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Working Paper

Spontaneous Norms in Law and Economics: A Sketch Typology

ILE Working Paper Series, No. 66

Provided in Cooperation with:

University of Hamburg, Institute of Law and Economics (ILE)

Suggested Citation: Zdybel, Karol B. (2023) : Spontaneous Norms in Law and Economics: A Sketch Typology, ILE Working Paper Series, No. 66, University of Hamburg, Institute of Law and Economics (ILE), Hamburg

This Version is available at:

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**INSTITUTE OF LAW AND ECONOMICS
WORKING PAPER SERIES**

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European Doctorate in Law and Economics, Institute of Law and Economics,
University of Hamburg

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Working Paper 2022 No. 66

Januar 2023



Photo
IIHH/RR7/Mentz by

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The author thanks Abishek Choutagunta, Michael Faure, Yulia Khalikova, Mitja Kovač, Pedro Christofaro Lopes, Raphael Maesschalck, Gabriele Paolini, Francesco Parisi, Tanja Porčnik, and Stefan Voigt for vital help in improving various versions of the paper.

Abstract

This article offers a concise typology of spontaneous norms – i.e., norms that are formed or sustained through decentralized collective behavior in a community. The typology combines three criteria for identifying spontaneous norms: (i) implicit formation of (customary) rules, as opposed to explicit formation; (ii) enforcement through decentralized sanctioning actions, as opposed to enforcement by a special social agent; (iii) private interpretation of compliance with rules, as opposed to the presence of a public interpreter of compliance. The paper also suggests how identified types can be modeled game-theoretically as repeated games. It is argued that structural differences between various types of spontaneous norms can be best understood as differences in the sequence of play in a stage game. Further, the typology is illustrated with examples from legal history and legal anthropology. Supposedly dissimilar systems of norms (e.g., customary international law and primitive law; norms of warfare and domestic social norms) are shown to exhibit structural resemblance.

Keywords: spontaneous norms, custom, customary law, social norms, comparative legal history, typology

JEL classification: B41, K00, N40, O17

Spontaneous Norms in Law and Economics: A Sketch Typology

Institutional economists and law and economics scholars have been systematically interested in various spontaneously emergent norms at least for several decades. Rules that do not extensively rely on the state's capacity attracted researchers who attempted to deepen the understanding of institutional realities. They presented themselves both as an empirically valuable research topic and as a worthy alternative to normative state-centric depictions of social order (see, e.g., Benson, 1990; Leeson, 2009). Over the years, the relevant literature has grown vast, naturally making navigation within the field increasingly challenging. Many leading concepts and theoretical approaches became blurry, having been used, borrowed, and cross-cited by numerous authors over time.

In light of this motivation, this paper attempts to systematically classify norms that are formed or sustained through decentralized collective behavior in a community – i.e., spontaneous norms. This will be done by providing a scheme of Weberian “ideal types”, i.e., idealized and abstract representations of real-world phenomena (Weber, 1949), based on criteria derived from legal theory and institutional economics. The paper also suggests that the aforementioned types can be given a game-theoretical interpretation: they can be mapped to specific designs of repeated games.

The contribution of the paper is twofold. First, the presented framework divides spontaneous norms into groups containing structurally similar objects of study. By doing so, it can improve the understanding of spontaneous norms and their role both in legal history and contemporary society. Second, the game-theoretic representation of this framework points to the economic forces operating within each group. Therefore, the article may help to understand how specific types of spontaneous norms arise, evolve, or transform into one another. In this way, it can improve the study of legal history and legal anthropology from the rational choice perspective.

The paper is related to two literatures. First of all, it contributes to the broad and interdisciplinary research on social norms, private ordering, customary law, and extralegal governance broadly conceived. This literature encompasses an array of related themes from different epochs and geographies. Various incarnations of spontaneous norms are invoked in the research of legal history (e.g., Maine, 1883; Bellomo, 1995; Kadens, 2012a; Kim, 2021); colonial legal systems (e.g., Hooker, 1975; Moore, 1986); legal anthropology (e.g., Malinowski, 2017 [1926]; Pospisil, 1958; Benda-Beckmann, 1981; Worby, 1997; Igbokwe, 1998; Penal Reform International, 2000; Robins, 2009; Ndulo, 2011); migrant diasporas (e.g., Büchler, 2012; Pera, 2019; Jaraba, 2020); extralegal norms of close-knit neighbor communities (e.g., Ellickson, 1986; Engel, 1980); business and industry self-governance (e.g., Bernstein, 1992, 2001; Ellickson, 1989); anarchic or stateless social environments (e.g., Anderson & Hill, 1978; Leeson, 2009; Lesaffer, 2007); international law (e.g., Posner & Goldsmith, 1999; Fon & Parisi, 2006; Guzman, 2008), and numerous others. The paper conceptually organizes this diverse and dissipated field.

Moreover, the article adds to the long list of formalizations in said field. Within this strand of literature, Dixit (2003a, 2003b, 2007 [2004]) formally analyzes several mechanisms that emerge spontaneously in the absence of a conventionally understood legal system. Dixit's focus is mostly on relational contracts, arbitration, for-profit private contract enforcement, and private protection of property rights. In a similar vein, Taylor (1982) uses game theory to describe the conditions necessary to provide social order under anarchy. Sugden (1986) also uses game theory to explain the origin and persistence of spontaneously emergent norms of property, reciprocity, and provision of public goods. Young (e.g., 2001 [1998], 2015) employs stochastic game theory in the study of social norms, abstractly defined as "customary rules of behavior that coordinate our interactions with others" (Young, 2008, p. 647). While this paper does not offer novel or deepened modeling techniques compared to

the aforementioned ones, it makes a step back and proposes model design principles suited to representing the identified types of spontaneous norms.

The article is divided into 6 sections. Section 2 identifies three definitional features of spontaneous norms that can be encountered in the literature. On this basis, it proceeds to classify them into Weberian ideal types. Section 3 uses game-theoretical concepts to translate the ideal types into designs of repeated games. It argues that the structural differences between the types of spontaneous norms can be interpreted as differences in the sequence of play in a stage game. Section 4 illustrates the abstract types with examples from legal history and anthropology. Section 5 discusses potential applications of the findings from the earlier sections. In particular, it suggests three research questions that can benefit from the framework developed in the paper. Section 6 concludes.

Three approaches to spontaneous norms

The law and economics approach typically conceptualizes all norms as a subset of economic institutions (see, e.g., Voigt, 2019). According to the most common definition, institutions are “humanly devised constraints that structure political, economic and social interaction” (North, 1991, p. 97). Institutions may be needed when the interaction involves high transaction or strategic costs resulting from, e.g., agency problems, information asymmetries, opportunism, or uncertainty. A predictable framework in which an interaction is expected to be carried out can lower transaction costs and alleviate strategic problems. For example, norms legitimizing appropriation can reduce the cost of conflicting claims to a previously ownerless resource; or commonly known conventions in traffic can decrease the cost of accidents.

Within this broad category, social scientists have researched norms that are produced or sustained through decentralized group behavior, often placed in contradistinction to norms deliberately designed by a planner or administered by a central authority. The naturally

occurring question is how to systematically distinguish so-defined spontaneous norms within the wider class of norms. While the solution to this problem touches upon fundamental philosophical questions (like, e.g., what is law?) and thus depends on the choice of legal philosophy, the argument this paper makes is that a combination of existing approaches can result in a compelling classification of spontaneous norms. In other words, various established criteria for identifying spontaneous norms can be instrumentally used to construct a typology.

Specifically, three such criteria will be used in subsequent parts of the paper: (i) custom as a source of rules; (ii) decentralized enforcement; (iii) private interpretation. According to the first criterion, the differentiating feature of spontaneous norms is that they are customary: rules of behavior are derived from the factual behavior of community members and not explicitly provided by an authoritative source. According to the second criterion, spontaneous norms are characterized by a decentralized structure of enforcement: there is no specialized enforcement agent with a superior power position. According to the third criterion, spontaneous norms are norms without a public (i.e., common to all agents) agent that answers the questions of compliance and thus provides a definitive interpretation of the norm.

Implicit Rulemaking, Decentralized Sanctions, and Private Idiosyncratic Interpretation

Implicit Rulemaking: Custom Versus Explicit Sources of Rules

The commonplace meaning of custom comprises long-standing and well-established practices – a portrayal with which respected dictionaries agree. The Cambridge Dictionary defines custom as a “way of behaving (...) that has been established for a long time”. The Macmillan Dictionary defines it as “something that people do that is traditional or usual”. Such traditional or usual behavior may become a basis for a legal obligation, thus forming customary law defined as “a set of rights that exist simply because things have always been

done that way and have been accepted as normal practice.” This basic concept of custom as a source of rules is well known to legal scholarship (see, e.g., Bederman, 2010; Parisi, 2001) but extends also to the non-legal sphere. In general, repeated patterns of group behavior may produce rules whenever a practice started in the past “continues in force because we prefer to conform to the rule given the expectation that others are going to conform” (Young 2008, p. 647).

In legal theory, the contradistinction between custom and other designs of rulemaking (like legislation and precedent) is given special attention. It emphasizes the difference in the method by which rules are formed. Unlike legislation made at a particular moment in an explicit and deliberate act, customs are spontaneously developed within a community “over a period of time by performing certain actions repeatedly in such a way as implicitly to indicate that the members had accepted that they must perform such actions.” (Kadens, 2012b, p. 1163). Thus, the concept of custom as a source of law requires two constituents: the existence of practice in a community and the accompanying belief of obligatoriness of this praxis – i.e., *opinio juris* (Parisi, 1998, 2001; Bederman, 2010).

