The Laws of Lawlessness

Peter T. Leeson

ABSTRACT

According to conventional wisdom, self-governance cannot facilitate order between the members of different social groups. This is considered particularly true for the members of social groups who are avowed enemies of one another. This paper argues that self-governance can do this. To investigate my hypothesis, I examine the Anglo-Scottish borderlands in the sixteenth century. The border people belonged to two social groups at constant war with one another. These people pillaged and plundered one another as a way of life they called "reiving." To regulate this system of intergroup banditry and prevent it from degenerating into chaos, border inhabitants developed a decentralized system of cross-border criminal law called the *Leges Marchiarum*. These laws of lawlessness governed all aspects of cross-border interaction and spawned novel institutions of their enforcement. The *Leges Marchiarum* and its institutions of enforcement created a decentralized legal order that governed intergroup relations between hostiles along the border.

> Insecurity paralyzes only when it is such in nature and in degree that no energy of which mankind in general are capable affords any tolerable means of self-protection. (John Stuart Mill [1848, p. 882])

1. INTRODUCTION

Even the most libertarian of economists believe that an overarching formal authority is needed to create intergroup cooperation. According to conventional wisdom, the scope of effective self-governance is severely

PETER T. LEESON is BB&T Professor for the Study of Capitalism, George Mason University. I am especially grateful to an anonymous referee for providing helpful comments and suggestions on an earlier version of this paper. I also thank Chris Coyne, Eric Posner, Andrei Shleifer, Russ Sobel, and the participants of the Economic History Workshop at Northwestern University. Finally, I am indebted to William Trumbull, who inspired this

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limited. Although decentralized institutions can effectively create order within social groups, they cannot do so between social groups (see, for instance, Greif 2002; Landa 1994; Dixit 2004; Zerbe and Anderson 2001). A sizeable body of research highlights the effectiveness of within-group self-governance (see also Ellickson 1991; Bernstein 1992; Clay 1997; Greif 1989, 1993; Kranton 1996; Milgrom, North, and Weingast 1990). Anderson and Hill (2004), Friedman (1979), and Leeson (2007a), for example, have examined the emergence of decentralized legal systems among members of the same social group. Virtually no one, however, has examined the emergence of a decentralized legal system between the members of different social groups.[1] This is most likely because of the widely held belief that there is nothing to find.

The reasons economists typically cite for self-governance's failure in the between-group context are highly sensible. Within groups, shared norms, beliefs, knowledge, and social affiliations create the cohesiveness and information flow required to effectively monitor and punish dishonest group members.[2] Between groups, in contrast, there is no such cohesiveness or automatic information flow that might facilitate decentralized order. Further, within groups, individuals typically share a broad range of interests, and this communion mitigates the potential for many kinds of conflicts. Between groups, in contrast, this situation is rarely the case. As a result, violent conflicts flourish, and this atmosphere undermines decentralized institutions' ability to secure intergroup cooperation.[3]

The idea that decentralized institutions could emerge to govern the members of separate social groups that are avowed enemies of one another appears even more absurd. If the broader societies these social groups are parts of have long been in an openly declared state of war against one another and each social group's members are mutually hos-

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1. Benson (1989, 1990) and Leeson (2008b), who consider intergroup self-enforcing exchange, are exceptions to this. However, those analyses focus exclusively on commercial agreements and do not consider the possibility of intergroup violence, with which this paper is primarily concerned.

2. For theoretical discussions of cooperation and conflict under anarchy more generally, see, for instance, Bush and Mayer (1974), Hirshleifer (1995, 2001), and Skaperdas (1992, 2003).

3. For an analysis of trade versus raid decisions in the absence of effective formal enforcement, see Anderson and McChesney (1994) and Leeson (2007b). On the endogenous emergence of property rights and their defense more generally, see Anderson, Benson, and Flanagan (2006), Haddock (2002), Libecap (2002), and Umbeck (1981).

tile toward the members of the other group, there would seem to be no chance for a decentralized system of law and order to emerge between them.

Despite these obstacles, this paper argues that such a system is not only possible but that it can and has emerged to govern relations between social groups that are bitter enemies. To investigate this hypothesis, I examine a significant and long-lasting era of intergroup anarchy among English and Scottish citizens on the Anglo-Scottish border in the sixteenth century.[4] The border people pillaged, plundered, and raided one another as a way of life they called "reiving." To regulate this system of intergroup banditry and prevent it from degenerating into chaos, border inhabitants developed a unique and decentralized system of cross-border criminal law called the *Leges Marchiarum*. These laws of lawlessness governed all aspects of cross-border interaction and spawned novel institutions of their enforcement, including days of truce, bonds, "bawling," and "trod." The *Leges Marchiarum* is important because it sheds light on the possibility of a decentralized intergroup system of law and order between long-standing hostiles and because it highlights the efficiency of various aspects of such a legal system.

The sixteenth-century Anglo-Scottish borderlands are not unique in giving rise to a self-enforcing system of rules governing violent conflict between enemy groups. Trench warfare between German and British soldiers during World War I, for instance, gave rise to related spontaneous, violence-reducing rules. Over time, interactions between opposing soldiers established tacit norms governing permissible times and locations for sniper fire. Unwritten, spontaneously emerging rules also created unofficial (and, from their governments' perspectives, undesirable) truces during which neither side aimed to kill members of the other or make an advance. Tacit agreements between opposing soldiers also permitted each side to receive rations (see, for example, Axelrod 1984; Ashworth 1980).

Similarly, during the wars between Britain, France, and Spain throughout the eighteenth and early nineteenth centuries, private men-of-war operated under a spontaneously emerging system of rules and regulations regarding violence and prize taking at sea. These rules facilitated prisoner exchanges, the ransom rather than seizure or destruc-

4. While the Anglo-Scottish border has been explored by historians (see, for instance, the excellent work by Fraser [1995], Neville [1998], and Lapsley [1900]), economists have totally neglected this episode.

tion of captured vessels, and agreements to abstain from entering into conflict (see, for instance, Petrie 1999). Like these private systems for controlling intergroup violence between enemies, the *Leges Marchiarum* did not eliminate violent conflict between enemies. But it did regulate this conflict, reduce it, and provide social order to an otherwise bloody and chaotic environment.

My investigation draws on primary source documents left behind by border inhabitants and observers between 1249 and 1603. Foremost among these is the *Leges Marchiarum* itself—a series of documents pertaining to the rules of the border from the mid–thirteenth century to 1597. William Nicolson, Lord Bishop of Carlisle, collected and compiled these documents about a century after the Anglo-Scottish union brought the era this paper describes to a close. I also utilize a series of sixteenth-century manuscripts called *The Border Papers* (Bain 1894–96). The British Crown compiled these records, which contain correspondence between various border inhabitants and the monarchs of England. Together with the *Leges Marchiarum,* these papers form the most important and detailed firsthand accounts of life on the Anglo-Scottish border.[5]

2. INTERGROUP ANARCHY

The Anglo-Scottish borderlands extended on the Scottish side from the River Cree to the North Sea coast and on the British side from the coast of Cumberland to the coast of Northumberland. This territory was divided into six "marches," three on each side: the English and Scottish East, Middle, and West Marches. The marches covered the areas that today roughly encompass the Southern Uplands and Lowland of Scotland on the Scottish side and the counties of Cumbria and Northumberland on the English side (Fraser 1995). The Anglo-Scottish marches were thus home to two distinct social groups: the English and Scottish borderers, separated by cultural, geographic, political, and national boundaries.

For much of the 250-year period between the first War of Scottish Independence in 1296 and the Treaty of Norham in 1551, England and Scotland were in open conflict with one another. Since the borderlands

5. In addition, this paper relies on and is greatly indebted to the work of contemporary historians who have discussed the border people and their unique international legal system. See, especially, the excellent discussions in Fraser (1995), Tough (1928), Neville (1998), and Armstrong (1883).

separated the warring nations, many of the border people were ensconced in this conflict, facing one another in battles during official Anglo-Scottish war and often existing in a state of undeclared conflict with one another when official war was not raging. March inhabitants thus grew to be bitter enemies of their counterparts on the opposite side of the frontier. Interborderer acrimony was not exclusively divided along national lines; inhabitants on the same side of the Anglo-Scottish border could and did clash with one another as well. Still, in light of the continued state of open conflict between the two countries, which side of the border the march people found themselves on was a crucial and powerful factor in shaping their friends and their enemies.

