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Andrew Rutten

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ANARCHY, ORDER, AND THE LAW: A POST-HOBBSIAN VIEW

Andrew Ruttent†

INTRODUCTION

Why are Bosnia and Rwanda the exception, not the rule? Why do most societies enjoy a fair amount of social order, of security of person, and property? Given the ubiquity of scarcity and venality, why aren't more of us at each other's throats more of the time?

For the past three hundred years, the stock answer to these questions has been that given by Hobbes: *the state*. That is, by acting as a third party that stands ready to punish those who do not respect their neighbor's rights, the state keeps us civil. For most of us, the state is so essential to the creation and maintenance of social order that we equate anarchy—literally, the absence of a state—with chaos and disorder. For us, as for Hobbes, life without the state is unthinkable; we believe that without its protection, we would fall into the war of all against all, where life would be “solitary, poore, nasty, brutish, and short.”¹

The Hobbesian orthodoxy has recently been challenged on both factual and theoretical grounds. On the factual side, scholars from a wide range of disciplines have documented again and again that, *contra* Hobbes, life without the state need not be a disaster and usually is far better than that. It seems that wherever we look, whether at businessmen in Wisconsin,² diamond merchants in New York,³ cattle ranchers in California,⁴ or rice farmers in Sri Lanka,⁵ we find people doing quite well without the state. For them, “order without law” appears to be a way of life, not just a catchy slogan.

On the theoretical side, game theorists have recently developed models of anarchic order rooted in traditional economic notions of rational self-interest. These models build on the theory of repeated

† Assistant Professor, Department of Government, Cornell University.

¹ THOMAS HOBBS, *LEVIATHAN* 103-04 (E.P. Dutton & Co., Inc. 1950) (1651).

² See Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

³ See Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992).

⁴ See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

⁵ See ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 157-73 (1990).

games, a theory that takes into account a central fact of social life—not everyone is a stranger.⁶ Whether at work or play, most of us find ourselves dealing over and over with the same people. This fact turns out to make a huge difference for strategic behavior. Put crudely, the fact that we will see someone again gives us a powerful incentive to be nice to them—if we are not, they may not be nice to us in the future.⁷ In the face of this threat, even the most narrowly self-interested, brutally calculating egoist might find that it pays to act like Mother Teresa.

Political theorists from across the spectrum have seized on anarchy's empirical and theoretical robustness as ammunition in their war against Hobbes.⁸ In his article,⁹ Jon Macey joins this fight, urging us to abandon the Hobbesian dichotomy of state and anarchy.¹⁰ He argues that instead of seeing anarchy and the state as substitutes, we should view them as complements.¹¹ In his view, we can (and should) exploit these complementarities by using each institution to improve the performance of the other.¹² The state can improve anarchy by stepping in to enforce norms when anarchy breaks down.¹³ By using the superior, centralized enforcement apparatus of the state, societies can enforce norms that the growing size and complexity of modern societies would otherwise render unenforceable.¹⁴ Moreover, anarchy can improve the state by providing a template for its legal rules.¹⁵ By basing legal rules on norms that have developed voluntarily, societies can check the tendency of democratic politicians to serve special interests at the expense of the general public.¹⁶

⁶ One of the pioneers in the application of repeated games to norms surveys the theory of repeated games in MICHAEL TAYLOR, *THE POSSIBILITY OF COOPERATION* (1987).

⁷ Some readers may object to the assumption that norms reflect incentives instead of values. I am not arguing that values have no effect on norms; obviously, they do. I am simply arguing that incentives do as well. For some fascinating evidence on this point, see recent studies in experimental psychology suggesting that the high levels of cooperation observed in Japan are due to incentives, not values. The experiments show that when incentives are removed, Japanese actually cooperate at far lower levels than Americans. See, e.g., Toshio Yamagishi, *The Provision of a Sanctioning System in the United States and Japan*, 51 *SOC. PSYCHOL. Q.* 265 (1988); Toshio Yamagishi & Midori Yamagishi, *Trust and Commitment in the United States and Japan*, 18 *MOTIVATION & EMOTION* 129 (1994).

⁸ See BRUCE L. BENSON, *THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE* (1990); MICHAEL TAYLOR, *COMMUNITY, ANARCHY AND LIBERTY* (1982).

⁹ Jonathan R. Macey, *Public and Private Ordering and the Production of Legitimate and Illegitimate Legal Rules*, 82 *CORNELL L. REV.* 1123 (1997).

¹⁰ *Id.* at 1132-37.

¹¹ *Id.* at 1134-37.

