

THE ROLE OF PUBLIC PERCEPTION IN THE RULE OF LAW

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Editor's note

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I want to thank the Tsinghua China Law Review and congratulate you on your 10th year. That is a fabulous accomplishment and I am very honored to be here and speak at your anniversary symposium today. My topic is the role that public perception plays in the success or failure of the rule of law. The rule of law refers to the authority and influence that law has in society, particularly as a constraint on individual and institutional behavior.¹ The promise of the rule of law, as opposed to the rule of individuals, is that it is the law itself that governs us, not the arbitrary whims or wishes of powerful officials.²

Much of the conversation about the rule of law takes place from this overarching policy level that I just mentioned. We can think of this as a top-down approach to the rule of law: What kinds of laws, legislative authority, and judicial capacity is necessary in order for the government to establish the rule of law? My remarks to some degree will view the rule of law from the opposite direction, from the bottom-up. They focus on what kind of popular understanding and

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¹ Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 781 (1989); J. RAWLS, A THEORY OF JUSTICE 235 (1971).

² Radin, *supra* note 1, at 781.

response to law are necessary in order for a society to successfully implement rule of law.

The traditional, and formalist, view of the rule of law conceives that in order for law to exist and function successfully in a society the law must possess or be given certain qualities.³ The qualities necessary are debated, but at a minimum they usually include that the law be prospective, that it be general, that the law be publicly declared such that those who are subject to it are on notice, and that the law be equally or consistency applied. There are variations on this list that add additional requirements, or perhaps specificity, including attributes such as clarity, non-contradictoriness, conformability, certainty, and others.⁴ Some propose substantive construction of the rule of law, arguing that the rule of law should have content requirements, such as individual rights or fairness.⁵ For my purposes, I am just focusing on the formal requirements of the rule of law. As Professor Margaret Radin has pointed out, we can roughly boil down the formal requirements identified here into just two: there must be rules (generality), and those rules must be capable of being followed.⁶

I started my talk by explaining that I am going to discuss how popular understanding of law implicates rule of law principles, and it does so in two significant regards. First is a direct tie to Radin's second prong: if the public is not aware of the law, or if the public understands the law differently from what it actually is, then the rules are not capable of being followed. In this regard, the traditional conception of the rule of law that we have been discussing, and the Wittgensteinian reinterpretation of a social practice conception of rules, share the insight that rule of law can only exist when there is community understanding of the rule in practice.⁷ If the public does not understand the law correctly, the rules are not really capable of being followed.

The second connection between popular perceptions of law and the rule of law is that even if there are rules, and even if people know

³ *Id.* at 786.

⁴ LON FULLER, *THE MORALITY OF LAW* 33–38 (rev. ed. 1969); *see* Radin, *supra* note 1, at 784.

⁵ Radin, *supra* note 1, at 786.

⁶ *Id.* at 785.

⁷ *Id.* at 788.

and can follow the rules, people must still be motivated to follow the rules.⁸ We can think of this as corollary to Radin's first prong. The rule of law will be hindered when there is a disconnect between the law on the one hand, and the public consensus or understanding on the other hand. Without public understanding of the law, the law can still operate as a check against individual, official abuse of power, but the rule of law will suffer failures in other regards: it will lack perceived legitimacy and functionality.⁹

Let me start with legitimacy. Widespread disagreement with the substance of a law undermines its perceived legitimacy.¹⁰ Where laws are not perceived as legitimate, they are less likely to affect citizen behavior and less likely to achieve their desired goals.

There are also implications for functionality. Rules can only successfully operate as rules if they motivate certain behavior, such as by sanction, concern about sanction, or opportunity for reward.¹¹ If people do not understand the rules, or are not motivated to follow them, then the law in many cases cannot achieve its desired ends—whether that be to conform conduct, promote economic development, or some other goal.

These concerns about public understanding of law in relation to rule of law legitimacy and functionality exist in many areas¹²—tax evasion and bribery being two clear examples. If people do not perceive tax laws as legitimate, there will be greater tax evasion; if people are not aware of bribery laws, there will be greater bribery. These legitimacy and functionality concerns are also very significant in my area of specialty: intellectual property law.

⁸ *Id.* at 787.

