The Jurisprudence of Custom

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INTRODUCTION

Is "customary law" a redundancy? Jeremy Bentham and John Austin both came close to believing that the very idea of customary law was essentially a contradiction in terms, but few these days take such a dim view of the legal status of custom. Yet although such extreme skepticism about the legality of custom might now be a bit passé, custom's role in a legal system still remains somewhat of a puzzle. Initially, for example, we might wonder about just how the customs, habits, or practices of ordinary people can become law. If law is prototypically created by legislatures and other bodies clothed with formal governmental authority, as classical positivists such as Bentham and Austin believed, then how is it that law can emerge from the practices of ordinary people? This question forms the beginning of the puzzle, because when we answer this question (and especially if we answer it by referring to the way in which such practices might be adopted, internalized, and applied by courts), we then become hard-pressed to distinguish the way in which custom acquires the status of law from the way in which we understand positive law generally, at least in a post-Hartian world. And when we see the legality of custom in terms of the internalization of norms by judges rather than exclusively as the issuance of orders by the sovereign, we must then confront further questions relating to how customary law differs, if at all, simply from law. These, in a nutshell, are the questions I propose to address here.

The argument I advance in this Article commences with the widely accepted notion that the custom that does or can have the status of law must be a normative custom and not merely a description of a non-normative empirical regularity. That

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1. See infra Part I.
2. Cf. RUPERT CROSS, PRECEDENT IN ENGLISH LAW 156-57 (3d ed. 1977) (describing Austin's views on the sources of law as "outmoded").
3. See infra Part II.
4. See Alfred F. Beckett, Ltd. v. Lyons, [1967] 1 Ch. 449 (Eng.); Mills v. Mayor of Colchester, [1867] 2 L.R.C.P. 476 (Eng.). For a discussion of the requirement that custom must have existed as an obligation and not merely a habit, see David J. Bederman, The Curious Resurrection of Custom: Beach Access and
is, a custom, to be available as a genuine source of law under the traditional common law view, must be understood to exist as of right. To qualify as enforceable law, the custom must, even prior to its formal recognition by the courts, have created in some people an obligation to conform, and consequently have created a claim of right (even if not a formal legal one) on the part of those aggrieved by the non-conformance of others. This principle is standard common law fare, but it generates a puzzle. At least since H.L.A. Hart, and perhaps earlier, most legal theorists, or at least most legal theorists in the positivist tradition, have accepted that the internalization of a rule of recognition, or, more precisely, the official internalization of the ultimate or master rule of recognition, is both a necessary and sufficient condition for the existence of law. But, the internalization of a rule of recognition as a criterion for law then begins to resemble the criteria for recognition of custom as a valid source of law. To the extent that this is so, there emerges the possibility that internalized normative custom simply is law, and in large part law simply is internalized custom. Insofar as these claims are true, then the legality of custom is not the puzzle that many legal theorists in the positivist tradition, including Hart himself, have sought to solve. Instead, it may be that the internalization of a rule of recognition is best explained in ways that make custom not merely a puzzling, if minor, appendage to the larger positivist picture of law, but instead an important component of the foundations of all of law. Or so I will argue here.

I. Bentham, Austin, and the Skeptical Tradition

Modern jurisprudence, especially in the legal positivist tradition, begins with Jeremy Bentham. His principal work of legal theory—now published as Of the


5. See CROSS, supra note 2, at 26 (describing a traditional view in which the common law includes "the usages and customary rules by which Englishmen have been governed since time immemorial"); see also id. at 160 (noting that custom must have been observed "as of right" to count as law).


