Justice, Primitive and Modern: Dispute Resolution in Anarchist and State Societies

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One of the main difficulties of anarchists today is to explain how stateless societies will deal with wrongdoers: what will be the dispute resolution procedure of anarchist societies, and who will catch and judge criminals in the absence of the state? It is not controversial to assume that individuals in any kind of society will have sundry forms of problems, which will require a complex dispute resolution procedure. In this respect, it is reasonable, at least, to ask for a rough description of this procedure in a stateless society. Since anarchism is against hierarchy, authority, and coercion, in an anarchist society, disputes among individuals or groups of people should be solved in accordance with these egalitarian values. Traditionally, most classic anarchist thinkers agree that wrongdoers should not be punished and they should be treated humanely. Nevertheless, none of them describe the dispute resolution procedure of their free anarchist societies. This avoidance of blueprints by anarchist philosophers is considered the weakest part of anarchist theory. Because the exact procedure of dispute resolution is not clear, anarchism is criticized on the grounds that it will lead to chaos instead of stability.

Bob Black, a professional lawyer and an anarchist philosopher, suggests that we should look at the practices of primitive stateless societies in order to understand how an anarchist society would possibly deal with its wrongdoers. Any form of society usually uses four methods of dispute resolution procedure – negotiation, mediation, arbitration, and adjudication. While the first two methods are based on the principle of voluntarism, the latter two methods are

implemented in a non-voluntary fashion by an authoritative state body. From the aforementioned principles of anarchism, it seems that an anarchist society would only use the voluntary methods to solve any problems among individuals or groups. But how? How can we implement voluntary methods such as negotiation and meditation, used by primitive stateless societies, in complex modern societies? Is it possible to apply the same techniques with high efficiency? What kind of social structure would be more suitable for voluntary methods of dispute resolution procedures? And to what extent do the structures of our complex modern societies deviate from the structures of primitive stateless societies? Black discusses these problems in this article.

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Introduction

In all societies, there's some trouble between people. Most societies have processes for resolving disputes. These include negotiation, mediation, arbitration and adjudication.[1] In their pure forms, negotiation and mediation are voluntary. Arbitration and adjudication are involuntary.[2] The ethnographic evidence shows "pretty strongly . . . that adjudicatory decision-making as opposed to mediatory activity is almost exclusively linked to the presence of central government."[3] The voluntary processes are typical of anarchist societies, since anarchist societies are voluntary societies. The involuntary processes are typical of state societies. In all societies there are also self-help remedies.[4] These are often effective as social control, but they only provide justice when might and right happen to coincide. In primitive societies, peace, not justice, is the highest priority.

The voluntary processes deal with a dispute as a problem to be solved. They try to reach an agreement between the parties which restores social harmony, or at least keeps the peace.

The involuntary processes implicate law and order, crime and punishment, torts, breaches of contracts, and in general, rights and wrongs. The difference interests me, among other reasons, because I'm an anarchist who lives in a statist society. I'm also a former lawyer. It is hard not to agree with E.B. Tylor, who wrote that "one of the most essential things we can learn from the life of rude tribes is how society can function without the policemen to keep order."[5]

I argue that voluntary processes are more effective in primitive societies, where there may be no peaceable alternatives, than in state societies. But in any society, the justice of private settlement might be more effective than the justice of the courts, since the only certain way of ending a dispute is to convince both parties that an end has been reached.[6] The question is which outcome is more convincing. There will always be some grievants who remain unconvinced, and some conflicts which later resume, under any system.

Adjudication always, according to Martin Shapiro, raises an issue of the legitimacy of authority, because the loser may perceive that he has merely been ganged up on by an enemy allied to a power wielder.[7] It doesn't occur to this political scientist that state authority as such raises a question of legitimacy. Political philosophers often justify it, sometimes half-guiltily, by positing a "social contract." Setting aside the absurdities of all versions of this theory, which even many philosophers acknowledge, for my purposes I only want to draw attention to the underlying assumption: that consent confers authority. In a state society, "tacit consent" supposedly legitimates the state – any state: democratic, fascist, state communist, theocratic, whatever.[8] Of course this tacit "consent" bears no resemblance to what consent means in everyday life, where it refers to actual, conscious, individual, informed agreement to or about specific actions. Try to imagine a claim of tacit consent to get married. And

marriage, unlike government, really is a contract! Anarchists like Lysander Spooner and libertarians like Herbert Spencer have debunked tacit consent.[9] So did David Hume, who was no anarchist or libertarian.[10]

"Tacit consent" is wholesale consent, imputed consent: consent to the state and to whatever it does, including adjudication, which can be one of the less bad things the state does. This tacit consent to anything, of which the loser is completely unaware (because it's only "tacit"), is not something which will mollify the loser of a civil case, much less the loser of a criminal case, who is convicted of a crime. In contrast, in anarchist societies, consent is retail, not wholesale. Everything is voluntary, although voluntary actions are often subject to the informal influence of others. This will be apparent in the case studies which follow. In these societies, one or both parties may in principle reject mediation (this rarely happens), and either party may reject a mediated settlement, but this only occasionally happens. This is consent on specific occasions to specific procedures and settlements. This is real consent. It is reasonable to believe that, in general, these voluntary mediated settlements, where that is the procedure, more often finally settle disputes than adjudication does, where that is the procedure.

Most modern anarchists, like most other moderns, are ignorant of how disputes are resolved in stateless primitive societies. And they rarely talk about how disputes would be resolved in their own modern anarchist society. This is a major reason why anarchists aren't taken seriously. I have a lesson for the anarchists. But I also have a lesson for modern legal reformers. Using examples, I'll discuss disputing in several primitive stateless societies. Then I'll discuss an attempt to reform the American legal system which was supposedly inspired by the disputing process used in one African tribal society. The idea was to insert mediation into the bottom layer of the U.S. legal system at the discretion of judges and prosecutors.

It was a failure. I will come to the conclusion that you can't graft an essentially voluntary procedure onto an essentially coercive legal system.

If I'm right, the case for anarchy is strengthened at its weakest point: how to maintain a generally safe and peaceful society without a state. Many anthropologists have remarked upon this achievement.[11] Few anarchists have. The controversy over anarchist "primitivism" has been almost entirely pointless, because it goes off on such issues as technology, population, and the pros and cons of various cultural consequences of civilization (religion, writing, money, the state, the class system, high culture, etc.). The possibility that certain structural features of primitive anarchy might be viable in – indeed, may be constitutive of – *any* anarchist society, primitive or modern, has received no attention from any anarchist. Primitivists urge anarchists to learn from the primitives[12] – but learn *what*? How to build a sweat lodge?

