

Flouting the Law

Janice Nadler*

What happens when a person’s commonsense view of justice diverges from the sense of justice he or she sees enshrined in particular laws? 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 or legal outcome can influence one’s willingness to comply with unrelated laws—and provides original experimental evidence to support this thesis. The results suggest that willingness to disobey the law can extend far beyond the particular unjust law in question, to willingness to flout unrelated laws commonly encountered in everyday life (such as traffic violations, petty theft, and copyright restrictions), as well as willingness of mock jurors to engage in juror nullification. Finally, this 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.

I.	Introduction.....	1400
II.	Theories of Legal Compliance and Perceived Injustice	1403
III.	Experimental Evidence for the Flouting Thesis	1407
	A. Background: Related Theories and Evidence.....	1407
	B. Experiment 1: Testing the Flouting Thesis via Intentions to Comply.....	1410
	C. Experiment 2a: Testing the Flouting Thesis via Mock Juror Behavior (Student Sample).....	1416
	D. Experiment 2b: Testing the Flouting Thesis via Mock Juror Behavior (Community Sample)	1423
IV.	Perceived Injustice in the Law and Its Consequences	1426
	A. The Influence of Popular Culture on Attention to Perceived Legal Injustice ...	1427
	B. Expressive Law, Perceived Injustice, and Compliance	1429
V.	Implications and Prescriptions	1432
	A. Sources of Perceived Injustice.....	1432
	B. Reducing the Gap Between Legal Rules and Commonsense Justice.....	1434
	C. Caveats and Unanswered Questions.....	1438
VI.	Conclusion	1439

* Associate Professor, Northwestern University School of Law, jnadler@northwestern.edu; Research Fellow, American Bar Foundation. I am grateful to Kenworthy Bilz, Rick Brooks, Dov Cohen, Jim Davis, Shari Diamond, Richard Farr, Andrianna Kastanek, Russell Korobkin, Brook Long, Richard McAdams, Tom Miles, Mary Rose, and Leigh Thompson for helpful comments. Amanda Dykema-Engblade, Marcia Ireland, and Jennifer Mo provided excellent research assistance. I thank workshop participants at the American Bar Foundation, Colorado, Cornell, Illinois, Missouri, Northwestern, Northwestern Zodiac, Stanford, Texas, UCLA, and Wayne State for helpful comments on an early draft. I thank the American Bar Foundation for its financial support.

I. 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 thirty years. The streets of Los Angeles became the site of chaos and lawlessness. For four days, city residents looted stores, destroyed property, assaulted and shot one another, and set buildings on fire. When it was over, more than fifty people were dead,³ nearly 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 were numerous and complex.⁶ 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.⁷

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

1. See David Cole, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1090–91 (1999) (arguing that, for people who distrust the legal system, violation of the law is often “romanticized, idealized, condoned, or even celebrated”); see also DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 171–72 (1999) (noting that those who view police performance unfavorably are less likely to comply with the law).

2. See COLE, *supra* note 1, at 169–78 (discussing how race-based inequality in the criminal justice system encourages crime).

3. Lou Cannon, *Scars Remain Five Years After Los Angeles Riots*, WASH. POST, Apr. 28, 1997, at A4.

4. Diego Ribadeneira, *Life Regains its Bustle in Los Angeles*, BOSTON GLOBE, May 5, 1992, at 13.

5. Cannon, *supra* note 3, at A4.

6. See, e.g., James Q. Wilson, *The Closing of the American City*, NEW REPUBLIC, May 11, 1998, at 40 (asserting that rioting became out of hand because of the failure of both police and political leadership).

7. 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. *World Politics and Current Affairs; American Survey*, ECONOMIST, May 2, 1992, at 27. 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.

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, sentencing disparities between crack cocaine and powder cocaine, or 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, and 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.⁸ 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.⁹ 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 confirming that perceived legal injustices¹⁰ 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. Economic theories of legal compliance uniformly focus on the expected value of outcomes shaped by threatened punishment. But economic theories uniformly ignore the possibility that there are reasons for obeying the law apart from the threat of sanctions.

8. *See infra* Part II.

9. Although different but related theories have been tested empirically—several are discussed in Part II of this Article—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 works, 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).

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

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 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, antidiscrimination 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 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 antismoking values expressed by law induced smokers to comply with minimal state enforcement of antismoking 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.

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 ANDENAES, *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. Sunstein, *supra* note 12, at 2032–33, 2043–44.

14. See Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 355 (1997) (arguing that laws can give rise to strong norms to which people conform to avoid esteem sanctions); 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, 404 (1994) (“[T]he 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. McAdams, *supra* note 14, at 405.

16. Dan M. Kahan, *Trust, Collective Action, and Law*, 81 B.U. L. REV. 333, 342 (2001).

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

Before presenting the evidence that injustice can encourage lawbreaking, I first discuss in Part II the theoretical and empirical underpinnings of the Flouting Thesis, including the reasons for believing that laws perceived as unjust can generate general disrespect and increased lawbreaking. In Part III, I report the results of three 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 IV of the Article, I explore potential explanations for why perceived injustice in the legal system might cause citizens to have less deference for the law. In Part V, I discuss possible remedies.

In this Article, I describe three 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 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 Experiments 2a and 2b—is a legal result whereby the law does not punish a person who is viewed by most people as deserving of punishment.¹⁸ Together, the results of these experiments show empirically that discrepancies between commonsense justice and legal practices can have unanticipated behavioral consequences. I conclude with an exploratory discussion about how to reduce these discrepancies by selectively harmonizing legal rules and social norms.

II. 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 another form of perceived injustice. Indeed, certain Supreme Court Justices 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

18. There are undoubtedly many other types and sources of perceived legal injustice. Accordingly, this Article does not aspire to enumerate 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.

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 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:

The 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 legal scholars 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 commonsense notions regarding appropriate punishment given the gravity of the offense in question.²¹ 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.”²² 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.’”²³

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.²⁴ Robinson and Darley argue that when the criminal law gains a reputation for assigning liability and

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 Peter L. Szanton, *Stare Decisis; A Dissenting View*, 10 HASTINGS L.J. 394, 397 (1959)).

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

22. *Id.*

23. Kent Greenawalt, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 359 (1983). Note that Greenawalt’s assertion that “people naturally think in retributive terms” has begun to be borne out in social psychological research on perceptions of punishment. See Kevin M. Carlsmith et al., *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. PERSONALITY & SOC. PSYCHOL. 284 (2002) (showing that people’s motivations to punish are driven by retributive considerations); John M. Darley et al., *Incapacitation and Just Deserts as Motives for Punishment*, 24 L. & HUM. BEHAV. 659 (2000) (same).

24. Robinson & Darley, *supra* note 17.

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.²⁵ 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.²⁶ 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.²⁷ Legislative proposals for new criminal law rules provide an occasion for public debate that strengthens the shared understanding of what conduct is prohibited.²⁸ Further, if the law has moral credibility, it can guide behavior in situations in which the harm underlying the prohibition is not immediately obvious.²⁹

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 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.³⁰ 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.³¹ 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 promotes compliance.³²

Criminal law theorists who support the notion that liability and punishment track commonsense justice are joined by others who are concerned about the fairness of specific laws. For example, a commission of police officers, academics, and politicians appointed to study Britain's drug

25. *Id.* at 457.

26. *Id.* at 468–69.

27. *Id.* at 472.

28. *Id.* at 473.

29. *Id.* at 475–76.

30. *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 are beyond the scope of this Article.

31. *Id.*

32. *Id.*

laws concluded that Britain's tough marijuana laws produce more harm than they prevent.³³ The commission's report asserted that Britain's tough marijuana laws are perceived as focusing on a drug that most people think is not dangerous, thus undermining the credibility and respect for law.³⁴ The report concludes: "There can be no doubt that, in implementing the law, the present concentration [by law enforcement] on cannabis weakens respect for the law."³⁵

It is worthy to note at this point that all of the variations on the Flouting Thesis reviewed so far share an important feature; they have never been tested. Thirty years ago, Lawrence Friedman noted that there is much yet to be discovered about the Flouting Thesis:

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 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?³⁶

Yet even today, we do not know much more about the Flouting Thesis than we did when Professor Friedman posed these questions. Although related theories have been tested empirically,³⁷ an exhaustive literature search revealed no empirical test of the thesis that there is a relationship between perceived injustice of particular legal rules or outcomes and reduced compliance with the law generally. This Article thus represents an initial attempt to investigate the most basic question raised by the Flouting Thesis: whether a perceived unjust law leads to lower levels of compliance with unrelated laws. As an initial investigation, this Article does not (and cannot) aspire to address the important boundary conditions delineated by Professor Friedman; these questions must, of necessity, be left to another day. In the next Part, I present the results of three experiments designed to test the basic claim of the Flouting Thesis.

