

Confusion About Hayek's Confusion: A Response to Morison

by John Hasnas*

I. A Confusing Situation

In my article, *Hayek, the Common Law, and Fluid Drive*,¹ I criticize the argument Friedrich Hayek presented for the “law of liberty” in the first volume of *Law, Legislation and Liberty*.² I suggest that Hayek confused customary law, which he referred to as “grown” law, with modern common law, which he referred to as “judge-made” law, and wrote as though these distinct types of law were identical. In *Custom, Reason and the Common Law: A Reply to Hasnas*,³ Samuel Morison takes issue with my thesis on two grounds: that I fail to recognize that Hayek is making a normative argument for an ideal liberal social order rather than an historical claim, and that my historical claims are false.⁴

Mr. Morison seems to be arguing that I am confused about whether Hayek is confused. I do not think that I am. I think that Mr. Morison may himself be a bit confused about both the forces that drove the development of the common law and the nature of customary law. Mr.

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¹John Hasnas, *Hayek, Common Law, and Fluid Drive*, 1 N.Y.U.J. LAW & LIBERTY 79 (2005).

²1 FRIEDRICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY* (1973).

³Samuel T. Morison, *Custom, Reason and the Common Law: A Reply to Hasnas*, ?? N.Y.U.J. LAW & LIBERTY ?? (200?).

⁴*Id.* at page 2 of draft supplied by author.

Morison's article contains much that is of value. He provides a useful and admirably lucid description of Hayek's arguments in *Law, Legislation and Liberty* and an interesting account of the role custom played in the pre-modern common law. Nevertheless, in what follows, I will suggest that Mr. Morison is confused about whether I am confused about Hayek's confusion.

II. Confusion about Hayek's Project

I am in complete agreement with Mr. Morison that Hayek's overall project was the normative one of providing a justification for the law of liberty that he regarded as necessary to the maintenance of the "great society."⁵ I do not agree that I overlooked this fact in my article. In *Law, Legislation and Liberty*, Hayek is not presenting an abstract philosophical argument for the rules of just conduct. Nothing would be more un-Hayekian. Hayek argues for "judge-made" law in preference to legislation because he believes that the law-making process he associates with the English common law does in fact produce and preserve rules of just conduct to a greater extent than does the legislative process. To make this argument effectively, Hayek needs a correct understanding of the common law process. In my article, I contend that Hayek does not possess such an understanding and that this weakens the force of his argument.

In focusing on Hayek's empirical error, I am not overlooking the normative nature of his project. All normative arguments rest on the accuracy of both their normative and empirical premises. Hayek himself usually contends that his disagreement with his opponents stems not from any difference over values, but from their mistaken empirical understanding of how the world works. I am both cognizant and supportive of Hayek's normative project, and I agree with his conclusion that the common law process is more likely to produce rules of just conduct than

⁵*Id.* at p.3 of draft.

the legislative process. I point out Hayek's mistaken assumptions about the common law not to undermine his argument, but, by correcting them, to advance it. For this reason, I am grateful to Mr. Morison for providing me with an opportunity to say something more on the subject.

III. Confusion about Driving Forces⁶

The English common law generated general rules of law that facilitated the non-violent pursuit of individuals' ends within society, i.e., Hayek's rules of just conduct. Why? What was it about the development of English law that produced this result?

Hayek thought the driving force was the role played by the common law judge. Mr. Morison points this out when he states that for Hayek, "the central figure is the person of the common law judge, whose case sensitive decision-making sustains and improves the legal framework necessary to support an extended market order by 'discovering' abstract rules of just conduct, . . ." ⁷ I argued, and Mr. Morison concedes, that this requires common law judges to consciously pursue "a normative political goal;" ⁸ in Mr. Morison's words, the goal of "protecting conventionally determined individual rights and promoting social utility, in the broad sense of sustaining the efficient functioning of the complex commercial and financial institutions that have arisen in the West over the course of [sic] last several centuries." ⁹

This is an ill-chosen position for Hayek to take. To begin with, the idea that common law

⁶This is not intended as a clever reference to the analogy in my original article between the various forms of law and automotive drive systems, although this note probably is.

⁷Morison, *supra* note 2, at page 5 of the draft supplied by the author. *See also* Hasnas, *supra* note 1, at 101-103.

⁸Morison, *supra* note 2, at page 10 of the draft the author supplied.

