“No Tragedy of the Common Law:

Polycentric Private Legal Systems and the Ostroms’ Institutional Analysis”

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“*The curious task of economics is to demonstrate to men how little they really know about what they imagine they can design. To the naive mind that can conceive of order only as the product of deliberate arrangement, it may seem absurd that in complex conditions order, and adaptation to the unknown, can be achieved more effectively by decentralizing decisions … This is the main reason for rejecting the requirements of constructivist rationalism.”* - F. A. Hayek[[1]](#footnote-1)

Pondering society without organized governmental law, the imagination constructs fantasies of Robin Hood and his merry men in Sherwood Forest, fleeing the Sheriff of Nottingham, or warring primitive native tribes in isolated corners of the globe. The imagination might further consider Icelandic Vikings settling disputes through feats of strength, the Wild, Wild West, with cowboys, Indians and outlaws. Political philosophers and economist through the ages have stated, as a known ‘fact’ of common sense, that society without governmental law is chaos. Thomas Hobbes, in the *Leviathan* (1651), stated that life in the state of nature, without the benevolent state stopping brother from killing brother, would be "nasty, brutish, and short”.[[2]](#footnote-2) Adam Smith’s *An Inquire into the Nature and Causes of the Wealth of Nations* (1776) notes that commerce requires the faith of contracts supported by governmental law, and that an economy cannot flourish without the authority of the state enforcing the payment of debts.[[3]](#footnote-3)

However, empirical historical analysis and the political economy of Eleanor and Vincent Ostrom provides a convincing case that private legal systems are not only possible, but actually more efficient than monocentric, government provided, and monopolistic law. While there is valuable and relevant literature regarding the ability of private markets to provide all aspects of jurisprudence, which would include private security and policing services (Tinsley 1999; Holcombe 2007; Benson 1999; Benson 1990; et el.), the scope of this paper will be limited to private court adjudication.

**I. SPONTANEOUSLY ORDERED LAW**

Hayek, throughout his works, demonstrate that through spontaneous order social structures could voluntarily emerge, like languages, which keep society peaceful and naturally progressing. Hayek argues “that many rules and institutions for governance evolve as the unintended outcomes of individuals separately pursuing their own goals.”[[4]](#footnote-4) He demonstrates that these structures are ‘‘the result of human action but not of human design.”[[5]](#footnote-5) Similarly, Carl Menger proposed that the origin, formation, and the ultimate process of all social institutions—including law—is essentially the same as the spontaneous order Adam Smith described for markets.[[6]](#footnote-6) Benson (1998) argues, like Hayek and Menger, that market institutions develop “because individuals discover that the actions they are intended to coordinate are performed more effectively under one system or process than under another.”[[7]](#footnote-7) No one has to tell an individual that it is beneficial for him to trade with his neighbor. Benson argues that legal structures historically emerged the same way:

All such institutional developments tend to be spontaneous and unplanned, and the result is a movement toward increasingly secure private property rights under ‘customary law.’ Indeed, ‘There is abundant evidence that a . . . group need not make a conscious decision to establish private property rights.... People who repeatedly interact can generate institutions through communication, monitoring, and sanctioning.... Contrary to Hobbes and Locke, a property system can get going without an initial conclave’[[8]](#footnote-8)

For example, justice usually requires a third-party “mutually acceptable mediator or arbitrator.”[[9]](#footnote-9) Such a person “might be chosen from among the most reputable members of the community… Since this third party must be acceptable to both disputants, ‘fairness’ is embodied in the dispute-resolution process.”[[10]](#footnote-10) Historical and anthropological analysis demonstrates that “voluntary third-party dispute resolutions are common institutions in close-knit groups’ legal systems.”[[11]](#footnote-11) These institutions can be constantly reforming and changing to better serve the needs of the society, similar to how the market progresses from simple barter to a multi-national economy. Benson states that “[r]ules and institutions vary in quality, of course, so as individuals discover new rules or institutions that prove to be better than the ones they have been using.”[[12]](#footnote-12)

Law is a necessary and beneficial function of a civil society; however, there are two different ways it can emerge: top down or bottom up. Benson (1990) notes that “[l]aw imposed from the top — authoritarian law — typically requires the support of a powerful minority.”[[13]](#footnote-13) Law from the bottom up, however, arises spontaneously from custom and only requires widespread acceptance, fostered by continuous exchange. When customary law is accepted, it is because “each individual recognizes the benefits of behaving in accordance with other individuals' expectations, given that others also behave as he expects.”[[14]](#footnote-14)

Disputes between individuals will naturally occur when individuals live together in society. There are two options for individuals to resolve said conflict: first, they can do as every three-year-old human being is inclined by nature to do: fight about it. This does not contribute to stable society. Second, they can resolve it peacefully. According Hasnas (2008), “[b]ecause violence has high costs and produces unpredictable results, human beings naturally seek peaceful alternatives.”[[15]](#footnote-15) When attacked, there is an obligation to avenge, thus “non-violent dispute resolution should evolve very quickly in customary law systems.”[[16]](#footnote-16) In order to have peaceful negotiations, the individuals have to be part of a legal community, and they must recognize the arbitration authority of that legal community.[[17]](#footnote-17) Benson states

[t]he makeup of such groups may reflect family (as it frequently did in primitive societies), religion (as in some primitive groups), geographic proximity (as in Anglo-Saxon England), functional similarity (as with commercial law), or contractual arrangements (e.g., as in medieval Ireland and in medieval Iceland).[[18]](#footnote-18)

These legal groups are backed by the threat of force, as will be explored further, however, considering the purpose is peaceful cooperation, the “use of such force is certainly not likely to be the norm.”[[19]](#footnote-19)

This submission to private legal authorities leads to customary law in two ways: first, the relevant group can accept rulings as valid.[[20]](#footnote-20) Second, “[i]ndividuals may observe others behaving in a particular way in a new situation and adopt similar behavior themselves, recognizing the benefit of avoiding confrontation”.[[21]](#footnote-21)

**II. HISTORICAL ANALYSIS**

**A. English Common Law**

The emergence of the common law in Middle Ages in Britain evolved into to the English legal system that has served as a foundation for a large portion of modern American law. Hasnas cites Berman’s discussion of Anglo-Saxon informal custom’s slow metamorphosis into English common law. Berman says the customary law comes from “patterns of behavior” that are unwritten and not dictated from some legislative body. Benson states, “A well-established set of rules arose some centuries before there were written records.”[[22]](#footnote-22) Hasnas also cites William Blackstone’s *Commentaries on the Laws of England* (1765) where Blackstone notes that common law emerged from generally practiced norms and customs.[[23]](#footnote-23) Hansas notes that common law “creates law only where it is actually needed to allow human beings to live together peacefully.”[[24]](#footnote-24) He provides the example of assault and battery tort:

