Robert E. Goodin

Norms Honoured in the Breach*

Max Weber offers one clear instance of how people might orient their behaviour around social norms even when they are not strictly being guided by them. We would be hard-pressed to explain why the thief operates under cloak of darkness, except by reference to the norm that he is violating and the sanctions that attach to its violation (Weber 1947, 125). Here I shall point to another such example—one that derives from a fundamental feature of norms that has heretofore been too little noticed.

Norms are paradigmatic 'orders without authority'.[1] They share this feature with customary law in traditional societies. Both are sets of rules that bootstrap their own authority. It is purely the practice of the community subject to them that makes those rules rules. There is no one who is duly authorized to 'issue' the orders, or interpret them, or apply them. It is purely a case of those who are subject to the rules 'doing it by and for themselves'. The rules being treated as rules is all that makes them rules.

In terms famous from H. L. A. Hart's *Concept of Law*, norms thus constitute a set of 'primary rules' without any 'secondary rules' (Hart 1961, ch. 5).[2] Primary rules are simply injunctions to 'do this!' or 'don't do that!' There are plenty of rules like that among both social norms and customary law. But what both sets of rules lack are any secondary rules—rules to authorize anyone to issue those orders, or to dictate how anyone can change or apply or authoritatively interpret those primary rules. That absence is what Hart sees as the characteristic feature of customary law. That is what I shall be focusing upon as the neglected feature of social norms.

The aims of this article are firstly to point out that fact about social norms and secondly to trace out the implications of living under a set of primary-without-secondary rules. How can people 'doing it by and for themselves' manage to perform the various functions that are performed by way of secondary rules in more developed legal systems? And what peculiar practices must people adopt when op-

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1 As Weber (1947, 126) says, writing of uncodified systems of social order, "For sociological purposes there does not exist, as there does for the law, a rigid alternative between the validity and the lack of a validity of a given order."

2 Hart systematically refers to 'sets' of primary-without-secondary rules, supposing it is the existence of secondary rules that transforms a 'set' into a 'system' of rules; but here I shall use the two terms interchangeably.

erating in such unstructured normative environments, to avoid costly errors and misunderstandings?[3]

1.

Some aspects of the problem of how to operate in a world of primary-without-secondary rules are fairly straightforward. At least they are in theory, however hard they may be solve in practice.

How do you get a new rule adopted in the absence of any secondary rule of recognition that specifies when some new rule has been formally adopted? Well, you simply get enough other people around to you to say it is a rule.

In a developed legal system, there would be a rule of recognition that is itself backed by serious social pressure from some sufficiently substantial portion of the community. It is by reference to that rule of recognition that we would decide what the primary rules of that system are (Hart 1961, 84–5). In the absence of any rule of recognition, the same thing that would have made the rule of recognition the secondary rule—serious social pressure from some sufficiently substantial portion of the community—is required to underwrite each and every primary rule of the system.

A cognate question is how to get some particular interpretation of the rule established, in the absence of any secondary rule appointing authorized interpreters. Again, you simply get enough other people to say that that is the right interpretation. Roughly speaking, that is how the common law emerges—and the common law is of course merely the customary law of the courts (Simpson 1973). One judge issues a ruling, and other judges go on to rule in like manner.

Or again, how do you change the rules, in the absence of any secondary rule specifying how to amend the first-order primary rules? Again, you must simply get enough other people around you to say that that is the new rule.

The dynamics of all this are intensely interesting, and there are various particular forms that they might take. Sometimes the process involves a fairly formal two-stage process, whereby in the first stage you go around collecting 'I will if you will' promises from all and sundry, and in the second stage you go around collecting on all those 'conditional promises' (Frohlick/Oppenheimer/Young 1971). International negotiations often look something like that. Think for example of the sequence of treaties governing emission of ozone-depleting CFCs: first there was the 1985 Vienna Convention for the Protection of the Ozone Layer promising to do something, then there was the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer that actually committed signatories to (moderately) binding targets.[4]

3 In a companion paper, I address similar issues as they arise with customary international law. See Goodin (2005).

4 I discuss the differences between these two agreements more fully in Goodin (1990).

More often, the dynamics depend on bandwagon-style mechanisms driven by differential sensitivities.[5] Some people suppose that something is a norm only if 80 percent of the relevant community say it is. Those people are going to be among the last to be won over. But there are some people who suppose that something is a norm if only 40 percent of the community say it is. And there are others who suppose that something is a norm if only 10 percent of community say it is (not unreasonably, provided everyone else is indifferent either way). So you start the bandwagon rolling by getting people with low thresholds to agree; and as more of them come on board you cross progressively higher thresholds triggering yet more people to agree, until you eventually have everyone agreeing. It is a classic case of a 'normative cascade'.[6]

As stories told about how norms get established, these are familiar ones. That is much the most discussed part of the problem of how to manage a in a world of primary-without-secondary rules. But as I have said, the same sorts of stories can probably be pretty readily adapted to provide answers to the allied questions of how norms get interpreted and how they get changed.

