When "a Citizen" Becomes Little Mary J. The Abstract-concrete Effects in Legal Reasoning and the Rule of Law

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ABSTRACT
This chapter investigates abstract-concrete effects from the point of view of legal reasoning, especially the Rule of Law commitments. We use the label "abstract-concrete effects" (ACEs) as an umbrella term to denote a class of psychological phenomena, such as the identifiability effect, construal level theory, or abstract-concrete paradox. All of these refer to the general tendency to judge an issue differently depending on the level of abstraction at which it is described in or the amount of potentially irrelevant details provided. Drawing on empirical research, including studies conducted in the legal context, we show how the existence of these effects might impact legal reasoning. Critically, we point out that the tension between the two aspects of the Rule of Law—formal and procedural—is more typical and fundamental than has been acknowledged thus far.

KEYWORDS
rule of law, legal reasoning, abstract-concrete effects, identifiability effect, legal interpretation

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1. *Introduction*

March 14 was a day of celebration. Little Mary J. would receive her extremely expensive cancer treatment. After an emotional court battle, the judge hearing her case ordered the national healthcare provider (NHP) to fund the overseas trip and the next-generation procedure and drugs. In the abstract, her case seemed doomed from the start. As the NHP statute makes clear, decisions on what can be refunded are made by the provider based on a clear-cut algorithm, taking into account the available public resources and the effectiveness of each procedure. In the case of Mary, who suffered from a very rare form of cancer, the decision had to be negative. Yet, as Mary's parents managed to hire a celebrity lawyer, who delivered a stellar speech about justice, little teddy bears, Mary's passion for horse riding, and how poor she was, the judge decided to rule based on high-level principles of equity and protection of human dignity enshrined in the constitution. Who could have denied treatment to this beautiful, unfortunate, yet brave little girl?

During the same week, the same treatment was denied to Bobby, Chris, Danielle, and other similar children in need whose names we do not even know. They were not fortunate enough to be represented by experienced lawyers. Their cases never ended up being about them—the real people with real voices and faces—and remained administrative decisions about the numbers, names of drugs, and specifics of cancer treatment. And, had they not been denied the treatment, the NHP would go bankrupt, rendering treatment for thousands of other patients impossible. If you manage healthcare for the whole nation, you make hard choices, choices in the abstract. In an individual case, each little boy and girl obviously is an exceptional patient.

This hypothetical case[1] illustrates a familiar tension: Many of us, facing a specific individual in need, would agree that society should do everything possible to help such a person. However, when asked a more general question, we might argue that scarce public resources should be allocated efficiently, which means that some people in need must be denied help. Such a seemingly inconsistent set of preferences, depending on the level of abstraction, is not limited to

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[1] Even though this is a hypothetical case, it is representative of a class of actual court rulings across jurisdictions. See, for example, the case law of the Brazilian Superior Court of Justice, as discussed by STRUCHINER & HANNIKAINEN 2016.

any single context. Indeed, over the last couple of decades, social scientists—psychologists, economists, or experimental philosophers—have documented multiple areas in which people change their minds about a given problem when more (or less) irrelevant detail is provided (JENNI & LOEWENSTEIN 1997; SCHELLING 1968; SINNOTT-ARMSTRONG 2008). These abstract-concrete effects (ACEs), as we call them, are present in people's reactions to deeply philosophical questions, such as the issue of determinism and free will (NICHOLS & KNOBE 2007) but also in their everyday actions, such as charitable donations (SMALL et al. 2007).

Recently, many studies have indicated the presence of abstract-concrete effects in the legal domain. This should not come as a surprise. Switching between abstract and concrete perspectives lies at the core of the legal process. Judicial decision-making, the paradigm of the application of law, typically requires the judge to apply an *abstract* rule to resolve a *concrete* dispute. The tension between the two aspects of every case may not seem new, as it has long been recognized that the strict application of a given rule without considering the overall picture may lead to gross injustice. Legal reasoning is defeasible; the presence of given factors may limit the application of a general rule (BROŻEK 2004; BILLI et al. 2021). However, the presence of ACEs would indicate that this process is even more complex than traditionally assumed[2]. It is not limited to situations in which, as traditionally discussed, one has a legally, or at least morally relevant reason to not apply the binding rule (which ideally would have been thought of when drafting the rule). In contrast, here we focus on situations in which providing legal decision-makers with legally and morally irrelevant factors, which could make a given problem more concrete, may determine how a given case is decided. An analogous argument applies to cases in which there is a collision of two different legal principles, and one ought to perform a balancing procedure (ALEXY 1985). While we cannot solve a case of collision between two constitutional values fully in the abstract, it is puzzling that the addition of irrelevant details, such as the name of the plaintiff, may influence how the collision is resolved.

