

Insights about the Nature of Law from History

The 11th Kobe Lecture, 2014

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INSIGHTS ABOUT THE NATURE OF LAW FROM HISTORY

2014 KOBE MEMORIAL LECTURE

Legal philosophy since the latter part of the twentieth century has been dominated by the contest between natural law and legal positivism, and more recently by inter-necine disputes between inclusive and exclusive legal positivism. A century ago the jurisprudential scene was different. “Until recently,” Roscoe Pound wrote in 1911, “it has been possible to divide jurists into three principal groups, according to their views of the nature of law and the standpoint from which the science of law should be approached. We may call these groups the Philosophical [natural law] School, the Historical School, and the Analytical School.”¹ When Pound penned this, legal positivism and historical jurisprudence were the two main rivals, with natural law theory mostly dormant. Soon thereafter historical jurisprudence fell off, and after the Second World War natural law theory revived to renew its battle with legal positivism.

In my view the standard breakdown of jurisprudential schools is misconceived. There have been three major branches all along, I believe, not just natural law and legal positivism, although the third goes unrecognized as such because it lacks a name and recognized identity.² Constituting a common core that runs through historical jurisprudence, sociological jurisprudence, legal realism, and several modern theories – ultimately traceable back to Montesquieu – this third theoretical perspective centers on law as a social institution that develops in connection with the society, economy, polity, and culture, and is best understood through an empirically-oriented lens.

“Social legal theory” is my label for this third branch. Elsewhere I have elaborated on social legal theory as a coherent theoretical approach and how it compares with natural law and legal positivism. Here I take the argument a step further, setting out this view of law by way of contrast to legal positivism, tackling the ultimate jurisprudential puzzle: “What is law?”

Legal positivists who set out to answer “What is law?” typically follow the same procedure: they assume what law is, then pare away non-essential features and render an abstract formulation of law. H. L. A. Hart in *The Concept of Law* posited “municipal law” as the paradigm because “most educated people” see that as law.³ When reduced to its core elements, law consists of primary rules of obligation, supplemented by secondary rules that specify how to identify, change, and apply primary rules. A legal

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1 Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 *Harv. L. Rev.* 591, 591 (1911).

2 See Brian Z. Tamanaha, *The Third Pillar of Jurisprudence: Social Legal Theory*, 56 *William & Mary Law Review* 2235 (2015).

3 H. L. A. Hart, *The Concept of Law* (Oxford University Press 1961) 2–3.

system exists, he asserted, when the bulk of the populace follows the primary rules and legal officials accept the secondary rules. The function of law is to maintain social order and guide behavior.⁴ Like Hart, Joseph Raz assumed that state legal systems are the epitome of law.⁵ Abstracting from state law, Raz identified three essential features: 1) “they claim to regulate any type of behavior;” 2) they claim supremacy over all other normative systems in society; and 3) they “maintain and support other forms of social grouping.” Law is “the most important institutionalized system in society” and “provides the general framework within which social life takes place.”⁶ More recently, Scott Shapiro began with intuitions about law from experts, “identifying those truths that those who have a good understanding of how legal institutions operate (lawyers, judges, legislators, legal scholars, and so on) take to be self-evident, or at least would take to be so on due reflection.”⁷ He came up with a batch of truisms about law (e.g. “In every legal system, some person or institution has supreme authority to make certain laws”⁸) and then abstracted away to come up with law’s essential features. Law, he concluded, “is a self-certifying compulsory planning organization whose aim is to solve those moral problems that cannot be solved, or solved as well, through alternative forms of social ordering.”⁹

These formulations of law have universal application, per Joseph Raz: “It is easy to explain in what sense legal philosophy is universal. Its theses, if true, apply universally, that is they speak of all law, of all legal systems; of those that exist, or that will exist, and even of those that can exist though they never will.”¹⁰ “When surveying the different forms of social organization in different societies throughout the ages we will find many which resemble the law in various ways. Yet if they lack the essential features of the law, they are not legal systems.”¹¹ Applying his concept of law in this fashion, Hart asserted that primitive law and international law were at best pre-legal because they lacked fully developed secondary rules.¹² Shapiro likewise declared, “Those who live in bands, in other words, don’t have law.”¹³ “Indeed, it is plausible to suppose that law is a comparatively recent invention, postdating the wheel, language, agriculture, art, and religion.”¹⁴

When answering “What is law?,” legal philosophers thus take a time-based concept of law – abstracted from intuitions about law of jurists in the here and now – and use it as the measure of law for all places and times. Although there is no logical objection to this way of proceeding, it masks that their conclusions about whether law exists are pre-determined by their starting assumption of the paradigm of law. To say that primitive societies lack law is equivalent to the assertion that primitive soci-

4 Id. 165, 188, 208.

5 Raz, Joseph., 2005, Can There Be a Theory of Law?, in: *The Blackwell Guide to Philosophy of Law and Legal Theory*, edited by Martin P. Golding and William A. Edmundson (Blackwell Publishing), 331.

6 Joseph Raz, *The Authority of Law* (Oxford University Press 1979) 116–21.

7 Scott Shapiro, *Legality* (Harvard University Press 2011) 15.

8 Id. 15.

9 Id. 225.

10 Joseph Raz, *Between Authority and Interpretation* (Oxford University Press 2009) 91–92.

11 Joseph Raz, Can There be a Theory of Law?, supra 328.

12 Hart, *Concept of Law*, supra 3–4.

13 Shapiro, *Legality*, supra 35.

14 Id. 36.

eties lack the basic features of state legal systems. But this begs crucial questions: Does law have only one form? Can law vary by place and change over time? Is this the most illuminating way to understand what law is?

I take a different approach. While I too begin with common intuitions about what law is, rather than pare away to come up with essential features, I trace law backwards (and forward), looking for earlier manifestations, kernels, continuities, variations, and growths, observing how law is structured, what it does, and how it works in different social groupings. This is a genealogical approach, situating law at various levels of social complexity, developing in conjunction with social, political, economic, technological, and cultural changes over time.

My argument proceeds on two tracks, one discussing increasingly complex social arrangements and the second making theoretical points about law. The first track draws mainly from anthropologists, archeologists, sociologists, political scientists, and historians, and the second refers to arguments by analytical jurists, legal positivists in particular. To prevent misunderstanding, I must emphasize at the outset that this is not a history of law. Nor do I mount a conceptual critique of legal positivist theories of law, which I do not challenge here on their own terms.¹⁵ Rather, as I outline a social view of law, I invoke a sampling of law in different times and places to cast doubt on the adequacy of legal positivist accounts, showing that they fail to capture the reality of law. At the conclusion I answer “What is law?”

THE BASICS OF SOCIAL LIFE

We are energy consuming beings who reproduce and live within communities; we seek to satisfy our basic needs (food, shelter, safety, reproduction) and desires (cooperation, affection, material comforts, knowledge, power, etc.); we perceive and communicate through the symbolic mediation of language and concepts; we act informed by and based on culturally generated and conveyed ideas and beliefs; we exist within webs of relationships, pursue projects, and coordinate our activities with others. Ecological, technological, and economic resources and constraints are the materialist aspects of our existence.¹⁶ Equally important are the idealist aspects: knowledge, beliefs, values, concepts, and habits inform and shape our behavior. “This heritage of culturally generated past experience supplies most of the knowledge that each individual has at her or his disposal for coping with social and ecological realities.”¹⁷ Social development involves the interaction of materialist and idealist elements.¹⁸

Group size is a crucial factor in the development of social institutions.¹⁹ A hierarchy of decision making and implementation is required to coordinate activities

15 For a general critique, see Brian Z. Tamanaha, What is ‘General Jurisprudence?’ A Critique of Universalistic Claims by Philosophical Concepts of Law, 2 *Transnational Legal Theory* 287 (2012).

16 See Bruce G. Trigger, Distinguished Lecture in Archeology: Constraint and Freedom – A New Synthesis for Archeological Explanation, 93 *American Anthropologist* 551 (1991).

17 Id. 560.

18 Bruce G. Trigger, *Understanding Early Civilizations* (Cambridge University Press 2003) 13.

19 See Gregory J. Johnson, Information Sources and the Development of Decision-Making Organizations, in: *Social Archeology: Beyond Subsistence and Dating*, edited by Charles L. Redman,

across many people.²⁰ “The larger the group of people who interact, the more ramified their organizational structure needs to be. There is a limit to the number of people whom a leader can effectively control without intermediaries; the less the activity in question follows a fixed and preunderstood pattern and the more group decisions need to be made, the smaller the number of people one leader can directly control.”²¹ Groups over five hundred must have leaders, “and if they contain over a thousand, some kind of specialized organization or corps of officials to perform police functions.”²² Hence “social complexity increases with group size.”²³

All large communities manage basic tasks: provide transportation, supply water, food and housing, produce and distribute goods and services, facilitate trade, manage waste disposal, provide effective communication, protect health and safety (injuries, disease, fire and natural hazards), coordinate behavior, and maintain internal order and defense against outsiders. Complex societies consist of institutions organized in terms of these and other functions.²⁴ Over time societies have become increasingly layered with hierarchical organization and heterarchy,²⁵ involving differentiated institutions to carry out these tasks and coordinate activities.²⁶ The larger the group, the more ramified the organizational structure must be, with a combination of horizontal specialization (distributed power among units at the same level) and vertical specialization (hierarchy).

In a long-delayed and halting fashion, human history has undergone a massive increase in the size, density, and complexity of social groups and has developed thick networks of interaction across social groups.²⁷ Law, as we shall see, takes on different forms and functions in connection with different degrees of social complexity, manifesting one way in simple societies and becoming something else in complex societies.

Many Jane Berman, Edward V. Curtain, William T. Langhorne, Nina M. Versaggi and Jeffrey C. Wansner (Academic Press 1978) 87–112.

- 20 See Johnson, Information Sources and the Development of Decision-Making Organizations, supra 100–104.
- 21 Raoul Naroll, A Preliminary Index of Social Development, 58 *American Anthropologist* 687, 690 (1956).
- 22 Id.
- 23 Joseph A. Tainter, *The Collapse of Complex Societies* (Cambridge University Press 1988) 23.
- 24 See C. R. Hallpike, *The Principles of Social Evolution* (Clarendon Press 1986) 142.
- 25 See Henri J. M. Claessen, Was the State Inevitable? 1 *Social Evolution & History* 101, 101 (2002). Heterarchy is a network or organization that is not structured in hierarchical terms, and can have various nodes of authority.
- 26 The seminal article on complexity is Herbert A. Simon, The Architecture of Complexity, 106 *Proceedings of the American Philosophical Society* 467 (1962). Using complexity as a measure of evolution is in tension with Darwinian theory because the latter does not have any built in progressive arrow. Random heritable variation and natural selection within an environment leads nowhere in particular, whereas increasing complexity is directional.
- 27 See generally Kent V. Flannery, The Cultural Evolution of Civilizations, 3 *Annual Rev of Ecology and Systematics* 399 (1972); Julian H. Steward, Cultural Causality and Law: A Trial Formulation of the Development of Early Civilizations, 51 *American Anthropologist* 1 (1949).