Of the two constituents, the underlying practice represents the objective element of customary law. Consistent actions by the group members can be directly verified by an external observer. In turn, the sense of obligation attached to said actions is the subjective element of customary law because it is not apparent from group behavior. The obligatory character of custom that separates it from mere regularities of group conduct cannot be observed and must be indirectly construed. Finding rules in past behavior thus requires an addition of a sophisticated interpretative capability that extends beyond mere reporting of social or historical facts. Differently from custom, legislation is a deliberate and forward-looking method of establishing rules: norms are intentionally set out to be in force in the future. The contents of the norms can be thus both known and controlled.

The difference between custom and other designs of rulemaking can also be considered from another standpoint: the method of discovering norms. The cost curve of determining the relevant rules can differ between custom and statute. Reliance on custom requires that the relevant actors determine the prevailing practices which necessitates an inquiry into the past or recent actions of the wider community. Such an inquiry may become increasingly costly with the decreasing number of available historical cases, their inconsistency, the timespan necessary to prove a custom, etc.

Moreover, when the observed patterns of group behavior are inconsistent, their role as a guide for future interactions may become perturbed. In contrast, explicit sources of rules can be consulted instantly whenever the situation requires. However, the ability to understand the documents containing relevant norms may require a one-off expenditure, especially when they are sophisticated or dissipated. The fixed investment in the capacity to understand explicit rules is mostly absent from the procedure of finding customary norms (cf., Rossi & Spagano, 2018).¹

Decentralized Sanctions

While the aforementioned viewpoint on spontaneous norms is indifferent to the enforcement method, economists interested in the operation of real-world institutions cannot altogether ignore it. An approach that emphasizes the structure of enforcement is particularly popular in law and economics and neighboring fields that extensively rely on rational choice. This approach equates spontaneous norms with norms prevailing in communities characterized by a dissipated distribution of sanctioning power. Such norms are contrasted

¹ In the framework of new institutional economics, every economic institution may be broken down into (i) the rule component and (ii) the enforcement component (Voigt, 2019). The rule component stipulates a norm of behavior for a specific type of social interaction, e.g., when and how the deferred payment should be made. The enforcement component determines the method of implementing this rule.

From this perspective, the emphasis on the implicit method of rulemaking touches exclusively upon the rule component of an institution. The conjunction of repeated praxis and belief in its obligatory character provides a method of recognizing a norm embedded in group behavior. However, it does not fully specify the conditions in which this behavior develops. To understand its development and evolution in time, it is necessary to take into account the incentives faced by individual agents both in its formative phase and after it becomes established.

with rules enforced by a specialized agent who is in a superior power position *vis-à-vis* other agents.

Philosophically, the juxtaposition of decentralized and centralized sanctions relies on the positivist notion of law. In positivist optics, the law is defined as a command of a sovereign backed by a threat of punishment or other adverse consequences. What differentiates law from non-legal (e.g., moral or social) norms is the enforcement by a distinguished agent (“sovereign”) who applies force in a consistent manner (Austin, 1832; Schauer, 2015). Echoes of the positivist view of the law can be noticed in the predominant law and economics contributions. In popular models, legal rules are seen as exogenous “prices” imposed on economic agents for taking specific actions (see, Posner, 1987; Cooter & Ulen, 2016). By entering the utility calculus, the prices influence choices and thus modify social outcomes. The usual problem is to assist the planner in designing those prices to achieve policy objectives.

Against this viewpoint, decentralized sanctions attracted the attention of rational choice scholars who attempted to explain compliance with complex rules in the absence of a central political authority, e.g., in preliterate societies (Rasmusen & Hirshleifer, 1989; Benson, 1989), under the regime of self-help characteristic for the international scene (Norman & Trachtman, 2005), or when the reliance on such authority is infeasibly costly (Ellickson, 1991). Scholars have developed models that attempt to specify the conditions under which decentralized sanctions may sustain complex rules of behavior (see, e.g., Powell & Stringham, 2009 for a survey) or how centralized and decentralized enforcement compare (Acemoglu & Wolitzky, 2020). In a related vein, researchers discussed the question of why actors may engage in costly sanctioning instead of free-riding on the sanctioning efforts of others (e.g., McAdams, 1997; Posner, 1998; Ellickson, 2001).

The emphasis on the incentives to comply with rules as a factor differentiating various forms of social control can be also found in fields like sociology (e.g., Durkheim, 1984 [1893]) or political sciences (e.g., Taylor, 1982; Axelrod, 1986). Durkheim (1984 [1893]) juxtaposes “diffuse” and “organized” sanctions as two fundamental methods of disciplining society. The former are applied by individual community members in a decentralized fashion; the latter are administered by designated persons or corporate entities and are seen as a characteristic feature of legal orders.

Taylor (1982) studies the social order under anarchy by juxtaposing a situation of “a limited concentration of force but no means of enforcing collective decisions” (p. 7) with a situation of a close-to-monopoly of coercion. In the first scenario, power “is dispersed amongst the members of the group; or, the greater the proportion of the group's members involved in solving the collective action problem (e.g. applying sanctions to free riders), the more decentralized the solution. Contrariwise, a solution is centralized to the extent that such involvement is concentrated in the hands of only a few members of the group” (Taylor, 1987, p. 23). Similarly, in a game-theoretical study of social norms, Axelrod (1986) models them by introducing the possibility of voluntarily sanctioning defectors in stage games of the supergame.

The exact character of decentralized sanctions depends in part on the actions technologically available to the agents in question. Such actions may include, e.g., gossip (Ellickson, 1991), shunning (Gruter, 1986), refusal to share or reciprocate benefits (Malinowski, 2017 [1926]), cessation of a commercial relationship (Bernstein, 1992, 2001) or other forms of cooperation (e.g., Guzman, 2008), symmetric reciprocation of the offensive act (Barsalou, 2010); raiding or feud (MacCormack, 1973; Friedman, 1979; Leeson, 2009), etc. All in all, the key characteristics of decentralized enforcement mechanisms are that an

individual agent has only limited capability to incentivize others and must separately decide on the application of a sanction.

Private Interpretation (No “Authoritative Stewardship”)

Finally, a factor distinguishing spontaneous norms may be sought in the absence of a public body providing a socially valid interpretation of rules. According to this criterion inspired by legal conventionalism (see, Postema, 1982; Marmor, 2001; McAdams, 2009; Basu, 2018), non-legal norms rest upon the private interpretation of compliance with norms. The classification of actions into compliant and non-compliant (e.g., honest and opportunistic; diligent and negligent; culpable and non-culpable, etc.) is supplied independently by individual agents based on their private classification logics.² Spontaneous norms are thus considered “the result of repeat interaction and the confluence of individual decision-making exercised in the absence of external coordination” (Hadfield & Weingast 2012, p. 491).

The same criterion suggests that legal norms are characterized by the presence of third-party classification authority. Said authority contains “the capacity to articulate, clarify, and adapt the content of a classification system” in the form of public knowledge (Hadfield & Weingast, 2012, p. 491). In Hart’s view (Hart, 1994 [1961]), such a classification authority is analogous to an “institution of a scorer whose rulings are final” in a sporting game. Unlike players’ private and possibly idiosyncratic statements of the score, “the scorer’s determinations are given (...) a status which renders them unchallengeable” (p. 142). In other words, the institution in question – i.e., “authoritative steward” (Hadfield & Weingast, 2012) – has the capacity to publicly pronounce the definitive content of the normative system and its application to individual cases.³

² Put differently, it is decided by each agent alone whether behavior conforms to the prevailing rules. For example, although there are multiple elaborate norms of politeness in official situations (often written down in savoir-vivre manuals), no tribunal exists to validate the behavior of individuals against those norms. Such validation must be (and is) performed privately and independently by individuals.

³ Carugati, Hadfield, and Weingast (2015) characterize authoritative stewardship as “an identifiable entity that provides a unique normative classification of behavior. (...) [T]he classification is common knowledge and

Importantly, the definitional function of an authoritative steward does not consist in ensuring compliance. It merely provides a public classification logic – a definitive assessment of conformity of behavior with norms. For example, this assessment may resolve the argument between two claimants to a resource, each stating to have appropriated it according to a known convention. It may also authorize eventual actions against the one who is found to have violated the convention. Nevertheless, in order to be operational, the assessment by an authoritative steward must be incentive-compatible for enforcers, given the enforcement method (Carugati, Hadfield, & Weingast, 2015).

Reliance on an authoritative steward may become viable when a decentralized initiative would likely produce unpredictable or irregular behavior based on principles specific to individual agents. This problem is particularly salient in situations characterized by a combination of strong coordination motives, i.e., preferences for diagonal solutions in the game, and high costs of acquiring information about the key parameters of the game. For example, while preferring any deal to no deal, trading partners may have interests that are not easily understandable to outsiders, making the valuation of different aspects of compliance (e.g., time, quality, and quantity) differ accordingly. This may impose prohibitive transaction costs at each encounter with a new interaction party.

Thus, the advantage of authoritative stewardship lies precisely in its uniqueness and public knowledge character, jointly enabling a shared understanding and interpretation of rules and facts (Ginsburg & McAdams, 2004). This shared understanding may differ from the situation-specific preferences of individual agents. Nonetheless, it creates expectations that are reproducible in comparable situations, thus decreasing information costs per interaction. For example, the awareness that a specific deviation from perfectly timely delivery is

incentive compatible for enforcers” (p. 295)

tolerated but deviation from perfect quality is not can be useful knowledge to transaction parties with divergent views of desirable compliance standards.⁴

Typology

So far, the discussion revolved around three alternative criteria for identifying spontaneous norms within the broader category of institutions. In the next step, the criteria can be combined into a systematic classification of Weberian “ideal types”: abstract, idealized, and simplified notions constructed to represent crucial features of real-world phenomena (Weber, 1949). Because ideal types are by design characterized by reduced complexity and model-like simplifications, they may be useful tools for navigating within infinitely complex realities.

