

On the Institutional Foundations of Law: The Insufficiency of Custom and Private Ordering

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Abstract: Some theorists propose that systems of law largely arise spontaneously, as an extension of customary rules. At most, the role of the state is to endorse customary laws and add some minimal general rules. Some see no essential difference between custom and law. By contrast, this paper argues that law has properties that cannot be reduced to custom or private ordering alone. Customary mechanisms are insufficient to explain adherence to complex systems of law. Furthermore, law proper arose when customs were violated and some higher adjudication was required. We require an explanation of how a system of complex legal rules may be enforced, and why people often obey laws in the absence of obvious incentives or disincentives. Laws and their enforcement depend on stratified social structures within the framework of the state.

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Suggestions that systems of law largely arise through self-organization rather than decree, as an extension of customary rules, are sometimes bolstered by historical claims that some early legal systems emerged spontaneously (Benson 1989; Friedman 1979; Jahnsen 1986), that contract enforcement in medieval times evolved through the efforts of trading coalitions or town guilds (Greif 1989; 1993; 1994; 2006; Greif, Milgrom and Weingast 1994; Landa 1994; North 1991), or that modern trade in some areas was sustained with inadequate political or legal authorities (Clay 1997; McMillan and Woodruff 1999). There is also a substantial literature on how trading networks or “private orders” enforce their own rules with minimal or no recourse to state legal systems (Bernstein 1992; 2001; McMillan and Woodruff 2000; Williamson 1985; 2002).¹

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While some authors take the view that systems of law can exist and be enforced without the state, others take a modified stance while upholding the general spontaneity of law.² For example, Hayek (1960) promotes a state constitutional framework to protect individual rights and property. But Hayek (1973, 72) also insists that law “is older than legislation” and that law “in the sense of enforced rules of conduct is undoubtedly coeval with society.” This implies that law existed before the state, constitutions and legislative institutions. Hayek and others argue that the law is essentially a spontaneous order; it emerges without overall design, through interactions between individuals. Statutory legislation is regarded as a ratification of prior customary arrangements – but not the essence of law. There is an emphasis on a bottom-up process of legal development, where statutory legislation typically ratifies customary precedents.³

No-one denies that since Classical Antiquity many legal systems have relied heavily on the state. Interest in the spontaneous evolution of legal systems is largely motivated by the claim that the essence of legal enforcement lies in interpersonal relations and incentives rather than state power. It is proposed that where the state is prominent it serves principally to sanction or modify pre-existing laws, as a statutory codification of existing customary arrangements. As Robert Sugden (1986, 5) puts it, legal codes “merely formalize . . . conventions of behavior” that have evolved spontaneously out of individual interactions. Importantly, the analytical focus on the spontaneous evolution of law does not necessarily derive from a claim that spontaneity was the historical norm. Instead it arises from the proposition that such spontaneous arrangements represent the essence of all legal systems, notwithstanding the widespread *de facto* involvement of the state.

These arguments concerning law are redolent of Carl Menger’s (1871) famous analysis of the evolution of money. Against the German historical school, Menger argued that the historical involvement of the state in the evolution of money shows neither that the state was necessary for the creation of money, nor essential to its nature. Instead, he claimed that institutions such as money could emerge spontaneously through the interaction of individuals, without the state. The role of the state was merely to legitimate and regulate these spontaneous monetary arrangements. This contrasts with alternative accounts of the nature and essence of money, including “state” and “chartalist” theories (Knapp 1924; Smithin 2000; Bell 2001; Ingham 2004). Hence, the dispute concerning the nature of law and the roles of private ordering and the state has a parallel in the controversy between spontaneous and state-based theories of money. A further parallel exists in disputes over the role of the state in constituting the business corporation (Phillips 1994; Iwai 1999; Blair 2003; Hansmann, Kraakman and Squire 2006; Gindis 2007; 2009). In each case there is one approach that focuses primarily on individual motivations and private ordering, and another that also relies on the existence of a state.

Despite the manifest role of the state in legal systems, theorists of spontaneous private ordering argue that the state or other third-party enforcers cannot play an ultimate role in the explanation because this would leave unanswered the question why “those who are supposed to enforce the rules do so” (Greif 2006, 8). The state is

staffed by persons with their own interests, so why should it be generally assumed that they enforce legal rules? Instead it is proposed that explanations must ultimately devolve on individuals and their interactions rather than state enforcement. As Avner Greif puts it: "Because institutions reflect human actions, we ultimately must study them as private order even when a state exists" (2006, 8). To bring in the state as a *deus ex machina* to account for laws and their enforcement is to assume what has to be explained. Instead, many theorists use game theory to show how interacting individuals give rise to legal and other "self-enforcing" institutions through the establishment of (Nash) equilibria in the game (Aoki 2001; Dixit 2004; Greif 2006; Schotter 1981; Sugden 1986).⁴

This argument must be taken seriously. But game theory does not provide an adequate answer because it too assumes what also must be explained. Individuals and their preferences, as well as the possible strategies and payoffs of the game, have to be assumed at the outset (Field 1979; 1981; 1984). There can be no games without rules, and thus game theory can never explain the elemental rules themselves. At least one game with its structure and payoffs must be assumed at the beginning. Some kind of cultural or psychological account must be provided for the evolution of the original rules and preferences.

Psychological underpinnings should be taken much more seriously than hitherto, to help explain basic human dispositions that help in the formation of social institutions. Game-theoretic arguments may help explain the persistence of rules once they get established, but they cannot explain the origins of the elemental frameworks of human interaction and cooperation.

