Introduction: Lessons from the History of Custom

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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

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

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.

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).