

Aquinas and Hayek on the Limits of Law: A Convergence of Ethical Traditions

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The ethical and legal thought of Thomas Aquinas and F. A. Hayek emerged out of distinct philosophical traditions. Aquinas, following the Aristotelian tradition, emphasized the inexact character of ethics and hence the mutability of law due to the contingency of particular circumstances. Hayek, relying on Kant, advocated a view of law as universal and general rules of conduct not intended to achieve particular, substantive social goals. Despite these differences in philosophical orientation, the legal theories of Aquinas and Hayek converge in their mutual recognition of the limits of law and legislation. Both believed that the legislator's ability to address and solve social problems through the statutory enactment of rules is severely limited. In light of these limits, both Aquinas and Hayek appealed to custom as an effective source of law and thus as an alternative to legislation.

Surely one of the most remarkable developments in Anglo-American law in the twentieth century was the burgeoning of legislative statutes and administrative regulations and the corresponding decline of the prominence of the common law. Legal scholars have documented and pondered this history. As one observer, Ellen Ash Peters, has noted, at the beginning of the past century, statutes were to be found "here and there" and common law cases constituted the principal, if not exclusive, source of law. Peters, writing in the early 1980s, estimated that a "scant" ten percent of the suits coming before her bench on the Supreme Court of Connecticut were pure common law cases, and she concluded that there had been a virtual 180-degree turn in the relationship between common law and statutes during the century.¹ When one considers

the confidence of the verdict of Sir William Blackstone just two centuries before, that the common law was “the first ground and chief cornerstone of the laws of England,”² especially in light of the influence of Blackstone upon the training of lawyers through the nineteenth century, this development in the century just past is all the more striking. To be sure, a number of scholars in recent years have recognized what a significant mutation has occurred in Anglo-American law. Some have wrestled with the negative effects of the new predominance of statutes and sought in one aspect or another of the common law tradition a way to see through these new challenges and bolster the integrity of the legal system.³ Nevertheless, from another vantage point, the reaction to twentieth-century developments has been quite muted. Statutes are generally assumed to be the new “cornerstone” of our law, and any interest in other ways of legal ordering tends to be confined to the gaps and margins. The chief questions usually revolve around the content of the laws to be created, not whether the enterprise upon which we have embarked—that of mass production of written laws—is a wise course.

In this article, I call attention to two perspectives relevant to the course of modern law, those of Thomas Aquinas and F. A. Hayek.⁴ Though both thinkers offer reasons to question the prevailing confidence in law-making, there are numerous reasons to be skeptical about the prospects of such an attempt to group the thought of Aquinas and Hayek together, especially on the subject of law. Many of the differences between the thirteenth-century monk and the twentieth-century Nobel prize-winning economist are obvious and revolve precisely around the wide disparity of their cultural and intellectual contexts. One sought the metaphysical and theological foundations of law; the other defended a version of classical liberalism, a creed meant to flourish among adherents subscribing to multiple creeds. As philosophical ethicists of law, Aquinas undoubtedly owed his greatest debt to Aristotle, and Hayek appealed to many of the key insights of Immanuel Kant. Not only is there wide divergence between the ethical traditions of Aristotle and Kant, as I consider ongoing, but Aquinas’s Aristotelianism is a Christianized version of the pagan philosopher’s thought while Hayek’s Kantianism is an agnosticized version of the Lutheran philosopher’s thought. Indeed, in many ways, Aquinas and Hayek lived in different worlds. Scholars have capitalized on their differences to drive a wedge between their jurisprudential theories⁵ and, in some ways, this can prompt no argument.

However, the legal thought of Aquinas and Hayek, in fact, converges in very significant ways on the matter of the limits of law and law-making. Both, from their respective standpoints, call attention to what legislation cannot

achieve and what other forms of law-generation, particularly the free development of custom, can achieve. In unfolding this perhaps surprising convergence of the thought of Aquinas and Hayek, one also finds, I believe, an interesting as well as compelling convergence of the Aristotelian and Kantian ethical traditions, in the interests of the development of a rational, moral, legal system. In this article, I attempt to trace this divergence and convergence of these ethical traditions in Aquinas and Hayek as well as to suggest its relevance for the current state of American law.

The Legal-Ethical Traditions of Aristotle and Kant

First, I call attention to the differences between the Aristotelian and Kantian traditions on the subjects of ethics and law. These differences are not subtle, and given the fact that Aristotle and Kant are undoubtedly two of the most influential moral thinkers in Western history, many of these observations have been discussed by other scholars. The present treatment is, of course, not comprehensive. It focuses chiefly upon the divergent perspectives of Aristotle and Kant on the extent to which law and morality are universal and necessary, the role of empirical considerations in ethical and legal reasoning, and the role of experience in the moral and legal enterprises. Each of these points is intimately related to the overarching matter of the contingent (or noncontingent) nature of ethics and law.

To begin with Aristotle, one notes his distinctive approach immediately at the beginning of his best-known treatment of the moral life, the *Nicomachean Ethics*. From the outset, he defines the study of ethics as an inexact science. He explains that one must gauge expectations of the results of one's study according to the nature of the study matter. Given the nature of the study of the moral and the just, one must be content with a "rough outline" of the truth and with "broad conclusions."⁶ About details, one cannot be precise.⁷ Furthermore, Aristotle claims, the inexactness of the study matter implies that ethical knowledge is not gained all at once, but that it takes time to develop a full picture of what is right and wrong.⁸ The consequences of this for law are significant: One ought not to view laws in their particularity as universal or necessary but as contingent and changeable. Aristotle, while acknowledging the existence of a natural (and hence universal) justice, cautions that the rules under which justice is administered in this world are constantly being modified, so that it becomes very difficult to determine which rules of justice are natural and which are legal or conventional.⁹ Laws, says Aristotle, can do no

more than generalize. It is true, however, that many judicial cases cannot be settled simply by recourse to general statements, and thus arises the need for exceptions to the rules. These occasions call for application of “equity,” which entails restoring the balance of justice when it is twisted by strict application of the law.¹⁰

Closely connected with the inexactness of ethics and the consequent generality and imprecision of law is Aristotle’s perspective on the importance of empirical considerations when making moral and legal judgments. For Aristotle, ethics cannot be mapped out ahead of time on the basis of abstract principles. Instead, Aristotle points the ethicist to the work of doctors and navigators. Just as doctors and navigators must continually adjust their professional actions to meet the circumstances that confront them rather than follow a predetermined course of action, thus, also, moral thinkers ought to think through what is best suited for each particular ethical situation that faces them.¹¹ For Aristotle, one might say, ethics is more an art than a science. This is manifest in his discussions about prudence, a key moral virtue that one must possess in order to conduct oneself well. Aristotle treats prudence as much more than a knowledge of general principles; rather, prudence demands familiarity with particulars, for conduct deals not with generalities but with concrete circumstances.¹² Once again, this has important implications for law. As Aristotle explains in his *Politics*, political writers must reflect not only upon what form of government is best absolutely but also upon what form or forms are possible under given social circumstances. Laws, then, must be framed to suit the form of government, and not vice versa.¹³ What the proper laws are depend upon the situation.

As might be predicted, given these ideas, Aristotle believed in the necessity of experience for those wishing to engage in ethical, political, or legal enterprises. Because the study of ethics cannot be reduced to a series of general rules but depends highly upon particular circumstances, and also because the moral virtues necessary for acting well are not innate but acquired, experience becomes paramount. Aristotle claims that happiness, which is the ultimate goal of our moral conduct, is acquired by virtue, study, and practice.¹⁴ The virtues themselves are gained by time and experience, which means that they must be exercised if they are to develop properly.¹⁵ Hence, to become just, one must act justly and to become temperate one must act temperately.¹⁶ Aristotle interpreted public opinion as skeptical that youths—though they may be very able to master mathematics—can be prudent, since prudence demands a kind of knowledge that comes only by practical experience.¹⁷ *There is no shortcut to moral maturity.* This is true no less in the political and legal arenas.

If one wants to learn how to legislate, for example, it is better to be taught by legislators than by theorists, for it is the former who have actually exercised the art of law-making. And those who wish to grasp political theory must have practical experience of political life.¹⁸

Kant turns on its head a great deal of what Aristotle claims. Where Aristotle promotes a view of ethics and law permeated by contingency and provisionality, Kant responds with a moral and legal philosophy that stresses universality and necessity and that largely eschews empirical considerations. In the preface to his *Grounding for the Metaphysics of Morals*, Kant argues that if a moral law is to be valid as a ground of obligation, it must be absolutely necessary. One cannot find the ground of obligation in human nature nor in the particular circumstances in which one finds oneself but only in *a priori* concepts of pure reason. Precepts—even those approaching universality—that are founded on experience cannot be called moral laws, but only practical rules. Empirical investigations, based on particular circumstances, are necessarily contingent. Practical reason must function according to law and hence, must seek a pure morality stripped of empirical considerations. When one adheres to this principle, one identifies genuine moral laws that necessarily apply to every rational being.¹⁹ The difference in Kant's orientation from that of Aristotle on this question of universality, contingency, and the place of the empirical and the particular is immediately obvious.

Good acts, Kant continues, are done not only according to the moral law but also for the sake of the moral law, out of duty. In the first section of the *Grounding*, Kant claims that the good will—that is, the ability to will rationally—is the only true good, because nothing else that we posit is unconditionally good.²⁰ This reveals another point at which, Kant's ethics diverges from Aristotle's. Whereas Aristotle began with the good and worked out his ethics from this basis, Kant refuses to condition the moral law on anything. Kant, therefore, rejects consequentialist and prudence-based ethical schema, and hence stands at odds from Aristotle's insistence on recognizing happiness as the end and on making ethics such a flexible discipline. This orientation of Kant is evident in the distinction between hypothetical and categorical imperatives that he makes in the second section of the *Grounding*. The former are subjectively grounded, defining the good in terms of a subjective purpose of the will. The latter, on the other hand, command certain conduct without being conditioned by any outside purpose. Only categorical imperatives, as unconditional and truly objective, are universally valid and may, hence, be considered laws.²¹ One of the ways, then, in which Kant states the categorical imperative is in terms of the test of universalizability: Can one will that a

particular maxim become a universal law?²² By this, Kant did not direct his readers to examine the consequences of particular behavior were everyone to engage in it, but to ask whether a maxim would result in a contradiction of reason were it to be universalized.

Kant's systematic presentation of his philosophy of law is set forth in the first section of his *Metaphysics of Morals*. In the introduction to the *Metaphysics of Morals*, as a whole, Kant lays some foundation that is important to note for present purposes. First, he distinguishes two kinds of moral laws, or laws of freedom (as opposed to laws of nature). These are "juridical" laws, which are directed merely to external actions, and "ethical" laws, which require that the laws themselves be the determining ground of action. The former kind are dealt with in his philosophy of law (or "Doctrine of Right"). They refer to a freedom only in the *external* use of choice.²³ The mere conformity of an action with law, irrespective of the incentive, is what Kant labels its "legality." Duties from rightful (i.e., juridical) lawgiving can only be external duties, since this lawgiving does not require duty to be the incentive. What distinguishes the doctrine of right from the doctrine of virtue is not so much their differences in duty as their differences in type of lawgiving.²⁴

In the introduction to the Doctrine of Right, Kant defines what the Doctrine of Right is: "The sum of those laws for which an external lawgiving is possible."²⁵ Kant believes that it is easy for a legal scholar, by empirical means, to describe what positive laws actually are in place in a given jurisdiction, but if one is to go beyond mere description to determine whether these laws are right or wrong, empirical studies must be left behind and reason alone must give the answer. Reason, then, is to proceed by pondering the external relations of one person to another as they are mutually influenced by their actions. It must consider the choice of one to the *choice* (not the *wish*) of another, and, specifically, the *form* of choice (not its *matter*). Consequently, reason does not inquire how one may benefit from a transaction. Kant concludes: "Right is therefore the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom."²⁶

What is the upshot of this? "Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if, on its maxim, the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law." A person is wronged if he is hindered from performing an action that can so coexist with the freedom of everyone else.²⁷ Kant's perspective, then, is manifestly different from Aristotle's. The flexibility, practicality, corrigibility, and purposefulness of law found in Aristotle recedes in

Kant into universal, *a priori* categories of reason for determining the rightness of laws, regardless of their particular consequences.