⁹ Robert MacCoun et al., *Do Citizens Know Whether Their State Has Decriminalized Marijuana? Assessing the Perceptual Component of Deterrence Theory*, 5 *REV. L. & ECON.* 347 (2009); Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 *ANN. REV. PSYCHOL.* 375, 380-82 (2006); Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 *STAN. L. REV.* 623, 628 (1986); Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 *HARV. L. REV.* 1787, 1790 (2005).

¹⁰ Tyler, *supra* note 9, at 380-82; John M. Darley et al., *The Ex Ante Function of the Criminal Law*, 35 *L. & Soc'y Rev.* 165, 183 (2001); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 45-46, 64 (2006).

¹¹ *E.g.*, MacCoun et al., *supra* note 9, at 367-68; TYLER, *supra* note 10.

¹² MacCoun et al., *supra* note 9, at 367-68; TYLER, *supra* note 10; *see also* Gregory N. Mandel, *The Public Perception of Intellectual Property*, 66 *FLA. L. REV.* 261, 274-75 (2014).

For those of you who are not intellectual property students or scholars, most policy-makers and scholars agree that intellectual property laws are designed in order to provide incentives for people and firms to create, commercialize, and distribute a greater amount of more creative works and innovative inventions. These objectives are very clear in patent and copyright law.¹³ This perception is widely shared across jurisdictions, from the United States and Europe to China and Japan.¹⁴

We could imagine other kinds of intellectual property systems, such as a system that is based on protecting creator's natural rights in their inventions or creations.¹⁵ Alternatively, intellectual property law also could be based on a theory of protecting people's expressive rights.¹⁶ The dominant strain, however, in both China and the United States is that intellectual property law exists to achieve utilitarian objectives.¹⁷

¹³ U.S. Const. art. I, § 8, cl. 8 (granting Congress the power "To promote the Progress of Science and useful Arts" by enacting copyright and patent laws); *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289, 1305 (2012) ("[T]he promise of exclusive rights provides monetary incentives that lead to creation, invention, and discovery."); Mark A. Lemley, *Faith-Based Intellectual Property*, 62 UCLA L. REV. 1328, 1328 (2015) ("The traditional justification for intellectual property (IP) rights has been utilitarian."); Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1746-51 (2012) ("According to the dominant American theory of intellectual property, copyright and patent laws are premised on providing creators with ... incentive[s] to create artistic, scientific, and technological works"); Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1597-99 (2003) ("[C]ourts and commentators widely agree that the basic purpose of patent law is utilitarian: We grant patents in order to encourage invention."); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 4 (2003) ("Today it is acknowledged that analysis and evaluation of intellectual property law are appropriately conducted within an economic framework that seeks to align that law with the dictates of economic efficiency.").

¹⁴ Brian J. Safran, *A Critical Look at Western Perceptions of China's Intellectual Property System*, 3 U. PUERTO RICO BUS. L.J. 135, 136 (2012); Fromer, *supra* note 13, at 1750-51; John P. Conley & Christopher S. Yoo, *Nonrivalry and Price Discrimination in Copyright Economics*, 157 U. PA. L. REV. 1801, 1802 (2009); Burk & Lemley, *supra* note 13, at 1597-99.

¹⁵ Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1540 (1993); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 296-330 (1988).

¹⁶ Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982); Gordon, *supra* note 15, at 1535-36; Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 330-65 (1988).

¹⁷ See Fromer, *supra* note 13, at 1746-51 ("According to the dominant American theory of intellectual property, copyright and patent laws are premised on providing creators with . . . incentive[s] to create artistic, scientific, and technological works . . ."); Burk & Lemley, *supra* note 13, at 1597-99 ("To a greater extent than any other area of intellectual property, courts and commentators widely agree that the basic purpose of patent law is utilitarian: We grant patents in order to encourage invention." (footnotes omitted)); Brian J. Safran, *supra* note 14, at 136.

This incentive function of intellectual property law cannot work properly if people do not know the law or are not motivated to follow it. We can think about this with respect to intellectual property users, creators, and policy-makers.

