

Cornell Law Review

Volume 79

Issue 1 November 1993

Article 5

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Recommended Citation

Andrea C. Loux, *Persistence of the Ancient Regime: Custom Utility and the Common Law in the Nineteenth Century*, 79 Cornell L. Rev. 183 (1993)

Available at: <http://scholarship.law.cornell.edu/clr/vol79/iss1/5>

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THE PERSISTENCE OF THE ANCIENT REGIME: CUSTOM, UTILITY, AND THE COMMON LAW IN THE NINETEENTH CENTURY

The term “custom” in English jurisprudence has been applied to such diverse bodies of law as public international law, the custom of Britain’s constitution, the international law of merchants and even the common law itself.¹ The judicial doctrine of custom is more precise. It is the doctrine by which ancient customs practiced by a definite community in a distinct geographical locale, though contrary to the common law, are recognized by royal judges to constitute local common law for the land and people of the region.

“Custom” refers at one and the same time to royal judicial doctrine and community praxis.² It is law that arises from the immemorial usage of the community. At once different from, yet coequal with, the uniform common law, custom is not created by royal judges: it is judicially noticed by them.³ The significance of custom is not merely that it is law from a time before legal memory,⁴ but that it is law “from below”: its origins and legitimacy derive from the praxis of the community.

While courts have recognized customs as various as the fee charged for performing marriages⁵ and the number of ounces in a

¹ The term custom has been applied to such diverse categories of law as (1) public international law, (2) the custom of the constitution, (3) the international law of merchants (now for the most part incorporated into the common law) and (4) the common law itself. H.E. Salt, *The Local Ambit of a Custom*, in CAMBRIDGE LEGAL ESSAYS 279, 279-80 (1926).

² E.P. THOMPSON, CUSTOMS IN COMMON 97 (1991) (“At the interface between law and agrarian practice we find custom. Custom itself is the interface, since it may be considered both as praxis and as law.”).

³ CARLETON KEMP ALLEN, LAW IN THE MAKING 86-87 (1st ed. 1927). Allen states:

[I]f a custom is proved in an English court by satisfactory evidence to exist and to be observed, the function of the Court is merely to recognize the custom as operative law. In other words, custom does not derive its validity from the authority of the Court; even the ‘sanction’ of the Court amounts only to formal recognition in case of dispute.

Id. (emphasis omitted). See also Albert Kiralfy, *Custom in Mediaeval English Law*, 9 J. LEGAL HIST. 26, 30-31 (1988). Judicial notice is defined as recognition by the court of “the existence and truth of certain facts . . . universally acknowledged as established by common notoriety.” BLACK’S LAW DICTIONARY (6th ed. 1990).

⁴ All customs found valid at law, in theory, had their origin before the time of legal memory. See *infra* notes 69-71 and accompanying text.

⁵ *Bryant v. Foot*, 3 L.R.-Q.B. (Ch. 1868) (customary marriage fee unreasonable because claimed amount due could not have existed in 1189).

pound of butter⁶ in ancient market towns, custom most often refers to local variations of the common law rules of property. In rural areas, ancient customary practices controlled the inheritance of estates, access to the common for subsistence agriculture and special uses of private land for business and recreation. Because custom regulates property, the jurisprudence of custom is fundamentally linked to economic development. Disputes over custom reached the common law courts when the property right at issue was of such value that a party was willing, or able, to undertake the expense of litigation.⁷

Part I of this Note provides a brief introduction to the history and traditional common law elements of custom through the eighteenth century. Common law courts recognized only those customs that were shown to be ancient, continuous, certain and reasonable. The common law has imposed the same four-part test for centuries, but far from being legal terms of art, the elements of custom were redefined by common law courts to accommodate changes in political economy.⁸

Part II explores E.P. Thompson's argument that such a change was effected by common law courts in the eighteenth century.⁹ As Thompson sees it, custom disappeared as a meaningful source of law with the rise of agrarian capitalism and the enclosure movement of the eighteenth century. Until the abolishment of copyhold in the early decades of the twentieth century, there were two types of rural custom: manorial copyhold custom, which attached to customary tenures held of the manor, and "easement custom," which inured to all inhabitants of a district. Thompson's study of custom in the eighteenth century focuses on inhabitant custom. He identifies the common law as one of the forces that destroyed custom and imposed capitalist definitions of property rights on traditional agrarian communities.¹⁰

⁶ *Noble v. Durrell*, 3 T.R. 271, 100 Eng. Rep. 569 (K.B. 1789) (town custom prescribing eighteen ounces to a pound superseded by Act of Parliament aimed at uniform weights and measures).

⁷ THOMPSON, *supra* note 2, at 141. Thompson observed:

The *English Reports* are not packed with cases in which poor commoners challenged their lords or great landowners in the highest courts of the land. On occasion freeholders or customary tenants did so, pledging themselves to each other to share the costs. But taking cases upwards to the courts of Common Pleas or King's Bench was not the cottagers' nor the labourers' "thing". Unless some party with a substantial interest was involved on their side, their rights were liable to be lost silently and without contest.

Id.

⁸ THOMPSON, *supra* note 2, at 137.

⁹ THOMPSON, *supra* note 2.

¹⁰ THOMPSON, *supra* note 2, at 9, 133.

This Note argues that, contrary to Thompson's assertions, custom was not destroyed by the common law in the eighteenth century, but remained a significant source of law throughout the nineteenth and into the twentieth century. Nineteenth century courts regularly upheld long-standing community rights and usages and overruled those eighteenth century judgments that vested arbitrary power in manorial lords. Copyhold custom was universally preserved, as were the customary rights of inhabitants to recreation, traditional markets, and renewable resources—the latter on grounds of their utility.

Part III of the Note examines two developments in the nineteenth century that set the stage for the preservation of custom in common law courts. This section explores the relationship between positivist legal theory, utilitarian moral theory, and the jurisprudence of custom. The section then sets out the Prescription Act, which formalized common law presumptions and contributed to the vitality of copyhold custom and customs of community access to renewable resources.

Part IV examines in detail the common law of custom between 1830 and 1910. Section IV.A argues that courts preserved manorial custom by employing a legal fiction, which characterized the relationship between lord and copyholder as contractual. Courts affirmed customs that evidenced the consent of the copyholders and would strike down customs as unreasonable if the consent of the copyholders, in some mythical distant past, could not be inferred. Section IV.B argues that this fiction was then incorporated into the law of easement custom.

In the nineteenth century, the jurisprudence of easement custom was transformed by positivist conceptions of law and a judicial belief in custom's utility. Courts struck down ancient easement customs on the grounds that they could not have been promulgated in a definite jurisdiction, while declaring modern innovations of genuinely ancient custom reasonable because they served the greater good of the community.

I

EARLY DEVELOPMENT OF THE LAW OF CUSTOM

A. Defining the Conceptual Framework of the Law of Custom

1. *Custom*

Custom is a local exception to the general law of the realm that is judicially noticed by royal judges as local common law.¹¹ Local custom serves as a source of adjudicatory law by virtue of its long and continu-

¹¹ ALLEN, *supra* note 3, at 86-87.

ous usage.¹² Upon proof of a custom's existence and reasonableness, the custom is recognized by the common law court as *lex loci* or local common law.¹³ Custom, like all common law, can only be abrogated by parliamentary act.¹⁴ The term custom is sometimes used to refer to the positive law of jurisdictions that were historically outside of the original jurisdiction of the common law courts.¹⁵ The "custom of London," for example, was not custom in the sense of ancient usage, but rather referred to the ordinances that were passed by London's mayor and aldermen.¹⁶ Most rural custom, however, consisted of community praxis that had attained the force of law as a result of long use.¹⁷

Custom is a unique category of law because it is both praxis and law. The case of *Mercer v. Denne*¹⁸ illustrates how custom is simultaneously law and praxis. In the town of Walmer, fishermen had long placed their nets on a strip of land convenient to the sea in order to dry them after a day's use and to treat them with oils. No one could say when the practice began, but the elderly men of the community testified that for as long as they could remember the nets had been placed on the land to dry.¹⁹ Hostilities broke out between the owner of the land and the fishermen when the owner announced his intention to erect buildings on his land.²⁰ The fishermen went to court and sought a declaration that all fishermen of the parish were entitled to dry and oil their nets on the defendant's grounds.²¹

Absent local custom or a long-established easement, the owner of the land would have had the right to exclude all others from the use and enjoyment of his property. Local praxis, however, limited the landowner's right to exclude and gave the community's fishermen not only the right to go onto the property and spread their nets there, but also the right to an injunction preventing the owner from building on his property. In seeking the judicial declaration the fishermen asked the court to take judicial notice of the custom to dry nets as *lex loci*, or

¹² ALLEN, *supra* note 3, at 89-91.

¹³ ALLEN, *supra* note 3, at 88-102.

¹⁴ *Hammerton v. Honey*, 24 W.R. 603, 604 (Ch. 1876) (Jessel, M.R.). The court stated that "[t]he nature of custom being, as it is, local law, you can only get rid of it in the same way as other local laws are got rid of, namely, by Act of Parliament." *Id.*

¹⁵ Another use of "the term 'custom' is to denote rules that once formed an exceptional body of law, but have been adopted within historical times as part of the Common Law." FREDERICK POLLOCK, *A FIRST BOOK OF JURISPRUDENCE* 284 (5th ed. 1923).

¹⁶ Kiralfy, *supra* note 3, at 33.

¹⁷ THOMPSON, *supra* note 2, at 100-01.

¹⁸ *Mercer v. Denne*, [1904] 2 Ch. 534 (Farwell, J.), *aff'd*, [1905] 2 Ch. 538 (C.A.).

¹⁹ *Id.* at 535-36.

²⁰ *Id.* at 535.

²¹ *Id.*

local common law, which granted rights of access to the fishermen and limited the property rights of the landowner.²²

The court held the custom good. The custom of spreading nets on the specified land was recognized as the local common law of Walmer and henceforth it would be recognized by all common law courts without further proof of the custom.²³ In recognizing the custom, the court did not confer legal status upon the custom, but found that the custom had legal status by virtue of its lineage. The court did not look to custom to plumb a good rule, but rather, to determine whether the communal practice was a source of law. Having obtained the force of law, the custom, like all common law, could only be abrogated by parliamentary act.²⁴

2. *The Forms of Rural Custom*

Custom was claimed with regard to the land of a particular district.²⁵ Rural land customs can be divided into two categories: those that granted accommodation in another's land (easements) and those that granted rights to take something out of another's land (*profits à prendre* or rights of common).²⁶ Customary profits à prendre were claimed with reference to all copyhold land,²⁷ while easement customs claimed for an entire district and applied to the fluctuating class of persons who lived there.²⁸

3. *Common Law Prescription*

A doctrine which was closely related to the doctrine of custom was that of prescription.²⁹ Prescriptive rights also arose from long and continuous usage.³⁰ Rights by prescription differed from those by custom in that they attached to a juridical person (either natural or corporate) and were created by grant.³¹ At common law, prescriptive

²² *Id.*

²³ *Id.* at 538-39. See *infra* note 56 and accompanying text.

²⁴ Hammerton v. Honey, 24 W.R. 603, 604 (Ch. 1876) (Jessel, M.R.).

²⁵ ALLEN, *supra* note 3, at 87.

²⁶ THOMAS H. CARSON, PRESCRIPTION AND CUSTOM 90 (1907).

²⁷ Warrick v. Queen's College, Oxford, 10 L.R.-Eq. 105, 121 (1870) ("The rights of copyhold tenants of a manor depend upon custom which applies to all; and as the right is one of a base tenure, it may be established by evidence of custom, because custom applies to all persons in that position.").

²⁸ Salt, *supra* note 1, at 283.

²⁹ Rowles v. Mason, 2 Brownl. & Golds. 192, 123 Eng. Rep. 892 (C.P. 1612) (Coke, C.J.).

