

Why You Should Be A Law-Abiding Anarchist (Except When You Shouldn't)

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I don't like rules. I find they chafe. And I fear for the soul of anyone who allows them to preempt right action. And if I could pick one lesson in life that I would want my children to internalize, it would be to be very suspect of rules, and of those who seek to wield them as reasons not to do what, all things considered, it seems best to do. This is because people who invest *social* rules with hefty normative power work at lousy jobs, stay in lousy marriages, and permit themselves only the most conventional pursuits. They beat back a percolating sense of despair by forcefully asserting that they are not quitters and compensate for their deep-seated resentment of freer-spirits by becoming the champions of procedural due process so as to mask their jealousy with self-righteousness. And people who invest *legal* rules with an authority that out-distances the wisdom of those rules become complicit in the injustices perpetrated in the name of law. While many of those injustices may be small, we have seen in our own lifetimes how an exaggerated belief in the authority of law can prompt a docile citizenry to permit gross poverty, oppression, and even appallingly wide-spread genocide.

So I will not advance an argument for why it is rational on your part to follow rules when they demand that you do things that are contrary to what reason would otherwise dictate. On the contrary, I will beg you to

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be suspicious of those who advertise that the hair shirts that they have woven for you will be both comfortable and flattering.

Now, does this mean that I do not think there are good reasons generally to abide by the social and legal rules of our society? Certainly not. There are many good reasons to abide by rules, and I have devoted an entire book to their analysis.¹ But in the end, the rationality of following any given rule resides in one's confidence that one is acting on the balance of reasons for action—including the good reasons for following the rule—and not at all in the fact that there is a rule; and this means that if there are weightier reasons to break the rule than to abide by it, all reasons for rule-following considered, the fact that what one is breaking is a *rule* is no more significant than would be the breaking of a stick.

Fortunately for our society (though perhaps not for other societies), the reasons to abide by social and legal rules are numerous and weighty, and hence, we have good grounds to believe that the order that we enjoy will not give way to chaos if children like mine are tutored to reject any claim that they ought to follow rules for rules' sake. Let me list some of the most obvious of these reasons so as to make clear that the anarchist's fundamental refusal to substitute rules for her own judgment is fully compatible with, and indeed largely dictates, a life that rarely runs amok of the law.

A. *Why Should Anarchists Follow the Law (Consistent With Their Anarchism)?*

1. *Fear of Personal Moral Error*

Given the complexity of morality's demands, we should be very often in doubt about the moral merits of our actions. I believe that morality's demands are highly complex, requiring extensive consequential calculations, the application of sophisticated deontological rights-based side-constraints (with threshold overrides), and an attention to the virtues and vices that aretaic theory often pits against deontic theory.² In the face of moral doubt, we have every reason to seek guidance about what we ought to do, and social and legal rules—within our society, at least—are relevant sources of moral advice. Just as we commonly use customs and laws to assist us in defining what is reasonable (for example, in tort law), so we

1. HEIDI M. HURD, *MORAL COMBAT* (1999).

2. For discussions of these components of a comprehensive moral theory, see Heidi M. Hurd, *Liberty in Law*, 21 *LAW & PHIL.* 385 (2002); Heidi M. Hurd, *Duties Beyond the Call of Duty*, 6 *ANN. REV. L. & ETHICS* 3 (1999); Heidi M. Hurd, *The Deontology of Negligence*, 76 *B.U. L. REV.* 249 (1996).

should reach to social and legal rules when they give us insight into what is moral. After all, social rules, like industry customs, have been generated and tested by the repeated experiences of a multitude of generations, and so we have some reason to believe that they capture behaviors that are in everyone's best interests over the long run. And legal rules are products of decisionmaking procedures that have evolved over time so as to protect and advance values of common allegiance by often very differently situated persons. That courts and legislatures have extensive fact-finding capacities, invite substantial debate and discussion, pit disputants against one another in adversarial combat so as to test arguments against their opposites, and so forth, gives us some reason to think that the outcomes of lawmaking processes are reliable indicators of what we should do to honor our own obligations.

2. Fear of Others' Moral Errors

Even when we are confident that in breaking a rule we would in fact be serving right reason, we have good reasons to abide by the rule if in breaking it, we would be setting an example for others who are less capable than ourselves at discerning when rules are in error. The justified fear of inducing unjustified copycatting is commonplace in parents, as for example, when we refrain from our usual jaywalking when accompanied by our children, because we fear their inability to decipher when it is safe to forsake the crosswalk for the open curb. But the need to safeguard others from their own temptation to copy one's rule-breaking in unfortunate circumstances is not confined to children. If otherwise justified rule-breaking will induce unjustified rule-breaking by others, then we have good reasons to set an example of rule-following for those who ought to defer to rules more often than they otherwise would if our conduct inspired them to second-guess the wisdom of such rules in their own circumstances.

