

**Law, Coercion, and Expression: A Review Essay
on Frederick Schauer's *The Force of Law* and
Richard McAdams's *The Expressive Powers of Law***

July 30, 2015

Eric Rasmusen

Abstract

*What is law and why do people obey it? This question from jurisprudence has recently been tackled using the tools of economics. The field of law-and-economics has for many years studied how fines and imprisonment affect behavior. Nobody believes, however, that all compliance is motivated by penalties and it is questionable whether that is even the typical motivation. Two books published in 2015, Frederick Schauer's *The Force of Law* and Richard McAdams's *The Expressive Powers of Law*, consider alternative motivations, Schauer skeptically and McAdams more sympathetically. While coercion, either directly or in its support of internalized norms, seems to dominate law qua law (and not as a mere expression of morality), a considerable portion of law serves other uses such as coordination, information provision, expression, and reduction of transaction costs. (JEL codes go here)*

Rasmusen: Dan R. and Catherine M. Dalton Professor, Department of Business Economics and Public Policy, Kelley School of Business, Indiana University. BU 438, 1309 E. 10th Street, Bloomington, Indiana, 47405-1701. (812) 855-9219. Fax: 812-855-3354. erasmuse@indiana.edu, <http://www.rasmusen.org>.

This paper: <http://www.rasmusen.org/papers/expressive-law-rasmusen.pdf>.

1. Introduction

It would not be unfair to say that economics relies on two big ideas, incentives, and markets, which Marshall's supply and demand curves have the wonderful property of combining. The buyers and sellers respond to the incentive of price, and the price in turn is formed by their responses. Thus it was natural when economics began to be applied to law that the same model was used for crime. The seminal article of Becker (1968) uses marginal cost and marginal revenue diagrams and it has become common to speak of the supply and demand for crime, confusing as the metaphor is for demand for a "good" with negative utility. Once we think of crime this way, we have the useful division between the incentives of those who supply it and those who provide the opportunities for the suppliers, their incentives at the margin, how the price and quantity change, entry and exit, changes in technology, and so forth. Crime is a special product, though, in that a large component of its price is set by the state through the medium of law. Law, too, has been studied in terms of its supply and demand, but in this essay we will consider its properties rather than its creation.

What is law and how does it work? Two recent books that have addressed the subject are Frederick Schauer's *The Force of Law* and Richard McAdams's *The Expressive Powers of Law*. Both are senior professors from prominent law schools (Virginia and Chicago), but their approaches are different. Professor's Schauer's perspective is that of traditional jurisprudence and Professor McAdams's is that of law and economics. Interestingly enough, each emphasizes the opposite of what one might expect. Schauer emphasizes the role of coercion in law, while McAdams emphasizes indirect incentives such as coordination and information.

Schauer is tackling the old and big questions in jurisprudence of "What is law?" We in economics are skeptical of spending energy on definitions, but definitions have their place. Underneath definitions are concepts. We all agree that understanding concepts is important, and so are definitions because it is hard to think straight while mentally

adjusting a definition to fit the underlying concept. It is like trying to do arithmetic in a system where the number x denotes $3x$. Thus, even in economics it is worthwhile to spend time pondering what we mean by “externality”, “transaction cost”, or “the firm”. The importance of clarity was recognized as long ago as Confucius, who argued the importance of clear concepts to public policy in his doctrine of “The Rectification of Names”.

“A superior man, in regard to what he does not know, shows a cautious reserve. If names be not correct, language is not in accordance with the truth of things. If language be not in accordance with the truth of things, affairs cannot be carried on to success. When affairs cannot be carried on to success, proprieties and music do not flourish. When proprieties and music do not flourish, punishments will not be properly awarded. When punishments are not properly awarded, the people do not know how to move hand or foot.” Confucius, *Analects*, Book XIII, Chapter 3, verses 4-7, translated by James Legge.

This passage, as it happens, also alludes to the two aspects of law that separate Schauer and McAdams: “punishment” and “proprieties”. Is the essence of law coercion, or should we look elsewhere? One place to start is with a dictionary. The Merriam-Webster online dictionary defines law as “a binding custom or practice of a community: a rule of conduct or action prescribed or formally recognized as binding or enforced by a controlling authority.” (<http://www.merriam-webster.com/dictionary/law>) That is a bit of cheat, though. Is the rule really still a law if it is prescribed by a controlling authority but not recognized as binding or enforced? Or if it is recognized as binding but not prescribed or enforced? Or if it is enforced but not prescribed or formally recognized as binding? And what is a ruling authority? In the end, a thoroughly satisfactory definition eludes us, and perhaps Confucius is right that this is related to why society is disordered, but we can still learn something from the search for the concept’s meaning. A good part of that search involves why laws are obeyed, and in particular the

question of whether law needs to be defined as a rule enforced by the coercive power of the state.

Oliver Wendell Holmes is known for his “prediction” or “bad man” theory of law. He says that to understand law, one must put aside thoughts of morality. Law is not for the good man, who will do what is right anyway. Rather, law is set up for the bad man, who wants to misbehave and worries only about how and whether he will be punished. Holmes follows Madison, who said, “If men were angels, no government would be necessary” (as cited in Schauer, p. 97). Thus,

“If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.... if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of this mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”

This concept of law seems clear: law boils down to the penalty the state will inflict if you break a rule. But useful as the concept is, especially for practising lawyers, it does not fit with how we think of law. A court can surely violate the law in its rulings, even if a higher court does not overrule it; indeed, the problem in a corrupt legal system is that it has the rule of men, not rule of law. And there are rules we call laws that cannot be enforced in court. The law says that Eric Rasmusen must pay income tax at a certain rate, but if the Secretary of the Treasury chooses to exempt him for whatever reason, it will not end up in court. First, of course, the Secretary and the taxpayer may keep the violation secret. Even if it is boldly proclaimed in public, however, the offense can be brought to court only by someone with “standing”—someone whose rights have been violated clearly enough that the law allows him to be the one to bring the case before a judge. The tax laws are such that in this case only the Secretary and Rasmusen would have

standing and neither would go to court, as we explain in Ramseyer and Rasmusen (2011) in the context of the 2008 TARP bailouts. Yet we would not say that the law exempts Rasmusen from taxation.

Schauer's effort is to try to sort out what makes laws work. At the foundation are two theories of law: deterrence theory, and legitimacy theory. Deterrence theory is the view of Holmes and Becker, and of Jeremy Bentham (1782) and John Austin (1832) before them. Law works because it commands people to obey orders or pay a price. H. L. A. Hart's contrary view in his 1961 book, *The Concept of Law*, is the foundation of modern jurisprudence on this topic. He argued that penalties were the result of internal moral obligations and hence a secondary part of law. Laws, unlike commands, apply to the issuer as well as others, some laws confer powers rather than imposing duties, not all laws arise as commands, and laws persist even when the ruler changes. Nor is coercion is not unique to law; it is the incentive used by a robber, yet we do not regard his demand for your wallet as a law. The alternative is legitimacy theory. This says that people obey the law because they believe it has been promulgated by a rightful authority. Max Weber said, "The most common form of legitimacy is the belief in legality, the compliance with enactments which are formally correct and which have been made in the accustomed manner" (as quoted in McAdams, p. 3). This is perhaps the difference between Holmes's bad man— who cares only about deterrence— and Holmes's good man— who cares also about legitimacy. In economic language, it is the difference between the incentive of an external price and the motivation of an internal taste.

