

the review of  
**metaphysics**

a philosophical quarterly

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Reviewed work(s):

Source: *The Review of Metaphysics*, Vol. 43, No. 4 (Jun., 1990), pp. 751-790

Published by: [Philosophy Education Society Inc.](#)

Stable URL: <http://www.jstor.org/stable/20128944>

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## NATURE, CUSTOM, AND STIPULATION IN LAW AND JURISPRUDENCE

**JAMES BERNARD MURPHY**

**N**O THREE CONCEPTS ARE MORE CENTRAL to legal theory than nature, custom, and stipulation; thus the familiar expressions “natural law,” “customary law,” and stipulated or “positive law.” The problem is that conflicting claims are made for natural law, customary law, and positive law. I will argue that to make sense of these conflicting claims we must first make a distinction between law as a species of social order and jurisprudence as the explanation of law. For example, the debate between the advocates of legal positivism and the advocates of natural law reflects a confusion between law and jurisprudence: law as social order is essentially stipulated, but the jurisprudential explanation of law requires the three categories of nature, custom, and stipulation. Thus legal positivists rightly insist that all law is stipulated, but advocates of natural law rightly insist that the explanation of law requires the use of a notion of nature. Conversely, the legal positivists wrongly insist that jurisprudence must be restricted to the consideration of stipulated “norms” or “rules,” and the natural law theorists wrongly insist that “nature” can stipulate a code of law. Finally, the historical school’s emphasis on “customary law” reflects the same confusion between law and jurisprudence: there is no such thing as “customary law,” but custom is an essential category of jurisprudence. Only by clarifying the distinction between law and jurisprudence can we begin to reconcile these three schools of legal theory.

A second fundamental shortcoming of legal theory is the failure to grasp the triadic logical structure of nature, custom, and stipulation. Legal theorists of all persuasions presuppose a fundamental dichotomy between nature and stipulation; in all three schools “custom” is either reduced to nature as “second nature” or to stipulation as “unwritten law.” This assimilation of custom to either nature or stipulation erodes the intrinsic qualities of custom, for custom

is precisely that species of order which is neither the product of nature nor the product of deliberate stipulation. One key reason why nature is often set in opposition to stipulation—and natural law opposed to positive law—is that the absence of an adequate concept of custom prevents the mediation of nature and stipulation. Once we clarify the logical relations of nature, custom, and stipulation, we will see the profound confusion that characterizes the treatment of custom in the history of legal theory.

The challenge, then, is to reconcile the conflicting claims made for natural, customary, and positive law. Natural law theorists argue that some laws are by nature; the historical school argues that all law is customary; the positivists argue that all law is stipulated. In order to effect such a reconciliation we must not only distinguish between law and jurisprudence, but we must also offer a logically rigorous account of the relations between natural, customary, and stipulated order. I will argue that just as stipulation presupposes custom, so custom presupposes nature. Laws are not divided into natural laws, customary laws, and stipulated laws; rather, all laws have a natural, customary, and stipulated dimension.

## I

Nature, custom, and stipulation represent the three fundamental concepts of order. There is the natural order of physical, chemical, and biological processes; there is the customary order of collective and habitual human practices; and there is the stipulated order of deliberate design. The nature, custom, and stipulation trichotomy can be found in a variety of historical guises. Our three categories make their first appearance in Aristotle: “There are three things which make men good and excellent; these are nature [*physis*], habit [*ethos*], and reason [*logos*].”<sup>1</sup> In other words, morality has three dimensions: we start with our natural dispositions, we cultivate these dispositions into habits, and we reflect on our habits in order to stipulate new moral ideals for ourselves. Morality, like all social

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<sup>1</sup> *Politics* 1332a40. All Aristotle citations from *The Complete Works of Aristotle*, ed. Jonathan Barnes (Princeton: Princeton University Press, 1984).

institutions, has a natural, a customary, and a stipulated dimension. The failure to distinguish these various senses of “morality” vitiates much of what is written about the relation of morality to law: the relation of law to the tacit customary morals of a society is very different from the relation of law to stipulated moral codes.<sup>2</sup> In his exposition of Aristotle’s moral doctrine, Thomas Aquinas renders Aristotle’s trichotomy as *natura*, *consuetudo*, and *ratio*.<sup>3</sup> These are, of course, three central terms of Latin jurisprudence from Cicero to Pufendorf. In his treatise on semiotics (1632), John Poinot (John of St. Thomas) considers: “Whether the division of signs into natural [*naturale*], stipulated [*ad placitum*], and customary [*ex consuetudine*] is a sound division?”<sup>4</sup> By natural signs he means signs that relate to their objects independently of human activity—smoke is a sign of fire. By customary signs he means those signs that arise from the collective and nonreflective practices of human communities—napkins on a table are a sign that dinner is imminent. By stipulated signs he means those signs whose meaning is deliberately appointed by an individual, as when a new word is introduced. Contemporary treatments of legal semiotics, however, conflate Poinot’s crucial distinction between the customary and the stipulated meaning of signs. Glanville Williams tells us that all symbols (including all words) are stipulated;<sup>5</sup> Bernard Jackson reverts to the Sophistic dichotomy between nature and convention.<sup>6</sup> F. A. Hayek also implicitly appeals to this trichotomy in his analysis of the three kinds of order: “Yet much of what we call culture is just such a spontaneously grown order [custom], which arose neither altogether in-

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<sup>2</sup> For examples of the failure to distinguish customary from stipulated morality in relation to law, see A. P. d’Entreves, *Natural Law* (London: Hutchinson, 1970), ch. 6; H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), ch. 9; Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969).

<sup>3</sup> Thomas Aquinas, *In libros politicorum Aristotelis expositio*, ed. Raymond Spiazzi (Turin: Marietti, 1951), 381.

<sup>4</sup> John Poinot, *Tractatus de Signis*, ed. John Deely (Berkeley: University of California Press, 1985), 269. For a critique and a revision of Poinot’s doctrine of signs, see James Bernard Murphy, “Nature, Custom, and Stipulation in the Semiotic of John Poinot,” *Semiotica* (forthcoming).

<sup>5</sup> “A symbol is a conventional sign; it is a sign that is consciously designed to stand for something” (Glanville Williams, “Language and the Law-I,” *The Law Quarterly Review* 61 [1945]: 73).

<sup>6</sup> See Bernard Jackson, *Semiotics and Legal Theory* (London: Routledge and Kegan Paul, 1985), 17.

dependently of human action [nature] nor by design [stipulation], but by a process that stands between these two possibilities, which were long considered as exclusive alternatives."<sup>7</sup> In this view, custom is the product of human action but not of human design. In short, as Hans Kelsen suggests, natural law, customary law, and stipulated law refer to three conceptions of social order.<sup>8</sup>

Aristotle developed his trichotomy as a way of transcending the Sophists' dichotomy between nature and convention (*physis* and *nomos*): where the Sophists assumed that social institutions must be either natural or conventional, Aristotle suggests that institutions have a natural, customary, and stipulated dimension. Without a concept of custom, the Sophists were unable to bridge the gap between nature and stipulation. Unfortunately, the Sophistic dichotomy between nature and convention is pervasive in legal theory and has served to obscure the central role of custom as a source of legal norms. Thus Cicero defines law in terms of nature and rational stipulation: "True law [*lex*] is right reason in agreement with nature."<sup>9</sup> The Sophists defined the natural as the universal, the true, and the unchanging, while the conventional is the particular, the false, and the arbitrary. Severed from its roots in custom, legal stipulation is often seen as arbitrary and willful. In considering the various forms of constitution, Suarez notes, "Thus men are not obliged, from the standpoint of natural law, to choose any given one of these forms of government. . . . Accordingly, this whole matter turns upon human counsel and human choice [*arbitrio*]."<sup>10</sup> But surely custom plays some role in the development of constitutional

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<sup>7</sup> F. A. Hayek, "Kinds of Order in Society," in *The Politicization of Society*, ed. Kenneth Templeton, Jr. (Indianapolis: Liberty Press, 1979), 509.

<sup>8</sup> "Because, when we compare the objects that have been designated by the word 'law' by different peoples at different times, we see that all these objects turn out to be *orders of human behavior*" (Kelsen, *Pure Theory of Law*, ed. Max Knight [Berkeley: University of California Press, 1970], 31). Kelsen, however, defines the legal order not in terms of stipulation but in terms of coercion.

<sup>9</sup> "Est quidem vera lex recta ratio naturae congruens . . ." (Cicero, *De Re Publica*, ed. Clinton Keyes [Cambridge: Harvard University Press, 1928], III, 21.33). Similarly, Cicero often contrasts natural justice with civil justice; see I, 17.27 and III, 8.13.

<sup>10</sup> Francisco Suarez, *De Legibus ac Deo Legislatore*, in *Selections From Three Works*, ed. J. B. Scott (Oxford: Clarendon Press, 1944), III, 4.1.

norms. Nor is this simply an academic quibble: the rise of the absolute monarchs in the early modern era was justified and facilitated by this dubious distinction between natural necessity and arbitrary stipulation. Otto Gierke sees a relation between the rise of modern natural law theory and modern absolutism: "The reverse side of this exaltation of Natural Law we may see in the doctrine of the absolute subjection of Positive Law to the Sovereign Power."<sup>11</sup> Hobbes's *Leviathan* shows nicely how compatible natural law and arbitrary absolutism are—in the absence of the constraints of custom. Similarly, Pufendorf divides the universe into natural entities and moral entities: nature is governed by necessity, while the moral and legal realms are governed by arbitrary stipulation (*arbitrio*).<sup>12</sup> Finally, Kelsen contrasts the natural necessity of "what is" with the arbitrary stipulation of the one who wills "what ought to be."<sup>13</sup> The use of the Sophistic antithesis between nature and stipulation in both natural law theory and positivist legal theory, by undermining the authority of custom, incessantly leads to the hazards of arbitrary stipulation.

Nature, as the set of physical, chemical, and biological processes, is a set of possibilities to be selected by custom and stipulation. The plasticity of nature is a function of how we selectively use these natural laws; the constraint of nature is a function of the limits of compossibility in our selection of a set of laws. J. S. Mill captures this sense of nature as a set of possibilities:

Though we cannot emancipate ourselves from the laws of nature as a whole, we can escape from any particular law of nature, if we are able to withdraw ourselves from the circumstances in which it acts. Though we can do nothing except through the laws of nature, we can use one law to counter-act another.<sup>14</sup>

All human activities are subject to natural causal laws, but, to a considerable extent, custom and stipulation select which causal laws govern a particular activity. Customary and legal justice can be

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<sup>11</sup> Otto Gierke, *Political Theories of the Middle Age*, ed. Frederic W. Maitland (Cambridge: Cambridge University Press, 1938), 76.

<sup>12</sup> Samuel Pufendorf, *De Jure Naturae et Gentium*, ed. C. H. Oldfather, et al. (Oxford: Clarendon Press, 1934), I, 1.4.

<sup>13</sup> Kelsen, *Pure Theory of Law*, 3-5.

<sup>14</sup> J. S. Mill, "Nature," in *Three Essays On Religion* (New York: Greenwood Press, 1969), 7.

based on sheer biological strength: "might makes right"; or justice can be based on the instinct of vengeance: "lex talionis"; or on the biological differences between the sexes, as in patriarchy; or on natural genetic relations of family and clan; or on the natural human cognitive ability to form universal concepts, such as human equality. Each of these forms of justice is equally natural, but each makes use of a different natural potentiality. Nature plays many different roles in the various historical conceptions of justice, but custom and stipulation select the particular role for nature.

