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Enforcement of Private Property Rights in Primitive Societies: Law without Government

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If law exists only where there are state-backed courts and codes, then every primitive society was lawless.[1] Indeed, one widely held definition or "theory" of law is that "the rule of law simply means the 'existence of public order.' It means *organized government,* operating through the various instruments and channels of *legal command.* In this sense, all modern societies live under the rule of law [but primitive societies did not]."[2] This definition of law characterizes the legal positivist school of legal theorists and dominates the economics profession. Even strongly market-oriented economists typically note that the market can function effectively only within a system of well-defined and enforced private property rights and that government is therefore needed to establish and enforce these "rules of the game." Any economist who would even question that law and order are necessary functions of government is likely to be considered a ridiculous, uninformed radical by most of the rest of the profession. For example, Bernard Herber, in a typical public finance textbook, writes

> The . . . function . . . of providing domestic stability in the form of law and order and the protection of properly . . . could be logically opposed only by an avowed anarchist. Since . . . [law and order is] not [a] controversial function of government, . . . [it does] not require a lengthy analysis in the effort to construct an economic case for the existence of a public sector for resource allocation purposes.[3]

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Although I would not call myself an avowed anarchist, I would suggest that it is time for a "lengthy analysis" of the case for *and* against the public production of law and enforcement.

One place to begin an analysis of the case for public provision of law and order is with an examination of the anthropological literature on primitive legal systems. These systems have been particularly troubling for the legal positivists because they apparently represent examples of law and order without a state government. They should be just as troubling for those economists who assume that the state must establish and enforce private property rights. As F. A. Hayek suggested,

> What we know about . . . primitive human societies suggests a different origin and determination of law from that assumed by the theories which trace it to the will of a legislator. . . . legal history proper begins at too late a state of evolution to bring out clearly the origins. If we wish to free ourselves from the all pervasive influence of the intellectual presumption that man in his wisdom has designed, or even could have designed, the whole system of legal or moral rules, we should begin with a look at the primitive . . . beginnings of social life.[4]

That is precisely what shall be done.

Primitive systems have been studied extensively by anthropologists and legal scholars. What can an economist add that has not already been said? The following examination will emphasize institutions and incentives that influence the provision of law and its enforcement. This emphasis is the contribution economists can make to the broad subject of law and order.[5] Some may contend that law is not an appropriate subject for economic analysis because law is not produced and allocated in exchange markets.[6] To be sure, economics has much to say about market institutions, but its relevance and scope are not so narrow. Economic theory requires only that scarce resources must be allocated among competing uses. Clearly, police services, court time, and all the other inputs into the process of law and order are scarce and must be allocated. Beyond that, economic theory explains human behavior by considering how individuals react to incentives and constraints. A well-defined set of behavioral assumptions underlies such analysis, and institutions—including but not exclusively restricted to market institutions—both provide and are created in response to the incentives and constraints.

Primitive socities have often been analyzed from an economic perspective. For example, Baden, Stroup, and Thurman have examined the resource management incentives of various American Indian tribes,[7] while Demsetz has explained the incentives to establish property rights and applied his analysis using examples from American Indian history.[8] Johnsen has explored the formation and protection of property rights among the Kwakiutl Indians.[9] The present discussion follows the lead of these studies, but goes beyond their emphasis on incentives and property right formation to discuss the *legal institutions* formed for the enforcement of rights. Although in this regard it is similar to work by Friedman on the medieval

Icelandic legal system,[10] it emphasizes relatively more primitive systems *and* develops a *generalizable characterization* of privately produced legal systems in the context of both economic and legal theory. In this sense it is closer to Posner, but the emphasis is different, as are many of the conclusions.[11] Posner clearly demonstrated that examination of primitive legal systems from an economic perspective reveals that private sector institutions are capable of establishing strong incentives that lead to effective law making and law enforcement. Here, however, it is emphasized that the costs of violence and the benefits of order in primitive societies were enough to induce the establishment of recognized rules of conduct with emphasis on individual rights and private property—that is, the type of laws necessary for maintenance of a free market system in more complex societies. Furthermore, voluntary participatory *mechanisms to enforce* those rules, *to adjudicate* disputes, and in contrast to Posner, *to allow for further legal growth*, also developed.

The presentation that follows is divided into six sections. First, the concept of law as defined by legal scholars and anthropologists is explored. Second, the concept of government is briefly examined. Then three sections are devoted to separate examination of three primitive societies as described in several anthropological studies in order to establish the general character of privately produced legal systems. Finally, concluding remarks are presented in the sixth section.

I. The Concept of Law

Malinowski defined law from an anthropologist's perspective as "the rules which curb human inclinations, passions or instinctive drives; rules which protect the rights of one citizen against the concupiscence, cupidity or malice of the other."[12] This definition suggests that a society in which customs and social mores are widely accepted and obeyed has a legal system even with no state government, written constitution, or codes. Morality and law would appear to be synonymous. Legal theorist Lon Fuller, however, differentiated between these concepts:

> Morality, too, is concerned with controlling human conduct by rules . . . how, when we are confronted with a system of rules, [do] we decide whether the system as a whole shall be called a system of law or a system or morality. The only answer to that question ventured here is that contained in the word "enterprise" when I have asserted that law, viewed as a direction of purposive human effort, consists in the "enterprise of subjecting human conduct to the governance of rules."[13]

Thus, Fuller's definition of law includes more than simply the existence of social mores defining rules of behavior. There must be an "enterprise," and it is "precisely because law is a purposeful enterprise that it displays structural constancies. . . . "[14] The enterprise of law generates the mechanisms of enforcement, change, and dispute resolution.

Fuller's concept of law corresponds more closely to the view of law proposed by the anthropologist Redfield, for example, than to Malinowski's. Redfield defines law as "a system of principles and of restraints of action with accompanying paraphernalia of enforcement."[15] The "paraphernalia" clearly constitute the "structural constancies" that are the manifestations of Fuller's legal enterprise.

Primary vs. Secondary Rules

Another way to distinguish between the definitions of law proposed by anthropologists like Malinowski and Redfield is to draw upon legal positivist H.L.A. Hart's discourse on "primary" and "secondary" rules.[16] Hart observed that

> it is, of course, possible to imagine a society without a legislature, courts or officials of any kind. Indeed, there are many studies of primitive communities which not only claim that this possibility is realized but depict in detail the life of a society where the only means of social control is the general attitude of the group towards its own standard modes of behavior in terms of . . . rules of obligation. . . . we shall refer to such a social structure as one of primary rules of obligation.[17]

Hart contends that for a society to function with primary rules alone, it must be small and "closely knit by ties of kinship, common sentiment, and belief," or "such a simple form of social control must prove defective and will require supplementation in different ways."[18]

This brings us to secondary rules designed to remedy the defects that must arise, according to Hart, as a society becomes too large or diverse to function with only primary rules. Hart discussed three defects that he felt were likely: (1) "*uncertainty,*" which occurs if only primary rules exist, so when "doubt arises as to what the rules are or as to the precise scope of some given rule, there will be no procedure for settling this doubt";[19] (2) the "*static* character" of primary rules, which include "no means . . . of deliberately adapting the rules to changing circumstances, either by eliminating old rules or introducing new ones";[20] and (3) "*inefficiency,*" because "Disputes as to whether an admitted rule has or has not been violated will always occur and will, in any but the smallest societies, continue interminably, if there is no agency specially empowered to ascertain finally and authoritatively the fact of the violation."[21] Each of these three defects can be remedied, Hart suggested, by supplementing primary rules with secondary rules, and the "remedies together are enough to convert the régime of primary rules into what is indisputably a legal system."[22]

Hart defined his secondary rules as follows:

1. The *rule of recognition* specifies "some feature or features possession of which by suggested rules is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts."[23] Hart suggested that such a rule could take a wide variety of forms, although his examples

and discussion emphasized written documents and implied recognition of a state-like authority.