Similar attempts to classify institutions have typically utilized one or both of the first two of the discussed criteria, i.e., the origin of rules and the method of enforcement (e.g., Voigt & Kiwit, 1998; Gutmann & Voigt, 2020). The design of these classifications was based on the economic definition of an institution as a conjunction of a rule and an enforcement method (see, Voigt, 2019). However, their purpose was more general as they comprised a wider class of rules and laws. On the other hand, this paper focuses in-depth on the internal variation of spontaneous norms. The current focus is thus limited and at the same time more nuanced. The purpose is to identify structurally similar clusters in the variety of spontaneous norms represented in the vast literature in the field.

Moreover, the merit of considering the three dimensions *in combination* is that spontaneous norms, being an outcome of community behavior, incorporate a self-reinforcing feedback mechanism. Past compliance with spontaneous norms magnifies the social expectation of future compliance. However, the degree to which they are obeyed depends on

⁴ Hadfield and Weingast (2012) argue that the uniqueness and public knowledge character, combined with several other characteristics of the decisions of the authoritative steward (i.a., generality, stability, prospectivity, and impersonal reasoning) suffice to incentivize agents to abandon their idiosyncratic compliance classification schemes even in the absence of centralized coercion.

the enforcement method, which in turn depends on the method of social coordination. Thus, in the attempts to classify spontaneous norms, the rule-formation method, the enforcement method, and the operation of authoritative stewardship should be considered an integrated whole.⁵

Classification Matrix

While the classification matrix has a total of eight hypothetical items, logical dependencies between two or more criteria would limit the total number of items in the matrix. It seems that one such dependency exists between the sanctioning method and authoritative stewardship: the existence of a central sanctioning agent necessitates a “stewarded” system of rules.

It is safe to assume that the actions of the designated enforcement agent are public in the sense of being observable by all other legal actors. Like the coordinative interpretative announcements of an authoritative steward, publicly observable acts of sanctioning by the central enforcer communicate the interpretation of rules of the normative system. Put differently, even if the coordinative function of legal norms may be sustained without a monopolistic enforcement apparatus, the opposite implication does not hold: centralized enforcement entails authoritative stewardship.

With this exception, other possible configurations of the three criteria seem logically plausible, resulting in a total of six possibilities summarized in Figure 1. The residual type aside, they will be now concisely discussed.

Figure 1

Typology of spontaneous norms

⁵ It should be emphasized that the definitions considered in this paragraph, like in the entirety of the paper, refer only to norms understood as observable outcomes of agents’ actions, as was indicated in the opening paragraph of this section. “Norms” can be alternatively defined in terms of agents’ preferences as “emotional and behavioral propensities of individuals” (Elster, 1989). This notion of norms-as-preferences has extensive literature in behavioral economics (e.g., Cardenas, 2011; Czajkowski et al., 2017) and evolutionary biology (e.g., Boyd & Richerson, 2009; Gavrilets & Richerson, 2017). However, norms in this sense are not in the scope of this article.

Implicit formation of rules		
	Authoritative steward absent	Authoritative steward present
Decentralized sanctions only	Ambient norm	Pure custom
Distinguished enforcement agent	X	Legally enforceable custom

Explicit formation of rules		
	Authoritative steward absent	Authoritative steward present
Decentralized sanctions only	Fixed relational rule	Arbitrated fixed relational rule (Purely expressive law)
Distinguished enforcement agent	X	No-custom (residual type)

Ambient Norms and Pure Customs

The upper panel of Figure 1 includes possible institutional arrangements that correspond with the dictionary definition of custom – i.e., a norm whose content emerges from spontaneous behavior in the community. Within this broader category, the panel contains three ideal types of institutions: ambient norms, pure customs, and legally enforceable customs.

Ambient norms exhibit all three features associated with spontaneous norms. Their rule component is derived from the usual pattern of action in the wider social environment (“When in Rome, do as Romans do”). They are enforced through community behavior in a situation of dispersion of agents’ power. Finally, ambient norms are interpreted and articulated privately by the relevant agents. These three properties jointly make ambient

norms fully “emergent” in the sense of all deliberate rulemaking, centralized enforcement, or steered interpretation being absent.

Further, the ideal type of pure custom is equated with a triad consisting of implicit rulemaking, decentralized sanctions, and the presence of an authoritative steward. The introduction of an authoritative steward can be understood as the “legalization” of ambient norms: compliance is assessed by a specialized social agent (e.g., a court, tribunal, council of elders, authorized group of go-betweens, a recognized panel of experts, etc.), and thus the rules are given a single public interpretation.

In building definitions of customary law, legal scholars routinely stress the conjunction of the sociological fact of norm-driven behavior and the corresponding elevation of this fact to the status of law. For example, Parisi describes customary law as “a spontaneous norm which is recognized by the legal system (...) as a proper legal rule” (Parisi, 1998, p. 672). Importantly, said recognition is not a doctrinal exercise but must be an empirical act performed by a flesh and blood agent. Likewise, Kadens (2013) systematically distinguishes norms that emerge from the spontaneous activity and legally binding customary rules proclaimed by an authorized agent. According to this approach, customary law consists of two counterparts: factual behavior-custom and legalistic rule-custom. Behavior-custom is a repeated, norm-driven behavior in the community. Rule-custom is the variant of said behavior endorsed and authoritatively communicated as a normative standard.

When legal rules are not explicitly stated but need to be inferred from sociological facts, the identification of rules presents a natural problem. As previously suggested, the standard doctrine that originated in late Roman law (see, Schiller, 1938; Bederman, 2010) responds to this difficulty by citing two joint requirements: the existence of the underlying praxis and the requirement of *opinio juris*. However, historical and empirical research on the strategies employed by courts to identify customary norms suggests that those two criteria,

even when declaratively accepted, are frequently downplayed (Kadens, 2013; Petersen, 2017).

Legally Enforceable Customs

The discussion of customary law understood as a rule derived by the legal system from sociological facts is mute to the method of enforcement. This definition seems compatible with all conceivable methods of incentivizing compliance. In particular, both ideal types of pure and legally enforceable customs from Figure 1 fit into said definition.

The difference between the two may be specified in terms of Hohfeldian analysis (Hohfeld, 1917). Normally, in a social environment that lacks the monopoly of coercion, a proclamation that a norm has been breached gives a subgroup of legal agents (e.g., the offended party, the kin group, the clan, or all agents) a liberty right to undertake steps towards legal redress. The role of an authoritative steward consists in authorizing and legitimizing the subsequent use of private means of enforcement. In contrast, a breach of an enforceable custom gives the offended party a claim right to the enforcement agent's action *vis-à-vis* the transgressor (Hoebel, 1967).

Fixed Relational Rules

The bottom panel of Figure 1 contains institutions that do not fit the commonplace definition of a customary norm as a norm derived from community behavior. Nonetheless, two of them exhibit at least one trait of spontaneous norms. For this reason, they are often discussed alongside other spontaneous norms in the literature on private and non-legal ordering (e.g., Dixit, 2007 [2004]; McAdams & Rasmusen, 2007).

A fixed relational rule represents a situation in which explicitly made or adopted rules (e.g., by making a pact, exchanging promises, or invoking an authoritative religious text) are sustained entirely *via* in-group enforcement mechanisms. As a result, the viability of keeping the norms alive depends on the parties' voluntary contributions to enforcement for the

anticipated benefit of a continued relationship or out of fear of the breakup of this relationship. As noted by Li (1999), explicit formulation of a relation-based agreement is redundant when parties have shared expectations. This is likely the case with two-party relational contracts enforced exclusively through second-party mechanisms, e.g., threats of suspending cooperation in the future. However, when enforcement through the actions of the members of the broader community is a viable option (e.g., by ostracizing, shunning, expulsion, etc.), the explicit formulation of a rule may serve the purpose of third-party verification.

When explicitly designed or formulated norms are adjudicated by an authorized social agent, they can be labeled arbitrated fixed relational rules. In general, they represent an abstract model of a purely “expressive adjudication”, i.e., rules with third-party public communication of compliance but without third-party enforcement (McAdams, 2000; McAdams & Nadler, 2008).⁶

Game-Theoretical Interpretation of the Typology

Scholars studying economic institutions have developed multiple formal models of social norms, customary law, relation-based governance, and other phenomena relevant to this paper. With some exceptions (notably Dixit, 2003a), the modeling techniques involve the use of repeated games with an infinite time horizon to represent spontaneous norms.⁷ The

⁶ Arbitrated fixed relational rules may be envisioned as groups, like professional organizations or friendly associations, in which the leadership is fully in control of the rules and the threat of “social” consequences of exit is the ultimate constraint that prevents leaving. For this reason, McAdams and Rasmusen (2007) label such governance structures “organization norms”.

⁷ The techniques of representing various kinds of spontaneous norms differ from subject to subject. Within this variety, two aspects stand out as the key model design features: informational assumptions and the solution concepts. Depending on the subject and context, researchers of spontaneous norms use games with perfect information (in which players know the full structure of the game) and imperfect information (in which players lack some of this knowledge). The assumption of imperfect information corresponds to the observation that true intentions or preferences of interaction partners in most social settings are not explicitly given to others but need to be discovered in the through interacting. In other words, imperfect information allows for the introduction of idiosyncrasies, i.e., private player-specific characteristics, into the game. Likewise, researchers use games with complete information (in which players have full knowledge of the past events in the game) and incomplete information (in which the knowledge of the past events is limited). The assumption of incomplete information reflects the idea that episodes from the distant past are unknown or doubtful and only recent events can be recalled with certainty.

repeated game design reflects the recurring nature of social interaction, e.g., a commercial transaction or a conflict over the ownership of a resource.