Battery forbids one from intentionally making ‘harmful or offensive contact’ with another. This prohibits not only direct blows, but snatching a plate out of someone’s hand or blowing smoke in his or her face. Assault forbids one from intentionally causing another to fear he or she is about to be battered, but it does not prohibit attempts at battery of which the victim is unaware or threats to batter someone in the future.[[25]](#footnote-25)

Both of these common law tort claims protect the individual from direct physical injury, but also “offensive physical contact” which might make someone think that direct physical injury was imminent. These kinds of customary tort law traditions arise out of actual settlements and are purposed towards creating peaceful society which respects the dignity of the human being, not simply as mechanisms for social control and order.[[26]](#footnote-26)

Benson states that when dispute arises and “the accused offender is found guilty, the ‘punishment’ tends to be economic in nature” laying the foundation for modern tort law.[[27]](#footnote-27) These monetary sentences provide compensation “in the form of a fine or indemnity to be paid to the plaintiff. Liability, intent, the value of the damages, and the status of the offended person all may be considered in determining the indemnity.”[[28]](#footnote-28) All such crimes based judgments off of the value of individual property. It is considered strange to evaluate criminal acts with monetary value, yet the modern American and English justice system provides similar monetary proclamations about criminal acts. Pollock and Maitland (1898) note that homicide was considered a deed reconciled by monetary payment, something we might consider appalling and barbaric today, yet worked as a mechanism to keep society peaceful for centuries under the early common law system.[[29]](#footnote-29)

One might think the clear error in such a system is that when an individual commits a crime, they can simply ignore the jurisdiction of the common law court and get away with their crime. However, what historically emerged to deal with such a dilemma was that refusal “to accept the monetary fine put the accuser outside the law.”[[30]](#footnote-30) An outlaw was not forced to leave society, but if he did not, it would not end well for him. By refusing to submit to the arbitration, protection under the law of his life or property would cease to be granted. Once declared an outlaw an individual’s “reciprocal arrangements for protection were no longer in force.”[[31]](#footnote-31) This would mean that every contract was void; local rulers could lay waste to their land; every bond with the rest of society was dissolved. Pollock recounts that the outlaw “comes back into the world like a new-born babe … capable indeed of acquiring new rights, but unable to assert any of those that he had before his outlawry”, which was an extraordinary negative incentive.[[32]](#footnote-32)

Not only were an outlaw’s property rights and contracts voided by his refusal to recognize the jurisdiction of the common court, but “anyone in the confederation was obligated to pursue him, [and] either killing him or driving him from the area.”[[33]](#footnote-33) The phrase is used, “Let him bear the wolf’s head”, meaning “To pursue the outlaw and knock him on the head as though he were a wild beast is the right and duty of every law-abiding man.”[[34]](#footnote-34) While this type of violence seems contrary to the tenants of common law, “[a]s with primitive law in general, the threat of violence was used to create incentives that could lead to a peaceful settlement.”[[35]](#footnote-35)

Because such strong incentives existed to recognized the jurisdiction “instead of being a substantive punishment, [an outlawry] becomes mere ‘criminal process,’ a means of compelling accused persons to stand their trial.”[[36]](#footnote-36) Benson states that

A judgment under customary law is typically enforceable because of an effective threat of total ostracism by the community … Reciprocities between the groups, recognizing the high cost of refusal to accept good judgments, takes those who refuse such a judgment outside their support group and they become outcasts or ‘outlaws.’ The adjudicated solutions tend to be accepted due to fear of this severe boycott sanction.[[37]](#footnote-37)

This is parallel to Locke’s (1689) conception of mankind as beings with enlightened self-interest, recognizing that if they harm others, they, in turn, will be harmed themselves.[[38]](#footnote-38)

Individuals will respect the law even when they wrong another and know they face punishment, because if they do not, the law will not respect them when they are wronged themselves in turn. Benson points out elsewhere that “dispute resolutions are likely to be accepted because even losers recognize that the long-term benefits of behaving in accordance with members’ expectations probably exceed the restitution payment.”[[39]](#footnote-39)

Ostracization serves as a sufficient economic incentive to follow laws without having to arbitrate because of the doctrine of continuous dealings. The doctrine of continuous dealings states that individuals are still better off economically following agreed upon rules because of the prospect of future trade, as explained by Holcombe and others.[[40]](#footnote-40) For example, if two farmers, farmer A and farmer B, enter into an contractual agreement and farmer B reneges on the contract, farmer A will not be able to, *ceteris paribus*, get compensation from farmer B wronging him. Most would see this as a failure of the market, necessitating an outside force, the state, to enforce contracts. However, next time farmer A need to trade with someone, he will most likely seek to trade with farmer C, and will tell farmer C to not trust farmer B. Fearing this ostracization, farmer B has sufficient economic incentive to honor his contract with farmer A.

In cases were a perpetrator, who accepts the jurisdiction of the customary common law, could not produce the monetary amount assigned to compensate the victim, Benson shows that “[i]nstitutions were developed to avoid violence even when a person was unable to pay his fine.”[[41]](#footnote-41) The customary law prescribed the use of debtor’s prison, a tradition stretching back to Roman times.[[42]](#footnote-42) Ford (1936) demonstrates that historically prison was only for unpaid debts in the common law tradition, never punishment.[[43]](#footnote-43) The criminal would have a certain period of time in which his kin had to redeem him.[[44]](#footnote-44) If that debt could not be paid, he would sometimes become a slave to his creditor. This too, however, was for the purpose of providing just compensation, not retributive punishment.[[45]](#footnote-45) “Imprisonment would have been regarded in these old times as [a] useless punishment; it does not satisfy revenge, it keeps the criminal idle, and … it is costly.”[[46]](#footnote-46) It is peculiar to consider that modern society accepts prison as a punishment, able to satisfy desires for retributive ‘justice’, while it was never intended for such a purpose as a part of its origins in the English common law tradition.

Customary law, outside of the scope of governmental planning or enforcement, operating as a private function of the market, soon morphed into a public institution. This was not because of any failures on the part of the customary law, but because of the attractive opportunity of filling the King’s coffers. Political bodies in Great Britain naturally consolidated between 450 and 600 A.D. until there were seven defined political regions on the island. While the primary function of the English kings prior to this point was warfare, the kings took over law as a revenue stream—to pay the high cost of defending against the Danish invasions.[[47]](#footnote-47) The kings declared that all crimes were crimes against the king, for he ‘owned’ everything and everyone, and thus *he* was due compensation, not the individual who was harmed.[[48]](#footnote-48) Political bodies developed “an administrative machinery to facilitate the collection of fines for ‘criminal’ activity”, [[49]](#footnote-49) with enforcement by the king’s representatives, called reeves, in each individual shire, also known as shire reeves, or sheriffs. Sheriffs would hunt down outlaws—already ostracized by their own communities—and try to make them paid the king.[[50]](#footnote-50) Absent the aforementioned state action, the idea of an ‘outlaw’—such as Robin Hood of Sherwood Forest—being ‘wanted’ was a misnomer for customary law. On the contrary, outlaws were decidedly not ‘wanted’. Accordingly, for centuries thereafter, tensions existed between the old customary law of the people and the imposed law of the crown.[[51]](#footnote-51) But while the English common law serves as an important lesson about the power of the customary law as a means of social governance, the emergence of private law is not limited to Anglos and Saxons on an island in northern Europe.