Despite these weaknesses, game-theoretic and other related accounts of private ordering and spontaneous orders prevail in both the new institutional economics and the interdisciplinary field of the economics of law. Relevant critiques are relatively rare and are often limited in their scope (Hodgson 2003; Knight 1992; Mantzavinos 2001; Samuels 1989; 1999; Sened 1997). Importantly, Itai Sened (1997) shows that standard explanations of the spontaneous evolution of property and contract rely on reputation and other effects, which in turn depend on small numbers of networked traders holding a relatively high amount of information. Sened points out that these conditions are generally absent in the more complex and larger-scale societies, and he consequently rehabilitates a role for the state in the enforcement of property rights and contracts.

Emphasizing the state does not mean that custom is unimportant. John R. Commons (1924) rightly argues that to be enforceable (at least in non-totalitarian societies) laws must be widely perceived as reasonable, appropriate and fair. Consequently, law must largely conform to established custom, even if it amounts to more than custom alone. He also emphasized that the collective power of the state also lay behind all property rights and transactions within capitalism. Custom is important to sustain law, but law is much more than an epiphenomenal expression of custom.⁵

While law is more than custom, they share some common psychological foundations. There is growing evidence of cooperative and moral dispositions in both

humans and primates. There is a natural and evolutionary foundation to many rules of social interaction.⁶ But as argued below, examination of these psychological foundations also helps to establish some differences between custom and law.

The first aim of this paper is to establish that there is a qualitative difference between custom and law, and a line must be drawn between societies dominated principally by customary rules and those where law proper has also emerged. This difference is partly established by considering the psychological mechanisms involved when individuals adhere to customs and showing that law requires more complex social institutions. In addition, work by prominent anthropologists and legal historians also shows that the evolution of law involves conflict resolution, powerful institutions, and the transcendence of mere customary arrangements. While custom remains important, law is irreducible to custom.

Second, while spontaneous processes are important, they can account adequately for neither the totality nor the essential nature of legal systems. While law depends on the spontaneous evolution of custom, it also requires the powers and institutions of the state. Law in the modern sense did not exist in simpler and smaller societies. It requires a specialist judiciary within a stratified system of power. While also depending on custom, law requires major institutional interventions and arrangements promoted by the state.

This paper has seven sections. The following section examines the prominent argument that custom is the essence of law, particularly as advanced by Hayek. The third section asks how particular dispositions to obey the law may evolve and shows that once relevant psychological mechanisms are addressed then problems arise in sustaining an exclusively custom-based view. The fourth section criticizes the custom-based analysis of law using historical and other evidence, and argues that although law relies on custom it is essentially a creature of the state. The fifth section relates the mistaken identification of law with custom to the equally erroneous conflation of property with possession. The sixth section returns to the question of why people obey the law, and what social and psychological mechanisms are involved. Again statutory systems of authority and power are crucial.

From Hume to Hayek: Custom as the Essence of Law

Several scholars suggest that custom is the key to understanding law. The origin and development of custom is seen as a process of long-term evolution, typically without overall guidance and design. Writers in this tradition include David Hume, Edmund Burke, Friedrich C. von Savigny, Henry S. Maine, James C. Carter and Friedrich Hayek. Among these, Carter (1907, 173) – a resolute defender of common law and a president of the American Bar Association – wrote “law . . . is custom, and like custom, self-existing and irrevocable.” Although many writers in this tradition do go so far as Carter in conflating law and custom, they retain a characteristic belief in the spontaneous evolution of the former from the latter.

This tradition involves a number of variants. For example, in regarding law as internalized custom or habit, Henry Maine (1861) and Numa Denis Fustel De

Coulanges ([1864] 1980) argued additionally that religion was the basis of most laws, particularly concerning property rights. Religion provided laws with perceived enforcement incentives and customary durability.

Hayek's writings in this genre are among the most sophisticated. In his classic account of the foundations of law, Hayek (1973) opposes the "constructivist" or "legal positivist" idea of law as emanating from the state. He also provides an evolutionary account of the origin, selection and persistence of legal rules. He apparently removes the need for any *deus ex machina* by framing the account in (essentially Darwinian) evolutionary terms where the emergence of complex orders (as in nature) can occur without the need for overall guidance or design. It will be argued below that while Hayek potentially resolves the problem of explaining his initial assumptions by framing his theory in evolutionary terms, his account has remaining defects that are common to the entire tradition that sees law as essentially reducible to custom.

As noted above, Hayek (1973, 72) upholds that law "is older than legislation" and that law in some sense is "coeval with society." For Hayek, laws are simply the "rules which govern men's conduct" (73). But in contrast to the anarcho-libertarians, Hayek (1960) stresses the necessity in modern society for an over-arching system of state and constitutional law within which contracts and markets can function.⁷

The central concept in Hayek's mature theory of social and legal evolution is that of a rule. Hayek (1973, 11) wrote: "Man is as much a rule-following animal as a purpose-seeking one." For Hayek (1973, 74-75), custom is a set of acquired rules, which can be learned or innate: "Rule in this context means simply a propensity or disposition to act in a certain manner, which will manifest itself in what we call a practice or custom." Hayek (1967, 66-67) earlier made it clear that the term "rule" is used for statements "by which a regularity of the conduct of individuals can be described, irrespective of whether such a rule is 'known' to the individuals in any other sense than they normally act in accordance with it."

Hayek (1979, 159-160) also explored the varied origins and "layers of rules" in human society. The lowest layer consisted of rules derived from the "little changing foundation of genetically inherited, 'instinctive' drives." Higher layers involve rules that were not deliberately chosen or designed but had evolved in society, and rules that were consciously designed and inaugurated.

Hayek (1967; 1973; 1979; 1988) developed an explanation of the selection of social rules through the selection of the fitter social groups. For Hayek (1973, 9), institutions and practices, which had first "been adopted for other reasons, or even purely accidentally, were preserved because they enable the group in which they had arisen to prevail over others."

