F. A. Hayek and the Common Law: An Assessment

Ronald Hamowy (rhamowy@ualberta.ca)

F.A. Hayek Lecture, Austrian Scholars Conference, Auburn, Alabama, March 16, 2002

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. 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. It was this view of law that predominated in England until the fifteenth and sixteenth centuries, when for the first time the European nation-states sought to use legislation to effect specific policies.[1] As Hayek maintains in Law, Legislation and Liberty,

> 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.[2]

The reason why England, unlike the continental countries, did not develop a highly centralized absolute monarchy in the sixteenth and seventeenth centuries, he argues, was its distinctive system of legal rules and procedures. "What prevented such development, " Hayek writes, "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

---

[1] Hayek's discussions of the common law are scattered throughout his writings on political philosophy but are dealt with at some length in chapter 11, "The Origins of the Rule of Law,' in The Constitution of Liberty (Chicago: University of Chicago Press, 1960): 162-175 [hereafter cited as Constitution], and chapter 4, "The Changing Concept of Law," in Law, Legislation, and Liberty: Vol. I: Rules and Order (Chicago: University of Chicago Press, 1973): 72-93 [hereafter cited as Law, I]

[2] Hayek, Law, I: 83. Hayek elsewhere 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." Hayek, Constitution, 163.

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."[3]

[3] Hayek, Law, I:84-85.

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 law-givers, those semi-mythic figures of which early civilizations boasted, among them Ur-Nammu, Hammurabi, Solon, Lykurgus, and the authors of the Roman Twelve Tables, not did set down new law but rather codified what the law was and had always been.[4] 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 pre-existing 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.[5]

The reason why England was the object of such great admiration by Europeans in the eighteenth century, according to Hayek, 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

---

[4] Hayek, Law, I:81.

[5] Hayek, Law, I: 81.

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, that 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.'"[6]

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,[7] 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 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 "Put very briefly," he writes, "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."[8]

All the leading seventeenth-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,

---

6 Hayek, Law., I: 85.

7 The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century (Cambridge: Cambridge University Press, 1987).

8 Pocock, The Ancient Constitution, 46.

constituted a body of rules that took precedence even over the commands of the sovereign. Perhaps the best contemporary summary of the common law–which comports with the way Hayek was later to interpret it--was put forward in the seventeenth century by Sir John Davies in 1612. Davies was then Attorney-General for Ireland and had introduced British common law to Ireland after the Tudor Conquest

> For 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.
>
> 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.
>
> 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.[9]

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 notes: "The ideal of individual liberty seems to have flourished chiefly among people where, at least for long periods, judge-made law predominated."[10]

---

[9] From the Preface Dedicatory to Irish Reports (London, 1674); quoted in Pocock, The Ancient Constitution, 32-33.

[10] Hayek, Law, I:94.

What I should like to suggest in these comments 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 a second system of substantive and procedural rules, known as 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, about which I pretend to no expertise. The historical description that follows therefore, although in the main accurate, is of necessity somewhat over-simplified.[11]

Common law was the law administered by the royal courts and, as such, was enforced throughout the whole of England. But prior to the fourteenth century they were by no means the only courts to 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 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 twelfth and thirteenth centuries when these courts actively expanded their authority. By the mid-thirteenth century, the great English jurist Henry Bracton noted that the King was the proper judge for all temporal causes.[12]

---

[11] This paper is indebted for many of the details respecting the development of English legal procedure to Holdsworth's masterful and exhaustive account of the history of English law. See Sir William Holdsworth, History of English Law (17 vols.; London; Methuen, [1982]).

[12] See Theodore F. T. Plucknett, A Concise History of the Common Law (5th ed.; Boston: Little, Brown and Company, 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, judgement–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. While ordeal, battle, and wager of law were all, at one time, used in the royal courts,[13] by 1215 they were replaced by trial by jury,[14] which, at about the same time, was also extended from private cases to questions of criminal guilt. Indeed, plaintiffs were compelled to take their cases to the king's courts in order 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. Indeed, private actions for dispossession [disseisen] often brought with them a criminal complaint against the defendant against whom judgement 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

---

[13] Trial by ordeal was abolished in 1215 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].

