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The University of Texas School of Law

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1. E. Ernest Goldstein, *Thank You Fidel! Or How the International Law Society and the* Texas International Law Journal *Were Born*, 30 TEX. INT'L L.J. 223 (1995).

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Introduction: Lessons from the History of Custom

EMILY KADENS*

The articles in this symposium issue demonstrate the problems and potential in the use of custom in modern legal systems. Marie Kim describes South Korea's struggles to fit custom, both age-old and possibly recently invented, into a modern constitutional structure. Professors Modéer and Ørebech detail the different directions Eastern and Western Scandinavian countries have taken, with Sweden showing more tolerance for custom in its property law and treatment of the Sàmi and Norway adhering to a code-based system that only begrudgingly allows custom to sneak in at the margins. One of those margins in Europe, as Pascale Fournier and Pascal McDougall's Article demonstrates, is the family law customs of Jewish and Muslim minorities in Germany, an issue that will likely prove a continuing challenge to the civil law systems of Europe. Professor Kostritsky undertakes an extensive survey of the various ways in which law and economics adherents use and try to define norms, a form of custom that has emerged from the shadows to prove that custom has not completely disappeared even in our heavily regulated and legalized society. By contrast, Henry Smith suggests that the age of custom is largely over in American law, at least in the field of property, because custom can only function within relatively small communities and cannot provide generalizable rules of law. Finally, Professor Schauer offers Hartian insight into the perennially difficult question of how to define custom, a problem with which jurists have been struggling since at least the twelfth century.

Despite the current flood of interest in bottom-up lawmaking that these articles represent, custom is preeminently pre-modern law—law before the common use of legislation, before the sovereign nation-state.[1] And if the medieval jurists peered over our shoulders they would, I suspect, conclude that lawyers today do not quite understand how custom works.

This should come as no real surprise. The jurists of the medieval and early modern periods lived in a world saturated with customs that formed many, even most, of the legally-enforceable rules of decision governing their lives and their society.[2] They had to try to understand it. We live in a world in which custom is

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1. *See* Thomas Barfield, *Culture and Custom in Nation-Building: Law in Afghanistan*, 60 ME. L. REV. 347, 355 (2008) (pointing out that custom can arise in the absence of state-made law).

2. Walter Ullmann, *Bartolus on Customary Law*, 52 JURIDICAL REV. 265, 265–66 (1940).

something of a novelty and in which we instinctively hold positivist notions about the sources and nature of law. Wrapping our modern minds around pre-modern custom would require putting aside notions of law that have had two or three hundred years to take hold. But if we were to try, we might find that the medieval jurists have something valuable to teach us about custom and how we currently use the concept.

First, and perhaps most importantly, studying the writings of the Roman and canon law jurists of Europe between the twelfth and seventeenth centuries would reassure us that our confusion about custom is not new. Both then and now, legal scholars have begun with a definition of custom that derives ultimately from the Romans and contains two parts: an objective requirement that an act be done repeatedly over time, and a subjective requirement that the people engaging in the act do so out of a sense of legal obligation, what has since the nineteenth century been called the *opinio juris*.[3]

Looking at the way the jurists treated this definition of custom, we might realize that, despite sharing the same definition with them, we do not have quite the same respect for it. Because they defined custom as a form of law, the jurists understood that not every behavior, no matter how longstanding or binding, deserved to be denominated a custom. As a consequence, they created elaborate distinctions dividing custom (repeat behavior binding the whole relevant community due to the "people's will or their tacit consent")[4] from other categories.[5] They drew the first distinction between mere longstanding practices (*usus* or *mos*) and custom. The former lacked the requisite *opinio juris*. Custom required both *usus* and the sense of being bound.[6]

Early on in their discussions of custom, the jurists identified two other distinctions: prescription, which is similar to what common lawyers call adverse possession, and implied contract terms. Both prescription and custom emerge over time, but prescription creates rights only between two parties, not among the public as a whole. Furthermore, prescription must be acquired in good faith, not so with custom. Prescription does not require the consent of the person adversely affected; whereas custom requires the consent of the community or a majority of it.[7] Implied contract terms arise from tacit consent, but they only bind the parties who are held to have actually given consent; custom binds the whole community even non-consenters, at least once a majority of them have tacitly consented to it.[8] Last, the jurists recognized that courts and chanceries created processual habits, what we

3. *See* Emily Kadens & Ernest A. Young, *How Customary is Customary International Law?*, 54 WM. & MARY L. REV. 885, 888 (2013) (detailing medieval jurists' Roman-law based definition of custom and how modern scholars build off the premise of this definition by using "the principles of state action plus *opinio juris* (the sense of being bound) to define custom").

4. PETRUS REBUFFUS, *Tractatus de consuetudine, usu, et stylo, in judiciis valde frequens et utilis* [*Treatise on Custom, Practice, Style, Exceedingly Frequent and Useful in Trials*], *in* IN CONSTITUTIONES REGIAS COMMENTARIUS [COMMENTARIES ON ROYAL LEGISLATION] 473 para. 26 (Amsterdam, Johannes Schipper 1668) ("voluntas populi, seu consensus tacitus").

5. BARTOLUS, IN PRIMAM DIGESTI VETERIS PARTEM COMMENTARIA [COMMENTARY ON THE FIRST PART OF THE OLD DIGEST] 19r. (Turin, Nicholaus Beuilaquam 1574) (*repetitio ad* Dig. 1.3.32, § 10) (listing categories).

6. *Id.* (calling *usus* the remote cause ("causa remota") of custom).

7. *See* REBUFFUS, *supra* note 4, at 472–74 paras. 14–35 (providing twelve ways in which prescription differs from custom).

8. *See* Ullmann, *supra* note 2, at 270 (describing Bartolus's discussion of the difference between contract and custom).

might call the "local rules" of a court or government office. These they called "*stylus curiae*," or the style of the court. While these rules arose from repeat behavior over time, they were only binding so long as the judge enforced them. The populace had no opportunity to accept or to refuse to consent.[9]

In creating these categories, the jurists recognized that drawing useful legal distinctions demanded creating accurate legal categories. Custom binding as law and usages binding as mere social norms, custom binding everyone and prescription or implied terms binding only the parties, and custom arising bottom-up and local rules imposed top-down by courts do not all have the same legal implications.

Of course, having elucidated their categories of binding acts, the jurists would have to admit that pre-modern society, both legal and lay, did little better than we do at keeping these categories apart in practice. They lazily used the word custom to refer to *stylus*,[10] habit, and *usus*.[11] Common people called many things custom, including the particular obligations or payments owed to a lord,[12] and even the written codifications consisting of local customs, aldermanic regulations, important public contracts, judicial opinions, and charters granted to a town.[13] Indeed the sixteenth-century Bruges lawyer Joost de Damhouder pithily articulated a medieval legal truism that would confound modern lawyers. He made the common distinction between written and unwritten law. The former consisted of the legislation of the Roman emperor as well as the writings of the Roman jurists. By contrast, "[u]nwritten law is those statutes, ordinances, public edicts, and received customs which were made use of in individual regions and established in these regions as convenient or necessary."[14] Thus, even written legislation could, somehow, be unwritten law, and thus, effectively, custom.

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9. 1 JOSEPHUS MASCARDUS, DE PROBATIONIBUS [ON EVIDENCE] 416 (Frankfurt am Main, Erasmus Kempfferus 1619) (*conclusio* 423, para. 34).

10. André Sergène, *Le precedent judiciare au Moyen-Age* [*Judicial Precedent in the Middle Ages*], 39 REVUE HISTORIQUE DE DROIT FRANÇAIS ET ÉTRANGER [HISTORICAL REVIEW OF FRENCH AND FOREIGN LAW] 224, 235 (1961) (quoting a case from 1322 conflating custom and *stylus curiae*: "ad probandum dictas consuetudines, juxta stilum curie nostre" ["in order to prove the said customs, according to the style of our court"]).

11. BARTOLUS, *supra* note 5, at 19r. (*repetitio ad* Dig. 1.3.32, § 6) (explaining that custom in common parlance has three meanings: instinct, habit, and custom-as-law and that only the last is the province of legal discourse).

12. Paul Brand, *Law and Custom in the English Thirteenth Century Common Law*, *in* CUSTOM: THE DEVELOPMENT AND USE OF A LEGAL CONCEPT IN THE MIDDLE AGES 17, 18 (Per Andersen & Mia Münster-Swendsen eds., 2009); John G.H. Hudson, *Introduction: Customs, Laws, and the Interpretation of Medieval Law*, *in* CUSTOM: THE DEVELOPMENT AND USE OF A LEGAL CONCEPT IN THE MIDDLE AGES 2 (Per Andersen & Mia Münster-Swendsen eds., 2009).

13. John Gilissen, *Loi et Coutume: quelques qspects de l'interpénétration des sources du droit dans l'ancien droit belge* [*Law and Custom: Some Aspects of the Interpretation of the Sources of Law in Historical Belgian Law*], 21 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS [LEGAL HIST. REV.] 257, 278 (1953) (Fr.).

14. JOOST DE DAMHOUDER, PRAXIS RERUM CIVILIUM, PRAETORIBUS, PROPRAETORIBUS, CONSULIBUS, PROCONSULIBUS, MAGISTRATIBUS [PRACTICE IN CIVIL TRIALS] 211 paras. 8–10 (Antwerp, Johannes Bellerus 1569) ("Haec cautum iura civilia sunt duplicia. Alia enim sunt iura scripta, alia iura non scripta. Iura scripta sunt qu[a]e Imperatores Romani cum suis iurisperitis, & co[n]siliarijs condiderunt, & servanda statuerunt, qualia sunt quae Diocletianus, Antoninus pius, Iustinian[us], Theodosius, Arcadius, suis scriptis nobis reliquerunt. Iura aute[m] no[n] scripta, sunt statuta, ordinationes, publica edicta, & receptae consuetudines, quae passim in suis singulis regionibus usurpa[n]tur, & iuxta earunde[m] regionum co[m]moditatem aut necessitatem sunt co[n]stituta.").

As lawyers know well today, the standard definition of custom as repeat action over time plus *opinio juris* creates immediate difficulties.[15] How is *opinio juris* to be ascertained? How long does the behavior have to have continued, and how many times does it have to have been repeated before it qualifies as customary? The medieval jurists threw out some answers, though many jurists did not actually agree with the received answers and the debates continued for centuries.[16] The juristic commentaries often recited that at least two acts must be proved to establish a custom, though some jurists believed that as many acts were required as demonstrated the tacit consent.[17] The commentaries held that the acts must have occurred over a span of at least ten years in the civil law, forty years in the canon law, and since time immemorial when the custom directly contravened a statute or the prerogatives of a prince.[18] And one would know a community believed itself to be obligated to perform the behavior when it demonstrated this by its acts and by how well known the relevant behavior was to the community.[19]

Beyond their simple, frequently formalist rules, however, the jurists recognized deeper conundrums about custom that still trouble us today. They asked whether mere repeat behavior could prove *opinio juris* in the absence of any contravention and thus any opportunity for the community to sanction an offender. No, they decided, because it would not make sense to say that a pattern of behavior followed without contradiction for a long time did not constitute a custom.[20] The jurists even tried out the theory of instant custom, asking if a single act done at a single moment shows the requisite *opinio juris*, why should it not create a custom?[21]

Finally, they debated the Austinian possibility that a so-called custom had to be adjudicated in court before it could be known to be obligatory.[22] Eventually, they decided that it did not because they realized something modern lawyers sometimes

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15. *See* DAVID J. BEDERMAN, CUSTOM AS A SOURCE OF LAW ix (2010) (discussing the difficult questions custom raises).

16. *See, e.g.*, 1 MASCARDUS, *supra* note 9, at 418–19 (collecting the disputes and received wisdom of three centuries of jurists on the issue of custom) (*conclusio* 424, paras. 11, 15 (disputes about witnesses), paras. 17–21 (disputes about the number of acts), para. 29 (disputes about length of time to show custom)); REBUFFUS, *supra* note 4, at 474 para. 41 (discussing the argument that as many acts were needed as showed both a repeat practice and tacit consent).

17. 1 MASCARDUS, *supra* note 9, at 418 (*conclusio* 424, paras. 13, 15).

18. *Id.* at 419–20 (*conclusio* 424, paras. 29–30, 32, 40).

19. *See* ANGELUS GAMBILIONIBUS DE ARETIO, IN QUATUOR INSTITUTIONUM IUSTINIANI LIBROS COMMENTARIA [COMMENTARIES ON THE FOUR BOOKS OF THE INSTITUTES OF JUSTINIAN] 18r. (Venice, Franciscius de Franciscis Senesem, 1574) (commentary on JI 1.2.9 "Ex non scripto," n.10–11) ("Na[m] tu[n]c p[rae]sumitur populus scire, q[uo]d consentiat: & co[n]sensus est principiu[m] consuetudinis. Alij d[icu]nt q[uod] ab uno actu publico, & notorio, incipit co[n]sensus, & per [conse]n[su]s incipit nasci consuetudo. . . . [A]liter non v[idetu]r congrue posse dici, cum non semper binus actus sic tra[n]seat in notitia[m] populi, q[uo]d tacitus eius consensus possit colligi, quia forte actus illi non fueru[n]t manifesti, nec ita ponderosi, q[uod] verisimiliter potuerint in notitia[m] populi transire nec esse, quia ut patet ex legibus . . . .").

20. L. WAELKENS, LA THÉORIE DE LA COUTUME CHEZ JACQUES DE RÉVIGNY [THE THEORY OF CUSTOM OF JACQUES DE RÉVIGNY] 488–90 (1984) (*repetitio ad* Dig. 1.3.32, § 3) (noting that when a community follows a behavior without dispute "there is greater consensus than if it is often adjudicated between many" ["maior est consensus quam si esset sic inter plures et pluries iudicatum"]).

21. 1 MASCARDUS, *supra* note 9, at 420 (*conclusio* 424, para. 49) (calling such custom "ficta et intitulata," which seems to have the sense of "contrived and so-called").

22. 1 ODOFREDUS, LECTURA SUPER DIGESTO VETERI [COMMENTARIES ON THE OLD DIGEST] 16r. (Lyon, Petrus Compater & Blasius Guido, 1550) (reprint Bologna, Forni 1967) (*repetitio ad* Dig. 1.3.32, § 14).

do not: namely, that custom has a dual nature. The late fifteenth-century German jurist Ulrich Zasius called these the judicial and extrajudicial sides of custom:

> Judicial is when two similar judicial sentences concerning some matter have been produced [as evidence of the custom], that is, when [the custom] has been adjudicated at least twice in similar cases in adversarial proceedings. Extrajudicial is that which has been introduced by the longstanding practice of the populace and which has existed for at least ten years.[23]

In other words, a community could evolve a custom over time through repeat behavior to which it felt bound to adhere. This behavior-custom was law just as powerful as any piece of legislation. When someone finally violated the custom, the issue of the custom came before the court. At that point, the court and the witnesses had to articulate the custom as a rule, and once they did this rule-custom began to take on characteristics we normally associate with formal law.[24]

Thus, the jurists intuited a key insight about custom: it did not always work as statutes worked. Modern lawyers may have difficulty comprehending this because we take an unconsciously positivist view of custom. We assume that because we describe them using the language of statutes, customs must behave like statutes. But they do not, because custom is as much anthropology as much as it is law.[25] The people in a community join in a behavior over time until they have come to believe they are required to do so. But arising from acts rather than words, that behavior can encompass within it a certain amount of acceptable variety. As the sixteenth-century French jurist, Petrus Rebuffus, wrote: "Panormitanus says that custom is difficult to prove. Many believe they can prove it, but they are wrong. Hostiensis and others say that it is almost impossible to prove custom because sometimes it is black, and sometimes it is white."[26] Nicolaus de Tudeschis, known as Panormitanus (1386–1445), was the leading canon law scholar of the fifteenth century. Henry of Segusio, called Hostiensis (c. 1200–1271), was one of the greatest of all medieval canon lawyers. These men knew whereof they spoke.

We have a great deal of historical evidence to back them up. The author of a thirteenth-century collection of customs of the Spanish town of Lérida justified his work on the grounds that certain people "affirmed the custom, when the custom was in their favor. But in a similar case, when the custom went against them, they declared it was not the custom."[27] Rebuffus pointed out that courts ruling on a

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23. UDALRICUS ZASIUS, IN PRIMAM DIGESTORUM PARTEM PARATITLA [PARATITLES ON THE FIRST PART OF THE DIGEST] 8 (Basel, Michael Ising 1539) ("Iudicialis, quando duae sententiae co[n]formes super aliquo negocio productae sunt, id est, quando ad minus bis iudicatam est in causis similibus in iudicio co[n]tradictorio. Extraiudicialis, quae per diuturnu[m] usum populi indicitur, ad quod ad minus decem anni exigu[n]tur") (internal citations omitted); *see also* 1 ODOFREDUS, *supra* note 22, at 16r. (*repetitio ad* Dig. 1.3.32, § 16) (expressing a similar sentiment several centuries earlier).

24. Kadens & Young, *supra* note 3, at 895–900 (explaining this theory in greater detail).

25. Laurent Mayali, *La Coutume dans la doctrine romaniste au Moyen Âge* [*Custom in the Medieval Roman Law*], *in* 2 LA COUTUME [CUSTOM] 1, 12 (1990) (Fr.).

26. REBUFFUS, *supra* note 4, at 480 (art. I, gl. 3) ("Panor[mitanus] dicit difficillimum esse probare consuetudinem. Et multi credunt probare illam, sed aberrant. Host[iensis] et alii dicunt esse quasi impossibile probare consuetudinem, quia modo alba, modo nigra.") [internal citations omitted].

27. COSTUMBRES DE LÉRIDA 17 (Pilar Loscertales de Valdeavellano ed., 1946) ("dedi aliquantulam operam ut consuetudines ciuitatis uarias et diuersas in unum colligerem et scriptis comprehenderem ut aufferretur quibusdam occasio malignandi qui quando erat pro eis consuetudo et esse consuetudinem

question of custom acted with discretion and considered the equities, thus presumably they were influenced by the stories of the litigants before them.[28] This comports with the observation of the English legal historian David Ibbetson that saying "[t]hat something was customary was a backward-looking reason for a forward-looking conclusion, and the more the conclusion was desired the flimsier might be the reason provide for treating it as law."[29]

The malleability of pre-modern custom is likely related to another of its notable features: how wildly it could vary from place to place. As the French royal *Ordonnance de Montil-les-Tours* of 1453 asserted, "it often happens that in one single region, the parties rely on contrary customs and sometimes customs are silent and vary at will . . . ."[30] A half century earlier the author of the *Grand Customal of France* had made a similar observation:

> In one single part of the country [*pays*] there can be diverse usages, styles, and customs. And there are even local customs which exist in one small enclave among several others in the surrounding countryside where that custom has no place and where [the customs] will be totally different from [those] in that small location.[31]

The jurists even included this issue as a common question in their teaching: What custom do you follow if the custom is X in the town of the plaintiff, Y in the town of the defendant, and Z in the town of the judge?[32]

One result of the malleability and localism of custom was that it was easy to claim, even falsely, by litigants seeking an advantage. As a consequence, the jurists, no doubt made skeptical by their frequent experience with such claims, tried to make custom harder to prove. They developed a set of procedural rules to control the introduction of custom as rules of decision, and the unscientific impression left by a perusal of printed collections of *consilia*, or opinions of counsel, suggests they were much more likely to find the alleger had failed to prove the custom than otherwise.[33]

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affirmabant. Si contra eos in consimili casu allegabatur non esse consuetudinem asserebant.").

28. REBUFFUS, *supra* note 4, at 473 ("ubi etiam dicit in consuetudine considerari aequitatem"); Lloyd Bonfield, *The Nature of Customary Law in the Manor Courts of Medieval England*, 31 COMPARATIVE STUDIES IN SOCIETY AND HISTORY 514, 521 (1989).

29. David Ibbetson, *Custom in Medieval Law*, *in* THE NATURE OF CUSTOMARY LAW 174 (Amanda Perreau-Sausine & James Bernard Murphy eds., 2007); *see also* M. T. Clanchy, *Remembering the Past and the Good Old Law*, 55 HISTORY 165, 172 (1970) (explaining that historians have found that custom is malleable and new, rather than fixed and old).

30. ALAN WATSON, THE EVOLUTION OF WESTERN PRIVATE LAW 97 (expanded ed. 2001).

31. JACQUES D'ABLEIGES, LE GRAND COUTUMIER DE FRANCE [THE GRAND CUSTOMAL OF FRANCE] 599 (E. Laboulaye & R. Dareste eds., Paris, Auguste Durand & Pedone-Lauriel, 1868) ("Car en ung seul pais peult l'en avoir divers usaiges, divers stilles, et divers coustumes. Et y a mesmes coustumes locales qui sont en ung petit lieu enclavé entre plusiers aultres que au pais environs là où coutume n'a point de lieu, et sera toute contraire à ce petit lieu.").

32. GLOSSA ORDINARIA to Cod. 8.52(53).1 ad v. *controversarium*; 1 ODOFREDUS, *supra* note 22, at 16v. (*repetitio ad* Dig. 1.3.32, § 19); *see also* GRATIAN, TREATISE ON LAWS: DECRETUM DD. 1–20 WITH THE ORDINARY GLOSS 43–44 (Augustine Thompson & James Gordley trans., 1993) (D. 12 c. 4, gl. to *usage*) (describing the different choice of law possibilities when the custom of the plaintiff, defendant, and forum differed).

33. This conclusion derives from looking at the *consilia* of Alexander de Imola, Panormitanus, and Petrus Paulus Parisius. The preponderance of negative responses to claims of custom in these *consilia* could, of course, just result from selection bias, for instance, that suits concerning these customs were more likely to be hotly disputed and end up calling for opinions of counsel.

The rules do not seem burdensome on the surface. The person alleging the custom had to make full proof of it. This was normally done through witness testimony and required at least two credible witnesses (or ten in France)[34] testifying to the performance of the customary act for the requisite amount of time (ten years or longer depending upon the custom and whether the issue came within the orbit of civil or canon law).[35] The difficulty arose in the details. Mere testimony that "such was the custom" was considered "silly."[36] The witnesses had to testify to affirmative acts about which they had actual knowledge, and they had to agree on the details.[37] Their testimony had to demonstrate sufficient repetition of the acts as would show the community had tacitly consented to be bound, and the witnesses had to testify to the community's awareness of the acts as a custom.[38]

These requirements left a great deal of discretion to the judge, who could always find insufficient the evidence of tacit consent, length of time, credibility of witnesses, agreement on details, and the awareness of the community. However, local judges may often not have rigorously applied the jurists' rules. We find too many examples in the historical record of customs being found despite contradictory witness testimony.[39]

But the jurists' attitude won out in the end. They tried to understand custom through the lens of formal, written law: defining it, surrounding it with rules, and creating a procedure for it.[40] As state-made law increasingly emerged in the early modern period, custom presented a challenge in its indeterminacy and decentralization, and it had to be controlled. By the modern era, law had become synonymous throughout the European civil law countries with legislation and codification. Even in common law countries, legislation, statutes, and judge-made law, regulated through strict *stare decisis*, reduced the role of custom. This is the mental history we bring to custom today and why we struggle to understand this ancient, but now very often foreign, source of law.

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34. 1 MASCARDUS, *supra* note 9, at 417 (*conclusio* 424, para. 5).

35. *Id.* at 417–19, 421 (*conclusio* 424, paras. 2, 13–14, 23–24, 58).

36. *Id.* at 420 (*conclusio* 424, para. 63) ("Immo testimonium talis testis ita deponentis, videlicet quod ita est consuetudo, est fatuum").

37. *Id.* at 417–18, 419 (*conclusio* 424, paras. 3, 22).

38. *Id.* at 418, 420 (*conclusio* 424, paras. 15, 18, 52–53); ALEXANDER IMOLENSIS, LIBER SECUNDUS CONSILIORUM ALEXANDRI IMOLENSIS [SECOND BOOK OF CONSILIA OF ALEXANDER OF IMOLA] 94r. (Lyon, Thomas Bertheau 1544).

39. *See, e.g.*, 2 LES OLIM OU REGISTRES DES ARRÊTS [THE OLIMS OR REGISTERS OF JUDGMENTS] 678–81 (J-C. Beugnot ed., Paris, Imprimerie Royale 1842) (appeal concerning notorious custom in which witnesses for each side testified to different rules); Alain Wijffels, *Business Relations Between Merchants in Sixteenth-Century Belgian Practice-Orientated Civil Law Literature*, *in* FROM LEX MERCATORIA TO COMMERCIAL LAW 270 (Vito Piergiovanni ed., 2005) (custom concerning thief in the chain of title found despite conflicting testimony).

40. James Q. Whitman, *Why Did Revolutionary Lawyers Confuse Custom and Reason?*, 58 U. CHI. L. REV. 1321, 1333, 1341 (1991).

In the Name of Custom, Culture, and the Constitution: Korean Customary Law in Flux

MARIE SEONG-HAK KIM*

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INTRODUCTION

The Korean Civil Code of 1960, the first Korean code after independence from Japanese colonial rule, recognizes customary law and reason (*chori*) as official sources of law.[1] Article 1 provides: "In civil matters, if there is no applicable

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1. Minpŏp [Civil Code], Law No. 471, promulgated Feb. 22, 1958, effective Jan. 1, 1960 (S. Kor.). Korea was under Japanese colonial rule from 1910 to 1945.

provision in Statutes, customary law shall apply, and if there is no applicable customary law, sound reasoning shall apply."[2] It is the same language that is found in the Chinese Civil Code of 1929–30 (currently in force in Taiwan) and the Civil Code of 1937 of the now-defunct Manchukuo.[3] This provision has been viewed as deriving from the famous Article 1 of the Swiss Civil Code, which provides: "In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as legislator. In doing so, the court shall follow established doctrine and case law."[4] The Swiss Code of 1907 served as the prototype for a number of civil codes around the world including East Asia; its clearly defined hierarchy of legal sources, in particular, profoundly inspired many legislators.[5] But the direct origin of the aforementioned provision in the East Asian codes was an article in a Japanese law, issued over thirty years earlier than the Swiss Civil Code.[6]

In June 1875, the Great Council of State (Dajōkan) of the Meiji government in Japan promulgated the Rules for the Conduct of Judicial Affairs (Law No. 103).[7] Its Article 3 provided the precise language that was later duplicated in other East Asian laws, that is, written law, customary law, and reason (*jōri*) were sources of law.[8] The 1875 law represented an early milestone in the process of the reception of European law into Japan. It is important to note that one of the first subjects of legal reception was the concept of customary law.[9] Custom as a source of law did not exist in pre-modern East Asia.[10] Traditional China and Korea, as well as Japan before the onset

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2. [Civil Code], art. 1 (S. Kor.), *available at* http://www.law.go.kr/lsSc.do?menuId=0&subMenu=1&query=%EB%AF%BC%EB%B2%95#AJAX.

3. THE CIVIL CODE OF THE REPUBLIC OF CHINA (Jinlin Xia trans., 1930–31) (The Civil Code was promulgated May 23, 1929, effective October 10, 1929) (China); Yusa Yoshio, *Manshūkoku hō hyōron* [*A Critique of the Civil Code of Manchukuo*], 19 WASEDA HOGAKU [WASEDA LAW REVIEW] 1, 7 (1940) (citing Article 1 of the Civil Code of Manchukuo), *available at* http://dspace.wul.waseda.ac.jp/dspace/bitstream/2065/1543/1/A03890546-00-019020001.pdf.

4. Art. 1 (2) & (3): "A défaut d'une disposition légale applicable, le juge prononce selon le droit coustumier et, à défaut d'une coutume, selon les règles qu'il établirait s'il aviat à faire acte de législateur. Il s'inspire des solutions consacrées par la doctrine et la jurisprudence." CODE CIVIL [CC], SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB], CODICE CIVILE [CC] [CIVIL CODE], Dec. 10, 1907, art. 1, paras. 2–3 (Switz.) *available at* http://www.admin.ch/ch/f/rs/2/210.fr.pdf; translation *available at* http://www.admin.ch/ch/e/rs/2/210.en.pdf.

5. KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 167–79 (Tony Weir trans., 1977); IVY WILLIAMS, THE SOURCES OF LAW IN THE SWISS CIVIL CODE 22–23 (1923).

6. MARIE SEONG-HAK KIM, LAW AND CUSTOM IN KOREA: COMPARATIVE LEGAL HISTORY 69 (2012) [hereinafter KIM, COMPARATIVE LEGAL HISTORY]. The *Projet* of the French code, known as *Projet de l'An VIII* (1800), included provisions that "customs" or "usages" should be consulted in the silence of the positive *loi* [law], but these articles were not retained in the French Civil Code of 1804. *Livre Préliminaire in* PIERRE-ANTOINE FENET, RECUEIL COMPLET DES TRAVAUX PREPARATOIRES DU CODE CIVIL [COMPLETE COLLECTION OF THE PREPARATORY WORKS OF THE CIVIL CODE] arts. 4, 5, 11 (reprint 1968) (1827). *See generally* Witold Wolodkiewicz, *"Livre préliminaire"-"titre préliminaire" dans le projet et dans le texte définitif du Code Napoléon* [*"Livre préliminaire"-"titre préliminaire" in the Projet and the Final Text of the Code Napoleon*], 83 REVUE HISTORIQUE DE DROIT FRANÇAIS ET ETRANGER [HISTORICAL REVIEW OF FRENCH AND FOREIGN LAWS] 441 (2005) (Fr.) (explaining that the removal of these provisions was decided on the consideration that the power to define the sources of law belonged to the legislature, not legal scholars).

7. KIM, COMPARATIVE LEGAL HISTORY, *supra* note 6, at 68.

8. *Id.* For the text of the law, see *id.* at 308–09.

9. *See id.* at 246 ("Custom as law facilitated acculturation of Western law in Japan.").

10. *Id.* at 15–16; *see also* Jérôme Bourgon, *La coutume et le droit en Chine à la fin de l'empire* [*Custom and Law in China at the End of the Empire*], 54 ANNALES HSS 1073, 1074 (1999) (Fr.); Jérôme Bourgon,

of feudalism in the twelfth century, each had a highly advanced and comprehensive codified legal system.[11] These states' codes were replete with elaborate penal proscriptions and administrative regulations, but the notion of private law as judicially enforceable norms that govern relations among individuals was largely absent.[12] This was one of the fundamental differences from the Western legal tradition in which law was primarily a system of civil law rules enforced through adjudication.

Before the codification of the modern Civil Code in Meiji Japan, express provisions of law were few and proved inadequate to deal with mounting civil disputes. The 1875 law declaring custom to be a source of law provided an important respite to this situation by allowing judges considerable latitude in deciding cases.[13] Because Japan did not have a written collection or a codified body of customary law, it was far from clear what custom was.[14] Japanese legislators and scholars were notoriously oblivious of the distinction between custom and conventional usages and tended to regard all indigenous practices as well as the Tokugawa *bakufu* government's laws as custom.[15] In the name of applying legal custom, under the 1875 law, Meiji judges evaluated old customs and practices and selectively applied what they regarded as reasonable custom; in the name of reason and justice, they applied general principles drawn from imported European law, in particular the French Civil Code.[16] The declaration that custom and reason were legal sources thus amounted to providing the courts with a means to apply Western legal rules and doctrines while avoiding a drastic break from the traditional legal order. The result was a rapid and solid transplantation of Western law in late nineteenth-century Japan. The imported notion of customary law served as an intermediary regime between tradition and the

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Uncivil Dialogue: Law and Custom Did Not Merge into Civil Law Under the Qing, 23 LATE IMPERIAL CHINA 50, 57 (2002) (disputing that civil law existed in imperial China in the form of customary law).

11. Marie Seong-Hak Kim, *Law and Custom Under the Chosŏn Dynasty and Colonial Korea: A Comparative Perspective*, 66 J. ASIAN STUDIES 1067, 1075 (2007) [hereinafter Kim, *Chosŏn Dynasty*].

12. *Id.* at 1072.

13. KIM, COMPARATIVE LEGAL HISTORY, *supra* note 6, at 78.

14. *Id.*

15. *Id.* at 73–78. This was in line with the European colonial usage of "native custom," the term that referred to any indigenous local practices and institutions that were distinguished from European law. *Id.* at 235–66.

16. The Meiji jurists viewed French law as the embodiment of civilized justice. Profoundly influenced by the French Civil Code, and later by the German Civil Code, Japanese law in the late nineteenth century rapidly left the family of Sinicized law to enter the family of civil law. *Id.* at 69–71; *see also* NOBUSHIGE HOZUMI, LECTURES ON THE NEW JAPANESE CIVIL CODE: AS MATERIAL FOR THE STUDY OF COMPARATIVE JURISPRUDENCE 38–39 (1912) (discussing the various sources of Japanese Civil Code and Meiji jurisprudence). The role the French Civil Code played in Japan at this time can be seen as analogous to the role of the *corpus iuris civilis* (Justinian Code) in late medieval and early modern France. Roman law, as the common law (*ius commune*) in Europe, served as "written reason" (*ratio scripta*) in systemizing and rationalizing French national law in the sixteenth century. Marie Seong-Hak Kim, *Christophe de Thou et la réformation des coutumes: l'esprit de réforme juridique au XVIe siècle* [*Christophe de Thou and the Reformation of Customs: The Spirit of Legal Reform in the Sixteenth Century*], 72 TIJDSCHRIFT VOOR RECHTSGESCHIENDENIS [THE LEGAL HISTORY REVIEW] 91, 102 (2004) (Neth.). For Roman law in European history, *see generally* ALAN WATSON, ROMAN LAW & COMPARATIVE LAW (1991); PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY (1999); MANLIO BELLOMO, THE COMMON LEGAL PAST OF EUROPE: 1000–1800 (Kenneth Pennington ed., Lydia G. Cochrane trans., 1995); R.C. VAN CAENEGEM, AN HISTORICAL INTRODUCTION TO PRIVATE LAW (D.E.L. Johnston trans., 1992); O.F. ROBINSON, T.D. FERGUS & W.M. GORDON, EUROPEAN LEGAL HISTORY: SOURCES AND INSTITUTIONS (2d ed. 1994).

demands of modern civil law, fully negotiated through jurisprudence. The same development took place in China and Korea.

This historical background of the introduction of the concept of custom into East Asia helps us to understand the importance of customary law in contemporary East Asian law. This Article focuses on Korean law. What set the development of Korea apart from that of Japan and of China was its colonial past. Colonialism is crucially relevant in studying customary law outside Europe because customary law as an instrument for precipitating legal development saw a dramatic expression in the colonial context in the nineteenth and twentieth centuries.[17] Korea was colonized by Japan after more than five hundred years of rule under the Chosŏn dynasty (1392–1910). It was during Japanese rule that Korean law and the legal system were comprehensively modernized.[18] The Chosŏn Ordinance of Civil Matters (*Chōsen Minjirei*), issued by the colonial government in 1913, imposed Japanese Civil Code and Code of Civil Procedure as the general laws in Korea, but decreed that most private legal relations among Koreans be governed by Korean custom.[19] Under this customary law framework, Korean custom obtained legal force through court decisions. The colonial High Court effectively engaged in creating law based on precedents.[20] Colonial Korea thus witnessed an effective process of legal transplantation through judicial lawmaking, with much of private legal relations among Koreans redefined and reconfigured through the operation of customary law. Following Korea's independence in 1945, a substantial part of colonial customary law precedents continued to be recognized as law in Korea.[21]

The authority of custom as enshrined in the Civil Code of independent Korea represents both the retention and the rejection of the colonial legal tradition. The Japanese Civil Code, promulgated in 1896 and 1898, did not include a separate provision declaring the official sources of law.[22] This was in line with the French Civil Code of 1804 which, with its emphasis on legislative supremacy and universal ideals of natural law principles, eschewed a specific reference to custom as a legal source.[23] In Germany, the Civil Code of 1900 made no mention of customary law, likely due to the consideration that custom was vague and varied in different parts of Germany.[24] Still, it was generally agreed in both France and Germany that custom was a source of law as important as statutes.[25] Idealization of custom as true national law, a

17. W.J. Mommsen, *Introduction*, *in* EUROPEAN EXPANSION AND LAW: THE ENCOUNTER OF EUROPE AND INDIGENOUS LAW IN 19TH AND 20TH CENTURY AFRICA AND ASIA 7–10 (W.J. Mommsen & J.A. de Moor eds., 1992); *see* Terence Ranger, *The Invention of Tradition in Colonial Africa*, *in* THE INVENTION OF TRADITION 211, 211–12 (Eric Hobsbawm & Terence Ranger eds., 1983) (describing customary law in Africa as a colonial creation).

18. KIM, COMPARATIVE LEGAL HISTORY, *supra* note 6, at 151.

19. *Id.* at 173.

20. *Id.* at 192–93.

21. *Id.* at 267.

22. *See generally* MINPŌ [CIV. C.] (Japan), *available at* http://www.cas.go.jp/jp/seisaku/hourei/data/CC_2.pdf.

23. *See generally* CODE CIVIL [C. CIV.] (Fr.), *available at* http://www.legifrance.gouv.fr/content/download/1950/13681/version/3/file/Code_22.pdf.

24. *See generally* BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] (Ger.), *available at* http://www.gesetze-im-internet.de/bgb/index.html.

25. *See* FRANÇOIS GENY, METHODE D'INTERPRETATION ET SOURCES EN DROIT PRIVE POSITIF [METHOD OF INTERPRETATION AND SOURCES OF PRIVATE POSITIVE LAW] (2d ed. 1919) (Fr.) [hereinafter GENY, METHODE D'INTERPRETATION] (defending the merits of custom as a source of law against the excessive emphasis on enacted law). The Introductory Act to the Civil Code of Germany

symbol of indigenous cultural values and tradition, was a dominant trend in European historical writing in the nineteenth century.[26] The tenets of the German Historical School—law was the product of the history of the people and popular practices were the living matter of law—had an immense impact on modern legal historiography.[27] In the wake of national codification in the nineteenth and twentieth centuries, a number of countries recognized custom as a source of law. Postulation of custom as a symbol of national identity was particularly common in postcolonial societies.

In post-independence Korea, native custom was acclaimed as the embodiment of its cultural values, not tainted by colonial influence. It was supposedly to transcend the boundaries of regulation and enforcement by statutes within the realm of legislative policy.[28] This is most likely why the Korean Civil Code declared customary law to be an official source of law next to statutes. While the notion of customary law itself had derived from colonial law, the crowning of custom with binding force in the Civil Code represented a clear expression of nationalistic legislative will. The deference to custom as a sort of *volksgeist* of the Korean people is powerfully supported by the language of the Constitution. Article 9 of the Constitution declares: "The State shall strive to sustain and develop the cultural heritage and to enhance national culture."[29] The Preamble of the Constitution stresses the "resplendent history and traditions dating from time immemorial" of the Korean people.[30]

In Korea, a civil law country where all laws are written and judicial precedent is not law, custom not only occupies a prominent place in the Civil Code but also remains at the center of jurisprudential and doctrinal discussions.[31] According to John Henry Merryman, custom in civil law jurisdictions receives scholarly attention "far out of proportion to its actual importance as law," mainly because of "the need to justify treating as law something that is not created by the legislative power of the state."[32] Custom commands as "a source of national pride."[33] It has also been pointed out that in civil law jurisdictions "custom is regularly listed as a primary source [of law], but routinely dismissed as of slight practical importance."[34] The

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provides in Article 2: "'Statute' under the Civil Code and under this Act means any legal rule." BÜRGERLICHES GESETZBUCH, *supra* note 24.

26. One of the examples is HENRI KLIMRATH, ETUDES SUR LES COUTUMES [STUDIES ON CUSTOMS] (1837) (Fr.).

27. Mathias Reimann, *Nineteenth Century German Legal Science*, 31 B.C. L. REV. 837, 837–38, 875–80 (1989–90); Edwin W. Patterson, *Historical and Evolutionary Theories of Law*, 51 COLUM. L. REV. 681, 690 (1951).

28. KIM, COMPARATIVE LEGAL HISTORY, *supra* note 6, at 268.

29. TAEHANMINGUK HŎNPŎP [HŎNPŎP] [CONSTITUTION] art. 9 (S. Kor.), translation *available at* http://www.ccourt.go.kr/home/att_file/download/Constitution_of_the_Republic_of_Korea.pdf [hereinafter English Translation of Korean Constitution].

30. *Id.* at pmbl.

31. YŎNG-JUN YI, MINPŎP CH'ONGCH'IK [GENERAL PROVISIONS OF THE CIVIL CODE] 20–21 (1987) [hereinafter YI, MINPŎP CH'ONGCH'IK] (asserting that there is disagreement among scholars over whether customary law has legal force equivalent to statutes).

32. JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 23 (2d ed. 1985).

33. *Id.* at 12.

34. MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL 129 (2d ed. 1999).

Korean case seems to befit these observations, with some caveats. While custom is a source of law under Article 1 of the Civil Code, there are a diminishing number of cases in which the court needs to resort to custom as a supplementary source of law due to the absence of applicable statutes.[35] At the same time, recent jurisprudence attests to the continuing importance of customary law as a crucial nexus between the traditional cultural heritage and the modern democratic identity of Korean society.[36]

This Article will examine a series of landmark decisions involving custom recently rendered by the Constitutional Court of Korea and the Supreme Court of Korea. The ongoing jurisprudential debate on custom is a phenomenon conspicuous in Korea, due mainly to the exalted place of custom in both the Civil Code and the Constitution. Emphasis on custom in turn can be ascribed to the Confucian morality that was equated with Korean indigenous tradition. Confucianism had a strong presence throughout the dynastic period.[37] Many customary practices which were influenced by the Confucian tradition, with its worldview emphasizing a family order based on strict agnatic succession, were incorporated into the codified law in modern Korea.[38] There were a number of statutes in the Civil Code of 1960 and later revisions that governed legal relations in family and succession matters in accordance with Confucian practices.[39] They were seen as the representation of indigenous tradition and culture, insulated from the perceived onslaught of alien and colonial influences.[40] These custom-based statutes have been at the center of jurisprudential debate as many of them came to be challenged on the grounds of constitutionality.

The following pages will first examine the meaning of custom in Korean law as gauged in recent jurisprudence. Next, the Article will discuss how the courts dealt with the laws grounded on Confucian ideology. Korean courts have been grappling with custom on two fronts: deciding the constitutionality of custom-based statutes on the one hand and finding and interpreting unwritten customary law as a source of law on the other hand. During the last twenty-five years or so, the Constitutional Court struck down a number of statutes for violating fundamental principles of equality, property rights, or individual rights to pursue happiness.[41] Yet other statutes survived constitutional scrutiny even when they were equally suspect of violating constitutional principles and lacking clear justification other than the fact that they were based on old customary practices.[42] Korean courts seemed reluctant to support

35. YI, MINPÔP CH'ONGCH'IK, *supra* note 31, at 20.

36. KIM, COMPARATIVE LEGAL HISTORY, *supra* note 6, at 270.

37. *See generally* WILLIAM R. SHAW, LEGAL NORMS IN A CONFUCIAN STATE (1981) (describing Confucianism's distinct role in shaping the nature and operation of law in the Chosŏn dynasty); PYONG-CHOON HAHM, KOREAN JURISPRUDENCE, POLITICS AND CULTURE (2d ed. 1986); PYONG-CHOON HAHM, THE KOREAN POLITICAL TRADITION AND LAW: ESSAYS IN KOREAN LAW AND LEGAL HISTORY (2d ed. 1971).

38. Chaihark Hahm, *Law, Culture and the Politics of Confucianism*, 16 COLUM. J. ASIAN L. 253, 291 (2003) [hereinafter Hahm, *Politics of Confucianism*]; KIM, COMPARATIVE LEGAL HISTORY, *supra* note 6, at 296–97.

39. Mi-Kyung Cho, *Korea: The 1990 Family Law Reform and the Improvement of the Status of Women*, 33 U. LOUISVILLE J. FAM. L. 431, 431–32 (1995); Erin Cho, *Caught in Confucius' Shadow: The Struggle for Women's Legal Equality in South Korea*, 12 COLUM. J. ASIAN L. 125, 126–27 (1998) [hereinafter Cho, *Women's Legal Equality*].

40. KIM, COMPARATIVE LEGAL HISTORY, *supra* note 6, at 268–69.

41. *Id.* at 288–89.

42. *Id.* at 289–92.

the changes that supposedly threatened the core elements of traditional culture and good morals.

This Article will analyze in-depth recent cases dealing with ritual property and gravesite superficies. The cases regarding ritual property succession, decided separately by the Constitutional Court and the Supreme Court in 2008, provide examples of those statutes that sit in the grey area between law and custom. One property right that has been recognized by judicial precedents as customary law and is closely related to traditional ritual practices is the right to occupy another person's land for the purpose of setting up and maintaining an ancestral grave. This right, a kind of customary law superficies, exhibits a curious nature of Korean law.

The insistence in recent jurisprudence on discovering and preserving true custom has caused some unsettling influence on the relationship between custom and statutes, with the consequence of obscuring the hierarchy of the sources of law. The courts' frequent resort to law-finding through custom and reason (*chori*) has tended to lead to a sort of jurisprudential quandary with looming uncertainty in adjudication. The two highest courts of Korea, the Supreme Court and the Constitutional Court, have not always been in agreement in their interpretations of customary law, which some observers say reveals the growing rivalry between the two institutions.[43] This issue, which would require a full treatment in a separate study, is only summarily introduced in this Article to the extent that it concerns customary law.

I. JURISPRUDENCE OF CUSTOM

As in most civil law countries, the courts in modern Korea are generally reluctant to create customary law through precedents. The jurisprudential tendency has been to scrutinize the assertion of customary rights by interpreting the concept of custom narrowly and restrictively.

A. Concepts of Customary Law

In a series of decisions spanning the last three decades, the Supreme Court deliberated on the concept of custom. The Court took on the task of distinguishing custom from usages, an issue that preoccupied jurists in Europe for centuries.[44] In a 1983 case, the Supreme Court defined customary law as an "existing social norm created through repeated use in society, which has obtained legal force through society's approval and recognition that its observance is required."[45] As such, "customary law is a source of law and has the same legal force as laws and regulations as long as it is not in conflict with laws and regulations."[46] It is different

43. *Id.* at 295.

44. Jacqueline Moreau-David, *La Coutume et l'usage en France de la rédaction officielle des coutumes au code civil: les avatars de la norme coutumière* [*Custom and Usage in France from the Official Recording of Customs to the Civil Code: Avatars of Customary Norm*], 18 REVUE D'HISTOIRE DES FACULTES DE DROIT ET DE LA SCIENCE JURIDIQUE [JOURNAL OF HISTORY OF THE FACULTIES OF LAW AND LEGAL SCIENCE] 125, 127 (1997) (Fr.).

45. Supreme Court [S. Ct.], 80Ta3231, June 14, 1983 (S. Kor.).

46. *Id.*

from mere usage, or custom in fact, which "simply supplements the intent of the parties in a legal act."[47]

The case at hand involved a property dispute. The plaintiff demanded the removal of a grave and the transfer of the neighboring land from the defendant.[48] The grave had been set up on the plaintiff's land without permission and was under the care of the defendant who was the son of the deceased.[49] The practice of setting up a grave without the landowner's authorization was, and still is, a common practice in Korea, recognized in jurisprudence as a sort of customary law superficies.[50]

The defendant requested dismissal of the suit on the grounds of procedural errors. Citing Article 996 of the Civil Code that recognized household headship succession, he claimed that custom required that "only the household head become the ritual successor as the sole person to exercise the rights and obligations regarding the maintenance of the gravesite and the performance of ancestor worship ceremony."[51] This argument was accepted by the lower court and the suit was dismissed for failure to name as defendant the household head on the family registry, who in this case was the surviving husband. On appeal, the plaintiff countered that the son was the responsible party under the Regulation of the Simplified Family Ritual Standards (*Kajŏng ŭrye chunch'ik*).[52] The regulation, issued as an executive order in 1973, provided that the surviving spouse or the descendants perform the mourning ceremony and take care of the gravesite and the surrounding land.[53]

The justices accepted the plaintiff's argument and remanded the case.[54] The unanimous opinion referred to a number of essential issues of customary law in Korea. First, the Court found that the defendant's claim of custom as a legal ground required an examination concerning whether the proffered practice was customary law or a mere custom in fact.[55] If it was customary law, the court could take judicial cognizance of custom (*jura novit curia*) on its own authority; if it was mere usage or custom in fact, the party invoking that custom had a duty to prove that it had binding legal force.[56] If the burden of proof is placed on the party who invokes the custom, the scope of the potential application of custom diminishes because it is obviously difficult to prove the existence of custom.[57]

The opinion focused on the meanings of custom in Article 1 and Article 106 of the Civil Code. Article 106 provides: "In cases where there is any custom which is

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47. *Id.*

48. *Id.*

49. *Id.*

50. YŎNG-JUN YI, MULKWŎN PŎP 694 (2009) [hereinafter YI, MULKWŎN PŎP]. The legal issues surrounding this so-called gravesite superficies are the topic of Part III below, and discussion here focuses on the specific questions considered by the Court in the 1983 case.

51. KIM, COMPARATIVE LEGAL HISTORY, *supra* note 6, at 280.

52. [S. Ct.], 80Ta3231 (S. Kor.).

53. Kajŏng ŭrye chunch'ik [Regulation of the Simplified Family Ritual Standards], Presidential Decree No. 21083, Oct. 14, 2008, art. 15 (S. Kor.).

54. [S. Ct.], 80Ta3231 (S. Kor.). Note that this case was decided before the series of revisions of the Civil Code took place, starting in 1989, concerning the household headship system. For the revision and the eventual abolition of the household headship system as a result of legal challenges, *see infra* note 116 and the text that follows.

55. [S. Ct.], 80Ta3231 (S. Kor.).

56. KIM, COMPARATIVE LEGAL HISTORY, *supra* note 6, at 201.

57. *Id.* at 201.

inconsistent with a provision in law that is not related to good morality or other social order, if the intent of the party is not clear, such custom shall prevail."[58] The difference between the two articles has commonly been explained in terms of distinction between compulsory or mandatory law (*ius cogens*) and non-compulsory or default law (*ius dispositivum*).[59] The former refers to law the application of which cannot be evaded by means of a different expression of intention by the parties, whereas the latter is law the application of which can be avoided by means of a special expression of intention. The general doctrinal view is that custom in Article 106 is custom in fact and custom in Article 1 is customary law.[60] Under Article 106, custom has the same legal effect as statutes over juristic acts. Moreover, legislation that did not deal with matters of public policy, i.e., non-imperative law, can be avoided by the parties and replaced by customary rules with contrary meaning.[61]

Concerning the meanings of custom in Article 1 and Article 106, questions arose as to how non-obligatory custom under Article 106 could have greater force as a source of law than binding custom under Article 1. This is viewed as one of the thorniest doctrinal questions that have plagued jurists in Korea. The same question has also preoccupied scholars in Japan which has similar provisions in its Civil Code.[62] One obvious answer is that customary law must be followed irrespective of the intention of the parties. In other words, customary law is binding on the parties regardless of the expression of intent to abide by it or even without the parties' knowledge of its existence. On the other hand, custom in fact becomes applicable only if the parties intended to follow it or at least if it can be presumed that they intended to follow it. An approach to reconcile the two provisions in the Civil Code thus focuses on the fact that custom can be law and at the same time can serve as a standard for legal interpretation. Whereas Article 1 declares the hierarchy of the applicable laws separate from the nature of legal acts, Article 106 provides the standards for interpreting legal acts.[63] When seen this way, there is no contradiction between the two articles.[64]

The Supreme Court in 1983 approached at the case by questioning if the claimed custom was customary law or mere custom in fact.[65] According to the Court, the two are distinguished by the existence of *opinio necessitatis*, i.e., whether citizens had legal conviction that it was law.[66] Lacking *opinio juris*, custom in fact does not override non-imperative statutes by itself; rather, it confirms the intent of the parties to supersede the statutes.[67]

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58. [Civil Code], art. 106 (S. Kor.).

59. *See* [S. Ct.], 80Ta3231 (S. Kor.).

60. For a comprehensive analysis of current scholarly views, see YI, MINPŎP CH'ONGCH'IK, *supra* note 31, at 304–12.

61. *See* Marie Seong-Hak Kim, *Customary Law and Colonial Jurisprudence in Korea*, 57 AM. J. COMP. L. 205, 216 (2009) [hereinafter Kim, *Colonial Jurisprudence*].

62. For the doctrinal discussion surrounding Article 2 of the *Hōrei* and Article 92 of the Japanese Civil Code, equivalent respectively to Article 1 and Article 106 of the Korean Civil Code, see KIM, COMPARATIVE LEGAL HISTORY, *supra* note 6 at 193–97.

63. YI, MINPŎP CH'ONGCH'IK, *supra* note 31, at 340–41.

64. *Id.*

65. [S. Ct.], 80Ta3231 (S. Kor.).

66. *Id.*

67. *Id.*

As mentioned earlier, finding and proving *opinio juris* is extremely difficult. In the 1983 case the justices confirmed that "when the Court is unaware of it the party has the burden to plead and prove it."[68] The Court rejected the defendant's claim that Article 996 in the Civil Code was proof of the custom.[69] Article 996 was irrelevant, ruled the Court, because that provision concerned household headship succession and thus applied only to the death of the household head, not the death of other family members as was the situation in the case.[70] It could not be construed in such a way that the household head automatically succeeded the rights and obligations regarding the grave maintenance regardless of the status of the deceased.[71]

The Supreme Court noted that the lower court failed to determine whether the custom claimed by the party was customary law and therefore governing the case.[72] Even assuming that the custom constituted customary law, according to the justices, it could not override the contradictory statute. The Court stated:

> If the lower court determined that the said custom was customary law (it appears so but is not clear), the legal effect of such customary law would be inferior to the statutes and it would have only supplementary nature. Therefore allowing the effect of such customary law [to supersede the regulation] would be against the intent of Article 1 of the Civil Code.[73]

In the case before the Court, it was beyond dispute that the provision in the Simplified Family Ritual Standards was compulsory law.[74]

The main significance of the 1983 decision is that the Supreme Court distinguished customary law from mere custom in fact and confirmed the hierarchy of written law and custom among the sources of law. The requirement that customary law not be in conflict with the laws means the denial of the validity of custom *contra legem* (against the law). An important related question was to what extent legal force should be given to custom *praeter legem* (alongside the law). The Supreme Court addressed this subject in subsequent years when it dealt with the question of custom and reason, another classic subject in doctrine and jurisprudence.

B. Custom and Reason

The case decided by the Supreme Court in 2003 largely followed the judicial analysis of the 1983 case.[75] But it was particularly interesting because it involved customary law that had been established by colonial judicial decisions. Colonial precedents in customary law continued to be recognized by postcolonial Korean

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68. *Id.*
69. *Id.*
70. *Id.*
71. [S. Ct.], 80Ta3231 (S. Kor.).
72. *Id.*
73. *Id.*
74. "Written law" in Article 1 of the Civil Code includes not only parliamentary enactments, but also executive orders, regulations, treaties, and municipal ordinances. YI, MINPŎP CH'ONGCH'IK, *supra* note 31, at 18.
75. Supreme Court [S. Ct.], 2001Ta48781, July 24, 2003 (S. Kor.). For analysis of this case, see KIM, COMPARATIVE LEGAL HISTORY, *supra* note 6, at 282–84.

courts. The 2003 case dealt with the statute of limitations in the recovery of rights over succession. Since the succession at issue had begun in 1950, well before the Korean Civil Code took effect, the lower court determined, and the Supreme Court agreed, that the colonial High Court's decisions were the governing law as judicial precedents that constituted customary law.[76] But the Supreme Court then refused to apply the colonial precedent that imposed specific time limitations for the recovery of succession rights, on the grounds that they were not reasonable.[77] The majority opinion declared that "we cannot recognize the legal effect of the said custom as customary law."[78] When custom lacked "social reasonableness" and "justness," it could not be recognized as customary law.[79] The Court held that even the custom that had been recognized as customary law in the past would lose binding force when it was no longer reasonable and just.[80]

Previously the Korean courts had ruled, following the classical theory of custom, that the necessary elements of customary law were usage and *opinio necessitatis*, the belief that the observance of that usage was required.[81] The Court in 2003 added a third requisite element of reasonableness. The Court concluded that the existing customary law did not conform to the ideology of "the general legal order under the Constitution as the supreme legal norms" and thus lacked legitimacy.[82]

The requirement that custom must be just and reasonable in order to be valid has long been accepted in European legal history.[83] The Korean courts' embrace of this theory represented the effort to tighten the boundaries of custom as a source of law and also to abate the authority of colonial judicial decisions as substantive contents of customary law in modern Korea. The Supreme Court's position was reaffirmed two years later. Applying the test of reasonableness, in 2005, the Supreme Court refused to recognize the legal effect of the practice excluding females

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76. [S. Ct.], 2001Ta48781 (S. Kor.).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* A blistery dissenting opinion argued that the Court could not refuse to apply existing customary law simply because it was supposedly unreasonable or lacked legitimacy. As long as the existing customary law had not been abolished and no new customary law that differed from the existing customary law had been recognized, according to the dissenters, the Court was bound by that customary law. *Id.*

81. KIM, COMPARATIVE LEGAL HISTORY, *supra* note 6, at 284. For the classical theory treating *opinio necessitatis* as a key element of custom, *see generally* GENY, METHODE D'INTERPRETATION, *supra* note 25; John Gilissen, *La Coutume*, *in* TYPOLOGIE DES SOURCES DU MOYEN AGE OCCIDENTAL [TYPOLOGY OF THE SOURCES OF THE OCCIDENTAL MIDDLE AGES] (G. Genicot ed., 1982). Of late, scholars have raised questions about the validity of *opinio necessitatis*. *See* Robert Jacob, *Les Coutumiers du XIIIe siècle ont-ils connu la coutume? [Did the Compilers of Custom in the Thirteenth Century Know What Custom Was?] in* LA COUTUME AU VILLAGE DANS L'EUROPE MEDIEVALE ET MODERNE [CUSTOM IN VILLAGES IN MEDIEVAL AND MODERN EUROPE] 103, 103–05 (Mireille Mousnier & Jacques Poumarède eds., 2001) (disputing the medieval scholars' postulation of *opinio necessitatis*).

82. KIM, COMPARATIVE LEGAL HISTORY, *supra* note 6, at 283.

83. Jacques Krynen, *Entre science juridique et dirigisme: Le Glas médiéval de la coutume [Between Legal Science and Interventionism: The Death Knell of Medieval Custom]*, 7 DROITS ET POUVOIRS [RIGHTS AND POWERS] 170, 172 (2000) (Fr.); *see* James Q. Whitman, *Why Did the Revolutionary Lawyers Confuse Custom and Reason?*, 58 U. CHI. L. REV. 1321, 1322 (1991) ("The eighteenth-century constitutionalist habit of identifying custom with reason should be traced back to the collapse of customary proof practices at the end of the Medieval period.").

from the clan (*chongchung*) membership.[84] The Court grounded its refusal to recognize the custom on the "changes in our society's legal order."[85] The Court acknowledged that the practice of excluding women from clan membership had been a customary law, but declared that it no longer had legal force because it contravened the fundamental principles of gender equality enshrined in the Constitution. The majority of the justices reasoned: "The legal conviction previously held by the members of our society that clan membership is limited to adult males excluding women has been significantly shaken and weakened."[86] Since the practice no longer had *opinio juris*, it lost its force as customary law. In the absence of pertinent legislation to govern the clan organization, the Court wrote, the matter must be governed by reason.[87] In accordance with reason, "descendants who share the family name with the common ancestors are deemed to be the natural members of the clan when they come of age, regardless of their gender."[88] The existing custom "cannot be deemed justifiable or reasonable as it does not conform to the overall legal order."[89] Therefore, "the past customary law that limits the clan membership to adult males no longer has legal effect."[90]

C. Confucian Culture and Constitutional Challenges

The cases examined in the previous Section concerned unwritten custom. What poses as much, if not more, difficulty are customs that have been turned into legislation. There are a number of statutes in the Civil Code, in particular those related to family law, that have been enacted on the basis of traditional customary practices.[91] Most prominent are the ones involving Confucian ritual practices in family and succession matters. They are grounded on Confucian ideology that was deeply embedded in Korean society.[92] Confucian practices that were observed during the Chosŏn dynasty were identified with Korean culture, and many of them were preserved in the postcolonial Civil Code.[93] Technically, these rules in family and succession law are statutes but they are inseparable from customary law because their legal justification remains that they were observed in Korean society for a long time with requisite *opinio necessitatis*. The colonial courts recognized them as Korean customary law and the postcolonial legislature turned them into statutes.[94]

Some of these statutes were often at odds with other statutes and also potentially incompatible with the Constitution. Under the Korean Constitution,

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84. Supreme Court [S. Ct.], 2002Ta1178, July 21, 2005 (S. Kor.); *see* KIM, COMPARATIVE LEGAL HISTORY, *supra* note 6, at 285–86.

85. [S. Ct.], 2002Ta1178 (S. Kor.).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. KIM, COMPARATIVE LEGAL HISTORY, *supra* note 6, at 270.

92. *See generally* MARTINA DEUCHLER, THE CONFUCIAN TRANSFORMATION OF KOREA: A STUDY OF SOCIETY AND IDEOLOGY (1992) (discussing the Confucian influences during the Chosŏn dynasty); MARK PETERSON, KOREAN ADOPTION AND INHERITANCE: CASE STUDIES IN THE CREATION OF A CLASSIC CONFUCIAN SOCIETY (1996) (discussing how Confucian values affected adoption and succession practices in the Chosŏn period).

93. KIM, COMPARATIVE LEGAL HISTORY, *supra* note 6, at 267–68.

94. *Id.*

determination of the constitutionality of statutes is within the purview of the Constitutional Court. Article 107 of the Constitution provides a division of labor in judicial and constitutional review:

> (1) When the constitutionality of a law is at issue in a trial, the court shall request a decision of the Constitutional Court, and shall judge according to the decision thereof. (2) The Supreme Court shall have the power to make a final review of the constitutionality or legality of administrative decrees, regulations or actions, when their constitutionality or legality is at issue in a trial.[95]

The Constitutional Court thus became embroiled in the customary law debate as the statutes based on custom came under constitutional challenge. The Constitutional Court had to decide the legal meanings of the provisions that were derived mainly from traditional culture and to reconcile them with the principles of the Constitution. The constitutional law's disproportionate influence on Korean family law is well known.[96] The Constitutional Court has been mired in unique cultural debates, which some scholars dubbed the "politics of Confucianism" in Korean society.[97]

The three most prominent examples of Civil Code provisions that had their origins in the Confucian patriarchal ideology were the requirement of agnatic adoption, the household headship system, and the statutory prohibition of marriages between persons of the same surname and of the same geographical origin. By the seventeenth century, the family system of the Chosŏn dynasty had attained its full patrilineal structure in line with the neo-Confucian order.[98] The stipulation in the Confucian classics that ancestors enjoy sacrifices only when they are offered by an agnatic descendant led to a number of unique ritual requirements in practices in adoption, marriage, and inheritance.[99]

During the Chosŏn period, the well-entrenched tradition prohibited the adoption of a child with a different family name.[100] Adoption was practiced solely to secure the perpetuation of the descent line so that the qualified heir was in charge of the ancestral ceremonies.[101] Under ritual succession, steeped in Confucian ideology, only a lineal male, usually the child of a brother or cousin, was suitable for adoption so as to offer proper sacrifices.[102] The resulting prohibition of non-agnatic adoption was responsible for highly complex, convoluted, and perplexing adoption rules in the Chosŏn dynasty.[103]

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95. English Translation of Korean Constitution, art. 107.

96. Jinsu Yune, *Tradition and the Constitution in the Context of the Korean Family Law*, 5 J. KOREAN L. 194, 195 (2005).

97. Hahm, *Politics of Confucianism*, *supra* note 38, at 258.

98. Kŭng-sik Chŏng, *Chosŏn sidae ŭi kagye kyesŭng pŏp che* [*Family Succession Law of the Chosŏn Period*], 51 SEOUL TAEHAKKYO PŎPHAK [SEOUL NATIONAL UNIVERSITY LAW REVIEW] 69, 93 (2010) (S. Kor.).

99. KIM, COMPARATIVE LEGAL HISTORY, *supra* note 6, at 213–23.

100. PETERSON, *supra* note 92, at 107–08.

101. *Id.* at 108–09.

102. KIM, COMPARATIVE LEGAL HISTORY, *supra* note 6, at 214.

103. *Id.*

Japanese colonial authorities attempted to change the adoption system in Korea. In 1939, the colonial government abolished the prohibition of adoption between different surnames and also introduced the adoption of a son-in-law, a common practice in Japan.[104] In addition, it invalidated the prohibition of marriage between same surnames. As soon as Japanese rule was over, however, Korea declared these colonial changes to be null and void and swiftly reinstated the traditional adoption system and marriage rules.[105] In 1947, a government decree outlawed non-agnatic adoption and prohibited the registration of such adoptive relations.[106] What about adoptions that had already taken place? In 1949, the Supreme Court of Korea in 1949 voided the legal effect of the adoption of a son-in-law that had taken place in 1942.[107] The Court asserted that such an adoption system was against Korean custom and that it "was naturally abolished with the departure of the Japanese." It held: "the relationship established on the basis of this system is against public order and good custom. Therefore it is void *ab initio*."[108] This ruling thus tossed out colonial precedents and nullified all non-agnatic adoptive relations completed during the colonial period.

The Civil Code of 1960 allowed adoption of a child with a different surname.[109] Yet, in accordance with the principle of the immutability of the surname, the non-agnate child was not allowed to take the adoptive father's surname.[110] The Supreme Court repeatedly ruled that non-agnatic adoption that had been granted the same legal effect as agnatic adoption under colonial law was invalid.[111] Long regarded as a determining characteristic of Korean family tradition, however, the prohibition of non-agnatic adoption came under serious legal challenges in the 1990s. In 1994, the Supreme Court finally reversed its position and recognized the validity of non-agnatic adoptions that took place between 1940 and 1959.[112]

The 1994 decision was in line with legislative changes. The Civil Code, revised in 1991, included important reforms of adoption laws: it abolished both the provision that prohibited the adoption of a future *hoju* (the eldest son of the household head) and the rule that disallowed the household headship succession by a non-agnatic adopted child.[113] These changes represented a fundamental shift in the Korean adoption system, moving away from the traditional contractual system grounded on the necessity to continue the family to a modern declaratory system grounded on furthering the welfare of the children. The revision of the Civil Code in 2005, which took effect in January 2008, established the "real adoption" system, alongside the existing "general adoption" (also known as "incomplete adoption") system.[114] The new system allowed adoption in the fullest sense: the adopted child now enjoys the same legal rights as the birth child and is allowed to change his or her surname to the

104. *Id.* at 179.

105. *Id.* at 277.

106. *Id.*

107. Supreme Court [S. Ct.], 1949Min-Sang348, Mar. 26, 1949 (S. Kor.).

108. *Id.*

109. Cho, *Women's Legal Equality*, *supra* note 39, at 149.

110. KIM, COMPARATIVE LEGAL HISTORY, *supra* note 6, at 278.

111. Supreme Court [S. Ct.], 65Ma1163, Apr. 24, 1967 (S. Kor.); Supreme Court [S. Ct.], 69Ta1400, Mar. 24, 1970 (S. Kor.); Supreme Court [S. Ct.], 92Ta29399, Oct. 23, 1992 (S. Kor.).

112. Supreme Court [S. Ct.], 93Mŭ119, May 24, 1994 (S. Kor.).

113. Cho, *Women's Legal Equality*, *supra* note 39, at 166.

114. [Civil Code], art. 908-2 (S. Kor.).

adoptive parents' surname.[115] The fact that it took such a long time and involved such heated social and jurisprudential debates to change the traditional kinship-based adoption system evidences the remarkable depth and tenacity of Confucian influences in Korean family law.

While the Supreme Court was engaged in deciding the legality of traditional and colonial custom, the Constitutional Court was drawn into determining the constitutionality of custom-based statutes. The paramount question was whether the challenged laws based on customary norms could claim constitutional protection on the grounds that they were deeply rooted in Korean tradition and culture. The landmark decisions in 2005 in which the Constitutional Court struck down the household headship (*hoju*) systems bore on this question.[116]

The *hoju* system was one of the most controversial issues in family law that long polarized Korean society.[117] This system, originating in Japan, was interposed during the colonial period on Korea's traditional ritual succession.[118] During the Chosŏn period, the eldest son was in charge of the ceremony to offer proper sacrifices for the ancestors. The recognition of his ritual position gradually led to the establishment of economic primogeniture.[119] The designation of the eldest son as the household head further conferred on him a disproportionate amount of economic and social power within the family.

In postcolonial Korea, the conservative forces advocated the *hoju* system as an important cultural and legal practice germane to Korea's Confucian heritage, whereas their opponents reviled the system for discriminating against women.[120] The critics of the system argued that the Japanese during the colonial rule vastly increased the authority of the *hoju* by superimposing their own "house" (*ie*) system.[121] They claimed that conservative legislators and scholars were willing to preserve the colonial laws that they deemed to uphold Confucian culture embedded in family institutions.[122] Here one notes that the discussion of custom in Korea is heavily swayed by the forces of the colonial past. Interestingly, Japan abolished the household headship system in 1948 but the Korean Civil Code of 1960 preserved it intact.[123]

In February 2005, the Constitutional Court finally ruled that the household headship system and the requirement that the child take the paternal surname were

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115. KIM, COMPARATIVE LEGAL HISTORY, *supra* note 6, at 278–79.

116. Constitutional Court [Const. Ct.], 2001 Hŏn-Ga9 to 15 & 2004Hŏn-Ga5 (consol.), Feb. 3, 2005, (2005 DKCC, 11) (S. Kor.); Constitutional Court [Const. Ct.], 2003Hŏn-Ga5 & 2003Hŏn-Ga6 (consol.), Dec. 22, 2005, (2005 DKCC, 11) (S. Kor.).

117. KIM, COMPARATIVE LEGAL HISTORY, *supra* note 6, at 289–92; Kim, *Colonial Jurisprudence*, *supra* note 61, at 205.

118. Pyŏng-ho Pak, *Ilche ha ŭi kajok chŏngch'aek kwa kwansŭp pŏp hyŏngsŏng kwajŏng* [*The Formation of Family Policy and Customary Law Under Japanese Rule*], 33 SEOUL TAEHAKKYO PŎPHAK 1, 17 (1992) (S. Kor.).

119. *Id.* at 15; KIM, COMPARATIVE LEGAL HISTORY, *supra* note 6, at 27–28.

120. KIM, COMPARATIVE LEGAL HISTORY, *supra* note 6, at 290.

121. *Id.*

122. Hyunah Yang, *Vision of Postcolonial Feminist Jurisprudence in Korea: Seen from the 'Family-Head System' in Family Law*, 5 J. KOR. L. 12, 24 (2006).

123. Fumie Kumagai, *Modernization and the Family in Japan*, 11 J. FAM. HIST. 371, 375 (1986); Kim, *Colonial Jurisprudence*, *supra* note 61, at 237.

in conflict with the Constitution.[124] Subsequently the Civil Code was revised in March 2005 and the *hoju* system was abolished effective January 1, 2008. In the 2005 decision, the majority opinion declared that "'tradition' and 'traditional culture' in the Preamble and Article 9 in the Constitution must be understood as concepts reflecting both the history and the circumstances of the time. The fact that [the said practices] existed at a certain point in history does not render them tradition that deserves constitutional protection."[125] The Court acknowledged that the *hoju* system was deeply rooted in the traditional family structure. However, "even if one agrees that the household head system has a certain relationship to the patriarchal family structure that characterizes our indigenous family system, . . . the social background that established and preserved the *hoju* system no longer exists."[126]

It seems apparent that the majority opinion tried to avoid getting entangled with the debate regarding the indigenousness of the household headship system, that is, whether the system was a genuine Korean family custom or a vestige of the Japanese house (*ie*) system. The Court opinion focused instead on the appropriateness of the practice in modern times. Yet, it is interesting to note that the constitutional adjudication of traditional customs became complicated by the argument that not all pre-colonial customs originated from the true Korean tradition but that they were merely an imported Confucian tradition. The debate over the origins of custom was not new. In 1997, after many years of legal wrangling, the Constitutional Court found unconstitutional the prohibition of marriages between parties with surnames of common geographical origin.[127] Main opposition to this momentous decision was that the prohibition of such marriages was genuinely indigenous to Korean culture, not something influenced by Chinese culture.[128] As if distinguishing indigenous custom from colonial custom were not difficult enough, separating genuine Korean tradition from Confucian tradition came to pose daunting problems.

The importance of tradition in Korea cannot be exaggerated. Under Article 9 of the Constitution the state has a duty to sustain and develop cultural heritage and national culture.[129] We have seen that legal questions frequently metamorphosed into a debate on the cultural meaning of Confucianism and national identity. When legal issues became permeated by polemics and cultural agenda, they seemed bound to present serious jurisprudential problems.

II. BORDERING TRADITION AND LEGISLATION: CUSTOM-BASED STATUTES

Broadly considered together, the recent decisions rendered by the Supreme Court and the Constitutional Court involving custom reflect judicial efforts to reconfigure the legal arena in which almost anything that could be styled as tradition or custom tended to claim legal protection. The courts exerted constitutional muscle in interpreting customary law: the laws grounded on custom and tradition were

124. *See supra* note 116.
125. [Const. Ct], 2001Hŏn-Ga9 to 15 (S. Kor.).
126. *Id.*
127. Constitutional Court [Const. Ct], 1997Hŏn-Ga6 to 13 (consol.), July 16, 1997 (S. Kor.).
128. KIM, COMPARATIVE LEGAL HISTORY, *supra* note 6, at 291.
129. *See supra* note 29.

scrutinized as to whether they encroached upon the fundamental rights protected by the Constitution, including the right to pursue happiness (Article 10), equality (Article 11), property rights (Article 23), and gender equality (Article 36).[130] The justices did not shy away from nullifying what they regarded as oppressive and iniquitous customs, in conflict with modern democratic concepts and principles. The Supreme Court required that customary law be just and reasonable and not contravene the overall constitutional order.[131] The Constitutional Court affirmed that law should be judged according to a value system commensurate with the principles of freedom and equality of a liberal democratic society.[132]

Behind this general trend to delineate and limit the scope of customary law, one must point out, judicial scrutiny of custom did not always take place in a consistent or even-handed manner. The courts, uneasy about flaunting by judicial fiat the statutes grounded on long-standing Korean customs and culture, have taken a cautious approach and tended to maintain the legal force of those statutes, as long as they are not explicitly in conflict with constitutional rights. While the courts often spearheaded the reform effort by forcing the legislature to revise outdated provisions in family and succession laws, justices were less willing to invalidate customs or law provisions that they viewed as the representation of the essence of Korean culture.[133] An example of a core Korean virtue is filial piety. Legal measures or actions that supposedly promote respect for parents and ancestors garner broad support in society with little dissension, regarded as the last bastion of good morals against the invasion of allegedly morally-deficient foreign culture. The recent Constitutional Court and Supreme Court decisions on ancestor memorial rites (*chesa*) and ritual property succession illustrate this point.[134]

Incidentally, unwritten custom and custom-based statutes that have been examined in the preceding pages concern Confucian practices involving living beings. We have seen that many of these practices—adoption, succession, marriage, or clan membership—were effectively struck down or modified by jurisprudence. In comparison, practices that concern the dead—i.e., performing ancestral rituals and maintaining ancestral graveyards—have proved far more difficult to modify. The reason for this difference can be found, at least in part, in the fact that the Confucian ideology places special emphasis on death rites. Confucianism is a religion in the sense that it highlights rituals that are imbued with near-theological rhetoric and dogma.[135] The changing perceptions and beliefs about family in modern times apparently have limited influence on postmortem ritual practices, and jurisprudence seems to corroborate this observation.

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130. KIM, COMPARATIVE LEGAL HISTORY, *supra* note 6, at 285, 288–92. Article 10 of the Constitution reads: "All citizens shall be assured of human dignity and worth and have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals." English Translation of Korean Constitution.

131. [S. Ct.], 2001Ta48781 (S. Kor.); [S. Ct.], 2002Ta1178 (S. Kor.).

132. [Const. Ct], 2001Hŏn-Ga9 to 15 (S. Kor.).

133. Tom Ginsburg, *The Constitutional Court and the Judicialization of Korean Politics*, *in* NEW COURTS IN ASIA 145, 151–52 (Andrew Harding et al. eds., 2009) (citing examples of the Constitutional Court's "willingness to uphold traditional norms").

134. Constitutional Court [Const. Ct], 2005Hŏn-Ba7, Feb. 28, 2008 (S. Kor.); Supreme Court [S. Ct.], 2007Ta27670, Nov. 20, 2008 (S. Kor.). See analyses *infra* Sections III.B, III.C.

135. CHANG-WON PARK, CULTURAL BLENDING IN KOREAN DEATH RITES: NEW INTERPRETIVE APPROACHES 11–12 (2010).

A. Ancestor Memorial Service and Ritual Property

Ancestor memorial service remains one of the most peculiar and culturally embedded practices in Korea. At its most basic form, the ancestral ritual consists of burning incense and preparing and offering ritual food in memory of the deceased members of the family. Chosŏn Korea observed ritual succession in which the eldest son obtained the status as the presider of the rites.[136] But in 1933, the colonial High Court denied the legal effect of ritual succession, stating that it was no more than a standard used to determine the claimant to household headship succession as well as property succession.[137] It is worth recalling that the notion of property succession as a legal act did not exist in Korea before the colonial period; it was a concept introduced by the Japanese jurists.[138] In Chosŏn, only the practice of dividing the property of the deceased existed, with no involvement of the state.[139]

Postcolonial Korean courts followed the colonial jurisprudence that ritual succession belonged to the sphere of ethics and was merely a symbolic aspect of property succession. In contemporary Korea, performance of family memorial service is not a legal obligation. It is interesting to note, then, that whereas ritual succession has no legal meaning the succession of ritual property is recognized as an enforceable right in law. Ritual property is the property allocated for use in performing ancestor worship ceremonies. As stipulated in Article 1008-3 of the Civil Code, it is an institution where law, morality, and ethics overlap. Under this statute, the individual responsible for performing ancestor memorial ceremony, i.e., the one presiding over the service, inherits property designated to cover the expenses for performing the ceremony.[140] The Article reads: "The right of ownership of forest not larger than 1 *chŏngbo* [about 9,900 square meters or 2,451 acres] designated for the management of graves, farmland not larger than 600 *pyŏng* [1,983.48 square meters] designated as gravesites, genealogy documents, and goods used for ancestor rituals shall be succeeded by the person who presides over the ancestral rites."[141]

The main purpose of Article 1008-3 is to protect the ritual property that would be needed to fund continuing ancestor memorial service. The land and goods reserved for memorial service constitute special property; they are not governed by regular property succession laws and are exempt from estate tax.[142] Ceremony

136. KIM, COMPARATIVE LEGAL HISTORY, *supra* note 6, at 218. Whether ancestral rites amount to religious rites was a question that was fiercely debated in seventeenth- and eighteenth-century Europe in the so-called Chinese Rites Controversy. At first the Holy See decreed the ceremonies honoring Confucius and family ancestors performed by the Chinese amounted to idolatry and banned the rites. It was not until 1939 that the Catholic Church allowed ancestral rites, considered to be civil and civic ceremonies paying respect to ancestors. This position was confirmed by the Second Vatican council (1962–65). In 1994 the Catholic Church of Korea published a revised *Liturgy for Ancestral Rights*, reconfirming that "the fundamental spirit of the rites is to honour ancestors by recognizing the legacy of their life and deepening the consciousness of one's roots." PARK, *supra* note 135, at 160.

137. KIM, COMPARATIVE LEGAL HISTORY, *supra* note 6, at 220.

138. *Id.* at 218–19.

139. *Id.* at 219–20.

140. [Civil Code], art. 1008-3 (S. Kor.).

141. [Civil Code], art. 1008-3 (S. Kor.).

142. Sangsokse mit jŭngyŏse pŏp [Estate and Gift Tax], Law. No. 11609, Jan. 1, 2010, art. 12(3) (S. Kor.). *See* Supreme Court [S. Ct.], 2005Ta45452 (S. Kor.); Supreme Court [S. Ct.], 97Nu7820, Nov. 25, 1997 (S. Kor.) (holding that since land was inherited by someone other than the ceremony presider it could not be treated as ceremony property).

property remains outside testamentary disposition.[143] The testator cannot designate the ceremony presider and therefore cannot decide who succeeds the ritual property.[144] One may find it ironic that the necessity to ensure uninterrupted ancestor worship ceremonies takes precedence over the last will of the decedent when the purpose of such ceremonies is to placate the spirit of the deceased. At any rate, the fact that the statutory succession of ceremony property trumps testamentary freedom demonstrates the significance of ancestral ceremony in Korea.

In 2006, the Supreme Court ruled that Article 1008-3 was governed by the statute of limitations concerning the recovery of succession rights as provided in Article 999(2).[145] The Court also declared that the ritual presider who claimed the designation of property as ritual property, which would qualify for estate tax exemption, must prove that income from the property had been used consistently for financing the performance of rituals.[146] Ritual property may be viewed as similar to the old French custom of substitutions in trust (*substitutions fidéi-commissaires*), also known as trust-entails. In both cases, the property is meant to be preserved within the family over generations.[147] But the Korean custom differs from trust-entails because the property is treated in law as private property of the successor once ritual property succession has taken place.[148] In France the "encumbered" was charged with preserving the property he inherited and bequeathing it intact to the new beneficiary substituted for him.[149] It is indeed remarkable that in Korea there is no law prohibiting or limiting the freedom of the successor to dispose of the ritual property of which he obtains absolute ownership. It seems that the ethical nature of the ancestral ritual—embodiment of filial duty—is crucially at work here, although it has not prevented situations in which the successors failed to perform their obligations.

The duty to perform proper rituals several times a year can place a heavy financial burden on the presider and his family. It has been pointed out that overzealous observation of ancestral rituals can result in bankruptcy.[150] It is not uncommon that the person who was assigned the task of performing rituals transfers ritual property or other property of his to a relative (a son or a younger brother) on the condition that the latter performs rituals on his behalf. Unfortunately it sometimes happens that the transferee, having received the property, fails to fulfill his agreed-upon obligations. In recent decisions, courts nullified the transfer of

143. *See* Chin-ki Yi, *Chesa chujaeja ŭi kyŏlchong kwa chesa yŏng chaesan* [*Determination of the Ceremony Presider and Ceremony Property*], 56 KORYŎ PŎPHAK [KOREA UNIVERSITY LAW REVIEW] 47, 78 (2010) (S. Kor.) [hereinafter Yi, *Chesa chujaeja*].

144. *Id.* at 68, 78–79 (pointing out the contradiction between the fact that ritual property succession is regarded as a legal act and the fact that the testamentary disposition of ritual property is prohibited, and explaining that this contradiction is justified by the consideration of the legislative intent to preserve ancestor ceremonies).

145. [S. Ct.], 2005Ta45452 (S. Kor.).

146. *Id.*; [Estate and Gift Tax], art. 12(3) (S. Kor.).

147. JEAN BRISSAUD, A HISTORY OF FRENCH PRIVATE LAW 726 (Rapelje Howell trans., 1912); Marie Seong-Hak Kim, *Civil Law and Civil War: Michel de L'Hôpital and the Spirit of Legal Reforms in Sixteenth-Century France*, 27 L. & HIST. REV. 791, 813–14 (2010) [hereinafter Kim, *Civil Law*].

148. [Civil Code], art. 1008-3 (S. Kor.).

149. Kim, *Civil Law*, *supra* note 147, at 813.

150. PARK, *supra* note 135, at 154.

property in such situations and ordered the return of the property, even after the property had been registered in the transferee's name.[151]

Most cases litigated under Article 1008-3 are disputes among the heirs over the ownership of the land designated as ritual property, that is, the gravesite and the surrounding land.[152] As the economic value of land skyrocketed in some areas, more disputes seem bound to occur. The problem is that Article 1008-3 is silent over who should obtain the status as the ceremony presider so as to succeed the ceremony property. The law simply presumes that the selection of the ritual presider is recognized by all the heirs. Cases before both the Constitutional and the Supreme Court, to be examined below, centered on the question of who, among the heirs, was to become the ceremony presider.

In previous cases, the courts had found that the eldest son's preferred claim as the ritual successor was Korea's custom. The Supreme Court had repeatedly ruled that the status of the presider of the ancestor worship ceremony passed in the order of the eldest son, eldest grandson, and the eldest daughter.[153] It was based on the custom that the eldest son or grandson had the right and duty to protect and manage ancestral tombs.[154] But the abolition of the household headship system in the revised Civil Code of 2005 created problems. Previously, the preferential treatment of the eldest son in ceremony property succession had been justified by the legally-recognized *hoju* system, prompting the courts to equate the ritual presider with the *hoju*.[155] But following the abolition of the *hoju* system, the eldest son's preferred status no longer had a legal basis. In this situation, important questions surfaced. Is the statute regulating the succession of ritual property constitutional? Can the statute be interpreted as granting the eldest son the right to protect and manage ceremony property? Can such an interpretation be justified in the name of custom?

B. Constitutional Reckoning

In 2005, a constitutional challenge to Article 1008-3 was lodged. In 2008, the Constitutional Court handed down a decision that the statute was constitutional.[156] The case, brought to the Court by means of constitutional complaint, involved a dispute over the inheritance of real property.[157] The widow and children of the third

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151. *See Pŏpwŏn, 'Chesa soholhi han chongson, chaesan tollyŏ chwŏra'* [*The Court Says, 'Ceremony Presider Who Neglected Ancestral Rituals Must Return Property'*], HANGUK KAJŎNG PŎMNYUL POPCHI SANGDAMWŎN [KOREA FAM. LEGAL SERV. CTR.] (Feb. 2, 2005), http://lawqa.jinbo.net/xe/?document_srl=5662 (reporting that a ceremony presider who broke promises to carry out ancestral rituals was ordered to return the property); *see also* Chihwan Chŏng, *'Chesa an chinaeryŏmyŏn ttang tollyŏ chwŏra'* [*'Return Land if You Do Not Want to Perform Ancestral Rituals'*], JOONGANG ILBO [JOONGANG DAILY] (Feb. 21, 2008), http://article.joinsmsn.com/news/article/article.asp?Total_ID=3048540 (reporting a situation where the court ordered the return of property from an estate).

152. [S. Ct.], 2007Ta27670 (S. Kor.).

153. [S. Ct.], 97Nu7820 (S. Kor.) (holding that the household head succeeds the ceremony property); Supreme Court [S. Ct.], 96Nu18069, Nov. 28, 1997 (S. Kor.); Supreme Court [S. Ct.], 2001Ta79037, Jan. 16, 2004 (S. Kor.).

154. [S. Ct.], 97Nu7820 (S. Kor.).

155. *Id.*

156. [Const. Ct.], 2005Hŏn-Ba7 (S. Kor.).

157. *Id.* Constitutional complaints can be lodged by the parties against any act of public authority when it infringes upon the person's constitutional right. HŎNPŎP CHAEP'ANSO PŎP [CONSTITUTIONAL COURT ACT], Law No. 10546, Aug. 5, 1988, art. 68 (S. Kor.).

son of the deceased had inherited the land from her father-in-law.[158] Her brother-in-law, the second son of the deceased, had succeeded the status of household head in 2005, before the *hoju* system was invalidated by the Constitutional Court.[159] He argued that since he became the presider of family memorial service he was the sole successor of the land that constituted the ritual property.[160] After he prevailed in ordinary courts, the widow and her children requested a constitutional review of the statute.[161]

The case centered on two issues. First, unlike the general succession rules that stipulated equal distribution of property among the heirs, Article 1008-3 of the Civil Code provided for the succession of ceremony property by a sole person; did this provision encroach upon the property right of other heirs? Second, did conferring the right to perform the memorial service on a sole presider, traditionally the eldest son or the eldest grandson, violate the equal rights of female heirs as well as other heirs who did not become the presider?[162]

The Constitutional Court answered both questions in the negative. The Court started by expounding on the importance of ancestor worship ceremony in Korean culture: "The ancestor worship ceremony succession system originated from the ideology of the Confucian rites to pay homage to ancestors, and it has been regarded as the symbol of our traditional good morals and beautiful customs."[163] The Court continued:

> Ritual property is corollary to our traditional ritual succession system. It is important to ensure the continuation of ancestral ceremonies by setting aside property to pay for the expenses of performing ceremonies. Ritual property is a special kind of property vested with the spiritual and cultural values that serve as the emblem of the lineage. As such, it is the pride of the family and a means to promote unity among the extended family members. The law in question, regarding the succession of ceremony property, has as its main purpose the preservation of our tradition of ancestor worship ceremony by maintaining and protecting ritual property endowed with this special meaning.[164]

According to the Court, Article 1008-3 did not encroach upon the property rights of other heirs who did not become the ceremony presider because "this provision only states that the ceremony presider succeeds ceremony property and it does not impose specific rules on how to determine the ceremony presider."[165] The ceremony presider is determined in principle by an agreement among the heirs, and the presider does not have to be the household head or the eldest son. The Court noted that there was nothing that would prevent a younger son or a female heir from

158. [Const. Ct.], 2005 Hŏn-Ba7 (S. Kor.).
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. [Const. Ct.], 2005 Hŏn-Ba7 (S. Kor.).
165. *Id.*

being selected to preside over the ceremony and succeed the ritual property. For the same reason, the Court rejected the argument that the provision violated the principle of equality: "it does not discriminate because anyone among the heirs can become the ceremony presider and succeeds ritual property."[166] It was also possible, the Court reasoned, that the heirs jointly preside over the ceremony or limit the size of ritual property, depending on the individual situations of the family.[167]

If the ceremony presider, who solely inherited ceremony property, sells or depletes the property, does it not amount to the deprivation of other heirs' right to perform ancestor memorial services, constituting a violation of their basic human rights, specifically, the right to pursue happiness? The Constitutional Court disagreed. According to the justices, "the right to maintain and observe ancestor memorial services cannot be seen as a constitutionally protected right under Article 10 of the Constitution."[168] The Court stated:

> The right to pursue happiness is a right attendant to other basic rights. We have ruled that there was no infringement of the property rights of other heirs including the right to own property. As long as we have fully taken into consideration the question of property rights, it is not necessary to determine the question of the right to pursue happiness separately.[169]

Once the Court rejected the constitutional challenges on the basis of fundamental rights, it applied the flexible rationality standard.[170] According to the Court, the law was a reasonable means to achieve the goals legitimately pursued by the government, that is, the preservation and development of traditional culture through the continuation of ancestor worship ceremony and the promotion of legal stability.[171] The Court admitted that it might be difficult to overlook the link between the status of ceremony presider and the household headship system that it had struck down three years earlier: both systems were based on the Confucian lineage ideology.[172] But the Court insisted that Article 1008-3 was a new statute drafted in the wake of the revision of the household headship system, replacing the old law (Article 996) that had recognized the succession of ceremony property as the privilege of the household head (*hoju*).[173] The current provision provided that the ceremony presider, not the *hoju*, succeeded ceremony property, and thereby removed the unconstitutional elements of the household headship system.[174] The justices emphasized that the status of the ceremony presider, to be decided by the agreement of the heirs, was different from that of the household head. The Court concluded that "the means are reasonable to achieve its purposes, and its potential harm is limited to the minimum; it strikes a balance between the needs for public interest to be protected by legislation and basic rights."[175] The challenged law was rationally related to the goal of preserving the good custom.

166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. [Const. Ct.], 2005 Hŏn-Ba7 (S. Kor.).
171. *Id.*
172. *Id.*
173. *Id.*
174. [Civil Code], art. 1008-3 (S. Kor.).
175. [Const. Ct.], 2005Hŏn-Ba7 (S. Kor.).