The second half of the sixteenth century saw a period without official Anglo-Scottish war. But more than two-and-a-half centuries of protracted and bloody battle between England and Scotland, and consequently the English and Scottish border people, left the frontier citizens in a permanent state of distrust and acrimony toward the citizens on the opposite side of the border. Despite this period of tenuous peace, the tradition of enmity between English and Scottish borderers continued, with each group's members viewing the other's as targets whom they might murder, kidnap, and despoil without compunction.

Officially at least, each march was governed by a warden appointed by its respective monarch. Wardens, in turn, appointed various underlings to help administer their areas. In theory, wardens administered their countries' domestic laws in peacetime between the two nations and mustered military forces in their areas during times of military conflict. In practice, however, things were very different. "[L]ack of a strong settled government" characterized the marches (Tough 1928, p. 28). Several reasons account for this. Some wardens, for instance, were engaged in the very violent behaviors they were supposed to control. In other cases, they were weaker than the powerful clans they were supposed to oversee. England and Scotland's frequent indifference to controlling their borderlands, which forced wardens to administer their marches "on myne owne purse" (Bain 1894–96, vol. 1, no. 948 [1594]), as one warden complained, meant that in some cases wardens didn't bother with trying to enforce domestic laws at all. And some marches experienced periods without wardens (see, for instance, Fraser 1995, p. 34; Bain 1894–96,

vol. 1, no. 197 [1583], nos. 948, 916, and 930 [1594], and no. 341 [1585]; Tough 1928, p. 35).[6,7]

Despite the weakness of march governments, the primary sense in which the borders were anarchic was not internal to each march or even between marches on the same side of the border (though formal authority was very weak there as well). Rather, the borderlands were without central authority in the sense that each kingdom, its march wardens, and the rest of its march citizens existed in a state of nature, so to speak, vis-à-vis the kingdom, march wardens, and march citizens on the other side of the border. Until the first decade of the seventeenth century, England and Scotland remained totally sovereign kingdoms. Each country's domestic system of law and order, therefore, extended only to the marches in its territory.[8] As border historian Cynthia Neville (1998, p. 192) points out, "Scottish miscreants," for instance, "whether they crossed the border in large numbers in organised raids or individually as free-booting felons, were outside the king's allegiance and, in turn, beyond the reach of the king's common-law judges."

No supranational sovereign existed to eliminate this intergroup anarchy; there was no government with the authority to promulgate rules over both groups of frontier citizens. Common formal laws and courts—and rules for dealing with cross-border interactions, such as a murder in one realm by an inhabitant of the other—did not exist.[9] The result was a large, formally ungoverned interstice—a lawless arena—for the interactions between march inhabitants on opposite sides of the Anglo-Scottish border. This situation erected a substantial obstacle for addressing intergroup crime along the frontier, since neither England nor

6. As Fraser notes, wardens were really only the "nominal overseers of the community" (1995, p. 30). Within each march were domestic courts that were occasionally used to deal with treason. However, "attempts to enforce the ordinary laws were somewhat intermittent," and march domestic courts met only a few times a year (Tough 1928, pp. 163–64).

7. The dates in square brackets after citations of Bain (1894–96) indicate the date of the original letter or paper.

8. English king Edward I on various occasions declared his overlordship over Scotland, in effect claiming the right of jurisdiction over certain cross-border conflicts. In a few cases, such disputes were adjudicated according to English common law in English courts. However, these instances are rare.

9. Nominally, traditional English common-law courts remained an option for English borderers seeking justice against cross-border criminals. However, since in practice securing justice against a border inhabitant from the other realm was exceedingly difficult, if not impossible, in many cases, borderers overwhelmingly relied on the international justice system created by the *Leges Marchiarum*.

Scotland had the authority to do so.[10] In this way, the border "formed almost a lawless state within, or between, two countries" (Fraser 1995, p. 5). The problem was, of course, compounded by the fact that, as I noted above, the individuals inhabiting either side of this lawless frontier were openly hostile, long-standing enemies of one another.

2.1. Threatening Chaos: The Anglo-Scottish Reiving System

The borderers were peculiar in many ways, but perhaps their most striking peculiarity was how many of them embraced banditry as a way of life.[11] This outcome was largely the result of the near-constant conflict between their broader societies. Frequent war left both border areas decimated, and inhabitants had little incentive to establish productive enterprises that would only be destroyed in the next violent outburst between their nations. In response to this situation, many borderers turned to thievery directed primarily, though not exclusively, at their enemies in the opposite realm. However, "[t]he border thieves were no ordinary thieves" (Tough 1928, p. 48). Unlike common bandits, for them "raiding, arson, kidnapping, murder and extortion were an important part of the social system" (Fraser 1995, p. 3). These activities composed a system they called reiving, and those who took part in it were called the border reivers. These are the notorious steel bonnets whose exploits and personages are memorialized in the prose of Sir Walter Scott ([1802–3] 1873, 1814–17).

The reivers thieved and raided professionally. Reiving involved the usual sorts of behaviors one would expect to attend violent theft. These included killing, maiming, kidnapping and ransoming, and other typical means of banditry. More exotic reiving activities included "black meale," the medieval equivalent of the protection racket, and a custom called the deadly feud. Black meale grew directly out of border anarchy. Our word "blackmail" derives from this border institution, though its meaning has evolved somewhat over time. The border institution referred to agreements between reivers and other borderers for property protection

10. In 1603, the Union of the Crowns placed England and Scotland under the same monarch. The countries remained separate, each retaining its own parliament and sovereignty in domestic affairs. However, Scotland effectively lost sovereignty in international affairs, especially those related to England. The Acts of Union, in 1707, joined England and Scotland fully, placing them under the same parliament.

11. In fairness to the border people, some of their notorious cross-border raiding was instigated, supported, and encouraged by the English and Scottish governments, which, as I discuss above, were frequently in conflict.

or, as one borderer called them, "compacts for their private safety" (Fraser 1995, p. 191).[12]

Deadly feud was the custom of killing the clan members of one's rivals, ostensibly in response to a violent act perpetrated against the feud initiator, which propelled the deadly back-and-forth to its next turn, and so on. As one border observer described it, "The people of this countrey hath had one barbarous custom among them; if any two be displeased, they expect no lawe, but bang it out bravely, one and his kindred against the other and his; they will subject themselves to no justice, but in an inhumane and barbarous manner fight and kill one another. This fighting they call their feides, or deadly feides, a word so barbarous that I cannot express it in any other tongue" (quoted in Fraser 1995, p. 170; see also Bain 1894–96, vol. 1, no. 197 [1583]).

Of course, the borderers did not exclusively reive. Someone needed to produce something for others to violently steal. So, although many regularly engaged in reiving, most were also part-time agriculturalists, raising crops such as oats and rye as well as livestock. "Thieving, for instance, was a recognized occupation, but the professional thief could and did occupy his spare time . . . in farming of one kind or another" (Tough 1928, p. 47).

Seasonal concerns dictated much of this activity. The prime reiving season was between fall and spring and tended to be concentrated most heavily between Michaelmas (September 29) and Martinmas (November 11). Most reiving was reserved for the fall because during this season nights were relatively long and livestock, a primary target of violent plunder, were both accessible and strong enough to drive from the victim's home to the thief's. During the winter, in contrast, cattle and sheep were weak, and during the summer, borderers moved their livestock to higher pastures, where they were comparatively difficult to access (Fraser 1995, p. 93). Because of these practical constraints, at least the season in which one could most reasonably expect to be plundered was predictable, even if the particular month, week, or day was not.

Reiving's focus on livestock both influenced and was influenced by

12. The practice was officially prohibited in 1587, not long before the union of England and Scotland, but remained widespread. Writing in 1593, for instance, one warden complained of some English gentlemen who paid blackmail to reivers on the other side of the border or, as he described it, "inconvenient kindnes and assurauances enterteigned between the gentlemen and the ryding borderers" (Bain 1894–96, vol. 1, no. 893 [September 26, 1593]).