2. The *rules of change* establish the means by which rules are enacted through legislation, judicial precedent, royal decree, or any number of other possible procedures.

3. The *rules of adjudication* empower "individuals to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken."[24]

At first glance it appears that Hart's distinction between primary and secondary rules is simply another way of stating Fuller's distinction between morality and law. The rules a primitive society are governed by may come from custom or social mores (primary rules), but for that society to have a legal system there must be an "enterprise" that results in an authoritative enforcement mechanism, a system of dispute resolution, and presumably a means of changing rules to meet the changing needs of the society (secondary rules). Very substantial differences exist between Fuller's and Hart's concepts of law, however. Hart's perception of the law falls under the legal positivist umbrella, which typically identifies law with the legal institutions that are observed (generally the state). Fuller, on the other hand, has an evolutionary (or "natural law") perspective. The differences between these views and these, their leading exponents, spawned a long running debate of classical proportions in the legal literature. This Hart-Fuller debate, while interesting and important, need not be detailed here, although one aspect of it is emphasized below. Rather, Hart's points about the uncertainty, static character, and inefficiency of a primitive society's law once that society become relatively large or diverse will be used to provide focal points in developing the following discussion of primitive law. It will be argued that many (probably all) primitive societies in the context of their enterprise of subjecting certain human conduct to control—that is, in the application of primary rules—naturally chose to establish mechanisms that alleviated the defects of uncertainty, static character, and inefficiency as they arose—or, in other words, to establish secondary rules.

The claim made here and demonstrated below that *primitive legal systems had secondary as well as primary rules* departs sharply from the conclusions reached by the legal positivist school. One can infer from Hart, for instance, that primitive societies generally lacked the secondary rules that designate authority to identify primary rules and to adjudicate disputes.[25] This view of primitive societies provides the means by which legal positivists claim that state government is a prerequisite for law and yet recognize that primitive societies functioned without such government. Primitive societies supposedly had only primary rules, while a "true" legal system requires secondary rules that must be established by the state.[26]

One particular aspect of the Fuller-Hart debate requires discussion before we can proceed. In the context of this presentation, a major source of divergence arises in Fuller's interpretation of Hart's specification of his secondary rule of

recognition. Fuller concluded that this rule implies *absolute authority*, which cannot be withdrawn even when that authority is abused.[27] Fuller's interpretation of Hart's rule of recognition is tempered considerably for our purposes. As Hayek explained,

> law may be gradually articulated by the endeavors of arbitration of similar persons called in to settle disputes but who have no power of command over the actions on which they have to adjudicate. The questions which they will have to decide will not be whether the parties have abused anybody's will, but whether their actions have conformed to expectations which other parties had reasonably formed because they correspond to the practices on which the everyday conduct of the members of the group was based. The significance of customs here is that they give rise to expectations that guide people's actions, and what will be regarded as binding will therefore be those practices that everybody counts on being observed and which thereby condition the success of most activities.[28]

This view of authority also characterizes Fuller's concept of law. He wrote, "there is no doubt that a legal system derives its ultimate support from a sense of its being 'right'. . . . this sense, deriving as it does from tacit expectations and acceptances. . . . "[29] With the view of law and authority suggested above in mind, let us now turn to an examination of the concept of government.[30]

II. The Concept of Government

The concept of government may be even more difficult to define than the concept of law. One might define government to mean the enterprise of or mechanisms for law enforcement, in which case the legal positivist argument would simply be inverted: If there is law, there is government. But that is certainly not the popular perception of government, nor is it the view held by the legal positivists (or most economists, for that matter). After all, Hart indicated that a society could exist without government institutions.[31]

It has been suggested that one way to distinguish a governmental from a nongovernmental social arrangement is that government induces cooperation through coercion, while privately arranged cooperation is achieved through persuasion. The line between cooperation and persuasion is not a clear one, however. The fact is that any property rights system is ultimately backed by a threat of force and violence.[32] This is clearly the case in the primitive systems discussed below. Property rights systems require enforcement, and they cannot be enforced if there are no incentives to accept their authority. The relative level of coercion certainly is a factor to consider in defining government, but it is not the only factor.

Another suggested distinction between government and nongovernment is that a private agreement to transfer property requires *unanimous* consent of all parties involved, while less than unanimity (e.g., a majority vote, a majority vote of

elected representatives, or the decision of a king or dictator) is required for a transfer when a government is involved. This argument is related to the coercion/persuasion definition, of course, and it is not completely satisfactory for similar reasons. For example, we shall see that while voluntary contractual agreements provided the basis for some primitive legal systems (also for some medieval systems, such as those in Iceland[33] and Ireland[34]), kinship provided the basis for still others. People do not necessarily unanimously agree to be in or contribute to production by their families, however, and it is not clear that leaving a primitive kinship group was easily or safely (and clearly not costlessly) accomplished.

Because the coercion and lack of unanimity definitions of government are not completely satisfactory, a definition of government is adopted here that emphasizes the institutions that perform the functions of law production and enforcement—that is, the institutions that legislate, execute, and adjudicate. In particular, government exists when these institutions are professionalized in such a way that (1) the primary source of income for some or all of the individuals who perform the legal functions is derived from those functions, and (2) some or all of the individuals involved in the production and enforcement of laws are "bureaucrats" in the sense that their coercive powers are *directly* derived through some system other than unanimous agreement of the parties affected by their actions (e.g., by royal appointment or appointment by an executive who has either been nonunanimously elected or risen to authority through force). The institutional characteristics of modern nation-states and their monarchal predecessors thus imply the existence of government.[35] This view of government implies that many of the characteristics of modern market economies evolved while government was evolving.[36] Simultaneous evolution does not imply that state government and its laws are necessary for the evolution of commercial law, however, and we shall see that they are not necessary for the establishment of private property and individual rights.[37]

III. Primary and Secondary Rules Among the Yurok Indians and Their Northern California Neighbors

Walter Goldsmidt, after studying the Yurok, Hupa, and Karok Indians and some of their Northern California neighbors, reported ". . . a culture which reflects in surprising degree certain structural and ethical characteristics of emergent capitalistic Europe."[38] In this Indian society, property was universally held in individual private ownership. Socially, these Indians were organized in households and villages. There were no class or other inalienable group affiliations, and no vested authoritarian position—that is no state-like government with coercive power.

Private property rights were sharply defined. Title considerations, for example, included (1) separation of title to different types of products; (2) ownership rights

within the territory of an alien group (e.g. Hupas owned property inside Yurok territory); and (3) the division of title between persons (e.g., a fishing place could be owned by several people and its use divided so that one person used it one day, another the next, and so on). Ownership was complete and transferable. Exchange was facilitated by a monetary system.

The emphasis on private property may seem surprising to those who think of tribal society as some sort of socialist or communal system. On the contrary, however, private property rights are a common characteristics of primitive societies; they constitute the most important primary rules of conduct.[39] After all, as explained in detail below, law enforcement (secondary rules of recognition and adjudication) arose through *voluntary* cooperative arrangements. Voluntarily recognition of laws and participation in their enforcement is likely to arise *only when substantial benefits from doing so can be internalized by each individual.* That is, individuals require incentives to become involved in the legal process. Incentives can involve rewards (personal benefits) or punishment. Punishment is frequently the threat that induces recognition of law established by a coercive government, but when there is no government, incentives are largely positive. Individuals must expect to gain as much or more than the costs they bear from voluntary involvement in the legal system. Protection of personal property and individual rights was apparently a sufficiently attractive benefit (along with others detailed below) to induce voluntary participation among the Yurok.

