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THE EVOLUTION OF VALUES AND INSTITUTIONS IN A FREE SOCIETY: THE UNDER-PINNINGS OF A MARKET ECONOMY

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ABSTRACT: THE EVOLUTION OF VALUES AND INSTITUTIONS IN A FREE SOCIETY: THE UNDER-PINNINGS OF A MARKET ECONOMY by Bruce L. Benson

It is widely believed that a monopoly in coercive power by a centralized authority is a necessary prerequisite to the establishment the fundamental values that support an ordered society. In the case of a market economy, for instance, presumably individuals will not respect property, fulfill obligations, or recognize legal arrangements, such as freedom of contract and the avoidance or redemption of torts, unless a coercive authority forces them to do so. The primary purpose of this paper is to contradict this belief by explaining how and why self-interested individuals will voluntarily adopt the values, and cooperate in the development of the basic institutional framework, which underlie and facilitate mutually beneficial interactions. The fact is that such values and institutions can evolve naturally, "as if guided by an invisible hand." The voluntary evolution of values and institutions is not universally observable, however, because incentives to organize for the purpose of taking from involuntary victims also exist. Therefore, the characteristics of the authoritarian transfer process and its legal ramifications are also explored. Finally, because the evolution of values and institutions in most societies is shaped by the ebbs and flows of the natural conflict between voluntary and authoritarian institutions and norms within and between groups, this conflict is examined in order to emphasize that the expanding scope of centralized authority does not reflect its superiority in preserving and protecting voluntary interactions.

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THE EVOLUTION OF VALUES AND INSTITUTIONS IN A FREE SOCIETY: THE UNDER-PINNINGS OF A MARKET ECONOMY

I. Introduction

An effectively functioning free market order requires that members of the society adopt certain fundamental values, such as a respect for private property, fulfillment of obligations (promises), and acceptance of rules governing, among other things, freedom of contract and the avoidance or redemption of torts. Many modern societies, including those characterized by predominantly free market economic orders, appear to have basic rules and obligations defined and imposed by the centralized 'authoritarian' institutions that are commonly associated with nation-states. This has lead to a widely held view that a monopoly in coercive power by a centralized authority is a necessary prerequisite to the establishment the fundamental values that support an ordered society. In the case of a market economy, for instance, presumably individuals will not respect property, fulfill obligations, or recognize legal arrangements unless a coercive authority forces them to do so. A substantial amount of evidence contracts this assumption, however. For example, as Fuller [1981, 174] notes, "it is clear that property and contract were ... functioning social institutions before state-made laws existed or were even conceived of."[1] Indeed, Rothbard [1970, 3] even contends that while the principles of a free society do imply such things as the existence and recognition of private property rights, "no State or similar agency contrary to the market is needed to define or allocate

property rights. This can and will be done by the use of reason and through market processes themselves; any other allocation or definition would be completely arbitrary and contrary to the principles of the free society." Nonetheless, while Rothbard, Fuller and a few other scholars [e.g., Friedman 1973; Barnett 1985] recognize the logical contradiction between a voluntary, decentralized free market and a centralized, coercive authority for law, an observation made by Bruno Leoni [1961, 90] over 30 years ago still generally applies: the fact is that even those "who have brilliantly defended the free market against the interference of the authorities have usually neglected the parallel consideration that no free market is really compatible with a law-making process centralized by authorities."

The primary purpose of the following presentation is to offer an explanation of how and why self-interested individuals will voluntarily adopt the values and develop the basic institutional framework that underlie and facilitate a free market, as well as other mutually beneficial interactions, in what de Jasay [1992] refers to as a "civil society." The fact is that the "rules of the game" can evolve naturally, just as Adam Smith described the evolution of markets: "as if guided by an invisible hand." This evolutionary process is explained in Sections II and III below, where Section II focuses on the processes internal to one group and Section III examines the various competitive and cooperative relationships that can arise between groups. It is not contended that the voluntary evolution of values and institutions described

in these sections must arise, however. Rather, the point is that they can and do arise without a coercive centralized authority. They are not universally observable because conflicting incentives also exist which are more effectively served by authoritarian institutions and laws.

Self-interest objectives can be fulfilled in more than one way, of course. Voluntary interaction and the resulting free market order expands individual wealth through mutually beneficial exchange. However, one individual's wealth can also be increased at the expense of another person through involuntary transfers. Involuntary transfers require a concentration of coercive power since the loser will obviously resist if the winner is not either stronger or backed by a stronger organization. Thus, incentives to organize for the purpose of taking from involuntary victims exist, just as incentives to organize to facilitate voluntary interaction exist. As de Jasay [1992] explains, certain ends cannot be achieved by one individual alone, so individuals either have to persuade others in a group to aim at the same ends, or have those ends imposed on others through force. Indeed, the same group may simultaneously evolve to facilitate voluntary interactions for its members and to take wealth from individuals outside the group (and/or to protect members' wealth from external powers). The norms and institutions which best facilitate voluntary interaction are different from the norms and institutions which best facilitate involuntary transfers, however. Therefore, Section IV of the following presentation explores characteristics of the

authoritarian transfer process: what de Jasay refers to as the world of "collective choice" or "politics".

A natural conflict between voluntary and authoritarian institutions and norms tends to develope within and between groups. The evolution of values and institutions in most societies is shaped by the ebbs and flows of this conflict. Therefore, Section V concludes the presentation by focusing on this conflict in order to emphasize that the expanding scope of centralized authority does not reflect its superiority in preserving and protecting voluntary interactions. Indeed, as Rothbard [1970] and Leoni [1961] suggest, an expanding authoritarian process is likely to undermine individual freedom and a free market order.

II. The Evolution of the Values and Institutions Which Facilitate Voluntary Interaction Within a Group

If every contact between people involves a discrete, simultaneous one-shot game, then mutually beneficial interaction, including cooperation in the form of collective recognition and compliance with a set of values, is unlikely in the absence of some threatened sanction by a coercive power. An individual, person A, that bears personal costs from adopting some type of conduct that constrains him in some way (e.g., respecting someone's property rights and therefore not using that property without permission, perhaps involving a payment for the use) will get nothing in return if the other individual, B, does not adopt a similar set of values and cooperative behavior (e.g., if B does not recognize the A's property rights). Uncertainty about the behavior of B in the

resulting one-shot prisoner's dilemma type situation induces non-cooperative behavior by A, and visa versa. This does not characterize many kinds of social interactions, however [Tullock 1985]. Individual's choices regarding interaction with others are part of continuous process, with each unique decision representing only one link in a long-time chain of social action. For example, most businessmen expect to be active for a long time, and perhaps to be involved in interactions with other businessmen over and over, and the same is true of members of families, primitive kinship groups, stable neighborhoods, religious organizations, and many groups who contract for joint production.

