

4-1-1970

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Recommended Citation

Daniel J. Gifford, *Custom, Law and Morality. by Burton M. Leiser.*, 19 Buff. L. Rev. 697 (1970).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol19/iss3/17>

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CUSTOM, LAW AND MORALITY. By Burton M. Leiser. Garden City, New York: Anchor Books, Doubleday and Company, Inc. 1969. 185 pages. \$1.45.

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Custom, Law and Morality makes a contribution to the development of our understanding of the interrelation between custom and law. The main thesis of the book seems to be that patterns of conduct regularly and widely practiced will develop expectations and hence the patterns themselves will acquire normative characteristics as guides for conduct.¹ While we frequently, and correctly, apply the term "custom" to such practices, Professor Leiser asserts that such customs can appropriately be called "law" as well. Restricting the term "law" to the material contained in statute books and judicial decisions² is correct in the technical sense of lawyers' law, but, according to Leiser, a wider application of the term is required in order to understand more clearly the relation of custom to the legal order. Ultimately Leiser arrives at a wide definition of law (covering normative aspects of custom) under which "law is what people conceive it to be, even where there is no authority invested with the power to pass laws, to enforce them, or to settle disputes . . . provided people generally act as if they were following a rule and provided further that they believe that there is a rule prescribing a certain course of conduct which they feel obliged to follow."³ Acceptance of the wider usage helps to explain the legal orders of primitive societies which lack any legislative or judicial institutions and of modern international law which is largely built on custom and which lacks the effective enforcement mechanisms usually associated with modern legal orders.

Leiser's equation of custom with the law of primitive societies is reminiscent of H. L. A. Hart.⁴ Hart also found a legal order in these societies analogous to our own. Hart was able to do this by distinguishing between "primary rules of obligation" and "secondary rules." The former are the rules which govern conduct and are found in all societies. Where the structure of the primitive legal order differs most significantly from our own is in its lack of legislative and

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1. See especially pp. 122-33.

2. Leiser follows Wittgensteinian procedures in recognizing that "law," like other words, possesses a "family of meanings" (see p. 110). Generally, however, Leiser contrasts a wider meaning of law growing out of practice and custom with the technical, narrow law taught in the law schools. A number of alternative definitions of this technical, narrow law are used: a "positivist" variety embodying Austin's "command" theory of law, a "realist" variety consisting in Gray's "what judges decide," and written law as opposed to unwritten custom. Although Leiser appears to have more sympathy for Gray's version of law in its narrow sense than for the other versions, in the text of my review I have used "law" in its narrow sense as embodying both statutes and judicial decisions, a sense which appears to be most compatible with the book's argumentation. This approach is inconsistent with a strict acceptance of Gray who, through his emphasis on judge-made law, made statutes "sources" of law and not part of the law itself. J. GRAY, *THE NATURE AND SOURCES OF THE LAW* at 125 (1963 ed.). But it is consistent with Leiser's prevailing focus on law in its normative or conduct-guiding functions.

3. P. 122.

4. H. L. A. HART, *THE CONCEPT OF LAW* 89-96 (1961).

judicial institutions. Rules governing the establishment and operation of these organs are denominated by Hart as "secondary rules." Primitive societies lacking legislative and judicial institutions necessarily lack secondary rules. Primitive legal orders, accordingly, resemble our own in possessing primary rules of obligation but they differ from our own in their lack of secondary rules.

Leiser's analysis, while similar to Hart's in finding a legal order despite the absence of legislative and judicial institutions, is different from Hart's in its emphasis on the growth and development of the rules of conduct observed in primitive societies. Leiser also uses as an analytical tool the contrasting notions of horizontal and vertical organization⁵ as a vehicle for elaborating the noninstitutional context in which the rules of primitive societies are found as contrasted with the more "vertical" organization of modern societies where rules are imposed and enforced from above by legislative and judicial institutions. This reviewer, however, wishes that Professor Leiser had further elaborated his horizontal-vertical analysis. Leiser implicitly suggests that a greater degree of horizontal organization of modern society would be desirable. Yet it seems that vertical organization best facilitates change and permits men to exert conscious control over the rules governing their behavior. To that extent, therefore, vertical organization seems superior. Yet conscious human control over society's rules exists in an absolute monarchy, a fully vertical organization, but a structurally unresponsive one. Perhaps what is needed, in Professor Leiser's vertical-horizontal idiom, is vertical organization which is horizontally responsive—which modern representative democracies are, at least in theory.

