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# Decorating the Structure: The Art of Making Human Law

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# DECORATING THE STRUCTURE: THE ART OF MAKING HUMAN LAW

BRIAN M. MCCALL<sup>†</sup>

In a prior article, I described the Eternal Law as a foundation on which human law is built.<sup>1</sup> The Eternal Law, which is God's providential ordering of the universe, establishes the natures of things and thereby determines their ends.<sup>2</sup> St. Thomas Aquinas uses the two concepts of *exemplar* and type to describe the Eternal Law.<sup>3</sup> These concepts are helpful in understanding how the Eternal Law moves one particular creature—humans—to their end. Since Man is distinguished by a faculty for reason, it is this very rationality that is decreed as the method of achieving his end.<sup>4</sup> Thus, the Eternal Law does not specify the means of attaining this end with particularity, but rather, like an *exemplar* in the field of art, it guides towards that end while leaving scope for detailed variations.<sup>5</sup> On the basis of this *exemplar*, human reason deduces a framework of general principles of action, or precepts of the Natural Law, and thereby participates in the Eternal Law.<sup>6</sup> Yet, as I examined in another prior article, Man's capacity to deduce and specify these precepts correctly has been seriously distorted, so much so that St.

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<sup>1</sup> See Brian M. McCall, *The Architecture of Law: Building Law on a Solid Foundation—the Eternal and Natural Laws*, 10 *VERA LEX* 47, 47 (2009) [hereinafter McCall, *The Architecture of Law*].

<sup>2</sup> See *id.* at 59–60.

<sup>3</sup> See *id.* at 58–59.

<sup>4</sup> See *id.* at 64–65.

<sup>5</sup> See *id.* at 59, 63–65.

<sup>6</sup> See *id.* at 93.

Thomas Aquinas claimed the Natural Law had been destroyed in us.<sup>7</sup> To assist in overcoming this infirmity, God promulgated a new law, the *Lex Scriptura*, or the revealed Divine Law. The Divine Law contains general principles of action that are part of the Natural Law in order to present a more reliable guide in deducing and specifying the principles of the Natural Law than unaided human reason.<sup>8</sup>

Having explored the foundation and framework for making particular law, it is now possible to turn to that law which is first in our order of knowledge—although last in the order of being—human positive law. The first Part of this Article describes the nature and purpose of, and process for formulating, human law. Notwithstanding having argued strongly in prior articles that Natural Law is an indispensable form of law that must undergird all human laws for them to be truly law, one might expect this Article to argue for the simple proposition that law is merely whatever the Natural Law establishes. Yet, as Part I of the Article demonstrates, the relationship between Natural Law and human law is more complex. The general precepts of Natural Law are in need of specific determination through a complex dialectical process involving the general principles of Natural Law, historically developing communal customs, and statutory enactments. The second Part of the Article applies the analysis from Part I to two specific questions confronting the process of human lawmaking: (1) the benefits and shortcomings of a common law (or “case law”) tradition versus the civil law (or “code”) tradition, and (2) the problem of the significant proliferation and complexity of modern legislation.

## I. ADORNING THE STRUCTURE WITH HUMAN LAWS

### A. *How Human Lawmaking Fits into the Structure*

Having examined the foundation—Eternal Law, the framing structure—Natural Law, and the on-site instructions of the architect—Divine Law, a survey of law can finally turn to the detailed completion of the edifice accomplished by what Jean Porter, relying on scholastic precedent, calls the “ministers of the

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<sup>7</sup> See Brian M. McCall, *Consulting the Architect When Problems Arise—the Divine Law*, 9 GEO. J.L. & PUB. POL’Y 103, 109–11 (2011) [hereinafter McCall, *The Divine Law*].

<sup>8</sup> See *id.* at 104.

law.”<sup>9</sup> In the architectural analogy these “ministers” can be viewed as the skilled “craftsmen” of the law. They particularize the details of Natural Law’s general precepts, reinforced by Divine Law, which arise out of the foundation of Eternal Law.<sup>10</sup> To reach this level of specificity, a long road of analysis has been necessary. This is natural, since unlike for the legal positivist, human law is not the Alpha and Omega of the field of law. As my prior articles have demonstrated, human law has a limited, albeit significant, role in the grand edifice of law. It is only one part of a vast system of law—Eternal, Natural and Divine—that is interrelated and interdependent.<sup>11</sup> My prior analysis of Divine Law has already elucidated the purpose of human lawmaking as the specification of Natural Law’s principles, which is accomplished by formulating specific determinations of those principles when they affect the common good.<sup>12</sup> As this Part will argue, this understanding already places a significant qualification on the process of human lawmaking. Human laws are dependent upon the Natural Law because the very reason for the existence of human law is to make particular determinations of the principles of this higher law.<sup>13</sup> Human law cannot exist as such without the Natural Law. Returning to the architectural analogy, one cannot paint a fresco until a wall has been erected on a foundation; crown molding cannot be installed until the walls have been erected. Likewise, human law cannot be properly made outside the foundation and framework of Eternal and Natural Law.

Yet, in a certain sense, Natural Law cannot exist without human law because Natural Law needs to be made particular, to be specified. As Jean Porter has observed, Natural Law is not a self-executing legal code that merely needs enforcement.<sup>14</sup>

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<sup>9</sup> See JEAN PORTER, *MINISTERS OF THE LAW: A NATURAL LAW THEORY OF LEGAL AUTHORITY* 223 (2010) [hereinafter PORTER, *MINISTERS OF THE LAW*].

<sup>10</sup> See *id.* at 60–62.

<sup>11</sup> See Patrick McKinley Brennan, *Persons, Participating, and “Higher Law,”* 36 PEPP. L. REV. 475, 484–85 (2009) [hereinafter Brennan, *Persons, Participating, and “Higher Law”*] (describing the role of higher law in human lawmaking).

<sup>12</sup> See McCall, *The Divine Law*, *supra* note 7, at 126–27.

<sup>13</sup> ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE*, pt. I-II, Q. 91, art. 3, at 997 (Fathers of the English Dominican Province trans., Benziger Bros., Inc. 1947) (1266–1273) [hereinafter *SUMMA THEOLOGIAE*].

<sup>14</sup> See JEAN PORTER, *NATURAL AND DIVINE LAW: RECLAIMING THE TRADITION FOR CHRISTIAN ETHICS* 159 (1999) [hereinafter PORTER, *NATURAL AND DIVINE LAW*].

Rather, its general principles require further specification.<sup>15</sup> An architectural plan might call for a fresco of the Last Supper, but the fresco does not exist until an actual fresco is painted by an artist. The Natural Law contains general principles to guide human action: do good, preserve life, and so forth.<sup>16</sup> As St. Thomas Aquinas explains, the content of Natural Law:

[H]as to be determined by Divine or human law, because naturally known principles are universal, both in speculative and in practical matters. Accordingly just as the determination of the universal principle about Divine worship is effected by the ceremonial precepts, so the determination of the general precepts of that justice which is to be observed among men is effected by the judicial precepts.<sup>17</sup>

St. Thomas Aquinas's example is helpful to understand this need for additional law beyond Natural Law. We can know from the use of our reason that if the world has been created by a Being, then that Being deserves in justice to be adored as the source of our existence. Yet, such knowledge, although making known the obligation, does not explain to us specifically how we should perform this act of justice towards our Creator. God therefore revealed particular determinations of this general and universal principle.<sup>18</sup> Likewise, Natural Law obligates Men to act justly. As with the ceremonial precepts, judicial precepts are needed to specify how to live justly.

Prior to the coming of Christ, due to the absence of the fullness of grace, Man needed more assistance in these determinations. Again, St. Thomas Aquinas's discussion of the relationship between habituation or training, and the ability to reach correct conclusions or determinations, is necessary to understand this distinction.<sup>19</sup> In the time of the Old Law, Men were not yet "possessed of a virtuous habit" and thus needed direct Divine determination of more particular laws.<sup>20</sup> Thus, in addition to promulgating certain principles of the Natural Law as moral precepts of Divine Law, God also revealed specific determinations of those general precepts in the judicial precepts

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<sup>15</sup> See *id.* at 153–54.

<sup>16</sup> See McCall, *The Architecture of Law*, *supra* note 1, at 89–90.

<sup>17</sup> *SUMMA THEOLOGIAE*, *supra* note 13, pt. I-II, Q. 99, art. 4, at 1034.

<sup>18</sup> See *id.* pt. I-II, Q. 99, art. 3, at 1033.

<sup>19</sup> See McCall, *The Divine Law*, *supra* note 7, at 121, 126.

<sup>20</sup> See *SUMMA THEOLOGIAE*, *supra* note 13, pt. I-II, Q. 107, art. 1, at 1109.

of the Divine Law.<sup>21</sup> Although human lawmakers existed, much lawmaking was done directly by God by revealing particular determinations of the Natural Law such as rules regarding the forgiveness of debts,<sup>22</sup> the time of payment of wages to laborers,<sup>23</sup> the particular punishments for crimes, and measures of damages for deliberate or negligent harms caused to others.<sup>24</sup> After the advent of grace—which St. Thomas Aquinas calls “an interior *habit* bestowed on us and inclining us to act aright”<sup>25</sup>—Men could be “endowed with virtuous habits” and thus were no longer in such need of Divine determinations as in the judicial precepts.<sup>26</sup> Once the human mind was capable of receiving the aid of an additional habit or training through the availability of the fullness of grace, the new Divine Law became a “law of liberty”<sup>27</sup> and the particular determinations of Natural Law contained in the judicial precepts ceased to bind directly.<sup>28</sup> With the availability of this grace to help discipline Men in virtue, the moral precepts of the Divine Law remained in force as “they are of themselves essential to virtue,” being synonymous with the general principles of the Natural Law.<sup>29</sup> However, the particular determinations of the judicial precepts were “left to the decision of [men].”<sup>30</sup> Put another way, once the habit of grace was made available, God could readjust the responsibilities for particular lawmaking, leaving more to the discretion of human agents.

These particular determinations are made within what Russell Hittinger calls three orders of prudence: the individual, the familial, and the regnative.<sup>31</sup> Some of these necessary determinations are left to individuals to decide for themselves.<sup>32</sup> Others are determined for individuals by their personal

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<sup>21</sup> See *id.* pt. I-II, Q. 99, art. 4, at 1034.

<sup>22</sup> See *Leviticus* 25:23–25 (New American).

<sup>23</sup> See *Deuteronomy* 24:15 (New American).

<sup>24</sup> See *Exodus* 21:1–22:30 (New American).

<sup>25</sup> *SUMMA THEOLOGIAE*, *supra* note 13, pt. I-II, Q. 108, art. 1, at 1114 (emphasis added).

<sup>26</sup> *Id.* pt. I-II, Q. 107, art. 1, at 1108.

<sup>27</sup> *Id.* pt. I-II, Q. 108, art. 1, at 1113.

<sup>28</sup> *Id.* pt. I-II, Q. 104, art. 3, at 1089–1090, pt. I-II, Q. 108, art. 3, at 1117.

<sup>29</sup> *Id.* pt. I-II, Q. 108, art. 3, at 1117.

<sup>30</sup> *Id.* pt. I-II, Q. 108, art. 2, at 1115.

<sup>31</sup> RUSSELL HITTINGER, *THE FIRST GRACE* 99 (2003); see also *SUMMA THEOLOGIAE*, *supra* note 13, pt. I-II, Q. 90, art. 3, at 995.

<sup>32</sup> *SUMMA THEOLOGIAE*, *supra* note 13, pt. I-II, Q. 108, art. 1, at 1114.

superiors,<sup>33</sup> such as parents for children, and those determinations that affect the common good<sup>34</sup> are left “to the discretion of those who were to have spiritual or temporal charge of others.”<sup>35</sup> This same threefold division traditionally divided the study of Moral Philosophy into Monastics or Ethics—the study of the relation of individual acts of Man to his end; Morality of the Family or Economics—the study of the operations of domestic society; and Political Philosophy or Morality of Civil Society—the study of the operations of civil society.<sup>36</sup> With the coming of the fullness of grace, which made the perfection of reason possible, God allowed more freedom in the determination of particular acts and withdrew the specific judicial precepts of the Old Law that ruled this third order, civil society, thereby entrusting the formulation of particular determinations related to civil society, to laws made by humans rather than to Divine Law.<sup>37</sup> It is in making these particular determinations of Natural Law that human beings participate in the Eternal Law or, put another way, participate in God’s providential lawmaking for the universe.

Just as St. Thomas Aquinas’s consideration of the Eternal Law highlighted both God’s rationality and volition,<sup>38</sup> human lawmaking employs both aspects of human nature. As we have seen, human law is dependent upon Natural Law, or the rational participation of Man in the Eternal Law.<sup>39</sup> Human laws are the “particular determinations, devised by human reason” from the precepts of the Natural Law.<sup>40</sup> Thus, the process of making human law must employ the use of right reason. The matter used by human reason in the process is the “singular and contingent”<sup>41</sup> “individual cases” presented by actual

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<sup>33</sup> *Id.* pt. I-II, Q. 108, art. 1, at 1114, pt. I-II, Q. 108, art. 2, at 1115.

<sup>34</sup> *Id.* pt. I-II, Q. 108, art. 2, at 1115.

<sup>35</sup> *Id.* pt. I-II, Q. 108, art. 2, at 1116.

<sup>36</sup> HENRI GRENIER, MORAL PHILOSOPHY 11 (1948) [hereinafter GRENIER, MORAL PHILOSOPHY].

<sup>37</sup> *SUMMA THEOLOGIAE*, *supra* note 13, pt. I-II, Q. 108, art. 2, at 1115, pt. I-II, Q. 108, art. 3, at 1117.

<sup>38</sup> See McCall, *The Architecture of Law*, *supra* note 1, at 57–60 (explaining that Eternal Law as Divine Wisdom emphasized its rationality, and the act of promulgation emphasized the volitional nature).

<sup>39</sup> *Id.* at 85.

<sup>40</sup> *SUMMA THEOLOGIAE*, *supra* note 13.

<sup>41</sup> *Id.* pt. I-II, Q. 91, art. 3, at 998.

circumstances of human existence.<sup>42</sup> Gratian's *Decretum* also recognizes the connection between reason and human law.<sup>43</sup> He includes a text explaining that "reason . . . supports [human laws]"—*legem ratio commendat*, and ordinances "[will be] determined by reason" and therefore ordinances are "all that reason has already confirmed"—*lex erit omne iam quod ratione constiterit*.<sup>44</sup>

Yet, the relationship of human law to reason also involves a relation to Eternal Law. St. Thomas Aquinas notes that Eternal Law, as the complete ordering of the universe, contains within it "each single truth" including "the particular determinations of individual cases."<sup>45</sup> This phrase easily can be misunderstood to mean that all particular human laws have already been formulated in the Eternal Law and human law must merely discover and conform to them. This conclusion would be similar to Ronald Dworkin's argument that there are "right answers" to all legal questions.<sup>46</sup> Such a conclusion is an oversimplification of the concept of the Eternal Law and human participation in it. To draw the distinction, it is important to examine this statement in context:

The human reason cannot have a full participation of the dictate of the Divine Reason, but according to its own mode, and imperfectly. Consequently, as on the part of the speculative reason, by a natural participation of Divine Wisdom, there is in us the knowledge of certain general principles, but not proper knowledge of each single truth, such as that contained in the Divine Wisdom; so too, on the part of the practical reason, man has a natural participation of the eternal law, according to certain general principles, but not as regards the particular determinations of individual cases, which are, however, contained in the eternal law. Hence the need for human reason to proceed further to sanction them by law.<sup>47</sup>

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<sup>42</sup> *Id.*

<sup>43</sup> See GRATIAN, THE TREATISE ON LAWS WITH THE ORDINARY GLOSS D. 1, C. 5 (Augustine Thompson trans., The Catholic Univ. of America Press 1993) [hereinafter GRATIAN, DECRETUM].

<sup>44</sup> *Id.*

<sup>45</sup> *SUMMA THEOLOGIAE*, *supra* note 13, pt. I-II, Q. 91, art. 3, at 998.

<sup>46</sup> Rebecca L. Brown, *How Constitutional Theory Found Its Soul: The Contributions of Ronald Dworkin*, in *EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN* 42 (Scott Hershovitz ed., 2006).

<sup>47</sup> *SUMMA THEOLOGIAE*, *supra* note 13, pt. I-II, Q. 91, art. 3, at 998.

The phrases Divine Reason and Divine Wisdom preceding the reference to Eternal Law recall the connection between the knowledge of God and the Eternal Law that is critical for St. Thomas Aquinas.<sup>48</sup> The Eternal Law establishes the nature of things and the ends to which those things are directed. Yet, these general principles also contain within them the particular actions determined by those ends just as a conclusion is said to be contained in the premises.<sup>49</sup> Yet, God has in the case of humans permitted the participation of human reason in the formation of those particular determinations. The particular shape these determinations will take is dependent both upon the type, or *exemplar*, of Eternal Law, and instrumentally on the practical reason of human beings participating in making particular determinations of the general principles.<sup>50</sup> Human lawmaking is a participation in the Eternal Law in the sense that human laws are meant to be derived from the general principles of Eternal Law made known through Natural Law.<sup>51</sup>

To the extent these particular determinations are reasonable determinations in harmony with the established ends, they are contained within Eternal Law in two different ways. First, they are contained in the general principles just as a particular work of art following a style is contained in the *exemplar* of that style.<sup>52</sup> Likewise, more than one conclusion can be contained in a major premise depending upon the contingent minor premise selected.<sup>53</sup> Taking the major premise that “Man is a rational animal,” we can show that both of the conclusions—“John Smith is a rational animal” and “Mary Jones is a rational animal”—are contained in the major premise. This is because both minor premises—“John

<sup>48</sup> See McCall, *The Architecture of Law*, *supra* note 1, at 57–59.

<sup>49</sup> HENRI GRENIER, GENERAL INTRODUCTION, LOGIC, PHILOSOPHY OF NATURE 78 (J.P.E. O’Hanley trans., 1948) [hereinafter GRENIER, PHILOSOPHY OF NATURE].

<sup>50</sup> See McCall, *The Architecture of Law*, *supra* note 1, at 59.

<sup>51</sup> *SUMMA THEOLOGIAE*, *supra* note 13, pt. I-II, Q. 93, art. 1, at 1003; see also SAINT THOMAS AQUINAS, THE *SUMMA CONTRA GENTILES* pt. III-II, ch. 123, at 116 (English Dominican Fathers trans., Benziger Bros. 1928) (“Now positive laws should be based on natural instinct, [oportet quod ex naturali instinctu procedant] if they be human: even as in demonstrative sciences, all human discoveries must needs be founded on principles naturally known. And if they be divine, not only do they express the instinct of nature, but they also supply the defect of natural instinct: even as the things that God reveals, are beyond the grasp of natural reason.”).

<sup>52</sup> See *SUMMA THEOLOGIAE*, *supra* note 13, pt. I-II, Q. 93, art. 1, at 1003.

<sup>53</sup> See W. D. Ross, *Introduction to ARISTOTLE’S PRIOR AND POSTERIOR ANALYTICS* 1, 4 (Oxford Univ. Press 2001).