Forms of Dispute Resolution

When a conflict arises between individuals – whether or not it later draws in others – initially, and usually, it may be resolved privately by discussion. Negotiation, a bilateral procedure, is undoubtedly a universal practice[13]: "It is the primary mode of handling major conflicts in many simple societies throughout the world."[14] In the terminology I adopt here,[15] where a conflict is resolved by negotiation, there has been a conflict but not a dispute. There is first a *grievance*: someone feels wronged. If she expresses her grievance to the wrongdoer, she makes a *claim*. If she gets no satisfaction, she has several alternatives. She may take unilateral action, actively or passively. The active way, "self-help," is to coerce or punish the wrongdoer, but, sadly, that is often not feasible.[16] Nonetheless, where real alternatives scarcely exist, as in the inner city, some people resort to violent

unilateral retaliation.[17] The passive way is "lumping it": caving: doing nothing.[18] This is how many grievances, instead of rising to the level of disputes, fall into oblivion. "You can't fight city hall" or various other too-powerful oppressors. Lumping it – avoidance – may also be universal, but it's especially common in the simplest and in the most complex societies: among hunter-gatherers and also in statist class societies with vast power disparities.[19]

As useful as negotiation can be, it doesn't always work. It doesn't always produce agreement. Dyads may deadlock. Whereas in a triad, the decision might be made by majority rule, or through mediation.[20] Or feelings may run so high that the parties refuse to talk to each other, or if they do, the encounter may turn violent.[21] And negotiation isn't always fair, because disputants are never exactly equal. If one party has a more forceful personality, or a higher social status, or more wealth, or more connections, if there is a settlement of the dispute, it is likely to favor him unduly. Among the rationales for involving a third party – whether a mediator, an arbitrator, or a judge – is to equalize the process by bringing in a participant who is impartial and independent. However, impartiality is the ideal but not always the reality of mediation. [22] The third party may also serve as a face-saving device for acquiescence in a settlement which, if negotiated bilaterally, might appear to be (and might actually be) a surrender to the other side.

If the victim (as he sees himself) voices her grievance to third parties, now there is a *dispute* which implicates, if only in a minor way, the interests of society. A dispute is an "activated complaint."[23] The appeal, whether explicit or implicit, depending on the individual and the society, might mean calling the police, filing a lawsuit, or just complaining to people you know. It might mean going to court – the court

of law or the court of public opinion. Mediation (voluntary) and adjudication (compulsory) are distinguishable from negotiation and self-help inasmuch as they necessarily involve a third party who has no personal interest in the outcome of the dispute.[24] Mediation could be considered assisted negotiation.[25]

Some primitive societies – especially the smallest-scale societies, the hunter-gatherers – have no customary dispute resolution processes. Contrary to some statements,[26] "triadic" dispute processes are not universal. In these societies, not only is there no authority, there is no procedure for resolving disputes or facilitating settlements: no mediator or arbitrator.[27] Thus, among the Bushmen, interpersonal quarrels usually arise suddenly and publicly, in camp. They range from arguments and mockery to fighting, which is usually restrained by others who are present, but which occasionally turns deadly. Anyone may use lethal force to settle a dispute.[28] If the dispute gives rise to ongoing enmity between individuals (and their associates), often one of the disputants moves away to join another band (this often happens anyway); or sometimes the local band separates into two.[29] This is typical for hunter-gatherer societies,[30] such as the Eskimos[31] and the Andaman Islanders.[32] These might be considered active forms of lumping it. In some other foraging societies, including some in Australia, avoidance or exile are possible outcomes of formal disputing processes. "Hunter-gatherer societies have friendly peacemakers, but owing to their largely egalitarian social organization, they tend not to rely significantly on mediators . . . "[33] Stanley Diamond refers to "a historically profound distinction between crime and certain types of violence. In primitive societies, crime tends to be personally structured, nondissociative and, thereby, self-limiting."[34]

Studies of the social primates (which is all of them) show that they, too, have dispute resolution practices. Fights are common, but, as among foragers, bystanders often break up the fight, which is usually soon followed by reconciliation. As among us humans, after couples quarrel, they often reconcile by having sex.[35] That is a bilateral dispute mechanism. There are other such bilateral mechanisms, where reconciliation is effected, when it is, by mutual behavior. Reconciliation procedures have been identified in at least 25 nonhuman primate societies.[36] What I find most interesting is that some primates have third-party dispute resolution procedures (chimpanzees, for instance, have mediation)[37] despite the fact that the animals lack language, although they don't lack other ways of communicating with each other.

In more complex class societies, avoidance (or, from organizations: "exit"[38]) is also common. Thus American suburbia has been called an "avoidance culture."[39] But in modern urban society, avoidance can be more difficult. Battered wives, for instance, are not always in a position to move out. And avoidance, even where practicable, may be just bowing to superior force. The absence of a formalized dispute resolution process is arguably why the Kalahari Bushmen, when studied in the 1960s, had an even higher homicide rate than the United States at that time.[40] One ethnographer describes a New Guinea society where, in his opinion, the absence of third-party dispute resolution processes is why a dispute over a pig could escalate into a war.[41] Nonetheless, some primitive societies which lack even these mechanisms are reasonably orderly and peaceful.[42]

In arbitration, the parties (or the plaintiff) empower a third party to hand down an authoritative decision, as a judge does.[43] It's not mediation: "Mediation and arbitration have conceptually nothing in common. The one involves helping

people to decide for themselves; the other involves helping people by deciding for them."[44]

But arbitration is not adjudication either, because of several differences. In adjudication, the decision-maker is an official, an officeholder who is not chosen by the parties. There, the third party (the judge) decides according to law – a law which is not of the parties' own making and which is not, for them, a matter of choice. In the United States, some business contracts and many labor/management collective bargaining agreements provide for arbitration. Arbitrators are usually drawn from a body of trained experts: the American Arbitration Association, which is a membership organization with codes of professional standards.[45] Often the arbitrator has some expertise in the industry.[46] The arbitrator interprets and enforces a law which the parties have previously made for themselves.

Because arbitration is coercive in its result, and better for those with more power than for those with less, from the 1980s, many businesses have incorporated mandatory arbitration clauses into consumer contracts so as to restrict consumer remedies and keep consumers out of the courts.[47] One Federal Circuit Court held that such contracts are unconscionable and therefore illegal.[48] The problem became so serious that many Congressional hearings were held.[49] Nothing resulted. In 2010, the U.S. Supreme Court upheld consumer arbitration clauses which preclude judicial review.[50] As a (predictable) result, "few plaintiffs pursue low-value claims and super repeat-players [big business] perform particularly well."[51]

Sooner or later, Alternative Dispute Resolution (ADL) is always co-opted: usually sooner. However, in primitive societies, arbitration is rare,[52] so I will not be discussing it any further. If anarchists ever bother to think about such

things, they might consider whether there's a place for arbitration in their blueprints for the future. The more complex, hierarchic and coercive their societies may be, the better suited they would be to compulsory arbitration: bringing the state back in, on the sly. I am thinking, in particular, of anarcho-syndicalism.