**B. Isolated Primitive Societies**

To explore the existence and emergence of private law in isolated primitive societies, Benson (1989) seeks first to distinguish between morality and law through the use of Fuller’s (1964) differentiation. Law seeks to restrain human conduct by rules, but

[m]orality, too, is concerned with controlling human conduct by rules . . . how, when we are confronted with a system of rules, [do] we decide whether the system as a whole shall be called a system of law or a system or morality? The only answer to that question ventured here is that contained in the word "enterprise" when I have asserted that law, viewed as a direction of purposive human effort, consists in the "enterprise of subjecting human conduct to the governance of rules.[[52]](#footnote-52)

Meaning that the existence of ‘law’ in a society must generate mechanisms for enforcement of law, change of law, and arbitration of disputes.[[53]](#footnote-53) Benson also looks to Hart’s (1961) division of law into primary and secondary rules.[[54]](#footnote-54) Primary rules are those that exist naturally in small close knit microcosms of human interaction, such as families. Secondary rules exist to deal with the fact that most human interactions take place outside of those microcosms.[[55]](#footnote-55) Hart states, similar to Fuller, three main features of secondary rules: rules of recognition, change, and adjudication. First, the law must be able to be known and recognized, either informally by custom or formally by written documentation, second, the law must have a procedure for change, and third, the law must be able to be enforced if broken.[[56]](#footnote-56) Benson preceded to apply these rules to three different primitive societies isolated from external legal influence to see what legal systems spontaneously emerged to govern human interaction.

The Yurok Indians and their neighbors in Northern California had legal norms such that private property rights were sharply defined.[[57]](#footnote-57) Benson points out—counter to conventional wisdom—that strong property rights regimes is a common characteristic of primitive societies (see also: Hayek 1973, 108; Rodriguez, Galbraith and Stiles, 2006). The benefits of property right protection was a sufficient incentive to motivate individuals to recognize and participate in the legal system without coercion. With this well-defined property rights structure, the Yurok Indians had no government at the village or national level.[[58]](#footnote-58) Absence state arbitration a well-developed enterprise of private judging emerged. If a dispute arose, both Yurok involved would hire two to four ‘crossers’—nonrelatives from a community not his own, as go-betweens, who would ascertain claims and review evidence and render a judgment. (Benson 1989, 8). Liability, intention, value of damages and the relationship between the accuser and defendant were all considered as part of the adjudication. Per Hart’s requirements for law, the Yurok had customary recognition of certain crimes uniformly across Northern California, such as murder, adultery, theft, illegal poaching, curses and even minor insults. Guilty parties were required to compensate the wronged party with valuable property. The judgments of the crossers were enforced by ostracism by the entire community of tribes if not followed. If a member refused to pay their proscribed punishment, they would become an outlaw, “which meant that anyone could kill him without any liability for the killing”.[[59]](#footnote-59) Naturally, the incentives were such that submission to the crossers judgments were the norm, not violence. While the Yurok Indian system shares many fundamental similarities with medieval English common law, there still existed particular legal norms specific to the needs and customs of the Yurok, which Benson highlights.

The Ifugao natives in Northern Luzon, Philippines, is another example of private law emerging spontaneously to govern human behavior from isolated communities. Their interdependent economy had complex water rights and real-estate systems to govern their irrigation based agricultural economy, yet the Ifugao “had no trial, district, or village governmental organization, and no centralized authority with the power to force compliance with the laws or to levy compulsive sanction on behalf of society at large”.[[60]](#footnote-60) Society was mostly structured familiarly, but disagreements between Ifugao families were settled non-violently with well-established adjudication procedures beyond the family. Individuals called monkalun served as professional impartial mediators, taking evidence and hearing testimony, and would get paid for their services. The monkalun would not have any authority to enforce his decisions, instead social ostracism provided the incentive to submit to his decisions. The Ifugao law was tort based, not criminal, and it would focus on compensation, not harming aggressors of life or property.[[61]](#footnote-61)

The Kapauku Papuans of West New Guinea demonstrate a similar system as well, but Benson highlights their contribution as a model for Hart’s second rule for law, that of established processes for change. A primitive linguistic group of about 45,000, the Kapauku Papuans lived in familial configurations of three to nine villages, with each village consisting of about fifteen households, with “no formal government with coercive power”.[[62]](#footnote-62) Leopold Pospisil observed that Kapauku had a strong emphasis on individualism and physical freedom in their communities. In the communities there existed tonowi, which means ‘rich ones’, who were healthy and wealthy men respected in the society. Anyone able to accumulate wealth would have been proved meritorious by the market, and thus a tonowi was “generally a mature, skilled individual with considerable physical ability and intellectual experience”.[[63]](#footnote-63) Each individual in the society could choose to align themselves with a tonowi and contract out to be their followers. In exchange, the tonowi would loan their followers money and provide legal arbitrations, in a strange mix of financial and legal services. If a tonowi acted in such a way that was delegitimizing, especially by ruling unjustly, the followers could pay back their loans and find a new tonowi.[[64]](#footnote-64)

If two individuals within a community had a dispute, it would become a public quarrel. This involved loud shouting, which would draw a crowd, including one or more tonowi. The tonowi would listen to the testimonies and observe the evidence, and then the tonowi with the most authority among the individuals involved would provide his case for resolution. The Kapauku had well-known customary law and precedent regarding property and contracts, which was recognized and accepted among the people. The punishments were almost always economic restitution, however to various forms of physical punishment also existed.[[65]](#footnote-65) Again, ostracism by the community was the ultimate threat, and, accordingly, was rarely ever used.[[66]](#footnote-66)

The most interesting part of the Kapauku legal system are the rules for change. One way the law could evolve was that local or regional customs could change. Pospisil observed a new custom regarding adultery sanctions work its way through the customary legal system over a two year period and spread throughout the communities. Another way was that a tonowi could try to change the laws himself. Pospisil observed a new ruling on incest, made independently by a tonowi, which then slowly gained more adoption by neighboring and regional tonowi over time until it was also a part of the customary law.[[67]](#footnote-67) In both cases, changes in law were not authoritarian, but relied upon the voluntary adoption by the community to become law.

Benson (1990) empirically observes that that primitive, private legal systems exhibit six universal characteristics:

[1] primary rules characterized by a predominant concern for individual rights and private property; [2] responsibility of law enforcement falling to the victim backed by reciprocal arrangements for protection and support in a dispute; [3] standard adjudicative procedures established in order to avoid violent forms of dispute resolution; [4] offenses treated as torts and typically punishable by economic payments in restitution; [5] strong incentives to yield to prescribed punishment when guilty of an offense due to the reciprocally established threat of social ostracism; and [6] legal change arising through an evolutionary process of developing customs and norms.[[68]](#footnote-68)

Each of these components are essential for a functioning legal system, and emerge spontaneously through peaceful, voluntary interactions.