Now let us consider the actual nature of the cooperation by which property rights were defined and enforced—that is, the secondary rules that characterized the legal enterprise. First,

> we may dismiss the village and tribe with a word. Though persons were identified by their village of residence and their tribe of origin, neither of these groups had any direct claim upon the action of the individual, there was no village nor national government, no village or tribal action in wars. Significantly, the affiliation could effectively be broken by moving to a distance or to one of the other tribes within the orbit of the culture.[40]

These Indian tribes nevertheless had a well-developed system of private judging.[41] For instance, if a Yurok wanted to process a legal claim he would hire two, three, or four "crossers"—nonrelatives from a community other than his own. The defendant in the claim would also hire crossers, and the entire group hired by both parties would act as go-betweens, ascertaining claims and defenses and gathering evidence. The crossers would render a judgment for damages after hearing all the evidence.

The formal dispute resolution system involved clear rules of adjudication. And as Hart himself noted, "a system which has rules of adjudication is necessarily also committed to a rule of recognition of an elementary and imperfect sort. This is so because, if courts are empowered to make authoritative determinations of the fact that a rule has been broken, these cannot avoid being taken as authoritative

determinations of what the rules are."[42] A large number of offenses were recognized by these Northern California tribes, ranging from murder, adultery, theft, and poaching to curses and minor insults.[43] Since there was no formalized social unit, all offenses were against the person (torts). This is an inevitable result of the procedures developed in this society, of course, since for disputes to arise and require the attention of crossers, some action by one individual had to affect another person negatively for it to be an issue of law. Actions that were clearly not of this kind, such as what a person did alone or in voluntary collaboration with other persons but in a manner that clearly did not affect or harm others, could never become subject to rules of conduct that would concern a crosser.

Yurok law contained a clearly indicated fine or indemnity to be paid to the plaintiff by the offender if the crossers' judgment was that the defendant was guilty. Liability, intent, the value of the damages and the status of the offended person were all considered in determining the indemnity. Every invasion of person or property could be valued in terms of property, however, and each required exact compensation. Again, law clearly was in the nature of modern tort law rather than criminal law. But how was the judgment enforced? After all, "Government was strictly *laissez faire* [in fact, nonexistent given the definition proposed here], with order prevailing through the consistent effort of each person to serve his own self interest."[44]

The crossers' judgment was enforceable because there was an effective threat of total ostracism by the entire community of tribes—an extreme form of a boycott sanction that will be discussed over and over below. In this Northern California society, if someone failed to pay the fine he automatically became the plaintiff's wage slave. If he refused to submit to this punishment, he became an outcast or "outlaw," which meant that anyone could kill him without any liability for the killing. Fear of this severe boycott sanction meant that the crossers' judgment tended to be accepted, of course. The threat of violence does not, in itself, imply that violence was the norm. Indeed, this and other primitive legal systems had as their basic impetus the desire by individuals to *avoid* violence.

The next question is how the community cooperated in order to make the threat of ostracism viable. Each man in these tribes was a member of a "sweathouse group"—a group of the men from three or more neighboring houses who shared a sudatory.[45] He was free to join any group as long as others in the group agreed. The groups were more than just social organizations, however. They carried out religious rituals, and they acted in mutual support in the case of a dispute. Each member had strong incentives to provide support because at some point in the future he might find himself in a dispute and require the current disputant to reciprocate. Thus, if an offender refused the judgment of the crossers and became an outlaw, the offended individual's sweathouse group would back his effort for physical retribution. The rest of the community would not interfere.

Yurok laws and their sanctions were clearly defined, and a system of authority was established whereby those laws could be enforced. The authority was established through reciprocal arrangements. As Pospisil explained, authority can be "coercive or permissive."[46] That is, individuals can be forced to accept authority or they can be persuaded. It was clearly in the best interests of individual members of the Yurok and related tribes to voluntarily join in reciprocal arrangements and, in doing so, to submit to the adjudication process established in that society in the event of a dispute. This voluntarism largely avoided the inefficiencies inherent in violent forms of dispute resolution.

Fuller suggested three conditions that make a legal (or moral) duty clear and acceptable to those affected:

> *First,* the relationship of reciprocity out of which the duty arises must result from a voluntary agreement between the parties immediately affected; they themselves "create" the duty. *Second,* the reciprocal performances of the parties must in some sense be equal in value. Though the notion of voluntary assumption itself makes a strong appeal to the sense of justice, that appeal is reinforced when the element of equivalence is added to it. We cannot here speak of an exact identity, for it makes no sense at all to exchange, say, a book or idea in return for exactly the same book or idea. The bond of reciprocity unites men, not simply in spite of their differences but because of their differences. When, therefore, we seek quality in a relation of reciprocity what we require is some measure of value that can be applied to things that are different in kind. *Third,* the relationships within the society must be sufficiently fluid so that the same duty you owe me today, I may owe you tomorrow—in other words, the relationship of duty must in theory and in practice be reversible. . . .
>
> These, then are the three conditions for an optimum realization of the notion of duty; the conditions that make a duty most understandable and most palatable to the man who owes it.[47]

Clearly these three conditions were met in the Yurok sweathouse groups. The arrangements were voluntarily entered into. An individual exchanged a commitment to support others in the case of a legal dispute for the equivalent commitment from those other individuals for the same support should he find himself in such a dispute. And finally, the arrangement was symmetrical in the sense that each individual had strong incentives to support anyone in his group in the event of a dispute because he realized that he might require the same kind of backing in the future when his own property rights might be threatened. The fact that men voluntarily entered into such reciprocal arrangements implies that the accompanying duties were clearly spelled out and generally fulfilled when a dispute arose.

The enterprise of law is a necessary prerequisite for social interaction. The development of society must be accompanied by the simultaneous evolution of a legal system. Lon Fuller proposed that "customary law" such as that practiced among Yurok might best be described as a "*language of interaction.*"[48] He pointed out that

> to interact meaningfully men require a social setting in which the moves of the participating players will fall generally within some predictable pattern. To engage in effective social behavior men need the support of intermeshing anticipations that will let them know what their opposite members will do, or that will at least enable them to gauge the general scope of the repertory from which responses to their actions will be drawn. We sometimes speak of customary law as offering an unwritten code of conduct. The word *code* is appropriate here because what is involved is not simply a negation, a prohibition of certain disapproved actions, but of this negation, the meaning it confers on foreseeable and approved actions, which then furnish a point of orientation for ongoing interactive responses.[49]

This function of facilitating interaction among the Indians of Northern California was accomplished, in large part, by the authority of clear—although unwritten—codes of conduct enforced through reciprocally agreed upon, well-established arbitration arrangements, with established legal sanctions backed by the threat of ostracism and, ultimately, physical retribution. In fact, it really is the "matching of expectations which is all the law can aim to facilitate."[50] This enterprise to facilitate interaction by matching expectations obviously tends to promote certainty and efficiency.

Naturally, it is difficult to judge the actual degree of the certainty and efficiency of this primitive legal system. However, there is some indirect evidence. For one thing, these California Indians were ". . . a busy and creative people . . . [and] poverty was not found here."[51] If incentives were in place to induce "busy and creative" behavior, it is likely that individuals and their private property rights were quite well protected. However, the widespread recognition of private property rights implies a more significant level of certainty than that. "It is only through thus defining the protected sphere of each that law determines those 'actions towards others' which it regulates, and that its general prohibition of actions 'harming others' is given determinable meaning. This maximal certainty of expectations which can be achieved in a society in which individuals are allowed to use their knowledge . . . is secured by rules which tell everyone which . . . circumstances must not be altered by others and which he himself must not alter."[52]

Laws and procedures for enforcement among the Yurok and their neighboring tribes have been well documented. Together they imply well-established rules of recognition and adjudication, but what about rules of change? Actual examples of changes in Yurok law are not documented. This is, unfortunately, a limitation of much of the anthropology literature, although not all, as noted below. Pospisil explained that "since many societies have been studied for a relatively brief period (one or two consecutive years), and since many investigators have been heavily influenced by the early sociological dogma that divorces the individual from the 'social process,' it follows that there are very few accounts of volitional innovations [in primitive law]."[53] However, rules of adjudication imply rules of change because adjudication of a dispute often leads to articulation of a new law, or at

least clarification of existing unwritten law in the context of an unanticipated circumstance. As Fuller explained:

> Even in the absence of any formalized doctrine of stare decisis or res judicata, an adjudicative determination will normally enter in some degree into litigants' future relations and into the future relations of other parties who see themselves as possible litigants before the same tribunal. Even if there is no statement by the tribunal of the reasons for its decision, some reason will be perceived or guessed at, and the parties will tend to govern their conduct accordingly.[54]

Crossers, in the process of settling disputes, were on occasion likely to make new rules, just as today's judges set precedents that become part of the law.