2.

For the remainder of this article, let us focus on the *changing* of primary-without-secondary rules, and the peculiar problems that that poses.

In a system with proper secondary rules, there are mechanisms for changing the primary rules of the system. The processes that those secondary rules prescribe may be slow and cumbersome, or they may be quick and efficient. Contrast, for example, the arduous amending of a constitution with the instantaneous rescinding of an Executive Order.

In a system that does not have any secondary rules, changing the primary rules will *necessarily* be a slow and tedious process. There, the only way rule-change can ultimately happen is by some people beginning to follow different primary rules of conduct and enough other people then following suit. Of course, you can do all sorts of things to encourage them to follow suit, talking up the proposed new norm and such like. But talk up the proposed new norm as you will, it does not actually become the new norm unless and until enough people actually start complying with it. As with making rules, so too with re-making rules, in a system of primary-without-secondary rules: "we must [simply] wait and see whether a rule gets accepted as a rule or not." (Hart 1961, 229) And that invariably takes a fair bit of time.

The 'stickiness' of social norms—their slowness to change—is of course a familiar feature that has already attracted much comment. Here I offer yet one more explanation. Systems of primary-without-secondary rules are always slow and cumber-

5 On bandwagons more generally, see Brams (1978).

6 And they are more stable in this form than the ones Timur Kuran writes about in, for example, Kuran (1998).

some to change, giving them something of a 'static character'.[7] Norms are conspicuous examples of such systems. That is one reason (doubtless among many others) that for the familiar 'stickiness' we observe in social norms.

A further fact emerges from the absence of secondary rules for changing social norms. Anyone who attempts to introduce changes in such rules inevitably finds herself in the precarious plight of having her actions easily misinterpreted.

In the absence of secondary rules, how do you go about proposing changes to the system of rules? There is no formal procedure for 'moving an amendment'. Without secondary rules, ultimately the only way to 'formally' move an amendment to change to a rule is to break that rule.[8] Of course you hope your new pattern of behaviour will eventually catch on and becomes the new rule. But in the meanwhile—and certainly in first instance—you will inevitably be breaking the rule.

Assuming some serious social pressure stands behind rules as they currently stand, that sets a potentially serious penalty on proposing changes in this, the only way one can, to systems of primary-without-secondary rules. That further exacerbates the static character of such systems (Akerlof 1984).

Not only is there a serious disincentive of that sort facing anyone who proposes changes in systems of primary-without-secondary rules. There is also a serious difficulty facing others trying to interpret their behaviour and to frame their own reactions in response.

Such observers need to know whether the rule-breaker is just a common-garden rule-breaker or whether she is hoping to become a rule-(re)maker. In the former case, her behaviour should be sanctioned and her model shunned. In the latter case, observers should at least consider whether the rule-breaker's proposed rule-revision has merit, and whether hers is a model that should be emulated. But in systems of primary-without-secondary rules, it can be hard to distinguish between breaches of primary rules that are intended as proposals for alterations to those rules and breaches that are just plain breaches with no such implication.

7 As Hart remarks, bemoaning the 'static character' of systems of primary-without-secondary rules, "The only mode of change in the rules [...] will be the slow process of growth, whereby courses of conduct once thought optional become first habitual or usual, and then obligatory, and the converse process of decay, when deviations, once severely dealt with, are first tolerated and then pass unnoticed. There will be no means [...] of deliberately adapting the rules to changing circumstances, either by eliminating old rules or introducing new ones: for, again, the possibility of doing this presupposes the existence of rules of a different type from the primary rules of obligation by which alone the society lives." (1961, 90)

8 Of course you can 'talk it up' as discussed above. That's just what I'll be exploring below. But actually to *move* the amendment requires a breach, and that motion is subsequently ratified if and only if others follow suit.

3.

Where people have to breach a rule to propose changing that rule, yet another complication arises. Sometimes a person breaches a rule without in any way wanting the rule to be changed. But precisely because breaching is the way changes are proposed, the breach might easily be misunderstood as advocating alteration. Elaborate rituals are required to forestall that misinterpretation.

