'CUSTOMS IN COMMON': THE OLD EMPEROR'S CLOTHES

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I INTRODUCTION

'Customs in Common' has an old sweet scent – of apples dried in autumn for a midwinter bake, or of willow on leather through a balmy afternoon. 'Our customs', surely, are a nicer form of social regulation than the tank-backed norms of the state or the bank-backed norms of the market. The concept of custom, then, should be very attractive to socialists. One socialist who was so attracted was historian E P Thompson, from whom this volume's theme is drawn. For him, however, the attraction quickly soured. I shall trace his path and his difficulty in theorising it. Then I shall examine 'custom' afresh, beginning at the effective origins of the western legal tradition in Constantinople. I will not consider ideas of 'custom' otherwise than as candidates for a popular mode of social regulation: hence I will not consider customary international law or customs of a trade or profession; nor the philosophers who used to conceive custom as a personal, habitual 'second nature'. I shall conclude that the concept of 'custom' has long ceased to make sufficient sense for any scholarly or political purpose, and that the sense that it formerly made was a ready tool of oppression and but a blunt weapon of resistance.

II E P THOMPSON

Thompson's path to his 1991 book *Customs in Common*[1] was highly irregular. To give a brief account of that path will necessarily be to portray it as straighter than it was.

Beginning in 1963 with his best-known work, *The Making of the English Working Class*,[2] Thompson pursued a project that he was eventually to characterise as the development of a 'socialist humanism'.[3] He pursued that project through works of

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[1]   E P Thompson, *Customs in Common* (1991).
[2]   E P Thompson, *The Making of the English Working Class* (first published 1963; 1980).
[3]   E P Thompson, 'Outside the Whale' (1960) in his *The Poverty of Theory and Other Essays* (1978). Cf Robert Fine, 'The Rule of Law and Muggletonian Marxism: the Perplexities of Edward Thompson' (1994) 21 *Journal of Law and Society* 193; Daniel H Cole, '"An

theoretical reflection, of empirical inquiry and of direct political intervention, in association with intensive political activity. This project was 'humanist' negatively, in that it proceeded from a rejection of Stalinism.[4] It was also 'humanist' positively, in that it aimed to recall, revive and reconstruct for present use core elements of the English Radical tradition.[5] Two of those elements were explored extensively: the idea of the freeborn Englishman and that of a moral economy. Neither of these was considered in isolation, however, from law. Nor, since Thompson's specialisation as a historian was eighteenth-century England, in isolation from custom. Of a piece with this was Thompson's English: whether writing in his own voice or in an imitation of the English of an earlier epoch.[6] He sought to recapture English from the Queen's men.[7]

A *The Freeborn Englishman*

The phrase 'freeborn Englishman' is traditional.[8] Thompson finds it in political rhetoric of the seventeenth and eighteenth centuries and keeps it in that air.[9] Its meaning, roughly speaking, is that every Englishman has a 'birthright', to be allowed a livelihood and to participate in the polity. Thus, to Cromwell and Ireton the Leveller champion Sir Thomas Rainborough responded: 'the poorest he that is in England hath a life to live as the greatest he'.[10] This status claim related to a difference less of degree than of kind. For beneath it lay the doctrine of Roman law that the 'principal distinction in the law of persons is that all men are either free

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    Unqualified Human Good": E P Thompson and the Rule of Law' (2001) 28 *Journal of Law and Society* 177.

4   An issue that preoccupied the Left in Thompson's generation. Even as late as 1978 he went out of his way to attack the work of Louis Althusser, then the leading philosopher of the Communist Party of France: E P Thompson, 'The Poverty of Theory: Or an Orrery of Errors' in *The Poverty of Theory and Other Essays*, above n 3; cf Perry Anderson, *Arguments within English Marxism* (1980). Althusser's 'structuralist' Marxism had become very attractive to English sociologists, in allowing them to become Marxist without appearing to embrace Stalinism yet without clearly superseding the conservative, structural-functionalist sociology in which they had been brought up.

5   This made it very different from the far more intellectual 'western Marxism' of, in particular, the Frankfurt School.

6   Thus did 'Squire Edwd Tomson' anticipate in the sixteenth century his country's base surrender to some European Economic Community: 'But Lawyer Grafter of Herefd who hath come but lately from the Innes of Court saith it is Otherwise and that it is … the Queen's own Council wch is to blame, wch have made a Secret Treaty with the French & the Low Countries … So that the Sweete Juices of England, whose Coddlins & Pippins no Land cd ever Equal, are run into the Grownde like an Old Ox pissing in the Mudd.' 'An Elizabethan Diary' (1979) in E P Thompson, *Writing by Candlelight* (1980) 91, 92.

7   One of his models was the prose of William Blake: E P Thompson, *Witness Against the Beast: William Blake and the Moral Law* (1993).

8   Though most closely associated with Leveller leader 'Freeborn John' Lilburne: Pauline Gregg, *Free-Born John: a Biography of John Lilburne* (first published 1960; revised ed, 2000).

9   See in detail his *William Morris: Romantic to Revolutionary* (1955); *Witness Against the Beast*, above n 7; *The Romantics: England in a Revolutionary Age* (1997).

10   Christopher Hampton (ed), *A Radical Reader: the Struggle for Change in England, 1381-1914* (1984) 188.

men or slaves'.[11] While slavery was long gone in seventeenth-century England, there remained a rigid distinction between the independent and the dependent.[12] Although the language of free birth and of birthright was as much rhetorical as logical, it played a key rôle in the logic of such Radical documents as the Levellers' proposed constitution, the *Agreement of the People* in 1647, and the Chartists' equivalent, the *People's Charter* of 1838. This banner of liberty would pass from the defeated Left among the parliamentarians to King Lud and Captain Swing, to the crowds that seized corn for a fair price and rallied to save John Wilkes, to the American revolutionaries (for whom Tom Paine's *Common Sense*[13] catalysed their protest against unjust taxation into a war for independence) and thence to Chartism, to the trade union movement and to the Left within the Labour Party of England.

Yet, if the idea of the freeborn Englishman was held to most vociferously by Radicals, it was not held to by them alone. It was held to, in some degree, by everybody outside the aristocracy. And everybody understood it, including the aristocracy. The commoners expected the aristocracy to observe it. Disorder from below was a popular response to its transgression, in the absence of democratic political channels. And most people were 'below' – even after the greatest of these disorders, the Civil War.

B *Moral Economy*

The idea of a 'moral economy' is the key element in Thompson's argument against assumptions that the frequent civil disorders in eighteenth-century England, often but in his view too broadly referred to as 'riots', were 'spasmodic' – that is, that they were only isolated and unreflective responses to social and especially economic pressures. Thompson contends instead that these incidents were actions intended to redress breaches of a traditional code of economic morality. There was, he says,

> a popular consensus as to what were legitimate and what were illegitimate practices in marketing, milling, baking, etc. This in its turn was grounded upon a consistent traditional view of social norms and obligations, of the proper economic functions of several parties within the community, which, taken together, can be said to constitute the moral economy of the poor. An outrage to these moral assumptions, quite as much as actual deprivation, was the usual occasion for direct action.[14]

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11   *omnes homines aut liberi sunt aut servi*: Justinian, Institutes 1.3.pr; cf Digest 1.1.5.3. Rousseau surely has this in mind in the opening words of *The Social Contract* (1762): 'Man was born free, yet everywhere he is in chains' (*L'homme est né libre, et partout il est dans les fers*). In this light, the hypocrisy of the American Declaration of Independence (1776) is breathtaking: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness'. Apart from the slaves.