Schauer sides with deterrence theory. "Law makes us do things we do not want to do," is the first sentence of his book and the title, *The Force of Law*, is no accident. But he recognizes that deterrence theory has problems. There are constitutive rules of law, for example, as well as regulative, to use the terminology of philosopher John Searle (1969). Regulative rules control behavior that would happen even if there were no laws. They make killing someone into murder,

and dumping toxic waste into a violation of the Environmental Protection Act. Constitutive rules create new opportunities. The law of wills and testaments, for example, allows you to leave your house to your nephew with the assurance that if your son objects, the coercive power of the state will block his objections. Contract law is the example par excellence. You can make promises without law, and regulative law constrains some promises— for example, it is unlawful for you to promise to deliver marijuana— but contract law allows us to make our promises into binding agreements. Coercion is an element of constitutive law, to be sure, but it is voluntary coercion. The buyer accepts the obligation because that is how he can impose an obligation on the seller. Much of Schauer’s position can be explained by his willingness to broaden the definition of coercion to include such things as being coerced for fear of shame and reputation loss (p. 133) and expulsion from cooperation with others (p. 135), indirect penalties others would contrast with fines, imprisonment, and corporal punishment. Even with this broadening, though, would not include obedience to the law independent of consequences.

What then of the “puzzled man” of Hart (1961), the man who wants to do what is right but wants the law to tell him right from wrong? The puzzled man is someone who does not need to be coerced. The idea of the puzzled man, who wishes to learn from the law what he ought to do, brings to mind “the three uses of the law” in John Calvin’s *Institutes*. One use of the law is to maintain order, to control the bad man. A second, however, is to convict men of sin— that is, to challenge them by revealing the evil within them— and a third is to educate, to provide a guide to how someone desiring to do good ought to behave. While admitting that the puzzled man may exist, Schauer is skeptical of his practical importance. Many of us are puzzled about what is moral, but how many of us, after we have decided what is moral, want to puzzle out what the law says for any reason other than to avoid punishment? Schauer admits that coercion may not be absolutely essential to law, but he argues that it is more useful to look for what is typical, that the puzzled man is the exception that proves

the rule. In general, laws are imposed to make people change their behavior. And most people will not change their behavior without the threat of coercion.

2. *Jurisprudence Games*

McAdams, on the other hand, recognizes that coercion is an important feature of law and even the dominant one if norms are independent of law, but he wishes to delve even into special cases of why laws affect behavior and why are they are enacted. He looks at two categories: coordination and information. Simple games give insight into why laws can be useful. The first is of course the prisoner's dilemma. McAdams (2009) notes that the prisoner's dilemma has been mentioned in over 3,000 law review articles compared to 246 mentions of the three coordination games we will look at below.

The story is a familiar one. Two prisoners are being held on suspicion of having committed a felony and a misdemeanor together. If they both deny having committed the felony, they will both convicted of the lesser misdemeanor and sentenced to two years in prison. If both confess, they will each be sentenced to six years. If one confesses and the other denies, the prisoner who confesses will serve one year and the one who denies will serve twenty years. Table 1 shows the payoffs.

		Prisoner 2	
		Deny	Confess
Prisoner 1	Deny	-2, -2	-20, -1
	Confess	-1, -20	-6, -6

FIGURE 1: THE PRISONERS' DILEMMA

Making their decisions independently, both prisoner choose to confess because that is not just the Nash equilibrium, a best response to the other player's equilibrium action, but dominant: whether the other player chooses to confess or to deny, to confess is the best response.

The puzzle is that both players could do better if they could both bind themselves to deny.

McAdams presents the prisoner's dilemma merely to distinguish it from the coordination games that are his main interest. The prisoner's dilemma is so dramatic that it distracts from other two-by-two games. It is not a model of expressive law, but it is helpful in understanding the need for both regulative and constitutive law. For regulative law, it represents the social contract. We all would like to pay rather than steal goods from each other because stealing leads to inefficient allocation and rent-seeking. Pay/steal parallels deny/confess in the payoff matrix. The solution of law is to introduce a third party, the state, which punishes deviation from the jointly optimal action. If you and I can vote for what the state does, we vote for coercive laws. If the state is a dictatorship, it chooses the same coercive laws so as to maximize social wealth (though of course some laws are themselves for rent-seeking, more akin to steal than to pay, in a dictatorship or in a democracy).

For constitutive law, the difference is that the law enlarges the sphere of opportunity rather than diminishing it. Two parties to a deal can make a promise even in the absence of law and each has the choice to perform their obligation or to breach. The dominant strategy will be to breach, regardless of what the other party does, in the absence of morality, reputation, and other private incentives. If the two parties can choose to make a contract instead of just a promise, the payoffs change because the state adds a penalty, enforced by coercion, that makes breach more costly.

It is noteworthy that the ordinary remedy for breach of contract is not for the state to require performance, but rather is limited to paying damages sufficient to make the injured party whole. This is one of Holmes's main examples for his bad man theory. The law says that it is a breach of a duty when a party breaches a contract, but what it means is not that breach is immoral, or even that the state forbids it, but that the breacher must pay a penalty. The damages are a price for breaching.

How a price differs from a penalty and how a penalty differs from a tax are interesting questions, and important to the law. *National Federation of Independent Business v. Sebelius* 56 U.S. __ (2012), the most central of the Supreme Court's health care mandate cases, is a prime example. The court ruled that the federal government could not use fines as penalties to force someone to buy health insurance without going beyond its constitutional powers, but that it could impose a tax on people who failed to do so. The distinction sounds humorous, and one might argue over whether the money in this case really was a tax (and the lawyers did!), but we all know there is a difference. I recall George Stigler suggesting to me back in 1990 that a monetary incentive is the price for an action if one is allowed to perform the action as many times as one wishes so long as payment is made, but a penalty if its failure to deter results in increased penalties for recidivism. Thus, parking tickets and penalties for not buying health insurance would be prices, but speeding tickets and felony sentences would be penalties.

In our terms, Schauer's focus is on regulative law as a payoff-changing solution to the prisoner's dilemma. He notes that constitutive law is also coercive in a certain sense. Once we have contract law, it becomes more difficult to use promises. In the absence of courts, the parties might be better able to trust each other's promises because social norms for promises are stronger. Once contract law is introduced, though, the parties are more likely to excuse their behavior by saying that they complied with the words of the contract and in contract law words trump spirit. Thus, they are coerced by the state into abandoning their social norm for the new legal rule.

On the other hand, legal rules may bring liberation from undesired social norms. In a world without courts, the bad man cannot find partners for his deals, but though the good man can find partners, the details of his agreement are constrained by whatever the social norm may be. Or, in the case of either a bad or a good man who can find partners because he has a good reputation and wishes to keep it, he is constrained by whatever behavior is required to maintain his

reputation. It may be, for example, that the norm is that you keep your promises, however costly they may have become to keep. In that case, the party who wants to breach might have far more benefit from breaching than the cost to the injured party, but he fears for his soul or his reputation if he breaks his promise. Or, there may be a mutually beneficial modification but the party desiring to breach can be “held up” by the other party and made to pay exorbitantly. In this case, the good man might breathe a sigh of relief in having his norms overridden by law, because the law would permit breach if the breacher pays reasonable damages, freeing him from the higher claims of the promisor’s duty. Indeed, law permits parties to a contract to implicitly include in their agreement a whole set of default rules established by others’ wisdom and long experience with the contingencies that arise. Of course, it can also happen that the legal rule is less efficient than the norm; Bernstein (1992) tells us that in the New York diamond industry the norm is never to breach and that is efficient in the particular context because of the importance of prompt payment for cash flow.

2.1 Pure Coordination

The prisoner’s dilemma is central to why law is desirable, but McAdams’s point is to distinguish it from coordination games. Using other stories of prisoners, he employs the paradigmatic three types of coordination games: pure coordination, the assurance game, and the battle of the sexes/hawk-dove.

Pure coordination is the simplest coordination game. Imagine now that the police have no evidence of the misdemeanor, but they will be able to convict the prisoners of a felony and imprison them for five years if they have inconsistent alibis. We then have the game of Table 2, in which the payoffs from both choosing Alibi A or both choosing B are (0,0), whereas if their alibis are inconsistent the payoffs are (-5,-5). There are two Nash equilibria in pure strategies, one for each alibi. There is also a mixed-strategy equilibrium in which each player chooses alibi A and alibi B with equal probability.