9. The word "modern" is important. Thomas Hobbes, for example, is no doubt an important figure in the development of what we now call legal positivism. See generally Sean Coyle, Thomas Hobbes and the Intellectual Origins of Legal Positivism, 16 CAN. J.L. & JURISP. 243 (2003). Even Thomas Aquinas, perhaps the most prominent figure in the natural law tradition, recognized the idea of human law created by secular authorities. Michael S. Moore, The Plain Truth about Legal Truth, 26 HARV. J.L. & PUB. POL'Y 23, 38 n.43 (2003). Nevertheless, a less ambiguous legal positivist perspective almost certainly owes most of its origins to Bentham.
Limits of the Penal Branch of Jurisprudence—remained largely undiscovered and thus unknown until the 1930s. By that time, John Austin's exposition and development of themes that had actually originated with Bentham had long emerged as the canonical positivist text. Bentham’s thoughts about the nature of law, and about the role of custom within it, have consequently come to us primarily through Austin, although it is certainly likely that Austin's presentation owes much to Bentham's own ideas as well. Indeed, Bentham said relatively little about what we now understand as customary law. He used the phrase “customary law” on some number of occasions, but he was referring to common law in general, an idea and a practice for which he exhibited unalloyed contempt. What we now understand to be customary law—the normative practices of a community originating from community norms and not from governmental, legislative, or judicial decree—was labeled “traditionary law” by Bentham, and he dismissed it, with characteristic scorn, as the law for “barbarians.” Thus, for an account of the position of what we now think of as customary law within the classic positivist perspective, we must leave Bentham behind and look primarily to Austin.

As is well-known, the basic idea in the Austinian account of the nature of law is the claim that law consists of the commands of the sovereign, with the backing of those commands by the threat of sanctions being an essential part of law and of the very ideas of legal duty and legal obligation. Without the threat of sanctions, Austin insisted, law would be little more than a series of official requests. Or they may be suggestions. For Austin, it was the threat of sanctions that converted these requests and suggestions into law. He thus distinguished the commands of the law from the commands of God, the unofficial commands of society's values, or the


11. See Bentham, Of the Limits of the Penal Branch of Jurisprudence, supra note 10, at xi ("The work was 'discovered' amongst the Bentham Papers deposited in University College London Library by Charles Warren Everett, who recognized it as the continuation of An Introduction to the Principles of Morals and Legislation, and published it for the first time in 1945 with the title The Limits of Jurisprudence Defined: Being Part Two of An Introduction to the Principles of Morals and Legislation.").


13. See Andrew Halpin, Austin's Methodology: His Bequest to Jurisprudence, 70 CAMB. L.J. 175, 187 (2011) (relying on John Stuart Mill in noting that Austin tended to be more complex and subtle than Bentham).


15. Id. at 161.

16. Id. at 162.

17. See John Austin, Lectures on Jurisprudence or the Philosophy of Positive Law 89 (Robert Campbell ed., London, John Murray, 5th ed. 1895) (1861) [hereinafter Austin, Lectures on Jurisprudence] (describing the source of law as commands of the sovereign); see also Austin, The Province of Jurisprudence Determined, supra note 12, at 13, 18–25.


19. Id.
commands of anyone else, even if backed by threats, was the notion of sovereignty.\textsuperscript{20} There were innumerable sources of commands backed by threats, but only those sanction-backed commands emanating from the sovereign power were to count as law properly so called.\textsuperscript{21}

Although the foregoing paragraph represents an egregious oversimplification of Austin's work,\textsuperscript{22} it should be sufficient for present purposes to demonstrate why a satisfactory explanation of the legal status of custom was so important from the Benthamite and Austinian perspective. It is central to the basic idea of a custom—indeed, it is the definition of custom—that customs do not emanate from the sovereign, but instead arise in a bottom-up fashion from the normative practices of the population.\textsuperscript{23} Yet, although custom's bottom-up rather than top-down character jeopardized its status as law in the classical positivist scheme of Bentham and Austin, its role in common law adjudication was centuries old and finely honed by the time that Bentham, and later Austin, were writing.\textsuperscript{24} Consequently, an account of law that did not include and give at least some explanation of custom and of its legal status would have been woefully incomplete. Thus Austin, especially, found himself forced to take on the task of explaining how custom could ever be law in a system in which law was understood, at least by him, as the explicit and sanction-backed command of the sovereign.

