An Evolutionary Contractarian View of Primitive Law: The Institutions and Incentives Arising Under Customary Indian Law

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The European conquest and absorption of native American Indian groups obviously produced tremendous changes in the way Indians live and interact with one another. One very important source of change in Indian life was the changes in the rules and institutions of Indian law. Few Indian groups had any sort of strong central legal authority before Europeans began to exert various types of influence on the evolution of Indian law. This does not mean that there was no law, however. Evolving unwritten social contracts among Indian groups had produced well-developed legal systems based on customary rules of conduct which emphasized individual rights and private property. Adjudication procedures were in place to solve disputes without violence. No state-like centralized authority applied sanctions, but sanctions were applied, primarily in the form of economic restitution. These sanctions were enforceable because of reciprocal arrangements between individuals for recognition of law, support of judgments, and community wide ostracism.[1] Such characteristics of primitive American Indian legal systems have been discovered through extensive study by anthropologists.

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[1]As E. Adamson Hoebel (1954, p. 294), who is responsible for some of the most important anthropological studies of American Indian law, explained, in virtually all primitive groups:

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What can an economist add to the understanding of Indian law that has not already been said by anthropologists? Economic theory predicts human behavior by considering how individuals react to incentives and constraints in the context of rational choice models. In contrast, most anthropologists adopt an "empirical" approach to law: behavior is not predicted from a theoretical model, but rather observation presumably allows the anthropologist to discern behavior (Hoebel 1954, p. 5). Thus, the following examination will emphasize the institutions and incentives which influence the provision of law and its enforcement, in order to see if anthropologists' observations support economic theory's predictions. In particular, predictions, based on economic theory, will be made as to (1) how a legal system could induce recognition of rules of conduct without strong centralized authority, (2) how institutions and procedures for adjudication and legal change could be voluntarily established, (3) and why a non-centralized legal system dominated by voluntarily established institutions and procedures should emphasize individual rights and private property. In other words, predictions about the characteristics of the implicit evolving social contract which underlies a customary law system will be made based on economic theory, so that a *generalizable characterization* of such legal systems can be developed. Examples of Indian legal systems as they have been reported by anthropologists will then be examined in light of the theoretical predictions.[2]

> 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 . . . 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.

[2]This is not the first time that primitive Indian legal systems have been analyzed from an economic perspective. Baden, Stroup and Thurman (1981) examined the resource management incentives of various American Indian tribes, for example, while Demsetz (1967) explained the incentives to establish property rights and applied his analysis with examples from American Indian history, and Johnsen (1986) explored the formation and protection of property rights among the Kwakiutl Indians. The presentation below follows the lead of these studies, but goes beyond the emphasis on incentives for and the process of property right formation to discuss the *legal institutions* formed for the enforcement of rights, adjudication of disputes, and legal change.

Customary Law as a Social Contract

If law is simply represented by any system of rules, as some have suggested,[3] then "morality" and law would appear to be synonymous. However, Lon Fuller (1964, p.30) contended that "law," when more appropriately "viewed as a direction of purposive human effort, consists in the enterprise of subjecting human conduct to the governance of rules."[4] Law and morality are not synonymous. Indeed, law as a purposive human effort can facilitate efficiency-enhancing interaction by reducing uncertainty, as explained below, and therefore it consists of both rules of conduct and the mechanisms or process for applying those rules. Individuals must have incentives to recognize rules of conduct, for example, or the rules tend to become irrelevant, so institutions for enforcement are a necessary component of the enterprise of law. Similarly, when a situation arises in which the implications of existing rules are unclear, a dispute becomes likely, so dispute resolution institutions will be required. Furthermore, as conditions change new rules may be needed, and mechanisms for development of new rules and changes in old rules must exist. Thus, legal systems include mechanisms to induce recognition and acceptance of rules, as well as procedures for dispute resolution and legal change, and consequently, they tend to evolve to display very similar structural characteristics (Fuller 1964, pp. 150-51). Fuller's definition of law is accepted here, in part because it allows the analysis of law to focus on the institutions involved in the production and enforcement of legal rules, and on the incentives which both lead to the development of and arise as a consequence of those institutions. That is, it lends itself to an economic analysis of law.[5]

[3]For an example from the anthropological literature, see Malinowski (1926).

[4]This is but one definition or "theory" of law, however. For example, Friedman (1951, p. 281) proposed 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*" (emphasis added). Friedman's perception of the law falls under the legal positivist (or "New Analytical Juristo") umbrella which typically identifies law with the legal institutions that are observed: generally the state (see Hart [1961] for a forceful modern exposition of the legal positivist view in the tradition of Hobbes and Austin). Fuller, on the other hand, held an evolutionary (or "natural law") perspective. One question emphasized below, of course, is whether state-like coercive power is required for effective law. Thus, one purpose of the following analysis is to support a natural law theory and reject legal positivist definitions of law which assume such a requirement.

[5]There are other reasons for adopting this definition as well. See note 4 above, for example, and Benson (1990) for more details.

Customary law

Individuals can be forced to recognize law, or they can be persuaded, thus voluntarily avoiding the proscribed behavior in recognition of personal benefits. Hayek (1973, pp. 96-97) explained that many issues of law are not "whether the parties have abused anybody's will, but whether their actions have conformed to expectations which other parties had reasonably formed because they corresponded 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." Customary law is recognized, not because it is backed by the power of some strong individual or institution, but because each individual recognizes the benefits of behaving in accordance with other individuals' expectations, *given* that others also behave as he expects. Alternatively, law can be coercively imposed from above by a minority.[6] Of course, such law will require much more force to maintain social order than is required when law develops from the bottom through mutual recognition and acceptance.

