



## HAYEK, THE COMMON LAW, AND FLUID DRIVE

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### Introduction

In the first volume of *Law, Legislation and Liberty*, Friedrich Hayek distinguishes two types of law: the law that is consciously created through the political process, which he calls the law of legislation,<sup>1</sup> and the unplanned law that evolves out of the settlement of interpersonal disputes, which he calls the law of liberty.<sup>2</sup> In drawing this distinction, Hayek paints a portrait of the law of liberty that is simultaneously brilliant and inspiring, and utterly confused. How can it possibly be both?

The purpose of this essay is to answer this question and to resolve Hayek's confusion. To do so, I intend to employ an extended analogy between law and automobiles. Accordingly, I would like you to consider the following account of how I gained a modicum of automotive wisdom.

Having been born in the latter half of the twentieth century, I learned to drive in a world in which automobiles contained either automatic or manual transmissions. In my world view, one drove a car either by putting the car in drive and stepping on the accelerator or by pressing on the clutch and employing the gearshift lever to manually change gear ratios at the appropriate times. To me, every car had to be classified as either an automatic or a stick.

When I was a graduate student, I shared an apartment with a colleague who was far more learned in automotive lore than I. One year, he returned from spring break driving a 1947 Dodge. He was intensely proud of his acquisition even though its top speed was apparently only 55 miles per hour, and he took me on a drive to

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<sup>1</sup> 1 Friedrich A. Hayek, *Law, Legislation and Liberty* 124 (1973).

<sup>2</sup> *Id.* at 94.

show it off. To my modern eyes, the car seemed huge with a massive back seat and wealth of head room. It had what my roommate called “air conditioning,” a lever on the dashboard that opened a metal flap in front of the windshield that allowed outside air to rush into the passenger compartment. But the most unusual thing about the car was that as we increased speed, my roommate appeared to be shifting gears without depressing the clutch. When I asked him about this, he said, “It’s got fluid drive,” adding in response to my blank stare, “you know, semi-automatic transmission.”

I realized then that I had a confused conception of what constituted a manual transmission. I had been using the phrase ‘manual transmission’ to refer to any transmission that was not fully automatic, thinking that this referred to a single type of automotive drive. I learned that this was incorrect, that there were two distinct types of non-fully-automatic transmissions, and that I had been using the phrase ‘manual transmission’ to refer to an amalgam of true manual transmissions and fluid drives.

I was not overly embarrassed by this. I had never been mechanically inclined, and as a graduate student in philosophy, knowledge of automotive transmissions was well outside of my field of expertise. Further, my conflation of manual transmissions with fluid drives was, in most contexts, a completely harmless error. Had I tried to drive my roommate’s car, however, my automotive naivete would certainly have produced confusion, if not more dire consequences.

In this essay, I want to suggest that in writing *Law, Legislation and Liberty*, Hayek was in a situation analogous to the one I would have been in had I gotten behind the wheel of my roommate’s Dodge. In chapters four, five, and six of volume one, Hayek seeks to contrast legislation with what he variously describes as either grown<sup>3</sup> or judge-made<sup>4</sup> law. Throughout chapter five, which he entitles “*Nomos: The Law of Liberty*,” Hayek continuously and apparently unreflectively alternates between discussions of rules of law that arise through human interaction and those laid down by judges adhering to a common law process. It soon becomes apparent that just as I had identified manual transmission with anything that is not an automatic transmission under the assumption that this referred to a single type of automotive drive, Hayek is identifying the law of liberty with anything that is not legislation under the assumption that this refers to a single type of law. This is incorrect, however. There are, in fact, two distinct types of non-legislative law—customary law and common law—and what Hayek calls the law of liberty is actually an amalgam of the two. Just as I had conflated manual transmissions and fluid drives, Hayek is conflating customary and common law.

That Hayek would do so is perfectly understandable. He was an Austrian economist, by which I mean that he was an economist from Austria, not that he was

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<sup>3</sup>See, e.g., *id.*, at 88, 95, 105.

a member of the Austrian school of economics. He was not trained as an attorney, and he had not been raised in a common law country. As such, the history and intricate workings of the common law were outside both his field of expertise and his personal experience.<sup>5</sup> Further, customary law and the common law have enough in common so that in many contexts the failure to distinguish between them will not cause much confusion. However, one of Hayek's main purposes in writing *Law, Legislation and Liberty* was to combat the widespread assumption that law necessarily consists in legislation by articulating an alternative conception of the source, nature, and authority of the law. In such a context, the failure to note the profound differences between customary and common law makes for some very difficult driving indeed.

In what follows, I will attempt to smooth the road a bit. I will begin by providing a brief account of the nature of both customary and common law. In Part II, I will show that customary law is the law that arises out of human interaction to allow people to more effectively coordinate their actions. Customary law is truly a "grown" law and is a good example of what Hayek calls a spontaneous order. If legislation, which is an automated process for the conscious production of law, plays the role of the automatic transmission in my extended analogy, then customary law, which is the law that arises from the actions of individuals without conscious design, is the analog of a true manual transmission. In Part III, I will show that although early common law shared many of the features of customary law, modern common law—the common law of the last century and a half that Hayek refers to as judge-made law—is radically different and consists in a process of consciously shaping the law through interstitial changes, a sort of legislation at the margins. Continuing the automotive analogy, common law is the analog of fluid drive, a semi-legislative law. Finally, in Part IV, I will show how Hayek's failure to clearly distinguish between customary and common law tarnishes the brilliance of several of his legal insights and weakens his argument for a society governed by a system of non-legislated rules. By disentangling the two, I hope to restore a bit of the luster to and strengthen the argument for Hayek's conception of a law of liberty.

## I. Customary Law

Customary law is often identified with the archaic rules of primitive and rudimentary legal systems. This is perhaps understandable because "primitive" legal systems are those associated with societies that lack a highly-organized central authority in which most law was customary law. Additionally, common law courts

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<sup>4</sup>See, e.g., *id.*, at 86, 94, 118.

<sup>5</sup>Hayek tacitly admits as much when, in describing his belief that codification provided greater legal certainty, he stated, "[i]n my own case even the experience of thirty odd years in the common law world was not enough to correct this deeply rooted prejudice, and only my return to a civil law atmosphere has led me seriously to question it." *Id.* at 116.

recognize only “ancient”<sup>6</sup> customs of “immemorial usage”<sup>7</sup> as having the force of law. Although this identification may be understandable, it is nevertheless unfortunate because it suggests that customary law is an obsolete legal form that is irrelevant to contemporary concerns. This is to mistake a part for the whole. The fact that primitive legal systems consist predominantly in customary law does not imply that customary law exists *only* in primitive legal systems and the fact that common law courts recognized only ancient customs does not imply customary law consists *only* in ancient customs. Customary law still exists and continues to play a significant role in the modern world, as illustrated by the fact that much of international law is customary law and the Uniform Commercial Code has explicitly incorporated custom into the commercial law of the United States.<sup>8</sup>

The essence of customary law is not its antiquity, but its origin. Customary law is law that arises out of human interaction. In Lon Fuller’s words, it “is not the product of official enactment, but owes its force to the fact that it has found direct expression in the conduct of men toward one another.”<sup>9</sup> The existence of customary law is merely a reflection of the twin facts that in order to live together human beings must know what to expect of each other, and that it is epistemically impossible for human beings to specify in advance through language the behavior to be expected in the myriad situations that constitute life in society.<sup>10</sup> Hayek famously compared the price mechanism to “a system of telecommunications”<sup>11</sup> that enables human beings to coordinate their economic activities. Customary law is similarly a system of communication that enables humans to coordinate their social interaction so as to avoid violence and facilitate joint pursuits:

[C]ustomary law can best be described as a language of interaction. To interact meaningfully men require a social setting in which the moves of the participating players will fall generally within some predictable pattern. To engage in effective social behavior men need the support of intermeshing anticipations that will let them know what their opposite numbers will do, or that will at least enable them to gauge the general scope of the repertory from which responses to their actions will be drawn. We sometimes speak of customary law as offering an unwritten code of conduct. The word code is appropriate here because what is involved is not simply a ne-

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<sup>6</sup>ARTHUR R. HOGUE, *ORIGINS OF THE COMMON LAW* 195 (1966).

<sup>7</sup>1 WILLIAM [NMI] BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 46 (Wayne J. Morrison ed., 2001) (1765).

<sup>8</sup>*See, e.g.*, UCC §§ 1-205, 2-202, 2-208 (1977).

<sup>9</sup>Lon L. Fuller, *Human Interaction and the Law*, in *THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER* 212 (1981). Fuller provides a wonderfully lucid account of the nature of customary law that I am certain I cannot improve upon. Accordingly, I will employ several rather lengthy quotations from his work in what follows.

<sup>10</sup>The epistemic impossibility of centralizing a set of communicable rules specifying appropriate behavior in all or most particular situations is the legal parallel of Hayek’s knowledge problem for central economic planning.

