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Sir John Davies on Custom and the Common Law

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Abstract: Seventeenth-century English common lawyer Sir John Davies sets forth, in his *Irish Reports*, a provocative and interesting argument on the nature of custom and its relation to the common law. This relatively unexplored argument shows how actions may emerge from conditions of liberty and slowly acquire qualities of social benefit and agreeability that are essential if the common law is to be identified with custom. Davies not only provides a coherent account of how custom might possess some reasonability, but he also seems to suggest that custom is unintended, thereby anticipating a theme found in eighteenth-century thinkers such as Mandeville, Hume, Ferguson, and Burke. In addition, Davies's account has important implications for political theory: the priority of the social over the political and a notion of political consent that arises via custom itself.

The idea of custom calls to mind unreflective and nondeliberative actions. For this reason, it might appear paradoxical to assert that a law may have its source in custom and yet be reasonable. However, such a paradox seems essential to the outlook of an important seventeenth-century jurist, Sir John Davies (1569–1626). One of the English common lawyers, and a minor Elizabethan poet, Davies's jurisprudence remains relatively unexplored in comparison to that of Sir Edward Coke, Sir John Selden, or Sir Matthew Hale. His defense of custom appears in the Preface to his so-called *Irish Reports*.[1] There he contends that the custom that constitutes the common

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[1]The *Reports* originally appeared in Law French as *Le Primer Report des cases and Matters en Ley, Resolues and Ajiudges en les Courts del Roy en Ireland* (Dublin: John Franckton, 1615), with an unpaginated English-language Preface dedicated to Lord Ellesmere, the lord chancellor of England. A paginated version of the same Preface may be found in a later edition, *A Report of Cases and Matters in Law Resolved and Adjudged in the King's Courts in Ireland* (Dublin: Sarah Cotter, 1762). Hereinafter,

law is reasonable, beneficial, and agreeable even though it arises as an unintended outcome of individual actions. Through this provocative and coherent, albeit not altogether explicit, argument, Davies advances one of the first theories of the unintended emergence of customary social norms.

Although Davies's thought is typically set alongside that of other common lawyers, recent scholarship has revealed that there is no univocal common law mind, at least not without serious qualification.[2] This scholarship pivots around the formative work of J. G. A. Pocock, who claimed that these lawyers did, in fact, share a "common-law mind."[3] In Pocock's estimation, the English ideology of the common law incorporated the thesis that law was the declaration and articulation of a custom whose form, originally emerging in nondeliberate fashion, was not only reasonable but had remained unchanged from time immemorial ("the myth of the ancient constitution").[4] Even if the notion of a *common* common-law mind may be challenged, Davies's schematic portrayal of custom merits greater attention than it has received.

This article will explain his theory, relate it to features of social theories adumbrated by eighteenth-century thinkers (such as Bernard Mandeville, David Hume, Adam Ferguson, and Adam Smith), and suggest how Davies's account also provides a valuable perspective for political theorists, whether in terms of the limits of political rationality or via a novel notion of political consent. Davies's appeal to custom has been recognized by Alan

references to the Preface will refer to this 1762 edition, to be cited as "Preface, *A Report of Cases*."

[2]See, for example, Hans W. Pawlisch, "Sir John Davies, the Ancient Constitution, and Civil Law," *Historical Journal* 23, no. 3 (1980): 689–702; this article forms the ninth chapter of Pawlisch's volume, *Sir John Davies and the Conquest of Ireland* (Cambridge: Cambridge University Press, 1985). See also J. W. Tubbs, "Custom, Time and Reason: Early Seventeenth-Century Conceptions of the Common Law," *History of Political Thought* 19, no. 3 (Autumn 1998): 363–406, and, in particular, *The Common Law Mind: Medieval and Early Modern Conceptions* (Baltimore, MD: Johns Hopkins University Press, 2000). And see Jeffrey Goldsworthy, "The Myth of the Common Law Constitution," in *Common Law Theory*, ed. Douglas E. Edlin (New York: Cambridge University Press, 2007), 204–35, and David Chan Smith, *Sir Edward Coke and the Reformation of the Laws* (Cambridge: Cambridge University Press, 2014).

[3]J. G. A. Pocock, *The Ancient Constitution and the Feudal Law* (New York: Cambridge University Press, 1957). The titles of the second and third chapters incorporate the phrase "common-law mind," which Pocock later, in his retrospective edition, refers to as a *mentalité*. See *The Ancient Constitution and the Feudal Law: A Reissue with a Retrospect* (New York: Cambridge University Press, 1987), esp. 255–305. Henceforth, all citations will be to the 1987 edition.

[4]Pocock, *Ancient Constitution*, 36.

Cromartie and by J. W. Tubbs,[5] but there has been no scholarly exploration of Davies's theory that custom is a beneficial yet unintended outcome of individual actions. The most focused examination of Davies has come from Hans W. Pawlisch, who maintained that Davies (and other common lawyers) drew not only from customary but from Continental and Roman law.[6] Pawlisch argued subsequently that Davies, in his role as solicitor-general and attorney-general for Ireland (1603–1619), served the English Crown by deploying "judicial procedures and mechanisms to consolidate its hold over Ireland."[7] Other scholars have made brief mention of Davies, typically in the course of examining more notable lawyers or larger political questions.[8] Most recently, David Chan Smith has explored Sir Edward Coke's understanding of law, with some references to the thought of Davies, as when Smith revisits the criteria invoked by common law judges to determine when a law is reasonable.[9] Alongside these works, scholars have offered historical and philosophical discussions of custom in relation to law.[10] In an extraordinary study of custom and popular memory, Andy Wood has delineated the ways in which individuals in early modern England utilized and remembered customary practices both as lived experiences and as a basis for law.[11]

There is clear justification for a delineation of Davies's account of custom, an examination of its affinities with theories typical of the eighteenth

[5]Alan Cromartie, *Sir Matthew Hale 1609–1676: Law, Religion and Natural Philosophy* (Cambridge: Cambridge University Press, 1995), esp. 12–13; and Tubbs, "Custom, Time and Reason" and *The Common Law Mind*, 130.

[6]Pawlisch, "Sir John Davies, the Ancient Constitution, and Civil Law." On Pawlisch's claim, see note 17, below.

[7]Pawlisch, *Sir John Davies and the Conquest of Ireland*, 35.

[8]For example, see Gerald J. Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon, 1986); Glenn Burgess, *The Politics of the Ancient Constitution: An Introduction to English Political Thought, 1603–1642* (University Park: Pennsylvania State University Press, 1992). Paul Christianson notes, more particularly, how Davies's conception of the common law is similar to that of Sir Thomas Hedley, in "Ancient Constitutions in the Age of Sir Edward Coke and John Selden," in *The Roots of Liberty: Magna Carta, Ancient Constitution, and the Anglo-American Tradition of Rule of Law,* ed. Ellis Sandoz (Columbia: University of Missouri Press, 1993), 107.

