

Theoretical Inquiries in Law

Volume 9, Number 2

July 2008

Article 9

LEGAL PLURALISM, PRIVATIZATION OF LAW AND
MULTICULTURALISM

The Depoliticization of Law

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The Depoliticization of Law

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Advocates of the privatization of law often assume that unless law springs from some act of agreement, some express or implicit social contract by which individuals consent to be bound, it is nothing more than force. In this Article, I argue that this is a false dilemma. Although law is rarely grounded in consent, this does not imply that law necessarily gives some individuals command over others. Law can arise through a process of evolution. When this is the case, those subject to law are indeed bound, but not by the will of any particular human beings. Although this depoliticized law is inherently coercive, it is not inherently a vehicle for domination. This Article argues that such a system of depoliticized law is consistent with the ideal of the rule of law, and, in fact, is free market law, when that phrase is properly understood.

INTRODUCTION

Libertarian philosophers of law often write as though law is morally legitimate only if grounded in individual consent. They assume that unless law springs from some act of agreement, some express or implicit social contract by which individuals consent to be bound, it is nothing more than force. According to this view, law is either a legitimate mechanism of social ordering that is consistent with respect for individual autonomy or

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an illegitimate mechanism of coercion by which some human beings are subjected to the will of others.

I believe this is a false dilemma. Law is rarely, if ever, grounded in consent. This does not mean, however, that law necessarily gives some individuals command over others. There is a third possibility. Law can arise through a process of evolution. It can be a product of "human action, but not the execution of any human design."¹ In such a case, those subject to law are indeed bound, but not by the will of any particular human beings. Although law is inherently coercive, it is not inherently a vehicle for domination. To the extent that the ideal of the rule of law consists of a vision of a society governed by "laws but not men," this conception of law places the ideal within reach.

In this Article, I argue for this third possibility; for a society governed by law that evolves from human interaction without the conscious guidance of any particular human intelligence. I begin, in Part I, by clarifying the terminology I intend to employ in making my case. In Part II, I identify and distinguish three types of law: politicized law, depoliticized law, and consent-based law. In Part III, I argue that politicized law is not consistent with a society governed by the rule of law. In Part IV, I argue that depoliticized law is consistent with the rule of law, and, in the only meaningful sense of the phrase, should be understood as free-market law. Finally, in Part V, I close with some speculation concerning the viability of a system of consent-based law.

I. PRELIMINARY MATTERS

Before presenting my arguments, I would like to clarify the way I intend to use several terms. Because I will sometimes be employing terms in ways that differ from their conventional usages, I want to ensure that I do not thereby engender confusion or misunderstanding.

A. Political

The term "political" may be used in many ways, and is fraught with ambiguity. In this Article, I intend to use the term to refer to anything that is concerned with the effort to gain control of the machinery of the state or that is the consciously created output of that machinery. Everything else will be considered non-political.

¹ ADAM FERGUSON, *AN ESSAY ON THE HISTORY OF CIVIL SOCIETY* pt. 3, § 2 (1767).

B. The Market

For purposes of conceptual analysis, economists often wish to consider how individuals would behave if free from external constraints. Thus, they posit a hypothetical marketplace in which individuals may contract with one another on whatever basis they please. This idealized conception of the market as a realm of unregulated voluntary transactions is useful to economists in the same way that the idealized conception of a perfect vacuum is useful to physicists.

Political scientists frequently employ this conception of the market as well; usually to help them identify the proper scope for the legal regulation of human activity. They note that when individuals transact with one another free from external constraints, their actions frequently impose unwanted costs on third parties. The political scientists then argue that because private parties do not take these "external" costs into account when contracting with others, markets fail to reflect the true cost to society of individuals' voluntary activity. They conclude that legal regulation is necessary to prevent private parties from ignoring the "social costs" of their activities or, in economic terminology, to internalize the externalities of individual transactions.

The conception of the market as the realm of unregulated voluntary transactions may be useful for academics engaged in abstract economic analysis or utopian political theorizing. For purposes of this Article, however, it is not. In fact, because it obscures a distinction that I regard as crucially important — specifically, the distinction between planned and unplanned forms of regulation — it is decidedly unhelpful.

In what follows, I will be discussing not how idealized human beings would behave under specified hypothetical conditions, but how living people actually behave in the world as we know it. In this world, there is no such thing as a realm of unregulated voluntary transactions. Human action is always subject to constraint, whether in the form of conventionally accepted ethical beliefs, customary practices, spontaneously evolved rules of customary law or the early common law, judicially created rules of the modern common law, or legislation. Thus, in the real world the question is never *whether* human action should be subject to regulation, but always *what form* the regulation should take.

Note, however, that there is a principled difference between the first three forms of regulation and the last two. Although ethics, custom, and spontaneously evolved law constrain individual activity, the regulations they impose are not consciously created by particular individuals. Rather, they arise over time out of repeated human interaction. In contrast, the modern common law and legislation are intentionally created at a particular point in

time by those who occupy the relevant positions within society's political power structure. Ethics, custom, customary law, and the early common law provide spontaneously evolving, unplanned forms of regulation. The modern common law and legislation provide consciously planned, politically generated regulation. Hence, the relevant distinction may be conveniently characterized as that between non-political and political regulation.

With this distinction in mind, consider again what the term "market" can refer to. Once we descend from the academic world of idealized types to the real world of human experience in which action is always to subject to some form of regulation, the only useful conception of the market is one that refers to the realm of human activity free from *political* regulation. This means that the market is correctly understood not as the realm of unregulated voluntary transactions, but as the realm of voluntary transactions subject to the regulation of ethics, custom, and spontaneously evolved law. This is the definition of the market that will be used in this Article.