EXAMPLES OF LAW IN BANDS, TRIBES, AND CHIEFDOMS

“Anthropologists now believe that humans mostly *lived without law* for the vast majority of their time on earth,”²⁸ asserts Scott Shapiro. This is too sweeping if attributed to anthropologists. “No society is without law,”²⁹ in the view of prominent legal anthropologist Sally Falk Moore. Julius Lips wrote, “there is no people without fire, without language, without religion, or without law. Our social, religious, and legal concepts do not coincide with those of the primitives; what we must do is to find the correct equivalent for our modern institutions in primitive societies.”³⁰

Hunter-gatherer groups were marked by a set of core characteristics.³¹ They lived in family-based groupings of twenty-five or so people, among a larger network of neighboring bands that gathered together and moved apart throughout the year, comprising tribes of several hundred members.³² They were egalitarian (except for gender relations³³) and leadership was determined by personal qualities (prowess as a hunter or warrior, persuasive ability or demonstrated judgment, or being an elder).³⁴ A basic division of labor existed between males and females on food production and other tasks.³⁵ Sharing and reciprocity within the camp was common.

Anthropologists define property rights in terms of the right to possess, to use, and to exclude. There is a “wide measure of agreement” in the field that hunter-gatherers had property rights, some collectively and some individually held.³⁶ “Movables – tools, weapons, cooking utensils, procured food, occasionally trees, and so on”³⁷ were owned individually, reflecting the time, effort and access to materials required to make them. “Hence individual ownership forms the basis for individual gift-giving and for inter-band exchange systems that make possible farflung networks of reciprocity.”³⁸ Five basic categories of property rights have been found in hunter gatherer societies: rights over land and water sources; rights over movables (tools, weapons, cooking pots, etc.); rights over killed game, harvested food, and

28 Shapiro, *Legality*, supra 35 (emphasis added).

29 Sally Falk Moore, *Law as Process: An Anthropological Approach* (Routledge & Kegan Paul 1978) 215.

30 Quoted in Morton H. Fried, *The Evolution of Political Society: An Essay in Political Anthropology* (Random House 1967) 16–17.

31 See Eleanor Leacock and Richard Lee, Introduction, in: *Politics and History in Band Society* (Cambridge University Press 1982) 1–20, 8–9.

32 See David Riches, Hunter-Gatherer Structural Transformations, *Journal of the Royal Anthropological Institute* 679 (1995).

33 See James G. Flanagan, Hierarchy in Simple ‘Egalitarian’ Societies, *18 Annual Review of Anthropology* 245 (1989).

34 See James Woodburn, Egalitarian Societies, *17 Man* 431 (1982).

35 Allen W. Johnson and Timothy Earle, *The Evolution of Human Societies: From Foraging Group to Agrarian State 2nd ed.* (Stanford University Press 2000) 44–45.

36 Alan Barnard and James Woodburn, Property, Power and Ideology in Hunter-Gathering Societies: An Introduction, in: *Hunters and Gatherers 2: Property, Power and Ideology*, edited by Tim Ingold, David Riches, and James Woodburn (Berg Publishers 1988) 4–31, 10.

37 Richard B. Lee, Reflections on Primitive Communism, in: *Hunters Gatherers 1: History, Evolution and Social Change*, edited by Tim Ingold, David Riches, and James Woodburn (Berg Publishers 1988) 252–268, 257.

38 Leacock and Lee, Introduction supra 9.

procured raw materials; rights over people (their labor, their sexual and reproductive capacity); and rights over sacred knowledge.³⁹

Land rights of hunter-gatherers varied in connection with cultural views and ecological surroundings, though collective ownership by the band was common.⁴⁰ Members of the band could collect and consume the fruits of the land, with certain restrictions; access to sacred sites was forbidden to women, children, and uninitiated men.⁴¹ Property rights vested in individuals or families were tied to concentrated resources like watering holes and fruit or nut groves.⁴² Many studies have found that bands would allow other bands reciprocal access to land (after permission was sought), and multiple studies have also found “that tribal areas are defined and subject to laws of trespass”⁴³ – with punishment for violations up to and including death.⁴⁴

Anthropologists draw a distinction between “immediate return” and “delayed return” hunters-gatherers. Those in immediate return systems consume the food they procure immediately. “They use relatively simple, portable, utilitarian, easily acquired, replaceable tools and weapons made with real skill but not involving a great deal of labor.”⁴⁵ Delayed return systems among hunter-gatherers exhibit a cluster of four characteristics. They have “valuable technical facilities used in production: boats, nets, artificial weirs, stockades, pit-traps, beehives and other such artifacts which are a product of considerable labor and from which food yield is obtained gradually over a period of months or years.”⁴⁶ They process and store food. They cull wild herds and tend wild food patches. And men have rights to bestow their female kin in marriage.

The pivotal difference between these two types is that “delayed return systems depend for their operation on sets of ordered, differentiated, jurally-defined relationships through which crucial goods and services are transmitted.”⁴⁷ Immediate return societies are more flexible and family units are less dependent on long-term commitments from others, with groups free to strike out on their own. In contrast,

- 39 Barnard and Woodburn, Property, Power and Ideology in Hunter-Gathering Societies, supra 14.
- 40 Leacock and Lee, Introduction supra 8. One theory of land rights is “territorial exclusion is expected whenever resource density and predictability is sufficient to make the benefits of exclusive use outweigh the cost of defense.” Eric Alden Smith, Risk and Uncertainty in the ‘Original Affluent Society’: Evolutionary Ecology of Resource-Sharing and Land Tenure, in Ingold, Riches, and Woodburn, *Hunters and Gatherers 1*, supra 222–251, 244.
- 41 Annette Hamilton, Descended from Father, Belonging to Country: Rights to Land in the Australian Western Desert,” in Leacock and Lee, *Politics and History in Band Society*, supra 85–108, pp. 90.
- 42 Timothy Earle, Property Rights in the Evolution of Chiefdoms, in: Timothy Earle, *Chiefdoms: Power, Economy, and Ideology* (Cambridge University Press 1991) 72.
- 43 Hamilton, Descended from Father, Belonging to Country, supra 90; on land rights, see also Nicolas Peterson, Hunter-Gatherer Territoriality: The Perspective From Australia, *77 American Anthropologist* 53 (1975).
- 44 See Robert Layton, Political and Territorial Structures Among Hunter-Gatherers, *21 Man* 18, 21–23 (1986).
- 45 James Woodburn, Egalitarian Societies, *17 Man* 431, 432 (1982).
- 46 Id. 432–433.
- 47 James Woodburn, African Hunter-Gatherer Social Organization: Is it best Understood as a Product of Encapsulation?, in Ingold, Riches, and Woodburn, *Hunters and Gatherers 1* supra 31–64, pp. 33.

“for people to build up, secure, protect, manage and transmit the delayed yields on labour, or the other assets which are held in delayed-return systems, load-bearing relationships are necessary.”⁴⁸ The difference is reflected in more extensive property rights in delayed return societies. “The *particular* form the organization will take cannot be predicted, nor can one say that the organization exists in order to control and apportion these assets because, once in existence, the organization will be used in a variety of ways, which will include the control and apportionment of assets but which are not otherwise determined.”⁴⁹

Larger settled groups are called chiefdoms,⁵⁰ which emerged “around the world between about 1,000 and 7,000 years ago,”⁵¹ ranging in size from hundreds to tens of thousands of people and marked by hereditary social stratification and inequality.⁵² Complex chiefdoms were “strongly theocratic,” led by priest-chiefs, “there usually being a royal class ruling over other nobility, warriors, craftsmen, and a large population of commoners.”⁵³ They interacted with neighboring chiefdoms in extensive networks of trade, mutual defense, and warfare.

How chiefdoms came to be hierarchical and inegalitarian are open questions.⁵⁴ *Functionalist* explanations point to the necessity for political leadership and coordination in economic activities when populations reach a certain size. Politically, this involves exerting force to keep internal order and lead battles against outsiders⁵⁵; economic activities involve the intensification of subsistence production through major projects like irrigation works or terracing. *Conflict* explanations invoke competition over status, wealth, and power in larger settled communities, leading to consolidation by the winners of their advantage, perpetuated by property rights that pass through kin groups.⁵⁶ Wealth derives from the acquisition of surplus production from commoners (redistributed to priests and warriors), as well as the accumulation of prestige goods (ritual objects, shells, obsidian, etc.) via long-distance exchange, which cements social and religious standing.⁵⁷ Power is a function of wealth and social status, and is tied to the strength/size of the kin group.⁵⁸

48 Id.

49 Id. 33–34.

50 See Gil J. Stein, Heterogeneity, Power, and Political Economy: Some Current Research Issues in the Archaeology of Old World Complex Societies, 6 *Journal of Archaeological Research* 1 (1998).

51 Robert D. Drennan and Christian E. Peterson, Patterned Variation in Prehistoric Chiefdoms, 103 *Proc. National Academy of Sciences* 3960, 3960 (2006).

52 An excellent overview is Robert L. Carneiro, The Chiefdom: Precursor of the State, in: Grant D. Jones and Robert R. Kautz, *The Transition to Statehood in the New World* (Cambridge: Cambridge University Press 1981) 37–75. See also Colin Renfrew, Beyond Subsistence Economy: The Evolution of Social Organization in Prehistoric Europe, in 20 *Bulletin on the American Schools of Oriental Research* 69, 79 (1974).

53 William C. Noble, Tsouharissen’s Chiefdom: And Early Historic 17th Century Neutral Iroquoian Ranked Society, 9 *Canadian Journal of Archaeology* 131, 132 (1985).

54 See Jerome Rousseau, Hereditary Stratification in Middle-Range Societies, 7 *J. Royal Anthropological Institute* 117 (2001).

55 See Robert L. Carneiro, A Theory of the Origin of the State, 169 *Science* 733 (1970).

56 See Earle, Property Rights in the Evolution of Chiefdoms, *supra* 71–99.

57 See Gary M. Feinman, Demography, Surplus, and Inequality: Early Political Formation in Highland Mesoamerica, in: Earle, *Chiefdoms: Power, Economy, and Ideology* *supra* 229–262.

