ORDER WITHOUT JUDGES: CUSTOMARY ADJUDICATION

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ABSTRACT

Scholarship on custom and law has largely focused on the creation and enforcement of informal rules, demonstrating and in some cases endorsing the existence of "order without law." But creating and enforcing rules are only two of the three functions of governance, corresponding roughly with what in other contexts are called the legislative and executive branches. The third function—adjudication—has not played such a prominent role in the scholarly literature on informal governance. As one leading scholar puts it: "Custom has no constitution or judges." But if customs can be created and enforced by nonstate actors, why should scholars assume that formal (that is, noncustomary) courts are the only institutions that do or should adjudicate those customs?

This Essay seeks to describe and emphasize the role of customary adjudication, the third branch of customary governance. In doing so, it has three main goals: first, to argue that customary governance can be understood in terms of the same three functions familiar to students of formal governance; second, to deliver a preliminary and tentative account of the third of these branches; and finally, to suggest that existing scholarship on custom and law has given comparatively little attention to the functions and forms of customary adjudication. If successful, those contributions should set the stage for future descriptive and normative work.

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INTRODUCTION

Custom-and-law scholarship has traditionally explored two major elements of informal governance: first, how custom arises,[1] and second, how custom is enforced.[2] These elements are analogous to the legislative and executive functions of formal government. Like laws, custom and social norms[3] arise and function as rules governing individual action, though they are not promulgated by any official body. This is the legislative element of customary governance. Like laws, social norms also carry sanctions for violators, including ostracism and snubs, though these penalties are not administered by state officials. This is the executive element of customary governance.

These traditional accounts of custom and law have not given nearly as much attention to the role of customary *adjudication*. As

1. *See, e.g.*, ERIC A. POSNER, LAW AND SOCIAL NORMS 18–22 (2000) (describing a "[s]ignaling" model of norms); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 355–65 (1997) (describing an "Esteem Theory of Norm Origin").

2. Perhaps the most celebrated work on norm enforcement is ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991). Professor Ellickson's study of Shasta County found that local ranchers followed community norms because of the threat of informal sanctions, such as "negative gossip" and forcible self-help. *Id*. at 57–59.

3. This Essay uses the terms custom and social norms interchangeably, along with the concepts of customary and informal governance. *Cf.* Randal C. Picker, *Simple Games in a Complex World: A Generative Approach to the Adoption of Norms*, 64 U. CHI. L. REV. 1225, 1233 (1997) ("We used to say 'customs' when we were talking about norms; now the norm, of course, is to say 'norm.'"); Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC'Y REV. 805, 809 (1998) ("'No concept is invoked more by social scientists in explanations of human behavior than *norm*.' Nevertheless, a specific definition of the concept is elusive." (emphasis added) (citation omitted) (quoting JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY 242 (1990)) (internal quotation marks omitted)).

one prominent scholar puts it: "Custom has no constitution or judges."[4] Indeed, the existing literature focuses disproportionately on the existence and content of norms as well as the sanctions that follow from their violation,[5] rather than on adjudicatory functions such as the selection of applicable norms, resolution of disputed facts, application of the selected norms to the facts, and recommendation of sanctions—the things that courts do in a formal legal system. To the degree that scholars have focused on adjudication, they have generally asked whether formal adjudicators—judges, that is—should take account of custom when deciding cases.[6]

There is something oddly asymmetric, however, about treating the informal system as capable of creating and enforcing norms, but ignoring its role in resolving disputes over their application. If informal governance is robust enough to perform the former two functions, there is no *prima facie* reason why it should not also be able to perform the third.[7] But even as the custom-and-law literature has quite properly encouraged scholars to be less "legal-centric,"[8] it has itself remained generally court-centric.

This asymmetry is problematic for many reasons. If the literature is to be descriptively accurate, it must capture the adjudicatory function, just as any basic account of American government must acknowledge the role of the courts. And that accuracy is important not only for its own sake, but because it enables better normative analysis of the virtues and vices of customary governance—whether,

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4. Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1654 (1996); *see also* SIMON ROBERTS, ORDER AND DISPUTE: AN INTRODUCTION TO LEGAL ANTHROPOLOGY 175 (1979) ("[I]t certainly seems to be the case that adjudicatory processes of settlement are largely confined to societies with some form of centralized organization.").

5. *See infra* Part I.

6. *See, e.g.*, Cooter, *supra* note 4, at 1645–46 ("The subject of this Article is another form of decentralized lawmaking: enacting custom. To illustrate, courts may determine fault and liability for accidents by applying the norms of the community in which the accident occurred."); Richard A. Epstein, *The Path to* The T. J. Hooper*: The Theory and History of Custom in the Law of Tort*, 21 J. LEGAL STUD. 1, 4 (1992) ("[I]n [tort] cases that arise out of a consensual arrangement, negligence is often the appropriate standard for liability, and, where it is so, custom should be regarded as conclusive evidence of due care in the absence of any contractual stipulation to the contrary.").

7. *See* Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 34 (1983) ("Courts and other official institutions are not the only settings in which adjudication and related modes of disputing take place.").

8. Barak Richman, *Firms, Courts, and Reputation Mechanisms: Toward a Positive Theory of Private Ordering*, 104 COLUM. L. REV. 2328, 2330 n.4 (2004).

for example, nonstate rule enforcement (i.e., social sanctions) should be entitled to deference, but nonstate rule interpretation (i.e., customary adjudication), should not. Moreover, simply recognizing customary adjudication should help identify and evaluate the mechanisms by which custom is adjudicated—face-to-face,[9] by tribal chiefs,[10] in the court of public opinion,[11] and so on.

This Essay attempts to describe the functions and forms of customary adjudication and suggests that they deserve more attention in the scholarly literature on custom and law. Part I describes a three-branch model of customary governance and explains how the existing literature on custom and law—primarily but not exclusively that appearing in law journals[12]—has provided rich normative accounts of customary legislation and enforcement.

Part II begins to do the same for the third branch of customary governance by enumerating some functions of customary adjudication, including the identification of governing norms, resolution of disputed facts, application of norms to facts, and determination of sanctions. Customary adjudication may also perform

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9. *See, e.g.*, Galanter, *supra* note 7, at 16 ("The most typical response to grievances, at least to sizeable ones, is to make a claim to the 'other party'—the merchant, the other driver or his insurer, the ex-spouse who has not paid support, etc. . . . A large portion of disputes are resolved by negotiation between the parties."); Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787, 1814 (2008) ("Under comedians' norms system, the initial step is also a form of negotiation. When a comedian believes that another has taken his bit, often he will confront the alleged appropriator directly, face to face.").

10. *See, e.g.*, Robert D. Cooter, *Inventing Market Property: The Land Courts of Papua New Guinea*, 25 LAW & SOC'Y REV. 759, 783 (1991) ("Social control within clans is accomplished mostly by informal means such as gossip and 'tit-for-tat.' For deeper disagreements, there are traditional mediators and judges, such as elders and bigmen. Unresolved disputes can lead to violence, especially disputes between clans in the highlands or ethnic groups in squatter camps.").

11. *See* Kathryn Webb Bradley, *Introduction*, 71 LAW & CONTEMP. PROBS. i (2008) (providing an overview of how intense public interest in high-profile cases and robust First Amendment protection of the press may lead to media coverage that erodes the presumption of innocence in the public mind and results in a "case [being] tried in the court of public opinion, rather than in the courtroom," with an accompanying "rush to judge, rather than to do justice"); *cf.* JOHN STUART MILL, ON LIBERTY 76 (David Bromwich & George Kateb eds., 2003) ("Protection, therefore, against the tyranny of the magistrate is not enough: there needs protection also against the tyranny of the prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them . . . . [That protection] is as indispensable to a good condition of human affairs, as protection against political despotism.").

