

## Democracy, Law, Compliance

Don Herzog

*Professors Schauer and McAdams both seek a more or less sweepingly general theory of why we obey the law. But we should split, not lump. There are different reasons different actors in different social settings obey different laws—not only, but not least, out of regard for democratic decision making.*

Why do people obey the law? Well, I suppose for lots of reasons. And I suppose that different people in different social settings have different reasons for obeying different laws. You probably know the distinction between lumpers and splitters. (I know it from J. H. Hexter, but Wikipedia informs me it goes back to Darwin.) It is not just that I am a splitter by temperament, though I sure am. It is also that I dourly suspect there are too many lumpers out there: witness the dreamy vacuous looks that accompany invocations of generalizability. I have the same sentiment about the obligation to obey the law. I suppose that different sorts of obligations attach to different people for different reasons as to different laws.

That temperament—I am sorry if it makes some of you impatient, but I'm not even making an argument yet, I'm just confessing, so bear with me—makes me inclined to be an unhappily genial sort of symposium participant and report that I am happy to endorse what both Frederick Schauer (2015) and Richard McAdams (2015) have done. Indeed, I will want to pile on and add another critter to their menageries.

Now I know that those of you who imagine academic exchange as highly mannered blood sport will think this is unhappily amiable of me. So first I'll venture some critical observations on what each of them has offered.

\* \* \*

Schauer wants us to shrug aside worries about necessary and sufficient criteria for law (I shrugged long ago, so I am not even going to pretend to wring my hands about that much) and rivet our attention on the central if contingent role of coercion. Sometimes, Schauer points more generally to sanctions: that opens up the worry that so very much can be packed into that concept, especially if we think of rewards as positive sanctions, that his thesis will lose bite. It will collapse into a reminder that law uses many different tools to secure compliance. I suspect the worry is exacerbated, not relieved, by Schauer inviting us to smudge the distinction between penalties and prices. You might think that it is great to stretch the concept of sanctions this way, that it reveals important underlying similarities. But I think

---

Don Herzog teaches law and political theory at the University of Michigan, and may be contacted at dherzog@umich.edu. He thinks your time is better spent reading Daryl Levinson's contribution to this symposium.

that is mistaken: I'd suggest instead that if you don't draw any distinctions, you won't notice any differences. Split, don't lump.

I have just the same worry about what might seem the more austere thesis that law relies on coercion. (More austere just because *coercion* sounds like a narrower category than *sanction*.) I worry that Schauer packs implausibly much into the concept of coercion. "The threat of unpleasant consequences if the subject does not behave in a particular way is still the principal weapon in law's coercive arsenal" (2015, 124): so far so good, I guess, but that "principal" gave me pause.

I did not have to pause long. We needn't rely on "after-the-act" sanctions, continues Schauer: "coercion may be applied even more directly than the threat and may give even less choice to the potential law violator" (2015, 124). I agree with that much: take the policeman who breaks up the increasingly rowdy pickup basketball game and makes the players go home. But Schauer turns to "immobilizers." A smart car won't start unless it recognizes you, say by your fingerprints or retinal pattern. And now everything goes awry: "Immobilization is a form of incapacitation, and incapacitation is a form of coercion" (125).

Beware whirling abstractions, that's what I say. But these hypnotize Schauer into saying with a straight face that the lock on your front door coerces the would-be thief by stopping him from entering into your house. One thinks of Hobbes on liberty as "the absence of external impediments" (1651, 64). I will baldly assert that no one talks this way. If you doubt it, try out this suggestion on your neighbor—not fair if you live in an academic ghetto—or at the corner bar. Ordinary language isn't sacrosanct. But the huge strain being put on it here is an invitation to rethink what's going on. My balking could be conscripted as support for the familiar thesis that coercion is already a moral category: on this view, we don't say you've coerced the thief because we think you have a right to keep your property secure and he has no right to break in.