In adjudication, a dispute – a "case" – is initiated by a complainant in court. In criminal cases, the complainant is the state, not a private party, but for present purposes, the difference from civil cases doesn't matter. The court is a previously constituted, standing tribunal. Court proceedings are initiated voluntarily by a public official or a private party, but after that, although the litigants still make some choices, they are subject to pre-existing rules of procedure and the decisions of the judge. They are always subject to the pre-existing laws of the state.[53]

Characteristic features of adjudication as an ideal stress "the use of a third party with coercive power, the usually 'win or lose' nature of the decision, and the tendency of the decision to focus narrowly on the immediate matter in issue as distinguished from a concern with the underlying relationship between the parties."[54] In short: "Judges do not merely give opinions; they give orders."[55]

In adjudication (litigation) the case is decided by a judge who doesn't know the parties. He doesn't care about the background of the dispute. He is not interested in repairing the relationship between the parties, if they had or have one. He is not supposed to consider those matters. The judge should be impartial and disinterested, deciding the cases on the basis of the parties presenting "proofs and reasoned arguments."[56] His decision "must rest solely on the legal rules and evidence adduced at the hearing."[57] Rules of evidence, which are more numerous and complex in the United

States than in any other legal system, narrowly circumscribe the admission of evidence, especially at trial. Resolutions of cases arising from interpersonal disputes are "constrained in their scope of inquiry by rules of evidence . . . "[58] U.S. courts are designedly better, in the terminology of Donald L. Horowitz, at identifying the "historical facts" of the particular case (whodunit) than the "social facts" which might be illustrative of the general circumstances which regularly give rise to cases like the one at bar.[59]

That doesn't mean that courts are very good at that either. Poverty is never put on trial; poor people are put on trial. But the courts, despite the title of a book by a reform-minded judge,[60] are never on trial. It isn't difficult to show that the ideal of the rule of law, thus institutionalized, is a failure even on its own terms. Anarchists and others have shown that repeatedly.

My first topic is mediation as practiced in more or less primitive societies, and its implications for contemporary anarchism. I emphasize that mediation is voluntary. The parties choose to submit their dispute to a mediator, not for a ruling, but for help. They, or sometimes just the complainant, may select the mediator, or he might be "appointed by someone in authority, [but] both principals must agree to his intervention."[61] Mediation is not primarily concerned with enforcing rules, although, the parties may cite rules to support their positions. In mediation, unlike adjudication, there is no such thing as irrelevant or inadmissible evidence.[62] The purpose of mediation is not to identify who is to blame, although the parties will do lots of blaming. The purpose of mediation is rather to solve an interpersonal problem which, unresolved, will probably become a social problem.

These forms of dispute resolution I am describing are ideal

types. One legal philosopher, Lon L. Fuller, insists that they should be kept distinct because each has its own "morality." Often in reality they are not so pure (such as the Ifugao example which follows, which Fuller was accordingly unable to understand[63]). Even the distinction between voluntary and involuntary processes, which I consider so important, is often not a bright-line distinction. Power is insinuated into many relationships which are not officially or overtly coercive.[64] If consent can be a matter of degree, nonetheless, one may ask "what proportion of nonconsensuality is implied in such a power relation, and whether that degree of nonconsensuality is necessary or not, and then one may question every power relation to that extent."[65] This, however, seems to be universally true: "Adjudication and mediation are in principle opposites, and can be separated analytically. But they do not represent *historical* oppositions;" "There are societies in the world . . . without formal procedures for judgement, but there are none without legitimate procedures for mediation."[66]

One inevitable consequence of involving a third party is that a third party always has his own agenda.[67] That is not necessarily a bad thing. American arbitrators of business/business and labor/management disputes are chosen and paid by the disputants, and they might lose *their* business if they are perceived to be biased or – so to speak – arbitrary. Elsewhere, the third party facilitator might be a socially prominent tribal mediator who strives to build a reputation as a successful problem-solver (bringing in more mediation business – for which he, too, is paid[68]). Or he might be an American judge looking to be re-elected, or aspiring to higher office.

Undoubtedly "every process, every institution has its characteristic ways of operating; each is biased toward certain types of outcomes; each leaves its distinctive imprint

on the matters it touches."[69] Third-party dispute deciders or resolvers are usually of higher social status than the disputants.[70] That may be essential to their effectiveness: they have to be taken seriously. Obviously, mediation on these terms may not be something to be imported, as-is and unthinkingly, into a neo-anarchist society. But unless it can be imported thinkingly, into an egalitarian society which not only tolerates, but encourages excellence – and therefore a measure of inequality – mediation will never be as effective as it could be.

Case Studies

I'll begin with examples from the ethnographic literature.

A. The Plateau Tonga.[71]

I begin with a true story about a conflict which arose among the Plateau Tonga of what is now Zambia. Traditionally they were shifting cultivators and herdsmen. In 1948, they were a dispersed, partly dispossessed, and rather demoralized population of farmers and herders. Europeans had taken some of their best land. At a beer party, Mr. A, who was drunk, slugged Mr. B. These men belonged to different clans and lived in different villages. Unexpectedly, and unfortunately, after several days, Mr. B died.

This was a stateless society. But there were social groups whose interests were directly affected by this homicide. The Tonga are matrilineal. For most purposes, a person's most important affiliation is with a limited number of matrilineal relatives. This is the group which receives bridewealth when its women marry, and it's the group which inherits most of his property when a man dies. It's also the group that's primarily responsible for paying compensation for the person's offences, and for exacting vengeance.

The *father's* matrilineal group (which, by definition, is

different from the son's), is also an interested party. It is *also* liable for a member's offenses, but to a lesser extent, and it also inherits from him, although it gets a smaller share than the matrilineal kin-group. By killing Mr. B, Mr. A did an injury to Mr. B's group. For several reasons, Mr. B's group didn't take vengeance on Mr. A or, if they couldn't get at him, against one of his relatives. If it did, a blood feud would result, with back and forth killings until everybody got sick of it. Another reason for not taking vengeance is that the British-imposed court system would have arrested the avenger. Mr. A himself was in fact arrested, convicted of manslaughter, and sent to prison.[72] But that didn't square things between the kin groups. Mr. B's group had lost a member and it demanded compensation.

The kin groups were intermarried. They also lived among one other. The Tonga lived in very small villages of about 100 people. Most villagers were not members of the same core kin group. But their fellow villagers were their neighbors and some of their friends, and they were some of the people they worked with. The villagers, as neighbors, also had an interest in a peaceful resolution of the dispute.

Before Mr. B died, the A group had made apologetic and conciliatory overtures to the B group. But after he died, all communication ceased. The matter had become too serious. This caused a lot of trouble for many people, especially if they had ties to both groups. Ordinary social life was disrupted. Even husbands and wives might stop speaking to each other, because they were often related to different, and now hostile, kin groups. Something had to be done.

Mr. C, a prominent member of A's group, found a go-between who was related by marriage to both groups. All along, A's group admitted that Mr. A was obviously the wrongdoer. He had a reputation as a troublemaker. Nobody was sorry when he went to prison. A's group's concern was how much compensation it would have to pay. The case had to end with payment of compensation.

A feud was inconceivable, because so many people in each group were related to people in the other group, and the groups were intermarried. It was these cross-cutting ties that made everybody want a generally acceptable settlement. In modern societies, usually these ties don't exist.

The anthropologist, Elizabeth Colson, doesn't report the specifics of the settlement. Because they don't matter. She wrote an article about this because she'd published a general account of Plateau Tonga society, and some of her readers just couldn't understand how there could be anything but anarchy under a system of, well, anarchy.[73]

B. The Ifugao[74]

About 35 years earlier, the situation would have been dealt with in a somewhat different way by the Ifugao of northern Luzon. They were stateless, pagan wet-rice cultivators. And headhunters. They were anarchists too, but their society was more stratified than Tonga society. An American, Roy Barton, taught school there from 1906 to 1917. His predecessor had been speared. He learned the language and wrote a well-respected book on Ifugao law. I'll be speaking in the present tense, what anthropologists call "the ethnographic present." But the story is based on evidence of practices in the period before 1903, before American authority became effective in the highlands. Spanish authority had never been effective in the highlands.

