

# The Myth of the Customary Law Merchant

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*Legal scholars from many disciplines—including law and economics, commercial law, and cyber law—have for decades clung to the story of the so-called law merchant as unassailable proof that private ordering can work. According to this story, medieval merchants created a perfect private legal system out of commercial customs. As this customary law was uniformly and universally adopted across Europe, it facilitated international trade. The law merchant myth is false on many levels, but this Article takes aim at two of its fundamental principles: that uniform and universal customary merchant law could have existed and that merchants needed it to exist. The Article argues that the most widespread aspects of commercial law arose from contract and statute rather than custom. What custom the merchants applied often did not become uniform and universal because custom usually could not be transplanted and remain the same from place to place. Yet, the use of local custom did not hamper international trade because intermediaries such as brokers ensured that medieval merchants had no need for a transnational law.*

Advocates of private ordering have fallen in love with the Middle Ages. Scholars in fields ranging from domestic and international sales law, cyber law, law and economics, sports law, and aviation law, as well as judges and casebook authors have made the medieval law merchant into the archetypal sophisticated legal system that private groups can create when not impeded by the intermeddling of the state.<sup>1</sup> In the mercatorists'<sup>2</sup> retelling, the law

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1. There is an enormous literature in the various legal fields that has borrowed the law merchant theory, even excluding references merely to the "new" law merchant. *See, e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004) ("The law merchant emerged from the customary practices of international traders . . ."); *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624, 635 (7th Cir. 2010) (Posner, J., concurring) ("The common law of contracts evolved from the law merchant . . ."); U.C.C. § 1-301 cmt. 3 (2001) ("Application of the Code . . . may be justified . . . by the fact that it is in large part a reformulation and restatement of the law merchant and of the understanding of a business community which transcends state and even national boundaries."); IAN AYRES & RICHARD E. SPEIDEL, *STUDIES IN CONTRACT LAW* 2, 6 (7th ed. 2008) ("Based upon the customs of merchants, and strongly impressed by an international character, the Law Merchant existed as a body of rules and principles pertaining to merchants and mercantile transactions, distinct from the ordinary law of the land."); BRUCE L. BENSON, *THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE* 30–36 (1990) (supporting libertarian political-economic policy with the law

merchant evolved from merchant practices, as traders experimented to find the most efficient commercial methods. Bubbling up from below and

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merchant); HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 341–44 (1983) (discussing the law merchant’s formative role in legal history); A. CLAIRE CUTLER, *PRIVATE POWER AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY* 108–40 (2003) (discussing the law merchant’s relationship with international relations); ANA M. LÓPEZ RODRÍGUEZ, *LEX MERCATORIA AND HARMONIZATION OF CONTRACT LAW IN THE EU* 87 (2003) (“[There] emerged ‘a body of truly international customary rules governing the cosmopolitan community of international merchants’ on the high seas and in the conduct of fairs. Merchants had in fact created a superior law, the *lex mercatoria*, *ius mercatorum* or *law merchant*, which constituted a solid legal basis for the great development of commerce in the Middle Ages. For several hundred years uniform rules of law, those of the law merchant, were applied throughout the market tribunals of the various European trade centers.” (footnotes omitted)); RUDOLF B. SCHLESINGER ET AL., *COMPARATIVE LAW* 278 (6th ed. 1998) (“Cosmopolitan in nature and inherently superior to the general law, the law merchant by the end of the medieval period had become the very foundation of an expanding commerce throughout the Western world.”); Harold J. Berman & Felix J. Dasser, *The “New” Law Merchant and the “Old”: Sources, Content, and Legitimacy*, in *LEX MERCATORIA AND ARBITRATION* 53, 61 (Thomas E. Carbonneau ed., rev. ed. 1998) (describing the centuries-old existence of an international business built on “an ongoing autonomous customary legal order”); Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1647 (1996) (“The traditional account of the ‘law merchant’ . . . provides a model for how lawmakers might respond.”); Bernardo M. Cremades & Steven L. Plehn, *The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions*, 2 B.U. INT’L L.J. 317, 320 (1984) (“Multinational enterprises, the vehicles of much of the world’s commerce, are normally associated with particular countries, but are essentially international in character. They are analogous to the medieval merchants whose activities were superimposed on a patchwork of local sovereignties and were hardly amenable to local regulation.”); Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469, 475 (2000) (arguing that a *lex mercatoria* “could, with appropriate adaptation, contribute to the development of international copyright standards”); Ken Foster, *Is There a Global Sports Law?*, 2 ENT. L. 1, 10 (2003) (“*Lex sportiva* deliberately invokes the concept of *lex mercatoria*.”); Lawrence M. Friedman, *Erewhon: The Coming Global Legal Order*, 37 STAN. J. INT’L L. 347, 356 (2001) (stating that the original *lex mercatoria* was based on mercantile custom in the Middle Ages); I. Trotter Hardy, *The Proper Legal Regime for “Cyberspace,”* 55 U. PITT. L. REV. 993, 1019–21 (1994) (analogizing cyber law to the medieval law merchant as a “bottom up” customary law); Brian F. Havel & Gabriel S. Sanchez, *The Emerging Lex Aviatica*, 42 GEO. J. INT’L L. 639, 658–59 (2011) (analogizing a proposed global aviation regulatory system to the law merchant); David R. Johnson & David Post, *Law and Borders—the Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1389 (1996) (“Perhaps the most apt analogy to the rise of a separate law of Cyberspace is the origin of the Law Merchant—a distinct set of rules that developed with the new, rapid boundary-crossing trade of the Middle Ages.”); Friedrich K. Juenger, *American Conflicts Scholarship and the New Law Merchant*, 28 VAND. J. TRANSNAT’L L. 487, 490–91 (1995) (describing conflict-of-law rules that developed independently of government as part of “the supranational *lex mercatoria*”); 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, 2 (1990) (studying reputation mechanisms during the medieval revival of trade when, “without the benefit of state enforcement of contracts or an established body of commercial law, merchants evolved their own private code of laws (the *Law Merchant*) with disputes adjudicated by a judge who might be a local official or a private merchant”); Irineu Strenger, *La notion de lex mercatoria en droit du commerce international*, 227 RECUEIL DES COURS 207, 253–60 (1992) (conjuring up images of the ancient law merchant as autonomous, cosmopolitan, and transnational); Leon E. Trakman, *From the Medieval Law Merchant to E-Merchant Law*, 53 U. TORONTO L.J. 265, 269, 275–76 (2003) (drawing a parallel between the law merchant and e-commerce).

2. *Mercatorists* here refers to modern advocates of the *lex mercatoria* theory.

independent of government involvement, the best of these practices spread across Europe. The uniformity and universality of the resulting customary rules facilitated transnational trade in a world of parochial local jurisdictions hostile to foreign merchants and lacking unifying states.<sup>3</sup> As a consequence, no matter where in Europe they traveled, traders could rely upon these merchant-devised customs to provide default rules and to fill in gaps around negotiated contracts.<sup>4</sup> Should disputes arise, the traders could have

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3. BENSON, *supra* note 1, at 30–31 (observing that the law merchant provided means to overcome “substantial barriers” to international trade); LEON E. TRAKMAN, *THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW* 10–11 (1983) (“[T]he plurality of local customs introduced confusion into transactions; they gave rise to hostility towards foreign customs and they ultimately led to mercantile confrontations.”); Johnson & Post, *supra* note 1, at 1389 (“Nor could the local lord easily establish meaningful rules for a sphere of activity that he barely understood and that was executed in locations beyond his control. The result of this jurisdictional confusion was the development of a new legal system—*Lex Mercatoria*.”); Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551, 1596 (2003) (“[B]ecause many commercial transactions were, by definition, transnational, it was desirable to have a uniform transnational body of law that did not vary according to the nationalities of the contracting parties.”).

4. See BENSON, *supra* note 1, at 32 (“Where conflicts arose, practices that were the most efficient at facilitating commercial interaction supplanted those that were less efficient.”); CLIVE M. SCHMITTHOFF, *The Unification of the Law of International Trade*, in CLIVE M. SCHMITTHOFF’S SELECT ESSAYS ON INTERNATIONAL TRADE LAW 206, 206 (Chia-Jui Cheng ed., 1988) (recounting that the law merchant “arose in the Middle Ages [as] a body of truly international customary rules governing the cosmopolitan community of international merchants who travelled through the civilised world from port to port and fair to fair”); TRAKMAN, *supra* note 3, at 11 (“The most viable mercantile practices were enforced in the Law Merchant . . . .”); Gesa Baron, *Do the UNIDROIT Principles of International Commercial Contracts Form a New Lex Mercatoria?*, 15 ARB. INT’L 115, 117 (1999) (“Its special characteristics were that it was first of all transnational. Secondly, it was based on a common origin and a faithful reflection of mercantile customs.” (footnote omitted)); Bruce L. Benson, *Law Merchant*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 500, 500 (Peter Newman ed., 1998) (“*Lex mercatoria*, the Law Merchant, generally refers to the customary law governing European commercial interactions during the medieval period. Despite its customary nature, however, the medieval Law Merchant constituted a true system of law . . . . Virtually every aspect of commercial transactions in Europe was governed for several centuries by this privately produced, privately adjudicated and privately enforced body of law.”); Thomas E. Carbonneau & Marc S. Firestone, *Transnational Law-Making: Assessing the Impact of the Vienna Convention and the Viability of Arbitral Adjudication*, 1 EMORY J. INT’L DISP. RESOL. 51, 57 (1986) (“Prior to the emergence of modern nation-states, trading transactions were conducted within a largely self-regulatory, customary framework free of any significant national government constraints. These self-imposed rules of commercial conduct and dispute resolution, which became known as the law merchant or *lex mercatoria*, applied in nearly all regions of Europe.” (footnote omitted)); Charl Hugo, *The Legal Nature of the Uniform Customs and Practice for Documentary Credits: Lex mercatoria, Custom, or Contracts?*, 6 S. AFR. MERCANTILE L.J. 143, 144–45 (1994) (“[*Lex mercatoria* was] in essence custom of a universal nature applied by the special mercantile courts throughout Europe to a special social class—the merchants. In this sense it can be described as law which operated on a supranational level.”); Milgrom, North & Weingast, *supra* note 1, at 5 (“[B]y the end of the 11th century, the Law Merchant came to govern most commercial transactions in Europe, providing a uniform set of standards across large numbers of locations.” (citation omitted)); Trakman, *supra* note 1, at 271 (“It is clear that the existence of a Law Merchant was widely known and that it was resorted to by medieval merchants.”); Zywicki, *supra* note 3, at 1593 (calling the law merchant a “collection of informal procedures and customary law” that was “largely universal”).

confidence that the merchant-created and merchant-staffed courts would apply the *lex mercatoria* customs as rules of decision.<sup>5</sup>

The law merchant story has such intrinsic appeal and carries so much weight in the literature of so many areas of legal scholarship that the efforts of numerous historians to expose it for the myth that it is have been met with skepticism at best.<sup>6</sup> More commonly, the mercatorists have ignored the

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5. See, e.g., SCHMITTHOFF, *supra* note 4, at 207 (“The remarkable feature of the old law merchant was that it was developed by the international business community itself and not by lawyers.”); Baron, *supra* note 4, at 117 (“[The law merchant] was developed and promoted by mercantile corporations and the special jurisdiction of the mercantile courts, business practice and the special courts of the great markets and fairs . . . and recognized the capacity of the merchants to regulate their own affairs through their customs, their usages, and their practices.” (footnote omitted)); Daniela Caruso, *Private Law and State-Making in the Age of Globalization*, 39 N.Y.U. J. INT’L L. & POL. 1, 19–20 (2006) (calling the law merchant “quintessentially independent from the state both in terms of production and enforcement”); Cremades & Plehn, *supra* note 1, at 319 (“The Lex Mercatoria was largely self-enforcing; a party who refused to comply with a merchant court’s decision risked his reputation and could be excluded from trading at the all-important fairs where the merchant courts were located. Parties to a dispute rarely needed the aid of the local sovereign to enforce a merchant court’s decision. The ability of the merchant class to both generate and enforce its own norms of behavior allowed it to achieve a large degree of independence from these local sovereigns.” (footnote omitted)); Hardy, *supra* note 1, at 1020–21 (“Special courts grew up to enforce the Law Merchant. These were merchant courts in every sense: their jurisdiction was that of commercial transactions, and their judges were drawn from the ranks of the merchant class itself on the basis of experience and seniority.”); Leon Trakman, *Ex Aequo et Bono: Demystifying an Ancient Concept*, 8 CHI. J. INT’L L. 621, 629 (2008) (“These merchant judges resolved disputes among itinerant merchants at regional fairs, markets, towns, and ports—outside the jurisdiction of courts and judges who administered the law of local princes.”); Trakman, *supra* note 1, at 271 (“The distinctive feature of the cosmopolitan, medieval Law Merchant was the asserted reliance by merchants on a legal system devised primarily by merchants themselves for the dispensation of justice in disputes among them.”).

6. See generally MARY ELIZABETH BASILE, JANE FAIR BESTOR, DANIEL R. COUILLETTE & CHARLES DONAHUE, JR., *LEX MERCATORIA AND LEGAL PLURALISM: A LATE THIRTEENTH-CENTURY TREATISE AND ITS AFTERLIFE* (1998) [hereinafter BASILE] (reviewing the history of the *lex mercatoria* theory, explaining that the English had no concept of a transnational law merchant and demonstrating that the law merchant was primarily a procedural concept); JAMES STEVEN ROGERS, *THE EARLY HISTORY OF THE LAW OF BILLS AND NOTES: A STUDY OF THE ORIGINS OF ANGLO-AMERICAN COMMERCIAL LAW 12–20* (1995) (demonstrating that English common law courts were competent to adjudicate commercial disputes); J.H. Baker, *The Law Merchant and the Common Law Before 1700*, 38 CAMBRIDGE L.J. 295 (1979) (debunking the story of the incorporation of the law merchant into English common law under Mansfield); Albrecht Cordes, *The Search for a Medieval Lex mercatoria*, reprinted in *FROM LEX MERCATORIA TO COMMERCIAL LAW* 53 (Vito Piergiovanni ed., 2005) (arguing against the universality of rules facilitating transnational trade); Charles Donahue, Jr., *Benvenuto Stracca’s De Mercatura: Was There a Lex mercatoria in Sixteenth-Century Italy?*, in *FROM LEX MERCATORIA TO COMMERCIAL LAW*, *supra*, at 69 (concluding that Benvenuto Stracca’s *De mercatura* does not prove that there was a separate *lex mercatoria* in sixteenth-century Italy); Charles Donahue, Jr., *Equity in the Courts of Merchants*, 72 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS [LEGAL HIST. REV.] 1 (2004) (Neth.) (showing that civil courts were able to resolve commercial disputes using the *ius commune*—the learned Roman and canon laws—rather than any special merchant custom); Charles Donahue, Jr., *Medieval and Early Modern Lex mercatoria: An Attempt at the Probatio Diabolica*, 5 CHI. J. INT’L L. 21 (2004) [hereinafter Donahue, *Medieval and Early Modern*] (pointing out that no treatises or codifications of merchant-created customary commercial law seem to have been written by merchants and that the concept of a customary law merchant was unknown to the leading commercial jurist of the sixteenth century); Emily Kadens, *Order Within Law, Variety Within Custom: The Character of the*

existence of challenges to their theory.<sup>7</sup> The story simply holds too much symbolic power for modern advocates of private ordering looking to give the underpinning of historical legitimacy to their political and economic theories about how law is and should be made.<sup>8</sup>

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*Medieval Merchant Law*, 5 CHI. J. INT'L L. 39 (2004) (arguing that commercial law did not develop in isolation from the state); Stephen E. Sachs, *From St. Ives to Cyberspace: The Modern Distortion of the Medieval "Law Merchant,"* 21 AM. U. INT'L L. REV. 685 (2006) (demonstrating that English fair courts were neither merchant established nor staffed by merchant judges, that these courts did not judge according to a substantive law merchant, and that the rules they expressed were not uniform and universal even within England); Oliver Volckart & Antje Mangels, *Are the Roots of the Modern Lex Mercatoria Really Medieval?*, 65 S. ECON. J. 427 (1999) (using economic history to demonstrate that no *lex mercatoria* could have formed in the eleventh century); Alain Wijffels, *Business Relations Between Merchants in Sixteenth-Century Belgian Practice-Orientated Civil Law Literature*, in FROM LEX MERCATORIA TO COMMERCIAL LAW, *supra*, at 255 (showing that merchant custom was local). A few legal scholars have begun to acknowledge the historical criticisms. See Christopher R. Drahozal, *Contracting Out of National Law: An Empirical Look at the New Law Merchant*, 80 NOTRE DAME L. REV. 523, 527–28 (2005) (citing several criticisms of a uniform *lex mercatoria* and expressing similar skepticism); Ralf Michaels, *The Mirage of Non-state Governance*, 2010 UTAH L. REV. 31, 37–38 (citing several criticisms of a uniform *lex mercatoria* and stating that “[*lex mercatoria* as non-state law is a myth”); Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 IND. J. GLOBAL LEGAL STUD. 447, 453–54 (2007) (citing sources rebuking *lex mercatoria* as non-state law).

7. For a nonexhaustive list of articles (excluding student notes) in American law reviews from the last three years that refer explicitly and positively to the medieval law merchant story, see Benito Arruñada, *Institutional Support of the Firm: A Theory of Business Registries*, 2 J. LEGAL ANALYSIS 525, 532 n.8 (2010); H. Allen Blair, *Hard Cases Under the Convention on the International Sale of Goods: A Proposed Taxonomy of Interpretative Challenges*, 21 DUKE J. COMP. & INT'L L. 269, 276 (2011); Isaac DiIanni, *The Role of Competition in the Market for Adjudication*, 18 SUP. CT. ECON. REV. 203, 227 (2010); Bryan Druzin, *Buying Commercial Law: Choice of Law, Choice of Forum, and Network Externalities*, 18 TUL. J. INT'L & COMP. L. 131, 161–62 (2009); Bryan Druzin, *Law Without the State: The Theory of High Engagement and the Emergence of Spontaneous Legal Order Within Commercial Systems*, 41 GEO. J. INT'L L. 559, 582–84 (2010); Nuno Garoupa & Carlos Gómez Ligüerre, *The Syndrome of the Efficiency of the Common Law*, 29 B.U. INT'L L.J. 287, 328–29 (2011); Ronald J. Gilson, Henry Hansmann & Mariana Pargendler, *Regulatory Dualism as a Development Strategy: Corporate Reform in Brazil, the United States, and the European Union*, 63 STAN. L. REV. 475, 502 (2011); Frederick B. Jonassen, *The Law and the Host of The Canterbury Tales*, 43 J. MARSHALL L. REV. 51, 59–60 (2009); Yvonne C.L. Lee, *The Governance of Contemporary Sovereign Wealth Funds*, 6 HASTINGS BUS. L.J. 197, 226 (2010); Amnon Lehari & Amir N. Licht, *BITs and Pieces of Property*, 36 YALE J. INT'L L. 115, 149 (2011); Michael W. McConnell, *Non-state Governance*, 2010 UTAH L. REV. 7, 8; Michael L. Rustad & Maria Vittoria Onufrio, *The Exportability of the Principles of Software: Lost in Translation?*, 2 HASTINGS SCI. & TECH. L.J. 25, 44 (2010); Timothy Sandefur, *Does the State Create the Market—And Should It Pursue Efficiency?*, 33 HARV. J.L. & PUB. POL'Y 779, 785 (2010); Gregory C. Shaffer, *How Business Shapes Law: A Socio-legal Framework*, 42 CONN. L. REV. 147, 167 (2009); Martha Simo Tumnde, *Harmonization of Business Law in Cameroon: Issues, Challenges and Prospects*, 25 TUL. EUR. & CIV. L.F. 119, 132 (2010); and Jeffrey C. Tuomala, *Marbury v. Madison and the Foundation of Law*, 4 LIBERTY U. L. REV. 297, 320 (2010).

8. Nikitas E. Hatzimihail, *The Many Lives—and Faces—of Lex Mercatoria: History as Genealogy in International Business Law*, LAW & CONTEMP. PROBS., Summer 2008, at 169, 173 (“‘History’ adds to the symbolic capital of *lex mercatoria* and confers on it . . . a venerable pedigree. . . . That the mercatorists’ historical imagery persists in spite of these refutations suggests that what matters, for the debate, is not so much what actually happened, but what projections into the past align best with present circumstances and what constructions of the past are used to justify explanations of the present.”); see also BENSON, *supra* note 1, at 30 (“[T]he ‘Law Merchant[]’ effectively shatters the myth that government must define and enforce ‘the rules of the game.’”);

Inconveniently, however, the historical evidence does not bear out the law merchant tale. To the extent that merchants did indeed invent a special set of uniform and universal rules governing long-distance trade across premodern Europe, those legal rules usually arose from contract and legislation rather than from custom. Commercial custom did exist, but it was primarily local.