It might be argued that a more appropriate characterization of many types of interaction would be as a multi-contact or repeated games wherein the same individuals interact (e.g., trade) with one another many times. Thus, for instance, Fuller [1964, 23-24] suggests three conditions which make mutually recognized norms (values, duties, obligations) clear and acceptable to those affected. (1) the relationship of reciprocity from which the norms of behavior arise "must result from a voluntary agreement between the parties immediately affected; they themselves 'create' the duty." In effect, each individual must have incentives to voluntarily place constraints on his own behavior. (2) The reciprocal acceptance of the value system must be equitable in the sense that both parties must expect to gain: the exchange cannot be one-sided so that one person gains and another loses. Voluntary agreement to cooperate requires that all parties expect to benefit

from the cooperation, once again emphasizing the paramount role of self-interest motives. (3) The parties must expect to interact on a fairly regular basis because the relationship "must in theory and in practice be reversible." That is, given reciprocal gains in a repeated game situation, recognition of common norms becomes likely as each individual recognizes that the long term benefits of remaining on good terms with the other party by doing so are likely to be greater than the immediate benefits of not cooperating (i.e., taking another person's property, committing fraud). Indeed, in a repeated game setting with a finite uncertain horizon, cooperation becomes possible (a la Luce and Raiffa [1957] and Axelrod [1984]), although it clearly is not certain.[2]

Even a repeated game situation involves weaker incentives to recognize a common set of values than those which exist in many situations, however [Tullock 1985]. In particular, each individual chooses to enter into several different games with different players. Thus, refusal to recognize widely held norms within one game can affect the person's reputation and limit his ability to enter into other games to the extent that reputation travels from one game to another. When there are players who value ongoing relationships with other reliable players more than the potential benefits associated with refusing to follow accepted values in any one single game, then the potential for cooperation in the form of recognition of standard values is even greater than in simple repeated games [Schmidtz 1991, 102]. Tullock [1985, 1073] refers to this combination of multiple games over time with reputation

effects using Adam Smith's phrase: "the discipline of repeated dealings." The positive incentives to cooperate that arise from repeated games are effectively reinforced by a threat of harm when reputation matters, because anyone who chooses a non-cooperative strategy in one game will have difficulty finding a partner for any future game [Tullock 1985, 1075-1076]. Therefore, in order to maintain a reputation for fair dealings or "high moral standards", each player's dominant strategy is to behave as expected throughout each game, whether it is a repeated or a one shot game.

Recognition of private property rights and the rights of individuals are likely to constitute the most important norms in a society built on reciprocity and reputation [Benson 1989b; 1990]. After all, voluntarily recognition of commonly accepted values (and participation in the institutions that develope to support those values, as noted below) is likely to arise only when substantial benefits from doing so can be internalized by each individual. That is, individuals must expect to gain as much or more than the costs they bear from voluntary constraining their behavior in light of common norms. Recognition by others of a person's private property and individual rights is a very attractive benefit. Indeed, private property is a key characteristic of all societies wherein reciprocity and reputation is the primary impetus for recognition of behavioral norms or values. There does not even appear to be any viable reason for voluntary cooperation that does not involve a relative increase in the degree of privatization of rights to property for the group. Individuals with no existing

claims to property might conceivably cooperate in order to take property out a commons and restrict others access to it, for example, but the result, if the group is successful, is that access and use rights to the property and claims to the benefits from such use become internalized by the group (i.e., privatized relative to what they were). More fundamentally, however, individuals have incentives to enter into cooperative arrangements in order to reduce their costs of defending possession claims, and to enhance the property's value by increasing the potential for mutually beneficial interaction, including exchange; that is, to support "distributive rights" [de Jasay 1992].

When a group of frequently interacting people is sufficiently small and stable so that reputations are well known and trust relationships are strong, there is little need for a formal institutional arrangement, perhaps beyond the institution of the immediate family. The self-interest impetus for new institution formation can arise when the potential for beneficial interaction expands to a larger and/or less stable group than one in which everyone knows everyone else's reputations well enough to establish individual trust relationships. As the group expands or becomes more dynamic (e.g., perhaps because of increasing potential for specialization and division of labor), individuals will want to interact with increasingly large numbers of other individuals, but because of uncertainty about someone's reputation, they may be reluctant to initiate their first interaction without some sort of assurance that the person shares the same set of values (e.g., that

the other party is not actually looking for short term gains rather than being concerned with longer term consequences associated with a loss of reputation). Each party's commitments to accept commonly expected norms of behavior must be credible.

One way to help insure credible commitments by another party is to maintain a position of personal strength, of course, in order to threaten violent retaliation if the other party does not behave as expected, given the community's norms. However, this can be quite costly. Thus, individuals with mutual interests in long term interaction (e.g., extended kinship ties, religious organizations, business dealings) have strong incentives to form "contractual" groups or associations for mutual support. Membership provides evidence that the individual is know by other persons in the group and considered to be trustworthy. Interacting with members of the extended group reduces the probability that an individual will have to defend his property, relative to what it would be in the absence of such an organization, and reduces the likelihood that violence will have to be employed to resolve a dispute following some form of interaction. Mutual support groups are, therefore, particularly attractive if group members are obligated to act as or provide access to third parties to arbitrate or mediate a dispute that might arise between members (e.g., because of a misunderstanding or because unforseen circumstances arise), assess judgments to make sure that they are just and consistent with the group's values (customs, practices), and if necessary, help enforce the adjudicated rulings [Benson 1990].[3]

When a system of values is backed by institutions for adjudication of disputes and enforcement of obligations, the result is a legal system [Fuller 1964; Benson 1990]. If a legal system develops from the bottom up through voluntary arrangements, as suggested here, it can be referred to as "customary" law [Fuller 1964]. Traditions and practices become legal rules of obligation supported by an institutional structure; indeed, even today, as Hayek [1973, 96-97] explains, 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." Such a legal system is based on individual decisions reflecting individual self-interests but it is ultimately achieved through collective action, because each member of a mutual support group finds it beneficial to agree in advance to obey certain rules (even though each probably recognizes that these rules may occasionally work to his disadvantage) and to contribute to the costs of enforcement, in anticipation that the long term benefits will exceed the costs.[4] In essence, the individuals "exchange inputs in the securing of a commonly shared output," to use Buchanan and Tullock's words [1962, 19] - the output is the order

arising under a commonly accepted set of values which develops into a customary system of law. But as a consequence of this exchange, total resources devoted to the production of the defense of property should fall relative to what individuals acting on their own would have to invest, and the property itself will become more valuable as the potential for interaction expands. As Weede [1992] suggests, then, such law becomes "social capital."

It should be emphasized that there is no distinction between criminal and tort law in a customary legal system. However, the fact that a legal system does not define "crimes" does not mean that a large proportion of the offenses which appear in a modern criminal code are not illegal (e.g., see Hoebel [1954; 1967], Barton [1967], Benson [1986; 1989a; 1990; 1991b; 1992b], Popisil [1971], Goldsmidt [1951], Peden [1971], Friedman [1979], and Auerbach [1983]). Indeed, as noted above, the primary concern of such a voluntary system is protection of private property. Thus, offenses against individuals tend to minutely provided for in customary legal systems, including provisions for appropriate restitution or other forms of punishment for homicide, and various kinds of assaults. Similarly, theft is generally extensively treated. All offenses against persons and property are torts (offenses against individuals), however, rather than crimes (offenses against "society" or the "state"). They are actions to be avoided, both in order to maintain reputations and reciprocal arrangements, and to avoid "punishment" in the form of payment of restitution or redemption.

