Order without Law

How Neighbors Settle Disputes

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ORDER WITHOUT LAW

To my mother and to the memory of my father, who in his youth ran cattle in North Dakota

Preface

This book seeks to demonstrate that people frequently resolve their disputes in cooperative fashion without paying any attention to the laws that apply to those disputes. This thesis has broad implications for how political debates should be conducted, how lawyers should practice their profession, and how law schools and social-science departments should educate their students.

I did not appreciate how unimportant law can be when I embarked on this project. Until then I had devoted my scholarly career to examining land-use issues from a law-and-economics perspective. In those endeavors I made use of the Coase Theorem, a central proposition of law and economics that portrays people as bargaining to mutual advantage from whatever starting points the legal system has bestowed on them. (The more provocative aspect of the Coase Theorem is that, under certain assumptions, people will bargain to the *same* outcomes regardless of their original legal entitlements.)

In 1981 I had just finished coauthoring a casebook on land-use law and had grown vaguely dissatisfied with library-based legal scholarship. I decided to venture out into the world to learn more about how neighbors actually interact with one another, particularly when their legal rights vary from one place to the next. My first inspiration was to investigate how the law of lateral support influences which landowner pays to shore up an existing urban building whose foundations are threatened by an excavation on adjoining land. This line of research had to be abandoned when it turned out that federal regulations designed to protect the safety of workers had essentially preempted the widely varying common-law rules of lateral support.

I then turned to the issue of a cattleman's liability for cattle-trespass damages, in part because Ronald Coase had featured this issue in the famous article in which he set out his theorem. Based at the Stanford Law School at the time, I sought to identify a county in California that had both "open" and "closed" range—legal regimes in which a cattle-

man's legal liabilities for cattle trespass are dramatically different. Because university law libraries have few county ordinances in their collections, this search necessitated travel to various rural county seats. In the California Gold Country around Sacramento I discovered that Amador County, El Dorado County, and Placer County had all recently "opened" some of their range, but only in largely uninhabited territories in the high Sierra. Increasingly frustrated, on a sweltering day in August 1981 I left the Gold Country and drove north for three hours to pursue a lead involving Shasta County, at the top of the Central Valley. In the offices of the University of California Extension Service in Redding, I came upon Shasta County's farm advisor, Walt Johnson. With my first question Walt's face lit up and he began to talk. It was immediately apparent that my search for a field site was over.

Although vaguely confident from the outset that fieldwork in Shasta County would turn out to be enlightening in one way or another, I began with no particular hypotheses in mind. Nevertheless, after only a few interviews I could see that rural residents in Shasta County were frequently applying informal norms of neighborliness to resolve disputes even when they knew that their norms were inconsistent with the law. In short, contrary to standard law-and-economics analysis, in many contexts legal entitlements do not function as starting points for bargaining. This book is largely my attempt to integrate this finding with social-scientific analysis of the functions of law.

Details of my research methodology are provided in the Appendix, but a few words about usage are in order here. I have employed pseudonyms for most of the residents of Shasta County involved in the vignettes included in the book. Some public officials, such as Judge Richard Eaton and Supervisors John Caton, Dan Gover, and Norman Wagoner, are identified by their real names, as are the two individuals who most helped ease my immersion into Shasta County life—Bob Bosworth, then the president of the Shasta County Cattlemen's Association, and Walt Johnson. I extend my deepest thanks to them and to all the others in Shasta County who helped the stranger in shirtsleeves and necktie.

Chapters 1–3 draw on my earlier article "Of Coase and Cattle: Dispute Resolution among Neighbors in Shasta County," 38 *Stan. L. Rev.* 623 (1986). Chapters 7–8 derive from "A Critique of Economic and Sociological Theories of Social Control," 16 *J. Legal Stud.* 67 (1987). A portion of Chapter 11 is based on "A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry," 5 *J.L. Econ. & Org.* 83 (1989). I thank Richard A. Epstein, coeditor of the *Journal of Legal Studies,* and

Roberta Romano, coeditor of the *Journal of Law, Economics & Organization,* for allowing me to reprint material from the latter two sources.