**C. Medieval Iceland**

Friedman (1979) and others (Benson 1990) have found medieval Iceland of great value in understanding the spontaneously emergent order of law. This is because Iceland’s history is scrupulously documented, but also because their society had a great interest in law. (In fact, Friedman notes that Njal—one of the most famous figures in medieval Icelandic folklore—was not a warrior, but a lawyer.[[69]](#footnote-69)) The core of the Icelandic society around 930 A.D. was a goði (plural goðar), the local chieftain and priest, and the goðorð, the congregation. Iceland was divided into four quarters with each quarter containing nine goðorð. If conflicts arose, small private courts would adjudicate with mediators being chosen half by the plaintiff and half by the defendant. Next thing up was a higher court, with judges chosen by the goðar, and then a higher court, one for each quarter, and then the highest court above everything.[[70]](#footnote-70)

While this initially looks like a regular governmental judicial system, it was all voluntarily organized. Individuals could choose which goði they wanted to align under, with goðar competing for alliance, and political seats on the goðorð were marketable property that could be bought, sold, inherited, loaned, etc. Friedman points out that while there was a legislative and judicial ‘branch’ of society, there was no executive, because the court did not enforce its verdicts.[[71]](#footnote-71) The system was entirely compensation based, with no violent punishment, and if they guilty party did not pay, he was no longer under the protection of the law, or ‘outlawed’. The law was known and recognized—there was also an elected lawspeaker, the lögsögumaðr, who was in charge of knowing and reciting the law to the people—and established customary norms existed for the amount fined for different crimes, including murder.[[72]](#footnote-72) Individuals in society that could not afford the use of the private legal system could sell their right to prosecute for harm done to them, and entrepreneurs would pay for arbitration and make a profit by collecting fines. Friedman does note that there is a potential concern regarding individuals becoming rich and powerful enough that it no longer becomes possible to enforce judgments against them, however, power remained dispersed for two centuries before the Icelandic private legal system started to break down.[[73]](#footnote-73)

**D. 19th Century American Frontier**

A supposed blemish in America’s traditional rich history of order and prosperity is the wild, Wild West where cowboys and Indians battled in the ravines and canyons of western United States, bounty hunters and sheriffs pursing murderous outlaws through the Desert Mountains, and daily shootouts on the streets of infamous cities like Dodge, as a lone tumbleweed bounds across the barren wasteland. Unfortunately, as Anderson and Hill (1979) point out, the aforementioned dramatic and chaotic view of the West can be blamed on literature, folklore, Hollywood and shoddy scholarship with little to no grounding in empirical investigation.[[74]](#footnote-74) Alternatively, Anderson and Hill cite research that demonstrates that

in five of the major cattle towns (Abilene, Ellsworth, Wichita, Dodge City, and Caldwell) for the years from 1870 to 1885, only 45 homicides were reported-an average of 1.5 per cattle-trading season. In Abilene, supposedly one of the wildest of the cow towns, ‘nobody was killed in 1869 or 1870. In fact, nobody was killed until the advent of officers of the law, employed to prevent killings.’ Only two towns, Ellsworth in 1873 and Dodge City in 1876, ever had five killings in any one year.[[75]](#footnote-75)

Outside of the reach of the judicial arm of state or federal governments, the justice void was filled with private organizations, associations, camps and club. For example, the vigilante committee in San Francisco acquired eight thousand members in three months and cut the murder rate from over a hundred in the six months leading up to the formation of the committee, to only two in three months.[[76]](#footnote-76)

Anderson and Hill examine many examples of extra-legal polycentric private law systems that provides insights into how law and order functioned in the 19th century American frontier. For example, claims associations were made up of pioneer ‘squatters’ were far beyond the control or jurisdiction of the federal government. Anderson and Hill write that each claims association adopted their “own constitution and by-laws, elected officers for the operation of the organization, established rules for adjudicating disputes, and established the procedure for the registration and protection of claims” as well as arbitration services.[[77]](#footnote-77) While violence was an option for sanctioning perpetrators, Anderson and Hill state that individuals who agreed to a particular land club and then did not honor the agreed upon private property arrangements were usually sanctioned by ostracization: all members of a club would neither interacting nor trading with the sanctioned party. The land clubs were based on voluntary association, thus if geographic neighbors did not want the benefits and protection of a club they were left alone.[[78]](#footnote-78)

On a smaller scale than land owning citizens, extra-legal judicial order also arose in the mining camps, which formed across the frontier in the wake of the gold rush. Without a smidgen of constitutional authority, judge or officer of the law for five hundred miles, private law emerged to provide necessary order to facilitate human interaction.[[79]](#footnote-79) Groups of miners entered into voluntary contracts, which specified both financing arrangements for the mining operations and governed their interpersonal relations, including caring for the sick, personal conduct alcohol and settling disputes. They had no higher enforcement or arbiter of disputes outside of the company. Each group specialized their rules to their local needs and knowledge. If an individual did not like the terms of one company, and could not bargain a change, they were free to leave a join another company.[[80]](#footnote-80) Humorously, in many of the camps all lawyers were strictly prohibited from practicing law (with threats of corporal punishment), reflecting their desire for common sense tort rulings that they decided, absent of bureaucracy and technicalities. Anderson and Hill highlight that in the case of a dispute “any man in the camp might be called upon to be the executive officer … anyone who was a law-abiding citizen might he considered for prosecutor or defender for the accused.” Evidence suggests that once formal governmental law was imposed upon mining camps, crime increased.[[81]](#footnote-81) The aforementioned miners’ courts, that existed to resolve any disputes that arose, functioned as follows:

a group of citizens were summoned to try a case … From their midst they would elect a presiding officer or judge and select six or twelve persons to serve as the jury. Most often their rulings were not disputed, but there was recourse when disputes arose. For example, in one case involving two partners, after a ruling by the miners' court, the losing partner called a mass meeting of the camp to plead his case and the decision was reversed. And if a larger group of miners was dissatisfied with the general rulings regarding camp boundaries or individual claim disputes, notices were posted in several places calling meeting of those wishing a division of the territory. ‘If a majority favored such action, the district was set apart and named. The old district was not consulted on the subject, but received a verbal notice of the new organization.[[82]](#footnote-82)

Anderson and Hill point out that such divisions were usually the result of differences in local customs and conditions, where separation greater meet the needs of the miners.[[83]](#footnote-83)

Evidence by Beadle suggest that there was competition between courts for providing arbitration services. For example, in Colorado in 1860, there were four different private ‘governments’ operating in the same geographic area providing legal services: the miners’ courts, the people’s courts, a ‘provisional government’ in the mountains, and a ‘provisional government’ running concurrently in the valleys.[[84]](#footnote-84) Individuals were free to choose which jurisdiction they would patronized with their business. “Appeals were taken from one to the other, papers certified up or down and over, and recognized, criminals delivered and judgments accepted from one court by another, with a happy informality which is pleasant to read of”.[[85]](#footnote-85) Beadle further points out that there was “undoubtedly much less crime in the two years this arrangement lasted” then the two years which followed after the formal, regular government was established.[[86]](#footnote-86)

Anderson and Hill conclude that first, the West was orderly, due to private market agencies, second, there was a diversity of preferences and standards of law that were allowed to flourish from the decentralized legal systems, and third, competition between providers of legal protection provided positive and efficient results, seeing as individuals were always free to leave private legal jurisdictions. Anderson and Hill remark that there we still many problems in the “Wild West”, but it was anything but *Lord of the Flies* with six-shooters and Gatling guns.