⁹*Id.*

judges intentionally sculpted a body of impersonal market-friendly law out of the clay of individual cases is wildly improbable as a matter of fact. As I mentioned in my article,¹⁰ Hayek seems to have an image of the common law judge as a Dworkinian Hercules, able to read political and economic implications off the face of cases. But historically, judges were selected on the basis of their wealth and status, not their intellectual brilliance. Further, much of the evolution of the common law took place before Adam Smith had even described the division of labor, much less before judges could have had an understanding of the economic workings of the modern commercial society. And even if common law judges were somehow miraculously endowed with the intellectual capacity and economic knowledge necessary to craft the required rules, they would have had little inclination to do so. Common law judges may well have had an interest in creating and preserving the rules favoring the land-owning class of which they were members, but they were hardly likely to share Hayek's love for the free market that would open up economic opportunity to the unpropertied masses.

Worse, to make the conscious actions of judges the essential characteristic of the common law defies the logic and undermines the purpose of Hayek's argument in *Law, Legislation and Liberty*. Hayek argues that the common law process is superior to the legislative process because the common law generates general rules of just conduct, whereas legislation generates rules that favor particular social interests. To make this point, Hayek must identify the feature of the common law process that produces this result. By making it the conscious rule-making activity of the judges, Hayek identifies a form of constructive rationalism as the driving force of the common law. This is wholly inconsistent with the rest of his argument in *Law, Legislation and Liberty*,

¹⁰Hasnas, *supra* note 1, at 103.

which attacks legislation precisely because of its inherent constructive rationalism.

Further, by placing the intellectual creativity of judges at the heart of the common law, Hayek essentially turns common law development into an alternative form of legislation; one in which an elite group of propertied white male judges make the rules rather than a body of political representatives. But this renders his argument for the common law susceptible to precisely the same objection that he makes against legislation. For why should anyone believe that the legislative constructions of common law judges are any more likely to produce rules of just conduct than those of the political representatives who comprise the legislature? As the legal realists pointed out long ago, the rules created by common law judges are just as likely to reflect their moral and political predispositions as the rules created by political representatives are to reflect theirs.

Why, then, does Hayek advance such an improbable and self-defeating explanation for the superiority of the rules of common law? Mr. Morison contends that Hayek had no confidence that, in the absence of the enlightened guidance of judges, common law processes would actually produce rules of just conduct. This is because:

First, there is no special reason to suppose that the *ex post* resolution of legal disputes is likely to lead to an optimal body of rules for the coordination of future actions, since there is nothing inherent in such decisions that is directly analogous to a market transaction, in which the results of a voluntary exchange are by definition mutually advantageous and in that formal sense “reasonable.”

...

Second, the enforcement of customary social practices by themselves, which, after all, may turn out to represent little more than the atavistic residue of instincts inherited from our primitive evolutionary past, obviously cannot guarantee outcomes consistent with the normative political ideals of classical liberalism.¹¹

Mr. Morison chides me for failing to recognize these problems in objecting that Hayek’s reliance

¹¹Morison, *supra* note 2, at page 5 of the draft the author supplied.

on the conscious creative activity of common law judges undermines his case for the law of liberty. As Mr. Morison puts it, “this objection is telling against Hayek only if we were willing to make the facile assumption that the *ad hoc* resolution of interpersonal disputes will somehow converge on prerequisites of a just liberal social order. In fact, just the reverse is likely to occur.”¹²

Mr. Morison has given a lucid and accurate account of why Hayek assigned the judge the central role in the development of the law of liberty. In doing so, however, I believe Mr. Morison demonstrates that he shares some of Hayek’s confusion about the common law. For my objection does not rest on any assumption, facile or otherwise, that the *ad hoc* resolution of interpersonal disputes will mystically converge on the rules of just conduct. Despite Mr. Morison’s assertion to the contrary, there was indeed an analog of the market mechanism at work within the common law. It is this mechanism, rather than any conscious effort by common law judges to create the legal infrastructure of commercial society, that produces the convergence about which Mr. Morison is so skeptical.

What Hayek and Mr. Morison overlook is that until relatively recently, there was no judicial monopoly. For the greater part of its formative history, the English common law evolved in a diverse system of competing courts. In addition to the royal courts, litigants could take their disputes to ecclesiastical courts, manorial courts, urban courts, merchant courts, and other local courts.¹³ The royal courts themselves consisted in several distinct types of courts, which

¹²*Id.* at 14.