58 Stein, Heterogeneity, Power, and Political Economy *supra* 6.

Leadership roles, bolstered by religious authority, harden into kin-based organization and social stratification that establish unequal access to resources.⁵⁹ Only members of noble families could become a chief. A common arrangement saw layers of chiefs, with paramount chiefs at the top, major chiefs below, and sub-chiefs in each village. Chiefs held authority through religious ideology, by the possession of status goods, and by economic redistribution and wealth secured to them by property rights and exchange with neighboring chiefdoms.⁶⁰

Property rights were fundamental to the power of chiefs and social stratification in chiefdoms. In the Hawaiian Islands, for example, “Since all lands were owned by the paramount chiefs, the allocation of community lands to his supporters and the further allocation of small subsistence plots to commoners formed the basis for requiring payments in labor and goods.”⁶¹ Chiefs kept the most fertile lands from which they obtained the greatest surplus for themselves. On their part, chiefs coordinated major projects that provided sufficient food supply, defended the community from external threats, and resolved internal disputes.⁶²

I have thus far emphasized property rights in hunter-gatherer bands and chiefdoms, but other familiar legal provisions were present as well. In *The Law of Primitive Man*,⁶³ Adamson Hoebel collected restrictions against theft, adultery, incest, assaults, and other delicts from hunter-gatherer bands and settled tribal groups around the world, focusing especially on responses to murder. Distinctions were made between accidental deaths, deaths from anger, and homicidal recidivists, the latter posing the gravest danger to the community. “The single murder is a private wrong redressed by the kinsman of the victim. Repeated murder becomes a public crime punishable by death at the hands of an agent of the community.”⁶⁴ Often the decision to carry out the appropriate punishment was made by chiefs or a council of elders, or by consensus of the community, and carried out by the victim’s kin. What distinguishes these actions from pure personal retaliation is that punishment receives authorization.⁶⁵ Prior approval lessens the potential for a tit-for-tat cycle of violence between families (feuds were circumscribed by rules⁶⁶). Decision-makers aimed to restore ruptured relations within the social group. Punishments ranged from fines, to labor obligations, to banishment, to death.

In *The Cheyenne Way*, Hoebel and Karl Llewellyn described a series of murder and suicide cases (told by informants) among nineteenth century Cheyenne, who were nomadic, semi-pastoral tribal hunters. Here is a portion of their reconstructed legal provisions: “Killing within the tribe is a crime, and a sin, but it is no longer

59 See Johnson and Earle, *The Evolution of Human Societies*, supra 265–67.

60 See Timothy Earle, The Evolution of Chiefdoms, in: Earle, *Chiefdoms: Power, Economy & Ideology* supra 1–15.

61 Johnson & Earle, *Evolution of Human Societies*, supra 291.

62 Id. 92.

63 See Adamson Hoebel, *The Law of Primitive Man* (Harvard University Press 1954) 88–91, 276–277, 298–307.

64 Id. 88.

65 See also Richard G. Dillon, Capital Punishment in Egalitarian Society: The Meta Case, 36 *Journal of Anthropological Research* 437 (1980).

66 William Ian Miler, *Bloodtaking and Peacemaking* (University of Chicago Press 1990).

even a fully recognized tort.”⁶⁷ “The chiefs present in a body of Cheyenne at the time of a homicide shall have exclusive jurisdiction over the offense of killing, if they exercise jurisdiction; but, in the absence [pending?] of a ruling by the chiefs, a military society may take such [minor?] measures as they may deem required, including temporary banishment during a hunt [or even a general banishment?]”⁶⁸ “The chiefs shall decree the banishment of the killer. Unless otherwise expressly provided in the decree, the banishment shall be for a period of five [ten?] years.”⁶⁹ (After two years, if persuaded of penitence and no further risk, chiefs had the discretion to remit the banishment.) And various “exceptions and mitigations” were specified for killings in self-defense, accidental killings, provoked killings, and so forth.⁷⁰ This was carried out without an organized legal system.

Anthropologist Max Gluckman observed that there have been many societies with “no governmental institutions,” no officers to judge disputes or enforce decisions, yet they have “well known codes of morals and laws,” laws which address personal injury, property, inheritance, and marriage restrictions.⁷¹

WHY THIS IS LAW

Anthropologists differ on whether bands and chiefdoms had law. The answer depends on how one defines law. A scholar who adopts a definition of law as a command of the sovereign backed by publicly administered sanctions and enforced by courts, as Morton Fried did, would conclude that any social group below complex chiefdoms did not have law.⁷² Stanley Diamond concurred: “law is the instrument of civilization, of political society sanctioned by organized force, presumably above society at large, and buttressing a new set of social interests.”⁷³ Many chiefdoms lacked “true government to back up legal decision by legalized force,”⁷⁴ and chiefs usually did not have a monopoly on force.⁷⁵ Hence they did not have law.

In contrast, a conception of law that does not require an institutionalized system can locate law in hunter-gatherer bands and in chiefdoms. Hoebel’s formulation does that: “A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting.”⁷⁶ Even if the victim’s kin carried out the punishment, as was frequently the case, this would still constitute

67 Karl Llewellyn and Adamson Hoebel, *The Cheyenne Way* (University of Oklahoma Press 1941) 166.

68 Id.

69 Id. 167.

70 Id. 168.

71 Max Gluckman, *The Peace in the Feud*, 8 *Past and Present* 1,1 (1955).

72 See Morton H. Fried, *The Evolution of Political Society: An Essay in Political Anthropology* (Random House 1967) 3–26. Elman Service takes an intermediate stance, recognizing that chiefdoms have basic elements of law, while lacking formal legal institutions. Elman R. Service, *The Origins of the State and Civilization: The Process of Cultural Evolution* (Norton 1975) 83–90.

73 Stanley Diamond, *The Rule of Law Versus the Order of Custom*, 38 *Social Research* 42,47 (1971).

74 Renfrew, *Beyond a Subsistence Economy* supra 73.

75 See Phyllis Kaberry, *Primitive States*, 8 *British Journal of Sociology* 224 (1957).

76 Hoebel, *Law of Primitive Man*, supra 28.

law if some form of community accord was required (via elders or accepted decision makers).

Legal positivists insist this is insufficient. Only organized legal institutions, only systems that combine primary and secondary rules, count as law. What supports this conclusion?

Hart constructed his account of law by identifying three “defects” suffered by a regime of purely primary rules. First, the rules are *uncertain*, because “if doubts arise as to what the rules are or as to the precise scope of some given rule, there will be no procedure for settling this doubt, either by reference to an authoritative text or to an official whose declarations on this point are authoritative.”⁷⁷ The second defect is that the rules are *static*: “There will be no means, in such a society, of deliberately adapting the rules to changing circumstances, either by eliminating old rules or introducing new ones.”⁷⁸ “The third defect of this simple form of social life is the *inefficiency* of the diffuse social pressure by which the rules are maintained.”⁷⁹ Without legal officials enforcing rules, “the waste of time involved in the group’s unorganized efforts to catch and punish offenders, and the smoldering vendettas which may result from self help in the absence of an official ‘monopoly’ of sanctions, may be serious.”⁸⁰ Secondary rules remedy each defect. A ‘rule of recognition’ specifies the criteria for what are valid legal rules, solving uncertainty; ‘rules of change’ empower a body or person to enact new rules and abolish old ones; ‘rules of adjudication’ empower individuals to identify when rules have been broken and specifies the procedure to be followed.⁸¹ Secondary rules are “the heart of a legal system,”⁸² he concluded, because they make law work better.

Notice, however, that the absence of secondary rules is a *defect* only if there is substantial uncertainty about the rules, if society is rapidly changing, and if existing enforcement mechanisms are not functioning. None of these conditions were typical of bands and chiefdoms. They were small homogeneous societies with shared understandings of their laws and what ought to be done in situations of disruption, with the response usually oriented to restoring relations within the community. Many of these groups, as an anthropologist described in connection with an Indian community, “had a strong feeling for the definition of rights and obligations, and recognized certain appropriate damages for any private delicts. Nevertheless this code was maintained not only without any court, but without any formal procedure at law.”⁸³ Hart’s concept of law privileges forms of law necessary to fast changing heterogeneous societies (law in institutionalized form), discounting non-institutionalized legal forms suited to slow-changing, close knit communities.

A genealogical approach holds that primitive legal provisions that resemble our own law in function, subject matter, and content are “law.” Systems of primary and secondary rules did not suddenly emerge fully formed, but rather evolved when additional institutionalization (secondary rules) became necessary as groups grew

77 Id. 90.

78 Id.

79 Id. 91.

80 Id.

81 Id. 92–95.

82 Id. 95.

83 Robert Redfield, *Primitive Law*, 33 *University of Cincinnati Law Review* 1,9 (1964).

much larger, requiring coordination across many people and different types of activities. The coalescing legal system was a component of advancing social complexity. Preexisting primary legal norms provided the social basis around which institutionalized legal apparatuses would later congeal.

Jürgen Habermas understood this. “As we learn from anthropology, law as such precedes the rise of the state and of political power in the strict sense, whereas politically sanctioned law and legally organized political power arise simultaneously.”⁸⁴ “Archaic law” paved the way for and “first made possible the emergence of a political rule in which political power and compulsory law mutually constituted one another.”⁸⁵

Other philosophers have echoed this position. In the *Second Treatise of Government*, John Locke wrote concerning bands (he mentioned American Indians as examples⁸⁶), “the equality of a simple poor way of living, confining their desires within the narrow bounds of each man’s small property, made few controversies, and so no need of many laws to decide them, or variety of officers to superintend the process, or look after the execution of justice, where there were but few trespasses, and few offenders.”⁸⁷ Full institutional support was not necessary for law, nor was it possible given the limited social complexity of bands, but basic laws still existed.

Immanuel Kant presented the argument on logical grounds. “If it were held that no acquisition, not even provisional acquisition, is juridically valid before the establishment of a civil society,” Kant wrote, “then the civil society itself would be impossible. This follows from the fact that, as regards their form, the laws concerning Mine and Yours in a state of nature contain the same things that are prescribed by the law in civil society insofar as they are considered merely as pure concepts of reason.”⁸⁸ What the state adds is a layer of public law that enforces preexisting private law of personal liberty and property rights. “The original community of the land and, along with the land, of the things on it (*communio fundi originaria*) is an Idea that has objective (juridical-practical) reality.”⁸⁹ Based on this view, Kant condemned as “reprehensible” the colonial taking of land from indigenous people⁹⁰ – a practice justified at the time on grounds that natives lacked law and therefore had no rights in property.