If a dispute between group members arise for some reason (e.g., because someone takes another persons property or because the terms of an exchange were misunderstood, etc.), a mutually acceptable arbitrator or mediator might be chosen from a group's membership (as in Benson [1986; 1989a; 1989b; 1990; 1991a; 1991b; 1992a; 1992b], Berman and Dasser [1990], Popisil [1971], Goldsmidt [1951], Friedman [1979], Anderson and Hill [1979], Trakman [1983], Mitchell [1904], and Auerbach [1983]). Since the arbitrator/mediator must be acceptable to both parties in the dispute, "fairness" becomes embodied in the adjudication process. As Buchanan emphasizes [1975, 68], "Players would not consciously accept the appointment of a referee who was known to be unfair in his enforcement of the rules of the game or at least they would not agree to the same referee in such cases. 'Fairness' or 'justice' may emerge, therefore, in a limited sense from the self-interest of persons who enter into an enforcement contract." Indeed, if the group is large enough so that disputes are not uncommon, certain highly reputable members of the community may be called on to adjudicate disputes so frequently that they can have some formal designation (e.g., elderman, peace chief, Law Merchant; see Benson [1989a; 1989b; 1990; 1992b], Trakman [1983], Mitchell [1904], and Popisil [1971]). Alternatively, an approved pool of arbitration or mediation specialists might develope (see Hoebel [1954], Barton [1967], Benson [1986; 1989a; 1990; 1992a], Berman and Dasser [1990], Peden [1971], and Anderson and Hill [1979]).

The arbitrator or mediator need have no vested authority to

impose a solution on disputants, however. Under such circumstances, the ruling must be acceptable to the group to which both parties in the dispute belong. An arbitrator or mediator's only real power in such a system is that of persuasion.[5] Given that the adjudicator has convinced the individuals in the affected group that a judgement should be accepted, the offender must pay the arbitrated restitution in order to maintain his position within the group. Thus, the adjudicated ruling is backed a threat of ostracism by the members of the entire community (e.g., see Hoebel [1954; 1967], Barton [1967], Benson [1986; 1989a; 1989b; 1990; 1991a; 1991b; 1992a; 1992b], Berman and Dasser [1990], Popisil [1971], Goldsmidt [1951], Trakman [1983], and Mitchell [1904]). That is, refusal to behave according the accepted rules of conduct, including acceptance and payment of fair judgments, can then be "punished" by boycott (i.e., exclusion from some or all future interaction with other members of the group) [Tullock 1985, 1077-1078]. Fear of this boycott sanction reinforces the self-interest motives associated with maintenance of reputation and reciprocal arrangements. In other words, because each individual has made an investment in establishing himself as part of the community (e.g., establishing a reputation), that investment can be "held hostage" by the community, a la Williamson [1983], in order to insure that the commitment to cooperate is credible [Tullock 1985, 1077]. Thus, arbitration decisions under customary law can be enforced without the backing of a centralized coercive authority.

Demsetz [1967] explains 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 and of establishing a new rule, to outweigh the cost of resolving the dispute and enforcing the resulting judgement, or they would not take it to the adjudication system. The 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, 99]. An adjudicated decision becomes a universally applied rule of customary law only if it is seen as a desirable rule by all affected parties, however [Benson 1988; 1990; 1991a; 1992a]. It is not coercively imposed on a group by some authority backing the court. Thus, good rules which correspond with the communities' dominant norms facilitate interaction and tend to be selected over time, while decisions that do not turn out to establish useful rules are ignored.[6] For new rules to be accepted by the members of an affected group, they generally must be consistent with individual's existing expectations; that is, they must build upon or extend existing values. Therefore, fundamental values do not change. They are simply extended to cover new situations.[7]

Dispute resolution is not the only source of evolving rules. 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 avoiding 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. A new contract form may develop, for instance, that improves on existing forms by reducing the potential for uncertainty. Others see the benefits of the new contract form and adopt it as well, so it becomes a standard practice in such situations. Fuller [1981, 224-225] explains that "the term contract law, therefore, refers primarily not to the law of or about contracts, but to the 'law' a contract itself brings into existence ... If we permit ourselves to think of contract law as the 'law' that parties themselves bring into existence by their agreement, the transition from customary law to contract law becomes a very easy one indeed."

Customary law and contract law are typically differentiated much more sharply than is suggested here. However, Fuller [1981, 176] argues that a sharp distinction is inappropriate:

> In many situations it may be difficult to distinguish between contractual obligations and those imposed by customary law. This is particularly true in the area of commercial transactions where repetitive dealings tend to create standardized expectations. Thus, if problems arise which are left without verbal solution in the parties' contract these will commonly be resolved by asking what "standard practice" is with respect to the issues in question. In such a case it is difficult to know whether to say that by entering a particular field of practice the parties became subject to a governing body of customary law or to say that they have by tacit agreement incorporated standard practice into the terms of the contract.
>
> The meaning of a contract may not only be determined by the area of practice within which the contract falls but by the interaction of the parties themselves after entering the agreement.... The meaning thus attributed to the contract is, obviously, generated through

> processes that are essentially those that give rise to customary law.... [In fact,] a contract [may be implied] entirely on the conduct of the parties; though no verbal exchange has taken place the parties may have conducted themselves toward one another in such a way that one can say that a tacit exchange of promises has taken place. Here the analogy between contract and customary law approaches identity.

The expanding use of contract and development of contractual arrangements is, in fact, a natural event in the evolution of customary law. As customary legal arrangements evolve and are improved upon, they tend to become more formal, and therefore, more contractual. In addition, as inter-group interaction develops and expands so that the trust relationships that characterize intra-group interaction do not apply, conflicts are avoided by explicitly stating the terms of the interaction a priori; that is, by contracting. A carefully constructed and enforceable contract can substitute for kinship or some other localized source of trust.

III. Inter-Group Interaction: Competition, Emulation, and Cooperation

No single group is likely to develope its norms and institutions in complete isolation from other groups. Indeed, other groups generally exist in close proximity to any particular group (note that the basis for such groups can be geographic proximity, but it need not be; other possibilities include kinship proximity, religious proximity, or functional proximity), and these other groups' norms and institutions are likely to be developing in a parallel fashion. Thus, inter-group interactions become probable, including competition, emulation, and cooperation.

Since voluntary associations include both the ability to

voluntarily join a group, given the individual is acceptable to the group's existing membership, and the ability to voluntarily withdraw, inter-group movements is a distinct possibility (e.g., see Goldsmidt [1951], Popisil [1971], Anderson and Hill [1979], Peden [1977], Friedman [1979], Umbeck [1981], Benson [1989a, 1990, 1991a, 1991b]). Thus, if norms and/or institutions develop in one group which differ from the norms and/or institutions in a parallel group, there will be a tendency for individuals to "migrate" to the group which best facilitates voluntary interaction. The coexistence of diverse parallel jurisdictions and legal systems therefore creates incentives to compete to attract or hold membership. But as a result, existing members of all the various legal systems have incentives adapted to their own uses many of the ideas and techniques of other groups which appear to be beneficial. Through imitation of desirable institutions and behavioral norms developed elsewhere, groups can avoid the potential for lost membership (and therefore, reduced beneficial interaction) to other groups; and for that reason, too, there is a tendency for the norms and institutions of each group to achieve the same degree of cohesion and sophistication as is developing in parallel systems. Competition and emulation need not eliminate all differences, but standardization of many norms and institutions across similarly functioning groups is likely.

