰² See Harry G. Levine, *The Birth of American Alcohol Control: Prohibition, the Power Elite and the Problem of Lawlessness*. 1985 CONTEMPORARY DRUG PROBLEMS 63 (1985); DAVID E. KYVIG, *REPEALING NATIONAL Prohibition* (1979).

¹⁰³ See *id.*

¹⁰⁴ See David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995) (“By demanding too much doctrinal order, we have produced a doctrine that demands too little justice”). William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1795 (1998) (“Differential enforcement breeds resentment, which undermines the law's normative force”).

¹⁰⁵ See Ian Weinstein, *Fifteen Years after the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87 (2003); Susan R. Klein & Jordan M. Steiker, *The Search for Equality in Criminal Sentencing*, 2002 SUP. CT. REV. 223.

¹⁰⁶ See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁰⁷ See DOROTHY ROBERTS, *SHATTERED BONDS* (2002).

¹⁰⁸ See, e.g., *The New York Times*, May 12, 2004 at A1, *A City of Quitters?* In *Strict New York*, 11% Fewer Smokers, by Richard Perez-Pena.

¹⁰⁹ See Dan Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000).

ordinary people.¹¹⁰ By limiting the incongruities between the condemnation expressed by a particular legal rule and the severity of condemnation implicit in public attitudes, perceived injustice can be diminished.¹¹¹ The key question, then, is how to go about reducing discrepancies between legal rules and citizen attitudes.

In principle, there are several ways to better harmonize legal rules and public attitudes. If there is an existing social norm regarding the issue addressed by the law, one method involves reforming the legal rule in question to better align it with the existing social norm; another method involves altering the social norm to better align it with the existing legal rule.¹¹² Legal rules sometimes do not directly implicate social norms, but instead implicate what are better described as socially shared attitudes. In these cases, it is possible to conform the law to public attitudes. I discuss these possibilities in turn.

Modifying the legal rule to better reflect the existing social norm involves a number of considerations. First, we must first make a determination that the existing norm promotes desirable social policies and that the legal rule is not as effective as the existing social norm. Thus we must decide that we want the legal rule to look more like the social norm. Of course, it is not always the case that the social norm is laudable. Historically, there are many instances of prevailing social norms that in retrospect many would agree were wrongheaded. These include the norm against the equal participation of women, racial minorities and gays and lesbians in social and political life; the norm against homosexual sex; norms against interracial marriage; norms permitting harm to the environment such as littering and polluting the air and water, to name just a few.

Second, assuming the existing norm is desirable, we must make a determination that there is in fact a unified social norm to which we can conform the legal rule. This is often not the case. For example, some of the most contentious issues of the day such as same sex marriage, abortion, physician assisted suicide, and the death penalty involve such deep differences of opinion that we

¹¹⁰ See Robinson & Darley, *supra* note 5 at 476.

¹¹¹ See *id.*

¹¹² Of course, these two methods are not mutually exclusive; both the rule and the social norm can be modified in an attempt to make them more compatible.

cannot hope to neatly conform the legal rule to existing norms.¹¹³ In these cases our best strategy is to rely on fair procedures to ensure that the decisions of legal actors are viewed as legitimate and thus likely to be complied with.¹¹⁴

Sometimes, the legal rule in question does not really implicate a social norm so much as it implicates a socially shared attitude about what justice requires. In these situations, it is possible to measure empirically the socially shared attitude and then conform the law to the consensus (assuming that there is no independent reason to think that the consensus makes for bad legal policy).¹¹⁵ For example, criminal law rules governing attempted crimes do not really implicate an existing, articulable social norm regarding when and whether it is permissible to attempt to commit crimes. Nevertheless, people are likely to have intuitions about what type of conduct ought to be punished as attempt crimes in specific situations.¹¹⁶ Moreover, social scientists using the right types of survey instruments and samples ought to be able to measure these popular intuitions.¹¹⁷

That this type of endeavor is possible was demonstrated by Paul Robinson & John Darley in their book *Justice, Liability and Blame*.¹¹⁸ They tested several different criminal law rules (e.g., attempt, justification, excuse, and so on) against the opinions of citizens regarding what the content of these rules should be. But instead of asking questions about criminal law rules in the abstract, the authors asked people to give their opinions about factual scenarios. For example, should a person who cases out a jewelry store with the intention to burglarize it, but then goes no further, be held criminally liable for attempting to commit a crime? From these responses they inferred what people thought the rule ought to be. Robinson and Darley found that although modern criminal law doctrine imposes liability as soon as a person takes a substantial step toward an offense, most people would impose no punishment when

¹¹³ See TOM R. TYLER, ET AL., *SOCIAL JUSTICE IN A DIVERSE SOCIETY* (1997).