3. Moral Demands of Democracy

Even when we have grounds to doubt that democratically-created social and legal rules in fact capture what would be in everyone's best interests, the values that lie behind democracy—that is, the values that support governmental structures which allow the majority to give itself its own rules—themselves often dictate compliance with less-than-optimal democratically-enacted rules. Consider two arguments for

according democratic results substantial moral weight. The first is that when a moral matter is in dispute (even a matter that concerns competing claims of right, rather than competing claims of preference or utility) and it is more important (again, perhaps as a matter of right) to gain a peaceful resolution of the dispute than to gain a right resolution at a cost to peace, a democratic resolution will recommend itself, and the value of peace will thus dictate compliance with the democratically-crafted solution, even when one takes the resolution to be in error.

Second, when rights are not at stake, it is reasonable to assume that what ought to be done is what the majority (subjectively) prefers or takes to be in its best interests. There are at least two reasons for this. First, one might reasonably suppose that the majority's subjective views concerning its best interests are the best evidence available of what would, in fact, be in the majority's best interests. If what ought to be done is what is in the best interests of all, one can do no better in assessing those interests than to tabulate (as democracy does) the subjective views of the majority. When democratically-enacted rules reflect the majority's judgments or preferences in circumstances in which morality dictates that such judgments govern, one has a sound epistemic reason to abide by them even when one perceives them as being at odds with what would *in fact* be in the majority's best interests or optimal on other grounds.

Second, in many instances in which others' rights are not at stake, the sole reasons for action applicable to agents are often those that derive from their own personal projects. These "agent-relative reasons" give agents reasons for action, but they do not give others reasons for action or otherwise enter into others' practical reasoning. Thus, for example, it is of agent-relative moral significance that an action will thwart my personal career goals, or do damage (but not injustice) to one of my valued relationships; or require me to sacrifice a private hobby. While persons can go wrong by making choices concerning agent-relative reasons for action that fail to accord with the balance of those reasons, *ex hypothesi* such moral failures do not implicate others' moral interests, and hence, they are ineligible for others' moral condemnation. When democracy tabulates people's assessments of their own agent-relative reasons for action, it might yield results at odds with the balance of those reasons (because people might have failed to conform their votes to their private reasons for action), but its results are immune from criticism by those who perceive the mismatch between legislation and the agent-relative reasons for action that imperfectly motivated its enactment.

4. *The Value of Coordination*

Just because persons are used to looking to social and legal rules to resolve questions of *prima facie* moral conflict, such rules can very often provide salient solutions to coordination problems. And when they do—that is, when one has sound reason to think that others’ expectations concerning one’s conduct will “nest” in the pronouncements of lawmakers—one has a reason to abide by those pronouncements just because one has a reason to coordinate with others so as to extract the benefits of collective action. And once coordination has been achieved by converging on a single course of action articulated by lawmakers to the exclusion of other, equally legitimate courses of conduct, the value of coordination is sufficient to compel continued action in accordance with the law (other things being equal). Admittedly, of course, in such instances one is conforming one’s conduct to law without, in fact, “obeying” the law. But inasmuch as the gains from social cooperation are vast, and inasmuch as the law constitutes the single most salient source of coordination available, we can expect that individuals’ behavior will track the law in ways that ought to allow us to sleep well at night.

5. *The Value of Reliance*

Relatedly, when others rely to their possible detriment on a belief that one will comport one’s actions to social and legal rules, one has a reason to do so that derives from the value of protecting reliance interests. Other things being equal, we are not entitled to act in ways that harm others; and when others rely on our acting in accordance with rules and alter their positions accordingly, we can render them worse off by violating the rules that provide the basis of their reliance. So in the interest of not harming others, we have reasons to follow rules that others expect us to follow.

Reliance arguments are, of course, only as strong as the reliance that they reference. Thus, if people ceased to rely upon others’ rule-following—because, for example, they came to take seriously my thesis that the law does not determine right action—then this reason for following rules would be lost. Because I am reasonably sure that the irrational tendency to invest rules with undue authority is likely to survive academic criticism, I am reasonably sure that the (often irrational) reliance by others on our own rule-following will persist as a significant reason to follow (otherwise irrational) rules.

6. *The Value of Equality*

Finally, there is at least modest virtue in treating like cases alike—that is, in ensuring that we all treat similarly-situated people in a manner that is similar. If I give my son a cookie, that is a reason to give my daughter a cookie, even if I believe that I was wrong to give my son a cookie. And if my colleagues impose a grading curve in grading their students, the value of equality gives me a reason to impose one on my own students, even if I believe that they will then receive grades that poorly capture the Platonically-conceived grades that I would otherwise give them.