While the empirical evidence suggests such systems can emerge and function, this paper will also examine potential theoretical foundations for how private customary law is sustained, and furthermore, how it is more efficient than public, governmental law.

**III. ECONOMIC ANALYSIS**

While the aforementioned historical evidence suggests that private law can both exist and function efficiently, simple thought experiments about social interaction fuel great skepticism concerning the reasonability of voluntary legal systems. For instance, contract violations are seen as a market failure justifying government provision of courts as a ‘public good’. In response, the political economy of Eleanor and Vincent Ostrom, and their institutional analysis, provide important insight into the plausibility, functionality and efficiency of private law, and why law should not be considered a public good. It is important to note that the Ostroms do not support private law in their works, and accept a limited rule of the state in society, as will be elaborated upon later. It is not the argument of this paper that the Ostroms would agree with polycentric private legal systems, rather that the Ostroms’ method and institutional analysis provide useful insight into the plausibility and efficiency of private law.

**A. ‘Third Way’ Institutional Analysis**

The Ostroms’ work is grounded in a rejection of a theoretical dichotomy between ‘market’ and ‘state’, where the ‘market’ only includes simple private property exchanges between individuals involving direct payments and contracts, and ‘state’ is the coercive force that coordinates and governing large groups of individuals and their interactions.[[87]](#footnote-87) When the Ostroms discuss government and governance throughout their work they do not strictly mean the state. V. Ostrom states, that the “focus upon States governing Societies has stripped much of human consciousness about what it means to be a human being coping with the exigencies of everyday life”.[[88]](#footnote-88) Instead, it must be understood that,

Families, voluntary associations, villages, and other forms of human association all involve some form of self-government. Rather than looking only to states, we need to give much more attention to building the kinds of basic institutional structures that enable people to find ways of relating constrictively to one another and of resolving problems in their daily lives…People can rely on self-help in arranging their institutions, rather than depending upon ‘the elite decision makers of government.’[[89]](#footnote-89)

The role of the ‘state’ can be performed voluntarily and without coercion, and thus they call for analysis of voluntary ‘public goods’.[[90]](#footnote-90)

The terminology of public goods comes from Samuelson’s paper *The Pure Theory of Public Expenditure* (1954), in which he divides all goods into private goods and public goods. Private goods are excludable, meaning that individuals can exclude other individuals from enjoying a good or service unless they pay for it, and are rivalrous, meaning that one individual’s use of the good or service is mutually exclusive with another individual using it. Public good are non-excludable, meaning that it is impossible to keep those who do not pay from enjoying the good or service, and non-rivalrous, meaning that an individual’s use of the good or service does not limit another individual’s ability to use it as well.[[91]](#footnote-91) Buchanan, in his work *An Economy Theory of Clubs* (1965), rejects the strict dichotomy between public and private goods, stating that there is a third way of looking at goods, which he called ‘club goods’, for “it was feasible for groups of individuals to create private associations (clubs) to provide themselves non-rivalrous but small-scale goods and services that they could enjoy while excluding nonmembers from participation”.[[92]](#footnote-92) It is important to note that when Buchanan and others discuss ‘club goods’, they state that such goods involve the exclusion of nonmembers, which implies a basic foundation of private property, thus ‘club goods’ should be considered a subset of private goods, as will be addressed in more detail later in the paper.

In the beginning of their project, the Ostroms took the idea of a ‘third way’ and started studying “how citizens, local public entrepreneurs and public officials engaged in diverse ways of providing, producing, and managing” public goods, such as public services and ‘commonly’ held property. The Ostroms’ empirical research found data that could not be explained by a strict Samuelsonian dichotomy between public and private. Further theoretical development of Buchanan’s idea was needed, and the Ostroms starting with the governance of metropolitan localities. Aligica and Tarko (2012) recount that the “conventional wisdom in the 1960s was that a metropolitan region should be one large community, functionally integrated by economic and social relationships”.[[93]](#footnote-93) Instead, metropolitan governance was a quilt of overlapping federal, state, county, city, and district jurisdictions with a perpetual lack of coordination. Mainstream political economy argues that this made effective administration impossible without centralization, with each local unit seeking their own interest at the cost of the public interest.[[94]](#footnote-94) Previously, the “fragmentation of authority and overlapping jurisdictions” was considered chaotic and the “principal source of institutional failure in the government of metropolitan areas”.[[95]](#footnote-95) Vincent and Eleanor Ostrom, and their associates, used their ‘third way’ analysis to reconsider the basic assumptions that polycentric governance is inefficient.[[96]](#footnote-96)

Polycentricity simply means a social system with decentralized decision centers “having limited and autonomous prerogatives and operating under an overarching set of rules”.[[97]](#footnote-97) The Ostroms took Buchanan’s ‘third way’ concept and, in light of further theoretical and empirical research, proposed that some governmental services could be provided more efficiently by overlapping, polycentric jurisdictions of different sizes and degrees of decentralization.[[98]](#footnote-98) Consider the parallel: in the market certain firms providing certain goods and services are more efficient when they are smaller in scale, because of diminishing marginal returns. Both publically and privately, providers of goods and services are not automatic more efficient because of centralization and consolidation. Aligica and Tarko continue that, “[q]uoting political economist after political economist, [the Ostroms] hammered the crucial fact that the optimum scale of production is not the same for all urban public goods and services.[[99]](#footnote-99) This research lead the Ostroms to develop a new framework for analyzing the diversity of human situations, known as IAD: institutional analysis and development. Aligica and Tarko highlight that out of IAD

grew a solid empirical research agenda, an entire new domain out of which the outstanding work on commons and common pool resources was later to emerge, as well as the applied institutional analysis tools for which the Ostroms’ Bloomington school is well known today.[[100]](#footnote-100)

Through their research and projects, the Ostroms “demonstrated that complexity is not the same as chaos in regard to metropolitan governance”[[101]](#footnote-101) but their conclusions held true far beyond municipal administration. Aligica and Boettke (2009) show that the Ostroms’ work demonstrates that goods and services traditionally thought to only be able to be provided by the state, such as “streets, roads and other thoroughfares, fire protection, police services, and other such services”, can be, and have been, provided by private entrepreneurs, but “under terms and conditions that are communally specified” through voluntary association.[[102]](#footnote-102)

