THE NATURE OF CUSTOMARY LAW

Edited by

AMANDA PERREAU-SAUSSINE

and

JAMES BERNARD MURPHY

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Some legal rules are not laid down by a legislator but grow instead from informal social practices. In contract law, for example, the customs of merchants are used by courts to interpret the provisions of business contracts; in tort law, customs of best practice are used by courts to define professional responsibility. Nowhere are customary rules of law more prominent than in international law. The customs defining the obligations of each State to other States and, to some extent, to its own citizens, are often treated as legally binding. However, unlike natural law and positive law, customary law has received very little scholarly analysis. To remedy this neglect, a distinguished group of philosophers, historians and lawyers has been assembled to assess the nature and significance of customary law. The book offers fresh new insights on this neglected and *misunderstood form of law.*

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The character of customary law: an introduction

AMANDA PERREAU-SAUSSINE AND JAMES BERNARD MURPHY

A book on customary law, many modern lawyers might say, can have no relevance for them. And neither, many modern thinkers would echo, could it be of much interest. On many influential modern accounts, reliance on customary practices is a mark of inadequacy: acceptance of customs should be minimal and provisional since an unreflective attachment to customary ways of thinking is inimical both to practical thought and to political harmony. Modern societies and their legal systems depend not on enslavement to customary habits and laws but on reasoned principles and doctrines; customary laws grow up only where legislators have done a particularly poor job, leaving a need for elaborate statutory construction and legislative gap-filling. The more coherent and consistent a legal system, the less the need for such customary rules and practices: an interest in customary law reflects at worst what Jeremy Bentham called the 'sinister' interests of self-interested reactionaries, and at best the eccentric tastes of scholars, antiquarians and those purporting to be international lawyers who work in what, on such accounts, is really a lawless international world.

This brief chapter introduces the diverse views of customary law offered in this collection of essays, showing how, despite this diversity, the thirteen contributors are united in arguing that such rejections of the relevance of customary law are wrong.

Is custom all we have?

Some jurists and philosophers argue that customary practices are *all* we have to guide us in aiming to solve practical questions: moral principles, written laws, legal doctrines and philosophical writing are all articulations of pre-existing customs. Such accounts are deeply sceptical of arguments in the name of reason, arguing that those who claim a priority for rational principles said to be manifest within a set of conflicting customary practices are really claiming priority for their own preferred doctrines, doctrines which are themselves nothing but a

rationalisation of a set of customary practices having no special status or claim to allegiance.

This sceptical account of practical reason is reflected in many of the contributions to this book by legal historians. As historians they are concerned to avoid allowing contemporary concerns to drive their study of earlier ideas and practices: instead they seek *first* to understand 'the specificity of a past situation', leaving readers to ask whether and how far 'the very specificity' of that earlier situation gave rise to problems analogous to those arising in the contingencies of our own age.[1] Thus David Ibbetson frames his comparative study of customary elements in the medieval laws of continental Europe and of England as a study of 'the uses of the idea of custom': his aim is to trace the different senses of custom in medieval law while prescinding from comment on the relationship between those different usages.[2] Such writers tend to treat doctrine not as leading changes in customary practice but as following and articulating the relevant changes in practice. Thus, for example, Randall Lesaffer argues that more humane customary practices and rules of siege warfare did not begin to be treated as binding rules in the early modern era as a result of doctrinal writings: 'In the final analysis, doctrine acquiesced to the fact of life that customary law in reality was not and did not have to be in accordance with rationality and morality to be accepted by states as constituting law.'

In modern societies, valid law is usually said to require democratic legitimacy, exemplified by an elected legislature. Many traditional jurists argued that custom is the only genuinely democratic mode of law-making, reflecting the actual convictions of the ordinary people who practise them, people who vote by consenting to those customs. But thinkers and writers from within the sceptical tradition represented here tend also to be sceptical about suggestions that customary practices are binding and valuable because they serve 'as a community building device for the group whose collective wisdom creates custom'.[3] Instead, these scholars argue that notions of customary law as a distillation of *popular* practices tend to be indefensible, and that the relevant customs prove to be those of an influential group of insiders. Lesaffer argues that 'the customs of war were still very much determined by the same professional elite that had dominated them for ages', and it was the notions of this elite on the requirements of honour and reciprocity that

[1] See Tierney, Chapter 5 below, pp. 101–3.
[2] Chapter 7 below, p. 151. [3] Chapter 1 below, pp. 31–3.

drove changes in the rules of siege warfare.[4] Most modern historians of the common law, including three contributors to this book, argue analogously that the common law embodies a set of *insiders'* customs, the product of lawyers' practices – among those a claim that what is done in the name of the common law reflects popular custom:[5]

> At a very basic level, no doubt, the values espoused by the common law would have been generally recognised by people in England, but the detailed working out of the rules derived from these values would certainly not have had any such populist grounding. This was all the work of lawyers, customary in the sense that the *communis opinio doctorum* might have been.[6]