The formation of several parallel "localized" mutual support groups can take on even more functions. For example, some member of one group may wish to interact with some member of another group

in a cooperative fashion (e.g., trade), but the two individuals may not expect to interact frequently so the dominate strategy is one of non-cooperation. After all, repeated game and reputation affects are localized within a group, and their is no potential for a boycott sanction to be applied against someone who is not in the group. It may be that there is considerable potential for mutually-advantageous interaction between the two groups as a whole, however, even though each individual within each group may not anticipate frequent interactions with members of the other group. That is, the groups may be in a repeated game situation with one another, with fairly large potential benefits from cooperation that can be internalized, even though this is not necessarily true of any of the specific individuals in the two groups (at least, before inter-group relationships develop). If members of each group recognize the benefits from inter-group interaction, then inter-group legal cooperation may evolve.

Inter-group cooperation is hindered by a significant assurance problem, however. Each individual must feel confident that someone from the other group will not be able to take advantage of him and then escape to the protection of that other group. Thus, some sort of inter-group insurance arrangement becomes desirable, as well as establishment of an apparatus for inter-group dispute resolution. For instance, in order to develop a group's reputation, the membership might bond all members in the sense that they will guarantee payment if a member is judged to be in the wrong in a dispute with someone from the other group. The mutual support

group becomes a surety group as well (e.g., see Rothbard [1973], Peden [1977], Friedman [1979], Benson [1990, 1992b]). Membership in a group then serves a signal of reputable behavior to members of another group, and lack of membership serves as a signal that the an individual may not be reputable. Furthermore, if a member of a group cannot or will not pay off a debt to someone from the other group, established by an acceptable arbitrator, then the debtor's group as a whole will, in order to maintain its reputation. And as a consequence, the individual for whom the group has had to pay will owe his own group members rather than someone from a separate group. In this way the boycott threat comes into play once again. A group is not going to continue bonding an individual who generates debts to the groups membership but does not pay them off, after all.

A judgement involving an inter-group dispute will have to be considered to be a fair one by members of both groups, of course. Thus, a dispute resolution apparatus is essential for inter-group cooperation to develope. An equal number of individuals from each group might serve as an arbitration board for disputes between individuals from the two groups (e.g., see Goldsmidt [1951], Friedman [1979], and Benson [1990; 1992b]), for example, or a mutually acceptable third party (i.e., an arbitrator or mediator with a reputation for good judgement) might be chosen (as in Barton [1967], Hoebel [1954], Peden [1977], Popisil [1971], and Benson [1986; 1988; 1990]). This provides another reason for the tendency toward standardization of customary law across parallel groups with

similar functions, of course.

A group whose members insist on strictly imposing their own morality and penalties on outsiders would probably be unable to initiate inter-group trade or other forms of beneficial interaction. And if they were able to begin such activity, they would face continual clashes, followed by boycott sanctions by other groups whose members refuse to travel to or trade with them. Indeed, if the benefits of inter-group interaction are substantial, those who hold the norms the group wishes to impose, but relatively weakly, will leave first to join other groups, and others will follow as property values and trade generated incomes decline. Thus, if a group wishes to simultaneously facilitate inter-group interaction and impose laws that differ substantially from the norm in other groups, its members have strong incentives to inform outsiders of the differences in order to avoid conflict and minimize the difficulty of maintaining non-standard laws. Part of the reciprocal agreements with other groups may be the explicit recognition of differences in laws and procedures for treating conflicts, for example. No group can effectively enforce its rules on outsiders without the support of outsiders. Rules for members of a group may be relatively restrictive, but the rules that apply to outsiders as a result of interaction will have to be moderated if the group is to survive in a free and competitive environment. This in turn implies that as inter-group interactions expand, a hierarchical jurisdictional arrangement may become necessary. For example, each localized group may have jurisdiction over disputes

between its members, while disputes between members of a confederation of different groups that interact frequently are settled by some higher confederation level court, and disputes between members of even more dispersed groups from different confederations, such that individuals from the localized groups do not interact frequently but individuals from the two confederations do, may go to an inter-confederation court (e.g., see Popisil [1971] and Benson [1990; 1992b]). Note that these courts are not "higher" courts in the sense that one has some power or authority over others that allows them to overturn lower court decisions upon appeal. Rather, this is a jurisdictional hierarchy that defines the role of each court and allows for increasingly more distant interactions (as in Popisil [1971] and Benson [1992b]). This allows for differences between the customary law that might be applied within different groups and between groups [Popisil 1971]. Llewellyn and Hoebel [1961, 53] point out that the traditional (western) bias of trying to delineate some all-embracing legal system for a society as a whole can be very misleading: "What is loosely lumped as a 'custom' [from an all-encompassing perspective] can become very suddenly a meaningful thing - one with edges - if the practices in question can be related to a particular grouping." They emphasized that an understanding of customary law requires that groups provide the points of reference rather than some "society" as a whole [1961, 28]: "there may then be found utterly and radically different bodies of "law" prevailing among these small units, and generalization concerning what happens in 'the'

family or in 'this type of association' made on the society's level will have its dangers. The total picture of law-stuff in any society includes along with the Great Law-stuff of the Whole, the sublaw-stuff or bylaw-stuff of the lesser working units."

In reality, some individuals may actually be members of more than one group. For example, a medieval merchant generally was simultaneously a member of the merchant community, a religious organization, and perhaps an urbanized community or neighborhood association of some kind. He had obligations to other members of each group and they had obligations to him. If he had a dispute with someone else who was also a member of some of the same groups they might chose among the groups' alternative dispute resolution processes. This multiple membership possibility increased the potential for inter-group cooperation. However, it also facilitates legal development through competition and emulation. As Berman [1983, 10] explains,

> It is this plurality of jurisdictions and legal systems that makes the supremacy of law both necessary and possible.... The very complexity of a common legal order containing diverse legal systems contributes to legal sophistication. Which court has jurisdiction? Which law is applicable? How are legal differences to be reconciled? Behind the technical questions lay important political and economic considerations.... The pluralism of ... law, ... has been, or once was, a source of development, or growth -- legal growth as well as political and economic growth. It also has been, or once was, a source of freedom.

Berman includes the "or once was" phrase in recognition of the fact that diverse legal systems are increasingly being subjugated and centralized under the authority of coercive state governments.