¹³See HAROLD BERMAN, *LAW AND REVOLUTION* 10 (1983); ARTHUR R. HOGUE, *ORIGINS OF THE COMMON LAW* 195 (1966).

eventually coalesced into the King's Bench, Common Pleas, Exchequer, and Chancery.¹⁴ The jurisdictional boundaries among these courts were plastic and, because judicial salaries were collected directly from the fees of the litigants, each court had the incentive to attract as many litigants as possible.¹⁵

But how could courts attract litigants? Apparently, only offering to provide “unbiased, accurate, reasonable, and prompt resolution of disputes.”¹⁶ Because “litigants could ‘vote with their feet,’ patronizing those courts that provided the most effective justice, . . . judges had to respond to their customers, the individuals who actually used the courts, rather than powerful special interests trying to impose rent-seeking rules involuntarily on passive citizens.”¹⁷ Thus, the competition among judicial fora pushed the common law in the direction of neutral rules of general application, i.e., rules of just conduct.

I cannot make this point more clearly than Professor Todd Zywicki has, so permit me to offer the following extended quote.

Even if the common law is defined as the law of the royal courts, this law was shaped both by the internal dynamics of the various royal courts as well as their interaction with other courts outside the framework of the royal courts.

. . .

In short, a market for law prevailed, with numerous court systems competing for market share in order to increase their fees. This competitive process generated rules that satisfied the demand of consumers (here, litigants) for fairness, consistency, and reasonableness.

. . .

¹⁴ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 189 (1966).

¹⁵Todd Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551, 1583 (2003).

¹⁶*Id.* at 1585.

¹⁷*Id.*

The presence of a market for law with several competing suppliers provides an important part of the explanation as to why the common law system tended to generate efficient rules. The King's Bench must be understood as just one actor within a system of several competing producers of law. The "common law," therefore, is the law that evolved from this competitive process, and the borrowing, winnowing, and evolutionary process that it generated. As with any market process, therefore, the end result of this process can be understood as a spontaneous order, created by the interactions of the many individuals who comprise the process rather than by a particular identifiable author. Where there are numerous suppliers of a service and individuals can freely choose among them, this competition will limit the ability to use the court system as a mechanism for redistributing wealth. Where authorities lack the power to coerce parties into their jurisdiction and impose their will, it is difficult to enact inefficient rules because parties can exit the disfavored jurisdiction. . . . The lesson of the historical record is that, under such conditions, the court system responded by providing decisions that reflected widespread consensus and efficiency, rather than the interests of a few well-organized special interests.¹⁸

If we replace the economists' term 'efficient' with 'general and impersonal,' we have a lucid explanation of why the judges' "*ad hoc*" resolutions of interpersonal disputes would tend to converge on rules of just conduct.

Mr. Morison characterized Hayek's normative project as providing the justification for the legal infrastructure necessary to support and maintain an extended commercial society. Yet this infrastructure developed almost wholly independently of the common law courts. The law of contracts evolved originally in the ecclesiastical courts and, because the early Chancellors were clerics, in Chancery.¹⁹ Commercial law evolved in the merchant courts and were engrafted wholesale into the common law by Lord Mansfield in the latter part of the eighteenth century. Indeed, it has been noted that

[i]f you read the law reports of the seventeenth century you will be struck with one

¹⁸*Id.* at 1587-89. As I did in my original article, I cannot recommend Professor Zywicki's article highly enough. It contains an extraordinarily useful and concise summary of the relevant historical sources at 1582-89.

¹⁹See 1 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 241-42 (1903).

very remarkable fact; either Englishmen of that day did not engage in commerce, or they appear not to have been litigious people in commercial matters, each of which alternatives appears improbable. . . .The reason why there were hardly any cases dealing with commercial matters in the Reports of the Common Law Courts is that such cases were dealt with by special Courts and under a special law. That law was an old-established law and largely based on mercantile customs.²⁰

Under these circumstances, it is highly unlikely that the rules necessary to undergird commercial society really resulted from the diligent efforts of “countless generations”²¹ of common law judges to craft such rules. Fortunately for Hayek’s project, there is no need to posit such efforts to explain how the common law produced rules of just conduct.