¹² *Id.* For a rather different argument as to how to use anarchy to tame the state, see Michael Taylor, *Good Government: On Hierarchy, Social Capital, and the Limitations of Rational Choice Theory*, 4 *J. POL. PHIL.* 1 (1996).

¹³ See Macey, *supra* note 9, at 1133-34.

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ See *id.* at 1136-37.

Macey's suggestion warrants close attention. It seems both more practical and more feasible than many of the proposals for harnessing anarchy.¹⁷ However, I believe that his optimism needs to be qualified: both the theory that he invokes, and the sort of evidence that he cites, call his conclusions into question.¹⁸ First, game-theoretic models of norms suggest that norms need not be morally sound to be feasible.¹⁹ These models show that a variety of norms, including many that are morally unsound, can be supported in anarchy, while factual studies show an abundance of such norms.²⁰ Second, it is not at all clear that his program of favoring norms over redistributive statutes will itself be politically viable in a democratic society. Indeed, the very theory that Macey draws on in his critique of ordinary lawmaking suggests the opposite: it may be precisely the worst norms that will receive the most political support.²¹

Because the "bad news" results of game theory are not as familiar to lawyers as the "good news" aspects, I focus on them.²² In doing so, I am not suggesting that Macey is wrong or that we should abandon his program. Nor am I arguing against using the theory of repeated games to study the relationship between law and social order. Rather, I hope that pointing out some lacunae in his argument will show us how to strengthen it. I believe that if we want to do so, we will do well to start with the theory of repeated games.

I

THE GOOD NEWS: ANARCHY, ORDER, AND REPEATED GAMES

Until recently, economics, in the form of game theory, seemed simply to reiterate and reinforce the Hobbesian logic. In the famous Prisoners' Dilemma (see Figure 1), game theory offers a mathematical

¹⁷ For a survey of contemporary varieties of anarchism and their proposals for improving society, see ULRIKE HEIDER, *ANARCHISM: LEFT, RIGHT, AND GREEN* (1994); *REINVENTING ANARCHY, AGAIN* (Howard J. Ehrlich ed., 1996).

¹⁸ Macey derives his theoretical framework from the theory of repeated games. Macey, *supra* note 9, at 1125-30. His facts come from ethnographic studies, such as those of Robert Ellickson and Stewart McCauley. *Id.* at 1126.

¹⁹ *See infra* Part II.

²⁰ *See infra* notes 38, 40 and accompanying text.

²¹ *See infra* Part III.

²² It is not clear how well these results are known to law professors. In a quick read of the footnotes to the articles in the May 1996 issue of the *University of Pennsylvania Law Review* dedicated to a symposium entitled *Law, Economics & Norms*, I found only one article that made more than passing reference to this literature: Jason Scott Johnston, *The Statute of Frauds and Business Norms: A Testable Game-Theoretic Model*, 144 U. PA. L. REV. 1859, 1873-79 (1996) (citing game theory to support an analysis of the use of written contracts in business relationships).

formalization of the Hobbesian argument.²³ This game analyzes the behavior of two people who find themselves considering whether to contribute to a joint venture in which they would be more productive working together than working alone. Both should prefer mutual cooperation to autarky. However, although cooperation is beneficial, it is not automatic. The difficulty lies in the structure of rewards, which makes it irrational for either player to cooperate.²⁴

FIGURE 1: THE PRISONERS' DILEMMA

		Chris	
		Work	Shirk
Pat	Work	(10, 10)	(0, 15)
	Shirk	(15, 0)	(5, 5)

To see why it is difficult to cooperate in a Prisoners' Dilemma, consider what happens if one player, say Pat, shirks while the other, Chris, works. In this situation (represented by the lower left cell in Figure 1), Pat does better than if she had worked. By free-riding, she reaps the benefits of Chris's hard work while bearing none of the burdens of working. In other words, Pat gets a payoff of 15 whereas if she had joined Chris in working, her payoff would have been only 10. Conversely, by working when Pat shirks, Chris gets less than if he had also shirked. Instead of the 5 he would have received by joining Pat and shirking, by working alone he is stuck with the aptly named "sucker's payoff" of 0. The lesson is clear: if you think that your colleague will work, you should shirk, since $15 > 10$; if you think that your colleague will shirk, you should also shirk, since $5 > 0$. In other words, you should shirk regardless of what your opponent does, because shirking always pays more than working.