Many details of Hayek's evolutionary theory of law need not concern us here. What is important for this essay is to consider Hayek's understanding of the nature and basis of the rules that become customary and allegedly form the foundations of law. As Roland Kley (1994, 44) points out, Hayek's conception of rule-following is too broad. It includes behavior emanating from instinct as well as customary rules. Hayek's definition of a rule as involving all behavioral dispositions should reasonably be modified to exclude instinctive or genetically transmitted dispositions (Hodgson 2006a).

What sustains the rule and gives it some durability through time? Hayek did not supply a sufficiently detailed answer, other than emphasizing the role of imitation in cultural transmission (Hayek 1967, 46-48; 1979, 155-157; 1988, 21, 24). This might help to explain how behavioral regularities are reproduced, but we still lack a causal explanation of imitation and rule-following itself. There are unfilled gaps in his theory.

Dispositions to imitate others or follow rules are either acquired culturally as habits or inherited biologically as instincts. Instinctive triggers are required to energize neural and behavioral responses that create the conditions for the cognition of appropriate information and the formation of habits. A habit is a disposition to engage in previously adopted or acquired behavior (including patterns of thought) that is triggered by an appropriate stimulus or context. In turn, habits are the preconditions for all reason and deliberation (Dewey 1922; Murphy 1994; Plotkin 1994; Hodgson 2004; 2006b).

The concept of habit appears infrequently in Hayek's work and is sometimes used to refer to settled behaviors (Hayek 1973, 11). Overall, Hayek subsumes both habit and instinct within his excessively general concept of a rule, thus neglecting the cognitive and psychological foundations of rules themselves. Hayek also lacks an adequate explanation of how customs are interpreted and why they are followed.

To understand why people follow rules we have to delve into psychology (Engel 2008). Once we attempt to identify the mechanisms involved, then some problems appear in the standard account of a close relation or equivalence between custom and law. When these problems are addressed, as in the following section, then important questions emerge about the nature and evolution of legal rules.

Learning the Law: Problems of Complexity and the Restraint of Punishment

How do we explain the origin of the specific motivations and dispositions to follow rules or obey laws? With some rules or laws we have strong incentives to follow reigning conventions, whatever our marginal preferences. We willingly drive on the same side of the road as others and follow shared rules of linguistic communication. But these "coordination games" or "self-enforcing" institutions do not represent all cases (Vanberg 1994; Schultz 2001; Hodgson 2003), and we must explain enforcement in the many other instances where incentives for conformism are less obvious.

Clearly, the mere codification, legislation or proclamation of a rule is insufficient. It might simply be ignored, just as drivers everywhere break speed limits on roads. What matters in the construction of institutions are systems of established and prevalent social rules that structure social interactions, rather than the formal rules as such.

As noted above, we need some explanation why people are disposed to follow rules. Hayek considers the imitation of the behavior of others and also inherited dispositions. An important problem then arises in the special context of the evolution of laws or legal rules. *Once a legal system emerges with a minimal degree of complexity, then*

neither imitation, habit nor instinct can be relied upon to explain fully the enforcement of intricate and extensive systems of laws.

In a complex legal system it would be absurd to suggest that most people follow a particular law principally because they acquire the habit or other disposition in line with that law. The number of laws becomes too great for a population to ground most of them upon habits. Many laws are unknown, obscure or difficult to understand. While imitating others can help explain conformity to some laws, it cannot explain adherence to a law where the relevant behavior of others is unobserved. Laws cannot generally become translated into habitual dispositions. Some other reason has to be found to explain why laws are enforced. Habit and imitation are insufficient to carry the burdens of legislation and enforcement.

A second problem concerns punishment. There is strong anthropological, experimental and theoretical evidence for learned or inherited dispositions to punish those that break the rules or fail to enforce them.⁸ The relevant inherited dispositions have evolved in our social species over millions of years. Some such punishment involves “strong reciprocity” (Gintis 2000) where there is a propensity not only to punish cheats, free-riders, rule-breakers and self-aggrandizers, but also to punish others who fail to punish the offenders. Especially within small groups, these propensities are driven by strong emotional feelings of anger. The evidence for them relates not only to modern humans but also to primates (De Waal 1996).

Given this longstanding instinct to punish transgressions of social norms, culture then moves in to enhance, refine or divert these emotionally-charged instincts, through the learning and imitation of habits of censoriousness or disapproval (Boyd and Richerson 1992; Runciman 2005). Inherited instincts for the punishment of social transgressors are highly modified or diverted by culture.

Nevertheless, *a problem concerning the evolution of law is to explain how culture could suppress the emotions and behaviors triggered by these instincts, to the extent that the punishment of rule-breakers is regulated by the institutionalized enforcement of abstract legal principles rather than freelance outpourings of visceral emotions.* Specific cultural mechanisms of control have to evolve that contain such punishment instincts and also bestow some survival value for the group. At some stage their development may be a by-product of the evolution of the state, which has a more obvious survival benefit in terms of its capacity for military protection.

Crucially, a system of law removes the right to punish from unauthorized individuals; it makes punishment a legitimized monopoly of the judiciary. This implies the establishment of judicial institutions and strong mechanisms to suppress dispositions to punish among the ordinary population. Law is not a system of reciprocal individual punishment. The qualitative change from custom to law entails a more complex and stratified society with developed judicial institutions.

Complexity and stratification are linked with the transition from groups and tribes to larger-scale societies, with a greater division of labor. In societies where interaction is on a small and personal level, customs and norms may suffice to maintain order and cooperation. Larger, more complex and stratified societies make interaction more impersonal and enhance the possibilities of internal conflict (North

2005, 57; Ostrom 1990). Particular institutions are required to deal with this problem.

Developed juridical and other institutions contain social positions that might in principle be occupied by alternative individuals (Runciman 2001). A judge, lawyer, clerk or jailor occupying such a social position within a juridical system acquires additional powers associated with that role. Such sophisticated institutions involve “information encoded in rules governing the reciprocal behavior of interacting pairs of institutional role incumbents independently of their personal beliefs or values” (Runciman 2005, 138).