The Court's opinion shows that the justices were committed to preserving ancestor worship ceremony, which they believed to be an integral part of Korean tradition. The necessity of continuing the ceremony was *a priori* presumed. It is striking to note that the justices seemed genuinely concerned about the prospect of neglecting or abandoning ceremony due to the lack of ceremony property. The Court stated that "if ritual property becomes subject to equal division like ordinary succession property, the property intended for the continuation of ceremony will dissipate. Therefore the provision [of Article 1008-3] is reasonable in separating ritual property from regular property and allowing the ceremony presider to succeed it intact."[176]

Did the justices' predilection for preserving ancestor worship rituals amount to a preference for a particular religion? The Court took pains to argue that protecting ceremony property did not promote Confucian rites. According to the Court,

> This provision does not impose obligations on the ceremony presider to perform ceremonies in any particular manner, including Confucian rites. The ceremony presider who succeeds ritual property can perform ceremonies to pay homage to the ancestors according to the rites of his or her own choosing, be it Confucian, Buddhist, Protestant, or Catholic. Therefore, the criticism that this provision encroaches upon the freedom of religion lacks persuasion.[177]

Yet, one cannot but note the rather contrived reasoning in these lines. It is beyond dispute that ancestor worship is grounded on the Confucian patrilineal system.[178] Is it not that the Constitutional Court, by upholding ceremony property succession, effectively bestowed a blessing to the custom of ancestral ritual couched in the Confucian tradition?

The entire opinion sounded like a treatise on why the observation of ancestral ceremony was an essential part of Korean culture that needed to be preserved. This precisely was the main weakness of the decision. Although tradition can be a standard for interpreting the statutes based on customs or validating extra-statutory customary rules, it cannot itself be a ground for the constitutionality of a statute provision. Jurisprudence must prove the constitutionality of matter, instead of presenting reasons why a certain custom is valuable and should be justified. Determination of the constitutionality of the ceremony property succession law does not hinge on whether ritual property succession promotes traditional custom. Instead of expounding on the cultural significance of ancestral rites, the Court should have focused on whether the law undermined the balance of rights, weighing the relative values of the existing law and its potential harm to the fundamental rights of the heirs.[179]

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176. *Id.*

177. *Id.*

178. Pyŏng-ho Pak, *Hanguk minpŏp sang ŭi chesayong chaesan ŭi sŭnggye* [*Inheritance of Ritual Property in the Korean Civil Code*], 12 T'OJI PŎPHAK [LAND LAW REVIEW] 119, 124 (1997) (S. Kor.) ("It is beyond dispute that the provision of ritual property was written on the premise of traditional ceremony succession and that the said property is the property used to perform rituals of the Confucian and patrilineal kindred system.").

179. *See* English Translation of Korean Constitution, art. 37(2) (declaring that the rights of citizens may only be restricted "when necessary for . . . public welfare").

The Court claimed that, as long as the selection of the presider by the agreement of all the heirs was not precluded, the law's collateral effect of perpetuating the privilege of the eldest son could not be attacked.[180] But one may ask: is it not that the law became an issue in the first place because the heirs could not reach agreement? The presumption of agreement among the heirs may square with the notion of harmony within the family, a central Confucian virtue, but lawsuits among the family members over ritual property speak otherwise. The Court asserted that gender equality was not an issue because the law did not prevent the heirs from reaching agreement, but it is beyond dispute that the Confucian patriarchal system categorizes genders separately.[181] The surmise of an elusive agreement of the heirs led the justices to sidestep the question of equality all together. When the Court failed to acknowledge the plain fact that ancestor ceremony could not be separated from the traditional agnatic succession system, its reasoning sounded rather hollow.

C. What's in a Name? That Which We Call Reason

Once Article 1008-3 survived constitutional challenge, it fell on the Supreme Court to interpret the meaning of the provision. A few months after the conclusion of the constitutional case, a separate lawsuit was brought to the Supreme Court. It concerned a dispute among heirs over who should become the presider in ancestor worship ceremony.[182] The decedent had six children, including the plaintiff, from a marriage that ended in separation.[183] Subsequently, he lived with another woman with whom he had three children, including the defendant.[184] When he died in 2006, the defendant buried him in a private plot in a cemetery, in accordance with his last will. The plaintiff sued claiming that under Article 1008-3 of the Civil Code he, as the eldest son of the deceased, had the legal status as the legitimate presider over ancestor memorial service. He thus demanded the delivery of the remains of the deceased.[185]

What to do when the heirs could not agree on who should become the presider? The problem was again that Article 1008-3 did not stipulate who should become the ceremony presider. Because the statute was silent, the Supreme Court decided that it must turn to custom. While the justices of the Constitutional Court were reluctant to acknowledge openly that the ritual property succession law was inseparable from the custom of patriarchal succession, their counterparts at the Supreme Court seemed more forthcoming. They did not question that the law was based on the traditional system of giving the eldest son priority in family ceremony; they instead asked whether the existing custom had legal force as customary law. The Court found that the custom was no longer valid because it did not conform to the current

180. [Const. Ct.], 2005Hŏn-Ba7 (S. Kor.).

181. *Id.*

182. [S. Ct.], 2007Ta27670 (S. Kor.); *see generally* Yi, *Chesa chujaeja*, *supra* note 143; Ku-t'ae Chŏng, *Chesa chujaeja ŭi kyŏlchŏng pangbŏp e kwanhan sogo* [*Essay on How to Decide the Ceremony Presider*], 45 KYUNGHŬI PŎPHAK [KYUNG HEE LAW REVIEW] 55 (2010) (S. Kor.).

183. [S. Ct.], 2007Ta27670 (S. Kor.).

184. *Id.*

185. *Id.* Because ritual succession was not a judiciable right, legal actions were often formulated as a dispute over the deceased's remains. The issue of the possession of the remains, although central to the case before the court, is beyond the scope of this Article.

legal order and social reasonableness.[186] Granting a preferential status to the eldest son was not in accordance with the family system that respects individual dignity and equality.[187] Consequently, the Supreme Court declared that the existing decisions based on the current custom did not have force as precedents.[188]

Since the statute did not provide a method of selecting the presider and the custom favoring the eldest son was unreasonable and hence no longer valid, the justices concluded that the question must be answered according to reason, or *chori*, a supplemental source of law under Article 1 of the Civil Code.[189] What would be a solution most closely conforming to reason? On this question, there was no consensus among the justices, resulting in multiple dissenting opinions.

According to the majority opinion, *chori* demanded that the eldest son of the deceased become the presider when no agreement could be reached; if the eldest son is dead, his son becomes the presider.[190] The justices who formed the majority declared that the precedence of male heir over female heir was a reasonable solution.[191] Since ceremony was based on the concept of patriarchal succession, this method, which they deemed both prevalent and predictable when viewed against the backdrop of Korean society was most attuned to sound reasoning.[192]

A number of dissenters had a different conception of *chori*, however. There were three different groups of dissenting justices. One group of dissenters argued that, absent agreement among the heirs, the presider should be selected by a majority vote.[193] Other dissenters argued that *chori* required that the Court select the presider both in accordance with relevant laws and principles of human rights such as gender equality and in consideration of the situations of the parties on a case by case basis.[194]

As mentioned above, Article 1 of the Civil Code prompted the Court to resort to *chori*. When neither statute nor custom was available to apply, *chori* was the only remaining source of law. But, as yet another dissenting opinion pointed out, the Court may not have needed to refer to *chori* as a source of law.[195] The majority and most dissenting justices of the Supreme Court, just like their colleagues in the Constitutional Court, did not question the necessity to ensure the continuation of ceremony for ancestors. Because they presumed that the presider had to exercise control over the ritual property including the burial plot, they felt compelled to determine the ceremony presider by referring to *chori*. Instead of hastily turning to a supplemental source of law, however, the Supreme Court could have referred to *chori* as a standard to clarify the meaning of the statute. As the last group of dissenters pointed out, the Court could have attempted to interpret the meaning of the provision—such as the definitions of ceremony, the action of presiding, and the

186. *Id.*
187. *Id.*
188. *Id.*
189. [S. Ct.], 2007Ta27670 (S. Kor.).
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. [S. Ct.], 2007Ta27670 (S. Kor.).

presiding person—in order to resolve the disputes among the parties, and, if necessary, to suggest directions for possible reform of the law.[196]

The Court could have treated the dispute as a property dispute. Under Article 1008-3 the parties formulated their disputes in terms of the determination of the ceremony presider but there was little doubt that the dispute was over property.[197] The cultural weight of ancestral rituals often overshadowed the real issues and diverted the courts away from them. The Court declared that the custom favoring the eldest son was no longer valid and that it was therefore necessary to find law by resorting to *chori*.[198] But then the justices who formed the majority confirmed the preferred status of the eldest son by applying *chori*.[199] Thus they rejected custom only to turn around and rely on custom through the working of *chori*. The Supreme Court denied the validity of the custom favoring the eldest son but nevertheless concluded that the eldest son or grandson had the right to protect and manage ancestral tombs. The Supreme Court has since continued to follow this rule.[200]

Whether *chori* is law is a question that has divided scholars in Korea. Those who view *chori* as a source of law point to Article 1 of the Civil Code, and also Article 103 of the Korean Constitution, which states: "Judges shall rule independently according to their conscience and in conformity with the Constitution and Law." Here one notes that the concepts of *chori*, conscience, and custom remain closely intertwined in Korean law. We have already witnessed the courts' propensity for approximating custom with constitutional ideology. Yet it is important to recall that the provisions above were created because statutory laws are not perfect and a judge cannot refuse to decide a case on the grounds of the absence or insufficiency of the written law.[201] Seen this way, *chori* does not need to be a source of law but can still be applied by the courts as a standard of adjudication. It can serve as an instrument for interpreting laws or legal acts.

Custom or reason must be constructed concretely, less as an abstract concept than as something that plays a role in legal resolution of particular questions. Above all, judges should avoid applying their expectation of justice in the name of custom and *chori*. The fractious divisions among the Supreme Court justices in this case illustrate the peril of the judicial tendency to skip over the interpretation of the law and draw liberally from the authority of custom and *chori* in order to justify their decisions. Excessive emphasis on *chori* as a source of law and, further, its conflation with custom may lead to an unwarranted expansion of judicial inquiry.

It may be helpful to consider together court decisions involving custom and *chori* in the context of the overall attempt by the judges to interpret law in a more consistent and rational way. While it is true that the scope of valid customary law has been clarified and better defined by jurisprudence, some areas of customary law remain solidly entrenched behind the protective wall of tradition and culture, seemingly oblivious to changes in society and economy. The decisions by the

196. *Id.*

197. *Id.*

198. [S. Ct.], 2007Ta27670 (S. Kor.).

199. *Id.*

200. Supreme Court [S. Ct.], 2009Ta1092, May 14, 2009 (S. Kor.).

201. E.g., Article 4 of the French Civil Code provides: "A judge who refuses to give judgment on the pretext of legislation being silent, obscure, or insufficient, may be prosecuted for being guilty of a denial of justice." [C. CIV.] art. 4 (Fr.).

Constitutional Court and by the Supreme Court examined above show that neither court was ready to challenge the custom of ancestral rites. They both stopped short of questioning the culture-bound value of ancestor worship, giving rise to the impression that the courts' reasoning was skewed by the culture factor.

One of the most unique and controversial examples of unwritten customary law is the so-called gravesite superficies. It is a right, created by jurisprudence, to occupy someone else's land for the purpose of building and maintaining ancestral graves. The next Section examines this customary law, which openly contradicts modern property law principles but has nonetheless consistently sustained by the courts.

III. CUSTOM THAT CONFOUNDS: GRAVESITE SUPERFICIES

Article 185 of the Korean Civil Code provides that property rights can be created and enjoyed through statutory rules and customary law: "No real right can be created at will other than ones provided for by law or customary law."[202] The specific mention of customary law sets it apart from the Japanese Civil Code, according to which property rights can be created solely through statutes.[203] In Korea, there exist only a few kinds of customary property rights that were created through judicial precedents and routinely recognized in civil adjudication. They include the transfer of ownership as security on a debt, superficies, the right to create a gravesite on another's land, the right to declare ownership for trees or the fruits growing on the trees standing on someone else's land by writing the putative owner's name on such property, and the registration of one's right under a third party's name.[204]

A. Superficies in Korean Law

Superficies (*chisangkwŏn*) is recognized in the Korean Civil Code.[205] It is the right to own buildings or trees separately from the ownership of the land on which they stand. Article 279 of the Korean Civil Code provides: "A superficiary is entitled to use the land of another person for the purpose of owning buildings, other structures or trees thereon."[206] This concept derives from the custom of treating buildings and land as separate real properties.[207] It is a departure from the Roman law principle *superficies solo cedit* [the surface yields to the ground], meaning that the legal destiny of a building was connected irrevocably to that of the land on which it was standing.[208] The concept of superficies was incorporated into French and German law.[209] Article 366 of the Korean Civil Code recognizes statutory superficies of the building owner when the ownership of the building and the land came to be divided through voluntary auction as a way to exercise the right of pledge.[210]

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202. [Civil Code], art. 185 (S. Kor.).

203. Article 175 of the Japanese Civil Code provides: "No real rights can be established other than those prescribed by laws including this Code." [CIV. C.] art. 175 (Japan).

204. KIM, COMPARATIVE LEGAL HISTORY, *supra* note 6, at 223.

205. [Civil Code], arts. 279–90 (S. Kor.).

206. *Id.* art. 279.

207. YI, MULKWŎN PŎP, *supra* note 50, at 669.

208. KIM, COMPARATIVE LEGAL HISTORY, *supra* note 6, at 224.

209. [C. CIV.] arts. 552–53 (Fr.); [CIVIL CODE], arts. 1012–17 (Ger.).

210. Article 366 of the Korean Civil Code provides: "Where the land and the building on it belong to

The main purpose of superficies is to prevent economic loss that would result from the forced removal of the buildings or the inability to use them when compelled by the exercise of the land property right.[211] Because the statute recognizes the rise of superficies right as a result of voluntary auction only, compulsory sale by auction, sale, or donation is excluded from the statutory protection.[212] This is what gave rise to superficies in customary law. Customary law superficies is a law created by judicial precedents.[213] It provides that, when the building and the land that had belonged to one owner comes to be owned by two different persons through means other than voluntary auction, the owner of the building obtains the property right and the owner of the land cannot compel the removal of the building as long as there was no agreement to remove it.[214] The colonial High Court first recognized superficies as custom in Korea in 1916.[215] In 1960 the Korean Supreme Court called it "our country's custom."[216] Later courts defined the concept as a right "that is presumed in custom to have been granted by the landowner to the building owner."[217] Just like statutory superficies, customary law superficies is "a system recognized due to the economic needs of the nation."[218] A judge-made law, it expands the principle of statutory superficies stipulated in the Civil Code.

As a customary law, registration is not necessary for the superficies right to arise between the original parties. But registration is required for the superficies holder in order to resist the claim of the third party who purchased the land, or for the party who purchased the building from the superficies holder to resist the claim of the landowner.[219] This is in line with the colonial jurisprudence that the purchaser of the building from the original superficies owner could not resist the claim of the landowner if he failed to register his right.[220] In the case of statutory superficies, the Supreme Court held in 1965 that the superficies owner can resist the claims of the third party, regardless of registration.[221]

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different persons by reason of the auction sale of the mortgaged property, the owner of the land is deemed to have created a superficies for the owner of the building: *Provided*, that in such case the rent shall be determined by the court on the application of the party concerned." [Civil Code], art. 366 (S. Kor.).

211. YI, MULKWŎN PŎP, *supra* note 50, at 699.

212. *Id.*

213. *Id.*

214. *Id.*

215. KIM, COMPARATIVE LEGAL HISTORY, *supra* note 6, at 226, citing Chosŏn High Court, Judgment of Sept. 29, 1916, 3 CHOSEN KOTO HOIN HANKETSUROKU 722 (1908–43) [hereinafter HANKETSUROKU], which ruled: "When land and the house that had once belonged to a single person came to be owned by two different persons, it is Chosŏn's custom that, unless there was an agreement upon the sale of the house to remove the house, the owner of the house obtains superficies on the land and the landowner cannot force the removal of the house."

216. Si-yun Yi, *P'allye rŭl chungsim ŭro han kwansŭp sang pŏpchŏng chisang kwŏn* [*Jurisprudence of Customary Superficies*], 14 SEOUL TAEHAKKYO PŎPHAK 124, 125 (1973) (S. Kor.) [hereinafter Yi, *P'allye*] (discussing Supreme Court [S. Ct.], 4292Min-Sang944, Sept. 29, 1960 (S. Kor.) and related decisions).

217. Supreme Court [S. Ct.], 70Ta2576, Jan. 26, 1971 (S. Kor.); Supreme Court [S. Ct.], 70Ta2728, Feb. 23, 1971 (S. Kor.).

218. Supreme Court [S. Ct.], 68Ta1029, Aug. 30, 1968 (S. Kor.). Scholars have questioned whether this justification of "economic needs" for customary law superficies still has validity in contemporary Korea. *See* YI, MULKWŎN PŎP, *supra* note 50, at 699–700.

219. YI, MULKWŎN PŎP, *supra* note 50, at 701.

220. KIM, COMPARATIVE LEGAL HISTORY, *supra* note 6, at 227, discussing Chosŏn High Court, Judgment of May 30, 1930, 17 HANKETSUROKU, at 145.

221. [S. Ct.], 70Ta2576 (S. Kor.); *see* Yi, *P'allye*, *supra* note 216, at 131.

B. Customary Law of Gravesite Superficies

A peculiar example of customary law superficies is the right to occupy another person's land in order to set up and maintain ancestral graves.[222] In 1927 the colonial court recognized the practice as custom in Korea, ruling that someone who set up a grave on another's land obtained "a kind of property right similar to superficies."[223] The reason for the creation of this peculiar customary law was the insufficiency of land available for burial.[224] Tradition required dignified ancestral burials, preferably in a place designated for that purpose in mountains owned by the clan or at least in remote and desirable places in the forest or field.[225] But in reality only a small number of the population owned such land.[226] There was no notion of the church providing burial places as in Europe. Consequently the practice of burying ancestors in the land belonging to another person, with or without permission, was widespread.[227] Unauthorized burial was a pervasive problem throughout the Chosŏn period and disputes between desperate descendants and landowners were commonplace, with no legal solutions.[228] The colonial court, unable to ignore the uncertainty in law in the face of mounting disputes, declared that the practice of burying the dead in another's land was "custom of Korea" and established it as customary law.[229]

When burial took place without the permission of the landowner, the superficies was subject to a period of prescription. The colonial courts ruled that "someone who set up a grave in another person's land without permission obtains, if he maintains the grave for twenty years peacefully and openly, a kind of property right similar to superficies through prescription."[230] The court decisions defined the right to set up a grave on someone else's land as a quasi-statutory superficies. After independence, courts in Korea faithfully followed the colonial precedents.[231] The Supreme Court of Korea consistently ruled that a person who set up a grave in another person's land without permission could not be forced to remove it if he had maintained it peacefully and openly for twenty years.[232]

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222. YI, MULKWŎN PŎP, *supra* note 50, at 694; Sŭng-gil Yi, *Punmyo kiji kwŏn* [*Customary Rights of Gravesite Superficies*], 19 T'OJI PŎPHAK 67 (2003) (S. Kor.) [hereinafter Yi, *Punmyo kiji kwŏn*].

223. Chosŏn High Court, Judgment of Mar. 8, 1927, 14 HANKETSUROKU, at 62. Here permission refers to simple request and acquiescence, not concrete agreement. When there is a contractual agreement, the relationship between the parties is governed according to that agreement, and there is no need to recognize the customary right.

224. YI, MULKWŎN PŎP, *supra* note 50, at 694.

225. *See* DEUCHLER, *supra* note 92, at 197–202 (discussing how the importance of ancestral burials led to using geomancy, the practice of "divining propitious gravesites").

226. *See* Kyŏng-mok Chŏn, *Sansong ŭl t'onghae bon Chosŏn hugi sabŏp chedo unyong silt'ae wa kŭ t'ŭkching* [*The Actual Operation and Character of the Judicial System in Chosŏn Dynasty Examined Through Litigation over the Ownership of Mountains*], 18 PŎPSAHAK YŎNGU 5, 6–7 (1997) (S. Kor.) (explaining that mountains were often considered public property and many people set up graves on land they did not own).

227. *Id.* at 12.

228. *Id.*

229. Chosŏn High Court, Judgment of Mar. 8, 1927, 14 HANKETSUROKU, at 62.

230. *Id.*

231. YI, MULKWŎN PŎP, *supra* note 50, at 694.

232. Supreme Court [S. Ct.], 2011Ta63017, Nov. 10, 2011 (S. Kor.); Supreme Court [S. Ct.], 96Ta14036, June 24, 1996 (S. Kor.). *See* YI, MULKWŎN PŎP, *supra* note 50, at 694–98.

The jurisprudence is strikingly favorable to the owner of a grave, no matter whether in his own land or someone else's, when the land ownership changes hands. The Supreme Court initially held that, when a person who set a grave on his land sold the land without any specific agreement regarding the future of the grace, he would obtain a property right similar to a superficies if he had maintained the grave for twenty years.[233] Subsequently, however, the Court ruled that, when there was no special expression of intent, the seller (the owner of the grave) obtained a right similar to superficies that could be exercised against the purchaser of the land as long as outsiders could observe the existence of the grave.[234] In other words, the Court removed the prescription requirement. Immediate acquirement of grave superficies was recognized on the presumption of the agreement to maintain the grave.[235] Put differently, the importance of ancestral graves is such that the new purchaser of the land is obliged to allow his land to be used continuously by other people as graveyards.

Once acquired, the grave superficies can be held for unlimited time—in perpetuity—as long the grave is maintained.[236] This is different from regular superficies, for which there is a clear duration limit depending on the kind of the structure, not more than thirty years in any case.[237] Because superficies is a property right created for the need to occupy someone else's land to the extent necessary for using the structure attached to it, it is presumed that the superficiary has a duty to pay fees to use the land. Indeed the only obligation of the person who enjoys the superficies is to pay usage fees.[238] Interestingly, when grave superficies is concerned, the right of the landowner to demand rent payment is not recognized in jurisprudence. The Supreme Court held in 1995: "The payment of usage fee is not an element of [grave] superficies and one cannot demand the usage fee as long as there is no agreement; therefore it is reasonable to interpret that there is no need to pay usage fee when one obtains the right to set up the grave after the prescription period for such a right."[239]

Other rules created by jurisprudence also favor the rights of grave owners at the expense of landowners. The person who acquired grave superficies can resist the third party regardless of any notice requirement, apparently against the principle that there is no real property right without registration.[240] It is not difficult to see that this liberal construction of the elements of superficies can seriously harm the innocent purchaser of the land who had only consulted the land registry. Further, judicial precedents have recognized early on that the gravesite includes the adjacent land, not

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233. "When a person sets up a grave on another person's land without permission of the landowner, the former must have maintained the grave for twenty years peacefully in order to acquire property right similar to superficies." Supreme Court [S. Ct.], 4288Min-Sang210, Sept. 29, 1955 (S. Kor.).

234. Supreme Court [S. Ct.], 67Ta1920, Oct. 12, 1967 (S. Kor.); *see* Yi, *P'allye*, *supra* note 216, at 134 (discussing the cases); *see also* Supreme Court [S. Ct.], 91Ta18040, Oct. 25, 1991 (S. Kor.) (confirming that the grave must be recognizable from the outside in order to obtain *superficies*).

235. Supreme Court [S. Ct.], 2009Ta1092, May 14, 2009 (S. Kor.).

236. *Id.*; Supreme Court [S. Ct.], 2005Ta44114, June 28, 2007 (S. Kor.); Supreme Court [S. Ct.], 94Ta28970, Aug. 26, 1994 (S. Kor.).

237. [Civil Code], art. 280(1) (S. Kor.).

238. *See* [Civil Code], art. 287 (S. Kor.) (stating that if rent is not paid for over two years superficies may be terminated).

239. Supreme Court [S. Ct.], 94Ta37912, Feb. 28, 1995 (S. Kor.).

240. YI, MULKWŎN PŎP, *supra* note 50, at 706.

just the tombs.[241] Consequently, the landowner cannot "trespass" the area surrounding the gravesite that sits in the middle of his land.[242]

Gravesite superficies is different from the doctrine of adverse possession. Setting up a grave on another person's land without authorization cannot be regarded as an occupation of the land with the intent to own. This is why the property right that rises from this situation is not a regular property right but merely a quasi-property right that is similar to superficies.[243] The main purpose and moral basis of adverse possession is to secure a landowner the title to his land. Instead, grave superficies is intended to ensure the permanent placement of the grave after the requisite time period. It becomes clear that it rewards the person who occupies the land of another, simply because the land is used for burial. This means that a landowner who fails to defend his property right during the prescription period may suffer a serious—and permanent—harm to his right.

The uniqueness of grave superficies lies in the fact that it is created by custom. It is a custom that arose from the need to provide a supposedly decent burial for ancestors. The persistent survival of the gravesite superficies demonstrates the immense weight of custom in Korea. The custom in question is not just an ordinary custom but one that involves the maintenance of ancestral tombs—the place of reverence and commemoration of the ancestors by the descendants. One can see that it is not very different from the ritual property succession question examined above: both are deeply embedded in a culture of filial piety and ethical sensibility. The significance of proper burial and ancestral rituals is recognized and respected by society at large, and the law ensures their continuation.

The normal economic argument for recognizing superficies—the need to avoid the removal of the building—has no place in grave superficies. What is at the core of gravesite superficies is tradition, not economics. The right to set up a grave on someone else's land and perform ancestral rites on the premise deserves more protection than the landowner's property right. Equally baffling is the presumption that it is improper to demand payment for the use of the land if it is used for someone else's ancestral graves.[244] The troubling nature of this reasoning is easily discernible, considering that commercial burial plots are regularly sold and purchased.[245]

The problems surrounding this customary right have been amply pointed. Allowing burial rights in another person's property confounds the core principles of property ownership. The main consideration behind the push for abolishing grave superficies is an economic one. There is consensus among scholars that it is necessary to change the situation in which a significant portion of the country's available land is occupied by graves and sits idly, causing enormous losses in unfulfilled economic opportunities.[246] In 2001 the government introduced a law

241. Supreme Court [S. Ct.], 91Min-Sang770, Oct. 8, 1959 (S. Kor.); Supreme Court [S. Ct.], 72Min-Sang840, June 30, 1960 (S. Kor.).

242. [S. Ct.], 91Min-Sang770 (S. Kor.).

243. [S. Ct.], 67Ta1920 (S. Kor.).

244. [S. Ct.], 94Ta37912 (S. Kor.).

245. *See* Ta-Ye Kim, *Burial Grounds Cost Korea 1.46 Trillion Won Per Year*, THE KOREA TIMES (Sept. 6, 2010), http://www.koreatimes.co.kr/www/news/biz/2012/08/123_72639.html.

246. According to some statistics, as of 1999, a total of 1,007 square kilometers of land, or 1.06 percent of Korea's entire land, was used as burial grounds. Between 2000 and 2009, about 1.2 million new

reforming burial practices.[247] The size of a burial ground must be under the legal limit; the maintenance of the grave is allowed for fifteen years, to be renewable three times, to the maximum period of sixty years.[248] The same law abolished the perpetual customary right for grave superficies: the person or his relatives who set up the grave without permission cannot claim the right to maintain the grave; the landowner can have the unauthorized grave removed.[249] But the law stipulated that it applied only to the graves that were established after the enforcement date of the law, therefore it has no effect on the graves that had been built before 2001.[250]

Incidentally, Japan does not recognize customary property rights either in doctrine or in jurisprudence. The Japanese Civil Code recognizes superficies in voluntary auction.[251] Instead of recognizing customary law superficies, however, the Japanese courts have resorted to interpreting Article 388 broadly to include compulsory auction as well. Article 388 of the Japanese Civil Code provides for legal superficies in case of voluntary auction.[252] In the cases of compulsory auction, jurisprudence resolves the cases through analogous interpretation of Article 388.[253] Japanese courts maintain the position that there is no need for the courts to intervene and recognize the right to use the land if the sale could have been arranged between the parties.[254] One may conclude that this jurisprudential stance is more reasonable than Korea's, because Korean courts' position of recognizing superficies simply because it is a custom seems to render meaningless the system of contractual legal superficies in the Civil Code. Of course one notes that Japan does not have problems of unauthorized burials due to its widespread cremation practices.

So far neither the courts nor the legislature in Korea seemed ready to confront the backlash that may result from reforming the customary law of grave superficies. It is a daunting prospect indeed to remove forcefully unauthorized but ancient graves, directly affronting the popular conscience that places the protection of ancestral graves before the protection of property rights. One can predict that it will be long before judicial precedents abrogate gravesite superficies. As in the ritual property succession cases, the courts have treaded a thin line. The stakes are higher in the grave superficies cases because they involve a judge-made law whereas the ritual property cases involve a statutory provision. In means that in the former cases the courts cannot simply say that it is a matter to be decided by the legislature.

Many Korean jurists view the gravesite superficies today as a law of a temporary nature. They believe that the courts recognize the practice with the understanding that it would be abolished when burial culture and funeral practices undergo changes.[255] We have seen that customary law, once valid, can subsequently

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graves were added. The economic losses resulting from burial grounds were estimated in 2009 at 1.46 trillion *won*, or 1.52 billion U.S. dollars, a year. *Id.*

247. Changsa tŭng e kwanhan pŏmnyul [Funeral Law], Law No. 11253, Jan. 13, 2001, art. 19 (S. Kor.). Si-yŏng O, *Kwansŭp pŏp sang ŭi punmyo kiji kwŏn ŭi p'yeji yŏbu e taehan koch'al* [*Discussion on the Abolition of Customary Law Gravesite Superficies*], 23 T'OJI PŎPHAK 37 (2007) (S. Kor.).

248. [Funeral law] arts. 18, 19.

249. *Id.* art. 27.

250. [Funeral law] Puch'ik [Supplementary Regulation], Law No. 8489, May 25, 2007, arts. 1, 2.

251. [CIV. C.] art. 388 (Japan).

252. *Id.*

253. Yi, *P'allye*, *supra* note 216, at 125.

254. *Id.* at 136.

255. YI, MULKWŎN PŎP, *supra* note 50, at 694–95.

be declared invalid when it is found lacking *opinio juris*. The courts may decide that the promulgation of the burial law in 2001 evinces that the *opinio juris* for grave superficies is no longer present and the practice no longer reasonable. Some scholars, more impatient, have advocated legislative enactment to override the judicial precedents.[256] The debate surrounding grave superficies may serve as a barometer of how customary law fares in the coming years.

CONCLUSION

Customary law in Korea is in flux. The cases examined in this Article show the courts' struggle to coordinate the dual constitutional dictates of protecting national culture and heritage on the one hand and promoting democratic concepts and principles on the other. The celebrated decisions like the reform of the adoption system and the abolition of the household headship system have amply displayed the progressive spirit in jurisprudence. At the same time, the cases involving ancestral death rites and gravesite superficies witnessed reluctance on the part of the courts to break away from tradition. It is clear, at least, that problems surrounding these issues cannot be explained away by the cultural argument that such customs are deeply embedded in tradition and must be sustained.

While the courts sought to clarify the meaning of custom and to reform specific custom or statutes based on custom in a way consistent with the modern legal principles, at times they seemed to move in an unanticipated direction, with a consequence of creating confusion about the hierarchy of the sources of law. Debate surrounding the famous capital relocation decision by the Constitutional Court may be a case in point.

In 2004, the Constitutional Court introduced the concept of customary constitutional law to strike down a statute.[257] The Court said that the designation of Seoul as the country's capital had legal force on the constitutional level, prevailing over the legislation that attempted to move the capital away from Seoul.[258] Initially, this decision seemed to be in line with the Supreme Court's earlier decisions that required reasonableness in customary law. But there was a crucial difference because the Constitutional Court ruled that written law could be abolished by customary law.[259] By invoking a custom with the highest level of legal force, the Constitutional Court adumbrated the hierarchy of the sources of law. By declaring that the abrogation of customary constitutional law required a process similar to repealing statutory law, the Constitutional Court seemed to obfuscate the difference between written law and custom.

Apart from many substantive issues that arose from the decision, this case engendered certain jurisdictional questions, concerning in particular the power of the Supreme Court over customary law. The Constitutional Court's ruling spurred the argument that customary law, as a formal source of law in Article 1 of the Civil Code, and now elevated to a new height even above legislation, resides beyond the reach of

256. Yi, *Punmyo kiji kwŏn*, *supra* note 222, at 82–83; O, *supra* note 247, at 59–60.

257. Constitutional Court [Const. Ct.], 2004Hŏn-Ma554 & 556, Oct. 21, 2004 (S. Kor.).

258. *Id.*

259. KIM, COMPARATIVE LEGAL HISTORY, *supra* note 6, at 293.

the ordinary courts.[260] If customary law can trump legislation, some scholars claimed, the Supreme Court's interpretation of custom amounts to a review of constitutionality of law and can be construed as a usurpation of the authority of the Constitutional Court.[261] It follows that the ordinary courts' determination of the validity of proffered customary evidence and judicial sanctions of the practice as a custom with legal force supposedly amount to a prohibited lawmaking activity.

The problems of these assertions are not difficult to point out. The argument that customary law must pass constitutional scrutiny negates the very notion of unwritten law existing beyond the sphere of state power. Judicial recognition of customary law takes place in the form of precedents, or repeated decisions. If one follows the reasoning above, once customary law is confirmed by precedents, ordinary courts may not abrogate it at will.

In fact, the criticism of the Supreme Court's alleged appropriation of the Constitutional Court's power over customary law matters shares its ground with the proposition that the ordinary courts' decisions be made subject to constitutional review. In Korea, court decisions are excluded from constitutional review.[262] This provision in the Constitutional Court Act has been seen by some as a violation of the citizen's constitutional right to demand trial under Article 27(1) of the Constitution.[263] Some may even argue that customary law should become the subject of individual petition for constitutional review, but it would be essentially the same position as the one calling for the review of court judgments by the Constitutional Court.[264] The potential jurisdictional conflict between the two highest courts is, of course, a question that opens an entire new realm of issues, which remains beyond the scope of this Article. At any rate, these discussions reveal the multifaceted nature of customary law in Korea. Customary law deserves more attention from scholars than has so far been paid.

Customary law has long been a major divisive issue in Korean society, weighed down with political and ideological baggage. Implementation of customary law involves balancing the legitimate cause of preserving cultural continuity with the principles of fundamental rights. It is critical that the courts take a hard look at custom as well as statutes based on custom and ensure that the interpretation of custom takes place insulated from heady cultural debates and social agenda. The courts must also resist the temptation to impose judicial will by precipitously resorting to custom and reason. One recalls that declaring custom and *chori* as supplemental sources of law was necessitated in order to alleviate the inflexibility and defects of written law. The recognition of custom and *chori* as sources of law gave Korean courts a quasi-legislative instruments. How to use these instruments

260. *Id.* at 286–87.

261. *Id.* at 295.

262. [Constitutional Court Act], art. 68(1) (S. Kor.); [Constitutional Court Act], art. 2(5) (S. Kor.).

263. KIM, COMPARATIVE LEGAL HISTORY, *supra* note 6, at 295. "All citizens shall have the right to trial in conformity with the Act by judges qualified under the Constitution and the Act." English Translation of Korean Constitution, art. 27(1).

264. In Korea a court's decision cannot be the object of constitutional complaint claiming that it does not conform to the Constitution. This is a major difference from the constitutional review system of Germany on which the Korean system was modeled. Chaihark Hahm, *Beyond "Law vs. Politics" in Constitutional Adjudication: Lessons from South Korea*, 10 INT'L J. CONST. L. 6, 34–35 (2012).

pursuant to the nation's constitutional order presents an on-going challenge to the courts.

The meanings of custom, culture, and the constitution in Korean law are so similar yet so different. When this peculiar trinity continues to be negotiated and reconciled in doctrine and jurisprudence, one can hope to ascertain the spirit of Korean law more accurately.

Legal Autonomy Versus Regulatory Law: Customary Law in East Nordic Countries

KJELL Å MODÉER*

SUMMARY

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INTRODUCTION AND CONTEXT

Legal romanticism is a fertile metaphor to characterize the context for the development of customary law, even in Sweden. The German Historical School (Historical School) in the nineteenth century identified and emphasized customary law as a fundamental legal source,[1] and, in the inter-war period of the twentieth century, this construct remained a relevant one for legal and jurisprudential discourses in Sweden. In modern civil law countries (such as Sweden), however, the introduction of a democratic parliamentary system and a modern constitution that

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1. JAMES Q. WHITMAN, THE LEGACY OF ROMAN LAW IN THE GERMAN ROMANTIC ERA: HISTORICAL VISION AND LEGAL CHANGE 122 (1990).

emphasized the principle of the people's sovereignty changed attitudes towards customary law as a construct of an autonomous legal source. The modern Swedish welfare state of the twentieth century was extremely reluctant to recognize customary law as an autonomous legal source. In 1974, the Swedish Instrument of Government (*Regeringsformen*) stated that "all public power in Sweden proceeds from the people" and thus politically prepared works came to be regarded as the main and dominant legal source.[2] Regulation by the state became the dominant modern parliamentary instrument for legal reform throughout legal modernity. The possibilities for the judicial branch to act in favor of customary law in this context were negligible.[3]

The Historical School regarded customary law and the influential legal commentaries of academic lawyers as the two legal sources that differed from the written law.[4] Both are given low status within Swedish legal modernity. Even authoritative and respected Swedish handbooks on legal sources mostly neglect these two legal sources.[5] The situation, as Peter Ørebech describes, is quite different in Norway and the other West Nordic countries.[6]

From a meta-perspective, the Nordic countries traditionally have been regarded as one distinct legal family or *Rechtskreis*.[7] Historically, these countries have been divided into two parts: the West Nordic countries with Denmark, Norway, and Iceland and the East Nordic countries with Sweden and Finland.[8] Sweden and Finland were connected within the Swedish kingdom from the medieval times until 1809, when Sweden lost Finland to the Russian Empire.[9] So, Sweden and Finland, to a great extent, have a common legal history, including the Swedish Code of 1734 (1734 Code),[10] which is still formally in force in those countries. For centuries the

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2. THE CONSTITUTION OF SWEDEN: THE FUNDAMENTAL LAWS AND THE RIKSDAG ACT 80 (Ray Bradfield trans., 2012) (citing REGERINGSFORMEN [RF] [CONSTITUTION] 1:1 (Swed.)).

3. Jan Schröder, *Zur Theorie des Gewohnheitsrechts zwischen 1850 und 1930* [*On the Theory of Common Law Between 1850 and 1930*], *in* USUS MODERNUS PANDECTARUM: RÖMISCHES RECHT, DEUTSCHES RECHT UND NATURRECHT IN DER FRÜHEN NEUZEIT [USUS MODERNUS PANDECTARUM: ROMAN LAW, GERMAN LAW, AND NATURAL LAW IN THE EARLY MODERN PERIOD] 240 (Hans-Peter Haferkamp & Tilman Repgen eds., 2007).

4. *Id.* at 221.

5. *See* STIG STRÖMHOLM, RÄTT, RÄTTSKÄLLOR OCH RÄTTSTILLÄMPNING: EN LÄROBOK I ALLMÄN RÄTTSLÄRA [LAW, LEGAL SOURCES AND THE APPLICATION OF THE LAW: A TEXTBOOK IN JURISPRUDENCE] 235–36 (3d ed. 1988) (discussing the position of customary law in modern Swedish rule making).

6. *See generally* Peter Ørebech, *Western Scandinavia: Exit "Bürgerliches Gesetzbuch"—the Resurrection of Customary Laws*, 48 TEX. INT'L. L.J. 405 (2013).

7. KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 63–65 (3d ed. 1998). *But see* Jaakko Husa, *Classification of Legal Families Today: Is it Time for a Memorial Hymn?*, 56 REVUE INTERNATIONALE DE DROIT COMPARÉ 11, 36 (2004) (contending that the traditional methods of classifying groups of comparative law is out of date in a globalized legal infrastructure).

8. Pia Letto-Vanamo, *Det nordiska rättsområdet i Unionens Europa* [*The Nordic Legal Sphere Within the European Union*], *in* UTVECKLINGEN AV DET NORDISKA LAGSTIFTNINGSARBETET UNDER INVERKAN AV EU OCH EES [DEVELOPMENT OF THE NORDIC LEGISLATIVE WORK DURING THE IMPACT OF THE EU AND EEA] 39 (TemaNord, Nordic Council of Ministers 2000) (from a seminar in Stockholm September 21–22, 2000).

9. *See* HENRIKA TANDEFELT, BORGÅ 1809: CEREMONI OCH FEST [PORVOO 1809: CEREMONY AND BANQUET] 20–21 (Helsingfors Svenska Litteratursällskapet 2009) (discussing a significant shift in the structure of the Finnish government in 1809).

10. *See* 3 SVERIGES RIKES LAG, GILLAD OCH ANTAGEN PÅ RIKSDAGEN ÅR 1734 [THANKED AND ADOPTED IN PARLIAMENT IN 1734] (1934) (containing the provisions of the 1734 Code).

positivist view on the 1734 Code has remained stable during continuous legal development, and legal reform was important for the further development of the legal cultures in these two countries. This is related to the Swedish language, which up to the mid-twentieth century was also the language of the bourgeoisie and the legal elite in constitutionally bilingual Finland.[11]

In the late nineteenth century, starting in the 1870s, legislative harmonization also became a key phrase within Nordic legal reform, focusing on the unity and homogeneity of a country's law. Since the early 1970s, however, the differences in the legal cultures have been emphasized more than the similarities. For this cultural change, the political and legal development in Europe has been an important context. The identification of the national legal cultures of the Member States within the European Union has been an important issue due to the paragraphs on cultural diversity in the Maastricht Treaty of 1992.[12] The supranational European courts in Luxembourg and Strasbourg have had a great impact for the introduction of a new constitutionalism (and a renaissance for Montesquieu). The greater impact on judicial practice has given more space for judicial and academic jurisprudence within European jurisprudence. Late-modern Swedish legal culture has also reintroduced a historical argumentation in legal discourses—as well as a renaissance for legal romanticism.[13] The deep structures of the law are increasingly visible and have become an important argument in current legal discourses.[14]

Comparative law has also been identified with chronological comparison. A comparison between the legal romanticism in the early nineteenth century and the legal context of the late-modern legal romanticism of the early twenty-first century is also relevant for our views on the orally transferred unwritten law—customary law.

I. LEGAL CUSTOMS AND CUSTOMARY LAW IN SWEDEN: A DEEP STRUCTURE PERSPECTIVE

Nordic customary law as a primary legal source can be traced back to the regional laws of the Middle Ages, beginning in the thirteenth century. In the 1734 Code, customary law was still regarded as a source of law. Professor of law David Nehrman (1695–1769) in his extensive descriptive systematization of Swedish private law, stated that national customs, *ius non scriptum* ("unwritten law"), should be

11. *See* Kjell Å Modéer, *Rätten och "kusternas arv" i "de tusen skärens land:" Om den finlandssvenska rättskulturen—om det nu finns en sådan . . .* [*Auditors and "Coastal Heritage" in "the Thousand Blades Country:" The Finnish-Swedish Legal Culture—If There Is such a Thing . . .*] *in* FESTSKRIFT TILL PER OLE TRÄSKMAN [FESTSCHRIFT FOR PER OLE TRÄSKMAN] 352 (Norstedt Juridik 2011) (stating that continuous legal development and legal reform began after 1946 as Finnish and Swedish cultures worked to define themselves).

12. The Maastricht Treaty: Provisions Amending the Treaty Establishing the European Economic Community with a View to Establishing the European Community, tit. IX art. 128, Feb. 7, 1992, *available at* http://www.eurotreaties.com/maastrichtec.pdf.

13. Kjell Å Modéer, *Lebende Ruinen des Rechts. Rechtliche Metaphern in postkolonialen und spätmodernen Rechtskulturdiskursen, Rechtsgeschichte* [*Surviving the Ruins of the Rights, Legal Metaphors in Post-colonial and Post-modern Legal Culture Discourses*], 19 RECHTSGESCHICHTE 228, 230–31 (2011).

14. *See, e.g.*, Kaarlo Tuori, *Towards a Multi-layered View of Modern Law*, *in* JUSTICE, MORALITY AND SOCIETY: A TRIBUTE TO ALEKSANDER PECZENIK ON THE OCCASION OF HIS 60TH BIRTHDAY 427, 434 (Aulis Aarnio, Robert Alexy & Gunnar Bergholtz eds., 1997) (analyzing the law on three levels: the surface level of law, the legal culture, and the deep structure of the law).

regarded as law when "it was not unreasonable."[15] Such a customary law was subsidiary to the written law and only valid if "written law didn't have any regulations or provisions."[16]

In the eighteenth century, customary law had a stronger position in Swedish and Finnish jurisprudence than in the jurisprudence of West Nordic countries. The established positive laws were either "written law" (*ius scriptum)* or "customary law" (*ius consuetudinem*).[17] Even if the continental European codification movement of the Enlightenment also influenced Nordic countries, customary law was emphasized as the Historical School reached Swedish jurisprudence in the nineteenth century. Uppsala University law professor Ernst Viktor Nordling (1832–1898) found that customary law, just like statutory law, court practice, and professorial jurisprudence were equal legal sources that formulated the content of the common sense of justice.[18] They only differed in the form in which they made the common sense of justice concrete. The customary law became concrete by repeat behavior, statutory law via law making, practice through the activities of the courts, and academic jurisprudence by academic writing on the law.[19]

II. CUSTOMARY LAW AUTHORIZED WITH THE HELP OF THE COURTS

Customary law has been maintained throughout history with the help of court decisions.[20] The constitutional principle of separation of power promoted by Montesquieu was adopted in the Swedish Constitution in 1809.[21] Even if the Swedish courts constitutionally were placed under the laws, the nineteenth century saw increasing autonomy for the courts. A doctrine of precedents, however, was not accepted as a legal source in Sweden and Finland for a long time. But, as the debate went on and customary law was accepted as a legal source in the 1734 Code, judges also had to implement customary law in their decisions.

Decisions of the Swedish Supreme Court regarding the application of the legal rule on customary law (Code of Procedure Chapter 1, Section 11) demonstrated that the Court adopted this theory of legal sources. In several cases, the Court approved heirs' claims to rights based on local customary law. In one 1873 case the Court

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15. DAVID NEHRMAN, INLEDNING TIL THEN SWENSKA IURISPRUDENTIAM CIVILEM, AF NATURENS LAGH OCH SWERIGES RIKES ÄLDRE OCH NYARE STADGAR UTHDRAGEN OCH UPSATT [INTRODUCTION TO SWEDISH PRIVATE LAW DERIVED FROM NATURAL LAW AND SWEDEN'S OLDER AND NEWER STATUTES] 36 (Lund 1727) (Swed.).

16. *See* LARS BJÖRNE, NORDISK RÄTTSKÄLLELÄRA: STUDIER I RÄTTSKÄLLELÄRAN PÅ 1800-TALET [NORDIC LEGAL SOURCE DOCTRINE: STUDIES IN THE LEGAL SOURCE DOCTRINES IN THE 1800S] 29 (1991) (on file with author) (noting Nehrman's position of customary law in Nordic legal systems).

17. HEINRICH A. ROMMEN, THE NATURAL LAW: A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY 247 (Thomas R. Hanley trans., 1948).

18. *See* ERNST VIKTOR NORDLING, ANTECKNINGAR EFTER PROF. E.V. NORDLINGS FÖRELÄSNINGAR I SVENSK CIVILRÄTT, ALLMÄNNA DELEN H.T. 1877–V.T. 1879 [NOTES OF PROFESSOR E.V. NORDLING'S LECTURES ON SWEDISH CIVIL LAW, GENERAL PART FALL TERM 1877–SPRING TERM 1879] 26 (Juridiska föreningen i Uppsala [Legal Uppsala Association] 1882) (discussing the various sources of law).

19. *Id.* at 27–29.

20. Schröder, *supra* note 3, at 241–44.

21. Fredrik Lagerroth, *Montesquieu och Sveriges Grundlagar: Till Frågan om Vår Författnings Originalitet [Montesquieu and the Swedish Constitutions: The Question of Our Constitution's Originality]*, 27 SVENSK TIDSKRIFT 519, 525 (1940).

approved of heirs becoming members of a fishing company, as the local custom gave them this right.[22] And in another case, in 1879, the Court upheld another local custom related to privileges of the clergy.[23]

But, as stated by the Finnish law professor Rabbe Axel Wrede (1851–1938), by implementing customary law, "the decision in such a case is just a form of custom, not an autonomous legal source."[24] Wrede's Swedish colleague, Carl Axel Reuterskiöld (1870–1944), stated that when a court is upholding a norm as a legal norm "and it had been made for a long time without objection or interruption, such a praxis imperceptibly has grown into customary law."[25] East Nordic legal culture has, in this case, quite a different attitude towards customary law as compared to the West Nordic one, where the influences from the Historical School and an autonomous legal source doctrine evolved.

The German Free Law Movement (*Freirechtschule*) also resulted in a vivid but reluctant and diverse discourse in the Nordic countries. The West Nordic countries were more open-minded in this respect.[26] The Swedish jurists, however, were much more hesitant and critical.[27] One exception is Wilhelm Sjögren (1866–1929), a Justice in the Swedish Supreme Court, who in an article in 1916 stated that a commonly recognized principle was that the customary law could overrule old law where customary law is exhaustive.[28]

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22. *Delägare i fiskelag eller icke? Tillämpning af det i 1 kap. 11 § Rättegångsbalken förekommande stadgande* [*Part in Fishing Company—Or Not? Application of Chapter 1:11 in the Swedish Supreme Court*] 11 TIDSKRIFT FÖR LAGSTIFTNING, LAGSKIPNING OCH FÖRVALTNING [TLLF] 493, 493. (Christian Naumann ed., 1874) (Swed.) ("Landssed, som ej har oskiäl med sig, må han (domaren) ock rätta sin dom efter, ther beskrifven lag ej finnes." ["He (the Judge) must direct his decision after the local area's custom when it is not unreasonable and no written law applies."]); Max Lyles, *Sedvanas omvandling till lag och rätt: HD och sedvanerätten 1859–1886* [*Customs Conversion to Law: The Supreme Court and Common Law 1859–1886*], *in* RÄTTEN OCH RÄTTSFAMILJER I ETT FÖRÄNDERLIGT SAMHÄLLE—RÄTTSHISTORISKT OCH KOMPARATIVT [LAW AND LEGAL SYSTEMS IN A CHANGING SOCIETY—LEGAL HISTORY AND COMPARISON] 287, 297 (Maarit Jänterä Jareborg & Mats Kumlien eds., Iustus Förlag 2011) (Swed.).

23. Christian Naumann & Walfrid Billing, *Beträffande den "landssed" på Öland att församlingarna bygga och underhålla äfven sådana hus å deras kyrkoherdars boställen, för hvilkas byggnad och vidmakthållande kyrkherdarne eljest enligt lag skulle svara* [*Regarding the Customary Law at the Island of Öland for the Congregations to Construct and Maintain the Vicar's Official Residences*] 16 TLLF 326, 326–29 (1879); Lyles, *supra* note 22, at 298.

24. R.A. WREDE, FINLANDS RÄTTS- OCH SAMHÄLLSORDNING [THE LEGAL SYSTEM AND SOCIAL ORDER OF FINLAND] 18 (1921).

25. C.A. Reuterskiöld, *Lagskipning och lagstiftning: Några synpunkter till läran om rättens källor,* [*Application of Law and Legislation: Some Views to the Doctrine on Legal Sources*], TIDSSKRIFT FOR RETTSVIDENSKAB 149, 166 (1902).

26. *See* Lars Björne, *Realism och Skandinavisk Realism: Den nordiska rättsvetenskapens historia,* [*Realism and Scandinavian Realism: The History of Nordic Legal Science*], *in* 4 SKRIFTER UTGIVNA AV INSTITUT FÖR RÄTTSHISTORISK FORSKNING [PUBLICATIONS ISSUED BY THE LAW INSTITUTE FOR HISTORICAL RESEARCH] 282 (2007), *and* Jon T. Johnson, *The Professionalization of Legal Counseling in Norway*, *in* LAWYERS IN SOCIETY: THE CIVIL LAW WORLD 63 (Richard L. Abel & Philip S.C. Lewis eds., 2005) ("The most influential innovation in Norwegian legal science after World War II was Scandinavian legal realism . . . .").

27. *See* Kjell Å Modéer, *Jherings Rechtsdenken als Herausforderung für die skandinavische Jurisprudenz* [*Jhering Legal Thought as a Challenge for the Scandinavian Jurisprudence*] *in* 19 RÄTTSHISTORISKA STUDIER, JURISTISCHE THEORIEBILDUNG UND RECHTLICHE EINHEIT: BEITRÄGE ZU EINEM RECHTSHISTORISCHEN SEMINAR IN STOCKHOLM IM SEPTEMBER 1992 [CONTRIBUTIONS TO A LEGAL HISTORY SEMINAR IN STOCKHOLM, SEPTEMBER 1992] 110 (Claus Peterson ed., 1993).

28. Wilhelm Sjögren, *Domaremakt och rättsutveckling* [*Judicial Power and Legal Development*],

From the early twentieth century, two legal institutions concurred in the legitimization of customary law. As an autonomous legal source, the courts and the court decisions became the relevant institution. In a modern regulatory system, however, this autonomy was supported and also legitimized by legislation and the state.[29]

In the late nineteenth century, the mainstream opinion of jurists, such as Johan Christian Kreüger (1818–1902), stated that Swedish customary law got its authority as a legal source from the legislator. Without being adopted and confirmed by the legislator, it could not be regarded as valid law.[30] This view became the dominant one throughout the twentieth century.

III. CUSTOMARY LAW IN CONSTITUTIONAL LAW

Modern Swedish constitutional culture started with the Instrument of Government (*Regeringsformen*) in 1809. Due to the parliamentary and democratic breakthrough at the beginning of legal modernity, the 1809 Constitution, framed in an aristocratic context, became increasingly obsolete.[31] The modern constitutional reform in Sweden, however, was not implemented until the mid-1970s. In 1974, the 1809 Constitution was replaced with a modern one based on the people's sovereignty principle.[32] For half a century, between 1920 and 1970, the 1809 Constitution was regarded as obsolete and was ignored by constitutional practice. This period of the Swedish welfare state has been called "the constitution-less half century."[33] This period in modern Swedish constitutional culture has been characterized as constitutional customary law.[34]

The checks and balances in Swedish constitutional law were based on the relation between the Supreme Court and the legislature in judicial review.[35] All the changes in civil and penal law, the law of procedure and church law, had to be constitutionally proofed by the Supreme Court before a governmental bill was presented to the Parliament. In 1909, this task was given to the Law Council (*Lagrådet*).[36] In contrast to the Norwegian Constitution of 1814, Swedish law did not introduce judicial review of statutes after they had been passed.[37]

TIDSSKRIFT FOR RETTSVIDENSKAP 343, 349 (1916).

29. *See* KJELL Å MODÉER, DEN SVENSKA DOMARKULTUREN—EUROPEISKA OCH NATIONELLA FÖREBILDER [SWEDISH JUDICIAL CULTURE—EUROPEAN AND NATIONAL MODELS] 55 (Corpus Iuris Förlag 1994) (stating that legislation became an effective means of countering conservative practitioners and citing President Kekkonen's criticism of conservative Finnish judges).

30. Johan Kreüger, *Huru må man förstå 2 mom. af 11 § i I kap. Rättgångsbalken i 1734 års lag?* [*How to Understand Chapter 1:11 Section 2 of the Procedural Law in the Code of 1734?*], 19 TLLF 572, 575 (Christian Naumann ed., 1882) (Swed.).

31. Fredrik Sterzel, *Författningens föränderlighet: Från grundlagstext till konstitutionell praxis* [*The Variability of the Constitution: From Constitutional Text to Constitutional Praxis*], *in* MAKTBALANS OCH KONTROLLMAKT: 1809 ÅRS HÄNDELSER, IDÉER OCH FÖRFATTNINGSVERK I ETT TVÅHUNDRAÅRIGT PERSPEKTIV [BALANCE OF POWER AND CONTROL POWER: 1809 EVENTS, IDEAS, AND CONSTITUTIONAL WORK WITH A TWO-HUNDRED YEAR PERSPECTIVE] 455, 465 (Margareta Brundin & Magnus Isberg eds., 2009) (Swed.).

32. ERIK HOLMBERG & NILS STJERNQUIST, VÅR FÖRFATTNING [OUR CONSTITUTION] 40 (Norstedts Juridik 11th ed. 1998) (Swed.).

33. Sterzel, *supra* note 31, at 470.

34. *Id.* at 455.

35. REGERINGSFORMEN 1809 [RF 1809] [CONSTITUTION] § 87 (Swed.).

36. Kjell Å Modéer, *Laggranskningen och lagrådet* [*Judicial Preview and the Law Council*],

However, after World War II, review was adopted in several constitutions, such as in the Federal Republic of Germany's Constitution of 1949.[38] One of the most discussed cases regarding the Swedish Supreme Court's reluctant use of judicial review was in a case on estate tax.[39] After the decision in this case, there was an increasingly vivid legal-political discourse on judicial review in the late 1950s, which resulted in an established constitutional custom. In 1979, an amendment to the recently adopted Swedish Constitution introduced judicial review in the Constitution.[40] It was a limited form of judicial review that resulted in a very restricted implementation of its rule by the courts. The breakthrough for judicial review in Sweden came with the incorporation of the European Convention on Human Rights into Swedish law in 1995.[41] It resulted in a more open formulation for the use of judicial review in the Swedish Constitution in 2010.

IV. CUSTOMARY LAW IN FAMILY LAW

The judge's duties were mentioned in the procedural rules of the 1734 Code. The judge had to follow the law. He could also—if written rules were lacking—follow the reasonable customs of the nation.[42] One example of such an old regional custom was the inheritance law in a small region in southern Sweden, Värend, where—in contrast to the national rule—sons and daughters had the same right to inherit property.[43] This regional custom—accepted in the appellate courts in 1685 as

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FÖRVALTNINGSRÄTTSLIG TIDSKRIFT 273, 273 (2009).

37. *Id.* at 275.

38. *See* Hans G. Rupp, *Judicial Review in the Federal Republic of Germany*, 9 AM. J. COMP. L. 29, 32 (1960) ("[T]he Constitution of 1949 has left unimpaired the power of the courts to review statutes.").

39. *See* Nytt Juridiskt Arkiv [NJA] [Supreme Court] 1951 p. 39 *Kvarlåtenskapsskattemålet* (Swed.) (noting that the Court would consider the constitutionality of an estate tax with regards to its interference with the rights of individuals).

40. LAG OM ÄNDRING I REGERINGSFORME [LAW AMENDING THE INSTRUMENT OF GOVERNMENT] (Svensk författningssamling [SFS] 1979:933) (Swed.). When Sweden became a Member of the European Union in 1995, the European Convention on Human Rights (ECHR) was implemented as Swedish law. The Convention provided unlimited judicial review of the Swedish norms. LAG OM ÄNDRING I REGERINGSFORME [LAW AMENDING THE INSTRUMENT OF GOVERNMENT] (Svensk författningssamling [SFS] 1994:1468) (Swed.). The notion that the Convention was unconstitutional was foreclosed after a revision of the Swedish Constitution adopted in 2010. 11 ch. 4 § LAG OM ÄNDRING I REGERINGSFORME [LAW AMENDING THE INSTRUMENT OF GOVERNMENT] (Svensk författningssamling [SFS] 2010:1408) (Swed.).

41. ULF BERNITZ, *FÖRORD* to EUROPARÄTTENS GENOMSLAG [*FORWARD* to EUROPE'S IMPACT] (2012).

42. RÄTTEGÅNGSBALKEN [RB] [CODE OF CIVIL PROCEDURE] 1:11 (Swed.). "Domaren skal noga pröfva Lagens rätta mening och grund, och ther efter döma; men ej theremot, efter egen godtycko. Landssed, som ej har oskiäl med sig, må han ock rätta sin dom efter, ther beskrifven lag ej finnes." ["A judge shall carefully examine the true purpose and grounds for the law and render judgement accordingly, and not following his or her own opinions against the law. In the absence of statutory law, the custom of the land, if not unreasonable, shall also be his or her guide."] *Id.*

43. Elsa Sjöholm, *Några arvsrättsliga problem i de svenska medeltidslagarna* [*Some Right of Inheritance Problems in Swedish Medieval Laws*], 34 SCANDIA 164, 166 (1968); Gerhard Hafström, *Den värendska arvs- och giftorätten* [*The Laws of Inheritance and Right to the Half of the Marital Property in Värend*], 36 SCANDIA 333, 333 (1970). In medieval rural laws, sons inherited twice as much as daughters. Gerhard Hafström, *Hatt och huva* [*Hat and Hood*], 39 SVJT 273, 277 (1958) [hereinafter Hafstron, *Hatt och huva*]. It was also regulated in the 1734 Code. ÄRVDABALK [ÄB] [INHERITANCE CODE] 2:1 (Swed.).

a "a long practice and habit"[44]—was regarded not only as an oral tradition, which could be traced back to the eleventh century, but was also used as a historical argument for a liberal reform in the 1840s.[45] The Swedish Diet, after a long discussion and with a very tight vote, adopted this modern liberal legal reform in 1844.[46]

In Swedish inheritance law, there are two other legal phenomena based on customary law worth mentioning, even if modern legislation (Code of Land Laws 1970) has abolished them as obsolete in modern regulatory law. Homestead division (*hemmansklyvning*) was frequently used as a customary inheritance law but also was repeatedly prohibited.[47] In a region in central Sweden, Dalarna, another form of unofficial parceling (*sämjedelning*), which divided the homestead between the heirs (generation after generation), resulted in severe problems—not only for the land registry, but also for the heirs.[48]

V. CUSTOMARY LAW IN REAL PROPERTY LAW

Sweden is a sparsely populated country, and customary law related to real property law has to be viewed in this context.

One unique Nordic specialty is the legal right of public access to open land, *allemansrätten*.[49] It provides the possibility for each and every person to enter onto someone else's land, to take a bath in and to travel by boat on someone else's waters, and to pick wild flowers, mushrooms, and berries.[50] Individuals may also put up a tent or park a caravan or trailer on the property for twenty-four hours.[51] One may even make a fire and use fallen branches and twigs as firewood.[52] This right has only been criminalized in cases of excess. In the nineteenth century, when the timber industry started, unscrupulous entrepreneurs damaged the forests, cut down the trees, and sold them to the timber industry. Those excesses resulted not only in court cases but also in a statute, passed in 1906, prohibiting companies from buying forest property in northern Sweden.[53] The right of legal access to open land is still not codified, despite the national environmental protection agency (*Naturvårdsverket*)

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44. Hafström, *Hatt och huva*, *supra* note 43, at 280–81.

45. *Id.* at 291.

46. *Id.* at 297.

47. Gerhard Hafström, *Den svenska fastighetsrättens historia* [*The History of Swedish Real Estate Law*], *in* JURIDISKA FÖRENINGEN I LUND [LEGAL SOCIETY IN LUND] 177 (1967); *see also* ELI F. HECKSCHER, AN ECONOMIC HISTORY OF SWEDEN 162–65 (Göran Ohlin trans., 1968) (discussing the history of land parceling).

48. Martin Persson, *Nils Wohlin och frågan om arvssedvänjor* [*Nils Wohlin and the Problems of Customary Inheritance Law*], 74 SCANDIA 37, 48–50 (2008).

49. Within the Scandinavian countries this right, originally based on customs, is found in Sweden, Finland, and Norway—but not in Denmark.

50. NATURVÅRDSVERKET, RIGHT OF PUBLIC ACCESS—A UNIQUE OPPORTUNITY 2–5 (Aug. 2010), *available at* http://www.naturvardsverket.se/Documents/publikationer6400/978-91-620-8522-3.pdf.

51. *Id.* at 3.

52. *Id.*

53. *See* Ulf Cervin, *Planering genom fastighetsbildning* [*Planning by Registration of Property*], *in* 50 JURIDISKA FÖRENINGENS I LUND SKRIFTER [LAW SOCIETY IN LUND PUBLICATIONS] 52 (1983) (discussing land management in Northern Sweden).

recently publishing an investigation aiming to regulate legislation in this field due to the extensive violations created by the expansion of tourism.[54]

The right of legal access to open land has been discussed throughout the twentieth century. Even as modern leisure time and vacation time has expanded for the population, two public commissions have decided not to regulate this right with law.[55]

The 1734 Code included two forms of acquisition of ownership by prescription (similar to American adverse possession). One prescriptive right came into effect after twenty years of use of the property; the other gave a prescriptive right when the usage had existed since time immemorial, *urminnes hävd*.[56] The concept of prescription, with its emphasis on use over time, relates directly to legal custom.

One oft-quoted example of customary law related to prescription from time immemorial is the claim of the Nordic ethnic minority, the Sàmi, to ownership or possession of land in northern Sweden for their traditional nomadic reindeer herding.[57] Starting with the rural colonization in the mid-nineteenth century, the conflicts between the new occupants and the ethnic minority became increasingly frequent. Already in 1751, the Sàmi, in a bi-national convention between Sweden and Norway, were guaranteed the right to cross the border between Sweden and Norway with their reindeer.[58]

In the 1880s, the conflicts with the landowners reached the Swedish Parliament, and legislation was adopted in 1886 on the rights of the Sàmi to pasture their reindeer.[59] In the legislative and jurisprudential discourses preceding the legislation, customary law was a main theme.[60] A legislative commission stated that there existed

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54. KLAS SANDELL & MARGARETHA SVENNING, ALLEMANSRÄTTEN OCH DESS FRAMTID [RIGHT OF PUBLIC ACCESS AND ITS FUTURE], NATURVÅRDSVERKET (Nov. 2011), *available at* https://www.naturvardsverket.se/Documents/publikationer6400/978-91-620-6470-9.pdf.

55. Statens Offentliga Utredningar [SOU] 1940:12 Betänkande med utredning och förslag angående inrättande av fritidsreservat för städernas och de tättbebyggda samhällenas befolkning avgivet av Fritidsutredningen [Report of investigation and proposals concerning the establishment of recreational parks in cities and urban communities population] [government report series] 80 (Swed.); Statens Offentliga Utredningar [SOU] 1951:40 Förslag till lagstiftning om förbud mot bebyggelse m.m. inom vissa strandområden. Betänkande avgivet av strandutredningen, [Proposal for legislation on prohibition against settlement etc. within certain seashore areas. Report given by the Seashore Commission] [government report series] 38 (Swed.).

56. Due to a statement in Swedish jurisprudence, prescription from time immemorial had to endure for ninety years to be valid. ÖSTEN UNDÉN, SVENSK SAKRÄTT II FAST EGENDOM [SWEDISH LAW OF PROPERTY II REAL ESTATE LAW] 144 (1960).

57. Statens Offentliga Utredningar [SOU] 2006:14 Samernas sedvanemarker Betänkande av Gränsdragningskommissionen för renskötselområdet, [The Customary Law Areas of the Sami. Report given by the Boundary Delimitation Committee for the Reindeer Husbandry Area] [hereinafter SOU 2006:14] [government report series] 38 (Swed.).

58. *See id.* at 149 (describing the cross-border grazing rights of the Sàmi people in 1751).

59. 38 ch. 1 § LAG ANGÅENDE DE SVENSKA LAPPARNES RÄTT TILL RENBETE I SVERIGE [LAW ON THE SWEDISH SÀMI'S RIGHT TO REINDEER GRAZING IN SWEDEN] (Svensk författningssamling [SFS] 1886:38) (Swed.).

60. *See Multiculturalism Policies in Contemporary Democracies*, QUEEN'S UNIVERSITY, http://www.queensu.ca/mcp/indigenouspeople/evidence-1/Sweden.html (last visited Dec. 30, 2012) (stating that "through the enactment of the 1886 Reindeer Grazing Act, the Swedish government revoked Sami legal traditions and customary law").

such a right to pasture.[61] Several of the members of the Supreme Court, however, in its constitutionally-based review of the legislation, were critical of how the commission had argued, not taking into account the different circumstances related to the use of customary law in northern Sweden (Västerbotten and Norrbotten) and in central Sweden (Jämtland).[62] Regionally-based customary law could not be applied in national legislation, they argued.[63] The members of parliament, however, disregarded this criticism.[64] They argued that the members of the Supreme Court failed to differentiate between the application of the law and legislative problems.[65] When the legislature wanted to uphold an existing custom as customary law, using an assertion *de lege lata* ("the law as it is") as an argument *de lege ferenda* ("the law as it should be"), the justices of the Supreme Court questioned this model of argumentation.[66] More bluntly, this was a collision between political and legal argumentation. The justices were critical about the legislator's criteria for creating customary law.[67]

The argument in the 1886 legislation regarding the Sàmi and reindeer pasture has been fundamental for not only further legislation,[68] but also for judicial claims from landowners and the Sàmi population. The legislation did not include the possibility of an autonomous Sàmi law. Prescription from time immemorial—in doctrine defined as at least ninety years old—was "discarded from the Land Code in 1972, but is still found in the Reindeer Husbandry Act."[69] Only the time between the late 1800s and 1971 can effectively qualify if argued for prescription from time immemorial.[70] And "a continuous interruption of use for a period of 30 years means that the period for the appearance of prescription from time immemorial has been broken."[71]

Since the 1970s, this has resulted in an extensive case law related to conflicts between the Sàmi population and landowners. In a spectacular case, the Tax-Mountain Case of 1981, the Supreme Court declined to accept the claims of the Sàmi that they owned mountains belonging to the state, which the Sàmi used.[72] The

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61. SOU 2006:14, *supra* note 57, at 38.

62. *See id.* at 36–37 (discussing the approach to Sàmi reindeer grazing rights in Västerbotten and Norrbotten as different than in Jämtland)

63. *See id.* at 38 (quoting Nils Vult von Stayern's position that the conflicting regional legislation on Sàmi grazing rights need to be brought into a "clear and unified whole").

64. *See id.* at 39 (noting the adoption of the Reindeer Grazing Act proposal despite regionally-based opposition).

65. *See id.* at 49–50 (noting the difficulty of interpreting the legislation and differing views on the "legal position" of Sàmi land rights).

66. Lyles, *supra* note 22, at 300.

67. *Utdrag af protokollet öfver lagärenden, hållet uti Kongl. Maj:ts Högsta domstol Fredagen den 21 November 1884* [*Records from the Judicial Preview Investigation in the Supreme Court 21.11.1884*], *in* 2 BIHANG TILL RIKSDAGENS PROTOKOLL VID LAGTIMA RIKSDAGEN I STOCKHOLM ÅR 1886 [APPENDIX TO PARLIAMENTARY REPORT BY PARLIAMENT'S SESSION IN STOCKHOLM IN 1886) 2 (1 coll., 1 detachment, bill number 2 1886).

68. RENNÄRINGSLAG [Reindeer Husbandry Act] (Svensk författningssanilng [SFS] 1971:437) (Swed.). The current Reindeer Husbandry Act was adopted in 1971. *Id.*

69. SOU 2006:14, *supra* note 57, at 43; *see also* JORDABALKEN [JB] [Land Law Code] 16:1 (Swed.); Reindeer Husbandry Act, *supra* note 68, § 1.

70. SOU 2006:14, *supra* note 57, at 24.

71. *Id.* at 44.

72. Nytt Juridiskt Arkiv [NJA] [Supreme Court] 1981-01-29 324/76 (Swed.), *reprinted in* THE SAMI NATIONAL MINORITY 147, 242 (Birgitta Jahreskog eds., 1982).

Swedish state won the case, but the Supreme Court noted that it was not impossible for the Sàmi in other cases to prove ownership of areas for their reindeer.[73] Since 1981, the Sàmi, in several court cases, have tried in vain to demonstrate their ownership or use of land for their reindeer. However, recently, in the Nordmaling Case, the Supreme Court found the Sàmi had produced convincing proof for their use of land.[74]

VI. CUSTOMARY LAW IN THE LAW OF SALES

The *Bürgerliches Gesetzbuch* (German Civil Code or BGB) of 1900 was adopted during a period of dominant judicial autonomy and freedom of contract doctrine.[75] The Swedish Law of Sales of 1905, in its first section, also accepted commercial customs as an autonomous legal source.[76] A commentator on the Swedish law, Tore Almén (1871–1919), emphasized the role of customary law in contract as an autonomous source of law. It was not only supplementary but also had priority in interpretation of contracts.[77] This original, liberal, and autonomous interpretation was criticized in the post-war era by a colleague of Almén, a justice in the Supreme Court, Hjalmar Karlgren (1897–1978), who in a monograph in 1960 wanted to give the Court some sort of censure in its interpretation of the customs. He noted that when a custom was against the dispositive law, the Court had an obligation to turn it down.[78] In other words, the Court not only had to uphold the authority of the law, but also be an instrument for legal politics. According to Kurt Grönfors (1925–2005), a Swedish professor of civil law who followed up Karlgren's position, the Court always had the ability to make a legal-political test of the customary law.[79]

VII. RENAISSANCE FOR CUSTOMARY LAW IN LATE-MODERN LEGAL CULTURE?

In the late-modern society, the jurisdiction of the nation-state has been reduced. In Europe, not only have transnational judicial entities such as the European Court

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73. *See id.* (Bertil Bengtsson, J. dissenting) (discussing Sàmi rights for fishing and hunting in a dissenting opinion that has been important for the further discourses of Sàmi rights in Sweden).

74. Christina Allard, Case Review, *The Swedish Nordmaling Case*, ARCTIC REV. ON L. & POL., 225, 225 n.2 (2011); *see also* Nytt Juridiskt Arkiv [NJA] [Supreme Court] 2011-04-27 p. 109 T 4028-07 [The Nordmaling Case] (Swed.).

75. *See* B.S. Markesinis et al., *Volume I The Law of Contracts and Restitution: A Comparative Introduction*, *in* THE GERMAN LAW OF OBLIGATIONS 28 (2001) (discussing freedom of contract in BGB); WHITMAN, *supra* note 1, at 229 (noting that the BGB passed authority to judges).

76. 1 § LAG OM KÖP OCH BYTE AV LÖS EGENDOM [ACT ON ACQUISITION AND REPLACEMENT OF MOVABLE PROPERTY] (SFS 1905:38) (Swed.).

77. TORE ALMÉN, OM KÖP OCH BYTE AF LÖS EGENDOM: KOMMENTAR TILL LAGEN DEN 25 JUNI 1905 [ABOUT THE PURCHASE AND EXCHANGE OF MOVABLE PROPERTY: COMMENTARY ON THE LAW OF JUNE 25, 1905] 28 (P.A.Norstedt & Söner Förlag 1908) (on file with author).

78. HJALMAR KARLGREN, KUTYM OCH RÄTTSREGEL [CUSTOM AND REGULATION] 52 (P.A.Norstedt & Söner Förlag 1960).

79. Kurt Grönfors, *Handelsbruk och annan sedvänja* [*Commercial Custom and Other Customary Law*], *in* JURIDIKENS KÄLLMATERIAL [JURISPRUDENTIAL SOURCE MATERIALS] 154–55 (Hilding Eek et al eds., 9th ed. 1979).

of Justice and the European Court of Human Rights demonstrated a powerful new role for the courts,[80] but also within public international law the authorization of customary law has been emphasized in conventions regarding ethnic minorities and indigenous people.[81] Of the Scandinavian countries, only Norway has ratified the Convention on Indigenous and Tribal Peoples. The Swedish government and parliament have been very reluctant to accept the claims of the Sàmi in this respect. To prepare for the ratification of the Convention, the Swedish government in 2002 appointed a commission to determine the extent of the reindeer herding area. The result of this commission was published in 2006,[82] but still no initiative has been taken by either the government or the parliament.[83]

As this survey has demonstrated, the modern Swedish constitutional culture, with its sovereignty principle that "all public power emanates from the people,"[84] has framed the context for the role of customary law in twentieth-century Sweden. The expansion of judicial power in the current era, however, again gives the courts more room for a wider judicial jurisprudence, including room for customary law in court praxis—as was the situation in the nineteenth century when the courts' autonomy governed the position of customary law.

H. Patrick Glenn, in his survey on legal traditions of the world, emphasized the importance and necessity of adjustment in a living tradition due to changing contexts.[85] Customary law has developed through different chronological paradigms and its discourses are dependent on the legal profession, the jurists as judges, and law professors. The current transnational law and transparent jurisdictions stimulate—once again—the customary law.

The Swedish situation in this period of transformation, however, is changing slowly. But, as this survey also demonstrates, there are tendencies to review the still existing customary law as "living ruins of the law."[86]

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80. C. Neal Tate & Torbjörn Vallinder, *The Global Expansion of Judicial Power: The Judicialization of Politics*, *in* THE GLOBAL EXPANSION OF JUDICIAL POWER 3–4 (C. Neal Tate & Torbjörn Vallinder eds., 1995).

81. *See, e.g.*, ILO CONVENTION ON INDIGENOUS AND TRIBAL PEOPLES, 1989 (NO. 169): A MANUAL, at 26–28 (2003) ("The Convention recognizes the right of indigenous and tribal peoples to their own customs and customary law.").

82. SOU 2006:14, *supra* note 57, at 3–4.

83. However, a Nordic convention on Sàmi rights and reindeer herding is currently being prepared. Martin Scheinin, *The Rights of an Individual and a People: Towards a Nordic Sàmi Convention*, in *The Nordic Sàmi Convention: International Human Rights, Self-Determination and Other Central Provisions*, 3 J. OF INDIGENOUS PEOPLES RIGHTS 40, 48–49 (2007), *available at* www.galdu.org/govat/doc/samekoneng_nett.pdf.

84. REGERINGSFORMEN [RF] [CONSTITUTION] 1:1 (Swed.).

85. *See generally* H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD (4th ed. 2010).

86. Kjell Å Modéer, *Living Ruins of the Law: On Legal Change and Legal History in Late Modernity*, 53 SC. ST. L. 219, 227 (2008).

Western Scandinavia: Exit *Bürgerliches Gesetzbuch*—the Resurrection of Customary Laws

PETER ØREBECH*

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> The preservation, during a number of centuries which it would be vain to calculate, of this great body of unwritten custom, differing locally in detail, but connected by common general features, is a phenomenon which the jurist must not pass over.
>
> Henry Sumner Maine[1]

THE PLATFORM AND THE PUZZLE

The western Scandinavian legal system builds on a basic understanding of law as omnipresent and underlying all social behavior whether it is written or non-written, codified or customary. For every dispute there is a legal solution. Thus, one does not experience any gaps of law. The positivist diversity between moral and ethical norms and legal norms never found any spokesperson in ancient times' Denmark-Norway. The common understanding seems to be that since the legislature would never prescribe unjust or unreasonable solutions, the ethical norms of society are neatly intertwined with the legal norms.[2] This implies that legal decisions are moral decisions. The Scandinavian populations are societies based upon legal, normative structures. *Inter partes* relations are regulated by subtle signs of these normative structures. The Scandinavian societies are lawful, and not lawless, societies.

This commentary considers the following: Part I considers the role of customary law in Danish and Norwegian dispute settlement, custom's justification in general and as a historical fact, and whether modern Scandinavian codes abolish ancient customary laws and prevent new customary laws from developing. Is custom or usage a valid source of law per se, independent of whether or not it is entitled to be so by the codification? Or is it the other way around, where customs only qualify as valid law if not otherwise found in the legislation? Part II discusses the *de lege lata* situation—what role does customary law have to play in the civil and public law of southern and western Scandinavia? Part III asks what are the prerequisites of customary law? Or more precisely, what are the requirements, listed by the courts, which allow customs to transform into customary laws?

An interesting issue not fully dealt with in the Article is this procedural puzzle: How to acknowledge that subtle signs of normative structures are "the law of the land?"[3] And are these norms valid law until amended by the legislature? Or is it the other way around—no custom or usage is valid law before a court justifies it? Alternatively, could a referendum do the job?

I also do not cover Danish law harmonized by the European Union (EU). This federal part of "the law of the land" is, according to this Author's interpretation, merely a 500-year-delayed introduction to the 1495 German reception of the Roman

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1. HENRY SUMNER MAINE, VILLAGE-COMMUNITIES IN THE EAST AND WEST 55 (7th ed. 1913).

2. Interview with Judge Magnus Aarbakke, Norwegian Professor Emeritus of Law and former Supreme Court Judge (May 1976).

3. This is the subject of my new project: Peter Ørebech, *Customary Law as Manifestation of Democracy—By the Means of Referendum and Other Out-of-Court Resolutions* (expected Jan. 2014) (unpublished manuscript) (on file with author).

Law by Deutsche Reichkammergericht, which was valid no further than up to the Danish borderline of Slesvig-Holstein in Rendsburg ("Eidora Romani Terminus Imperii").[4] Thus the customary law as developed by the European Court of Justice (ECJ) is excluded from this analysis.[5] However, since the EU treaty in principle excludes property law from its domain,[6] important parts of property rights arenas are still under the exclusive jurisdiction of national law.

I. THE ROLE OF CUSTOMARY LAW IN DENMARK & NORWAY: THE PLATFORM

"Customary laws are valid *praeter legem*, but not *contra legem*."

Fredrik Vinding Kruse[7]

The first task is to clarify the role of customary law in old times. All social societies are in need of legal rules. Long ago all provisions of law were customary and unwritten.[8] From this two issues arise: First, was custom or usage valid law, and has this continued to be the case? Has the absolute monarchy of the Kingdom of Denmark-Norway or any other sovereign abandoned customs or usage as sources of law? Second, if customary law is valid law, is its sole function to fill in the gaps of law, such as in the Vinding Kruse theorem?[9]

But what are the norms characterized as customary laws? A 1950s Norwegian legal dictionary defines customary law as the body of legal rules not expressed in positive legislation, but nevertheless followed by the legal community and implemented by the courts as binding rules.[10] According to legal theory some prerequisites should be satisfied, at least the following two—ancient usage and

4. "The river Eider is the frontier of the Roman Empire," is an inscription from the town gate of Rendsburg, located in the former Danish province of Schleswig-Holstein, now in Germany. *See* CHARLES A. GOSCH, DENMARK AND GERMANY SINCE 1815 432–33 (1862) (discussing the inscription); *see also* 3 M. MALTE-BRUN, A SYSTEM OF UNIVERSAL GEOGRAPHY 1073 (James G. Percival, ed. 1854) (discussing the inscription's significance).

5. This is not a substantial problem since the ECJ has explicitly stated in several cases that it does not view customs as having such a character as to change any of the provisions of the constituting EU treaties. Case C-426/93, Ger. v. Council of the Eur. Union, 1995 E.C.R. I-3723; Case C-133/06, Eur. Parliament v. Council of the Eur. Union, 2008 E.C.R. I-3189. For example, in the case of agriculture, articles 43 and 144 of the Treaty on the Functioning of the European Union (TFEU) are in force despite Commission practices over a long period of time that might indicate otherwise. Consolidated Version of the Treaty on the Functioning of the European Union arts. 43, 144, Mar. 30, 2010, 2010 O.J. (C 83/47).

6. TFEU, *supra* note 5, art. 345 ("The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.").

7. FREDERIK VINDING KRUSE, RETSLÆREN [JURISPRUDENCE] 152 (Nyt Nordisk Forlag-Arnold Busck 1943) (emphasis added) (on file at Copenhagen University Library) [Translation, and future translations are by Author unless otherwise noted].

8. On the philosophical basis of law in customs and natural law, see HARTVIG FRISCH, MAGT OG RET I OLDTIDEN. FRA HOMER TIL PERSERKRIGENE [POWER AND LAW IN THE ANTIQUITY. FROM HOMER TO THE PERSIAN WARS] 14–17 (1944).

9. KRUSE, *supra* note 7, at 152.

10. KRISTIAN FREDRIK BRØGGER, LOV OG RETT [LAW AND RIGHT] 903 (1951).

opinio juris sive necessitatis custom.[11] But sometimes six separate conditions have been listed: public, justified, reasonable, anciently used, *opinio juris* rationalized, and *rationem vincat* (morally well founded).[12]

A. The Ancient Codification and the Law Books

In ancient Norse lands all legal provisions were originally unwritten. The law of the land was orally put forward at the *Althing*[13] by the knowledgeable *lovseiemann* (the speaker of the *Althing*) and in Norway by the *lagmann*.[14] Around the year 900 A.D. the ancient districts' laws were written down in Norway and sometime later in Iceland.[15] Denmark, however, has no trace of public codes before the King Valdemar Sejrs Code (*Jyske Lov* [Jutland Law]) of 1241 A.D.[16]

The division of codified laws and customary law did not trace the line between written and orally expressed rules. The bulk of unwritten laws resulted from people's custom and usage as recognized by the popular opinion;[17] "[l]aw and justice was not something decided or created by command, it was already existing, ancient rules that were written down by the earliest Kings, by the recognition of all free men."[18] These district laws subsequently were enacted and adopted through decisions by authorities.[19] While this was clearly the case in Iceland[20] and Norway,[21] Danish law books were not publicly established law commissions or decisions, but rather private collections of laws.[22]

Gradually, in fits and starts, this fully non-codified normative structure was replaced by Norse regional codes like *Gulatingslag* (Norway) and *Jyske Lov* (Denmark).[23] Through these codifications, popular usage transformed into "public sentiment" and thus became acknowledged by what were then the superior legislative authorities: the legislative and dispute-settlement institutions of legislation and justification (*lagrett*), the *lovseismann* of the people's assembly (the *Althing*), and the *lagmann*.[24] Gradually custom and usage, unwritten as it was, transformed into regional or national codes or law books and became part of the

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11. TORSTEIN ECKHOFF, RETTSKILDELÆRE [THEORIES ON THE SOURCES OF LAW] 226 (1980).

12. PER AUGDAHL, RETTSKILDER [SOURCES OF LAW] 207–15 (1973).

13. Now the name of the Icelandic Parliament.

14. KNUT ROBBERSTAD, GULATINGSLOVI 8 (1969) [hereinafter GULATINGSLOVI].

15. *Id.* at 8–9; *see* Guðvarður Már Gunnlaugsson, *Manuscripts and Palaeography*, *in* A COMPANION TO OLD NORSE-ICELANDIC LITERATURE AND CULTURE 246 (Rory McTurk ed., 2005) (discussing when the laws were recorded in Iceland).

16. POUL JOHANNES JØRGENSEN, DANSK RETSHISTORIE [DANISH LEGAL HISTORY] 26–27 (1947) [hereinafter DANISH LEGAL HISTORY].

17. KNUT ROBBERSTAD, RETTSSOGA [LEGAL HISTORY] 144 (1971) [hereinafter RETTSSOGA].

18. JAN RAGNAR HAGLAND & JØRN SANDNES, FROSTATINGSLOVA xi (1994).

19. GULATINGSLOVI, *supra* note 14, at 8–9.

20. Iceland was part of the Kingdom of Denmark-Norway until 1814 and later part of Denmark until independence in 1944. Thus Icelandic law was fully integrated into Danish law. Iceland follows the Danish-Norwegian system of customary law as a dynamic and vital source of law. Since Iceland is not part of Scandinavia, this country is not scrutinized in this Article.

21. GULATINGSLOVI, *supra* note 14, at 8–9.

22. DANISH LEGAL HISTORY, *supra* note 16, at 26–27.

23. *Id.*

24. GULATINGSLOVI, *supra* note 14, at 8–9.

written laws of the land: "Customary law was often recorded in writing."[25] At the same time, the unwritten portions of normative structures gradually decreased. But was further development of popular usage and custom abandoned?

What was the legislature's position with regard to customary laws? Before the regional codifications of *Frostatingslag*, *Gulatingslag*, *Borgartingslag*, etc., in Norway,[26] *Grágás* in Iceland,[27] and the law book of *Jydske Lov*, or the book of decisions *Skaanske Lov*, among others of Denmark,[28] all provisions were unwritten and memorized by the *lovseiemann*.[29] The material substance was altered throughout the years. It was the privilege of the speaker to add new provisions to the law and to terminate ill-considered ones. The ancient jury decided which new provisions to launch. Such provisions lasted for three years, but became obsolete if the *lagmann* or *lovseiemann* refused to mention such provisions in his yearly speech. Unnecessary fabrications would then be forgotten and sink into oblivion.[30] Iceland practiced the same system.[31] This practice follows the Roman Law tradition of desuetude.[32] But gradually, codifications and law books gained ground and conquered most of the legal arena. Thus, new motives and purposes emerged. As posed by the Danish classical philologian, Hartvig Frisch, the transformation promoted by philosophical speculation, from customary law to codified law, paved the way for the civil ideal of justice, bringing the religious law to the brink of extinction.[33] But areas beyond the reach of the codes were still ruled by unwritten and customary laws. Has this position changed over the years?

An early indication is given by the King Christian IV Norwegian Code (NL) of 1604, which translated the King Magnus Lagabøte's Norwegian Code of 1274 from Old Norse to Danish.[34] Identical text is displayed in the preamble of the still-valid King Christian V Norwegian Code of April 15, 1687: "All ancient codes, decisions and statutes, in so far as not incorporated in this codification, are fully terminated, and not allowed in any justification by any litigants as such provisions by this date are void."[35]

Though the Code terminated all ancient public acts, statutes and other codifications, it omitted mentioning unwritten materials. Without explicit reference to customary laws, it is likely they were still valid law.[36] Thus, ancient customary law

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25. 1 ABSALON TARANGER, UTSIKT OVER DEN NORSKE RETTS HISTORIE BD I INNLEDNING RETTSKILDENES HISTORIE [THE NORWEGIAN LEGAL HISTORY: AN OUTLINE, VOL. 1 INTRODUCTION TO THE HISTORY OF THE LEGAL SOURCES] 21 (1935) (on file at The National Library of Denmark).

26. GULATINGSLOVI, *supra* note 14, at 8.

27. An Icelandic law book before 1274—when the Norwegian King Magnus Lagabøte's law called *Járnsiða* became law in Iceland. Lester B. Orfield, *Icelandic Law*, 56 DICK. L. REV. 42, 58–59 (1951).

28. DANISH LEGAL HISTORY, *supra* note 16, at 26–27.

29. RETTSSOGA, *supra* note 17, at 144.

30. *Id.* at 171.

31. Per Sveaas Anderson, *Lovsigemann*, STORE NORSKE LEKSIKON [THE ENLARGED NORWEGIAN LEXICON], http://www.snl.no/lovsigemann (last visited Apr. 13, 2013).

32. *See* Note, *Desuetude*, 119 HARV. L. REV. 2209, 2209 (2006) (discussing the concept of "desuetude"—a legal doctrine "by which a legislative enactment is judicially abrogated following a long period of nonenforcement"—and its legal application in the United States).

33. FRISCH, *supra* note 8, at 33.

34. MAGNUS LAGABØTERS LANDSLOV (Absalon Taranger ed. and trans., 1979).

35. KONG CHRISTIAN VS NORKSE LOV [The Laws of King Chrisitan V] (Apr. 15, 1687) pmbl. (Nor.).

36. The main reason for this is that the King was fully aware of his inability to make rational, detailed

is by subsequent customs[37] and not as in more modern times, by the grace of the King, confirmed as valid Norwegian law.

This is not a peculiarity of Norway, which also included the Faroe Islands, Iceland, and Greenland. The King Christian V Danish Law of 1683 imported the code's position vis-à-vis ancient custom and usages from the Christian IV NL of 1604.[38] As the 1683 codification used the identical text, the Norwegian Code preamble cited above took effect in Denmark as well.[39] Thus, if no ancient customs were abolished by the 1687 Code, neither were they by the 1683 codification.[40]

While this platform clarifies the role of ancient customs and usages in 1680s Denmark-Norway, the role of new customs and usages is open and thus left for the future legislators to decide. And if undecided by the lawmakers, the puzzle comes before the courts.

B. Public and Civil Law: The Legal Theory

Custom is "at present unquestionably . . . to the extent it is recognized as legal, a source of law."[41] While this statement is possibly a truism that does not take into account the question of recognition of custom as customary law, it places its trust in customary law as one of the practical tools for dispute settlement and justification in Denmark and Norway. But who should decide which are the usages and customs that qualify as the law of the land? In legal theory, both the Danish-Norwegian[42] and the British[43] claim that the King's consent is required in order for a custom to be recognized as a legal custom.