Of course, when both players reason this way, neither works and they end up back in autarky, where they reap none of the gains from cooperation. This sorry outcome confronts them with a dilemma: given the choice between both working and both shirking, each would prefer that both work, since $10 > 5$. However, given their situation, they cannot achieve this outcome, for even if they sign a contract

²³ The relationship between Hobbes and modern game theory is discussed at length in JEAN HAMPTON, *HOBBS AND THE SOCIAL CONTRACT TRADITION* (1986); GREGORY S. KAVKA, *HOBBSIAN MORAL AND POLITICAL THEORY* (1986); TAYLOR, *supra* note 6, at 125-63.

²⁴ For a fuller discussion of the Prisoners' Dilemma, see (in order of increasing technical difficulty) DAVID M. KREPS, *GAME THEORY AND ECONOMIC MODELLING* 28-29, 37-39 (1990); DOUGLAS BAIRD ET AL., *GAME THEORY AND THE LAW* (1994); ROBERT GIBBONS, *GAME THEORY FOR APPLIED ECONOMISTS* (1992).

promising to work together, their promises are not, in the jargon of game theory, "credible." That is, because each knows that, when it comes time to act, neither will have an incentive to do anything but shirk, each will treat a promise to work as what it is—empty talk.

This logic surely explains many of the cooperation failures that we see around us. At every level of society, we can find people stuck in Prisoners' Dilemmas, acting in ways that are mutually destructive. Examples of people free-riding to their mutual detriment range from littering to polluting to overfishing.²⁵ At the same time, the model's bleak conclusion—that people should never cooperate—does not explain those instances of cooperation that we do see. How can we resolve this contradiction?

The obvious explanation for the model's failure to predict well is that it is the wrong model—wrong, not because it is illogical, but because it fails to capture some essential feature of social reality. There are several important features of the real world missing from the simple Prisoners' Dilemma. To a good Hobbesian, perhaps the most glaring omission is the lack of a Leviathan, a third party the players empower to force them to do what they cannot do themselves: enforce contracts. Such an enforcer could induce cooperation by fining anyone who did not cooperate, in which case the payoffs would become:

FIGURE 2: THE PRISONERS' DILEMMA AFTER LEVIATHAN

		Chris	
		Work	Shirk
Pat	Work	(10, 10)	(0, 0)
	Shirk	(0, 0)	(0, 0)

The introduction of the Leviathan transforms the game, so that instead of playing a Prisoners' Dilemma, Pat and Chris are now playing a trivial coordination game. In this transformed game, both players will want to work, because any other choice gives them a lower payoff.²⁶

²⁵ The classic statement of these problems is in Garrett Hardin, *The Tragedy of the Commons*, 162 *Sci.* 1243, 1244 (1968) ("Each man is locked into a system that compels him to increase his herd [i.e., his wealth accumulation through consumption of resources] without limit—in a world that is limited.")

²⁶ Of course, to be complete, one would want to model the behavior of the Leviathan. Such a model is developed in Robert Gibbons & Andrew Rutten, *Hierarchical Dilemmas: Social Order with Self-Interested Rulers* (Jan. 17, 1997) (unpublished manuscript, on file with author).

To a good sociologist or anthropologist, the obvious problem with the Prisoners' Dilemma is its "undersocialized conception of human action."²⁷ In other words, the Prisoners' Dilemma treats society as a series of isolated two-person deals. This treatment ignores the obvious fact that most deals are embedded in a rich web of social relations. One way to model this embeddedness is to treat the players as dealing with each other repeatedly, so that any one meeting is embedded in the longer series. While seemingly minor, this alteration has major consequences; allowing people to play with each other over and over turns out to change completely their strategic calculus.²⁸

Repetition changes behavior by changing incentives. Unlike the players in the one-shot Prisoners' Dilemma, people who deal with each other repeatedly are not helpless against each other. They can punish shirking through their own future shirking. For example, in the game above, Chris might tell Pat that if she ever cheats, he will never work with her again. Thus, instead of comparing 15 and 10, Pat must now compare two payoff streams:

payoff to cheating: 15 + 5 + 5 + 5 + 5 + . . .
 payoff to cooperating: 10 + 10 + 10 + 10 + 10 + . . .

It is easy to see that as long as Pat does not discount the future so heavily that the future losses do not have much value today, it will not pay for her to cheat.²⁹ Of course, she can use the same threat to ensure that Chris does not cheat either. Thus, even though they are still playing the Prisoners' Dilemma, Pat and Chris can now avoid the Hobbesian war of all against all.³⁰ They do so, not because dealing with each other over and over has made them less egotistical or self-interested, but because they are now living in the shadow of the future. By allowing them to make credible threats to punish shirking, the prospect of future dealings allows them to make *self-enforcing* contracts, agreements that bind because of the threat of future losses.