33. THE POLICE FOUNDATION, DRUGS AND THE LAW: REPORT OF THE INDEPENDENT INQUIRY INTO THE MISUSE OF DRUGS ACT 1971, at 115 (2000), available at <http://www.police-foundation.org.uk>.

34. *Id.* at 7, 10.

35. *Id.* at 115.

36. Lawrence Friedman, THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE 118-19 (1975).

37. *See infra* subpart III(A).

III. 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 law and general noncompliance, there is evidence on associated questions. This evidence shows first that 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 prohibited by a particular criminal offense (such as 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.³⁸ 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 (such as 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.³⁹ 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, past personal encounters with law enforcement, and the like). By contrast, the question of interest in this Article focuses on the problem of a particular legal doctrine, rule, or decision viewed as unjust, and the subsequent effects on not only feelings of obligation to obey that law, but also on behavioral compliance with laws in general.

Related to the question of people’s general sense of obligation to obey the law is the question of trust in legal institutions and procedures. Work in this area has demonstrated that people have more trust in the police and in the courts when police officers and judges make their decisions using fair

38. Matthew Silberman, *Toward a Theory of Criminal Deterrence*, 41 AM. SOC. REV. 442, 445–47 (1976). Similarly, Grasmick and 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 were 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).

39. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 41–68 (1990) (finding that perceived legitimacy of legal authorities increases the likelihood of 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 (results that are consistent with the reported findings of Silberman, *supra* note 38, as well as Grasmick & Green, *supra* note 38) and the extent to which people felt generally that the law is something that deserves respect and ought to be obeyed. TYLER, *supra*, at 44–50, 57, 60, 64.

procedures.⁴⁰ The use of fair procedures makes it more likely that people will conclude that the legal authorities with whom they are dealing are acting in good faith and that motives underlying these authorities' actions are benevolent.⁴¹ Questions of procedural justice and trust in legal authorities, however, are distinct from the question of interest in this Article. Work in procedural justice has shown that when a person has a positive experience with the police or in court, that person is more likely to feel satisfied with the process and is ultimately more willing to accept the police officer's or court's decision.⁴² This Article, by contrast, focuses not on people's perceptions of the procedures used by legal authorities (like police) or institutions (like courts), but rather on people's perceptions of the fairness of substantive laws (like criminal statutes) and decisions (like verdicts and punishment judgments). Whereas procedural justice focuses on fairness of treatment (including being treated with dignity and respect), the Flouting Thesis as examined in this Article focuses on the fairness of the law itself and the consequences for future compliance with unrelated laws.

Another important difference between the Flouting Thesis explored in this Article and the work on procedural justice is that the latter focuses chiefly on the extent to which a person's own experiences with legal authorities influence that person's trust in those authorities. This Article, by contrast, focuses on vicarious experiences with legal injustice. Most people do not experience the legal system directly.⁴³ However, all ordinary people experience the legal system vicariously, both through others they know who themselves experience it directly (a family member is arrested; an associate is audited; a best friend is divorced), as well as through messages in media and popular culture which mold our attitudes toward and understanding of the legal system. Vicarious experiences with the legal system are far more common than direct experiences—we read and hear about others' experiences in the legal system everyday.

Vicarious justice experiences are the central focus of the social psychology of moral mandates—the stands people take that develop out of strong moral convictions.⁴⁴ A person's moral conviction that the guilty must

40. Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B.U. L. REV. 361, 378–79 (2001).

41. *Id.* at 363, 366, 374–75. See generally TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS (2002).

42. See Tyler, *supra* note 40, at 378–79.

43. See generally Stewart Macaulay, *Images of Law in Everyday Life: The Lessons of School, Entertainment, and Spectator Sports*, 21 LAW & SOC'Y REV. 187 (1987) (canvassing Americans' everyday experiences where they gain education and knowledge of the law and illustrating how important these experiences are in light of the fact that very few people have actual contact with the court and legal mechanisms in their everyday lives).

44. See Linda J. Skitka, *Do the Means Always Justify the Ends, or Do the Ends Sometimes Justify the Means? A Value Protection Model of Justice Reasoning*, 28 PERSONALITY & SOC.

be punished (and the innocent must not) influences fairness perceptions.⁴⁵ If a given procedure leads to a guilty person being punished (or an innocent person being exonerated), then that procedure will likely be viewed as fair (as will the outcome).⁴⁶ Conversely, if a given procedure yields a morally unjustified outcome, then that procedure will likely be viewed as unfair.⁴⁷ Further, feelings of anger in the face of a threat to a moral mandate lead to perceptions of unfairness.⁴⁸ Anger in the face of perceived threats to morally mandated outcomes is certainly consistent with the Flouting Thesis. But to date, the work on moral mandates has not yet investigated the behavioral consequences of threats to moral mandates; that is the central question of this Article.

A survey study of tax compliance is perhaps the one study that most closely addresses the specific question addressed by this Article: what is the relationship between perceived injustice in the law in a particular instance and more general attitudes about respect for the law and compliance?⁴⁹ In the tax survey, people reported on both their own experiences with the IRS, as well as on second-hand information about the experiences of friends, neighbors, and coworkers with the IRS.⁵⁰ Especially revealing were the attitudes of people who reported that a friend's, neighbor's, 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.⁵¹

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 noncompliance with the

PSYCHOL. BULL. 588, 589 (2002) (showing that personal identity concerns influence how people decide whether an event is fair or unfair).

45. See Linda J. Skitka & David A. Houston, *When Due Process Is of No Consequence: Moral Mandates and Presumed Defendant Guilt or Innocence*, 14 SOC. JUST. RES. 305, 323–24 (2001) (finding that people see criminal trial outcomes in morally mandated terms).

46. *Id.* at 317.

47. *Id.* Interestingly, the finding that the perceived moral correctness of an outcome strongly influences perceptions of procedural fairness is directly contrary to findings in the social psychology of procedural justice. See *supra* notes 40–42 and accompanying text.

48. See Elizabeth Mullen & Linda J. Skitka, *Exploring the Psychological Underpinnings of the Moral Mandate Effect: Motivated Reasoning, Identification, or Affective Heuristic?*, 89 J. PERSONALITY & SOC. PSYCHOL. (manuscript at 2) (forthcoming 2006) (on file with the Texas Law Review) (showing that anger associated with verdicts that violated a moral mandate colored fairness judgments).

49. Karyl A. Kinsey, *Deterrence and Alienation Effects of IRS Enforcement: An Analysis of Survey Data*, in WHY PEOPLE PAY TAXES: TAX COMPLIANCE AND ENFORCEMENT 259, 264–76 (Joel Slemrod ed., 1992) (describing the results of a 1988 telephone survey about tax compliance).

50. *Id.* at 264.

51. *Id.* at 276.

law in the future. The conclusions to be drawn from the tax survey results are, however, limited in several important respects. First, all of the data was correlational,⁵² 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 was ambiguous. It might be, for example, that a person's intention to cheat on 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. 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 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 injustice 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

52. *Id.* at 262–63.

attitudes and behavior is not always straightforward.⁵³ 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, 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.⁵⁴ 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.⁵⁵

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.⁵⁶

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 that focused on a legal issue, and three that did not. The three news stories describing legal statutes were interspersed with the nonlegal 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 by using a questionnaire that focused on intentions to engage in fairly common, but legally prohibited, acts.⁵⁷

53. Indeed, the conditions under which people exhibit consistency between their attitudes and their behavior is a question that social psychologists continue to debate. See generally, e.g., Icek Ajzen et al., *Explaining the Discrepancy Between Intentions and Actions: The Case of Hypothetical Bias in Contingent Valuation*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 1108 (2004) (demonstrating that, in the context of a hypothetical donation to charity, people overestimate the likelihood that they will engage in socially desirable behavior); Richard T. LaPiere, *Attitudes vs. Actions*, 13 SOC. FORCES 230 (1934).