Smith is a Man” and “Mary Jones is a Man”—can be paired with this major premise. Although both conclusions are contained in the major premise, the particular conclusion to a given syllogism is contingent upon the selection of the minor premise.<sup>54</sup>

Secondly, Divine Wisdom, knowing all things, knows the particular determinations that will in fact be made instrumentally by the human laws.<sup>55</sup> This foreknowledge, however, is denied to Man so that he may participate in the lawmaking process by using his reason and not divine revelation to make those determinations.<sup>56</sup> It is this element of participation in lawmaking that distinguishes the process of lawmaking from a mechanical discovery of particular human laws that already exist, which need merely be made known by the promulgation of human laws.<sup>57</sup> If this were all that occurred, human laws would only participate in one aspect of lawmaking—promulgation. By contrast, the rules governing the operation of non-rational creatures already exist in particular determinations. For example, dropping something causes it to fall by virtue of gravity. Man does not participate in formulating this law in the same way he does with respect to laws of human action.<sup>58</sup> He merely discovers its operation and attempts to understand its causes. As to laws governing human actions, Man is charged with the task of not only discovering, but also determining the rule’s details according to the general principles implanted in Man’s reason through the Natural Law.<sup>59</sup> At the same time that God permits this active participation, the Divine Wisdom already knows the determination that will be made.

Yet, this participation in lawmaking God has granted is not a “full participation of the dictate of the Divine Reason,” but only “a natural participation of Divine Wisdom [source of Eternal Law]” consisting of “a natural participation of the eternal law,

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<sup>54</sup> See GRENIER, PHILOSOPHY OF NATURE, *supra* note 49, at 81–83 (describing major and minor premises and their relation to conclusions using categorical syllogism, but employing slightly different terminology).

<sup>55</sup> See *SUMMA THEOLOGIAE*, *supra* note 13, pt. I-II, Q. 91, art. 3, at 998.

<sup>56</sup> See Mark C. Modak-Truran, *Beyond Theocracy and Secularism (Part I): Toward a New Paradigm for Law and Religion*, 27 MISS. C. L. REV. 159, 168 (2007).

<sup>57</sup> See McCall, *The Architecture of Law*, *supra* note 1, at 53.

<sup>58</sup> See Martin Rhonheimer, *Natural Law as a “Work of Reason”*: *Understanding the Metaphysics of Participated Theonomy*, 55 AM. J. JURIS. 41, 69 (2010).

<sup>59</sup> See *SUMMA THEOLOGIAE*, *supra* note 13, pt. I-II, Q. 91, art. 3, at 998.

according to certain general principles.”<sup>60</sup> Thus, we can know that there exist objectively true determinations of individual cases, contained within the Divine Wisdom or Eternal Law, but our knowledge of these singular truths is not “natural.” Unlike the general principles of the Natural Law which are “impressed on it [our reason] by nature”<sup>61</sup> or “imparted to us by nature,”<sup>62</sup> the particular determinations are arrived at by the “efforts of reason”—*industriam rationis*.<sup>63</sup> Making these particular determinations involves work or industry. It is not something that we know like a proposition *per se nota*, which once explained is easily grasped by the mind.<sup>64</sup> This difficulty of making determinations in individual cases further explains the need for human laws. Because making these particular determinations is hard work for each individual accompanied by a significant risk of error, and hence confusion,<sup>65</sup> there is a need for human law to “sanction” particular determinations.<sup>66</sup> Not all of these sanctioned determinations will be perfectly contained within the Eternal Law, in the sense of being perfect determinations although they are contained in the sense of being foreknown by God. The error is not an error in God but rather in the weakness of human reason. It is not an error in God but rather tolerated by Him as a consequence of permitting human, fallible participation in the lawmaking process for human action.<sup>67</sup>

Understanding the imperfect nature of Man’s participation helps to explain why St. Thomas Aquinas argued for the limited jurisdiction of lawmaking by constituted authorities.<sup>68</sup> Not all rules of human action are to be determined by legal authorities. As noted *supra*, some are left to individuals and others to personal superiors. What marks the jurisdictional boundary of the determinations to be made by communal, as opposed to personal, superiors? The answer is contained in our prior discussion—those touching upon the “common good.” The

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* pt. I-II, Q. 91, art. 3, at 997.

<sup>63</sup> *Id.*

<sup>64</sup> *See id.* pt. I-II, Q. 94, art. 2, at 1009.

<sup>65</sup> *See* McCall, *The Divine Law*, *supra* note 7, at 122.

<sup>66</sup> *SUMMA THEOLOGIAE*, *supra* note 13, pt. I-II, Q. 91, art. 3, at 998.

<sup>67</sup> *See* JOHN RZIHA, PERFECTING HUMAN ACTIONS: ST. THOMAS AQUINAS ON HUMAN PARTICIPATION IN ETERNAL LAW 217 (2009).

<sup>68</sup> *See* *SUMMA THEOLOGIAE*, *supra* note 13, pt. I-II, Q. 108, art. 2, at 1115–16.

definition of law according to St. Thomas Aquinas includes a dictate of reason oriented to the common good.<sup>69</sup> A text from Isidore contained in the *Decretum* exemplifies this limitation on human law. He says: “Furthermore, if ordinance is determined by reason, then ordinance will be all that reason has already confirmed—all, at least, that is congruent with religion, consistent with discipline, and helpful for salvation.”<sup>70</sup> Notice, human law (ordinance) is not all that reason has confirmed but that which is related to a phrase that summarizes the supernatural and natural common good of Man: religion, discipline, and salvation. St. Thomas Aquinas uses another phrase to encapsulate the common good sought by human law: peace within the community and attainment of individual habits of virtue of its members.<sup>71</sup> Thus, human laws should not determine all actions, but only those related to the common good.

Why is the sanction of human law better than each deciding for himself between all the individual choices of action presented in life? The answer to this question depends on the volitional aspect of lawmaking. In addition to being consistent with reason, status as a law requires that a volitional choice of the will be made and promulgated.<sup>72</sup> An act of the will is necessary because the common good requires it. Decisions affecting the common good should not be left to individual choice because, as they involve contingent matters, there may be more than one reasonable way of determining them.<sup>73</sup> Reason may not be enough to determine the precise choice, as reason may provide for a number of reasonable alternatives. Hence each individual would be a law unto himself, with the result that the order of civil society would be harmed or destroyed. Civil society is a heterogeneous organism that attains only a unity of order. This fact means that members of society have individual ends that they pursue that require coordination to the heterogeneous society’s common end.<sup>74</sup> Such coordination requires that choices

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<sup>69</sup> See *id.* pt. I-II, Q. 90, art. 2, at 994.

<sup>70</sup> GRATIAN, *DECRETUM*, *supra* note 43.

<sup>71</sup> See *SUMMA THEOLOGIAE*, *supra* note 13, pt. I-II, Q. 95, art. 1, at 1013–14.

<sup>72</sup> See *id.* pt. I-II, Q.90, art. 4, at 995.

<sup>73</sup> See *id.* pt. I-II, Q. 95, art. 3, at 1015–16.

<sup>74</sup> See GRENIER, *MORAL PHILOSOPHY*, *supra* note 36, at 290.

be made by an authority and followed by the members, so as to preserve the unity of order that is necessary to attain the common good.<sup>75</sup>

An example will aid in understanding this argument. Natural Law contains the precept to preserve human life.<sup>76</sup> In the course of pursuing their individual end, people operate vehicles capable of killing innocent human beings. Easily we can conclude the principle that cars should be driven in a safe and orderly manner so as to avoid killing innocent people. A more particular conclusion flowing from this general conclusion is that cars traveling in the same direction should travel on the same portion of the road so as not to collide with those traveling in the opposite direction. All of these deductions can be reached by merely applying rules of practical reason. Yet, the final conclusion still does not tell the driver on which side to drive when going north on a particular road. Should it be the right side or the left side? The principle permits either; there is no inherently more reasonable side to choose. We thus reach a point where humans must make a volitional choice between two reasonable determinations. A choice must be made to preserve that aspect of the common good called orderly safety; it must not be determined by each individual driver as they would be capable of determining rationally different sides from one another. Hence, a volitional act of an authority must bring a unity of order to the individual ends pursued by drivers by definitively choosing right or left for the community. This example demonstrates a case for necessitating the formation of a law, in the proper sense of the term, in contrast to individual determination. The common good requires a legal determination of the Natural Law principle by the authority with interests in the care of the community. Once selected, driving on the side not selected by the legal authority now would violate the Natural Law precept to preserve life.

One of Jean Porter's greatest contributions to contemporary Natural Law theory has been to reemphasize the under-determination of Natural Law, the principles of which allow for a variety of specific contingent determinations.<sup>77</sup> Given the

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<sup>75</sup> See *id.* at 289–90, 367–68.

<sup>76</sup> See *SUMMA THEOLOGIAE*, *supra* note 13, pt. I-II, Q. 94, art. 2, at 1009.

<sup>77</sup> See, e.g., PORTER, *MINISTERS OF THE LAW*, *supra* note 9, at 81–82, 221–22.

contingency of matter to which precepts of Natural Law are applied, the precepts do not automatically determine a particular choice, such as the left or right side of the road. There is a realm of choice which must be made by an authority with care of the community. Even though Natural Law precepts foreclose some choices, such as a law requiring people to drive into oncoming traffic, they leave choices, often broader than the binary one in the traffic law example, to be made by authorities as a participation in the Eternal Law.<sup>78</sup>

This under-determination by Natural Law does not mean that Natural Law and human law's determinations of it lack the quality of truth. As St. Thomas Aquinas explains, the correspondence constituting truth differs for speculative and practical matters.<sup>79</sup> For speculative matters this correspondence is "conformity between the intellect and the thing."<sup>80</sup> For practical matters it is the "conformity with right appetite."<sup>81</sup> The difference is that speculative knowledge is oriented to necessary things whereas practical matters are oriented to contingent things, choices of action that could be other than they are.<sup>82</sup> The end of actions, or the goods to be obtained, are determined by nature and thus cannot be chosen to be good but only willed or desired as such.<sup>83</sup> The means to attain these goods or ends, however, can be the object of a real human choice because they are contingent.<sup>84</sup> The choice of the right side could have been the left side (and in fact is in other countries than ours). But it is still a true choice: The choice corresponds to a right appetite, the willing of a contingency that truly conforms to a good—safe travel on the roads. Since necessary things cannot be but what they are, there can only be one true speculative judgment—this particular shape is a circle. Yet, because human actions as means are contingent—different choices can all correspond to a

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<sup>78</sup> See *id.* at 80–81.

<sup>79</sup> See ST. THOMAS AQUINAS, COMMENTARY ON THE NICOMACHEAN ETHICS bk. VI, lec. II: cmts. 1127–32 (C. I. Litzinger trans., Henry Regnery Co. 1964) [hereinafter COMMENTARY ON THE NICOMACHEAN ETHICS]; *SUMMA THEOLOGIAE*, *supra* note 13, pt. I-II, Q. 57, art. 5, at 832.

<sup>80</sup> *SUMMA THEOLOGIAE*, *supra* note 13, pt. I-II, Q. 57, art. 5, at 832.

<sup>81</sup> *Id.*

<sup>82</sup> See *id.*

<sup>83</sup> COMMENTARY ON THE NICOMACHEAN ETHICS, *supra* note 79, at bk. III, lec. V: cmt. 446.

<sup>84</sup> *Id.* at bk. III, lec. V: cmt. 446, bk. III, lec. IX: cmt. 487, bk. III, lec. XI: cmt. 496.

right appetite for the good—there can be more than one true practical judgment.<sup>85</sup> Either the right or the left side could be a true judgment because either can correspond to willing the good of orderly and safe driving. These practical judgments are choices of intermediate—as opposed to ultimate—ends, or a choice of means, so this conclusion is consistent with the reality that there may be more than one means to the same end.<sup>86</sup> If the judgment to be made were whether travel should be safe or unnecessarily dangerous, this would be a speculative judgment with only one possible answer, safe.

This traffic law example also demonstrates why some particular determinations or choices of means must be made by human law rather than left to individual determination. Those individual acts whose nature requires coordination to the common good need to be determined by individuals having “spiritual or temporal charge of others.”<sup>87</sup> Everyone choosing for themselves would create dangerous chaos. Yet, the requirement for a communal determination in some circumstances does not mandate that all choices should be determined by one in a superior position in our community.

On the other side of the coin are the actions intrinsically tied to the personal good but remote to the common good.<sup>88</sup> As a result of the remoteness to the common good, these choices are left to private individuals. Human law may justly regulate the manner in which these individual choices are lived out in the community and affect the common good, but the choice itself is left to the individual.<sup>89</sup> For example, an individual’s choice of profession or career is one primarily oriented to his personal good. Natural Law principles will provide the boundaries for this choice by, for example, foreclosing the choice of being a professional mass murderer. Yet, the particular determination within the range permitted by Natural Law is rightly left to individual determination. Prior to making this determination and to prepare for it, some education must be provided. This decision again affects more directly the individual good of the

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<sup>85</sup> *Id.* at bk. III, lec. V: cmt. 446, bk. III, lec. VI: cmt. 452.

<sup>86</sup> *See id.* at bk. VI, lec. II: cmt. 1131 (explaining that ends are determined by nature but means are left to the choice of Men).

<sup>87</sup> *SUMMA THEOLOGIAE*, *supra* note 13, pt. I-II, Q. 108, art. 2, at 1116.

<sup>88</sup> *See* GRENIER, *MORAL PHILOSOPHY*, *supra* note 36, at 288, 367.

<sup>89</sup> *See id.* at 289, 368.

person and should be made by his personal superior, such as his parent, who is charged with making determinations affecting his personal good on his behalf. Yet, once the choice of career is made, the legal authority in a community may have promulgated laws regarding the way this choice is lived out in the community. For example, a civil authority may determine the level of knowledge and skill which must be demonstrated before someone choosing to be a doctor can begin treating other members of the community. The choice of individual profession is an individual determination; the determination of licensing for publicly carrying out that profession is rightly reserved to the authority caring for the community.

Marriage presents another example. The law would wrongly exercise authority to determine that an individual must marry or must marry a particular spouse. Yet, the requirements of form to enter into a legal marriage, once chosen, and the public consequences of that choice in terms of property, for example, are determinations properly to be made in conformity to the precepts of Natural Law by those having “spiritual or temporal charge of others.”<sup>90</sup>

As a natural lawyer, St. Thomas Aquinas is admittedly idealistic (he argues for the existence of an objective truth in practical matters), but he balances this idealism with a healthy practicality.<sup>91</sup> Truth is the correspondence of a chosen means to a truly desirable good. Multiple choices of means may all correspond truly with a given objective, which allows for a variety of legal systems making different but all true choices. A worldwide harmonized legal system is not necessary for law to be true. Further, even the wise can err, and we need not be scandalized by this fact. In reality, no legal system will always be perfect. In other words, each particular determination of a given legal system may not be a correct correspondence to the proper ends under every circumstance. It is sufficient for human societal well-being that the wise get particular determinations as correct as is possible given their abilities. Some error in the system is inevitable and does not undermine the legitimacy of the entire system. Ultimately, as God has withdrawn from direct legislation for Man after the promulgation of the New Law, He

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<sup>90</sup> *SUMMA THEOLOGIAE*, *supra* note 13, pt. I-II, Q. 108, art. 2, at 1116.

<sup>91</sup> *See id.* pt. I-II, Q. 57, art. 5, at 832.

wills the temporal and spiritual leaders, who may not in fact even be wise, to do their best in reaching particular determinations.

Human lawmaking thus involves both an act of the intellect and the will.<sup>92</sup> Human laws must conform to the Divine Wisdom of Eternal Law as known through the principles of Natural and Divine Law. The Natural Law does put constraints on the content of human law. As Jean Porter observes:

[T]he canonists and theologians do consider the natural law to have direct moral and social implications, even in human society as it now exists. It is true that for them, as well as for the civilians, the natural law must be expressed through human conventions in order to have practical force in the present historical order. Nonetheless, they also believe that the natural law places definite moral constraints on the legitimate forms of institutional life . . . .<sup>93</sup>

Even within these constraints and under certain circumstances, the principles of Natural Law permit real human choices, some of which must be made for a community. The following Subsection will address these determinations more closely and consider their source and the process that produces the choice of the will in light of principles of reason.

### *B. The Processes and Sources of Human Lawmaking*

The prior Subsection explored the nature and purpose of human law as the process of rationally making particular determinations of Natural Law's general precepts, which are necessary to promote the common good. For Gratian and St. Thomas Aquinas, the Natural Law must serve as the framework onto which particular human laws are added. Gratian expresses this dependence by explaining that human laws are constituted by, confirmed by, or stand with reason.<sup>94</sup> St. Thomas Aquinas explains the relation thus: "[E]very human law has just so much of the nature of law, as it is derived from the law of nature."<sup>95</sup> In other words, human law's character as law is a product of its derivation from Natural Law. This Subsection will examine the dialectical process of working out this derivation. The process

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<sup>92</sup> See *id.* pt. I-II, Q. 57, art. 6, at 832.

<sup>93</sup> PORTER, NATURAL AND DIVINE LAW, *supra* note 14, at 250.

<sup>94</sup> GRATIAN, DECRETUM, *supra* note 43.

<sup>95</sup> SUMMA THEOLOGIAE, *supra* note 13, pt. I-II, Q. 95, art. 2, at 1014.

involves two stages of intellectual activity. First, there are human laws that belong to the “law of nations” (*jus gentium*) and secondly, to the “civil law” of a particular people, or the *jus civile*.<sup>96</sup>

The first set of human laws contains “those things which are derived from the law of nature, as conclusions from premises.”<sup>97</sup> These are general principles of law deduced directly from the speculative knowledge of the end of Man. They have become general principles underlying various legal systems, operating in the absence of the legal system’s particular determination. St. Thomas Aquinas provides as an example the conclusion that buying and selling should be on just terms, because just commercial activity, “without which men [could not] live together,” is necessary as Man must live together as “a social animal.”<sup>98</sup> Thus the general law of nations contains a principle that exchange transactions should be just. The civil law of a particular community, on the other hand, contains more particular laws “which are derived from the law of nature by way of particular determination.”<sup>99</sup> These laws are particular determinations of what constitutes just exchange, such as the particular scope of factual misrepresentation that will render an exchange transaction unjust and unenforceable by a particular community’s court system.<sup>100</sup>

St. Thomas Aquinas also proffers an example of the relationship between *jus gentium* and *jus civile*. The *jus gentium* contains a conclusion that “evil-doer[s] should be punished.”<sup>101</sup> In contrast, the *jus civile* contains a law requiring that an evil-doer “be punished in this or that way.”<sup>102</sup> Roman law provides an example illustrating the use of the *jus gentium*. The particular law of Rome (the *jus civile*) was not applicable to non-Romans.<sup>103</sup> Yet as Rome’s power spread beyond its original territory, disputes arose involving non-Roman citizens. In 247 B.C., the position of a second Praetor, Praetor Peregrinus, was created to

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<sup>96</sup> *Id.* pt. I-II, Q. 95, art. 4, at 1016.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *See id.*

<sup>101</sup> *Id.* pt. I-II, Q. 95, art. 2, at 1015.

