

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.

* Fessenden Professor of Law, Harvard Law School. Email: hesmith@law.harvard.edu. I would like to thank the participants at the conference "Is There a Role for Custom in Modern European Law?" at the University of Texas at Austin School of Law. As per custom, all errors are mine.

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

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

(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

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

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

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 (explaining 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

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 text; 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. Nottingham*, 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

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.

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 Balganes, *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

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

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

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 Shugar 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.

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).