<sup>11</sup>FRIEDRICH A. HAYEK, *INDIVIDUALISM AND ECONOMIC ORDER* 87 (1948).

gation, a prohibition of certain disapproved actions, but also the obverse side of this negation, the meaning it confers on foreseeable and approved actions, which then furnish a point of orientation for ongoing interactive responses.<sup>12</sup>

Understanding customary law as a system of communication focuses our attention on its essential characteristic, which is not that it arises through repetition, but that it exists when and to the extent that members of the community have adapted their behavior to it. Customary law exists only when members of the relevant community have had sufficient interaction to be able to predict how others will react to their behavior and to incorporate this prediction into their decisions about how to behave. That is, customary law is law that arises from the formation of “interactional expectancies”:

Instead, therefore, of speaking vaguely of an obligation arising through mere custom or repetition, it would be better to say that a sense of obligation will arise when a stabilization of interactional expectancies has occurred so that the parties have come to guide their conduct toward one another by these expectancies.<sup>13</sup>

In describing customary law as arising from the formation of interactional expectancies, one must be careful not to read any intentionality into its creation. The mutual expectations that develop typically are not formed on the basis of conscious reflection about the nature of others’ behavior or the best way to react to it. Rather, human beings learn to adjust their behavior toward one another gradually over the course of repeated dealings and typically without consciousness that they are beginning to conform their conduct to a rule. As Fuller explains:

The term interactional expectancy is itself, however, capable of producing difficulties. We shall be misled, for example, 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. To take an example from a somewhat trivial context, experiments have shown that the distance people stand from one another in carrying on ordinary conversations varies predictably among cultures and between individuals. At the same time most people would not be able to state, without some preliminary testing, what they themselves regard as a normal conversational distance. My inability to define offhand a proper distance would not prevent me, however, from finding offensive the action of someone who projected his face uncomfortably close to mine, nor would it relieve my puzzlement and distress at the conduct of someone who kept retreating when I approached what seemed to

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<sup>12</sup>Fuller, *supra* note 9, at 213–14.

<sup>13</sup>*Id.* at 219–20.

me a normal speaking distance. Our conduct toward others, and our interpretations of their behavior toward us, are, in other words, constantly shaped by standards that do not enter consciously into our thought processes. The analogy of language is once again useful; often we only become aware of rules of grammar when they are broken, and it is sometimes their breach that leads us to articulate for the first time rules we had previously acted on without knowing it.<sup>14</sup>

Furthermore, customary law is not rational in any mean-ends sense of rationality. The rules that evolve are not necessarily those that produce the most logical solution to the problem they address, but those that facilitate the peaceful interaction of the members of the community with regard to it:

Generally we may say that where A and B have become familiar with a practice obtaining between C and D, A is likely to adopt this pattern in his actions toward B, not simply or necessarily because it has any special aptness for their situation, but because he knows B will understand the meaning of his behavior and will know how to react to it.<sup>15</sup>

On this point, consider the example of US-Soviet relations that Fuller used in 1969 as an illustration of customary law:

To illustrate the points I have been making with regard . . . to the communicative function of customary practices, I should like to refer briefly to a development that appears to be occurring in the diplomatic relations of Russia and the United States. Here we may be witnessing something like customary law in the making. Between these two countries there seems to have arisen a kind of reciprocity with respect to the forced withdrawal of diplomatic representatives. The American government, for example, believes that a member of the Russian embassy is engaged in espionage, or, perhaps I should say, it believes him to be *overengaged* in espionage; it declares him *persona non grata* and requires his departure from this country. The expected response, based on past experience, is that Russia will acquiesce in this demand, but will at once counter with a demand for the withdrawal from Russia of an American diplomatic agent of equal rank. Conversely, if the Russians expel an American emissary, the United States will react by shipping back one of Russia's envoys.

Here we have, for the time being at least, a quite stable set of interactional expectancies; within the field covered by this practice each country is able to anticipate with considerable confidence the reactions of its opposite number. This means that its decisions can be guided by a tolerably accurate advance estimate of costs. We know that if we throw one of their

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<sup>14</sup>*Id.* at 220.

<sup>15</sup>*Id.* at 228.

men out, they will throw out one of ours. [STEP 8: INSERT FN W/  
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We know that since Fuller wrote, the practice he described continued and hardened into a rule that was consistently followed by the United States and the Soviet Union and, following the collapse of the Soviet Union, by Russia. Further, we know that after observing this behavior by the United States and the Soviet Union/Russia, other nations adopted it in their dealings, not only with those two states, but with each other as well. Now, even in the context of superpower relations in which it arose, few would argue that a rule calling for the calibrated reciprocal expulsion of diplomats is the most logical solution to the problem of diplomatic espionage, or even that it is moderately well-adapted to its end. And there is still less reason to believe it is a logical way to deal with diplomatic espionage between superpowers and lesser powers or among the lesser powers that adopted the rule by imitation. The rule does, however, have the virtue of allowing nations to continue peaceful interaction in the face of events that could otherwise raise the specter of the termination of relations, if not war.

What this shows is that customary law is exclusively a solution to coordination problems. The rules evolve not to resolve the particular problem their content addresses, but to facilitate peaceful human interaction. The solutions they provide to substantive problems are a byproduct of this essential function. There is every reason to believe that a political theorist charged with the task of resolving a particular social problem could devise a theoretically superior and more elegant rule than any produced by customary law. But customary law develops precisely because no such legislator exists. In this sense, customary law truly is “grown law,” a set of rules that constitute “the result of human action, but not the execution of any human design.”<sup>16</sup> As such, it is an excellent example of Hayekian spontaneous order.

Although I have been at pains to argue that customary law should not be identified with ancient law, it is worth devoting some attention to the customary law that developed in Britain during the Dark Ages. The collapse of Roman rule at the beginning of the fifth century produced an extended period during which the inhabitants lived without centralized legislative authority. Hence, the law that arose during this period was necessarily customary law. And the process by which this law arose is instructive.

At the risk of oversimplifying, the story is as follows. As the literate Romans left the island, so did their law, and as the legions departed, so did its enforcement. This left the British ever more exposed to violent attack upon their persons and property and without authoritatively established mechanisms for dealing with such aggression. In these circumstances, self-help in the form of the blood feud

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<sup>16</sup>ADAM [NMI?] FERGUSON, AN ESSAY ON THE HISTORY OF CIVIL SOCIETY [pin] ([editor] ed., [pub year]) (1767).

became the primary form of redress. When someone was assaulted, killed, or robbed, the expected, socially accepted response was for the members of the aggrieved party's household or clan to wage private war against the wrongdoer.<sup>17</sup> But the risk to life and limb and disruption of normal life inherent in the blood feud created strong incentives for people to escape from the necessity of combating violence with violence.

Interestingly, they initially did this through agreement; that is, the practice developed of holding the feud in abeyance while attempts were made to reach a peaceful settlement through negotiation.<sup>18</sup> If the dispute was with another member of the local community, these negotiations could take place in the context of a public assembly, the moot, which served as the chief instrument of social administration.<sup>19</sup> When the parties agreed, they could lay their dispute before the moot, whose members, much like present-day mediators, attempted to facilitate an accommodation that the disputing parties found acceptable. When reached, such accommodations resolved the dispute in a way that preserved the peace of the community.

Dispute settlement by such publicly mediated negotiations was popular because it avoided the strife of private war. As a result, recourse to the moot was gradually transformed from an optional alternative to self-redress to a necessary prerequisite for receiving the help of one's support group and retaining one's good standing in the community.<sup>20</sup> What once had been voluntary became mandatory upon pain of outlawry, that is, upon pain of being put outside the protection, the "law," of one's group.

The virtue of settling disputes before the moot was that the moot had an institutional memory. When parties brought a dispute before the moot that was similar to ones that had been resolved in the past, someone would remember the previous efforts at composition. Accommodations that had failed in the past would not be suggested; those that had succeeded would be repeated. Because the moot was a public forum, the repetition of successful methods of composing disputes gave rise to expectations in the community as to what the moot would recommend, which in turn gave the members of the community advance notice of how they must behave in order to avoid the feud. As the members of the community conformed their behavior to these expectations and took them into consideration in the process of composing subsequent disputes, rules of behavior gradually evolved. This, in turn,

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<sup>17</sup>See 1 SIR FREDERICK [NMI] POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 46 (2d ed. 1898).

<sup>18</sup>See JULIUS [NMI] GOEBEL, JR., *FELONY AND MISDEMEANOR: A STUDY IN THE HISTORY OF CRIMINAL LAW* 28–33 (1976).

<sup>19</sup>When the conflict was between members of households or tribes that did not participate in the same moot, the negotiations took place directly between the clans or tribes. HAROLD J. BERMAN, *LAW AND REVOLUTION* 52 (1983).

<sup>20</sup>See POLLOCK & MAITLAND, *supra* note 17, at 47–48. See also BRUCE [NMI?] BENSON, *THE ENTERPRISE OF LAW* 23 (1990).

allowed for the transformation of the dispute settlement procedure from one dominated by bargaining to one consisting primarily in the application of rules.

It should not be surprising that successful negotiations usually involved some form of compensatory payment. Repetition of the process taught the community what level of compensation would effectively discourage violence and, as bargaining gave way to the application of rules, eventually produced “extraordinarily detailed schedules of tariffs . . . for various injuries.”<sup>21</sup> It also established the conditions under which compensatory payments were due. For example, no payment was due if one killed a thief, but only if one immediately publicized the killing;<sup>22</sup> a condition that apparently developed in response to attempts to escape payment by manufacturing evidence of a theft after the fact. Indeed, over the course of the centuries between the departure of the Romans and the coming of the Normans, the process described above produced an extensive body of customary law that served as the basis of English common law and to a large extent still resides within contemporary common law.<sup>23</sup>

Note the nature of the process. Human beings live together without fixed, known rules of behavior. No central authority exists with the power to establish and enforce such rules. Conflicts inevitably arise, often resulting in violence that disrupts normal life in the community and undermines cooperative activities. This creates strong social incentives to find an alternative method of resolving the conflicts. At first, the members of the community encourage disputants to voluntarily negotiate settlements and facilitate such negotiations by acting as mediators. As this process reduces social strife, publicly mediated negotiations become mandatory, and thus, more frequent. As certain types of negotiated settlements prove successful and are repeated, the members of the community come to expect that similar disputes will be resolved similarly. They begin to base their behavior on these expectations. They also take them into consideration when mediating subsequent disputes, basing their judgment of what constitutes a fair accommodation at least in part on what they believe the parties should have expected given the resolution of past disputes. This makes it more likely that subsequent disputes will be resolved in the same way as previous ones, further reinforcing the emerging expectations.

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<sup>21</sup>BERMAN, *supra* note 19 at 54.