³⁰ CARSON, *supra* note 26, at 3 (Prescription is defined as "the doctrine under which defined persons acquire title to certain purely incorporeal hereditaments, such title resulting from acts of user and lapse of time.").

³¹ Gateward's Case, 6 Co. Rep. 59b, 60b, 77 Eng. Rep. 344, 345 (K.B. 1607) ("Another . . . difference was taken, and agreed, between a prescription which always is alledged (sic) in the person, and a custom, which always ought to be alledged (sic) in the land: for every

rights did not need to be immemorial and could be claimed by "lost grant."³² The lost grant theory allowed a juridical person who could prove twenty years' use to allege that a grant had been made sometime after 1189, but had been lost.³³ The lost grant was a legal fiction; in most, if not all cases, no such grant was ever made. Nevertheless, the better opinion in the nineteenth century "seems to [have been] that express evidence [could] not be given to . . . show that in fact no grant was ever made."³⁴

Temporary inhabitants of a district or an unincorporated town were not permitted to claim rights by grant. In *Lockwood v. Wood*,³⁵ the defendant in an action for nonpayment of stallage fees for the erection of a booth in the market town pleaded "never indebted" on the basis of a grant to the inhabitants of Easingwold dated 1646 that exempted them from tolls and stallage. The Court of the Exchequer, on appeal from the Queen's Bench, held that inhabitants of an unincorporated locality could claim the right only by immemorial custom.³⁶ Because the right could not be claimed by recent grant (that is by grant made in the seventeenth century), the case was reheard by a jury on the claim of custom. Although the jury found for the defendant in the lower court, on appeal Lord Denman found for the plaintiff on the ground that the defendant failed to prove the existence of the custom in 1189 (or anytime prior to the 1646 grant).³⁷

B. History of the Law of Custom

One cannot look to the changed conception of custom in the nineteenth century without some understanding of what had come before. The purpose of this section, however, is not to provide an exhaustive account of custom prior to the nineteenth century. Rather, it seeks to provide an overview of the law in order to provide the reader with an understanding of the nature of the rights protected by custom and the incorporation of those rights into the expanding jurisdiction of the common law.

prescription ought to have by common intendment a lawful beginning, but otherwise it is of a custom."); *Lockwood v. Wood*, 6 Q.B. 50, 64, 115 Eng. Rep. 19, 24 (Ex. Ch. 1844) (Tindal, C.J.) (holding that the inhabitants of an unincorporated town cannot prescribe for an easement by grant); CARSON, *supra* note 26, at 11 ("The most important point . . . is that the foundation of common law prescription is the presumption of a grant.").

³² CARSON, *supra* note 26, at 24.

³³ CARSON, *supra* note 26, at 24.

³⁴ CARSON, *supra* note 26, at 25.

³⁵ 6 Q.B. 50, 115 Eng. Rep. 19 (Ex. Ch. 1844) (Tindal, C.J.).

³⁶ *Id.* at 64, 115 Eng. Rep. at 24 ("[u]pon referring to the several authorities which have been cited in support of the validity of such a prescription, it will be found that the claim by the inhabitants, quā inhabitants, to any easement, wherever it has been allowed, has been invariably vested on the ground of custom, not on that of prescription").

³⁷ *Id.* at 67-68, 115 Eng. Rep. at 25-26.

1. *Custom in Medieval Law: The Autonomy of Local Law*

The doctrine of custom, whereby local usages are judicially noticed by the common law court upon proof of their antiquity, continuity, certainty and reasonableness, first appeared in the sixteenth century.³⁸ The notion of custom or local community praxis obtaining the force of law by virtue of common usage, however, is as old as the common law itself.

In the medieval period, common law courts took judicial notice of special or local custom because the power to make and enforce law lay in multiple jurisdictions.³⁹ One of the incidents of power granted by the King to rural vassals and chartered boroughs was the jurisdiction to make law and adjudicate disputes. In rural areas, manorial customs were established and tried in the lord's court, which was attended by his tenants. In towns, boroughs, and counties granted a charter by the Crown, customs were recorded in customals (written compilations of a jurisdiction's customs) and adjudged by borough or county courts established by royal franchise.⁴⁰ Custom governed those areas beyond the original jurisdiction of the common law courts.

In this context, custom could mean positive law promulgated by a manorial lord or the burgesses of a chartered borough. Much of what is found in the town and county customals is a record of genuinely ancient praxis.⁴¹ There is evidence, however, that customals were amended from time to time as new rights emerged and others were rendered obsolete.⁴² Newly chartered boroughs would often adopt wholesale the customs of another town.⁴³

Manorial custom could be recorded in the customary of the manor, but most surviving customaries appear to have been recorded in modern times in preparation for litigation.⁴⁴ Manorial and other rural custom in the medieval period need not be recorded because the common law had few opportunities to pass judgement on rural

³⁸ THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 312 (5th ed. 1956).

³⁹ Another use of "the term 'custom' is to denote rules that once formed an exceptional body of law, but have been adopted within historical times as part of the Common Law." POLLOCK, *supra* note 15, at 280.

⁴⁰ J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 31 (3d ed. 1990).

⁴¹ In the medieval customals, custom is described as "usage," "our use," and the "custom among us." NORMAN DOE, *FUNDAMENTAL AUTHORITY IN MEDIEVAL ENGLISH LAW* 20 (1990).

⁴² For example, the customal of Kent refers to rules of descent established by statute after the time of the first recordation of Kent's customs. 3 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 263 (3d ed. 1926).

⁴³ ALLEN, *supra* note 3, at 65-68.

⁴⁴ BENAIAH W. ADKIN, *COPYHOLD AND OTHER LAND TENURES OF ENGLAND* 88 (2d ed. 1911).

customs.⁴⁵ The custom of the manor governed the interest of the copyholders and the landless peasants who lived on the lord's waste. The tenure of copyhold, however, was not legally cognizable at common law until the middle of the sixteenth century. As a result, copyhold custom was not litigated at common law.⁴⁶

Most rural custom had its origins in the praxis of the community rather than from the command of the manorial lord. In addition to the absence of litigation, because there was sufficient land for lord and commoners alike and the products of the common had no market value,⁴⁷ there was little need to define rights such as turbary (the taking of turves and peats for fuel) and estover (the collection of small wood for fencing, repairs and fuel).⁴⁸

2. *The Early Modern Period: The Expansion of Common Law Jurisdiction and the First Enclosure Movement*

Rural communities in early modern England were made up of the feudal lord, freeholders, copyholders, and inhabitants who lived on the lord's waste and subsisted on the products of the common. Like the copyholders, the inhabitants' access to the common was governed by the custom of the manor.

In the sixteenth century, rural England underwent the first enclosure movement. The great landowners sought to abandon traditional agriculture in favor of sheep farming and production of cloth for the international market. In order to graze animals, the landowners sought to appropriate land formerly available for communal use.⁴⁹

Concurrent with this movement, the power and jurisdiction of the common law expanded to recognize many of the disputes that had

⁴⁵ HOLDSWORTH, *supra* note 42, at 400 ("The common law has fewer opportunities of expressing its opinion upon the reasonableness of rural by-laws and customs. It can and does so on occasion; but it is clearly the borough customs and by-laws which will afford the most scope for interference of this kind.")

⁴⁶ CHARLES MONTGOMERY GRAY, *COPYHOLD, EQUITY, AND THE COMMON LAW* 54 (1963) ("It is almost certain that in the late fifteenth century copyholders had no remedy against their lords at common law."). Common law courts began to recognize the claims of copyholders "shortly after the middle of the sixteenth century." *Id.* at 59.

⁴⁷ See THOMPSON, *supra* note 2, at 133.

⁴⁸ See THOMPSON, *supra* note 2, at 104.

⁴⁹ R.H. TAWNEY, *THE AGRARIAN PROBLEM IN THE SIXTEENTH CENTURY* 6-7 (1912). Land could also be appropriated for tillage. 4 HOLDSWORTH, *supra* note 42, at 368. The two great movements of enclosure occurred in the sixteenth and eighteenth centuries. TAWNEY, *supra*, at 11-12. Although it is difficult to precisely date enclosure because it varied by region

[O]pen fields were almost without exception enclosed by 1850, and opposition rarely kept commons and wastes open for much longer, except in special circumstances which include large wastes upon which several villages intercommoned, forest and fenland regions, and commons contiguous to market towns or larger urban centers.

THOMPSON, *supra* note 2, at 121.

previously been the exclusive provenance of localities. With this expansion, judges assimilated local custom into the common law by judicial notice⁵⁰ and established rules by which custom would be recognized as operative law.⁵¹

Plucknett suggests that the delineation of the four elements of custom—antiquity, continuity, certainty and reasonableness—by the common law served as a check on the growth of customary tenures and usages.⁵² For example, the element of antiquity required that all custom recognized at common law must have originated before 1189.⁵³ Copyhold land did not even exist in 1189, but the requirement of antiquity ensured that, while some legitimately ancient usages of the people would be judicially noticed by the common law, manorial courts could no longer promulgate new customs.

The newly declared element of certainty had a dramatic impact on customary use-rights when it was applied by the Court of King's Bench in *Gateward's Case*⁵⁴ (1608) to rights of common. The court declared that rights of common could not be claimed in the name of a group as amorphous and "uncertain" as the "inhabitants" of a district. Only copyholders could claim a right of common by custom.⁵⁵ Prior to the establishment and application of the four-part test in the early seventeenth century, reasonable custom was recognized and applied by the common law courts.⁵⁶ The development of a new judicial test limited the extent to which local custom was judicially noticed as operative law. The test also regularized customary use-rights by attaching those rights to recognized tenurial interests in land.

Aside from the doctrinal significance of *Gateward's Case*, it is also an important indicator of the effect of social forces on the development of customary law. The court would not recognize a right of common vested in all inhabitants because a common that could be claimed by virtue of inhabitancy would be "transitory and altogether to uncertain, for it will follow the person, and for no certain time or estate but during his inhabitancy, and such manner of interest the law will not suffer, for custom ought to extend to that which hath certainty and continuance."⁵⁷ Although the court expressed its refusal to recognize the inhabitants' right of common in terms of certainty, its chief policy concern was that landowners be able to enclose. The

⁵⁰ See *supra* note 3 and accompanying text.

⁵¹ PLUCKNETT, *supra* note 38, at 312.

⁵² PLUCKNETT, *supra* note 38, at 312.

⁵³ PLUCKNETT, *supra* note 38, at 312.

⁵⁴ 6 Co. Rep. 59b, 77 Eng. Rep. 344 (K.B. 1607).

⁵⁵ *Id.* at 60b, 87 Eng. Rep. at 345-46.

⁵⁶ WILLIAM NOY, THE GROUNDS AND MAXIMS, AND ALSO AN ANALYSIS OF THE ENGLISH LAWS 1 (Charles Barton ed., 7th ed., 1808) (originally published in 1641).

⁵⁷ *Gateward's Case*, 6 Co. Rep. at 60a, 77 Eng. Rep. at 344-45.

court noted that "every common may be suspended or extinguished,"⁵⁸ but if the right of common were vested in inhabitants, rather than copyholders of the manor, "no person certain can extinguish [the common], but as soon as he who . . . releases, &c. removes, the new inhabitant shall have it."⁵⁹

Following the decision in *Gateward's Case*,⁶⁰ many rural customs were said to have originated with a grant by a feudal lord, but historians agree that the "notion of the origin of common rights in royal or feudal grants is a fiction."⁶¹ Nonetheless, it was a fiction of great legal significance. As we shall see below, Thompson argues that it was the reappearance of the holding of *Gateward's Case* in the litigation surrounding inhabitant custom in the eighteenth century that resulted in the destruction of custom and the loss of long-standing use-rights of the landless cottager. But before turning to that period, it will be useful to examine more carefully the traditional elements of custom developed by the common law.