Where customs conflict, hard moral, political or legal cases arise. In solving such cases, one's understanding of the nature of customary practices or laws, and in particular of the relationship between practice and legal doctrine, will become evident. Does custom provide the tacit but indispensable matrix for shared moral and legal reasoning or is it merely the dead hand of the past? Is the selection or preference of one custom over rival conflicting ones itself purely a matter of custom? And, whatever lawyers, judges and decision-makers claim, how far and in what ways (if at all) are they really constrained by past customary practices?[7]

The relation between reason and customary morality

Kant's position illustrates an extreme approach to the relationship between reason and custom. For him, customary *moral* rules and practices are only ever conditionally binding, forms of reasoning 'private' to those groups of unreflective, dependent people who accept as

[4] Chapter 8 below, pp. 201–2.
[5] Cromartie questions whether the common law 'can be indefinitely sustained on such a meagre basis' as Hale's and Blackstone's related notions of artificial reason. See Chapter 9 below, p. 227. See in particular the influential essays by A. W. B. Simpson, 'The Common Law and Legal Theory', in A. W. B. Simpson, *Legal Theory and Legal History* (London and Roncevert, WV: Hambledon Press, 1987), p. 359: and J. H. Baker, *The Law's Two Bodies* (Oxford: Oxford University Press, 2001), pp. 59–90.
[6] Chapter 7 below, p. 165.
[7] See Frederick Schauer's contribution to this volume, tracing five 'sceptical' questions, interpretative questions which 'anyone seeking to develop a theory of customary international law, or a theory of the role of custom in common law decision-making, must at least attempt to answer'. Chapter 1 below, p. 14.

authoritative the relevant practices.[8] 'Public' practical reason is of value not least because it renders moral knowledge accessible and justifiable to reflective individuals without the need for a mediating tradition: practical reason can pull itself up by its own boot-straps. So moral solutions to conflicts among customary practices are not to be found by seeking one winning principle incipient within the relevant customs. Instead, a Kantian aims to *impose* upon those practices a moral meaning conceived in line with prior rational principles, principles one imposes upon oneself because of their rationality. This means that a moral interpretation of customary practices may 'appear to us as forced – and be often forced in fact; yet, if the text can at all bear it, it must be preferred to a literal interpretation which either contains absolutely nothing for morality, or even works counter to its incentives'.[9]

Such accounts of moral principles as imposed upon custom are challenged by three contributors to this volume. Writing within the tradition of Anglo-American analytical philosophy, Ross Harrison offers an argument designed to show that morality both requires and reaches beyond convention. James Bernard Murphy traces an Aristotelian argument for why 'our choice is not between reason and prejudice or between custom and law', developing an account of custom as both conventionalising human nature and naturalising human conventions:

> Custom, Janus-like, faces toward human nature and toward stipulated law. Custom turns our natural propensities toward eating, competing, and mating into complex conventions of dining, gaming, and marrying; custom also turns our deliberate rational and legal conventions of arguing, evaluating, and judging into tacit practices as spontaneous and fluid as natural instinct.[10]

[8] See e.g. *Groundwork* 4:408: 'Nor could one give worse advice to morality than by wanting to derive it from examples. For, every example of it represented to me must itself first be appraised in accordance with principles of morality, as to whether it is also worthy to serve as an original example, that is as a model; it can by no *means* authoritatively provide the concept of morality.'

[9] Kant is writing here of the rational interpretation of scripture: *Religion within the Limits of Mere Reason* 6:110. On Kant on interpretation in this context, see Allen Wood, 'Rational Theology, Moral Faith, and Religion', in *The Cambridge Companion to Kant* (ed. Paul Guyer, Cambridge: Cambridge University Press, 1992), pp. 394–416; and Onora O'Neill's Tanner lectures, in *The Tanner Lectures on Human Values*, vol. 18 (ed. Grethe B. Peterson, Salt Lake City: Utah University Press, 1997), pp. 269–308 (also reproduced at www.tannerlectures.utah.edu/nopq.html).

[10] Chapter 3 below, pp. 78 and 58.

While some jurists like Bentham argue that custom cloaks the sinister interests of a dominant elite, Savigny and his fellow jurists of the historical school argue that custom is morality made visible, that there can be no further moral standard to erect over it. In his contribution to this volume, Christoph Kletzer defends Hegel's attempt to transcend such polar views by arguing that reason and custom evolve together towards concrete universality. Comparing the role of custom in Hegel's philosophy of right and Savigny's legal science, Kletzer develops a Hegelian argument that 'Custom and habit are not social expressions opposed to freedom, they are not expressions of the "daily grind" to be overcome by self-expressive, heroic subjectivity but they rather are conditions of this subjectivity, play-forms of freedom.'[11]