<sup>102</sup> *Id.*

<sup>103</sup> WILLIAM L. BURDICK, *THE PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW* 198 (The Lawbook Exchange, Ltd. 2004).

decide cases involving non-Romans applying not the *jus civile*, but the principles of the *jus gentium*, to reach judgment.<sup>104</sup> Since the *jus civile* was inapplicable, this Praetor used the universal principles of the *jus gentium* to render particular judgments.<sup>105</sup> With this distinction between *jus gentium* and *jus civile* in mind, we can now turn our attention to the process by which human law moves from the general precepts of the Natural Law, to the universal principles of the *jus gentium*, to the particular determinations of various legal systems.

Cicero is one of the earliest authors to describe this process of translating principles of Natural Law into laws of particular peoples.<sup>106</sup> He summarizes the process thus<sup>107</sup>:

Justice is a habit (*habitus*) of the mind which attributes its proper dignity to everything, preserving a due regard to the general welfare. Its first principles proceed from nature (*ab natura*). Afterwards certain things come into common usage (*in consuetudinem*) due to the reasonableness of their utility; afterwards, the fear of both the laws (*legum*) and religion sanctioned these things [for example, the things that have been adopted as part of common usages], both having been established by nature (*ab natura*) and having been approved by common usage (*ab consuetudine*).

....

Law by common usages (*consuetudine jus*<sup>108</sup>) is that which either, having been drawn out of nature quietly, use (*usus*) has nourished and made great, like religion; or, if we see preserved any of those things which we have already spoken of as having been produced by nature and made stronger by common usage (*consuetudine*) or, that which antiquity has carried through into custom (*morem*) by the approval of the common people: such as a covenant that has been made, fairness, and cases which have already been decided. A covenant is that which is agreed upon between some people; fairness is that which is equitable in all cases; a case previously decided concerns that which is already

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<sup>104</sup> See *id.* at 105, 200.

<sup>105</sup> *Id.* at 200.

<sup>106</sup> CICERO, ON THE COMMONWEALTH AND ON THE LAWS xxiv (James E. G. Zetzel ed., Cambridge Univ. Press 1999) [hereinafter CICERO, ON THE COMMONWEALTH].

<sup>107</sup> The following is a slightly adjusted translation of the original source.

<sup>108</sup> *Consuetudine* being the ablative of cause expresses the cause or reason of a thing. Thus, this sentence describes law caused by common usages. ROBERT J. HENLE, LATIN GRAMMAR 178 (1958) (“The ablative without a preposition may also be used to express the CAUSE OR REASON (ABLATIVE OF CAUSE).”). *Id.* at 320.

decreed by the opinions of some person or persons. Law by statute (*Lege ius*<sup>109</sup>) is contained in that which is in writing which is made known to the people in order that it might be observed.<sup>110</sup>

There are several key concepts contained in this passage: justice (*justitia*), nature (*natura*), usages (*consuetudine* or *usus*), custom (*mos*), and law (*jus*), which can be caused by common usages (*consuetudine*) or by written ordinances (*lege*). The beginning of human law (*jus*) is justice.<sup>111</sup> Justice has its origin in nature. Eventually this natural justice is formulated into law either in the form of law by customs (law caused by usages) or written statutes (law caused by written laws).<sup>112</sup> Yet, Cicero's explanation of the process helps to disabuse us of a notion that has dominated Natural Law jurisprudence since the Enlightenment. When it is said that these principles are deduced from nature, this phrase conjures images of a thinker—such as René Descartes—interacting directly with abstract principles and closed within the confines of his mind, where he abstractly deduces more abstract principles. Yet, Cicero describes a more concrete process. Certain common practices develop naturally because they appear useful.<sup>113</sup> These constitute the *jus gentium*—general principles of justice in common usage. Over the course of time, some particularities of these principles enter into the customs of a people, and eventually these practices become sanctioned or confirmed by long standing constant use.<sup>114</sup> Some of these longstanding practices receive formal sanction by religion or the law: Recall St. Thomas Aquinas's reference to spiritual or temporal authorities.

Not all practices or usages become part of the law. Rather, only those that are carried through time by longstanding antiquity or which are confirmed by written statutes.

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<sup>109</sup> The same ablative of cause is used. *See id.*

<sup>110</sup> CICERO, DE INVENTIONE bk. II, ch. LIII–IV [hereinafter CICERO, DE INVENTIONE], available at <http://www.thelatinlibrary.com/cicero/invention2.shtml> (author's translation).

<sup>111</sup> *SUMMA THEOLOGIAE*, *supra* note 13, pt. II-II, Q. 57, art. 1, at 1431 (describing *jus* as “the just thing itself” (*ipsam rem iustam*)); *see id.* (“[J]us (right) is so called because it is just [*justum*].”).

<sup>112</sup> *Id.* pt. II, Q. 57, art. 1, at 106.

<sup>113</sup> CICERO, DE INVENTIONE, *supra* note 110, at bk. II, ch. LIV.

<sup>114</sup> *Id.*

Significantly, Cicero mentions no particular person engaging in abstract deductions. These practices are drawn out of nature quietly or softly (*leviter*). Thus, more particular principles of Natural Law and their particular determinations within a commonwealth are deduced, not scientifically by an abstract thinker, but collectively over the course of time by the practices of a people and the evaluation of those practices by religious and legal authorities, periodically lending sanction to them.<sup>115</sup> In many ways, this reading of Cicero corresponds to Professor Jean Porter's understanding of how we interact with the Natural Law. She explains that Natural Law principles are always mediated through a particular culture.<sup>116</sup> The general propositions are not encountered in the abstract but through their particular instantiation in a legal culture.<sup>117</sup> For Medieval lawgivers, she explains, "[A]djudication and even legislation presupposed a basis of generally accepted norms and practices . . . to provide starting points and substance for new law."<sup>118</sup> This does not mean that philosophers and jurists did not formulate and articulate abstract principles of the Natural Law and deductively reason from them. Yet, those abstract principles are first encountered not in the abstract, but through some particular legal culture or cultures.<sup>119</sup> As Professor Porter explains, "A natural law analysis is directed towards identifying the natural purposes served by a conventional practice or institution, with the aim . . . of rendering this practice intelligible as one aspect of the 'unified set of goal-ordered capacities' that jointly inform human existence."<sup>120</sup>

Cicero would certainly agree with her characterization. He contrasts the discussion of the best legal regime in his *On the Commonwealth* to the more abstract discussion in Plato's *Republic*.<sup>121</sup> For this Roman philosopher, the best method of discussing the philosophy of the commonwealth is by examining

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<sup>115</sup> See *id.*

<sup>116</sup> See PORTER, MINISTERS OF THE LAW, *supra* note 9, at 120.

<sup>117</sup> See, e.g., *id.* at 115–22.

<sup>118</sup> *Id.* at 50.

<sup>119</sup> See, e.g., *id.* at 105–13.

<sup>120</sup> *Id.* at 117.

<sup>121</sup> CICERO, ON THE COMMONWEALTH, *supra* note 106, at 34 ("I will have an easier time in completing my task if I show you *our commonwealth* as it is born, grows up, and comes of age, and as a strong and well-established state, than if I make up some state as Socrates does in Plato." (emphasis added)).

its actual instantiation in the history of the Roman Republic rather than a theoretical construct of pure rationality as in *Republic*.<sup>122</sup> As Laelius observes during the discussion of Roman history:

[W]e see that you have introduced a new kind of analysis, something to be found nowhere in the writings of the Greeks . . . . All the others wrote about the types and principles of states without any specific model or form of commonwealth. You seem to me to be doing both: from the outset, you have preferred to attribute your own discoveries to others [for example, Romulus and the other critical figures in the history of Rome] rather than inventing it all yourself in the manner of Plato's Socrates . . . .<sup>123</sup>

This contrast in methodology is useful in understanding the relationship between the general, rational principles of Natural Law and actual human laws. Rather than conceiving the transition from Natural Law to human law as a purely descending deductive process—starting with the first principle of Natural Law from which general principles are deduced, from which more specific principles are deduced and following which particular legal determinations are made—the process is more fluid.<sup>124</sup> Over the course of time, practices and usages come into being to usefully address natural inclinations, some of which, being reasonable, stand the test of time and become common. From these practices, the inclinations<sup>125</sup> underlying them can be discerned, and principles from them can be articulated. Once formulated, these principles can be used to normatively evaluate the same practices and customs to determine if they should be strengthened and carried through time by acquiring legal sanction. Such an inductive or deductive process of reasoning involving both speculative and practical knowledge is similar to the methodology for moral reasoning employed by St. Thomas

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<sup>122</sup> Thelma B. Degraff, *Plato in Cicero*, 35 CLASSICAL PHILOLOGY 143, 149 (1940).

<sup>123</sup> See CICERO, ON THE COMMONWEALTH, *supra* note 106, at 39. In fairness to the Greeks, Aristotle does employ a more historically rooted approach within his theoretical treatment of politics by examining the history of certain cities. See ARISTOTLE, *Politica*, in THE BASIC WORKS OF ARISTOTLE bk. II, ch. 8–12 (Richard McKeon ed., Benjamin Jowett trans., Random House 1941).

<sup>124</sup> See CICERO, DE INVENTIONE, *supra* note 110.

<sup>125</sup> See McCall, *The Architecture of Law*, *supra* note 1, at 47, 84 (discussing the role of inclinations in the Natural Law).

Aquinas, as described by Professor Maria T. Carl.<sup>126</sup> The result is a dialectical process running from the particular instantiation of a practice up to general principles induced from it, and running back down to the particular practices to evaluate them. This model of lawmaking also resembles Michael Moore's functionalist jurisprudence. Moore argues that since law is a functional kind, we come to know law by starting with a hypothesis about law's goal, which must then be tested by examining its structural components so as finally to come to know law's goal.<sup>127</sup>

Such a process also correlates to Alasdair MacIntyre's important contribution to modern Thomistic Aristotelianism, which emphasizes the same need for particular contexts in which to understand universal principles.<sup>128</sup> Thaddeus Kozinski succinctly explains MacIntyre's concept of tradition-constituted rationality thus: "MacIntyre insists that it is only through active participation in particular authentic traditions that men are rendered capable of discovering and achieving their ultimate good; for, it is only through a *particular* tradition that we can properly apprehend *universal* truth."<sup>129</sup> MacIntyre explains that for the Aristotelian or Thomistic tradition, ethics or moral reasoning involves a dialectic process involving three points of reference: (1) man-as-he-happens-to-be, which can be reflected in customs; (2) the precepts of the Natural Law; and (3) man-as-he-could-be-if-he-realized-his-essential-nature.<sup>130</sup>

We can translate MacIntyre's epistemological claim into the language of our current discussion. The universal principles of the Natural Law can only be discovered and explored through a particular community's determinations of human law, its tradition. The universal and particular are both part of the process.

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<sup>126</sup> Maria T. Carl, *The First Principles of Natural Law: A Study of the Moral Theories of Aristotle and Saint Thomas Aquinas* 124–30 (Dec. 1989) (unpublished Ph.D. dissertation, Marquette University).

<sup>127</sup> See Michael S. Moore, *Law as a Functional Kind*, in *NATURAL LAW THEORY: CONTEMPORARY ESSAYS* 188, 208–09 (Robert P. George ed., 1992).

<sup>128</sup> THADDEUS J. KOZINSKI, *THE POLITICAL PROBLEM OF RELIGIOUS PLURALISM AND WHY PHILOSOPHERS CAN'T SOLVE IT* 150–51 (2013).

<sup>129</sup> *Id.* at 151.

<sup>130</sup> ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 53 (Univ. of Notre Dame Press 2d ed. 1984).

We can use the practice of enforcing contacts (*pactum*), mentioned by Cicero, as an example of this process.<sup>131</sup> Over time a community requires the fulfillment of certain promises, called contracts in the American legal tradition.<sup>132</sup> By examining this practice we can conclude that the peace and efficiency of human society depend to some extent upon the practice of enforcing certain promises. This requirement can be seen as an inclination related to Man's social nature. To live in society and work on projects jointly, people need to depend upon—be justified in relying on—the commitments of others. It is therefore unjust to break a pact. Yet, we can observe that the practice does not universally enforce all promises. For example, in the American legal tradition, promises made under duress,<sup>133</sup> promises made for no consideration,<sup>134</sup> promises made pursuant to a mistake,<sup>135</sup> or promises whose enforcement would be unconscionable<sup>136</sup> may not be enforced. We can determine if a particular promise should be enforced according to the common practice by comparing the particular promise that someone seeks to enforce to contracts that longstanding practice has enforced, in light of the general principles related to Man's social nature as discerned by examining this practice.

Lawyers, philosophers, and theologians in the Natural Law tradition took the institution of private property as another example of this dialectical relationship between societal conventions and Natural Law principles.<sup>137</sup> The legal forms for the creation, transfer, and inheritance of property are developed through communal customs. Yet, these forms are constrained by Natural Law principles such as the Decalogue precept prohibiting theft.<sup>138</sup>

Roman law provides another example of this important relationship between Natural Law and the customs of particular communities. By declining to apply the law of the city of Rome,

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<sup>131</sup> Jean Porter uses the example of the institution of marriage for a similar illustration. See, e.g., PORTER, *MINISTERS OF THE LAW*, *supra* note 9, at 117.

<sup>132</sup> See 17 C.J.S. *Contracts* § 1 (2013).

<sup>133</sup> 81A C.J.S. *Specific Performance* § 42 (2013).

<sup>134</sup> *Id.* § 35.

<sup>135</sup> *Id.* § 40.

<sup>136</sup> 17 C.J.S. *Contracts* § 3 (2013).

<sup>137</sup> See PORTER, *NATURAL AND DIVINE LAW*, *supra* note 14, at 251.

<sup>138</sup> See *id.*

the *jus civile*, to non-Roman citizens,<sup>139</sup> the Praetor Peregrinus acknowledged that the Roman particular customary instantiation of Natural Law was not applicable to other peoples not part of that tradition. In the absence of the applicable particular *jus civile*, the Praetor Peregrinus had to abstract from common usages the principles of *jus gentium* to decide cases.<sup>140</sup> This law of nations appears to function as a type of law that resides between Natural Law and the human laws of a particular people. It resembles Natural Law precepts in that its rules are general; it resembles the particular law of a nation in that its principles are derived from the study of common practices of all nations.<sup>141</sup> Justinian's Institutes define it thus: "[T]he law which natural reason has established among all mankind and which is equally observed among all peoples, is called the Law of Nations, as being that which all nations make use of."<sup>142</sup>

The *jus gentium* appears similar to Natural Law as it is established by natural reason. Yet, it includes more than general abstract principles; these principles have been in fact observed by different nations in their formulation and administration of their law. In a certain sense, the *jus gentium* looks to a broader definition of customs than the application of a particular people's law. It looks to the entire human race to discern common principles across legal systems, which in varying contexts have been derived by the use of reason from the principles of the Natural Law.<sup>143</sup> Yet, as the Praetor Peregrinus decided cases under the *jus gentium*, common usages and practices started to develop. The *jus gentium* is thus gradually determined into a new communal set of practices: the *jus gentium* as applied to non-Roman citizens. Unlike Natural Law, which remains at the level of more or less general principles, within the system of Roman law the *jus gentium* becomes a new communal tradition, a body of more particular rules developed over time through particular case decisions. For present purposes, the creation of the Praetor Peregrinus and the development of a distinct category of Roman positive law applicable to non-Romans based

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<sup>139</sup> See BURDICK, *supra* note 103, at 105, 200.

<sup>140</sup> See *id.*

<sup>141</sup> F. S. C. Northrop, *Naturalistic and Cultural Foundations for a More Effective International Law*, 59 YALE L.J. 1430, 1435 (1950).

<sup>142</sup> *Justinian Institutes*, in 2 THE CIVIL LAW 3, 6 (The Central Trust Co. 1932).

<sup>143</sup> Northrop, *supra* note 141.

on the *jus gentium* demonstrate that the particularity of communal customary practices was critical to the development of law by Roman jurists. Abstract principles were insufficient; concrete customary practices needed to be examined. It would be inappropriate to apply Roman customary law to non-Romans, and thus a broader examination of human custom was necessary, leading to the development of a more particular legal tradition based on the Natural Law principles reflected in the *jus gentium*.

Yet within both the *jus civile* and the *jus gentium*, not all practices become part of the law, as Cicero himself observed.<sup>144</sup> The process involves both historical repetition and particular rational evaluation. Cicero's definition of justice, which opened this Subsection,<sup>145</sup> contains another concept which can help us understand better how certain longstanding practices become part of the law. Justice is defined as a habit.<sup>146</sup> A habit consists of a repetition of certain actions that become part of our nature.<sup>147</sup> Aristotle explains that virtue is instilled by good habits—the repetition of virtuous acts.<sup>148</sup> As the virtue of justice is instilled in an individual by the habitual performance of virtuous acts, so too communities acquire the virtue of justice—the object of law (*jus*)—by longstanding customs, which become virtuous customs.<sup>149</sup>

St. Thomas Aquinas explains that in Greek and Latin the words ethics and morality (the study of human actions) are related to the word for customs.<sup>150</sup> Just as an individual develops virtues by repeated human actions or habits, likewise the community develops its law by repeated human actions or

<sup>144</sup> See CICERO, DE INVENTIONE, *supra* note 110.

<sup>145</sup> See *supra* Part I.B.

<sup>146</sup> *SUMMA THEOLOGIAE*, *supra* note 13, pt. II-II, Q. 58, art. 1, at 1435.

<sup>147</sup> See MARCUS TULLIUS CICERO, *The Second Book of the Rhetoric, or of the Treatise on Rhetorical Invention, of M. T. Cicero, in ORATIONS VOL. 4: THE FOURTEEN ORATIONS AGAINST MARCUS ANTONIUS; TO WHICH ARE APPENDED THE TREATISE ON RHETORICAL INVENTION; THE ORATOR; TOPICS; ON RHETORICAL PARTITIONS, ETC. 373–74* (G. Bell and Sons 1913-1921).

<sup>148</sup> COMMENTARY ON THE NICOMACHEAN ETHICS, *supra* note 79, at bk. V, lec. II: cmts. 908–12.

<sup>149</sup> See PORTER, MINISTERS OF THE LAW, *supra* note 9, at 139 (“[Culture] represents, therefore, a kind of social analogue to the Aristotelian and Thomistic idea of virtue as *habitus* . . .”).

<sup>150</sup> COMMENTARY ON THE NICOMACHEAN ETHICS, *supra* note 79, at bk. II, lec. I: cmt. 247 (explaining that in Greek *ethos* when spelled with an *epsilon* means moral virtue or habit, but when spelled with an *eta* means custom and that the Latin words *mos* and *moris* contain both meanings of habit and custom).

customs.<sup>151</sup> If the customs are good, its law will attain its end, which is justice. Similarly, a person possessing good habits will attain his end, which is virtue.<sup>152</sup> But habits can be good or bad; and bad habits produce vices, not virtues.<sup>153</sup> Not all habits are good, and individuals must rationally review their habitual actions to root out bad habits and instill good ones. Aristotle and St. Thomas Aquinas analogize to the arts and explain that this is why builders need a teacher to guide them to build well or else they will become bad builders through the habit of building poorly.<sup>154</sup> Just as those learning the art of building need a teacher to guide the development of their habit, the community needs an authority to guide the development of usages. This analogy will assist in understanding the relationship between the two means of making law discussed by Cicero—law by usages and law by statute (*consuetudine jus* and *lege jus*).