The reason for this, this Article argues, relates to the nature of custom and legal borrowing. Unless merchant customs arose spontaneously and identically in every place they were found,<sup>9</sup> then the *lex mercatoria* story

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TRAKMAN, *supra* note 3, at 40 (“Just as the medieval Law Merchant revealed that the progress of law lay in the actual practices of businessmen, so conventional trade demands that law adapt to the current course of international commerce. Just as medieval adjudicators sought to ascertain the conduct of merchants within the framework of business itself, a similar obligation now rests upon the upholders of this modern Law Merchant to develop trade law on a similarly commercial foundation.”); Carbonneau & Firestone, *supra* note 4, at 59 (“Malynes’ recognition of the non-national status of the law merchant is significant, illustrating that the interest of the commercial community in a uniform law should not be defeated by national political rivalries or local pride.”); Caruso, *supra* note 5, at 50–51 (“Widely practiced in the Middle Ages, then buried for a long time under a dominant Westphalian logic, *lex mercatoria* is again in vogue. The successful ‘privatization’ of merchants’ disputes rests upon the intuition that when private parties deal with one another across state borders, there are good reasons to depart from state-based rules or courts, and to switch instead to private mechanisms for lawmaking and dispute resolution.” (footnotes omitted)); Leon E. Trakman, *The Evolution of the Law Merchant: Our Commercial Heritage*, 12 J. MAR. L. & COM. 1, 5 (1980) (“The socio-economic features which typified this ancient Law Merchant also constituted the reasons for its subsistence. There was the underlying need to promote trade based upon freedom . . . . Rulers who sought by means of national law to rigidify this free commerce would inhibit the success of exchanges in the market place . . . . The only law which could effectively enhance the activities of merchants under these conditions would be suppletive law, *i.e.*, law which recognized the capacity of merchants to regulate their own affairs through their customs, their usages, and their practices.”).

9. It is entirely possible that sales rules did arise more or less identically and spontaneously in every market of Europe. First, medieval European countries shared only two foundational sets of legal rules: the Roman law and the Germanic customs. If sales rules evolved solely from these foundations, it would not be surprising that many areas ended up with the same laws. Second, every sale involves the same set of fundamental legal problems, and only a limited number of possible viable solutions exist. Thus, again, many markets could have arrived at identical rules. However, such laws of the sale of goods would apply to all sales, not just those involving merchants engaged in supralocal commerce. The hypothesis of the law merchant theory is that long-distance traders had to develop their own *unique* rules in order to transcend the differences among local customary law. *See, e.g.*, BENSON, *supra* note 1, at 32 (“By the twelfth century, mercantile law had developed to a level where alien merchants had substantial protection in disputes with local merchants and ‘against the vagaries of local laws and customs.’”); Gilson, Hansmann & Pargendler, *supra* note 7, at 502 (“The medieval law merchant, a transnational body of commercial law—distinct from the general law of the era, and with its own separate courts—arose among merchants across Europe . . . .”); Hardy, *supra* note 1, at 1020 (“[T]he Law Merchant existed in some sense apart from and in addition to the ordinary rules of law that applied to non-merchant transactions.”); Hatzimihail, *supra* note 8, at 171, 177 (“[A]ll mercatorists seem to share a minimum degree of commitment to, and desire for, the existence of certain norms . . . distinct from—and possibly transcending—‘traditional’ state law and ‘municipal’ legal forms and institutions. . . . Schmitthoff presents medieval law as a body, a complex of customary rules that are truly international. These rules were thus not created by political institutions and sovereigns of ‘local’ scope.”); Trakman, *supra* note 5, at 630 (“Cosmopolitan in nature and adaptable in operation, the Law Merchant was meant to transcend the law of local princes . . . .”).

implicitly assumes that the users of those customs transmitted them from market to market and fair to fair.<sup>10</sup> The literature of legal transplants is extensive, but transplant scholars do not appear to have inquired into the characteristics of laws that can be borrowed successfully.<sup>11</sup> Most studies of legal transplants concern fully expressed, normally written rules.<sup>12</sup> The hypothesis of this Article is that such rules can be borrowed or shared in part because they are sufficiently capable of a definite and bounded articulation. The borrower or sharer can, in other words, state the rule and describe how it works or what it is supposed to accomplish.<sup>13</sup> Unlike lawmaking that originates in the express consent of the legislator or the contracting parties, lawmaking through custom rarely fulfills the criteria of definiteness and articulation. Custom often lacks the sort of boundaries and definition created by the expression of a publicly or privately legislated rule at the point of its enactment. This suggests that it is highly improbable that medieval merchants could have created, transmitted, and maintained a body of commercial customs that remained uniform from place to place.

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10. See, e.g., Baron, *supra* note 4, at 116 (“[T]he laws of particular towns, usually those that were trade centres, inevitably grew into dominant codes of custom of transterritorial proportions.”); Zywicki, *supra* note 3, at 1595 (“[T]he law merchant eventually migrated to England through the pressures of international trade as England joined the family of commercial nations.”).

11. Classification of legal transplants tends to focus on the recipient legal system rather than on the type of law borrowed. See, e.g., Daniel Berkowitz et al., *The Transplant Effect*, 51 AM. J. COMP. L. 163, 181 (2003) (arguing that the means of transplant and the character of reception are the best predictors of long-term transplant success); Inga Markovits, *Exporting Law Reform—But Will It Travel?*, 37 CORNELL INT’L L.J. 95, 98–102 (2004) (categorizing transplants in terms of how much effort is required by the recipient to make the transplant successful); Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839, 845–67 (2003) (classifying transplants by the reason for the adoption of the transplant); Max Rheinstein, *Types of Reception*, ANNALES DE LA FACULTÉ DE DROIT D’ISTANBUL, no. 6, 1956, at 31, 31–33 (differentiating between imposed and voluntary legal transplants). The author would like to thank Lisa Kinzer at The University of Texas School of Law for her excellent research assistance into legal transplants.

12. See, e.g., Berkowitz et al., *supra* note 11, at 173 (borrowing of French and German civil codes); Li-Wen Lin, *Legal Transplants Through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example*, 57 AM. J. COMP. L. 711, 738 (2009) (borrowing of contract terms); Miller, *supra* note 11, at 848–50 (borrowing of administrative regulations); Joel M. Ngugi, *Promissory Estoppel: The Life History of an Ideal Legal Transplant*, 41 U. RICH. L. REV. 425, 493–97 (2007) (borrowing of judicial doctrine); Bradley J. Nicholson, *Legal Borrowing and the Origins of Slave Law in the British Colonies*, 38 AM. J. LEGAL HIST. 38, 42 (1994) (borrowing of medieval English vagabond laws); Carlos F. Rosenkrantz, *Against Borrowings and Other Nonauthoritative Uses of Foreign Law*, 1 INT’L J. CONST. L. 269, 273 (2003) (borrowing of the U.S. Constitution); Jan M. Smits, *Import and Export of Legal Models: The Dutch Experience*, 13 TRANSNAT’L L. & CONTEMP. PROBS. 551, 553–54 (2003) (borrowing of Dutch civil code).

13. See, e.g., Paul Edward Geller, *Legal Transplants in International Copyright: Some Problems of Method*, 13 UCLA PAC. BASIN L.J. 199, 209–13 (1994) (discussing the importance of articulating the transplant so that the recipient community will accurately understand and implement the rule); Edward M. Wise, *Transplant of Legal Patterns*, 38 AM. J. COMP. L. (SUPP.) 1, 6 (1990) (“[I]t helps if the foreign system has been set out in writing, in a familiar language, in a form open to easy consultation, in a more or less systematic fashion, [and] in detail . . .”).

Nevertheless, because this Article does not challenge the claim that many merchants across Europe employed bills of exchange or insurance policies, or made partnership agreements that might have taken similar forms and included nearly identical language, one could maintain that these largely invariant contracts formed a transnational law merchant. Certainly contracting is private ordering, but in making contracts, medieval merchants did not create a special form of private ordering that differentiated either long-distance traders from others of the time or the medieval business environment from the modern one. Furthermore, if only the contract forms became widespread, while the underlying gap-filling customs remained local, such a law merchant would merely describe a set of express contractual terms without giving judges and arbitrators a widely shared body of customary law by which to decide cases. This is not the sort of law merchant to which its modern advocates want to point to justify the jurisprudence underlying Article 2 of the Uniform Commercial Code, World Bank-sponsored economic-development policies, decision making in international commercial arbitration, or theories of private ordering in the business world.

The mercatorists might object that medieval merchants could not have carried out the international commerce in which they unquestionably engaged without an overarching transnational law that insulated them from the vagaries of local courts and provided rules in the absence of a law-making state. In fact, the traders managed quite well without a shared law merchant because contracting was not itself international. Merchants did business face-to-face, and even the Middle Ages had default jurisdictional and conflicts-of-law rules. Furthermore, where foreign merchants gathered, so did intermediaries such as brokers, hostellers, and notaries. These professions existed to mediate differences between buyers and sellers. And when disputes arose, the decision makers may rarely have settled them on the basis of customary rules of decision. Court records instead suggest that most disagreements rested on questions of fact, good faith, and fairness rather than law.

The Article begins by presenting a definition of custom that permits us to distinguish between legislative or contractual rules made through express consent and custom made through behavior, and between nonbinding practices and binding legal customs. This definition demonstrates that most of the areas of commerce long thought to compose a broadly shared law merchant evolved from contract or legislation rather than custom. Of course, custom did play at least a gap-filling role in these widespread commercial techniques. Part II, however, argues that the gap fillers were usually not uniform and universal but rather local and contested, and then attempts to explain why custom could not provide a system of uniform rules of decision. Instead, as Part III shows, merchants sometimes felt it necessary to turn to judicial decisions and statutes to establish clearer commercial rules than custom could provide. Finally, Part IV offers evidence that medieval

merchants could have completed sales transactions successfully without requiring an exceptional, transnational law merchant.

### I. Custom Versus Contract

Contracts and customs both represent forms of private ordering. Yet some types of medieval commercial private ordering, such as the bill of exchange or the marine insurance policy, demonstrated the ability to spread and become relatively uniform and universal, while other aspects, such as many gap-filling customs, did not. The difference seems to lie in the transferability of express rules arising from contract and statute as opposed to the variability and localism of underarticulated rules arising from behavior. A sharper definition of custom than is commonly used in modern scholarship will help make this distinction clearer.

According to Alan Watson, godfather of the theory of legal borrowing, transplanting rules from one society to another is a “fertile source of [legal] development.”<sup>14</sup> But in the growing list of studies of legal transplants, the evidence of the transmission of an unwritten custom from its birthplace to another community is slim.<sup>15</sup> One well-known example of borrowed custom suggests the reasons why such transplants do not happen often. During the Middle Ages, established German towns exported their urban law to newly settled “daughter” towns across Germany and Eastern Europe.<sup>16</sup> Where the “mother” town’s law was customary, unwritten, and not preserved in an ordered form in the memory of a speaker of the oral law, the daughter town could often not know its own law until a dispute arose and the town sent the question to the lay judges of the mother (or grandmother) town for a ruling.<sup>17</sup> That the adoption of its laws by a daughter town was often the reason a

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14. ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 95 (2d ed. 1993).

15. *Cf.* ALAN WATSON, *LEGAL ORIGINS AND LEGAL CHANGE* 95 (1991) (discussing the transmission of medieval Saxon custom and claiming “even custom transplants”). However, Watson is referring to a written version of that custom in the form of Eike von Repgow’s thirteenth-century *Sachsenspiegel*. *Id.* A written custom is no different from a written statute. Compare the difficulties surrounding borrowing of the unwritten English constitutional structure, called the Westminster model. *See* Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 *COLUM. HUM. RTS. L. REV.* 309, 315–19 (1995) (discussing Israel’s struggles in borrowing the English Westminster model because of the difficulty of determining the content of rules—such as the guarantee of civil rights—which were never fully expressed or written in England); Andrew Harding, *The ‘Westminster Model’ Constitution Overseas: Transplantation, Adaptation, and Development in Commonwealth States*, 4 *OXFORD U. COMMONWEALTH L.J.* 143, 147–48 (2004) (stating that “the unwritten nature of the Westminster constitution, especially its important conventions, [was] clearly inappropriate for export” and noting that all but one or two of the recipients chose to commit the constitution to writing); Tracy Robinson, *Gender, Nation and the Common Law Constitution*, 28 *OXFORD J. LEGAL STUD.* 735, 742–43 (2008) (noting that lawyers in the Caribbean felt somewhat like “poets” in trying to interpret their Westminster constitution, relying on local history to try to make sense of the model).

16. JOHN P. DAWSON, *THE ORACLES OF THE LAW* 157 (1968).

17. ALAN WATSON, *SOURCES OF LAW, LEGAL CHANGE, AND AMBIGUITY* 35 (1984); *see also* DAWSON, *supra* note 16, at 162–65 (giving examples of cases put to the mother towns).

mother town wrote down its laws demonstrates the difficulty of transporting oral custom from place to place.<sup>18</sup>

By contrast, merchants could share contractual mechanisms easily. Merchant *A* learned about a new way of transferring funds or establishing an agency relationship created by Merchant *B*, and he duplicated the terms. Perhaps he used the same notary who drew up the first document or one of the contract-form books that existed in the Middle Ages. New terms that came to be added to the contract by innovative parties could similarly spread through imitation.

The contract of marine insurance offers an apt example. Italian merchants evolved insurance from earlier forms of risk-shifting contracts during the fourteenth century.<sup>19</sup> They then carried that contract with them to other parts of Europe so that by the mid-fifteenth century the technique had become widely known.<sup>20</sup> At first, the Italians retained control over the insurance industry, even in foreign cities. Until the 1540s, for instance, Italians wrote all insurance policies issued in London, and they drafted the contracts in Italian. By the late 1540s, the English began to underwrite policies themselves, first using the old Italian contracts and then, in the following decade, translating them into English.<sup>21</sup> At first, the English policies repeated their Italian predecessors; but the English observed the innovations introduced in the Antwerp insurance market, and by the 1570s, English policies had adopted Antwerp rules by taking over certain clauses from Antwerp-issued policies.<sup>22</sup>

Similarly, every bankruptcy law established in northern Europe during the sixteenth century derived ultimately from the statutory systems created in the late-medieval northern Italian towns, and those towns adapted their law from laws created during the Roman Empire.<sup>23</sup> Each urban or national statute altered the rules somewhat to reflect local preferences or perhaps to attempt to improve upon what went before. Nonetheless, once again the pattern of borrowing is clear. The Italian laws were originally written in Latin, a language known across Europe. The organization of the bankruptcy

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18. WATSON, *supra* note 17, at 35.

19. 1 J.P. VAN NIEKERK, *THE DEVELOPMENT OF THE PRINCIPLES OF INSURANCE LAW IN THE NETHERLANDS FROM 1500–1800*, at 5–7 (1998).

20. *Id.* at 7; The Verie True Note and Manner of the Common or Ordinarie Pollicies After th'Order of Barsalona (British Library, Add. MS 48020, fol. 346r.) (c. 1580) [hereinafter The Verie True Note] (claiming Lombards brought insurance usage to London from Barcelona).

21. David Ibbetson, *Law and Custom: Insurance in Sixteenth-Century England*, 29 J. LEGAL HIST. 291, 292 (2008).

22. Guido Rossi, *The London "Booke of Orders": A 16th Century Civil Law Code in England*, 19 MAASTRICHT J. EUR. & COMP. L. (forthcoming 2012).

23. JEAN HILAIRE, *INTRODUCTION HISTORIQUE AU DROIT COMMERCIAL* 307 (1986); see also Dave De ruysscher, *Designing the Limits of Creditworthiness: Insolvency in Antwerp Bankruptcy Legislation and Practice (16th–17th Centuries)*, 76 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS [LEGAL HIST. REV.] 307, 311 (2008) (Neth.) (explaining how Antwerp's liquidation procedure was influenced by Italian law).

process could be observed by foreign merchants and explained by those involved in it, and that information could be carried to other parts of Europe.<sup>24</sup> This sort of legal borrowing has happened repeatedly throughout Western history.

To understand why custom does not lend itself to borrowing as readily as contracts or statutes, we must first establish a meaning for the term *custom*. The mercatorists tend to use the word loosely to refer to whatever merchants did. As a result of such inexactness, scholars inadvertently elide distinct categories of rules, which hinders careful discussion about the history of commercial law. Without being able to distinguish between customary rules on the one hand and contracts, statutes, and nonbinding business techniques on the other, we cannot accurately test claims about the purview and limits of spontaneous legal ordering.

#### A. *The Definition of Custom*

The definition of custom offered here is that developed by the medieval Roman law jurists. It focuses on the narrow use of the term *custom* as referring to a form of legally binding rules. According to the great fourteenth-century jurist Bartolus of Sassoferrato, a custom consisted of a repeat behavior to which the relevant majority of the community had tacitly consented to be bound to perform.<sup>25</sup> This definition requires some unpacking. Custom for medieval jurists was law. Latin, like most European languages besides English, has two words to describe law, and having two words helps to avoid confusion when talking about custom as law. The Latin word denoting the general concept of law is *ius*, while the word for enacted law is *lex*. *Ius*, in the view of the medieval jurists, had at least two components: enacted law (*lex*) and custom.

But if custom was *ius*, it was law of a quite different quality than *lex*. The latter was imposed through statutes and the texts of the Roman and canon law. Custom was made bottom-up by the behavior of a specific community. The law giver created *lex* at a particular moment in time by his express consent. The community established custom over a period of time by performing certain actions repeatedly in such a way as implicitly to indicate that the members had accepted that they must perform such actions. *Lex* came into force prospectively at the moment of its enactment. Custom, and its binding nature, had to be deduced by looking backward at the behavior of the community.

Custom and *lex*, therefore, were, in theory, fairly easily distinguished: tacit versus express consent, repeated acts versus a single moment of

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24. See, e.g., Strangers and the Bankruptcy Laws (National Archives, SP 12/146 f. 232) (c. 1580) (quoting English merchants comparing English bankruptcy law to Dutch and Flemish bankruptcy law).

25. BARTOLUS, IN PRIMAM DIGESTI VETERIS PARTEM COMMENTARIA 19r. (Turin, Nicholaus Beulaquam 1574) (*repetitio ad Dig. 1.3.32, §§ 6–7*).

creation, and retrospective versus prospective. The real difficulty lay in distinguishing between mere repeat behavior (usage) and repeat behavior to which the community had tacitly consented to be bound (custom). Bartolus pointed out that in common speech the word *custom* had three meanings.<sup>26</sup> It could be used to describe an act an individual did routinely; what we might more accurately call a habit. Next, it could refer to a practice that some group of people followed, which Bartolus called a usage (*usus seu mos*).<sup>27</sup> For Bartolus, a usage was a “fact” describing behavior, but it was not itself a rule of decision that obligated the parties legally. In the third meaning, *custom* was the law that resulted from a usage followed by the majority of the community once they had tacitly consented to be bound to perform that usage. In the view of the jurists, only this final category was the province of legal discussion, and only it created a legally obligatory rule of behavior.<sup>28</sup> Thus, the distinction between usage and custom was that between what people *may* do and what they *must* do.

The question of how a nonbinding usage was found to be, and articulated as, a binding custom vexed the medieval jurists, as it does modern scholars.<sup>29</sup> Arguably, the difficulty of determining where usage ends and custom begins is not a problem to be solved but is instead a characteristic inherent and unavoidable in the process of bottom-up rule making. Although the jurists said that a “usage of something is required for the introduction of a custom,”<sup>30</sup> mere repeated acts, even if performed by the entire community, did not suffice to show that a usage was binding. The thirteenth-century

26. *Id.* (*repetitio ad Dig.* 1.3.32, § 6). Bartolus briefly summarized the three meanings:

First, therefore, I ask what custom is. And lest we should enter into ambiguity, let it be known that according to the doctors custom is understood to have three meanings. The first is something done from the habits of men . . . which [sort of] custom also occurs in animals . . . , and we are not speaking of it here. Second, custom is derived from the acts of many people, and this is called a usage or mores. . . . Third, custom is derived from the law that results from the usage or mores of many people, and this is what we are talking about here. [“Primo igitur quaero, Quid sit [con]suetudo? Et ne in aequiuocum procedamus, sciendam est s[ecundu]m doct[orum] q[uod] [con]suetudo sumitur trib[us] mod[is]. Primo pro assuefactione hominis. Quae [con]suetudo accidit et[iam] in animalibus . . . & de hoc non loquimur hic. Secundo accipitur [con]suetudo, pro facto plurium personarum, & istud appellatur usus seu mos. Tertio accipit [con]suetudo p[ro] iure, quod resultat ex usu seu moribus plurium personarum, & sic loquitur hic.”].

*Id.* (citations omitted).

27. *Id.*

28. *Id.*

29. See JAMES M. DONOVAN, LEGAL ANTHROPOLOGY: AN INTRODUCTION 12–13 (2008) (describing various conflicting attempts to create a principled typology of social norms and concluding that “no accepted, principled typology of social norms is currently available”); Emanuele Conte, *Roman Law vs Custom in a Changing Society: Italy in the Twelfth and Thirteenth Centuries*, in CUSTOM: THE DEVELOPMENT AND USE OF A LEGAL CONCEPT IN THE MIDDLE AGES 33, 34 (Per Anderson & Mia Münster-Swendsen eds., 2009) (“In fact, for Savigny—as for everyone else—it was easy to define the abstract idea of custom, but difficult to analyze its real content.”).

30. L. WAELKENS, LA THÉORIE DE LA COUTUME CHEZ JACQUES DE RÉVIGNY 489 (*repetitio ad Dig.* 1.3.32, § 4) (1984) (“exigitur ad consuetudinem usus rei inducende”).