Austin's solution to the problem, or at least his problem, is well known. Custom is not law by itself, he argued, but becomes law only upon it being duly adopted by judges, who are not only (tacitly) authorized by the sovereign to do so, but are also (equally tacitly) authorized by the sovereign to threaten or impose sanctions in the event of non-compliance.\textsuperscript{25} Thus, custom becomes law, albeit in several steps, by virtue of the tacit command of the sovereign.\textsuperscript{26} Although the connection between custom and law for Austin is consequently both derivative and indirect, the status of custom as law arises in the Austinian account precisely because of the links between custom and sovereignty, and between custom and the sanctions that are provided by the sovereign's own implicit authorization.

\textsuperscript{21} Coleman & Leiter, supra note 18, at 231.
\textsuperscript{22} More extensive expositions and analyses of the full Austinian picture can be found in W.L. Morison, John Austin (William Twining ed., 1982); Wilfrid E. Rumble, The Thought of John Austin: Jurisprudence, Colonial Reform, and the British Constitution (1985); Brian Bix, John Austin, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/austin-john/ (last modified Feb. 23, 2010); Frederick Schauer, Was Austin Right After All? On the Role of Sanctions in a Theory of Law, 23 RATIO JURIS 1 (2010) [hereinafter Schauer, Was Austin Right After All?].
\textsuperscript{24} See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, at 74–79 (1765).
\textsuperscript{26} Bentham's views about the legal status of custom are given a sympathetic and nuanced explication in GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 218–62 (1986).
II. CUSTOM AND MODERN POSITIVISM

Austin's basic account of the nature of law held sway for more than a hundred years, from the middle of the nineteenth century to the middle of the twentieth.27 There were of course numerous criticisms and emendations,28 but the basic Austinian picture provided the paradigm for jurisprudential thinking in ways that Austin, who died feeling profoundly unappreciated,29 could never have anticipated.30

The dominance of the Austinian picture evaporated, however, with the publication in 1961 of H.L.A. Hart's The Concept of Law.31 Taking dead aim at Austin throughout much of the beginning of the book,32 Hart challenged the centrality of sanctions to the idea of law, and thus challenged the bedrock of what had first been Bentham's, and then became Austin's, account of the very idea of legality.

A sanction-based picture of law, Hart argued, was defective in numerous ways. First of all, it could not explain very much about law in its empowering rather than regulating mode, and thus could only with distortion explain the way in which law created the possibility of making wills, trusts, contracts, and corporations, for example, while still leaving it up to citizens whether they should make such instruments or engage in such transactions in the first place.33 Nor could a sanction-dependent model allow us to understand why, in modern constitutional societies, the sovereign as well as the subjects were bound by law.34 Austin might well have offered an explanation for some aspects of a system in which a legally unconstrained sovereign made rules for its subjects, but that picture fails to explain how it can be that sanction-independent sovereigns nevertheless can and do internalize and obey the constitutional and other laws that bind them as well as their subjects.

Hart's proposed replacement of Austin's picture not only involved the attempt to explain law in terms of the union of primary rules of obligation with secondary rules of adjudication, change, and most importantly recognition,35 but it also incorporated the introduction of the idea of the internal point of view.36 We have an internal point of view about rules, including legal rules, Hart argued, when we use those rules to guide our own conduct and to criticize or otherwise evaluate the conduct of others.37 And when officials have an internal point of view with respect to the ultimate rule of recognition in a society, that rule of recognition specifies what is to count as law and what does not. For Hart, this official internalization of the