I have many other debts to acknowledge as well. Portions of the text benefited from comments made during presentations at workshops at Boalt Hall, Boston University Law School, Chicago Law School, Harvard Law School, Michigan Law School, Stanford Business School, Stanford Law School, University of Toronto Law School, and Yale Law School. I received helpful suggestions from, among many others, Bruce Ackerman, Yoram Barzel, Bob Clark, Bob Cooter, Richard Epstein, Ron Gilson, Vic Goldberg, Mark Granovetter, Mark Handler, Henry Hansmann, Tom Jackson, Jim Krier, John Langbein, Geoff Miller, Bob Mnookin, Mitch Polinsky, Dick Posner, and Roberta Romano. I extend special thanks to four law-and-society scholars who, at different times and in different ways, reached across the chasm to educate me about what they do: Donald Black, Lawrence Friedman, Rick Lempert, and Stan Wheeler. The complete manuscript was greatly improved by three generous friends who had the steadfastness to make line-by-line comments—Dick Craswell, Carol Rose, and Gary Schwartz.

The Stanford Law School made this project possible by devoting a portion of a bequest from the Dorothy Redwine Estate to defray my field-research expenses. Jerry Anderson, Cheryl Davey, Tom Hagler, Keith Kelly, and Debbie Sivas contributed research assistance along the way; Simon Frankel provided exceptional research and editorial help during the manuscript's final stages. Jean Castle and Trish DiMicco reliably provided crucial secretarial support. At the Harvard University Press, I thank Elizabeth Gretz for her meticulous and sensible changes in the manuscript, and Mike Aronson, my editor, who patiently and skillfully pushed the project through to completion.

Lastly, I am grateful to my wife, Ellen, and my children, Jenny and Owen, for putting up with my years of work on this book. In January 1983, a few months after I had finished most of the fieldwork, the Shasta County Cattlemen's Association invited me to speak at their annual luncheon, which I was delighted to do. On this trip, Ellen and the children came with me. In the years since, when encouraging me to finish this project, Ellen has sometimes reminded me how small Jenny and Owen were then, playing on the deck of the cattlemen's meeting place while their father spoke inside, the snowy foothills of the Cascade Range stepping upward toward the distantly looming cone of Mount Shasta.

New Haven, December 1990

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Contents

Introduction

I think the whole thing is good neighbors. If you don't have good neighbors, you can forget the whole thing.

—*Chuck Searle, Shasta County cattleman*

My family believes in "live and let live." Have you heard of that?

—*Phil Ritchie, Shasta County farmer*

Events in a remote corner of the world can illuminate central questions about the organization of social life. The first half of what follows is an account of how residents of rural Shasta County, California, resolve a variety of disputes that arise from wayward cattle. A principal finding is that Shasta County neighbors apply informal norms, rather than formal legal rules, to resolve most of the issues that arise among them. This finding is used as a springboard for the development, in the second half of this book, of elements of a theory of how people manage to interact to mutual advantage without the help of a state or other hierarchical coordinator. The theory seeks to predict the content of informal norms, to expose the processes through which norms are generated, and to demarcate the domain of human activity that falls within—and beyond—the shadow of the law.

Stated most rashly, the aim of this work is to integrate three valuable—but overly narrow—visions of the social world: those of law and economics, sociology, and game theory. Expressed more modestly, the goal is to add a bit more realism and clarity to discussions of relations among neighbors and among members of other close-knit groups.

Why Stray Cattle? Why Shasta County?: The Coasean Parable

Investigation of the law in action in a specific setting can enhance general understanding of human affairs. Shasta County offers a saga replete with cowboys, scoundrels, barbed wire, citizen petitions, and other details that

connect to venerable traditions of the United States. Especially because there has been lamentably little legal scholarship in an anthropological mode, this story is informative (and colorful) in and of itself.[1]

The events reported here are of more than ordinary interest for another reason. One subarea of Shasta County is a microcosm perhaps uniquely suited to providing a real-world perspective on a hypothetical conflict much discussed in the literature on human cooperation. In a seminal work, "The Problem of Social Cost"—the most cited article on law—the economist Ronald Coase invoked as his fundamental example a conflict between a rancher running cattle and a neighboring farmer raising crops.[2] Coase used the Parable of the Farmer and the Rancher to illustrate what has come to be known as the Coase Theorem.[3] This counterintuitive proposition states, in its strongest form, that when transaction costs are zero a change in the rule of liability will have no effect on the allocation of resources. For example, as long as its admittedly heroic assumptions are met, the theorem predicts that making a rancher liable for damage done by his trespassing cattle would not cause the rancher to reduce the size of his herds, erect more fencing, or keep a closer watch on his livestock. A rancher who is liable for trespass damage has a legal incentive to implement all cost-justified measures to control his cattle. But even if the law were to decline to make the rancher liable, Coase reasoned that potential trespass victims would pay the rancher to implement the identical trespass-control measures. In short, market forces internalize all costs regardless of the rule of liability. This theorem has undoubtedly been both the most fruitful, and the most controversial, proposition to arise out of the law-and-economics movement.[4]

1. On the merits and methods of microlevel anthropology, see Clifford Geertz, *The Interpretation of Cultures* 3–30 (1973).

