F. A. Hayek and the Common Law

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One of the most significant insights into the history of Anglo-American law offered by F. A. Hayek concerns the superiority of common over statute law in framing a free society.

Hayek's Legal Theory

English common law, like much medieval law, Hayek maintained, reflected the underlying notion that law was not so much created as uncovered and that its principles were identical to the fundamental canons of justice upon which all free societies rest.[1] It was this view of law that predominated in England until the 15th and 16th centu-

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[1]Hayek's is by no means the only argument offered in defense of the common law. In 1973, Richard Posner, one of the nation's most prolific legal scholars, maintained that the legal rules that emerged from the common law courts, by virtue of relying on precedent, are more efficient—where efficiency is understood as wealth-maximizing—than are the enactments of a legislative body and that they in turn promote social efficiency. Since that time there have been numerous attempts to corroborate this claim, among the most notable those by William Landes and Posner (1987) and by George Priest (1978). Robert Cooter and Lewis Kornhauser (1980: 139) have observed that arguments justifying the common law as more efficient have taken three forms: first, that common law judges in their decisions actively seek efficiency; second, that it is highly likely that inefficient legal rules will be litigated more often than will efficient rules; and, third, that litigants who are likely to benefit from an efficient rule will invest more in litigating their cases than will those who favor inefficient rules. The literature on the relation between the common law and efficiency is capably summarized in Gillian Hadfield (1992). As interesting and valuable as this literature is, however, it is irrelevant to the subject of this study.

It should be emphasized that these arguments supporting the common law on grounds of efficiency are in no way reiterations of Hayek's earlier argument. Hayek maintained that, at least before the 17th century, the common law, for a variety of reasons set forth in this study, was crucial in contributing to England's comparative freedom and served as a barrier against the arbitrary power of the monarch. Hayek's arguments in favor of the common law have very little, if anything, to do with the efficiency of the common law and nothing whatever to do with questions of public choice nor whether the decisions of the common law courts were Pareto optimal. His principal concern was to offer a theory of what political

ries, when for the first time the European nation states sought to use legislation to effect specific policies.[2] As Hayek maintains (1973: 83):

> Until the discovery of Aristotle's *Politics* in the thirteenth century and the reception of Justinian's code in the fifteenth . . . Western Europe passed through . . . [an] epoch of nearly a thousand years when law was . . . regarded as something given independently of human will, something to be discovered, not made, and when the conception that law could be deliberately made or altered seemed almost sacrilegious.[3]

The reason why England, unlike the continental countries, did not develop a highly centralized absolute monarchy in the 16th and 17th centuries, he argues, was its distinctive system of legal rules and procedures. "What prevented such development," writes Hayek (1973: 84–85), "was the deeply entrenched tradition of a common law that was not conceived as the product of anyone's will but rather as a barrier to all power, including that of the king—a tradition which Sir Edward Coke was to defend against King James I and his Chancellor, Sir Francis Bacon, and which Sir Matthew Hale brilliantly restated at the end of the seventeenth century in opposition to Thomas Hobbes."

Indeed, according to Hayek, all early conceptions of law took this form, that law was unalterably given and that while legislation might attempt to purify the law of its accumulated corruptions it could not go beyond this to make completely new law. Thus, the great early lawgivers, those semimythic figures of which early civilizations

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and legal institutions are consistent with a free and open society, and it is within this context that he singled out the common law—that is, a body of law based primarily on custom and undergoing change through slow evolution—as an essential element of early English liberty. His discussion does not concern itself with questions of efficiency nor is this justification as it touches on the structure of law relevant to his thesis. Indeed, not to distinguish between these two clearly distinct reasons for supporting the common law constitutes the pons asinorum of scholarship bearing on Hayek's work.

If the arguments offered by Posner and others supporting the comparative efficiency of common law judgments are justified, however, this might well account for why the common law courts proved as successful as they proved in the end to be.

[2]Hayek's discussions of the common law are scattered throughout his writings on political philosophy but are dealt with at some length in "The Origins of the Rule of Law" (Hayek 1960:162–75) and "The Changing Concept of Law" (Hayek 1973:72–93).

[3]Elsewhere Hayek (1960:163) writes: "This medieval view, which is profoundly important as background for modern developments, though completely accepted perhaps only during the early Middle Ages, was that 'the state cannot itself create or make law, and of course as little abolish or violate law, because this would mean to abolish justice itself, it would be absurd, a sin, a rebellion against God who alone creates law.' For centuries it was recognized doctrine that kings or any other human authority could only declare or find the existing law, or modify abuses that had crept in, and not create law. Only gradually, during the later Middle Ages, did the conception of deliberate creation of new law—legislation as we know it—come to be accepted."

boasted, among them Ur-Nammu, Hammurabi, Solon, Lykurgus, and the authors of the Roman Twelve Tables, did not set down new law but rather codified what the law was and had always been (Hayek 1973: 81). The law, as originally understood, stood above and separate from the will of the civil magistrate and bound both ruler and ruled. This notion of law as residing in the unwritten rules that governed social interaction in the community was particularly true of England, where, Hayek contends, the ordinances of the Norman and Angevin monarchs played a more muted role in shaping social regulation and where the law administered by the king's courts had its origins in the judicial articulation of preexisting rules and practices that were common to the community.

As cases were brought before the common law courts, judges sought precedents for their decisions in the principles that had been laid down in earlier cases. This doctrine of *stare decisis* bound judges to apply similar principles in analogous cases. However, this development of the common law, Hayek noted, did not entail that it remained static and unchanging. The law did indeed change, through its application to new circumstances and through variations in interpretation that emerged in specific legal decisions. Common law thus evolved over time as judge-made law, the product of countless judicial decisions each having a specific end in view but the whole body of which reflected no deliberate intention or plan. Like language, common law formed a spontaneously generated arrangement, the product of human action but not of human design (Hayek 1973: 81).

