

## MORE THAN ONE WAY TO BE OF USE

LIAM MURPHY\*

Professor Sykes's elegant article explains with great clarity how rational self-interest alone can both justify and explain states' compliance with international agreements. Such agreements will effectively constrain the behavior of states when all states involved stand to gain from cooperation and some effective enforcement mechanism is available. Crucial to his argument is that enforcement does not have to take the form of literal force by some central enforcer; an agreement may be self-enforcing in that noncompliance may be sanctioned by other states' refusal to cooperate with the noncomplier in the future. Sykes's analysis of the circumstances when these conditions are met is enlightening and convincing. It also clearly helps to explain why some kinds of international agreement, such as those relating to trade, tend to be more closely complied with than others, such as those relating to human rights. It is hardly surprising that we would see greater compliance where self-interest lines up with compliance.

But Sykes also makes the strong claim that it is only in those circumstances where self-interest lines up with compliance that international law is "useful." This claim is more taken for granted than defended, and it seems to me to be wrong. Furthermore, the upshot of Sykes's argument is more radical even than that strong claim suggests. For on his analysis, at least as presented in this article, law as such plays no useful role at all. Nothing in the analysis turns on the legal status of international agreements. Legal status appears to make no difference to the self-interested calculation. The distinction between "soft law" and treaties is erased. The entire analysis could go forward, and even presumably be extended to more informal cooperation along the lines of customary international law, without mentioning the word "law" at all.

---

\* Herbert Peterfreund Professor of Law and Professor of Philosophy, New York University. This reply draws at various points on my book *WHAT MAKES LAW*, forthcoming from Cambridge University Press. The financial assistance of the Filomen D'Agostino and Max E. Greenberg Research Fund at the NYU School of Law is gratefully acknowledged.

Professor Sykes's position is that in the contexts of both domestic law applied to private subjects and international law applied to states, there are two kinds of motivations at play. The first is an independent motivation to act in the way the law requires. For example, Professor Sykes contends that he will not murder not because the law prohibits it, but rather because of his "values and principles." The motivational force of these values and principles are not themselves said to be reducible to motivations of rational self-interest. So Sykes appears to allow (what it would be absurd to deny) that people do have moral motivations that can lead them to act contrary to interest. And he is surely right that legal prohibition of conduct that we independently believe to be seriously wrong does not add significantly to our motivation not to act in that way. In fact, as Joseph Raz has suggested, it would be morally perverse to refrain from murder for the reason that the law forbids it.<sup>1</sup>

The second kind of motivation is self-interest. Sykes is also surely right that in many cases when we are moved to follow a legal rule that does not line up with our independent moral motivations, that will be because of a desire to avoid sanctions in the form of fines or imprisonment.

The problem with this account is that it ends there. Sykes holds that law as such is never treated by people or state officials as providing a reason to act. We comply with law either because of independent moral motivations or because of fear of sanction. But this purely descriptive claim is wrong. Many people accept the law in H.L.A. Hart's sense—they treat it as giving them standing reasons for action.<sup>2</sup> They may do so because they believe that it is in their long-term self-interest to adopt compliance as a general policy, rather than calculate the expected disvalue of noncompliance case by case. But many also accept the law because they believe that they ought to do so; they believe that they have a *prima facie* moral duty to comply with law. Much legal theory inspired by economic theory

---

1. JOSEPH RAZ, *The Obligation to Obey: Revision and Tradition*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 341, 343 (1994).

2. See H.L.A. HART, *THE CONCEPT OF LAW* 203 (2d ed. 1994) (indicating that in addition to moral considerations, reasons for accepting law include considerations of long-term interest, interest in others, inherited or traditional attitudes, or the wish to do as others do).

presents itself as nonromantic, clear-sighted, realistic. But to deny that many people are motivated to act by a sense that they morally should obey the law rather clearly flies in the face of reality.

But is it true that there is a *prima facie* moral duty to obey the law for private subjects? Actually, I think it is not true. No argument—whether turning on consent, or fair play, or the implications of democratic rule—to the effect that there is a general deontological reason to obey the law is, in my view, successful. What we do have are instrumental moral reasons to obey the law: We should obey the law when that will do more good than not obeying. Legitimate governance domestically requires law; general disobedience threatens legitimate governance and would therefore be a bad thing. But for most private subjects, most of the time, considering the effects of their compliance decisions alone, it seems clear that their decision typically will make no difference to the quality and effectiveness of legitimate governance.

The situation of state actors with respect to the moral force of law is very different, however. Taking first the domestic case, official lawlessness has an impact on governance structures, and thus on what good government can achieve over time, of a fundamentally different order of magnitude. Official lawlessness undermines the overall structure of government through law directly. Law plays a central role in defining the substantive nature of our state. If law that defines the structure of our state is not complied with, we will end up with only rulers and *de facto* power; we will not have an institutional structure we can point to that might or might not deserve our allegiance over time. If subjects cannot count on government officials for the most part to comply with law that applies to them, we cannot properly assess our reasons for supporting the overall political coercive order.