<sup>22</sup>MAITLAND & POLLOCK, *supra* note 17, at 53.

<sup>23</sup>See HOGUE, *supra* note 6, at 190–92. Although for purposes of brevity I have limited my discussion to matters concerning what today would be called either tort or criminal law, the customary law that developed in Anglo-Saxon England was much broader than this. Precisely the same process that gave rise to the basic rules of order and personal security gave rise to property rules governing the descent of land and for determining when one was wrongfully dispossessed of chattels. For example, cattle theft was apparently a significant enough problem that one would have to purchase cattle before a required number of reliable witnesses to establish a right to continued possession. See POLLOCK & MAITLAND, *supra* note 17, at 58–59. Further, much of contemporary commercial law is derived directly from the customary law of the Law Merchant of the eleventh and twelfth centuries. See John [nmi] Hasnas, *Toward a Theory of Empirical Natural Rights*, 22 SOC. PHIL. & POL’Y (forthcoming 2005) (on file with author) and BENSON, *supra* note 20, at 30–35.

Eventually, there develops a sufficient “stabilization of interactional expectancies” for the members of the community “to guide their conduct toward one another by these expectancies.”<sup>24</sup> The continued iteration of the dispute settlement process then gradually transforms these interactional expectancies into recognized rules of behavior. This, in turn, allows the process itself to evolve from one of mediated bargaining into one of the enforcement of rules. And this transforms the question at issue from what constitutes a fair composition of a dispute to what constitutes the fair application of rules to a particular case.

Note also the basic normative features of this process. In the early stages of development in which disputes are resolved through negotiation, settlements must be regarded as fair by both parties to command mutual assent. The purpose of community involvement is to help discover such “fair” compositions. But as successful compositions are repeated, people come to expect future cases to be resolved in the same way and feel unfairly treated if their expectations are violated. To be accepted as fair, proposed settlements must now conform to the evolving public expectations. This requires that new disputes be resolved in the same way as past similar ones, i.e., that like cases be treated alike. The operation of this principle over time gives rise to identifiable and definite rules of behavior. In this way, an entire body of customary law arises purely from a commitment to fairness that is operationalized in the form of the principle that like cases should be treated alike.<sup>25</sup>

Customary law, then, is the law that arises from the repeated process of settling disputes on the basis of conventional notions of fairness; a process that is entirely backward-looking in orientation. Past resolutions matter because they establish expectations that are themselves an element in determining what constitutes a fair resolution to a present dispute. But in each individual case, the issue is always what constitutes a resolution that is fair to the parties to the instant dispute, not how the outcome of the case will affect the interests of other parties in the future. Cases are never decided on the basis of their precedential value, that is, on the basis of how the rules they instantiate will operate in future cases. Although the rules of customary law *derive from* considerations of fairness, they are not created *for the purpose of* ensuring fairness or any other social value.

It is precisely this backward-looking orientation that distinguishes customary law from both legislation, which consists in rules consciously designed to guide future behavior, and modern common law, which explicitly considers the prospective effects of its decisions in resolving present controversies.<sup>26</sup> With its inherent focus on settling actual disputes fairly rather than on the realization of any abstract ideal of justice, customary law provides fundamental rules of order that allow human beings to coordinate their activities without a guiding intelligence. By facilitat-

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<sup>24</sup>Fuller, *supra* note 9, at 219–20.

<sup>25</sup>See BERMAN, *supra* note 21, at 479–80.

<sup>26</sup>See *infra* text accompanying notes 53–60.

ing cooperative human interaction, these rules enable the individual members of society to better achieve their separate ends without necessarily advancing any particular collective end.

When one drives a manual transmission automobile cross-country, each individual decision as to when to shift gears is made on the basis of the particular driving conditions of the moment (e.g., how fast the car is traveling, whether it is going uphill or downhill, accelerating or decelerating, rounding a curve or going straight), usually without conscious thought. Yet the sum total of these individual decisions can take one from New York to Los Angeles in a reasonably efficient manner. Similarly, each individual decision in a system of customary law is made on the basis of its own merits (e.g., what is the fair resolution of the dispute or the fair application of a rule given each party's conduct, any particular mitigating or aggravating conditions, and any legitimate expectations that could be drawn from past decisions), usually without explicit conceptual analysis. Yet the sum total of these individual decisions produces a body of law that is reasonably efficient at facilitating cooperative human interaction.<sup>27</sup> In contrast to automatic transmission and legislation that takes gear-shifting and rule-making decisions out of the hands of drivers and litigants, manual transmission and customary law allow road trips and legal rules to emerge from the countless decisions of the individuals who use the roads and the dispute settlement mechanism. Hence, it seems entirely reasonable to assign customary law the role of manual transmission in our automotive analogy.

## II. Common Law

"Customary law" is a phrase of abstract and universal significance, referring to a form of law that can and does exist wherever people live in society. "Common law" is not. "Common law" has a distinct and parochial referent. The common law is the law that emerged from the royal courts of England.<sup>28</sup>

This simple fact is typically obscured by the many metaphorical and otherwise indistinct and poorly discriminated uses to which the phrase is put. "Common law" can be used to refer generally to the legal systems of the British Commonwealth countries or to any in which precedent has binding legal authority, or more specifically to non-statutory law, to "judge-made" law, or to the undifferentiated mass of procedural and substantive rules that comprise Anglo-American law.<sup>29</sup>

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<sup>27</sup>Indeed, manual transmissions are *more* fuel efficient than automatic transmissions; suggesting that the analogy might be extended to include an argument for the superiority of customary law to legislation. This is an argument that Hayek actually makes in his comparison of the law of liberty with legislation, although, as I suggest in Part IV, not very clearly due to his conflation of customary and common law.

<sup>28</sup>*See, e.g.,* HOGUE, *supra* note 6, at 5 (stating that common law "is simply the body of rules prescribing social conduct and justiciable in the royal courts of England"); JOHN [NMI] HUDSON, *THE FORMATION OF THE ENGLISH COMMON LAW* 18 (asserting that common law is "the normal law of England, enforced by the king's court, above local custom"); BERMAN, *supra* note 21, at 480 (stating that common law is "the rules applicable in the central royal courts at Westminster")

<sup>29</sup>Indeed, the variety of ways in which the phrase "the common law" is used is undoubtedly responsible

However, if we are interested in identifying the essential nature of the common law, and especially if we are interested in distinguishing modern common law from customary law, none of these metaphorical uses are helpful. We must focus on the more precise, parochial definition of the term.

Until the nineteenth century, there would have been little harm in identifying the common law with the customary law of England. This is because the common law was simply the customary law as it was applied in the king's courts. During the formative period of the common law, the royal courts constituted only one among many fora in which in the English could settle their disputes.<sup>30</sup> The royal courts operated alongside and in competition with ecclesiastic, manorial, urban, mercantile, and local courts.<sup>31</sup> Because the various courts collected their fees from the litigants,<sup>32</sup> they competed with each other for business, often creating elaborate legal fictions to extend their jurisdictions to include newer and more types of disputes.<sup>33</sup> In this market for dispute settlement services, the main competitive advantage of the royal courts had nothing to do with the substance of the rules being applied, but was the procedural innovation of the inquest; the fact-finding procedure that was the basis for trial by jury. The king attracted business to his courts by offering what was regarded as a more rational method of resolving disputes than was available in the other fora.<sup>34</sup>

Although litigants came to the royal courts for its superior dispute settlement procedure, the disputes they brought for settlement were those that arose under the customary law. Thus, the substantive law of the royal courts was the customary law:

[T]he common law of England is usually said to be itself a customary law. It is not easy to know what this means. The English common law is usu-

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for some of Hayek's confusion in LAW, LEGISLATION AND LIBERTY.

<sup>30</sup>See HOGUE, *supra* note 6, at 5. Hogue discusses this phenomenon at length:

We should remember that the law enforced in royal courts, and common to all the realm of England, was in competition with concurrent rules enforced in other courts. Save when a matter of freehold was at issue, Englishmen were not compelled to present their causes before the king's courts. Men were free to take their cases into the local courts of the counties, which administered local, customary law; men might seek justice from the church courts administering rules of canon law, which touched many matters, especially those related to wills and testaments, marriage and divorce, and contracts involving a pledge of faith; feudal barons might accept jurisdiction of a baronial overlord whose court applied rules of feudal custom; townsmen might bring their causes before the court of a borough, which would judge them by rules of the law merchant.

*Id.*

<sup>31</sup>See BERMAN, *supra* note 21, at 10.

<sup>32</sup>ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 720 (R.H. Campbell & A.S. Skinner eds., 1976) (1776).

<sup>33</sup>For an excellent discussion of the competition among the various courts prior to the nineteenth century, see Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551, 1582–89 (2003).

<sup>34</sup>See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 72–74 (4<sup>th</sup> ed. 2002). See also HUDSON, *supra* note 28, at 19 (“With regards to land law, there was not so much a chance of substantive rules as a transfer of jurisdiction from local to royal courts, the latter offered swifter and more rational

ally traced back to the Assize of Clarendon and other twelfth-century royal enactments; these constitute enacted law, which is the opposite of customary law. What is meant, no doubt, is that the royal enactments established procedures in the royal courts for the enforcement of rules and principles and standards and concepts that took their meaning from custom and usage. The rules and principles and standards and concepts to be enforced . . . were derived from informal, unwritten, unenacted norms and patterns of behavior. These norms and patterns of behavior existed in the minds of people, in the consciousness of the community.<sup>35</sup>

As late as 1765, Blackstone could still identify the common law with “general customs; which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification.”<sup>36</sup>

That the common law retained its customary nature for so long is not surprising given that for most of its history, the essential machinery of the common law was procedural. Almost all of the issues of concern to the lawyers and judges of the king’s courts related to matters of jurisdiction or pleading. Given the competition among legal fora, and later among the different benches within the king’s courts (i.e., exchequer, common pleas, king’s bench, and chancery), the most important question to be decided was often whether the matter was properly before the court at all.<sup>37</sup> 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.<sup>38</sup> Once that was done, the matter was simply handed to the jury “who were expected to do substantial justice.”<sup>39</sup> Thus, the substantive decisions in the common law courts were made on the same basis as they were under customary law; the jury, who were members of the community, decided what was fair to the parties given the expectations that could be drawn from custom.

