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Curtis A. Bradley

Mitu Gulati

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THE DUKE PROJECT ON CUSTOM AND LAW

CURTIS A. BRADLEY[†] AND MITU GULATI^{††}

FOREWORD

We are delighted to introduce the ten Essays in this Special Symposium Issue, each of which concerns some aspect of the intersection of law and custom. The Essays are the outgrowth of a yearlong project at Duke Law School. We began organizing this project in the spring of 2011, with the idea of having a school-wide topic around which much of the faculty could interact and exchange ideas.¹ We chose the relationship between custom and law as the topic because it permeates almost all fields of legal study.² We had recently completed an article focusing on the role of custom in international law and, in the course of that work, had found that our thinking about the topic benefited enormously from the insights of scholars working on subject areas far afield from international law.³ As a result, it

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[†] William Van Alstyne Professor, Duke Law School.

^{††} Professor, Duke Law School.

1. For the initial announcement of the Project, see *The Duke Project on Custom and Law*, DUKE LAW (Apr. 28, 2011), <http://law.duke.edu/news/6410>. A website was subsequently created for it. See *The Duke Project on Custom and Law: Exploring the Influence of Custom and Law—Past, Present, and Future*, DUKE LAW, <http://law.duke.edu/customlaw> (last visited Nov. 13, 2012).

2. For an excellent overview of some of the areas of law that are informed by custom, see DAVID J. BEDERMAN, *CUSTOM AS A SOURCE OF LAW* (2010).

3. See Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202 (2010). That article became the subject of a symposium published in the *Duke Journal of Comparative & International Law* and also a set of online papers on *Yale Law Journal Online*.

occurred to us that there might be value in putting together a conversation about differing perspectives on the relationship between custom and law.

The project began with a series of informal meetings in the summer of 2011, during which interested faculty members met to discuss a number of important works on law and custom.⁴ By the end of the summer, it had become evident that certain issues were recurring, regardless of the specific subject matter we addressed, such as the meaning of custom; the relationship between custom, norms, and traditions; how to determine when custom has legal status; the proper level of generality in describing custom; the effect of formalized adjudication on custom's development; and the inevitability of normative judgment when discerning how to characterize custom.

For the next phase of the project, we invited a number of leading law and custom scholars to Duke Law to talk about their past work. These external workshop presenters included Lisa Bernstein (Chicago), Robert Cooter (Berkeley), Robert Ellickson (Yale), Emily Kadens (Texas), Timur Kuran (Duke University, Economics), Richard McAdams (Chicago), Annelise Riles (Cornell), and Carol Rose (Yale). We were concerned at first that it might be difficult to persuade leading scholars to talk about work that they had already published, in some cases long ago, but in fact almost everyone we invited for this series agreed to attend.

We had an instrumental goal here, in addition to wanting to learn more about the relationship between law and custom. Our hope was to influence our own customs at the law school. We are fortunate to be at a place that is collegial. But, as we suspect is the case at many law schools, our colleagues are busy working in their separate research fields. As a result, although many faculty members participate in our general faculty workshops each week, scholars working in one area (say, constitutional law) are not regularly

4. The summer readings included Richard Craswell, *Do Trade Customs Exist?*, in *THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW* 118 (Jody S. Kraus & Steven D. Walt eds., 2000); Richard A. Epstein, *The Path to The T.J. Hooper: The Theory and History of Custom in the Law of Tort*, 21 *J. LEGAL STUD.* 1 (1992); Gerald J. Postema, *Custom in International Law: A Normative Practice Account*, in *THE NATURE OF CUSTOMARY LAW* (Amanda Perreau-Saussine & James Bernard Murphy eds., 2007); George Rutherglen, *Custom and Usage as Action Under Color of State Law: An Essay on the Forgotten Terms of Section 1983*, 89 *VA. L. REV.* 925 (2003); Frederick Schauer, *Pitfalls in the Interpretation of Customary Law*, in *THE NATURE OF CUSTOMARY LAW*, *supra*, at 13; and Henry E. Smith, *Community and Custom in Property*, 10 *THEORETICAL INQUIRIES L.* 5 (2009).

exchanging drafts and discussing ideas with scholars in substantially different areas (say, securities regulation). One of the many positive features of the Project on Custom and Law that we observed from the start was that there were conversations—sometimes quite lively conversations—occurring across different fields. That led us to think that it might be possible to organize a Symposium Issue of papers, in which a wide variety of our colleagues would engage around the custom-and-law topic.