2. 3 *J.L. & Econ.* 1 (1960). During the 1957–1985 period the most cited article published in a conventional law review was Gerald Gunther, "The Supreme Court, 1971 Term—Foreword," 86 *Harv. L. Rev.* 1 (1972). See Fred R. Shapiro, "The Most-Cited Law Review Articles," 73 *Cal. L. Rev.* 1540, 1549 (1985). The *Social Sciences Citation Index,* which counts citations to articles appearing in law, economics, and other social science journals, provides a basis for comparing citations to the Coase and Gunther articles. This index indicates that during 1981–1988 the Coase article was cited in the surveyed journals almost twice as often as the Gunther article was.

3. Coase didn't, and no doubt wouldn't, use the label *parable.* This noun is nevertheless a useful shorthand way to refer to his example.

4. Some landmarks in the Coase Theorem literature are Robert Cooter, "The Cost of Coase," 11 *J. Legal Stud.* 1 (1982); John J. Donohue III, "Diverting the Coasean River: Incentive Schemes to Reduce Unemployment Spells," 99 *Yale L.J.* 549 (1989); and Donald H. Regan, "The Problem of Social Cost Revisited," 15 *J.L. & Econ.* 427 (1972).

Coase himself was fully aware that obtaining information, negotiating agreements, and litigating disputes are all potentially costly, and thus that his Farmer-Rancher Parable might not accurately portray how rural landowners would respond to a change in trespass law.[5] Some law-and-economics scholars, however, seem to believe that transaction costs are indeed often trivial when only two parties are in conflict.[6] These scholars therefore might assume, as Coase likely would not, that the Parable faithfully depicts how rural landowners would resolve cattle-trespass disputes.

Shasta County, California, is an ideal setting within which to explore the realism of the assumptions that underlie both the Farmer-Rancher Parable in particular and law and economics in general. Most of rural Shasta County is "open range." In open range an owner of cattle is typically not legally liable for damages stemming from his cattle's accidental trespass upon unfenced land. Since 1945, however, a special California statute has authorized the Shasta County Board of Supervisors, the county's elected governing body, to "close the range" in subareas of the county. A closed-range ordinance makes a cattleman strictly liable (that is, liable even in the absence of negligence) for any damage his livestock might cause while trespassing within the territory described by the ordinance. The Shasta County Board of Supervisors has exercised its power to close the range on dozens of occasions since 1945, thus changing for selected territories the exact rule of liability that Coase used in his famous example. The first part of this book reports how, if at all, the legal distinction between open and closed range influences behavior in rural areas. Shasta County neighbors, it turns out, do not behave as Coase portrays

5. Coase developed the parable not to describe behavior but rather to illustrate a purely theoretical point about the fanciful world of zero transaction costs. He himself has always been a militant in the cause of empiricism. See Ronald H. Coase, *The Firm, the Market, and the Law* 174–179 (1988).

6. Several of Coase's colleagues at the University of Chicago wedded themselves to this assumption in the 1960s. See, e.g., Walter J. Blum and Harry Kalven, Jr., *Public Law Perspectives on a Private Law Problem* 58–59 (1965); Harold Demsetz, "When Does the Rule of Liability Matter," 1 *J. Legal Stud.* 13, 16 (1972) (transaction costs "would seem to be negligible" when a baseball player negotiates with his club). The current consensus, even among Chicagoans, is that negotiations in bilateral-monopoly situations can be costly because the parties may act strategically. See, e.g., William M. Landes and Richard A. Posner, "Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Altruism," 7 *J. Legal Stud.* 83, 91 (1978) ("transaction costs under bilateral monopoly are high"); Robert Cooter, Stephen Marks, and Robert Mnookin, "Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior," 11 *J. Legal Stud.* 225, 242–244 (1982). Other reasons why transaction costs might be high in simple two-party situations are explored in Ellickson, "The Case for Coase and against 'Coaseanism,'" 99 *Yale L.J.* 611 (1989).

them as behaving in the Farmer-Rancher Parable.[7] Neighbors in fact are strongly inclined to cooperate, but they achieve cooperative outcomes not by bargaining from legally established entitlements, as the parable supposes, but rather by developing and enforcing adaptive norms of neighborliness that trump formal legal entitlements. Although the route chosen is not the one that the parable anticipates, the end reached is exactly the one that Coase predicted: coordination to mutual advantage without supervision by the state.