This subsection will suggest a game-theoretic interpretation of the typology developed above. While it rejects the pretense to build an all-encompassing model, it uses game theory to highlight the structural similarities and differences between the identified ideal types.

Representing Implicit Norm Formation, Decentralized Sanctions, and Authoritative Stewardship

In game-theoretical terms, explicit norm formation can be interpreted as a pre-game “constitutional” stage (Buchanan & Tullock, 1962) at which agents determine the rules of the subsequent repeated game with a predefined selection method. For its part, the determination of the rules can be understood as an equilibrium selection for games played by perfectly rational actors or an initial condition selection for games played by boundedly rational actors (i.e., evolutionary games). On the other hand, the absence of the constitutional stage corresponds to implicit norm formation. Rules are not designed within any structured procedure, being fully emergent from the players’ actions in the game.

Decentralized sanctions can be understood as strategic action choices of individual players made in response to perceived infringements. For example, the famous tit-for-tat strategy in prisoner dilemma games requires that a player responds with a single period of defection to a defection in the preceding period. In general, decentralized sanctions are technologically built into the action sets of agents. On the other hand, centralized sanctioning

For example, repeated games with perfect and complete information have been used to study customary international law (e.g., Norman & Trachtman, 2005); with perfect but incomplete information have been used to study the development of rules governing medieval trade (Milgrom et al., 1990); with imperfect but complete information, to study the possibility of a legal order without centralized enforcement (Hadfield & Weingast, 2012).

The solution concepts employed in the research of spontaneous norms can be grouped into two categories: perfectly rational and boundedly rational. Under perfectly rational solution concepts, players’ ability to design a strategy is limited by the condition of subgame rationality, meaning that at every node of the supergame, a player must choose a locally optimal action given his rationally constructed beliefs about the past events in the game. On the other hand, in the evolutionary setting, such requirements do not typically apply. Players simply imitate strategies that proved successful in the preceding period (e.g., Axelrod, 1986; Sugden, 1986; Skyrms, 1996; Mahoney & Sanchirico, 2001; Young, 2001 [1998], 2015). Both approaches have been used to study various types of governance by spontaneous norms, with the perfectly rational concept prevailing.

requires an introduction of an artificial social agent, i.e., an enforcer, that can make interfere with other players' payoffs.

Finally, an authoritative steward may be again understood as an artificial social agent. In contradistinction to an enforcer, the actions of an authoritative steward are payoff-irrelevant announcements disseminated to all other agents. The announcements can potentially affect the equilibrium of the game only because of being information-relevant, i.e., being common knowledge to all players.⁸ Naturally, the absence of an authoritative steward corresponds to the absence of such a player in the game.

The Structure of Spontaneous Norms as the Design of Stage Games

Drawing on a simplified variant of the comparative institutional analysis (Aoki, 2001, p. 186-188), economic institutions can be represented with a model that includes:

- (i) $N = \{1, \dots, n\}$ = set of agents,
- (ii) A_i = set of all technologically feasible actions a_i of agent i , for each $i \in N$
- (iii) $A = \times_i A_i$ = set of all technologically feasible action profiles,
- (iv) $U = \{u_1, \dots, u_n\}$ = set of utility functions $u_i: A \rightarrow \mathbb{R}$, specific to agent i ($i \in N$), assigning a real-numbered utility value to an action profile in A .⁹

The pair $\langle N, A \rangle$ can be said to define a simplified game form. It represents the objective structure of a one-off social interaction by specifying the participants of the interaction (e.g., traders, firms, states, etc.) and the combinations of actions that can be taken by the participants.¹⁰ Said interaction can be anything that involves a group (or a randomly

⁸ X is common knowledge if all players know X , know that others know X , know that others know that others know X , etc. *ad infinitum*.

⁹ It will be assumed below that the utility functions u_1, \dots, u_n are private knowledge of agents $1, \dots, n$, and therefore that the entire supergame is a game with imperfect knowledge. This approach has a few rationales. First, it is consistent with the approach of the comparative institutional analysis, where economic institutions are defined as a subset of agents' beliefs. This reflects the idea that institutions are belief-dependent (and thus path-dependent) socially devised "methods" of playing the same "objective" game. Moreover, making utility functions private knowledge better illustrates of the role of an authoritative steward. Finally, this assumption is simply more realistic than its opposite in most contexts.

¹⁰ The function associating the action profiles with objectively observable outcomes, originally present in Aoki (2001), is omitted in this simplified variant. A utility function is defined directly over the action profiles, not over the outcomes generated by the profiles.

selected subset) of agents making interdependent choices. For example, a simple two-person game of chicken is often used to represent a conflict between two actors over an ownerless resource (e.g., Sugden, 1986; Ginsburg & McAdams, 2004); two-person stag hunt games are used to illustrate the dilemma between cooperation and security faced by international actors (e.g., Weiss & Agassi, 2020).

By fixing the set of actors $N = \hat{N}$ and the set of feasible action profiles $A = \hat{A}$ it is possible to select a specific game form $\langle \hat{N}, \hat{A}, \succ \rangle$. After fixing, this particular game form represents a specific interaction with defined agents and structure. It will be subsequently treated as a building block of several infinitely repeated supergames that represent the variety of spontaneous norms classified in the earlier subsection. Such an approach reflects the basic idea that the same recurring social interaction may be hypothetically solved through different kinds of institutions.¹¹ This conclusion is summarized in Figure 2 and discussed below.

¹¹ Importantly, treating economic institutions as infinite repeated games and differentiating between them only at the stage game level does not preordain any specific solution concept. For example, it is equally consistent with the perfect Bayesian equilibrium concept and with equilibria in evolutionary game theory.

Figure 2

Stage game designs corresponding to the items of the spontaneous norms typology

	Players	Pre-game stage of equilibrium/ initial condition selection	Sequence of play in each subsequent period (stage game)
Ambient norm	\hat{N}	No	(1) Game in the form $\delta \hat{N}, \hat{A} > \delta$
Pure custom	$\hat{N} \cup \{A, \text{Steward}\}$	No	(1) Game in the form $\delta \hat{N}, \hat{A} > \delta$ (2) Payoff-irrelevant announcement by A. Steward – common knowledge
Legally enforceable custom	$\hat{N} \cup \{\text{Enforcer}\}$	No	(1) Game in the form $\delta \hat{N}, \hat{A} > \delta$ (2) Payoff-relevant action by Enforcer – common knowledge
Fixed relational rule	\hat{N}	Yes	(1) Game in the form $\delta \hat{N}, \hat{A} > \delta$
Arbitrated fixed relational rule	$\hat{N} \cup \{A, \text{Steward}\}$	Yes	(1) Game in the form $\delta \hat{N}, \hat{A} > \delta$ (2) Payoff-irrelevant announcement by A. Steward – common knowledge

Ambient Norms and Pure Customs. Ambient norms are the easiest type to represent in the game-theoretical framework. They can be envisioned as an infinite string of indistinguishable underlying game forms $\delta \hat{N}, \hat{A} > \delta$. The absence of a distinguished “formative” period of ambient norms design accentuates their unplanned emergence and thus path dependence. Formal analyses of spontaneous norms that utilize comparable model designs are plenty (e.g., Axelrod, 1986; Sugden, 1986; Young, 2001 [1998], 2015).¹²

¹² The relative simplicity of such models is often counterbalanced by realistic assumptions about the process through which players select their actions or, especially, information available to players. For example, a typical element of a model design treats the discount factor of individual players as their private information. Differences in discount factors reflect varying degrees of cooperativeness among agents. The higher the player’s discount factor, the more valuable the cooperation in the future becomes relative to the immediate gains from opportunistic behavior. Given this background, Posner’s signaling theory of social norms (Posner, 1998) suggests that by complying with social norms and engaging in costly punishment of violators, individuals attempt to signal their cooperativeness.

In turn, pure custom by definition embodies a spontaneous norm explicitly recognized as a proper legal rule. In a game-theoretical setting, the event of recognition can be represented through the introduction of an additional player – i.e., Authoritative Steward – that moves alternately with all other players. This gives rise to an infinite alternating chain of social interaction $i, \hat{N}, \hat{A} > i$ and payoff-irrelevant assessment of compliance by Authoritative Steward.

The actions available to this artificial agent are limited to (payoff-irrelevant) opinionating the compliance of agents in the preceding iteration. The decision rule used to formulate opinions corresponds to a method of “finding” customary norms among the previous iterations of the supergame. While the decision rule may remain private knowledge of Authoritative Steward, the public character of the assessment might enable a rational reconstruction, making the future decisions, at least to a certain extent, predictable in the eyes of other players (see, Hadfield & Weingast 2012, 2013, 2018).

The public assessment by Authoritative Steward plays two important roles: interpretative and informative. Its common knowledge characteristic allows for the coordination of actions and, if future decisions are predicted with certain accuracy, coordination of expectations. Thus, considering that individual utility functions are private, public announcements associating compliance with objectively verifiable outcomes can be critical for coordinating behavior around predictable norms. In other words, public messages can turn otherwise idiosyncratic preferences into an objective body of rules.

Game-theoretical models that emphasize the interpretative role in detail and resemble the design proposed in this subsection can be found, e.g., in papers by Aldashev, Chaara,

Moreover, several models assume incomplete information by limiting the players' awareness of the past events in the supergame (e.g., Young 2001, [1998]). This assumption emphasizes the limited cognitive capacity of agents and thus underlies the importance of relatively recent history in shaping expectations about the future behavior of others. For example, Acemoglu and Jackson (2014) study the importance of historically prominent figures by assuming that, unlike ordinary events, their actions can be observed by *all* future agents. In their overlapping generations model, such figures can divert the pattern of development of social norms driven by the recent past.