The thread of familiar legal proscriptions from hunter-gatherer bands, to chiefdoms, to modern society, connects law across these very different social arrangements. This is why anthropologists naturally invoke legal terms like “juridical” and “rights” to characterize rules, sanctions, and procedures in these societies notwithstanding the absence of an institutionalized system.

84 Jürgen Habermas, *Law and Morality, Tanner Lectures* (1986) 263.

85 *Id.* 264. These were not just empirical claims by Habermas, who as “primarily concerned with the clarification of conceptual relations.” 266.

86 John Locke, *Second Treatise of Government* (Hackett 1980 [1690]), 58.

87 *Id.* 57.

88 Immanuel Kant, *Metaphysical Elements of Justice, 2nd ed.*, Translated by John Ladd (Hackett 1999 [1797]) 116–117. Kant uses the term “provisionally” to represent the right to possess given property in a state of nature; he contrasts this with “peremptorily,” which is property rights in civil society backed by institutionalized enforcement.

89 *Id.* 183.

90 *Id.* 65–66.

“LAW” WITHOUT “LEGAL SYSTEM”

Legal positivists unthinkingly conflate “law” and “legal system.” “Such is the standard case of what is meant by ‘law’ and ‘legal system,’”⁹¹ Hart said merging the two. “Yet if they lack the essential features of the *law*,” Raz wrote, “they are not *legal systems*.”⁹² “Law” and “legal system” must be separated analytically. As social complexity increases with population density, bringing hierarchy and institutionalization, legal systems are necessary for law to function efficiently (as Hart asserted). In small social groups, however, law effectively preserves persons and property and resolves disruptions without an organized system. This is what law has been for most of human existence and still is in remote areas around the world.

Raz and Shapiro insist categorically that an organized system is essential to the nature of law, so whatever lacks this form does not count as law. Hart expressed a more flexible position, acknowledging that “There are no settled principles forbidding the use of the word ‘law’ of systems where there are no centrally organized sanctions”⁹³ (though he did not embrace this usage). The continuities in function and content between primitive law and modern law provide compelling grounds to consider them law, notwithstanding the absence of a system.

Dropping the system as a criterion of law raises another old jurisprudential puzzle. Legal positivists have long thought it necessary to find a way to distinguish law from other normative orders. As Andre Marmor writes, “Law is not the only normative domain in our culture; morality, religion, social conventions, etiquette, and so on, also guide human conduct in many ways which are similar to law. Therefore, part of what is involved in the understanding of the nature of law consists in an explanation of how law differs from these similar normative domains, how it interacts with them, and whether its intelligibility depends on such other normative orders, like morality or social conventions.”⁹⁴ Because the presence of an organized system helps distinguish law from these other normative orderings, discarding this as an element of law appears to make it impossible to draw the distinction.

This is an artificial puzzle, however, the product of a poorly posed question. We have little trouble making these distinctions in our own societies using common sense conventional criteria. Difficulties arise only because law is formulated in abstract terms and then applied to other social contexts like hunter gatherers and simple chiefdoms.⁹⁵ Sharp distinctions cannot be drawn between law and custom, morality, etiquette, religion, and so on, in these early social groups because low levels of social differentiation did not have the horizontal normative variations present at higher levels of social complexity. It was a primordial undifferentiated normative soup. If one points at the lack of differentiation to conclude, therefore, that law did not exist, then it would also follow that customs and morality did not exist because they too cannot be clearly distinguished – which reinforces the point that

91 Hart, *Concept of Law*, supra 5. Hart

92 Joseph Raz, *Can There be a Theory of Law?*, supra 328.

93 Hart, *Concept of Law*, supra 195.

94 Andrei Marmor, *The Nature of Law*, *Stanford Encyclopedia of Philosophy*, at <http://plato.stanford.edu/entries/lawphil-nature/>

95 This is not just a problem with respect to primitive societies. Shapiro grants that according to his formulation the rules of a professional golfing association (USGA) qualify as a form of law.

these distinctions are inapposite. A genealogical approach does not need to make these distinctions, for it can identify whether law exists in early social groups by locating recognizably familiar legal proscriptions.

Let me now make an essential clarification. When I assert that “law” existed in bands and chiefdoms, I am not saying that *they* saw this as “law” or that this is law in some objectively true universal sense. Law is *our* concept not theirs (as analytical jurists also recognize); my claim is that what we think of as law was present despite the absence of a system, even if *they* had no conception of law or of property or murder in our terms. We cannot help but use our own concepts in these inquiries, and must proceed mindful toward not mistaking our categories and interests for theirs.⁹⁶

LAW AND INEQUALITY IN EARLY CIVILIZATIONS/STATES

Legal systems are a defining feature of early states.⁹⁷ Pristine or primary states arose independently in several parts of the world – Mesopotamia, Egypt, Indus Valley, China, Peru, Mesoamerica – three to five thousand years ago.⁹⁸ States had populations of a hundred thousand and more with a complex stratified society, including administrators, priests, warriors, manual workers, artisans, traders, slaves, etc. Centralized government was typically headed by a kingship enjoying religious support (though priests could be rivals for power), bolstered by religious and political ideologies that justified the social-political arrangement. It exercised territorial control over the surrounding area. There were layers of officials carrying out specialized functions, funded by taxation, tribute, or plunder. The leaders managed large projects (irrigation works, large public buildings and temples, monuments), conducted or controlled significant external trade (whether by the state itself or in private hands that were taxed), waged offensive and defensive wars, and had the capacity to exert force within society and to hold court.⁹⁹

As with chiefdoms, scholars put forth functionalist and conflict theories of state formation.¹⁰⁰ Functionalist theories focus on the needs of society in organic or holistic terms. They emphasize the benefits of the state in providing coordination,

96 This hearkens to the famous Gluckman-Bohannan debate of the 1950s over the potential misuse of Western legal categories to study other societies. The lesson of this exchange was that folk terms cannot be compared, but analytic categories abstracted from folk ideas and practices can be compared. See Sally Engle Merry, *Transnational Human Rights and Local Activism: Mapping the Middle*, 108 *American Anthropologists* 38,41 (2006).

97 A leading work by Elman Service uses the presence of formal legal institutions to distinguish states from chiefdoms. Service, *The Origins of the State and Civilization*, supra 14–16. For the features of early states, see Henry T. Wright, *Recent Research on the Origin of the State*, 6 *Annual Review of Anthropology* 379 (1977); Henri M. Claessen, *The Internal Dynamics of the Early State*, 25 *Current Anthropology* 365 (1984); Robert L. Carneiro, *Cross-Current in the Theory of State Formation*, *American Ethnologist* 756–770 (1987); Rita Smith Kipp and Edward M. Schortman, *The Political Impact of Trade in Chiefdoms*, 91 *American Anthropologist* 370 (1989).

98 See Elman R. Service, *Origins of the State and Civilization: The Process of Cultural Evolution* (New York: Norton 1978). See Robert J. Wenke, *Patterns in Prehistory: Humankind's First Three Million Years*, 4th ed. (Oxford University Press 1999) 331–336.

99 Henri J. M. Claessen, *Was the State Inevitable?* supra 107–112.

100 See Tainter, *The Collapse of Complex Societies*, supra 33.

order, protection, defense, food provision to offset bad harvests, markets, information and communication, public works and other projects for the common good. These theories “argue that complexity and stratification arose because of stresses impinging upon human populations, and were positive responses to those stresses.”¹⁰¹ Conflict theories, in contrast, see the state as managing individual and group conflict within society in the interest of power holders. “More specifically, the governing institutions of the state were developed as coercive mechanisms to resolve intra-societal conflicts arising out of economic stratification. The state serves, thus, to maintain the privileged position of a ruling class that is largely based on the exploitation and economic degradation of the masses.”¹⁰² A leading scholar of state development, Henri Claessen, remarked, “there is always found great inequality in (early) states. Some people, the happy few, are rich and powerful and all others, the great majority, are poor and powerless.”¹⁰³ Law maintained this arrangement.

Law in early states was intertwined with religion. Archeologist Bruce Trigger provides a few examples (citations omitted):

Laws were often claimed to originate with the gods, who transmitted them to humans through the proclamations of rulers. The Aztec term for ‘laws’, *nabuatilli*, meant ‘a set of commands’. Laws were a means by which human society was not only regulated but also aligned with a cosmic order that was profoundly hierarchical. The Babylonian word *mesaru* and the Egyptian *m3’i* referred both to the cosmic order and to legal justice. The Inka state claimed that subjects’ commission of crimes such as murder, witchcraft, theft, and neglect of religious cults threatened the health of the king and considered them sacrilege. Later evidence from China indicates that law (*fa*) was believed to have been created by superhuman beings in accordance with divine models and interests. To promote order on earth, rulers sought to suppress blood feuds and punish murder, treason, theft, incest, and many other forms of misconduct. Supernatural powers were believed to support the legal process by revealing guilt or innocence through oracles and ordeals and by punishing oath-breakers. The gods punished individuals whose crimes went undetected or unpunished by humans. The Babylonian king Hammurabi claimed to have assembled his law code at the command of the god Utu, or Shamas, who, because as the sun god he saw everything that humans did, was also the patron deity of justice. Promulgating this law code gave Hammurabi an earthly role analogous to that of Enlil, the chief executive deity of the Sumerian pantheon. The laws proclaimed by Aztec ruler Mochtezuma I were described as ‘flashes that the great king...[had] sown in his breast, from the divine fire, for the total health of his kingdom. This claim referred to the divine powers that were implanted in the Aztec monarch at the time of his enthronement. The early Chinese believed that improper conduct was supernaturally punished.’¹⁰⁴

Another common characteristic of law in early states was the enforcement of social hierarchy and status differences. Hammurabi’s Code is replete with status distinctions. “If any one strikes the body of a man higher in rank than he, he shall receive sixty blows with an ox-whip in public.”¹⁰⁵ Anyone who steals property from the court or temple is put to death, whereas thieves who steal from others suffer lesser punishments.¹⁰⁶ A husband can sell his wife and children into forced labor to pay

101 Id. 34.

102 Id. 33.

103 Claessen, *Was the State Inevitable?*, supra 104.

104 Trigger, *Understanding Early Civilizations*, supra 221–222.

105 Hammurabi’s *Code of Law*, translated by L. W. King, available at <http://eawc.evansville.edu/anthology/hammurabi.htm#202>

