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## LAW AND THE PARAMETERS OF ACCEPTABLE DEVIANCE

MARK A. EDWARDS\*

*It can be useful to think of law as a standard around which we construct parameters of acceptable deviance (PADs). Behavior that occurs within PADs usually is not sanctioned, despite its illegality; behavior that occurs outside PADs is often sanctioned, regardless of its legality. This Article examines the construction of PADs, arguing that they are the product of continuous interplay between formal law and the normative sensibilities of the regulated and their regulators. The Article then attempts to explain why institutions of regulation and enforcement cannot formally acknowledge PADs without altering them. Finally, it demonstrates explanatory power of PADs applied to a range of otherwise puzzling or bedeviling legal phenomena, such as racial profiling, jury nullification, and even the Supreme Court's controversial decision in Bush v. Gore.*

### I. INTRODUCTION

What's the speed limit?<sup>1</sup>

The explanatory power of one answer to that apparently innocuous question provides a useful and rich conceptualization of law that can shine light on the dynamic relationship between the regulated and their regulators, and guide lawmakers in their policy decision-making. Moreover, it can link together the most mundane and ubiquitous legal phenomena, such as the

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\* Associate Professor of Law, William Mitchell College of Law. For their insight and generosity of time and spirit, I'd like to express deep gratitude to Marc Galanter, Howard Erlanger, Michael Smith, Walter Dickey, and Herman Goldstein.

<sup>1</sup> By using speed limits as a launching point—but only as a launching point—for this study, I hope to avoid sinking into the quicksand of traffic law minutiae that swallowed Underhill Moore, at least according to John Henry Schlegel. See John Henry Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 BUFF. L. REV. 195 (1980); see also Underhill Moore & Charles C. Callahan, *Law and Learning Theory: A Study in Legal Control*, 53 YALE L.J. 1 (1943) (a detailed—some say too detailed—study of traffic and parking behaviors). But see Ian Ayres et al., *To Insure Prejudice: Racial Disparities in Taxicab Tipping*, 114 YALE L.J. 1613 (2005) (an insightful study of taxicab tipping dedicated to Moore for his pioneering work).

decision of a police officer to stop a driver for a traffic violation, with the most spectacular and rare, such as the decision of the Supreme Court to intervene in the presidential election in 2000.

## II. THE EFFECT OF SOCIAL NORMS ON ENFORCEMENT DISCRETION

There is a well-recognized gap between law-on-the-books, or formal law, and law-as-enforced. This is apparent nowhere so much as in criminal law; as Kenneth Culp Davis recognized long ago, there are “two sides” within criminal law—“the formality and the reality.”<sup>2</sup> The formality, in Davis’s classic formulation, exists “in statute books and in opinions of appellate courts.”<sup>3</sup> Reality, by contrast, “is found in the practices of enforcement officers.”<sup>4</sup> These practices vary widely: “[S]ome law is always or almost always enforced, some is never or almost never enforced, and some is sometimes enforced and sometimes not.”<sup>5</sup> There is a parallel gap between law-on-the-books and law-as-behaved. As Tom Tyler explained, despite continuous efforts by regulators over long periods of time, the regulated simply do not conform their behavior to formal law in many areas.<sup>6</sup> Some law is always or almost always behaved, some is almost never behaved, and some is sometimes behaved and sometimes not.

If the formal law is neither behaved nor enforced, how do regulators and the regulated find behavioral and enforcement standards that leave most people free from coercive enforcement most of the time, regardless of the legality of their behavior, yet subject the most extreme behaviors to coercive enforcement most of the time?

Scholars have taken serious interest in the social forces that guide the regulated’s compliance decisions.<sup>7</sup> Much scholarship has focused on the powerful effect of social norms on those decisions across legal boundaries.<sup>8</sup>

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<sup>2</sup> KENNETH CULP DAVIS, *POLICE DISCRETION* 73 (1975).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 1.

<sup>6</sup> TOM TYLER, *WHY PEOPLE OBEY THE LAW* 19 (1990) (“[P]olice officers and judges have been unable to stop” many types of illegal behavior “from tax evasion to drunk driving and drug abuse.”).

<sup>7</sup> *See id.*

<sup>8</sup> *See, e.g.,* Steven A. Bank, *Tax, Corporate Governance, and Norms*, 61 WASH. & LEE L. REV. 1159 (2004); Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285 (2003); Marc Galanter & Mark Alan Edwards, *Introduction: The Path of the Law Ands*, 1997 WIS. L. REV. 375 (1997); Steven Hetcher, *The Jury’s Out: Social Norms’ Misunderstood Role in Negligence Law*, 91 GEO. L.J. 633 (2003); Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC’Y REV. 805 (1998); Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks Is Just? Coercive Versus Normative Crime Control*, 86 VA. L. REV. 1839 (2000); Lior Jacob

Many years ago, Stewart Macaulay showed that norms of social behavior are often more powerful than the law;<sup>9</sup> that is, behavioral decisions, even those made within a law-based relationship, are often made with reference to norms first, law second.<sup>10</sup> Macaulay's insights focused on civil law, but they apply to criminal as well; as Paul Robinson explains, "criminal law's power to influence conduct may reside in large part in its normative rather than its coercive crime control mechanisms."<sup>11</sup>

Less attention has been paid to the effect of norms on discretionary enforcement decisions. Although commentators have debated how much discretion institutions of enforcement and actors within them should have,<sup>12</sup> and whether particular exercises of discretion are wise or just,<sup>13</sup> few have examined the social forces that guide discretionary enforcement decisions.

To the extent regulators' enforcement decisions do not adhere to enforcement of the formal law—that is, to the extent they are formally "deviant"—we may ask, as we do for the regulated, what is guiding their decision-making. Both enforcement and compliance decisions are exercises of discretionary behavior. If enforcement and compliance are both kinds of discretionary behavior, then both are subject to the social forces that influence behavior. It is not surprising, therefore, that close examination reveals that just as the regulated are guided by norms in their compliance discretion, regulators are guided by norms in their enforcement discretion.

An example from the frozen sidewalks of Madison, Wisconsin,<sup>14</sup> helps to illustrate the point.<sup>15</sup> In the winter months, Madison deploys sidewalk snow inspectors—men and women whose job it is to enforce the city's sidewalk-clearing ordinance following a snowstorm. The ordinance is specific: property owners must clear, free of snow and ice, at least a three-

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Strahilevitz, *Social Norms from Close-Knit Groups to Loose-Knit Groups*, 70 U. CHI. L. REV. 359 (2003); Symposium, *Symposium on Norms, Law, and Order in the City*, 34 LAW & SOC'Y REV. 129 (2000).

<sup>9</sup> Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

<sup>10</sup> See, e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991); Sally Engle Merry & Susan S. Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151 (1984).

<sup>11</sup> Robinson, *supra* note 8, at 1841.

<sup>12</sup> See Edward L. Rubin, *Discretion and its Discontents*, 72 CHI.-KENT L. REV. 1299, 1321 (1997) ("For some, [discretion] justifies that government by securing flexibility and opening a space for empathy. . . . For other observers, probably the larger number, discretion condemns modern government because it violates the rule of law.") (footnotes omitted).

<sup>13</sup> *Id.*

<sup>14</sup> Chosen for convenience sake alone; that is where I reside.

<sup>15</sup> See Doug Erickson, *Policing the Snowy Paths*, WIS. ST. J., Feb. 22, 2006, at A1.

foot wide path no later than noon of the day following each snowfall.<sup>16</sup> But its enforcement is guided not just by its terms, but also by the inspectors' normative sensibilities.

For example, in February 2006, an inspector measured a cleared path in front of an apartment complex.<sup>17</sup> It was two feet wide at its widest point, and narrower elsewhere: a clear violation. Still, he wrestled with whether to enforce the ordinance, describing it as "a tough call."<sup>18</sup> Ultimately, keeping in mind that most wheelchairs are wider than two feet, he decided to issue a citation, explaining, "If it's a big business, I'm OK with it. It's not the greatest feeling when you're beating up Grandma."<sup>19</sup>

In contrast to the "tough calls," some decisions to enforce are "no-brainers."<sup>20</sup> For example, he did not hesitate to cite a business that had made no attempt to clear any of the eight-inch deep snow from its sidewalk; he had cited this business twice previously during the same winter.<sup>21</sup>

In short, the inspector had created a taxonomy of enforcement that did not exist in the ordinance. "Grandma's" violations were not subject to enforcement; it was a "tough call" when a non-Grandma had made some effort toward compliance; enforcement against a non-Grandma who made no effort toward compliance was a "no-brainer." The blueprint for this taxonomy was not the ordinance; it was the inspector's normative sensibility, one likely shared by and derived from others in his community, regulators and regulated alike. Consequently, at least on his beat, that normative sensibility became the effective ordinance.

More than forty years ago, Herman Goldstein, then Executive Assistant to the Chicago Police Superintendent, discussed a remarkably similar issue.<sup>22</sup> A Chicago ordinance prohibited four-wheeled vehicles from being driven on sidewalks.<sup>23</sup> Chicago police arrested a man who was clearing snow from his neighborhood sidewalks by driving a snowplow on them, in clear violation of the ordinance.<sup>24</sup> The department found, to its horror, that the community was "enraged" by the arrest.<sup>25</sup> To the community, there were degrees of acceptability for driving on sidewalks,

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<sup>16</sup> *Id.* at A1, A7.

<sup>17</sup> *Id.* at A1.

<sup>18</sup> *Id.* at A7.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Herman Goldstein, *Police Discretion: The Ideal Versus the Real*, 23 PUB. ADMIN. REV. 140, 142 (1963).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

even though forms of driving on the sidewalk were formally deviant. Driving on the sidewalk for one's own convenience was unacceptably deviant; driving on the sidewalk to help neighbors clear snow was acceptably deviant.

The fact that the police had enforced the law made no difference to the public, because the police were not expected to enforce the law; they were expected to enforce the limit of normatively acceptable deviance. In response, the police adapted their enforcement practices to the regulated's normative sensibility: "Members of the department no longer arrest the drivers of four-wheel sidewalk plows; the ordinance, however, remains on the books. We have just decided not to enforce it."<sup>26</sup>

Goldstein reported similar uproar over no-fault enforcement practices.<sup>27</sup> For example, formal law required police to cite motorists driving with a non-working headlight, regardless of fault.<sup>28</sup> The local press joined public condemnation of the practice, summarizing the popular argument as "the motorist who purposely breaks the law deserves to be punished" but that otherwise enforcing the law was not "sensible."<sup>29</sup> The police responded by tailoring their enforcement practices to match popular sentiment: officers were instructed to issue citations if they believed the motorist had ample time to fix the headlight but had refused.<sup>30</sup> In other words, the community's normative sensibility added the element of mens rea to the formal law, and the police decided to enforce the law-as-rewritten-by-normative-sensibility, rather than the law-as-written.<sup>31</sup>

Similarly, in his study of the enforcement of strict liability criminal laws governing wildlife conservation, Frank Remington discovered that the wardens charged with enforcing strict liability statutes had effectively read the element of mens rea back into them.<sup>32</sup> He found that game wardens would not usually arrest a hunter in a no-hunting area, *unless* the hunter

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 147.

<sup>28</sup> *Id.* Goldstein dryly reports that "[h]ad an effort been made, it is doubtful if one could have devised a more effective way of antagonizing the public." *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*; see also John M. Darley et al., *The Ex Ante Function of Criminal Law*, 35 LAW & SOC'Y REV. 165, 184 (2001) ("One way to avoid the application of criminal sanctions is to construe the statute in question as requiring a 'willful' mens rea, as requiring, in other words, a realization on the part of the actor that the conduct was illegal and, since no such realization was plausible, acquitting the actor.")

<sup>32</sup> Frank J. Remington et al., Comment: *Liability Without Fault Criminal Statutes—Their Relation to Major Developments in Contemporary Economic and Social Policy: The Situation in Wisconsin*, 1956 WIS. L. REV. 625 (1956).

tried to hide from the warden—by hiding, the hunter revealed a guilty mind, indicating that he knew he was in a no-hunting area and had intentionally entered it anyway.<sup>33</sup> By basing enforcement decisions on the presence of a guilty mind in defiance of the statute's strict liability scheme, the wardens had aligned their enforcement practices with what they perceived through their "day-by-day, warden-meets-offender" experience as the community's normative sensibility: that liability without fault was simply unfair.<sup>34</sup> Insisting upon it, the wardens believed, would endanger "public cooperation" with the broader goals of wildlife conservation.<sup>35</sup>

Grattet and Jenness have insightfully observed that police departments "are places where law is given meaning."<sup>36</sup> Statutes "cast[] a shadow" over policing but do not determine what police do.<sup>37</sup> But as Goldstein and Remington noted, regulators such as police are not alone in giving the law meaning. The real meaning of law is also generated within the "realms that it seeks to regulate."<sup>38</sup> "Meaning-making . . . is distributed across traditionally understood boundaries between 'inside' and 'outside' of the legal system."<sup>39</sup>

In each of these instances, formal law is neither behaved nor enforced. But the result is not chaos. Those charged with enforcing the law frequently exercise their discretion in a manner that enforces norms instead, just as those charged with complying with it frequently exercise their discretion in a manner that complies with norms instead. As Edward Rubin has explained:

Weakening the formal controls may increase random variations in behavior, but its only consistent effect will be to increase the effects of informal norms. Very often, it is the strength or acceptability of the informal norms that makes weakened control acceptable. . . . In any event, the behavior, even when the controls are weakened, is likely to reveal a pattern.<sup>40</sup>

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<sup>33</sup> *Id.* at 665.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 664.

<sup>36</sup> Ryken Grattet & Valerie Jenness, *The Reconstitution of Law in Local Settings: Agency Discretion, Ambiguity, and a Surplus of Law in the Policing of Hate Crime*, 39 *LAW & SOC'Y REV.* 893, 935 (2005).

<sup>37</sup> *Id.*

<sup>38</sup> Lauren B. Edelman, *Rivers of Law and Contested Terrain: A Law and Society Approach to Economic Rationality*, 38 *LAW & SOC'Y REV.* 181, 189 (2004).

<sup>39</sup> Grattet & Jenness, *supra* note 36, at 935.

<sup>40</sup> See Rubin, *supra* note 12, at 1322-23.

## III. THE CONSTRUCTION OF PARAMETERS OF ACCEPTABLE DEVIANCE

The pattern revealed by law-as-behaved is informed by, but not identical to, informal norms alone. Law and norms are not autonomous; they co-exist in an endogenous system, influencing each other in a continuous, evolving cycle of cause and effect.<sup>41</sup> Norms express the collective moral sensibility that gives rise to law<sup>42</sup> and also serve as a heuristic for law.<sup>43</sup> Law has an anchoring effect on normatively acceptable behavior;<sup>44</sup> it symbolizes moral and normative commitments;<sup>45</sup> it expresses values that become assumed;<sup>46</sup> and it evokes the norm of law-obeying for its own sake.<sup>47</sup> Norms help create and sustain law, and law helps create and sustain norms. Most importantly, their interplay creates a third space that is occupied, over time, by a range of normatively acceptable behaviors that is neither synonymous with formal law nor independent of it.

Foucault hinted at the existence of this dynamic. "Order," he wrote, "is at one and the same time, that which is given in things as their inner law," and also "that which has no existence except in the grid created by a glance, an examination, a language."<sup>48</sup> The first of these orders corresponds with norms, at least as we usually perceive them. Norms sometimes seem natural, factual, a given; they arrive without debate and are internalized

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<sup>41</sup> See Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC., 406, 407 (1999) ("[T]he content and meaning of law is determined within the social field that it is designed to regulate.").