Reciprocities are the basic source both of the recognition of duty to obey law and of law enforcement in a customary law system. That is, individuals must "exchange" recognition of certain behavioral rules with one another for their mutual benefit. Individual *A* must agree (perhaps explicitly as through a contract, or perhaps implicitly through behavioral patterns that establish expectations) to act in a certain way in his relationship with *B* in exchange for *B* acting in a certain way in his relationships with *A*. Fuller (1964, pp. 23-24) suggested three conditions which make a duty clear and acceptable to those affected: First, the relationship between the parties immediately affected must be voluntary; second, both parties must gain from the exchange; and third the parties must expect to interact fairly regularly so that the resulting duty can be reversible in the sense that what one individual is required to do at a particular time can be required of another at a different time.

Since the source of recognition of customary law is reciprocity, private property rights and the rights of individuals are likely to constitute the most important primary rules of conduct in such legal systems (Benson 1989a; 1990). After all, voluntarily recognition of

[6]For more detailed discussion of the differences between customary and authoritarian law, see Benson (1990).

laws and participation in their enforcement is likely to arise *only when substantial benefits from doing so can be internalized by each individual.* Individuals require incentives to become involved in any legal process, of course, and incentives can take the form of rewards (personal benefits) or punishments. Punishment is frequently the threat which induces recognition of law imposed from above, but when customary law prevails, incentives must be 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 is a very attractive benefit.[7]

Under customary law, offenses are treated as torts (private wrongs or injuries) rather than crimes (offenses against the state, the tribe, or the "society" at large). This is inevitable since interaction between individuals is required for something to become an issue of law. Thus, a potential action by one person has to impact someone else before any question of legality can arise. Any action which is not clearly of this kind, such as what a person does alone, or in voluntary cooperation with someone else but in a manner which clearly harms no one, is not likely to become the subject of a rule of conduct under customary law. Indeed, Fuller (1981, p. 213) proposed that "customary law" might best be described as a "language of interaction." This function of facilitating interaction can only be accomplished with recognition of clear (although not necessarily written) codes of conduct enforced through reciprocally acceptable, well established adjudication arrangements accompanied by effective legal sanctions.

Customary law as an unwritten constitution

James Buchanan (1972a, p. 37) posed the following question: if government is dismantled, "how do rights re-emerge and come to

[7]Private property is not a European or capitalist invention, nor is it exclusive to free market economic systems. It is a key characteristic of all societies wherein custom is the primary source of law and reciprocity is the primary impetus for recognition. Thus, for example, private property has been a central component of primitive legal systems, at least until authority begins to be centralized and backed by organized coercive power that can be used to attenuate and transfer such rights (Benson 1989a; 1990). As Hayek (1973, p. 108) explained, it is an

> erroneous idea that property had at some late stage been 'invented' and that before that there had existed an earlier 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.

command respect?" How do "laws" emerge that carry with them general respect for their "legitimacy?" He contended that collective action would be necessary to devise a "social contract" or "constitution" designed to define the rights of the people in the first place and to establish the institutions to enforce those rights (1972a; 1972b). However, collective action for the production of law can be achieved through the process of individual agreements, with the resulting rules spreading to other members of a group if they are useful rules. For instance, Demsetz (1967) explained that property rights will be defined when the benefits of doing so cover the costs of defining and enforcing such rights. Such benefits may become evident because a dispute arises, for example, perhaps implying that existing rules do not adequately cover some new situation. The parties involved must expect the benefits from resolving the dispute (e.g., avoiding a violent confrontation), and of establishing a new rule, to outweigh the cost of resolving the dispute and enforcing the resulting judgment, or they would not take it to the adjudication system.

Dispute resolution actually can be a major source of legal change since in most types of interaction, situations arise wherein uncertainty exists as to what expectations are legitimate. Consequently, it becomes necessary to appeal to an arbitrator or mediator (the development of such institutions is discussed below) if violence is to be prevented. Such an adjudicator will often have to make more precise those rules about which differences of opinion exist, and at times even to supply new rules because no generally recognized rules exist to cover a new situation (Hayek 1973, p. 99). If the relevant group accepts the ruling it will affect other individuals' behavior as well: "Even in the absence of any formalized doctrine of stare decisis or res judicata, an adjudicative determination will normally enter in some degree into the 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" (Fuller 1981, p. 90).

An adjudicated decision becomes part of customary law only if it is seen as a desirable rule by all affected parties, however. It is not coercively imposed on a group by some authority backing the court. Thus, good rules which facilitate interaction tend to be selected over time, while bad decisions are ignored (Benson 1988). For new rules to be accepted by the members of an affected group, they generally must build upon, and indeed, extend existing rules. That is, the fundamental principles of customary law (e.g., private property and

individual rights) do not change.[8] They are simply extended to cover new situations. As Fuller emphasized, "Tradition is not something constant but the product of a process guided . . . by success" (1964, p. 90). Fuller's characterization of customary law is therefore quite consistent with Hayek's (1973) view of an evolving social contract.[9]

Dispute resolution is not the only source of legal evolution under customary law. Rules of conduct evolve in many ways as individuals interact with one another. Individuals may simply observe that others are behaving in a particular way in light of a new situation, and adopt similar behavior themselves, recognizing the benefit of avoid-

[8]As Epstein (1980, p. 266) explained, for example:

> the merits of freedom of contract in no way depend upon the accidents of time and place. Acceptance of that basic principle will not however put an end to all contractual disputes. It remains to discover the terms of given contracts, usually gathered from language itself, and the circumstances of its formation and performance. Even with these aids, many contractual gaps will remain, and the courts will be obliged, especially with partially executed contracts, to fashion the terms which the parties have not fashioned themselves. To fill the gaps, the courts have looked often to the custom or industry practice. The judicial practice makes good sense and for our purposes introduces an element of dynamism into the system . . . But it by no means follows that conduct in conformity with the custom of one generation is acceptable conduct in the next. The principles for the implication of terms, I believe, remain constant over generations. Yet the specific rules of conduct so implied will vary with time and with place.