I will start with intellectual property users, because there is a very obvious point to make here. Individuals are more likely to infringe if they do not understand intellectual property rights or disagree with them.¹⁸ Further, given the rise in technological capabilities that make intellectual property infringement easier in many circumstances, without widespread voluntary compliance, intellectual property enforcement is much more expensive. Lack of understanding and respect for intellectual property law is also a problem with respect to certain potential intellectual property creators. Individual inventors, for example, and those acting in less legally sophisticated environments, may not engage in as much creative or innovative activity if they do not understand their opportunity for reward.¹⁹ Finally, most policy-makers do not have intellectual property backgrounds, and in many cases their level of intellectual property understanding will be similar to that of the general public. In this context, it is important to understand public perceptions in order to understand the conceptions that policy-makers may bring to policy development.

Popular understanding of intellectual property law is thus a necessary part of the success of the intellectual property system—it is necessary in order for an intellectual property system to satisfy rule of law principles. But, we all know that worldwide there appears to be a significant disconnect between the intellectual property law on the books and people following of the law.²⁰ Understanding why this is the case is critical to establishing the rule of law in intellectual

¹⁸ Radin, *supra* note 1, at 785 (“The rules must be understandable by those who are expected to obey them.”); Gregory N. Mandel et al., *Intellectual Property Law’s Plagiarism Fallacy*, 2015 B.Y.U. L. REV. 915 (2015).

¹⁹ Mandel, *supra* note 12, at 262; Mark D. Janis & Timothy R. Holbrook, *Patent Law’s Audience*, 97 MINN. L. REV. 72, 84 (2012) (rejecting the notion that those who operate under the patent system are all sophisticated concerning the content of patent law); Christopher A. Cotropia & James Gibson, *The Upside of Intellectual Property’s Downside*, 57 UCLA L. REV. 921, 925 (2010) (illustrating this point by considering how production would work in the absence of intellectual property rights).

²⁰ Gregory N. Mandel, *What Is IP For? Experiments in Lay and Expert Perceptions*, 90 ST. JOHN’S L. REV. 659, 667-69 (2016).

property. It also serves as a valuable example for other fields of law—from criminal law to tax.

What I am going to do in the rest of my talk is to take a little bit of time to explore popular understanding of intellectual property law by discussing a number of studies that I have conducted on this subject. I collaborated in much of this work with University of Washington Psychology Professor Kristina Olson and then-graduate student Annie Fast.

First, we explored U.S. adult opinions. We began by testing attitudes towards copying creative work product. No mention was made of intellectual property, this study just focused on copying. Respondents felt that copying other people's creative work is bad, but we were more interested in why: 78% of respondents identified a moral or ethical basis; only 6% mentioned any legal basis.²¹ The explanations for why copying creative work is bad often made references to theft, but not theft from an intellectual property infringement perspective. Rather, copying was viewed as theft because it is perceived as taking credit for another person's work—stealing the credit that someone else is due.²²

We then turned from attitudes about copying in general to attitudes about intellectual property law, and we explored popular understandings of the basis for intellectual property law. We tested the incentive basis that policy-makers and experts adopt, as well as potential bases that are sometimes referenced in the literature involving natural rights and expressive rights. We also, based on our copying results, included preventing plagiarism as a potential basis for intellectual property law.

Table 1 Perceived basis for intellectual property rights²³

Top ranked basis	N	Percent
Plagiarism	43	37.1
Incentives	30	25.9
Natural Rights	30	25.9
Expressive	13	11.2

²¹ Mandel et al., *supra* note 18.

²² *Id.* at 923–24.

²³ *Id.* at 931.

We found that American adults commonly perceive intellectual property law as designed to prevent plagiarism.²⁴ No policymaker or scholar had ever propounded an anti-plagiarism theory of intellectual property law, but this is how it is perceived by the American public.

We checked these findings by testing many different scenarios involving intellectual property infringement in different fields—from books and music to medicine and semiconductors—and confirmed our results: Americans generally believe that copying of creative work product should be permitted so long as the copier provides attribution. We also found that Americans tend to believe that intellectual property rights are too strong. We dubbed this result the “plagiarism fallacy”—U.S. adults tend to believe that IP law is designed to prevent plagiarism, contrary to its generally identified incentive purpose.²⁵

Table 2 Participant rankings of potential reasons for IP law²⁶

	Ranked 1 st	Ranked 2 nd	Ranked 3 rd	Ranked 4 th
Plagiarism	39%	24%	18%	19%
Incentives	24%	32%	22%	21%
Natural Rights	21%	25%	30%	24%
Expressive Rights	16%	19%	30%	36%

Why does the plagiarism fallacy matter for the rule of law? Prior to our work, analysts struggled, and proposed many theories, to explain the widespread public disregard for intellectual property rights, the rampant illegal downloading, and the common knock-off behavior that we see in the intellectual property space. Our findings shed new light on the common perception that the public tends to be

²⁴ *Id.* at 971.