12. As noted below, legal anthropologists have focused more directly on the issue of informal adjudication. *See infra* notes 128–135 and accompanying text.

functions that are less characteristically adjudicatory, such as clarifying custom, educating people about governing rules, and spreading information about violators. The identity of the customary adjudicators who perform these functions is important because, as the custom-and-law literature has emphasized with regard to creation and enforcement, the institutional dimension of customary governance is crucial.[13]

This is a preliminary and extremely tentative account, meant to frame research questions rather than resolve them. The custom-and-law scholarship has benefited enormously from careful sociological study of how groups—ranchers,[14] diamond merchants,[15] and lobster gangs[16] are among the most famous examples, though by no means the only ones—actually govern themselves through custom. But this literature has yet to engage thoroughly with the role of customary adjudication and adjudicators.[17] This is of course a matter of relative, not absolute, neglect,[18] and there may be good reason for the imbalance—perhaps customs *must* be bright-line rules to be enforceable, and thus their violation will be so clear as to obviate the need for adjudication. Or perhaps customary adjudication simply does not exist,[19] since disputes over custom destroy a system of customary governance, which, after all, is based on social agreement. Maybe disputes over custom inevitably end up in the formal courts because no customary adjudicator has the necessary legitimacy to pronounce on disputes, or the power to enforce its own judgments.

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13. *See* Robert M. Cover, *Dispute Resolution: A Foreword*, 88 YALE L.J. 910, 910 (1979) ("Dispute-resolution work begins with the premise that there are many techniques and institutions for performing a single social function.").

14. *See* ELLICKSON, *supra* note 2, at 40–64 (examining the customary self-governance of ranchers).

15. *See* Barak D. Richman, *How Community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York*, 31 LAW & SOC. INQUIRY 383, 395–409 (2006) (examining customary self-governance in the context of diamond merchants).

16. *See* JAMES M. ACHESON, THE LOBSTER GANGS OF MAINE 71–83 (1988) (examining customary self-governance in the context of lobster-gang territories).

17. I have done some preliminary investigation into two potentially interesting groups—Key West's wreckers and North Carolina's tobacco auctioneers—but have yet to complete a paper on either.

18. Scholars have paid extensive attention to the adjudication of custom in formal courts. *See* sources cited *supra* note 6. My focus here is on adjudication of custom by customary institutions.

19. *Cf.* E.E. EVANS-PRITCHARD, THE NUER 162 (1940) ("In a strict sense Nuer have no law. There are conventional compensations for damage, adultery, loss of limb and so forth, but there is no authority with power to adjudicate on such matters or to enforce a verdict.").

But these are all hypotheses, not conclusions. This Essay attempts three steps toward testing them: first, it argues that customary governance can be understood in terms of the three familiar branches of formal governance familiar to students; second, it delivers a preliminary and tentative account of the third of those branches—customary adjudication;[20] and third, it suggests that custom-and-law scholarship has given comparatively little attention to that branch. In doing so, this Essay attempts to illustrate an important question, to show that the literature has not addressed it, and to take some tentative steps in the direction of an answer.

I. THE TRADITIONAL TWO-BRANCH ACCOUNT OF CUSTOMARY GOVERNANCE

Custom can be understood as a system of social order that operates outside of the state;[21] a system, as Professor Robert Ellickson famously put it, of "order without law."[22] So conceived, custom is essentially a form of government unto itself, one that creates, enforces, and presumably adjudicates its own rules—the same three major functions that formal governments perform. The law/custom divide appears within each of these functions. With regard to legislation—the creation of rules—customs and social norms are rules that originate from decentralized social processes, whereas laws are rules that originate from centralized state bodies.[23] With regard to the executive function, a rule enforced by informal social sanctions such as gossip and escalating self-help is a social norm,[24] whereas a rule

20. The classic discussion of the forms of adjudication remains Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 365–72 (1978).

21. My description of custom here is intentionally hesitant, as giving authoritative definition to custom is a task that has bedeviled scholars far better positioned than I. The state/custom distinction tracks, albeit imprecisely, related distinctions between formal and informal, planned and spontaneous, and rational-legal and charismatic authority. The distinction is not likely to create bright lines because the boundaries of what counts as "the state" are not capable of precise definition. *See* Ralf Michaels, *The Mirage of Non-State Governance*, 2010 UTAH L. REV. 31, 37 ("Almost all governance combines public and private, or governmental and non-governmental, aspects.").

22. Professor Ellickson's account of social control divided the subject into five categories: "self-control," "promise-enforced contracts," "informal control," "organization control," and "legal system." ELLICKSON, *supra* note 2, at 131 tbl.7.3. By "customary governance," I mean what Ellickson called informal control, or norms. *Id.* at 127, 131 tbl.7.3.

23. *See id.* at 127 (defining norms as "the rules that emanate . . . from social forces").

24. *See, e.g.*, Arti Kaur Rai, *Regulating Scientific Research: Intellectual Property Rights and the Norms of Science*, 94 NW. U. L. REV. 77, 81 (1999) ("Further, norms are distinct from legal rules. While the violation of law is punished by state actors, the violation of norms is typically

enforced by police action and a prison sentence is a legal rule.[25] The goal of this Part is to show that scholars of custom and law have emphasized these rule-creating and rule-enforcing functions and largely neglected the rule-*interpreting*, or judicial, function of custom.

A. A Tripartite Framework for Customary Governance

Before distinguishing rule creation and enforcement from rule interpretation within custom and law, it may be useful to say more about the three-function approach just described. As a conceptual matter, treating customary governance as having three branches can be illuminating.[26] It imposes a familiar and fundamental analytical structure that has proven useful not only for understanding American government[27]—whose three branches are of course divided by the Constitution itself[28]—but of other governments as well.[29] Indeed, the

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punished by private actors. Sanctions imposed on norm violators may include everything from informal gossip and disdain to formal exclusion from the group governed by the norms." (citation omitted)); *see also* McAdams, *supra* note 1, at 340 ("Roughly speaking, by *norms* this literature refers to informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external non-legal sanctions, or both.").

The possibility of sanction might also differentiate norms from behavioral regularities. *See, e.g.*, POSNER, *supra* note 1, at 8 ("What distinguishes social norms from other behavioral regularities is that departure from them provokes sanctions . . . ."); Oliar & Sprigman, *supra* note 9, at 1812 ("To be a norm rather than a mere behavioral regularity, the rule against appropriation must be enforced; that is, violations must be punished." (citation omitted)); Lior Jacob Strahilevitz, *How Changes in Property Regimes Influence Social Norms: Commodifying California's Carpool Lanes*, 75 IND. L.J. 1231, 1234 n.11 (2000) ("In this Article I define norms as patterns of behavior that are widely adhered to by some group of individuals, at least in part because of social pressures to conform to that norm. . . . Norms can be distinguished from other forms of human behavior that are widely adhered to for reasons having nothing to do with social pressures.").

25. *See* Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577, 1579 (2000) ("[T]he 'imperative theory of law' . . . asserts that a law is an obligation backed by a state sanction.").

26. By dividing customary law into three "branches," I do not mean to suggest that there are rigid and easily identifiable lines between them, nor that the divisions are best understood in formalist terms, only that the creation, enforcement, and adjudication of rules are important and conceptually distinct functions of government.

27. *See, e.g.*, BLACK'S LAW DICTIONARY 1487 (9th ed. 2009) (defining the doctrine of separation of powers as "[t]he division of governmental authority into three branches of government—legislative, executive, and judicial—each with specified duties on which neither of the other branches can encroach"); CARL T. BOGUS, WHY LAWSUITS ARE GOOD FOR AMERICA: DISCIPLINED DEMOCRACY, BIG BUSINESS, AND THE COMMON LAW 45 (2001) ("The division of powers among three branches of government is perhaps the most fundamental feature of American government.").

28. U.S. CONST. art. I (establishing the executive branch); *id.* art. II (establishing the legislative branch); *id.* art. III (establishing the judicial branch).

three-branch approach has become such a familiar way of looking at government that students of the American system might forget we are employing it, like glasses a person forgets he is wearing. Refocusing on the three "essentially different powers of government"[30] makes it possible to speak with more precision about the specific *kinds* of governance performed by the formal and informal systems.