<sup>42</sup> See Dan M. Kahan, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L. REV. 1621 (1998).

<sup>43</sup> See Amos Tversky & Daniel Kahneman, *Judgment under uncertainty: Heuristics and biases*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3, 11 (Daniel Kahneman, et al. eds., 1982).

<sup>44</sup> See Joseph R. Gusfield, *Moral Passage: The Symbolic Process in Public Designations of Deviance*, 15 SOC. PROBS. 175 (1967); see also Karene M. Boos & Eric J. Boos, *At the Intersection of Law and Morality: A Descriptive Sociology of the Effectiveness of Informed Consent Law*, 5 J.L. SOC'Y 457 (2004).

<sup>45</sup> See Joseph R. Gusfield & Jerzy Michalowicz, *Secular Symbolism: Studies of Ritual, Ceremony and Symbolic Order in Modern Life*, 10 ANN. REV. SOC. 417, 423-24 (1984).

<sup>46</sup> In Robinson's words, "the influences of social group sanctions and internalized norms are the most powerful determinants of conduct, more significant than the threat of deterrent legal sanctions. But . . . [c]riminal law, in particular, can influence the norms that are held by the social group and that are internalized by the individual." Robinson, *supra* note 8, at 1863; see also Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 586 (1998) (by expressing social values, law can tip a system of social norms into a new equilibrium).

<sup>47</sup> See Margaret Raymond, *Penumbra Crimes*, 39 AM. CRIM. L. REV. 1395, 1423-24 (2002).

<sup>48</sup> MICHEL FOUCAULT, *THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES* xx (Vintage Books 1973) (1970).



without conscious decision. The second of these orders corresponds with law, composed of our own reflections upon what seems a natural order. Law does not seem to arise from within us; it is produced by autocratic fiat or legislative negotiation and arrives as an externality, with its deep origins as a reflection upon what seems a natural order obscured. Unlike norms, which do not require formal reduction to language in the form of codification, law has no existence except through language. Law cannot exist outside language unless it coincides with norms, and a law that coincides with norms and is not reduced to language has no existence distinct from the norm with which it coincides.

Norms and law, then, are “primary codes” that guide us.<sup>49</sup> But, Foucault explained, in operating together, these two forces create a third order, neither norm-autonomous-from-law nor law itself.<sup>50</sup> This is the space within which much behavior occurs.<sup>51</sup>

But between these two regions, so distant from one another, lies a domain which, even though its role is mainly an intermediary one, is nonetheless fundamental: it is more confused, more obscure, and probably less easy to analyse. It is here that a culture, imperceptibly deviating from the empirical orders prescribed for it by its primary codes, instituting an initial separation from them . . . frees itself sufficiently to discover that these orders are perhaps not the only possible ones or the best ones . . . . Thus, in every culture, between the use of what one might call the ordering codes and reflections upon order itself, there is the pure experience of order and its modes of being.<sup>52</sup>

Thus, there is a range of behaviors that are neither compliant with, nor independent of, law. It is deviance informed by norms and anchored by law that occurs within parameters of acceptability.

These parameters of acceptable deviance (PADs) are the limit of behavior that is normatively acceptable to most of the regulated and their regulators, and the informal standard that triggers enforcement by regulators and social sanctions by the regulated. They encompass law-as-behaved and define law-as-enforced. The regulated and their regulators, both guided by norms and anchored by law, find a mode of behavior that is formally deviant but normatively acceptable and that does not trigger enforcement. When discretionary enforcement is exercised based upon a normative sensibility shared by the regulated and regulators, and anchored by law,

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<sup>49</sup> *See id.*

<sup>50</sup> *Id.* at xx-xxi.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

PADs become the informal, but very real, law. They define the “experience of order.”<sup>53</sup>

The 2x2 box in Figure 1 depicts the effect of the relationship between legality and normative acceptability on enforcement.

**Figure 1**

*Exercise of Discretionary Enforcement by Normative and Legal Status of Behavior*

	Formally Legal	Formally Illegal
Within PADs	Wrong	Suspect
Outside PADs	Awkward	Expected

Behavior that is both formally legal and within PADs falls within the upper left box. Enforcement against behaviors that are both legal and within PADs is in error. Enforcement may be the product of misinterpretation of either the formal law or the behavior.<sup>54</sup>

In the lower left box are behaviors that are legal but outside PADs. These are the opposite of acceptably deviant behaviors—they are unacceptably compliant. For example, driving the speed limit in the middle lane of an interstate highway is formally legal, but normatively unacceptable; so is covering a front lawn with plastic pink flamingos in some neighborhoods.<sup>55</sup> Enforcement by formal institutions against such

<sup>53</sup> *Id.*

<sup>54</sup> Of course, that misinterpretation may have been arrived at either in good faith or willfully.

<sup>55</sup> See *infra* note 56.

behaviors is conceivable, but so awkward as to be unlikely.<sup>56</sup> In the absence of formal enforcement, communities often impose their own informal social sanctions—the unacceptably complaint driver might find himself subject to sanctions such as tailgating, horn-blowing, headlight-flashing, and obscene gestures, while the flamingo-lover could find her lawn vandalized or herself ostracized.

In the lower right box are behaviors that are both illegal and outside PADs, such as most forms of sexual contact between adults and young children. Enforcement against these behaviors is expected. Non-enforcement, in these cases, suggests that factors other than the illegality and normative unacceptability of the behavior may be driving enforcement decisions. These might include political influence, bribery, or simply inadequate enforcement resources.

The upper right square encompasses behaviors that are formally illegal but within PADs, such as Goldstein's example of driving with a faulty headlight.<sup>57</sup> Enforcement against behavior that is formally illegal but within PADs is unusual and, therefore, suspect. Because enforcement is not usually triggered by these behaviors, enforcement may be motivated by factors other than the defendant's behavior. As I will discuss in Section V, when enforcement is triggered by behavior that falls within PADs, courts should recognize a duty to apply heightened scrutiny to the motivation behind enforcement.

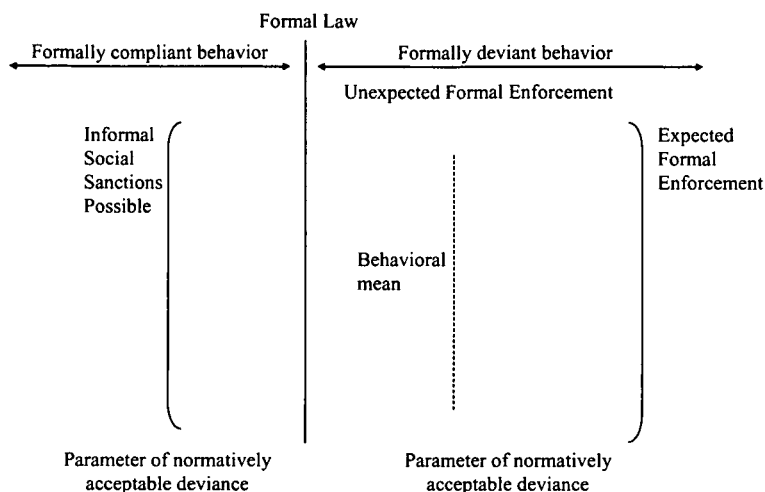
Figure 2 offers another way to visualize the dynamic relationship between law and PADs. Formal law is the standard around which PADs flow. As seen in Figure 2, enforcement is unexpected against behaviors that are formally deviant but within the parameters of acceptability. Indeed, the behavioral mean might exist somewhere between the formal law and the limit of normatively acceptable deviance. On the other hand, it is expected that formal enforcement will occur against behaviors that are both formally deviant and outside the parameters of acceptability. Informal social sanctions might be expected against behaviors that are formally compliant but normatively unacceptable (such as the "pink flamingo" behavior).

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<sup>56</sup> For example, police could rely on vague notions such as "flow of traffic" to stop a compliant driver, see Raymond, *supra* note 47, at 1427 n.139, and a zoning board could invoke some standard of reasonable aesthetics. See Lior Jacob Strahilevitz, *The Right to Destroy*, 114 Yale L.J. 781 (2005).

<sup>57</sup> See *supra* note 28.

**Figure 2**  
*Enforcement and Parameters of Acceptable Deviance*



#### A. NEGOTIATION-THROUGH-PRACTICE

Implicit agreement on the location of PADs seems to be generated through day-to-day interactions between the regulated and their regulators. Like parties bargaining over the terms of divorce “in the shadow of the law,”<sup>58</sup> the regulated and their regulators negotiate the terms of acceptable deviance in the shadows of law and norms. Negotiation over the location of PADs seems to be a macro-level social process derived from innumerable micro-level enforcement experiences. Eventually an “implicit social contract” locating PADs is derived from “shared expectations that evolve from repeated interactions over time between regulatory authorities and regulatees.”<sup>59</sup> The social process that produces an implicit social contract locating PADs might usefully be called negotiation-through-practice.

##### *i. Speed limits*

Speed limits provide a useful opportunity to observe negotiation-through-practice in action for several reasons. First, it is difficult to think of

<sup>58</sup> See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

<sup>59</sup> Peter J. May, *Compliance Motivations: Affirmative and Negative Bases*, 38 LAW & SOC'Y REV. 41, 43 (2004).

another instance in which the content of a law is presented to the public on large signs again and again. The ubiquity of speed limit signs dulls our awareness of how unique, in fact, they are.<sup>60</sup> Nowhere else does the government go to such extraordinary effort to inform its citizens about the content of law. Speed limits are probably the formal law about whose content the regulated receive the most extensive notice. If law and norms both influence behavior, it might be expected that the relative influence of norms would be stronger when the content of formal law is less well-known. It is useful to examine speeding behavior, therefore, because if norms influence compliance decisions even when the formal law is well-known, then we should probably expect norms to influence behavior when the requirements of formal law are less obvious.

Second, the enactment of new formal law, or changes in existing law, present the opportunity to watch negotiation-through-practice in action, as new PADs are established around the new law. In 1987, Congress amended the law regulating speed limits on interstate highways to allow states to raise the speed limit on intrastate portions of highways from 55 mph to 65 mph.<sup>61</sup> Some states that have experimented with changes in speed limits have gathered data regarding driving behaviors before and after those changes.

For example, in 1996, Iowa raised the speed limit from 55 mph to 65 mph on Route 20, a rural interstate highway which enters from Illinois into Dubuque on Iowa's eastern border, and exits into Nebraska through Sioux City on Iowa's western border.<sup>62</sup> The Iowa Department of Transportation monitored driving behavior on portions of Route 20 before and after the change.<sup>63</sup>

Figure 3 is a chart that shows the percentage of drivers in compliance with speed limits on a representative portion of Route 20, from County Road 38 to Dubuque, both before the new speed limit was enacted, and after the change.<sup>64</sup> It shows that approximately 30% of drivers were in compliance with the 55 mph speed limit in 1995. The speed limit was then raised to 65 mph to better reflect actual driving behavior. Immediately after the speed limit was raised to 65 mph, the percentage of drivers in

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<sup>60</sup> Imagine, for example, awaking one morning to find the time limit for adverse possession or the statutory elements of battery posted every few hundred yards.

<sup>61</sup> NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., *BEYOND THE LIMITS: A LAW ENFORCEMENT GUIDE TO SPEED ENFORCEMENT* (1992).

<sup>62</sup> Data for this graph was compiled from IOWA HIGHWAY SAFETY MGMT. SYS. TASK FORCE ON SPEED LIMITS, *UPDATE REPORT ON SPEED LIMITS IN IOWA* (2002).

<sup>63</sup> *Id.*

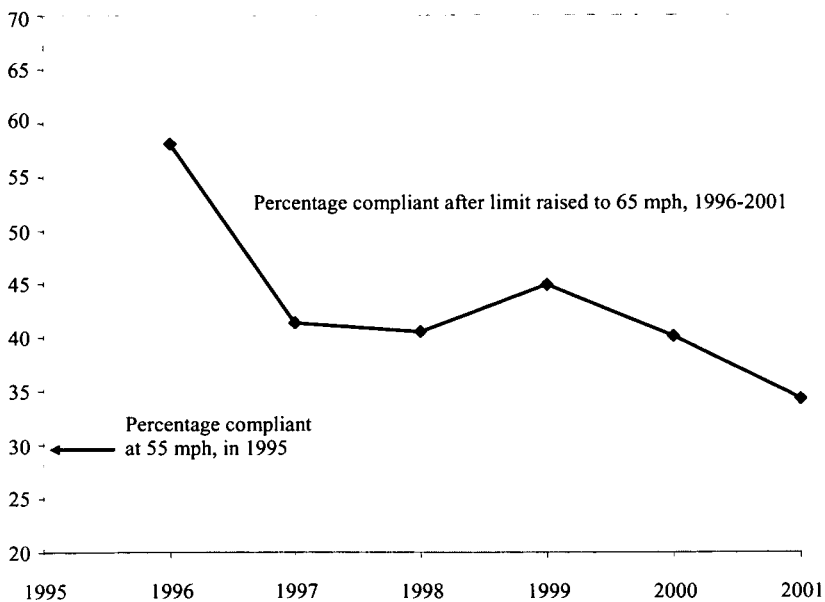
<sup>64</sup> *Id.*

compliance with the speed limit rose to approximately 60%, capturing a large percentage of the drivers who had been driving at deviant speeds in 1995.

By 1997, however, the percentage of drivers in compliance with the 65 mph speed limit fell to approximately 42%. In the following years, the percentage in compliance drifted generally downward, but slowly and in a narrow range. By 2001, the last year for which data is available, the percentage of drivers in compliance with the 65 mph speed limit had fallen to approximately 35%, a level just slightly higher than the percentage in compliance with the 55 mph speed limit, before the new limit was implemented.

**Figure 3**

*Percentage of Compliance on Iowa Route 20, County Road 38 to Dubuque*



Similar trends are observable before and after the speed limit changes in Indiana.<sup>65</sup> Figure 4 shows the 85th percentile speed for drivers on Indiana rural interstate highways before and after the speed limit was raised from 55 mph to 65 mph.<sup>66</sup> The 85th percentile speed is the speed at which

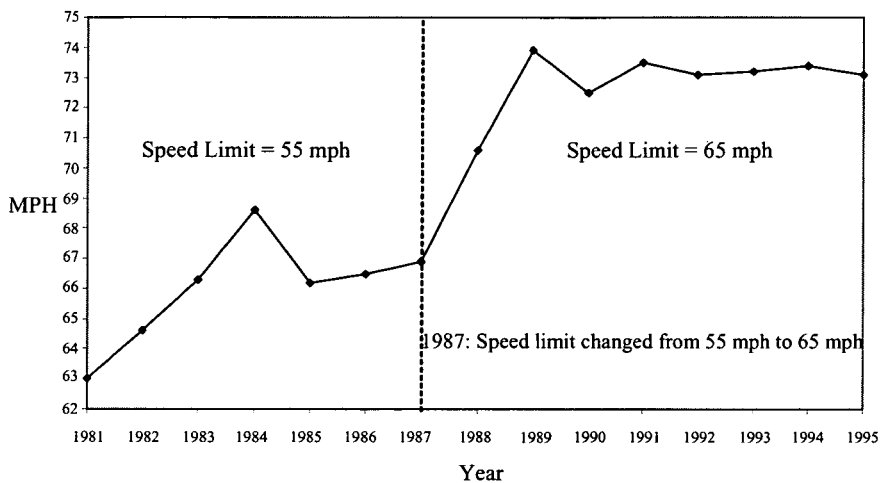
<sup>65</sup> See NISAR KHAN, KUMARES C. SINHA & PATRICK S. MCCARTHY, IND. DEP'T OF TRANSP., AN ANALYSIS OF SPEED LIMIT POLICIES FOR INDIANA (2000).

