
RECENT BOOK

LEGAL THEORY — LAW AND ECONOMICS — PROFESSOR MCADAMS PUBLISHES BOOK ON INFORMATION AND COORDINATION FUNCTIONS OF LEGAL EXPRESSION. — RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW* (2015).

Questions about the nature of legal power — about law’s relationship with rational agents and why those agents obey it — are not new; the answers proffered are usually complex, controversial, and often incompatible. Still, patterns emerge. Most answers can be generalized and categorized, sorted into broader philosophical theories that try to explain the relationships among the concepts most often associated with legality. In *The Expressive Powers of Law*,¹ Professor Richard McAdams explores what he takes to be an undertheorized dimension of law: its expressive powers. McAdams’s account is useful, powerful, and — a rarity in legal theory — concrete. At the same time, however, the account focuses on the causal mechanisms of, rather than the underlying reasons for, compliance with law. The project is thus illuminating but narrowly circumscribed, operating at a level of explanation that may lead more to curiosity than to satisfaction.

McAdams’s book begins with a brief sketch of the two accounts of legal compliance dominant in the academy today.² The first is the deterrence account, which states that individuals obey the law in order to avoid sanctions. On this view, law deters noncompliance by raising the expected costs of noncompliance above its expected benefits.³ Through damages, penalties, fines, or incarceration, laws exploit our sensitivities as rational agents by creating a cost-benefit tradeoff that almost always points in favor of compliance.⁴ The second theory is the legitimacy account, which states that obeying the law is a matter of duty: it’s what individuals believe they are supposed to do, regardless of whether or not noncompliance will be discovered or penalized.⁵ On this view, law possesses “legitimate moral authority,” exploiting our sensitivities as moral agents conscious of an overarching obligation to respect legality in its various forms or manifestations.⁶

Having set up the contrast points to his theory, McAdams develops the idea that law has unique functions that neither the deterrence nor

¹ RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW* (2015).

² *See id.* at 1–4.

³ *See id.* at 2–3.

⁴ *See id.*

⁵ *See id.* at 3.

⁶ *Id.* (quoting Kenworthy Bilz & Janice Nadler, *Law, Psychology, and Morality*, in 50 *THE PSYCHOLOGY OF LEARNING AND MOTIVATION* 101, 117 (Daniel M. Bartels et al. eds., 2009)).

the legitimacy account appreciates. There are two such functions: the coordinative and the informative.⁷ McAdams calls these functions law's "expressive powers," the causal mechanisms through which it "influences behavior, usually in the direction of compliance."⁸ In particular, the coordination function allows individuals to recognize mutually salient "focal point[s]," a term McAdams borrows from Professor Thomas Schelling's work on game theory.⁹ A focal point tends to attract attention or generate salience.¹⁰ For example, groups of tourists in a foreign country who become separated face a "meeting place" problem, one that focal points such as prominent landmarks can help solve.¹¹ Likewise, the law's salience makes it a focal point for individuals coordinating their behavior in society.¹² In complement, the information function communicates, or signals, content to individuals, allowing them to form and update their beliefs.¹³

McAdams believes the various manifestations of law — everything from traffic signals to arbitration awards to prosecutorial discretion — are expressions that often influence behavior in a manner independent of the explanatory forces posited by either the deterrence or legitimacy accounts.¹⁴ Legal expressions thus have the capacity to be sources of normativity, exerting a pull on rational agents sensitive to their functions as focal points.¹⁵

To flesh out how this function might be accomplished, McAdams contrasts traditional game-theoretic Prisoners' Dilemma (PD) scenarios with a more general class of coordination games. Traditional PD games involve two players who face the non-iterated credible choice to take one of two options, the payoff for which may be influenced by the option chosen by the other player in a scenario in which they cannot communicate.¹⁶ In this situation, both parties share an equilibrium point, a position in which "no one has any incentive to switch strategies unilaterally because each is doing as well as he can given what the

⁷ See *id.* at 5–7.

⁸ *Id.* at 7.