Consider the contrasting case of breaching primary rules of a legal system with a fully panoply of secondary rules for making, interpreting and altering the primary rules. There, there is considerably less scope for misunderstanding what a breach is supposed to imply.

To be sure, breach of laws *is* sometimes meant to signal that the laws should be changed. Sometimes there is indeed an orchestrated refusal to obey some particular enactment, with a view to proving it unworkable. Classic cases of civil disobedience are like that (more of which later).

Much more ordinarily, however, breach is just plain breach, and nothing further for the larger legal system is supposed to follow from that. For the most dramatic illustration of that what I will call 'callous breach', consider the theory of 'efficient breach' proposed by Richard Posner and the Chicago School of Law and Economics more generally (Posner 1972, 57–61).

The Chicago thought is just this. If you can afford to pay the legally-prescribed penalty for breaking a law, and still be better off than you would have been complying with the law, then the efficient thing for you to do is to breach the law. That is not merely the efficient thing from your personal point of view. Assuming the legally-prescribed penalties have been set properly—by which economically-minded lawyers mean, in such a way as to reflect the full social costs of your breach—then it would be most efficient from the point of view of society as a whole for its members to break the law.[9]

'Efficient breach' doctrine was developed with reference to, and makes most sense as applied to, the law of contracts. There, it is quite uncommon for courts to compel 'specific performance', and require that the contracting parties do exactly what they contracted to do. More typically, courts merely require payment of monetary damages for breach of contract, in sums sufficient to compensate the wronged party for the loss of what was contractually owed. That really does make it look very much as if you are being invited (or anyway permitted) to breach your contract whenever it would be cheaper for you to pay the damages than it would be for you to perform as promised.

But taking the Chicago Law and Economics programme to its logical conclusion, there is no reason that 'efficient breach' ought be applied to contracts alone. Other

9 You could pay the penalties and still come out ahead—that is all that is required to say that it is socially efficient for you to breach. That is not necessarily to say that you actually should pay the penalties—that, economists would say, is a separate distributional question which is outside the realm of efficiency.

branches of the law—torts and especially criminal law—assess punitive damages as well as or instead of compensatory ones. Nonetheless, the same principle should still apply. If the penalties have been set properly, and reflect the full social 'cost' of your breaching the law, then it would be efficient (socially, and not just personally) for you to breach the law whenever complying would cost you more.

Of course, there are plenty of people—legal scholars and ordinary folk alike—who would be aghast at this theory of efficient breach. 'Contracts are promises', they would say, 'and as such they should be kept even when inconvenient' (Fried 1981). All the more, they might insist: 'The criminal law is not just a price schedule; it is a set of prescriptions for behaviour.' And while everyone may agree that a violator who has 'paid her debt to society' should be reintegrated into society rather than shunned forever, the breach of law was wrong in ways that can never be put fully to right by payment of the penalties.

I introduce the theory of efficient breach of law not to take sides in that controversy. My aim is merely to point out that that would be a much more plausible (even if perhaps ultimately wrong) way to think about breaching laws that have a full panoply of secondary rules behind them than it would be of thinking about the breach of norms lacking any secondary rules.

Such a callous breach of primary rules is more viable where there are secondary rules standing behind them, precisely because there is no danger there that one's breaking the rule will be misconstrued as a proposal for changing the rule. A separate set of procedures is in place for making and considering proposals of that sort.

In systems of primary-without-secondary rules, there are no such procedures in place. There, the way you change a rule is to break it. In consequence, anyone who breaks a rule might well be (mis)understood as proposing a change to the rule. If the rule-breaker wants to avoid that implication, she has to go to extraordinary lengths to 'honour the rule in the breach', explaining why that is the right rule to follow even if due to some extraordinary circumstances she now finds herself breaking it.

'Conscientious' as contrasted with 'callous' rule-breaking is thus required in systems of primary-without-secondary rules. In such systems, people cannot merely let their actions speak for themselves. Instead they must conjoin their actions with explanations of what is meant by them. There may be some default assumption—perhaps, for example, that breaking a rule will be taken as a suggestion for changing the rule, unless any further explanation is offered (or maybe the opposite). But if you want your rule-breaking not to be understood that way, you must actually say so. And insofar as there is a real risk of different observers operating according to different default assumptions, you all the more emphatically had better actually say what you mean to convey by your breach.

That, I suggest, is one of the principal things (doubtless again among many others) that gives rise to the sort of elaborate account-giving that so often surround breaches of social norms and mores (Mills 1940; Tilly 2006). Of course, people try to wiggle off the hook when caught in violation of a legal obligation as well. But the touch and tone is characteristically quite different. When offering excuses or entering pleas in mitigation in cases of legal breaches, people focus primarily on their

own special circumstances. Again, of course people do some of that when explaining why they have breached social norms as well (more of which below). But people violating a norm often go to great lengths to emphasize their endorsement of the value and importance of the norm they have violated, in a way that is much less common in cases of broken laws.