3. *The Crystallization of the Elements of Custom*

By the seventeenth century, the four common law elements of custom, which survive in name to this day, were in place. As this Note later argues, the further evolution of custom law was spurred by the partial reinterpretation of these elements in the eighteenth and then again in the nineteenth century. The following is a detailed look at the traditional elements of custom as they existed prior to the changes in the modern period.

When custom was litigated in the King's courts, the existence of a particular custom was a question of fact to be decided by the jury.⁶² Once proved in fact, local custom must have been found by the royal judge to be good at law.⁶³ Custom must "be not agaynste the lawe of reason/nor the law of god/though they be agaynst the sayde generall customis or maxymis of the law."⁶⁴ A custom must be reasonable, and

⁵⁸ *Id.* at 59b, 77 Eng. Rep. at 344.

⁵⁹ *Id.*, 77 Eng. Rep. at 345.

⁶⁰ *Id.*

⁶¹ THOMPSON, *supra* note 2, at 132.

⁶² CHRISTOPHER ST. GERMAN, DOCTOR AND STUDENT 71 (Selden Society ed. 1974) (1528) ("yf it ryse in questyon *between parties* in the kynges courtes whether there be any such partyculer custome or not/ it shalbe tryed by .xii. men *whether there is such a custome or not/ & not by the Iugis*"; see also *Bastard v. Smith*, 2 M. & Rob. 129, 174 Eng. Rep. 238, 240 (Q.B. 1837) (example of jury instructions).

⁶³ *Tyson v. Smith*, 112 Eng. Rep. 1265, 1271 (Ex. Ch. 1838) (custom for all victuallers to erect stall at fair on the lord's waste). "[O]f these several requisites to the validity of custom, the only one which is brought in question on the present occasion is, whether the custom is reasonable or not; and this is a question which it belongs to the Judges of the land to determine." *Id.* at 1271.

⁶⁴ ST. GERMAN, *supra* note 62, at 71.

reason was the purview of the King's judges.⁶⁵ The existence of an ancient custom was most often proved by the testimony of elderly members of the community.⁶⁶ Once a custom was proved in fact, the common law judge applied the tests of antiquity, continuity, certainty and reasonableness.⁶⁷ These tests were applied as a matter of law to determine "whether there was any evidence on which the jury [could] find the custom proved" and to disallow custom that was contrary to subsequent positive law or was too "unreasonable" to be judicially noticed by the royal court.⁶⁸

Antiquity. The first ground upon which custom was deemed local common law was its antiquity. The custom must have existed since a

⁶⁵ S.C. CARTER, *LEX CUSTUMARIA: OR, A TREATISE OF COPY-HOLD ESTATES* (1696).

⁶⁶ *Hammerton v. Honey*, 24 W.R. 603, 604 (Ch. 1876) (proof of ancient custom is often in the form of testimony of persons of middle to old age who attest that "in their time, usually at least half a century, the usage has always prevailed").

⁶⁷ For the four traditional elements of custom, see CARTER, *supra* note 65. Blackstone, in his *Commentaries* lists the grounds of good custom as antiquity, continuity, peaceable use, certainty, reasonableness, compulsory (not by license) and consistency. 1 WILLIAM BLACKSTONE, *COMMENTARIES* *76-78. The latter two requirements are logical rules that ensure custom is local common law, rather than actual elements of custom.

Blackstone adds the element of "peaceable enjoyment" to the four-part judicial test of custom. *Id.* at 77. According to Blackstone, "custom must have been *peaceable*, and acquiesced in; not subject to contention and dispute. For as customs owe their original (sic) to common consent, their being immemorially disputed either at law or otherwise is a proof that such consent was wanting." *Id.*

Littleton says that possession by custom must be long, continual and peaceable. THOMAS COVENTRY, *A READABLE EDITION OF COKE UPON LITTLETON* § 110a (1830). However, throughout the seventeenth, eighteenth and nineteenth centuries, the commoners right to assert their rights of the common by throwing down enclosures was supported in law. See, e.g., *Mason v. Caesar*, 2 Mod. 65, 86 Eng. Rep. 944 (K.B. 1528); *Hall v. Harding*, 4 Burr. 2426, 98 Eng. Rep. 271 (K.B. 1769); *Arlett v. Ellis*, 7 B. & C. 346, 108 Eng. Rep. 752 (K.B. 1827). In *Arlett*, the commoners were sued for breaking down "hedges and fences" and pulling down the bank "in a greater degree and to a greater extent, and with more force and violence than was necessary for abating . . . said supposed stoppages. . . ." *Id.* at 348, 108 Eng. Rep. at 754. The court held that:

[W]here a fence has been erected upon a common, enclosing and separating parts of that common from the residue, and thereby interfering with the rights of the commoners, the latter are not by law restrained, in the exercise of those rights, to pulling down so much of that fence as it may be necessary for them to remove for the purpose of enabling their cattle to enter and feed upon the residue of the common, but that they are entitled to consider the whole of that fence so erected upon the common as a nuisance, and to remove it accordingly.

Id. at 362, 108 Eng. Rep. at 758-59 (citation omitted).

While it may be true that a custom "immemorially disputed" will be disallowed by the court, such cases are absent from the case law. The case law clearly asserts that commoners need not acquiesce to the lord's usurpation of their customary right. The element of peaceable enjoyment is notably absent from Pollock's work, despite the fact that he is careful to mention the other elements of custom described by Blackstone. Pollock recategorizes the elements or disagrees that they are an element at all. See POLLOCK, *supra* note 15, at 280-83. For a colorful description of such assertions of right by commoners, see THOMPSON, *supra* note 2, at 116-20.

⁶⁸ ALLEN, *supra* note 3, at 89.

"time whereof memory of man runneth not to the contrary."⁶⁹ The date of legal memory was fixed at 1189, by analogy to the time period for bringing writs of right established by the Statute of Westminster.⁷⁰ The antiquity of custom was a legal presumption at common law, but could be rebutted by evidence that a custom could not have existed during the reign of Richard I. The element of antiquity was a legal fiction that served as a check on the growing power of custom at common law, once the courts recognized copyhold as a legal interest.⁷¹

Continuity. The right or license arising out of local custom must have been exercised without interruption.⁷² The element of continuity was evidence of custom as fact.⁷³ Any significant interruption in the exercise of a right that arose by custom created a presumption that the custom never existed.⁷⁴ Custom was law by virtue of ancient usage, and any significant interruption of that usage indicated that it was not truly a custom at all.⁷⁵ Custom was rarely challenged on the ground that it had not been continuous.

Certainty. The common law required that local custom be certain. It had to lie in a definite district and be limited in scope to ensure that local exceptions did not swallow the common law rule.⁷⁶ The doctrine of custom recognized local exceptions to the common law. Custom could not inure to all the subjects of the realm because then it would not have been local custom, but rather the common law itself.⁷⁷ It must have adhered to a definite locale because custom was local law that bound the land and applied to those who owned or inhabited it for as long as they resided there.⁷⁸

⁶⁹ ALLEN, *supra* note 3, at 89.

⁷⁰ ALLEN, *supra* note 3, at 89; *Cf.* POLLOCK, *supra* note 15, at 278 (that date was set by accident or inertia).

⁷¹ PLUCKNETT, *supra* note 38, at 312.

⁷² ALLEN, *supra* note 3, at 91.

⁷³ ALLEN, *supra* note 3, at 91.

⁷⁴ Hammerton v. Honey, 24 W.R. 603 (Ch. 1876).

⁷⁵ ALLEN, *supra* note 3, at 91.

⁷⁶ See, e.g., Arthur v. Bokenham, 11 Mod. 148, 160, 88 Eng. Rep. 957, 962 (K.B. 1708) ("[A]ll customs which are against the common law of England, ought to be taken strictly, nay very strictly, even stricter than any Act of Parliament that alters the common law.")

⁷⁷ Earl of Coventry v. Willes, 12 W.R. 127, 128 (Q.B. 1863) (custom alleged for all the Queen's subjects to enter the close to watch horse races is bad because "the rights possessed by the Queen's subjects generally are part of the general law of the land, not the customs of a particular place").

⁷⁸ COVENTRY, *supra* note 67, § 113b ("a custom, which is local, is alleged in no person, but layd within some manor or other place"); Edwards v. Jenkins, [1896] 1 Ch. 308, 312-13 (defendant claimed that inhabitants of three adjoining parishes cannot maintain the right to recreate on plaintiff's close because such a right could not have originated in a single grant.); Sowerby v. Coleman, 2 L.R.-Ex. 95, 100 (1867) (Channell, B.) (custom of inhabitants of training horses outside their parish on a neighboring manor is bad because the manor and parish were not co-extensive and the custom was not "properly laid in the commencement"). For a discussion of the fictional origin of custom in the feudal grant see *infra* notes 185-90 and accompanying text.

Reasonableness. The most significant requirement of custom at common law was that custom be reasonable, or as Blackstone more accurately stated the rule, a custom must not have been unreasonable.⁷⁹ The element of reasonableness allowed the King's courts to determine which of the innumerable local customs would survive the imposition of a uniform common law.

A custom might have existed in fact, but if it "conflict[ed] with any fundamental principle of the Common Law," it could not be permitted to stand at law.⁸⁰ A custom was never unreasonable merely because it was contrary to the common law. Local custom was by definition a variation of the common law. Custom that conflicted with a fundamental principle of the common law, however, could be declared unreasonable.⁸¹

The test of reasonableness was applied to the contemporary practice of a custom rather than its origins. The courts acknowledged that the origins of most customs had been lost to history.⁸² The common law could not ascribe lawful origins to custom because it was by definition contrary to the common law. Courts would take judicial notice of reasonable local custom because of its antiquity, but would refuse to extend custom in the manner of the common law or an act of Parliament because custom lacked lawful origin.

II

THOMPSON AND THE LAW OF CUSTOM IN THE EIGHTEENTH CENTURY

E.P. Thompson has studied the jurisprudence of custom in the eighteenth century and its impact on the landless cottager. He argues that the reemergence of the holding in *Gateward's Case*, that the rights of common could only inure to copyholders, reified use rights and imposed capitalist definitions of property on traditional agrarian communities.⁸³ In the eighteenth century, he argues, the common law was an instrument of innovation that did away with customary use-rights of property by finding them unreasonable at law. The jurisprudence of custom became an instrument of class expropriation as judges, who had common origins in the class of landowners, overruled

⁷⁹ BLACKSTONE, *supra* note 67, at *77.

⁸⁰ "It is one thing for a custom to be a local variation of the general law, another for it to negate the very spirit of law. It is . . . sometimes a nice problem to decide which of these two effects a custom produces." ALLEN, *supra* note 3, at 88.

⁸¹ ALLEN, *supra* note 3, at 88.

⁸² See, e.g., *Hix v. Gardiner*, 2 Bulst. 195, 196, 80 Eng. Rep. 1062, 1063 (K.B. 1614) ("you cannot imagine the reason of a custom, the custom of borough English and gavelkinde, are no reasonable customs, the reason to be shewed of the beginning of them is impossible").

⁸³ THOMPSON, *supra* note 2, at 134-35.

custom by "allow[ing] 'reasons' to be considered which had more to do with political economy . . . [than] strict attention to the terms of law."⁸⁴

Thompson limited his study to the plight of the poorest members of agricultural communities and made a significant contribution to the understanding of the relationship between law and the social history of English agrarian society. The trend of abolishing customary *profits à prendre* of the landless continued unabated into the nineteenth century. Indeed, as the market developed and different types of material acquired value, a wide range of customs were litigated and declared *profits*, which could not be claimed by inhabitants.⁸⁵

The study of custom at common law cannot be limited to its distributive effects—which class won or lost. The primary beneficiaries of custom were the copyholders, a group which has yet to be adequately defined in terms of class by historians and who may in fact defy such analysis.⁸⁶

Mick Reed draws attention to the historiographically "neglected class" of small farmers in England in the nineteenth century, many of whom may have been copyholders.⁸⁷ Reed argues that this group, who relied on common land, did not disappear with enclosure,⁸⁸ but

⁸⁴ THOMPSON, *supra* note 2, at 137.