The Appropriation of Aristotle and Kant by Aquinas and Hayek

The divergent perspectives on law and ethics were in many ways appropriated by Thomas Aquinas and F. A. Hayek. Aquinas, following Aristotle, treated ethics as an inexact science and, correspondingly, looked upon laws as mutable rules highly dependent on particular circumstances for their usefulness. Hayek, following Kant, argued that laws should not seek to achieve particular, concrete consequences but, rather, should be general rules that set a framework for the interaction of free people as they themselves work out the consequences of their mutual dealings. Initially, the prospects of enlisting the philosophies of law of Aquinas and Hayek in a common cause look meager.

To consider Aquinas more specifically, one is struck immediately by the Aristotelian flavor of his moral and legal reflections. Aquinas's commentary on the *Nicomachean Ethics* is particularly revealing of this basic orientation,²⁸ though it manifests itself throughout Aquinas's moral writings, especially in the *Secunda Pars* of his *Summa Theologiae*. In this section, I focus particularly on the Aristotelian character of his theology of law, since his legal thought is the particular concern of this article.

One, quite prominent, example of how the inexact character of ethics shapes Aquinas's view of law is his connection of law and utility. For Aquinas, the exact shape that human law is to take is not immediately obvious. Instead, the legislator must test and consider the utility of possible rules to determine which is best suited to be law. In other words, Aquinas makes utility an important standard for the justice of legal rules—quite frankly, Aquinas wants to know what works. In fact, he explicitly sets forth usefulness (*utilis*) as one of the criteria for valid law, following the teaching of Isidore of Seville.²⁹ One example of the application of this idea emerges from Aquinas's defense of his claim that human law cannot get rid of every evil. Aquinas reasons that laws that aim at expunging all evils also inevitably exterminate many good things in society as well. In the face of the mixed consequence of even the best-intentioned laws, the standard that Aquinas implicitly establishes for determining which laws ought to be enacted is "the advance of the common good (*utilitas boni communis*)."³⁰ Likewise, Aquinas points his readers to considerations of utility as a standard for knowing when law needs to be changed:

He writes of lawgivers remaking social institutions that would “prove less frequently deficient in respect of the common weal (*communi utilitate*).”³¹ He adds that law is rightly changed “insofar as such change is conducive to the common weal (*communi utilitati providetur*).”³² These examples could be multiplied.³³

This emphasis on determining the usefulness of laws goes hand in hand with Aquinas’s conviction that law is mutable. For Aquinas, law was not something to be imposed once for all, nor were particular laws equally appropriate for every community. Aquinas insisted that law was to be “adapted to time and place” and “can be rightly changed on account of the changed condition of man.”³⁴ One of Aquinas’s requirements for just law was that it promote the common good, and he counseled that rules of law be diversified for communities of different character.³⁵ Though justice itself is a universal goal for human law, the substance of justice depends upon the particular conditions in which it is applied.³⁶ Hence, he defines the justice of a regime as its ruling each thing according to its own mode.³⁷ In commenting on Aristotle, he remarks that civil life and the administration of the State vary from place to place, and he prescribes that laws must be framed according to the extent that they are necessary for the end of the State.³⁸ What is potentially just, then, has wide berth,³⁹ and the details of the circumstances make all the difference.

As Aquinas’s philosophy of law consciously followed that of Aristotle, so Hayek’s consciously follows that of Kant at a number of significant points. One particularly important aspect of this fact is that Hayek, like Kant, associates the idea of law with the idea of freedom. Hayek understands that “freedom” is used in a number of different ways, and he therefore defines his use of the term *freedom* carefully. He refers to freedom as the “state in which a man is not subject to coercion by the arbitrary will of another or others,”⁴⁰ a sentiment that echoes Kant’s discussion of freedom in terms of the absence of coercion. This definition might give the impression that law stands opposed to freedom, since law is undoubtedly, in one way or another, an instrument of coercion. However, Hayek takes just the opposite view. The absence of law would mean not the elimination of coercion but the multiplication of it, for there would thus be little constraint on the private use of force by one against another. Law, as a centralized, governmental use of coercion, is meant to maximize the degree of freedom that each person can enjoy without impinging on the liberty of others. This must occur, Hayek insists, through general rules that are known and applicable to all.⁴¹

This means that law is not set in place in order to achieve particular results. Law, says Hayek, is not a matter of “directly assigning particular things to

particular persons,” a position that he believes established by Kant, as well as by David Hume before him.⁴² The justice of law, in this very important sense, does not rest upon empirical considerations. Instead, by establishing general, universal rules, law provides a framework within which, people are able to plan their own futures and seek to attain their own ends.⁴³ In other words, law is not to prescribe that some particular person or group of persons are to receive a particular share of society’s resources but is, rather, to set rules by which, people are to interact with each other and determine their own destinies. In distinction, then, from Aquinas, for whom law is to be adjusted in order to attain what is useful and to achieve the end for which the State exists, Hayek asserts that law has no purpose beyond providing a sort of level playing field and allowing people to use whatever knowledge and skills they possess for achieving their own purposes. Hayek was confident in the ability of people to flourish when provided with such a legal framework. He believed that general, universal rules establish a stability and predictability that people need if they are to plan rationally and effectively for the future. Given this stability and predictability, then, Hayek expected the creative powers of society to be most fully unleashed.⁴⁴

Hayek did not expect that such a freedom-maximizing, coercion-minimizing legal framework could be immediately put in place, *de novo*. In fact, he cautions that such a law will never be achieved perfectly. Instead, he advocates an approach by which, existing systems of law are gradually pared down so as to eliminate those laws that are inconsistent with the criteria that he has established.⁴⁵ In saying this, Hayek follows what he believes to be Kant’s own understanding of the advancement of law. According to Hayek, Kant did not seek to use his criteria for just law to build up a system of law from scratch but, rather, to prune already-existing legal systems.⁴⁶ Hayek, therefore, sought to deal with the imperfections of law not by coming to grips with the mutability of justice as applied to various circumstances but by continually adjusting the general rules so as to make them better and better.⁴⁷

The Convergence of the Traditions

To this point, the present study has emphasized the differences in the approach to law displayed by Aristotle and Kant, and in Aquinas and Hayek, their disciples of sorts. The most prominent point of difference highlighted here is that concerning the role of empirical circumstances and the interest in the practical results of law. However, this difference in perspective ought not mask the way in which these two legal traditions converge on important matters. Most

significant in the present context, both Aquinas and Hayek recognize crucial limits to what lawmaking can achieve. They display a sobriety about legislation that necessarily constrains its exercise and the expectations attached to it.

As an initial matter, Aquinas recognizes the limits of law in the production of virtuous citizens. Aquinas holds that the promotion of virtue in citizens is one of the chief purposes of law, yet he notes that law ought not directly command the exercise of every virtue nor directly prohibit the exercise of every vice. In doing so, the law would create new social problems and ultimately damage the common good more than foster it.⁴⁸ Another matter in which Aquinas recognizes the limits of legislation, and one that was discussed above, concerns his belief that law is always to be just and that what is just depends upon circumstances. The obvious implication, which Aquinas himself draws, is that universally applicable rules of law are unattainable. No legislator, however wise, is able to anticipate every particular circumstance to which a law will be applied. Therefore, it is impossible to draft laws whose words express every specific application that will be conducive to the goal of the legislation. In fact, Aquinas insists that even if people were capable of incorporating every future case into a piece of legislation, they should not, for the sake of avoiding confusion. Instead, rules of law must be stated generally, capturing what is right for cases of most frequent occurrence.⁴⁹

However, this produces situations here and there in which a law that is suitable for the majority of circumstances produces an injustice if strictly applied. Aquinas readily grants this point. Nevertheless, it does not prompt him to modify his position that laws must be framed generally; instead, it shapes his view of how law is to be applied in judicial proceedings. He states that when cases arise in which strict application of a law would be harmful to the common good, the letter of the law should be set aside so that justice can be done.⁵⁰ Aquinas provides a concrete example. Suppose, he says, that a law commands that the city gate be kept closed and that this law is generally for the good of the city. Then imagine that certain citizens who are defenders of the city are fleeing from enemies and will be lost if the gate is not opened to them. In such a case, Aquinas continues, the city would suffer harm if the law is strictly followed and, hence, an exception must be made.⁵¹ Aquinas deems this the power of “equity,” in which a judge lays aside the words of a law in order to attain a more just outcome. Equity, he explains, is an aspect of justice and moderates observance of the law.⁵² It is interesting to note that Aquinas did not envision the exercise of equity on the part of judges as a thwarting of the legislators’ purposes. On the contrary, he reasons that legislators desire that their laws fur-

ther the cause of justice, and hence, expect judges to modify their laws in situations in which justice demands it.⁵³

It should not be left unnoted that Aquinas affirmed the necessity of human law for orderly social life, nor that he advocated the establishment of social rules ahead of time and the corresponding minimization of ongoing judicial discretion, as far as possible.⁵⁴ Nevertheless, the preceding discussion demonstrates that Aquinas had rather modest expectations about what legislation can accomplish. Legislation can achieve its primary goal of producing virtuous citizens only to a degree, can frame rules only for the majority of circumstances, and must be altered in (inevitable) situations in which the cause of justice requires it. For Aquinas, grand social plans to be produced by legislation must be tempered by the realization that the best-intentioned and most fully informed law-making can itself only get society part of the way toward its goals.