Disaggregating the branches of customary governance is important not only for the conceptual clarity it offers but also because of the analysis that disaggregation permits. Perhaps most importantly, it enables exploration of particular customary functions, rather than treating customary governance as an amorphous form of social practice. Like a formal legal system, one of the functions of a customary system is to create rules. Another function common to both systems is the enforcement of those rules. And, as this Essay argues, both systems must also settle disputes over what rules mean and how they apply to a given situation. This is the adjudicatory function, and it is often referred to as,[31] but can be distinguished from, the enforcement of custom. In the familiar three-function framework, courts do not, strictly speaking, enforce law; rather, they determine when it has been violated and prescribe sanctions.[32] Executive branch

29. *See, e.g.*, Fraser v. Pub. Serv. Staff Relations Bd., [1985] 2 S.C.R. 455, 469 (Can.) ("There is in Canada a separation of powers among the three branches of government—the legislature, the executive and the judiciary."); B.N. Srikrishna, *The Indian Legal System*, 36 INT'L J. LEGAL INFO. 242, 242 (2008) ("The Constitution of India has set up three branches of the State: 1. the executive, 2. the judiciary, and 3. the legislature.").

30. *See* O'Donoghue v. United States, 289 U.S. 516, 530 (1933) ("The Constitution in distributing the powers of government, creates three distinct and separate departments—the legislative, the executive, and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, namely, to preclude a commingling of these essentially different powers of government in the same hands." (citation omitted)).

31. *See, e.g.*, Michael Conant, *The Commerce Clause, the Supremacy Clause and the Law Merchant:* Swift v. Tyson *and the Unity of Commercial Law*, 15 J. MAR. L. & COM. 153, 156 (1984) ("[D]iamond merchants have systematically rejected use of public courts and state-created law to enforce contracts and police behavior."); Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1, 13 (2005) (same); Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 158 & n.53 (1996) (same); Richman, *supra* note 15, at 384 (referring to courts' inability to enforce custom).

32. *See* Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 454 (1993) ("The Constitution balances the power of the three branches of government—legislative, executive and judicial—by granting the legislative branch the power to enact the laws, the executive branch the power to enforce the laws, and the courts the power to interpret the laws.").

officials—police, federal marshals, and the like—are responsible for enforcement. Along the same lines, customary adjudication determines when custom has been violated and sometimes prescribes informal sanctions.

This functionalist approach, in turn, permits an institutional analysis—one that draws attention not only to *what* legal and customary systems do but on *who* has power and responsibility for doing so.[33] Just as the rule-making, rule-enforcing, and rule-interpreting functions vary, so too do the identities of the people or institutions with responsibility for performing them. A norm may be created by the community as a whole and enforced by a particular set of individuals within it—the peers of the norm violator, for example. Either of these groups, or a separate actor entirely, could determine when the norm has been violated and what sanctions are appropriate.

Disaggregating the three branches of customary governance also enables a more detailed and accurate view of how custom does or should interact with the formal legal system. The simplified version of custom as a single undifferentiated mass fails to capture the nuanced ways in which the customary and formal legal systems interact. For example, custom-and-law scholars often focus on the question of whether courts should apply custom when deciding cases.[34] But there is no *prima facie* reason why courts are or should be the only point at which the formal and customary systems interact, nor why formal courts should be the only ones to adjudicate customary disputes.

If one believes enforcement to be an adjudicatory function, this Essay can simply be read as arguing that *some* adjudicatory functions—those discussed in Part I.A—have been undervalued in the literature.

33. This distinction between *what* and *who* tracks the functionalism-versus-formalism debate in American constitutional law. *See, e.g.*, William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21, 21 (1998) ("Formalism might be associated with bright-line rules that seek to place determinate, readily enforceable limits on public actors. Functionalism, at least as an antipode, might be associated with standards or balancing tests that seek to provide public actors with greater flexibility."); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489 (1987) ("The Supreme Court has vacillated over the years between using a formalistic approach to separation-of-powers issues grounded in the perceived necessity of maintaining three distinct branches of government . . . and a functional approach that stresses core function and relationship, and permits a good deal of flexibility when these attributes are not threatened." (citations omitted)).

34. *See, e.g.*, Cooter, *supra* note 4, at 1694 ("The theory developed in this Article argues that the lawmaker's role is to find community norms, apply the structural test, and enforce the norms that pass the test."); Epstein, *supra* note 6, at 1–2 ("Here the relevant question is this: where the defendant has complied with an industry custom, is that an absolute defense against a charge of negligence and, therefore, a finding of liability . . . ?").

Indeed, recognizing the three separate branches of formal and customary governance illuminates a range of interesting possibilities for interaction between the two systems, an approach more nuanced and accurate than a binary choice between law *or* custom. Sometimes courts apply custom when deciding cases—the equivalent of a formal adjudicator interpreting informal law. The reverse may also be true, for example when the informal "court of public opinion" finds someone guilty of having violated a formal law, even when that person was found innocent in a state-run court.[35] In other cases, private parties use informal sanctions to pressure one another into following the law—the equivalent of the customary executive enforcing formal law.[36] Other combinations are not hard to imagine. Professor Eric Feldman's study of the Tsukiji Tuna Court in Japan provides a nuanced example of a formal-informal mix-and-match. The Tuna Court is a formalized dispute resolution system created by the state,[37] but it is staffed by industry experts rather than judges,[38] and its substantive rules seem to have originated as social norms.[39]

B. Creating Custom

The bulk of the literature on custom and law focuses on the important questions of how and why customs arise. Sometimes implicitly, this literature also addresses the question of who has the power to create customs—who, in other words, serves the legislative function with regard to custom. These descriptive and explanatory accounts are deeply intertwined with the normative question of

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35. This point of contact is worth particular attention, if only because it suggests ways in which those who create formal law may be unable to control its impact. My thanks to Curt Bradley for emphasizing this point.

36. *Cf.* Richman, *supra* note 15, at 397 ("The [New York Diamond Dealers Club's (DDC's)] system of arbitration and information exchange thus sets the stage for other family- and community-based institutions to enforce the industry's executory contracts; if the DDC announces the verdict, then these complementary institutions are the sheriffs that enforce it.").

37. Eric A. Feldman, *The Tuna Court: Law and Norms in the World's Premier Fish Market*, 94 CALIF. L. REV. 313, 354 (2006) ("The rules for handling disputes at Tsukiji are thus state law, which is interpreted and imposed by a specialized public court.").

38. *Id.* at 339.

39. Some of the Tuna Court's operative rules are derived from customary sources. *See id.* at 358 ("[T]he Tuna Court's very existence likely depends on social norms. Although it is difficult to verify, for instance, the principle that the risk of latent defects should be borne by both buyers and sellers may have started as a market norm and been formalized as a legal rule in the [Tokyo Metropolitan Government] ordinance. And norms that bear on trust and reputation help to keep buyers and their disputes within the market's dispute-resolution mechanism.").

whether and to what degree custom should be entitled to deference or support within the formal legal system.

The incubator of social norms—the customary legislature—is generally thought to be the close-knit group.[40] Professor Ellickson, for example, argues that "members of a close-knit group develop and maintain norms . . . [that] maximize the aggregate welfare" and that "members of tight social groups will informally encourage each other to engage in cooperative behavior."[41] Other scholars have focused on somewhat broader patterns of social interaction, while still invoking the close-knit group as an important creator of norms.[42] Professor Richard McAdams explains the creation of norms in terms of a natural human preference for esteem;[43] Professor Eric Posner builds his theory on the value of signaling and cooperation.[44]

These descriptive accounts of how and why particular customs arise are closely connected with the normative question of whether they should be entitled to special respect from the legal system itself. Most legal scholars addressing the role of custom in the private-law setting seem to answer the question affirmatively, with varying

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40. *See* ELLICKSON, *supra* note 2, at 177–78 ("The hypothesis predicts that welfare-maximizing norms emerge in close-knit settings . . . . This qualification is necessary because an informal-control system may not be effective if the social conditions within a group do not provide members with information about norms and violations and also the power and enforcement opportunities needed to establish norms.").

41. *Id.* at 167 (emphasis omitted); *see also id.* ("In uncovering the various Shasta County norms, I was struck that they seemed consistently utilitarian. Each appeared likely to enhance the aggregate welfare of rural residents. This inductive observation, coupled with supportive data from elsewhere, inspired the hypothesis that *members of a close-knit group develop and maintain norms whose content serves to maximize the aggregate welfare that members obtain in their workaday affairs with one another*.").