⁸⁵ See, e.g., *Blewett v. Tregonning*, 111 Eng. Rep. 524 (K.B. 1863) (practice of inhabitants to take drifted sand from seaside close for manning their lands is a *profit in alieno solo* and cannot be claimed by custom); *Constable v. Nicholson*, 14 C.B. (N.S.) 230, 143 Eng. Rep. 434 (C.P. 1863) (custom to go onto the sea-shore between the high and low-water mark and take gravel, stones and sand for cultivation of land and repair of highways is void as a *profit à prendre in alieno solo*); *Chilton v. Corporation of London*, 7 Ch. D. 735 (1878) (plaintiff's claim of right of inhabitants "to cut or lop, under the name of 'lopwood,' the boughs and branches of the trees growing upon the waste lands of the . . . manor" cannot be supported in law even though the defendant corporation did not deny the right); *Goodman v. Saltash Corp.*, 7 App. Cas. 633 (1882) (right of free inhabitants to take oysters cannot be claimed by custom, but may be sustained as right arising by prescription); *Lloyd v. Jones*, 6 C.B. 81, 136 Eng. Rep. 1182 (C.P. 1848) (custom does not sustain claim of right to take trout from stream).

⁸⁶ The legal historian may speak of the copyholders as constituting, in spite of minor differences, a fairly well-defined class. The economic historian cannot. He finds, on the contrary, the widest difference between the economic conditions of tenants holding their land by copy of court roll, not only, as would be expected, in different parts of the country, but on the same manor.

TAWNEY, *supra* note 49, at 55; THOMPSON, *supra* note 2, at 114 (citing Mick Reed, *The Peasantry of Nineteenth-Century England: A Neglected Class*, HIST. WORKSHOP J. 53 (1984) ("one must note that we still have little firm evidence as to the number of landowners who held by copyhold or other forms of customary tenure . . . in the eighteenth century").

⁸⁷ See Reed, *supra* note 86, at 53-54.

⁸⁸ See Reed, *supra* note 86, at 57.

So strong was the obsession of nineteenth-century commentators with improved farming and large scale agriculture, that when they found different systems, usually where they lived, they were sure that they were seeing something unusual, and historians have tended to take their observations at face value. In fact they were wrong. Small farming and farmer-labourers sur-

continued to play “a significant economic and social role within the English countryside.”⁸⁹ It was the copyholders who could legally resist enclosure by self-help⁹⁰ and challenge the local gentry who sought to rid the country of customary use-rights.⁹¹ In the nineteenth century, copyhold custom was universally upheld by the courts, aided by Parliament’s passage of the Prescription Act.⁹²

In the area of easement custom, the focus of Thompson’s study, customs of inhabitants were also vested by the Prescription Act⁹³ and customary rights to markets, recreation and renewable resources were recognized by common law courts.⁹⁴ In the nineteenth century, the common law upheld the custom of inhabitants on the ground that it served the greater good of the community.⁹⁵ Arguing that the common law abolished local custom of inhabitants in the eighteenth century, Thompson contends that the terms “‘reasonable’ and ‘unreasonable’ . . . were gates through which a large flock of other considerations might come baaing and grunting onto the field of the common law.”⁹⁶ During the nineteenth century, the terms of reasonableness were indeed transformed, but considerations of utility led courts to preserve long-established use rights.⁹⁷

The differences between the conclusions of Thompson and the findings of this Note reflect the rejection of notions of arbitrary lordship by the courts after the era of enclosure and a shift in the judicial philosophy of political economy with the rise of utilitarian thought after 1830.

The eighteenth century witnessed the second great movement of enclosure; during which landowners sought to appropriate communal land.⁹⁸ Courts responded to enclosure by upholding the arbitrary

vived in many places. Often they relied on common land, as well as their own holdings.

Id. at 60.

⁸⁹ Reed, *supra* note 86, at 60.

⁹⁰ See *supra* note 67.

⁹¹ Reed, *supra* note 86, at 67.

⁹² Prescription Act, 2 & 3 Will. 4 ch. 71 (1832). See *infra* notes 141-51 and 162-73 and accompanying text.

⁹³ See *infra* notes 143, 152-57 and accompanying text.

⁹⁴ See *infra* notes 134-37, 152-57, and 226-37 and accompanying text.

⁹⁵ See *infra* notes 134-40.

⁹⁶ THOMPSON, *supra* note 2, at 130.

⁹⁷ See *infra* notes 134-40, 155-57 and 229-31 and accompanying text.

⁹⁸ The two great movements of enclosure occurred in the sixteenth and eighteenth centuries. TAWNEY, *supra* note 49, at 11-12, 183. It is difficult to date enclosure precisely because it varied by region,

[O]pen fields were almost without exception enclosed by 1850, and opposition rarely kept commons and wastes open for much longer, except in special circumstances which include large wastes upon which several villages intercommoned, forest and fenland regions, and commons contiguous to market towns or larger urban centres.

power of lordship. If the lord could prove his superior right by custom or immemorial use, then his use could derogate not only the use-rights of landless cottagers, but also the rights of his copyholders.⁹⁹

In the nineteenth century, courts rejected the arbitrary power of lordship and refused to recognize customs that vested rights solely in the lord of the manor.¹⁰⁰ Not only did the common law protect the interests of the copyholder, but it also rebuked lords who sought to take advantage of the purported power of lordship. In *Betts v. Thompson*,¹⁰¹ for example, the Master of the Rolls upheld the plaintiffs' rights of common and issued a decree forbidding the lord to put up fences. On appeal, the Lord Chancellor upheld the order, adding that:

[T]he lord had purchased the manor for a comparatively small sum, and if he had succeeded in depriving the freeholders of all rights would have made a very handsome profit; and he seemed to have considered that, being the lord, his title would not without difficulty be displaced. In that speculation he had been disappointed.¹⁰²

In the area of inhabitant custom, courts employed a utilitarian calculus to uphold custom that evidenced the consent of the community and served the greater good.¹⁰³ Private land was reserved for community recreation¹⁰⁴ and rights to renewable resources were preserved by the common law even after enclosure.¹⁰⁵

In some cases courts would employ a legal fiction to uphold customs that benefitted the community. The Court in *Willingale v. Maitland*,¹⁰⁶ ruling on a demurrer for want of equity, presumed a royal grant in order to uphold an inhabitant custom that would otherwise have been void as *profit à prendre* inuring to an uncertain class.¹⁰⁷ The court reasoned that the parish and forest were royal lands and that the Crown had a unique power to grant to "the poor, or labouring, inhabitants of the parish" the right to cut wood from the forest for their own use and for sale for their own benefit.¹⁰⁸ In *Chilton v. Corporation of London*, Master of the Rolls Jessel narrowed the *Willingale* holding by

THOMPSON, *supra* note 2, at 121.

⁹⁹ *Bateson v. Green*, 5 T.R. 411, 101 Eng. Rep. 230 (K.B. 1793) (where it can be proved that copyholder's right to the common has been subservient to the lord's right to dig clay, the lord or those empowered by him can dig without leaving sufficient herbage for the copyholders).

¹⁰⁰ See *infra* notes 174-84 and accompanying text.

¹⁰¹ 6 L.R.-Ch. App. 732 (1871).

¹⁰² *Id.* at 741 (Lord Hatherley, L.C.).

¹⁰³ See *infra* notes 134-40, 155-57 and 229-31 and accompanying text.

¹⁰⁴ See *infra* notes 134-37 and accompanying text.

¹⁰⁵ See *infra* notes 152-57 and accompanying text.

¹⁰⁶ 3 L.R.-Eq. 102 (1866).

¹⁰⁷ *Id.* at 108.

¹⁰⁸ *Id.*

distinguishing the case as an instance where the judge ruling on demurrer was bound to take allegations of a grant as true even though "he and everybody else in [c]ourt knew that they were fictitious."¹⁰⁹ Nevertheless, the decision in *Willingale* was a far cry from that in *Steel v. Houghton*,¹¹⁰ where the right of gleaning by the labourers of the parish was struck down on grounds that it "would raise the insolence of the poor."¹¹¹

Thompson alternately condemns the common law courts as the tools of agrarian capitalism and acknowledges that the judiciary's condemnation of custom was not aimed at the landless poor, but rather interlopers and entrepreneurs.¹¹² In the nineteenth century, the market economy placed new pressures on communally held resources, and rights to those resources had to be defined with a new certainty. In *Wilson v. Willes*,¹¹³ for example, the defendant was sued for breaking and entering the plaintiff's land and taking 100 square yards of turf, worth twenty pounds.¹¹⁴ The defendant alleged that "customary tenants immemorially dug, taken and carried away . . . such turf as had been fit and proper [for making and repairing gardens and making and repairing mounds for hedges and fences] at all times in the year, as often, and in such quantity as occasion had required."¹¹⁵ The custom was held void for uncertainty because a custom limited only by "caprice and fancy" was "inconsistent with the rights of all the other commoners, as well as of the lord."¹¹⁶

When the custom in *Willes* is examined in historical context, it is likely that the custom existed as alleged, but at a time when the commoners were taking turf for their individual use. The defendant in this case removed one hundred square yards of turf, an amount clearly intended for market. Thus, a once valid custom became "uncertain" or legally unreasonable because of its exploitation by an entrepreneur. In *Wilson v. Willes*, the law intervened to prevent the

109 7 Ch. D. 735, 742 (1878) (Jessel, M.R.).

110 126 Eng. Rep. 32 (C.P. 1788).

111 *Id.* at 38 (Heath, J.).

112 THOMPSON, *supra* note 2, at 133.

113 103 Eng. Rep. 46 (K.B. 1806).

114 *Id.* at 46-47.

115 *Id.* at 47.

116 *Id.* at 49. For another example of a custom held bad at law on grounds that its uncertainty would lead to the destruction of the property, see *Sowerby v. Coleman*, 2 L.R.-Ex. 95, 99-100 (1867) (Kelly, C.B.) (custom for the inhabitants of a parish to train horses outside the limits of the parish is bad because "[s]uch a right, then, to exercise an indefinite number of horses, for an indefinite period of the year, would exclude the owner from the beneficial occupation of his property during probably the whole year, and cannot be sustained on behalf of a parish or district beyond the limits of the place where it is to be exercised").

"Tragedy of the Commons."¹¹⁷ Under the pressure of entrepreneurial activity, the community's traditional methods of resource management failed.¹¹⁸ The common law, far from acting as an instrument of class expropriation, protected the commons and the rightful exercise of the commoners' customary rights.¹¹⁹

Thompson is doubtless correct that the restriction of the use of the commons to those who had an interest in the manorial land disappropriated those landless cottagers who lived on the lord's waste and subsisted on the products of the common. The decisions of eighteenth century courts had a profound effect on agrarian communities throughout England, forcing those without land and rights of common into exploitive wage labor for the great landowners.¹²⁰ Courts of the eighteenth century also upheld customs vesting arbitrary power in the lord without regard to the copyholders and the landless poor.

Nineteenth century courts, however, preserved easement customs of recreation, markets and water rights, and upheld copyholders' rights of common. The common law took no cognizance of those disappropriated in the eighteenth century and inhabitants continued to lose customary use rights in the nature of *profits à prendre*. Common law courts did, however, regularly uphold custom. A class of customary use-rights were extinguished by the common law, but custom as a category of law remains vital. Thompson has identified a paradox of the eighteenth century: plebeian culture was rebellious, but rebellious in defense of custom.¹²¹ The paradox of the nineteenth century was that a distinctly modern, positivist judiciary upheld custom on grounds of its utility.