²⁵ *Id.* at 971. Further studies found that people do not tend to significantly change their views on intellectual property even when presented with greater information about its purpose, history, and accomplishments. Anne Fast, Kristina Olson, & Gregory Mandel, *Experimental Investigations on the Basis for Intellectual Property Rights*, 40 *LAW & HUM. BEHAV.* 458 (2016). Contrary to the public at large, intellectual property attorneys do tend to believe in the incentive theory of intellectual property law. Maggie Wittlin, Lisa Ouellette, & Gregory Mandel, *What Causes Polarization on IP Policy?*, 52 *U.C. Davis L. Rev.* (forthcoming).

²⁶ Anne Fast, Kristina Olson, & Gregory Mandel, *Intuitive Intellectual Property Law: A Nationally-Representative Test of the Plagiarism Fallacy*, *PLOS ONE* (2017), at 7.

ethically dismissive or indifferent towards intellectual property rights. Rather, our research indicates that experts have failed to comprehend how the public actually conceives of intellectual property law. These results were confirmed in a nationally representative sample of U.S. adults.²⁷

It is not that people are simply dismissive or indifferent to intellectual property law. Rather, the public does not understand it. People care about intellectual property rights as they conceive of them—as protection against misattribution—but people care much less about intellectual property rights as policy-makers intend them and as the law is designed. This misperception limits the legitimacy and function of intellectual property law. Understanding the misperception is necessary if we hope to better educate the public about the law, and if we want to design an intellectual property system that can function successfully in the real world to achieve its desired ends.²⁸

All of the studies I have just discussed concerned American adults. The second set of studies I'll cover are cross-cultural, comparing American and Chinese perceptions of intellectual property law and rights.

We chose the United States and China for a couple of reasons. First, for decades, the United States and some other Western nations have contended that there is significant disregard for intellectual property rights in China. China has enacted a series of stronger intellectual property laws during this period. There has been a variety of pushback and actions on all sides. It is worth noting that we conducted this study before the current trade war taking place between the United States and China, a substantial basis for which is intellectual property rights.²⁹ Second, the United States and China are now likely the two greatest producers of intellectual property in

²⁷ *Id.*

²⁸ Mandel et al., *supra* note 18, at 938.

²⁹ Bryce Baschuk, *U.S. Takes Aim at China in WTO, Escalating Stakes of Trade War* (Oct. 19, 2018), https://news.bloomberglaw.com/ip-law/us-takes-aim-at-china-in-wto-escalating-stakes-of-trade-war?usertype=External&bwid=00000166-8c0e-d347-ad77-8fdee8250000&qid=5570396&cti=LS3&uc%20=21269&et=CURATED_HIGHLIGHTS&emc=ipnw_hlt%3A1&context=email&email=00000166-8d8dc1-d8dc-a7f7-bdcdb8e0001&access-ticket=eyJjdHh0IjoiSVBOVYsImkljoiMDAwMDAxNjYtOGMwZS1kMzQ3LWFkNzctOGZkZWU4MjUwMDAwIiwic2lnIjoiRGVWNEc0bUJQVWdvT2JEdWtWRFJZazUwb0JrPSIsInRpbWUiOiIxNTQwMTk5MTY5IiwidXVpZCI6Ik9Vd0c3V2g0eVVuZTlwOWgxNHdiT0E9PUhtbDdXN0xBa0loaU1WZi9uTmhXbUE9PSIsInYiOiIxIn0%3D.

the world, certainly by some measures. For example, the United States and China rank first and second in the world in patent issuances, and the United States is first in trademark registration, with China passing Germany sometime during 2018 to become second.³⁰

We recruited American college students at a large American university and Chinese college students at a large Chinese university to take part in a series of survey experiments designed to test attitudes towards intellectual property—both patent and copyright—as well as attitudes towards personal property and real property rights. The American study materials were written in English. The materials were translated into Mandarin by native Mandarin speakers, and then back-translated to English to ensure accuracy.