To understand this relationship between communal usages and written statutes, we turn to Gratian. He begins his treatise on canon law by emphasizing that human actions are governed both by laws made by God and laws made by humans.<sup>155</sup> The laws made by God include the Natural Law.<sup>156</sup> Gratian defines the laws made by humans as the longstanding customs (*mores*) “drawn up in writing and passed on as law.”<sup>157</sup> He offers a somewhat confusing definition of custom (*mos*): Longstanding custom (*mos*) is long usages (*consuetudo*) simply handed on from customs (*moribus*)<sup>158</sup> The gloss identifies the confusing nature of this definition in that the word *mos* appears in the definition of itself. The gloss resolves this ambiguity by suggesting three different meanings for custom (*mos*), customs (*moribus*), and usage (*consuetudo*). Custom (*Mos*) means unwritten law (*iure non scripta*).<sup>159</sup> Usage (*consuetudo*) means “law [*iure*] whether written or unwritten.”<sup>160</sup> Customs (*moribus*) means “frequently

<sup>151</sup> See *id.* at bk. V, lec. 2: cmts. 902–03.

<sup>152</sup> *Id.* at bk. V, lec. II: cmts. 909–11.

<sup>153</sup> See *id.* at bk. II, lec. II: cmts. 260–64.

<sup>154</sup> See *id.* at bk. II, lec. I: cmt. 250.

<sup>155</sup> See McCall, *The Architecture of Law*, *supra* note 1, at 54 (citing GRATIAN, *DECRETUM*, *supra* note 43, at D. 1).

<sup>156</sup> *Id.* at 93.

<sup>157</sup> GRATIAN, *DECRETUM*, *supra* note 43, at D. 1, C. 1.

<sup>158</sup> *Id.* at D. 1, C. 4 (“*Mos est longa consuetudo, de moribus tantummodo tracta.*”).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

performed human actions.”<sup>161</sup> Thus, not all *moribus*, or frequently performed human actions, become usages (*consuetudino*). Those that do are either written (*jure scripta*) or unwritten (*mos*). Once a certain common practice moves from mere repeated actions to law, it can either take the form of a statute or an unwritten customary law.<sup>162</sup> Before examining the relationship between written and unwritten law, we will first consider how the multitude of customs are sifted to become or remain law.

Pope Nicholas declared that evil custom must be “torn up by its roots.”<sup>163</sup> Those vested with care of the common good, those possessing legal authority, are to tear up evil customs by enacting written laws prohibiting bad customs, just as bad habits are to be driven out of a person by the guidance of a teacher. Legislators must set aside customs if they conflict with truth or reason.<sup>164</sup> The example of chattel slavery in America presents a case where a deeply rooted custom needed to be rooted out.<sup>165</sup> As quoted by Gratian, Pope Nicholas provides:

An evil custom is no more to be tolerated than a dangerous infection because, unless the custom is quickly torn up by its roots, it will be adopted by wicked men as entitling them to a privilege. And then unchecked deviations and various infractions will soon be revered as lawful and honored as immemorial privileges.<sup>166</sup>

This rooting up must be done by legislation enacted by the legal authorities.<sup>167</sup> “Let practice yield to authority; let ordinance and reason vanquish bad practice.”<sup>168</sup> It is ordinance and legal

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at D. 1, C. 5.

<sup>163</sup> *Id.* at D. 8, C. 3.

<sup>164</sup> *See id.* at D. 8, C. 4–C. 9.

<sup>165</sup> *See* CHRISTOPHER A. FERRARA, LIBERTY, THE GOD THAT FAILED: POLICING THE SACRED AND CONSTRUCTING THE MYTHS OF THE SECULAR STATE, FROM LOCKE TO OBAMA 257 (2012) (arguing that slavery had become integrated in the customs of the South and as Southerners themselves admitted could only be ended by being rooted out and quoting John C. Calhoun as saying: “We of the South cannot, will not surrender our institutions. To maintain the existing relations between the two races inhabiting that section of the Union is indispensable to the peace and happiness of both. *It cannot be subverted without drenching the country in blood . . .* Be it good or bad, it has grown up among our society and institutions, it is so interwoven among them that *to destroy it is to destroy us as a people.*”).

<sup>166</sup> GRATIAN, DECRETUM, *supra* note 43, at D. 8, C. 3.

<sup>167</sup> *See id.* at D. 8, C. 3–C. 5.

<sup>168</sup> *Id.* at D. 11, C. 1.

authority that accomplish this pruning action. Since it must be “rooted up,” it is not to be left to development by usages, but rather definitively declared to be outside the law.

Even with respect to a law that overturns a practice, the law is still connected to common practices. The development of the practice has given rise to the definitive declaration by statute. The pruning is guided by the Natural Law, which provides a standard for determining which customs are evil, those that conflict with truth or reason, terms which clearly refer to the Natural Law as the rational participation in the Eternal Law, the source of truth.<sup>169</sup> Although the normal disposition of legal authority should be to respect longstanding practices and not to interfere with them,<sup>170</sup> such respect does not extend to practices that are contrary to Natural Law which should be “held null and void.”<sup>171</sup> St. Thomas Aquinas agrees that although human law, including custom, is a rule and measure, it must itself be ruled and measured by a higher law, Divine and Natural Law.<sup>172</sup>

The analogy to building is useful yet again. When a builder paints an inside section of the house, he engages in a similar process. He begins applying the paint, and then steps back periodically to evaluate the result to determine if it correlates well or poorly with the general intention. Does the color as actually applied reflect the original intention? Does the thickness present the desired effect or is another coat of paint required? The painter does not make such evaluations with every paint stroke, but rather periodically evaluates his repeated actions.

Before leaving this aspect of the relationship, it must be emphasized that the ability of statute to reverse longstanding customs should not be misunderstood as a plenary authority to overturn customs at will. As noted, the normal position is that

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<sup>169</sup> *Id.* at D. 6, C. 3.

<sup>170</sup> See *SUMMA THEOLOGIAE*, *supra* note 13, pt. I-II, Q. 97, art. 3, at 1024 (“*Sed Contra*, Augustine says (Ep. ad Casulan. xxxvi): ‘*The customs of God’s people and the institutions of our ancestors are to be considered as laws. And those who throw contempt on the customs of the Church ought to be punished as those who disobey the law of God.*’”).

<sup>171</sup> GRATIAN, *DECRETUM*, *supra* note 43, at D. 8 C. 1 (citing St. Augustine for the proposition that custom must be abandoned if it is contradicted by the revelation of God, or the Divine Law); see also *id.* at D. 1 C. 2.

<sup>172</sup> See *SUMMA THEOLOGIAE*, *supra* note 13, pt. I-II, Q. 95, art. 3, at 1015.

custom must be respected.<sup>173</sup> The amount of respect due to a custom, and hence the extent of the limitation on the legal authorities' ability to tamper with it, is a function of its relationship to Natural Law. If "truth supports custom, nothing should be embraced more firmly."<sup>174</sup> The pruning is limited to bad customs only.

The roles of custom and legislation are more complex than statutes merely overturning bad customs. Sometimes statutes restate in written form that which is already law by custom.<sup>175</sup> Recall that Cicero's historical explanation noted that practices can become sanctioned by the written laws. Another purpose of statutes can be to confirm or make more known the laws made by custom. The earliest written collection of Roman law, the Twelve Tables, was such a collection of customary Roman law written down so that all subject to it could know its contents.<sup>176</sup> Written law can perform two different functions—sanctioning or confirming customs or abolishing bad customs.<sup>177</sup>

Even those customs not confirmed by statute still carry the force of law. The body of statutes is not coextensive with all of human law.<sup>178</sup> Custom having the force of law provides legal answers to some questions not specifically addressed by statute. "Custom [*consuetudo*] is a sort of law established by usages and recognized as ordinance [*lege*] when ordinance [*lex*] is lacking."<sup>179</sup> Custom can thus supplement the written law by expanding its application to broader contexts. In a gloss to this section, the jurist, Johannes Teutonicus, cites several cases where custom "has force against written law."<sup>180</sup> One of these examples is a later *causa* in the *Decretum*, wherein an answer is provided to the question of which clerics are bound to observe clerical

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<sup>173</sup> See BURDICK, *supra* note 103, at 183.

<sup>174</sup> GRATIAN, *DECRETUM*, *supra* note 43, at D. 8 C. 7.

<sup>175</sup> *Id.* at D. 1 C. 5 ("It does not matter whether [custom] is confirmed by writing or by reason, since reason also supports ordinances [*lex*].").

<sup>176</sup> BURDICK, *supra* note 103, at 100.

<sup>177</sup> 15A C.J.S. *Common Law* § 16 (2013).

<sup>178</sup> See GRATIAN, *DECRETUM*, *supra* note 43 ("[T]his shows that, in part, custom [*consuetudo*] has been collected in writing, and, in part, it is preserved only in the usages [*moribus*] of its followers. What is put in writing is called enactment or law [*ius*], while what is not collected in writing is called by the general term 'custom' [*consuetudo*].").

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

celibacy.<sup>181</sup> The *causa* references a written statute requiring only bishops, priests, and deacons to observe clerical celibacy, but concludes that clerics of other ranks are also obliged to observe the church's custom (*consuetudinem*) of clerical celibacy, even though not specifically subject to the statute.<sup>182</sup> In this case, the customary law supplements the specific ordinance applicable only to the three highest classes of clerics.

St. Thomas Aquinas also explains that law can and is made both by speech—statute, and action—customs.<sup>183</sup> To support this conclusion, he uses an analogy to common experience. People express practical judgments made in their mind both by speech and by deeds.<sup>184</sup> Analogously, a community can express its rationally chosen law by written statutes and repeated deeds, or through habitual customs.

The analysis thus far could suggest only a gap-filling function for custom; it is law only when no statute addresses a topic. If custom were limited to this role, it would be subordinate to and at the mercy of enacted statutes. Individual passages within the *Decretum* can be read to support this conclusion; however, others seem to contradict it. The thirteenth-century jurist Johannes Teutonicus observes that some authorities can be cited to support the proposition that custom cannot judge statutes and other authorities can be cited to support the proposition that it can.<sup>185</sup> This apparent contradiction of authorities can be seen as a necessary tension between custom and written law within a legal system. Denying absolute controlling authority to one or the other allows for a continued dialectical relationship between the two sources of law, by statute and by custom. Since one function of statutes is to uproot bad customs, statutes require a certain priority over custom. Yet, written laws are, like customary laws, subject to evaluation by a higher standard.<sup>186</sup> Like custom, they are also subordinate

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<sup>181</sup> *Id.* at D. 32 C. 13.

<sup>182</sup> *See id.*

<sup>183</sup> *SUMMA THEOLOGIAE*, *supra* note 13, pt. I-II, Q. 97, art. 3, at 1024.

<sup>184</sup> *Id.*

<sup>185</sup> GRATIAN, *DECRETUM*, *supra* note 43 (“And so it may be argued that one is never to judge according to custom if law prescribes the contrary . . . . But much can be found that is against this position.”).

<sup>186</sup> *See id.* at D. 8 C. 2 (“[N]atural law similarly prevails by dignity over custom and enactments. So whatever has been either received in usages or set down in writing is to be held null and void if it is contrary to natural law.” (emphasis

to Natural Law and must give way to it when they stand in contradiction. According to Gratian, “[B]oth ecclesiastical and secular enactments are to be rejected entirely if they are contrary to natural law.”<sup>187</sup> One method for overturning bad enactments is the development of a practice abrogating them. Gratian comments, “Some ordinances have now been abrogated by the usage of those acting contrary to them because ordinances are confirmed by the usages of those who observe them.”<sup>188</sup> St. Thomas Aquinas agrees that an established contrary custom that demonstrates why a previously enacted statute “is no longer useful,” can abrogate that statute “just as it might be declared by the verbal promulgation of a law to the contrary.”<sup>189</sup>

In a gloss on a later section of the *Decretum*, Johannes Teutonicus returns to this question of customary practice abrogating statutes. He compiles a list of criteria drawn from various authorities that appear to circumscribe the precedence of custom over enactment. The enumerated criteria include:

(1) the contrary custom must “gain force through the passage of time”;

(2) the custom must be “maintained by a contrary popular judgment;”

(3) those maintaining the practice must do so “in the belief that they are acting rightfully”

(4) and “with the intention of acting the same way in the future”;

(5) the object of the custom must be a matter with respect to which “rights may change with the passage of time”,<sup>190</sup>

(6) the custom must be “ancient and approved”;

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removed)); see also Kenneth Pennington, *Politics in Western Jurisprudence, in 7 A TREATISE OF PHILOSOPHY AND GENERAL JURISPRUDENCE: THE JURISTS’ PHILOSOPHY OF LAW FROM ROME TO THE SEVENTEENTH CENTURY 157*, 163 (Andrea Padovani & Peter G. Stein eds., 2007) (“Under Gratian’s schema, laws were not simply reflections of different usages in various communities. All law had to be evaluated according to standards that transcended human institutions.”).

<sup>187</sup> GRATIAN, *DECRETUM*, *supra* note 43, at D. 9 C. 11.

<sup>188</sup> *Id.* at D. 4 C. 3; see also Pennington, *supra* note 186.

<sup>189</sup> *SUMMA THEOLOGIAE*, *supra* note 13, pt. I-II, Q. 97, art. 3, at 1024.

<sup>190</sup> This phrase is a translation of the word *praescriptibilis*, which appears to be a rarely used word. It could mean “capable of becoming a rule or precept” or “capable of exception by prescription,” which is an exception to law created by the passage of time. The latter meaning seems appropriate in the context in that the custom may be with respect to a matter that Divine and Natural Law leave to be determined by human law.

- (7) the practice must “contain natural equity”;
- (8) its introduction must be “with the knowledge of the prince and not merely tolerated” by him;
- (9) the custom must not be introduced “through error”; and
- (10) a “greater part of the people must be accustomed to the use of this custom.”<sup>191</sup>

Several important elements can be observed in this list. First, the practice contrary to the statute must be in accord with Natural Law: It must contain natural equity, and it must concern a contingent matter left to determination by human law. Secondly, the nature of time runs forward and backward from the adoption of the statute. The statute must be one that is overturning an ancient custom and the contrary practice must continue for some time after enactment. The people must act against the statute *deliberately*—the act is described as one of exercising a judgment—which suggests they must have a real knowledge of the statute and deliberately disregard it. The list is a bit ambiguous about which “people” must be engaging in this practice. It must be more than a mere majority of the people, but it also appears that the government must be involved in some way.<sup>192</sup> The “prince” must to some extent approve of the abrogation in that he must not merely tolerate the contrary practice. The use of the word prince is somewhat ambiguous. It may imply that the one who enacted the statute must consent to its change by custom. On the other hand, not all legislation is by the prince but sometimes by a legislative body, so it could suggest the prince in exercising his executive or judicial capacity disapproves of the enactment.

The key elements of the conditions can be distilled down to two: The contrary practice must be (1) a deliberately chosen act consistent with Natural Law which (2) sustains an ancient practice of the community. Such is the summary conclusion appended to this list by another jurist, Bartholomew of Brescia: “Briefly . . . it suffices . . . that custom be reasonable and have gained force through passage of time.”<sup>193</sup> The same jurist warns the reader of the *Decretum* not to focus too literally on this list but rather to focus on the principles of Natural Law and

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<sup>191</sup> GRATIAN, *DECRETUM*, *supra* note 43, at D. 8 C. 7–C. 8 (“custom”).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at D. 8 C. 7 (“custom”).

antiquity when he states that “rational and long-standing custom detracts from written law . . . even if the other elements mentioned by Ioan<sup>194</sup> at D. 8 c. 7 are not present.”<sup>195</sup> A later canonical source maintains the conclusion that customary practices can take precedence over statutes, but only if they are rational and legitimate.<sup>196</sup> The more detailed criteria of Johannes Teutonicus can thus be seen as a way of expressing cases in which these principles would be fulfilled in a way maintaining a tension among the following: law and customary practice, the people and their governors, natural reason and particular determinations, and ancient and contemporary usages.<sup>197</sup>

Beyond supporting the theoretical justification for customs abrogating statutes, the *Decretum* also can be read to place customary use within the legislative process itself. Gratian introduces an example showing how a particular statute is not part of the law due to a contrary use. He quotes a lengthy papal ordinance mandating all clerics to fast from Quinquagesima Sunday. Immediately following the quotation, Gratian asserts that clerics cannot be held guilty for transgressing these statutes “because they were not approved by common use.”<sup>198</sup> The process of written statutes entering into law involves more than adoption by the legislator. Gratian describes a two-part process following deliberation over a new written ordinance. “Ordinances are *instituted* when they are promulgated; they are *confirmed* when they have been approved by the usage of those who observe them.”<sup>199</sup> Institution of a statute is complete when the written rule is made public and then a second phase begins: the rule’s confirmation by reception into common use. Refusal of a community to confirm a statute is curtailed by the conditions described by Johannes Teutonicus, summarized as the contrary practice must be rational and consistent with ancient custom.<sup>200</sup> The ability of common customs to abrogate a statute can be understood to be embedded in the lawmaking process itself. In

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<sup>194</sup> Ioan is an abbreviation for Johannes Teutonicus.

<sup>195</sup> GRATIAN, *DECRETUM*, *supra* note 43, at D. 1. C. 5 (“is lacking”).

<sup>196</sup> 2 CORPUS JURIS CANONICI X 1.4.11 (1582).

<sup>197</sup> *Id.*

<sup>198</sup> GRATIAN, *DECRETUM*, *supra* note 43, at D. 4 C. 6.

<sup>199</sup> *Id.* at D. 4 C. 3 (emphasis removed).

<sup>200</sup> *Id.*

the language of H. L. A. Hart, part of the rule of recognition<sup>201</sup> is confirmation by reception into practice. To form part of the binding written law, a statute must be promulgated and then confirmed by the practice of observing it.<sup>202</sup> The particular ordinance concerning fasting from Quinquagesima Sunday is not part of the law because it was never received into practice and hence, never confirmed.

Thus, rather than custom and written law being in a static one-way relationship wherein statute either confirms or abolishes custom, they appear in a more fluid dialectical relationship.<sup>203</sup> Statutes and customs can supplement each other by addressing cases different than or distinguishable from those addressed by the other. Statutes can overturn bad customs, and custom can abrogate statutes, in each case based on the higher authority of the Natural and Divine Law. As Jean Porter has explained, “His [Gratian’s] point . . . is that custom and ordinance represent two distinct *but interrelated* ways of expressing the demands of natural law in a particular time and place.”<sup>204</sup> Harold Berman has similarly described the medieval lawmaking process as involving law coming up from the customs of the people and coming down from the will of the legislator, by which process “[l]aw helps to integrate the two.”<sup>205</sup>

Yet, the question still remains: Can a judge before whom a case arises abolish a statute that conflicts with Natural Law, or must it be enforced until changed by the legislator?<sup>206</sup> It would seem that if a statute can be abrogated by custom, a judge can refuse to enforce a statute that has been abrogated by contrary practice. In this case, the judge is not abrogating a written

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<sup>201</sup> See generally H. L. A. HART, *THE CONCEPT OF LAW* 94–107 (2d ed. 2012).

<sup>202</sup> See *id.* at 94–95.

<sup>203</sup> See *id.* at 95–96.

<sup>204</sup> PORTER, *MINISTERS OF THE LAW*, *supra* note 9, at 253 (emphasis added).

<sup>205</sup> HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 557 (Harvard Univ. Press 1983).