However the answer to this question actually depends upon whether the law is disputed. The Danish law professor Alf Ross's position is that most provisions are binding upon judges only; private parties may opt for whatever solution they prefer *inter partes*.[44] To illustrate, although the Norwegian Act of Neighbors provides that no one may plant and keep trees having the height of twice the distance from the boundary of adjoining property, it is commonplace for the landowners involved to agree otherwise.[45] I adhere to Swedish law professor Jes Bjarup's position, which describes the use of "interpersonal perspective" based upon social interaction as

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regulations of Norwegian local peculiarities in areas far from the capital, Copenhagen, in Denmark.

37. TARANGER, *supra* note 25, at 20.

38. DANISH LEGAL HISTORY, *supra* note 16, at 156.

39. *See* LESTER B. ORFIELD, THE GROWTH OF SCANDINAVIAN LAW 15, 169–70 (1953) (discussing the Danish preamble's resemblance to Church texts and similarities to Norwegian codifications).

40. KONG CHRISTIAN DEN FEMTIS DANSKE LOV [THE CODE OF CHRISTIAN V] (Apr. 15, 1683) pmbl. 6 (Den.).

41. PREBEN STUER LAURIDSEN, RETSLÆREN [JURISPRUDENCE] 365 (Akademisk forlag 1977).

42. *See* FREDERIK THEODOR HURTIGKARL, DEN DANSKE OG NORSKE PRIVATE RETS FØRSTE GRUNDE [THE BASIC PRINCIPLE OF THE DANISH AND NORWEGIAN CIVIL LAW] 29 (1813) (stating custom becomes law when the King impliedly consents by not objecting to the people's repeated actions).

43. JOHN AUSTIN, LECTURES ON JURISPRUDENCE 36 (Robert Campbell ed., 5th ed. 1911) (stating that "till the legislator or judge impress them with the character of law, the custom is nothing more than a rule of positive morality"). For Austin, "customary law has nothing of the magnificent or mysterious about it. It is but a *species* of *judiciary* law, or of law introduced by the sovereign or subordinate judges as properly exercising their judicial functions." *Id.* at 543. I am indebted to Jes Bjarup for this reference.

44. *See* ALF ROSS, ON LAW AND JUSTICE 35 (Univ. of Cal. Press 1974) ("[T]he law provides the norms for the behaviour of the courts, and not of private individuals.").

45. Grannelova [Act of Neighbors' Relations] June 16, 1961 nr. 15 §3 (Nor.).

such: Communicative relations among persons as communal agents engaged in the intentional and intellectual activity of making valid rules by means of the exercise of the rational will or practical reason.[46] Thus, an individual possesses the competency to establish binding rules for himself and acknowledging parties. Here, my position—and that of other Scandinavian legal scientists—departs from the understanding that parliaments, agencies, and other public, competent organs monopolize the right to legislation, i.e., that "the ruler's law enforcement necessarily retains the sole right to legislation."[47] At present time it is beyond doubt that customs that are recognized as customary laws are sources of law.[48]

Individuals are not only subjects of law, but creators of law. Lawmaking features not only top-down micromanagement, but also bottom-up normative structures. As in other civil law countries, "successful practices" are driving forces cementing trivial life behavior into legal spheres.[49] Customary law exemplifies Georg Jellinek's illuminating point: normative structures are the metamorphosis of practical performance, "*die normative Kraft des Faktischen.*"[50] Thus, the legal structure is composed of written and unwritten norms, as well as codifications, common laws, general principles of law, and customary laws.

Norwegian Supreme Court Judge Skattebøl fully adhered to this high regard for general principles of law and the public sentiment as envisaged through custom and usage. According to his expressions in a judicial conference in the 1920s, the Court has never let a law force it to adjudicate contradictory to equity.[51] He allowed the Court to apply an equity-law justification that accords with the general principle of law interpreted in the light of the modern public sentiment. This is not a unique position; rather, it is one commonly expressed.[52] This position is—as I see it—is based upon the understanding that there is no way legislators intend to promote law principles that result in unjust and unreasonable justifications, and all legal texts should be interpreted accordingly.

C. The De Facto Pillar

Customary law responds to practical needs and cannot prosper without the continuous and specific relief of these needs. We are thus confronted with the needs of the situation: one rule or another is required. My personal observation from work experience in the Norwegian Ministries is that predictability combined with the common human disposition to ease the burden of thinking creates a tendency to copy

46. Jes Bjarup, *Social Interaction: The Foundation of Customary Law*, *in* THE ROLE OF CUSTOMARY LAW IN SUSTAINABLE DEVELOPMENT 89, 142 (Peter Ørebech et al. eds., 2005).

47. CARL TORP, FORMUERETTENS ALMINDELIGE DEL [GENERAL PRINCIPLES OF PROPERTY LAW] 10 (J. H. Schultz ed., 1890).

48. LAURIDSEN, *supra* note 41, at 365.

49. GEORG JELLINEK, ALLEGEMEINE STAATSLEHRE [GENERAL STATE TEACHING] 330 (2d ed. 2005).

50. *Id.*

51. Fredrik Stang, *Mine juridiske arbeider* [*My Legal Studies*], 55 TIDSSKRIFT FOR RETTSVITENSKAP [J. OF JURISPRUDENCE] 1, 18–19 (1942).

52. Interview with former Norwegian Supreme Court Judges Magnus Aarbakke and Helge Røstad (Apr. 1989).

and generalize previous, reasonable *inter partes* agreements.[53] The legal understanding, as displayed by professor of legal history Poul Johs Jørgensen, was simply that if otherwise unsaid, a repeated solution prevails even though no particular solution is negotiated or settled for future situations.[54]

This de facto starting point also has a historical platform. Prior to the legislative tradition, a period ruled totally by customary law existed. And even under the reign of legislation, custom seems to have remained the dominant factor in developing law for quite a while given the legislature's lack of capability and practice.[55] Following the same school of thought, Norwegian law professor Oscar Platou states that "The ancient Norwegian Codices of *Frostating* and *Gulating* were . . . codified customary law . . . [and] [u]nder the reign of natural law it was said that customary law was invalid until a legislator gave notice that it was law."[56]

What the system requires is a fact-based, adaptable solution that responds to the needs of the situation as visualized by the living fabric of life. As told by Oliver Wendell Holmes, experience and not logic is the life of the law.[57] This does not, however, exclude reason, which clearly has a role to play in relation to effective solutions. The objective of all justification is to work out an effective solution. The ineffectiveness of micromanagement is part of Peter Karsten's observation: "Rules adopted by ordinary people 'work'; those they don't accept, those forced upon them by 'pig-headed' legislators, often don't work."[58] Other studies support that same view.[59]

Why should prosperous constitutional states allow popular lawmaking to become the law of the land? The advantages of customary law include its dynamic structure and its flexibility. Customary law is constantly in a state of progress, adapting to the changing conditions of life and what is "just." As United States Supreme Court Justice Joseph Story observed:

> In truth, the common law is not in its nature and character an absolutely fixed, inflexible system, like the statute law, providing only for cases of a determinate form, which fall within the letter of the language, in which a particular doctrine or legal proposition is expressed. It is rather a system of elementary principles and of general juridical truths, which are continually expanding with the progress of society, and adapting themselves to the gradual changes of trade, and commerce, and the mechanic arts, and the exigencies and usage of the country.[60]

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53. For a similar observation with regard to U.S. Agencies, see Angus Macbeth, *Settling with the Government*, NAT. RESOURCES & ENV'T 9, 11 (Winter 1985) ("They relieve the mid-level official from the burden of thinking through and making judgments about each issue that comes before him.").

54. DANISH LEGAL HISTORY, *supra* note 16, at 26.

55. PER AUGDAHL, RETTSKILDER [SOURCES OF LAW] 191 (3d ed. 1973).

56. OSCAR PLATOU, FORELÆSNINGER OVER RETSKILDERNES THEORI [LECTURES IN THE THEORY OF LEGAL SOURCES] 55 (1915).

57. OLIVER WENDELL HOLMES, THE COMMON LAW 5 (Paulo J.S. Pereira & Diego M. Beltran eds., 1881).

58. PETER KARSTEN, BETWEEN LAW AND CUSTOM 539 (2002).

59. *See generally* THE ROLE OF CUSTOMARY LAW IN SUSTAINABLE DEVELOPMENT (Peter Ørebech et al. eds., 2005) (containing works discussing the practical implications of customary law).

60. JOSEPH STORY, *Codification of the Common Law*, *in* THE MISCELLANEOUS WRITING OF JOSEPH STORY 702 (William W. Story, ed., 1951).

The flexible and highly adaptable customs of the Middle Ages developed "rapidly because they proceeded from the people, expressed their thoughts, and regulated civil, commercial and family life."[61] Perhaps the immemorial customary-law requisite (*longa consuetudo*) was entirely a "tonypandy," which is defined as a historical event that is reported and memorialised inaccurately but consistently until the resulting fiction is believed to be the truth.[62] As stated by Susan Jane Buck Cox, history is not the only field in which tonypandy occurs; economics is infected as well.[63] So is law.[64] Was the belief in immemorial usage only a political way for the English to defend the customary law from the encroachment of an increasingly active sovereign monarchy?[65] It was quite common in Norway and England[66] to add new principles of law to the unwritten legal universe of the ancient speakers (*lovseiemann*) and to the *ting* (all free men at the governing assembly), disguising them as "very old principles of law."[67] The best argument lobbied against powerful kings, eager to embody the entire law-giving capacity, was the fact that immemorial claims were more-or-less tacitly acknowledged by King Richard the Lionheart. The "popular fence" was anchored in "immemorial usage."[68] As this was only an argument, there never was any intention to give a realistic description to the customary law institution. Jean-Jacques Rosseau gave a rational explanation for this legitimization, stating "nothing but the excellence of old acts of will can have preserved them so long: if the Sovereign had not recognized them as throughout salutary, it would have revoked them a thousand times."[69]

Regardless, new customs develop and old customs lapse. The transition causes uncertainty and confusion as to the substantive content of the law. A criteria is needed to evaluate whether a custom has transformed or metamorphosed into a state of law. I agree with Thomas Jefferson's position on this process, that it "is much more material that there should be a rule to go by than what that rule is . . . ."[70] Thus, clear prerequisites are needed to be authenticated by a specific procedure. As elaborated here, court decisions are but one of many things to evaluate in order to determine whether a popular habit, custom, or institution has peaked into established and acknowledged customary law. Our experience is therefore a society of men engaged, throughout many generations, in a corporate experimental search for the external conditions of "the good life." Unwritten normative principles are the product of a balanced and well-regarded system that is capable of managing the

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61. THEODORE PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 308 (5th ed. 1956).

62. Susan Jane Buck Cox, *No Tragedy on the Commons*, 7 ENVTL. ETHICS 49 (1985).

63. *Id.* at 49–50.

64. *See, e.g.*, Cheek v. United States, 498 U.S. 192, 199–200 (1991) (chronicling the development of a statutory defense for criminal tax offenses without specific intent).

65. PLUCKNETT, *supra* note 61, at 307.

66. HENRY SUMNER MAINE, DISSERTATIONS ON EARLY LAW AND CUSTOM 169–70 (1883).

67. This concept was given the Norse name of *nymaele* which means "new speech," i.e., new oral provisions as *maele* means "utterance" or "revelation." *See* DAG MICHALSEN, RETT: EN INTERNASJONAL HISTORIE [LAW: AN INTERNATIONAL HISTORY] 227 (2011).

68. On the Blackstonian criteria, see e.g., William S. Brewbaker III, *Found Law, Made Law and Creation: Reconsidering Blackstone's Declaratory Theory*, J.L. & RELIG. 255–86 (2006).

69. JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 89 (G.D.H. Cole trans., Prometheus Books 1988).

70. THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE: FOR THE USE OF THE SENATE OF THE UNITED STATES §1 (2d ed. 1812).

just distribution of wealth.[71] Conventional morality and law together present the collective and institutionalized wisdom of the nation.[72]

To such a system, the transition periods are critical because they serve to carry society from one level into another. Transaction costs exist, many of which are not of a pecuniary character but—by its rigidity—rather function to preserve old customs longer than expected. This type of cost is often called the "cost of un-sustainability,"[73] and brings disorder into the well-balanced system of commons utilization. It is of great importance how efficiently these periods are handled. As always, transition takes time. As stated by Thomas Paine, "like all other steps which we have already passed over, [it] will in a little time become familiar and agreeable."[74] The steps passed over are real-life changes and the results will lead to changed attitudes toward already established customary laws.

Usage and customs evolve in a society by experience and through discussion find formal expression in its legal order. No custom will survive the test of time if it is found to be contrary to the needs of societies. Illegitimacy will rapidly put an end to a custom. Society needs an authentication process to challenge ancient habits and views caused by transition periods presumably by voting according to systems, referendums, or public polling procedures.

Disputes on whether habits, customs, etc., break into spheres of law are to be settled by the courts, which base their decisions on the specific elements of the case.

D. The Structure of the Competency and Entitlement System

As Kjell Å Modéer said, "all public power emanates from the people."[75] In his universe, the legislative competency is thus embedded in the populous. This is an ancient position that also created the basis for the West Scandinavian system of law one thousand years ago in the sense that the ancient acts and statutes were invalid until recognized by the custom; compare the diversion between "law" (*log*) and "draft law" (*nymæli*).[76] It seems to be that the basis for this system of recognition is founded in the idea of a social contract. However, as is often misunderstood, the delegation of power to the representatives is not an irrevocable transfer of popular power. The people do not by contract abdicate from the continuous responsibility for a peaceful development due to norm development and creation. The system leaves the populous with residual rights of a different kind, such as the right to revolt and, less dramatically, the power to legislate. As Rousseau said: "the depositaries of

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71. This perspective is vital in the generation gap that is the focus of JOHN RAWLS, A THEORY OF JUSTICE 284–89 (1988).

72. *See* T.H. GREEN, LECTURES ON THE PRINCIPLES OF POLITICAL OBLIGATION, DELIVERED 1879–80 at 121–41 (1895) (discussing how sovereigns derive their true power from public will rather than force).

73. Paul Ekins, *The Environmental Sustainability of Economic Processes*, *in* TOWARD SUSTAINABLE DEVELOPMENT: CONCEPTS, METHODS, AND POLICY 25, 34–39 (Jeroen C.J.M. van den Bergh & Jan van der Straaten eds., 1994).

74. THOMAS PAINE, COMMON SENSE 45 (Dover Thrift ed., 1997).

75. Kjell Å Modéer, *Legal Autonomy versus Regulatory Law: Customary Law in East Nordic Countries*, 48 TEX. INT'L L.J. 393, 404 (quoting REGERINGSFORMEN [RF] [CONSTITUTION] (Instrument of Government) 1:1 (Swed.)).

76. ABSALON TARANGER, UTSIKT OVER DEN NORSKE RETTS HISTORIE BD I INNLEDNING RETTSKILDENES HISTORIE [THE NORWEGIAN LEGAL HISTORY: AN OUTLINE VOL. I, INTRODUCTION TO THE HISTORY OF THE LEGAL SOURCES] 20 (1935).

the executive power are not the people's masters, but its officers; that it can set them up and pull them down when it likes; that for them there is no question of contract, but of obedience."[77] Thus, as a logical consequence of this system, to the extent that the parliament has refrained from making regulations, legislative power remains in the people and may be used to fill in gaps in the law. I interpret that the Montesquieu power-sharing arrangement is consequently not a tripartite division, but a system including four parties: the people, the legislature (parliament), the judiciary, and the government.[78]

In this system the people are at risk of being sold out bit by bit—the bulk of their law competency being successively reduced. However, in a democratic society like Denmark or Norway, this fear is not strongly felt. An overly aggressive attack on people's liberties and freedoms may be reversed by the result of the next election. This is because most constitutions give elected representatives power for only a limited period of time.[79] The remaining power is encapsulated in the self-determination of the people, which also includes the right to produce what we tend to call customary law. As far and as long as the parliaments or agencies do not act, the legislative power remains in the people. "The people, in whom the supreme power resides, ought to have the management of everything within their reach: that which exceeds their abilities must be conducted by their ministers."[80] Thus, the legal system consists of both enacted and customary law. Neither of these sources of law are per se superior to the other. Their ranks are decided by the legislature, and if not, by the conflict-solving entity, either the courts or other mediators: "In a situation of a peremptory code, the customary rule of law does not always recede .... It depends on the Judge's discretion whether the codification or the customary law should gain superiority in case of inconsistency."[81]

E. The Role of Customary Law in West Scandinavian Jurisprudence

In this Article, my approach is a general division between in-court and out-of-court decisions. The Nordic understanding of the function of customary law that I adhere to is that customary law is acknowledged as the law of the land, and thus the procedure leading up to this system of law is legally valid. My position is that the courts are more easily adaptive to a custom *praeter legem* than *contra legem*.[82] The Vinding Kruse theorem rejecting customary law in any role, in the latter case, is too rigid. However, sometimes codified law goes out of use—becomes *desuetude*—and thus needs replacement. Subsequently, the bottom-up system of popularly created norms may come to the rescue. A solution has to be found and, in plain language, a fixed and long-lasting practice is not the worst substitute. Since the populous is the mother of all power, there are always some remaining residual rights. Stated

77. ROUSSEAU, *supra* note 69, at 99.

78. *See generally*, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS (1899).

79. *E.g.*, U.S. CONST. art. I, § 2 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States.").

80. MONTESQUIEU, *supra* note 78, at 9.

81. TORSTEIN ECKHOFF, RETTSKILDELÆRE [THEORIES ON THE SOURCES OF LAW] 217 (Tanum Forlag 1980) ("Dreier det sego m en presptorisk lov, må kutymen alltid stå tilbake .... Det beror på dommerens skjønn om han skal la lovens regel eller kutymen gå foran når de strider mot hverandre").

82. KRUSE, *supra* note 7, at 152.

differently, the establishment of representative organs does not delegate all popular power to the representatives.

From this platform one sees the following: First, ancient-time normative structures—those not replaced by codifications of the representative organ—are the law of the land according to criteria discussed in the Article, without needing a specific decision by any representative of the people. Secondly, the theoretical understanding, safely built on Nordic case law, that new customary laws appear, not only based on resurrected ancient principles of law, but also feature newly construed principles that appear without any formal decision made.

With out-of-court solutions, regardless of these general principles, as tacitly implied by the Alf Ross position, each individual may opt for whatever solution acknowledged by others and chosen for the benefit of solving a dispute.[83] These norms may be newly construed for that particular case, or copied out of popular normative structures and followed by few or many, though not (yet) the acknowledged law of the land.

II. THE PRESENT *DE LEGE LATA* SITUATION: CIVIL AND PUBLIC LAW

> One of the Decretals of Gregory IX proclaims the validity of custom even when derogatory of the law, when the former is established by ancient practice and is not contrary to reason.
>
> Paul Vinogradoff[84]

The civil law system of Scandinavia is developed not on the basis of a comprehensive *Bürgerliches Gesetzbuch*, but on the basis of a step-by-step codification of the laws of contracts, checks, sales, bills of exchange, and so on, the provisions of which are developed on an inter-Nordic basis.[85] This codification process was well received not only in Norway, but also in Denmark: "[a] continuation of a cooperation that for years has shown important results."[86] Under the Norwegian provisions, the civil law texts not explicitly peremptory are secondary, only to be taken into consideration in case of gaps in mutual agreements or lack of customary law solutions.[87] These acts indicate the superiority of customary law when in conflict with civil law codification.

That same position results from the justification of a double-traced system of law, i.e., public statutes are not necessarily decisive *inter partes*.[88] In private law,

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83. ROSS, *supra* note 44, at 35–36.

84. PAUL VINOGRADOFF, CUSTOM AND RIGHT 26 (Aschehoug 1925); *see* Daniel Ibbetson, *Custom in Medieval Law*, *in* THE NATURE OF CUSTOMARY LAW, 151, 151 (discussing how medieval law rejected the Roman idea of custom as superior to law). *See generally* J. Porter, *Custom, Ordinance and Natural Right in* THE NATURE OF CUSTOMARY LAW 79 (A. Perreau-Saussine and J.B. Murphy eds., 2007) (discussing the Decretum of Gratian on customary law, which declares that it is "human conventions, rather than natural right as such, which limit and constrain the spirit of permissible human activity").

85. GULATINGSLOVI, *supra* note 14, at 237–39.

86. Proposed Bill [Prop.] 1916-11-9:115 Kommisionsloven [Kml] [Commission Act], remarks on the proposed bill (Den.).

87. ECKHOFF, *supra* note 81, at 221.

88. PETER ØREBECH, OM ALLEMANNSRETTIGHETER [ON PUBLIC PROPERTY RIGHTS] 32–43 (1991).

unwritten customary rules do solve the conflicts; as a result, in some cases the Supreme Court has found "a double-traced system of tax exemptions by corporation restructuring is present."[89] On the national Norwegian level, the provisions in the Mountains Act and other commonage, the Act of Prescriptive Right, and the Act of Property Co-ownership are subsidiary provisions to the superior customary laws of the fields.[90]

This section investigates the place of customary laws in different fields of law in Denmark and Norway. Since contract law was a product of Nordic cooperation, identical solutions tend to follow from both Danish and Norwegian domestic legislation. I mostly relate this to the Norwegian civil law provisions.

The first issue is the civil law approach: What is the basis for legal thinking? Do the customary laws require a specific entitlement to acquire the *infra legem* status, or is it the other way around, and custom and usage are by definition legally valid, enjoying the status of residual rights, if not otherwise decided by the legislature?

The second issue relates to public law. Two perspectives are disclosed: first, customary law's role of filling in the gaps, and second, the role of customary law in cases that might easily be defined as usurpation. Does customary law also play a role here?

In this chapter, if not otherwise stated, illustrations are from Norwegian domestic law.

A. Civil Law

1. Contract Law

There are two—or perhaps three—situations in contract law. First, are the instances of overlapping provisions, for example, acts that collide with contractual clauses, business agreements, customs, and usages generally followed in a particular trade which cover identical instances. In some cases of inconsistency, the compulsory solution dictated by the legislator is to follow the text of the civil law act. Second, we have the identical situation which provides that in some cases of conflict, the parties of the contract may decide to abandon the provisions of the act. An inconsistent, but agreed-upon rule is thus *infra legem*. A third instance is the case of lacunas—gaps in the law—where customary laws may fill in and supplement the codified solutions.

Neither Denmark nor Norway has hesitated resorting to customary laws if they are recognized as the law of the land. To the contrary, under civil law, private parties in particular are entitled to construe private agreements as having superior rank to code provisions and even to expressly or tacitly adhere to business custom and usage as their primary source of law.

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89. *E.g.*, Rt. 2004 1331, para. 40 (Sup. Ct.) (Nor.) (*Aker Maritime* case).

90. *See* Lov Om Utnytting Av Rettar Og Lunnende M.M. I Statsallmenningane [Fjelllova] [The Mountain Act] June 6, 1975 nr. 31 §2 (Nor.); *see also* Lov Om Bygdeallmenninger [The Act of Bygd Commons] June 19, 1992 nr. 59 §1-1 (Nor.).

How does the legislator rule out the connection between codes of law and customary law? I consider only a few, but typical illustrations. There are many alternative formulations made. Several civil law acts were drafted by inter-Nordic law committees,[91] such as the following three acts at the beginning of the twentieth century:

Act of Commission of June 30, 1916 No. 1 § 1 [later "Commission Act of 1916"]:

> The provisions of this act are applicable only if not otherwise stated in contracts or trade usage or other customs, with the exception of provisions that are invariable.[92]

Act of Contracts of May 31, 1918 No. 4 § 1:

> The provisions of this chapter are applicable if not otherwise stated in law, usage, or other custom.[93]

Sale of Goods Act of May 13, 1988 No. 27 § 3:

> The legal provisions pursuant to the agreement are non-binding if established practice between the parties or if commercial practice or other mandatory custom applies between the parties.[94]

Other Danish law solutions are more or less identical, such as the repealed acts, Act of Contracts of May 8, 1917 § 1 and Act of Sales of Goods of April 6, 1906 § 1.[95] The new provisions that are replacing these two acts have identical principles, such as the new Act of Sales of Goods of March 28, 2003 No. 237 § 1. "The provisions of this act are applicable, if not otherwise expressly agreed or presumed as part of an agreement or as follows from trade usage or other customs."[96] An identical solution is found in the Act of Contracts of August 26, 1996 No. 781 § 1. "The provisions of §§ 2–9 are applicable if not otherwise decided in an offer and acceptance or from trade usage or other customs."[97] This is also the case with the Interest on Overdue Payment Act of September 4, 2002 No. 743 § 1.[98] It is important to note that the notion of custom here is identical to trade usage or practice, which indicates that the law provisions are inferior even if these practices have not yet satisfied the customary law prerequisites.

The Danish Act of Insurance Contracts of October 5, 2006 No. 999 § 3 takes a slightly different approach. "The provisions of this law, if not expressly declared invariable, or if invariable following other acts, only apply if not otherwise expressly agreed upon, or is implied in the agreement."[99]

An interesting solution is found in the Danish Act of Commission, Trade Agency and Traveling Salesmen of November 9, 1916 No. 115 § 1, the text of which is

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91. *See, e.g.*, Prop. 1905-02-24 Forslag til lov on køb [Danish Sale of Goods Act], committee recommendations (Den.).

92. Kml June 30, 1916 nr. 1 §1 (Nor.).

93. Avtaleloven [Avtl] [Act of Contracts] May 31, 1918 nr. 4 §1 (Nor.).

94. Kjøpsloven [Sale of Goods Act] May 13, 1988 nr. 27 §3 (Nor.).

95. Aftaleloven [Aftl] [Act of Contracts] May 8, 1917 nr. 242 §1 (Den.); Koebeloven [Kbl] [Sale of Goods Act] Apr. 6, 1906 nr. 102 §1 (Den.).

96. Kbl [Sales of Goods Act] Mar. 28, 2003 nr. 237 §1 (Den.).

97. Aftl Aug. 26, 1996 nr. 781 §1 (Den.).

98. Renteloven [Interest on Overdue Payment Act] Sept. 4, 2002 nr. 743 §1 (Den.).

99. Forsikringsaftaleloven [Insurance Contracts Act] May 10, 2006 nr. 999 §3 (Den.).

identical to the Commission Act of 1916.[100] In the preparatory work to the Danish text, it is explicitly stated that this draft does not exclude future constitutions of customary law contradictory to the provision of this act.[101] It is also said that the 1916 act nowhere terminates or alters already existing customary law.[102] At the same time, as the formulation here is quite identical to the Sales of Goods Act, similar conclusions can be drawn from both acts. For further examples see:

Real Estate Sales Act of July 3, 1993 No 93 §§ 1–2:

> If not otherwise provided for in this act, derogation is allowed by agreement between the parties.[103]

Consumer Purchase Act of June 21, 2002 No. 34 § 3:

> Agreements ruling out law provisions of this act are prohibited if more unfavorable to the consumer than provided for here.[104]

Act on Sales of Timeshare Leisure Accommodation of May 25, 2012 No. 27 § 3:

> The Act cannot be derogated from to the disadvantage of the consumer.[105]

Right of Return Act of December 21, 2000 No. 105 § 3:

> No agreement or requirement is valid if it results in worse conditions compared with the provisions of this act.[106]

As most of these contractual law provisions indicate, *inter partes* contracts and recognized customs and trade usages are superior to the legal provisions and rank over contradictory legislation. However, as stated by Professor Henry Ussing, despite these statements, "customs and usages do not always supersede the statutory provisions. It must depend on the general principles of law under which condition [the superiority of customs or usages] do so."[107]

However, in several acts this is not the case, such as when agreed documents, terms of a contract, or unilaterally based, standard contracts are less favorable to the weaker party than code-based rights.[108]

These are the most common alternatives in contract law. Similar alternatives are also present in instances of property law and the public regulation of property.

2. Property Law

The Norwegian legal system allows customary law to play a considerable role within property regulation. Thus, property-law regulations balance codified and

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100. Kml Sept. 11, 1916 nr. 115 §1 (Den.); Kommisjonsloven [Kml] [Commission Act] June 30, 1916 nr. 1 §1 (Nor.).

101. Prop. 1916-11-09 nr. 115 Kml, remarks to §1 (Den.).

102. *Id.*

103. Avhendingslova [Real Estate Sales Act] July 3, 1993 nr. 93 §§1–2 (Nor.).

104. Forbrukerkjøpsloven [Consumer Purchase Act] June 21, 2002 nr. 34 §3 (Nor.).

105. Om avtaler om deltidsbruksrett og langtidsferieprodukter mv [Act of Sales on Timeshare Leisure Accommodation] May 25, 2012 nr. 27 §3 (Nor.).

106. Angrerettloven [Right of Return Act] Dec. 21, 2000 nr. 105 §3 (Nor.).

107. HENRY USSING, AFTALER PAA FORMUERETTENS OMRAADE [CONTRACTS IN AREA OF THE LAW OF OBLIGATIONS] 441 (Gads forlag 1945).

108. This position is strongly stated in ECKHOFF, *supra* note 81, at 218.

customary laws. For instance, the Co-ownership Act of June 18th 1965 No. 6 § 1 states that "[t]hese provisions are valid as far and as long as not otherwise decided by agreement or due to special circumstances."[109] As displayed in the preparatory work, these special circumstances relate to non-contractual material facts, also known as customary laws.[110] A similar solution can be found in the Act of Neighbors' Relations of June 16th 1961 No. 15 § 1.[111]

See, for example, the Act on Salmon and Freshwater Fishery of May 15th 1992 No. 15 § 5(d). This defines an "[o]pen-access fishery" as "[a] fishery which according to local customary law or other specific entitlement does not belong to the landowner."[112] This is a special regulation on salmon fisheries that are open-access; the delimitation between fisheries conducting business in navigable waters and those which are privately owned, is regulated by customary law. Thus, the customary law is superior to codified law regarding the division of waters.

Also, the non-codified landowner rights over the seabed operate in similar fashion. The landowner's right over the seabed is not codified, and in Norway this right is part of customary law. According to clear and ancient rules, private ownership rights do not reach beyond the depths of two meters or, beyond a steep underwater gradient close to the land.[113] In some instances this general rule is challenged by arguing that local customs are contradictory to the general rule. For instance, in 2011 the Norwegian Supreme Court rejected the position taken by the littoral-zone owners that even deep-basin seabeds beyond the gradient of two meters deep should, according to local customary law, belong to them: "Ownership rights in excess of the rules of the underwater slopes and two meters depths *are possible* on a specific legal basis related to real estate, like immemorial usage and local customary law. I cannot however see that such circumstances are present here."[114]

On grazing rights, customary laws affect fencing in and fencing out goats. In 1995 the Norwegian Supreme Court stated "The local customary law [which gives rights of free-grazing] that here exists is not limited to the farms that are part of the same land number . . . . The considerations on which I here base the local customary law reach out far beyond the conflicting parties estates."[115]

In Denmark, the size of the country, the number of inhabitants combined with relatively small common areas, and the well-organized and -regulated land areas diminish the need for non-codified solutions. Geographic areas are mainly distributed amongst private owners and the challenge is to display rules of access to remaining common pools, of which right-of-way is one of the most important issues. Public lands and the public's access are regulated by the Environmental Protection Act of September 24, 2009 No. 933 § 22, stating "[t]he inshore zone and other littoral regions are open to passage on foot, to short stops, and to sun-bathing in areas

109. Sameigelova [Co-ownership Act] June 18, 1965 nr. 6 §1 (Nor.).

110. Prop. Sameigelova (1964–65) Ot.prp.nr.13 at 12, 18 (Nor.).

111. Grannelova [Act of Neighbors' Relations] June 16, 1961 nr. 15 §1 (Nor.) ("Føresegnene i denne lova gjeld berre så langt anna ikkje fylgjer av avtale eller serlege rettshøve.").

112. Lakse-og Innlandsfiskloven [Act on Salmon and Freshwater Fishery] May 15, 1992 nr. 47 §5(d) (Nor.) ("[F]ritt fiske: det fiske som ifølge lokal sedvanerett eller annen særlig rettshjemmel ikke anses for å tilhøre grunneieren.").

113. *See, e.g.*, PETER ØREBECH, NORSK HAVBRUKSRETT [NORWEGIAN OCEAN FARMING LAW] (1988).

114. Rt. 2011 556, para. 46 (Sup. Ct.) (Nor.) (*Eiendomsrett Sjøgrunn* case) [emphasis added].

115. Rt. 1995 644, 651 (Sup. Ct.) (Nor.) (*Balsfjord* case).

between the low-water level and the continuous vegetation not dominated by saline-resistant plants."[116] However, inland passage was originally under the auspices of customary law: "In this manner it—rather early—was considered firm customary law that all passage in forest and field was open to all."[117] It is commonly understood that right of way is often allocated to the public according to customary law, prescriptive rights, or immemorial usage, despite the road being a private possession. [118]

The rights of passage on horseback cause more excessive use of private lands than hiking, and are normally not covered by the right of way, and thus are in need of a specific entitlement: "Right-of-way on horse or bike is open to all on roads or paths outside home fields and in all mountain areas without fences."[119] However, immemorial usage here may also establish local customary solutions qualified as the law of the land. For example, in 2005, the Danish Supreme Court considered a riding club member's use of a private road throughout the years. The Court stated that

> [R]iding on the piece of road had for many years been *tolerated* by the owner of Krogsgaard, and for that reason [only] this road has been open to everyone who used it for that purpose. On *this* basis the Supreme Court rules that the club member cannot gain prescriptive rights [for their members only] as a minor part of the indefinite group of riders using the road.[120]

The Court rejected both claims from the club regarding prescriptive rights and the immemorial usage, respectively, because the owner of the private path had tolerated its use, not only by the club members, but by all persons on foot and on horseback.[121] While the Court stated that this tolerated usage did not qualify as a basis for special rights for the members of the club through either prescriptive rights or immemorial usage, the Court did not consider whether the practice constituted a local customary law.[122]

In 1987, a Danish High Court recognized an instance of immemorial usage.[123] The Court held that a landowner's decision to close the road was illegal because of those living near it. This conclusion was in consideration of the fact that others used the road. Therefore, the Court's decision also had de facto consequences for people living nearby, similar to a local customary law on an open-access road.[124]

In Denmark, a personal right of way cannot be established on roads that are open to all. This was made clear by the Supreme Court in 2003.[125]

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116. Bekendtgørelse af lov om naturbeskyttelse [Environmental Protection Act] Sept. 24, 2009 nr. 933 §22 (Den.).

117. Prop. Om lov om friluftslivet [Recreational Usage of Nature Act] (1957) Ot.prp.nr.2 at 3 (Nor.).

118. *Id.*

119. *Id.* at 7.

120. U.2005.2464H, 2473 (Sup. Ct.) (Den.) (*Hørsholm* case) (emphasis added).

121. *Id.*

122. *Id.*

123. U.1987.845V(L) (High Court) (Den.) (*Pandrup* case).

124. *Id.* at 847.

125. *See* U.2003.2078H, 2084 (Sup. Ct.) (Den.) (*Vedbæk* case) (holding that.the road in question must be recognized as a municipal road by the respondent, the Søllerød municipality).

The right of way is the basis for some other derived rights, such as the right to harvest seaweed. However, in this particular case the Supreme Court did not find proof of immemorial usage of this right, as it was not documented that seaweed gathering from the property's shore was an immemorial usage.[126]

B. Public Law

1. Customary Law as Entitlement for Statutory Laws

Regulations made by agencies are mostly incorporated in acts, codes, laws and regulations. However, the Norwegian legal system does not require that statutes be made only on the basis of parliamentary decisions. Sometimes, especially with regard to the State Church regulations, customary law is referred to as the entitlement for a statute. One such illustration is the provision on the Norwegian Church's use of its herald, flag, and other church signs as seen in the Regulation of June 8, 1990 No. 4151.[127] Another illustration is on the recognition of the Norwegian Church's herald and flag (King Olav the Saint's (†1030 A.C.) heraldic mark).[128]

In Denmark the inner-life regulations of the Church are also entitled to customary, constitutional law. Since 1849, the Danish government has established necessary regulations according to such customary law. Illustrations are found in the Royal decrees of March 22, 1897, July 18th 1912, and June 12, 1992 regarding wedding rites, and in the Communication of December 15, 1969 on wedding ceremonies in the State Church.[129]

Also in the taxation field, mainly codified in the Danish Constitution of June 5, 1953 No. 169 § 43, the Danish membership in the Organisation for Economic Cooperation and Development (OECD) is applicable, as the 2005 OECD Model Tax Convention on Income and Capital develops principles that tend to acquire a customary law status.[130] Despite the fact that this model convention is legally non-binding, its frequent domestic application increases its value as a legal source within the framework of customary law. Thus, one can say that tax burdens are no longer codified only in the constitutions, but also in customary laws. This result is problematic in relation to the next section—the indispensable provision of the Danish Constitution § 43.

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126. U.1953.40H, 40 (Sup. Ct.) (Den.) (*Seaweed Harvesting* case) ("Ikke bevist, at der i alderstid var hentet tang fra en ejendoms strandkant").

127. Forskrifter for bruk av Den Norske Kirkes våpen [Rules for the Use of Norwegian Church's Herald/Shield/Weapon], Passed by the Church Council June 8, 1990 nr. 4151 (Nor.).

128. Våpen og Flagg for Den Norske Kirke [Herald/Shield/Weapon and Flag of the Norwegian Church], Crown Prince Regents Order of Sept. 28, 1990 nr. 866 (Nor.).

129. BEK 1992-10-08 nr. 841; CIRK 1969-12-15 nr. 258.

130. The 2008 Update To The OECD Model Tax Convention, Organisation For Economic Cooperation And Development, July 18, 2008, Changes to the Commentary on Article 5, *available at* http://www.oecd.org/ctp/41032078.pdf; Model Tax Convention on Income and on Capital, OECD Committee on Fiscal Affairs, July 15, 2005, paras. 37–40, *available at* http://www.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-condensed-version-2005_mtc_cond-2005-en.

2. Contradictory to Written Law

The main understanding is that neither Denmark nor Norway display a widespread practice of acknowledging a governmental policy that is contradictory to codifications that are the law of the land. One such instance is the institution of desuetude. As stated by the Norwegian professor of law Torstein Eckhoff, "this has always been related to very ancient provisions that clearly were contradictory to the sense of justice at the time of justification."[131] According to ancient theories this is *contra legem* activity and thus illegal.[132] And accordingly, constitutional practice in Scandinavia has rarely resulted in legally binding provisions with only a few exceptions.

Norwegian Constitution of May 17, 1814 § 12:

> The regent in high person appoints his ministers from among the Norwegian electors. The cabinet should consist of a Prime Minister and at least seven other members.[133]

The famous case of 1884—which introduced parliamentary rule and caused the demise of the King's appointment of his cabinet ministers—is an example of "instant custom" that initiated a constitutional customary law; "[i]t may, almost instantly, create new law . . . which happened when the parliamentary rule broke through."[134]

Danish Constitution of June 5th 1953 No. 169 § 64:

> In the performance of their duties the judges shall be governed solely by the law. Judges shall not be dismissed except by judgement, nor shall they be transferred against their will, except in such cases where a rearrangement of the courts of justice is made . . . .[135]

The Supreme Court has since interpreted this provision. While the Danish state claimed that this provision was altered according to a customary law under which only judges should enjoy independence from the government, the Court found that the practice of appointing temporary judges that were fully employed at the Ministry of Justice was contradictory to the constitution.[136] Thus the practice was found insufficient to establish a customary law inconsistent with § 64.[137]

Danish Constitution of June 5, 1953 No. 169 § 46:

> Taxes shall not be levied before the Finance Act or a Provisional Appropriation Act has been passed by the Folketing. . . . No expenditure shall be defrayed unless provided for by the Finance Act passed by the

131. ECKHOFF, *supra* note 81, at 210 ("Men da hard et alltid dreiet sego m meget gamle bestemmelser som sto sterkt I strid med rettsoppfatningen på domstiden.").

132. KRUSE, *supra* note 7, at 152.

133. GRUNNLOVEN [GRL NOR] [CONSTITUTION] §12, May 17, 1814 ("Kongen vælger selv et Raad af stemmeberettigede norske Borgere. Dette Raad skal bestaa af en Statsminister og i det mindste syv andre Medlemmer").

134. ECKHOFF, *supra* note 81, at 200.

135. GRUNDLOVEN [GRL DEN] [CONSTITUTION] June 5, 1953, VI:64.

136. U.1994.536H (Sup. Ct.) (Den.) (*Judges' Independence* case).

137. *Id.*

> Folketing, or by a Supplementary Appropriation Act, or by a Provisional Appropriation Act passed by the Folketing.[138]

Customary law alters this constitutional provision since it is acknowledged that the Treasury may charge expenses after the confirmation of the National Assembly (called the *Folketinget*) Committee of Finance.[139] In a commentary, the *Folketinget*'s Constitutional Commission affirmed the legality of this practice.[140]

3. Filling in the Gaps

In several instances, legislation provides no particular solution to the issues between legal codes and customary law. These situations are complicated since legislators neither expressly nor tacitly signal which position to take regarding the role of customary law in dispute settlement. This section scrutinizes the sector of constitutional and public law, in particular administrative law provisions, such as:

> *Danish Constitution of June 5, 1953 No. 169 § 78*:
>
> Citizens shall, without previous permission, be free to form associations for any lawful purpose.[141]

However according to constitutional practice, NGO purposes may be disqualified as legal by being barred not only by codification, but also by customary law and general principles of law.[142] Thus, not only are some associations illegal according to legislation, but customary law may also exclude such a constitutional right.

The Danish Fisheries Act of September 26, 2008 No. 978 § 112(c) concerns digital signatures.[143] The *Folketinget*'s ombudsman for public administration has stated that all decisions made should be endorsed by Ministers, the Director General, and other competent persons by their personal signatures due to a requirement created by customary administrative law.[144] For that reason the new Danish Administrative law paragraph entitles the Ministry of Justice to derogate from the personal signature requirement.[145]

4. Code Annulment Results in Customary Law Resurrection

A peculiar study of the amendment of Norwegian Law of 1687 illustrates the interplay between codification and customary law.[146] The provision had the following text until its termination in 1993: "The common pools shall remain as from ancient

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138. GRUNDLOVEN [GRL DEN] V:46.

139. 2 HENRIK ZAHLE, DANSK FORFATNINGSRET [DANISH CONSTITUTIONAL LAW] 64 ff. (1991).

140. *Id.*

141. GRUNDLOVEN [GRL DEN] VIII:78.

142. 2 ALF ROSS & OLE ESPERSEN, DANSK STATSFORFATNINGSRET [DANISH CONSTITUTIONAL LAW] 749 (3d ed. 1980).

143. Fiskeriloven [Danish Fisheries Act] Sept. 26, 2008 nr. 978 XX:112(c) (Den.).

144. FOLKETINGET OMBUDSMAN [PARLIMENT OMBUDSMAN], FOLKETINGETS OMBUDSMANDS BERETNING (FOB) [PARLIMENT OMBUDSMAN REPORT] 79 (2008).

145. *Id.*

146. NORGES LOVER 1685–1985 19 (Oslo 1986).

time, both the topmost and the furthest out."[147] Due to general effort to update legal texts, the Norwegian government proposed that this 300-year-old provision on the open-access common pools be given modern textual content and form.[148] The language-revision committee wrote the draft law but had a hard time in the transition process. The 300-year-old sentence derived from King Magnus Lagabøte's *Landslov* [National Code] of 1274, written in Old Norse, providing an identical requirement.[149] This provision was itself replacing an identical provision in the *Frostatingslova*, the district laws of Frostathing.[150] Thus the provision—first codified around year 1000 A.D.—has generated case law for a tremendously long time.[151] The sentence was simply distended with meaning. To reproduce all this meaning, many paragraphs had to be construed, an extensive task that my personal conversations with committee members revealed the committee was unable to accomplish.[152] Thus the entire codification idea was at the end dropped.

While the language-revision committee did its best to secure a modern version of this common pool provision, the end result was unsatisfactory. No single sentence could justify the full meaning of the provision.

"All these law titles provide the basic principles of the common law, which all later codification has taken as a starting point. Even if these provisions are formally abolished, many of the moot point solutions will be sought in these ancient provisions and the interpretation that throughout time has been bestowed upon them."[153]

The many attempts to fully capture its meaning failed, and the provision soon expanded into a number of paragraphs—even pages—to fully cover its material content.[154] Thus, the language-revision committee had to concede defeat: "The Ministry refrains from any attempt to translate the ancient provision into modern written language, and thus incorporate the provision in the new code."[155] No short and easy-to-understand sentence was an adequate replacement for the provision. What then was the final result? Did the original provision survive? The answer is no!

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147. Kong Christian Vs Norske Lov [The Laws of King Christian V] N.L. 3-12-1.

148. Prop. Norges Offentlige Utredninger NOU 1985:32 Revisjon av almenningslovgivningen [Revising the Commons' Legislation] (Nor.).

149. MAGNUS LAGABØTERS LANDSLOV, *supra* note 34, at 155.

150. HAGLAND & SANDNES, *supra* note 18, at §204.

151. While the cases are too numerous to mention, some of the most important are presented in Part III, Sections A & B, the quintessence of which is long term activity, intensely conducted, commonly followed in good faith, see in particular the *Lågen* case Rt. 1963 at 377–78.

152. Conversation with Commons' Revision Committee Members of NOU 1985:32 (Sept. 1992).

153. OT.PRP.NR.37 (1991–92), OM A) LOV OM BYGDEALMENNINGER . . . C) LOV OM OPPHEVELSE AV OG ENDRINGER I GJELDENDE LOVGIVNING OM ALMENNINGER M.V. [On A) Act of Community-Owned Common Land . . . C) Act on the Repeal and Amendment of Present Legislation on the Commons] Jan. 1, 1993, §9-4 at 81 (Nor.) ("Alle disse lovstedene inneholder almenningsrettslige grunnregler som senere lovgivning og fremstillinger av gjeldende almenningsrett har tatt utgangspunkt i. Selv om bestemmelsene nå skulle bli formelt opphevet, vil man ved avgjørelsen av mange tvilsspørsmål måtte søke tilbake til dem og den forståelse av dem som gjennom tidligere tider har vært lagt til grunn.").

154. *Id.* ("legger departementet til grunn at dette ikke vil rokke ved almenningenes og bruksrettenes rettslige stilling. Departementet anser det ikke riktig å gjøre forsøk på å gi bestemmelsene en moderne språkdrakt og ta dem inn i det nye lovverket.").

155. *Id.* at 82 ("Departementet anser det ikke riktig å gjøre forsøk på å gi bestemmelsene en moderne språkdrakt og ta dem inn i det nye lovverket.").

When the inflated text appeared on paper, all involved, especially a Circuit Chief Judge who chaired the law-amendment commission, argued that since no alteration seemed possible, the ancient provision of N.L. 3-12-1 should remain unchanged.[156] However, the Ministry of Consumer Affairs and Government Administration's Bureau of Textual Renewal refused to listen to the strong advice from the Chairman of the law committee, Judge President Ola Rygg, who had advocated against the amendments. As stated by the Ministry of Justice and Judge President Ola Rygg, it is the provisions as originally formulated that one nonetheless has to consult when deciding concrete common law questions. "As these provisions are in reality still the ruling law, it is the position of the Committee that these codifications remain the law of the land . . . ."[157]

The N.L. 3-12-1 was terminated as of January 1, 1993.[158] Thus, by this move, the codification as interpreted by courts during all these years, was set aside because of the resurrection of a customary law with the same material content.

III. THE WESTERN SCANDINAVIAN CUSTOMARY LAW PREREQUISITES

Es erben sich Gesetz' und Rechte
wie eine ew'ge Krankheit fort;
sie schleppen von Geschlecht sich zum Geschlechte,
und rücken sacht von Ort zu Ort,
Vernunft wird Unsinn, Wohltat Plage;
Weh dir, dass du ein Enkel bist!
Vom Rechte, das mit uns geboren ist,
von dem ist, leider! nie die Frage.

Johann Wolfgang von Goethe[159]

Surely, as Mephistopheles said in the play *Faust*, many adhere to what seems an unassailable assessment that law should follow the living fabric of life and not repeatedly copy the past generation's norms.[160] This is unquestioned: New challenges require new answers. The popular trial-and-error method results in successful compliance.[161] However, it is too broad a conclusion to subscribe to the Faustian view that laws fail their mission if they create barriers to human activity and are thus "our most structured and revealing social institution."[162] The basic purpose of the law is to be obeyed. And the main purpose of norm setting is to justify and civilize social behavior, so as to avoid the ruin of anarchy and chaos, such as in the bandit states of modern times. Clearly, customary law has a function here.[163]

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156. *Id.* at 81 ("Almenningslovutvalet har foreslått oppheva dei reglane i NL som bør opphevast, og har på side 107 i tilrådinga sagt frå kvifor NL 3-12-1, 3-12-3 og 3-12-6 bør bli ståande i lovverket.").

157. *Id.* at 81–82 ("Når de således reelt fortsatt vil være gjeldende uansett, er det utvalgets syn at de også formelt bør bli stående som fortsatt gjeldende i lovverket.").

158. *Id.* at 105.

159. JOHANN WOLFGANG VON GOETHE, FAUST: TRAGEDIE DE GOETHE 110 (1884).

160. *See* HOLMES, *supra* note 57, at 1 (discussing how we must consult the previous and existing theory of legislation and understand the combination of the two).

161. *See* PETER KARSTEN, BETWEEN LAW AND CUSTOM 539 (1st ed. 2002) (illustrating that the real problem of settling disputes is how the rules become adopted in practice).

162. RONALD DWORKIN, LAW'S EMPIRE 11 (1986).

163. Martin Chanock, *Customary Law, Sustainable Development and the Failing State*, *in* THE ROLE

This basic understanding was quite vital in both Denmark and Norway 800–1000 years ago. "States should be built on laws. If all men kept to themselves, and let others do the same, laws would be superfluous. If laws were vacant, those had the most who grabbed the most."[164] While this common-sense theorem seems obvious to many, some have questioned it.[165]

Since nothing was written down, law was indistinguishable from customary law in ancient Scandinavia. Slowly, prescriptions were written down to ultimately end up in statutes, acts and more comprehensive codifications. The transition from custom and usage to the confirmed customary law is quite a leap. This problem lies in the metamorphosis of fact into norm ("Die normatives Kraft des Faktischen").[166] Though we understand that a transformation of some kind takes place, this section develops more precise criteria.

It is commonly understood that the division between custom and usage and customary law is diffuse: "It is the courts that decide—on the basis of fairly vague criteria—whether there exists [a practice] that is customary law."[167] This is also a common view in other countries.[168] It is hard to say when the intensity of trade usage or other custom is sufficient. The general understanding seems to be that it is within the court's competency to decide the matter.[169] This part of the puzzle is not to be considered here.[170]

My interest is in the customary law prerequisites as practices in Denmark and Norway. It is understood among Danish and Norwegian legal scientists that the conditions for acknowledging customs and usages are more or less identical.[171] As the most cases are the product of Norwegian case law, my main sources of understanding are the Norwegian Supreme Court decisions.

The issue is how new customs and usages are developing into the arena of law. As will be envisaged, these two Scandinavian countries practice a dynamic system that allows not only for ancient customs and usages to develop into law, but also for new customs and usages to do the same. The explanation of the Denmark-Norway position on customary law may best be understood via a comparison to the Blackstonian criteria designated for the development of Anglo-American law. Blackstone's seven prerequisites for converting popular practices into customary law are (1) the requirement of antiquity, (2) the non-concurring use, (3) no verbal

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OF CUSTOMARY LAW IN SUSTAINABLE DEVELOPMENT 338 (Peter Ørebech et al. eds., 2005).

164. JYSKE LOV [Jute Law] pmbl. (King Valdemar 1241) (Den.); MAGNUS LAGABØTES LANDSLOV, *supra* note 34, pmbl. ("Med lov skal land byggjast, og ikkje med ulov øydast").

165. Gregory S. Kavka, *Why Even Morally Perfect People Would Need Government*, 12 SOC. PHIL. & POL'Y, 1, 1–18 (1995).

166. GEORG JELLINEK, ALLEGEMEINE STAATSLEHRE [GENERAL CONSTITUTIONAL LAW] 330 (2nd ed. 2005).

167. ECKHOFF, *supra* note 81, at 186.

168. *See generally* J.B. Murphy, *Habit and Convention at the Foundation of Custom*, *in* THE NATURE OF CUSTOMARY LAW (A. Perreau-Saussine and J.B. Murphy eds., 2007).

169. Prop. 1905-02-24 Forslag til lov on køb [Danish Sale of Goods Act], remarks to §1 (Den.).

170. This question is investigated in my new book project: PETER ØREBECH, CUSTOMARY LAW AS MANIFESTATION OF DEMOCRACY—BY THE MEANS OF REFERENDUM AND OTHER OUT-OF-COURT RESOLUTIONS (in progress).

171. *See* LAURIDSEN, *supra* note 41, at 364–68 (comparing the Danish and Norwegian legal systems).

disagreement, (4) no unreasonableness, (5) certainty, (6) obligation, and (7) consistency.[172]

Unlike the Blackstonian criteria recognized by Anglo-American courts, the Norwegian prerequisites vary in range from two to three conditions (ancient usage and *opinio juris sive necessitatis* custom),[173] to six separate conditions (anciently used, *opinio juris*—rationalized, public, justified, reasonable, and *rationem vincat* (morally well founded)).[174] Despite the formal differences, there are considerable similarities between the two sets of criteria, which I will address later. For now, what follows is an outline of the Norwegian prerequisites.

A. Prolonged Practice

The general requirement defined by legal scholars is that usage must be followed "since ancient times" (*usus longaevous*).[175] The *Balsfjord* case asserts that common grazing was ongoing for at least 150 years.[176] In the *Trondheimsfjorden Mussels* case the Supreme Court states that the usage "has been customary since ancient times."[177] In the *Lågen* case the requirement is that people must have engaged in shallow-bank fishing since the first half of the last century.[178] The Court stated, however, that the origin of this fishing practice goes back even further than verified by the information. The Eidsivating High Court takes a similar stance in the *Jessheim Commons Grazing* case: "as far back as the information is available."[179] A similar decision is made in the *Bolstadfjord* case, even if the wording is different: "This right must have been practiced . . . for as long as the present generation can remember."[180] Compare also the *Jølster Lake* case which states, "[i]n order to have this [binding] character . . . the usage must be so ancient that the oldest living people know nothing else."[181] In the *Vansjø* case, the courts states the practice "must disappear into the darkness of the past."[182]

Therefore, the criteria vary. Sometimes, the criterion is a relative concept, e.g., ancient times or a very long—and abstract—period of time. Just as frequently, the time span must be stated more concretely, e.g., that a score of years is far too short. Nevertheless, the Supreme Court has never clearly stated that the time must be a certain number of years, often stated as 100 years.[183] Memory goes as far back as available information. For the present generation, it points back a maximum of seven generations: the great-grandfather can remember what his great-grandfather

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172. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS 76–78 (London, A. Strahan, T. Cadell & W. Davies eds. 13th ed., 1899); *see also* David Callies, *How Custom Becomes Law in England*, *in* THE ROLE OF CUSTOMARY LAW IN SUSTAINABLE DEVELOPMENT 166–207 (Peter Ørebech et al., eds., 2005) (discussing the Blackstonian criteria).

173. ECKHOFF, *supra* note 81, at 223–26.

174. AUGDAHL, *supra* note 55, at 207.

175. *Id.*

176. Rt. 1995 644, 644 (Sup. Ct.) (Nor.) (*Balsfjord* case).

177. Rt. 1888 682, 684 (Sup. Ct.) (Nor.) (*Trondheimsfjorden Mussels* case).

178. Rt. 1963 370, 379 (Sup. Ct.) (Nor.) (*Lågen* case).

179. RG 1962 261, 265 (High Ct.) (Nor.) (*Jessheim Commons Grazing* case).

180. Rt. 1912 433, 443 (Sup. Ct.) (Nor.) (*Bolstadfjord* case).

181. Rt. 1935 838, 843 (Sup. Ct.) (Nor.) (*Jølster Lake* case).

182. Rt. 1983 569, 579 (Sup. Ct.) (Nor.) (*Vansjø* case).

183. AUGDAHL, *supra* note 55, at 207.

told him. With no contradictory information, we assume that the present tradition follows the earlier tradition. In no case, however, does the Norwegian requirement of "prolonged practice" correspond to the formerly practiced British criterion of "ancient usage," which required continuous practice since the reign of King Richard the Lionhearted, or September 3, 1189.[184]

B. Continuity

Another prerequisite is that the practice has been more or less continuous.[185] The *Trondheimsfjorden Mussels* case emphasized that a group of undefined fishermen "have taken mussels in Sundstrømmen for many years," which indicated a continuous practice.[186] In the *Lågen* case the Supreme Court stressed that

> [S]hallow-bank fishing was conducted in direct view of the property owners, in fixed places over a bounded area and limited to a short period in the fall when the herring go up the river. Shallow-bank fishermen have fished there every year. Shallow-bank fishing ... has gained great constancy and stability. A condition that has developed in this way and which is acknowledged to this extent should not and cannot now be disrupted.[187]

Shallow-bank fishing is an enduring, annual event. It will not take much for a break in this event to discontinue "the acknowledged practice." This also can be compared to the *Bolstadfjord* case claiming that fishermen "put up with being turned away and, in particular, simply stopped fishing for several years when the fishing rights were rented out."[188] Clearly, if the pattern is broken for a certain period of time, we cannot speak of acknowledged consistent practice. Compare also the *Frosta Felling Rights* case.[189] There, local usage was overruled due to a lack of evidence because, among other things, "there has scarcely been any real talk of any definite, regular or independent use by the crofters."[190]

In the *Vansjø* case, the Court found insufficient public activity because the fishing during the actual time period was "pursued to a small extent," "of low volume," "of poor volume and importance," or was "scattered and occasional."[191] Accordingly, recognition is related to intensive usage that is consistent and regular (not "scattered and occasional"), while acknowledged practice means that usage is consistently employed and pursued in the same way ("stable").[192] In most of the seasonal fisheries along the coast, one can easily establish that the practice has been

184. MICHAEL T. CLANCHY, FROM MEMORY TO WRITTEN RECORD: ENGLAND 1066–1307 123 (1979).

185. AUGDAHL, *supra* note 55, at 207.

186. *Trondheimsfjorden Mussels* case Rt. 1888 at 682 and 684.

187. *Lågen* case Rt. 1963 at 377–78.

188. *Bolstadfjord* case Rt. 1912 at 442–43.

189. Rt. 1931 428 (Sup. Ct.) (Nor.) (*Frosta Felling Rights* case).

190. *Id.* at 430.

191. *Vansjø* case Rt. 1983 at 581–83.

192. ØREBECH, *supra* note 88, at 292.

repeated year in and year out. Thus, the practice is not scattered and occasional. It is unlikely that anyone will dispute this prerequisite.

C. Opinio Juris Necessitatis

Traditionally, a third customary law condition applies: the prolonged practice must be based on a common belief that a rule of law, and not just a social norm, was being followed.[193] Three issues arise. First, there is a puzzle concerning the creation of the rule. Above all, is the rule creation visible and not hidden? Otherwise, antagonists are defenseless against creeping legal norms. Second, have the parties to the dispute obtained a somewhat identical legal position? Third, should customary law be recognized despite the existence of minor material discrepancies? Clearly, the proposed legal opinion should be held in good faith.

Practice that is fully legitimate according to one particular entitlement—for example a contract—cannot serve as a basis for an improved right according to usage and customary law.[194] For example, fisheries conducted pursuant to an agreement do not initiate valid customary rights that substitute for that agreement if terminated. Examine in the *Trysil Firewood* case where the Court stated that a new right cannot be established through the exercise of an already recognized right of access, since such practice is invisible to the owner and may not be contested.[195] Accordingly, if tacit acceptance is founded in innocent right of use, the passivity of the lessor cannot create local customary law of a particular type.

> [It must] be assumed that no previous practice of intense, independent cutting of dry [wood] and waste has taken place. Therefore, forest owners were not challenged to intervene when they, as understood by the parties, have certainly considered the existing practice an innocent right of use that represented no danger to the forest.[196]

Practice taking place under the cover of *precario* usage does not create customary law—*inter alia* "[t]he usage has under all circumstances been *precario*—the freeholder having been fully aware of that the usage was fully dependent upon the Forest Authority's benevolence."[197] Usage developing new legal entitlements should exceed or contradict the valid activity under law or the agreement between the parties.[198] Despite this clear position, some instances of *precario* usage have developed into legal rights. The *Vansjø* case is important in this regard because it displays tacit approval of sporadic and occasional fishing:

> The usage developed in the shadow of the property owners' benevolent attitude. It is hardly in accordance with good customs and usage to deny people such lenient fishing. I refer to the *Lågen* case in Rt. 1963 p. 370. In

193. AUGDAHL, *supra* note 55, at 209–10.

194. SJUR BRÆKHUS & AXEL HÆREM, NORSK TINGSRETT [NORWEGIAN PROPERTY LAW] 612 (1964).

195. Rt. 1918 II 261, 265–66 (Sup. Ct.) (Nor.) (*Trysil Firewood* case).

196. *Id.* at 265.

197. Rt. 1962 304, 317 (Sup. Ct.) (Nor.) (*Dønnes Gods* case).

198. *See* BRÆKHUS & HÆREM, *supra* note 194, at 612–13 (discussing that usage must be of a nature that would cause the other party to intervene).

> my opinion . . . a scattered and occasional usage . . . and without economical significance for the property owners or the users, is tolerated fishing. Subsequently the conditions for acquisition of rights by ancient time usage do not exist. However, it follows from the *Lågen* Case, that tolerated fishing through the years is converted into a right. Whether such a development can be proven depends upon individual circumstances.[199]

Tolerated usage may develop into an acknowledged right. It is important to describe the transfer mechanisms because they provide the criteria for the transition from a non-customary law "contested right" to an "established customary law right."

Since the practice is camouflaged, innocent usage does not give notice to parties who consequently refrain from any protest. The display of signs and public notice prevents trespassing. In the *Trondheimsfjorden Mussels* case, the mussel owners' "protection notice" prevented good faith fisheries from continuing.[200] The Supreme Court acquitted the defendants, who, in accordance with ancient customary practice, had taken mussels in Sundstrømmen for years without any hindrances whatsoever until the mentioned owners put up a protection notice to prevent further fishing a few years before.[201] In this case, the Court recognized that the landowners had a reason to react because the mussels fishing was clearly visible.[202] Since the use was justified, the notice as such did not terminate the public property right.

On the other hand, timely presented objections are effective. For instance, in the *Sperillen* case where the majority states: "Since the turn of the century, some have certainly fished to a broader extent and with looser association to the farms. Nevertheless, this has been contested in part, and permission to fish has been granted in part."[203] Consequently, the property owner barred fishing and did not remain passive. As the permission to fish suggests, the legal entitlement lay in the agreement, and not in *precario* usage.

Further, one-sided recognition of custom is not enough. The parties must share the same legal belief. In the *Trysil Firewood* case, the Supreme Court denied the farmers' alleged right to trees belonging to others.[204] The Court reasoned that a right that had evolved to the detriment of the owner's rights, and for which no reciprocal legal rights or obligations were exchanged, had to be acknowledged by a joint understanding.[205] Even the aggrieved party had to be complicit in this understanding and recognize that the exercise of the right had been lawful.[206] In other words, the party surrendering user or ownership rights must recognize the existence of the right in the party assuming it.[207] This 1918 case did not satisfy the prerequisite of "shared legal opinion." The reciprocity requirement is further confirmed by the *Jølster* case: "No one can create binding customs by behavior alone; in order to have this

199. *Vansjø* case Rt. 1983 at 583.
200. *Trondheimsfjorden Mussels* case Rt. 1888 at 682–84.
201. *Id.* at 684.
202. *Id.* at 682–84.
203. Rt. 1972 77, 82 (Sup. Ct.) (Nor.) (*Sperillen* case).
204. *Tyrsil Firewood* case Rt. 1918 II at 261.
205. *Id.* at 265.
206. *Id.*
207. *Id.*

character, the use requires a reciprocal awareness of positive right and obligation."[208] The same viewpoints are presented in both the *Fluberg Pasture* case[209] and the *Vansjø* case.[210]

Additionally, the reciprocal understanding should mirror the general opinion of the trade or district. The customary law should be generally recognized throughout the realm of the proposed rule, not only amongst those involved in the actual conflict. This position is clearly stated in the *Seaweed Sheds* case, where the court held, "The general opinion in the district, including those of the property owners, is that the latter may not forbid seaweed sheds on their beaches. That such an opinion has been commonly held, is, in my opinion, far from proven."[211] While the beneficiaries shared the legal conviction of open access seaweed sheds, the property owners' belief was slightly different. The owners thought they could not actually prohibit the activity.[212]

To what extent, however, should unanimous belief exist? In the *Jessheim Common Grazing* case, the High Court recognized twenty-two witnesses from different parts of the district, who,

> [S]o to say, unanimously expressed the belief that they had a "duty" to fence off the home fields from outlying fields and roads. They also believed this to be the general opinion in the district .... The observations the court made during inspection of the scene corroborate that it must have been the general opinion in the district that the duty to fence existed as stated ... I hardly think that fences would have had been so well maintained [as they are] if the farmers did not believe that they were required to do so.[213]

In summation, the legal opinion should be held in good faith by both parties. However, the reciprocally held opinions need not be identical. Such a requirement is impossible, because if the parties involved fully agreed, no customary law would have ever developed. No requirement claims that the parties share identical legal understanding in all respects. According to the *Jessheim Common Grazing* case, it is sufficient that opinions, at a general level, do not conflict,[214] such as in the *Lågen* case:

> The fishermen continued shallow-bank fishing believing that they had a right to do so. They were convinced that the property owners could not deny or interfere with that, nor could the owners get in the way of permanently positioned equipment. I cannot place much weight on the fact that they have provided reciprocally different answers when asked about the legal basis for their right in association with the case.[215]
>
> [I]f the property owners' opinion is that shallow-bank fishing is dependent on their giving their permission, one would have expected them to express

208. *Jølster Lake* case Rt. 1935 at 843.
209. Rt. 1959 1321, 1322 (Sup. Ct.) (Nor.) (*Fluberg Pasture* case).
210. *Vansjø* case Rt. 1983 at 569.
211. Rt. 1896 500, 505 (Sup. Ct.) (Nor.) (*Seaweed Sheds* case).
212. *Id.* at 505–06.
213. *Jessheim Commons Grazing* case RG 1962 at 265.
214. *Id.* at 265–66.
215. *Lågen* case Rt. 1963 at 376.

> this concern in the appropriate situations .... The property owners' behavior ... indicates that they have put up with the fishing, either because they assumed that they could not deny it, or because they were in doubt about their rights and therefore did not intervene. Shallow bank fishing by people without special fishing rights has developed because of the property owners' consistent passivity.[216]

Consequently, while the fishermen's implemented practice tends to document customary rights, the owners' input is limited to non-contesting. Despite the landowners' unclear *opinio juris*, a customary right similar to fisheries practice was upheld.[217] The key is whether the qualifying groups advocate an adversarial understanding of the law. Their feelings of obligation to the rule should be based on law, not on extra-legal principles.

CONCLUSION

While my findings here are based on Norwegian case law, the Danish position to the criteria of customary law is similar, as made clear by Preben Stuer Lauridsen.[218]

The democratic principle does not hinder the customary law from playing a vital legislative role in Denmark and Norway. To the contrary, the legislature often refers directly to custom and usage as a primary source of law. And even though no reference is made to customary law, such bottom-up-created norms are recognized by the courts. Thus, as case law indicates, new signs of normative structures are from time to time invited into the law of the land regardless of legislature's resolutions.

The criteria for popular norms to qualify are that popular actions resulted from a common belief that a rule of law and not just a social norm (ethical or moral), that people follow it, that the usage must be so ancient that the oldest living people know nothing else, and that the practice is related to continuous usage—i.e., is consistent and regular.

No requirement exists claiming the practice, usage, or customs must be from ancient time. Sometimes instant custom is acknowledged as the law of the land. Further, western Scandinavia does not face any trace of a *contra legem* limitation to valid customary laws.

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216. *Id.* at 377–78.
217. *Id.* at 378–79.
218. LAURIDSEN, *supra* note 41, at 365.

False Jurisdictions? A Revisionist Take on Customary (Religious) Law in Germany

PASCALE FOURNIER* & PASCAL MCDOUGALL**

SUMMARY

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INTRODUCTION: CUSTOM AS A SOCIAL LEGAL ORDER?

Over the last decades, two important debates have echoed each other in Western European countries. The first is quite ancient, and touches upon the place of custom in the legal system and its distinction from (state) law.[1] The second debate, of more recent origins, pertains to the integration of minorities through recognition of their distinct religious normative orders.[2] Despite fundamental differences, both discourses share many interesting meeting points. Indeed,

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1. *See* H. Patrick Glenn's LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW 74 (2007) (describing debates over the definition and legal status of customary law).

2. Bryan S. Turner & Berna Zengin Arslan, *Shari'a and Legal Pluralism in the West*, 14 EUR. J. SOC. THEORY 139, 151–52 (2011).

customary law is currently defined as a system that "grows out of the social practices [that] a given jural community has come to accept as obligatory."[3] It is viewed as a "pervasive normative order."[4] Customary law "arises when there is a long-standing practice and those affected by it recognise its legality."[5] The virtues of customary law have been sung by many authors, who view it as a living, democratic, and social form of law, to be preferred over state law whenever possible.[6] For instance, one author argues that customary law is valuable because it "assur[es] [the states'] citizens of their legal rights to believe in and practice their own different ways of life."[7] Another commentator stresses the value of this form of law on the grounds that it is "made from the 'bottom up' by relevant communities."[8] Finally, other authors underline the need "for a country to both respect and make space for the customary legal systems of its various populations."[9] Customary law—often portrayed as a "bottom-up" approach to sustainable economic development in lieu of state intervention[10] or as a way to repair injustice committed by settler states towards aboriginal groups[11]—has been invoked in many different social contexts. Unsurprisingly, the view of customary law as an empowering social legal system has been especially strong with regard to religious and non-Western customary laws. One author thus deplored a tendency "to regard the rules of social intercourse observed in non-Western communities as not being in any true sense law."[12] The author proposed that "we ought not therefore to refuse to recognise . . . an institution or status unknown in our Western countries"[13] but instead recognize all non-Western customs in the name of the "progressive integration of what is after all . . . a single world."[14] Specifically with regard to the recognition of Islamic law in Western countries, some authors, likening Islamic law (Shari'a) to customary law,[15] have argued in favor of "allowing [Muslims]

3. T. W. Bennett, *Comparative Law and African Customary Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 641, 642 (Mathis Reimann & Reinhard Zimmermann eds., 2006).

4. Bennett, *supra* note 3.

5. RAYMOND YOUNGS, ENGLISH, FRENCH & GERMAN COMPARATIVE LAW 77 (2d ed. 2007).

6. *See, e.g.*, David Pimentel, *Legal Pluralism in Post-colonial Africa: Linking Statutory and Customary Adjudication in Mozambique*, 14 YALE HUM. RTS. & DEV. L.J. 59, 81–83 (2011) (noting customary law's "flexibility and responsiveness to community needs" and arguing in favor of "enhancing the role for customary law and customary systems as much as possible" because they "are the most accessible, productive, and effective in meeting the dispute-resolution needs of the population"). For a genealogy of forms of social law in contemporary legal thought, see Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 19, 40 (David Trubek & Alvaro Santos eds., 2006).

7. LEON SHELEFF, THE FUTURE OF TRADITION: CUSTOMARY LAW, COMMON LAW AND LEGAL PLURALISM 6 (2000).

8. DAVID J. BEDERMAN, CUSTOM AS A SOURCE OF LAW, at X (2010).

9. Susan H. Williams, *Democracy, Gender Equality, and Customary Law: Constitutionalizing Internal Cultural Disruption*, 18 IND. J. GLOBAL LEGAL STUD. 65, 65 (2011). Susan H. Williams, however, criticizes customary law's effects on women. *Id.* at 65–66.

10. PETER ØREBECH ET AL., THE ROLE OF CUSTOMARY LAW IN SUSTAINABLE DEVELOPMENT, at ix (2005).

11. JOHN BORROWS, CANADA'S INDIGENOUS CONSTITUTION 205 (2010).

12. R. D. Kollewijn, *Conflicts of Western and Non-western Law*, *in* 2 FOLK LAW: ESSAYS IN THE THEORY AND PRACTICE OF *LEX NON SCRIPTA* 775, 776 (Alison Dundes Renteln & Alan Dundes eds., 1994).

13. *Id.* at 792.

14. *Id.*

15. Turner & Arslan, *supra* note 2, at 151.

to have the social space within which *Shari'a*-mindedness can flourish, thereby allowing pious Muslims to live a faith-based life."[16]

In this Article, we problematize this idealized picture of customary law as harmonious. Based on fieldwork, we present customs as contested from the inside and open to decisions, strategies, and manipulations that sometimes alter their content and meaning. The product of our fieldwork arises from the particular context of Germany, a country that shares many traits with other continental European polities as far as the recognition of religious laws is concerned. Germany has been marked by debates surrounding the search for "pluralistic modes of incorporation"[17] of communities along the lines of their religious socio-legal orders, specifically as to the possibility for Muslims to organize their community along religious lines in an entity called a public law corporation, like German Christians and Jews are allowed to do in Germany.[18] A "religious conception of community," such as that adopted with regard to the issue of religious public law corporations, bears much relevance to the topic of the recognition of religious custom.[19] Indeed, in addition to the pastoral organization of communities, debates have focused specifically on religious law and on whether "a European *fiqh* (Islamic 'law') is possibly developing."[20] Germany, like other European countries, does not allow religious law to apply to national citizens, with very few exceptions. This Article tries to outline the challenges to an eventual recognition of religious law as custom, arguing that these challenges are considerable and downplayed or under-estimated by many legal scholars. To explore the dynamics of customary religious law in Germany, we present the findings of fieldwork among Jewish and Muslim communities in Germany and data from formal interviews with eight Jewish and Muslim women. Although the fieldwork focuses on Jewish and Islamic religious laws in Germany, our hypotheses are meant to be applicable to other sets of customary legal systems. More specifically, we argue that recognizing Jewish and Islamic law as custom is a project potentially fraught with conceptual difficulties and unintended distributive consequences. This state of affairs can be explained by the unstable

16. *Id.* at 156. For similar positions see TARIQ MODOOD, MULTICULTURAL POLITICS: RACISM, ETHNICITY, AND MUSLIMS IN BRITAIN 141–43 (2005) (arguing for the accommodation of religion as a central element of integration policies); Natasha Bakht, *Religious Arbitration in Canada: Protecting Women by Protecting Them from Religion*, 19 CAN. J. WOMEN & L. 119, 120 (2007) (arguing for "consideration for religious women who might want to live a faith-based life").

17. Matthias Koenig, *Incorporating Muslim Migrants in Western Nation States—A Comparison of the United Kingdom, France, and Germany*, 6 J. INT'L MIGRATION & INTEGRATION 219, 228 (2005).

18. *See* Mathias Rohe, *The Legal Treatment of Muslims in Germany*, *in* THE LEGAL TREATMENT OF ISLAMIC MINORITIES IN EUROPE 83, 87 (Roberta Aluffi B.-P. & Giovanna Zincone eds., 2004) (explaining that the public law corporation constitutional status provides entitlements such as "the right to levy taxes from members of the community and to organize a parish," among others); *see also* Pascale Fournier & Jens Pierre Urban, *La régulation des morts par le droit allemand: L'au-delà comporte-t-il des privilégiés? [The Regulation of the Dead by German Law: Does the Afterlife Consist of Privileged People?]*, *in* LES CARRÉS DE L'ISLAM EN EUROPE 13 (Atmane Aggoun ed., 2010) (discussing the possibility of German Muslim communities managing their own funeral rites and cemeteries through the public law corporation status and the resulting discursive and subjective implications).

19. Riva Kastoryano, *Religion and Incorporation: Islam in France and Germany*, 38 INT'L MIGRATION REV. 1234, 1248 (2004).

20. Mathias Rohe, *Islamic Norms in Germany and Europe*, *in* ISLAM AND MUSLIMS IN GERMANY 49, 51 (Ala Al-Hamarneh & Jörn Thielmann eds., 2008).

nature of religious legal orders and of law in general, which are socio-legal realities in which anyone concerned with customary or religious law should be interested.

After having presented in Part I the basic rules of Islamic and Jewish law and the German state law that regulates them, we delineate our socio-legal findings in two parts. Part II contends that the external boundaries of religious customary laws are often blurry and constantly redefined by adjudicators and bargaining parties, such that the religious legal order to be recognized may be undefined and varying in its scope, content, and normative reach. Part III then shifts the gaze towards the internal architecture of religious law, claiming that the adjudicatory outcomes and the procedures of religious marriage and divorce are often uneven and depend on the choices and decisions of particular adjudicators, parties, and stakeholders. We query whether these conflicting outcomes might be explained not only by boundless discretion and informality in the religious adjudication process, but also by customary law's internal structure. Thus, if the project of recognizing customs is to be maintained, it must take stock of the conceptual and practical conflicts inherent to the sphere of customary law, and to law more generally. These arguments are intended as a contribution not only to the literature on customary law, but also to the burgeoning literature on the interaction between secular state law and unofficial religious norms.[21]

By focusing on the experiences of women, this Article aims to assess women's positions in religious family law and customary legal systems. Observations about the vulnerability of women within traditional and religious family law are not new.[22] Scholars have noted that women "face greater restrictions on their rights to marry, their rights to pass on their nationality or membership to their children, their options and access to divorce, their financial circumstances and their opportunities to be awarded custody."[23] If we indeed acknowledge these observations and focus our fieldwork on the situations of religious women, we nevertheless aim to go beyond conventional feminist accounts of religious law.[24] The picture we paint is thus not

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21. *See generally* MARIE-CLAIRE FOBLETS ET AL., CULTURAL DIVERSITY AND THE LAW: STATE RESPONSES FROM AROUND THE WORLD (2010); RALPH GRILLO ET AL., LEGAL PRACTICE AND CULTURAL DIVERSITY (Ralph Grillo et al., eds., 2009); RICHARD MOON ET AL., LAW AND RELIGIOUS PLURALISM IN CANADA (Richard Moon ed., 2008); JOEL A. NICHOLS ET AL., MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT: MULTI-TIERED MARRIAGE AND THE BOUNDARIES OF CIVIL LAW AND RELIGION (Joel A. Nichols ed., 2011).

22. *See, e.g.*, Radhika Coomaraswamy, *Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women*, 34 GEO. WASH. INT'L L. REV. 483, 483 (1964) (arguing that group-based identities "create obstacles for the realization of equality"); *see also* MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 7 (2000) (encouraging international, political, and economic discussion addressing justice issues for impoverished women).

23. Ann Laquer Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 MD. L. REV. 540, 600 (2004).

24. On Jewish women, see Carmel Shalev, *Women in Israel: Fighting Tradition*, *in* WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 89, 92 (Julie Peters & Andrea Wolper eds., 1995) ("[S]ubstantive Jewish laws of marriage and divorce are pervaded by a double standard that is patently discriminatory."); Gila Stopler, *The Free Exercise of Discrimination: Religious Liberty, Civic Community and Women's Equality,* 10 WM. & MARY J. WOMEN & L. 459, 462 (2004) ("The close ties between religion and the state in Israel clearly violate women's rights to equality."). On Muslim women, see MARGOT BADRAN, FEMINISTS, ISLAM, AND NATION: GENDER AND THE MAKING OF MODERN EGYPT 124 (1995) (denouncing Islamic family law as perpetuating the "[p]atriarchal domination remain[ing] most entrenched in the family"); Homa Hoodfar, *Circumventing Legal Limitation: Mahr and Marriage Negotiation in Egyptian Low-Income Communities*, *in* SHIFTING BOUNDARIES IN MARRIAGE AND DIVORCE IN MUSLIM COMMUNITIES 121, 124 (1996) (portraying Islamic marriage as a

one of total gender oppression. Instead, we present portraits of women moving through religious divorce as social agents[25] in order to outline that custom is a contested social space, which can be and indeed sometimes is used by women to their advantage. We try to grasp religious women's fragmented powers and knowledge as they move through the saturated social sphere designated as custom. In so doing, our aim is to move away from religious "gendered images" or "symbolic roles"[26] and closer to an image of women entering conflicting and multiple worlds of negotiation. This will allow us to outline some conceptual and social difficulties associated with viewing religious law as potential custom, or as a social way of life to be recognized by secular states.

I. THE GERMAN LEGAL LANDSCAPE: RELIGION, STATE, AND CUSTOM

This section presents the basic rules that form the common ground of almost all variants of Muslim and Jewish law. We then present the German civil law of marriage and divorce, which often leaves religious law unrecognized in the private sphere. The concepts explored in this section form the basis of our subsequent exploration of the concrete manifestations of Muslim or Jewish normative orders in the private sphere of religion in Germany.

When Jews and Muslims marry in Western countries, their ceremony often includes both a religious and a civil element. Under both traditions, husbands and wives have distinct rights and responsibilities within the marriage. Access to religious divorce is drawn sharply along gender lines.[27] Under Islamic family law, marriage establishes a reciprocity system in which each party is assigned a set of contractual rights and duties towards the other party.[28] An Islamic marriage contract is concluded through the principles of offer (*ijab*) and acceptance (*qabul*) by the two principals or their proxies.[29] Upon marriage, the husband acquires the right to his wife's obedience[30] and the right to restrict her movements outside the matrimonial home.[31] The wife acquires the right to her *mahr*[32] and the right to maintenance.[33]

"fundamentally unequal social institution").

25. On the topic of Muslim women's agency, see Anna C. Korteweg, *The Sharia Debate in Ontario: Gender, Islam, and Representations of Muslim Women's Agency*, 22 GENDER & SOC'Y 434, 444 (2008) (developing a conception of "agency . . . embedded in religion").

26. *See* Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, 9 THEORETICAL INQUIRIES L. 573, 591 (2008) (discussing how "[f]or a complex set of reasons, women and the family often serve a crucial symbolic role in constructing group solidarity").

27. *E.g.*, *id.* at 576; Ann Laquer Estin, *Unofficial Family Law*, 94 IOWA L. REV. 449, 464 (2008–2009) [hereinafter Estin, *Unofficial Family Law*]; HAIDEH MOGHISSI, FEMINISM AND ISLAMIC FUNDAMENTALISM: THE LIMITS OF POSTMODERN ANALYSIS 20–21 (1999).

28. Lama Abu-Odeh, *Modernizing Muslim Family Law: The Case of Egypt*, 37 VAND. J. TRANSNAT'L L. 1043, 1063–64 (2004).

29. JAMAL J. NASIR, THE ISLAMIC LAW OF PERSONAL STATUS 45 (3d ed. 2002).

30. *Id.* at 98; MUHAMMAD JAWĀD MAGHNĪYAH, THE FIVE SCHOOLS OF ISLAMIC LAW 359 (1995); M. AFZAL WANI, THE ISLAMIC LAW ON MAINTENANCE OF WOMEN, CHILDREN, PARENTS AND OTHER RELATIVES: CLASSICAL PERSPECTIVES AND MODERN LEGISLATIONS FROM INDIA AND MUSLIM COUNTRIES 49 (1995).

31. NASIR, *supra* note 29, at 80.

32. *Mahr*, meaning "reward" (*ajr*) or "nuptial gift" (*sadaqa*), is the expression used in Islamic family law to describe the "payment that the wife is entitled to receive from the husband in consideration of the

Like Muslim marriage, Jewish marriage is finalized according to contractual principles. The parties execute a marriage contract (a *ketubah*, pluralized as *ketubot*), often written in Aramaic,[34] which lists the duties of each spouse.[35] Unlike the Muslim marriage contract, which is negotiated between the parties and is therefore unique to them and their relationship, the *ketubah* is fairly standard.[36] Based on the Torah's articulation of a husband's duties towards his wife, this contract includes requirements for adequate food, clothing, shelter, and regular intercourse, as well as the sum of a payment for the wife in the event of death or divorce (traditionally, the sum necessary for the woman to support herself for one year).[37]

Islamic legal institutions such as *talaq* divorce, *khul* divorce, and *faskh* divorce determine the degree to which each party may or may not initiate divorce and the different costs associated with such transactions.[38] According to classical Islamic family law, women have the agency to use the *khul* or *faskh* divorce, but may not use the *talaq* divorce.[39] The *khul* divorce is introduced judicially by the woman, with the understanding that such route will dissolve the husband's duty to pay the deferred *mahr*.[40] The *faskh* divorce is a fault-based divorce initiated by the wife before the Islamic tribunal, and it is by nature limited to specific grounds.[41] In the case of termination of marriage by *faskh* divorce, unlike *khul* divorce, the wife is entitled to *mahr*.[42] Finally, the *talaq* divorce (repudiation) is a unilateral act that dissolves the marriage contract through the declaration of the husband only.[43] The law recognizes the power of the husband to divorce his wife by saying "*talaq*" (meaning "divorce") three times without any need for him to ask for the enforcement of his declaration by the court.[44] However, what comes with this unlimited freedom of the husband to

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marriage." PASCALE FOURNIER, MUSLIM MARRIAGE IN WESTERN COURTS: LOST IN TRANSPLANTATION 9 (2010) [hereinafter FOURNIER, MUSLIM MARRIAGE].

33. *Nafaqah*, or maintenance, is the "husband's primary obligation" to his wife and "includes food, clothing, and lodging." JOHN L. ESPOSITO & NATANA J. DELONG-BAS, WOMEN IN MUSLIM FAMILY LAW 26 (2d ed. 2001); WANI, *supra* note 30, at 194–95.

34. Nowadays Hebrew *ketubahs* are also used. Jonathan Reiss & Michael J. Broyde, *Prenuptial Agreements in Talmudic, Medieval, and Modern Jewish Thought*, *in* MARRIAGE, SEX, AND FAMILY 192, 202 (Michael J. Broyde & Michael Ausubel eds., 2005).

35. Jodi M. Solovy, Comment, *Civil Enforcement of Jewish Marriage and Divorce: Constitutional Accommodation of A Religious Mandate*, 45 DEPAUL L. REV. 493, 496 (1996).

36. As put by Elliott N. Dorff and Arthur I. Rosett, "[t]he parties may determine by contract only those elements of the relationship which the law permits them to decide." A LIVING TREE: THE ROOTS AND GROWTH OF JEWISH LAW 453 (1988).

37. Solovy, *supra* note 35, at 496.

38. Kathleen Miller, *Who Says Muslim Women Don't Have the Right to Divorce?—A Comparison Between Anglo-American Law and Islamic Law*, 22 N.Y. INT'L L. REV. 201, 218–25 (2009) (defining and explaining the different types of divorce in Islam).

39. *Id.* at 218–25.

40. *See* DAWOUD EL ALAMI & DOREEN HINCHCLIFFE, ISLAMIC MARRIAGE AND DIVORCE LAWS OF THE ARAB WORLD, 27–28 (1996) (discussing women's possibilities of getting a divorce from their husbands and the consequence of such a divorce); Abdal-Rehim Abdal-Rahman Abdal-Rahim, *The Family and Gender Laws in Egypt during the Ottoman Period*, *in* WOMEN, THE FAMILY, AND DIVORCE LAWS IN ISLAMIC HISTORY 96, 105 (Amira El Azhary Sonbol ed., 1996) (explaining that *khul* divorce demanded by women must be conditioned on forfeiture of any dowry and alimony).

41. *See* Abdal-Rahim, *supra* note 40, at 105 (outlining that women can initiate divorce for legal reasons such as impotence, lack of piety, and nonperformance of Islamic duties).

42. *Id.*

43. EL ALAMI & HINCHCLIFFE, *supra* note 40, at 22.

44. *Id.* at 23.

divorce at will in the private sphere is the (costly) obligation to pay *mahr* in full as soon as the third *talaq* has been pronounced.[45]

Unlike Muslim women who may initiate divorce through *khul* or *faskh*, Jewish women are not in a position to religiously divorce their husbands. In order to be "*halakhically*"[46] correct, a Jewish marriage may only end in the death of a spouse or the voluntary granting of a divorce (*get*) by the husband[47] and its simultaneous acceptance by the wife.[48] The husband thus has the exclusive power to deliver the *get*,[49] which comes in the form of a surprisingly brief written document written mostly in the Aramaic language.[50] The most important passage of this document essentially states that the woman is now free to marry any man and that in so doing she will not be guilty of committing adultery.[51] If a Jewish woman is entitled to a *get* and has not received one due to her husband's refusal, she is referred to as an *agunah* (pluralized as *agunot*); literally, a "chained" or "anchored" woman.[52] Several limitations are placed on a divorced Jewish woman who wishes to religiously remarry without a *get*. First, if she marries a man civilly, the relationship is considered adulterous under Jewish law.[53] Therefore, the woman is never permitted to marry that man religiously.[54] Second, any children born to a woman who has not received a *get* are

45. ASAF A.A. FYZEE, OUTLINES OF MUHAMMADAN LAW 133 (4th ed. 1974).

46. *Halakha* is the entire corpus of Jewish law, which draws on the Torah, rabbinical laws, and customs. *Halakhah*, *in* 7 ENCYCLOPAEDIA JUDAICA 1156–57 (Macmillan Co., 1971).

47. *See* Irwin H. Haut, *Divorce in Jewish Law and Life*, in 5 STUDIES IN JEWISH JURISPRUDENCE 18 (1983) ("It is a fundamental principle in Jewish law that only a husband can give a get.").

48. Ayelet Blecher-Prigat & Benjamin Shmueli, *The Interplay Between Tort Law and Religious Family Law: The Israeli Case*, 26 ARIZ. J. INT'L & COMP. L. 279, 281 (2009); *see* Karin Carmit Yefet, *Unchaining the* Agunot*: Enlisting the Israeli Constitution in the Service of Women's Marital Freedom*, 20 YALE J.L. & FEMINISM 441, 443–45 (2009) (noting that developments in Jewish law "provide[d] women with a limited fault-based divorce right and [the right] to equalize the divorce prerogative by abridging a husband's freedom to divorce his wife against her will").

49. The biblical foundation for this prerogative is found in *Deuteronomy* 24:1: "When a man has taken a wife and married her, and it comes to pass that she finds no favour in his eyes because he has found some unseemliness in her, then let him write her a bill of divorce and give it in her hand and send her out of his house." This passage was interpreted as bestowing upon the husband the exclusive privilege of initiating divorce. Yehiel S. Kaplan, *Enforcement of Divorce Judgments by Imprisonment: Principles of Jewish Law*, 15 JEWISH L. ANNUAL 57, 61 (2004).

50. Heather Lynn Capell, *After the Glass Has Shattered: A Comparative Analysis of Orthodox Jewish Divorce in the United States and Israel,* 33 TEX INT'L L.J. 331, 336 (1998).

51. *See* Haut, *supra* note 47, at 27–28, ("Since the get certifies divorce and establishes the termination of the marital relationship, it is necessary to have words of complete separation set forth in it. It must therefore be explicitly stated that the wife is henceforth permitted to remarry at her will.").

52. The situation of the *agunah* is mentioned but once in the Bible, at *Ruth* 1:13. However, the Mishnah and Talmud both refer to it frequently, as does the subsequent literature in response. AVIAD HACOHEN, THE TEARS OF THE OPPRESSED: AN EXAMINATION OF THE AGUNAH PROBLEM: BACKGROUND AND HALAKHIC SOURCES *passim* (Blu Greenberg ed., 2004). Originally, this term was reserved for women whose husbands had disappeared. Unless a woman had proof of her husband's death, she could not remarry religiously. Michelle Greenberg-Kobrin, *Civil Enforceability of Religious Prenuptial Agreements*, 32 COLUM. J.L. & SOC. PROBS. 359, 359 (1998–1999). However, the modern *agunah* problem has more to do with recalcitrant rather than missing husbands. MICHAEL J. BROYDE, MARRIAGE, DIVORCE AND THE ABANDONED WIFE IN JEWISH LAW: A CONCEPTUAL UNDERSTANDING OF THE AGUNAH PROBLEMS IN AMERICA 3, 8 (2001).