There is, in fact, a more fundamental reason to expect that the laws of the Yurok could and did change. After all, those laws were not imposed on this society by a sovereign. They *developed* or *evolved* internally. Clearly the Indians of Northern California were a very homogeneous group by the time their laws and legal procedures had advanced to the level described above, but this homogeneity had to develop in conjunction with an evolving process of interaction and reciprocity facilitated by customary law. The Yurok had a well-established legal system defining and protecting private property rights. Carl Menger proposed that the origin, formation, and the ultimate process of all social institutions—including law—is essentially the same as the spontaneous order Adam Smith described for markets.[55] Social institutions coordinate interactions. Markets do this and so does law, as Fuller stressed. Institutions develop the way they do because, perhaps through a process of trial and error, it is found that the actions they are intended to coordinate are performed more effectively under one system or process than under another. The more effective institutional arrangement replaces the less effective.

In the case of customary law, traditions and habits evolve to produce the observed "spontaneous order," to use Hayek's term. As Hayek explained, however, while Smith's and Menger's insights regarding the evolution of social order "appear . . . to have firmly established themselves [in several of the social sciences] another branch of knowledge of much greater . . . influence, jurisprudence, is still almost wholly unaffected by it."[56] In particular, the legal positivist view holds that law is the product of deliberate design rather than the evolutionary, undesigned outcome of a process of growth. In fact, however, as this discussion of primitive law demonstrates, the *secondary rules* that Hart proposed must be "imposed" in order to create a legal system "*evolved*" *without the design of any absolute authority.*

In the case of the Yurok, the earliest sweathouse groups probably proved to be an effective social arrangement for internalizing reciprocal legal and religious benefits, *relative* to previously existing arrangements. Others saw those benefits and either joined existing groups or copied their successful characteristics and formed new groups. In the process, the arrangements may have been improved upon and become more formal (contractual) and effective. It is perfectly con-

ceivable that neither members of the earliest groups nor those that followed even understood what particular aspect of the contract actually facilitated the interactions that led to an improved social order—they may have viewed the religious function of the group to be its main purpose and paid little attention to the consequences of their legal functions, for instance. Customary law and society develop coterminously. Those customs and legal institutions that survive are relatively efficient because the evolutionary process is one of "natural selection," where laws or procedures that serve social interaction relatively poorly are ultimately replaced by improved laws and procedures.

The discussion of the Yurok legal system has served two purposes. First, it provided strong indications that the evolutionary enterprise of law produces secondary rules of recognition, adjudication, and change despite the fact that no government or absolute authority figure existed to mandate such rules. Second, it introduced several general characteristics of virtually all primitive legal systems. They are: (1) primary rules characterized by a predominant concern for individual rights and private property; (2) placement of the responsibility for law enforcement in the hands of the victim with recognition of his rights arising through reciprocal arrangements for protection and support when a dispute arises; (3) standard adjudicative procedures established in order to avoid violent forms of dispute resolution; (4) offenses treated as torts punishable by economic payments in restitution; (5) strong incentives to yield to prescribed punishment (recognize the law's authority) when guilty of an offense because of the threat of social ostracism leading to physical retribution; and (6) legal change arising through an evolutionary process of developing customs and norms.

Let us now turn to some of the other primitive systems that anthropologists have studied. We shall find that the specific legal procedures may be different from those of the Yurok and their neighbors, but that each society has established Hart's secondary rules to one degree or another and that the same six characteristics listed here apply.

IV. The Legal System of the Ifugao of Northern Luzon

Privately produced law in primitive societies is not unique to the American Indian.[57] For example, "the great significance of the Ifugao for the study of the nature and function of primitive legal and political institutions rests in the fact that they reveal how far it is possible to elaborate a system of interfamilial law on the foundation of quite elementary social structure. They reveal how wrong are political theorists who hold that law and government are wholly indivisible."[58] The economy of the Ifugao in Northern Luzon during the early 1900s was dominated by an intensive irrigation hoe culture. Such an economy inevitably requires laws, if for no other reason than to resolve issues over water rights and maintain a complex real-estate system. And the Ifugao developed a very elaborate

system of substantive law. Yet the Ifugao had no tribal, district, or village governmental organizations, and no centralized authority with the power to force compliance with the laws or to levy compulsive sanctions on behalf of the society at large. The family had a leader, but not in the sense of a political organization: "Although he leads the family in legal and economic enterprise, its members think of him more as an integrating core than as a head who in any way dominates."[59]

The family, which for any individual included ascendants and descendants of both his father and his mother to the third degree, was the individual's source of support in legal matters. "The mutual duty of kinfolk and relatives, each individual to every other of the same family, regardless of sex, is to aid, advise, assist, and support in all controversies and altercations with members of other groups or families."[60] The family members were obligated to aid another member in direct proportion to the closeness of their kinship or relationship through marriage and to the extent to which that member had fulfilled his obligations to the family in the past. The ability to obtain support in a dispute thus depended on reciprocal loyalty, much as with the Yurok, but in this case the support group was clearly defined by kinship.

Individual disputes were not settled by warfare between families, however. As with the Yurok, well-established adjudication procedures were designed to resolve disputes without violent confrontations. The factor behind dispute resolution—the impetus for reaching an agreement—was the ever present threat of force, but use of force was certainly not the norm. The key figure in any difficult dispute among the Ifugao was the *monkalun.* He was a go-between or mediator.[61] The *monkalun* had no vested authority to impose a solution on disputants, however. He was like the private mediators of today, receiving a fee if he could somehow lead the two parties to a peaceful settlement. The *monkalun* was not likely to be a close relative to either of the parties in dispute since his only real power was that of persuasion, and a close relative of one party would have considerable difficulty in persuading the other. His "authority" in disputes was voluntarily granted by those involved because they were convinced that he would perform his function well—that is, achieve a nonviolent resolution of the dispute.

Ostracism provided important incentives for law enforcement, as with the Yurok. Among the Ifugao, however, an individual was expected to collect all debts owed him or punish injuries to him that were not compensated for: "Did he not do so he would become the prey of his fellows. No one would respect him . . . [he would] hear himself accused of cowardice and called a woman."[62] Ifugao law, like all privately produced law, was in the nature of torts—private wrongs or injuries—since "criminal law" implies some wrong against society. Thus it was up to the aggrieved party to pursue prosecution. However, Ifugao legal procedure required the use of a *monkalun.* After all, if the accuser took matters into his own hands and killed the accused, the family of the accused was

obliged to avenge the death by killing the initial accuser. The two families (as well as nonfamily residents of the village or villages involved) were eager for a peaceful settlement, then, in order to avoid an extended violent confrontation.

In fact, a great number of cultural taboos (customary laws of adjudication) kept the two parties in a dispute apart as long as the *monkalun* was working toward a settlement. The *monkalun* truly was a go-between in the sense that he heard all testimony and confronted each party with the other party's evidence. As long as a peaceful settlement was remotely possible, this mediator strove for that solution. His fee (paid by the defendant) depended on it, and more importantly ". . . the peaceful settlement of cases in which he is mediator builds up a reputation for him, so that he is frequently called and so can earn many fees."[63] Mediation was a competitive industry.

