

A Different Approach: A Positive Account of Rights¹

During the time men live without a common power to keep them all in awe, they are in that condition called war; and such a war, as if of every man, against every man.

Thomas Hobbes

In this chapter, I offer answers to a number of different questions:

1. What are rights, considered not as a moral or legal category but as a description of how people act.
2. How is it possible for civil order to exist — why are not all people, all of the time, in the Hobbesian state of nature, the war of each against all?
3. What is government — what distinguishes it from other human institutions?

And, as a free bonus,

4. Why did the U.K. send a fleet most of the way to Antarctica and risk its only aircraft carrier in order to defend a cluster of barren islands with a few hundred people on them?

The Puzzle

Thomas Hobbes described the state of nature as a war of each against all in which the life of man would be “solitary, poor, nasty, brutish, and short.” That does not sound like the world we live in. His solution was to establish an all powerful ruler. That comes a little closer to the real world, but not all that close. And it is not clear how, starting with the world Hobbes describes, it could be done or why it would work.

In the Hobbesian state of nature, each individual acts in his own interest. That sounds like a reasonably accurate description of our world. How is his improved version, the world with a ruler, different? The ruler is not Superman; he too must sleep and can be killed while doing so. He may have a police force and an army, but police forces and armies are made up of men; what causes those men to act differently than they did in the state of nature? Where does the structure of an orderly, peaceful society come from? What is the magic ingredient that distinguishes civil order from the state of nature? It cannot simply be laws; words on paper only take effect to the extent that individuals act on them. Why should individuals act differently after laws are passed than before? It cannot be police in uniforms and judges in robes. Uniforms and robes do not confer

¹ The argument of this chapter first appeared in full in "A Positive Account of Property Rights," *Social Philosophy and Policy* 11 No. 2 (Summer 1994) pp. 1-16, <http://www.daviddfriedman.com/Academic/Property/Property.html>. Parts of it previously appeared in my review of *Further explorations in the Theory of Anarchy*, ed. Gordon Tullock, (Blacksburg: University Publications, 1974), published in *Public Choice* in 1976. Elements of the argument also appeared in David Friedman, "Many, Few, One -- Social Harmony and the Shrunken Choice Set," *American Economic Review*, vol. 70, no. 1 (March 1980), pp. 225-232. This version is based mostly on Chapter 52 of the third edition of *The Machinery of Freedom*.

magic power on their wearers or compel their wearers to act differently than they would without them.

That is the central puzzle that this chapter attempts to answer.

Neighborly Extortion

Imagine that you live in a suburban neighborhood with a not terribly efficient or well organized law enforcement system. One day your neighbor calls you over to the fence for conversation. He explains that he finds taking his trash down to the town dump every week to be a nuisance and has decided that it would be less trouble to simply dump it over the fence onto your property.

When you recover your breath and start lecturing him on property rights, he offers you a simple cost/benefit analysis of your alternatives. Dealing with his trash will take ten or twenty dollars worth of your time and effort every week. Persuading the city authorities that the trash is his and not yours, getting them to do anything, appearing for multiple court hearings, raising a fuss, will cost you the equivalent of considerably more than that.

But, he adds, he has an alternative proposal. For him to dump the trash and someone else to collect it is clearly inefficient. A better solution is for him to deal with his trash and you to pay for it. For a mere five dollars a week, half or less what your lowest cost solution to the problem would cost you, he will agree to refrain from dumping the trash over the fence.

I predict that you will turn down his generous offer, tell him to go to hell and, if he persists in dumping his trash on your property, spend the equivalent of considerably more than five dollars a week, or even ten or twenty, prodding the relevant authorities into doing something about the problem.

Why?

The answer is the human version of the territorial behavior observed in a variety of species, mostly birds and fishes but also some mammals. Territorial animals mark the territory they claim and enforce their claim by a commitment strategy, by somehow turning a switch in their brain that makes them attack a trespasser of their own species more and more fiercely the farther into the territory he comes. Unless the trespasser is much larger than the defender a fight to the death is a loss for both, so once the trespasser realizes the defender is committed to fight, he retreats.