In addition, prior to the nineteenth century, the common law courts did not apply the doctrine of *stare decisis*; that is, they did not treat previous judicial decisions as binding legal authority for the decision of present cases.<sup>40</sup> Cases were men-

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justice.”).

<sup>35</sup>BERMAN, *supra* note 21, at 480–81.

<sup>36</sup>1 BLACKSTONE, *supra* note 7, at 67. See also SIR FREDERICK [NMI] POLLOCK, A FIRST BOOK OF JURISPRUDENCE FOR STUDENTS OF THE COMMON LAW 254 (6th ed. 1929) (“[T]he common law is a customary law if, in the course of about six centuries, the undoubting belief and uniform language of everybody who had occasion to consider the matter were able to make it so.”).

<sup>37</sup>See Zywicki, *supra* note 33, at 1584–87.

<sup>38</sup>See BAKER, *supra* note 34, at 76–81.

<sup>39</sup>*Id.* at 80.

<sup>40</sup>The most obvious reason for this is that before the printing press, the state of the written records of cases rendered such a practice utterly impracticable. See POLLOCK & MAITLAND, *supra* note 17, at 183 (“By some piece of good fortune Bracton, a royal justice, obtained possession of a large number of rolls. But the ordinary litigant or his advocate would have had no opportunity of searching the rolls, and those who know what these records are like will feel safe in saying that even the king’s justices can not have made a habit of searching them for principles of law.”). See also THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 343 (5<sup>th</sup> ed. 1956). Further, even in the sixteenth and seventeenth centuries when written records were becoming somewhat more accessible, past cases were cited primarily on matters

tioned, if at all, only as evidence of the existence of a custom. A long line of cases decided in the same way could provide a strong reason to believe that a valid rule of customary law existed, but a single precedent did not constitute a statement of the law:

[C]ases are used only as evidence of the existence of a custom of the court. It is the custom which governs the decision, not the case or cases cited as proof of the custom. Nor does it appear that a court would follow a case where it felt the result would be mischievous. The distinction is clearly seen when mediaeval practice is contrasted with that of our own day; at the present time it is possible for a judge to explain that his decision works substantial injustice, and is questionable on principle but he is bound by a particular case. This is a typical example of the working of the principle of precedent. Such things are not to be found in the Year Books, however. A single case was not a binding authority, but a well-established custom (proved by a more or less casual citing of cases) was undoubtedly regarded as strongly persuasive.<sup>41</sup>

Further, in keeping with the essentially procedural superstructure of the common law, when cases were referred to, it was usually to illustrate a matter of pleading. Indeed, Plucknett points out that the early Year Books themselves “are mainly concerned with the details of process and pleading.”<sup>42</sup> When private reports of cases became available in the late sixteenth and early seventeenth centuries, cases were mentioned more frequently, but even then only

to reinforce a newly emerging principle that in matters of procedure and pleading the common law courts would adhere to their custom—and, in that sense, their precedents.

Moreover, the principle was largely confined to procedural matters, including matters of competence, and was probably related to the necessity of maintaining lines of separation between the jurisdiction of the common law courts and that of the other types of courts.<sup>43</sup>

Therefore, for most of its history, the substantive rules of the common law were free to develop along with the community’s sense of fairness as expressed by the jury. Other than procedurally, common law was not “judge-made” law. Despite the ridicule it was subjected to by the legal realists, the image of the common-law judge as the discoverer of the law is really quite appropriate. The judge did not

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of pleading and procedure, not for authoritative statements of substantive law. See Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L. J. 1651, 1732 (1994).

<sup>41</sup>PLUCKNETT, *supra* note 40, at 347. For an excellent discussion of the weakness of precedent before the nineteenth century, see Zywicki, *supra* note 33, at 1565–78.

<sup>42</sup>PLUCKNETT, *supra* note 40, at 269.

<sup>43</sup>Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: from Hale to Blackstone*, 45 EMORY L.J. 437, 446 (1996).

make law, but discovered the law by discovering what constituted the customs of the country. Hence, through the eighteenth century, the substantive common law could be accurately described as case-generated customary law.

This is not true of the modern common law. By the end of the eighteenth century, the common law courts had absorbed most of business of its non-royal competitors, although there was still internal competition among the different common law courts themselves. During the nineteenth century, legal reform movements in both England and the United States brought this to an end as well by merging the various common law courts into a unified system of courts with a formal hierarchical structure.<sup>44</sup> This and the advent of reliable private case reporters made adherence to the doctrine of *stare decisis* practical and the practice soon evolved of holding judges to be bound by the decisions of courts of superior or equal status in their jurisdiction.<sup>45</sup>

This development was followed closely by the “knowledge revolution of the late nineteenth century,” in which “a mode of conveying information that stressed the recapitulation and memorization of a finite body of knowledge was replaced with a mode—widely labeled ‘scientific’—that assumed knowledge to be complex and infinite but capable of orderly classification and analysis through the use of proper methodological techniques.”<sup>46</sup> This revolution manifested itself in the legal world in the form of the “law as science” movement spearheaded by Christopher Columbus Langdell at Harvard Law School. Langdell reconceived legal education as an inductive process in which general substantive principles of law were abstracted from appellate judicial decisions; the data points of “legal science.”<sup>47</sup> Langdell’s “case method,” which was adopted by virtually all American law schools and thereby influenced the outlook of almost all 20<sup>th</sup> century lawyers and judges, manifested a “distrust of ancient maxims” and “an enthusiasm for the appellate case as a training device, since cases, being concrete manifestations of abstract principles, embodied ‘both the scientific and the practical side of the law.’”<sup>48</sup>

In pursuit of their new scientific method, the legal academics of the late nineteenth and early twentieth centuries mined the reported appellate decisions for

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<sup>44</sup>In England, this was effected by the Judicature Act of 1873 and the Appellate Jurisdiction Act of 1876. In the United States, hostility to the chancery courts, which were often identified with the hated royal prerogative courts, stimulated the legal reform movements in many states. PEGY A. RABKIN, *FATHERS TO DAUGHTERS: THE LEGAL FOUNDATIONS OF FEMALE EMANCIPATION* 68 (1980).

<sup>45</sup>Zywicki argues persuasively that the same legal reforms that made the doctrine of *stare decisis* practical also made it necessary by ending competition among the courts. Without the check that the existence of alternative fora put on the discretion of judges, some mechanism was needed to ensure that judges did not legislate from the bench. He contends that *stare decisis* was adopted to supply the needed constraint. See Zywicki, *supra* note 33, at 1631.

<sup>46</sup>G. EDWARD WHITE, *TORT LAW IN AMERICA* 20–21 (1980).

<sup>47</sup>More accurately, the principles were abstracted from a limited set of appellate decisions selected for the purpose by Langdell and his Harvard colleagues; a fact exploited by later realist critics of Langdell’s method as patently undermining any claim it may have to scientific objectivity.

<sup>48</sup>WHITE, *supra* note 46, at 31 (quoting William Keener, *The Inductive Method in Legal Education*, 17 A.B.A. REP. 473, 488–89 (1894)).

substantive legal doctrines that would bring intellectual coherence to various areas of law.<sup>49</sup> For example, Oliver Wendell Holmes and other tort scholars developed the fault theory that organized tort law around the concept of a universal duty of care limited by the requirement that the defendant be at fault to incur liability.<sup>50</sup> This represented a sharp break with earlier legal thought in that “to the extent that American law had an intellectual organization in the early nineteenth century, that organization had been procedural rather than doctrinal. Jurisprudential rules . . . were linked more to the writ system than to any substantive grouping of ‘fields’ of law.”<sup>51</sup> [41 words] To continue the tort example, not only was there no substantive tort doctrine, “[t]here was no ‘field’ of ‘Torts’ at all prior to 1870; the ‘tort’ writs (trespass and case) had their own separate rules.”<sup>52</sup>

These twin developments radically changed the nature of the common law process. By causing lawyers and judges to seek the rules of the common law in individual past decisions, the doctrine of *stare decisis* changed the putative source of the common law from custom to the opinions of appellate judges. And by mining these opinions for substantive principles of law, the legal scientists transformed the content of the common law from a body of essentially procedural rules to one containing the substantive rules of tort, contract, property, and criminal law. By the end of the nineteenth century, the operation of these forces had transformed the common law process from one designed to properly prepare a dispute for submission to a jury, who would do justice according to custom, to one designed to ensure that courts of inferior jurisdiction were applying both procedural and substantive rules of law consistently with the rules announced in prior judicial decisions. Significantly, the focus of the process had shifted from the just resolution of particular disputes to the maintenance of a consistent and coherent body of rules. At this point, the common law had lost its character as a customary law.

The transformation of the common law was far from complete, however. The convergence of *stare decisis* and the law as science movement had placed the focus on the past decisions of appellate judges. The legal scientists sought to extrapolate a coherent body of rules from these decisions to which the doctrine of *stare decisis* would demand adherence. Like the customary law, this conception of the common law was essentially backward-looking in that present cases were to be decided exclusively on the basis of past holdings. Unlike the customary law, however, it was without a firm normative foundation. Where the rules of customary law were

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<sup>49</sup>*See id.* at 40–41. White has noted that:

In its formative years, the late nineteenth-century academic-judicial symbiosis placed a high value on the achievement of order and coherence in fields of law. A successful law review article or treatise was one that “illuminated” a field by propounding doctrines capable of continuing to organize an increasing number of cases in an intelligible fashion.