As this Special Symposium Issue illustrates, many of our colleagues took the leap and began to write papers connected in some way to the topic. In February 2012, we held a two-day symposium for Duke faculty (including some faculty from outside the law school) who were involved in these writing projects, along with a number of faculty who generously served as commentators. In addition to the authors in this Issue, our colleagues who participated in this project included: Matt Adler, Lawrence Baxter, Rachel Brewster, Larry Helfer, Margaret Hu, Jack Knight, Maggie Lemos, Julie Maupin, Ralf Michaels, Jed Purdy, Arti Rai, and Jonathan Wiener. To one extent or another, approximately two-thirds of the Duke Law faculty was actively involved in the project. As part of the celebratory spirit of the event, participants in the symposium received a t-shirt, the back of which reads, “Legal Theory—It’s Our Custom.” The exchanges at the symposium were invaluable, and most of the presenters proceeded to develop their papers further with an eye towards publication.⁵

The *Duke Law Journal* and its editors have been supportive of this effort from the beginning. The *Journal* does not normally publish symposium issues other than its annual administrative law symposium. After we explained the nature of the project the *Journal* enthusiastically agreed to be part of our effort—the goal being that our students would be part of the conversation as well. The *Journal* members have also given valuable feedback to each of the authors in this Issue.

5. Independently, the two of us also developed our own papers relating to custom, with co-authors from elsewhere. See Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012); Anna Gelpern & Mitu Gulati, *CDS Zombies*, 13 EUR. BUS. ORG. L. REV. 347 (2012). The Bradley-Morrison effort in turn led to its own symposium in the fall of 2012 and will eventually become a book project. It also led to the development of a seminar offered at both Duke Law School and Columbia Law School. See *History and Constitutional Authority*, DUKE LAW, <http://law.duke.edu/curriculum/courseinfo/course?id=488> (last visited Nov. 13, 2012); and *History and Constitutional Authority*, COLUMBIA LAW SCH., <http://www.law.columbia.edu/courses/L8863-history-and-constitutional-authority> (last visited Nov. 13, 2012).

Duke students were involved in other ways as well. The two of us taught a yearlong seminar in 2011–2012 on the topic of custom and law.⁶ Our seminar students read many of the same readings that the faculty had read over the summer,⁷ attended the external workshops during the school year, and participated in the symposium. Also as part of the project, another faculty member (Kathy Bradley) organized a seminar on the relationship between custom and spousal property rights in Ghana and took her students to that country for field study.⁸ Finally, one of our students is a co-author with a faculty member of one of the papers in this Issue. The student involvement in the project ensured that this was a school-wide effort.

The project owes a special debt to Dean David Levi. In addition to generously funding the project, he was present at many of the events throughout the year, and he continually gave us encouragement. As with so many faculty ideas at Duke, with this project our Dean's question has not been, "how much is it going to cost?" but rather "what can I do to help?" We made sure that he received a t-shirt.

We hope that you enjoy reading the enclosed Essays as much as we have. They vary enormously in their subject matters, ranging from customs in the art industry (Deborah DeMott), to norms in kidney exchange programs (Kieran Healy and Kim Krawiec), to traditions in the constitutional law of substantive due process (Kate Bartlett). They range from the theoretical (Gerald Postema's Essay on the role of subjective intent in discerning when custom has legal status), to the highly practical (Larry Zelenak's Essay on how the Internal Revenue Service uses customs to under-enforce the Tax Code). Some of the Essays (Barak Richman's, Joseph Blocher's, and Suzanne Katzenstein's) challenge conventional wisdom, such as about how reliance on custom develops, how custom changes, and what is worth

6. For a description of the seminar, see *Custom and Law*, DUKE LAW, <http://law.duke.edu/curriculum/courseinfo/course?id=212> (last visited Nov. 13, 2012).

7. The students also read additional works, including JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005); John M. Conley & William O'Barr, *Legal Anthropology Comes Home: A Brief History of the Ethnographic Study of Law*, 27 *LOY. L.A. L. REV.* 41 (1993); Avner Greif, Paul Milgrom & Barry R. Weingast, *Coordination, Commitment, and Enforcement: The Case of the Merchant Guild*, 102 *J. POL. ECON.* 745 (1994); and Paul R. Milgrom, Douglass C. North & Barry R. Weingast, *The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs*, 2 *ECON. & POL.* 1 (1990).

8. For a description of the seminar, see *Legal Frameworks: Ghana*, DUKE LAW, <http://law.duke.edu/curriculum/courseinfo/course?id=469&all=1> (last visited Nov. 13, 2012).

studying in this area. The Essays also offer different perspectives on the normative desirability of relying on custom and include critiques of such reliance in areas such as the constitutional law governing Congress's authority to regulate commerce (Neil Siegel) and the regulation of financial markets (Steve Schwarcz and Lucy Chang).

We are optimistic that this will be but the first of many such Duke Law collaborations. Our thanks again to Dean Levi, the *Duke Law Journal*, and, of course, our colleagues who took time out of their own research schedules to make this project work.