You, like a territorial bird or fish, have adopted a commitment strategy, more complicated than theirs because what you are committed to defend is not a territory but a set of rights. There are things you consider yourself entitled to in your interaction with other people, and one of them is not having trash dumped on your property. In defense of those rights you, like the territorial animal, are willing to bear costs out of proportion to what is immediately at stake.

A different way of putting the point is that, if you give in to your neighbor's attempt at small scale extortion, there is no obvious limit to how far it will go. There are, after all, quite a lot of other ways in which he, or other people, could impose costs on you or demand payment not to. By adopting a policy of resisting such demands even at considerable cost, you give other people an incentive not to make them. If they do not make them, you do not need to bear the cost of resisting them.

What prevents your neighbor, following the same logic, from committing himself to bear large costs if you do not give in to his extortion? The short answer is that you will not believe him. The long one requires an explanation of Schelling points.

Schelling Points²: The Idea

A professor calls a student into his Yale office and asks him to participate in an experiment with the possibility of a reward. The objective is to rendezvous with another student in New York city by both being at the same place at the same time. If they succeed, they will each get a hundred dollars. Neither knows the other's name and, even if he guesses it, they are not permitted to communicate before meeting.

To win the prize, each has to guess where and when the other will try to meet him. One way of doing so is to figure out what time and place each will see as unique, since if their criterion for choice yields more than one answer they might choose different answers and so miss each other. Time is easy — given our system of timekeeping, noon and midnight are the only times that appear unique. Which they choose will depend on how long it takes them to get from New Haven to New York and what hours they normally keep. If it does not take too long and they are not night owls, noon is the obvious choice.

Where is harder. When I first read about the problem, my suggestion was the top of the Empire State building. That was, at the time, the tallest building in the world, making it in an obvious sense unique. It turned out, however, that there was no such place. The building has four observation decks spaced around the four sides, with no obvious way of deciding which one to meet at. I am told that in the real world experiment, proposed by Thomas Schelling some sixty years ago and later implemented by someone else, the students met under the clock at Grand Central Station, to them the obviously unique meeting place. At noon.

This is a story about coordination without communication. What makes it relevant to this chapter and much else is that that describes not only situations where you are unable to speak to each other but also situations where neither party has a good reason to believe what the other says.

For that version of Schelling's idea, replace our two Yale students with two bank robbers. Having pulled off a successful heist they must decide how to split the loot before going their separate ways; if they argue about it for too long the police may show up. Each played a different role in the robbery and each believes that his contribution was larger than that of his accomplice. I predict that they will split the money evenly, not because either thinks that fair but because that is the one division that both see as unique, hence as an alternative to interminable bargaining. They can talk to each other, but if one insists that he will not agree to any division that gives him less than 60% of the money the other has no reason to believe him. Fifty-fifty is different.

The same analysis applies to a wide variety of bargaining situations. Both parties are better off reaching agreement, each would prefer to do it on terms more favorable to himself. The longer they bargain the less the benefit to be shared between them. In the case of the bank robbers, that is represented by the risk that the cops will show up. In union/management bargaining, lost wages and revenue during a strike. In bargaining over a treaty to end a war, lives lost and property destroyed. The logic of all three situations is the same.

² Sometimes referred to as “focal points.”

Returning to your conflict with your neighbor, what makes your commitment believable and his not is the Schelling point created by your (and his!) perception of individual rights. Given the existence of only one such Schelling point, one settlement of your potential conflicts that appears unique to both of you, it makes sense for you to defend it.

The logic of the situation does not depend on the existence of either law or shared moral beliefs. All it requires is that both of you know what rights you claim and that both of you know that the claim is unique, that you cannot believably insist that your rights consist of no trash plus his paying you a modest tribute any more than he can insist on the same terms the other way around.