¹¹⁴ See *id.*

¹¹⁵ See PAUL ROBINSON & JOHN DARLEY, *JUSTICE, LIABILITY, AND BLAME* (1995).

¹¹⁶ See *id.*

¹¹⁷ See *id.*

¹¹⁸ PAUL ROBINSON & JOHN DARLEY, *JUSTICE, LIABILITY, AND BLAME* (1995).

faced with the facts of such a case.¹¹⁹ Where the legal rule departs from the consensus of the lay public regarding just desert, lawmakers can modify the legal rule to reflect popular consensus, so long as such consensus can be justified in criminal law theory. This assumes, of course, that the theoretical considerations that led to the adoption of the original rule do not overwhelm the reasons for adopting the new, more “popular” rule. In the case of attempt crime standards, there is a proliferation of different approaches, and there seems to be no real consensus among scholars or lawmakers about which approach is superior.¹²⁰ In this case, therefore, a sensible approach might be to adopt the rule that best accords with common sense notions of what justice requires.¹²¹

The second main way to reduce the gap between legal rules and common sense justice is to change the prevailing conception of justice. Education of the public regarding legal rules and procedures is a key method to pursue. Most people are woefully unaware of

¹¹⁹ Id. At 205.

¹²⁰ These include: the physical proximity doctrine (liability imposed if act directly tends toward completion of the crime), the dangerous proximity doctrine (liability for attempt more likely as gravity and probability of the crime, as well as the proximity of the act to the completed crime, increases), the indispensable element test (liability imposed when the defendant has control over all indispensable aspects of the crime), the probable desistance test (liability imposed if the crime intended will result without interruption from outside sources), the abnormal step test (liability imposed when defendant goes beyond the point where most others would desist), the unequivocal test (liability imposed when the defendant’s conduct manifests an intent to commit the crime), and the substantial step test (liability imposed when defendant does any act that constitutes a substantial step toward commission of the crime). See JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 749-50 (3rd Ed. 2003).

¹²¹ An important caveat is in order at this point. This type of inquiry must by nature be grounded in data. One cannot establish the criminal law in the community’s sense of justice when claims about this sense of justice are based only on the speaker’s own intuitions, which the speaker assumes are shared by the public at large. Instead, this inquiry must be grounded in the community’s sense of justice as measured by empirical observation. JUSTICE, LIABILITY, AND BLAME is a step in the right direction in this regard. As other commentators have observed (see Christopher Slobogin, *Is Justice Just Us?* 28 HOFSTRA L. REV. 601, 605 (2000)), there are methodological issues regarding sampling in these studies, but it is important to keep in mind that this was an initial foray into the measurement of community justice intuitions.

existing legal requirements.¹²² One study asked the residents of five different states about their knowledge of four different criminal law rules.¹²³ In each of the states the criminal law took a minority view on at least one of the four rules, so that the rules tested varied from state to state.¹²⁴ Yet, residents of each of the five states tested had essentially identical beliefs about the law in their state.¹²⁵ The actual legal rule in effect in their state apparently had little or no influence on what people believed the rule to be. In fact, people's beliefs about what the law is in their state did not track so much the majority rule as they tracked people's own moral intuitions about what they thought the rule ought to be.¹²⁶

Given the goal of reducing the gap between legal rules and common sense justice, the challenge is not only to educate people about the content of existing legal rules, but in addition, to facilitate a public understanding of the rationale for existing rules. Sometimes, the facts of a well-publicized criminal case will help to make known an existing, but previously little-known legal rule; but if the rationale for the rule is not transparent, that rule might fall into disrepute if it is contrary to common sense notions of justice, or if it leads to a result widely regarded as unjust.¹²⁷ In addition, the perception of an unjust result might arise because of application of procedural rules that most would regard as just and necessary if only they were made aware of the existence of the procedural safeguard and associated rationale.¹²⁸

Experiment 2 demonstrated that perceptions of injustice can have different consequences that depend on the gender of the

¹²² See John M. Darley, Kevin M. Carlsmith and Paul H. Robinson, *The Ex Ante Function of the Criminal Law*, 35 LAW & SOC REV 165 (2001).