Natural law theory has tended to confuse the potentialities of nature with the commands of nature. This is why there have been so many versions of natural law. But within natural law theory one can find an implicit acknowledgement of the view that nature represents a set of possibilities to be selected by custom and stipulation. Thomas Aquinas, for example, acknowledges that natural law evolves historically. Many things have been added to natural law, he says, "by divine law as well as by human laws, which are beneficial to social life"; in the case of the secondary principles of natural law, something that was once natural law can later cease to be so.<sup>15</sup> Ernest Barker argues that every society or state has a unique set of natural potentialities based on the physical characteristics of its people and territory: "Society and the State, whatever they are in themselves, have a biological basis. . . . This basis will necessarily react upon that which is built upon it; and to understand fully any particular State or Society we must therefore study this basis."<sup>16</sup> Lon Fuller argues that natural law evolves with our understanding of the possibilities of nature: "our notions of what is in fact impossible may be determined by presuppositions about the nature of man and the universe, presuppositions that are subject to historical change."<sup>17</sup> Fuller develops a set of eight principles required for the efficacy of any legal system and compares these principles to the physical laws governing the efficacy of carpentry: "They are like the natural laws of carpentry or at least those laws respected

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<sup>15</sup> *Summa Theologiae*, 61 vols., ed. Thomas Gilby (Cambridge: Blackfriars, 1964), I-II, q. 94, art. 5.

<sup>16</sup> Ernest Barker, "Introduction," in *Natural Law and the Theory of Society 1500-1800*, by Otto Gierke (Cambridge: Cambridge University Press, 1958), xxviii.

<sup>17</sup> Fuller, *The Morality of Law*, 79.

by a carpenter who wants the house he builds to remain standing and serve the purpose of those who live in it.”<sup>18</sup> The comparison is apt because the natural laws that govern carpentry are a set of potentialities selected by the customs and stipulated rules of the carpenter. These natural laws evolve with the development of our knowledge of nature and technique.

Custom must be carefully distinguished from natural habit on the one side and from law on the other. Individuals have habits but not customs. Rather, individuals participate in customs. Customs are social patterns of behavior with normative import; customs are rooted in individual habit, but they reside in the collectivity. Customs cannot exist apart from habits, but idiosyncratic habits can exist apart from customs. The relation between individual habit and social custom is reciprocal: “Habits create customs and customs create habits.”<sup>19</sup> Customs are an indissoluble unity of empirical fact and normative value, and they demand conformity simply by being customs.<sup>20</sup> Customs, unlike mere habits, are obligatory because they signify membership in a community. Since even the most trivial activities can signify community, customs are experienced as binding.

Customs differ from laws because customs are a creation of collective and nonreflective behavior: “The mores are social rituals in which we all participate unconsciously.”<sup>21</sup> Customs, in short, do not have an author:

Whereas law is often *made*, and is always *applied*, by the definite power of the state, custom is a group procedure that has gradually emerged, without express enactment, without any constituted authority to declare it, to apply it, to safeguard it. Custom is sustained by common acceptance.<sup>22</sup>

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<sup>18</sup> Fuller, *The Morality of Law*, 96.

<sup>19</sup> R. M. MacIver and Charles Page, *Society* (London: Macmillan, 1950), 189.

<sup>20</sup> “The notion of right is in the folkways. It is not outside of them, of independent origin, and brought to them to test them. In the folkways, whatever is, is right” (W. G. Sumner, *Folkways* [Boston: Ginn and Co., 1906], 28).

<sup>21</sup> *Ibid.*, 62.

<sup>22</sup> MacIver and Page, *Society*, 176. As John Finnis says, “Custom is not *made* in the full sense of ‘made’—for making is something that someone can set himself to do, but no one sets himself to make a custom” (John



Every person who participates in a custom unconsciously modifies it. The evolution of languages is the best example of such collective and unconscious usage. Yet despite the clear distinction between law and custom, legal theorists continue to use the oxymoron "customary law."<sup>23</sup>

Law is always the product of deliberate stipulation by an individual mind or by a legislature acting as one mind.<sup>24</sup> The transition from custom to stipulation has two related features: the habitual custom becomes the object of reflection; and the social system of custom becomes reduced to a synoptic perspective. The linguist stipulates a grammar both by reflecting on the customary use of language and by reducing the social system of language to a unitary perspective. The grammarian, the legislator, the engineer, all strive deliberately to unify the social system of custom. Law is used to enforce customs, to modify customs, to create new customs, and to negate customs; but in every instance, law presupposes the existence of the order of custom. "All institutions (including legal institutions) develop customs. Some customs, in some societies, are re-institutionalized at another level: they are restated for the more precise purposes of legal institutions."<sup>25</sup> John Austin had already described this restatement whereby custom becomes law: "The custom is transmuted into positive law, when it is adopted as such by the courts of justice, and when the judicial decisions fashioned upon it are enforced by the power of the state."<sup>26</sup>

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Finnis, *Natural Law and Natural Rights* [Oxford: Oxford University Press, 1980], 277).

<sup>23</sup> See, for example, Carleton K. Allen, *Law in the Making* (Oxford: Clarendon Press, 1964), 68, 126, 147, 155; Kelsen, *Pure Theory of Law*, 216, 226, 254, 294; Fuller, *The Morality of Law*, 232-3; Roberto Unger, *Law in Modern Society* (New York: Free Press, 1976), 49. Max Weber, however, acknowledges that "customary law" is "not a very useful concept" (Weber, *Economy and Society*, ed. Guenther Roth and Claus Wittich [Berkeley: University of California Press, 1978], 319).

<sup>24</sup> Thus we speak of the "will of the Congress"; and even stipulated legislation that is the product of collective debate usually has an individual author.

<sup>25</sup> Paul Bohannan, "The Differing Realms of the Law," in *The Ethnography of Law*, ed. Laura Nader (*American Anthropologist*, 67, no. 6[1965]), 35.

<sup>26</sup> John Austin, *The Province of Jurisprudence Determined*, ed. H. L. A. Hart (New York: Humanities Press, 1965), 31. Austin, however, goes

What makes law different from other species of stipulated order? When a grammarian stipulates the rules of linguistic usage, he does not make laws except in a metaphorical sense. Thus Suarez points out that if customs are stipulated by someone lacking legal authority, these customs remain as customs; "if, however, custom be reduced to writing by one who has authority to establish law, it ceases to be custom. . . ." <sup>27</sup> Law is that form of stipulation articulated and enforced by governmental officials. Every stipulated code has some attribute of authority, but it is "the law that alone in modern society has behind it the authority of unconditional enforcement. . . . The rules of associations other than the state are conditional on membership. . . . The legal rules are coercive in a wider sense; their sanction cannot be evaded by the sacrifice of membership." <sup>28</sup>

Yet before law or grammar can be stipulated, custom must be brought to conscious awareness. Customs are unreflective routines and only obstacles to such routines can create the occasion for reflection. "Reflection is the painful effort of disturbed habits to readjust themselves." <sup>29</sup> Legal stipulation is the attempt to resolve conflict within the realm of custom. "Custom begins to be law when it is brought into dispute and some means is provided for declaring or recognizing its obligatory character." <sup>30</sup> The resolution of disputes in nonlegal institutions leads to substantive law; the resolution of disputes in legal institutions leads to procedural law. "Law arises in the breach of a prior customary order and increases in force with the conflicts that divide political societies internally and among themselves." <sup>31</sup> Nothing creates more of a breach in the order of

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on to make the curious statement that before custom is positive law it is positive morality. Yet custom is not positive, that is, stipulated, at all. Custom can, no doubt, be stipulated into a positive moral code.

<sup>27</sup> Suarez, *De Legibus*, VII, 2.3.

<sup>28</sup> MacIver and Page, *Society*, 175.

<sup>29</sup> John Dewey, *Human Nature and Conduct* (New York: Modern Library, 1957), 71.

<sup>30</sup> *Encyclopedia of the Social Sciences*, 1930 ed., s. v. "Customary Law," by C. S. Lobingier. "Legal institutions—and often they alone—must have some regularized way to interfere in the malfunctioning (and, perhaps, the functioning as well) of the nonlegal institutions in order to disengage the trouble-case" (Paul Bohannon, "The Differing Realms of the Law," 35).

<sup>31</sup> Stanley Diamond, "The Rule of Law vs. the Order of Custom," *Social Research* 51 (Spring 1984): 417.

custom than war, which is why war so often promotes the development of law.<sup>32</sup>

Once custom becomes the object of reflection, legal stipulation imposes a synoptic unity: all law has an author—whether a judge, a sovereign, or a legislature. The definition of law as stipulation transcends the false dichotomy presupposed in the debate about whether law pertains essentially to reason or will, for stipulation is the indissoluble unity of reason and will. As Suarez says, “Law is a thing which pertains to the intellectual nature as such, and accordingly, to the mind thereof; both intellect and will being included under the term ‘mind’.”<sup>33</sup> No theorist has emphasized the synoptic unity of law more than Hans Kelsen. For Kelsen, all laws form a logical system of presupposition and entailment leading back to a fundamental axiom, or *Grundnorm*; this synoptic unity is the product of the totalizing quest of individual legal minds.<sup>34</sup> The author of law is what Kelsen terms an “organ of the community”: the judge or legislator who acts as the mind of the body politic by imposing logical order to the customary norms of action. “One speaks of ‘organs’ creating general legal norms and of ‘organs’ applying the law only if an individual or an assembly of individuals has been called to the function of legislation and if certain individuals have been called to the function of applying the law as judges.”<sup>35</sup> The

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<sup>32</sup> “It follows that war and warlike expansion have at all stages of historical development often been connected with a systematic fixation of the law both old and new” (Max Weber, *Economy and Society*, 771).

<sup>33</sup> Suarez, *De Legibus*, I, 4.2. Mortimer Adler also sees this unity: “It belongs to the nature of a law for its rules to be *formulated* by ordinations of reason and *instituted* by acts of will” (Adler, “A Question About Law,” in *Essays in Thomism*, ed. Robert Brennen [New York: Sheed and Ward, 1942], 236).

<sup>34</sup> “Since the basic norm is the reason for the validity of all norms belonging to the same legal order, the basic norm constitutes the unity of the multiplicity of those norms” (Kelsen, *Pure Theory of Law*, 205). This synoptic unity need not be a function of will: “The moment in fact that we conceive of the legal order as a construction in degrees—a *Stufenbau*, as Kelsen puts it—in which every legal proposition derives its validity from the step that precedes it; the moment, in other words, we conceive the whole legal system as merely a system of reciprocal coherence and implication—that moment indeed we shall have no need or use for a ‘will’ to set as it were the whole system in motion” (d’Entreves, *Natural Law*, 125).

<sup>35</sup> Kelsen, *Pure Theory of Law*, 155. For Kelsen’s view that judges create legal norms just as do legislatures, see 238 and 255.

quest for synoptic unity in legal stipulation makes use of two fictions: the infallibility of the legislated code and the perfect integrity of precedent. The *Corpus Iuris Civilis* embodies this fictive claim to perfect coherence and completeness: in order to deal with new situations, Roman legalists developed two types of legal analogy—the *analogia legis* and the *analogia iuris*—to accommodate the anomalous while preserving the fiction of the perfection of the code.<sup>36</sup> English common law contains the assumption that the body of precedence has the synoptic coherence and completeness of a code produced by a single author. “It is taken absolutely for granted that there is somewhere a rule of known law which will cover the facts of the dispute now litigated, and that, if such a rule be not discovered, it is only that the necessary patience, knowledge, or acumen is not forthcoming to detect it.”<sup>37</sup> Contrary to Holmes’s dictum, law is forever torn between logic and life, between the quest for synoptic logical unity and the articulation of living, ever-changing custom.