The basic rules of private property and freedom of contract characterize customary law systems. As such systems evolve, the need for extensions of these basic principles to cover unanticipated circumstances always arise, however, and the customary law adapts through spontaneous collaboration, building on the existing base of substantive principles.

[9]Buchanan has been critical of some evolutionist analysis of the development of legal constraints, of course. For example, (Buchanan 1989, p. 44):

> A generalization of the evolutionist paradigm may suggest that, although institutions of social interaction do change through time, these changes can only emerge through the long process of cultural evolution. According to this perception, it is not legitimate to infer that basic institutions of social order, basic rules for the socio-economic-legal-political "game," can be "chosen" in any manner analogous to the choices of options that are available to persons, in a collective decision process, within an existing set of institutional rules.

However, in the case of customary legal systems which spontaneously evolve, all changes in the institutions and rules reflect individual choices. Rules and institutions can be "deliberately chosen" (see Benson [1988] for an example of a deliberately induced change in customary law) in a manner which is very analogous to one particular type of collective decision—Wicksell's unanimity or consensus rule. If a new rule or institutional arrangement is acceptable by all the affected parties it becomes part of customary law. The outcome of this process of constitutional choice is not "government" as popularly conceived, perhaps even by those who advocate a constitutionally limited government such as Buchanan, but individuals still end up being "governed" by a set of enforceable rules of conduct.

ing a confrontation by trying to establish a different type of behavior. As a consequence of adopting such behavior, the individuals create an obligation to one another to continue the behavioral pattern, and a new rule of customary law has been created. Fuller (1981, pp. 227-28) explained:

> 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. . . . This kind of explanation abstracts from the interactional process underlying customary law and ignores their ever-present communicative aspect.

Thus, customary law evolves as the benefits of adopting new practices and customs are recognized by individuals.

Institutions for enforcement similarly evolve due to recognition of reciprocal benefits. Consequently, customary law is appropriately viewed (Fuller 1964, pp. 128-29) as:

> a branch of constitutional law, largely and properly developed outside the framework of our written constitutions. It is constitutional law in that it involves the allocation among various institutions . . . of legal power, that is, the authority to enact rules and to reach decisions that will be regarded as properly binding on those affected by them.

Consider the development of dispute resolution procedures. No state-like coercive authority exists in a customary system to force disputants into a court, so some other means of inducing disputants to peacefully resolve their disagreement must evolve. Since rules of obligation under customary law are in the nature of torts it is up to the aggrieved party to pursue prosecution. Consequently, individuals have strong reciprocal incentives to join with others to form mutual support groups for legal matters.[10] The resulting group contract makes group members obligated to aid any other member in a valid dispute, given that member has fulfilled his obligations to the group in the past. Thus, ability to obtain support in a dispute depends upon an exchange of reciprocal loyalty.

[10]The makeup of such groups may reflect family (as it frequently was in primitive societies [Hoebel 1954; Barton 1967; Benson 1989a]), religion (as in some primitive groups [Goldsmidt 1951]), geographic proximity (e.g., as in Anglo-Saxon England [Benson 1990]), functional similarity (as with commercial law [Trakman 1983; Berman 1983; Benson 1989b]), contractual arrangements (e.g., as in medieval Ireland, and in medieval Iceland [Peden 1977; Friedman 1979], and see Anderson and Hill [1979], Umbeck [1981a] and Benson [1989c] for examples from American history, such as mining camps, land clubs, and wagon trains of the eighteenth-century West), or some combination of the these sources of recognition and trust.

Reciprocal support groups give individuals a position of strength should a dispute arise. This does not mean that disputes are settled by warfare between groups, however. Violence is a potential means of solving a dispute, but it is a very costly one. After all, if the accuser and his support group attacks the accused, members of the accused's group are obliged to avenge the attack. Thus, group members (as well as non-group residents in the vicinity of those directly involved) are generally very anxious for a peaceful settlement in order to avoid an extended violent confrontation.[11] Consequently, arrangements and procedures for non-violent dispute resolution should evolve very quickly in customary law systems.

The impetus for accepting adjudication to settle a dispute in a customary legal system (as well as an authoritarian system[12]) is the ever present threat of force, but use of such force is certainly not likely to be the norm. Rather, an agreement between the parties must be negotiated. Frequently, a mutually acceptable arbitrator or mediator is chosen to consider the dispute. This individual (or group of individuals) will have no vested authority to impose a solution on disputants, however. The ruling, therefore must be acceptable to the groups to which both parties in the dispute belong. An arbitrator or mediator's only real power under such a system is that of persuasion.[13]

Since customary law is in the nature of tort law rather than criminal law, if the accused offender is determined to be guilty, the "punishment" tends to be economic in nature: restitution in the form of a fine or indemnity to be paid to the plaintiff by the offender. Other forms of punishment (e.g., imprisonment) are inefficient, after all, in that they are costly for the group to administer and do not generate sufficient benefits to restore a victim. Liability, intent, the value of the damages, and the status of the offended person all may be considered in determining the indemnity. Every invasion of person or property is generally valued in terms of property.