*Id.*

<sup>50</sup>*See id.* at 38–41.

<sup>51</sup>*Id.* at 40.

<sup>52</sup>*Id.*

derived from the ordinary person's sense of what was fair in particular circumstances, under the legal scientists' conception, the rules of common law were derived from appellate judges' opinions as to which precedents governed the instant case and how broadly or narrowly they should be construed. Critics promptly pointed out that such judgments were not objective, but were necessarily based on the judges' personal values and beliefs about what was right.<sup>53</sup> Why were rules derived from such a source entitled to respect? Why should anyone believe that rules reflecting the moral and political presuppositions of the mostly dead, propertied, white, Anglo-Saxon, Protestant males who made up the judiciary were either just or appropriate to the rapidly changing conditions of modern life at the beginning of the twentieth century?

The legal realists argued that it was pointless to attempt to decide cases strictly on the basis of their logical relationship to past precedents. Not only was this impossible,<sup>54</sup> but even if it could be done, there was no reason why the dead hand of the past should control the present. The purpose of the law cannot be merely to maintain a consistent and coherent body of rules regardless of their content, but must be to maintain as consistent and coherent a body of rules as can be made to serve progressive social ends. This, however, requires an at least partially forward-looking decision-making process. Legal decisions must be rendered not solely in terms of their coherence with past decisions, but also in terms of their real-world effects.<sup>55</sup> In deciding cases, therefore, judges must explicitly consider both the social ends the law is supposed to serve and whether a particular ruling will advance or retard the achievement of those ends. Thus, the common law required Janus-faced decision-making; backward-looking in that judges had to ensure sufficient consistency and stability over time for the law to be intelligible to the public whose behavior it was to govern, and forward-looking in that they also had to ensure that the actual effects of the decision advanced the law's normative ends.

Within a generation, the realist critique of the formalistic legal science approach had incorporated itself into legal and judicial practice in the form of public-policy arguments.<sup>56</sup> Attorneys regularly presented and judges frequently based their decisions on arguments detailing the anticipated empirical effects of those decisions. This practice was most famously exemplified by Louis Brandeis's Supreme Court

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<sup>53</sup>For a fuller discussion of this critique, see John [nmi] Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument*, 45 DUKE L. J. 84 86–98 (1995).

<sup>54</sup>See *id.* at 88–89.

<sup>55</sup>See, e.g., Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1237 (1931); LAURA [nmi] KALMAN, *LEGAL REALISM AT YALE, 1927–1960*, at 3 (1986); Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 467 (1897); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 822–26 (1935).

<sup>56</sup>The realists actually called for the explicit use of empirical social science in judicial decision-making, but such a radical change in judicial practice was not to be.

brief in the 1908 case of *Muller v. Oregon*<sup>57</sup> that contained two pages of legal argument and over a hundred pages of sociological data and analysis.<sup>58</sup> As this forward-looking aspect of judicial decision-making became an integral part of the common law process, the concept of the common-law judge as the discoverer of the law was discarded. The common law was no longer purely case-generated law embodying the practical wisdom and normative sentiments of the community. It was now truly judge-made law.

Consider, then, the nature of the modern common law. It still contains within it the rules that evolved from custom and were recognized by the king's courts as well as those from other fora that the common law absorbed over the course of its development. The content of many of these rules has been modified, however, and the corpus as a whole both pared and supplemented; first, in order to fit the conceptual structures of the legal scientists, and then, by the iterated process of judicial decision-making governed by the demands of both *stare decisis* and public policy. Rather than a set of uncoordinated rules, each of which facilitates peaceful human interaction without the whole advancing any particular normative end, the modern common law consists in an integrated body of rules designed to achieve valuable social ends and help create a more just society. The common-law judge no longer acts merely as a referee overseeing the adversarial process to ensure that the disputed issues are properly framed for submission to the jury, but also as the arbiter of the substance of the law. No longer merely a discoverer of customs, the judge is now an intellectual craftsman, charged with sculpting the rules into a consistent and coherent body of law while ensuring that the whole does not lose touch with the normative ends it is designed to serve. In every appellate decision, the judge must consider not merely what is fair to the parties to the dispute, but how the decision will impact the law's twin goals of maintaining a reasonable consistency with past rulings and advancing good public policy. Hence, the modern common law is case-generated, but judge-made law.

Now consider the essential normative features of modern common law. Like customary law and the older common law, it retains a commitment to fair treatment for the parties, although in a somewhat attenuated form. Where this commitment previously resided in the jury's or other decision-maker's power to directly decide what is fair based on the parties' custom-derived expectations, in the modern common law, it resides in the doctrine of *stare decisis*. By providing assurance that future cases will be decided in the same way as factually similar precedents, *stare decisis* ensures that those who make good faith efforts to conform their behavior to the law will not have their expectations unfairly thwarted. The com-

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<sup>57</sup>208 U.S. 412 (1908).

<sup>58</sup>See EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY* 76 (1973). This brief was so remarked upon that subsequent briefs containing empirical public policy arguments became known as "Brandeis briefs."

mitment is attenuated, however, because *stare decisis* actually protects only those who are not only familiar with past decisions, but are able to correctly predict both which precedent the judge will apply to his or her case and how broadly the precedent will be construed.

Unlike the customary law and older common law, however, the modern common law makes normative commitments to society at large as well as to the parties to the dispute. These commitments are to shape the law into a doctrinally coherent corpus and to ensure that the law advances normatively valuable social ends. Honoring these commitments requires more than a purely retrospective adherence to the demands of procedural justice; it requires substantive conceptions of social value and justice. Judges cannot bring coherence to a body of law without a substantive conception of the law's purpose.<sup>59</sup> To determine which rules are essential to the law's mission and which are aberrations or mistakes that should be discarded, a judge must have some conception of the end the law is designed to serve. A judge that believes the purpose of contract law is to maximize free exchange and individual control of resources will come up with a very different set of rules than one who believes the purpose of contract law is to ensure that all parties receive fair bargains. Just as obviously, judges cannot base their decisions on considerations of public policy without a substantive conception of justice. To determine whether a decision advances public policy, a judge must have some conception of what makes society better. A judge that believes that a good society is one that maximizes social wealth will have a very different idea of public policy than one who believes that a good society is one in which opportunities and wealth are distributed equally or democratically or for the benefit of the least well-off.

Modern common law, then, is the law that arises from the interplay between the effort to afford procedural justice to litigants and the effort to advance the normatively valuable substantive ends of society at large. This interplay requires the common-law judge to look both forward and backward; forward, to ensure that his or her decisions are advancing the relevant collective end, and backward, to ensure that in doing so, he or she is not unduly trammeling the individual interests of litigants who relied on past decisions in good faith. It is immaterial whether the process by which the modern common law evolves is described as one in which the concern for fairness to the parties constrains the pursuit of the collective good or one in which the attempt to provide perfect justice to the parties must be tempered by the needs of the greater society. The difference is one of emphasis only. The fact is that the rules of modern common law derive from both considerations of individual fairness and the explicit effort to advance valuable collective ends.

It is the Janus-faced nature of modern common law that distinguishes it from both legislation and customary law. Legislation is entirely forward-looking.

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<sup>59</sup>For a famous defense of this point, see Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to*

Legislators are free to consciously design rules to influence future behavior unrestrained by either the interests of particular parties or the previous state of the law. Common-law judges, in contrast, are never free to ignore the past. They may base their decisions on future-oriented, public policy considerations only to the extent that doing so is neither wildly inconsistent with the body of existing law nor works an unacceptable injustice on litigants who relied on past decisions in good faith.<sup>60</sup> Yet it is precisely this limited ability to take future-oriented considerations into account that distinguishes modern common law from customary law. With no guiding intelligence, customary law evolves strictly in response to past conflicts. Compositions or decisions are always attempts to restore harmony to the community, which requires resolutions to be seen as fair by all parties. Thus, only the past behavior, entitlements, and legitimate expectations of the parties play a role in deciding cases under customary law. On the other hand, although common-law judges are partially bound by the pre-existing law and the expectations of the parties, they are always free to consider the future in deciding whether to expand a precedent by applying it to the instant case, to terminate its growth by distinguishing its facts, or, when the litigation is in a court of at least equal status, to kill it off entirely by overruling it.

It is true that common-law judges can decide only the cases that are brought before them. But in each of these cases, they may make future-oriented normative judgments that work minor alterations in the law. Although no individual judge has the power to remake the law by himself or herself, as a group, common-law judges can make interstitial changes in the law that, over time, significantly alters its substance. One might say that common-law judges are empowered to legislate at the margins.

When my former roommate drove his Dodge, he could not simply step on the gas and go. He still had to get the car up to a minimal speed manually and then move the gearshift lever himself. Yet he had gained a small but significant degree of freedom in that he could cruise along without worrying about the clutch. Similarly, common-law judges do not have the power to simply make up the law as they go. They still must do the work required to resolve particular cases within the confines of the doctrine of *stare decisis* and the body of pre-existing law. Yet once they have met this obligation, they are invested with a small but significant degree of freedom to influence the future development of the law. Neither fully constrained by the past nor fully free to embrace the future, the common law is a good analog for fluid drive. Just as fluid drive is semi-automatic transmission, common law is semi-legislative law.

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*Professor Hart*, 71 HARV. L. REV. 630, 661–69 (1957).

<sup>60</sup>Even when overruling a precedent, common-law judges are bound to show how the new or altered rule is more consistent with the general body of law and better serves its normative purpose than the rule it is replacing.

### III. Hayek's Confusion

In *Law, Legislation and Liberty*, Hayek wishes to both persuade his readers that law does not necessarily, and did not originally, consist in legislation and to provide an account of the alternative form of law that he calls the law of liberty. In my opinion, he brilliantly achieves his first aim, but utterly fails to achieve his second. His argument that law cannot possibly originate or consist predominantly in rules consciously created by those in political authority is both convincing and inspiring in that it kindles the hope that the ideal of a society based upon the rule of law might just be attainable. Unfortunately, Hayek's description of the law of liberty that would serve as the basis for such a society is so confused that this hope is almost immediately dashed. After reading chapters four and five of volume one, one is left with the feeling that there really is a law of liberty, but with no idea of precisely what it is.