12   C B Macpherson, *The Political Theory of Possessive Individualism* (1964).

13   Thomas Paine, *Common Sense* (first published 1776; 1976 ed): this 50-page pamphlet sold half a million copies within a few months.

14   Thompson, above n 1, 188.

Those assumptions were partly political; yet, although there was a class interest in making them, they were not simply assertions in pursuit of that interest. They were 'notions of the common weal', shared to such an extent by the other classes

> that the authorities were, in some measure, the prisoners of the people. Hence this moral economy impinged very generally upon eighteenth-century government and thought, and did not only intrude at moments of disturbance.[15]

So much so, Thompson finds, that the remarkable thing is not that there was so much disorder but that within the disorder there was so much restraint. There was 'a deeply-felt conviction that prices *ought*, in times of dearth, to be regulated, and that the profiteer put himself outside of society'. Thus one finds a crowd requesting a magistrate or other figure of authority to receive from them and place in the owner's hands what the people considered to be a fair price for goods that they had seized – goods such as sacks of corn, the price most important to them being that of bread.[16] Thompson was not the first to make these points: his particular contribution was to identify an actual moral code.[17]

Such a code was neither original to the eighteenth century nor confined to England. The idea of a moral economy had long been encapsulated in the feudal and scholastic idea that everything marketable has a 'just price'.[18] What was new in eighteenth-century England was a predominantly secular version of it. And that secularity made it particularly attractive to Thompson's political aim.

The ideas of the freeborn Englishman and of a moral economy form a pair, and doubly so: the former is primarily political, while the latter is primarily economic; at the same time, the former focuses primarily on the individual while the latter focuses primarily on the collectivity. Thompson argues that, while both of them operated mainly as tools of resistance, they were more successful than might be expected from tools of simple resistance because they were largely shared by those above, who to the extent of that commonality could be held to it.

C *Law*

Both freedom, whether political or economic, and moral (or immoral) economy are obviously imbricated with law. An opportunity to address the rôle of law in this context arose when Thompson agreed to contribute to a collective volume by

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15   Ibid.
16   Ibid 229.
17   Two years earlier, Eric Hobsbawm and George Rudé had noted understandings as to the acceptable limits of violent protest, as in rick burning and machine breaking, that were shared among all classes (not, however, that every member of every class chose to adhere to them): *Captain Swing* (first published 1969; 1973 ed).
18   Rudolf Kaulla, *Theory of the Just Price* (first published 1936; Robert D Hogg trans, 1940).

socialist historians on law in eighteenth-century England, which appeared as *Albion's Fatal Tree*.[19] But Thompson eventually made a relatively specialised contribution.[20] What had originally been planned as his contribution had taken on a larger life of its own and was published simultaneously as *Whigs and Hunters*.[21]

There, Thompson examines the intentions and operation of the *Black Act* 1723, which codified and greatly extended the criminality of poaching – particularly, of blacking one's face and in darkness going armed upon the lord's land in order to obtain venison.[22] Depending on how it is interpreted, the Act created between 50 and 200 new capital offences. It was a vicious statute, aimed at finalising the benefits of centuries of enclosures. However, it did not lead to large numbers of executions. It was, rather, an act of terrorism. When it failed to deter, the usual outcome was a negotiated reprieve followed by imprisonment – a common practice with the many other capital offences.[23] From a peasant point of view, poaching was not theft: the land still rightfully belonged to the common people and, if they could not retrieve the land itself, they could help themselves to its fruits. There was a potential here for revolt and everybody understood that. The result was a live-and-let-live system of morality, in which Westminster terrorism was locally diluted and revolt was not developed into revolution.

Thompson calls all of these norms 'law'.[24] He rejects the orthodox Marxist view that law is located merely within an ideological 'superstructure' and hence is dispensable, and insists that, although law has its own logic of development and does serve as a legitimating ideology for the ruling class, it is also 'deeply imbricated within the very basis of productive relations, which would have been inoperable without this law'.[25] This imbrication renders it necessary for the new ruling class, produced by competitive capitalism, to legitimate itself by adhering to its own rules. The ruling class thus found themselves 'prisoners of their own rhetoric; they played the games of power according to rules which suited them, but they could not break those rules or the whole game would be thrown away'.[26] This 'rule of law', to Thompson, is self-evidently preferable to 'arbitrary extra-legal power'. In this sense, the idea of the rule of law is 'an unqualified good'.[27] Critics persuaded him to qualify that position,[28] but he never abandoned a commitment to legality as such.

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[19]   Douglas Hay *et al* (eds), *Albion's Fatal Tree* (1975).
[20]   E P Thompson, 'The Crime of Anonymity', ibid 255.
[21]   E P Thompson, *Whigs and Hunters: The Origins of the Black Act* (1975).
[22]   9 Geo 1 c 22; 5 Statutes at Large 323. Although Statutes at Large places the Act in 1722, Thompson (ibid 21) is sure that it was passed in May 1723.
[23]   Douglas Hay, 'Property, Authority and the Criminal Law' in Hay, above n 19, 17. A practice which was eventually to fill prison hulks to bursting and provoke the British invasion of Australia: see, eg, Robert Hughes, *The Fatal Shore* (1988).
[24]   Thompson, above n 21, 261.
[25]   Ibid.
[26]   Ibid 263.
[27]   Ibid 258-69.
[28]   See Bob Fine, *Democracy and the Rule of Law* (1984) 169-89.

D *Custom: Ambiguities*

As an attack on the orthodox Marxist perspective, those observations related mainly to state law. However, Thompson also wants to count as 'law' norms found in everyday practice.

'As to the interface between law and agrarian practice', he says, 'we find custom. Custom itself *is* the interface, since it may be considered both as praxis and as law.'[29] That sounds scholarly – and, specifically, Marxist – yet the place where Thompson finds this combination is seventeenth-century common law:

> Custom's original lies in praxis; in a treatise on copyhold at the end of the seventeenth century we learn that 'customs are to be construed according to vulgar apprehension, because Customs grow generally, and are bred up and brought up amongst the Lay-gents, therefore are called *Vulgares Consuetudines*'.[30]

Likewise, in *Whigs and Hunters* he observes that when law is seen as an element of agrarian productive relations it is found that

> law was often a definition of actual agrarian *practice*, as it had been pursued 'time out of mind'. How can we distinguish between the activity of farming or of quarrying and the rights to this strip of land or to that quarry? The farmer or forester in his daily occupation was moving within visible or invisible structures of law: this merestone which marked the division between strips; that ancient oak – visited by processional on each Rogation Day – which marked the limits of the parish grazing; those other invisible (but potent and sometimes legally enforceable) memories as to which parishes had the right to take turfs in this waste and which parishes had not; this written or unwritten customal which decided how many stints on the common land and for whom – for copyholders and freeholders only, or for all inhabitants?[31]

Here, however, there are both an empirical ambiguity and a double theoretical ambiguity.

The empirical ambiguity is: who makes the norms that are experienced as custom? Rights to land, for instance, were precisely the issues around the *Black Act*. Plainly enough, Thompson's assumption is that these norms are made both from above and from below. But how these two interpenetrate and indeed merge is not made clear. And how that analysis might be carried out is rendered obscure by the first theoretical ambiguity.