¹¹⁷ Garret Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1343-48 (1968). Hardin argues that when communal resources are owned and protected by no one, they will inevitably be over-exploited because no one member of the community has an interest in preserving the whole of the resource.

¹¹⁸ THOMPSON, *supra* note 2, at 107 ("[o]ver time and over space the users of commons have developed a rich variety of institutions and community sanctions which have effected restraints and stints upon use").

¹¹⁹ *But cf.* THOMPSON, *supra* note 2, at 138 ("[a]uthorities on enclosure fail to examine . . . whether . . . the law itself may not have been the instrument of class expropriation").

¹²⁰ One must be careful, however, not to exaggerate the impact of common law judgments on customary activities. Peter King has demonstrated that the common law judgment against gleaning failed to halt the practice. *See generally* Peter King, *Gleaners, Farmers and the Failure of Legal Sanction in England 1750-1850*, 125 *PAST & PRESENT* 116 (1989). Even more importantly for purposes of this study, in areas where gleaning was a custom recorded in by-laws or in the elderly's memories, a particular local judgment had to be obtained before the practice could be abrogated by law. *Id.* at 139. *See* David Sugarman, *Towards a New History of Law and Material Society in England 1750-1914*, in *LAW, ECONOMY AND SOCIETY* 32-33 (G.R. Rubin & David Sugarman eds., 1984).

¹²¹ THOMPSON, *supra* note 2, at 9.

III

EVENTS AFFECTING THE JURISPRUDENCE OF CUSTOM IN THE
NINETEENTH CENTURY

A. Positivism and the Law of Custom

The traditional positivist conception of law is that law is a system of rules laid down by the lawgivers: the King, Parliament and their courts.¹²² The jurisprudence of custom illuminates a central paradox of the common law. Although the royal courts are rapidly imposed upon the realm a uniform common law,¹²³ a litigant could always plead custom, a right or defense issuing from the community that the common law recognized as an exception to itself.¹²⁴

Jeremy Bentham, the father of legal positivism,¹²⁵ addresses the paradox of custom in his *Commentaries*. Bentham distinguishes between two types of custom: custom that arises by praxis (“originally spontaneous custom”) and custom that has been granted the imprimatur of the royal courts (“legalized custom”). According to Bentham, spontaneous custom gives rise to legitimate expectations, but

¹²² A.W.B. SIMPSON, *LEGAL THEORY AND LEGAL HISTORY* 359, 362 (1987) (The “weak” form of positivism describes a system of rules that pass a test of validity established by an ultimate rule of recognition. As A.W.B. Simpson points out, this weak form of positivism, which moves away from the position that all law is enacted, does not wholly account for the source of the validity test. *Id.* at 365. Customary practice is only mentioned briefly by H.L.A. Hart as a possible source of law. *Id.* at 366 (citing H.L.A. HART, *THE CONCEPT OF LAW* 97 (1961)).

¹²³ Salt, *supra* note 1, at 282:

[W]e may safely say that the term common law means paramount custom of the Curia Regis every bit as much as popular usage of the people. It is “common” because the royal judges have foisted it on the realm at large in defeasance of the more ancient shire customs and at the expense of the feudal jurisdictions.

See also DOE, *supra* note 41, at 26 (“[a]s compared with parliamentary legislation and local customary law, whose authority is derived predominantly from the consent of the community at large, . . . judicial consent alone shapes the common law”).

¹²⁴ ALLEN, *supra* note 3, at 86.

¹²⁵ Philip Schofield has argued that John Austin, rather than Bentham, was the major influence on nineteenth century academic jurisprudence. Philip Schofield, *Jeremy Bentham and Nineteenth-Century English Jurisprudence*, 12 J. OF LEGAL HIST. 58, 61 (1991). I have discussed positivism in terms of Bentham because of the influence of his theory of utility. *Id.* at 59. Austin agreed that, once it had been “legalized,” custom became law by command and not consent:

The admirers of customary law love to trick out their idol with mysterious and imposing attributes. But to those who can see the difference between positive law and morality, there is nothing of mystery about it. Considered as rules of positive morality, customary laws arise from the consent of the governed, and not from the position or establishment of political superiors. But, considered as moral rules turned into positive laws, customary laws are established by the state: established by the state directly, when the customs are promulgated [sic] in its statutes; established by the state circuitously, when the customs are adopted by its tribunals.

JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE* 32 (Noonday Press 1954) (1832, 1863).

cannot create a binding legal obligation until it is legalized by a common law court. Moreover, custom cannot be said to have been made with the consent of the people because custom is produced by the common law.¹²⁶

Bentham's explanation of custom does not comport with the common law doctrine, whereby the court takes judicial notice of custom as *lex loci* or local common law. In the daily life of the community custom may have been more "ambience, *mentalité*, . . . a whole vocabulary of discourse, legitimation and expectation" than strictly defined rules.¹²⁷ However, when a dispute over custom reached the royal court, community praxis was recognized as local common law that gave rise to legally enforceable rights and obligations. While some of what was termed custom may have been, as Bentham points out, positive law of "local judicatories which the Common Law courts . . . refused to recognize,"¹²⁸ on the whole, custom was law by virtue of community praxis. Customary rights and obligations were legally vested by virtue of immemorial usage.

In the nineteenth century, common law courts employed both natural law and positivist, utilitarian theory to declare custom *lex loci*. In a departure from a line of precedent originating in the seventeenth century,¹²⁹ courts required that good custom have legitimate and reasonable origins in the feudal manor. Thus, all custom must have been established by the authority of the lord. Customs that could not have been established in a single manorial jurisdiction were held bad for uncertainty.¹³⁰ Custom, like positive law, must derive from and apply to a legally defined jurisdiction.

Custom could be established, however, solely by command. Nineteenth century courts held that custom could only be reasonable if it was created with the consent of the community. Copyhold custom had to evidence the consent of the homage,¹³¹ and easement customs had to have been the result of "repeated acts of assent" by both the property owner and the beneficiary of the customary usage.¹³² While custom must have been promulgated within the jurisdiction of a recognized authority, its legitimacy, contrary to the positivist theory of sovereignty, rested on the consent of the people.

¹²⁶ JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES: A CRITICISM OF WILLIAM BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 221-23 (1928). See GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 268-69 (1986).

¹²⁷ THOMPSON, *supra* note 2, at 2.

¹²⁸ BENTHAM, *supra* note 126, at 234-35.

¹²⁹ See *supra* notes 82-83 and accompanying text.

¹³⁰ See *infra* notes 211-12 and accompanying text.

¹³¹ See *infra* notes 168-78 and accompanying text.

¹³² See *infra* notes 195-96 and accompanying text.

Bentham's theory of sovereignty rejected centuries of jurisprudence that established the special status of local custom as *lex loci*.¹³³ The increasing positivism of common law courts in the nineteenth century is revealed in their insistence on proof of custom's reasonable origins. Nevertheless, common law courts could not support the notion that custom is law imposed by the sovereign. Customs were considered to have grown up with the tacit consent of those who employ them.

Bentham's most significant influence on the jurisprudence of custom was not his theory of sovereignty, but rather, his theory of utility. In the nineteenth century, good custom reflected the consent of the people and served the interests of the community at large. Courts regularly upheld traditional and recently modified easement customs on the ground that they provided the greatest good for the greatest number. In *Hall v. Nottingham*,¹³⁴ for example, the inhabitants of the parish of Ashford Carbonell claimed a custom to "go upon the . . . land [known as the Maypole Piece] . . . at all times, for the purpose of using the same as a recreation ground. . . ." ¹³⁵ The Court of the Exchequer unanimously upheld the custom as reasonable despite Chief Baron Kelly's doubts that such a custom that would deprive the owner of the beneficial use and enjoyment of his freehold could be reasonable.¹³⁶ Nevertheless, Kelly upheld the custom because:

[w]e are dealing, it must be remembered with a matter affecting an individual owner of a small piece of land on the one hand, and the rights and privileges of all the inhabitants of an entire parish on the other; and it is so much for the physical and moral benefit and advantage of those inhabitants that they should have rational and healthful recreation, and that they should have a piece of ground on which they may be able to indulge in the exercise of all lawful sports, games, and pastimes, that I think the benefit and advantage accruing to them from the right claimed outweigh the injury and disadvantage arising therefrom to the owner of the land.¹³⁷

In *Hall*, the court upheld the claimed custom because the benefit to the community outweighed the harm to the individual. Similarly, in *Mercer v. Denne*,¹³⁸ an early twentieth century easement case that involved the spreading of fishermen's nets on private land, the court observed that a custom which derogated the rights of an individual to the benefit of the community was reasonable. In *Mercer*, the court went so far as to hold that the benefit to the community was proof that

133 Kiralfy, *supra* note 3, at 30.

134 33 L.T.R. 697 (Ex. D. 1876).

135 *Id.*

136 *Id.* at 699.

137 *Id.*

138 *Mercer*, [1904] 2 Ch. 534, 552 (Farwell J.), *aff'd*, [1905] 2 Ch. 538 (C.A.).

the custom had a "lawful commencement" and did not result from accident or indulgence.¹³⁹ In so holding, the court sustained modern innovations of the ancient custom that acted to deprive the owner of the beneficial use of his land, because to do otherwise "might result in making an arrangement that was in its inception reasonable, because of public benefit, become actually injurious to public interests."¹⁴⁰

B. The Prescription Act

In 1832, Parliament passed the Prescription Act,¹⁴¹ legislation introduced by the Chief Justice of the King's Bench to remedy the "[i]nconvenience and [i]njustice" that resulted from the requirement at common law that a right claimed by custom must have originated before 1189. Copyhold custom was declared nonrebuttable upon a showing of thirty years' use and was made "absolute and indefeasible" after sixty years.¹⁴² The Act vested easements after twenty years of use and made the right absolute and indefeasible after forty years of use.¹⁴³

The Prescription Act was meant to formally institute the legal presumptions of the antiquity of custom, but its effect was broader in scope.¹⁴⁴ In *Earl De La Warr v. Miles*,¹⁴⁵ the lord of the Manor of Dudleswell sued the copyholders for taking "brakes, fern, heather, and litter" from the lord's forest.¹⁴⁶ The manor had been enclosed and in the decree the rights of "pasturage and herbage," (the right to turn beasts out to feed) had been reserved to the commoners.¹⁴⁷ The Court of Appeal agreed that the right of cutting litter had not been included in the grant and refused to recognize the right as one arising by immemorial prescription or lost grant.¹⁴⁸ Nonetheless, the right was upheld as custom because the commoners had taken litter "as of right"¹⁴⁹ for the sixty-year time period mandated in the Prescription Act.¹⁵⁰ So long as the right alleged was one that could arise by cus-

¹³⁹ *Id.* at 552.

¹⁴⁰ *Id.*

¹⁴¹ The Prescription Act 2 and 3 Will. IV. c. 71 (1832).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ 3 Hansard's Parliamentary Debates 442 (March 15, 1831).

¹⁴⁵ 17 Ch. D. 535 (C.A. 1881).

¹⁴⁶ *Id.* at 540.

¹⁴⁷ *Id.* at 540.

¹⁴⁸ *Id.* at 590-91.

¹⁴⁹ *Id.* at 591 ("The true interpretation of those words 'as of right' seems to me to be that he has done so upon a claim to do it, as having a right to do it without the lord's permission, and that he has so done it without that permission.").