But I don't think my balking depends on that thesis. The safety rails on the winding drive *prevent* you from driving your car off the cliff, even if you want to—and even if you have a right to. (I'm imagining there that you have a right to commit suicide. If you are fretting about the costs of cleaning up the debris, suppose you've already established a generous escrow account.) But it seems to me astonishing to suggest that the rails coerce you. Or that the people who designed and installed them did, even if they did so with the express purpose of keeping your car on the road. (But what if they intended only to prevent accidentally driving off the road? If they also deliberately decided to stop such suicides, is it easier to see coercion? Does coercion require a consciously coercing agent or is it a feature of a situation, regardless of how it came about?) When the elevator breaks down, you're immobilized. But neither the elevator nor (if there were any) the negligent maintenance people are coercing you into staying where you are.

Back to Schauer's big picture. Some of my worry is moot because front and center is the criminal law, which relies centrally on the threat of punishment, whether jail time or fines or (in shameless jurisdictions) public shaming or whatever else. I am inclined to think that those are coercive (and I don't think they invade any right of the criminals, at least if applied in procedurally and substantively sensible ways: and that counts against the moralized view of coercion). All I want to say

is that when Schauer invites us to think about the central role of sanctions and even when he invites us to think about the central role of coercion, we need to beware that he not fold in conceptually adjacent phenomena that we ought to keep distinct.

\* \* \*

I have similar worries about how McAdams wields the category *expressive*. Again, the real worry isn't mapping ordinary usage: this one is a term of art, anyway. While I'm tickled at the very thought that economists have been up to the same thing as us would-be expressivist opponents all along, I worry that his maneuver, too, smudges a distinction we need. It is one thing to provide a focal point and solve a coordination dilemma, another thing to provide information—and still another to symbolically say, this conduct is wrong. Those I ordinarily think of as expressive theorists are interested in that last, and it is interestingly different from the first two. McAdams, I think, wants partly to set aside “this conduct is wrong” as wrapped up in another approach to the question of why people comply with the law, one he calls *legitimacy*. What's behind that curtain? Too much, I fear, and I'm not sure how to make sense of some of it. Take this:

By definition, a legitimate authority is the quality to which people defer. The expression of a legitimate speaker may then stand out—be focal—in a way that no other speaker is. It means the speaker is someone to whom one “ought” to listen and defer. That a speaker or expression has legitimacy seems inevitably a salient distinction, in a different dimension from the fact that the expression is the one on green paper or in a PDF file. (2015, 124)

I had thought that McAdams wanted to leave open whether anything like Weber's picture of legitimacy did in fact explain legal compliance. I had thought he wanted to say that sometimes his expressive theory, his turn to focal points and signaling, does better than either “deterrence” (the sort of wares Schauer is peddling) or “legitimacy.” So it is odd to hand Weber the prize—and surely confused to say he wins it by definition. There has to be an open question here—whether people do in fact defer to authorities they take to be legitimate. It is idiomatic to say, “yes, he has a right to tell me what to do, and I know I'm obliged to obey, but I'm disobeying anyway.” Not just idiomatic to say, but coherent to act on, and in some settings arguably common.

I am puzzled, too, by McAdams's dismissing the impact of the kind of expressivism he is not pursuing, that on which the law says something symbolically about what is right or wrong. “Lessig and Dan Kahan,” he reports, “argue that law affects behavior, in part, by its ability to change social meaning” (2015, 167). Suppose the law decrees that segregated schools are inherently unequal, so they violate equal protection of the laws. Then, one might think, people clinging to “separate but equal” are on new ground. The law, with whatever majesty it can muster, has decreed that it's kinda hard to tell the difference between them and racists. And

this might well force them to revise their position on public schools, indeed on segregation more generally.