I began *Hayek, the Common Law, and Fluid Drive* by describing Hayek’s legal theory as “simultaneously brilliant and inspired, and utterly confused.”²² Its brilliance resides in the distinction it draws between the law of liberty and legislation; its identification of the law of liberty with impersonal rules of general application that facilitate the pursuit of citizens’ individual objectives, i.e., rules of just conduct; and its recognition that the common law process tends to generate such rules of just conduct while legislation tends to undermine them. Its confusion lay in its identification of the feature of the common law process that gives rise to rules of just conduct with the conscious effort of judges to create them. I do not fault Hayek for his confusion. As I mention in my article,²³ he was not trained as an attorney and was not raised in a common law country. Given that most British and American jurisprudential thinkers are ignorant of many of the

²⁰Thomas Edward Scrutton, *General Survey of the History of the Law Merchant*, 3 *Select Essays in Anglo-American Legal History* 1-2 (Association of American Law Schools ed., 1968).

²¹Hayek, *supra* note 2, at 97.

²²Hasnas, *supra* note 1, at 79.

²³*See* Hasnas, *supra* note 1, at 81.

details of common law history, it cannot be surprising that Hayek would be as well. Confronted with the recognition that the common law produced rules of just conduct, but unaware of the competitive forces driving its evolution, he did what many of us do and anachronistically read current judicial practice back into the past. But although Hayek's confusion is understandable, it is confusion, nevertheless. For it is not reasonable to attribute the evolution of the rules of just conduct to the conscious efforts of judges to pronounce rules which will "fill a definite gap in the body of already recognized rules in a manner that will serve to maintain and improve that order of actions which the already existing rules make possible"²⁴ at a time when there was no coherent body of legal doctrine and no widely accessible system of case reports. In defending Hayek on this point and in similarly overlooking the "invisible hand" explanation provided by the competition among courts, Mr. Morison shares Hayek's confusion. Hence, I contend that it is he, rather than I, who is confused about the force responsible for the common law's production of rules of just conduct.

III. Confusion about Customary Law

There seems to be much confusion concerning my characterization of the older common law as a form of customary law. I will take some of the blame for this. For purposes of brevity, I was admittedly painting with a rather broad brush in recounting the history of the common law. This apparently left sufficiently indistinct borders to cause Mr. Morison to mistake my position in certain respects. In responding, I will try to provide more definition for these borders.

Mr. Morison seems to assume that I was contending that common law judges continued to "prove custom" by interviewing members of the local community throughout the formative period

²⁴Hayek, *supra* note 2, at 100.

of the common law; something he argues persuasively was not the case.²⁵ I have no quarrel with Mr. Morison on this point because I was making no such claim.

I opened my section on the customary law by stating that although “common law courts recognize only ‘ancient’ customs of ‘immemorial usage’ as having the force of law, . . . [this] does not imply customary law consists *only* in ancient customs.”²⁶ I followed this with an extensive discussion of the concept of customary law as a body of law that arises in the absence of legislation from the formation of what Lon Fuller called “interactional expectancies.”²⁷ In doing so, I was attempting (perhaps not clearly enough) to draw a distinction between the parochial use of the term ‘customary law’ to refer to the specific customs that were officially recognized by the common law courts on the basis of their ancient lineage and the more generic use of the term to refer to a body of law that arises “from the repeated process of settling disputes on the basis of conventional notions of fairness.”²⁸

In subsequently asserting that “[u]ntil the nineteenth century, there would have been little harm in identifying the common law with the customary law of England,”²⁹ I assumed that the reader would know that I was employing the term ‘customary law’ in the latter, generic sense rather than the former, parochial one. But I see now that the use of the definite article in that

²⁵Morison, *supra* note 2, at page 15 of the draft supplied by the author.

²⁶Hasnas, *supra* note 1, at 81.

²⁷*Id.* at 83.

²⁸*Id.* at 88.

²⁹*Id.* at 89.

sentence could be misleading.³⁰ Let me, therefore, clarify things now. I mean to assert that prior to 1800, the common law consisted predominantly in rules that arose in the absence of legislation from the repeated process of settling disputes on the basis of conventional notions of fairness (although these notions were often described by judges as the demands of natural law or natural justice). I do not mean to assert that it consisted predominantly in the ancient customs of immemorial usage that satisfied the requirements for official recognition by the common law courts.