42. *See, e.g.*, Lior Jacob Strahilevitz, *Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks*, 89 VA. L. REV. 505, 507–09, 561–67 (2003) (arguing, *inter alia*, that in the file-sharing community, a norm of reciprocity explains why users make their files available to others, and that this reciprocity norm was inculcated in other social settings and carried over into the Internet).

43. McAdams, *supra* note 1, at 355–58 ("Under the right conditions, the desire for esteem produces a norm. For some behavior *X* in some population of individuals, a norm may arise if (1) there is a consensus about the positive or negative esteem worthiness of engaging in *X* . . . ; (2) there is some risk that others will detect whether one engages in *X*; and (3) the existence of this consensus and risk of detection is well-known within the relevant population." (footnote omitted)).

44. *See* POSNER, *supra* note 1, at 18–27 ("The signaling theory suggests that any costly action can be a signal, that is, a mechanism for establishing or preserving one's reputation."); *id.* at 25 ("Rejecting or shunning another person is costly because one cuts off opportunities for cooperative gains and risks retaliation. If others mimic the leader in order to avoid being labeled bad types, a moral norm would emerge from the statistical norm.").

degrees of certainty and with a wide range of qualifications. Although some norms might well maximize group welfare, they could do so at cost to "social goals such as equality, corrective justice, or the protection of fundamental individual liberties."[45] Indeed, norms can be socially destructive,[46] random,[47] inefficient,[48] or impose costs on outsiders.[49] Professor Lisa Bernstein, for example, has argued that courts should be cautious when using custom to supplement written agreements.[50] Bernstein points out that lawsuits often signal the end of a relationship, and the parties involved might not want the rules they use in their day-to-day affairs to govern such disputes.[51]

Separating desirable from undesirable norms is therefore one of the major questions for custom-and-law scholarship. Professor Robert Cooter suggests that formal courts do so by engaging in "structural adjudication,"[52] a practice of enforcing only those norms that arise as

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45. ELLICKSON, *supra* note 2, at 169–70.

46. *See* Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1064–71 (1995) (presenting and defending economic theories of discriminatory caste systems and concluding that "[d]iscrimination exists because it is productive for its practitioners"); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2035 (1996) ("[C]hoices are a function of norms for which individual agents are not responsible and which, on reflection, many or most agents may not endorse.").

47. Professor Posner's theory, in fact, depends on some random variation in order to form majorities. *See* POSNER, *supra* note 1, at 26 (demonstrating how hairstyle norms develop from initial random distributions).

48. *See* McAdams, *supra* note 1, at 412 ("All kinds of judgments can produce a norm. When the norm does not arise to solve a collective action problem, the norms are necessarily inefficient because the costs incurred in obeying and enforcing such norms produce no social benefit."); *see also* POSNER, *supra* note 1, at 172–77 ("In sum, one can make no presumptions about whether group norms are efficient and about whether a legal intervention will improve behavior in close-knit groups." (footnote omitted)); *id.* at 234 n.5 ("Dueling was widely seen as ridiculous shortly before its demise, and was satirized. Clothing fashions seem ridiculous as soon as they pass. Dysfunctional norms often make people feel ridiculous but helpless: for example, wearing ties or high heels, or attending a party for someone everyone hates, or a celebration of someone who has done nothing good, or receiving gifts that one does not want from people who do not want to give them." (citations omitted)).

49. *See* ELLICKSON, *supra* note 2, at 169 ("[N]orms that add to the welfare of the members of a certain group commonly impoverish, to a greater extent, outsiders to that group. Examples are the norms of racial segregation in the Jim Crow era in the South, and norms of loyalty among the Gypsies or the Mafia.").

50. *See* Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1768 (1996) ("This Article challenges the idea that courts should seek to discover and apply immanent business norms in deciding cases.").

51. *Id.* at 1770.

52. Cooter, *supra* note 4, at 1677.

a result of long-run relationships, have minimal externalities, and when there is not another approach that is clearly superior.[53] Norms that meet this test will be welfare-maximizing, he argues, and judges should therefore rely on them when deciding cases.[54] This may well be so, but the fact that formal courts play the lead role in Professor Cooter's account of structural adjudication further emphasizes the degree to which the forms and functions of *customary* adjudication have been minimized.

C. Enforcing Custom

No matter which account of norm creation one finds persuasive, a second and equally crucial inquiry arises: How are norms to be enforced? This is a difficult question because the state's monopoly on the legitimate use of force effectively deprives custom enforcers of one of the most useful tools for forcing compliance. And yet scholars have demonstrated that, in many cases, it is possible to create order without law by using customary enforcement mechanisms—social and reputational sanctions, for example—and customary enforcers such as peers and business partners.

One approach, of course, would be to say that customary rules are or should be enforced through state-backed sanctions. This is the approach implicitly taken by those who argue that customary practices should be treated as law and enforced by the state against noncomplying parties.[55] But the appeal to state power, as useful and effective as it may be, is not truly a form of customary governance, or at least not of customary enforcement. Relying on the police or other formal law enforcers to ensure compliance with customary rules means combining the customary rule-making function with the formal rule-executing function.

State-backed sanctions, however, are not the only option when it comes to enforcement of customary rules and obligations. One of the central insights of the custom-and-law literature is that social

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53. *See id.* at 1677–78 (describing three conditions—"long-run relations," "no spill-overs," and "convexity"—under which "enforcement of social norms is fair by the norms of the community to which they apply and efficient by the standards of economics").

54. *See id.* at 1696 ("[A] common law court should find that a social norm is law if it evolved from an appropriate incentive structure. An appropriate incentive structure is one in which incentives for signaling by individuals align with the public good (long-run relations, convexity, no spill-overs).").

55. *See, e.g.*, sources cited *supra* note 6.

sanctions such as gossip and exclusion[56] can be, and often are, just as effective in ensuring compliance with customary rules.[57] For example, a comedian who violates norms by retelling another comedian's joke may be subjected to loss of reputation and other social sanctions, such as mockery or peers' refusal to share billing.[58] Such reputational sanctions can be devastating for comedians, just as they can be for merchants who rely on their own reputations.[59] Other sanctions are more direct. Ranchers who suffer repeated or egregious trespasses from another's cattle sometimes respond by injuring the offending animals, thereby inflicting another type of extralegal, and perhaps illegal, sanction.[60] Some aggrieved ranchers even resort to interpersonal violence.[61] And lest it be thought that ranchers are

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56. *See* Rai, *supra* note 24, at 81 ("Sanctions imposed on norm violators may include everything from informal gossip and disdain to formal exclusion from the group governed by the norms.").

57. *See*, *e.g.*, ELLICKSON, *supra* note 2, at 282–83 ("[O]ne reason people are frequently willing to ignore law is that they often possess more expeditious means for achieving order. For example, neighbors in rural Shasta County are sufficiently close-knit to generate and enforce informal norms to govern minor irritations such as cattle-trespass and boundary-fence disputes."); POSNER, *supra* note 1, at 19–20 (analyzing how reputation can affect a person's economic potential); MICHAEL TAYLOR, THE POSSIBILITY OF COOPERATION 23 (1987) (noting that groups "can wield with great effectiveness a range of positive and negative sanctions, including the sanctions of approval and disapproval"); Robert D. Cooter, *Structural Adjudication and the New Law Merchant: A Model of Decentralized Law*, 14 INT'L REV. L. & ECON. 215, 223 ("Empirical studies of community life and business practice have often concluded that informal sanctions are more important than the law in enforcing norms."); McAdams, *supra* note 1, at 355–56 (focusing on the intrinsic value of esteem).

58. Oliar & Sprigman, *supra* note 9, at 1815. For a demonstration, see Peteholloway, *Stewart Lee — Joe Pasquale Joke*, YOUTUBE (Dec. 2, 2006), http://www.youtube.com/watch?v=0YE9Kthyaco (excerpt from a Stewart Lee set, broadcast on Comedy Central's *Edinburgh & Beyond* in 2006).