The closest we find to that in the formal legal system is the discourse of civil disobedience. There is an important difference, of course: what the civil disobedient is emphatically reaffirming is her allegiance to the larger legal system, not the very law (banning blacks from riding in the front of the bus, or whatever) that she is insistently disobeying. With social norms, there is no 'larger system'.[10] Still, the attitude of 'conscientiousness' attending the breach is similar.

In the discourse of civil disobedience, 'conscientious' means two things. The first is that the breach of law was motivated by a 'claim of conscience' (morality rather than material self-interest, for example). The second is that the law was breached 'conscientiously', publicly and in a way that pays due respect to the larger legal system.[11] A canonical statement of that appears in the *Letter from Birmingham City Jail* by Martin Luther King, Jr.:

> One who breaks an unjust law must do it openly, lovingly [...], and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and willingly accepts the penalty by staying in jail to arouse the conscience of the community over its injustice, is in reality expressing the very highest respect for law. (Reprinted in Bedau 1969, 78–79)

Note that there is definitely something a little odd in saying that you respect the larger legal system at the same time as finding this particular enactment utterly unconscionable. How could it *fail* to reflect badly on the larger system of lawmaking that it resulted in this enactment that my conscience finds so intolerable?

That issue does not arise with social norms, of course. There, there is no system of secondary rules for you respect. There is only a bunch of unconnected primary rules. In such circumstances, what might violators of a norm be professing respect for, as they set about 'conscientiously' violating the norm in question? Maybe they could be swearing full allegiance to all the *other* primary rules, whilst refusing to comply with this particular one. But if those really are just a whole pile of other unrelated norms, you would not be professing allegiance to any larger system of norms. You would just be professing allegiance to a long list of unconnected commandments.

'Honouring a norm in the breach' is thus importantly different from 'honouring a law in the breach'. Once again, that is precisely because social norms, unlike laws, are not embedded within a system of primary plus secondary rules. There is in con-

10 Defined in terms of second-order rules anyway.

11 Hugo A. Bedau (1961) writes: "Civil disobedience is necessarily *public*" (656); and "Conscientiousness [...] requires that the dissenter acknowledge that the law, no matter what it is, makes some claim on his obedience, no matter how readily this claim may be overriden by other claims." (660) See similarly Cohen (1971, 16–22).

sequence no 'larger system' to honour, while breaching some subordinate part of it. In the unsystematized world of primary-without-secondary rules, there are no subordinate or superordinate parts of the normative environment. It is all on one plane.

When honouring social norms in the breach, therefore, you must engage in the more florid and rhetorical displays associated with civil disobedience. You acknowledge the rule that you are breaking, and (*modulo* what I shall go on to say below) you openly acknowledge that you are indeed breaking it. You engage in lots of hand-wringing, you go on and on about how hard the decision was, how very atypical were the circumstances in which you found yourself. You promise faithfully comply with the norm under other circumstances in the future, and you entreat others to do likewise. You emphasize that your action should not be taken as a precedent by others.

Such displays would of course be transparently disingenuous if you engaged in them too often. So to be taken as sincere, your breaches and accompanying protestations must be relatively rare. But if sufficiently rare, you might in this way be able to convince (enough) others that you really did not mean to propose a change to the norm or undermine others' adherence to it, through your own violation of it.

Of course, breaching a norm can be contagious, even when the breaching party does not intend for her model to be emulated. In any Prisoner's Dilemma or Public Goods game, when other people defect from cooperative patterns of play, you do likewise—not so much to punish them as to protect yourself. In iterated *N*-person games of that sort, the more people who defected in the previous round, the more others who will defect in the next, and so on until a new 'norm' of non-cooperation is established—much to the chagrin of everyone (not least the initial defector's).

So 'misunderstanding' of the signal that the norm-violator meant to send by her violation of the norm is not the only risk to worry about, here. That sort of 'unraveling' of a norm can easily occur, even if there was no misunderstanding.

My point here is merely that misunderstanding is easy, in the realm of social norms—and that can easily lead to the undermining of norms, even when the strategic structure of the situation would not itself lead to this sort of unraveling.

4.

'Honouring a rule in the breach' is thus a device whereby you hope to persuade others to persist in their adherence to a rule that you yourself violate. What sort of story can you tell to make it plausible that they should abide by it at the same time as you should (or should be allowed to) violate it?