C. Rule of Law

The phrase "rule of law" is an ambiguous one. It is used alternatively to refer to political systems in which citizens are governed by general rules rather than particular commands directed at individuals,² those in which citizens are governed by general rules that contain certain substantive liberal safeguards for individuals, and those in which citizens are governed by impersonal, neutral rules that are equally applied to all. The latter use of the phrase has historically been embodied in the claim that such a system constitutes "a government of laws and not of men."³

In this Article, I am not interested in either of the first two uses of the phrase. The first reduces the rule of law to a purely formal requirement of limited significance. It is true that requiring the law to consist of general rules is a protection against arbitrary rule, in that it guarantees that citizens will not be subject to the caprices and personal whims of their political superiors. This can be useful for distinguishing rule-based legal regimes from both feudal systems based on personal allegiance, in which one is bound to obey the commands of one's overlord, and prerogative systems, in which all are bound to obey the commands of the anointed monarch. As

² See, e.g., FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 72-87 (1944); FRIEDRICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY* chs. 4, 5 (1973) [hereinafter HAYEK, *LAW, LEGISLATION AND LIBERTY*].

³ 4 JOHN ADAMS, *Novanglus Papers, No. 7*, in *THE WORKS OF JOHN ADAMS* 106 (Charles Francis Adams ed., New York, AMS Press 1851).

a substantive matter, however, this conception of the rule of law does very little work. Because even the most oppressive measures can be expressed in the form of general rules, adherence to the rule of law in this sense says almost nothing about the desirability or moral character of the conforming system. Rules requiring that all citizens profess a particular faith, refrain from criticizing the government, or associate only with those who have the same skin color are all perfectly general, but nevertheless repugnant to a just society.

The second use of the phrase, which defines the rule of law in terms of a varying selection of liberal characteristics, is too amorphous to be useful. Used in this way, the rule of law has been identified with political systems that include any combination of features, such as the separation of powers, an independent judiciary, a democratic voting process, a guarantee of equality before the law, rights to freedom of expression and religion, and protection against oppressive or biased criminal procedures and punishment. When thus amalgamated with varying features of legal liberalism, the rule of law often becomes a proxy for whatever the speaker believes to be the essential characteristics of a just society. In such cases, the phrase is reduced to a general term of approbation, and is too indefinite to be of much value.

The third conception of the rule of law can be given a more concrete and useful referent, however. The idea of a government of general, neutral, and equally applied rules suggests a system in which no one is subject to any other human will; one in which men do not rule over men, but all are governed by intelligible, impersonal rules that do not elevate the interests of any citizen or group of citizens over those of others. This requires more than the first, purely formal definition, yet is more definite than the second. Understood in this way, the rule of law constitutes an important component of a just political system. Hence, for purposes of this Article, I intend to employ the phrase "rule of law" in this third sense.

II. THREE TYPES OF LAW

In what follows, I intend to distinguish and discuss three types of law: politicized law, depoliticized law, and consent-based law. Because these represent fairly unconventional classifications, some explanation is required.

A. Politicized Law

Politicized law refers to law that is consciously produced by the machinery of government. In the common law countries, this consists of legislation,

administrative regulations, and the modern common law. Legislation is the direct output of the legislative branch of government; the law that is consciously created by the political agents invested with law-making authority by the country's constitution, e.g., the enactments of the United States Congress or state legislatures. Administrative regulations are the output of executive branch agencies that have been endowed with rule-making authority by the legislature, e.g., regulations issued by the Environmental Protection Agency, the Food and Drug Administration, or the Federal Communications Commission. The modern common law is the output of the judicial branch of government, consisting of the rules of law announced by appellate judges in the course of their review of lower court decisions, e.g., the creation of the twentieth century tort of the intentional infliction of emotional distress⁴ or the interpretation of the 1964 Civil Rights Act to permit "race-conscious steps to eliminate manifest racial imbalances in traditionally segregated job categories."⁵

Legislation and administrative regulations are obviously politically generated, being the conscious creation of governmental agents. The political nature of the modern common law is less patent, however, and can bear some comment. No common law judge is authorized to make law wholesale as are legislators. Judges are constrained by their institutional setting to rendering decisions in individual cases. In the modern common law, however, the doctrine of *stare decisis* renders judicial decisions binding in future cases. Thus, by deciding how the law applies to particular cases, judges can contract or expand the scope of the law, and, by factually distinguishing instant cases from precedents, alter the direction of its development. In all such cases, the judges make future-oriented normative judgments that work minor alterations in the law. By thus making interstitial changes in the law that, over time, significantly alter its substance, common law judges are, in effect, legislating at the margin. And because the judges are government officials, their incremental legislation is political.

B. Depoliticized Law

Depoliticized law refers to law that is not consciously created by governmental agencies. Both customary law and the old, pre-nineteenth century common law are examples of depoliticized law. Let us examine why this is the case.

⁴ See *State Rubbish Collectors Ass'n v. Siliznoff*, 240 P.2d 282 (Cal. 1952).