This is not to undermine the role of custom in the evolution and maintenance of a system of modern law. Instead, it is to expose serious weaknesses in the identification of law with custom, and to emphasize the crucial transition from customary adjudication to a complex legal system with institutional roles, embedded in the state.

A precondition of this transition was the use of a sophisticated language involving abstract referents and complex conditional and ethical formulations. In most cases, behavioral imitation and verbal communication could not cope with this complex transition, and the use of some form of writing or record was necessary. Disputes had to be judged and proportional punishments had to be administered with procedures involving codifiable, abstract rules. Legal processes involve the description and identification of abstract social positions or roles independently of the personal characteristics of their occupants.

Emotionally-charged punishment instincts go back millions of years to our simian ancestors. By contrast, states and civilizations involving juridical systems have been in existence for no more than ten thousand years. Culture had a lot of work to do in a short time to suppress and divert all rudimentary punitive emotions into legal channels. It required strong institutional enforcements and supports for this achievement. This leads us to the question of the rise of the state and the establishment of its monopoly of force, which is addressed in the next section.

The State as an Institutional Foundation of Law

The precise dating and detailed analysis of the origins of states in Antiquity need not concern us here (Bar-Yosef 1998; 2001; Carneiro 1970; Runciman 1982; 2001; 2005; Yoffee 2005). Sedentism is regarded as a precondition for the emergence of states and social hierarchies. Circumstances must have emerged that not only permitted a sedentary population but also imposed disincentives or constraints upon renewed mobility. Once sedentism was established, the division of labor helped the further accumulation of wealth in one location and bolstered a greatly enhanced stratification of society. Trained armies became possible, and emergent states could resist or subdue less-developed tribal adversaries (Diamond 1997).

Our primary focus here is on legal institutions. Commons (1925, 687) was clear that even common law, while relying on custom, is more than the latter, and develops through dispute:

It is out of these customs that the common law arises. But we do not reach the need of a common law until disputes arise which must be decided promptly in order to keep the association, or community, or nation, in a peaceable frame of coöperation. In this sense, there is a common law that arises in all private associations without any intervention of the State ... The peculiar common law of the State comes in only when a decision is made by a court which directs the use or the collective physical violence of the community.

The influential anthropologist Arthur Radcliffe-Brown (1933, 205) made an important distinction between the existence of an “organized system of justice” – as found in many tribal societies – and a system of law. The former may lack a “juridical authority,” which is a necessary condition for the latter:

An important step is taken toward the formation of a legal system where there are recognized arbitrators or judges who hear evidence, decide upon responsibility and assess damages; only the existence of some authority with power to enforce the judgments delivered by the judges is then lacking.

Also running against the identification of law with custom, some neglected legal historians stress that the essence of law resides in its transcendence of custom, particularly at a stage when breaches of customary conventions arise (Diamond 1935; Seagle 1941; Redfield 1950; 1957). According to the evidence, the view of Maine and others that law derived from religion is wrong. Instead, disputes over violations of custom in large part gave rise to proto-legal actions and institutions. William Seagle’s historical account is the most detailed. Far from being reduced to custom, the emergence of law also involves the emergence of the state and a legal apparatus. Seagle (1941, 35) writes:

It is in the process of retaliation that custom is shaped into law. Breach is the mother of law as necessity is the mother of invention. . . . law deals with the abnormal rather than the normal. . . . Only confusion can result from treating law and custom as interchangeable phenomena. If custom is in the truest sense of the terms spontaneous and automatic, law is the product of organized force.

For Seagle (1941, 62)

the origin of the state was bound up with some form of social stratification . . . The chief point of dispute is really whether social stratification resulted from external causes such as conquest . . . or from internal causes [such as] the division of labour, the accumulation

of agricultural surpluses, or the exploitation of superior ability as well as superstition.

Law requires the existence of a state, and the state itself arises when society becomes complex, divided and hierarchical. In emphasizing the state the role of custom is not denied, customary social rules were often transformed into laws by the state apparatus. As Seagle (1941, 69) explains:

the custom had to be declared to be law by a judgement in order to receive the necessary *étatistic* stamp. . . . It is in this sense that there is no law until there are courts.

Later, Robert Redfield (1950, 581) argued in a critique of Maine that custom differed from law:

custom is understood to exist whenever the members of a primitive group expect one another to follow one line of conduct rather than another in circumstances that more or less repeat themselves, and when on the whole they do follow that line.

By contrast, Redfield continues, law is associated with the potential use of force purportedly “on behalf of the whole group.” The “beginning of law and the beginnings of the state are thus closely associated.”

E. Allan Farnsworth (1969) dissects in detail the requirements of a system of contract wherein an agreement between two parties becomes enforceable in law. Today we take this for granted, but on reflection the automatic investment of pledges with legal enforceability is an extraordinary outcome, unlikely to evolve spontaneously and completely from custom. Farnsworth (1969, 588) argues that the legal basis of contract emerged in Ancient Rome:

The notion that a promise itself gives rise to a duty was an achievement of Roman law. It came, however, through the development of a series of exceptions rather than through the establishment of a general principle of the enforceability of promises.

Again, this undermines the view that law is a simple extension of custom, and points to the role of disputes in the evolution of rules of contract and to the judicial functions of the state.

The distinction between common law and civil law is important in the modern context but does not undermine the historical case. Common law evolves by accumulation and modification of the decisions of judges. Nevertheless, the existence of a judiciary implies the existence of discernable and robust legal institutions that transcend arrangements based on popular custom. Indeed, systems of common and civil law both rely heavily on elements – including contract law – derived from the

legal system of Ancient Rome. As Seagle (1941, 153-160) argues, the distinction between the two systems is not as severe as some enthusiasts propose. Common law also depends on the machinery of the state.⁹

The distinction between law and custom undermines theories of “natural law” that propose that all laws emerge entirely by allegedly “natural” processes such as common law. While accepting that some such universal principles may have validity or existence, the historical context and essential role of the legislature is acknowledged. On the other hand, it is not proposed here that all law emanates from legislative will or design.