54. See Russell H. Fazio, *How Do Attitudes Guide Behavior?*, in HANDBOOK OF MOTIVATION AND COGNITION: FOUNDATIONS OF SOCIAL BEHAVIOR 204, 208–10 (Richard M. Sorrentino & E. Tory Higgins eds., 1986).

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

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

57. The law breaking measured here was not intended to represent a fair sample of all behavior that is prohibited by the law. Rather, I sought to measure people's intentions to break laws that they encounter on an everyday basis. I contend that it is these everyday laws that are most vulnerable to flouting following perceived injustice, because of increased opportunity and lower levels of inhibition, compared to laws prohibiting very serious (but more rare) acts such as robbery or murder. Moreover, as a practical matter, it would be exceedingly difficult to measure willingness to engage in these latter, more serious, offenses, precisely because they are less common, and also because people would be less likely to admit to engaging in them.

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 reading newspaper stories about current events can increase a person's societal-level concern about the problem at hand.⁵⁸ 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 may have been left to speculate about the purpose of reading legal statutes.

The participants were 98 undergraduate students.⁵⁹ 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.⁶⁰ Three of these were filler stories (on NASA, oil drilling, and movie ushers) that 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:

58. See Tom R. Tyler & Fay L. Cook, *The Mass Media and Judgments of Risk: Distinguishing Impact on Personal and Societal Level Judgments*, 47 J. PERSONALITY & SOC. PSYCHOL. 693, 695–704 (1984) (finding in three studies that exposure to relevant media stories influenced “societal level judgments” about social problems such as drunk driving and cancer).

59. 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.”

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

TABLE 1. CONTENT OF NEWSPAPER STORIES CONTAINING PRIMES			
<i>News Story</i>	<i>General Emphasis (both versions)</i>	<i>Just Prime Version</i>	<i>Unjust Prime Version</i>
<i>Civil Forfeiture</i>	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
<i>Income Tax</i>	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
<i>Landlord/ Tenant</i>	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 participants⁶¹ 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.⁶²

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 of the story they just read.⁶³ 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 performing a short filler task, participants completed the Likelihood of

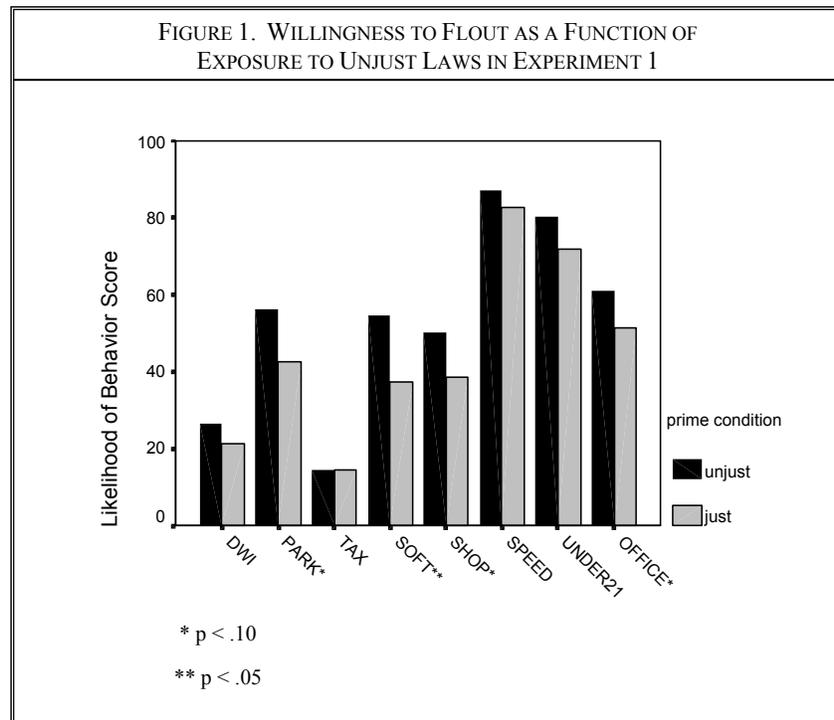
61. The participants in the pilot test were drawn from the same undergraduate population as those in the experiment itself.

62. 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.

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

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.⁶⁴

3. *Experimental Results.*—An analysis of each individual questionnaire item reveals an overall trend:⁶⁵ 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 1.⁶⁶



64. 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.

65. 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.

66. 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 .10; two asterisks indicate a p-value less than .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.⁶⁷

A reliability analysis (Cronbach's α) indicated that the eight questionnaire items could be combined into a single measure of Likelihood of Criminal Behavior,⁶⁸ which was computed by summing scores across items.⁶⁹ The standardized⁷⁰ 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 significantly⁷¹ greater mean willingness to engage in criminal behavior ($M = 1.15$) compared to participants exposed to laws perceived as just

67. 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 group is Mothers Against Drunk Driving (MADD)). See, e.g., Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 634 (2000) (reporting that, as a result of the MADD campaign, public attitudes with respect to drunk driving "became suddenly more condemnatory in the late 1980s"). Because of the stigma currently associated with drunk driving, participants may have been reluctant to admit to doing it, and as a result, 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.

68. Cronbach's $\alpha = .82$. Cronbach's α is a measure of the reliability and internal consistency of a scale. Possible values range from 0 to 1. See JACOB COHEN ET AL., *APPLIED MULTIPLE REGRESSION/CORRELATION ANALYSIS FOR THE BEHAVIORAL SCIENCES* 129–30 (3d ed. 2003).

69. 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 the number of studies in which they participated 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 first question, 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 that 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.

70. 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 COHEN ET AL., *supra* note 68, at 23–26.

71. 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. WILLIAM L. HAYS, *STATISTICS* 267–82 (5th ed. 1994).

($M = -0.97$).⁷² Thus, exposure to a legal rule generally perceived to be unjust leads to personal estimations of a greater likelihood of expressed willingness to engage in unrelated future criminal behavior.⁷³

C. Experiment 2a: Testing the Flouting Thesis via Mock Juror Behavior (Student Sample)

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.⁷⁴ 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.⁷⁵

72. $t(96) = 2.02$; $p < .05$; Cohen's $d = 0.41$. The t statistic reported throughout this Article tests for differences between two independent parametric samples. *Id.* at 312–27. Cohen's d is a measure of the magnitude, or practical significance, of a treatment effect. As a rule of thumb, Cohen's d is often interpreted as follows: Small Effect Size, $d = .2$, Medium Effect Size, $d = .5$, and Large Effect Size, $d = .8$. See JACOB COHEN, STATISTICAL POWER ANALYSIS FOR THE BEHAVIORAL SCIENCES 20–27 (2d ed. 1988) (explaining effect size index for variable d).

73. 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.

74. See ALICE H. EAGLY & SHELLEY CHAIKEN, THE PSYCHOLOGY OF ATTITUDES 155–216 (1993) (analyzing studies that have looked at the relationship between attitudes and behavior and concluding that, although the relationship is complex, there are indications that the correlation between attitudes and behavior is moderate but not perfect).

75. Laboratory experiments in which subjects are induced to engage in unethical or unlawful conduct to further scientific understanding of human behavior have 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 shocks to another person by applying surprisingly little social pressure. STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW 13–26 (1974). 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

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—not complying 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.⁷⁶ Participants were exposed to 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 his friend abduct 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.⁷⁷ 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.

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 he receives a sentence of one year in prison. In the Unjust Outcome story, David Cash receives no punishment.⁷⁸

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. *Id.* at 193–202.

76. Of these participants 152 were female, 30 were African American, 36 were Asian or Asian American, 26 were Hispanic, and 136 were white. The mean age was 18.6 years.

77. 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.

78. 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).