The reason why England was the object of such great admiration by Europeans in the 18th century, according to Hayek (1973: 85), was because the law administered in its courts was the common law, which existed, he argues, "independently of anyone's will and at the same time binding upon and developed by the independent courts; a law with which parliament only rarely interfered and, when it did, mainly only to clear up doubtful points within a given body of law." While this division of powers was erroneously attributed by Montesquieu to the separation of the executive from the legislature, it would be more correct to claim, Hayek concludes, it was "not because the 'legislature' alone made law, but because it did *not*; because the law was determined by courts independent of the power which organized and directed government, the power namely of what was misleadingly called the 'legislature.' "

Hayek's characterization of the common law as an institutional bulwark against the depredations of the Stuart monarchs is not dissimilar to that offered by J. G. A. Pocock in his *The Ancient Constitution and the Feudal Law*, where he argues that the legal rules under

which Englishmen operated had their origins in ancient custom, not statute, and took their form through a process of evolution over many centuries. Pocock (1987: 46) maintains that it is this aspect of English political history that provided the parliamentarians the legal principles with which they armed themselves in their struggles with the Crown:

> What occurred was that belief in the antiquity of the common law encouraged belief in the existence of the ancient constitution, reference to which was constantly made, precedents, maxims and principles from which were constantly alleged, and which was constantly asserted to be in some way immune from the king's prerogative action; and discussion in these terms formed one of the century's chief modes of political argument. Parliamentary debates and pamphlet controversies involving the law or the constitution were almost invariably carried on either wholly or partially in terms of an appeal to the past made in this way.

All the leading 17th-century British lawyers sympathetic to the parliamentary cause embraced the view that the common law stood as the great protector of prescriptive rights and of parliamentary government. As the fundamental law of England whose roots lay in ancient custom and whose social value was attested to by its having survived over time, the common law, it was claimed, constituted a body of rules that took precedence even over the commands of the sovereign. Perhaps the best 17th-century summary of the common law—which comports with the way Hayek was later to interpret it—was put forward in 1612 by Sir John Davies. Davies was then attorney general for Ireland and had introduced British common law to Ireland after the Tudor Conquest. He maintained that

> the *Common Law of England* is nothing else but the *Common Custome* of the Realm: and a Custome which hath obtained the force of a Law is always said to be *jus non scriptum*; for it cannot be made or created either by Charter, or by Parliament, which are Acts reduced to writing, and are alwaies matter of Record; but being onely matter of fact, and consisting in use and practice, it can be recorded and registered no-where but in the memory of the people.
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> For a Custome taketh beginning and groweth to perfection in this matter: When a reasonable act once done is found to be good and beneficiall to the people, and agreeable to their nature and disposition, then do they use it and practise it again and again, and so by often interation and multiplication of the act it becometh a *Custome*; and being continued without interruption time out of mind, it obtaineth the force of a *Law*.
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> And this *Customary Law* is the most perfect and most excellent, and without comparison the best, to make and preserve a Commonwealth. For the *written Laws* which are made either by the

> Edicts of Princes, or by Councils of Estates, are imposed upon the Subject before any Triall or Probation made, whether the same be fit and agreeable to the nature and disposition of the people, or whether they will breed any inconvenience or no. But a *Custome* doth never become a Law to bind the people, untill it hath been tried and approved time out of mind, during all which time there did thereby arise no inconvenience: for if it had been found inconvenient at any time, it had been used no longer, but had been interrupted, and consequently it had lost the virtue and force of a Law.[4]

It is interesting that Davies' account of the development of the common law relies on a species of evolutionary theory close to that later put forward by Edmund Burke and given systematic expression by Hayek. Davies appears to be suggesting that legal rules are of an order of complexity such that only an evolutionary test through trial and error could determine their ultimate social value. "The edicts of princes" and the "councils of estates," when they attempt to contrive fundamental legal rules whose justification is rationally demonstrated, will fail because the process of coordination with existing rules will fail. The strength of the common law, indeed of all law based on precedent, is that its rules are compatible with ancient custom and therefore irreconcilable with a sovereign who seeks to issue arbitrary commands. As Hayek (1973: 94) notes, "The ideal of individual liberty seems to have flourished chiefly among people where, at least for long periods, judge-made law predominated."

What I should like to suggest in this essay is that while this characterization has some merit it fails as an accurate description of the genesis and development of the common law. More important, it does not address the common law's weaknesses and inadequacies, which were so extensive that it was only by supplementing it with other systems of substantive and procedural rules, particularly the law of equity, that it was able to survive its early history. At the outset I should make clear that in dealing with the early history of English law we are dealing with a subject of truly immense complexity. The historical description that follows therefore is of necessity somewhat oversimplified.[5]

A word of explanation might be useful. Although the term "com-

[4]From the Preface Dedicatory to *Irish Reports* (London 1674), quoted in Pocock (1987: 32–33).

[5]This study is indebted for many of the details respecting the development of English legal procedure to Sir William Holdsworth's masterful and exhaustive account of the history of English law (see Holdsworth 1982).

mon law" is regarded, in the minds of many, as synonymous with English law, especially the form that English law took until the 18th century, this is not the common law Hayek has in mind when he writes of its greatest virtue.[6] By the 18th century, elements of equity had been incorporated into the common law and, in addition, during the second half of the century, Lord Chief Justice William Manfield had made the law merchant, which governed a substantial portion of all commercial transactions, a part of the common law.[7] The common law that Hayek holds in such esteem is the common law as understood by the medieval lawyers and legal theorists, when its legal rules reflected custom and precedent and where statute and deliberate design played no, or at best a minimal, role. What Hayek wishes to emphasize is the *spontaneous* nature of the common law, that is, that aspect of law that was the creature of an unformulated web of rules governing the way Englishmen were expected to deal with each other.