Platteau, and Wahhaj (2012), and Hadfield and Weingast (2012). Crucially, the argument developed in the second paper is that, if payoff-irrelevant announcements of an authoritative steward possess certain desirable characteristics (i.e., universality, generality, stability, prospectivity, congruence, and uniqueness) and do not diverge significantly from the idiosyncratic preferences of players, they can support a perfect Bayesian equilibrium in which players obey the rules because violation would be followed by coordinated social sanctions. Thus, the model suggests that under specific conditions, authoritative stewardship can overcome the hurdles caused by individual idiosyncrasies in the understanding of compliance.

In turn, the informative role of authoritative stewardship is key for the operation of reputation-based enforcement mechanisms. The informative role is theorized in a model by Milgrom, North, and Weingast (1990), in which the only function of the artificial agent lies in informing agents about others' past behavior. According to this approach, the transmission of information about the past performance of agents is a substitute for a long-term bond between parties. The awareness of the track record allows for the formation of correct beliefs about the intended behavior of trading partners, and thus for engaging only with those who are likely to refrain from opportunism. Although careful historical examination suggests that the assumptions of the model do not correspond with the historical realities of medieval trade (e.g., Mangels & Volckart, 1999; Kadens, 2012b, 2015), it still can be treated as a generic formal representation of reputational enforcement aided by a centralized information repository.

Legally Enforceable Customs. In the setting of game theory, enforceable customs can be treated as a structural extension of pure custom in which the artificial agent not only assesses compliance but also administers punishments (or other payoff-relevant incentives). Thus, the stage game sequence of a model enforceable custom can be obtained by alternating

the underlying interaction $\hat{c}, \hat{N}, \hat{A} > \hat{c}$ and a payoff-relevant action of Enforcer, as illustrated in Figure 2. Such a design reflects the idea that compliance is periodically assessed by courts whose decisions are in consequence enforced by government agencies or some other specialized entity.

Although not based on formal models, the arguments against the enforcement of immanent business norms developed by Bernstein (1996), Ben-Shahar (1999), and Kostritsky (2006) highlight the singularities of legally enforceable spontaneous norms. Enforcement by a special social agent strategically influences the norm-making process, making implausible the ambition to enforce such norms without affecting their substantive content.

For example, if consistently accepted payments below the contractual price may ultimately override the contractual terms by lowering the price, the receiver of the payment would be more cautious to disallow payment deviations, even by the means of costly litigation. However, if such deviations do not affect the enforceable terms of the written contract, the flexibility would be higher (Ben-Shahar 1999). In this and similar scenario, the equilibrium path of enforceable customs will likely differ from other types of spontaneous norms.

Fixed Relational Rules. Finally, fixed relational rules can be represented in the same way as ambient norms or pure customs with an addition of a “constitutional” period at the start of the game. The constitutional period corresponds to the time in which the rules are established or otherwise presented to the players. For example, a village community may meet to decide how to exploit a commons (like in the case of Indian *panchayat* forests, see Agrawal, 1994) or an assembly may decide on how to keep the peace in anarchic conditions (like in the case of social organization devised in the American Wild West, see Anderson & Hill, 1979). Since by definition the initial agreement does not entail centralized enforcement, the further course of the game does not differ from the ambient norms or pure custom games.

Filling the Matrix: Real-World Examples

The previous section developed a typology of spontaneous norms. Its purpose was to use the existing legal and economic scholarship in the field to distill abstract notions of spontaneous norms that can be formally represented and analyzed. By design, the ideal types summarized in Figure 1 were intended as conceptual shells that ignore contingencies but capture key structural features of real-world phenomena.

In contrast, the current section intends to make the typology more comprehensible by assigning real-world examples to the classification categories. While the correspondence between ideal types and actual institutions can never be perfect, the purpose of providing illustrations is to demonstrate that the typology can be a useful classification tool. Equally important is the fact that such a mapping can reveal structural similarities between various norms that are assigned to a single category.

Figure 3

Examples corresponding to the ideal types from Figure 1

Implicit formation of rules		
	Authoritative steward absent	Authoritative steward present
Decentralized sanctions only	Social norms; Primitive law with no public adjudication (e.g., Trobrianders studied by Malinowski); Customs of warfare; Customary international law in the pre-international dispute resolution era	Primitive law with public adjudication (e.g., Yurok people); Customary international law in the international dispute resolution era; Anglo-Scottish borderland customs until the 16 th century
Distinguished enforcement agent	X	Custom as a source of standards in torts (e.g., medical malpractice); Commercial custom, when incorporated into the law; Colonial “customary law”

Explicit formation of rules		
	Authoritative steward absent	Authoritative steward present
Decentralized enforcement only	International agreements in the pre-international dispute resolution era	International agreements in the international dispute resolution era; Religious law in the diaspora (e.g., among Mennonites); social order of medieval Iceland
Distinguished enforcement agent	X	No-custom (residual type)

Ambient Norms: Social Norms, Primitive Law Without Adjudication, International Law in the Pre-International Dispute Resolution Era

As emphasized previously, ambient norms represent rules that are emergent-in-fact and function in a fully unsupervised, decentralized, and uncoordinated setting. As such, they can be best exemplified in social norms. Social norms are self-enforcing at the group level and history-dependent (Young, 2015). The rationale for conforming to social norms stems from the fact that they have been established in the past in a specific form and are being shared in the wider society. Moreover, their continuing existence depends on decentralized incentivization by group members and decentralized expectation-making processes. They are transmitted and interpreted privately by individuals, families, or other organic social units. Similar characteristics of social norms have been acknowledged by researchers who attempted to understand them through the lenses of evolutionary game theory as emergent and evolutionary phenomena (e.g., Sugden, 1986; Young, 2001 [1998], 2015).¹³

Scholars have also extensively studied empirical cases of social norms in various contexts from the rational choice perspective. Such studies often considered social norms substitutes for legal rules when these are too costly or otherwise infeasible to establish. Examples include norms of liability for animal-caused property damage developed among cattlemen and ranchers in Shasta County, California (Ellickson, 1991); norms of property in hunted animals among whale fishers on the North Atlantic Ocean (Ellickson, 1989); norms of performing, communicating, and responding to a breakdown of the marriage in one of the Illinois counties (Engel, 1980); norms regulating inheritance of real property in rural

¹³ Naturally, alternative approaches also exist in the law and economics literature. For example, in their extensive survey paper on social norms in the perspective of law and economics, McAdams and Rasmusen (2007) do not require that social norms are implicitly created by repeated actions of individual agents, nor that they are privately interpreted. Such centrally devised or created norms (e.g., by a professional association) are given the name “organization norms”. However, the additional requirement stipulated by McAdams and Rasmusen is that social norms are obeyed because they are at least in part supported by “normative attitudes”. These attitudes differentiate social norms from “conventions” that are abided by because of the interplay of purely external incentives, e.g., threats of sanctions by others or preexisting equilibrium-supporting beliefs in the society.

Catalonia (Assier-Andrieu, 1983); footbinding norms in Imperial China (Mackie, 1996). In all those cases, the relevant rules are unwritten and derived from the practice, privately interpreted, and rely on community enforcement.

Beyond contemporary domestic social norms, other exemplifications of norms combining backward-looking rule-formation, decentralized sanctioning, and the lack of public interpretative authority may be sought in legal anthropology. Scholars routinely notice that the widespread trait of non-literate communities is the prevalence of rules embedded in flexible oral traditions or commonly followed practices – in other words, “whatever is regularly or generally done is considered rightly done” (Diamond, 1971, p. 164). With the art of writing absent, legislation and precedent are unlikely to emerge as socially approvable sources of rules, and thus “the remaining source of law, and the one that dominates primitive law, is custom” (Posner, 1980, p. 31). Concomitantly, the egalitarian social structure prevents a single individual or a small group of individuals from amassing sufficient power or wealth to dominate the community (see, e.g., Hoebel, 1967; Taylor, 1982). Therefore, the enforcement of norms typically requires collective participation (e.g., in ostracism, ex-communication) or at least tolerance for legitimate (i.e., legally privileged) violence against one’s kin- or clansmen.

The existence of public adjudication is a known source of variety in primitive law. Organized and ritualized dispute resolution is observed in some of the non-literate societies (typically those more economically advanced), being absent in others (Diamond, 1971; MacCormack, 1973).¹⁴ It is precisely those regimes of primitive law lacking public adjudication (in other words, systems of sophisticated social norms in non-literate

¹⁴ Diamond (1971) generalizes his extensive case studies of preliterate legal institutions by suggesting that societies of food gatherers and those in “lower grades” of agriculture or pastoralism typically have no recognizable adjudication institutions. Mechanisms of public dispute settlement are present only in more economically developed primitive societies (e.g., among cattle keepers or advanced agriculturalists), yet even in those cases, their emergence is not universally observable.

communities) that can be considered real-world exemplifications of the ideal type of ambient norms.

Regimes of primitive law without public dispute resolution methods have been long studied by anthropologists. For example, in the pioneering work on the “savage society” of the Melanesian people in the Trobriand Archipelago, Malinowski (2017 [1926]) denies the existence of an institution resembling a tribe court in which disputes are settled.¹⁵ Tribe members would self-willingly resort to reciprocal sanctioning to enact punishment after a perceived transgression of a community norm. They would also refuse to share the means of subsistence, cooperate, or associate with someone they consider a wrongdoer.