59. *See, e.g.*, Paul R. Milgrom, Douglass C. North & Barry R. Weingast, *The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs*, 2 ECON. & POL. 1, 9–10 (1990) (noting that if traders are adequately informed of a trader's previous transgression, they will institute informal sanctions); Richman, *supra* note 15, at 396–97 ("Merchants comply with the DDC arbitration board only to preserve good reputations and protect the opportunity to engage in future diamond transactions.").

60. *See* ELLICKSON, *supra* note 2, at 58 ("Despite the criminality of the conduct . . . , I learned the identity of two persons who had shot trespassing cattle. Another landowner told of running the steer of an uncooperative neighbor into a fence.").

61. *See* Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 679 (1986) ("[F]ear of physical retaliation is undoubtedly one of the major incentives for order in rural Shasta County."); *see also* Donald Black, *Crime as Social Control*, *in* 2 TOWARD A GENERAL THEORY OF SOCIAL CONTROL 1, 7 (Donald Black ed., 1984) ("Most conduct that a lawyer would label as assault may also be understood as self-help. In the vast majority of cases the people involved know one another, usually quite intimately, and the physical attack arises in the context of a grievance or quarrel.").

uniquely prone to violent retribution, it is worth noting that comedians have been known to punch those who steal punch lines.[62]

Considering the conditions under which custom should be expected to succeed helps illustrate the other important feature of customary enforcement: the actors and institutions responsible for imposing sanctions. These actors play the same role in customary governance as police and other law-enforcement officials in the formal system. In the examples above, customary enforcers are often peers—other comedians, for example.[63] Rural ranchers fear gossip from neighbors.[64] Tuna traders who are too litigious can be sanctioned through loss of business.[65]

This brief account of customary enforcement is meant to illustrate the functions of the customary executive branch by describing both its outputs and its institutions. That is, customary governance has its own versions of the formal executive branch's sanctions—prison terms, fines, and the like—and sanctioners—law-enforcement officers from the president on down to the police.

II. THE UNDER-RECOGNIZED THIRD BRANCH: A PRELIMINARY ACCOUNT OF CUSTOMARY ADJUDICATION

As the preceding Part demonstrates, the existing literature has painted a rich picture of the relationship between custom and law. But that picture places the legislative and executive functions prominently in the foreground, with adjudication appearing only in the background, if at all. This Part attempts to touch up the picture by focusing directly, if briefly, on the functions of customary adjudication.

A great deal of custom-and-law scholarship describes the norms or customs of a particular (and generally very interesting)

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62. *See* Oliar & Sprigman, *supra* note 9, at 1820 ("[A]cts of violent or potentially violent retribution enjoy considerable legitimacy within the comedic community. In some instances the attackers appear to feel morally justified. Comedian George Lopez did not try to hide the fact that he punched Carlos Mencia in a dispute over suspected joke stealing—rather he boasted about it publicly on *The Howard Stern Show*.").

63. *See id.* at 1817 ("A second retaliation option, often employed as an adjunct to shunning and bad-mouthing, is for an aggrieved comedian (and sometimes that comedian's friends and allies) to refuse to appear on the same bill with a known joke thief.").

64. ELLICKSON, *supra* note 2, at 57.

65. *See* Feldman, *supra* note 37, at 344 ("As one seller put it, 'Why would I, as the auctioneer, sell a fish to someone who I know might loudly complain if I could sell it to someone else? It's only natural.'").

community—ranchers,[66] whalers,[67] comedians,[68] roller-derby girls,[69] jam bands,[70] French chefs,[71] and so on[72]—and how each community's norms are, can be, or should be enforced in the event of a breach. But these analyses assume that there is agreement about what norm applies, what the facts are, and whether a breach has occurred, assumptions rarely, if ever, made with regard to the formal legal system. Indeed, determining *whether* a rule has been violated is arguably the principal function of courts. The questions of who gets to decide whether a rule has been breached and how that determination is to be made are therefore crucial to understanding any system of governance, whether formal or informal.

It is far beyond the scope of this Essay to define the essential attributes of adjudication. Professor Lon Fuller, in his classic *The Forms and Limits of Adjudication*,[73] focuses on the role of judges in an "institutional framework that is intended to assure to the disputants an opportunity for the presentation of proofs and reasoned arguments,"[74] and argues that "[a]djudication is a process of decision that grants to the affected party a form of participation that consists in the opportunity to present proofs and reasoned arguments."[75] Others have defined adjudication as "the process by which final,

66. ELLICKSON, *supra* note 2, at 1–120.

67. *See* Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 J.L. ECON. & ORG. 83, 89–90 (1989) (describing the customs and rules that are used to resolve disputes over ownership of harvested whales).

68. Oliar & Sprigman, *supra* note 9, at 1809–31.

69. David Fagundes, *Talk Derby to Me: Emergent Intellectual Property Norms Governing Roller Derby Pseudonyms*, 90 TEX. L. REV. 1093, 1108–31 (2012).

70. Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People To Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651, 691–718 (2006).

71. Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORG. SCI. 187, 192–94 (2008).

72. *See* Richman, *supra* note 8, at 2334 (noting that the private-ordering literature "contains genuinely interesting stories"). This Essay unfortunately lacks such a story. I hope to provide one in future work.

73. Fuller, *supra* note 20.

74. *Id.* at 365.

75. *Id.* at 369; *see also* Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 29 (2003) ("The traditional judicial role was characterized by two guiding principles: Judges relied on the parties to frame disputes and on legal standards to help resolve them."); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 988 (1987) ("As Lon Fuller and others have taught us, it is resolving disputes through reasoned and principled deliberation, based on rules, that is at the heart of adjudication.").

authoritative decisions are rendered by a neutral third party who enters the controversy without previous knowledge of the dispute."[76]

Customary adjudication is to formal adjudication what custom is to law and what social sanctions are to formal sanctions. That is to say, it is the nonstate equivalent of the third branch of government. And like courts, customary adjudication can be understood in terms of its functions as well as its form. Those functions vary widely, but some are relatively common. The following representative functions do not constitute a comprehensive list, nor are they strictly necessary to all forms of adjudication.[77]

First is factfinding. In formal systems, one essential role of courts is the determination of disputed facts—whether a criminal defendant possessed drugs, whether a defective product caused injury, and so on.[78] Customary adjudication must have a similar function to establish a link between action, norm, and sanction. Professor Jeffrey Rachlinski explains that fact clarification is often performed with the help, intentional or not, of others.[79] Because customary adjudicators are generally members of the community in which the dispute arises, they are often particularly well suited to this factfinding role. Judges on the Tuna Court, for example, "are not members of the national judiciary, nor do they have any legal training."[80] Rather, "they are registered tuna auctioneers who work for the Tsukiji tuna brokers (*oroshi*) in the specialized tuna and swordfish division."[81] Similarly, tribunals in the cotton industry are composed of arbitrators selected

76. ALAN SCOTT RAU, EDWARD F. SHERMAN & SCOTT R. PEPPET, PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 21 (4th ed. 2006); *see also* William L.F. Felstiner, *Influences of Social Organization on Dispute Processing*, 9 LAW & SOC'Y 63, 69 (1974) ("Conventionally we label as adjudication that process in which the third party is acknowledged to have the power to stipulate an outcome of the dispute . . . .").

77. *Cf.* Cover, *supra* note 13, at 911 ("A court not only resolves disputes, but also allocates resources, confers legitimacy, administers other institutions, promulgates norms, allocates costs, and records statistics, to mention but a few of its more commonly recognized functions." (citations omitted)).

78. *See* Joshua Kleinfeld, *Skeptical Internationalism: A Study of Whether International Law Is Law*, 78 FORDHAM L. REV. 2451, 2465 (2010) ("[I]t seems to be socially necessary to make certain claims of fact binding as a matter of law . . . . This establishing is what it means for a court to 'find' facts, and it is among courts' most characteristic and essential functions.").

79. Jeffrey J. Rachlinski, *The Limits of Social Norms*, 74 CHI.-KENT L. REV. 1537, 1554 (2000) (discussing how group settings affect individuals' interpretations of factual situations).