28. See Bix, supra note 22 ("[T]he weaknesses of [Austin's] theory are almost better known than the theory itself.").
29. See id. (discussing Austin's tendency for melancholy and perfectionism, juxtaposed with his belief in his relative obscurity).
30. See id. (discussing how Austin's work became more well known after his death).
31. See generally HART, supra note 6.
32. Id. at 18–78.
33. Id. at 28–39.
34. Id. at 50–78.
35. Id. at 79–99.
36. Id. at 86–91; see also sources cited supra note 8 and accompanying text.
37. HART, supra note 6, at 79–88.
ultimate rule of recognition, when combined with the union of primary and secondary rules, constituted a legal system. 38 If an ultimate rule of recognition enables officials to determine what is to be understood as law, and if officials internalize that ultimate rule of recognition in making legal determinations, then we have law. Period. Sanctions are widespread in modern legal systems, Hart acknowledged, 39 and may be contingently useful in assuring or at least increasing compliance and fostering effectiveness, he further admitted, even describing sanctions in the language of necessity with respect to real legal systems. 40 But the conceptual role of sanctions is decidedly unnecessary, Hart insisted, for, in theory, an entire legal system could exist with no sanctions at all. 41

III. CUSTOM AND THE RULE OF RECOGNITION

Hart’s anti-Austinian account of law rejected both the necessity of sanctions for the existence of legality, as well as the strongly top-down picture of law that Austin painted. And, by jettisoning both coercion and sovereign promulgation as essential features of law, Hart could offer an anti-Austinian account of the role of custom. Writing in more or less the same common law legal tradition as Austin, and against the background of pretty much the same legal history, Hart too seemed to recognize the need to explain the legal status of custom, and he proceeded to do so, albeit rather more implicitly than explicitly. 43 For Hart, a rule of recognition could, but need not, recognize custom as law, and more specifically as law existing prior to judicial application. Similarly, a rule of recognition could, and usually did, recognize statutes as law, and as law existing prior to judicial application. 44 So too with the decisions and opinions of courts. 45 But Hart offered this claim largely in the context of his criticisms of Austin early in The Concept of Law, 46 and he never explicitly returned to the question of custom after having laid out in some detail the distinction

38. Id. at 91.
39. Id. at 36–38 (noting that “every ‘genuine’ law shall direct the application of some sanction” and that sanctions are “centrally important element[s]”).
42. Id., supra note 6, at 44–48.
43. Indeed, there is a tension between the way in which the entire Hartian paradigm supports the lawness of customary law (see Laurence Claus, The Empty Idea of Authority, 2009 U. ILL. L. REV. 1301, 1312–13 (2009) (discussing Hart’s explanation of the lawness of customary law)) and Hart’s own denigration of customary international law as akin to a more primitive legal system. HART, supra note 6, at 89. On this very tension, see David J. Bederman, Acquiescence, Objection and the Death of Customary International Law, 21 DUKE J. COMP. & INT’L L. 31, 39–44 (2010).
44. Id., supra note 6, at 97–98.
45. Id.
46. Id. at 44–48.
between primary and secondary rules, the variety of secondary rules, and the fundamental idea of the internal point of view.

Yet, although appreciation and application of the Hartian perspective involves more interpolation and interpretation of Hart than direct quotation from his writings, the interpolation and interpretation are fairly straightforward. Hart insists that many norms and sources can have the status of law, which is determined simply by the relevant officials treating them as law pursuant to a rule of recognition. This rule of recognition itself is law by virtue of a master or ultimate rule of recognition, whose status as the ultimate determinant of law is simply a function of internalization. Just as the ultimate rule of recognition ordinarily, but not necessarily, treats statutes as law and typically treats decided judicial opinions as law, so too could an ultimate rule of recognition treat morality as law, or treat as law any number of other sources of norms that do not have, or do not necessarily have, governmental origins. To understand Hart’s account generally, and to understand more specifically why Hart can accept the contingent incorporation of morality as law, is thus to understand why Hart can, and seemingly did, accept the contingent incorporation of custom as law, including custom that originated in popular practice rather than official decrees. Indeed, one can find the same view in the writings of Hans Kelsen, who, even before Hart implicitly addressed the question, recognized that “norms created by custom do not differ radically from norms created by acts of will.”