Within jurisprudence, sophisticated intermediate positions do exist. Herbert Hart (1961) – who is widely regarded as the most important Anglophone philosopher of law of the twentieth century – made a distinction between being obliged, as a result merely of threats or constraints, and being obligated, as an outcome of law. He opposed the natural law tradition to uphold that the normative content of law cannot be reduced merely to the imperatives of a social situation. Not all social rules are laws in the proper sense of that term. Acceptance of legal authority is more than the exercise of habit or adherence to custom.¹⁰ Although Hart and the “legal realist” Lon Fuller were doctrinal antagonists, Fuller (1969) saw law as involving the “morality of duty,” beyond the exigencies of aspiration of circumstance. This deontic dimension is diminished in some but not all naturalistic accounts.

The understanding of law as more than custom is redolent of Marxism and its claim that there is no law without a state, and there is no state without law. Marxists stress that systems of law and the state emerged with the stratification of society into social classes, and law and the state are outcomes of class struggle (Engels 1902; Dugger and Sherman 1997). But in other respects the Marxist account is deficient.¹¹

The creation of the law and the state corresponded to a shift from relatively simple and moderately egalitarian tribal societies based on custom, to more complex, divided and highly stratified social systems where general rules could not be adequately sustained by widespread individual habits, and social and religious customs were subject to violation and dispute.

Today the idea that law emerges with social stratification and the state is eclipsed by numerous theorists who have returned to earlier conceptions that more or less identify custom with law. Their opponents are crudely characterized as naïve “legal positivists” or “constructivists” who regard laws simply as decrees of the state.¹² The position advanced here is that the state is a necessary but not a sufficient condition for a system of law. This does not amount to the mistaken “identity theory” that the state and law are the same thing (Somek 2006). Likewise, custom underpins much law, but law cannot be reduced to custom.

The historically-grounded alternative views, regarding the law as a statutory transcendence of custom, are largely ignored in economics and elsewhere. Nevertheless, there has been a significant minor rebellion against customary and spontaneous conceptions of law within a section of the “new institutional economics.” Nobel Laureate Ronald Coase (1988, 10) has written:

When the physical facilities are scattered and owned by a vast number of people with very different interests . . . the establishment and administration of a private legal system would be very difficult. Those operating in these markets have to depend, therefore, on the legal system of the State.

Jack Knight (1992) argues that distributional differences and power asymmetries, rather than spontaneous outcomes of individual interactions, explain how laws are established. Sened (1997) argues that private ordering based on reputational effects is insufficient to explain the enforcement of property rights. Instead, and especially when large numbers of people are involved, a state machine based on a monopoly of force is required to sustain these rights.

Against this, some scholars point to historical examples of law without the state. Two defects emerge in this literature. One is to overlook the crucial distinctions between law and custom (and property and possession, as addressed in the next section). A second mistake is to claim that state authority was effectively absent, where in fact it did exist, even if it was weak or parcellized.

For example, consider David Friedman's (1979) study of the "private creation and enforcement of law" in Iceland in Viking times. Most Viking societies (who gave the word "law" to the English language) had limited state machines, with kings, chieftains, parliaments and law courts. But in Iceland there was neither a king nor a central executive power. Instead there were local chieftains who provided for defense and appointed judges. Friedman shows the heavy reliance of the Viking system on local dispute mechanisms, but it does not establish that the legal system was entirely private, or free of any state coercive power or authority. Far from being an anarcho-libertarian utopia, the system retained strong feudal characteristics (Byock 1988). By the thirteenth century, it began to disintegrate due to internal strife.

Some writers claim that the Internet provides a contemporary case of rule enforcement without a central authority. These accounts downplay the presence of substantial legal rules and regulatory authorities (Radin and Wagner 1999).

Amitai Aviram (2004) argues that private ordering is generally insufficient to create an enforceable legal authority. A newly formed spontaneous order cannot alone enforce compliance, because mechanisms to secure this cooperation (such as the threat of exclusion) depend on its ability to confer benefits to its members, and a newborn order cannot yet confer such advantages. Hence, what are described as "private legal systems" typically do not form spontaneously, but build on pre-existing institutions to secure initial compliance. Consequently, private ordering requires an institutional *deus ex machina* such as the state!

A brief mention of the concept of "legal pluralism" is relevant here (Galanter 1981; Griffiths 1986; Merry 1988). These writers claim that most societies contain groups with rival rule systems and normative orders. They point to the imperialist imposition of European legal systems upon substrata of indigenous legal traditions in the colonial era. But their claims are not confined to less developed countries. As Merry (1988, 871) puts it: "virtually every society is legally plural."

But as Brian Tamanaha (1993) points out, theorists of legal pluralism regard any normative order or system of social control as “legal” in character. With this vague and highly generous conception of “law,” claims of “legal pluralism,” and the notion that much law does not emanate from the state, all follow readily. The problem here, once again, is the conflation of law with custom and the failure to identify the distinctive features of legal systems proper.

All societies contain plural systems of normative rules, but this does not amount to plural systems of law. The more dramatic cases of conflicting systems of normative rules, in Africa and elsewhere, are not marks of a minimal-state utopia, but of tribal or clan-based societies with high degrees of religious, cultural and ethnic fragmentation that are arguably impediments to institutional, legal and economic development (Easterly and Levine 1997).

The Mistaken Identification of Law with Custom and Property with Possession

Of course, many laws evolve on customary foundations, and it would be a mistake to regard all law as emanating from the will of legislators. Nevertheless, the state transforms custom into law, particularly by dealing with breaches or disputes. If customs were consistent and faithfully observed, then there would be no need for the involvement of the state or the courts.