¹⁵⁰ *Id.* at 595.

tom, the Prescription Act ensured that sixty years of community use was sufficient to create a legally cognizable custom.¹⁵¹

In *Race v. Ward*,¹⁵² a case arising under the Act, the inhabitants claimed access to a well by custom and fifty years' use after enclosure. The case began after the community members breaking a drain that had been placed on the field to drain away water from the well:

the defendants broke into and burst the said drain, and threw and placed large quantities of earth &c. there, and wrongfully obstructed the same, whereby divers large quantities of the waters which from time to time during the time collected and were in and upon the said field were prevented from running away from the same as they otherwise would have done, and were then caused to overflow and accumulate upon the said field.¹⁵³

Like the copyholders in *Arlett v. Ellis*, the inhabitants had taken back by force their common right of water and defended their trespass on grounds of immemorial custom.¹⁵⁴

The court accepted their plea and gave judgment for the defendants.¹⁵⁵ The court, on a rule to enter the verdict for the plaintiff, upheld the community's right of access to the well.¹⁵⁶ The enclosure decree had not specifically extinguished the well, and the court would not deny the custom by implication of enclosure because it did "not think that there is in all inclosures an intention to extinguish, for the sake of agriculture, a right which is often of so great importance to the inhabitants as that of drawing water for domestic purposes."¹⁵⁷

The Prescription Act was judicially proposed legislation that protected the holders of customary use-rights.¹⁵⁸ Courts employed the Act to support the interests of inhabitants and copyholders against large landowners. One judge wrote, with a tone of reproof, of the

considerable authority, *dicta* at all events by learned Judges sitting in the Court of Chancery, that where the facts of user are proved, the Court ought to be astute to discover some legal mode in which the claim of right might be maintained, that is to say, that the Court ought to lean heavily in favor of the defence of a prescription under the statute. Now, if by that it is meant that the Court ought to look at the evidence with extreme indulgence, I beg leave to say that I cannot accede to that view.¹⁵⁹

¹⁵¹ *Id.* at 594.

¹⁵² 4 El. & Bl. 702, 119 Eng. Rep. 259 (Q.B. 1855).

¹⁵³ *Id.*

¹⁵⁴ *See supra* note 67.

¹⁵⁵ *Race*, 119 Eng. Rep. at 264.

¹⁵⁶ 7 El. & Bl. 384, 119 Eng. Rep. 1289 (Q.B. 1857).

¹⁵⁷ *Id.* at 390, 119 Eng. Rep. at 1291 (Erle, J.).

¹⁵⁸ The Prescription Act was proposed by the Chief Justice of the Court of King's Bench, Lord Tenterden. 3 Hansard's Parliamentary Debates 442 (March 15, 1831).

¹⁵⁹ *Earl De La Warr v. Miles*, 17 Ch. D. 535, 595 (C.A. 1881) (Brett, L.J.).

The judge did go on, however, to approve the custom of the copyholders upon proof of sixty years of use.¹⁶⁰

Parliament and common law judges placed their faith in copyholders as the best managers of communal land. The lord and his tenants were left alone to regulate their resources in the lord's court. After 1860 courts looked only to the origins of custom to determine its reasonableness.¹⁶¹

IV

RECONSTRUCTION OF CUSTOM IN THE NINETEENTH CENTURY

A. Copyhold Custom in the Nineteenth Century

By the nineteenth century, courts were treating copyhold as a contract between a lord and his customary tenants. Royal judges applied contract theory to determine whether a copyhold custom was good at law and concluded that a lord and his copyholders were free to arrange their relations as they saw fit so long as the custom evidenced the copyholders' consent.

In 1861 the House of Lords narrowed the inquiry into the reasonableness of copyhold custom by limiting judicial review to the origins of the custom.¹⁶² As the profits to be made from land grew with the development of markets in the nineteenth century, litigation ensued between lords and their copyholders over the right to develop the copyhold for various industrial uses. For example, in *Salisbury v. Gladstone*,¹⁶³ a lord brought an action for ejectment of a copyholder who was digging up clay on his holding and selling it as bricks. The *Salisbury* Court refused to find the custom unreasonable because "reasonable[ness]" when applied to a custom regulating the relation between a lord and his copyholders" was hard to define.¹⁶⁴ This was because a lord and his copyholders could stipulate to whatever arrangement they wished. If the parties continued to act on that arrangement, the judge would not declare the arrangement void for unreasonableness.¹⁶⁵ Lord Cranworth added that the element of reasonableness meant nothing more than that the custom "resulted from accident or indulgence, and not from any right conferred in ancient times on the party setting up the custom."¹⁶⁶

¹⁶⁰ *Id.*

¹⁶¹ See discussion *infra* notes 162-94.

¹⁶² *Salisbury v. Gladstone*, 9 H.L. Cas. 692, 11 Eng. Rep. 900 (1861).

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 701, 11 Eng. Rep. at 903.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 701-02, 11 Eng. Rep. at 903-04.

The holding in *Salisbury* led to great profits for the copyholders of the manor of Leighton. In *Hanmer v. Chance*,¹⁶⁷ the sand beneath the tenements contained valuable silver vitreous sand, which was used in the manufacture of glass.¹⁶⁸ Prior to that decision, the lord of the manor had won an order enjoining the copyholders from digging up their holdings and selling the sand to a glass manufacturer.¹⁶⁹ On appeal, the *Hanmer* Court reversed the injunction on proof of the copyhold custom "to dig for and get sand, sandstone, gravel and clay from their respective tenements. . . and to cart and carry away the same on to other lands . . . and to use or sell the same either on or off the . . . manor without license from the lord."¹⁷⁰ The court emphasized that, although the custom of taking the valuable sand and selling it to the glass company had only been proved to have existed for twenty-seven years, this proof was merely part of the evidence that showed a general custom of taking sand from the manor.¹⁷¹ It may be that, in finding for the copyholders, the Lord Chancellor "allowed 'reasons' to be considered which had more to do with political economy . . . [than] strict attention to the terms of law."¹⁷² At the time that the injunction was sought, a major glass manufacturer had already removed 50,000 tons of sand.¹⁷³

Manorial customs that courts found unreasonable at law were those favoring the lord's interests over those of the copyholders. For example, in *Hilton v. Granville*,¹⁷⁴ the lord's coal mining undermined the foundation of the tenant's house. The lord claimed a custom by which he could enter any lands within the manor and take coal without compensating for any damage caused to the dwellings located thereon.¹⁷⁵ The court held the custom repugnant and void and noted that the unreasonableness of the custom was "too clear from the simple statement to admit of illustration of the argument."¹⁷⁶ The court in *Hilton* relied on an earlier decision that had invalidated another mining custom that "favoured . . . arbitrary power, and might (as laid) put in the power of the lord, totally to deprive the tenant of the benefit of the land."¹⁷⁷

Alleged customs that favored the lord's interests over those of his tenants were struck down on the ground that the tenants would not

¹⁶⁷ *Hanmer v. Chance*, 4 De G.J. & S. 626, 46 Eng. Rep. 1061 (Ch. 1865).

¹⁶⁸ *Id.* at 628, 46 Eng. Rep. at 1062.

¹⁶⁹ *Id.* at 626, 46 Eng. Rep. at 1061-62.

¹⁷⁰ *Id.* at 629, 46 Eng. Rep. at 1062.

¹⁷¹ *Id.* at 630-31, 46 Eng. Rep. at 1063.

¹⁷² THOMPSON, *supra* note 2, at 137.

¹⁷³ *Hanmer*, 4 De G.J. & S. at 632, 46 Eng. Rep. at 1063.

¹⁷⁴ 5 Q.B. 701, 114 Eng. Rep. 1414 (1845).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 730, 114 Eng. Rep. at 1425.

¹⁷⁷ *Wilkes v. Broadbent*, 2 Strange 1225, 93 Eng. Rep. 1146 (K.B. 1745).

consent to such customs. Lords and copyholders were free to contract to custom as they wished, but courts upheld the custom as reasonable only if the contract demonstrated the parties' consent. In *Arlett v. Ellis*,¹⁷⁸ the landowner answered the copyholders' claim of common by alleging a custom vested in the lord to enclose the whole of the common at his discretion.¹⁷⁹ The landholder sought to prove his right by custom to do with the common what he will by showing that he had made various grants of the common. However, the grants were apparently not made "with the consent of the homage, or . . . [in a manner allowing] a sufficiency of common . . . [to] remain[] for the . . . [use of the] commoners."¹⁸⁰ Upholding the right of the defendant commoners, the court stated that the right of the common could not be utterly destroyed "by the act of the lord himself."¹⁸¹ The court distinguished the case at bar from the facts of *Folkard v. Hemmett*,¹⁸² where the lord obtained the consent of the homage before making grants of the common. The consent of all tenants who could, by right, appear before the lord's court assured the commoners (and the royal judges) that a sufficient portion of the common would be retained for customary use.¹⁸³ In contrast, the *Arlett* court did not uphold the alleged custom of the lord because the commoners did not, nor would they ever, consent to such a custom.¹⁸⁴

Consent to feudal custom is a legal fiction created by the courts of the nineteenth century. Custom is law by virtue of immemorial usage and cannot rationally be said to have been consented to by anyone. Manorial customs arose at a time when a fee interest in land was valuable, but wasteland for common use was plentiful.¹⁸⁵ In rare instances, courts may have documented manorial custom,¹⁸⁶ but even where documentation does exist, its accuracy is in doubt.¹⁸⁷

¹⁷⁸ 7 B. & C. 346, 108 Eng. Rep. 752 (K.B. 1827).

¹⁷⁹ *Id.* at 349, 108 Eng. Rep. at 754.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 369, 108 Eng. Rep. at 761.

¹⁸² 5 T.R. 417, 101 Eng. Rep. 234 (K.B. 1776) (lord claims custom of licensing noncopyholders to pasture beasts on the lord's waste).

¹⁸³ *Arlett*, 7 B. & C. at 368-69, 108 Eng. Rep. at 761 ("[T]he homage would never consent to any part of the common being taken away from the tenants, unless they were satisfied that sufficient remained for the commoners.").

¹⁸⁴ *Id.*

¹⁸⁵ THOMPSON, *supra* note 2, at 27.

¹⁸⁶ See, e.g., *Folkard*, 5 T.R. 417, 101 Eng. Rep. 234 (manorial records reveal consent of the homage to grants of right of pasturage to strangers).

¹⁸⁷ These documentary sources are often partisan briefs drawn up by the lord's steward, or by the substantial landholders on the in-coming of a new lord; or they may even be the result of bargaining and compromise between several propertied parties in the manorial court, in which the cottager or the landless had no voice on the homage.

Modern historians of feudalism do not recognize the fictional feudal manor described in nineteenth century legal judgments. The feudal order rested on power, not consent. Although the lord's alleged custom, at issue in *Hilton v. Granville*,¹⁸⁸ of destroying his tenants' homes without recompense, was unreasonable by any standard, in many cases, such as *Arlett v. Ellis*,¹⁸⁹ the lord most likely did sell off portions of the common by right. Yet it was the *Hilton* and *Arlett* courts that repudiated such power of lordship that had been upheld in eighteenth century cases such as *Bateson v. Green*.¹⁹⁰

Courts in the nineteenth century created an historical fiction in defense of custom and community property rights. Utilitarian notions of custom as law for the greater good that was founded in a contract between lord and copyholder pervaded the jurisprudence of copyhold. Courts almost universally upheld customs alleged by the copyholders, even when the landowner was a powerful and influential institution, such as Queen's College, Oxford.¹⁹¹ In *Warrick v. Queen's College, Oxford*,¹⁹² the college was sued by the freeholders of the manor for enclosing the commons. Despite the fact that the manor in *Warrick* had no copyholders, the court permitted the individual freeholders to sue on behalf of all freeholders of the manor and upheld their right of common.¹⁹³

The courts' deference to custom was the result of a judicial policy to protect long-established users of customary rights.¹⁹⁴ The rationale for preserving custom at law was that custom benefitted the community as a whole. Therefore, courts upheld agreements between a lord and the copyholders only in so far as they benefitted the community and evidenced the consent of the homage. The themes of consent, the greater good, and legitimate origin in the feudal order echo

188 5 Q.B. 701, 114 Eng. Rep. 1414 (1845).

189 7 B. & C. 346, 108 Eng. Rep. 752 (K.B. 1827).