The idea, if not the terminology, of a self-enforcing contract lies behind much of the empirical literature on "order without law." For example, in his study of business dealings in Wisconsin, Stewart Macaulay noted that few business partners bothered to formalize their relations in a contract; among those who did, few bothered to go to court to enforce the contract.³¹ Yet these businesses often formed relations that spanned decades. Macaulay argued that to sustain these

²⁷ This point is argued at length in Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. SOC. 481, 483 (1985).

²⁸ For discussions of repeated games, see BAIRD ET AL., *supra* note 24, at 159-87; GIBBONS, *supra* note 24, at 82-115; KREPS, *supra* note 24, at 65-77, 95-106.

²⁹ Although this example captures the basic logic of the argument, it finesses some of the details. For a more complete treatment, see GIBBONS, *supra* note 24, at 82-115.

³⁰ See *supra* note 1 and accompanying text.

³¹ Macaulay, *supra* note 2, at 55.

relations without using the courts, businesses used the prospect of future dealings to keep each other honest.³²

As noted above, people can rely on the long arm of the future to produce cooperation only if future losses weigh heavily today. That is, people must not discount the future too highly, and they must meet regularly enough. If both conditions are not met, then future losses will not be valuable enough to outweigh the present gains from shirking, and malefactors will conclude that shirking pays. The assumption about the discount rate seems innocuous, but the requirement that people meet regularly seems especially problematic in the modern world. Except for a handful of people, such as family, friends, and immediate co-workers, very few of us deal with exactly the same people on a daily, or even weekly, basis. As a result, it seems unlikely that we can rely on self-enforcement to support cooperation—we simply do not deal with any one person often enough to have a powerful threat against her.

However, we may still be able to use the threat from the future to sustain cooperative relations by taking advantage of the fact that, although we do not deal with any one person that often, we do deal with the same group of people repeatedly. Even in the modern world, many of our relationships are embedded in communities, that is, groups of people who have overlapping relations. We can use these communities to enforce cooperation by expanding the terms of cooperation, so that we respond not just to our own history, but to everyone else's history as well. For example, instead of using the rule, "I will punish anyone who shirks on me," we might expand the rule to "I will punish anyone who shirks on me or my friends." In this way, people who are members of a community can use the other members as third parties to enforce their agreements.³³

Extending repeated games from dyads to communities brings the game theoretic models much closer to what we usually think of when we think of norms. Most descriptions of norms stress the importance of reputations and communal, third-party enforcement. For example, Ellickson argues that ranchers and farmers in Shasta County do not rely solely on self-help to enforce norms.³⁴ They also rely on the

³² *Id.* at 63-64.

³³ Such communal enforcement is modeled explicitly in David M. Kreps, *Corporate Culture and Economic Theory*, in PERSPECTIVES ON POSITIVE POLITICAL ECONOMY 90, 106-11 (James E. Alt & Kenneth A. Shepsle eds., 1990) (arguing that a firm will cooperate in one-time dealings so as to maintain its reputation with others with whom it will deal in the future); see also Avner Greif, *Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders' Coalition*, 83 AM. ECON. REV. 525, 528-43 (1993) (arguing that, in the absence of a state, a group of medieval long-distance traders enforced contracts by ostracizing cheaters).

³⁴ ELLICKSON, *supra* note 4, at 56-64.

threat that other members of the community will not cooperate with defectors.³⁵ Similarly, Macaulay claims that concerns about reputation weigh heavily on businesses.³⁶

The use of reputation to induce cooperation among the members of a community increases the level of cooperation, but at a cost. For communal reputations to work, people need much more information than in the repeated two-person Prisoners' Dilemma. Instead of knowing only their own history, they need to know everyone else's history as well. Eventually, the costs of gathering and disseminating this information may become so large as to chew up all of the gains from cooperation. If people cannot control these costs, then the communal reputation mechanism will destroy itself.

Throughout history, people have developed a variety of mechanisms to economize the flow of information needed to support reputations.³⁷ One common method is to empower some citizens to hear and resolve disputes, while leaving enforcement of the decision to the general citizenry. For example, in medieval Europe, long distance merchants often brought their disputes to judges at trade fairs.³⁸ The judges would investigate, and then announce their decision. Losers who did not pay faced the threat that other merchants would not trade with them.³⁹ Similarly, in East Africa, disputes over cattle were traditionally settled by an official known as the leopard-skin chief, an ordinary citizen with absolutely no enforcement power.⁴⁰ Yet once his decision was announced, both parties abided by it.⁴¹ They did so not only out of respect for his abilities and wisdom, but also because of the threat that others would punish them if they did not.⁴²

This brief tour of repeated games shows how we can use game theory to model norms and other forms of anarchic cooperation.⁴³

³⁵ See *id.* at 57-58.