		Prisoner 2	
		Alibi A	Alibi B
Prisoner 1	Alibi A	0,0	-5,-5
	Alibi B	-5,-5	0,0

FIGURE 2: THE ALIBI GAME OF PURE COORDINATION

I would supplement McAdams’s pure coordination game with the game of “ranked coordination”. In a ranked coordination game, discoordination yields the worst payoff, but different coordinated actions have different payoffs. Thus, imagine that Alibi A is that the prisoners were playing foosball together at the other end of town, for a payoff of (0,0) but that Alibi B is that the prisoners were committing a misdemeanor together at the other end of town, for a payoff of (-1,-1). There are still two Nash equilibria. If prisoner 1 expects prisoner 2 to choose alibi A, he of course will choose it too. But if prisoner 1 expects prisoner 2 to choose alibi B, his payoff from also choosing it is -1 compared to -5 from choosing alibi A so he too will choose the inferior alibi B.

Pure and ranked coordination are the games of standard setting and conventions. Not all conventions are rankable; some fit the category of pure coordination. American law requires drive on the right side of the road. There are, of course, coercive penalties for driving on the left, but everyone would choose to drive on the right anyway to avoid an accident. Law works by suggesting an equilibrium. It provides one of the Schelling (1961)’s “focal points”, a reason for players to think other players will choose to play out a particular equilibrium. The coercive penalty has some influence, both directly and because it may be focal to choose the equilibrium which is unpunished, but the dominant force is expectations; if we knew we might receive a ticket for driving on the left but we think every other driver will drive on the left, we would prefer the ticket to causing a traffic accident.

Other standards, however, need both focal points and careful consideration of which standard is best, and so are better considered

ranked coordination games. The U.S. federal government sets the standard for what it means for lettuce to be “organic” so different kinds of sellers can communicate to organic-loving and organic-indifferent consumers what they are paying for when they buy organic lettuce. Organic has a variety of possible meanings which would yield different amounts of social surplus depending on their cost and the value placed on them by consumers, but the government picks one meaning. This illustrates a second feature of ranked coordination too; it opens up the possibility of an information function for law. In the alibi game, it is obvious which alibi is best. In organic labelling, it is not. The citizens know coordination is desirable to make labels meaningful, but they do not know which definition is best. The law thus serves a second purpose, beyond pure coordination: to identify the best definition. There is reason, however, that this might be classified under McAdams’s coordination theory rather than his information theory. The new information about the payoff of the action is helpful, but it is not why citizens use the governments definition. Rather, they use it first because of the underlying law against fraud (the solution to a prisoner’s dilemma) and second because they know other citizens will use it and would do so even if they thought another definition was better.

Merrill and Smith (2000) apply the idea of coordination on definitions in a sophisticated way to property law’s principle of *numerus clausus* (closed number), the principle that land property can only be enforced as falling into one of a small number of legal forms. A rental agreement that says a tenancy will last “for the duration of the war” will not be enforced. Instead, the courts will try to fit it into one of the four recognized forms of tenancy. Most courts have treated it as “tenancy at will”, lasting only so long as both parties agree, or as a “periodic tenancy”, if the agreement provides for payments at, say, monthly intervals. This contrasts with contract law, which is extremely flexible as to which terms can be inserted into contracts. It is possible, for example, to write a contract in which I sell you my house with the provision that you never bring oranges into it on pain of \$5,000 damages. That will be enforced as a contract between the two of us,

but not as part of the house as property; if you resell the house the new owner is not bound, and would not be bound even if we put this specifically into the contract.

Why the limitation for property law? One possibility is the worry that property could result in fragmentation of interests in the property that would outlast their usefulness and create waste after the purpose of the novel form had disappeared, but why then would the original owner not put a term of years on the novelty? Merrill and Smith dismiss fragmentation in favor of a different explanation: that land interests frequently involve third parties who would have to incur transaction costs in determining who exactly had which interests in the property. Even if most property were held in conventional forms, a third party wishing to buy the property, base a mortgage upon it, or rent it would have to check for oddities in its ownership.

Thus, law can help with coordination. Schauer, however, would wish to object at this point that the coordination function of law is easy to overstate. What if the government did not tell us which side of the road to drive on, or what lettuce to label organic? Customs, would develop for driving, social norms for behavior. Industry associations would decide on standards and issue certificates of organic compliance. When force is not necessary to implement a rule, private actors can do it. The government has an advantage only because it is powerful and focal: we expect other people to follow the standard the government suggests. This objection could be answered by saying that power and expectations are essential features of government. The same objection could be made to the idea of the central bank as lender of last resort, since a large enough private bank could do the same thing (since ending a crisis by lending to sound institutions is profitable). Even so, governments have the means to communicate and the expectation that the citizens will listen. This is one aspect of legitimacy: not that people feel they ought to obey the government if it is against their interest, but that they think it in their self-interest to obey because other people will.

2.2 The Assurance Game

Legitimacy can in fact be modelled using our next game, the assurance game. The assurance game in Figure 3 changes just one of the payoff combinations of the prisoner's dilemma. Now, instead of (deny, deny) resulting in two years of prison each, the prosecutor has very little evidence and would have to release both prisoners. As a result, there are two Nash equilibria. The prisoner's dilemma outcome of (confess, confess) is still a Nash equilibrium, but it is no longer a dominant strategy to confess. Instead, if prisoner 1 expects prisoner 2 to deny, he should pick deny too, since now (deny, deny) has a payoff of 0 compared to -1 from (confess, deny).

		Prisoner 2	
		Deny	Confess
Prisoner 1	Deny	0, 0	-20, -1
	Confess	-1, -20	-6, -6

FIGURE 3: THE PRISONER'S ASSURANCE GAME

The assurance game is like ranked coordination in having two Nash equilibria ranked equally by both players. The difference is that the assurance game retains the prisoner's dilemma feature that if one player deviates from his equilibrium strategy in the pareto-superior equilibrium, the other player's payoff is particularly low—twenty years in prison, here. If we add to the game a probability α that a player choose the out-of-equilibrium strategy by mistake, that would not affect the player's choices in the prisoners' dilemma, pure coordination, or ranked coordination. In the prisoner's assurance game, though, if that probability were greater than $\alpha = 2/5$ the (deny, deny) equilibrium would disappear. A player needs assurance that the other player will play to their mutual benefit.

McAdams uses the assurance game to think about a constitution, the basis of a government. In the conventional view, a constitution is the solution to a prisoner's dilemma. In the state of nature, everyone is

choosing to plunder rather than to create because that is individually the dominant strategy. To escape, they agree to form a government that punishes plunder. McAdams suggests that this is more like an assurance game. Each player has the choice to refrain from plunder and support the rule of law, on the one hand, or to launch a pre-emptive attack on the other. It is not a prisoner's dilemma, because if player 1 expects other players to support the rule of law, doing so is also to his private advantage. If, however, expectations become pessimistic, the rule of law ends as each player seeks to protect himself as best he can. As McAdams notes, this is the same idea as a repeated contribution game, a repeated prisoner's dilemma in which each player's choice is to contribute to a public good or to be selfish. Infinitely repeated games have multiple equilibria, but in the two extreme equilibria the actions are the same in each repetition: either nobody contributes or everybody contributes. Everybody contributing is an equilibrium because if one player deviates he will receive a higher current payoff than the other players but by causing them to stop contributing in the future he reduces his own overall payoff. Condensing this to a one-shot game we obtain an assurance game with a high payoff for a player if he and everyone else contributes but a low payoff if he contributes in isolation, worse even than if he too fails to contribute.