[14] 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 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.

prospective litigants.[15] 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 thirteenth 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.[16] The other supreme courts of common law were (2) the Common Bench or 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. While 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

---

[15] R. C. Van Caenegem, The Birth of the English Common Law (2nd ed.; Cambridge: Cambridge University Press, 33. 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.

[16] 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. By the end of the fourteenth century the King's Bench had ceased to go on circuit and settled permanently in Westminster.

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 thirty-nine writs and these increased to more than 470 in the reign of Edward II (1271-1307). During the twelfth and thirteenth 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 thirteenth century this processed slowed considerably and by the fourteenth 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.

While some 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 which varied only slightly from writ to writ. Thus, writs of entry, invented during th 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. Consequently, by the reign of Edward I (1272-1307) there were eighteen different writs of entry. While the earliest writs referred in the main to landed property, personal actions made their appearance toward the end of the twelfth 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,"[17] which was not to become a writ of course until very late in the reign of Henry III. As a civil action, trespass, whether against land, against the person, or against goods, were all variants of the principle that force had been misused against the defendant. It appears that prior to 1252 one was expected to act on one's own behalf in defense of one's person, goods, or land.[18] 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.[19]

Despite the fact that the common law had, by the end of the thirteenth 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 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 thirteenth century they were prepared to abandon support for any novel legal solution, even in the interests of justice. There existed an early maxim, to which most of the common lawyers adhered,

---

[17] In the words of the great British legal scholar F. W. Maitland. See The Forms of Action at Common Law, ed. A. H. Cadre & W. J. Whitaker (Cambridge: Cambridge University Press, 1971): 39.

[18] James Barr Ames, Lectures on Legal History: and Miscellaneous Legal Essays (Cambridge, Mass.: Harvard University Press, 1913): 50, 56, cited in Arthur R. Hague, Origins of the Common Law (Indianapolis: Liberty Press, 1985): 16.

[19] "The action of trespass," writes Maitland, "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." Forms of Action, 40.

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).[20] 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.”[21] Certainly by the middle of the fourteenth 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 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.”[22]

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 judgement for money or to a recovery 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 just 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 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.

---

[20] Plucknett, History of the Common Law, 680.

[21] Statute of Westminster II, 13 Edw. I c. 24, quoted in Maitland, Forms of Action, 41.

[22] Maitland, Forms of Action, 42.

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 fourteenth. 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."[23] 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 fourteenth 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, many of its own making, with which the common law was tied down 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 in order to remedy these inadequacies. The failings of the common law were acute and far-reaching. Since its courts were circumscribed in their judgements to awards of money or to the recovery of specific real or personal property, the common law lacked the ability to right a huge range of wrongs, including– most importantly, the enforcement of fiduciary trusts. The Chancery courts, on the other hand, 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 judgements 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 where 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

---

[23] Hague, Origins of the Common Law, 175.

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 judgement 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 judgement, the chancellor would issue a writ of injunction forbidding the creditor to proceed further under the judgement.

Similarly, if a man entered into an oral contract where 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 it was also occasionally inadequate with regard to tenure of land. 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, 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 a earlier suit.[24] 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.

The refusal of the common lawyers either to permit flexibility in its rules or to permit the Chancery from issuing writs for new causes of action inevitably led to their losing ground to the court of Chancery, 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 seventeenth 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 fifteenth 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

---

[24] Hanbury's Modern Equity 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. Harold Greville Hanbury, Modern Equity [Ronald Harling Maudsley, 9th edition] (London: Steven & Sons Limited, 1969): 7.

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.

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 where 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 then 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 were 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 sixteenth 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 were 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.[25]

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.[26] As earlier noted, juries, at least as they

---

[25] 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.

[26] An excellent overview of the history of the English jury is provided by Sir Patrick Devlin, Trial by Jury, The Hamlyn Lectures (Rev. ed.; London: Stevens & Sons Limited, 1956).