French law professor Jacques de Révigny used the examples of a mill at which the whole city milled its grain or the habit of all the men of a city to go on pilgrimage to Santiago de Compostela in Spain:

[I]f they go [on pilgrimage] over the course of ten or twenty years, you must conclude that they therefore *may* go. I say the same concerning the mill. Everyone has gone to your mill for ten or twenty years. You can conclude that there is therefore a practice that they may go, [but] not that they can be compelled [to go].<sup>31</sup>

In other words, for a usage to become a custom, it must switch from being permissive to being mandatory.

For the medieval jurists, the factor distinguishing usage from custom was the existence in the latter of the tacit consent of the majority of the community.<sup>32</sup> Thus, the community did not need to articulate the custom to be bound to it. But tacit consent was, by its nature, difficult to prove, and this is one place the jurists' theory began to run into significant problems. Many jurists contended that the demonstration of tacit consent required someone to behave contrary to the usage and consequently to incur the objection of others.<sup>33</sup> This objection might take the form of community sanction or could be raised in the context of a lawsuit.<sup>34</sup> From that point,

31. *Id.* at 490 (*repetitio ad Dig.* 1.3.32, § 4) (“Set si iuerunt, x. uel xx. anni sunt elapsi, debes concludere: ergo possunt ire. Sic dico de molendino. Omnes iuerunt ad molendinum tuum per annos x. uel xx. Posses concludere: ergo consuetudo est quod est quod possent ire, non possent compelli.”).

32. *Id.* at 485–86 (*repetitio ad Dig.* 1.3.32, § 2) (“[Q]uia statutum est habito tractatu in communi et expresso quod sit ius in futurum. Set si sic tacite uteretur populus uel maior pars populi una die, non est statutum nec est ius consuetudinarium, nisi sequatur tantum tempus quod exigitur ad consuetudinem inducendam. Vnde dico quod ‘expressum’ et ‘tacitum’ sunt differentie et per quas differunt statutum et consuetudo . . .”).

33. *Id.* at 488 (*repetitio ad Dig.* 1.3.32, § 4).

34. The jurists clearly expected litigation to be one of the forms in which the adjudication of contrary acts would occur, since they debated how many lawsuits were required to establish the existence of tacit consent. *See, e.g.*, GLOSSA ORDINARIA at Dig. 1.3.32 v. *inveterata* (“But how is a custom introduced during the decade? Response: if it had been twice litigated in that time, or a judge rejected a suit or a complaint as contrary to the language of the custom. . . . Likewise during a decade, thus if the [lord in] power twice judged in the same spirit in during a council that had been convoked, henceforth this should be the custom, though not based on badly adjudged examples, but on well judged ones. Or say that not one but many examples.” [“[S]ed qualiter decennio consuetudo introducitur? R[esponsum] si bis fuerit iudicatum in illo tempore, vel libellum, vel querimoniam propositam contra talem consuetudinem spreuerit iudex . . . vt si Potestas bis iudicabit concilio co[n]uocato eo animo, vt sit consuetudo deinceps. [V]el non exe[m]plis male iudicantis, sed bene sic. Vel dic no[n] exe[m]plis vni[us] sed multorum.”]); *see also* WAELKENS, *supra* note 30, at 493 (*repetitio ad Dig.* 1.3.32, § 6) (“Thus, someone wishes to prove a custom. If he proves that it had been adjudged between Titius and Maevius, and secondly that it had been adjudged between others, the judge before whom the custom is proved should look into the first sentence and into the second.” [“Vnde aliquis uult probare consuetudinem. Si probat quod ita fuit iudicatum inter Titium et Meuium, item quod secudo fuit iudicatum inter alios, iudex coram quo probatur consuetudo inquireret in prima sententia et in secunda.”] (citations omitted)).

Some jurists recognized that the assumption that customs would be determined through multiple lawsuits raised a question about the extent of the community's consent. Litigation meant that at

assuming that the objection successfully established the majority's consent, the community knew itself to be bound.

This raises a neat issue of temporality in the usage–custom time frame. Custom, as a backward-looking form of law, is only known to exist once the tacit consent is proven, but the tacit consent could have been in place well before a contrary act gave reason for it to be proved. Thus, the demonstration of a custom is evidence of something that might already have existed for years. The only difference after proof of consent is that the community knows it must henceforth follow the custom, whereas before, when the practice was, technically, only a usage, they followed it because they felt that they may do so. Of course, as long as no one had acted contrary to the practice, it was not necessary to determine whether the behavior was a usage or a custom because the community was acting unanimously regardless of the actual legal status of the practice.

This definition of custom, though it may be criticized as too limiting and though it certainly (as the jurists realized) has its weaknesses, has two advantages here. First, the jurists' definition was widely accepted during the Middle Ages as explaining how customs functioned as law. As the learned definition found its way into vernacular discussions of customary law, it may even have been familiar to the merchants and to judges in urban and fair courts.<sup>35</sup> Second, the definition allows us to separate a legislated or contractual rule made by express consent from a customary rule made by behavior tacitly consented to, and to separate a merely habitual practice, such as using a common form contract, from a practice that the community agrees is binding, such as an understanding that a thief in the chain of title does not vitiate a good-faith purchase for value.<sup>36</sup>

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least one party was arguing, in good faith, against the custom, and multiple suits indicated that multiple people in the community disagreed that a certain behavior was binding on them.

35. See, e.g., JEAN BOUTILLIER, *SOMME RURALE* 3 (Louis Chardonas le Caron ed., Paris, Barthelemy Macé 1603) (“[U]nwritten law is custom . . . held and kept up in common knowledge [notoriously] and equivalent to law by the approbation of the old people of the land, such that no one is seen presently to do the opposite.” [“Droit non escrit est la coustume . . . tenuë & gardée notoirement, & equipolle à loy par l’approbation des anciens du païs, en maniere qu’on n’ait point veu entre les presens le contraire.”]); PHILIPS WIELANT, *PRACTIJSKE CIVILE* 27, pt. 1, cap. 29 (Amsterdam, Cornelis Claesz. 1598) (defining custom as “an unwritten law, introduced by usages and acts continually repeated by people or by practitioners, which are publicly followed, without the opposition of the majority of the people, for [a] long enough time to prescribe a custom” [“Costume is recht niet gescreve[n] inbrocht by usantien ende co[n]tinuele acten van anderlingen ofte practisienen openbaerlijck gheuseert, sonder weder seggen vander meeste menichte van volcke soe langen tijt als om costume te moge[n] prescriberen.”]).

36. Cf. H.L.A. HART, *THE CONCEPT OF LAW* 44–45 (2d ed. 1994) (“The first [question] is whether ‘custom as such’ is law or not. . . . Failure to take off a hat to a lady is not a breach of any rule of law; it has no legal status save that of being permitted by law. This shows that custom is law only if it is one of a class of customs which is ‘recognized’ as law by a particular legal system.”); K.N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* 275 (William S. Hein & Co. 2002) (1941) (arguing that the concepts of custom and mores “are ambiguous. They *fuse* and *confuse* the notion of ‘practice’ (say, a moderately discernible line of actual behavior) with the notion of ‘standard’ (say, an actually held

In other words, just because merchants all opted to use a particular form contract or just because they all used the same wording in a bill of exchange did not make that form or that wording a custom in the narrow sense of a legally binding rule. The form and the bill were essentially business techniques rather than law. As with modern financial and commercial mechanisms, the business techniques of medieval merchants could become widespread, but they did not necessarily become law unless, for instance, a court or legislator adopted some or all of their constituent parts and made them so, or a group of merchants chose to refuse to accept a contract or bill unless it contained certain language. If a court found that a bill of exchange was invalid because it was missing certain words or that a term should be implied in a contract that lacked it because all contracts of that sort must be assumed to have that provision, then the court was retrospectively finding (or creating) a custom and thus turned the contractual language or implied term into law.<sup>37</sup> Short of that, the contract language remained a usage that bound no one but the parties expressly opting to employ it no matter how common the particular form had become.<sup>38</sup>

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ideal of what the proper line of actual behavior should be”); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997) (defining *norms* as “informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external non-legal sanctions, or both”); Richard A. Posner, *Social Norms and the Law: An Economic Approach*, 87 AM. ECON. REV. (AM. ECON. ASS’N PAPERS & PROC.) 365, 365 (1997) (defining a social norm as “a rule that is neither promulgated by an official source, such as a court or a legislature, nor enforced by the threat of legal sanctions, yet is regularly complied with (otherwise it wouldn’t be a rule)” and including in this category “rules of etiquette, including norms of proper dress and table manners; the rules of grammar; and customary law in prepolitical societies and private associations”).

37. It is necessary here to distinguish between custom being used to interpret contract and implied contract because the two may look very similar. Although both depend upon tacit consent, they are distinguishable in the quality and timing of that consent. In contract, a limited number of opposing or complementary parties, e.g., buyer and seller, voluntarily agree to be bound to the implied terms at the moment they make the contract. With a custom, the community has over time tacitly assented to be bound by a certain law whether or not the members of the community would choose that rule at any given moment of contracting. Thus, implied contract assumes the agreement of two or more particular parties at a moment of private lawmaking. Custom assumes the agreement of a whole community established over a period of time in an act of public lawmaking. As such, custom is law, and if the parties do not want it to control an agreement, they must contract around it (if they may). By contrast, were a dispute to arise about whether an implied term was included in their contract, the party asserting it would have to show that his counterparty had agreed to it, albeit tacitly. See Walter Ullmann, *Bartolus on Customary Law*, 52 JURIDICAL REV. 265, 270 (1940) (describing Bartolus’s discussion of the difference between contract and custom).

38. See Cordes, *supra* note 6, at 62–63 (“As early as the tenth and eleventh centuries, notaries in Genoa and Pisa drew up certain contracts in company law, namely the commenda contracts, in a fully standardized form. Those formulas had most likely proved their practical merit; at the same time all participants must have become acquainted with them and have learned to conduct business using these standardized contracts. It is crucial in this context, though, that there is not the slightest hint that a privilege *had* to be granted in a certain way or that a contract *had* to be drafted with those standard formulas. This would have been a precondition for a fixed body of law.” (footnote omitted)).

*B. The Contractual and Statutory Law Merchant*

If we take Bartolus's definition of custom as repeat behavior to which the community has tacitly consented to be bound and apply it to the constituent elements of commercial law, we will see that those aspects of commerce that the original law merchant apologists of the sixteenth and seventeenth centuries described as uniform and universal originated in contract or statute rather than custom. For mercatorists today, the law merchant primarily concerns sales transactions,<sup>39</sup> and sales rules may well have originated in custom. But when the term *law merchant* was used in the past to refer to substantive commercial rules, it did not encompass the law of sales. Instead, the law merchant concerned those mercantile technologies whose use distinguished merchants and bankers from mere local traders: bills of exchange, insurance, brokers, proto-corporate structures, maritime shipping, and bankruptcy.

The invocation of the term *law merchant* to refer to a uniform and universal merchant-created customary body of law is an invention of the nineteenth and twentieth centuries. It appears in the famous history of commercial law by the *Volksgeist*-influenced scholar Levin Goldschmidt in nineteenth-century Germany;<sup>40</sup> in the brief, accessible book on the law merchant by William Mitchell in 1904;<sup>41</sup> in the writings about modern transnational law by Berthold Goldman in the 1960s;<sup>42</sup> in the popular survey history of Western law by Harold Berman in 1983;<sup>43</sup> and in the books and articles by the libertarian legal and economic theorists Leon Trakman and Bruce Benson in the 1980s and 1990s.<sup>44</sup> However, these oft-cited works, each relying on the unproven and undocumented assertions made by its forerunners,<sup>45</sup> have not managed to put forth persuasive evidence to support their authors' visions of the law merchant.

39. BERMAN, *supra* note 1, at 334 ("The law merchant governed not only the sale, in the strict sense, but also other aspects of commercial transactions . . ."); Kenneth C. Randall & John E. Norris, *A New Paradigm for International Business Transactions*, 71 WASH. U. L.Q. 599, 608 (1993) ("The law merchant included what is now the law of admiralty, as well as rules respecting negotiable paper and sales.").

40. LEVIN GOLDSCHMIDT, *HANDBUCH DES HANDELSRECHTS* (Stuttgart, Verlag von Ferdinand Enke 1891); Laura R. Ford, *Max Weber on Property: An Effort in Interpretive Understanding*, 6 SOCIO-LEGAL REV. 24, 32–33 (2010) (reviewing Goldschmidt's views on commercial law history).

41. WILLIAM MITCHELL, *AN ESSAY ON THE EARLY HISTORY OF THE LAW MERCHANT* (1904).

42. See Hatzimihail, *supra* note 8, at 178 ("The key legal concept in Schmitthoff's story of medieval *lex mercatoria* is custom . . .").

43. BERMAN, *supra* note 1.

44. See *supra* notes 1–4.

45. A handful of examples illustrate the point. Cremades and Plehn claim that [t]he *Lex Mercatoria* was largely self-enforcing; a party who refused to comply with a merchant court's decision risked his reputation and could be excluded from trading at the all-important fairs where the merchant courts were located. Parties to a dispute rarely needed the aid of the local sovereign to enforce a merchant court's decision. The ability of the merchant class to both generate and enforce its own norms of

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behavior allowed it to achieve a large degree of independence from these local sovereigns.

Cremades & Plehn, *supra* note 1, at 319 (footnote omitted). These significant claims are supported by a single citation to Leon Trakman. *Id.* at 319 n.13 (citing Trakman, *supra* note 8, at 7, 15). Page fifteen concerns merchant judges. Trakman says that these judges “were generally selected from the ranks of the merchant class on the basis of their commercial experience, their objectivity and their seniority within the community of merchants.” Trakman, *supra* note 8, at 15. He goes on to explain that lay merchant judges were used rather than lawyers because of their superior knowledge of commerce and the needs of merchants. *Id.* In support of these details, he cites nothing. In support of his more general claim that “[t]he use of ‘merchant’ judges was a . . . feature of the Law Merchant era,” he cites MITCHELL, *supra* note 41, at 55 (providing only vague comments about merchant judges), 69 (discussing the creation of commercial courts by the king of France in the sixteenth century, but see the details on page 68 about the royal appointment of merchant court judges), and 71 (discussing the hanse-reeve in Germany, about whom, on page 70, Mitchell states “[t]here is no evidence to show that the hanse-reeve was . . . as a general rule elected by the merchants” and discussing the seventeenth-century commercial court of Leipzig, which was composed of “partly laymen and partly jurists”). Trakman, *supra* note 8, at 15. Trakman also cites 1 GERARD MALYNES, *CONSuetudo, VEL, LEX MERCATORIA* 309 (3d ed. London, J. Redmayne 1685). On that page, Malynes speaks only of the procedures in merchant courts. On the previous page, he mentions the “Priors and Consuls” who presided over the courts, but he does not describe them or their qualifications in any way. MALYNES, *supra*, at 308. Finally, Trakman cites generally, without pincites, *BOROUGH CUSTOMS* (Selden Society vol. 21, Mary Bateson ed., 1906) (not indicating volume); GOLDSCHMIDT, *supra* note 40, and ROBERT SABATINO LOPEZ, *THE COMMERCIAL REVOLUTION OF THE MIDDLE AGES, 950–1350* (1971). The *Borough Customs* book concerns only local English courts, which were presided over by the lord or his representative, not by merchant judges. Sachs, *supra* note 6, at 693–94. Lopez does not appear to discuss merchant courts at all. Goldschmidt does not appear to provide support for Trakman’s claims, and indeed in his most specific discussion of merchant courts, in Italy, he states that the judges on the commercial courts consisted of at least one Roman law-trained lawyer. GOLDSCHMIDT, *supra* note 40, at 170–71. At page seven, in addition to several general statements about the history of medieval commerce, Trakman makes sweeping claims unsupported by evidence, such as: “The law did little more than echo the existing sentiments of the merchant community,” and “The success of the concept of freedom among merchants lay in the community enjoyment which could readily be achieved by the growth of a pliable merchant regime, uninhibited by an aloof system of peremptory law.” The claim that “[s]upply and demand were conveniently satisfied in an unfettered exchange of goods and services,” is supported by a list of classical liberal and utilitarian works of political economy, such as Adam Smith, John Stuart Mill, and David Ricardo. Trakman, *supra* note 8, at 7. Such sources prove nothing about medieval commerce.

Also ultimately tracing back to Leon Trakman is Johnson and Post’s observation: “Nor could the local lord easily establish meaningful rules for a sphere of activity that he barely understood and that was executed in locations beyond his control. The result of this jurisdictional confusion was the development of a new legal system—*Lex Mercatoria*.” Johnson & Post, *supra* note 1, at 1389. Johnson and Post cite Bruce L. Benson, *The Spontaneous Evolution of Commercial Law*, 55 S. ECON. J. 644, 647 (1989), where Benson cites TRAKMAN, *supra* note 3, at 13. Trakman there writes about merchant court procedure and judges without making the claim that commercial courts were necessary because of the inability of princes to regulate commerce. *Id.*

For another example, consider a similar claim by Professor Hardy that the law merchant was simply an enforceable set of customary practices that inured to the benefit of merchants, and that was reasonably uniform across all the jurisdictions involved in the trade fairs. Two key elements of the Law Merchant for our purposes were first, that no statute or other authoritative pronouncement of law gave rise to its existence, and second, that the Law Merchant existed in some sense apart from and in addition to the ordinary rules of law that applied to non-merchant transactions.

Hardy, *supra* note 1, at 1020 (footnote omitted). For the second sentence, Hardy cites nothing. For the first sentence, Hardy cites TRAKMAN, *supra* note 3, at 11–12. Trakman, in turn, cites *Bank of Conway v. Stary*, 200 N.W. 505, 508 (N.D. 1924); *Bank of Conway* cites 3 JAMES KENT,

Unquestionably, the phrase *lex mercatoria* and others like it, such as *ius mercatorum* (right of merchants) and *usus mercatorum* (practice of merchants), have existed since the Middle Ages.<sup>46</sup> But no one has demonstrated a premodern belief that such terms referred to a transnational, substantive customary law.<sup>47</sup> Quite to the contrary, references to the law, right, or custom of merchants made between approximately the eleventh and sixteenth centuries most commonly signified special rules of procedure or proof,<sup>48</sup> and less often fair-court jurisdiction,<sup>49</sup> local market privileges granted to merchants by lords,<sup>50</sup> or location- or trade-specific ways of doing business that may or may not have risen to the level of binding customary

COMMENTARIES ON AMERICAN LAW 2 (14th ed., Boston, Little, Brown, & Co. 1896); and Kent cites 4 WILLIAM BLACKSTONE, COMMENTARIES \*67, who writes, “[I]n mercantile questions . . . the law merchant, which is a branch of the law of nations, is regularly and constantly adhered to.” TRAKMAN, *supra* note 3, at 11–12. For this point, Blackstone cites nothing.

Benson makes similar claims in two places. First, he contends that “[v]irtually every aspect of commercial transactions in Europe was governed for several centuries by this privately produced, privately adjudicated and privately enforced body of law.” Benson, *supra* note 4, at 500. Benson cites WYNDHAM ANSTIS BEWES, THE ROMANCE OF THE LAW MERCHANT 1 (photo. reprint 1986) (1923), but Bewes merely states, without support, that “the law merchant was indeed the law of the merchants” and that “it was applied to all transactions of a mercantile character between merchants.” Benson also cites TRAKMAN, *supra* note 3, at 13, which, as discussed above, is speaking of courts and procedure and is not on point.

A few pages later, Benson claims that “[b]y the twelfth century all important principles of commercial law were international in character.” Benson, *supra* note 4, at 503. Benson cites MITCHELL, *supra* note 41, at 7–9, who makes the point that the law merchant was actually “vague and indefinite,” *id.* at 8, and while generally similar, varied in its particulars from place to place. Furthermore, Mitchell’s evidence comes primarily from the thirteenth and fourteenth centuries.

Benson also cites BEWES, *supra*, at 138. Bewes, while discussing only the uniformity of the law of the fairs, quotes from PAUL HUVELIN, ESSAI HISTORIQUE SUR LE DROIT DES MARCHÉS & DES FOIRES 596 (Paris, Arthur Rousseau 1897). Huvelin refers to the uniformity only of fair law “in its essential features.” *Id.* But presumably the part Benson likes is Huvelin’s statement (as translated by Bewes) that “thus emerges the conception of the law merchant, outside and above civil statutes and local commercial usages” [“ainsi se dégage la conception d’un droit des marchands, qui reste en dehors et au-dessus des statuts civils et des usages commerciaux locaux”]. For this point, Huvelin cites GOLDSCHMIDT, *supra* note 40, at 132–33, where Goldschmidt lists the handful of mercantile rules he believed were uniform and universal. As pointed out below at note 98, when researched, some of these rules turn out not to be uniform or universal.

46. Cordes, *supra* note 6, at 57–58, 62; Donahue, *Medieval and Early Modern*, *supra* note 6, at 27.

47. See BASILE, *supra* note 6, at 128 (“The idea of the *lex mercatoria* as positive law in the international community is not part of the English medieval record.” (footnote omitted)); Sachs, *supra* note 6, at 788 (arguing that because the evidence implied that *lex mercatoria* signified what law was appropriate for merchants rather than a specific, applicable body of law, “one cannot conclude that the practice of mercantile law was . . . part of a single legal system, a ‘law universal throughout the world’”).