Leiser provides a number of illustrations suggesting the evolution of behavior into regularized patterns and hence into "practices" or "customs" with growing normative aspects to them, and hence into "law" in the wide sense. The interaction between law in the wide sense and law in the narrow sense, however, is not adequately treated. Law in the wide sense may be transformed into law in the narrow sense when a legislator or judge uses the former as a "source" of the latter.⁶ Leiser makes the statement, however, that custom is not only a source of law, but that it is "constitutive" of law.⁷ This claim seems sound with respect to primitive law, customary international law, and perhaps to circumstances in which a judge incorporates "custom" into law. Custom plays a role in filling the interstices of the written laws of the statute books and judicial decisions. But custom—or "law" in the wide sense—is largely bounded in its impact on the technical "narrow" law of judges and lawyers by the written laws of statutes and judicial decisions. If, then, custom is limited to filling the interstices of the written law, why cannot custom's relation to "law" in the narrow sense be explained better as a "source" than as "constitutive" of law? A reply might be that custom provides the norma-

5. Pp. 113-16.

6. Pp. 63, 121-22, 157, 158, 163. Cf. pp. 173-74.

7. P. 122.

tive rules of conduct even before they have been adopted by a court and hence are properly "law" in the wide sense and if it can be foreseen that a court will in fact apply the custom in a later decision, then an existing custom will predictably be law in a narrow sense, *i.e.*, it will be predictive of what judges will decide. Hence, with Holmes,⁸ we might treat as law today those customs which are likely to be embodied in tomorrow's judicial decisions.

Leiser's wide definition of law poses a number of problems when it is applied to societies with established legislative and judicial bodies and hence with "law" in the narrow as well as the wide sense. It is a compliment to the author that he stimulates his readers to raise questions beyond the scope of the author's designedly limited inquiry. What is the relationship between law in the narrow technical sense and law in the wide nontechnical sense? What if law in the technical sense does not sanction that which law in the wide sense sanctions or vice versa? Leiser gives us an example of two persons adhering to a defective contract in the mistaken belief that the contract is enforceable in the courts.⁹ Implicit in the example is the likelihood of disappointment to the plaintiff and a windfall to the defendant if suit is ever brought on the contract. This in turn suggests potentiality for other disappointments and interferences with expectations which may result from inconsistencies between "law" in its wide and narrow senses. Discrepancies between law in its wide and narrow senses form part of a larger problem of discrepancies between the norms used as conduct guides and the norms used by courts in the adjudication of cases.¹⁰

8. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458-61 (1897).

9. Pp. 118-21.

10. Leiser finds reason to tarry long enough on "natural law" to accept H. L. A. Hart's criticism of the use of a higher law concept as a justification for postwar punishment of Nazi officials who performed iniquitous acts during the Hitler regime, but whose acts nonetheless conformed to Nazi law. Hart had urged that invalidation of the defense of acting pursuant to (Nazi) law on higher law grounds obscured the issues: that what in fact was being done was retrospective punishment; that for clarity's sake we admit that the Nazi officials acted pursuant to "law," but that their acts were so evil that we are punishing them despite the legal authorization for their acts at the time those acts were performed. H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 619-20 (1958); H. L. A. HART, *THE CONCEPT OF LAW* 204-07 (1961). Leiser accepts the Hart criticism as a valid one, although as one horn of an unattractive dilemma (pp. 75-76).

In accepting the Hart analysis of the punishment of Nazi officials as far as he does, Leiser implicitly says that while normative rules of "custom" may be called "law," normative rules of "morality" may not be. Another point is raised by Leiser's partial adoption of the Hart analysis. Recall that Leiser accepts as a definition of "law" appropriate for lawyers' use "what judges decide" and yet propounds the intrusion of "custom" and the "nonlegal" as elements in judicial decision-making. Restated, then, "law" in the lawyers' sense is open-ended; it is continually in the process of creation by successive judicial decisions. But if law (in the narrow sense) is created by judicial decision, it must be "different" after a decision from before it unless we adopt the Holmes predictive analysis. See text accompanying note 8 *supra*. But if we apply newly created "law" to a past event we are applying law retrospectively and yet normally—contrary to the Hart and Leiser critiques—we obscure the retroactivity by casting the decision in the traditional judicial format. See P. Mishkin and C. Morris, *On Law in Courts* 81-88 (1961). The natural law critique of Hart and Leiser, then, has force, but it should not be limited to the unusual settings in which Nazi officials are punished for past misdeeds. It should be applied to more routine examples of retroactivity in the ordinary operations of the judicial system. Observe, however, that judicial

Such discrepancies are likely to result in sanctions being imposed upon persons for failures to conform their conduct to the latter norms despite the fact that they carefully adjusted their behavior to conduct norms which they thought were appropriate. To the extent that "law" in the wide sense can shade into law in the narrow, technical sense because of a likelihood that the former will be adopted and applied in subsequent judicial decisions, however, this difficulty is ameliorated or eliminated.¹¹ In giving us the conceptual tool of "law" in its wide sense, Leiser thus aids us in assessing the degrees of nominal or real retrospectivity involved in creative judicial decisions which apply newly formulated law to past events: if the new judicially formulated "law" corresponds to a prior norm of "custom" (or of "law" in its wide sense) retrospectivity in any real sense is eliminated.

law creation will not result in injustice as long as the new judge-made "law" was a pre-existing conduct norm of "custom" (or morality?). In such instances, the normative rule applied would be retroactive in its character as "law" (in the narrow sense) but not in its character as a normative rule.

11. See text accompanying note 7 *supra*.