Hayek's legal philosophy was suffused with this same basic, but very important, conviction. In the first volume of *Law, Legislation, and Liberty*, Hayek argues that our contemporary advanced society is not the product of any human planning or will, but emerged spontaneously as people interacted and discovered rules of conduct that enabled them to survive and flourish. A spontaneous order, or *cosmos*, is essentially different from an organization (such as the business corporation), or *taxis*, in that the latter is a product of deliberate human planning, while the former is not. Superiors are able to govern a *taxis* by giving orders to subordinates for the accomplishment of certain set purposes. This is the case because the *taxis* is a small and contained organization whose internal functionings can be more or less fully understood by those administering it. However, one is not able to govern a *cosmos* in the same way, that is, by giving commands to subordinates for the accomplishment of stated goals. The reason for this is that it is impossible to attain a comprehensive understanding of a spontaneous order, a *cosmos*. In Hayek's view, spontaneous orders, such as modern society, not only developed apart from anybody's planning but also are of such a complex and inscrutable nature that nobody *could have* planned them nor can anybody today know enough to be able to control them. The amount of information required to understand all of the workings of the *cosmos* of modern society is out of the grasp of any one person or group of people. Hence, any attempt to produce a particular state of affairs through legislation is doomed to failure: Not only does legislation often fail to achieve its stated, concrete goals, but it also always produces an unknown and unpredictable number of unintended social side effects. In light

of the legislator's inevitable ignorance, to legislate in the hope of attaining substantive social goals is inherently irrational, says Hayek.⁵⁵

It is at this point that Hayek's analysis of the concepts of *taxis* and *cosmos* meets his Kantian orientation toward law. His Kantian antipathy toward laws that are determined by empirical considerations harmonizes with his observation that legislation cannot produce desired empirical results with any great degree of accuracy. Hayek concludes that the laws governing a spontaneous order must be no more than rules of general conduct. Most of such rules will already have been formed by customs, apart from formal legislation, but they may be modified by legislation that is careful to fit into the matrix of the prevailing rules.⁵⁶

In limiting law to the establishment of general rules of conduct and urging legislators to refrain from trying to accomplish specific social results that they are incapable of producing anyway, Hayek recognizes that he is advocating a position that people do not want to believe. Concerning legislators' ignorance of all the information necessary for the accurate attainment of concrete social plans, he observes:

This may at first seem to be a fact so obvious and incontestable as hardly to deserve mention, and still less to require proof. Yet, the result of not constantly stressing it is that it is only too readily forgotten. This is so, mainly because it is a very inconvenient fact that makes both our attempts to explain and our attempts to influence intelligently the processes of society very much more difficult, and which places severe limits on what we can say or do about them. There exists, therefore, a great temptation, as a first approximation, to begin with the assumption that we know everything needed for full explanation or control.⁵⁷

Hayek also anticipates the objection that it is necessary for law-makers to plan and manage modern society because of its ever-increasing complexity. In fact, he anticipates the argument by turning it on its head. It is the very complexity of society that makes impossible the shaping of society into particular molds. As society grows ever more complex, the task becomes all the more unthinkable. For this reason, Hayek labels as "paradoxical" the view that "we must deliberately plan modern society because it has become so complex."⁵⁸

Aquinas and Hayek, then, each in his own way and from his own perspective, recognize the limits of law and urge restraint and modesty on the part of legislators. Their precise motivations were different. Aquinas addressed those who thought that legislating good rules, determined ahead of time, could provide a just solution for every future conflict. Hayek fought those who

believed that they could engineer a society that matched their ideals and visions by means of legislation. In many ways, however, the final result is the same: However lofty one's motivations and attractive one's dreams, legislation is insufficient for attaining a prosperous society or for solving society's ills. For both Aquinas and Hayek, the limited capacities of human reason and the nearly limitless complexity of the world that we seek to understand and tame are incommensurate.

The Limits of Law and the Prospects of Custom

As noted above, Hayek observes that these limitations of the powers of human reason; and, hence, of legislation, are rather obvious. It is difficult to dispute this point, and the fact that both Aquinas and Hayek, coming from quite distinctive philosophical traditions, would speak about these limits of law as a matter of course certainly adds to its persuasiveness. Yet, Hayek also observes that people must constantly be reminded of the existence of these limits. The inability to legislate a system of law that cleanly resolves all future matters of conflict and difficulty is a disappointing reality, because people tend to have insatiable appetites for trying to legislate away all social ills. This Legislative Temptation obviously lurked in Aquinas's day,⁵⁹ it raged in Hayek's day,⁶⁰ and undoubtedly it still lingers in our own. Whether the social problems be perennial issues such as urban poverty or environmental protection, or contemporary hot-items such as stem-cell research or power crises, ever newfangled solutions are rarely far from legislative dockets. Debates about proposed legislation are often intense, but often these debates concern much more the content of the legislation than the question of whether legislation of any sort is the wisest course for those who truly wish the betterment of society. For those who, however begrudgingly, acknowledge the force of the caveats from Aquinas and Hayek on the prospects for legislative improvement of social ills, the question about alternatives arises. If one cannot expect to legislate all problems away, then is there a more promising course of action available for those not content to be passively resigned to the social problems that persistently rear their heads?

Those inclined to heed the wisdom of Aquinas and Hayek on the limits of legislation may be intrigued to learn that these thinkers—again, despite their divergence in philosophical orientation—give a similar answer in their quest for an alternative. This alternative is the development of custom and the incorporation of customary practices into the fabric of the law. It is an alternative that has, in large part, though in some ways strangely, been lost from sight

in the contemporary Anglo-American legal scene; yet, it is an alternative with a prominent place in our legal history. Perhaps a consideration of why Aquinas and Hayek often favored recourse to the development of custom over the quick solutions of legislation may inspire contemporary reflection on the virtues of a revival of customary law for our legal future.

I have argued elsewhere that Aquinas's thought on custom is a central aspect of his broader theology of law, though this has not been much explored in the scholarly literature.⁶¹ The legal functions that Aquinas attributes to custom indicate its importance. For example, Aquinas asserts that custom can create law, abolish law, and interpret law.⁶² Furthermore, Aquinas treated custom as a sort of constitutional boundary for the creation of new law; in other words, he advises that law ought to be consistent with prevailing customary practices.⁶³ Aquinas readily admits that customs can be evil, and he grants that law ought to replace custom in such circumstances. Nevertheless, even here, Aquinas warns of overconfidence in legislators' ability to replace the structure of customary practices with something new and better. As discussed at some length above, Aquinas was sanguine about the ability of legislation to solve social ills, and therefore he expresses skepticism that legislation will always be an improvement even when trying to correct harmful customs.⁶⁴

Aquinas's claims about custom and law are undergirded by rich theological considerations. The centrality of human rationality for Aquinas's moral theology expressed itself in this matter, I have argued elsewhere. According to Aquinas, rationality is the key element of humanity's identity as the image-bearers of God, and it is its possession of the image that sets it apart from other creatures and endows it with a special dignity. For Aquinas, the creation of human law is one of the most eminent tasks that God has entrusted to his image-bearers and, as such, is to be an exercise of reason. Aquinas also spoke of the development of custom as an expression of human rationality. However, one reason why Aquinas emphasizes the creation of law through custom is because it permits the expression of this rational, honorable, image-bearing task to be accomplished by God's image-bearers corporately and not just by a select few.⁶⁵ Aquinas also advocates the creation of law through custom because recourse to customary practices provides the resources that he believes are necessary in order to execute the task of law-making aright. As noted above, Aquinas followed Aristotle in making moral and legal reasoning an inexact exercise. Law is not to be created in the abstract or apart from knowledge of the concrete social situation. Rather, good law is created through learning from experience, from the past, and through close consideration of social circumstances. For Aquinas, custom provides exactly these and other

resources. Custom reflects the experience of present and past generations and manifests the particular social circumstances that law must address.⁶⁶

Hayek also advocates the customary development of law and social ordering, though he approaches the issue in ways different from Aquinas. Hayek's thoughts on the matter are closely connected with his ideas about the limits of legislation, discussed previously. Central to the reality of law's limitations, in his thinking, are the twin facts of social complexity and the finitude of the human mind. In other words, the fact that society is so complex and that an ability to understand and control its inner workings requires such a mass of information, makes any attempt to manipulate the social order through legislation undertaken by a single individual or group of individuals a futile matter that will produce any number of unknown effects. However, in asserting that the information necessary to control society intelligibly is unavailable to any person or group of persons, Hayek is not claiming that this information was not available at all. Rather, Hayek claims that knowledge of all of the relevant facts according to which the social order operates is known, but only to all of the members of society in the aggregate. Each person and various groups of people possess information about the workings of society that is unavailable to others. Therefore, in order to establish ways of dealing with each other that take account of all of the relevant information, the input of all of the members of society rather than simply that of a few, is necessary.⁶⁷

Hayek sees no formal or institutional way by which to capture this information from all people, so he looks to informal and non-institutional measures. In economic life, this means that prices need to be determined by market mechanisms rather than by central planning, for a free marketplace provides buyers and sellers with information about supply and demand that can never be obtained by any bureaucratic planning organization. For Hayek, rules of law ought to be developed along similar lines. The formation of customary practices depends upon information contributed by innumerable members of society in their complex relationships and is shaped by much more of the information than any legislation can be. Historically speaking, Hayek argues that the modern "great society" was molded primarily by unplanned, spontaneous actions and arrangements established by people seeking ways of dealing with each other within the various constraints of life. It is an order created more by customs than by legislation, and its future prosperity depends upon a continued openness to the development of the spontaneous processes that propelled us to the point at which we have arrived. The complex society that could only have been formed spontaneously, in large part, through this development of customs, and never by centrally planned legislation, is not now

capable of being manipulated and contorted into all sorts of shapes through legislation or bureaucratic administration. Hayek pointed to the common law tradition of the Anglo-American world as an excellent—though not the only—example of a customary legal system that effectively enabled the growth of society from the primitive to the complex.⁶⁸

Hayek's appeal to the common law tradition, especially coming from one trained not in the common law but in the continental Roman law, raises intriguing matters for legal scholars who are both persuaded by Aquinas and Hayek about the limits of legislation and also looking for alternative resources in a statute-drenched world. For those in the English-speaking lands, the common law tradition presents itself as a singularly appealing resource, given both its customary basis and its long history as a central aspect of the Anglo-American legal heritage. To acknowledge the customary nature of the common law is not to deny that there was written, statutory law in England as far back as anyone can trace. Blackstone makes the traditional categorization when he asserts that the municipal law of England is divided into two parts: the unwritten and the written—the first, which he calls “common law” and the second, which he calls “statute law.” This unwritten common law includes, according to Blackstone, general customs, particular customs (of certain parts of the kingdom), and particular laws observed by custom only in certain courts and jurisdictions. The first of these, general customs, are called common law “properly so called” because they, unlike the last two, are indeed common to all people on all English soil. Blackstone goes on to explain that the unwritten, common law derives its authority not from Parliament but from immemorial usage and universal reception.⁶⁹ Indeed there are and were written laws, but Blackstone concludes that common law, which he terms “general immemorial custom,” is “the first ground and chief cornerstone of the laws of England.”⁷⁰

The common law has indeed generally been viewed as *customary* law.⁷¹ The eighteenth-century legal scholar Sir Matthew Hale, speaking similarly to Blackstone, writes that the unwritten laws have gained their binding power by long and immemorial usage and by the strength of custom.⁷² More recent writers agree about the customary nature of the older common law. John Hudson, for example, speaks about law and custom as “intimately related” in the post-Conquest development of English legal life. He explains that customs “are not simply neutral statements of what usually happens; rather, they are prescriptions of established and proper action, prescriptions that carry authority.”⁷³ He suggests the following definition of *custom*: “A norm, questioning of that might draw the answer ‘Well, that’s how we do things here.’”⁷⁴ A century ago, Frederic William Maitland asserted that it was nothing else than the custom of

the king's court that became the common law.⁷⁵ Reflecting on both ancient and more recent English history, Maitland noted that much was left to social custom that by his own day had become regulated by legislation and controlled by courts of justice.⁷⁶ Even in the present day, however, custom is still often acknowledged as extremely important for what remains of the common law. For example, M. Stuart Madden points out that both societal and professional customs play a recognizable role in the development of common law doctrines.⁷⁷ Similarly, scholars such as A. W. B. Simpson and Melvin Aron Eisenberg are critical of positivist understandings of the common law, which tend to view it as simply a series of rules "legislated" by judges. Both writers point to the customary nature of the common law as more effectively explaining its distinctive dynamic.⁷⁸

Does the customary common law have a future in a world that seems much more interested in the rapid developments and quick answers of statutory law? Some legal scholars have bothered to ask this question and to answer in the affirmative, though the specifics of their proposals certainly differ. For example, Madden calls for an ongoing partnership of common law and statutes, since he perceives limitations in both. He likes what he calls common law's "enlightened gradualism" and "polycentric justice," which have effectively pursued objectives of law such as corrective justice, individual autonomy, instrumentalism, and efficiency.⁷⁹ Guido Calabresi also calls for the development of a common law to supplement statutes. Calabresi's concern is with the petrification of statutes; in other words, the tendency of statutes to grow obsolete as they age. Aware that legislatures have difficulty in keeping statutes current, Calabresi admires the traditional ability of the common law to balance the needs for continuity and change in the law. He argues that judicial precedents that interpret statutes should be treated just as common law precedents have been traditionally treated: with a combination of respect and flexibility. This would, in effect, create a new common law of statutes.⁸⁰ A third proposal for the continuing use of common law in a statutory world is found in the work of Daniel Farber and Philip Frickey. These scholars assume that judges possess a policy-making role, albeit secondary to that of legislators. Farber and Frickey perceive a continuing need for common law when the existence of a statute affects judicial policymaking outside of the statute's domain. To bolster this common law adjudication, they recommend the use of various insights generated by recent advocates of republicanism and social choice theory.⁸¹

All of these scholars, to be sure, have argued for the potentially continuing importance of the common law *within* a world dominated by statutes. Their

ideas about the future of customary law are certainly more muted than Hayek's and, it seems, than Aquinas's. Yet their recognition of the limits of statutes and of the contemporary habit of creating law from the top down adds additional weight to the claims of Aquinas and Hayek. Whatever legislation can accomplish, it cannot do it all. It cannot establish a system of law that will be just and effective for all time, yet its predominance makes the ongoing modification of law choppy and sporadic, and however many of our social dreams it is able to implement, it inevitably creates all sorts of other scenarios that one could never anticipate.