48. See Baker, *supra* note 6, at 300 (“[I]t is doubtful whether any distinctions were made at all between the law merchant and the common law. When medieval lawyers distinguished systems of ‘law’ they usually had procedure in mind.”); Cordes, *supra* note 6, at 57–58 (describing how the earliest recordings of the phrase *lex mercatoria* originate from the law of procedure and evidence).

49. BASILE, *supra* note 6, at 51–53 (quoting and discussing an unpublished Common Pleas opinion from 1296 speaking of the jurisdiction of law merchant at fair courts).

50. See, e.g., Cordes, *supra* note 6, at 62 n.33 (explaining the use of *ius mercatorum* in the Early and High Middle Ages to signify “a personal right granted by the emperor or a prince”).

rules.<sup>51</sup> At least one scholar has persuasively argued that references to the law merchant may have been no more than a trope expressing the vague perception that the people involved in long-distance trade—merchants<sup>52</sup>—had procedural or evidentiary requirements and business practices that differed from those of local tradesmen and retailers.<sup>53</sup>

Unfortunately for the mercatorists' story, during the medieval heyday of private compilations of local and regional custom, not a single one of the many literate and civically involved merchants of Europe appears to have attempted to write down a list or explanation of merchant sales customs.<sup>54</sup> And merchants did write. In the fourteenth century, the Florentine merchant Francesco Balducci Pegolotti wrote a lengthy merchant manual.<sup>55</sup> He spent pages discussing such practical matters as weights and measures, currency changing, and bills of exchange, but nowhere does he mention a single custom about the sale of goods. When John Browne, a merchant of Bristol, wrote a small handbook of instruction for his son in the late sixteenth century,<sup>56</sup> he gave guidance on the measure of cloth; the value of moneys; and the making of bills of lading, insurance policies, letters of obligation, and other documents. But as for advice about buying and selling, he wrote only

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51. A 1278 case from Southampton provides an apt illustration of the early uses of the phrase *lex mercatoria*. The buyer claimed that the seller had falsely sold him wool of substandard quality. The record mentioned the law merchant in three senses. First, the king ordered two judges to inquire into the matter so that "swift and competent amends thereof [may] be made according to the law merchant." Second, the plaintiff, making his complaint, explained that although he had "in good faith and according to the custom [of merchants] handed them to [the seller] to be kept until he had sent for them," the seller had allowed some of the wool to be removed by his own men while in his custody. (The translator here inexplicably translates "secundum consuetudinem mercatorum" as "according to the custom of the country.") Third, the question arose whether the plaintiff had given the defendant an adequate summons, and on that issue, "the citizens and other merchants of Winchester present testify that such previous notice suffices for answering a merchant according to the law merchant." Thus, in this case alone, it could be said that the law merchant referred to rules of procedure (notice), possibly either some unnamed but supposedly known substantive rules of decision or simply the order to act fairly and equitably (ensuring amends), and common merchant practices that did not necessarily imply a legally binding rule (leaving goods with a seller). 2 SELECT CASES CONCERNING THE LAW MERCHANT 28–29 (Selden Society vol. 46, Hubert Hall ed., 1930).

52. Until about the sixteenth century and continuing in some places until the eighteenth, the word *merchant* referred to long-distance traders and not to local retailers. It is also in this sense that the modern advocates of the *lex mercatoria* seem to use the term. Kadens, *supra* note 6, at 44–45 & n.24.

53. See Sachs, *supra* note 6, at 694, 780, 788 ("Within [the fair-court records of] St. Ives, the use of the phrase '*secundum legem mercatoriam*' did not invoke a specific body of substantive principles . . . but rather referred indefinitely to whatever principles might be appropriate to the case, according to a mixture of local custom and contemporary notions of fair dealing . . ."); see also Baker, *supra* note 6, at 316 ("The 'law merchant' had become a figure of speech for what we now call mercantile law: that branch of ordinary English law which happens to govern merchants' affairs.").

54. Donahue, *Medieval and Early Modern*, *supra* note 6, at 28.

55. FRANCESCO BALDUCCI PEGOLOTTI, *LA PRATICA DELLA MERCATURA* (Allan Evans ed., Medieval Academy 1936).

56. JOHN BROWNE, *THE MERCHANTS AVIZO* (London, Richard Field 1589).

that his son should ask around to find out how things were done at each market and then follow the local laws and customs.<sup>57</sup> Around 1643, the Antwerp company Van Colen-de Groote produced an internal handbook for its merchants.<sup>58</sup> Once again, the manual spent pages on merchandise quality, weights and measures, and currency exchange but included not a word about the customs governing the sale of goods. Yet of all the aspects of commerce in which premodern merchants engaged, sales rules were the most likely to have arisen from custom rather than contract or statute.<sup>59</sup>

The seventeenth-century English merchant author Gerard Malynes was among the first to use the term *lex mercatoria* to denote the substantive rules governing long-distance commerce. Based on the content of his book, *Consuetudo vel lex mercatoria*,<sup>60</sup> by *law merchant* Malynes meant rules concerning weights and measures and the exchange of money, monetary instruments (particularly letters of credit and bills of exchange), suretyship and agency, maritime commercial law, banking and usury, bankruptcy, arbitration, and merchant courts. While Malynes focused on the constituent parts of the sales transaction—merchandise and payment—he barely touched upon the law of the contract of sale itself.<sup>61</sup> The closest he came with regard to the law of sales to the sort of extensive cataloguing of concrete rules that he provided for monetary instruments,<sup>62</sup> maritime law,<sup>63</sup> agency,<sup>64</sup> and the rest was a page-long description of a sample contract for the sale of cloth between an English and a Dutch merchant,<sup>65</sup> a sentence about the warranty of merchantability,<sup>66</sup> a few sentences about limitations on damages,<sup>67</sup> two

57. *Id.* at 2, 4 (“[B]efore you enterprise any thing, doe you after curteous and gentle manner aske counsel, either of some Marchant in the Ship, or your Hoste, or of some English man: how you are to deale about your wares, both touching the landing it, the customing it, the selling it, the receauing of your moneyes, the buying of any wares againe . . . . [W]hen you be in the country of Spaine or else where . . . learne what be their ciuill lawes and customes, and be carefull to keepe them.”).

58. JAN DENUCÉ, *KOOPMANSLEERBOEKEN VAN DE XVI<sup>e</sup> EN XVII<sup>e</sup> EEUWEN IN HANDSCHRIFT* (1941).

59. They may, of course, also have come from the Roman law, which had well-developed laws of sale.

60. GERARD MALYNES, *CONSUEUDO, VEL LEX MERCATORIA, OR THE ANCIENT LAW-MERCHANT* (London, Adam Islip 1622); *see also* BASILE, *supra* note 6, at 124 (asserting that the seventeenth-century English authors were among the first to use *lex mercatoria* to denote substantive merchant law).

61. MALYNES, *supra* note 60, at p. 3 of the unpaginated dedicatory epistle “To the Courteous Reader” (explaining that he will be discussing the “three Essentiall Parts of Trafficke,” which all go to the sales transaction).

62. *Id.* at 378–424.

63. *E.g.*, *id.* at 121–22 (describing procedure in maritime suits); *id.* at 134–41 (explaining charter parties and freighting rules); *id.* at 146–56, 159–66, 197–99 (discussing maritime insurance rules); *id.* at 175–82 (providing an abridged version of the 1614 Hanseatic sea laws).

64. *Id.* at 111–19 (providing detailed rules about factors and agents).

65. *Id.* at 123–24.

66. *Id.* at 125.

67. *Id.* at 127.

paragraphs of examples of payment terms in contracts concerning the West Indies trade,<sup>68</sup> and a page-long description of how futures contracts worked.<sup>69</sup> Notably, in referring to the law of merchant contracts he repeatedly cited not custom but the civilian—that is, medieval and early modern Roman law—jurists.<sup>70</sup>

This typology of the law merchant as including the rules of the various subjects of commercial law except contracts of sale would remain consistent for centuries. The earliest national commercial code, the French Code of 1673, included nothing on sales but a great deal on monetary instruments, bankruptcy, merchant-court jurisdiction, and partnership.<sup>71</sup> In 1718, Giles Jacob's *Lex Mercatoria: Or, the Merchant's Companion* spent all of its three hundred pages on maritime commerce, factors, partnership, and international commercial treaties.<sup>72</sup> The five hundred pages Wyndham Beawes devoted to law in his 1752 *Lex Mercatoria Rediviva* concerned, again, maritime commerce, insurance, arbitration, banking, bills and notes, brokers, and bankruptcy.<sup>73</sup> He also added one and one-half pages of basic contract law, which mentioned nothing specific to long-distance trade.<sup>74</sup>

Yet, while sales law may well have been created through custom, it should be obvious upon reflection that bills, bankruptcy, partnership, brokerage, insurance, and the other aspects of commercial law considered synonymous with the law merchant could not. Instead, they must have been the result of deliberate contracting or legislation—both of which required express consent given at a particular moment in time and which were intended to have prospective force.

68. *Id.* at 129–30.

69. *Id.* at 203–04.

70. *See, e.g., id.* at 92 (“The Civilians . . . do admit that a man may sell deerer unto an expert man, than unto a simple man . . .”); *id.* at 127 (“[I]t will not be impertinent to note the observations and opinions of Civilians concerning Merchants Contracts, which they have distinguished to be Solemne, Publike or Private . . . to the end all controversies may bee avoided in the said Merchants Contracts. The Civilians writing, *De Contractibus Mercatorum*, or of Merchants Contracts make many distinctions . . .”); *id.* at 128 (“The penalties or forfeitures upon any Contract . . . are consequently much approved by all Civilians, and by their Law allowed.”); *id.* (“To enter into consideration of some Verball Contracts, some Customes are be observed, which the Civilians make questionable.”).

71. 19 FRANÇOIS-ANDRÉ ISAMBERT, RECUEIL GÉNÉRAL DES ANCIENNES LOIS FRANÇAISES, DEPUIS L’AN 420, JUSQU’A LA RÉVOLUTION DE 1789, at 92–107 (Paris, Belin-Leprieur 1829). The code consisted of twelve titles. The longest titles concerned letters of exchange, bankruptcy, partnerships, and the jurisdiction of the commercial courts. Other titles identified the category of persons (merchants) subject to the code, regulated apprenticeships, prohibited brokers from acting on their own account, established bookkeeping requirements, regulated imprisonment for debt, and detailed the rules of separation of marital property.

72. *See generally* GILES JACOB, LEX MERCATORIA: OR, THE MERCHANT’S COMPANION (London, Eliz. Nutt & R. Gosling 1718).

73. *See generally* WYNDHAM BEAWES, LEX MERCATORIA REDIVIVA: OR, THE MERCHANT’S DIRECTORY (London, John Moore 1752).

74. *Id.* at 403–04.

Consider, for instance, the quintessential category of the law merchant: bills of exchange.<sup>75</sup> No other aspect of the historical commercial law seems to fit better the mythical law merchant image of universal, merchant-created rules. Bills of exchange grew out of commercial practice and eventually came to be employed (more or less) uniformly across Europe.<sup>76</sup> Neither the Roman law nor the existing customary law had anything similar. In addition, bills of exchange fulfilled the criteria commonly associated with custom. The transactors interacted repeatedly and in the same fashion over a long period of time; the transactions were reciprocal because merchants would at different times have been debtors and creditors; the transactors were for quite a long time basically of a homogeneous social status; and they faced strong social sanctions against default given the importance of good faith and reputation for determining creditworthiness in this society.<sup>77</sup>

According to the definition of custom offered above, merchants would have established their customs through repeated action to which nearly everyone involved tacitly consented to be bound. The key is tacit consent. While we have no evidence of the precise invention of bills of exchange, and while we know that it evolved from similar types of contracts, we can imagine the moment of invention when some merchants complained to each other about the danger and difficulty of moving their money (all in silver or gold coins) from one place to another. When Tomaso in Genoa mentioned to

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75. In the least complicated, most textbook situation, the exchange involved four parties in two different locations. Assume a merchant in Amsterdam wished to make a payment to a merchant in Paris. The Amsterdam merchant, the *deliverer*, lent money to an exchange agent—often but not always a banker—in Amsterdam, the *drawer*. The drawer gave the deliverer a bill of exchange drawn on the drawer's agent in Paris, the *payor*. The deliverer sent the bill to the merchant in Paris, the *payee*, who presented it to the payor for payment. Permutations of this basic structure abounded. The exchange could involve three, or only two, people, could occur within a single location and in a single currency (the so-called dry exchange), or could flow in the reverse direction—the first party taking money drawn on a correspondent rather than lending money, etc. For an accessible early modern description of the other possibilities, see JOHN SCARLETT, *THE STILE OF EXCHANGES CONTAINING BOTH THEIR LAW & CUSTOM AS PRACTISED NOW IN THE MOST CONSIDERABLE PLACES OF EXCHANGE IN EUROPE* 1–7 (London, John Bringhurst 1682).

76. See MALACHY POSTLETHWAYT, *THE UNIVERSAL DICTIONARY OF TRADE AND COMMERCE* 254 (London, John & Paul Knapton 1751) (1723) (“Foreign bills of exchange have long been looked on as the most obligatory and convenient paper-security, that is amongst merchants; not so much by virtue of the laws of any country, as in conformity to the universal customs and usages established among traders themselves, by a kind of unanimous concurrence, for the facilitating a general commerce throughout the world.”).

77. MATHIAS MARESCHAL, *TRAICTÉ DES CHANGES ET RECHANGES, LICITES, ET ILLICITES. ET MOYENS DE POURVOIR AUX FRAUDES DES BANQUEROUTES* 11 (Paris, Nicolas Buon 1625) (“[L]e principal fondement de la Negotiatio[n] est sur le Credit<sup>e</sup> & reputation”); see also Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710, 714 & n.14 (1999) (noting the “general accepted premise that unwritten commercial customs are most likely to arise and endure in situations where transactors interact on a repeat basis, over a long period of time, in relatively similar transactions”); Richard A. Epstein, *The Path to The T.J. Hooper: The Theory and History of Custom in the Law of Tort*, 21 J. LEGAL STUD. 1, 11–16 (1992) (exploring the reasons that custom emerges and stating that “[t]he key conditions . . . are reciprocity and high frequency”).

Giuseppe that he needed to send money to Jacques in Marseille to pay for some silk, Giuseppe had an idea. “Listen,” he said, “Carlo in Marseille owes me about that much money. If you give me the money you want to send to Jacques, I will give you a letter to send to Jacques telling him to go to Carlo and have him pay to Jacques the money he owes to me. That way, both the debts are paid.” How could such a transaction have arisen without the transactors explicitly laying out the rules of their deal? They could not have achieved their end through repeat behavior to which they tacitly consented. In other words, the bill-of-exchange transaction grew out of contract, not custom.

The same is true for many areas of commercial law. Marine insurance, for instance, would have originated when parties expressly decided to transfer the risk of a sea voyage through insurance. Similarly, the various forms of partnership and proto-corporations invented in the premodern era would have originated when parties agreed to divide up labor and capital in different ways. Such transactions required nonsimultaneous cooperative behavior in which the transactors would have wanted to know in advance the terms to which they had agreed. This cooperation would be extremely difficult to achieve without *ex ante* express consent. Thus, where cooperation is necessary, contract (or legislation) is the more likely source of the rule.

Sometimes contract could not solve problems any better than custom could, and in these cases, merchants encouraged local governments to pass statutes. The prime example is the bankruptcy statutes that appeared in the northern Italian towns during the late Middle Ages. Debt-collection mechanisms did not have to be legislated. In medieval northern Europe, the practice developed that creditors of an insolvent debtor had the right to swoop in and take possession of as much of the debtor’s property as they could lay their hands on, up to the amount of their debts—first come, first served regardless of any priorities.<sup>78</sup> This had obvious disadvantages, as the best connected, most powerful, and most informed creditors could seize all of the debtor’s estate and leave nothing for the bulk of the creditors.<sup>79</sup>

Consequently, across Europe between the thirteenth and sixteenth centuries, as commerce became more sophisticated and the use of credit spread, governments instituted recognizably modern bankruptcy systems that enforced creditor collective action.<sup>80</sup> Tacit consent was not going to solve the problem because the creditors could be anywhere and would not necessarily be repeat players or even be able to identify each other, and because they were unlikely to acquiesce silently to giving up their right to grab what might be significant assets. Contract would not work either

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78. HILAIRE, *supra* note 23, at 313.

79. See BARBARA WINCHESTER, TUDOR FAMILY PORTRAIT 294–96 (1955) (describing the 1553 bankruptcy of the Johnson Company (English wool merchants), whose many creditors had to fight over the assets on a first come, first served basis).

80. HILAIRE, *supra* note 23, at 315.

because early modern bankruptcy was involuntary. The creditors put the debtor into bankruptcy, so the debtor would have no ability to contract *ex ante* for pro rata distribution in the event of insolvency.<sup>81</sup>

It could be objected that this distinction—between contract and custom, and even between local statute and custom—is a mere semantic quibble. Does the category of origination make any difference when the impetus for the rule came from the merchants rather than the state? The distinction is indeed important with relation to the mercatorists' claims about what the medieval law merchant proves about private ordering. Mercatorists deploy the *lex mercatoria* example to demonstrate that groups can regulate themselves through custom without the interference of the state in order to support their policy prescriptions that private ordering is better than state ordering and that state ordering crowds out the space for private ordering. But the law merchant theory only has teeth, from a modern perspective, if it included actual custom; that is, if it consisted of binding, gap-filling rules made bottom-up by merchants based on their repeated practices rather than through contracting or legislation. Modern advocates of the law merchant believe that it did, and still does, embody customary rules that all merchants would know—and consequently would not bother to memorialize in their contracts—and that courts and arbitrators should apply when deciding disputes. But if the historical law merchant, to the extent that it is said to be composed of special uniform and universal transnational rules, was nothing more than express form contracts that everyone used, then it is an empty concept. We do not need a special phrase to describe the fact that merchants historically used contracts any more than we need one to describe the same fact now.

## II. The Nature of Custom

The distinction offered in the previous part between custom and contract ignored what may have been the most important role custom played in commerce. Contracts inevitably had gaps, and some of those gaps were filled by custom.<sup>82</sup> Despite the existence of gap-filling customs, however, we

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81. *Id.* at 308–09.

82. See ENRICO BENZA, HISTOIRE DU CONTRAT D'ASSURANCE AU MOYEN ÂGE 42 (Jules Valéry trans., Paris, Ancienne Librairie Thorin et Fils 1897) (describing an early fifteenth-century Genoese opinion of counsel (*consilium*) concerning marine insurance explaining that all such policies listed in detail the risks assumed by the insurer and adding that “by the common, unwritten custom of the land and by the common and tacit understanding of those making the contract,” the policies were to be understood to exclude damage caused by the fraud or barratry of the ship’s captain [“Bene fateor pro veritate quod ex communi consuetudine patriae non scripta et ex communi tacito intellectu hos contractus ineuntium, excipitur unus casus tantum quo periculum pertineat ad facientes se assecurari, scilicet quando probatur res amissas fraude et machinatione patroni ad hoc excogitata.”]); Julius Caesar Papers (British Library, Add. MS 12505, fol. 203r.) (Mar. 8, 1584) (regarding a marine insurance contract, counsel refers to “the express agreeme[n]t between the parties [that] the saide instrume[n]t shall bee understood in most beneficiall maner according to th’use and customs of the [royal] exchange”); *id.* at fol. 204r. (June 18, 1583) (“[T]hey further in the

lack evidence that they became a uniform and universal part of the *lex mercatoria* other than, perhaps, at a very high level of generality. Instead, the evidence suggests that substantive customs remained geographically local or confined to a particular network of repeat players. Subpart II(A) offers evidence suggesting that custom was often contested because it was not universal. Subpart II(B) attempts to explain why custom did not lend itself to uniformity across space or trading networks.

#### A. *Contested Custom*

If merchant custom constituted a widely recognized uniform and universal set of laws, we might expect litigants to disagree over whether a custom applied to their particular facts but not to argue about whether it existed at all. Traders who wished to maintain a good reputation for honesty and abiding by the rules would presumably have had little incentive to deny customs they realized everyone knew. As in any modern dispute, however, medieval merchants wanted to win and would make the arguments they felt best guaranteed an overall positive outcome, even if that might involve lying and cheating that they believed they could get away with.<sup>83</sup>

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saide co[n]tract and bargaine covenau[n]ted and agreed that the saide pollicy or bill of assurance wth all things therein co[n]teined sholde bee understood and construed according to the ancient custome of merchants, and to the use of Lo[m]bard streate and of the [royal] exchange in London.”); James Oldham, *Insurance Litigation Involving the Zong and Other British Slave Ships, 1780–1807*, 28 J. LEGAL HIST. 299, 300–02, 307 (2007) (discussing gap-filling custom providing interpretations of the standard marine insurance contract); Wijffels, *supra* note 6, at 271, 275 (citing sixteenth-century legal opinions to the effect that custom could be used to interpret contracts).