190 5 T.R. 411, 101 Eng. Rep. 230 (K.B. 1793).

191 *Warrick v. Queen's College, Oxford*, 10 L.R.-Eq. 105 (1870), *aff'd*, 6 Ch. App. 716 (1871).

192 10 L.R.-Eq. 105 (1870).

193 *Id.* at 126, 129, *aff'd*, 6 Ch. App. at 726.

194 "[T]he Court is entitled; nay, bound by authority—not merely from an inclination towards any abstract rule of justice—when it finds rights which have been exercised [continuously for over two hundred years] . . . to find the origin of them in some way if it can." 6 Ch. App. at 722.

After all, whatever definition you may give to custom and prescription, we all know that they are legal fictions invented by judges for the purpose of giving a legal foundation or origin to long usage. . . . [W]hen you find long-continued usage which can have a legal origin, then, with the view of preserving to the people claiming them the quiet possession of the rights of property or rights of easement which they have so long enjoyed, you shall attribute these rights, if possible, to a legal origin so as to support them.

Hammerton v. Honey, 24 W.R. 603, 604 (Ch. 1876).

throughout the case law in defense of all custom, including that which did not attach to an interest in land.

B. The Custom of Inhabitants

Customs in the nature of easements compose the second category of rural custom and could be claimed by all inhabitants of a district. Easement-type customs were not recorded or agreed upon in the lord's court. Unlike the customs of copyhold, easement customs remained subject to the common law tests of antiquity, continuance, certainty, and reasonableness throughout the nineteenth and early twentieth centuries.

Nineteenth century courts were influenced not only by economic utilitarianism, but also by the positivist theory of the common law. Traditionally, custom was a unique form of law that was believed to have no reasonable origin. Custom arose from ancient community praxis, the rationale for which was lost to history. Under positivist theory, however, all law must be handed down. Valid custom was that which resembled positive law: rules derived from and applied to a certain jurisdiction that royal judges could apply rationally. Nineteenth century judges updated the ancient doctrine of custom by redefining the traditional elements of antiquity, certainty and reasonableness and ascribing lawful beginnings to custom in a fictional, democratic feudal order.

1. *Antiquity*

The first ground on which custom was deemed to be local common law was that it was the way things had been done since a "time whereof memory of man runneth not to the contrary," judicially established as 1189 A.D.¹⁹⁵ By the nineteenth century, of course, few litigants could prove that a custom had been in continuous existence for over six centuries, but by then the ancient origin of custom was legal presumption.¹⁹⁶ In the early twentieth century case of *Mercer v. Denne*, for example, the testimony of fishermen that the custom of drying fishing nets on the plaintiff's land existed for "the whole of their

¹⁹⁵ ALLEN, *supra* note 3, at 89.

¹⁹⁶ The legal presumption of antiquity was "rendered absolutely necessary by the previous 'judicial legislation,' which established the reign of Richard I as the extent of legal memory." *Bryant v. Foot*, 3 L.R.-Q.B. 497, 516 (1868). In *R. v. Jolliffe*, where the evidence showed the existence of custom for more than twenty years, the court instructed the jury that "slight evidence [of custom], if uncontradicted, became cogent proof" of immemorial usage. 2 B. & C. 54, 107 Eng. Rep. 303 (K.B. 1823). On appeal, the court upheld the charge because "[a] regular usage for 20 years, not explained or contradicted, is that upon which many private and public rights are held . . ." *Id.* at 59, 107 Eng. Rep. at 305. Thus, regular usage for twenty years was the fictional period whereby courts presumed a grant by prescription. ALLEN, *supra* note 3, at 90.

memory . . . extending over more than seventy years” was strong evidence of antiquity.¹⁹⁷

Although the immemorial usage of custom enjoyed a presumption at law, the presumption was still rebuttable. In *Simpson v. Wells*,¹⁹⁸ the court rejected the custom of setting up a stall at a fair to hire servants because the authorization for such fairs was the Statute of Labourers, instituted in 1349, two centuries after the date of legal memory. The unreasonableness of an alleged custom could also serve to defeat the claim of its antiquity. In *Bryant v. Foot*, for example, the rector of a parish claimed the right to a 13 shilling marriage fee. The court denied the custom because the law will not presume the impossible, “that such a sum as 13s. should have been payable as of right upon every marriage in a small rural parish in England in the time of Richard I.”¹⁹⁹ In order to avoid the legal presumption of antiquity, litigants sometimes challenged the antiquity of a custom under the guise of the element of certainty. Not only was the presumption avoided, but courts in the eighteenth and nineteenth centuries demonstrated a willingness to strike down custom on grounds of certainty.²⁰⁰

In *Mercer v. Denne*, plaintiff fishermen sought a declaration that the fishermen of the parish were entitled to dry their nets on the defendant’s land.²⁰¹ The custom claimed was that “inhabitants [of Walmer] carrying on the trade or business of fishermen . . . had from time immemorial . . . exercised the right and privilege at all times necessary or proper . . . to dry their nets upon the beach ground.”²⁰²

The defendant challenged the custom on grounds of certainty. He argued that the custom claimed must be “to dry nets at particular times for particular fish.”²⁰³ Although fishermen had dried herring and mackerel nets on the defendant’s land for many years, long enough to create a presumption of antiquity, the sprat fishing industry was a mere thirty-five years old and involved oiled nets that were placed to dry on the land at a different time of year.²⁰⁴ The defendant claimed that a custom that varied in practice from that used in ancient times was void because of uncertainty.²⁰⁵

197 [1904] 2 Ch. 534, 535.

198 7 Q.B. 214 (1872).

199 3 L.R.-Q.B. at 507 (1868).

200 *Mercer*, [1904] 2 Ch. 534.

201 Although this study generally addresses nineteenth-century custom, early twentieth-century cases are consistent with those of the nineteenth century.

202 *Mercer*, [1904] 2 Ch. at 535.

203 *Id.* at 552.

204 *Id.* at 535-36.

205 *Id.* at 549.

The court held, however, that custom need not be invariable to be valid. The Court noted that other aspects of custom involved some uncertainty but were still good at law. By definition custom adheres to a fluctuating class of persons that varies by number, yet custom is not void by virtue of this uncertainty.²⁰⁶ In modern cases, the court observed, good custom is often alleged generally. In *Fitch v. Rawling*, for example, although the charge was trespassing to play cricket (a game of recent vintage), the court upheld a custom allowing "all the inhabitants of [the] parish to play . . . in the close at all seasonable times of the year."²⁰⁷

The defendant in *Mercer* also claimed that the custom of spreading fishing nets on his land could not have existed since 1189 because the land itself did not exist then, but was a result of recent accretion. Good custom, he argued, combining the elements of antiquity and certainty, must affect a definite locale.²⁰⁸ The court dismissed this argument by resort to property law and the rules governing the ownership of land that accretes,²⁰⁹ but at least one Justice felt it necessary to prove the ancient origins of the beach by reference to geological surveys and the discovery by a contractor of Roman ruins.²¹⁰

Reasons of political economy and the foundation of custom in use-rights that serve community interests underlie the *Mercer* court's willingness to define the terms of the custom broadly enough to encompass modern innovations in the fishing industry. Changes in the method of preparing the nets and the length of the sprat fishing season forced the landowner to give over his land to the fishermen for a significantly greater part of the year.²¹¹ Nonetheless, the court held that to limit the custom as it existed in 1189 A.D. "might result in making an arrangement that was in its inception reasonable, because of public benefit, become actually injurious to public interests . . . [because] all improvements and progress are debarred."²¹²

Nineteenth century courts readily admitted that the antiquity element of custom was a legal fiction.²¹³ The foundation of this fiction

²⁰⁶ *Id.* at 552.

²⁰⁷ *Id.* at 553 (citing *Fitch v. Rawling*, 2 Hy. Bl. 393, 126 Eng. Rep. 614 (C.P. 1795)). The court here reasons by analogy. There is no evidence that the custom in *Fitch* was challenged on grounds of antiquity.

²⁰⁸ *Id.* at 540.

²⁰⁹ *Id.* at 556-57; [1905] 2 Ch. at 582 (Stirling L.J.) .

²¹⁰ 2 Ch. at 584 (Cozens-Hardy, L.J.).

²¹¹ *Mercer*, [1904] 2 Ch. at 536.

²¹² *Id.* at 552.

²¹³ *Hammerton v. Honey*, 24 W.R. 603, 604 (Ch. 1876) ("I do not suppose anybody imagines that in the case of . . . custom that there has been from time immemorial a common law of the particular place . . ."); *Bryant v. Foot*, 3 L.R.-Q.B. 497, 508 (Ex. 1868) (accepting *arguendo* that in cases of custom, "neither judges nor juries have in reality believed . . . that customs found to be immemorial had actually existed in the time of Richard I.").

was a policy of the courts to quiet title and to protect long-established use-rights.²¹⁴ Because customary uses were presumed to benefit the community as a whole, the *Mercer* court did not need to treat the ancient legal custom as immutable, but could adapt it to modern conditions for the benefit of all.²¹⁵

2. *Certainty*

The traditional element of certainty in custom arose from the concept of custom as a local exception to the common law of the realm. The element of certainty ensured that local exceptions did not swallow the common law rule.²¹⁶ When custom was litigated at law in the nineteenth century, the courts defined the element of certainty in terms of positive legal rules. The redefined element of certainty required that custom lie in a definite district so as to “coincide with some recognised jurisdiction.”²¹⁷

Easement customs did not have to originate in the lord’s courts and could be claimed by any inhabitant of a district. But the courts, having created an historical fiction of the democratic feudal manor, disallowed custom when it could not have originated by grant of a feudal lord. In *Sowerby v. Coleman*, for example, a custom of inhabitants to train horses outside of their parish in a neighboring manor was invalid because the manor and parish were not co-extensive and the custom was not “properly laid in the commencement.”²¹⁸ Likewise, when the inhabitants of three parishes joined forces to claim a right of recreation in *Edwards v. Jenkins*, the court ruled that the claim could not be maintained because such a right could not have originated in the grant of a single lord.²¹⁹

The presumption of a custom’s origin in the grant of a feudal lord was the creation of eighteenth and nineteenth century judges who sought the origins of custom in a mythic feudal past. In earlier

²¹⁴ If we assume [that] . . . neither judges nor juries have in reality believed that . . . customs . . . actually existed in the time of Richard I., still, if this state of the law, created by the judges to quiet titles, to protect rights derived from long user or enjoyment, and so, to supply the want of a just and enlightened legislation, be established by these decisions, we must accept it as we find it

Bryant, 3 L.R.-Q.B. at 508; see also *supra* note I19.

²¹⁵ *Mercer*, [1904] 2 Ch. 534; [1905] 2 Ch. at 581 (Stirling, L.J.) (“those who are entitled to the benefit of a custom ought not to be deprived of that benefit simply because they take advantage of modern inventions or new operations, so long as they do not thereby throw an unreasonable burden on the landowner”).

²¹⁶ See, e.g., *Arthur v. Bokenham*, 11 Mod. 148, 160, 88 Eng. Rep. 957, 962 (K.B. 1708) (“[A]ll customs which are against the common law of England, ought to be taken strictly, nay very strictly, even stricter than any Act of Parliament that alters the common law”).

²¹⁷ *Salt*, *supra* note 1, at 293.

²¹⁸ 2 L.R.-Ex. 96, 100 (1867) (Channell, B.).

²¹⁹ [1896] 1 Ch. 308, 312-13 (1895).

centuries, courts acknowledged that the origins of certain customs had been lost to history.²²⁰ Lord Coke, in *Gateward's Case*, distinguished prescription, which required a lawful beginning by grant, from custom precisely on the point of lawful origin.²²¹ Custom, he reasoned, cannot be said to have lawful origins because custom, though reasonable, is by definition against the common law.²²² In an attempt to rationalize the origins of custom in a feudal grant, the courts of the nineteenth century distorted the concept of custom. For most rural customs alleged at law in the nineteenth century, there is no record of their origin. The record of custom was evidence, however slim, of immemorial praxis.