Let's assume the same situation as among the Tonga: an unintentional killing by a drunken man. Drunken brawls among young men occurred among the Ifugao too. If the killing had been intentional, the kin group of the victim would have killed the wrongdoer.[75] If they couldn't get at the wrongdoer himself, they would kill one of his relatives. The result is a blood feud. A death for a death, until the groups get sick of it. But an unintentional killing by a drunk would usually be

resolved by mediation resulting in the payment of compensation by the one kin group to the other.

The aggrieved party, or in this case one of his relatives, initiates the process. The plaintiff would recruit a go-between, known as a *monkalun*. The only restriction is that the mediator not be closely related to either party. The mediator would be a relatively wealthy man, and usually a successful headhunter. He was preferably somebody with experience mediating disputes. He could also recruit more support from relatives and dependents than most people could do. If he arranges a settlement, he is paid a fee by the defendant, and his prestige is enhanced. And like everybody else, he wants the matter to be settled peacefully.

In theory, the defendant is free to reject mediation. In practice, the *monkalun* makes him an offer he can't refuse. If the defendant won't listen to him, "the *monkalun* waits until he ascends into his house, follows him, and, war-knife in hand, sits in front of him and compels him to listen." The defendant is well aware that the mediator has used knives – maybe this very knife – to cut off heads. He accepts mediation.[76]

Once that happens, the parties and their relatives are forbidden to talk to each other. Whatever they have to say to each other, has to go through the *monkalun*, even if it has nothing to do with the dispute. I think this is very ingenious. It keeps the parties from getting into angry arguments and making matters worse. It makes it possible for the mediator to manipulate everybody for their own good. The conflict imposes a social cost on the village, because it disrupts the ordinary social relations and the economic cooperation among members of the kin groups, as it did among the Plateau Tonga. So it's in the interest of a lot of the local people to have the case resolved.

Formal separation of the parties is not a typical feature of

mediation in primitive societies.[77] But in all societies where mediators operate, the mediator's shuttle diplomacy results in a de facto cooling-off period. In early medieval Ireland, there were dispute resolution practices which proceeded by stages, with, in between them, "a formal 'cooling-off period' to prevent a dispute from getting out of control, and to allow maximum opportunity for private agreement" before a defendant's intransigence led to "independent adjudication."[78] "Courtroom delay" in the United States is widely decried, but it may serve the same function.

Occasionally U.S. law provides for cooling-off periods during the processing of disputes. Under the Railway Labor Act, disputes between management and labor, when the parties remain at an impasse despite mediation, the National Mediation Board mediator orders a 30 day cooling off period during which the parties may continue to negotiate or agree to arbitration, but they cannot resort to self-help (such as strikes and lockouts). Thereafter, the cooling-off period may be extended indefinitely if a presidential emergency board is created to formulate recommendations. If these are refused, a final 30 day cooling-off period begins to run.[79]

One group of people who especially desire a settlement is people who are related to both parties. The closest kin really do have to side with their kinsman, although they don't have to like it. But those who aren't so closely related to one side will be severely criticized if they take sides in the dispute. They want a settlement on almost any terms.

The mediator is a go-between. But he's not just relaying messages. He actively shapes the settlement as it eventually emerges. Mediators almost always do that. I'll quote from Barton again, because this quotation often appears in books about the anthropology of law.

"To the end of peaceful settlement, he exhausts every art of

Ifugao diplomacy. He wheedles, coaxes, flatters, threatens, drives, scolds, insinuates. He beats down the demands of the plaintiff or prosecution, and bolsters up the proposals of the defendants until a point be reached at which the two parties may compromise." It's part of the game that the defendant initially refuses a settlement offer. These are proud people. Even a defendant who is obviously in the wrong is expected to be truculent for awhile.[80] He's saving face. These are my kind of people. In another society, "Even where a principal's claim is very strong and the balance of bargaining power lies with him, he commonly makes some effort to show tolerance and good will by giving way to his opponent in at least some small degree."[81]

However, if the mediator thinks that the defendant is being unreasonable for too long, he may formally withdraw from the case. For the next two weeks, the parties and their kin can't engage in hostilities. After the truce expires, retaliation, which may include revenge killings, commences. Nobody wants that. Usually the defendant backs down. But not always. It's possible to start over with a new mediator. But this won't go on endlessly. In another book, Ralph Barton mentions a case where the defendant deserted his wife and refused to pay compensation to her kinsmen. He rejected the settlements negotiated by *four* mediators. The plaintiff's kin then speared him. The defendant's family didn't do anything about it.[82]

This is not the only way the Ifugaos coped with conflicts, or failed to. A serious crime among family intimates (such as theft, or even homicide, between brothers) is likely to go unpunished. Disputes are between, not within groups. A group can't punish itself or claim compensation from itself. This is also the situation in some other primitive societies. But it is also true that in legally ordered state societies, law is least effective in regulating intimate relationships, those among people with the least "relational difference."[83]

The Ifugao mediation procedure which I've described is also increasingly inactive as the relational difference among the disputants increases beyond local, more or less face to face social networks so as to implicate people who are more distant socially and geographically. Ralph Barton described the Ifugaos – who were not an especially peaceable people – as occupying concentric "war zones" radiating outwards. As disputes crossed the borders of zones, they became more serious, and more likely to be resolved by violence. In the outermost zone, the word "dispute" hardly applies. There, anybody you don't know is an enemy, to be killed on sight. There is no doubt that primitive societies in general have often failed to establish mechanisms for the resolution of intergroup conflicts the more closely the situation approximate war.

But again, this is where states have also conspicuously failed, despite the United Nations, "international law," etc. They often lack the common ground, the middle ground on which to base resolutions of disputes. We are at our worst at solving our problems when we are either too close, or too far apart. "The relationship between law and relational distance is curvilinear": "Law is inactive among intimates, increasing as the distance between people increases but decreasing as this reaches a point at which people live in entirely separate worlds."[84] "This double conception of morality," wrote Kropotkin, in tranquil late Victorian England, "passes through the whole evolution of mankind, and maintains itself now." He added that if Europeans had in some measure "extended our *ideas* of solidarity – in theory at least – over the nation, and partly over other nations as well – we have lessened the *bonds* of solidarity within our own nations, and even within our own families."[85] In 1914, like many other thoughtful people, he was shocked to discover how tenuous international solidarity really was.

In my title I use the word "justice." I was thinking, not of

justice as a moral value, but of justice (as in the phrase "criminal justice") as a social institution. Ever since Plato's *Republic*, philosophers, in trying to explicate justice as a value, have often, instead of defining it, described just institutions. In modern political philosophy, probably the most influential theory of justice, and certainly the most famous – justice as fairness – is that of John Rawls. It is about, not fairness among individuals, but rather, a just political society.[86] For Rawls, justice means social justice.[87] Rawls had nothing to say about the just resolution of interpersonal disputes, although, that is the first and usually the only thing that most people think of, when they think of justice. Post-Rawls philosophers such as Jeremy Waldron think of justice in terms of "neutrality," not a word Rawls originally used.[88] For Waldron the word does apply, even if not exclusively, to third-party dispute resolution: "The neutrality of the third party is a matter of his relation to the contest between the other two."[89] The emphasis is on the third party's impartiality. That is what makes his decision fair.