Differences of legal philosophy matter, and Aquinas and Hayek certainly advocated legal philosophies different in many ways. One area in which a very practical and important difference emerges between Aquinas and Hayek concerns the degree of flexibility that judges and other governmental officials ought to have in applying the rules of law to particular cases. Aquinas clearly left room for more flexibility and the exercise of prudence than did Hayek.⁸² Yet the convergence of the thought of the two representatives of these different ethical and legal traditions indicates that they have stumbled upon a truth that is important to remember in the midst of struggles to shape a just law that will govern societies of ever-increasing complexity: Legislation cannot accomplish everything, and the less frequently we ignore this stubborn truth, the *better*.

Notes

1. Ellen Ash Peters, "Common Law Judging in a Statutory World," 995–98. See confirmation of Peters' basic thesis in M. Stuart Madden, "The Vital Common Law: Its Role in a Statutory Age," 555, 556; and Guido Calabresi, *A Common Law for the Age of Statutes* (Cambridge: Harvard University Press, 1982), 1.
2. Sir William Blackstone, *Commentary on the Laws of England*, vol. 1 (1765; reprint, Chicago: University of Chicago Press, 1979), 73.
3. See Calabresi, *Common Law*; Guido Calabresi, "The Non-Primacy of Statutes Act: A Comment," *Vermont Law Review* 4 (1979): 247–55; Madden, "The Vital Common Law," 555–611; Melvin Aron Eisenberg, *The Nature of the Common Law* (Cambridge: Harvard University Press, 1988); and Daniel A. Farber and Philip P. Frickey, "In the Shadow of the Legislature: The Common Law in the Age of the New Public Law," *Michigan Law Review* 89 (1991): 875–906.
4. Thomas Aquinas lived from 1224 or 1225 to 1274. A recent and thorough biographical account of Aquinas's life is found in Jean-Pierre Torrell, O.P., *Saint Thomas Aquinas*, vol. 1, *The Person and His Work*, trans. Robert Royal (Washington,

- D.C.: Catholic University of America Press, 1996). Friedrich A. Hayek lived from 1899 to 1992. A new biography of Hayek has just appeared: Alan Ebenstein, *Friedrich Hayek: A Biography* (New York: Palgrave, 2001).
5. Though he compares Hayek and *Aristotle*, this is the implication of Eugene F. Miller, "Prudence and the Rule of Law," *American Journal of Jurisprudence* 24 (1979): 181, 181–206. Miller argues that Hayek's concept of the rule of law leaves little room for the use of prudence in the development and application of law, in contrast to the close relationship between law and prudence in Aristotle.
 6. Aristotle, *Ethics* (henceforth, *NE*), trans. J. A. K. Thomson (New York: Penguin, 1971), 1.3.
 7. *NE*, 2.2.
 8. *NE*, 1.7.
 9. *NE*, 5.7.
 10. *NE*, 5.10.
 11. *NE*, 2.2.
 12. *NE*, 6.7.
 13. Aristotle, *Politics*, trans. Hippocrates G. Apostle and Lloyd P. Gerson (Grinnel, Ia.: Peripatetic, 1986), 4.1.
 14. *NE*, 1.9.
 15. *NE*, 2.1.
 16. *NE*, 2.4.
 17. *NE*, 6.8.
 18. *NE*, 10.9.
 19. Immanuel Kant, *Grounding for the Metaphysics of Morals*, 3d ed., trans. James W. Ellington (Indianapolis: Hackett, 1993), 1–3.
 20. *Ibid.*, 7–17.
 21. *Ibid.*, 25–27.
 22. *Ibid.*, 30.
 23. Immanuel Kant, *The Metaphysics of Morals*, trans. and ed. Mary Gregor (Cambridge: Cambridge University Press, 1996), 14.
 24. *Ibid.*, 20–21.
 25. *Ibid.*, 23.

26. *Ibid.*, 23–24.
27. *Ibid.*, 24.
28. See, for example, Aquinas's comments on the *Nicomachean Ethics* in his *Commentary on Aristotle's Nicomachean Ethics* (henceforth *CNE*), trans. C. I. Litzinger, O.P. (Chicago: Regnery, 1964; reprint Notre Dame, Ind.: Dumb Ox Books, 1993), 1.3, 2.2, 5.10.
29. Thomas Aquinas, *Summa Theologiae* (henceforth *ST*), 1a2ae 95.3 obj. 1. English translations are taken from *Summa Theologica*, trans. Fathers of the English Dominican Province, rev. ed., vols. 2–3 (Allen, Tex.: Christian Classics, 1981); quotations from the Latin are taken from *Summa Theologiae*, vols. 1–2 (Rome: Marietti, 1950).
30. *ST*, 1a2ae 91.4.
31. *ST*, 1a2ae 97.1.
32. *ST*, 1a2ae 97.2.
33. For example, see the Latin in *ST*, 1a2ae 96.6 and 1a2ae 100.8.
34. *ST*, 1a2ae 95.3; 1a2ae 97.1.
35. *ST*, 1a2ae 90.2; 1a2ae 100.2.
36. *ST*, 1a2ae 104.3 ad.1.
37. Thomas Aquinas, *Summa Contra Gentiles*, trans. Vernon J. Bourke, vol. 3 (Garden City, N.Y.: Hanover House, 1956; reprint, Notre Dame, Ind.: University of Notre Dame Press, 1975), 3.71.4.
38. *CNE*, 5.7.
39. For example, see *ST*, 2a2ae 57.2 ad.2.
40. Friedrich A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960), 11.
41. See *ibid.*, 21.
42. Friedrich A. Hayek, *Law, Legislation, and Liberty*, vol. 2, *The Mirage of Social Justice* (Chicago: University of Chicago Press, 1976), 37.
43. See Friedrich A. Hayek, *Law, Legislation, and Liberty*, vol. 1, *Rules and Order* (Chicago: University of Chicago Press, 1973), 55.
44. Hence the title of chapter 2 of *Constitution of Liberty*: “The Creative Powers of a Free Civilization,” 22–38.
45. *Constitution of Liberty*, 11–12.
46. *Mirage of Social Justice*, 43, 166–67.

47. *Rules and Order*, 57.
48. *ST*, 1a2ae 96.2; 1a2ae 96.3; see also 1a2ae 71.6 ad.4; 1a2ae 100.2; 2a2ae 77.1 ad.1.
49. *ST*, 1a2ae 96.6; 1a2ae 96.6 ad.3.
50. *ST*, 1a2ae 96.6.
51. *ST*, 1a2ae 96.6 ad.3.
52. *ST*, 2a2ae 120.2; 2a2ae 120.2 ad.3. Some contemporary commentators on Aquinas's view of law point to the centrality of his concept of equity: See Anton-Hermann Chroust, "The Philosophy of Law of Saint Thomas Aquinas: His Fundamental Ideas and Some of His Historical Precursors," *American Journal of Jurisprudence* 19 (1975): 1, 34; and E. A. Goerner, "Thomistic Natural Right: The Good Man's View of Thomistic Natural Law," *Political Theory* 11 (August 1983): 393, 400–415.
53. *ST*, 1a2ae 100.8; 2a2ae 60.5 ad.2; *CNE*, 5.10.
54. *ST*, 1a2ae 95.1.
55. See especially *Rules and Order*, chap. 2, "Cosmos and Taxis," 35–54.
56. See *Rules and Order*, chap. 4, "The Changing Concept of Law," 72–93.
57. *Rules and Order*, 12.
58. *Ibid.*, 50–51.
59. Aquinas spent much of his life living under the domain of two powerful monarchs, Frederick II of the Kingdom of the Two Sicilies and Louis IX of France. Both were political and legal reformers who used their legislative power to effect important changes in their realms. See David VanDrunen, "Natural Law and Common Law: The Relationship of Law and Custom in the Moral Theology of Thomas Aquinas" (Ph.D. diss., Loyola University Chicago, 2001), 87–93. On the reign of Frederick II, see David Abulafia, *Frederick II: A Medieval Emperor* (New York: Allen Lane, 1988); Thomas Curtis Van Cleve, *The Emperor Frederick II of Hohestaufen: Immutator Mundi* (Oxford: Clarendon, 1972); and Ernst Kantorowicz, *Frederick the Second: 1194–1250*, trans. E. O. Lorimer (London: Constable, 1931; reprint, New York: Frederick Ungar, 1957). For treatment of the life and reign of Louis IX, see Jean Richard, *Saint Louis: Crusader King of France*, trans. Jean Birrell (Cambridge: Cambridge University Press, 1992); William Chester Jordan, *Louis IX and the Challenge of the Crusade: A Study in Rulership* (Princeton: Princeton University Press, 1979); and Margaret Wade Labarge, *Saint Louis: Louis IX Most Christian King of France* (Boston: Little, Brown and Company, 1968). For additional perspective on the importance of contemporary legal and political happenings for Aquinas's understanding of law, see

Alasdair MacIntyre, "Natural Law As Subversive: The Case of Aquinas," *Journal of Medieval and Early Modern Studies* 26 (Winter 1996): 61–83.

60. Hayek's principal enemy for most of his scholarly career was socialism, and during his life, of course, debates over the merits of socialism and its implementation were common throughout the Western world. Hayek's last major work, published just short of his ninetieth birthday, was a refutation of Socialist arguments: *The Collected Works of F. A. Hayek*, vol. 1, *The Fatal Conceit: The Errors of Socialism*, ed. W. W. Bartley III (Chicago: University of Chicago Press, 1989).
61. The centrality of custom in Aquinas's theology of law is the central concern of my doctoral dissertation, "Natural Law and Common Law," cited above. A few scholars have touched upon the role of custom in Aquinas's legal thought, though not in great detail; for example, see John Finnis, *Aquinas: Moral, Political, Legal Theory* (Oxford: Oxford University Press, 1998), 270; MacIntyre, "Natural Law As Subversive," 61, 70; and Chroust, "The Philosophy of Law," 1, 33.
62. *ST*, 1a2ae 97.3.
63. *ST*, 1a2ae 95.3 obj. 1. Here Aquinas follows the claims of the early medieval thinker, Isidore of Seville.
64. *ST*, 1a2ae 97.3 ad.2.
65. VanDrunen, "Natural Law and Common Law," 145–88.
66. *Ibid.*, 189–266.
67. See, for example, *Rules and Order*, 11–15.
68. See again *Rules and Order*, chap. 4, "The Changing Concept of Law," 72–93.
69. Blackstone, *Commentary*, vol. 1, 63–64.
70. *Ibid.*, 73.
71. The very notion of a *customary* law has occasionally been challenged. For example, see J. P. B. de Josselin de Jong, "Customary Law: A Confusing Fiction," in *Folk Law: Essays in the Theory and Practice of the Lex Non Scripta*, ed. Alison Dundes Renteln and Alan Dundes, vol. 1 (Madison: University of Wisconsin Press, 1994), 111–17; originally published in *Koninklijke Vereeniging Indisch Instituut* (Amsterdam: Het Indisch Instituut, 1948), 3–8. More frequently, scholars have defended the validity of the idea of customary law. See the recent extensive study of customary law by Leon Sheff, *The Future of Tradition: Customary Law, Common Law, and Legal Pluralism* (Portland, Ore.: Frank Cass, 2000).
72. Sir Matthew Hale, *The History of the Common Law of England*, ed. Charles M. Gray (1713; reprint, Chicago: University of Chicago Press, 1971), 17.