3. Reasonableness

The existence of custom was a question of fact for the jury²²³ and it had to be demonstrated by the party asserting the custom. The burden of proving that a custom is unreasonable lay with those who challenged the custom²²⁴ and was a question of law "for the judges of the land to determine."²²⁵

When courts addressed the element of reasonableness in easement custom, they upheld customs that served the good of the community, often in derogation of the rights or interests of the individual. In *Tyson v. Smith*, for example, an action in trespass was brought against a victualler for entering the plaintiff's manor and setting up booths, stalls and tables. In response, the defendant pled a custom that:

every . . . victualler . . . hath [during certain times of the year] been used and accustomed to enter . . . upon that part of the said commons or waste grounds, from time to time appointed for holding said fairs . . . and, for the more conveniently carrying on . . . said trade . . . to erect a booth and stall, and to put and place posts and tables there, and to keep . . . the said booth, stall, posts, and tables so erected . . . until a reasonable time after the last of the said fairs,

²²⁰ See, e.g., *Pain v. Patrick*, 3 Mod. 289, 293, 87 Eng. Rep. 191, 194 (K.B. 1690) (the origins of gavelkind and borough English are unknown).

²²¹ 6 Co. Rep. 59b, 60b, 77 Eng. Rep. 344, 345-46 (K.B. 1607).

²²² *Id.* ("[E]very prescription ought to have by common intendment a lawful beginning, but otherwise it is of a custom; for that ought to be reasonable . . . but need not be intended to have a lawful beginning . . . These and the like customs are reasonable, but by common intendment they cannot have a lawful beginning . . ."); see *Hix v. Gardiner*, 2 Bulst. 195, 196, 80 Eng. Rep. 1062, 1063 (K.B. 1614) ("[Y]ou cannot imagine the reason of a custom, the custom of borough English and gavelkinde, are no reasonable customs, the reason to be shewed of the beginning of them is impossible").

²²³ *Bastard v. Smith*, 2 M. & Ros. 129, 174 Eng. Rep. 238 (Q.B. 1837).

²²⁴ ALLEN, *supra* note 3, at 95.

²²⁵ See *supra* note 80 and accompanying text.

yielding and paying therefore to the lord the sum of 2d., when lawfully demanded.²²⁶

The lord in *Tyson* challenged the custom on three grounds: the generality of its applicability to *all* victuallers, the impossibility of its execution in practice, due to its general application, and the allegation that the custom amounted to a *profit in alieno solo* in another's land and therefore could not be sustained as a customary right.²²⁷

The prescriptive right of the fair was admitted in the pleadings, leaving only the existence of the custom in dispute. The jury at the Cumberland Assize found that the custom existed in fact; the plaintiff challenged the reasonableness of the custom at law.²²⁸

In keeping with the theory that custom arises from the consent of the community, the court stated that a custom can not be deemed unreasonable simply because it prejudices the interests of one man for the greater benefit of the community.²²⁹ According to the court, not only was custom good at law despite its being prejudicial to the interests of a single individual,²³⁰ but the benefit of a custom inuring to the community rather than an individual actually "renders [the] lawful commencement [of the custom] reasonably probable."²³¹

A valid local custom can only inure to the benefit of a class of persons in a particular district, because to grant the right to all the subjects of the realm would create common law, not *lex loci*.²³² The court held that the term "victualler" should be defined with reference to its meaning at the time of pleading, which made the custom sufficiently narrow, applying only to those licensed by law to have houses of entertainment.²³³

The lord also argued that the number of victuallers was so large that to allow the custom could mean that the entire fair would be taken over by houses of entertainment. The court doubted that this would happen and noted that when judging the reasonableness of custom a court must look to the "probabilities of the case, and be satisfied that the inconvenience is real, general, and extensive" before they declared that a custom, which a jury has found to exist from time out of memory, was void.²³⁴

²²⁶ 9 A. & E. 406, 112 Eng. Rep. 1265 (Ex. Ch. 1838).

²²⁷ *Id.* at 422-23, 112 Eng. Rep. at 1272.

²²⁸ *Id.* at 419-20, 112 Eng. Rep. at 1271.

²²⁹ *Id.* at 421, 112 Eng. Rep. at 1271.

²³⁰ *Id.*

²³¹ *Mercer v. Denne*, [1904] 2 Ch. 534, 552, *aff'd*, [1905] 2 Ch. 538 (C.A.).

²³² Thus, the right to play cricket on the lord's land is vested in the inhabitants of the community but not in any of the crown's subjects who happen to be in the parish. *Fitch v. Rawling*, 2 Hy. Bl. 393, 126 Eng. Rep. 614 (C.P. 1795).

²³³ *Tyson*, 9 A. & E. at 423, 112 Eng. Rep. at 1272.

²³⁴ *Id.* at 424, 112 Eng. Rep. at 1272. The results in this case can be profitably compared to those in *Wilson v. Willes*, 7 East 121, 103 Eng. Rep. 46 (K.B. 1806), where the

Finally, the court addressed the lord's claim that the right constituted a *profit in alieno solo*, which could not be asserted by custom.²³⁵ The court found that the custom provided for the compensation of the landowner (even if 2 shillings was not full compensation). In addition, at its inception, the custom was a benefit to the lord because it encouraged strangers to come to the fair and buy wares.²³⁶ Finding that the agreement had been evidenced by "repeated acts of assent on both sides from the earliest times, beginning before time of memory and continuing down to our own times," the court declared the custom good and affirmed the judgment of the Queen's Bench in favor of the defendant.²³⁷

In *Tyson*, the court also applied theories of consent, community benefit and contract to uphold custom. Having found the custom to benefit the community, the court manipulated the concept of reasonableness. The term victualler was defined at the time of pleading, while the rationale and terms of compensation were defined in relation to the origins of medieval market practice. Indeed, it is interesting to note that the same judge who rejected the claims of the inhabitants in *Lockwood v. Wood*, who claimed an exemption from stallage fees by grant, affirmed the indefinite class of "all victuallers" and the token compensation of two shillings to the lord. The court would not interfere where a custom had demonstrated its benefit to the community, adopting the belief that reasonableness is utility.²³⁸

When nineteenth century courts adjudged the reasonableness or certainty of rural customs at common law, they accorded custom a fictional beginning in the feudal court with the consent of the copyholders. This approach narrowed the inquiry into the reasonableness of custom, but may also have resulted in otherwise valid customs being held void for uncertainty because they were not laid in a single manor. Customs that favored the single landowner over the interests of his tenants were unreasonable. Good custom issued from a community with the consent of its members.

court rejected for indefiniteness and uncertainty the alleged custom of tenants' unrestricted right to turbary of the common.

²³⁵ See *supra* note 85 and accompanying text.

²³⁶ *Tyson*, 9 A. & E. at 425, 112 Eng. Rep. at 1273.

²³⁷ *Id.* at 425-26, 112 Eng. Rep. at 1273.

²³⁸ One commentator has argued that Chief Justice Tindall went "further than the authorities perhaps warranted." Salt, *supra* note 1, at 285. Yet, Tindall was experienced in the intricacies of custom litigation. I contend that this "error" was a result of defining reasonableness in terms of "what made 'common sense'—crypto-utilitarian judgments, one might say, impregnated with a deep respect for established practice." W.R. CORNISH & G. DE N. CLARK, *LAW AND SOCIETY IN ENGLAND 1750-1950*, at 70 (1989) (defining "reasonableness" in nineteenth-century judgments).

CONCLUSION

Although Thompson argued that in the eighteenth century the common law was a force of innovation that imposed capitalist definitions of property rights on traditional agrarian communities,²³⁹ our examination of the nineteenth century suggests that the common law regularly upheld customary rights and usages. The law was forced to adapt to a market economy in which traditional subsistence use-rights acquired new value. In some cases, the courts circumscribed customary rights in order to preserve communal resources.²⁴⁰ In others, they invoked reasons of political economy to uphold modifications of genuinely ancient custom.²⁴¹ Nonetheless, far from being hostile to custom, nineteenth century courts created an historical fiction to give custom legal origin.²⁴²

It may be, as Thompson argued, that the common law aided in the expropriation of the landless cottager in the eighteenth century. His thesis is supported by cases like *Bateson v. Green*, which upheld the lord's right to destroy the common.²⁴³ The arbitrary power of lordship, however, was repudiated by the courts of the nineteenth century.²⁴⁴ Nineteenth century courts regularly upheld custom on the grounds of utility: good custom was law established by common consent of the community members and operated for the greater good of all.

The jurisprudence of custom was transformed by utilitarian theory and positivist conceptions of law. Lawmaking by judicial opinion in the nineteenth century became increasingly rational and rule-based. Custom that was valid at common law in the nineteenth century was that which resembled positive law. An increasingly rational and scientific judiciary redefined the elements of custom while settling disputes over customary property and use-rights in the context of market demand for land and communal resources.

²³⁹ THOMPSON, *supra* note 2, at 137.

²⁴⁰ See, e.g., *Wilson v. Willes*, 7 East 121, 103 Eng. Rep. 46 (K.B. 1806) (rejecting unlimited right of commoners' turbarry, or the taking of turves and peats from the common, for uncertainty, where individual commoner takes one hundred square yards of turf for market).

²⁴¹ See, e.g., *Mercer v. Denne*, [1904] 2 Ch. 534, *aff'd*, [1905] 2 Ch. 538 (C.A.) (extending time during which fishermen by custom may dry nets on the owner's land to accommodate modern sprat fishing industry); *Rogers v. Brenton*, 10 Q.B. 25, 59, 116 Eng. Rep. 10, 23-24 (Q.B. 1847) (jury finding that stannary (tin mining) custom to renew claim to mine by annual renewal of boundary marks is good in fact, but judges disallow it as "an abuse of the original limits of the custom").

²⁴² See *supra* text accompanying notes 185-87.

²⁴³ 5 T.R. 411, 101 Eng. Rep. 230 (K.B. 1793).

²⁴⁴ See, e.g., *Hilton v. Granville* (Earl), 5 Q.B. 701, 730, 114 Eng. Rep. 1414, 1425 (Q.B. 1845).

As with much of legal history, the real story of the fate of custom may lie in facts not revealed in the legal opinions written by nineteenth century judges. Further research is needed into the background of litigants and the value of the customary rights relative to the national economy to determine the overall impact of custom cases in the nineteenth century. While many customs were upheld, *profits à prendre* that were exercised by inhabitants were litigated throughout the nineteenth century, and the poor and landless continued to lose customary use-rights as landowners put valuable land to more "profitable" use. Legitimate inhabitant customs were disallowed by the application of modern positivist notions of jurisdiction. With the exception of traditional easements, those who did not hold a tenurial interest were not aided by the presumptions of the Prescription Act. Finally, the type of inhabitant customs that were upheld tended to benefit those engaged in for-profit enterprise.

These caveats aside, custom remained a vital source of law throughout the nineteenth and into the twentieth century. As nineteenth century judges struggled to impose reason on an archaic system of landholding, and ancient customs of traditional communities were stretched to their limits by the exigencies of a growing market economy, the common law upheld customs that inured to the benefit of the many over the few and affirmed the effectiveness of law "from below" in regulating community resources.

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I would like to thank Professor David Millon, Professor Gregory Alexander and Dean Russell Osgood who carefully read and commented on multiple versions of this text. Thanks also to Professor David Sugarman, whose comments on this piece and suggestions for further research were invaluable. All errors or omissions are, of course, my own. Finally, I would like to thank Professor Barbara Diefendorf and Professor Dietrich Orlow, who invited me to seminars, accompanied me to libraries and ensured that through law I would make my way back to history.

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