The value of equality gives us reasons both to coordinate with our past and future selves and to coordinate with others so as to ensure that we treat people as we've treated those in the past and as we will treat those in the future; and so as to treat people as others have treated similarly-situated persons in the past and as they will treat them in the future. The demand for equal treatment thus generates complex coordination problems. I need to know what you have done and are likely to do in the future so that I may treat people in a manner that is equal to how you have treated and will treat similarly-situated people. You stand in need of the same information from me. And we all stand in such situations vis-à-vis our own past and future selves.

Once again, we can solve these coordination problems by reaching to social and legal rules. So long as compliance with such rules does not work other injustices (or so long as the injustices inflicted by following such rules are less significant in kind and degree than the injustices accrued by treating persons unequally), such rule-following may guarantee that we act consistently over time and identically to others. And if by following such rules we can better ensure that similarly-situated persons are treated similarly, then we all have a reason to follow such rules absent any more salient, equality-producing equilibria.

B. Why Should Everyone Share the Anarchists' Distrust of the Law?

Now that's a short list of the reasons why I believe that it is generally appropriate, indeed, generally obligatory, to comport one's conduct in accordance with social and legal rules, and why I will teach my children to do the same. Some are individually very powerful reasons to comport our conduct to the dictates of others; collectively, I would submit, the fear of error and the values that lie behind the rule of law and the protection of democracy conspire to demand a pretty law-abiding life.

But let's be clear. None of these considerations, nor any set together, justifies blind obedience to law or unthinking social conformity. None of these considerations gives us a reason to follow the law *because it's*

the law or to abide by social rules because they are rules. So those who seek reasons for rule-following will argue that I have given you no reason to follow rules that takes as special the fact that rules are *rules*. All I have told you is that you should avoid moral error, avoid inducing it in others, seek coordination when it will bring significant rewards, honor reliance interests, protect democracy, and preserve equality; and when, as a practical matter, rules assist you in doing what you should otherwise do, you should follow rules.

But I have not told you that you should follow rules even when they fail to serve epistemic and moral goals. I have not told you why you should follow rules even when they offend against the balance of reasons for action. So I have not vindicated the blind obedience with which many self-righteously follow rules. Indeed, many would argue that I have not made a case for any sort of “obedience” at all!

But why would one want to do that? Why would one ever want people to follow rules when their better judgment, brought to bear on all the reasons for action available to them (including the many hefty reasons for following rules that I have given you) suggests that they ought to break them? Well, of course, the timeless answer is that if people feel licensed to re-examine the wisdom of rules every time they apply them, rules will lose their advantages. Cognitive limitations will prevent people from accurately assessing and weighing the reasons for and against abiding by rules, so that persons will mistakenly suspend rules more often than they should. And volitional impediments—weakness of the will, as it were—will motivate them to discount the wisdom of acting according to rules when doing so will permit short term personal gratification. So if right action is the goal, the claim is that persons will do better if they *never* second-guess the wisdom of rules if, over the long run, following such rules will result in acting rightly more often than if they subject such rules to case-by-case scrutiny. And as critics will argue, my reasons for why citizens in a just democracy should give rules more weight than they might otherwise first accord them do nothing to answer this puzzle. If considerations of error, coordination, reliance, equality, and democracy are taken seriously, people might break rules less often; but they are still likely to go against them more often than they should.

Something has to give, and we philosophers have to figure out which it will be: Either we have to make blind obedience—i.e., the suspension of practical reason—reasonable; or we have to abandon the view that

right action consists of action in accordance with the balance of reasons for action, so as to make it right that people periodically knowingly do wrong by deliberately following rules that would plainly be far better broken. Because I have failed to seize hold of, and wrestle with, one of these horns of the dilemma, it will be argued that I have failed to get the point of this symposium.

Well, I don't see any hope for victory in an encounter with the first horn of the dilemma. I've devoted the better part of a book and two articles to a critique of Joseph Raz's claim that laws can generate second-order reasons for obedience that make it rational not to act on the balance of first-order reasons for action.³ And quite frankly, I'm completely sick of reciting that critique. So let me instead say a few words about Scott Shapiro's interesting alternative: the suggestion that once one has concluded that one will do better in the long run by abiding by the rules generated by a given source (be it a court, a legislature, society's collective conventions, or a single authority), one can plausibly employ mental ropes to tie oneself to the mast of obedience just as Ulysses used physical ones to tie himself to the mast of his ship.⁴ Put differently, just as Ulysses adopted physical restraints that caused him not to be responsive to the Sirens' song; so we can adopt mental restraints that will *cause* us not to be responsive to reasons for action that would contradict the demands of long-term beneficial rules.