<sup>206</sup> This very question was at the center of one of the earliest Supreme Court cases. See *Calder v. Bull*, 3 U.S. 386 (1798). Justices Chase and Iredell clashed in their opinions over whether the judiciary has the power to void legislation on grounds of its violation of Natural Law. Compare *id.* at 388, with *id.* at 399 (Iredell, J., concurring). Both justices agreed on the requirement that legislation must comply with the Natural Law but differed over who held the power to abrogate offending statutes. *Id.* Chase believed the power vested in the legislature, while Iredell believed it vested in the judiciary. *Id.*; see also J. BUDZISZEWSKI, *THE LINE THROUGH THE HEART* 151 (2011).

ordinance, but rather enforcing the law (*jus*) in its totality, taking into account that a contrary custom has either abrogated a statute or failed to confirm it. This leaves another case (which as we shall see is comprised of two sub-cases) where a statute contradicting Natural Law has not been abrogated by custom. It would seem that the judge is not permitted to abrogate written laws. “In the case of temporal ordinances, although men pass judgment on them when they are being instituted, a judge may not pass judgment on them after they are instituted and confirmed, but only according to them.”<sup>207</sup> A careful read of this passage leaves open the possibility of abrogating a written statute after enactment but before confirmation. It states a judge may not pass judgment on them after they have been “enacted” and “confirmed.”<sup>208</sup> This would indicate that a judge may judge a statute during its period of entry into the legal system, after enactment and before confirmation.<sup>209</sup> This would be a logical conclusion because one way a statute is confirmed is by its reception into the customs of the people. One way of entering the customs of a people would be the customary enforcement of the statute by courts. Thus, judicial evaluation of newly enacted statutes that reverse longstanding customs, subject to the qualifications and limitations on this process discussed *supra*, appears to be part of the necessary process of confirming statutes, failure of which results in their abrogation.

Yet, this leaves a case where a statute has been instituted and confirmed, including by enforcement of the statute by courts. In essence, a bad statute has been instituted and confirmed and enforced for a significant time by courts. A judge realizes that the statute violates Natural or Divine Law. An example might be the fugitive slave laws at issue in the infamous *Dred Scott* decision.<sup>210</sup> The Fugitive Slave Act was a restatement of the common practice of forcefully returning slaves to their owners, a practice dating back to the Fugitive Slave Clause in the Constitution.<sup>211</sup> Forcibly enforcing slavery of the type in existence in nineteenth-century America<sup>212</sup> is contrary to the

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<sup>207</sup> GRATIAN, *DECRETUM*, *supra* note 43, at D. 4 C. 3.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Dred Scott v. Sandford*, 60 U.S. 393, 452 (1856).

<sup>211</sup> U.S. CONST. art. IV, § 2, cl. 3.

<sup>212</sup> See FERRARA, *supra* note 165, at 297.

principle of the “identical liberty of all” contained in Natural Law.<sup>213</sup> Assuming the judge cannot avoid concluding the ordinance has been confirmed by use, what may such a judge do? This sub-case goes beyond the first in which the statute was not yet confirmed. The analysis thus far would suggest that he cannot simply abrogate the Fugitive Slave Act, again assuming its confirmation by accepted use. Again many authorities assert that, absent the exceptions discussed *supra*, the judge must judge according to the statute.<sup>214</sup> In one provision of Roman law, magistrates who failed to enforce a law regarding burial of the dead outside of towns were ordered to pay the same fine as the offenders for failing to enforce the statute.<sup>215</sup> Absent the exceptions discussed in the prior two cases, it would seem the judge would have no other choice but to enforce the bad law.

Another exception may be available to our troubled judge. A long tradition dating from St. Augustine holds that “[a] law which is not just does not seem to me to be a law.”<sup>216</sup> The tradition following St. Augustine is important to understand the extent of the binding obligation of the law generally. For now we can observe, however, that at least in extreme cases human laws, of whatever origin, that compel a violation of the revealed Divine Law are not laws at all and must be refused.<sup>217</sup> This topic is broader than current purposes, but it is enough to note that the principle does not mean all unjust laws (those that transgress the Natural Law) are abrogated. As we have already observed, human law will never be a perfect participation in Eternal Law, and some error must be tolerated for the common good. A more nuanced evaluation is necessary and even some unjust laws ought to be obeyed for the common good.<sup>218</sup> Yet, we can still conclude that if a judge is confronted by a statute whose enforcement would compel the judge to transgress the Divine Law, the judge must refuse the statute as no law at all.<sup>219</sup> Thus,

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<sup>213</sup> GRATIAN, *DECRETUM*, *supra* note 43, at D. 1 C. 7.

<sup>214</sup> *E.g.*, *id.* at D. 1. C. 5, D. 11 C. 4 (“The authority of longstanding custom and practice is not . . . of such moment as to prevail over . . . ordinance.”).

<sup>215</sup> *Justinian Digest*, in 10 THE CIVIL LAW bk. 47, tit. 12.3.5 (The Central Trust Co. 1932).

<sup>216</sup> *St. Augustine: The Problem of Free Choice*, in ANCIENT CHRISTIAN WRITERS 35, 44 (Johannes Quasten & Joseph C. Plumpe eds., 1955).

<sup>217</sup> *See SUMMA THEOLOGIAE*, *supra* note 13, pt. I-II, Q. 96, art. 4, at 1020.

<sup>218</sup> *See id.*

<sup>219</sup> *See id.*

a statute could be abrogated by a judge. Outside of this narrow exception, it would seem that the judge would be required to enforce the offensive law. Once again the relationship between practice and statute is complex, without one having complete precedence over the other. Their respective authority varies depending upon the context and the conformity, or transgression, of each to Natural Law.

Having examined the relationship between ordinance and custom within the general category of human law, we can conclude this Subsection by turning from resolving conflicts among sources of law to examining the criteria for the process of human legislating. We can begin with written ordinances. Gratian includes a useful summary of the characteristics of well-written laws by Isidore:

A[n] ordinance, then, shall be proper, just, possible, in accord with nature, in accord with the custom of the country, suitable to the place and time, necessary, useful, clear enough so that it contain no hidden deception, and not accommodated to some private individual, but composed for the common utility of the citizens.<sup>220</sup>

This passage succinctly integrates many of the themes we have been examining. Human law must be woven out of a dialectical interaction between Natural Law and the customs of the community for whom they are made. To the extent they accord with Natural Law they will be proper and just as suited to human nature. To the extent they accord with the customs of the people the laws will be suitable for the time and place in which they appear. A third element woven through this dialectical tension between nature and custom is the common good. Laws must be written so as to address the common good of the community and not just the individual good of some members.<sup>221</sup> The skill of a lawmaker is to draft clear ordinances that express general Natural Law principles in a particular manner suited to the particular instantiation of the common good in an actual community. Human laws cannot be made in the abstract but only in the particular context of the customs of a community.<sup>222</sup>

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<sup>220</sup> GRATIAN, *DECRETUM*, *supra* note 43, at D. 4 C. 2.

<sup>221</sup> See McCall, *The Architecture of Law*, *supra* note 1, at 93.

<sup>222</sup> See GRATIAN, *DECRETUM*, *supra* note 43, at D. 4 C. 2 (“[B]ecause what is against the custom of the inhabitants is abrogated through their contrary custom.”).

The requirement that good laws are written according to the customs of a particular community points to another relationship between written law and custom. Since written law should be framed in accordance with the customs of the community, those laws should be interpreted likewise. If one criteria of written law is that it be suited to a time and place, it should be read and understood in the same context. Part of the gloss on the phrase “customs of the country” in this passage from the *Decretum* says that “ordinances are interpreted according to custom.”<sup>223</sup> St. Thomas Aquinas likewise lists three legal effects of custom: “[C]ustom has the force of a law, abolishes law, and is the interpreter of law.”<sup>224</sup> The dialectical relationship of statute and custom thus continues, even when custom does not abrogate law, in that laws should be interpreted in accordance with custom and not merely according to a presumed original intent of the statute if that intent is seen as an abstraction devoid of connection to the customs of the people.

Yet, as we have noted, not all customs are good. Although morality calls individuals to strive to maintain only good habits, in reality the habits of individuals at any point in time are usually comprised of both good and bad ones. Hopefully the individual is working to nurture the good and extirpate the bad. Communities are also comprised of a mixture of good and bad customs. Although bad customs need to be rooted up, the practical idealism of St. Thomas Aquinas’s Aristotelianism recognizes that the rooting up is an act of prudence that may take time to achieve.<sup>225</sup> “The purpose of human law is to lead men to virtue, not suddenly, but gradually.”<sup>226</sup> St. Thomas Aquinas clearly teaches that the end or goal of human law is perfect conformity to Natural Law.<sup>227</sup> Yet, he recognizes that at any given moment in time, systems of human laws will fall short of that goal in different respects.

Human laws need to be made in the context of particular communities, taking into account the particular state of the virtue of the customs maintained. Interpreting Isidore’s

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<sup>223</sup> *Id.*

<sup>224</sup> *SUMMA THEOLOGIAE*, *supra* note 13, pt. I-II, Q. 97, art. 3, at 1024.

<sup>225</sup> *Id.* pt. I-II, Q. 96, art. 2, at 1018.

<sup>226</sup> *Id.*

<sup>227</sup> *See id.* pt. I-II, Q. 95, art. 2, at 1014 (“Consequently every human law has just so much of the nature of law, as it is derived from the law of nature.”).

description of well-written law discussed *supra*, St. Thomas Aquinas explains that for a law to be proper, it must be proportional to the nature of the people for whom it is made.<sup>228</sup> Thus, different rules are framed for adults and children in light of their differing capacities.<sup>229</sup> Likewise, because “human law is framed for a number of human beings, the majority of whom are not perfect in virtue,”<sup>230</sup> human laws do not, and St. Thomas Aquinas argues should not, prescribe every virtue or punish every vice.<sup>231</sup> Human law cannot approve of or compel violations of Natural and Divine law, or otherwise it would be no law at all, but it may, by certain omissions, necessitated by the state of a community’s customs, neglect to forbid or punish all infractions.<sup>232</sup> Doing so does not leave the vice unregulated. As human law is merely the lowest level in a hierarchy of law, the action remains subject to Divine and Natural Law.

Returning to the architectural analogy, even if a builder neglects to paint a wall, that does not mean the wall does not exist. Likewise, simply because a community’s law has not yet enacted a particular determination of a Natural Law precept does not mean that precept ceases to stand to rule the choices of individuals. Even before the first particular traffic rule was framed, the Natural Law obligated people to drive safely.

St. Thomas Aquinas explains the omissions in human law:

[H]uman law is given to the people among whom there are many lacking virtue, and it is not given to the virtuous alone. Hence human law was unable to forbid all that is contrary to virtue; and it suffices for it to prohibit whatever is destructive of human intercourse, while it treats other matters as though they were lawful, not by approving of them, but by not punishing them . . . . On the other hand the Divine law leaves nothing unpunished that is contrary to virtue.<sup>233</sup>

Human law cannot actually approve of vice; it may merely omit to punish a particular instance. Since human law has concurrent jurisdiction with the other forms of law, Man is still accountable for vice under other law.<sup>234</sup> The process of rooting up

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<sup>228</sup> *Id.* pt. I-II, Q. 96, art. 2, at 1018.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* pt. I-II, Q. 96, arts. 2–3, at 1018–19.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* pt. II-II, Q. 77, art. 1, at 1514.

<sup>234</sup> *Id.* pt. I-II, Q. 96, art. 2, at 1018.

bad customs and leading Men to virtue is a slow and gradual process. Lines must be drawn. Once again, the principle of the common good is what guides the fixing of the line between enacting a particular law and abstaining in light of the particular situation of a community. Those violations of Natural Law which are “destructive of human intercourse,” or destructive of living in society for the common good, are those which human law must root up.<sup>235</sup>

In recognizing this important limitation on human law’s ability to proscribe virtue and prescribe vice, we can again observe the important tension between universal and particular, as well as between the desired perfect good and the accepted practical reality. This dialectical tension is resolved by the necessity of orienting the law to the common good of a real community with a particular customary history. Thus, no two legal systems will be identical, although, to be real legal systems, they will exhibit a commonality of purpose and orientation. Likewise, no two houses will be identical in detail but will have to exhibit a commonality of form to be recognizable as houses.

In summary, the process of human lawmaking is multidimensional. It is a deductive or inductive process making use of general principles of natural reason known through common practices (*jus gentium*) and particular practices of the particular community. Law emerges out of tensions among written ordinance and customary usages. Each cause of law possesses certain precedence over the other and vice-versa. Custom can confirm—or refuse to confirm—law, make law, abrogate law, and interpret it. Classical Natural Law jurisprudence conceives of the role of the human legislator, the lawgiver, in fairly modest terms. Human legislators are a part of a complex dialectical process, not the Alpha and the Omega of the legal system. Statutes they promulgate can root up bad custom and give sanction to good custom. Dante’s portrayal of

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<sup>235</sup> See *id.* pt. II-II, Q. 77, art. 1 at 1514; see also *id.* pt. I-II, Q. 96, art. 2, at 1018 (explaining that human law should prohibit those vices “without the prohibition of which human society could not be maintained”), pt. I-II, Q. 96, art. 3, at 1019 (explaining that human law only requires virtuous acts “that are ordainable to the common good—either immediately, as when certain things are done directly for the common good,—or mediately, as when a lawgiver prescribes certain things pertaining to good order, whereby the citizens are directed in the upholding of the common good of justice and peace”).

Justinian, “the Empire’s greatest law-giver,”<sup>236</sup> in his *The Divine Comedy* aptly expresses this limited conception of legislators. Justinian introduces himself and describes his great work of codifying centuries of Roman law simply by stating: “I was Caesar and am Justinian, who, by will of the Primal Love which moves me, removed from the laws what was superfluous and vain.”<sup>237</sup> Rather than describing his work as commanding newly devised precepts, he characterizes it as pruning, removing from the existing civil laws what had become superfluous or vain. Dante’s Justinian, rather than seeing the lawgiver as supreme commander of new precepts born of his will, places him within the midst of an historically developing dialectical process of refining the decoration of the pre-existing legal framework of the Natural Law.

## II. APPLICATION TO PARTICULAR ISSUES IN HUMAN LAWMAKING

Part I elucidated the purpose of human law as a process of making more explicit and particular the principles of the Natural Law, as reinforced by Divine Law. Essentially, making human law involves selecting appropriate means to a predetermined end. From ancient times, this process has been seen as a long and gradual process of discovering with more precision the principles of Natural Law and developing expressions of those principles within a people’s particular customary tradition.<sup>238</sup>

The history of Roman jurisprudence exemplifies this understanding of human law in many respects. Cicero explained the development of law as an evolution of customs from Natural Law over time. Roman law developed through case law decisions of the Praetors applying either the *jus civile* to Roman citizens or the *jus gentium* to aliens. Yet, Roman law was more than pure casuistry. Throughout its development, legislation would interact with developing jurisprudence. Finally, various jurists would survey the legal history and attempt to elucidate the

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<sup>236</sup> DANTE, *THE DIVINE COMEDY 3: PARADISO 96* (John D. Sinclair trans., Oxford Univ. Press 1939). I am grateful to my colleague Jason Houston, whose on-campus lecture on Canto VI of the *Paradiso*, “Reading the Signs of History in Dante’s *Paradiso*,” September 10, 2014, directed my attention to this passage.

<sup>237</sup> *Id.* at 87.

<sup>238</sup> See, e.g., *SUMMA THEOLOGIAE*, *supra* note 13, pt. I-II, Qs. 95–97, at 1013–25.

principles underlying the particular decisions.<sup>239</sup> The *Corpus Juris Civilis* of Justinian represents the final product of the Roman system. It contains a compilation of specific legislative determinations,<sup>240</sup> summaries of specific resolutions of various particular cases,<sup>241</sup> and a systematic summary of the principles underlying these particular laws.<sup>242</sup> Gratian, writing at the time of the great revival of Roman law, applied this approach to the organization of the law of the Church. His *Decretum* contains an introductory summary of the principles of law<sup>243</sup> followed by a collection of case law decisions and legislative enactments drawn from the past 1,000-year history of the Church organized by subject matter. Structurally, the work presents cases, or *causae*, which are resolved by comparison with the collection of prior decisions and enactments. Both the *Corpus Juris Civilis* and the *Decretum* are a compilation of temporal and ecclesiastical law drawn from the varied customary and statutory sources that developed over time.

This Part turns from this theoretical and historical overview of human lawmaking from a Natural Law perspective to consider several contemporary issues facing jurisprudence.

#### A. *Common Versus Civil Law*

Modern law rooted in the history of the Western legal tradition<sup>244</sup> can be divided into two main types or systems, generally referred to as Common Law and Civil Law.<sup>245</sup> Although most legal systems are not pure examples, and in fact contain elements of both types,<sup>246</sup> individual systems tend to be

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<sup>239</sup> See, e.g., Gaius, *Institutes*, in 1 THE CIVIL LAW 81, 81–83, 196 (The Central Trust Co. 1932) (author's translation).

<sup>240</sup> See generally *Justinian Codex and Novelles*, in THE CIVIL LAW vols. XII–XVII (The Central Trust Co. 1932).

<sup>241</sup> See generally *Justinian Digest*, *supra* note 215, at vols. III–XI.

<sup>242</sup> See *Justinian Institutes*, *supra* note 142, at vol. II.

<sup>243</sup> See GRATIAN, *DECRETUM*, *supra* note 43, at D. 1–D. 20.

<sup>244</sup> By which I mean Western Europe, America, and former colonies of these nations whose legal systems have been adapted from prior colonial rulers and thus exclude from the discussion two other categories of legal systems—Socialist law and Islamic law. See JAMES S.E. OPOLOT, *WORLD LEGAL TRADITIONS AND INSTITUTIONS* 9 (rev. ed. 1981).

<sup>245</sup> Rafael La Porta et al., *The Economic Consequences of Legal Origins*, 46 J. ECON. LITERATURE 285, 288 (2008).

<sup>246</sup> See Opolot, *supra* note 244. The United States, for example, possesses a legal system built upon the Common Law model, yet many areas of the law have been

dominated by more of the characteristics typically referred to by the general categories of Common Law or Civil Law. In recent decades debate has ensued over the superiority of one approach over the other.<sup>247</sup> This Subsection will examine what contribution the foregoing Natural Law analysis of human lawmaking brings to this debate between the two types of legal systems.

Although simple definitions are under-inclusive, we must begin at some point. The differences between legal systems characterized as Common Law and Civil Law touch many areas, such as court procedure and criminal presumption.<sup>248</sup> The particular aspect we shall examine in relation to each system is the method for making and developing law exemplified by each. In light of this specific purpose the following definitions can serve to present the contrast between the two systems. A Common Law system is characterized by appellate judge-made law formulated in response to specific controversies.<sup>249</sup> Legal rules emerge as particular responses to resolving individual disputes. As new disputes arise, prior rules are refined and developed in light of previously formulated rules and the new factual scenarios. The term “case law” can function as a synonym for our intended definition of Common Law. Common Law identifies a legal system in which: (1) a significant portion of laws; (2) are formulated over periods of time; (3) in response to specific disputes; (4) by judges who see themselves as refining or further specifying an ordered system of law not of their own creation and which pre-exists their tenure; (5) periodically refined and even overturned either by legislative enactments or in grave cases judicial reversals of prior decisions.