The Ostroms lamented the academic divide between the disciplines of economics and political science.[[103]](#footnote-103) One line of analysis lost from the divide was the legacy of political philosophers asking questions such as, “How can fallible human beings achieve and sustain self-governing entities and self-governing ways of life? How can individuals influence the rules that structure their lives?” The same questions asked by Plato, Aristotle, Madison, Hamilton, Toqueville, etc. For example, Madison and Hamilton, in *The Federalist* papers, did not explicitly mention polycentricity, yet “their conception of the principles of federalism and separation of powers within a system of limited constitutions meets the defining conditions for polycentricity”.[[104]](#footnote-104) Similarly, Tocqueville made “observations about the invisible mechanisms of social order” in America, arriving at his conclusions regarding “a science and art of association” serving as the foundation of self-governance, of which the Ostroms’ work is an outgrowth.[[105]](#footnote-105)

**B. The Efficiency of Polycentricity**

E. Ostrom points out that the concept of organization is “closely tied to the presence of a central director who designed a system to operate in a particular way”.[[106]](#footnote-106) Accordingly, Ostrom claims that self-organized governance systems are better viewed as complex adaptive systems. She states that, “Complex adaptive systems are composed of a large number of active elements whose rich patterns of interaction produce emergent properties that are not easy to predict by analyzing the separate parts of a system”.[[107]](#footnote-107) She calls them polycentric, which means that individuals inside of the system are able to organize multiple governing authorities (public or private) at different scales. Each unit within a complex adaptive system “may exercise considerable independence to make and enforce rules within a circumscribed scope of authority for a specific geographic area”.[[108]](#footnote-108) She stresses that units can take many forms, such as general-purpose governing units, highly specialized governing units, associations, etc. All such aforementioned units are both private, in the sense that they are based on voluntary exchange and private property rights, while also being what she would consider ‘public’, seeing as they govern interactions and exchanges beyond the simplistic understanding of private property systems as only one-on-one exchanges under contract, and ‘govern’, through systems of voluntary association, a broader scope of exchanges and interactions.

Three parallel examples are the division of labor, money, and language: while each can exist in a basic sense simply between two isolated individuals, none of them can fully emerge apart from a larger social network of exchanges and interactions.[[109]](#footnote-109) The division of labor, money, and language are all the result of spontaneous order emerging from a far broader social context than simply two private individuals writing up individual contractual agreements. They exist because individuals act in a social spontaneous order that no individual choose or designed.

The idea of polycentric law is intricately linked to theories of spontaneous order, and to the reasons why a decentralized economy is desirable over a centrally planned economy. Hayek states that to talk about an economy is, in itself, a misnomer. The economy does not exist as a monolithic, coordinated, deliberate arrangement, known and overseen by a singular agent. The cosmos of the market, instead, “serves the multiplicity of separate and incommensurable ends of all its separate members”[[110]](#footnote-110) and, thus, to say the economy is a certain way is a dangerous oversimplification. In the same way referring informal and formal legal norms and institutions that exist in society as ‘the law’ is also incongruent. Hayek states that no “system of law has ever been designed as a whole, and even the various attempts at codification could do no more than systematize an existing body of law and in doing so supplement it or eliminate inconsistencies”.[[111]](#footnote-111)

Hayek’s *Use of Knowledge in Society* (1945) demonstrated that a centrally planned economy could never work, because all knowledge of the workings of an economy are decentralized, and thus it would be impossible to centralize all knowledge in such a way for a single agent, or Central Pricing Board, to ‘plan’ an economy.[[112]](#footnote-112) Hayek argues that judicial bodies cannot create law, in the same way that central planners cannot create prices, instead they ‘discover’ law. Quoting Kern, Hayek writes that, under the medieval conception of lawmaking, when cases arise where precedent does not exist, judicial officials make law, but only in the sense that they are making good old law, which has tacitly existed. [[113]](#footnote-113) Judgments made in court were indistinguishable from the legal activity of the community. “Law is old; new law is a contradiction in terms; for either new law is derived explicitly or implicitly from the old, or it conflicts with the old, in which case it is not lawful”.[[114]](#footnote-114) Accordingly, all judicial official could do with regard to the law is restore the law that has been violated.

According to Aligica and Tarko, the idea of polycentricity originates with Michael Polanyi’s *Logic of Liberty* (1951), who drew upon the works of Mises and others (Mises 1922, Lange 1938).[[115]](#footnote-115) Polanyi’s

arguments about the impossibility of economic calculation in a socialist system were closely related to Hayek’s, yet they also benefited from the more general perspective provided by the concept of polycentricity. The market, he wrote, should be seen as a polycentric system involving a web of many agents that constantly adjust their behavior to the decisions made by others. Socialism implies the transformation of the system into a monocentric one. … In some sense, the market can also be said to have an ideal, namely, to deliver the optimal distribution of goods and the optimal production processes (i.e., to reach a Pareto equilibrium), and real markets always fall short of this ideal as agents lack perfect information and human activities often involve externalities.[[116]](#footnote-116)

Having polycentric private law is like having a free market economy. Perfect law is the equivalent of a perfect equilibrium price, which does not exist in the real world. An efficient economy has many prices, all moving towards a Pareto equilibrium, thus an efficient legal system has heterogeneous legal norms, each one emerging from small, decentralized, polycentric systems, all moving toward ‘perfect law’. The alternative is a monocentric legal system where “the prerogatives for determining and enforcing the rules are ‘vested in a single decision structure that has an ultimate monopoly over the legitimate exercise of coercive capabilities’”.[[117]](#footnote-117) The same issues of economic inefficiency that exist with other non-natural monopolies (post office, public utilities, transportation) must also be true with a monopoly over law.[[118]](#footnote-118)

V. Ostrom argues that for any polycentric system of governance to exist and persist through time, “a structure of order relationships would have to prevail, perhaps, under the illusion of chaos.” One might say a Smithian invisible hand producing a hidden order.[[119]](#footnote-119) Polanyi distinguished between two different methods of organization: deliberate direct order coordinated by central authority and the other spontaneous and polycentric, “where the elements of a complex system are allowed to make mutual adjustments to each other” as a part of a system of rules.[[120]](#footnote-120)

While Polanyi fully support polycentricity within a legal system—differing courts and circuits—he argues that polycentricity cannot function without a pre-existing legal framework which provides adequate private property protection and contract enforcement.[[121]](#footnote-121) V. Ostrom affirmed Polanyi’s claim, adding that such private property rights must be maintained in a legal and judicial system which exists prior to the market being able to function.[[122]](#footnote-122) E. Ostrom also does not believe in the plausibility of private courts, stating that you need centralized government to provide “efficient, fair, and honest courts systems, effective property right systems”, which cannot be provided locally, to facilitate self-governing societies and private common pool resource management.[[123]](#footnote-123) However, as seen, the theory of polycentricity still strongly supports private legal systems without the prerequisite of private property protection.