⁵ *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

Customary law is often, and inappropriately, identified with primitive legal systems. This is understandable because most primitive legal systems are systems of customary law, but it is nevertheless unfortunate, because 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."⁶ Its obligatory character arises not "through mere custom or repetition, [but] when a stabilization of interactional expectancies has occurred so that the parties have come to guide their conduct toward one another by these expectancies."⁷ Such law did not disappear with the Dark Ages, but is still very much with us, as exemplified by the fact that much of contemporary international law is customary law and the Uniform Commercial Code has explicitly incorporated custom into the commercial law of the United States.⁸

Customary law is an evolved or "grown" law⁹ that arises in the absence of a legislative authority. A highly telescoped account of this evolutionary process would begin with the recognition that when human beings live together without fixed, known rules of behavior, conflicts arise which can result in violence or otherwise disrupt communal life and undermine cooperative activities. This creates strong social incentives to find non-violent, non-disruptive methods of resolving such conflicts. In the absence of any recognized coercive authority, the members of the community typically respond to disruptions by pressuring disputants to voluntarily negotiate settlements and by facilitating such negotiations by acting as mediators. 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, and they begin to base their behavior on these expectations. They also take these expectations 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 anticipated 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. Eventually, there develops a sufficient "stabilization of interactional expectancies" for the members

6 LON L. FULLER, *Human Interaction and the Law*, in THE PRINCIPLES OF SOCIAL ORDER 211, 212 (1981).

7 *Id.* at 219-20.

8 *See, e.g.*, U.C.C. §§ 1-205, 2-202, 2-208 (1977).

9 "Grown law" is Friedrich Hayek's phrase. *See* 1 HAYEK, LAW, LEGISLATION AND LIBERTY, *supra* note 2, at 88, 95, 105.

of the community "to guide their conduct toward one another by these expectancies."¹⁰ The continued iteration of the dispute settlement process then gradually transforms these interactional expectancies into recognized rules of behavior, which, in turn, allows the process itself to evolve from mediated bargaining into the enforcement of rules. The rules that result from this process are rules of customary law. A useful contemporary illustration of the development of customary law can be found in the current evolution of the rules of behavior in cyberspace.

Customary law is clearly not the conscious creation of governmental actors. Hence, it is classified as depoliticized law.

What I am calling the old common law may reasonably be classified as depoliticized law as well. It is true that many of the rules of common law were announced by the judges in the king's courts,¹¹ who may be seen as governmental agents. But having government agents announce rules is not the same as having them consciously create them. The structural features of the old common law ensured that its rules were derived from past practice or custom, rather than from judicial contemplation of their prospective effect. In this sense, the old common law shared many of the salient features of the preexisting customary law.

The first of these structural features was an exceedingly weak doctrine of precedent. 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 the cases before them.¹² During most of the formative period of the common law, which lasted from the twelfth to the seventeenth century, there was no doctrine of precedent at all. Cases were mentioned, if at all, only as evidence of the

¹⁰ FULLER, *supra* note 6, at 219-20.

¹¹ Many, but by no means all. Large swathes of the common law were simply appropriated from other court systems. For example, the law of contracts evolved originally in the ecclesiastical courts and, because the early Chancellors were clerics, in Chancery, and commercial law evolved in the merchant courts and was grafted wholesale into the common law by Lord Mansfield in the latter part of the eighteenth century.

¹² See Todd Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551, 1584-87 (2003) ("Although most modern lawyers and scholars conceive of the doctrine of *stare decisis* as a formative element of the common law, this is an ahistorical understanding of the development of the common law. The doctrine of *stare decisis*, the idea that the holding of a particular case is treated as binding upon courts deciding later similar cases, is a late nineteenth-century development and represents a clear doctrinal and conceptual break with the prior history of the common law." (footnotes omitted)).

existence of a custom.¹³ 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.¹⁴ Further, when the doctrine of precedent did begin to develop, it was usually limited to procedural matters. The Year Books were "mainly concerned with the details of process and pleading,"¹⁵ and when private reports of cases became available in the late sixteenth and early seventeenth centuries, cases were mentioned chiefly

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.¹⁶

13 See THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 347 (5th ed. 1956):

[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.

14 See Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 *EMORY L.J.* 437, 450 (1996):

The common lawyers had always been interested in cases and had always discussed cases in argument, in judicial opinions, and in legal writings. . . . Nevertheless, prior to the sixteenth century, they had had no doctrine of precedent whatsoever, and, in the sixteenth and early seventeenth centuries, the persuasive authority (as distinct from the binding authority) of a series of previous judicial decisions was largely limited to procedural matters.

See also MATTHEW HALE, *THE HISTORY OF THE COMMON LAW OF ENGLAND* 68 (1713).

15 PLUCKNETT, *supra* note 13, at 269.

16 Berman & Reid, *supra* note 14, at 446.

As late as 1762, Lord Mansfield could still declare that "[t]he reason and spirit of cases make law; not the letter of particular precedents."¹⁷

The second structural feature was the competitive environment within which the common law evolved. During its formative period, common law courts had to compete for litigants both with other court systems and among themselves.¹⁸ For much of the period, the royal courts operated alongside and in competition with ecclesiastic, manorial, urban, mercantile, and local courts.¹⁹ The royal courts themselves consisted of several distinct types of courts, which eventually coalesced into the King's Bench, Common Pleas, Exchequer, and Chancery.²⁰ Because the various courts collected their fees from the litigants,²¹ they competed with each other for business, often creating elaborate legal fictions to extend their jurisdictions to include additional categories of disputes.²²

17 *Fisher v. Prince*, (1762) 97 Eng. Rep. 876, 876 (K.B.).

18 See ARTHUR R. HOGUE, *ORIGINS OF THE COMMON LAW* 5 (1966):

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.

19 HAROLD BERMAN, *LAW AND REVOLUTION* 10 (1983).

20 *Id.* at 189.

21 See 2 ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 720 (R.H. Campbell & A.S. Skinner eds., Oxford Univ. Press 1976) (1776); 2 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 252-54 (4th ed. 1936).

22 J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 40-41 (4th ed. 2002) [hereinafter BAKER, *INTRODUCTION TO ENGLISH LEGAL HISTORY*]; PLUCKNETT, *supra* note 13, at 159, 210; JOHN HUDSON, *THE FORMATION OF THE ENGLISH COMMON LAW* 51 (1996). For an excellent discussion of the competition among the various courts prior to the nineteenth century, see Zywicki, *supra* note 12, at 1582-89.