80. Feldman, *supra* note 37, at 339.

81. *Id.*; *see also id.* at 339 n.69 ("Although the ordinance allows buyers to serve as judges, it seems that the time commitment makes this unattractive, and no buyers are currently involved in adjudicating cases.").

by industry associations.[82] This relevant expertise presumably improves their ability to understand and find relevant facts.

Second is identifying the relevant custom. Customary adjudicators must be able to identify the content of norms and determine which of many possible norms governs a given situation. As Professor Rachlinski points out, "social norms are always in tension with each other, which makes predictions as to which norm will dictate social behavior invariably unstable."[83] For example, it may be customary for the head of a household to sit at the head of a table but also customary for an honored guest to do so. At any dinner with such a guest in attendance, a determination must be made as to which norm will govern. Customary adjudication must therefore include a determination of the proper governing norm.[84]

Third is applying the norm to the facts—that is, making conclusions of custom. Though norms are often extremely clear-cut, leading to a relatively simple application, it is not hard to imagine situations in which a resolution could go either way. Say, for example, that a comedian tells a joke that another comedian already told in public. He does so inadvertently, however, not realizing that he was effectively retelling another person's joke. Is that a violation of the industry norms against joke stealing? (The answer, it seems, may be yes; joke retelling is apparently a strict-liability offense.[85])

Fourth is determining an appropriate sanction.[86] Just as formal courts hand down judgments saying more than just "Party A is right," sometimes customary adjudicators not only declare who prevails, but also what remedy is appropriate. It is at this stage that formal and customary adjudication begin to diverge most sharply, in part because the menu of sanctions available in customary governance is, as explained in Part I.C, different than in a formal system. Additionally,

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82. Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1728 (2001).

83. Rachlinski, *supra* note 79, at 1541.

84. This determination is particularly complicated in cases in which custom conflicts with formal law.

85. Oliar & Sprigman, *supra* note 9, at 1816 ("Here is how the well-known comedian Robin Williams, who has faced long-standing allegations of joke stealing, describes the experience: 'Yeah, I hung out in clubs eight hours a night, improvising with people, playing with them, doing routines. And I heard some lines once in a while and I used some lines on talk shows accidentally. That's what got me that reputation and that's why I'm f***ing fed up with it.'" (quoting Playboy Interview: Robin Williams, PLAYBOY, Jan. 1 1992, at 57, 62)).

86. This is not necessarily the same as *imposing* a sanction. *See supra* note 32 and accompanying text.

customary adjudication may place a higher premium on reconciling the parties[87] and performing mediation[88] than on identifying breaches or determining damages.

More importantly, adjudication and enforcement are closely related—perhaps inseparable—in the context of custom. The judicial and executive functions blend in customary governance because public adjudication spreads information, and the spreading of information can amount to enforcement through reputational sanctions.[89] The announcement of an adverse judgment is itself a sanction, precisely because of its impact on reputation. This was the case, for example, with the medieval law merchant. Enforcement of official judgments was extremely difficult,[90] but the law merchant could keep account of those merchants who defaulted. The dissemination of this information created strong compliance incentives because merchants needed to protect their reputations as business partners. In their landmark study of the law merchant, Professors Paul Milgrom, Douglass North, and Barry Weingast conclude that "the role of the judges in the system, far from being substitutes for the reputation mechanism, is to make the reputation system more effective as a means of promoting honest trade."[91]

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87. *See, e.g.*, LUCY MAIR, AN INTRODUCTION TO SOCIAL ANTHROPOLOGY 149 (2d ed. 1972) ("[T]he decisions of the courts [of some African societies] were concerned as much with reconciling the parties as with awarding damages or punishing offenses.").

88. *See, e.g.*, P.H. GULLIVER, SOCIAL CONTROL IN AN AFRICAN SOCIETY 299 (1963) ("The solution of a dispute between Arusha does not come from authoritative decision, but through agreement resulting from discussion and negotiation between the parties which are in conflict."); ROBERTS, *supra* note 4, at 26 ("In stateless societies, . . . third parties are typically limited to acting as go-betweens, transmitting messages from one disputant to another, or as mediators, actively coaxing the parties towards a settlement, but still without the power to resolve the matter by decision."); Audrey Butt, *The Shaman's Legal Role*, 16 REVISTA DO MUSEU PAULISTA 151, 158 (1965) (describing the function of séances conducted by shamans in the Guiana Highlands as "provid[ing] an occasion for bringing disputes and malpractices into the open: if a culprit does not openly argue his case or make his excuses, the séance at least informs him that his various activities are under public scrutiny and he is given the chance of setting wrongs to rights").

89. *Cf.* Milgrom et al., *supra* note 59, at 10 ("The institution that we model as the resolution of these problems is based on the presence of a specialized actor—a 'judge' or 'law merchant' (LM) who serves both as a repository of information and as an adjudicator of disputes."). Of course, a judgment of guilt in a formal adjudicatory proceeding will often lead to reputational sanctions as well.

90. *See id.* at 2 ("While hearings were held to resolve disputes under the code, the judges had only limited powers to enforce judgments against merchants from distant places.").

91. *Id.* at 3. This conclusion has been analyzed and criticized from many angles. *See, e.g.*, Emily Kadens, *The Myth of the Customary Law Merchant*, 90 TEX. L. REV. 1153, 1156–58 (2012) (arguing that medieval law merchants did not create universal customs but instead relied

Professors Ellickson and McAdams similarly conclude that gossip networks can enforce norms when knowledge of a violation moves freely.[92]

Fifth is educating the members of the community. The educative function of adjudication is important not only because it spreads knowledge about who has violated rules but also, as Professor Bernstein points out, because it educates "members of the trade about the content of the rules and the contours of proper business practices."[93] Customary authorities can therefore help clarify, reaffirm, or elucidate customary rules, in much the same way that courts "explicate and give force to the values embodied in authoritative texts such as the Constitution."[94] Indeed, the social sanctioning of a norm violator reaffirms not only the content of the norm but also the obligation of the community to uphold and enforce it. As Professor McAdams explains, "[t]he primary consensus that behavior *X* merits disapproval is therefore likely to lead to a secondary consensus that those who expressly approve, or fail to disapprove, of the perpetrators of *X* merit disapproval."[95]

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on local laws in resolving disputes); Stephen E. Sachs, *From St. Ives to Cyberspace: The Modern Distortion of the Medieval 'Law Merchant,'* 21 AM. U. INT'L L. REV. 685, 699 (2006) ("[C]oercive power—to enforce decisions, to collect damages, and to assess fines—was exercised routinely [in thirteenth-century St. Ives].").

92. ELLICKSON, *supra* note 2, at 180–81; *see also* Richard H. McAdams, *Group Norms, Gossip, and Blackmail*, 144 U. PA. L. REV. 2237, 2251 (1996) (proposing a two-stage model for development of norms, in which "[i]n the first stage, some group members internalize the norm and are willing to bear costs to enforce it," and "[i]n the second stage, their *public norm enforcement* causes other members to internalize the norm").

93. Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710, 773–74 (1999) [hereinafter Bernstein, *Questionable Empirical Basis*]. *See* Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 124 (1992) [hereinafter Bernstein, *Opting Out*] ("An important feature of the arbitration system [for diamond merchants] is the secrecy of the proceedings."); *id*. at 127 ("The absence of explicit findings of fact and written opinions is a precaution to prevent people from complaining, rightly or wrongly, that the arbitrators were biased, unfair, or relied on evidence that lacked probative value."); McAdams, *supra* note 92, at 2251 ("Even for adults, public enforcement may be crucial for inculcating new members with group values.").

94. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984); *cf.* Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 963 (2008) (suggesting that judicial statesmanship "charges judges with approaching cases so as to facilitate the capacity of the legal system to legitimate itself by accomplishing two paradoxically related preconditions and purposes of law: expressing social values as social circumstances change and sustaining social solidarity amidst reasonable, irreconcilable disagreement").