¹²³ *Id.* The rules tested were: duty to assist a stranger in danger, the use of deadly defensive force in situations where the victim can safely retreat, duty to report a known felony, and the use of deadly force in protection of property.

¹²⁴ See *id.*

¹²⁵ See *id.*

¹²⁶ See *id.*

¹²⁷ See Robinson & Darley, *supra* note 5 at 476.

¹²⁸ See Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003).

perceiver.¹²⁹ Recall that women were more likely to engage in juror nullification than men when primed with a case involving rape. This result suggests that, in examining gaps between law and common sense justice, it is especially important to scrutinize areas in which the law operates to the systematic disadvantage of women. It has been long recognized that the law should formally bestow equal treatment to men and women.¹³⁰ But culture and social practices operate to dominate women under laws that often are facially neutral.¹³¹ I argued in the beginning of this Part that recognizing sources of perceived injustice is a necessary condition for controlling the general diminished compliance it triggers.¹³² Because there are many sources of perceived injustice in the law,¹³³ it seems difficult to know where to begin the process of recognizing and narrowing gaps between commonsense justice and legal requirements. The results of Experiment 2 suggest one particular area in which to begin: places where the criminal law operates to the systematic detriment of women. This work has already begun,¹³⁴ but there is undoubtedly much work left to be done.

CONCLUSION

This Article explored the widely-assumed but little-tested belief that specific instances of perceived injustice in the legal system can lead to diminished deference to the law generally. Experiment 1 tested the influence of perceived unjust legal rules regarding civil forfeiture, distribution of the income tax burden, and the right to privacy, and demonstrated that perceived unjust legal rules cause people to report being more likely to engage in lawbreaking in their daily lives. Experiment 2 tested the influence of a perceived unjust outcome of a criminal case in which a person peripherally involved

¹²⁹ It is likely that other characteristics, such as race and ethnicity, play a role here as well. The small sample size in Experiment 2 did not permit an examination of the effects of race and ethnicity. This is, however, a topic ripe for further research.

¹³⁰ See, e.g., Wendy W. Williams, *Notes from a First Generation*, 1989 U. CHI. LEGAL F. 99, 99.

¹³¹ See, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 40 (1987).

¹³² See *supra* note 94 and accompanying text.

¹³³ See *supra* notes 99-103 and accompanying text.

¹³⁴ See, e.g., Schulhofer, *supra* note 68; Becker, *supra* note 68; Estrich *supra* note 68; Nourse, *supra* note 68.

in a serious crime is not prosecuted. Experiment 2 demonstrated that the failure to punish a person who is perceived to deserve punishment can, in some circumstances, lead people to display a greater willingness to disregard the law in their role as jurors. This willingness to flout, however, was qualified by the gender of the mock juror and the facts surrounding the perceived injustice: in a rape case where a potential accomplice goes unpunished, women are more willing than men to disregard the law in their role of jurors. These stark gender differences highlight the need for more research regarding the Flouting Thesis. It is undoubtedly false that perceived injustice in the legal system leads to greater willingness to break the law for all people, in all circumstances, at all times. This Article presents the first experimental evidence that such a relationship exists at all; but as such it is only a start, and more research is needed to understand the contours of this relationship.

The notion that specific instances of legal rules, practices, and decisions that clash with common sense notions of justice can promote widespread lawbreaking is an idea with far reaching implications for policies about the content of criminal law rules and sentencing regimes, for promoting public education and awareness about the legal system and about the rationales that underlie controversial rules and procedures, and for examining and rethinking legal rules and policies that can promote diminished respect for the legal system.

TECHNICAL APPENDIX

Results of Logistic Regression Analysis for Likelihood of Guilty Verdict as
a Function of Prime and Gender

Variable	Model 1: b	Wald χ^2	Model 2: b	Wald χ^2	Model 3: b	Wald χ^2
Intercept	-.19	.19	.17	.40	-.27	.67
Prime Condition	.38	3.72	-.13	.22	.74	2.52
Gender			.33	1.32	1.03	6.01*
Prime x Gender					-1.33	5.31*
Model χ^2	.19		1.52		6.92 [†]	
-2 Log L	310.17		310.37		303.44	

† p < .10
* p < .05