I believe the common law originated in precisely the processes Mr. Morison describes in his critique of my position. In his words,

[T]he purpose of local “law-making” gatherings was to maintain social peace and avoid the outbreak of actual hostilities in the interest of communal survival, . . . [I]t simply would not have occurred to these people, most of whom were functionally illiterate farmers, to insist upon reaching agreement on a settled practice, and still less an explicit rule, that would have general application to future disputes. . . . In matters of any difficulty, local law-making involved not agreeing upon ‘the rule’ but agreeing upon a peaceful solution.³¹

Indeed, as Lon Fuller pointed out, “[w]e shall be misled . . . if we suppose that the relevant expectancy or anticipation must enter actively into consciousness. In fact the anticipations which most unequivocally shape our behavior and attitudes toward others are often precisely those that are operative without our being aware of their presence.”³² Nevertheless, these repeated unconscious practices, if not superceded by government dictate, produce law. For at some point

³⁰I was perhaps clearer when I subsequently summarized my position by stating, “Hence, through the eighteenth century, the substantive common law could be accurately described as a case-generated, customary law.” *Id.* at 92.

³¹Morison, *supra* note 2, at pages 15-16 of the draft supplied by the author.

³²Lon L. Fuller, *Human Interaction and the Law*, in *THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER* 220.

after the interactional expectancies have stabilized, the rule inherent in the practice is recognized. It may be by a member of the participating community, such as a local leader, official, or cleric, but it may be by an outsider. It may be that a judge called upon to decide a dispute is the first to articulate the rule implicit in the practice. This is undoubtedly the germ of the idea that common law (and other) judges “discovered” rather than made the law.

Common law judges regularly justified their decisions on the basis of the demands of natural justice. But if this phrase has any meaning at all, it can be little more than an injunction not to violate the reasonable expectations that people have relied upon in good faith and to treat like cases alike. This, however, is precisely the normative standard that would produce a body of law “from the repeated process of settling disputes on the basis of conventional notions of fairness;” that is, customary law. Hence, it still seems reasonable to me to regard the pre-nineteenth century common law as an embodiment of a customary law.

I, therefore, submit that with regard to my characterization of the older common law as a form of customary law, it is Mr. Morison, and not I, who is confused. On this point, however, I am willing to concede that it may have my inartful choice of words that engendered his confusion.

IV. Confusion about the Jury

Mr. Morison’s article contains an extended discussion of the role of the jury, apparently in response to my remark that

Given the competition among legal fora, and later among the different benches within the king’s courts, . . . the most important question to be decided was often whether the matter was properly before the court at all. When it was, the job of the lawyers and judges was to ensure that the pleadings properly specified the issues to be submitted to the jury. Once that was done, the matter was simply handed to the jury “who were expected to do substantial justice.”³³

³³Hasnas, *supra* note 1, at 81 (footnotes omitted).

Although I find Mr. Morison's discussion of the jury interesting and informative, I am genuinely unsure what to make of it because it is either irrelevant to or supportive of my historical thesis.

The majority of Mr. Morison's discussion concerns the political status of the criminal jury as "a bulwark against government overreaching" due to its power to issue acquittals in derogation of the law when it believes a conviction would be unjust.³⁴ I will admit to being as interested in the subject of jury nullification as the next person, but I am completely at a loss to see how it relates to any assertion I make in my article.

Mr. Morison also includes a briefer discussion of the historical process by which the civil jury became relegated to a mere trier of fact.³⁵ This discussion is certainly relevant to the thesis of my article, but not only is it not inconsistent with my historical claims, it actually bolsters them. I asserted that during the formative period of the common law, the role of judges in discussing matters of law was predominantly to ensure that the matter was properly before the court and that litigants' arguments would address relevant issues. This done, the matter was turned over to the jury for decision. I also asserted that as the modern common law developed, this changed as the judges took on more power to declare substantive law and limited the jury to determining matters of fact. As a result, by the nineteenth century, the jury was typically instructed in the substantive law by the judge and told what verdict to render upon its determination of the facts of the case. This was the feature I identified as responsible for converting the common law from a customary law to one of interstitial judicial legislation.

As far as I can determine, Mr. Morison's discussion reinforces these claims. He himself

³⁴Morison, *supra* note 2, at pages 22-27, 29-30 of the draft supplied by the author.

³⁵*Id.* at pages 27-29 of the draft supplied by the author.

quotes John Adams in 1771 and John Jay in 1794 to establish that even as late as the end of the eighteenth century, the jury retained the power to consider both law and fact and render judgement on the basis of its sense of justice.³⁶ He then provides an extremely useful account of the process by which judges arrogated to themselves full control over the future of legal development; so useful in fact that it is worth quoting at length.