⁹ See *id.* at 22, 268 n.1 (citing THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 144 (1960)). In some ways, McAdams's project is a throwback to an interest among legal scholars in the relationship between law and social norms. See Eric Posner, *Richard McAdams' The Expressive Powers of Law*, ERIC POSNER (Feb. 10, 2015), <http://ericposner.com/richard-mcadams-the-expressive-powers-of-law> [<http://perma.cc/KM4G-8FAR>].

¹⁰ See MCADAMS, *supra* note 1, at 62.

¹¹ See *id.* at 27.

¹² See *id.*; *cf. id.* at 101–04 (describing how focal points can aid in the coordination of social movements).

¹³ See *id.* at 6.

¹⁴ *Id.* at 4–9, 67.

¹⁵ See *id.* at 6–7.

¹⁶ See *id.* at 29.

others are doing.”¹⁷ According to McAdams, legal scholars’ enthusiasm for the modeling power of PD games has “led them to apply it to just about every area of law.”¹⁸

However, McAdams claims, this narrow focus on PD games has “diverted attention from the pervasiveness of equally important situations, especially coordination games,” which focus on expected payoffs in scenarios in which individuals can communicate with one another.¹⁹ Such communication allows theorists to relax key assumptions, moving from non-iterated games with symmetrical payoff schedules and unilaterally dominant equilibrium points (that is, strategies it makes most sense for an individual to play regardless of what the other does) to a more complex (and hence more realistic) model of human behavior, with repeat players and asymmetrical payoffs.²⁰ Exploring a variety of coordination games, McAdams illustrates how modeling behavior through repeat interactions reveals that individuals will not necessarily want to take the same specific actions *no matter what others do* (as in non-iterated PD games), but rather will want to take some specific actions *only if others do the same* (as in games in which there are multiple possible equilibrium points, and, consequently, the players’ goals are to match their strategies in order to arrive at a Pareto-optimal scenario — a scenario in which it is impossible to make any player better off without making at least one other player worse off).²¹ Not only is this interactive calculus a “pervasive feature of social life,”²² but it also shows how rationally calculated behavior often resembles a “coordination problem *embedded* within an iterated PD.”²³ A key element of correctly modeling behavior lies in recognizing that agents must coordinate in determining the means by which they will cooperate.²⁴

After laying out the main ideas of his expressivist theory, McAdams applies it in a variety of legal contexts. For example, he probes the information function of legislation by arguing that while legislators are

¹⁷ *Id.* at 30 (citing DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 310 (1994)).

¹⁸ *Id.*

¹⁹ *Id.* at 31.

²⁰ *See id.* at 30–42.

²¹ *See id.* at 27–37.

²² *Id.* at 39.

²³ *Id.* at 40.

²⁴ *See id.* For example, two nations may agree to limit import tariffs in order to coordinate their trade policies. But differing interpretations of behavior can lead to miscommunication between them: Is one nation’s new legislation indirectly impeding cross-border trade, and therefore violating the treaty? Does currency manipulation in the other nation cancel out its own cooperation? If one nation believes it is cooperating while the other interprets the first’s actions as violating the treaty, cooperation will likely end. To avoid this outcome, the parties need to converge on what *counts* as cooperation. Focal points serve this need: they act as equilibrium points that can play a role in influencing the outcome of coordination games by representing shared standards that signal cooperation or violation. *See id.* at 40–42, 69.

not experts in the subjects on which they legislate, they are experts when it comes to the interests of their constituencies.²⁵ When they make or repeal laws, their actions are signals that reveal constituent attitudes, which in turn influence behavior.²⁶ In representing the will of a constituency, legislation “change[s] the social meaning of [a given] action,”²⁷ communicating facts about others’ attitudes toward that action. For instance, wearing a seat belt communicates one thing in a jurisdiction in which it is not legally required; it takes on a new meaning when the law is changed.²⁸ In the former, McAdams writes, “the social meaning of wearing a seat belt raises its cost,”²⁹ expressing not just an individual’s concerns about safety, but also the relationship between his values and those of the community, whose preferences are revealed by the lack of legislation.