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.⁷⁹ Each subject’s verdict preference of Guilty or Not Guilty thereby served as the measure of compliance or noncompliance 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, and the like. 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”

79. 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 the “three strikes and you’re out” sentencing policies that exist in several states. See Tom R. Tyler & Robert J. Boeckmann, *Three Strikes & You Are Out, but Why?: The Psychology of Public Support for Punishing Rulebreakers*, 31 *LAW & SOC’Y REV.* 237, 258 (1997) (arguing that support for three strikes and you’re out policies originate from concerns about moral cohesion in society). 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.

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, noncompliance rates were measured by the proportion of all participants who made Not Guilty decisions. The higher the proportion of Not Guilty decisions, the higher the level of noncompliance. According to the Flouting Thesis, observing legal injustice leads to noncompliance. It was expected, therefore, that 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 noncompliance, in the form of a higher proportion of Not Guilty decisions in the case of the homeless man.⁸⁰ 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.⁸¹ This experiment, therefore, pits the Flouting Thesis against an alternative hypothesis (the Anger-Blame hypothesis) that predicts the opposite outcome.

Analysis of the data revealed that in fact, and contrary to both the Flouting Thesis and the Anger-Blame hypothesis, there was no statistically significant difference overall between Just and Unjust Prime groups in proportion to Not Guilty decisions.⁸² This failure to detect a difference between the two primed groups suggests a boundary condition on the Flouting Thesis, such that perceptions of injustice might not influence compliance with the law in the context of juror decisionmaking. To explore this possibility further, I separated the participants into two groups based on gender.⁸³ This generated a total of four groups: males primed with a Just

80. 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.

81. See Jennifer S. Lerner et al., *Sober Second Thought: The Effects of Accountability, Anger, and Authoritarianism on Attributions of Responsibility*, 24 PERSONALITY & SOC. PSYCHOL. BULL. 563, 570 (1998) (finding that 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).

82. See Table 2. The Total Unjust and Total Just percentages (Exp. 2a) do not differ statistically. $\chi^2(1) = 0.19$; $p = .66$.

83. 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 ANNALS AM. ACAD. POL. & SOC. SCI. 165, 165 (1998) (demonstrating that exposure to gender stereotypical portrayals can influence subsequent interpretations of unrelated events).

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.⁸⁴ The Technical Appendix summarizes the logistic regression⁸⁵ 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. The patterns of this Prime x Gender interaction are illustrated in Table 2. Recall that the Flouting Thesis predicts that people exposed to unjust legal outcomes will be more willing to flout the law themselves. The pattern of results illustrated in Table 2 shows that whereas the responses of female participants are consistent with the Flouting Thesis, the responses of male participants are not.

Note that it is difficult to discern whether the patterns here are attributable to the Unjust Prime encouraging women to choose a Not Guilty verdict, or to the Just Prime encouraging men to choose a Not Guilty verdict, or some combination of both. To further explore this question, I subsequently asked 78 participants drawn from the same population⁸⁶ as the current experiment to indicate their verdict preference in the shopping cart theft case. This group did not read the case of David Cash, and they were not exposed to the Unjust Prime or the Just Prime. Therefore, this group provided a baseline measure of the verdict preference regarding the shopping cart theft absent any prior exposure to a just or unjust outcome.

As Table 2 indicates, the proportion of Not Guilty verdicts of female participants in the baseline group fell in between the Unjust Prime group and the Just Prime group.⁸⁷ Note that for women, compared to the baseline rate of Not Guilty verdicts, the Unjust Prime appears to increase this rate and the Just Prime appears to decrease this rate, consistent with the Flouting Thesis.⁸⁸ For men, the Unjust Prime appears to have no effect on the rate of Not Guilty verdicts, whereas the Just Prime appears to increase this rate. Because none of the tests of simple main effects reach conventional levels of statistical significance, it is difficult to interpret the nature of the effect of each prime.

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

85. Logistic regression is a statistical technique for testing relationships between variables when the dependent variable (here, verdict preference) is dichotomous (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 COHEN ET AL., *supra* note 68, at 485–86.

86. Participants in this baseline group shared all of the relevant attributes of the participants in the main experiment: they were undergraduates enrolled in the same introductory psychology class at the same university during the same academic year as the participants in the main experiment.

87. None of the tests of simple main effects discussed here reach conventional levels of statistical significance, but the patterns illustrated in Table 2 are nonetheless suggestive.

88. Again, note the caveat that these patterns are merely suggestive.

Especially puzzling are the differential effects of the prime that depended on the gender of the participant. These differences were unexpected and a definitive explanation requires further study. As a preliminary matter, one might posit that these results be explained by differences in attitudes between males and females because of their historical position in the legal system.⁸⁹ These 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 male participants who learned that the legal system imposed on David Cash the punishment he was perceived to have deserved (the Just Prime). A perceived just outcome may have confirmed for male participants that the legal system indeed works to serve and protect 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. This explanation for why male participants were more likely to flout the rules after observing the legal system meting out a just punishment is supported by recent work in experimental social psychology on the phenomenon of “moral credentialing.”⁹⁰ The theory of moral credentialing holds that people feel licensed to act on questionable motives when they have previously established their credentials as a person of pure motives.⁹¹ For example, a man who credentials himself as nonsexist by hiring a woman might later feel greater license to express a politically incorrect opinion on an unrelated topic. In general, establishing moral credentials serves to liberate people to engage in behavior that they might otherwise avoid for fear of

89. See, e.g., SUSAN ESTRICH, REAL RAPE: HOW THE LEGAL SYSTEM VICTIMIZES WOMEN WHO SAY NO (1987) (arguing that the legal system fails women who say “No”); Mary Becker, *The Social Responsibility of Lawyers: Access to Justice for Battered Women*, 12 WASH. U. J.L. & POL’Y 63, 63 (2003) (“Our legal system routinely fails women who live with domestic violence.”); Victoria Nourse, *The “Normal” Successes and Failures of Feminism and the Criminal Law*, 75 CHI.-KENT L. REV. 951, 951–53 (2000) (arguing that feminist reforms in the criminal law have failed in certain areas); 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); 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.”). It is noteworthy that the historically different treatment of women and men by the legal system has been acknowledged by the government itself. For example, the Violence Against Women Act of 2000 was motivated, in part, by Congressional findings that crimes against women are often treated less seriously than other crimes. Joseph R. Biden, Jr., *The Civil Rights Remedy of the Violence Against Women Act: A Defense*, 37 HARV. J. ON LEGIS. 1, 4–5 (2000).

90. Benoît Monin & Dale T. Miller, *Moral Credentials and the Expression of Prejudice*, 81 J. PERSONALITY & SOC. PSYCHOL. 33 (2001).

91. *Id.* at 42; see also Daylian M. Cain, George Loewenstein & Don A. Moore, *The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest*, 34 J. LEGAL STUD. 1 (2005) (demonstrating that disclosing a conflict of interest can lead agents to feel morally licensed to give advice that is even more biased than if the conflict remained undisclosed).

being viewed (by oneself or by others) in a negative light.⁹² In the current study, male participants who observed that the legal system meted out a just punishment to David Cash may have subsequently felt licensed to flout the law and pronounce as “Not Guilty” the homeless man who was clearly guilty of stealing the shopping cart. According to moral-credentialing theory, males who observed the legal system justly punish another male who was involved in a crime against a female saw the legal system establishing its credentials as nonsexist and concerned with doing justice. In the subsequent task, failure to follow the judge’s instructions is a behavior that might ordinarily be viewed in a negative light, but, given the prior credentialing of the law, male participants who saw David Cash justly punished felt licensed to flout the law and ignore the judge’s instructions.

The results are also consistent with prior research that demonstrates that men and women react quite differently when exposed to media portrayals involving female stereotypes.⁹³ At the same time, 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 2a.⁹⁴ To further explore the nature of these unexpected effects, I conducted another experiment that used a different sample of participants: adult community members from diverse backgrounds. The next subpart describes in detail the procedure and results of Experiment 2b.

	<i>Exp. 2a</i>			<i>Exp. 2b</i>		
	Female	Male	Total	Female	Male	Total
	N = 193	N = 113	N = 306	N = 91	N = 57	N = 149
<i>Unjust</i>	46	38	43	38	43	39
<i>Baseline</i>	42	38	40	26	21	24
<i>Just</i>	32	57	41	19	12	16

92. Monin & Miller, *supra* note 90, at 42.

93. See J. Gerard Power et al., *Priming Prejudice: How Stereotypes and Counter-Stereotypes Influence Attribution of Responsibility and Credibility Among Ingroups and Outgroups*, 23 HUMAN COMM. RES. 36, 52 (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 spousal abuse).