106 Id. #6–8.

off debt, though they must be set free in the fourth year.¹⁰⁷ Runaway slaves must be returned to their master, and anyone who harbors them shall be put to death.¹⁰⁸ The overall governing norm was rough equivalence (factoring in hierarchy), matching their sense of justice: an eye for an eye, a broken bone for broken bone, a tooth for a tooth (except that a tooth knocked out of a lower status person results in a fine).¹⁰⁹ “If a builder build a house for some one, and does not construct it properly, and the house which he built fall in and kill its owner, then that builder shall be put to death.”¹¹⁰ If the son of the owner is killed by the falling building, the builder’s son is put to death;¹¹¹ if the owner’s slave is killed, the builder “shall pay slave for slave to the owner.”¹¹²

Modern states have status-based laws as well, notoriously exemplified by slave laws in the United States. Slave status was inherited through the mother (including mulatto offspring of the slave owner), making slavery a legal condition passed through generations.¹¹³ Whipping was the penalty for a slave striking or attempting to strike a white; second or third offenses were punishable by death.¹¹⁴ Attempts to escape (or advocating escape) were punishable by whipping, branding, cutting off an ear, or death; owners could seek compensation for lost property from the state when slaves were executed.¹¹⁵ Slaves were prohibited from owning cattle, horses, sheep, pigs, and boats, and were prohibited from engaging in commercial activities, so as not to compete with whites.¹¹⁶ There were sumptuary laws that restricted slaves to low status clothing.¹¹⁷ After slave laws were abolished, legally enforced status distinctions were perpetuated in Jim Crow laws on the books through the 1950s. There were also legally enforced ideological and political controls to maintain white dominance over blacks.¹¹⁸

Law is often presented by legal theorists as the hallmark of civilization. “Civilization is possible only with a very high degree of social cooperation and interdependence,” Shapiro writes, “which, in turn, is possible only when a community has the ability to regulate social relations efficiently and effectively. Law was a revolutionary invention precisely because it permitted this regulation.”¹¹⁹ This is an ideal-

107 Id. #117.

108 Id. #17–19.

109 Id. #196–197; #200–201.

110 Id. #229.

111 Id. #230.

112 Id. #231.

113 See William M. Wiecek, *The Statutory Law of Slavery and Race in the Thirteen Mainland Colonies of British America*, 34 *William and Mary Quarterly* 258, 262–263 (1977).

114 See Id. 273.

115 Id. 270.

116 Id. 276.

117 Id. 268.

118 A Mississippi statute still on the books in the 1950s read: “Any person...who shall be guilty of printing, publishing or circulating printed, typewritten or written matter urging or presenting for public acceptance or general information, arguments or suggestions in favor of social equality or of intermarriage between whites and negroes, shall be guilty of a misdemeanor and subject to fine of not exceeding five hundred (500.00) dollars or imprisonment not exceeding six (6) months or both.” See Examples of Jim Crow Laws, *The Jackson Sun*, at <http://www.ferris.edu/jimcrow/links/misclink/examples/>

119 Shapiro, *Legality*, supra 36.

ization emphasizing the functional benefits law provides while shunting to the margins its oppressive aspects backed by force, painting the former as central and the latter as contingent, although they are constant companions in the history of law. Legal theorists discuss openly oppressive legal systems, like Nazi Germany, slaveholding America, apartheid South Africa, or contemporary authoritarian regimes,¹²⁰ as if they are aberrant manifestations of law.

History suggests, however, that oppression in varying ways and degrees, particularly in service of hierarchy, is a common aspect of state legal systems. Philosopher David Hume did not sugarcoat the reality that “Almost all of the governments which exist at present, or of which there remains any record in story, have been founded originally either on usurpation or conquest or both, without any pretense of a fair consent or voluntary subjection of the people.”¹²¹ Jurist Rudolph von Jhering observed, “Whoever will trace the legal fabric of a people to its ultimate origins will reach innumerable cases where the force of the stronger has laid down the law for the weaker.”¹²² Law in states is an organized system of coercive power and individuals and social groups naturally seek to utilize this power to serve their ends. A dominant aspect of law throughout history is the service of political and economic power, social stratification, and inequality.

Adam Smith, the apostle of capitalism, provided an evolutionary account of social-legal development from hunter-gatherers, to chiefdoms, to the state, highlighting the connection between law, property, and inequality.¹²³ Once people settled and raised animals, distinctions arose between rich and poor. Property ownership generates disputes over possession, inheritance, marriage settlements, and transactions.¹²⁴ The wealthier members of the community gain eminence and political authority, which in time becomes hereditary.¹²⁵

[When] some have great wealth and others nothing, it is necessary that the arm of authority should be continually stretched forth, and permanent laws or regulations made which may ascertain the property of the rich from the inroads of the poor, who would otherwise continually make incroachments upon it, and settle in what the infringement of this property consists and in what cases they will be liable to punishment. *Laws and government may be considered in this and indeed in every case as a combination of the rich to oppress the poor, and preserve to themselves the inequality of the goods which would otherwise be soon destroyed by the attacks of the poor, who if not hindered would soon reduce the others to an equality with themselves by open violence.* The government and laws hinder the poor from ever acquiring the wealth by violence which they would otherwise exert on the rich; they tell them they must either continue poor or acquire wealth in the same manner as they have done. Settled laws therefore, or agreements concerning property, will soon be made after the commencement of the age of shepherds.¹²⁶

120 See generally David Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Legality* (Oxford University Press 2010); *Rule by Law: The Politics of Courts in Authoritarian Regimes*, edited by Tom Ginsburg and Tamir Moustafa (Cambridge University Press 2008).

121 David Hume, *Political Essays*, Charles W. Hendel, ed. (1953) 47.

122 Rudolph von Jhering, *Law as a Means to an End*, Issack Husik trans. (1914) 185.

123 See Andrew Skinner, Adam Smith: Society and Government, in: Elspeth Attwooll, ed. *Perspectives in Jurisprudence* (University of Glasgow Press 1977) 195–220.

124 Id. 203.

125 Id. 203–204

126 Adam Smith, *Lectures on Jurisprudence*, edited by R.L. Meek, D.D. Raphael, and P.G. Stein (Indianapolis: Liberty Fund 1982) 208 (emphasis added).

Smith gave economic factors primacy in the emergence and shaping of law,¹²⁷ though he also recognized the importance of ideological factors, whereby noble descent entitled chiefs to their rank and property duly enforced by law.¹²⁸

It is widely assumed that the shift from status-based societies to modern liberal legal systems with freedom of contract and property rights creates a society free of coercion, but what has changed are the underlying bases for coercion. Whether this represents an actual reduction of coercion, Max Weber observed, “depends entirely upon the concrete economic order and especially on the property distribution.”¹²⁹ In market systems, owners of the means of production (employers) and those with capital utilize legal empowerment to their advantage, dictating the terms of employment relationships with people lacking property. “A legal order which contains ever so few mandatory and prohibitory norms [lacking restrictions on what employers can impose] and every so many ‘freedoms’ and ‘empowerments’ can nonetheless in its practical effects facilitate a quantitative and qualitative increase not only of coercion in general but quite specifically of authoritarian coercion.”¹³⁰ The influence of capital interests on law was plain at the turn of the twentieth century when criminal conspiracy laws and antimonopoly statutes were applied to squelch labor actions, courts issued labor injunctions against strikes and boycotts, and public and private police forces killed and imprisoned strikers.¹³¹ Although less visible today, the influence of capital in securing legal advantages remains in a multitude of ways.

Attention to the actual workings of law across time and place reveals that legal systems and inequality are linked, the former helping constitute the latter. State legal systems are an aspect of functional differentiation within social complexity, taking institutionalized form to organize the application of coercive power of polities. This power is used to good and bad ends. Analytical jurists who write about the nature of law emphasize that legal institutions serve social functions. Critical theorists emphasize that law entrenches, normalizes, and enforces hierarchy and inequality within complex societies, assisted by ideological support from cultural, religious and political beliefs. The mainstream and the critical view each emphasize one side of law, downplaying the other. A full understanding sees both sides of law.

THE LEGAL COVERAGE OF EARLY STATES

Legal proscriptions commonly found in early states can be broken down into eight rough (overlapping) categories: laws in the interest of the state itself; laws enforcing social hierarchy; religious-supernatural laws; laws regulating sex; laws involving personal injuries; laws protecting property; laws controlling labor; laws involving trade.¹³² Here are examples of each:

127 See Andrew Skinner, *Adam Smith: Society and Government* supra

128 Id. 215–216.

129 Max Weber, *Economy and Society*, vol. 2, edited by Guenther Roth and Clause Wittich (University of California Press 1978) 730.

130 Id. 731.

131 See generally Michael Mann, *The Sources of Social Power: Volume 2: The Rise of Classes and Nations, 1760–1914*, 2nd ed. (Cambridge University Press 2012) Chapters 17 and 18.

132 For examples, see Chapter 11, “Law”, in Trigger’s *Understanding Early Civilizations* supra 221–239, along with the other sources cited earlier. The categories and summaries are my own.

1) Maintaining the state apparatus (including royalty and officials) are laws securing revenues (rents, taxes, customs duties); laws punishing treason, disloyalty, or disobedience; and laws requiring corvée (obligatory unpaid labor).

2) Enforcing social hierarchy are laws on proper conduct toward superiors; sumptuary laws restricting food consumption, clothing, and possession of luxury items by social rank; status based legal distinctions in treatment between nobles, warriors, commoners, women, children, and slaves.

3) Religious-supernatural laws deal with witchcraft, sacrilege, violation of religious prohibitions, failure to meet religious obligations, and supplying human sacrifices, as well as mystical-legal ordeals, oracles, and punishments.

4) Sexual regulation include legal prohibitions against incest, adultery, rape, seduction, sex outside of marriage, and laws about marriage and divorce (including age restrictions, who has the right of permission, dowry, which family the new spouse lives with, grounds for divorce, who the children belong to).

5) Personal injury laws deal with killings (intentional and accidental), assaults or wounding in attacks, accidental injuries, illnesses and ill-fortune attributed to witchcraft, and kidnapping, as well as feuds.

6) The preservation of property includes laws against robbery and theft (personal items, livestock, etc.), trespass, damage to property, disputes over ownership of personal property and land (including use rights), and inheritance law.

7) Laws regulating labor cover slave ownership and rules about the disposition, treatment, and return of slaves, restrictions on who can do what types of work, enforcement of indentured or debt servitude, and property rights in the labor of others (wives and children, serfs, servants).

8) Laws relating to trade address breaches of agreements between merchants, dishonest traders defrauding buyers, the selling of faulty goods or non-delivery, payment of debts, and restrictions that protect guilds.