[9]Smith, *Sir Edward Coke*, e.g. 161–62.

[10]Donald R. Kelley, "'Second Nature': The Idea of Custom in European Law, Society, and Culture," in *The Transmission of Culture in Early Modern Europe*, ed. Anthony Grafton and Ann Blair (Philadelphia: University of Pennsylvania Press, 1990), 131–72; James Bernard Murphy "Nature, Custom, and Stipulation in Law and Jurisprudence," *Review of Metaphysics* 43 (June 1990): 751–90; and see the more recent collection *The Nature of Customary Law,* ed. Amanda Perreau-Saussine and James Bernard Murphy (Cambridge: Cambridge University Press, 2007), especially the essays of Frederick Schauer, James Bernard Murphy, and Alan Cromartie.

[11]Andy Wood, *The Memory of the People: Custom and Popular Senses of the Past in Early Modern England* (Cambridge: Cambridge University Press, 2013). I thank an anonymous referee for bringing this book to my attention.

century, and its implications for political theory more generally. My reconstruction will try to steer clear of rendering Davies's "thought more coherent, and indeed, more explicit, than it actually was."[12] It will reveal how Davies—unlike his contemporary Coke[13]—appeals to custom as a cumulative and unintended aggregation of particular anonymous actions. The first section outlines Davies's theory of custom and common law as set forth in the Preface to his *Irish Reports*. However, Davies also suggests, in other parts of the *Reports*, that certain conditions are necessary for the emergence of a *reasonable* custom—a custom worth following. These conditions are described, in the second section, in terms of the implementation of a natural law conception of justice that provides a framework of security and liberty, without which an unreasonable custom might emerge that reflects the preferences of the powerful.[14] A consideration of these conditions will evince how the theory provided in the Preface is not altogether isolated from other elements of the *Reports*.[15] However, this discussion will also indicate several points of tension between Davies's account of custom and his endorsement of English imperialism. The third section illuminates several ways in which one might comprehend the emergence of custom as *un*intended. The next section offers summary remarks about how Davies's conception of custom anticipates similar kinds of theories—conjectural histories—found in the works of eighteenth-century thinkers such as Mandeville, Hume, and Ferguson, among others. The closing section explores how the thought of Davies provides a valuable vantage point from which to consider the limits of political rationality and the power of custom to signal consent.

A Custom "Groweth to Perfection"

Of the three types of law in early modern Britain, the civil (courts of equity), canon, and common law,[16] Davies regards the last as

[12]An insight that Glenn Burgess records in relation to interpretations of the thought of Sir Edward Coke on Bonham's Case (1610). See *Absolute Monarchy and the Stuart Constitution* (New Haven, CT: Yale University Press, 1996), 186.

[13]As Allen D. Boyer puts it, "Coke's belief in custom was essentially skin-deep. . . . He did not work out (as Davies did) a true theory of common law as customary law" (*Sir Edward Coke and the Elizabethan Age* [Stanford: Stanford University Press, 2003], 87).

[14]By the early seventeenth century, common law judges were increasingly determining which conditions or criteria could be invoked to disallow a custom. See Smith, *Sir Edward Coke*, 161–67.

[15]Pocock has been criticized for having isolated one passage in Davies's Preface, thereby misrepresenting Davies's overall outlook. See Pawlisch, "Sir John Davies, the Ancient Constitution, and Civil Law," 695.

[16]Both oral and printed sources were included within common law cases but the identity and implications of a custom rested in the memory of jurors. See Smith, *Sir Edward Coke*, 146.

preeminent.[17] The common law is based on the common custom of the kingdom, though Davies's theory could apply to local custom as well. Earlier common lawyers, such as Sir John Fortescue (ca. 1395–1477) and Christopher St. German (1460–1540), appear to identify the common law with custom, but neither treats custom as a normative practice emerging from individual acts. As Tubbs affirms, Davies "identifies the common law more strongly with custom than any common lawyer before or since."[18]

In a three-paragraph passage in the Preface to his *Irish Reports*,[19] Davies offers his theory of custom in its relation to law. It begins with the identification of the common law with "the *Common Custome* of the Realm." This custom "cannot be made or created either by Charter, or by Parliament, which are Acts reduced to writing, and are alwaies matter of Record." Custom, on the other hand, is "onely matter of fact, and consisting in use and practice, it can be recorded and registered no-where but in the memory of the people." Davies then sketches how a custom "taketh beginning and groweth to perfection." He states, "When a reasonable act once done is found to be good and beneficiall to the people, and agreeable to their nature and disposition, then do they use it and practise it again and again, and so by often iteration and multiplication of the act it becometh a *Custome*; and being continued without interruption time out of mind, it obtaineth the force of a *Law*." Davies offers a paean to customary law "as the most perfect and most excellent . . . to make and preserve a Commonwealth." However, a written law is imposed by "the Edicts of Princes, or by Councils of Estates . . . before any Triall or Probation made," but a custom "hath been tried and approved time out of mind, during all which time there did thereby arise no inconvenience: for if it had been found inconvenient at any time, it had been used no longer, but had been interrupted, and consequently it had lost the virtue and force of a Law."

By concluding that custom should constitute the common law, Davies equates the qualities of custom (henceforth abbreviated in terms of "benefit" and "agreeability") to the criteria of good or reasonable law. A custom, he says, begins as a reasonable act. When such an act fails to be agreeable or beneficial, it is discontinued, which itself manifests the fact that the act has "lost the virtue and force of law." Therefore, the virtues of law are,

[17]The common law is "far more apt and agreeable then the *Civil* or *Canon Law*, or any other written Law in the world besides" (Preface, *A Report of Cases*, 5). Pawlisch claims that Davies utilizes in his jurisprudence both civil and canon law. However, these appeals are, in my estimate, often designed to facilitate or support a decision, not to determine it. See Pawlisch, "Sir John Davies, the Ancient Constitution, and Civil Law," 698–700.

[18]Tubbs, *Common Law Mind*, 130.

[19]Preface, *A Report of Cases*, 3–4 (all italics are original). Any subsequent quotation from this three-paragraph passage will come from these pages but not be otherwise cited.

presumably, benefit and agreeability, but these qualities are realized only in custom, not through "Edicts of Princes."