## II

The distinction between law and jurisprudence is the distinction between first-order and second-order stipulation. First-order stipulation is the articulation of customary norms into rules; second-order stipulation is the articulation of principles governing the rules generated in first-order stipulation. “In the ordinary terminology of jurisprudence, the interpreters of custom are generically described as *jurists*, their science, to adopt a convenient German term, as *Juristenrecht*.”<sup>38</sup> In physics, this is the distinction between the specific laws of motion and the general principle of the conservation of energy. Linguists distinguish between the grammar of a language and the principles of syntax which govern all grammars. Although law is sometimes compared to language, law is actually analogous not to customary language usage, but to grammar, just as jurispru-

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<sup>36</sup> See Leopold Pospisil, *The Ethnology of Law* (Menlo Park: Cummings Publishing, 1978), 18.

<sup>37</sup> Henry Sumner Maine, *Ancient Law* (New York: Dorset Press, 1986), 26.

<sup>38</sup> Allen, *Law in the Making*, 112.

dence is analogous to linguistic science.<sup>39</sup> The law refers to those first-order rules of conduct that can only be stipulated by legal officials; jurisprudence refers to those second-order principles that govern laws and that can be stipulated by anyone knowledgeable about the law. Typically, law and jurisprudence are mingled in legal codes and in judicial decisions, and those who stipulate laws are often the same persons who stipulate the principles of jurisprudence. But the rules of law and of jurisprudence are quite distinct, as is evident when one considers the different sanctions associated with their breach.

Law and jurisprudence were gradually distinguished by a long and arduous historical path that runs parallel to the path whereby grammar and linguistics were distinguished. Jurisprudence derives from the *regulae iuris* of Roman law. *Regula* is Cicero's rendering of the Greek *kanon*, which was a term of the ancient grammarians used to describe a rule of declension or conjugation. Just as *kanones* were rules of grammar, so originally *regulae* were rules of law. Cicero defines *lex* as a *regula*.<sup>40</sup> Peter Stein carefully documents the uncertain historical path whereby the *regulae iuris* evolved from rules of law to rules of jurisprudence.<sup>41</sup> The jurist's methods of analogy and anomaly derive from the grammarian's methods for classifying rules of conjugation. This is not surprising since all Roman lawyers were trained in the *ars grammatica*. The jurist Paulus (c. 200) defined a *regula* as a summary explanation of law: "*regula* is that by which the law is briefly expounded."<sup>42</sup> Gradually

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<sup>39</sup> d'Entreves overlooks the distinction between first- and second-order stipulation, causing him to wrongly equate law and language: "The parallel between law and language is ready to hand, as well as the comparison of jurisprudence and grammar" (*Natural Law*, 102).

<sup>40</sup> Cicero defines *lex* as "iuris atque iniuriae regula" in *De Legibus*, ed. Clinton Keyes (Cambridge: Harvard University Press, 1928), I, 19. Aquinas concurs: "lex est regula et mensura humanorum actuum" (*Summa Theologiae* I-II, q. 96, art. 1).

<sup>41</sup> See Peter Stein, *Regulae Iuris* (Edinburgh: Edinburgh University Press, 1966).

<sup>42</sup> Paulus: "Regula est quae rem quae est breviter enarrat. Non ex regula ius sumatur, sed ex iure quod est regula fiat" (*Digest*, 50.7.1). As Peter Stein explains: "So a *regula* which *enarrat* does not merely summarize the law; it brings out its hidden significance and gives it a certain tendency . . . Varro declared that *enarratio* was one of the four *officia* of grammar (the others being *lectio*, *emendatio*, and *iudicium*) . . ." (*Regulae Iuris*, 67-72).

the *regulae iuris* became understood as principles of jurisprudence as opposed to rules of law.<sup>43</sup> Still, the distinction between a rule of law and a rule of jurisprudence was not clearly expressed until François Hotman (1524–1590): “a *lex* is what the people has decisively laid down as law; a *regula* is a generalization which jurists have elicited from a number of *leges* by comparing their provisions and noting their similarities.”<sup>44</sup> But this careful distinction was soon blurred. Blackstone identified the maxims of jurisprudence with the rules of law. According to Stein, Blackstone was led “to suggest that the law itself had the orderliness and simplicity of the maxims. Moreover, the maxim made the common law appear to be identical with the inevitable laws of human nature.”<sup>45</sup>

Once we see the profound distinction between the nature of law and the nature of jurisprudence, we can see the fundamental non-sequitur at the heart of positivist legal theory. The positivists begin with the correct premise that all law is stipulated or posited; but the positivists then wrongly conclude that jurisprudence must be limited to the study of positive law. As Austin says: “The science of jurisprudence (or, simply and briefly, jurisprudence) is concerned with positive laws, or with laws strictly so called, as considered without regard to their goodness or badness.”<sup>46</sup> But the fact that laws are essentially stipulated has no bearing on the scope of the jurisprudential explanation of law: indeed, to explain the origin, intention, and efficacy of any positive law we must begin by describing the custom that it will enforce, modify, or negate. We need to know further what natural capacities will be required to comply with the law; the law cannot impose the same duties or penalties on children as it does on adults or on the mentally deficient as it does on the competent. Jurisprudence, in short, is centrally concerned with nature, custom, and stipulation; for we cannot explain stipulation except in terms of nature and custom. Jurisprudence, then, must incorporate the findings of those disciplines which study nature and custom: environmental law, for example, makes use of

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<sup>43</sup> “Regula Iuris: An abstract legal principle of a more general nature. . . . Therefore the rule itself does not create law.” *Encyclopedic Dictionary of Roman Law*, 1953 ed., s. v. “Regula Iuris.”

<sup>44</sup> François Hotman, *Novus Commentarius de verbis iuris*, 1563, s.v. “regula,” paraphrased in Stein, *Regulae Iuris*, 172.

<sup>45</sup> Stein, *Regulae Iuris*, 176.

<sup>46</sup> Austin, *The Province of Jurisprudence Determined*, 126.

chemistry, biology, and ecology; criminal law makes use of psychology; civil rights law makes use of sociology and history; tort law makes use of economics.

Cicero was well aware that jurisprudence transcends the law in depth and breadth: "Then you do not think that the science of law [*disciplina iuris*] is to be derived from the praetor's edict, as the majority do now, or from the Twelve Tables, as people used to think, but from the deepest mysteries of philosophy?"<sup>47</sup> Indeed, the genius and universality of the *Corpus Iuris Civilis* lay precisely in the philosophical (that is, interdisciplinary) scope of Roman jurisprudence.<sup>48</sup> "Natural law" in the *Corpus Iuris Civilis* does not constitute a code of positive law; rather, natural law is a heuristic principle of jurisprudence. The Roman jurists sought to give the explication and interpretation of law the same order and simplicity as was found in the Stoic conception of nature—natural jurisprudence was modelled on natural philosophy. "The ideas of simplification and generalization had always been associated with the conception of Nature; simplicity, symmetry, and intelligibility came therefore to be regarded as the characteristics of a good legal system. . . ."<sup>49</sup> It is precisely this conception of jurisprudence that is rejected by Hans Kelsen. Kelsen emphatically asserts and extends Austin's view that jurisprudence must be coextensive with positive law.

It is called a "pure" theory of law, because it only describes the law and attempts to eliminate from the object of this description everything that is not strictly law: Its aim is to free the science of law from alien elements. This is the methodological basis of the theory.<sup>50</sup>

Kelsen goes on to explain that a "pure" jurisprudence will not be contaminated with elements of psychology, sociology, ethics, and political theory.

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<sup>47</sup> Cicero, *De Legibus*, I, 5.17.

<sup>48</sup> "Iurisprudentia: Defined as 'the knowledge of divine and human matters, the knowledge of what is just and what unjust'. Iurisprudentia is synonymous with *iuris scientia*: it is knowledge of the law in the broadest sense of the word, the science of the law" (*Encyclopedic Dictionary of Roman Law*, s. v. "Iurisprudentia").

<sup>49</sup> Maine, *Ancient Law*, 47. "I know no reason why the law of the Romans should be superior to the laws of the Hindoos, unless the theory of Natural Law had given it a type of excellence different from the usual one" (*Ancient Law*, 64).

<sup>50</sup> Kelsen, *Pure Theory of Law*, 1.

Kelsen's notion of jurisprudence is vulnerable to criticism on two counts. First, he accepts Austin's conflation of law and jurisprudence. Just because all law is stipulated it does not follow that jurisprudence be limited to stipulation, for stipulation presupposes nature and custom.<sup>51</sup> Second, if Kelsen has effaced an important distinction, then, as a consequence we should expect to find serious distortions in his legal theory. We find such distortions in abundance. Since Kelsen's jurisprudence is limited to one category, stipulation, it follows that custom must be a form of stipulation. Thus, he says, customs are "posited" or "positive norms"; customary obligations are "commanded"; customary norms are "created by an act of will"; indeed, "custom could be attributed to the state just as much as legislation."<sup>52</sup> Kelsen's insistence that all legal theory can be forced onto the procrustean bed of stipulation leads him to the view that "any kind of content might be law. There is no human behavior which, as such, is excluded from being the content of a legal norm."<sup>53</sup> Yet once we understand how stipulation presupposes nature and custom, we can see how absurd is this view that law is perfectly arbitrary. Kelsen himself admits in another place that nature constrains the content of law, since law must be on the whole efficacious, and obviously custom places much more profound and far-reaching constraints upon the content of law—if law must have "the possibility of causal effectiveness."<sup>54</sup> In the end, Kelsen's attempt to limit jurisprudence to the notion of stipulation undermines his definition of the law; by effacing the distinction between law and custom, Kelsen obscures the concept of law itself.

Although the distinction between law and jurisprudence became explicit only in modern times, I will show that this distinction has long been implicit in the contrast between *lex* and *ius*, *loi* and *droit*, *Gesetz* and *Recht*. The English "law" conflates this distinction between an instance of law (*lex*) and the concept of law (*ius*), between

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<sup>51</sup> Indeed, Kelsen claims that because the "nature" of law is stipulation, the "essence of the science of law" must be the same (*Pure Theory of Law*, 1). The notion that a science has an "essence" betrays Kelsen's confusion between law as an object of inquiry and jurisprudence as the explanation of law. All actual natural and social sciences borrow freely from other disciplines and are thus radically "impure."

<sup>52</sup> See *Pure Theory of Law*, 9, 114, 196, 294.

<sup>53</sup> *Ibid.*, 198.

<sup>54</sup> *Ibid.*, 95.



legal reality and legal theory, between *a* law and *the* law. Ulpian cites Celsus's definition of *ius* as "the art of goodness and fairness [*ius est ars boni et aequi*]." <sup>55</sup> In other words, *ius* is jurisprudence. As such, *ius* is divided into three departments: *ius naturale*, *ius gentium*, and *ius civile*. These three terms do not refer to three different codes of stipulated law. They refer implicitly to three heuristic principles for explaining law: law has a natural dimension, a customary dimension, and a stipulated dimension. The *Digest* does not use the expressions *lex naturalis*, *lex gentium*, and *lex civilis*, for *lex* is restricted to statutes and, as such, is but one department of the *ius civile*, which includes decrees and judicial decisions. <sup>56</sup> The *Digest* also carefully distinguishes *lex* from custom (*mos* and *consuetudo*) while custom is said to be a kind of *ius*, for custom is not stipulated law, but a category of jurisprudence. <sup>57</sup> "The primary meaning of *lex* is that of statute law. . . . Statutes are designated by the gentile name of the proposer . . ." <sup>58</sup> Thus a *lex*, being stipulated, is designated by its author. The *ratio iuris*, the logic of the law as a whole, was distinguished from the *ratio legis*, the intention behind a statute; similarly, the *analogia iuris*, an analogy from the spirit of the law as a whole, was distinguished from the *analogia legis*, an analogy from a specific statute. Bentham has the distinction between statute law and jurisprudence in mind when he says of the commentaries on the common law: "They contain *jus* indeed but not *leges*: *le droit*, but not *des loix*." <sup>59</sup> Indeed, the science of law is called *iurisprudentia*, not *legumprudentia*. Kelsen's pure theory of law is thus the attempt to reduce *iurisprudentia* to *legumprudentia*.