The Pervasiveness of Order without Law

The Shasta County findings add to a growing library of evidence that large segments of social life are located and shaped beyond the reach of law. Despite this mounting evidence, the limits of law remain too little appreciated. In everyday speech, for example, one commonly hears the phrase "law and order," which implies that governments monopolize the control of misconduct. This notion is false—so utterly false that it warrants the implicit attack it receives in the title of this book.

Order often arises spontaneously. Although many other writers have recognized this point,[8] it remains counterintuitive and cannot be repeated too often. It is hardly surprising that the statists who favor expanding the role of government do not sufficiently appreciate nonhierarchical systems of social control. What is surprising is that some of the most militant supporters of decentralization often commit a similar error. The work of Coase is illustrative. Although Coase's writing reveals an unmistakable antigovernment streak, in "The Problem of Social Cost" he adopted the "legal centralist" view that the state functions as the sole creator of operative rules of entitlement among individuals. In so doing Coase repeated a blunder that dates back at least to Thomas Hobbes. According to Hobbes, without a Leviathan (government) to issue and enforce commands, all would be endless civil strife. The Shasta County evidence shows that Hobbes was much too quick to equate anarchy with chaos.

7. Besides exaggerating the reach of law, Coase's parable misidentifies the main risks associated with straying cattle. In Shasta County, the principal risks are not those posed to neighboring vegetation but those posed to motorists and to the animals themselves. See Chapter 5.

8. Two classic sources are Charles Lindblom, *The Intelligence of Democracy* 3–6 (1965) (lucid explanation of the possibility of coordination without hierarchy), and Friedrich Hayek, *The Road to Serfdom* 35–37 (1944) (reasons why planned economies can be expected to perform less well than unplanned ones). Some important subsequent works in the same vein are cited infra notes 19–21.

Many entitlements, especially workaday entitlements, can arise spontaneously. People may supplement, and indeed preempt, the state's rules with rules of their own.[9]

An alert observer can find in everyday life abundant evidence of the workings of nonhierarchical processes of coordination. Consider the development of a language. Millions of people have incrementally helped shape the English language into an enormously ornate and valuable institution.[10] Those who have contributed to this achievement have acted without the help of the state or any other hierarchical coordinator. The innovators who coined the words in this sentence, for example, are anonymous. *Time* magazine, a publication whose lifeblood is the English language, cannot possibly recognize (even retrospectively) any of its language's architects as Person of the Year.

Consider the growth of cities. In the nineteenth century several million people in the Midwest coordinated their efforts and built the city of Chicago. No one supervised this achievement and no single actor had more than a small part in it. Indeed, that Chicago's growth was largely undirected likely helped it develop so quickly.

Consider the operation of markets. Every day hundreds of thousands of people assist in supplying the food needed to sustain the seven million residents of New York City. No single individual knows how this aggregate feat is accomplished, and no one goes to work with this aggregate objective in mind. Nevertheless, New Yorkers invariably find food on their market shelves. This happens because a host of people consciously carry out tiny tasks that require them only to be aware of how their particular task meshes with the tasks of their immediate neighbors in the food-supply system. A Kansas wheat-farmer, for example, must know something about how his harvested grain is trucked to the local grain elevator, but he need not know how bread baked from his wheat is trucked from New York bakeries to New York supermarkets. Would a New York City mayor be wise to appoint a "czar" to supervise the vital activity of food supply? Anyone who answers in the negative implicitly understands that undirected market processes can supply food more economically than would an intentional hierarchy.

9. For fuller discussion, see infra Chapter 8, text accompanying notes 1–44. In recent years Hobbes has been kicked around almost as much as Richard Nixon was in his prime. See, e.g., Robert Axelrod, *The Evolution of Cooperation* 4 (1984); Peter Singer, *The Expanding Circle: Ethics and Sociobiology* 23–24 (1981); Michael Taylor, *Anarchy and Cooperation* 3, 7, 98–118 (1976).

10. English is employed as the illustrative language here because this book is written in it. Needless to say, many other languages are less irregular (more coordinated) than English is.