A Little More on Schelling Points

A Schelling point is a subjective feature of reality, a fact about how the interacting parties view the world. To make that clearer, imagine that two people are presented with the following list of numbers and offered a prize if they succeed in separately selecting the same one:

2, 5, 9, 25, 69, 73, 82, 100, 126, 150

Each of them, as per the previous discussion, is looking for a number that is unique. Which numbers are unique depends on how each of them thinks about numbers. To many ordinary people, 100 is a round number in a sense in which the others are not. To a mathematician, all that is special about 100 is that it is an exact square and the list contains two others. It may, however, occur to the mathematician, assuming he is coordinating with another mathematician, that in the entire set of positive integers there exists only one even prime, making it the obvious choice. To someone who is illiterate and sees the numbers only as patterns, 69 will seem unique for its symmetry, conveniently letting him coordinate with someone whose interest is more prurient than mathematical.

There is no objectively correct answer. It depends on how the person you are coordinating with thinks.

For a more strained example of the same point, go back to our bank robbers, with one difference. Because they come from a society dominated by utilitarians they have been taught to think of value not in dollars but in utiles, units of happiness. Furthermore, everyone in their society believes that the marginal utility of income is inverse to wealth, that someone with twice as many dollars values each additional dollar at exactly half as much. To these philosophical robbers the obvious division is still fifty-fifty, an even split, but it is an even split of utility, not money. One of them happens to be twice as wealthy as the other, so a split that gives him half the utility must give him two thirds of the dollars.

What the two robbers agree on is not how much each one is morally entitled to; we can assume, as before, that each believes he did more than half the work and so deserves more than a half share. We could even assume that both agree which one of them did more than half the work. Provided that they do not agree about how much more, that agreement does not generate a Schelling point to coordinate on. A fifty-fifty split does.

One possible explanation of social order is morality, individuals refraining from murder, rape, and robbery because they believe such actions are wrong. That is a possible explanation but not the

one I am offering here. My claim is that even without moral agreement, even without any moral belief at all, a pattern of consistent commitment strategies makes coordination possible.

Escaping the State of Nature

I have now offered a solution to the puzzle I started with. What is added to a state of nature in order to turn it into civil order, to convert the war of each against all into peace, is a network of commitment strategies based on an elaborate set of mutually perceived Schelling points. It could be based on shared religious or ideological beliefs but need not be. What matters is that each person is committed to bearing substantial costs to maintain his commitment strategy, that people for the most part correctly perceive each others' commitment strategies, and that those strategies are for the most part consistent, that I am not committed to getting from you something you are committed to not giving me.

The ways in which individuals enforce their commitments will vary with context. In some contexts it involves the actual use of force. In my tale of suburban extortion, the weapons are more likely to be lawyers than guns. In both versions and many others, it is the pattern of commitment that gives order to the society and the existence of a commonly perceived network of Schelling points that makes possible that pattern of commitment.

Why Hobbes was Wrong

One implication of this way of viewing an orderly society is that Hobbes was wrong. A society may have no all powerful sovereign, even no sovereign at all, and still be a great deal more orderly than he imagined. The clearest real world examples would be primitive stateless societies such as the Commanche. They had nothing we would recognize as a government, but killing a man or seducing his wife had predictable consequences due to the commitment strategies of other members of the society, consequences that made such actions much less common than they would be in Hobbes' version of the state of nature.³

And Why Hobbes was Right

The same account of human behavior shows why Hobbes' solution, if not necessary, is at least possible. His version of an orderly society, rule by an all powerful sovereign, is supported by a different pattern of commitment strategies and Schelling points. It is a pattern in which individuals are committed to resist actions by most other individuals as rights violations but not similar actions by the sovereign or his agents, and in which the relations of the sovereign and his agents are structured into a hierarchy of authority by their own self-consistent network of commitment strategies.