IV. Authoritarian Law: Cooperation in Order to Facilitate

Involuntary Transfers

While individuals have strong incentives to cooperate and avoid conflict with others when they are likely to interact frequently, they have very different incentives when "the discipline of repeated dealings" does not apply. Indeed, when wealth enhancing voluntary interaction is unlikely (or when the gains are not likely to be very large), individuals may have stronger incentives to take wealth away from the others rather than attempt some reciprocal arrangement for mutual satisfaction.[8] The taking of wealth will be resisted, of course, if the potential victim feels that he is strong enough to resist, so violent confrontation is likely, particularly if the potential loser is a member of a support group of some kind. After all, one form of mutually beneficial interaction within the groups described above is in cooperative defense against outsiders, since an important internal function of these groups is the protection of private property, and such a taking by an external aggressor is a theft. In order to reduce the cost of such violence, those seeking transfers must amass sufficient strength to coerce compliance. One way to reduce the potential for resistance is to employe a "professional army." However, if that individual can persuade others of a like mind to cooperate and share the cost in a taking effort in exchange for a share of the transferred wealth, then that individual lowers his own costs. Thus, there are incentives to develope cooperative mechanisms for taking wealth from some and transferring it to others. Of course, when some individuals form

groups for the purpose of taking from others, then others have incentives tend to expand their groups which share the cost of protection. Indeed, many of the historical examples of localized support groups whose internal legal systems can be characterized by the customary legal system described above, were simultaneously involved in warfare with other groups (e.g., see Popisil [1971], Benson [1988; 1989a; 1990; 1991a; 1992b], Hoebel [1954; 1967], and Peden [1971]). In Europe, for example, Kingship initially developed within tribal groups for purposes of warfare [Benson 1990; 1992b]. A centralized hierarchical structure of top-down command has proven to be the most effective institutional arrangement for the purposes of warfare.[9] During the early development of this institution, kings had no law making or law enforcing authority.

Military conquest means that different groups are forced to become sub-groups within a collective kingdom (in follow presentation, "kingship" will be used to describe all such arrangements, and the area over which a military leader exerts authority will be called a "kingdom"). As more and more sub-groups come under the control of a single centralized military authority, the potential for taking from one sub-group and transfer to another <u>within</u> that Kingdom arises. The evolution of king's authoritarian role in internal law making and enforcement (i.e., legislation, adjudication, and law enforcement affecting relationships within the Kingdom as apposed to external relations with other kingdoms), is completely analogous to the development of the external role of

Kingship [Benson 1990; 1992b]. That is, a legal system emanating from a centralized hierarchical authority, referred to here as authoritarian law, has as its primary functions the development and use of rules and institutions (or "redistributive rights" [de Jasay 1992]) for taking wealth from some and transferring it to others, and for discrimination among sub-groups on the basis of their relative power in order to determine who gains and who loses [Benson 1990]. Indeed, in Europe, authoritarian legal functions were taken on by the kings' military hierarchy initially, until the increasing demands for authoritarian law led to its own specialized hierarchy. As with virtually all individual action of any significant consequence, the actors in an authoritarian law process are motivated by their own self interests. This includes those who demand transfers and those who grant them (e.g., kings). Individuals in positions of authority attempt to enhance their own well-being with transfers to themselves and with transfers to others who cooperate in the takings process and/or are powerful enough to affect the authority's well-being.

In international competition between national governments, the basis for determining wealth transfers is clearly a function of military might -- the ability to use force. Military power can be an important discriminatory criterion in determining internal wealth transfers as well. The control of military forces by earls and barons was one of the most important considerations in early development of authoritarian law under the kingship form of government in England, for example [Benson 1990; 1992b]. However,

it is not the only source of power in the internal struggle for wealth transfers. In many nation-states, rule by military authorities, i.e. kingship, has been replaced by other sources of authoritarian law, for example, such as elected representative bodies. Nonetheless, authoritarian law, whether imposed by kings or an elected representative assembly, involves the taking of wealth from relatively weak sub-groups in order to transfer it to relatively powerful sub-groups, or "interest groups" in reflection of the self-interest motives of the decision-making authorities [Benson 1990; 1992b].[10] As Hayek [1973, 3] notes,

> it would indeed seem that the particular form of representative government which now prevails in the Western world, and which many feel they must defend because they mistakenly regard it as the only possible form of democracy, has an inherent tendency to lead away from the ideals it was intended to serve ...
>
> ... Sooner or later people will discover that not only are they at the mercy of new vested interests, but that the political machinery of para-government, which has grown up as a necessary consequence of the provision state, is producing an impasse by preventing society from making those adaptations which in a changing world are required to maintain an existing [order] ... let alone to achieve [an improving] one.

However, in some systems, a sub-group's political power may be a function of such other factors as its economic power, the number of its members (perhaps because of the physical force that it can bring to bear, but also because of the votes it can muster in a representative democracy), and its ability to effectively organize and voice its demands in the political arena. The reason that these factors are important is that internal competition for wealth transfers often involves a cooperative exchange process, in order to impose the combined will of the strong on the weak, or to

combine relatively weak sub-groups in opposition to those which are stronger.[11] Authoritarian decision-makers discriminate between competing interest groups on the basis of what they can give to the decision-maker. The self-interest motives of government decision-makers must be recognized in the context of an authoritarian transfer process. Kings were clearly not simply impartial transfer mechanisms, for example. They demanded (took) transfers for their own benefit when they felt they had sufficient power to do so, and even when they entered an exchange, thereby transferring to others, the support gained in the exchange generally enhanced their own wealth and power relative to what it would have been in the absence of such an exchange. In this light, the effort by those in positions of relatively strong authority to reduce the power of other interest groups (and visa versa) becomes clear. Those other interest groups may threaten sources of wealth for decision-makers.

Now consider the internal taking/transfer mechanisms. They all involve property rights alterations to benefit some at the expense of others through authoritarian changes in law. Taxation, for example, can be viewed as the taking from a resource owner of part of the right to the income derived from productive uses of property (including labor services).[12] Another fairly obvious transfer occurs when property of some kind is confiscated or someone is forced to sell property for less than its value in a voluntary exchange, and then the property is given to or used for the benefit of others.[13] Other rights modifications simply place limitation on a person's use of his property. For instance, a

monopoly franchise simultaneously grants an exclusive right to produce to one individual or sub-group and restricts or attenuates rights to the use of other individuals' resources who might wish to enter that market. All of these transfer activities are completely analogous to theft [Tullock 1967].

Once sufficient organized power is exerted to cause decision-makers to make an authoritarian change in a rights assignment, those who would be harmed by the change must either organize and apply counter pressure, or resign themselves to being worse off. The same "prisoners dilemma" arises in this internal political struggle for property rights as arises in the external struggle between governments.[14] Thus, there is a potential for spiralling competition between interest groups much like the spiralling arms build up that typically characterizes intergovernmental competition.[15] As the relative strength of interest groups change, the magnitude and direction of transfers should change.

An important implication of an authoritarian modification in property rights, there will be a "train of readjustments through time" [Furubotn 1976, 108]. Some of these changes are predictable. For instance, as noted above, a rights modification tends to increase the incentives of unorganized losing interests to organize. Of course, if such a group successfully organizes, it does not follow that the original rights modification will be reversed. After all, that would harm the previously organized and already powerful group. Some modification of the earlier change is possible, but a more probable response is that the authority

will grant some alternative favorable treatment to compensate the new group for its earlier losses. This change is likely to harm an as yet unorganized group. That group then has relatively strong incentives to organize and seek rights modifications. Thus, demands for authoritarian rights modifications grow over time. Often the changes in authoritarian laws and institutions are slow, or marginal, as with customary law, but at times they can be large as a "wholesale backlash that has nothing marginal about it" [de Jasay 1992]. Indeed, the competition for authority can turn violent, if the authority attempts to impose a relatively large transfer at the expense of a potential rival for power. The resulting revolution can replace one authority with another and possibly alter the property rights structure significantly (although such revolutionary reforms are generally backward looking as noted below). Thus, both evolution and revolution shape the development of laws [Berman 1983]. But the new authority is not likely to radically change the basic institutions of the legal system. After all, those institutions developed for the purpose of transferring wealth and they can serve one authority as well as another. The authoritarian transfer process continues to evolve and expand [de Jasay 1992], simply redistributing to a new set of dominant interest groups.