Last, and most pertinent, consider the operation of informal controls on behavior, as illustrated by the controversy that erupted in 1989 over flag burning. In June of that year a Supreme Court decision held that the First Amendment protects from criminal prosecution a person who burns a flag as a symbolic statement.[11] This ruling triggered a political melee. Opponents of flag burning declaimed that "there ought to be a law" against it. The President and many lesser political figures began to push for enactments, including a constitutional amendment, that would recriminalize the activity. Proponents of recriminalization doubtless understood that theirs was largely a symbolic battle. They apparently also believed, however, that the passage of legislation would serve the instrumental function of curbing flag burning. In this regard they seemed largely oblivious to the power of informal social controls. For better or worse, informal social forces in fact powerfully constrain the desecration of national symbols in public places. A demonstrator considering burning the national flag in the middle of a busy park can anticipate that observers will respond vehemently regardless of what the law says. Indeed, on July 4, 1989, when a handful of extremists scattered around the country tried to exercise the First Amendment flag-burning right that the Supreme Court had conspicuously recognized two weeks before, onlookers (mostly veterans) forcefully reminded them that informal rules against flag burning remained firmly in place.[12]

Out of the Swamp?: Bringing Theory to Law-and-Society Scholarship

An investigator of informal norms can find much of value in the works of scholars in the law-and-society movement, one of the significant social-scientific schools of legal research. Within law schools, the law-and-society scholars, especially those steeped in the tradition of Willard Hurst, are typically those most fervently committed to field work.[13] Most law-

11. Texas v. Johnson, 109 S. Ct. 2533 (1989). See also United States v. Eichman, 110 S. Ct. 2404 (1990) (Flag Protection Act of 1989 held to violate first amendment).

12. See L. Gordon Crovitz, "On the Flag, the Justices Make Dukakis's Mistake," *Wall St. J.*, July 6, 1989, at A12, col. 3 (reporting how onlookers used force to prevent and punish flag burnings attempted on July 4 in Albany, Little Rock, Minneapolis, and New York City). In the hope of encouraging this sort of response, some state legislators in Louisiana pushed for reduction of criminal sanctions applicable to informal punishers of flag-defacers. See *Wall St. J.*, June 5, 1990, at B8, col. 5.

13. It should be noted that a number of practitioners of law and economics have undertaken field research. Pioneering economic investigations into how people coordinate their activities in the face of transaction costs include Steven N. S. Cheung, "The Fable of the Bees:

and-society scholars have their roots not in economics but in the more humanistic social sciences such as history, sociology, and anthropology. Perhaps as a result, some of these scholars see patterns of human behavior as highly variable and contingent on historical circumstance. A scholar with this outlook tends to resist designing field research to test articulated hypotheses. In fact, if influenced by the anthropologist Clifford Geertz, the scholar might aspire only to produce "thick" anecdotal accounts that would display "local knowledge" of the culture examined.[14] Practitioners of law and economics, by contrast, rarely shrink from applying in every context the model of rational, self-interested, human behavior that they borrow from economics proper.

One might think that members of both camps would see irresistible benefits in blending law-and-economics theory with law-and-society field data. In fact, a chasm separates these two groups of scholars.[15] They publish separate journals.[16] They gather at separate conferences. They seem rarely to read, much less to cite, work by loyalists of the other camp. Although this absence of cross-fertilization may stem in part from a lack of familiarity with the working language of a foreign discipline, it is also due in part to a mutual lack of respect, and even a contempt, for the kind of work that the other group does. To exaggerate only a little, the law-and-economics scholars believe that the law-and-society group is deficient in both sophistication and rigor, and the law-and-society scholars believe that the law-and-economics theorists are not only out of touch with reality but also short on humanity.

This book was written with one foot firmly placed in each of these two

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An Economic Investigation," 16 *J.L. & Econ.* 11 (1973), and Ronald H. Coase, "The Lighthouse in Economics," 17 *J.L. & Econ.* 357 (1974). See also Elizabeth Hoffman and Matthew L. Spitzer, "Experimental Law and Economics: An Introduction," 85 *Colum. L. Rev.* 99 (1985) (includes bibliography on laboratory experiments).

14. See C. Geertz, supra note 1. Many law-and-society scholars regard Geertzism as insufficiently scientific, and are more willing than he to generalize.

15. The best-known assertion of a chasm between academic outlooks is C. P. Snow's 1959 lecture, "The Two Cultures." Snow saw literary intellectuals and physical scientists as polar opposites, and speculated about whether social scientists represented yet a third culture. C. P. Snow, *The Two Cultures: and a Second Look* 8–9 (2d ed. 1965). That the two camps of social scientists interested in empirical research on law have had difficulty communicating suggests that Snow was right to be in a quandary about how to classify members of the social-scientific disciplines.

16. The core journals are entitled, appropriately enough, the *Journal of Law & Economics* and the *Law & Society Review.* In addition, although they are both slightly more catholic, the *Journal of Legal Studies* has tilted heavily toward law-and-economics articles, and *Law & Social Inquiry,* toward law-and-society articles.