These categories of legal regulation extend as far back as early states several thousand years ago. That we regulate most of same categories today suggests there are certain constants of social life in large polities. They include enforcing social and economic hierarchy, control over sexuality and offspring, rules for economic exchange and debt, protection of property, regulation of labor, protection from physical injury, and ideological enforcement (i. e. religion, political legitimation). These legal constants flow from the needs of social-sexual beings living in large groups, who require food, safety, and shelter and pursue material comforts, who require cooperation and coordination with others, who are threatened by others, and who strive to make sense of the world and find meaning in their lives. Another constant is that the state apparatus uses law to protect and consolidate its own power; once states and legal systems exist, they jealously preserve their own interests apart from the social interests they advance.

H. L. A. Hart suggested there is a “minimum content of natural law” that exists in all societies. The human condition (vulnerability, approximate equality of capacities, limited altruism, limited resources, limited understanding and will) requires basic legal elements for the ordered maintenance of social life, he argued, including the protection of persons, property, and promises.¹³³ The legal coverage of early

133 Hart, *The Concept of Law*, supra 189–195.

states is consistent with Hart's observation. But four additional legal constants he failed to mention might be added (at least in larger social groups): legal regulation of sexual relations, legal regulation of labor of others, legal enforcement of hierarchy, and maintenance of the power of the legal system itself and the polity to which it is attached. Hart's legal minimums focus on functional benefits, whereas the list of legal constants includes not just its benefits for social groups but also the oppressive aspects of law – including male patriarchy, hierarchical domination, and the power of legal coercion.

A few changes have taken place over time with respect to this list. Magic and religion were intertwined with law up through the medieval period: priestly figures declared norms in prophecies or oracles, agreements were sealed with sacred oaths, violations of rights were punished by supernatural sanctions (curses), and guilt was determined by omens and ordeals.¹³⁴ With the advance of legal institutionalization and rationalization (and the Enlightenment and rise of science) these irrational elements of law diminished. Though a range of theocratic arrangements still exist, religious institutions in liberal societies have been deprived of previous state enforced orthodoxy, though they retain special privileges in civil and criminal law,¹³⁵ and still enjoy significant financial support via direct subsidies or non-taxation. Another difference is that law in early states directly enforced hereditary social status, whereas in liberal societies hierarchy is largely based on wealth and occupational status supported by property rights and special privileges available to those who can afford them.

Additional differences between early states and most states today (liberal and non-liberal) involve growth in the size and scopes of the first and last categories, dealing respectively with the government and the economy, which now dwarf the other categories. Entirely new realms of activities in society are undertaken by the modern administrative state, much of it carried out through law, including constructing the government itself and its purposive pursuits. Laws dealing with economic activities have also ballooned enormously. Laws relating to trade provide the infrastructure for capitalism, including the creation of corporations, finance and banking systems, money ("legal tender"), and regulation and support of the market.

Modern law has undergone a shift in activity from law in earlier ages. After legal institutions were established that enabled state legal officials to create law at will, law diversified to become a multifunctional instrument backed by coercion that could be used for *any* purpose. In complex societies this protean-plus-coercion capacity has made law a favored mechanism by state officials and other actors for getting things done. When societies became denser and larger, more varied activities of greater numbers of interdependent people had to be coordinated. Matters like transportation, food provision, housing, communication, education, health and safety protection, and markets, needed to be managed across extensive ranges. The state uses legal mechanisms to set up institutions and direct their activities and to carry out initiatives. Invoked by groups, individuals, corporations and governments to achieve their

134 See Georges Gurvitch, *Magic and Law*, 9 *Social Research* 104 (1942); Weber, *Economy and Society*, vol. 2, supra 647, 761–62, 765, 768–770, 809–831.

135 Churches may benefit from certain immunities, and from the reluctance of secular authorities to penetrate church authority, as reflected in the delayed and minimal prosecutions of priests and churches for child sexual abuse.

purposes, law has become an actor in social arenas engaging in projects in a manner that extends far beyond maintaining social order and solving moral problems.

EMPIRES AND LAW

Empires are incorporative states that exercise control over other societies through military force: Roman, Byzantine, Persian, Mongol, Mughal, Ottoman, and British Empires, to name a few of the best known.¹³⁶ They are economically motivated, seizing labor (slaves), material resources (gold, silver, etc.), and taxes and tributes.¹³⁷ Owing to the difficulty of controlling large territories of people with diverse language and cultures, empires typically allowed a substantial degree of local autonomy after pacifying the subject populace. A relatively small contingent of imperial administrators and an armed force ruled, relying on local elites to maintain order and collect taxes, allowing local laws to continue undisturbed except when they clashed with imperial interests. Empires bare the extractive side of states, as extortion rackets that offer protection from plundering – by the state itself and others – in exchange for taxes and tribute.¹³⁸

The East India Company (EIC), a private corporation that ruled major swaths of India from the mid-eighteen to the mid-nineteenth century, was a particularly naked example of the connections between empire, law, and economic interests.¹³⁹ It was “the sole British administrative, judicial, and commercial representative in India during this period. The monopolistic company acted as the upholder of British interests and served as the vehicle for territorial expansion on the subcontinent.”¹⁴⁰ EIC supplemented revenues from its commercial activities (a legal monopoly) with substantial territorial revenues it took over from the Mughal emperor. EIC set up a dual court system, one for employees applying English law, a second for natives applying Hindu and Muslim personal laws, and Islamic criminal law.¹⁴¹ Native courts were prohibited from trying British citizens; the expense of coming to Calcutta where the English court was located meant that Indians in the interior were “extremely vulnerable to European violence and exploitation in both civil and criminal matters.”¹⁴²

British colonial practices are telling because they saw themselves as a rule of law society spreading civilization to backward lands, yet law served as the enforcer of

136 For a history of the world told through empires and the commerce they generated, see J.R. McNeill and William H. McNeill, *The Human Web* (New York: Norton 2003).

137 See generally Carla M. Sinopoli, *The Archeology of Empires*, 23 *Annual Review of Anthropology* 159 (1994).

138 See Charles Tilly, *War Making and State Making as Organized Crime*, in: *Bringing the State Back In* edited by Peter Evans, Dietrich Rueschemeyer, and Theda Skocpol (Cambridge University Press 1985).

139 See L. S. Sutherland, *The East India Company in Eighteenth Century Politics*, 17 *Economic History Review* 15 (1947); Amar Farooqui, *Governance, Corporate Interest and Colonialism: The Case of the East India Company* 35 *Social Scientist* 44 (2007).

140 Huw V. Bowen, *The ‘Little Parliament’: The General Court of the East India Company, 1750–1784*, 34 *Historical Journal* 857, 858 (1991).

141 Elizabeth Kolsky, *Codification and the Rule of Colonial Difference: Criminal Procedure in British India*, 23 *Law and History Review* 631, 641 (2005).

142 *Id.*

imperial interests. “Colonial rule created new ‘crimes,’ many of which were offences against the imposed structure of colonial management.”¹⁴³ To facilitate the acquisition of land by settlers for plantations and mining, preexisting collective property rights of the community were abolished and replaced with individually held titles that could be sold or leased (benefiting savvy traditional elites while dispossessing the collective).¹⁴⁴ A standard colonial legal initiative was to impose Hut taxes or head taxes on natives to secure revenues to run the colony. To pay taxes owed, natives were forced to seek employment in the money economy, supplying labor for settler farms growing export crops.¹⁴⁵ A colonial administrator in Rhodesia lamented in 1935 that the District Officer came into contact with the African population “almost only in the guise of public authority and power – that is as the avenging magistrate and the tax collector.”¹⁴⁶ Labor laws were also exploitative. In Papua New Guinea, for example, taxes forcing native people to seek paid work were backed by a indentured servitude system that locked plantation workers into multi-year terms of employment enforced by criminal sanctions against “desertion.”¹⁴⁷

Colonial law is an unadorned instrument of extractive rule, preserving the colonial state and advancing imperial economic enterprises, while providing scant services to the native public. The state legal system in many colonial settings initially made little effort to maintain social order outside colonial towns, leaving those tasks to indigenous institutions. This did not contravene rule of law ideology, at least on the surface. Indentured servitude contracts imposed legal obligations on *both* parties, plantation owners and laborers, although natives “had, in practical terms, almost no access to courts to enforce his side.”¹⁴⁸ And while they suffered significant legal disadvantages, indigenous people were in limited ways occasionally able to invoke law against colonial government, settlers, missionaries, and local elites.¹⁴⁹

An unintended consequence of empires was a mish mash of legal hybridity and pluralism, through the juxtaposition of law from one society onto another with a different social-political-economic arrangement, transforming both law and society in myriad ways.¹⁵⁰ Western common law and civil law systems spread around the globe through imposition by colonial powers (and in some cases voluntary copy-

143 David Killingray, *The Maintenance of Law and Order in British Colonial Africa*, 85 *African Affairs* 413 (1986). This article provides an excellent look at the distorting impact of colonial policies.

144 See Martin Chanock, *The Law Market: The Legal Encounter in British East and Central Asia*, in: *European Expansion and Law*, edited by W.J. Mommsen and J.A. de Moor (Berg Publishers 1992).

145 See John Lonsdale and Bruce Berman, *Coping with the Contradictions of the Colonial State in Kenya, 1895–1914*, 20 *Journal of African History* (1979).

146 Quoted in Killingray, *The Maintenance of Law and Order in British Colonial Africa*, supra 411 n.1.

147 See Peter Fitzpatrick, *Law and Labor in Colonial Papua New Guinea*, in: *The Political Economy of Law: A Third World Reader*, edited by Yash Ghai, Robin Luckham, and Francis Snyder (Oxford University Press 1987) 130–143.

148 Id. 131.

149 See Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge University Press 2002).

150 See generally Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press 2001) 112–120; Sally Engle Merry, *Law and Colonialism*, 25 *Law & Society Review* 889 (1991).

ing). Religious law also spread with empires and trade lanes they opened up; Islamic Law, initially arising in Arabia, ultimately stretched from North Africa through the Near East, reaching Indonesia. Empires also produce law-carrying diasporas: people fleeing subjugation or moving to the economic center of the Empire seeking opportunities; groups of emigrants who form communities in new lands bring legal understandings from home (especially marital and inheritance), at least for a time.