V. Ostrom provides three conditions for polycentric governance to exist and function efficiently: first, there must be freedom of entry.[[124]](#footnote-124) Second, there must be enforcement: “If individuals or units operating in a polycentric order have incentives to take actions to enforce general rules of conduct, then polycentricity will become an increasingly viable form of organization”.[[125]](#footnote-125) Third, there must be orderly ways to change the rules.[[126]](#footnote-126) Polycentric law meets these standards: first, a free market means freedom of entry and exit to supply arbitration services, second, members of a society are incentivized to ostracize individuals who have been outlawed, and third, through competition and changing customs private law can adapt.

The ability to change legal rules and norms exists in a government monopoly judicial system as well, but this process is controlled by politically appointed judges, not by market pressures and profit and loss, thus only a small minority that is governed by the law has almost complete control over innovations of the rules. Only when pushed by market forces do prices move towards Pareto equilibrium prices; similarly, only with polycentric law do legal reforms move towards optimal legal norms that most efficiently serve those it governs. However, it is important to note that V. Ostrom warns that

conditions for social order include shared believes and norms within communities about how they regard one another, what they consider to be fair, how they distinguish right from wrong. … If there were no bases for trust, and no shared community of understanding about the meaning of right and wrong, then the terms of trade in exchange relationships, or the patterns of reciprocity in communal and social relationships, would become extraordinarily precarious.[[127]](#footnote-127)

An equilibrium in the market is possible because a market clearing price is an objective reality, but if there is no shared preference for a standard of ‘justice’, at some point equilibrium law becomes incoherent.

Polycentric complex adaptive systems do not have a central authority, and thus necessarily will have overlap and less than Pareto optimal outcomes, “given the immense difficulty of fine-tuning any complex, multi-tiered system.”[[128]](#footnote-128) However, for the same reason prices should be decentralized instead of centrally planned, because of the overlap and lack of centralization, “information about what has worked well in one setting can be transmitted to other units. And when small systems fail, there are larger systems to be called upon – and vice versa.”[[129]](#footnote-129)

The presence of redundancy within a polycentric system also provides reasons to be concerned about inefficiency.[[130]](#footnote-130) Duplication of services is assumed to be wasteful and generate disorder especially when one considers redundancy in law. However, E. Ostrom points out that redundancy is essential in “keeping systems running in the presence of external shocks or internal malfunctions”.[[131]](#footnote-131) Consider the human immune system “and its capacity to cope with external threats by the presence of a large number of seemingly redundant systems that are ready to combine and recombine in order to fight off the threat of various types of infections”.[[132]](#footnote-132) Or simply one of the many benefits of having competitive, instead of monopolistic, providers of near homogenous goods and services in the economy. While initially it might seem like a waste of resources to have the redundancy of two firms producing the near identical product, not only does the competition incentivize efficiency and innovation, but also if one firm fails—because of mismanagement, external disaster, PR nightmare, etc.—the other firm can seamlessly step in to fill the void.

It is important to note that while polycentricity can seem rather focused on institutions, organizations and collectives, V. Ostrom affirms that, “In a theory of polycentric orders, individuals are the basic unit of analysis. Individuals are assumed to be interested decision makers who can calculate potential benefits and costs subject to elements of risk and uncertainty”, who control the rest of the polycentric order through individual decisions made.[[133]](#footnote-133) In this way, the Ostroms’ method of analysis can be considered methodological individualism.

**C. Common Pool Resource Management**

What the Ostroms are best know—and the work for which Eleanor receive the Nobel Prize in Economics in 2009—is her work on common pool resource management. Law can be considered a common resource—benefiting all who associate within the umbrella of its protection—that easily disintegrates without the centralization and enforcement of the state, as will be discussed in more detail. However, E. Ostroms research and theoretical framework surrounding common pool resource management of environmental resources provide insight into how a polycentric legal system does not have to necessarily have to end in tragedy.

As conventional theory goes: when a resources are held in common, i.e. public, no one has an incentive to take care of the resource, and everyone has an incentive to exploit the resource, thus you get, what Hardin academically coin in his paper, a *Tragedy of the Commons* (1968).[[134]](#footnote-134) This theory was also based on Olson’s analysis in *The Logic of Collective Action* (1965), which, based on theory, claimed that collective action results in chaos because of individuals acting rationally based on their self-interested and the incentives present.[[135]](#footnote-135) As E. Ostrom did her empirical work using institutional analysis, she discovered that what the economic theory predicted just was not true. Instead, many examples of ‘common pool resources’ were incredibly efficiently managed, despite their public nature, needing neither the state nor ‘privatization’ to save it from tragedy.

E. Ostrom points out that when presented with supposed ‘market failures’, economists immediately jump to proscriptions for benevolent Leviathan to deal with the problems, ignoring that state management lacks sufficient incentives for efficiency. Economists cannot imagine how voluntary self-organizations could provide ‘public goods’ or manage ‘common pool resources’. This is what Hayek calls the ‘fatal conceit’: the assumption that complex order can only result as a product of a central planning designed by rational minds.[[136]](#footnote-136) Instead, E. Ostrom seeks to develop a theory of self-organization and self-governance.

Ostrom criticizes Smith’s claims that “The only way to avoid the tragedy of the commons in natural resources is to end the common-property system by creating a system of private property rights” because of the inefficiencies of each individual only owning their personal private property, without being allowed to share its use or management, especially when it came to common pool resources.[[137]](#footnote-137) As Block (2011) points out, in his review of E. Ostrom’s *Governing the Commons,* Ostrom has a limited and narrow understanding of privatization and private property that is quite destructive. When she talks about ‘common’ ownership, she really is talking about partnerships.[[138]](#footnote-138) As Ostrom states in her eight rules for governing the commons—which will be examined in length later—the first rule demands that common pool resource must have clearly-defined boundaries allowing for the effective exclusion of unentitled parties.[[139]](#footnote-139) The ability to exclude implies a framework of private property.

Ostrom throughout her work provides numerous examples of ‘commons’ not ending in tragedy: fishing in Alanya, Turkey,[[140]](#footnote-140) forest managements in Torbel, Switzerland,[[141]](#footnote-141) villagers in Japan,[[142]](#footnote-142) irrigation in Spain,[[143]](#footnote-143) and the Philippians.[[144]](#footnote-144) As Block points out, each of the examples are actually examples of governance through complex, voluntary, private partnership arrangements that exclude non-members in a way completely consistent with private property.[[145]](#footnote-145) Ostrom gives many other examples throughout her works of, what she calls, “common-property institutions” such as business corporations and housing condominiums, both examples of complex private property arrangements.[[146]](#footnote-146) Block addresses potential political and personal reasons why she makes the obvious error of explicitly stating that such partnerships are “not a private property system”.[[147]](#footnote-147) However, regardless of her intention in using a simplistic and limited understanding of private property, her examples and analysis still provide true and valuable insights into the power of complex voluntary partnerships, within a system of private property, to manage and govern what can be mistaken for common pool resource problems.