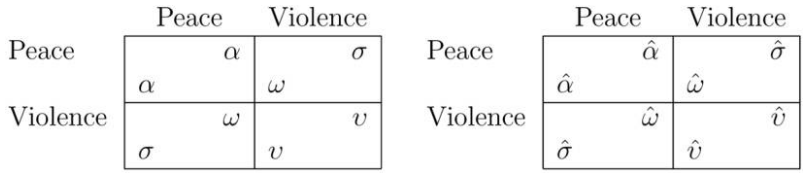

Figure 1. Threatening chaos

these considerations. Stealing cattle required cattle healthy enough to steal, which in turn required agricultural production sufficient to raise healthy cattle. This fact had a predictable effect on agricultural production. Oftentimes, it did not make sense for reivers to direct their thievery at agricultural products, since doing so would only diminish their ability to steal livestock later in the year. Further, since the reiving season did not interrupt agricultural production, this outcome had the pleasant effect of enabling border inhabitants to raise enough crops to feed their livestock and themselves, which permitted at least a subsistence level of production and consumption despite seasonal reiving. On the other side of things, the borderlands were far from fertile lands ideal for agricultural production. Shifting from livestock to predominantly agricultural production was therefore not an option. The infertility of the soil, in turn, is partly what dictated productive activity devoted to livestock, which helped to focus reiving activity on the theft of cattle.

The "Lawles and Disobedient Disposition of the most part of the Inhabitants" of the border posed a serious threat to social order (Nicolson 1747, p. 104 [1597]).[13] As English warden Robert Carey described the problem, "we are macht with a people without laues, and we are bound to keepe laues" (Tough 1928, p. 258). Carey's exasperation reflected the futility of trying to provide order to the border people through "the Queenes lawes which they dare not answer" (Bain 1894–96, vol. 1, no. 197 [1583]).[14]

Modeling the problem situation that borderers confronted—the threat of lawlessness degenerating into violent mayhem—is straightforward. Consider an infinitely repeated version of the two-player prisoners' dilemma shown in the left matrix of Figure 1. The players in this game

13. The dates in square brackets after citations of Nicolson (1747) indicate the year or version of the *Leges Marchiarum*.

14. Carey was one of the few wardens who actually endeavored to administer his kingdom's domestic law in his march.

are inhabitants of opposite sides of the Anglo-Scottish border. They may be thought of as an individual Englishman and an individual Scotsman or as an English border clan and a Scottish border clan. Mutual cooperation, which here refers to borderers behaving peaceably toward one another, earns both borderers α for the period. If one borderer behaves peaceably but the other behaves violently, the former earns ω for the period, and the latter earns σ for the period. If both borderers behave violently, both earn υ, where $\sigma > \alpha > \upsilon > 0 > \omega$ and $2\alpha > \sigma + \omega$. Note that even in the mutual violence equilibrium, both borderers earn a positive payoff. Per the discussion above, this result reflects the fact that even when reiving is unregulated, borderers produce and consume a subsistence level of production.

The folk theorem suggests that when play is infinitely repeated and players are sufficiently patient, the shadow of the future can support the cooperative equilibrium. This possibility is easy to see in the game depicted by the left matrix in Figure 1. Assume, for example, that borderers use a grim-trigger strategy whereby they punish violent behavior from their opposite by permanently behaving violently themselves. Where δ is the agents' discount factor and $\delta \in (0, 1)$, borderers will behave peaceably toward one another if and only if

$$\sum_{t=0}^{\infty} \alpha_t \delta^t > \sigma + \sum_{t=1}^{\infty} \upsilon_t \delta^t.$$

Rewriting and solving for δ yields $\delta > (\sigma - \alpha)/(\sigma - \upsilon)$. Under the threat of the grim trigger, borderers cooperate when they are sufficiently patient to satisfy this inequality.

Of course, as the folk theorem also suggests, other equilibria, including violent equilibria, are also possible when play is infinitely repeated. Even when δ satisfies the inequality above, the possibility of the mutually violent equilibrium remains. As Skyrms (2004) points out, when the prisoners' dilemma in the left matrix in Figure 1 is infinitely repeated, the game is simply transformed into the assurance game shown in the right matrix in Figure 1, in which $\hat{\alpha} > \hat{\sigma} > \hat{\upsilon} > \hat{\omega}$, where

$$\hat{\alpha} = \sum_{t=0}^{\infty} \alpha_t \delta^t, \quad \hat{\sigma} = \sigma + \sum_{t=1}^{\infty} \upsilon_t \delta^t, \quad \hat{\upsilon} = \sum_{t=0}^{\infty} \upsilon_t \delta^t, \quad \text{and} \quad \hat{\omega} = \omega + \sum_{t=1}^{\infty} \upsilon_t \delta^t$$

when $\delta > (\sigma - \alpha)/(\sigma - \upsilon)$.

As in the infinitely repeated prisoners' dilemma, here, too, there are multiple Nash equilibria. In pure strategies, these are peace-peace, in

which both borderers refrain from plundering one another, and violence-violence, in which both borderers aggress against one another. Which equilibrium prevails depends upon the extent of trust between the players. Formally, this is captured by ρ, the probability that borderers attach to their opposite abstaining from violence, where $\rho \in (0, 1)$. Specifically, where $\hat{\alpha}(\rho) + \hat{\omega}(1 - \rho) > \hat{\sigma}(\rho) + \hat{v}(1 - \rho)$, both borderers behave peaceably toward one another. Solving for ρ gives the inequality $\rho > (\hat{v} - \hat{\omega})/(\hat{\alpha} - \hat{\sigma} - \hat{\omega} + \hat{v})$. Where intergroup trust is deficient such that ρ does not satisfy this inequality, the violent equilibrium emerges.

Thinking about borderer interaction in terms of this assurance game is especially useful in light of the serious trust problem that plagued opposing borderers because of the long-standing hostility between them. In particular, the borderers exhibited precisely the lack of assurance, or trust, vis-à-vis their compatriots on the opposite side that would facilitate the satisfaction of the inequality above. The absence of a formal, supranational government that could regulate the borderers' lawlessness and overcome this trust problem, therefore, threatened to lead to the violent equilibrium and, in doing so, plunge the borders into bloody chaos.

3. *LEGES MARCHIARUM:* THE LAWS OF LAWLESSNESS

The borderers' lawlessness does not mean that they did not have laws, however. In the absence of a sovereign supranational authority to create and enforce laws that could govern the interactions of the members of hostile social groups on both sides of the border and prevent the violent equilibrium in Figure 1 from monopolizing these interactions, the borderers' interactions gave rise to an independent body of customary rules that regulated reiving and created a decentralized, intergroup legal system for this purpose. This legal system was called the *Leges Marchiarum,* or the Laws of the Marches.[15]

The *Leges Marchiarum*'s customary rules developed organically from cross-border interactions. "[T]hey are ancient and loveable custumis, ressavit and standing in force as law, be lange use, and mutual consent of the Wardanis and subjectis of baith the realms" (Balfour 1754, quoted in Fraser 1995, p. 149). Eventually, English and Scottish peace commissioners codified "these Laws," which "have long kept in our . . .

15. The name *Leges Marchiarum* comes from Nicolson (1747), whose compilation of international border law bears this title.

Borders," as treaties between the kingdoms (Nicolson 1747, p. vi). Of course, since no supranational government existed, this cross-border cooperation was forged without the benefit of an overarching central authority to facilitate the process. The individuals acting on behalf of each kingdom who set down in writing and subsequently modified the *Leges Marchiarum* over time had no recourse to a formal agency that could establish laws governing cross-border crime or compel either side to enforce the substance of the laws agreed on for this purpose. In this sense, although the codified *Leges Marchiarum* was the product of cooperation between governments, ironically, like all such agreements, it had no government to create or enforce its terms (see, for instance, Leeson 2008a).