<sup>66</sup> Data for this chart was compiled using *id.*

or below 85% of drivers drive. Between 1981 and 1987, when the speed limit remained 55 mph, the 85th percentile speed fluctuated between approximately 63 mph and 68.5 mph. In 1987, the last year of the 55 mph limit, the 85th percentile speed was approximately 66 mph.

After the speed limit on Indiana rural interstate highways was raised in 1988, the 85th percentile speed rose sharply, peaking at 73.9 mph in 1989. It then fell, rose again, then fluctuated within a very narrow range for the final four years for which data was available.

**Figure 4**  
*Indiana Rural Interstate 85th Percentile Speed Before and After Speed Limit Change*



A similar pattern is revealed by data collected on highways in Kansas, although that study was limited to just three years.<sup>67</sup> The data show that the 85th percentile speed in 1996, when the speed limit was 55 mph, was 66.9 mph. In the year following the increase in speed limits to 65 mph, the 85th percentile speed rose to 70.9. Over the next two years, the 85th percentile speed moved within a narrow range; the last year for which data is available shows the 85th percentile speed was 71.4.

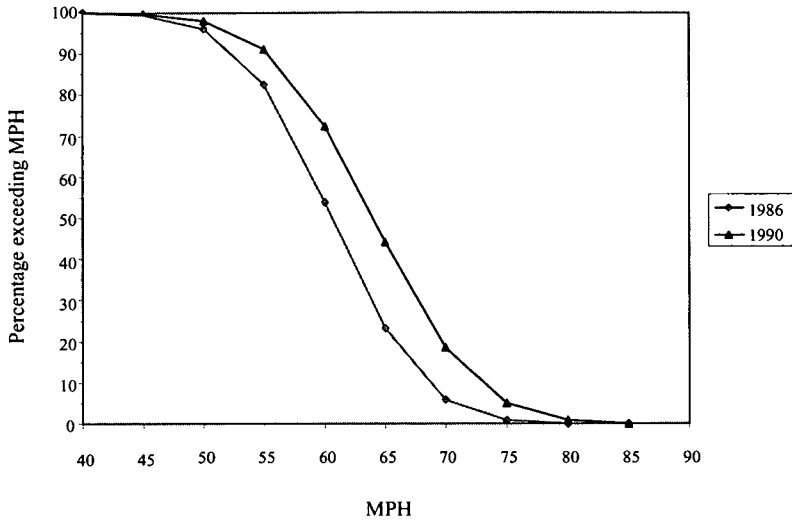
The National Highway Traffic Safety Administration (NHTSA) compared raw speed data aggregated from eighteen states gathered at two points in time—one before and one after the speed limit was increased from

<sup>67</sup> YACOB M. NAJJAR ET AL., KAN. DEP'T OF TRANSP., IMPACT OF NEW SPEED LIMITS ON KANSAS HIGHWAYS (2000).

55 mph and 65 mph.<sup>68</sup> As depicted in Figure 5, NHTSA data show that in 1986, when the speed limit was 55 mph, approximately 22% of drivers exceeded 65 mph.<sup>69</sup> In 1989, following the speed limit increase, the percentage of drivers exceeding 65 mph had jumped to 45%. But a year later, that percentage had hardly moved, and stood at 44%.

**Figure 5**

*NHTSA 18 State Data: Percentage of Drivers Exceeding Certain Speeds*



A basic pattern can be discerned in each of the above instances. Changes in the speed limit are accompanied by a predictable series of changes in driving behavior. Initially, the level of formally deviant behavior is relatively low, but it then rises quickly over a relatively short time before stabilizing and then moving in a narrow range.<sup>70</sup>

<sup>68</sup> NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., EFFECTS OF THE 65 MPH SPEED LIMIT THROUGH 1990: A REPORT TO CONGRESS (1992).

<sup>69</sup> Data for this chart was compiled using *id.*

<sup>70</sup> In their study of driving behaviors in Montana following the elimination of a numerical speed limit on interstate highways in favor of a "reasonable and prudent" standard, King and Sunstein similarly found that "most citizens appeared to coordinate their behavior around a certain area of appropriate speed" both before and after the elimination of the numerical speed limit, leading them to conclude that "much driving behavior is governed by informal norms." Robert E. King & Cass R. Sunstein, *Doing Without Speed Limits*, 79 B.U. L. REV. 155 (1999). They found that over time there emerged a shared "judgment about what kinds of behavior would count as unreasonable and imprudent." *Id.*



*ii. Drunk Driving*

This pattern of behavior is mirrored when drunk driving laws are made more restrictive. In several landmark studies, H. Laurence Ross collected data on changes in drunk driving behavior following changes in laws in several European countries.<sup>71</sup> In Britain throughout 1966 and the first half of 1967, on average, there were 1200 fatalities or serious injuries per month resulting from crashes between the hours of 10:00 p.m. Friday until 4:00 a.m. Saturday, and 10:00 p.m. Saturday until 4:00 a.m. Sunday.<sup>72</sup> Following the enactment of the Road Safety Act in September 1967,<sup>73</sup> the number of fatalities or serious injuries dropped to around 400.<sup>74</sup> Then the numbers began a steady rise.<sup>75</sup> After one year, the monthly total had climbed to 800. From that point, the number of fatalities or injuries moved in a slowly increasing but narrow range. By December 1970, there were 1,000, and the rate of change had declined significantly.<sup>76</sup>

Ross found similar results in France following adoption in July 1978 of a law known colloquially as the "Alcotest" law.<sup>77</sup> The law allowed police to administer blood alcohol tests to any driver they stopped, and revoke the driver's license if his blood alcohol level was above .08 pro mille.<sup>78</sup> As was the case in Britain, considerable opposition to the law created public awareness of it.<sup>79</sup> Data show that in the months preceding the law's enactment, the percentage of persons responsible for fatal crashes with illegal blood-alcohol concentration stood as high as 60%.<sup>80</sup> In the months immediately following enactment, that percentage dropped as low as 35%.<sup>81</sup> From there, however, the percentage began to rise again.<sup>82</sup> Five

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<sup>71</sup> H. LAURENCE ROSS, *DETERRING THE DRINKING DRIVER: LEGAL POLICY AND SOCIAL CONTROL* (Lexington Books 1984) (1982).

<sup>72</sup> *Id.* at 30-31.

<sup>73</sup> The Road Safety Act provided for roadside testing of blood alcohol levels and criminalized driving when blood alcohol content exceeded the statutorily prescribed level. H. Laurence Ross, *Law, Science, and Accidents: The British Road Safety Act of 1967*, 2 J. LEGAL STUD. 1, 1, 19 (1973).

<sup>74</sup> ROSS, *supra* note 71, at 30-31.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 35-36.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 36-37.

<sup>80</sup> *Id.* at 41.

<sup>81</sup> *Id.*

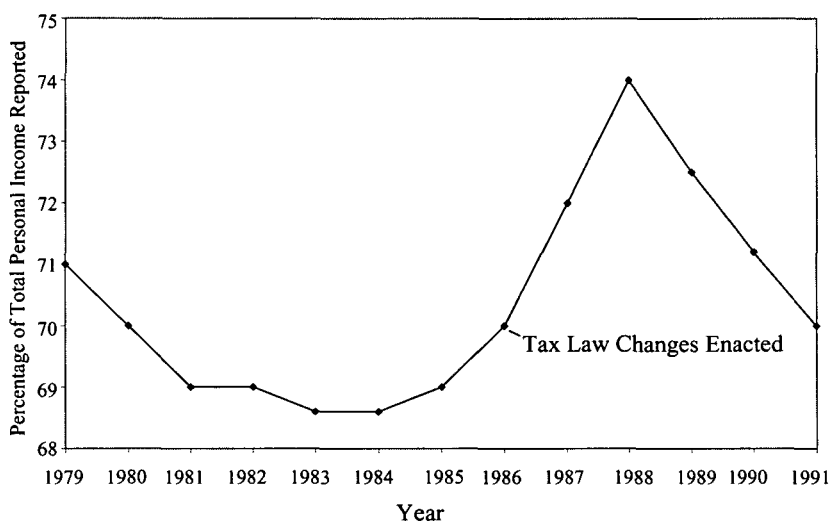
<sup>82</sup> *Id.*

months after enactment, the percentage had risen to approximately 50% and appeared to be leveling off.<sup>83</sup>

### iii. Tax Compliance

A similar trend appears in patterns of tax compliance in reaction to changes in tax law and auditing standards. As shown in Figure 6, researchers have found that compliance with income reporting requirements increases immediately following a change in law, then levels off again over time.<sup>84</sup>

**Figure 6**  
*Total Income Reporting Compliance*



In their study of tax compliance following the 1986 tax code revisions, Steenbergen et al. discovered that “social processes through which individuals find out about the contents of new laws” had “considerably more impact” on the level of compliance with formal law than “subjective evaluations of the laws and objective measures of their impact.”<sup>85</sup> These

<sup>83</sup> *Id.*

<sup>84</sup> Data for this graph was compiled from INTERNAL REVENUE SERV., THE DETERMINANTS OF INDIVIDUAL INCOME TAX COMPLIANCE: ESTIMATING THE IMPACTS OF TAX POLICY, ENFORCEMENT AND IRS RESPONSIVENESS (1996).

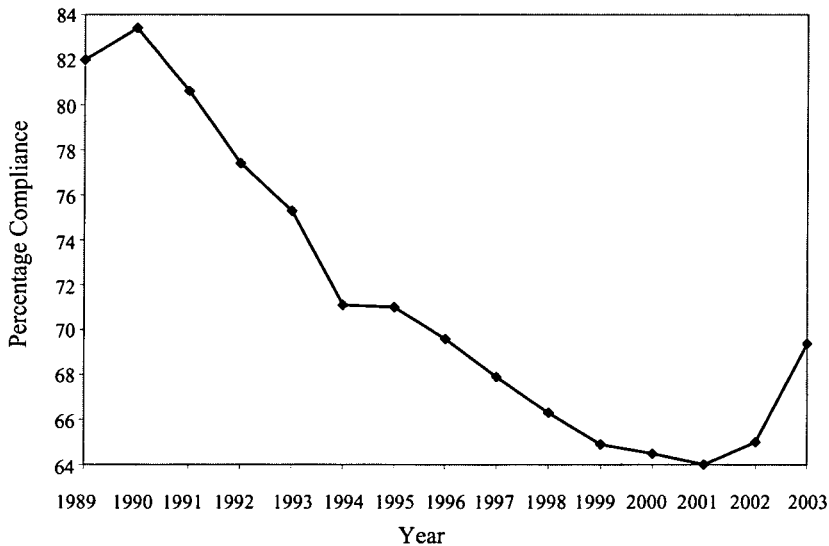
<sup>85</sup> Marco R. Steenbergen et al., *Taxpayer Adaptation to the 1986 Tax Reform Act: Do New Tax Laws Affect the Way Taxpayers Think About Taxes?*, in WHY PEOPLE PAY TAXES: TAX COMPLIANCE AND ENFORCEMENT 9, 9 (Joel Slemrod ed., 1992).

social processes may include both personal experiences with regulatory agents<sup>86</sup> and gossip about the experiences of others.<sup>87</sup>

#### *iv. Criminal Sentencing*

Interestingly, judges appear to follow the same patterns of compliance and deviance following the enactment of sentencing guidelines.<sup>88</sup> As shown in Figure 7, federal judges complied with federal sentencing guidelines in non-plea bargaining cases 82% of the time during the guidelines' first year. The compliance rate then rose slightly in the second year, then began a long and steady fall, bottoming out ten years later in 2001 at 64%. Over the next two years, compliance rose slightly.

**Figure 7**  
*Sentence in Compliance with Federal Guidelines*



The pattern of behavior by judges in Minnesota following enactment of state sentencing guidelines is almost identical to that of federal judges,

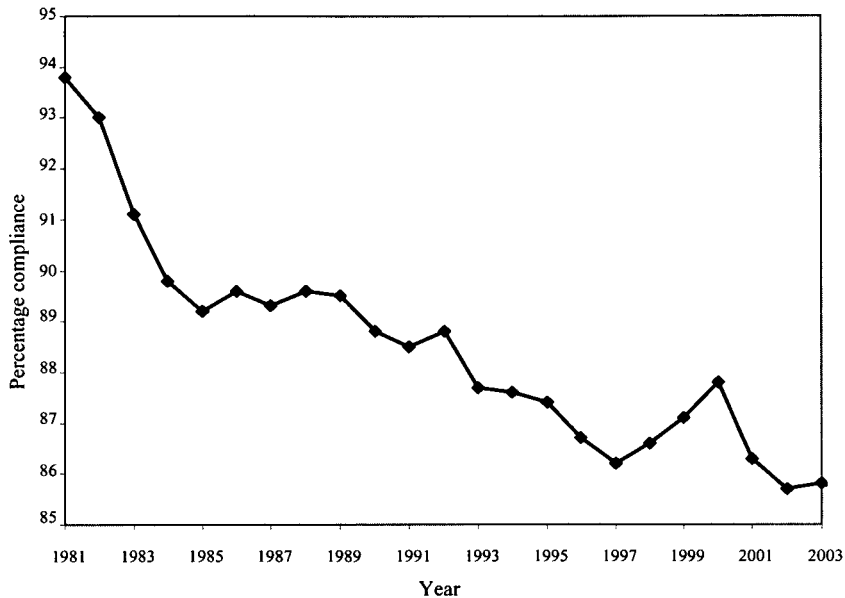
<sup>86</sup> For example, unlucky taxpayers who have been target-selected for audit and penalized, and then later randomly selected for audit again, have a much higher rate of compliance on the second audit. See Brian Erard, *The Influence of Tax Audits on Reporting Behavior*, in *WHY PEOPLE PAY TAXES*, *supra* note 85, at 95.

<sup>87</sup> Steenbergen, *supra* note 85.

<sup>88</sup> Data for this chart was compiled from the U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (1995-2003 annually), available at <http://www.ussc.gov/annrpts.htm>.

although the absolute increases in deviance were much smaller.<sup>89</sup> As shown in Figure 8, in 1981, the year after the Minnesota guidelines were first enacted, judges complied with them nearly 94% of the time.<sup>90</sup> During the next three years, compliance fell relatively sharply, accounting for approximately half of the total increase in deviance between 1981 and 2003. From 1985, compliance fell slowly until reaching 86% in 1997. From 1997 to 2000, compliance rose before falling again, then leveling off from 2002 to 2003.

**Figure 8**  
*Sentences in Compliance with Minnesota Guidelines*



In sum, this data proves nothing. But it suggests a pattern of negotiation-through-practice that constructs PADs. Changes in formal law create uncertainty about how much deviation from it is acceptable. Over time, through a process of day-by-day trial and error, regulators and the regulated alike move toward an acceptable range of deviance. Because an unknown risk often has more deterrent effect than a known one,<sup>91</sup> perhaps

<sup>89</sup> MINN. SENTENCING GUIDELINES COMM'N, 2004 SENTENCING DEPARTURE DATA (2004), available at <http://www.msgc.state.mn.us/Data%20Reports/2004%20Departure%20Data.doc>.

<sup>90</sup> Data for this chart was compiled using *id.*

<sup>91</sup> See Deborah D. Frisch & Jonathan Baron, *Ambiguity and Rationality*, 1 J. BEHAV.

this is the reason why compliance with a new law seems highest when the law itself, and the enforcement parameters that surround it, are unknown. Briefly, therefore, behavior adheres relatively closely to the new formal law.