The competitive nature of the medieval legal order and the development of the doctrine of precedent are not unrelated. Indeed, the need to police the jurisdictional boundaries among the competing courts was the primary impetus for courts to have regard to prior judicial decisions, and explains why almost all reported use of cases during the common law's formative period concerned procedural matters rather than matters of substantive law.

These two features of the old common law worked together to curtail what we would now call judicial legislation. In the first place, in the absence of *stare decisis* judges were not and did not regard themselves as creating "rules" of prospective application. To the extent that they were involved in deciding cases at all,²³ their focus was retrospective, seeking a basis in past custom for resolving the instant dispute. Despite the ridicule it was subjected to by legal realists, the image of the old common law judge as the discoverer of the law, rather than its creator, is really quite appropriate.

In the second place, judges' ability to craft rules of law was constrained by the need to attract litigants to their courts. Far from being free to opine about the demands of public policy, the competitive legal environment forced

It is frequently noted that the essential features of the common law had formed by the thirteenth century. See R.C. VAN CAENEGEM, *THE BIRTH OF THE ENGLISH COMMON LAW* 29 (2d ed. 1988); HUDSON, *supra*, at 21. This must refer in large part to the substance of the law that was drawn from custom, since the procedural apparatus of the common law that evolved over the succeeding centuries was in its infancy at that time. As J.H. Baker notes,

The common law was not all invented in a day, or a year, but arose out of a long process of jurisdictional transfer in which many old customs were abandoned but many more were preserved. To appreciate how the ancient customs of England were accommodated to the unifying innovations of the Normans and Angevines, regard must be had not merely to the views of the great men in the king's court at Westminster, but also to what was happening from day to day in the shires, hundreds and boroughs throughout the land.

J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 9 (1971). This is undoubtedly the source of the continually repeated characterization of the English common law as a customary law. See 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *67 (1765) (identifying the common law with the "general customs; which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification"); FREDERICK POLLOCK, *FIRST BOOK OF JURISPRUDENCE* 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."); BERMAN, *supra* note 19, at 480-81:

[T]he common law of England is usually said to be itself a 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.

23 Much of the job of early common law judges was to ensure that the pleadings properly specified the issues to be resolved, and then turn the matter over to the jury who "were expected to do substantial justice." BAKER, *INTRODUCTION TO ENGLISH LEGAL HISTORY*, *supra* note 22, at 80. See *id.* at 76-81.

judges to focus on providing the service its customers/litigants wanted — a forum for the "unbiased, accurate, reasonable, and prompt resolution of disputes."²⁴ Regardless of their personal beliefs and biases, early common law judges were compelled to decide cases in a way that was responsive to the public that used the court system. Hence, the old common law was

the law that evolved from this competitive process, and the borrowing, winnowing, and evolutionary process that it generated. . . . [T]he end result of this process can be understood as a spontaneous order, created by the interactions of the many individuals who comprise the process rather than by a particular identifiable author.²⁵

In this way, the old common law was very much like the customary law that preceded it.

In sum, under the old common law, judges typically decided cases with a backward-looking perspective designed to determine what customary practice was. In the absence of *stare decisis*, there was no reason for judges to view themselves as laying down forward-looking rules for future application. The substantive rules that eventually evolved from the judges' decisions were shaped more by competitive forces that required judges to supply law and procedures that were acceptable to potential litigants

24 Zywicki, *supra* note 12, at 1585. Because "litigants could 'vote with their feet,' patronizing those courts that provided the most effective justice, . . . judges had to respond to their customers, the individuals who actually used the courts, rather than powerful special interests trying to impose rent-seeking rules involuntarily on passive citizens." *Id.* See also PLUCKNETT, *supra* note 13, at 650 ("[T]he different courts were, in fact, on intimate terms. It did not matter so much that they were usually terms of rivalry, for even then they kept close watch on developments in other institutions, and competed in providing the best remedy."); SMITH, *supra* note 21, at 720:

The fees of court seem originally to have been the principal support of the different courts of justice in England. Each court endeavoured to draw to itself as much business as it could, and was, upon that account, willing to take cognizance of many suits which were not originally intended to fall under its jurisdiction. . . . In consequence of such fictions it came, in many cases, to depend altogether upon the parties before what court they would chuse to have their cause tried; and each court endeavoured, by superior dispatch and impartiality, to draw to itself as many causes as it could. The present admirable constitution of the courts of justice in England was, perhaps, originally in a great measure, formed by this emulation, which anciently took place between their respective judges; each judge endeavouring to give, in his own court, the speediest and most effectual remedy, which the law would admit, for every sort of injustice.

25 Zywicki, *supra* note 12, at 1589.

than by any "legislative intent" of individual judges. Hence, although the old common law was the product of the actions of government officials, it was not the product of their design. Therefore, it may be classified as depoliticized law.

C. Consent-Based Law

Consent-based law refers to rules of law whose obligatory authority derives from the voluntary consent of the parties governed by them. Consent-based law is created either by contract or by voluntarily agreeing to abide by the output of a specified law-making process. The key feature of consent-based law — the feature that distinguishes it from traditional social contract theory — is that the consent that grounds the obligation must be actual, not hypothetical.