McAdams next applies his theory to law enforcement, using examples from criminal law to show how enforcement decisions can have expressive impact quite apart from their deterrence effects.³⁰ In order to do so, McAdams writes, legal expressions must meet three conditions: they must convey a particular message that can be *received*; must meet a threshold requirement of *publicity*; and must show sufficient *expertise* or *aggregation* to stand out among the plethora of information with which individuals are bombarded on a daily basis.³¹ Thus, in order for law to “send a message,” McAdams argues, it must meet certain criteria: simply claiming that an action or expression has some effect does not make it true.³²

McAdams then moves to cases of arbitration, where disputants can converge on courses of conduct after an arbitrator signals the strengths and weaknesses of each party.³³ In these scenarios, the parties will coordinate to reach a resolution based on the signals sent rather than the sanctions dealt by the arbitrator, a third party who reveals a meeting place, so to speak, between two disputing parties.³⁴ McAdams explains this phenomenon by noting that referring a case to arbitration generates a focal point, one that improves the *ex ante* payoffs of parties with otherwise conflicting interests by allowing them to converge on an equilibrium point.³⁵ The presence of the arbitrator ensures that

²⁵ *Id.* at 141–42.

²⁶ *See id.* at 148–52.

²⁷ *Id.* at 166 (emphasis omitted).

²⁸ *See id.*

²⁹ *Id.*

³⁰ *Id.* at 169.

³¹ *Id.* at 179–80.

³² *Id.* at 169; *see also id.* at 169–70.

³³ *Id.* at 221.

³⁴ *See id.*

³⁵ *See id.* at 204.

neither party will be swayed by alternatives salient only to one of them, thereby avoiding the unilaterally dominant equilibrium points present in a traditional, non-iterated PD game.³⁶

McAdams concludes the book with a brief discussion of some potential normative repercussions of the expressivist theory. Law's expressive powers can increase efficiency, for example, by identifying optimal enforcement strategies; a sensitivity to domains in which law can act as a focal point allows officials to determine where additional resources are best deployed.³⁷ In other cases, law's capacity to impart information has predictive power: for example, a government whose currency has long been imprinted with the words "In God We Trust" need not worry about this endorsement signaling religion-based preference, but a facially similar new policy is more likely to signal such a preference.³⁸ McAdams lists a number of similar situations in which the expressive theory can contribute to our understanding of the relationship between law and various social forces.

As the breadth of this cursory overview indicates, *The Expressive Powers of Law* is rich and wide ranging, and the picture of law McAdams presents is intriguing. Moreover, McAdams's disciplined analysis of when legal expressions "send a message" is a valuable contribution to contemporary legal theory. Despite these virtues, however, the book's explanatory power is tied to a typology that focuses on the causal mechanisms that provide answers to the question of *how* individuals comply with the law rather than the question of *why* they do so. In this way, the expressive theory engenders theoretical pluralism, as McAdams desires,³⁹ but does so at a level of analysis that explains the specific actions individuals undertake without illuminating the underlying reasons they might have, or how these reasons relate to the law's deeper claim to normativity.

To see why this is so, notice that legal expressions can only lead to compliance once they are grounded in considerations of self-interest.⁴⁰ So grounded, how distinct is the expressive theory from the deterrence theory? McAdams characterizes the latter in terms of the costs associated with various courses of conduct,⁴¹ but ultimately, courses of conduct are made more or less attractive to individuals by virtue of their interests. This relationship may seem trivially true, but if it is, it reveals an important feature of the deterrence theory, namely, that its ex-

³⁶ See *id.* at 204–08.

³⁷ See *id.* at 233–34.

³⁸ See *id.* at 257.

³⁹ *Id.* at 7 ("I am . . . advocating a theoretical pluralism about compliance . . ." (emphasis omitted)).

⁴⁰ See *id.* at 4–7.