47. Id. at 97–98.
48. Note that this claim is very different from John Chipman Gray’s claim that neither statutes nor judicial opinions—nor custom for that matter—are law, but are only sources of law to be drawn on by judges in reaching decisions. JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF LAW 125 (2d ed. 1921). Hart’s claim is not that statutes are not law until a judge applies them, which was, more or less, Gray’s claim, but that statutes become law by the general practice of some class of officials—such as judges—treating them as law antecedent to the decision of any particular case.
49. The foregoing is consistent with what, in modern jurisprudential debates, tends to be labeled as “inclusive legal positivism.” It appears to be the view of positivism adopted by Hart, or at least Hart so claims (under the label of “soft positivism”). HART, supra note 6, at 253. The perspective is developed in, for example, JULES COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY (2001); W.J. WALLACH, INCLUSIVE LEGAL POSITIVISM (1994); Kenneth Einar Himma, Inclusive Legal Positivism, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 125 (Jules Coleman & Scott J. Shapiro eds., 2002); David Lyons, Principles, Positivism, and Legal Theory, 87 YALE L.J. 415 (1977); Philip Soper, Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute, 75 Mich. L. Rev. 473 (1977). Whether Hart was correct in aligning himself with inclusive or soft positivism is not entirely without controversy. See Leslie Green, The Concept of Law Revisited, 74 Mich. L. Rev. 1687, 1705–09 (1996) (reviewing H.L.A. HART, THE CONCEPT OF LAW (1994)). Inclusive legal positivism is to be contrasted, in ways not directly relevant to the present paper, with the “exclusive” legal positivism espoused by, for example, Joseph Raz. See generally JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS IN LAW AND MORALITY (2d ed. 2009). And, for a careful analysis of the status of customary law under both the inclusivist and exclusivist perspectives, see David Leckowitcz, Customary Law and the Case for Incorporationism, 11 LEGAL THEORY 405 (2005).
50. For a similar interpretation of Hart, and for the view that Hart was committed to this view about both customary law and international law, some of his own statements notwithstanding, see NEIL MACCORMICK, H.L.A. HART 143–45 (2d ed. 2008).
IV. CUSTOM AS LAW

If Hart is largely correct about the ultimate rule of recognition and about the internalization of a rule of recognition as lying at the foundations of law, the implications for thinking about custom are substantial. First, and perhaps most importantly, if it is the internalization of rules or norms rather than sovereign command that is central to law itself, then custom no longer occupies any separate or distinct jurisprudential space.\(^5\) It is of course true that there are customs, even customs having normative purchase, that are typically not treated as enforceable law by common law courts.\(^5\) Common law courts do not ordinarily enforce, for example, the custom of writing thank-you notes, of respecting one’s place in a queue (in the United Kingdom, for example, but not necessarily in other countries),\(^6\) or of acting respectfully towards the national anthem or in a house of worship. In this respect, what we think of as the law of custom, or the rule of recognition of custom, recognizes only some customs as law, and only some normative customs as law. But, the law in some legal system could, in theory, recognize all customs as law, or all normative customs as law, or no customs at all as law. Under Hart’s account, any of these possibilities would be consistent with the existence of a legal system, and such a system could choose any of these options, or any of a number of variations on them.\(^7\) Moreover, although we think that a rule of recognition ordinarily recognizes all statutes of a certain kind as law, or all decisions of certain courts as law, or all constitutional provisions as law, again nothing in the Hartian picture compels that this be so.\(^8\) As the phenomenon of desuetude illustrates,\(^9\) a rule of recognition could recognize as law only most statutes, rather than all of them. And a rule of recognition could recognize only court cases of a certain kind, or from certain jurisdictions, or from certain eras, or even handed down on certain days of the week, as law. The same is true with constitutional provisions. Some rule of recognition—