The widespread presence of ACEs in legal reasoning poses challenges to the ideal of the Rule of Law[3]. Indeed, the Rule of Law requires the presence of general and prospective norms, and officials base their decisions on the law, not their individual opinions (WALDRON 2008). In addition, it requires that every individual should have a right to argue their case in a fair procedure (TASHIMA 2008). In a legal system committed to the Rule of Law, both these aspects—formal and procedural—are important. Scholars have pointed out that *sometimes* these two aspects are in tension (WALDRON 2020). However, given the empirical evidence generated by psychology and cognitive sciences, we argue that this tension is likely much more commonplace than usually assumed.

In this chapter, we summarize existing research on a class of psychological phenomena that we jointly label ACEs (Section 2), give an overview of the Rule of Law requirements (Section 3), and analyze why the tension between the abstract and the concrete is problematic from the point of view of the Rule of Law (Section 4). We conclude with some ideas for potential policy intervenitons (Section 5) and further research (Section 6).

2. *Abstract-concrete effects: What are they?*

Abstract-concrete effects is an umbrella term we introduce to refer to a family of psychological effects. Although those effects have been studied within different sub-disciplines of social science, oftentimes without much cross-referencing, all of them, on the most basic level, are

[2] For the discussion on the tension between general rules in legislation and the justice in a given case, see for example SCHNEIDER 1998.

[3] We capitalize "the Rule of Law" after WALDRON 2008, in order to distinguish it from a rule of law (i.e., a particular rule in a legal system, such as the prohibition to drink and drive).

instances of the impact that the level of abstraction or concreteness has on human judgment. As these effects have been studied within different frameworks, and slightly different explanations and normative assessments have been proposed for each of them, we will first introduce them separately in this section.

Perhaps the most famous and striking instance of ACEs is the *identifiability effect*, which was first discussed by SCHELLING 1968. He pointed out the contrast between the willingness to help financially in an emotionally engaging case of a girl dying of cancer and the reluctance to be taxed to support the budget of a local hospital, even though the latter action could likely save a larger number of lives. Therefore, the effect is mostly known as the "identified victim effect," as it was usually analyzed in the context of helping victims in need, but it also extends to other contexts, such as blaming and punishing identifiable individuals (KOGUT 2011a; LOEWENSTEIN et al. 2005; SMALL & LOEWENSTEIN 2005). The more general term, identifiability effect, has the advantage of covering the effect of a setting in which one has not yet been identified, but it will be possible to identify in the future (LEWINSOHN-ZAMIR et al. 2016; SMALL & LOEWENSTEIN 2003).

The essence of this phenomenon relates to people's shifting preferences, depending on whether they are provided with the details that allow them to pinpoint a particular individual affected by their choices. Identified groups may not trigger similar reactions (see KOGUT & RITOV 2005b; LEE & FEELEY 2016), which constitutes another phenomenon: the singularity effect (KOGUT & RITOV 2005b; MOCHE et al. 2022)., also known as individuation (STRUCHINER et al. 2020). However, the effect may persist if a group is perceived as a unit (SMITH et al. 2013). A variety of information can be treated as allowing the identification of an individual, including a name, photograph, or even age or ID number (FRIEDRICH & MCGUIRE 2010; KOGUT & RITOV 2005a, 2005b; SMALL et al. 2007; SMALL & LOEWENSTEIN 2003). The identifiability effect seems to affect choices even if people are asked to attribute responsibility to a single individual identified only by a number rather than to an unspecified individual (SMALL & LOEWENSTEIN 2005).

A number of theories have been proposed to explain the identifiability effect. One explanation emphasizes the affective aspect of the process. Emotional reactions, such as compassion or sympathy or feeling the distress of the other, are directed *via* empathy toward the suffering fellow human (see also SABATO & KOGUT 2021). Interestingly, the effect may be moderated by the perception of the individual as a member of one's own group or an outsider (KOGUT 2011a, KOGUT 2011b; KOGUT & RITOV 2007). Other approaches stress the potential cognitive aspect: people may perceive their actions as more effective or having a greater impact if they are addressed at an identified individual (DUNCAN 2004) or have a greater responsibility toward such an individual (BASIL et al. 2006). Some models (CHAIKEN 2003) argue that both affective and cognitive factors may be at play due to different kinds of information processing about specific and abstract targets[4].

When it comes to real-life studies, the strength of the effect is disputed (LESNER & RASMUSSEN 2014). A recent replication study failed to replicate the effect of identification in the context of singular victims (MAJUMDER et al. 2022). Meta-analytic studies have confirmed the existence of the effect (BUTTS et al. 2019; see also LEE & FEELEY 2016), but estimate its overall magnitude as modest (LEE & FEELEY 2016), limiting the strength of the effect mostly to the radiant examples (e.g., a single victim of misfortune to which they did not contribute or that happened independently of them).