³⁶ Macaulay, *supra* note 2, at 64 (describing the various ways in which a merchant can tarnish the reputation of someone who has cheated, and thus reduce his future business prospects).

³⁷ See Randall L. Calvert, *Rational Actors, Equilibrium, and Social Institutions*, in EXPLAINING SOCIAL INSTITUTIONS 57, 63-70 (Jack Knight & Itai Sened eds., 1995) (discussing the information costs of running different contract enforcement institutions).

³⁸ See Paul R. Milgrom et al., *The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs*, 2 ECON. & POL. 1, 2 (1990).

³⁹ See *id.* at 6.

⁴⁰ See ROBERT H. BATES, *The Preservation of Order in Stateless Societies: A Reinterpretation of Evans-Pritchard's The Nuer*, in ESSAYS ON THE POLITICAL ECONOMY OF RURAL AFRICA 7, 11-12 (1983).

⁴¹ See *id.*

⁴² See *id.* at 12.

⁴³ For studies of other institutions using this approach, see GARY J. MILLER, *MANAGERIAL DILEMMAS: THE POLITICAL ECONOMY OF HIERARCHY* 183-233 (1992) (modeling corporate culture and leadership in firms as equilibria of repeated games); Randall L. Calvert, *Leadership and Its Basis in Problems of Social Coordination*, 13 INT'L POL. SCI. REV. 7 (1992) (arguing that leaders help followers solve various social dilemmas by communicating the

These models mimic a variety of institutions, from simple two-person relations to communities. Despite their differences, the models share several important features. First, they treat the institutions as equilibria, which must provide everyone, including enforcers, with an incentive to do their job. Second, all of them treat norms not as institutions of their own, but as institutions embedded in the games of daily life. The models all start with the games between citizens and build the institutions "on top" of those games. As a result, the incentives to conform to the norms must come from the games of daily life between the citizens; these are literally the only sources of rewards. Finally, none of the modeled institutions are Hobbesian. Even those that rely on a central authority to collect information rely on decentralized methods to enforce rules.

II

THE BAD NEWS: ANYTHING CAN (AND DOES!) HAPPEN

The survey in the last section seems to imply that game theory has only happy implications for the Macey program. Repeated dealings allow people to escape from the mutual defection of the one-shot Prisoners' Dilemma by making cooperation rational. Unfortunately, this happy outcome does not exhaust the lessons of game theory for the viability of anarchic cooperation. Game theory has several other, more pessimistic, results that bear directly on anarchic order.

The first, and in many ways, the most depressing, result comes from the theory of repeated games itself. In addition to the result above, game theory also shows that repeated play can sustain equilibria in which people do very bad things to each other. Indeed, the correct statement of the major result in the theory of repeated games is that "repeated play allows virtually any payoff to be an equilibrium outcome."⁴⁴ In other words, "anything can happen" in a repeated game. The reason is simple: when people work together, they generate a surplus over what they could achieve on their own. This surplus is the point of working together. However, there is no natural way to divide the surplus; as long as each player gets more than she would get by working alone, she is better off working with others.

To make this logic concrete, consider the Prisoners' Dilemma that we examined above. Suppose that, instead of suggesting that they

"cooperative equilibrium" to followers and assuring them that others are complying with it, and that punishment will follow if they are not); Geoffrey Garrett & Barry R. Weingast, *Ideas, Interests, and Institutions: Constructing the European Community's Internal Market*, in *IDEAS AND FOREIGN POLICY: BELIEFS, INSTITUTIONS, AND POLITICAL CHANGE* 173 (Judith Goldstein & Robert O. Keohane eds., 1993) (arguing that countries of the European Community voluntarily comply with those decisions of the European Court that are equilibria of the repeated games among the countries).

⁴⁴ DREW FUDENBERG & JEAN TIROLE, *GAME THEORY* 150 (1991).

both work each period, Chris tells Pat that he is going to use the following rule: "I will work for three periods and shirk in the fourth, but you must work every period. If you do not, I will never work again." This rule offers the following payoffs:

payoff to Pat:	$10 + 10 + 10 + 0 + 10 + \dots$
payoff to Chris:	$10 + 10 + 10 + 15 + 10 + \dots$
payoff to autarky:	$5 + 5 + 5 + 5 + 5 + \dots$

This rule distributes the gains from cooperation so that Chris receives more than Pat. While this seems unfair, it still leaves Pat better off than if they did not cooperate at all. Thus, if she believes that Chris will indeed stick to this rule, then she has no choice but to accede. In other words, repeating makes this skewed distribution sustainable—it is an equilibrium of the repeated game.