The relation between reason and customary law

Kant's approach to the relation between reason and law again illustrates an extreme position. In strong contrast to his approach on moral reasoning, Kant argues that lawyers aiming to resolve conflicts between *legal* rules and practices must *not* appeal to rational principles of justice: lawyers' reasoning must remain exclusively within the reasoning internal to legislative commands and authoritative customs. If a faculty of law 'presumes to mix with its teaching something it treats as derived from reason, it offends against the authority of the government'; a jurist 'as an authority on the text, does not look to his reason for the laws ... but to the code of laws that has been promulgated and sanctioned by the highest authority (if, as he should, he acts as a civil servant)'.[12]

Kant's position is one that many practising lawyers would find staggering. As one Kant scholar remarks, 'it is hard to see how the practical tasks of the practising lawyer, and in particular the practical task of the judge, can be fully guided by norms set by state authority. That might be possible if legal rules were true algorithms – but it does not seem at all plausible to think that any practical rules are algorithms: they may specify what is to be done, but always under-specify what is actually done.'[13] No written law *can* give exhaustive directions on its own interpretation and application, so customary rules and practices will be needed, not just to resolve faults in codification, but to guide judicial interpretation – and these guiding

[11] Chapter 6 below, p. 138. [12] *Conflict of the Faculties* 7:22–3.

[13] Onora O'Neill, 'Kant on Reason, Authority and Interpretation' (unpublished conference presentation, Newnham College, Cambridge, September 2004), p. 12.

customary rules and practices will themselves be subject to change and development through interpretation.[14]

While for many thinkers this is enough to show that customary rules are an immanent part of any legal system, some would insist that instead custom is at best a *source* rather than a part of law and that a formal legal act such as a judicial decision is needed to convert custom into customary law. On the latter account, custom is not itself a valid part of law (akin to legislation) but at best the raw material out of which a legislature or a court might fashion genuine positive law. Thus Frederick Schauer argues that 'the important questions about customary law are questions about formal law's use of pre-legal normative practices as the basis for legal norms'.[15] And Michael Lobban offers a detailed study of the way in which nineteenth-century English common lawyers approached customary international law in very much this spirit, working on the assumption that 'international law was a source of English law without being itself part of it'.[16]

In reflecting on the nature of such customary rules and practices, while the question of how to resolve hard cases is important, it is at least as important – and as difficult – to understand 'what it is that makes the easy cases easy'.[17] This returns us to the question of what effect, if any, doctrine or reason has on customary practices, and the contributors to this volume offer diverse responses. As already seen above, the approach to the question taken by many legal historians is to offer an account of lawyers' own views

[14] Related arguments have been made against the positions of contemporary legal positivists. To argue that a particular formulation is the correct view of a rule of law, as do teachers, textbook-writers, judges and counsel, is, as Brian Simpson argues against H. L. A. Hart, 'to participate in the system, not simply to study it scientifically'. See A. W. B. Simpson, 'The Common Law and Legal Theory', in *Oxford Essays in Jurisprudence* (ed. A. W. B. Simpson, Oxford: Clarendon Press, 1973), p. 97. Gerald Postema builds a powerful critique of Bentham's position on a similar point: 'what the courts do has an important (though not necessarily decisive) impact on what the law is and what it requires.' See Gerald Postema, *Jeremy Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986), pp. 456–7.

[15] Chapter 1 below, p. 18. Schauer follows Raz's reading of Hart in treating a rule as a 'content-independent' reason for action, and distinguishes a custom (such as waking at 6 a.m.) from a rule. Taking the example of the contemporary prohibition on slavery, he also draws a sharp distinction between the morally right and 'a series of national normative acts (not in the legal sense, and certainly not items of international law)'. Other contributors to this volume, notably Murphy (Chapter 3 below) and Harrison (Chapter 2 below), would contest such a disjunction between custom and morality.

[16] Chapter 11 below, p. 277.

[17] Chapter 1 below, p. 28n34.

of the relation between practice and doctrine while aiming to avoid imposing or relying on a view of their own. In the most extreme cases, reason or legal philosophy is rejected as 'a waste of time', an enterprise 'of interest only for people too idle to engage in the intricacies of the positive law': thus Savigny writes sarcastically of how 'until today we come across people who take their own juristic concepts and opinions to be purely reasonable, only because they lack knowledge of their genealogy'.[18]

But, in his comparative study of Savigny and Hegel on customary law, Christoph Kletzer contends with Hegel that, if legal history understood as a scholarly enterprise is to be rational, then legal history understood as a series of events 'must at least be understood as making the rationality of this historical inquiry possible, as being the history of the rationality of historical inquiry. Now, historical research is not an isolated enterprise, but can be rational only in a context of freedom, i.e. in the modern rational state. Thus, rational historical enquiry is the enquiry into the development of reason as such.'[19]

And, in her study of Gratian's *Decretum*, a text which attempted to show how diverse and seemingly inconsistent canons could be interpreted and applied in a consistent way, Jean Porter concludes in Aristotelian fashion:

> Because written laws serve to formulate and correct custom, they will normally supercede and override customary law; yet, because they find their context and point within a broader framework of customary law, the customs of a people will provide the necessary context for their interpretation. What is more, written law will have no purchase on a community, unless it reflects the practices of that community in some way; even a law that sets out to correct custom will necessarily reflect other aspects of the customary practices of a community, or it will lack purchase in the community for which it is intended. Far from being a minor adjunct to the law properly so called, custom is seen from this perspective as the one essential component of any legal system, sufficient to sustain a rule of law under some circumstances, and one essential component of the rule of law under any and every circumstance.[20]

[18] Chapter 6 below, p. 128, summarising Savigny's position on legal philosophy: and quoting from Friedrich Carl von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (Hildesheim: Georg Olms, 1967), p. 115.