Other studies have explicitly analyzed the role of the identifiability effect in legal contexts. LEWINSOHN-ZAMIR et al. 2016, for example, presented a sample of law students with five tort law scenarios and two cases of violations punishable by fine and asked participants to take the

[4] See also ERLANDSSON et al. 2021; RAHAL & FIEDLER 2022 for a current discussion of the cognitive and affective background of prosocial behavior.

role of a policy-maker (a legislator) or decision-maker (the adjudicator). The cases in the latter condition included the names of the tortfeasor and the victim (in civil cases) or the perpetrator (in public law cases). In both types of cases, identifiability influenced the participants' decisions. BARAK-CORREN & LEWINSOHN-ZAMIR 2019 examined the role of identifiability in sexual harassment cases. Identified offenders were treated better than anonymous ones, and the reverse held for victims. A number of studies have also analyzed how legal outcomes might be determined by legally irrelevant factors, which could increase or decrease the judge's sympathy for a party (SPAMANN & KLÖHN 2016; WISTRICH et al. 2014).

Another line of research addressed identifiability strictly in court settings by changing the degree of case detail provided to the participants. In studies by STRUCHINER et al. 2020, one of the conditions identified a concrete individual (name and location) as a plaintiff as opposed to the other condition, which was also framed as a concrete case but did not include identifying information. As it turned out, identifying information made people evaluate judicial intervention more favorably.

The second example of ACEs can be found in the literature on the *construal-level theory of psychological distance* (EYAL & LIBERMAN 2012; TROPE & LIBERMAN 1996), which posits that, while reasoning about objects that transcend their direct experience and immediate situation, people form abstract mental construals of those objects. What is central to this process is *psychological distance*, that is, how far away from a given person the object *feels*, in terms of space, time, or the level of abstraction. Although the psychological distance corresponds to many such dimensions, the construal level theory (CLT) assumes that this subjective experience that something is close or far away will result in similar patterns of reasoning independently of which actual dimension is present in a given context.

Although the construal level theory has been applied in many areas of psychology (HO et al. 2015; LIBERMAN et al. 2007), moral reasoning remains one of the most visible examples of its application. In general, CLT predicts that when facing a moral dilemma, people are more likely to choose options that lead to overall better outcomes (even when it means violating some general principles or moral taboos) *when the object feels close*, but they are more likely to choose options consistent with general moral principles *when the object feels distant* (KÖRNER & VOLK 2014; PATIL et al. 2014). For example, BOSTYN et al. 2018 analyzed how the construal level can affect intuitive choices in the so-called trolley problem (in which the actor can choose to cause the death of one innocent person in order to save the lives of a larger group of people). The researchers asked participants to choose whether to kill one mouse by applying an electric shock to save the lives of five mice. However, one group of participants was presented with this scenario as a pure hypothetical, while the other group was made to believe that their decision would be immediately implemented to a group of mice they could see through a window. It turned out that people in the "real-life" condition (in which, arguably, the objects of their choice felt psychologically closer) were more likely to choose to kill the innocent mouse.

Legal decision-making appears to be an obvious field in which CLT can be expected to work similarly as in moral reasoning. After all, a judge typically makes decisions whose "objects," that is, parties to the proceedings, are psychologically close across many dimensions: They are concrete and located in the same place in time, and they are often also present in the same room. In contrast, the lawmaker's decisions will typically affect psychologically distant objects, as new rules normally apply only to future, hypothetical cases. A study by CAVIOLA et al. 2021 provided evidence that CLT correctly predicts a divergence in responses to the analytically same legal problem, depending on whether the participants are asked to decide on an existing one-shot problem or rather establish a rule for future cases. The authors asked a sample of lay participants to decide whether to prioritize saving the life of a socially useful individual over saving a socially less useful one in an emergency situation. The participants were systematically less inclined to give such priority when deciding on a rule rather than deciding on a specific, one-shot problem. Interestingly, this *generality effect* also

persisted in intermediate cases: When participants were asked to decide on a specific case but also to assume that their decision would form a precedent applicable to future cases, they would provide responses consistent with the abstract construal (i.e., refusing to prioritize).

The third example of ACEs, the *abstract-concrete paradox* (NAHMIAS et al. 2007; NICHOLS & KNOBE 2007; SINNOTT-ARMSTRONG 2008), refers to the situation in which the description of a problem in more abstract or more concrete terms results in people's diverging philosophical intuitions. The paradox was studied with respect to intuitions concerning free will, moral responsibility, knowledge, and rule-following. The most notable finding of the initial set of studies was that people tend to attribute moral responsibility to agents in a deterministic world when confronted with concrete cases of wrongdoing, while they find moral responsibility incompatible with determinism if asked the question in abstract terms. The concept of concreteness was operationalized by experimental philosophers in two major ways in some cases: as a reference to specific agents (SINNOTT-ARMSTRONG 2008) or as a detailed description of an action that was previously left undescribed (MANDELBAUM & RIPLEY 2012).