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, prior to the sixteenth century jurors were selected from the district where 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 inasmuch 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 twelve men and if these twelve did not agree, then others were added until twelve concurred in a verdict. It was not until the mid-fourteenth 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.[27] 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 prior to the fifteenth century, jurors were the only witnesses and were free to get their information out of court in any way they chose.[28] However, they

---

[27] 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.

[28] John Maxcy Zane, The Story of Law, (2nd ed.: Indianapolis: Liberty Fund, 1998): 254, 258. [This work was originally published in 1928.]

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 prior to 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 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 fifteenth 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 which would have proved the verdict and judgement 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 judgement, thus compelling the winning party to agree to a new trial.

The common-law courts were further burdened by the fact that pleadings and judgements were made in Norman French, which persisted until the sixteenth 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 ampute*** and the man himself ***immediatment hange in presence de Court.***.[29] Attempts had been made by Parliament to change this but these were disregarded by the common lawyers, who insisted that they could not express

---

[29] Quoted in Alan Harding, A Social History of English Law (Baltimore: Penguin Books, 1966): 205.

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.

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 thirteenth century no clear distinction between legislation and judicial actions was possible and every rule, no matter its origin, was regarded as binding only from "the consent of the barons and the king in his feudal capacity."[30] 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,[31] but in fact the legal and procedural rules of civil and criminal procedure were comprised of 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.[32] And one of the earliest surviving legal treatises, dating from around 1188 and attributed to Henry II's justiciar,[33] Ranulf Glanvill, noted that

---

[30] Walter Ullmann, Principles of Government and Politics in the Middle Ages (London: Methuen, 1961): 167.

[31] F. W. Maitland, Equity: A Course of Lectures (Cambridge: Cambridge University Press, 1969): 2.

[32] 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 [twelve men from each hundred, plus the priest, the reeve, and four men from every village]. This "presenting jury" was, in turn, asked to name, under oath, all persons in the area suspected of murder or theft since Henry's coronation ten years earlier. The list of names, known as presentments, were then taken before the royal justices, who ordered the arrest of the suspects and put them through trial by ordeal

[33] The king's viceroy in England.

"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."[34]

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. Indeed, clause 17 of 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.[35]

Second, one cannot underestimate the importance of the forms of action and the writs associated with them in providing the framework of the common law. Maitland 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."[36] 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

---

[34] G. D. G. Hall, ed. and trans., The Treatise on the Laws and Customs of the Realm of England, commonly called Glanvill (London: Nelson, 1965): 2; quoted in Van Caenegem, English Common Law, 2.

[35] 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 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 some early statutes, 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." J. H. Baker, An Introduction to English Legal History (London: Butterworths, 1979): 178.

[36] Maitland, Forms of Action, 1.

Chancellor played a crucial role in shaping the development of English law. 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 seventeenth-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.

Attorney General under Queen Elizabeth, 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,[37] 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

[37] Coke's attempts to limit the authority of the Chancery courts to enjoin proceedings in the common law courts brought him into conflict with two Lords Chancellor, Francis Bacon, Baron Verulam and Viscount St. Albans, and Sir Thomas Egerton, Lord Ellesmere. The dispute with Bacon was particularly acrimonious and personal. 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 Catherine Drinker Bowen, The Lion and the Throne: The Life and Times of Sir Edward Coke, 1552-1634, (Boston: Little, Brown, 1957).

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 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 towards 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. While 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 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."[38] 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.[39]

---

[38] Hayek, Law, I: 98.

[39] The conflation of the common law with natural law was not unusual among the seventeenth-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, by Coke, who wrote: "in many cases, the common law will controul 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 controul it, and adjudge such act to be

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 the product of evolution any more than any other medieval English institution nor, indeed, as it was to evolve, can it be described as a workable system of justice. It was only with the rise 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 has misconceived the strengths and weaknesses of early English law and made of the common law a bulwark against tyrannical government. The truth is that, even admitting all its strengths, it was much less.

Ronald Hamowy
University of Alberta

void." 8 Co, Rep. 107 (1610), quoted in Philip B. Kurland and Ralph Lerner, eds., The Founders' Constitution (Chicago: University of Chicago Press, 1987): V:303