For a simplified version, suggested to me long ago by the late Earl Thompson, imagine that the ruler can successfully commit himself to kill any of three subordinates if they defy his orders. He orders each of them to make a similar commitment to control three of their subordinates. Continue the cascade until there are enough people in it to believably threaten any of those outside the ruling clique — who, since they are not committed to defy such threats, will yield whenever yielding is less costly than resisting. Each individual, inside and outside government, is acting in his own

³ For details of this example and several others, see my *Legal Systems Very Different from Ours*.

rational self interest given what everyone else is doing, making it what game theorists describe as a Nash Equilibrium.

A Positive Account of Rights

This way of looking at behavior provides a way of understanding rights that depends on neither law nor morality, although it might be reinforced by either. The fact that I have a right not to be killed means neither that killing me is wicked nor that it is illegal, only a reason that it will usually not be in other people's interest to do it. That right is enforced by the commitment strategies of other people — in saga period Iceland, the commitment of my kin to use violent force against anyone who kills me and refuses to pay them adequate compensation. My rights are whatever I am, or others are, successfully committed to defend, where success depends in part on other people recognizing the commitment and having no commitment of their own that directly clashes with it.

What is Government, What is Anarchy

How is a government different from other human institutions? It cannot be what it does, since governments do a great variety of different things all of which, including making war and enforcing law, have at some time or place been done by institutions we do not think of as governments.

The answer is that a government is an institution against which people have dropped the commitment strategies that defend what they view as their rights against other people. An anarchy is a society in which there is no such institution. An anarchist is someone who sees such a society as desirable.

And What the British Navy Was Doing in the Falklands

This way of looking at individual behavior also explains some of the behavior of governments. Argentina's invasion of the Falkland Islands triggered a British commitment strategy: Respond with force to anyone seizing British territory. Britain responded by sending a fleet most of the way to the South Pole to get the islands back. It made very little sense viewed in immediate cost/benefit terms; it would have been a great deal cheaper to transport all of the inhabitants to England and give each of them enough money to support him for the rest of his life. But it made a great deal of sense given that 'defend our boundaries' was a Schelling point and 'defend our boundaries except when Argentina invades the Falklands' was not.

Hobbes had a vision, certain, crystal clear,
Through logic's lens alone he clearly saw
The state of nature, red in tooth and claw
And sword and axe, where each man lives in fear,
A nightmare world unless a king appear
Equipped with force enough to overawe
All powers else and bend them to his law,
A monarch absolute, without a peer.

One question yet remains: In many lands
Men lived and fathered children, planted grain,
Slept soundly through the night, worked with their hands,
Together or apart, for love or gain.
How is it that the human race survived

Through the long years before the king arrived?⁴

Credits

In addition to Thomas Schelling, the ideas of this chapter owe most to the late Earl Thompson, possibly the most brilliant not-very-famous economist I have known. It was Earl who first convinced me of the importance of commitment strategies in understanding human behavior and the structure of human societies.

A Little More on Earl Thompson

I was recently corresponding with a fellow economist, a friend and ex-student, and he mentioned having organized a session at some meetings in honor of the late Earl Thompson of UCLA. I responded by commenting that I too was an admirer of Thompson's and remembered James Buchanan having once said something to the effect that Earl had the highest IQ of anyone he knew. My friend described having spent very many hours as a graduate student arguing with Earl Thompson, to their mutual enjoyment.

I, my friend, and Buchanan were all pretty far on the pro-market side of the economics profession. Earl was not. The first time I encountered him he was giving a talk at the public choice center at VPI, sometime in the 1970's, offering clever arguments in favor of things that I and most of his audience were against. He did not, ultimately, convince me, but his ideas changed how I thought about certain theoretical issues in an important way.

That is how the academic world is supposed to work. What was important about Earl, to all three of us, was not whether he agreed with us but whether he had original, interesting and intelligent ideas. Which he did. He will be missed.

[Includes index references]

⁴ From *The Machinery of Freedom*, third edition, Part V.