There are at least two kinds of theories that account for the persistence of the abstract-concrete paradox: affective and cognitive. According to the theory developed by NICHOLS & KNOBE 2007, the paradox is an effect of an affective performance error: A violation of moral norms in concrete cases creates affective responses, which in turn distort our reliance on the tacit theory of making judgments concerning responsibility, which tends not to elicit specific affective responses. This, in turn, explains why the attribution of responsibility is higher in concrete cases than in abstract ones. On the other hand, according to the *separate capacities hypothesis* developed by SINNOTT-ARMSTRONG 2008, the paradox results from the use of two different memory systems while judging different cases. This theory claims that in the case of the concrete level, we encode and represent it in episodic memory, which supports the attribution of responsibility. In contrast, in abstract cases, we encode them in semantic memory, which tends to produce decreased responsibility attributions (SINNOTT-ARMSTRONG 2008).

A notable study on judicial reasoning inspired by research on ACP was conducted by STRUCHINER et al. 2020. The authors demonstrated that legal reasoning can be affected by this phenomenon in at least two contexts. In the context of the application of vague legal principles, the authors hypothesized that when such a principle has at least two conflicting interpretations (e.g., the libertarian or paternalistic interpretation of the principle of the protection of human dignity), different interpretations might be associated with different levels of abstraction in which a given problem is presented. In the context of the *application of clear-cut legal rules*, on the other hand, Struchiner and colleagues hypothesized that people are more likely to apply the literal meaning of a rule in abstract but to decide against such a literal meaning in a concrete case. Struchiner and colleagues obtained substantial support for their hypotheses with both lay and professional (i.e., Brazilian judges) samples.

Furthermore, the participants in this study were asked to complete parts of the Interpersonal Reactivity Index questionnaire, thus capturing individual differences in cognitive (*perspective taking*) and affective (*empathic concern*) empathy. Echoing previous findings, affective but not cognitive empathy predicted the subjects' responses. In particular, highly empathic individuals were most susceptible to the manipulation of abstraction versus concreteness. While the original study was conducted using a between-subjects design (i.e., each participant decided cases on just one level of abstraction), in a follow-up study, Struchiner and colleagues presented professional judges with both abstract and concrete versions in a counterbalanced order (abstract-first or concrete-first), asking them to decide on each version. Strikingly, in such a setting, judges strived for consistency, with the effect present in reaction to the first version they saw but disappearing when they saw the second version.

One potential explanation of the pattern of results observed by Struchiner and colleagues is the fact that both lay and professional participants in their studies were recruited in Brazil, a country

whose legal culture is known for its particularism (i.e., the tendency to look for a just solution to a given case even at the expense of not following the relevant abstract rules). To address this potential challenge, BYSTRANOWSKI et al. (2022) replicated the effect on the population of judges from a country following the formalist approach to adjudication (Poland), who—as it can be hypothesized (SCHAUER 2006; see also SHERWIN 2006)—could have been expected to be consistent about the interpretation of legal rules, thus providing some evidence that the presence of ACEs in legal reasoning is not contingent on the peculiarities of a given legal system.

Just as the three analyzed strands of literature differ in terms of explanations provided for the postulated effect, so different are the normative perspectives from which they analyze whether the effect can be considered a bias and, if so, which level of reasoning, abstract or concrete, should be considered superior and preferable. Perhaps the most intense normative discussion has emerged around the literature on the identifiability effect. Most scholars contributing to this literature tended to argue that pure identifiability lacks moral significance (HOPE 2001), is irrelevant to a given target decision, and, as it is mostly driven by affective reactions, changing one's moral preferences on its basis is undesirable (GREENE 2008). Furthermore, to the extent that identification makes one focus on individual cases at the expense of maximizing some social good (which, in the public policy context, likely results in a suboptimal allocation of resources), decisions made at the abstract level seem preferable from the consequentialist point of view[5]. However, recently, a number of philosophers have started to argue that decisions affected by the identifiability effect can be defensible on at least some metaethical grounds, such as *ex ante* contractualism (ŻURADZKI 2018).

While the literature on CLT and the abstract-concrete paradox have been less involved in discussions on the relative advantages of reasoning in abstract or in concrete, we can see that at least some authors associate abstract judgment with more effortful and reflexive reasoning, which arguably implies that the resulting judgment is more reliable (SINNOTT-ARMSTRONG et al. 2010).

To recapitulate, in this section, we briefly discussed three examples of ACEs: psychological phenomena which affect people's intuitive judgment depending on the level of abstraction in which a problem is presented. Abstract-concrete effects appear to be present in many social contexts, including moral judgment and, as emerging evidence suggests, in legal decision-making, possibly including decisions made by professional legal officials. While some scholars see the effects as normatively problematic (and, specifically, consider abstract judgment superior in some important respects), the normative debate is still in its infancy. Thus, even if we were to assume that ACEs are pervasive in legal decision-making, the normative assessment of such a state of affairs would require some further theoretical work.