⁴¹ *Id.* at 2.

planatory power ultimately reduces to, and relies on, self-interest.⁴² The expressive theory works in the same way: legal expressions may provide individuals with information or facilitate their coordination, but they do not generate motivation — they cannot influence behavior without essential reference back to individuals' antecedent values, preferences, or interests. And while McAdams gestures toward a neat, clear, schematic account of action — “law provides information; information changes beliefs; new beliefs change behavior”⁴³ — the schematic cannot stand on its own: it is true only when supplemented by the point that beliefs are combined with desires, preferences, or other values in order to generate action.⁴⁴ The deterrence and expressivist theories thus share an explanatory base. While the means of compliance emphasized in the two theories are different, they account for it — they ground it — in the same way.

Having recognized this common ground, one might think that the way to differentiate the expressive and deterrence theories lies in spelling out how they explain real-world legal compliance — the actual practices that manifest it. But such a move would not be promising. That is, the expressivist theory would not aid our understanding if its explanatory contribution were cashed out in terms of the particular instances of compliance or in a mechanical listing of the ways in which compliance is achieved.⁴⁵ Particular forms of compliance are functions from the *reasons* rational agents have, or believe they have; what matters, then, is how law interacts with those reasons, not the means through which it does so.⁴⁶

Now if law can influence behavior only when it is packaged together with considerations of self-interest, as the deterrence and expressivist accounts both concede, what explanatory work are the specifically deterrent or expressive features of the respective theories

⁴² See FREDERICK SCHAUER, *THE FORCE OF LAW* 13–15, 110 (2015) (citing Jeremy Bentham and, to a lesser extent, John Austin in the long tradition of theorists understanding deterrence in terms of self-interest: “For most of us, our decisions are driven, as Bentham recognized, by some mixture of moral . . . motivation on the one hand and prudential self-interest on the other,” *id.* at 110).

⁴³ MCADAMS, *supra* note 1, at 136 (emphasis omitted).

⁴⁴ This point goes back at least to Hume. See DAVID HUME, *A TREATISE OF HUMAN NATURE* 265–68 (David Fate Norton & Mary J. Norton eds., Oxford Univ. Press 2007) (1739).

⁴⁵ As Professor John McDowell puts it: “To respond to a ‘How possible?’ question . . . in, so to speak, engineering terms, with a perspicuous description of the requisite material constitution, would be plainly unhelpful; it would be like responding to Zeno by walking across a room.” JOHN MCDOWELL, *MIND AND WORLD*, at xxi (1996).

⁴⁶ Professors Frank Jackson and Philip Pettit make a similar point in writing about the functional nature of explanation: “It is the nature of the role [of a purported explanation], not the nature of the occupant of the role, which matters.” Frank Jackson & Philip Pettit, *Functionalism and Broad Content*, in *MIND, MORALITY, AND EXPLANATION* 95, 95 (Frank Jackson et al. eds., 2004).

doing? The answer is that they explain the manner in which conduct may be influenced by law, but not the reasons for it. For example, when a driver comes to a stop sign, the expressive power of the sign influences *how* he conducts himself, but not *why* he does so: the reason to stop at the stop sign is not created by the sign; the sign triggers, rather than creates, the individual's preexisting reasons, whatever they may be.⁴⁷ As Professor David Enoch puts it, manipulating non-normative circumstances triggers dormant reasons that do not depend for their existence on that manipulation.⁴⁸ In other words, the grounds of law are not illuminated by the various ways in which we might comply with it.

In light of this critique, one might wonder whether McAdams might profitably spend less time on the various causal mechanisms of legal compliance and more on the deeper differences between the deterrence and expressivist theories on the one hand and the legitimacy theory on the other. The idea here is not to trade one classificatory scheme for another. Its motivation lies in the conviction that if we want a better understanding of law and how we relate to it, it is important to carve up the legal world in explanatorily deep ways — to carve at the joints. True, there are some differences between the deterrent and expressive theories, but if they manifest in a merely mechanical way, they gloss over the shared properties that distinguish them from rivals that provide genuinely alternative conceptual analyses of law's normativity, for example, or that posit necessary and/or sufficient conditions without which a system cannot be said to be *law* at all.⁴⁹