73. John Hudson, *The Formation of the English Common Law: Law and Society in England from the Norman Conquest to Magna Carta* (London: Longman, 1996), 6–8.
74. *Ibid.*, 6, n. 25.
75. Sir Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I*, 2d ed., vol. 1 (Cambridge: Cambridge University Press, 1923), 184.
76. *Ibid.*, xxiv. Maitland frequently expressed sentiments suggesting that customary law is more primitive and written law more advanced, a point also noted by John Hudson in “Maitland and Anglo-Norman Law,” in *The History of English Law: Centenary Essays on “Pollock and Maitland.”* ed. John Hudson (Oxford: Oxford University Press, 1996), 28. Maitland’s observations about the written character of law in his own day should perhaps be read with this in mind.
77. “The Vital Common Law,” 573–74.
78. A. W. B. Simpson, “The Common Law and Legal Theory,” in *Folk Law*, ed. Renteln and Dundes, vol. 1, 119–39; Eisenberg, *The Nature of the Common Law*, 146–51.
79. Madden, “The Vital Common Law,” 555–611.
80. Calabresi, *Common Law*; see also his additional reflections on the matter in Calabresi, “The Non-Primacy of Statutes Act,” 247–55.
81. Farber and Frickey, “In the Shadow of the Legislature,” 888–906.
82. This is one of the points at which Miller finds the greatest disagreement between the legal theories of Aristotle and Hayek: “Prudence and the Rule of Law,” 204–5. It should not be forgotten that Aquinas did make a strong case for the establishment of known rules of law by which future judicial controversies would be settled (for example, see *ST*, 1a2ae 95.1 ad.2), but he left considerable room for judges to relax the rules when their strict application would result in an injustice, as discussed at some length above. Hayek warned that the freedom of society would be eroded to the extent that established rules and principles are set aside in the interests of expediency (see *Rules and Order*, 56–59).

more than generalize. It is true, however, that many judicial cases cannot be settled simply by recourse to general statements, and thus arises the need for exceptions to the rules. These occasions call for application of “equity,” which entails restoring the balance of justice when it is twisted by strict application of the law.¹⁰

Closely connected with the inexactness of ethics and the consequent generality and imprecision of law is Aristotle’s perspective on the importance of empirical considerations when making moral and legal judgments. For Aristotle, ethics cannot be mapped out ahead of time on the basis of abstract principles. Instead, Aristotle points the ethicist to the work of doctors and navigators. Just as doctors and navigators must continually adjust their professional actions to meet the circumstances that confront them rather than follow a predetermined course of action, thus, also, moral thinkers ought to think through what is best suited for each particular ethical situation that faces them.¹¹ For Aristotle, one might say, ethics is more an art than a science. This is manifest in his discussions about prudence, a key moral virtue that one must possess in order to conduct oneself well. Aristotle treats prudence as much more than a knowledge of general principles; rather, prudence demands familiarity with particulars, for conduct deals not with generalities but with concrete circumstances.¹² Once again, this has important implications for law. As Aristotle explains in his *Politics*, political writers must reflect not only upon what form of government is best absolutely but also upon what form or forms are possible under given social circumstances. Laws, then, must be framed to suit the form of government, and not vice versa.¹³ What the proper laws are depend upon the situation.

As might be predicted, given these ideas, Aristotle believed in the necessity of experience for those wishing to engage in ethical, political, or legal enterprises. Because the study of ethics cannot be reduced to a series of general rules but depends highly upon particular circumstances, and also because the moral virtues necessary for acting well are not innate but acquired, experience becomes paramount. Aristotle claims that happiness, which is the ultimate goal of our moral conduct, is acquired by virtue, study, and practice.¹⁴ The virtues themselves are gained by time and experience, which means that they must be exercised if they are to develop properly.¹⁵ Hence, to become just, one must act justly and to become temperate one must act temperately.¹⁶ Aristotle interpreted public opinion as skeptical that youths—though they may be very able to master mathematics—can be prudent, since prudence demands a kind of knowledge that comes only by practical experience.¹⁷ *There is no shortcut to moral maturity.* This is true no less in the political and legal arenas.

If one wants to learn how to legislate, for example, it is better to be taught by legislators than by theorists, for it is the former who have actually exercised the art of law-making. And those who wish to grasp political theory must have practical experience of political life.¹⁸

Kant turns on its head a great deal of what Aristotle claims. Where Aristotle promotes a view of ethics and law permeated by contingency and provisionality, Kant responds with a moral and legal philosophy that stresses universality and necessity and that largely eschews empirical considerations. In the preface to his *Grounding for the Metaphysics of Morals*, Kant argues that if a moral law is to be valid as a ground of obligation, it must be absolutely necessary. One cannot find the ground of obligation in human nature nor in the particular circumstances in which one finds oneself but only in *a priori* concepts of pure reason. Precepts—even those approaching universality—that are founded on experience cannot be called moral laws, but only practical rules. Empirical investigations, based on particular circumstances, are necessarily contingent. Practical reason must function according to law and hence, must seek a pure morality stripped of empirical considerations. When one adheres to this principle, one identifies genuine moral laws that necessarily apply to every rational being.¹⁹ The difference in Kant's orientation from that of Aristotle on this question of universality, contingency, and the place of the empirical and the particular is immediately obvious.

Good acts, Kant continues, are done not only according to the moral law but also for the sake of the moral law, out of duty. In the first section of the *Grounding*, Kant claims that the good will—that is, the ability to will rationally—is the only true good, because nothing else that we posit is unconditionally good.²⁰ This reveals another point at which, Kant's ethics diverges from Aristotle's. Whereas Aristotle began with the good and worked out his ethics from this basis, Kant refuses to condition the moral law on anything. Kant, therefore, rejects consequentialist and prudence-based ethical schema, and hence stands at odds from Aristotle's insistence on recognizing happiness as the end and on making ethics such a flexible discipline. This orientation of Kant is evident in the distinction between hypothetical and categorical imperatives that he makes in the second section of the *Grounding*. The former are subjectively grounded, defining the good in terms of a subjective purpose of the will. The latter, on the other hand, command certain conduct without being conditioned by any outside purpose. Only categorical imperatives, as unconditional and truly objective, are universally valid and may, hence, be considered laws.²¹ One of the ways, then, in which Kant states the categorical imperative is in terms of the test of universalizability: Can one will that a

particular maxim become a universal law?²² By this, Kant did not direct his readers to examine the consequences of particular behavior were everyone to engage in it, but to ask whether a maxim would result in a contradiction of reason were it to be universalized.

Kant's systematic presentation of his philosophy of law is set forth in the first section of his *Metaphysics of Morals*. In the introduction to the *Metaphysics of Morals*, as a whole, Kant lays some foundation that is important to note for present purposes. First, he distinguishes two kinds of moral laws, or laws of freedom (as opposed to laws of nature). These are "juridical" laws, which are directed merely to external actions, and "ethical" laws, which require that the laws themselves be the determining ground of action. The former kind are dealt with in his philosophy of law (or "Doctrine of Right"). They refer to a freedom only in the *external* use of choice.²³ The mere conformity of an action with law, irrespective of the incentive, is what Kant labels its "legality." Duties from rightful (i.e., juridical) lawgiving can only be external duties, since this lawgiving does not require duty to be the incentive. What distinguishes the doctrine of right from the doctrine of virtue is not so much their differences in duty as their differences in type of lawgiving.²⁴

In the introduction to the Doctrine of Right, Kant defines what the Doctrine of Right is: "The sum of those laws for which an external lawgiving is possible."²⁵ Kant believes that it is easy for a legal scholar, by empirical means, to describe what positive laws actually are in place in a given jurisdiction, but if one is to go beyond mere description to determine whether these laws are right or wrong, empirical studies must be left behind and reason alone must give the answer. Reason, then, is to proceed by pondering the external relations of one person to another as they are mutually influenced by their actions. It must consider the choice of one to the *choice* (not the *wish*) of another, and, specifically, the *form* of choice (not its *matter*). Consequently, reason does not inquire how one may benefit from a transaction. Kant concludes: "Right is therefore the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom."²⁶

What is the upshot of this? "Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if, on its maxim, the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law." A person is wronged if he is hindered from performing an action that can so coexist with the freedom of everyone else.²⁷ Kant's perspective, then, is manifestly different from Aristotle's. The flexibility, practicality, corrigibility, and purposefulness of law found in Aristotle recedes in

Kant into universal, *a priori* categories of reason for determining the rightness of laws, regardless of their particular consequences.

The Appropriation of Aristotle and Kant by Aquinas and Hayek

The divergent perspectives on law and ethics were in many ways appropriated by Thomas Aquinas and F. A. Hayek. Aquinas, following Aristotle, treated ethics as an inexact science and, correspondingly, looked upon laws as mutable rules highly dependent on particular circumstances for their usefulness. Hayek, following Kant, argued that laws should not seek to achieve particular, concrete consequences but, rather, should be general rules that set a framework for the interaction of free people as they themselves work out the consequences of their mutual dealings. Initially, the prospects of enlisting the philosophies of law of Aquinas and Hayek in a common cause look meager.

To consider Aquinas more specifically, one is struck immediately by the Aristotelian flavor of his moral and legal reflections. Aquinas's commentary on the *Nicomachean Ethics* is particularly revealing of this basic orientation,²⁸ though it manifests itself throughout Aquinas's moral writings, especially in the *Secunda Pars* of his *Summa Theologiae*. In this section, I focus particularly on the Aristotelian character of his theology of law, since his legal thought is the particular concern of this article.

One, quite prominent, example of how the inexact character of ethics shapes Aquinas's view of law is his connection of law and utility. For Aquinas, the exact shape that human law is to take is not immediately obvious. Instead, the legislator must test and consider the utility of possible rules to determine which is best suited to be law. In other words, Aquinas makes utility an important standard for the justice of legal rules—quite frankly, Aquinas wants to know what works. In fact, he explicitly sets forth usefulness (*utilis*) as one of the criteria for valid law, following the teaching of Isidore of Seville.²⁹ One example of the application of this idea emerges from Aquinas's defense of his claim that human law cannot get rid of every evil. Aquinas reasons that laws that aim at expunging all evils also inevitably exterminate many good things in society as well. In the face of the mixed consequence of even the best-intentioned laws, the standard that Aquinas implicitly establishes for determining which laws ought to be enacted is "the advance of the common good (*utilitas boni communis*)."³⁰ Likewise, Aquinas points his readers to considerations of utility as a standard for knowing when law needs to be changed:

He writes of lawgivers remaking social institutions that would “prove less frequently deficient in respect of the common weal (*communi utilitate*).”³¹ He adds that law is rightly changed “insofar as such change is conducive to the common weal (*communi utilitati providetur*).”³² These examples could be multiplied.³³

This emphasis on determining the usefulness of laws goes hand in hand with Aquinas’s conviction that law is mutable. For Aquinas, law was not something to be imposed once for all, nor were particular laws equally appropriate for every community. Aquinas insisted that law was to be “adapted to time and place” and “can be rightly changed on account of the changed condition of man.”³⁴ One of Aquinas’s requirements for just law was that it promote the common good, and he counseled that rules of law be diversified for communities of different character.³⁵ Though justice itself is a universal goal for human law, the substance of justice depends upon the particular conditions in which it is applied.³⁶ Hence, he defines the justice of a regime as its ruling each thing according to its own mode.³⁷ In commenting on Aristotle, he remarks that civil life and the administration of the State vary from place to place, and he prescribes that laws must be framed according to the extent that they are necessary for the end of the State.³⁸ What is potentially just, then, has wide berth,³⁹ and the details of the circumstances make all the difference.