But, does it? Is it even fairness we are looking at – or looking for – in "justice, primitive"? The Ifugao mediator is not neutral. He is not impartial. He is partial toward both parties. He is partial to society. He is not a judge. He is not deciding which party is right and which party is wrong. He is not deciding anything. He is trying to resolve a problem between two disputants which implicate the interests of other people too. He isn't even trying to be "fair." Whatever its other merits, compromise is unfair where the fault is entirely on one side. But mediated outcomes are always compromises.

I see two ways to characterize the mediator's activity with respect to *justice as fairness*. One way is that mediation working toward reconciliation or pacification is another, better kind of justice. The other way is that whatever

mediation accomplishes, when it succeeds, is something better than justice. For me, as an anarchist, peace and freedom are more important than justice. I think that justice will be a by-product of freedom more often than freedom will be a by-product of justice.

Multiplex Relationships

Now I will get a bit theoretical. There's something about these disputes which makes them different from many disputes in modern societies. In a modern urban society, in a dispute there's usually only one (if any) social relationship between the parties. Each party plays a single role. Usually, for instance, your landlord doesn't also know you from church or at work. Your employer isn't your relative, except in the Philippines. Your landlord is not your friend. The anthropologist Max Gluckman called these relationships, *simplex relationships*.[90] American suburbanites, for example, share few ties, and "even while they exist, most suburban relationships encompass only a few strands of people's lives."[91]

Just as an individual may have multiple relations with someone else, he may have relationships with people who have relationships with each other. Describing a Mexican Indian town, Laura Nader writes: "Cross-linkage brings a number of individuals or groups together, while dividing them by linking certain members with different groups. The degree to which inter-group relations cross-link affects the development of balanced oppositions or factions in the town."[92] Those who have ties to both parties to a dispute have a personal interest, in addition to the general interest, in the harmonious settlement of the dispute. Cross-links had a pacifying influence among the Plateau Tonga.[93]

In primitive societies, which are anarchist societies, if you get into a dispute with someone, he might be playing multiple

roles in your life. You have a multiplex relationship. Someone may be your brother in law, your creditor, your workmate and your neighbor. This is someone you probably encounter often in your everyday life. These multiple roles may multiply occasions for conflict. But they also motivate both of you resolve the conflict, because all these relationships taken together are probably more important than whatever the dispute is about. And there are typically a lot of other people who have an interest in a peaceful settlement. This is what Gluckman calls a multiplex relationship. He also argued that the more activities the disputants share, the more likely is it for the dispute to be handled in a more conciliatory than authoritative fashion.[94]

There's a seeming paradox here. In complex societies, simplex relationships predominate. In simpler societies, multiplex relationships prevail. In Tonga and in Ifugao country, there were a lot of cross-links. There were many people with ties to both sides. And there was no state to impose law and order. Instead, the social organization provided very powerful inducements to make peace.

Forms of Dispute Resolution

What's a dispute? I'll adopt a definition used by some (not all) social scientists. A dispute begins with a grievance. Someone feels she has been wronged. She may complain to the wrongdoer. They might resolve the matter. Up to this point, it's been a completely private matter. But if they don't agree, and the victim goes public with the matter, then there's a dispute. Depending on the society, going public might mean calling the police, filing a lawsuit, or just complaining to people you know.

Negotiation is a two-party, bilateral form of dispute resolution. It probably exists everywhere. But, it isn't the solution to every problem. A dyad can be deadlocked. Very often, as we saw, the involvement of a third party is helpful.

My main objective here is to contrast mediation with adjudication. My focus is mediation. Mediation is appropriate to anarchist societies. You find adjudication usually in state societies. But it is questionable whether state societies are better served by adjudication than anarchist societies are served by mediation.

I will define mediation as a disputing process which is, above all, voluntary. It's one where the parties choose to submit a dispute to a mediator, not for a decision, but for help. It's not primarily concerned with enforcing rules, although, the parties may invoke rules. The mediator's purpose isn't to identify somebody to blame, although the parties will do lots of blaming. The purpose is to solve a problem. This is an ideal type. Ifugao mediation isn't quite pure, because it isn't commenced in a purely voluntary way. But it's much purer than what was later attempted in the name of mediation in the United States.

I will define adjudication as when a dispute – a case – is initiated by a grievant in a court. A court is a permanent, pre-existing decisional tribunal. Its jurisdiction is compulsory. Cases are decided by a judge who doesn't know the parties. He isn't interested in repairing the relationship between the parties, if they have one. He doesn't care what the background of the dispute might be. He's not supposed to consider those things. He decides the case according to the laws of the state. Usually, if the case goes to trial, the judgment is that someone is "guilty" or not guilty of a crime, or that someone is or is not "at fault" in a civil case. Usually, one party wins and the other party loses. In mediation there aren't supposed to be any winners or losers.

That's the ideal of adjudication. I could criticize it as a description of the American legal system, and, I suspect, every legal system. Adjudication doesn't even live up to its own ideal. But I don't even like the ideal version. Instead, I want to discuss what can happen when mediation is inserted

into an adjudication system, supposedly as a legal reform.

[1] Donald Black with M.P. Baumgartner, "Toward a Theory of the Third Party," in Donald Black, *The Social Structure of Right and Wrong* (San Diego, CA: Academic Press, 1993), 110-115 (originally 1983).

[2] Actually, there is voluntary and involuntary arbitration: "When arbitration is in no sense binding, it merges with mediation. When arbitration is binding, both in the sense that the two parties must go to arbitration on the demand of either and must then abide by the arbitrator's holdings, it tends to merge into judicial judgment." Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago, IL & London: University of Chicago Press, 1981), 4.

[3] Simon Roberts, "The Study of Dispute: Anthropological Perspectives," in *Disputes and Settlements: Law and Human Relations in the West*, ed. John Bossy (Cambridge: Cambridge University Press, 1983), 15.

[4] Laura Nader & Harry F. Todd, Jr., "Introduction: The Disputing Process," in *The Disputing Process – Law in Ten Societies*, ed. Laura Nader & Harry F. Todd, Jr. (New York: Columbia University Press, 1978), 9-10. Despite the title of their book, they profess neutrality as to "the question whether these procedures are law or social control or 'merely' custom. "Ibid., 8. Many people, including myself, draw a sharp distinction between law (regarded as statist) and custom (regarded as anarchist). *E.g.*, Donald Black, *The Behavior of Law* (New York: Academic Press, 1976), 2 (defining law as "governmental social control"); Stanley Diamond, "The Rule of Law versus the Order of Custom," in *The Rule of Law*, ed. Robert Paul Wolff (New York: Simon & Schuster, Touchstone Books, 1971), 116-17, reprinted in Stanley Diamond, *In Search*

of the Primitive: A Critique of Civilization (New Brunswick, NJ: Transaction Books, 1974), 257-58; ibid., "The Search for the Primitive," 136-37.

[5] Edward B. Tylor, *Anthropology: An Introduction to the Study of Man and Civilization* (New York: D. Appleton & Co., 1907), 405.

[6] Jenny Wormald, "An Early Modern Postscript: The Sandlow Dispute, 1546," in *The Settlement of Disputes in Early Medieval Europe*, ed. Wendy Davies & Paul Fouracre (Cambridge: Cambridge University Press, 1986), 192. As discussed below, state-sponsored, ostensibly voluntary processes are often ineffective, judging by their substantial rates of recidivism.