So far so plausible, or so I'd have thought. But McAdams dismisses this picture. "This 'social meaning' story is . . . parasitic on some other mechanism of behavioral change. The social meaning changes only if many individuals *first* comply with the law for reasons *other than* a social meaning change" (2015, 167). I don't see why. I get that what others do can change social meaning. If all the other middle-aged men are wearing hats in public and you don't, you are underdressed or just plain weird. If few are but you do, you are pretentious or eccentric. But I don't see why the law needs the intervening variable of behavior change to shift social meaning. Try this: By social convention, no longer underwritten by racist law or state power, only whites use the basketball court on the mostly white north side of town. An antiracist city council votes to post a sign on the court: Only Racists Play Here. That might backfire, of course. Or it might seem frivolous. But whites might stop playing there—not because they observe other whites stopping (and why would those first ones stop?), but because they don't want to be seen as racists.

\* \* \*

The question of the day is: Why in fact do people obey the law? And again my impulse is that different people in different settings obey different laws for different reasons. To say that is not at all to challenge either Schauer or McAdams—I'm done with the blood sport bit of my comment, and I won't apologize for how bloodless it was—because both agree.

If you are a certain kind of empiricist, you'll want to know what's doing the lion's share of the explanatory work, or what picks up most of the variance, or something like that. It is not entirely clear what the right metric is. We could be cheerfully flatfooted and say that it is the total number of acts of legal compliance. But we might pause: it's dumb to count "I would have jaywalked but the law says I shouldn't so I didn't" and "I would have murdered those schoolchildren but the law says I shouldn't so I didn't" the same way. We can think some acts of legal compliance are more important than others, and still ask the descriptive or explanatory question: What's going on when people comply with those laws. Indeed, we can think some acts of compliance are just plain more interesting. And that's the intuition I want to pursue in my remaining time, with an autobiographical example. I should say that this is my own view of the matter, that I don't purport to speak for the law school or the university or anyone else. I should add that I might of course be misinformed in ways large or small, though obviously I don't think I am, or I wouldn't be asserting what I'm about to. Since I should say those things, I hereby do.

I teach at the University of Michigan Law School, and our admissions policy, because of its explicit commitment to race-based affirmative action, was challenged as a violation of the Equal Protection Clause, and the school prevailed in *Grutter v. Bollinger*. (As a member of the committee that drafted that policy, I was deposed. Good times.) As you probably also know, the state's voters then passed a

constitutional amendment, still known as Prop. 2, explicitly forbidding the state's public universities from "grant[ing] preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin."

Most faculty at the law school think, with the varying levels of enthusiasm and complicated feelings you might expect, that all things considered it was good for the school to have an affirmative action policy. Most think too that it was a good thing for us to practice affirmative action in faculty hiring. I say "most," not "all," but I'll add that the school had been formally committed to both, and no, that's not an elliptical way of repeating the claim that most faculty were in favor. But then the state's voters said, "no, stop."

To my surprise—there are, after all, real constitutional lawyers on our faculty—I was made principal drafter of our new admissions policy. Would-be realists in the crowd insisted it didn't much matter what the formal policy said; what mattered was how decisions were actually made; and some doirly said that we would cheat. (Then, too, some encouraged us to cheat, some of them strenuously, and some of them actors I was startled to see take that position.) We would go on relying on race. After all, it was and is widely thought that various public universities and law schools in California cheat in just that way, despite their state's voters too having adopted a ban on affirmative action.

Shortly after we adopted the new policy, I was on an interesting panel at the school. On the panel were lawyers who had pressed cases against affirmative action admissions policies in court. They were remarkably forthcoming about one thing. Easy, they said, to challenge a policy that uses race on its face. (They said they had been sure their side would win *Gratz v. Bollinger*, where our College of Literature, Science, and the Arts used a crude point system, and pretty sure they'd win *Grutter*, too.) But more or less impossible to challenge a facially neutral policy on the grounds that behind the scenes the admissions people were cheating. "What are you going to do?" demanded one—no, that's not verbatim—"Seek every single application in discovery? Demand an account of every single decision, or every one of hundreds at a pretty wide margin?" Any adept admissions official, they said—and they said it publicly, at our law school, and they said it sincerely, not trying to bait us, and they said it resignedly, not as if they'd won more than a Pyrrhic victory—would find it child's play to navigate that deposition. Even if there were some range of GPAs and LSATs in which whites were more or less uniformly denied and minorities more or less uniformly admitted, the official would always be able to tell some other plausible story.