[19] Kletzer recognises that this line of thought makes sense only to one who believes, like Hegel, that 'reason has already actualised itself in the world . . . in the French Revolution, in the advent of the rational liberal state that guarantees mutual recognition and free citizenship to all'. Chapter 6 below, p. 145.

[20] Chapter 4 below, p. 100.

The nature of customary international law

Codify it, repeal it, abolish it; some form of customary law will inevitably reappear. But how far, if at all, does a lawyer need to rely on reasoned argument in offering an account of rules of customary law? The issue of democratic legitimacy is especially contested in the case of customary international law, which some jurists claim threatens the democratic sovereignty of national law-making. This is one of the broader questions at stake in four of the contributions to this volume on customary international law.

Two of these essays focus mainly on English approaches to international law in the nineteenth century. In chapter 10, Perreau-Saussine argues that nineteenth-century English treatises on the law of nations reflect three distinctive accounts of the relationship between reasoned argument and the practices of states. The question of the relationship between reasoned argument and customary international law also plays a key role in Michael Lobban's account of the view of the law of nations taken by English courts in the nineteenth century. Lobban suggests that the attitude of English courts to the law of nations hinged both on nineteenth-century common lawyers' own understanding of the common law (as deriving not from custom itself but from judicial decision and ultimately 'artificial reason') and on their understanding of how far the relevant rule of customary international law was understood to be rationally defensible:

> As with their use of the law of nature, it was drawn on not for the moral content of its precepts, but as a means of reasoning on the nature of the problem. In novel cases, where English law offered no clear answers, courts (particularly before the mid-nineteenth century) were content to draw on the classic natural law works of Grotius, Bynkershoek or Vattel. However, insofar as the law of nations was made up of contingent and changing state practice, it was not regarded as of itself part of the common law.

For 'sceptics' who believe that custom is all we have, to suggest that particular jurists or treatise writers could have an attributable influence on the development of international law is akin to suggesting that assisting at the delivery of a child makes one a biological parent. A history of the influence of a particular writer or jurist can and must be a history of the work of a professional tradition, of advocates' and judges' 'shared attempt at addressing and resolving the problematic of

order in a diverse world'. On such accounts, 'there is a fundamental problem with assigning and measuring influence in international law, which is the ultimately collective character of so much of the work': the collective work of international lawyers is rooted in a reflective professional tradition whose customs have a long history. Central to this tradition, it is usually argued, is a style and culture traceable to Grotius and other creators of modern international law and one 'still-existing, and no longer merely European'. It is a tradition that individuals 'may influence but hardly decisively', not least since 'its outcomes at any time, though expressed definitively in terms of current international law, are at the same time part of a process, and are to that extent provisional': 'Rise and fall, rise and fall, that is its enduring significance.'[21]

In contrast, the two final contributions to this volume defend accounts of customary international law that do aim to reach beyond legal practice to fundamental principles which it is argued are in some sense prior to and constraining of that practice. Arguing that 'human institutions exist and are capable of acting intelligibly . . . only insofar as they and others recognize them as defined and governed by norms, capable of grasping and following norms *as norms* (rather than merely strategic markers of the parameters of their anomic choices)', Gerald Postema sketches a general account of custom as a 'normative practice', an account which he suggests can 'illuminate the nature and typical mode of operation of customary international law'.[22] And John Tasioulas argues that 'the account of custom we should favour is that which is best justified by a political morality that offers the most attractive specification of the values served by international law'. Tasioulas offers an interpretative understanding of customary international law in which the ethical appeal of a candidate rule of international law figures among the criteria for determining whether it is a valid rule: this account, he argues, can serve as 'a template for guiding judicial decision-making and assessing its correctness'.

While the studies in this book focus mainly on the common law and on customary international law, customary practices underpin *every*

[21] J. Crawford, 'Public International Law in Twentieth-Century England', in Jurists Uprooted: German Speaking Emigre Lawyers in Twentieth Century Britain (ed. J. Beatson and R. Zimmermann, Oxford: Oxford University Press, 2004), pp. 692, 699 and 700–1.