There are also other reasons to expect increasing numbers of rights modifications. Substantial benefits, or avoidance of substantial losses, typically must be anticipated in order to induce individuals to incur initial organizational costs, for

instance, but once a group is organized, the additional costs of demanding more benefits are relatively low. Thus, organized interest groups often become active in regards to many issues beyond their earliest concerns. As power increases goals expand.

Another change arising from an alteration in property rights and subsequent "chain of readjustments" is also predictable. Legal authorities can never anticipate all of the consequences of their actions [Hayek 1973, 51]. After all, property rights provide incentives which condition behavior, so a change in rights is likely to change behavior. The customary legal structures described above emphasized private property and individual rights. Since rights transfers are a major consequence of authoritarian law, it follows that at least initially, authoritarian legal developments imply restrictions on private property and individual rights (later, interest groups may form which successfully press for reestablishment of certain rights, of course - those who suffer loses tend to be "backwards looking," as noted above, in the sense that they press for a return to a previous rights structure [Benson 1990; 1992b; de Jasay 1992]). At any rate, it is clear that under authoritarian law, property rights are never "given": they are permanently "in play" [de Jasay 1992]. Thus, as Weede [1992] notes, "the application of coercion has strong negative incentive effects."[16] When rights are significantly altered through authoritarian changes in law, or when they become sufficiently tenuous due to frequent changes in law, individuals' behavior will change. Given the loss of rights, for instance, individuals will

quit performing previously worthwhile functions (e.g., providing goods or services). If the function is demanded by powerful groups, the legal authority will either try to force the previous behavior, or directly produce the function [Benson 1990; 1992b].

An example of one such restriction on individual rights was noted in Benson [1990; 1992b]. As Anglo-Saxon kings began to develop a role in law enforcement they began to use their power to shift the form of "punishment" from victim restitution to a fine paid to the king's treasury. This taking of private citizens' rights to restitution continued, and expanded considerably under Norman rule. The concept of "crimes" began to be considered during the reign of Henry II and the contrast between criminal and civil causes developed, with criminal causes referring to offenses that generated revenues for the king or the sheriffs rather than payment to the victim [Pollock and Maitland 1959, 141]. The right to restitution provided strong incentives for victims to pursue and prosecute offenders. Indeed, it was one important incentive underlying the reciprocal arrangements for protection, insurance, pursuit, and adjudication. The taking of this right substantially altered such incentives. Victims incentives to pursue and prosecute declined. Reciprocal arrangements began to break down. A long chain of readjustments followed. In fact, this evolution continues to this day as criminal justice authorities wrestles with the problem of getting victims to report crimes and assist in prosecution. Furthermore, the behavior generated, by the customary rights to restitution are so vital to law enforcement, and the

taking of this right altered behavior so significantly, that kings had to take on many of those functions. The king became a judge, for instance. In addition, however, the king was forced to create a separate hierarchical enforcement apparatus: public courts, prosecutors and police ultimately evolved [Benson 1990; 1992].

Authoritarian decision-makers (e.g., kings, legislators) could conceivably respond to growing interest group demands strictly through legislation, but instead they tend to delegate considerable independence and power to bureaucratic agencies. The fact is that a decision-making authority's own time and resources are limited, so increased demands ultimately force delegation of certain responsibilities to lower levels of authority. There are at least three important consequences of such a hierarchy of delegated authority. First, competition between bureaucracies for new "production rights" (rights to enforce certain laws) and their accompanying budgets, power and prestige becomes prevalent. Considerable expenditures (in terms of bureau budgets and bureaucrats' time) can be devoted to such competition. Similarly, considerable expense may arise as bureaucrats try to protect existing production rights from aggressive competitors. Thus, inter-bureaucratic competition is not unlike intergovernmental and inter-interest group competition [Faith 1980, 33]. A second implication of the delegation of authority to bureaucracies is that as these bureaus increase in number and/or size the ability of higher decision-making authorities to monitor their actions decreases, again because authoritarian decision-makers' time and

resources are limited. Therefore, the highest authority tends to exercise less and less control over bureaucracies. Agencies become more independent and their discretion in both enforcing and assigning property rights increases. The power of bureaucrats grows relative to the power of those they supervise (e.g., non-bureaucratic interest groups), and those they originally obtained their authority from (e.g., kings, legislators). This brings us to the third important implication of the delegation of authority to bureaucracies. As their discretion increases and they grow in size they generally will demand more rights modifications to enforce [Benson 1983; 1984; 1990], thus resulting in wealth transfers to bureaucrats (i.e., larger budgets and/or more power).

VII. Conclusions: The Conflict Between Custom and Authority

It should be emphasized that the theory of authoritarian law outlined above is not simply a restatement of the "rent-seeking" or "interest-group" theory of government.[17] The fact is that governments, including those headed by kings, have other functions as well: some government functions may be completely consistent with this theory of authoritarian law (i.e., the warfare function), but some may not be. Perhaps two points will help to clarify the scope of these assumptions. First, for reasons explained below, many rules of conduct enforced by governments' legal apparatus are simply codified custom rather than rules truly imposed by the king, legislature or some other authority. Thus, an examination of any government's law will reveal many aspects which may not fit the transfer theory proposed here.[18] Second, governments are not the

only source of authoritarian law. Historically, powerful entities that were not geographically defined kingdoms, such as the medieval Roman Catholic Church, have been able to take property rights from others through the use of authoritarian legal institutions [Berman 1983]. The most visible sources of authoritarian law are national governments, of course, but even today, there are other sources of such law. Consider modern organized crime, for example. These organizations establish rules of conduct for members backed by enforcement mechanisms and sanctions. Some of their rules and institutions have evolved over time as customary law, through voluntary interactions of members, but they also use the same enforcement apparatus and threat of their sanctions to extort payments from individuals who do not want to voluntarily interact with them (e.g., "protection rackets"). Thus, organized crime is like kingship and modern representative governments in that it uses its legal institutions, at least in part, to take from some individuals within its sphere of influence for the benefit of those with power. The scope of authoritarian law therefore reaches beyond governments' legal arrangements, and it need not cover every aspect of modern government.

The fact that there is not necessarily one unique source of authoritarian law, or of customary law for that matter, suggests that with the advent of authoritarian law, even more intensive competition between legal systems arises. Authoritarian law by its nature requires a substantial amount of localized monopoly power in order to truly impose law that generate transfers. When people

can choose between alternative sources claiming legal authority then these legal arrangements have to compete for the attention of potential subjects. Thus, the supposed authority really has little authority, since individuals will be able to opt for an alternative legal system whenever there is an attempt to take wealth from them without sufficient compensation. As a result, those who wish to generate wealth transfers by establishing some authoritarian law will generally have to claim to be the source of all law, whether that truly is the case or not. Competition leads to emulation, of course, and at times competing legal authorities might cooperate with one another in an effort to defeat yet another rival for authority. As de Jasay [1992] suggests, the repeated "redistributive game" is often one of coalition formation and splitting. The changing tides of cooperation and competition between cannon law of the Roman Church, royal law of developing kingdoms, and the feudal law of the manors in medieval Europe was a very important factor in shaping Western legal tradition, for example [Berman 1983]. This competition can turn violent, but it may not.