Commentators who have addressed Hayek's legal theory appear to have all underscored this conclusion, that the common law is a particularly appropriate example of a spontaneously generated institution that developed as a consequence of innumerable human actions, each having as their object a specific and different end but was not consciously and deliberately designed to achieve any specific purposes. To the extent that there existed certain legal principles, those principles were not the creation of any mind or group of minds but rather were embedded in the disparate and unarticulated rules under which Englishmen operated in dealing with each other.[8] What this study seeks to show, however, is that the common law as it in fact arose was not the idealized system of justice that Hayek portrayed it to be.

The Royal Courts

Common law was the law administered by the royal courts and, as such, was enforced throughout the whole of England. But before the 14th century the royal courts were by no means the only courts to

[6]It is customary even today to refer to those countries whose legal systems had their origin in English law as "common law" nations despite the fact that statute law might well have superceded common law. Such is the case, for example, with certain jurisdictions in the United States.

[7]The Judicature Act of 1873 formally amalgamated law and equity in England.

[8]The literature on Hayek's social and political philosophy is substantial and daily growing. Although a great deal of attention has been given to Hayek's discussion of the structure of law necessary for a free society, very little has been written on his treatment of the common law. For particularly insightful discussions of this aspect of Hayek's thought, see Ogus (1989: 393–409); Kley (1994: 135–47), and particularly Barry (1979: 76–102).

which Englishmen could have access. With the exception of cases in which a freehold was at issue, plaintiffs were free to have their cases heard in a variety of different courts, each enforcing a distinct set of rules. Among them were local county courts, which dated back to the period before the Conquest and which administered the customary rules of the region, the borough courts, which administered commercial law and the rules that prevailed in towns, and the manorial and other seignorial courts, which enforced feudal law. In addition, the ecclesiastical courts administered canon law, which included jurisdiction over issues of marriage and divorce, wills and testaments, and contracts sealed by a pledge of faith. Even in the face of these choices, however, the king's courts and the common law gained steadily in popularity, especially during the 12th and 13th centuries when those courts actively expanded their authority. By the mid-13th century, the great English jurist Henry Bracton noted that the king was the proper judge for all temporal causes (Plucknett 1956: 80–81).

This shift away from those courts competing with the courts of common law was due in large measure to the fact that the royal courts offered far more efficient protection. Not only did the kings' courts have professional judges a good deal earlier than the local courts but the method of determining guilt was different. In the local courts, judgment—amazing as it might seem—preceded proof. A group of freeholders of the region were called to sit as judges, called suitors, before the plaintiff and defendant and determined which of the litigants should present proof of their claim. Proof was not what we currently understand as proof but rather an appeal to the supernatural, through ordeal, battle, or what was called wager of law, that is, swearing to the truth of one's claim and rounding up a sufficient number of "oath-helpers" who would testify that one's oath was clean and unperjured. Although ordeal, battle, and wager of law were all, at one time, used in the royal courts, by 1215 they were replaced by trial by jury,[9] which, at about the same time, was also extended from private cases to questions of criminal guilt.[10] Indeed, plaintiffs were

[9]Trial by ordeal was abolished by order of the Lateran Council of 1215. Trial by battle and wager of law were not formally abolished until 1819 and 1833, respectively. Battle had become archaic even during the late Middle Ages and there is no evidence that any battle was fought after 1485. However, it was not legally abolished until a gauntlet was thrown into a startled court of King's Bench in 1818 (*Ashford v. Thornton* [1818] B & Ald 405).

[10]The original jury took the form of a group of neighbors who were impaneled to tell the truth about the matter before the court. They were thus more like witnesses than judges of fact. Trial by battle was clearly an unreliable method of determining guilt, which was of especial concern to the king when the charge involved the dispossession of the rightful

compelled to take their cases to the king's courts to avoid trial by battle or wager of law inasmuch as only the king could grant the privilege of jury trial. Finally, the increased activity of the royal courts was greatly accelerated by virtue of the fact that the king claimed a virtual monopoly over criminal justice since it proved a valuable source of revenue through the forfeitures and fines collected. Private actions for dispossession [disseisen] often brought with them a criminal complaint against the defendant against whom judgment was given, who was required not only to pay damages to the plaintiff but also a fine to the king.

As one legal historian has pointed out, the old courts were not deprived of their competence to hear cases. Rather, the alternative of bringing suit in the royal courts, unhampered by the antiquated and sluggish processes with which the older courts were burdened, clearly was a superior option to most prospective litigants (Caenegem 1973: 33).[11] There can be little doubt that the king's courts indeed reflected the genuine preferences of litigants since, unlike the older courts, the king's courts charged for their services by requiring the plaintiff to purchase a writ, which would provide him access to the court. Each writ governed a separate and distinct procedure and was devised for a specific type of grievance. The plaintiff's complaint thus had to fit into one of the existing forms of action. The specific writ was addressed to the sheriff, who was directed to demand of the named defendant that he remedy the wrongful act complained of or, should he not, to appear in a royal court to answer why he had not done so.

By the end of the 13th century, three great royal courts had emerged, all functioning in much the same way and all administering the same rules. These were (1) the Court of King's Bench, whose authority originated in the royal right to preserve the peace and which, as a result, had unlimited criminal jurisdiction, that is, authority to try all cases involving appeals of felony and breaches of the peace. The court originally accompanied a perambulating king in his circuit throughout the kingdom and the king himself would, from time to time, participate in the operation of the court.[12] The other supreme courts of common law were (2) the Common Bench or

occupier of a piece of land. As a result in 1179 Henry II enacted the Grand Assize, which permitted the decision in such cases to be determined by jury trial.

[11]The older courts, whose origin and authority were independent of the king, gradually lost their independent status and were absorbed into the system of royal justice. In the end, they were either abolished or were displaced by other institutions.