As experience multiplies, more information is gathered about how much deviance is acceptable to both the regulated and the regulators. As the regulated gain experience with the new law and the probability of its enforcement, and bring their own normative sensibilities to bear upon both, compliance generally falls rapidly after the period of initial compliance.<sup>92</sup> As Ross observed with regard to drunk driving laws:

Changes in behavior resulting from changes in the certainty of threat . . . are evanescent. The reductions in the indicators of drinking and driving have disappeared after a few months or years . . . Similar diminutions of effect are clear in all other studies that have reported similar long-term postintervention data.<sup>93</sup>

Ross's evidence revealed that the "Road Safety Act was initially effective" in decreasing drunk driving, but that "this effect dissipated within a few years."<sup>94</sup>

However, the rapid fall in compliance does not extend indefinitely; after the initial period of rapid increase in deviance, deviant behavior tends to level off. Deviance may level off in the face of a "pushback" as deviance approaches the limit of normative acceptability for the community, regulators or—most likely—both. In some cases, the pushback may take the form of an "enforcement campaign," which can generally be understood as an attempt to contract PADs. This pushback may briefly induce an increase in compliance after a long period of decline, followed by a period of relative stability. The behavior that coalesces at that point may be the parameter of acceptable deviance.

When modeled, the pattern might look like Figure 9. In Year 1 following the enactment of new formal law, the behavioral mean adheres relatively closely to the new law. In Year 2, the level of deviance expands rapidly. In Year 3, the level of deviance continues to expand until it meets pushback in the form of enforcement by regulators or social sanction by the regulated. By Year 4, the behavioral mean is relatively stable at a slightly contracted level of deviance as compared to Year 3. At this point, most

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DECISION MAKING 149 (1988).

<sup>92</sup> See, e.g., Young-dahl Song & Tinsley E. Yarbrough, *Tax Ethics and Taxpayer Attitudes: A Survey*, 38 PUB. ADMIN. REV. 442 (1978) (publicity about the existing degree of noncompliance may result in further increases in noncompliance as taxpayers change their perceptions of social norms).

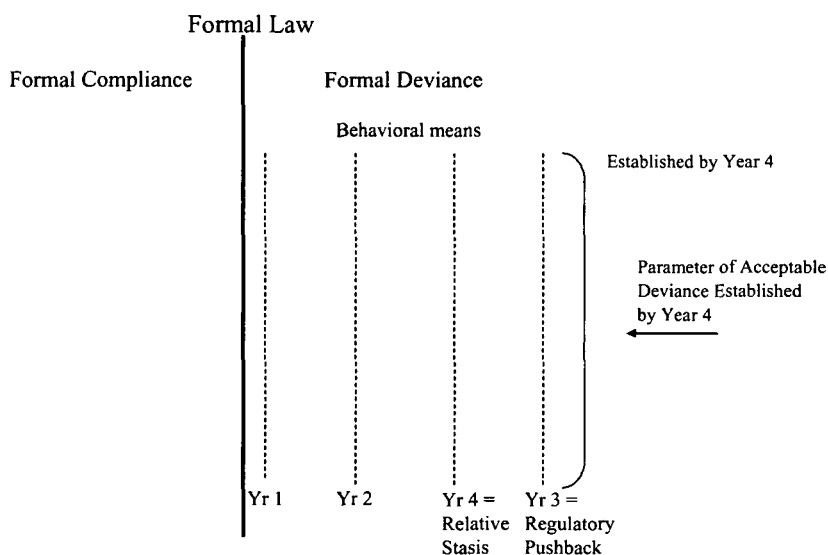
<sup>93</sup> ROSS, *supra* note 71, at 103.

<sup>94</sup> *Id.* at 31.

people are observing established PADs, and enforcement against deviance from the formal law takes place only outside of those PADs.

**Figure 9**

*Negotiation-Through-Practice over Time Between Regulated and Regulators Following Adoption of a New Standard Sets the Parameters of Acceptable Deviance*



#### B. PADS AND LAW'S ANCHOR

Formal law may be neither obeyed nor enforced, but that does not mean it is without influence on standards of behavior and enforcement. In fact, it is quite the opposite. Confronted with uncertainty, “estimates are often made from an initial value, or ‘anchor,’ which is then adjusted to produce a final answer.”<sup>95</sup> Changes in law seem to enhance the gravitational pull of law’s anchoring function, narrowing the range of behaviors around it.

The anchoring effect should not be confused with deterrence. The data do not suggest whether a change in norms precedes a change in law, or a change in law precedes a change in norms. Michael Tonry has persuasively

<sup>95</sup> Cass R. Sunstein, *Hazardous Heuristics*, 70 U. CHI. L. REV. 751, 752 (2003).

argued that cyclical changes in sensibilities cause changes in both behavior and law.<sup>96</sup> In other words, changes in law may not be the cause of changes in behavior; instead, changes in behavior may be the result of the same change in normative sensibility that prompted the change in law.<sup>97</sup> As Robinson and Darley have shown, the formulation of criminal law has a deterrent effect only under narrow and unlikely circumstances.<sup>98</sup>

The anchoring effect of law on PADs may be more akin to the phenomena of “reference transactions.”<sup>99</sup> The presence of a reference point, or suggested value, exerts a powerful anchoring influence on the value people assign to a given phenomenon. For example, Guthrie et al. conducted an experiment in which 168 federal magistrate judges were given materials from a hypothetical tort case in federal court under diversity jurisdiction.<sup>100</sup> Half of the judges received a hypothetical that included a motion to dismiss because the amount in controversy was allegedly less than the statutory minimum of \$75,000.<sup>101</sup> Everything else was identical. The motion was clearly frivolous, and was denied by all but two of the judges.<sup>102</sup> The judges were then asked to determine a monetary value for damages in the case. The average damages award from the judges who did not receive the motion to dismiss was \$1.249 million. The average damages award from the judges who did was \$882,000. In other words, even though the motion to dismiss was clearly frivolous and was dismissed by nearly every judge, the suggestion that the damages may have been less than \$75,000 anchored the value that the judges eventually assigned to the damages award. In the same way, the value suggested by law, whether communicated literally or through the prism of enforcement practices, may anchor what is considered to be normatively appropriate behavior.

The data above regarding actual speeds in relation to speed limits following changes in speed limits may show the anchoring effect at work. The actual speeds that become normatively acceptable as a limit of behavior

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<sup>96</sup> See MICHAEL TONRY, *THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE* (2004).

<sup>97</sup> *Id.*

<sup>98</sup> See Robinson, *supra* note 8, at 1842. Note, however, that although there may be no deterrent effect from criminal law formulation due to the content of the new law, the data do suggest that uncertainty about law and enforcement practices following the formulation of criminal law may have a temporary deterrent effect.

<sup>99</sup> Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 *STAN. L. REV.* 1471, 1496 (1998).

<sup>100</sup> Chris Guthrie et al., *Inside the Judicial Mind*, 86 *CORNELL L. REV.* 777, 790-91 (2001).

<sup>101</sup> *See id.*

<sup>102</sup> *See id.*

and enforcement are not the legal speed limits, but neither are the actual speeds independent of the legal speed limits. For example, in Indiana, when the speed limit is 55 mph, 85% of drivers drive at 63 mph or less. When the speed limit is 65 mph, 85% drive at 72.5 mph. If the actual speed limit had no anchoring effect, we would not expect to see a difference in actual driving behaviors following the speed limit increase, and we would not expect to see a similar, stable gap between speed limits and actual speeds. For example, if formal law had no gravitational effect, drivers might average speeds of 90 mph in a 65 mph zone. But the formal law does have a gravitational effect on actual driving behaviors; in other words, PADs are anchored by law.

The anchoring effect may also be a product of the availability heuristic that sometimes accompanies a change in law.<sup>103</sup> People use mental shortcuts in assessing the probability of any particular event; the assessment of probability is linked to the ease with which the event can be brought to mind.<sup>104</sup> For example, the availability of information about the riskiness of certain behaviors, accurate or not, effects risk assessment.<sup>105</sup> “The availability heuristic operates in an emphatically social environment,” so to the extent that the risk of harm influences the placement of the parameters of normatively acceptable deviance, the placement of those parameters may initially be affected by bursts of public information.<sup>106</sup> Ross found that “extensive publicity campaigns” threatening interdiction have been successful in temporarily decreasing drunk driving.<sup>107</sup>

Ross suggests that the availability of information about interdiction may cause potential offenders to overestimate their risk of detection.<sup>108</sup> However, it seems equally possible that massive public campaigns may influence the community’s normative sensibility regarding the acceptability of drunk driving, or that a change in the community’s normative sensibility about drunk driving might spur the massive publicity campaign. In either case, the result would be a decrease in drunk driving. The decrease in drunk driving Ross documented following enactment of the Road Safety Act may be a testament to the bias in risk assessment caused by “availability cascades,”<sup>109</sup> or it may be a testament to law’s anchoring power. The increase in drunk driving behavior after that is a testament to

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<sup>103</sup> See Tversky & Kahneman, *supra* note 43.

<sup>104</sup> *See id.*

<sup>105</sup> *See id.*

<sup>106</sup> Cass R. Sunstein, *Economics and Real People*, 3 GREEN BAG 2D 397, 403 (2000).

<sup>107</sup> *See* Ross, *supra* note 73, at 76.

<sup>108</sup> *See id.*

<sup>109</sup> *See* Tversky & Kahneman, *supra* note 43; Sunstein, *supra* note 106.



the power of normative acceptability in guiding behavior despite the anchoring power of law. The leveling-off following those increases is evidence of the establishment of parameters of deviance acceptable to the regulated and their regulators.

The regulated may also be unaware that their behavior is formally deviant. For the most part people do not know what the law is.<sup>110</sup> People ignorant of the law tend to assume that the law is whatever their own normative sensibility is;<sup>111</sup> such people might assume any number of possibilities about the law's content. It is no coincidence that people assume the law is consistent with their normative sensibilities. The focus on the dissonance between law-as-written and law-as-understood misses the fidelity between law-as-enforced and law-as-understood. Because people generally do not read statute books, their impression about the content of law may well come from their experience—vicarious or direct—of enforcement practices. Absent exceptional practices like posting speed limits, enforcement practices may be the most common means of communicating the law's content to the regulated. As Remington, Goldstein and others have shown, enforcement practices are informed and sometimes defined by communities' normative sensibilities. It is not surprising, therefore, to find that the community's impression of the law's content is consistent with its own normative sensibilities; its normative sensibilities are reflected back by enforcement practices which are based, in part, on community normative sensibility. It is an endogenous system.<sup>112</sup>

### C. PADS AND SOCIAL FIDELITY

Tyler argues that regulators are aware that they cannot ignore community sensibilities in exercising their enforcement discretion.<sup>113</sup> Regulators, he suggests, are "concerned with making allocations and resolving conflicts in a way that will both maximize compliance with the decision at hand and minimize citizens' hostility toward the authorities and institutions making the decision."<sup>114</sup> Tyler has shown that "the most important normative influence on compliance with the law is the person's assessment that following the law accords with his or her sense of right and

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<sup>110</sup> See Darley et al., *supra* note 31.

<sup>111</sup> See *id.*

<sup>112</sup> See Edelman et al., *supra* note 41.

<sup>113</sup> See TYLER, *supra* note 6, at 25.

<sup>114</sup> See *id.*

wrong.”<sup>115</sup> When it does, he concludes, people become self-regulating, and “self-regulating people are law-abiding” people.<sup>116</sup>

Tyler is undoubtedly correct that, to the extent that law and normative sensibilities coincide, compliance will be high. But Tyler’s conclusion misses an important point. If people obey the law when it coincides with their normative sensibilities and disobey it when it does not, then law disappears as an explanation for their behavior. People do not comply with law, except to the extent that law-abiding behavior exists within the parameters of normatively acceptable behavior. In other words, people are not “law-abiding,” but they are acceptable-deviance-abiding.

People may *appear* law-abiding because abiding by the standards of acceptable deviance usually does not trigger an enforcement response. Enforcement responses generate the statistics upon which researchers usually measure compliance with formal law. Relying on enforcement response statistics to measure compliance with formal law assumes that deviation from formal law triggers an enforcement response. But in the real world, deviance alone does not trigger enforcement; only unacceptable deviance does. Relying on enforcement response statistics misses that dynamic. Therefore, people may appear law-abiding, when in fact they may be law-breaking but acceptable-deviance-abiding.

Moreover, utilitarian concerns about maximizing compliance with formal law are probably not the only factor motivating enforcers’ willingness to accommodate community normative sensibilities. Indeed, accommodating normative sensibilities may minimize compliance with formal law. It is quite possible that enforcers are motivated to enforce consistent with the community’s normative sensibilities because they share them. As H. Laurence Ross noted, “underlying the intellectual order of black-letter law is a social order of legal actors, and these can be expected to resist innovations that overturn established ways of doing things, especially when such innovations are considered extreme and unfair.”<sup>117</sup>

Of course, the ability of the regulated and their regulators to achieve agreement on acceptable behavior and enforcement depends in part on the social fidelity between them, and on the relative absence of countervailing pressures on institutions of enforcement to defy norms. The greater the social fidelity between the regulated and their regulators, the more likely they share normative sensibilities that guide both compliance behavior and enforcement behavior. For some behaviors, particularly those traditionally

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<sup>115</sup> See *id.* at 64.

<sup>116</sup> See TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS xiii (2002).

<sup>117</sup> ROSS, *supra* note 71, at 96.

defined as *malum in se*, there may be almost no gap between law, norm, and parameter of acceptable deviance. To the extent law differs from normatively acceptable behavior, shared norms between the regulated and agents of enforcement may result in a diminished influence for law on enforcement practices.

Strong social fidelity between the community and enforcers can cause a “sticky norms’ pathology” that causes law enforcers to work at cross-purposes with lawmakers trying to “change social norms” through expanded liability for certain offenses.<sup>118</sup> Kahan argues that because some norms of behavior are more powerful than others, regulators react to increases in liability for those behaviors by reducing enforcement against them.<sup>119</sup> In other words, if the normative acceptability of the targeted behavior is unchanged, and punishment is the product of the severity of liability and the probability of enforcement, then an increase in liability will result in a corresponding decrease in enforcement, leaving the quantum of punishment unchanged.<sup>120</sup> He notes that “hard shoves” are often less effective than “gentle nudges” at causing “norm reform” because resistance to hard shoves is greater, and may even be counterproductive, strengthening the existing norm by diminishing enforcement against it.<sup>121</sup>

On the other hand, weak social fidelity between the regulated and agents of enforcement may result in a diminished influence for the community’s normative sensibilities, to the extent that they differ from law. Sarah Waldeck explores the social fidelity problem with regard to community policing and the social norms theory of regulation.<sup>122</sup> As Waldeck puts it, “one cannot endorse the social norms approach to deterrence without placing tremendous faith in a police department’s ability to interpret and enforce norms, or in a community’s ability to correct a police force whose interpretation is misguided.”<sup>123</sup> Waldeck argues that the social norms theory of enforcement is undermined unless it is accompanied by a model of community policing that promotes fidelity between the normative sensibilities of police and the public.<sup>124</sup>

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<sup>118</sup> See Dan M. Kahan, *Gentle Nudges v. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000).

<sup>119</sup> See *id.*

<sup>120</sup> See *id.*

<sup>121</sup> See *id.* at 644-45; see also WILLIAM K. MUIR, JR., *PRAYER IN THE PUBLIC SCHOOLS: LAW AND ATTITUDE CHANGE* (1967).