This idea of equilibrium as legitimacy can be found also in Weingast (1992) in verbal form. Hadfield and Weingast (2012) formally model the idea using repeated games in "What is Law: A Coordination Model of Legal Order." The idea builds on the well-known use of repeated games to explain cooperation in general (see Fudenberg and Maskin (1986)). I have used it myself in the context of modelling judicial legitimacy and adherence to precedent; see Rasmusen (1994). What government adds to the idea of multiple equilibria in repeated games is a player who declares what is to be equilibrium behavior and what is to be deviation. This is a form of "cheap talk"—a move in a game that has no direct impact on payoffs but on which strategies can be based, in some games increasing the scope for desirable outcomes (surveyed in Farrell and Rabin (1996)). Cheap talk does not

solve the problem of multiple equilibria— adding it does not alter the set of equilibria since players can always use strategies that ignore it— but it makes the plausibility of desired outcomes as focal points even more compelling. Or, the government may impose punishments that make the desired behavior an equilibrium independent of coercion and then remove the penalties without disturbing behavior if continuation of past behavior is focal. What starts by command becomes coordination.

Coordination in repeated games thus gives us a theory of legitimacy in general contexts, with legitimate behavior as equilibrium behavior enforced by the threat of low payoffs that would result from deviation that sends the players into a subgame in which legitimacy is lost. This is different from another, equally interesting, way in which deviation can be punished: by the equilibrium specifying that other players are to punish a deviator or be punished themselves. This, too can support a variety of equilibria in repeated games. Perhaps such punishments can be described as the upholding of legitimate rules too, but it is based on the existence of a second level of punishment and so is closer to the idea of coercion. Schauer would classify both threats as forms of government coercion (p. 135).

The rival of the repeated game theory of legitimacy is legitimacy as internalized principle. If legitimacy is a principle, people are educated to believe that the government is legitimate and that disobedience is wrong, generating the disutility of guilt (the pain felt even aside from the existence of other people) or shame (the pain of other people seeing what you have done, or imagining them see it). No doubt both legitimacy as coordination and legitimacy as principle contain truth, but the mechanics are different, and the implications. Legitimacy via principle is a solid legitimacy that outlasts the sovereign's public sway. It is the legitimacy that French royalists granted Louis XVIII while he was an exile and Napoleon was in power. Legitimacy via coordination is a brittle legitimacy, which lasts in citizen 1 only while citizen 2 acknowledges it. Poetry sometimes conveys ideas better than prose: this

legitimacy is the gameskeepers' loyalty to the crown in Shakespeare's *King Henry VI-Part 3* (III-1). They are chided by King Henry when they capture him fleeing from his rival, Edward IV, and propose to turn him in for the reward:

King Henry VI: But did you never swear, and break an oath?

Second Keeper : No, never such an oath; nor will not now.

King Henry VI: Where did you dwell when I was King of England?

Second Keeper : Here in this country, where we now remain.

*King Henry VI:*I was anointed king at nine months old;

My father and my grandfather were kings,

And you were sworn true subjects unto me:

And tell me, then, have you not broke your oaths?

First Keeper: No; For we were subjects but while you were king.

The gameskeepers obey the sovereign, but only the sovereign that everyone else obeys, as is, indeed, a principal theme of the Henry VI plays. Part of sovereignty is history-dependent— the fact that Henry's grandfather captured the throne from a weak rival— and part depends on self-interest— the fact that Henry too is a weak king and many of his nobles wanted a change. The rival kings jockey to capture the expectations of the nobility and the people. And those expectations are not without their own internal morality of taste. This is where taste and coordination are hard to distinguish. For what of the internalized belief that you should obey the sovereign everyone else is obeying? That is the oath the gameskeepers thought they were swearing. And in practice, in large communities a common citizen does not obey the law because he fears that if he does not then society will crumble. That may well be the reason Republican senators respect the minority's right to filibuster when the minority are Democrats, why members of a family keep up respectability for each others' sake, or why large factions long respected the peace in Northern Ireland and Yugoslavia, but for the individual in a large group this leads to the tragedy of the commons. Rather, obedience to the law, written or unwritten, is supported by

guilt, shame, or disapproval — feelings that depend on what other people do, but create a somewhat different coordination problem.

If we return again return to Schauer’s cautions about the coercion behind expressive law, they will apply here too. Force creates a coordination game too. If everyone obeys the law, a single deviator is easy to force into compliance. If everyone disobeys, the state is helpless. Much depends on the equilibrium in which we start. I think that I would not steal even if the police did not exist to stop me, but that thought is easy to maintain in the absence of true temptation. My taste for respect of property might well be fragile, controlling my behavior when crime doesn’t pay, but eroding once it does start to pay. So it is with legitimacy generally; the support it has from internal tastes in ordinary times may vanish once it is not longer supported by force.

2.3 *The Battle of the Sexes*

McAdams’s third coordination game is the battle of the sexes, with the payoffs in Figure 4. The games so far described all have equilibria with symmetric payoffs. The battle of the sexes does not. Here, instead of McAdams’s version, I will use a modification of the alibi pure coordination game that I will call the battle of the alibis. The difference is that now instead of an alibi for innocence, the only alibi available is a story that both prisoners were committing a lesser crime, as in ranked coordination’s alibi B, but that one of the prisoners was the culprit and the other merely a witness. Alibi A is the story with prisoner 1 as the witness and payoffs of (0,-3); alibi B has prisoner 2 as the witness and payoffs of (-3,0). Again, both alibi A and alibi B are Nash equilibria, but now the two prisoners have different preferences over them.

		Prisoner 2	
		Alibi A	Alibi B
Prisoner 1	Alibi A	0,-3	-5,-5
	Alibi B	-5,-5	-3,0

FIGURE 4: THE BATTLE OF THE ALIBIS

This game is known as the battle of the sexes when the coordinating actions are the same for each player, as in the battle of the alibis, and hawk-dove when they wish to coordinate on a different, complementary, action for each. The difference from the other coordination games is that now the players have different preferences over equilibria. Prisoner 1 wants alibi A; prisoner 2 wants alibi B. The various tricks of Schelling's *The Strategy of Conflict* come into play as players strive to control expectations. Prisoner 1 would want to move first, blabbing out alibi A as soon as the two prisoners are caught, and in the presence of prisoner 2. Or, he might shout out "Alibi A!" to prisoner 2 as he is dragged away from him. Or, he might lie later and say to prisoner 2 that he has already told alibi A to the police and they find it plausible. The principle that different players have different preferences certainly holds true for laws also, and explains the maneuvering over their formation. When a desirable law is to be passed, each player wants his version to be the focal point, by announcements to the media, control of the first draft, or confident announcements of victory. Our earlier example of labelling organic lettuce could be seen as a battle of the sexes, since all producers would benefit from standards, but each producer would want to make his original personal standard the standard for everyone rather than have to adapt to a different new standard.

3. Law as Information Provision

Let us now turn to McAdams's second theory of law: the information theory. McAdams says that law can convey information to someone in three ways. The first is facts about the physical world, such as whether anti-lock brakes are really worth having on a car ("risk signalling"). The second is information about other people's opinions ("attitudinal signalling"). The third is information about the level of enforcement ("violations signalling").

A good example of risk signalling is the Food and Drug Administration's requirement that pharmaceutical products be proven safe

and effective. The main motivation for obeying the law is coercion of the seller. For the buyer, however, the main effect of the law is informational. He knows that any product the FDA allows to be sold has passed a high threshold of safety. In the case of prescription drugs, the informational effect extends not only to the patient but to the doctor, who has the FDA's approval as a first cut for which drugs to consider for a particular malady. If the FDA allowed all drugs to be sold, but put a seal of approval on drugs proved safe and effective, the law would still be largely effective, since buying a drug without the FDA's seal would be risky enough to require careful thought.

Attitudinal signalling conveys different information. Whenever a law is passed, that is an indication that somebody wanted it passed. Thus, beyond the direct effect of the law, the citizen can deduce something about other citizens. Moreover, he learns not about a random sample of other citizens, but about a group powerful enough to enact a law. Depending on the context, this group may be a majority or it may be a minority with strong enough tastes or beliefs that it can use log-rolling or lobbying to obtain its desired law.