[7] Shapiro, *Courts*, 3.

[8] Bob Black, "Debunking Democracy," *Defacing the Currency: Selected Writings 1992-2012* (Berkeley, CA: LBC Books, 2012), 32 n. 75.

[9] Lysander Spooner, "No Treason. No. 6. The Constitution of No Authority," in *No Treason: The Constitution of No Authority and A Letter to Thomas Bayard* (Novato, CA: Libertarian Publishers, n.d.), 5: Herbert Spencer, *Social Statics* (New York: Robert Schaltenbach Foundation, 1954), 90; see Bob Black, *Nightmares of Reason* (2009-2015), ch. 17, available online at www.theanarchylibrary.org.

[10] David Hume, "Of the Original Contract," *Essays: Moral, Political, and Literary*, ed. Eugene F. Miller (rev. ed.; Indianapolis, IN: Liberty Fund, [1987]), 465-487.

[11] *E.g.,* E. Colson, "Social Control and Vengeance in Plateau Tonga Society," *Africa* 23(3) (July 1953), 199-200, reprinted as chapter 3 of Elizabeth Colson, *The Plateau Tonga of Northern Rhodesia: Social and Religious Studies* (Manchester,

England: Manchester University Press, 1962); Diamond, "The Rule of Law versus the Order of Custom," 135; R.F. Barton, *Ifugao Law* (Berkeley & Los Angeles, CA: University of California Press, 1969), "Preface" (n.p.) & 3 (originally1919).

[12] *E.g.*, A. Morfus, "Beyond Utopian Visions," in *Uncivilized: The Best of Green Anarchy* (n.p.; Green Anarchy Press, 2012).

[13] P.H. Gulliver, "Case Studies of Law in Non-Western Societies: Introduction," in *Law and Culture in Society*, ed. Laura Nader (Berkeley, CA: University of California Press, 1997), 21 (originally 1969).

[14] Donald Black, "The Elementary Forms of Conflict Management," *Social Structure of Right and Wrong,* 83.

[15] Ibid., 14; Frank E.A. Sander, "Varieties of Dispute Processing," in Roman M. Tomasic & Malcolm M. Feeley, eds., *Neighborhood Justice: Assessment of an Emerging Idea* (New York & London: Longman, 1982), 38 n. 4 (originally 1976); Richard E. Miller & Austin Sarat, "Grievances, Claims, and Disputes: Assessing the Adversary Culture," Law & Society Rev. 15(3, 4) (1980-1981): 525-566.

[16] But it is more common than is generally believed. Donald Black, "Crime as Social Control," in *Towards a General Theory of Social Control*, ed. Donald Black (Orlando, FL: Academic Press, 1984), 2: 1-27, reprinted in *Social Structure of Right and Wrong*, 27-46; Black, "'Wild Justice': Crime as an Anarchist Source of Social Order," 233-267.

[17] Elijah Anderson, *Code of the Street: Decency, Violence, and the Moral Life of the Inner City* (New York: W.W. Norton & Co., 1999); Black, "Crime as Social Control."

[18] William L.F. Felsteiner, "Influences of Social

Organization on Dispute Processing," in *Neighborhood Justice*, 54.

[19] M.P. Baumgartner, *The Moral Order of a Suburb* (New York & Oxford: Oxford University Press, 1988), 11.

[20] "Mediation – Its Forms and Functions," in *The Principles of Social Order: Selected Essays of Lon L. Fuller*, ed. Kenneth I. Winston (Durham, NC: Duke University Press, 1981), 133; see also *The Sociology of Georg Simmel*, ed. Kurt Wolff (New York: The Free Press, 1950), 118-169.

[21] Simon Roberts, *Order and Dispute: An Introduction to Legal Anthropology* (Oxford, England: Martin Robertson, 1979), 72.

[22] Gulliver, "On Mediators," 16, 46.

[23] W.L.F. Felstiner, Richard Abel, & Austin Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . . ," Law & Society Rev. 15 (1980-1981), 635-37.

[24] Felsteiner, "Influences of Social Organization on Dispute Processing," 48.

[25] *Social Workers and Alternative Dispute Resolution* (Washington, DC: National Association of Social Workers, 2014), 7.

[26] Shapiro, *Courts*, 1, 3.

[27] Roberts, *Order and Dispute*, 97.

[28] Napoleon A. Chagnon, *Yanomanö* (5th ed.; Belmont, CA: Wadsworth, 2009), 212.

[29] Richard Borshay Lee, *The !Kung San: Men, Women, and Work in a Foraging Society* (Cambridge: Cambridge University Press,

1979), 370-398; Roberts, *Order and Dispute*, 84. Jealousy was the prime cause of discord. Elizabeth Marshall Thomas, *The Old Way: A Story of the First People* (New York: Farrar Straus Giroux, 2006), 169-70.

[30] Black, "Elementary Forms of Conflict Management," 80.

[31] Asen Balici, *The Netsilik Eskimo* (Garden City, NY: Natural History Press, 1970), 192-93.

[32] Lidio Cipriani, *The Andaman Islanders*, ed. & trans. D. Taylor Fox (New York & Washington, DC: Frederick A. Praeger, 1966), 43.

[33] Douglas P. Fry, "Conflict Management in Cross-Cultural Perspective," in *Natural Conflict Resolution*, ed. Filippo Aureli & Frans de Waal (Berkeley, CA: University of California Press, 2000), 336.

[34] Diamond, *In Search of the Primitive*, 368-69 n. 50.

[35] Frans de Waal, *Peacemaking among Primates* (Cambridge: Harvard University Press, 1989), 206.

[36] *Natural Conflict Resolution*, Appendix A, "The Occurrence of Reconciliation in Nonhuman Primates," 383.

[37] De Waal, *Peacemaking*, 241-42.

[38] Black, "The Elementary Forms of Conflict Management," 80; Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Cambridge: Harvard University Press, 1970), ch. 3 & *passim*.

[39] Baumgartner, *Moral Order of a Suburb*, ch. 3.

[40] Lee, *The !Kung San*, 398.

[41] Klaus-Friedrich Koch, "Pigs and Politics in the New Guinea Highlands," in Nader & Todd, *Disputing Process*, 41-58. The article is adapted from Klaus-Friedrich Koch, *War and Peace in Jalémó: The Management of Conflict in Highland New Guinea* (Cambridge: Harvard University Press, 1974). Curiously, the famous McHoy/Hatfield feud also originated in a dispute over a pig. Black, "'Wild Justice,'" 252 & n. 45; Alina L. Walker, *Feud: Hatfields, McCoys, and Social Change in Appalachia, 1860-1900* (London & Chapel Hill, NC: University of North Carolina Press, 1988), 2-3.

[42] Roberts, *Order and Dispute*, 158.

[43] Sarah Rudolph Cole & Kristen M. Blankley, "Arbitration," in *The Handbook of Dispute Resolution*, ed. Michael L. Moffitt & Robert C. Bordone (San Francisco, CA: Jossey-Bass, 2005), 318-19; Roberts, *Order and Dispute*, 70-71, 135.