Over time the Roman distinction between law (*lex*) and jurisprudence (*ius*) became blurred. Isidore (d. 636) refers to this distinction when he says that *ius* is the genus and *lex* is a species of

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<sup>55</sup> *The Digest of Justinian*, Latin text ed. Theodor Mommsen and Paul Krueger, trans. Alan Watson (Philadelphia: University of Pennsylvania Press, 1985), I, 1.1. Suarez comments: "This definition would be suited, not so much to *lex* itself, as to *iurisprudentia*" (*De Legibus*, I, 2.6).

<sup>56</sup> See *The Digest of Justinian*, I, 1.1-1.7.

<sup>57</sup> *Ibid.*, I, 1.9; I, 3.32; I, 3.37.

<sup>58</sup> *Encyclopedic Dictionary of Roman Law*, s. v. "lex." Cicero seems to have correctly derived *lex* from *legere* ("to read"); since the ancients read aloud, *lex* means to declare or stipulate. See Stein, *Regulae Iuris*, 9-10.

<sup>59</sup> Jeremy Bentham, *Of Laws in General*, ed. H. L. A. Hart (University of London: The Athlone Press, 1970), 13.3.

*ius*. He divides *ius*, not *lex*, into *naturale, civile, gentium*.<sup>60</sup> Thomas Aquinas, however, divides *lex* into *lex aeterna, lex naturalis, lex humana*, and *lex divina*. He divides *ius* into *naturale, gentium*, and *civile*. Thus Aquinas treats *ius naturale* as synonymous with *lex naturalis*.<sup>61</sup> In Roman jurisprudence *lex* refers only to a positive statute, so that a *lex naturalis* would be incomprehensible.<sup>62</sup> Aquinas has thus confused law with jurisprudence: nature is a principle of legal explanation, nature cannot stipulate law. Where Kelsen wrongly confined jurisprudence to law, Aquinas wrongly extends law to nature.<sup>63</sup> Despite their fundamental incoherence, Aquinas's *lex naturalis* and *lex naturae* were adopted by a host of legal theorists from Suarez to Hobbes to Grotius to Pufendorf to Locke.<sup>64</sup> The notion of a law of nature was first attacked by Bentham, who refers to "laws of nature, and other fictitious entities."<sup>65</sup> The conceptual incoherence of natural law is best described by Kelsen: "From the point of view of science, nature is a system of causally determined elements. Nature has no will and therefore cannot enact norms."<sup>66</sup>

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<sup>60</sup> Isidore of Seville, *Etymologiarum Sive Originum*, ed. W. M. Lindsay (Oxford: Clarendon Press, 1911), V, 3 and 4.

<sup>61</sup> *Summa Theologiae* I-II, q. 91 and II-II, q. 57.

<sup>62</sup> "The phrase 'lex naturalis' is just as violent a conflict of meanings as the Greek combination of *physis* and *nomos* would be" (Adler, "A Question About Law," 410n.). This comment needs qualification: after the Stoa, *physis* and *nomos* were joined in Greek thought and the Sophistic antithesis became rendered as *physis* and *thesis*.

<sup>63</sup> Aquinas's definition of the essence of law seems consistent with the notion of stipulated law: "*Lex* is nought else than an ordinance of reason for the common good made by the authority who has care of the community and promulgated" (*Summa Theologiae* I-II, q. 90, art. 4). It is thus curious that Aquinas takes *lex aeterna* to be the primary analogue of *lex*, since the eternal law is neither imperative nor promulgated; see Thomas Gilby's note on *Summa Theologiae* I-II, q. 93, art. 1. Mortimer Adler argues that Aquinas's extension of this definition to *lex aeterna* and *lex naturalis* may be interpreted as merely an analogy with true positive *lex*; see Adler, "A Question About Law," 233.

<sup>64</sup> Suarez explicitly states that he will use *lex* and *ius* as synonyms (*De Legibus*, I, 2.7). Grotius for the most part uses *ius naturale*, but sometimes *lex naturalis*.

<sup>65</sup> Bentham, *Of Laws in General*, 1.2n. Bentham, it should be noted, also denied that judicial opinions constitute law.

<sup>66</sup> *Pure Theory of Law*, 221. Divine law stipulated by God is fully consistent with the positivist definition of law, which is why God is so often described as the author of natural law. Natural law for the most part is treated as a mode of divine law.

The positivist insistence that all law is stipulated is acknowledged now even in Thomistic circles. Mortimer Adler argues that the word "law" is used univocally of positive law and equivocally of natural law: "No harm would be done, and some clarity might be achieved, if the word 'law' were used only to signify the rules of positive law, and never the principles of natural law."<sup>67</sup> Thomas Gilby agrees that Aquinas's use of the term law is analogical: "Neither the eternal law nor the natural law are proper concepts of positive legal science."<sup>68</sup> Even John Finnis, in a major recent defense of natural law theory, concedes: "'Natural law'—the set of principles of practical reasonableness in ordering human life and human community—is only analogically law. . . ."<sup>69</sup>

A parallel confusion between law and jurisprudence can be seen in the historical process whereby the *ius consuetudine* of Roman jurisprudence became the *lex consuetudinis* of modern legal theory. Because the Romans restricted *lex* to a statute, the notion of a *lex consuetudinis* would be as incomprehensible as a *lex naturalis*. According to Roman legal theory, *ius consuetudine* has validity only *cum deficit lex*.<sup>70</sup> The jurisprudential study of the interplay between custom and law is impossible if there is a *lex consuetudinis*.<sup>71</sup> Custom, like nature, is a category of jurisprudence and not a code of law.

We can now see a basis for reconciliation between the three schools of legal theory: natural law theorists acknowledge the truth of the claim that law is essentially stipulated, but positivists must also acknowledge that nature and custom are fundamental categories of jurisprudence, and the historical school must likewise distinguish custom as a principle of jurisprudence from law proper. John Aus-

<sup>67</sup> Adler, "A Question About Law," 211 and 234.

<sup>68</sup> See Gilby's notes to *Summa Theologiae* I-II, q. 91, art. 1.

<sup>69</sup> Finnis, *Natural Law and Natural Rights*, 280.

<sup>70</sup> Thus Cicero contrasts *ius consuetudine* with *lex*: "Customary law [*ius consuetudine*] is thought to be that which lapse of time has approved by the common consent of all without the sanction of statute [*lex*]" (*De Inventione*, ed. H. M. Hubbell [Cambridge: Harvard University Press, 1976], II, 67).

<sup>71</sup> Suarez may be credited with introducing the expression *lex consuetudinis* to legal theory; see *De Legibus*, VII, 2.1 and 14.5. Hobbes rightly noted, however, that "*Consuetudo* by its own force doth not constitute *lex*" (*De Cive*, ed. H. Warrender [Oxford: Clarendon Press, 1983], 14.15).

tin does in fact outline a positivist theory of nature and custom. Austin sees that custom, for example, is a cause of positive law, but that custom does not become law until it is stipulated.<sup>72</sup> Similarly, Austin sees that nature is a cause of law without there being a natural law: "It is true that the instincts of the animal man, like many of his [customary] affections which are not instinctive, are amongst the causes of law in the proper acceptation of the term."<sup>73</sup> Thus jurisprudence is concerned with the natural and customary causes or sources of law, while law proper is always stipulated. "But nothing can be more absurd than ranking with laws themselves the causes which lead to their existence."<sup>74</sup> Adler adopts this distinction as a way of reconciling natural law and positive law: "As medicine or exercise is called healthy as a cause of the body's health, so natural law is called law as a cause of legality in the enactments of human legislators."<sup>75</sup> Kelsen, as we have seen, also acknowledges the role of nature and custom in the explanation of law. Legal behavior takes place in space and time and is thus subject to the constraints of natural causality. Since law must have the possibility of efficacy, it cannot mandate the impossible: "lex non cogit ad impossibilia." The legally normative presupposes natural causation: "is" and "ought" cannot be contradictory.<sup>76</sup> Similarly, norms are created by

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<sup>72</sup> Austin, *The Province of Jurisprudence Determined*, 31. C. K. Allen, unfortunately, blurs Austin's clear distinction between law and custom: "The Austinian doctrine that custom is in no sense 'law' until a court or statute has ratified it, is too rigid and presents only part of the truth . . ." Allen reverts to the oxymoron "customary law"; see *Law in the Making*, 128.

<sup>73</sup> Austin, *The Province of Jurisprudence Determined*, 177. Austin continues: "More especially, the laws regarding the relation of husband and wife, and the laws regarding the relation of parent and child, are mainly caused by the instincts which Ulpian particularly points at. And that, it is likely, was the reason which determined this legal oracle [Ulpian] to class the instincts of animals with laws imperative and proper." Austin's claim here that Ulpian has confused natural instinct with law is unfounded, since Ulpian used the expression *ius naturale* and never *lex naturalis*; see *ibid.*, 177.

<sup>74</sup> *Ibid.*, 177.

<sup>75</sup> Adler, "A Question About Law," 229. He also states: "The rules of positive laws are laws. The propositions of natural law are not laws. They are only principles, sources, or foundations, of law" ("A Question About Law," 234).

<sup>76</sup> Kelsen, *Pure Theory of Law*, 12, 94-98.

custom: "Custom may create moral or legal norms."<sup>77</sup> Yet despite these explicit acknowledgments of the role of nature and custom in the creation of law, Kelsen insists: "According to a positivistic theory of law, the source of law can only be law."<sup>78</sup> Since the question of the source of law is a matter of jurisprudence, Kelsen is tangled in his confusion between the positive essence of law and positivist jurisprudence. That law is positive in no way implies that it is to be explained only with reference to stipulation.

The fundamental claim of positivist jurisprudence is that law is to be explained simply as a function of being "posited" or willed by the law-giver; law deriving thus from the will (*arbitrio*) of the sovereign is thus taken to be essentially arbitrary. In practice, as we have seen, positivist theorists make use of nature and custom to explain the content of law. But we should examine for a moment the claim that law can be explained solely as a function of the arbitrary will of the sovereign. I will try to outline an approach to legal semiotics which will show that, as Hume put it, "Though the rules of justice be *artificial*, they are not *arbitrary*."<sup>79</sup>

Legal semiotics from Hobbes to Glanville Williams and Bernard Jackson has employed Aristotle's definition of the sign: "Now spoken sounds are symbols [*symbola*] of affections in the soul, and written marks symbols of spoken sounds."<sup>80</sup> In short, written laws are signs of spoken commands which are in turn signs of the mental intention of the law-giver. Although many theorists have defined law as essentially written in contrast to unwritten custom, legal semiotics has taken the more general view that any sign manifesting the will of a superior is law. Thus Suarez defines law as "a sign making sufficiently manifest the will or the thought of the prince." Suarez adds that such a sign might be written or oral.<sup>81</sup> From a semiotic perspective, written law must not be confused with law *per se*, since writing is only one of several sign-systems capable of manifesting the will of the sovereign. Hobbes accepts Aristotle's claim that law is essentially written, but then Hobbes defines written law as any

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<sup>77</sup> *Pure Theory of Law*, 9.

<sup>78</sup> *Ibid.*, 233.

<sup>79</sup> David Hume, *A Treatise on Human Nature*, ed. L. A. Selby-Bigge (Oxford: Oxford University Press, 1978), I, 2.1.

<sup>80</sup> Aristotle, *On Interpretation* 16a2.