Social legislation concerning such things as sodomy, marijuana, flag burning, same-sex marriage, abortion, and gun control all convey attitudinal signalling. While bills on these matters usually have coercive effects, the bitter fights over them point to something else at stake. One of those things is that victory communicates political power. Being able to convince a legislator that voting for your side will be best for his career, or to unseat legislators who will not cooperate, is a sign that your side has more people, resources or talent. The less the vote corresponds with the legislator's personal beliefs or past allegiances, the better it is for showing your group's power. The extreme comes in totalitarian societies. Theodore Dalrymple says in *Glazov* (2005), In my study of communist societies, I came to the conclusion that the purpose of communist propaganda was not to persuade or convince, nor to inform, but to humiliate; and therefore, the less it corresponded to reality the better. When people are forced to remain silent when they are being told the most

obvious lies, or even worse when they are forced to repeat the lies themselves, they lose once and for all their sense of probity. To assent to obvious lies is to co-operate with evil, and in some small way to become evil oneself. One's standing to resist anything is thus eroded, and even destroyed. A society of emasculated liars is easy to control.

The idea generalizes to less malevolent forms of political expression. A law is a public expression of the society's will. When one state passes a bill in favor of same-sex marriage, that says something about the beliefs of the majority in that state, or of those who care the most, or are most able, or have the most money. Whatever the currency of power, the law represents every citizen of the state, whether in favor or opposed. A state passing a bill against same-sex marriage is an even clearer example. There, the law may have no coercive effect at all, if it merely restates the status quo. It is, rather, a declaration of where political power is strongest on that issue.

Why would such a declaration be useful? In some cases such as laws against same-sex marriage, it may be a warning shot fired at the judiciary. The judge might create a new law himself if he thinks the citizens do not care or would support him but be more restrained if he fears public disapproval. Of course, the judge may himself engage in attitudinal signalling when he creates new law. In that case it is the political balance within the judiciary that is conveyed as information to the people. Justice Scalia criticized the Court in the 2015 same-sex marriage case, *Obergefell v. Hodges* for ruling based on personal beliefs given that the Court was composed entirely of graduates of Harvard and Yale Law School, but just because a political body is unrepresentative does not mean its actions fail to convey useful information. In this case, it conveyed the information that the view of same-sex marriage of the legal elite had changed, which in turn implied that the elite generally had changed their view.

In other cases, the legislature may be signalling the executive branch. In February 2014, a law was passed requiring the President to notify Congress of prisoner trades thirty days prior to the actual

trade. In May 2014 the President traded five Taliban prisoners for an American prisoner, Bowe Bergdahl, notifying Congress the same day. The law had no enforcement provisions, however, so nothing came of it. Why, then, enact the law? What the law did was to communicate to the President that the majority in Congress wanted to be notified of prisoner exchanges in advance so Congressmen could raise possible objections. The President was willing to sign the bill, but he apparently decided that notifying Congress 30 days before the trade would create more trouble than revealing that he did not care what Congress wanted. And this law is not anomalous; there are many laws that lack enforcement provisions.

Let us return to the effect of attitudinal signalling on the ordinary citizen. Citizens would find signalling useful because information on what other people believe should and does affect one's own beliefs, even on a strictly intellectual level. Blind conformity is irrational, of course, but Bayesian updating requires that one update towards the beliefs of other people unless one understands where they went wrong. For many people who are politically uninvolved and hence have weak priors, going with the majority is rational. For them, even if the judiciary is unrepresentative, its declaration would be evidence that intelligent people held that belief, which would also be informative.

A less intellectual motive is that people have a taste for agreeing with the majority, or with the winner. This returns us to coordination, of course, but not in the same form. In the coordination games, the law created a focal point and shifted everyone's behavior. Now, more information is being conveyed than just the identity of the focal point. Rather, the citizen learns that other citizens hold a belief, and he may wish to conform to that belief even if he does not think anyone else will shift with him, simply because he wants to join the majority or those who are politically weighty.

Attitudinal signalling has a problem shown by my repeated qualifications, e.g. "or those who are politically weighty". It is easier to imagine why citizens would decide to conform to the majority than to

the powerful, especially if they know special interests have been making vigorous efforts. Also, there is ample scope for ulterior motives when a law is not majority-based. Citizens know that they do not know the motives behind the actions of the legislature. The government has a limited amount of credibility, which is used up whenever one of its assertions is discovered to be false. This is a problem even with risk signalling, of course. The chicken industry wants the government to make people believe that cholesterol is unhealthy and the beef industry wants them to believe it is healthy. If people think that what the government announces is based purely on interest-group politics, laws will have no information content. If they believe the government is lying 30% of the time but don't know which 30%, their willingness to obey laws will be correspondingly reduced. This applies to attitudinal signalling too, and even more so. Those who pass a law with the motive of attitudinal signalling are intending to convey information about other people's beliefs. Their own bias will lead them to overestimate their popularity, and even aside from that, they may think it ethical to exaggerate how many people believe as they do, especially if they think their exaggeration will be self-confirming by shifting public opinion. Other citizens know this, of course, and just as they take the claims of commercial advertisers with a grain of salt, so too will the effect of attitudinal signalling be weakened by skepticism.

Recall Hart's puzzled man, wondering how to behave. It is perhaps under the category of attitudinal signalling that we would place law's educative purpose. Whether the puzzled man is really puzzled or is just ignorant, if he violates a criminal law he will discover how society wants him to behave. This would happen even without penalties— as with the traffic cop who lets you off with a caution— but penalties drive home the message. This is the theme of Dau-Schmidt (1990), the message of which is clear from the title, "An Economic Analysis of the Criminal Law as Preference-Shaping Policy." Indeed, rehabilitation is one of the functions of criminal punishment that is routinely cited, and whatever difficulties it has in practice, the goal is a worthy one.

We use the legal status of actions in private life too. We tell children “Stealing’s against the law”, even if what we really mean is “Stealing is sinful” or “Stealing is morally wrong” or “If you steal, you’ll get a bad reputation.” The illegality of the act is shorthand, a non-commercial example of law’s reduction of transaction costs. How will people become virtuous unless somebody teaches them? Plato’s *Laws* includes 214 mentions of the word education: for him, education and law were subjects that had to be considered jointly. The educative power of law does depend on how closely it tracks social norms, however. The more that law is morally arbitrary or offensive, the less it is respected. Particularly given how difficult it is to distinguish laws enacted by the legislative branch from regulations enacted by the executive branch, respect for the law becomes eroded.

McAdams’s third category of signalling is violation signalling. This is different from the first two categories because it consists of involuntary transmission of information. Sometimes the passage of a law signals the existence of a problem. A law increasing the penalty for a crime is passed because the current penalty is insufficient. Discovering this, citizens may learn that criminal acts are more profitable than they’d thought. The idea is attractive in its counter-intuitive result of an increase in bad behavior, but examples are hard to come by. McAdams suggests the study of Israeli daycare centers by Uri Gneezy and Aldo Rustichini (2000). Initially, the day care centers imposed no fine on parents who picked up their children late. After a fine was imposed in six of the daycare centers, late pick-ups rose rather than fell. One explanation is that this changed the sanction from a shame penalty, which would increase for repeat offenders, to a price, which would not. Another explanation is violation signalling. Imposing the fine conveyed to parents that other parents were picking up their children late, and they responded to that information by being late themselves.

McAdams discusses risk, attitudinal, and violation signalling, but he does not discuss a fourth kind of signalling: citizens who signal information about themselves to other citizens by obeying the law. The first three categories of signalling are not signalling the way economic modelling uses the term: a player with desirable but hidden characteristics intentionally engaging in costly behavior that communicates his type because the behavior is even more costly for a undesirable player. Making a statement, communicating power by winning a political battle, or involuntarily conveying information is not that kind of signalling, though the word “signal” is so useful that its use can be excused. To refrain from crime, however, is behavior that is easier for the person with greater self control. We could, for example, have an equilibrium in which except those with a very low level of self-control everyone obeys the law for fear of being thought to lack self-control if they are convicted. No penalty would be needed except the state’s public declaration that the offender was guilty. In Rasmusen (1996) I model this in an adverse selection model and call it “stigmatization”; for a search model version, see Harel and Clement (2007). It is a cheap form of deterrent, and can even have a negative cost because it does convey useful information (though some argue that by reducing non-criminal opportunities it could actually increase crime, e.g. Funk (2004)). Because of stigmatization— or, the other side of the coin, validation of one’s desirable type, someone looking for an employee or a spouse is able to separate types with low and high self-control and make a more appropriate match, shooting neither too low nor too high. In such a model there is a second equilibrium, however, in which stigmatization fails and everyone disobeys the law. If everybody commits crime, including people with high self-control, the stigma disappears. A conviction conveys no information, because everybody knows that in equilibrium anyone without a conviction is merely a criminal who got away. A unilateral deviation to noncriminal behavior by someone will not convey any information.