There it was: a green light to cheat. Our state constitution could have whatever language it wanted, but no legal sanction would attach to violation. So our expert adversaries assured us. And this was emphatically not a case where we were inclined anyway to do what the law now dictated: so if we didn't cheat it would be legal compliance, not just legal obedience. But—I tell you three times that this is true—we do not cheat. Yes, there was a stormlet some years ago when critics indignantly revealed that the school was still asking for the race of applicants. But we responded, truthfully, that we are required to do so by federal law. We were collecting that information on a separate page of the application. A clerical assistant would record the data on that page and then rip it off and throw it away before the

application found its way into the hands of any admissions official. “But can’t they still tell who the minorities are?” Sure, sometimes, though maybe less often than you’d think. But—I tell you three times again—they are not cheating. I’ll add that the proportion of minority students at the school declined significantly after *Grutter*, which counts as evidence for our claim in litigation that no race-neutral approaches would secure what we called a critical mass of minority students.

Prop. 2 isn’t restricted to admissions. Its language is more sweeping: no “preferential treatment” on the grounds of race, etc. We’ve had to construe just what that means. We’ve done so in good faith, as has the university’s general counsel. We have not taken the position of aggressive litigators, thinking we should do anything and everything we can offer a vaguely colorable defense of without running afoul of Rule 11 sanctions. So, for instance, we used to invite entering minority students to campus in the late summer to help orient and prepare them; now we run that session for any student who’d like it. We continue to do race-based outreach in some settings to expand the pool—or, as you might well think, to avoid having the pool structured in the depressingly familiar white-guy-social-networks ways—but in no setting does the school consider race in deciding among applicants or job candidates. And again, we’ve been encouraged to cheat, sometimes strenuously, sometimes by those you might think would know better, and sometimes by both of those at once.

Why do I bore you with this story? Because it highlights two features of the complex landscape of complying with the law, features that both Schauer and McAdams are not getting in sharp focus. One: Sometimes we comply with the law because we think we owe it to a democratic majority. Two: Too much of the literature on legal compliance summons up a character called “the individual.” But in our actual lives, we are not free-floating individuals confronting the law or the government. We are often acting in particular roles, in particular social institutions. And our stance about the law will properly vary (to put it in “normative” terms) and will in fact vary (to put it in “descriptive” terms) depending on what role and institution we are in.

Let me expand on each in turn.

\* \* \*

Why might it matter—in fact, for explanatory purposes, in thinking about legal compliance—that a democratic majority has passed a law or amended a state constitution? McAdams might suggest there’s signaling here: not quite. It’s not the news that a majority of the state’s citizens oppose affirmative action. If we learned that from a highly reliable public opinion poll, we would have happily sailed on with affirmative action. If we were flooded with belligerent petitions or beseeching letters or anguished telephone calls, we would have happily sailed on. Not because we’d imagine these were Astroturf grumblings, not genuine grassroots sentiment; not because we’d imagine that only the laborious business of changing the law would really demonstrate public opinion. After all, some of us are in the clutches of public choice theory and its ilk, so some of us imagine that law itself is more likely

to reflect well-organized interest groups, rent seeking, regulatory capture, and the like than it is to demonstrate public opinion. Still, we might well think—I *would* think—that something that matters has changed when the law changes. So there is more to law here than signaling something about public opinion.

There is more, too, than law providing a focal point or anything else helping solve some coordination dilemma. There just is no reason all the state's public colleges and universities have to have the same policy here. Indeed, there are straightforward reasons—subsidiarity, learning from varied experiments, yada yada yada—that it's better if different schools have the right to have different policies, and in fact have different policies.