<sup>122</sup> Sarah E. Waldeck, *Cops, Community Policing, and the Social Norms Approach to Crime Control: Should One Make Us More Comfortable with the Others?*, 34 GA. L. REV. 1253 (2000).

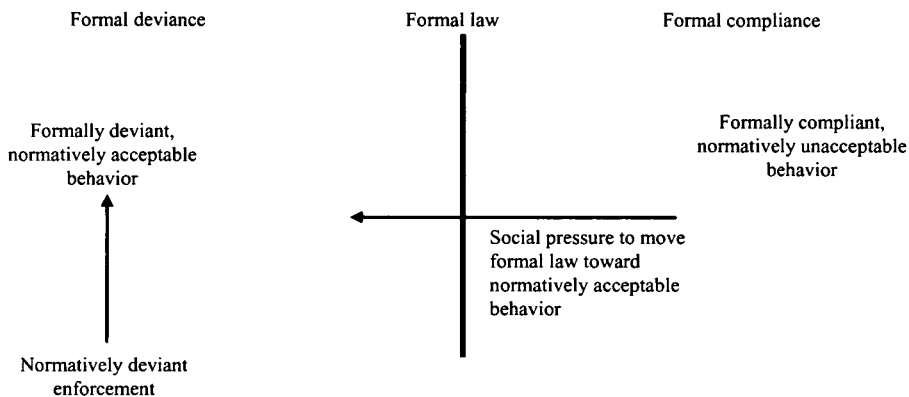
<sup>123</sup> *Id.* at 1257.

<sup>124</sup> See *id.*

Similarly, the ability of the regulated and their regulators to find an enforcement standard along parameters of deviance acceptable to them both depends, in part, on common normative sensibilities. When that is not possible, dissonance creates odd dynamics, and formal institutions of enforcement often falter. In these cases, attempts at enforcement are motivated by influences other than the community's normative sensibilities, regardless of whether agents of enforcement share them. The "other influence" is simply the directive of formal law. Interestingly, in such cases, it is enforcement itself that is the normatively unacceptable deviant behavior. When regulators such as prosecutors insist upon enforcement despite the normative acceptability of the offending behavior, it is often the formal institutions of enforcement that falter.<sup>125</sup> As depicted in Figure 10, pressure may develop to make the law align with normative sensibilities.

**Figure 10**

*Enforcement as Normatively Unacceptable Deviance*



For example, because occasional marijuana use is within PADs in many communities, and because such cases are often prosecuted zealously and sentenced harshly, prisons may become distended and overcrowded, and debate may arise about proper resource allocation.

In some cases, if the prohibited behavior is normatively acceptable under certain conditions, the community may resist enforcement of a law,

<sup>125</sup> As Roscoe Pound observed, in "all cases of divergence between the standard of common law and the standard of the public, it goes without saying that the latter will prevail in the end." Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607, 615 (1907).

even if it otherwise coincides with their normative sensibilities.<sup>126</sup> For example, the prohibition against murder may coincide with normative sensibilities under most circumstances, but not all: consider assisted suicide for the terminally ill, suicide itself, lynching, honor-killing, and vigilantism. All are formally illegal, but not all are outside PADs in all communities. The prohibition on sexual relationships with children may coincide with normative sensibilities under most circumstances, but not all. For example, in the very recent past, marriage between men in their early twenties and women in their early teens was not considered normatively unacceptable in many communities in the United States.<sup>127</sup> Today, the enforcement of laws prohibiting the sexual assault of children may coincide with community normative sensibilities—except, perhaps, when applied in draconian fashion to both sixteen year-old participants in a consensual sexual relationship because, for many, such relationships (while discouraged) are not so far outside the parameters of acceptable deviance as to warrant an enforcement response.<sup>128</sup>

Tellingly, it has become standard practice for political and business elites accused of crimes to complain that they are the victims of politically motivated prosecutors who have “criminalized” normatively acceptable political and business practices.<sup>129</sup> The expectation that enforcement will be guided by PADs rather than formal law is that powerful; the prosecuted argue that their formally criminal behaviors have been “criminalized.” As discussed in detail in Section VI.A, below, the prosecution of formally illegal behavior that is within PADs creates a host of difficulties.

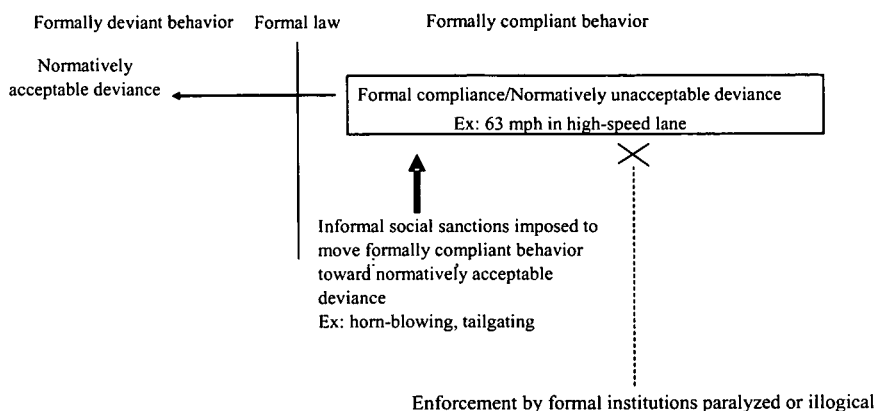
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<sup>126</sup> Interestingly, not only are people likely to privilege their sense of fairness over law; they are also likely to privilege it over their own self-interest. See Christine Jolls et al., *A Behavioral Approach to Law and Economics*, in *BEHAVIORAL LAW & ECONOMICS* 22 (Cass R. Sunstein ed., 2000).

<sup>127</sup> See, e.g., LORETTA LYNN, *COALMINER'S DAUGHTER* 49-52 (1976).

<sup>128</sup> Megan Twoley, *Teens Who Have Sex Charged with Abuse*, *MILWAUKEE J. SENTINEL*, Mar. 8, 2004, at 1A (discussing the community uproar over charging both sixteen year-old participants in a consensual sexual relationship with sexual assault of a minor).

<sup>129</sup> See, e.g., Jeffrey Bell & William Kristol, Editorial, *Criminalizing Conservatives*, *WEEKLY STANDARD*, Oct. 24, 2005 (arguing the investigation of the Valerie Plame affair was a “criminalization” of normal—albeit technically criminal—political practices); Robert Novak, *Criminalized Politics*, Oct. 14, 2004, available at <http://www.cnn.com/2004/ALLPOLITICS/10/14/criminalized.politics/index.html> (alleging the indictment of (then) House Speaker Tom Delay was a “criminalization” of normal—albeit technically criminal—political practices); Daniel J. Popeo, *Criminalizing Success*, <http://www.wlf.org/Communicating/inallfairness.asp> (last visited Dec. 20, 2006) (arguing prosecution of Arthur Andersen was part of a “crusade to criminalize legitimate free market activity” without regard to the technically criminal nature of those activities).

**Figure 11***Formal Compliance as Normatively Unacceptable Deviance*

As depicted in Figure 11, just as people are inclined not to punish behavior that is illegal but normatively acceptable, they are inclined to punish behavior that is normatively unacceptable even if legal.<sup>130</sup> Recall, for example, the earlier discussion about the very slow driver, or the neighbor with a passion for pink flamingoes. Other examples might include cohabitation of same-sex or interracial couples. In the absence of enforcement by formal institutions, informal social sanctions are imposed by members of the community in order to push the behavior within PADs. Community members may shun, pressure, or confront deviants; they may even lynch them as a warning to others.<sup>131</sup> Formal institutions of enforcement are not well-equipped to punish normatively unacceptable legal behavior, because the acknowledged justification for their intervention—violation of formal law—is unavailable.

“Acknowledged” may be the most important word in the preceding sentence. As we have seen, violation of formal law is not an adequate explanation for the exercise of enforcement discretion. Violation of PADs is. But due in part to the operation of a phenomenon I describe as the formalization paradox, formal institutions of enforcement cannot acknowledge this concept.

<sup>130</sup> See Jolls et al., *supra* note 126.

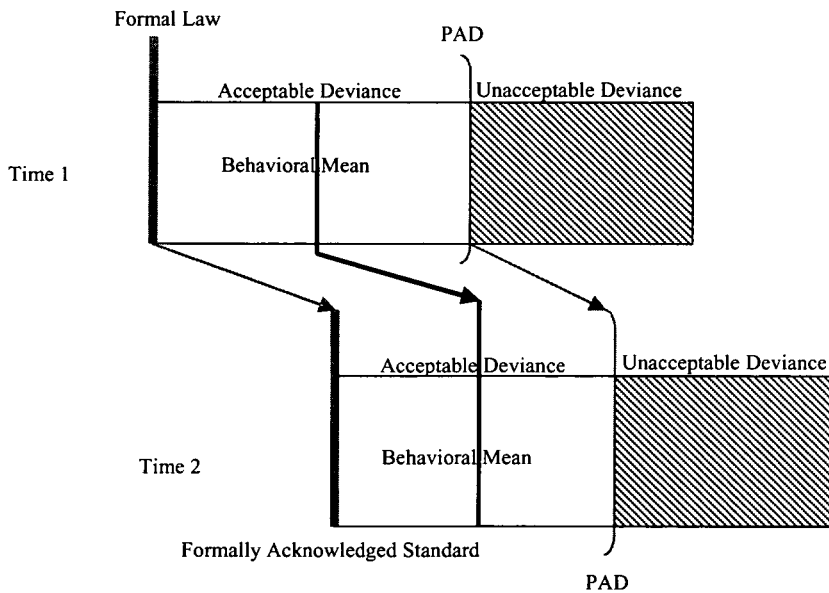
<sup>131</sup> See, e.g., David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 *LAW & SOC'Y REV.* 793, 816 (2005).

## IV. PADS AND THE FORMALIZATION PARADOX

PADs are the product of dynamic interplay between law and norms. Formal law has an effect upon the placement of PADs, just as PADs have an effect on the content of formal law. Therefore, changes in law, norms, or both should produce some change in PADs. The data cited above regarding changes in behavior accompanying changes in law suggest this is true. When the formal law was raised to a maximum consistent with actual behavior, actual behavior shifted along with the formal law. In short order, the new maximum was closer to, but no longer consistent with, actual behavior. In other words, the shift in formal law was accompanied by a shift in PADs. This idea is depicted in Figure 12 below.

**Figure 12**

*The Formalization Paradox: Formal Acknowledgement of Acceptable Deviance Shifts PADs*



That formal law and PADs shift together places formal institutions of enforcement in a trap. If formal institutions of enforcement acknowledge that PADs are an appropriate enforcement standard, then PADs have been formalized. The law shifts so that PADs become the effective law. But when the law shifts, PADs shift as well, creating new limits of acceptable deviance.

Speed limits are a useful example again. Speed limits are posted everywhere; and yet, everywhere, both regulators and the regulated know they are untrue. Why post an obvious untruth? The data above suggests an answer. If regulators formally acknowledge that the enforced speed limit is, say, 72 mph, then the limit of acceptable deviance would shift with that formal acknowledgement and become some speed faster than 72, negotiated-through-practice between drivers and the police over time. Regulators use the fictional, formal 65 mph law to anchor the parameters of deviance at an acceptable level.

The “broken windows” theory of policing can be understood as a reaction against the formalization paradox. According to this theory, permitting minor deviance (such as broken windows and graffiti on subway cars) establishes a normative climate that accommodates greater deviance.<sup>132</sup> Put another way, the failure of police to enforce formal law acknowledges that violations of that law are normatively acceptable. That acknowledgement implicitly formalizes the legality of the behavior, and shifts the PADs to encompass greater deviance. Advocates of the broken windows theory urge enforcement against minor violations in order to contract PADs.

It may be impossible for formal institutions of enforcement to acknowledge PADs without affecting them. An enforcer who formally acknowledges that enforcement occurs at the limit of acceptable deviance rather than at the point of formal law is akin to a negotiator revealing her “bottom line” during negotiations. It is highly unlikely that the final result of the negotiations would be unaffected by that disclosure.<sup>133</sup> Thus, unless regulators want to change PADs, they cannot acknowledge them.

As Goldstein observed, if PADs are acknowledged, they “become known both to the violator and the officer.” They then create “bargaining power” for the regulated against their regulators.<sup>134</sup> Prosecutors similarly fear the formalization paradox; they are reluctant to create a written guide to the exercise of discretion in the charging decision because such a guide may fall into the public’s hands.<sup>135</sup> In short, acknowledgement by formal institutions of enforcement of the existence of PADs turns the PADs into a new formal standard and gradually, by negotiation-through-practice, new PADs form around them.

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<sup>132</sup> See Waldeck, *supra* note 122, at 1256-57.

<sup>133</sup> See Robert H. Mnookin, *Strategic Barriers to Dispute Resolution: A Comparison of Bilateral and Multilateral Negotiations*, 8 HARV. NEGOT. L. REV. 1 (2003).

<sup>134</sup> See Goldstein, *supra* note 22, at 145.

<sup>135</sup> See Michael Edmund O’Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439, 1494-95 (2004).



## V. PADS AND THE FORMAL FICTION

The formalization paradox has different implications for different political institutions. For policymakers such as legislatures, the formalization paradox can be a useful tool or an unwanted consequence. Which it is depends on whether its potential is recognized and whether decisions are made with it in mind. Wise policymakers can use formal law as an anchor for PADS in order to achieve their policy goals.

Enforcement agencies are in a more difficult position. They are rarely in a position to create law in order to anchor PADS to achieve specific social goals. However, refusing to acknowledge PADS requires some amount of implausible pretense.<sup>136</sup> Even a cursory observation of the operation of law in society makes clear that full enforcement of the law is neither present nor desirable<sup>137</sup> nor possible.<sup>138</sup> Yet Kenneth Culp Davis found that police departments refused to formally acknowledge that, and

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<sup>136</sup> Our complicity in the fiction may best be revealed by the habit of slowing down while passing a police car parked along a highway. Even if we feel certain we will not be ticketed despite speeding—in other words, we feel certain that our behavior is within PADS—we slow down as if the parameter of enforcement was the actual speed limit, as a sign to the police officer that we respect authority and are willing to play our part in the fiction that the formal law is the standard of enforcement.

<sup>137</sup> Either full enforcement or compliance would likely bring any functioning society to a crashing halt. In other words, even if we are reluctant to acknowledge acceptable deviance, we depend upon it. In some ways, the effects of full enforcement or compliance with formal law can be seen by analogy in the labor tactic known as “work-to-rule.” In work-to-rule campaigns, employees work according to the letter of company policy in order to cripple operations. See *Loc. 702, Int’l. Bhd. of Elec. Workers v. NLRB*, 215 F.3d 11 (D.C. Cir. 2000) (defining work-to-rule as “adhering strictly to all company safety and other rules; doing exactly and only what they were told; reporting to work precisely on time and parking work trucks at company facilities at day’s end (thus precluding employees from responding to after-hours emergencies); presenting all grievances as a group; advising non-employees to report unsafe conditions; and advising customers of their right to various company information and of their right to have their meters checked annually for accuracy”); Pam Galpern, *Telephone Workers Pressure Verizon from Within*, Troublemaker’s Website, <http://troublemakershandbook.org/Text/Inside%20Strategies/fullchapter.htm> (last visited Oct. 25, 2006) (In a recent work-to-rule campaign, telephone workers pressured Verizon by complying with Department of Transportation regulations and Verizon’s own policies. They started each morning with a twenty-minute inspection of each truck, ensured that they had proper signage for each worksite, met each customer before and after every job, refused to use fire escapes or work in inadequate lighting, and parked only in legal parking spaces. The result crippled Verizon’s operations, and brought a sharp response from Verizon.). Note that full compliance with regulations and policies is regarded by labor and management alike as a type of “troublemaking” deviant behavior. See DAN LA BOTZ, *A TROUBLEMAKER’S HANDBOOK: HOW TO FIGHT BACK WHERE YOU WORK—AND WIN!* 16-19 (1991). In other words, compliance was outside PADS, and thus unacceptably deviant.