[44] A.S. Meyer, "Functions of the Mediator in Collective Bargaining," Industrial & Labor Relations Rev. 13 (1960), 164. "However the two processes have a way of shading into each other." Ibid.

[45] *Social Workers and Alternative Dispute Resolution*, 4-5; American Arbitration Association, "The Code of Ethics for Arbitration in Commercial Disputes," May 1, 2004, & idem; "Code of Professional Responsibility for Arbitrators of Labor Management Disputes," Sept. 2007, at htpps://www.adr.org.

[46] Carrie Menkel-Meadow, "Roots and Inspirations: A Brief History of the Foundations of Dispute Resolution," in *Handbook of Dispute Resolution*, 318.

[47] *Social Workers and Alternative Dispute Resolution*, 5; Michael L. Moffitt & Robert C. Bordone, "Perspectives on Dispute Resolution: An Introduction," *Handbook of Dispute Resolution*, 21.

[48] *In re* American Express Merchants' Litigation v. American Express, 634 F.2d 182 (2d Cir. 2011).

[49] Mandatory Binding Arbitration Agreements: Are They Fair for Consumers? hearing before the Subcommittee on Commercial and Administrative Law of the Committee on the Judiciary, House of Representatives, 110th Cong., 1st sess., June 12, 2007; Federal Arbitration Act: Is the Credit Card Industry Using It to Quash Legal Claims? hearing before the Subcommittee on Commercial and Administrative Law of the Committee on the Judiciary, House of Representatives, 111th Cong., 1st sess., May 5, 2009; Arbitration or Arbitrary: The Misuse of Mandatory Arbitration to Collect Consumer Debts: hearing before the Subcommittee on Domestic Policy of the Committee on Oversight and Governmental Reform, House of Representatives, 111th Cong., 1st sess., July 22, 2009; Mandatory Binding Arbitration: Is It Fair and Voluntary? hearing before the Subcommittee on Commercial and Administrative Law of the Committee on the Judiciary, House of Representatives, 111th Cong., 1st sess., Sept. 15, 2009; Arbitration: Is it Fair When Forced? hearing before the Committee on the Judiciary, U.S. Senate, 112th Cong., 1st sess., Oct. 13, 2011.

[50] Rent-a-Center West, Inc. v. Jackson, 561 U.S. 63, 72 (2010). "Rent-to-own" is one of the worst rackets for exploiting low-income consumers.

[51] David Horton & Andrea Camm Chandrasekher, "After the Revolution: An Empirical Study of Consumer Arbitration," Georgetown L.J. 104(1) (Nov. 2015), 124.

[52] Roberts, *Order and Dispute*, 163-64.

[53] Felsteiner, "Influences of Social Organization on Dispute Processing," 48; Kenneth I. Winston, "Introduction," *The*

Principles of Social Order, 28-29.

[54] Sander, "Varieties of Dispute Processing," 28.

[55] Black, "Toward a Theory of the Third Party," *Social Organization of Right and Wrong*, 114.

[56] Fuller, "The Forms and Limits of Adjudication," *Principles of Social Order*, 93-94.

[57] Goldberg v. Kelly, 397 U.S. 254, 271 (1969).

[58] Robert C. Davis, "Mediation: The Brooklyn Experiment," *Neighborhood Justice,* 156.

[59] Donald L. Horowitz, *The Courts and Social Policy* (Washington, DC: The Brookings Institution, 1977), 45, 48. Whether they are very good at ascertaining even historical facts is a topic which, to my knowledge, has never been investigated.

[60] Jerome Frank, *Courts on Trial*: *Myth and Reality in American Justice* (New York: Atheneum, 1963) (originally 1949).

[61] Nader & Todd, "Introduction," 10.

[62] *E.g.*, James L. Gibbs, Jr., "The Kpelle Moot," in *Law and Warfare: Studies in the Anthropology of Conflict,* ed. Paul Bohannan (Garden City, NY: The American Museum of Natural History, 1967), 282-83.

[63] "What appear to us [sic] as hopelessly confusing ambiguities of role were probably not perceived as such either by the occupant of the role [the mediator, the *monkulun*] or by those subject to his ministrations." [Fuller,] "Mediation – Its Forms and Functions," 156. Of course Fuller is hopelessly confused when he looks for his Platonic Forms and finds only

reality. Laura Nader's work in a Mexican town "illustrates how a single person, the president, may be mediator, adjudicator, and arbitrator all in one day." Nader & Todd, "Introduction," 10; see Laura Nader, *Harmony Ideology: Justice and Control in a Zapotec Mountain Village* (Stanford, CA: Stanford University Press, 1990), 122. There's a lot of evidence from many times and places of judges acting as conciliators or arbitrators. *E.g.*, Nicole Castan, "The Arbitration of Disputes Under the 'Ancien Regime,'" in *Disputes and Settlements,* 259-60. The "style" of adjudication may be penal, compensatory, therapeutic, or conciliatory. Donald Black, *The Behavior of Law* (New York: Academic Press, 1976), 4-5.

[64] Michel Foucault, "Truth and Power," *The Foucault Reader*, ed. Paul Rabinow (New York: Pantheon Books, 1984), 61.

[65] Foucault, "Politics and Ethics: An Interview," in ibid., 379.

[66] *The Settlement of Disputes in Early Medieval Europe*, "Conclusion," 237. The Conclusion is unsigned.

[67] Gulliver, "On Mediators," 16.

[68] Barton, *Ifugao Law*, 87, 88-89.

[69] Horowitz, *The Courts and Social Policy*, 24.

[70] "Friendly peacemakers tend to be about equal to the adversaries, whereas mediators, arbitrators, and adjudicators tend to be (in the same order) increasingly elevated above the adversaries." Black, "Elementary Forms of Conflict Management," 86.

This issue came up after I delivered, as a speech, in Manila, a version of this article. One of the formal responders gave

his own speech in praise of the Katarungang Pambarangay (or Barangay Justice System) in the Philippines. It provides, on a neighborhood or village basis, for compulsory mediation of certain kinds of disputes between residents of the same barangay (the smallest unit of government, typically corresponding to a rural village or an urban neighborhood). The mediators consist of a barangay "captain," an elected official, in association with conciliation committees of local residents. The system remotely resembles some earlier indigenous dispute resolution institutions, such as that of the Ifugao. From the little I know of them, they may not have some of the defects which vitiated our Neighborhood Justice Centers (*infra*). The barangays are much smaller, and probably more homogeneous than the catchment areas of the NJCs. This system probably moves faster than the regular courts, and lawyers are not necessary – in fact, they are banned. It has reliable permanent financing from the national government. In the United States, parties to lawsuits, or involved in criminal prosecutions, may feel like the proceedings are conducted in a foreign language. In the Philippines, they actually are. In the regular courts, proceedings are conducted in English, and the English language proficiency of Filipinos, as I learned during a 17 day visit, varies widely. In the barangay courts, the local language is used.

The system was initiated in 1975, by Presidential Decree No. 1508 – by President Ferdinand Marcos, who had assumed dictatorial power and imposed martial law. He had political reasons for doing that. Nonetheless, in three villages in Cebu Province, the rural population in the 1970's accepted the system as useful for them. G. Sidney Silliman, "A Political Analysis of the Philippines' Katarungang Pambarangay System of Informal Justice Through Mediation," Law & Soc'y Rev. 19(2) (1985): 279-302. Obviously I lack up-to-date sources. But it is at least clear that this system of informal justice is not, as it has been called, a non-state justice system. S. Golub, "Non-State Justice Systems in Bangladesh and the Philippines"

(2003), Department for International Development (London), https://gsdrc.org/document-library/non-state-justice-systems-in-bangladesh-and-the-philippines/.