Importantly, codified border law did not replace the customary law that preceded it but, rather, enshrined these customs in writing, including changes to these customs that evolved over time.[16] We know this because the written *Leges Marchiarum* explicitly identifies its basis in the ancient customary usage of the border people, "that Heavy Yoke which hung so long upon the Necks of their Ancestors" (Nicolson 1747, p. A). The written versions we have, for example, repeatedly refer to "the ancient Laws and Customs of the Borders" (Nicolson 1747, pp. 79–80 [1553]).[17]

The first written version of the *Leges Marchiarum* was set down in 1249 and was periodically altered or amended and reconfirmed by both sides until the last written version in 1597, which governed intergroup crimes until the Union of the Crowns in 1603. Since the *Leges Marchiarum* spanned more than 3 centuries, the changes it underwent were numerous. My discussion focuses primarily on the Laws of the Marches as they existed during the second half of the sixteenth century. Even during this much shorter time period, however, border law experienced substantial alterations that are impossible to fully recount here. My discussion, then, considers only snapshots of this law at particular points in time with a view to analyzing some of its core, general features.

The *Leges Marchiarum* regulated all aspects of cross-border interaction, including killing, wounding, and maiming; robbery or theft;

16. This paper uses the term "border law" to refer to the system of international law England and Scotland forged to deal with the problem of international crime. This border law should not be confused with the domestic border law both England and Scotland used to govern their march territories internally.

17. Some of "the customs contynuallie used on the borders" were "not comprehended in the foresaid lawes and treatises" (Tough 1928, p. 95, quoting Richard Bell's 1605 *Bell Manuscript,* p. 6). The codified *Leges Marchiarum* is therefore far from complete.

"over swearing," or falsely declaring the value of goods stolen or otherwise perjuring oneself; seeking unapproved revenge against a transgressor; arson; farming, pasturing cattle, felling trees, or hunting or fishing through trespass; entering into the other realm without permission; receiving and harboring outlaws from the other realm; taking unlawful prisoners; impeding a warden; bawling and reproaching; and breaching assurance at days of truce.

In light of the reiving system, laws dealing with physical violence and theft were especially important. Early border law relied on a form of wergeld called "manbote" that required an individual convicted of unjustified cross-border killing to financially compensate or to offer himself as a prisoner to his victim's family (Neville 1998, p. 6). In the latter case, the victim's family had the option of executing the aggressor or, more profitably, ransoming him to his relatives. According to the *Leges Marchiarum* circa 1398, for instance, if an inhabitant from one realm engaged in "slauchteris or mutilatioun" against an inhabitant of the other, his warden delivered him to the injured party (or his kin in the event of murder) on the other side of the border to "sla or raunsoum at thair lyking" (Rymer 1739–45, vol. 3, pt. 4, p. 150, quoted in Armstrong 1883, p. 27).

Barbaric though it may have been, manbote was efficient. Costs that the law imposed on aggressors were enjoyed as benefits by aggressors' victims. This system contrasts starkly with modern criminal punishments, such as execution or imprisonment, which impose costs on criminals that victims do not correspondingly enjoy as benefits (Friedman 1979).[18] Mid–sixteenth century border law moved away from straight manbote to capital punishment. Notably, however, the new law retained much of its desirable efficiency properties from the earlier law by retaining a manbote element. In addition to punishing murderers with death, the 1556 law, for example, also required "all the moveable goodes of the committor or committors of any slaughter or slaughters in tyme comminge be tayne . . . to the use and profit of the wife and children" of the victim, "and in default of the wife and children, to the next of his or their blood" (Armstrong 1883, p. 28).[19] Thus, a large portion of murderers' punishment was still converted into benefits for their victims,

18. On the economics of the private enforcement of law, see Becker and Stigler (1974) and Landes and Posner (1975).

19. Any person who harbored such a criminal, an act called resetting, was liable for the same punishment as the actual offender.

thereby reducing the deadweight loss associated with modern criminal punishment.

Border law treated other forms of illegitimate cross-border violence similarly, punishing legal violations in ways that converted aggressors' costs into victims' benefits. According to the *Leges Marchiarum* circa 1553, for example, if an aggressor "mutylate and maymed" a border inhabitant in the opposite realm, his warden was to deliver him to the opposite warden to be held in "straight Prison" for 6 months. However, in addition to this, any borderer who "shall unlawfully bodily hurt or wound any of the Subjects of the other Realm . . . shall [pay] . . . the Damage so being set and esteemed to be two doubles, as in the case of Theft and Spoil is used, and deliverance to be made to the Warden of the Marche where the party grieved inhabiteth, to be kept with him until redress be made thereof accordingly" (Nicolson 1747, p. 80 [1553]).

Analogous rules applied to theft, although later incarnations emphasized direct financial compensation as opposed to ransoming the aggressor: "If any of the subjectes of ether realme, ether by violence or force, robbe or spoyle the goodes or cattalles of any subjectes of the opposyte realme, or by night or day steale the goodes of any suche subjecte forthe oof the sayd opposite realme upon the complaynantes herof tryed and founde to be trewe, the offendour or offendours shall redresse or restore unto the partie offended *the dooble and sallfye* of such goodes or cattelles as were them ether robbed, spoyled, or stolen" (Armstrong 1883, p. 32, quoting the 1551 *Manuscript of Sir Robert Bowes,* fols. 84, 84b).[20]

The term "dooble and sallfye" in this passage refers to borderers' custom of compensation. It entailed twice the value of what was stolen, plus compensation for the time and trouble of the victim equal to the value of the item, making total compensation due equal to three times the stolen goods' value (Armstrong 1883, p. 32, quoting the 1551 *Manuscript of Sir Robert Bowes,* fols. 84b, 85). Border inhabitants commonly used this formula, also variously called "two double and sawfey" or "doble and salffie," to determine fines and penalties. The double-and-sawfey rule speaks to two important concerns that often arise regarding decentralized legal systems. These are that such a legal system is likely to evolve draconian punishments in response to victims' demands for

20. In 1563, the *Leges Marchiarum* included a three-strikes rule that punished the third offense with death. The *Leges Marchiarum* also punished knowing receipt of stolen property and declared thief resetters liable for the same punishment that the thieves were.

retribution and that the resulting criminal law, since it has no formal mechanism for enforcing punishments, is likely to go unenforced.

Instead of being draconian, as the double-and-sawfey custom suggests, border law developed a more efficient proportionality of punishment practice. If punishments are excessive and independent of the magnitude of the crime committed, marginal deterrence is undermined. In contrast, proportionality, which the *Leges Marchiarum* enshrined, retains a penalty substantial enough to deter some crime but simultaneously ensures that criminal penalties for more minor infractions are not so costly as to encourage more egregious infractions. Further, the moderation of the double-and-sawfey compensation rule suggests that cross-border criminals were often brought to justice under border law (I discuss how below). If almost no criminals were brought to justice because of enforcement's ineffectiveness, to make the expected punishment of committing a crime sufficient to deter it, the stipulated penalty would need to be very large to offset the extremely low probability of its enforcement. The moderation of border law punishment thus suggests that in many cases (though not all, for reasons I discuss below) this law was enforced.

3.1. Hot Trod, Cold Trod, Hue and Cry

The border justice system provided mechanisms for restitution for cross-border thefts under the law described above. However, as is often the case with recourse to adjudication, the wheels of justice could grind slowly. In many cases of theft, if action was prompt, it was possible to recover stolen property and apprehend the criminals without delay simply by counter-riding on the bandits with one's own posse. Of course, to prevent this activity from degenerating into simple reprisal raids that would only exacerbate intergroup conflict, certain regulations on such self-help were important.

To empower self-help but also to prevent its abuse, the *Leges Marchiarum* established specific rules for how the victim of a reiving expedition on one side of the border could proceed against his raiders on the other side. The primary institution for this purpose was called "hot trodd." Under this institution, a victim of robbery could pursue his thief into the opposite realm to recover his stolen goods with deadly force. If he caught his thief "reed hand," the pursuer could execute him on the spot. Alternatively, and more profitably, however, he might ransom the thief to his clan. According to the *Leges Marchiarum* circa 1549,

> If any the Subjects . . . have stolen any thing, or things, or committed any Attempts within the Marches of Land of the other Prince . . . and, after the said Theft so committed, flying, doth return to the Marches or Land to whom he is subject, it shall be lawful for him, against whom it hath been so done and attempted, freely (within six days, to be accounted from the time of the said Fault so committed or attempted) . . . to enter safely and freely the Marches or Land into which the same Evil-doer is gone; so that so soon as he hath enter'd the said Marches or Land for that case, he go unto some honest Man, being of good Name and Fame, inhabiting in the Marches which he hath enter'd, and declare unto him the Cause of his Entry: That is to say, to follow his Goods stolen (Nicolson 1747, pp. 63–64).