Davies stipulates that the written law, exemplified or symbolized by "Edicts of Princes," is set forth without "Triall or Probation"; in other words, the lawmaker acts without regard to whether the edict will be beneficial or agreeable. Davies's focus is less on lawmaker insouciance than on how a law requires testing ("Triall or Probation"): if the lawmaker already possessed knowledge of benefit and agreeability, no test would be necessary. For Davies, the persistence of a custom over time demonstrates a successful "Triall or Probation." Custom emerges (and becomes law) by evolving through these stages: act, usage, custom (and law). Customary conduct begins in some "reasonable act" (an important descriptive phrase to be examined in the next section). This act is iterated by other persons until, presumably, it extends throughout the group, acquiring thereby the normative force of custom and, in some cases, the force of law.

It follows that a custom is a "reasonable act" reiterated "time out of mind" by a community of people. There is no reason to assume, however, that the process by which an act becomes custom is one in which the original act undergoes no alterations before attaining customary status. Wood underscores how custom is "protean," adding, "The incremental accumulation of such processes of negotiation, compromise and innovation provided the everyday dynamics for the evolution of custom."[20] The usage cannot be *too* flexible, however; otherwise it would have no identity as a *type* of act that survives over time or is tested by a variety of individuals acting in distinct circumstances.

The origin and persistence of a usage may result from a "negotiation" that is as much behavioral as conversational. An initiating act might develop as an instance of coordination between or among individuals, with each person's conduct depending, in part, on what each thinks that the other will do or allow to be done. Such coordination need not entail that a custom be understood as a convention in the standard sense that individuals adhere to it because they prefer that everyone (or almost everyone) adhere to the same regularity.[21] Even if many, if not most, customary usages *are* conventional in this sense, there is no evidence that Davies had this notion in mind. He emphasizes the benefit and agreeability of usages as custom and, in his estimate, these prove sufficient to establish the custom as normative.

As his argument continues, Davies affirms that an act reiterated "without interruption" establishes that the act is (a) beneficial and (b) agreeable. The fact of its persistence ensures that an action has undergone "Triall or Probation" and is a custom. Therefore, custom, by its nature, satisfies the

[20]Wood, *Memory of the People*, 133–34.

[21]See David Lewis, *Convention* (Cambridge, MA: Harvard University Press, 1969), esp. 78, and Andrei Marmor, *Social Conventions: From Language to Law* (Princeton, NJ: Princeton University Press, 2009), esp. 2.

criteria of good law. As Davies suggests, it is difficult to know, prior to enactment, whether statutory or legislated laws (e.g., "Edicts of Princes") will satisfy the criteria of good law. So it is reasonable to assume that laws based on custom are more likely than legislated laws to be (a) beneficial and (b) agreeable. Therefore, the common law should be based on custom if the laws are "to make and preserve a Commonwealth."

This reconstruction has set forth Davies's identification of the common law as the law of the realm and derivative of custom. A practice becomes a custom as it is, effectively, selected over time through the winnowing process of "Triall or Probation." The surviving practice is a custom that is both "good and beneficiall to the people, and agreeable to their nature and disposition." Given these qualities, not otherwise attainable via legislation, custom should constitute the law.

However, that a custom fulfills the criteria of law does not establish that the particular custom should become law. Davies offers a necessary condition of law, not a sufficient one. This gap illustrates one difference between Davies and Coke, who focuses less on the idea of custom than on the role of the common law judge in perfecting custom. In explaining the process by which custom obtains the force of law, Coke, unlike Davies, emphasizes the contribution of the judge who, in articulating or interpreting the custom of the realm, artificially perfects it.[22] Coke not only grants the common law judge a significant role in the articulation of the law, but he allows the judge to correct a custom that is unreasonable, specifically, if it is incompatible with the larger body of custom incorporated into the law.[23]

Davies's appeal to the historical selection of custom is reminiscent of Sir John Fortescue's utilization of antiquity as evidence of a law's beneficial

[22]Davies does not ignore completely the role of the judge: the law, he says, must be applied, just as the "best Lute" requires "the learned hand of the Lute-player" (Preface, *A Report of Cases*, 24). For Coke's perspective, see *The First Part of the Institutes of the Laws of England* (1628), 2 vols. (London: Clarke, 1832; repr., New York: Garland, 1979), vol. 1, 97b. On Coke's notion of an "artificial perfection of reason," see Charles M. Gray, "Further Reflections on 'Artificial Reason,'" in *Culture and Politics from Puritanism to the Enlightenment*, ed. Perez Zagorin (Berkeley: University of California Press, 1980), 121–26; James R. Stoner, *Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism* (Lawrence: University Press of Kansas, 1992), 22–26; Burgess, *Absolute Monarchy and the Stuart Constitution*, 168–69; Boyer, *Sir Edward Coke and the Elizabethan Age*, chap. 7; Tubbs, *Common Law Mind*, 162–67; and Smith, *Sir Edward Coke*, 153–56.

[23]For Coke, the common law does not tolerate changes that run counter to the established law: "the wisdome of the judges and sages of the law have always suppressed new and subtile inventions in derogation of the common law" (*The First Part of the Institutes of the Laws of England*, vol. 2, 282b; see also 379b). J. H. Baker points out that, as a matter of fact, Coke was one of the "greatest judicial innovators in the history of English law" (Baker, "Funeral Monuments and the Heir," in *The Common Law Tradition: Lawyers, Books and the Law* [London: Hambledon, 2000], 352).

character. As Fortescue puts it, "the realm has been continuously ruled by the same customs as it is now, customs which, if they had not been the best, some of those kings would have changed for the sake of justice or by the impulse of caprice."[24] Fortescue offers a reason why antiquity provides proof of goodness: that a law has not been repealed is sufficient to inform us that it has survived the purview of kings. For Davies, unlike Fortescue, the winnowing occurs prior to a usage becoming law. For Fortescue, on the other hand, there is no mention of a test of custom *prior* to its stipulation as law; for him, the test is applied to customary *law*.

A view similar to that of Davies is offered by his contemporary, the common lawyer Thomas Hedley. In a speech to the House of Commons, in 1610, Hedley appealed to "tried reason" as essential to the common law. As to what it is that could "try" reason, Hedley remarks that it is neither judges nor king, nobility, clergy, or the Commons; rather, it is "time, which is the trier of truth, author of all human wisdom." The "time" which tries the common law is "such time as will beget a custom."[25] One might surmise that Hedley's "time" which tries the common law is analogous to Davies's time which tries custom, and for this reason "the common law is a reasonable usage . . . approved time out of mind."[26] Custom is tried over time as it is applied by different persons, with differing motives, in diverging circumstances, but the common law is "tried" over time as it is employed, in fact, by a host of judges who consider distinct cases involving different persons in diverse circumstances: "if a judgment once given should be peremptory and trench in succession to bind and conclude all future judges from examining the law in that point or to vary from it, then the common law could never have been said to be tried reason grounded upon better reason than the statutes."[27]

Whereas Fortescue appeals to the purview of monarchs, Davies and Hedley draw on a more generalized test to select a beneficial and agreeable custom. Alongside what is, effectively, a functionalist strand of thought—a beneficial and agreeable custom tends to persist—there is the notion, in Davies's account, that the custom endures not because of legislative action but through the repetition of the practice by the subjects. This suggests another insight: Davies has grasped, perhaps haltingly, the idea that social patterns and norms may emerge and persist as an unintended effect of individual action. But as we have seen, Davies describes a custom as emerging when a "reasonable act once done is found to be good and beneficiall." However, if the act can be known, at initiation, to be reasonable, the role of

[24]John Fortescue, *De Laudibus Legum Anglie* (London: Streater, Flesher, and Twyford, 1672), chap. xv, 24.