The damages paid by an Ifugao defendant as restitution were fairly clearly spelled out, as they were with the Yurok Indians and their neighbors. When both parties in the dispute were of the same social class or status, the compensation was easily determined.[64] Although settlements in disputes between people of different social status were a bit more complex, there still were fairly clear standards for judgments. The violation of contracts or commission of torts was virtually always sanctioned by property assessments.

But what happened if the defendant refused to admit his guilt and would not come to terms through the *monkalun*? Did interfamily warfare break out? The answer to the second question is no because the answer to the first is that such a refusal would be viewed as an insult to the *monkalun* and align his family against whichever party initiated the violence. This prospect deterred any immediate action by either party even when an impasse was reached. If a *monkalun* saw no prospect for a settlement, he would formally withdraw and declare a truce, which had to last for between two weeks and a month. If the truce was violated, the *monkalun* and his family would align themselves against the aggressor.

At the end of the truce the plaintiff had two options. He could find a new *monkalun* and hope for a peaceful settlement, or he and his family could begin preparing to ambush the defendant. Typically, if the plaintiff's claim was just, a successful ambush would not result in retaliation by the slain defendant's family. It was generally only when the claim was not justified that retaliation occurred and ". . . it was here that Ifugao law breaks down" as feuds resulted.[65] However, the entire justice system was designed to avoid this end, and indeed,

> Within the "home district" (i.e., a given valley system) resort to killing is rare, however. Neighbors not involved in the dispute exert pressure on the litigants to come to terms. The *monkalun* extends his efforts to the utmost. And the litigants also feel an obligation not to endanger home security. When [a feud] does occur . . . [it] will be brought to a close before too long.[66]

One might argue that the *potential* for this breakdown in the private system of law and order developed by the Ifugao implies that the system was incomplete

or ineffective, even though such breakdowns were rare. Of course, every legal system can break down in the same way because individuals can always take the law into their own hands and face the consequences. In fact, the Ifugao system appears to have been quite effective. Given the almost continual warfare that existed *between* various districts, the private system of law and order seems to have kept violence *within* each district to a very low level.[67] Once again we find a clear legal enterprise that produced a recognition of the authority of widely known although unwritten law protecting property rights and an apparently efficient dispute resolution mechanism.

V. Evolutionary Law: The Kapauku Papuans of West New Guinea

Many legal scholars have contended that primitive legal systems were quite static and resistant to change.[68] This opinion is frequently traced to Sir Henry Maine.[69] Maine wrote that "the rigidity of primitive law . . . has chained down the mass of the human race to those views of life and conduct which they entertained at the time when their usages were first consolidated into a systematic form."[70] E. A. Hoebel, however, has remarked that "If ever Sir Henry Maine fixed an erroneous notion on modern legal historians, it was the idea that primitive law, once formulated, is stiff and ritualistic."[71] Similarly, Pospisil explained that several examples of change in primitive law have been documented.[72]

The examples of primitive legal systems discussed earlier indicate that many of these systems have a great deal in common. Indeed, additional detailed examples would begin to sound both repetitive and redundant. However, the preceding examples lack strong documentation of Hart's rules of change, which he considered to be necessary for existence of a true legal system, and for this reason one more primitive system will be discussed. Pospisil's work with and discoveries about the legal system of the Kapauku Papuans of West New Guinea is chosen because of his explicit discussion of the process of legal change in this society. Before examining this particular aspect of Kapauku law, however, the society and its legal system will be briefly discussed.

The Kapauku Papuans were a primitive linguistic group of about 45,000 living by means of horticulture in the western part of the central highlands of West New Guinea until well past the middle of this century. Their reciprocal arrangements for support and protection were based on kinship, as with the Ifugao. However, members of two or more patrilineages typically joined together for defensive and legal purposes, even though they often belonged to different sibs. These "confederations" often encompassed from three to nine villages, with each village consisting of about fifteen households.

The Kapauku had no formal government with coercive power. Most observers have concluded that there was a virtual lack of leadership among these people.

One Dutch administrator noted, however, that "there is a man who seems to have some influence upon the others. He is referred to by the name *tonowi* which means 'the rich one.' Nevertheless, I would hesitate to call him a chief or a leader at all; *primus inter pares* [the first among equals] would be a more proper designation for him."[73] In order to understand the role and prestige of the *tonowi,* one must recognize two basic values of the Kapauku: an emphasis on individualism and on physical freedom.[74] The emphasis on individualism manifested itself in several ways. For instance, a detailed system of private property rights was evident. In fact, there was absolutely no common ownership. "A house, boat, bow and arrows, field, crops, patches of second-growth forest, or even a meal shared by a family or household is always owned by one person. Individual ownership . . . is so extensive in the Kamu Valley that we find the virgin forests divided into tracts which belong to single individuals. Relatives, husbands and wives do not own anything in common. Even an eleven-year-old boy can own his field and his money and play the role of debtor and creditor as well."[75]

The paramounts role of individual rights also was evident in the position of the *tonowi* as a person who had earned the admiration and respect of others in the society. He was typically "a healthy man in the prime of life" who had accumulated a good deal of wealth.[76] The wealth accumulated by an individual in Kapauku society almost always depended on that individual's work effort and skill, so anyone who had acquired sufficient property to reach the status of *tonowi* was generally a mature, skilled individual with considerable physical ability and intellectual experience. However, not all *tonowi* achieved respect that would induce others to rely upon them for leadership. "The way in which capital is acquired and how it is used make a great difference; the natives favor rich candidates who are generous and honest. These two attributes are greatly valued by the culture."[77] Generosity was a major criteria for acceptance of a particular *tonowi* in a leadership role because, in large part, followers were obtained through contract.

Each individual in the society could *choose* to align himself with any available *tonowi* and then *contract* with that chosen *tonowi.* Typically, followers would become debtors to a *maagodo tonowi* (a "really rich man") who was considered to be generous and honest. In exchange for the loan, the individual agreed to perform certain duties in support of the *tonowi.* The followers got much more than a loan, however:

> It is good for a Kapauku to have a close relative as headman because he can then depend upon his help in economic, political, and legal matters. The expectation of future favors and advantages is probably the most potent motivation for most of the headman's followers. Strangers who know about the generosity of a headman try to please him, and people from his own political unit attend to his desires. Even individuals from neighboring confederations may yield to the wishes of a *tonowi* in case his help may be needed.[78]

Tonowi authority was given, not taken. This leadership reflected, to a great extent, an ability to "*persuade* the unit to support a man in a dispute or to fight for his cause."[79] Thus the *tonowi* position of authority was not, in any way, a position of absolute sovereignty. It was achieved through reciprocal exchange of support between a *tonowi* and his followers, support that could be freely withdrawn by either party (e.g., upon payment of debt or demand for repayment).[80]

What happened if a *tonowi* proved to be ineffective or dishonest in his legal role? First of all, honesty and generosity were prerequisites for a *tonowi* to gather a following. However, if someone managed to do so and then proved to be a bad leader, he simply lost his following. "Passive resistance and refusal of the followers to support him is . . . the result of a decision [considered unjust]."[81] Clearly, change in the legal authority was possible; indeed, one purpose of the Kapauku procedure that involved articulation of relevant laws by the *tonowi* was to achieve public acceptance of his ruling. As Fuller noted, one course of "the affinity between legality and justice consisted simply in the fact that a rule articulated and made known permits the public to judge its fairness."[82]

The informality and contractual characteristics of Kapauku leadership led many western observers to conclude that Kapauku society lacked law, but clear evidence of rules of recognition, adjudication, *and* change can be demonstrated within the Kapauku's legal system.