[12]Given the more intimate relationship with the king and his council, the King's Bench originally had appellate jurisdiction over appeals of error from the Court of Common Pleas.

Court of Common Pleas, which sat as a permanent court in Westminster and which had exclusive jurisdiction over suits in which the king had no interest, and (3) the Court of Exchequer, whose jurisdiction largely concerned issues touching the royal finances. Although each of these courts originally tended to specialize in a specific area of the law, by the reign of Edward III they all judged cases by common law and the Courts of King's Bench and Common Pleas exercised what amounted to concurrent jurisdiction over civil actions. And all, by virtue of being common law courts, relied on one form of writ or another before a case could be initiated.

Writs were issued through the Chancery, the royal secretariat. As the disputes before the king's courts raised new and recurring issues, the Chancery would frame new forms of writ, ordering the sheriffs to call juries to deal with the specific complaint. For example, to secure enforcement of an agreement, the plaintiff would obtain a *writ of covenant*; to collect a certain sum of money earlier lent the defendant, the plaintiff would bring an action of *debt*; to recover personal property or chattels illegally taken, the plaintiff would apply for a *writ of replevin*. By the end of Henry II's reign in 1189, there were approximately 39 writs and these increased to more than 470 in the reign of Edward II (1271–1307). During the 12th and 13th centuries, the Chancery appears to have been prepared to create appropriate writs to address new instances where any private right had been violated. However, by the end of the 13th century, this process slowed considerably and by the 14th century had stopped altogether. By that time the writ system in use in the common law courts had hardened to the point where no new forms were devised, partly because the common law judges opposed the issuance of writs that had no precedent.

Although 470 writs might suggest that the common law was able to address an almost unlimited spectrum of private wrongs, this was not in fact the case. Many of the original writs fell into groups or families, with similar formulas grounded on a single principle that varied only slightly from writ to writ. Thus, writs of entry, invented during the reigns of Richard I, John, and Henry III (1189–1272), all concerned themselves with recovering the possession of land wrongfully held through a flaw in title. However, there were a large number of possible causes of such flaws, including wrongful transfers by a host of different officials. Each of these instances required a distinct writ.

By the end of the 14th century the King's Bench has ceased to go on circuit and settled permanently in Westminster.

Consequently, by the reign of Edward I (1272–1307), there were 18 different writs of entry. Although the earliest writs referred in the main to landed property, personal actions made their appearance toward the end of the 12th century in the form of actions for debt and detinue. An action for debt ordered that a specific sum of money be returned to the plaintiff, while an action for detinue ordered the defendant to surrender certain chattels (or their value). Thus, should one of the parties to the transaction refuse to fulfill his obligation, the seller could sue for debt or the buyer could bring an action for detinue.

Possibly the most important of all the personal actions developed during this period was that for trespass, "the fertile mother of actions,"[13] which was not to become a writ until very late in the reign of Henry III. As a civil action, trespass, whether against land, against the person, or against goods, was based on the principle that force had been misused against the plaintiff. It appears that before 1252 one was expected to act on one's own behalf in defense of one's person, goods, or land (Ames 1913: 50, 56). Should someone wronged pursue and catch the thief, he was allowed, and expected, to execute him on the spot. However, this private use of force often proved awkward and ineffective. The introduction of writs of trespass permitted the intervention of the king's officials in such instances and they quickly became extremely popular. Not only did these writs bring to bear the majesty of royal authority but they also served to expand the criminal law and criminal procedure inasmuch as most trespasses constituted breaches of the king's peace.[14]

Limitations of the Common Law

Despite the fact that the common law had, by the end of the 13th century, extended its reach to address what appears to have been a large number of offenses, the law's ability to provide remedies for the complaints brought before the common law courts was in fact quite limited. Despite the proliferation of writs, there was insufficient expansion of the courts' competence to redress injuries, not because of

[13]In the words of the great British legal scholar F. W. Maitland (1971: 39).

[14]"The action of trespass," writes Maitland (1971: 40), "is founded on a breach of the king's peace: with force and arms the defendant has assaulted and beaten the plaintiff; broken the plaintiff's close, or carried off the plaintiff's goods; he is sued for damages. The plaintiff seeks not violence but compensation, but the unsuccessful defendant will also be punished and pretty severely."

the actions of the Chancery but because of strong objections from the common lawyers themselves. They were fearful that with the authority to invent new remedies came an authority to create new rights and duties, thus placing too much power in the hands of the Chancery. Indeed, the early common lawyers appear to have suffered from such a strong prejudice in favor of precedent that by the end of the 13th century they were prepared to abandon support for any novel legal solution, even in the interests of justice. There existed an early maxim, quoted in Plunkett (1956: 680), to which most of the common lawyers adhered, that it was better to tolerate a "mischief" (by which they meant a failure of substantive justice in a particular case) than an "inconvenience" (by which was meant a breach of legal principle). As early as 1285, the second Statute of Westminster noted that "men have been obliged to depart from the Chancery without getting writs, because there are none which will exactly fit their cases, although cases fall within admitted principles."[15] Certainly by the middle of the 14th century this rule had seized hold of the common law, whose procedures became firmly fixed, and by the end of the reign of Edward III in 1377 all innovation had effectively ceased and the common law courts had become totally inflexible. As Frederic Maitland (1971: 42) notes, by this point in the development of English law, "the king's courts had come to be regarded as omnicompetent courts; [but] they had to do all the important civil justice of the realm and to do it with the limited supply of forms of action which had been gradually accumulated in the days when feudal justice and ecclesiastical justice were serious competitors with royal justice."