As Aquinas’s philosophy of law consciously followed that of Aristotle, so Hayek’s consciously follows that of Kant at a number of significant points. One particularly important aspect of this fact is that Hayek, like Kant, associates the idea of law with the idea of freedom. Hayek understands that “freedom” is used in a number of different ways, and he therefore defines his use of the term *freedom* carefully. He refers to freedom as the “state in which a man is not subject to coercion by the arbitrary will of another or others,”⁴⁰ a sentiment that echoes Kant’s discussion of freedom in terms of the absence of coercion. This definition might give the impression that law stands opposed to freedom, since law is undoubtedly, in one way or another, an instrument of coercion. However, Hayek takes just the opposite view. The absence of law would mean not the elimination of coercion but the multiplication of it, for there would thus be little constraint on the private use of force by one against another. Law, as a centralized, governmental use of coercion, is meant to maximize the degree of freedom that each person can enjoy without impinging on the liberty of others. This must occur, Hayek insists, through general rules that are known and applicable to all.⁴¹

This means that law is not set in place in order to achieve particular results. Law, says Hayek, is not a matter of “directly assigning particular things to

particular persons,” a position that he believes established by Kant, as well as by David Hume before him.⁴² The justice of law, in this very important sense, does not rest upon empirical considerations. Instead, by establishing general, universal rules, law provides a framework within which, people are able to plan their own futures and seek to attain their own ends.⁴³ In other words, law is not to prescribe that some particular person or group of persons are to receive a particular share of society’s resources but is, rather, to set rules by which, people are to interact with each other and determine their own destinies. In distinction, then, from Aquinas, for whom law is to be adjusted in order to attain what is useful and to achieve the end for which the State exists, Hayek asserts that law has no purpose beyond providing a sort of level playing field and allowing people to use whatever knowledge and skills they possess for achieving their own purposes. Hayek was confident in the ability of people to flourish when provided with such a legal framework. He believed that general, universal rules establish a stability and predictability that people need if they are to plan rationally and effectively for the future. Given this stability and predictability, then, Hayek expected the creative powers of society to be most fully unleashed.⁴⁴

Hayek did not expect that such a freedom-maximizing, coercion-minimizing legal framework could be immediately put in place, *de novo*. In fact, he cautions that such a law will never be achieved perfectly. Instead, he advocates an approach by which, existing systems of law are gradually pared down so as to eliminate those laws that are inconsistent with the criteria that he has established.⁴⁵ In saying this, Hayek follows what he believes to be Kant’s own understanding of the advancement of law. According to Hayek, Kant did not seek to use his criteria for just law to build up a system of law from scratch but, rather, to prune already-existing legal systems.⁴⁶ Hayek, therefore, sought to deal with the imperfections of law not by coming to grips with the mutability of justice as applied to various circumstances but by continually adjusting the general rules so as to make them better and better.⁴⁷

The Convergence of the Traditions

To this point, the present study has emphasized the differences in the approach to law displayed by Aristotle and Kant, and in Aquinas and Hayek, their disciples of sorts. The most prominent point of difference highlighted here is that concerning the role of empirical circumstances and the interest in the practical results of law. However, this difference in perspective ought not mask the way in which these two legal traditions converge on important matters. Most

significant in the present context, both Aquinas and Hayek recognize crucial limits to what lawmaking can achieve. They display a sobriety about legislation that necessarily constrains its exercise and the expectations attached to it.

As an initial matter, Aquinas recognizes the limits of law in the production of virtuous citizens. Aquinas holds that the promotion of virtue in citizens is one of the chief purposes of law, yet he notes that law ought not directly command the exercise of every virtue nor directly prohibit the exercise of every vice. In doing so, the law would create new social problems and ultimately damage the common good more than foster it.⁴⁸ Another matter in which Aquinas recognizes the limits of legislation, and one that was discussed above, concerns his belief that law is always to be just and that what is just depends upon circumstances. The obvious implication, which Aquinas himself draws, is that universally applicable rules of law are unattainable. No legislator, however wise, is able to anticipate every particular circumstance to which a law will be applied. Therefore, it is impossible to draft laws whose words express every specific application that will be conducive to the goal of the legislation. In fact, Aquinas insists that even if people were capable of incorporating every future case into a piece of legislation, they should not, for the sake of avoiding confusion. Instead, rules of law must be stated generally, capturing what is right for cases of most frequent occurrence.⁴⁹

However, this produces situations here and there in which a law that is suitable for the majority of circumstances produces an injustice if strictly applied. Aquinas readily grants this point. Nevertheless, it does not prompt him to modify his position that laws must be framed generally; instead, it shapes his view of how law is to be applied in judicial proceedings. He states that when cases arise in which strict application of a law would be harmful to the common good, the letter of the law should be set aside so that justice can be done.⁵⁰ Aquinas provides a concrete example. Suppose, he says, that a law commands that the city gate be kept closed and that this law is generally for the good of the city. Then imagine that certain citizens who are defenders of the city are fleeing from enemies and will be lost if the gate is not opened to them. In such a case, Aquinas continues, the city would suffer harm if the law is strictly followed and, hence, an exception must be made.⁵¹ Aquinas deems this the power of “equity,” in which a judge lays aside the words of a law in order to attain a more just outcome. Equity, he explains, is an aspect of justice and moderates observance of the law.⁵² It is interesting to note that Aquinas did not envision the exercise of equity on the part of judges as a thwarting of the legislators’ purposes. On the contrary, he reasons that legislators desire that their laws fur-

ther the cause of justice, and hence, expect judges to modify their laws in situations in which justice demands it.⁵³

It should not be left unnoted that Aquinas affirmed the necessity of human law for orderly social life, nor that he advocated the establishment of social rules ahead of time and the corresponding minimization of ongoing judicial discretion, as far as possible.⁵⁴ Nevertheless, the preceding discussion demonstrates that Aquinas had rather modest expectations about what legislation can accomplish. Legislation can achieve its primary goal of producing virtuous citizens only to a degree, can frame rules only for the majority of circumstances, and must be altered in (inevitable) situations in which the cause of justice requires it. For Aquinas, grand social plans to be produced by legislation must be tempered by the realization that the best-intentioned and most fully informed law-making can itself only get society part of the way toward its goals.

Hayek's legal philosophy was suffused with this same basic, but very important, conviction. In the first volume of *Law, Legislation, and Liberty*, Hayek argues that our contemporary advanced society is not the product of any human planning or will, but emerged spontaneously as people interacted and discovered rules of conduct that enabled them to survive and flourish. A spontaneous order, or *cosmos*, is essentially different from an organization (such as the business corporation), or *taxis*, in that the latter is a product of deliberate human planning, while the former is not. Superiors are able to govern a *taxis* by giving orders to subordinates for the accomplishment of certain set purposes. This is the case because the *taxis* is a small and contained organization whose internal functionings can be more or less fully understood by those administering it. However, one is not able to govern a *cosmos* in the same way, that is, by giving commands to subordinates for the accomplishment of stated goals. The reason for this is that it is impossible to attain a comprehensive understanding of a spontaneous order, a *cosmos*. In Hayek's view, spontaneous orders, such as modern society, not only developed apart from anybody's planning but also are of such a complex and inscrutable nature that nobody *could have* planned them nor can anybody today know enough to be able to control them. The amount of information required to understand all of the workings of the *cosmos* of modern society is out of the grasp of any one person or group of people. Hence, any attempt to produce a particular state of affairs through legislation is doomed to failure: Not only does legislation often fail to achieve its stated, concrete goals, but it also always produces an unknown and unpredictable number of unintended social side effects. In light

of the legislator's inevitable ignorance, to legislate in the hope of attaining substantive social goals is inherently irrational, says Hayek.⁵⁵

It is at this point that Hayek's analysis of the concepts of *taxis* and *cosmos* meets his Kantian orientation toward law. His Kantian antipathy toward laws that are determined by empirical considerations harmonizes with his observation that legislation cannot produce desired empirical results with any great degree of accuracy. Hayek concludes that the laws governing a spontaneous order must be no more than rules of general conduct. Most of such rules will already have been formed by customs, apart from formal legislation, but they may be modified by legislation that is careful to fit into the matrix of the prevailing rules.⁵⁶

In limiting law to the establishment of general rules of conduct and urging legislators to refrain from trying to accomplish specific social results that they are incapable of producing anyway, Hayek recognizes that he is advocating a position that people do not want to believe. Concerning legislators' ignorance of all the information necessary for the accurate attainment of concrete social plans, he observes:

This may at first seem to be a fact so obvious and incontestable as hardly to deserve mention, and still less to require proof. Yet, the result of not constantly stressing it is that it is only too readily forgotten. This is so, mainly because it is a very inconvenient fact that makes both our attempts to explain and our attempts to influence intelligently the processes of society very much more difficult, and which places severe limits on what we can say or do about them. There exists, therefore, a great temptation, as a first approximation, to begin with the assumption that we know everything needed for full explanation or control.⁵⁷

Hayek also anticipates the objection that it is necessary for law-makers to plan and manage modern society because of its ever-increasing complexity. In fact, he anticipates the argument by turning it on its head. It is the very complexity of society that makes impossible the shaping of society into particular molds. As society grows ever more complex, the task becomes all the more unthinkable. For this reason, Hayek labels as "paradoxical" the view that "we must deliberately plan modern society because it has become so complex."⁵⁸

Aquinas and Hayek, then, each in his own way and from his own perspective, recognize the limits of law and urge restraint and modesty on the part of legislators. Their precise motivations were different. Aquinas addressed those who thought that legislating good rules, determined ahead of time, could provide a just solution for every future conflict. Hayek fought those who

believed that they could engineer a society that matched their ideals and visions by means of legislation. In many ways, however, the final result is the same: However lofty one's motivations and attractive one's dreams, legislation is insufficient for attaining a prosperous society or for solving society's ills. For both Aquinas and Hayek, the limited capacities of human reason and the nearly limitless complexity of the world that we seek to understand and tame are incommensurate.

The Limits of Law and the Prospects of Custom

As noted above, Hayek observes that these limitations of the powers of human reason; and, hence, of legislation, are rather obvious. It is difficult to dispute this point, and the fact that both Aquinas and Hayek, coming from quite distinctive philosophical traditions, would speak about these limits of law as a matter of course certainly adds to its persuasiveness. Yet, Hayek also observes that people must constantly be reminded of the existence of these limits. The inability to legislate a system of law that cleanly resolves all future matters of conflict and difficulty is a disappointing reality, because people tend to have insatiable appetites for trying to legislate away all social ills. This Legislative Temptation obviously lurked in Aquinas's day,⁵⁹ it raged in Hayek's day,⁶⁰ and undoubtedly it still lingers in our own. Whether the social problems be perennial issues such as urban poverty or environmental protection, or contemporary hot-items such as stem-cell research or power crises, ever newfangled solutions are rarely far from legislative dockets. Debates about proposed legislation are often intense, but often these debates concern much more the content of the legislation than the question of whether legislation of any sort is the wisest course for those who truly wish the betterment of society. For those who, however begrudgingly, acknowledge the force of the caveats from Aquinas and Hayek on the prospects for legislative improvement of social ills, the question about alternatives arises. If one cannot expect to legislate all problems away, then is there a more promising course of action available for those not content to be passively resigned to the social problems that persistently rear their heads?