There are many small-scale examples of consent-based law. Perhaps one of the most obvious would be the "law" of homeowners' associations that governs various aspects of the behavior of the member homeowners. The purchaser of a home in one of these associations explicitly agrees to be bound by both the current rules of the association and all future rules duly adopted according to the procedures specified in the association's bylaws. Similarly, labor-management contracts typically create both the law of the workplace and the grievance procedures by which it will be adjudicated. When employees are not forced to be members of a union and voluntarily accept employment with knowledge of the terms of the collective bargaining agreement, this too would be an example of consent-based law. On a somewhat larger scale, ecclesiastical law, and religious law generally, can be considered consent-based law, as long as all congregants voluntarily choose to practice the relevant faith.

I am unable to cite any examples of national systems of consent-based law. Various libertarian scholars have argued that such systems are practicable.²⁶ Many dispute this.²⁷ However, a national system of purely consent-based law

26 See, e.g., MURRAY N. ROTHBARD, *FOR A NEW LIBERTY* (1973); DAVID FRIEDMAN, *THE MACHINERY OF FREEDOM* (2d ed. 1989); BRUCE BENSON, *THE ENTERPRISE OF LAW* (1990); Edward Stringham, *Overlapping Jurisdictions, Proprietary Communities, and Competition in the Realm of Law*, 162 J. INSTITUTIONAL & THEORETICAL ECON. 516 (2006).

27 See, e.g., Tyler Cowen, *Law as a Public Good: The Economics of Anarchy*, 8 ECON. & PHIL. 249 (1992); William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 6 J. LEGAL STUD. 235 (1979).

is certainly a theoretical possibility. Hence, the inclusion of consent-based law within the classification scheme is appropriate.

III. THE INCOMPATIBILITY OF POLITICIZED LAW WITH THE RULE OF LAW

Little need be said to show that politicized law is incompatible with the rule of law *when the rule of law is understood to refer to a system in which citizens are governed by neutral rules and not the will of others*. In fact, there is little that I can add to the observations of the public choice scholars in economics and the legal realists and critical legal studies scholars in law to help establish this point. Consider legislation first.

Legislation is law that is consciously created by political agents. Even in an ideal democracy, legislation is supposed to embody the *will* of the majority. In the real world, public choice economics has demonstrated *ad nauseam* how politically adept rent-seekers shape legislation to effectively impose their will on their fellow citizens. Western liberal democracies may have tamed the more objectionable aspects of personal rule. Rather than being subject to the arbitrary will of one ruler or clique, the citizens of such regimes are subject to the will of more diversified political coalitions that can effectively manipulate the cumbersome machinery of the democratic state. But the essence of legislation remains what it always was — the imposition of some people's will upon others. Casting legislation in neutral terminology may obscure this fact from the citizens being subjected to the will of those who control the machinery of government, but it does not change the character of the subjection. A rose by any other name would smell as sweet. The same is true of pork.

Despite the reflexive obeisance paid to the concept of "a government of laws and not of men," no one believes or acts as though legislation conforms to this ideal. From time immemorial, good government reformers have been on a quest to find just the right set of restrictions to place on legislators to prevent them from favoring their parochial interests over the common good. The never-ending search for the right set of parliamentary or congressional "ethics" rules, the proper restrictions on campaign contributions and political speech, and the correct configuration of anti-corruption criminal statutes indicates the widespread belief that legislation improperly imposes the will of "special interests" on the rest of society. It is true that the never-ending nature of the search also indicates the belief that this situation can be changed — that there exists some configuration of rules that can counteract human nature and cause those motivated enough to engage in the struggle for

political power, and skillful and ruthless enough to triumph in that struggle, to use that power solely to enact impersonal legislation of equal benefit to all members of society. Of course, human beings spent a considerable amount of time attempting to square the circle as well.

The situation is no different when we consider administrative regulations, which, like legislation, are consciously created by political agents. Administrative agencies are usually run by political appointees. It can hardly be surprising that the nature of the regulations tends to change as the party affiliation of the executive making the appointments changes. Further, administrative agencies are famously subject to being "captured" by the industries they are designed to regulate, privileging the interests of the entrenched firms over that of society as a whole.²⁸ Other public choice explanations of what skews the functioning of regulatory agencies from the neutral pursuit of the public interest²⁹ need not be canvassed to recognize that the quest for regulatory reform, like that for the proper constraints upon legislators, is a never-ending one. No less than legislation, in the real world, regulation is a mechanism by which those able to manipulate the machinery of government impose their will on society.

Finally, legal realists and critical legal scholars have spent decades demonstrating that the modern common law is similarly a vehicle for politically dominant parties to impose their values on society. The now century-old indeterminacy argument of the legal realists established that the rules of law do not bind common law judges to decide controversial appellate cases one way rather than another. The existence of contradictory rules of law and construction and the open textured nature of legal language always provide the judge sufficient leeway to arrive at the legal conclusion that he or she believes to be correct — something that is determined by his or her pre-existing moral and ideological commitments.³⁰ More recently, the critical legal theorists added the "mystification thesis" that demonstrates how the contrary belief that judges impersonally and objectively decide cases according to neutral criteria merely masks the imposition of the ideological preferences of the judges (and those who select them) on the entire community.³¹ But there is little need to rehearse the arguments of the

28 George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. 3 (1971).

29 See, e.g., WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971).

30 See, e.g., Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

31 See Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 463-70 (1987). For a more detailed account of both the realists' indeterminacy argument and the critical scholars' mystification thesis, see

realists and critical legal scholars to demonstrate that when judges can rule that the words "Congress shall make no law abridging the freedom of speech" permit Congress to make laws prohibiting speech that creates a clear and present danger or advocates the election of a federal candidate within sixty days of an election (thereby interpreting the word "no" to mean "some") but prohibits Congress from making laws banning topless dancing or flag burning (thereby interpreting the word "speech" to mean "expressive conduct"), it is the judges' moral values and ideological beliefs, rather than the legal language, that determines what the law is. The titanic political struggles that accompany each vacancy on the United States Supreme Court would not ensue were there not a clear public awareness that the substance of the law varies with the Court's personnel. Thus, to the extent that judges are "legislating at the margin," it is they (and derivatively, those who select them) and not the rules of law that govern. Like legislation and regulation, the modern common law necessarily involves the imposition of one party's or faction's will upon the entire citizenry.³²