What is particularly useful about signalling via stigma avoidance is that it can explain why people would obey even unjust or silly laws.

That is because the motive is no longer to do what is right or to avoid guilt, but to be considered a law-abiding person. Indeed, the more arbitrary the law, the better it serves this purpose because the clearer is the signalling motive, as opposed to compliance for other reasons. Moreover, signalling separates obedience to the law from any direct benefit. It is not like coordination, where a deviation from convention immediately reduces one's payoff, or informative law, which teaches that obedience has a higher immediate payoff than disobedience.

Schauer wonders whether stigmatization is even a function of law at all. "When and where this is so, the role of law *qua* law may be less than is often thought. The state, after all, could simply publicize the names of those who engaged in widely scorned activities without making them illegal and would thus achieve its content-based goals without having to resort to the law at all." (p. 134) The question, though, is whether the decision to publicize is a decision to use law. The state has thereby officially labelled an act as special, put it through a verification process, and done something that results in harm to the actor. That it does not administer any direct penalty seems unimportant to whether we call this a law. Indeed, as I will discuss later, Friedman (1979) has given us the example of medieval Iceland, where the government acted as a court but left enforcement of fines to private citizens.

4. Alternatives to Coordination and Information: Expression and Transaction Costs

Largely missing from McAdams and Schauer is discussion of two other alternatives to law as coercion: expression *per se* and the reduction of transaction costs.

By expression *per se* I mean expressive law as expression. Sometimes a law is passed just for the sake of passing a law, independent of whether it is ever enforced. The law is not meant to coerce people into acting differently, or to coordinate their actions, or to provide them with information. It is just to satisfy the desire of its backers to make

a statement, to put themselves on record. Even if this is not the only purpose of a law, it can be a major purpose.

When a crisis arises, people want to do something. One thing they can do is to announce their opinion. Action may be better than words, but words are more satisfying than nothing at all. Part of the motivation may be to persuade other people, McAdams's information theory. Another part, however, is to salve their own frustration. In economic terms, expression enters directly into the utility function. We all know this from committee meetings. There is always someone talking just to hear himself speak. His point may already have been made; the decision may already be clear; but he wants to voice his opinion. Such speakers may be frustrating, but their speeches are not entirely a social waste. They themselves derive utility, and it is perfectly rational for them to speak even when their speech will have no effect on other people: the direct utility is sufficient.

So it is with laws. They may be purely expressive, or they may mix expression with other motives. This was noted by the U.S. Supreme Court most famously in *Brown vs. Board of Education*, 347 U.S. 483. The question in the case was whether segregation by race was permissible if the schools were of equal quality, since the separation between races was symmetric treatment. The court's rationale for the decision was that the separation was not really symmetric, and the expressive asymmetry harmed the black children: "The policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn." Segregation of course had other purposes besides the expressive one, and a part of the expression itself was McAdams's "attitudinal signalling", the demonstration of the power of white voters, but another part was the desire of those voters to declare their beliefs, regardless of whether any black children actually wanted to attend white schools. The Supreme Court is still alert for for any state or federal expression of forbidden viewpoints, in particular for support of religion or a particular race. McAdams even devotes a chapter, "Normative Implications,"

to the difficulties of legal doctrine in deciding which government expressions are legitimate and which illegitimate, despite neglecting pure expression as a motive for law.

On a more routine level, expression is part of the function of imprisonment and corporal punishment (including capital punishment) in criminal law. Feinberg (1965) says, “Punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority himself or of those ‘in whose name’ the punishment is inflicted.” This is not the same as retribution, which with deterrence, incapacitation and rehabilitation is one of the standard four purposes of punishment. Retribution is the infliction of disutility on an offender to satisfy moral principles or desire for revenge, independent of any future effects, but such infliction of disutility can satisfy even if the fact of the punishment is not public. Public punishment announces the citizens’, and especially the victims’, satisfaction that justice has been done. Kahan (1996, 1998) makes the same point and draws a useful implication: fines, despite their lower social cost, may be undesirable if they fail to make the announcement as well as imprisonment. If less costly punishment is desired, we should look to alternatives that still shame the criminal and announce society’s disapproval.

Reduction in transaction costs is another reason for law. We have already talked about coordination on definitions, the benefit of everyone using the same definition, and of how government can try to choose the best available equilibrium. A distinct motivation for an individual is to use default provisions of the law instead of having to craft provisions oneself. Consider writing a contract. It is, of course, good to know that the Uniform Commercial Code, the basis for the state law of sales in the United States, standardizes the definitions used in contracts and that both parties to the transaction can be in agreement as to the terms. Indeed, contracts will often specify the state law by which they are to be governed, e.g. “This agreement shall be governed by the laws of the State of Indiana.” But although it is important to

be in agreement with the other party to forestall disputes, an equally important concern is to write an efficient contract. Party 1 wants sensible treatment of unforeseen contingencies whether or not party 2 cares about that or not. By agreeing to be governed by the law provided by the state, Party 1 avoids having to write a contract covering all possible contingencies. Instead, by saying nothing the contract is implicitly agreeing to use the default provisions legislators enacted and the case law that courts have developed as cases arose that were not covered by the legislature's statutes. The parties are free to override most provisions of state law. They can, for example, say that instead of UCC §2-308's default provision that "the place for delivery of goods is the seller's place of business or if he has none his residence," delivery will be to a different address. If they don't mention the place of delivery, though, the law provides a sensible default. Use of the law's defaults also reduces another transaction cost: what I call "contract reading costs" in Rasmusen (2001). Hard as it is to write a long contract, it is perhaps even more difficult for the other party to read it carefully enough to find what advantages the drafting party has inserted for himself. A short contract leaves the missing terms to state law, a neutral party.

Searle's idea of constitutive law, law that creates opportunities, is close to the idea of law as reduction in transaction costs. The only difference is that putting it in terms of transaction costs emphasizes that it is not exactly the creation of new opportunities but the reduction of the costs of transactions that could still take place without law but at greater cost, a cost that might even block the transaction. It is possible to write a detailed contract even if the law has not spelled out default rules; it is just more costly. One can create most of the features of a corporation—governance, share ownership, and transferrability of ownership—by crafting a partnership agreement specifying those features. The only feature of a corporation that cannot be inserted without statutory permission is limited liability, since that concerns third parties who are not part of the agreement, but even limited liability's benefits can be largely included by using a limited partnership

(in which only the general partner is liable) and tort insurance. Even in the example of making a will, it is possible to write an agreement transferring enough characteristics of ownership while the testator is still alive to make it difficult for the son to displace the favored nephew. A trust does this by giving control over property to trustees, who do have the usual principal-agent problem which can be solved at some cost by social norms or reputation. Sovereigns of doubtful legitimacy have used this kind of partial transfer to make the succession more certain (e.g., the succession in Korea of Kim Il-sung by Kim Jong-il in 1994, the succession in Rome of Augustus by Tiberius in A.D. 14) . The advantage of law is that it lays out default rules so the testator and dictator do not have to be as clever in organizing their affairs.

To be sure, custom and standard-form contracts are also means of reducing transaction costs. In theory, private law and private courts could replace government law and government courts. It is a question of which organization can most cheaply create and deliver cost-reducing institutions. We will turn to such competing sources of law next in Section 5.