The ingrained conservatism of the common lawyers and their power to translate their concerns into curbs on the king and his chancellor to create new forms of action acted to seriously limit the ability of the common law courts to resolve the disputes that came before them. Regardless of the circumstances of the case, its remedies were limited to a judgment for money or to ordering the return of specific real or personal property or its value. Fortunately, the Chancery was under no such constraint respecting its own authority to respond to the petitions it received and to dispense substantive justice. The king always held residual discretionary power to do justice among his subjects where, for some reason, it could not be obtained in his courts. As a result, his Chancellor, the highest ranking official in the king's secretariat, and the Chancery clerks gradually began to exercise independent jurisdiction as judges in legal disputes

[15]Statute of Westminster II, 13 Edw. I c. 24.

heard in the Chancery courts. However, unlike the common law courts—whose central focus was the application of existing legal principle–courts of equity concerned themselves with what ought to be the results of their decisions, that is, with whether the remedies handed down served the interests of justice. In the words of one legal historian, "The distinction between *what is* and *what ought to be* may serve as a rough guide to the difference between common law and equity in the centuries after the 14th. Equity supplements the common law; its rules do not contradict the common law; rather, they aim at securing substantial justice when the strict rule of common law might work hardship" (Hogue 1985: 175). There is no way that the common law could have served as an exclusive body of legal rules governing a society as complex as was England in the 14th century. Over the course of the preceding 150 years commercial activity had become increasingly important to the economic life of the nation, and the common law courts were simply not equipped to deal with cases arising out of mercantile transactions. The numerous artificial restrictions with which the common law was tied down, many of its own making, made it impossible to adequately treat a large number of legal relations, particularly those having to do with trade. As a result, the equity courts assumed the jurisdiction that the common law courts had abdicated to remedy these inadequacies. The failings of the common law were acute and far-reaching. Since its courts were circumscribed in their judgments to awards of money or to directing that specific real or personal property be returned, the common law lacked the ability to right a huge range of wrongs, including—most importantly—the enforcement of fiduciary trusts. The Chancery courts, however, could cancel a document, compel the delivery of deeds or of specific personal property, grant specific performance of a contract, liberate a freeman wrongly held as a serf, and so on. They could issue declaratory judgments and injunctions. Indeed, the whole range of possible remedies was available to it. In sum, the courts of Chancery were in a position to grant relief in any of the countless instances in which a petitioner could not be awarded a remedy in the ordinary course of justice, even when entitled to a remedy.

There are any number of examples of the limitations under which the common law courts were forced to operate because of the writ system. For example, if a debtor failed to cancel his sealed bond on paying his debt, common law was obligated to regard the bond as incontrovertible evidence of the debt and to award payment to the plaintiff, thus forcing the debtor to pay a second time. Only if the debtor should have obtained from the creditor a release under seal would the common law courts adjudge his debt to have been paid.

The Chancery courts were under no such limitation. Should the complaining debtor advise the court of equity that he had either been sued and judgment given against him or that he was about to be sued upon a bond that he had paid, the chancellor exercised his authority to issue a subpoena to the creditor, requiring him to answer under oath as to the payment. If the creditor admitted the payment, or if, under examination, it were found that payment had been made, the chancellor would cancel the bond. Should the creditor have already been awarded a common law judgment, the chancellor would issue a writ of injunction forbidding the creditor to proceed further under the judgment.

Similarly, if a man entered into an oral contract for which the law required written evidence, even though the facts were undisputed, the complainant was without remedy. Because of the technical requirements associated with the common law, the law was filled with such aberrations. The limitations of common law were particularly acute with respect to commerce, but the common law was also occasionally inadequate with regard to land tenure. Should a man grant land to someone else in trust on condition that the trustee carry out the original owner's wishes, the original holder of the land had no recourse if the grantee, who was recognized in law as absolute owner of the property, refused to act as he had agreed.

Nor was the common law able to deal with situations in which goods were sold that had not yet been manufactured. The law held that upon the sale of goods, property in the goods immediately transferred to the purchaser and, totally independent of delivery, the seller could at once sue in an action of debt for the stipulated price, and the buyer could sue in an action of detinue for the goods. That being the case, the sale of nonexistent goods was regarded by the courts as a nullity and no remedy existed for breaches of such agreements.

Nowhere were the limitations of the common law more dramatic than in the area of trusts. Despite any prior agreement between the original owner and the person to whom ownership was transferred, all transfers of titles to property were regarded by the common law courts as unconditional. The result was that the courts were helpless to enforce the original owner's intentions. Once title had transferred, ownership was regarded as absolute and this was true even when fraud was involved in the transfer. The Chancery courts were under no such constraint. They could and did order that, despite the fact that A owned, say, a piece of land, it must be held for the exclusive benefit of B, if those were the terms under which the transfer was made. In addition, A was enjoined from suing in a court of law (that is, a common law court) to establish his legal rights, or from exercising

them had they been established by an earlier suit.[16] The effect of such decisions was to create a distinction between legal and beneficial ownership, or *ownership in law* and *ownership in equity*. These decisions were far-reaching and opened up the law to the possibility of permanent endowments for charitable ventures and to the whole range of commercial activities that relied on being able to transfer title to real property or chattels to someone else to be used for specific purposes.

Growing Inflexibility of Common Law Courts

The refusal of the common lawyers either to permit flexibility in the legal rules or to permit the Chancery from issuing writs for new causes of action inevitably led common law courts to lose ground to the Chancery courts. In this way the common law's addiction to precedent was in large part responsible for protecting it from the changes that all social institutions require if they are to remain vibrant and relevant. So rigid and complex did the procedural requirements of the common law become that litigants, in many instances with the connivance of the courts, took to relying on fictions to expedite access and to reduce the costs involved in bringing suit. These fictions, known by all parties to be false and used to extend the substantive remedies available to the courts, became so common that by the 17th century only highly trained experts in the law were aware of how best to proceed in bringing an action.