Legal transplantation, serving imperial interests, is prominent in the history of law around the world.¹⁵¹ Legal theorists construct theories of law assuming law is a mirror of society that maintains social order. In imperial contexts, however, law was exploitative, clashed with prevailing social norms, and was avoided by the populace. Raz's assertion that law "provides the general framework within which social life takes place" was belied by colonial law, and its legacy continues to this day in mismatches between law and social life in many societies. According to Hart, a legal system "exists" when two conditions are met: the bulk of citizens obey primary rules and legal officials accept secondary rules. In colonial contexts, however, the native populace – which often did not speak the imperial language in which the law was set forth and carried out – was largely hostile to or ignorant of the primary rules imposed by colonial legal system. Legal systems, as colonial law shows, are complexes of coercive power that do things in the name of law with no necessary or inherent connections to the society they purport to rule. Legal institutions can operate contrary to prevailing social norms and interests when legal officials pursue an agenda different from that of the surrounding social group.

What is most problematic about legal positivist conceptions is that their built-in functionalist take on law downplays the extent to which legal systems can be a "Gunman writ large,"¹⁵² an apt description of many legal regimes in history and some legal systems today. "If we want to explain what makes the law *the law*, we must see it as necessarily having a moral aim,"¹⁵³ Shapiro insists.¹⁵⁴ Only a theorist who ignores the history of law and strips away much of what law does would arrive at the position that law is a planning system that solves hard moral problems. Consider yet another counter-example, the native Aro Confederacy that ruled large parts of Nigeria in the 18th and 19th centuries, keeping peace and managing an extensive trade network, while maximizing revenues; in response to trans-Atlantic slave trade, "Judicial penalties that formerly had taken the form of beatings, payment of compensation or exile, for example, were now converted to enslavement,"¹⁵⁵ handing over prisoners to slave traders in return for payment. A clear-eyed view suggests that legal institutions exert coercive power for all kinds of purposes, to advance all sorts of aims, ranging from moral, to amoral, to immoral.

151 See Alan Watson, *The Evolution of Law* (John Hopkins University Press 1985).

152 For a critique of functionalist assumptions by legal positivists, see Brian Z. Tamanaha, Socio-Legal Positivism and a General Jurisprudence, 21 *Oxford J. Leg. Stud.* 1 (2001).

153 Shapiro, *Legality*, supra 215.

154 Shapiro's view of the moral function of law appears to commit him to an weak anti-positivist position (or weak natural law position), although he lacks a moral theory to provide criteria to determine what counts as moral. See William A. Edmundson, Why Legal Theory is Political Philosophy, *Legal Theory*, February 2014.

155 Martin Klein, The Slave Trade and Decentralized Societies, 42 *Journal of African History* 49, 59 (2001).

THE CONSOLIDATION OF LAW-STATE

The standard unified vision of state law exercising a monopoly of legitimate power – reflected in Raz’s theory of law – was a late entry on the historical stage and might already be passing. Law in medieval Europe was a jumble of different laws and institutions occupying the same space, lacking any overarching hierarchy or organization.¹⁵⁶ Law was the product of social groups and associations, each forming a special legal order “either constituted in its membership by such objective characteristics of birth, political, ethnic, or religious denomination, mode of life or occupation, or arose through the process of explicit fraternization.”¹⁵⁷ These forms of law included unwritten local customary law; residual Roman law; codified Germanic customary law; feudal law; municipal law; the law merchant (*lex mercatoria*); the law of specific guilds; canon law of the Roman Catholic Church; royal legislation, and revived Roman law developed in universities. Various types of courts coexisted: manorial courts staffed by barons or lords of the manor; municipal courts staffed by burghers (leading citizens); merchant courts staffed by merchants; guild courts staffed by members of the guild; church courts staffed by bishops and archdeacons; and royal courts staffed by the king or his designees. “The demarcation disputes between these laws and courts were numerous.”¹⁵⁸ Not only did separate systems and bodies of law coexist, and compete, but also under the “personality principle” a single court could apply different bodies of law.¹⁵⁹ As medievalist Walter Ullmann remarked, “This complex mosaic of legal systems presented many difficulties to the application of abstract legal rule to the given set of concrete circumstances.”¹⁶⁰

A truism about law, Shapiro contends: “In every legal system, some person or institution has supreme authority to make certain laws.” This statement resonates with lawyers today, but would not have been self-evident in the medieval age and other times and places when local customary law – no final authority, competing versions – was a primary form of law.¹⁶¹ “Every legal system has institutions for changing the law” – another Shapiro truism. However, Max Weber observed, customary laws “were at first not conceived as the products, or even the possible subject matter, of human enactment...As ‘traditional’ they were, in theory at least, immutable. They had to be correctly known and interpreted in accordance with established usage, but they could not be created.”¹⁶² Also ill-fitting to medieval times are Joseph

156 See generally Thomas Fergus and William Gordon, *European Legal History* (2000); Harold Ber- man, *Law and Revolution: The Formation of the Western Legal Tradition* (1983).

157 Weber, *Economy and Society*, vol. 2, supra 695.

158 Raoul van Caenegem, *Legal History: A European Perspective* (1991) 19.

159 See van Caenegem, *Legal History* supra 117–118; Patrick Geary, *The Myth of Nations: The Medieval Origins of Modern of Europe*, (Princeton University Press, 2002) 152–154.

160 Walter Ullmann, *The Medieval Idea of Law* (1969) 71.

161 The assertion that every legal system has a supreme authority is also problematic when applied to the contemporary European Union. A noted theorist observed, “For the most part national courts have not accepted that EU Law is the supreme law of the land. But nor have they simply assumed that national constitutional law is the supreme law of the land.” Mathias Kumm, *How Does European Union Law Fit into the World of Public Law?* in: *Political Theory of the European Union*, edited by Jurgen Neyer and Antje Wiener (Oxford University Press 2011) 127. This assertion applies not only to the substantive law but also to which courts have final say.

162 Weber, *Economy and Society*, vol. 2., supra 760.

Raz's essential features of law, particularly his assertion that "they claim supremacy over all other normative systems in society." This runs contrary to the long-standing medieval principle "special laws were to prevail over the general law of the land."¹⁶³ Law was personal, not territorial, under which "every man was entitled everywhere to be judged by that tribal law by which he 'professed' to live."¹⁶⁴ No single legal regime held supremacy over all others (Popes claimed supremacy for canon law, though not entirely effectively¹⁶⁵). "The result was the coexistence of numerous 'law communities,'" Weber wrote, "the autonomous jurisdictions of which overlapped, the compulsory, political association being only one such autonomous jurisdiction in so far as it existed at all."¹⁶⁶

What legal philosophers assert as self-evident truths about law, as we can see, are contemporary assumptions based on relatively recent developments in human history. Raz unselfconsciously declares, "Suffice it to say that the truth of these theses of the general theory of law is not contingent on existing political, social, economic, or cultural conditions, institutions, or practices."¹⁶⁷ That is wrong. Theories of the nature of law produced by analytical jurists are contingent at their core: their assumed paradigm of law – 20th century state law – was the product of existing political, social, economic, and cultural factors. Law in earlier periods did not match the state law paradigm, and law continues to evolve in form and function.

The consolidation of the state system across Europe took several centuries to achieve.¹⁶⁸ Monarchs had first to establish their dominance over rival sources of political and military power.¹⁶⁹ Internally this meant pushing the church out of political affairs and pacifying major nobles by buying or co-opting their allegiance and denuding their military capability; externally this meant absorbing neighboring territories through alliances (royal marriages) or martial adventures and defending borders against incursion from other monarchs.

State building monarchial officials established administrative apparatuses that oversaw tax collection, law enforcement, and judging. Previously the main source of funding for monarchs had been revenues from their feudal holdings, special customs, and fees collected by royal courts; high officials were members of the king's household staff; many offices were privately owned, with occupants deriving rents from their official activities. A pivotal bureaucratic development was to create a separation between public and private positions, with public monies paying people holding public offices.¹⁷⁰ The Reformation diminished the grip of the Church, allowing monarchs in Protestant countries to seize church assets and restrict ecclesias-

163 Id. 852.

164 Id. 696.

165 Id. 830.

166 Id. 697.

167 Raz, *Between Authority and Interpretation*, supra 92.

168 See Martin van Creveld, *The Rise and Decline of the State* (Cambridge University Press 1999).

169 For a detailed account of these developments, see Michael Mann, *The Sources of Social Power: Volume 1: A History of Power from the Beginning to AD 1760*, 2nd ed. (Cambridge University Press 2012); Michael Mann, *The Sources of Social Power: Volume 2: The Rise of Classes and Nation-States, 1760–1914*, 2nd ed. (Cambridge University Press 2012).

170 See Mann, *The Rise of Classes and Nation-States*, supra Chap. 13; S. E. Finer, *The History of Government: Empires, Monarchies, and the Modern State* (Oxford University Press 1999) 1266, 1298–1299.

tical courts (not deprived of jurisdiction in England until the 1850s¹⁷¹). The Treaty of Westphalia (1648) divided Europe into separate territories, confirming control by sovereigns over internal affairs.

Consolidation of law in the state required absorbing coexisting bodies of law, enacting territory-wide codes, creating legal offices paying regular income from the state, and creating and staffing courts not beholden to local magnates. The institutionalization of law in the state also involved building the legal profession, training people in specialized legal knowledge and legal practices (holding guild monopolies). Professional police forces were created in the nineteenth century (separate from the military) at the national, regional and municipal levels and state-run prisons were built.¹⁷²

Only when a full complement of bodies of law and effective legal institutions were created and consolidated in state offices, rationalized, and hierarchically organized, did the unified vision of the law-state approximate reality. This involved two developments: the functional differentiation and institutionalization of law and the lodging of this complex of legal institutions within the political structure of the state.

The crucial point is that the unified vision of the law-state with a monopoly over law is an ideological *claim* that must be achieved and cannot be assumed to hold. Law past and present on the ground is altogether messier. Multiple factors can produce this: external conquest that does not suppress prevailing local law, diasporas, different ethnic or religious communities with their own legal norms and institutions living side-by-side within a territory, weak state legal institutions, insufficient people with training in legal knowledge and practices, legal institutions infused by corruption or powerful social interests, and more. The state legal system of Afghanistan today, for example, claims supreme authority, but state legal institutions function poorly and have scant reach outside major cities; traditional tribunals or Taliban courts sit in the countryside, the former as alternatives to the state and latter battling the state outright.¹⁷³ Even modern megacities, from immigrant neighborhoods in the West to the favelas of Sao Paulo, have pockets where community forms of law (including property holding and transfers and policing) matter more than state law.

Viewed historically, legal systems involve complexes of legal norms and institutions that take different forms and vary in efficacy and reach, vying for authority in social arenas, some attached to the state, some not. When legal institutionalization thickens and ramifies within the state, differentiating horizontally (among different legal functions: policing, prosecuting, lawyering, judging, punishing, imprisoning) and vertically (higher levels), and develops the capacity to effectively exert power, it becomes a normalized aspect of and background infrastructure for social-political-economic life. But whether this occurs and the shape it takes depend on the

171 R. B. Outhwaite, *The Rise and Fall of the English Ecclesiastical Courts, 1500–1860* (Cambridge University Press 2006).