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53. And thus we see the emergence of detailed rules about the age and status of a custom necessary for an English court to treat it as law. See Simpson v. Wells, [1872] 2 L.R.Q.B. 214 at 214–17 (Eng.) (discussing the age of the custom in finding “these meetings were not from time immemorial . . . . Therefore there could not be such a custom, as there could not be any legal origin of it; and consequently there could be no claim of right.”); Wyld v. Silver, [1963] Ch. 243, at 243 (Eng.) (finding entitlement through “ancient usage”); Wilson v. Wiles, (1806) 103 Eng. Rep. 46, 49 (Eng.); 7 East 121, 127 (noting that a “custom, however ancient, must not be indefinite and uncertain”); see also Mills v. Mayor of Colchester, [1867] 2 L.R.C.P. 476 at 486 (Eng.) (“[L]ong enjoyments in order to establish a right must have been as a right, and therefore neither by violence nor by stealth, nor by leave asked from time to time.”). See generally E.K. Braybrooke, Custom as Sources of English Law, 50 Mich. L. Rev. 71 (1951).


55. See Coleman & Leiter, supra note 18, at 228, 237.


57. See Blanchard v. Ogima, 215 So. 2d 903, 905 (La. 1968) (applying doctrine of desuetude to deny applicability of vicarious liability provision in the Louisiana Civil Code); Corey R. Chivers, Desuetude, Due Process, and the Scarlet Letter Revisited, 1992 Utah L. Rev. 449, 451 (noting that the doctrine of desuetude can be applied to void statutes); Linda Rodgers & William Rodgers, Desuetude as a Defense, 52 Iowa L. Rev. 1 (1966) (explaining the doctrine of desuetude); see also CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE BAD FOR AMERICA 97–99 (2005) (urging the use of desuetude to void outdated and rarely-enforced statutes dealing with sexual behavior). Also relevant in this context is GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982) (calling for judges to use common law principles to revise what they perceived to be obsolete statutes).
or better, some practices of recognition—could amend a constitution outside of the formal amendment procedures, and by the same token could eliminate some provisions even outside of any formal amendment or repeal provisions. Thus, the fact that the rule of recognition as it exists in, say, English law, recognizes only some customs as law is not fundamentally different from the way in which the same rule of recognition might recognize only some statutes, only some court decisions, or only some constitutional provisions as law. Moreover, there is no reason why a rule of recognition could not recognize (some) local customs as law even to the derogation of general common law or to the derogation of statutes. The difference, one might say, is in the details, but not in the basic picture.

V. LAW AS CUSTOM

Related to the way in which custom is or becomes law, and does so in a manner not fundamentally different from the way in which statutes and court decisions become law, is the fact that under this account even ordinary, non-customary law is itself custom, albeit custom of a certain global type. In important respects, law is principally, at least in the Hartian account, the internalization of a practice (possibly a practice long existing in history and possibly not) and the treatment of it as normative. I could write a constitution for the United States today and make it valid according to its own terms, but, however internally valid it might be, it would still not be the Constitution of the United States, precisely because it would not have been accepted and internalized by the people or by the class of relevant officials. If in some fantastic world the people and the officials did accept such a constitution as the Constitution, it would then become the law. But this process, whether it be of the real Constitution or my pseudo-constitution, is no different from the way in which the practices of the Walmer fishermen become law, except that the procedures have become more entrenched in the latter case than in the former. But in both cases it is the internalization of a normative system, or the internalization of

58. As Brian Simpson influentially argued, there is no reason to think of a legal system's master or ultimate practices of recognition in rule-like terms, as they are better, especially in common law systems, understood as a messy collection of constantly changing practices of lawyers and judges, especially in common law systems. A.W.B. SIMPSON, The Common Law and Legal Theory, in OXFORD ESSAYS IN JURISPRUDENCE 73 (A.W.B. Simpson ed., 1973). To the same effect, see Sebok, Is the Rule of Recognition a Rule?, supra note 8 (concluding that the practice of recognition is not a rule).