One example of the numerous fictions to which the common law courts had recourse will suffice. Because of the complexities and the cost to plaintiffs of acquiring the necessary writs, there was a steady decline over the course of the 15th century in the number of cases taken to these courts. This was especially true of the Court of King's Bench, which had settled permanently at Westminster and which could not ordinarily entertain writs of debt or other suits between private individuals—over which the Court of Common Pleas held exclusive jurisdiction. In order to increase the number of litigants appearing before it, the King's Bench took to encouraging employment of a more streamlined procedure, the use of bills rather than writs.

[16]Hanbury's *Modern Equity* (1969: 7) lists several reasons why land might be conveyed to another person for the benefit of the conveyor. If the conveyor were going on a crusade, feudal services would still have to be performed and received. A community of Franciscan friars, who because of their rule of poverty could not hold property, would need to find someone to hold land for the group's benefit. In cases where a landowner was attempting to escape his creditors or where he feared a conviction for felony, he might wish to transfer his lands "to his use," that is, to be used for his benefit after the transfer.

A bill was a petition addressed directly to a court to commence an action, thus bypassing the expense and inconvenience of lodging a complaint at the Chancery and of purchasing a writ, which would then be sent to the court in which the proceedings were to take place. This made it a far superior device for initiating action against someone than was a writ. In addition, bills were substantially less expensive than were writs. However, a bill's reach was severely circumscribed. One could bring an action via bill procedure only in two instances: (1) where the defendant was at the time either an officer of the court or a prisoner of the court, that is, only if the prospective defendant were at that moment the defendant in another case, or (2) if the prospective defendant were accused of having committed the offense in the county in which the court was sitting.

By the 16th century these two exceptions provided a loophole sufficiently large that a substantial number of legal actions via bill were undertaken in the Court of King's Bench, including actions for debt and covenant, which, being private, were ordinarily the prerogative of the Court of Common Pleas. If the fiction were maintained that the defendant committed a wrong in Middlesex (the county in which Westminster was situated and in which the King's Bench sat) and that the wrong was a trespass in which the King had an interest, this would constitute sufficient cause to arrest the defendant. And once arrested, a bill would suffice to institute legal proceedings on the particular wrong that the plaintiff wished to have addressed by the court.[17]

The inflexible formalism of the common law courts was not alone the cause of their declining popularity. Curiously, juries, which constituted one of the great strengths of the common law courts in the early history of English law, later proved a critical weakness.[18] As earlier noted, juries, at least as they originally functioned and unlike those with which we are familiar, were not charged with determining the facts of a case on the basis of the evidence placed before them. Rather, before the 16th century, jurors were selected from the district in which the wrong was alleged to have been committed and were asked to bear witness regarding the truth or falsity of the plaintiff's charge. The use of juries was confined to the king's courts in-

[17]Should the defendant not be found in Middlesex, as was most often the case, the plaintiff would then inform the court that the defendant "lurks and runs about" in a particular county, at which point the court would issue a writ of arrest *(latitat)* to the sheriff of that county.

[18]An excellent overview of the history of the English jury is provided by Sir Patrick Devlin (1956).

asmuch as the king alone could compel the taking of an oath. The jurors in a proceeding were taken to have knowledge of all the relevant facts of the case and were required under oath to answer which of the disputants was in the right. Initially juries consisted of 12 men and if they did not agree, then others were added until 12 concurred in a verdict. It was not until the mid-14th century that juries were required to render a unanimous verdict.

Henry II had been responsible for turning the jury into an essential instrument of English law, first, in 1166, when jury trials were extended to all criminal cases by the Assize of Clarendon, and second, with enactment of the Grand Assize in 1179, which provided that in disputes involving title to land, litigants had a choice between a wager of battle or trial before a jury. Both these uses of the early jury as testifier of fact made some sense. With regard to questions of real property, the disputants' neighbors would almost certainly have been aware of recent changes in possession. And those living in the district could be expected to have knowledge of the crimes committed in the district and who was likely to be responsible.[19] Indeed, the use of this type of jury in criminal cases adumbrates the modern grand jury. But it soon became apparent that the knowledge that juries possessed was inadequate to most of the cases before them. The growth in trade and the expansion of urban life both worked to seriously limit what one knew about one's neighbors.

The problems confronting the common law jury were compounded by the rules respecting the giving of evidence. With few exceptions, particularly before the 15th century, jurors were the only witnesses and were free to get their information out of court in any way they chose (Zane 1998: 158, 254). However, they were thoroughly shielded from any testimony that might be presented in court. Indeed, early juries were called in only when the defendant requested a definitive decision on the issue in dispute. Anyone who voluntarily testified to the jury when he had no interest in the case or where he was not a relative of one of the parties was guilty of the crime of maintenance. Indeed, in criminal cases before the reign of Elizabeth, even when court rules were relaxed sufficiently to permit juries to hear testimony, only the Crown could adduce witnesses. Even when the defendant was finally permitted to call witnesses in his defense, they had to remain unsworn, sworn inquisition being a prerogative of the Crown. These limitations on the abilities of juries in common law

[19]Juries in criminal cases were not required to speak of their own knowledge but could report what was reputed to be the case in their districts.

courts to arrive at just verdicts contributed substantially to the increasing popularity of the courts of Chancery, which were free from such constraints. Chancery courts, armed with the subpoena power, routinely summoned witnesses, whose testimony was written down.

In the 15th century the Chancery courts had assumed jurisdiction over cases that fell outside the common law, including those concerning foreign merchants and those based on maritime or ecclesiastical law. At about the same time the authority of these courts was extended to include appeals from litigants who had lost in a common law court through fraud (for example, the use of perjured evidence) or as the result of an excusable inadvertence or by the petitioner's failure to produce evidence that would have proved the verdict and judgment wrong, provided the failure was not the fault of the losing party. In such cases the Chancery court would enjoin enforcement of the common law judgment, thus compelling the winning party to agree to a new trial.