83. On the frauds of merchants, see, for example, PHILIPPE BORNIER, ORDONNANCE DE LOUIS XIV SUR LE COMMERCE 23 (new ed., Paris, Compagnie des Libraires-Associés 1757) (“[I]t is very important that this Ordinance be religiously observed, especially in this century, when it appears that the good faith and probity of centuries past have greatly degenerated.” “[I] est très important que cette Ordonnance soit religieusement observée, sur-tout en ce siècle [sic], où il semble que la bonne foi & la probité des siècles [sic] passés ont fort dégénéré.”); 19 ISAMBERT, *supra* note 71, at 93 (preface to French commercial code of 1673: “[W]e believed it to be an obligation to provide for the continuance [of commercial development] regulations capable of assuring among merchants the good faith against fraud and of preventing the obstacles that turn them away from their work by lengthy lawsuits that consume their profits.” “[N]ous avons cru être obligé de pourvoir à leur durée, par des réglemens capables d’assurer parmi les négocians la bonne foi contre la fraude, et prévenir les obstacles qui les détournent de leur emploi, par la longueur des procès, et consomment en frais le plus liquide de ce qu’ils ont acquis.”); JOHANNES PHOONSEN, WISSEL-STYL TOT AMSTERDAM pt. 2, at 120 (Amsterdam, Andries van Damme & Joannes Ratelband 1711) (1676) (describing a 1666 ordinance of Frankfurt and recounting the town council explaining that it had promulgated the rules “based on diverse complaints that have been made to us, that for some time great abuses have been introduced with regard to the letters of exchange drawn on this city either at the fairs or at other times, these causing much disorder and confusion and long and contentious suits, and which it is good to remedy in order to prevent the decline and the ruin of business and to avoid the hardship that these abuses could cause our free fairs” “[zu wissen welcher gestalt wir aus denen uns vorkommenen Klagen befunden daß nun eine zeithero mit denn Wechselbriefen so auff diese Stadt oder dero Messen gerichtet allerhand Unordnung und Mißbräuche eingerissen. Weil dan solches nicht geringe Ungelegenheit, Confusion und kostbare langwürige Process und Rechtfertigung verursacht und dahero zu besorgen da deme nicht begenet werden solte daß hierauß anders nichts als eine Zerruttung der Negotien und Wechselhandlung zu nicht geringen Ubruch, Schaden und Nachtheil der alhiesigen hoch befreyeten Wessen entstehen

In the seventeenth century, we hear of disputes concerning the length of the usance period. Usance, the time between the drawing of a bill of exchange and the date it came due in another city, was perhaps the most widespread custom exclusive to merchants.<sup>84</sup> Usances between cities were so well established that merchant manuals published lists of them.<sup>85</sup> Traditionally, an usance lasted a month, regardless of how many days the month had.<sup>86</sup> And yet, despite the strength and even universality of this custom, enough disputes arose over the question of whether a month-long usance lasted twenty-eight days or depended upon the length of the specific month of the usance period at issue that the drafters of the French commercial code of 1673 felt it necessary to set the length of usance in France at thirty days.<sup>87</sup>

Similarly, in a sixteenth-century insurance case heard by the English Court of Admiralty, one set of insurers—trying to wriggle out of paying on a claim—asserted that an insurance policy good for one year should use the common law method of determining the length of a month as twenty-eight days despite the fact that “the chiefest merchants in London, Englishmen, Italians, Frenchmen, Dutchmen, Spaniards, and [Portuguese], the chiefest and most eminent public notaries Englishmen and strangers, the Lord Mayor of London and his brethren, the commissioners for the hearing and determining of causes of assurance upon their oaths” testified that according to

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mochte”); 1 LÉOPOLD GILLIODTS-VAN SEVEREN, *CARTULAIRE DE L’ANCIENNE ESTAPLE DE BRUGES* 233 (1904) [hereinafter GILLIODTS-VAN SEVEREN, *CARTULAIRE*] (recounting complaints of Scottish merchants in 1359 of sharp practices of Bruges merchants); Sachs, *supra* note 6, at 706 (discussing evidence that some merchants appeared repeatedly as defendants in different cases); Volckart & Mangels, *supra* note 6, at 438 (quoting writings by monk Alpert of Metz from 1020, which provide one of the earliest descriptions of merchants and explains how they would try to defraud their creditors by “persistently den[ying the debt] and immediately swear[ing] to have taken nothing. When one is discovered to have committed public perjury they maintain that nobody can prove this. When the object is so small that it can be concealed in one hand he uses the other hand to [take the oath] that it does not exist”); *see also* BRONISLAW MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* 65 (1926) (“[T]he force of custom, the glamour of tradition, if it stood alone, would not be enough to counteract the temptations of appetite or lust or the dictates of self-interest.”).

84. One indication that usance was a customary development comes from its name, which means usage.

85. *E.g.*, MALYNES, *supra* note 60, at 392–93. *But see* BORNIER, *supra* note 83, at 248 (explaining that the rule applied only for bills payable within France but that merchants drawing bills in foreign countries needed to conform to the local custom of that country); FRANÇOIS DE BOUTARIC, *EXPLICATION DE L’ORDONNANCE DE LOUIS XIV ROI DE FRANCE ET DE NAVARRE CONCERNANT LE COMMERCE* 45 (Toulouse, Gaspard Henault & Jean-François Forest 1743) (acknowledging that when trading in foreign countries “it is necessary to conform oneself to the rule determined by custom or the law of the prince” in that country [“il faut se conformer à ce qui se trouve réglé par la Coûtume ou par la Loi du Prince”]).

86. ANDRÉ VANDENBOSSCHE, *CONTRIBUTION À L’HISTOIRE DES SOURCES DU DROIT COMMERCIAL: UN COMMENTAIRE MANUSCRIT DE L’ORDONNANCE DE MARS 1673*, at 67 (1976).

87. 1 JACQUES SAVARY, *LE PARFAIT NEGOCIANT* 150 (new ed. Geneva, Cramer & Philibert 1752); *see also* Baker, *supra* note 6, at 312 (describing a 1600 case in which an English jury rendered a special verdict that, by the custom of merchants, usance meant one month).

custom twelve months meant a calendar year “in all merchantlike contracts and business.”<sup>88</sup> The court found in favor of the custom.<sup>89</sup>

Another case challenging an apparently well-known custom arose in the aldermanic court of Bruges in 1439. The Spanish iron merchants trading in that town brought suit against the Spanish wool merchants there disputing the correct way to apportion the damages that the merchandise carried for them by the Spanish shipping fleet had incurred during shipment. The iron merchants argued that the terms of the charter party (under which they would pay less) should control, while the wool merchants wanted to be governed by the “ancient custom maintained between them about this.”<sup>90</sup> The court held that the custom should apply and said that if the iron merchants felt otherwise, they should pursue their suit in Spain.<sup>91</sup>

This case is noteworthy in two respects. First, the wool merchants referred to a specific custom they had developed with the iron merchants, not to a general mercantile custom. The pleading of custom as belonging to a particular place or region or as part of a particular trade or trading network was very common.<sup>92</sup> Second, the only evidence the mercatorists can provide that a true, systematic law merchant existed comes from maritime law, which was early codified.<sup>93</sup> Yet here is a case from the fifteenth century demonstrating that merchant communities that had been doing business in Bruges for over a century by that time still did not agree about when a custom governing general averages—one of the fundamentals of maritime law—applied.

In many other instances, the parties disagreed about the content of the alleged custom. In sixteenth-century Antwerp, a seller proffered a jury (*turba*) of eleven experts to prove that where a fraudulent buyer had transferred the goods to a third party, “the ancient Antwerp custom, often confirmed by judicial decisions, [held that] an unpaid seller could attach and reclaim the goods sold, whether in possession of the buyer or of a third party,

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88. Julius Caesar Papers, *supra* note 82, at fol. 203r. (Mar. 8, 1584) (spelling modernized and a few minor words omitted without ellipses). For a description of the case, see Ibbetson, *supra* note 21, at 302–03. It should be noted that the same issue had come up the year before and was decided the same way. Julius Caesar Papers, *supra* note 82, at fol. 203r. (June 18, 1583).

89. Julius Caesar Papers, *supra* note 82, at fol. 203v.

90. 1 GILLIODTS-VAN SEVEREN, *CARTULAIRE*, *supra* note 83, at 619 (“selonc lanchienne coustume sur ce entre eulx entretenue”).

91. *Id.* (“Et par ainsi quil semble ausdis marchans de fer quilz en doivent plus avoir par vertu desdictes chartres parties faictes a Bilbar, quilz le poursuient en Espagne, devant le Roy ou les seigneurs de son noble conseil, ou ailleurs en Espagne, ou bon leur semblera.”).

92. Baker, *supra* note 6, at 319 (describing instances where custom that developed between merchants from London and Venice was claimed in court); Wijffels, *supra* note 6, at 255–57, 265, 266 n.29, 270 (recounting sixteenth-century opinions of counsel from the Low Countries repeatedly making reference to the custom of the bourse of Antwerp or the custom of Bruges). In addition to the other examples discussed in this section, see also 2 GILLIODTS-VAN SEVEREN, *CARTULAIRE*, *supra* note 83, at 17 (discussing a citation from 1453 to maritime customs of France).

93. See BERMAN, *supra* note 1, at 340–41 (listing examples of early maritime codes, the earliest of which was adopted around 1095).

when the former had run away immediately or shortly after having obtained the transfer of the goods.”<sup>94</sup> The transferee, by contrast, produced six lawyers to attest that “in the case of a fugitive buyer, the seller was to enjoy priority in being repossessed only if the goods were found among the buyer’s goods, but not if they had meanwhile been transferred with a title to a third party.”<sup>95</sup> The lawyer giving an advisory opinion on behalf of the defrauded seller opined that the *turba* should be followed because it conformed with the learned (Roman and canon) law.<sup>96</sup> This dispute is particularly interesting because mercatorist tradition going back to Levin Goldschmidt considers the rule that a thief in the chain of title will not vitiate a good-faith purchase for value one of the undisputed pieces of evidence that a uniform and universal customary law merchant existed.<sup>97</sup>

Custom could also vary across different trading networks. The seventeenth-century French parliamentary attorney Matthias Mareschal related the story of a person who drew a bill on a merchant of Rouen. When presented with the bill three days after it was due, the merchant on whom the bill was drawn could not pay because he had gone bankrupt. A dispute arose over who bore the risk of the bankruptcy. Because commercial usages could vary from town to town, before ruling the Parlement of Paris felt it necessary to pose the question to six merchants of Paris, three of whom traded at the fairs of Lyon and three of whom traded in Rouen.<sup>98</sup> The problem with such consultation, wrote Mareschal, was that even the merchants consulted often could not advise the judge with certainty.<sup>99</sup>

The customs in most of these examples were quite fundamental: a certain percentage of the damage, a certain number of days, and a certain division of risk. Yet the rules did not become unified. One reason may be

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94. Wijffels, *supra* note 6, at 270 (internal quotation marks omitted).

95. *Id.* (internal quotation marks omitted).

96. *Id.*

97. BERMAN, *supra* note 1, at 349; GOLDSCHMIDT, *supra* note 40, at 133. *But see* Sachs, *supra* note 6, at 778–79 (demonstrating that it was not a universally followed custom); *see also* Aldermanic Court Decision (Mar. 21, 1408) (Stadsarchief Brugge, Groenenboek A, fol. 53v.–54r. (modern numbering)) (containing a decision by aldermen that if goods left with a pawnbroker were stolen and sold to a bona fide purchaser, they could be reclaimed by the true owner, unless the goods were purchased in a *vrije jaermaercten*, literally: free annual fair, or a market *ouvert*); 1 GILLIODTS-VAN SEVEREN, *CARTULAIRE*, *supra* note 83, at 594 (noting that Hansa merchants in Bruges could get restitution of goods even if they were sold in the open market).

98. MARESCHAL, *supra* note 77, at 15–16.

99. *Id.* at 16–17 (“Car bien souuent les Iuges s’y trouuent empeschez à iuger, & mandent des gens experts en Negoce, lesquels eux-mesmes n’en peuuent bailler aduis bien assureé.”); *see also* 1 JAMES OLDHAM, *THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY* 371, 374–75 (1992) (relating a case concerning whether the debtor or the creditor bore the risk of the bankruptcy of a banking house on which the debtor drew the draft with which it paid the creditor and illustrating that the court took into account evidence of bankers’ customs according to which creditors presenting drafts for payment on the same day would have been paid before closing time if the bank was located to the east of Mansion House, London, but not until the following day if the bank was located to the west of Mansion House). The author thanks Professor Oldham for this reference.

that merchants had neither need for nor expectation of uniform and universal customs. In the medieval mind, custom belonged to the specific community that created it. Medieval merchants believed custom to be personal, not international.<sup>100</sup> Indeed, in carrying out trade, merchants expected to follow the local laws and customs, as the English author of a seventeenth-century merchant manual instructed:

In the concluding of a *Bill of Exchange*, if the *Parties* and *Bro[k]ers* only treat about the Course, not mentioning any other Conditions, then the other Conditions are supposed to be such, as the Custom of the Place, to which the Bill must be directed, ordinarily allows of, not only in respect of the Time of Payment, and the Species in which the Bill must be paid, but in all other respects.<sup>101</sup>

As long as the merchants knew the practices of the group of people with whom they did business, the fact that commercial customs were not uniform and universal made little difference to them. Disputes surfaced when they did not know the local rules, and this would become increasingly common as commerce opened up and members began trading across networks with people or in locations with which they were unfamiliar.

#### *B. The Non-unifying Nature of Custom*

According to the mercatorists, the medieval law merchant consisted of uniform and universal merchant-created customs. Part I disputed the claim that most of those aspects of premodern commercial practice that might in fact have been relatively widespread originated in custom at all, and the previous subpart pointed to evidence suggesting that many customs that did form were not uniform and universal. This subpart attempts to explain why shared custom—defined as before, as law made through behavior to which the community has tacitly consented—usually could not have been a shared source of identical mercantile practices across Europe.

To demonstrate how difficult it would have been to pin down a simple rule that yielded a dependable account of the content of a specific custom, this subpart offers an elementary—and entirely provisional—tripartite typology of custom ranging from those that are (1) rule-like, to those that are (2) under-articulated, to those that are (3) invented only at the moment of

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100. Donald R. Kelley, “*Second Nature*”: *The Idea of Custom in European Law, Society, and Culture*, in *THE TRANSMISSION OF CULTURE IN EARLY MODERN EUROPE* 131, 137 (Anthony Grafton & Ann Blair eds., 1990); MARTHA C. HOWELL, *COMMERCE BEFORE CAPITALISM IN EUROPE, 1300–1600*, at 56 (2010) (“[C]ustomary law was by definition local and particular . . .”). In the Netherlands, for instance, in the sixteenth century, the Emperor ordered the customs to be consolidated, written, and promulgated. R.C. VAN CAENEGEM, *AN HISTORICAL INTRODUCTION TO PRIVATE LAW* 36–37 (D.E.L. Johnston trans., 1992). Almost six hundred local customs were abrogated in favor of consolidated regional customs, leaving ninety-six to be fully homologated, while another eight hundred thirty-two were merely reduced to writing. *Id.* at 37–38. This should remind us that custom was a form of law that only worked in communities of limited size.

101. SCARLETT, *supra* note 75, at 14; *see also supra* note 57.

dispute resolution. Within these categories, customs had a greater or lesser tendency to demonstrate certain non-uniting characteristics. First, the same general custom could be expressed in various and inexact ways, which argues against uniformity across communities. Second, customs, even after they had been once or twice established in court, remained susceptible to the influence of equitable considerations each time they had to be re-remembered. These influences could result in significant alterations to the content of the rule, leading it to vary from place to place. Third, custom lent itself to manipulation, for it originated in behavior that was not necessarily understood to represent a binding rule until after some member of the community did the opposite and was sanctioned. Disputants could claim, with apparent certainty, that a particular custom existed even though, in fact, no one had previously realized it and, in some cases, even though no such custom did genuinely exist. While such indeterminacy did not prevent communities from governing themselves with customary law, these factors contributed to making custom too amorphous and malleable a social phenomenon to be successfully transplanted from one location to another while still remaining the same.

On one extreme of the proposed typology sits that subset of highly rule-like customs that had such clearly defined limits that a single formula could express the totality of the rule. These customs would likely have represented simple, frequently repeated behaviors, performed by one person independently and requiring no discretion. They may have generally involved a specified numerical limit, such as a number of days, that was easy to remember and to police. An example might be the baker's dozen. It stands for the custom that in the sale of rolls, twelve means thirteen. Such a well-defined custom within a restricted community of bakers could not only have great stability and staying power but also portability. It could, in other words, theoretically become uniform and universal.

And yet, that may rarely have occurred. Despite the fact that it might have been a simple matter for a community of bakers to establish as unambiguous a custom as the baker's dozen, evidence suggests that it was difficult to make some types of well-defined customs universal. First, customs arise in small, closely knit communities in which the expected behavior can be both modeled and policed. Where a custom concerned a mere coordinating rule in which no one particular formulation of the rule was necessarily superior or more efficient, different communities or trading networks could evolve different rules. Until those networks interacted with each other, they would have no reason to know that others did not share their rule.<sup>102</sup>

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102. Lisa Bernstein found the same phenomenon in her study of the writing of industry regulations in the late nineteenth and early twentieth centuries. Disputes proliferated as trade became more national, and when industry members sat down to draft national rules, they discovered that each region had different practices. Bernstein, *supra* note 77, at 719, 721, 724–27.

We have a telling example of this phenomenon from Paris in 1628. A bill of exchange would specify that it was payable on a certain number of days after presentation, or it would say that it was payable on sight. However, “on sight” came routinely to mean that the bearer could protest for nonpayment only after a prescribed grace period of several days.<sup>103</sup> A case concerning the number of days of grace on a sight bill came before the royal court of the Châtelet of Paris.<sup>104</sup> One party claimed that these so-called days of grace lasted ten days and the other that they lasted eight.<sup>105</sup> To resolve the dispute, the court first

heard out several notable burghers and bankers, together with the masters and officers of the six guilds of merchants<sup>106</sup> of the town of Paris about the form and usage that they were accustomed to follow in the protest of letters of exchange and the time in which the protest must be made. These were all unanimous that until then the usage had been that the letters of exchange were protested in eight or ten days after their maturity, but that the said time had not yet been limited by any ordinance, and all the said burghers, bankers, and officers of the six guilds requested the court, in judging the suit, to regulate and prescribe the time within which the protest of letters of exchange must be made for the good and utility of commerce.<sup>107</sup>

The court picked ten days and ruled accordingly.<sup>108</sup>

Second, dispute resolution that followed divergent paths in different places could have resulted in disuniting the substance of even a rule-like custom. We can hypothesize an example based on a real case. Some years after the Parisian court chose to make the days of grace on a sight bill ten

103. 1 SAVARY, *supra* note 87, at 161–62.

104. *Id.* at 165.

105. *Id.*

106. A perhaps imperfect translation of the “Gardes de six Corps des Marchands.” See 2 JACQUES SAVARY DES BRUSLONS, *DICTIONNAIRE UNIVERSEL DE COMMERCE* 1441–42 (new ed. Paris, La Veuve Estienne 1741) (s.v. Garde).

107. 1 SAVARY, *supra* note 87, at 165–66 (ellipses omitted in the translation). The original text states:

la Cour après avoir entendu plusieurs notables Bourgeois & Banquiers, ensemble les Maîtres, & Gardes des six Corps des Marchands de la Ville de Paris . . . sur la forme & l’usage qu’ils avoient accoutumé de garder aux protests des lettres de change, & le tems dans lequel le protest se devoit faire . . . lesquels auroient tous unanimement dit que jusques alors l’usage avoit été, que les lettres de change avoient été protestées dans les huit ou dix jours après l’échéance d’icelles, quoique ledit tems n’eût encore été limité par aucune Ordonnance, & tous lesdits Bourgeois, Banquiers, & Gardes des six Corps, auroient requis la Cour en jugeant le Procès vouloir régler & prescrire le tems dans lequel les protests des lettres de change se devoient faire pour le bien & utilité du Commerce. La Cour, dis-je, auroit ordonné par cette Arrêt, *que tous porteurs de lettres de change en cete Ville de Paris, seroient tenus de faire le protest d’icelles dans les dix jours d’échéance desdites lettres . . .*

*Id.*; see also BORNIER, *supra* note 83, at 233–36 (detailing the different customs concerning the time for protest in cities all over Europe).