Authoritarian legal systems, with their centralized power, also attempt to absorb customary legal systems over time, simultaneously adopting many aspects of the customary system and altering others. Groups who benefit from the authoritarian transfer process support and encourage this absorption and the efforts of the authoritarian decision-making institution (king, representative government, etc.) to claim a monopoly in law. So

pervasive are the processes of authoritarian absorption of law that Lon Fuller [1981, 156-157] suggests:

> Now the tendency is to convert every form of social order into an exercise of the authority of the state... Legislation, adjudication, and administrative direction, instead of being perceived as distinctive interactional processes, are all seen as unidirectional exercises of state power. Contract is perceived, not as a source of "law" or social ordering in itself, but of something that derives its whole significance from the fact that the courts of the state stand ready to enforce it.

In some cases, the rise of authoritarian law has been successfully resisted to a substantial degree, however.

Resistance to legal authority is most likely to arise where the benefits generated through voluntary interaction are vary large and/or the relevant group interacts across the jurisdictions of different authorities. Thus, the international merchant community of medieval Western Europe is one such example [Mitchell, 1904; Trakman, 1983; Berman, 1983; Benson 1989b; 1990; 1992a], and it was from the resulting system of values and customary law that modern commercial law, the backbone of free trade, emerged. Indeed, modern international commercial law which evolved from this medieval legal system, remains as a largely voluntarily produced and enforced system of customary law, despite many attempts by various coercive governments to subjugate it over the centuries [Trakman 1983; Berman and Dasser 1990; Benson 1989b, 1990, 1992a]. International commercial law evolves as business practices and contracts evolve. Disputes are settled through arbitration provided by international trade associations and the International Chamber of Commerce, and decisions are backed by boycott threats:

refusal to accept a decision can result in substantial harm to a trade association member's reputation, for instance, as his name is released to the rest of the association.

Many other groups which started with customary law systems did not achieve a market order, however. The fact is that at some point many of these evolutionary processes have been interrupted and perhaps even stopped by coercive forces, either from internal or external power bases, before a full-blown free market order was able to emerge. The interruption can be abrupt, as through military conquest, or gradual, as through a gradual breakdown in the incentives to voluntarily interact for mutual gain (and the resulting breakdown of these incentives' accompanying norms and institutions), as authoritarian institutions expand their scope. The evolution of values, laws, and institutions is an ongoing process characterized by a continuing conflict between custom (voluntary arrangements) and authority. In some cases custom dominates, while in others authority does, but in most cases, a combination of the two exist in an unstable social order. To use de Jasay's [1992] words, these are "two different ethics" which produce a "social order the values motivate ... [which is] ethically inconsistent."

Customary norms and institutions evolve through a process of natural selection. Values and institutions which are in some sense superior (or more efficient) replace those which are inferior (less efficient). Since authoritarian law and its institutions often evolved to replace or at least absorb and build upon customary

rules and institutions, a "non-cognitivist" or "consequentialist" (see de Jasay [1992]) might contend that this demonstrates that the authoritarian system is more effective. This is not the case, however. After all, "while there is usually little need for external force to uphold the customary law, the authoritarian law ... needs for its enforcement the prestige and influence or even the intimidation and physical force of the authority and his supporting minority" [Popisil 1971, 344]. Consequently, the legal institutions which evolve to facilitate involuntary transfers will be quite different from those which characterized the customary law systems detailed above. Such institutions certainly may become quite effective in accomplishing their purpose. In other words, it is quite conceivable that authoritarian legal institutions which are relatively ineffective will be replaced by more effective institutions through a similar process to that which characterizes the evolution of customary law and its accompanying institutions. The evolutionary processes themselves need not be different, however, for outcomes to be quite different. Therefore, it does not follow that authoritarian legal institutions evolved because they are more effective or efficient than the customary institutions they replaced.[19] The resulting institutions could be equally effective at facilitating the purposes of their legal systems, but those purposes are different.

Endnotes

1. Many predominantly voluntary arrangements for internal order have been examined and described by anthropologists, historians, and scholars studying modern groups and associations. They include such diverse groups as the primitive Ifugao of Luzan [Hoebel 1954; Barton 1967; Benson 1986, 1989a] and the Papau Kapauka of New Guinea [Popisil 1971; Benson 1988, 1989a, 1990], American Indians like the Comanche [Hoebel 1954, 1967; Benson 1991a] and the Yurok [Kroeber 1925; Spott and Kroeber 1943; Goldsmidt 1951; Hoebel 1954; Benson 1989a, 1991a], Anglo-Saxon society prior to the Norman invasion [Benson 1990, 1992b] and Irish society prior to the British invasion [Peden 1971], Iceland in the tenth through the thirteen centuries [Friedman 1979], the medieval merchant community of Europe [Mitchell 1904; Berman 1983; Trakman 1983; Benson 1989b, 1990], nineteenth century gold camps, wagon trains, land clubs and other groups in the western United States territories [Anderson and Hill 1979; Reid 1980; Umbeck 1981; Benson 1990, 1991b], colonial religious communities [Auerbach 1983; Benson 1991b], early twentieth century Chinese and Jewish communities in American cities [Auerbach 1983; Benson 1991b], and the modern international commercial community [Trakman 1983; Berman and Dasser 1990; Benson 1992a], as well as others too numerous to mention.

2. Actually, there is no agreement as to what the solution will be [Tullock 1985, 1073]. It apparently depends on payoffs and other considerations.

3. Note that the mutual support group may have many functions

besides its role in law enforcement and adjudication. Primitive kinship groups, for example, might have been primarily concerned with joint production of food, shelter from the elements, protection from outside threats (or taking of wealth from outsiders, as noted below), and/or religious functions, and even though they also developed a system of customary law to maintain internal order, they may not have fully recognized the importance of this function for facilitating interaction.

4. Collective action based on individual decisions, as described here includes only a small subset of collective decision-making processes as discussed by Weede [1992]. Specifically, since each individual accepts new rules and values voluntarily, no rule is universally applied unless it is universally accepted. Thus, in a sense, a unanimity decision rule applies. This is, as de Jasay [1992] suggests, a "value-neutral" system in that no individual's action is based on the values of others. Nonetheless, the emergent order ends up favoring certain values over others in a process of natural selection. There are many other forms of collective decision-making, of course [de Jasay 1992], which are not value-neutral in this sense, and some (e.g., representative government) are considered below. Weede [1992] contends that "room for private decision-making depends on prior collective decision-making" but this can be misleading. It is individual or "private decision-making" that provides the basis for collective action in this case.

5. In this light, Fuller [1981, 134] observes that "A serious study of mediation can ... offset ... 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."

6. This description of the evolution of customary law is, in some important ways, quite similar to the analysis of common law that has lead several legal theorists to conclude that judge made common law produces "efficient" rules [Landes and Posner 1979; Leoni 1961; Rubin 1977; 1982; 1983; Priest 1977; Hayek 1973, 94-103]. In fact, much of common law was simply a codification of the basic norms common to Anglo-Saxon society (that is, from customary law), but common law was also authoritarian royal law, and therefore, even during its earliest periods of development some aspects of it were legislated and imposed by authoritarian kings. Many of the basic character of much of common law today evolved from authoritarian sources [Benson 1990] that are described below. See footnote 19 for further discussion.