This is: who means what by the word 'custom'? There seems, as one could expect,

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29   Thompson, above n 1, 97.
30   Ibid. Thompson goes on to refer to Sir Edward Coke and to Samuel Carter, *Lex Custumaria* (1696).
31   Thompson, above n 21, 261. A 'customal' (or 'custumal'), from mediaeval Latin *custumale*, is a written-down collection of customs, usually of a town or a region.

to have been little evidence of popular usage. There was, however, readily available evidence of rulers' usage, in the judgments of the courts and in ancillary legal literature. Thompson examines rulers' usage, citing in particular Coke and Blackstone.[32] He then appears to take this as typical for the society – as evidence of common usage. That may have been a risky step, but it does not seem unreasonable. Yet this usage was not just rulers' usage, but specifically a usage within legal discourse. Thompson appears to take that too to be typical for the society. And that was a more dangerous move: the common law was notorious for the obscurity of its jargon.

The second theoretical ambiguity, however, is more perilous for him. He refers to 'custom' as a concept used by the actors, or by some of them: that is, as a 'folk' concept. But, especially in *Customs in Common*, he goes on to use that concept himself: that is, as an 'analytical' concept.[33] The theoretical issue of an analytical meaning is fudged by accepting the (or a) specialised folk meaning. Thompson's reflections on the more general history of the concept of custom are very brief and show concern with its moral load rather than with its descriptive adequacy or even its coherence.[34]

E *Bad Customs*

While content to adopt the concept of custom descriptively, Thompson had always been wary of its moral load. Already in *The Making of the English Working Class* he eschews a romanticisation of customs, in which everything rustic is rosy:

> While many contemporary writers, from Cobbett to Engels, lamented the passing of old English customs, it is foolish to see the matter only in idyllic terms. These customs were not all harmless or quaint. The unmarried mother, punished in a Bridewell, and perhaps repudiated by the parish in which she was entitled to relief, had little reason to admire 'merrie England'. The passing of Gin Lane, Tyburn Fair, orgiastic drunkenness, animal sexuality, and mortal combat for prize-money in iron-studded clogs, calls for no lament.[35]

In *Customs in Common* he exercises similar caution. Rather than make 'custom' a hurrah-word for the popular, he wants to allow it to contain, alongside any good

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32   Thompson could have got much more out of Blackstone on custom than he does: Sir William Blackstone, *Commentaries on the Laws of England* (first published 1765-9; 1966 ed) vol 1, 63-78. Blackstone says that for a particular custom to have legal force it must (1) have been 'used so long that the memory of man runneth not to the contrary' (but he does not mention the judicial doctrine that legal memory begins in 1189, so that a custom will be upheld if there is no evidence that it commenced after that date), (2) have continued without interruption, (3) be peaceable and acquiesced in, (4) be reasonable or at least not unreasonable, (5) be certain, (6) be binding ('compulsory') and (7) not be inconsistent with another custom.

33   For the distinction between 'folk' and 'analytical' planes, see Paul Bohannan, *Social Anthropology* (1963) 10-14.

34   Thompson, above n 1, 2-4.

35   Thompson, above n 2, 451.

that may be found, 'its own kinds of narrowness, brutality and superstition'.[36] Especially when 'custom' is understood as a kind of 'law'. A powerful anti-romantic caveat is laid down in the last pages of the book, which end a discussion of charivaria – specifically, the English custom of 'rough music'. This was a mode of public denunciation, consisting of 'a rude cacophony, with or without more elaborate ritual, which usually directed mockery or hostility against individuals who offended against certain community norms', such as those prohibiting adultery.[37] Thompson confesses to being torn between attraction to this institution because it was communal and repulsion from its capacity for 'psychic terrorism'. He also identifies some even more repulsive customs, such as wife-sale. He adds to his verdict in favour of popular norm-creation this rider:

> Because law belongs to people, and is not alienated, or delegated, it is not thereby made necessarily more 'nice' and tolerant, more cosy and folksy. It is only as nice and as tolerant as the prejudices and norms of the folk allow. Some forms of rough music disappeared from history in shadowy complicity with bigotry, jingoism and worse. In Sussex rough music was visited upon 'pro-Boers' .... In Bavaria the last manifestations of *haberfeldtreiben* were linked to mafia-like blackmail, anti-semitism and, in the final stage, to ascendant Nazism. For some of its victims, the coming of a distanced (if alienated) Law and a bureaucratised police must have been felt as a liberation from the tyranny of one's 'own'.[38]

That there could be 'bad' customs is not a new point: it was well known in the Middle Ages.[39] But, from whose standpoint were they 'bad'? They might be bad from the standpoint of the king or the church. And of course they might be bad from a moral standpoint in the present. Thompson's contribution is to show in empirical detail how popular customs can be bad from a popular standpoint in the present. The consequence for Marxist legal theory is to rule out popular custom as a reliable alternative to statute. Or: once state and law have 'withered away', what sort of music will be most likely to succeed?

The consequences, indeed, reach further for legal theory. Thompson's evidence problematises the tendency in legal theory, largely contemporary with his work, to prefer the informal to the formal.[40]

II THE EMPEROR'S CLOTHES

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[36]   Thompson, above n 1, 182.

[37]   Ibid 467.

[38]   Ibid 530-1. *Haberfeldtreiben* were charivaria in rural Bavaria, flourishing between 1700 and 1900 (*Wikipedia*, German version, 'Haberfeldtreiben' <http://de.wikipedia.org/wiki/Haberfeldtreiben> 7 November 2006).

[39]   See eg, below on Henry I; also Jean-Marie Carbasse, 'Contribution à l'étude du processus coutumier: la coutume de droit privé jusqu'à la Révolution' (1986) 3 *Droits* 24, 27.

[40]   This tendency is sometimes traced back to Eugen Ehrlich's conception of 'living law': *Fundamental Principles of the Sociology of Law* (first published 1913; Walter L Moll trans, 1975 ed); 'The Sociology of Law' (Nathan Isaacs trans) (1922) 36 *Harvard Law Review* 130. It tends to involve the fallacy that a broad definition is better than a narrow one, while the only virtues that a definition can have are exactitude and truth.

Rarely does a concept come with a birth certificate, but – at least within legal discourse – the concept of custom comes close to that. It first achieves prominence in 533, in the Institutes of Eastern Roman emperor Justinian I. His contrast between custom and statute remains fundamental to the western legal tradition, including the aberration within it that is the common law.

Almost all that is now known of Roman law is to be found in Justinian's Institutes (*Institutiones*),[41] Digest (*Digesta*)[42] and Code (*Codex*). The Code largely repeats and replaces the only other major source of Roman law, the Code commissioned in the previous century by Theodosius II.[43] According to this evidence and such other evidence as can be found, while the concept of custom is ancient in Roman law it was not prominent until Justinian. The Digest is a collection of brief extracts from earlier jurists and some of those concern custom, and there are occasional references to custom in the Code, a collection of extracts from statutes, but the prominence of the concept of custom for Justinian is to be found in the Institutes.[44]

The Institutes is a textbook through which students will be introduced to the Digest and the Code. Justinian's typology of law appears fully in the Institutes. It may be crudely schematised thus. First, law is pleasantly equated with justice. Then law is distinguished into 'natural law (*ius naturale*)', which here looks very like natural law as the concept is understood today but turns out to be a sort of animal instinct, and human law. Then human law is distinguished into a 'law of all peoples (*ius gentium*)', a sort of commercial law common to the civilised world, and 'state law (*ius civile*)', the law of a particular polity.[45]

So far, Justinian is following closely the model for his Institutes, the second-century Institutes of Gaius.[46] Then Justinian introduces a distinction that, if it was not new, at least had never before been given prominence: he distinguishes state law into 'written law (*ius scriptum*)' and 'unwritten law (*ius non scriptum*)'. Next, written law is distinguished into a variety of types, most of which were no longer in operation but the central element of which remains 'statute (*lex*)', while unwritten law is identified with 'custom (*mores*, *consuetudo* and sometimes *usus*)'.