[25]Thomas Hedley, speech in Parliament, June 28, 1610, in *Proceedings in Parliament, 1610*, ed. Elizabeth Read Foster (New Haven, CT: Yale University Press, 1966), 2:175.

[26]Ibid.

[27]Ibid., 2:178–79.

"Triall or Probation" becomes unclear. An investigation of the language of the "reasonable act" will show that a genuine "Triall or Probation" requires conditions that allow for consent.

A "Reasonable Act": The Conditions of Custom

One might presume that a custom that commences as a "reasonable act" *must* be agreeable and beneficial. However, as an adjective, "reasonable" suggests a feature of the act distinct from either benefit or agreeability. In fact, in other portions of his *Irish Reports*, Davies employs the phrase "reasonable act" to refer to the conditions out of which the act emerges, not to qualities of the act itself.

In considering a case involving the Irish custom of "tanistry" (whereby a lord or chieftain, prior to death, gives his land not to a son or relation but to a man of his choosing, typically the strongest or most powerful),[28] Davies admits that the custom "hath been used and approved time out of mind," even though he also concludes that the custom is "void in itself."[29] To explain this apparent paradox, Davies returns to the nature of custom, noting that a custom that equates to law must have "four inseparable qualities," the first of which is that "it ought to have a reasonable commencement" (the others are that it be certain, have an uninterrupted continuance, and be subject to the prerogative of the king).[30] Presumably, then, a custom might survive which has an *unreasonable* commencement (and could therefore not equate to law), and that is just what Davies believes has happened in the case of several Irish customs, tanistry included. In a prior case concerning tariffs, Davies had pointed out that "every thing that is due of common right, and by prescription, ought to have a reasonable cause of commencement."[31] In the case of tanistry, he affirms: "For if it was unreasonable in the original, no usage or continuance can make it good."[32] After noting that "the commencement of a custom . . . ought to be upon reasonable ground and cause,"[33] Davies adduces the grounds or reasons for which a custom might be deemed unreasonable and links these to its commencement:

> a custom which is contrary to the public good, which is the scope and general end of all laws (*falus populi suprema lex*) or injurious and prejudicial to the multitude, and beneficial only to some particular person, is

[28]"For as the next heir of the lord or chieftain was not to inherit the chiefry, but the oldest and worthiest of the sept [clan], (as is shewn before in the case of *tanistry*) who was often removed and expelled by another, who was more active and strong than he" (*A Report of Cases*, 135).

[29]Ibid., 78 and 86.

[30]Ibid., 87.

[31]Ibid., 25.

[32]Ibid., 88.

[33]Ibid.

> repugnant to the law of reason, which is above all positive laws, and therefore cannot have a reasonable or lawful commencement, but is void *ab initio*, and no prescription of time can make it good.[34]

Davies determines several customs to be unreasonable, a feature he traces to their *cause*, namely, that they "have their commencement (for the most part) by oppression and extortion of lords and great men" and do not arise "by the voluntary consent of the people."[35] For example, the custom of tanistry "appears plainly to have commencement by the usurpati[on] and tyranny of those who were most potent amongst them."[36] It seems clear that unreasonable conditions include those in which the wills of some thwart the wills of others. This is why Davies employs the language of "oppression and extortion" and "usurpation and tyranny."

This discussion reveals that the term "custom" is deployed ambiguously. There is a purely descriptive sense in which customs refer to practices that emerge over time and persist, but some of these customs may be void because of the conditions (such as "oppression and extortion") in which they arose (or persist). On the other hand, a legitimized sense of custom refers to practices which arise in "reasonable" conditions and which persist because they prove beneficial or agreeable through "Triall or Probation." But an act or usage is subject to "Triall" only if those who practice it may consent to do so or not.[37] Without the ability of entrance or exit (consent), a real "Triall" cannot take place. Reasonable conditions that ensure the absence of oppression, tyranny, or wrongdoing must ensure consent and, thus, "Triall or Probation." At the heart of the legitimized sense of custom is consent: "for consent may be express' as well by deed, as by word, and that which is expressed by deed is stronger than that which is expressed by word; and that which is expressed by several and continual acts of the same kind, is a custom."[38]

If such consent is a matter of deed rather than voice, then it is realizable only if one enjoys some liberty of action to alter, correct, or abandon a usage. Davies effectively addresses these conditions by relating the emergence of a reasonable custom to conditions of natural law justice, which allow for liberties of action. The customary law seems, then, to presuppose a general law of nature whose implementation ensures the conditions that

[34]Ibid. 89.

[35]Ibid., 89 and 90.

[36]Ibid., 94.

[37]In another passage Davies refers to another possible background condition for good customs, namely, "a vertuous and wise people": "*England* . . . hath been inhabited alwaies with a vertuous and wise people, who ever embraced honest and good *Customes*, full of reason and conveniencie" (Preface, *A Report of Cases*, 5). Presumably Davies offers here a *retrospective* judgment based on his valorization of English customs.

[38]*A Report of Cases*, 87.

allow reasonable usages to emerge. Customary law both presupposes the natural law and serves to realize it:

> Therefore as the *Law of Nature*, which the School-men call *Jus commune*, and which is also *Jus non scriptum*, being written onely in the heart of man, is better then all the written rules thereof: so the *Customary Law* of *England*, which we do likewise call *Jus commune*, as coming nearest to the Law of *Nature*, which is the root and touchstone of all good Laws, and which is also *Jus non scriptum*, and written onely in the memory of man.[39]

A legitimate custom originates and persists in conditions that guarantee that one's actions reflect one's will (and not one's lack of power). Such conditions may be deemed "reasonable" because they conform to the law of reason—natural law. And this natural law of justice incorporates a notion of a liberty:

> For do not *all persons* stand in need of Justice, when without her rule the Prince himself knows not how to rule, nor his people how to obey? when without her support the Nobleman cannot uphold his honour, nor the common subject hold his liberty? When without her safeguard the rich man cannot be free from spoil, nor the poor man from oppression? Briefly, when without her no man living, be he virtuous or vicious, can enjoy his life, nor any thing that makes his life delightful? For the covetous man cannot increase his profit, nor the sensual man enjoy his pleasures, but under the shadow of her wings.[40]

Davies describes a kind of liberty that allows for property, productive activities, and the pursuit of a pleasant life. His general descriptions also seem compatible with the liberty to use common resources, not just the liberty of private possession.[41]

That customs could be oppressive was clear to Davies: in his analysis of the conquest of Ireland he condemns Irish customs, such as tanistry, gavelkind (a method of distributing, and redistributing, land without regard to family lineage),[42] and coshering (which allowed a lord to visit the homes of tenants and eat from their table).[43] These customs, Davies argues, have not

[39]Preface, *A Report of Cases*, 4.