<sup>81</sup> Suarez, *De Legibus*, I, 4.4.

external sign of the will of the legislator whether in speech or in writing; Hobbes describes unwritten law as “the voice of nature, or naturall reason.”<sup>82</sup> Bentham similarly defines law as “an assemblage of signs expressive of an act of the will.” He even argues that the gesture of the sovereign is capable of positing law. Bentham denies that customary or common law is truly law since it does not make manifest the sovereign will: “English judges neither hand up their laws, nor publish them.”<sup>83</sup> For Glanville Williams, laws signify rights and duties: “Rights and duties are mental states, but they are not states of mind of the subjects of rights and duties; they are states of mind of the persons asserting legal rules.”<sup>84</sup>

Legal semiotics seems to bolster positivist jurisprudence, since whenever theorists have asked “What is law a sign of?” the answer has usually been “Law is a sign of the will or thought of the law-maker.” In legal semiotics, explanation tends to stop when we reach the mysterious “will of the sovereign.” Yet we need to press on and ask “What is the will of the sovereign a sign of?” In order to ask this question, however, we need to adopt the Scholastic distinction between formal and instrumental signs. An instrumental sign is something that refers the mind to an object only after first being itself cognized: thus words, spoken or written, refer us to objects after we have first cognized them as sounds or characters; a formal sign is a sign that refers us to an object without having first been cognized: thus ideas and perceptions refer our mind to objects before we are cognitively aware of those ideas.<sup>85</sup> So the will and thought

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<sup>82</sup> “By written, I understand that which wants a voice, or some other signe of the will of the Legislator that it may become a Law . . . Wherefore not a writing, but a voice is necessary for a written law; this alone is requisite to the being, that to the Remembrance of a Law. . . .” (Hobbes, *De Cive*, 14.14).

<sup>83</sup> Bentham, *Of Laws in General*, 13.1, 15.11. “The statute law of a country is upon paper, and may be seen all the world over: the state of the customary law is comparatively a secret, depending in a great degree upon habits which are not perceptible out of the particular circles in which the practice of it is carried on” (15.3n.).

<sup>84</sup> Williams, “Language and the Law-V,” *The Law Quarterly Review* 62 (1946): 398.

<sup>85</sup> The distinction between formal and instrumental signs is still unknown to legal semiotics. A recent collection of essays in legal semiotics contains this comment: “An initial definition would be to view the sign as an entity that (1) can become perceptible. . . .” Such a definition excludes

of the sovereign are an assemblage of signs that refer to customs, laws, and traditions. Suarez comes closer than any other legal theorist to grasp the fact that the will of the sovereign is itself a formal sign. "Nor may it even be said that the internal locution, as we conceive it in the mind of the prince, constitutes law; for this locution, too, has force and efficacy only in that it is a sign, so that it necessarily presupposes the existence of that which is law in its essence."<sup>86</sup> Suarez goes no further in specifying what it is to which the will of the prince refers, but simply by raising the question he transcends all other legal theorists in history on this question. For if the will of the sovereign who stipulates law is a sign, then it cannot be arbitrary. Words cannot function as signs unless they be understood; the will of the sovereign cannot posit laws unless they be understood. In short, the will of the sovereign is a sign of, and reflection on, custom. The sovereign intends to enforce, modify, or negate the existing customary order. Apart from the background condition of customary order, laws signify nothing. Legal semiotics, therefore, properly understood, reveals the logical dependence of legal stipulation on nature and custom.

### III

There is a profound tendency in European jurisprudence to treat nature, custom, and stipulation as a circle of interdefinability; that is, we tend to define each one of our concepts in terms of one or both of the other concepts. "Cases are known where there is a set of concepts such that any member of that set may be defined in terms of one or more other members of the set, but no member can be

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the possibility of formal signs; see *Semiotics, Law and Social Science*, ed. Domenico Carzo and Bernard Jackson (Rome: Gangemi, 1985), 58. Jackson's *Semiotics and Legal Theory* treats all signs on the model of the instrumental signs of language.

<sup>86</sup> Suarez, *De Legibus*, I, 5.6. Suarez's implicit grasp of the distinction between formal and instrumental signs is not surprising since this distinction was created by the Renaissance Thomists of Spain; what is surprising is that Suarez does not explicitly refer to formal and instrumental signs. The most profound explication of this distinction of signs is in John Poinot, *Tractatus de Signis* (1632). Poinot, it seems, was a student of Suarez at Coimbra.

defined otherwise.”<sup>87</sup> Nature is often defined as legal stipulation, “the laws of physics,” while law is defined in terms of nature—“natural law” or “natural right.” Custom is typically defined either as “second nature” or as “unwritten law.” There are two claims here: the first is that nature, custom, and stipulation are all simple or primitive terms that cannot be reduced to simpler parts; the second is that these primitives can only be defined in terms of each other.

I will argue briefly that nature, custom, and stipulation are indeed the three fundamental categories of European jurisprudence. This trichotomy is presupposed by the other major categories of jurisprudence, but does not presuppose them. Our trichotomy in the language of Latin jurisprudence is *ius naturale*, *ius consuetudine*, and *ius legale*; each of these terms appears in Latin jurisprudence, but they never appear as a trichotomy.<sup>88</sup> Ever since Aristotle, many theorists have distinguished written from unwritten law. Yet this distinction does not bear scrutiny. Aristotle, Ulpian, Isidore, Aquinas and Suarez all attempted to define custom as unwritten and law as written.<sup>89</sup> It has long been known, however, that law can be stipulated orally: “Law can emerge from custom long before the development of writing and has demonstrably done so in numerous cases.”<sup>90</sup> To compound the confusion, Cicero, Hobbes, Grotius, and Maritain all describe natural law as unwritten, while Augustine says that natural law is written on the hearts of men.<sup>91</sup> I submit

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<sup>87</sup> “Example: In logic, ‘or’ can be defined in terms of ‘not’ and ‘and’; also, ‘and’ can be defined in terms of ‘not’ and ‘or’” (Rulon S. Wells, “Criteria for Semiosis,” in *A Perfusion of Signs*, ed. Thomas A. Sebeok [Bloomington: Indiana University Press, 1977], 8).

<sup>88</sup> Cicero lists the departments of *ius* as “natura, lege, consuetudine, indicato, aequo et bono, pacto”; see Cicero, *Rhetorica Ad Herennium*, ed. Harry Caplan (Cambridge: Harvard University Press, 1954), II, 19. For *ius naturale* see *The Digest of Justinian*, I, 1.1; for *ius consuetudine* see Cicero, *De Inventione*, II, 67; for *ius legale* see Aquinas, *Summa Theologiae* I-II, q. 95, art. 1, and Suarez, *De Legibus*, II, 17.2.

<sup>89</sup> Aristotle, *Politics* 1287b5; Ulpian in *The Digest of Justinian*, I, 1.6; Isidore, *Etymologiarum*, II, 10; Aquinas, *Summa Theologiae* I-II, q. 90, art. 4; Suarez, *De Legibus*, VII, 9.1.

<sup>90</sup> *Encyclopedia of the Social Sciences*, 1930 ed., s. v. “Custom,” by Edward Sapir.

<sup>91</sup> Cicero, *De Legibus*, II, 4.10; Hobbes, *De Cive*, 14.14; Grotius, *De Jure Belli ac Pacis*, ed. Francis Kelsey (Indianapolis: Bobbs-Merrill, 1925), Pro-



that this distinction between written and unwritten law—a distinction which can refer to either the distinction between law and custom or to the distinction between positive and natural law—darkens counsel.

No distinction is more common to jurisprudence than the distinction between *lex naturalis* and *lex positiva*.<sup>92</sup> Yet once we concede that law is essentially stipulated, there is no escaping the conclusion that *lex naturalis* is a contradiction in terms while *lex positiva* is a pleonasm.<sup>93</sup> The expression *ius naturale* is a coherent principle of jurisprudence, not to be confused with the incoherent view that nature can stipulate law. Why not a *ius positivum*? Because *ius legale* is a much more precise expression: many rules are posited without being legal. Moreover, the term *positivum* is ambiguous, meaning both what is posited (*positum*) and what is artificial (as opposed to natural).<sup>94</sup> If it is taken to mean “posited” then it is too general; if it is taken to mean artificial or arbitrary, then it embodies the false Sophistic antithesis between nature and law.

The shortcomings of the distinction between natural and positive law are most evident in the equally common distinction between *lex divina* and *lex humana*. The distinction between law stipulated by God and law stipulated by man is perfectly consistent with the essence of law as positive. The essential clarity of this distinction

legomena, 26; Jacques Maritain, *Man and the State* (Chicago: University of Chicago Press, 1951), 90 and 94. Aquinas cites Augustine with approval in *Summa Theologiae* I-II, q. 94, art. 6.

<sup>92</sup> Thomas Aquinas is mainly responsible for these terms, since he equated the *ius naturale* with the *lex naturalis* and equated *lex humana* with *ius positivum*. Thus we find the expression *lex humanitus posita* as well as *lex positiva*; see *Summa Theologiae* I-II, q. 94 and q. 95.

<sup>93</sup> As d'Entreves points out: “from the point of view of legal positivism, the very use of the adjective ‘positive’ with regard to law is nothing but a pleonasm” (*Natural Law*, 99).

<sup>94</sup> The origin of *positivum* as a term of jurisprudence is hotly contested. According to Ullmann: “Imperial legislation frequently used the term *legem ponere* for the process of creating the law. . . . The *lex posita* or the *ius positum*—the law laid down—was what through a mistaken copying much later (in the twelfth century) became ‘positive’ law which should correctly be called posited law” (Walter Ullmann, *Law and Politics in the Middle Ages* [London: The Sources of History Ltd., 1975], 62). Hayek cites Sten Gagner’s view: “In the second century A.D., a Latin grammarian, Aulus Gellius, rendered the Greek terms *physei* and *thesei* by *naturalis* and *positivus*. . . .” (Hayek, *Law, Legislation, and Liberty*, vol. 1. [Chicago: University of Chicago Press, 1973], 20).

explains why it is that even within natural law theory, the distinction between divine and human law is treated as more fundamental than the distinction between natural and positive law. "All law proceeds from the reason and will of the law-giver; divine and natural law from the intelligent will of God, human law from the will of man regulated by reason."<sup>95</sup> The pervasive subordination of natural law to divine law from Cicero to Maritain reveals the acknowledgment that all law is essentially stipulated, that all law has an author. Indeed, natural law can only have meaning on the assumption that it is a mode of divine law.<sup>96</sup> Grotius realized that the subordination of natural law to divine law undermined the intrinsic rationale of natural law. He thus attempted to found a natural law apart from God's will by arguing that natural law is valid even on the assumption that God does not exist.<sup>97</sup> Grotius's claims on behalf of the autonomy of natural law were rejected in advance by Suarez and subsequently by Pufendorf. No doubt Grotius' bold claims were rejected in part due to their seeming impiety, but they were also rejected because the notion of a natural law apart from divine stipulation is untenable. The pervasive treatment of natural law as a mere mode of divine stipulation is nicely illustrated in a comment by Chrysostom (cited with approval by Grotius): "When I say nature I mean God, for He is the creator of nature."<sup>98</sup> Natural law loses its intrinsic rationale if the order of nature is but one instance of divinely stipulated order.

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<sup>95</sup> Thomas Aquinas, *Summa Theologiae* I-II, q. 97, art. 3. The distinction between divine and human law is treated as fundamental by most theorists. Isidore: "Omnes autem leges aut divinae sunt aut humanae" (*Etymologiarum*, V, 2). See Suarez, *De Legibus*, I, 9.3; II, 6.2, 7.1, and 19.4. Hobbes: "All law [*lex*] may be divided, first according to the diversity of its Authors into Divine and human" (*De Cive*, 14.4). Pufendorf: "Lex is very conveniently divided, as to its origin, into divine and human, the former having God as its author, the latter man" (*De Jure Naturae et Gentium*, I, 6.18). Austin: "The divine laws and positive [human] laws are laws properly so called" (*The Province of Jurisprudence Determined*, 1).