53. Joel A. Nichols, *Multi-tiered Marriage: Ideas and Influences from New York and Louisiana to the International Community*, 40 VAND. J. TRANSNAT'L L. 135, 155 (2007) [hereinafter Nichols, *Multi-tiered Marriage*].

54. Margit Cohn, *Women, Religious Law and Religious Courts in Israel—The Jewish Case*, 27

labeled as a *mamzer* (pluralized as *mamzerin*).[55] Such children are sometimes "effectively excluded from organized Judaism," as they are illegitimate and may never marry anyone but another *mamzer*.[56] Although a wife can in theory refuse a *get* issued by her husband, in practice the consequences for the husband are neither as serious nor as far-reaching as they are for an *agunah*. As put by Joel A. Nichols, "[a] man who marries without a Jewish divorce has not committed adultery, but has only violated a rabbinic decree mandating monogamy; he is nonetheless considered married to his second wife, and his children are legitimate."[57]

These basic rules of Islamic and Jewish law will serve to explore the challenges posed to the recognition and identification of religious customs in Germany. These concepts will be useful to our discussion of religious law in action. However, before we get to the results of our fieldwork, we now outline the German treatment of religious family law. The German legal system very scantily recognizes Islamic and Jewish divorce law. In short, even though foreign law is made applicable to all non-German citizens, of which there are many in the Muslim immigrant communities,[58] *talaq* and *get* divorces are only recognized if all relevant gestures were carried out outside of German territory.[59] When religious law is indeed recognized for foreigners, it is applied with reference to foreign law, with no regard for the customs applied by religious communities on German soil.[60] Moreover, German domestic family law, which applies to German citizens, does not allow for the performance of *talaq* divorces or the compulsion and performance of *get* divorces.[61] As a result, German law only very rarely recognizes religious customs. Instead, the latter often remains in the private sphere of non-legal religious devotion, a space we sought to enter to better understand its internal logic.

RETFAERD [SCANDINAVIAN JOURNAL OF SOCIAL SCIENCES] 57, 66 (2004).

55. *Id.*

56. Nichols, *Multi-tiered Marriage*, *supra* note 53, at 155.

57. *Id.*

58. German immigration policy is very restrictive. Until 1999, a citizenship applicant had to provide evidence of at least one German ancestor in order to receive German citizenship, making it almost impossible for foreigners (*ausländer*) to become citizens. *See* STAATSANGEHÖRIGKEITSGESETZ [STAG] [NATIONALITY ACT], July 22, 1913, BUNDESGESETZBLATT [BGBL.] III at 102, as amended on July 15, 1999, § 40a (Ger.); *see also* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBL. I, art. 116 (Ger.), *translated at* http://www.gesetze-im-internet.de/englisch_gg/index.html (granting citizenship to those returning to Germany "of German ethnic origin or as the spouse or descendant of such person"). Germany's citizenship policy has thus been described as "one of the most restrictive in the EU." Simon Green, *Between Ideology and Pragmatism: The Politics of Dual Nationality in Germany*, 39 INT'L MIGRATION REV. 921, 922 (2005). Even with the 1993 and 1999 amendments to Germany's Nationality Act, which made possible the process of naturalization on the basis of long-term residency or of birth in Germany, German law maintains great hostility towards double citizenship, and imposes stricter conditions than most European countries on the legal status of the parents of the children applying for German citizenship. Marc Morjé Howard, *The Causes and Consequences of Germany's New Citizenship Law*, 17 GER. POL. 41, 53–54 (2008).

59. *See, e.g.*, Mathias Rohe, *On the Applicability of Islamic Rules in Germany and Europe*, 3 EUR. Y.B. MINORITY ISSUES 181, 186–87 (2003–2004) (stating that German courts may recognize a *talaq* conducted in a foreign jurisdiction).

60. Einführungsgesetzes zum Bürgerlichen Gesetzbuche [EGBGB] [Introductory Act to the Civil Code], Sept. 21, 1994, BGBL. I, last amended May 23, 2011, art. 16, (Ger.), *translated at* http://www.gesetze-im-internet.de/englisch_bgbeg/englisch_bgbeg.html#BGBEGengl_000P6.

61. EGBGB art. 17(2).

The jurisdictional issue occupying German courts with respect to *talaq* and *get* divorces ("private divorces" or *Privatscheidungen*)[62] turns on the question of which divorce law will be applied by German courts. In Germany, conflict of laws (*Kollisionsrecht*) issues with respect to international private law (*Internationales Privatrecht*) are governed by the EGBGB (*Einführungsgesetz zum Bürgerlichen Gesetzbuche*), the Introductory Act to the Civil Code.[63] Generally, in the case of international private law issues, the law of the country to which the person has the closest connection through citizenship will be applied, to the extent that it is held to conform to German public policy, or *ordre public*.[64] However, German citizenship, even if it is only one of several citizenships, will lead the court to the application of German law according to Article 5(1) of EGBGB.[65]

German courts have been consistent in their treatment of *talaq* divorce. Before German courts, a *talaq* divorce will be recognized only if it has been carried out entirely in a jurisdiction which allows for such a divorce.[66] The situation is different when the *talaq* is announced on German territory. Such a divorce will not be recognized. This is addressed in Article 17 of EGBGB, which states that in Germany, only a court can pronounce a divorce decree (the "divorce monopoly of the court" or *gerichtliches Scheidungsmonopol*).[67] No "private divorces" are recognized in Germany.[68]

The main issue concerning the recognition of a Jewish *get* divorce in Germany is the fact that German courts treat it largely as a religious practice that the husband cannot be forced to perform.[69] The refusal to grant the *get* is problematic for the wife, since she can legally divorce before a German court, but without the religious divorce she will remain an *agunah*. In general, German courts will not perform *get* divorces themselves, nor pressure the husband to grant the divorce, but refer the parties to the appropriate jurisdiction: rabbinical authorities.[70] German courts have

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62. *See* Rohe, *supra* note 59, at 186–88 (discussing the ways in which German courts have handled Islamic marriage and divorce).

63. EGBGB, BGBL. I at 2494.

64. The application of foreign law runs contrary to public policy when its application has effects that are "obviously incompatible with, for example, the main principles of German law." Rohe, *supra* note 59, at 185. Among these principles are human rights enshrined in the Basic Law for the Federal Republic of Germany. *See* GG, May 23, 1949, BGBL. I, art. 3 (Ger.) (discussing equality rights guarantees).

65. "If referral is made to the law of a country of which a person is a national and where this person is a bi- or multinational, the law applicable shall be that of the country with which the person has the closest connection, especially through his or her habitual residence or through the course of his or her life. If such person is also a German national, that legal status shall prevail." EGBGB art. 5(1).

66. *See* Kurt Siehr, *Private International Law*, *in* INTRODUCTION TO GERMAN LAW 337, 352 (Matthias Reimann & Joachim Zekoll eds., 2005) ("Ecclesiastical courts, consular officers or private parties (under Islamic or Jewish law) have no power to dissolve a marriage *if they are acting in Germany*.") (emphasis added).

67. EGBGB art. 17(2).

68. *Id.*; BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Jan. 2, 2002, BGBL. at 295, as amended July 27, 2011, art. 1564 (Ger.).

69. *See* Oldenburg Oberstes Landesgericht [OLGR] [Oldenburg Court of Appeal] Mar. 7, 2006, OLGR OLDENBURG 362, 2006 (Ger.) (noting that the use of coercion to obtain a *get* is against German public policy); Bundesgerichtshof [BGH] [Federal Court of Justice], May 28, 2008, ZEITSCHRIFT FÜR DAS GESAMTE FAMILIENRECHT [FAMRZ] [FAMILY LAW JOURNAL] 1409, 2009 (Ger.) (noting that a *get* is a contractual divorce).

70. Kammergericht Berlin [KG] [Berlin Court of Appeal], Jan. 1, 1993, 41 FAMRZ 839 (839–40) (Ger.) (declining jurisdiction on Jewish divorce in favor of rabbinical authorities).

confirmed that freedom of religion exonerates Jewish men from all coercion as to the giving of the *get*, whether the coercion results from domestic court decisions or the recognition of foreign judgments.[71] Otherwise, German courts will probably recognize *get* divorces that were performed outside of Germany by non-Germans, but only if all legal acts were performed outside of Germany.[72] At the domestic level, Jewish divorces are not recognized.[73]

For a German citizen, German divorce laws and procedure are the same whether or not one follows the laws of a religious tradition. Like most Western countries, Germany has a no-fault divorce system.[74] Provisions related to divorce are found in Book 4, Title 7 of the *Bürgerliches Gesetzbuch*, the German Civil Code, at Articles 1564–68.[75] The first of these provisions specifically states that "[a] marriage may be dissolved by divorce *only by judicial decision* on the petition of one or both spouses."[76] A religious authority does not have the jurisdiction to grant a divorce under German law.[77] This is again justified by German courts on the basis of the idea that a divorce in Germany can only be pronounced by a (state) court.[78]

Finally, it bears notice that even though customary law (*Gewohnheitsrecht*) is recognized along with statutory law (*Gesetz*) as an official source of law,[79] its importance in the German legal system is very small. Indeed, German legal scholars describe customary law as having "practically no relevance to the study of law"[80] and as a "very limited source of new law."[81] Other authors have suggested that German customary law does not exist unless it is recognized by courts.[82] Formal recognition of religious custom in German law is thus not yet accomplished. One exception, however, to the non-recognition of religious family customs is the possibility for Jewish and Muslim individuals to have recourse to religious arbitration. Unlike in other polities such as parts of Canada,[83] religious arbitration is not precluded in

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71. OLGR 362 (Ger.); BGH, FAMRZ 1409 (Ger.).

72. Oberlandesgericht [OLG Düsseldorf] [Düsseldorf Court of Appeal] 1968, FAMRZ 87, 1969 (Ger.) (recognizing a *get* that was performed outside Germany).

73. 41 FAMRZ 839 (Ger.).

74. GERHARD ROBBERS, AN INTRODUCTION TO GERMAN LAW 285–86 (Michael Jewell trans., 4th ed. 2006). The only ground for divorce is a demonstrable *Zerrüttungsprinzip*—"an inevitable breakdown of the marriage." NIGEL G. FOSTER & SATISH SULE, GERMAN LEGAL SYSTEM AND LAWS 468 (3d ed. 2002). This doctrine is found in the BGB Article 1565, which states that there is a breakdown of the marriage "if the conjugal community of the spouses no longer exists and it cannot be expected that the spouses restore it." BGB art. 1565(1). Generally the Code requires that the spouses live apart for one year before a divorce is available, however, an earlier divorce may be granted if "the continuation of the marriage would be an unreasonable hardship for the petitioner for reasons that lie in the person of the other spouse." *Id.* art. 1565(2).

75. BGB arts. 1564–68.

76. *Id.* art. 1564 (emphasis added); *see also* ROBBERS, *supra* note 74, at 285 (stating that divorce can only be obtained "by order of court").

77. Siehr, *supra* note 66, at 352.

78. EGBGB art. 17(2); BGB art. 1564.

79. YOUNGS, *supra* note 5, at 77.

80. FOSTER & SULE, *supra* note 74, at 38.

81. NIGEL G. FOSTER, GERMAN LAW & LEGAL SYSTEM 3 (1993).

82. ROBBERS, *supra* note 74, at 22.

83. *See* Natasha Bakht, *Were Muslim Barbarians Really Knocking on the Gates of Ontario?: The Religious Arbitration Controversy—Another Perspective*, 40th Anniversary ed. OTTAWA L. REV. 67, 80 (2006) (discussing proposed Ontario laws prohibiting some religious arbitration); FOURNIER, MUSLIM MARRIAGE, *supra* note 32, at 120 (describing a ban on Shari'a law in Quebec and Ontario).

Germany, whether in family law or in other private matters.[84] However, this recognition of religious law is not bestowed on the basis of the binding customary nature of the norms, nor on the bindingness of religion as a legal system. It is tolerated (indeed, ignored) as a consensual, "private" matter.[85] It should also be noted that the possibility of religious arbitration is being heavily questioned and criticized in Germany.[86] We now examine the dynamics of religious law to see whether it could be recognized as customary law and, if so, what the challenges would be for the recognition and delineation of such a complex legal order.

II. PLURAL BELONGINGS AND RELIGION'S EXTERNAL BOUNDARIES

In this section, we aim to tease out the socio-legal reality of religious custom by interviewing eight Muslim and Jewish women in Germany. The interviews took place mainly in Berlin[87] and were conducted in the midst of intensive networking and fieldwork in sectors of German Muslim and Jewish communities.[88] Our participants came from a variety of backgrounds. Two of them had converted to their current religions: one to Judaism and the other to Islam.[89] Some were born in Germany, while others had immigrated at various stages in their lives. None of them were extremely poor, though several were by no means well-off. Many of the women spoke English as a third or fourth language. Almost all of them were educated at the undergraduate level and worked. All of these traits must be taken into consideration when trying to draw any conclusion about what these women's accounts say about divorce and the use of customs in Germany. We are aware that the women interviewed are not necessarily representative of their entire communities. Moreover, caution is warranted when writing about such a small sample of participants. Nonetheless, some similarities in experiences among the participants point to consistent themes.[90] We use a story-telling approach to the field to develop hypotheses as to the ways in which legal agents navigate the religious and socio-economic endowments that community life produces. If it is indeed difficult to draw

84. *See* Mathias Rohe, *Shari'a in a European Context*, *in* LEGAL PRACTICE AND CULTURAL DIVERSITY 93, 97–98 (Ralph Grillo et al. eds., 2009) (discussing European allowance of private agreements on optional civil laws).

85. *Id.* at 97 ("Private autonomy is the core value of the liberal European civil law orders. Thus, in matters exclusively concerning the private interests of the parties involved, these parties are entitled to create and to arrange their legal relations according to their preferences.").

86. For an overview of the public debates surrounding religious arbitration in Germany, see Maximilian Popp, *Parallel Justice: Islamic 'Arbitrators' Shadow German Law*, SPIEGEL ONLINE (Sept. 1, 2011), http://www.spiegel.de/international/germany/parallel-justice-islamic-arbitrators-shadow-german-law-a-783361.html.

87. The original plan was to interview women in Berlin only, without translators. This meant that the women we would interview had to be able to speak English, a trait that in itself would limit the number and type of women participating. The plan changed, however, as it proved difficult to find English-speaking women in Berlin willing to talk about their divorces. In the end some of the interviews were conducted with translators, and one participant was from outside Berlin.

88. Although we advertised for volunteers through a website (http://talaqgetgermany.wordpress.com), e-mails to academic groups, and public posters, the majority of volunteers came to us by word of mouth and contacts within the Jewish and Muslim communities of Berlin. This method was approved by application to the Office of Research Ethics and Integrity of the University of Ottawa.

89. Participant #5 and Participant #6.

90. The participants were all asked the same basic questions, with follow-up questions varying depending on individual answers.

policy conclusions from stories,[91] we hope that our preliminary findings can inspire further scientific inquiry. We also use the story-telling approach—the origins of which can be traced back into feminist jurisprudence[92] and critical race theory[93]—based on the assumption that "law can never rest on a complete picture of reality, but it can acquire a fuller, more accurate vision by accumulating stories that widen the horizon."[94] In this sense, qualitative interview analysis brings new, marginalized accounts of religious customs as they are experienced by religious women and thus build on existing scholarship from its margins. More specifically, this section explores religious law's external boundaries and its interactions with the civil law, focusing on how parties and adjudicators redesign those boundaries through legal interactions. Part III will then turn to the internal structures of religious custom, revealing the deeply contradictory treatment of religious custom in Germany. Before we present our findings, however, a brief note on the legal structures of Muslim and Jewish communities in Germany is in order.

Under classical Islamic law, the Islamic court (*qadi*) usually does not arbitrate *talaq* divorces,[95] but rather adjudicates *khul* divorces[96] and *faskh* divorces.[97] In the latter instance, "a wife who is unhappy in her marriage and who wishes to obtain a dissolution must petition the court but only in so far as she can demonstrate to the court (*qadi*) that the limited grounds under which divorce can be granted have been met."[98] In Germany, however, there is no organized system of *qadis* with jurisdiction over family law.[99] In the absence of religious courts, religious leaders known as imams, a word literally translatable to "prayer leader,"[100] "fulfill more responsibilities that could be attributed to the Islamic religious sphere."[101] Notably, German imams celebrate Islamic marriages and adjudicate divorces.[102] This has allowed imams to "become central figures of the community"[103] in Germany. Thus, the informal

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91. Marc A. Fajet, *Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship*, 82 GEO. L.J. 1845, 1846 (1994).

92. *See* Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 831 (1990) (discussing the use of narrative as a feminist legal method).

93. Richard Delgado, *Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183, 1191 (1993).

94. Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255, 284 (1994).

95. Amira Mashhour, *Islamic Law and Gender Equality—Could There Be a Common Ground? A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt*, 27 HUM. RTS. Q. 562, 574 (2005).

96. In cases of mutual consent where the wife waives the deferred portion of *mahr*, divorce can be finalized outside the court system. However, in most cases, the parties will disagree as to the amount of *mahr* and file their respective claims with the *qadi*. Also, in some countries, such as Egypt, the wife can even obtain a *khul* divorce from the *qadi* without the husband's consent. *Id.* at 583.

97. EL ALAMI & HINCHCLIFFE, *supra* note 40, at 30.

98. *Id.* at 29. For example, under Egyptian Law No. 100 of 1985, a wife could only obtain a *faskh* divorce if her husband habitually failed his duty to provide her maintenance, suffered from a serious disease, was absent for a lengthy period, was imprisoned for a long-term sentence, or inflicted harm on her. Abu-Odeh, *supra* note 28, at 1106.

99. *See* Melanie Kamp, *Prayer Leader, Counselor, Teacher, Social Worker, and Public Relations Officer—On the Roles and Functions of Imams in Germany*, *in* 7 ISLAM AND MUSLIMS IN GERMANY 133, 143–44 (Ala Al-Hamarneh & Jorn Thielmann eds., 2008) (explaining that imams are assigned the family law-related duties normally attributed to *qadis*).

100. *Id.* at 143.

101. *Id.* at 143–44.

102. *Id.* at 144.

103. Kastoryano, *supra* note 19, at 1237.

practices of Islamic adjudication in Germany require empirical assessment, diverging as they do from the classical Islamic *qadi* model.

Unlike the heterogeneous venues and audiences of Islamic religious divorce, the act of Jewish religious divorce is systematically overseen by one party: a *beth din*.[104] This tribunal of three Jewish judges (*dayanim*) functions according to formalities born from centuries of religious tradition.[105] Although the *beth din* oversees the process, it does not execute the divorce. This is undertaken by the parties themselves, and more specifically by the man: "[n]o one—not the government, not the courts, not even a rabbi—is authorized to divorce a couple except for the husband."[106] Therefore, the power of the *beth din* lies in its persuasive authority rather than its ability to mandate results. Historically, the *beth dins* yielded considerable power and influence over the German Jewish communities.[107] However, in 1945, the Jewish community and its legal structure were decimated by the Holocaust and mass exile, leading to social isolation, emigration to Israel, and deep, understandable estrangement from German society.[108] From that point on, German Jewish communities have relied on American, British, and Israeli rabbis, given their institutional disorganization and demographic instability.[109] The influence of foreign rabbis and *beth dins* was indeed recurrent in our participants' testimonies. That being said, since 1990 there has been a tectonic shift in Jewish community dynamics. German Jews have seen the development of "an, at first, pragmatic, but, later, self assertive, if ambiguous, recognition of Germany as home,"[110] which in turn bred a "positive attitude toward the idea of a Jewish diaspora and a reassertion of German Jewry and its traditions."[111] In parallel, there has been conclusive evidence of institutional reconstruction, for instance with the creation of a new center for rabbi training, opened in 1999 to replace the historical "Higher Institute for Jewish Studies," which had been closed by the Nazis in 1942.[112] Furthermore, the year 2006 saw the ordination of the first German rabbis since World War II.[113] For scholars studying the German Jewish community, which has tripled in number since 1990,[114] these recent developments in community institutions are indications that the existing accounts of Jewish life in Germany will soon be dated. The newly ordained rabbis and their evolving communities will shape Jewish law in ways that require scholarly attention. Specifically, there will probably be more contact points between Jewish

104. Lisa Fishbayn, *Gender, Multiculturalism and Dialogue: The Case of Jewish Divorce*, 21 CAN. J.L. & JURIS. 71, 80–81 (2008) (citations omitted).

105. *Id.*

106. Yefet, *supra* note 48, at 442–43.

107. RUTH GAY, THE JEWS OF GERMANY: A HISTORICAL PORTRAIT 32 (1992).

108. Y. Michal Bodemann, *The State in the Construction of Ethnicity and Ideological Labor: The Case of German Jewry*, CRITICAL SOCIOLOGY, Oct. 1990, at 35, 40.

109. *See* Melissa Eddy, *A New Start for Rabbis in Germany*, PHILADELPHIA INQUIRER, Sept. 14, 2006, at A12 ("But for years, Germany has had to rely on rabbis trained in England, Israel and the United States because its last Jewish seminary, the Berlin-based Higher Institute for Jewish Studies, was shuttered by the Nazis in 1942.").

110. Y. Michal Bodemann, *Between Israel and Germany from the "Alien Asiatic People" to the New German Jewry*, JEWISH HISTORY 91, 103 (2006).

111. *Id.*

112. Eddy, *supra* note 109, at A12.

113. Editorial, *Rabbis in Germany*, THE GLOBE AND MAIL, Sept. 18, 2006, at A16.

114. Eddy, *supra* note 109, at A12.

legal orders and German civil law, as well as more adjudicatory complexities to explore.

The contemporary German Muslim context also seems to leave some space for a decline of importance of the religious sphere among immigrant communities. Recent surveys reported by *Der Spiegel* in August 2012 showed a rising will among Muslim Germans of Turkish origin to "integrate into German society" and secular institutions, along with a paradoxical increasing religiousness.[115] This uneven influence of the religious sphere was a recurring theme in our fieldwork. It allowed many participants to ignore or marginalize religious legal norms when it was to their advantage. The ability of some religious individuals to pick and choose normative belongings contributes in important ways to fashioning religious law in action. Many participants mentioned that the religious rules and rulings could be ignored by one party, who would then turn to the civil sphere to uphold his or her interests:

> Participant #1:
>
> Interviewer: During or before your marriage, did you ever discuss the *talaq* type of divorce with your husband . . . ?
>
> Participant: No, never, because we were both not that religious. I mean, we were both just very young, and I think for us the legal [civil] marriage was a lot more binding than the other thing, that was just a show for the family . . . .
>
> Participant #8:
>
> Interviewer: Do you think that the civil divorce also means something in the religious community?
>
> Participant: No. . . . I mean, . . . the community, it is not very important what they say.
>
> Participant #1:
>
> Interviewer: What did your ex-husband think of the religious divorce?
>
> Participant: I think he didn't care at that point because he was more involved with English and German people, when he broke away from me he broke away from the Muslim society and he just lived as he pleased.

Sometimes, the Jewish or Islamic authorities will themselves contribute to lessening the influence of their religious normative order by aligning with the civil sphere and "surrendering" to its grasp. This can happen, for instance, when a woman convinces the adjudicator to recognize a civil divorce, even though the latter cannot in itself lead to a religious divorce by strict application of Jewish and Islamic legal rules. Both Muslim and Jewish participants have successfully obtained such a surprising outcome before religious adjudicators:

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115. *Young Turks Increasingly Favor Integration and Religion*, SPIEGEL ONLINE (Aug. 17, 2012), http://www.spiegel.de/international/germany/survey-turks-in-germany-willing-to-integrate-but-more-religious-a-850607.html.

Participant #2:

Once you have the secular divorce you're also divorced in God's eyes. Yes, normally in our religion you have to have a divorce . . . but because I was never overly religious and because in my case, this is a special case. My case was my mom died when I was very little, so the family sort of broke apart a bit. . . . So in my case it was all a lot more liberal.

Participant #4:

Interviewer: So did your rabbi recognize your civil divorce from Germany?

Participant: Yes, of course. He was living here, of course.

If the civil law sometimes trumps religious law, however, it should be noted that there did not seem to be any uniformity in this civil and religious interaction. In some of the cases at hand, the adjudicators refused to consider civil law decrees, sticking instead to their own internal legal rules and criteria to grant the religious divorce and to celebrate religious marriages. To these actors and adjudicators, religious law is all that matters. This was confirmed by several Muslim participants:

Participant # 1:

Interviewer: So the imam would have remarried you if you had wanted to, whether or not you got a German divorce?

Participant: He would have, yes.

Interviewer: So they don't really care about what the German law is?

Participant: No, no. They care about your marriage in God.

Participant #2:

Interviewer: Is your family religious?

Participant: Medium. No, not very.

Interviewer: So, along with the civil wedding, was there a religious wedding as well?

Participant: Yes. Everybody has to, all Muslims must [have a religious marriage].

The fact that religious law sometimes trumps civil law was also a constant among several Jewish participants. One theme was that if their families or their spouses were from Israel—where all marriages are religious[116]—then the German

116. SUZI NAVOT, CONSTITUTIONAL LAW OF ISRAEL 144–45 (2007); Hanna Lerner, *Entrenching the Status-Quo: Religion and State in Israel's Constitutional Principles*, 16 CONSTELLATIONS 445, 449 (2009). A bill was passed in May 2010 to allow civil marriage for partners who are both labeled as "lacking a

civil marriage was of especially little consequence. One woman said that her spouse, whose family was from Israel, did not tell his parents they had celebrated a German civil marriage. His mother was upset until the man clarified that it had only been a civil ceremony. The couple had a religious ceremony soon after, and the parents considered that their absence from the civil ceremony was of no consequence:

> Participant #3:
>
> The religious marriage was for my parents-in-law very important, because they didn't know [what] a civil contract [was], they didn't know that; they're from Israel.... [W]e got married in Berlin in the civil court, and when we came in the afternoon, [my husband] arrived and he said, "Where are my parents?" I said, "What do you mean, where are your parents, why didn't you invite them, why didn't you tell them?" ... So we came in, we made one, two, three, and that was it!
>
> And then in the afternoon ... we went for dinner [with the husband's parents].... [M]y husband stood up and [told his parents we were married]. And ... my mother-in-law was up and down the ceiling, "How could you marry without me!" It was a mess .... Then my husband said it was not a Jewish ceremony, it was a civil.... So, then she says, "That's ok, I don't care! Ok, fine, fine." ... We made the Jewish [ceremony] and then everything was ok.

Here, religious and civil norms are constantly and unpredictably reconfiguring their respective spheres of influence, shedding light on the ethical imperatives that influence individuals in their interactions with one another. As our study shows, religious women (and sometimes men) will attempt to bend the religious adjudication in their favor by making it align with the civil sphere. Whether that strategy is successful or not, both parties will often (but not always) have the opportunity to ignore religious law and turn to the civil sphere, with some relational costs. This strategic process redraws the lines of the religious legal order and distributes different endowments depending on context.

In addition to considerable paradoxical interplay between the civil and religious spheres, our fieldwork suggests that even inside the religious normative order, the voices of the law are plural. In such context, the customary legal power of official figures such as imams or rabbis are at times overshadowed and influenced by other stakeholders in religious communities, such as friends, families, and members of the community. This complex battlefield—and the open-ended space it creates—is often used by parties to adopt several tactics to secure the approval or support of some stakeholders, effectively engaging in what Robert H. Mnookin and Lewis Kornhauser called "bargaining in the shadow of the law."[117] For instance, it may lead some to spread false rumors about the other party in order to gather support to initiate a divorce:

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religion," however, it seems to apply to only a few Israelis. HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES 214, n.16 (2011).

117. *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979) (arguing that divorce laws create a framework affecting the bargaining power of spouses in the lead-up to divorce as well as during marriage).

Participant #8:

> [He told] his friends and his family, "Do you know what she told about you?" and "Do you know what she has done?" ... [He did that] before [the divorce] because he wanted to tell everyone why he wants to do this. Because nobody wanted to accept it.

It is interesting to note the difficulty in predicting what the stakeholders' influence will be. Sometimes, families and friends will clearly and unambiguously support a party's decision, making bargaining futile:

Participant #2:

> I was lucky. There are many families that put a lot of pressure on women so that they cannot get divorced, simply because they are very religious. But in my case, my family is rather relaxed and more liberal and this is why I consider myself lucky that I could just make my own decision and follow it through.

In all these instances, we see that the concrete implications of customary religious law are dependent on the actions of third parties. As a result, the law is constantly mediated by intricate family loyalties, community networks and friendships that interact spatially in processes akin to what Michel Foucault called the "little tactics of the habitat."[118] In some instances, the case-specific stakeholder strategizing has the potential to circumvent the customary legal rules, making them ineffective. For example, while polygamy is allowed under Islamic law, subsequent wives can refuse to marry and hamper a husband's strategy, thus prompting him to ask for religious divorce much more quickly:

Participant #8:

> Interviewer: So why would he want the religious divorce so quickly?
>
> Participant: Because he wanted this to be halal [religiously correct] .... For him and her [his second wife], when we are divorced he can marry her.... He could also marry her [without getting the divorce]. He can marry [up to] four women.... But she didn't want it, I think.
>
> Interviewer: Okay. So she wanted to make sure that he was divorced before anything.
>
> Participant: Yes.

This perpetual redesigning of the boundaries of religious customs serves as an illustration of legal pluralism's insight that "law arises from, belongs to, and responds to everyone."[119] Normative orders such as custom do not simply exist with clear

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118. *See* MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972–1977 149 (1980) (discussing how power struggles manifest themselves through architectural, economic and political spaces).

119. RODERICK A. MACDONALD, LESSONS OF EVERYDAY LAW 8 (2002).

contours and outer limits, but are constantly created by the legal subjects themselves as the latter "participate in the multiple normative communities by which they recognize and create their own legal subjectivity."[120] In outlining precisely how these processes of norm-creation unfold in specific cases, our fieldwork is inspired by scholarship in the vein of "left law and economics"[121] and by insights from the traditional law and economics of family life.[122] This theoretical approach allows us to better picture the micro-level power relations in which religious parties are entangled.[123] The power relations that implicate friends and family spur the parties to respond to legal rules and decisions in a strategic manner in order to maximize the benefits generated by a given rule. This helps explain much of the strategic reactions of individuals who bend the religious sphere according to their needs and turn away from it when it does not work in their favor. Such an economic view of the parties' agency and power helps us re-conceptualize the law not as a fixed corpus that can be easily recognized and delineated, but as a messy, constantly redefined entity. This outlook led us to heed Duncan Kennedy's call to view the legal system as "providing background rules that constitute the actors, by granting them all kinds of powers under all kinds of limitations, and then regulating interactions between actors by banning and permitting, encouraging and discouraging particular tactics of particular actors in particular circumstances."[124] It is this form of "everyday law"[125] that we have tried to unearth in the context of religious custom, discovering that there are many on-the-ground difficulties to conceiving custom as a fixed legal entity.

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120. Martha-Marie Kleinhans & Roderick A. MacDonald, *What is a Critical Legal Pluralism?*, 12 CAN. J.L. & SOC'Y 25, 38 (1997).

121. *See generally* Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982); Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983). For an analysis of legal realist-inspired law and economics and its relationship to feminist thought, see PRABHA KOTISWARAN, DANGEROUS SEX, INVISIBLE LABOR: SEX WORK AND THE LAW IN INDIA 185 (2011).

122. For economic analyses of family life, see Lloyd R. Cohen, *Marriage: The Long-Term Contract*, *in* THE LAW AND ECONOMICS OF MARRIAGE AND DIVORCE 10 (Antony W. Dnes & Robert Rowthorn eds., 2002). *See generally* FRANCINE D. BLAU, MARIANNE A. FERBER & ANNE E. WINKLER, THE ECONOMICS OF WOMEN, MEN, AND WORK (1998); Robert A. Pollak, *Gary Becker's Contribution to Family and Household Economics*, 1 REV. OF ECON. OF THE HOUSEHOLD 111 (2003).

123. Our conception of power and freedom owes much to Duncan Kennedy's seminal, *The Stakes of Law, or Hale and Foucault!*, 15 LEGAL STUD. F. 327 (1991).

124. Duncan Kennedy, *Legal Economics of U.S. Low Income Housing Markets in Light of "Informality" Analysis*, 4 J.L. IN SOC'Y 71, 80 (2002).

125. For an empirical study of norm-generating everyday interactions, see generally PATRICIA EWICK & SUSAN SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE (1998). *See also* Austin Sarat & Thomas R. Kearns, *Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life*, *in* LAW IN EVERYDAY LIFE 21 (Austin Sarat & Thomas R. Kearns eds., 1993) (noting the "variety of ways in which society responds to law, sometimes by ignoring it, reconstructing it, or using it in novel, unanticipated ways"); Sally E. Merry, *Everyday Understandings of the Law in Working-Class America*, 13 AM. ETHNOLOGIST 253, 253 (1986) (noting "the dual legal ideologies embedded within the American lower courts[:] one . . . [being] the dominant American vision of justice provided by the rule of law, the other a situationally based lenient, personalistic vision of justice produced within the local setting"); Austin Sarat, "*. . . The Law is All Over": Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMAN. 343, 344–45 (1990) (discussing legal rules for people on welfare and noting that for "welfare recipients law is not a distant abstraction; it is a web-like enclosure in which they are 'caught'").

III. ADJUDICATORY CONTRADICTIONS AND RELIGION'S INTERNAL STRIFE

This section shifts the analysis to the internal mechanisms of religious law, focusing on the roles of the Islamic and Jewish adjudicators. Julie Macfarlane, one of the few scholars conducting empirical research on Muslim practices in the West, has found that imams in North America often assume roles that go beyond those assigned by classical Islamic law to *qadis*.[126] Macfarlane has noted that the adjudicatory role of imams is particularly inconsistent, generating wildly diverging outcomes in various factual cases.[127] Since, as noted earlier, German imams assume roles similar to those of their North American colleagues, we have sought to examine whether their decisions and adjudication present any consistency. Our findings mirror those of Macfarlane: religious adjudication and bargaining in Germany may lead to wildly diverging results. After having outlined the unevenness of the legal processes of creation of religious customs, we put forward a tentative explanation of this inconsistency. Rather than being a misapplication of the custom, or a new custom that supersedes the classical religious law, we explore whether the unevenness may be due to religious law's own internal structure.

Oftentimes, the substantive and procedural rules of Islamic law will be disregarded by the adjudicators and the parties. This will lead to strikingly varied results like uneven requirements for marriage celebration. For instance, the marriage will sometimes be performed in the absence of the imam, like in the case of Participant #8, even though other women, like Participant #2, asserted that the presence of the imam is an essential condition for a valid Muslim marriage:

> Participant #8:
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> We did the marriage at home, and you don't need an imam . . . to do this. You can go to an imam or to a mosque, but you can do it at home. And there was my father, and his father—the family. And brothers and sisters. So we had witnesses, and everything. . . . His father made the *nikah* [Muslim marriage contract].
>
> Participant #2:
>
> Even if you're not overly religious or not religious at all, you have to have an imam wedding.

The same selective observance of procedural and substantive rules can be noticed among certain Jewish *beth dins* and rabbis. Specifically, the *get* ceremonial

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126. *See* JULIE MACFARLANE, ISLAMIC DIVORCE IN NORTH AMERICA: A SHARI'A PATH IN A SECULAR SOCIETY 23 (2012) [hereinafter MACFARLANE, SHARI'A PATH] ("Laurence Rosen in his classic study of Moroccan *shari'a* courts concludes that these courts give wide discretion to the judges, or *qadis*. . . . The interpretation and application of Islamic law by North American imams appears to adopt the same tradition of contextualization described by Rosen and others.").

127. *See* Julie Macfarlane, *Practicing an 'Islamic Imagination': Islamic Divorce in North America*, *in* DEBATING SHARIA: ISLAM, GENDER POLITICS AND FAMILY LAW ARBITRATION 35, 45 (A. Korteweg & J. Selby eds., 2012) (noting that adjudicating divorce is one of the most inconsistent areas of an imam's practice).

requirements were sometimes bent by the rabbis, who would create their own *get* procedures, humiliating and insulting women:

> Participant #4:
>
> [The rabbi] invented a ceremony for me .... He asked me through his secretary to come with a hat on my head and dressed with long sleeves. And it was July, it was very hot.... So after he finished insulting me, ... he told me "Go to the wall. Come back. Go to the wall. Come back." And then, he told me to take this paper and put it [inside my dress].... [He said] "No, it must be deeper on your breast." I was sure that it was something special for me, because I couldn't imagine that it was part of the ceremony. And then I took it out, and he said "Give it to me now, and then go there again" ... and I don't remember if he said something, and then he cut it, and ... that was the story.

However, interestingly, other religious adjudicators bend the procedural rules in favor of women. It would thus seem that the vagaries of customary religious law can go both ways. Some imams allow women to pronounce the *talaq* divorce, which under Islamic law can only be done by the man:[128]

> Participant #1:
>
> Participant: Well I did the divorce with an imam. My husband wasn't there .... [The imam] just said something and I had to say it three times and then I was divorced.
>
> Interviewer: Do you remember what you had to say three times?
>
> Participant: ... It was uh "I divorce with Allah's permission, I divorce you, I divorce you, I divorce you" and that was it.... It took 30 seconds or something.
>
> Interviewer: So they let you initiate the religious divorce without his consent?
>
> Participant: Yes, because by that time we'd lived separately and everybody knew he was violent, everybody knew that he was having loads of extra-marital affairs, you know, loads of them, and so he was considered unworthy of being a Muslim ....

The substantive rules of divorce are also bent and applied irregularly, as illustrated by the case of the grounds for divorce. Under Islamic law, grounds to issue a decree of the Islamic *faskh* divorce include impotence on the part of the husband, insufficient material support and companionship ("the loneliness of the marriage bed"), non-fulfillment of the marriage contract, mental or physical abuse, or a husband's lack of piety.[129] However, some imams apply these divorce grounds unevenly, being reticent to grant divorce for insufficient material support and

128. JAMILA HUSSAIN, ISLAM: ITS LAW AND SOCIETY 120–25 (3d ed. 2011).

129. *See* Abdal-Rahim, *supra* note 40, at 105; ESPOSITO & DELONG-BAS, *supra* note 33, at 50–52.

physical abuse, while favoring divorce claims on grounds of homosexuality or impotence:

> Participant #1:
>
> . . . If he's gay, then you'll find any imam [to adjudicate the divorce], if he's unable to father a child, again you'll find any imam. But if he beats you and leaves you hungry and you know that kind of stuff, . . . you have to sit there and do all your dirty washing out in front of witnesses in order to [divorce] . . . .

Likewise, we have found that some imams are reluctant to enforce post-divorce alimony, even though the woman is entitled to three months of additional maintenance under Islamic law:[130]

> Participant #2:
>
> Normally, [alimony] is in our religion but the imam doesn't do it anyway. Once you're divorced, you reach another status, you're no longer important in a sense . . . . The only time the imam puts any pressure is if you don't fast during Ramadan, if you don't go to the mosque and stuff like that. So it's really selfish, but whether you have food or not [is not important]. Yes, help the poor, but whether or not you and your children are starving doesn't interest him really, as long as you still come to pray half starved, he doesn't care.

Mahr also seems to be an element that is enforced selectively, even though it is central to the Muslim custom of marriage and divorce:

> Participant #1:
>
> We signed some sort of contract saying in case of divorce what he would have to pay me, which of course never happened. . . . It was never again an issue. The minute it came to finances, there was no Muslim blood in him at all . . . . I know many who sign the religious contract, and then you might as well use it as toilet paper because it has no meaning.
>
> Participant #8:
>
> Interviewer: What was the process for the religious divorce, after he called your parents, your dad?
>
> Participant: He came with his brother. And my father and his brother, they were the witnesses. And then he said three times the *talaq*, and that was it.
>
> Interviewer: Okay. And so there was nothing, no amount he had to give you for *mahr*, because anyhow—

130. NASIR, *supra* note 29, at 142.

Participant: No.

Interviewer: Okay, it was just symbolic.

Undoubtedly, the inconsistencies in the application of religious customs often stem from arbitrary applications of the law, a phenomenon exacerbated by the informality surrounding religious customary law in Germany. However, we will now advance a different explanation for the pervasive inconsistencies in the adjudication of Islamic and Jewish law. Perhaps these phenomena can be seen as products of the very nature of religious law, which, just like any state law, can be indeterminate and fashioned by the bargaining parties themselves.

Many Islamic legal rules are, in fact, dependent on bargaining power and strategic behavior in order to be binding. Their meaning has to be worked out by particular individuals in a particular set of circumstances. For instance, if a man repudiates his wife by issuing three *talaq*, the divorce is binding despite the wife's lack of consent.[131] The apparent potential for extortion of the *talaq* divorce has long been recognized in the literature on Islamic divorce.[132] However, the formally unequal rules of *talaq* play out differently in practice depending on the amount attached to *mahr* in the marriage contract. Islamic jurists conceived *mahr* as a powerful limitation on the possibly capricious exercise of the *talaq* as well as a form of compensation to the wife once the marriage has been dissolved.[133] Indeed, if *mahr* is very high, chances are the husband will hesitate before repudiating his wife. As put by Homa Hoodfar, "the larger the sum of *mahr*, the more effective the wife's leverage."[134] In most cases, this constitutes a source of security for wives who do not want to divorce. However, for those who do want a divorce,[135] high *mahr* can be disconcerting: it may only be at the price of behaving in a disgraceful manner that the woman can obtain a *talaq* from her husband.[136] Some participants' experiences offered interesting illustrations of various Islamic doctrines clashing with each other to produce asymmetrical bargaining positions. For instance, some participants described the unwillingness of their husbands to divorce them because of *mahr*. When the women indeed wanted to obtain divorce, some have had to waive *mahr*:

Participant #7:

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131. *See* HUSSAIN, *supra* note 128, at 120 ("[A husband] can effect a divorce simply by pronouncing a *talaq* at the appropriate time and under the appropriate conditions. . . . This can be done by the husband at will and without any prior formalities. . . .").

132. Judith Romney, *The Status of Women in Jewish and Islamic Marriage and Divorce Law*, 5 HARV. WOMEN'S L.J. 1, 17 (1982); Hindun Anisah, *Divorce*, *in* ISLAMIC FAMILY LAW AND JUSTICE FOR MUSLIM WOMEN 31, 41 (Nik Noriani Nik Badlishah ed., 2003).

133. JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 167 (1982); NOEL J. COULSON, A HISTORY OF ISLAMIC LAW 207–08 (1964).

134. Hoodfar, *supra* note 24, at 131.

135. This can often be the case. For instance, Judith Tucker, in analyzing peasant women in nineteenth-century Egypt, affirms that "[r]ecognizing, on balance, the material advantages of *talaq*, many women who wanted a divorce preferred that their husbands repudiate them." JUDITH E. TUCKER, WOMEN IN NINETEENTH-CENTURY EGYPT 55 (1985).

136. *Id.* The forms of disobedience used by Muslim women to push men into the direction of repudiation are manifold. In her study, Judith Tucker noticed the following: "Having enlisted the cooperation of the local shaykh al-bald, one woman managed to bully her husband into pronouncing a divorce. Another used blackmail: she threatened to take her husband to court and claim that he had stolen her jewelry unless he divorced her; so she 'frightened him' and he indeed complied with a repudiation." *Id.*

> Participant: . . . We tried twice to make this divorce and the second time, when I gave him the money, he was more easy to divorce, like to get him to agree.
>
> Interviewer: The money from your marriage contract that you were keeping for him?
>
> Participant: Yes, yes. He wouldn't, he didn't want to divorce me without getting the money.
>
> . . . .
>
> Participant: I am for civil marriage and I will never get married according to Islamic law again. . . . He could have said, "I wouldn't give you a divorce at all if you don't give me the money." . . . We could have stayed like that for ten years if he wouldn't have divorced, and he could marry and divorce as much as he can and I don't have this kind of flexibility . . . .

In addition to *mahr*, the Qur'anic doctrine of the *idda* also modulates the bindingness of *talaq* divorce. This three-month waiting period after the man's pronouncement of the first *talaq* gives him time to reconsider his actions, withdraw the pronouncement of divorce, and potentially reconcile.[137] However, during this time, the husband is obliged to provide financially for the woman.[138] If the woman does prove to be pregnant, the support obligation will be extended until the birth of the child.[139] The husband could, even against his wife's will, take her back during the waiting period.[140] It is also theoretically open to the husband to take his wife back at the end of the *idda* period only to divorce her again, leaving her in what Joseph Schacht called "divorce limbo."[141] The Qur'an recognizes this possibility and specifically prohibits it, supplying the wife with an offsetting religious claim.[142] Indeed, to conform to Qur'anic requirements, reconciliation must be genuine and not entered into for the purpose of influencing the woman to give up *mahr*.[143]

Thus, upon closer look, the bindingness of the *talaq* divorce is revealed as highly contingent upon other religious institutions such as *mahr* and *idda*, which interlock with the *talaq* in complex, contradictory ways. The *talaq* will be applied differently according to the circumstances, depending on the bargaining interests of the parties, who will or will not push for a divorce depending on *mahr*, *idda*, and myriad other legal doctrines and religious and socio-economic interests. These various religious doctrines can be manipulated by bargaining spouses to affect the bindingness of the *talaq* and the outcome of the divorce proceedings.

The same complex indeterminacy can be found in some doctrines of Jewish law. If a Jewish man refuses to grant the *get*, the wife is left with very little religious

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137. Miller, *supra* note 38, at 214.
138. NASIR, *supra* note 29, at 142.
139. Joseph Schacht, *Talak*, *in* ENCYCLOPAEDIA OF ISLAM 151, 152 (P. J. Bearman et al. eds., 2000).
140. *See* QUR'AN 65:1–65:4 (declaring that Allah contemplates reunions).
141. Schacht, *supra* note 139, at 151.
142. QUR'AN 4:24.
143. Schacht, *supra* note 139, at 151.

recourse.[144] Hence, the opportunity for "strategic behavior"[145] in civil divorce proceedings is remarkable, making the *get* a potential tool for blackmail.[146] Lisa Fishbayn writes that "the power men enjoy under Jewish law to withhold a *get* is of concern to civil law because this power becomes an effective bargaining endowment in the resolution of civil family law disputes."[147] In its seminal *Bruker v. Marcovitz* decision pertaining to the awarding of damages for *get* refusal,[148] the Supreme Court of Canada similarly suggested that "the spouse could say, 'Give up your claim for support or custody of the children and I will offer the *get*.'"[149] The *get* thus appears at first glance as a potential unilateral blackmailing tool. That being said, the Jewish *agunah* has been provided with some countervailing bargaining instruments. If Jewish women cannot grant the *get* of their own initiative,[150] they may refuse their husbands' *get*, which will prevent rabbinical authorities from dissolving the marriage contract.[151] Jewish women may refuse consent to the *get* for reasons related to the best interests of their children, to extract further concessions from the husband, or for pecuniary incentives.[152] Jewish men who are citizens of Israel may respond to this bargaining by obtaining an official permission to marry a second wife from an Israeli rabbinical court, effectively circumventing the wife's refusal.[153] Although bigamy is prohibited under Israeli law, a permit obtained by a rabbinical court to marry a second wife is a valid defense to the crime of bigamy.[154] Throughout the first half of the 1990s, the Israeli rabbinical courts had issued an average of eleven permits per

144. *See* Estin, *Unofficial Family Law*, *supra* note 27, at 464 (pointing out the complications posed by the intersection of civil and religious law, specifically how recognition of a particular mechanism in one system does not guarantee recognition of that mechanism in the other system).

145. *Id.*

146. Joel A. Nichols notes several examples from the United States: "[O]ne recalcitrant husband agreed to issue a *get* only after receiving $15,000 and a promise that his former wife would not press assault charges against him after he broke her leg. Other examples include a woman who mortgaged her house for $120,000 to pay the amount demanded by her husband for issuance of a *get*, a woman who was forced to drop charges against her husband for sexually abusing their daughter so that she might obtain a *get*, and the increasing demands of a recalcitrant husband who asked for $100,000 (which he received), then $1 million, and then his wife's father's pension—in addition to demanding full custody of the children." Nichols, *Multi-tiered Marriage*, *supra* note 53, at 158 (citations omitted).

147. Fishbayn, *supra* note 104, at 85 (citations omitted).

148. Bruker v. Marcovitz, [2007] 3 S.C.R. 607 (Can.).

149. *Id.* para. 8.

150. It is regarded as against the spirit of Jewish Law for a wife to be able to dismiss her husband by granting him the *get*. *See* MOSES MIELZINER, THE JEWISH LAW OF MARRIAGE AND DIVORCE AND ITS RELATION TO THE LAW OF THE STATE 118 (1987) (describing the divorce process under Mosaic and traditional law as initiated by the husband even when a wife is wronged).

151. *See id.* at 120 (describing the rabbinical rule according to which a wife cannot be divorced against her will, except in certain circumstances).

152. Although little evidence exists with regard to the frequency at which this bargaining power is used by women, a study issued by the Chief Rabbinate of the State of Israel reports that within divorce proceedings commenced from 2005 to 2006, "some 180 women are 'chained' to their husbands, while a slightly higher amount of men are 'chained' to their wives." Hillel Fendel, *Rabbinate Stats: 180 Women, 185 Men 'Chained' by Spouses*, ISRAEL NATIONAL NEWS (Aug. 23, 2007), http://www.israelnationalnews.com/News/News.aspx/123472. In nearly 350 divorce cases that were active as of 2005, 19% of the cases continue to be unresolved because of the man's refusal to grant a *get*, while 20% of the cases showed that women failed to cooperate with the divorce proceedings. *Id.* Among the reasons cited for this "divorce blackmail" were the negotiation of custody agreements and spousal support. *Id.*

153. Blecher-Prigat & Schmueli, *supra* note 48, at 282.

154. *Id.*; Yifat Bitton, *Public Hierarchy and Private Harm: Tort Law as a Remedy for Gender Inequality in Israeli Family Law*, *in* (RE)INTERPRETATIONS: THE SHAPES OF JUSTICE IN WOMEN'S EXPERIENCE 115, 120 (Lisa Dresdner & Laurel S. Peterson eds., 2009).

year to marry a second wife.[155] One of the conditions to obtain such a permit is for the court to find that the wife is refusing the *get*.[156] However, it is interesting to note that singling out which party is refusing in a context of intense economic bargaining can be a complicated line-drawing exercise. For example, if the husband attempts to pressure the wife into foregoing alimony in exchange for the *get*, is the woman refusing the *get*? If the husband is trying to negotiate a more advantageous custody agreement and is momentarily withholding the *get* until the wife accepts the agreement, is this a case of *get* refusal? The Israeli rabbinical courts may be confronted with similar legal dilemmas in which Jewish legal rules conflict with each other.[157] A line has to be drawn between refusing the *get* and negotiating over its granting. Some of our participants' experiences illustrated very well the indeterminacy of such religious rules. These participants' husbands went to Israel to (successfully) argue that the women were refusing the *get*, even though the husbands had never even attempted to give the *get* and were in fact refusing to do so:

> Participant #4:
>
> Participant: I think until today he doesn't understand why I left him, because he was very hurt about this.
>
> . . . .
>
> Interviewer: But had he tried to give you the *get*?
>
> Participant: No! Never, never. . . . He didn't have to get a *get*, he just had to get a permission to remarry. . . . He went to the rabbis in Haifa [Israel]. . . . He didn't say why he doesn't have a *get*, and they accepted it like this, so they permitted him to remarry . . . . He argued that I was refusing to accept the *get*.

Given the possibility for both men and women to refuse the other party's bargain over the *get*, the law creates a gap that has to be filled by the adjudicator deciding exactly who is refusing the other party's terms. Indeed, Ayelet Blecher-Prigat and Benjamin Shmueli report that many Israeli rabbis hold that when refusal to give the *get* is used by the husband as a bargaining tool, it is the woman who is refusing to receive the *get*.[158] However, that outcome is not dictated by the internal structure of the legal rules involved. Rather, a process of strategizing, persuasion, and choice is happening before rabbinical courts.

It would seem that religious law's inconsistencies stem not from its misapplication, but from its internal structure. Our field work on the workings of religious customs supports Susan Weiss's view that Jewish law "is not a collection of harsh and uniform rules, but rather embraces various and contradictory voices [and

155. RUTH HALPERIN-KADDARI, WOMEN IN ISRAEL: A STATE OF THEIR OWN 243 (2004).

156. Blecher-Prigat & Shmueli, *supra* note 48, at 282.

157. Pascale Fournier, Pascal McDougall & Merissa Lichtsztral, *A 'Deviant' Solution: The Israeli Agunah and the Religious Sanctions Law*, *in* MANAGING FAMILY JUSTICE IN DIVERSE SOCIETIES 89 (Mavis Maclean & John Eekelaar eds., 2013) (analyzing Israeli Jewish law and conducting fieldwork in Israel).

158. Blecher-Prigat & Shmueli, *supra* note 48, at 283.

the] outcome of a given case depends upon the rabbinical authority consulted, the 'facts' he deems worthy of emphasis, and the voices he chooses to heed."[159] This quote can also apply to Islamic custom, as we have sought to demonstrate. The religious rule according to which *talaq* is unilateral, but creates an obligation to pay *mahr*, makes Islamic divorce an unstable legal system over which parties will fight economically and religiously. Its binding nature is obscured by this bargaining process, making every factual case unique. Hence, religious customs do not seem to be a homogeneous body of oppressive rules but an open-ended toolbox, which is used in various contradictory ways by different rabbis, imams, and parties. The growing mass of feminist scholarship reinterpreting the internal legal doctrines of Jewish law[160] and Islamic law[161] is interesting in this regard, as it underlines that religious custom is, in fact, malleable and can be invoked to support many conflicting conclusions. These findings are quite problematic for the project of recognizing customary law as a bottom-up or faith-based legal system, not only because customary law may be lacking on the level of gender equality, but also, and most importantly, because the boundaries of customary religious law are constantly being redefined. To formally recognize these legal rules and practices by entering into a process of crystallization would thus lead to many unpredictable distributive consequences, which must be acknowledged and studied empirically before the fruitful conversation on the nature of customary law can continue.

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159. Susan Weiss, *Israeli Divorce Law: The Maldistribution of Power, Its Abuses, and the "Status" of Jewish Women*, *in* MEN AND WOMEN: GENDER, JUDAISM AND DEMOCRACY 53, 63 (Rachel Elior ed., 2004); *see also* Philippa Strum, *Women and the Politics of Religion in Israel*, 11 HUM. RTS. Q. 483, 496 (1989) ("The problem is not *halacha*, . . . but who interprets it.") (internal quotation marks omitted).

160. *See, e.g.*, NAOMI GRAETZ, UNLOCKING THE GARDEN: A FEMINIST JEWISH LOOK AT THE BIBLE, MIDRASH AND GOD 4 (2005) ("[S]ince feminism is inseparable from our religious orientation and is viewed as part of our concepts of spirituality and holiness, its teachings must be integrated. We bring to the texts questions from our time and seek to uncover meanings . . . that relate to these questions."); TAMAR ROSS, EXPANDING THE PALACE OF TORAH: ORTHODOXY AND FEMINISM xvi (2004) ("[F]eminism need not be seen as a threat to traditional Judaism . . . ."); Esther Fuchs, *Jewish Feminist Scholarship: A Critical Perspective*, *in* 14 STUDIES IN JEWISH CIVILIZATION 225, 225 (Leonard J. Greenspoon et al. eds., 2003) (describing feminist Jewish scholarship as being "a new field of study"); Judith Hauptman, *Feminist Perspectives on Rabbinic Texts*, *in* FEMINIST PERSPECTIVES ON JEWISH STUDIES 40, 43 (Lynn Davidman & Shelly Tenenbaum eds., 1994) ("[T]here has been an explosion in the number of recently published popular works on feminism and Judaism."); Norma Baumel Joseph, *Jewish Law and Gender*, *in* 2 ENCYCLOPEDIA OF WOMEN AND RELIGION IN NORTH AMERICA 576, 588 (Rosemary Skinner Keller & Rosemary Radford Ruether eds., 2006) ("Since the legal system was established as a responsive one, much of [Jewish law's] content can be addressed in today's language and terms, using women's experience to pry it open."); ISAAC SASSOON, THE STATUS OF WOMEN IN JEWISH TRADITION vii (2011) ("[T]he presence of feminist research in religion has been intensified because there is more at stake than simple scholarly investigation.") (quoting CAROL MEYERS, DISCOVERING EVE: ANCIENT ISRAELITE WOMEN IN CONTEXT 6 (1988)).

161. *See, e.g.*, LEILA AHMED, WOMEN AND GENDER IN ISLAM 63 (1992) (arguing that the voice of Islam can be "stubbornly egalitarian"); ASMA BARLAS, "BELIEVING WOMEN" IN ISLAM: UNREADING PATRIARCHAL INTERPRETATIONS OF THE QUR'AN 2 (2002) (arguing that "the Qur'an's epistemology is inherently antipatriarchal"); AMINA WADUD, QUR'AN AND WOMAN: REREADING THE SACRED TEXT FROM A WOMAN'S PERSPECTIVE 79–80 (Oxford Univ. Press ed. 1999) (1992) (emphasizing that women can benefit from the "broader Qur'anic wisdom which aims at harmonious reconciliation"); FATIMA MERNISSI, BEYOND THE VEIL: MALE-FEMALE DYNAMICS IN MODERN MUSLIM SOCIETY 50–52 (Indiana Univ. Press rev. ed. 1987) (arguing that the *talaq* is an Arabian tradition which the Prophet himself did not live by).

CONCLUSION: LEGAL SCHOLARSHIP IN TIMES OF DIASPORA AND MIGRATION

This Article has outlined several conceptual difficulties and challenges to seeing religious law as a social, harmonious sphere of identity that can be easily captured and recognized by the state. Part II has explored the processes through which the external boundaries of the customary religious order come to be defined. It revealed a recurring phenomenon in our fieldwork: the incessant cross-cutting of civil and customary religious orders. In fact, the cases at hand show that religious custom is deeply entangled with the civil law, the shadow of which is always lurking over social interactions in the customary legal space. For instance, religious parties often brandish civil law to influence religious outcomes or marginalize customary religious law. However, this process is not by any means constant or unidirectional. Indeed, the religious haunts the civil as well, sometimes overriding it completely. As a result, religious legal subjects are busy constantly redrawing the lines of these competing normative orders, such that clear-cut recognition of the boundaries of one or the other is practically unworkable.

Part III then shifted to the internal contours of religious custom, outlining its many conflicting treatments and invocations. In our sample, several parties and adjudicators were able to bend the religious rules to favor one party or the other, making it easy to consider religious law as a set of conflicting legal rules to be manipulated by bargaining men and women. Finally, our fieldwork helped form a hypothesis: religious law's malleability is neither due to arbitrary, bad law-making, nor to new customs that diverge from the black-letter religious law. Instead, the contradictory outcomes are closely related to religious law's indeterminacy, its internal gaps, conflicts, and ambiguities, which leave the door open to choice, agency, and strategic behavior in legal interpretation.[162] If this is so, the road to the formal recognition of custom will be fraught with difficulties, which should be acknowledged and studied closely through socio-legal fieldwork and doctrinal analysis.[163]

We do not consider these traits, however, to be peculiar to religious legal orders. In fact, we would argue that our hypotheses can be extended to other customary legal orders, as well as to state law. Indeed, a huge body of literature has already studied the indeterminacy and internal contradictions of non-customary (state) law.[164]

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162. DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE 180–81 (1997).

163. It does not follow from our analysis that religious customs should never be recognized, nor do we suggest that civil state law is better than customs or that it is more determinate or egalitarian. Our argument does not align with secular feminists who emphasize the need to value civil law over religious law to preserve the interests of women. *See generally*, Susan Moller Okin, *Is Multiculturalism Bad for Women?*, *in* IS MULTICULTURALISM BAD FOR WOMEN? 7 (Joshua Cohen et al. eds., 1999); Gila Stopler, *Countenancing the Oppression of Women: How Liberals Tolerate Religious and Cultural Practices that Discriminate Against Women*, 12 COLUM. J. GENDER & L. 154 (2003). Instead, we argue that any attempt to recognize religious law as customs must take into account the instabilities and indeterminacy of religious law.

164. *See, e.g.*, KENNEDY, *supra* note 162, *passim* (discussing the contradictory and indeterminate structure of legal argument which allows ideology to permeate adjudication); Pascale Fournier, *Transit and Translation: Islamic Legal Transplants in North America and Western Europe*, 4 J. COMP. L. 1 (2009) (discussing comparative law and the challenges of treating a single nation's laws as a coherent, determinate body of knowledge); David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101, 116–17 (2002) (pointing out that despite the high expectations placed upon

What provisory conclusions can we draw from our exploration? Scholarship around the recognition of customs has too often focused our attention on comparing legal orders (official law versus non-official law; rules versus norms; civil law versus religious law, etc.) and not enough on the hybridity produced by such interaction and the import and export dialogue that makes the jurisdictional or territorial model unstable. This instability should be better embraced, bringing us a little closer to individuals and the background rules and norms that shape their movement.

If our study does not pretend to offer a perfect policy alternative to multicultural recognition, it offers an awareness of the complexity of legal orders and of the unintended consequences of certain policy choices. It also aims to contribute to a much-needed discussion of the distributive impact of legal recognition of plural normative orders. In a context where international migration and transnational flows of people are ever-increasing, it is imperative for law to take stock of the many conflicting implications of proposed policies. A much-needed turn to private relational dynamics thus seems to be lacking in legal scholarship on minority legal systems and customary law. To be sure, brilliant legal accounts of the complex hybridity of legal identities and belongings have been emerging.[165] Fascinating fieldwork has also been produced on the topic of legal subjects' navigation of informal, religious legal orders.[166] However, a broader turn towards the empirical study of these socio-legal complexities will become even more necessary as time progresses.

Artists have provided us with interesting material to better conceptualize the power of normative pluralism in religious settings. As put by New York-based, Montreal-born Jewish writer Emmanuel Kattan, in this new global context, questions of faith and religion "put in place invisible borders inside the very heart of beings."[167] His latest novel, *Les lignes de désir*, published in October 2012, depicts the journey of Sara, a woman born to a Jewish father and a Muslim mother, as she moves to Jerusalem to explore her superseding, internally conflicting identities (she is officially neither Jewish—born of a Jewish father—nor Muslim—born of a Muslim mother). Can customary law provide conceptual tools to picture the story of Sara? Which religious script would speak on her behalf, if any? How does state law interact or interfere with two religious systems which erase Sara's religious affiliation? The case

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the law, legal outcomes are not free of the political influences that affect other areas of life); Kerry Rittich, *Who's Afraid of the* Critique of Adjudication? *Tracing the Discourse of Law in Development*, 22 CARDOZO L. REV. 929 (2000) (discussing the open-ended nature of the legal system that leaves judges room to maneuver and to pursue ideological projects within the law); Mark Tushnet, *Defending the Indeterminacy Thesis*, 16 QUINNIPIAC L. REV. 339, 341–45 (1996) (discussing indeterminate legal propositions that equally support an outcome in favor of the plaintiff and of the defendant).

165. *See generally*, Davina Cooper, *Talmudic Territory? Space, Law, and Modernist Discourse*, 23 J.L. & SOC'Y 529 (1996) (discussing the impact of social geography on conflicts between various identities and affiliations); Amr Shalakany, *Sanhuri and the Historical Origins of Comparative Law in the Arab World: Or How Sometimes Losing Your* Asalah *Can Be Good for You*, *in* RETHINKING THE MASTERS OF COMPARATIVE LAW 152 (Annelise Riles ed., 2001) (giving a path-breaking historical account of post-colonial legal hybridity in Egypt); Shauna Van Praagh, *The Chutzpah of Chasidism*, 11 CAN. J.L. & SOC'Y 193 (1996) (discussing the ways in which individuals are influenced by different legal orders and combine these different legal orders to create unexpected outcomes).

166. *See generally*, Angela Campbell, *Bountiful's Plural Marriages*, 6 INT'L J.L. CONTEXT 343 (2010) (discussing the polygamist community of Bountiful, British Columbia); MACFARLANE, SHARI'A PATH, *supra* note 126, *passim* (discussing the development of Islamic law in North America).

167. EMMANUEL KATTAN, LES LIGNES DE DÉSIR [THE LINES OF DESIRE] *back cover* (2012) (our translation, "instaurent des frontières invisibles au cœur même des êtres").

of Canada-based playwright Wajdi Mouawad is also interesting in this regard. Mouawad, born in Lebanon, educated in France, and raised in Canada, exemplifies the figure of the exilic, hybrid being. Mouawad's art vividly embodies the superposing, cross-cutting cultural belongings of transnational migration, as "the poeticity of his plays written in French camouflages the oral traditions of Arabic storytelling, with its specific rhythms and syntactic designs."[168] By the very internal rhythmic structure of his text, the exilic playwright teaches us about the complexities of culture, belonging, and identity in an age of migration. Can Mouawad's artistic insights shed light on legal reform projects? Hopefully, art and theatre can enrich the lawyers' gaze by, in German playwright Bertolt Brecht's words, "stripping the event of its self-evident, familiar, obvious quality and creating a sense of astonishment and curiosity about them."[169] Armed with this curiosity, legal scholars can perhaps begin the study of customary and religious legal orders afresh.

168. Yana Meerzon, *The Exilic Teens: On the Intracultural Encounters in Wajdi Mouawad's Theatre*, 30 THEATRE RESEARCH IN CAN. 82, 97 (2009); *see generally* WAJDI MOUAWAD, TIDELINE (2002) (a play chronicling a young man's quest for his identity as he travels to his hometown to bury his father).

169. Peter Brooker, *Key Words in Brecht's Theory and Practice of Theatre*, *in* THE CAMBRIDGE COMPANION TO BRECHT 185, 191 (Peter Thomson & Glendyr Sacks eds., 1994) (quoting BERTOLT BRECHT, GESAMMELTE WERKE [COLLECTED WORKS] XV, at 301).

The Law and Economics of Norms

JULIET P. KOSTRITSKY*

SUMMARY

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* Everett D. & Eugenia S. McCurdy Professor of Contract Law at Case Western Reserve University School of Law. Colleagues who contributed in important ways to clarify my thinking and to this Article include: Professors Ronald J. Coffey, Peter M. Gerhart, Saul Levmore, and Liza Vertinsky. The scholarship cited in this Article challenged me to think deeply about the subjects of law, norms, choice, and exchange. For that I am grateful. I have more to learn. Yelena Grinberg, Peter Larson, and George Skupski from Case Western Law School provided excellent research assistance. Special thanks are due to Dean Lawrence Mitchell and his support of scholarship through the dean's summer stipend and scholarship program. Robert R. Myers provided superb assistance with library source materials.

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Both law and economics largely ignored norms until the 1990s.[1] Norms remained the exclusive province of the social sciences.[2] For the purposes of this Article, norms include patterns of behavior, impulses, and spontaneous ordering initially enforceable by non-legal sanctions (i.e., they are initially non-adjudicable) and promulgated by private parties.[3]

Classical economics ignored norms for several reasons.[4] First, because economics used abstract models of behavior built on rational choice theory and the individual utility function,[5] it did not study how people actually behaved and ignored the frictions of real exchange as well as norms—the self-imposed constraints that parties use to reduce such frictions.[6] Second, economics was not concerned with how preferences developed—only that people had preferences that they would seek to maximize (not taking into account encounters with or interests in others)[7] in a

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1. Robert Ellickson's work on cattle farmers changed everything. He demonstrated the willingness and ability of a particular community to ignore the legal rules and to govern disputes in accordance with non-legal norms. *See* Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603, 1603 n.1 (2000) ("Ellickson is generally credited with anticipating, if not creating, the field of law and social norms."). Of course, Stewart Macaulay made an earlier contribution in documenting that business norms, rather than law or contract, governed disputes between businessmen. Stewart Macaulay, *Non-contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 63 (1963); *see also* Robert W. Gordon, *Is the World of Contracting Relations One of Spontaneous Order or Pervasive State Action? Stewart Macaulay Scrambles the Public-Private Distinction*, *in* REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL 49, 68 (Jean Braucher et al. eds., 2013) (situating Macaulay's exploring the public aspects of the private world of business practices as a "post-Realist tradition of scrambling the public-private distinction").

2. *See generally* MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION (Talcott Parsons ed., A.M. Henderson & Talcott Parsons trans., Oxford Univ. Press 1947). *See also* Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537, 542 (1998) ("Sociologists have long studied the creation, transmission, and enforcement of norms as well as the pairing of norms with social roles. The field of sociology, however, has not had much influence on the scholars in other disciplines who have recently become interested in norms.").

3. *See* Richard A. Posner & Eric B. Rasmusen, *Creating and Enforcing Norms, with Special Reference to Sanctions*, 19 INT'L REV. L. & ECON. 369, 369 (1999) (defining a norm as "a social rule that does not depend on government for either promulgation or enforcement," and noting that "[n]orms may be independent of laws . . . or may overlap them").

4. If classical economists took any interest in norms, it was to look at predictable regularities. *E.g.*, Richard H. McAdams & Eric B. Rasmusen, *Norms and the Law*, *in* 2 HANDBOOK OF LAW AND ECONOMICS 1573, 1576 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

5. With respect to rational choice theory "[i]t is important to emphasize a particular point here. The behavioral assumptions that economists use do not imply that everybody's behavior is consistent with rational choice. But they do rest fundamentally on the assumption that competitive forces will see that those who behave in a rational manner, as described above, will survive, and those who do not will fail . . . ." DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 19 (1990).

6. *Id.* at 11. *See generally id.* at 11–13 (discussing the problems with classical economic theory and how economists have sought to solve these problems).

7. The new institutional economists seem to recognize that people made choices that took into account the effects on others that might "on the surface [have] appear[ed] to be altruistic and not consistent with individual wealth-maximization [but] turn[ed] out to be superior survival traits . . . ." *Id.* at

perfectly functioning market.[8] This model ignored that those with preferences might engage in a different type of exchange that results in non-adjudicable norms. In this exchange, one party decides on an approach to resolve what he seeks as a function of his own preferences and beliefs[9] in an encounter with the expected response of another.[10] This process results in a norm.[11] Because preferences, endowments, and beliefs exist in the brain—within associated neural assemblies—these matters are endogenous to it.[12] The ramifications of this recognition of a norm as the result of an exchange will be explored later. Because economics focused exclusively on markets, it ignored non-market means of organizing and cooperating.

Likewise, law ignored norms. In the centrist view of law formerly embraced by economists,[13] law derived from the command of the sovereign, and people obeyed law because of its coercive threat.[14] In this ideal world, law functioned well and without costs.[15] Therefore, neither economists nor legal scholars considered that the effectiveness of, need for, or content of laws might depend on the underlying embedded norms,[16] beliefs, or other supporting institutions,[17] and on the interactions between these institutions as norms change.[18]

21.

8. *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 156 (1991) (discussing rational choice model's "failure to explain how people come to hold particular preferences").

9. This view contrasts with the narrow view of the classical economists who, through "the same rational choice lens that has proven tractable in studying the direct effects of legal rules[,] . . . continue to treat values, moral character, and preferences as exogenous . . . ." Scott, *supra* note 1, at 1604–05 (footnote omitted).

10. *See id.* (noting that an actor's own behavior may be influenced by the behavior of others, such as a neighbor shaming the actor for failing to follow a norm).

11. The brain's selection of the terms of how an encounter with another person will be resolved is endogenous since it occurs as a function of the brain's internal mechanisms. *See* Ernst Fehr and Antonio Rangel, *Neuroeconomic Foundations of Economic Choice—Recent Advances*, 25 J. ECON. PERSP. 3, 3 (2011) (exploring "actual computational and neurobiological processes behind human behavior").

12. Of course, an array of outside, or exogenous, influences could influence parties' preferences, endowments, and beliefs, making them endogenous. *See, e.g.*, *id.* at 1603–04 (noting that laws may empower citizens to use public ridicule as an enforcement technique, and that laws may well be internalized where a person self-enforces due to potential feelings of guilt).

13. *See* AVINASH K. DIXIT, LAWLESSNESS AND ECONOMICS: ALTERNATIVE MODES OF GOVERNANCE 3 (2004) (discussing the centrist view of law where "the state has a monopoly over the use of coercion").

14. As Professor Schauer explains, it was H.L.A. Hart who recognized that custom could have the status of law rather than only having meaning if adopted by the command of the sovereign (the canonical Austinian position). *See* Frederick Schauer, *The Jurisprudence of Custom*, 48 TEX. INT'L L.J. 523, 527 (2013) ("Hart challenged the centrality of sanctions to the idea of law, and thus challenged the bedrock of what had first been Bentham's, and then became Austin's, account of the very idea of legality."). Although Hart recognized custom as a legitimate source of law, legal scholars and economists are not concerned so much with concluding whether something is law or not but with why we care about norms apart from whether they are called law or not. *See, e.g.*, Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 341–42 (1997) (noting that while law and economics scholars recognize the usefulness of norms in addressing legal problems, there is no consensus on the meaning of the term).

15. The assumption of costless functioning of the legal system ran into contrary conclusions when "economics recognized the ubiquity and importance of information asymmetries and transaction costs." DIXIT, *supra* note 13, at 3.

16. Williamson includes "norms, customs, mores, traditions," and religion at the "top level . . . [of] social embeddedness." Oliver E. Williamson, *The New Institutional Economics: Taking Stock, Looking Ahead*, 38 J. ECON. LIT. 595, 596 (2000) [hereinafter *The New Institutional Economics*].

Despite early neglect, today both law and economics recognize the importance of norms.[19] Under the robust view of human behavior embraced by the new institutional economists,[20] norms are part of culture.[21] Norms must inform any methodology that studies behavior and incentives and takes account of how parties with preferences follow norms in choosing actions. Norms matter because they are implicit ways in which people devise solutions to the problems of cooperation, exchange, and maximizing welfare.[22] Law cannot foster successful markets and societies on its own since law depends on norms that motivate people to adhere to law.

The increased importance of norms embodies an alternative approach to rationality: ecological rationality.[23] Under this view, people evolve mechanisms for cooperation and exchange; these institutions include not only norms, but trust and beliefs, organizations, and networks.[24] They all influence choice and help parties deal with "the complexity and incompleteness of our information," matters that classical economics ignored.[25]

Using new institutional economics as a baseline, this Article considers norms as coordinating devices and one of several alternative strategies (sometimes complementary and sometimes not) that enable parties to get the most out of their resources and achieve their goals. The costs and benefits of norms versus other arrangements, including law, should be compared to determine the optimal mix of formal and informal arrangements.

The origin and function of norms—and the roles that law, private exchange, and norms perform—differ across settings.[26] There is no one role for the law to play in a society in which various norms also operate.[27] Norms "are not monolithic"[28] since

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17. *See id.* at 596–97 (discussing the existence and formation of informal institutions). Ignoring norms may lead to other analytical errors: It can "cause one to overstate the significance of law . . . ." McAdams & Rasmusen, *supra* note 4, at 1589.

18. *See The New Institutional Economics*, *supra* note 16, at 595–96 (discussing the ignorance of neo-classical economics towards institutions and later affirming the fact that "institutions do matter").

19. *See id.* at 596 (discussing how norms and institutions slowly change); Scott, *supra* note 1, at 1603–05 (demonstrating the influence changing laws can have on social norms); McAdams & Rasmusen, *supra* note 4, at 1588–90 (analyzing how "[e]conomic analysis of law needs to consider carefully how norms may govern behavior in the absence of law and how a new legal rule may . . . change . . . a norm").

20. This is meant to include all of the various subfields of new institutional economics, evolutionary economics, etc.

21. NORTH, *supra* note 5, at 42.

22. *See* Vernon L. Smith, *Constructivist and Ecological Rationality in Economics*, 93 AM. ECON. REV. 465, 471 (2003) ("There is a sense in which ecological systems, whether cultural or biological, must necessarily be, or are in the process of becoming rational: they serve the fitness needs of those who unintentionally created them through their interactions.").

23. *See id.* at 469–70 (explaining how ecology fits into the new approach of rationality); *id.* at 471 (exploring the difference between rational choice theory, which "represents an observed socioeconomic situation with an abstract interactive game tree," and an ecological approach, which focuses on the origin of the norms or behaviors); ELINOR OSTROM, UNDERSTANDING INSTITUTIONAL DIVERSITY 122 (2005) ("Norms change the internal value that participants place on an action or outcome in a situation . . . .").

24. *See* AVNER GREIF, INSTITUTIONS AND THE PATH TO THE MODERN ECONOMY: LESSONS FROM MEDIEVAL TRADE 14 (2006) (defining institutions as "beliefs, norms, or behavioral traits").

25. NORTH, *supra* note 5, at 23.

26. *See* GREIF, *supra* note 24, at 14 (noting "that institutions are not monolithic").

27. *Id.*

they are part of the mix of law, private arrangements (such as contracts and firms),[29] beliefs, organizations, and rules. All of these institutions exist in societies; some are adjudicable, and some are non-adjudicable.[30] Norms will differ depending on their particular origin, purpose, the context in which they operate, and other supporting institutions.[31]

The proper "division of labor between . . . norms" and the relative role that law should or can play is complex.[32] Factors that affect the balance include barriers to express contracting,[33] economic structure, strength of the state, strength of the norm, presence of organizations, communication mechanisms, efficiency of the norm, likelihood of externalities, and the robustness of informal sanctioning mechanisms.[34] Understanding the appropriate role of the law versus other institutions, in particular cases, also depends on understanding the purpose that the norm serves.

By purpose, this Article looks at norms as devices to solve the problems that come with all exchanges: the problems of measurement (What is the object's value?), of asymmetric information, of uncertainty, and of opportunism. Parties pursue their objectives and navigate these problems partly by creating and adhering to norms.[35] "[P]rivate objectives" end up "produc[ing] institutional solutions that turn out to be or evolve into socially efficient ones."[36]

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28. *Cf. id.* (discussing institutions as norms).

29. For an article that compares the benefits and costs of different ordering mechanisms including not only private ordering and public law but also vertically integrated firms, see generally Barak D. Richman, *Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering*, 104 COLUM. L. REV. 2328 (2004).

30. *See* Posner & Rasmusen, *supra* note 3, at 370–71 (explaining that norms can be enforced in a variety of ways, including: automatic sanctions, guilt, shame, informational sanctions, bilateral costly sanctions, and multilateral costly sanctions).

31. *See* GREIF, *supra* note 24, at 15 ("[I]nstitutions have different origins and serve different functions . . . and sometimes reflect forward-looking behavior in well-understood situations."); *id.* at 148 ("Because different legitimate authorities are likely to have different objectives and because societies differ in terms of their legitimate authorities, institutional development is likely to vary across societies.").

32. *See* Saul Levmore, *Norms as Supplements*, 86 VA. L. REV. 1989, 1989 (2000) (stating that "the coexistence of social practices and legal obligations raises a set of interesting questions . . . about the division of labor between laws and norms").

33. If parties cannot negotiate without great expense a contractual provision to secure their goals and protect against hazards in long-term trade, then other devices of a non-legal or law-supplied default rule may be needed. *See* Macaulay, *supra* note 1, at 63 ("[C]ontract and contract law are often thought unnecessary because there are many effective non-legal sanctions."); OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 10 (1985) (explaining a study that supports the view that "contractual disputes and ambiguities are more often settled by private ordering than by appeal to the courts").

34. Posner and Rasmusen, *supra* note 3, at 380 (explaining that "[l]egal sanctions are also important because many people are impervious to informal sanctions").

35. *See* Eric Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1711–13 (1996) [hereinafter *Inefficient Norms*] (identifying problems arising from information costs that can make norms inefficient); McAdams & Rasmusen, *supra* note 4, at 1595 (noting that one issue in selecting norms or laws is whether norms "are generally efficient or inefficient"); Posner & Rasmusen, *supra* note 3, at 380 (emphasizing the importance of laws when "sanctions for violating norms are . . . too weak"). *But see* Avery Katz, *Taking Private Ordering Seriously*, 144 U. PA. L. REV. 1745, 1751–52 (1996) (remarking on the limitations that affect state-set norms); Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537, 551 (1998) (discussing the importance of norms in areas, such as the Internet, where resistance to government regulation is strong); Alex Raskolnikov, *The Cost of Norms: Tax Effects of Tacit Understandings*, 74 U. CHI. L. REV. 601, 654–55 (2007) (explaining how tax avoidance and related financial risks depend on the strength of a given norm); Eric Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 157–

Norms, private arrangements, and legal rules promote welfare maximization and achieve the "common ends of the parties."[37] Those ends include the effort to "mitigate *conflict* and realize *mutual gains*."[38] Formal and informal mechanisms are all available tools for ordering society; however, the means of enforcement differ (e.g., private versus state).[39]

Whenever an individual creates or adheres to a norm, an exchange takes place. If an individual's beliefs incline him to follow a norm in order to avoid a cost that would come with deviating from the norm (clearly it is in his self-interest to conform), then a norm is the outcome of an exchange. The exchange is the decision taken to resolve what an individual seeks as a function of his own preferences and beliefs in an encounter, taking account of the expected response of another (or nature). It results in a norm (when there is repeated expression of it in subsequent encounters between individuals and others) that embodies a statement to the community of what has been found satisfactory as a result of individuals making decisions in encounters with others.[40]

Norms are thus a subset of the larger set of exchanges. A norm is just like every other institution, including what we normally think of as "a trade" or an "exchange."[41] When competing self-interests affect parties, the parties will try to minimize their costs so that they get more of what they seek from others (e.g., goods or satisfactions of various kinds) at the lowest cost.[42] This Article posits that the preference for cost minimization is one of the core mechanisms that permanently resides in the brain, or—if not permanent—is extremely resistant to change.[43] Once

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58 (1996) (examining the case for deferring to norms or resorting to legal regulations when groups are involved).

36. NORTH, *supra* note 5, at 16. Of course the institutions are not always efficient. *Id.*

37. *See* Yoshinobu Zasu, *Sanctions by Social Norms and the Law: Substitutes or Complements?*, 36 J. LEGAL STUD. 379, 383 (2007) (explaining that "social norms of the community . . . are assumed to maximize community welfare"). Scholars have identified several purposes norms can serve. Norms, as institutional elements, can "reduce uncertainty." NORTH, *supra* note 5, at 6. Additionally, norms can increase efficiency and reduce transaction costs. *See* WILLIAMSON, *supra* note 33, at 17 (asserting that organizational innovations and developments in economic institutions have economized transaction costs).

38. *The New Institutional Economics*, *supra* note 16, at 599.

39. *See* NORTH, *supra* note 5, at 36, 54–60 (discussing the formal and informal constraints that shape "human interaction" and different enforcement structures); GREIF, *supra* note 24, at 8–9 (explaining both state-mandated and "institutions-as-rules" frameworks, which rely on force as well as a private order framework where "order prevails despite the lack of a third-party enforcer").

40. Robert C. Ellickson, *The Market for Social Norms*, 3 AM. L. & ECON. REV. 1, 2 (2001) (describing a norm as "the purposive actions of discrete individuals, especially those who are particularly suited to providing the new rule and those who are particularly eager to have it adopted"). North states, "The evidence we have with respect to ideologies, altruism, and self-imposed standards of conduct suggests that the trade-off between wealth and these other values is a negatively sloped function." NORTH, *supra* note 5, at 22.

41. A separate question arises as to whether other exchanges are legally enforceable or not. Norms in this context assume non-adjudicability, but parties may choose to make other exchanges (e.g., contracts) legally enforceable. *See* Macaulay, *supra* note 1, at 63 ("[C]ontract and contract law are often thought unnecessary because there are many effective non-legal sanctions."). Parties may even decide to make norms legally enforceable by incorporating their terms into a contract. *See* Posner & Rasmusen, *supra* note 3, at 381 ("A contract is a set of norms constructed by two parties.").

42. *See* WILLIAMSON, *supra* note 33, at 2 (describing "transaction cost economizing").

43. *See* Colin Camerer, George Lowenstein & Drazen Prelec, *Neuroeconomics: How Neuroscience Can Inform Economics*, 43 J. ECON. LIT. 9, 49 (2005) (illustrating a cost-minimization tool by discussing the brain reaction of reward for seeing someone identified as a cooperator).

conceptualized in this way, from the inside of the human brain, it is easy to understand how these exchanges function as institutional supports for navigating in society and minimizing costs while helping parties achieve their goals.

Part I develops a broad definition of norms. Since every deviation from a norm is a cost,[44] and compliance with such norms often furnishes a satisfaction,[45] such tradeoffs play a part in the cost-benefit analyses affecting behavior and choice. But other costs and benefits also come into play in an actor's determining what conduct to follow. In an expected encounter with an agent, if the principal is friends with the agent, the principal may have as an object of choice a desire to maintain a friendship with the agent. Then a principal might value a possible stream of revenue resulting from maintaining a friendship with the agent. On the other side, the principal would weigh the costs of divergence by the agent, and these would be associated with a brain-state value of such costs.[46] Cost-benefit analysis thus includes not only the costs of complying with a norm or convention, or deviating from such, but also the costs and benefits associated with certain actions (such as hiring a particular agent). Part II discusses the origins of norms within genetics, social evolution, and culture. Part III explores how the economic view of norms has shifted from a centrist view, which segregated norms from law and economics, to a more robust theory of human behavior and motivation, which reintegrated norms into both legal and economic analysis. Part IV proposes a typology of norms distinguishing between (1) norms that have non-governmental origins and (2) norms that arise as the product of governmental intervention in market and social contexts. They are distinct but related since it is the presence of social norms and beliefs that either allows the parties to cooperate without the law or to cooperate in the face of the law. Part IV also identifies norms with non-governmental origins that operate as self-enforcing institutions that do not need government. Part V examines norms that are inputs and become incorporated into law,[47] with law sometimes completely displacing or substituting for the norm. Part VI looks at how law can generate substantive and enforcement norms where they do not preexist. This section also discusses how and why laws might be passed to change or destroy existing norms.

This Article looks at both types of norms (i.e., inputs to law and products of law) in terms of the functions they serve in solving problems and explores whether, when, and how norms, law, and private arrangements exist alone or interact with each other. Furthermore, this Article examines the evolution of which particular mix of formal and informal institutions dominates at a certain time. In contrast to other treatments of norms, which focus primarily on answering whether law or norms will optimize welfare, this Article emphasizes that parties trying to minimize the cost of exchange have the option of solving problems by private arrangements (e.g., contractual or firm) or through operating by informal norms. Thus, the decision of whether law can optimize welfare[48] depends on a comparison of the costs and achievability of contractual solutions and non-market solutions.

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44. *See* Scott, *supra* note 1, at 1610–11 (detailing the costs for violating norms).

45. *See* Ellickson, *supra* note 40, at 3 ("[S]omeone who honors a norm may reap informal rewards such as enhanced esteem and greater future opportunities for beneficial exchanges . . . .").

46. *See generally* Camerer, Lowenstein & Prelec, *supra* note 43.

47. Sometimes it is difficult to tell which originated first, the norm or the law since there are interactive effects. *See* Zasu, *supra* note 37, at 379 ("Both social norms and law are older than political society . . . .").

48. A similar trend away from a law versus norm or law versus market approach characterizes the

I. NORMS DEFINED: NON-ADJUDICABLE INSTITUTIONS ADOPTED TO RESOLVE PREFERENCES IN ENCOUNTERS WITH OTHERS: TOWARDS COST MINIMIZATION

As noted earlier, a working definition of norms would include patterns of behavior, impulses, and spontaneous ordering enforceable by non-legal sanctions.[49] The term "norm" is sometimes, but not always, interchangeable with "custom," "understanding," "convention," "arrangement," "agreement," "implicit contracting," "exchange," "institution," and even "constitution." (We could even throw in words like "tradition," "observance," "habit," "usage," "give-and-take," "protocol," "manners," "etiquette," "good (bad) form," "virtue," and "best practices."[50])

Failing to note these differences in usage can confound the discourse. For example, the interchangeable terms are often used without assuming enforceability by a governmental adjudicator or, sometimes, even by a nongovernmental third party adjudicator (say, a voluntary self-regulatory body), formal or informal.[51] Indeed, the terms often are principally meant to convey that very attribute; namely, a kind of voluntary observance[52] without the threat of positive intervention, but with propagation, perpetuation, modulation, and decay that depend on the dynamics (perhaps quite intricate) that lead to repeated acknowledgement by adherents through action.[53] Moreover, these rules are often unspoken (unless inquired about), let alone written.[54]

In this Article, such norms (and interchangeable terms) are dubbed self-sustaining or non-governmentally-adjudicable. Thus, even though people may follow norms for different reasons (such as social sanctions, fear, or inner compunction), what makes norms significant is that they help us make decisions.[55] Norms embody the belief systems that govern behavior.

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scholarship of Elinor Ostrom. "Contemporary research on the outcomes of diverse institutional arrangements for governing common-pool resources (CPRs) and public goods at multiple scales builds on classical economic theory while developing a new theory to explain phenomena that do not fit in a dichotomous world of 'the market' and 'the state.'" Elinor Ostrom, *Beyond Markets and States: Polycentric Governance of Complex Economic Systems*, 100 AM. ECON. REV. 641, 641 (2010).

49. Posner & Rasmusen, *supra* note 3, at 369.

50. Some have criticized the breadth of meanings attached to the term norm, arguing that such encompassing definitions become useless. *See* Scott, *supra* note 1, at 1607 (commenting on the connection between the absence of "even a basic consensus on the proper definition of a social norm" to the "complexity of the social phenomena that we are seeking to understand"). However, I am deliberately using a broad definition to emphasize the breadth of the underlying institutions, which support exchange and facilitate welfare in societies and promote economic growth.

51. *See* McAdams, *supra* note 14, at 340 ("Sometimes norms govern behavior irrespective of the legal rule . . . .").

52. *See id.* (defining norms as "informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external non-legal sanctions, or both").

53. *See* ELLICKSON, *supra* note 8, at 128 ("The best, and always sufficient, evidence that a rule is operative is the routine . . . administration of sanctions . . . upon people detected breaking the rule.") (footnote omitted).

54. *See id.* at 130 ("A rule can exist even though the people influenced by the rule are unable to articulate it in an aspirational statement . . . . Rural residents of Shasta County had trouble articulating the norms that governed how they shared the costs of boundary fences.").

55. As Greif points out, institutions, which include norms, "guide, enable, and constrain the actions of individuals." DIXIT, *supra* note 13, at 6 (quoting Greif).

This Article uses the term "norm" to broadly encompass "conventions." Some authors exclude conventions from norms on the theory that conventions (such as driving on the right side of the road) are followed due to self-interest and therefore lack any normative component.[56] We drive on the right side of the road to avoid being hit, not because we feel obligated to do so as a normative proposition. Without the normative obligation, the behavioral regularity would be simply an equilibrium that results when each person takes his best step considering the actions of others (e.g., to drive on one's right if the other party is driving on his right).[57] The driver has no conflict with the other driver; his only interest is to make sure that both parties coordinate their behavior.

This Article includes conventions in the norms discussion because both are part of the institutional substructure.[58] Conventions, like other institutions between people or between people and nature, involve an equilibrium state that comprises influences of various types, including everything that each side wants from the operation of the institution, making the resolution a kind of exchange.[59] Self-enforcement, while it works, results from a rational, stable equilibrium of a variety of the aforementioned influences.[60] So, to carve up the institutional universe into separate terms—based on different types of influences on the brain (i.e., those based on self-interest versus other influences, such as informal norms that exert a pull)—leads not to coherence but to piecemeal differentiation.[61]

An inclusive definition is useful for two reasons. First, by looking broadly at norms as including conventions, internal codes, and other influences on the brain—such as informal norms—one can fully understand how individuals maneuver in society with others.[62] There can be competing self-interests within one brain, and the brain resolves them (in a kind of exchange) by calculating which approach with which to deal with others or with nature, will minimize costs. Costs include not getting something of interest to an individual. These interests can include a good from another person or the satisfaction of complying with one's internal code.[63] In the case of a convention, the brain decides whether to comply with the convention or code or norm by considering the costs of deviance given the overall desire to minimize costs.