61. HART, supra note 6, at 99–100.

62. There are interesting disputes about whose internalization is to count. Hart thought that the relevant internalizing body is the judiciary, but it might be the people, other officials, or even, and ultimately, the army. These questions are important both practically and jurisprudentially, but they are not germane to the present discussion.

63. The example is developed at some length in Schauer, Was Austin Right After All?, supra note 22, at 5.

an individual law pursuant to a systemic rule of recognition, that establishes its legal status.

And so too, as the example of the difference between a fictional constitution and the real Constitution was designed to suggest, with the ultimate rule of recognition. Hart says that a legal system exists when there is both a union of primary and secondary rules, and when the ultimate rule of recognition (a secondary rule), is internalized by officials of a particular sort. But in this respect, and with only slight distortion, law just is custom, in the sense that it is actual human practices that turn norms into law, in much the same way that actual human practices make customs normative. There are, to be sure, habits (or customs in a different sense) that are not normative, such as my habit of waking up at a certain time every morning, or the habit perhaps in some societies of planting tulips and not marigolds, or preferring red cars to blue ones. But if at some point it is considered appropriate in that society for citizens to criticize others for planting marigolds instead of tulips, or for driving blue cars and not red ones, then the process by which the mere regularity has become normative shares much in common with the way in which a society adopts this and not that ultimate rule of recognition as the foundation of its legal system.

VI. CUSTOM AND LEGAL INCORPORATION

We might consider the same set of ideas about the affinity between the recognition of custom and the recognition of law itself in a slightly different and potentially more illuminating way. Thus, if we accept Hart's ideas about the non-essential connection between either coercion or sovereignty to law, then it turns out that the practices of the Walmer fisherman, to the extent that those practices have become normative as well as being merely habitual, simply are law. If law under the Hartian account is the internalization of the ultimate rule of recognition by some set of officials or citizens, then there may exist within the community of Walmer fishermen an ultimate rule of recognition specifying which practices of its community will be normative, and what forms of criticism (or sanctions) will be applied against the members of the community who transgress the existing normative practices.

65. We go astray if we follow Hart into thinking that the rule of recognition must be a rule in any sensible understanding of that term. Rather, the ultimate rule of recognition is best understood as a collection of practices (in the Wittgensteinian sense), practices that may not be best understood in rule-like ways. See sources cited supra note 43 and accompanying text.

66. This is somewhat easier to see with respect to common law. See Joseph Raz, Intention in Interpretation, in THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 249, 259 (Robert P. George, ed., 1996). On Raz and the legal status of custom under his version of legal positivism, see Lefkowitz, supra note 49, at 405 (outlining his argument on the Razian account of the authority of customary law).

67. Cf. ROGER A. SHINER, LAW AND MORALITY, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 436, 441 (Dennis Patterson, ed., 1996) (noting that custom can bring law into existence, even if customary law is only a "quantitatively minor part" of most modern legal systems).

68. Hart is slightly more obscure with respect to sovereignty, perhaps because without an account of sovereignty, or at least an account of the relationship between law and the political state, he has a hard time explaining how law is different from the elaborate and internalized rule systems of, for example, the Mafia or the American Contract Bridge League. See HART, supra note 6, at 23–25 ("It remains indeed to be seen whether this simple, though admittedly vague, notion of general habitual obedience to general orders backed by threats is really enough to reproduce the settled character and continuity which legal systems possess.").

69. But cf. supra note 48 and accompanying text.
When this process occurs, then there is law within the community of Walmer fishermen, and the particular practices regarding fish, nets, beaches, and the like will be specific legal norms.