<sup>96</sup> "In this sense natural law, too, is 'posited', that is, positive law-positing, however, not by a human but by a super-human will" (Kelsen, *Pure Theory of Law*, 220).

<sup>97</sup> Grotius, *De Jure Belli ac Pacis*, Prolegomena, 11. Suarez had already discussed the question of whether the natural law could be valid on the assumption that God does not exist; see *De Legibus*, II, 6.3.

<sup>98</sup> Chrysostom, *Homilia ad Corinthios* I, xi, 3; cited by Grotius, *De Jure Belli ac Pacis*, Prolegomena, 12n.

The final, fundamental distinction of Latin jurisprudence is the trichotomy *ius naturale*, *ius gentium*, and *ius civile*.<sup>99</sup> This trichotomy has unfortunately generated an enormous amount of confusion in the history of jurisprudence as is evident from the conflicting accounts given of these terms by the various authorities of *The Digest of Justinian*.<sup>100</sup> The expression *ius gentium* has been especially ambiguous. As a body of law, the *ius gentium* was constructed from the judicial decisions of the Praetor Peregrinus who had jurisdiction over cases involving foreigners. The *ius gentium* was based on the attempt to find a common element in the customs of the various Italian tribes. As Roman political and commercial relations extended throughout the Mediterranean, the *ius gentium* became regarded as the common law of all nations.<sup>101</sup> The *ius gentium* is thus a hodgepodge of heterogenous elements, from natural instincts governing family relations, to various common customs, to a body of case-law. Because of this heterogeneity, the *ius gentium* is almost always assimilated to either the *ius naturale* or the *ius civile*. The *ius civile* is a similar jumble. According to Ulpian it means the *ius* specific to each state—including both law and custom; according to Papinian, *ius civile* is civil law in all its forms whether statutes (*leges*), decrees, or judicial opinions.

In the end, the *ius naturale*, *ius gentium*, *ius civile* trichotomy belongs to social and political theory more than to jurisprudence. For each of these terms refers not to a principle of jurisprudence, but to a principle of social and political community. *Ius naturale*, says Ulpian, is that which nature has taught all animals, the community of creatures; *ius gentium* is the common law of all nations, the human community; *ius civile* is the law specific to one nation, the political community.<sup>102</sup> The translation of these political cat-

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<sup>99</sup> These terms may well have their origin in Cicero, but they were disseminated through Ulpian's use of them in *The Digest of Justinian*, I, 1.1.

<sup>100</sup> See d'Entreves, *Natural Law*, 28-32; and Michael Zuckert, "Bringing Philosophy Down From the Heavens': Natural Right in the Roman Law," *Review of Politics* 51, no. 1 (Winter 1989).

<sup>101</sup> See *Encyclopedic Dictionary of Roman Law*; see Maine, *Ancient Law*, 36-60.

<sup>102</sup> "The *jus gentium* 'recedes from' the *jus naturale* in that it applies only to all the human peoples and not to all animal beings as such. The *jus civile* is yet more restricted, for it is the *jus* belonging only to some

egories into juristic categories led to considerable confusion. The *ius gentium*, common customs of the nations, can refer to the shared civil customs of the nations or to the shared customs governing relations between the nations (*ius inter gentes*).<sup>103</sup> The interpretation of *ius gentium* as the *ius naturale* led Hobbes to the view that the relations between nations are governed only by natural law; the interpretation of *ius gentium* as custom led Kelsen to argue that international relations are governed by custom, while law is identical with the state.<sup>104</sup> Actually, of course, international relations are governed by nature, custom, and law. The interpretation of *ius civile* as *ius legale* has led many theorists to the conclusion that law is identical to the state.<sup>105</sup> The view that law presupposes the political organization of the state has been a major obstacle to the study of both primitive law and of international law.<sup>106</sup> Indeed, if law presupposes a state, then we must be prepared to assert that canon law is not law. The identity of state and law is usually defended on the grounds that the state alone can administer the coercive sanctions associated with law; but sanctions of considerable severity can be administered by other organizations. A deeper reason why the state is so often identified with law is that government (legislatures and courts) has historically been the primary locus of reflection on custom leading to legal stipulation. Yet wherever we find organized reflection on custom, we find law—in primitive arbitration, in the United Nations and the World Court, in religious communities, in corporations. The relation between law and the

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particular people or other” (Zuckert, “‘Bringing Philosophy Down From the Heavens,’” 76).

<sup>103</sup> Suarez was the first to clearly distinguish *ius gentium* from *ius inter gentes*; see *De Legibus*, II, 19.8.

<sup>104</sup> See Maine, *Ancient Law*, 44, and Kelsen, *Pure Theory of Law*, 216.

<sup>105</sup> According to Kelsen, *Rechtsstaat* is a pleonasm; *Pure Theory of Law*, 313. Hobbes says simply: “Humana lex omnis civilis est.” From this, Hobbes concludes that international law is the law of nature; but what happened to custom? See *De Cive*, 14.5. Suarez similarly limits law to a perfect community (i.e., a state); see *De Legibus*, I, 6.21. Unger defines positive law as “bureaucratic law,” which he traces to the separation of state and society; see *Law in Modern Society*, 57–8. Grotius alone among classic theorists does not restrict law to *ius civile*: “Human law, then, is either municipal law (*ius civile*), or broader in scope than municipal law, or more restricted than municipal law” (*De Jure Belli ac Pacis*, XIV, 1).

<sup>106</sup> See Pospisil, *The Ethnology of Law*, 27 and 54; see Hart, *The Concept of Law*, 3.

state is thus historically contingent: there was law before the state and there will be law after the state, just as there is now law below the state and law above the state.

If nature, custom, and stipulation form a circle of interdefinability, then in addition to being logically fundamental, they must be definable only in terms of each other. I will argue that nature, custom, and stipulation have typically been defined in terms of each other in the history of jurisprudence, but that we need to attempt to define them apart from each other if we seek a more secure foundation for legal science.

Law and nature have long been defined in terms of each other:

In Western civilization the ideas of natural law (in the juristic sense) and the laws of Nature (in the sense of the natural sciences) go back to a common root. . . . For without doubt one of the oldest notions of Western civilization was that just as earthly imperial lawgivers enacted codes of positive law, to be obeyed by men, so also the celestial and supreme rational creator deity had laid down a series of laws which must be obeyed by minerals, crystals, plants, animals and the stars in their courses.<sup>107</sup>

Men had grasped the uniformity of the legal order long before they grasped the order of nature, so that the pre-Socratic philosophers, who first developed the concept of nature, described the uniformity of natural processes as just (*dike*).<sup>108</sup> According to Thomas Aquinas, the order of nature is created by the *lex aeterna*, which is formally analogous to human law; indeed, it is the primary analogue of human law.<sup>109</sup> Suarez, however, insists that the use of the term *lex* to refer

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<sup>107</sup> Joseph Needham, "Human Law and the Laws of Nature in China and the West," in *Science and Civilization in China*, vol. 2 (Cambridge: Cambridge University Press, 1980), 518.

<sup>108</sup> See John Burnet, "Law and Nature in Greek Ethics," *International Journal of Ethics* 7, no. 3 (1897). "It is significant that the Greek word for cause, *aitia*, originally meant guilt: the cause is 'guilty' of the effect, is responsible for the effect. . . . One of the earliest formulations of the law of causality is the famous fragment of Heraclitus: 'If the Sun will overstep his prescribed path, then the Erinyes, the handmaids of justice, will find him out'. Here the law of nature still appears as a rule of law: If the Sun does not follow his prescribed path he will be punished" (Kelsen, *Pure Theory of Law*, 84).

<sup>109</sup> "Accordingly, the Eternal is nothing other than the exemplar of divine wisdom as directing the motions and acts of everything" (*Summa Theologiae*, I-II, q. 93, art. 1). On the other hand, Aquinas says that brute animals obey the law only in a matter of speaking (*per similitudinem*); see *Summa Theologiae*, I-II, q. 91, art. 2.

to the order of nature “is therefore strictly metaphorical, since things which lack reason are not, strictly speaking, susceptible to law, just as they are not capable of obedience.”<sup>110</sup> Montesquieu ignores this careful attempt to distinguish nature from law: “all beings have their laws [*lois*]: the Deity His laws, the material world its laws, the intelligence superior to man their laws, the beasts their laws, man his laws.”<sup>111</sup> J. S. Mill attacks Montesquieu’s use of the word “law,” not on the Suarezean ground that “law” is univocally used only of human behavior, but on the ground that “law” has two very different meanings which, though equally valid, must be distinguished: “No word is more commonly associated with the word Nature than Law; and this last word has distinctly two meanings, in one of which it denotes some definite portion of what is, in the other, of what ought to be.”<sup>112</sup> J. S. Mill thus avoids the more profound issue—addressed by Suarez—of whether the use of the term law to describe the order of nature is a strict equivocation or a formal analogy. C. S. Peirce argues that the uniformities of nature resemble habits more than laws, since they are constantly evolving; to describe the uniformities of nature as laws simply raises the question: where did these laws come from?<sup>113</sup> Peirce’s effort to define natural order in terms of habit (custom) rather than in terms of law does not escape our circle of interdefinability, but his tour through the circle sheds light on nature, custom, and law.

The shortcomings of our circle of interdefinability are especially evident in the case of custom. Custom is almost always defined either in terms of nature or in terms of law, obscuring the intrinsic

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<sup>110</sup> Suarez, *De Legibus*, I, 1.2; cf. I, 3.8. Grotius concurs in *De Jure Belli ac Pacis*, XI, 1; Pufendorf, in *De Jure Naturae et Gentium*, II, 3.2; John Finnis, in *Natural Law and Natural Rights*, 280.

<sup>111</sup> Montesquieu, *The Spirit of the Laws*, ed. and trans. Thomas Nugent (New York: Hafner Press, 1949), I, 1. Of this passage, Austin comments: “Now objects widely different, though bearing a common name, are here blended and confounded” (*The Province of Jurisprudence Determined*, 179).

<sup>112</sup> J. S. Mill, “Nature,” 14.

<sup>113</sup> “Now the only possible way of accounting for the laws of nature and for uniformity in general is to suppose them results of evolution.” Confer: “Uniformities in the modes of action of things have come about by their taking habits. At present, the course of events is approximately determined by law. In the past that approximation was less perfect; in the future it will be more perfect” (*The Collected Papers of Charles Sanders Peirce*, ed. Charles Hartshorne and Paul Weiss [Cambridge: Harvard University Press, 1935], 6.12 and 1.409).

rationale of custom. What is most characteristic of Savigny's historical school of jurisprudence is its effort to define custom simultaneously as legal and as natural. Savigny and his school rightly sought to restore the concept of custom to the center of jurisprudence in response to the displacement of custom by the natural law theorists from Hobbes to Pufendorf. But Savigny's concept of a *Volksrecht* confuses custom as a principle of jurisprudence with the oxymoron of customary law.<sup>114</sup> In addition to asserting that custom is law, and indeed, the essence of law, Savigny argues further that custom is natural. Customs, he says, evolve according to the inexorable laws of nature—what Weber terms a “natural law of the historically real.”<sup>115</sup>

Ever since Aristotle defined custom (*ethos*) as a second nature, there has been a pervasive attempt to assimilate custom to nature. Aristotle argued that the universal unwritten law is according to nature, and this led the Romans to argue that the common customs of the Italian tribes were a natural law: the *ius gentium* became the *ius naturale*.<sup>116</sup> Aquinas also defines custom (*consuetudo*) as a second nature, but he begins to dissociate the *ius gentium* from the *ius naturale*: the precepts of the *ius gentium* are drawn like conclusions

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<sup>114</sup> According to Savigny, “all law is originally formed in the manner in which . . . customary law is said to have been formed: i.e. that it is first developed by custom . . .” (Savigny, *The Vocation of Our Age for Legislation and Jurisprudence*, ed. Abraham Haywood [New York: Arno Press, 1975], 30). Since the historical school always speaks of a *Volksrecht* and never of a *Volksgesetz*, this could be interpreted as an implicit acknowledgment of the distinction between *ius* and *lex*.