[40]Ibid., 22.

[41]As Wood notes, "much of customary law was about the careful husbanding and preservation of scant resources," including those held in common (*Memory of the People*, 105).

[42]The custom of gavelkind, at least in Ireland, involved a method of land disbursement that basically eliminated any sense of property ownership. The population was divided into septs or clans, each with a chief who distributed property among the adult males of the sept. When any one of these died, the land was re-distributed by the chief, thus rendering any family's estate "but a temporary or transitory possession" (*A Report of Cases*, 134).

[43]John Davies, *A Discoverie of the True Causes Why Ireland Was Never Entirely Subdued, Nor Brought under Obedience of the Crowne of England, untill the Beginning of His Maiesties Happie Raigne* (London: Millar, 1747, 1612), 178.

only created insecurity in life, land, and possessions but removed any motivation for improving the land or developing civil or political life. Prior to the imposition of English common law, Ireland was, in Davies's view, a society as close to a state of nature as could be. So the Irish customs have emerged in circumstances of "usurpation and tyranny of those who were most potent among them"; in the case of tanistry, "this custom hath been used time out of mind . . . yet it was bad in the commencement, and bad in the continuance."[44] Such customs "made all their possessions uncertain . . . which uncertainty of estates hath bin the true cause of such Desolation and Barbarism in this land."[45] "As for Oppression, Extortion, and other trespasses, the weaker had never any remedy against the stronger: whereby it came to pass that no man could enjoy his Life, his Wife, his Lands or Goods in safety, if a mightier man than himself had an appetite to take the same from him."[46]

This examination of the conditions of custom reveals several significant questions for Davies's account. A factual concern focuses on whether Irish customs had, in fact, earned their demise. In his *History of England*, David Hume draws from Davies to maintain that it was necessary to abolish the laws of Ireland, adding that the customs of tanistry and gavelkind manifested an "absurdity in the distribution of property."[47] However, almost three decades later, John Millar, holding the chair of civil law at the University of Glasgow, regards Davies to have "greatly exaggerated" the vices of the Irish. In fact, Millar employs his own stadial view of history to suggest that tanistry, gavelkind, and coshering are not so much typical of the Irish as emblematic of a certain stage "in the early history of mankind."[48] In any case, the viability of Davies's examples need not vitiate the larger point—the necessity of natural law justice as a condition for genuine freedom to consent to (or dissent from) a practice.[49]

Another concern, more of coherence than fact, reflects a tension between Davies's theory of custom and his endorsement of the ambitions of the English Crown toward Ireland.[50] Davies does not propose his theory of

[44]*A Report of Cases*, 94.

[45]Davies, *A Discoverie of the True Causes*, 170.

[46]Ibid., 168.

[47]David Hume, *The History of England* (Indianapolis, IN: Liberty Fund, 1983 [1778]), 5:47.

[48]John Millar, *An Historical View of the English Government*, ed. Mark Salber Phillips and Dale R. Smith (Indianapolis, IN: Liberty Fund, 2006 [1787]), 4:672 and 674, respectively. The divergent judgments of Hume and Millar have not, to my knowledge, been the subject of scholarly inquiry.

[49]In the closing lines of his account of the English conquest, Davies makes plain his belief that the English delivered to Ireland the institutions of natural law justice and the common law (*A Discoverie of the True Causes*, 283).

[50]Pawlisch, *Sir John Davies and the Conquest of Ireland*, sets forth, in some detail, Davies's jurisprudential labors on behalf of English imperial ambitions.

custom as any sort of justification for English imperialism. Rather, he utilizes Roman notions of conquest to justify English rule over Ireland and then characterizes the subjugation in terms of a "royal" (rather than a "despotick") monarchy acquiring a right to establish its own laws over the conquered.[51] Although Davies's portrayal of the (long) conquest of Ireland is not without interest, the imposition on the Irish of English common law sits uneasily with his theory that custom (and law) rests on consent. In Davies's rendering, the Irish welcomed the imposition of a common law that would relieve them of customs born of oppression and extortion.[52] Setting aside the historicity of this claim, the consent that Davies celebrates as a condition of custom is hardly the consent, if such it is, that he imputes to the Irish on whom the common law was imposed.

There remains another aspect of Davies's approach to Ireland that seems difficult to reconcile with his theory of custom. For Davies, the virtue of custom is that it has survived a "Triall or Probation," not otherwise available to those who make statute law or pronounce "Edicts." But the imposition of the English common law on the Irish would seem to violate the necessity of "Triall or Probation," even as the habits and traditions, as well as the social and physical circumstances, of the two peoples would seem to be distinct.

Whether it is possible, without contortions, to reconcile these aspects of Davies's theory of custom with his endorsements of English imperialism is a subject that would take us beyond the scope of this essay. Nonetheless, the theory of custom has its independent appeal, including the way in which it is an unintended outcome of individual actions.

How a Custom Is Unintended

Because a reasonable or genuine custom is beneficial and agreeable, it might be plausible to interpret Davies as suggesting that individuals discern the value of an act and on that basis elect to repeat the action in relevant circumstances. However, this interpretation seems inconsistent with Davies's claim about social knowledge. Suppose that individuals perform actions with the intentional beliefs that such acts are, in general, beneficial to a wide variety of persons in distinct circumstances. If these actions do emerge as custom, then the actions are, in fact, beneficial and agreeable. But this would suggest either that everyone's intentional beliefs had, rather miraculously, been correct or that there is a real sense in which individuals can determine, prior to any "Triall or Probation," that some practice would be generally beneficial. However, this sort of determination is precisely what Davies precludes when he laments that the "Edicts of Princes" are imposed regardless of

[51]Davies, *A Discoverie of the True Causes*, 111–14. See Pawlisch's discussion at *Sir John Davies and the Conquest of Ireland*, 9–11.