IV. DEPOLITICIZED LAW AND THE RULE OF LAW

A. Compatibility

Politicized legal systems do not produce what Friedrich Hayek referred to as rules of just conduct — general rules of universal application that do not favor the interests of any particular group.³³ Recognition of this has led certain libertarian scholars to regard the concept of the rule of law as a dangerous myth that disguises the fact that law is inherently a coercive mechanism for subjecting some people to the will of others. This leads them to argue that the only just legal system is one comprised exclusively of consent-based law. In a system of consent-based law, each person voluntarily agrees to be governed by the rules of law. It is only in such a system, these scholars conclude, that no one is rendered subservient to the will of another. But this move is too fast. What has been ignored is the possibility of depoliticized law.

Depoliticized law is law. Hence, it is coercive. The duty to obey has

John 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).

³² For a more detailed account of the incompatibility of politicized law with the rule of law, see John Hasnas, *The Myth of the Rule of Law*, 1995 WIS. L. REV. 199.

³³ 1 HAYEK, *LAW, LEGISLATION AND LIBERTY*, *supra* note 2, ch. 4.

not been voluntarily assumed and compliance is not optional. However, depoliticized law is not the conscious creation of any identifiable person or group of persons. It evolves out of the effort of human beings to resolve interpersonal disputes in the absence of a centralized authority. The slow accretion of successful resolutions of individual disputes eventually produces recognizable rules of law of binding effect. Such rules do not represent the command of any identifiable person and are not an embodiment of anyone's will. Therefore, one can be bound by depoliticized law without thereby being rendered subject to the will of another. In a system of depoliticized law, it really is the law and not men or women that rule.

This, of course, does not imply that all systems of depoliticized law are just, or that they will in fact produce general rules of just conduct. Social forces and governmental influences can skew the evolution of customary law to privilege the interests of some groups over others. In general, there is little reason to believe that rules that emerge from systems of case-by-case decision making will be normatively superior to those that emerge from legislative processes. Nevertheless, when the proper institutions and incentive structures are in place — institutions and incentive structures such as the weak commitment to precedent and competitive legal environment that rendered the old common law an extremely poor mechanism for rent-seeking³⁴ or the absence of well-organized central authority and the communal/mediational dispute settlement procedures that gave rise to the antecedent customary law — the evolutionary processes of legal development can be channeled toward the production of neutral rules of general application. Under appropriate conditions, depoliticized legal systems are likely to produce the type of rules required by the ideal of the rule of law.

A good illustration of how evolutionary forces can yield rules of just conduct may be supplied by the common law of assault and battery. In contemporary terminology, the law of battery forbids any person from intentionally making "harmful or offensive contact" with another. This prohibits not only direct blows, but snatching a plate out of someone's hand³⁵ or blowing smoke in his or her face.³⁶ The law of assault forbids one from intentionally causing another to fear he or she is about to be battered, but it does not prohibit attempts at battery of which the victim is unaware or threats to batter someone in the future.³⁷ Why are the torts defined in this way?

34 See Zywicki, *supra* note 12, at 1564-65.

35 Fisher v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627 (Tex. 1967).

36 Leichtman v. WLW Jacor Communications, Inc., 634 N.E.2d 697 (Ohio Ct. App. 1994).

37 Western Union Telegraph Co. v. Hill, 150 So. 709 (Ala. Ct. App. 1933).

Why does battery bar not only harmful, but offensive contact, and why doesn't assault bar attempts of which the victim is unaware or that are remote in time?

At the time these rules of law were evolving, one of the most urgent social needs was to reduce the level of violence in society. This meant discouraging people from taking the kind of actions that were likely to provoke an immediate violent response. Quite naturally, then, when disputes arising out of violent clashes were settled, the community tended to hold parties who had taken such actions at fault. But what type of actions are these? Obviously, direct physical attacks on one's person are included. But affronts to one's dignity or other attacks on one's honor are equally if not more likely to provoke violence. Hence, the settlements that eventually coalesced into the law of battery forbid not merely harmful contacts, but offensive ones as well. Furthermore, an attack that failed was just as likely to provoke violence as one that succeeded, and thus equally in need of discouragement. But if the intended victim was not aware of the attack, it could not provoke a violent response, and if the threat was not immediate, the threatened party had time to escape, enlist the aid of others, or otherwise respond in a nonviolent manner. Hence, the settlements that eventually coalesced into the law of assault forbid only threats of immediate battery of which the target was aware.

Citizens of England and other common law countries are bound by the law of assault and battery. Yet this law is not the expression of any human will. Indeed, this law consists of general, neutral rules that do not favor the interests of any particular group. And, of course, this characteristic is not limited to the law of assault and battery. Similar stories may be told for wide swathes of the customary/old common law of England.³⁸ When we limit our focus to that portion of our law that originated through these non-political, evolutionary processes, the concept of the rule of law becomes a real possibility. In the case of depoliticized law, there really can be a government of law and not of men.³⁹

38 This is clearly true for the rules of tort; contract, which evolved in the ecclesiastical courts and Chancery; and commercial law, which evolved independently as the law merchant; and to more limited extent, for the rules of property law as well.