<sup>138</sup> If only because the resources required for full enforcement far exceed those available to regulators.

instead maintained the “pretense of full enforcement.”<sup>139</sup> Institutions of enforcement often feel compelled, at least publicly, to maintain the fiction that formal law is the point of enforcement.

Courts are not commonly thought of as institutions of enforcement, but “the judiciary’s role is no different, in its essence, from that of any other implementation mechanism.”<sup>140</sup> A court’s implementation function requires it, in formal terms, to implement the law as written.<sup>141</sup> Like other agents of enforcement, courts have difficulty acknowledging the existence and operation of PADs, in part because of the formalization paradox. This inability by the judiciary to acknowledge the existence and operation of PADs traps them in a “formal fiction.”

Courts’ formal fiction dovetails with a widespread misperception about courts and the law generally—what Ronald Dworkin calls the “empirical view” of law.<sup>142</sup> Dworkin notes two general ways in which lawyers and judges might disagree about a proposition of law.<sup>143</sup> First, they might disagree on what he calls “empirical” grounds.<sup>144</sup> A disagreement on empirical grounds is a disagreement about positively ascertainable legal facts.<sup>145</sup> For instance, the “law” exists as a fact in a statute, regulation, constitution, or prior dispositive case.<sup>146</sup> Disagreement about what that law is can be resolved by reference to the authoritative source.<sup>147</sup> The example Dworkin uses is, conveniently enough, speed limits: the speed limit is what the statutes say the speed limit is; lawyers and judges may disagree about what the statute says, but that is ascertainable, and thus their disagreement is resolvable, by reference to the extant, authoritative source.<sup>148</sup>

The second way in which lawyers and judges might disagree about law is on “theoretical” grounds.<sup>149</sup> In a theoretical disagreement, the actors may agree empirically on what the statutes, regulations, constitutional provisions, or cases *say*, but not on what they *mean*; the meaning of the law, and thus the law itself, is contested.<sup>150</sup> This is the type of disagreement with which every law student, lawyer, law professor, and judge is deeply

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<sup>139</sup> See DAVIS, *supra* note 2, at 70.

<sup>140</sup> See Rubin, *supra* note 12, at 1313-14.

<sup>141</sup> *Id.* at 1313.

<sup>142</sup> RONALD DWORKIN, LAW’S EMPIRE 4-5 (1986).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 7.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 4-5.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 5.

familiar. Indeed, law teaching through the case method is often designed to tease out Dworkin's theoretical disagreement;<sup>151</sup> a case is read by the class, and some unfortunate student is then called upon to explain both its meaning and its place within the jurisprudence of that area of law, the two of which often seem inconsistent. There are rarely clear answers; there are only more or less persuasive arguments.

As Dworkin notes, the public seems oblivious to, and distrustful of, theoretical disagreements in law.<sup>152</sup> They seem to regard the law as clearly expressed *somewhere*, even if they cannot locate it or describe it.<sup>153</sup> The public also seems to believe that even though legal actors know where and what the real law is, they refuse to reveal it. Instead the public believes that legal actors purposely contrive tricky arguments to make the issues confusing in order to advance their own political or monetary interests. Public debate around judicial appointments often focuses on whether the candidate will be a good judge who "finds" the law, or a bad one who "invents" it in order to advance her own private agenda.<sup>154</sup>

In some ways, it is this faith in the independent, empirical existence of law that sustains, in the public eye, the legitimacy of the legal system and the judiciary. The temple of justice itself remains sound, even if it is currently overrun by money-changers.<sup>155</sup> Skeptical commentators on both the Left and Right have argued that judges are, in fact, political actors motivated by their own ideologies, and have called upon the courts to be more candid about it.<sup>156</sup> Calls for judicial candor are sometimes accompanied by calls to limit the discretion, and thus power, of judges.<sup>157</sup> Candor, the argument goes, holds judges accountable.<sup>158</sup> But candor has its

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 7.

<sup>154</sup> *Id.*; see Att'y Gen. Alberto R. Gonzales, Prepared Remarks of Att'y Gen. Alberto Gonzales at George Mason University (Oct. 18, 2005) ("[Harriet Miers's] judicial philosophy is consistent today and will be in the future with the vision laid out by the President: that judges should interpret law faithfully, not make the law creatively."); President Ronald Reagan, Radio Address to the Nation on the Supreme Court Nomination of Anthony M. Kennedy, Central America, and Deficit Reduction (Nov. 14, 1987) ("Judge Kennedy shares my fundamental legal philosophy of judicial restraint—the conviction that judges should interpret the law, not make it—that, in other words, judges should be umpires, not players.").

<sup>155</sup> See Marc Galanter, *The Faces of Mistrust: Lawyers in Public Opinion, Jokes and Political Discourse*, 66 U. CIN. L. REV. 805 (1998).

<sup>156</sup> See Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307 (1995).

<sup>157</sup> See *id.*

<sup>158</sup> *Id.* at 1345.

costs. The opacity of judicial decision making comes with significant benefits that cannot be lightly discarded. One is the legitimacy of the judiciary itself.<sup>159</sup>

The Supreme Court has gone to great lengths to mask its work in an aura of mystery to enhance its legitimacy.<sup>160</sup> It is Merlin to the Executive's Arthur and Congress's Lancelot; lacking an army of its own,<sup>161</sup> it maintains its power by projecting an image of secrecy and ceremony. As Barbara Perry notes, the Court has cultivated an image of both "majesty" and "mystery" through its language, emblems of power, and physical environment.<sup>162</sup> That image validates, and exploits, the general misapprehension of law that Dworkin describes as the "empirical" view of legal disagreement: the law is knowable, and judges know how to find it. Acknowledging PADs is incompatible with the courts' "empirical" image. Courts reap the benefit of this misperception—but at a significant cost.

## VI. PADs AND SYSTEM BREAKDOWN

The inability or unwillingness of formal institutions of enforcement to formally acknowledge the existence and operation of PADs around law helps to explain, in some instances, why courts are bedeviled by some seemingly intractable issues, why the formal system of justice sometimes breaks down, and why the courts sometimes issue legally baffling

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<sup>159</sup> *Id.* at 1388; *see also* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 172-77 (1982); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1986).

<sup>160</sup> BARBARA PERRY, THE PRIESTLY TRIBE: THE SUPREME COURT'S IMAGE IN THE AMERICAN MIND 2 (1999).

<sup>161</sup> President Andrew Jackson, defying the Supreme Court's decision that Cherokee tribes could not be ethnically cleansed from the State of Georgia, is reported to have said, "John Marshall has made his decision; now let him enforce it." H.W. BRANDS, ANDREW JACKSON: HIS LIFE AND TIMES 493 (2005).

<sup>162</sup> PERRY, *supra* note 160, at 2. The exterior of the Supreme Court was consciously designed to evoke the popular idea of an ancient temple. *Id.* at 10. The great front steps and marble columns lead to a front entrance that is flanked by two enormous marble figures representing the "Contemplation of Justice" and the "Authority of Law." *Id.* They are surrounded by torch-bearing, mask-holding angels, who symbolize the discovery of truth. *Id.* The pediment displays sculptures representing "Liberty, Justice, Order, Authority, Council, and Research Past and Present." *Id.* at 10-11. The interior, modeled on a French Cathedral, *id.* at 10, displays frieze sculptures of Moses, Confucius, Solomon, Mohammed, and John Marshall. *Id.* at 12. Spectators may speak in hushed tones until five minutes before the Justices are to appear; then they are commanded to silence. *Id.* The Justices emerge, black-robed. *Id.* at 15. They sit on a dais beneath carvings representing "Majesty of Law, Power of Government, Wisdom, Justice, and the Defense of Human Rights and Protection of the Innocent." *Id.* at 12.

decisions. In this section, I examine an example of each: racial profiling, jury nullification, and the Supreme Court's decision in *Bush v. Gore*.<sup>163</sup>

#### A. RACIAL PROFILING

Police claim that "by following any vehicle for 1 to 2 minutes they can observe a basis on which to stop it."<sup>164</sup> In other words, drivers do not obey the formal law. Having stopped a vehicle for "a legitimate traffic violation," i.e., a violation of formal law, police can employ what the Illinois State Police call the "the Nickel Defense," meaning they employ their five senses to detect anything suspicious that justifies a search.<sup>165</sup> This allows police to "routinely use traffic stops as a means of tracking down drug or gun couriers."<sup>166</sup> In other words, police officers use evidence of crimes within PADs to conduct searches for evidence of crimes outside PADs. "[T]hese discretionary decisions are seldom documented and rarely reviewed."<sup>167</sup>

Of course, police decisions to enforce crimes within PADs are not always motivated by stopping crimes outside them. They may be motivated by illegitimate factors such as racial bias, profiteering, or some combination of them. One particular form of such enforcement, racial profiling against black motorists, has generated tremendous publicity and controversy and has already reached the Supreme Court.

In *Whren v. United States*, the seminal racial profiling case, the Supreme Court heard the case of two African-American men who had been stopped for a minor traffic violation so that police could search them for drugs.<sup>168</sup> The men sought to suppress evidence of drug possession, arguing that the search had been unreasonable under the Fourth Amendment because it was motivated by the defendants' race.<sup>169</sup> The Court held that

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<sup>163</sup> 531 U.S. 98 (2000).

<sup>164</sup> In one study, of 1,100 stops in Florida, 243 were made for "swerving," 128 for driving 10 mph above the speed limit, 71 for burned out tag lights, 46 for improper license tags, 45 for failure to signal, and others for other offenses, primarily for speeding less than 10 mph above the limit. David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 562 (1997). More than 70% of those stopped were African-Americans or Hispanic. *Id.* African-Americans made up 12% of the driving population, but the study fails to report the percentage made up by Hispanics, and fails to report different offending rates. *Id.* Of the 1,100 stops, roughly half led to searches overall, but 80% of the searches were of African-Americans. *Id.* Only 9 of the 1,100 stopped received tickets. *Id.*

<sup>165</sup> NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., *supra* note 61, at 14.

<sup>166</sup> *Id.*

<sup>167</sup> See Harris, *supra* note 164.

<sup>168</sup> 517 U.S. 806, 808-09 (1996).

<sup>169</sup> *Id.* at 809.

the Fourth Amendment did not protect defendants against police officers' subjective motivations.<sup>170</sup> Under Fourth Amendment analysis, the Court held, the only question was whether there was reasonable suspicion to justify the stop.<sup>171</sup> Because the police could show that other, nondiscriminatory factors caused suspicion of illegal activity, the search was reasonable; whether the officer was also incidentally motivated by illegal factors such as the defendant's race was irrelevant to Fourth Amendment analysis.<sup>172</sup> Similarly, in the Fourteenth Amendment context, the Supreme Court has held that the Equal Protection Clause does not protect defendants without evidence of individual acts of deliberate discrimination by state actors.<sup>173</sup> Aggregate data offered as evidence of general disparate treatment is inadequate.<sup>174</sup> Despite—or perhaps because of—the paucity of relief offered by the Court, profiling black motorists has generated sufficient controversy and outrage that there have now been some official efforts to curtail it.<sup>175</sup>

Other forms of racial profiling have received less attention. Some evidence suggests that Hispanics may be disproportionately targeted for pretextual stops motivated by anti-illegal immigration views<sup>176</sup> and the desire to seize cash.<sup>177</sup> Hispanics in the United States, by population, are more likely than members of other ethnic groups to work as migrant

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<sup>170</sup> *Id.* at 813.

<sup>171</sup> *Id.* at 819.

<sup>172</sup> *Id.*; see *United States v. Armstrong*, 517 U.S. 456 (1996) (holding that selective enforcement claims require evidence of discriminatory intent).

<sup>173</sup> *Armstrong*, 517 U.S. at 469-70.

<sup>174</sup> See *id.*

<sup>175</sup> See U.S. DEP'T OF JUSTICE, A RESOURCE GUIDE ON RACIAL PROFILING DATA COLLECTION: PROMISE PRACTICES AND LESSONS LEARNED 9 (2000).

<sup>176</sup> Some police officers, believing that federal anti-illegal immigration efforts are inadequate, have targeted Hispanics for minor traffic violations, then contacted federal authorities to trigger deportation. See Paul Vitello, *Path to Deportation Can Start with a Traffic Stop*, N.Y. TIMES, Apr. 14, 2006, at A1. One New York state county sheriff justified arresting Hispanics for minor offenses and then triggering the deportation process by stating, "We have a situation in this country where the borders are not being adequately protected." *Id.* In one of the few such incidents to generate controversy, recently in Missouri an eighteen-year old Hispanic male was stopped for driving with "excessively tinted windows." *Id.* at B6. Under police interrogation, he admitted that he had entered the United States illegally. *Id.* The police then triggered the deportation process against him. *Id.* The case became notorious only because the police learned—after transferring his custody to the INS—that the boy was well-known and popular in town, having spent almost his entire life there, and was the key player on the high school soccer team that season, which was still ongoing.

<sup>177</sup> See William L. Anderson, *Racial Profiling and State Abuse of Power*, LEWROCKWELL.COM, June 29, 2000, <http://www.lewrockwell.com/anderson/anderson9.html>.

laborers. Migrant workers must travel great distances, are often paid in cash, and are often unable to establish bank accounts during the farm work season. In many jurisdictions, police departments are permitted to keep cash discovered in vehicles during searches incident to traffic stops, if none of the vehicle's occupants claim ownership of the cash.<sup>178</sup> In fact, many departments depend upon the practice for part of their funding.<sup>179</sup> Migrant workers are particularly vulnerable to cash seizures because they are paid in cash, must travel, may have difficulty communicating in English, may have entered the country illegally, and may fear deportation.<sup>180</sup> Biased police officers, aware of these vulnerabilities, sometimes deliberately exploit them.<sup>181</sup>

To date academics researching racial profiling, and litigants challenging it, have focused their efforts on gathering statistical evidence

<sup>178</sup> See Karen Dillon, *U.S. Rules Let Police Keep Cash They Seize*, CHARLOTTE OBSERVER, May 21, 2000, at 1A. Of course, any number of reasons might motivate the occupants not to claim the cash: fear of arrest, inability to speak or understand English, fear for their safety, fear that the money will be used as evidence against them for a crime they have committed. The least likely reason seems to be genuine lack of ownership.

<sup>179</sup> See *id.* at 15A. The head of the Albuquerque police special investigations unit estimates that 75% of the unit's \$1 million cost each year is funded by cash seized from motorists during searches.

<sup>180</sup> See Anderson, *supra* note 177.