<sup>115</sup> Savigny describes customary law as the organic “natural law” of the people in contrast to the “learned law” of the jurists. See *The Vocation of Our Age*, 29. As Maitland says: “We are accustomed to think of him [Savigny], and rightly, as the herald of evolution, the man who substitutes development for manufacture, organism for mechanism, natural laws for Natural Law . . .” (Frederic Maitland, “Introduction,” in *Political Theories of the Middle Age*, xv). Weber is skeptical of the efforts of the historical school to define custom as natural: according to this school, says Weber, “a legislator could not in any legally effective way restrict the sphere of validity of customary law by any enactment or exclude the derogation of the enacted law by custom. It was said to be impossible to forbid historical development to take its course . . . all ‘genuine’ law must have grown up ‘organically’ and must be based directly upon the sense of justice, in contrast to ‘artificial’ i.e., purposefully enacted law” (*Economy and Society*, 867).

<sup>116</sup> See Aristotle, *Rhetoric* 1373b3; see Gaius in *The Digest of Justinian*, I, 1.9.

from the premises of the *ius naturale*.<sup>117</sup> Suarez was the first theorist to define the common customs of the nations apart from natural law. He asks the key question, "How is the *ius gentium* universal but not natural?" Suarez rightly points out that the common customs of the Mediterranean world are largely the product of cultural diffusion and imitation.<sup>118</sup> Suarez, however, bifurcates the intrinsic unity of custom into "customs of fact" (the natural uniformity of habit) and "customs of law" (the normative force of obligation).<sup>119</sup> H. L. A. Hart makes the same bifurcation within custom between a "social habit" and a "social rule": social habits are natural uniformities of conduct which are not "normative," while social rules are felt to be obligatory.<sup>120</sup> These attempts to separate the natural habit from the legal norm in custom serve to rent asunder the intrinsic unity of custom.

Ever since Aristotle defined custom as "unwritten law," legal theorists have assimilated custom to law in a variety of ways. As we have seen, the definition of custom as "unwritten law" fails both

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<sup>117</sup> *Summa Theologiae* I-II, q. 32, art. 2, and I-II, q. 95, art. 4.

<sup>118</sup> Suarez observes of the *ius gentium*: "it is easily apparent that this system of law, simply as the result of usage and tradition, could have been gradually introduced throughout the whole world, through a successive process, by means of propagation and mutual imitation among the nations, and without any special and simultaneous compact or consent on the part of all peoples." Even Suarez, however, cannot escape the circle of interdefinability, for he continues: "For the body of law in question [*ius gentium*] has such a close relationship to nature and so befits all nations, individually and collectively, that it has grown, almost by a natural process, with the growth of the human race . . ." (*De Legibus*, II, 20.1).

<sup>119</sup> "The one [custom of fact] is the frequency of actions, as such, which we may call formal custom. This, as we have said, is matter of fact—as usage is. . . . A second after-effect [of a custom of fact] may be one of the moral order, after the manner of a power or a law binding to such an action, or nullifying another obligation. This may be called customary law [*ius consuetudinis*]. . . ." (Suarez, *De Legibus*, VII, 1.4). On this distinction between habit as custom of fact and legal custom, see also, *De Legibus*, VII, 1.5.

<sup>120</sup> "In the case of what may be called mere group habits, like that of going weekly to the cinema, deviations are not met with punishment or even reproof; but wherever there are rules requiring certain conduct, even non-legal rules like that requiring men to bare their heads in church, something of this sort is likely to result from deviation." Hart's attempt to argue that some customs (group habits) are mere uniformities of behavior with no normative force is completely unconvincing: all customs—especially going to the cinema—are at once uniformities of behavior and experienced as obligations; see *The Concept of Law*, 10 and 54–58.



because laws need not be written and because customs can be written without being legislated. A more subtle but equally pervasive attempt to assimilate custom to law is the claim that customs are signs of the sovereign will just as laws are signs of the sovereign will. This argument takes two forms. The first is the claim that custom reflects the will of the prince on the principle that "whatever the Sovereign permits, he commands."<sup>121</sup> Thus Aquinas says that custom obtains the force of law in so far as it is tolerated by the sovereign, because this tolerance expresses the implicit approval of the sovereign.<sup>122</sup> In positivist legal theory, custom is often interpreted as a tacit command of the sovereign.<sup>123</sup> Suarez, however, had already argued that the legal validity of custom requires neither the express nor the tacit consent of the prince.<sup>124</sup> The attempt to treat the historical order of custom as if it were a code stipulated by the prince effaces the essence of custom as the sediment of immemorial and unreflective human practices.

The second form of the claim that custom is a sign of the sovereign will is the argument that custom reflects the will of the people. This argument goes back to classical Roman jurisprudence: "What does it matter whether the people declares its will by voting or by the very substance of its actions?"<sup>125</sup> Indeed, Paulus argues that

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<sup>121</sup> This fiction became a principle of Roman law in the medieval period: "the fiction became law that the existing customary law displayed its force precisely because the Ruler tolerated and thus acquiesced in this state of affairs: if he had so wished he could have wiped it out. In a word, he was presumed to have had knowledge of all the valid law which evidently included the unwritten customary law" (Ullmann, *Law and Politics in the Middle Ages*, 63).

<sup>122</sup> *Summa Theologiae* I-II, q. 97, art. 3.

<sup>123</sup> "The main objection to the use of the idea of tacit expressions of the sovereign's will to explain the legal status of custom is that, in any modern state, it is rarely possible to ascribe such knowledge, consideration and decision not to interfere to the 'sovereign' . . ." Hart makes this point to discredit the positivist notion of law as command; *The Concept of Law*, 47. Suarez, however, had already observed that "it is practically impossible that all customs should come to the knowledge of the prince" (*De Legibus*, VII, 13.8).

<sup>124</sup> According to Suarez: "when a law is established by prescriptive custom, the personal consent of the prince is not required; nor, therefore, is any special knowledge of the custom on his part called for . . ." (*De Legibus*, VII, 13.6 and 13.7).

<sup>125</sup> Julian in *The Digest of Roman Law*, I, 3.32. Classical jurists spoke

custom has such profound approval by the people that it has never been necessary to reduce it to writing.<sup>126</sup> Aquinas agrees that “what we inwardly mean and want is most effectively declared by what outwardly and repeatedly we do.”<sup>127</sup> Suarez argues that just as the words of law are signs of the prince’s consent, so the actions of custom are signs of each individual’s consent.<sup>128</sup> Kelsen insists that customs reflect not merely the tacit consent of individuals but their conscious approval: “the acts which constitute the custom must take place in the belief that they ought to take place. But this opinion presupposes an individual or collective act of will whose subjective meaning is that one ought to behave according to custom.”<sup>129</sup> The view that customs reflect the consent of the people seems more plausible than the view that customs reflect the consent of the prince. But consent implies two distinct elements—reflective awareness of what is being consented to and some degree of choice among alternatives. When I vote I am aware that my consent is being given and I am able to choose to what or to whom I shall give my consent. Neither of these elements is characteristic of custom. In what sense do we consent to speak our customary language? We are neither reflectively aware of learning our native language nor do we choose a mother tongue among a set of alternatives. We absorb our customs unconsciously like the air we breathe. Our participation in a particular customary order is neither according to our willful consent nor is it contrary to our consent—consent has no bearing on custom. “Many customs which have taken deep root in society do not appear to be based on any general conviction of their rightness or necessity, or upon any real and voluntary *consensus utentium*.”<sup>130</sup> Politics is

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of *consuetudo* as the *tacitus consensus populi*. See Berger, *Encyclopedic Dictionary of Roman Law*, s. v. “Consuetudo.”

<sup>126</sup> In *The Digest of Justinian*, I, 3.36.

<sup>127</sup> *Summa Theologiae* I-II, q. 97, art. 3.

<sup>128</sup> “The written law and unwritten law differ not in the matter with which they deal, but only in the mode of expression [*signum*] employed in their institution. Hence, in consuetudinary law, there is no special form, sensible and external, except the actions [constituting the custom], which must be external and sensible, and these, in so far as they are tokens [*signa*] of consent, may be called the unwritten words by which this kind of law is engraved upon the memory of man” (Suarez, *De Legibus*, VII, 9.1).

<sup>129</sup> Kelsen, *Pure Theory of Law*, 225.

<sup>130</sup> Allen, *Law in the Making*, 89.

the realm of reflection on custom, but custom is itself prepolitical. Thus Aquinas's description of custom as "democratic" and J. S. Mill's description of custom as "tyrannical" suffer from the same categorical mistake.

#### IV

The traditional treatment of nature, custom, and stipulation as a circle of interdefinability has no doubt generated some fruitful analogies between law and nature, between custom and nature, and between custom and law. But this same circle has tended to efface important distinctions between the three concepts. "And interdefinability is tantamount to indefinability, since we think of definability as being an asymmetrical relation."<sup>131</sup> We need a logic of definition that reflects both the relatedness and the distinctiveness of the three concepts. We have treated nature, custom, and stipulation as the three fundamental species of the genus "order." But one clear shortcoming of this genus/species logic is that it does not indicate the serial and hierarchical relations of our trichotomy. Yet I argue that nature is prior to custom and that custom is prior to stipulation. Aristotle offers an alternative logic of classification to the genus/species logic. This logic is most clearly illustrated by his analysis of the kinds of souls. Here, instead of defining the genus "soul" and the species of plant, animal, and human souls, Aristotle says that the plant soul is living, the animal soul is living plus sensitive, the human soul is living and sensitive plus rational.<sup>132</sup> I will argue that nature, custom, and stipulation form such a hierarchy: "In every case the lower faculty can exist apart from the higher, but the higher presupposes those below it."<sup>133</sup> Nature represents the physical, chemical, and biological processes of the created universe. Nature can and did exist apart from human custom and stipulation. Human custom makes use of various natural qualities. Family customs make use of natural differences between individuals of age and sex. Custom is rooted in the physiology of habit, but custom transcends habit by becoming a social sign system. Custom

<sup>131</sup> Wells, "Criteria for Semiosis," 9.

<sup>132</sup> Aristotle, *On the Soul* 414b20-415a13.

<sup>133</sup> R. D. Hicks, *De Anima* (Amsterdam: A. M. Hakkert, 1965), 185.

presupposes nature, but custom can exist without being the object of reflective stipulation in law. Legal stipulation is the synoptic order consciously imposed upon the prereflective materials of custom. Law always presupposes custom, just as grammar always presupposes customary speech.