172 See Mann, *The Rise of Classes and Nation-States*, supra 404; see van Creveld, *The Rise and Decline of the State*, supra.

173 See Barfield, Thomas 2006: Neamat Nojumi, and J. Alexander Their, *The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan*, (2006), at: http://www.usip.org/files/file/clash_two_goods.pdf

unique history and circumstances of every society. In many places it remains incomplete.

TRANSNATIONAL CONNECTIONS – LAW BEYOND THE STATE

World history has often been told as the accretion of connections between societies through the combined effects of conquest by empires and expansion of trade, technological improvements in transportation and communication, population growth, and movement of people from rural areas to cities and from one land to another in the pursuit of a better life.¹⁷⁴ State systems and the global capitalist economy have grown thick connective branches that are maturing into transnational and global networks, weaving additional layers of complexity through human society.¹⁷⁵ Imperial expansion is no longer predominant, but the other factors are galloping ahead.

The geography of social-political space is changing from local to global levels.¹⁷⁶ The consolidation of the state system appears to have peaked in the mid-twentieth century, marked by a centralizing dynamic tying together economic, political and legal activities within nation states. Now this is pulling apart and going in different directions beyond the state. The nation state remains dominant territorially in political-legal terms (except in chronically weak or war-torn states), while significant political-legal power has devolved to regional (European Union, NAFTA, and ASEAN) and international bodies. Corporations have emerged as major global actors, with production and distribution networks spanning multiple countries. World cities/regions (London, New York, Los Angeles, Paris, Hong Kong, Frankfurt, Amsterdam, Tokyo, Shanghai, etc.) have become nodes in global capitalism – the location for production facilities, skilled and unskilled labor, banking and finance, markets and consumers for products and services, transportation hubs, legal and accounting services, all the stuff modern capitalism requires to function.¹⁷⁷ Municipal and national governments increasingly assume the role of facilitators of local and global commerce,¹⁷⁸ and engage in economic activity through partnerships with developers and tax incentives for corporations, or by creating quasi-private entities that invest in or directly conduct economic pursuits.¹⁷⁹

174 See McNeill and McNeill, *The Human Web* supra; William J. Bernstein, *A Splendid Exchange: How Trade Shaped the World* (Grove Press 2008). A clear and concise theoretical account of the global economic system can be found in Immanuel Wallerstein, *World Systems Analysis: an Introduction* (Duke University Press 2004).

175 Many accounts of social development stop at the state, but recent that move beyond the state is Robert Wright, *Nonzero: The Logic of Human Destiny* (New York: Vintage 2000), and Ian Morris, *Why the West Rules – For Now: The Patterns of History and What They Reveal About the Future* (Farrar Straus and Giroux 2010).

176 A terrific exploration of this is Neil Brenner, Globalisation as Reterritorialisation: The Re-scaling of Urban Governance in the European Union, 36 *Urban Studies* 431 (1999).

177 Id. 438–441.

178 See Philip Bobbitt, *Terror and Consent: The Wars for the Twenty-First Century* (Anchor Books 2009) 86–93.

179 See Gordon MacLeod, New Regionalism Reconsidered: Globalization and the Remaking of Political Economic Space, 25 *International Journal of Urban and Regional Research* 804 (2001).

At the same time that state governments are becoming more deeply entwined with private economic actors, some are relinquishing core legal activities. Private security forces handle policing at universities, malls, sporting and entertainment arenas, business facilities, and gated communities. Privately run penitentiaries house prisoners sent by the state legal system. A growing proportion of commercial and personal legal disputes are heard through private arbitration alternatives to the legal system. This shift to the private reverses aspects of the consolidation of the law-state described in the last section, blurring the line between public and private legal functions and offices.

At the supra-state level, new layers of law and legal institutions have been created addressing “security, the conditions on development and financial assistance to developing countries, environmental protection, banking and financial regulation, law enforcement, telecommunications, trade in product and services, intellectual property, labor standards, and cross-border movements of populations, including refugees.”¹⁸⁰ There are a variety of conventions on human rights and treatment of women and minority populations. Nearly 50 active regional and international courts and tribunals hear cases.¹⁸¹ A body of transnational business law facilitates commercial transactions between private parties across different nations. Most of this law is not enacted by official legal authorities and has no supreme authority – it is created through the actions of parties engaging in commercial intercourse. They use standardized contractual terms taken from model provisions and business usages, and disputes are handled by private arbitration rather than national or international courts.¹⁸²

International law and transnational law have changed a great deal since H. L. A. Hart observed mid-century that it resembles primitive law, both of them lacking the structure of legal systems. Although there are now many more legal institutions, Hart remains correct in that it is far short of fully systematized secondary rules.¹⁸³ International tribunals lack coercive enforcement ability. (The WTO’s grant of authorized reprisals by nations wronged by unfair trade practices is analogous to pre-state societies where elders approved retaliation by an injured party.) Compliance with rules and the judgments of tribunals frequently relies on voluntary acquiescence. There is much talk of the fragmentation and pluralism of international law because it is not rationalized or unified. A scholar characterized transnational commercial law as “mainly stand-alone ‘soft law,’ independent of any international framework of binding legal rules and sometimes lacking the degree of precision indispensable to a legally enforceable rule.”¹⁸⁴ Human rights norms are violated in many lands.

180 Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, The Emergence of Global Administrative Law, 68 *Law and Contemporary Problems* 15, 16 (2005).

181 See Cesare P.R. Romano, A Taxonomy of International Rule of Law Institutions, 2 *Journal of International Dispute Settlements* 241 (2011).

182 See Ross Cranston, Theorizing Transnational Commercial Law, 42 *Texas International Law Journal* 597 (2007); Roy Goode, Rule, Practice, and Pragmatism in Transnational Commercial Law, 54 *International and Comparative Law Quarterly* 539 (2005).

183 For an argument that international law institutions fall along a continuum of legalization, see Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal, The Concept of Legalization, 54 *International Organization* 401 (2000).

184 Mario Giovanoli, A New Architecture for the Global Financial Market: Legal Aspects of International Financial Standard Setting, in: *International Monetary Law*, edited by Mario Giovanoli (2000) 40, quoted in: Cranston, Theorizing Transnational Commercial Law supra 598.

From a genealogical standpoint none of this disqualifies these as important manifestations of law. International and transnational law are continuous with and have grown out of pre-existing bodies of law, including many of the same types of legal provisions and mechanisms, and various ongoing ties to state law. As international lawyers insist, “around the world today the vast majority of governments abide by the dictates of international law an overwhelming majority of the time.”¹⁸⁵ International law and transnational legal regimes undeniably exert legal consequences through the activities of governments, corporate actors, non-governmental organizations, lawyers, activists, and people who invoke and resort to international law.¹⁸⁶

And like law in chiefdoms, states, and empires, law at the transnational level, while ordering and providing a background framework for intercourse also reflects and enforces power. Again we see the dual sides of law. The most powerful countries shape and support international law they believe serves their interest and defy what does not: to wit, the US water-boarding of prisoners and refusal to join the International Criminal Court. The five permanent seats in the UN Security Council (China, United States, Russia, France, and United Kingdom) legislate and have veto power over the application of sanctions for legal violations.¹⁸⁷ The free trade ethos of the World Trade Organization – excluding labor and environmental protection provisions – is an ideological choice pushed by economically powerful nations; meanwhile, the United States and European states provide substantial subsidies to their farmers, distorting the global agricultural market, rebuffing requests by developing countries to desist.¹⁸⁸

International and transnational law are the latest forms of law to emerge in history, developing in interaction with social, political, and economic actors and activities between states and transnationally.

WHAT IS LAW?

Law is a social construction that has changed in form and function in the course of human history. Early on when humans lived in hunting and gathering bands, law at its most rudimentary established protections and restrictions relating to property and persons – the basics necessary for physically vulnerable comfort-and-pleasure seeking social-sexual beings with aggressive-and-affectionate tendencies to live together, procure adequate food and shelter, survive and reproduce. When communities settled and markedly increased in size, forming complex chiefdoms and early states, institutions coalesced as an aspect of social complexity, adding structure and organized force to law, creating legal systems. This was a kind of phase transformation after which law acquired a different form and set of capabilities, most importantly standing coordinated coercive power. Legal systems continued the basic func-

185 Louis Henken, *How Nations Behave* (Columbia University Press 1979) 47.

186 See Karen J. Alter, *The New Terrain of International Law* (Princeton University Press 2014).

187 Stefan Telman, The Security Council as World Legislature, 99 *American Journal of International Law* 175 (2005).

188 See Sungjoon Cho, The Demise of Development in the Doha Round Negotiations, 45 *Texas International Law Journal* 573 (2010).

tions of law in bands, while also structuring and enforcing social, economic, and political hierarchy, and adding enhancement of the power of the legal system itself. Early states included law within the polity as a complex of institutions that could make legal determinations and direct force, clothed in religious and political ideology, tradition, and community norms. States that became empires utilized law as a coercive mechanism to maintain imperial domination and advance imperial economic interests. After the consolidated law-state system underwent further institutionalization, entrenchment, and rationalization, a second phase transformation occurred, whereby law, no longer mainly limited to social ordering functions, was created at will and became a multi-functional instrument backed by organized coercion to advance the ends of those who wield it. The latest stage involves the institutionalization of law between states and law across states, matching growing networks of political and economic activities that cross state boundaries.

Law today is multifarious for reasons that go unrecognized by most legal theorists. The foregoing narrative discusses different forms of law that have existed in the course of human history: hunter gatherers, chiefdoms, early states, empires, states seeking legal uniformity, and international and transnational law (particularly tied to global capitalism). When laid out in chronological order, it looks like a historical trajectory, with later stages replacing earlier. But that is misleading. Versions, variations, and legacies of all of these forms of law can be found in innumerable contexts around the world today, interacting with other forms of law also present in the same social space (though hunter gatherer groups are disappearing). That is why these different forms must be recognized if law is to be truly understood: they are real and continue to have an impact.

Like all social phenomena, law is highly variable and is still in the making. The quest of legal positivists to identify essential, necessary, universally applicable timeless truths about law remove it from history and reduce it to a narrow set of unvarying features. What results is inconsistent with law in many past and present social settings and discards much of what law is and does. To understand what law is, it cannot be divorced from surrounding social, cultural, political, technological, material, and economic forces. A social theory of law keeps it tethered to this reality.