Custom is characterised thus:

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[41]   J A C Thomas, *The Institutes of Justinian* (1975); Peter Birks and Grant McLeod (eds), *Justinian's Institutes* (1987).
[42]   Alan Watson (ed), *The Digest of Justinian* (revised ed 1998).
[43]   Clyde Pharr (ed), *The Theodosian Code and Novels and the Sirmondian Constitutions* (1969).
[44]   For the sake of consistent expression, translations from Latin will be my own – though heavily indebted to others.
[45]   Justinian, Institutes 1.1, 1.2.1; Digest 1.1.9 (omitting the last two sentences, which are in Gaius).
[46]   Gaius, Institutes 1.1; see W M Gordon and O F Robinson, *The Institutes of Gaius* (1988).

> From unwritten law comes that which has been approved by use. For a long-standing custom endorsed by the agreement of those who observe it is just like statute.[47]

That agreement is not explicit but is a 'tacit agreement of the people (*tacito consensus populi*)'.[48]

Examining the characteristics of statute and custom that Justinian appears to assume, one finds a multiple contrast. The creation of statute is explicit, while that of custom is tacit. Hence statute is voluntary – and the more so because written, and in an age when writing was deemed to be a recording of the author's voice. Custom, on the other hand, because it is tacit, is involuntary. It stands to reason that the voluntary is superior to the involuntary. Yet Justinian gives custom the same force as statute. A solution to that puzzle is hard to find, but I shall speculatively offer two explanations.

First: custom had once before had primacy over statute or at least equality with it. From the founding of the Republic in 509 BCE, the law had been primarily customary. It was in the hands of those patricians who acted as pontiffs – men whose wealth allowed them to undertake, without pay, public duties in the rôles of both magistrate and priest. 'Sacral, private, and public law were alike forged by the same small, exclusive, socially and economically homogeneous class'.[49] The pontiffs would state both what was the custom on a particular topic and what was the sacral law.[50] Naturally, they tended to understand the law consistently with their own interests. Eventually, the frustrated plebeians seceded and enacted their own laws. One of the conditions that they exacted for their return was that the agreed laws would be written down and made publicly available. These were the Twelve Tables.[51] In a modern account:

> For the Romans the publication of these laws signalized a stage in the class conflict between the patricians and the plebeians, for the latter compelled the codification and the promulgation of what had been largely customary law interpreted and administered by the former primarily in their own interests. As a result of this political victory every Roman of either high or low rank could know at last what were both his legal rights and his legal duties as well as not a little about the procedure to be pursued in asserting these rights and in performing these duties, especially in civil cases.[52]

A possible explanation of Justinian's elevation of custom may therefore be that it is

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[47]   *Ex non scripto ius venit quod usus comprobavit. [N]am diuturni mores consensu utentium comprobati legem imitantur*: Justinian, Institutes 1.2.9.
[48]   Ibid 1.2.11.
[49]   Fritz Schulz, *History of Roman Legal Science* (2nd ed, 1953) 12.
[50]   A Arthur Schiller, *Roman Law* (1978) 154-71, 270-2, 276; see also Schulz, above n 49, 6-8; Cicero, *De domo* 1.1.
[51]   Clyde Pharr (ed), *Ancient Roman Statutes* (1961) 9-18; M H Crawford (ed), *Roman Statutes* (1996) 555-721.
[52]   Pharr, above n 51, 9.

a concession to the patricians, needing their support after he had almost lost his throne to a popular revolt, perhaps instigated by some of the patricians, in the previous year—which had been so bloody that Justinian might have needed all the support he could get.[53] The pontiffs had long been replaced by secular and specialised jurists, such as those who wrote Justinian's codification.

Second: Justinian was an imperialist. Persians to the east of him and Goths to the west, he bought off the former with tribute and set about subjugating the latter in what had been the western part of the Roman empire. At the time of the codification, his armies had reconquered north Africa. They would later reconquer the Balkans and, eventually, Italy. Apart from the Italians, there would be a need to recognise and allow some force to the local laws. In the light of how Justinian's coupling of statute and custom would be used in later empires, it may be suggested that the elevation of custom is a device of recognition. For the local laws would be unwritten; or, if they were written, they would not be written in Latin and so could be treated as unwritten. Therefore, whatever their status in local eyes, within the imperial legal order they could be categorised as 'custom' and in that sense as law.

To both of these explanations, it may be added that the concession is not as great as may appear. For one thing, as outlined above, custom was inferior to statute *by definition* – it would not have the same respect. For another, custom is inferior to statute *in practice* in that, while proof of a written law is easy, needing only an available text (albeit that texts of that age could be hard to obtain and unreliable), proof of custom is intrinsically more difficult. There must be questioning of witnesses, whose status may be challenged and who may well state the law favourably to one party.

III CUSTOM AND COMMON LAW

As to the common-law systems, Justinian's statute/custom couple literally 'came over with the Conqueror'. The importation of the distinction between laws and customs provides terms in which royal, Normal colonial power can override the institutions of the colonised.

A *Over with the Conqueror*

The Normans knew about Justinian's codification, but they did not adopt it. They appear to have possessed the Institutes, but among them few outside the church could read Latin even if they could read at all. The Theodosian Code had been

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[53]   Known since at least the ninth century as the Nika Revolt. For contemporary accounts, see: Procopius of Caesarea, *History of the Wars* (c 550) in *Procopius* (H B Dewing trans 1914-40, 7 vols; vols 1-5) vol 1, 219-39; *The Chronicle of John Malalas*, (c 565) (Elizabeth Jeffreys *et al* trans, 1986) 275-81. See generally and especially as to sources: Ernest Stein, *Histoire du Bas-Empire* (first published 1928; 1968 ed) vol 2, 449-55 (also vol 1, 294-5, 568-9); also J B Bury, *History of the Later Roman Empire from the Death of Theodosius I to the Death of Justinian* (first published 1923; 1958 ed) vol 2, 39-48 (also vol 1, 83-4; vol 2, 71-4).

cloned in Spain by the Visigoths back in 506.[54] But Justinian's Code never made headway west of Italy and the Digest was lost until the very time of the Norman Conquest. Yet the Laws of William, compiled late in the eleventh century or early in the twelfth century, begin with Justinian's couple, at least in name: 'These are the laws and customs (*les leis e les custumes*) which King William granted to the people of England after the conquest of the land, which are the same that King Edward his cousin held before him.'[55]

However, William's *custumes* differ from Justinian's *consuetudines*, in that the distinction between written and unwritten is not employed. William's differentiation of *leis* and *custumes* is, rather, between general and particular on a geographical plane. There is a strong emphasis on William's own laws as *leis* and regional laws as *custumes*. Each of the former kingdoms, whether Danish or Anglo-Saxon, is termed a *lahe* (legal region) – '*Denelahe*', '*Westsexenlahe*' and so on – and the law of each region is its *costume* – '*La custume en Merchenlahe est*' etc.[56] The word *lahe* is employed also in the Latin translation. The relation between *leis* and *custumes* is mapped onto the relation between centre and region. The centre, however, is not among the regions but above them. The royal court was itinerant. The king's peace was to be enforced everywhere.[57] The relation between *leis* and *custumes* becomes a relation between the 'common' and the merely regional. The *custumes* include the Anglo-Saxon codes of law (the Laws of Alfred-Ine), as well as their development in the *Danelahe* under Danish king Cnut. Here, then, the put-down element of the statute/custom couple is paramount, dispensing with the written/unwritten couple and even categorising local codes of law as custom.