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56. Francesco Parisi distinguishes actions followed due to a normative obligation from "mere behavioural regularity." The latter are considered to "reflect mere behavioural patterns that are not essential to the legal order . . . ." Francesco Parisi, *Customary Law*, *in* THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 572, 573 (Peter Newman ed., 1998); *see, e.g.*, McAdams & Rasmusen, *supra* note 4, at 1586–87 (choosing to exclude conventions from norms discussion).

57. Judge Richard A. Posner defines equilibrium thus: "[T]he point at which resources are being put to their most valuable use . . . ." RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 13 (8th ed. 2011).

58. "Each individual, responding to the institutional elements implied by others' behavior and expected behavior, behaves in a manner that contributes to enabling, guiding, and motivating others to behave in the manner that led to the institutional elements that generated the individual's behavior to begin with." GREIF, *supra* note 24, at 15–16.

59. *See id.* at 16 (arguing that institutions, like conventions, are "equilibrium phenomena" that respond to individual actors).

60. *Id.* at 15–16.

61. *See id.* at 13 (claiming there is a need to "integrate diverse lines of institutional analysis").

62. *See id.* at 14 (advancing that the departure from viewing institutions as "monolithic entities" and instead viewing them as "interrelated . . . rule, beliefs, and norms" allows one to see how they "enable, guide, and motivate" individual actors).

63. Since obeying norms or conventions or internal codes or religious convictions offers satisfactions, deviation from them is a cost.

Second, studying conventions allows one to fully analyze why and when legal intervention or other institutions might be needed even with behaviors that are self-enforcing.[64] For example, a norm works well, but it causes externalities such as harm outside the Mafia.[65] Conventions seem to be self-enforcing and so do other practices, such as signaling norms, because the best strategy (in terms of self-interest) is to follow the norms.[66]

Conventions and other self-enforcing norms should nonetheless be studied by those interested in optimal arrangements of non-adjudicable norms, adjudicable contracts, and law because sometimes, even with a self-enforcing system based on influences on the brain, there may be "exogenous shocks . . . that cause an institution to no longer be self-enforcing."[67] Moreover, there is no guarantee that the adherence to the norm will persist as individuals start to see benefits and costs of the exchange differently. People may no longer adhere to courteous driving as obeying the norm becomes too costly for those intent on pursuing other interests, such as using driving to signal how powerful one is. Those shocks and changes may explain why other institutions (formal or informal) develop to replace former self-enforcing institutions. Moreover, even with conventions like driving on the right side of the road, there may be a role for the law to play in providing a focal point or alerting new drivers to the content of the norm through publicity.[68] The least cost method might have the law pick the coordination point for actors who will then comply due to the satisfaction obtained from conforming to the norm (e.g., from not getting killed).[69] Finally, preferences, beliefs, and endowments of enough brains in the community may shift so that the norm is no longer cost-minimizing.[70] In this case, the norms may shift, but there may be a significant time lag.[71]

II. ORIGINS OF NORMS: NORMS AS SOLUTIONS OF THE COST MINIMIZATION FUNCTION: THE VIEW FROM INSIDE THE BRAIN

Norms originate in a basic genetic path forward that is programmed into our biology.[72] Many developed norms, those that survive over long periods of time, are

64. *See id.* at 31 (proposing that "[t]o study the impact of the legal system" it is necessary to grasp the behavior enforcing institutions in which the legal system exists).

65. *See Inefficient Norms*, *supra* note 35, at 1722 (discussing criminal groups as an externality that might lead to inefficient norms).

66. *See id.* at 30 (claiming that these conventions "motivate, enable, and guide" individuals' behavior).

67. *Id.* at 16.

68. *See* Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1666–68 (2000) (suggesting that "when the legal rule is sufficiently publicized," it can lend weight to a normative behavior).

69. *Id.* at 1668.

70. *See* DEIRDRE N. MCCLOSKEY, THE BOURGEOIS VIRTUES: ETHICS FOR AN AGE OF COMMERCE 4 (2006) (documenting changes in the populace that permitted an escape from "internal predation") (footnotes omitted). Preferences may shift so that a prior norm of accepting internal predation by kings or priests may no longer prevail as the preferences and beliefs of the members of the community shift so that they no longer view the loss of the old system's satisfactions as greater loss than the cost of continuing to forego prosperity.

71. *See Inefficient Norms*, *supra* note 35, at 1711 (discussing lag in norms).

72. KEN BINMORE, NATURAL JUSTICE 12 (2005). The argument for the survival of efficient norms depends on the idea of competition between societies. As Ken Binmore explains, the explanation as to

efficient and stable.[73] This is the evolutionary theory of norms, in which people begin to develop a sense of obligation as part of an "evolved outcome of a process similar to maximization."[74] If norms or patterns of behavior do not meet the basic criteria of efficiency and stability, they will be obliterated.[75] Efficient norms emerge without planning and develop through trial and error.[76] Societies with more successful norms will thrive and those with less successful norms will fail or have less economic success.[77] There is also evidence of a cultural gene that gyrates around, but not too far from, the ultimate genetic path forward.[78]

One theory, championed by Richard McAdams, to explain why behavioral regularities become norms rests on esteem.[79] Since all people desire esteem, once a regularity of behavior exists, people will conform to the behavior since they will gain more in esteem from conforming than from deviating.[80] The desire for esteem explains the adherence to a specific behavior resulting in a norm.[81]

The desire for esteem may offer an explanation for why third parties would undertake to sanction deviants. One might expect that parties would fail to sanction deviants because of a desire to free ride on others' enforcement efforts.[82] McAdams suggests that the free riding can be solved since sanctioning, in the sense of withholding or granting esteem, is costless.[83] Therefore, third parties may sanction deviants.

However, the esteem theory fails to explain why the precise norms that do persist are the ones that survive over time.[84] Therefore, it cannot explain the content of the norms since it does not explain why the particular regularity began. Resolving why a norm has a particular content, at least in the exchange context, requires an analysis of the functions of norms and other influences on the brain and behavior.

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why we should "expect evolution to succeed in selecting one of the efficient equilibria rather than one of the many inefficient alternatives" lies in "competition among groups." *Id.* at 12.

73. Of course, inefficient norms may sometimes arise. *See Inefficient Norms*, *supra* note 35, at 1698 (examining "plausible conditions [in which] . . . norms are likely to be inefficient, in the sense of failing to . . . exploit the full surplus of collective action") (footnote omitted); Paul G. Mahoney & Chris W. Sanchirico, *Competing Norms and Social Evolution: Is the Fittest Norm Efficient?*, 149 U. PA. L. REV. 2027, 2027–29 (arguing that "social evolutionary processes will tend to favor the adoption of efficient norms" in many areas of society).

74. McAdams & Rasmusen, *supra* note 4, at 1587.

75. BINMORE, *supra* note 72, at 12.

76. *See* Mahoney & Sanchirico, *supra* note 73, at 2030–31 (stating that in the leading theoretical approach to efficiency "norms are modeled as equilibrium strategy choices in a particular repeated game").

77. BINMORE, *supra* note 72, at 12. Where there are multiple efficient equilibria, fairness norms usually guide societies to select a fair option from among them. *Id.* at 14. Binmore provides a foundation for understanding and structuring the meaning of fairness around a Rawlsian consideration of the opposite side of the game. *Id.* at 15–16. It provides an understanding as to why one outcome from among many possible efficient equilibria is chosen. *Id.*

78. *See id.* at 61 (explaining how "[e]volution operates between successive plays of the game to increase the frequency of strategies in the population that get high payoffs at the expense of strategies that get low payoffs").

79. *See* McAdams, *supra* note 14, at 355.

80. *Id.* at 355–56.

81. *Id.* at 355.

82. *See* Scott, *supra* note 1, at 1608–09 (discussing effects of reactions to those holding different preferences).

83. *See* McAdams, *supra* note 14, at 364.

84. *Id.* at 394–97.

The main functions of norms and other comparable institutions are to reduce uncertainty and minimize transaction costs.[85] Norms develop as parties with different preferences interact with others while taking into account those others' reactions.[86]

The esteem theory addresses the origin of norms in the following way:

> For some behavior X in some population of individuals, a norm may arise if (1) there is a consensus about the positive or negative esteem worthiness of engaging in X (that is, either most individuals in the relevant population grant, or most withhold, esteem from those who engage in X); (2) there is some risk that others will detect whether one engages in X; and (3) the existence of this consensus and risk of detection is well-known within the relevant population. When these conditions exist, the desire for esteem necessarily creates costs of or benefits from engaging in X.[87]

The esteem theory helpfully emphasizes why parties would want to conform to a norm (more esteem) and why they would not deviate (more sanctioning) and the structural and informational conditions under which norms are likely to develop.[88] It explains why parties might avoid behaviors that result in disesteem (to avoid cost) and why parties might engage in behaviors that are preferred (to gain esteem).[89]

However, this framing perhaps too narrowly focuses the decision-making and choice solely in terms of the desire for esteem, or the desire to avoid disesteem, and the associated costs and benefits. Moreover, the model seems to be built on norms arising from an external factor: an existing norm and the desire for esteem. The esteem theory cannot explain behavior in the first instance—before the norm has been deemed to be the acceptable choice between multiple encounters between human beings and others.[90] Yet, in these early instances, when an individual is deciding what choice to make in an encounter with another, the result of that encounter is an exchange. To explain the choice being made, one needs a model that operates from the inside out rather than from the outside in. The choice that parties make that results in a norm is part of an exchange that involves several tradeoffs that are made in the brain, only some subset of which involves a cost or benefit associated with gaining or losing esteem.[91] When one party decides whether to follow a norm, that party starts with preferences, beliefs, and endowments that are endogenous to an individual with certain neural assemblies.[92] A party resolves what action to take in light of those preferences, as well as the expected response of others. Thus, the desire for esteem, which can be satisfied by following a norm, is only a part of the calculus that the individual goes through in arriving at a choice of action.[93]

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85. *See infra* Section IV.A.

86. *See Inefficient Norms*, *supra* note 35, at 1733–34 (discussing the "coordination game" and the "prisoner's dilemma").

87. McAdams, *supra* note 14, at 358 (footnotes omitted).

88. *Id.* at 355.

89. *Id.* at 355–57, 366–67.

90. *See id.* at 367 (discussing "the simple case where a norm arises *after* there is already a behavioral regularity consistent with the consensus" and then addressing the case where a new norm is created).

91. *See id.* at 370–72 (discussing the esteem aspect of norm creation).

92. *See supra* note 12 and accompanying text (discussing the interaction between endogenous and exogenous influences).

93. The fuller picture of exchange that is the central focus of this Article starts with parties' beliefs

Essentially, the party starts with objectives and has to decide between the cost of not achieving one good (i.e., an objective, purpose, or goal) against the cost of another good, and then come up with a rate of substitution at which he is willing to incur one cost to prevent the incurrence of the other cost. Esteem is one part of the cost calculus, but it is folded into the human decision-making process that also involves the comparison of how a decision will affect the achievement of different goals or goods simultaneously.[94]

The process by which the brain deals with preferences, beliefs, and endowments in a cost-minimizing way may also broaden our understanding of effects on human behavior in still another way. Robert Scott suggests that how norms affect behavior "can be analyzed in terms of changes in the costs and benefits of particular behaviors."[95] Parties' "opportunity set[s]"[96] change as parties gain information from the norm about the costs of taking or not taking certain behaviors.[97] Scott poses a rational choice analysis to determine the effects of norms on decision-making.[98] This Article agrees that the cost of deviating from or complying with norms will constitute one piece of information or outside influence that will be taken into account by a decision-maker who is weighing how to resolve an encounter with another. Expected criticism by others for one's failure to comply with a norm will be a part of the calculus, but the tradeoffs will include a whole array of outside influences as well as the preferences, endowments, beliefs, and a rate of substitution between competing influences.[99] Esteem theory offers a theory for how norms might change. It suggests that if there is criticism of a norm, that norm might change. This could occur as parties with a certain preference gain more information from critics of the norm, which helps to shift the norm.[100]

This Article suggests that the model is one that operates at the level of an individual making decisions in encounters with others. Those decisions will begin with beliefs, endowments, and preferences and they will involve tradeoffs in which a party with a goal (for example, perhaps the goal of being invited to a party and the desire to smoke freely wherever one goes) has to trade off that preference against the cost of another good (such as the esteem of others and the lack of party invitations). Taking into account the rate of substitution and a consideration of how willing an individual is to incur one cost to prevent the incurrence of another cost (e.g., being willing to incur the cost of not smoking in order to avoid not being invited

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and objectives and explains how choices are made in light of those beliefs and preferences given the expected reactions of others. One might have a strong preference to allow smoking at parties at one's home, and that preference might trump the expected reaction of others, including one's guests. One would trade off the possible loss of esteem from some guests, the possible increase in esteem from those that value smoking, and the loss of the possible objective of having a successful party if too many people stay away due to the smoking (or due to the ban on smoking).

94. *See* McAdams, *supra* note 14, at 355–57.

95. Scott, *supra* note 1, at 1618.

96. *Id.*

97. *See id.* at 1632 ("Thus, our putative moral defective observes that she loses opportunities because she cannot make credible commitments. The motivation to increase her opportunity set stimulates the necessary characterological changes in values. Out of this process emerges a 'new person.' New and better preferences and values—honesty, loyalty, trustworthiness—now form part of the individual's stock of traits.").

98. *Id.* at 1613–21.

99. *See id.* at 1612 (suggesting that "an embedded hierarchy of values" may be at work in resolving such conflicts).

100. McAdams, *supra* note 14, at 395.

to the party) gives a fuller picture of the decision-making going on among many individuals in society. The individual's preferences, beliefs, and endowments can be influenced by a variety of outside influences, including the possible reactions of others.[101] Those reactions in this model then influence the brain and change the brain so that these outside influences become endogenous to the decision-making.[102]

Therefore, this Article, while recognizing the enormous value of an esteem theory of norms, will emphasize the idea that norms originate as a resolution from exchanges that parties make to satisfy their preferences while taking into account the reaction of others and the desire to minimize the transaction costs and uncertainties that plague complex transactions.[103] This explanation for the origin of norms, based on a functional analysis of cost reduction, can help explain why particular substantive norms arise and why other institutions may be called for when the norms are no longer achieving their purposes.

If one seeks to understand why parties may adhere to a "no-smoking at a party norm," there is much to be learned from applying the web of overtures and responses (the trade paradigm). As an attendee, one might start with the objective of being at the party (an object of choice). One might also have a preference for smoking, but in resolving what action to take one would weigh the desire to be at the party against the possible denial of future invitations, the potential loss of future business partners, and the risk of being thrown out by the host as costs that may account for an individual bearing the cost of voluntarily adhering to a no-smoking norm. The host would engage in similar calculations, which may ultimately result in a no-smoking policy at parties in the household.

III. SEPARATION OF LAW AND NORMS: EVOLUTION OF NORMS WITHIN ECONOMICS AND LAW

The traditional disinterest in norms by economists and legal scholars meant that their theories did not attempt to explain the role of norms. Norms played no role in their theories because law was conceptualized as a top-down mechanism of formal laws that attained the goal of public order through coercive enforcement. Law was considered the only way to bring order and control violence.[104]

Economists applied their tools of the trade—primarily rational choice theory—to understand different substantive areas of law.[105] Economics succeeded at explaining how people with given preferences make choices and how goods or objects are moved by consensual exchange.[106] This model works particularly well at

101. *See id.* at 355–56 ("[Evidence] shows that people pay for status goods to signal their wealth or 'good taste,' that people incur material costs to cooperate in situations where their only reward is the respect and admiration of their peers, and that individuals conform their behavior or judgment to the unanimous view of those around them in order to avoid the disesteem accorded 'deviants.'").

102. *Id.*

103. *Cf.* NORTH, *supra* note 5, at 6 (discussing institutions as a response to uncertainty).

104. *See* Ellickson, *supra* note 40, at 3–4 (describing the Hobbesian view that "people are unable to coordinate with one another without significant assistance from a coercive central authority").

105. *See* Scott, *supra* note 1, at 1604–05 (explaining that direct effects of legal rules can be understood through a "rational choice lens" that treats "values, moral character and preferences as exogenous" when "analytical tools" provide no guidance).

106. *See* Ellickson, *supra* note 40, at 13 (explaining norms as part of an exchange process).

illuminating the operation of financial markets.[107] Such economic theories, however, were built on unrealistic assumptions of frictionless exchange and perfect information.[108]

Economists assumed parties governed by idiosyncratic taste (e.g., preferences and endowments) could always improve welfare, both private and societal, by exchange in the market.[109] Economics did not care about the messiness of actual transactions; it ignored transaction costs and other impediments to parties that might impair the parties from realistically being able to achieve their goals.[110]

Because the theory of rational choice assumed away transaction costs and ignored how preferences developed, it remained indifferent to norm formation—to the idea that in pursuing individual preferences and beliefs, individuals, in an encounter with another's expected beliefs, would seek a resolution that would minimize costs. Because it presumed frictionless markets, economics ignored the role that norms, as institutional supports, could play in minimizing the costs of transacting and promoting exchange.[111] Economists neglected the importance of norms because they downplayed the "complexity and incompleteness of our information,"[112] and the institutional supports required to overcome those complexities if parties were going to actually maximize their gains from trade (at a reasonable cost). They did not see that norms could play a role in helping parties navigate complex environments and that parties would take into account the reactions of others to arrive at a satisfactory solution.

Likewise, law also downplayed the importance of norms, albeit for different reasons. Under the centrist model of law, law ignored norms and the complexities of people's motivations for obeying or disobeying laws.[113] As conceptualized, the content of law remained independent of norms and people obeyed the law because of the prospect of state punishment.[114] Legal centrists believed that the passage of a single law would affect human behavior and achieve its goals.[115] They failed to consider how underlying norms and informal constraints would affect goal achievement differently, even in countries with identical laws.[116]

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107. *Cf. id.* at 2 (providing an illustration of how the creation of norms, much like supply and demand, can be explained by rational choice theory).

108. NORTH, *supra* note 5, at 11.

109. *See* Scott, *supra* note 1, at 1613 n.22 (discussing the maximization of utility via choices based on preferences).

110. *See* NORTH, *supra* note 5, at 11 ("[Economic theory's] harmonious implications come from its assumptions about a frictionless exchange process in which property rights are perfectly and costlessly specified and information is likewise costless to acquire.").

111. *See id.* at 12 (describing how "difficult it is for economists to come to terms with the role of institutions in capturing the potential gains from trade").

112. *Id.* at 23.

113. *See* Robert D. Cooter, *Against Legal Centrism*, 81 CALIF. L. REV. 417, 417–18 (1993) (reviewing ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991)) ("[M]ost American scholars apparently regard the common law process as one in which judges make law, rather than finding it in social norms.").

114. *See* NORTH, *supra* note 5, at 21 (citing research pointing out that issues of free riding, fairness, and justice "enter the utility function" leading to "more elaborate models of human behavior").

115. *See* Cooter, *supra* note 113, at 428 (in contrast to law, "custom is not under anyone's control (it lacks 'secondary rules'), so it cannot be directed to serve the ends of policy makers.").

116. *See* NORTH, *supra* note 5, at 36–37 (describing the importance of informal constraints and how it is a "key to understanding a more complex behavioral pattern than is derived from the expected utility model").

Efforts to enact "contract, tax, and bankruptcy laws" in the Soviet Union demonstrated that laws may flounder if underlying norms and institutions do not support the formal constraints.[117] This is an example of how "[i]gnoring norms . . . can cause one to overstate the significance of law . . . ."[118]

Once economists, like Douglass C. North and Oliver Williamson, emphasized the limits on bounded rationality and the deficiency of rational choice theory's dismissal of transaction costs, other economists took a greater interest in all aspects of behavior that could increase or decrease the cost of exchange.[119] Williamson studied private governance structures devised by parties to lower the costs of exchange.[120] He assumed that the rules of law were fixed and that parties would structure their transactions and use either contracts or vertically integrated companies—non-market organization—depending on which method would minimize transaction costs and maximize surplus.[121] North looked at norms and other institutional constraints as a means to facilitate exchange and increase prosperity.[122] Norms—along with laws, beliefs, and organizations—became part of the equation for reducing the costs of exchange and increasing gains from trade.

Understanding norms and their functions and their influence on beliefs, in various settings, remains the first step to determining why particular norms develop, and how they evolve and change. Such knowledge will illuminate when law needs to intervene or when it can remain neutral, why and how to minimize the occasions to use coercive force, and how laws and norms influence each other. These institutions are connected since one cannot establish other structures of society—such as property rights, laws, constitutions, judiciary, contract, and the production function—without taking account of the embedded norms.[123]

Norms and law are related. They share a function in solving the problem of social order, deterring cheating, and making it possible for societies and economies to thrive. The better a society's institutions—including informal norms, beliefs, organizations, and formal laws—are at effecting these goals, the greater the overall welfare of the community.[124] Society requires cooperation and coordination in order to solve problems, create exchanges, and provide credible commitments. Norms, contracts, and law provide different ways of achieving those ends. They are all

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117. John M. Litwack, *Legality and Market Reform in Soviet-Type Economies*, J. ECON. PERSP., Fall 1991, at 77, 77–79.

118. McAdams & Rasmusen, *supra* note 4, at 1589.

119. For an example, see David Mamet's new book on costs of maneuvering without an understanding of norms and how much more costly interactions would be. DAVID MAMET, THE SECRET KNOWLEDGE: ON THE DISMANTLING OF AMERICAN CULTURE 13 (2011) (discussing the "tool of culture").

120. WILLIAMSON, *supra* note 33, at 68–84 (providing an overview of the factors that impact private governance structures and particular circumstances that present special difficulty).

121. This is Williamson's discriminating alignment thesis. *See id.* at 72–79, 90–95 (examining the concept of matching governance structures to transactions in an efficient way and discussing the discriminating alignment theory).

122. NORTH, *supra* note 5, at 5–10.

123. *See The New Institutional Economics*, *supra* note 16, at 596 (discussing how the first level of social analysis starts at the "social embeddedness level," which is where norms are located).

124. *See* NORTH, *supra* note 5, at 7 (asserting that institutions can be made a "determinant of economic performance," and "the persistence of inefficient institutions . . . was the result of . . . a disparity between private incentives and social welfare").

institutions and, as such, are the results of brain-driven cost-minimizing exchanges (i.e., trades).[125]

Norms sometimes thrive[126] and sometimes decay.[127] They sometimes operate where there are no states or strong legal courts for enforcement, and at other times they function in concert with legal rules.[128] At times, the norms are precursors for and sources of the later adopted legal rules.[129] Part VI examines this process of migration and incorporation. Occasionally, norms blossom in self-sustaining isolated societies without affecting larger norms in society or the laws and institutions that govern at a broader level.[130]

IV. OVERALL NATURE, FUNCTIONS, AND CAUSES OF NORMS AND OTHER INSTITUTIONS: A TYPOLOGY OF NORMS

A. Nature and Functions of Norms

Recognizing the complexities of human behavior, new institutional economics promotes a richer picture of how complex decision-making is and how difficult it is to bring order to society so that parties can efficiently engage in exchange.[131] The question then becomes how to operationalize our understanding of norms. The key lies in connecting the role that law should play, if any, in a world of already embedded norms, to the functions that the norms serve in different contexts and to the limitations that might hinder the creation or operation of norms. This Article suggests that once the functions of norms are understood, it becomes possible to understand how and why the law and norms divide their respective roles. Additionally, this understanding illuminates why the role of law or norms will need to shift in response to changes in either of them and how to best achieve that change.

Norms change, and law sometimes seeks to manipulate or accelerate that change through legislation or adjudication.[132] In other instances, norms are static and dysfunctional, and the role of the law shifts to overcoming the inertia of such

125. However, these institutions may differ in terms of adjudicability (versus non-adjudicability).

126. *See* Eric A. Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 U. VA. L. REV. 1781, 1788 (2000) (discussing how norms may reach different equilibria). Law itself would be ineffective if there were no norm of adhering to and following laws. The widespread tax evasion in Greece furnishes a current example of how the absence of informal norms of compliance can undermine the effectiveness of a formal rule. *See id.* at 1782–83 (discussing tax compliance in terms of underlying norms); James Kanter, *Task Force Urges Greece to Improve Tax Collection*, N.Y. TIMES, Nov. 18, 2011, at B2, *available at* http://www.nytimes.com/2011/11/18/business/global/european-commission-urges-greece-to-tighten-tax-collection.html (discussing tax evasion issues in Greece).

127. *See* Posner, *supra* note 126, at 1788 (noting that norms "may crumble").

128. *See id.* at 1791–92 (discussing the possible benefits of encouraging people "to act properly because of social norms, rather than because of fear of legal sanction," and noting the possibility that government can modify laws to "manipulate social norms . . . from the outside").

129. *See id.* at 1793 (stating that, in some cases, the government will outlaw an action only after "it has become a signal").

130. The persistence of such self-sustaining communities in modern times, which have strong states, is a puzzle that Richman addresses in his article. *See* Richman, *supra* note 29, at 2359–62 (discussing such self-sustaining sub-communities within close-knit communities and among Silicon Valley engineers).

131. Ostrom, *supra* note 48, at 641.

132. *See* Ellickson, *supra* note 40, at 39 (discussing the role of government as a "change agent").

embedded, "sticky" norms[133] (such as anti-dueling statutes or racial discrimination laws).[134] Change can also occur when "an institution cultivates the seeds of its own demise, leading to endogenous change."[135]

The best way to understand norms is not only to consider them as serving particularized functions (e.g., solving the driving coordination problem, or solving the principal-agent problem), but also as broader efforts to "find better solutions" to the circumstances that transactors face.[136] For example, based on observations in different settings, one can argue that human nature prompts people to find cost-effective solutions in encounters with others because "the economic livelihood of the appropriators depends on their ingenuity in solving individual and joint problems."[137] All norms thus serve as tools (one of many institutions) for better private ordering to manage resources and minimize the transaction costs of exchange. However, each norm may achieve those goals in different ways in particular contexts, depending in part on the costs of alternative arrangements—such as contracts—and adjudicative forms—such as common law, statute, and agency law—and the particular advantages and disadvantages of each solution in such contexts.[138] Thus, when studying norms, we must also analyze private exchanges (including contracts) and the law to see how they co-exist, interact, substitute for, and displace one another. Sometimes (1) norms supplement private contracts;[139] (2) law seeks to change a norm;[140] (3) law encourages the development of a norm;[141] (4) law refines the content of a norm; (5) law seeks to incorporate a norm as a source of law;[142] (6) law displaces a norm, as when the norm deteriorates or mishandles a conflict in norms or values;[143] (7) a norm softens the

133. Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 608–09 (2000).

134. *See infra* Section VI.C.

135. GREIF, *supra* note 24, at 17.

136. *See* Clayton P. Gillette, *Lock-In Effects in Law and Norms*, 78 B.U. L. REV. 813, 833–35 (1998) (discussing how social norm behavior creates solutions to the driving coordination problem).

137. ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 34 (1991).

138. Well formed norms may guide individual behavior similarly to laws, markets, and regulatory agencies. *See* McAdams & Rasmusen, *supra* note 4, at 1597–1608 (revealing the role of norms in tort law, contract law, and other areas of law).

139. *See* Scott, *supra* note 1, at 1632 ("Cooter's claim rests on the assumption that an individual's character is 'translucent'—at least to his intimates and close colleagues. While the state may not know whether an individual is a 'cooperator' or a 'defector,' basic moral values are observable, albeit imperfectly, by friends, neighbors, and coworkers. Knowing that, an individual with a defective moral character observes that she lacks the ability to solve ordinary commitment problems in the absence of formal mechanisms like enforceable contracts. Social interactions depend on credible commitments that are self-enforcing. Thus, our putative moral defective observes that she loses opportunities because she cannot make credible commitments. The motivation to increase her opportunity set stimulates the necessary characterological changes in values. Out of this process emerges a 'new person.' New and better preferences and values—honesty, loyalty, trustworthiness—now form part of the individual's stock of traits.").

140. *See id.* at 1622 ("The expressive effects of law are those consequences of legal rules that stimulate changes in social norms and conventions and/or change the social (or normative) meaning of particular behaviors.").

141. *See id.* at 1615 ("[B]y expressing the sentiment of the community, the ordinance modifies or stimulates the creation of an underlying norm in some way.").

142. *See id.* at 1614 ("[T]he effect of the law is to teach the community about the general local sentiment regarding the conflict between dogs and trees.").

143. *See id.* at 1624 ("[C]hanges in preferences and values occur because the social meaning of

effect of a rule or a law to provide flexibility;[144] (8) a norm displaces the need for any contract provision or law;[145] and (9) norms completely act as a private order without a need for law but with private contracts.[146] The driving force in exchanges or in the choice of institutions is whether the benefits exceed the cost. Which arrangement or group of arrangements (institutions, etc.) will minimize costs and achieve the parties' goals? Answering that question is sometimes a decision that parties will make when they decide to make a norm (to which they have been adhering) enforceable by including it in a contract that is adjudicable. In making that decision, individuals would consider the costs of non-compliance, even with the legal enforceability feature; the cost of judicial error; and the cost of opportunistic behavior if it is not controlled by norms through informal sanctioning.

The role that the norms play may change. In some instances, the norms that thrived in a personal setting may underperform in a larger, more impersonal exchange setting.[147] In other instances, the norms will persist but will evolve to take account of new technologies.[148] Understanding these aspects illuminates how parties choose to structure their relationships in order to minimize transaction costs and maximize overall value in varying environments. Norms sometimes combine with other institutional enforcement mechanisms, both legal and non-legal, and at other times remain hostile to legal enforcement. At the same time, understanding how law can piggyback onto or jump start norms, and how norm entrepreneurs[149] create and promote certain norms, can answer questions about the role that law will play in changing dysfunctional norms.

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littering or not cleaning up after one's dog has been changed from the exercise of free choice to a demonstration of disrespect for others. A 'norm cascade' is stimulated by the mere consequence of changing preferences and behavior in some citizens, and, at some point, the behavior reaches a tipping point and a new norm is entrenched."). Norms are agreements or contracts of a type, though they are not adjudicable unless they have been ensconced in an adjudicable form or announced by the court or legislature as such. *See* McAdams, *supra* note 14, at 350 ("[N]orms are enforced by some means other than legal sanctions. If recycling were a norm, for example, we would not mean that—or at least not merely mean that—the state punishes the failure to recycle but rather that the obligation to recycle is enforced by a nongovernmental sanction—as when individuals internalize the duty and feel guilt from failing to recycle or when individuals privately punish those who do not recycle.").

144. *See* Scott, *supra* note 1, at 1606 n.8 ("Along another dimension, the meaning of law is precise; the meaning of norms is fuzzy .... These differences imply that sometimes law and norms function antagonistically. See, for example, the code of silence among certain professional groups that undermines legal requirements that illegal activity be reported.") (citation omitted).

145. *See id.* ("[D]isfavored behavior constrained by norms may not require additional legal sanction.") (citation omitted).

146. *See* Ellickson, *supra* note 40, at 14 n.29 ("Business customs . . . are shaped not only by informal exchanges but also by explicit contracts.").

147. *See* McAdams, *supra* note 14, at 343 ("Within law and economics, Janet Landa and Robert Cooter sought to explain why, in parts of Asia, ethnic minorities tended to dominate the middleman position in many industries. They concluded that these 'ethnically homogenous middlemen groups' succeed in nations without reliable legal enforcement of contracts because the groups' social connectedness give their members a unique means of (informally) sanctioning contract breaches by other group members.") (footnotes omitted).

148. *See, e.g.*, Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 143 (1992) (discussing the diamond industry's shift towards new technologies).

149. Ellickson, *supra* note 40, at 15.

B. Typology: Norms That Are Inputs Versus Norms That Are Products of Governmental Intervention

Before examining particular norms, it is important to distinguish between norms that arise from a source other than the government but may become eligible as an input to a governmental intervention (i.e., an eligible input, or EI)[150] and norms that are the product of a governmental intervention.[151] The next two sections will deal with EIs. In these cases, the governmental decision to intervene (thereby making the norm a governmental rule) or not depends on a comparison of the cost of achieving desired goals through non-governmental actions (including norms and contracts) with the cost of the governmental intervention.[152] Will there be a net benefit to intervening, and how can the costs and benefits be assessed? Part IV looks at examples of input norms that exist without the support of any government adoption. Part V examines norms that pre-date laws but become incorporated into the substantive laws, causing a "hybrid system"[153] of control to govern behavior.

With norms that arise from and are products of governmental intervention, discussed in Part VI, the government has already decided to intervene by passing a statute, or the parties have decided to invoke the law by making a term adjudicable. The intervention of law affects individuals in a variety of ways. These include raising the cost of non-compliance,[154] creating enforcement norms (secondary effects),[155] and perhaps fostering an internalization of the norms.[156] The accommodation that the brain makes and the actions taken in response to the laws and to the possible responses of others who are themselves responding to the law is similar to the tradeoff that the individual makes when responding to others when there is no law to begin with and one is deciding how to behave in an encounter with another. However, there may be differences between norms that originate as inputs and those that are products of laws. Those differences will be considered later.

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150. *See* McAdams, *supra* note 14, at 340 (defining norms as "informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external non-legal sanctions, or both").

151. *See id.* at 346 ("Law can influence behavior by changing the norms that determine the meaning ascribed to behavior.").

152. *See* Zasu, *supra* note 37, at 382 ("Social connectedness in premodern society is strong, and the expected level of punishment imposed by social norms is high. As a result, undesirable acts are deterred. In this environment, law, which is costly, is not required. There is only a slim possibility that law can improve such a society. In other words, social norms and laws are substitutable, and there is no reason for the existence of costly formal regulations. In contrast, social connectedness in modern society is weak, and the expected level of punishment by social norms is low. In such a society, only social norms monitor undesirable acts. As a result, such acts are insufficiently deterred. In this envirnoment [sic], law is required even if it is costly (the emergence of law).").

153. *See* David Charny, *Illusions of a Spontaneous Order: "Norms" in Contractual Relationships*, 144 U. PA. L. REV. 1841, 1841–42 (1995–1996) ("The Japanese products liability system and the transactional rules of the American grain industry . . . represent two variants of a particular type of nonlegal governance regime—a type in which the parties devise a fairly comprehensive system that includes written rules of conduct, sanctions, and procedures for enforcement. These systems are established in a two-step process: first, norms evolve as a result of transactors' dealings (as in the grain industry) or industry consensus (standard identifying 'design defects'); second, [a] centralized agency selects among, codifies, and enforces these norms.").

154. Scott, *supra* note 1, at 1626.

155. *Id.* at 1603–04.

156. *Id.* at 1604.

C. Examples: Norms That Are Eligible Inputs and Originate in Non-governmental Actions and That Are Self-enforcing Without Legal Intervention

1. Example One: As a Supplement to Incomplete Contracts Where Law Declines to Intervene: Tipping: Self-enforcing Systems and Institutional Mechanisms

In all societies, parties will engage in exchange transactions and contracts (if available) to secure gains from trade. Since the failure to do so would leave gains from trade unrealized, the incentives will be there to develop mechanisms to support exchanges. Parties will cooperate, even in the absence of a government, to obtain the benefits of cooperation.[157] The parties may create or adhere to norms, such as truth-telling, that then constitute a bedrock of virtues that facilitate all exchanges.[158]

Norms may also arise where a government exists but formulates no positive law on a particular matter and the parties, even if they have entered into an adjudicable contract, have not chosen to include any contract term on a particular matter.[159] When parties subsequently face a possible encounter with another, because parties naturally strive to reduce the costs of dealing with others, norms arise to reduce those costs. The calculus then includes the cost of not adhering to a norm or of adhering to a norm, as well as how this decision will impact a party's ability to get the goods or satisfactions that he seeks and at what cost. Parties, of course, may also directly contract with others to satisfy those preferences. However, transaction costs may discourage or raise the cost of contracting and hinder exchange, leaving parties with an incomplete contract.[160] When those costs prevent complete contracting, parties' goals will not be fully realized. Whether parties on their own can devise solutions or whether law should intervene in private contracts depends on a mix of formal and informal arrangements, including norms and contracts.

An example of a private mechanism governing an exchange transaction is the tipping norm prevalent in the restaurant industry. The contractual governing arrangements include: an employment contract between the service provider and employer, and an implied contract between the restaurant and the patron (e.g., "I will pay for food I order.").[161] Failure to pay for the meal is a breach of an implied contract with the restaurant and constitutes a form of theft of services subject to criminal constraints and also a breach of the express contract with the credit card issuer. Tipping norms, perceived by most patrons as obligatory, function to

157. *See, e.g.*, ELLICKSON, *supra* note 8, at 123 (discussing interdisciplinary research squaring the assumption of individual self-interest with the "reality of ubiquitous cooperation").

158. *See* MCCLOSKEY, *supra* note 70, at 3–4 (2006) (discussing how honest dealings, which may arise as a social norm, are an underlying virtue of successful capitalist systems).

159. *See id.* at 138 (quoting Jennifer Roback Morse) (noting that partnerships, though often evidenced by contractual agreements, seldom attempt to reduce all eventualities to adjudicable contract terms).

160. *See* Eric Maskin & Jean Tirole, *Unforeseen Contingencies and Incomplete Contracts*, 66 REV. ECON. STUD. 83, 84 (1999) (acknowledging that "transaction costs matter in reality"); Gillian K. Hadfield, *Judicial Competence and the Interpretation of Incomplete Contracts*, 23 J. LEGAL STUD. 159, 159 (1994) (recognizing that contracts may be incomplete, in part, due to drafting costs).

161. Another contract exists between the patron who receives the bill and the credit card company that issues the patron a credit card slip agreeing to pay the charges for the meal after the patron has signed. There is no requirement that the patron put a tip on the credit card slip. *See* Levmore, *supra* note 32, at 1990 (describing tipping as "required neither by law nor contract").

supplement incomplete contracts that fail to specify all of a waiter's obligations.[162] Individual patrons decide, given their preferences and beliefs (these might include rewarding those who work hard and securing good service), how to satisfy their preferences and whether to follow the tipping norm in the expected encounter with the waiters and the restaurant management. The patron, who is trying to satisfy his objectives of getting good service and providing appropriate rewards for others, will make internal tradeoffs in which he will consider the guilt that he might suffer if he refrains from tipping, as well as the possible negative ramifications in terms of expected encounters with others, such as future service at the restaurant (if he is a repeat patron), the possible frown or other reaction that the waiter or manager will deliver if not tipped appropriately, and a possible negative account with the manager or waiter if he fails to tip at all. The patron will consider these tradeoffs while trying to minimize the costs of the exchange of purchasing food and services at a restaurant.

When tipping norms operate in conjunction with private contracts, the result is better than if the parties operated solely by private contract.[163] The contract between the waiter and the employer is incomplete since it is hard to observe or measure the waiter's efforts, making it difficult to fix appropriate compensation. The patron, however, can easily observe the waiter's efforts and attach an appropriate amount to account for the quality of service.[164] The norm of tipping between ten to twenty percent of the bill incentivizes the waiter to provide excellent service, which in turn ensures that all parties are better off.[165] The contract at a fixed wage, plus tips (through a norm), constitutes an arrangement preferable to either a pure fixed-wage contract or to a fixed-gratuity contract on all bills, or otherwise built into the price of the menu items. If restaurants imposed a fixed gratuity on all patrons,[166] the restaurant owner would be paying some waiters too much and other waiters too little since the compensation would not distinguish between relative levels of effort.

Another alternative is for restaurant patrons to negotiate a tip each time they purchase a meal *ex ante* by contract. This would require considerable time and effort. Thus, with no norm to set the parameters, the patron would experience uncertainty about the right amount to tip, similar to the kind of uncertainty experienced by foreign travelers who are often unsure of the tipping norms abroad. The norm functions as a cost effective way of navigating in the environment. A further option could be governmental regulation of tipping, where restaurants would be required to pay a pre-set amount to be added to the fixed wage. Given the measurement difficulty, all these alternatives are costly. The arrangement of a tipping norm helps to reduce these transaction costs and the uncertainty associated

162. *See id.* at 1991 (noting that patrons have more information regarding a waiter's performance than does the waiter's employer; as such, the patron is in a better position to furnish a performance-based reward to the waiter).

163. The notion that contracts may be incomplete in some instances and that norms may help parties reach optimal arrangements or overcome bargaining imperfections mirrors the willingness of law to supply low cost default rules when contracts are incomplete. In each instance, the optimal mix of legal and informal arrangements where "governance is costly, the least cost method will get chosen from among the available institutions, whether it be state law or a private alternative." DIXIT, *supra* note 13, at 4.

164. Levmore, *supra* note 32, at 1991.

165. *See id.* (explaining how tipping results in higher compensation for the waiter and could result in better service for a customer).

166. This is sometimes the norm with large groups. *See id.* at 1994–95 (discussing fixed service charges).

with individually negotiated tips. Depending solely on private contractual arrangements, between the employer and waiter or between the patron and the waiter, to decide the tip amount prior to the rendering of any service would be unlikely to achieve the goal of incentivizing the server and thus, securing the best service for the customer. The private parties could not set an appropriate sum ahead of time for the same reason the government could not do so: transaction costs.[167]

In this context, as in many others, the question is: Given the problem that the norm is solving, would an alternative feasible arrangement[168] be better? Where the tipping norm supplements the contract, the law does not intervene.[169] Deciding whether the non-governmentally originated tipping norm should be legally enforced through a positive law or incorporated into a legally enforceable contract depends on whether the norm is achieving its goals of incentivizing servers, solving the principal-agent problem—not otherwise resolvable by contract—and furnishing the patron the opportunity to evaluate the level of service.

Since the norm has an evaluative element built into it (designed as a standard to be decided by patrons after services are rendered because it cannot be decided ahead of time), which is not observable by lawmakers, the law would have difficulty deciding precisely on a tipping schedule. Given that the government cannot adequately judge the level of service, intervention would not yield net benefits.

Using a comparative analysis of alternatives, with "the least-cost method" likely to prevail,[170] it is understandable why tipping at fast food restaurants is comparatively rare.[171] Norms in these restaurants do not arise because there is no reason to think that the parties cannot achieve an optimal contract. Saul Levmore explains the absence of tipping norms in such contexts as follows: "[T]here is no gain from using the customer (and the social practice) to enhance the employment contract. The employer has standardized the employee's task down to the details of how customers are greeted, and supervisory employees can directly monitor virtually everything that customers observe."[172]

Norms arise as an alternative institutional arrangement only when there are cost advantages to using them as compared to relying on private contractual or governmental substitutes.[173]

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167. The same problem of determining an appropriate wage by contract arises in the principal agent context. It is difficult to fix a sum ex ante for agents' performance ex post given the inability of the principal to observe or monitor the agent's efforts, and performance. Those barriers to contracting help to explain a different kind of institutional solution in the principal-agent context, namely, the law supplied obligation of fiduciary duty. *See* Robert Cooter and Bradley Freeman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. Rev. 1045, 1048–49 (1991) (discussing the fiduciary relationship as a solution to the costs of contracting to solve the principal-agent problem).

168. *See* Oliver E. Williamson, *Public and Private Bureaucracies: A Transaction Cost Economics Perspective*, 15 J. L. ECON. & ORG. 306, 316 (1999) (suggesting "remediableness criterion, with its continuous focus on alternative feasible modes," as the best way to address "real issues").

169. As Levmore points out, tipping is "required neither by law nor contract." Levmore, *supra* note 32, at 1990–91.

170. DIXIT, *supra* note 13, at 4.

171. Levmore, *supra* note 32, at 1993.

172. *Id.*

173. *See id.* at 1990–97 (discussing the norm of tipping, which is widely practiced although not required by law or contract, as a useful supplement to contract).

The ability of a norm to supplement private contractual arrangements and to generate extra effort—and thus, more overall gains—is context dependent. It must be judged by comparative cost as well as by the ability to incentivize effort and maximize overall welfare.[174] In settings where there is no reason to think that the patron is better able to judge the value of the services than the employer (e.g., the fast food industry), no norm for ex-post tipping arises. In other situations, the possibility of competition among potential tippers means that tipping is not an efficient arrangement.[175] For example, if students could offer tips as supplements to teachers, the tipping norm would have perverse effects.[176] The norm would not incentivize the teacher to provide greater effort for all students, but to selectively help the biggest tippers.[177] To discourage such tipping by students, norms exist against these arrangements. Norms in the teaching context, at least in the pre-collegiate setting, involve small or de minimis gifts.[178] Gifts are rare in the collegiate setting.[179]

Thus, in some situations, tipping norms do not arise and are actively discouraged by other rules, laws, and norms. In settings involving the employment of public servants, the tipping norm would not work well to supplement the private contractual arrangements that a public servant, such as a police officer, has with the city; and so, no tipping norm arises. Moreover, there are norms and rules against tipping or rewarding police officers.[180] Society does not want crime victims competing to see who can incentivize the police officer the most. First, the employer can easily judge the efforts of the police officer because of its access to information about arrest results and other data.[181] Second, any possible cost advantages in terms of supplementing an incomplete contract would be more than offset by the cost of rearranging police efforts to benefit the largest tipper and of hindering other goals of law enforcement (such as solving the most heinous crimes).[182]

2. Example Two: Airport Queuing: Providing Flexibility to a Rule in a Private Context: A Self-enforcing Norm with No Law Involved

Sometimes a norm operates in conjunction with a private rule to provide greater flexibility in dealing with exigent contingencies.[183] They operate together to maintain order and achieve greater efficiencies. At airports, for example, in order to maintain order, airline ticket counters have rules governing passenger ticket lines. Yet, there is an exception—a norm that allows someone about to miss a plane to go to the head

174. *Id.*

175. *See id.* at 1994 (noting that, rather than generating greater effort on a service provider's part, tipping may simply incentivize the provider to favor the most generous tippers, and those served "might be better off with a no-tipping norm").

176. *Id.*

177. Levmore, *supra* note 32, at 1994.

178. *See id.* (explaining why "professors do not expect or accept gratuities from their students").

179. *See id.* (noting that professors do not expect gifts from students).

180. *Id.*

181. *Id.*

182. *Id.*

183. Levmore, *supra* note 32, at 1998.

of the line despite the rule.[184] The exception is not explicit since it is not built into the price of the ticket. Airlines intervene on the side of the norm by announcing the exception to the rule: "Will all passengers on the 8:15 to New York come to the head of the line?" The norm and the airline rule operate through private enforcement. The norm acts as an efficient coordination mechanism[185] because it is not in the airline's best interest for the plane to fly half-full. The airline also does not want to permanently alienate late-arriving customers who are not entitled to a fare refund even if they miss their flight. Airlines could not, as easily and at such a low cost, achieve these goals without a private norm. Such a norm incentivizes airlines to create rules in the first place because they can rely on a norm to allow for later flexibility.[186]

In such cases, the norm operates effectively in conjunction with a private rule, softens the effect of the rule, and provides flexibility when needed. The law does not intervene in such cases: "Sometimes, as here, a norm provides relief where a rule imposes undue costs under particular circumstances."[187] As a result, parties subscribe to a norm partly because it is in their own self-interest since they may need flexibility and relief from the rule in the future. The individual in line who is deciding whether to let someone cut in line weighs his own preferences for getting to the head of the line as quickly as possible against the possible negative encounters with the late-arriving passenger and with other passengers who are willing to be flexible. The resulting norm is the product of an exchange. The exchange results when the passenger already in the line weighs the possible opprobrium that he would suffer if he refused to allow someone to cut in line against his own goal of advancing to the head of the line as quickly as possible while minimizing the transaction costs of navigating airport lines and weighing the possible need for a reciprocal benefit[188] in the future. The law refrains in part because the parties' norm (a type of exchange) solves the cooperation problem; in addition, there are no externalities as all the effects are concentrated on passengers and the airline.

Norms may also act to soften a judicially adjudicable law. An example is the norm that exempts from the speed limit laws someone who is speeding while driving a heart attack victim to the hospital. The concept of negligence incorporates norms

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184. *If You Are Late for Your Flight*, ABC ARTICLE DIRECTORY, http://www.abcarticledirectory.com/Article/If-You-Are-Late-For-Your-Flight/345776#.ULQIQoagGSo.

185. *See* Cora B. Excelente-Toledo & Nicholas R. Jennings, *Learning to Select a Coordination Mechanism*, Autonomous Agents & Multiagent Sys. 1 (2002), *available at* http://eprints.soton.ac.uk/256870/1/cora-aamas-02.pdf ("Effective coordination is essential if autonomous agents are to achieve their goals in a multiagent system. Such coordination is required to manage the various forms of dependency that naturally occur when the agents have inter-linked objectives, when they share a common environment, or when there are shared resources. To this end, a variety of [coordination] mechanisms have been developed to address the coordination problem at different levels of abstraction.").

186. Of course, if an airline thought that a particular party was a serial violator, it might decline to give him the flexibility to violate the rule.

187. Conversation with Peter M. Gerhart, Professor of Law, Case Western Reserve University School of Law (June 18, 2012).

188. The belief that one will interact with others in the future serves to promote cooperation since one fears that a failure to cooperate will generate an equally unhelpful response by one's counterparty in a future interaction. Binmore discusses "[t]he idea that reciprocity is the mainspring of human sociality [that] goes back nearly as far as there are written records." BINMORE, *supra* note 72, at 77; *see also* Robert E. Scott, *A Theory of Self-enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641, 1642 n.4 (2003) (arguing that parties leave contracts incomplete with "an intent to use self-enforcing mechanisms such as reciprocity").

that allow us to speed if an emergency exists.[189] The norm allows for particularized justice and supplements the law rather than the other way around.

In the two hypotheticals involving exceptions, the question arises of whether law could improve outcomes by enforcing a norm of flexibility. On one level, since the norm seems to be functioning well currently without legal sanctioning, law would be superfluous. Reciprocity may play a role in the effectiveness of the informal norm since airline passengers are sufficiently likely to face the prospect of encountering unexpected difficulties after arriving at the airport. When such conditions exist, the affected passengers may make accommodations in order to increase the odds that similar accommodations will be made for them in future transactions.[190] Second, the norm is based on an exception to the rule and requires highly contextualized knowledge about the party seeking an exception. The greater distance from the underlying encounter might make a legal institution less able to judge the propriety of an exception.

Third, the nature of a flexible norm is such that it lacks some of the characteristics of a rule of law.[191] Its vagueness may prevent the norm, if incorporated into law, from publicly delineating the actual parameters of the exception. It will remain ambiguous and unhelpful to people trying to plan their behavior. Fourth, there is no problem of externalities since most of the ill effects of a late arriving passenger are focused on the offending party.

3. Example Three: The Maghribi Traders: Norms, Coalitions, and Networks as Private Enforcement Mechanisms for Contracts: Norms That Are Largely Self-enforcing but Have Some Limits on Self-governance

Norms functioned to supplement incomplete contracts with the eleventh-century Maghribi traders. The encounter between delegators (i.e., principals) and delegates (i.e., agents) involved interactions that called for resolution. The resulting exchange took the form of certain norms. In these settings, potential performance by the agent for pay opened up the possibility of divergence and shirking or theft by the agent, matters about which principals were acutely concerned. The principal had to make an internal tradeoff between his objectives, preferences, and beliefs. His preferences would have included engaging in a profitable venture at the least cost. He would have weighed the possible divergence by an agent as a cost; if his prospective agent were a friend, he would have weighed the possible loss of friendship as a cost he would have incurred if he had not hired the friend as an agent. The principal's decision would have depended on whether the loss of the revenue stream from shirking or divergence would have been greater or less than the loss of the value of the friendship. The principal would also have considered, once the norm had been established, whether to have adhered to the Maghribi norm of hiring only members who had not cheated[192] and the possible negative effects on business of not

189. *See, e.g.*, JAMES M. ROSE, N.Y. VEHICLE & TRAFFIC LAW § 34:19 (2d ed. 2012) ("The courts have held that, in a true emergency, speed limits may be exceeded . . . .").

190. GREIF, *supra* note 24, at 144; ELLICKSON, *supra* note 8, at 154–55.

191. *See* H.L.A. HART, THE CONCEPT OF LAW 89–96 (1961) (describing both the deficiencies of norms as compared to formal laws, and the evolution from norms to enforceable rules of law).

192. GREIF, *supra* note 24, at 59.

having adhered to the norm. The principal would also have weighed the benefits of having adhered to the norm in terms of minimizing the costs of divergence.

The comparative cost analysis differs from that of the tipping example because in the eleventh century the state was weak; therefore, the main institutional alternatives available to the principal were contracts and norms.[193] The success of the informal Maghribi institutions, including norms, that arose to govern these principal-agent relationships depended on a variety of specific factors including the following: (1) information-sharing mechanisms;[194] (2) links between a single present transaction and future transactions;[195] (3) cultural norms of adhering to certain hiring practices and norms of collective punishment;[196] and (4) beliefs about others sharing information and adhering to hiring and punishments norms.[197] The reasons why a collective enforcement coalition prevailed and was successful over other alternatives, such as contracts, legal enforcement, or bilateral trading, are examined below. The discussion highlights how a variety of institutional elements combined to allow parties to solve the critical economic problem of agent opportunism. The norms produced value by minimizing transaction costs, specifically agency costs.[198] The limits of the Maghribi self-governance mechanism will also be addressed.[199]

The Maghribi traders employed agents over long distances, which presented an opportunism problem as a result of the impersonal trading context.[200] Trading was "characterized by asymmetric information, slow communication technology, inability to specify comprehensive contracts and limited legal contract enforceability."[201] Solving this principal-agent problem by contract[202] was therefore difficult; yet resolving it was crucial to enabling trade to thrive over long distances.[203]

The Maghribi were an ethnic and religious community with a trading club whose practice was "to hire only member agents" and "never to hire an agent who had cheated another member."[204] The Maghribi merchants responded by applying a norm of multilateral sanctions against agents who defected by cheating.[205]

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193. *See id.* at 58 ("Despite their efficiency, however, agency relations are not likely to be established unless supporting institutions are in place, because agents can act opportunistically and embezzle the merchants' goods.").

194. *Id.* at 59.

195. *Id.*

196. *Id.*

197. *Id.* at 82 (listing the factors that "make collective punishment effective" and encourage coalition members to commit to specified hiring practices).

198. GREIF, *supra* note 24, at 87.

199. *See id.* at 87–88 (discussing the deficiencies of Maghribi self-governance).

200. Unless they were to accompany the goods, however, the principal traders needed to employ agents over long distances and to turn over goods and capital to the agents. This presented shirking problems and opportunities for agents to embezzle from the merchants. *Id.* at 58.

201. *Id.* at 85–86.

202. The Maghribi did enter into contracts with agents; however, these were not legally enforceable. *See id.* at 64 (discussing obstacles to enforcing contracts).

203. *See id.* at 88 ("The same factors that ensured . . . self-enforceability prevented . . . expanding in response to welfare-enhancing opportunities.").

204. GREIF, *supra* note 24, at 58–59.

205. *See id.* at 66–67 (detailing the collective punishment of an agent accused of dishonesty in Jerusalem; his contracts were cancelled by merchants "as far away as Sicily" once the allegations of dishonest conduct reached them).

Additionally, the Maghribi adopted "rules of conduct"[206] that allowed a merchant to determine if an agent had cheated him.

The system worked well in the policing and monitoring of agents and provided value to both principal and agent members. Agents benefited because the members paid a wage premium[207] that was made possible in part by the decreased likelihood of cheating. Merchant principals could rely on the threat of multilateral sanctions effectively deterring agents from cheating,[208] which allowed them to pay a lower wage premium than if the merchant depended on bilateral sanctions, making the agency relationship efficient.[209] Outside the coalition, the "wage required to keep an agent honest . . . is higher."[210] Thus, merchants inside the coalition paid outside merchants a lower wage since there were other institutional mechanisms to keep the agent honest. The relative success of the alternative informal institutions depended on the relative ability of the punishment mechanism (e.g., bilateral versus multilateral) to sanction cheaters, detect deviant behavior, transmit information, and achieve efficiency and profitability.

The ease of transmitting information within the network promoted the detection and reporting of cheating to other members.[211] Information linked an individual transaction and "information-sharing transactions among the merchants[,]"[212] which helped foster a belief that "opportunistic behavior is likely to be detected."[213]

The Maghribi system of multilateral punishment depended on the parties knowing that sanctions would be effectively imposed against agents who defected, and the ability to punish depended on accurate transmission of information about an agent's cheating.[214] This may explain why the Maghribi did not trade with some non-members, such as the Italian Jews.[215] Uncertainty about the truth of the outsiders' accusations would impair the functioning of the multilateral system of sanctions in such contexts.

The multilateral system for sanctioning opportunism arose in the context of ineffective national states and state courts with relatively limited and local jurisdiction.[216] In this atmosphere, a need developed for an alternative system to constrain such behavior. Adherence to the system itself operated as a norm that influenced behavior through the prospect of economic punishment rather than any

206. *Id.* at 59. Greif characterizes the merchant rules as "social norms" since they were "rule[s] that [were] neither promulgated by an official source, such as a court or legislator, nor enforced by the threat of legal sanctions but [were] nevertheless regularly complied with." *Id.*

207. *Id.* at 68.

208. *See id.* at 80 ("[A] multilateral punishment strategy supports cooperation . . . by . . . decreas[ing] the probability that a cheater will be rehired.").

209. GREIF, *supra* note 24, at 79–80.

210. *Id.* at 82.

211. *See id.* at 81–82 ("The fact that within a coalition each trader is known to the others enables informal information flows . . . to facilitate monitoring and to inform traders about cheating.").

212. *Id.* at 59.

213. *Id.*

214. *Id.* at 59, 81–82.

215. GREIF, *supra* note 24, at 78.

216. *Id.* at 64, 314.

internalized guilt or shame.[217] The effort to devise mechanisms to solve the shirking problem demonstrates how people behave in the absence of legal institutions to achieve their goals and to prosper. Non-governmental mechanisms will arise to reduce the drag on gains from trade that would otherwise have diminished the surplus available to the parties and rendered agency relations costly or nonexistent.

The lesson of the Maghribi traders is that parties will devise mechanisms to achieve the function of deterring cheating as a means of reducing the costs of exchange. Parties deciding on the terms of trade, including how to structure trade, will consider the possible costs of unconstrained opportunistic behavior and consider whether to devise or adhere to norms to lower the costs of trade. The norm of adherence to the merchant system governed the actions of the merchant community and effectively policed opportunism. Communities that lacked private mechanisms for punishment for deviant behavior did not flourish to an efficient level until those mechanisms were in place.[218] The success of the coalition demonstrates "the importance of contract enforcement institutions in the operation of markets."[219]

Although the government did not play a role in imposing sanctions against defecting agents, studying the Maghribi reveals that their private enforcement mechanisms intended to deal with agency costs as well as the institutional elements that made it possible to police, monitor, and punish deviants; studying the limits of such a system can help identify (1) the criteria for successful self-enforcement;[220] (2) the "limits of self-governance;"[221] and (3) identify cases where other institutional mechanisms might be useful. An unanswered question could arise: Should a government incorporate similar merchant norms into a statute, common law rule, or the parties' contract or punish defecting merchants with legal penalties if they fail to adhere to the norms? The answer depends on whether the non-governmental means under the particular conditions are effective and self-enforcing. If so, there would be no reason to intervene. If the multilateral mechanism or other norms deteriorate or the nature of the market differs from the Maghribi's by not offering the opportunity for so many informational flows among a close knit group, then a strong government would have to decide whether it should legally sanction breaches of merchant law to deter opportunism and whether there would be any negative effects from such intervention. The government should use an analysis based on which law or which combination of laws and informal arrangements would be most effective in cost-minimization and achievement of the parties' goals.

4. Example Four: A Complete Private Ordering System That Shuns Outside Legal Enforcement: The Diamond Industry

The diamond industry furnishes a modern equivalent to the Maghribi. In this industry, trading norms also develop in the context of a social and ethnically tight knit community. The industry successfully relies on a combination of norms, trade

217. *Id.* at 67.

218. *See id.* at 105–08 (discussing the importance of the Hanseatic league in contributing to prosperity by curbing the abuses merchants suffered).

219. *Id.* at 88.

220. *See id.* at 58 (examining the necessary framework of trust, familiarity, and mutual punishment among the Maghribi required for the success of a reputation-based economy).

221. DIXIT, *supra* note 13, at 13; *see also* GRIEF, *supra* note 24, at 62–63 (exploring the "commitment problem" and the ease with which an agent could embezzle goods without a formal legal system).

rules, and extra-legal enforcement to solve problems in the trade. The success and persistence of these norms indicate that they are superior to legal enforcement.[222]

Enforcement depends on parties voluntarily belonging to diamond clubs that adopt trade rules to govern diamond sales.[223] Although parties can purchase diamonds on the market, most purchases take place through a club with its own norms and rules.[224] Several norms prevail. First, secrecy norms discourage litigation.[225] Second, norms favoring extra-legal "voluntary resolution of disputes"[226] are embodied by mandatory pre-arbitration proceedings.[227]

The successful policing of diamond clubs' members depends on a combination of traditional social bonds and the posting of a reputation bond that will be forfeited if an adverse judgment is rendered in an arbitration proceeding.[228] Upon judgment, the member faces the possible loss of future information about other members, an adverse effect on his reputation, and the social consequences of guilt and shame.[229]

The diamond industry and other homogenous groups are likely to encourage "extralegal contractual regimes . . . when preexisting or gradually evolving social relationships provide a basis for nonlegal [extralegal] commitment[s] without large additional investments in developing a bond . . . [since they are] incrementally less costly . . . when they are parasitic on background habits or understandings built into the culture in which these bonds are formed."[230] A foundation of embedded norms and customs is imported into the diamond industry rules and helps make such practices successful and profitable.[231] These norms have survived and thrived despite a decline in the force of Jewish law and changing conditions, including a less homogeneous group with fewer social connections.[232] Should certain members of the diamond trading community in the future refuse to adhere to the norms of secrecy and arbitration, then those who want the norm to be followed in an exchange may decide to make the norm a term of an adjudicable contract.

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222. Bernstein, *supra* note 148, at 157.

223. *See id.* at 119–21 (discussing the prevalence of bourses and their use of internally developed trade rules).

224. *Id.* at 119–20.

225. *Id.* at 134–35.

226. *Id.* at 124.

227. *Id.* Members of the group are discouraged from seeking legal redress much as the Shasta County residents studied by Ellickson were. ELLICKSON, *supra* note 8, at 135. Other norms include using a broker to mediate sales between buyers and sellers by sealed offer, the use of which discourages brokers from falsely representing the terms of the offer and opportunistically pocketing a part of the sale price. Bernstein, *supra* note 148, at 122–23.

228. Bernstein, *supra* note 148, at 138.

229. *Id.* at 139.

230. *Id.* at 140 (quoting David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 393, 423–24 (1990)) (footnote omitted).

231. *See* Bernstein, *supra* note 148, at 141 (discussing how the diamond industry trade rules grew out of traditional Jewish law); *see id.* at 157 (noting that the diamond industry's trade rules have promoted low cost and fast dissemination of information).

232. *Id.* at 141–42.

5. Example Five: Signaling Communicative Norms with Private Promulgation and No Legal Implementation: Dressing for Success

In certain contexts, the precise role that law can play, given the existence of social norms, depends principally on the purpose of the norm (such as solving the principal-agent problem) and the effectiveness of various institutions in achieving this purpose. In other environments, the nature of the norm itself suggests that the role of law should be limited even apart from whether there are institutional networks to enforce the norm or not. Norms of social etiquette originally involve norms not likely to cause an externality.[233] In such cases, "rules are more likely to be propagated privately, based on the incentives of individuals to study or transmit them,"[234] and they are thus likely to be self-enforcing.

Parties sometimes communicate through norms that have signaling or expressive value.[235] A potential employee can choose to follow the norms of dress and timely arrival for an interview or choose to rebel by not following the norms. Respecting the norm creates private benefits for the adherent[236] since it may signal to the employer that the applicant for the job will conform to the culture of the organization and be sensitive to the feelings of others. This impression increases the adherent's chances of being hired. These types of norms serve to build trust and lower transaction costs because conformity to the norms provides an applicant screening mechanism for potential employers and others.

In terms of the earlier framework of norms as a form of exchange, one can think of the dress norm as a non-adjudicable institution that is the outcome of an exchange between the applicant and the firm. The applicant has preferences about whether to dress up but will decide how to behave and reach a resolution in light of an expected encounter with others, particularly the employer.

Norms that act as signals would lose their value if the state were to mandate that job applicants comply with norms of dress or timeliness since the adherent might be conforming because of the fear of punishment rather than obeying, voluntarily, as a means to signal to an employer that they are valuable team players who will conform in ways that will benefit the employer. Mandating the norm would muddy the signal that the employer wishes to receive. State intervention would interfere with the exchange being made by the job applicant. The applicant considers how much he wants to pursue a personal preference to dress down (forfeiting the preference is a cost) and resolves that preference in light of the expected reactions of others. How that applicant makes the tradeoff is useful information that would be lost with coercive punishment. In other instances, to be examined later, the state can intervene to enforce the norm without obliterating the signal that is the purpose of adhering to the norm. In this case, a comparative cost analysis seems the best way to decide if legal intervention is justified.

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233. *See* GREIF, *supra* note 24, at 136 (noting that where an actor learning the rule imposes an externality on others, a "dedicated public organization" would be better suited to propagating the rule).

234. *Id.* at 136–37.

235. This is an example of a norm that works best through "private propagation" without legal intervention. *Id.* at 136.

236. Scott, *supra* note 1, at 1624.

V. NORMS AS INPUTS THAT EVOLVE FROM SELF-ENFORCING TO INCORPORATED-INTO-LAW OR THAT FUNCTION AS A COMPLEMENT TO LAW IN EXCHANGE AND NON-EXCHANGE TRANSACTIONS

A. Inputs (i.e., Norms) That Are Incorporated: The Migration to Law

1. Example One: Function: Minimizing the Costs of Transacting with Others: Reducing Measurement Costs: Norms That Are Initially Self-enforcing and Then Incorporated into Law: Formal Weights and Measures

When parties develop norms on their own to reduce uncertainty and maximize gains by minimizing the costs of exchange, questions arise as to why and when the law might choose to intervene to displace private norms (while using the same content of the existing norms) or, in other instances, to supplement the existing norms by making the breach of them legally sanctionable. The reasons for the legal intervention, whether in the form of displacement or supplementation as part of a "*hybrid system*," will be examined with each example below.

One instance when law has displaced informal norms involves the introduction of standardized weights and measures. The standardization of weights and measures emerged initially as norms that minimized measurement costs in markets.[237] These devices relieved parties from devoting resources to measurement, and thus increased the gains from trade and encouraged trading.[238] Later formalization by the state makes sense. Informal norms became less efficient in totally impersonal exchange and were subsequently incorporated into law.[239] State enforcement, via random government checking, provides a low-cost way of punishing cheating.[240] The law can at low cost provide a coordination point.[241] Intervention would not destroy the function of the norm as it would with signaling norms. There would seem to be benefits from public pronouncements as they would provide a cognitive foundation for parties buying scales and weights. Government enforcement must be cheaper than private enforcement in order for it to be adopted.[242]

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237. NORTH, *supra* note 5, at 41.

238. Professor North notes that these devices had features "that make the exchange viable by reducing measurement and enforcement cost." *Id.* at 41.

239. *Id.* at 46–47.

240. *See* RONALD EDWARD ZUPKO, REVOLUTION IN MEASUREMENT: WESTERN EUROPEAN WEIGHTS AND MEASURES SINCE THE AGE OF SCIENCE 183–84 (1990) ("Parliament in 1858 mandated that inspectors examine the weights and measures of anyone selling goods in streets and public places.").

241. *See id.* at 183 (noting that the ability of the law in 1824 to successfully overcome local customary measurement norms was complicated by the entrenchment of the local variations and some resistance).

242. The displacement of the business norms of measurement with a legal rule that mimics the norms makes sense because "technological change tended to lower measurement costs and encourage precise, standardized weights and measures." NORTH, *supra* note 5, at 46. Zupko highlights the large variations in measurement and "metrological proliferation" due to local customs as well as a lack of consistency caused by the government itself adopting inconsistent standards. ZUPKO, *supra* note 240, at 14. When technological breakthroughs occurred, the law followed in 1824 by streamlining and unifying the standards and legislating out of existence prior inconsistent standards. *Id.* at 177–78. The adoption of the metric system by the government followed in 1965. *Id.* at 177, 270.

In other instances of exchange, measurements may be standardized through organizations such as better business bureaus or credit rating agencies, both of which can reduce the measurement costs of parties trying to determine the value of certain products or companies.[243] The development of mechanisms for auditing and accounting also lowers measurement costs for parties in exchange transactions and promote the exchange of information.[244] Standardization makes enforcement easier and cheaper. Moreover, the "increasing complexities of societies" make it more beneficial to have more formal constraints in place as it "raise[s] the rate of return."[245] Of course, once the norm is incorporated into a law, norms of adhering to legal rules reinforce adherence to the law.

2. Example Two: Solving Problems, such as the Principal-Agent Problem and Other Forms of Opportunism, with Norms That Are Incorporated by Law into Contracts: The Plastics Industry

In the form of usages of trade, norms also play an important role in dealing with the recurrent problem of opportunistic behavior arising in the modern commercial context. They can be seen as private efforts to maximize the value of returns to each side and minimize the costs of exchange that diminish the gains from trade in situations where the opportunism may be difficult to control by comprehensive contracting. Norms are eligible inputs for the content of law.[246]

A norm of conduct may arise to deal with certain recurring issues faced by the parties. The main contractual communication may not contain the norm, but it will arise instead as a pattern that exhibits the following express content: If a given contingency occurs, parties will respond in a given manner.

The parties may omit the norm from their express contract thinking that—since they have dealt with the problem in the past and therefore know what will happen as a result of prior express, though informal, communication—there is no need to include it.[247] This is a cost saving argument that might cut in favor of judicial enforceability of a custom. Parties may not even realize, for example, that they need to expressly incorporate trade terms into a contract.

One example of trade usage involves the plastics industry.[248] In these cases, a mold manufacturer may produce a plastic mold for a buyer at great expense due to

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243. *See* NORTH, *supra* note 5, at 41 ("Informal constraints can take the form of agreed upon lower cost forms of measurement ... and make second- and third-party enforcement effective by specific sanctioning devices or information networks that acquaint third parties with exchange performance (credit ratings, better business beaureaus, etc.)."); *see also id.* at 46 (noting that standardization of measures tends to "lower measurement costs").

244. *See id.* at 41 (noting that the "development of auditing and accounting techniques lowered critical ... information and enforcement costs").

245. *Id.* at 46.

246. *See* Juliet P. Kostritsky, *Judicial Incorporation of Trade Usages: A Functional Solution to the Opportunism Problem*, 39 U. CONN. L. REV. 451, 465 (2006) ("Whether the law should incorporate a business norm into a contract should depend on whether legal incorporation of that norm can be justified in efficiency terms.") (footnotes omitted).

247. *See* Gord Indus. Plastics, Inc. v. Aubrey Mfg., Inc., 469 N.E.2d 389, 391 (Ill. App. Ct.) (1984) (indicating that if the "mold removal fee is customary in trade" then "such a term [becomes] incorporated into the parties' contract").

248. *See id.* at 392 (discussing whether mold removal fees are customary in the plastics industry). *See generally* Kostritsky, *supra* note 246 (discussing other examples).

the large engineering and other sunk costs. A buyer may agree to pay for the manufacture of the mold and agree to buy items manufactured from the mold. This buyback arrangement allows the manufacturer to recover the sunk costs of engineering. If a buyer demands the mold while canceling its buyback arrangement, the trade usage norm requires the buyer to pay a "mold removal fee."[249]

The norm curbs opportunistic behavior by buyers. Without the norm, buyers could deprive the seller of the ability to recoup its investment in a way that would potentially be costly to solve by contract.[250] The norm is an exchange that results from the encounter of the manufacturer and buyer and thus reduces transaction costs. At the same time, the norm discounts the cost to the buyer because without an expectation of adherence to it, the seller would charge a higher price to the buyer based on a markup for the possibility of opportunistic removal of the mold.[251]

Whether the norm should be enforceable by the judiciary or by reputational sanctions alone depends on the cost and benefits of judicial recognition. Under the Uniform Commercial Code, trade usages are part of the bargain unless the parties negate them.[252] The primary justification for the legal default rule incorporating trade usages into parties' contracts is that it enhances value for both parties by saving them the transaction costs of express incorporation.[253] A party may still face the prospect that its counterparty will act opportunistically over the course of the contract since the mold manufacturer does not know a buyer's proclivities for opportunism in advance. Legal incorporation curbs the potential for such opportunism and increases gains from trade.

3. Example Three: Coordination Norms That Are Seemingly Self-enforcing but Co-exist with Organizations and Law: Driving on the Right

With certain types of regularities of behavior, self-interest makes the norm mostly self-enforcing. This raises the question of why law would intervene. The norm of driving on the right side of the road is an example of a self-enforcing norm. It is largely self-enforcing because the failure to follow it will result in harm or even death to the deviant, so ordinarily there will be no need for the law. A preference for one side or the other may or may not exist to begin with. If no preference exists, the party's choice is determined mainly by what one decision maker thinks that the other will do. As Greif explains, "[t]he belief that everyone else will drive on the right motivates an individual to do likewise."[254] However, the law may become involved even when a coordination norm governs behavior.[255]

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249. *Gord*, 469 N.E.2d at 392.

250. *See* Kostritsky, *supra* note 246, at 491–92 ("[I]f one party seeks the court's help, it may indicate that the informal mechanisms are not working or are not likely to work, since otherwise the party bringing the lawsuit would not undertake the additional costs of legal enforcement.").

251. *See id.* at 505 ("[T[rade usage itself constitutes one means of controlling opportunistic behavior and maximizing the benefits of the exchange.").

252. U.C.C. § 1-303, cmt. 3 (2012).

253. *See* Kostritsky, *supra* note 246, at 514 ("[A] prime advantage of the incorporation strategy is that it saves parties transaction costs.").

254. GREIF, *supra* note 24, at 36.

255. *Id.* at 37.

Nonetheless, even if parties develop a norm of driving on the right, there would be advantages in adopting or formalizing the rule. Doing so would "provide a shared cognitive system, coordination, and information . . . ."[256] Rule adoption could educate newcomers on the norm. The involvement of organizations to implement the rules would "facilitate the creation of the corresponding beliefs,"[257] including the belief that "others will follow [the] rules."[258]

4. Example Four: Neighborhood Norms Plus Law to Solve the Problem of Externalities: Lawn Care

Where certain behaviors may have positive or negative effects, a consensus will develop around behaviors that generate positive and avoid negative effects. Cutting one's lawn and keeping one's house in good repair are prime examples of such behaviors. In the majority of neighborhoods, a consensus builds in favor of behaviors that have positive effects.

In these situations, one neighbor is incentivized to keep his lawn cut and his own house in good repair in order to maintain the value of both the house and the neighborhood.[259] However, if his neighbors fail to maintain their properties, the value of his home could deteriorate. The other neighbors then become enforcers of the social norm or consensus in favor of keeping one's house and lawn in good condition.[260] However, if a homeowner is not motivated to comply by the opportunity to gain the esteem of others, the law often intervenes to deal with a deteriorating home if it has become an eyesore in the neighborhood.[261] In such a situation, the homeowner would be placing an externality on others and the law would notify or penalize the homeowner in accordance with home-condition statutes.[262]

VI. NORMS THAT ARE THE PRODUCT OF A STATUTE OR A RULE AND MAKE ENFORCEMENT OF LAWS OR RULES POSSIBLE EVEN WITH NO OR MINIMAL SANCTIONS BY LAW: SOCIAL ENFORCEMENT NORMS

Two other distinct types of norms exist. The first type does not arise spontaneously or by evolution to solve problems of cooperation in a cost-minimizing way. This norm does not predate the law and is instead empowered to exist by the passage of the law. The second norm is created through a law for the purpose of changing an existing dysfunctional norm. In both of these cases, the law plays a different role than it does where it decides to incorporate pre-existing norms. Rather than allowing the parties to solve their problems on their own or to supplement such pre-existing norms, the law plays a more active role in creating new norms or demolishing existing norms.

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256. *Id.*

257. *Id.*

258. *Id.*

259. McAdams, *supra* note 14, at 359.

260. The desire for esteem may motivate neighbors to comply. *Id.* at 355, 359.

261. *See id.* at 397 ("[T]he law can strengthen a norm by imposing sanctions on those who violate it.").

262. *See id.* at 391 ("[A]n important function of law is to shape or regulate norms.").

When there is no pre-existing norm, norms are not embedded in a way that currently affects parties' choices or will affect the decision of whether a law is needed, as happens when existing norms already operate. A law may be passed to publicize the state's view of what the norm should be and to stimulate secondary enforcement mechanisms.[263]

The justification for the law acting to stimulate or overturn norms should be that the law needs to intervene because the parties cannot reach efficient or fair results on their own. The content of the law cannot be based on an underlying norm if one does not exist.

A. Function One: Empowering Enforcement Norms with the Passage of a Law to Stimulate Secondary Enforcement Mechanisms

Understanding how law affects behavior and predicting those effects allows us to determine how "an alternative complex regime of social control . . . interacts with law in many different ways."[264] Studying the interactions between law and norms is important because the success of the law may depend on its ability to generate norms of social enforcement beyond legal sanctions.

These types of social norms generated by the passage of a law are distinct from the norms that arise, perhaps spontaneously, to promote cooperation and coordinate behavior. A norm that arises after the passage of a law follows a different path from the norm that naturally becomes embedded in the culture as part of evolutionary trends toward efficient and stable norms.[265] In the case of embedded social norms that arise before laws are passed, the state may have a difficult time crafting laws that directly reject them.[266] In fact, the ability of the norm to change and shape preferences (as with no-smoking norms, where there was a lack of a shared consensus) seems greater than if the norm predated the law. The ability of the law to overturn embedded norms, which may well have evolved naturally toward stability, efficiency, and fairness, would usually be limited and counterproductive.[267]

One example of a preference that might be enacted into law, which is discussed in the literature, is a tree preference.[268] The passage of an ordinance banning dogs from parks gives effect to this preference by permitting those who prefer trees to sanction violators who choose to bring dogs to parks.[269] Similarly, a law may be passed requiring dog owners to pick up their dog's litter.

In these cases, one could argue that where the nature enthusiast and the dog owner each have different preferences, no norm would arise through repeated interactions between them, which would reveal a strong consensus on which

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263. *Id.*

264. Scott, *supra* note 1, at 1606.

265. *See id.* at 1615 (illustrating how the passage of a law changes a norm).

266. *See id.* at 1612 (explaining that normative constraints by the state are sometimes in tension with norms, and that this conflict is resolved through an individual's "hierarchy of values").

267. There are instances, however, where the law can overturn embedded norms such as dueling norms through legislation. *Id.* at 1623–24. The most effective type of statutes for overturning such a dysfunctional norm will be examined in the next section.

268. *Id.* at 1608–12.

269. *Id.*

preference should prevail. Similarly, although there might be distaste for dog littering, it may not rise to the level of a self-sustaining norm that is enforced through repeated sanctioning of violators. An individual may have an inner conflict between norms; for example, the dog lover may want to be virtuous about picking up dog litter but also may want to avoid appearing silly by doing so. Thus, no social norm may exist before the law is implemented. Certainly, some people prefer dogs to trees and others prefer trees to dogs; but until the law is enacted in favor of trees over dogs in public parks, presumably those who prefer trees will not feel empowered to sanction the dog lovers. Similarly, some parties may share distaste for dog litter, but there may not be enough of a consensus on violations and proper punishment to empower norm enforcers, or else no consensus may have emerged (as in the case of public smoking). Those with disparate preferences will not feel a sense of duty to obey one preference over the other or to sanction violators.

Normally, law would not care about preferences and would remain neutral, requiring dog lovers and tree lovers to work out conflicts they might have about park use through agreement and contract. The dog litter problem, however, may be an externality that is difficult to solve by cooperation due to the collective action problem. The resident of a community often does not know which dog owner is responsible for the dog litter and will have a hard time sanctioning the perpetrator since he will be peripatetic, and once the dastardly deed is done it is difficult to know who is responsible.

Since there is a problem that the law would like to control, the law will intervene. It favors one preference here (i.e., the preference for trees over dogs or for no dog littering over allowed dog littering) and then relies in part on informal sanctions to help achieve that goal.

Passage of a law preferring tree lovers or outlawing dog litter can then unleash a variety of activities and an increased willingness to informally sanction violators, a process less costly than contracting.[270]

Once a law is passed, it empowers people to object. Some people with dogs have conflicting preferences about dog litter.[271] On the one hand, the dog owner may feel embarrassed about carrying around a plastic bag. On the other hand, the owner may also feel virtuous about picking up after the dog. The law legitimizes this feeling of virtue. Dog owners now feel motivated, given permission to feel virtuous rather than silly. Moreover, they gain a sense of esteem from adhering to the law. Others can withhold esteem easily and at a low cost and start punishing violators.[272] Publicity and high detection probabilities can lead to the formation of a norm.[273] A social norm may have a different origin, however, arising in aid to an intervention that was originally prompted by the difficulties of contracting. It may be that these patterns of conduct become internalized for some people who see that by obeying the law, they gain esteem from others.[274] On the other hand, "[o]thers will obey the norm

270. This is an example of an attempt "to explain the mechanisms by which legal expression can affect social norms." Scott, *supra* note 1, at 1624.

271. *See id.* at 1608–09 (setting up an example of laws influencing norms in the context of dog-littering laws).

272. *Id.* at 1618, 1624.

273. *Id.* at 1615 (describing Bayesian analysis of dog owners' sensitivity to increased probabilities of enforcement).

274. There remains the problem of empirically verifying whether the law has actually prompted an internalization or a change in preferences. *Id.* at 1635.

automatically because their respect for law causes them to obey the laws as an intrinsic value. Together these two effects can . . . shift behavior to a new equilibrium."[275]

B. Function Two: Passage of a Law to Contribute to the Refining of the Content of a Norm

Laws may also influence behavior by shaping a norm.[276] For example, there may be a norm of good parenting. As long as no law has been passed mandating that parents put children in car seats, a parent can rationalize his failure to put the child into a car seat as behavior that still comports with good parenting.[277] The parent has his own preferences (for example, to not put the child in a car seat) but once the child seat law is passed, it "expresses a consensus and creates an esteem-based norm defining good parental behavior."[278] The parent now takes his preferences (say, for personal freedom) and arrives at a resolution by taking account of the expected reactions of others and of the price that he will pay if he violates the law.

C. Function Three: Changing Norms: Dueling Norms, No Smoking Norms, and Racial Discrimination Norms

Sometimes inefficient or non-utilitarian norms develop or persist. One example of a persistent inefficient norm is the practice of dueling to protect one's honor.[279] Theory suggests that the practice of dueling arose to promote a culture of "self-help violence to remedy an insult."[280] It developed amongst white Southerners who needed to "maintain their solidarity"[281] to discourage revolts by black slaves.[282] Once slavery was abolished, the dueling norm lived on because it had become internalized and was thus difficult to dislodge. In that instance, two types of laws were passed: (1) those prohibiting dueling and (2) those prohibiting duelers from holding public office.[283] The latter proved more effective in changing the norm.[284]

Other changes to norms occur due to the stimulus of changed economic circumstances that alter "the cost-benefit conditions" for existing norms.[285] Demsetz traces a change in norms regarding hunting among Labradorian Indians.[286] A rise in the monetary opportunities for fur trading prompted the tribe to adopt a system of exclusive hunting rights to give appropriate incentives for hunting sustainably and

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275. *Id.* at 1633.

276. McAdams, *supra* note 14, at 407–08.

277. *Id.* at 408.

278. *Id.*

279. *Inefficient Norms*, *supra* note 35, at 1736; Warren F. Schwartz, Keith Baxter & David Ryan, *The Duel: Can These Gentlemen Be Acting Efficiently?*, 13 J. LEGAL STUD. 321, 335 (1984).

280. Ellickson, *supra* note 40, at 33 n.75.

281. *Id.* at 33.

282. *Id.*

283. Schwartz, Baxter & Ryan, *supra* note 279, at 326.

284. *Id.* at 328; *Inefficient Norms*, *supra* note 35, at 1739–40.

285. Ellickson, *supra* note 40, at 23.

286. *Id.*

protecting property rights in the hunting grounds.[287] This change in norms is consistent with the evolutionary theory in which parties tend toward the adoption of more efficient practices over time.[288]

Norms can also become dysfunctional over time due to "group composition" dynamics.[289] For example, the norm in a particular law school may evolve away from intense use of the Socratic method and toward the use of PowerPoint displays. Although much evidence suggests that the new norm may be inefficient or less beneficial than it appears, it may arise due to student demand that professors teach them black letter rules. Another unhelpful norm that might arise in legal academia is the trend toward the publication of many small articles that are narrow in scope rather than larger, interdisciplinary pieces. Such an unhelpful norm may arise because the rewards for frequent publication outweigh concerns for quality or scholarly impact. A third such norm might arise in favor of pursuing teaching to the exclusion of scholarship.

The dysfunctional norms could be changed by decanal pronouncements in favor of the Socratic method and a faculty-implemented reward system geared toward more thoughtful scholarship requiring longer gestation periods. The third norm could be countered by a reward system incentivizing scholarship or by hiring productive, young scholars who would shift the norm toward a more scholarly orientation.[290] Dysfunctional norms can also arise due to "perverse reputational cascades"[291] in which parties like fashionistas derive income or reputation from encouraging others to buy the latest fashions. This phenomenon is due to change agents "pursuing ephemeral personal gains."[292] An inefficient norm may arise, but one would think that if it were highly inefficient, a corrective force would upset it.

The occurrence of norms like smoking may have increased as a result of the fashionable associations between smoking and movie stars. When such dysfunctional norms persist, the government can seek to change them by acting as a change agent. Private parties can become norm entrepreneurs as well as enforcers,[293] sanctioning those who smoke in public. The government can also intervene by pursuing change through publicity, such as the Surgeon General reports documenting the illnesses caused by smoking.[294] Thus, information can be promulgated to counteract a bad norm. In addition, state and municipal governments have acted to ban smoking in public.[295] Those laws were in response to the transactional impediments to allocating space between smokers and non-smokers.[296]

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287. *Id.*; Harold Demsetz, *Toward A Theory of Property Rights,* 57 AM. ECON. REV. 347, 352–53 (1967).

288. Ellickson, *supra* note 40, at 8.

289. *See id.* at 24 (discussing how changes in group membership can lead to changing norms).

290. *Id.*

291. *Id.* at 34.

292. *Id.* at 35.

293. *Id.* at 28.

294. Ellickson, *supra* note 40, at 41.

295. *E.g.*, Robbie Brown, *In the Tobacco-Rich South, New Limits on Smoking*, N.Y. TIMES, July 21, 2012, at A14, *available at* http://www.nytimes.com/2012/07/21/us/atlanta-curbs-smoking-part-of-southern-wave-of-bans.html?_r=0.

296. *See* Ellickson, *supra* note 40, at 28–29, 38, 40 (explaining that the amassing of new information about the health risks of first- and second-hand smoke led medical researchers and public health officials to emerge as norm entrepreneurs and society to become more hostile towards those smoking in their presence and establishments).

CONCLUSION

Traditionally, economics was not interested in norms as this discipline was indifferent to the way parties acquired preferences. It assumed that people took the information provided to them by the market and made choices based on expected utility. Law shared this disinterest as it assumed that parties would perceive law as an exogenous given and obey laws because of the coercive power of the state. Gradually, economists and lawyers became interested in norms because they recognized their effects on parties' behavior and choices. Analyzing norms and human behavior that predate markets and states allows analysts to understand how parties could cooperate in a non-market setting and how norms might help foster exchanges in other settings, including markets. Additionally, scholars may then understand how norms bring order even without a coercive state as well as how informal enforcement of norms, as institutions, might actually make markets and other institutions work better than if the law operated without such informal constraints. By studying how private parties bring order despite the absence of a coercive state and the idea of a norm as the result of an exchange, one can better understand how modern states, private agreements, public laws, and market economies work in conjunction with the norms and human behavior patterns that underlie all communities. These institutions of norms, public law, private law and agreements, the state, and markets are all alternative and complementary ways of (and sometimes substitutes for) addressing the same problem of social ordering to maximize welfare. Understanding that norms and their functions may shift, and therefore, that the relative role played by norms, public law, private law, markets, and institutions may also evolve to serve those underlying needs in changed circumstances presents an issue for comparative institutional analysis at a micro level.

Custom in American Property Law: A Vanishing Act

HENRY E. SMITH*

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INTRODUCTION

Custom isn't what it used to be. Custom today plays a smaller role in American law, and American property law in particular, than it did before the late nineteenth century. This Article advances two related hypotheses for the decline of custom in American property law. First, the law faces a general constraint of information costs in incorporating custom, and second, developments in American law since the nineteenth century have made courts, legislatures, and commentators less receptive to incurring the costs of incorporating custom into property law.

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All legal systems, including those that incorporate custom into the law, face informational constraints. For information-cost reasons it is difficult for custom to be detailed and generally applicable at the same time. Something usually has to give. First, custom can be detailed and confined to informal use within a smaller community.[1] For example, merchants in a given industry in a given city might have customs about delivery times or quality of goods. Or the users of a common pool resource like a grazing area or a fishery might have customs of proper use. Second, custom can feed into the law where law adopts and reinforces existing regularities of behavior. For example, which acts show an intent to abandon things is part of everyday knowledge, which exists in semi-isolation of the law, but the law of abandonment makes use of such behavior in a factual sense. Third, the law might incorporate custom by allowing it to directly define rights and duties, but in such situations custom must be stripped down, simplified, and formalized in order to be usable by a wide and impersonal set of actors.[2]

This constraint of simplicity and formality for substantive direct use of custom in the law applies with special force in that part of property law that deals with in rem rights. An in rem right binds the widest and most impersonal class of duty bearers. In many contexts, from its origins in the aftermath of the French Revolution to modern China, the *numerus clausus* principle (property comes in a closed number of standard forms) on the one hand and the use of custom in property law on the other have stood in great tension.[3] Legislatures might educate the public about the details of a custom, but in such cases they are doing something very similar to ordinary legislation where custom loses some of its advantage of being already familiar to its audience. Thus, for law to incorporate custom, it usually must be adapted from application in smaller communities by stripping out some of the details and becoming more formalized.

For a variety of reasons, American property law has become less receptive to this process of simplifying and formalizing custom as part of the development of property. First, earlier uses of custom had natural law and natural rights overtones. Starting some time in the nineteenth century, there was a move away from natural law and natural rights. Custom may have been too associated with natural law and natural rights to remain welcome as a source for substantive lawmaking. Second, positivism became popular over the course of the nineteenth century, and narrow

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1. *See, e.g.*, EUGEN EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 58–64, 496–98 (W. Moll trans., Harvard Univ. Press 1936) (1913) (arguing that law is based to a large extent on customs of everyday life and that many social groupings besides the state exert coercive power); ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 52–64 (1991) (focusing on the operation of social norms in close-knit groups and hypothesizing that close-knit groups will develop norms that maximize group welfare).

2. *See* Henry E. Smith, *Community and Custom in Property*, 10 THEORETICAL INQUIRIES L. 5, 41 (2009) [hereinafter Smith, *Community and Custom*] ("Judges and juries largely lack community knowledge, and the process of proving a custom and filtering it through doctrines requiring 'certainty' with a view toward 'generality' has the effect of adaptation through formalization.").