A judgment under customary law that is acceptable to individuals

[11]In fact, under customary law a great number of rules of adjudication typically prevent a direct physical confrontation between the two parties in a dispute as long as some other means of working towards a settlement is available (e.g., see Barton 1967; Pospisil 1971; or Benson 1989a).

[12]The threat of violence is ultimately what backs any system of property rights (Umbeck 1981a; 1981b).

[13]In this light, Fuller (1981, p. 134) observed that "A serious study of mediation can serve . . . to offset the tendency of modern thought to assume that all social order must be imposed by some kind of 'authority.' When we perceive how a mediator, claiming no 'authority,' can help the parties give order and coherence to their relationship, we may in the process come to realize . . . that social order can often arise directly out of the interactions it seems to govern and direct."

in all the affected groups is typically enforceable because of an effective threat of total ostracism by the members of the entire community. Reciprocities between the groups, recognizing the high cost of refusal to accept good judgments, takes any individual who refuses such a judgement outside his support group, and he becomes an outcast, or outlaw. Fear of this severe boycott sanction means that the adjudicated solutions tend to be accepted, of course. Once again, the threat of violence does not, in itself, imply that violence must be the norm. Indeed, the threat of violent punishment is a significant deterrent to illegal behavior in every legal system, but as stressed above, customary legal systems have as one of their basic impetuses the desire by individuals to avoid violence.

We are now in a position to examine examples of customary law systems among American Indians. One group which remained relatively isolated from European influence at least until the second half of the nineteenth century was the Yurok Indians and their Northern California neighbors.

Yurok Law

The Yurok Indians of the nineteenth century lived along the lower reaches of the Klamath River and the nearby Pacific Coast (Kroeber 1925). Fishing and food gathering were major sources of subsistence, but sufficient production occured to allow for a considerable amount of trade, relative to many other American Indian groups of the period (exchange was facilitated by a monetary system). In order to facilitate interaction, including trade, these Indians had "a welter of legal relationships in the realm of personal law" (Hoebel 1954, p. 52). In particular, as Goldsmidt (1951, p. 506) found, after studying the Yurok, Hupa, Karok and some of their Northern California neighbors, property was universally held in individual private ownership. Indeed, property was extremely important for the maintenance of personal status and prestige (Hoebel 1954, p. 52). Thus, private property rights were sharply defined with regard to both privileges and liabilities. Title considerations, for instance, 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, etc.); and (3) the division of title between persons. Ownership was complete and transferable.

Consider an example. A canoe owner had exclusive rights of use of the canoe. If someone used a canoe without permission, or in some way misused or harmed the canoe, the owner could collect damages. In addition the owner could transfer the property rights to another through sale or as a gift. However, there were also well recognized

duties or obligations which went with canoe ownership (Hoebel 1954, p. 57). For instance, a canoe owner was obliged to ferry a traveler across the river if it was requested. Refusal resulted in restitution to the traveler. In this regard, however, the traveler was liable for any damages suffered by the canoe owner as a consequence of ferrying. For instance, if the canoe owner's house burned down while he was ferrying a traveler, the traveler was liable for full damages. Property rights clearly could be quite complex.

Similarly, for instance, the owner of a fishing spot on the banks of the Klamath had exclusive use of the site. However, he could sell a temporary right of use to a second party if he wished. Extension of such a right carried with it a liability as well (Hoebel 1954, p. 55). The owner was responsible for seeing that the user was not injured while fishing. If a user slipped on a rock, for example, and suffered an injury, the owner had to pay damages. Ownership rights for a fishing spot could also be permanently divided in the sense that several individuals could hold limited ownership rights to the same spot, with each having exclusive rights (including liability) to its use during certain specified times.

In addition to rules of conduct, the Yurok and their neighbors also developed an enterprise of law. 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 tribal government* with coercive power (Goldsmidt 1951, p. 511):

> 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.

These Indians, nonetheless, had a well-developed system of private judging (Hoebel 1954, pp. 52-53; Landes and Posner 1979, p. 243). Each man in these tribes was a member of a "sweathouse group"—a clique of the men from three or more neighboring houses who shared a sudatoria (Goldsmidt 1951, p. 512). These groups often consisted of members of the same family, but family relationships were not necessary. An individual 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 such support because at some point in the future he might find himself in a dispute and require the current disputant to reciprocate (the Yurok also believed that religious or supernatural benefits were achieved by joining such groups, and of course, other personal benefits were also associated with socializing with neighbors).

Fuller's three conditions for reciprocal recognition of a legal duty were clearly met within 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 a victim in the event of a dispute, because he realized that he might require the same kind of backing in the future. 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.

It was up to the victim or his support group to institute proceedings against an offender, but formal procedures had to be followed. Victims did not have the right to seek revenge or collect damages directly. Rather, if a Yurok wanted to process a legal claim he would hire two, three or four "crossers"—non-relatives 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. Note that crossers were similar to modern arbitrators or mediators rather than public sector judges, because their judgments were not backed by the police powers of a centralized authority.

A large range of offenses were recognized by these Northern California tribes, ranging from murder to adultery, theft and poaching, to curses and minor insults (Goldsmidt 1951, p. 512). All offenses were against the person since there was no formalized social unit. Yurok law contained a clearly indicated fine or indemnity to be paid to the plaintiff by the offender, given 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 was clearly in the nature of modern tort law rather than criminal law.