39 In another context, I explained why the evolutionary forces driving the development of depoliticized law tend to produce a liberal legal regime along Lockean lines, *see* John Hasnas, *Toward a Theory of Empirical Natural Rights*, 22 SOC. PHIL. & POL'Y 111, 137-40 (2005), and provided a normative basis for such a regime — the nearly universal instrumental moral value of peace, *id.* at 140-42. However, the limitations of the present format do not permit the inclusion of a substantive discussion of these points here.

This observation will be a matter of purely academic interest unless a system of depoliticized law can function in the contemporary world. However, I see no reason to believe that it cannot. Common law processes were effective at producing a complex network of general, neutral rules prior to the nineteenth century reorganization of the courts into a hierarchical structure which, when combined with the doctrine of *stare decisis*, invested judges with legislative power. All that would be required to return to a depoliticized system would be to remove this power from the judge. And this can be done fairly easily.

To show that this is the case, let me ask you to imagine a significantly reformed common law legal system.⁴⁰ In this reformed system, trial judges function much as they presently do. They rule on whether cases are 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 supervise trial procedures to ensure a fair trial by ruling on motions and enforcing the rules of evidence. They do not, however, issue instructions to the jury or other decision-maker. After both sides have presented their case, judges simply charge the decision-maker to do justice to the parties.

The role of appellate judges, in contrast, is greatly altered in the reformed system. Although they still review the procedural decisions of their trial court brethren to ensure that both sides have received a fair trial, they do not review the substantive decisions of the jury or other decision-maker for consistency with the established rules of law. They do not reverse verdicts in favor of plaintiffs for failure to establish all the required elements of a cause of action, nor those in favor of defendants by announcing new rules or expanding the range of application of old ones to encompass the plaintiff's complaint. And although the facts of cases and their outcomes are reported, appellate judges do not issue judicial opinions in which they comment on, restrict, expand, announce new, or overrule old rules of substantive law.

Academics or other legal scholars could, of course, analyze the reported cases 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 members of public understand both what to expect if they become involved in litigation and how to conform their behavior to the law. Furthermore, these rules could play a role in litigation, in that the

⁴⁰ This thought experiment was originally proposed in John Hasnas, *Hayek, Common Law, and Fluid Drive*, 1 N.Y.U. J.L. & LIBERTY 79, 106-07 (2005).

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 decision-maker 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.⁴¹

In this hypothetical legal system, rules arise from decisions in individual cases based upon the jury's or other decision-maker's judgment of what is fair to the parties. These decisions are, in turn, based in part on what is reasonable for the parties to expect given past decisions. Judges function solely as referees, and have no direct role in making the law. By encapsulating past practice, the existing rules of law help determine the outcome of cases by suggesting to the jury or other decision-maker what constitutes a fair resolution of the instant case, but no party is called upon to consider how a rule that may be abstracted from the decision will function prospectively.

In this system, the law evolves 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 in to the mass of previously decided cases, the range of application of many of the existing rules of law either contracts or expands. As juries or other decision-makers come to believe that something that was previously regarded as proper is, in fact, unjust, old rules are 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 are added to the system. But these changes to the body of law would 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 the rules of law should be.

There is good reason to believe that such a system would, in the main, produce general, neutral rules that do not favor the interests of any particular

41 The imagined legal system is offered as an example of how a depoliticized system could function under contemporary conditions, not as prescription for what should be adopted. Indeed, it was chosen because it is the least unconventional example — that is, the one most resembling the present legal system — not because it is necessarily the optimal one. For example, it assumes that incentives adequate to generate general rules can function within a monopolistic legal system in which courts do not have to compete for litigants. This is in defiance of historical experience indicating that the competitive legal environment was an important factor in preventing the common law from becoming a vehicle for rent-seeking. Hence, it should be considered for illustrative purposes only, and not regarded as a proposal for reform.

group.⁴² There is no forward-looking element in the system's decision process — no cases are decided on the basis of their prospective effect as a rule of law. There is no doctrine of *stare decisis* by which present decision-makers can bind future ones. No intentional law-making is taking place. Rules of law simply evolve out of the jury's or other decision-maker's intuitive sense of what is just in particular, concrete situations. Such rules, which reflect conventional notions of fairness, are precisely the ones most likely to facilitate peaceful interaction among citizens. Thus, the structure and incentives of the hypothetical legal system favor the creation of reasonably neutral rules that help individuals peacefully coordinate their activities, rather than rules that elevate the interests of one group of citizens over those of others.

The non-politicized processes inherent in the customary and old common law of England produced an impressive body of general, neutral rules that formed the infrastructure of the modern commercial society. These processes function perfectly well in contemporary circumstances and may still be harnessed. Hence, there is every reason to believe that a system of depoliticized law is both feasible and compatible with the ideal of a government of law and not of men.

B. Free Market Law

The holy grail of libertarian legal theory is "free market law." Several libertarian scholars have undertaken a quest to show how market forces can generate the rules of law necessary for a peaceful and orderly society. These scholars have made their task unnecessarily difficult, however, by adopting the economists' definition of the ideal market and by limiting their analysis to the effect of competitive forces. Whether competition alone can produce a viable, liberal legal regime in an unregulated environment is undoubtedly

⁴² It is important to realize that in making this claim, I am not comparing the output of some idealized system of customary/common law with that of the flawed, real-world legislative process. The fanciful thought experiment being offered is not intended to suggest that such a system would operate perfectly. At best, it would function as well as the old system of customary and common law on which it is modeled. The comparison being made in this Article is always between the real and the real — between the output of the flawed, real-world customary/common law process, which produced the fundamental rules of contract, tort, property, and commercial law that undergird the legal systems of the common law countries, and that of the flawed, real-world legislative process. For an excellent account of the reasons that the old common law did a better job of producing general, neutral rules than the modern common law and the legislative state, see Zywicki, *supra* note 12.

an interesting theoretical question. But it is not one that must be answered to determine whether free market law can exist. For when we turn our attention from flights of economic fancy to the real world, it becomes apparent that depoliticized law *is* free market law.