And how do these mental ropes work so as to *causally* preclude independent thought after one has submitted to an authority? According to Shapiro, submission to authority can feasibly suppress free-thinking by two means: cognitive repression and volitional inhibition:

First . . . [t]he reasons for disobeying would . . . be 'repressed' by the directive. This repression blocks the possibility of intentional action contrary to the directive—the agent, being unaware of reasons for not complying, would be unable to disobey for a reason. Secondly . . . [a]n agent in the grip of an authority might no longer be able to withstand certain emotional pressures, such as guilt and shame, even though the agent would be aware of the important reasons for not complying.⁵

Now if I, or anyone I know, were capable of using her will to accomplish what Ulysses accomplished with ropes—to causally induce cognitive blindness and emotional inhibition—I would be at pains to suggest that this would be normatively far less desirable than permitting the sort of independent judgment that risks rule violations in unjustified

3. HURD, MORAL COMBAT, *supra* note 1; Heidi M. Hurd, *Challenging Authority*, 100 YALE L.J. 1611 (1991); Heidi M. Hurd, *Justifiably Punishing the Justified*, 90 MICH. L. REV. 2203 (1992).

4. Scott J. Shapiro, *Authority*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 382, 415–19, 427–30 (Jules Coleman & Scott Shapiro eds., 2002).

5. *Id.* at 428.

circumstances. I'd rather my children make and live with their own mistakes than that they figure out how to harness the tools of guilt, shame, and repression so as to tie themselves into psychological knots that will allow them to live with the mistakes induced by the directives of another.

Fortunately, I am quite sure that a mental rope stands to a hemp rope the way that punk rock stands to music and hypothetical consent stands to real consent: namely, it's *not*. After all, if the will could disable temptation and bar calculation, Ulysses would hardly have needed his hemp ropes! He needed them precisely because his present self couldn't bind his future self except by physical means. And so it is, I believe, with us. We can alter or rearrange our environment so as to remove reasons for action that would otherwise force themselves upon us; and we can avoid situations in which volitional weaknesses are most prone to assert themselves. But we cannot, through will alone, cause ourselves not to know what we know, not to believe what we believe, and not to be responsive to powerful feelings, desires, and temptations.

So, we can decide not to have children if we think that we'll be lousy at according their interests greater weight than our own; we can avoid bars that sell fine cigars if we fear that once in them we'll succumb to the temptations of good scotch and expensive imports. And similarly, if we fear our own inability to assess and comply with certain rules, we can often structure our activities so as to escape the chafing quality of those rules. (I always let someone else drive when I can, because that removes my ability to second-guess the wisdom of red lights and speed limits!) And like Ulysses, we ought to co-opt the causal power of circumstances to self-paternalistic ends whenever we can do so to protect right action from error or temptation.

But to say this is not to say that it's ever rational to abandon reason; it is only to say that it is rational to manipulate one's circumstances so as to give reason its best chance against cognitive and volitional impairments. And so this is not to win out over the dilemma of rule-following by cutting off its first horn.

So what of the second horn of the dilemma? If I won't concede that abandonment of reason can be rational, then presumably I have to say that it is sometimes right knowingly to do wrong. That is, I presumably have to concede that it is right to follow a rule when it is, and is known to be, over-inclusive, so long as that rule, if always followed, will guarantee more instances of right action than wrong action over time.

Well, I'm not going to concede this. I think it's just silly. If the reasons for a rule—all reasons considered (including the weighty systemic ones I outlined in the previous part)—are, in fact, better served by violating the rule, then I should violate the rule, and threats that I'll do so in error on another day are quite irrelevant to the question of whether it would be right to violate it today. When and if I go wrong and violate a rule under circumstances in which the reasons dictated my conformity, then I ought, indeed, to be punished. Not only will I get my just deserts, but such a sanction will help to educate me about the true wisdom of the rule I violated: it will add to my database, and the databases of others, so that in future similar circumstances, I and others will have more evidence of the reasons for action applicable to us.

And this is at least how *I* want to educate my children. I don't want to repress their judgment; I don't want to chill their free action by inducing shame or guilt that will inhibit their responses to their own independent conclusions. I want them to second-guess rules whenever they suspect that those rules are mistaken, and I want them to set those rules aside when they are right about that. And when my children are wrong about the applicability of a rule, I want them to pay a price—not because they broke a rule, but because they over-weighted their own interests, under-weighted others' interests, and/or otherwise failed to take seriously the values that dictated conduct that accorded with the social or legal rule. And if they commit by autonomous choice more mistakes than I would commit on their behalf, they at least will have the satisfaction of their mistakes being *theirs* and not mine. And it strikes me as a minimum condition of a well-lived life that one own one's mistakes as fully as one own one's successes.