Likewise, MacCormack (1973) observes that many African peoples like the Nuer, the Dinka, the Tiv, the Amba, the Konkomba, and the Lugbara had “no chiefs and no courts and not even village headmen” capable of deciding disputes (p. 77). He nonetheless reports on complex systems of unwritten rules regulating behavior within a single tribe and relationships between different tribes. Diamond emphasizes that among the Nuer, “there are no governmental or judicial organs of people, tribe, tribal sections, village or settlement and nowhere developed leadership except on the part of the lineage head (...)” (Diamond, 1971, p. 238).¹⁶

Finally, another locus of ambient norms may be found in the international realm. Derivation of rules from past behavior in the international community, dispersion of power, and lack of external coordination are the conditions historically prevalent among the states and other relevant international actors. In this sense, customary norms governing

¹⁵ “The rare quarrels which occur at times take the form of an exchange of public expostulation (*yakala*) in which the two parties assisted by friends and relatives meet, harangue one another, hurl and hurl back recriminations. Such litigation (...) may be of assistance in settling disputes. Sometimes it seems, however, only to harden the litigants. In no case is there any definite sentence pronounced by a third party, and agreement is but seldom reached then and there.” (Malinowski, 2017 [1926], p. 85)

¹⁶ Although the Nuer recognized figures of go-betweens (called leopard-skin chiefs) that alleviate inter-group disputes, they are mere assistants of the conflicted parties. Gruel (1971) argues that the authority of leopard-skin chiefs is founded on the ability to build large coalitions on the case-by-case basis and thus channel the threats of social sanctions against those refusing to make peace with other tribe members.

international relations seem structurally similar to social norms in the domestic context (see, Norman & Trachtman, 2005) and primitive law (see, Barkun, 1968), and thus, more generally, ambient norms. Indeed, the fundamental features of customary international law regularly emphasized in the literature are the derivation of normative content from the established behavior of states and decentralized enforcement, i.e., through actions of individual states taken in response to perceived infringements (e.g., Roberts, 2001; Guzman, 2008; Shaw, 2017). According to Guzman (2008), absent a hierarchy in the international system, the enforcement mechanisms decisive for the operation of international law in the conditions of anarchy between states are “the three Rs of compliance”: reputation, reciprocity, and retaliation.

Like in the case of primitive law, the derivation of norms from the behavior of states and the decentralized method of sanctioning suffice to classify customary international law in two out of three dimensions. The presence of authoritative stewardship presents a more complicated issue. Contemporary customary international law relies on a set of broadly recognized international dispute resolution authorities (e.g., The International Court of Justice) that seem to satisfy the definition of an authoritative steward but are historically novel. For example, the ICJ was established in 1945 and its predecessor, The Permanent Court of International Justice attached to the League of Nations, in 1920. The claim about the structural parallel between domestic social norms, primitive law, and customary international law is limited to the period before their creation¹⁷, or to situations in which parties would typically unilaterally reject the authority of international dispute resolution authorities.

This is particularly applicable to the customs regulating warfare. By definition, belligerents normally reject any possibility of external coordination of actions, nor are they

¹⁷ For example, Bederman seeks an analogy between primitive law and international law in antiquity by emphasizing its lack of public procedures that precede and condition the administration of sanctions. He states that “[a]ncient international law was not a primitive legal system because of its doubtful dependence on religious belief. It was primitive because the ancient mind could not conceive of norms of State behavior apart from the admittedly diverse sanctions for non-compliance with those rules.” (Bederman 2001, p. 51)

subject to a single superior force. However, this does not entirely preclude the development of spontaneous norms of war. For example, customs that specified the acceptable ways of conducting siege in the early modern era (i.e., in the 16th – 17th century) were created through a learning-by-doing process as a byproduct of siege operations, enforced by the warring parties through adjustments to their future siege tactics *vis-à-vis* the opposing party (in a manner similar to tit-for-tat), and required individual interpretative abilities of the field commanders to be applied consistently and understandably to others (Lesaffer, 2007).

Pure Customs: Primitive Law with Adjudicative Mechanisms, Present-Day Customary International Law

As suggested in the previous section, the ideal type of pure custom represents an ambient norm that is given an organized legalistic frame: it is articulated and interpreted in a public process carried out by a special social agent. In this context, it should be expected that many of the real-world institutions exemplifying the ambient norm type may have a corresponding variant falling under the pure custom type.

Indeed, it has been already mentioned that the legal systems of non-literate men are diversified with respect to the existence of public dispute-resolution procedures. Since sociological facts normally constitute the basis for legal rules in primitive law, and since power in non-literate communities is typically dissipated within a large group, stewarded systems of primitive law can be considered examples of pure custom.

To illustrate, the Indian Yurok tribe combined traditionalist rules, self-help as the key enforcement method, and well-recognized public adjudication procedures that authorized the use of this method in the eyes of the public (Hoebel, 1967; Benson, 1989). According to Hoebel (1967), Yurok people “did not themselves (...) arraign the offender or determine the extent of the damages to be assessed. This was done by the informal court of go-betweens, or "crossers," who were chosen from among nonrelatives living in different communities than

those occupied by parties to the litigation.” (p. 52). The procedure of a Yurok was structured, evidence-based, and resulted in an unequivocal announcement of a verdict binding to the parties of a dispute. If the go-betweens “found the defendant guilty, [they] declared an explicit judgment against him. (...) [T]he judgment assessed the customary damages against him, which he had to pay over to the plaintiff.” (p. 52-53)

Importantly, the Yurok procedure could not be followed by action by organized enforcement authorities because there were none. Instead, the verdict gave the offended party and his allies the liberty to seek redress on their own. “In default, the defendant normally became the plaintiff’s debtor-slave; otherwise, his execution by the plaintiff and his kin was warranted, although there was risk of engendering feud in this kind of action even though public opinion supported the plaintiff.” (p. 53). In other words, although imperfect, the procedure served as a coordinative device that endues private sanctioning efforts with social legitimacy.

Similar examples of publicly adjudicated systems of spontaneous norms have been extensively reported in legal anthropology. For example, among the Lango people of northern Uganda, “the only administrative or judicial bodies were the informal gatherings of the village elders to settle intra-village and intervillage disputes (...). But there was no power to enforce their decisions except public opinion” (Diamond, 1971, p. 239). Likewise, in the Vogusu and Logoli Bantu tribes, “the main judicial authority is exercised by the old men of the sub-clan, but there is no organized judicial assembly and no means of enforcing a judgment except public opinion” (Diamond, 1971, p. 241). In a similar vein, the contemporary research on “legal pluralism” in developing countries reports numerous other case studies of “unofficial” adjudication according to customary norms, e.g., from Zimbabwe and Nigeria (Worby, 1997; Igbokwe, 1998). Typically in those cases, centralized procedures

of adjudication serve a coordinative purpose by funneling the execution of social sanctions by group members.

Moreover, present-day customary international law adjudicated in international tribunals may represent another example of ambient norms enhanced by a coordinative mechanism. While the derivation of rules from the regular behavior of states and reliance on self-help as the only available enforcement tool both remain the constant features of the international legal order, the 20th-century novelty lies in the prominence of permanent international dispute resolution bodies, like the ICJ or the International Tribunal for the Law of the Sea.¹⁸

The functions of international dispute resolution organizations emphasized in the law and economics literature overlap with the characteristics of an authoritative steward silhouetted in the preceding section. Firstly, international courts interpret, clarify, and articulate norms of customary international law, and thereby “assist the states to come to a common understanding regarding relevant (...) law” (Guzman, 2008, p. 51-52). Thus, they provide focal points within the set of possible interpretations of norms without affecting objective payoffs (Ginsburg & McAdams, 2004), potentially reducing the effects of states’ idiosyncrasies. In the specific case of custom as a source of international law, the courts’ role boils down to finding the relevant behavior, examining its binding status, and proclaiming an unequivocal announcement of how it translates to a binding rule.

Moreover, by publicly announcing the outcome, international dispute resolution bodies disseminate information about the objective state of the world (e.g., past performance of states) among the interested actors. As suggested by some scholars (Norman & Trachtman, 2005; Guzman, 2008), the facilitative role of international courts in spreading information

¹⁸ International dispute resolution originated in Greek antiquity. Its modern roots can be traced to the 2nd half of the 19th century, or more precisely to the so-called Alabama arbitration between Great Britain and the United States. However, the period of heavy institutionalization of international dispute resolution began only with the Hague Peace Conferences in 1899 and 1907, with its culmination in 1922 marked by the establishment of the Permanent Court of International Justice (see, Ginsburg & McAdams, 2004, p. 1288-1291; Bederman, 2001, p. 82-85).

can be vital for the effective administration of responses by individual states in the system. For example, it makes the coordination of sanctions more likely or decreases the cost of developing a track record of a state's performance, thereby contributing to more veracious reputation-building. Alternatively, if international courts are considered unbiased, their assessment of the facts may cause an update of states' beliefs about uncertain facts and thus contribute to solving a pure coordinative problem (Ginsburg & McAdams, 2004).

An early case study of a stewarded system of customary international law may be found in the borderland norms of 16th-century England and Scotland, known after its eventual writing down under the name *Leges Marchiarum*. Inhabitants of both sides of the border have been grave enemies, routinely engaging in raiding, pillaging, and plundering each other's territories. Yet even such warlike conditions did not prevent the emergence of unwritten norms that "developed organically from cross-border interactions" (Leeson, 2009, p. 481). Like in the anthropological accounts of primitive law, the enforcement of borderland customs relied on regulated private violence or threats thereof – in this case, typically in the form of private raiding and exchange of hostages.

Importantly, despite the hostility of both nations, *Leges Marchiarum* saw a development of an organized public adjudication forum. This institution was meant to prevent arbitrary exercise of vengeance that could potentially escalate into chaos and full-scale war. The dispute resolution assembly met periodically (yet only during the periods of truce between both monarchies) and supervised the compliance with meta-rules of raiding and revenge, thereby seeing to it that the borderland customs do not slip into a spiral of increasing alternate violence.¹⁹

¹⁹ The case of *Leges Marchiarum* suggests that the role of authoritative stewardship may extend beyond providing focal points in games that represent pure coordination problems with little conflict of interest. On the contrary, it can support complex equilibria in repeated games in which conflicting motives are prevalent but possibilities of avoiding deadweight loss are nonetheless present.