[52]Davies, *A Discoverie of the True Causes*, 115–19 (and see 144–45).

whether they are known to be beneficial or agreeable. Indeed, Davies's worry seems to be that such "Edicts" were, more likely than not, set forth without sufficient justification, even perhaps under false beliefs. Davies's skeptical perspective on a prince's knowledge of society should plausibly extend to any individual, so no individual can know, in advance, how some practice will affect large numbers of unknown persons.

It is best to read Davies's account as intimating the unintended and undesigned emergence of a customary norm. Two complementary processes are at work. First, the conditions of reasonable commencement (liberty of consent) filter out usages that could be oppressive or that would otherwise favor one person or faction over others. Second, given this filter, the "iteration and multiplication of the act" in similar circumstances over the course of time will gradually yield a custom to which a general conformity is expected.[53] In a slow, almost evolutionary manner, an act emerges, either by initiation or coordination, and is iterated by increasing numbers of persons: from repetition comes use, and usage yields a custom. Davies believes that this process has an end (a "Custome . . . groweth to perfection"), after which there is no further significant alteration. An act is adapted or altered as individuals imitate or iterate it, thereby ensuring its benefit and agreeability. This is the process of "Triall or Probation." That a customary act evolves to "perfection" could be understood, in contemporary parlance, in terms of an equilibrium state, itself dependent on the circumstances, as well as the knowledge and preferences of agents. Such an equilibrium might be disturbed and then readjusted to meet new or transformed conditions. As the usage is perfected, approaching equilibrium, so does its "iteration and multiplication" introduce an element of normativity to the act: what was once an act used by some comes to be an act to which all are expected to conform. Up to that moment of "perfection" (or equilibrium), there is a diachronic accumulation of acts in which no individual intends that any particular iteration of an act establish a customary norm or be part of a process in which such a norm is established.

Several hypothetical scenarios, consistent with Davies's theory, illustrate how a custom might emerge, over time, as an unintended outcome. Consider, first, a scenario in which a person imitates the action of another in order to garner approval of some kind. The person who imitates takes no account of any qualities or effects of the (imitated) action except its capacity to generate approval from those who witness or hear of it. Even if a regard to approval could imply the sort of agreeability referenced by Davies, such regard is hardly an intentional effort to assess *general* agreeability and it is compatible with an ex post assessment of the act's overall benefit or agreeability.

[53]On a filtering versus an equilibrating process, see Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 21.

As a second scenario, suppose that an individual performs some act with the intention to benefit the self (or some associates). The person will, in all likelihood, render some assessment of whether the act proved beneficial. The individual will make this evaluation with an eye to known or local individuals, without any awareness of whether the act might prove beneficial to unknown persons. In fact, whether the act would prove beneficial or agreeable to other persons in other circumstances is something that must await the reiteration of the act (or some variant) by persons in just those circumstances. The beliefs that motivate the individuals, whose iterated actions lead to customs, are precisely beliefs about local circumstance and known particular acquaintances.[54]

A third scenario manifests elements of coordination between or among persons. Hume's account of the emergence of a convention of property illustrates this sort of situation:

> I observe, that it will be for my interest to leave another in the possession of his goods, *provided* he will act in the same manner with regard to me. He is sensible of a like interest in the regulation of his conduct. When this common interest is mutually express'd, and is known to both it produces a suitable resolution and behaviour. And this may properly enough be call'd a convention or agreement betwixt us . . . since the actions of each of us have a reference to those of the other, and are perform'd upon the supposition, that something is to be perform'd on the other part.[55]

Hume refers to an observation ("to leave another in the possession of his goods") that could be made either before or after the fact. Perhaps one person considers that failure to respect the other person's possessions might generate deleterious consequences; so, the first person leaves the second alone. The second person then imitates the first person's action. Alternatively, perhaps for reasons distinct from any calculation of advantage—illness, a visit to a distant town—the first person does not bother the second person's possessions. The second person notes this fact and reciprocates. In either of these scenarios, neither individual intends to establish any customary rule of property and neither assesses the situation in terms of general benefits or explicit agreement. Rather, one or both responds to the other person and then makes adjustments in behavior in accordance with what will be beneficial to a narrow circle.

These scenarios provide examples of how the iteration of an act by various persons in various circumstances could provide, over time, a method of "Triall or Probation" by which a custom emerges that is not only unintended but beneficial and agreeable to the people. What will be beneficial and agreeable to a large society cannot be known by one individual acting intelligently

[54]Kelley, " 'Second Nature,' " 132.

[55]David Hume, *A Treatise of Human Nature*, ed. L. A. Selby-Bigge, rev. P. H. Nidditch (Oxford: Clarendon, 1978 [1739–40]), III.II.ii (490, italics original).

in his own local circumstance, nor can it be known by appeal to natural reason. The knowledge of benefit or agreeability can be acquired through (or *only* through) the experiences of many people in a variety of contexts: as people act in similar ways in differing circumstances, knowledge (of benefit and agreeability) is effectively built into a practice as it is customized to persons and circumstances. As particular acts are iterated and altered for new circumstances, so does a type of act emerge whose conditions of application grow and whose behavioral content becomes expected and normative. Such piecemeal alteration, which might be viewed as a kind of "trial and error" process of cumulative change, presupposes that individuals who so act have some criterion, though local and particular, for alteration.

In this sort of way, iteration, not intention, produces a custom. The iterating agents believe neither (a) that their iteration will produce a custom or be a part of a process which produces such a custom or (b) that their single iteration will contribute to or produce, in society, some reiterated act that is beneficial and agreeable. Only so long as the overall political conditions are "reasonable" does the process of iteration allow for a consensual participation, thereby yielding a custom that is generally beneficial and agreeable. If this custom survives over time ("for if it had been found inconvenient at any time, it had been used no longer"), then it "obtaineth the force of a *Law*."

Eighteenth-Century Affinities

Hume's account of the conventions of justice provides one scenario to exemplify the unintended emergence and growth of custom.[56] Davies's own theory, along with his skepticism regarding the knowledge of "Princes," finds additional parallels in the social theories of eighteenth-century thinkers. These affinities reveal how an eighteenth-century perspective on society had already begun to appear in the seventeenth century. Although these similarities do not provide evidence of influence, they do offer grounds for further inquiry into the reach of common law ideas into eighteenth-century political and social thought.