[22] Chapter 12 below, p. 306.

legal system. Customary rules of interpretation play a part in any legal system, however codified: no written law can give exhaustive directions on its own interpretation, so customary rules and practices inevitably guide judicial interpretation. And those customary rules and practices themselves in turn will be subject to change and development through interpretation. Ancient and modern, international, civilian and common law: every interpretation and application of a written law relies on a complicated set of shared customs. And, once given, each interpretation and application of a written law itself extends that same set of customs. As James Bernard Murphy writes, 'Like a beaver, law is both adapted to its customary environment and transforms that environment ... Many of our customs began as laws and all successful law eventually becomes customary.'[23]

[23] Chapter 3 below, p. 77.

PART I

Custom and morality: natural law, customary law and *ius gentium*

1

Pitfalls in the interpretation of customary law

FREDERICK SCHAUER*

Much has been written on the legal status of customary law, but considerably less attention has been devoted to the question of determining the content of the customary law whose legal status (or not) is at issue. Like any other source of law, customary law presents the question of interpreting, applying, and enforcing the emanations from that source, but interpreting customary law – or interpreting the custom that is to be part of the law[1] – presents issues arguably more complex than those presented when we are considering the interpretation of constitutions, statutes, regulations, treaties, and even the common law. My goal here is to explore these interpretive questions, and to do so with perhaps somewhat of a skeptical attitude. This is not to say that such skepticism will turn out at the end of the day to be justified. It is to believe, however, that

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[1] There is a long-standing dispute about the status of customary law, with some (such as C. K. Allen) holding that custom is an immanent part of law in any common law system, and others (most prominently Jeremy Bentham and John Austin) insisting that a formal legal act (such as a judicial decision) is necessary to convert custom into customary law. See Rupert Cross, *Precedent in English Law* (3rd edn, Oxford: Clarendon Press, 1977), pp. 157–9; Gerald J. Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986), pp. 4–14 and 219–30. This is an important dispute, but nothing I say in this paper depends on its resolution. Nevertheless, both of these opposing positions should be distinguished from the sense in which a common law system just *is* itself a customary system of law, albeit not necessarily congruent with the pre-legal customs that the common law as a customary system may choose to adopt. See A. W. B. Simpson, "The Common Law and Legal Theory," in A. W. B. Simpson, ed., *Oxford Essays in Jurisprudence (Second Series)* (Oxford: Clarendon Press, 1973), pp. 77–99.

addressing such skeptical questions is an inevitable task for any satisfactory account of the role of customary law in common law adjudication, and perhaps to an even greater extent with respect to the role of customary international law as a part of international law more generally. So, although in this paper I will ask more questions than I answer, my goal is to put on the table those interpretive issues that anyone seeking to develop a theory of customary international law, or a theory of the role of custom in common law decision-making, must at least attempt to answer.

Indeed, one of my goals here is to connect questions about customary law with many of the enduring questions about legal interpretation more generally, questions whose importance seems all-too-often ignored by theorists of customary law. And so at the outset it might be worthwhile noting five of these questions. One is a question focusing on the identification of those features of some previous decision that enable subsequent decision-makers to reference that decision or to rely upon it. Thus, in a debate marked by the earlier contributions of Goodhart, Simpson, and Montrose, and furthered in more recent times by Larry Alexander, most prominently, the question was raised as to whether it was the facts of a previous decision, or the decision itself, or the words used to describe that decision, that enabled such a decision to constitute a precedent for some other decision.[2] This issue is plainly relevant to the question of customary law, for custom is itself the aggregate of a series of past acts or decisions, but in order to make sense out of these past acts or decisions we need to know which features of those acts or decisions are the ones that have the quasi-authoritative status necessary for custom itself to have such a status.

At a more extreme level, sorting out the status of customary law requires confronting the challenges of American Legal Realism, the tradition which has raised enduring questions about the extent to which, if at all, previous acts, events, or decisions actually do constrain

[2] Larry Alexander, "Constrained by Precedent," *Southern California Law Review*, vol. 63 (1989), pp. 1–64; Arthur L. Goodhart, "The Ratio Decidendi of a Case," *Modern Law Review*, vol. 22 (1959), pp. 117–24; Arthur L. Goodhart, "Determining the Ratio Decidendi of a Case," *Yale Law Journal*, vol. 40 (1930), pp. 161–83; J. L. Montrose, "The Ratio Decidendi of a Case," *Modern Law Review*, vol. 20 (1957), pp. 587–95; J. L. Montrose, "Ratio Decidendi and the House of Lords," *Modern Law Review*, vol. 20 (1957); pp. 124–30; A. W. B. Simpson, "The Ratio Decidendi of a Case," *Modern Law Review*, vol. 21 (1958), pp. 155–60; A. W. B. Simpson, "The Ratio Decidendi of a Case," *Modern Law Review*, vol. 20 (1957), pp. 413–15.

judges and other subsequent decision-makers.[3] Legal Realism, especially at its extremes, may not be plausible, but nor may it be plausible, as an empirical proposition, to believe that the canon of authoritative law is as exclusive and as constraining as pre-Realist legal theory supposed it to be. It seems strange, therefore, to consider the actual (empirical) authority of customary law without considering a long-standing debate about the empirical authority of legal norms, legal rules, and legal decisions more generally.