The crossers' judgment was enforceable because there was an effective threat of total ostracism by the entire community of tribes. In the case of 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 he became an outlaw which meant that anyone could kill him without any liability for the killing. In particular, if an offender became an outlaw, the offended individual's sweathouse group would back his effort for physical retribution. The rest of the "community" would not interfere, again through reciprocal recognition that any member of the society might at some time require such community support in ostracizing a law breaker. Fear of this severe boycott sanction meant that the crossers' judgment tended to be accepted, of course. As in other societies, then, obeying the Yurok's laws led to relatively predictable consequences. Disobeying, and the resulting ostracism by the community, meant living outside the social order, and the added uncertainty that entailed provided strong incentives to obey the laws, or yield to whatever punishment the crossers' proposed in the case of a violation. Recognition of the authority of Yurok law and support of the adjudication procedure that they developed was, therefore at least in part, a consequence of the reduced uncertainty that legal system provided.

If a victim chose not to follow the formal adjudicative procedures, then he violated the law and was liable for damages. Consider an example involving ownership rights to a beach. Owners had to allow seal hunters access to the water, but in exchange the land owner was to receive the flippers of all sea lions caught on his beach. A case which took place during the 1860s involved a wealthy and powerful individual who owned about four miles of beach around his village (see Hoebel 1954, pp. 54-55; or Spott and Kroeber 1943, pp. 182-99). A particular seal hunter disregarded the owner's property rights on several occasions by failing to give him the sea lion flippers he had a right to, but rather than follow the formal procedures of law, the beach owner took revenge by assaulting the hunter's father and wounding him. The hunter's support group, consisting of members of his family in this case, then instituted a suit against the beach owner for damages. The crossers ruled that the assault damages were slightly less than the original damages that the beach owner could have claimed against the hunter, but under the circumstances both legal claims were nullified. Nonetheless, the hunter remained antagonistic against the beach owner, and two days later he cursed the beach owner. This was a violation of Yurok law, and the beach owner entered a legal claim. While the crossers were at work, however, a

relative of the beach owner assaulted the hunter and killed him. Thus, a member of the beach owner's support group simultaneously disregarded due process while adjudication was under way, and took the life of a member of the society—both were very serious violations of Yurok law. At this point a blood feud might have broken out. However, the incentives to avoid such a costly action were strong, and the slain hunter's mother entered a legal claim for restitution. Specifically, she maintained that the beach owner's property rights to the flippers of sea lions killed on his beach should be transferred to her family. She won the award, and was backed by the community at large. Further violence was avoided. This case illustrates that even the very powerful and wealthy were subject to the law. Of course, it also illustrates that individuals broke the law and resorted to violence on occasion. But the same is true of any legal system. Members of urban gangs regularly kill members of rival gangs today, and public police kill hundreds of individuals annually who refuse to yield to the criminal justice system. The Yurok system did stop the violence from escalating further and endangering the social order of the community.

Naturally, it is difficult to judge the actual degree of 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" (Goldsmidt 1951, pp. 513-14). 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. In fact, the very existence of the relatively complex customary system of private property indicates that the legal system was relatively efficient as compared to what it evolved from. As Hayek explained, individuals adopt and follow rules of conduct "because actions in accordance with them have proved more successful than those of competing individuals or groups" (1973, p. 18).[14]

[14]Actual examples of changes in Yurok law are not documented. This is, unfortunately, true of much of the anthropology literature, although not all of it (Benson 1988). As Pospisil explained, "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]" (1971, p. 215). Nonetheless, crossers, in the process of settling disputes, were likely to, on occasion, make new rules.

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 some 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

In this regard, it should be stressed, however, that the success of one group over competing groups does not imply conquest through warfare. In the case of the Yurok, for instance, 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, become more formal (almost contractual) and effective. It is perfectly conceivable that neither members of the earliest groups nor those which followed even understood what particular aspect of the contract actually facilitated interactions that led to an improved social order—they may have viewed the religious function to be their main purpose and paid little attention to the consequence of their legal functions, for instance. Customary law and society develop spontaneously and conterminously. Those customs and associated legal institutions that survive are relatively efficient because the evolutionary process is one of voluntary "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 introduced several general features that probably characterized virtually all primitive Indian legal systems at some point prior to the pressures put on these legal systems by the arrival and continual westward movement of Europeans (the Yuroks were simply one of the last Indian groups to feel this pressure). Naturally, many of these legal systems have not and cannot be studied, so it cannot be said with certainty that all such systems displayed these features at some point in their development. Nonetheless, there are theoretical reasons to expect that they did and anthropological studies of many primitive systems support these expectations.[15] These features are: (1) rules of conduct which emphasized a predominant concern for *individual rights and private property*; (2) the responsibility of law enforcement falling to the victim backed *by reciprocal arrangements for protection and support when*

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evolved 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.

[15]Legal systems all over the world have, at one time or another, been characterizable in the same way that the Indian systems discussed above were characterized. Some anthropologists and legal scholars distinguish between "stages" of legal development, for instance, and would put such customary systems in one or more of the stages occurring before centralization of political power and formal institutions of government arise (e.g., Malinowski 1926; Diamond 1950). Also see note 14 above in this regard, as well as Benson (1988; 1989a).

a dispute arose; (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* when guilty of an offense due to the reciprocally established *threat of social ostracism* which led to physical retribution; and (6) legal change arising through an *evolutionary process of developing customs and norms*. Let us turn to another example (among many) of the primitive Indian systems that anthropologists have studied—the Comanche.[16] We shall find that the same characteristics listed here apply, even though the actual institutions and procedures differed in some ways.