As part of the hot trod, pursuers sometimes used a "hue and cry," sounding their horns to announce the trod and rally others to their aid. Border law permitted "Parties grieved to follow their lawful Trodd with Hound and Horn, with Hue and Cry and all other accustomed manner of fresh Pursuit, for the Recovery of their Goods spoiled" (Nicolson 1747, p. 89 [1563]). To facilitate the recovery process, addenda to the law prevented interference with another's trod: "If any man interrupte suche persone in his saide pursute, he shall answerre hym to the bill of goodes spoyled or taken. And onely for the troublance of the partie spoyled in his trod (as the termes of the border be) the trobler shall be condempned to make redresse to the partie of his goodes stolen or spoyled with doble and salffie as aforne is mentyoned" (Armstrong 1883, p. 17, quoting the 1551 *Manuscript of Sir Robert Bowes,* fols. 86, 86b; see also Armstrong 1883, p. 47, quoting the 1450–1500 *Lansdowne Manuscript,* no. 262).

Additional amendments required individuals in pursuit of hot trod to notify the first person or community they encountered on the opposite side of the border that they were in pursuit of trod and stipulated punishment for those who refused to help the pursuers track down the stolen goods. This addendum to the trod practice served two purposes. First, by requiring pursuers to declare their purpose and intentions in the neighboring country, this provision created a way for march inhabitants to determine whether individuals were pursuing cross-border justice under the *Leges Marchiarum* or initiating intergroup crime. Second, by requiring domestic inhabitants to aid international trod pursuers against cross-border criminals, this rule created intergroup reciprocity and facilitated intergroup cooperation in the pursuit of international lawbreakers.

In addition to hot trod, the *Leges Marchiarum* also provided for a "cold trodd," any such pursuit taking place after six days. Cold trod operated similarly but required warden approval. Using deadly force to apprehend or punish the thief in this case was also a shakier proposition and could lead to punishment for the executor. The longer an individual waited to recover his stolen property, the more doubt emerged about whether he was in fact recovering stolen property or mounting a thieving expedition himself. To prevent this type of activity, and therefore to minimize the chances for a violent outbreak between opposing borderers, cold-trod rules restricted pursuers more than those for hot trod did.

The rules of the *Leges Marchiarum* distinguished between trod, which might involve justified killing, and straight revenge. Admittedly, this line was often unclear. But border law permitted the former and prohibited the latter. Similarly, the trod institution did not license pursuers to slaughter innocents on the opposite side of the border. Doing either of these could jeopardize a borderer's ability to pursue his goods or, worse yet, result in charges against him at the day of truce.

3.2. Days of Truce

The day of truce was an ingenious court institution the borderers developed to ask violators of border law to answer for their offenses and to resolve cross-border disputes. According to custom, wardens from either side of the border held prearranged meetings "at a sett daie and place indifferent" to settle their inhabitants' disputes (Bain 1894–96, vol. 1, no. 343 [1585]).[21] Wardens announced an upcoming day of truce in their marches in market towns on either side of the border. Borderers with grievances against those in the opposite realm then notified their alleged offenders of their intent to file a bill of complaint at the day of truce. This process of notification was called "arresting." Alternatively, a grieved borderer could notify his warden, who then sent notification of intent to arrest an inhabitant of the other realm to that inhabitant's warden.

Customary proceedings on the day of truce highlight the delicate status of Anglo-Scottish relations in the late medieval period resulting from the fact that these two groups were hostile enemies and illustrate how these proceedings developed to ameliorate this tension. Days of

21. By custom, the meeting place was usually somewhere in Scotland. However, Northham ford on the Tweed, Wark, Carharm, Redenburn, Cocklaw, Reideswire, Kershipefoot, and other places became focal meeting spots, depending on the marches involved (Fraser 1995).

truce involved hundreds, and sometimes thousands, of individuals from both sides of the border (Tough 1928, p. 144). As the first order of the day, each warden took an oath to proceed on the day of truce honestly and amicably, to "speir, fyill, and deliver upone his honour, he shall searche, enquire, and redrese the samin at his uttirmost power" (Rymer 1739–45, vol. 6, pt. 4, p. 120, quoted in Armstrong 1883, p. 19; see also Nicolson 1747, p. 88 [1563]). After this, the wardens created English and Scottish juries, called assizes or inquests, to hear their fellow borderers' bills of complaint.[22] The English warden selected six Scottish jury members, and the Scottish warden chose six English jury members.

This jury selection process was an efficient institutional response to the distrust and animosity that each side felt toward the other, and it facilitated cooperation between members of enemy groups in applying cross-border justice. By each side selecting the other's jurors, this custom created the conditions required to apply a tit-for-tat strategy. This environment created a strong incentive for reasonableness on both sides' part, since if one side selected the other side's jurors unfairly, the other side could reciprocate with its own unfair selection, thereby leveling an otherwise stacked jury. Both sides also agreed to basic rules governing the selection of jurors to help ensure a fair selection and, as I discuss below, to coordinate enforcement of the border law that punished lawbreakers by diminishing or eliminating their standing and protection under the law. For example, "[n]o tratour, murderer, fugitive, infamous person, convict upon assize, nor betrayer of one parte or other" was "allowed to passe on any assize, to beare any office, nor to beare any witnes, but only good and lawfull men deserving credite and unsuspected" (Armstrong 1883, p. 20, quoting the 1450–1500 *Lansdowne Manuscript,* no. 263, fol. 4b, no. 9).

As the *Leges Marchiarum* circa 1553 described the day-of-truce process, anyone with a grievance against a party from the other realm

> shall make a Bill of Complaint upon the persons so offending them at the *days of Trewes*; and the party Offender to be arrested to answer such Bill, and be compelled to answer thereto after like manner as is used by Robbers, Thieves, and Spoilers; and such like proof and Tryal to be had, of

22. There were two other ways that bills could be decided: on the honor of the warden or by admission of the accused. According to the first "manner of triall of any person . . . the warden shall, upon his owne knowledge confesse the facte and so deliver the partie offending" (Bain 1894–96, vol. 1, no. 343 [1584]). After a warden had taken his oath, borderers considered his word sufficient to determine the veracity of bills of complaint when he had direct knowledge of the guilty party.

> every behalf, until either the Bill be acquitted or fyled, and the Damage thereof to be set down by six Gentlemen of Worship and Good Name of Scotland, to be named by the warden of England; and other six like Gentlemen of England to be named by the Warden of Scotland (Nicolson 1747, p. 80).

All assize members took oaths pledging to uphold border law: "Yow shall cleare no bills worthie to be filed, yow shall fyle no bill worthie to be cleared, but shall doe that which appeareth with a truth for the maintenance of peace and suppressing of attempts. So helpe you Gode, &c." (Tough 1928, pp. 141–42, quoting Richard Bell's 1605 *Bell Manuscript*). The wardens then looked over their bills of complaint and agreed on how many to settle that day. To preserve the slate-cleaning nature of the day of truce process and avoid upsetting the delicate balance of intergroup relations, they made an effort to hear an equal number of bills from each side (Fraser 1995).[23]

The English assize heard the Scottish bills of complaint, and the Scottish assize heard the English bills of complaint. This cross hearing of complaints was an additional check on the honesty and reasonableness of both sides and was similar to the custom of cross selecting the assize members.[24] If an assize acquitted an individual, he was "cleared." If it found him culpable, the bill was called "fyled" and the guilty was called "foull." Arrested individuals who did not appear at the day of truce were "fyled condytionally, which is, if he, at the next daye of trewce, be not redy lawfully to answerre the sayd compleynante against hym, and to excuse his former defaulte, he shalbe adjuged culpable or foull by his own defaulte" (Armstrong 1883, p. 17, quoting the 1551 *Man-*

23. All complainants took a public oath of honesty for bills they filed to "truth say what your goods were worth at the tyme of their taking to have been sold in a market" (Tough 1928, p. 142, quoting the Richard Bell's 1605 *Bell Manuscript*). In addition, in 1553 the *Leges Marchiarum* was amended such that in the event of suspected gross overstatement, the warden or assize reserved the right to modify the value considered.