95. McAdams, *supra* note 1, at 372.

Together, these pressures can contribute to the internalization of norms, which is crucial to the success of the system as a whole.[96] They are also a very important mechanism for the development and revision of custom, for as Professor Cooter points out, "[u]nlike law, custom lacks secondary rules. Custom does not prescribe procedures for making, revising, or repealing itself."[97] As a result, customary adjudication might well play an even more important role in the development of custom than court decisions do in the development of the common law.

Because these functions seem straightforward and intuitive, it might be surprising that custom-and-law scholarship has not addressed them in much detail. Some may protest that the literature *does* do so. Of course, proving a negative is always a difficult proposition, and it is not my goal here to demonstrate that no scholar has previously addressed the issue. But as the following discussion attempts to show, the traditional treatment of dispute resolution in custom largely fails to address the adjudicatory functions laid out above. Some scholars have effectively ignored the existence of disputes about which, if any, norm governs a given conflict. Others have focused predominately or exclusively on adjudication in formal courts. Yet others have given attention to semiformal organizational courts such as arbitration panels. None of these approaches offers a full account of customary adjudication.

First, much custom-and-law scholarship downplays the point at which disputes arise, jumping straight from the creation of a norm to its enforcement. Professor Ellickson's canonical *Order Without Law*,[98] for example, purports to address "how residents of rural Shasta County, California, resolve a variety of disputes."[99] But the actual resolution of these disputes in an adjudicatory sense—the determination of what social norm governs and how it applies, for example—is mostly sidelined. As Professor Lewis Kornhauser pointed out in his review of the book:

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96. *See* Cooter, *supra* note 4, at 1665 ("[A] social norm is ineffective in a community and does not exist unless people internalize it.").

97. *Id.* at 1654. From this, Professor Cooter concludes that "[c]ustom has no constitution or judges. A person who wants to change custom must use whatever means are at hand to convince others to follow different norms." *Id.* I obviously disagree with the first of these statements, at least to the degree that it would minimize the importance of the adjudicatory *function* described here.

98. ELLICKSON, *supra* note 2.

99. *Id.* at 1.

> Ellickson uses the term "dispute." However, I have placed "dispute" in quotes because these transactions display little disagreement either over the facts or over the relevant norms governing these facts. When X delivers a gross of widgets to Y with payment expected in 30 days, we do not think that Y's prompt payment constitutes a dispute. Nor do we necessarily view X and Y as disputing if, after Y returns the delivery as non-conforming to the contract specifications, X delivers a conforming gross.[100]

Other scholarship in the Ellicksonian tradition similarly addresses situations in which customary rules are clear,[101] and disputes over the existence of a violation correspondingly rare. Whalers adhered to a rigid fast-fish rule that clearly indicated possession of an animal.[102] Comedians give precedence to the first to perform a joke.[103] In roller derby, a Master Roster of pseudonyms decides which skater gets to use a contested name based on who registered it first.[104] And for jam bands, the question is simply whether or not the band has green-lighted the duplication of a particular work.[105] In each of these cases, and most of the other scholarly examples, the potential for a real dispute is limited, because the rules are exceedingly clear.

Second, to the degree that scholars have addressed the adjudication of customary disputes, they have tended to assume that such adjudication does or should take place in formal, state-sanctioned courts. Indeed, perhaps the central concern of most custom-and-law scholarship has been to identify situations in which such courts should resolve disputes using customary rules. Even those case studies that seem to explore informal courts actually tend to address state-backed courts. Professor Feldman's study of the Tsukiji

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100. Lewis A. Kornhauser, *Are There Cracks in the Foundations of Spontaneous Order?*, 67 N.Y.U. L. REV. 647, 649 n.9 (1992) (reviewing ELLICKSON, *supra* note 2).

101. As discussed, there may be good reasons why custom is generally clear. *See supra* text accompanying notes 18–19.

102. *See* ELLICKSON, *supra* note 2, at 197–98 ("Prior to 1800, the British whalers operating in the Greenland fishery established the norm that a claimant owned a whale, dead or alive, so long as the whale was fast—that is, physically connected by line or other device to the claimant's boat or ship."); *see also* Ellickson, *supra* note 67, at 89–90 (same).

103. *See* Oliar & Sprigman, *supra* note 9, at 1826 (explaining that the first comedian to perform a joke becomes the exclusive owner of that joke).

104. *See* Fagundes, *supra* note 69, at 1121 ("If a proposed name is identical to an existing registered one, another skater cannot use that proposed name.").

105. *See* Schultz, *supra* note 70, at 681 (explaining that many bands do not allow their songs to be copied without permission).

Tuna Court fits this model.[106] Professor Cooter's study of the land courts of Papua New Guinea does, too. As Cooter notes, "[t]he very existence of [Papua New Guinea's] land courts represents a departure from customary dispute resolution," which was traditionally done by appealing to village elders and bigmen.[107] Even as custom-and-law scholarship has become less "legal-centric,"[108] it has remained largely court-centric.

Another variation in the literature addresses what might be called "organizational" adjudication. Professor Bernstein's work is exemplary in this regard. Her studies have shed light on extralegal dispute resolution within groups such as diamond dealers,[109] grain traders,[110] and cotton merchants.[111] In Professor Bernstein's work, disputes are real, meaty, and complex.[112] Professor Barak Richman, too, has described the Jewish diamond dealers' arbitration system[113] and studied how "Jewish community institutions serve as unusually effective enforcement mechanisms and thus create a comparative advantage for Jewish merchants."[114] These institutions include intricate arbitration systems.[115] Inasmuch as these tribunals exist apart from the state itself,[116] Professor Bernstein is "challeng[ing] the idea

106. *See* Feldman, *supra* note 37, at 354 (noting that many of the rules governing the Tsukiji Tuna Court are state laws).

107. Cooter, *supra* note 10, at 783.

108. *Cf.* Richman, *supra* note 8, at 2330 n.4 (discussing criticisms of legal centrism).

109. *See* Bernstein, *Opting Out, supra* note 93 ("[S]ophisticated traders who dominate the [diamond] industry have developed an elaborate, internal set of rules, complete with distinctive institutions and sanctions, to handle disputes among industry members. This article explores the reasons that this system of private governance has developed and endured within the diamond trade.").

110. *See* Bernstein, *supra* note 50 ("[This Article] presents a case study of the private legal system created by the National Grain and Feed Association ('NGFA') to resolve contract disputes among its members.").

111. *See* Bernstein, *supra* note 82 (describing cotton-merchant associations' dispute-resolution systems).

112. One example of this complexity is determining the quality of cotton. *See, e.g.*, *id.* at 1773–74 ("Even in the absence of opportunism, two cotton transactors, each acting in good faith, might well disagree about how to grade a particular shipment, and each might therefore conclude that the other has defected.").

113. Richman, *supra* note 15, at 395–98.

114. *Id.* at 389.

115. *See* Bernstein, *supra* note 50, at 1771–74 (describing the grain traders' arbitration system); Bernstein, *supra* note 82, at 1727–31 (describing the cotton merchants' arbitration system); Bernstein, *Opting Out*, *supra* note 93, at 124–25 (describing the diamond dealers' arbitration system).

116. As Professor Richman notes, the Memphis Cotton Exchange and the New York DDC "generally invite state courts to enforce their rulings," but "very few private disputes spill into

that *courts* should seek to discover and apply immanent business norms in deciding cases"[117]—thus avoiding the court-centric focus that characterizes much of the custom-and-law literature. Professor Richman, meanwhile, is primarily interested in the *enforcement* of contracts,[118] not the adjudicatory functions discussed in this Essay.

And yet the kinds of organizational adjudication Professors Bernstein and Richman have explored do not capture the full range of customary adjudication. Most are centralized dispute-resolution tribunals, and the procedural rules they follow are not traditional social norms but formal codes crafted by the organization.[119] They represent what Professor Richman calls "organized" rather than "spontaneous" private ordering.[120] And as he points out, "[n]ot all systems of private law have private judges or arbitrators."[121] Thus although industry arbitration boards are "informal" in the sense of being nonstate, they are as different from customary adjudication as organizational rules are from custom.[122]

Other scholars mention customary dispute resolution but do not address it in much depth. Medieval Iceland, for example, has been the focus of a relatively rich literature on informal governance,

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state courts and are instead enforced exclusively through the threat of private, extralegal sanctions." Richman, *supra* note 8, at 2339 n.32.