108. 1 SAVARY, *supra* note 87, at 166.

days rather than eight, a new question arose among the merchants of Paris: when were the days of grace to begin, on the day the payee presented the bill for payment or on the day after? Once again, a court had to decide. This time it was the Parlement of Paris that held that the days of grace began the day after presentation.<sup>109</sup>

Now imagine that Parisian merchants had exported their pre-judicially-defined custom of an eight-day grace period to another town. At some point, the question would arise in the borrower town of when the counting began. If the court in that town held that the grace period began on the day of presentation, then the custom could come to be understood as a nine-day grace period. As such, the custom in the borrower town would begin to diverge from that of the lender town. Thus, even a very rule-like custom would not necessarily remain consistent with its origins if it left any space for discretion by a decision maker or the community.<sup>110</sup>

The divergence between the customs of different localities could become even more acute, though oddly perhaps less immediately obvious, in the second category of the typology: indeterminate customs that lack well-defined boundaries. The hypothetical example here is the custom that the seller delivers. Despite its apparent clarity, this rule is far from definitive. As Richard Craswell has explained,

some merchants might frame the custom as a bright-line rule: “Sellers should always provide free delivery, no matter what the circumstances.” Some might frame it as a bright-line rule qualified by an open-ended exception: “Sellers should *normally* provide free delivery, but in extreme circumstances this obligation might not apply.” And some might frame it as a completely general standard—for example, “Sellers should provide free delivery whenever failure to do so would amount to bad faith” . . . .<sup>111</sup>

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109. *Id.*

110. Cf. Henry Serruys, *Remains of Mongol Customs in China During the Early Ming Period*, 16 *MONUMENTA SERICA* 137, 173–74 (1957) (discussing Mongol marriage practices, in which a brother was “bound” to wed the widow of his brother). However, while the custom of a brother marrying his brother’s widow may have been widespread, it varied in its details from place to place within the Mongol empire. In some provinces the oldest younger brother had a right of first refusal, and upon rejection, the widow would be offered along until the youngest male relation was expected to take her. In such regions, brothers older than the deceased were not allowed to marry the widow. Later, in other provinces, the custom evolved to permit the older brother to marry the widow. *Id.* at 173–74 & n.106.

111. Richard Craswell, *Do Trade Customs Exist?*, in *THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW* 118, 127 (Jody S. Kraus & Steven D. Walt eds., 2000). George Schroeder made a similar point in the context of football customs:

To be sure, there are still unwritten rules of sportsmanship. But considering it’s not written down anywhere, it’s perhaps not surprising that the code has become elastic. Pull your starters in the fourth quarter? Or at halftime? OK, but when do you stop passing?

. . . .

In the context of a medieval town in which a usage arose amongst merchants through repeat behavior, the seller's act of delivering would be bounded by his experience and the expectations of buyers. Those sellers who delivered only in the neighborhood, for instance, would not have reason to contemplate whether the rule was "seller delivers only in the neighborhood," or "seller delivers everywhere in town," or "seller delivers everywhere close to town," or "seller delivers everywhere." Those sellers whose customers were foreign merchants might think that "seller delivers" just meant sending the goods to the buyer's hostel in town. And those sellers who did not deliver, either because of the nature of their business or because of the practice to which they had become accustomed with their particular customers, might not know of the general usage at all or might think it applied to other sellers but not to them. In this sort of custom, the behavior in question is heterogeneous enough that it could be performed somewhat differently by each person without incurring sanctions for nonconformity with the custom.<sup>112</sup>

To see how these characteristics would play out as the usage "seller delivers" became a custom, assume that a dispute arose between Buyer and Seller about whether the town had a custom that sellers would deliver. For the purposes of this hypothetical, we must understand that the parties had no oral or written contractual term about delivery and that the question of a delivery custom had never explicitly arisen before in this community. Consequently, the only evidence that a custom that the seller delivers existed was repeated behavior (delivery) by many, but perhaps not all, of the sellers in the community.

Given the jurists' distinction between usages that one may do and customs that one must do, the parties to this dispute could not know *ex ante* whether the norm "seller delivers" was binding. Any resolution of that

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There's still a debate to be had over how much is too much, and when and how it's best to hit the brakes. But those unwritten rules remain up for interpretation. And like the game, they're also evolving. Maybe 90 points would be too much, but is anyone sure? We know what the Ol' Ball Coach thinks: "As long as you let your backups play, nobody cares (about the score)," he said.

George Schroeder, *Winning Is Paramount, but Winning Impressively Is Almost as Important*, SPORTS ILLUSTRATED (Oct. 14, 2011), [http://sportsillustrated.cnn.com/2011/writers/george\\_schroeder/10/14/running-up-the-score/index.html](http://sportsillustrated.cnn.com/2011/writers/george_schroeder/10/14/running-up-the-score/index.html).

112. See LLEWELLYN & HOEBEL, *supra* note 36, at 275–76 (“[S]uch terms as ‘custom’ and ‘mores’ have come to lend a seeming solidity to any supposed lines of behavior to which they are applied, and a seeming uniformity to phenomena which range in fact from the barely emergent hit-or-miss, wobbly groping which *may* some day find following enough to become a practice, on through to an established and nearly undeviating manner in which all but idiots behave. The terms obscure also the very important range of unnoticed or unrebuked scatter of behavior around the ‘line’ [of acceptable behavior] concerned. Even on the ‘normative’ side, that of the accepted standard, they obscure the question of how many hold the standard to be proper, and how uniformly they hold it so, and who may be feeling differently . . . .”); MALINOWSKI, *supra* note 83, at 31 (explaining that the customs of the Trobriand tribe “are essentially elastic and adjustable, leaving a considerable latitude within which their fulfilment is regarded as satisfactory”).

question would have to await a dispute that originated when a seller refused to deliver and the buyer, with community backing, objected, perhaps in the form of nonlegal sanctions, perhaps in the form of a lawsuit.

If a buyer brought suit and claimed a custom, he would have to prove its existence, and medieval courts had well-established procedural rules for this.<sup>113</sup> The process usually involved polling representatives of the community, either through the interrogation of expert witnesses or through the use of a jury-like mechanism called a *turba*.<sup>114</sup> In the *enquête par turbe*—or investigation by jury—a group, traditionally composed of ten leading men,<sup>115</sup> was told the custom claimed and called upon to “report faithfully what they know and believe and see to be the use concerning that custom.”<sup>116</sup>

Even if every witness or juror consulted in the case at hand believed that a norm existed that the seller delivers, their articulation of the precise contours of that rule would depend both upon the framing of the question and their own experience of the behavior. Assume that the question of first impression before the court was whether a seller who manufactured leather goods must deliver to a buyer who lived just outside the town walls. Ten merchants were consulted on the question. Merchant *A* might believe that all sellers in the town had to deliver but only within six blocks of the seller’s shop, because that was as far as *A* or the sellers he knew had ever delivered. Merchant *B* might believe that the seller had to deliver if the goods cost above a certain amount, because that reflected his experience. Merchant *C* might believe that sellers delivered if convenient, because that was what he assumed sellers did. Merchant *D* might believe that sellers had to deliver within the town walls only, because he had never heard of anyone being asked to do otherwise. Merchant *E* might believe that shoemakers, like himself, had to deliver but did not know whether other sorts of leatherworkers did as well. And so on down the line.

The experts articulated the rule, if they considered a rule to exist, as they understood it from their own behavior and that which they had observed in others. Customs, by their nature, arise from repeating an act and not from the abstract expression of a rule. But the members of the community, if even they recognized the existence of a common behavior, may not know whether

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113. David Ibbetson, *Custom in Medieval Law*, in *THE NATURE OF CUSTOMARY LAW* 151, 158–60 (Amanda Perreau-Saussine & James Bernard Murphy eds., 2007).

114. See 2 *SELECT CASES CONCERNING THE LAW MERCHANT*, *supra* note 51, at 14–15 (providing an example of an inquisition requested by an English court of experts in Bordeaux in 1276).

115. See *GLOSSA ORDINARIA* at Dig. 47.10.7.5 v. *turba* (“A *turbe* is made up of ten men” [“*Turba. quae sit ex decem*”]). A *turbe* could be composed of laypeople, merchants, or even lawyers, depending upon the situation. *E.g.*, PHOONSEN, *supra* note 83, pt. 2, at 7–9 (describing a *turbe* from 1663 composed of ten lawyers practicing before the city court concerning bill protests).

116. CH. V. LANGLOIS, *TEXTES RELATIFS À L’HISTOIRE DU PARLEMENT DEPUIS LES ORIGINES JUSQU’EN 1314*, at 79 § 58 (Paris, Picard 1888) (reproducing an ordinance of the King of France from 1270 establishing the procedure of a *turba*).

their own engagement with the action reflects the full limits of the custom. As Hayek explained,

The process of a gradual articulation in words of what had long been an established practice must have been a slow and complex one. The first fumbling attempts to express in words what most obeyed in practice would usually not succeed in expressing only, or exhausting all of, what the individuals did in fact take into account in the determination of their actions. The unarticulated rules will therefore usually contain both more and less than what the verbal formula succeeds in expressing.<sup>117</sup>

Thus, if the experts polled were asked only whether a seller had to deliver in a fact situation in which the buyer lived just outside the city walls, and they found he did, does the new custom “seller delivers” mean delivery close to town, or delivery anywhere, or delivery within a certain distance outside the walls, or delivery only outside the walls but not inside, etc.? The reality is that, until the dispute and the concurrent need to begin to express the custom in words arose, the pattern of behavior that had taken root in the community might have included all, some, or none of these possibilities. The articulation of a custom was to some degree itself an act of invention.<sup>118</sup>

Even customs that began as a shared vocabulary with similar meanings could often have grown apart. Assume that after Town *A* had established that “seller delivers” was a custom, at least in cases in which the buyer lived close to town, *A*’s merchants exported that custom to Town *B*. Unless *B* repeatedly sent back to *A* for rulings on the meaning of the custom, the content of *B*’s seller-delivers custom would likely begin to diverge from that of *A*. Because medieval custom was oral, realized through behavior, and reliant on memory, it tended to evolve as the decision makers permitted their memories and judgment to be swayed by biases or equitable concerns. As David Ibbetson, the prominent English legal historian, has perceptively observed,

That something was customary was a backward-looking reason for a forward-looking conclusion, and the more the conclusion was desired the flimsier might be the reason provide[d] for treating it as law. . . . [T]he aim in practically every dispute was to achieve consistency with the past at the same time as getting the result which was thought to be right . . . .<sup>119</sup>

Custom that was indeterminate rather than rule-like could consequently evolve over time as the community decided whether or not to impose

117. 1 F.A. HAYEK, *LAW, LEGISLATION AND LIBERTY* 77–78 (1973) (footnote omitted).

118. *Id.* at 78 (“The process of articulation will thus sometimes in effect, though not in intention, produce new rules.”).

119. Ibbetson, *supra* note 113, at 174–75; *see also* The Verie True Note, *supra* note 20, at fol. 347r. (“[I]f they will not be iudged by lawe (as they saie and swear they ought not but only by them selves) the world must neades iudge them to be p[ar]ciall and evill dealers . . .”).

sanctions based upon factors unrelated to an offender's failure to perform the usage correctly. Jurors could "remember" the custom in different ways under the influence of the passage of time; self-serving ends; sympathy or antipathy for the parties in a case; or some sense of fairness, compassion, or righteous indignation.<sup>120</sup>

Medieval judges were apparently aware of custom's malleability at the hands of fallible, manipulable memories.<sup>121</sup> At the conclusion of his huge thirteenth-century collection of the laws of the Beauvaisis, Philip de Beaumanoir wrote,

I have arrived at the end of what I undertook in my heart to do, that is to write a book on the customs of Beauvais. . . . And since the truth is that customs come to an end because of young jurors who do not know the old customs, so that in the future the opposite of what we have put into this book will be observed to happen, we pray to all to excuse us, for when we wrote the book, we wrote as far as we could what was enforced or should have been done ordinarily in Beauvais; and the corruption of the time to come should not bring us into ill repute, or be blamed on our book.<sup>122</sup>

If custom could change even after it had been recorded in writing, it could also change when transmitted orally from one place to another untethered

120. An anthropologist discovered a similar result while investigating adjudication in an African customary-law tribal court:

[Ngoni tribal] courts have continually to deal with new situations and to make decisions which are unprecedented. This is done under the guise of drawing attention to some good Ngoni custom which has been neglected. Thus for example a man came to court saying that he was always quarrelling with his wife and that he wished to divorce her. The bench granted the divorce and awarded the woman 30s. damages. The litigant protested. The junior member of the bench, a man aged about 25 years, said, "Don't you know, it has always been the custom in this court to award 30s. damages against men who divorce their wives." Yet this was a comparatively recent practice and the litigant's protest seemed, to me, to be quite justified. The young man had been on the bench only about eighteen months.

J.A. Barnes, *History in a Changing Society*, 11 RHODES-LIVINGSTONE J. 1, 5-6 (1951). For other discussions of the flexibility of custom, see MALINOWSKI, *supra* note 83, at 80-81 (discussing accepted and well-established "evasions" of what superficially appear to be strict and mandatory customs); Craswell, *supra* note 111, at 139 ("[I]t is easy to find cases where the court's own view of the merits of a practice has clearly influenced its ruling on the legal issues involving customs."); and Thomas Barfield, Neamat Nojumi & J. Alexander Thier, *The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan*, U.S. INST. PEACE, 6-7 (Nov. 2006), [http://www.usip.org/files/file/clash\\_two\\_goods.pdf](http://www.usip.org/files/file/clash_two_goods.pdf) ("[F]ar from being timeless and unchanging, [customary law systems] are subject to a great deal of manipulation and internal contest. . . . The fundamental goal of [a customary court] process is to restore community harmony, which is generally achieved by arriving at an equitable settlement that corrects harm done to honor and/or property.").

121. See RANULF DE GLANVILL, *THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL*, 73-74, bk. vii. c. 1 (G.D.G. Hall ed., 1965) (admitting that custom will be influenced by equity).

122. *THE COUTUMES DE BEAUVAISIS OF PHILIPPE DE BEAUMANOIR* 725, ¶ 1982 (F.R.P. Akehurst trans., Univ. of Pa. Press 1992) (1283); see also Ibbetson, *supra* note 21, at 305 (discussing customs concerning life insurance that changed in the twenty years after a compilation of insurance customs was written in London in the late sixteenth century).

from a central court or the control of a single group of wise men or experts. As a consequence, the apparent similarity of the custom “seller delivers” in different towns could mask significant differences of meaning and application.<sup>123</sup>

The witnesses asked to define the custom “seller delivers” engaged in a certain degree of lawmaking as they, in good faith, attempted to articulate as a rule the various permutations of a behavior they recognized as shared at some level of generality by the members of the community.<sup>124</sup> But litigants and experts did not always act in good faith, or at least they did more legislating than simply articulating. The hypothetical above of “seller delivers” assumed that the majority of sellers in the town did indeed deliver. But in some instances, parties seeking to win their suits and believing that they needed a custom to provide a rule of decision in their favor could also assert customs that either did not exist or that were not yet recognized to exist even as a usage. A fascinating manuscript from the late sixteenth century illustrates how this third category in the typology—invented custom—worked.

The manuscript is anonymous. It is a polemic against looking to custom to interpret the standard form contracts used in the London insurance industry of the time. The author explained that when a loss occurred and the policyholder or the underwriters believed some ambiguity might exist about the obligation to pay, the parties each obtained what the author called a “perrera.”<sup>125</sup> A *parere* was a French bastardization of the Italian *mi pare* (“it seems to me”), and it referred to advisory opinions given by leading merchants, commercial courts, and later, commercial lawyers in business disputes.<sup>126</sup> The manuscript author, however, used the term differently. For him, a perrera was a statement of a supposed custom. As he described the process, each party, worried about litigation, would write up a statement of the custom he proposed with a description of the facts of the case, while altering the names to disguise the perrera’s origins. The perrera’s creator then gave the paper to a friend (the more respected, the better), and the friend attested that he was of the opinion that the custom was as stated. The friend passed the paper on to another friend who made the same notation, and so on. The perrera was then given to a broker (hopefully a foreigner, because that obfuscated the trail more effectively), and the broker would also attest to the

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123. See Cordes, *supra* note 6, at 66–67 (pointing out that superficial similarity hides subsurface differences in the supposedly universal maritime law of medieval Europe).

124. Ibbetson, *supra* note 113, at 168–69 (“Behind the guise of their finding of the custom [the jury] would, perhaps unwittingly, have been creating it, in exactly the same way as a common law judge finding and applying a rule would be engaged in an incremental exercise of law-creation.”).

125. A Note Shewing the Maner of a Devise Called a Perrera (British Library, Add. MS 48020, fol. 348r.) (n.d.); see also MALYNES, *supra* note 60, at 156 (discussing an insurance dispute in which he was involved on which were consulted “the sea-lawes and customes, and the Paracer . . . of all experienced Merchants”).

126. 2 SAVARY, *supra* note 87, at p. 2 of unpaginated preface to 1688 edition.

custom and then “getteth xl or lx hands or more thereunto, Englishmen and strangers.”<sup>127</sup> If the insured was lucky, some of the signatories to his perrera would include his insurers, who signed against their interest.<sup>128</sup>

“Now when the matter cometh to arbitrement both parties sheweth their perreras, the one being repugnant to the other[,] [y]et diverse of the assurers hands to both.”<sup>129</sup> The arbitrators considered the signatures on each document and selected the perrera signed by the merchants, brokers, and insurers they respected more. The arbitrators were also often influenced by the wealth of the disputants. According to the manuscript author, the arbitrators would favor the position of the underwriters, who were usually richer and who did business with them more frequently. As the author wrote, the arbitrators and underwriters went by the rule, “do for me and I will do for thee.”<sup>130</sup>

The customs claimed in the perreras were not necessarily genuine. The perreras never explained or justified their assertions, and none of the people who signed the papers would “dare swear the same is true.”<sup>131</sup> Yet the custom set out in the winning perrera “of force must be credited and also forthwith prescribed for an order or custom whereby men must be judged,” even if the custom were a fabrication “devised or drawn forth of uncertain heads whereof perchance the same was never or but a small time before recorded.”<sup>132</sup> If the signatories had been individually questioned about the supposed custom, “they will be found of diverse opinions according to the discretion of the party.”<sup>133</sup> Yet once the arbitrators or court had selected the custom stated in one of the perreras, their decision established the existence of the rule.<sup>134</sup>

Of course, the possibly disingenuous claim of custom did not always convince a court. In 1315, an English plaintiff claimed that the law merchant concerning the distraint of a foreign merchant’s goods was the same “in all and every fair throughout the whole realm.”<sup>135</sup> The defendant disagreed that this was the case, and the court was forced to call an inquest of merchants

127. A Note Shewing the Maner of a Devise Called a Perrera, *supra* note 125, at fol. 348r. (spelling modernized).

128. *Id.* at fol. 348r.–v.

129. *Id.* at fol. 348v. (spelling modernized).

130. *Id.* (spelling modernized).

131. *Id.* (spelling modernized).

132. *Id.* (spelling modernized).

133. *Id.* (spelling modernized); *see also* J.A. BRUTAILS, LA COUTUME D’ANDORRE 134 (1904) (relating that when asked about the rights of widows to intestate succession to their husband’s property, the local notables gave the author five different and contradictory answers about what the rule was).

134. A Note Shewing the Maner of a Devise Called a Perrera, *supra* note 125, at fol. 348v. (spelling modernized).

135. 2 SELECT CASES CONCERNING THE LAW MERCHANT, *supra* note 51, at 87. No result of this inquest is reported.

from four major towns across the country.<sup>136</sup> Despite the plaintiff's argument, a few decades earlier, the renowned thirteenth-century treatise about the law merchant that has so often been held up as proof of the existence of a systematic *lex mercatoria* had admitted that attachment of merchants' goods was done "in such different ways in different parts [of the kingdom] that no one at all was able to know or to learn the process of mercantile law in this respect."<sup>137</sup>

How could it happen in a society in which norms of all sorts, and mercantile norms in particular, played such an important role that disputants could get away with manufacturing a custom? In fact, such fabrication probably occurred with some regularity on account of two characteristics of custom.<sup>138</sup> First, because custom formed from behavior rather than from verbal expression, most members of a community would rarely have reason, prior to a dispute, to define their actions as a form of law. They might only be vaguely aware of their habitual acts or that others did the same thing. When a question arose as to whether the community behaved in certain ways under particular conditions, it would be tempting to extrapolate from what one thought people would or should do in those circumstances to assuming that is what they indeed did.<sup>139</sup> And since any relevant behavior, or lack thereof, was in the past and might not have been noteworthy at the time, it could be difficult to prove the contrary.

Second, custom also permitted gaps to remain that became apparent only when a dispute arose or a community undertook to write its custom down.<sup>140</sup> For instance, a seventeenth-century merchant manual describes what appears to have been a famous dispute in 1673 over how long a bearer

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136. *Id.* at 88.

137. *Lex mercatoria*, reprinted in BASILE, *supra* note 6, app. at 9. For an example of a polemical use of the *Lex mercatoria* treatise, see BASILE, *supra* note 6, at 128–39. Stephen Sachs has similarly shown how many of the rules claimed since the nineteenth century to demonstrate a uniform and universal law merchant actually varied from place to place. Sachs, *supra* note 6, at 788.

138. Cf. SALLY FALK MOORE, SOCIAL FACTS AND FABRICATIONS: "CUSTOMARY" LAW ON KILIMANJARO, 1880–1980, at 194 (1986) ("[H]istorically rooted and locally generated, the adaptation (and even invention) of 'custom' has always been an ongoing enterprise.").

139. Cf. Simon Roberts, *The Recording of Customary Law: Some Problems of Method*, in 1 FOLK LAW: ESSAYS IN THE THEORY AND PRACTICE OF *LEX NON SCRIPTA* 331, 333 (Alison Dundes Renteln & Alan Dundes eds., 1994) (concerning ascertaining African custom from witnesses, "there is the risk of distortion on the part of the informant: he may tell you what he thinks you would like the answer to be; what he would like the answer to be; or, what the answer might have been in the past").