The claim that the Laws of William only confirm the laws of Edward the Confessor constitutes a double legitimation. On one level, it legitimates William's Laws within Anglo-Saxon tradition. On the other, as the reference to 'cousin' emphasises, William was claiming England not merely as conqueror but also as the rightful heir to the throne. He had to confirm the laws to which he appealed.

Each set of pre-Norman and Norman laws, from those of Æthelberht to those of the Conqueror and beyond, is pronounced by and as royal power. This process of assertion makes a quantum leap with the promise of Henry I, at his coronation in 1100, to suppress the 'bad customs (*malas consuetudines*) by which the realm of England has been unjustly oppressed'.[58] Whoever's customs these are, the king gains by successfully asserting the ability of royal law to suppress custom.

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54   The *Lex Romana Visigothorum* or Breviary of Alaric II.
55   F Liebermann, *Die Gesetze der Angelsachsen* (first published 1903-16; 1960 ed) vol 1, 492. It appears in a probably contemporary Latin translation as *leges et consuetudines* (ibid vol 1, 493).
56   Ibid vol 1, 494.
57   Ibid vol 1, 494-5.
58   Ibid vol 1, 521.

B *Glanvill, Bracton and Thereafter*

1 *Glanvill*

An actual familiarity with Justinian's Institutes is evident in the first successful treatise on English law. Completed toward the end of the twelfth century, the work that since the thirteenth century has been attributed to Glanvill[59] aims to set down the royal and vicecomital laws of England, both civil and criminal. Although the basis for attributing authorship to Glanvill is unknown, the expertise involved indicates that the author was a justiciar. The work is in Latin and, inevitably, elements of Roman terminology abound, although they are not always employed in exactly their Roman senses.

The prologue to this book, like that to Justinian's Institutes, is enthusiastically royalist, lauding the arms and laws of monarchy in general and especially 'our most excellent king'. The first-mentioned business of a monarch is that of 'crushing the pride of the unbridled and ungovernable with the right hand of strength'.[60] Glanvill leaves no doubt of his commitment to the king's ascendancy. The royal court is 'so impartial that no judge there is so shameless or audacious as to presume to turn aside at all from the path of justice or to digress in any respect from the way of truth'. There, the king 'does not scorn to be guided by the laws and customs of the realm which had their origin in reason and have long prevailed (*Legibus namque regni et consuetudinibus de ratione introductis et diu obtentis*)' and 'he is even guided by those of his subjects most learned in the laws and customs of the realm (*iuris et regni consuetudinibus*)'.[61]

Glanvill's scope, then, is 'laws and customs'. His 'law' is *lex* or *ius* – often, it seems, indeterminately. His 'custom' is normally *consuetudo*, although occasionally *solitus*.[62] However, '*ius*' is sometimes used in a sense that could only refer to custom.[63] So far, he is in the line from Justinian through William. Then he makes some radical departures. He wants to make the name *lex* central, but include under it much that is unwritten. Quoting the Institutes that '*quod principi placuit legis habet vigorem*',[64] he observes that it cannot matter whether the prince's pleasure is expressed in writing or only orally:

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[59] G D G Hall (ed and trans), *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill*, (first published c 1189, 1993 ed). Latin text and English translation are printed on facing pages bearing the same page number. For the circumstances of the 'Glanvill' book, see Hall's Introduction.

[60] Ibid 1; cf Justinian, Con *Summa* pr (529).

[61] Hall, above n 59, 2.

[62] Eg, '*Legibus ... regni et consuetudinibus*', '*iuris et regni consuetudinibus*' (ibid 2); '*Leges ... et iura regni*' (ibid 3).

[63] 'there is a general rule according to the law of the realm (*quia generaliter uerum est secundum ius regni*)' (ibid 72, cf 73, 76).

[64] Justinian, Institutes 1.2.6.

> Although the laws (*leges*) of England are not written, it does not seem absurd to call them laws – since it is itself a law that 'what pleases the prince has the force of law' – those that are known to have been promulgated about problems settled in council on the advice of the magnates and with the supporting authority of the prince. For if, merely for lack of writing, they were not deemed to be laws, then surely writing would seem to supply to written laws a force of greater authority than either the justice of him who decrees them or the reason of him who establishes them.[65]

Of course, he admits, it is impossible to write down all of the 'laws and legal rules (*leges ... et iura*)' of the realm, owing to the 'ignorance of scribes' and the 'confused multiplicity' of the laws and legal rules themselves:

> But there are some general rules frequently observed in court which it does not seem to me presumptuous to commit to writing, but rather very useful for most people and highly necessary to aid the memory. I have decided to put into writing at least a small part of these general rules, adopting intentionally a commonplace style and words used in court in order to provide knowledge of them for those who are not versed in this kind of inelegant language.[66]

Glanvill makes three points about writing: (1) for a law to be written is irrelevant to its authority; (2) even if to be written could be essential to the authority of a law, that requirement would be impractical; but, (3) outside the question of authority, it is very useful for the main laws to be available in writing, even though that text itself be unauthoritative. He rejects Justinian's distinction between written and unwritten law, but does so by extending Justinian's reasoning. For, if, as Justinian says, being unwritten is irrelevant to the question of legal authority, being written must also be irrelevant.

From that point in his argument, Glanvill becomes cavalier with his terminology. Royal law appears, apparently indiscriminately, under several names. Sometimes it is partly characterised as customary, sometimes not, and it does not seem to matter which. The 'law of the realm (*ius regni*)'[67] appears to be the same as the 'law and custom of the realm (*ius regni et consuetudinem*)',[68] the 'law or custom of the realm'[69] or the 'law of the realm and ancient custom (*ius regni et consuetudinem antiquam*)'.[70] The word order is unstable: the law and custom of the realm also appear as '*ius et consuetudinem regni*',[71] '*iure regni et consuetudine*'[72] and '*ius*

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[65]   Glanvill, above n 59, 2 (translation modified).
[66]   Ibid 3.
[67]   Eg, ibid 89; 'by the law of the realm they succeed to their father by hereditary right (*de iure regni succedunt patri iure hereditario*)' (ibid 68, cf 73).
[68]   Ibid 88, also 57.
[69]   'law or custom of the realm (*iure uel consuetudine regni* – translation modified from "and")' is followed a few lines later, without differentiation, by the usual 'law and custom of the realm (*ius et consuetudinem regni*)' (ibid 85). The reason for this indecision is not apparent.
[70]   Ibid 24.
[71]   Ibid 85, cf 86.
[72]   Ibid 63.