24. As a final mechanism for preventing wrongful convictions, the border trial process relied on "vowers." Vowing meant "confronting of a man of the same nation to averre the fact" of the crime alleged by the victim. The assize's decision alone was not enough to convict an accused criminal. But if a countryman of the accused—a vower—would also support the victim's allegation, the conviction was secured. "Then is hee by the law guilty; for except the warden him self knowing, shall acknowlege the fact, or a man of the same nation found that voluntarilie will avonche it (the ordinarie and onlie waies of triall), be the facte never so patent, the delinquent is quitt by the lawes of the Borders" (Bain 1894–96, vol. 1, no. 343 [1585]). Fraser (1995) and Armstrong (1883) both refer to vowing as a separate method of trial. However, as Armstrong's discussion indicates, vowing was not really a separate method but rather worked in conjunction with the assize method of trial.

uscript of Sir Robert Bowes, fol. 86). After deciding the bills, the sides exchanged prisoners in cases in which border law called for the delivery of offenders to the opposite warden, wardens set up the next day of truce and then saluted and embraced each other, and the participants departed.

4. HONOR AMONG THIEVES: ENFORCING BORDER LAW

An obvious potential problem plagued cross-border dispute resolution: refusal to comply with day-of-truce decisions or otherwise participate in the justice process established by the *Leges Marchiarum*.[25] For instance, what ensured that an arrested individual would appear at the day of truce for his trial? As I noted above, if an arrested borderer did not appear, he was conditionally filed—found guilty for nonappearance unless he appeared at the next day of truce with a legitimate excuse for his absence. But being filed by the assize would mean little for a borderer if he could perpetually avoid justice by never attending a subsequent day of truce. Furthermore, what if a fouled borderer refused to pay the compensation required by border law? If day-of-truce decisions could not be enforced, the system of cross-border criminal law—and, with it, intergroup governance—was threatened.

Borderers used several mechanisms to ensure participation in days of truce and compliance with day-of-truce decisions. The first of these was bonds, which the borderers called "borowis," or pledges. The way bonds worked was straightforward. If, for instance, an accused party did not appear on the day of truce as he promised during the arresting process, his warden delivered a human hostage to the other side who remained there until he did.[26] In principle, bonds could be any member of the accused's social group—his fellow countrymen. In practice, however, a subset of this larger group, his family members and fellow clan members,

25. An additional mechanism of border law enforcement, not discussed here, was outlawry. Refusal to make recompense could place a man outside the bounds of border law, leaving him without the protection against violence established in the *Leges Marchiarum*. According to border law circa 1249, this was achieved through "Banishment by the Sound of a Trumpet" (Nicolson 1747, p. 17). A public declaration of outlawry in this fashion communicated the outlaw's status to the border community, effectively announcing that he and his possessions were fair game for the taking.

26. In 1563, border law also required lords to ensure that their tenants, if arrested, appeared per this summons at the day of truce. For failing to do so, such a lord could be found liable for his tenant's crime (though he could not be executed even if this was the corresponding punishment his tenant should receive).

performed this role. Bonds were not always used for this purpose in an ex post fashion. To ensure that arrested individuals appeared at impending days of truce, wardens sometimes also sought ex ante the accused borderers' bonds—members of their family or clan who were released when their accused relatives appeared at the day of truce.

Immediate family or clan members provided the stronger bond since failure to appear at a day of truce jeopardized the fate of an individual's loved ones or members of his closest support network. However, bonds of fellow countrymen also provided an incentive to appear at days of truce. Since borderers lived among their group members, including the bond's family, they could exert considerable pressure on their noncompliant compatriots to attend days of truce to which they were summoned per border law.

Borderers also used bonds to produce compensation from fouled parties who did not have the means to repay their victims. In this case, the fouled party himself might enter the custody of the aggrieved or his warden at the day of truce until his payment was forthcoming, or he might be able to cajole a family member to take his place for this purpose instead. Borderers similarly used bonds to ensure compliance with assize decisions. If a fouled individual did not satisfy the assize's decision by the next day of truce, "The Wardens of both Marches (at the next day of Trewes ensuing or following the Fileing of the said Bills) shall make Deliverance of such other Persons, by the Assent of the Opposite Warden; as he will undertake to be sufficient for the said Bill. The Person so delivered, to remain with the Party offended until he be fully satisfied, and lawfully and fully redressed, according to Justice, and the Laws of the Marches" (Nicolson 1747, p. 73 [1553]).[27]

In addition to family, clan, or fellow country members, professional bondsmen also performed this role (Fraser 1995). Professional bondsmen were effectively hostages for hire. By permitting a market for human hostages as sureties, the border system ensured that this mechanism for enforcing border law was carried out with the least cost. Since fouled borderers who valued their freedom more highly could compensate their victims by purchasing the services of other individuals who valued their freedom less highly to fulfill the bonding function, victims (or their wardens) secured their bonds at the lowest social cost.

Bonds were helpful in enforcing the *Leges Marchiarum*. They created

27. On rare occasions when no suitable bond could be found, the fouled borderer's warden or one of his deputies offered himself for this purpose.

a strong incentive to participate in, and comply with, day-of-truce decisions. However, bonds did not provide a bullet-proof remedy. For example, if a fouled borderer hired a professional bondsman to be delivered to the aggrieved in his stead while he accumulated the repayment he owed, what prevented him from stopping the process there? Why repay the victim? The victim had his bond and could ransom or execute him if the fouled borderer defaulted on compensation. Unless the professional bondsman was a fellow group member, the fouled borderer had little incentive to make good on his promise. And on the other side of the transaction, what compelled bond recipients to release bonds once their offenders had completed compensation?

To deal with these problems and strengthen compliance with the *Leges Marchiarum* more generally, borderers employed a peculiar custom called bawling. Bawling provided a means to reproach noncompliant individuals publicly. Sir Robert Bowes, warden of the East and Middle English marches, described this practice as follows:

> Thais, if anye Englisheman or Scottesman be bounde to another of the opposite realme for ransomes, entry of prysoners, or any other just cause, for whiche he byndethe hym by his faythe and truthe, and dothe not accordingly perfourme and accomplishe the same, after reasonable monytions thereof given to the partie, and request to perfourme his sayde bande and promyse, it hate bene used between the realmes that the partie offended wolde beare a glove or a picture of hym [on the tip of one's sword] that had so broken his truthe, and, by the blast of a horne, or crye, to give knowledge to the hole assembly that suche a person is an untrue and unfaithfull man of his promysse, to his reproch, which is as muche in the lawe of armes as to give unto hym the lye, and appealle to fight with hym in the quarrell, and, indede, the partie soe reproched may (if he will) defende his cause and truthe by singuler battaille, which the other partie can not honestly refuse (Armstrong 1883, p. 58, quoting the 1551 *Manuscript of Sir Robert Bowes,* fol. 83b).

In this manner, borderers denounced and shamed any man who "crakit his creddence" along the frontier (Leslie 1888–95, p. 101, quoted in Tough 1928, p. 105). The practice of publicly questioning a man's honor and challenging him to a customary, duty-bound duel served as an important check on borderer compliance. Individuals used it most widely at days of truce to call out those who had broken their promises of repayment, bonding, and so forth.[28] Further, bawling's reliance on

28. The following is an example of a duel contract between borderers: "It is agreed

dueling reduced the potential for large-scale, intergroup violence between borderers—a critical feature in light of Anglo-Scottish enmity. As Posner (1996, p. 1737) points out, for example, in the absence of a central authority for enforcing social rules, dueling may be an efficient enforcement mechanism because it "prevents disputes from exploding into feuds by formalizing and channeling the means of enforcement." The Anglo-Scottish borderlands, which had no central authority to create or enforce laws governing intergroup interactions and which were home to individuals with a penchant for feuding, were therefore precisely the sort of environment in which dueling would be efficient.[29]

Beginning in 1553, an amendment to the *Leges Marchiarum* required warden permission for "bauchling and reproving" at days of truce: "no Person or Persons of either said Realms, shall, at any Day of Trewes . . . bear, shew or declare any sign or token of Reproof or *Baughling* against any Subject of the opposite Realm, unless he be thereunto licensed by the Wardens of both the Realms" (Nicolson 1747, p. 81 [1553]). This rule was to ensure that overzealous bawling did not create disorder at days of truce. "Reproofing" without permission resulted in the acquittal of the individual charged with not fulfilling his promise.[30]