140. See, e.g., SELECT CASES IN MANORIAL COURTS 1250–1550, at 132–33 (Selden Society vol. 114, L.R. Poos & Lloyd Bonfield eds., 1998) (describing a 1331 case in which the jurors at an English manor court, being asked about which party had greater right to property according to the customs of the manor, responded that "they do not know, because this situation never occurred among them").

had to present a sight bill after it had been negotiated to him.<sup>141</sup> The bearer took the bill to the payor, only to find that the payor, who had held the money for many months in anticipation of paying the bill, was now a prisoner of war and stripped of his possessions. The merchants consulted in the litigation could not agree on which side bore the risk in such situation. Some felt that the drawer was liable because the bill was payable on a certain number of days' sight, leaving the bearer the choice of when to present it. Others believed that, given the fact that the payor had been ready to pay, the bearer delayed at his own risk. Apparently, no custom existed to resolve the issue, though it is difficult to believe that it had never arisen before.<sup>142</sup>

Significant gaps could exist because premodern communities were able to govern themselves for hundreds of years without knowing precisely the content of their supposed customs and even without recognizing that some portion of the community disagreed with the majority about the meaning of certain customary rules. One well-documented example of the ability of communities to accommodate the indeterminacy of their customs comes from the recording of customs in sixteenth-century France.<sup>143</sup> In the year 1500, about two-thirds of what is now modern France was governed by oral customary law.<sup>144</sup> This presented an obstacle to the increasingly centralized French government and its increasingly sophisticated system of hierarchical courts. While the customs might have been broadly similar over large areas, the details differed in significant ways.<sup>145</sup> Adding to the complexity, no one was quite certain about the territorial extent of each custom, making it even more difficult for courts to function, for they not only had to find the custom—often by convening a *turba*—but also had to determine the correct custom to find for the parties' locality.<sup>146</sup>

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141. JACQUES DUPUIS DE LA SERRA, *L'ART DES LETTRES DE CHANGE*, reprinted in 1 SAVARY, *supra* note 87, after p. 856. For a discussion of the sight-bill issue, see *supra* text accompanying notes 102–09.

142. This account comes from DE LA SERRA, *supra* note 141, at 20–21, ¶¶ 5–14. The story is also mentioned by Anonymous in VANDENBOSSCHE, *supra* note 86, at 65–67, who says that the 1673 French commercial code should have included a rule dealing with this situation. See also PHOONSEN, *supra* note 83, pt. 2, at 140 (Danzig exchange ordinance of 1701 lamenting “the absences which are found in the laws and statutes which have been made on this subject [such gaps having] been used as a pretext or excuse for the irregular procedures that have arisen” [“die bißherige Ermangelung eines in dergleichen Sachen beschriebenen Rechters zum pretext des unbefugten Verfahrens angezeigt werden wollen”]). In a similar situation, writing about fifty years earlier, Gerard Malynes recounted a disagreement that arose at a fair in Germany over whether a bystander could unwittingly become surety for a buyer. He explained that “[t]he opinion of Merchants was demanded, wherein there was great diversitie.” This forced the court to turn to the civil law. MALYNES, *supra* note 60, at 94.

143. See generally John P. Dawson, *The Codification of the French Customs*, 38 MICH. L. REV. 765 (1940) (describing the process of homologating customs).

144. *Id.* at 766.

145. *Id.* at 767.

146. *Id.* at 767–68.

To remedy these problems, a succession of French kings ordered the customs of the various towns and regions of northern France to be codified.<sup>147</sup> This process took over eighty years, beginning around 1497,<sup>148</sup> and involved sending parliamentary lawyers out into the country, where they summoned large local assemblies composed of representatives from each of the Three Estates.<sup>149</sup> These assemblies would discuss and decide on the content of their customs, ultimately voting by majority rule.<sup>150</sup> The minutes of many of these assemblies have been preserved, and they demonstrate two relevant trends. First, on occasion when a custom was stated, some members of the assembly would disagree with the meaning given to it by the rest, claiming that “since time immemorial,” it had meant something different.<sup>151</sup> Second, the assemblies discovered gaps that needed filling.<sup>152</sup> Yet for hundreds of years the towns and villages of France had been able to govern themselves based on these customs that, when the assemblies attempted to articulate them, could not be defined with certainty.

The flexible articulation of patterns of behavior, the role of equity in determining how courts decided questions of custom, the incentives for parties to invent rules of decision, and the ability of communities to manage without fully worked-out law provides the background against which to understand the repeated admonition in merchant manuals and the writings of learned jurists that commercial courts should decide cases *ex aequo et bono*.<sup>153</sup> Equity, which had judges and arbitrators looking to facts, fairness, and good faith rather than customary rules of decision, might usually have been the only way to settle disputes. This could explain why litigants frequently did not assert a custom in lawsuits and why we have rather little evidence of formal proofs being made of commercial custom. Custom or usage was probably more often an indirect rather than direct mechanism. In other words, instead of claiming “I win because such-and-such custom controls,” the party said, “I win because my behavior conformed with what other people do, and this is evidence that I acted in good faith and dealt fairly.” The judges or arbitrators did apply the rule that merchants should act fairly and in good faith, and litigants could demonstrate that they followed

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147. *Id.* at 770–72.

148. *Id.* at 775; VAN CAENEGEM, *supra* note 100, at 36 n.5.

149. Dawson, *supra* note 143, at 773 n.26, 774.

150. *Id.* at 778–80.

151. *See, e.g.*, François Olivier Martin, *Un document inédit sur les travaux préparatoires de l'ancienne coutume de Paris*, 42 NOUVELLE REVUE HISTORIQUE DE DROIT FRANÇAIS ET ÉTRANGER 192, 210–12 (1918) (providing a transcript of the commission drafting custom of Paris debating correct custom concerning payments due to the lord upon the sale of property).

152. Dawson, *supra* note 143, at 781.

153. TRAKMAN, *supra* note 3, at 12 (citing examples); JEAN TOUBEAU, LES INSTITUTES DU DROIT CONSULAIRE OU LA JURISPRUDENCE DES MARCHANDS 14, 78–79 (Paris, Jean Guignard 1682) (citing civilian jurists on the importance of equity and good faith in deciding merchant disputes and adding that in his time, conciliar judges were to judge based on equity, good faith, and the positive laws and ordinances concerning commerce).

that rule by pointing to their adherence to a regular community practice rather than through the proof of a binding custom.

These observations about the nature of custom are not meant to imply that custom did not exist or that it was unable to provide an effective means of dispute resolution. The formation of custom through adjudication appears to have created rules much like those created through common law adjudication. Law arising from custom, like that arising from the common law, formed in response to questions raised by particular sets of facts. The custom “seller delivers” does control in *this* case, in which the buyer lives close to town, but it does not control in the next case, in which the buyer lives a greater distance from the town, because the custom as we state it in the second case is “seller delivers to buyers who live close to town.” By contrast, what custom could not do was provide generalizable, abstract rules.<sup>154</sup> As a French jurist “observed in the seventeenth century, only ‘where the crops are showing’ could customary law protect possession.”<sup>155</sup>

The pliability of custom, the difficulty of proving it with any assurance, and the complexity of transmitting it from place to place may have been an important reason that courts of appeals throughout continental Europe, and even trial courts in the Italian cities, looked to Roman and canon law (*ius commune*) rather than to merchant custom in resolving commercial disputes.<sup>156</sup> They did not do so from a prejudice against custom, for in certain other areas of law, such as real property and inheritance, where customs were more stable and earlier put into writing, courts did apply the local customary law.<sup>157</sup> But for mercantile cases, the judges often found it easier to turn to the clear, sophisticated, and usually adequate rules of the Roman law.

In sum, custom is a slippery type of law to try to borrow or share. Prior to a dispute, the members of a community would not necessarily even have been consciously aware of the existence of a usage, let alone a binding custom. When experts or jurors attempted to express what had theretofore been only actions, their articulations were unlikely to capture precisely the contours of the alleged custom. Custom, like common law, was better at solving specific disputes on specific facts than at creating abstract rules. These factors made custom, again like the common law, difficult to transmit.

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154. Ibbetson, *supra* note 21, at 301.

155. Kelley, *supra* note 100, at 141.

156. *See, e.g.,* Wijffels, *supra* note 6, at 261–64 (providing numerous examples of cases resolved on the learned laws). For example, the decisions of the Genoese Rota, the premier merchant court in Europe, whose opinions were cited by other courts as authoritative, used Roman law. MARCUS ANTONIUS BELLONUS, DECISIONES ROTAE GENUAE DE MERCATURA (3d ed., Frankfurt, Martinum Lechlerum 1592).

157. *See, e.g.,* FRANÇOIS HOTMAN, ANTITRIBONIAN OU DISCOURS D’UN GRAND ET RENOMME JURISCONSULTE DE NOSTRE TEMPS 36–37 (Paris, Ieremie Perier 1603) (commenting on the need of lawyers to know customary property law, as well as marriage and inheritance customs, in order to work in French courts).

In addition, as malleable descriptions of behavior, custom accommodated equitable decision making that took into account the totality of the situation in each case. For the same reasons, claims of custom were exposed to cheating because witnesses and jurors could be persuaded that what ought to be the practice actually was. Consequently, over time, the natural evolution of a community's behavior or court decisions introducing variations might alter the contours of the custom. This means that even if a custom could have been transplanted from one community to another and perhaps started out the same in both places, the custom of the two locations would not necessarily have remained identical.<sup>158</sup> These observations argue against the existence during the Middle Ages of a *lex mercatoria* composed of uniform and universal merchant customs.

The implications of this claim for the law merchant story are significant. If customs were local, even if the various types of contracts that merchants used were universal, then an assumption by merchants that all of commercial law was uniform and universal would result in many disputes.<sup>159</sup> For example, assume that the insurance policies of London and Antwerp were very similar on their faces. They both functioned the same way, and they shared much of the same express language. However, the gap-filling customs in London differed from those in Antwerp. If a London underwriter sold an insurance policy to an Antwerp merchant, and if the merchants believed that uniform and universal customs existed, then they would assume that the gap-filling customs were the same and would not try to reconcile their in-reality variant understandings at the time of contracting. Should a disagreement arise concerning a gap-filling custom, each party would feel that he was correct and acting in good faith because he was following his own local custom, which he had believed the other party also to be following.

Several responses could result from this scenario. First, merchants might quickly realize that no uniform and universal law merchant existed and stop acting as if it did. Second, merchants from many places could get together and expressly agree to reconcile their customs. This, however, represents an act of legislated lawmaking rather than the evolution of a binding custom through repeat behavior. Third, merchants might never have believed in the existence of a uniform and universal customary law merchant and therefore always made sure to inquire about local rules and practices. No traces of the first scenario remain, though it is possible that it happened so early (probably by the eleventh century) that all evidence of it is now lost. The second scenario did occur, but perhaps only when the rules were eventually written down in either private or public law codes. The third scenario also happened, as attested to in merchant manuals advising mer-

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158. A similar effect can be seen in the common law of the various states of the United States.

159. Cf. Trakman, *supra* note 1, at 271 (making the unproven claim that it was "clear that the existence of a Law Merchant was widely known and that it was resorted to by medieval merchants").

chants to inquire about and follow the local laws and customs.<sup>160</sup> None of these three possibilities, however, allow for a transnational customary law merchant that lasted hundreds of years, as depicted in the traditional *lex mercatoria* myth.

### III. Calls for Legislation

As a result of the instability of custom, merchants sometimes had good reason to want an authoritative institution—e.g., court, public legislature, or guild—to establish a rule for them.<sup>161</sup> A statute or judicial decision could resolve the confusion that arose when the lack of a single superior solution allowed competing customs to come into being, and the process of creating the legislation could fill in gaps and resolve long-standing uncertainties.<sup>162</sup> Enacted laws also provided judges with more defined rules of decision that obviated the need to summon expert witnesses and *turbae*—with the possi-

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160. See, e.g., *supra* notes 57–59 and accompanying text.

161. See, for example, the comments of a modern law merchant skeptic on the drawbacks of customary law:

Romantic hindsight at the law merchant tends to overlook its weaknesses: the uncertainty of custom recorded in so many different reports or not recorded at all; differences between solutions of the same issues adopted in neighboring cities, and gaps of mercantile practice. It appears that business circles were very much interested in mechanisms which would provide a more effective resolution of commercial disputes. These solutions became feasible when larger territorial states started to develop an active policy in economic matters.

Jürgen Basedow, *The State's Private Law and the Economy—Commercial Law as an Amalgam of Public and Private Rule-Making*, 56 AM. J. COMP. L. 703, 705 (2008).

162. For example, in 1676, an Amsterdam merchant and highly respected, often-quoted expert on bills of exchange named Johannes Phoonsen listed ten unresolved issues in the law of bills as they related to bankruptcy and then commented:

To prevent these and similar and hundreds of other questions, disputes, and inconveniences that arise in exchange that I could list and describe, it is only necessary to make a precise order and regulation based on which everyone could regulate and guide themselves, written with knowledge, ordained, and legislated. For it is astonishing and to be complained about that, in this city, which is assuredly the leading commercial and exchange locale in the whole world, no badly-needed ordinance, required and useful to prevent disputes, exists but only a few orders and regulations established from time to time . . .

[Tot preveneringe van dese en diergelijke, en honderden van questien, disputen en inconvenienten, ik omtrent veelderley voorval in de Wissel-handel soude konnen op tellen en voorstellen, behoefden maar een wel geraisonneerde vaste voet, reglement en ordre, waar na men sig te reguleren en te richten hadde, met kennis ingestelt, beraamt en gestatueert te werden; sijnde overwonderens waardig, en beklaaglijk, dat in dese de voornaamste handel- en Wissel-plaats van de geheele Weerelt, geene soo seer noodige, en tot voorkomige van vele geschillen gerequireerde en dienstige, Wissel-ordonnantie gevonden werd, maar alleen eenige weynige Keuren en Ordonnantien nu en dan gestatueert . . .]

PHOONSEN, *supra* note 83, pt. 1, at 332–36.

bility of invention that process introduced—each time an alleged custom came up for dispute.<sup>163</sup>

The way the mercatorists tell the story, the state imposed formal commercial law on the merchants to the detriment of the efficient *lex mercatoria*.<sup>164</sup> While that may have happened in some instances,<sup>165</sup> it does not account for all of the legislation that came to exist. As noted above in the example of the French merchants asking the court to select between the customs of eight or ten days of grace,<sup>166</sup> sometimes it was the merchants who turned to judges and legislators to establish rules.

Commercial courts had a front-row seat to the uncertainty that could arise when regulation was left to custom. For example, the length of time a payee on a bill of exchange had to seek payment of a protested letter of exchange from the drawer and from endorsers up the chain “often [gave rise to] intense disputes between merchants, which greatly troubled commerce.”<sup>167</sup> Consequently, the question came frequently before courts, moving the judges and consuls of the Parisian merchant court to take action. In 1662, they convoked a meeting of the former consuls and other notable bankers and merchants to advise them on the means of remedying this abuse.<sup>168</sup> The group created a set of rules establishing time limits for protests and notice, and presented them to the Parlement of Paris.<sup>169</sup> Parlement passed a bill and petitioned the King to ratify it, which he did in January 1664.<sup>170</sup> The preamble of the King’s declaration recounted the bill’s origin in the concerns of the

163. Cf. Robert L. Hecht, *How the Tea Association Serves Its Members*, 51 TEA & COFFEE TRADE J. 321, 321 (1926) (stating that one of the purposes behind the formation of the Tea Association of the United States was to “procure uniformity and certainty in the customs and usages of said trade and commerce, to settle differences between the members of the association, and to promote a more enlarged and friendly intercourse among business men connected with the trade”).

164. Harold J. Berman & Colin Kaufman, *The Law of International Commercial Transactions* (Lex Mercatoria), 19 HARV. INT’L L.J. 221, 227–28 (1978); Carbonneau & Firestone, *supra* note 4, at 61–62; Cremades & Plehn, *supra* note 1, at 319–20; Trakman, *supra* note 8, at 15, 22–24.

165. E.g., 19 ISAMBERT, *supra* note 71, at 101 (documenting title 6, article 2 of the 1673 French commercial code, which banned compound interest, which French merchants commonly charged); VANDENBOSSCHE, *supra* note 86, at 81, 83 (giving the response of one early commentator to this provision: “This article is entirely contrary to the usage of the exchange of Lyon, and when, in litigation, one wished to allege the rule in this article, the court ignores it” [“Cet article est entièrement contraire à l’usage de la place de Lion, et, lorsque dans les procez on a voulu alléguer la disposition de cet article, la cour n’y a eu aucun égard.”]). This critical commentary comes from an anonymous manuscript work (“Anonymous”) that its editor dates to 1678–1686. The identity of the author of the Anonymous presents an interesting puzzle. He was, from all appearances, a Roman law-trained lawyer with an extensive knowledge of commercial practice. Vandenbossche expresses the belief that the author was a practicing attorney. *Id.* at 9.

166. See *supra* notes 103–08 and accompanying text.

167. 1 SAVARY, *supra* note 87, at 179 (“[I]l y avoit souvent de grandes contestations entre les Négocians, qui troubloient beaucoup le Commerce.”).

168. *Id.* at 180.

169. *Id.*

170. *Id.* at 180–81.

judges and consuls of our good city of Paris, [who,] having recognized through long usage the prejudice that merchants endure in the absence of a definitive regulation concerning the acceptance, guaranteeing, and protest of letters of exchange . . . , have presented their request to our court of Parlement in the said place, with the intent that there should be provided a good regulation of the making and negotiation of these said letters of exchange.<sup>171</sup>

The regulation of bills of exchanges impelled a great deal of similar legislation. The preambles of numerous seventeenth-century statutes across Europe relate that the rules were made because “the merchants of this town . . . requested that we establish some ordinances concerning exchange, for the advancement of commerce and to prevent disorders, disputes, and costly suits, which arise too often.”<sup>172</sup> Most of the regulations concerned coordinating rules dealing primarily with the acceptance and protest of bills. Such rules were unlikely to reflect the law merchant story of governments taking over commercial law or the rent seeking or regulatory capture by the most powerful merchants. First, as merchants acted variously as payors and payees, a rule that benefited debtors would disadvantage those same people when they were creditors. Thus no single, coherent group had a readily apparent interest in joining together to seek rents and try either to get regulation or to influence the choice of the rule.

Second, the specific content of private-law coordinating rules was meaningless to the law giver. As long as a rule existed that kept commerce flowing and disputes out of court, the government neither cared about, nor necessarily had the power to insist upon, the content of the rule. In addition, many of these exchange statutes came from city governments, and in most major trading towns, the merchant class controlled, entirely or in part, the city council. For instance, the government of Amsterdam, to name one of the most extreme examples, was dominated by merchants throughout the

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171. 18 ISAMBERT, *supra* note 71, at 28–29 (“[L]es juges et consuls de notre bonne ville de Paris ayant reconnu par un long usage le préjudice que reçoivent les négocians, faute d’un règlement certain pour l’acceptation, cautionnement et protêt de lettres de change, . . . auroient présenté leur requête à notre cour de parlement dudit lieu, tendante à ce qu’il fût pourvu d’un bon règlement sur le fait et négoce desdites lettres de change.”).

172. PHOONSEN, *supra* note 83, pt. 2, at 218 (reprinting a statute of Breslau of 1672: “Demnach die löbliche Kauffmanschafft alhier ben uns Ansuchung gethan daß wir zu befürdrung der Comerzien, abwendung allerhand Unordnungen und verhütung vieler wachsenden Streitigkeiten und kostbahrer processen, selbst mit einer gewissen Wechsel Ordnung versehen mochten”); *id.* at 120 (documenting a Frankfurt exchange statute of 1667 explaining that, “both for ourselves and for the good of the many good and honest merchants who have requested this of us, we have decided to promulgate a stable regulation, on which everyone can base themselves in the future, on the subject of letters of exchange drawn on this city, whether during the fairs or at other times” [“so well für uns selbst als auff dienstfleissiges Unhalten und Bitten verscheidener Kauff- und Handels-leuthen zu begegnen und dessentwegen ein Einsehen zu haben auch wie es ins kunsstige in unseren Messen und darzwischen in Kauff- und wechselshandlung zu halten gewisse Verordnung zu machen bewegt und gemüziget worden”]).

seventeenth century.<sup>173</sup> Such men had no reason to pass legislation antithetical either to their own businesses or to that of their social and commercial associates.

Finally, some quite basic legal matters of significance to commerce ended up in front of civil courts frequently enough to suggest that the merchants could not adequately police the rules themselves. According to one of the leading mercatorists, the law merchant created a rule of agency under which the agent did not “acquire any independent rights and liabilities of his own. The Law Merchant generally perceived of ‘agency’ as a factual relationship—a useful conduit pipe in establishing a link between the principal and distant merchants or carriers.”<sup>174</sup> Despite this supposed agreement, a town register of Bruges that recorded grants of privileges and judicial opinions of particular importance to the city includes copies of eleven decisions handed down by the aldermanic court between 1410 and 1413 concerning the liability of a principal for debts incurred by his agent.<sup>175</sup> While one could imagine a scenario in which a rule about principals and agents arose through tacit agreement, policed by merchants and their nonlegal sanctions, the number of cases in this short period of time indicates the disinclination of the principal to accept responsibility for his agent’s debts. If the liability of the principal for his agent was a custom of merchants, it was not one they were hesitant to contest in court.