94. Recall that, as revealed in the pilot data from participants who only rated the David Cash case, 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’ noncompliance rates in the second part of the experiment were not likely caused by different, gender-based attitudes of the justness of the David Cash story prime.

D. Experiment 2b: Testing the Flouting Thesis via Mock Juror Behavior (Community Sample)

1. *Background.*—The Flouting Thesis was confirmed in Experiment 2a but, unexpectedly, only among female participants. To examine whether the absence of the predicted effect among male mock jurors in Experiment 2a extends to other populations, I conducted a similar experiment using a very different sample of participants. Instead of using undergraduate college students from the midwestern United States, I recruited a diverse sample of adults from a wide geographic range. The method of Experiment 2b was very similar to that of the previous experiment; exceptions are noted below.

2. *Experimental Method.*—

a. Participants and Materials.—Participants were invited to participate via an email message sent to individuals who had previously registered as a volunteer to participate in web-based research.⁹⁵ The email message included a URL to a survey hosted on the internet. Participants were offered an incentive for participation in the form of a random draw to receive a gift certificate from an online retailer. Participants were assured that their responses would remain anonymous and that identifying information would not be collected.

An email message was sent to one thousand people, inviting them to participate. One hundred and sixty-five people completed the survey. Of these, 16 people failed to correctly answer two questions designed to test basic understanding of the materials, so their responses were excluded from the results, leaving a final sample size of 149. Of these, 60% were female, and 82% were white.⁹⁶ The participants' mean age was 37 years. Two-thirds were U.S. residents. Of non-U.S. residents, the vast majority (about 90%) were residents of common law countries such as Canada, the United Kingdom, Australia, and New Zealand. The responses of U.S. and non-U.S. residents did not differ statistically; the analysis below includes all respondents in the final sample. The materials were identical to those used in Experiment 2a, with one exception in format. The David Cash case was presented in the form of a print newspaper story, rather than a *60 Minutes* TV program.

95. Participant recruitment was managed by the StudyResponse Project, hosted by the School of Information Studies at Syracuse University, at <http://www.studyresponse.com>.

96. About 6% were Black, 7% were Asian, and 2% were Hispanic. Three percent declined to answer. The gender of one of the participants is unknown; this is reflected in Table 2, which indicates that the sample for Experiment 2b included 91 females and 57 males (which sums to 148).

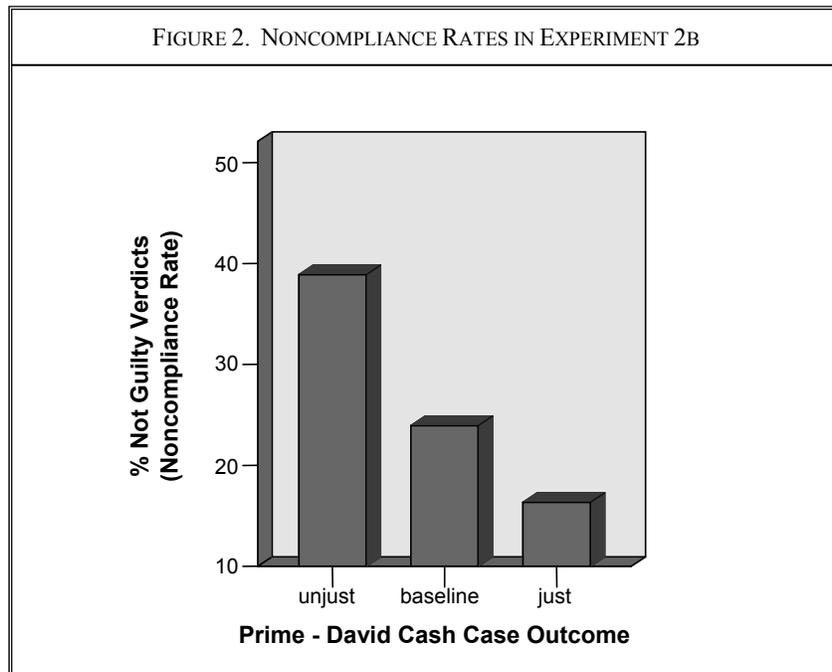
b. Procedure.—Participants were randomly assigned to one of three conditions: Just Outcome (David Cash punished), Unjust Outcome (David Cash not punished), or Baseline (no exposure to the David Cash case). Upon agreeing to participate in the survey, participants not assigned to the Baseline condition were presented with the David Cash news story, 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). Filler questionnaires elicited ratings of the writing quality of the news stories. Participants assigned to the Baseline condition proceeded directly to the next part of the experiment.

Participants were then informed that they would act as mock jurors whose task was to render a verdict in a criminal case. Participants read the trial materials involving the homeless man accused of stealing a shopping cart (which were identical to the materials used in Experiment 2a), and then privately indicated their personal verdict preference of Guilty or Not Guilty. They were then asked to rate the likelihood that the defendant was guilty on a seven point scale (1 – Definitely Guilty; 7 – Definitely Not Guilty).

3. Experimental Results.—As in the prior experiment, noncompliance rates were measured by the proportion of participants who made Not Guilty decisions. Unlike in the prior experiment, in Experiment 2b the prime had a statistically significant effect on compliance rates of both women and men.⁹⁷ The results are illustrated in Figure 2 and are consistent with the Flouting Thesis: compared to those primed with a Just Outcome, participants primed with an Unjust Outcome in the David Cash case exhibited a greater rate of noncompliance, in the form of a higher proportion of Not Guilty decisions in the case of the homeless man.⁹⁸

97. $\chi^2(2) = 6.95$; $p = .03$. This test demonstrates that the probability of choosing a Not Guilty verdict preference (noncompliance) depended on the exposure to the Prime (Unjust, Just, or Baseline).

98. These results are detailed in the Technical Appendix. In Model 4, there was an overall effect of the prime on noncompliance, and the rate of noncompliance was greater in the Unjust Prime group compared to the Just Prime group. However, the apparent difference in compliance rates (illustrated in Figure 2) between the Baseline and Unjust Prime groups, and between the Baseline and Just Prime groups, did not reach conventional levels of statistical significance. For this reason, it is difficult to determine whether the overall effect of the prime on noncompliance is attributable to an increase in flouting due to the Unjust Prime, a decrease in flouting due to the Just Prime, or both.



The Flouting Thesis was therefore confirmed. In light of the gender differences that emerged in Experiment 2a, gender differences were examined in this experiment as well. As illustrated in Table 2, rates of noncompliance for male and female participants were very similar, and this was confirmed in the logistic regression analysis, which revealed no statistically significant effect of gender on rates of Not Guilty decisions.

In addition to indicating their verdict preference, participants also rated the defendant's guilt on a seven point scale (1 – Definitely Not Guilty; 7 – Definitely Guilty). An analysis of variance⁹⁹ revealed that prime had a statistically significant effect on continuous ratings of guilt. The pattern here was similar to the one that emerged from the dichotomous verdict judgments: participants primed with an Unjust outcome rated the defendant as less guilty (Mean = 3.4) compared to participants primed with a Just outcome (Mean = 4.1) and compared to those in the Baseline condition (Mean = 4.2).¹⁰⁰

Despite the preliminary nature of the inferences to be drawn from the results of these studies, one feature of all three experiments is noteworthy. The duration of exposure to perceived legal injustice was exceedingly

99. $F(2, 146) = 10.93$; $p = .002$. An analysis of variance measures for statistical differences between the means of groups whose data are categorical (as opposed to continuous). See HAYS, *supra* note 71, at 376–81.

100. The Unjust-Just and Unjust-Baseline pairwise comparisons are both statistically significant at $p < .01$.

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.¹⁰¹ 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 Part, I consider explanations for the influence of perceived injustice on general diminished compliance.