Closely related to these debates about the status of precedent and the status of legal authority in general are contemporary debates about legal interpretation inspired primarily by Ronald Dworkin.[4] Is there, in theory if not in practice, one right answer to any legal question? Does the interpretation of law resemble in important ways the interpretation of literature? Is legal interpretation ultimately a coherence-based and holistic practice, rather than one in which individual legal items determine particular legal results? These are the questions that Dworkin has so prominently placed on the jurisprudential agenda, and they are no less relevant when the question is the interpretation (and identification) of customary law.

In the United States, and increasingly in Canada, Australia, South Africa, and other countries with written constitutions and aggressive judicial review, many of these interpretive debates have played out as debates over the proper way to interpret a written constitution.[5] Is the

[3] See, for example, Jerome Frank, *Law and the Modern Mind* (New York: Brentano's, 1930); Laura Kalman, *Legal Realism at Yale, 1927–1960* (Chapel Hill, NC: University of North Carolina Press, 1986); Karl Nickerson Llewellyn, *The Bramble Bush: Some Lectures on Law and Its Study* (New York: Columbia University School of Law, 1930); William Twining, *Karl Llewellyn and the Realist Movement* (London: Weidenfeld & Nicolson, 1973).

[4] Especially in Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986); Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985); Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977).

[5] The literature, especially in the United States, is vast. A sample of the issues can be found in John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980); Antonin Scalia, *et al.*, *A Matter of Interpretation* (Amy Guttman ed., Princeton: Princeton University Press, 1997); Akhil Reed Amar, "Intratextualism," *Harvard Law Review*, vol. 112 (1999), pp. 747–803; Richard H. Fallon, Jr., "Judicially Manageable Standards and Constitutional Meaning," *Harvard Law Review*, vol. 119 (2006), pp. 1274–332; Michael J. Perry, "The Authority of Text, Tradition, and Reason: A Theory of Constitutional 'Interpretation,'" *Southern California Law Review*, vol. 58 (1985), pp. 551–602; Frederick Schauer, "An Essay on Constitutional Language," *UCLA Law Review*, vol. 29 (1982), pp. 797–832.

process of constitutional interpretation essentially a common law process, or does it more resemble the interpretation of a statute, a regulation, a contract, or a will? Is the goal of such interpretation to interpret the words of the document as ordinary language, or instead as technical language, or as embodying the intentions of those who first wrote them, or in their best possible light in view of the demands of morality and democracy and policy? To purport to interpret customary law is to deal with many of the same issues, especially since the significant indeterminacy of customary law bears a close affinity with the linguistic indeterminacy of many of the most important and most disputed provisions in written constitutions.

Finally, but perhaps most importantly, how can the insights of disciplines other than law inform our understanding of the legal interpretive process? Are there lessons from philosophy, from psychology, from behavioral economics, and from other disciplines and sub-disciplines that can help us to make sense of the process by which customary law is created and interpreted? Implicit in this paper is an affirmative answer to this question, and thus my attempts here to relate these debates and insights outside of law is but a larger manifestation of the guiding principle of this paper – that there are many insights and challenges in the legal and non-legal literature outside of the literature on customary law and outside of the literature on international law that can valuably inform questions about the interpretation of customary law, and that have been less of a presence in the customary law and international law literatures than might be desirable.

Many of these jurisprudential and philosophical debates revolve around the respective roles of the creator of some norm and the interpreter of that norm. How much freedom do authoritative interpreters actually have? When such interpreters purport to be *describing* customary law, are they simply engaged in an act of description, or are they doing something that is more interpretive and more creative than many within the customary law tradition have been willing to admit? This question arises in each of the five debates I have just mentioned, and thus in describing this paper as having a "skeptical" cast my ultimate goal is to attempt to make the domains of customary law and customary international law less complacent than they at times have appeared to be, and to confront the same challenges that most other areas of legal analysis have been confronting for generations.

Clarifying the question

It is common ground that in some domains custom can be a source of law, and that reaching a legal conclusion based on custom can be as legitimate as reaching a legal conclusion on the basis of a statute, a legal precedent, a provision of a written constitution, or the opinion of an authoritatively recognized secondary source. With respect to such conventional sources of law, it is a trivial point that first we locate a normative rule, and then determine the extent to which, if at all, it applies to the matter at hand. All legal rules are expressed in or translatable into an if-then form, and thus the application of any of the foregoing sources typically involves, to oversimplify, determining whether the facts we have perceived fall within the scope-designating or "if" part of the rule, and, if so, then determining what the normative consequent – the "then" part of the rule – requires to be done.[6]

Seen from the perspective of this point about the basic structure of a prescriptive rule, one preliminary but key question about custom as a source of law is whether the customary source must be normative. As H. L. A. Hart so plainly stressed in his discussion of habits,[7] and others have analyzed in the context of descriptive rules,[8] not all regularities of human behavior are based on normative or rule-guided considerations. It is my *custom* – I am *accustomed* – to wake up at 6 a.m., but no rule tells me to do so, and no rule (not even my own) would be violated were I not to do so. So too with the behavior of institutions and governments. For a long time it was the practice of airlines to have names that had either geographic or weighty and serious connotations, and sometimes both, as with "British Airways" and "Air France" and "United" and "Continental." When airlines started calling themselves things like "Virgin Atlantic" and "Song" and "Ted," the practice shifted, yet no normative rule was broken. Similarly, although it is a fact that the majority of the nations of the world have names that end in "a," and thus it is a fact that nations *generally* have names ending in "a," there is no normative or prescriptive standard that is violated by Peru, New Zealand, Pakistan, and Portugal.