3. *The Rule of Law perspective*

In the previous section, we discussed the results of the empirical studies aimed at addressing the positive question of how people make normative decisions depending on the level of generality and the amount of, seemingly irrelevant, information they have about the persons whom the decision concerns. In this section, we move toward the normative question: How *should* officials make decisions in a system committed to the Rule of Law? As we demonstrate in what follows, even though the prescriptive dimensions of the Rule of Law might seem clear and coherent on paper, their implications for reacting to the widespread ACEs in normative reasoning are not straightforward.

[5] For an overview of the arguments for and against consequentialism in the context of the identifiability effect, see DANIELS 2012.

3.1. *The ideal of the Rule of Law*

The Rule of Law is one of the foundational concepts of liberal democratic legal orders, next to democracy, human rights, and, arguably, social justice and economic freedom (RAZ 1977; WALDRON 2020). It is both an ideal in political philosophy and, in some jurisdictions, a specific black letter doctrine (LENAERTS 2020). Given that the specific contents of such black letter doctrines differ between jurisdictions while remaining in dialogue with the philosophical ideal (SELLERS & TOMASZEWSKI 2010), in this article we refrain from engaging the specifics of the national doctrines and focus on the philosophical accounts.

Theorists of the Rule of Law distinguish its three aspects: (1) formal, (2) procedural, and (3) substantive (WALDRON 2020). The last one is the most contentious. Under some accounts (BINGHAM 2010), for a legal system to comply with the Rule of Law, it must protect basic human rights, that is, feature certain substantive guarantees. Other scholars (RAZ 1977; WALDRON 2020) have remarked that although human rights and substantive justice are clearly important ideals of a good legal system, for the sake of conceptual clarity, they should be distinguished from the Rule of Law in the strict sense. Without taking sides in this debate, for the sake of clarity, in this article, we focus on the formal and procedural aspects of the Rule of Law.

The formal understanding of the Rule of Law has been most famously, according to WALDRON 2008, theorized by Lon FULLER in his *Morality of Law* (1969). In his account, a legal system committed to the Rule of Law should feature norms that are general (addressed to all subjects and not specific persons), prospective (not retroactive), intelligible (understandable to their addressees), consistent (not contradictory), practicable (possible to realize), stable (not changing overnight), and congruent (applied by the officials exactly as they are promulgated). This last requirement that officials do what the law stated in advance has been highlighted by Jeremy Waldron as the central element of the Rule of Law:

> «The Rule of Law is a multi-faceted ideal. Most conceptions of this ideal, however, give central place to a requirement that people in positions of authority should exercise their power within a constraining framework of public norms, rather than on the basis of their own preferences, their own ideology, or their own individual sense of right and wrong (...) the Rule of Law is violated when the norms that are applied by officials do not correspond to the norms that have been made public to the citizens, or when officials act on the basis of their own discretion rather than norms laid down in advance» (WALDRON 2008, 6).

In this sense, the formal aspect of the Rule of Law emphasizes both certain features of legal norms (that they be general, prospective, clear, etc.) and the mode of their application by officials. Such a system allows individuals to plan their lives with full knowledge of what to expect from the state (RAZ 1977). It also, arguably, helps vindicate other ideals, like human rights or democracy, where, in liberal democratic systems, individuals know that their future fate depends on the commonly agreed-upon rules of the game, and not a personal preference of a particular judge or a clerk.

The procedural understanding of the Rule of Law complements the formal dimension by emphasizing that the application of the law by officials should occur with certain guarantees in place. Jeremy Waldron, summarizing the work of TASHIMA 2008, has postulated four procedural guarantees necessary for a system to qualify as compliant with the Rule of Law:

1. A hearing by an impartial and independent tribunal that is required to administer existing legal norms on the basis of the formal presentation of evidence and arguments.
2. A right to representation by counsel at such a hearing.
3. A right to be present, to confront and question witnesses, and to make legal arguments about the bearing of the evidence and the various legal norms relevant to the case.

4. A right to hear reasons from the tribunal when it reaches its decision that are responsive to the evidence and arguments presented before it (WALDRON 2020).

What matters from the point of view of the procedural aspect of the Rule of Law is not merely that the final decision is congruent with the existing law but primarily that all the features necessary (or, at least, increasing the probability) for such an outcome are present as well. Not just the content of the decision, but also the procedure for arriving at it, matters.

However, one can see how these two aspects of the Rule of Law ideal, formal, and procedural, can be in conflict. Waldron pointed this out:

> «For the most part, these two currents of thought sit comfortably together. They complement each other. Clear, general public norms are valueless if they are not properly administered, and fair procedures are no good if the applicable rules keep changing or are ignored altogether. But there are aspects of the procedural side of the Rule of Law that are in some tension with the ideal of formal predictability (...). Instead of the certainty that makes private freedom possible, the procedural aspects of the Rule of Law seem to value opportunities for active engagement in the administration of public affairs» (WALDRON 2008, 8).

Given our discussion of ACEs in the previous section, we postulate that this tension between the formal and procedural aspects of the Rule of Law is much more commonplace than Waldron admits. It is structurally present whenever an official must apply a general norm to a concrete case. Moreover, empirical research suggests that the decision might be *different* depending on how much, seemingly irrelevant, information the official has.