No doubt at least partly because of the prospect of bawling, and despite being thieves, border inhabitants took their promises seriously. "Infamy fell on any Borderer who broke his word, even to any enemy" (Tough 1928, p. 36). Consequently, although "they would not care to

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between Thomas Musgrave and Lancelot Carleton, for the true trial of such controversies as are betwixt them, to have it openly tried by way of combat before God and the face of the world, to try it in Canonby holme before England and Scotland, upon Thursday in Easter week, being the 8th day of April next ensuing, A.D. 1602, betwixt nine of the clock and one of the same day; to fight on foot; to be armed with jack, steel cap, plaite sleeves, plaite breeches, plaite frocks, two baselard swords, the blades to be one yard and half a quarter length, two Scotch daggers or dorks at their girdles; and either of them to provide armour and weapons for themselves according to the indenture. Two gentlemen to be appointed on the field to view both the parties, to see that they both be equal in arms and weapons according to this indenture; and being so viewed by the gentlemen, the gentlemen to ride to the rest of the company, and to leave them but two boys, viewed by the gentlemen to be under 16 years of age, to hold their horses. In testimony of this our agreement, we have both set our hands to this indenture, of intent all matters shall be made so plain as there shall be no question to stick upon that day" (Armstrong 1883, p. 74).

29. For additional discussion of the efficiency of dueling as a legal enforcement mechanism under such circumstances, see Schwartz, Baxter, and Ryan (1984).

30. Border law treated perjury at days of truce in a somewhat related fashion. A perjurer could be imprisoned for 3 months, but far worse, following his term, at the next day of truce he was "openly denounced and proclaimed a Perjur'd man; after which time he shall not be reputed to be a Man able to give further Faith or Testimony in any Case or Matter" (Nicolson 1747, p. 83).

steal . . . yet they would not bewray a man that trust in them for all the gold in Scotland and France" (Sadler 1809, quoted in Armstrong 1883, p. 83). Testimony from border observer John Leslie, Bishop of Ross, suggests this as well. "[H]aving once pledged their faith, even to an enemy," he remarked, "they are very strict in observing it, insomuch that they think nothing can be more heinous than violated fidelity" (Fraser 1995, p. 45). The comments of an English warden of the East and later Middle Marches support this view as well. As he put it, the border reivers "will rather lose their lives and livings, than go back from their word, and break the custom of the Border" (Fraser 1995, p. 45).

To better understand the effect of the *Leges Marchiarum* and its institutions of enforcement on intergroup order, it is useful to analyze this system in the context of the assurance game in Figure 1. Recall that without this system, reiving threatened to plunge the borders into bloody chaos via the violent equilibrium in the lower right-hand corner of the right matrix in Figure 1. The reason for this is that in the absence of Anglo-Scottish trust, ρ—the probability that borderers attached to their opposite abstaining from violence—fails to satisfy the inequality $\rho > (\hat{v} - \hat{\omega})/(\hat{\alpha} - \hat{\sigma} - \hat{\omega} + \hat{v})$ required to avoid the violence-violence equilibrium.

The *Leges Marchiarum* improved this situation in a few ways. First, by creating common rules for cross-border interactions, it helped to make peaceable interaction a focal point, thereby improving borderers' ability to coordinate on the nonviolent equilibrium. Even the mere presence of these rules reduced mistrust between opposing borderers by specifying certain aggressive-seeming behaviors as illegitimate and others as legitimate. Rules for hot trod and cold trod, for instance, which applied to and were understood by both sides, helped to clarify the aggressive or nonaggressive nature of certain otherwise ambiguous cross-border interactions, which in the absence of such rules could be construed as violent. By creating such rules, the *Leges Marchiarum* formed a more objective backdrop against which to evaluate the peaceable or violent intentions of opposing borderers, which in turn made it easier to trust opposing borderers who were in fact behaving peaceably. This environment had the effect of increasing ρ, which made the peaceable equilibrium more prevalent.

The day of truce and its enforcement mechanisms also had an important effect on cross-border violence by reducing the expected benefit of violence for the aggressor and reducing the expected cost of being victimized for the victim. Instead of earning $\hat{\sigma}$ from violence when the

other party is peaceable, under the *Leges Marchiarum,* a violent borderer earned only $(\hat{\sigma} + c)\theta$, where $\theta \in [0, 1]$ is the probability of being brought to justice under the *Leges Marchiarum* and $c < 0$ is the punishment in this case. Further, the victimized borderer, instead of earning $\hat{\omega}$ in this case, earns $(\hat{\omega} + x)\theta$, where x is the victim's compensation when the aggressor is brought to justice and $|c| \geq x > 0$, which is to say that the victim's compensation always benefits the victim but can never be greater than the punishment cost the aggressor incurs since it is not possible for more than 100 percent of the aggressor's punishment cost to be transformed into benefits for the victim. Calculating the critical trust threshold, ρ, required for the mutually peaceable equilibrium to emerge under the *Leges Marchiarum,* then, is straightforward. Under the *Leges Marchiarum,* the peace-peace equilibrium emerges if and only if $\rho > [(2c + \hat{v} - x)\theta + \hat{v} - \hat{\omega}]/(\hat{\alpha} - \hat{\omega} - \hat{\sigma} + \hat{v})$. Since $[(2c + \hat{v} - x)\theta + \hat{v} - \hat{\omega}]/(\hat{\alpha} - \hat{\omega} - \hat{\sigma} + \hat{v}) < (\hat{v} - \hat{\omega})/(\hat{\alpha} - \hat{\sigma} - \hat{\omega} + \hat{v})$ for any $\theta > 0$, the *Leges Marchiarum* made the dearth of cross-border trust less likely to lead to the violent equilibrium. In this way, the *Leges Marchiarum* partially substituted for lacking interborderer trust.

Despite this, the *Leges Marchiarum* did not totally eliminate cross-border violence on the equilibrium path. Several factors contributed to violence remaining in equilibrium. The first of these factors was imperfect enforcement. As I noted above, enforcement under the *Leges Marchiarum* could not have been wholly ineffective since the punishments stipulated under its terms were not exorbitant. But by the same token, neither could have enforcement been perfect or else there would not have been any violence remaining in equilibrium, which there clearly was (Fraser 1995).

The extent to which the *Leges Marchiarum* reduced violence in the way described above depended in part upon θ, the probability of enforcement, which was less than 1 for two reasons. First, some degree of corruption plagued the Anglo-Scottish marches. If, for example, a member of a powerful clan violated the *Leges Marchiarum* but this clan was important to its march warden—for instance, because the warden was also a member of this clan or because the clan supported the warden in some other capacity—his warden might do his best to avoid bringing this borderer to justice at the day of truce. The corrupt warden could, for example, swear an oath of the accused borderer's innocence, officially excuse his absence at the day of truce, or otherwise help to get the accused borderer off the hook in answering for his crime. Second, the arresting process itself was crude, and wardens did not always have the

time, energy, or resources required to track down an accused borderer or even one of his clan members to hold in his stead. Both of these factors contributed to imperfect enforcement of the *Leges Marchiarum,* leading to remaining violence in equilibrium.

A second, and closely related, reason that cross-border violence remained on the equilibrium path was the difficulty of extracting full compensation from violators and, as a result, fully compensating victims in a timely fashion. There are several reasons that payment by aggressors and thus compensation by their victims could be seriously delayed under the *Leges Marchiarum*. While in principle days of truce were held monthly, in practice sometimes long periods could elapse between them. These lapses were most likely to occur in the period immediately preceding the outbreak of official warfare between England and Scotland, during war itself, or immediately following war's conclusion, when cooperation between wardens turned to hostility. When days of truce were suspended, cross-border crimes could not be addressed until days of truce recommenced. Lawbreakers thus enjoyed additional time without facing punishment, and victims incurred the cost of a longer wait before receiving justice.

Another factor contributing to delayed compensation was a filed borderer's inability to come up with compensation. Human hostages, who could be ransomed, and bawling helped to reduce this problem, but they did so imperfectly. There was no guarantee, for instance, that in the event a hostage had to be ransomed he would fetch a price sufficient to fully offset the victim's loss or to equal the payment stipulated by the *Leges Marchiarum*.