Rules of Recognition

A "mental codification of abstract rules" existed for the Kapauku Papuans, so that legal decisions were part of a "going order."[83] Recognition of law was based on kinship and contractual reciprocities motivated by individual rights and private property. Grammatical phrases and references to specific customs, precedents, or rules were present in all adjudication decisions Pospisil observed during his several years of studying the Kapauku. He concluded that "not only does a legal decision solve a specific case, but it also formulates an ideal—a solution *intended* to be utilized in a similar situation in the future. The ideal component binds all other members of the group who did not participate in the case under consideration. The authority himself turns to his previous decisions for consistency."[84] The authority of the law is obvious, as is the drive for certainty. Legal decisions had the status of modern legal precedents, and therefore it should be obvious that rules of adjudication *and* change existed since the setting of and reference to precedent is a form of "legislation."

Rules of Adjudication

The Kapauku process of law appears to have been highly standardized, almost to the point of ritual. It typically started with a loud quarrel, during which the plaintiff accused the defendant of committing some harmful act while the defen-

dant responded with denials or justification. The quarrel involved loud shouting for the purpose of attracting other people, including one or more *tonowi.* The close relatives and friends of those involved in the dispute would take sides, presenting opinions and testimony in loud, emotional speeches. The *tonowi* generally simply listened until the exchange of opinion approached the point of violence, whereupon he stepped in and began his argument. If he waited too long, an outbreak of "stick fighting" or even war could occur, but this was rare. (Pospisil observed 176 dispute resolutions involving "difficult cases"; only 5 led to stick fights and 1 resulted in war.[85]) The *tonowi* began his presentation by "admonishing" the disputants to have patience and then proceeded to question various witnesses. He would search the scene of the offense and the defendant's house or both for evidence if doing so was appropriate. "Having secured the evidence and made up his mind about the factual background of the dispute, the authority starts the activity called by natives *boko duwai,* the process of making a decision and inducing the parties to the dispute to follow it."[86] The *tonowi* would make a long speech, summing up the evidence, appealing to the relevant rules and precedents, and *suggesting* what should be done to end the dispute.

When judged to be guilty a Kapauku was punished. The specific sanction for a case was suggested by the *tonowi* if the dispute required his intervention, and if the dispute was settled it meant the guilty offender *agreed to accept* that sanction. Sanctions in this society varied considerably, depending on the offense. They included economic restitution and various forms of physical punishment. Despite the use of a wide array of sanctions, however, the Kapaukus' paramount concern for individual freedom precluded certain types of punishments widely used in western societies. There was no such thing as imprisonment, for instance, and neither torture nor physical maiming was permitted. (Both have been common in western societies, of course.[87]) Moreover, capital punishment was not the normal sanction even for violent crimes. As with the Yurok and Ifugao, however, "economic sanctions are by far the most preferred ones among the Kapauku."[88]

The Kapauku did resort to physical punishment at times, nonetheless. In fact, defendants often had a choice between an economic sanction or a physical sanction, frequently choosing the latter. Sometimes an offense was considered too severe to warrant economic payment. "A heinous criminal or a captured enemy would be killed but never tortured or deprived of liberty."[89] In keeping with the emphasis on individual freedom, however, the killing generally took place through an ambush with bow and arrow:[90] "A culprit . . . would always have the chance to run or fight back."[91]

A third type of sanction was also applied by the Kapauku—psychological sanctions. "The most dreaded and feared of the psychological and social sanctions of the Kapauku is the *public reprimand.* . . . The Kapauku regard this psychological punishment as the most effective of their entire inventory of sanctions."[92] Furthermore, punishment by sorcery or through the shaman's helping spirits was

also employed when the offender was strong enough to resist a *tonowi's* decisions. "Disease and death are the ultimate (psychosomatic) effect of this 'supernatural' punishment."[93]

This suggests one solution to the problem that might arise when a defendant refused to submit to the sanction proposed by a *tonowi,* an infrequent but possible outcome of the Kapauku legal process. As Fuller explained, one form of punishment in primitive societies has often been "an exercise of magical powers on the offender to purge the community of an uncleanliness. A similar purging was accomplished through the generous use of ostracism."[94] In fact then, the use of magic was simply one form of ostracism, and another, the one mentioned in earlier discussion, was also a solution when a judgment was not accepted. Ostracism by all members of a confederation was the ultimate threat.[95]

Rules of Change

Pospisil documented two ways that legislation could occur. First, very simply, law could change as custom changed. One example of such an occurrence had to do with the Kapauku adultery laws. It was customary until a few years prior to 1954 that an adulterous woman would be executed by her husband. However, men, and particularly relatively poor men, came to realize that such a sanction was too costly because of the high price paid for a wife. As a result, the punishment was changed to beating or perhaps wounding the adultress. The change was made initially by relatively poor men and was resisted by rich Kapauku Papuans. However, the new customary sanction was upheld by *tonowi* in four adultery cases observed by Pospisil during the 1954–55 period: "Thus what started as a more economical practice among the poorer husband became customary law by being incorporated into legal decisions."[96] In a similar fashion, of course, a law that at one time is applied can loose its popular support and effectively be abolished.[97]

A second procedure for legal change was also observed among the Kapauku. A change in one lineage's law of incest resulted from "successful legislation" by a sublineage *tonowi:* "He succeeded in changing an old rule of sib exogamy into a new law that permitted intrasib marriages as close as between second cousins."[98] This legislation was not authoritarian in the sense that its passage forced compliance by others, of course. Rather its acceptance spread through voluntary recognition. First it was adopted by the *tonowi,* then by more and more young men in his sublineage, and ultimately by *tonowi* of other sublineages within the same lineage. The head of the confederacy, a member of that lineage, also ultimately accepted the new law, but other lineages in the same confederacy did not, and thus incest laws varied across lineages within the same confederacy.[99] The characteristic that distinguishes this legal change from the previous one is that it was an intentional legal innovation *initiated* by a *tonowi.* Its adoption was still voluntary, however. Popisil concluded that in primitive systems "legal phenomena are constantly changing as does the rest of the culture."[100]

VI. Law in Primitive Societies: Conclusions and Implications

Many economists and legal scholars believe that physical sanctions administered by a politically organized society are the basic criteria of law, and thus many primitive societies have been held to be "lawless." The examples of law among the Yurok, Ifugao, and Kapauku clearly contradict this view, and they are, in fact, only examples. Many other primitive societies could be similarly characterized. As Hoebel explained, in virtually all primitive societies

> the community group, although it may be ethnologically a segment of a tribe is autonomous and politically independent. There is no tribal state. Leadership resides in family or local group headmen who have little coercive authority and are hence lacking in both the means to exploit and the means to judge. They are not explicitly elected to office; rather, they lead by the tacit consent of their followers, and they lose their leadership when their people begin no longer to accept their suggestions. . . . As it is, their leadership is confined to action in routine matters. The patriarchal tyrant of the primitive horde is nothing but a figment of nineteenth-century speculation. The simplest primitive societies are democratic to the point of near-anarchy. But primitive anarchy does not mean disorder. Anarchy as synonymous with disorder occurs only temporarily in complex societies when in a social cataclysm the regulating restraints of government and law are suddenly and disastrously removed.[101]

Customary systems of law maintained internal order in primitive societies even when violence and warfare characterized relationships with other groups or societies. This customary law often was quite complex, systematically covering all types of torts and breaches of contract relevant to the society. (There were no "criminal laws" since all offenses were against individuals rather than the "society" as represented by a government.) The rules and institutions established to carry out the law appeared to be effectively designed to alleviate uncertainty, enhance efficient interactions between members of the societies, and encourage legal change as a reflection of changing needs. In particular, these primitive arrangements clearly were intended to minimize the chance of violent confrontations within the societies while maintaining systems of private property and individual rights.