IV. 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.¹⁰²

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 point where I even question my belief in God.¹⁰³

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.¹⁰⁴

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.¹⁰⁵ 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

101. For one example, see the discussion of the O.J. Simpson trial *infra* Part IV.

102. Interview with Al [last name withheld], on NPR's *All Things Considered* (Oct. 12, 1995).

103. Interview with Sherrie [last name withheld], on NPR's *All Things Considered* (Oct. 12, 1995).

104. Cathleen Decker, *Faith in Justice System Drops*, L.A. TIMES, Oct. 8, 1995, at S2; see also Cathleen Decker & Sheryl Stolberg, *Half of Americans Disagree with Verdict*, L.A. TIMES, Oct. 4, 1995, at A1 (reporting similar lack of confidence in the criminal justice system in a national poll not limited to Los Angeles residents).

105. Alexander Peters, *Poll Shows Courts Rate Low in Public Opinion*, RECORDER, Dec. 11, 1992, at 1.

presented in this Article suggests that cases perceived to have 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 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 language; 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 ranks¹⁰⁶

The propensity of the law to inhabit the popular imagination in the United States is more evident today than ever before.¹⁰⁷ Hundreds of movies

106. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 258 (Harvey C. Mansfield & Delba Winthrop eds., Univ. of Chi. Press 2000) (1835).

107. See Anthony Chase, *Toward a Legal Theory of Popular Culture*, 1986 WIS. L. REV. 527; Stewart Macaulay, *Images of Law in Everyday Life: The Lessons of School, Entertainment, and Spectator Sports*, 21 LAW & SOC'Y REV. 185, 185-87, 197 (1987) (arguing that ordinary people receive their "everyday legal education" from schooling, media portrayals, and spectator sports, rather than from direct experience with the legal system). Richard Sherwin has argued that law and popular culture have become so intertwined that the distinction between 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. *Id.* at 16. 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*. Caryn James,

involve portrayals of trials.¹⁰⁸ A substantial proportion of television programs focus exclusively on law, lawyers, or criminal justice, and television news magazines (for example, *60 Minutes* or *20/20*) also regularly focus on legal topics. Included in ABC's fall 2004 lineup was a seven-part documentary depicting a real jury deciding a real capital criminal case.¹⁰⁹ There is at least one cable television station, Court TV, that is devoted entirely to legal topics. Live television coverage is available both for momentous national legal events such as Senate hearings on U.S. Supreme Court Justice nominations, as well as for routine congressional sessions. 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.¹¹⁰ In sum, stories and shows about the law have a broad popular appeal in the United States.

Law-related television dramas, news shows, tabloid shows, newspaper articles, and novels tend to highlight certain aspects of the law (for example, violent crime, consumer fraud, trials, and prisons) and ignore others for dramatic effect.¹¹¹ As a result, there is a natural focus on whether justice is done. Viewers and readers naturally want to know whether the person or people depicted got what they deserved. 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.¹¹² When the legal

The Testing of a President: Clinton's Role of a Lifetime Breaks Cinema's Rules, N.Y. TIMES, Sept. 22, 1998, at A16.

108. For an incomplete list compiled by an online journal at the University of San Francisco School of Law, see PICTURING JUSTICE: THE ON-LINE JOURNAL OF LAW & POPULAR CULTURE, available at <http://www.usfca.edu/pj/index.html> (last visited Jan. 19, 2005) (listing, among others, such movies as *Erin Brockovich*, *The Firm*, and *A Civil Action*).

109. See *ABC News Special: The Jury Room* (ABC television broadcast, Aug. 10, 2004).

110. 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). Gina Bellafante, *Soap Operas: The Old and the Desperate*, TIME, May 29, 1995, at 73. 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).

111. See, e.g., Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L.J. 1579, 1588 (1989) ("[T]here are no songs, movies or TV programs about Medicare, dog licenses, zoning laws, or overtime parking. . . . Crime shows, for example, overrepresent violent crimes; shoplifting is no great audience-holder, but murder is."); see also Michael Asimow, *When Lawyers Were Heroes*, 30 U.S.F. L. REV. 1131 (1996) (describing an evolution in the portrayal of lawyers in films from crusading heroes to morally corrupt mercenaries).

112. See Carolyn L. Hafer, *Do Innocent Victims Threaten the Belief in a Just World? Evidence From a Modified Stroop Task*, 79 J. PERSONALITY & SOC. PSYCHOL. 165, 172 (2000) (demonstrating that small-scale negative events can heighten concern for fairness).

system is portrayed as failing to serve the interests of justice (whether in a drama or in news reports on real laws or cases), the effects might reach further than the particular law or legal procedure that is the focus of the show or news story.¹¹³ A portrayal of injustice in the legal system may cause people to question the integrity of not only the particular law, judge, 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 the 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 subpart, 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, and 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.¹¹⁴ 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.

On the other hand, people also refrain from legally prohibited acts in which they may be genuinely tempted to engage, 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.¹¹⁵ 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.¹¹⁶ Such moral commitments can operate, even on people who have not internalized them,

113. See Lerner et al., *supra* note 81, at 570; Power et al., *supra* note 93, at 45–47.

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

115. See McAdams, *supra* note 14, at 402.

116. *Id.*

through social pressure to avoid the loss of esteem in others' eyes that would result from engaging in prohibited conduct.¹¹⁷ In this 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.¹¹⁸ 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.¹¹⁹ Under these circumstances, the very labeling of a certain act as criminal might make

117. See ANDENAES, *supra* note 11, at 112 (arguing that “a successful inculcation of moral standards may result in social pressure towards acceptable behavior even on persons who have not been influenced personally by the moral message of the law”); see also McAdams, *supra* note 14, at 355. McAdams argues that we generally seek the esteem 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 38, at 334 (concluding that social disapproval is one of three factors that explains the inhibition of illegal behavior).

This idea of norm-regulated behavior is also captured in social psychological theories, such as Fishbein and 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 generally 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. Sociologist Elijah Anderson 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, *The Code of the Streets*, *ATLANTIC MONTHLY*, May 1994, at 81. As a result, a person must maintain an appearance (including clothing, gait, and 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 in the event of a threat to one's self-esteem, all to ensure that respect is secured and maintained. *Id.*

As another example, norms motivated by fear of peer stigma regarding honor and violence are very different in the southern United States, compared to the northern United States. See generally Dov Cohen et al., “When You Call Me That, Smile!” *How Norms for Politeness, Interaction 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 subpopulations, they nonetheless play an important causal role in explaining factors that motivate behaviors that are observed with regularity within a community. *Id.*

118. See TYLER, *supra* note 39, at 57–68 (finding that general feelings of obligation to obey the law, and general support for the courts and police predict compliance with specific laws).

119. See Robinson & Darley, *supra* note 17, at 476 (arguing that the law can be a moral authority even when the harm of the act is not clearly known to society).

people more aware of the socially harmful quality of that act.¹²⁰ For example, before the existence of severe criminal punishments for drunk driving, many people were unaware of the severity of the risk associated with drunk driving. It may be that drunk driving is increasingly considered in moral terms precisely because it has been labeled criminal.¹²¹

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 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.¹²² 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.¹²³

120. See ANDENAES, *supra* note 11, at 116 (“It is possible that the fact that a certain act has been labeled criminal can make the citizens more aware of its socially harmful character.”). There is some empirical evidence supporting this proposition. See Leonard Berkowitz & Nigel Walker, *Laws and Moral Judgments*, 30 *SOCIOMETRY* 410, 420–21 (1967) (reporting an experimental finding that knowledge of the existence of a law diminishes the perceived moral propriety of the actions regulated by law).

121. But in the example of drunk driving, it also might be the case that law followed changes in social norms. See Kahan, *supra* note 67, at 634 (raising the possibility that increasingly condemnatory norms led to both tougher drunk driving laws and also greater willingness to enforce them).

122. See Robinson & Darley, *supra* note 17, at 476 (“Criminal law rules can contribute to normative forces . . . only if the community accepts the law as a legitimate source of moral authority.”).