Civil Law systems are dominated not by judge-made law, but rather by comprehensive codes, that can be defined as “a statute which covers the whole law, or the whole of some branch or

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superseded by comprehensive codes, such as the Uniform Commercial Code and the Model Penal Code. *See id.*

<sup>247</sup> *See, e.g.,* Richard B. Cappalli, *At the Point of Decision: The Common Law's Advantage over the Civil Law*, 12 TEMP. INT'L & COMP. L.J. 87, 87 (1998); La Porta et al., *supra* note 245, at 286; Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUD. 503, 519 (2001).

<sup>248</sup> *See* OPOLOT, *supra* note 244, at 13–98.

<sup>249</sup> La Porta et al., *supra* note 245.

province of the law.”<sup>250</sup> The term code is an ambiguous word, referring to two very different objects. The Code of Justinian and the United States Code represent one type, which, for the purpose of distinction, we can call a code of compilation. The Code Napoleon or the Uniform Commercial Code comprise another type of code, which we can refer to as a comprehensive code. A code of compilation merely collects and organizes by subject matter prior laws enacted over the course of time.<sup>251</sup> A comprehensive code is a newly written law which is enacted to supersede all prior legislation covering the field of law of the code.<sup>252</sup> A code of compilation enacts no new law but merely brings a systematized order to legislation adopted over the course of time. As new statutes are enacted, they are integrated or appended to the code.<sup>253</sup> Although produced after a study of prior legislation, comprehensive codes go beyond merely organizing existing law. They rewrite and supersede all prior law. The Code Napoleon adopted points of law that were completely new and in some cases reversed prior law. The concept of legality that emerged from the French Revolution and was spread throughout Continental Europe by Napoleon rejects the “lawmaking role of the courts” and “resulted in the articulation of the primacy of the legislature.”<sup>254</sup> Therefore, for purposes of this Part, Civil Law jurisdiction refers to a collection of the following characteristics: (1) a comprehensive code or codes, (2) which is or are intended to be complete and final in the applicable area, (3) enacted on the premise that statutes are preeminent over customs and history, (4) by a legislator who is the actual normative source of law and not just the determiner of law within a positive legal system.

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<sup>250</sup> R. FLOYD CLARKE, *THE SCIENCE OF LAW AND LAWMAKING: BEING AN INTRODUCTION TO LAW, A GENERAL VIEW OF ITS FORMS AND SUBSTANCE, AND A DISCUSSION OF THE QUESTION OF CODIFICATION* 10 (The Macmillan Co. 1898).

<sup>251</sup> 1 U.S.C. § 204(a) (2012).

<sup>252</sup> U.C.C. § 1-103(a).

<sup>253</sup> In the case of Justinian’s Code, this was done through appending the Novels to the Code. The United States Code is updated periodically to remove repealed legislation and insert adopted legislation.

<sup>254</sup> Leonard Besselink et al., Introduction: Legality in Multiple Legal Orders, *in* *THE ECLIPSE OF THE LEGALITY PRINCIPLE IN THE EUROPEAN UNION* 6 (Leonard Besselink et al. eds., 2011).

The process of making law in Common Law systems is embedded in the facts, and in the analogizing and distinguishing of new scenarios.<sup>255</sup> Even when reading a new statute, Common Law courts employ analogical reasoning and appeal to precedent.<sup>256</sup> This characterization makes Common Law sound purely inductive. “[T]he common law exalts the particulars, which, as the court encodes them in its narrative, become a set of givens, enabling the formation of the legal standard or proposition for which the pending case will stand in the future, for others to claim as legal precedent.”<sup>257</sup>

Yet the process is also permeated with deductive reasoning in addition to the inductive formulation of rules from case-specific facts. Once legal rules have been formulated out of particular disputes, those rules become general principles from which new rules and applications can be deduced.

Within the common-law legal system, for example, by virtue of the courts’ crafting of legal principles, each precedent stands for a legal norm from which applications to future pending cases can be deduced. Common-law reasoning thus clearly contains a deductive component that is as intrinsic to its nature as the analogical reasoning by similarity and dissimilarity which dominates the comparative process of evaluating the legal significance of a pending case by weighing it against prior case law.<sup>258</sup>

Harold Berman describes this type of legal method as having been developed by the Medieval jurists working with the texts of Roman law.

The jurists thus gave the West its characteristic methods of analysis and synthesis of texts. They taught the West to synthesize cases into rules, rules into principles, principles into a system. Their method, which is still that of legal science in the United States today, was to determine what various particulars have in common, to see the whole as the interaction

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<sup>255</sup> Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 COLUM. J. EUR. L. 63, 76–77 (2001).

<sup>256</sup> *Id.* at 93.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 105.

of the parts . . . . [I]t took the customs and rules as data and adduced from the data the regularities—the “laws”—that explained them.<sup>259</sup>

This description highlights the connection between inductive reasoning from particular cases and deductive creation of a system of principles which characterizes the Common Law system. This dialectical process of making law by judicial case decision resembles the description of the role of custom contained in Part I.<sup>260</sup> Human law contained in case decisions is developed over time in response to the particular developing practices of a legal community. Justice Cardozo similarly connected the case law method to customs when he said, “[T]he judge in shaping the rules of law must heed the *mores* of his day.”<sup>261</sup> Professor James Whitman likewise connects the development of the historicism of English Common Law to its deep respect for custom.<sup>262</sup> Case law, like general customs, develops gradually and in light of an adherence to precedent. Its default starting point is the transmission of existing practices. The late nineteenth-century defender of the Common Law, Joel Prentiss Bishop, described the Common Law in language reminiscent of Cicero and the Natural Law tradition described in Part I:

They [laws] are the visible product of invisible laws,—imperfect and incomplete in their first formations, because man is imperfect, but capable of being gradually improved and perfected by reason.

. . . .

Following instinct, or conscience, or whatever else we call it,—in other words, moved by impulses from the nature given by God to man,—he, while living as all must in society, establishes various customs and usages. After they become universal the court takes judicial cognizance of them as law. When statutes are enacted it takes the like cognizance of them also.”<sup>263</sup>

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<sup>259</sup> BERMAN, *supra* note 205, at 529.

<sup>260</sup> Jean Porter has drawn the same conclusion. See PORTER, *MINISTERS OF THE LAW*, *supra* note 9, at 256 (“The common law tradition informing the legal systems of England and its former colonies is itself a kind of customary law, extending well beyond those areas of law explicitly identified as falling within its scope.”).

<sup>261</sup> BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 104 (Yale Univ. Press 2007).

<sup>262</sup> JAMES Q. WHITMAN, *THE LEGACY OF ROMAN LAW IN THE GERMAN ROMANTIC ERA: HISTORICAL VISION AND LEGAL CHANGE* 71–72 (1990).

<sup>263</sup> JOEL PRENTISS BISHOP, *COMMON LAW AND CODIFICATION*, 3, 9–10 (1888).

This Common Law attachment to precedent as custom resembles the attitude towards custom described in Part I. The developing case law contains the usages and customs of the legal community.

Although custom is to be a general guide for human law, bad customs need to be rooted out. Likewise, the Common Law limits the adherence to custom. The principle of *stare decisis*—particularly as applied by the American judiciary—is a principle subject to exception.<sup>264</sup> Whereas some jurists have struggled to articulate a consistent standard for when *stare decisis* is to be followed<sup>265</sup> and when it is to be overruled, the analysis in Part I provides an answer. When a precedent represents a bad custom it should be rooted up.<sup>266</sup> Bad precedents can and should be overturned when they are contrary to reason, or Natural Law principles.<sup>267</sup> Joel Prentiss Bishop described the relationship between Natural Law principles and changes in law:

Now, for a court to decide a question differing from what has gone before, it must take cognizance of the law engraved, not by man, but by God, on the nature of man. In other words, it must take cognizance of what our predecessors have named the unwritten law, or common law. This law has already been

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<sup>264</sup> See *Payne v. Tennessee*, 501 U.S. 808, 827–28 (1991) (“[W]hen governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent. *Stare decisis* is not an inexorable command; rather, it is a principle of policy and not a mechanical formula of adherence to the latest decision.” (citations omitted) (internal quotation marks omitted)).

<sup>265</sup> See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992); Robert Barnhart, Note, *Principled Pragmatic Stare Decisis in Constitutional Cases*, 80 NOTRE DAME L. REV. 1911, 1911 (2005); Daniel M. O’Keefe, *Stare Decisis: What Should the Supreme Court Do When Old Laws Are Not Necessarily Good Laws? A Comment on Justice Thomas’ Call for Reassessment in the Supreme Court’s Voting Rights Jurisprudence*, 40 ST. LOUIS U. L.J. 261, 261–262 (1996).

<sup>266</sup> GRATIAN, *DECRETUM*, *supra* note 43, at D. 8 C. 7 (describing truth’s supremacy over custom and custom’s strength when it is supported by truth).

<sup>267</sup> See, e.g., *Loving v. Virginia*, 388 U.S. 1, 10–11 (1967) (overturning *Pace v. Alabama*, 106 U.S. 583, 585 (1883), which held that states could prohibit interracial marriages because of potential harm to white marriages); *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954) (overturning *Plessy v. Ferguson*, 163 U.S. 537, 547–48 (1896), which held that separate facilities for blacks and whites were constitutional so long as they were equal); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391–92 (1937) (overturning *Lochner v. New York*, 198 U.S. 45, 60 (1905), which held that the Constitution included a freedom to contract with which government could not interfere).

discovered by judicial wisdom to consist of a beautiful and harmonious something not palpable to the visible sight, yet to the understanding obvious and plain, called principles.<sup>268</sup>

As Bishop explains, the deductive or inductive nature of the Common Law process allows for the discovery of general principles of reason, or the Natural Law, which then can be used to correct prior mistakes by overruling bad precedents. He argues, “[W]hat is termed the law’s progress or growth consists, more than in anything else, in discoveries of its just and true reasons, and in correcting old mistakes as to them.”<sup>269</sup>

Still, courts are not the entire legal system even in Common Law countries; statutes also have a role in traditional Common Law systems, particularly in correcting such old mistakes.<sup>270</sup> Yet their function is often understood as more akin to the role of enactment described in Part I, a tailored pruning of the gradually developing case law as opposed to a way to supplant it. Legislation is episodic and often focused on reversing a particular line of case law considered unsatisfactory.<sup>271</sup> This narrower role of legislation is reinforced by the principle of construing derogations of existing Common Law strictly.<sup>272</sup> This principle reinforces the idea that law develops gradually through decisions, with legislation weaving in and out of the process to guide its development. Roscoe Pound observed that notwithstanding claims of legislative supremacy, the interpretive power of courts means that judges possess a *de facto* supremacy in their ability to narrowly interpret and apply statutes.<sup>273</sup>

The proposition that statutes in derogation of the common law are to be construed strictly . . . assumes that legislation is something to be deprecated. As no statute of any consequence dealing with any relation of private law can be anything but in derogation of the common law, . . . [one] must always face the

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<sup>268</sup> BISHOP, *supra* note 263, at 11.

<sup>269</sup> *Id.* at 12.

<sup>270</sup> *See* Curran, *supra* note 255, at 83.

<sup>271</sup> *See id.* at 75.

<sup>272</sup> *Id.* at 84–85.

<sup>273</sup> *See* Curran, *supra* note 255, at 83; Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 386 (1908).

situation that the legislative act . . . will find no sympathy in those who apply it, will be construed strictly, and will be made to interfere with the *status quo* as little as possible.<sup>274</sup>

The approach described by Pound resembles the dialectical interaction between ordinance and custom, especially the role of confirmation of statutes, discussed in Part I. The final part of the legislative process involves confirmation by the community, which in Common Law countries occurs through the acceptance and application of the statute by courts. To the extent that it is narrowly interpreted and applied, it is confirmed.<sup>275</sup>

The philosophical vision of human lawmaking described in Part I appears to justify a Common Law tradition allowing for a dialectical development of law over time. As Jeremiah Newman explains, for the Natural Law tradition, the primary image of a political ruler is the judge who declares and enforces the law rather than a legislator.<sup>276</sup> For Aristotle, a ruler discovers and declares law rather than enacts it,<sup>277</sup> since in his vision, law “is no code: it is the custom, written and unwritten, which has developed with the development of a state.”<sup>278</sup> Law is made through courts and legislatures transmitting and pruning custom. A qualified respect for custom is shown in the process through a doctrine of *stare decisis*, which still permits either legislatures or courts to overrule laws made in opposition to reason.

The Civil Law system, by contrast, places the emphasis on comprehensive legal codes. A comprehensive code is written on a clean slate and is meant to supersede all prior law as a final and comprehensive statement of the whole law or of the law of a particular subtopic. As Professor Curran explains:

By contrast, the civil law focuses on codes, written texts designed to govern throughout time, designed to embody the immutably true, to embody principles so reliable that they supersede and can withstand the vicissitudes of the particular,

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<sup>274</sup> Pound, *supra* note 273, at 387.

<sup>275</sup> *Id.* at 396.

<sup>276</sup> See JEREMIAH NEWMAN, FOUNDATIONS OF JUSTICE: A HISTORICO-CRITICAL STUDY IN THOMISM 40 (1954).

<sup>277</sup> THE POLITICS OF ARISTOTLE 367 (Ernest Barker trans., Oxford Univ. Press 1946).

<sup>278</sup> *Id.* at lv.

of the temporal, of the myriad contextual elements that connect human beings to the legal issues they ask courts to adjudicate.<sup>279</sup>

Civil Law codes use legislation to formulate axiomatic principles of Kantian reasoning and are held out to be “a coherent and complete representation of law, all of its parts mutually reconcilable.”<sup>280</sup> Although prior laws may be studied in preparing the code, the project aims at a complete articulation of law, or a part of law, at a particular moment in history. Professor Tunc likewise summarizes the philosophy of the prototype of modern Civil Law codes, which is the French Napoleonic Code:

Portalis’ excellent *Discours préliminaire*, which so admirably explains the thought of the drafters of the *Code civil*, suggests that the French concept of the law rests on three fundamental principles: A code ought to be complete in its field; it ought to be drafted in relatively general principles rather than in detailed rules; and it ought at the same time to fit them together logically as a coherent whole and to be based on experience.<sup>281</sup>

Codes aspire to be complete, axiomatic, and logically comprehensive as a whole.<sup>282</sup> They are written rather than developed over time. By its abstract axioms, the code remains detached from particulars or the contingent matter of life. The English utilitarian, Jeremy Bentham,<sup>283</sup> was a great admirer and advocate of modern codes. He also believed that codes could be formulated so completely as to answer all legal questions once and for all, in a sense outside of history. He boasted:

<sup>279</sup> Curran, *supra* note 255, at 100–01.

<sup>280</sup> *Id.* at 95.

<sup>281</sup> André Tunc, *Methodology of the Civil Law in France*, 50 TUL. L. REV. 459, 459–60 (1976) (footnote omitted).

<sup>282</sup> *Id.* at 469.

<sup>283</sup> Bentham attempted to get himself hired to replicate Napoleon’s process in any jurisdiction willing to pay. See Philip Schofield & Jonathan Harris, *Editorial Introduction* to JEREMY BENTHAM, ‘LEGISLATOR OF THE WORLD’: WRITINGS ON CODIFICATION, LAW, AND EDUCATION, at xi, xi (Philip Schofield & Jonathan Harris eds., Clarendon Press 2009) (“Bentham offered to draw up such a code, but only if he were formally requested to do so. He was not prepared to embark on the arduous task of codifying unless he were given sufficient encouragement. He therefore wished to receive an invitation from a ‘constituted authority’ asking him to draw up a code of law . . .”).

Were any such all-comprehensive Code in existence, and executed as it ought to be and might be, seldom would there be any such question as a question of law: never any other question of law than a question concerning the import of this or that portion of the existing text of the really existing law.<sup>284</sup>

One might conclude that this process seems commensurate with Natural Law legal jurisprudence, which argues that the Natural Law contains comprehensive general principles of action derived from a unified systemic whole, the Eternal Law. Yet, despite the similarities, the Civil Law process errs by conflating the two levels of law. These characteristics—general axioms, completeness, wholeness, a transcendence of particular times and places—characterize the Natural Law. Human law, as described in Part I, is more detailed, particular, and incomplete. The very claim of the code to be complete, to make law for all cases, directly contradicts St. Thomas Aquinas's conclusion described in Part I that human law not only cannot, but should not, address all vices. In an attempt to be complete, the code fails to take account of the particular situation of the people for whom it is made. Human law should involve particular determinations of the general principles in relevant evolving historical contexts. Due to weaknesses in the reasoning process, lawmakers are prone to err in the elucidation and refinement of Natural Law principles.<sup>285</sup> A Common Law system of historical development limited to particular cases contains the effect of any one person's mistakes. Chancellor Kent in his famous commentary on American law quotes Sir Matthew Hale: "[T]he common law of England is, 'not the product of the wisdom of some one man, or society of men, in any one age; but of the wisdom, counsel, experience, and observation of many ages of wise and observing men.'"<sup>286</sup>

Another nineteenth-century advocate of retaining the Common Law in America, J. Bleecker Miller, looked to the Roman law as a historical example of a legal system developed not by one Man but across generations. For Miller, Roman law

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<sup>284</sup> JEREMY BENTHAM, 'LEGISLATOR OF THE WORLD': WRITINGS ON CODIFICATION, LAW, AND EDUCATION 245 (Philip Schofield & Jonathan Harris eds., Clarendon Press 2009).

<sup>285</sup> See McCall, *The Divine Law*, *supra* note 7, at 108.

<sup>286</sup> 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 536 (O. W. Holmes, Jr. ed., 12th ed. 1873).

was not the prototype of Civil Law codes but rather an example of a historically rooted Common Law tradition.<sup>287</sup> He explained, “[T]he great merit of the Roman Law being, that it is a natural product of one people, with which no legislator interfered before its perfection.”<sup>288</sup> Once it reached a maturity of historical development, its components—case decisions, ordinances, and general principles—could then be gathered into the systemic whole by Justinian.

Civil Law codes, contrary to Miller’s understanding of the evolution of Roman law, attempt to usurp the place of Natural Law as well as the customary evolution of its determination. The legislator is charged with the task of composing the general axioms which Natural Law considers merely as given.<sup>289</sup> The axioms serve as means for reaching particular determinations through the guidance of evolving customs. By contrast, the premise of the Civil Code is that the legislator posits the axioms, which places them at the wrong level of the legal edifice. According to the Civil Law system, legislation deals in absolutes,<sup>290</sup> whereas for Natural Law jurisprudence, human legislation deals in contingent matters—choices which could be decided in more than one way.<sup>291</sup> The levels of absolute truth are the Eternal, Natural, and Divine Law; human law is contingent and contextualized. This difference between the Common Law and Civil Law understanding of the contingent nature of human law is epitomized by the terminology used to refer to court action. Common Law courts tend to refer to their products as opinions whereas the Civil Law system typically refers to decisions: “*décision*” in French and “*Entscheidung*” in German.<sup>292</sup>

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<sup>287</sup> In contrast to the view that continental European legal systems form one group based on Roman law and Anglo-American another based on a rejection of Roman law, Harold Berman has argued that all Western legal systems including continental European and Anglo-American ones share “common historical roots.” See BERMAN, *supra* note 205, at 539.