From her research, Ostrom (1990) noted eight rules for governance of commons: first, the common pool resource must have clearly-defined boundaries allowing for the effective exclusion of unentitled parties, second, “congruence between appropriation and provision rules and local conditions”,[[148]](#footnote-148) as in, proportionality between benefits and costs, third, “most individuals affected by a resource regime are authorized to participate in making and modifying its rules”,[[149]](#footnote-149) fourth, individuals that monitor the resource are accountable to the users, fifth, “sanctions for rule violations start very low but become stronger if a user repeatedly violates a rule”,[[150]](#footnote-150) sixth, “Rapid, low-cost, local arenas exist for resolving conflicts among users or with officials”,[[151]](#footnote-151) seventh, the rights of the users to make their own rules is not constrained by external authorities, eighth, nesting enterprises: “when a common-pool resource is closely connected to a larger social-ecological system, governance activities are organized in multiple nested layers”.[[152]](#footnote-152) When all eight of these design principles are in place, common pool resources can be sustained without exploitation, despite being neither public nor privately managed. These eight rules have since been empirically verified by numerous field experiments based on the Ostroms’ research.[[153]](#footnote-153)

Ostrom defined a common pool resource as “a natural or man-made resource system that is sufficiently large as to make it costly—but not impossible—to exclude potential beneficiaries from obtaining benefits from its use”.[[154]](#footnote-154) From this, it is reasonable to say legal services is a common pool resource: it is a man-made service that serves as an umbrella for large scale social human interactions—Harts secondary rules—that is costly, but not impossible, to exclude potential beneficiaries from obtaining benefits from its use. Consider the following thought experiment: if a person is a robber in a law-abiding society, the robber gains the benefits from living in a law abiding society without having to pay the cost of following the law himself. He can both steal other people’s property and not have his own property stolen. In this sense, law could be considered a tragedy of the commons. Supposedly, the rule of law disintegrates over time, and society reverts to a Hobbesian state of nature.

However, in light of the historical examples examined in this paper, legal services can match the eight rules laid out by Ostrom making law public and yet not an exploited common-pool resource: first, boundaries, if an individual is ‘outlawed’, they will not be granted access to private mediation services in society; second, proportionality of costs: with competition between service providers of arbitration, costs will be kept low. If the cost of the harm from a tort exceeds the cost of paying an arbiter, an individual will not sue; third, individuals effected by the resource take part in shaping the rules, through the evolution of social legal custom; fourth, accountability of monitors—with competition between arbiters, if they issue bad rulings, they will not get business; fifth, the custom that emerges in society, regarding how much an individual gets compensated for a tort, is a tiered sanction, e.g. murder is more costly than battery; sixth, private arbitration is low-cost and rapid; seven, if the rules are not constrained by outside authorities or not depends on what political system private law is under, but this condition can be met; and eighth, nested jurisdictions, which is also fundamental feature of a common law system. Accordingly, a common legal system can operate, providing benefits to a larger community with neither complete privatization nor government control, without devolving into a tragedy of the commons.

The Ostroms, relying upon Hayek (1948) and others (Ostrom et al. 1993; Oates 1985; Hilton 1992), demonstrate that common pool resources are most efficiently governed by local entities. This is because with local knowledge:

users who have lived with and harvested from a resource system over a long period of time will have developed relatively accurate mental models of how their biophysical system operates, since their harvesting success efforts depend on such local knowledge… Because of this local knowledge, local users are more likely to craft better-adapted rules for local common-pool resources than any general system of rules for a larger array of resource systems ... Letting local users devise their own rules, they may create rules that limit access to the resource, encouraging inclusion of participants who are trustworthy and exclusion of individuals who are not. Such rules will, in turn, increase the probability that participants will trust each other more and use positive reciprocity.[[155]](#footnote-155)

It is more efficient, because of the decentralization of knowledge, to have small, decentralized legal systems without uniformity, because the local customs and norms regarding torts and contracts and local enforcement creates more efficient law that greater serves the legal needs of those under its jurisdiction. For example, E. Ostrom’s work in Nepal found that the irrigation systems built and managed locally by rural farmers were far more efficient that the modern, large-scale, industrial systems “improved by the construction of modern, permanent, concrete-and-iron head-works, funded largely by donors, and constructed by professional engineering firms”.[[156]](#footnote-156) She attributes this idiosyncrasy to the fact that the primitive systems had their own sets of locally designed rules and institutional structures grounded in, what Hayek would call, local knowledge.[[157]](#footnote-157) According to Aligica and Boettke, quoting V. Ostrom:

to free our institutional and political imaginations … we need to return to the idea that government cannot be the universal problem solver because ‘there can be no universal problem-solver capable of addressing diverse problems as applying to societies as wholes.’ Rather, ‘human societies require diverse patterns of association to cope with problems of varying scales under variable time and place exigencies.’[[158]](#footnote-158)

It is this decentralization of information that leads to superior efficiency of polycentric governance. Efficiency is obtained through maximum information being utilized. A polycentric legal systems, by its decentralized nature, will have more local knowledge, relevant to the preferences and needs of a particular community, taken into account. This also leads to the conclusion that polycentric law is more efficient than monocentric law.

**IV. CONCLUSION**

In the absence of government creation and enforcement of law, spontaneous human interactions results in complex, decentralized, polycentric legal systems, based on customary legal norms and traditions, that have developed to facilitate peaceful human society. Polycentric private legal systems are not result of state coercion, but they are also not merely one-on-one contract based exchanges. Law exists as part of the complex network of voluntary associations and systems which man can neither design nor control. When law emerges as a function of the free market, it will naturally be unorganized, redundant, duplicative, imperfect and constantly changing with the appearance of chaos. This, however, is far more preferable, and efficient, in society to cold, dead, static monocentric law. Arbitration administered by entrepreneurs, within a context of voluntary association, will lead to a legal system where there are many tiers of law, some providing general arbitration services while others will be for specific subsets of the market. By the nature of the fact that the systems would be polycentric and based on local needs, it is hard to describe and predict the exact functionality of particular private legal systems, yet competition would lead to general efficiency and innovation, moving toward equilibrium law.

While contrary to both common sense and hundreds of years of political and economic theory, polycentric private legal systems are not only is shown historically to be a viable method of governing human interactions, but theory suggests that polycentric private legal systems—riddled with chaos and decentralization—actually might be the most efficient way of administering law in society. There is no tragedy of common law, law spontaneously emergent from the voluntary exchanges of free individuals, yet there is a tragedy of moncentric, monopolistic law. Economic theory generally rejects centrally planned and controlled economies as inefficient. Economics should also reject monocentric law, and for the same reasons.

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