As Stewart Macaulay (1963) suggested, most business deals are enforced without any appeal to the courts, and many without written contracts. But this does not mean that legal institutions have no place in the everyday commerce. As Greif, Milgrom and Weingast (1994, 746) put it, “the effectiveness of institutions for punishing contract violations is sometimes best judged like that of peacetime armies: by how little they must be used.” Where the rule of law prevails, the mere possibility of access to the courts is sufficient for the legal system to bear down upon contractual agreements.

Classic accounts by Harold Demsetz (1967) and Richard Posner (1980) discuss the origin of “laws” of “property” in primitive societies. These are not so much wrong as tangential to the argument. Both writers conflate law with custom. Consequently, given the arguments above, Demsetz’ discussion of the origin of property rights is about the origins and motivations for customary rather than fully legal rights. Posner addresses primitive “laws” concerning property, contract and marriage. His main claim is that various forms of these institutions were “rational” in the context of prevailing information costs and other factors. Again his arguments concern custom, rather than law in the fuller sense.¹³

Possession does not amount to legal ownership, yet many authors conflate the two.¹⁴ For example, Armen Alchian (1977, 238) defined the property rights of a person in the universal terms of “the probability that his decision about demarcated uses of the resource will determine the use.” The upshot of this definition is that if a thief manages to keep stolen goods then he acquires a substantial property right in them, even if, on the contrary, legal or moral conclusions would suggest that they remain the rightful property of their original owner. Alchian’s ahistorical definition of

property neglects the essential concept of rightful ownership. His definition denotes possession, not property rights. Similarly, Grossman and Hart (1986, 694 n.) claim that ownership is “substantially the same” as possession.

Herbert Gintis (2007) establishes a mechanism to explain the evolution of the “endowment effect,” where “people value a good more highly than the same good when they do not possess it.” He also cites evidence for a similar effect in other species, in the form of recognition of territorial incumbency. Theory and evidence point to the likely evolution under some conditions of possessive instincts. But the viable proposition that possession has an instinctive and evolutionary basis should not lead us to the false conclusion that property and possession are the same (or to their terminological conflation, as found in Gintis’ (2007) article and elsewhere). The term “property” should be reserved for cases of institutionalized possession with third-party mechanisms of adjudication and enforcement.

Property is a social relation involving rights, benefits and duties (Hallowell 1943). The essence of the right of ownership of a resource is its acknowledgement of that right by others, involving some mechanism of institutional accreditation or legitimation. Property, unlike objects of mere possession, can be used as collateral or can involve legal encumbrances (Heinsohn and Steiger 2000). It involves not two parties but three, where the third is the state or a “superior authority” (Commons 1924, 87). Yet many social scientists treat property principally as a relation between a potentially isolated individual and a good, thus downplaying the fact that the institution of property also involves social relations between individuals, and between individuals and the state. Such social relations and structures are absent from this conception of property. The primary focus is on the individual, individual goods, and individual incentives. The institutions that sustain and legitimate property are given inadequate attention.

In sum, these prominent accounts of law – and specific legal provisions such as contracts and property rights – make the mistake of over-generalizing the phenomena in a manner that excludes vital, historically specific features of these legal phenomena.

State Power: Why do People Obey the Law?

States have a monopoly over the use of force. The threat of force, restraint or imprisonment becomes the ultimate legal sanction. But although some states have ruled by naked violence and terror, most (if not all) rely on some considerable degree of conscious support and consent. It is vital to understand how states manipulate public sentiment and gain the acquiescence or even devotion of the masses.

As argued above, it is impossible for all laws in a complex legislative system to be incorporated in widespread individual habits, because most individuals are unaware of many laws. We need an explanation why many individuals accept the authority of others, and accept some rules principally because they emanate from accepted leaders. The motivating forces behind individual conformity and obedience must be specified. The answer to the question that heads this section must refer to both psychological motivations and social institutions.

For millions of years, humans and their simian ancestors have been living in social groups. Often these groups have leaders and followers (Boehm 1999; 2000; De Waal 1982; Johnson and Earle 2000; Ludwig 2002), although structures and degrees of stratification have varied significantly.

Peter Richerson and Robert Boyd (1999; 2001) argue that modern social hierarchies (including armies) often involve tribal-sized groups at each level that deploy instincts and capacities more suited to our earlier, tribal existence. Social cohesion within each level is thus maintained by deploying tribal mechanisms of group leadership and conformism. But people at the very bottom of the social hierarchy also pay homage to those at its highest pinnacle, with whom they have had no close or sustained contact. Some additional reasons must be found why people acquiesce with authority at all levels.

Important insights are found in the experiments on obedience conducted by Stanley Milgram (1974). Members of the public were recruited to help in a laboratory study ostensibly about learning. A “scientist” asked these recruits to administer electric shocks to a subject, to punish wrong answers to questions. Milgram found that a majority of adults would administer shocks that were apparently painful, dangerous or even fatal, if ordered to do so by the person in authority. In fact, there were no shocks and the subject was an actor, feigning agony or even death. This experiment shows that people can willingly accept the orders of perceived authority figures, even when their own moral feelings are violated. Particular institutional contexts, procedures and surroundings can engender an “agentic state” where people obey the commands of what they perceive to be legitimate authority.