I contend that this feeling arises from Hayek's failure to distinguish clearly between customary law and common law. Just as my conflation of manual transmissions and fluid drives produced an inaccurate and indistinct image of the alternative to automatic transmission, Hayek's conflation of grown law and judge-made law produces an inaccurate and indistinct image of the alternative to legislation. By unraveling these two types of law, we may be able to provide a clearer picture of the law of liberty and thereby revive some of the hope for the rule of law that Hayek originally engendered.

Upon reading chapters four and five, the source of Hayek's confusion rapidly becomes clear. He is anachronistically projecting the features of the modern common law onto the customary and older common law; that is, he is projecting the features of judge-made law onto the grown law. Hayek begins chapter four with an extended description of what is clearly customary law, the "law that existed for ages before it occurred to man that he could make or alter it."<sup>61</sup> Without explicitly labeling it as such, Hayek describes a type of law that exhibits all the characteristic features of customary law. Thus, the rules of law consist in "simply a propensity or disposition to act or not to act in a certain manner, which will manifest itself in what we call a *practice* or custom,"<sup>62</sup> and "are learnt by imitating particular actions, from which the individual acquires 'by analogy' the capacity to act in other cases on the same principles which, however, he could never state as principles."<sup>63</sup> The rules evolve not to achieve particular ends, but as the solutions to coordination problems. Hence:

The reason why all the individual members of a group do particular things in a particular way will thus often not be that only in this way they will

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<sup>61</sup>HAYEK, *supra* note 1, at 73.

<sup>62</sup>*Id.* at 75.

<sup>63</sup>*Id.* at 77.

achieve what they intend, but that only if they act in this manner will that order of the group be preserved within which their individual actions are likely to be successful.<sup>64</sup>

This is the law that arises from Fuller's interactional expectancies in that "it was not through direction by rulers, but through the development of customs on which expectations of the individual could be based, that general rules of conduct came to be accepted."<sup>65</sup>

Not inappropriately, Hayek traces the evolution of this customary or grown law into the common law of England of the seventeenth and eighteenth centuries,<sup>66</sup> accurately describing this law as consisting in "purpose-independent rules which govern the conduct of individuals towards each other, are intended to apply to an unknown number of further instances, and by defining a protected domain of each, enable an order of actions to form itself wherein the individuals can make feasible plans."<sup>67</sup> Trouble arises, however, when Hayek attempts to account for these features of the law because it quickly becomes apparent that he is inappropriately reading the doctrine of *stare decisis* back into the older common law.<sup>68</sup> Thus, he characterizes the grown law that he has just finished describing as "a law based on precedent,"<sup>69</sup> and he completely reverses the meaning of Lord Mansfield's famous statement that the common law "does not consist of particular cases, but of general principles, which are illustrated and explained by those cases,"<sup>70</sup> by declaring that "[w]hat this means is that it is part of the technique of the common-law judge that from the precedents which guide him he must be able to derive rules of universal significance which can be applied to new cases."<sup>71</sup> Before long, Hayek is attributing the abstract nature of the rules that evolve through the processes of customary law and the older common law to the common-law judge's analytical skill at parsing precedents. Thus, Hayek sees the "general principles on which the going order of society is based"<sup>72</sup> as arising from the common-law judge being saddled with "the constant necessity of articulating rules in order to distinguish between the relevant and the accidental in the precedents which guide him."<sup>73</sup>

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<sup>64</sup>*Id.* at 80.

<sup>65</sup>*Id.* at 82.

<sup>66</sup>*See id.* at 84–85.

<sup>67</sup>*Id.* at 85–86.

<sup>68</sup>Indeed, this is made evident by the title of the subsection in which Hayek refers to the "law arising from custom and precedent." *Id.* at 85.

<sup>69</sup>*Id.* at 86.

<sup>70</sup>*Id.*

<sup>71</sup>*Id.*

<sup>72</sup>*Id.* at 87.

<sup>73</sup>*Id.* Matters are made considerably worse by the fact that Hayek misrepresents the role of the common-law judge, writing as though the judge rendered trial level rather than appellate decisions. For almost the entire history of the common law, judges did nothing more than supervise procedures to ensure that the matter was properly before the court and the issues properly joined before handing things off to the jury for decision. Even in the modern common law, judges issue only appellate decisions reviewing the actions of the other judges, not the substantive decisions of juries. Yet, Hayek insists on representing the

Apparently without realizing it, Hayek proceeds to attribute all of the features of the modern common law to the customary and older common law that he has hitherto been discussing. As a result, he is soon both describing *and criticizing* customary law as though it was modern common law. For example, in the section entitled “Why *grown* law requires correction by legislation,”<sup>74</sup> Hayek explains that “[t]he development of *case-law* is in some respects a sort of one-way street,”<sup>75</sup> explicitly identifying the grown law with the *stare-decisis* driven, judge-made, modern common law. He then attributes the defects of the latter—i.e., that it “may prove too slow to bring about the desirable rapid adaptation of the law to wholly new circumstances,”<sup>76</sup> and may lead into intellectual dead ends that are “seen to have undesirable consequences or to be downright wrong”<sup>77</sup>—to the former to conclude that the grown law must be supplemented by legislation.<sup>78</sup>

Hayek’s confusion is further evidenced in chapter five, in which he seems to alternate between descriptions of customary law and modern common law under the assumption that he is discussing a single thing. For example, Hayek opens the chapter with a section entitled “The functions of the judge”<sup>79</sup> in which he repeatedly identifies the law of liberty with judge-made law, stating:

We must now attempt to describe more fully the distinctive character of those rules of just conduct which emerge from the efforts of *judges* to decide disputes and which have long provided the model which legislators have tried to emulate. It has already been pointed out that the ideal of individual liberty seems to have flourished chiefly among people where, at least for long periods, *judge-made* law predominated. This we have ascribed to the circumstance that *judge-made* law will of necessity possess certain attributes which the decrees of the legislator need not possess and are likely to possess only if the legislator takes *judge-made* law for his model.<sup>80</sup>

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process by which customary and the older common law evolved as one in which judges decide the initial dispute. Thus, he asserts that “[t]he chief concern of a *common-law judge* must be the expectations which the parties in a transaction would have reasonably formed on the basis of the general practices that the ongoing order of actions rests on,” *id.* at 86 (emphasis added), that “[b]y the time *the judge* is called upon to decide a case, the parties in the dispute will already have acted in the pursuit of their own ends,” *id.* (emphasis added), and that “[t]he task of *the judge* will be to tell them what ought to have guided their expectations . . .,” *Id.* at 87 (emphasis added).

<sup>74</sup>*Id.* at 88 (emphasis added).

<sup>75</sup>*Id.* (emphasis added).

<sup>76</sup>*Id.*

<sup>77</sup>*Id.*

<sup>78</sup>In another revealing temporal reversal, Hayek discusses “[t]he case for relying *even in modern times* for development of law on the gradual process of judicial precedent and scholarly interpretation,” *id.* at 88 n.35, as though *stare decisis* was a relic of the past rather than a relatively recent innovation.

<sup>79</sup>*Id.* at 94.

<sup>80</sup>*Id.* (emphasis added). Note that once again, Hayek counterfactually places judges in the role of trial level rather than appellate decision-makers, see *supra* note 73.

Yet, after the opening two paragraphs of this section, Hayek discusses the customary law exclusively.<sup>81</sup> He continues to conflate customary law and modern common law throughout the chapter and frequently ascribes the advent of the purpose-independent rules that arose from the older law to the processes characteristic of the modern common law. Thus, he attributes the formation of “[a]bstract rules independent of any particular result aimed at”<sup>82</sup> to “the efforts of countless generations of judges”<sup>83</sup> and accounts for “[t]he contention that the judges by their decisions of particular cases gradually approach a system of rules of conduct which is most conducive to producing an efficient order of actions”<sup>84</sup> on the basis of “their endeavor to cope with new problems by the application of ‘principles’ which they have to distil from the *ratio decidendi* of earlier decisions.”<sup>85</sup>

Hayek’s confusion either derives from, or manifests itself in the form of, a fixation with rules. Prior to the nineteenth century, it is fair to say that the decisions of individual cases gave rise to rules. The rules that evolved had the characteristic of facilitating human cooperation without advancing particular substantive ends precisely because the decision-maker or decision-making process focused on resolving the dispute and not on the content of the rules that would result therefrom. It is also fair to say that in the modern common law, judges decide cases not merely on the basis of what will be fair to the parties, but also to ensure that the resulting precedent can be properly assimilated into the existing body of rules.<sup>86</sup> But it is not fair to say that prior to the latter part of the nineteenth century, judges decided cases on this basis. Indeed, before the work of abstraction and categorization that was performed by the legal scientists, there was no “body of rules” to assimilate precedents into. Yet, Hayek continually projects the common-law process of assimilating rules into an ongoing order back onto the customary and older common law. It is as though he is so uncomfortable with the idea of cases being decided on the basis of amorphous notions of equity or fairness to the parties that he cannot resist the image of the judge as rule-maker.

Thus, after identifying “[t]he distinctive attitude of the judge” as concern with “what private persons have ‘legitimate’ reasons to expect, where ‘legitimate’ refers to the kind of expectations on which generally his actions in that society have been based,” Hayek immediately states that “[t]he aim of the rules must be to facilitate that matching or tallying of the expectations on which the plans of the indi-

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<sup>81</sup>*See id.* at 95–97.

<sup>82</sup>*Id.* at 97.