The common law courts were further burdened by the fact that pleadings and judgments were made in Norman French, which persisted until the 16th century. Even as late as 1631, the records of the Salisbury assizes noted that the Chief Justice of the Court of Common Pleas condemned a prisoner, who *"ject un Brickbat a le dit Justice que narrowly mist,"* for which *"son dexter manue amputee,"* and the man himself "*immediatment hange in presence de Court*" (quoted in Harding 1966: 205). Attempts had been made by Parliament to change this but these were disregarded by the common lawyers, who insisted that they could not express the necessary legal niceties without recourse to Norman French and who treasured the priest-like status mastery of this esoteric language accorded them. That most plaintiffs and defendants could not follow the proceedings proved a serious blow to the common law courts and contributed to a shift of litigation into the courts of Chancery, where the proceedings were in English and where, after 1435, the pleadings were in the same language.

The Origin of Common Law Revisited

Not only is Hayek's account defective in that it does not reflect the severe limitations of the early common law, but his conclusions regarding the origin of its rules are questionable. Hayek's claim that the common law, because it reflected customary rules, was superior to the statutes and ordinances that issued from the king and his council, cannot stand up to historical scrutiny. The common law as it developed over time comprised not only a body of principles derived from precedent but also the ordinances and royal regulations that issued

from the king and the *curia reges*. Even by the middle of the 13th century no clear distinction between legislation and judicial actions was possible and every rule, no matter its origin, was regarded as binding only by virtue of "the consent of the barons and the king in his feudal capacity" (Ullmann 1961: 167). It is true that the term "common law," which became current during the reign of Edward I (1272–1307), was borrowed from the Canon Law jurists to describe that part of the law that was unenacted, or nonstatutory (Maitland 1969: 2), but in fact the legal and procedural rules of civil and criminal procedure comprised statute as much as custom. Indeed, one of the most important advances in common law that played a crucial role in structuring the criminal law in the royal courts was the Assize of Clarendon, which was enacted as a statute by Henry II in 1166.[20] And one of the earliest surviving legal treatises, dating from around 1188 and attributed to Henry II's justiciar (the king's viceroy in England), Ranulf Glanvill, noted that "although the laws of England are not written, it does not seem absurd to call them laws—those, that is, which are known to have been promulgated about problems settled in council on the advice of the magnates and with the supporting authority of the prince" (Hall 1965: 2).

Indeed, the procedures by which the common law courts operated were ultimately dependent on the king and his council. The staffing, location, and jurisdiction of the courts themselves, as well as the rules governing their operation, all reflected administrative decisions originating in the king's council and particularly in his secretariat. Clause 17 of the Magna Carta explicitly provided that the Court of Common Pleas sit permanently at Westminster. These procedural rules, which gave shape and direction to the legal rules that the king's courts applied when determining the outcome of the cases before them, while in some instances reflecting traditional elements, were instituted through what amounted to legislation.[21]

[20]Enacted by Henry II, the Assize of Clarendon was issued to the sheriffs of every county in England, calling on them to assemble a specified group from each country: 12 men from each 100, plus the priest, the reeve, and 4 men from every village. This "presenting jury" was in turn, asked to name, under oath, all persons in the area suspected for murder or theft since Henry's coronation 10 years earlier. The list of names, known as presentments, were then taken before the royal justices, who ordered the arrest of the suspects and proceeded to put them through trial by ordeal.

[21]With respect to the question of how legislation was enacted in medieval England, one historian writes: "The parliamentary form of modern legislation is rarely encountered before the end of the thirteenth century, and the consent of the House of Commons was probably not regarded as indispensable until after 1400. The present bill procedure was not settled until early Tudor times. It is therefore anachronistic to regard medieval legislation

In understanding the framework of the common law throughout most of its history, it is essential that we are fully aware of the singular importance played by the forms of action and the writs associated with them. Maitland (1971: 1) went so far as to note that "the system of Forms of Action or the Writ System is the most important characteristic of English medieval law, and it was not abolished until its piecemeal destruction in the nineteenth century." These writs ultimately determined the remedies available to plaintiffs in the king's courts. And being creatures of the Chancery, an integral arm of the *curia regis*, writs partake in large part of statutory determinations. By varying the existing writs or, indeed, by inventing new ones when he was permitted to do so, the chancellor played a crucial role in shaping the development of English law.

While Hayek is correct in noting that the central concern of the common law is property, the property of which the early common law speaks is real property. Moreover, it was only changes in the common law brought about by decisions of equity, by the law merchant, and by statute that English law began to address the complex interrelationships of commerce and to make provision for the instrumentalities of finance that we associate with modern capitalism (Atiyah 1979).[22] The common law of which Hayek is such a proponent operated in what was primarily an agrarian society where people dealt with those whom they knew and where custom was sufficient to structure their legal relationships. Historically, however, the laws that developed in England that proved necessary for the operation of an advanced commercial society seem to have been far too complex to have relied solely on rules that were never made explicit and that did not grow by deliberate design. Its principles had first to have been contrived and consciously applied by judges who had learned the law and then applied it.

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as an authoritative text in quite the modern sense. The text was written law, certainly, but it was not a text which had been pored over word for word in both houses, with debates upon verbal amendments. In the case of the early statrutes, the drafting was done by the clerks and judges after assent had been given. A statute represented the terms of a decision upon a complaint or petition; a decision of the highest authority in the land, but not different in kind from decisions by inferior branches of the *Curia Regis*" (Baker 1979: 178).

[22]Atiyah traces the 18th-century transition of English law from one whose primary concern is the law of property to one where the law of contract plays the most crucial role. As he points out, "Between 1688 and 1770 the common law, with the aid of the Court of Chancery, created the legal principles necessary to support…[a] credit system [compatible with a flourishing market economy], though not without travail, and not wholly successfully" (Atiyah 1979: 135).