This example generalizes into what game theorists call the "folk theorems."⁴⁵ These formal results show that requiring an outcome to be an equilibrium, so that people's actions are mutually consistent, imposes few constraints on the distributions of the gains from cooperation.⁴⁶ Each person will find it rational to accept any outcome in which they are better off than in autarky. As a result, in a repeated game, the players can sustain virtually any distribution of the surplus as an equilibrium: given that I believe that you will keep most of the surplus, I will still cooperate, for I cannot do better on my own.

Put another way, the proper interpretation of the folk theorems is not, as is widely believed, that repeated play makes cooperation rational,⁴⁷ but rather that repeated play turns every game into a Battle of the Sexes. In a Battle of the Sexes, the players must choose one of two alternatives, say, watching soccer or opera. Because of their preferences, they face both a distributional problem—they disagree on the merits of soccer and the opera—and a coordination problem—whether they end up at soccer or the opera, each wants to be with the other. This gives rise to the game shown in Figure 3. In this game, at least one of them will be unhappy no matter what they do, so we would expect each to work hard to ensure that they end up doing what each wants.

⁴⁵ For discussions of the folk theorem, see GIBBONS, *supra* note 24, at 88-102; KREPS, *supra* note 24, at 75-77, 95-102.

⁴⁶ Indeed, the outcomes do not even have to be efficient!

⁴⁷ See, e.g., ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 11 (1984).

FIGURE 3: THE BATTLE OF THE SEXES

		Chris	
		Soccer	Opera
Pat	Soccer	(20, 15)	(5, 5)
	Opera	(0, 0)	(15, 20)

This game is identical to the repeated Prisoners' Dilemma in which one of the players regularly shirks. Framed this way, it is easy to see why the folk theorem raises serious problems for Macey's program. According to the folk theorem, norms will be equilibria in the sense that no single person has an incentive to change her behavior, *given that everyone else does what they are supposed to do*. Thus, one might play an equilibrium, not because one wants to or because one agreed to, but because one thinks that other people will. Indeed, given the definition of an equilibrium—a pattern of actions through which nobody can make herself better off by doing something different—this is the only sensible response. You could only lose by doing otherwise. Under these conditions, however, it is no longer clear that compliance with a norm implies consent to it in any morally interesting sense. Compliance simply means that, given their circumstances, this was the best that they could do.

Thus, before we decide that equilibria are good, we should perhaps ask how people choose them. Are they chosen, as Ellickson argues, to maximize wealth?⁴⁸ Are they chosen, as others suggest, so as to benefit the powerful?⁴⁹ These issues are especially troubling because casual empiricism suggests that real norms do vary greatly. Whatever our criteria for a "good" norm, it seems that we can find some real norms that are "bad." Thus, the various norms that subjugate minorities and women will trouble egalitarians, while the "leveling norms" that are so common in stateless societies will trouble those who favor merit.⁵⁰

The folk theorem—the idea that "anything can happen"—is not the only bad news from game theory. The informational requirements of real repeated games raise a host of subtle problems ne-

⁴⁸ ELLICKSON, *supra* note 4, at 167-83.

⁴⁹ The relationship between inequality and norms is discussed at length throughout JACK KNIGHT, *INSTITUTIONS AND SOCIAL CONFLICT* (1992), and Jean Ensminger & Jack Knight, *Changing Social Norms: Common Property, Bridewealth, and Clan Exogamy*, 38 CURRENT ANTHROPOLOGY 1 (1997).

⁵⁰ For further discussion of leveling norms, see Gary Miller & Kathleen Cook, *Leveling and Leadership in States and Firms*, in *NEW INSTITUTIONALISMS: INSTITUTIONS AND SOCIAL ORDER* (Virginia Haufler et al. eds., forthcoming 1998).

glected above. There, I assumed that the rules were clear and unambiguous, so that everyone understood what they were supposed to do. In the stick-figure world we examined, where people were doing nothing more complicated than playing the Prisoners' Dilemma, this assumption might have been justified. But in the real world, people are playing games that are far more complex than the Prisoners' Dilemma. In these games, it may be quite difficult even to imagine all possible contingencies and figure out what should be done in each. As a result, real people often end up making complicated, but incompletely specified, agreements. Even legal rules are not always explicit and clear; for example, constitutional law has "due process," and contract law, "unconscionability."