Milgram (1974, 124-125, 131) argues that our capacities to behave in this way emanate from the evolutionary survival advantages of cohesive social groups. He proposes that the human species has evolved an inherited, instinctive, propensity for obedience that is triggered by specific social circumstances. Conditional dispositions to accept authority, notwithstanding challenges and rebellions to the contrary, have evolved in order to enhance the chances of survival of both the individual and the group.¹⁵

Such inherited propensities are overlaid by culturally acquired proclivities. In particular, from the moment of our birth we learn to accept the authority of our parents. Instinctive triggers are likely to be relatively primitive, and deference to authority will rely heavily on nuanced habits of recognition and obeisance, largely acquired during childhood.¹⁶

These habits involve dispositions to interpret specific aspects of bodily deportment, interpersonal interaction, ceremony, clothing, decoration, symbolism and so on, as markers of social authority and power, depending on the cultural context. Once such authority is recognized and accepted as appropriate in the context, then additional habits trigger obeisance. Habits of obeisance are general, rule-like dispositions to accept and follow rules imposed by those in authority. They have a second-order character; they are rules to follow other existing and (possibly unknown) future rules.

Consequently, habits of obeisance may come into conflict with other norms and dispositions, such as moral sentiments for fairness or equity. As the Milgram experiment illustrates, the powers of authority and obeisance may lead us to do things that we would otherwise regard as wrong.

The very existence and functioning of complex state machines depends on the creation of these habits of obeisance. In specific institutional and cultural circumstances, often involving the symbols and uniforms of state or legal power, we are disposed to accept and obey legal authority. Acting with specific contexts, a psychological basis for obedience to law is established. Previously, religious beliefs and institutions played a major part in the legitimation of law. This was recognized by leading nineteenth century authors (Maine 1861; Fustel De Coulanges [1864] 1980) but they confused the legitimation of law with its nature and origins. Mixtures of nationalism and democratic involvement also help to legitimate modern legal systems.¹⁷

Effective systems of authority do not require that habits of obeisance are uniform or universal. Their prevalence among a critical mass of individuals of intermediate or higher social status is necessary. Once this occurs then habits of conformism and emulation can ensure more widespread deference and consent to authority. Conformism, while culturally transmitted, may also rely on an inherited instinctive grounding (Veblen 1899; Boyd and Richerson 1985; Henrich and Boyd 2001; Richerson and Boyd 2004). But note that conformist habits are different from habits of obeisance because the latter means the acceptance of authority rather than the imitation of others. Furthermore, conformist habits emerge in the early stages of cultural transmission, long before the evolution of states and other complex organizations. By contrast, habits of obeisance begin to play a greatly enhanced and critical auxiliary role with the emergence of complex and highly stratified systems of power and authority.

None of this suggests that the power of authority is absolute. Systems of power rely on a ramshackled ensemble of different habits and instincts, tangled among many varied individuals. Variation is the essence of the Darwinian evolutionary approach upon which this argument depends. Furthermore, habits of obeisance and conformism can work among dissident groups or organizations, potentially undermining popular support for the existing regime. No power is invincible.

Nevertheless, unlike dispositions to punish those that break social rules, instincts to obey authority – that have likewise evolved over millions of years – do not have to be restrained for modern political and legal systems to function. Instead they have to be channelled and energized by learned cultural cues. Modern legal and political power is partly built on an ancient foundation of inherited deferential traits.

Conclusion

Theoretical arguments that law evolves spontaneously from “private ordering” or custom are sometimes bolstered by the claim that the understanding of such a spontaneous evolution is necessary to understand how real legal systems work. The

existence of the state cannot itself explain why people follow laws; we still require an explanation why state officials are themselves motivated to enforce them.

But theories of the spontaneous or custom-based evolution of law also rely on unexplained assumptions. For example, the rationality or preferences of individuals are simply assumed. To place the explanation of the emergence of law in an evolutionary framework would require that one would address evolutionary theories in psychology that explain the origin and transmission of particular motivations and deliberations.

Nevertheless, once this is attempted major problems arise. For example, imitation or habit cannot explain the widespread observance of numerous obscure and complex laws. This suggests a significant difference between the observance of custom and enforcement in a complex legal system. Another relevant psychological mechanism is a (partly inherited) predisposition to punish those that break rules, as evident in ape communities and relatively simple human societies. But once we move to complex systems of law, culture and institutions must suppress the emotions and behaviors triggered by these instincts, so that the punishment of rule-breakers is regulated more by the institutionalized enforcement of abstract legal principles than emotionally charged actions by freelance individuals. Modern states have a monopoly of legal force and this implies the suppression of dispositions to punish by unauthorized individuals.

Historical accounts establish that law is different from custom. The contrast between common law and civil law is important in the modern context but does not undermine this view. Both types rely heavily on elements derived from Ancient Roman law. Historical evidence suggests that general systems of law emerged through disputes involving breaches of custom, rather than custom itself. Violations of rules were addressed by an institutionalized judiciary that emerged with organized state power in a sedentary and stratified society. Law relies to a large degree on custom, but law also depends on the existence of the state.

While emphasizing the distinction between law and custom, the key questions remain of how the law is enforced and why people obey the law. The Milgram experiments provide us with some striking empirical material. Species existing in social groups for millions of years evolve dispositions to obey those in apparent authority. In specific cultural settings, we learn to recognize individuals in social positions with authority over others. Recognition of perceived legitimate authority will often be cued by symbols and ceremonies associated with state power. We acquire general habits of obeisance that dispose us to obey the law even when we are unaware of its details. In turn, others imitate and conform to the rule-followers.

These insights are neglected in other accounts of the evolution of legal systems, largely because of the prevalence of approaches that take individual preferences or dispositions as given, rather than to inquire also into their evolutionary origins. There is also a desire by some social scientists to attempt to establish principles that are true for all human existence, rather than a historically specific period involving the state (Hodgson 2001).

Typically, theorists of spontaneous law express extreme caution or antipathy concerning the role of the state. On the contrary, while the state is a highly fallible and sometimes destructive institution, it is indispensable for legal systems. Rights and freedoms are not the antithesis of state power; they can only be sustained through the latter within an appropriate legal framework that protects individual liberties and rights.¹⁸

Many important questions on the foundations of law, such as its relationship to perceptions of morality and justice, are not discussed here. For reasons of space they must be addressed elsewhere: the scope of this paper can be no more than preliminary. Its aim is to show that law is neither entirely spontaneous nor reducible to custom, and the constitutive role of the state in legal systems has once again to be acknowledged.