Bernard Mandeville, in *The Fable of the Bees*, appeals to unintended outcomes—in the form of economic prosperity emerging from "vice" but also in the development of sociability and forms of virtue which, if not genuinely moral, nonetheless guide and establish social cooperation. For Mandeville, praise and approval provide inducements that yield and sustain customary

[56]Gerald Postema suggests that Hume's account of the conventions of justice may be understood as "a revision and extension" of ideas of the common law, though he does not "wish to overstate the claim" (Postema, *Bentham and the Common Law Tradition* [Oxford: Clarendon, 1986], 88). However, Neil McArthur, "David Hume and the Common Law of England," *Journal of Scottish Philosophy* 3, no. 1 (2005): 67–82, suggests that Hume diverges from the common lawyers on important points.

forms of social cooperation.[57] Although Hume had read Mandeville, Hume's account of justice owes much to Hugo Grotius's theory (*De Jure Belli ac Pacis*, 1625) of the empirical and historical development of natural law, which, as suggested by Duncan Forbes, is really a thesis about "social evolution."[58] For Hume, a convention of justice not only "arises gradually . . . by our repeated experience of the inconveniences of transgressing it" but acquires its content as a reflection of nondeliberative associative principles of the human imagination.[59] Hume's gradualist account of these conventions is akin to Davies's considerations on the emergence of custom.

Hume's appeal to the natural development of conventions of justice may be viewed as one small instance of an appeal to a conjectural history of society.[60] A conjectural history is a species of natural social history that aims to explain events, patterns, or institutions through an appeal to causes—sometimes hypothesized or otherwise derived from a view of human nature—that are neither divine nor the effective result of specific human intention or design. Davies's schema of act, usage, and custom offers the structure of a conjectural history. Such histories are also found throughout the eighteenth century. In his *Account of the Life and Writings of Adam Smith* (1793), Dugald Stewart characterizes such histories as purporting to reveal the "gradual steps" that lead from one state of things to another, especially if the overall transition is from a simple state to a "wonderfully artificial and complicated" one.[61] One may read Adam Smith's *The Theory of Moral Sentiments* (1759) as in part a conjectural history of the development of moral standards and the crystallization of an impartial point of view. Less than a decade after Smith's treatise, Adam Ferguson contends that language, property, laws, technological improvements, forms of government, and perhaps even some normative

[57]See "The Third Dialogue," in Mandeville, *The Fable of the Bees or Private Vices, Publick Benefits*, ed. F. B. Kaye, vol. 2 (Indianapolis, IN: Liberty Fund, 1988). See also Eugene Heath, "'Carrying Matters Too Far?': Mandeville and the Eighteenth-Century Scots on the Evolution of Morals," *Journal of Scottish Philosophy* 12, no. 1 (2014): 95–118. For a recent examination of the possible influence of Matthew Hale on Mandeville, see Mauro Simonazzi, "Common Law, Mandeville, and the Scottish Enlightenment: At the Origin of the Evolutionary Theory of Historical Development," *Storia del Pensiero Politico*, no. 1 (January–April 2018): 107–26.

[58]Duncan Forbes, *Hume's Philosophical Politics* (Cambridge: Cambridge University Press, 1975), 18. In his excellent study *Hume: An Intellectual Biography* (New York: Cambridge University Press, 2015), James A. Harris does not consider the common lawyers, but he does delineate the formative role of Mandeville on Hume's thinking.

[59]Hume, *A Treatise of Human Nature*, III.II.ii (490); III.II.iii, note 1 (504).

[60]Pocock describes Hume, in his *History of England*, as recognizing in Davies's account of Ireland a "'philosophical history' in the Scottish Enlightenment's sense" (Pocock, *Ancient Constitution*, 263).

[61]Dugald Stewart, *Account of the Life and Writings of Adam Smith*, ed. I. S. Ross, in *Essays on Philosophical Subjects*, by Adam Smith, ed. W. P. D. Wightman and J. C. Bryce (Indianapolis, IN: Liberty Fund, 1982), 292.

standards may be explained in terms of unintended processes of development.[62] John Millar, one of Smith's students, crafts a natural history of social structures which "point out the more obvious and common improvements which gradually arise in the state of society" and how these affect "the manners, the laws, and the government of a people."[63]

A conjectural history of social patterns or institutions is often accessorized with a skepticism regarding the foresight of statesmen. Just as Davies counsels against "Edicts of Princes" imposed without "Triall or Probation," so Mandeville rejects the notion that farsighted rulers easily devise laws and policies that will prove beneficial: "we often ascribe to the Excellence of Man's genius and the depth of his Penetration, what is in reality owing to length of Time and the Experience of many Generations."[64] Though opposed to Mandeville's appeal to self-interested vice, Ferguson doubts the prescience of princes, maintaining, "We are therefore to receive, with caution, the traditionary histories of ancient legislators, and founders of states. . . . An author and a work, like cause and effect, are perpetually coupled together. This is the simplest form under which we can consider the establishment of nations: and we ascribe to a previous design, what came to be known only by experience, what no human wisdom could foresee."[65] In contrast to the rationalist René Descartes, who contends that the "flourishing" of Sparta derived from its laws "being drawn up by one individual," Ferguson maintains that the greatness of Sparta, or Rome, "took its rise from the situation and genius of the people, not from the projects of single men."[66]

Finally, and apart from Mandeville and the Scots, it has long been acknowledged that Edmund Burke admired the common law heritage of Britain.[67]

[62]Adam Ferguson, *An Essay on the History of Civil Society*, ed. Fania Oz-Salzberger (Cambridge: Cambridge University Press, 1995 [1767]). See also Lisa Hill, *The Passionate Society*: *The Social, Political and Moral Thought of Adam Ferguson* (Dordrecht: Springer, 2006); Eugene Heath, "Ferguson on the Unintended Emergence of Social Order," in *Adam Ferguson: Philosophy, Politics and Society*, ed. Eugene Heath and Vincenzo Merolle (London: Pickering & Chatto, 2009), 155–68.

[63]John Millar, *The Origin of the Distinction of Ranks*, ed. Aaron Garrett (Indianapolis, IN: Liberty Fund, 2006 [1771]), 89–90.

[64]Mandeville, *The Fable of the Bees*, 2:142.

[65]Ferguson, *Essay on the History of Civil Society*, 120.

[66]Descartes, *Discourse on the Method of Rightly Conducting the Reason* (1637), in *The Philosophical Works of Descartes*, trans. Elisabeth Haldane and G. R. T. Ross, 2 vols. (Cambridge: Cambridge University Press, 1973), Part II, 88; and Ferguson, *Essay on the History of Civil Society*, 121. Millar contends the same in *Origin of the Distinction of Ranks*, 86–87.