In addition, recall that at days of truce wardens made an effort to hear an equal number of complaints from each side, so as not to upset the delicate balance of Anglo-Scottish relations. This process helped to preserve the slate-cleaning nature of the day of truce. But it meant that if one side had accumulated more bills of complaint than the other side since the last day of truce, the next day of truce might be put off until the balance was equalized.

According to Fraser (1995, p. 163), these factors together meant that borderers sometimes had to wait years before lawbreakers actually incurred their punishments and victims actually received compensation. Delayed compensation operated to shrink the effective cost of crime for the aggressor and the effective compensation for the victim, thereby reducing the *Leges Marchiarum*'s effectiveness in deterring cross-border crime. The effect of delayed compensation on cross-border violence is

straightforward to see by considering the inequality required for peaceable behavior under the *Leges Marchiarum*: $\rho > [(2c + \hat{v} - x)\theta + \hat{v} - \hat{\omega}]/(\hat{\alpha} - \hat{\omega} - \hat{\sigma} + \hat{v})$. As $|c|$ and/or x becomes smaller (recall that $c < 0$ and $|c| \geq x > 0$), which is to say that as the effective punishment cost of violating the *Leges Marchiarum* and/or the effective compensation victims receive under the *Leges Marchiarum* declines, this inequality grows larger, which makes it more difficult to satisfy, which leads to more violence in equilibrium.

A third factor facilitating violence on the equilibrium path may have been hyperbolic or quasi-hyperbolic discounting by some borderers. If some borderers discounted the future in this fashion, they could have confronted a time-inconsistency problem that led them to behave violently, in violation of the *Leges Marchiarum,* despite an understanding of and desire for the larger, long-term benefits of complying with these rules. For instance, a borderer who hyperbolically discounts the future, if he does so sufficiently, could find defaulting on a promise to compensate his victim or to return a bond profitable at the moment despite the fact that bawling ruins his future credibility and the fact that, projecting himself into the future, he does not find defaulting on his promise worthwhile. Notably, as the right matrix in Figure 1 illustrates, because borderers' best strategy is conditioned on what strategy they expect others to follow, even if many borderers did not discount the future hyperbolically, the presence of some who did could lead even those who did not to behave violently as well by increasing the expectation of such behavior from those with whom they interacted.

Finally, some borderers derived utility from the act of reiving itself (Fraser 1995). For such individuals, the payoff of violence was not only its instrumental benefit, $\hat{\sigma}$; the payoff of violence was $\hat{\sigma} + \beta$, where $\beta > 0$ represents the utility a violence-loving borderer receives from reiving activity itself. For violence-loving borderers, the expected benefit of violence was therefore larger, which made these individuals more willing to risk the penalties imposed by the *Leges Marchiarum* by engaging in violence. This willingness, of course, made it more difficult to trust violence-loving borderers to behave peaceably and thereby made it more likely that even peace-preferring borderers would behave violently in their interactions with such individuals in equilibrium. Thus, while the *Leges Marchiarum* facilitated a movement away from a purely violent equilibrium that would likely have emerged in its absence, the Anglo-Scottish border's laws of lawlessness were not capable of eliminating all violence in equilibrium, nor did all borderers desire this.

It is also important to recognize that the *Leges Marchiarum* was not the only factor that helped to reduce and control cross-border violence in the Anglo-Scottish marches. Several other factors also contributed to this control. The first of these factors was intermarriage. Several clans intermarried their members explicitly for the purpose of reducing conflict with competing clans. For example, to bring potentially long-lasting and bloody feuds to a faster and more peaceful conclusion, competing clans sometimes intermarried their members, placing once-hostile borderers on cooperative terms with one another. Officially, both England and Scotland prohibited cross-border intermarriage, though this prohibition was difficult to enforce, especially in the face of the peace-creating effects it had for border inhabitants.

Through such intermarriage, "'international families' like the Grahams" extended across the Anglo-Scottish border (Fraser 1995, p. 65). In turn, this intermingling had another conflict-reducing effect for some borderers: it dulled the otherwise sharp distinction between the English and the Scots. An English warden, for instance, complained of border "people that wilbe Scottishe when they will, and Englishe at theire pleasure" (Bain 1894–96, vol. 1, no. 197 [1583]). The ambivalent attitude some borderers displayed toward citizenship facilitated the idea of a "border people," distinct from either English or Scottish citizenship, and this notion reduced intergroup mistrust and hostility.

Cross-border intermarriage and fuzzy views about citizenship help explain why the more numerous English borderers did not simply annihilate their less populous Scottish neighbors. Together with the *Leges Marchiarum,* they also help to explain why cross-border violence, though present, did not decimate the border population over years of conflict and hostility. If reiving was continually killing off large numbers of men and women, we would expect the population on one or both sides of the border to decline precipitously over time. A dearth of population data prevent a direct evaluation of this issue. However, we know at the very least that violence was not so rampant as to have brought the border population to ruins, since at the end of the sixteenth century this population was near 170,000 people strong (Tough 1928, pp. 26–28).

At least one other factor besides the *Leges Marchiarum* also helped to reduce cross-border violence: repeated dealings between the English and Scottish governments. It did not behoove the English Crown, for instance, to send soldiers to the border to exterminate the Scottish borderers. Although neither government cared deeply about the welfare of its march inhabitants, because the border region was strategically im-

portant to both, a move such as this by the English Crown would have simply prompted the Scottish Crown to repopulate its border, perhaps sending along with these new citizens an army sufficient to exterminate the population of the English marches. Recognition of this fact likely prevented both governments from overzealously attacking the border inhabitants of the other.

5. CONCLUDING REMARKS

In 1603, England and Scotland joined together under a single monarch. The Union of the Crowns signified the end of the marches, intergroup anarchy, and the Anglo-Scottish laws of lawlessness. In the early seventeenth century, England disbanded the march wardens and applied its common, formal domestic law throughout the old borderlands (renamed the Middle Shires), thereby unifying the formerly separate English and Scottish social groups and drawing the Anglo-Scottish intergroup justice system to a close.

My analysis of this period leads to several conclusions. First, contrary to conventional wisdom, central authority is not needed to create or enforce a legal system governing intergroup interactions. Although agents acting on behalf of independent governments negotiated the *Leges Marchiarum,* no government existed to create or enforce their agreements or the laws these agreements produced. Decentralized, self-enforcing arrangements were required for this purpose instead. As the *Leges Marchiarum* demonstrates, such arrangements are as capable of addressing conflict and resolving disputes between the members of different social groups as they are capable of doing this for members of the same social group. Although it may be more difficult to create decentralized, intergroup order, and more elaborate institutions may be required for this purpose, there does not appear to be anything about multiple groups, per se, that prevents decentralized institutions from operating.

Second, this is true even when the different social groups such a legal system encompasses are bitter enemies and aim to constantly prey on one another. The English and Scottish border reivers constituted precisely these sorts of groups. However, instead of this situation preventing decentralized institutions from emerging to govern them, if anything, it seems that these bandits' animosity enhanced the importance of developing a system to oversee intergroup interactions and, thus, both groups'

incentive to devise institutions for regulating their predatory inclinations. Of course, the borderers' system was far from perfect, and some violence remained. But the emergence and operation of an intergroup legal system among Anglo-Scottish bandits makes what regulation the *Leges Marchiarum* did manage to achieve that much more remarkable. In 1598, for instance, border visitor John Udall noted precisely this. "Considering the weakness of their governors," Udall "did not marvel at the many outrages, factions, thefts, and murders committed, but rather wondered that there were not many more" (Tough 1928, p. 32).

Finally, the rules and customs that comprised border law reflected efficient institutional responses to the need for intergroup criminal law specifically in the hostile context in which the members of these groups operated. In particular, the substantive elements of border law suggest that two major concerns about decentralized legal systems, overly harsh punishments and an inability to enforce punishments, may not be as significant causes for concern as we usually think. Border law, at least, developed a more efficient punishment regime that eliminated many of the deadweight losses associated with modern criminal punishments, rested on proportionality, and, though imperfectly enforced, succeeded in helping to control violence between hostiles.

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