regni et consuetudinem[73]; although the instability does not affect the meaning. Given this ambivalence, the 'law of the realm (*ius regni*)' can sometimes seem to refer to statute and sometimes to custom. It is mentioned in one place where it might refer to a *lex*, since although the reference itself is to general law it follows a mention of royal inquests.[74] On the other hand, the matter of escheat is considered without differentiation under first the category of custom ('*solent*') and then that of the 'law of the realm (*ius regni*)'.[75] To complete the pattern that we entered at the point of royal *lex*, there is also, on its own, the 'custom of the realm (*consuetudinem regni*)'.[76]

Otherwise, there is only custom and it is always particular. Sometimes the custom is of a particular place,[77] sometimes of a particular court[78] and sometimes it pertains to a certain type of relationship.[79] Where there is a relation between law (*ius* or *lex*) and custom, it is a relation of subordination which takes the logical form of a relation between general and particular. The combination of law and custom is permitted to the royal courts, although with a clear subordination: the 'law and custom of the court (*ius et consuetudinem curie*)' is trumped by the 'law and custom of the realm (*ius et consuetudinem regni*)'.[80] In this instance, it appears that the law, as well as the custom, of the court are seen as particular. But the particularisation of law is supposed only in the case of a royal court, whose norms should in any case reflect those of the 'realm'.

The idea that even a royal court might have 'law and custom' autonomous of the law and custom of the realm reflects the book's pervading ambiguity between a substantive and a procedural focus. The court would be authorised to apply only the law of the realm, so that from a substantive point of view there could be no autonomy. From a procedural point of view, however, the court would be expected to develop its own adjectival law. The book's ambiguity arises from the extent to which Glanvill tries to write Institutes of English law from a procedural point of view.

'To make matters clear,' Glanvill promises, he will distinguish 'the kinds of secular cause (*causarum secularium genera*)'. It is at least clear that he is concerned with

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73   Ibid 88.
74   Ibid 89.
75   Ibid 90.
76   Ibid 148.
77   'according to the custom of some places (*secundum quorundam consuetudinem*)', 'according to the custom of other places (*secundum quorundam autem consuetudinem*)' (ibid 75); 'by ancient custom of that city (*per longam consuetudinem eiusdem ciuitate*)' (ibid 77); 'according to the custom of one district (*secundum cuiusdam patrie consuetudinem*)', 'Whatever the customs of different districts (*Quicquid diuersarum patriarum consuetudines*)' (ibid 79).
78   'the customary practice of the court will be followed (*cetero solitus cursus seruabitur*)' (ibid 59, 14; cf 15, 32, 100, 112 and 139).
79   'customs and right services which he ought to render (*consuetudines et recta seruicia que ei facere debet*)' (ibid 113; cf 69-70 on *dos* and 148 on the service due to the lord in respect of a tenement).
80   Ibid 40.

secular and not ecclesiastical jurisdiction. Then he switches the terminology from 'cause' to 'plea (*placitum*)'. He divides pleas into 'criminal' and 'civil', and lists several pleas of each type. Then he plunges into the varieties of writ by which a plea may be made, giving the full wording of each writ: 'The king to the sheriff, greeting' and so on.[81] In modern terminology, the idea of a cause comports that of a right and the availability of a writ is one mode of availability of a remedy. In those terms, one can say that, in his switch from cause through plea to writ, Glanvill inverts the Romanist assumption that, where there is a right, there ought to be a remedy; now, it is only where there is a remedy that one can speak of a right.

The most important part of this switch is the choice to focus primarily on writs. For a writ is neither a law (*lex*) nor a custom. The juristic terminology available to Glanvill, or at least the terminology in which he could appear to be writing institutionally, therefore did not fit the factors that he was taking as fundamental. That may explain his vaguery and vacillation in characterising royal law. Obversely, it means that, when the traditional terminology is employed emphatically, it works autonomously of the focus on writs.

In this way, the customary is sometimes discussed on its own account. Thus, a sufficiently ancient custom may give rise to a binding rule:

> the general rule (*quia generaliter uerum est*) is that a woman never shares in an inheritance with a man, unless there is a special rule in a particular city by ancient custom of that city (*nisi forte aliquid speciale fiat in aliqua ciuitate et hoc per longam consuetudinem eiusdem ciuitatis*).[82]

Also, a custom might be 'reasonable' or not.[83] Or it might provide a criterion of what is a reasonable practice.[84] But what will be the criteria of the 'reasonable' is left unaddressed.

There are many loose ends. Amid them, the ambiguity of the particular which appeared in the Laws of William is transmuted into an ambiguity of the general, which is then successfully buried. The particular is customary, while the general is both law and custom. Just how the general manages to be both law and custom is obscure, but that does not matter very much if the basis of the whole is procedural. The law is the procedure and the procedure is the custom. The idea of substantive law as customary has been marginalised.

2 *Bracton and Thereafter*

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[81]   Ibid 3ff.
[82]   Ibid 77.
[83]   'the judgment and reasonable custom of the lord's court (*considerationem curie et consuetudinem rationabilem*)' (ibid 112).
[84]   Ibid 108.

A lifetime after Glanvill, Bracton attempted to return English law to the mainstream of the western legal tradition. He had to confront Justinian's connection between the statute/custom couple and the written/unwritten couple. Bracton eschews Glanvill's emphasis on procedure but agrees with him that unwritten law can be *lex*:

> Though in almost all lands use is made of the *leges* and the *ius scriptum*, England alone uses unwritten law and custom. There law derives from nothing written [but] from what usage has approved. Nevertheless, it will not be absurd to call English laws *leges*, though they are unwritten, since whatever has been rightly decided and approved with the counsel and consent of the magnates and the general agreement of the *res publica*, the authority of the king or prince having first been added thereto, has the force of law.[85]

And thus was formed the idea of the general, common law of England as 'custom' – it was 'custom' because of its form, not because of its source – and of the common illusion that it is indeed 'custom' because it has its source in the English people. There was a *non sequitur*: the common law is 'custom', because it is unwritten; custom is created through the tacit consent of the people; therefore the common law has been created through the tacit consent of the people. But it was in fact made by the royal judges, with an emphasis on procedure over substance. And, when Englishmen denounced the Norman Yoke and yearned for the Good Old Law of Edward the Confessor, appealing to an idealised image of old custom, of which the judges should be the 'oracles',[86] they were actually harking back to the spirit of legal norms that had once been codified.

Or, if the common law was not attributed to the common people but recognised to be discovered and declared by the judiciary, there was a supreme satisfaction with the asserted perfection of that exercise. One finds this especially in Coke,[87] as well as in Blackstone when he writes about the common law as 'general custom'.[88] Blackstone's student Bentham was infuriated by this: 'it is this miserable sophistry in speaking of the Common Law that is to give a relish to all that froth, all that doting pedants have drivelled out upon it in the way of panegyric' he spluttered.[89] The common law, he insisted, is judge-made law and the judges make as they please.[90] He was to produce, as I understand him, two versions of his own, far more positivistic conception of custom. The first, in his *Comment on the Commentaries* of Blackstone,[91] suffers, in my view, from a confusion between the couples is/ought

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[85]   Henry de Bracton, *On the Laws and Customs of England* (c 1256, Samuel L Thorne trans 1968-77) vol 2, 19. On Bracton and the tradition from Justinian, see Frederick William Maitland (ed), *Selected Passages from the Works of Bracton and Azo* (1895; *Publications of the Selden Society* vol 8).

[86]   J G A Pocock, *The Ancient Constitution and the Feudal Law* (2nd ed, 1967).