A clear case of the formal and procedural aspects of the Rule of Law being in conflict can be seen when discussing the phenomenon of judicial discretion. According to some scholars (DICEY 1915; HAYEK 2007), judicial discretion is, in principle, incompatible with the formal aspect of the ideal Rule of Law. If a judge "fills the gap" in the set of legal rules they need to apply, even when doing so based on high-level legal principles, they come closer to being a legislator than an adjudicator. A decision based on a rule generated in this way (or inferred depending on one's views) can hardly be deemed "prospective." Other scholars (DAVIS 1969), however, point out that the phenomenon of judicial discretion cannot be, as a matter of fact, and should not be, as a matter of justice, fully eliminated from the legal system. To uphold the Rule of Law, legislators should, instead, properly frame and authorize (WALDRON 2020) judicial discretion when necessary.

3.2. *Data show the tension might be much more common*

As we saw above, overall, legal scholars endorse values associated with both the formal and procedural aspects of the rule of law and see the two aspects as mutually reinforcing, with a fair procedure in which the law is applied being a necessary condition for the abstract formal Rule-of-Law values to be realized in life. If some of these scholars notice room for a conflict between the two aspects, it is primarily because of activist legal officials, who might abuse legal procedures and the scope of judicial discretion to enforce their private values at the expense of formal requirements of the Rule of Law. In other words, such a conflict would be a deviation from the norm, dependent on the (presumably conscious) choices of specific legal officials.

Against this more traditional picture, we postulate that the empirical research on ACEs implies that the tension between the two aspects is more typical and fundamental than has been acknowledged thus far. To the extent that deciding a concrete case might systematically change the way a legal decision-maker understands the relevant legal rule, legal procedure undermines, rather than reinforces, the Rule-of-Law virtues of general rules.

Let us revisit the empirical data most striking in this context. While the established body of research on ACEs aimed at demonstrating that the *moral* preferences of a given actor can shift

depending on the level of abstraction (CAVIOLA 2021), more recent studies in legal decision-making (BYSTRANOWSKI et al. 2022; STRUCHINER et al. 2020) demonstrate that the *interpretation* of existing law (including interpretation by professional judges) is affected by the level of abstraction. In other words, the same (textually) constitutional principle or statutory rule can be interpreted differently in the abstract and when applied to a particular case. Strikingly, STRUCHINER et al. 2020 observed that professional judges, if given an opportunity to interpret and apply the same rule both in abstract and concrete, managed to give consistent responses. This provides evidence that legal officials strive for consistency.

This observation (that legal decision-makers' tendency to interpret law under the influence of ACEs diminishes when they are asked to make choices both in abstract and concrete at the same time) can be seen as evidence that those effects constitute a bias, at least from the point of view of legal officials themselves (HSEE et al. 1999). However, from a normative perspective, more analysis is needed before we decide whether ACEs are indeed unwelcome in the domain of legal decision-making. So far, we have pointed out that their presence in this context amplifies the tension between the formal and procedural aspects of the Rule of Law. Whether, normatively, this tension should be accepted and welcome or resolved and eliminated is a question we address directly in the next section.

4. *The tension is problematic*

After reviewing empirical data providing evidence of the commonality of the assumed tension, one should emphasize why this tension may be problematic for legal scholars and lawmakers. We will do that by reviewing some theoretical insights and putting this issue against the ideal of the Rule of Law.

Having some understanding of a legal rule in the abstract, judges change their interpretations when facing the need to apply the same rule to a specific case. They change their interpretations after realizing that this rule will affect the lives of actual individuals, after familiarizing themselves with the details of the case and after listening to the parties' arguments. Are such changes necessarily something to be frowned upon? Certainly not, at least for some scholars who see the right to a fair trial as the main tenet of the Rule of Law—something that is not of a merely instrumental value (that is, worth practicing to the extent that it is conducive to achieving some more fundamental values, such as the formal Rule-of-Law values) but rather something of intrinsic value (HAREL 2014; HAREL & KAHANA 2010).

From a judge's point of view, if we assume that the purpose of a trial is not only to discover facts relevant to the case but also to hear the arguments of both parties, it appears very much welcome that the judge is open to revising their interpretation of the law in light of the details of the case. In addition, from the perspective of the parties, to the extent that the trial is a realization of their right to be heard, they should be able not only to present relevant evidence but also to argue, and perhaps convince the judge, that their situation and their claims are particular, possibly providing an exception to the abstractly understood rule.

Turning to the ideal of the Rule of Law, one might say that the tension's existence is problematic because it renders the mentioned ideal an empty postulate. To provide the full picture, we should move back to the formal aspects of the Rule of Law presented earlier, relying heavily on Fuller's work (FULLER 1969; WALDRON 2020). Bearing in mind the empirical data from the abovementioned studies on ACEs, those formal aspects (generality, intelligibility, etc.) might be analyzed in action (WALDRON 2016), and we might argue that those formal features might be especially vulnerable to the operation of ACEs, thus creating and strengthening the tension between the Rule of Law and judicial decision-making.