<sup>181</sup> A recent discussion on an on-line forum for police officers helps to demonstrate the depth and danger of the problem. Police Forums & Law Enforcement Forums @ Officer.com—Tricky Traffic Stops, <http://forums.officer.com/forums/archive/index.php/t-33874.html> (last visited Nov. 24, 2006) [hereinafter Tricky Traffic Stops]. It was started by a police officer recounting an experience with a traffic stop and asking for advice from other officers. Posting by ufresfave to *id.* (July 27, 2005, 07:30). The officer had stopped a dilapidated car for speeding. *Id.* The driver and passengers were Hispanic, appeared to be migrant laborers, and spoke little English. “[The passenger] suddenly no speak the english either. We get consent to search (in a sense) and find 10,000 in cash. Well no can claim it, bc no one speaka the english, as I said earlier.” *Id.* To the officer's disappointment, a passenger claimed ownership of the cash when he realized the police officer intended to keep it: “Woulda loved to bring 10k home to the chief.” Posting by ufresdave to Tricky Traffic Stops, *supra* (July 27, 2005, 18:55). The officer then sought the opinions of other officers: how could he have kept the cash? One officer replied:

If I stopped normal Joe Blow citizen with \$10,000 cash and he told me that he had just sold a used car and was on his way to the bank to deposit the money, the interview is over. . . . On the other hand, if Jose Blow was speeding, unlicensed, in an “un-car” and with \$10,000 he claims no knowledge of, he takes a ride to the house. . . . [The cash] would be returned as soon as he provides proof of ownership. He could do that on the same day he appears in court to answer the speeder and other coupons I gave him.(yeah right!)

Posting by duckfan to Tricky Traffic Stops, *supra* (July 27, 2005, 14:03). A second officer agreed: “Like the man said, seize the money and let the [sic] proove [sic] to the court they have it legally. . . . If they were Americans, it'd probably be a tougher sell. But as it was? Nah.” Posting by Centurion 44 to Tricky Traffic Stops, *supra* (Aug. 1, 2005, 14:44).

that tends to reveal whether minorities are stopped in disproportion to their population, and on whether race is a statistically significant predictor of stops.<sup>182</sup> Unfortunately, as Bernard Harcourt has insightfully explained, these data are of little use for determining whether stops are unlawfully motivated, because not only do they fail to account for differential offending rates, they also fail to account for differences in elasticity in response to enforcement.<sup>183</sup> As Harcourt demonstrates, police behavior alone is an inadequate focus of study; the behavior of the regulated must be studied as well.<sup>184</sup>

But there is a second, more fundamental problem with these studies. Even if the data is corrected to account for offending rates and elasticity in response to enforcement, it is still of little use if mere illegality is enough to justify otherwise unlawfully motivated enforcement. For example, if the parameter of acceptable deviance for driving behavior is ten miles per hour above the formal speed limit, and an unlawfully motivated officer can justify stopping a driver driving seven miles an hour above the limit because the driver's behavior is formally illegal, the driver has no recourse—*unless* courts acknowledge PADs.<sup>185</sup>

In other words, to protect the regulated from selective enforcement, courts must examine not whether the defendant's behavior violates the law, but rather whether it occurred within PADs. But in order to do that, courts must abandon the formal fiction that normally law is enforced and instead acknowledge that what is enforced are the normative standards arrived at through negotiation and through practice between the regulated and their regulators. The unwillingness or inability of courts to acknowledge PADs thus undermines their ability to perform one of the fundamental tasks with which they are entrusted: protection of minority populations against state actors unlawfully motivated by racial bias.

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<sup>182</sup> See JOYCE MCMAHON ET AL., U.S. DEP'T OF JUSTICE, HOW TO CORRECTLY COLLECT AND ANALYZE RACIAL PROFILING DATA: YOUR REPUTATION DEPENDS ON IT! FINAL PROJECT REPORT FOR RACIAL PROFILING DATA COLLECTION AND ANALYSIS (2002).

<sup>183</sup> Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. 1275 (2004).

<sup>184</sup> *Id.*

<sup>185</sup> In one study of the New Jersey Turnpike, of 1,768 observed motorists, more than 98% were speeding. U.S. GEN. ACCOUNTING OFFICE, RACIAL PROFILING: LIMITED DATA AVAILABLE ON MOTORIST STOPS 25 (2000).



**Figure 1**  
*Exercise of Discretionary Enforcement by Normative and Legal Status of Behavior*

	Formally Legal	Formally Illegal
Within PADs	Wrong	Suspect
Outside PADs	Awkward	Expected

To determine whether or not enforcement, or non-enforcement, is suspect, legal analysts should determine where the illegal behavior justifying the stop fits within the 2x2 box in Figure 1, reproduced above. Stops justified by behavior that falls within the upper right-hand box—in other words, behavior that is formally illegal but within PADs—should be subject to heightened scrutiny.

Unless courts acknowledge PADs, they are left with very limited instruments to redress unlawfully motivated enforcement. One such instrument is the review of administrative action under the “abuse of discretion” standard.<sup>186</sup> But the limitations of that instrument are obvious: as long as there is a rational basis for the exercise of enforcement discretion in the manner in which it was exercised, there is no abuse of discretion, and the exercise is insulated from review.<sup>187</sup> This makes the abuse of discretion standard of review particularly ill-suited as a tool to challenge enforcement actions against behaviors that are formally illegal but within PADs. Because the abuse of discretion standard allows enforcement to survive challenge if it has any rational basis, enforcers can immunize their acts by

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<sup>186</sup> See Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47 (2000).

<sup>187</sup> See *id.*

evidence that the enforced-against behavior was formally illegal. After all, under the formal fiction, enforcers' *raison d'être* is the enforcement of formal law; one can hardly argue that enforcers have no rational basis for fulfilling their reason for being. Consequently, the abuse of discretion standard does nothing to help courts protect those harmed by the formal fiction.

Perhaps the most straightforward method of applying heightened scrutiny is through burden-shifting. Harcourt has suggested an equal protection burden-shifting analysis in racial profiling cases based upon the *Batson* model, used to prevent racial discrimination in the use of preemptory jury challenges.<sup>188</sup> Under Harcourt's proposal, the defendant would establish a *prima facie* case of an equal protection violation by presenting "statistical discrepancies in the race of persons searched."<sup>189</sup> The state would then have the burden of showing either that there are "race-neutral reasons" for the disparities, or that race is a statistically significant predictor of crime and its use is designed to maximize search success without unduly burdening minority populations.<sup>190</sup> The defendant would then have the opportunity to rebut the state's evidence. Harcourt's model is designed to relieve the defendant of the burden of proving "actual intentional discrimination by a police officer."<sup>191</sup> The defendant's burden is merely to present credible evidence of statistical disparities.<sup>192</sup> It is then the state's burden to prove that factors other than intentional discrimination lead to, and justify, the stop.<sup>193</sup>

Harcourt's model is useful in that it addresses a central problem in the racial profiling analysis: it moves the burden of proving intent (or its absence) from the defendant to the state. However, Harcourt's model does not correct the blind spot undermining older models: it does not correct the fiction that law is the thing that police enforce. What is needed is a model that acknowledges that the limit of acceptable deviance is the thing that police enforce. A burden-shifting model that acknowledged PADs would, like its predecessors, rely upon behavioral statistics. But the focus would not be on police behavior by target population, or even on the elasticity of drivers' response by race, but rather on the behavior of both the regulated and their regulators in order to determine the location of PADs.

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<sup>188</sup> See Harcourt, *supra* note 183, at 1347.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

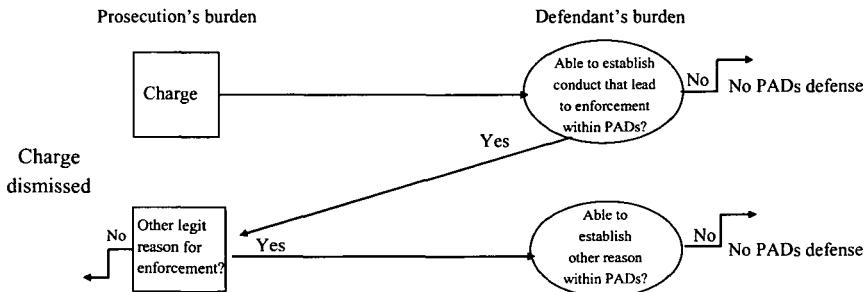
<sup>191</sup> *Id.* at 1348.

<sup>192</sup> See *id.*

<sup>193</sup> See *id.*

Put simply, the model might work like this: if a person with immutable characteristics has been stopped for behavior within parameters of normatively acceptable deviance, then the burden should shift to the state to articulate a reason for the act of enforcement that is neither based on immutable characteristics nor on behaviors within PADs.

**Figure 13**  
*Racial Profiling Burden-Shifting Model*



The flow diagram in Figure 13 suggests a series of burden shifts designed to allow courts to ensure that prosecutions are not unlawfully motivated. A defendant moving either to dismiss a charge or to suppress evidence on the basis of the enforcer's unlawful motivation would have the initial burden of establishing that the behavior that lead to the enforcement action was within the community's PADs, and that enforcement against it is unusual. If the defendant can meet her burden, the burden would then shift to the enforcer to articulate a legitimate, nondiscriminatory reason for, in this unusual instance, enforcing the formal law against behavior that is within PADs. If the enforcer cannot meet that burden, the court should act to protect the defendant against unlawfully motivated enforcement; if the enforcer can meet that burden, the prosecution should proceed.

This type of analysis seems odd on its face, but is not entirely unfamiliar to courts.<sup>194</sup> Courts perform a similar task in the context of First Amendment challenges to enforcement actions against alleged obscenity.<sup>195</sup> In obscenity cases, courts are called upon to examine evidence of community standards, make judgments about what those standards are, and compare them to the enforced-against expression.<sup>196</sup> Courts then decide whether the enforced-against expression is within or outside community

<sup>194</sup> See *Miller v. California*, 413 U.S. 15, 30 (1973).

<sup>195</sup> See *id.*

<sup>196</sup> See *id.*

standards.<sup>197</sup> In other words, courts must determine whether the challenged expression is within PADs.

Courts would actually be in a better position to determine whether certain behaviors are within PADs, as opposed to certain expressions. In expression cases, courts must make subjective judgments about normative values based primarily on anecdotal evidence. In behavior cases, courts can make objective judgments on the location of PADs based upon empirical data. For example, in cases involving traffic stops, litigants can present the court with extensive driving behavior data maintained by administrative agencies, such as the data I have used in this Article.

Like almost all procedural devices, the practical effect of burden-shifting based on PADs would likely be quite small in the court room.<sup>198</sup> But outside the court room—where most cases are resolved<sup>199</sup>—the effect could be significant. Defendants armed with evidence that their behavior is within PADs would be in a better bargaining position than they are now. Busy prosecutors may be more inclined to offer favorable plea bargaining agreements, and may be less willing to support charges for crimes discovered through unlawfully motivated enforcement against behavior that, though illegal, is within PADs.

## B. JURY NULLIFICATION

Jury nullification is a phenomenon that probably would not exist but for the operation of unacknowledged PADs. Jury nullification gives expression to two distinct, opposite phenomena mentioned earlier: acceptable deviance, and unacceptable compliance.

Juries confronted with a defendant charged with conduct that is formally illegal but within PADs may nullify the legally appropriate verdict in favor of the normatively appropriate one. Nullification inspired by acceptable deviance results, in criminal trials, in acquittal despite the jurors' belief beyond a reasonable doubt that the defendant is guilty of the crime. In the civil context, it results in a finding of no liability even though the jurors believe that a preponderance of the evidence demonstrates that the defendant is liable in tort.

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<sup>197</sup> See *id.*

<sup>198</sup> See Marc Galanter & Mia Cahill, 'Most Cases Settle': *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994); see also Robert H. Mnookin & Robert B. Wilson, *Rational Bargaining and Market Efficiency: Understanding Pennzoil v. Texaco*, 75 VA. L. REV. 295 (1989).

<sup>199</sup> See Galanter & Cahill, *supra* note 198; see also Mnookin & Wilson, *supra* note 198.

**Figure 14***Jury Verdict and Nullification by Normative and Legal Status of Behavior*

	Formally Legal or Compliant	Formally Illegal or Deviant
Within PADs	Not guilty	Nullification = not guilty Ex: racial bias against victim
Outside PADs	Nullification = guilty Ex: racial bias against defendant	Guilty

As Hannaford-Agor and Hans note, several renowned instances of jury nullification in American history “have been heralded as courageous examples of political protest and moral integrity.”<sup>200</sup> For example, jury nullification is commonly credited with sparing some violators of the Fugitive Slave Act, Prohibition, and draft laws during the Vietnam War.<sup>201</sup> In other words, in some times and places, aiding escaped slaves, manufacturing alcohol, and resisting the draft were within PADs though formally illegal. In each case, prosecutors and courts could not or would not accommodate PADs. Negotiation-through-practice had failed to produce a parameter of deviance acceptable to both regulators and the regulated. Faced with this disjuncture, jurors were forced to “reconcile literal application of the criminal statute with principles and norms implicated in the case.”<sup>202</sup> Some juries refused to comply with formal law and instead enforced their own normative standards of acceptability.<sup>203</sup> The

<sup>200</sup> See Paula L. Hannaford-Agor & Valerie P. Hans, *Nullification at Work? A Glimpse from the National Center for State Courts Study of Hung Juries*, 78 CHI.-KENT L. REV. 1249, 1256 (2003).

<sup>201</sup> See *id.*

<sup>202</sup> Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1174 (1997).

<sup>203</sup> See Hannaford-Agor, *supra* note 200, at 1276-77. Jurors’ perceptions of the fairness of the law allegedly violated, and the outcome for the defendant of guilty verdict, may color perceptions about the strength of the evidence. Thus it is very difficult even for jurors

strength of their fidelity to normatively acceptable standards is revealed by their willingness to enforce them despite personal risk.<sup>204</sup> Although at common law jurors have been immune from prosecution for voting their consciences, they have sometimes been prosecuted after nullification for violating their jurors' oaths by refusing to adhere to the law.<sup>205</sup>

Today, nullification resulting in acquittal is thought to occur most commonly in "three-strikes" cases and drug cases.<sup>206</sup> Hannaford-Agor and Hans make a distinction between jurors' concerns about the fairness of the law itself, on the one hand, and the fairness of the outcome of a guilty verdict for the defendant, on the other.<sup>207</sup> This distinction seems particularly important in "three-strikes" cases, which can impose enormous penalties for relatively minor offenses, and in those drug cases where small amounts of drugs can result in long sentences. In such cases, the jury may find the defendant's conduct outside of PADs, but may also find the punishment that will be imposed normatively unacceptable. If the legal penalty is less acceptable than the illegal conduct, juries may vote to acquit despite believing the defendant guilty.<sup>208</sup>

Some scholars argue that unjust acquittals should not be considered acts of nullification.<sup>209</sup> But nullification, on its own terms, is neither just nor unjust. Whether the result is just or unjust, nullification is the product of the same phenomena: juries preferring PADs over law. So, normatively acceptable deviance may include unlawful acts that are also unjust. For example, in some times and places, juries might acquit white supremacist defendants who, beyond a reasonable doubt, had killed or assaulted African-American civil rights workers.<sup>210</sup> Historically, juries may also have nullified the law by acquitting murderous cuckolded husbands, rapists "enticed" by their victims, violent nationalists, and others whose conduct was formally illegal but, by the normative sensibilities of their time and place, within PADs.<sup>211</sup>

In addition to just and unjust acquittals, jury nullification may—and perhaps most commonly does—take the form of unjust convictions. In

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themselves to say whether a vote to acquit was based on their perception of the fairness of the law or outcome, or the strength of the evidence.

<sup>204</sup> *Id.* at 1262-63 (citing *People v. Kriho*, 996 P.2d 158 (Colo. Ct. App. 1999)).

<sup>205</sup> *Id.*

<sup>206</sup> *See id.* at 1263; *see also* Nancy S. Marder, *Juries, Drug Laws & Sentencing*, 6 J. GENDER RACE & JUST. 337 (2002).