<sup>288</sup> J. BLEECKER MILLER, DESTRUCTION OF OUR NATURAL LAW BY CODIFICATION 7 (1882).

<sup>289</sup> Curran, *supra* note 255, at 95.

<sup>290</sup> *Id.* at 93.

<sup>291</sup> See *SUMMA THEOLOGIAE*, *supra* note 13, pt. I-II, Q. 91, art. 4, at 998, pt. I-II, Q. 96, art. 1, at 1018.

<sup>292</sup> Curran, *supra* note 255, at 92.

Within the Civil Law system the legislator is supreme.<sup>293</sup> Hobbes expressed this supremacy by holding the following three principles, among five others, to be fundamental to the legal order: “[f]irst, that the sovereign is the *sole* legislator; second, that the sovereign is effectively *immune to civil laws*, since they may change those laws at will; and third, that any norms or conventions only become law because the sovereign *indicates a tolerance* for them by his inaction.”<sup>294</sup>

Rather than making particular periodic determinations bounded by general principles of Natural Law, the Hobbsian sovereign enacts the whole law in the code. The code may be changed at will by the Sovereign, and changes are limited by neither principles of Natural Law nor custom.<sup>295</sup> Custom is only law to the extent the legislative Sovereign permits it to continue. The general principles of the code are stated in the abstract and derive from the enactment of the Code, not from the evolution of customary practices. This exaltation of the legislator, the author of the Code, has consequences for the Civil Law’s understanding of the judiciary. French opinions, taken to exemplify the Civil Law approach, tend to be short, anonymous, and abstract, and lack reasoning dissent or concurrence.<sup>296</sup> Additionally, Civil Law court opinions tend to avoid detailed recitation or analysis of the particular facts of the case decided.<sup>297</sup> This tendency is a consequence of understanding the code as containing all the law through unfailing abstract principles. As a result, the judge is viewed as merely logically applying the absolute abstract principle.

Common Law opinions by contrast typically contain lengthy discussions of the particular facts of the case.<sup>298</sup> As a result, Common Law reasoning arrives at general principles, not through legislative *fiat*, but through the inductive process of case resolution. Such a process keeps ever present the reminder that general principles are capable of exceptions. As St. Thomas Aquinas explained, because Natural Law precepts are applied to

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<sup>293</sup> See Besselink et al., *supra* note 254.

<sup>294</sup> Benjamin Lee Samuel Nelson, Unwritten Law: Three Selections from the History of Political Philosophy 3 (May 19, 2012) (unpublished manuscript), available at <http://ssrn.com/abstract=2062924> or <http://dx.doi.org/10.2139/ssrn.2062924>.

<sup>295</sup> *Id.*

<sup>296</sup> Tunc, *supra* note 281, at 466–67.

<sup>297</sup> Curran, *supra* note 255, at 87–88.

<sup>298</sup> *Id.* at 87.

contingent human actions, “although there is necessity in the general principles, the more we descend to matters of detail, the more frequently we encounter defects.”<sup>299</sup> By defect, he does not mean that the principle is defective, but rather its application in the particular facts would fail “because the greater the number of conditions added, the greater the number of ways in which the principle may fail.”<sup>300</sup> St. Thomas Aquinas gives the example of the principle of the Natural Law that if one accepts possession of goods for safekeeping, he should return them.<sup>301</sup> Yet, in some cases this principle fails, as when for example the one to whom they will be returned is planning to use them to fight one’s country.<sup>302</sup> The Common Law’s determination of law’s general principles based on application to discrete facts, and the process of distinguishing precedents on the facts, reminds the judge of this tendency of principles to fail to apply in some contingent cases.<sup>303</sup>

Oliver Wendell Holmes contrasted the abstract logical formalism of Civil Law courts to the more fluid experiential Common Law process: “The life of the law has not been logic: it has been experience.”<sup>304</sup> By which, he does not mean that the Common Law is illogical, but rather, it is a logic worked out through experience rather than axiom. Common Law judges discover the logic by applying principles over time and thereby gaining experience.<sup>305</sup> Civil Law achieves a logical code by having a legislature impose the logical whole upon the law independent of the particular facts of a case.<sup>306</sup> By contrast, the Common Law assumes the logical whole exists in the law, and judges are merely attempting to knit together and shine a light upon the various intersecting threads in the tapestry that pre-

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<sup>299</sup> *SUMMA THEOLOGIAE*, *supra* note 13, pt. I-II, Q. 94, art. 4, at 1011.

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> *Id.* pt. I-II, Q. 94, art. 4, at 1011, pt. I-II, Q. 96, art. 6, at 1021 (discussing exceptions to a general rule about keeping the gates of the city closed), pt. II-II, Q. 62, art. 5, at 1458–59 (regarding exceptions to the rule that restitution of goods to their owner must be made but a sword should not be restored to a madman).

<sup>303</sup> Curran, *supra* note 255, at 92 (arguing that the assembly of particular examples “no matter how numerous they may be, is vulnerable to defeat by counterexample”).

<sup>304</sup> OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (The Lawbook Exchange, Ltd. 2005) (1881).

<sup>305</sup> *Id.*

<sup>306</sup> Curran, *supra* note 255, at 93.

exists. The Civil Law system thus appears to lack the appropriate dialectical tension between legislature and judiciary that was part of the development of law rooted in custom described in Part I.

The philosophy of Common Law jurisprudence thus appears more commensurate with the understanding of the relationship of human law to Natural Law described in Part I. Legislation is understood as a more limited and constrained process, which interacts dialectically with evolving customs to prune and guide the development of a community's particular determinations.<sup>307</sup> Judicial conflicts are resolved through a deductive or inductive process of inducting general principles from particular facts as well as deductively developing those principles. The entire process is factually and historically rooted in particular contingent details, the matter of human lawmaking. By contrast, the Civil Law approach usurps the level of Natural Law by transforming human law into a legislature of general abstract principles, which are seen to be the entire law mechanically applied by courts.<sup>308</sup> The law is disconnected both from pre-existing Natural Law norms and evolving customs. The result is the supremacy of the legislature in Civil Law jurisprudence, in contrast to a more fluid relationship in Common Law jurisprudence. J.N. Figgis extolled the Common Law tradition for this very reason. It trusts no single legislator to know and articulate all principles of natural reason perfectly, but rather allows their discovery across time. As he explains: "Common Law is the perfect ideal of law; for it is natural reason developed and expounded by the collective wisdom of many generations."<sup>309</sup> St. Thomas Aquinas would agree: "No man is so wise as to be able to take account of every single case; wherefore he is not able sufficiently to express in words all those things that are suitable for the end he has in view."<sup>310</sup>

Ironically, one of the drafters of Napoleon's Civil Code, Portalis, expressed an understanding of the limitations and necessary historical contextualization of law that stands in sharp

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<sup>307</sup> *Id.* at 92.

<sup>308</sup> *Id.* at 93.

<sup>309</sup> JOHN NEVILLE FIGGIS, *THE DIVINE RIGHT OF KINGS* 229 (Cambridge Univ. Press 2d ed. 1934) (1896).

<sup>310</sup> *SUMMA THEOLOGIAE*, *supra* note 13, pt. I-II, Q. 96, art. 6, at 1022.

contrast to the way his Code has come to be seen in Civil Law jurisdictions.

Laws are not pure acts of will; they are acts of wisdom, of justice, and of reason. The legislator does not so much exercise a power as he fulfills a sacred trust. One ought never to forget that laws are made for men, not men for laws; that they must be adapted to the character, to the habits, to the situation of the people for whom they are drafted; that one ought to be wary of innovations in matters of legislation . . . .<sup>311</sup>

A Common Law system which fosters dialectical interaction among existing precedent, Natural Law principles, case decisions and targeted legislation seems to fulfill Portalis's criteria more than his abstract, trans-historical code.

### B. *The Problem of Legislation*

As noted in the previous Subsection, both Common Law and Civil Law systems rely to varying degrees on legislation. This Subsection will argue that legislation, both in Civil Law jurisdictions with their comprehensive codes and in Common Law jurisdictions that have yielded much of the field of law to statutes, "is a problem in law."<sup>312</sup>

One problem of modern legislation is its volume. As Patrick Brennan has remarked: "The statutory codes swell, the case reporters go into new series, and the Government Printing Office can barely keep up with our zeal to regulate from soup to intrauterine devices . . . . We are awash in the badges and incidents of law."<sup>313</sup>

As a result, we are "[s]urrounded . . . by law on all sides."<sup>314</sup> The United States Code comprises approximately 235 volumes.<sup>315</sup> The typical state code of laws comprises anywhere from twenty to

<sup>311</sup> Translated in Tunc, *supra* note 281, at 468 (internal quotation marks omitted).

<sup>312</sup> JOSEPH VINING, FROM NEWTON'S SLEEP 155 (1995).

<sup>313</sup> Brennan, *Persons, Participating, and "Higher Law"*, *supra* note 11, at 476.

<sup>314</sup> Patrick McKinley Brennan, *Are Legislation and Rules a Problem in Law? Thoughts on the Work of Joseph Vining*, 55 VILL. L. REV. 1191, 1191 (2010) [hereinafter Brennan, *Legislation and Rules*].

<sup>315</sup> See *United States Code Service*, LEXISNEXIS, <http://www.lexisnexis.com/store/catalog/booktemplate/productdetail.jsp?pageName=relatedProducts&skuId=S KU7560&catId=121&prodId=7560#> (last visited Feb. 13, 2015) (listing the number of volumes comprising the United States Code).

hundreds of volumes.<sup>316</sup> In the 111th Congress alone, the federal government passed over 300 new laws including the 906-page Affordable Care Act.<sup>317</sup> Not only are we surrounded by laws, but the laws we are surrounded by are of greater length than the Bible, which took thousands of years to complete. Grant Gilmore once quipped that after the 1930s, our government engaged in an “orgy of statute making.”<sup>318</sup> As observed in the prior Subsection of this Part, although founded as a Common Law jurisdiction, America no longer represents a pure form of this system. Although never conquered by the Code Napoleon, America has allowed her law to be conquered over the course of the twentieth-century by a creeping, or more accurately, a flooding, invasion of legislation.<sup>319</sup> This Subsection will first consider the causes of this massive expansion of legislation and then outline some of the deleterious effects of it.

The primary reason for the expansion of legislation is a belief, fostered by supporters of codes, now permeating even Common Law jurisdictions,<sup>320</sup> that legislation can be complete. One attribute of modern codification is the claim that the new legislation includes all law, or all law with respect to a particular subject area. Notwithstanding this claim to completeness, the enactment by Napoleon of the Code did not bring an end to law making. In the twentieth-century changes in daily life led many to call for wholesale change of the Code and a new type of statute

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<sup>316</sup> See, e.g., *Deering's California Codes Annotated*, LEXISNEXIS, <http://www.lexisnexis.com/store/catalog/booktemplate/productdetail.jsp?pageName=relatedProducts&skuId=SKU7329&catId=360&prodId=7329> (last visited Feb. 13, 2014) (listing the number of volumes comprising California's code as 219); *Michie's West Virginia Code Annotated*, LEXISNEXIS, <http://www.lexisnexis.com/store/catalog/booktemplate/productdetail.jsp?pageName=relatedProducts&skuId=SKU6989&catId=409&prodId=6989> (last visited June 1, 2014) (listing the number of volumes comprising the code of West Virginia as twenty-nine).

<sup>317</sup> Susan Davis, *This Congress Could Be Least Productive Since 1947*, USA TODAY (Aug. 15, 2012), <http://usatoday30.usatoday.com/news/washington/story/2012-08-14/unproductive-congress-not-passing-bills/57060096/1>.

<sup>318</sup> GRANT GILMORE, *THE AGES OF AMERICAN LAW* 95 (1977).

<sup>319</sup> *Id.*

<sup>320</sup> This Subsection is premised upon the claim that, although still classed as a Common Law jurisdiction, the United States has allowed entire sections of the law to become dominated by legislation and codes. From the various codes of types of law to the omnibus statutes covering major sections of American life, entire areas of the law are dominated by codes or omnibus statutes, such as The Securities Act of 1933, the Dodd-Frank Act, and the Affordable Care Act.

emerged, detailed and regulatory minute rules.<sup>321</sup> France has seen the growth of executive decrees making detailed rules to enforce the allegedly complete Code.<sup>322</sup> Further, in many areas French courts have developed new areas of law such as unjust enrichment and products liability.<sup>323</sup> John Henry Merryman has argued that Napoleon's attempt to draft and promulgate a code that was complete, coherent, and clear failed quickly, and then sardonically has added that France forgot to communicate this failure to the countries that adopted the code system, so the other countries clung tenaciously to belief in this theory and restricted judicial scope to develop the law.<sup>324</sup>

Why has the goal of completeness inevitably failed? St. Thomas Aquinas rendered the answer centuries ago. Law by definition includes rules.<sup>325</sup> Yet, rules can be understood in two very different senses, one detailed and precise, specifically addressing all variables, and the other more general and less complete in its formulation.<sup>326</sup> Patrick Brennan, in commenting on the work of Joseph Vining, uses the rules of a game to exemplify the first class.<sup>327</sup> Rules in games produce binary results. In "Monopoly," when one rolls doubles three times, one must go directly to jail without passing Go.<sup>328</sup> Yet, in life and hence in law, rules are part of a "methodical process that is not itself governed by any 'rule' (or standard) of law that we have made."<sup>329</sup> Put another way, life is more complicated than a game, which by definition is played in an artificially simplified universe, no matter how complicated the particular game may be.

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<sup>321</sup> Tunc, *supra* note 281, at 461.

<sup>322</sup> *Id.* at 462.

<sup>323</sup> *Id.* at 465–66.

<sup>324</sup> JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 144–45 (3d ed. 2007) [hereinafter MERRYMAN, *THE CIVIL LAW*]; John Henry Merryman, *The French Deviation*, 44 *AM. J. COMP. L.* 109, 112, 116 (1996).

<sup>325</sup> See *SUMMA THEOLOGIAE*, *supra* note 13, pt. I-II, Q. 90, art. 1, at 993 ("Law is a rule and measure of acts . . .").

<sup>326</sup> See Brennan, *Legislation and Rules*, *supra* note 314, at 1202.

<sup>327</sup> *Id.* at 1203 (commenting on Joseph Vining, *The Resilience of Law*, in *LAW AND DEMOCRACY IN THE EMPIRE OF FORCE* 151, 155–56 (H. Jefferson Powell & James Boyd White eds., 2009)).

<sup>328</sup> Hasbro, *Monopoly*, <http://www.hasbro.com/common/instruct/00009.pdf> (last visited Feb. 13, 2015).

<sup>329</sup> Brennan, *Legislation and Rules*, *supra* note 314, at 1203 (commenting on Vining, *supra* note 327).

Life, and hence law, is radically more contingent than a game. As we observed in Part I, law is applied to contingent matters,<sup>330</sup> which vary greatly across time and space. Legislation can attempt to address such multiplicity of contingent matters in two ways. First, it can merely contain a rule written as a general standard of conduct written at a level of generality (a “Standards Rule”).<sup>331</sup> Alternatively, law can attempt to write a series of rules, each meant to address a different particular contingent matter to which the law might need to be applied (a “Game Rule”).<sup>332</sup>

To explain, we can adapt an example used by Patrick Brennan<sup>333</sup> of two forms of a statute meant to cover the same conduct. Example 1 (a Game Rule): “[I]t shall be a crime to cry “fire” in a crowded theatre.’ ”<sup>334</sup> Example 2 (a Standards Rule): “[I]t shall be a crime to cry “fire” in a crowded theatre if all things considered this was a dangerous thing to do.’ ”<sup>335</sup> The Game Rule is clear and precise, yet incomplete. It does not, on its face, prohibit shouting earthquake in a crowded stadium. The Standards Rule is very general and does not specifically address many situations. All things considered, what constitutes “dangerous”? If one makes law from a premise that the only law that legitimately exists is the complete statutory law made by a legislator to the exclusion of: (1) the Natural Law; (2) custom; and (3) law made by the judiciary as it tries cases, one would find the Game Rule woefully under-inclusive. The only solution is to write more Game Rules that address other possible scenarios—other shouts and other locations—until all possible contingent matters have been covered. Yet, unlike a board game with a limited number of spaces on which to land, life is not as finite in its possibilities. The result is that one would continue writing more and more Game Rules addressing every conceivable scenario and then, after completing this task, someone will shout something not yet conceived in a new location, and the legislator must go back to expand the legislation to add one more Game Rule to cover the new space added to the “game board.” The

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<sup>330</sup> See *supra* text accompanying note 79.

<sup>331</sup> See Brennan, *Legislation and Rules*, *supra* note 314, at 1202.

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

result is an endless cycle of amending and expanding the written law to cover every possible scenario. This has been the pattern and problem of American legislation involved in the orgy described by Grant Gilmore. Since America never adopted a code with more abstract standard rules, her legal system has tended to adopt Game Rules. Yet, as legislation comes to be seen as all-inclusive, the failure of the Game Rules and proliferation of their number follows.

If the Game Rule in such a system leads to a legislative orgy, then what of the Standards Rule typically found in a code system? It would appear to be the only alternative to an ever-expanding set of rules trying to overturn the last unjust result, when the Game Rule failed to cover a new scenario. In fact, the Standards Rule has been the form of many Civil Law codes, which, as discussed previously, contain abstract general standards.<sup>336</sup> Yet, once the Standards Rule is selected, it eventually becomes necessary to further determine the meaning of the standard in varying contingent circumstances. New law is made every time judgment is given that determines the specific meaning of the standard in the particular facts. Yet, the court in a code system is, at least in theory, handicapped in this role by three limitations. First, it must labor under the pretext that it is not making law and thus limit its justification for the new rule to a fictional mechanical application of the existing legislation.<sup>337</sup> This trait is observed in the perfunctory decisions of Civil Law countries already noted. Second, custom has been obliterated as a source of law.<sup>338</sup> Thus, in theory the judge is precluded from using custom as a source of law, unless it has been incorporated into the code, to define the general terms. Third, the purpose the law was meant to fulfill cannot be uncovered by asking what principles of Natural Law this rule is meant to determine and then using the background Natural Law precepts to understand the meaning of the general rule.<sup>339</sup> In addition to these problems, the court faces the problem of a case in which the general rule fails. The case of the person who, all things considered, should shout fire in the crowded theater—as when, for example, the fire detection system is broken and nobody is listening to his quiet

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<sup>336</sup> See *supra* text accompanying note 332.

<sup>337</sup> See *supra* text accompanying notes 296–94.

<sup>338</sup> MERRYMAN, *THE CIVIL LAW*, *supra* note 324, at 144–45.

<sup>339</sup> McCall, *The Divine Law*, *supra* note 7, at 108.

warnings. As St. Thomas Aquinas explains, the more contingent conditions that are added to a case, the more likely a general precept will not work a just result in some cases or, in other words, the precept will fail.<sup>340</sup> It may be that shouting fire is, all things considered, dangerous but nonetheless should be done in the circumstances. Thus, even the general rule deserves to go unobserved in this particular case. The judiciary in such a system is precluded from legislating an exception or dispensing from the law since it cannot make law.<sup>341</sup>

Turning to a legal system built on the understanding of human law described in Part I, the Game Rule is useful and non-problematic as a statute. It appears to be a particular determination of the Natural Law precepts of preservation and protection of human life as well as the obligations of living in a society of social animals.<sup>342</sup> It makes the determination that in this particular case—a crowded theater—these natural law precepts would be transgressed by shouting fire. Since statutes only make particular determinations that are not meant to be complete, the enactment of the rule contains no danger of authorizing other equally dangerous behavior that may be prohibited by custom and judicial analogizing to a similar scenario, such as shouting “earthquake” in the crowded stadium. The Game Rule in such a system poses no danger of triggering a flood of further necessary specifications. It is supplemented by custom and judicial lawmaking by analogy.