Those inclined to heed the wisdom of Aquinas and Hayek on the limits of legislation may be intrigued to learn that these thinkers—again, despite their divergence in philosophical orientation—give a similar answer in their quest for an alternative. This alternative is the development of custom and the incorporation of customary practices into the fabric of the law. It is an alternative that has, in large part, though in some ways strangely, been lost from sight

in the contemporary Anglo-American legal scene; yet, it is an alternative with a prominent place in our legal history. Perhaps a consideration of why Aquinas and Hayek often favored recourse to the development of custom over the quick solutions of legislation may inspire contemporary reflection on the virtues of a revival of customary law for our legal future.

I have argued elsewhere that Aquinas's thought on custom is a central aspect of his broader theology of law, though this has not been much explored in the scholarly literature.⁶¹ The legal functions that Aquinas attributes to custom indicate its importance. For example, Aquinas asserts that custom can create law, abolish law, and interpret law.⁶² Furthermore, Aquinas treated custom as a sort of constitutional boundary for the creation of new law; in other words, he advises that law ought to be consistent with prevailing customary practices.⁶³ Aquinas readily admits that customs can be evil, and he grants that law ought to replace custom in such circumstances. Nevertheless, even here, Aquinas warns of overconfidence in legislators' ability to replace the structure of customary practices with something new and better. As discussed at some length above, Aquinas was sanguine about the ability of legislation to solve social ills, and therefore he expresses skepticism that legislation will always be an improvement even when trying to correct harmful customs.⁶⁴

Aquinas's claims about custom and law are undergirded by rich theological considerations. The centrality of human rationality for Aquinas's moral theology expressed itself in this matter, I have argued elsewhere. According to Aquinas, rationality is the key element of humanity's identity as the image-bearers of God, and it is its possession of the image that sets it apart from other creatures and endows it with a special dignity. For Aquinas, the creation of human law is one of the most eminent tasks that God has entrusted to his image-bearers and, as such, is to be an exercise of reason. Aquinas also spoke of the development of custom as an expression of human rationality. However, one reason why Aquinas emphasizes the creation of law through custom is because it permits the expression of this rational, honorable, image-bearing task to be accomplished by God's image-bearers corporately and not just by a select few.⁶⁵ Aquinas also advocates the creation of law through custom because recourse to customary practices provides the resources that he believes are necessary in order to execute the task of law-making aright. As noted above, Aquinas followed Aristotle in making moral and legal reasoning an inexact exercise. Law is not to be created in the abstract or apart from knowledge of the concrete social situation. Rather, good law is created through learning from experience, from the past, and through close consideration of social circumstances. For Aquinas, custom provides exactly these and other

resources. Custom reflects the experience of present and past generations and manifests the particular social circumstances that law must address.⁶⁶

Hayek also advocates the customary development of law and social ordering, though he approaches the issue in ways different from Aquinas. Hayek's thoughts on the matter are closely connected with his ideas about the limits of legislation, discussed previously. Central to the reality of law's limitations, in his thinking, are the twin facts of social complexity and the finitude of the human mind. In other words, the fact that society is so complex and that an ability to understand and control its inner workings requires such a mass of information, makes any attempt to manipulate the social order through legislation undertaken by a single individual or group of individuals a futile matter that will produce any number of unknown effects. However, in asserting that the information necessary to control society intelligibly is unavailable to any person or group of persons, Hayek is not claiming that this information was not available at all. Rather, Hayek claims that knowledge of all of the relevant facts according to which the social order operates is known, but only to all of the members of society in the aggregate. Each person and various groups of people possess information about the workings of society that is unavailable to others. Therefore, in order to establish ways of dealing with each other that take account of all of the relevant information, the input of all of the members of society rather than simply that of a few, is necessary.⁶⁷

Hayek sees no formal or institutional way by which to capture this information from all people, so he looks to informal and non-institutional measures. In economic life, this means that prices need to be determined by market mechanisms rather than by central planning, for a free marketplace provides buyers and sellers with information about supply and demand that can never be obtained by any bureaucratic planning organization. For Hayek, rules of law ought to be developed along similar lines. The formation of customary practices depends upon information contributed by innumerable members of society in their complex relationships and is shaped by much more of the information than any legislation can be. Historically speaking, Hayek argues that the modern "great society" was molded primarily by unplanned, spontaneous actions and arrangements established by people seeking ways of dealing with each other within the various constraints of life. It is an order created more by customs than by legislation, and its future prosperity depends upon a continued openness to the development of the spontaneous processes that propelled us to the point at which we have arrived. The complex society that could only have been formed spontaneously, in large part, through this development of customs, and never by centrally planned legislation, is not now

capable of being manipulated and contorted into all sorts of shapes through legislation or bureaucratic administration. Hayek pointed to the common law tradition of the Anglo-American world as an excellent—though not the only—example of a customary legal system that effectively enabled the growth of society from the primitive to the complex.⁶⁸

Hayek's appeal to the common law tradition, especially coming from one trained not in the common law but in the continental Roman law, raises intriguing matters for legal scholars who are both persuaded by Aquinas and Hayek about the limits of legislation and also looking for alternative resources in a statute-drenched world. For those in the English-speaking lands, the common law tradition presents itself as a singularly appealing resource, given both its customary basis and its long history as a central aspect of the Anglo-American legal heritage. To acknowledge the customary nature of the common law is not to deny that there was written, statutory law in England as far back as anyone can trace. Blackstone makes the traditional categorization when he asserts that the municipal law of England is divided into two parts: the unwritten and the written—the first, which he calls “common law” and the second, which he calls “statute law.” This unwritten common law includes, according to Blackstone, general customs, particular customs (of certain parts of the kingdom), and particular laws observed by custom only in certain courts and jurisdictions. The first of these, general customs, are called common law “properly so called” because they, unlike the last two, are indeed common to all people on all English soil. Blackstone goes on to explain that the unwritten, common law derives its authority not from Parliament but from immemorial usage and universal reception.⁶⁹ Indeed there are and were written laws, but Blackstone concludes that common law, which he terms “general immemorial custom,” is “the first ground and chief cornerstone of the laws of England.”⁷⁰

The common law has indeed generally been viewed as *customary* law.⁷¹ The eighteenth-century legal scholar Sir Matthew Hale, speaking similarly to Blackstone, writes that the unwritten laws have gained their binding power by long and immemorial usage and by the strength of custom.⁷² More recent writers agree about the customary nature of the older common law. John Hudson, for example, speaks about law and custom as “intimately related” in the post-Conquest development of English legal life. He explains that customs “are not simply neutral statements of what usually happens; rather, they are prescriptions of established and proper action, prescriptions that carry authority.”⁷³ He suggests the following definition of *custom*: “A norm, questioning of that might draw the answer ‘Well, that’s how we do things here.’”⁷⁴ A century ago, Frederic William Maitland asserted that it was nothing else than the custom of

the king's court that became the common law.⁷⁵ Reflecting on both ancient and more recent English history, Maitland noted that much was left to social custom that by his own day had become regulated by legislation and controlled by courts of justice.⁷⁶ Even in the present day, however, custom is still often acknowledged as extremely important for what remains of the common law. For example, M. Stuart Madden points out that both societal and professional customs play a recognizable role in the development of common law doctrines.⁷⁷ Similarly, scholars such as A. W. B. Simpson and Melvin Aron Eisenberg are critical of positivist understandings of the common law, which tend to view it as simply a series of rules "legislated" by judges. Both writers point to the customary nature of the common law as more effectively explaining its distinctive dynamic.⁷⁸

Does the customary common law have a future in a world that seems much more interested in the rapid developments and quick answers of statutory law? Some legal scholars have bothered to ask this question and to answer in the affirmative, though the specifics of their proposals certainly differ. For example, Madden calls for an ongoing partnership of common law and statutes, since he perceives limitations in both. He likes what he calls common law's "enlightened gradualism" and "polycentric justice," which have effectively pursued objectives of law such as corrective justice, individual autonomy, instrumentalism, and efficiency.⁷⁹ Guido Calabresi also calls for the development of a common law to supplement statutes. Calabresi's concern is with the petrification of statutes; in other words, the tendency of statutes to grow obsolete as they age. Aware that legislatures have difficulty in keeping statutes current, Calabresi admires the traditional ability of the common law to balance the needs for continuity and change in the law. He argues that judicial precedents that interpret statutes should be treated just as common law precedents have been traditionally treated: with a combination of respect and flexibility. This would, in effect, create a new common law of statutes.⁸⁰ A third proposal for the continuing use of common law in a statutory world is found in the work of Daniel Farber and Philip Frickey. These scholars assume that judges possess a policy-making role, albeit secondary to that of legislators. Farber and Frickey perceive a continuing need for common law when the existence of a statute affects judicial policymaking outside of the statute's domain. To bolster this common law adjudication, they recommend the use of various insights generated by recent advocates of republicanism and social choice theory.⁸¹

All of these scholars, to be sure, have argued for the potentially continuing importance of the common law *within* a world dominated by statutes. Their

ideas about the future of customary law are certainly more muted than Hayek's and, it seems, than Aquinas's. Yet their recognition of the limits of statutes and of the contemporary habit of creating law from the top down adds additional weight to the claims of Aquinas and Hayek. Whatever legislation can accomplish, it cannot do it all. It cannot establish a system of law that will be just and effective for all time, yet its predominance makes the ongoing modification of law choppy and sporadic, and however many of our social dreams it is able to implement, it inevitably creates all sorts of other scenarios that one could never anticipate.

Differences of legal philosophy matter, and Aquinas and Hayek certainly advocated legal philosophies different in many ways. One area in which a very practical and important difference emerges between Aquinas and Hayek concerns the degree of flexibility that judges and other governmental officials ought to have in applying the rules of law to particular cases. Aquinas clearly left room for more flexibility and the exercise of prudence than did Hayek.⁸² Yet the convergence of the thought of the two representatives of these different ethical and legal traditions indicates that they have stumbled upon a truth that is important to remember in the midst of struggles to shape a just law that will govern societies of ever-increasing complexity: Legislation cannot accomplish everything, and the less frequently we ignore this stubborn truth, the *better*.