5. Is the State Necessary for Law?

Without the state, would law disappear? A first step is to note that even when the state exists, it is not the only source of rules. Universities, corporations, football leagues, churches, condominium associations, and families all have rules, which are even sometimes labelled as laws. All of these except the family are voluntary associations which can enforce their rules by expulsion. As a milder penalty they can impose fines or loss of status, and with the support of the state they can even, in the form of contracts, use fines as bigger penalties than expulsion. Indeed, turning it the opposite way, a contract between two parties can be thought of as a voluntary association with money penalties from damages. Expulsion from a long-term relationship is often the penalty even in contracts, as evidenced in fascinating detailed investigations by Bernstein (2015) and Bozovic and Hadfield (2015) of particular contractual relationships.

Let us start with the fact that even if the state exists, it does not have to retain its coercive powers for it to enact laws that are enforced by coercion. That sounds paradoxical, but the answer to the paradox is that the state can let private actors inflict the coercion. Friedman (1979) tells us that this actually was the case in medieval Iceland. Iceland had a weak government—if one can even call it that—with courts whose function was to identify what happened but not to inflict punishments. In the case of killings, for example, the court would determine whether the killer was liable for damages paid to the victim’s family. If the killer was found liable and did not pay, or if he attempted to conceal the death instead of announcing it publicly, he was declared an outlaw whom anyone could kill without having to pay a penalty. Max Weber (1919) defined the state as having a monopoly on the legitimate use of force. The case of Iceland is an extreme example of a qualification he had to add: this has to include state permission for private citizens to use force in certain situations. To me it seems this exception undoes the definition; would we say the state has a monopoly on land because it permits people to use land themselves in certain ways? In any case, even more mundane examples such as private security guards and the right to self-defense show that it is possible to separate the party that makes a law from the party that enforces it with coercion.

Private laws enforced by nonviolent means have been the subject of much scholarship. Macaulay (1961) is the standard cite for the point that businesses generally work out disputes themselves rather than using courts. In some cases, they even publish formal laws. Lisa Bernstein (1992, 2001) is known for studying this in the context of the diamond and cotton industries. At the time of her article, 80% of the rough diamonds in America passed through the hands of the 2,000 members of the New York Diamond Dealers Club. They had their own set of formal rules, e.g., “Any oral offer is binding among dealers, when agreement is expressed by the accepted words ‘Mazel and Broche’ or any other words expressing the words of accord” (the Club is predominantly Jewish). She discusses the problems of enforcing

contracts in government courts (e.g., delay) and how reputation and social ostracism work to enforce club rules, which include arbitration to resolve disputes. Similarly, the merchant-to-mill cotton trade in the United States has almost entirely opted out of the formal legal system, creating its own commercial law administered by the American Cotton Shippers Association and the American Textile Manufacturers Institute. They use arbitrators with rules special to the industry who rely on documents with names redacted, and not on oral hearings. Sometimes the arbitrators give reasons for their results, sometimes not, but in either case the opinions are circulated to members. Failure to comply with the decision of the arbitrators is grounds for expulsion from the trade associations, expulsions which are widely publicized. Such failure is rare, except when a business is in severe financial distress. Of course, trade associations are dealing with disputes which are in essence based on cooperation—contractual disputes—so the threat of expulsion is particularly potent.

Not all private rules are formalized. The subject of social norms has generated a large literature in law-and-economics Cooter (1998), Ostrom (2000) and E. Posner (2009) are three of the most cited works. McAdams himself has published on this topic (notably McAdams [1997]) and has surveyed the field with myself as co-author (McAdams and Rasmusen (2007)). “Norms” is as hard to define as “law”, but the term is ordinarily used to represent unwritten rules of behavior— not just common patterns of behavior, but rules which people expect others to obey and whose violation creates disapproval. Disapproval might just mean displeasure, but some authors define norms as requiring moral disapproval (Cooter 1996; Ellickson 1991; Kaplow and Shavell 2002), McAdams (1997, 2001). Other authors would dispense with that and use norms even to refer to a morally neutral coordinated equilibrium (Picker (1997); Mahoney and Sanchirico (2001), E. Posner (2000)). Norms, like the formal rules of private organizations, often replace formal law.

Perhaps the best-known empirical study of the relation of norms and law is Ellickson (1986) (later expanded to a 1991 book). Ellickson set out to explore the famous example in Coase (1960) of how in the presence of clearly established legal rules the ranchers running cattle and the farmers raising crops would negotiate efficient outcomes to the disputes between them. He found that in Shasta County, California, the county government was authorized to determine what the trespass laws would be in different parts of the county— some “open range” where the owner of cattle was not liable for grazing damage, and some “closed range” where he was strictly liable. He found that the formal law was unimportant. Rather, neighbors resolved disputes by gossip, negotiation using their own norms, and physical reprisal. Curiously enough, even insurance adjusters paid little attention to who was formally liable for damage. It seems formal law was too slow, too costly, and, perhaps most important, too disruptive of social relationships.

Social norms are enforced by the same means as law, prison excepted, including monetary payments backed up by incentives such as ostracism rather than by imprisonment. Guilt, shame, fear of disapproval, coordination, signalling that one is a good person, and convincing information are all used. Even violence is used in some contexts, though perhaps more in less developed countries than in modern America. Ellickson notes that cattle-killing did occur in Shasta County, if rarely, and even castration of a straying bull in one case.

What, then, makes private law or social norms different from government laws? Not much, perhaps. If laws are formal rules of general applicability then I do not see why several sets of laws cannot co-exist in one locality being used by different people in disputes of different sizes. When someone says “law” we think of government law, a useful default meaning, but there is no contradiction in the term “private law”. Social norms could have the difference that they are not formally stated by a single authority, but they function similarly and are often more powerful. The relationship with law runs both ways: norms can support law, and law can support norms. Common law was originally

based on norms, and even today judges look to custom to help with such questions as whether behavior is negligent. Much of law is enforced by social norms— that is how one might classify stigma, for example, as well as morality. That is why why Schauer wishes to emphasize coercion as why law as law is obeyed. If a law is obeyed because it is aligned with a social norm, then as law it is not obeyed at all; all the action is coming from the social norm, and its formalization in law is unimportant. Norms and laws intertwine in support each other, though, as with the aid law gives stigma by publicizing someone’s violation of a rule and confirming (or disconfirming) it by an unbiased and careful trial.

6. Conclusion

Schauer and McAdams show that economics has become a standard tool in law, reaching even to subjects as philosophical as jurisprudence. On the question of why people obey laws, economics contributes its extensive experience with how people respond to incentives of various kinds. Threats of monetary punishment or the direct disutility of imprisonment are the most obvious incentives, but one of the big questions in jurisprudence has been whether direct penalties are an essential feature of law. Can economic reasoning help? Economics does have expertise in thinking about incentives. Thus, it can contribute to the understanding of incentives to follow equilibrium strategies in coordination games and to respond to new information revealed by the passage of laws. The breaking of laws also conveys information, and social and economic stigma can result from the violation of law even apart from belief in the the law’s justice or injustice.

Judging the importance of indirect incentives to obey the law is profoundly difficult. When Schauer says that law makes us do things that we do not want to do, an economist might say he is violating a tautology. After all, doesn’t a person always make the choice he thinks will maximize his utility. What he wants depends on both costs and benefits. He always would like to have a different choice with higher benefits and lower costs. An alternative phrasing of Schauer’s idea is

that the law imposes costs on certain decisions. As McAdams shows, however, though a law saying people must drive on the right side of the road does result in a higher cost for those who drive on the left, it also results in a higher benefit for those who drive on the right. Similarly, a law requiring seat belts results in higher prices for cars but also in higher utility for those it binds (or at least for most people) because it informs them that seat belts are a feature worth paying for.

In the end, Schauer may be right that coercion is the feature of law that matters the most in creating laws and analyzing their effect, but McAdams also is right that coordination and information incentives sometimes matter and are worthy of analysis. Much of law lies outside both paradigms, though, and exists to reduce transaction costs. We could think of that as coordination on definitions or information about what contract clauses are most useful, but the main purpose is to avoid having to create one's own institutions for each transaction.