117. Bernstein, *supra* note 50, at 1768 (emphasis added).

118. *See, e.g.*, Richman, *supra* note 15, at 389, 392 (discussing the challenges of enforcing diamond-executor contracts).

119. *See* Bernstein, *supra* note 50, at 1777–78 ("The NGFA tribunal does not permit unwritten customs and usages of trade to vary or qualify the meaning of either trade rules or explicit contractual provisions. Arbitrators use custom to decide cases only when both the trade rules and the contract are silent. Yet even when looking to custom to fill a true contractual gap, the arbitrators often signal their distaste for this type of adjudication . . . ."); Bernstein, *supra* note 82, at 1731–32 ("The [Board of Appeals] decides contract disputes by applying the [Southern Mill Rules], a comprehensive set of bright-line contract default rules that cover contract formation, performance, quality, delay, payment, repudiation, excuse, and damages, and include numerous industry-specific definitions of terms . . . ."). The diamond dealers may use some custom to decide disputes, but they also rely on trade rules set out in bylaws. Bernstein, *Opting Out*, *supra* note 93, at 126.

120. Richman, *supra* note 8, at 2339 n.33.

121. *Id.*; *see also* McAdams, *supra* note 1, at 351 ("[S]ome theorists prefer to use the term *norms* to refer only to decentralized rules and regard *organizational rules* as a set of obligations falling between centralized law and decentralized norms.").

122. *See* ELLICKSON, *supra* note 2, at 127 (distinguishing between norms and organizational rules); David Charny, *Illusions of a Spontaneous Order: "Norms" in Contractual Relationships*, 144 U. PA. L. REV. 1841, 1842 (1996) (distinguishing between centralized and decentralized norms).

including—albeit usually in passing—adjudication.[123] Icelandic society was governed through a combination of local assemblies, called "Things," and annual national assemblies, called "Allthings." Both Things and Allthings functioned as courts, with the latter effectively having diversity jurisdiction over cases from different localities and appellate jurisdiction over decisions rendered by Things. Judges in these tribunals were selected by chieftains, and "functioned more like our juries."[124]

Closer to home, Professor Andrea McDowell provides a compelling account of customary adjudication involving gold miners in the early days of the California gold rush. The miners used a number of more-or-less informal dispute-resolution systems.[125] This is excellent evidence of customary adjudication in action. But Professor McDowell is primarily interested in how the camps maintained order on the basis of rules that differed greatly from camp to camp,[126] not how disputes over those rules were resolved. She applies game theory to show that rules do not need normative value to be effective, but need only sort the rights of disputants before things get nasty.[127] So although she provides examples of dispute resolution without courts, customary adjudication is not her focus.

Finally, it is worth noting that scholars operating within the framework of legal anthropology—some of them on law faculties, many of them not—have devoted some attention to the forms and functions of informal adjudication. Professor William Felstiner, for

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123. *See, e.g.*, Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252, 284–90 (2011) (describing medieval Iceland's court system (citing WILLIAM IAN MILLER, BLOODTAKING AND PEACEMAKING: FEUD, LAW, AND SOCIETY IN SAGA ICELAND (1990); and JESSE L. BYOCK, MEDIEVAL ICELAND: SOCIETY, SAGAS, AND POWER (1988))).

124. *Id.* at 285.

125. *See* Andrea McDowell, *Real Property, Spontaneous Order, and Norms in the Gold Mines*, 29 LAW & SOC. INQUIRY 771, 779 (2004) ("Many mining codes established a procedure for settling disputes over claims either by arbitration, by an elected official, or by a jury. In some camps, conflicts were settled by a miners' meeting—that is, by an assembly of all the miners in the camp—or at least as many as were willing to come." (citation omitted)) .

126. *See id.* at 774 ("I argue that the rules were virtually self-enforcing even though they varied in detail from camp to camp and sometimes from one day to the next.").

127. *See id.* at 801 ("In short, the theory of spontaneous order fits the evidence from the mines very well."). To be sure, Professor McDowell argues that the miners were governed by law rather than norms. *See id.* at 807 ("It is part of my argument that mining codes, or rules and regulations, represented law rather than norms or custom."); *id.* at 772 ("I argue that the mining codes were rules, not norms, . . . and that informal controls played little or no role in maintaining order.").

example, forty years ago noted that "[i]nstitutionalized responses to interpersonal conflict . . . stretch from song duels and witchcraft to moots and mediation to self-conscious therapy and hierarchical, professionalized courts."[128] Professor Richard Abel, writing around the same time as Professor Felstiner, offered a "macrosocial theory to explain, in terms of social structural variables," the types of "dispute institutions" in society.[129] Others, operating in a more directly anthropological vein, have studied the inner workings of dispute-resolution systems in various communities.[130]

Some law-and-economics scholars have picked up on these contributions, and indeed they seem to have informed the sociological-anthropological style of the Ellicksonian approach. One early and particularly notable foray in this regard was made by Professor William Landes and Professor, now Judge, Richard Posner, whose *Adjudication as a Private Good* "examined the question whether adjudication can be viewed as a private good, i.e., one whose optimal level will be generated in a free market."[131] Their answer was something of a qualified yes,[132] and the authors even included a brief explanation of adjudication in primitive societies.[133] But their work has also been criticized for employing a reductive economic approach and an oversimplified division between the public and private.[134]

Perhaps the more relevant concern for present purposes is simply that such scholarship did not proliferate. Professor Felstiner bemoaned the fact that "[a]lthough there is an occasional note to the effect that 'private informal dispute settlement . . . is significant in complex societies', the references to non-government institutionalized adjudication or mediation within the United States are very sparse except within organizations, within organized

128. Felstiner, *supra* note 76, at 63.

129. Richard L. Abel, *A Comparative Theory of Dispute Institutions in Society*, 8 LAW & SOC'Y 217, 221 (1973).

130. *E.g.*, Jesse Berman, *The Cuban Popular Tribunals*, 69 COLUM. L. REV. 1317 (1969); Laura Nader & Duane Metzger, *Conflict Resolution in Two Mexican Communities*, 65 AM. ANTHROPOLOGIST 584 (1963); David N. Smith, *Native Courts of North Nigeria: Techniques for Institutional Development*, 48 B.U. L. REV. 49 (1968).

131. William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 284 (1979).

132. *Id.*

133. *Id.* at 242–45.

134. *See, e.g.*, Paul D. Carrington, *Adjudication as a Private Good: A Comment*, 8 J. LEGAL STUD. 303, 305–08 (1979) ("[A]n economic model which supposes private and public adjudication as competing in a marketplace is a seriously flawed model.").

commercial activities and within some minority groups."[135] And the comparative attention given to the judicial function in that literature—most of it now decades-old—does not seem to have carried over to the current scholarship on custom and law.

CONCLUSION

This Essay has described customary adjudication and argued that custom-and-law scholarship has generally undervalued it. Even if that premise is correct, however, many important questions remain. Much more must be said about when customary adjudication is likely to displace formal adjudication and what factors—frequency of disputes, the stakes at issue, the breadth of agreement on customary rules—are relevant. That descriptive account would in turn enable a more thoughtful analysis of when customary adjudication is likely to be efficient or otherwise normatively desirable. It would also help shed light on the *who* of customary adjudication: the people or institutions actually tasked with resolving disputes. Those research questions almost certainly require study of a particular system of customary adjudication—the kind of in-depth, detailed study that has proven so useful in the Ellicksonian-style custom-and-law literature.[136]

These are important questions, and their answers are not obvious. If customary adjudication does not exist, why not? If custom creates clear rules to minimize the need for adjudication, that may help explain both the content and desirability of custom itself. If customary adjudication is fragile and tends to give way to formal adjudication, under what conditions does that happen? In sum, making sense of customary governance requires us to identify and explain its third branch. This Essay builds on prior scholarship in an effort to start doing that.

135. Felstiner, *supra* note 76, at 85 (citation omitted) (quoting Grossman & Sarat).

136. *See, e.g.*, *supra* notes 67–72 and sources cited therein.