Acting largely on their own initiative, then, the judiciary began to “sharpen the law-fact dichotomy and give it concrete institutional expression” through the use of a variety of procedural and evidentiary devices, such as the directed verdict, special interrogatories, detailed legal instructions, the doctrine of judicial notice and the like. These innovations were “judicially developed tools [designed] to curtail the jury’s power to decide questions of law,” primarily in the service of the stability of proprietary rights. The courts, ably abetted by attorneys representing emerging commercial interests, were thus able to exercise a decisive measure of control over the trial process, not only by assuming the authority to reverse verdicts that were inconsistent with the court’s instructions or against the weight of the evidence, but also by providing the jury with a single, authoritative statement of the law governing the matter at hand and limiting the information presented to the jury by precluding lawyers from introducing evidence or argument in support of any proposition deemed legally irrelevant, still less inviting the jury to disregard the law altogether. “This program was so successful,” Matthew Harrington notes, “that by 1820, the jury’s power over law [in civil cases] had all but disappeared.”³⁷

I fully endorse this account of the disempowerment of the jury and would be happy to engraft it into my article. But if Mr. Morison believes his comments on the jury undermine the historical claims that I make in my article, then, on this point, I am the one who is confused.

V. Confusion about Conclusions

In his conclusion, Mr. Morison contends that “it cannot be seriously maintained that an unadulterated system of customary adjudication, in which lay juries determined the substantive law on the basis of unitary social practices and common sense notions of morality, prevailed in

³⁶*Id.* at pages 26-27 of the draft supplied by the author.

³⁷*Id.* at pages 28-29 of the draft supplied by the author.

England until the beginning of the nineteenth century.”³⁸ I have scoured my article, but I am unable to find any such claim within it. It is fair to say that I described the rules of common law that evolved between the fourteenth and eighteenth centuries as produced by a process akin to customary adjudication (by a significantly adulterated system of customary adjudication, if you will) in which juries were free, once the issues in controversy had been specified by lawyers and judges, to decide cases on the basis of their sense of justice. It is also fair to say that I claimed 1) that prior to the nineteenth century the doctrine of *stare decisis* was not followed in the modern sense in which the individual prior decisions of courts were regarded as binding precedent, 2) that common law and other judges actually did try to discover rules of law in the customary practices of the people and the courts of England, and especially 3) that common law judges with little or nothing in the way of modern economic knowledge who were functioning at a time when there was no coherent body of legal doctrine did not consciously decide cases in a way designed to produce the rules of just conduct necessary to support a “great” commercial society. Now, I am willing to concede that Mr. Morison has effectively refuted the claim that he attacks, but which I do not make in my article. In doing so, however, I do not see that he has controverted any of the claims I do make. This leads me to believe that Mr. Morison may be somewhat confused about the conclusion for which I was arguing.

This impression is reinforced by the concluding sentence of Mr. Morison’s article in which he asserts that “theoretical analysis and historical reflection undermine the plausibility of Hasnas’s vision of the revival of an essentially medieval conception of adjudication, . . .”³⁹ Mr. Morison

³⁸*Id.* at page 30 of the draft supplied by the author.

³⁹*Id.* at page 31 of the draft supplied by the author.

must be confused because I offer no vision of a revival of a medieval conception of adjudication. I do, however, offer what I hope is an interesting and thoroughly twenty-first century thought experiment. I conclude my article by asking the reader to contemplate what would happen if our contemporary judicial system were altered so that trial judges would no longer “instruct the jury or other decision-maker on the law, but would simply charge it to do justice to the parties,”⁴⁰ and “[a]ppellate judges would review the procedural decisions of their trial court brethren to ensure that both sides had received a fair trial[, but] would not . . . review the substantive decisions of the jury or other decision-maker for consistency with the established rules of law.”⁴¹ I suggest that such a reform might, by removing the potential for judicial legislation, convert our current judicial system into a modern equivalent of a system of customary law; one that is likely to produce rules of just conduct. I may be wrong about this, but right or wrong, there is nothing medieval about the proposed system of adjudication.

It is apparent that either Mr. Morison or I am confused about whether Hayek is confused about the common law. In his article, Mr. Morison claims it is I; in this response, I claim that it is he. I am content to leave it to the interested reader to decide. Either way, I am grateful to the editors of this journal for the opportunity to attempt to clear up any confusion regarding Hayek’s confusion.

⁴⁰Hasnas, *supra* note 1, at 107.

⁴¹*Id.*