<sup>83</sup>*Id.*

<sup>84</sup>*Id.* at 118. This is another example of Hayek assuming that judges make trial level rather than appellate decisions. *See supra* note 73.

<sup>85</sup>*Id.* at 119.

<sup>86</sup>Common-law judges do not decide cases on the basis of what will be fair to the parties because common-law judges do not decide cases—juries do. Common-law judges decide appellate cases, which explicitly present questions as to what constitutes the appropriate rule of law. *See supra* note 73.

viduals depend for success.”<sup>87</sup> And, in describing the process by which customary law forms, Hayek states that “in more unusual situations [in which] this intuitive certainty about what expectations are legitimate will be absent . . . there will be the necessity to appeal to men who are supposed to know more about *the established rules* if peace is to be preserved and quarrels to be prevented.”<sup>88</sup> The person thus appealed to, however, will not “be free to pronounce any rule he likes. The rules which he pronounces will have to 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.”<sup>89</sup> Indeed, Hayek appears to be so fixated on the image of the judge as rule-maker that he comes close to denying the possibility of the spontaneous evolution of law he has spent much of chapter four describing when he asserts that “where there exists a real gap in the recognized law a new rule will be likely to establish itself only if somebody is charged with the task of finding a rule which after being stated is recognized as appropriate.” Hayek, in identifying the judge whom he believes to be crucial to development of the law of liberty with one who is given the task “of improving a given order of actions by *laying down a rule* that would prevent the recurrence of such conflicts as have occurred,” and who “[i]n endeavouring to perform this task . . . will always have to move in a given cosmos of rules which he must accept and will have to fit into this cosmos a piece required by the aim which the system as a whole serves,”<sup>90</sup> comes remarkably close to anachronistically writing Ronald Dworkin’s Hercules<sup>91</sup>—the very model of the modern common-law judge—into the history of the evolution of law. Thus, Hayek’s confusion causes him to identify, not the iterated process of deciding individual cases fairly, but the effort to maintain a consistent body of rules as the essential creative force undergirding the law of liberty.

Hayek’s conflation of customary and modern common law, and especially his attribution of the spontaneous development of customary law to the decision processes of the modern common law are far from harmless. In fact, they do considerable damage to the case he wishes to make for the law of liberty as a viable alternative to legislation. This is because to the extent that the law of liberty is identified with the modern common law, it falls prey to many of the standard philosophical objections that have been raised to the legitimacy of the common law.<sup>92</sup>

To appreciate the most serious of these, consider that in writing the modern common law decision process into the formation of the customary and older common law, Hayek places judges’ conscious effort to make rules at the heart of the de-

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<sup>87</sup>HAYEK, *supra* note 1, at 98 (emphasis added).

<sup>88</sup>*Id.* (emphasis added).

<sup>89</sup>*Id.* at 100.

<sup>90</sup>*Id.* at 101 (emphasis added).

<sup>91</sup>Ronald [nmi] Dworkin, *TAKING RIGHTS SERIOUSLY* 105 (1977).

<sup>92</sup>Hayek seems to be entirely unaware of these objections. On the basis of both his text and his footnotes, there is no evidence that Hayek had even heard of the legal realists.

velopment of the law of liberty. In doing so, he injects an intentional element into what he otherwise claims to be a process of spontaneous legal evolution. But intentional action is purposeful action; a judge cannot make a rule without some conception of the purpose the rule is to serve. And because Hayek is supposed to be describing a spontaneous process, there is no higher human authority to assign the judge the normative value he or she should seek to advance in creating the rule. Therefore, to make a rule, a judge is necessarily required to make a normative choice. He or she must personally decide what normative end the rule should advance.

Hayek repeatedly tells us that the judge is not “free to pronounce any rule he likes.”<sup>93</sup> Judges are constrained to make only those rules that can be consistently assimilated into the body of existing rules. But this does not mean that the judge is not required to make a normative choice; it merely pushes the choice back one step. To determine whether a rule fits into a body of existing rules, a judge must ask whether it advances or retards the purpose served by the body of rules. This requires some conception of the purpose the body of rules is designed to serve. And because in a process of spontaneous evolution, there is no higher authority to make this determination for the judge, he or she is required to personally decide what normative end the body of rules should advance.

As previously noted, the modern common law is necessarily Janus-faced, looking not merely backward toward the litigants’ just deserts, but also forward toward the law’s ability to advance valuable social ends.<sup>94</sup> This means that to perform their tasks, judges must have some idea of what ends are socially valuable; in other words, their decisions must be based at least in part on some substantive normative conception of what constitutes a good society. Thus, by projecting the processes of the modern common law onto the customary law, Hayek makes it appear that the law of liberty ultimately rests on the substantive, normative beliefs of judges.

Although Hayek recognizes this,<sup>95</sup> he seems oblivious to the fact that it completely undermines his argument for the law of liberty. Hayek has no doubt about what the proper normative end of the law is. It is the maintenance of a set of rules of just conduct that facilitates peaceful human interaction without privileging or prejudicing the substantive interests of particular individuals or groups. The

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<sup>93</sup>HAYEK, *supra* note 1, at 100.

<sup>94</sup>See *supra* text accompanying note 59.

<sup>95</sup>For example, he states that, in designing rules, judges must not only ensure that they advance “the aim which the system as a whole serves,” HAYEK, *supra* note 1, at 100, but also seek “to maintain *and improve* that order of actions which the already existing rules make possible,” *id.* at 100 (emphasis added). Further, he concedes that when there are gaps in the law,

the judge must fill in such gaps by appeal to yet unarticulated principles, . . . [and] even when those rules which have been articulated seem to give an unambiguous answer, if they are in conflict with the general sense of justice he should be free to modify his conclusions when he can find some unwritten rule which justifies such modification and which, when articulated, is likely to receive general assent.

*Id.* at 118.

problem is that he has provided an account of the advent of the law of liberty that places judges in the position of consciously creating rules that fit into an existing order of rules so as to advance the order's normative end. Now if the judges all share Hayek's conviction that the purpose of the order is to facilitate individual human beings' ability to achieve their ends whatever these ends may be, they will undoubtedly decide cases in such a way as to produce Hayek's rules of just conduct. But, of course, there is absolutely no reason to believe that most real-world judges do or ever have shared this conviction. Hayek cannot simply assume that the judges whose decisions create the law of liberty hold the same view of the order's normative end that he does without rendering his argument viciously circular. But without this assumption, his thesis that a legal order of rules of just conduct would emerge from the developmental process he describes is almost certainly empirically false.

As the realists were quick to point out in the early twentieth century, if judges create rules on the basis of their extra-legal normative values, then a body of rules made by the wealthy, politically powerful, white males that make up the judiciary will tend to reflect the normative values of wealthy, politically powerful, white males.<sup>96</sup> Far from producing a body of neutral law designed to facilitate cooperation without favoring the substantive ends of any particular group, the law produced by such a judiciary will necessarily privilege the interests of the politically powerful over all others.

Hayek is not unaware of this problem, although he seems to have no appreciation for its significance, treating it as something of a minor glitch. He recognizes that the normative beliefs of actual judges may diverge from those associated with the true ideal of neutral justice, and that as a result the law that actually evolves may not truly consist in rules of just conduct. Sounding something like a realist himself, he argues that when this happens,

the most frequent cause is probably that the development of the law has lain in the hands of members of a particular class whose traditional views made them regard as just what could not meet the more general requirements of justice. There can be do [sic] doubt that in such fields as the law on the relations between master and servant, landlord and tenant, creditor and debtor, and in modern times between organized business and its customers, the rules have been shaped largely by the views of one of the parties and their particular interests—especially where, as used to be true in the first two of the instances given, it was one of the groups concerned which almost exclusively supplied the judges.<sup>97</sup>

Yet, with an astonishing lack of concern, Hayek addresses this problem by simply asserting that “such occasions when it is recognized that some hereto accepted rules

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<sup>96</sup>See Hasnas, *supra* note 53.

<sup>97</sup>HAYEK, *supra* note 1, at 89.

are unjust in the light of more general principles of justice may well require the revision not only of single rules but of whole sections of the established system of case law.”<sup>98</sup>

This is no minor glitch. The evolutionary process Hayek describes either does or does not dependably produce law with a greater claim to moral legitimacy than legislation. If it does not, it does no good to declare that this failing can be rectified through legislation. There would then be no reason not to rely on legislation in the first place. Because Hayek’s purpose in Volume I of *Law, Legislation and Liberty* is to offer the law produced by evolutionary forces as an alternative to legislation, such a concession would simply give away the game. If the realist critique is correct (as Hayek seems to concede), then there is no reason to believe that Hayek’s law of liberty is morally superior to legislation. It simply imposes the normative preferences of unelected judges rather than those of elected politicians on the public. But if this is the case, Hayek’s argument is defeated. It cannot be saved by appealing to the very form of law that it seeks to supplant.

I do not want to overstate the nature of this critique. There are good reasons to prefer the results of the common law process to legislation, and I frequently argue for the common law in preference to legislation myself.<sup>99</sup> But these reasons concern the role of the jury and other structural features of the common law that make it a relatively less attractive vehicle for oppression and rent-seeking than the legislative process. In *Law, Legislation and Liberty*, however, Hayek is not offering the law of liberty as a lesser of two evils, and he is not arguing for it on a comparative basis as a less efficient means of exploitation. Rather, he is arguing that it is a source of neutral, objectively just rules that can provide a basis for the rule of law. To the extent that the evolutionary process he describes produces a set of rules that merely reflect the normative biases of the judiciary, this argument fails.

But note the source of this failure. Hayek’s inability to distinguish between modern common law and the customary and older common law caused him to view the conscious creation of rules by judges as an inherent feature of the evolution of law. It is precisely this feature that gives rise to the objection that the grown law is not neutral but unjustly favors the interests of the politically powerful. Thus, it is Hayek’s own mistake in grafting the Janus-faced decision-process of the modern common law onto the customary and older common law that ultimately defeats his argument for the law of liberty.