So what's the more? Not, surely, something about sanctions or coercion. Again it is hard to imagine what state investigation or prosecution could conceivably enforce Prop. 2, and we have very good reason to think that as long as our admissions policy is facially neutral, no one is going to sue us. Nor do I see any way to cobble together both theories—to say that law works here by some mix of signaling about public opinion (hat tip to McAdams) and sanctions or coercion (hat tip to Schauer).

Instead, I'd say something like this. As a governing member of the law school faculty I have obligations to advance the welfare of the institution. But not, I think, if it means flouting the law. Yes, there are limits to that constraint: I would urge disobeying a flagrantly unjust law if I thought we could get away with it. But here I thought, and I was not alone, that affirmative action is the kind of policy dispute properly left to democratic decision making. Sure, I could impeach the integrity of the discussion that yielded that vote: the misrepresentations, the racist undercurrents, the racist not-so-under currents, and so on. But I have never been starry-eyed about actual democratic politics, and it is too easy to impeach particular decisions by pointing to disreputable features of the process that afflict so many other decisions. There is no point defending a highly selective skepticism with grounds yielding a much more general skepticism.

It matters, too, that this line of analysis is one I adopted acting in the role of professor at the law school. Asked more generally about the merits of affirmative action or asked to advise some other institution, I might well have other views. Indeed it would be coherent for me to vote to ban affirmative action when Prop. 2 came up, though I didn't, because there I was being asked a different kind of question: whether public universities should be barred from doing something that at least some of them are doing and believe it sensible to do. It might well make sense to approve that bar on the grounds that too many institutions will choose wrong in adopting such policies, while still, for instance, thinking our law school was right to adopt it. This would qualify as the billionth example of a fully defensible law that arguably happened to be overinclusive (in barring schools using affirmative action sensibly) and underinclusive (in leaving, say, all private schools free to do what they liked). But that broader normative call is not the one I'm supposed to make as a professor at the school.

I have some virtues, I suppose, but statistical significance is not among them. But I do think the stance I took, and so many of my colleagues took, about not cheating on Prop. 2 despite our own commitments to race-based affirmative action,

isn't hopelessly idiosyncratic, or I wouldn't have wasted your time recounting it. And I do think that this sort of thing is interesting and that it should remind us to pay attention to settings in which as a matter of fact we have special regard for the democratic credentials of law. It should remind us, too, to think about the roles and institutions we occupy, and how our views may well shift depending on where in the social landscape we are: it should, that is, remind us to stop summoning up some rootless phantasm called "the individual."

I've been dutifully playing along with a background assumption of this discussion—that the normative questions (should people obey the law?) are one thing, the descriptive ones (why do they obey the law?) are another. But there is something confounding about this assumption, and you can see what without dipping deep into the vexing disputes about reasons and causes. Often, the right explanation of why you do something is just to point to the good reasons you had to do it: you leave the room by the door, not the window, because otherwise you'd get hurt; you vote because that's what good citizens do; and so on, and on, and on. Often, not always—but not never, either. If that is right (and it is, promise), it's confused to say, "I don't care what reasons might be given for why people ought to obey the law, I want to know why in fact they do." Because, again, they might actually obey for just the reasons they're supposed to. There is absolutely no reason to think "I shall act self-interestedly" or "I shall pursue my preferences" is somehow on firmer footing, normatively or descriptively, than "I shall do what's right." There is absolutely no reason to take the first two as good explanations but think the third requires some special or reductionist support. When I noticed that I had good reason to disavow speaking on behalf of my law school, good reason, too, to acknowledge that I might have some facts wrong, and I went ahead and did just that, nothing mysterious happened. "Well, the agent has to realize what moral considerations or good reasons bear on his choice, and it's a factual question whether he does." Sure. But there is often nothing trickier about noticing the relevant considerations than there is about noticing a door.

If or insofar as the fact/value or positive/normative distinction makes it harder to see that, it's a problem. If or insofar as Schauer's and McAdams's projects depend on not seeing that, they're afflicted with those problems, too.