3. Henry E. Smith, *Standardization in Property Law*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 148, 168 (Kenneth Ayotte & Henry E. Smith eds., 2011); *see also* Smith, *Community and Custom*, *supra* note 2, at 35 ("In the aftermath of the French Revolution, many feudal customs were removed from property law under the banner of the *numerus clausus*."); Yin Tian, *Reflection on the Criticism of* Numerus Clausus, 1 FRONTIERS L. CHINA 92, 94–95 (2006) (describing how opponents of civilian-style *numerus clausus* in East Asian legal systems advocate more open-ended incorporation of custom into law). *See generally* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1 (2000).

versions of positivism tend to look towards legislatures as a source of law and to emphasize the consciously designed character of legal orders. Third, custom can be seen as a threat to legal centralization, which was on the increase in the late nineteenth and twentieth centuries. Fourth, a deference to custom is associated with respect for tradition and is somewhat in tension with a lawmaking role for judges. Especially with the rise of legal realism, such constraints on the judicial function were no longer welcome. Finally, the traditional role of custom in the law may have become somewhat obscure because of the fusion of law and equity. The equity courts had a special role in enforcing—or, if not enforcing, taking into account—the customs of intermediate-sized groups. Notions like good faith were also informed by custom, but after the fusion of law and equity, the link between good faith and custom would not be constrained by the limits of equity courts and substantive equity.

Overall, a combination of information-cost constraints on custom and developments culminating in legal realism has had the effect of diminishing the chances that customs would be incorporated into the law.

Part I will set forth the informational trade-off, in which law, custom, and all communication must choose between the reach or extensiveness of the audience and the intensity of the information it conveys. The trade-off implies that basing law on in rem custom is difficult and should be rare, because generality and formalism will tend to go together. Part II shows how groups in between the in personam and in rem—intermediate-sized groups—can support somewhat general custom. For this reason, intermediate-sized groups can serve as laboratories, upon which the law can draw. Judges or legislatures can adapt such quasi in rem custom and make it in rem by making it more formal and general. American property law exhibits some famous examples of this process, especially in whaling and mining law. In Part III, I argue that a number of trends culminating in legal realism have made it less likely that quasi in rem custom will serve in this role. These macro trends include the decline of natural law and natural rights thinking, the rise of positivism, increasing legal centralism, greater suspicion of tradition and made orders, and the fusion of law and equity. A brief conclusion follows.

I. THE INFORMATIONAL TRADE-OFF

Custom reflects an informational trade-off. It can be detailed and require much background knowledge, but then it is very hard to reach a wide audience. Thus, the most limited customs are the ones that are easiest to emerge, but the law faces a trade-off if these customs are to be treated as part of the law. Either they can apply only in a limited domain to a limited group, or they must be stripped down and formalized to make them easier for more widespread and impersonal audiences to navigate. Thus, we should expect a correlation between the formality and generality of custom on the one hand and the extensiveness of its audience on the other.

Controversies over the law merchant illustrate this trade-off. According to a familiar story, medieval merchants developed a body of law governing their transactions that was not merely local, but also not promulgated by a central authority.[4] According to this view, the law of merchants was a spontaneous order,

4. *See* LEON E. TRAKMAN, THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW 7–9

which some have hypothesized gives it a greater chance of being efficient than "made" legal orders like codes.[5]

Recently, scholars have given theoretical, empirical, and historical reasons to question this picture. Emily Kadens has shown that merchants' customs were not simultaneously general and detailed.[6] Some merchant custom was detailed and local. More substantive general rules tended to be supplied by legislation or standard form contracts.

Part of the motivation for the rosy view of a general spontaneously created law merchant stemmed from its role in the incorporationist project of Karl Llewellyn and the drafters of the Uniform Commercial Code. The idea was that the Code would invoke merchant usages to give content to its rules. Judges would ideally hear from expert witnesses to learn of the relevant custom and apply it in order to fill gaps and interpret terms in contracts.[7] Lisa Bernstein has called this strategy into question for

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(1983) ("The only law which could effectively enhance the activities of merchants . . . would be suppletive law, *i.e.*, law which recognized the capacity of merchants to regulate their own affairs through their customs, their usages, and their practices.").

5. *See* F. A. HAYEK, NEW STUDIES IN PHILOSOPHY, POLITICS, ECONOMICS AND THE HISTORY OF IDEAS 3–23 (1978) (arguing that the error of constructivism lies in thinking social orders are intelligently made rather than selectively evolved); F. A. HAYEK, LAW, LEGISLATION AND LIBERTY 50 (1973) [hereinafter HAYEK, LAW, LEGISLATION, AND LIBERTY] ("It is because it was not dependent on organization but grew up as a spontaneous order that the structure of modern society has attained that degree of complexity which it possesses and which far exceeds any that could have been achieved by deliberate organization."); FRIEDRICH CARL VON SAVIGNY, ON THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE 30 (Abraham Hayward trans., Arno Press 1975) (1814) ("[A]ll law is originally formed in the manner . . . customary law is said to have been formed: i.e. that it is first developed by custom and popular faith, next by jurisprudence,—everywhere, therefore, by internal silently-operating powers, not by the arbitrary will of a law-giver."); Richard A. Epstein, International News Service v. Associated Press*: Custom and Law as Sources of Property Rights in News*, 78 VA. L. REV. 85, 86 (1992) ("That information [provided by custom] is generated by trial and error from below, and those practices that survive have good claim to being beneficial (one could almost say efficient or wealth-maximizing) for the community at large."). Hayek did see a role for judges in stripping away the accidental properties of custom in the process of applying it more generally, but he was not clear about what this process entailed. *See* HAYEK, LAW, LEGISLATION, AND LIBERTY, *supra* note 5, at 100 ("[A]lthough rules of just conduct . . . will in the first instance be the product of spontaneous growth, their gradual perfection will require the deliberate efforts of judges . . . who will improve the existing system by laying down new rules.").

6. Emily Kadens, *The Myth of the Customary Law Merchant*, 90 TEX. L. REV. 1153, 1193–94 (2012); *see also* Felix Dasser, *Mouse or Monster? Some Facts and Figures on the* Lex Mercatoria, *in* 2 GOLBALISIERUNG UND ENSTAATLICHUNG DES RECHTS: NICHTSTAATLICHES PRIVATRECHT—GELTUNG UND GENESE [GLOBALIZATION AND DENATIONALIZATION OF THE LAW: NON-STATE PRIVATE LAW—VALIDITY AND GENESIS] 129, 132–39 (Reinhard Zimmermann ed., 2008) (distinguishing trade usage and general principles of law and arguing that *lex mercatoria* is a relatively unimportant "mouse").

7. Originally this was supposed to take the form of merchant tribunals or merchant juries. *See* Allen R. Kamp, *Uptown Act: A History of the Uniform Commercial Code: 1940–49*, 51 SMU L. REV. 276–77, 278 n.4, 280 (1998) (noting that Llewellyn initially proposed a fairly detailed version of this reliance on trade norms, including the input of merchant juries, but in the face of criticism eventually the drafters compromised on notions like "unconscionability"); James Whitman, *Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 YALE L.J. 156, 174 (1987) (pointing out that when Article 59's proposed institutional framework of merchant tribunals was dropped, the Code retained the substantive notions they were supposed to decide, including "custom," the "law merchant," "good faith," and "reasonableness"); *see also* Robert E. Scott, *The Rise and Fall of Article 2*, 62 LA. L. REV. 1009, 1060–63 (2002) (detailing the controversial development and the failure of Article 2 as a generalized guide to decisions involving custom). For Llewellyn's take in the midst of this period, see Karl N. Llewellyn, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 873, 873–76 (1939) (arguing

theoretical and empirical reasons.[8] The mechanism by which detailed merchant codes would spread beyond particular localities is difficult to specify in theory. And, as a matter of practice, trade associations had great difficulty creating codes out of the welter of varying local customs. Merchants generally did not support the incorporationist strategy either. Further, as things turned out, neither the drafters nor courts have followed through on the empirical work of finding the putative uniform customs in a trade.[9] Here it is questionable whether even an intermediate (but often large) group of participants in a trade employs substantively important uniform customs.

A. Generality and Formality

The informational trade-off leads us to expect that only general customs that are simple and formal can apply to many scenarios. General custom will tend to be relatively simple and track preexisting focal points.[10] Legislatures by contrast can cause information to be salient: statutory law is not as reliant on pre-existing knowledge as custom is. The types of custom that support possession would be good examples. The informal possessory rights to parking spots after snowstorms in Chicago are marked with milk crates and broken lawn furniture, and it is said that these markers are quite easy to interpret.[11] The more a custom travels to new

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that merchant norms can be incorporated into commercial law without merchant tribunals, and noting the flexibility of German law of sales despite generalities in the civil code).

8. *See generally* Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710 (1999).

9. *See* Lisa Bernstein, Trade Usage in the Courts: The Flawed Evidentiary Basis of Article 2's Incorporation Strategy, 3 (Mar. 2012) (unpublished manuscript), *available at* http://www.law.northwestern.edu/colloquium/law_economics/documents/Spring2012_Bernstein_Trade_Usage.pdf (concluding that "[t]he types of 'objective' trade usage evidence that the strategy [of the Uniform Commercial Code] relies on to minimize the risk of interpretive errors—such as expert witness testimony, trade codes, and statistical evidence—are rarely introduced in sales-related litigation").

10. *See* Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1659–63 (2000) (discussing the role of focal points in coordination).

11. *See* Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 81 (1985) (citation omitted) ("In my home town of Chicago, one may choose to shovel the snow from a parking place on the street, but in order to establish a claim to it one must put a chair or some other object in the cleared space. The useful act of shoveling snow does not speak as unambiguously as the presence of an object that blocks entry."); *see also, e.g.*, Richard A. Epstein, *The Allocation of the Commons: Parking on Public Roads*, 31 J. LEGAL STUD. S515, S528 (2002) ("During the winter of 2000–2001 in Chicago, it was commonplace to see dug-out parking spots on side streets that were then marked with chairs, tables, or stools that were (presumably) placed there by their owner as a sign that the parking place had an owner who held a right to return to the spot at any time. In the local language, the party who dug out the spot had 'dibs' on the space."); John Kass, *Park If You Dare in a Street Spot Saved with a Chair*, CHI. TRIBUNE (Jan. 20, 1999), http://articles.chicagotribune.com/1999-01-20/news/9901200282_1_chairs-parking-dibs ("I'm talking survival of our species during times of street parking shortage. I'm talking the ancient Kass Postulate of I Got Dibs Over By Here. You've seen it work in the city and suburbs. You've seen the ugly chrome chairs on the street. And you see how these objects d'snow form a series of non-verbal cues, which are understood by most humans."); *see also* John Kass, *Snowstorm's Charm Can't Stand up to Law of Street*, CHI. TRIBUNE (Jan. 5, 1999), http://articles.chicagotribune.com/1999-01-05/news/9901050044_1_bedford-falls-neighbors-wonderful-life (setting forth a system of Dibs and relating a satirical story of misunderstanding about a chair-marked spot). These informal possessory rights are illegal but have gained widespread acceptance. *Dibbing Through the Snow*, CHI. TRIBUNE (Jan. 4, 2005), http://articles.chicagotribune.com/2005-01-04/news/0501040267_1_shovel-dibs-snow.

contexts, the harder it is for custom to draw on localized knowledge. I will focus on the audience for custom and whether it is numerous and socially distant. But first, it is important to show the implications of the informational trade-off for a more familiar set of issues in the relation of custom to law: generality and formalism.

When a rule is more general it gathers more situation types for a single treatment. Generality is closely related to formalism in that a formal rule makes less reference to context.[12] Thus, generality and formalism tend to go together.[13] By eschewing context, the rule can apply more broadly. The downside to this is lack of fit; more formal and more general rules tend not to be fully congruent with their purposes.

Custom has at times featured in debates over formalism versus contextualism. Thus, legal realism in all its forms looked kindly on taking context into consideration and was skeptical of the value of formal and general rules.[14] Realists' opposition to what they took to be the formalism and conceptualism of classical jurisprudence is well-known.[15] But this leaves us with the problem of how judges are to decide, and whether the law could be certain enough despite its lack of formalism and generality. Many of the realists reached back to sociological jurisprudence (and indirectly to the historical school in Germany) to invoke mores as a way out of this dilemma.[16] According to some realists, judges, like everyone else, were unconsciously influenced by general custom.[17] Because this custom was at once substantive and relatively uniform, one could predict what judges would do. For those who invoked mores and the "folkways" of William Graham Sumner in explaining the content of the law, whether a judge made law or legislation, the law has some legitimacy because people in society widely participate in it.[18] Interestingly, some of the anti-codifiers of the late nineteenth century both anticipated aspects of legal realism and invoked custom as the basis for and source of predictability and certainty in common-law development.[19]

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12. Francis Heylighen, *Advantages and Limitations of Formal Expression*, 4 FOUND. SCI. 25, 49–53 (1999); Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1112–13 (2003) [hereinafter Smith, *The Language of Property*].

13. Henry E. Smith, *Emergent Property*, *in* PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW (James Penner & Henry E. Smith eds., forthcoming, Oxford Univ. Press); *see also* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND LIFE 49 (1991) (pointing out that conversational norms except seeing eye dogs from a "no dogs" ban, but a formal general rule bereft of that context applies to all dogs regardless).

14. Smith, *The Language of Property*, *supra* note 12, at 1106.

15. There is some dispute as to the accuracy of the realists' portrayal of their predecessors as formalist. *Compare* BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 67–68 (2009) (stating that realism in judging had existed decades before the appearance of legal realists and that the current identification of historical jurists with legal formalism is incorrect), *with* Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?*, 16 LEGAL THEORY 111, 117 (2010) (concluding that Tamanaha's claim "turns out to trade on a sloppy and loose characterization of realism that does no justice to the distinctive theses of Realists. . .").

16. Lewis Grossman, *Langdell Upside-Down: James Coolidge Carter and the Anticlassical Jurisprudence of Anticodification*, 19 YALE J.L. & HUMAN. 149, 156–59, 204–09 (2007).

17. *Id.*

18. *See* WILLIAM GRAHAM SUMNER, FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES, AND MORALS 521 (1906) (promoting a realistic approach to moral behavior by stating "the mores can make anything right and prevent condemnation of anything"); *see, e.g.*, Karl N. Llewellyn et al., *Law and the Modern Mind: A Symposium*, 31 COLUM. L. REV. 82, 84 n.1 (1931) (citing as influences John Commons, Franz Boas, and William Graham Sumner).

19. Grossman, *supra* note 16; Aniceto Masferrer, *Defense of the Common Law Against Postbellum American Codification: Reasonable and Fallacious Argumentation*, 50 AM. J. LEGAL HIST. 355, 383 (2008–

Nevertheless, in the sense of a binding custom that would constrain judges' decision-making, the anti-codifier defense of custom was challenged precisely on the grounds that customs were too "uncertain, complex, contradictory, and confusing," thus leaving judges as the real decision-makers.[20]

This reliance on general custom or mores assumes a general level of knowledge of implicit custom to support the certainty of judicial decision-making. In other words, the entire state or the United States as a whole is a community for purposes of supporting the needed customs. It is hard to know what to make of such assertions. They might be seen as a simple denial of the informational trade-off—a misplaced aspiration to reach an in rem set of duty bearers with highly contextual and information-intensive legal content. If everyone in society shares large amounts of common knowledge, then they might well spontaneously coordinate on the development of a great many conventions. The question is how far this can get us on the types of legal issues that courts face, from the time to object to a delivery of nonconforming goods under a contract, to the rights of good faith purchasers, and on and on. The tendency for those positing an unconscious general custom is to start identifying bad practice and false consciousness.[21] Another problem is that this theory seems almost designed not to be verifiable in principle. How can we tell whether a legal decision maker is reflecting such a general unconscious custom?

By contrast, there are quite a number of instances in which custom is important to the application of a general legal standard. For example, on some approaches to the law of nuisance, what counts as a reasonable land use would turn in part on what is usual in the neighborhood.[22] It is possible that, if a social practice were firm enough to count as a custom, such a custom would be taken seriously in the determination of whether a given activity constitutes a nuisance. But in such a case the custom is not being applied directly—it is being taken as evidence of what is reasonable. Likewise, where following a trade custom is taken as evidence of good faith, custom is not being incorporated in the law but is being tossed into the mix in the determination of good faith. Likewise, custom can be said to feature indirectly in the law of abandonment. A chair left next to a door is likely to be interpreted as owned (and being moved) whereas a chair on the curb is likely to be deemed

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10) [hereinafter Masferrer, *Defense of the Common Law*]. James Coolidge Carter's use of custom as part of a characterization of the proposed Field Civil Code as civilian in nature was a less than accurate but effective argument. *See id.* at 415–30 (detailing the history of and reactions to Carter's argumentation); *see also* Aniceto Masferrer, *The Passionate Discussion Among Common Lawyers About Postbellum American Codification: An Approach to Its Legal Argumentation*, 40 ARIZ. ST. L.J. 173, 199 (2008) (arguing that Carter misleadingly shaped the debate as "popular custom-democracy-common law against foreign, despotic political regimes-codification-civil law system").

20. JOHN COMMONS, LEGAL FOUNDATIONS OF CAPITALISM 300 (Univ. of Wis. Press 1995) (1924), *quoted in* Lewis A. Grossman, *James Coolidge Carter and Mugwump Jurisprudence*, 20 LAW & HIST. REV. 577, 614 (2002); *see also* Masferrer, *Defense of the Common Law*, *supra* note 19, at 383 (arguing that judges, "to a considerable extent," made law); Frederick Schauer, *Pitfalls in the Interpretation of Customary Law*, *in* THE NATURE OF CUSTOMARY LAW: LEGAL, HISTORICAL AND PHILOSOPHICAL PERSPECTIVES 13 (Amanda Perreau-Saussine & James Bernard Murphy eds., 2007) (analyzing how customary law and the custom meant to create customary law are interpreted).

21. *See, e.g.*, Grossman, *supra* note 16, at 159 (explicating John Carter's distinction between custom and "bad practice" or false custom); Grossman, *supra* note 20, at 613–14 (critiquing Carter's "semantic and intellectual contortions" in explaining away false customs).

22. Robert G. Bone, *Normative Theory and Legal Doctrine in American Nuisance Law*, 59 S. CAL. L. REV. 1101, 1151 (1986).

abandoned. But this amorphous knowledge is highly defeasible and context-dependent. If the chair by the roadway has a sign saying "don't take," there is no act evidencing an intent to abandon, as required by the law of abandonment.

In general, the law of possession has a standardizing effect through its protection of third parties. There are indeed extra-legal customs that seem to be widespread, in part because of shared social knowledge, and in part because of an appeal to basic non-natural meaning. As Robert Ellickson hypothesizes, if one visits a very different country from one's own, many of the signals that resources are privately owned (fences, certain markings) would be easy to understand.[23] More esoteric signals, like local conventions to use certain elaborate markers (e.g., tied bamboo knots) to make claims to land are a closer case.

Nevertheless, courts are reluctant to allow custom to create duties in people outside the usual community where the custom prevails.[24] Thus, in first-possession cases the customs of hunters of foxes or whales are allowed to bind non-hunters only if the outsiders are likely to have notice at low cost.[25]

B. In Personam Versus in Rem

Besides the number of contexts in which a custom might operate, the information-cost approach points to the importance of another aspect of the extensiveness of a custom: the set of duty bearers. If a custom or any other norm, legal or non-legal, casts a duty on others generally, we can call it in rem.[26]

As I have argued in previous work, the informational trade-off implies that in rem rights and duties will tend to be more formal than in personam ones.[27] Again, "formal" here means relatively invariant to context. The language of first order logic is more formal than English because the latter requires more context for its interpretation. Semantic meaning is more formal than pragmatic inference; asking someone to close a window by saying, "Please close the window," is more formal than trying to achieve the same effect by saying, "It's cold in here," to someone standing next to a window.[28] Defining formalism this way makes it implausible (or impossible) that any system will be wholly formal or contextual.[29]

In rem rights cast duties on a wide and impersonal set of duty bearers. Compared with the members of the community of a custom's origin, it is less likely

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23. Robert C. Ellickson, *The Inevitable Trend Toward Universally Recognizable Signals of Property Claims: An Essay for Carol Rose*, 19 WM. & MARY BILL OF RTS. J. 1015, 1025 (2011).

24. *See* Smith, *Community and Custom*, *supra* note 2, at 28–30 (discussing "use of particular customs which puts an informational burden on duty-holders and enforcer—and one that grows as the distance between them and the originating community increases").

25. Smith, *The Language of Property*, *supra* note 12, at 1115–25.

26. Ellickson, *supra* note 23, at 1026; *see* Bone, *supra* note 22, at 1121–22 (delineating Holland's conceptualization of in rem rights as antecedent duties).

27. Smith, *Community and Custom*, *supra* note 2.

28. Smith, *The Language of Property*, *supra* note 12, at 1131–33; *see* Paul Grice, *Logic and Conversation*, *in* STUDIES IN THE WAYS OF WORDS 22, 26–32 (1989) (defining shared communicative principles which are required to hold conversations).

29. Heylighen, *supra* note 12, at 25, 37; *see* Henry E. Smith, Property, Equity, and the Rule of Law (Sept. 2012) (unpublished manuscript) (on file with the *Texas International Law Journal*) (explaining that due to information costs and risks of opportunism, property law as a system incorporates formalist and equitable elements).

that such members of an impersonal set of duty bearers will have the needed background knowledge and ability to deal with duties of high information content. We can use network theory to identify the communities, which are modular in featuring dense and multiplex links between members and relatively weaker ties to nonmembers.[30] When the law incorporates custom into property law, the incorporated custom will tend to be more formal if the rights and duties are in rem.

The most familiar role for custom arises in an in personam context, as it relates to contracts. As mentioned earlier, the Uniform Commercial Code adopts an incorporationist strategy for trade custom.[31] But what is trade custom? Parties themselves can supply explicitly an idiosyncratic rule for themselves, such as for time for delivery, and can even be their own lexicographers.[32] But for this to happen we need no recourse to custom. A custom has to be pre-existing and widespread, and must have normative force other than what is given by the parties.[33] The end result is an interpretive rule for contracts but one that doesn't have much to do with custom in the sense of spontaneous bottom-up emergence of regularities in behavior that come to be recognized as normatively binding.

At the other end of the spectrum are in rem rights and duties. Property rights are the prototypical example. Can they arise by custom? Again, yes and no. Truly in rem custom must be simple enough to play off of people's general knowledge. Some accounts of the custom of deferring to possessors are like this: challengers will defer to incumbents.[34] The custom is very widespread (all of society or close to it) but is very minimal in content. It might even be hard-wired.

In rem custom would have to rely on very salient focal points. Otherwise the knowledge necessary for the average member of society to navigate the world would be overwhelming.

Much of custom in property is local, but not too local, custom. It can be applied to a group, especially one that is in control of a common pool resource. These customs make reference to specific uses of the resource. For instance customs of resource use might prescribe how many animals a commoner can graze on the commons or what kind of tether must be used. In zooming in on such uses, such customs are more like governance than exclusion,[35] and because they bind the

30. Smith, *Community and Custom*, *supra* note 2, at 19.

31. Bernstein, *supra* note 9, at 1–4.

32. *See* Smith, *The Language of Property*, *supra* note 12 (discussing idiosyncratic rule in the context of internalizing and externalizing costs).

33. *See infra* notes 41–44 and accompanying test; *see also* Jim C. Chen, *Code, Custom, and Contract: The Uniform Commercial Code as Law Merchant*, 27 TEX. INT'L L.J. 91, 97–98 (1992) (describing test for legally binding custom under English common law as featuring seven requirements, including ancientness, obligation, and universality).

34. The custom or convention is modeled as an equilibrium strategy in a hawk-dove (or chicken) game—the interesting question being why the other equilibrium of always deferring to the invader is not generally seen. *See* ROBERT SUGDEN, THE ECONOMICS OF RIGHTS, CO-OPERATION AND WELFARE 58–61, 94–95 (1986) (explicating hawk-dove game theory and discussing why conventions might arise favoring possessors); *see also* Carol Rose, *Game Stories*, 22 YALE J.L. & HUMAN. 369, 385–86 (2010) (setting out and critiquing the chicken game approach to respect for property).

35. *See* Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453, S453–55 (2002) [hereinafter Smith, *Exclusion Versus Governance*] (arguing that in the context internal to common property, governance rules rather than exclusion rule should be applied).

members of the group only, they are not fully in rem. The set of duty bearers is an intermediate-sized group—neither all the members of society, nor the relatively small set of parties to a contract. It is neither fully in rem nor in personam, and it could be called quasi in rem.

Sometimes custom is made fully in rem, but here the roles of courts and legislatures tend to be underappreciated. Part of the process is formalizing the custom. This is a matter in part of writing it down, but also involves making it simpler and more in accord with people's general knowledge. Alternatively, the public has to be educated about the custom in question, which is also costly.

The most famous invocations of in rem custom in recent times relate to beach access. In some states, public rights to the dry-sand area have been established through judicial recognition of custom.[36] Such a theory is an alternative to the doctrines of public trust, implied dedication, and prescription.[37] Carol Rose treats some of these approaches as providing the basis for what she calls "inherently public property."[38] Property is inherently public if the unorganized public governs its use.[39] Sometimes the government will step in as a steward on behalf of the public, but its role as trustee or steward differs from its role as proprietor, say of a post office building. Other examples of the public inherently organizing itself are rare. A classic example is the maypole dancing ground; villagers might have a right to dance around the maypole on a given piece of ground on certain days.[40] But such customs are highly local and involve a defined set of right holders and duty bearers.

In inherently public property, the government might be duty bearer as trustee, but are rights in inherently public property in rem? Yes, in theory, but the main duty bearers are those who would block access to the public resources, namely private owners of neighboring or overlapping parcels.

This brings us to how intermediate-sized groups can be a source of custom for law, if law is receptive. Later I will show why American law has become less receptive to custom from intermediate-sized groups.

II. QUASI IN REM CUSTOM AS A LABORATORY

When we speak of custom as part of property law, we usually mean that the content of a custom is given legal force. At one time, the common law was regarded as "general custom,"[41] and the theory was that custom had the force of law on its own and was merely recognized by courts.[42] The famous test set out by Blackstone can be

36. Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 714 & n.16 (1986) (citing a well-known example, State *ex rel.* Thornton v. Hay, 462 P.2d 671 (Or. 1969)).

37. *Id.*

38. *Id.* at 720.

39. *See id.* at 721 (explaining that "historic doctrines about 'inherently public' property in part vested property rights in the 'unorganized public'").

40. *Id.* at 740–41 (citing Hull v. Nottinghan, 33 L.T.R. 697 (Ex. D. 1876) for the customary right to have maypole dance and other recreation on owner's land).

41. 1 WILLIAM BLACKSTONE, COMMENTARIES *67–68 (George Chase ed., Banks Law Pub. Co. 1914) (1765) ("General customs . . . are the universal rule of the whole kingdom, and form the common law, in its . . . usual signification.").

42. *See, e.g.*, CARLETON KEMP ALLEN, LAW IN THE MAKING 86–87 (1927) (asserting that English Courts apply proven customs as operative law).

regarded as one example of such criteria as part of a process of adaptation, because such approaches ask whether a custom satisfies requirements of antiquity, continuity, peaceable use, certainty, reasonableness, compulsoriness (not by license), and consistency.[43] The criteria of certainty and reasonableness in particular could screen—or shape—the custom to be formal enough to reach an in rem audience. Certainty in particular ensured that a custom was tied to a particular locality, thus making it easier to keep track of which information was operative where, in a fashion reminiscent of exclusion strategies.[44] These days we are more likely to ask whether judges will look to custom in shaping the common law. Either way, the informational trade-off plays an important role in the process whereby custom acquires legal force or not.

As I suggested in an earlier work, custom may enter the law neither as automatically as enthusiasts claim, nor serve merely as window dressing for judicial law-making as its critics claim.[45] As Bruno Leoni argued, custom can be an important source of law even if lawyers and judges generalize and crystalize it in the process of adapting it into the law.[46] According to the informational trade-off, common law judges and legislatures adapt custom if it is to apply more widely and to cast duties on wider groups of people.

The simplest situations in which custom might form the content of the law involve custom that applies to an intermediate-sized group both informally and formally. Such is the situation with common-pool resources. Groups with access to common-pool resources sometimes institute governance regimes among themselves.[47] For example, those with access to a grazing commons might devise and enforce stints and other rules of proper use. The law might incorporate such rules but they would not apply further than to the commoners themselves. To the outside world the internal governance rules are largely irrelevant.[48] The main message is one of exclusion, which is comparatively simple.

Custom among trade groups has attracted much attention. These groups are smaller than whole societies and yet they are more geographically and socially

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43. BLACKSTONE, *supra* note 41, at *76–78; *see also* Smith, *Community and Custom*, *supra* note 2, at 8 (discussing Blackstone's test and certainty of customs).

44. *See, e.g.*, Andrea C. Loux, *The Persistence of the Ancient Regime: Custom, Utility, and the Common Law in the Nineteenth Century*, 79 CORNELL L. REV. 183, 194, 213–14 (1993) (tracing the origin of certainty as a crucial element of custom from the need to demarcate local custom from the common law).

45. Smith, *Community and Custom*, *supra* note 2, at 7–12 (outlining the debate between critics of and enthusiasts for custom).

46. BRUNO LEONI, FREEDOM AND THE LAW 216–18 (3d ed. 1991).

47. *See, e.g.*, GARY D. LIBECAP, CONTRACTING FOR PROPERTY RIGHTS 10–28 (1989) (developing a framework for analyzing conditions under which those with access to a resource will contract for economic property rights); ELINOR OSTROM, GOVERNING THE COMMONS (1990) (analyzing self-organization and self-governance in common-pool resource situations); Rose, *supra* note 36 at 742–43 (suggesting that a group capable of creating customs might be a reasonable holder of public property to manage resources).

48. *See* Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 155 (1998) (noting that common property is "commons on the inside, property on the outside"); Smith, *Exclusion Versus Governance*, *supra* note 35, at S474–75 (noting that exclusion from common property is more effective than governance for in rem audiences). *Cf.* Barry C. Field, *The Evolution of Property Rights*, 42 KYKLOS 319, 323 (1989) (differentiating collective decisions about the behavior of commoners in use or a resource and collective decisions about exclusion of non-commoners from the resource).

dispersed than the participants in a common pool resource regime.[49] And, as noted earlier, the existence of non-trivial uniform trade customs in trade groups has come in for much questioning.

Property raises another scenario, in which a custom that applies in a defined community might be adapted by the law to apply more widely. This has happened in mining law, in which local codes were formalized and simplified in the process of becoming part of federal mining law.[50] In a particularly dramatic example, consider the *pedis possessio* doctrine, which gives miners who have not yet acquired a claim against the government a right to work a given spot as against other miners, as long as the miner keeps working the spot.[51] How large a spot was and how long the miner could leave without losing these rights were a matter of local knowledge. These days courts interpret the *pedis possessio* doctrine as tracking the boundaries of the claimed area.[52] This may well be larger than the "spot" but it is much smaller than would be most sensible in the uranium industry.[53] For this reason, uranium companies have to do make-work on each of a large set of aggregated claims. As is the case more generally, property law at its most formal tends to track parcel boundaries even if this is not optimally tailored to the uses to which the parcel is being put.

In both the in personam and the in rem context, the source of custom—if it is to be part of the law at all—might be termed quasi in rem.[54] It has to apply to an intermediate-sized group. If the norm starts out as in personam it is not wide enough to count as a custom. If the custom is already in rem it is unlikely to supply much beyond very basic coordination. But courts or legislatures can take custom among intermediate-sized groups and apply it in in personam contexts, or it can generalize—by formalizing—custom beyond the intermediate-sized group to the rest of society. The jump from quasi in rem to full in rem is shorter than from in personam to in rem, and so quasi in rem custom can be expected to need less adaptation (substantive alteration for scaling up and formalization for impersonal duty bearers) to make it suitable for the in rem context.

III. THE DECLINE IN CUSTOM IN AMERICAN PROPERTY LAW

The problem then becomes whether and under what circumstances the law is hospitable to adopting rules that emerge in intermediate-sized groups. Here is where developments culminating in legal realism come in. There are a number of reasons why legal realism would not be hospitable to quasi in rem custom. Some of these considerations apply to in personam uses of custom; all of them are involved for in rem adaptations of custom.

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49. *Cf.* Kadens, *supra* note 6 (rebutting the case for the existence of significant transnational custom among medieval merchants).

50. Smith, *Community and Custom*, *supra* note 2, at 30–34.

51. *Id.* at 32–34.

52. *Id.* at 33.

53. *Id.* at 33–34 (citing Geomet Exploration, Ltd. v. Lucky Mc Uranium Corp., 601 P.2d 1339 (Ariz. 1979)).

54. *See* Int'l News Serv. v. Assoc. Press, 248 U.S. 215, 236 (1918) (defining news stories as "quasi property"); *see also* Shyamkrishna Balganesh, *Quasi-Property: Like, But Not Quite Property*, 160 U. PA. L. REV. 1889, 1891–93, 1900–01 (2012) (analyzing often-ignored significance of quasi property notion from *International News Service v. Associated Press*).

A. Natural Law and Custom

Although there is no necessary connection between custom and natural law or natural rights, they have often been associated. Natural law is based on notions of morality and the working out of what is reasonable; it is based on reason.[55] In this older legal thought, custom has also been associated with reason through the notion of policy.[56] Universal customs are candidates for reasonable solutions to universal problems and so reflect good policy or might even serve as evidence of natural law. But not all customs are reasonable. And in the common law, which as noted above was once thought to be general custom, judges were thought to bring natural law principles into the law in part through their evaluation of custom.[57] Recall that judges were supposed to filter out unreasonable customs. With the rise of legal realism, the association of custom with natural law and natural rights would become a liability, and as we have seen, the realists who took custom seriously did not view it as based on natural law. They took a highly diffuse view of custom, leaving a greater scope for judicial decision-making.

B. Positivism

Custom is in tension with more extreme versions of positivism. Over the course of the nineteenth century, positivism displaced natural law and natural rights. Just as some versions of positivism are compatible with a role for morality in the law,[58] there is no reason in many versions of positivism why custom could not be a source of law. But narrow Austinian-style positivism that identifies law with commands of a sovereign does not naturally look at custom as a source of the law.[59] Moreover, positivism is in part motivated by a search for neutrality that responds to a perceived lack of agreement about morality upon which older natural law and natural-rights thinking depended.[60]

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55. Charles Grove Haines, *The Law of Nature in State and Federal Judicial Decisions*, 25 YALE L.J. 617, 617–20 (1916).

56. 2 JAMES BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE 563–68 (1901) (connecting the notion of beneficial social customs to the Law of Nature); *see* Haines, *supra* note 55, at 622 ("Natural justice, or the reason of the thing, which the common law recognized and applied was a direct outgrowth of the law of nature which the Romans identified with jus gentium and the mediaeval canon lawyers adopted as being divine law revealed through man's natural reason."). *Cf.* James Q. Whitman, *Why Did the Revolutionary Lawyers Confuse Custom and Reason?*, 58 U. CHI. L. REV. 1321, 1322 (1991) (arguing that confusion of custom and reason was a seventeenth and eighteenth century development arising out of an evidentiary crisis of custom).

57. BLACKSTONE, *supra* note 41, at *68–69.

58. *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW 250 (2d ed. 1994) ("[T]he rule of recognition may incorporate as criteria of legal validity conformity with moral principles or substantive values.").

59. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 28 (Noonday 1954) (1832) ("[B]efore [a custom] is adopted by the courts, and clothed with the legal sanction, it is merely a rule of positive morality."). *Compare* Jack Goldsmith & Steven Walt, Erie *and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 675–76 (1998) (examining legal positivism's historical, conceptual, and normative connections to the *Erie* case) *with* George Rutherglen, *Custom and Usage as Action Under Color of State Law: An Essay on the Forgotten Terms of Section 1983*, 89 VA. L. REV. 925, 926 (2003) (arguing that legal positivism ignores the role custom plays in the law, particularly in the Section 1983 context).

60. *See, e.g.*, Desmond Manderson, *Modernism, Polarity, and the Rule of Law*, 24 YALE J.L. & HUMAN. 475, 487 (2012) ("The development of law's structural, systemic, and linguistic neutrality—legal

C. Legal Centralism

Legal centralism emphasizes the role of a central authority in promulgating and enforcing law. Legal centralism is not surprisingly taken as a foil by scholars of social norms.[61] The relation of legal centralism and custom is similar to that between Austinian positivism and custom, in that looking to localized and dispersed custom is in tension with centralism.

As with positivism, one could devise a sophisticated centralism that is more consistent with a role for custom. The central authority could adopt custom as the standard in law, say property law. Nevertheless, a central authority would be deferring to non-central actors.

Accordingly, custom might be regarded as a threat to legal centralism. This is why custom has appealed to libertarians.[62] If anything, libertarians have tended to exaggerate the efficiency of custom and the effectiveness of its development of uniform standards precisely to counter the claims of legal centralists.[63]

Conversely, the Progressives and Legal Realists were not fond of intermediate groups interposing themselves between the state and the individual.[64] The idea of custom applying outside of a very close-knit context is a threat to the kind of legal centralism they favored.[65]

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positivism—was a *creature* of modernity and a consequence of the steady leeching away of some underlying religious or customary sense of the common good or justice. The whole notion of positivism was built on the claim that we cannot agree on any of these things anymore; it replaced that kind of justification for law with a purely structural or formal justification which was entirely content-free."); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1129, 1176 (1987) (arguing that the Founders subscribed to a notion of what she terms "fundamental law . . . a mixture of custom, natural law, religious law, enacted law, and reason," and that this fundamental law was lost because of the rise of positivism).

61. *See* Robert C. Ellickson, *A Critique of Economic and Sociological Theories of Social Control*, 16 J. LEGAL STUD. 67, 81–90 (1987) (discussing legal centralism and refuting it through empirical evidence involving the dependence of society on norms instead of legal authority).

62. *See, e.g.*, HAYEK, LAW, LEGISLATION, AND LIBERTY, *supra* note 5, at 47 (comparing the role of government to a "maintenance squad at a factory" where the government functions "not to produce any particular services or products to be consumed by the citizens, but rather to see that the mechanism which regulated the production of those goods and services is kept in working order"); LEONI, *supra* note 46, at 216 (contrasting two competing theories of law making, one where "the interpreters of the law perform a mostly passive and receptive task: They reflect the habits and customs of the people by describing them in their own language . . . ," and the other where "customs and habits would just derive from the work of the lawyers and judges"); Richard A. Epstein, *The Path to* The T.J. Hooper*: The Theory and History of Custom in the Law of Tort*, 21 J. LEGAL STUD. 1, 11 (1992) ("[T]he vast bulk of customs will emerge in repetitive settings where their clarity and power is likely to be strong.").

63. *See, e.g.*, Kadens, *supra* note 6, at 1182 (explaining that customs had been subject to manipulation and misunderstanding where "[d]isputants could claim, with apparent certainty, that a particular custom existed even though, in fact, no one had previously realized it and, in some cases, even though no such custom did genuinely exist"); *see also* Smith, *Community and Custom*, *supra* note 2, at 11–12 (describing how proponents of social norms counter the claims of legal centralists "that custom on its own lacks legitimacy and bears no legitimacy and bears no guarantee of suitability for anyone other than its generators" by acknowledging that "in order to apply customs to those outside the group of origin we need some filter to prevent illegitimate customs from spreading").

64. Smith, *Community and Custom*, *supra* note 2, at 10–12.

65. *Id.* at 11.

D. Tradition and Made Orders

Custom suggests limits on social engineering by judges. Again, opponents of social engineering may see custom as perhaps more of a bulwark than it is. The presumption these days is that general rules are statutory, or at least designed (a "made order," in Hayek's terminology).[66]

As discussed earlier, a bland assumption that judges are constrained by custom is a way of justifying common law decision making against efforts at codifying the law. But the informational trade-off suggests that this level of pervasive but detailed custom needs to be demonstrated rather than assumed.

E. The Fusion of Law and Equity

The role of custom has been more obscure since the fusion of law and equity. Equity courts had a special role in enforcing custom. Equity also bore a close relation to natural law, and many sources refer to "natural equity."[67] Equity in turn was also closely associated with custom, since ancient Rome.[68] Even equitable devices like the class action originated in suits by intermediate groups (such as common pool resource users and parishioners) to enforce their rights.[69]

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66. HAYEK, LAW, LEGISLATION, AND LIBERTY, *supra* note 5, at 52–54.

67. *See, e.g.*, 2 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES [On the Law of War and Peace: Three Books] ii.6, at 193 (Francis W. Kelsey transl., Oxford at the Clarendon Press, 1925) (1646) ("We must, in fact, consider what the intention was of those who first introduced individual ownership; and we are forced to believe that it was their intention to depart as little as possible from natural equity."); GULIAN C. VERPLANCK, AN ESSAY ON THE DOCTRINE OF CONTRACTS: BEING AN INQUIRY HOW CONTRACTS ARE AFFECTED IN LAW AND MORALS, BY CONCEALMENT, ERROR, OR INADEQUATE PRICE 37 (New York, G. & C. Carvill 1825) ("[Lord Mansfield made] the judgments of the law correspond with the actual practice of intelligent merchants, and with those universal usages, founded partly in convenience, and partly in natural equity, which might be considered as the common commercial and maritime law of the civilized world."); *see also* Bright v. Boyd, 4 F. Cas. 127, 133 (C.C.D. Me. 1841) (No. 1875) ("I have ventured to suggest, that the claim of the *bonâ fide* purchase [in unjust enrichment for improvements made to real property] is founded in equity. I think it founded in the highest equity; and in this view of the matter, I am supported by the positive dictates of the Roman law. The passage already cited, shows it to be founded in the clearest natural equity. '*Jure naturae aequum est.*' ['By the law of nature it is equitable.']") (Story, Circuit Justice); Moses v. Macferlan, [1760] 97 Eng. Rep. 676, 681 (K.B.) (Mansfield, J.) ("In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."). *But see* 1 FRED F. LAWRENCE, A TREATISE ON THE SUBSTANTIVE LAW OF EQUITY JURISPRUDENCE § 3 (1929) (arguing that it is fallacious to regard equity as based on natural justice).

68. Cicero, *Topica* 23.90 (H.M. Hubbell trans., Loeb Classical Library 1949), *quoted in* ALDO SCHIAVONE, THE INVENTION OF LAW IN THE WEST 302 (Jeremy Carden & Antony Shugaar trans., 2012):

> But when the discussion is about what is fair and unfair, all the topics of equity are brought together. These are divided in a two-fold manner, depending on whether they regard nature or a positive rule. Nature has two parts: to give to each his own, and the right to punish a wrong. Equity, which consists of a positive rule, is in three parts: one part rests on statutes; one depends on agreements; the third is confirmed by the antiquity of custom.

Note that in the original both "nature" ("natura") and the "positive rule" or "arrangement" ("institutio") are equity, so that "[e]quity" in the last sentence refers to the institutional side of equity ("Institutio . . . aequitatis"), not its entirety, as the translation ("which consists of . . . ") might imply.

69. Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866, 868 (1977) (citing Z. CHAFEE, SOME PROBLEMS OF EQUITY 149–295 (1950)).

In other works, I argue that a major role for substantive equity was to discourage opportunism.[70] The challenge is to find reliable and stable proxies for opportunism. These center on bad faith and disproportionate hardship. Adherence to or violation of a custom can be taken as evidence of opportunism.[71] Also, areas of law like misappropriation have their origins in equity's enforcement of custom.[72] This made many nervous, because the danger would be that equity would start declaring in rem rights.[73] Equity was supposed to refrain from declaring in rem rights or altering property rights.[74]

CONCLUSION

Like law and any other communication, custom is subject to an informational trade-off. At the same cost, custom can apply in an informationally intensive manner to a smaller, more expert community, or reach a more extensive set of contexts and duty bearers with a more formal message. Custom exemplifies this trade-off dramatically because it is generated in particular communities and often presupposes knowledge particular to such communities. Some custom applies to a large enough group that it is a step away from being in rem. In property, custom in a quasi in rem context can be a source of experiments from which the law can benefit. Judges and legislatures can draw on such customs in fashioning law that has an in rem effect. They do so by substantively altering customs for a larger scale and stripping them down and making them more formal. Nevertheless, a variety of trends since the mid-nineteenth century have made it more difficult to adapt custom into the law, including the decline of natural law and natural rights, the rise of legal positivism of a narrow sort, a rise in legal centralism, an orientation toward spontaneous orders, and the fusion of law and equity. Custom in American property law has long been on the way out.

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70. Henry E. Smith, *The Equitable Dimension of Contract*, 45 SUFFOLK U. L. REV. 897, 903–11 (2012); Henry E. Smith, *Rose's Human Nature of Property*, 19 WM. & MARY BILL RTS. J. 1047, 1050 (2011); Henry E. Smith, *An Economic Analysis of Law Versus Equity* 4 (unpublished manuscript) (on file with the *Texas International Law Journal*).

71. *Cf.* Kadens, *supra* note 6 at 1188–89 (describing how the understanding of customs may opportunistically "evolve over time" so that "[j]urors could 'remember' the custom in different ways under the influence of . . . self-serving ends . . . . [P]arties seeking to win their suits and believing that they needed a custom to provide a rule of decision in their favor could also assert customs that either did not exist or that were not yet recognized to exist even as a usage").

72. Henry E. Smith, *Equitable Intellectual Property: What's Wrong with Misappropriation?*, *in* INTELLECTUAL PROPERTY AND THE COMMON LAW (Shyamkrishna Balganesh ed., forthcoming).

73. *See, e.g.*, Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899 (2007) (charging that indiscriminate judicial use of custom creates overbroad intellectual property rights).

74. *See, e.g.*, Charles M. Gray, *The Boundaries of the Equitable Function*, 20 AM. J. LEGAL HIST. 192, 202–06 (1976) (examining the controversies in seventeenth century Anglo law over the use of equity and custom).

The Jurisprudence of Custom

FREDERICK SCHAUER*

INTRODUCTION

Is "customary law" a redundancy? Jeremy Bentham and John Austin both came close to believing that the very idea of customary law was essentially a contradiction in terms,[1] but few these days take such a dim view of the legal status of custom.[2] Yet although such extreme skepticism about the legality of custom might now be a bit passé, custom's role in a legal system still remains somewhat of a puzzle. Initially, for example, we might wonder about just how the customs, habits, or practices of ordinary people can become law. If law is prototypically created by legislatures and other bodies clothed with formal governmental authority, as classical positivists such as Bentham and Austin believed, then how is it that law can emerge from the practices of ordinary people? This question forms the beginning of the puzzle, because when we answer this question (and especially if we answer it by referring to the way in which such practices might be adopted, internalized, and applied by courts), we then become hard-pressed to distinguish the way in which custom acquires the status of law from the way in which we understand positive law generally, at least in a post-Hartian world.[3] And when we see the legality of custom in terms of the internalization of norms by judges rather than exclusively as the issuance of orders by the sovereign, we must then confront further questions relating to how customary law differs, if at all, simply from law. These, in a nutshell, are the questions I propose to address here.

The argument I advance in this Article commences with the widely accepted notion that the custom that does or can have the status of law must be a normative custom and not merely a description of a non-normative empirical regularity.[4] That

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1. *See infra* Part I.

2. *Cf.* RUPERT CROSS, PRECEDENT IN ENGLISH LAW 156–57 (3d ed. 1977) (describing Austin's views on the sources of law as "outmoded").

3. *See infra* Part II.

4. *See* Alfred F. Beckett, Ltd. v. Lyons, [1967] 1 Ch. 449 (Eng.); Mills v. Mayor of Colchester, [1867] 2 L.R.C.P. 476 (Eng.). For a discussion of the requirement that custom must have existed as an obligation and not merely a habit, see David J. Bederman, *The Curious Resurrection of Custom: Beach Access and*

is, a custom, to be available as a genuine source of law under the traditional common law view, must be understood to exist as of right. To qualify as enforceable law, the custom must, even prior to its formal recognition by the courts, have created in some people an obligation to conform,[5] and consequently have created a claim of right (even if not a formal legal one) on the part of those aggrieved by the non-conformance of others. This principle is standard common law fare, but it generates a puzzle. At least since H.L.A. Hart,[6] and perhaps earlier,[7] most legal theorists, or at least most legal theorists in the positivist tradition, have accepted that the internalization of a rule of recognition, or, more precisely, the official internalization of the ultimate or master rule of recognition, is both a necessary and sufficient condition for the existence of law.[8] But, the internalization of a rule of recognition as a criterion for law then begins to resemble the criteria for recognition of custom as a valid source of law. To the extent that this is so, there emerges the possibility that internalized normative custom simply is law, and in large part law simply is internalized custom. Insofar as these claims are true, then the legality of custom is not the puzzle that many legal theorists in the positivist tradition, including Hart himself, have sought to solve. Instead, it may be that the internalization of a rule of recognition is best explained in ways that make custom not merely a puzzling, if minor, appendage to the larger positivist picture of law, but instead an important component of the foundations of all of law. Or so I will argue here.

I. BENTHAM, AUSTIN, AND THE SKEPTICAL TRADITION

Modern jurisprudence, especially in the legal positivist tradition, begins with Jeremy Bentham.[9] His principal work of legal theory—now published as *Of the*

Judicial Takings, 96 COLUM. L. REV. 1375, 1391–92 (1996).

5. *See* CROSS, *supra* note 2, at 26 (describing a traditional view in which the common law includes "the usages and customary rules by which Englishmen have been governed since time immemorial"); *see also id.* at 160 (noting that custom must have been observed "as of right" to count as law).

6. H.L.A. HART, THE CONCEPT OF LAW 113 (Penelope A. Bulloch & Joseph Raz eds., 2d ed., Clarendon Press, 1994) (1961).

7. Hart himself notes that traces of his central ideas can be found in HANS KELSEN, GENERAL THEORY OF LAW AND STATE 110–24, 131–34, 369–73, 395–96 (Anders Wedberg trans., 1949); JOHN WILLIAM SALMOND, JURISPRUDENCE 137, app. I (Glanville Williams ed., 11th ed. 1957).

8. For valuable analyses of Hart's basic idea of the internal point of view, see generally Dennis Patterson, *Explicating the Internal Point of View*, 52 SMU L. REV. 67 (1999); Veronica Rodriguez-Blanco, *Peter Winch and H.L.A. Hart: Two Concepts of the Internal Point of View*, 20 CAN. J.L. & JURISP. 453 (2007); Scott J. Shapiro, *What is the Internal Point of View?*, 75 FORDHAM L. REV. 1157 (2006). For a general overview and discussion of the rule of recognition, see generally Larry Alexander & Frederick Schauer, *Rules of Recognition, Constitutional Controversies, and the Dizzying Dependence of Law on Acceptance*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 175 (Mathew Adler & Kenneth Himma eds., 2009); Melvin A. Eisenberg, *The Concept of National Law and the Rule of Recognition*, 29 FLA. ST. U.L. REV. 1229 (2002); Anthony J. Sebok, *Finding Wittgenstein at the Core of the Rule of Recognition*, 52 SMU L. REV. 75 (1999); Anthony J. Sebok, *Is the Rule of Recognition a Rule?*, 72 NOTRE DAME L. REV. 1539 (1997).

9. The word "modern" is important. Thomas Hobbes, for example, is no doubt an important figure in the development of what we now call legal positivism. *See generally* Sean Coyle, *Thomas Hobbes and the Intellectual Origins of Legal Positivism*, 16 CAN. J.L. & JURISP. 243 (2003). Even Thomas Aquinas, perhaps the most prominent figure in the natural law tradition, recognized the idea of human law created by secular authorities. Michael S. Moore, *The Plain Truth about Legal Truth*, 26 HARV. J.L. & PUB. POL'Y 23, 38 n.43 (2003). Nevertheless, a less ambiguous legal positivist perspective almost certainly owes most of its origins to Bentham.

Limits of the Penal Branch of Jurisprudence[10]—remained largely undiscovered and thus unknown until the 1930s.[11] By that time, John Austin's exposition and development of themes that had actually originated with Bentham had long emerged as the canonical positivist text.[12] Bentham's thoughts about the nature of law, and about the role of custom within it, have consequently come to us primarily through Austin, although it is certainly likely that Austin's presentation owes much to Austin's own ideas as well.[13] Indeed, Bentham said relatively little about what we now understand as customary law. He used the phrase "customary law" on some number of occasions, but he was referring to common law in general, an idea and a practice for which he exhibited unalloyed contempt.[14] What we now understand to be customary law—the normative practices of a community originating from community norms and not from governmental, legislative, or judicial decree—was labeled "traditionary law" by Bentham,[15] and he dismissed it, with characteristic scorn, as the law for "barbarians."[16] Thus, for an account of the position of what we now think of as customary law within the classic positivist perspective, we must leave Bentham behind and look primarily to Austin.

As is well-known, the basic idea in the Austinian account of the nature of law is the claim that law consists of the commands of the sovereign, with the backing of those commands by the threat of sanctions being an essential part of law and of the very ideas of legal duty and legal obligation.[17] Without the threat of sanctions, Austin insisted, law would be little more than a series of official requests.[18] Or they may be suggestions. For Austin, it was the threat of sanctions that converted these requests and suggestions into law.[19] He thus distinguished the commands of the law from the commands of God, the unofficial commands of society's values, or the

10. THE COLLECTED WORKS OF JEREMY BENTHAM: OF THE LIMITS OF THE PENAL BRANCH OF JURISPRUDENCE xi (Philip Schofield ed., 2010) [hereinafter BENTHAM, OF THE LIMITS OF THE PENAL BRANCH OF JURISPRUDENCE]. The earlier, better-known, but now superseded version is JEREMY BENTHAM, OF LAWS IN GENERAL (H.L.A. Hart ed., Athlone Press, 1970) (1782).

11. *See* BENTHAM, OF THE LIMITS OF THE PENAL BRANCH OF JURISPRUDENCE, *supra* note 10, at xii ("The work was 'discovered' amongst the Bentham Papers deposited in University College London Library by Charles Warren Everett, who recognized it as the continuation of *An Introduction to the Principles of Morals and Legislation*, and published it for the first time in 1945 with the title *The Limits of Jurisprudence Defined: Being Part Two of An Introduction to the Principles of Morals and Legislation*.").

12. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED XIV, XX-XXII (Wilfrid E. Rumble, Cambridge University Press, 5th ed. 1995) (1832) (describing how Austin recognized that a discussion of what is law required a long, detailed treatise and how the evolution of scholarly interpretation of Austin's work demonstrated this work's significance) [hereinafter AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED].

13. *See* Andrew Halpin, *Austin's Methodology: His Bequest to Jurisprudence*, 70 CAMB. L.J. 175, 187 (2011) (relying on John Stuart Mill in noting that Austin tended to be more complex and subtle than Bentham).

14. BENTHAM, OF THE LIMITS OF THE PENAL BRANCH OF JURISPRUDENCE, *supra* note 10, at 161–63, 185–97.

15. *Id.* at 161.

16. *Id.* at 162.

17. *See* JOHN AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW 89 (Robert Campbell ed., London, John Murray, 5th ed. 1895) (1861) [hereinafter AUSTIN, LECTURES ON JURISPRUDENCE] (describing the source of law as commands of the sovereign); *see also* AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED, *supra* note 12, at 13, 18–25.

18. Jules L. Coleman & Brian Leiter, *Legal Positivism*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL PHILOSOPHY 228, 231 (Dennis Patterson ed., 1996).

19. *Id.*

commands of anyone else, even if backed by threats, was the notion of sovereignty.[20] There were innumerable sources of commands backed by threats, but only those sanction-backed commands emanating from the sovereign power were to count as law properly so called.[21]

Although the foregoing paragraph represents an egregious oversimplification of Austin's work,[22] it should be sufficient for present purposes to demonstrate why a satisfactory explanation of the legal status of custom was so important from the Benthamite and Austinian perspective. It is central to the basic idea of a custom—indeed, it is the definition of custom—that customs do not emanate from the sovereign, but instead arise in a bottom-up fashion from the normative practices of the population.[23] Yet, although custom's bottom-up rather than top-down character jeopardized its status as law in the classical positivist scheme of Bentham and Austin, its role in common law adjudication was centuries old and finely honed by the time that Bentham, and later Austin, were writing.[24] Consequently, an account of law that did not include and give at least some explanation of custom and of its legal status would have been woefully incomplete. Thus Austin, especially, found himself forced to take on the task of explaining how custom could ever be law in a system in which law was understood, at least by him, as the explicit and sanction-backed command of the sovereign.

Austin's solution to the problem, or at least his problem, is well known. Custom is not law by itself, he argued, but becomes law only upon it being duly adopted by judges, who are not only (tacitly) authorized by the sovereign to do so, but are also (equally tacitly) authorized by the sovereign to threaten or impose sanctions in the event of non-compliance.[25] Thus, custom becomes law, albeit in several steps, by virtue of the tacit command of the sovereign.[26] Although the connection between custom and law for Austin is consequently both derivative and indirect, the status of custom as law arises in the Austinian account precisely because of the links between custom and sovereignty, and between custom and the sanctions that are provided by the sovereign's own implicit authorization.

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20. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED, *supra* note 12, at 24–25.

21. Coleman & Leiter, *supra* note 18, at 231.

22. More extensive expositions and analyses of the full Austinian picture can be found in W.L. MORISON, JOHN AUSTIN (William Twining ed., 1982); WILFRID E. RUMBLE, THE THOUGHT OF JOHN AUSTIN: JURISPRUDENCE, COLONIAL REFORM, AND THE BRITISH CONSTITUTION (1985); Brian Bix, *John Austin*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/austin-john/ (last modified Feb. 23, 2010); Frederick Schauer, *Was Austin Right After All? On the Role of Sanctions in a Theory of Law*, 23 RATIO JURIS 1 (2010) [hereinafter Schauer, *Was Austin Right After All?*].

23. Or, in the context of international law, from the practices of states. *See generally* DAVID BEDERMAN, CUSTOM AS A SOURCE OF LAW (2010); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

24. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, at 74–79 (1765).

25. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED, *supra* note 12, at 34–36, 141–42, 238–39. *See generally* THEODORE M. BENDITT, LAW AS RULE AND PRINCIPLE 63–64 (1978) (explaining Austin's views on custom). Additional explanations and analyses of Austin (and Bentham) on custom can be found in David J. Bederman, *Public Law and Custom*, 61 EMORY L.J. 949 (2012); Kunal M. Parker, *Context in History and Law: A Study of the Nineteenth-Century American Jurisprudence of Custom*, 24 L. & HIST. REV. 473, 512–13 (2006); Ekow N. Yankah, *The Force of Law: The Role of Coercion in Legal Norms*, 42 U. RICH. L. REV. 1195, 1202 (2008).

26. Bentham's views about the legal status of custom are given a sympathetic and nuanced explication in GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 218–62 (1986).

II. CUSTOM AND MODERN POSITIVISM

Austin's basic account of the nature of law held sway for more than a hundred years, from the middle of the nineteenth century to the middle of the twentieth.[27] There were of course numerous criticisms and emendations,[28] but the basic Austinian picture provided the paradigm for jurisprudential thinking in ways that Austin, who died feeling profoundly unappreciated,[29] could never have anticipated.[30]

The dominance of the Austinian picture evaporated, however, with the publication in 1961 of H.L.A. Hart's *The Concept of Law*.[31] Taking dead aim at Austin throughout much of the beginning of the book,[32] Hart challenged the centrality of sanctions to the idea of law, and thus challenged the bedrock of what had first been Bentham's, and then became Austin's, account of the very idea of legality.

A sanction-based picture of law, Hart argued, was defective in numerous ways. First of all, it could not explain very much about law in its empowering rather than regulating mode, and thus could only with distortion explain the way in which law created the possibility of making wills, trusts, contracts, and corporations, for example, while still leaving it up to citizens whether they should make such instruments or engage in such transactions in the first place.[33] Nor could a sanction-dependent model allow us to understand why, in modern constitutional societies, the sovereign as well as the subjects were bound by law.[34] Austin might well have offered an explanation for some aspects of a system in which a legally unconstrained sovereign made rules for its subjects, but that picture fails to explain how it can be that sanction-independent sovereigns nevertheless can and do internalize and obey the constitutional and other laws that bind them as well as their subjects.

Hart's proposed replacement of Austin's picture not only involved the attempt to explain law in terms of the union of primary rules of obligation with secondary rules of adjudication, change, and most importantly recognition,[35] but it also incorporated the introduction of the idea of the internal point of view.[36] We have an internal point of view about rules, including legal rules, Hart argued, when we use those rules to guide our own conduct and to criticize or otherwise evaluate the conduct of others.[37] And when officials have an internal point of view with respect to the ultimate rule of recognition in a society, that rule of recognition specifies what is to count as law and what does not. For Hart, this official internalization of the

27. *See* Frederick Schauer, *The Best Laid Plans*, 120 YALE L.J. 586, 588–89 (2010) (reviewing SCOTT J. SHAPIRO, LEGALITY (2011)) [hereinafter Schauer, *The Best Laid Plans*] (describing the ascendancy and then decline of the Austinian picture of law).

28. *See* Bix, *supra* note 22 ("[T]he weaknesses of [Austin's] theory are almost better known than the theory itself.").

29. *See id.* (discussing Austin's tendency for melancholy and perfectionism, juxtaposed with his belief in his relative obscurity).

30. *See id.* (discussing how Austin's work became more well known after his death).

31. *See generally* HART, *supra* note 6.

32. *Id.* at 18–78.

33. *Id.* at 28–39.

34. *Id.* at 50–78.

35. *Id.* at 79–99.

36. *Id.* at 86–91; *see also* sources cited *supra* note 8 and accompanying text.

37. HART, *supra* note 6, at 79–88.

ultimate rule of recognition, when combined with the union of primary and secondary rules, constituted a legal system.[38] If an ultimate rule of recognition enables officials to determine what is to be understood as law, and if officials internalize that ultimate rule of recognition in making legal determinations, then we have law. Period. Sanctions are widespread in modern legal systems, Hart acknowledged,[39] and may be contingently useful in assuring or at least increasing compliance and fostering effectiveness, he further admitted, even describing sanctions in the language of necessity with respect to real legal systems.[40] But the conceptual role of sanctions is decidedly unnecessary, Hart insisted, for, in theory, an entire legal system could exist with no sanctions at all.[41]

III. CUSTOM AND THE RULE OF RECOGNITION

Hart's anti-Austinian account of law rejected both the necessity of sanctions for the existence of legality, as well as the strongly top-down picture of law that Austin painted. And, by jettisoning both coercion and sovereign promulgation as essential features of law, Hart could offer an anti-Austinian account of the role of custom. Writing in more or less the same common law legal tradition as Austin, and against the background of pretty much the same legal history, Hart too seemed to recognize the need to explain the legal status of custom, and he proceeded to do so,[42] albeit rather more implicitly than explicitly.[43] For Hart, a rule of recognition could, but need not, recognize custom as law, and more specifically as law existing prior to judicial application. Similarly, a rule of recognition could, and usually did, recognize statutes as law, and as law existing prior to judicial application.[44] So too with the decisions and opinions of courts.[45] But Hart offered this claim largely in the context of his criticisms of Austin early in *The Concept of Law*,[46] and he never explicitly returned to the question of custom after having laid out in some detail the distinction

38. *Id.* at 91.

39. *Id.* at 36–38 (noting that "every 'genuine' law shall direct the application of some sanction" and that sanctions are "centrally important element[s]").

40. *Id.*; H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 622–23 (1958).

41. This possibility is developed at length and with great sophistication in SCOTT SHAPIRO, LEGALITY 92 (2011). A far briefer but still useful recapitulation is Christopher W. Morris, *State Coercion and Force*, 29 SOC. PHIL. & POL'Y 28, 36–38 (2012). For my own quarrels with a sanction-independent understanding of the nature of law, see Frederick Schauer, *On the Nature of the Nature of Law,* 98 Archiv für Rechts- und Sozialphilosophie 457 (2012); Frederick Schauer, *Positivism Before Hart*, 24 CAN. J.L. & JURISP. 455, 458 (2011); Schauer, *The Best Laid Plans*, *supra* note 27, at 588–89; Schauer, *Was Austin Right After All?*, *supra* note 22, at 1. Related arguments can be found in Danny Priel, *Sanction and Obligation in Hart's Theory of Law*, 21 RATIO JURIS 404 (2008) (arguing against Hart's theory of sanction and obligation).

42. HART, *supra* note 6, at 44–48.

43. Indeed, there is a tension between the way in which the entire Hartian paradigm supports the lawness of customary law (*see* Laurence Claus, *The Empty Idea of Authority,* 2009 U. ILL. L. REV. 1301, 1312–13 (2009) (discussing Hart's explanation of the lawness of customary law)) and Hart's own denigration of customary international law as akin to a more primitive legal system. HART, *supra* note 6, at 89. On this very tension, see David J. Bederman, *Acquiescence, Objection and the Death of Customary International Law*, 21 DUKE J. COMP. & INT'L L. 31, 39–44 (2010).

44. HART, *supra* note 6, at 97–98.

45. *Id.*

46. *Id.* at 44–48.

between primary and secondary rules, the variety of secondary rules, and the fundamental idea of the internal point of view.

Yet, although appreciation and application of the Hartian perspective involves more interpolation and interpretation of Hart than direct quotation from his writings, the interpolation and interpretation are fairly straightforward. Hart insists that many norms and sources can have the status of law, which is determined simply by the relevant officials treating them as law pursuant to a rule of recognition.[47] This rule of recognition itself is law by virtue of a master or ultimate rule of recognition, whose status as the ultimate determinant of law is simply a function of internalization.[48] Just as the ultimate rule of recognition ordinarily, but not necessarily, treats statutes as law and typically treats decided judicial opinions as law, so too could an ultimate rule of recognition treat morality as law, or treat as law any number of other sources of norms that do not have, or do not necessarily have, governmental origins.[49] To understand Hart's account generally, and to understand more specifically why Hart can accept the contingent incorporation of morality as law, is thus to understand why Hart can, and seemingly did, accept the contingent incorporation of custom as law, including custom that originated in popular practice rather than official decrees.[50] Indeed, one can find the same view in the writings of Hans Kelsen, who, even before Hart implicitly addressed the question, recognized that "norms created by custom do not differ radically from norms created by acts of will."[51]

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47. *Id.* at 97–98.

48. Note that this claim is very different from John Chipman Gray's claim that neither statutes nor judicial opinions—nor custom for that matter—are law, but are only sources of law to be drawn on by judges in reaching decisions. JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF LAW 125 (2d ed. 1921). Hart's claim is not that statutes are not law until a judge applies them, which was, more or less, Gray's claim, but that statutes become law by the general practice of some class of officials—such as judges—treating them as law antecedent to the decision of any particular case.

49. The foregoing is consistent with what, in modern jurisprudential debates, tends to be labeled as "inclusive legal positivism." It appears to be the view of positivism adopted by Hart, or at least Hart so claims (under the label of "soft positivism"). HART, *supra* note 6, at 253. The perspective is developed in, for example, JULES COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY (2001); W.J. WALUCHOW, INCLUSIVE LEGAL POSITIVISM (1994); Kenneth Einar Himma, *Inclusive Legal Positivism*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 125 (Jules Coleman & Scott J. Shapiro eds., 2002); David Lyons, *Principles, Positivism, and Legal Theory*, 87 YALE L.J. 415 (1977); Philip Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICH. L. REV. 473 (1977). Whether Hart was correct in aligning himself with inclusive or soft positivism is not entirely without controversy. *See* Leslie Green, *The Concept of Law Revisited*, 74 MICH. L. REV. 1687, 1705–09 (1996) (reviewing H.L.A. HART, THE CONCEPT OF LAW (1994)). Inclusive legal positivism is to be contrasted, in ways not directly relevant to the present paper, with the "exclusive" legal positivism espoused by, for example, Joseph Raz. *See generally* JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS IN LAW AND MORALITY (2d ed. 2009). And, for a careful analysis of the status of customary law under both the inclusivist and exclusivist perspectives, see David Lefkowitz, *Customary Law and the Case for Incorporationism*, 11 LEGAL THEORY 405 (2005).

50. For a similar interpretation of Hart, and for the view that Hart was committed to this view about both customary law and international law, some of his own statements notwithstanding, see NEIL MACCORMICK, H.L.A. HART 143–45 (2d ed. 2008).

51. Richard Tur, *The Kelsenian Enterprise*, *in* ESSAYS ON KELSEN 149, 153 (Richard Tur & William Twining eds., 1986).

IV. CUSTOM AS LAW

If Hart is largely correct about the ultimate rule of recognition and about the internalization of a rule of recognition as lying at the foundations of law, the implications for thinking about custom are substantial. First, and perhaps most importantly, if it is the internalization of rules or norms rather than sovereign command that is central to law itself, then custom no longer occupies any separate or distinct jurisprudential space.[52] It is of course true that there are customs, even customs having normative purchase, that are typically not treated as enforceable law by common law courts.[53] Common law courts do not ordinarily enforce, for example, the custom of writing thank-you notes, of respecting one's place in a queue (in the United Kingdom, for example, but not necessarily in other countries),[54] or of acting respectfully towards the national anthem or in a house of worship. In this respect, what we think of as the law of custom, or the rule of recognition of custom, recognizes only some customs as law, and only some normative customs as law. But, the law in some legal system could, in theory, recognize all customs as law, or all normative customs as law, or no customs at all as law. Under Hart's account, any of these possibilities would be consistent with the existence of a legal system, and such a system could choose any of these options, or any of a number of variations on them.[55] Moreover, although we think that a rule of recognition ordinarily recognizes all statutes of a certain kind as law, or all decisions of certain courts as law, or all constitutional provisions as law, again nothing in the Hartian picture compels that this be so.[56] As the phenomenon of desuetude illustrates,[57] a rule of recognition could recognize as law only most statutes, rather than all of them. And a rule of recognition could recognize only court cases of a certain kind, or from certain jurisdictions, or from certain eras, or even handed down on certain days of the week, as law. The same is true with constitutional provisions. Some rule of recognition—

52. *See* LON. L. FULLER, THE MORALITY OF LAW 232–36 (Rev. Ed. 1969) (chastising Austinian positivism on this score, but not recognizing the import of Hart's contra-Austinian account of customary law).

53. And thus we see the emergence of detailed rules about the age and status of a custom necessary for an English court to treat it as law. *See* Simpson v. Wells, [1872] 2 L.R.Q.B. 214 at 214–17 (Eng.) (discussing the age of the custom in finding "these meetings were not from time immemorial .... Therefore there could not be such a custom, as there could not be any legal origin of it; and consequently there could be no claim of right."); Wyld v. Silver, [1963] Ch. 243, at 243 (Eng.) (finding entitlement through "ancient usage"); Wilson v. Willes, (1806) 103 Eng. Rep. 46, 49 (Eng.); 7 East 121, 127 (noting that a "custom, however ancient, must not be indefinite and uncertain"); *see also* Mills v. Mayor of Colchester, [1867] 2 L.R.C.P. 476 at 486 (Eng.) ("[L]ong enjoyments in order to establish a right must have been as a right, and therefore neither by violence nor by stealth, nor by leave asked from time to time."). *See generally* E.K. Braybrooke, *Custom as Sources of English Law,* 50 MICH. L. REV. 71 (1951).

54. *See* Michael Reisman, *Lining Up: The Microlegal System of Queues*, 54 U. CIN. L. REV. 417, 444 (1985) (noting the self-policing nature of queue behavior in the United Kingdom).

55. *See* Coleman & Leiter, *supra* note 18, at 228, 237.

56. *See* Soper, *supra* note 49, at 487.

57. *See* Blanchard v. Ogima, 215 So. 2d 903, 905 (La. 1968) (applying doctrine of desuetude to deny applicability of vicarious liability provision in the Louisiana Civil Code); Corey R. Chivers, *Desuetude, Due Process, and the Scarlet Letter Revisited*, 1992 UTAH L. REV. 449, 451 (noting that the doctrine of desuetude can be applied to void statutes); Linda Rodgers & William Rodgers, *Desuetude as a Defense*, 52 IOWA L. REV. 1 (1966) (explaining the doctrine of desuetude); *see also* CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE BAD FOR AMERICA 97–99 (2005) (urging the use of desuetude to void outdated and rarely-enforced statutes dealing with sexual behavior). Also relevant in this context is GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982) (calling for judges to use common law principles to revise what they perceived to be obsolete statutes).

or better, some practices of recognition[58]—could amend a constitution outside of the formal amendment procedures, and by the same token could eliminate some provisions even outside of any formal amendment or repeal provisions.[59] Thus, the fact that the rule of recognition as it exists in, say, English law, recognizes only some customs as law is not fundamentally different from the way in which the same rule of recognition might recognize only some statutes, only some court decisions, or only some constitutional provisions as law. Moreover, there is no reason why a rule of recognition could not recognize (some) local customs as law even to the derogation of general common law or to the derogation of statutes.[60] The difference, one might say, is in the details, but not in the basic picture.

V. LAW AS CUSTOM

Related to the way in which custom is or becomes law, and does so in a manner not fundamentally different from the way in which statutes and court decisions become law, is the fact that under this account even ordinary, non-customary law is itself custom, albeit custom of a certain global type. In important respects, law is principally, at least in the Hartian account, the internalization of a practice (possibly a practice long existing in history and possibly not) and the treatment of it as normative.[61] I could write a constitution for the United States today and make it valid according to its own terms, but, however internally valid it might be, it would still not be the Constitution of the United States, precisely because it would not have been accepted and internalized by the people or by the class of relevant officials.[62] If in some fantastic world the people and the officials did accept such a constitution as the Constitution, it would then become the law.[63] But this process, whether it be of the real Constitution or my pseudo-constitution, is no different from the way in which the practices of the Walmer fishermen become law,[64] except that the procedures have become more entrenched in the latter case than in the former. But in both cases it is the internalization of a normative system, or the internalization of

58. As Brian Simpson influentially argued, there is no reason to think of a legal system's master or ultimate practices of recognition in rule-like terms, as they are better, especially in common law systems, understood as a messy collection of constantly changing practices of lawyers and judges, especially in common law systems. A.W.B. SIMPSON, *The Common Law and Legal Theory*, *in* OXFORD ESSAYS IN JURISPRUDENCE 73 (A.W.B. Simpson ed., 1973). To the same effect, see Sebok, *Is the Rule of Recognition a Rule?*, *supra* note 8 (concluding that the practice of recognition is not a rule).

59. *See* Frederick Schauer, *Amending the Presuppositions of a Constitution*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 145 (Sanford Levinson ed., 1995).

60. *See* R.W.M. DIAS, JURISPRUDENCE 248 (4th ed. 1976).

61. HART, *supra* note 6, at 99–100.

62. There are interesting disputes about whose internalization is to count. Hart thought that the relevant internalizing body is the judiciary, but it might be the people, other officials, or even, and ultimately, the army. These questions are important both practically and jurisprudentially, but they are not germane to the present discussion.

63. The example is developed at some length in Schauer, *Was Austin Right After All?*, *supra* note 22, at 5.

64. Mercer v. Denne, [1904] 2 Ch. 534 (Eng.). *Mercer* and its treatment of the net-drying practices of the Walmer fishermen has become the stock example in many discussions of the status of custom. *See, e.g.*, Andrea C. Loux, *The Persistence of the Ancient Regime: Custom, Utility, and the Common Law in the Nineteenth Century*, 79 CORNELL L. REV. 183 (1993); Robert N. Wilentz, *Judicial Legitimacy*, 49 RUTGERS L.J. 859, 874–78 (1997).

an individual law pursuant to a systemic rule of recognition, that establishes its legal status.

And so too, as the example of the difference between a fictional constitution and the real Constitution was designed to suggest, with the ultimate rule of recognition. Hart says that a legal system exists when there is both a union of primary and secondary rules, and when the ultimate rule of recognition (a secondary rule), is internalized by officials of a particular sort.[65] But in this respect, and with only slight distortion, law just is custom,[66] in the sense that it is actual human practices that turn norms into law, in much the same way that actual human practices make customs normative. There are, to be sure, habits (or customs in a different sense) that are not normative, such as my habit of waking up at a certain time every morning, or the habit perhaps in some societies of planting tulips and not marigolds, or preferring red cars to blue ones. But if at some point it is considered appropriate in that society for citizens to criticize others for planting marigolds instead of tulips, or for driving blue cars and not red ones, then the process by which the mere regularity has become normative shares much in common with the way in which a society adopts this and not that ultimate rule of recognition as the foundation of its legal system.[67]

VI. CUSTOM AND LEGAL INCORPORATION

We might consider the same set of ideas about the affinity between the recognition of custom and the recognition of law itself in a slightly different and potentially more illuminating way. Thus, if we accept Hart's ideas about the non-essential connection between either coercion or sovereignty to law,[68] then it turns out that the practices of the Walmer fisherman, to the extent that those practices have become normative as well as being merely habitual, simply are law.[69] If law under the Hartian account is the internalization of the ultimate rule of recognition by some set of officials or citizens, then there may exist within the community of Walmer fishermen an ultimate rule of recognition specifying which practices of its community will be normative, and what forms of criticism (or sanctions) will be applied against the members of the community who transgress the existing normative practices.

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65. We go astray if we follow Hart into thinking that the rule of recognition must be a rule in any sensible understanding of that term. Rather, the ultimate rule of recognition is best understood as a collection of practices (in the Wittgensteinian sense), practices that may not be best understood in rule-like ways. *See* sources cited *supra* note 43 and accompanying text.

66. This is somewhat easier to see with respect to common law. *See* Joseph Raz, *Intention in Interpretation*, *in* THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 249, 259 (Robert P. George, ed., 1996). On Raz and the legal status of custom under his version of legal positivism, see Lefkowitz, *supra* note 49, at 405 (outlining his argument on the Razian account of the authority of customary law).

67. *Cf.* ROGER A. SHINER, *Law and Morality*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 436, 441 (Dennis Patterson, ed., 1996) (noting that custom can bring law into existence, even if customary law is only a "quantitatively minor part" of most modern legal systems).

68. Hart is slightly more obscure with respect to sovereignty, perhaps because without an account of sovereignty, or at least an account of the relationship between law and the political state, he has a hard time explaining how law is different from the elaborate and internalized rule systems of, for example, the Mafia or the American Contract Bridge League. *See* HART, *supra* note 6, at 23–25 ("It remains indeed to be seen whether this simple, though admittedly vague, notion of general habitual obedience to general orders backed by threats is really enough to reproduce the settled character and continuity which legal systems possess.").

69. *But cf. supra* note 48 and accompanying text.

When this process occurs, then there is law within the community of Walmer fishermen, and the particular practices regarding fish, nets, beaches, and the like will be specific legal norms.

Even if the Walmer fishermen thus have the power to constitute a legal system,[70] the relationship between that legal system and another one occupying the same space (and possibly having access to greater physical force) remains an open question. That is, the legal system of the Walmer fishermen, assuming by hypothesis the internalization and existence of secondary rules including an ultimate rule of recognition, may or may not be adopted by another legal system—call it the Law of England—as its law. The norm system we think of as "English Law" may choose to adopt the norm system that is "Walmer Fishermen Law," or it may choose not to, just as "English Law" may choose to adopt or choose not to adopt any other system of normative customs. But this is not unique to the law of the Walmer fisherman or to law created by custom or by community normative practices. The point is not about customary law, but about the fact that legal systems often must choose whether and how to use the law of other legal systems. Thus, the way in which the Law of England chooses to adopt or not to adopt "Walmer Fishermen Law" is no different from the way in which the Law of England chooses to adopt or not adopt the law of Nebraska, international law, or Sharia law as its law, or the way in which in the U.S. Uniform Commercial Code adopts (some of) the normative practices of merchants as law.[71] In all of these instances there is the development of what, through a post-Hartian lens, we can recognize as a legal system, even if it is not the legal system most closely associated with the sovereign political state. And then there is the question of what the legal system of the sovereign political state will do with respect to the laws created by a different, but possibly geographically (or in some other way) overlapping, legal system.

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70. Hart recognizes the existence of customary rules in "primitive" communities. HART, *supra* note 6, at 91–92, 291–92. But, he seems barely, if at all, to recognize the way in which non-state communities may have the union of primary and secondary rules that he takes to be central to law itself. *Id.* at 79–99.

71. On the way in which U.S. commercial law under the Uniform Commercial Code has essentially adopted the normative customs of the merchant community as (formal) law, see Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465 (1987). On the possibility that the Uniform Commercial Code did not do a very good job of adopting normative customs, see Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710 (1999). And on the undeniably law-like, in precisely Hart's sense, character of various complex (in the primary- and secondary-rules sense) non-governmental systems, see ROBERT ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 191–208 (1991) (describing how the whaling industry in the 19th century, as a "nonhierarchical" group, was able to create a system of norms that "*created* law"); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001) (explaining that the cotton industry established "one of the eldest and most complex systems of private commercial law" with their own administrating institutions); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992) (pointing out that the diamond industry has their own "elaborate, internal set of rules, complete with distinctive institutions and sanctions" in the place of state-created law). Both Ellickson and Bernstein label the systems they study as "extra-legal," but under Hart's account (or Shapiro's), the systems are ones in which there is a union of primary and secondary rules, an ultimate rule of recognition, and the internalization of the ultimate rule of recognition by all or at least most of the relevant participants. Shapiro, *supra* note 8, at 1165. To label such systems "extra-legal" is to associate law with the political state in ways that resonate more with Bentham and Austin than with Hart and his successors.

The law of custom can thus be seen as one manifestation of the law—or the secondary rules, in Hartian terminology—regarding whether the laws of system B shall be adopted by system A.[72] This is a vitally important question, and indeed one becoming ever more important as modern transportation, modern communications, and contemporary governmental transformations increase the probability that legal systems are as likely to be nested or overlapping as abutting. But once we understand the question as one of the relationship between different legal systems and not as the way in which non-law becomes law, we can see that the question of custom—although often very important in particular legal systems, and likely becoming even more important for the reasons just noted—may be of far less jurisprudential significance than Austin thought almost two centuries ago, and less than many have thought ever since. The question is far more one of conflicts of law than of jurisprudence, but it may have taken some jurisprudential work to help us see why this is so.

72. *See* Steven D. Walt, *Why Jurisprudence Doesn't Matter for Customary International Law*, 54 WM. & MARY L. REV. (forthcoming 2013). Despite the title of Walt's article, which makes perfect sense in the context of a discussion centered on *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), his perspective and mine are largely compatible.

Contextualizing Legitimacy

KISH VINAYAGAMOORTHY*

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INTRODUCTION

Bosnia. Rwanda. Darfur. How many times has the international community vowed "never again" only to witness further tragic loss of life in another humanitarian crisis? The outrage over these crises—the deaths of thousands at the hands of their own government—launched renewed efforts to examine the relationship between the sovereignty of a state and the responsibility of the state to its citizens.[1] The examination of this relationship also invited inquiry into the international community's responsibility for crimes perpetrated by a state against its own citizens. These efforts were primarily undertaken by an independent body, the International Commission on Intervention and State Sovereignty (ICISS), which attempted to recast traditional notions of state sovereignty in terms of state responsibilities.[2] The result was the notion of the "responsibility to protect."[3] This responsibility to protect is comprised of three principles: responsibility to prevent, responsibility to react, and the responsibility to rebuild.[4]

This Article argues that the successful implementation of the responsibility to protect requires re-examination of the definition of law and those qualities that distinguish legal norms from other types of ordering principles within society. If this re-examination does not occur, international lawyers working towards the implementation of the responsibility to protect will make law an impediment to its success and not a tool for its facilitation. Similarly, this re-examination is needed in order for an international legal norm on the responsibility to protect to secure a meaningful and lasting commitment from the world's actors. This requires appreciation for other factors and forces—outside the traditional legal system—that strive to make similar changes in the world. A legal norm produced out of such considerations is the only type of legal norm that can potentially bring about the changes in the world that the advocates of the responsibility to protect desire. Through this analysis, this Article brings new focus to prevention of atrocity crimes and illustrates how strict adherence to jurisprudential values—the rule of law values—may actually hinder this objective.

The idea of the responsibility to protect gained much attention in the past couple of years when it was invoked with reference to the crises in Libya and Ivory Coast. Civilian protesters in Libya were targeted by government forces in a series of events that risked escalation into "atrocity crimes:" crimes against humanity, ethnic cleansing, war crimes, or genocide.[5] In the face of such risk, the international community responded. The U.N. Security Council passed Resolution 1973, which authorized a no-fly zone and permitted Member States, in cooperation with the

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1. *See* Ishaan Tharoor, *How to Understand the Responsibility to Protect*, TIME (Apr. 9, 2011), http://world.time.com/2011/04/09/how-to-understand-the-responsibility-to-protect/ (claiming "the horrors of Rwanda and Srebrenica" led to a responsibility to protect doctrine).

2. *See generally* INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT, at VII (Dec. 2001), *available at* http://responsibilitytoprotect.org/ICISS%20Report.pdf [hereinafter ICISS REPORT] (answering the question of "when if, ever, it is appropriate for states to take coercive—and in particular military—action").

3. *Id.* at VIII.

4. *Id.* at XI.

5. *The Crisis in Libya*, INT'L COAL. FOR THE RESP. TO PROTECT, http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-libya (last visited Feb. 21, 2012); *Definitions of Atrocity Crimes*, GENOCIDE PREVENTION PROJECT, http://www.preventorprotect.org/overview/definitions.html (last visited Jan. 27, 2013).

Security Council, to take "all necessary measures . . . to protect civilians and civilian populated areas under threat of attack . . . ."[6] This was a historic step for the international community and the fledgling norm of the responsibility to protect. According to United Nations Secretary-General Ban Ki-Moon, Resolution 1973 "'affirm[ed], clearly and unequivocally, the international community's determination to fulfill its responsibility to protect civilians from violence perpetrated upon them by their own government.'"[7]

The international community's resolve to protect was tested again in Ivory Coast. Following elections in November 2010, Ivory Coast's incumbent president, Laurent Gbagbo, refused to cede power.[8] Thousands of civilians were killed in the months following the elections as people were attacked based on their ethnic and religious identities, and state television was used to incite further violence.[9] This could have been another Rwanda. But this time, the international community acted promptly and decisively. The United Nations Security Council passed Resolution 1975 and authorized military intervention into Ivory Coast by U.N. peacekeepers in order to protect civilians.[10]

In each of these crises, the international community acted to stop the killing. It acted to fulfill its responsibility to protect. However, because both these situations involved the use of coercive means, there is a growing perception that the responsibility to protect is just another name for military intervention.[11] This view threatens the continued growth and acceptance of the responsibility to protect because many states remain extremely wary of the use of force for humanitarian purposes. Nowhere is this truer than in Asia, where the principle of non-intervention is regarded as an essential value.[12] Demonstrating such antipathy for intervention, China and India did not support Resolution 1973, which authorized the use of armed force with reference to Libya.[13] Given that China is a United Nations Security Council member and possesses a veto, and that India is a growing global power, the resistance of these two states to military intervention may effectively compromise

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6. *The Crisis in Libya*, *supra* note 5; S.C. Res. 1973, para. 4, U.N. Doc S/RES/1973 (Mar. 17, 2011).

7. *The Crisis in Libya*, *supra* note 5.

8. GLOBAL CENTER FOR THE RESPONSIBILITY TO PROTECT, *Côte d'Ivoire*, R2P MONITOR, JAN. 10, 2012, at 1, 10, *available at* http://www.globalr2p.org/media/files/r2p_monitor_january2012.pdf.

9. *Id.*

10. *Id.*; *see* Tharoor, *supra* note 1 (suggesting U.N. action in Ivory Coast was motivated in part by the responsibility to protect doctrine); James Reinl, *The World's 'Responsibility to Protect' is Tested*, THE NAT'L (Apr. 13, 2011), http://www.thenational.ae/thenationalconversation/comment/the-worlds-responsibility-to-protect-is-tested (suggesting that U.N. intervention in Ivory Coast is an example of how the United Nations is "starting to shoulder its responsibility to protect").

11. *See generally* Alex J. Bellamy, *The Responsibility to Protect and the Problem of Military Intervention*, 84 INT'L AFFAIRS 615 (2008) (discussing the relationship and tension between the responsibility to protect and military intervention).

12. *See* Alex J. Bellamy & Paul D. Williams, *The New Politics of Protection: Cote d'Ivoire, Libya, and the Responsibility to Protect*, 87 INT'L AFFAIRS 825, 843 (2011) [hereinafter Bellamy & Williams, *The New Politics of Protection*] (observing that China's "five principles of foreign policy" include non-intervention).

13. *Id.* at 835; *see also* C. Raja Mohan, *India, Libya and the Principle of Non-Intervention*, ISAS INSIGHTS, Apr. 13, 2011, at 1, *available at* http://www.isas.nus.edu.sg/Attachments/PublisherAttachment/ISAS_Insights_122_-_Email_-_India,_Libya_and_the_Princple_of_Non-Intervention_19042011144243.pdf (explaining India's abstention from voting on the use of force in Libya as part of its "strategic culture" that is risk-averse and prudent in the use of force); Reinl, *supra* note 10 (noting that China, a "traditional noninterventionist[]," was joined by India in abstaining from supporting Resolution 1973).

future efforts to achieve international coordinated military action to halt atrocity crimes. Their resistance is also illustrative of a broader global concern about the use of military intervention. But this resistance does not signal the end of the responsibility to protect. Instead, it demonstrates that the future of the responsibility to protect is not about reacting to atrocity crimes through military intervention but preventing atrocity crimes before they even occur.

From the very beginning, advocates for the responsibility to protect have urged the importance of conflict prevention. ICISS, the independent commission that originated the principle, always cautioned that "[p]revention is the single most important dimension of the responsibility to protect."[14] Given Asia's emphasis on non-interference, the better course for winning the support of this region's states for the responsibility to protect is to focus on preventing the commission of atrocity crimes so that there is no need for armed intervention at a subsequent stage. In fact, the Asia-Pacific Centre for the Responsibility to Protect has advised that "[a] cooperative, rather than coercive, approach to risk-mitigation is more likely to be effective, and far more likely to gain the endorsement of UN member states."[15] As promising as the responsibility to prevent may seem, it faces a serious impediment to its implementation from an unlikely source: jurisprudence.

Almost every student, professor, and practitioner of law has encountered certain "jurisprudential values" in their interactions with the discipline. These are values that are loosely relied upon to demarcate the line between legal norms and other forms of ordering principles within society. In international law, jurisprudential values serve to distinguish international legal norms from their relatives: moral principles and political norms. Examples of jurisprudential values include the emphases placed on the clarity, constancy, and precision of legal obligations.[16] The precision of legal obligations refers to how unambiguously rules "define the conduct they require, authorize, or proscribe."[17] Rules fall along the "precision spectrum," from vague principles at the low-precision end to precise,

14. ICISS REPORT, *supra* note 2, at XI; *see also* William W. Burke-White, *Adoption of the Responsibility to Protect* 16 (Univ. of Pa. Law Sch. Pub. Law & Legal Theory Research Paper Series, Research Paper No. 11-40, 2011), *available at* http://ssrn.com/abstract=1960086 ("[A]s articulated in the ICISS Report and inherent in the first sentence of paragraph 138 of the Outcome Document, the ultimate goal of the Responsibility to Protect is atrocity prevention.").

15. DEBORAH MAYERSEN, THE RESPONSIBILITY TO PREVENT: OPPORTUNITIES, CHALLENGES AND STRATEGIES FOR OPERATIONALISATION 16 (2010), *available at* http://www.humansecuritygateway.com/documents/APCRP_R2P_OpportunitiesChallengesStrategiesForOperationalisation.pdf; *see also id.* at 8–13 (summarizing a recent report by the Genocide Prevention Task Force); ASIA-PAC. CTR. FOR THE RESPONSIBILITY TO PROTECT, INTERNATIONAL CONFERENCE ON PREVENTING MASS ATROCITIES: ASIAN PERSPECTIVES ON R2P 5 (2008), *available at* http://www.r2pasiapacific.org/docs/R2P%20Reports/Preventing%20Mass%20Atrocities%20Asian%20Perspectives%20on%20R2P%202008.pdf (advocating conflict prevention rather than military intervention).