[67]Burke mentions, specifically, Sir Edward Coke in *Reflections on the Revolution in France* (1790), in *Select Works of Edmund Burke* (Indianapolis, IN: Liberty Fund, 1999), 2:119. See also Pocock, "Burke and the Ancient Constitution: A Problem in the History of Ideas," in *Politics, Language and Time: Essays on Political Thought and History* (New York: Atheneum, 1971), 202–32, and Harold J. Berman, "The Origins

Davies's valorization of custom, as informed by the complexity of society and the preferences of individuals, offers an anticipation of Burke. Like Davies, Burke defends the customary and traditional as embodying a reservoir of experience and knowledge not otherwise available to a single individual: "We are afraid to put men to live and trade each on his own private stock of reason, because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations and ages."[68]

Davies's account of customary law anticipates several eighteenth-century thinkers in their appeals to conjectural histories and in their doubts regarding the effectiveness of political ingenuity. Moreover, in light of the fact that Hume and Millar had some acquaintance with Davies's writings, and in light of Adam Smith's concerns with jurisprudence, the question of influence cannot be ruled out.[69] With these affinities and possibilities in mind, it is worth concluding with some considerations on the political implications of Davies's account.

Like a "Silk-Worm": Implications for Political Theory

Davies's theory of custom may operate in tension with his embrace of English imperial ambitions in Ireland, but the theory nonetheless yields an important perspective on political reason and political consent. His approach encourages, first, an appreciation of how the political may presuppose a conception of the social. The purpose of law is less to create or fashion a society than to affirm it: Davies's appeals to "practice" and "experience," along with his remarks on the common law as a "peculiar invention . . . delivered by Tradition," caution against an embrace of a politics that is either ahistorical or abstract.[70] The rationale for limiting the independence of the political from the social is chiefly epistemic: society is complex. There is an "infinite

of Historical Jurisprudence: Coke, Selden, Hale," *Yale Law Journal* 103 (1994): 1651–1738.

[68]Burke, *Reflections on the Revolution in France*, 182.

[69]On Hume and Millar's knowledge of Davies, see the second section, above. In the case of Adam Smith, things become more speculative, though he had clearly read some of the common lawyers. Student notes taken in Smith's moral philosophy class at the University of Glasgow in 1762–63 and 1763–64 suggest Smith's use of illustrations from Matthew Hale's *History of the Pleas of the Crown*. See Adam Smith, *Lectures on Jurisprudence*, ed. R. L. Meek, D. D. Raphael, and P. G. Stein (Indianapolis, IN: Liberty Fund, 1982), e.g. 110–12. Smith's personal library included Hale's *History*, as well as Coke's *Institutes*. See Hiroshi Mizuta, *Adam Smith's Library: A Supplement to Bonar's Catalogue with a Checklist of the Whole Library* (Cambridge: Cambridge University Press, 1967), 26 and 82.

[70]Preface, *A Report of Cases*, 5.

diversitie of mens Actions, and of other accidents which make the Cases that are to be decided by the Law" and these "acts and accidents . . . are in perpetuall motion and mutation."[71] Such complexity, which involves both a variety of activities and circumstances and a diversity of ends, does not entail that society is invisible, only that a rational account of society proves easiest at the most general and least applicable level.[72] Davies appeals to Aristotle's notion of the Lesbian rule, the pliable lead measure used by masons of Lesbos, that could bend to the varied surfaces of stone.[73] In Davies's account, it is legitimate custom that embodies the Lesbian rule: if the law is based in custom, then custom will provide the pliability essential to social cooperation.

A second perspectival insight reveals another facet of Davies's thought, one that also foreshadows Burke's contention that the social contract exists "between those who are living, those who are dead, and those who are to be born."[74] Burke's construction seems metaphorical, but there is a sense in which Davies's theory of custom (and common law) provides a validation of this extended notion of contract. To adhere to a custom is to agree to an arrangement forged by ancestors who, having inherited the practice from their forebears, transmitted it to another generation. One's adherence to custom involves a compact with other practitioners but also with the dead and those yet to be born. Quite explicitly, though perhaps not uniquely, Davies's theory reveals how consent establishes custom and enables it to acquire the force of law. The common law, as the primary form of law, rests, therefore, on the consent originally given to custom. As Davies puts it, the common law

> is so framed and fitted to the nature and disposition of this people, as we may properly say it is connatural to the Nation, so as it cannot possibly be ruled by any other Law. This Law therefore doth demonstrate the strength of wit and reason and self-sufficiency which hath been always in the People of this Land, which have made their own Laws out of their wisedome and experience, (like a Silk-worm that formeth all her web out of her self onely) not begging or borrowing a form of a Commonwealth, either from *Rome* or from *Greece*.[75]

[71]Ibid., 11.

[72]Davies's comparison between a lawmaker's knowledge and that achieved through "Triall or Probation" has a contemporary analog—the distinction between "ecological" and "constructivist" rationality. See Vernon L. Smith, *Rationality in Economics*: *Constructivist and Ecological Forms* (Cambridge: Cambridge University Press, 2008), esp. chaps. 1–2, which draws on the work of F. A. Hayek; and Hayek, *Law, Legislation, and Liberty*, vol. 1, *Rules and Order* (Chicago: University of Chicago Press, 1973).

[73]"Certain it is that Law is nothing but a Rule of Reason, and humane Reason is *Lesbia Regula*, pliable in every way" (Preface, *A Report of Cases*, 9). Aristotle refers to the Lesbian rule in *Nicomachean Ethics* 1137b28–32.

[74]Burke, *Reflections on the Revolution in France*, 193.

[75]Preface, *A Report of Cases*, 6.

Davies's appeal to custom uncovers a kind of consent that connects the individual not only to a specific practice but to a larger social and political identity, extending from past to future. In turn, the chief laws of the land are drawn from custom, itself forged by the people; in this sense, customary law ensures that the people have legislated in accordance with their own will, like a silkworm.

The simile does not weave an inescapable web. A theory such as Davies's is laden with its own assumptions, chief of which is that even if the customary usages that emerge are not the *most* optimal, they are at least beneficial to some degree *and* consensual and agreeable. However, the degree of benefit depends heavily on the degree of consent. Without doubt, a history of customary practices would reveal various instances in which customs do not seem to be, all things considered, beneficial or agreeable. Some of this divergence might, in fact, exhibit how the unhappy customs result from the oppressive or nonconsensual conduct condemned by Davies. Even so, it is not entirely clear how his theory can counter the more insidious sorts of power relations that slip past liberal norms of permission and prohibition.[76] In addition, there are psychological features of the human being that seem scarcely accounted for in the theory. Inertia, habit, conformity—these too may affect whether a custom persists or declines.

Nonetheless, Davies's account discloses how custom might be construed plausibly as reasonable, beneficial, and unintended. In a theory of some sophistication, he brings to light how custom emerges as an unintended outcome of acts of consent and a source of the social and political compact. His achievement not only bears comparison to ideas of thinkers in the eighteenth century, but in its marriage of social evolution to conditions of liberty, it allows one to glimpse why some might consider a deference to custom to be justified.

[76]In *The Memory of the People*, Wood attends to how customs reflected inequalities of power, wealth, class, or gender yet sometimes served as an "integrative" force (120) or as an avenue for agency (e.g. 289).