Duke Law Journal Online

VOLUME 67 MAY 2018

INVESTIGATING JUDICIAL RESPONSES TO RULES

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Much has been written about the process by which judges reach decisions in cases governed by the common law, but very little has been done to test this process empirically. Most empirical efforts have attempted to determine whether and to what extent judges' political views influence their legal decisions. My own interest is different; I would like to learn more about how judges respond to legal rules, and particularly to precedent rules established in prior decisions.

Larry Alexander and I have written at some length about the function of rules in legal decisionmaking.[1] Briefly, we argue that, from the central perspective of someone designing a legal system, it is desirable that at least some range of legal disputes be governed by general, determinate rules, and that these rules be treated as authoritative. To treat a rule as authoritative is to follow it in all cases that fall within its terms, without further analysis of the underlying purpose or rationale that motivated the rulemaker to announce the rule. From a systemic perspective, authoritative rules are attractive for several reasons. Rules, if they are generally obeyed, can help their subjects avoid errors and biases that distort case-by-case judgment. Rules can also provide coordination if all or most subjects treat them as authoritative. Individuals can act more effectively if they know what others are likely to do, and an authoritative rule makes it possible to predict others' conduct in situations governed by the rule.

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1. LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW (2001).

At the same time, the generality of rules often leads to overinclusiveness in application. As a result, rules will sometimes prescribe outcomes that are wrong, judged by the rules' own purpose or rationale. Yet the overinclusiveness of rules does not alter the conclusion that rules function most effectively when treated as authoritative. If a rule is well designed—that is, if the rule will prevent more errors overall than it will cause through overinclusiveness—then it is best, from the perspective of the system designer, that those who are subject to the rule follow it in every case to which it applies.[2]

The difficulty with authoritative rules is that it is not at all clear how rational subjects *can* treat rules as authoritative. If a rule appears to give the wrong answer in a particular case, the rational choice is to disobey. The subject may understand that rules prevent errors of judgment, but if the subject also understands that rules are overinclusive, the subject may nevertheless conclude that his judgment is correct. The subject may also understand the coordination value of rules, and yet conclude that the error that will result from following a rule in a particular case outweighs the loss of coordination that will result from a single act of disobedience. In each case, the subject may be wrong, but this does not make it subjectively rational to follow the rule.[3] The consequence is an unbridgeable gap between the perspective of those who oversee the legal system and the perspective of those subject to the system's rules.

Judges occupy two positions in this account of legal rules. First, they act as rulemakers. Judicial opinions often contain prescriptive statements that are determinative enough to count as rules and are intended to serve as decisional standards in future cases. Assuming the rules are well designed in the sense described above (assuming, that is, that the rules will prevent more errors than they generate over the long run), the legal system will benefit if future judges, as well as future actors, treat them as authoritative: judicial rules, no less than legislative rules, can reduce errors and provide coordination.

In addition to serving as rulemakers, judges also apply rules to the cases litigants bring to court. When judges apply rules, their perspective is similar to that of rule subjects. If a judge is persuaded

2. *See id.* at 10–21, 55–61. Frederick Schauer reaches a similar conclusion. *See* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LIFE AND LAW 128–34 (1991).

3. *See* ALEXANDER & SHERWIN, *supra* note 1, at 61–95; HEIDI M. HURD, MORAL COMBAT 62–94 (1999).

that the governing rule provides the wrong answer (as indicated by the rule's underlying rationale) in a particular case, applying the rule will seem both irrational and unfair. Moreover, the judge may find it difficult to give due recognition to the long-term advantages of the rule, because the judge's attention is focused on the specific facts of the case.

This view of rules and the roles they play in judicial decisionmaking leads to a number of empirical questions about how judges respond to rules. The most basic question is whether judges treat rules as authoritative. Do judges apply rules only when they are persuaded that the outcome of the rule in the case at hand is consistent with the rule's purpose or rationale (or is correct, all things considered)? If so, the answer to the basic question is no; rules have no real consequences for adjudication, and the various Legal Realist speculations about what drives judicial decisionmaking come into play.

Assuming that judges sometimes do follow rules simply because they are the rules of the system, the next question is how deeply judges are committed (or how thoroughly they are habituated) to following rules. Do judges follow rules without reflection only when the purpose or rationale of the rule has not been brought to their attention? Do they refuse to consult the rationale or purpose of an established rule if the terms of the rule apply uncontroversially to the case at hand? Do they also follow rules in conscious disregard of the rule's purpose or rationale, when the rule's purpose or rationale appears to conflict with the result it prescribes?

If the answer is that judges who follow rules do treat the rules as authoritative against their own best judgment about what outcome is best, subsidiary questions arise about the conditions under which judges are willing to suspend judgment and follow rules. For example, the rule in question may be defective, in the sense that it generates more errors than it prevents overall. Alternatively, the rule may be sound, in that it prevents more errors than it generates overall, and yet misfire in a particular case. Here, the question for investigation is whether differences in the overall quality of the rule affect the level of judicial obedience to the rule.

Another subsidiary question is whether differences in the vividness of the facts presented for adjudication affect judges' responses to precedent rules. Here, the variable is not the quality of the rule, but the salience or affective impact of a seemingly wrong

outcome required by the rule.[4] The question for investigation is whether judges approach rules consistently in different factual settings, or, alternatively, whether their treatment of rules varies according to the exigencies of particular cases.