The treatment of nature, custom, and stipulation as a progressive hierarchy can be found—in implicit and imperfect form—throughout the history of legal theory. The logical treatment of the trichotomy *ius naturale*, *ius gentium*, *ius civile* implicitly acknowledges the progressive hierarchy between nature, custom, and stipulation. Ever since Ulpian's exposition, these three concepts have been treated in serial order: nature, the common customs of the nations, and stipulated civil law. Ulpian treats the *ius gentium* as the transition from universal natural instinct to particular civil law. Aquinas treats the *ius gentium* as conclusions drawn from natural law which serve as premises for civil law. As Suarez puts it: "the *ius gentium*, is a form of law, intermediate (as it were) between the natural and the civil law."<sup>134</sup> Suarez illustrates the manner in which civil law presupposes natural law and the *ius gentium*: when two parties make a contract, the specific form of such a contract is stipulated by civil law. But the commercial freedom to enter into contracts is the product of the *ius gentium*: commercial customs make possible stipulated contracts. The fulfillment of the obligation incurred by the contract is a function of the natural law, since the fulfillment of promises is a necessary condition for the possibility of commercial life.<sup>135</sup> "Thus there are imperceptible transitions (at least from the point of view of historical experience) between Natural Law, the Law of Nations, and Positive Law."<sup>136</sup>

The *ius naturale*, *ius gentium*, *ius civile* trichotomy is, however, a very imperfect surrogate for our nature, custom, stipulation trichotomy. Can we find more explicit anticipations of our trichotomy? Aristotle tells us that political justice (*dikaion politikon*) includes

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<sup>134</sup> "For, in a certain sense, the *ius gentium* is in harmony with the natural law, because of the common acceptance and universal character of the former, and the ease with which its rules may be inferred from natural principles; although this process of inference is not one of absolute necessity and manifest evidence, in which latter respect the law in question [*ius gentium*] agrees with human law" (Suarez, *De Legibus*, II, 20.10).

<sup>135</sup> Suarez, *De Legibus*, II, 19.7.

<sup>136</sup> Maritain, *Man and the State*, 100.

both natural justice (*dikaion physikon*) and conventional justice (*dikaion nomikon*).<sup>137</sup> Isidore follows Aristotle's lead by listing the conditions required for valid law. Law, he says, must be "possible, according to nature, and according to the local customs."<sup>138</sup> In his discussion of this passage from Isidore, Aquinas says that for law to be possible it must be according to nature. It must take into account the natural ability of individuals (*possibilitate naturae*), "for the same tasks are not to be imposed on those who have grown up and those who have not." Moreover, says Aquinas, for a law to be possible it must accord with the customs of the country: "To set aside the customs of a whole people is impracticable."<sup>139</sup> Suarez interprets Isidore in light of Aquinas and says that for a law to be possible (*possibilis*) it must be in harmony with nature and with custom; but he distinguishes two senses of possible: law not in harmony with nature is absolutely impossible, since the principles of natural order cannot be contravened; law not in harmony with custom is "almost morally impossible" since it is difficult, oppressive, and burdensome.<sup>140</sup> Nature is employed in contemporary jurisprudence as a condition for the possibility of law. Kelsen argues that the normative order is subject to the laws governing the natural order, since law must have the possibility of causal effectiveness.<sup>141</sup> H. L. A. Hart argues that to explain legal institutions we must make use of statements, "the truth of which is contingent on human beings and the world they live in retaining the salient characteristics which they have." These natural characteristics constrain the possible forms of legal arrangements; chief among these natural laws is the human instinct for survival.<sup>142</sup> Lon Fuller interprets natural law as the eight rules of legal procedure required for the viability of any legal system.<sup>143</sup> These contemporary treatments of the conditions

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<sup>137</sup> Aristotle, *Nicomachean Ethics* 1134b18. Since *nomos* includes both custom and law, Aristotle is saying that political justice has natural, customary, and stipulated elements.

<sup>138</sup> Isidore's list is as follows: "Erit autem lex honesta, iusta, possibilis, secundum naturam, secundum consuetudinem patriae, loco temporisque conveniens, necessaria, utilis . . ." (Isidore, *Etymologiarum*, II, 10, and V, 21).

<sup>139</sup> *Summa Theologiae* I-II, q. 95, art. 3, and q. 97, art. 3.

<sup>140</sup> Suarez, *De Legibus*, I, 9.16-9.19.

<sup>141</sup> Kelsen, *Pure Theory of Law*, 94-98.

<sup>142</sup> Hart, *The Concept of Law*, 187-195.

<sup>143</sup> Fuller, *The Morality of Law*, 96.

for the possibility of law are clearly inferior to the tradition culminating in Suarez, for the contemporary treatments do not distinguish between the natural and the customary conditions for the possibility of law. Instead, Hart and Fuller, for example, lump natural and customary principles together under the rubric of a minimal natural law.<sup>144</sup>

Perhaps the nearest approximation to the progressive hierarchy of our trichotomy is found in Cicero: "Law [*ius*] initially proceeds from nature, then certain rules of conduct become customary by reason of their advantage; later still both the principles that proceeded from nature and those that had been approved by custom received the support of religion and the fear of the law [*lex*]."<sup>145</sup> Here Cicero not only distinguishes law proper (*lex*) from jurisprudence (*ius*), but he orders nature, custom, and law in a serial progression. The only shortcoming of this formulation is that he suggests that certain natural principles can be directly stipulated without the mediation of custom. This seems doubtful since even our scientific knowledge of nature always embodies the tacit assumptions of custom.

## V

The principle shortcoming of the expression "customary law" is that, by assimilating custom to law, it blocks the road of inquiry into the dialectic of law and custom. For law is deliberately instituted in response to the failures of customary order: first, custom lacks an agency for the arbitration of inter-personal disputes, leaving punishment to the hazards of private retaliation; second, custom cannot adapt itself quickly to changing conditions—the customary rule of the road could not accommodate the coming of the automobile; third, custom provides no basis for mediating the conflicts between

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<sup>144</sup> Thus both Hart and Fuller admit that their principles of "natural law" are historically contingent; see Hart, *The Concept of Law*, 190, and Fuller, *The Morality of Law*, 79.

<sup>145</sup> "Initium juris est ab natura profectum; deinde quaedam in consuetudinem ex utilitatis ratione venerunt; postea res et ab natura profectas et ab consuetudine probatas legum metus et religio sanxit" (Cicero, *De Inventione*, II, 53.160).

diverse customs in a complex society—law provides an inclusive agency to mediate between various classes and ethnic groups.<sup>146</sup>

Once law is established, law and custom enter into a dialectic of mutual interpretation: law interprets custom and custom interprets law. A great deal of what is most characteristic of social life can be explained by this dialectic of interpretation—or rather misinterpretation. For what is most characteristic of legal action—as opposed to technical production—is that the law’s intention is almost never realized. Law represents the best laid plans of individuals or groups, while custom represents why they typically go astray. Nor is this quite right. Law is itself often a poorly laid plan based on a misunderstanding of custom—as was evident with prohibition. The legislator, in Adam Smith’s famous image,

seems to imagine that he can arrange the different members of a great society with as much ease as the hand arranges the different pieces upon a chessboard. He does not consider that the pieces upon the chessboard have no other principle of motion besides that which the hand impresses upon them; but that, in the great chessboard of human society, every single piece has a principle of motion of its own . . .<sup>147</sup>

Law and custom are forever locked in a dialectic of misinterpretation for two basic reasons: first, because customs are essentially collective rituals, while law is essentially a synoptic blueprint; second, because laws are essentially static while customs are essentially fluid. When the individual legislator or judge interprets the relevant customs, he or she cannot possibly grasp in a single rule the diversity and nuance of social usage any more than a grammarian can grasp the diversity of linguistic usage. For the custom exists perfectly only in the collectivity as a whole; thus every individual interpretation of social custom is a misinterpretation. And because custom is always evolving in unforeseen directions, the legal interpretation of custom is soon obsolete, just as a grammar is almost instantly out of date. Once this obsolete misinterpretation of custom becomes law, it must be interpreted by everyone who obeys it. Custom then misinterprets the law, as witnesses a crime, each person seeing something a little different, or like the game of telephone, in which

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<sup>146</sup> See MacIver and Page, *Society*, 176.

<sup>147</sup> Adam Smith, *The Theory of Moral Sentiments*, ed. D. D. Raphael and A. L. Macfie (Oxford: Oxford University Press, 1979), VI, 2.17.

the intended message at the start is transformed into a very different message at the end. Custom misinterprets law only with respect to the intention of the law-maker. Such misinterpretation may well be consistent with the maxim of Paulus that custom is the best interpreter of the law, for, as we know from literary theory, an author is not always his or her best interpreter. The key issue is simply that the customary interpretation usually diverges from the law-maker's interpretation. The equal rights guaranteed by the Fourteenth Amendment become interpreted as separate but equal; the *Brown* decision forcing integration of public schools sent white students to private schools. This dialectic of misinterpretation explains in part why Weber, Kelsen, and Hart define law in terms of coercive sanctions: violence is often required to achieve even temporary congruence between law and custom.

The dialectic between law and custom has several modalities: law may attempt to enforce custom, to modify custom, to supplement custom, to negate custom. In every case, law presupposes the existing customary order, which is why, says Suarez, the custom that existed prior to the enactment of a law is of great assistance in interpreting the meaning of that law.<sup>148</sup> Similarly, custom may attempt to reenforce law, to modify law, to supplement law, or to negate law. Our dialectic, however, is asymmetrical in one crucial respect: whereas law can formally negate custom, custom cannot formally negate law.<sup>149</sup> This asymmetry reveals much about the differences between law and custom. Custom can cause a law to fall into disfavor, to be unenforced, or even to be forgotten, but custom cannot abrogate law. Even the most obscure and obsolete law remains valid until abrogated by a subsequent law. One of the most dangerous aspects of law is its immortality; laws long considered dead and buried by custom may at any time be revived through enforcement. Customs die through disuse or are killed by law; laws must always be killed.<sup>150</sup> Yet from the Roman jurist Julian to Hans

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<sup>148</sup> Suarez, *De Legibus*, VII, 17.2.

<sup>149</sup> As Allen notes, the English courts have always reserved the right to abrogate a pernicious custom: "Malus usus abolendus est"; see *Law in the Making*, 146.

<sup>150</sup> The maxim "lex posterior derogat priori" applies only to *lex*. It is to be expected that Kelsen, who always assimilates custom to law, would overlook this fundamental asymmetry between law and custom: "Statutory



Kelsen we find the doctrine that custom can repeal law through desuetude—clear evidence of the pervasive conflation of law and custom in the history of jurisprudence.<sup>151</sup>

What our dialectic reveals is that law and custom are forever “out of phase.” Legal fictions, equity, and coercion are all remedies for bringing the letter of the law and the spirit of custom into congruence.<sup>152</sup> Legal fictions allow the law to accommodate custom while pretending that the law is unchanged; equitable interpretation allows the rigor of the law to be relaxed in keeping with new customs; and violence can be employed by law to square the circle of custom. Although it is true that most attempts to reform society through law are defeated or distorted by the lack of phase between law and custom, it is equally true that “if there were ever to be perfect phase between law and society, then society could never repair itself, grow and change, flourish or wane.”<sup>153</sup> If too much congruence between law and custom means stagnation, then too little congruence means violence. Humane legal reform requires a profound appreciation of the dialectic of law and custom by those who make and who apply the law. Yet how can such humane legal practice be fostered if legal education is the product of a jurisprudence conceived of narrowly as knowledge of the law alone?

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law and customary law cancel each other according to the principle of the *lex posterior*” (*Pure Theory of Law*, 226).

<sup>151</sup> On whether custom can abrogate law through desuetude or other means, see Julian in *The Digest of Justinian*, I, 3.32; Aquinas, *Summa Theologiae* I-II, q. 97, art. 3; Suarez, *De Legibus*, VII, 5.14, and VII, 18-19; and Kelsen, *Pure Theory of Law*, 213.

<sup>152</sup> Maine cites “legal fictions, equity, and legislation” as the three agencies whereby “law is brought into harmony with society”; see *Ancient Law*, 20.

<sup>153</sup> Bohannon, “The Differing Realms of the Law,” 37. Bohannon continues: “It is in these very interstices [between law and custom] that social growth and social decay take place.”