This suggests, however, that there may still be hope for the law of liberty. For, if the source of objection lies in the processes of the modern common law, then disentangling the older law from the modern common law may yet yield an acceptable account of the law of liberty. And once we reject Hayek’s conflation of cus-

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<sup>98</sup>*Id.*

<sup>99</sup>*See, e.g.,* John [nmi] Hasnas, *What’s Wrong with a Little Tort Reform?* 32 IDAHO L.REV. 557 (1996); John [nmi] Hasnas, *The Myth of the Rule of Law*, 1995 WIS. L.REV. 199 (1995).

tomary law and modern common law, it is easy to show that the conscious creation of rules by judges is not necessary to the formation of a legal order. We need only point to the English customary and common law prior to the nineteenth century. If we can then show that the processes inherent in this older law really would produce Hayek's rules of just conduct *with no guiding intelligence*, we will have gone a long way toward identifying a form of law that could give life to the ideal of the rule of law. And to establish this point, we can rely on much of the discussion Hayek provides in chapter four before he collides with the modern common law<sup>100</sup> as well as those portions of chapter five in which he is truly discussing the customary law.<sup>101</sup>

But is there really any point in discussing a system of customary law in the 21<sup>st</sup> century? Isn't [STEP 8: KEEP CONTRACTION, PER AUTHOR] it rather late in the day to consider returning to such a system after a century and a half of both modern common law and the legislative state? Hayek, himself, obviously thought so, as he made evident in Volume III of *Law, Legislation and Liberty* by proposing his model constitution.<sup>102</sup> Is it even possible to go back? How would a modern legal system in which neither judges nor legislatures consciously created the rules of order function?

Very simply, really, as I hope a thought experiment will show. Let me ask you to indulge me by imagining an alternative reality that contains a legal system with several significant differences from the current one. In this legal system, trial judges would perform many of their traditional functions just as they do now. For example, they would rule on whether the dispute is properly before the court by addressing matters such as whether the litigants had standing to sue and whether the court is a convenient and fair forum. They would also supervise procedures to ensure a fair trial by ruling on motions and enforcing the rules of evidence. They would differ from their real-world counterparts, however, mainly with respect to what they do not do. For, after the parties have presented their cases, the trial judge in the imaginary legal system would not instruct the jury or other decision-maker on the law, but would simply charge it to do justice to the parties.

Appellate judges would review the procedural decisions of their trial court brethren to ensure that both sides had received a fair trial. They would not, however, review the substantive decisions of the jury or other decision-maker for consistency with established rules of law. Hence, they would not reverse a verdict in favor of a plaintiff for failure to establish all the currently required elements of a cause of action nor one in favor a defendant by announcing a new rule or expanding the range of application of an old one to encompass the plaintiff's complaint. And although the facts of a case and its outcome would be reported, appellate judges

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<sup>100</sup> See HAYEK, *supra* note 1, at 72–85.

<sup>101</sup> See *id.* at 102–12.

<sup>102</sup> *Id.* at 105–27.

would not issue judicial opinions in which they commented on, contracted, expanded, announced new, or overruled old rules of substantive law.

Academics or other legal scholars could, of course, analyze the reported cases in order to abstract rules of law, much as the legal scientists of the late nineteenth and early twentieth century did. They could publish the results of their analyses in casebooks to help students learn the law, in articles and treatises to help attorneys prepare cases more effectively, and in more popular works to help the members of public understand both what to expect if they become involved in litigation and how to conform their behavior to the law. Further, these rules could play a role in litigation in that the rules of evidence would permit a litigant to introduce them to show that he or she acted reasonably in light of past legal decisions; something the jury would be allowed to consider in reaching its verdict. But no judge would directly apply, create, or amend such rules. Trial judges would not dismiss complaints that did not conform to their requirements and appellate judges would have no role in their articulation.

The imaginary legal system is designed to look very much like the current one with the judges relieved of any role in the rule-making process. With that change, however, I would contend that we have described a 21<sup>st</sup> century model of customary law. The imaginary system certainly appears to have all the essential features of customary law.<sup>103</sup> The rules it generates arise from human interaction in the form of the settlement of actual interpersonal disputes. The disputes themselves are resolved by a direct appeal to equity; by the jury's or other decision-maker's efforts to do justice to the parties. This does not mean that members of juries or other decision-makers have unfettered discretion to decide cases purely on the basis of their personal moral sentiments. Because the parties will have based their actions on expectations drawn from the way past cases were decided, and because justice demands that like cases be treated alike, to do justice to the parties the jury or other decision-maker will have to consider whether and how the rules derived from past decisions bear on the present case. This decision process is entirely backward-looking in orientation. The jury or other decision-maker must look to the past as it is encapsulated in the rules of law to the extent that doing so bears on the fair resolution of the present case. But in deciding that case, the jury or other decision-maker is not called upon to and does not consider how the rule that can be abstracted from their decision will affect the future well-being of society.

Further, like the traditional systems of customary law, our imaginary system is free to evolve without a guiding human intelligence. As new decisions that address changing social or technological conditions or that are based on evolving moral sentiments or notions of fairness are assimilated into the mass of previously decided cases, the range of application of many of the existing rules of law will ei-

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<sup>103</sup>See *supra* text accompanying notes 23–26.

ther contract or expand. As juries or other decision-makers come to believe that something that was previously regarded as proper is, in fact, unjust, old rules will be discarded and overruled. And as juries or other decision-makers are called on to decide novel cases unlike those that have previously arisen, new rules will be added to the system. But these changes to the body of law will derive from the jury's or other decision-maker's judgments as to what is fair to particular parties in particular cases, not from any conscious consideration of what rules of law would be beneficial for society as a whole.

Would the rules of law that would emerge from such a legal system really resemble Hayek's rules of just conduct? There is good reason to believe that they would. Because there is no forward looking element in the system's decision process, no conception of what is good for society is necessary to resolve cases. No decision requires the explicit consideration of whether the purpose of the law is to maximize social wealth, harness the productive capacities of society to advance the interests of the least well-off, or create a more egalitarian society by dismantling illegitimate hierarchies. The decision-makers need not even have a fully developed abstract conception of fairness. They need only have an intuitive sense of what is fair in a particular, concrete situation. Such a decision process is unlikely to produce a set of rules that embody a particular conception of social justice. And if the decision-makers are juries comprised of ordinary members of society chosen at random, it is also unlikely that the rules would favor any particular social interest.<sup>104</sup> It is much more likely that the rules that emerge would simply reflect society's conventional notions of fairness. But this is precisely the information that individuals would need if they wish to interact peacefully with their fellow members of society. Thus, there is good reason to believe that the rules that would evolve in the imaginary system would be reasonably neutral rules that help individuals coordinate their activities so as to avoid conflict; something that sounds quite a bit like Hayek's law of liberty.

Almost none of the cars currently on the road contain fluid drives. This is unsurprising because the task fluid drive was designed to perform, allowing drivers to change gears without depressing the clutch, is better performed by automatic transmissions. Hence, fluid drive has been almost entirely replaced by automatic transmissions. Similarly, little of our current law retains its common law character.

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<sup>104</sup>Of course, if juries are chosen as they presently are so as to be comprised predominately of relatively less educated citizens from the lower socio-economic classes, then the rules may reflect a bias against the interests of wealthy individuals and corporations. But it is by no means certain that the envy and resentments of the poor would override their basic sense of morality or fairness, especially in a country in which the overwhelming majority of the lower class are regular and committed churchgoers. It is worth keeping in mind that to the extent that such envy or resentment manifests itself in our current legal system, it does so in the context of judicial instructions that inform jurors that commercial enterprises are strictly liable for injuries caused by defective products, that contributory negligence is not a bar to recovery, and that punitive damages may be awarded in the absence of a purpose to cause harm. There would be no such judicial instructions in the imagined alternative system.

This is perhaps unsurprising because many theorists argue that the task which the common-law judges were performing, consciously creating rules of law, is better performed by legislators specifically chosen for the task. Hence, much of the common law has been either codified into or purposely replaced by legislation.

Manual transmission vehicles, on the other hand, still constitute a small but noticeable proportion of the cars on the road. Although it would be very inconvenient, it would not be impossible to return to a fleet of purely manual transmission vehicles. And one can imagine circumstances in which the gains in fuel efficiency and greater driver control would make such a return highly desirable. Similarly, customary law still produces a small, but noticeable proportion of contemporary national and especially international law. And although it would certainly be inconvenient, it would not be impossible to return to a system of purely customary law such as that described in our thought experiment. But for those who, like Hayek, are searching for a legal system that would produce only neutral rules of just conduct, it just might be worth it.

### Conclusion

For a great part of my life, I was totally unaware of the difference between manual transmission and fluid drive. To me, cars were either automatics or sticks. Fortunately, my lack of understanding of the existence and nature of fluid drives never did me any harm. But this was only because I never tried to drive a 1947 Dodge.

With regard to Anglo-American law, Hayek seems to have been in a similar situation. He was apparently unaware of the significant substantive differences between customary and common law. To him, law was either legislation or judge-made. There are very few contexts in which a lack of understanding of the role played by judges in the development of the common law would be harmful. Unfortunately, advancing an argument that neutral, objective rules of just conduct would spontaneously evolve through the common-law process is among them. Unlike me, Hayek tried to drive.

Hayek's confusion of customary and common law ultimately caused his argument for the law of liberty to crash. However, in true Hayekian fashion, this provides the rest of us with an opportunity to learn from his mistake. In this article, I have suggested that by extricating the customary law from the coils of the modern common law in which Hayek enmeshed it, we may be able to identify a form of law that truly evolves without a guiding intelligence, and further, that there is a good chance that this law will embody the features of Hayek's rules of just conduct. In this way, I hope to have driven the argument for Hayek's law of liberty a bit farther down the road.