In *The Morality of Law*, Fuller listed possible ways in which features of the law, later interpreted as formal aspects of the Rule of Law, might be affected by bad legislation and a distorted process of

applying the law. Most of the formal features of the Rule of Law could be perceived as rules of creating legal provisions, and as such, one might say that in this interpretation, they will be safe from the operation of ACEs by simply not being applied to the application of the legal rules. However, one might say that if we treat the Rule of Law as an ideal that should be applied to the law in action as well, then suddenly features such as the generality or the prospective character of the legal rules might be threatened by the operation of ACEs. For example, if an interpretation of a rule made by a judge differs between abstract and concrete cases, one might say that the prospective character of this rule is violated. Another example might be one obvious feature of the legal system and one that is directly affected by the incoherent interpretation of the legal rules: congruence. This feature might be negatively affected: «mistaken interpretation, inaccessibility of the law, lack of insight into what is required to maintain the integrity of a legal system, bribery, prejudice, indifference, stupidity, and the drive toward personal power» (FULLER 1969, 81). Putting aside ways that require, obviously, criminal (or malicious) intent, one may ask to what extent ACEs may operate here. By briefly reintroducing the possibility of a different understanding of a given legal rule by the official applying the law, one might conclude that the idea of congruence, by mistaken interpretation or even prejudice, might be in danger.

The formal features of the Rule of Law might thus be affected by ACEs-related cases, effectively creating the situation in which the abovementioned tension should be perceived as problematic.

5. *Can the tension be resolved?*

From our discussion until now, it should be clear that, unlike with some other biases present in legal decision-making, the presence of ACEs, scrutinized from the point of view of the Rule of Law, there is no clear solution to this problem. It is hard to propose "solutions" to the problem—particular means, or concrete interventions—when the goals of the intervention, or even the very need for any intervention are disputed. In some ways, ACEs help to vindicate the procedural aspect of the Rule of Law; in others, they jeopardize its formal aspect. As there is no common understanding of what the ideal is, the proposed interventions could go in opposite directions.

For these reasons, we refrain from offering any "recommendations" on how judges should behave, or what lawmakers should do. We believe that the main function of this chapter is to raise awareness and illuminate, report empirical evidence, and point out normative problems, leaving the prescriptive work to future analyses that would start from stronger normative assumptions. Yet, as specific solutions usually seem more concrete to lawyers than the discussion of a problem in the abstract, in this section, we discuss a thought experiment playing with possible interventions and scrutinize them from the point of view of both the formal and procedural aspects of the Rule of Law. To the extent that ACEs in law result simply from applying general rules to specific cases, it seems that they will stay with us as long as it is human judges that are tasked with interpreting and applying the law. However, as these effects are magnified by some salient situational factors, such as the identification of parties, one could imagine what some potential interventions could look like.

Consider the possibility of holding "anonymous trials." We could imagine a world in which both parties, witnesses, and counsels are behind a veil of anonymity so that the decision-makers do not know their names, cannot see their faces, and potentially even hear their real voices. Moreover, anonymity could include the inability to share more information than is required by the legal norms being applied. Such a limited approach, addressing only some aspects of concretization, would render decision-making slightly more abstract. But would it be of any help from the point of view of the ideal Rule of Law?

Regarding the formal aspect, the answer could be affirmative. As rules are made in the abstract, their application in the abstract helps advance the ideals of predictability and congruence. However, from a procedural point of view, such a suggestion seems problematic. Arguably, the

Rule of Law requires that one's case is about oneself, and that includes the right to have one's face seen, one's voice heard, and being treated as a human being in the fullest possible sense, not just some anonymous number. Yes, a judge might be more lenient when, on top of rationally learning that a defendant has expressed remorse, they see the emotions on one's face and hear the tone of one's voice. However, is this always and necessarily bad? This is a hard call.

Such a simple thought experiment illuminates a more profound claim: from the mere fact that ACEs exist, even when studying them from the point of view of only one normative ideal, the Rule of Law, one cannot infer an obvious prescription regarding the goals of a lawmaker's intervention. Both the legislature and the decision-makers should be aware of the functioning and presence of ACEs. What to do about them, however, is a political choice made by the polity.

6. *Further research*

Thus far, we have discussed only the role that ACEs play in the tension between different conceptualizations of the Rule of Law ideal. The existence of these phenomena and their impact on legal decision-making open a number of issues to be explored, including general normative considerations in political and legal philosophy, empirical work, and some more direct implications for constitutional law, such as the role of judicial review. As these issues are complex, we will limit ourselves to highlighting them and pointing out further directions of inquiry.