The contrast between self-interest and legitimacy theories seems to get at this deeper cleavage. To see this divergence, notice that legal expressions are not unique in serving coordination and information functions — to take just two examples, religious codes and social mores provide similar capacities. In isolating the features of law that make it what it is, its expressive functions are not especially salient. What is intriguing about law is that it claims to give us reasons for action that are not already implicated in our preexisting interests or values.⁵⁰ Trying to understand the interactions between law and rational

⁴⁷ See generally David Enoch, *Reason-Giving and the Law*, in 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 1, 25 (Leslie Green & Brian Leiter eds., 2011) (explaining how law can only trigger, or make relevant, reasons for action agents already have, rather than create reasons that apply to agents on the basis of the law's claim that they do).

⁴⁸ *Id.* at 4–5.

⁴⁹ See, e.g., JOSEPH RAZ, *THE AUTHORITY OF LAW* (2d ed. 2009); cf. SCHAUER, *supra* note 42.

⁵⁰ After all, to the extent that law exists to serve our ends, it provides causal mechanisms with which to do so. That is what it is *for*; no surprise, then, that it has powers to facilitate these ends. What is puzzling or challenging to explain is law's claim to give us reasons for action external to our interests, binding us despite ourselves, as it were. See Scott J. Shapiro, *Authority*, in *THE*

agents is where the real action is; too narrow a focus on the information and coordination functions of law's expressive powers risks putting the emphasis in the wrong place.⁵¹

To some extent, McAdams's project is more modest than claims about the nature or normativity of law need to be. His goal is "to understand all the causal mechanisms that produce [compliance],"⁵² and he characterizes the literature with which he is engaging as an "empirical study of legal compliance."⁵³ But a satisfactory understanding of legal compliance — of the law and its relationship to rational agents who go about determining how to act in the world — is one that must engage with the normative reasons individuals have, or believe they have. And that, in turn, requires a theory sensitive to the differences between helping achieve agents' goals and generating them *sua sponte*.

Of course, building an explanatory structure this powerful and sophisticated is not easy, and the fact that McAdams does not provide one is no real cause for criticism. The insistence that law's coordination and information functions are underappreciated in the empirical literature is a virtue of his book, and McAdams admirably shows the wide range and applications of these functions in fields as diverse as arbitration, international negotiation, criminal law, and constitutional law. While law's expressive powers cannot alone explain its normativity, McAdams's treatment reveals important insights into how rational agents reason and interact both with one another and with the law. *The Expressive Powers of Law* is a valuable contribution to our understanding of these interactions.

OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 382, 418–19 (Jules Coleman & Scott Shapiro eds., 2002); *see also* H.L.A. HART, *THE CONCEPT OF LAW* 27 (3d ed. 2012) (explaining how law's unique combination of duty-imposing and power-conferring rules may be considered legitimate); Larry Alexander, *Constitutional Theories: A Taxonomy and (Implicit) Critique*, 51 SAN DIEGO L. REV. 623, 642 (2014) ("[O]ne of the two most difficult questions in legal philosophy [is] . . . how it is possible for law to be normative.").

⁵¹ Take a concrete example: A driver comes to a stop sign on his way to work. Why might he stop? The deterrence theory mentions his desire to avoid fines. The expressivist theory mentions his goals of reaching work safely and efficiently. At bottom, these answers reduce to the same considerations: the driver wants to attain his end (going to work) while avoiding various outcomes on his way there. The legitimacy theory, in contrast, is wholly different. On this view, the reasons to stop at the sign need not have anything to do with the driver's interests or preferences, and they may apply to him no matter what his non-normative situation might be. In a word, legitimacy considerations are (depending on the variant within the theory) *irreducible*. *See* HART, *supra* note 50, at 88–91 (arguing that from an "internal point of view," *id.* at 89, legal obligations are *sui generis*); *see also* Jules L. Coleman, *The Architecture of Jurisprudence*, 121 YALE L.J. 2, 28 (2011) (summarizing the Hartian idea that legal obligations do not reduce to other kinds of obligations).

⁵² MCADAMS, *supra* note 1, at 4 (emphasis omitted).

⁵³ *Id.*