It is widely understood that such rules ("incomplete contracts," in the jargon of economists) are often more economical than trying to specify what one should do for every possible contingency. Such rules are especially sensible when they are enforced by specialized third parties that everyone entrusts to figure out what the rule demanded and then to enforce this decision. It is not clear that such open-ended rules are enforceable in anarchic settings. In many communities, there are no outside third parties; the only third parties are other community members. Such parties are less likely to be disinterested in any particular dispute. Under these conditions, communities may rely on bright lines, rules for which it is easy to tell who has, and who has not, complied.⁵¹ They will do so, not because such rules are better, but because they are easier to enforce. In particular, such rules will reduce the chances for disagreement over the resolution of a particular case.

To further complicate matters, rules in communities must often be transmitted in a decentralized fashion. Unlike statutes or common law rules, norms are seldom announced by authoritative bodies. Instead, they are transmitted from person to person, often on the basis of watching many others act based on the norm. When there are multiple equilibria, many involving complicated, incomplete norms, it seems likely that this requirement will weed out complex norms, which many will see as too hard to understand. Thus, the difficulty of transmitting complex norms may also force them to be simple.⁵²

This brief, but closer look at the theoretical foundations of anarchic order suggests that the happy results of the first section do not

⁵¹ The link between enforcement and the structure of self-enforced rules is explored in detail in Geoffrey P. Miller, *Contracts of Genesis*, 22 J. LEGAL STUD. 15 (1993), and in Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911 (1996).

⁵² For a fuller discussion of these issues, see N. Schofield, *Anarchy, Altruism and Cooperation*, 2 SOC. CHOICE & WELFARE 207, 210-11 (1985).

stand up. The story simply is more complex than the simple Prisoners' Dilemma implies.

III

NORMS IN THE WEB OF INSTITUTIONS

So far, we have looked at norms in isolation, without considering how they interact with other institutions. Yet such interactions are at the heart of Macey's argument. He starts with the claim that when norms and the law are used together, they work better than either used alone;⁵³ he ends with the claim that politicians will be willing to substitute norms for law.⁵⁴ To examine these claims, I now want to turn to two real world norms—those of cooperation in Japan and of racial subjugation in the American South. The cases both show that, as Macey argues, the state and anarchy can work together. Once again, however, not all of the conclusions support his arguments.

The high levels of cooperation in Japan are often cited as evidence of the importance of values in social order.⁵⁵ As noted above, this conclusion has been challenged on the ground that Japanese cooperation is rooted in incentives.⁵⁶ Sociologists argue that, from schools to families, Japanese institutions contain features that provide individuals with powerful incentives to cooperate.⁵⁷ The lower mobility in schools and jobs in Japan means that individuals value good standing within their organization much more than do people in countries with more mobility. Furthermore, most Japanese institutions are structured to make it easy for members to monitor each other's performance. In many cases, the monitors include agents of the state. For example, police in Japan are much more closely tied to neighborhoods than are police in the United States. In short, the Japanese state works with other institutions that provide people with both motive and opportunity to enforce the norm of cooperation.

Close examination of the American South shows that a similar web of institutions supported its norms of racial subjugation.⁵⁸ When social sanctions alone were not strong enough to maintain the norm, white Southerners turned to other institutions for sanctioning. For

⁵³ Macey, *supra* note 9, at 1132-37.

⁵⁴ *Id.* at 1140-43.

⁵⁵ See, e.g., FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* 149-207 (1995).

⁵⁶ See *supra* note 7.

⁵⁷ For details, see Michael Hechter & Satoshi Kanazawa, *Group Solidarity and Social Order in Japan*, 5 J. THEORETICAL POL. 455 (1993).

⁵⁸ For general analyses of the role of markets and states in the enforcement of racial norms, see Robert Cooter, *Market Affirmative Action*, 31 SAN DIEGO L. REV. 133 (1994); Jennifer Roback, *Southern Labor Law in the Jim Crow Era: Exploitative or Competitive?*, 51 U. CHI. L. REV. 1161 (1984).

example, Jennifer Roback argues that during the 1890s, it became clear that racial integration on public accommodations such as streetcars was the rule, not the exception.⁵⁹ (Ironically, this integration occurred side-by-side with segregation along other lines, such as smoking/nonsmoking.) In response, whites who wanted segregation turned to coercion to enforce the norms. In some areas, this meant an increase in communal violence, such as lynching and whitecapping. Across the South, it took the form of Jim Crow laws, which made segregation the law of the land. As part of the Jim Crow program, blacks (and lower class whites) were disenfranchised, ensuring that they could not challenge the laws through the political process.⁶⁰