[87]   See John Underwood Lewis, 'Sir Edward Coke (1552-1633): His Theory of "Artificial Reason" as a Context for Modern Basic Legal Theory' (1968) 84 *Law Quarterly Review* 330.

[88]   Blackstone, above n 32, vol 1, 68-70.

[89]   Jeremy Bentham, *A Comment on the Commentaries* (1775, unpublished; 1977 ed) 201.

[90]   Ibid 192-6.

[91]   Ibid 162-4, 179-85, 217-55, 303-9, 332-5.

and extra-legal/intra-legal (customs *in pays* and *in foro*). The second, in his more mature works, has no more success. He again treats writing or the lack of it as unimportant to authority, but he also insists that laws are an expression of will. Hence customary law (if it exists at all) originates in repeated acts of *cadi* justice.[92] In this, however, 'there is no rule established, no measure to discern by, no standard to appeal to: all is uncertainty, darkness, and confusion'.[93] This desperation would lead his principal follower in utilitarian jurisprudence, John Austin, to declare that customs were merely moral rules, except they be sanctioned either legislatively or judicially.[94]

IV THOMPSON, MARX AND SAVIGNY

A *Marx's Concept of Law*

Karl Marx, so far, has made only a brief appearance, even though one might have expected Thompson to have him play a wounded hero. Thompson, as historian, draws on Marx for everything but law. And rightly so, since Marx's conceptualisation of law is not Marxist – it is not put through the mill of a critique of ideology, as Marx does with political economy. Marx's primary conceptualisation of law is standard nineteenth-century legal positivism, very similar to that of Austin (who had studied German legal theory).[95] Marx – and Engels – identify legal norms in a legal-positivist way. They then do engage in critique of those norms' ideological associations: as to form, the generality of bourgeois legal norms, suiting *laissez-faire*; and, as to content, their expression of ruling-class interests.[96] The closest that Marx comes to a critique of specifically legal ideology is in his 'Contribution to the Critique of Hegel's Philosophy of Law', which despite the title does not pass from ideology-critique of Hegel's conception of the state into ideology-critique of Hegel's conception of law.[97] In his later works, such as *Capital*, Marx studies the forms of economic value while analytically bracketing their legal components. This is a deferment of critique as to law in order to get on with it as to political economy, in the same way that Marx deferred critique of culture – as the Frankfurt School attempted to remedy.[98] The 'law', then, that according to Engels and later Lenin was to 'wither away' with the transitional communist state is conceived as state-produced coercive norms in a deeply unresolved manner.

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[92]   In an ill-informed image of the *cadi*.

[93]   *Of Laws in General* (1782, unpublished; 1970 ed) 152-3, 184-95.

[94]   John Austin, *Lectures on Jurisprudence* (first published 1861; 1970 ed) vol 1, 24, 148; vol 2, 222, 230.

[95]   Andreas B Schwarz, 'John Austin and the German Jurisprudence of his Time' (1934) 2 *Politica* 178.

[96]   For texts and discussion of them see Maureen Cain and Alan Hunt (eds), *Marx and Engels on Law* (1979); see also Paul Phillips, *Marx and Engels on Law and Laws* (1980). The suggestion that Marx's conceptualisation of law is not Marxist is, however, my own.

[97]   Karl Marx, 'Contribution to the Critique of Hegel's Philosophy of Law' (1843) in Karl Marx and Frederick Engels, *Collected Works*, vol 30, 3-129.

[98]   See eg, David Held, *Introduction to Critical Theory: Horkheimer to Habermas* (1980).

These are good reasons for Thompson, whether he entertained them or not, to have tried to be Marxist outside of legal positivism. It is therefore the more remarkable that he notes only in passing, even in *Whigs and Hunters*,[99] Marx's secondary conception of law – law as custom. I shall turn to this after considering Marx's mentor on law as custom.

B *Savigny*

Marx had studied law at the University of Berlin under the renowned professor Friedrich Carl von Savigny. Savigny's principal expertise was in Roman law, on which private law of the German state was based. Roman law, as has been seen, had been preserved in the *Corpus Iuris Civilis*. One might accordingly have thought that Savigny would sympathise with the contemporary movement toward national codes of private law. Such codes had already been adopted in Prussia, as well as in Bavaria and in Austria. The first great modern code, the French *Code civil* (or *Code Napoléon*) had appeared in 1804. But, when at the end of the first Napoleonic war, in 1814, Savigny's rival at Jena, Anton Thibaut, published a proposal for a similar German code, Savigny let fly. He would have nothing of a bourgeois code. In his pamphlet *On the Vocation of our Age for Legislation and Jurisprudence*,[100] he insisted that law should reflect the 'national spirit (*Volksgeist*)' or 'national consciousness (*Volksbewusstsein*)', which like the national language[101] has developed spontaneously and not by decision. As he says in a later work:

> The law peculiar to a nation (*Volk*) cannot be stated, any more than their language, in terms of a static concept, since its essence properly consists, rather, in unbroken refinement (*Bildung*) and development.[102]

The proper form of law, then, is 'custom (*Gewohnheit*)'. He speaks of law generally, although his focus is on private law, which he assumes (as in Roman law) to be fundamental. In terms of content, this entails that existing customary land rights – meaning those of the aristocracy – would prevail over potential bourgeois or market rights.

This is, for Savigny, a rule-of-law argument. Custom is a safeguard against *Willkür* (arbitrariness or despotic caprice) and of course all of us are against *that*. But one passage in the *Vocation* is more revealing. Condemning any 'capricious alteration of the law', he advises – with an unsubtle evocation of religiosity:

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[99]   Thompson, above n 21**,** 241 n 1.
[100] Friedrich Carl von Savigny, *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft*. The texts of the Savigny-Thibaut debate are collected in Hans Hattenhauer (ed), *Thibaut und Savigny: ihre programmatischen Schriften* (1973).
[101] Here Savigny drew on the Romantic tradition in linguistics, exemplified by Johann Herder. Savigny rarely used the expression *Volksgeist*; that was more the practice of his disciple Georg Friedrich Puchta, eg in *Das Gewohnheitsrecht* (first published 1828-37; 1965 ed).
[102] Friedrich Carl von Savigny, *Geschichte des römischen Rechts im Mittelalter* (2nd ed, 1834-51) vol 1, 21; cf *Vom Beruf* in Hattenhauer, above n 100, 103-4.

> That which is thus constructed by men's hands before our eyes will always hold a very different place in popular estimation from that which has not so plain and palpable an origin; and when we, in our praiseworthy zeal, inveigh against this attitude as a blind prejudice, we ought not to forget that all faith in, and feeling for, that which is not an a level with us, but higher than we, depends upon the same kind of spirit. Such a kinship might well lead us to doubt whether that attitude is exceptionable.[103]

And thus 'the very rules of private law' can 'belong to the objects of popular faith'.[104] This is not just ivory-towerism and slippage between 'is' and 'ought'.[105] Rather, a fake commonality is proposed, which would leave no room for challenge. The commonality would be irrational; in its basic emptiness it could be given any content and any challenger would appear to be an opponent of the nation. One can nearly hear the wool sliding over the victims' eyes.