One might argue that the privately provided law of primitive society has no relevance today, since the simply arrangements described above could never be effective in a more complex society. Even if this argument is true, however, there are some very significant reasons to study primitive systems of privately produced law and order. For example, as Lon Fuller explained, "if we look closely among the varying social contexts presented by our own society we shall find analogues of almost every phenomenon thought to characterize primitive law."[102] An understanding of these relatively simple systems may lead us to a clearer understanding of our own.

Furthermore, a study of the incentives and institutions of primitive law and the resulting primary and secondary rules makes it evident that precisely the same kinds of governmentless legal systems have existed in considerably more advanced, complex societies, ranging from Medieval Iceland,[103] Ireland,[104] and Anglo-Saxon England,[105] to the development of the Medieval Law Merchant and its evolution into modern international commercial law,[106] and even to the western frontier of the United States during the 1800s.[107] The fact is that much of the law that guides today's complex American society actually evolved from or is simply a reflection of precisely the same customary law sources as those underlying the legal systems discussed above. In particular, private property rights appear to be a product of customary, not government produced, law. Market prices and institutions arise spontaneously in order to facilitate interaction. Economists should not be surprised to find that private property and legal institutions can exist without government, since their purpose is similarly to facilitate interaction.

NOTES

1. Robert Redfield, "Primitive Law," in Paul Bohanan, ed., *Law and Warfare* (Garden City, N.Y.: The Natural History Press, 1967).
2. Wolfgang G. Friedmann, *Law and Social Change in Contemporary Britain* (London: Stevens, 1951), p. 281. Emphasis added.
3. Bernard P. Herber, *Modern Public Finance: The Study of Public Sector Economics* (Homewood, Ill.: Richard D. Irwin, 1975).
4. F. A. Hayek, *Law, Legislation and Liberty*, vol. 1, *Rules and Order* (Chicago: University of Chicago Press, 1973), p. 73.
5. For example, John Baden, Richard Stroup, and Walter Thurman, "Myths, Admonitions and Rationality: The American Indian as a Resource Manager," *Economic Inquiry* 19 (January 1981): 399–427; and D. Bruce Johnsen, "The Formation and Protection of Property Rights Among the Southern Kwakiutl Indians," *Journal of Legal Studies* 17 (January 1986): 41–67.
6. Actually, the production of law and allocation of its enforcement can easily be characterized as a market process. See Bruce L. Benson, *Liberty and Justice: Alternatives in the Provision of Law and Order* (San Francisco, Calif.: Pacific Institute) Forthcoming.; and Bruce L. Benson and Eric Engen, "The Market for Laws: An Economic Analysis of Legislation," *Southern Economic Journal* 54 (January 1988): 732–745.
7. Baden, Stroup and Thurman, "Myths, Admonitions and Rationality."
8. Harold Demsetz, "Toward a Theory of Property Rights," *American Economic Review* 57 (May 1967): 347–359.
9. Johnsen, "The Formation and Protection of Property Rights."
10. David Friedman, "Private Creation and Enforcement of Law: A Historical Case," *Journal of Legal Studies* 8 (March 1979): 399–415.
11. Richard A. Posner, "A Theory of Primitive Society, with Special Reference to Primitive Law," *Journal of Law and Economics* 23 (April 1980): 1–53; and Posner, *The Economics of Justice* (Cambridge, Mass.: Harvard University Press, 1981).
12. Bronislaw Malinowski, *Crime and Custom in Savage Society* (London: Routledge and Kegan Paul, 1926).
13. Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964), p. 130.
14. Ibid., p. 151.
15. Redfield, "Primitive Law," p. 3.
16. H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), pp. 89–96.

17. Ibid., p. 89.
18. Ibid., p. 90.
19. Ibid.
20. Ibid.
21. Ibid., p. 91.
22. Ibid.
23. Ibid., p. 92.
24. Ibid., p. 94.
25. Kenneth I. Winston, "Editors Note," in Lon L. Fuller, ed., *The Principles of Social Order* (Durham, N.C.: Duke University Press, 1981).
26. In fact, Hart's distinction between primary and secondary rules is closely associated with, if not synonomous with, the distinction between "private law" and "public law" made by many legal scholars. Private law is often used to designate rules of conduct while public law refers to the rules setting up the apparatus of government to enforce those rules of conduct. See Hayek, *Law, Legislation and Liberty*, pp. 133, 176–178. This distinction is not made here because the term "public law" implies existence of a state and its government, but as noted above, secondary rules can and do evolve without a state.
27. Fuller, *Morality of Law*, pp. 133–155.
28. Hayek, *Law*, vol. 1, pp. 96–97.
29. Fuller, *Morality of Law*, p. 138.
30. Hart implied that law typically must be written to be recognized, but, according to Fuller, "to the extent that the law merely brings to explicit expression conceptions of right and wrong widely shared in the community, the need that [it] . . . be publicized and clearly stated diminishes in importance." Ibid., p. 92.
31. Hart, *Concept of Law*, p. 89.
32. John Umbeck, *A Theory of Property Rights With Applications to the California Gold Rush* (Ames, Iowa: Iowa State University Press, 1981); and John Umbeck, "Might Makes Rights: A Theory of the Foundation and Initial Distribution of Property Rights," *Economic Inquiry* 19 (January 1981): 38–59.
33. Friedman, "Private Creation and Enforcement of Law."
34. Joseph R. Peden, "Property Rights in Celtic Irish Laws," *Journal of Libertarian Studies* 1 (1977).
35. In effect, government is held to exist when the system of authority has characteristics common to those nations ruled by kings in Europe during the medieval period (and several earlier periods, of course), or characteristics that have since evolved as kings centralized and expanded their powers and groups of citizens reacted in an attempt to limit the kings' efforts. See Benson, *Liberty and Justice*, for details.
36. Ibid.
37. Bruce L. Benson, "The Spontaneous Evolution of Commercial Law," *Southern Economic Journal* 55 (January 1989): 644–661.
38. Walter Goldsmidt, "Ethics and the Structure of Society: An Ethnological Contribution to the Sociology of Knowledge," *American Anthropologist* 53 (October-December 1951): 506–524.
39. Hayek (*Law*, vol. 1, p. 108) explained that it is an

> erroneous idea that property had at some late stage been 'invented' and that before that there had existed an early state of primitive communism. This myth has been completely refuted by anthropological research. There can be no question now that the recognition of property preceded the rise of even the most primitive cultures, and that certainly all that we call civilization has grown up on the basis of that spontaneous order of actions which is made possible by the delimitation of protected domains of individuals and groups. Although the socialist thinking of our time has succeeded in bringing this insight under suspicion of being ideologically inspired, it is as well demonstrated a scientific truth as any we have attained in this field.

40. Goldsmidt, "Ethics," p. 506.
41. William M. Landes and Richard A. Posner, "Adjudication as a Private Good," *Journal of Legal Studies* 8 (March 1979), p. 243.