123. *Id.* at 473–76; see also Robert Cooter, *Expressive Law and Economics*, 27 *J. LEGAL STUD.* 585, 587 (1998) (discussing the multiple equilibria in systems of social norms and the function of law in creating focal points that could possibly tip the system into a new equilibrium). 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 teaching might be perceived as unjust by Latino communities; a set of legal rules that mandates 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

V. Implications and Prescriptions

A. Sources of Perceived Injustice

Recognition of initial sources of perceived injustice is a necessary condition for controlling the generally diminished compliance it triggers.¹²⁴ In the experiments reported in this Article, justice perceptions were induced by the conditions of the experiment. The primary advantage of this admittedly artificial procedure is that by randomly inducing perceptions of either injustice or justice in participants, we can confidently conclude that the observed mean difference in flouting behavior between the two groups was attributable to the perceptions of injustice of the prime, as opposed to some other cause. At the same time, inducing people to perceive injustice in the laboratory does not advance our understanding of how and why and when people perceive legal injustice in everyday life. Natural sources of perceived injustice in the legal system are varied: A person can experience perceived legal injustice personally, such as when a person feels that he is unfairly targeted by a police officer for a traffic violation because of his race. Alternatively, sources of perceived injustice can be experienced vicariously, such as when a person sympathizes with defendants harshly punished under federal mandatory minimum sentencing provisions.¹²⁵

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 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 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.¹²⁶ For example, from

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.

124. See Robinson & Darley, *supra* note 17, at 488.

125. See, e.g., 21 U.S.C. §§ 841, 844, 860 (2000) (providing minimum penalties for various drug offenses); 18 U.S.C. § 924(c) (2000) (providing minimum penalties for carrying a firearm during or in relation to any crime of violence or drug trafficking crime).

126. See Skitka & Houston, *supra* note 45, at 305.

the point of view of a person who believes that O.J. Simpson did in fact kill two people without legal 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.¹²⁷ In sum, because information about jury verdicts is, and should be,¹²⁸ 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 regulation, that conflicts with commonsense notions of what justice requires. Perhaps the most salient historical example is the prohibition on the manufacture, distribution, or sale of alcoholic beverages imposed by the Eighteenth Amendment. During the period when the Eighteenth Amendment was in force, the law prohibiting alcohol was notoriously disobeyed.¹²⁹ 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.¹³⁰ 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 sentencing disparity between crack cocaine and powder cocaine offenses in the Federal Sentencing Guidelines),¹³¹ mandatory minimum sentences of incarceration

127. See *infra* notes 153–54 and accompanying text.

128. 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 David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785, 786 (1993); Ruth Ann Strickland & Richter H. Moore, Jr., *Cameras in State Courts: A Historical Perspective*, 78 JUDICATURE 128, 135 (1994) (pointing out that televised trials on *Court TV* “allow[] viewers to become better educated about the cumbersome as well as sensational aspects of the judicial process”); 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, 238–40 (1999) (arguing that increased media coverage of trials focuses public resentment on the jury, undermining the perceived legitimacy of the justice system as a whole).

129. See DAVID E. KYVIG, *REPEALING NATIONAL PROHIBITION 28–32* (1979) (describing the ongoing difficulty of enforcing prohibition); Harry G. Levine, *The Birth of American Alcohol Control: Prohibition, the Power Elite and the Problem of Lawlessness*, 1985 CONTEMP. DRUG PROBS. 63, 75 (“[T]he report (by Hoover’s National Commission on Law Observance and Enforcement) found widespread disobedience to prohibition and seemed to conclude that national prohibition could never be enforced.”).

130. See KYVIG, *supra* note 129, at 69–70 (noting that those who opposed prohibition expressed concerns about “spreading disrespect for law”); Levine, *supra* note 129, at 69.

131. See David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1322 (1995) (“By demanding too much doctrinal order, we have produced a doctrine that demands

for certain crimes,¹³² sodomy statutes,¹³³ foster care regulations,¹³⁴ and smoking ordinances,¹³⁵ 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.¹³⁶ Many discrepancies between legal regulation and commonsense attitudes constitute 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 ordinary people.¹³⁷ 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.¹³⁸ The key question, then, is how to go about reducing discrepancies between legal rules and citizen attitudes.

B. Reducing the Gap Between Legal Rules and Commonsense Justice

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.¹³⁹ 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 for the law to conform to public attitudes. I discuss these possibilities in turn.

1. Modifying Legal Rules.—Modifying the legal rule to better reflect the existing social norm involves a number of considerations. First, we must make a determination that the existing norm promotes desirable social policies and that the legal rule would be more effective at promoting those policies if it were to better reflect the existing social norm. In other words,

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.”).

132. See, e.g., Susan R. Klein & Jordan M. Steiker, *The Search for Equality in Criminal Sentencing*, 2002 SUP. CT. REV. 223; 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).

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

134. See DOROTHY ROBERTS, *SHATTERED BONDS* 120–21, 205 (2002).

135. Richard Pérez-Peña, *A City of Quitters? In Strict New York, 11% Fewer Smokers*, N.Y. TIMES, May 12, 2004, at A1.

136. See Kahan, *supra* note 67, at 607–09.

137. See Robinson & Darley, *supra* note 17, at 476.

138. *Id.*

139. 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.

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; the norm against interracial marriage; and the norm 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 cannot hope to neatly conform the legal rule to existing norms. 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.¹⁴⁰

Sometimes, the legal rule in question does not really implicate a social norm but instead implicates a socially shared attitude about what justice requires.¹⁴¹ 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).¹⁴² 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 an attempted crime in specific situations.¹⁴³ Moreover, social scientists using the right types of survey instruments and samples ought to be able to measure these popular intuitions.¹⁴⁴

That this type of endeavor is possible was demonstrated by Paul Robinson and John Darley in their book *Justice, Liability, and Blame*. They tested several different criminal law doctrines (e.g., attempt, justification, excuse, and the like) against the opinions of citizens regarding what the content of these rules should be. But instead of asking questions about

140. TYLER, *supra* note 39, at 76–79.

141. See John Darley et al., *Enacting Justice: The Interplay of Individual and Institutional Perspectives*, in THE SAGE HANDBOOK OF SOCIAL PSYCHOLOGY 458, 461 (M.A. Hogg & J. Cooper eds., 2003) (arguing that communities' shared sense of justice help them determine which offenses deserve punishment).

142. See PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* 16–20 (1995).

143. *Id.* at 21.

144. *Id.* at 27–28.

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, we can infer what people think 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 faced with the facts of such a case.¹⁴⁵ 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, as 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.¹⁴⁶ In this case, therefore, a sensible approach might be to adopt the rule that best accords with commonsense notions of what justice requires.¹⁴⁷

Note, however, that we need not limit ourselves to considering only those legal rules about which expert consensus is lacking. There may be other rules that depart from socially shared intuitions that are, on the one hand, widely accepted by legal experts, but on the other hand, amenable to review and revision. Of course, the decision to revise an existing rule in order to better harmonize it with commonsense intuitions must never be taken lightly. This decision process necessarily entails a balancing between theoretical justifications underlying the rule, and justifications for the

145. *Id.* at 25.

146. These include: the physical-proximity doctrine (liability imposed if the act directly tends toward completion of the crime), the dangerous-proximity doctrine (liability for attempt becomes more likely as the 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 approach (liability imposed when the 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 the 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 (3d ed. 2003).

147. 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. Robinson and Darley’s book, *Justice, Liability, and Blame*, is a step in the right direction in this regard. As other commentators have observed, 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. See Christopher Slobogin, *Is Justice Just Us?*, 28 HOFSTRA L. REV. 601, 605 (2000).

existing shared intuition. One can imagine situations in which there is a sound reason for the existing rule and a less sound—but still justifiable reason for an alternate rule; if the alternate rule comports better with socially shared intuitions, this fact weighs in favor of its adoption but is not, in itself, determinative.

2. *Facilitating Understanding of Existing Legal Rules.*—The second main way to reduce the gap between legal rules and commonsense 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 existing legal requirements.¹⁴⁸ One study asked the residents of four different states about their knowledge of four different criminal law rules.¹⁴⁹ 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.¹⁵⁰ Yet, with only one exception, residents of all of the four states tested had essentially identical beliefs about the law in their state.¹⁵¹ 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, peoples' beliefs about what the law is in their state did not track so much the majority rule as they tracked peoples' own moral intuitions about what they thought the rule ought to be.¹⁵²

Given the goal of reducing the gap between legal rules and commonsense 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 apparent, that rule might fall into disrepute if it is contrary to commonsense notions of

148. See John M. Darley et al., *The Ex Ante Function of the Criminal Law*, 35 LAW & SOC'Y REV. 165 (2001).

149. *Id.* at 170–71. 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.