The occasional preference of merchants for legislation or court decisions does not demonstrate the superiority of legislation or the inefficiency of custom. Merchants merely seemed to realize that custom could not serve all purposes equally effectively. If they needed hard and fast rules that all parties could know *ex ante*, they needed a statute. If they wanted a uniform rule in a coordination situation in which more than one reasonable solution existed, they were better off having some authority impose the rule. And when a rule was controversial—perhaps because it placed significantly more risk on one side, such as the agency cases discussed above—then a custom might give rise to endless weaseling as the burdened party tried to reduce his liability. On the other hand, custom offered more room for equitable development when the parties were close-knit, repeat players who wanted less imposed, enacted law and more reliance on good faith, accommodation, and fair dealing in situations in which the risks were more evenly shared.

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173. D.J. Roorda, *Het Hollandse regentenpatriciaat in de 17e eeuw*, in *VADERLANDS VERLEDEN IN VEELVOUD* 232, 238–39 (G.A.M. Beekelaar et al. eds., 1975).

174. TRAKMAN, *supra* note 3, at 14.

175. I GILLIODTS-VAN SEVEREN, *CARTULAIRE*, *supra* note 83, at 473–74.

#### IV. The Unnecessary Law Merchant

The law merchant story rests on the assumption that medieval merchants needed a body of transnational law in order to permit cross-border trade, which would otherwise have been impossible. One scholar has gone so far as to claim that the law merchant was necessary because few conflicts-of-law rules existed prior to the emergence of modern nation-states in the seventeenth century.<sup>176</sup> Without attempting to write a voluminous history of premodern commerce, this part points to four factors demonstrating the falsity of these ahistorical presuppositions undergirding the law merchant myth. First, contracting was largely done face-to-face, meaning it was clear what law governed the contract. Second, towns had well-developed choice-of-law rules. Third, arbitrators were often selected from the residences of the disputants and therefore could apply local customs as necessary. Fourth, merchants used brokers and other intermediaries who knew the laws of the town.

The mercatorists are not incorrect in worrying about foreign merchants' encounters with local law. Medieval merchants did not make their contracts in a stateless legal vacuum or a legal universe of solely noncommercial feudal law. In fact, merchants—foreign and local—found themselves hemmed in by the laws and regulations of many jurisdictions and organizations. City aldermen, for example, promulgated extensive rules governing what merchants could sell, for how much, where, when, and to whom.<sup>177</sup>

In addition to the town regulations, guilds or the local organization of the foreign nation to which traders belonged controlled many aspects of their members' commercial practices. The northern Germans who did business in Bruges, for instance, belonged to the German Hansa and were organized under the Hansa's private legislative rules, both those sent out to the local offices (called *kontors*) by the central administration in Lübeck and by the local governors of each *kontor*.<sup>178</sup> Local merchants and those who serviced

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176. A prominent commentator on the law merchant theory summarizes this claim:

Schmitthoff notes that in the period before the seventeenth century, there were hardly any conflict rules relating to transnational commercial transactions. The absence of conflict rules should, according to Schmitthoff, be explained by the existence of the *law merchant*, a cosmopolitan mercantile law based upon customs and applied to transnational disputes by the market tribunals of the various European trade centers.

FILIP DE LY, *INTERNATIONAL BUSINESS LAW AND LEX MERCATORIA* 15 (1992).

177. 1 GILLIODTS-VAN SEVEREN, *CARTULAIRE*, *supra* note 83, at 249 (describing the 1362 privileges granted to merchants of Nuremburg regulating quality of cloth made in Flanders); 6 LÉOPOLD GILLIODTS-VAN SEVEREN, *INVENTAIRE DES CHARTES* 5–13 (Bruges, Gaillard 1871–1878) [hereinafter GILLIODTS-VAN SEVEREN, *INVENTAIRE*] (explaining the 1470 renewal of charter of staple in Bruges establishing who could sell cloth where and of what sort); JAMES M. MURRAY, *BRUGES, CRADLE OF CAPITALISM, 1280–1390*, at 63–73 (2005) (describing the commercial geography of Bruges).

178. 3 KONSTANTIN HÖHLBAUM, *HANSISCHES URKUNDENBUCH* 344 (Halle, Verlag der Buchhandlung des Waisenhauses 1882–1886); *id.* at 56 (discussing the ordinance of Hansa

them, such as brokers and hostellers, also belonged to guilds.<sup>179</sup> In the eleventh century, these were fraternal protection organizations, created so that merchants from a town could travel together and fight off bandits on the road or mobs at the markets.<sup>180</sup> As trade developed and towns became more important, the guilds, far from being benevolent agents of free trade, became locally based monopolistic organizations designed to limit competition and change.<sup>181</sup> Rather than use the power of the guild to pursue cheaters and benefit trade, the guilds facilitated anticompetitive behaviors such as price fixing and interdicting product innovations that threatened their exclusive position.<sup>182</sup>

How did foreign and local traders mediate all of these particular rules without the assistance of an overarching transnational law merchant? From the beginning of the so-called commercial revolution in the eleventh century through the early modern era, commerce was normally done face-to-face. During the high Middle Ages, merchants traveled to fairs, markets, and towns to meet with buyers, bringing their goods with them.<sup>183</sup> Later, some merchants might be sedentary, but they still hired a local agent or sent a factor to live in foreign towns and act on their behalf.<sup>184</sup> The merchants conducted their trade in well-defined commercial spaces: the cloth hall for cloth sales, the spice market for spices, the wool staple (the town that had the monopoly on wool sales) for wool. These markets were governed by city-appointed wardens responsible for ensuring product quality.<sup>185</sup> Often, though not always, the buyer had the opportunity to inspect the goods before purchasing. If he did not, it was assumed that he would inspect them very soon after the sale, while the seller was still available, and some city laws

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merchants over sale of Poperingse cloth from 1347); 1 GILLIODTS-VAN SEVEREN, *CARTULAIRE*, *supra* note 83, at 277–79 (providing the regulations of Hansa kontor in Bruges from 1375).

179. Anke Greve, *Brokerage and Trade in Medieval Bruges: Regulation and Reality*, in *INTERNATIONAL TRADE IN THE LOW COUNTRIES (14TH–16TH CENTURIES): MERCHANTS, ORGANIZATION, INFRASTRUCTURE* 37, 39 (Peter Stabel, Bruno Blondé & Anke Greve eds., 2000).

180. Volckart & Mangels, *supra* note 6, at 437.

181. EDWIN S. HUNT & JAMES M. MURRAY, *A HISTORY OF BUSINESS IN MEDIEVAL EUROPE, 1200–1550*, at 35 (1999).

182. *E.g.*, Aldermanic Court Decision (Stadsarchief Brugge, Register Civile Sententies 1447–1453, fol. 56r.–v.) (punishing an importer of madder not dried according to the guild regulations); *id.* at fol. 53v. (punishing a seller who sold oil in containers no longer proper under regulations); 1 GILLIODTS-VAN SEVEREN, *CARTULAIRE*, *supra* note 83, at 524 (describing complaints by foreign merchants of price fixing by merchants in Bruges).

183. Volckart & Mangels, *supra* note 6, at 436.

184. HUNT & MURRAY, *supra* note 181, at 55–56.

185. *See, e.g.*, 6 GILLIODTS-VAN SEVEREN, *INVENTAIRE*, *supra* note 177, at 11–12 (describing the regulations giving wardens of cloth hall the right to fine sellers for cloth that did not meet requirements).

limited the buyer's rights to reject nonconforming goods after a certain time.<sup>186</sup>

In other words, medieval commerce did not consist of a seller in one country selling the prospect of future goods to a buyer in another. Merchants may have crossed national borders to make sales, but contracts did not. The locus of the contract was almost always clear, and the default medieval conflicts-of-law rule was *lex loci contractus*—the law of the place where the contract was made controls.<sup>187</sup> We see this rule expressed in urban legislation. For instance, in the privilege granted by Bruges to the Hansa merchants, the town established the rule that in contracts made between Hansa members, the parties could choose to be governed by their own law and have their disputes heard by the Hansa governors. But in transactions between a Hansa merchant and a non-Hansa merchant, the laws and customs of Bruges controlled, and the aldermanic court had jurisdiction.<sup>188</sup>

When courts were not competent to decide on the governing law, a common solution was to appoint arbitrators from the disputants' nations.<sup>189</sup> The arbitrators' decision could be read into the court record and approved and adopted by the court.<sup>190</sup> Presumably, one reason for using arbitrators from the same town or country as the parties was that they could be assumed to know any relevant customs from the parties' places of residence.

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186. 1 GILLIODTS-VAN SEVEREN, *CARTULAIRE*, *supra* note 83, at 227–28 (explaining the privileges granted to English merchants in 1359 by the Count of Flanders limiting the right of return after inspection).

187. Wijffels, *supra* note 6, at 269 n.35; *see also* Aldermanic Court Decision (Stadsarchief Brugge, *Cartul. Oude Wittenboek*, fol. 160r.) (Apr. 10, 1381) (describing a dispute before aldermen of Bruges over refused payment on a letter of exchange where the aldermen instructed the litigants to take the case to Paris where the contract was made); 1 GILLIODTS-VAN SEVEREN, *CARTULAIRE*, *supra* note 83, at 45 (explaining the charter of privilege granted by the Countess of Flanders to the German merchants in 1253 ordering that disputes concerning debts be resolved “secundum legem loci” and that in all matters not addressed in the privilege, the custom and law of the county would control).

188. 1 GILLIODTS-VAN SEVEREN, *CARTULAIRE*, *supra* note 83, at 613 (rules permitting Hansa merchants to have disputes between them judged by their own Hansa governors and requiring disputes between Hansa merchants and merchants of other nationalities to come before the aldermen of Bruges); *see also id.* at 212 (describing a regulation from 1350 allowing English merchants to use their own law and courts to govern contracts between them); *id.* at 246 (discussing privileges granted by three main towns of Flanders to merchants of Nuremberg in 1362 allowing them self-governance but requiring disputes over contracts for sale of enumerated goods to be brought before aldermen of the towns).

189. *E.g.*, Aldermanic Court Decision (Stadsarchief Brugge, *Register Civiele Sententies 1447–1453*, fol. 40r.) (describing a dispute between an English merchant and a Bruges merchant, who agreed on an English arbitrator and an arbitrator from Bruges); 1 GILLIODTS-VAN SEVEREN, *CARTULAIRE*, *supra* note 83, at 685 (asserting that Italian merchants were used as arbitrators when disputants were from Italy); 2 GILLIODTS-VAN SEVEREN, *CARTULAIRE*, *supra* note 83, at 9 (reporting a dispute in Bruges between merchants from Lucca that was submitted to merchant-arbitrators from Lucca residing in Bruges).

190. *See, e.g.*, Aldermanic Court Decision (Stadsarchief Brugge, *Register Civiele Sententies 1447–1453*, fol. 62v.–63r.) (describing an arbitration decision written in Italian and translated orally by one of the arbitrators into French to be read into the record).

Arbitrators, therefore, had no need to apply a transnational law merchant. And because the arbitrators, like the judges themselves in cases they heard, did not have to explain their reasoning or state the law or custom they had applied, the court record contained nothing that could operate as precedent for the future.<sup>191</sup>

The answer to the question of how foreign merchants would know the local laws is surprisingly simple. Many towns required foreigners to use a city-certified broker when concluding transactions.<sup>192</sup> “One can never value highly enough the role of brokers of all sorts.”<sup>193</sup> They facilitated transactions in towns in which merchants from many nations gathered.<sup>194</sup> They were experts on the market; they knew the local customs, the gossip, and the rulings of the courts;<sup>195</sup> they knew where to find sellers with goods to sell and buyers who wanted to buy them; and they knew about the reputation and creditworthiness of the traders doing business in town.<sup>196</sup> Brokers were also expected to serve as neutral expert witnesses in court, testifying to the transaction and its terms.<sup>197</sup> They could even act as attorneys for absent merchant-litigants.<sup>198</sup> In Arras, France, brokers had the right to sit as judges in commercial disputes.<sup>199</sup> Thus, brokers not only knew the laws and customs, but they also helped create them.

191. *Id. passim*; cf. Benson, *supra* note 4, at 503 (claiming rulings in merchant courts gave detailed justifications and that merchant court records were maintained).

192. KATHRYN L. REYERSON, *THE ART OF THE DEAL: INTERMEDIARIES OF TRADE IN MEDIEVAL MONTPELLIER* 92–93, 178 (2002) (explaining that Bruges forbade foreigners to engage in retail trade and required them to use brokers for wholesale trade and that Prato forbade sales of cloth not organized by a local broker); 1 GILLIODTS-VAN SEVEREN, *CARTULAIRE*, *supra* note 83, at 81 (displaying a charter of 1293 granted by Count Guy of Flanders to brokers of Bruges ordering that no foreigner or citizen of the town could buy or sell merchandise without having a broker with them).

193. 1 V. VÁZQUEZ DE PRADA, *LETTRES MARCHANDES D’ANVERS* 69 (1960) (“On n’estimera jamais assez haut le rôle des courtiers de toutes sortes.”).

194. J.A. van Houtte, *Makelaars en waarden te Brugge van de 13e tot de 16e eeuw*, 5 *BIJDRAGEN VOOR DE GESCHIEDENIS DER NEDERLANDEN* 1, 1 (1950).

195. 1 GILLIODTS-VAN SEVEREN, *CARTULAIRE*, *supra* note 83, at 243, 247 (listing privileges granted to merchants of Nuremberg by the towns of Ghent, Bruges, and Ypres in 1362, including the provision that “no broker shall perform brokerage services without knowledge of selling and merchandise” [“gheen makelare makelaerdie hebben zal, zonder de ghene die over den coop of coopmanscepe wesen zal”]); see also BORNIER, *supra* note 83, at 247 (“[A]s merchants, or those who are obliged to draw letters of exchange, may not know the usance or practice [of a city], there is in the major commercial cities ordinarily the seneschals or agents of the Exchange, who know the ins and outs of the business of banking, and who are there to give advice about the customary practice [of the town] and about the probability [of repayment] or the solvency of the financier, and to which [agent] it is necessary to address oneself.” “[C]omme les Négocians ou ceux qui sont obligés de tirer Letters de Change, ne connoissent pas l’usage ou pratique, il y a ordinairement dans les Villes de grand commerce des Sensals ou Courtiers de Change, qui entendent l’intrigue du Négoce de la Banque, & qui sont établis pour donner avis sur ce qu’on a accoutumé de pratiquer, & sur la probabilité ou solvabilité des traitans, & à quel Marchand il faut s’adresser.”).

196. Greve, *supra* note 179, at 42; van Houtte, *supra* note 194, at 1.

197. Greve, *supra* note 179, at 43; van Houtte, *supra* note 194, at 28.

198. Van Houtte, *supra* note 194, at 23–25.

199. *Id.* at 28 n.1.

In some towns, brokers worked for hostellers.<sup>200</sup> While in Italy, foreign merchants had to live in compounds; in many northern cities they were not segregated.<sup>201</sup> Instead, they found rooms in hostels, and the hosteller became their warehouseman, local guide, credit reference, surety, newsmonger, and sometimes agent.<sup>202</sup> The hostellers thus had an incentive to ensure that foreign merchants knew the ways of the town and succeeded in conducting their business there effectively.

Alongside brokers and hostellers were other intermediaries, such as the notaries who drew up contracts. When the merchants of Ypres attended the fairs of Champagne in the thirteenth century, they took the town secretary with them. He could draw up the contracts and letters obligatory, which were then officialized by the town aldermen upon the merchants' return. This ensured that the law of Ypres, not the law of Champagne or some hypothetical law of the fair, controlled.<sup>203</sup> In medieval Bruges, foreign notaries—and by the fifteenth century also their Flemish counterparts—set up business in the center of town.<sup>204</sup> These were not mere passersby, but rather long-term residents whose profession it was to know the local law as well as the law of the foreign nations represented by their clients.

Merchants, too, occasionally settled for long periods in foreign towns. Sometimes they even became citizens.<sup>205</sup> These merchants served as middlemen, communicating across cultures and customs, and helping their countrymen navigate local laws and mores.<sup>206</sup> Given all these adjuncts to trade, foreign merchants, who might remain in a town for months during the pendency of a fair and return there regularly each year, had plenty of avenues by which to learn whatever local laws and customs governed the contracts they made. They did not require a law merchant in order to conduct trade.

Finally, it is possible that our modern assumption that commercial disputes needed to be resolved by legal rules of decision is inaccurate for the Middle Ages. The evidence of records of judicial and arbitral opinions is late and difficult to analyze. But in the opinions that we have, from courts that are not applying the learned laws as a matter of course,<sup>207</sup> the judicial and arbitral decisions nearly always discuss only the facts of the case and the

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200. Greve, *supra* note 179, at 42; van Houtte, *supra* note 194, at 12.

201. Peter Stabel, *De gewenste vreemdeling: Italiaanse kooplieden en stedelijke maatschappij in het laat-middeleeuws Brugge*, 4 JAARBOEK VOOR MIDDELEEUWSE GESCHIEDENIS 189, 198 (2001).

202. MURRAY, *supra* note 177, at 73, 191–92, 199, 212–13 (explaining that a hosteller's business “depended on the collection and exchange of trade information”).

203. GUILLAUME DES MAREZ, *LA LETTRE DE FOIRE À YPRES AU XIIIÈ SIÈCLE. CONTRIBUTION À L'ÉTUDE DES PAPIERS DE CRÉDIT* 15–16 (1901).

204. Stabel, *supra* note 201, at 210.

205. *Id.* at 199.

206. *Id.*

207. The Rota of Genoa, the most respected commercial court of the late Middle Ages and early modern era, is an example of a court applying almost exclusively *ius commune* to resolve commercial disputes.

outcome without stating a rule of decision.<sup>208</sup> Of course, the decision makers may have based the outcome on an unexpressed rule, including the rule of good faith, but in customary legal systems, disputes seem to turn most frequently on questions of fact rather than questions of law.<sup>209</sup> From what court records permit us to see, the majority of commercial disputes centered on issues such as “he owes me money, and he did not pay,” or “he sent me nonconforming goods,” or “those goods are mine, and I have the documents to prove it.”<sup>210</sup> In many instances, the resolution was probably a matter of examining the evidence, hearing the statements of the parties, questioning witnesses and experts, and deciding who had the more convincing story, who had acted in bad faith, or what would be a fair outcome. Law would not necessarily have come into the case at all.

### Conclusion

If merchants did not create uniform and universal customs but rather used local law when they needed to supplement their common contract forms and, in some instances, even asked the courts and governments to legislate a rule for them precisely because of the instability of custom, then not only does this challenge the law merchant myth, but it also calls into question the assumption of many international commercial arbitrators and of Article Two of the Uniform Commercial Code that decision makers should look to merchant usage to decide disputes. If custom is local or network dependent, then only trading partners who are proven to belong to the same trading community should be held to know the custom and to understand it in the same way. And because customs evolve, the fact that an entire industry might articulate a custom similarly does not mean that the decision maker is freed from inquiring into the specific meaning each community within that industry actually assigns to the custom. Furthermore, decision makers and advocates of private ordering should be aware that the premodern evidence suggests that customs do not exist in every instance in which they are claimed, despite

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208. Ibbetson, *supra* note 113, at 168 (discussing English opinions). This pattern holds true for the records of the opinions of the aldermen of Bruges in the fifteenth century and for the opinions of the judges of the commercial court of Lyon in the seventeenth century. Where the rule of decision can be deduced, it is usually because one of the parties pled a custom or statute. *See, e.g.*, Aldermanic Court Decisions (Aug. 28, 1448) (Stadsarchief Brugge, Register Civile Sententies 1447–1453, fols. 56r.–v.) (pleading charter of the jurors of madder); 1 GILLIODTS-VAN SEVEREN, *CARTULAIRE*, *supra* note 83, at 618–19 (highlighting a pleading custom of shippers in Spain); *cf.* 2 *id.* at 6 (describing a defendant pleading the merchant custom concerning bill of exchange [“selon la coutume en tel cas entretenue entre les marchands”] and the court finding for the plaintiff).

209. Lloyd Bonfield, *The Nature of Customary Law in the Manor Courts of Medieval England*, 31 *COMP. STUD. SOC. & HIST.* 514, 521 (1989).

210. *See, e.g.*, 1 GILLIODTS-VAN SEVEREN, *CARTULAIRE*, *supra* note 83, at 692–93 (describing an aldermanic court decision from 1448 interpreting a surety agreement for the payment of a debt); *id.* at 705, 707–08 (recounting disputes from 1449 over quality of wool in which wool was sent to experts for their assessment); 2 *id.* at 3 (summarizing a dispute from 1451 over quality of animal skins); *id.* at 9 (discussing a case where a hosteller denied that he took delivery of three tons of Scottish butter).

testimony asserting that people do behave in a certain way. Even when the parties admit to the existence of the custom, the witnesses and experts engage, knowingly or not, in a certain degree of invention. The decision maker participates in this process of construction by selecting among competing articulations of the alleged custom. In such circumstances, the custom chosen does not necessarily reflect the *ex ante* expectations of the parties, nor does it necessarily reflect the merchants' efficient self-governance.