Notes

1. Incidentally, Greif's empirical account of the Maghribi traders is challenged by Edwards and Ogilvie (2008), who argue that there is no clear historical evidence for Maghribi coalitions. Edwards and Ogilvie maintain that these traders made use of a statutory legal system and took disputes before courts of law. Greif (2008) has responded to these claims.
2. Compare Hayek (1973;1979), Sugden (1986), Ellickson (1991), Parisi (1995), Dixit (2004), and Greif (2006).
3. This explains Hayek's preference for Anglo-American systems of common law, rather than Napoleonic and other codes of civil law. However, the point of the present paper is not to enter into this debate over the alleged advantages of common over civil law (Glaeser and Shleifer 2002). Instead, we are primarily concerned with the nature of law per se. Hence the argument in the paper applies to both common and civil law.
4. Dixit (2004) makes the important additional point that reliance on the courts or state to enforce contracts is in practice extremely cumbersome and costly, hence any adequate theory of law must focus on interpersonal enforcement mechanisms.
5. Custom is also important in international law, where a developed international state machine is absent. International legislation proceeds through treaties and other international institutions. Nevertheless, international customary norms face a "legitimacy deficit" (Chigara 2001). Hart (1961) also saw international law as problematic, because it lacks some of the essential elements of a fully-developed legal system. For simplicity, we concentrate on national systems of law in this paper.
6. See, for example, Bowles and Gintis (2005), Cordes and Schubert (2007), De Waal (1996; 2006), Hammerstein (2003), Hauser (2006), Richerson and Boyd (2004).
7. Hayek (1988, 9) linked his conception of law with the self-organizing and self-regulating systems in "autopoiesis, cybernetics, homeostasis, spontaneous order, self-organisation, synergetics, systems theory." There is now a significant literature on autopoietic (self-regulating) conceptions of law (Teubner 1988; 1993; Luhmann [1993] 2004). For a critique see Beck (1994), Stein (1980) for an historical account of evolutionary theories of law, and also Hutchinson (2005).
8. See for example Andreoni (1995), Boyd and Richerson (1992), Boyd et al. (2003), De Waal (1996), Fehr and Gächter (2000a; 2000b; 2002), Fehr and Gintis (2007), Gintis (2000), Field (2001), Gintis et al. (2005), Guzmán, Rodríguez-Sicken and Rowthorn (2007), Price, Cosmides and Tooby (2002).
9. Commons, Diamond, Seagle, Redfield and Radcliffe-Brown implied that societies without states did not have systems of law proper. This proposition was regarded by many as an ethnocentric prejudice, and it is a possible reason why their views became unpopular after the 1950s. Cultural relativism became fashionable, where no society was regarded as superior to another. Many abandoned notions of progress, or of the superiority of civilization over tribalism.
10. See also the works of Hart's influential pupil, Raz (1975).
11. We are required neither to follow Marxists in their hope that the state would "wither away" nor in their treatment of law as an epiphenomenon of underlying "economic relations" (Hodgson 2003).

Marxists also neglect the important role of custom (Commons 1925). Furthermore, their claim that primitive societies were largely communistic has not withstood subsequent anthropological criticism. Notably, Veblen (1934, 39) wrote in 1898: “no concept of ownership, either communal or individual, applies in the primitive community. The idea of communal ownership is of a relatively later growth . . . Ownership is an accredited discretionary power over an object on the ground of a conventional claim.”

12. Hayek (1973, 73) writes of “legal positivism which derives all law from the will of a legislator.” But advocates of “legal positivism” are less simplistic and concerned with additional issues, notably the relation between law and morality (Kramer 1999). In his classic and influential work, Hart (1961) advances a “soft” legal positivism upholding that there is no necessary connection between law and morality. This contrasts with the legal positivist Kelsen (1967) who wished also to sever the connection between law and the social sciences. Legal positivists generally oppose natural law theories and see law instead as a distinctive human creation (but not necessarily an exclusive creation of the state). Hayek’s caricature of “legal positivism” omits such nuances. Note also that legal positivism has little resemblance to philosophical positivism, at least in its original Comtean or logical positivist variants.
13. Posner does not explain how such rationality emerges, or how people understand and are motivated to follow the established rules. Like many neoclassical economists, Posner (1980, 5, 53) ducks the whole question of psychological underpinnings. For him, the “rationality of ‘economic man’ is a matter of consequences, not states of mind . . . in suggesting that people are economically rational, I am not making any statement about their conscious states. Rational behavior to an economist is a matter of consequences rather than intentions.” Furthermore, much of Posner’s argument concerning property rests on elaborate “insurance” arrangements between parties that Knight (1992, 114) persuasively argues are unfeasible.
14. The distinction is famously maintained by Hegel ([1821] 1942) and Proudhon ([1840] 1890) among others. See Heinsohn and Steiger (2000) for a very useful discussion.
15. Perhaps because of the challenge in Milgram’s work to conventional ideas of the autonomous individual, these striking experiments have had less impact on the social sciences than one might expect. Relatively rare exceptions include Akerlof (1991), who emphasizes their challenge to mainstream assumptions in economics.
16. Habits are by definition acquired in a cultural context. But for their development they all depend on biologically inherited dispositions.
17. Tyler’s (1990) evidence suggests that the more people regard themselves as part of the process of law-formation, the more likely they are to accept legal rulings, even if they disagree in particular cases.
18. This is redolent of the “legal realist” Robert Lee Hale (1952), who had links with the Veblen-Commons tradition of institutional economics (Fried 1998).

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