Common Law as a Barrier to State Power

Given the limitations of the common law and of the courts whose function it was to enforce its rules and given the fact that the common law itself was as much a product of conscious design as it was of unarticulated custom, how could Hayek have concluded that the English common law had served as an effective barrier to the incursions of state power? There are, I think, two principal reasons for this. First, all the great 17th-century common law jurists, most notably Sir Matthew Hale and Sir Edward Coke, were associated with the parliamentarians' struggle against arbitrary government and the oppressive policies of the Tudor and Stuart monarchs. Coke was the earlier of the two great jurists and, in large measure because of his *Institutes of the Laws of England*, was to leave a deeper impression.[23]

Coke was appointed Chief Justice of the Court of Common Pleas in 1606 by James I and, in 1613, was transferred to the position of Chief Justice of the Court of King's Bench in the hope that he would be more sympathetic to the prerogatives claimed by the king. Throughout his tenure on the bench, he was an uncompromising defender of the common law and viewed with great suspicion not only the Chancery courts, whose jurisdiction he made every effort to limit,[24] but with the ecclesiastical courts as well. While Coke employed the common law, of which he had a brilliant mastery, as a tool against the encroachments of the Stuart kings, his knowledge of the early legal and political history of England is now conceded to have been quite poor and it was largely through a series of misinterpretations of early common law that Coke was successful in voiding a number of royal edicts. Coke's zeal in defending the common law courts against the prerogative courts and the Parliamentary cause against the king was in large measure responsible for the reputation the common law earned as a defense against arbitrary government.

The second reason why Hayek appears so taken with the common law as an institutional deterrent to a tyrannical and capricious state is that he ascribes to the common law the properties normally associated with natural law, whose great proponent in England is John

[23]Hayek's conception of the common law derives primarily from that of Sir Edward Coke, whom Hayek regarded as "the great fountain of Whig principles."

[24]Coke's attempts to limit the authority of the Chancery courts to enjoin proceedings in the common law courts brought him into conflict with Francis Bacon. Coke had attempted to gain the post of attorney general, which was eventually awarded to Bacon in 1613, and both Bacon and Coke engaged in a bitter competition for the hand of a young and wealthy widow, in which Coke, despite his age, prevailed. Coke's life and career is dealt with at some length in Bowen (1957).

Locke. As Locke maintained, natural law dictates that men, by virtue of their nature and the nature of the universe in which they all exist, are subject to a system of objective rules, good for all times and all places, governing how they are to behave toward each other, and that man's reasoning ability provides him the instrument whereby he can uncover these rules. From natural law derive a spectrum of natural rights that all men possess by virtue of their humanity that protect them from the encroachments of an oppressive government. When governments violate these rights they pervert their natural purposes and men may attempt to replace them with others more fitting.

Hayek's description and analysis of the English common law locates the law's origins in the unwritten rules and conventions to which English society adhered, which were then taken up by the king's courts and which, through the vehicle of precedent, became the law of the land. To the extent that Englishmen had rights over and against the king, these rights followed from the unwritten rules that comprised the law and were historical and prescriptive in origin. Although there appears to be a sharp divergence between discovering our legal rules in right reason on the one hand or in the traditional rules of the group on the other, the distinction, as Hayek understands it, is less than one might at first suppose. What is significant in this regard is that Hayek (1973: 98) concedes that the unwritten rules that form the basis of the common law must meet certain strict criteria, that "only some order of rules of individual conduct will produce an overall order while others would make such an order impossible." There are some rules that conduce to a peaceful, free, and ordered society and others that do not and it is only the former that will, in the end, be selected. The only difference between natural law theory and Hayek's conclusions respecting these rules is how they are discovered. For Hayek they can only be uncovered by a process of evolution, while a Lockean would maintain that reason alone is sufficient to decipher them.[25]

Indeed, there is a striking similarity between Hayek's treatment of the common law and Hume's discussion of the nature of justice. As Knud Haakonssen (1981: 12–21) has observed of Hume's ethical

[25]The conflation of the common law with natural law was not unusual among the 17th-century common lawyers. The claim that historical precedent existed for almost every limitation on the power of the sovereign to make law was extended in *Dr. Bonham's Case* (8 Co, Rep. 197 [1610]) by Coke, who wrote: "In many cases, the common law will control acts of parliament, and sometimes adjudge them to be utterly void: for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void" (quoted in Kurland and Lerner 1987, V: 303).

theory, while it is true that the rules that comprise justice are the product of convention, these rules are not capricious but reflect our common nature as social beings born into a universe of scarce resources (see also Dun 1994: 269–86). We thus all share certain values simply by virtue of the fact that we share a common environment in which our wants exceed the means to satisfy them In like manner it is possible to reconcile the common law, which has its origin in the unarticulated rules that have slowly evolved over time and which are the product of convention, with natural law, which comprises a series of objective moral rules determinable by reason. The rules that form the matrix of the common law, like Hume's rules of justice, also reflect the common environment in which we find ourselves and thus give rise to certain values that we all more or less embrace. Hence, although Hayek (1988: 10) maintained that there are no universally valid principles of justice, his theory of law is spared being relativistic by taking on certain crucial characteristics of natural law.

Conclusion

Hayek, however, wishes to go further. Not only does he want to explain the dynamic by which the legal rules of a free society develop but he also wishes to provide an historical instance of this dynamic in the form of the English common law. But the facts of the matter simply do not warrant this conclusion. The early common law cannot be said to be either the product of evolution, any more than any other medieval English institution, nor a workable system of justice.

It was only with the rise of the law of equity that English law was able to deal with the legal needs of a growing commercial society. Hayek's distrust of social institutions that are clearly the product of deliberate design is so deep and his reliance on the historical misinterpretations of the common law made by those jurists who opposed the arbitrary power of the Stuarts so great that he misconceived the strengths and weaknesses of early English law and made of the common law one of the strongest bulwarks against tyrannical government with which the Parliamentarians were armed. The truth is that, even admitting all its strengths, it was much less.

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