Legally Enforceable Customs: Customary Standards of Diligence, Commercial Practices, Colonial and Post-Colonial “Customary Law”

As previously elaborated, legally enforceable customs can be understood as sociological facts that are officially recognized as foundational for legally binding rules and enforced by a specialized enforcement agent (e.g., by state agencies).²⁰ In contemporary Western legal systems, legally enforceable custom can be exemplified by those rules of domestic law that reflect community practices. Customary standards of diligence in torts in the United States, e.g., in boating accidents or medical malpractice, are one natural example, even though researchers observe gradual departure from custom in both areas (Epstein, 1992; Peters, 2000). Business practices incorporated into American commercial law are another example (Bernstein, 1999).

The rationale for invoking custom in such cases is the conviction that the community of specialized agents can, *via* learning-by-doing, develop knowledge and consciousness of appropriate norms of behavior that are superior to the knowledge legislators or courts can possess. This can be due to both their advantage in technical or craftsmanship expertise and their awareness of specific circumstances of time and place.

Historically, the category of legally enforceable custom conceptually squares also with the colonial construct of “customary law”. Colonial customary law amounted to practices of indigenous peoples admitted by the colonial authorities as substantive legal rules for respective indigenous communities and granted enforcement in courts (Hooker, 1975). The admission was normally conditioned on non-contradiction with the colonizer’s vision of decent morals (“repugnancy clause”) and with broader political order. Similar approaches to customary law continue today in many post-colonial countries, mostly in Sub-Saharan Africa (Zenker & Hoehne, 2018).

²⁰ Kim (2007, 2009) argues that this concept of custom is specific to the broadly understood Western legal tradition and thus absent from other legal cultures, e.g., Far Eastern, that were able to develop well-organized legal systems with strong hierarchical enforcement.

However, the translation of indigenous practices into legal frameworks foreign to their originators frequently transformed the meaning and functions of said practices. Therefore, researchers studying colonial and post-colonial legal systems have often found a significant divergence between the pre-colonial social arrangements and the technocratic customary law manufactured in the process of colonization (Snyder, 1981; Moore, 1986; Kim, 2009). This finding led them to distinguish custom “pronounced in court judgments, textbooks, and codifications” on the one hand and “living customary law” that consists of “norms that regulate people’s daily lives” on the other (Diala, 2017, p. 143). The distinction arguably reflects the forced institutional transition of ambient norms or pure customs that have been products of a long *durée* into a structurally different enforceable custom.

Fixed Relational Rules and Arbitrated Fixed Relational Rules: International Agreements and Other Agreements Under Anarchy, Self-Governance of Religious Diasporas

The previous section suggested that fixed relational rules constitute a “degenerate” type of spontaneous norms. Rules stipulated in such agreements are constructed or brought forward beforehand and proclaimed with a forward-looking intention. Yet fixed relational rules still exhibit the other two features associated with governance by spontaneous norms: decentralized sanctioning and the lack of authoritative stewardship. They exist in an environment of self-help and no interpretative coordination.

Such a combination of conditions is typical for international agreements. Agreements between international actors are deliberately formulated and almost always put down in writing. However, the anarchy of equivalent states is the ever-present feature of the contemporary international order, naturally precluding the emergence of a distinguished enforcement agent in the system. Moreover, as noticed by Guzman, “most international agreements exist without any form of dispute resolution. Agreements might be entirely silent

on the question of dispute resolution or might include the singularly unhelpful command that the parties work together to resolve the dispute” (Guzman, 2008, p. 50). Of course, in present-day realities, the possibility to use an external dispute resolution mechanism is open to states, even if it is not generally used.²¹ In such a case, the international agreement would take the form of an *arbitrated* fixed relational rule – i.e., the final category in the classification of spontaneous norms.

Other real-world cases of arbitrated fixed relational rules might be sought outside of the realm of international relations. For example, certain religious diasporas constitute an interesting case. Communities bound together by confession may be subject to a foreign or secular law that does not recognize their rights and duties of religious nature. In such cases, it is often observed that religious doctrine provides normative guidance while its socially binding interpretation rests in the hands of religious leaders.

Examples may include American Mennonites that follow the Dordrecht Confession of Faith or several Muslim diasporas in Europe. Mennonites are obligated by their faith to live in strict accordance with the Dordrecht Confession. Mennonite religious leaders possess supreme authority in the matters of interpreting the document and also the authority to identify and announce the events in which infringements have occurred. While they possess no ability to forcibly subordinate their fellow believers to their will, the special position of religious leaders in Mennonite communities allows them to effectively coordinate social sanctions against transgressors (Gruter, 1986). A similar phenomenon can be observed among parts of the contemporary Muslim diasporas in England and Germany (The British Home Office – Siddiqui et al., 2018; Jaraba, 2020).

²¹ The Statute of the ICJ in article 36 stipulates that “The states parties to the present Statute may at any time declare that they recognise as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
a. the interpretation of a treaty;
(...)
d. the nature or extent of the reparation to be made for the breach of an international obligation.”

Finally, one more real-world instance representing an arbitrated fixed relational rule can be found in the well-studied social system of early medieval Iceland. Iceland in the period between the 9th century, when the Vikings arrived on the island, and 1262, when they pledged loyalty to Norwegian king Hakon, is often considered an example of a “stateless society” (e.g., Friedman, 1979; Miller, 1996; Geloso & Leeson, 2020). The country at that time was a loose confederation of small chieftaincies that were themselves internally divided. Even by the standards of feudal Europe, Icelanders were devoid of political authority and organized force, having neither dukes nor any equivalent (individual or corporate) of a similar figure.²²

Despite these anarchic conditions, inhabitants of the island developed a sophisticated system of both legislation and organized adjudication. Laws of Iceland were discussed and legislated during annual assemblies of freemen (*Allthing*) held at a designated place, the Law Rock, and subsequently memorized by a special public officer called a lawspeaker. The sole role of the lawspeaker was to accumulate knowledge of Iceland's laws and recite them at request – in particular, during each Law Rock assembly.

Beyond their legislative function, The Law Rock meetings decided disputes between individual Vikings or families and could in effect impose obligations onto parties. The outcomes of the disputes settled during the Law Rock meetings were enforced through a sophisticated system of private vigilantism authorized and regulated by the *Allthing*. Icelandic laws attempted “to limit the permissible range of self-help, but it did not try to prohibit altogether. It sought to limit the class of expiators and the time and place where self-help could be legitimately taken” (Miller, 1996, p. 232). Compliance with a decision made in one year could be verified during the following assembly. Persistent refusals to comply would

²² Stein-Wilkeshuis (1986) elegantly summarizes the consequences of the anarchic conditions for the maintenance of a legal order: “From the very beginning the Icelanders were well aware of the fact that a well-functioning society could not be attained without the existence and observation of laws, even more so since there was no central authority with an executive power. Every legal action, be it a summons, prosecution or punishment, entirely depended on private initiative, and therefore it was very necessary that everybody knew exactly what were his rights and duties.” (p. 40)

result in declaring the transgressor an outlaw to whom no one was allowed to offer help or shelter (Friedman, 1979).

In sum, medieval Iceland combined the three characteristics of the ideal type of arbitrated fixed relational rule: explicit rulemaking in the form of *Allthing* with a legal knowledge repository in the figure of the lawspeaker; authoritative stewardship in the form of dispute resolution meetings during the *Allthing*; and exclusive reliance on decentralized sanctions for enforcement.

Discussion

The primary ambition of this paper was to conceptually organize the mosaic of law and economics research of spontaneous norms, extralegal governance, custom, and the like. The volume of existing literature makes it implausible to deliver an all-encompassing picture of the field. Still, it seems fair to believe that the classifications outlined in the previous sections may help identify further research questions and better understand the existing ones from the law and economics standpoint.

This section proposes three research questions that can be accurately addressed with the help of the theoretical framework developed in the paper. The first touches upon the phenomenon of the declining role of spontaneous norms in legal history and their supersedure with more “rigid” or “formal” modes of social organization. The second, and related, deals with the question of why customary and traditional law continues today in some societies while having declined in others. Finally, the framework can be used to address the problem of the viability of governance by spontaneous, or bottom-up rules, instead of state-made and state-administered laws. The three applications of the classification scheme will be now discussed one by one.

Why Have Spontaneous Norms Declined Throughout Legal History?

Many legal historians have emphasized a transition from spontaneous, unwritten, and by contemporary standards informal forms of social control toward more formalized, exact, and professionalized legal mechanisms. Researchers of archaic law also pay careful attention to the evidence of social norms available in documents like the Bible (e.g., Parisi et al., 2020). They assume that subsequent forms of early law bear a structural resemblance to the social norms from which they supposedly developed. Custom is also recognized as the most important source of law at the beginning of European legal development.

However, the role of social norms and custom declined over time, giving way to other sources of rules (e.g., Van Caenegem, 1988). This transition has been documented in many case studies (e.g., Kadens, 2019; Masferrer, 2019; Rossi & Spagano, 2018; Thompson, 2015 [1992]; Zasu, 2007; Harding, 2001; Assier-Andrieu, 1983; Weber, 1978 [1921]), and the process continues even today. As Epstein (1998) notes, “It seems clear that the dominant trend of the past century has been towards the demotion of customary norms and to the rise of what has been called legal centrism” (p. 579).²³

The gradual qualitative transformation of law has not been limited to sources of rules (custom *versus* explicit sources). More broadly, the process comprises the departure from “spontaneous” social regulation in all three dimensions identified in the preceding sections. For example, Schauer (2015) notices that the past two centuries have been marked by a conspicuous centralization of law enforcement capabilities.²⁴ In turn, Harding (2001),

²³ In the European context, the gradual displacement of spontaneous norms in legal history was a process comprising multiple substeps. Their list includes, but is not limited to, black-lettering (i.e., putting orally transmitting rules into a written form), “homologation” (i.e., standardization of customary norms in a single official document), doctrinal marginalization, and monopolization of lawmaking (see, e.g., Glenn, 1997; Dalhuisen, 2008; Rossi & Spagano, 2018; Masferrer, 2019).

