

Introduction to the Symposium on the Rationality of Rule-Following

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Five of the following six articles were prepared for and presented at the 2004 meeting of the Section on Jurisprudence of the Association of American Law Schools, a meeting which I chaired and organized. The final article, Bruce Chapman's, was contributed after the meeting, Bruce having been unable to attend in person. I believe the high quality of these articles fully vindicates my choices of whom to invite to address the Section.

I can do no better in introducing the topic these articles address—the rationality of rule-following—than by setting forth the description of it that I gave the authors and placed in the A.A.L.S. program:

Legal norms are typically divided into standards and rules. Standards are legal norms that enjoin us to do what is “reasonable,” “fair,” “just,” etc.—in other words, they enjoin us to “do the right thing.” Because it is always rational to “do the right thing,” following legal standards poses no problem for rational actors.

As legal norms, however, standards are frequently suboptimal. For where people are, as is frequently the case, uncertain about what the “right thing” is, or disagree with one another about the “right thing,” standards will lead to many instances where the “right thing” is not achieved due to error or failure to coordinate. In other words, enjoining people to “do the right thing” will frequently lead to their doing the wrong thing.

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Legal norms in the form of rules are the antidote to the problems of error and failure of coordination caused by legal standards. Legal rules give determinate guidance so that no one need be uncertain about what the rule requires of her or what other rule-followers will do.

Rules achieve their superior ability to provide guidance by being blunt instruments, over and under-inclusive relative to the background moral goals they are meant to achieve. Although over the full range of cases to which they apply, rules may produce fewer moral errors than standards, in any given case, following the rule may conflict with doing the right thing. In such a case, what reason does the actor have for following the rule rather than doing the right thing as the actor understands it? If the answer is that the actor does not have any reason to follow the rule rather than to do the right thing, the rule will collapse into a general standard enjoining doing the right thing and become suboptimal. On the other hand, how can it ever be right not to do the right thing?

Sanctions attached to rule-breaking cannot solve this puzzle. First, sanctions provide the wrong kind of reason (prudential), so that they deter only those whose motivation to do the right thing is the weakest. Second, they cannot influence those, like judges, who must apply sanctions, but who are not themselves subject to sanctions if they disobey, or if they disobey in secret.

Many of us believe this problem of the rationality of rule-following is the central problem of law and explains many commonplace dilemmas, such as substance versus procedure, equity versus law, repose versus correctness.

Our panelists will each offer his or her take on the rationality of rule-following. Scott Shapiro will give an overview of the literature and then present his own, novel position, namely, that one does not follow rules *for reasons*. The other panelists will then follow Scott with their own takes on the problem. We intend to leave ample time for questions and comments from the floor.