16. *See, e.g.*, Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 675–76 (2004) (noting the importance of precision in "human rights regime design"); Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 429 (2000) (arguing that the legitimacy of legal rules relies in part on the "determinacy and coherence" of the rules). Other standard jurisprudential values include Lon Fuller's criteria of legality ("generality, promulgation, non-retroactivity, clarity, not contradiction, not asking the impossible, constancy, and congruence between rules and official action") that the interactional conception of international law adopted. JUTTA BRUNNÉE & STEPHEN J. TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT 6–7 (2010) [hereinafter BRUNNÉE & TOOPE, LEGITIMACY AND LEGALITY].

17. Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401, 401 (2000).

highly elaborated rules at the high-precision end.[18] The significance of these values is that they are so dominant within the legal discipline that a norm must often satisfy these values in order to be accepted as a legitimate legal norm.[19]

This Article examines the implications of these jurisprudential values for the implementation of the responsibility to prevent. The broader norm of the responsibility to protect—of which the responsibility to prevent is one component—is not currently reflected in existing international law, at least with regard to some of the principles relating to the responsibilities of third-party states and the international community.[20] It is therefore likely that advocates for the responsibility to prevent will seek to remedy this legal shortfall by exploring ways to fully transform the norm into an international legal norm. As part of these efforts, international lawyers and scholars may intentionally or unwittingly prioritize certain jurisprudential values in attempting to make the responsibility to prevent a legal norm without examining the consequences of such values on the actual implementation of the responsibility to prevent. As this Article demonstrates, such efforts will prove problematic for the future of the responsibility to prevent.

This Article argues that the unexamined adoption and application of jurisprudential values compromises the success of the responsibility to prevent for two main reasons. First, many of these jurisprudential values (e.g., clarity, precision) are in tension with the values advocated by policy analysts and practitioners for the successful implementation of the responsibility to prevent (e.g., flexibility, adaptability). The tension between these competing sets of values suggests that the majority of these jurisprudential values could detrimentally affect the actual implementation of the responsibility to prevent.

Second, the dominance of these values tends to preclude inquiry into whether any other values are equally essential to securing the fidelity of actors to the rules of international law. To determine what captures fidelity, international lawyers must go beyond the law to benefit from the insight of the social sciences and consider the possibility that determinants of fidelity may be context specific—features of history, culture, and tradition—and that context may also need to be reflected in legal norms.

In offering this analysis, this Article makes the following contributions to international legal scholarship. First, most of the legal scholarship on the responsibility to protect concerns the "responsibility to react" and the use of military intervention to halt atrocity crimes.[21] This Article shifts the focus to conflict prevention and examines how international law can facilitate the implementation of the responsibility to prevent. Second, as noted by numerous scholars, the broader principle of the responsibility to protect poses many challenges to traditional

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18. *Id.* at 404.

19. *See* BRUNNÉE & TOOPE, LEGITIMACY AND LEGALITY, *supra* note 16, at 6–7 ("What distinguishes law from other types of social ordering is not form, but *adherence to specific criteria of legality: generality, promulgation, non-retroactivity, clarity, non-contradiction, not asking the impossible, constancy, and congruence between rules and official action.* When norm creation meets these criteria and is matched with norm application that also satisfies the legality requirements . . . actors will be able to pursue their purposes and organize their interactions through law.") (emphasis added).

20. *See generally* Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT'L L. 99 (2007).

21. Gareth Evans, *From Humanitarian Intervention to the Responsibility to Protect*, 24 WIS. INT'L L.J. 703, 709 (2006).

assumptions in international relations and international law.[22] Most of this scholarship has focused on how the responsibility to protect implicates a reevaluation of traditional notions of state sovereignty.[23] This Article identifies another significant but neglected challenge that emerges from the jurisprudential values that are so dominant within international law and the broader discipline of law.

Third, in identifying this challenge and its consequences, this Article is a plea for self-reflection. This Article aims to make lawyers and academics aware of the influence and effects of these jurisprudential values. It cautions against the implicit and passive adoption of these values without evaluating the human implications of these values. These jurisprudential values have real-world consequences, and these consequences must be recognized and considered before these values are championed, explicitly or implicitly. This Article does not aim to discredit the significance of jurisprudential values generally, but instead encourages self-awareness of the human effects of these values and presents the possibility that these values—accepted within the discipline for so long—may actually have detrimental effects on the human good that the law may seek to achieve. This self-awareness does not necessarily signify the abandonment of certain jurisprudential values but a modification of their degree, so that the premium placed on achieving clarity and precision, for example, may change depending on context. This recalibration of values is important if we want international law to be the force for positive change that advocates for the responsibility to prevent desire.

Finally, this Article challenges the view that the legitimacy of legal norms is determined only by jurisprudential values. Numerous accounts of legitimacy in international law have studied why actors comply or do not comply with international law.[24] It is important to consider the possibility that factors outside the law may be equally significant for promoting legal legitimacy and securing obligation. This Article illustrates how such extra-legal factors can be crucial to determining the success of a legal norm in a particular context. The focus should be on qualities of a legal norm that enable it to harmonize with these extra-legal factors. A legal norm, through such qualities, can facilitate expanded social acceptance of the norm, thereby

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22. *See, e.g.*, Jutta Brunnée & Stephen Toope, *Norms, Institutions and UN Reform: The Responsibility to Protect*, 2 J. INT'L L. & INT'L REL. 121, 127 (2005) ("[The responsibility to protect] presents a fundamental challenge to structural imperatives that have long shaped international law and politics."); Matthew Kalkman, *Responsibility to Protect: A Bow Without an Arrow*, 5 CAMBRIDGE STUDENT L. REV. 75, 76 (2009) (discussing the limits of the responsibility to protect due to conflicts with traditional international law doctrines); Mehrdad Payandeh, *With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking*, 35 YALE J. INT'L L. 469, 485 (2010) (discussing the impact of the responsibility to protect on existing legal norms).

23. *See* Peter Stockburger, *The Responsibility to Protect Doctrine: Customary International Law, an Emerging Legal Norm, or Just Wishful Thinking?*, 5 INTERCULTURAL HUM. RTS. L. REV. 365, 396 (2010) ("[T]he discussion regarding humanitarian intervention ... implies a contravention of the traditional norms of sovereignty and non-intervention, principles that have been at the heart of the international legal structure.").

24. *See, e.g.*, Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823, 1825 (2002) (discussing compliance under a model of rational, self-interested states); Thomas M. Franck, *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, 100 AM. J. INT'L L. 88, 88 (2006) (discussing the future of the American Society of International Law and its goal of "international relations on the basis of law and justice"); Harold Hongui Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2603 (1997) (arguing that a combination of "the managerial and fairness approaches with deeper analysis of ... [the] transnational legal process" provides a more complete understanding of why nations obey international law).

improving the likelihood of voluntary adherence to the norm and creating the foundation for more ambitious law on the subject. Such a legal norm will need to exhibit qualities other than those traditionally prioritized within the discipline. This self-examination is vital if we are to stop perpetuating a self-image that was formed in response to threats against the sanctity of the discipline.[25] We are now past the point of an identity crisis and should therefore feel comfortable with re-examining self.

Part I provides an introduction to traditional jurisprudential values and the risks that these values pose for the principle of the responsibility to prevent. It introduces the various tools for conflict prevention and explains how these tools have been employed in particular crises. It concludes by demonstrating the tension between the operational needs of conflict prevention and a number of jurisprudential values, thereby signifying the need to ameliorate these values depending on context.

Part II highlights the importance of regional and subregional actors to the successful implementation of the responsibility to prevent. Regional ownership of the responsibility to protect is inconsistent, and this section demonstrates the inadequacy of dominant jurisprudential values for securing the fidelity of regional actors to the responsibility to prevent. Utilizing the insightful "localization" analysis of Professor Amitav Acharya,[26] this section looks at the factors that contribute or impede the acceptance of the responsibility to prevent in a particular region: East Asia-Pacific.[27] East Asia-Pacific is chosen as a case study because the initially cautious attitude of the region to the responsibility to protect is giving way to gradual acceptance of the norm.[28] Therefore, it is important to identify the causes of this changing attitude and the factors that may facilitate this continued trend in favor of the responsibility to protect. As part of this analysis, Part II demonstrates the importance of extra-legal factors—derived from historical, cultural, anthropological, social, and political studies—for securing voluntary compliance from international actors. It then identifies other legal values that increase the likelihood of harmony with these extra-legal factors. This identification of significant but overlooked values provides a way for an emerging legal norm to benefit from extra-legal factors that seek to make similar changes in the world.

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25. *See* Jutta Brunée & Stephen J. Toope, *Interactional International Law*, 3 INT'L L.F. 186, 187 (2001) [hereinafter Brunée & Toope, *Interactional International Law*] (describing how international law did not fare well according to indicators of legality that are based upon formalistic and positivist conceptions of law).

26. Amitav Acharya, *How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism*, 58 INT'L ORG. 239, 241 (2004) (describing localization analysis).

27. This region includes the following states: Australia, Brunei, Burma, Cambodia, China, East Timor, Fiji, Indonesia, Japan, Kiribati, Laos, Malaysia, Marshall Islands, Micronesia, Mongolia, Nauru, New Zealand, North Korea, Palau, Papua New Guinea, Philippines, Samoa, Singapore, Solomon Islands, South Korea, Taiwan, Thailand, Tonga, Tuvalu, Vanuatu, and Vietnam. *East Asian and Pacific Affairs: Countries and Other Areas*, U.S. DEP'T OF ST., http://www.state.gov/p/eap/ci/ (last visited Jan. 20, 2013).

28. Jochen Prantl & Ryoko Nakano, *Global Norm Diffusion in East Asia: How China and Japan Implement the Responsibility to Protect*, 25 INT'L REL. 204, 208 (2011); Holly Haywood, *Operationalisation of the "RtoP" in Southeast Asia*, MACARTHUR ASIA SEC. INITIATIVE CLUSTER 3 BLOG (Dec. 10, 2010, 3:46 PM), http://www.asicluster3.com/blog_self/index.php?page=viewentry&id=193.

I. THE EFFECTS OF JURISPRUDENTIAL VALUES ON THE RESPONSIBILITY TO PREVENT

Jurisprudential values have significantly influenced the trajectory of international law. One value of particular importance is precision:[29] "A precise rule specifies clearly and unambiguously what is expected of a state or other actor (in terms of both the intended objective and the means of achieving it) in a particular set of circumstances . . . . [P]recision narrows the scope for reasonable interpretation."[30] Precision requires more than the unambiguity of a particular rule.[31] It instead means that the rules in a set "are related to one another in a non-contradictory way, creating a framework within which case-by-case interpretation can be coherently carried out."[32] Finally, "[p]recise sets of rules are often highly elaborate[] or dense" and "detail[] conditions of application, spelling out required or proscribed behavior in numerous situations . . . ."[33]

It is no surprise, therefore, that "[m]uch of international law is in fact quite precise, and precision and elaboration appear to be increasing dramatically."[34] One reason that "[i]nternational instruments are often 'remarkably precise and dense, [is] presumably because proponents believe that these characteristics enhance their normative and political value.'"[35]

There are a number of reasons why precision has been traditionally valued within international law. The emphasis on precision may be due to its ability to trigger reputational losses because a more precise legal obligation makes it easier to identify those circumstances when a state party violated its legal obligations.[36] Similarly, by narrowing the scope for interpretation, precision reduces the likelihood that state parties can benefit from self-serving interpretation and opportunistic behavior. In an international system that still lacks many developed administrative and enforcement bodies, "imprecise norms are, in practice, most often interpreted and applied by the very actors whose conduct they are intended to govern" and "there is no centralized legislature to overturn inappropriate, self-serving interpretations."[37]

Other scholars have emphasized precision because of a belief in the connections between the precision of a legal rule, its perceived legitimacy by the international community, and the resulting levels of compliance by international actors. Professor Thomas Franck has argued that "a belief in the law's legitimacy reinforces the perception of its fairness and encourages compliance."[38] According to Franck, "[t]he degree to which a rule is perceived as legitimate is itself affected by certain intrinsic properties both of that rule and of the process by which it was made, and the process

29. Abbott et al., *supra* note 17, at 412–15.

30. *Id.* at 412.

31. *Id.* at 413.

32. *Id.*

33. *Id.*

34. *Id.* at 414.

35. Goodman & Jinks, *supra* note 16, at 681 (quoting Abbott et al., *supra* note 17, at 414).

36. *Id.* at 677; Abbott & Snidal, *supra* note 16, at 427.

37. Abbott et al., *supra* note 17, at 414; *see also* THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 31 (1995) ("Indeterminate normative standards make it harder to know what conformity is expected, which in turn makes it easier to justify noncompliance.").

38. FRANCK, *supra* note 37, at 8.

of its interpretation by judges and officials."[39] International legal rules are "likely to be perceived as more or less legitimate in accordance with four variables[:] ... *determinacy*, *symbolic validation*, *coherence*, and *adherence*."[40] These variables matter because the "extent to which any rule exhibits these qualities will determine its legitimacy."[41] In the international legal system, the "more plausible a community's perception of a rule's legitimacy, the more persuasive that rule's claim to fairness, [and] the stronger its promotion of compliance . . . ."[42] Under this view, "determinate rules" have a "readily accessible meaning and . . . say what they expect of those who are addressed;" the "greater its determinacy, the more legitimacy the rule exhibits and the more it pulls towards compliance."[43]

The "interactional conception of international law" proposed by Professors Jutta Brunnée and Stephen J. Toope makes a similar claim about legitimacy but it embraces a broader range of values.[44] In addition to precision, or the clarity and coherence in and among legal rules, the theory also emphasizes "generality, promulgation, non-retroactivity, ... not asking the impossible, constancy, and congruence between rules and official action."[45] These values are derived from the criteria of legality advanced by Lon Fuller, which have now been heralded by many legal scholars as "largely uncontroversial."[46] As such, the Fullerian jurisprudential values offer a good portrait of the dominant values and preferences within the legal discipline regarding what qualifies as a legal norm, even if consensus does not exist on all of Fuller's values. According to the interactional conception, these values serve as a threshold that a norm must satisfy in order for it to qualify as a legal norm.[47] A norm's satisfaction of these jurisprudential values is important in order for a legal norm to be perceived as legitimate by the audience to whom the norm is addressed.[48] This perception of legitimacy determines whether or not the audience will feel a sense of obligation to the legal norm.[49] According to the interactional conception, this sense of obligation, or fidelity, is the defining quality of law and distinguishes legal norms from other types of norms.[50] As such, the satisfaction of the

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39. *Id.* at 26.

40. *Id.* at 30; *see also id.* at 34 ("A rule is symbolically validated when it has attributes, often in the form of cues, which signal its significant part in the overall system of social order."); *id.* at 38 ("Coherence is a key factor in explaining why rules compel. A rule is coherent when its application treats like cases alike and when the rule relates in a principled fashion to other rules of the same system."); *id.* at 41 ("[R]ules are better able to pull towards compliance if they are demonstrably supported by the procedural and institutional framework within which the community organizes itself, culminating in the community's ultimate rule, or canon of rules, of recognition.").

41. FRANCK, *supra* note 37, at 30.

42. *Id.*

43. *Id.* at 30–33.

44. Brunnée & Toope, *Interactional International Law*, *supra* note 25, at 187–88 ("Ultimately, rules are persuasive and legal systems are perceived as legitimate when they are broadly congruent with the practices and shared understandings in society.").

45. BRUNNÉE & TOOPE, LEGITIMACY AND LEGALITY, *supra* note 16, at 6.

46. *Id.* at 28.

47. *See id.* at 6–7 ("When norm creation meets these criteria and is matched with norm application that also satisfies the legality requirements—when there exists what we call a 'practice of legality'—actors will be able to pursue their purposes and organize their interactions through law.").

48. *See id.* at 55 (delineating the factors that comprise legal legitimacy).

49. *Id.*

50. *See id.* at 6 ("[I]t is the obligation that constitutes law's added value. . . .").

jurisprudential values influences the degree of obligatory force exerted by a norm and, consequently, the extent to which it can be considered law. Both the interactional conception and Franck's theory of fairness emphasize jurisprudential values as a means of securing voluntary compliance by actors in an international legal system that often lacks credible enforcement mechanisms.[51]

This inquiry into law's defining characteristics—the jurisprudential values that separate law from other forms of ordering principles—is important because it influences the development of non-legal norms that aspire to the status of a legal norm. For example, scholars have observed "the language used to define obligations in human rights treaties is notoriously vague compared with the language used in other legal domains."[52] This difference has led to a belief that "human rights treaties should aspire to greater levels of precision to foster compliance and enforcement."[53] Other scholars have observed that "many modern treaties are explicitly designed to increase determinacy and narrow issues of interpretation" and that even many nonbinding instruments "are remarkably precise and dense, presumably because proponents believe that these characteristics enhance their normative and political value."[54]

Similar recommendations have also been made with reference to the responsibility to protect. One group of scholars has criticized the norm's shortcomings with regard to a number of widely accepted jurisprudential values. With reference to the application of the responsibility to protect concerning the use of force, they highlight the norm's weaknesses in terms of generality, clarity, consistency, constancy, and congruence between norm and practice.[55] For example, the 2005 Summit Outcome Document was one of the primary documents articulating the responsibility to protect.[56] Professors Brunnée and Toope argue that the ambiguity of this document in regards to critical issues—such as the identification of threats to peace and security—limits the application of the norm to a "deliberately fluid and broadly political decision-making criterion" on a case-by-case analysis that "weakens the legality of the responsibility to protect as regards the requirements of generality, clarity and constancy over time."[57] They therefore view positively political developments that would improve the norm's performance in relation to these factors, such as guidelines on the use of force that would "significantly enhance the legality of the norm by subjecting case-by-case decisions to over-arching criteria."[58] They similarly approve of current developments that bring the norm in closer compliance with the legality criteria.[59] Though still ambiguous, they note that

51. *See* FRANCK, *supra* note 37, at 26 (stating that when a community creates laws through the right process it promotes voluntary compliance especially in international law, which has "relative paucity of modes of compulsion").

52. Goodman & Jinks, *supra* note 16, at 676.

53. *Id.*

54. Abbott et al., *supra* note 17, at 414.

55. Jutta Brunnée & Stephen J. Toope, *The Responsibility to Protect and the Use of Force: Building Legality?*, 2 GLOBAL RESP. TO PROTECT 191, 193 (2010) [hereinafter Brunnée & Toope, *The Responsibility to Protect*].

56. *See id.* at 198, 200 (stating that the United Nations adopted a resolution endorsing the responsibility protect as expressed in the 2005 Summit Outcome Document, and that a majority of Member States supported the responsibility to protect as described in that document).

57. *Id.* at 208

58. *Id.* at 209.

59. *Id.* at 211–12.

the articulation of the responsibility to protect in the 2005 Summit Outcome Document aided in the promulgation of the norm by publicizing the basis for the norm and its future development, even if the report did not actually promulgate the norm into law.[60] The report also improved the clarity and consistency of the norm in its articulation of triggering events for the norm's application with reference to existing international law.[61]

The significance of this type of analysis is that it influences the future development of the responsibility to protect. As recognized by the U.N. Assistant Secretary-General Edward Luck, "[t]he implementation of the responsibility to protect (RtoP) is a work in progress."[62] One critical step in implementing the responsibility to protect concerns its normative development: "In these formative years, choices are being made, both at the United Nations and in national capitals, that could profoundly shape the future development of this promising, perhaps even historic, concept."[63]

In further developing the norm, advocates for the responsibility to protect will be influenced by these jurisprudential values due to their belief that these values represent the necessary path of legality that a social norm will need to travel if it is to be accepted as law. These values will therefore influence how legal advocates frame, define, and otherwise create and maintain the norm. For example, the value on precision may lead advocates of the responsibility to protect to steer towards greater specificity in outlining when the norm is implicated and what obligations are involved. Advocates may believe that the norm will not be considered a candidate for a legal norm until it can take the form of "determinate rules" that leave "only narrow issues of interpretation."[64] However, these jurisprudential values also pose significant risks to the successful implementation of the responsibility to protect. The following sections illustrate these risks with reference to one dimension of the responsibility to protect: the responsibility to prevent.

A. The Responsibility to Prevent

According to the ICISS, the state owes its citizens three responsibilities: responsibility to prevent, responsibility to react, and responsibility to rebuild.[65] The responsibility to prevent is a responsibility to "address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk."[66] The responsibility to react refers to a responsibility to "respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention."[67] Lastly, the responsibility to rebuild is a responsibility "to provide,

60. *Id.* at 206.

61. Brunnée & Toope, *The Responsibility to Protect*, *supra* note 55.

62. Edward C. Luck, *From Promise to Practice: Implementing the Responsibility to Protect*, *in* THE RESPONSIBILITY TO PROTECT: THE PROMISE OF STOPPING MASS ATROCITIES IN OUR TIME 85, 85 (Jared Genser & Irwin Cotler eds., 2011).

63. *Id.*

64. Abbott et al., *supra* note 17, at 415.

65. ICISS REPORT, *supra* note 2, at XI.

66. *Id.*

67. *Id.*

particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert."[68] All three dimensions constitute the broader principle of the responsibility to protect. Only the preventive dimension of the responsibility to protect will be analyzed in this Article.

Conflict prevention is becoming a priority for combating violence against civilians. This prioritization is partially due to the changing realities of present day conflicts. Conflicts increasingly involve "complex transnational, identity, and territorial [issues] . . . where there are zones of both peace and war, where consent is not easily obtained and exit strategies are both impractical and undesirable."[69] Given these realities, "preventive, forward-looking strategies may be the preferred if not, the only, option other than inaction."[70] One reason for the widespread support for the preventive element is that it prioritizes the use of non-coercive measures.[71] This was clear even in the early development of the responsibility to protect. The ICISS report stated that "[t]he exercise of the responsibility to both prevent and react should always involve less intrusive and coercive measures being considered before more coercive and intrusive ones are applied."[72]

Although conflict prevention is a responsibility of sovereign states, the ICISS identified a number of ways that the international community could aid states in their efforts:

> Such support may take many forms. It may come in the form of development assistance and other efforts to help address the root cause of potential conflict; or efforts to provide support for local initiatives to advance good governance, human rights, or the rule of law; or good offices missions, mediation efforts and other efforts to promote dialogue or reconciliation.[73]

According to Gareth Evans, co-chair of the ICISS, the responsibility to prevent "recognizes the need to bring to bear every appropriate preventive response: be it political, diplomatic, legal, economic, or in the security sector while falling short of coercive action."[74] Each of these dimensions of prevention can serve a critical role in

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68. *Id.*

69. David Carment & Martin Fischer, *R2P and the Role of Regional Organisations in Ethnic Conflict Management, Prevention and Resolution: The Unfinished Agenda*, 1 GLOBAL RESP. TO PROTECT 261, 263 (2009).

70. *Id.*

71. *See, e.g.*, *The Responsibility to Protect in Southeast Asia: Issues and Challenges*, NTS ALERT, Apr. 2, 2009, at 1–3, *available at* http://www.rsis.edu.sg/nts/resources/nts-alert/NTS%20Alert%20April%200209.pdf [hereinafter NTS ALERT] (explaining that the Association of Southeast Asian Nations (ASEAN) states are more likely to support responsibility to protect (R2P) non-coercive measures that more closely align with the region's focus on development and capacity building, but that they remain wary of the coercive dimension of R2P which they perceive as a risk to their sovereignty).

72. ICISS REPORT, *supra* note 2, at XI; *see also id.* § 3.1 ("The need to do much better on prevention, and to exhaust prevention options before rushing to embrace intervention, were constantly recurring themes in our worldwide consultations, and ones which we wholeheartedly endorse.").

73. *Id.* § 3.3.

74. Gareth Evans, Chancellor, The Australian National University, Implementing the Responsibility to Protect: Lessons and Challenges, Freilich Foundation 2011 Alice Tay Lecture on Law and Human Rights (May 5, 2011) (transcript available at http://www.gevans.org/speeches/speech437.html) [hereinafter Evans, Lessons and Challenges].

effective conflict prevention. Political and diplomatic measures include efforts to promote good governance and membership in international organizations, but these efforts could also be accompanied by preventive diplomacy and the threat of political sanctions.[75] Economic and social measures include support for economic development, education, tolerance, and community peace-building, as well as aid conditionality, the threat of economic sanctions, and economic incentives.[76] Employing legal measures may mean promoting fair constitutional structures, human rights, and the rule of law, as well as efforts aimed at combating corruption and promoting legal dispute resolution.[77] The legal options could also include international criminal prosecution, such as before the International Criminal Court (ICC).[78] Finally, security-based measures include reform of the security sector, such as transformation from military to civilian-controlled government, confidence-building measures, small arms and light weapon control, preventive deployment, non-territorial show of force, and the threat of arms embargoes or termination of military cooperation programs.[79]

Aspects of this preventive toolkit have been employed successfully in Kenya and Burundi. After the December 2007 Kenyan elections, violence broke out across the country as supporters of Raila Odinga, Kenya's main opposition leader, clashed with those of Mwai Kibaki, the incumbent president.[80] This violence resulted in the estimated death of 1,300 individuals and the displacement of another 350,000–600,000.[81] The international community responded swiftly with preventive diplomacy. The African Union, with the aid of the United Nations, the European Union, and supporting nations (including the United States), mediated the crisis and helped prevent the escalation of the violence into the mass atrocity that observers at the time predicted and feared.[82] Edward Luck, Special Representative to the U.N. Secretary-General for Responsibility to Protect, hailed the diplomatic response to the post-2007 Kenyan election as a successful example of the employment of the responsibility to protect and many analysts share his view.[83]

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75. *See* ALEX J. BELLAMY, THE RESPONSIBILITY TO PROTECT: THE GLOBAL EFFORT TO END MASS ATROCITIES 99 (2009) (noting that "conflict prevention tends to be associated with ... preventive diplomacy" and that "conflict prevention can involve ... economic considerations such as sanctions").

76. *Id.*

77. *See id.* at 53–54 (stating that the legal dimension is key in the prevention of the root causes of violent conflict).

78. *See id.* at 127 (stating that the ICC, despite the challenges it faces, could have an important role in prevention solutions).

79. *See id.* at 178–80 (describing the U.N. "light footprint" approach to rebuilding in the security field as a model of conflict prevention).

80. Jeffrey Gettleman, *Disputed Vote Plunges Kenya Into Bloodshed*, N.Y. TIMES (Dec. 31, 2007), http://www.nytimes.com/2007/12/31/world/africa/31kenya.html.

81. Mark Schneider, Senior Vice President, Int'l Crisis Grp., Implementing the Responsibility to Protect in Kenya and Beyond: Address to the World Affairs Council of Oregon (Mar. 5, 2010) (transcript available at http://www.crisisgroup.org/en/publication-type/speeches/2010/implementing-the-responsibility-to-protect-in-kenya-and-beyond.aspx).

82. *Id.*; Alex J. Bellamy, *The Responsibility to Protect—Five Years On*, 24 ETHICS & INT'L AFF. 143, 154 (2010) [hereinafter Bellamy, *Five Years On*].

83. *The Responsibility to Protect*, PUBLIC RADIO INT'L (Mar. 7, 2009), http://www.pri.org/stories/world/global-responsibility-to-protect.html); EDWARD C. LUCK, THE STANLEY FOUND., POL'Y ANALYSIS BRIEF: THE UNITED NATIONS AND THE RESPONSIBILITY TO PROTECT 1 (2008). *But see* Bellamy, *Five Years On*, *supra* note 82, at 155 ("It is fair to say that it was the AU's emerging, but still frail, peace and security architecture—which predates 2005—that provided the

Successful preventive measures were also implemented in Burundi. Even though many of these measures were employed in Burundi prior to the introduction of the responsibility to protect, the atrocities committed between 1993–2005 would have qualified Burundi as a responsibility to protect situation.[84] The first democratically elected president in Burundi, Melchior Ndadaye, was assassinated in October 1993, precipitating political violence that claimed the lives of over 300,000 individuals.[85] Due to fears over the escalating violence in Rwanda, regional and international actors were actively engaged in an effort to secure a peace agreement in Burundi. The primary preventive measure used was mediation, and this effort was supported by regional and international organizations, NGOs, and neighboring states.[86] The mediation efforts were supplemented by other measures such as regional sanctions and peacekeeping forces.[87] The U.N. Security Council was kept apprised of the situation in Burundi and, through sustained engagement, "[t]he warring factions in Burundi understood the message of the international community: traumatized by the genocide in Rwanda, it would not accept another genocide in Burundi."[88] Although armed attacks continued even after mediation efforts began, the combination of measures and sustained regional and international support ultimately resulted in political stability and cessation of atrocity crimes.[89]

Conflict prevention was also attempted, albeit unsuccessfully, in response to the violence in Ivory Coast that erupted after the November 2010 elections, when the country was split between supporters for the incumbent President Gbagbo and the challenger, Mr. Outtara.[90] One early measure that the U.N. Security Council employed was to officially recognize Mr. Outtara as president and to persuade the parties to recognize this result.[91] It accomplished this with U.N. Security Council

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immediate catalyst for international engagement, not [the responsibility to protect] per se.").

84. *See* GREGORY MTHEMBU-SALTER ET AL., PRIORITIZING PROTECTION FROM MASS ATROCITIES: LESSONS FROM BURUNDI 2 (2011) (assessing "international and regional responses to Burundi's conflict between 1995 and 2004 to determine what lessons the Burundi experience can offer about the application of the responsibility to protect (R2P) norm").

85. Adonia Ayebare, *Peacemaking in Burundi—A Case Study of Regional Diplomacy Backed by International Peacekeeping and Peacebuilding*, *in* THE UN SECURITY COUNCIL AND THE RESPONSIBILITY TO PROTECT: POLICY, PROCESS AND PRACTICE 81, 81 (Hans Winkler, Terje Rod-Larsen & Christoph Mikulaschek eds., Diplomatic Academy of Vienna 39th IPI Vienna Seminar 2010); *Commission of Inquiry: Burundi*, U.S. INST. OF PEACE, http://www.usip.org/publications/commission-inquiry-burundi (last visited Mar. 15, 2013).

86. MTHEMBU-SALTER ET AL., *supra* note 84, at 5.

87. *Id.* at 6, 8.

88. Ayebare, *supra* note 85, at 81; *see also* GARETH EVANS, THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL 58–59 (2008) (illustrating the international steps taken to sustain peace in Burundi which include political mediation, the deployment of peacekeeping troops, and focusing on the new U.N. Peacebuilding Commission) [hereinafter EVANS, ENDING MASS ATROCITY CRIMES].

89. MTHEMBU-SALTER ET AL., *supra* note 84, at 13.

90. *See* Bellamy & Williams, *The New Politics of Protection*, *supra* note 12, at 829 ("[A]fter the principal parties disputed the results of the long-postponed presidential election of 28 November 2010 . . . armed conflict reignited between the supporters of incumbent President Laurent Gbagbo and his challenger Alassane Ouattara. Within days of Gbagbo claiming an election victory, the Economic Community of West African States (ECOWAS) and the UN Secretary General concluded that Ouattara had in fact prevailed, yet Gbagbo and his supporters refused to step aside. As fighters from both sides began to commit atrocities, UNOCI and France confronted difficult political and operational questions about how to protect civilians.").

91. *See id.* at 832–33 ("After receiving a briefing from the Secretary General's Special Representative for Côte d'Ivoire, who insisted that Ouattara had prevailed, the Council formally supported this view in

Resolution 1962.[92] This recognition was important because it signaled to Mr. Gbagbo that he would not prevail by exploiting schisms within the African region or between Africa and other international actors.[93] The Security Council's action also legitimized sanctions against Mr. Gbagbo's supporters and eliminated the need for Mr. Gbagbo's consent to the deployment of peacekeepers.[94] This last factor is important for those members of the Security Council, such as China, who desire host consent for U.N. action. The Economic Community of West African States (ECOWAS) also took a variety of diplomatic measures, including suspending Ivory Coast from its membership ranks and deploying a delegation to persuade Mr. Gbagbo to step down.[95] The United Nations invested in mediation efforts that proved unsuccessful due to the intransigence of the conflicting parties.[96] The worsening situation on the ground ultimately led the Security Council to shift its focus from the responsibility to prevent to the responsibility to react. On March 30, 2011, the Security Council passed Resolution 1975 that authorized U.N. peacekeepers to "use all necessary means" to protect civilians.[97]

This section explored what it takes for the successful operationalization of the responsibility to prevent. As illustrated from the case studies, implementation of the responsibility to prevent involves the use of multiple preventive measures in conjunction, including mediation, economic sanctions, intelligence gathering, early warning systems, and peacekeeping forces. It also requires the sustained support of a variety of actors, such as the United Nations, the European Union, foreign governments, and the involvement of regional and local actors. The next section considers the effects of jurisprudential values on the implementation of the responsibility to prevent.

B. Tension: The Consequences of Legitimacy & Limiting the Utility of the Responsibility to Prevent

As discussed above, international law scholars and practitioners have generally emphasized the importance of traditional jurisprudential values for the development of international legal rules. Precision, in particular, has been highly valued and, as a result, many international legal rules are specific.[98] But what is the effect of these same jurisprudential values on the actual operationalization of the legal norms? In other words, what effects would a value like precision have on the operationalization of the responsibility to prevent?

Resolution 1962 (20 Dec. 2010) and urged the parties to respect this result.").

92. *See id.* at 832 (discussing the adoption of U.N. Security Council Resolution 1962 on December 20, 2010, which recognized Outtara as the rightful president of Ivory Coast).

93. *See id.* at 833 (explaining that the adoption of U.N. Security Council Resolution 1962 recalled "prior recognition of Ouattara as president-elect by the African Union and ECOWAS . . . [and that] such unanimity countered Gbagbo's strategy of playing for time, hoping that African-European or inter-African schisms would provide him with some sort of mitigated legitimacy").

94. *Id.*

95. *Id.* at 834.

96. Bellamy & Williams, *The New Politics of Protection*, *supra* note 12, at 834.

97. *Id.*

98. Abbott et al., *supra* note 17, at 414; Goodman & Jinks, *supra* note 16, at 681.

Precision, of course, offers a number of benefits for the implementation of a norm of the responsibility to prevent. The precision of a legal rule improves compliance, as actors are better able to understand what behavior is or is not permitted.[99] The principle of the responsibility to prevent is not particularly clear as currently articulated. The 2005 World Summit Outcome Document only stated that the responsibility to protect "entails the prevention of [atrocity] crimes, including their incitement, through appropriate and necessary means .... The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability."[100] Additional clarity regarding the scope and content of the responsibility to prevent can have a number of benefits. First, clear limitations on the scope of the responsibility to prevent could reduce anxiety regarding unwanted and unwarranted interference. The U.N. Secretary-General advocated a rule-based approach to conflict prevention "as it makes efforts to avoid conflicts more effective as well as more acceptable to the international community."[101] Second, the ambiguity regarding the primary actors for preventive action compounds the risk of inaction. For example, with regard to Darfur, the international community "has been characterized by disagreements about where responsibility ought to lie—with the host government, the African Union, or the U.N. Security Council—and these disagreements themselves have served to stymie collective efforts to respond to the unfolding emergency."[102] Last, the problem of indeterminacy compromises effective conflict prevention because "there is nothing to prevent states from using the Responsibility to Protect's inhibiting mechanism to eliminate preventive action by arguing, for example, that the threat is not sufficiently grave to warrant making a potentially costly commitment."[103]

It is also important to recognize the potential risks that arise with attempts to produce a clear international legal norm on prevention. First, the preventive toolkit comprises measures that state governments are encouraged to affirmatively adopt.[104] However, each crisis is unique, arising from a wide range of causes. For example, while the April 2010 ethnic violence in Kyrgyzstan was sparked by steep increases in electricity prices, the atrocity crimes in Burundi followed the assassination of its president.[105] Because of this "bewildering range of structural and direct causes of violent conflict, genuine conflict prevention entails a similarly bewildering range of

99. *See* LON FULLER, THE MORALITY OF LAW 63 (1965) ("[O]bscure and incoherent legislation can make legality unattainable by anyone."); FRANCK, *supra* note 37, at 31 ("Indeterminate normative standards make it harder to know what conformity is expected, which in turn makes it easier to justify noncompliance.").

100. G.A. Res. 60/1, para. 138, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

101. U.N. Secretary-General, Annex: Summary Statement of the Secretary General at the Concluding Session of the Third Meeting Between the United Nations and Regional Organizations, held on 28 and 29 July 1998, para. 6, U.N. Doc. A/52/1021-S/1998/785 (Aug. 21, 1998).

102. Alex J. Bellamy, *Conflict Prevention and the Responsibility to Protect*, 14 GLOBAL GOVERNANCE 135, 147 (2008) [hereinafter Bellamy, *Conflict Prevention*].

103. *Id.* at 149; *see also* Bellamy, *Five Years On*, *supra* note 82, at 161–62 (discussing the problems caused by indeterminacy); Burke-White, *supra* note 14 (discussing dangers of inadequate action when the scope of the obligation is left undefined).

104. *See supra* notes 65–83 and accompanying text (discussing the responsibility to prevent).

105. CHRISTOPH MIKULASCHEK & PAUL ROMITA, CONFLICT PREVENTION: TOWARD MORE EFFECTIVE MULTILATERAL STRATEGIES 21 (2011), *available at* http://reliefweb.int/sites/reliefweb.int/files/resources/epub_conflictprevention_dec2011.pdf; Ayebare, *supra* 85, at 81.

policies and potentially vast political and economic commitment."[106] Given the variety of causes and solutions to conflict, the effective combination of measures may be hard to identify in advance of the crisis.[107]

Second, precision may fix the limits of the legal norm and thereby impede the norm's ability to meet these challenges of conflict prevention. Third, precision also risks promoting rigidity so that once the parameters of the legal obligation are identified, these lines solidify and make it difficult for the legal norm to adapt to new crises and new needs. The limits of a legal norm may be pinned down through acts of promulgation that consequently inhibit the norm's gradual growth and evolution. However, successful conflict prevention is dependent upon flexibility in defining and employing implementation strategies:

> [E]ffective prevention 'depends on finding ways of engagement that are appropriate to specific circumstances. No one formula will fit all circumstances, and to pretend otherwise is both presumptuous and risky. Because every emerging conflict situation differs, a great deal of latitude and flexibility must be given to those who devise and implement preventive strategies both on the ground and at headquarters.'[108]

As such, a norm of responsibility to prevent will be flexible, and, perhaps at times, vague in order to promote the wide range of activities encompassed in preventive strategies. According to the Asia-Pacific Centre for the Responsibility to Protect, "[r]esponding to risk of genocide and mass atrocities requires a nuanced and flexible approach."[109] The Centre has therefore advocated an incremental, multi-faceted approach that proceeds on a case-by-case basis.[110] Similarly, the Genocide Prevention Task Force advised that "[t]here are few, if any, one-size-fits-all solutions. Effective strategies must be tailored carefully, based on a deep understanding of case-specific characteristics."[111]

Additionally, the characteristics of the crisis may implicate different actors who should take primary responsibility and leadership in responding to the crisis.[112] Conceptually, we may prefer norms that apply equally to state actors.[113] However, in

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106. Bellamy, *Conflict Prevention*, *supra* note 102, at 143 (emphasis omitted).

107. *See* Magnus Öberg, Frida Möller & Peter Wallensteen, *Early Conflict Prevention in Ethnic Crises, 1990–98: A New Dataset*, 26 CONFLICT MGMT. AND PEACE SCI. 67, 69 (2009) (describing the state of previous research which "emphasized the conditions of successful preventive actions, rather than the effects of the various measures used").

108. Moolakkattu Stephen John, *The Concept and Practice of Conflict Prevention: A Critical Reappraisal*, 42 INT'L STUD. 1, 6 (2005) (quoting Michael Lund, *Preventing Violent Intrastate Conflicts: Learning Lessons from Experience, in* SEARCHING FOR PEACE IN EUROPE AND EURASIA: AN OVERVIEW OF CONFLICT PREVENTION AND PEACE-BUILDING ACTIVITIES 131 (Paul van Tongeren et al. eds., 2002)).

109. MAYERSEN, *supra* note 15, at 14.

110. *See id.* at 8 (describing a three pillar approach to preventing mass atrocities centered on state responsibility, international assistance, and timely responses).

111. *Id.* at 15 (quoting MADELEINE K. ALBRIGHT & WILLIAM S. COHEN, PREVENTING GENOCIDE: A BLUEPRINT FOR U.S. POLICYMAKERS 18 (2008)).

112. *See id.* at 8–13 (emphasizing both state responsibility as well as international assistance and capacity-building in its preventive plan).

113. *But cf.* BRUNNÉE & TOOPE, LEGITIMACY AND LEGALITY, *supra* note 16, at 279 (noting that some commentators are opposed to the normative prohibition against inter-state use of force, listing

practice, we may be unable to avoid the realization that some states have a greater responsibility for preventive strategies than others. For example, states or other actors that possess the capacity to employ successful preventive strategies may be implicated to a greater degree than other states or actors. Following the Cold War, there have been many occasions when peace operations were undertaken by individual states, such as regional state hegemons, former colonial powers, neighboring states, and current-day great powers.[114] There are a number of reasons why these states acted when the rest of the international community did not. A greater responsibility to act may result from proximity to the conflict site because neighboring states have a greater sense of awareness of the situation and may be better suited to act quickly. For example, mediation efforts in both Kenya and Burundi were led by regional states, organizations, and actors, including South Africa and the African Union.[115]

Similarly, Australia led a regional "coalition of willing" states to intervene in the civil war that erupted in the Solomon Islands.[116] Coalitions of the willing are "groups of actors that come together, often around a pivotal state, to launch a joint mission in response to particular crises."[117] The coalition that responded to the crisis in the Solomon Islands included forces from New Zealand and the Pacific Islands (Fiji, Papua New Guinea, Samoa, Tonga, and Vanuatu).[118] The endorsement and participation of regional states in the peace operations improved the legitimacy of the operations, as did the fact that the Solomon Islands consented to action.[119]

Former ties between a state and the location of a crisis could also motivate action. In 2000, Britain deployed troops to Sierra Leone in response to reports of escalating conflict.[120] The U.N. Security Council, West African region actors, and even the Sierre Leonean population expected Britain to act because of Britain's status as a former colonial power and its earlier efforts to mediate the conflict.[121]

States, and the regional organizations to which they belong, also differ in their capacities to effectively respond.[122] A state may not be able to supply personnel for peacekeeping operations or fact-finding missions, but it may have the ability to assist with preventive diplomacy. Some states may have the ability to provide the full spectrum of measures in the preventive toolkit while some states may only be able to supply very little. All these factors underscore the importance of the Secretary-

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"state-sponsored" terrorist organizations thriving in countries such as Afghanistan and Iraq).

114. Alex Bellamy & Paul Williams, *Who's Keeping the Peace? Regionalization and Contemporary Peace Operations*, 29 INT'L SEC. 157, 168 (2005) [hereinafter Bellamy & Williams, *Who's Keeping the Peace?*].

115. *See supra* notes 81–86 and accompanying text (stating the African Union and the U.N. Security Council worked with the Kenyan government to support its responsibility to protect); *see also* Öberg et al., *supra* note 107, at 78 ("Neighboring countries are an active group of intermediaries, often relying on facilitation as a preventative measure.").

116. Bellamy & Williams, *Who's Keeping the Peace?*, *supra* note 114, at 185–86.

117. *Id.* at 169.

118. *Id.* at 185–86.

119. *Id.* at 186.

120. *Id.* at 179–80.

121. *Id.* at 181.

122. *See generally* Kristin M. Haugevik, *Regionalising the Responsibility to Protect: Possibilities, Capabilities and Actualities*, 1 GLOBAL RESP. TO PROTECT 346 (2009) (discussing the different capabilities of regional organizations and states in the implementation of the responsibility to protect).

General's conclusion that "context matters" and that "implementation ... should respect institutional and cultural differences from region to region."[123]

Because each crisis may implicate actors based on differing criteria (proximity, history, capacity, etc.), a legal norm of prevention may be more effective if it recognizes that the responsibility to act may be unevenly distributed. States may not share an equal or identical burden, and this burden-sharing may be reallocated from crisis to crisis.

C. Summary

The limitations discussed in the previous section illustrate the risks that come with increased precision of an international legal norm on conflict prevention. Such risks do not necessarily implicate abandonment of precision but only moderation of its emphasis given its potential effects on operational success. The emphasis placed on a jurisprudential value, such as precision, depends on the effects that such a value will have for the realization of the substantive norm. As discussed above, precision introduces significant risks for the implementation of the responsibility to prevent, and these risks should calibrate the emphasis that scholars and practitioners place on defining and specifying the nature of such an obligation. Precision, however, may be highly desirable for other dimensions to the responsibility to protect. For example, the responsibility to react could benefit from clearly defined parameters regarding the use of force. But just because greater precision is beneficial for one dimension of the responsibility to protect (use of force) does not mean that it is equally beneficial for another dimension (conflict prevention). Because of these concerns, different international treaties sometimes do calibrate the level of precision used. Sometimes international organizations match imprecision of terms with greater delegation of authority to a body that will interpret the terms.[124] Other treaties simply include imprecise language without an accompanying delegation of authority for interpretation.[125] Scholars have identified the benefits of relaxing the need for precision and adopting soft law alternatives in certain situations. Actors may prefer to adopt soft law with a relaxed emphasis on precision depending on the nature of the problems they are trying to resolve.[126] Soft law "offers more effective ways to deal with uncertainty, especially when it initiates processes that allow actors to learn about the impact of agreements over time."[127] It also "facilitates compromise, and thus mutually beneficial cooperation, between actors with different interests and values, different time horizons and discount rates, and different degrees of power."[128]

These and similar doubts that are voiced regarding the value of precision usually relate to the costs of precision to improving consensus and compliance among international actors. One concern is that prioritization of precision increases the

123. U.N. Secretary-General, *The Role of Regional and Subregional Arrangements in Implementing the Responsibility to Protect*, para. 8, U.N. Doc. A/65/877-S/2011/393 (June 27, 2011) [hereinafter *Regional and Subregional Arrangements*]; *see also* Haywood, *supra* note 28 (commenting on the higher probability of regional consensus on implementation of the responsibility to protect rather than global consensus).

124. Abbot et al., *supra* note 17, at 405–06, 415.

125. *Id.* at 407.

126. Abbott & Snidal, *supra* note 16, at 423.

127. *Id.*

128. *Id.*

likelihood of disagreement between parties and reduces the likelihood of consensus, especially during a treaty-drafting stage.[129] Another concern is that too much specificity may actually discourage conformity between members of the international community. Under the "acculturation approach" "[c]onformity depends less on the properties of the rule than on the properties of the actor's relationship to the community."[130] According to this theory, "rules best foster conformity by 'establish[ing] broad hortatory goals with few specific proscribed or prescribed activities.'"[131] Precision, by contrast, "is more likely to emphasize disagreements—triggering cognitive cues that the would-be reference group is importantly dissimilar from the target actor."[132]

By focusing on only the compliance costs of precision, however, these views understate the full consequences of increased precision because these views take for granted that full compliance will result in the operational success of the substantive norm. By translating the principle of the responsibility to prevent into a legal norm, international law becomes a tool to commit actors to abide by this principle. But this commitment is not the ultimate objective, nor is the resulting compliance. Instead, the critical question is what kind of world results from such compliance? If actors behave exactly as proscribed or prescribed by the legal rule, does this result in the successful operationalization of the responsibility to prevent? As discussed below, precision can compromise the success of an international legal norm on conflict prevention even if full compliance is achieved.

Consider the current definition of the responsibility to prevent, which "entails the prevention of... [atrocity] crimes, including their incitement, through appropriate and necessary means.... The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability."[133] As stated, this obligation is hardly precise. Imagine that the advocates of the responsibility to prevent set out to rectify this shortfall. Their goal is to maximize the compliance-increasing effects of precision by (a) allowing actors to know what is required by the norm, (b) minimizing self-interpretation, (c) permitting identification of non-compliance, and (d) increasing reputational losses from non-compliance.[134] They seek to achieve a level of precision that would secure the commitment of state actors without suffering from the compliance-decreasing costs of precision, such as (a) jeopardizing consensus, (b) compromising substantive content, or (c) marginalizing actors so that they no longer experience a need to conform behavior.[135] But even a level of optimal precision that maximizes compliance-gains and minimizes

129. *See* Goodman & Jinks, *supra* note 16, at 678 ("Commentators suggest that ambiguity facilitates agreement in the drafting stage. Indeed, Professors Abbott and Snidal, contend that ambiguity can be 'a major advantage' in lowering contracting costs and that, in some circumstances, insisting on precision 'may prevent agreement altogether.'").

130. *Id.* at 683.

131. *Id.*

132. *Id.* at 683–84 ("Effective social sanctions (and rewards) require that target actors value the judgment of some reference group. Indeed, it is the approval of, or status in, this reference group that the target actor seeks. If precision outstrips the institutionalized preferences and expectations of target actors, then it disserves acculturation. As described above, too much precision risks deinstitutionalization.").

133. 2005 World Summit Outcome, G.A. Res. 60/1, para. 138, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

134. *See* Goodman & Jinks, *supra* note 16, at 677 (discussing the benefits of precision of obligation).

135. *Id.* at 677–78; FRANCK, *supra* note 37, at 30–33 (discussing the impact of textual determinacy on compliance).

compliance-costs still poses significant risks to the implementation of the responsibility to prevent.

Informed by the past experiences in Kenya and Burundi, imagine that these advocates offer a revised definition of the responsibility to prevent that includes the following obligations:

In the event that a Crisis Event threatens to occur on the territory of a Contracting State or its Neighbor, or in the Region of the Contracting State, the Contracting State shall:

(a) offer its diplomatic services to the Affected Parties in a timely manner, with the objective of reducing tensions between the Affected Parties and preventing a Crisis Event;

(b) cooperate with other State Parties in the Region to apply appropriate political and economic sanctions in a manner designed to prevent a Crisis Event;

(c) refrain from contributing to the occurrence of a Crisis Event, including refraining from supporting, aiding, or facilitating any aggressive or belligerent activities by the Affected Parties, and

(d) remain informed about the Affected Parties and their changing circumstances and provide regular updates to international institutional actors, such as the United Nations, on the situation.

Such a revised obligation still contains some necessary ambiguity. But even if this level of precision could satisfy international actors and persuade them to accept such an obligation, full compliance with these terms will not achieve the implementation of the responsibility to prevent. Kenya and Burundi will not occur again—at least, not in the same manner. Preventive strategies crafted retrospectively will best address crises of the past and will not necessarily prevent the crises of the future. The toolkit of preventive strategies described in the hypothetical legal obligation discussed above may easily fail in another crisis situation, even if all state actors comply exactly as they promised. These are the limitations of foresight and why flexibility is required. Greater precision may win greater compliance, but that compliance may still miss the mark.

Precision may work better in situations where it is easier to envision both the objective and the means to achieving such an objective. When the means can be identified clearly and formulated as either prescriptive or proscriptive legal obligations of state actors, then compliance with such obligations is more likely to result in outcomes closer to the objective desired. When the means to the objective are unknown or disputed—such as in conflict prevention strategies—then compliance with the legal obligations may not signify very much in terms of achieving the ultimate objective. This is especially true when, as in conflict prevention, the objective is achieved through the positive obligations of states.[136] These obligations can take innumerable forms, varying with the causes of the crisis and escalation and the actors' proximity and capacity. The combination of these variables frustrates attempts to clearly identify these obligations in advance of the crisis. In addition, precision may discourage actors from providing assistance above and beyond what is

136. *See* Goodman & Jinks, *supra* note 16, at 683 (discussing how imprecision is more likely to result in the adoption of social norms, whereas precision is more likely to emphasize disagreements).

clearly obligated and thereby compounds the risk of ineffectiveness. Finally, precision may impede the evolution and growth of the legal obligation. By contrast, as recognized even under Franck's theory of fairness, vagueness can promote flexibility and incorporation of new information.[137]

II. INADEQUACY: FAILING TO CREATE LEGITIMACY

A number of the proponents of precision and other jurisprudential values discussed above advocate these values in order to improve the compliance of international actors with international legal rules.[138] Under Franck's theory of legitimacy, particular characteristics of legal rules influence whether a community will perceive that rule as fair and legitimate, and these perceptions thereby help determine that community's compliance with such rules.[139] Similarly, according to the interactional conception, these values are important in order for a legal norm to be perceived as legitimate by the community to whom the norm is addressed.[140] It is this belief in the legitimacy of the legal norm that determines whether or not the community will feel a sense of obligation to the legal norm.[141] Obligation, in this sense, is an "internalized commitment and not . . . an externally imposed duty matched with a sanction for non-performance."[142]

As this section illustrates, the legal values that secure the desired perceptions of legitimacy may include values not traditionally emphasized. This is because these values include extra-legal factors that are often neglected in considerations of legitimacy. This section illustrates, however, the importance of nontraditional jurisprudential values for securing compliance from a critical group of actors—regional and subregional actors—for the responsibility to prevent.

A. The Role of Regional Organizations in Implementing the Responsibility to Prevent

The success of the responsibility to prevent with reference to Burundi and Kenya has been partially credited to the role that regional organizations played in preventing the escalation of the conflicts. In Kenya, the African Union (AU) led mediation efforts in order to control escalation.[143] The AU's Panel of Eminent Africans, including former U.N. Secretary-General Kofi Annan, was involved in negotiating a peaceful resolution, and the AU Assembly also advocated a peaceful settlement by the parties.[144] The AU's sustained support for mediation and peaceful

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137. FRANCK, *supra* note 37 at 31 ("The vagueness of the rule did permit a flexible response to further advances in technology, a benefit inherent in indeterminacy.").

138. *See generally supra* notes 28–63 and accompanying text (discussing the effects of jurisprudential values on the responsibility to protect).

139. *See* FRANCK, *supra* note 37, at 30 (discussing how to examine the legitimacy of the primacy rules).

140. BRUNNÉE & TOOPE, LEGITIMACY AND LEGALITY, *supra* note 16, at 27.

141. *Id.* at 55.

142. *Id.* at 27.

143. *The Kenya National Dialogue and Reconciliation*, KOFI ANNAN FOUND., http://kofiannanfoundation.org/kenya-national-dialogue-and-reconciliation (last visited Jan. 20, 2013).

144. *Id.* Though successful in this regard, commentators note the need for regional arrangements in Africa to improve their capacity for preventive diplomacy. *See* Kwesi Aning & Samuel Atuobi,

resolution, in combination with similar support from other international actors, was important in reaching a settlement.[145] The involvement of local and regional actors was significant in guaranteeing an effective resolution of the conflict.[146]

In Burundi, regional leadership supported mediation.[147] According to Ambassador Adonia Ayebare, former Ugandan Deputy Ambassador to the United Nations, the appointment of Mr. Julius Nyerere by regional heads of state was significant because "it signaled that, from the onset, the region was going to take the lead in the mediation process while the United Nations and the rest of the international community would play a supporting role."[148] Representatives of powerful regional states, such as South Africa, assisted in facilitating the mediation process and also added financial and peacekeeping support.[149] Finally, regional leaders presented unified positions in support of the mediation process in order to pressure the warring parties into participation in the mediation and eventual compromise.[150]

Regional support was also important to the preventive measures employed in Ivory Coast. The Security Council's comfort with officially recognizing one of the parties was likely due to the fact that the AU and ECOWAS had similarly recognized Mr. Outtara on an earlier occasion.[151] According to one analyst, "[a]s in Libya . . . the attitude of regional arrangements was a critical determinant of Security Council action."[152] Although ultimately unsuccessful as a deterrent to violence, this recognition by the Security Council legitimized and supported other preventive measures adopted by other parties to deter the violence in Ivory Coast.[153] Additionally, regional support was critical to the coercive measures that were ultimately adopted by the Security Council and which deterred the violence:

> [T]he specific language on the use of force for protection purposes in Resolution 1975 was facilitated by ECOWAS's earlier announcement that

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Application of and Responses to the Responsibility to Protect Norm at the Regional and Subregional Levels in Africa: Lessons for Implementation, *in* THE ROLE OF REGIONAL AND SUBREGIONAL ARRANGEMENTS IN STRENGTHENING THE RESPONSIBILITY TO PROTECT 12, 16 (Stanley Found. 2011) (discussing past failures of regional and subregional organizations and the need for improvement).

145. HUMAN RIGHTS WATCH, BALLOTS TO BULLETS: ORGANIZED POLITICAL VIOLENCE AND KENYA'S CRISIS OF GOVERNANCE 67 (2008); *see also* MARCH 2008 MONTHLY FORECAST: KENYA, SEC. COUNCIL REPORT (Feb. 28, 2008), *available at* http://www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.3909161/k.63A9/March_2008brKenya.htm ("As the violence worsened, international pressure for a negotiated solution increased, including from the AU Peace and Security Council, the US, the EU, and the UK, as well as the Secretary-General during talks at the margins of the AU Summit in late January and in a subsequent visit to Nairobi.").

146. KOFI ANNAN FOUND., *supra* note 143.

147. MTHEMBU-SALTER ET AL., *supra* note 84, at 5.

148. Ayebare, *supra* note 85, at 82.

149. *Id.* at 83; MTHEMBU-SALTER ET AL., *supra* note 84, at 8; U.N. Secretary-General, *Implementing the Responsibility to Protect*, para. 41, U.N. Doc. A/63/677 (Jan. 12, 2009) [hereinafter *Implementing the Responsibility to Protect*].

150. *See* MTHEMBU-SALTER ET AL., *supra* note 84, at 5 (describing the efforts of regional leaders to convince the Burundian president to take part in discussions and help cease the fighting).

151. Bellamy & Williams, *The New Politics of Protection*, *supra* note 12, at 832–33.

152. *Id.* at 833.

153. *See* FRANCK, *supra* note 37 and accompanying text ("[A] belief in the law's legitimacy re-enforces the perception of its fairness and encourages compliance.").

> force could be a legitimate means of responding to the crisis. Without strong regional support it is very unlikely that events would have unfolded in this manner.[154]

As these case studies demonstrate, preventive diplomacy has "significant conflict dampening effects," but is usually more effective when it is supported by regional powers and neighboring states.[155] The importance of regional organizations to conflict prevention is demonstrated by the fact that, beginning in the 1990s, most preventive efforts have been undertaken at the regional level.[156] The value of regional leadership in conflict prevention is that "the institutions developed will be sensitive to regional norms and therefore better able to tailor and target appropriate responses."[157] Those favoring regionalism argue that "regional bodies are better able to understand local dynamics of conflict, therefore helping to overcome the dilemma of comprehensiveness by focusing only on those elements of conflict prevention that are instrumentally and culturally appropriate."[158]

The proponents of the responsibility to protect recognize the importance of regional organizations. In its 2001 report, the ICISS recognized that for effective conflict prevention "[g]reater involvement by regional actors with intimate local knowledge is . . . crucial."[159] According to the ICISS,

> [a]lthough emerging conflicts tend to share a number of characteristics, each is also unique in some ways. Regional actors are usually better placed to understand local dynamics, although they also have shortcomings—not least of which is that they are often not disinterested in the outcomes of deadly conflicts.[160]

The ICISS was referencing the value of regional actors in developing effective early warning capabilities that are critical to successful conflict prevention. But effective early warning is dependent upon "detailed knowledge of the countries and regions at risk" that can provide both the necessary data as well as the accompanying analysis for an effective response.[161]

Accurate analysis is important in order to better identify the correct response. Effective conflict resolution is dependent upon an accurate understanding of the options available for prevention and the likelihood of success of those options in a

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154. Bellamy & Williams, *The New Politics of Protection*, *supra* note 12, at 837. Similar support was also necessary for the use of coercive measures in Libya: "As in Côte d'Ivoire, regional organizations played a 'gatekeeping' role by establishing the conditions under which the Security Council could consider adopting enforcement measures." *Id.* at 839.

155. Öberg et al., *supra* note 107, at 67, 69, 85.

156. *See* Bellamy, *Conflict Prevention*, *supra* note 102 ("[S]ince the 1990s, the majority of conflict prevention initiatives has been launched at the regional level.").

157. *Id. But see id.* at 148 (discussing the drawbacks to a regional focus for conflict prevention, including asymmetrical implementation of conflict prevention efforts and weakening of global conflict prevention strategies).

158. *Id.*

159. ICISS REPORT, *supra* note 2, § 3.17.

160. *Id.*

161. EVANS, ENDING MASS ATROCITY CRIMES, *supra* note 88, at 81; *see also* ICISS REPORT, *supra* note 2, § 3.11 (identifying "the perennial problem of securing accurate information on which to base analyses and action" as a factor that prevents and hinders early warning).

particular crisis.[162] The collection of data, the correct analysis of the data, and the formulation of an effective response are all areas that can benefit from the insight of regional actors,[163] as illustrated by the use of conflict prevention in Kenya and Burundi. Additionally, and critically, successful conflict prevention is dependent upon the political will to commit resources to ensure that a conflict does not emerge or escalate.[164] Neighboring states, regional institutions, local NGOs, and civil society are more likely to suffer the consequences of an emerging conflict and are therefore more likely to be invested in successful conflict prevention. These actors are therefore more likely to provide the necessary sustained support for conflict prevention.[165]

B. Regional Organization as the Critical Audience

As illustrated in the discussion above, the primary audience for the norm of the responsibility to prevent should be the regional and subregional actors of the world. Their commitment to the responsibility to prevent is critical for the norm's continued growth and acceptance. It is therefore important to secure the ownership of the responsibility to prevent by these actors.[166] The U.N. Secretary-General acknowledged the importance of regional and subregional arrangements in his June 2011 report, *The Role of Regional and Subregional Arrangements in Implementing the Responsibility to Protect*.[167] In his report, the Secretary-General recognized that "[r]egional and subregional arrangements can encourage Governments to recognize their obligations under relevant international conventions and to identify and address sources of friction within their societies before they lead to violence or atrocities."[168] Examples include regional bodies that promote human rights within the region, encourage Member States to participate in international conventions on human rights, and improve public awareness of human rights standards.[169] Regional

162. EVANS, ENDING MASS ATROCITY CRIMES, *supra* note 88, at 81, 85.

163. *See Regional and Subregional Arrangements*, *supra* note 123, para. 24 ("Often, neighbours and sub-regional, and regional organizations have the keenest sense of when trouble is brewing in the neighbourhood and of where and how the international community can be of the greatest assistance. They can identify capacity gaps and serve as conduits for the two-way flow of information, ideas and insights between stakeholders at the local and national levels and those at the global level . . . . Most often, it is through the interplay of ideas, perspectives and preferences among local, national, and international stakeholders that the best policies and the most sustainable strategies are identified.").

164. *See* EVANS, ENDING MASS ATROCITY CRIMES, *supra* note 88, at 81 ("[C]onflict prevention requires . . . the necessary political will to apply those resources."); Aning & Atuobi, *supra* note 144 ("The second lesson from the conflicts in Côte d'Ivoire and Libya is that it is quite difficult to persuade Africa's political leadership to mobilize regional arrangements for conflict prevention . . . . The Ivorian and the Libyan conflicts were thus exacerbated by a lack of both respect for regional norms and courage on the part of the AU to take timely decisions."); Bellamy, *Five Years On*, *supra* note 82, at 154 (explaining the unwillingness of Member States to commit resources).

165. *See* Paul Martin, Note, *Regional Efforts at Preventative Measures: Four Case Studies on the Development of Conflict-Prevention Capabilities*, 30 N.Y.U. J. INT'L L. & POL. 881, 884 (1998) ("Because [regional arrangements] are usually closer to the scene of a potential conflict, they may react more quickly and possess greater access to the major actors and problems.").

166. *Regional and Subregional Arrangements*, *supra* note 123, para. 8.

167. *Id.* para. 4.

168. *Id.* para. 17.

169. *See, e.g.*, *id.* (describing the creation of the Association of Southeast Asian Nations Intergovernmental Commission on Human Rights in 2009 and its activities as an example of "neighbours

organizations can also assist with improving "preparedness" and "the regional and sub-regional development of norms, standards and institutions that promote tolerance, transparency, accountability, and the constructive management of diversity."[170]

The challenge, therefore, is to secure the commitment of regional and subregional actors to the responsibility to prevent. Although a multitude of states have voiced their support for conflict-prevention responsibilities as articulated in the Outcome Document, actual support for prevention is currently insufficient.[171] With the exception of the Organisation for Economic Co-operation and Development (OECD) states, most U.N. Member States have not taken adequate steps to include conflict prevention strategies as part of their foreign policy.[172] Regional and subregional institutions in the third world have taken even fewer steps in incorporating conflict prevention.[173] The Association of Southeast Asian Nations (ASEAN) in particular was identified as among the "furthest away from adopting R2P's preventive component."[174] Therefore, one of the pressing challenges facing the implementation of the responsibility to prevent is securing the commitment and cooperation of regional actors.

The U.N. Secretary-General recognized that "if principles relating to the responsibility to protect are to take full effect and be sustainable, they must be integrated into each culture and society without hesitation or condition, as a reflection of not only global but also local values and standards."[175] The Secretary-General's advice reaffirms the conclusions reached in a recent conference on Asian perspectives of the responsibility to protect: "The relatively broad and general appeal and high-level support in Geneva and New York must be bolstered by constituencies at the national and regional levels. The globalization of the responsibility to protect is predicated, in part, on its localization."[176] The next step in implementing the responsibility to prevent therefore concerns the best approaches to regional internalization of this principle.

A number of advocates for the responsibility to protect recognize that the effective internalization of the norm depends on its "localization."[177] This means there is a lack of support in some regions for "the promotion of [the responsibility to

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helping neighbours").

170. *Id.* para. 23.

171. *See* 2005 World Summit Outcome, *supra* note 133, para. 138 (documenting the commitments of Heads of State and Government of the U.N. General Assembly to, among other things, prevention of genocide, war crimes, ethnic cleansing, and crimes against humanity).

172. Carment & Fischer, *supra* note 69, at 264.

173. *Id.*

174. *Id.* at 280.

175. *Implementing the Responsibility to Protect*, *supra* note 149, para. 20.

176. ASIA-PACIFIC CTR. FOR THE RESP. TO PROTECT, *supra* note 15, at 7.

177. *See* Alex J. Bellamy & Mark Beeson, *The Responsibility to Protect in Southeast Asia: Can ASEAN Reconcile Humanitarianism and Sovereignty?*, 6 ASIAN SEC. 262, 269 (2010) (applying localization theory in a discussion about Southeast Asia governance); Prantl & Nakano, *supra* note 28, at 214–15 (applying localization theory to the adoption of R2P in China and Japan); Charles Aruliah, *Protecting the Responsibility to Protect: Canada, R2P, and the Need for Engagement in the Asia-Pacific* 23 (Asia-Pac. Ctr. for the Responsibility to Protect, Working Paper No. 1, 2011) (discussing how Canada can use localization to internalize R2P norms); Paul D. Williams, *The "Responsibility to Protect," Norm Localisation, and African International Society*, 1 GLOBAL RESP. TO PROTECT 392, 414 (2009) (discussing the implementation of R2P in Africa).

protect] principles [as] externally imposed" and that instead "[t]here is keen interest in the region for developing its own set of norms and principles parallel to [the responsibility to protect] that is anchored on existing practices and experiences of countries in dealing with intra- and inter-state conflicts."[178] The localization theory that is applied to the responsibility to protect derives from Amitav Acharya's research regarding the process of norm diffusion in Southeast Asia.[179] The localization theory is important because it identifies the factors that influenced the acceptance of external norms into Southeast Asia. This insight is therefore important in order to fulfill the U.N. Secretary-General's mandate of "integrat[ing] [the responsibility to protect] into each culture and society without hesitation or condition, as a reflection of not only global but also local values and standards."[180] In fact, scholarship in other disciplines has applied localization theory to the responsibility to protect,[181] but such efforts have been neglected in legal scholarship on the topic.

Localization is "the active construction . . . of foreign ideas by local actors, which results in the former developing significant congruence with local beliefs and practices."[182] A number of advocates for the responsibility to protect have recognized the importance of localization to the successful implementation of the responsibility to protect:

> [T]he principle must be "localized"—incorporated into regional patterns of norms—if it is to be "operationalized." Consequently, we need to better understand the composition of norms, values, and interests in any given region, their sources and authority, and their relationship to [the responsibility to protect] because localization requires the reconciliation of new global norms with preexisting regional norms. In other words, to gain traction in Southeast Asia, [the responsibility to protect] needs to become compatible with other regional norms.[183]

Localization offers an explanation of what factors contributed to the acceptance of transnational norms in Southeast Asia. As such, the localization theory highlights the factors that are important for similar regional acceptance of the transnational norm of the responsibility to prevent. One critical factor improving the likelihood of localization is the existence and strength of local norms.[184] "Some local norms are foundational to a group," Acharya explains, and "[t]he stronger the local norm, the greater the likelihood that new foreign norms will be localized rather than accepted wholesale."[185] The extent of localization is also influenced by the availability of credible insider proponents, such as individuals or NGOs, "whose primary commitment is to localize a normative order and whose main task is to legitimize and

178. Noel M. Morada, *R2P Roadmap in Southeast Asia: Challenges and Prospects*, 11 UNISCI DISCUSSION PAPERS 59, 59, 65 (2006) [hereinafter Morada, *R2P Roadmap*].

179. Acharya, *supra* note 26, at 270.

180. *Implementing the Responsibility to Protect*, *supra* note 149, para. 20.

181. Bellamy & Beeson, *supra* note 177.

182. Acharya, *supra* note 26, at 245.

183. Bellamy & Beeson, *supra* note 177, at 263.

184. *Id.* at 269.

185. Acharya, *supra* note 26, at 248.

enhance that order by building congruence with outside ideas."[186] Acharya cautions that "[l]ocal norm entrepreneurs are likely to be more credible if they are seen by their target audience as upholders of local values and identity and not simply 'agents' of outside forces or actors."[187] Lastly, "'the norm-takers' sense of identity . . . facilitates localization, especially if they possess a well-developed sense of being unique in terms of their values and interactions."[188]

These factors facilitate the localization of a transnational norm in the Southeast Asian region, and this localization process is critical for securing the region's ownership of and commitment to the responsibility to prevent. The analysis introduces the un-profound realization that transnational norms do not operate on a blank slate. Instead, the successful implementation of a transnational norm should account for the context in which it will operate, including the region's history, regional state powers and regional arrangements (including their security policies), advocacy networks, and regionally shared values that are perceived as unique and that define the region and its members. This means that the transnational norm of the responsibility to prevent will likely face a process of localization as its shape and content is adapted to a particular regional context.

The question is how can law facilitate this localization process? The theories of jurisprudential values discussed in Part I provided the valuable insight that the characteristics possessed by a legal norm can contribute to its legitimacy as perceived by its audience. The degree of precision exhibited by a legal norm can determine whether or not its audience perceives that norm as fair and, consequently, the compliance pull that the norm exerts.[189] This section offers a different application of that same insight. It argues that perceptions of fairness are not sufficient to win the compliance pull of actors. Instead, compliance is promoted by demonstrating a fit between a transnational norm and the regional context in which it will operate. Characteristics displayed by a legal norm can help ensure this fit, but not the characteristics traditionally emphasized in international jurisprudence, such as precision. Instead, the characteristics that facilitate the fit between transnational norms and regional context are derived from Acharya's theory of localization, and include the following representative characteristics:

Congruence with deeply held values that are implicated by the potential legal norm.

Sensitivity to the historical experiences of those affected by the potential legal norm.

Adaptability of the norm and its capacity for slight modifications in different contexts and different crises while retaining its core nature.

Capacity for incremental evolution that takes account of (a) dialogue between practitioners, civil society, and government representatives; (b) the changing nature of crises; and (c) growing capacities of actors to deliver on their legal obligations.

186. *Id.* at 249.

187. *Id.* at 248.

188. *Id.* at 249.

189. *See generally supra* notes 38–46 and accompanying text (discussing the effect of precision on the perceived legitimacy of a legal rule).

Existence of broad constituencies in support of the potential legal norm, implicating the need for public awareness of the legal norm's existence and content but a deeper public understanding of the norm's objectives and benefits.

Active participation by local and regional representatives in defining and shaping the legal norm.

These characteristics highlight key factors for successful norm diffusion in Southeast Asia. Compliance with these characteristics can improve the likelihood that a transnational norm—such as the responsibility to prevent—is accepted and obeyed in the region. However, values highlighted by Franck, Fuller, and others do not necessarily advance the localization of the norm as described by Acharya.[190] As a result, the legal norm of the responsibility to prevent could perfectly adhere to traditional jurisprudential values and still fail to secure voluntary adherence of regional and subregional actors. The following section illustrates how a legal norm's compliance with these characteristics can promote its localization in the East Asia-Pacific region.

C. How International Law Facilitates the Regional Ownership of the Responsibility to Prevent: The Case of the East Asia-Pacific

East Asia-Pacific is the focus of the present analysis because the region's initially wary attitude to the responsibility to protect is giving way to cautious engagement with the principle, especially the preventive dimension.[191] Since it was articulated in 2005, this region experienced the greatest positive turn in favor of the responsibility to protect.[192] However, the "[r]esponsibility to [p]rotect . . . is still far from having taken root in China, Southeastern Asia, and the larger Asia Pacific region."[193] The internalization of the responsibility to protect is dependent on "how RtoP is adapted and operationalized in the context of the principle of non-interference in the internal affairs of states, which is valued by many states in the region."[194] Even if the focus on conflict prevention conforms better to the attitudes and priorities of the region, it is not immune from regional concerns over outside intervention: "Conflict prevention can sometimes be interpreted by the people at the ground level as a form of intervention which makes it mandatory that all prevention efforts are socially rooted in the local culture and concerns of the local people rather

190. *Compare* BRUNNÉE & TOOPE, LEGITIMACY AND LEGALITY, *supra* note 16, at 26 (explaining Fuller's criteria of legality), *and* FRANCK, *supra* note 37, at 30 (outlining the variables that will lend legitimacy to international rules), *with* Acharya, *supra* note 26, at 248 (stating the key factors for advancing localization).

191. *See* NTS ALERT, *supra* note 71, at 1 (stating that while "[t]he doctrine of the Responsibility to Protect is a controversial and contentious one in Southeast Asia . . . [i]t has been largely accepted in principle by most ASEAN states"); Prantl & Nakano, *supra* note 28, at 211 (noting "the July 2009 General Assembly Informal Debate, including the subsequent September 2009 consensus resolution, illustrated that the Asia-Pacific has seen a significant shift in favour of R2P since 2005"); Bellamy & Beeson, *supra* note 177, at 268 (explaining that statements made during the 2009 General Assembly debate on R2P are indicative of the fact that the region has warmed to the principle).

192. Haywood, *supra* note 28.

193. Noel M. Morada, *Asia and the Pacific*, *in* THE RESPONSIBILITY TO PROTECT: THE PROMISE OF STOPPING MASS ATROCITIES OF OUR TIME 136, 131 (Jared Gensler & Irwin Cotler eds., 2012) [hereinafter Morada, *Asia and the Pacific*].

194. *Id.*

than that of external actors."[195] This is the reason why the localization of the responsibility to protect, including its preventive dimension, is so important and why characteristics of legal norms that promote such localization are important. This section illustrates this process by explaining how nontraditional jurisprudential values can facilitate the localization of the responsibility to prevent in East Asia and thereby improve the likelihood that the principle will take root in the region and gain broader support.

1. Congruence

Transnational norms, such as the responsibility to prevent, may need to be adapted to reflect dominant values of the region—values that are seen by the region's inhabitants as defining the region and distinguishing it from others.[196] Therefore, it is important to recognize the importance of these dominant values in promoting the principle of the responsibility to prevent.

The values of national sovereignty, territorial integrity, and non-interference form the core principles of the ASEAN.[197] The value of non-interference is especially important to the Asian region as a whole.[198] The value placed on non-interference is a reason why Asian states have been more willing to consider the dimensions of the responsibility to protect that are concerned with non-coercive preventive measures rather than armed military intervention.[199] The non-coercive nature of the responsibility to prevent does not threaten state sovereignty to the same degree as armed military intervention. If atrocity crimes are prevented in the first place, then there will not be a need for subsequent external intervention in the region to address such crimes. Therefore, the responsibility to prevent is more likely to be accepted the more it reinforces the value of non-interference or, at the least, does not transgress it.

2. Sensitivity to Historical Experiences

A norm should also account for the historical experiences of those who will be bound by the norm.[200] One reason why Asian states place such value on non-

195. John, *supra* note 108, at 13.

196. *See* Morada, *R2P Roadmap*, *supra* note 178, at 60 (discussing the importance of the religious dimensions of the concept of sovereignty).

197. *See* NTS ALERT, *supra* note 71, at 2 (indicating that sovereignty, territorial integrity, and non-interference are among the various ASEAN principles).

198. TOM GINSBURG, *Eastphalia as the Perfection of Westphalia*, 17 IND. J. GLOBAL LEGAL STUD. 27, 28, 32 (2010).

199. Morada, *R2P Roadmap*, *supra* note 178, at 64 ("Thus, given the strong resistance to the very idea of intervention—whether for humanitarian reasons or not—it is only understandable that countries in the region are more willing to develop norms and mechanisms for conflict prevention in order to avoid resorting to military intervention.").

200. *See* Bellamy & Beeson, *supra* note 177, at 265 ("Local practices are potentially crucial because states—even regions—remain surprisingly different .... Simply put, some states or regions are likely to prove more receptive to [the responsibility to protect] because of their unique historical experiences. This is nowhere truer than in Southeast Asia. What we now think of as Southeast Asia has been exposed to historical forces over which the region has generally had little control. As a consequence, the states of the region have been preoccupied with shoring up sovereignty and consolidating domestic security.").

interference is because of their past experiences with colonial powers.[201] Therefore, post-colonial states that remain wary of Western influence may be receptive to legal norms depending on how much of the norm's substance coincides with the local culture's indigenous beliefs. This is why it may be productive to ground the norm in an antecedent or local version in order to reduce concerns about neo-colonialism and improve the receptivity to the norm.[202] In fact, the "prior existence of a local norm in similar issue areas as that of a new external norm and which makes similar behavioral claims makes it easier for local actors to introduce the latter."[203]

Therefore it may be beneficial for the responsibility to prevent to be based in regional policies that aim to achieve similar goals. According to a recent conference sponsored by the Asia-Pacific Centre for the Responsibility to Protect, participants recommended identifying the responsibility to protect (including the preventive dimension) within "existing transnational networks that seek to promote human rights and human security in the region."[204] The ASEAN Political Security Commitment (APSC) Blueprint was adopted in 2009 and identifies a list of priorities related to human rights protection, conflict prevention and resolution, and post-conflict peace-building.[205] According to one regional analyst, "the APSC Blueprint could serve as the main framework in promoting RtoP norm internalization in the region."[206] Developing the responsibility to prevent in Asia around these regional policies could assuage fears about external influence and secure a more meaningful commitment to the norm in the region.

3. Adaptability

According to the localization theory, "the external norm must lend itself to some pruning, or adjustments that make it compatible with local beliefs and practices, without compromising its core attributes."[207] In fact, a study commissioned by the Council for Security Cooperation in the Asia Pacific (CSCAP) found that one of the benefits of involving regional arrangements in implementing the responsibility to protect is that it "[f]osters regional ownership of RtoP and ensures that it is localised in a manner consistent with existing regional norms" and "increases the potential for 'Asia Pacific solutions to Asia Pacific problems.'"[208]

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201. Morada, *R2P Roadmap*, *supra* note 178, at 64.

202. *See id.* at 68 ("ASEAN already has a number of norms and values related to peace and conflict prevention that could be the starting point for [responsibility to protect] promotion in the region.").

203. Acharya, *supra* note 26, at 250.

204. ASIA-PAC. CTR. FOR THE RESP. TO PROTECT, PREVENTING MASS ATROCITIES: ASIAN PERSPECTIVES ON R2P 8 (2008), *available at* http://www.r2pasiapacific.org/images/stories/food/conference%20report.pdf; *see* SARAH TEITT, WORKSHOP ON RESPONSIBILITY TO PROTECT CONSTITUENCY BUILDING IN CAMBODIA 16 (2010) ("Advocates should be careful when introducing new concepts in Cambodia because these concepts are very alien. The best way of explaining these concepts to stakeholders in Cambodia is to base outreach in familiar concepts and make sure the terms are properly translated.").

205. ASEAN SECRETARIAT, ASEAN POLITICAL-SECURITY COMMUNITY BLUEPRINT 4, 8 (2009), *available at* http://www.asean.org/archive/5187-18.pdf.

206. Morada, *R2P Roadmap*, *supra* note 178, at 146.

207. Acharya, *supra* note 26, at 250.

208. COUNCIL FOR SEC. COOPERATION IN THE ASIA PAC., STUDY GROUP ON THE RESPONSIBILITY TO PROTECT: FINAL REPORT, para. 31 (2011) [hereinafter CSCAP FINAL REPORT].

Therefore, in engaging with the normative development of the responsibility to prevent, such as its scope and substantive content, it may be wise to define the responsibility to protect in a way that would allow it to adapt to local cultures while still retaining its nature. The fact that the norm can and does adapt from one region to the next may not undermine its legitimacy, but may facilitate its acceptance and effectiveness. The responsibility to protect is an emerging norm that is comprised of three pillars; (a) each state is responsible for protecting its populations from mass atrocities; (b) the international community must assist the state in fulfilling its responsibility to protect its population; and (c) when a state is unwilling to protect its population, and peaceful measures have failed, the international community must act in accordance with the UN Charter.[209] These pillars have not been accepted universally.[210]

In Africa, all three pillars have received a considerable degree of acceptance.[211] There are operational early warning initiatives, such as the Economic Community of West African States Monitoring Group (ECOMOG), as well as the African Court of Justice and Human Rights.[212] There are five African standby forces and NGOs are particularly active within Africa, where they can even authorize resolutions in the African Union.[213] The story is very different in Latin American and Asia where the third pillar has not been accepted.[214] However, attitudes to the responsibility to protect are changing—especially in Asia, which has undergone the most positive change in favor of the responsibility to protect since 2005.[215]

Therefore, if the responsibility to prevent only embraces the first and second pillars in Asia, but includes the third pillar in Africa, it does not mean that such variation precludes the norm's status as law. Instead, such variation is a product of adaptability of the norm to different contexts and may be necessary in order for it to be perceived as legitimate.

4. Capacity for Incremental Evolution

Capacity for flexibility and adaptability are especially important for norms that are going to develop incrementally and on a case-by-case basis. Though there is currently little support for the third pillar in Asia, it is possible that regional attitudes

209. Heraldo Muñoz, *The Responsibility to Protect: Three Pillars and Four Crimes* 6–8 (Univ. of Denver Human Rights and Human Welfare, Working Paper No. 53, 2009).

210. *See* NTS ALERT, *supra* note 71, at 1 ("[M]ost ASEAN states, which are generally supportive of the first two pillars . . . are wary of the third, reactive pillar.").

211. *See* CSCAP FINAL REPORT, *supra* note 208, at 4, 9 (describing the passage of the Constitutive Act of the African Union and the role of the African Union and the Economic Community of West African States in "regional peace operations and promoting the transfer of best practices which could help prevent the crimes covered in the RtoP").

212. *Africa*, INT'L COAL. FOR THE RESP. TO PROTECT, http://www.responsibilitytoprotect.org/index.php/africa (last visited March 15, 2013).

213. *See id.* (describing and listing the African regional organizations that "have thus sought to incorporate preventive and reactive measures to genocide and mass atrocities" since the 1994 genocide in Rwanda).

214. NTS ALERT, *supra* note 71, at 1; STANLEY FOUND., THE ROLE OF REGIONAL AND SUBREGIONAL ARRANGEMENTS IN STRENGTHENING THE RESPONSIBILITY TO PROTECT 7 (2011).

215. Haywood, *supra* note 28, at 1.

may change in the future.[216] There is also evidence that attitudes of regional powers such as China are cautiously changing to accept new responsibilities.[217]

Therefore, the norm will hopefully evolve and grow in response to inter- and intra-regional dialogue as actors benefit from each other's experiences with implementation.[218] And as state, regional, and international institutional capacities to act improve, the scope of the responsibility to prevent may also advance appropriately. The possibilities for evolution require that the norm remains sufficiently malleable to accommodate change. A norm should remain flexible and capable of evolution; the norm may begin with modest substantive content, but slowly evolve to encompass bolder legal obligations.[219] This may simply be the fate of an emerging norm that is in the process of articulation and acceptance.

5. Presence of Local Advocates and Active Participation by Local and Regional Representatives in Defining the Legal Norm

A related factor is the existence of local actors who can assist in promoting the norm among the relevant populations. One factor limiting the diffusion of the responsibility to protect in Japan was the lack of domestic advocacy networks that supported the norm; instead, these networks were wary of the norm's effects on the human security agenda.[220] Therefore, it is important to involve key local actors who can help facilitate acceptance of the norm. In Asia, regional leadership was valued in adopting and disseminating the ways in which the region would implement the responsibility to protect.[221] CSCAP recently commissioned a study on the regional implementation of the responsibility to protect in order to counteract the region's lack of involvement in developing the norm of responsibility to protect at the global stage.[222] The purpose of the study was to incorporate the views of powerful regional bodies in the Asia-Pacific on how the responsibility to protect should be implemented in the region.[223] The study group identified activities—as set out in the World Summit Outcome Report—that regional organizations are uniquely suited to undertake in the implementation of the responsibility to protect, including regional capacity building, improvement of early warning systems, support to sovereign states that are at risk of mass atrocities, and as a liaison with the United Nations in implementing the responsibility to prevent.[224] With regards to Asia, the study group

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216. *See id.* (stating that Asia underwent "the greatest positive shift in favour of the [responsibility to protect] since 2005").

217. *See* Morada, *Asia and the Pacific*, *supra* note 193, at 137 (describing how there has been a transformation in Chinese policies regarding the responsibility to protect, including the policy elite disregarding mass atrocities as the state's sovereign prerogative and the belief that the international community should respond and assist during extreme humanitarian crises).

218. *See Implementing the Responsibility to Protect*, *supra* note 149, paras. 22–23, 37, 47 (explaining the value of state-to-state learning and lessons-learned processes).

219. BRUNNÉE & TOOPE, LEGITIMACY AND LEGALITY, *supra* note 16, at 54–55.

220. Prantl & Nakano, *supra* note 28, at 216.

221. CSCAP FINAL REPORT, *supra* note 208, para. 39 (explaining that the ASEAN Regional Forum (ARF) is the "most appropriate arrangement for leading the implementation of RtoP in the region" because the ARF understands preventive diplomacy and has institutional ties to CSCAP).

222. *Id.* at 2.

223. *Id.*

224. *Id.* at 16.

found that regional institutions can promote the responsibility to prevent by supporting early warning and response efforts, protecting civilians, and supporting peacekeeping measures.[225] The study group hoped that the implementation of these and similar proposed action items "would also foster regional ownership of and ensure that [the responsibility to protect] is implemented in a manner consistent with local norms and interests."[226] Therefore, the active participation of regional institutions in formulating the norm and subsequently endorsing it to its member constituencies may be critical steps for ensuring that the norm is accepted in East Asia.

6. Existence of Broad Constituencies

Some commentators have also argued that it is not enough that a norm's audience is aware of the norm's existence and requirements, but that the audience should also understand the policies and objectives underpinning the norm.[227] This would expand public awareness beyond promulgation of the legal norm to also include efforts to promote public understanding of the goals the norm seeks to achieve and thereby contribute to the development of supportive constituencies.[228] There is still a general lack of knowledge about the responsibility to prevent in the Asia-Pacific region, even among government officials.[229] For example, although the responsibility to prevent is relevant in Cambodia, given its history with the Khmer Rouge, there is a very low level of awareness of the norm among Cambodian academics, government officials, and civil society organizations.[230]

One regional analyst has observed that the promotion of the norm of the responsibility to protect in Southeast Asia should

> consider the importance of creating constituencies for [the responsibility to protect] at different levels (i.e., community, local, national, and regional) through short- and long-term projects that will bring together key actors and critical sectors that could influence state policies with regard to preventing conflicts and managing humanitarian crisis situations.[231]

Such efforts could include education and training in conflict prevention, improved advocacy networks, and the creation of working groups to examine how the principles of the responsibility to prevent can be applied in Southeast Asia.[232] The belief is that "[t]hrough these working groups, the acceptability of ideas is negotiated with particular consideration for the diverse historical and cultural

225. *Id.* paras. 30, 46, 54.

226. *Id.* at 2–3.

227. Aning & Atuobi, *supra* note 144, at 16; *see also* Morada, *R2P Roadmap*, *supra* note 178, at 65 (stating that the prospects for advancing responsibility to protect norms depends primarily on the openness of the informed public in the region to the idea of rethinking sovereignty).

228. *See* TEITT, *supra* note 204, at 11 (stating that the key to promote the responsibility to protect in the region is to demonstrate to the governments and people of Southeast Asia how a commitment to the responsibility to protect strengthens sovereignty and assists states in meeting core protection goals).

229. Aruliah, *supra* note 177, at 23.

230. TEITT, *supra* note 204, at 22–24.

231. Morada, *R2P Roadmap*, *supra* note 178, at 59.

232. *Id.* at 67.

context of the region."[233] Additionally, one of the suggestions advanced by the CSCAP study group was to strengthen the role of the Eminent and Experts Persons Group so that this group could assist with implementing responsibility in the region.[234] Whether a legal norm reinforces pre-existing (albeit controversial or ignored) legal obligations or introduces a fundamentally new set of legal obligations, it is important to consider how that legal norm could contain the seeds of generating broader normative acceptance. Creating broad constituencies may be especially important in situations where the implementation of the legal norm rests less on enforcement measures than on voluntary compliance.[235]

D. Summary

This section illustrates how nontraditional values of a legal norm facilitate its localization in a particular regional context. Some argue that the localization factors highlighted by Acharya relate to the social legitimacy of a norm and whether the norm is based in shared social understandings.[236] Under this view, localization can determine the social legitimacy of a norm, but jurisprudential values determine the norm's legal legitimacy and whether it is considered law. However, this division between social and legal legitimacy is counterproductive for a number of reasons.

First, the jurisprudential values discussed in Part I were derived with considerations of compliance in mind. These characteristics were identified as desirable because they increased a norm's claim to fairness or legitimacy. Precision makes a norm easier to follow by clearly identifying proscribed or prescribed behavior and worth following by fostering a perception of fairness. The jurisprudential values discussed in Part I are compliance-promoting characteristics of a legal norm. As Part II illustrated, these jurisprudential values may be necessary for compliance, but they are insufficient. Compliance with certain international legal norms, at least, will depend on demonstration of other qualities besides fairness. Informed by Acharya's analysis, a norm's compliance-pull may be better ensured by persuading its audience of the norm's accommodation of the region's dominant values, traditions, and history.[237] Therefore, a norm's characteristics should demonstrate not only its fairness, but also its fit with the local culture.[238] Disregard

233. *Id.*

234. CSCAP FINAL REPORT, *supra* note 208, para. 71.

235. *Cf.* BRUNNÉE & TOOPE, LEGITIMACY AND LEGALITY, *supra* note 16, at 34 ("[W]e accept that power and force are salient to law, but they do not explain the sense of obligation that must exist in international society for legal enforcement to be possible and effective."); John, *supra* note 108, at 6 ("Prevention requires public support so that there is no gap between the policy groups and the people, thereby providing the effort greater legitimacy.").

236. *See, e.g.*, PETER VAN HAM, SOCIAL POWER IN INTERNATIONAL POLITICS 13 (2010) (proposing that normative change constitutes the bulk of social power, which is largely based upon the element of legitimacy); Katharina Wolf, *R2P—A Case for Norm Localisation*, *in* THE RESPONSIBILITY TO PROTECT—FROM EVASIVE TO RELUCTANT ACTION? THE ROLE OF GLOBAL MIDDLE POWERS 111, 112 (Malte Brosig ed., 2012), *available at* http://www.isn.ch/isn/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=155245 ("Norm initiatives are doomed to fail if [the responsibility to protect] is not connected to specific social interests and ideas generated locally . . . .").