These questions are obviously hard to answer. Written opinions may provide some evidence of judges' attitudes toward rules, but only when judges perceive the dilemma of rule-following and also have reason to discuss it in the course of explaining their decisions. This set of circumstances may be rare; in any event, opinions that directly address rule-following are not likely to yield a representative sample of judicial responses to rules.

A more promising approach might be to conduct controlled experimental studies on judicial subjects. The logistics of this form of research are daunting, but work by Chris Guthrie, Jeffrey Rachlinski, and Andrew Wistrich suggests that it can be done.[5] As an illustration, consider the following stylized example. (Many refinements would be needed to produce a workable test.) A group of judges is presented with a problem case. The defendant is a retired veterinarian who has just moved to a new neighborhood. In his backyard, he keeps a pet giraffe. The defendant treats the animal well and provides it with ample space. The giraffe is a quiet animal with no violent tendencies, and it has no negative sensory effects on neighbors. The defendant kept the giraffe for several years in another state without incident or complaint. Neighbors have sued, claiming the giraffe is a nuisance and requesting an order requiring the defendant to remove it from the neighborhood.

To capture variations in legal rules, some judges might be told that prior cases establish that keeping a wild animal in a residential neighborhood is a nuisance per se. This is, presumably, a sound rule—over the long run, it will tend to prevent harm and offense, though it

4. *See generally* Norbert Schwartz & Leigh Ann Vaugn, *The Availability Heuristic Revisited: Ease of Recall and Content of Recall as Distinct Sources of Information*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 103 (Thomas Gilovich, Dale Griffen & Daniel Kahneman eds., 2002); Paul Slovic et al., *The Affect Heuristic*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT, *supra*, at 397; Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 163 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982).

5. *See, e.g.*, Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 3 (2007); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001); Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Evidence? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005).

may sometimes result in the elimination of unobjectionable pets, such as the defendant's giraffe. Other judges might be told that prior cases establish that keeping a large animal in a residential neighborhood is a nuisance per se. This rule looks too broad: it may do more harm than good over the range of cases to which it applies. Judicial subjects would be asked to decide the case and possibly to comment on the outcome. A significant number of decisions in the plaintiffs' favor might suggest that rules influenced the judges' decisions, particularly if the judges signified discomfort with the outcome of the case. If results were roughly the same for both versions of the problem, the inclination to follow rules would seem impervious to the quality of the rule. If, however, outcomes varied according to the version of the precedent rule presented to judges, this would suggest that judges deciding whether to follow rules are likely to discriminate according to the quality of the precedent rule.

The facts of the experimental problem could also be varied to detect the influence of vivid facts. For example, some judges might not be given any personal information about the defendant; others might be told that the defendant rescued the giraffe from sordid conditions in a private zoo. In this case, variation in decisions would indicate that judges deciding whether to follow rules discriminate according to the salience of the factual consequences of applying the rule.

A second set of questions relates to the role of judges as rulemakers. Frederick Schauer has suggested, very plausibly, that the quality of judicial rules may suffer as a result of the adjudicatory context in which judges work.[6] In particular, a judge focused on the salient features of a litigated case may adopt a rule that responds to those features, without adequately considering the effects of the rule in other cases that fall within its terms. The judge may assume, in other words, that the present case is more typical than it is—more representative, as a cognitive psychologist might say—of cases governed by the rule. A tame and odorless giraffe, for example, might not typify wild animals kept as pets. If so, the rule is likely to prove unsatisfactory over time.

The initial question is whether Professor Schauer's suggestion—that judicial rules may be adversely affected by the adjudicatory setting

6. *See* Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 884 (2006) ("If in fact concrete cases are more often distorting than illuminating, then the very presence of such cases may produce inferior law whenever the concrete case is nonrepresentative of the full array of events that the ensuing rule or principle will encompass.").

from which they emerge—is correct. If so, a further question is whether certain features of the judicial process can help avoid or decrease the distorting effects of vivid facts. For example, are judges less likely to err in their choice of rules when the parties present them with an array of purportedly analogous cases that might arise under a proposed rule?[7]

It is surely possible to find examples of this pattern in decided cases, but decided cases are unlikely to provide a systematic overview of the problem. Again, the most promising alternative is probably experimental. Judges might be given the facts of a case together with a selection of proposed decisional rules, the overall quality of which varies inversely with the attractiveness of their outcomes in the case at hand.

Empirical information about judicial responses to rules would be of great utility in studying the judicial process. Obtaining reliable information would, of course, require tremendous empirical ingenuity: designing effective problems is a challenge. Eliciting a serious but candid response from judges is an even greater challenge: judges must somehow be enticed to do what they ordinarily do, without too much reflection on the nature of the exercise. Fortunately, the objective of this short Essay is only to identify the types of information that would be most helpful to theorists interested in decisionmaking in a regime of legal rules.

7. *See* LARRY ALEXANDER & EMILY SHERWIN, DEMYSTIFYING LEGAL REASONING 118–20 (2008) (suggesting that the method of analogy may serve to counteract bias in rulemaking, even if it does not survive scrutiny as a method of reasoning).