Southern whites responded similarly when the New Deal challenged the norm of white superiority. In the 1930s, labor contracts on plantations were embedded in an extensive set of patron-client relations, with tenants receiving services ranging from protection against local authorities to old age benefits. For blacks, racial subordination was an essential aspect of these relations.⁶¹ The welfare programs of the first New Deal threatened this system by making the federal government, not the landlord, the provider of many of these services.⁶² When, after the Supreme Court struck down some of these programs, many were repassed in the late 1930s, they no longer applied to farm workers. This change in coverage was the price that Roosevelt paid for Southern support for the second New Deal. Southern support, in turn, was crucial because the norm of seniority in Congress, when combined with the one-party system in the South, gave Southerners extra power in Congress.⁶³

During the 1950s, this system started to unravel as mechanization of cotton agriculture led to a decrease in the demand for labor on plantations. The result was a large scale exodus of labor from agriculture. In response, Southern politicians switched their positions, voting to extend federal welfare programs to include farm workers as part of a general Southern support for federal welfare.

These examples suggest that Macey is correct to argue that norms reflect incentives and that those incentives need not all be provided in a decentralized, communal fashion. Nevertheless, these accounts give

⁵⁹ Jennifer Roback, *The Political Economy of Segregation: The Case of Segregated Streetcars*, 46 J. ECON. HIST. 893 (1986).

⁶⁰ Of course, the federal government's acquiescence, symbolized by *Plessy v. Ferguson*, 163 U.S. 537 (1896), was essential.

⁶¹ See Lee J. Alston, *Race Etiquette in the South: The Role of Tenancy*, in 10 RES. ECON. HIST. 199, 200 (Paul Uselding ed., 1986).

⁶² Here I draw heavily on Lee J. Alston & Joseph P. Ferrie, *Paternalism in Agricultural Labor Contracts in the U.S. South: Implications for the Growth of the Welfare State*, 83 AM. ECON. REV. 852 (1993).

⁶³ For a repeated-game model of a norm of seniority, see Kenneth Shepsle & Barry Nalebuff, *The Commitment to Seniority in Self-Governing Groups*, 6 J.L. ECON. & ORG. 45 (1990).

us little hope that the dynamics of norms—the ways in which their relations to other institutions change over time—favor efficiency or moral merit. Indeed, the stories from the South suggest the opposite: politicians find it hard to resist the temptation to intervene on behalf of the wrong norms.

CONCLUSION: THE HOBBSIAN FALLACIES AND GOOD GOVERNMENT

This brief tour suggests that the relationships between norms and politics are more complex, and perhaps less friendly, than Macey suggests.⁶⁴ Macey's claim that norms can save democracy from itself relies on the assumption that norms are different than law. He argues that because norms are not enforced by the Leviathan, with its specialized coercive apparatus, they will not be as redistributive as laws.⁶⁵ Sadly, the theory and evidence reviewed above suggests that this is not always so. Self-interest will make people "accept" norms that give them very little more than they would get in autarky. As a result, people will seek norms that favor their interests. If they fail, they will try to get the state to step in and support the norms that they favor. Thus, it seems that norms are unlikely to be exempt from the venal considerations that guide ordinary politics.

At the same time, the evidence suggests that Macey is right in his deeper points. As he suggests, norms are part of the web of institutions—simply one more way that people order their social world.⁶⁶ As he also suggests, the practical unity of norms and law should be reflected in a theoretical unity.⁶⁷ Like politics, norms can (and should) be treated as an incentive system, which can be understood by considering the incentives and opportunities they provide to people.

Finally, the tour supports Macey's deepest point, one that he consistently underplays: *it is time to throw off the Hobbesian yoke*.⁶⁸ For too long, Hobbes's claim that anarchy was so bad that anything would be better has limited the imagination of institutional designers. Seduced by this logic, they have ruled out whole classes of options on the grounds that the institutions cannot work. As Macey argues, we know too much about both Leviathan and its alternatives to accept such a view.

⁶⁴ For another view of the relationship, in which the state is needed as a referee among different anarchic groups, see Michael Hechter et al., *The Attainment of Global Order in Heterogeneous Societies*, in RATIONAL CHOICE THEORY: ADVOCACY AND CRITIQUE 79 (James Coleman & Thomas Fararo eds., 1992); Satoshi Kanazawa & Debra Friedman, *The State's Contribution to Social Order in National Societies: Somalia as an Illustrative Case* (Sept. 1996) (unpublished manuscript, on file with author).

⁶⁵ Macey, *supra* note 9, at 1140-43.

⁶⁶ *Id.* at 1125-26.

⁶⁷ *Id.* at 1132-37.

⁶⁸ *Id.* at 1140-43.