As noted in Part I, in the real world, human action is always subject to some form of regulation. There can be a free market in the real world only in the sense that human beings are permitted to transact their business free from *political* regulation. This means that the free market is correctly understood as the realm of human activity regulated by ethical beliefs, customary practices, and spontaneously evolved law. But spontaneously evolved law is depoliticized law. When we are not blinded by ideal economic types, we can see that depoliticized law is an integral part of the free market.

In my judgment, the effort to provide an account of how purely competitive forces can produce a functioning system of consent-based law is a red herring. As intriguing as this speculation may be, it is tangential to the central question of libertarian theory, which is how human beings organize themselves in the absence of a centralized coercive authority. The answer to this question is not merely that they buy, sell, and trade with each other in a manner that increases aggregate welfare, but also that they resolve interpersonal disputes in a way that gives rise to general rules that enhance the ability of individuals to pursue their ends free from violent interference by their fellows. The spontaneous generation of such depoliticized law is part and parcel of the market process. Depoliticized law is as much a product of the market as are cars, coal, and tangerines. In economic terminology, depoliticized law is endogenous to the market.

In my opinion, libertarians can call off the quest. The grail has been found. Just as in the movie *Indiana Jones and the Last Crusade*, it was hidden in plain sight.⁴³ Free market law is the depoliticized law that has been with us for centuries and that forms the infrastructure of the Anglo-American legal system.

V. THE VIABILITY OF CONSENT-BASED LAW

A system of consent-based law is an interesting theoretical possibility. Is it a practicable one?

Providing a satisfactory account of the obligation to obey the law is one of the perennial problems of jurisprudence. Consent-based law cuts the

⁴³ Although not in *Petra*.

Gordian knot of legal obligation by grounding it in individual consent. One's voluntary agreement to abide by a set of rules or the output of a specified rule-making procedure creates a moral obligation to do so. In such a case, there is no need to search for an independent source of the obligation to obey the law. Consent-based law has the virtue of clearly being morally legitimate.

Furthermore, consent-based law is consistent with the ideal of the rule of law, although it would be more accurate to say that consent-based law renders the ideal of the rule of law irrelevant. Because each individual is bound only by his or her autonomous act of will, no one is involuntarily subjected to the will of another. Under such circumstances, it is immaterial whether one binds oneself to obey a set of general rules or the particular commands of a designated superior. One has undertaken a legitimate moral obligation in either case.

The obvious moral legitimacy of a system of consent-based law is certainly the basis of its appeal to the libertarian scholars who advocate its adoption. The question is whether such a system can be practically instituted on a large scale. On a theoretical level, economists debate whether a large-scale system of consent-based law can be maintained, or whether it is inherently unstable and will necessarily degenerate into an abusive coercive system.⁴⁴ I am neither qualified to enter this debate nor interested in doing so. Under the assumption that the adoption of a large-scale system of consent-based law is theoretically feasible, I offer only a few speculative comments on its practicability.

Although it is unfair to generalize, theories of the formation of consent-based legal systems usually couple the assumption that individuals consciously recognize the need for security and rules of order with the efforts of entrepreneurs to satisfy these needs. Hence, theorists contend that people will form protective associations, or purchase personal protection insurance contracts, or live in private communities with their own security services, and that rules of law will be contractually agreed upon by the organizations to reduce expensive inter-organizational conflict. Because individuals voluntarily contract with their particular association, insurance agency, or community with knowledge of the rules they adhere to, the result is consent-based law.

⁴⁴ See, e.g., Cowen, *supra* note 27; David D. Friedman, *Law as a Private Good: A Response to Tyler Cowen on the Economics of Anarchy*, 10 *ECON. & PHIL.* 319 (1994); Tyler Cowen, *Rejoinder to David Friedman on the Economics of Anarchy*, 10 *ECON. & PHIL.* 329 (1994); Bryan Caplan & Edward Stringham, *Networks, Law, and the Paradox of Cooperation*, 16 *REV. AUSTRIAN ECON.* 309 (2003).

I am perfectly willing to concede that this type of process *could* lead to the establishment of a consent-based legal system. I nevertheless believe that such a process is exceedingly unlikely to be followed in the real world. Even assuming the type of massive social upheaval that would require rebuilding legal institutions from scratch, it is unlikely that most people will or would want to engage in the type of reflection necessary to choose the rules of law under which they will live. Senior citizens in the United States protested vociferously when provided with a prescription drug benefit that required them to choose among several complex plans. How much more would this be the case with regard to the choice of plans offering the fundamental rules of social order? Historical evidence suggests that most people are content to unreflectively abide by the customary and conventional practices of their society, as long as these practices allow them to coordinate their activities without being too oppressive.

In my opinion, the problem with consent-based law is a matter of transaction costs. It is simply cheaper to start from where one is, even if it means enduring some injustice, than to construct the world anew in an attempt to achieve perfect justice. Most Americans have long since given up trying to claim every reduction in income tax liability to which they are entitled, being satisfied with completing the filing process in a conventional and familiar way as long as they do not do too much worse than last year. The cost differential between establishing a system that requires the conscious reflection of all or most of its participants and one that requires only the habitual obedience of the bulk of them is so great as to make the prospects of actual human beings adopting the former vanishingly small. As theoretically superior as consent-based law may be, depoliticized law will do and has the virtue of arising through processes that human beings naturally follow in the absence of governmental authority. Hence, I believe we may rest content with a system of depoliticized law.