Why then should this Game Rule be adopted in the first place? The answer might be that it need not be, absent a particular cause relating to shouting fire in theaters. Custom may already specify that shouting fire in a theater is a violation of the relevant Natural Law precepts and courts will hold one violating it accountable under tort law, for example. In such a situation, the Game Rule is redundant and should not be enacted. On the other hand, a legislator may find it necessary to enact the Game Rule because a court either has attempted to overturn the old custom, such as by exonerating a fire shouter in circumstances that in the past would have incurred liability, or has attempted the initiation of a new bad custom encouraging

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<sup>340</sup> See *SUMMA THEOLOGIAE*, *supra* note 13, pt. I-II, Q. 94, art. 4, at 1011.

<sup>341</sup> See *id.* pt. I-II, Q. 97, art. 4, at 1024 (considering when lawgivers should dispense).

<sup>342</sup> See McCall, *The Architecture of Law*, *supra* note 1, at 86–87.

the fire shouting, or because the community has itself developed a bad custom of shouting fire in crowded theaters notwithstanding existing judicially enforced liability. In these scenarios, the court, or perhaps even the community as a whole, needs to be reminded of the forgotten general principle of Natural Law.<sup>343</sup> In the job of pruning the development of law, the legislator enacts this specific Game Rule in response to one of these particular failings but without attempting to address all similar cases. In some cases, a Standards Rule may be appropriate to remind the communal conscience of the general principle of Natural Law.<sup>344</sup> In such a case, the human law does not really make law, but rather repeats an existing precept of Natural Law in need of reinforcement. Thus, a Game Rule and a Standards Rule are possible legislative responses to an apparent need for a statutory correction of some flaw in the legal system. Yet, because both a Game Rule and a Standards Rule will function within the integrated hierarchy of law, Natural and customary included, the problems identified in each type within a legislatively closed legal system can be avoided.

Turning from the hypothetical example of the fire shouting, we can see the implications of the foregoing analysis in the regulation of the financial markets, which markets in the United States have become dominated by legislative law in the form of statutes and administrative rules. In 2000, credit default swaps were completely exempted from state-made Common Law, including state Common Law affecting gambling contracts by legislative *fiat*.<sup>345</sup> Yet, these products that resembled financial gambling<sup>346</sup> fell outside the complex of Game Rules contained in federal securities and commodities regulation.<sup>347</sup> Due to the federal preemption, Common Law courts were precluded from addressing the problems these instruments posed and were unable to use evolving Common Law standards holding gambling

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<sup>343</sup> For example, just as the Gauls forgot the Natural Law precept against all forms of theft. See *SUMMA THEOLOGIAE*, *supra* note 13, pt. I-II, Q. 94, art. 4, at 1011 (noting how the Gauls had developed the custom of permitting theft from foreigners notwithstanding theft clearly being contrary to the Natural Law).

<sup>344</sup> See *id.* (describing a division of human law between general principles (as in the *jus gentium*) and particular determinations (as in the *jus civile*)).

<sup>345</sup> See H.R. 5660, 106th Cong. § 408(2)(C) (2000).

<sup>346</sup> See Brendan Sapien, Note, *Financial Weapons of Mass Destruction: From Bucket Shops to Credit Default Swaps*, 19 S. CAL. INTERDISC. L.J. 411, 442 (2010).

<sup>347</sup> See *id.*

contracts unenforceable as against public policy.<sup>348</sup> The unregulated credit default swaps contributed at least in part to the financial collapse epitomized by the failure of Bear Sterns and Lehman Brothers.<sup>349</sup> Following the financial collapse, the Dodd-Frank Act's 848 pages was an attempt to add more Game Rules to address the new contingent matters added to the game board, the role of risk multiplying credit default swaps in the financial collapse.<sup>350</sup> Yet, just as its 2000 predecessor, it exempted the area from all Common Law.<sup>351</sup> Thus, the federal government remains committed to churning out more Game Rules fighting the last crisis as the financial markets continue to evolve. The one legal institution containing the flexibility to adapt and analogize to the changes, the Common Law courts, remains excluded from lawmaking under this federal tyranny of legislative preemption.<sup>352</sup> Thus, even in a historically Common Law system, areas of American law have been subjected to voluminous Game Rules to the exclusion of the Common Law.

The approach that allows law to be made from a variety of sources thus eliminates many of the problems of legislation in Common or Civil Law contexts.<sup>353</sup> The Game Rule is no longer under-inclusive, as it is non-exclusive. Detailed case-by-case judgments can be made and explained so as to guide development. Because the Game Rule forces a court doing anything other than simply applying the rule to the precise case,

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<sup>348</sup> See, e.g., Schrenger v. Caesars Ind., 825 N.E.2d 879, 882 (Ind. Ct. App. 2005) (declaring that, except for specifically authorized and highly regulated exceptions, gambling contracts are against public policy); 7 SAMUEL WILLISTON, CONTRACTS § 17:1 (4th ed. 2013).

<sup>349</sup> See Blake Hornick & Arren Goldman, Commentary, *The End of the Reagan Era of Deregulation and Worship of the Free Markets*, 14 No. 17 ANDREWS SEC. LITIG. & REG. REP. 1, 3 (2008).

<sup>350</sup> *Id.*

<sup>351</sup> 7 U.S.C. § 16(e)(2) (2012) ("This chapter shall supersede and preempt the application of any State or local law that prohibits or regulates gaming or the operation of bucket shops . . . in the case of . . . (B) an agreement, contract, or transaction that is excluded from this chapter under section 2(c) or 2(f) of this title or sections 27 to 27f of this title, or exempted under section 6(c) of this title (regardless of whether any such agreement, contract, or transaction is otherwise subject to this chapter).").

<sup>352</sup> See La Porta et al., *supra* note 245, at 64–65 (arguing that one cause of the superiority of Common Law systems is their flexibility (or adaptability), enabling courts to catch evasions).

<sup>353</sup> *Id.* at 42–43.

to analogize to similar situations or to explain a dispensation from the law, it encourages the articulation of reasons.<sup>354</sup> As Patrick Brennan explains:

[J]udges, unlike legislators and legislatures, are required to give reasons. It is true that legislators often give explanations for what they are up to in proposing or supporting legislation, but there is little by way of culture that demands that their reasons be argued rather than asserted. Legislators can often get by with progandistic, half-hearted explanations for their decisions.<sup>355</sup>

Statutes, although enacted for reasons, lack a forum for making the reasons part of the law. As noted in the previous Subsection, Civil Law judges hesitate to articulate reasons underpinning their decisions as they are not supposed to be making law.<sup>356</sup> As a result, a system that embraces law generated through case law will not only address more particular and contingent situations with equitable rules, but it will also embody reasoned decisions.<sup>357</sup> Reason then becomes a source of law. As R. Floyd Clarke observed:

It follows that in cases whose subject-matter involves considerations of equity, a system of decisions of special cases will produce more justice than a system of general rules expressed so as to govern all cases. The Case Law decides one case, the Statute Law attempts to solve many. In short, it is easier to decide one case correctly and give a true reason therefor, than it is to decide all cases that may possibly arise correctly, and by one form of words express the general rule, and its exceptions.<sup>358</sup>

This is not to say that case law always gets the rule correct. Still, it implants the rule within a larger system, providing opportunities to correct the error through distinguishing other cases or, in appropriate cases, exposing the faulty reasoning and overturning the rule.<sup>359</sup> The “imperfection of human reasoning powers” results in the imperfection of the Common Law system,

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<sup>354</sup> Patrick McKinley Brennan, *The Place of “Higher Law” in the Quotidian Practice of Law: Herein of Practical Reason, Natural Law, Natural Rights, and Sex Toys*, 7 GEO. J.L. & PUB. POL’Y 437, 475–76 (2009).

<sup>355</sup> *Id.* at 476.

<sup>356</sup> *Id.* at 475–76.

<sup>357</sup> *Id.* at 476.

<sup>358</sup> CLARKE, *supra* note 250, at 25.

<sup>359</sup> *See id.* at 40.

but this problem is compounded when imperfection in reasoning produces a rigid fixed statutory rule applicable to all cases in theory.<sup>360</sup> Rather than the tripartite sources of law formerly recognized in the Western Tradition, those being reason, custom, and commands,<sup>361</sup> all Western legal systems, including both those historically identified as Common Law and those as Civil Law, are being overwhelmed by tyrannical legislation that collapses the three sources into one—legislative command. The result in both Common and Civil Law systems has been a great increase in the quantity of laws.<sup>362</sup>

The consequences of the growing exclusivity and quantity of legislation are many, but this Subsection will focus on two. First, as noted, it detaches lawmaking from reasoning and customary history.<sup>363</sup> This Article has already noted the emphasis in Common Law on the reasoned opinion that is generally absent from massive legislation, which may be explained in general terms but rarely contains rational explanations of adopted rules. Law no longer appears to be a reasoned evolution of rules based upon a rational analysis of the dialectical interaction of Natural Law principles and customary practices.

In turn, this detachment of law from rationality contributes to a growing disrespect for law, the violation of which is no longer connected either to the transgression of transcendental moral principles, since human law is no longer seen as determinations of them, or to the traditions of the community.<sup>364</sup> Although experts debate the causes, our current prison population is greater than any country's in recorded history, and it continues to grow.<sup>365</sup> In particular, instances of white-collar crime are

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<sup>360</sup> See *id.*

<sup>361</sup> See BERMAN, *supra* note 205, at 528.

<sup>362</sup> See CLARKE, *supra* note 250, at 334.

<sup>363</sup> See *supra* Part 1.B.

<sup>364</sup> See *id.*

<sup>365</sup> See *What's America's Real Crime Rate?*, ECONOMIST (Feb. 14, 2012), <http://www.economist.com/blogs/democracyinamerica/2012/02/prisons-and-crime> (“[I]n 1980, there were about two hundred and twenty people incarcerated for every hundred thousand Americans; by 2010, the number had more than tripled, to seven hundred and thirty-one. No other country even approaches that.” (quoting Adam Gopnik, *The Caging of America: Why Do We Lock up so Many People?*, THE NEW YORKER (Jan. 30, 2012))). But see Richard Fausset, *Conservatives Latch onto Prison Reform*, L.A. TIMES (Jan. 28, 2011), <http://articles.latimes.com/2011/jan/28/nation/la-na-conservative-crime-20110129> (describing the recent successes of Texas

increasing,<sup>366</sup> which indicates a socioeconomically broader disrespect for law. The typical white-collar criminal is not an inner-city economically-deprived criminal but rather affluent and possibly a community leader.<sup>367</sup> The increase in white-collar crime demonstrates a weakening concern for respecting the congressionally-generated statutes designed to regulate the industries in which they work. These crimes often impact our societies to a much greater extent than violent crimes, at least in purely economic terms.<sup>368</sup> This disregard of law by wealthy individuals is exemplified through the individual cases of Martha Stewart,<sup>369</sup> James Paul Lewis, Jr.,<sup>370</sup> and Bernard Madoff,<sup>371</sup> as well as the corporate cases like Worldcom, Enron, Tyco and Adelphia.<sup>372</sup> Some academics even argue that corporations should violate the law whenever it is economically efficient to do so and pay the financial price.<sup>373</sup> As Harold Berman has remarked:

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and other states reducing or eliminating the trend of increasing prison populations with prison reform).

<sup>366</sup> See Robert S. Mueller, III, *Today's FBI: Facts and Figures 2010-2011* 37 (Diane Publishing 2011) ("Since 2007, there have been more than 1,700 pending corporate, securities, commodities, and investment fraud cases," an increase of thirty-seven percent from 2001).

<sup>367</sup> See generally *id.* at 37–39 (discussing high-profile white-collar crimes).

<sup>368</sup> See *Corporate Crime and Abuse: Tracking the Problem*, CTR. FOR CORPORATE POLICY (2003-2004), <http://www.corporatepolicy.org/issues/crimedata.htm> ("[I]n its 2001 report the FBI estimated that the nation's total loss from robbery, burglary, larceny-theft and motor vehicle theft in 2001 was \$17.2 billion—less than a third of what Enron alone cost investors, pensioners and employees that year.").

<sup>369</sup> *Martha Stewart Convicted*, TIME (Mar. 5, 2004), <http://www.time.com/time/nation/article/0,8599,598286,00.html>.

<sup>370</sup> Gillian Flaccus, *Calif. Man Gets 30 Years for Ponzi Scheme*, WASH. POST (May 27, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/27/AR2006052700250.html>.

<sup>371</sup> Diana B. Henriques, *Madoff Is Sentenced to 150 Years for Ponzi Scheme*, N.Y. TIMES (June 29, 2009), [http://www.nytimes.com/2009/06/30/business/30madoff.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2009/06/30/business/30madoff.html?pagewanted=all&_r=0).

<sup>372</sup> *WorldCom Scandal One of Many*, CNN MONEY (June 27, 2002, 10:13 AM), [http://money.cnn.com/2002/06/26/news/companies/accounting\\_scandals/](http://money.cnn.com/2002/06/26/news/companies/accounting_scandals/). See generally Penelope Patsuris, *The Corporate Scandal Sheet*, FORBES (Aug. 26, 2002), <http://www.forbes.com/2002/07/25/accountingtracker.html>.

<sup>373</sup> Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1177 n.57 (1982) ("[M]anagers not only may but should violate the rules [economic regulatory laws] when it is profitable to do so."); see also *id.* at 1168 n.36 (arguing that managers "have no general obligation to avoid violating regulatory laws, when violations are profitable").

Almost all the nations of the West are threatened today by a cynicism about law, leading to a contempt for law, on the part of all classes of the population. The cities have become increasingly unsafe. The welfare system has almost broken down under unenforceable regulations. There is wholesale violation of the tax laws by the rich and the poor and those in between. There is hardly a profession that is not caught up in evasion of one or another form of governmental regulation. And the government itself, from bottom to top, is caught up in illegalities.<sup>374</sup>

Thus, the more commands not based in reason and custom come to dominate the source of law, the less respect law seems to hold among the governed.

The second major impact upon human law is the eroding of the legal principle that ignorance of the law is no excuse, which “is deep in our law.”<sup>375</sup> How can American citizens still be presumed to know the law when the law is composed of libraries of statute books of Game Rules? In the area of tax law, ignorance of the law “is a defense, not just in the constitutional sense of vagueness, but as the flat, unadorned lack of knowledge of the law.”<sup>376</sup> Professor Sharon Davies has even argued that ignorance of law is slowly becoming a defense to all crimes.<sup>377</sup> The legal maxim made sense when laws were either restatements of Natural Law, which is able to be known by all, such as do not murder the innocent,<sup>378</sup> or were the product of longstanding customs, which due to their age were clearly known by the community in general. Specific enactments must be promulgated and accepted (as discussed in Part I) so that variations from longstanding customs become well known. The maxim is reasonable in such a context. Yet, it becomes a legal fiction, and arguably an absurd one, when the law has become a mountain of detailed Game Rules or vague Standard Rules lacking connections to both Natural Law and longstanding custom.

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<sup>374</sup> BERMAN, *supra* note 205, at 40.

<sup>375</sup> *Lambert v. California*, 355 U.S. 225, 243 (1957).

<sup>376</sup> Mark D. Yochum, *Ignorance of the Law is No Excuse Except for Tax Crimes*, 27 DUQ. L. REV. 221, 223 (1989).

<sup>377</sup> Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341, 342 (1998).

<sup>378</sup> *SUMMA THEOLOGIAE*, *supra* note 13, pt. I-II, Q. 94, art. 4, at 1011 (“It is therefore evident that, as regards the general principles whether of speculative or of practical reason, truth or rectitude is the same for all, and is equally known by all.”).

Obviously the policy implications of allowing such a defense are significant. Yet, is justice really worked when the law through its sheer quantity and disconnection to Natural Law or custom becomes unknowable?

### CONCLUSION

Part I described the role of human lawmaking within the grand architecture of law as the progressive decoration of the structure with specific determinations of the general principles. The process weaves deductive reasoning from principles of practical reason together with inductive discovery of principles through developing customs.<sup>379</sup> Statutory and customary law interact dialectically to prune customary development of human determinations of the Natural Law.<sup>380</sup> Unlike H. L. A. Hart, who saw Natural Law—and morality generally—and human positive law as opposed to or at least existing on separate planes,<sup>381</sup> the Natural Law tradition seems them as coterminous. “The immutable idea of right [Natural Law or *jus*] dwells in the changing positive law.”<sup>382</sup>

Part II has applied this jurisprudential framework to a more detailed consideration of the nature of a legal system. Among the two idealized types, the Common Law tradition, with its developing judge-made law with a flexible rule of *stare decisis* interacting with periodic necessary statutes, appeared to embody the philosophy of Part I more than Civil Law codes.<sup>383</sup> Part II also lamented the takeover of law by legislative statutes not only in the realm of Civil Law codes but also in formerly Common Law systems, which are increasingly dominated by voluminous Game Rules. The explosion of legislation either in the form of codes of abstract standards or American-style exponentially growing Game Rules, appears to contribute to a lack of respect for law.<sup>384</sup> The elimination, or at least overwhelming by sheer volume, of reason (Natural Law principles) and developing custom has eliminated both knowledge of and respect for law,

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<sup>379</sup> See *supra* Part II.A.

<sup>380</sup> See *supra* Part I.B.

<sup>381</sup> See generally, HART, *supra* note 201, at 181–207.

<sup>382</sup> HEINRICH A. ROMMEN, *THE NATURAL LAW* 17–18 (Thomas R. Hanley trans., 1946).

<sup>383</sup> See *supra* Part II.A.

<sup>384</sup> See *supra* Part II.A.

leading some to challenge the viability of the maxim that ignorance of the law is no excuse.<sup>385</sup> To return to the architecture analogy, the vision of human lawmaking described in Part I may result in the decoration of a structure slowly and eclectically transcending various architectural styles. Like Chartres Cathedral, the law may be a structure decorated with Romanesque, Gothic, and Baroque ornaments woven together. Yet, the triumph of legislation has papered over the structure with a dizzying array of disjointed pieces of paper, piled so high that they obscure the foundation and the architectural structure. Whereas code countries have whitewashed over the interconnected architectural styles with a uniform abstract code, Common Law countries continue to churn out paper to obscure the structure. The aesthetically displeasing result was poetically predicted by John Pretiss Bishop in his polemical arguments against the adoption of the legislation-dominated code system when he wrote:

And she [England] threatens to substitute acts of Parliament for all her common law of reason; and make it possible for sluggards and fools to practise at her bar and preside in her courts. If she does it, it requires no gift of prophecy to foresee that her encompassing seas will weep upon the dripping rocks around that little island a more mournful requiem to her entombed empire than was ever before sung over fallen greatness and glory.<sup>386</sup>

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<sup>385</sup> Davies, *supra* note 377, at 343.

<sup>386</sup> BISHOP, *supra* note 263, at 8.