\* \* \*

A brief historical coda. In his *Reflections on the Revolution in France*, fulminating against the sort of thing we cast as rationalization or secularization or disenchantment, "the new conquering empire of light and reason," Edmund Burke (1993, 66) scornfully unveiled what law would amount to in that brave new world:

On the scheme of this barbarous philosophy, which is the offspring of cold hearts and muddy understandings, and which is as void of solid wisdom as it is destitute of all taste and elegance, laws are to be supported only by their own terrors, and by the concern which each individual may find in them from his own private speculations, or can spare to them from



his own private interests. In the groves of *their* academy, at the end of every vista, you see nothing but the gallows. Nothing is left which engages the affections on the part of the commonwealth.

Don't worry, Burke has a ready denunciation of McAdams's project, too:

the age of chivalry is gone. That of sophisters, economists, and calculators, has succeeded; and the glory of Europe is extinguished for ever. (1993, 65)

I have nothing particularly nice to say about Burke's cherished alternatives, sentiment and illusion. If those are the sole alternatives on offer, then sign me up with Schauer and McAdams, cheerfully affirming the prospect from which Burke shrank in disgust and horror.

But I want to add to the mix the conscientious regard of particular individuals in particular roles for democratic decision making. (I can't say I mind in the least that Burke would despise that, too.) I suppose that regard has limits. But I suppose, and did in fact suppose as a faculty member at Michigan Law, that a democratic majority properly has the right to ban race-based affirmative action, however stupid and pernicious I found that decision; and I supposed myself duty-bound to faithfully implement their decision.

It might seem priggish or worse to suggest that many acts of legal compliance are like that. I'd respond with two demurrers. One: I don't claim that all that many are. Not because I doubt it, but because again I'm not sure what metric we're considering: I suppose people figure out whether to feed parking meters or jaywalk far more often than they confront the kind of choice I've described here. But I do claim that my response, the school's response, was not vanishingly rare or idiosyncratic, and it is an interesting and important part of the landscape. If you are inclined to say that the "real" terrain of legal compliance is about coercion or conveying information or whatever else, I'd caution you that it is generally a mistake to equate cynicism and realism. Two: I would insist more generally, again, that we stop thinking about "the individual." Solving the puzzles of legal compliance will depend in part, as just about everything in political theory does at the end of the day, on cultivating our sociological imaginations and grasping just how central roles and institutions are in our lives.

I don't invoke Burke as "merely corroborative detail, intended to give artistic verisimilitude to an otherwise bald and unconvincing narrative," as Pooh-Bah puts it (Gilbert n.d., 36). I do it to issue a promissory note, one I might or might not redeem eventually. Questions about legal obligation, legal interpretation, legal compliance, and the like have a history. Not in the weak sense that people have been trying for centuries to get "the nature of law" right, and they have furnished different answers over time. Rather because law itself has shifted, in ways far deeper than the contents of the statute books, and the social and political contexts of law have shifted, too. So it is worth remembering that Schauer and McAdams are offering us a perspective on law for us, here, now. More broadly than that? Yes, sure. But how much more broadly is itself a complicated empirical question.

## REFERENCES

- Burke, Edmund. 1993. *Reflections on the Revolution in France*. New Haven, CT: Yale University Press.
- Gilbert, W. S. n.d. *The Mikado*. Boston, MA: Oliver Ditson.
- Hobbes, Thomas. 1651. *Leviathan*. London: Andrew Crooke.
- McAdams, Richard H. 2015. *The Expressive Powers of Law: Theories and Limits*. Cambridge, MA: Harvard University Press.
- Schauer, Frederick. 2015. *The Force of Law*. Cambridge, MA: Harvard University Press.

## CASES CITED

- Gratz v. Bollinger*, 539 U.S. 244 (2003).
- Grutter v. Bollinger*, 539 U.S. 306 (2003).