237. Acharya, *supra* note 26, at 245–50.

238. AMITAV ACHARYA, WHOSE IDEAS MATTER: AGENCY AND POWER IN ASIAN REGIONALISM 5 (2009).

for the cultural canvas on which a legal norm operates invites two dangers. The danger to account for social norms can create unnecessary tension between the legal norm and its audience and can also compromise its compliance.[239] This occurs when a legal norm does not account for particular factors and forces outside the traditional legal system that can determine the degree of internalization reached. These extra-legal factors constitute the cultural context through which a transnational norm is filtered and can therefore impede the desired regional internalization.

Second, disregard of social norms neglects potential compliance-promoting tools.[240] Fit allows a legal norm to capitalize on extra-legal factors that promote the same desired behavior. Where possible, law should not work in isolation or, worse, in competition with indigenous social forces and norms. Instead, it should attempt to augment its own normative force through partnerships with local social norms that attempt to achieve the same ends. Such extra-legal norms may be a product of the region's attitude towards international legal processes, its history, preferences of dominant actors, applicable regional institutional and domestic policies, and local beliefs and practices. These factors are important because they can determine the success of a legal norm in a particular context. For example, there may be local values, religious beliefs, or regional institutional policies that necessitate that the region's inhabitants come to the aid of a neighboring population that is terrorized by its own regime. Such factors can improve the receptivity and influence of a legal norm on the responsibility to protect that similarly prescribes intervention under such circumstances. These extra-legal factors can be critical for facilitating the meaningful adoption of the responsibility to prevent. An emerging transnational norm does not need to begin from scratch; it should work with what is already there.

Last, social norms and legal norms have the potential to share a mutually-reinforcing and constructive relationship.[241] Social attitudes to the responsibility to protect are changing and it is important to provide for how legal norms should adapt to changing social attitudes, and, more importantly, how legal norms can bring about such changes in social attitudes. Especially when we are concerned with emerging norms—such as the responsibility to protect—international lawyers should account for a two-way relationship between social norms and legal norms, or a feedback loop, where social understandings serve as the foundation for a subsequent legal norm and the legal norm then facilitates the expanded growth of those social understandings to encompass bolder and more substantive social norms.[242] Under this model, an inchoate social norm on the responsibility to protect can give rise to a similar legal norm with minimal substantive content—such as prescribing only the duty of the primary state to prevent the commission of atrocity crimes on its territory. But this legal norm, under the right conditions, could facilitate the expanded growth of social

239. *See id.* at 16 (concluding that an external norm fails to take hold when it "competes with a strong local norm"); BRUNNÉE & TOOPE, LEGITIMACY AND LEGALITY, *supra* note 16, at 24 (quoting Gerald J. Postema, *Implicit Law*, 13 LAW AND PHILOSOPHY 361, 374 (1994), in noting that legal norms are effective only if they are "congruent with the patterns and practices of interaction extant in the society generally").

240. *See* BRUNNÉE & TOOPE, LEGITIMACY AND LEGALITY, *supra* note 16, at 23–25, 98 ("Law-makers must also pay attention to the congruence of prospective legal norms with shared understandings, construct norms and regimes in keeping with criteria of legality, and instantiate a practice of legality.").

241. *See id.* (explaining that law's existence necessitates effective interaction and cooperation between law-applying officials and citizens, which in turn requires congruence between the law and social norms, is necessary to the existence of law).

242. *See id.* at 75–77 (discussing how both social and legal shared understandings can contribute to the creation and maintenance of norms).

understandings on the responsibility to protect to include bolder obligations—such as the responsibility of the international community to act to prevent the commission of atrocity crimes. This expanded growth of social understandings then creates the way for a more robust and demanding legal norm on the responsibility to protect to include these more substantive obligations. Therefore, an emerging legal norm on the responsibility to protect that is first characterized by minimal content could contribute to broad-based support and expansion of shared understandings on the responsibility to protect that could in turn expand and facilitate a more robust version of the legal norm. Indeed, the interactional conception acknowledges the possibility of such a relationship between law and social understandings: "[L]aw is rooted in social practice that generates shared understandings, and we can work to make these shared understandings deeper through more and more interaction. This can, but will not necessarily, lead to law that is more ambitious, that regulates more intrusively."[243] Traditional jurisprudential values alone do not allow a legal norm to generate this feedback loop and facilitate broader social understandings. Although these values may allow actors to reason with law and "make choices about their own lives and appropriate conduct,"[244] there is more that is needed in order for a legal norm to push the contours of current day social understandings.

The question, then, is how does a legal norm facilitate this feedback loop and contribute to broader shared understandings? A legal norm accomplishes this facilitation by harnessing extra-legal factors that seek to accomplish similar changes in the world. Professor Acharya's localization theory identified a series of extra-legal factors that influence norm diffusion in Southeast Asia. These factors determine if a transnational norm—such as the responsibility to prevent—will be accepted in a region and, if so, to what degree. The challenge, then, is to develop legal norms according to nontraditional legal values that work with these extra-legal factors so that the legal norm can indeed expand social understandings. Such values increase the likelihood that a legal norm concerning a particular subject—such as the responsibility to protect—will harmonize with the traditions, practices, and beliefs in a local culture. Successful harmonization means that a legal norm can work with extra-legal factors (such as local values and beliefs) that also share objectives similar to the legal norm. This coordination between legal norms and extra-legal factors enables the legal norm to broaden social understandings under the feedback loop and reduces the likelihood that these extra-legal factors will impede the success of the legal norm in a particular context.

CONCLUSION

As the U.N. Secretary-General has highlighted, regional institutions, their Member States, and a variety of associated actors, such as civil society, NGOs, and local elites, are vital to the effective implementation of the responsibility to prevent.[245] In promoting regional ownership and facilitating the general acceptance of the norm of the responsibility to prevent, its proponents may desire to use international law to help implement the responsibility to prevent.

243. *Id.* at 33.
244. *Id.* at 29–30.
245. *Id.* at 75.

Context matters significantly for the accomplishment of this objective. First, it is important to consider the types of behavior that the legal norm would seek to encourage or discourage and how approaches to promoting legitimacy influence the desired behavior. The responsibility to prevent rests upon a toolkit of preventive measures, including preventive diplomacy, political sanctions, support for economic development, and promotion of human rights, as well as reform of the security sector.[246] Therefore, the relevant analysis concerns whether the jurisprudential values that are emphasized result in the facilitation or impairment of the adoption of these measures.

As discussed above, the value of precision could lead to a rigid application of the norm of the responsibility to prevent, precluding the timely implementation of appropriate measures to changing forms of conflict. It is also important to note that precision presupposes knowledge of what behavior is required before the crisis emerges. As explained in previous sections, the toolkit for prevention is comprised of a multitude of measures that are meant to be employed depending on the particular circumstances of the crisis. Given that practitioners and analysts are still engaged in the process of determining the types of measures that are appropriate for a particular type of conflict, it is much less likely that such clarity is possible when the crisis and its characteristics are still unknown.

The value of precision may also depend on the specific type of norm at issue. Professors Brunnée and Toope's advocacy concerned legal rules applicable to the use of force where clear and consistent rules may be better warranted,[247] though there are still significant drawbacks to clarity even regarding the use of force.[248] Therefore, the value of precision varies depending on whether we are discussing strategies for conflict prevention versus military intervention. This difference in value is a reminder of the importance of contextualized legitimacy standards that are formulated with specific attention to the nature of the legal obligation at issue.

In order to enhance the obligation force of a legal norm, it is important to consider the relationship between social and legal legitimacy. There are characteristics of a legal norm that can enhance the social legitimacy of a norm, expanding the base of shared understandings, and making it possible for fuller, more robust legal norms.[249] But the internal attributes that accomplish this are not derived solely from jurisprudential values. Instead, this inquiry requires consideration of extra-legal factors. These factors, such as history, local values, cultural practices, religious beliefs, and regional security policies constitute the context through which a transnational norm is filtered.

Where feasible, a legal norm will have more success the more it can harmonize with these factors and decrease the likelihood of tension with these same factors. Local values or traditions that reinforce the objectives of the legal norm can improve the likelihood that the norm will be obeyed. In order to utilize the benefits of these extra-legal factors, international lawyers and academics should identify

246. Evans, Lessons and Challenges, *supra* note 74.

247. *See* BRUNNÉE & TOOPE, LEGITIMACY AND LEGALITY, *supra* note 16, at 5 ("The central argument of this book is that there is law in the jungle.").

248. *See* Bellamy & Williams, *The New Politics of Protection*, *supra* note 12, at 847 ("[T]he imposition of more constraints on UN peace operations or coalitions of the willing might exacerbate some of the operational problems experienced in Libya, making it more difficult to implement resolutions effectively.").

249. BRUNNÉE & TOOPE, LEGITIMACY AND LEGALITY, *supra* note 16, at 56.

nontraditional values that increase the likelihood of harmonization between legal norms and extra-legal factors. This Article provided one set of values that can foster the localization of the responsibility to prevent in East Asia.

The extra-legal factors that are important vary depending on the actors who are most essential for securing the objectives of a legal norm, such as conflict prevention. If there is a risk that the elites in power will reject the norm of conflict prevention because they intend to perpetrate crimes on their people, it is not important for the legal norm to harmonize with their particular determinants of legitimacy. Instead, it would be more important to identify the key alternative actors (neighboring states, other international actors) whose support is essential for conflict prevention in that particular situation and reflect their determinants of legitimacy in the extra-legal factors. However, if there is a low risk that the local elites would be the actual perpetrators of violence, their acceptance of the norm becomes more important and extra-legal factors should reflect their determinants of social legitimacy. This difference in the extra-legal factors highlights yet another reason why context matters.

The harmonization between legal norms and extra-legal factors is especially important for emerging norms, such as the responsibility to prevent. Such norms are not yet widely supported.[250] These norms are still in the process of being debated and defined as international actors consider their benefits and risks.[251] Advocates for the norm should consider how law can facilitate the norm's widespread acceptance. Researchers and analysts of conflict prevention note that one of the primary impediments to the implementation of the responsibility to prevent is the lack of political will.[252] Gareth Evans writes that "[p]olitical will is capable of creation and subject to change: its presence or absence is not a given."[253] International law's potential to remedy this lack of political will is not through a legal norm's formal status as law. Instead, adherence to nontraditional values that facilitate the feedback loop between legal legitimacy and social legitimacy can lead to the eventual growth of political will. A minimal legal norm on conflict prevention can, when exhibiting the appropriate internal attributes, foster increased shared understandings on conflict prevention and improved political will for conflict prevention.

Given the risks of jurisprudential values and the hidden potential of other neglected internal attributes, it is essential that international lawyers and academics reconsider the qualities that define law and distinguish legal norms from other types of ordering principles in society. Otherwise, certain norms will never ascend to the status of law. They will inevitably be relegated to the realms of moral values or political principles. This means that a norm such as the responsibility to prevent may never be law. But the responsibility to prevent concerns some of the most egregious problems in the world today and highlights a path forward. If law is going to play a role in this struggle, lawyers and academics must appreciate that law will be insufficient to bring about change. Instead, the change we want to see in the world is dependent upon partnership with other forces and factors for the same change. This

250. *See* Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 895–902 (1998) (explaining that the life cycle of a norm begins with "norm emergence").

251. *Id.*

252. EVANS, ENDING MASS ATROCITY CRIMES, *supra* note 88, at 81.

253. *Id.* at 224.

is the vision of law that we should work towards and we should prioritize the values and internal attributes that help get us there.

Why a War Without a Name May Need One: Policy-Based Application of International Humanitarian Law in the Algerian War

KATHERINE DRAPER*

SUMMARY

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INTRODUCTION

Forty-five years after the beginning of Franco-Algerian hostilities in Algeria, the French government officially recognized that the conflict was, in fact, a war.[1]

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1. *France Admits Algerian Campaign Was 'War,'* BBC NEWS (June 10, 1999), http://news.bbc.co.uk/2/hi/africa/365868.stm; *see also* Blandine Grosjean, *La "guerre d'Algérie" reconnue à l'Assemblée. Les*

Throughout the Algerian War's nearly eight-year duration and for nearly four decades after its end, the French government characterized the conflict merely as *opérations de maintien de l'ordre* or "order maintenance operations."[2] From the beginning of the conflict, France insisted that the Algerian events were purely internal order maintenance operations[3] governed by domestic law and as such were "not a conflict relevant to international law."[4]

The actual nature of the conflict in Algeria, however, never quite reflected the legal appraisal offered by the French government. At the height of the order maintenance operations, 400,000 French troops—including 80% of conscripts—were fighting in Algeria.[5] In total, 2,000,000 French men served in Algeria between 1955 and 1962.[6] French military casualties totaled 23,196 deaths,[7] 7,541 wounded, and 875 missing.[8] The Algerian Ministry of War Veterans calculates 152,863 *Front de Libération Nationale* (FLN) deaths, and although the death toll among Algerian civilians may never be accurately known, Algerian authorities estimate "1,000,000 martyrs."[9] The conflict created other victims too—refugees seeking exile in neighboring countries, forcibly resettled citizens, and detainees held in internment camps.[10] By the end of the war, these victims numbered about 2,500,000, or about one-fourth of the population of Algeria.[11]

Given these disparities between the actual nature of the conflict and France's legal characterization, it is perhaps unsurprising that the question of whether or not

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députés adoptent la proposition de loi officialisant cette expression. [*The "Algerian War" Recognized in the Assembly. Members Adopt the Bill Formalizing This Expression.*], LIBÉRATION (June 11, 1999), http://www.liberation.fr/politiques/0101286383-la-guerre-d-algerie-reconnue-a-l-assemblee-les-deputes-adoptent-la-proposition-de-loi-officialisant-cette-expression (reporting the French National Assembly's unanimous acceptance of a law recognizing the expression "Algerian War"). This translation and all others given hereinafter, unless otherwise noted, are the Author's.

2. Blandine Grosjean, *La France reconnaît qu'elle a fait la "guerre" en Algérie. L'assemblée vote aujourd'hui un texte qui enterre le terme official d' "opérations de maintien de l'ordre"* [*France Recognizes That It Made "War" in Algeria. The Assembly Voted Today for Legislation That Buries Official Term of "Order Maintenance Operations."*], LIBÉRATION (June 10, 1999), http://www.liberation.fr/politiques/0101286322-la-france-reconnait-qu-elle-a-fait-la-guerre-en-algerie-l-assemblee-vote-aujourd-hui-un-texte-qui-enterre-le-terme-officiel-d-operations-de-maintien-de-l-ordre.

3. Maurice Flory, *Algérie algérienne et droit international* [*Algerian Algeria and International Law*], 6 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL [FRENCH DIRECTORY OF INTERNATIONAL LAW] 973, 983 (1960) [hereinafter Flory, *Algérie algérienne*].

4. Jean Touscoz, *Etude de la jurisprudence interne française sur les aspects internationaux de l'affaire d'Algérie*, [*Study of French Domestic Law on the International Facets of the Algerian Affair*], 9 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL [FRENCH DIRECTORY OF INTERNATIONAL LAW] 953, 959–60 (1963) [hereinafter Touscoz, *Etude*].

5. YVES BEIGBEDER, JUDGING WAR CRIMES AND TORTURE: FRENCH JUSTICE AND INTERNATIONAL CRIMINAL TRIBUNALS AND COMMISSIONS (1940–2005) 96 (2006).

6. *Id.*

7. Martin S. Alexander, Martin Evans, & J. F. V. Keiger, *The "War Without a Name," the French Army and the Algerians: Recovering Experiences, Images and Testimonies*, *in* THE ALGERIAN WAR AND THE FRENCH ARMY, 1954–62: EXPERIENCES, IMAGES, TESTIMONIES 1, 5 (Martin S. Alexander et al. eds., 2002).

8. BEIGBEDER, *supra* note 5, at 96.

9. Alexander et al., *supra* note 7, at 5.

10. Arnold Fraleigh, *The Algerian Revolution as a Case Study in International Law*, *in* THE INT'L. LAW OF CIVIL WAR 179, 179 (Richard A. Falk ed., 1971) [hereinafter Fraleigh, *Algeria Case Study*].

11. *Id.*

any of the provisions of the Geneva Conventions of 1949 were applicable to the order maintenance operations became a contemporary source of recurring debate.[12]

As this Note will explain, the Algerian War provides a historical example of a policy-based application of the Geneva Conventions—a serious and recurring application problem of international humanitarian law (IHL). To prevent the application of IHL for various political and strategic reasons, signatory states have either tendentiously classified or denied altogether the existence of armed conflicts in which they are involved.[13] In theory, the very existence of an armed conflict—either international or "not of an international character"—automatically triggers the application of relevant provisions and protections of the Geneva Conventions and thus prevents avoidance of the law by states.[14] However, in practice, signatory states avoid applying the Geneva Conventions for various political and strategic reasons because it remains open to those states to determine whether the subjective criteria of an armed conflict have been met.[15]

Importantly, the fact that the case of the Algerian War is not unique in this regard highlights how widespread this classification problem continues to be in contemporary IHL. France's policy-based application of the Geneva Conventions in Algeria is a pattern that has repeated itself similarly in El Salvador, South Africa, Sri Lanka, Colombia, and the U.S. global war on terror against Al Qaeda.[16]

This Note will present an analysis of the debate about applicable international law during the Algerian War and will also shed light on some of the concrete

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12. Eldon Van Cleef Greenberg, *Law and the Conduct of the Algerian Revolution,* 11 HARV. INT'L L.J. 37, 47 (1970).

13. *See* LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT 34 (2002) (explaining that states can "hide behind the lack of a definition to prevent the application of international humanitarian law by denying the very existence of an armed conflict").

14. Geoffrey S. Corn & Eric Talbot Jensen, *Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror,* 81 TEMP. L. REV. 787, 796–97 (2008).

15. MOIR, *supra* note 13, at 45.

16. *See, e.g.*, Robert Goldman, *International Humanitarian Law and the Armed Conflicts in El Salvador and Nicaragua,* 2 AM. U. J. INT'L L. & POL'Y 539, 544 ("Despite the fact that both the Salvadoran and Nicaraguan governments have permitted the ICRC to establish permanent delegations in their territory, neither government has publicly recognized the existence of an internal armed conflict as defined in Article 3 of the Geneva Conventions."); U.N. Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka 7–13 (Mar. 31, 2011), *available at* http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf (describing the Sri Lankan government's refusal to allow for humanitarian assistance during the country's civil war and the classification of some armed conflict as counterterrorism and humanitarian rescue operations); Arturo Carrillo-Suarez, *Hors de Logique: Contemporary Issues in International Humanitarian Law as Applied to Internal Armed Conflict,* 15 AM. U. INT'L L. REV. 1, 34–38 (1999) (arguing that, while parts of the Colombian Constitutional Court recognized that international humanitarian law is integrated into Colombian law, the military, Congress, and the Executive Branch all refused to adopt applicable IHL standards); Derek Jinks, *September 11 and the Laws of War,* 28 YALE J. INT'L L. 1, 20–25 (2003) (explaining that the September 11 attacks on the United States may not be classified as armed conflict in international law because they "were carried out by a transnational criminal organization that does not appear to act on behalf of any state" and the "armed group responsible for the attacks does not seek to administer or control any part of U.S. territory, nor have they articulated any specific political objectives"); The Azanian Peoples Organization (Azapo) v. The President of the Republic of South Africa 1996 (4) South African Law Reports 671 at 698, para. 29 (S. Afr.) (holding that "it is doubtful whether the Geneva Conventions of 1949 read with the relevant Protocols thereto apply at all to the situation in which [South Africa] found itself during the years of the conflict").

consequences that resulted from France's reluctance to recognize the applicability of the various provisions of the Geneva Conventions. I will begin in Part I by laying out relevant historical background to the conflict. In Part II, I will then analyze the debate concerning applicable IHL—both the lower threshold of Common Article 3 between internal disturbance and armed conflict not of an international character, as well as the debate about whether the conflict eventually constituted an international armed conflict.

This Note will illustrate that as one of the first major test cases for the applicability of either Common Article 3 or the full corpus of the Geneva Conventions, the Algerian War began a legacy of policy-based application of IHL that continues in the post-9/11 world.

I. THE EVOLUTION AND ESCALATION OF THE ALGERIAN WAR

From November 1, 1954 to March 18, 1962, the French military forces fought the FLN in Algeria.[17] Before the war began, however, France and Algeria shared a long, interwoven history. Unlike other French colonial possessions, Algeria had long been considered a part of France itself rather than a colony or a protectorate.[18] Annexed since 1830—longer than the *comté* of Nice, which was annexed in 1860—Algeria had been considered a French territory for nearly 130 years.[19] Algeria was divided into *départements*—or administrative districts—included with the *départements* of the mainland French *métropole*.[20] By the start of the conflict in 1954, over one-million French and other European settlers were living in the Algerian *départements*.[21]

However, while both the *indigenes*, or indigenous people, of Algeria and the European settlers were considered French citizens, they were not equals under French law. For example, only European settlers in Algeria were represented in parliament.[22] There were stirrings of Algerian nationalism prior to the first attacks in 1954, with the first movement calling for an independent, Muslim-controlled Algeria arising in 1926.[23] On the day of the German surrender in 1945, another nationalist demonstration escalated into riots, and thousands of Algerians were killed when the French military "brutally" put down the rioters.[24] Growing from these same roots of nationalist movements and driven by similar aspirations for an independent Algeria, the FLN and its military arm, the *Armée de Libération Nationale* (ALN), planned and carried out the first surprise attacks of the Algerian War against French settlers and military targets in November 1954.[25]

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17. Fraleigh, *Algeria Case Study*, *supra* note 10, at 179.

18. BEIGBEDER, *supra* note 5, at 93.

19. Maurice Flory, *Algérie et droit international* [*Algeria and International Law*], 5 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL [FRENCH DIRECTORY OF INTERNATIONAL LAW] 817, 819 (1959) [hereinafter Flory, *droit international*].

20. *Id.*

21. *See id.* (stating that in 1954 more than 80% of the Algerian population was Muslim). *See generally* BEIGBEDER, *supra* note 5, at 93–95 (discussing the size of the French and other European population in Algeria leading up to the Algerian War).

22. BEIGBEDER, *supra* note 5, at 94.

23. *Id.*

24. *Id.*

25. ALISTAIR HORNE, A SAVAGE WAR OF PEACE: ALGERIA 1954–1962 90–95 (1977). There were

The scope and intensity of the eight-year conflict increased steadily. The organization of the ALN was initially limited, and popular support for the FLN's aspirations for an independent Algeria did not come immediately. Only about 700 FLN members carried out the first FLN attacks on All Saints' Day in November 1954, and it is estimated that only about half were armed—mainly with hunting rifles, shotguns, and homemade bombs.[26] The first year of fighting consisted mainly of hit-and-run terrorism, and furthermore, the district chiefs in charge of three of the six military-political districts set up by the FLN had few followers and weapons at their command.[27] One French intelligence expert estimated that the ALN numbered about 6,000 FLN regulars at the end of 1955, but by the end of 1956 it numbered about 20,000 men carrying 13,000 weapons—mainly automatic rifles and pistols.[28]

However, with an influx of new recruits, the number of attacks carried out by the ALN increased,[29] and the conflict grew to a mainly guerilla-style war with no fixed military fronts or set battles throughout the duration of the war.[30] According to French estimates, the number of incidents rose steadily during the first two years of the conflict, peaking at about 2,500 per month and fluctuating between 1,000 and 2,000 per month for the rest of the war.[31] The ALN's strategy focused on quick, limited attacks—for example, small guerilla units ambushing convoys, attacking military outposts, or derailing trains and immediately retreating into the night.[32] Barracks and police stations were popular targets; however, brutal murders and mutilations of other Muslim "friends of France" also increased.[33] Urban terror campaigns against civilians in Algiers also escalated; bombs were detonated in public areas where Europeans congregated, like cafes, stadiums, and bus stops.[34] Due to the nature of the ALN's guerilla tactics, it was difficult to be sure which areas were held by FLN forces and which were secured by French forces for the French military command.[35]

The success of an FLN-led general strike across Algeria corresponded with a growth of tacit support for the rebels amongst the 8,000,000 Muslim Algerians.[36] After this growth in popular support, the FLN eventually created the *Gouvernement Provisoire de la République Algérienne* (GPRA)—meaning the Provisory Government of the Republic of Algeria—in 1958, headquartered in Tunisia.[37] The highest figure mentioned by the FLN during the conflict counted 130,000 fighters,

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several separate attacks including blowing up roads and bridges, attacking barracks and garrisons, cutting telegraph poles, and burning cork and tobacco stores. *Id.*

26. JOHN TALBOTT, THE WAR WITHOUT A NAME: FRANCE IN ALGERIA, 1954–1962 38 (1980).

27. *Id.* at 47.

28. *Id.* at 48–49.

29. HORNE, *supra* note 25, at 111.

30. Fraleigh, *Algeria Case Study*, *supra* note 10, at 192.

31. *Id.* at 193.

32. Martin Evans, *The Harkis: The Experience and Memory of France's Muslim Auxillaries*, *in* THE ALGERIAN WAR AND THE FRENCH ARMY, 1954–62: EXPERIENCES, IMAGES, TESTIMONIES 117, 123 (Martin S. Alexander et al. eds., 2002).

33. HORNE, *supra* note 25, at 112.

34. Fraleigh, *Algeria Case Study*, *supra* note 10, at 202.

35. *Id.* at 192.

36. Greenberg, *supra* note 12, at 43.

37. *Id.* at 40; Fraleigh, *Algeria Case Study*, *supra* note 10, at 211.

but after Algerian independence, 250,000 Algerians claimed to have been fighting for the FLN.[38]

As for the French military forces, at the beginning of the conflict there were only seven *gendarmes* in charge of maintaining order in the region where the attacks took place and about 54,000 troops on the ground under the commander-in-chief in Algeria.[39] However, after the first attacks, the French government immediately dispatched "[20,000] additional troops" and one-third of "the mainland's riot police."[40]

However, the French military presence continued thereafter to increase dramatically. By December 1956, there were 400,000 French troops in Algeria—about twenty French soldiers for each single FLN fighter—divided between search-and-destroy missions and divisions charged with the protection of Algerians and French settlers and their property.[41] It was the largest army that the French government had ever sent overseas.[42] Included among these troops were paratrooper divisions, fresh from the war in Indochina, which quickly gained a reputation as a "nasty police force" in their repression of the FLN rebels.[43] By sea, the French navy controlled the entire Algerian coastline, attempting to prevent arms importation to the ALN.[44] In turn, the financial cost of maintaining the military operations ballooned, and by mid-1956, the French military budget for fighting in Algeria reached 280 billion *anciens francs*, or $560 million.[45]

The FLN relied on support from Tunisia and Morocco as training grounds for ALN forces, supply depots, bases for launching attacks into Algeria, and as sanctuaries when they fled from French forces.[46] In response, the French turned to various military measures to attempt to put an end to the FLN's use of the two neighboring Arab countries. The French military, for example, constructed barriers along the Tunisian and Moroccan borders, which consisted of barbed wire, electrified fences, and about 3,200,000 mines buried between them.[47] The French air force even bombed several Tunisian villages that had contributed to border skirmishes.[48]

Relying more and more heavily on counter-insurgency tactics, the French army also recruited pro-French Algerian Muslims, known as *harkis*, as auxiliary forces.[49] Paid less than conscripts and professional French soldiers but with an intimate knowledge of the terrain and local population, *harkis* were often used in secretive

38. Fraleigh, *Algeria Case Study*, *supra* note 10, at 192 (citing White Paper on the Application of the Geneva Conventions of 1949 to the French Algerian Conflict, Algerian Office of FLN, New York (1960)).

39. TALBOTT, *supra* note 26, at 38; HORNE, *supra* note 25, at 89.

40. TALBOTT, *supra* note 26, at 38–39.

41. *Id.* at 63.

42. *Id.* at 73.

43. *Id.* at 69.

44. *The Algerian War: Personal Account of Colonel Henri Cousatux*, *in* THE ALGERIAN WAR AND THE FRENCH ARMY, 1954–62: EXPERIENCES, IMAGES, TESTIMONIES 229, 232 (Martin S. Alexander et al. eds., 2002) [hereinafter *Personal Account of Colonel Henri Cousatux*].

45. Greenberg, *supra* note 12, at 39.

46. Fraleigh, *Algeria Case Study*, *supra* note 10, at 193.

47. General Alain Bizard, *Isolating the Algerian Rebellion and Destroying Armed Bands*, *in* THE ALGERIAN WAR AND THE FRENCH ARMY, 1954–62: EXPERIENCES, IMAGES, TESTIMONIES 225, 225 (Martin S. Alexander et al. eds., 2002).

48. TALBOTT, *supra* note 26, at 118; Fraleigh, *Algeria Case Study*, *supra* note 10, at 206–07.

49. Evans, *supra* note 32, at 121–22.

counter-insurgency operations, carrying out "commando raids and ambushes" mirroring the ALN's strategies.[50] Once the *harkis* located and cornered an ALN unit, French paratroopers would be flown in by helicopter to "finish off the job."[51]

Faced with a mounting domestic political crisis and the continuing insurrection in Algeria, the French peacetime legal framework strained to provide justification for the French army's use of repressive force.[52] Thus, in April 1955, the government declared a state of emergency status for Algeria that extended France's civil and military authority, effectively allowing "exceptional police measures."[53] Specifically, the "state of emergency" granted civil authorities the right to order house arrests and greatly expanded the legal powers of the French army to "accelerat[e] the course of justice."[54] Military tribunals therefore gained jurisdiction to try crimes committed by FLN nationalists,[55] including offenses from simple traffic violations to theft, criminal association, rape, and murder.[56] House arrests could be ordered without judicial authorization "on any person . . . whose activity proves to be dangerous for public security and order."[57] Furthermore, French authorities could thereafter order curfews, forbid meetings, close cafés, search private homes at night, and censor the press.[58] Because the authority to order house arrest raised the specter of concentration camps and the crimes of the Vichy police,[59] the National Assembly included another provision in the state of emergency law stating, "In no case, will confinement to residence result in the creation of camps."[60] Despite this provision, four camps were opened one month later in May 1955.[61]

As the situation in Algeria continued to deteriorate, and with victory in Algeria given greater priority, the National Assembly passed in March 1956 another, more expansive special powers law.[62] The special powers given to the government were not enumerated, as they had been under the state of emergency, and instead granted breathtakingly broad power to the government to re-establish order in Algeria with refocused and intensified vigor.[63] These special powers were presented as merely a

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50. *Id.* at 122–23.

51. *Id.* at 123.

52. Raphaëlle Branche, *Torture and Other Violations of the Law of War by the French Army During the Algeria War*, *in* GENOCIDE, WAR, CRIMES AND THE WEST 134, 135 (Adam Jones ed., 2004).

53. *Id.*

54. *Id.*

55. SYLVIE THENAULT, UNE DRÔLE DE JUSTICE: LES MAGISTRATES DANS LA GUERRE D'ALGÉRIE [A STRANGE JUSTICE: MAGISTRATES IN THE ALGERIAN WAR] 31 (Edition La découverte & Syros 2001).

56. BEIGBEDER, *supra* note 5, at 97.

57. *Id.* at 96.

58. *Id.*

59. THENAULT, *supra* note 55, at 34–35. As one member of the National Assembly said, "We are numerous, in this Assembly, to have known personally, before 1939 and from 1940 to 1944, the crimes of police affiliations." *Id.* at 35. Denying that house arrests opened the possibility of concentration camps, another member responded that, "Under the Vichy regime, arrests made for imprisoning people in concentration camps is not the same as talking about confinement to residence." *Id.*

60. *Id.*

61. *Id.*

62. Branche, *Torture and Other Violations*, *supra* note 52, at 135–36.

63. *See id.* (stating that these powers were granted for the purpose of "buttressing the principle of the executive's absolute power with regard to all matters concerning Algeria").

temporary measure, but they were continually renewed by subsequent French political chiefs and remained in effect throughout the war.[64]

After the spectacular collapse of the Fourth Republic, spurred by French army pressure and riots in Algiers against the French government,[65] the turning point of the war came in September 1959 when—against the wishes of part of the French army and the French settlers in Algeria—newly re-installed President Charles de Gaulle endorsed the right of self-determination of the Algerian people.[66]

> I deem it necessary that recourse to self-determination be here and now proclaimed. In the name of France . . . I pledge myself to ask the Algerians, on the one hand, in their twelve Departments, what, when all is said and done, they wish to be; and, on the other hand, all Frenchmen to endorse that choice.[67]

Specifically, de Gaulle offered the Algerian people three alternatives: "secession," integration with France, or a "government of Algerians by Algerians" that would remain politically and economically associated with the French *métropole*.[68] However, De Gaulle's endorsement of self-determination came with qualifications,[69] and it took another two and a half years of war before the last qualification was dropped.[70]

In January 1961, the French as well as Algerian people approved the referendum on self-determination by a large majority.[71] In a dramatic reversal of France's previous policy of non-recognition, de Gaulle recognized the GPRA as the representative of all of Algeria at the negotiation table.[72] After months of tense and often bitter negotiations, on March 18, 1962 the Algerian War finally came to an end with de Gaulle and GPRA representatives signing the Evian Accords and the birth of *Algérie algérienne*.[73]

Four days later, the French government issued two decrees: one granting amnesty for all offenses committed relating to the Algerian insurrection and the other granting amnesty for all offenses committed during "operations of order maintenance" against the Algerian insurgents.[74] The events in Algeria remained, however, *une guerre sans nom*—or a war without a name—until 1999.[75]

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64. *Id.* at 136.

65. BEIGBEDER, *supra* note 5, at 95.

66. *Id.*

67. Fraleigh, *Algeria Case Study*, *supra* note 10, at 183 (citing Speech of de Gaulle (Sept. 16, 1959) *in* MAJOR ADDRESSES, STATEMENTS AND PRESS CONFERENCES OF GENERAL CHARLES DE GAULLE: MAY 19, 1958–JAN. 31, 1964, at 54 (1964)).

68. TALBOTT, *supra* note 26, at 151.

69. For example, de Gaulle made clear that the FLN were not allowed to participate in organizing the referendum for self-determination, but the FLN refused to accept a vote supervised by the French army. Fraleigh, *Algeria Case Study*, *supra* note 10, at 183.

70. *Id.*

71. BEIGBEDER, *supra* note 5, at 95.

72. Flory, *Algérie algérienne*, *supra* note 3, at 995. Two of the main issues negotiated included the terms of a cease-fire and the future status of Europeans in Algeria. TALBOTT, *supra* note 26, at 222.

73. BEIGBEDER, *supra* note 5, at 95. The Evian Accords were approved of by 90.7% of voters in a referendum in France one month later. *Id.*

74. *Id.*

75. *Id.* at 96.

II. THE DEBATE OVER THE APPLICATION OF THE GENEVA CONVENTIONS OF 1949

France ratified, without reservations, the Geneva Conventions of 1949 on June 28, 1951[76] and was therefore bound to observe the Conventions in all applicable circumstances.[77] The question of whether various provisions of the Conventions were applicable to the Algerian conflict became a recurring source of debate throughout the nearly eight-year conflict.

The legal appraisals of the French government and of the FLN concerning the conflict were in complete opposition. The French steadfastly insisted that the conflict was a purely internal problem in which political malcontents showed their opposition to the government by illegal means and where a police force was necessary to restore order.[78] At the same time, the FLN loudly asserted that the conflict had quickly become an international armed conflict.[79] The progressive escalation of the Algerian events, therefore, not only blurred the crucial lower threshold distinction between internal disturbance and an "armed conflict not of an international character," but also eventually posed the question of whether the events rose to the scale of international armed conflict.[80]

First, in Section A, I will discuss the relevant debate concerning the nature of the conflict and the applicability of Common Article 3 that circulated in the government, military, judiciary, and psyche of France during the Algerian War. In Section B, I will then discuss the debate surrounding the question of whether the conflict, which reached its apex in the later stages of the war, rose to merit the classification of an international armed conflict.

A. Common Article 3: Armed Conflict Not of an International Character

For the Algerian conflict, the threshold question was whether Common Article 3[81] was applicable (i.e., whether the violence amounted to an "armed conflict").

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76. Greenberg, *supra* note 12, at 47.

77. Geneva Convention Relative to the Treatment of Prisoners of War art. 1, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter GPW]. Common Article 3, like its namesake, is common to all four Geneva Conventions. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950) [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950) [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) [hereinafter Fourth Geneva Convention].

78. Touscoz, *Etude*, *supra* note 4, at 954.

79. *Id.*

80. *Id.*

81. Common Article 3 of the four Geneva Conventions provides:
In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any

Before the ratification of the four Geneva Conventions, there had never existed an international legal instrument to regulate internal armed conflict.[82] Often called the "conventions in miniature,"[83] Common Article 3 was drafted to come into effect for any "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties"[84] and to trigger the application of certain minimal, underlying humanitarian principles of all four Conventions upon the parties to such a non-international armed conflict.[85]

However, the question of which conflicts come within the scope of application of Common Article 3 has remained a consistently controversial one. The lower threshold between a purely internal disturbance—where no international humanitarian frameworks apply—and the upper threshold, an armed conflict—where IHL is called into force—is critical but difficult, and perhaps impossible, to objectively identify.[86] There are no authoritative or clearly defined criteria for identifying when an internal armed conflict has reached this legal category of armed conflict not of an international character.[87] Because the definition contains relatively open criteria necessary to define an abstract concept like armed conflict, it remains open to states to determine whether such a conflict exists and thus, whether to apply IHL.[88] Oftentimes—and as France did during the Algerian War—states deny that insurgents have met necessary criteria and thus claim that the situation does not amount to armed conflict.[89]

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other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

GPW, *supra* note 77, art. 3; First Geneva Convention, *supra* note 77, art. 3; Second Geneva Convention, *supra* note 77, art. 3; Fourth Geneva Convention, *supra* note 77, art. 3 [hereinafter Common Article 3].

82. MOIR, *supra* note 13, at 30.

83. *Id.*

84. Common Article 3, *supra* note 81.

85. *See id.* (creating both prohibitions and affirmative obligations concerning non-combatants).

86. *See, e.g.*, MOIR, *supra* note 13, at 45 (discussing obstacles to objective assessment).

87. Greenberg, *supra* note 12, at 48; *see also, e.g.*, MOIR, *supra* note 13, at 31–32 (stating that there is no universally accepted definition of the term "armed conflict" and the condition, "not international in character," provides little guidance).

88. MOIR, *supra* note 13, at 45.

89. *Id.*

France was reluctant to admit the applicability of Common Article 3, and never explicitly accepted its obligations. From the beginning of the conflict, France insisted that the Algerian events were purely internal "operations to restore order"[90] governed by domestic law and as such did not constitute "a conflict relevant to international law."[91] Throughout the eight-year duration of the Algerian War and for nearly four decades after its end, the French government employed an impressive variety of creative legal semantics to avoid officially recognizing the conflict as a "war." Examples of such tendentious official terminology include *opérations de maintien de l'ordre en Afrique du Nord* (order maintenance operations in North Africa),[92] *évènements d'Algérie* (Algerian events),[93] rebellion,[94] *l'affaire algérienne* (the Algerian affair),[95] *le conflit algérien* (the Algerian conflict),[96] and *les troubles d'Algérie* (the Algerian troubles).[97] Similarly, the official discourse of the French government and military systematically denied members of the National Liberation Army (ALN) the status of fighters or combatants, and were instead referred to as *hors-la-loi* (outlaws),[98] *fellaghas* (bandits/highwaymen),[99] *rebelles*,[100] *responsables de la rebellion* (responsible for the rebellion),[101] and *terroristes*.[102] The French military's "pacification" campaign was not officially considered waging war, but rather order maintenance operations and police operations.[103]

The rhetorical veneer of the French government's official discourse aside, the debate about applicable law showed similar reluctance to recognize that the lower threshold between internal disturbance and armed conflict had ever been crossed. Considered a collection of *départements*, Algeria was politically, economically, and socially linked closely to France.[104] France never considered Algeria to have been a separate state,[105] and this attitude heavily informed France's early legal assessment of the conflict. For example, during the Tenth General Assembly of the United Nations in 1955, Antoine Pinay—the French Foreign Minister at the time—attempted to put an end to the first official international discussion concerning the character of the events when he declared, "Algeria is an integral part of the French territory" and "[i]t would . . . be inconceivable that the United Nations could be so unmindful of its

90. Flory, *Algérie algérienne*, *supra* note 3, at 983.

91. Touscoz, *Etude*, *supra* note 4, at 959.

92. Grosjean, *supra* note 2.

93. Sylvie Thénault, *Justice et politique en Algérie 1954–1962* [*Justice and Politics in Algeria 1954–1962*], 34 DROIT ET SOCIÉTÉ [LAW AND SOCIETY] 575, 578 (1996) [hereinafter Thénault, *Justice et politique*].

94. Touscoz, *Etude*, *supra* note 4, at 954.

95. *Id.*

96. *Id.*

97. *Id.*

98. TODD SHEPARD, THE INVENTION OF DECOLONIZATION: THE ALGERIAN WAR AND THE REMAKING OF FRANCE 43 (2006).

99. *Id.*

100. Thénault, *Justice et politique*, *supra* note 93, at 583.

101. Touscoz, *Etude*, *supra* note 4, at 954.

102. *See* Flory, *Algérie algérienne*, *supra* note 3, at 983 (describing the actions of Algerian fighters as terrorism); Alexander et al., *supra* note 7, at 3 (stating that the French government labeled the ALN as "terrorists").

103. Flory, *Algérie algérienne*, *supra* note 3, at 983.

104. *Greenberg*, *supra* note 12, at 39.

105. *Id.*

functions and so untrue to its mission as to interfere in the domestic affairs of member states."[106] When the "Algerian question" was voted onto the docket of the General Assembly by a one-vote margin, the French delegation walked out in protest and the issue was shortly thereafter removed from discussion.[107]

The debate was largely a psychological and political one, closely tethered to the French government's need to maintain the viability of any degree of its authority in Algeria.[108] The creation of the GPRA, which was comprised only of FLN members,[109] unsurprisingly did not change France's legal assessment of the purely internal nature of the conflict.[110] The French legal community generally considered the GPRA to be an "exterior organization of the rebellion"[111]—or at best a propaganda organization.[112] For the French government, the idea of the FLN establishing a government of an independent state was absurd[113] since Algeria was considered to be as much a part of France as Alsace or Strasbourg.

The FLN first argued that Common Article 3 applied to the conflict as early as February 1956, and prominent contemporary legal commentators argued that France eventually conceded that Common Article 3 applied to the conflict.[114] While never published in the official record, in 1955 the Prime Minister expressly acknowledged Common Article 3's applicability to the conflict when asked an official question by a member of the National Assembly.[115] Moreover, the International Committee of the Red Cross (ICRC) initially offered its humanitarian services to the French government first in 1955 and again in 1956.[116] The French government urged the ICRC for "pressing reasons of public order" to defer sending missions.[117] Eventually, the Prime Minister accepted the second ICRC offer to visit prisoners "in conformity with Article 3 of the Geneva Conventions regarding armed conflicts not of an international character."[118] ICRC representatives ultimately made 289 visits to French detention centers in Algeria by 1959.[119]

Despite French cooperation with the ICRC, the record of compliance with Common Article 3 for both France and the FLN was far from satisfactory and included the practice of questionable due process, summary execution, collective responsibility, and widespread, if not systematic, use of torture.[120] Efforts by the

106. *Id.* at 39–40 (citing U.N. GAOR 10th Sess., U.N. Doc. A/PV 528 (1955)).

107. Flory, *droit international*, *supra* note 19, at 822.

108. Greenberg, *supra* note 12, at 46.

109. Flory, *droit international*, *supra* note 19, at 835.

110. Greenberg, *supra* note 12, at 40.

111. *Id.* at 44.

112. *Id.* at 41.

113. *Id.* at 40.

114. MOIR, *supra* note 13, at 71. *See, e.g.*, Flory, *droit international*, *supra* note 19, at 832 (stating that the French government's position that the events in Algeria were not an international armed conflict implicated a de facto recognition of the applicability of Article 3).

115. *See* MOIR, *supra* note 13, at 71 (stating that "the question was from M. Boutbien, No. 17,520 of 20 June 1955, and the answer was communicated only to him and the ICRC").

116. Greenberg, *supra* note 12, at 50.

117. *Id.* at 67.

118. *Id.* at 50; Flory, *droit international*, *supra* note 19, at 831.

119. Flory, *droit international*, *supra* note 19, at 831.

120. An in-depth discussion of such practices exceeds the scope of this Note, but has been tackled in impressive detail elsewhere. *See, e.g.*, BEIGBEDER, *supra* note 5 (discussing previous war crimes committed by France); Branche, *Torture and Other Violations*, *supra* note 52, at 134 (discussing France's

ICRC to coax the two sides into special accords, which would have agreed to slightly more than the minimum humanitarian principles laid out in Common Article 3, were never realized.[121] Neither party responded to a Draft Agreement, presented by the ICRC in May 1958 whereby "both parties would pledge themselves to observe Article 3, avoid reprisals, and treat prisoners humanely."[122] In fact, neither side replied to the repeated requests of the ICRC made in October 1958, and the premier of the GPRA, Ferhat Abbas, ignored a written demand on the subject again in December 1959.[123]

Despite the tacit nod to Common Article 3, throughout the war the French government never wavered in its insistence that only French domestic law—and not the international laws of war—governed its order maintenance operations in Algeria. Only days after the first attacks in November 1954, Minister of the Interior François Mitterand wrote, "The terrorist attacks are common law crimes. The men who commit these attacks against people and property are in no case to be considered as having a military nature since the antinational propaganda strives to attribute precisely this [military] characteristic to the bandits."[124] In line with this sentiment, domestic penal code provisions, criminal offenses, and the heaviest criminal sanctions—which were reserved only for times of war—were never employed to prosecute FLN rebels.[125] After years of military escalation, this same legal appraisal endured. As late as 1958, the French legal system treated FLN fighters as part of a sedition movement that fell not under the laws of war but under French domestic law protecting against national security.[126]

Importantly, moreover, the French military strategies and operations in Algeria did not very closely mirror the French government's official legal appraisal of a purely internal conflict. Specifically, there was a noticeable disconnect between the actual nature of the French military's pacification operations and what might generally be expected of order maintenance operations of law enforcement in an

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use of torture during the Algerian War); RITA MARAN, TORTURE: THE ROLE OF IDEOLOGY IN THE FRENCH-ALGERIAN WAR (1989) (evaluating the use of torture during the French-Algerian War). For French language studies, see generally Raphaëlle Branche, *Ombres et lumières sur la Guerre d'Algérie en France (1962–2005)* [*Shadows and Light on the Algerian War in France (1962–2006)*], *in* CONTROVERSES [CONTROVERSIES], 160 n.2 (June 2006); PIERRE VIDAL-NAQUET, LA TORTURE DANS LA RÉPUBLIQUE [TORTURE IN THE REPUBLIC] (1972); SYLVIE THENAULT, UNE DRÔLE DE JUSTICE: LES MAGISTRATES DANS LA GUERRE D'ALGÉRIE [A STRANGE JUSTICE: MAGISTRATES IN THE ALGERIAN WAR] (2001); PIERRE VIDAL-NAQUET, FACE À LA RAISON D'ETAT: UN HISTORIEN DANS LA GUERRE D'ALGÉRIE [FACED WITH THE STATE'S RATIONALE: A HISTORIAN IN THE ALGERIAN WAR] (1989); Raphaëlle Branche, *La commission de sauvegarde pendant la guerre d'Algérie: chronique d'un échec annoncé* [*The Conservation Commission During the Algerian War: Chronicle of a Foreshadowed Failure*], 61 REVUE D'HISTOIRE [HISTORY REVIEW] 14 (Jan.–Mar. 1999); RAPHAËLLE BRANCHE, LA TORTURE ET L'ARMÉE PENDANT LA GUERRE D'ALGÉRIE: 1954–1962 [TORTURE AND THE ARMY DURING THE ALGERIAN WAR: 1954–1962] (2001). For French language memoires, see generally, HENRI ALLEG, LA QUESTION [THE QUESTION] (1958); GENERAL AUSSARESSES, SERVICES SPÉCIAUX: ALGÉRIE 1955–1957 [SPECIAL SERVICES ALGERIA 1955–1957] (2001).

121. Greenberg, *supra* note 12, at 51.

122. *Id.*

123. *Id.*

124. Thenault, *Justice et politique*, *supra* note 93, at 577.

125. Touscoz, *Etude*, *supra* note 4, at 955–56.

126. *See* Flory, *droit international*, *supra* note 19, at 829–32 (stating that after de Gaulle's 1958 conference, "certain French jurists assessed that the status of combatant could be applied to FLN fighters").

internal disturbance. French military strategy in Algeria did not much resemble law enforcement but instead more closely paralleled status-based rules of engagement.[127] The principal official military objectives were to "pacify Algeria," reestablish confidence in a continued French presence, and to "crush the uprising."[128] In other words, the scope, intensity, and duration of the French government's response to the threat indicated that the government was engaged in combat operations or even war, and not merely maintaining order in the face of widespread criminal disobedience.

Troops were divided generally into one of two different sectors: (1) *quadrillage* and pacification, as well as reestablishing order by *ratissage*, or (2) seeking out and fighting the rebels.[129] *Quadrillage* consisted of dividing the countryside into grids with each box raked over by military patrols.[130] This method, however, proved largely ineffective in light of ALN troops' intimate knowledge of the terrain and ability to attack and retreat into hiding quickly.[131] Beginning around 1959, the search-and-destroy missions took more of an offensive approach with "integrated radio communications, tactical air support, and interdiction of fleeing ALN bands by French air force light bombers, along with helicopter scouts, armored cars, and motorized columns."[132] For the French, the key to victory became relentless pursuit. Tracker units of Muslim *harkis* and a large general reserve of French troops worked in tandem to seek out ALN bands,[133] and naval helicopters also assisted in locating and weeding out ALN forces.[134] Such status-based tactics became acutely evident during the famous Battle of Algiers where, in mass round-ups, military regiments made summary arrests from lists of suspects made by military authorities who had forcibly taken over police dossiers.[135] As the Minister of Defense stated: "You do not fight rebels with legal means; you fight rebels with means identical with theirs. It is the *lex talionis*—eye for an eye, tooth for a tooth; it is the law of self-defence on a country-wide scale."[136]

One particular tactic not generally considered characteristic of order maintenance or law enforcement operations was the forced mass relocation of Algerian civilians. Despite assertions by the French government and military that the ALN never secured territorial control over any section of Algeria, there were large expanses of the country that were "won by the rebellion"[137] or where "the FLN

127. Geoffrey S. Corn, for example, has argued that when the rules of engagement "authorize engagement based solely on status determinations, it represents an inherent invocation of the laws of war as a source of operational authority . . . and indicates when the forces of the state will inherently invoke authorities derived from the laws of war." Corn further recommends that the use of status-based rules of engagement should be adopted as a new law-triggering paradigm for Common Article 3. Corn & Jensen, *supra* note 14, at 823–24.

128. *Personal Account of Colonel Henri Cousatux*, *supra* note 44, at 230–32.

129. RAPHAËLLE BRANCHE, LA TORTURE ET L'ARMÉE PENDANT LA GUERRE D'ALGÉRIE: 1954–1962 [TORTURE AND THE ARMY DURING THE ALGERIAN WAR: 1954–1962] 41 (2001) [hereinafter BRANCHE, TORTURE ET L'ARMEE].

130. FRANCE AND THE ALGERIAN WAR 1954–62: STRATEGY, OPERATIONS AND DIPLOMACY 9 (Martin Alexander & J. F. V. Keiger eds., 2002) [hereinafter FRENCH ARMY STRATEGY].

131. *Id.*

132. *Id.* at 17. These operations were known as the Challe Plan. *Id.* at 16.

133. HORNE, *supra* note 25, at 332.

134. *See id.* at 334 (discussing French air support).

135. *Id.* at 190.

136. MOIR, *supra* note 13, at 73 (citing Howard J. Taubenfeld, *Applicability of the Laws of War in Civil War*, *in* LAW AND CIVIL WAR IN THE MODERN WORLD 499, 509 n.38 (John N. Moore ed., 1974)).

137. BRANCHE, TORTURE ET L'ARMEE, *supra* note 129, at 41.

were the masters," called *zones interdites*, or "No Go Zones" by French military command.[138] French troops strictly controlled access to these zones and required the civilian population living within any *zones interdites* to evacuate the area.[139] After civilian evacuations, homes and villages were often destroyed or burned[140] to make it easier to detect ALN troop movements.[141] This regroupment policy—figuratively designed to drain the water in order to asphyxiate the rebel fish—led to the transfer of over one million Muslim villagers to housing camps.[142] Camps ranged from installations that resembled "fortified villages of the Middle Ages to the concentration camps of a more recent past."[143] Sometimes surrounded by barbed wire, trenches, and armed sentries, the camps often had serious problems with disease, malnutrition, and cramped living conditions—for example, housing fifteen civilians in a single tent.[144] At least one, perhaps overstated, calculation remarks that 2,157,000 Muslims were either currently or at one point living in one of over 2,000 regroupment centers by 1960.[145]

Besides forced displacement and internment, French military operations at times purposefully did not discriminate against the civilian population. "In the course of combat, *mechtas* (small villages) that serve as active defensive cover to rebels are military objectives, to be treated as such by [French military] firepower" but "after combat, no retaliation against surrounding buildings by soldiers or commanders is tolerated."[146] To incentivize civilians suspected of harboring rebels to talk or to convince the rebels to surrender, parachutists sometimes soaked family farms in gasoline.[147] After civilians were evacuated, troops often burned the village since cattle and grain were essential provisions for the rebels.[148] Moreover, after the passage of the state of emergency laws, *centres de triage et de transit* (CTT), or "triage and transit centers" operating under total military authority could hold any suspect—civilian or combatant—for interrogation for a maximum of one month.[149] Torture and other coercive interrogation techniques were not uncommon practices in these camps.[150]

However, while the French government consistently maintained that this military pacification of the FLN rebels did not constitute a war, French civil courts in metropolitan France asserted—though rather timidly—that the conflict was in fact a

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138. FRENCH ARMY STRATEGY, *supra* note 130, at 15.

139. *See* Fraleigh, *Algeria Case Study*, *supra* note 10, at 202 (discussing mandatory evacuations of areas of Algeria for the purpose of targeting combatants); FRENCH ARMY STRATEGY, *supra* note 130, at 15 (noting that the French called the areas controlled by the FLN *zones interdites*).

140. BRANCHE, TORTURE ET L'ARMEE, *supra* note 129, at 41.

141. *See* Fraleigh, *Algeria Case Study*, *supra* note 10, at 202 (stating that after civilian areas were destroyed, the French presumed that those remaining were FLN sympathizers).

142. HORNE, *supra* note 25, at 338.

143. *Id.*

144. *Id.* at 338–39.

145. JOHN DOUGLAS RUEDY, MODERN ALGERIA: THE ORIGINS AND DEVELOPMENTS OF A NATION 189 (Ind. Univ. Press 2d ed., 2005).

146. BRANCHE, TORTURE ET L'ARMEE, *supra* note 129, at 40.

147. *Id.* at 46–47.

148. *Id.* at 47.

149. *Id.* at 122.

150. *Id.*

civil war.[151] In light of the prolonged and increasingly intense nature of the rebellion in Algeria, a metropolitan court of appeals—ruling on an insurance company indemnification claim for private property destroyed by attacks in Algeria—first qualified the conflict as a civil war in November 1959.[152] The court declined to give significance to the French government's official statement and instead held:

> Whereas this well-known situation, whether it is qualified as "terrorism," "rebellion," or "events" is, by its political goals, by the importance of the military resources put in place, by the magnitude of the conflict and by the number of its victims, constitutive of an insurrectional state armed by a part of the French population against the government and must be qualified as a civil war.[153]

According to this decision, therefore, the political goals and the violent military confrontation warranted the legal characterization of civil war.[154] Other courts of appeals followed this reasoning, and the highest French court, the Court of Cassation, affirmed the decision, although it did so without setting forth its own definition of the notion of civil war.[155] Prior to this affirmation, the Court of Cassation had annulled the decision of the Court of Algeria, which had held that the events in Algeria could no longer be qualified as only a rebellion, and had affirmed another decision holding that a fire set by FLN rebels was not an act of civil war.[156]

This position, however, fell well outside the range of the French government's legal appraisal of the nature and gravity of the Algerian conflict.[157] Moreover, the legal ambiguity of the situation persisted, for example, when the President of the Military Tribunal refused to admit witnesses' use of the expression "Algerian War" into the record.[158] In fact, Common Article 3 was invoked only once before the Court of Cassation, but was never expressly pronounced to be applicable.[159]

The reach of Common Article 3 in this case, therefore, was extremely limited in its legal capacity to offer "any real guarantee" to prosecuted FLN rebels.[160] It is also important to note that the French civil courts characterized the conflict as a civil war for insurance purposes—reasons irrelevant to humanitarian concerns.[161] Nonetheless, by qualifying it as a civil war, the French judicial system, at least in part, helped to add some precision to a poorly defined conflict and suggested that there was an emergent international dimension to the Algerian events.

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151. Touscoz, *Etude*, *supra* note 4, at 966–68.

152. *Id.* at 965.

153. *Id.* at 967. "Attendu que cet état de fait notoire, qu'il soit qualifie 'terrorisme,' 'rébellion,' ou 'événement' est, par ses buts politiques, par l'importance des moyens militaires mis en œuvre, par l'ampleur du conflit et par le nombre de ses victimes, constitutive d'un état insurrectionnel arme d'une partie de la population française contre le gouvernement et qu'il doit être qualifié 'guerre civile.'" The case of *Société Purfina contre La Nationale Incendie et autres.* Cour d'appel [CA] Montpellier, Nov. 20 1959, Gaz.Pal. 1959, 2, 328 (Fr.).

154. Touscoz, *Etude*, *supra* note 4, at 967.

155. *Id.* at 968.

156. *Id.* at 963–64.

157. Flory, *Algérie algérienne*, *supra* note 3, at 983.

158. *Id.*

159. Touscoz, *Etude*, *supra* note 4, at 958.

160. *Id.*

161. *Id.* at 965.

B. International Armed Conflict: The Full Geneva Conventions?

Throughout the conflict, there was never a clear resolution to the question of whether the war was an internal one or one of international character. In fact, French government officials and FLN representatives in the GPRA disputed this point all the way up to the cease-fire negotiations in 1962,[162] and the question remains in dispute today.

While the French government at least implicitly acknowledged the applicability of Common Article 3, it steadfastly denied that the conflict reached an international scope, and thus that the full force of the Geneva Conventions applied.[163] The FLN, on the other hand, pushed early on for the recognition of the hostilities as an international armed conflict.[164]

This distinction is a particularly meaningful one since parties to an international armed conflict benefit from the robust humanitarian protections of the full corpus of the Geneva Conventions as triggered by Common Article 2,[165] while internal or armed conflicts not of an international character trigger only the comparatively modest protections of Common Article 3.[166] Of particular importance for the case of Algeria, if a conflict rises to one of an international scope, the detailed protections of the Third and Fourth Conventions, which cover the treatment of prisoners of war and protection of civilians, then apply. After providing for the application of the full Conventions to "armed conflicts which may arise between two or more of the High Contracting Parties," Common Article 2 further provides, in relevant part:

> Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.[167]

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162. Fraleigh, *Algeria Case Study*, *supra* note 10, at 182.

163. *Id.* at 195.

164. *See* Flory, *Algérie algérienne*, *supra* note 3, at 980 (stating that the GPRA announced in 1960 its intention to define the conflict in Algeria as one that is international in nature).

165. Common Article 2 establishes the criteria for the application of the Conventions to armed conflict. It provides:

> In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
>
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.
>
> Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

GPW, *supra* note 77, art. 2; First Geneva Convention, *supra* note 77, art. 2; Second Geneva Convention, *supra* note 77, art. 2; Fourth Geneva Convention, *supra* note 77, art. 2 [collectively hereinafter Common Article 2].

166. Common Article 3, *supra* note 81.

167. Common Article 2, *supra* note 165.

Generally, an international conflict is understood to mean an inter-state conflict, and therefore, whether a conflict is legally characterized as international depends on the involvement of more than one state power.[168] Attempting to fulfill this international characterization—and thus to potentially receive the humanitarian protections of the full Conventions and not just Common Article 3—the FLN sought international recognition of its belligerent status and of the legitimacy of the GPRA.[169] Accordingly, in an effort to raise the conflict to international status, the GPRA publicly announced its own adherence to the Conventions.[170]

Despite changing its official policy after General de Gaulle's 1959 speech—shifting from keeping Algeria "French" to allowing for the possibility of an "Algerian Algeria"—France never changed its position that the Algerian question was a purely internal issue.[171] Therefore, it is perhaps unsurprising that the French government did not seriously consider characterizing the GPRA as anything other than "the exterior organization of the rebellion."[172] While the GPRA was no longer considered the "leader of bands of rebels,"[173] the French government remained unconvinced that the GPRA was representative of the Algerian people merely by virtue of "installing itself at the head of Algerian Algeria."[174] This is because for France to have recognized the belligerency of the FLN or the legitimacy of the GPRA would have "called into question the whole validity of its efforts" to pacify the FLN and restore internal order.[175]

In December 1959, the GPRA issued a memorandum outlining French actions that it claimed amounted to a recognition of Algerian belligerency:

> (1) recourse by France to exceptional legislation inspired by that used in times of war;
>
> (2) the legal significance of French inspections of ships on the open ocean and the seizure of their cargo;
>
> (3) the legal impact of diverting the plane transporting [an FLN leader] and his companions;
>
> (4) the recognition of Algerian belligerence by General de Gaulle in his speech on 23 October 1958;
>
> (5) the negotiation attempts between the FLN and the French government.[176]

Even so, according to the French legal analysis, the FLN barely fulfilled any of the three requirements of belligerency under the traditional laws of war. These requirements include: (1) hostilities conducted by organized troops under military

168. MOIR, *supra* note 13, at 47.
169. Flory, *droit international*, *supra* note 19, at 825.
170. Flory, *Algérie algérienne*, *supra* note 3, at 981.
171. *Id.* at 973–74.
172. *Id.* at 973 ("[L]'Organisation extérieure de la rebellion . . . .").
173. *Id.* at 991 ("[I]l n'est plus question de chefs de bande . . . de l'insurrection . . . . ").
174. *Id.* at 990 ("[p]uisqu'il se place déjà à la tête de l'Algérie algérienne").
175. Greenberg, *supra* note 12, at 47.
176. Flory, *Algérie algérienne*, *supra* note 3, at 982.

discipline in compliance with the laws of war; (2) the establishment of a government that exercises the rights inherent in sovereignty on that territory; and (3) occupation of a certain part of the State territory by insurgents.[177] At least by 1959, it was generally recognized that, despite continuing weaponry shortages, the ALN forces showed sufficient military organization to constitute at least the semblance of an army.[178] The ALN was trained both abroad and in Algeria, had a hierarchically organized command structure,[179] was composed of relatively standardized units, and wore a distinctive sign—a red crescent and a star on the cap.[180] One prominent contemporary legal scholar contends, though perhaps overstates, that "the bulk of the ALN consisted of soldiers in uniform."[181]

However, for French authorities, the FLN's fulfillment of belligerency requirements stopped there. The French maintained not only that the GPRA was not a legitimate government, but also that the ALN never held exclusive control over a portion of Algerian territory.[182] More than this, the French saw the GPRA's vigorous arguments for application of the full Geneva Conventions as disingenuous and merely a "means of propaganda."[183] The GPRA issued the "White Paper," in which it demanded Common Article 3 treatment "as a minimum," and asserted that ALN forces qualified for the full protection of prisoner of war status under Article 4 of the Third Geneva Convention.[184] The GPRA had previously asserted this position in its first official Policy Declaration after its formation.[185] More specifically, relying on belligerent status and asserting that "the conflict in Algeria constitutes a war," the GPRA argued that under paragraph (A)(2) of Article 4 of the Third Geneva Convention (GPW), its forces met all defining qualifications set forth to qualify its members as part of an "organized resistance movement."[186]

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177. *Règlement Adopté par L'Institut: Droits et Devoirs des Puissances Étrangères, au Cas de Mouvement Insurrectionel, Envers les Gouvernements Établis et Reconnus qui sont aux Prises avec L'Insurrection* [*Rules Adopted by the Institute: Rights and Duties of Foreign Powers, in the Case of an Insurrectional Movement, Towards Established and Recognized Governments that Are Taken with the Insurrection*], 18 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL [DIRECTORY OF THE INSTITUTE OF INTERNATIONAL LAW], Sept. 1900, at 227–29.

178. *See* Greenberg, *supra* note 12, at 42, 57 (describing the recognition of the ALN as a belligerent army, and the typical captured ALN soldier as not having a weapon).

179. Flory, *droit international*, *supra* note 19, at 826.

180. Greenberg, *supra* note 12, at 42.

181. *Id.* (citing M. BEDJAOUI, LAW AND THE ALGERIAN REVOLUTION 53 (1961)). Bedjaoui later became the Minister of Justice of Algeria. Press Release, International Committee of the Red Cross, Algeria: Colloquium on Humanitarian Law (May 23, 2001), *available at* http://www.icrc.org/eng/resources/documents/misc/57jr2a.htm.

182. Flory, *droit international*, *supra* note 19, at 826–27.

183. *Id.*

184. Greenberg, *supra* note 12, at 56.

185. *Id.* at 47 n.48 (citing LE MONDE, Sept. 27, 1958, at 2, col. 5).

186. *Id.* at 56.

The conditions set forth are:

(a) That of being commanded by a person responsible for subordinates;

(b) That of having a fixed distinctive sign recognizable at a distance;

(c) That of carrying arms openly;

(d) That of conducting their operations in accordance with the laws and customs of war.

GPW, *supra* note 77, art. 4(A)(2).

Moreover, the GPRA Council of Ministers passed a decree in approval of the Conventions and deposited the instrument with the Swiss Federal Council.[187] In response, however, the Swiss Federal Council issued a public statement "that for states which had not recognized Algeria, adhesion was 'without juridical relevance,'" and while the ICRC announced its pleasure at the GPRA's willingness to ratify the Conventions, it made clear that no recognition of belligerency by other signatories could be implied by the gesture.[188] The French government had no official response, but a *Le Monde* article written by a respected contemporary legal commentator might be representative of reactions within the government:

> [It] does not appear judicially receivable. In effect, whatever may be its international status, the "GPRA" does not represent an established state. As a result, it does not fall within the scope of the articles of the Geneva Conventions, which envision the adhesion of powers, that is, of states.[189]

To be sure, the FLN very likely invoked the full Conventions in large part to lend international recognition to their cause.[190] However, there is evidence that at least a small effort was made to give prisoner of war status to detained French soldiers. A fair number of captured French soldiers—either after their release or in letters home to their families carried by the ICRC—stated that they had been treated as prisoners of war.[191] Another GPRA decree releasing French prisoners mentioned its compliance with Common Article 2.[192] The FLN's overall record of compliance was certainly not as rosy as these examples suggest. However, despite engaging in a public relations campaign for international legitimacy by showing its willingness to ratify, the FLN voluntarily took on the likelihood of international pressure from other states and perhaps took a small step toward humanizing the conflict.[193] For example, in 1959, the GPRA proposed a general humanitarian agreement that extended modestly beyond the reach of Common Article 3, but the French did not accept.[194]

Despite the reluctance of the French government to recognize the legitimacy of the GPRA, the FLN was, in fact, rather successful in gaining international recognition. Even before the founding of the GPRA, the FLN attended the Bandung Conference as unofficial delegates and five months later was added by a vote on to the agenda of the U.N. General Assembly.[195] The FLN had foreign offices in Bonn, Rome, London, and New York.[196] When French naval ships seized cargo of ships in international waters in attempts to stop arms shipments to the FLN, several

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187. Greenberg, *supra* note 12, at 64.

188. *Id.* at 65.

189. *Id.* (citing Roger Pinto, *Le "GPRA" et les Conventions de Genève* [*The "Provisional Government" and the Geneva Conventions*], LE MONDE (Apr. 13, 1960), at 1, col. 2).

190. *Id.* at 65–66.

191. Flory, *droit international*, *supra* note 19, at 826.

192. *Id.*

193. Greenberg, *supra* note 12, at 66 ("[T]he decision to ratify can also be seen as a gesture directed toward humanizing the conflict. . . . Ratification imposed an obligation on the FLN to conform to the rules it had accepted; regardless of the motivation of its accession, the FLN was voluntarily opening itself to increased external (and perhaps internal) pressure from other parties to comply.").

194. *Id.* at 51.

195. HORNE, *supra* note 25, at 130–31.

196. Greenberg, *supra* note 12, at 43.

countries protested that France had violated international law.[197] By the end of 1959, seventeen countries recognized the GPRA,[198] and by the cease-fire, that number had grown to thirty.[199] The French government, however, attached no legal implications to such recognitions and instead viewed them as purely politically motivated acts by "Soviet-bloc states," the "group compact of Muslim countries," and "two African countries."[200]

However, it is perhaps important to note that both Tunisia and Morocco behaved as if the war had risen to one of international character.[201] Both neighboring countries officially considered the conflict to be an international war,[202] declared themselves allies of the FLN, and provided considerable financial and material support to the FLN during the conflict.[203] For its part, the Tunisian government refused to consider FLN members as French citizens and claimed that the French consul did not have the right to visit FLN fighters in prison.[204] Similarly, the Moroccan leader warned that pursuing FLN rebels who were seeking refuge in Moroccan territory would not be tolerated.[205] Aware of the delicate situation and wanting to avoid any internationalization, France explicitly avoided confrontation with either country but maintained that Morocco and Tunisia's recognition of belligerence did not alter its own legal appraisal of the conflict as purely internal.[206] However, when twice brought before the U.N. Security Council for the bombing of Tunisian villages believed to be harboring ALN fighters, France in turn requested condemnation of Tunisia for its military aid to rebels and argued that the support to the rebels provided by Tunisia constituted acts of aggression.[207]

In light of French actions such as recourse to emergency laws, attempts at negotiation with GPRA representatives, frontier incursions into Tunisia, and the seizure of ships under foreign national command in international waters, some jurists wondered whether France had ventured outside the boundaries of a purely internal conflict and had instead recognized the de facto belligerency of the FLN.[208] One jurist wrote that in light of these French actions, the FLN might deserve "a

197. Flory, *Algérie algérienne*, *supra* note 3, at 982.

198. *Id.* at 984.

199. Greenberg, *supra* note 12, at 43.

200. *See* Flory, *droit international*, *supra* note 19, at 840 (noting that other factors beyond political considerations were important for the Muslim countries as well). States recognizing the GPRA in 1959 include: Iraq, the United Arab Republic, Libya, Yemen, Morocco, Tunisia, Saudi Arabia, Jordan, Sudan, Indonesia, China, North Vietnam, North Korea, Outer Mongolia, Ghana, and Guinea. *Id.* at 839–40.

201. *Id.* at 829.

202. *Id.*

203. *Id.* at 828.

204. *Id.* at 829.

205. Flory, *droit international*, *supra* note 19, at 828–29. The Moroccan leader Abbas el Fassi defined his country's official position, stating in 1957, "Our Algerian brothers fight inside their borders and if they take refuge inside Morocco, no one has the right to pursue them there because the sanctuary that they seek inside Moroccan territory is one of the rights without which Moroccan sovereignty could not be complete. It is the least of our duties toward a brother country who defends liberty. . . . We equally strive to increase the support that we bring to our brother country in his fight against colonialism for his liberation." *Id.*

206. *Id.* at 834–35.

207. Fraleigh, *Algeria Case Study*, *supra* note 10, at 214–15.

208. Greenberg, *supra* note 12, at 41–44.

belligerent status in the non-technical sense of the term."[209] This non-technical belligerent status was perhaps achieved by the close of the war, as indicated at the opening peace negotiations at Evian, where the chief French negotiator discussed the French government's perception of the GPRA representatives by saying, "[W]e recognize in them the quality of combatants. We see in them the delegates of a political organization who present themselves as candidates for power . . . ."[210]

Translated into military practice in Algeria, the French government's refusal to consider application of the full Conventions, and thus to offer prisoner of war status to ALN fighters led to ambiguous detention practices. Even after General de Gaulle began the transition toward an official French political policy of allowing for Algerian self-determination and an Algerian Algeria in 1959, the French government did not reconsider its policy of refusing to apply formal prisoner of war status to ALN troops and FLN fighters.[211] In the year before de Gaulle's return to the presidency, French military leadership stipulated that certain FLN rebels, referred to as "PAM" (*pris les armes à la main* or "fighters captured openly carrying arms"), should not be prosecuted.[212] Instead, military leadership suggested the creation of *centres militaries d'internés* (CMI), where combatants would be held under arrest.[213] On this new practice, General Salan commented that, "It is well settled that the detained must not be considered as prisoners of war. The Geneva Conventions are not applicable to them."[214]

After suggesting calling these facilities military internment camps, however, General Salan soon changed his mind in favor of the term military interment centers in order to avoid any comparison with prisoner of war camps.[215] Despite this careful lexical adjustment, however, the ersatz prisoner of war camps were recognized as such: "The CMIs are in fact prisoner of war camps to which one did not want to give this name in order not to recognize the de facto belligerent status of the FLN."[216]

The stated policy of not prosecuting PAM, however, did not amount to a general recognition of either combatant or prisoner of war status. The official instructions from the Ministry of Justice directed procurer generals not to prosecute combatants "against whom there is no crime charged and those who acted under the coercion of the FLN."[217] In actuality, PAM, who were deemed to have committed crimes or atrocities as well as "those who have proved a likely fanaticism to harm the

209. *Id.* at 44 (citing THOMAS OPPERMAN, LE PROBLÈME ALGÉRIEN [THE ALGERIAN PROBLEM] (1961)).

210. *Id.* at 45 (citing Jean Charpentier, *La France et la GPRA* [*France and the GPRA*], 7 ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL [FRENCH DIRECTORY OF INTERNATIONAL LAW] 855, 867 (1961)).

211. Thenault, *Justice et politique*, *supra* note 93, at 585.

212. *Id.* at 583 (citing Memorandum from General Salam to l'Armée de terres (Mar. 13, 1958) (on file with le Service historique de l'Armée de terre)).

213. *Id.*

214. *Id.*

215. *Id.* at 583–84.

216. *Id.* at 587 (citing Memorandum from General de Gaulle (Nov. 11, 1961) (on file with le Service historique de l'Armée de terre)).

217. Thenault, *Justice et politique*, *supra* note 93, at 584 (citing Memorandum from le sous-directeur de la direction des Affaires crimenelles et graces [Memorandum from the Deputy Director of the Direction of Criminal Affairs] (Dec. 31, 1958) (on file with le Centre des archives contemporaines de Fontainbleau)).

favorable evolution of the State spirit overall," were not exempt from prosecution under French domestic law.[218]

Later, in 1960—the same year that de Gaulle and the French government began their first meetings with GPRA representatives to negotiate the terms of Algerian self-determination—the PAM policy was further clarified:[219]

> The government considers, as much for reasons of military order (encouragement of surrender) as for consideration of international order (foreign opinion, Red Cross ...), that the current system must be maintained. As a result, rebels captured openly carrying weapons (PAM) will continue as a general rule not to be prosecuted and to be detained directly in special camps (CMI).[220]

The policy was clearer—PAM were not to be detained and not to be prosecuted—but its application remained problematic and unpredictable.[221] In fact, there was no precise definition of PAM, though one conception included those "combatants of rebel bands (djounoud) who, in uniform, armed, trained, lived as a djebel without compromising himself in other subversive forms of the rebellion."[222] Therefore, any member who played an active role in political activities or administrative functions of the FLN could still be prosecuted. As before, PAM who had engaged in military actions could still be tried if they committed any prosecutable crime or exaction.[223] The concept of exaction was not clearly defined, but its interpretation was extremely broad. Included in the term exaction were "all acts contrary to laws of war," "all attacks against life and property of civilians," "attacks on liberty," "attacks on the public welfare that have no connection to war," as well as "all acts which target public order," like train derailments.[224] Moreover, it was the general commander of each particular military zone who had the sole discretion to grant or refuse PAM status, and therefore the sole discretion to determine whether such prisoner would face prosecution.[225]

While PAM status appeared to be a grant of unofficial prisoner of war status in principle, in practice the availability of the status was completely unpredictable and depended upon individual commanders.[226] The population statistics of the CMI provide intriguing evidence. The initial total number of prisoners in the CMI was relatively modest—holding about 1,000 men by the end of 1958.[227] The number of PAM detained at any one time did not fluctuate significantly. From the end of 1958 to the cease-fire, the number of PAM never far exceeded 5,000 men.[228] The number

218. *Id.*

219. *Id.* at 585.

220. *Id.* at 585–86 (citing Directive particulière concernant les rebelles pris les armes à la main [Directive concerning the rebels captured carrying arms] (Nov. 24, 1960) (on file at le Service historique de l'Armée de terre)).

221. *Id.* at 586.

222. *Id.*

223. Thenault, *Justice et politique*, *supra* note 93, at 586.

224. *Id.*

225. *Id.* at 586.

226. *Id.*

227. *Id.* at 584.

228. *Id.* at 586.

of terrorists, accused criminals, or those already convicted who were housed in other detainment facilities, however, fluctuated between 9,000 and 16,000.[229] Even up to ten days before the signing of the Evian Accords, French military tribunals continued to issue death sentences.[230]

The French civil judicial system also treaded lightly around the issue of addressing prisoner of war status raised as a defense by FLN fighters on trial for domestic crimes prosecuted under the French penal code. Specifically, prisoners most often appealed to Article 4(A)(3) of the Convention relative to the Treatment of Prisoners of War.[231] Article 4(A) sets forth various categories of persons "who have fallen into the power of the enemy" that qualify for prisoner of war status, including "members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power."[232]

While at first glance this provision seems applicable to the circumstances of the FLN and the GPRA, the legal analyses of French courts highlighted the French government's position that the war was not an international one.[233] Returning to a familiar argument, France insisted that the GPRA was not a legitimate government and had no territorial foundation in Algeria—since its headquarters sat in Tunisia.[234] Moreover, French jurists asserted that in the absence of any further agreement between French authorities and the Algerian rebels, France's implicit adhesion to Common Article 3 did not activate any other provisions of the Conventions.[235] Since this inquiry of whether the war was an international one did not present serious difficulty, French military courts never called the interpretation of the Conventions to the attention of the government.[236]

Several decisions by the Court of Cassation, however, indicate a more nuanced analysis of the applicability of the Conventions.[237] The highest French court never

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229. Thenault, *Justice et politique*, *supra* note 93, at 586.

230. *Id.* at 586–87.

231. The Third Geneva Convention, Article 4(A) provides, in relevant part:

> A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
>
> 1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
>
> 2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
>
> (a) That of being commanded by a person responsible for his subordinates;
>
> (b) That of having a fixed distinctive sign recognizable at a distance;
>
> (c) That of carrying arms openly;
>
> (d) That of conducting their operations in accordance with the laws and customs of war.
>
> 3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

GPW, *supra* note 77, art. 4.

232. *Id.*

233. Touscoz, *Etude*, *supra* note 4, at 959.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* at 960.

expressly declared that the full Conventions applied to the Algerian conflict, but it is significant that it also never explicitly affirmed that the Conventions did not apply.[238] In fact, many Court decisions seemed to establish a distinction between rebel members of regular forces and terrorists.[239] For example, on appeal from a military tribunal conviction where the tribunal had refused to accord prisoner of war status under the full Conventions, the Court of Cassation affirmed the military tribunal's conviction, but the content of its reasoning indicated that the Court recognized a distinction between types of fighters.[240] The FLN member on trial had been convicted of criminal association and aiding attacks on civilians not participating in combat, and the Court reasoned that because of the nature of his acts of terrorism, the rebel did not benefit from the full Conventions.[241] Similarly, in another case where an FLN fighter condemned to death for murder and complicity in attempted murder invoked the Conventions to determine his combatant status and thereby avoid conviction, the Court of Cassation affirmed his conviction because he "did not belong to a regularly formed troop."[242]

At the same time, the Court also seemed to admit the possibility of applying the Conventions to Algeria in different cases. In one case, the Court set aside the conviction of a rebel who had invoked Article 4(A)(3) as a defense, but who had been sentenced to death without consideration of his claim. The Court of Cassation held that since the military tribunal did not decide whether the prisoner could benefit from prisoner of war status, the tribunal had therefore not properly determined whether he could be prosecuted for his crimes.[243]

Another case illustrates in an even more significant way the idea that defenses based on the Geneva Conventions were not entirely ignored by the Court. Abdellah Berrais, a corporal of a regularly formed ALN troop who was captured after exchanging fire with French troops, was convicted by a military tribunal for attempted murder and participation in an armed band formed to trouble the State, despite raising the Conventions as a defense.[244] Declaring the tribunal not to be competent to carry out an interpretation of an international convention—which was of concern to public order[245]—the Court quashed the judgment below, stating:

> [T]he response of the military tribunal to these contentions does not permit the Court of Cassation to verify whether the said Convention was irrelevant to the facts of the case or whether an official interpretation should have been sought from the government.[246]

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238. *Id.*

239. Touscoz, *Etude*, *supra* note 4, at 960.

240. *Id.* at 960 n.23 (citing the case of Zaamouche Hocine, Cour de cassation [Cass.] [Supreme Court for Judicial Matters] crim., Oct. 19, 1961, Bull. Crim. 1961, No. 410 (Fr.)).

241. *Id.*

242. *Id.* at 960–61, n.24 (citing the case of Becetti Abdelkader, Cour de cassation [Cass.] [Supreme Court for Judicial Matters] crim., Sept. 4, 1961, Bull. Crim. 1961, No. 368 (Fr.)).

243. Greenberg, *supra* note 12, at 63.

244. *Id.* at 62–63; Touscoz, *Etude*, *supra* note 4, at 961.

245. *Id.*

246. *Id.*; Greenberg, *supra* note 12, at 62–63 (citing the case of *Abdellah Berrais*. Cour de cassation [Cass.] [Supreme Court for Judicial Matters] crim., Feb. 2, 1959, unpublished officially but reproduced in Rousseau, *Jurisprudence française en matière de droit international public: condition juridique des rebelles*

While it is possible that these decisions were perhaps not of much practical significance because the Court was aware that the government had not officially recognized the applicability of the full Conventions, these decisions seem to indicate that the Court at least recognized "the possibility of their technical relevance."[247] Likely in light of the tense political context surrounding this question, the Court avoided expressly declaring the Conventions to be either applicable or inapplicable.[248] Though the Berrais case appears to be an exception to the Court's general preference to avoid addressing the Convention's applicability, one prominent contemporary French jurist characterized this partial and unofficial respect for the full Conventions as useful, at least for encouraging a psychological *détente* between French authorities and FLN fighters and in hopes that French soldiers would also benefit from unofficial prisoner of war status.[249]

Ultimately, the French government never considered either declaring war or accepting the applicability of the full Geneva Conventions. In fact, French discussions about the applicability of IHL did not include discussions about the significance of terms such as armed conflict, international conflict not of an international character or international armed conflict. These thresholds terms used in the Conventions are noticeably absent from the French legal debate. The legal analysis employed by jurists as well as the government instead tracked the traditional laws of war and leaned heavily on the bright line distinction between belligerency and non-recognition.[250] While it is not entirely clear whether the avoidance of armed conflict discussion was a deliberate choice, it does seem to indicate the French government's discomfort with the newly implemented framework of the Conventions. This is very likely because of the high value of status for both parties during the Algerian war, and the seeming political impossibility for France to admit that the FLN was a party worthy of French engagement in an armed conflict of any character.[251]

Despite its reluctance to meaningfully examine whether the threshold for international armed conflict had been crossed, the French government spoke—and acted—as if the Conventions and the opinion of international institutions like the United Nations mattered.[252] French jurists were particularly concerned about the treatment of the Algerian conflict before the U.N. General Assembly,[253] were wary of

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algériennes au regard du droit international [*French Jurisprudence in International Public Law: Legal Status of Algerian Rebels in Relation to International Law*], 65 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC [GENERAL REVIEW OF INTERNATIONAL PUBLIC LAW] 624 (1961)).

247. Greenberg, *supra* note 12, at 63.

248. Touscoz, *Etude*, *supra* note 4, at 962.

249. *Id.*

250. *See, e.g.*, Greenberg, *supra* note 12, at 71 (implying that France's approach during the Algerian War demonstrates a traditional and ineffective approach to international law due to an inappropriate fixation on the "dichotomy between non-recognition and belligerence").

251. *See, e.g.*, *id.* at 39–47 (recognizing that as much as the FLN and GPRA valued combatant status, the French position demonstrated a desire to avoid recognizing the legitimacy of the movements).

252. *See, e.g.*, *id.* (arguing that France's instinct was to view the conflict as an internal affair even while France's Foreign Minister Antoine Pinay claimed it would "be inconceivable that the United Nations could" involve itself in domestic affairs); Fraleigh, *Algeria Case Study*, *supra* note 10, at 182–224 (claiming that "there was no clear-cut resolution to the question whether the conflict was an international or internal war" and that "the French Government held consistently to the position that neither [the General Assembly nor the Security Council] had the competence" to evaluate the conflict, but went so far as to seek U.N. assistance during the *Athos* incident).

253. *See, e.g.*, Flory, *droit international*, *supra* note 19, at 819 (stating the French State took such a

potential conflicts with the U.N. Charter,[254] and were quick to downplay the significance of third party recognition of both the GPRA and of a state of belligerency between France and the FLN.[255] It seems very likely that the French government was aware, just as contemporary French jurists remarked, that the French legal position in the eyes of the international legal community was, at best, delicate.[256]

In fact, the effects of increasing international pressure to channel the conduct of war modified, at least in part, France's original position. This is especially visible, for example, in the informal—and inconsistent—prisoner of war status that the French government granted to ALN and FLN prisoners in the later years of the war.[257] Though political factors seemed to dictate much of France's conduct in Algeria, the presence of IHL and the international legal community served as a constant, quietly impactful presence that noticeably informed and modified the behavior of the French, as well as the FLN.

CONCLUSION

This historical case study of IHL as applied to the Algerian War sheds light on the recurring state practice of policy-based application that continues to pose a serious problem in the post-9/11 world. States that find themselves in armed conflicts like France will perhaps inevitably employ legal sleight of hand in order to apply IHL in a politically and strategically optimal way—whether to avoid rules that are perceived as "favoring political opponents,"[258] or that are seen to preclude various policy choices. Under any given set of circumstances, "[s]tates have naturally found it [in] their interest to keep the letter of the law . . . restrictive and limiting."[259]

In this respect, the case of the Algerian War is certainly not unique. U.S. global war on terror provides a relevant modern comparison. Before the September 11 attacks, the United States also avoided official use of the word war when engaged in conflict with North Vietnam.[260] Similarly, nine days after the attacks, President George W. Bush characterized the events as "an act of war,"[261] but subsequently contended that the nature of transnational terrorism triggered neither Common

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firm position that approaching the subject of Algeria before the General Assembly was unthinkable); Flory, *Algérie algérienne*, *supra* note 3, at 976 (stating the French position that the General Assembly lacked competence to address the conflict because of Algeria's lack of right as to auto-determination).

254. *See, e.g.*, Flory, *droit international*, *supra* note 19, at 819 (explaining that France strictly interpreted the Algerian conflict as an internal conflict rather than an international one, thus depriving the United Nations of jurisdiction); Flory, *Algérie algérienne*, *supra* note 3, at 976 (arguing that the French government accepted that Algeria would become truly Algerian, but until the transition was complete, the territory remained French, thereby depriving the United Nations of jurisdiction over the matter).

255. *See, e.g.*, Flory, *droit international*, *supra* note 19, at 832 (stating that France believed external parties should not meddle in a strictly internal affair devoid of international implications).

256. *Id.* at 833.

257. *See id.* at 829–32 (highlighting the recurring difficulty in clarifying the French POW policy).

258. MOIR, *supra* note 13, at 34.

259. GREGORY BEST, WAR AND LAW SINCE 1945, p. 228 (1994).

260. *Id.* at 229.

261. *A Nation Challenged, President Bush's Address on Terrorism Before a Joint Meeting of Congress*, N.Y. TIMES, (Sept. 21, 2001), www.nytimes.com/2001/09/21/us/nation-challenged-president-bush-s-address-terrorism-before-joint-meeting.html.

Article 2 nor Common Article 3 to exploit a gap in IHL application.[262] The parallel to the French government's reliance on the non-recognition and belligerency paradigm should not go unnoticed. However, the global war on terror is far from the only example of policy-based application of IHL, and the current debate over how to properly construe Common Articles 2 and 3 brings to mind the legal reforms in the decades following the Algerian War (as well as other conflicts now deemed wars of national liberation).

While many of the application problems in this case study of the Algerian War stemmed from the fact that it was tantamount to a political impossibility for France to recognize the legitimacy of the FLN or the GPRA, this issue was eventually addressed by the addition of Additional Protocol I (API) to the corpus of IHL in 1977.[263] API later provided that "national wars of liberation" were to be classified as international armed conflicts to which all four Conventions attach.[264] The drafters of API, in other words, did not want another war without a name like the Algerian War.

Reforms to IHL have not traditionally solved the problem of policy-based application. When the IHL community finally arrived at a consensual definition of aggression, for example, states' actions that were substantively aggressive under the reformed standard "still had to find some way of describing them which would pretend they were not so."[265]

Some commentators believe that the ambiguities of key concepts that were at play during the Algerian War, such as how to determine the existence and nature of an armed conflict—or how even to define an armed conflict altogether—are at the heart of the state practice of policy-based application of IHL.[266] However, it seems more likely that the problem is not necessarily in the murky conception or definition of these triggers of consideration, but rather in the subjective criteria of determining whether the threshold has been crossed. As Lindsay Moir asserted, "It is unrealistic to expect parties involved in the situation to be either willing or capable of assessing the position objectively. Irrespective of how precise, or how general, the accepted definition . . . might be, so long as the definition contains certain criteria in order to determine the existence or otherwise of a conflict, it will always be open to States to . . . [prevent] the application of humanitarian law."[267]

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262. GEOFFREY S. CORN ET AL., THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE xv (2009).

263. *See* Greenberg, *supra* note 12, at 39 (claiming that France's commitment to Algeria, "far greater than that to any other non-metropolitan possession," left a "firm and early imprint" on their legal assessment and treatment of combatants); David A. Bagley, *Ratification of Protocol I to the Geneva Conventions of 1949 by the United States: Discussion and Suggestions for the American Lawyer-Citizen*, 11 LOY. L.A. INT'L & COMP. L. REV. 439, 441–42 (1989) (asserting that "the proliferation of internal conflicts" gave rise to Additional Protocol I).

264. *See* Noelle Higgins, *The Regulation of Armed Non-state Actors: Promoting the Application of the Laws of War to Conflicts Involving National Liberation Movements*, 17 No. 1 Hum. Rts. Brief 12, 13 (2009) ("[W]ars of national liberation were determined to be international armed conflicts and thus fall under Additional Protocol I.").

265. BEST, *supra* note 259, at 229.

266. *See* MOIR, *supra* note 13, at 34 (suggesting that the absence of a party or method to determine the existence of an armed conflict means "decisions on the issues will inevitably be made by the State itself" and that State can therefore "hide behind the lack of a definition" to prevent adverse consequences).

267. *Id.* at 45.

Perhaps, therefore, the solution to the state practice of policy-based application of IHL entails the removal of subjective criteria from the crucial de facto law-triggering standards and thresholds of IHL, which, in practice, the very states in conflict assess. Ultimately, one of the main objectives of the drafters of the Geneva Conventions was to prevent law avoidance,[268] and in the end, perhaps an important step in IHL reform is to directly address the state practice of policy-based application to more effectively put an end to state avoidance of IHL.

268. Corn & Jensen, *supra* note 14, at 826.


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