The participants were queried using different vignettes testing a variety of types of property (patent, copyright, personal, and real) and a variety of types of taking of property (a private party taking for a private purpose, a private party taking for public purpose, and a public entity taking for public purpose). For example, the patent scenario involved using lab equipment to analyze and copy a vaccine and manufacture copies of it; the real property (i.e. land) scenario concerned the taking of property by what we would call eminent domain. A second real property scenario involved simply trespass on land.

Given our time constraints, I will cover just a few of our findings that that are pertinent to our discussion today. First, perhaps not too surprisingly, we found that Americans do tend to prefer stronger property rights than Chinese. Chinese participants' permissibility ratings—that is, whether they would allow the taking of property in a given circumstance—averaged higher than Americans for each type of property and for each type of transfer that we investigated.

³⁰ See, e.g., *Who Filed the Most PCT Patent Applications in 2017?*, WORLD INTELLECTUAL PROP. ORG., http://www.wipo.int/export/sites/www/ipstats/en/docs/infographic_pct_2017.pdf (last visited Dec. 8, 2018) (identifying the United States and China as first and second, respectively, in Patent Cooperation Treaty application filings by country in 2017); *Who Filed the Most Madrid Trademark Applications in 2017?*, WORLD INTELLECTUAL PROP. ORG., http://www.wipo.int/export/sites/www/ipstats/en/docs/infographic_madrid_2017.pdf (last visited Dec. 8, 2018) (identifying the United States, Germany, and China as first through third, respectively, in Madrid Agreement trademark application filings by country in 2017, but growing at rates that indicate China may now have passed Germany).

More surprisingly, however, this difference was highly context dependent. In some areas there was a widespread difference between Americans and Chinese (intellectual property rights taken for private gain), whereas in others they were very similar (taking of either tangible property or intellectual property for social benefit). Americans do prefer stronger property rights, but only in certain contexts. Also unexpectedly, Chinese responses were substantially more consistent than Americans across the different types of property and different contexts that we explored. As one indicator of this variation, average Chinese responses across the twelve property scenarios we ran varied by about 50%, while American responses varied ten-fold.

We also found that there is substantial conflict between participant responses and the law. Each of the scenarios we tested involved illegal copying or taking property, yet for many of the scenarios nearly 50% of respondents would permit the copying. Further, the distinctions that Americans do draw among intellectual property and tangible property rights are largely inconsistent with actual property law in the United States.

Where does this leave us with respect to intellectual property law and the rule of law? There is clearly a significant disconnect between public perceptions and actual intellectual property law. As I explained, this produces substantial legitimacy challenges for intellectual property law and limits its ability to function as designed.

Based on our findings, it is also worth revisiting some common beliefs around U.S. versus Chinese attitudes towards intellectual property rights. For decades the common perception in the West has been that Chinese do not respect intellectual property rights sufficiently. This critique is based on a perception that Chinese attitudes towards intellectual property rights are in some way exceptional in relation to the Western perspective, different from what they should be or different from other people's attitudes towards intellectual property rights. Our experiments provide evidence supporting some of the perceptions of difference between American and Chinese attitudes towards intellectual property rights, but they also disprove other commonly held perceptions—for instance, there are greater similarities across cultures than previously perceived.

I will note a couple of other final points in conclusion. Chinese attitudes towards intellectual property tracks Chinese attitudes towards tangible property—both personal and real—relatively closely. It is not the case that Chinese tend to think of intellectual property exceptionally, but that Chinese appear to have a different attitude towards property rights from Americans in general, which may not be surprising given the substantial differences in the societies' histories and culture.

Further, Chinese attitudes towards intellectual property bear a significant resemblance to American attitudes towards intellectual property in certain regards, greater resemblance than many would predict. The Chinese and American responses differed more in the personal and real property scenarios than in the intellectual property scenarios.

Overall, the results indicate that both American and Chinese attitudes towards intellectual property rights are more complex than previously realized. The studies also suggest that perhaps we should be exploring a different exceptionalism question: Why do Americans differentiate their perceptions of intellectual property rights so starkly from other property rights, depending on context? We do not know that answer yet, but we do know that there are significant rule of law challenges for intellectual property law in both the United States and China.

Understanding how the rule of law functions from the bottom up, that is, how it may or may not lead people to change their behavior in response to the law, is a critical and complex question that requires significant understanding of individuals' insight into and relationship to the laws.