[6] For a lengthier discussion of such structural matters about rules, see Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford: Clarendon Press, 1991), pp. 23–7.

[7] H. L. A. Hart, *The Concept of Law* (2nd edn., Oxford: Clarendon Press, 1994), pp. 9–12 and 55–60.

[8] Schauer, *op. cit.* note 6, pp. 18–22.

Yet, although there are many pre-legal regularities that are not normative, there are many that are, and now we approach more closely the issues that surround customary law.[9] It is not mere habit that leads wholesale diamond merchants in New York, Antwerp, Johannesburg, and Jerusalem to sell to retailers (or cutters) on a "take it or leave it" basis for a package of diamonds, but rather a well-entrenched normative practice within the industry, such that departure would be the occasion for criticism or the imposition of a non-legal sanction.[10] So too with the rules of etiquette, or the rules of non-governmental organizations. One cannot call the police when a person slurps his soup or, if insufficiently senior, traverses the lawn of a Cambridge college, but there can be little doubt that these practices are imbued with all of the trappings of normativity save for the state as the source of authority.[11]

Thus, the important questions about customary law are questions about formal law's use of pre-legal normative practices as the basis for legal norms.[12] And, even more precisely, these important questions are ones about the possibility, nature, and desirability of formal law's taking as legally authoritative some pre-legal normative and authoritative practice. And the limitation to the "normative" and the pre-legally "authoritative" is crucial. It is always open for a law-maker exercising discretion to decide to follow some existing pre-legal normative or non-normative practice, but this is no different from the law-maker consulting any other non-normative or non-authoritative source of wisdom. Only when pre-legal normative customs are taken as (not-necessarily-conclusive) content-independent sources of authority do the genuine issues arise, and thus my question is about determining the content of

[9] See Deryck Beyleveld and Roger Brownsword, *Law as Moral Judgment* (London: Sweet & Maxwell, 1986), p. 125.

[10] See Deborah L. Spar, *The Cooperative Edge: The Internal Politics of International Cartels* (Ithaca, NY: Cornell University Press, 1994); Lisa Bernstein, "Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry," *Journal of Legal Studies*, vol. 21 (1992), pp. 115–57.

[11] On the existence of such normative customary practices, and on their predominance in less legally complex societies, see, for example, Lloyd Fallers, *Law Without Precedent: Legal Ideas in Action in the Courts of Colonial Busoga* (Chicago: University of Chicago Press, 1969), pp. 310–14; Roberto Mangabeira Unger, *Law in Modern Society* (Cambridge: Cambridge University Press, 1976), pp. 48–58.

[12] On normative custom, and on the disagreements about how to understand it and assess it, see, for example, Paul Bohannon, "The Differing Realms of Law," *American Anthropologist*, vol. 6 (1965), pp. 33–42; Stanley Diamond, "The Rule of Law versus the Order of Custom," *Social Research*, vol. 38 (1971), pp. 42–72.

those customary normative sources that have already been socially or culturally but not-yet-legally determined to be authoritative.[13]

This limitation may be slightly idiosyncratic, or at least at odds with some aspects of positive law. Consider, for example, *Mercer* v. *Dunne*,[14] in which "it was held in 1905 that the fishermen of Walmer were entitled by a local custom to dry their nets on a particular stretch of sand,"[15] despite the fact that, in the absence of the custom, the practice would have constituted an unlawful trespass. Here there is no indication that the customary practice was done under claim of right, and no indication that the practice itself became normative. A fisherman new to the Walmer area would not have been subject to criticism, we suppose, for not participating in the custom, and instead drying his nets somewhere else. Yet when, as in this example, the practice is not normative – indeed the case would strike the American property lawyer as one of adverse possession, a matter of substantive law, and not of the application of custom – the issues are different. The extent to which law does or should reflect the existing conditions of the world, an issue to which I shall return in conclusion, is important, but here, as in most of the literature on customary law, I shall limit my inquiry to the arguably narrower question of the extent to which law does or should reflect the pre-legal *normative* world – a world in which some but not all practices are authoritative – on which it is superimposed.