Our considerations concern only the strain between the formal and procedural requirements of the Rule of Law. Further research should consider how the different Fullerian requirements should be structured in the legal systems, possibly balancing the use of concrete and abstract modes of decision-making and making the rationale of introducing these more explicit. Moreover, the substantive aspect of the Rule of Law may be affected by the tension as well.

Normative research should be supplemented by empirical work that aims to explore whether different models of decision-making already present in the legal system are actually prone to ACEs and, if so, whether the shifts in preferences, depending on the amount of details, are problematic from the viewpoint of cohesiveness of legally relevant decisions. For example, some aspects of the thought experiment presented above are already present in different jurisdictions: one may ask to what extent does the written or oral form of different proceedings tend to affect decisions made in practice?

As for the direct practical consequences for the implementation of the ideal of the Rule of Law into actual constitutional orders with ACEs in mind, the issue of judicial review stands out. Let us discuss this briefly. On one hand, the ability of the judiciary to strike down legislation and protect individual rights may be seen as a guarantee of political legitimacy and enforcing the Rule of Law principles (BERTOMEU 2011; FALLON JR. 2019; ZURN 2007), but on the other hand is challenged as *prima facie* undemocratic (see, e.g., TUSHNET 1999; TUSHNET 2020; WALDRON 2020).

From a theoretical perspective, the issue with arguments for and against judicial review as part of the Rule of Law and ACEs will be analogous to the problem of tension, as discussed above. However, an analysis of the influence of ACEs on legal reasoning seems crucial in implementing a particular model of judicial review. Different jurisdictions tend to employ very diverse approaches to controlling legislative and executive acts through the lens of constitutional provisions. Foremostly, we can distinguish between strong and weak forms of judicial review (WALDRON 2020). As described by Waldron, the former type refers to the systems in which courts, apart from controlling administrative and executive decisions, hold the power to either strike down provisions that they have found to be violating constitutional rights or do not bypass the application of the clearly relevant statute or modify the scope of its application with prospective binding power. A weak judicial review refers only to the courts' signaling power, which does not allow them to bypass the application of a potentially rights-violating rule. These forms can be described as prototype

categories of the strength of judicial control, while actual legal systems adopt a wide spectrum of these. The other perspective on judicial review is institutional, where we can distinguish between two main models: American and Kelsenian (FEREJOHN 2002). The main difference between the two refers to yielding the power to review to ordinary courts over their day-to-day adjudication in the American model, and creating a specialized body—constitutional court—what can assess the validity apart from a particular case in the European model (RAMOS 2007). The differentiation between various jurisdictions goes further when it comes to procedural and substantive relations between legislatures, ordinary courts, and constitutional courts (RAMOS 2007).

Three aspects of judicial review seem to be particularly relevant from the cognitive viewpoint of ACEs: the type of court that is allowed to review the legislation[6]; the mode of constitutional review (if it is performed in abstract, without a reference to a particular case, or requires a concrete case in which one's rights were infringed); and the outcome of the ruling (whether it establishes a precedent or only confirms the violation of rights in a given case).

Judicial review is not the only area of the legal system that seems particularly susceptible to ACEs. Apart from their impact on the judiciary and the level of application of law, the tension between concrete and abstract reasoning also exerts pressure on legislative bodies. Two recent studies (FANARRAGA 2020; SOCIA 2022) shed light on the practice of so-called "apostrophe laws," that is, naming statutes after specific cases (for example, using a victim's name). One might argue that these kinds of laws make use of identifiability and concrete reasoning in order to include some more radical solutions, which would be difficult to implement only when abstract reasoning is at play. Further research should carefully examine the potential role of ACEs in the political process accompanying such statutes.

7. *Conclusions*

In this chapter, we presented a cluster of cognitive phenomena that result in people judging a problem differently, depending on the level of abstraction described or the amount of potentially irrelevant details provided. The mechanisms behind these ACEs are complex, seem to include a number of cognitive and affective factors, and cannot be reduced simply to empathetic or negative reactions toward a given individual.

As we argue, research on ACEs in general, and on ACEs in legal contexts in particular, should not be overlooked by legal philosophers. While the discussion on when strict application of general rules should give way to recognizing the particularities of a specific case spans millennia, here we argue that the conflict between abstract and concrete legal decision-making might be much more common than traditionally acknowledged. The tendency of legal decision-makers to disregard general legal norms might actually not be limited to situations when a given case is exceptional in some possibly relevant sense, but instead simply results from the effect of different levels of abstraction on which decision-making takes place.

The discrepancy between these two modes of reasoning, abstract and concrete, amplifies the tension problem in the discussion of the formal aspects of the rule of law. In practice, choosing between abstract and concrete approaches to legal disputes remains a policy decision, and each solution bears its own problems (RACHLINSKI 2006). The impact of ACEs on judicial review and legislation should be carefully analyzed by legal philosophers, constitutional law scholars, and political theorists.

[6] The specialization and experience of judges may play a major role; see LEIBOVITCH 2017.

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