Nineteenth-Century Comanche Law

By the nineteenth century tremendous changes had already occurred in the life of the plains Indians, as a direct result of the movement of Europeans into America (Hoebel 1954, pp. 126-27). Before the arrival of the Spanish, for instance, these Indians were largely river bound, and rarely traveled over the plains. Thus, their lives were probably similar to the Yuroks in many ways. The introduction of horses by the Spanish allowed the plains Indians to significantly expand their hunting territories. Many became nomadic tepee-dwelling buffalo hunters as a consequence of this and other factors set in motion by the arrival of Europeans. One of those factors was British and French settlement of the eastern part of the continent which began to displace many of the Eastern woodland Indians. As these Indians moved west, conflicts between tribes began to occur. Previously peaceful Indians were forced to become warriors in an effort to protect their homes, property, and hunting territories. On top of this, the fur trade created an additional reason for this conflict. British companies gave guns to certain tribes and encouraged them to drive off tribes which traded with the French. The French responded in kind. Tribes with relatively poor arms were driven westward, and more new tribes entered the plains. Tribes native to the plains were displaced as a consequence. One of these tribes was the Comanche.

In the sixteenth century the Comanche were part of the Shoshonean group of tribes occupying the headwaters of the Missouri and Yellowstone Rivers. They were not at all warlike (Hoebel 1954, p. 129). The Shoshonean lived in isolated family bands that were economically self-sufficient. By the eighteenth century, the Com-

[16]Hoebel explained that the Comanche provides only one example of many such primitive societies where law existed without a political state (1967, p. 188).

anche had split from the rest of the Shoshonean as they were pushed to the southern plains while the Shoshones were driven over the Rocky Mountains by tribes coming in from the east. This led to a tremendous change in the Comanche way of life, in part because the Comanche were one of the first Indian groups to acquire horses. Their numbers grew, and they became very militant as they strove to defend their newly claimed territory and wealth from other Indians and from the advancing Europeans. Military prowess became a source of considerable pride and prestige for the individual Comanche.

The Comanche population of the nineteenth century was distributed among a large number of loosely organized, autonomous bands. "The tribe was no more than a congerie of bands held together as a peace group by the bonds of common tongue and culture. There appears to have been no machinery for institutionalized political action on a tribal scale" (Hoebel 1967, p. 184). Beyond that, there was no clan organization and even kinship principles were weak. There was not even a formal organization for warfare. "War chiefs" were simply outstanding fighters with long records of accomplishments against enemies. Anyone was free to organize a war party *if* he could convince others to follow him, but such individuals had leadership roles only when others voluntarily followed, and only for the period of the raid (Hoebel 1954, p. 132). They had no authority in internal tribal matters such as law. There were also band headmen or "peace chiefs," but they too had no formal authority. They were typically well-respected wise men of the band who made certain routine decisions regarding the day to day operation of the band, such as when and where to move the camp. However, "Anyone who did not like his decision simply ignored it. If in time a good many people ignored his announcements and preferred to stay behind with some other man of influence, or perhaps to move in another direction with other men, the chief had lost his following. He was no longer chief, and another had quietly superseded him" (Hoebel 1954, p. 132). A respected peace chief might have relatively more influence in important decisions of the band as well, because he was typically a wise man with considerable experience—people respected his opinion. However, he had no special authority in such decisions, and all men of the band were free to have their say. In particular, he had no "law-speaking or law-enforcing authority" (Hoebel 1954, p. 133). Yet there was an implicit social contract establishing an enterprise of law.

In this apparently very unorganized society there was a very clear, widely held set of rules of conduct. These rules reflected individual rights to private property. Indeed, among the Comanche, "the individual is supreme in all things" (Hoebel 1954, p. 131). Some have

suggested that the plains Indians did not recognize private property because private land holdings by individuals were not recognized. However, property rights are developed only after the benefits of doing so outweigh the costs (Demsetz 1967), and the nomadic hunting and gathering lifestyle of the plains Indians, particularly after the introduction of horses, meant that individual's rights to specific tracks of land would be worth very little. Furthermore, prior to settlement of the region by white men, land was still very abundant within the range of most of the plains tribes, so private property rights to land were largely unnecessary (groups of individuals, such as bands and clans claimed certain hunting territories, of course). Other goods (e.g., horses, weapons, food, etc.) were privately held.

Reciprocally recognized ostracism in the society provided the incentives which backed the rules regarding individual rights, just as with the Yurok. In fact, among the Comanche, a male who suffered a legal wrong had to take action against the offender or face social disgrace as a coward, so a form of social ostracism played a significant role in inducing victims to bring suit. For example, adultery and the taking of another's wife were considered as direct attacks against the husband. The husband had to respond to such an attack in order to maintain his reputation. "Ridicule was the weapon used by society to cause a man to proceed after the cause for action had become public" (Hoebel 1967, p. 189). Thus, the aggrieved could either confront the accused directly and publicly by stating the offense and demanding what he considered appropriate compensation for damages, or send a representative to prosecute the claim, implying the matter was not worth his personal attention, or form a group to prosecute. However, if an individual lacked self confidence and/or had insufficient status to gather a prosecuting group, Comanche "legal procedure" allowed for two options. First, the plaintiff could ask a war chief—or "champion-at-law"—to act for him, and if this warrior agreed he would then be obliged to see the process through to the end (see further discussion below). Or second, an old woman could be sent to prosecute, ". . . hoping through presenting his cause pitiably to touch the compassion of the offender and so gain larger damages than he himself would dare demand" (Hoebel 1967, p. 191).