150. *Id.* at 169.

151. *Id.* at 181–82. The one exception was the rule about use of deadly force in defense of property; here, Texas residents correctly indicated that the law of their state permits the use of deadly force against an unarmed fleeing burglar.

152. *Id.* at 183. Note that there is a sense in which widespread ignorance of the law undermines the urgency of the Flouting Thesis: if most people do not know the law, then they will not perceive injustice in the law (especially if they simply assume that the law comports with their own moral intuitions) and will therefore have no motive to flout it. On the other hand, widespread ignorance of the law does not by any means blind citizens to pockets of perceived legal injustice. Moreover, the common assumption that the law probably comports with one's own intuitions could create a situation that is more (not less) likely to induce flouting. This is because people who are unaware of the actual legal rule might be shocked when they learn that the rule in fact clashes with socially shared intuitions, and this, in turn, might heighten one's sense of injustice. Further evidence is needed to shed light on this question.

justice, or if it leads to a result widely regarded as unjust.¹⁵³ 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.¹⁵⁴

C. *Caveats and Unanswered Questions*

It is important at this point to acknowledge several questions that remain unanswered. One important question left open by the experiments reported in this Article is: How stable is the impulse to flout the law in the face of perceived injustice? Measures of how long the perceptions of injustice induced by the procedure were not included in these experiments. Even more uncertain is how long the effects of perceived injustice last outside of the laboratory. These are important yet unanswered questions and are worthy of examination.

A limitation of the experiments discussed in this Article is that actual lawbreaking was not measured. Experiments 2a and 2b measured actual behavior, but to the extent that the behavior is categorized as lawbreaking (in the sense that participants violated the judge's instructions to follow the law), it is important to note that the behavior in question was apparently motivated by a desire to do justice, rather than an attempt to reap self-interested gains. Experiment 1, by contrast, measured self-interested lawbreaking, but measured only stated willingness to break the law rather than actual behavior. The primary difficulty in measuring behavioral lawbreaking in an experimental setting is an ethical one: there is only a narrow range of unlawful behavior that an ethical experimenter can comfortably induce participants to engage in. Alternative methods, such as unobtrusive observation of behavior outside the laboratory, as well as archival records of lawbreaking following perceptions of an actual event inducing perceptions of injustice, are promising routes for further investigation.

Another question left unanswered by the initial set of experiments discussed in this Article is the nature of the psychological mechanism that drives willingness to flout. The experimental results suggest that perceiving an unjust law or outcome increases the likelihood of flouting the law. But it is unclear what it is about perceived injustice that leads to flouting. One possibility is that people explicitly revise their general attitudes toward the legal system upon learning about an unjust legal rule or result, and based on these revised attitudes, make a conscious decision to flout. At the other extreme, it

153. See Robinson & Darley, *supra* note 17, at 476.

154. See generally Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003) (arguing that people's perceptions of legal authorities are based largely on their subjective assessments of the fairness of the procedural rules that are followed).

is possible that people's increased willingness to flout does not rise to the level of conscious thought—that is, people who resist legal rules following perceived injustice might not attribute their behavior to the prior perception of injustice. It is also unclear whether increased flouting is constrained to perceptions of injustice, or whether other, more general negative experiences can lead to flouting. For example, it is possible that negative mood is responsible for increased willingness to flout observed in the experiments, rather than perceived injustice per se. These questions can be examined in the future by separating out the effects of mood from injustice and by prompting people to provide an account of their own attributions for their own willingness to flout.

This Article focused on two prototypes: perceived unjust outcomes and perceived unjust legal rules. Of course, there are many other possible sources of perceived legal injustice. For example, the perceived injustice of the treatment of Rodney King at the hands of Los Angeles police officers (as opposed to the acquittal of those officers of criminal charges that touched off civil unrest) is an example of unjust enforcement of criminal law rules and procedures that are not, in and of themselves, particularly controversial. Indeed, it may be the case that legal rules and regulations do not often trigger perceptions of injustice in the abstract because ordinary citizens do not often attend to them in the abstract, in the way that participants in Experiment 1 were prompted to do. On the other hand, legal rules certainly are vulnerable to perceptions of injustice when they give rise to an outcome or decision which is itself perceived to be unjust.¹⁵⁵ In these cases, the outcome of individual cases is the mechanism that gives rise to the perception that the rule itself is unjust. As noted earlier,¹⁵⁶ sources of perceived injustice were manipulated in the laboratory in the experiments reported in this Article; future work could examine actual sources of perceived injustice in everyday life. Examination of sources of perceived injustice would help delineate the circumstances under which people are more likely to be prompted to flout the law.

VI. 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

155. Consider, for example, the lobbying group Families Against Mandatory Minimums (FAMM), the purpose of which is to “challenge inflexible and excessive penalties required by mandatory sentencing laws.” See About, Families Against Mandatory Minimums, *available at* http://famm.org/rs_mission_strategy.htm (last visited Mar. 9, 2005). The group focuses on the perceived injustice of a set of legal rules (mandatory minimum sentencing statutes), but does so by making salient a variety of perceived unjust sentencing decisions in individual cases.

156. See *supra* subpart IV(A).

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 law-breaking in their daily lives. Experiments 2a and 2b tested the influence of a perceived unjust outcome of a criminal case in which a person peripherally involved in a serious crime is not prosecuted. Experiments 2a and 2b 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 in Experiment 2a 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 were more willing than men to disregard the law in their role as jurors. Although this relationship between gender and perceived injustice was observed only in the undergraduate sample (Experiment 2a) and was not observed in a more general community sample (Experiment 2b), these stark gender differences nonetheless 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 commonsense 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
 Logistic Regression Analysis for Likelihood of Guilty Verdict
 as a Function of Prime and Gender

	<i>Exp. 2a</i> <i>Model 1</i>	<i>Exp. 2a</i> <i>Model 2</i>	<i>Exp. 2a</i> <i>Model 3</i>	<i>Exp. 2b</i> <i>Model 4</i>	<i>Exp. 2b</i> <i>Model 5</i>
Prime					
<i>Estimate</i>		1.92			0.19
<i>S.E.</i>		0.82			0.70
<i>Wald Chi square (df)</i>		5.44(1)	5.85(2)	6.68(2)	0.08(1)
<i>p</i>		0.02	0.05	0.036	0.78
<i>Exp (B)</i>		6.83			1.21
Unjust vs. Just					
<i>Estimate</i>	-0.12			1.18	
<i>S.E.</i>	0.27			0.48	
<i>Wald Chi square (1)</i>	0.19			6.15	
<i>p</i>	0.66			0.013	
<i>Exp (B)</i>	1.12			3.26	
Unjust vs. Baseline					
<i>Estimate</i>			0.32	0.71	
<i>S.E.</i>			0.90	0.44	
<i>Wald Chi square (1)</i>			0.13	2.52	
<i>p</i>			0.72	0.11	
<i>Exp (B)</i>			1.38	2.02	
Just vs. Baseline					
<i>Estimate</i>			-1.60	-0.48	
<i>S.E.</i>			0.94	0.52	
<i>Wald Chi square (1)</i>			2.85	0.85	
<i>p</i>			0.09	0.36	
<i>Exp (B)</i>			0.20	0.62	
Gender					
<i>Estimate</i>		1.03	0.19		-0.88
<i>S.E.</i>		0.42	0.25		0.64
<i>Wald Chi square (1)</i>		6.01	0.61		0.19
<i>p</i>		0.014	0.44		0.89
<i>Exp (B)</i>		2.80	1.21		0.91
Prime x Gender					
<i>Estimate</i>		-1.33			0.01
<i>S.E.</i>		0.58			0.48
<i>Wald Chi square (2)</i>		5.32	6.01		0.00
<i>p</i>		0.021	0.048		0.98
<i>Exp (B)</i>		0.26			1.01
N	228	228	306	149	148
Model Chi square (df)	0.19(1)	6.92(3)	7.16(5)	6.96(2)	0.82(3)
p	0.66	0.074	0.21	0.031	0.84