One of the things that you insistently say, in such situations is, that this is not exactly the sort of case covered by the rule. The civil disobedient often says, along these lines, that the law she is breaking is 'not really law'. In his letter to fellow clergymen, Dr. King claimed that the law that he violated was not really law because it contravened God's law (*ibid.*, 77). Other civil disobedients claim that the laws they violate are not laws because they violates are contrary to the Constitution or

federal statutes that override state law. Or, if they had been reading too much early Dworkin, civil disobedients might say that the laws they violate are not laws because they are contrary to the 'principles' underlying the legal 'rules' (Dworkin 1967). And as with laws, so too with norms.

The more interesting case comes when someone concedes that she is genuinely violating a rule, but insists that the rule is the right rule regardless—not 'for others but not herself' but for herself as well. How can one plausibly assert both that it is the right rule and that it is all right to violate the rule?

One way that argument might work is through some appeal to 'weakness of will'. You concede that it is the right rule, but you simply cannot bring yourself to act upon it. Or, as a variation on that theme, you might say that some very special features of your present circumstances make the rule 'overly demanding' for you in those circumstances.

Here is a second and more interesting way that argument might work. Both laws and social norms are necessarily rules that are general in form. They are designed to cover lots of cases of a standard sort. There will inevitably be very particular circumstances where the 'spirit of the rule' would indeed require a different resolution. But rules work best if stated simply and easy to access intuitively. So there is a very good reason for not building absolutely all exceptions—however infrequently they might arise—into the rule.

Hence it is perfectly plausible for me to say that both (a) my case is an exception to the rule and also (b) I think it would be wrong for all such exceptions literally to be written into the rule. That is the sort of situation in which you honour the rule in the breach. You agree you are breaching the rule as it stands; you agree that that is precisely what the rule should be, rather than appealing for any amendment to incorporate your exceptional circumstances. Yet you also argue that your breach is to be condoned, somehow.

5.

It is a characteristic feature of norms is that they are 'orders without authority'. Like customary law, norms are systems of primary rules without secondary rules governing how to make them, interpret them or change them.

Given that there is no authority—no *grundnorm*, no secondary rule—standing behind them, norms must be established and re-established by being reiterated on each occasion. Honouring in the breach is a way of reaffirming the a norm, even whilst breaching it.

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Holly Lawford-Smith

The Importance of Being Earnest, and the Difficulty of Faking It

A Comment on Robert Goodin

1. Introduction

Goodin's *Norms Honoured in the Breach* is the companion to his earlier paper *Toward an International Rule of Law: Distinguishing International Law-Breakers from Would-Be Law Makers* (2005). In the domestic context there are set procedures for legal reform, so the straightforward way to distinguish law breakers from would-be law-makers (i.e. those seeking legal reform) would be to look at whether they break the existing laws, or instead take the appropriate steps to change the existing laws. But international law is an interesting case, because there is little by way of set procedure for reform—and in fact little by way of genuine law, if you think that enforceability is necessary to render law 'genuine'. One way to push for legal reform in a system with no set procedures for doing so is to *break* the law. But that poses an interesting question: how can we tell when a state is simply breaking international law, and how can we tell when it is pushing for international law reform? In his (2005) paper Goodin considers several answers to that question, arguing in general that would-be lawmakers will break the law publicly, accept the accompanying sanctions, and accept the legitimacy of other states acting in the same way for the same reasons. Presumably, would-be law-making is normatively acceptable, under the same conditions that conscientious objection in the domestic case is normatively acceptable.

In his article in this volume, Goodin exploits his earlier work, extending the conditions that distinguish a would-be lawmaker to cover domestic norm breakers. The paper might be read uncharitably as a handy 'how to' guide for the would-be social cheater. Goodin offers his readers some useful tips: don't break norms too often, or your excuses will start to seem disingenuous; make sure to sincerely protest your special reasons for breaking the norm, and your otherwise firm commitment to it; and it wouldn't hurt to throw in a little hand-wringing for effect. In short, the lesson is that the very behaviour that makes both international and domestic law-breaking normatively acceptable can be emulated to allow successful social defection. Very well. Goodin has adopted the perspective of the social agent concerned to cheat and get away with it; here I shall take the perspective of the society concerned to identify the threat of such ingenious defectors. The discussion shall proceed covering two central questions. Firstly, I'll ask whether there's actually anything wrong with the odd well-disguised defection. If there's not, maybe there's nothing that society needs to protect itself from. Secondly, I'll discuss the likelihood of society actually being confronted by Goodin-style cheaters. I will draw upon arguments of the evolu-