<sup>207</sup> *See* Hannaford-Agor, *supra* note 200, at 1263.

<sup>208</sup> *See* Marder, *supra* note 206, at 354.

<sup>209</sup> *See* Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877 (1999).

<sup>210</sup> *See id.*

<sup>211</sup> *See id.*

other words, juries may convict a defendant even if they are not convinced of guilt beyond a reasonable doubt, if some other characteristic of the defendant or his conduct is considered unacceptably deviant. Juries may be likely to convict a defendant that they find unacceptably deviant, as opposed to a defendant with whom the jury shares common normative sensibilities, even if the evidence of the particular crime with which the defendant is charged is the same. For example, jurors may be inclined to convict a defendant covered in gang-insignia tattoos, even if the evidence that he committed the crime with which he was charged is not strong. Similarly, juries may be inclined to sanction members of formally legal—but normatively unacceptably deviant—religions, or professions, or political organizations. The normatively unacceptable behavior is not illegal, which makes formal enforcement against it impossible. But because the behavior is normatively unacceptable, the community may welcome the opportunity to impose sanctions that formal institutions of enforcement cannot.<sup>212</sup>

Few scholars have considered unjust convictions instances of jury nullification, but they are logically identical to jury nullifications resulting in acquittal: they are the product of jurors preferencing PADs over law. Just or unjust, conviction or acquittal, the phenomenon is the same. Moreover, by excluding cases that result in convictions, scholars ignore the phenomenon of unacceptable compliance and miss what is, quite possibly, the majority of jury nullifications.

### C. *BUSH V. GORE*

*Bush v. Gore*<sup>213</sup> is still a hot potato, at least within the legal academy.<sup>214</sup> But my purpose in this very brief discussion of the case is not to argue whether the decision was right or wrong. My purpose is much simpler: it is to argue that an understanding of the existence and operation of PADs, and the formalization paradox they produce, casts a new perspective on the decision.

In *Bush v. Gore*, the Court interpreted the Equal Protection Clause in a way it had not before and, it suggested, it never would again, to re-interpret

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<sup>212</sup> In that way, nullification in the form of conviction for legally permissible—but normatively unacceptable—behavior is different in degree but not in kind from the social sanctions imposed on slow drivers.

<sup>213</sup> 531 U.S. 98 (2000).

<sup>214</sup> See, e.g., Abner S. Greene, *Is There a First Amendment Defense for Bush v. Gore?*, 80 NOTRE DAME L. REV. 1643 (2005); Steven M. Pyser, *Recess Appointments to the Federal Judiciary: An Unconstitutional Transformation of Senate Advice and Consent*, 8 U. PA. J. CONST. L. 61 (2006); Richard B. Saphire & Paul Moke, *Litigating Bush v. Gore in the States: Dual Voting Systems and the Fourteenth Amendment*, 51 VILL. L. REV. 229 (2006).

Florida state law in a manner that contradicted the Florida Supreme Court's week-old interpretation of the same statute.<sup>215</sup> Even setting aside the opinion's practical effect—deciding who would be President—it was extraordinary as a matter of legal reasoning. Laurence Tribe, although admittedly partisan, fairly summarized the reaction to the opinion of many observers, regardless of political stripe: “[W]here the hell did that come from?”<sup>216</sup>

For some legal scholars, there is no question that the Court's decision was wrong; the only issue is whether it was “unprincipled or merely indefensible.”<sup>217</sup> In other words, the debate centers on whether the decision was politically-motivated or just mistaken. In this camp, Tribe believes the decision was just mistaken,<sup>218</sup> Judge Calabresi, by contrast, describes it as an “unprincipled,” “dangerous,” “legally incoherent outcome-determinative” holding.<sup>219</sup> Other legal scholars support the ruling.<sup>220</sup> Like the detractors, the supporters fall into two camps: those who argue the decision was correct, and those who argue the decision was good enough, given the circumstances.<sup>221</sup> Nelson Lund argues that the decision was correct as a matter of law.<sup>222</sup> Judge Posner, by contrast, argues only that given the near impossibility of the situation it found itself in, the Court arrived at a reasonable decision.<sup>223</sup>

If we acknowledge the existence of PADs and the operation of the formalization paradox, then Posner's explanation may come closest to the mark. The Court found itself in a rare situation in which formal institutions are likely to stumble: a formal fiction was suddenly laid bare. The Court was faced with a crisis always latent, now made manifest, in an electoral and judicial system of unacknowledged PADs: elections take place within parameters of acceptable deviance. Usually, the parameters of deviance within election administration go unnoticed because the margin of votes

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<sup>215</sup> *Bush*, 531 U.S. at 109 (“Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”).

<sup>216</sup> Laurence H. Tribe, *Erog v. Hsub and Its Disguises: Freeing Bush v. Gore from Its Hall of Mirrors*, 115 HARV. L. REV. 170, 222 (2001).

<sup>217</sup> *Id.* at 270.

<sup>218</sup> *Id.* at 222.

<sup>219</sup> Guido Calabresi, *In Partial (but not Partisan) Praise of Principle, in BUSH v. GORE: THE QUESTION OF LEGITIMACY* 67 (Bruce Ackerman ed., 2002).

<sup>220</sup> See, e.g., RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* (2001); Nelson Lund, *The Unbearable Rightness of Bush v. Gore*, 23 CARDOZO L. REV. 1219 (2002).

<sup>221</sup> See, e.g., POSNER, *supra* note 220; Lund, *supra* note 220.

<sup>222</sup> See Lund, *supra* note 220.

<sup>223</sup> See POSNER, *supra* note 220, at 134.



between the leading candidates is greater than the margin of error.<sup>224</sup> Florida's presidential election in 2000 was an exception: it was a statistical tie,<sup>225</sup> and always would be no matter how many times the votes were counted and recounted, and no matter how "votes" were defined.<sup>226</sup>

The very public demonstration of regulators' inability to tally votes reliably and completely undermined a formal fiction important to the American sense of political identity—that every vote counts.<sup>227</sup> That fiction is undermined by the discovery that elections take place within PADs. Discovering that, in fact, every vote does not count and never had, peeled back that formal fiction.

Formal fictions have an important role in preserving our view of ourselves: police officers enforce the formal law; judges find the law by reference to an extant authoritative source; in our elections, every vote counts. The crack in that last formal fiction occasioned by the revelation that we have always had PADs in elections challenged the polity's sense of itself. Indeed, it triggered a type of societal identity crisis that found clear expression in a question asked repeatedly, with a sense of utter disbelief: "Is this really America?"<sup>228</sup> That rhetorical cry is a familiar response when formal fictions are challenged by the unavoidable reality of PADs.

In *Bush v. Gore* in particular, the Court found itself between the rock of the formal fiction and the hard place of the formalization paradox. If it refused to disavow the formal fiction and instead acknowledged the

<sup>224</sup> See Steve Bickerstaff, *Post-Election Legal Strategy in Florida: The Anatomy of Defeat and Victory*, 34 LOY. U. CHI. L.J. 149, 163 (2002) ("In the reality of elections involving possibly millions of ballots, votes in an election are seldom fully and accurately counted because every method of counting votes has some margin of error. Most elections, however, are not nearly close enough to fall within this margin of error.").

<sup>225</sup> See POSNER, *supra* note 220, at 49-50 ("Bush's original margin of 930 votes out of six million made the Florida Presidential election a statistical tie. Because the counting of millions of ballots by any method is liable to error, a razor-thin margin of victory such as Bush received establishes merely a probability—and not necessarily or in this case a very high one—that the victor actually received more votes than the vanquished. That is what I mean in calling the vote in Florida a statistical tie. The central question is whether a fair recount would have broken the tie. I think not.").

<sup>226</sup> See *id.*

<sup>227</sup> See *id.* at 43 ("The right to vote is a symbol of equality. It dramatizes the principle that every person is to count for one and no one for more than one, at least in the political sphere. This may be hokum or sentimentality, or even a mask for the inequalities of circumstance and opportunity that pervade our (as every) society; but it is a brute fact about the American political culture.").

<sup>228</sup> For example, Florida State Senator Tom Risson asked on the floor of the state senate, "What the hell is going on here? . . . Is this America?" Susan Milligan, *Gore in Heated Battle on 2 Fronts in Florida Presses Case for New Tally, Seeks to Block Lawmakers*, BOSTON GLOBE, Dec. 1, 2000, at A1.

existence of election administration PADs, it would demand an impossible and unworkable level of formal compliance from election administrators. As a result, “successful contests—in the sense of contests eventuating in judicial orders for selective or comprehensive hand recounts or even for revotes—would be the norm in close elections.”<sup>229</sup>

On the other hand, if the Court acknowledged that election administration takes place within PADs, that acknowledgement might shift the PADs surrounding election administration, creating more room for deviance. Moreover, for the Court to acknowledge that it could not turn to an extant, authoritative source of law to tell us who could legitimately claim the Presidency would undermine the “empirical” view of the law, and thus the courts’ institutional legitimacy as its guardian. The priests of law’s temple could hardly return from behind their velvet curtain, only to report that the oracle had shrugged its shoulders and said “close enough.”

In addition, the inability to resolve the competing legal claims to the Presidency may have triggered a political crisis with no foreseeable resolution.<sup>230</sup> In this regard, the formal fiction protects not just the Court’s place within the polity, but the cohesion of the polity itself. Calabresi explains that a judge’s lack of candor can usefully hide “a fundamental value conflict, recognition of which would be too destructive for the particular society to accept.”<sup>231</sup> Insisting on the formal fiction’s reality may protect the polity from a destructive crisis.

The Court recognized the difficulty it was in, protesting that it had to shoulder “unsought responsibility” and was being “forced to confront” issues it would rather not.<sup>232</sup> It stated that its foremost concern in deciding the case was “to sustain the confidence that all citizens must have in the outcome of elections.”<sup>233</sup>

What the Court needed was a pragmatic solution that would end the crisis, but one veiled in the cloak of the formal fiction. As Judge Posner notes, the Court was hesitant “to acknowledge the pragmatic grounds” of its

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<sup>229</sup> POSNER, *supra* note 220, at 120-21.

<sup>230</sup> The Onion newspaper satirized the crisis by reporting that Washington was littered with corpses and burning tanks from pitched battles between Republicans and Democrats. It also reported that President Clinton had declared himself President-for-Life, burned the Constitution, and dissolved Congress, scoffing that opponents could bring their complaints “to the impotent courts.” For a collection of related articles, see The Onion—America’s Finest News Source, <http://www.theonion.com/content/index/3641> (last visited Nov. 24, 2006).

<sup>231</sup> CALABRESI, *supra* note 159, at 172.

<sup>232</sup> *Bush v. Gore*, 531 U.S. 98, 111 (2000).

<sup>233</sup> *Id.* at 109.

constitutional decisions lest it appear “lawless.”<sup>234</sup> But, he argues, the *Bush v. Gore* decision can only be “explained and defended” by “positing pragmatism as the hidden ground of decision.”<sup>235</sup> In the end, faced with an insoluble dilemma, the Court covered itself with a curtain hastily constructed out of the Equal Protection Clause, and Wizard-of-Oz-like, urged the nation to ignore the Justices behind it.<sup>236</sup>

Tribe laments that the Court’s decision evinced “a deep-seated concern with how things look, rather than how things are.”<sup>237</sup> As Tribe described it, the Court seemed chiefly concerned with maintaining some “prescribed level of popular confidence in the results of the election”<sup>238</sup> rather than with requiring enforcement of the formal law. Protecting the formal fiction does require a concern with appearance and with maintaining popular confidence in the institutions of enforcement. Acknowledging PADs is not only an admission of imperfection; it may also be an invitation to greater imperfection through the formalization paradox, as new PADs form around the acknowledged standard. Moreover, in cases such as *Bush v. Gore*, acknowledging PADs may trigger both a social identity and structural political crisis. In averting a “genuine constitutional crisis,” Cass Sunstein opines, “the Court might have done the nation a big favor” even though it may have “abandoned the law simply because of pragmatic concerns.”<sup>239</sup>

Whether the benefits of preserving the formal fiction were truly worth the cost is a question I will not address. But to understand the otherwise baffling ruling of the Supreme Court in *Bush v. Gore*, it helps to acknowledge that the formal fiction is at work, obscuring the existence and operation of PADs.

## VII. CONCLUSION

We are governed neither by law nor norm, but rather by unacknowledged parameters of deviance acceptable to the regulated and their regulators, informed by law and norm in an endogenous and constantly evolving system. The location of the parameters of acceptable deviance is set by negotiation-through-practice between the regulated and their regulators over time.

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<sup>234</sup> POSNER, *supra* note 220, at 173-75.

<sup>235</sup> *Id.*

<sup>236</sup> See NOEL LANGLEY, FLORENCE RYERSON & EDGAR ALLAN WOOLF, *THE WIZARD OF OZ: THE SCREENPLAY* (Michael Patrick Hearn ed., 1989).

<sup>237</sup> Tribe, *supra* note 216, at 254.

<sup>238</sup> *See id.* at 253.

<sup>239</sup> Cass R. Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 757, 769 (2001).

Understanding how PADs shift with changes in the formal law could allow lawmakers to predict the behavioral effect of adjustments in regulation, a potentially useful tool. But the fact that PADs shift with changes in the formal law also prevents formal institutions of enforcement from acknowledging their existence and operation, because to do so formalizes them. When they are formalized, new PADs are created around them. I have called this phenomenon the formalization paradox. In order to avoid the formalization paradox, formal institutions of enforcement claim to enforce the law, when in fact they usually enforce PADs. I have called the refusal to formally acknowledge that PADs are the true point of enforcement the formal fiction. The formal fiction avoids the formalization paradox; it can also enhance the court's "empirical" legitimacy, and divert the polity from fundamental identity crises.

But the formal fiction has a substantial cost for some segments of the population. The refusal to formally acknowledge that enforcement occurs at PADs can leave some vulnerable to enforcement practices that are formally justified but improperly motivated. And until we acknowledge that, we will never be able to come to grips with legally bedeviling phenomena like racial profiling.

As long as courts find their legitimacy enhanced by the formal fiction they are unlikely to discard it. But as public institutions, courts should teach the public, not enjoy the advantage of its ignorance. The threat to the legitimacy of courts in acknowledging PADs cannot outweigh their responsibility to prevent misuse of the courts by improperly motivated regulators.

But in the end, the needed reforms lie not within formal institutions, but within the populace itself. We need a more mature and nuanced understanding of law as a social practice. A more mature understanding, hopefully, would reduce the effect of the formalization paradox and would help protect those whose behavior is formally illegal, but within PADs, from unscrupulous enforcers motivated by characteristics other than the defendant's behavior.

Moreover, there is something inherently democratic in recognizing that the relationship between the regulated and their regulators is dynamic, its terms negotiated through practice. Acknowledging that rightly locates the law not behind the wizard's curtain, or the judge's robe, or the bureaucracy's labyrinth, but on the table between the state and its citizens.

And that has pedagogical importance, too, for law teachers; good lawyers understand that the law is a point of reference, not an answer. We should impart to our students a more mature understanding of the role of law in society. Failing to acknowledge that we behave within parameters of

deviance, guided neither by law nor norm alone, but rather a normative sensibility informed by law, distorts our understanding of law as a social practice.

So, in answer to my original question, I offer two definitions:

One: the speed limit is a formal standard around which, by negotiation-through-practice over time, we construct unacknowledged parameters of normatively acceptable deviance, informed by norms and are anchored by formal law, that guide both behavior and enforcement.

Two: about 74 mph, but don't hold me to it.