The questions I want to pose are largely questions existing at the contrast between statute or codified law, on the one hand, and common law and customary law, on the other. In practice, this means that these questions presuppose the (moderate) determinacy of language, various and sundry literary theorists, French philosophers, and other deconstructionists notwithstanding. Although it is obvious that the legal use of terms like "justice," "equal protection," "reasonable," "fair," "proportionate," and "necessary" provide little constraint on decision and allow much room for law-making under the rubric of "interpretation,"

[13] On understanding authority in just this content-independent way, the locus classicus is H. L. A. Hart, "Commands and Authoritative Legal Reasons," in *Essays on Bentham: Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982), pp. 243–68. See also Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979); Donald H. Regan, "Reasons, Authority, and the Meaning of 'Obey': Further Thoughts on Raz and Obedience to Law," *Canadian Journal of Law and Jurisprudence*, vol. 3 (1990), pp. 3–28; Frederick Schauer, "The Questions of Authority," *Georgetown Law Journal*, vol. 81 (1992), pp. 95–115.

[14] [1905] 2 Ch 538. [15] Cross, *op. cit.* note 1, p. 162.

such is not the case, or at least is not necessarily the case, when law uses terms like "two," "insect," and "parliament." It is true that most of the terms used by the law have, following Hart, a core of settled application and a fringe or penumbra of uncertainty.[16] Still, I take it as a given that common linguistic usage, whether ordinary or technical, can and often does serve satisfactorily to designate a core,[17] and that shared understandings about linguistic meaning are what typically or standardly make it possible for statutes often to generate "clear" or "easy" cases.[18] All of this may in some contexts be open to debate, but, if we are to try to focus on the special problems of customary law, and on why customary law would often seem especially problematic, we need to assume, if only for the sake of argument, that statute or codified law has the capacity to generate unique or tightly clustered interpretations, that in most advanced legal systems it often does so, and that it does so by virtue of the ability of human beings to read off from a printed page a single or tightly clustered set of meanings for particular sentences, meanings that are themselves a function of the similar capacities of individual words.

Given this background assumption, I want to proceed by offering a series of questions, each labeled with the name of a theorist who might be said to have, or at least have for me, inspired the question. Little should be made of the names, however, for my goal here is well removed from exegesis of this or that thinker. The names should, however, provide a convenient way of designating particular and skeptical questions about the practice of interpreting existing normative custom.

Hanson's question

Interpreting custom requires an interpreter. And thus we can conceive of the interpreter of custom as someone looking out over a vast sea of human behavior and identifying the particular strands, patterns, and practices that might constitute a normative custom. In doing so, perhaps she is simply looking at the law. Perhaps *all* normative customs are

[16] Hart, *op. cit.* note 7, pp. 124–54.

[17] As Lon Fuller pointed out against Hart, however, sometimes the core may be designated by purpose and not by literal meaning, Lon L. Fuller, "Positivism and Fidelity to Law – A Reply to Professor Hart," *Harvard Law Review*, vol. 71 (1958), pp. 630–72, a point which Hart ultimately conceded in H. L. A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), pp. 6–8.

[18] See Walter Sinnott-Armstrong, "Word Meaning in Legal Interpretation," *San Diego Law Review*, vol. 42 (2005), pp. 465–83.

part of the relevant body of law, such that all of the normative customs of England are immanent in the English common law, and all of the normative customs of nations – and not just those that are understood as *legally* normative under the doctrine of *opinio juris* – are part of international law. But, even if this is so, and certainly if it is not so, the normative customs of a jurisdiction that are *explicitly* incorporated within the law constitute but a subset of the totality of that jurisdiction's normative customs. And from this it follows that the task of interpretation turns out to be, in significant part, the task of selection, the selection from the universe of normative customs those normative customs that will explicitly be part of the law. The relevant custom for some decision does not simply leap out and grab the interpreter, but rather is selected by that interpreter from among the entire field of that jurisdiction's normative customs,

Once we see that the interpreter's task includes the task of selection, however, then we are forced to consider the grounds on which that selection is made. The analogy here, and the analogy that explains the name of this section, is to the idea long referred to in the philosophy of science as *theory-laden observation*. In his autobiography, Karl Popper recounts the time at the end of a lecture when he gave an assignment to the attendees, to be completed prior to the next lecture. And that assignment was simply to go out and observe. Period. Full stop. Popper's point was that simple observation, without purpose and without theory, was impossible, and he wanted his students to recognize that the task of observation required them to have, use, or develop a theory of what they were observing and why they were observing it.[19] This idea was developed more fully by Norwood Hanson,[20] and it is now more or less commonplace that the task of observing is not simply one of recording the world as it exists, but instead necessarily involves recording those parts of the world that are recorded for some reason, and then grouping those parts into categories that once again reflect a goal, a purpose, or a theory.

So too with the observation of custom. The interpreter of custom is not simply labeling all of the normative customs of the world or of England or of whatever, but is identifying some customs for some

[19] Karl R. Popper, *Unended Quest: An Intellectual Autobiography* (London: Open Court, 1976).

[20] Norwood R. Hanson, *Patterns of Discovery* (Cambridge: Cambridge University Press, 1958).