7. As Epstein [1980, 266] explains, 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.

8. For instance, as Tullock [1985, 1079] notes, once a person's reputation is lost, there is virtually no reason to behave cooperatively in the future, because the cost of rebuilding a reputation is extremely high. Therefore, such a person has incentives to "con" people into games wherein he takes advantage of their cooperative incentives, or to become a thief.

9. This hierarchical structure is internal to the group and it involves top down authority. Thus, it differs from the jurisdictional hierarchy that develops as a customary legal system expands. As Weede [1992] notes, hierarchical arrangements are not necessarily undesirable, nor are they always desirable.

The development of kingships (or authoritarian military associations with other names) does not imply that every kingdom was constantly at war, of course, at least in a military sense. Through the competitive process of emulation of successful military institutions, arms built up, and strategic alliances between kingdoms, it is certainly possible that kings might maintain relatively equal levels of military power for considerable periods of time, thereby deterring each others' aggression. Also see de Jasay [1992].

10. Weede [1992] also emphasizes that collective decision-making rules other than unanimity result in losses for those who do not win in the political competition. Similarly, de Jasay [1992]

explains that a non-unanimous decision rule always produces a redistributive social order.

11. The ability to offer to use military force in support of a decision-making authority, as well as to threaten to withhold such support or to actually use it against the authority, has obviously become quite insignificant in the internal political process of most of the nations of Western Europe and North America, for example. Military power is still a major factor in many non-western countries trying to establish stable governments, of course (e.g., the Philippines, Nicaragua, El Salvador, Lebanon, Iraq, South Africa, Yugoslavia, etc.), and the threat and use of military-like terrorism is an important political factor in much of the world. The ability to threaten political disruption also remains an important political consideration everywhere. Thus, labor unions (including public sector unions like police), for instance, can obtain considerable wealth transfers by implicitly or explicitly threatening major strikes and then trading stability for their desired legal changes.

12. Indeed, under kings, a major purpose of taxes and other authoritarian developments in law was extraction of revenue to strengthen the king in his performance of the external function of kingship -- wealth transfer through warfare.

13. Of course, taxes and transfer payments or property confiscations and transfers can alter the behavior of those directly impacted in ways that benefit other groups as well, so not all beneficiaries need be obvious. One reason for this is that

transfers themselves can alter incentives of the recipients in ways which create wealth for third parties. For example, Anderson [1987] explains that a major reason for labor unions' strong political support of welfare programs is that these programs create incentives for some people to stay out of the work force, thereby reducing the level of competition for unions in the labor market.

14. One theory of government which explicitly treats this political competition for property rights is the rent-seeking paradigm [Tullock 1967; Benson 1984]. Furthermore, the rent-seeking paradigm is equivalent to the interest group theory of economic regulation developed by Stigler [1971], and the extension of this theory to government in general [Tollison 1982]. Recall footnote 8, and recognize that once a sub-group establishes a reputation as a political interest group intent on achieving transfers, the probability of that group becoming an effective part of a cooperative customary law system in the future is very small, because the cost of rebuilding a reputation is extremely high.

15. This kind of competition implies that resources are "wasted" in the sense that they are used up the "produce" wealth transfers rather than to produce additional wealth (e.g., new goods and services the consumption of which enhances well-being for members of the society). Thus the process can be characterized as a negative sum game [Tullock 1980].

16. Weede suggests that law is a form of "social capital" in that the rule of law enhances productivity. But then he qualifies this suggestion by noting that the content of the law also matters.

This presentation of and distinction between customary and authoritarian law provides a way to determine which laws are part of "social capital" and which are not. In general, customary laws that develope from the bottom up support private property and individual freedom, while authoritarian laws imposed from the top down create disincentives and reduce productivity.

17. See footnotes 14 and 15.

18. Hayek [1973, 47-48] argues that "government becomes indispensable ... in order to see that the mechanism which regulates the production of ... goods and services is kept in working order ... it provides an essential condition for preservation of ... overall order." Similarly, Buchanan and Tullock [1962, 13] suggest that "Collective action is viewed as the action of individuals when they choose to accomplish purposes collectively rather than individually, and government is seen as nothing more than the set of processes, the machine, which allows such action to take place." Under such definitions, customary legal systems clearly establish governments. However, Buchanan and Tullock go on to suggest that their "approach make the State into something that is constructed by man, an artifact," perhaps implying to some readers that "government" and "State" are synonymous, or at least that one requires the other (e.g., much as the legal positivism view of law requires the state to exist before law can). If government is defined as the set of processes which allow for collective action in a "State" to take place then the institutions of a pure customary law system should not be called

government. It should be noted, however, that Buchanan and Tullock apparently do not view the State and collective action to be synonymous or that one necessarily requires the other (e.g., they discuss "state or collective action" at times [1962, 48]). Indeed, if "state" and "government" go together then it might be appropriate to characterize the institutions and processes of the customary law with Buchanan's term of "ordered anarchy" [1975, 180]. The focus of this analysis is on the differences between customary and authoritarian legal systems, however, and not the differences between government and anarchy.

19. The same is not true of the laws that arise from customary and authoritarian sources. Authoritarian legislation can make inefficient rules and their acceptance can be forced. Leoni [1961, 17] explains it well when he notes that legislation (one form of authoritarian law)

> may have and actually has in many cases today a negative effect on the very efficacy of the rules and on the homogeneity of the feelings and convictions <u>already prevailing</u> in a given society. For legislation may also deliberately or accidentally disrupt homogeneity by destroying established rules and by nullifying existing conventions and agreements that have hitherto been voluntarily accepted and kept. Even more disruptive is the fact that the very possibility of nullifying agreements and conventions through supervening legislation tends in the long run to induce people to fail to rely on any existing conventions or to keep any accepted agreements. On the other hand, the continual change of rules brought about by inflated legislation prevents it from replacing successfully and enduringly the set of nonlegislative rules (usages, conventions, agreements) that happen to be destroyed in the process.

In this regard, also recall that Leoni and others cited in footnote 17 view judge made law to be fundamentally different from

legislation. A sharp distinction is inappropriate, however [de Jasay 1992]. When a coercive authority's judges make new law through precedent, the resulting rules are also imposed from above. They becomes enforceable law for <u>everyone</u> in the society whether they are a mutually beneficial laws or not. And like authoritarian legislation dictated by a king or a representative body, authoritarian precedent can make major alterations in law (rather than gradual extensions) without the consent of all parties affected. The resulting uncertainty about the longevity of rights is an additional source of inefficiency [Leoni 1961]. But inefficient rules are less likely under customary law [Benson 1990; 1992a]. For instance, a dispute settlement may produce an efficient settlement, but if other parties recognize this the settlement does not become a universal rule in the customary body of law. This does not prove that customary law produces an efficient set of rules, but it does suggest that efficient rules are relatively more likely to evolve in a system of customary law than in a system of authoritarian law, even if the authority to make laws is in the hands of judges.

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