Even if the Walmer fishermen thus have the power to constitute a legal system, the relationship between that legal system and another one occupying the same space (and possibly having access to greater physical force) remains an open question. That is, the legal system of the Walmer fishermen, assuming by hypothesis the internalization and existence of secondary rules including an ultimate rule of recognition, may or may not be adopted by another legal system—call it the Law of England—as its law. The norm system we think of as "English Law" may choose to adopt the norm system that is "Walmer Fishermen Law," or it may choose not to, just as "English Law" may choose to adopt or choose not to adopt any other system of normative customs. But this is not unique to the law of the Walmer fisherman or to law created by custom or by community normative practices. The point is not about customary law, but about the fact that legal systems often must choose whether and how to use the law of other legal systems. Thus, the way in which the Law of England chooses to adopt or not to adopt "Walmer Fishermen Law" is no different from the way in which the Law of England chooses to adopt or not adopt the law of Nebraska, international law, or Sharia law as its law, or the way in which in the U.S. Uniform Commercial Code adopts (some of) the normative practices of merchants as law. In all of these instances there is the development of what, through a post-Hartian lens, we can recognize as a legal system, even if it is not the legal system most closely associated with the sovereign political state. And then there is the question of what the legal system of the sovereign political state will do with respect to the laws created by a different, but possibly geographically (or in some other way) overlapping, legal system.

70. Hart recognizes the existence of customary rules in "primitive" communities. HART, supra note 6, at 91–92, 291–92. But, he seems barely, if at all, to recognize the way in which non-state communities may have the union of primary and secondary rules that he takes to be central to law itself. Id. at 79–99.

71. On the way in which U.S. commercial law under the Uniform Commercial Code has essentially adopted the normative customs of the merchant community as (formal) law, see Zipporah Batshaw Wiseman, The Limits of Vision: Karl Llewellyn and the Merchant Rules, 100 HARV. L. REV. 465 (1987). On the possibility that the Uniform Commercial Code did not do a very good job of adopting normative customs, see Lisa Bernstein, The Questionable Empirical Basis of Article 2’s Incorporation Strategy: A Preliminary Study, 66 U. CHI. L. REV. 710 (1999). And on the undeniably law-like, in precisely Hart’s sense, character of various complex (in the primary- and secondary-rules sense) non-governmental systems, see ROBERT ELICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 191–208 (1991) (describing how the whaling industry in the 19th century, as a “nonhierarchical” group, was able to create a system of norms that “created law”); Lisa Bernstein, Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions, 99 MICH. L. REV. 1724 (2001) (explaining that the cotton industry established “one of the eldest and most complex systems of private commercial law” with their own administrating institutions); Lisa Bernstein, Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry, 21 J. LEGAL STUD. 115 (1992) (pointing out that the diamond industry has their own “elaborate, internal set of rules, complete with distinctive institutions and sanctions” in the place of state-created law). Both Ellickson and Bernstein label the systems they study as “extra-legal,” but under Hart’s account (or Shapiro’s), the systems are ones in which there is a union of primary and secondary rules, an ultimate rule of recognition, and the internalization of the ultimate rule of recognition by all or at least most of the relevant participants. Shapiro, supra note 8, at 1165. To label such systems “extra-legal” is to associate law with the political state in ways that resonate more with Bentham and Austin than with Hart and his successors.
The law of custom can thus be seen as one manifestation of the law—or the secondary rules, in Hartian terminology—regarding whether the laws of system B shall be adopted by system A.\footnote{See Steven D. Walt, Why Jurisprudence Doesn't Matter for Customary International Law, 54 WM. & MARY L. REV. (forthcoming 2013). Despite the title of Walt's article, which makes perfect sense in the context of a discussion centered on Erie Railroad v. Tompkins, 304 U.S. 64 (1938), his perspective and mine are largely compatible.} This is a vitally important question, and indeed one becoming ever more important as modern transportation, modern communications, and contemporary governmental transformations increase the probability that legal systems are as likely to be nested or overlapping as abutting. But once we understand the question as one of the relationship between different legal systems and not as the way in which non-law becomes law, we can see that the question of custom—although often very important in particular legal systems, and likely becoming even more important for the reasons just noted—may be of far less jurisprudential significance than Austin thought almost two centuries ago, and less than many have thought ever since. The question is far more one of conflicts of law than of jurisprudence, but it may have taken some jurisprudential work to help us see why this is so.