42. Hart, *Concept of Law*, p. 89.
43. Goldsmidt, "Ethics," p. 512.
44. Redfield, "Primitive Law," p. 8.
45. Goldsmidt, "Ethics," p. 512.
46. Leopold Pospisil, *Anthropology of Law: A Comparative Theory* (New York: Harper and Row, 1971), p. 58.
47. Fuller, *Morality of Law*, pp. 23–24.
48. Fuller, *Principles of Social Order*, p. 213.
49. Ibid.
50. Hayek, *Law, Legislation and Liberty*, p. 111.
51. Goldsmidt, "Ethics," pp. 513–514.
52. Hayek, *Law*, vol. 1, pp. 108–109.
53. Pospisil, *Anthropology of Law*, p. 215.
54. Fuller, *Morality of Law*, p. 90. The arguments which follow are expanded upon in Bruce L. Benson, "Legal Evolution in Primitive Societies," *Journal of Institutional and Theoretical Economics* 144 (December 1988): 772–788.
55. Carl Menger, *Problems of Economics and Sociology*, trans. Francis J. Nook, Louis Schneider, ed., (Urbana, Ill.: 1963); and Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (New York: Modern Library, 1937).
56. F. A. Hayek, *Studies in Philosophy, Politics and Economics* (Chicago: University of Chicago Press, 1967), p. 101.
57. The laissez-faire society of Northern California is not the only instance of private law and order among the American Indians. In fact, Hoebel explained that law existed for many Indian societies without a political state. (E. Adamson Hoebel, *The Law of Primitive Man* (Cambridge, Mass.: Harvard University press, 1954), p. 188.)
58. Ibid., p. 100. Parts of the presentation in this section can be found in Bruce L. Benson, "The Lost Victim and Other Failures of the Public Law Experiment," *Harvard Journal of Law and Public Policy* 9 (Spring 1986): 399–427.
59. Hoebel, *Law of Primitive Man*, p. 101.
60. R. F. Barton, "Procedure Among the Ifugao," in Paul Bohanan, ed., *Law and Warfare* (Garden City, N.Y.: The Natural History Press, 1967), p. 161.
61. Ibid., p. 163.
62. Ibid., pp. 164–165.
63. Ibid., p. 166.
64. Hoebel, *Law of Primitive Man*, p. 117.
65. Ibid., p. 121.
66. Ibid.
67. Hoebel explained that as an Ifugao moved away from his home district he moved through a "neutral zone" into a "feudal zone" where, "Permanent feuding relations with certain families in the area are the thing" (Ibid., p. 122). There were also "war zones" where, "Anybody in the area is killed on sight" (Ibid., p. 124). It should be noted that such interdistrict warfare was not "warfare" as conceived in modern society, where one political organization seeks to take territory and/or resources from another; rather it was a social and religious institution with successful headhunting generating social prestige and religious "benefits."
68. For example, see Posner, *Economics of Justice*, p. 178.
69. Sir Henry S. Maine, *Ancient Law*, 3rd American from 5th English edition (New York: Henry Holt and Co., 1864).
70. Ibid., p. 74.
71. Hoebel, *Law of Primitive Man*, p. 283.
72. Pospisil, *Anthropology of Law*, pp. 194, 206, 208.
73. Quoted in Ibid., p. 64.
74. Ibid., p. 65.
75. Ibid., p. 66.
76. Ibid., p. 67.
77. Ibid. Other criteria were important as well, including an ability and willingness to speak in public.
78. Ibid., pp. 68–69.

79. Ibid., pp. 69–70.
80. One group of a *tonowi's* followers was especially faithful and dependable, always available when a need for support arose. They were called *ani jokaani* or "my boys," and consisted of a group of young men who were "adopted" by the *tonowi* and became his "students" (Ibid., p. 69):

> They came to live with the rich man to learn especially how he transacted business, to secure his protection, to share his food, and, finally, to be granted a substantial loan for buying a wife. In return they offer their labor in the fields and around the house, their support in legal and other disputes, and their lives in case of a war. The boys may be from different sibs and confederacies, or they may be relatives.
>
> . . . However, this contractual association is quite loose. Both parties are free to terminate it at any time and the boy is never treated as an inferior by the rich man.

81. Ibid., p. 94.
82. Fuller, *Morality of Law*, p. 159.
83. Pospisil, *Anthropology of Law*, p. 80.
84. Ibid., p. 80.
85. Ibid., p. 36.
86. Ibid.
87. See Benson, *Liberty and Justice*.
88. Pospisil, *Anthropology of Law*, p. 93.
89. Ibid., p. 65.
90. Interestingly, in many of these cases "the punishment was carried out by a close patrilineal relative of the culprit. . . . Employment of patrilineal relatives to participate in the killing was a clever cultural device to prevent internal strain and feuds" (Ibid., p. 92).
91. Ibid., p. 65. Another form of physical sanction was beating the head and shoulders of the offender with a stick. Again the individual was not constrained and could fight back, but in each instance observed by Pospisil submitted without raising a defense. Individual defendants apparently *chose* to submit to the beating rather than make a payment to the victim or his heirs.
92. Ibid., p. 93. Other psychological sanctions were also employed. A private warning given by a *tonowi* for a minor violation of a taboo or for lying could cause the guilty party to suffer "a loss of face once it becomes known that he was punished in such a way."
93. Ibid., p. 94.
94. Fuller, *Morality of Law*, pp. 143–144.
95. Rules of adjudication among the Kapauku were much more detailed than suggested in this brief discussion. For instance, there were clearly specified, detailed jurisdictional delineations. See Pospisil, *Anthropology of Law*, or Benson, *Liberty and Justice*.
96. Pospisil, *Anthropology of Law*, p. 205.
97. Fuller explained the procedure of such changes in customary law, as follows, noting that change like this is quite common and can occur quite quickly (*Principles of Social Order*, pp. 227–229):

> Where by his actions toward B, A has (whatever his actual intentions may have been) given B reasonably to understand that he (A) will in the future in similar situations act in a similar manner, and B has, in some substantial way, prudently adjusted his affairs to the expectation that A will act in accordance with this expectation, then A is bound to follow the pattern set by his past actions toward B. This creates an obligation by A to B. If the pattern of interaction followed by A and B then spreads through the relevant community, a rule of general customary law has been created. This rule will normally become part of a larger system, which will involve a complex network of reciprocal expectations. Absorption of the new rule into the larger system will, of course, be facilitated by the fact that the interactions that gave rise to it took place within limits set by the system and derived a part of their meaning for the parties from the wider interactional context within which it occurred.

> Where customary law does in fact spread we must not be mislead as to the process by which this extension takes place. It has sometimes been thought of as if it involved a kind of inarticulate expression of group will; the members of group B perceive that the rules governing group A would furnish an apt law for them; they therefore take over those rules by an act of tacit collective adoption. This kind of explanation abstracts from the interactional process underlying customary law and ignores their ever-present communicative aspect. . . . Generally we may say that where A and B have become familiar with a practice obtaining between C and D, A is likely to adopt this pattern in his actions toward B, not simply or necessarily because it has any special aptness for their situation, but because he knows B will understand the meaning of his behavior and will know how to react to it.
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> There remains for discussion one further . . . notion that . . . custom becomes law only through usage observed to have persisted over a considerable period.
>
> This is, again, too simply a view of the matter . . . in part because of mistaken implications read into the word *customary,* and in part because it is true that normally it takes some times for reciprocal interactional expectations to "jell." But there are circumstances in which customary law (or a phenomenon for which we have no other name) can develop almost over night.

98. Pospisil, *Anthropology of Law,* p. 110.
99. This was possibly due to the detailed jurisdictional rules that applied in Kapauku law (see note 95).
100. Pospisil, *Anthropology of Law,* p. 348. See Benson, "Legal Evolution in Primitive Societies" for further elaboration.
101. Hoebel, *Law of Primitive Man,* p. 294.
102. Fuller, *The Principles of Social Order,* p. 243.
103. Friedman, "Private Creation and Enforcement of Law."
104. Peden, "Property Rights in Celtic Irish Law"; and Murray N. Rothbard, *For a New Liberty* (New York: Macmillan Co., 1973).
105. Benson, *Liberty and Justice* and references cited therein.
106. Ibid.; Benson, "The Spontaneous Evolution of Commercial Law"; Leon E. Trakman, *The Law Merchant: The Evolution of Commercial Law* (Littleton, Colo.: Fred B. Rothman and Co., 1983); and references cited therein.
107. Terry Anderson and P. J. Hill, "An American Experiment Anarcho-Capitalism: The *Not* So Wild, Wild West," *Journal of Libertarian Studies* 3 (1979): 9–29; Umbeck, *Theory of Property Rights;* Benson, "Lost Victim"; and Benson, *Liberty and Justice.*