Notes

1. Ellen Ash Peters, "Common Law Judging in a Statutory World," 995–98. See confirmation of Peters' basic thesis in M. Stuart Madden, "The Vital Common Law: Its Role in a Statutory Age," 555, 556; and Guido Calabresi, *A Common Law for the Age of Statutes* (Cambridge: Harvard University Press, 1982), 1.
2. Sir William Blackstone, *Commentary on the Laws of England*, vol. 1 (1765; reprint, Chicago: University of Chicago Press, 1979), 73.
3. See Calabresi, *Common Law*; Guido Calabresi, "The Non-Primacy of Statutes Act: A Comment," *Vermont Law Review* 4 (1979): 247–55; Madden, "The Vital Common Law," 555–611; Melvin Aron Eisenberg, *The Nature of the Common Law* (Cambridge: Harvard University Press, 1988); and Daniel A. Farber and Philip P. Frickey, "In the Shadow of the Legislature: The Common Law in the Age of the New Public Law," *Michigan Law Review* 89 (1991): 875–906.
4. Thomas Aquinas lived from 1224 or 1225 to 1274. A recent and thorough biographical account of Aquinas's life is found in Jean-Pierre Torrell, O.P., *Saint Thomas Aquinas*, vol. 1, *The Person and His Work*, trans. Robert Royal (Washington,

- D.C.: Catholic University of America Press, 1996). Friedrich A. Hayek lived from 1899 to 1992. A new biography of Hayek has just appeared: Alan Ebenstein, *Friedrich Hayek: A Biography* (New York: Palgrave, 2001).
5. Though he compares Hayek and *Aristotle*, this is the implication of Eugene F. Miller, "Prudence and the Rule of Law," *American Journal of Jurisprudence* 24 (1979): 181, 181–206. Miller argues that Hayek's concept of the rule of law leaves little room for the use of prudence in the development and application of law, in contrast to the close relationship between law and prudence in Aristotle.
 6. Aristotle, *Ethics* (henceforth, *NE*), trans. J. A. K. Thomson (New York: Penguin, 1971), 1.3.
 7. *NE*, 2.2.
 8. *NE*, 1.7.
 9. *NE*, 5.7.
 10. *NE*, 5.10.
 11. *NE*, 2.2.
 12. *NE*, 6.7.
 13. Aristotle, *Politics*, trans. Hippocrates G. Apostle and Lloyd P. Gerson (Grinnel, Ia.: Peripatetic, 1986), 4.1.
 14. *NE*, 1.9.
 15. *NE*, 2.1.
 16. *NE*, 2.4.
 17. *NE*, 6.8.
 18. *NE*, 10.9.
 19. Immanuel Kant, *Grounding for the Metaphysics of Morals*, 3d ed., trans. James W. Ellington (Indianapolis: Hackett, 1993), 1–3.
 20. *Ibid.*, 7–17.
 21. *Ibid.*, 25–27.
 22. *Ibid.*, 30.
 23. Immanuel Kant, *The Metaphysics of Morals*, trans. and ed. Mary Gregor (Cambridge: Cambridge University Press, 1996), 14.
 24. *Ibid.*, 20–21.
 25. *Ibid.*, 23.

26. *Ibid.*, 23–24.
27. *Ibid.*, 24.
28. See, for example, Aquinas's comments on the *Nicomachean Ethics* in his *Commentary on Aristotle's Nicomachean Ethics* (henceforth *CNE*), trans. C. I. Litzinger, O.P. (Chicago: Regnery, 1964; reprint Notre Dame, Ind.: Dumb Ox Books, 1993), 1.3, 2.2, 5.10.
29. Thomas Aquinas, *Summa Theologiae* (henceforth *ST*), 1a2ae 95.3 obj. 1. English translations are taken from *Summa Theologica*, trans. Fathers of the English Dominican Province, rev. ed., vols. 2–3 (Allen, Tex.: Christian Classics, 1981); quotations from the Latin are taken from *Summa Theologiae*, vols. 1–2 (Rome: Marietti, 1950).
30. *ST*, 1a2ae 91.4.
31. *ST*, 1a2ae 97.1.
32. *ST*, 1a2ae 97.2.
33. For example, see the Latin in *ST*, 1a2ae 96.6 and 1a2ae 100.8.
34. *ST*, 1a2ae 95.3; 1a2ae 97.1.
35. *ST*, 1a2ae 90.2; 1a2ae 100.2.
36. *ST*, 1a2ae 104.3 ad.1.
37. Thomas Aquinas, *Summa Contra Gentiles*, trans. Vernon J. Bourke, vol. 3 (Garden City, N.Y.: Hanover House, 1956; reprint, Notre Dame, Ind.: University of Notre Dame Press, 1975), 3.71.4.
38. *CNE*, 5.7.
39. For example, see *ST*, 2a2ae 57.2 ad.2.
40. Friedrich A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960), 11.
41. See *ibid.*, 21.
42. Friedrich A. Hayek, *Law, Legislation, and Liberty*, vol. 2, *The Mirage of Social Justice* (Chicago: University of Chicago Press, 1976), 37.
43. See Friedrich A. Hayek, *Law, Legislation, and Liberty*, vol. 1, *Rules and Order* (Chicago: University of Chicago Press, 1973), 55.
44. Hence the title of chapter 2 of *Constitution of Liberty*: “The Creative Powers of a Free Civilization,” 22–38.
45. *Constitution of Liberty*, 11–12.
46. *Mirage of Social Justice*, 43, 166–67.

47. *Rules and Order*, 57.
48. *ST*, 1a2ae 96.2; 1a2ae 96.3; see also 1a2ae 71.6 ad.4; 1a2ae 100.2; 2a2ae 77.1 ad.1.
49. *ST*, 1a2ae 96.6; 1a2ae 96.6 ad.3.
50. *ST*, 1a2ae 96.6.
51. *ST*, 1a2ae 96.6 ad.3.
52. *ST*, 2a2ae 120.2; 2a2ae 120.2 ad.3. Some contemporary commentators on Aquinas's view of law point to the centrality of his concept of equity: See Anton-Hermann Chroust, "The Philosophy of Law of Saint Thomas Aquinas: His Fundamental Ideas and Some of His Historical Precursors," *American Journal of Jurisprudence* 19 (1975): 1, 34; and E. A. Goerner, "Thomistic Natural Right: The Good Man's View of Thomistic Natural Law," *Political Theory* 11 (August 1983): 393, 400–415.
53. *ST*, 1a2ae 100.8; 2a2ae 60.5 ad.2; *CNE*, 5.10.
54. *ST*, 1a2ae 95.1.
55. See especially *Rules and Order*, chap. 2, "Cosmos and Taxis," 35–54.
56. See *Rules and Order*, chap. 4, "The Changing Concept of Law," 72–93.
57. *Rules and Order*, 12.
58. *Ibid.*, 50–51.
59. Aquinas spent much of his life living under the domain of two powerful monarchs, Frederick II of the Kingdom of the Two Sicilies and Louis IX of France. Both were political and legal reformers who used their legislative power to effect important changes in their realms. See David VanDrunen, "Natural Law and Common Law: The Relationship of Law and Custom in the Moral Theology of Thomas Aquinas" (Ph.D. diss., Loyola University Chicago, 2001), 87–93. On the reign of Frederick II, see David Abulafia, *Frederick II: A Medieval Emperor* (New York: Allen Lane, 1988); Thomas Curtis Van Cleve, *The Emperor Frederick II of Hohestaufen: Immutator Mundi* (Oxford: Clarendon, 1972); and Ernst Kantorowicz, *Frederick the Second: 1194–1250*, trans. E. O. Lorimer (London: Constable, 1931; reprint, New York: Frederick Ungar, 1957). For treatment of the life and reign of Louis IX, see Jean Richard, *Saint Louis: Crusader King of France*, trans. Jean Birrell (Cambridge: Cambridge University Press, 1992); William Chester Jordan, *Louis IX and the Challenge of the Crusade: A Study in Rulership* (Princeton: Princeton University Press, 1979); and Margaret Wade Labarge, *Saint Louis: Louis IX Most Christian King of France* (Boston: Little, Brown and Company, 1968). For additional perspective on the importance of contemporary legal and political happenings for Aquinas's understanding of law, see

Alasdair MacIntyre, "Natural Law As Subversive: The Case of Aquinas," *Journal of Medieval and Early Modern Studies* 26 (Winter 1996): 61–83.

60. Hayek's principal enemy for most of his scholarly career was socialism, and during his life, of course, debates over the merits of socialism and its implementation were common throughout the Western world. Hayek's last major work, published just short of his ninetieth birthday, was a refutation of Socialist arguments: *The Collected Works of F. A. Hayek*, vol. 1, *The Fatal Conceit: The Errors of Socialism*, ed. W. W. Bartley III (Chicago: University of Chicago Press, 1989).
61. The centrality of custom in Aquinas's theology of law is the central concern of my doctoral dissertation, "Natural Law and Common Law," cited above. A few scholars have touched upon the role of custom in Aquinas's legal thought, though not in great detail; for example, see John Finnis, *Aquinas: Moral, Political, Legal Theory* (Oxford: Oxford University Press, 1998), 270; MacIntyre, "Natural Law As Subversive," 61, 70; and Chroust, "The Philosophy of Law," 1, 33.
62. *ST*, 1a2ae 97.3.
63. *ST*, 1a2ae 95.3 obj. 1. Here Aquinas follows the claims of the early medieval thinker, Isidore of Seville.
64. *ST*, 1a2ae 97.3 ad.2.
65. VanDrunen, "Natural Law and Common Law," 145–88.
66. *Ibid.*, 189–266.
67. See, for example, *Rules and Order*, 11–15.
68. See again *Rules and Order*, chap. 4, "The Changing Concept of Law," 72–93.
69. Blackstone, *Commentary*, vol. 1, 63–64.
70. *Ibid.*, 73.
71. The very notion of a *customary* law has occasionally been challenged. For example, see J. P. B. de Josselin de Jong, "Customary Law: A Confusing Fiction," in *Folk Law: Essays in the Theory and Practice of the Lex Non Scripta*, ed. Alison Dundes Renteln and Alan Dundes, vol. 1 (Madison: University of Wisconsin Press, 1994), 111–17; originally published in *Koninklijke Vereeniging Indisch Instituut* (Amsterdam: Het Indisch Instituut, 1948), 3–8. More frequently, scholars have defended the validity of the idea of customary law. See the recent extensive study of customary law by Leon Sheff, *The Future of Tradition: Customary Law, Common Law, and Legal Pluralism* (Portland, Ore.: Frank Cass, 2000).
72. Sir Matthew Hale, *The History of the Common Law of England*, ed. Charles M. Gray (1713; reprint, Chicago: University of Chicago Press, 1971), 17.

73. John Hudson, *The Formation of the English Common Law: Law and Society in England from the Norman Conquest to Magna Carta* (London: Longman, 1996), 6–8.
74. *Ibid.*, 6, n. 25.
75. Sir Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I*, 2d ed., vol. 1 (Cambridge: Cambridge University Press, 1923), 184.
76. *Ibid.*, xxiv. Maitland frequently expressed sentiments suggesting that customary law is more primitive and written law more advanced, a point also noted by John Hudson in “Maitland and Anglo-Norman Law,” in *The History of English Law: Centenary Essays on “Pollock and Maitland.”* ed. John Hudson (Oxford: Oxford University Press, 1996), 28. Maitland’s observations about the written character of law in his own day should perhaps be read with this in mind.
77. “The Vital Common Law,” 573–74.
78. A. W. B. Simpson, “The Common Law and Legal Theory,” in *Folk Law*, ed. Renteln and Dundes, vol. 1, 119–39; Eisenberg, *The Nature of the Common Law*, 146–51.
79. Madden, “The Vital Common Law,” 555–611.
80. Calabresi, *Common Law*; see also his additional reflections on the matter in Calabresi, “The Non-Primacy of Statutes Act,” 247–55.
81. Farber and Frickey, “In the Shadow of the Legislature,” 888–906.
82. This is one of the points at which Miller finds the greatest disagreement between the legal theories of Aristotle and Hayek: “Prudence and the Rule of Law,” 204–5. It should not be forgotten that Aquinas did make a strong case for the establishment of known rules of law by which future judicial controversies would be settled (for example, see *ST*, 1a2ae 95.1 ad.2), but he left considerable room for judges to relax the rules when their strict application would result in an injustice, as discussed at some length above. Hayek warned that the freedom of society would be eroded to the extent that established rules and principles are set aside in the interests of expediency (see *Rules and Order*, 56–59).