²⁴ Schauer (2015) points out that “[t]oday, individuals, businesses, and associations operate within the constraints of the administrative state to a much greater extent than Bentham and Austin could ever have imagined in the nineteenth century. And, importantly, the modern administrative state is an environment of pervasive regulation, with a mass of detailed regulations being enforced by the threat of criminal fines, civil liability, loss of privileges, and a panoply of other sanctions. Moreover, much of the contemporary regulatory environment, although often effective in implementing worthwhile environmental, health, safety, consumer protection, financial stability, and other policy goals, rarely inspires voluntary compliance.” (p. 43-44) In the same vein, Friedman (1995) emphasizes that in 18th century England, “[p]rosecution of almost all criminal offenses was private, usually by the victim” (p. 475). The shift toward law enforcement by “paid police” occurred only in the beginning of the next century.

Hadfield and Weingast (2013), Carugati, Hadfield, and Weingast (2015), and, in the international context, Ginsburg and McAdams (2004) describe historical case studies of the emergence of centralized rule-interpreting institutions from environments of loose and ambiguous *de facto* norms.

Depending on their background and preferred legal theory, scholars offer several explanations for the decline of spontaneous norms. Conventional explanations typically focus on factors such as political changes and developments in the legal culture (e.g., Bellomo, 1995; Brundage, 2008). On the other hand, likely because of insufficient conceptual clarity, the problem has attracted only limited attention in law and economics (Rossi & Spagano, 2018 and De Geest, 2020 are exceptions to this rule).

The suggested law and economics interpretation of this problem developed in this paper is relatively simple. The journey from spontaneous norms to contemporary legal centrism can be separated into three parts: (i) the demise of “implicit” rules, (ii) the centralization of enforcement, and (iii) the solidification of authoritative stewardship. The explanation for the qualitative changes in the dominant forms of social control should take into account, and attempt to elucidate, these three conceptually distinct phenomena.

This interpretation may be helpful for understanding the economic forces behind each of said transitions. As suggested in the earlier sections, the alternative between backward-looking and forward-looking rulemaking regimes can be portrayed as a tradeoff between higher flexibility of rules on the one hand and a higher level of certainty on the other.²⁵

Likewise, the centralization of enforcement presents a natural tradeoff between the advantages of the division of labor and the risk of the misuse of concentrated enforcement

²⁵ Unwritten common norms are generally considered more adaptable to ever-changing circumstances and, by their very nature, less prone to capture by vested interest. However, the procedures required to become acquainted with such norms can be prohibitively costly compared to rules reduced to an easily accessible writing form (Rossi and Spagano 2018). Moreover, historically enrooted norms may be prone to evolutionary traps and difficult to reform. The introduction of a set of explicit norms that abrogate and replace them can be one of few viable solutions to an evolutionary dead end.

power. Finally, the introduction of an authoritative steward should also be seen as a tradeoff between coordination and decentralized idiosyncratic interpretation of norms.

What is the Role of Customary, Traditional, etc. Laws in Contemporary Domestic Legal Systems?

The breakdown of spontaneous norms into three dimensions may facilitate an analysis of such norms in law and economics terms. In turn, this may prove helpful in understanding present-day legal and extralegal realities. Indeed, extralegal and semi-legal governance mechanisms operating in contemporary societies have attracted researchers' attention in the past decades. In legal anthropology, the interest in the operation of traditional law in parallel with modern-day legal systems gave rise to the entire subfield of "legal pluralism".

As already hinted in the previous sections, researchers described many case studies that emphasize the important role played by indigenous law in present-day developing countries, mostly in Africa (e.g., Worby, 1997; Igbokwe, 1998) and South Asia (e.g., Chiba, 1993). Moreover, since the 1990s, sociologists study the "informal" administration of justice by bottom-up emergent bodies within migrant communities in Europe (e.g., Jaraba, 2020). In Great Britain, the concerns over the consistency between the unofficial Sharia councils and the principles of the rule of law caused the launch of an investigation by the British Home Department (The British Home Office – Siddiqui et al., 2018). However, the contemporary role of traditional law has not lived to see many cross-sectional empirical works or theoretical inquiries from the law and economics perspective. As an exception, Gutmann and Voigt (2020) have made one cross-country study.²⁶

²⁶ The evidence from the study suggests that reliance on what the authors label "traditional law" is statistically associated with lower per capita income and lower levels of rule of law. Moreover, historical and socio-geographical factors also play a role in its prevalence: it is reduced by a longer history of statehood and a higher share of descendants of European ancestry.

However, the study has several limitations. First, it blends several dissimilar types of spontaneous norms (e.g., ambient norms, pure customs, and those fixed relational rules whose substantive part is of religious nature). Second, due to data availability, it relies heavily on the data on recognition of customary and traditional law by state authorities, and therefore risks overrepresenting legally enforceable customs.

The typology presented in the paper may contribute to clarifying the problem of the ongoing importance of spontaneous norms in several ways. First, it allows for setting clearer boundaries between various rule-based methods of social organization and also highlights their similarities and dissimilarities. The typology differentiates between entirely non-legal norms (i.e., ambient norms) and various semi-legal norms that exhibit only some features of contemporary state law while lacking others. Thus, it may provide a more precise formulation of the research problem in question.

For example, the continuing reliance on Islamic law in family matters among Muslims in Europe is arguably based on explicit rules of religious origin, enforced non-legally through social sanctions, and often administered by local leaders who enjoy high esteem in the community. As suggested in the previous section, it should be thus considered a case of arbitrated fixed relational rule. In contradistinction, customary justice in central Africa often uses non-written substantive rules and thus belongs to the pure custom type.

Under Which Conditions is Governance by Spontaneous Rules Viable?

Many classically liberal or libertarian political philosophers consider governance by spontaneous norms a worthy alternative to state-centric legal order. They maintain that a social system with a minimum or outright nonexistent role of government in making, administering, and enforcing the law is viable and desirable.²⁷ While opposing the coercive and one-size-fits-all nature of contemporary state-run legal systems, these authors believe that privately created or spontaneously emergent rules may be at least equally efficacious in ordering behavior (e.g., Friedman, 1989 [1973]; Benson, 1990; Kinsella, 1995).²⁸ When justifying this position from the law and economics perspective, researchers rely on

²⁷ The fascination with stateless law is often visible already in the titles of books, papers, or chapters: “Private Creation and Enforcement of Law: A Historical Case” (Friedman, 1979); “The Enterprise of Law: Justice without the State” (Benson, 1990); “Law without the State” (Murphy, 2002; Hadfield & Weingast, 2013); “The Laws of Lawlessness.” (Leeson, 2009)

²⁸ This statement is sometimes qualified. For example, Taylor (1982) claims that the provision of social order under anarchy requires the existence of a “community”, i.e., a multi-faced network of dependencies (e.g., familial, religious, and professional) between individuals.

theoretical models and invoke numerous case studies, both historical and contemporary (see Powell & Stringham, 2009 for an extensive survey).

However, the attempts to undermine the state-centric view of the law often lack due clarity. It is not always certain what kind of alternative the critics envision and where the emphasis of their arguments lies. This ambiguity is also reflected in the fact that the umbrella term “private ordering” used to denote such alternatives covers a broad array of phenomena like “rancher/farmer relations, (...) extralegal contractual relations among wholesale diamond traders, (...) aboriginal customs in Papua New Guinea, (...) the rulemaking procedures of the American Law Institute” (Katz, 1995, p. 1745). It is far from obvious how they are related to each other and why they should be considered a single category. Yet they all, alongside many others, are used by the critics of state-centric legal systems to illustrate their argument.

Against this unstructured picture, this paper suggests a refinement of the normative claim in question. It proposes a fine-grained theoretical framework that decomposes the notion of “legal centrism” into three elements: rulemaking, enforcement, and interpretation. By rephrasing the argument in this framework, the discussion about the possibility of private provision of rule-based governance can gain the clarity that it is currently missing. Moreover, such a step can more precisely indicate the socioeconomic preconditions of the envisioned legal order. In other words, the typology developed in the paper can be a useful tool in future normative debates, both constructive and critical, on law from the classical liberal or libertarian standpoint.

Concluding Remarks

This paper has made a simple claim: the dissipated research field of “extralegal”, law-like, spontaneous norms and institutions can be organized according to three well-known principles. The proposed organization results in the development of a scheme of ideal types of spontaneous norms. The typology allows for a convenient classification of governance by

norms that lack at least some characteristics associated with the legal rules of contemporary domestic legal systems.

However, the advantages of the typology extend beyond mere convenience. The paper further does two things. First, it attempted to suggest how the identified ideal types of spontaneous norms can be represented game-theoretically. While the detailed modeling solutions depend on the specific features of the represented object, the suggestions emphasize the structural differences between the ideal types and allow for an economically informed interpretation of the typology. Second, the paper illustrates the classification with real-life counterparts. By so doing, it points out that seemingly dissimilar normative regimes (e.g., primitive law and customary international law; war-waging norms and domestic social norms) bear structural similarities. While such suggestions have occasionally appeared in earlier scholarship, they are given a more substantiated formulation in the paper.

Finally, the paper indicates several applications of the classification in investigating specific research problems in legal history, institutional economics, and political philosophy.

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