So for the case of domestic law, I believe that there are strong instrumental moral reasons why high state officials should comply with law. For somewhat different reasons, I believe the same is true for international law. As with individual subjects of domestic law, it seems clear that general noncompliance with international law (supposing the content of the law is not too bad) by states would make the world a worse place. Whatever the weakness of the Security Council in preventing war, international humanitarian law has arguably

been enormously important in disciplining the conduct of war. Sykes indicates that to some extent self-interest can motivate compliance with norms of humanitarian law; but where it does not, states have a moral reason to comply, because compliance with this body of law is better than noncompliance, even if its content is not perfect. To have a settled law of the sea that is usually complied with, even if it is less than fully just, is clearly preferable to having no law of the sea at all. Similarly, the content of international environmental law is hardly what it needs to be, but to have international environmental law at all is a precondition of having good law.

In the case of individual subjects of domestic law, the fact that general compliance is better than general noncompliance does not translate into an instrumental duty of obedience to all law all the time. But in the case of international law, it comes close to doing that. In part this is because of the lack of centralized enforcement in international law and the fact, so clearly explained by Sykes, that self-enforcement is not effective in all areas of law. The more compliance is in effect voluntary, the more harm noncompliance may do. But it is also just a matter of numbers. There are very few states, relatively speaking, and individual acts of noncompliance by one or a handful of the 200 odd states may make a very significant difference to the practice of compliance. It would seem to be especially important that states that can get away with illegality in self-interested terms should comply. The signal that noncompliance by powerful states sends—that only the weak or the foolish would follow the law if noncompliance were better in self-interested terms—is particularly destructive.

The moral case for compliance, then, is very simple. With so few legal subjects, each act of noncompliance has a reasonable chance of being part of a pattern of increasing noncompliance that snowballs into a situation where compliance is no longer the norm. Given the positive role general compliance with (good enough) international law can play, this provides moral reason for individual states to comply.

Now Sykes does not address the issue of whether different kinds of legal subjects in fact have moral reason to comply with law, domestic or international. This is presumably because he thinks that there is no point. Just as no individual accepts the law, no state does either, and certainly not for moral reasons. But again this assumption requires defense. One might infer

an argument from Sykes's paper of the following form: Compliance is weaker the less clearly self-interest lines up with compliance; it follows that the only motivating reason for states is self-interest. But that does not follow. Of course compliance will be better where self-interest lines up with compliance. That doesn't establish that states never comply out of a sense that they ought, generally speaking, to comply with the law.

International law can be useful in more ways than one. It can do good. This gives individual states moral reasons to comply. It is clearly not impossible for state actors to recognize the force of these reasons and act on them; and it is surely true that at least to some extent, they do.

But Sykes's reductionism is actually more radical yet. As stated, his article has the implication that an international agreement is never useful *because it's the law*. Self-enforcing agreements will be useful whether or not they have legal status as treaties. An agreement that is regarded as not legally binding can provide, for all Sykes tells us, precisely the same self-interested reasons for cooperation as one that is regarded as legally binding. One might think that the argument could be extended so as to give a self-interested account of the difference law makes. Perhaps the costs in terms of being shut out from future cooperation are greater if one fails to comply with agreements that have legal status? But it is unclear why this would be. On Sykes's analysis, self-enforcement is specific to the subject matter of the agreement. It is not that penalties in terms of exclusion are attached to noncompliance with agreements of a certain (legal) status. In his analysis, states lose no credibility in the trade field by doing less well on human rights. So it is not as if there is some subject-independent special self-interested reason, on this analysis, to comply with legal agreements in particular. The upshot is that so far as agreements are concerned, at any rate, it makes no difference whether we are dealing with law or not. In that sense, rather than showing where international law is useful, Sykes's argument suggests that it is actually of no use at all. All the work is being done by the fact that self-enforcing cooperative agreements for mutual advantage are possible.

According to Sykes, no state is ever, or will ever be, motivated to follow the law because it is the law—not for moral or any other reasons. If that statement were true, it would presumably follow that we shouldn't worry about whether there

are ever moral reasons to follow the law because it is the law. I believe that the statement is false, or at any rate has not been shown to be true. And I believe that states do, in fact, have powerful instrumental moral reasons to follow the law. But these disagreements do not at all undermine Sykes's compelling analysis of the kinds of contexts in which self-enforcing agreements will be possible. And even if self-interest isn't the whole story, it is surely a very important part of the story. It is clearly better, when thinking about legal design, to take full advantage of self-interest as a motive to compliance.

My concern is not with the substance of the argument from self-interest at all. It is with the grander claims to the effect that this is, in fact, the whole story. Clearly self-interest often counsels against compliance with law. An argument that in that case states have no reason to comply, so the decision to comply would be irrational, and would also play the state as a sucker, since no other state whose officials are in their right minds would dream of complying, can have only one effect on levels of compliance.

Let me end by noting an implication of Sykes's analysis that is perhaps most troubling of all. Everything he writes about the reasons states comply with international law applies to high government officials with respect to domestic law, constitutional or otherwise. The upshot is that presidents of the United States are never motivated to comply with law because they believe that they are morally required to do so and that, in fact, they are not morally required to do so, or at any rate there is no point troubling our heads with the question of whether they are.<sup>3</sup> Some may welcome this result.<sup>4</sup> To me, it is close to a *reductio ad absurdum*.

---

3. See generally Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1832–34 (2009) (describing similarities between international and constitutional law).

4. See generally ERIC POSNER & ADRIAN VERMUELE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 206–10 (2011) (discussing the erosion of legal constraints on the presidency, resulting in a system of constraint based on politics alone).