Once the charges were made under any of the procedures noted above, the next step was bargaining. Thus, the rules of adjudication delineated a system more closely aligned with modern mediation than with arbitration. Adjudication was even less clearly associated with persons than it was under the Yurok system of crossers. Nonetheless, it existed. Widely held rules of adjudication procedure were followed. For instance, there were virtually no cases in which evi-

dence or witnesses were presented. The accuser was expected to ascertain guilt before confronting the offender so no evidence was necessary. Of course, guilt could be denied, and it is not clear what the procedure was under such circumstances. The fact is that, "Denial of guilt by an accused . . . was so uncommon that there are not cases enough to draw sound conclusions" (Hoebel 1967, p. 192). Indeed, the defendant typically recognized that he would have to pay restitution when he committed an offense (Hoebel 1954, p. 134), since the Comanche rules of obligation were well known. He simply hoped to use the adjudication process to keep the payment light, while the plaintiff naturally hoped for a large payment. The plaintiff or his representatives typically would state his demands for damages with formal politeness in front of other members of the group, but there was no judge or arbitrator to determine the compensation to be paid. And unlike the Yurok's, there was no customary code of payments relating to various offenses. Therefore, cases could only be settled by mutual agreement reached through bargaining. Previous legal decisions might serve as a guide, of course, and in this respect Comanche law was case law (Hoebel 1954, p. 135).

As Hoebel (1967, p. 193) explained, "A reputation as a doughty slayer of enemies was a handy thing," since the solution reached in the bargaining process often reflected the relative skills of the two parties in warfare. In Comanche law, as in all law, the ultimate threat was violence. If the bargaining process broke down the parties had the right to use force. Nonetheless, the obvious implication drawn from this discussion that "might makes right" is clearly inappropriate in the Comanche case. As noted above, a plaintiff need not prosecute his claim by himself. Only those who were sure of their courage relative to the defendant actually did so. If an offended individual was not confident of his bargaining strength he could gather his relatives (particularly his brothers) and perhaps other friends together to aid him in seeking compensation. This was a much less formal arrangement than the Yurok's sweathouse cliques, but a person's ability to put together a group for support still was clearly a reciprocal arrangement—friends and relatives were willing to provide support because they might need the plaintiff's support in some future dispute. Among the Comanche, however, this privilege was apparently not granted to the offender (Hoebel 1967, p. 196). Thus, the legal procedures gave added protection to the aggrieved.

Of course, this could lead to such a large show of force that the defendant could be cowed into paying unduly high restitution. One clear advantage of giving an overbalancing of force to the prosecuting side rather than the defenders side, of course, is that such a system

provides a relatively strong deterrent to illegal behavior. Nonetheless, the over-balancing was not as great a problem as it might appear (Hoebel 1967, p. 196). One constraint on the size of a plaintiff's group, and therefore on the show of force, for instance, was that any friend or relative called upon to join the group received a share of the damages paid, and group participants' claims to shares of the compensation took precedent over the plaintiff's claim. Punishment was in the form of economic restitution, but if too large a group was gathered, the offended party might end up with virtually nothing as restitution for the harm done to him. Beyond that, the need for a large show of force meant that the plaintiff lost considerable prestige within the band. Thus, he had incentives to keep the support group in any dispute to a minimum.

The strongest reciprocal linkage among the Comanche was between brothers, and this was the primary source of support in a dispute. Some individuals had no brothers, perhaps because they had died in warfare, or perhaps because the individual had initially been captured from another tribe. The Comanche were constantly recouping their loses in warfare with captives taken as children. These children acquired full rights in Comanche society and many were adopted by Comanche families, thus establishing kinship linkages (Hoebel 1954, p. 137). Some captives were not adopted, however, and while they achieved free status, they never established the reciprocal kinship ties necessary in a dispute with a strong defendant. Nonetheless, even those injured parties who could not gather a group for support had recourse, as noted earlier—"men whose status was so low that on the personal and kinship basis they were, in effect, without status were still guaranteed protection under the Comanche law . . . There was the institution of *champion-at-law*" (Hoebel 1967, p. 198). The champion-at-law was not an arbitrator or even a mediator. He served to represent a damage claim in the bargaining process and, if need be, in physical combat.

There were no payments to convince a warrior to act as a champion. He did not receive a share of the compensation paid by the offender. Threat of ridicule seems to have provided sufficient incentives, however, since any warrior who refused to serve as a champion was held to have done so because he feared the defendant. No war chief was willing to admit fear. Hoebel felt that the "institutional capitalization of these factors is an amazing piece of social engineering" (1967, p. 200). But as Fuller (1981, pp. 243-44) noted, one advantage of customary law is that it "does not limit itself to requiring or prohibiting precisely defined acts, but may also designate roles and functions, and then, when the occasion arises, hold those discharging

these roles and functions to an accounting for their performances. . . . Stable interactional expectancies can arise with reference to roles and functions as well as to specific acts; a language of interaction will contain not only a vocabulary of deeds but also a basic grammar that will organize deeds into meaningful patterns."