Through its "Rule of Law Initiative," the American Bar Association is promoting the barangay courts with the same uncritical self-satisfaction it brought to promoting Neighborhood Justice Centers and Restorative Justice (discussed herein) in the United States. "Small Claims Courts and Barangay Justice Advocates Collaborate to Resolve Disputes" (Oct. 2010), https://www.americanbar.org/advocacy/rule_of_law/where_we_work/asia/philippines/news/news_philippines_barangay_justice_advocates_collaborate_with_small_claims_courts_1010/.

[71] I will usually not provide detailed page citations to ethnographic sources. For the Plateau Tonga, my sources are: E. Colson, "Social Control and Vengeance in Plateau Tonga Society"; Elizabeth Colson, *The Plateau Tonga of Northern Rhodesia: Social and Religious Studies* (Manchester, England: Manchester University Press, 1962) (the "Social Control" article is chapter 3, at 102-121); Elizabeth Colson, "The Plateau Tonga of Northern Rhodesia," in *Seven Tribes of British Central Africa*, ed. Elizabeth Colson & Max Gluckman (Manchester, England: Manchester University Press, 1951), 94-162.

[72] This example, and all the others I discuss, are based on observations of peoples subject to Western colonialism. Elizabeth Colson was an employee of the British colonial regime. The dispute processing institutions all existed by the recognition or sufferance of the colonial powers, which created formal court systems for what they considered serious crimes and claims. The indigenous disputing processes were, therefore, subordinate parts of what are now called "dual" legal systems. However, their subordinate position did not detract from the fact that, within the jurisdiction allowed to

them, they generally worked. As Colson writes, “These [traditional forms] still work to reach a settlement over and above that which can be obtained through the courts. They are interested, not in the punishment of the offenders, but in the re-establishment of good relations between the groups involved.” Colson, “Social Control and Vengeance,” 204.

[73] Colson, “Social Control,” 199-200, 210-211.

[74] Barton, *Ifugao Law*; R.W. Barton, *Autobiographies of Three Pagans in the Philippines* (New Hyde Park, NY: University Books, 1963) (originally 1938); R.W. Barton, *The Half-Way Sun* (New York: Brewer & Warren, 1930); R.W. Barton, *The Kalingas:Their Institutions and Customary Law* (Chicago, IL: University of Chicago Press, 1949) (not primarily about the Ifugao, but with frequent comparisons to them); E. Adamson Hoebel, *The Law of Primitive Man: A Study in Comparative Legal Dynamics* (Cambridge & London: Harvard University Press, 2006), ch. 6 (originally 1954).

[75] Barton states as the general rule that unintentional homicides are compensable, but, that is at the option of the victim’s kin. One of his informants insisted that if a hunter through carelessness in handling his spear caused a death, that would not be compensable. Barton, *Autobiography*, 182. That may reflect a local variation in the law, or, it occurs to me, a distinction between an innocent and a negligent homicide. Ifugaos consider a drunk not to be blameworthy. In U.S. law, voluntary intoxication mitigates but does not excuse a homicide.

[76] “The word *monkalun* comes from the root *kalun*, meaning *advise.* The Ifugao word has the double sense, too, of our word *advise*, as used in the following sentences, ‘I have the honor to advise you of your appointment!’ and ‘I advise you not to do that.’” Barton, *Ifugao Law*, 87 n. 19.

[77] P.H. Gulliver, "On Mediators," in *Social Anthropology and Law*, ed. Ian Hamnett (London: Academic Press, 1977), 33.

[78] Richard Sharpe, "Dispute Settlement in Medieval Ireland," in *The Settlement of Disputes in Early Medieval Europe*, 180-81.

[79] 45 U.S.C. §§ 151-164, 181-188.

[80] This was also true of 16th century Scotland. The problem was that in an honor society no-one wanted to appear to be too keen to compromise. More commonly, therefore, the initiative for that peace came from kinsmen, friends, and neighbors who were concerned that the feud was disrupting the locality. Keith M. Brown, *Bloodfeud in Scotland, 1573-1625: Violence, Justice and Politics in an Early Modern Society* (Edinburgh, Scotland: John Donald Publishers Ltd., 1986), 45. Feud was, at this time, common to Highland and Lowland Scotland. Jenny Wormald, "The Blood Feud in Early Modern Scotland," in *Disputes and Settlements*, 105-06.

[81] P.H. Gulliver, "Dispute Settlement Without Courts: The Ndeneuli of Southern Tanzania," in *Law in Culture and Society*, ed. Laura Nader (Berkeley, CA: University of California Press, 1997), 67 (originally 1969).

[82] Hoebel, *The Law of Primitive Man*, 110-111.

[83] Black, *Behavior of Law*, 40-41.

[84] Black, *Behavior of Law*, 41 (emphasis deleted).

[85] Peter Kropotkin, *Mutual Aid: A Factor of Evolution* (Boston, MA: Extending Horizons Books, 1960), 113 (emphasis added) (originally published 1902). I would like to thank Michael Disnevic (letter to Bob Black, March 3, 2016) for reminding me to re-view this book. Kropotkin held the curious belief that

international law, because it is customary law (which is not entirely true), embodies values of mutual aid and equality. Peter Kropotkin, "A New Work on International Law," The Speaker (April 1, 1905), 7-8.

[86] John Rawls, *Justice as Fairness: A Restatement*, ed. Erin Kelly (Cambridge: Belknap Press of Harvard University Press, 2001); idem, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), 3 ("Justice is the first virtue of social institutions, as truth is of systems of thought").

[87] Ibid., 54.

[88] Jeremy Waldron, "Legislation and Moral Neutrality," *Liberal Rights: Collected Papers, 1981-1991* (Cambridge: Cambridge University Press, 1993), 144-45.

[89] Ibid., 145.

[90] Max Gluckman, *The Ideas in Barotse Jurisprudence* (2d ed.; New Haven, CT & London: Yale University Press, 1967), 19-20; Max Gluckman, *The Judicial Process Among the Barotse of Northern Rhodesia* (Manchester, England, UK: Manchester University Press, 1965), 5-6.

[91] "Such ties usually arise from residential proximity or common membership in an organization, and they are only rarely buttressed by shared employment, joint ownership of possessions, participation in a closed social network, or economic interdependence." Baumgartner, *Moral Order of a Suburb*, 9.

[92] Nader, *Harmony Ideology*, 36 (quoted), 274.

[93] Max Gluckman spoke of this as "the peace of the feud." *Custom and Conflict in Africa* (Oxford: Basil Blackwell, 1956), ch. 1. However, it doesn't always work out that way. Renato

Rosaldo recounted a feud between two groups which was supplanted by their allying to raid a third group. *Ilongot Headhunting, 1883-1974: A Study in Society and History* (Stanford, CA: Stanford University Press, 1980), 273-74.

[94] Gluckman, *Judicial Process Among the Barotse of Northern Rhodesia,* 20-21.