Finally, we must keep in mind that the hardest to measure and most important rivals to coercion as an explanation for obeying the law are morality and stigma, not coordination or information. It is hard to think of how to quantify which is more important, coercion or these supportive norms. Each of the three supports the other two, and only coercion changes rapidly enough to be amenable to regression analysis. We all realize that higher penalties reduce law-breaking, but if only we knew how to improve the workings of morality and stigma we could achieve better results at lower cost. Perhaps that is like saying that if only we had fusion power then electricity would be cheaper than using natural gas or coal— true but too hypothetical to be useful. But it may be that Plato is right and in the long run we could replace our investment in prisons with an investment in virtue.

REFERENCES

John Austin. 1832. *The Province of Jurisprudence Determined*.
<http://www.koeblergerhard.de/Fontes/AustinJohnTheprovinceofjurisprudencedetermined1832.pdf>.

Becker, Gary S. 1968. "Crime and Punishment: An Economic Approach." *Journal of Political Economy* 76: 169-217.

Bentham, Jeremy. 1782/2010. *Of the Limits of the Penal Branch of Jurisprudence*. Ed. Philip Schofield. Oxford: Oxford University Press.

Bernstein, Lisa. 1992. "Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry." *Journal of Legal Studies* 21: 115-157.

Bernstein, Lisa. 2001. "Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions." *Michigan Law Review* 99 (7): 1724-1788.

Bernstein, Lisa. 2015. "Private Ordering, Social Capital, and Network Governance in Procurement Contracts: A Preliminary Exploration," U. of Chicago Law School working paper.

Bozovic, Iva and Gillian K. Hadfield. 2015. "Scaffolding: Using Formal Contracts To Build Informal Relations in Support of Innovation," University of Southern California Law School working paper (February 25, 2015).

Calvin, John. 1536. *Institutes of the Christian Religion*. <http://www.ccel.org/ccel/calvin/institutes.html>.

Confucius, *Analects*, Book XIII, Chapter 3, verses 4-7, translated by James Legge. <https://ebooks.adelaide.edu.au/c/confucius/c748a/>.

Cooter, Robert D. 1996. "Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant." *University of Pennsylvania Law Review* 144: 1643-1696.

Cooter, Robert D. 1998. "Expressive Law and Economics." *Journal of Legal Studies* 27: 585-608.

Dau-Schmidt, Kenneth G. 1990. "An Economic Analysis of the Criminal Law as a Preference-Shaping Policy." *Duke Law Journal* 1990: 1-38.

Ellickson, Robert C. 1986. "Of Coase and Cattle: Dispute Resolution among Neighbors in Shasta County." *Stanford Law Review* 38 (3): 623-687.

Ellickson, Robert C. 1991. *Order without Law: How Neighbors Settle Disputes*. Cambridge, MA: Harvard University Press.

Farrell, Joseph and Matthew Rabin. 1996. *The Journal of Economic Perspectives* 10 (3): 103-111.

Feinberg, Joel. 1965. "The Expressive Function of Punishment." *The Monist* 49 (3): 397-423.

Friedman, David. 1979. "Private Creation and Enforcement of Law: A Historical Case." *The Journal of Legal Studies* Vol. 8 (2): 399-415.

Fudenberg, Drew and Eric Maskin (1986) "The Folk Theorem in Repeated Games with Discounting or Incomplete Information." *Econometrica* 54 (3): 533-554.

Funk, Patricia. 2004. "On the Effective Use of Stigma as a Crime-Deterrent." *European Economic Review* 48: 715-728.

Glazov, Jamie. 2005. "Our Culture, Whats Left of It." *Front-PageMagazine.com*. August 31, 2005. <http://archive.frontpagemag.com/readArticle.aspx?ARTID=7445>.

Gneezy, Uri and Aldo Rustichini. 2000. "A Fine is a Price." *The Journal of Legal Studies* 29 (1): 1-17.

Harel, Alon and Alon Klement. 2007. "The Economics of Stigma: Why More Detection of Crime May Result in Less Stigmatization." *Journal of Legal Studies* 36: 355-377.

Hart, H. L. A. 1961/1997. *The Concept of Law*. 2nd edition. New York: Oxford University Press.

Kahan, Dan M. “What Do Alternative Sanctions Mean?” *University of Chicago Law Review* 63 (2): 591-653.

Kahan, Dan M. 1998. “Social Meaning and the Economic Analysis of Crime.” *The Journal of Legal Studies* 27 (S2): 609-622.

Kaplow, Louis and Steven Shavell. 2002. *Fairness versus Welfare*. Cambridge, MA: Harvard University Press.

Macaulay, Stewart. 1963. “Non-Contractual Relations in Business: A Preliminary Study.” *American Sociological Review* 28 (1): 55-67.

Mahoney, Paul G. and Christopher Sanchirico. 2001. “Competing Norms and Social Evolution: Is the Fittest Norm Efficient?” *University of Pennsylvania Law Review* 149: 2027-2062.

McAdams, Richard H. 2009. “Beyond the Prisoners’ Dilemma: Coordination, Game Theory, and Law.” 82 *Southern California Law Review* 82: 209-258.

McAdams, Richard H. 1997. “The Origin, Development and Regulation of Norms.” *Michigan Law Review* 96 (2): 338-433.

McAdams, Richard. 2015. *The Expressive Powers of Law*. Cambridge, MA: Harvard University Press.

McAdams, Richard and Eric Rasmusen. 2007. “Norms and the Law.” *Handbook of Law and Economics, Vol 2*, eds. A. Mitchell Polinsky and Steven Shavell, chapter 20, pp. 1573-1618. Amsterdam, Elsevier.

Merrill, Thomas W. and Henry E. Smith. 2000. “Optimal Standardization in the Law of Property: The Numerus Clausus Principle.” *The Yale Law Journal* 110 (2): 1-70.

Picker, Randal C. 1997. "Simple Games in a Complex World: A Generative Approach to the Adoption of Norms." *University of Chicago Law Review* 64: 1225-1287.

Plato *The Laws*, tr. Benjamin Jowett, Project Gutenberg, http://www.gutenberg.org/files/1750/1750-h/1750-h.htm#link2H_4_0015.

Posner, Eric A. (2000) *Law and Social Norms* Cambridge, Mass: Harvard University Press.

Ramseyer, J. Mark and Eric Rasmusen. 2011. "Can the Treasury Exempt Companies It Owns from Taxes? The \$45 Billion General Motors Loss Carryforward Rule." *The Cato Papers on Public Policy* 1 (1): 1-54.

Rasmusen, Eric. 1994. "Judicial Legitimacy as a Repeated Game." *Journal of Law, Economics, and Organization* 10: 68-83.

Rasmusen, Eric. 1996. "Stigma and Self-Fulfilling Expectations of Criminality." *Journal of Law and Economics* 39 (2): 519-543.

Rasmusen, Eric. 2001. "Explaining Incomplete Contracts as the Result of Contract-Reading Costs." *BE Press: Advances in Economic Analysis and Policy* 1 (1): Article 2. <http://www.bepress.com/bejeap/advances/vol1/iss1/art2>.

Schauer, Frederick. 2015. *The Force of Law*. Cambridge, MA: Harvard University Press.

Schelling, Thomas C. 1981. *The Strategy of Conflict*. Cambridge, MA: Harvard University Press.

Searle, John R. (1969) *Speech Acts: An Essay in the Philosophy of Language* Cambridge: Cambridge University Press.

Shakespeare, William. 1591. <http://shakespeare.mit.edu/3henryvi/full.html>.

Weber, Max. 1919. *Politics as a Vocation*. <http://anthropos-lab.net/wp/wp-content/uploads/2011/12/Weber-Politics-as-a-Vocation.pdf>.

Weingast, Barry R. 1997. "The Political Foundations of Democracy and the Rule of the Law." *American Political Science Review* 91 (2): 245-263.