Procedures developed by the Comanche were clearly designed to tip the scales of relative strength in such a way as to generate a bargained settlement—that is, to *avoid a violent confrontation*. The accused was not necessarily put at a tremendous disadvantage but there appears to have been sufficient force arrayed against him to convince him that he was likely to be better off bargaining in good faith. The ". . . Comanche legal system is therefore to be viewed as a not so badly balanced mechanism, which operated without the organization of government" (Hoebel 1967, p. 200). Given the primitive, warlike nature of nineteenth-century Comanche society, their unwritten social contract produced rules and legal institutions which represent a remarkably efficient, violence-free system of internal order.

Conclusions: Amendments Imposed on the Social Contract

As pressures from European settlement mounted, the way of life of American Indians changed dramatically. They were forced into military confrontations among themselves and with the advancing white settlers. The resulting changes set the stage for amendments to implicit social contracts within some tribes, even before the American government subjugated them, suppressed their law, and put them on reservations. For example, some tribes began to organize and centralize authority, primarily for warfare, and this centralization frequently had legal ramifications. Consider the Cheyenne, for instance. Before 1600 they were a food-gathering society residing around the lakes near the headwaters of the Mississippi River (Hoebel 1954, p. 144). They were pushed westward during the seventeenth century and sought sanctuary along the Missouri river in the Dakotas, where they built earth-lodge villages and adopted corn farming. During the eighteenth century they were pushed further and became a nomadic horse tribe of the plains. Unlike the Comanche, however, the Cheyenne clearly recognized the advantages of organization for warfare. They developed a formalized military system consisting of six "soldier societies," and the beginnings of a centralized tribal government in the form of tenured chiefs in a tribal council. Law took on a tribal, or communal nature as a consequence of the growing power of the soldier societies and tribal council. Hoebel suggested that there were

"social purposes" of Cheyenne law by the nineteenth century (1954, p. 130), but this simply means that the individual and his rights were no longer paramount in all things. Indeed, individuals were considered to be subordinate to supernatural forces and spirit beings, who in turn were represented by the central tribal council; this council presumably had ultimate authority over all other elements in Cheyenne society (Hoebel 1954, pp. 142-43).[17]

Cheyenne bands scattered during the winter months, but during the summer they joined together as a tribe. Here the tribal council of 44 chiefs ruled. These chiefs were appointed for specific tenure (unlike chiefs among the Comanche, for example), and each chief, upon completion of his tenure, appointed his own successor. If a chief died his successor was appointed by the other chiefs. These council members were the individual bands' peace chiefs as well, and one duty of the chief was to act as a mediator in disputes. Thus, justice was becoming centralized. The soldier societies also developed legal functions. Initially, this was limited to the maintenance of order on communal hunts and during tribal ceremonies, but "in the dynamic flow of crisis and cultural change in which the Cheyenne were caught in the nineteenth century the military societies were steadily expanding the area of their legal powers . . . the Cheyenne military societies *assumed jurisdiction* in a large variety of dispute and misbehavior situations . . ." (Hoebel 1954, p. 155, emphasis added). They made new law and frequently enforced their decisions with physical punishment and or banishment.[18]

The Cheyenne legal system prior to the advent of this outside pressure apparently was, like most North American Indians' legal systems, characterized by a social contract which established decentralized institutions and customary law, emphasizing individual rights and private property.[19] The social contract was amended, not by mutual recognition of all affected parties arising out of reciprocity, but by the use of organized power which came about as a consequence of external forces resulting from the advancing tide of European

[17]This is very similar to the development of kingship in Europe, where kings claimed that they had legal authority because they were descendants of gods, or later under Christianity, because they had divine rights to rule (Benson 1990; Berman 1983).

[18]The importance of military power in the early development of centralized legal authority is also similar to what occurred under European kings (see note 17 above), as is the increasing use of physical punishment instead of economic restitution (Benson 1990). With the rise of coercive authority, punishment becomes more arbitrary.

[19]This cannot be stated with certainty, but see footnote 15 above and the textual discussion to which it refers.

settlement.[20] The consequences of such amendments can be seen even today. The institutions of American Indian law that have developed on reservations since the federal government began to loosen its control over reservation Indians and their property rights in the early to mid 1970s are dominated by the centralized authority of tribal governments with their tribal councils, courts and tribal police. Beyond that, many of the property rights on reservations are increasingly designated as tribal or communal, under the control of the centralized tribal governments. This is exemplified by a large increase in tribal ownership of reservation lands (see Anderson and Lueck 1989), but tribal governments are also making decisions regarding the allocation of many other economic resources on reservations for activities like large development projects. Cornell (1987, pp. 63-64) points out that many tribal councils cite a commitment to preserving Indian culture and traditions as a primary justification for not releasing control over tribal resources to individual Indians, and for not decentralizing reservation institutions. If today's Indian political leaders mean maintaining the traditions and culture inherited from the very brief period of Indian history during which external forces led to centralization and increasing emphasis on communal rights, then for the most part, they are really speaking of a culture which was already tremendously influenced by the coming of the white man. If Indian leaders truly wish to preserve Indian tradition as it was when Europeans began to influence Indian society, however, then they should be *reestablishing* private property rights and decentralizing the legal system.

[20]One weakness in a customary social contract established under a unanimity rule (see note 9 above) is an apparent inability to prevent amendments imposed by powerful minorities when they become organized enough to exert their will. Of course, it is not clear that any constitution can prevent such actions once groups organize sufficiently to become powerful. Thus, an important feature of a social contract, assuming the normative goal of preserving individual liberties, should be the establishment of institutions and constraints which limit the incentives to organize and centralize power. A customary social contract can be quite effective in that regard, in the absence of external pressures such as military invasions by other organized groups (Benson 1990).

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