C *Marx on Popular Customs*

Marx aimed to uncover those eyes. Into Savigny's nationalistic consensualism, Marx inserted class. He then focused on the customs of the peasant class, in his early journalism on theft of wood.[106] Like Thompson in *Whigs and Hunters*, Marx examines new statutory enclosure of land to the exclusion of customary popular rights to fauna, fallen wood and the remains of harvest. As Savigny tacitly champions the customary rights of the aristocracy against bourgeois legislation, so Marx expressly champions those of the peasantry against the same. In doing so, like Thompson Marx seeks a true commonality of the common people. He stacks it up against the actual élitism of Savigny. Yet Marx adds nothing to the conceptualisation of custom.

V CONCLUSION

To conclude (as one should not) by way of a new beginning.

A *Is, Ought and Obligation*

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[103]   Savigny, *Vom Beruf* in Hattenhauer, above n 100, 122-3.

[104]   Ibid 102. Ehrlich was inspired by Savigny and Puchta to a historical approach, but objected that they still saw law in terms of rules, while he preferred to see law in terms of actually existing 'institutions' whose life was the 'living law' (*Fundamental Principles*, above n 40, 83-6).

[105]   As claimed by Hermann U Kantorowicz, *Was ist uns Savigny?* (1912); see also Herman Kantorowicz. 'Savigny and the Historical School of Law' (1937) 53 *Law Quarterly Review* 326.

[106]   Karl Marx, 'Proceedings of the Sixth Rhine Province Assembly. Third Article. Debates on the Law on Thefts of Wood' (1842) in Karl Marx and Frederick Engels, *Collected Works*, vol 1, 224-63. See, further, Pierre Lascoumes and Hartwig Zander, *Marx: du 'vol de bois' à la critique du droit* (1984).

There is a level on which the words 'custom' and 'customary' continue to make intuitive sense. I have never found this sense better expressed than upon a certain occasion in the Hundred Acre Wood:

> 'Hallo, Pooh,' [Owl] said, 'How's things?'
>
> 'Terrible and Sad,' said Pooh, 'because Eeyore, who is a friend of mine, has lost his tail. And he's Moping about it. So could you very kindly tell me how to find it for him?'
>
> 'Well,' said Owl, 'the customary procedure in such cases is as follows.'
>
> 'What does Crustimoney Proseedcake mean?' said Pooh. 'For I am a Bear of Very Little Brain, and long words Bother me.'
>
> 'It means the Thing to Do.'
>
> 'As long as it means that, I don't mind,' said Pooh humbly.[107]

The 'customary procedure' is desirable simply because it has worked in the past and in general what is not broken ought not to be fixed. That makes some sense and, before the rise of modern social science, 'custom' was an amenable workhorse of social reflection. But, when one attempts to place rather more weight upon the concept, using it to conceive some form of moral or even legal obligation, or as more than a label or convenient hook in scholarly social or historical description, one needs to examine it more closely. And then it falls apart.

One finds an 'is', the *Thing*, and an 'ought', that this Thing is *to Do*. But what is the relation between the two – a reason *why* this Thing is to Do? And things get worse when one turns to law books, or to books by historians or social scientists that deal with law. For there one finds that 'custom' can be a kind of law – that what is to Do may not be only what it is a Good Idea to Do but even what Must be Done. Yet one cannot find a reason for the added element, obligation.[108] We have a problem. And such is the spread of meanings that we have encountered when looking at the word

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[107]   A A Milne, *Winnie-the-Pooh* (first published 1926; 1989 ed) 45.

[108]   It might be just a 'feeling' that the factually existing situation is valid—that there is just a 'normative power' or 'normative meaning' 'of the factual (*des Faktischen*)': Georg Jellinek, *Allgemeine Staatslehre* (first published 1900; 3rd ed, 6th repr 1959) 337-44. For subscribers to a 'will' theory of law, there might then be a 'conative power of habit': Axel Hägerström, 'On the Question of the Notion of Law: the Will-theory' (1917) in his *Inquiries into the Nature of Law and Morals*, Karl Olivecrona ed and C D Broad trans (1953) 155-6. But here and elsewhere Hägerström finds such a supposition suspiciously shaky. For an attempt to develop the thoughts of both Jellinek and Hägerström, see Torgny T Segerstedt, 'Customs and Codes' (1942) 8 *Theoria* 3 and 126.

Hans Kelsen was baffled by both the is/ought problem and the obligation problem—not least because (in my view more rigorously than anyone else) he pursued those problems as general issues of the identities of law and of legal science. Eventually he settled for ignoring the manner in which customary norms come into existence. He seemed (though I doubt it) content to say that a custom may be a 'law-creating fact'—in that, when its normative side is recognised under the presupposition of a basic norm, that norm is translated from being a subjective meaning into being an objective meaning, a legal norm: *Pure Theory of Law* (2nd ed 1960; Max Knight trans 1967) 9, 213, 226-7, 250. He cannot evade these issues, because (unlike Austin) he wants to count international law as a kind of law. But Kelsen defines a norm of any kind as the meaning of an act of will and the concept of a customary norm is precisely that of a meaning that cannot be traced to an act of will.

'custom' that an eclectic mixing of them does not seem a promising path.[109]

B *Being Positive?*

To begin again. Western culture, for most of its past two millennia, has been overwhelmingly Christian. This includes its idea of positive law.[110] Almost all that survives of 'Roman' law is found in the codifications by Theodosius and Justinian. These works are Christian. They legislate Christian doctrine and policies as positive law.[111] The constitutions (decrees) that commission and promulgate the Corpus are stridently committed to the guidance of the Christian deity. The ideas of justice and law that they contain are thus embedded within an absolutistic idealism. One can therefore suppose that, within the idea of custom as law, the divine overpinning secures the connections between the fact that is regular social behaviour and the norm that that behaviour ought to be, as well as the connection between that norm as a mere norm and unconditional (legal) obligation.

With the rise of 'positivism' in the philosophical sense, that overpinning is removed. The three elements of legally binding custom – behaviour, ordinary norm and obligation – fall apart. The concept of custom has now dropped out of the toolkit of the social sciences, including social and cultural anthropology. It remains, however, in legal science and even in legal positivism, for I think two reasons. Firstly: the extent to which the two key notions of legal positivism – 'positing' as in 'enacting' and 'positive' as in 'sensuously concrete' – are regularly confused.[112] Secondly: legal science has yet to emancipate itself from legal meanings themselves – including their scholarly adjunct, legal doctrine. I have proposed a figure of 'use', 'mention' and 're-use', in which key legal vocabulary may be re-used within an independent framework.[113] But such are the frailties of the name 'custom' that it does not seem up to that task. And certainly not for continuing to categorise Indigenous law as 'customary': that would still place the primary focus on observable behaviour rather than culture, including normative belief; on behaviour to be managed by government rather than on Indigenous resources for self-regulation.

It may now have become clear how the concept of 'custom' used to make a kind of sense that is now bafflingly inaccessible. And that, so far as 'custom' retains any sense, that sense is precarious and even dangerous. One may therefore conclude that, at the end of the day, the concept has had its day.

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[109]   It did not, in my assessment, avail Sir Paul Vinogradoff: *Custom and Right* (1925); 'The Problem of Customary Law' (1925) in *The Collected Papers of Paul Vinogradoff* (1928).

[110]   See Iain Stewart, 'The Use of Law' (2005) 8 *Current Legal Issues* 259, 259-61.

[111]   In the Theodosian Code the doctrinal section is the final book (bk 16); in Justinian's Code it is extended and moved to the front (bk 1).

[112]   Stewart, above n 110.

[113]   Ibid 277-8.