



**CUSTOM, REASON, AND THE
COMMON LAW:
A REPLY TO HASNAS**

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The first and chief design of every system of government is to maintain justice; to prevent the members of society from encroaching on one another's property, or seizing what is not their own. The design here is to give each one the secure and peaceable possession of his own property.

—Adam Smith¹

Introduction

In a recent article in this journal, John Hasnas takes Friedrich Hayek to task for allegedly failing to appreciate the basic distinction between the common law enforcement of local customary practices, of which Hasnas approves, and interstitial judicial law-making grounded in the interpretation of precedent

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¹ LECTURES ON JURISPRUDENCE 5 (R. L. Meek et al., eds. 1978).

and normative considerations of public policy, to which he objects as being akin to legislation.² Professor Hasnas accuses Hayek not only of confusing customary and judge-made law, but also of compounding the error by anachronistically projecting the modern conception of judge-made law on to the older common law, the substance of which, he claims, consisted exclusively of the enforcement of organic social customs.³ In particular, Hasnas makes the striking assertion that, prior to the advent of the nineteenth century, the substantive content of the British common law was not judge-made at all, but instead reflected nothing other than “the community’s sense of fairness as expressed by the jury” and could thus be “accurately described as case-generated customary law.”⁴

Finally, given that the judge-centered conception of the common law is a comparatively recent innovation, Hasnas suggests that there is no principled reason why we should not revert to a purely customary practice of dispute resolution, in which “the trial judge . . . would not instruct the jury or other decision-maker on the [substantive] law, but would simply charge it to do justice to the parties.”⁵

Though these are provocative claims, I believe that Hayek can be largely acquitted of Hasnas’ bill of particulars. In sum, my contention is that Hasnas misreads Hayek, in that he fails to give sufficient weight to the fact that Hayek was not necessarily making a historical claim, but a normative political argument concerning the prerequisites of an ideal liberal social order. In *that* context, I

² John Hasnas, *Hayek, the Common Law, and Fluid Drive*, 1 N.Y.U. J. L. & LIBERTY 79 (2005). For the sake of brevity, I will not attempt to respond to Hasnas’s arguments in fine detail, but will instead assume that the reader is familiar with his article, as well as the relevant Hayekian texts.

³ *Id.* at 81-98.

⁴ *Id.* at 92; *see also id.* at 89-90 (“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.”).

⁵ *Id.* at 107.

shall argue, it made perfect sense for Hayek to relegate customary social practices to a secondary normative status.

I shall also endeavor to show that Hasnas' historical claims are exaggerated, if not simply false. In fact, the historical evidence suggests that, contrary to Hasnas' claim, Hayek's partly idealized conception of the judicial function is closer to the actual understanding of common law adjudication that had become firmly entrenched in England by the early seventeenth century and that was, in large measure, replicated in the United States in the early nineteenth century. This is not merely to insist on a fine point of historical periodization. Instead, my suggestion is that the legal culture and the attendant economic order bequeathed to us by the Anglo-American common law tradition is, for better or worse, the intellectual achievement of generations of lawyers, judges, and legislators, rather than an unreflective conduit for organic social practices. In what follows, I will address each of these issues in turn.

I. Hayek's Common Law Liberal Utopia

Hasnas correctly asserts that Hayek considered both custom and precedent to be legitimate sources of law. Nevertheless, Hasnas' critique is tendentious for the simple reason that it conspicuously overlooks the nature of Hayek's project. Throughout the course of his lengthy intellectual career, Hayek's overriding concern was not, as Hasnas would have it, to celebrate the virtues of the organic practices embedded in local customary communities, but to reestablish the theoretical foundations of the complex order of modern commercial civilization, for which he uses (following Adam Smith) the shorthand phrase "the Great Society." Thus, Hasnas' claim that Hayek's conception of judicial law-making in *Law, Legislation and Liberty* is "utterly confused" merely because it presupposes, counterfactually perhaps, that judges would have to

be inclined to consciously adopt and enforce characteristically liberal social norms, rather dramatically misses the point.⁶

Hayek's purpose was to persuade his readers of the moral imperative of reinvigorating the normative political ideals of classical liberalism, the legal expression of which he came to believe were manifested paradigmatically in the British common law tradition.⁷ In Hayek's view, such a defense was urgently required if there was to be any genuine hope of preserving the material advantages collectively accrued from the development of large-scale market institutions. To this end, Hayek's pedagogical task was to sketch "an ideal picture of society . . . or a guiding conception of the overall order to be aimed at," which "may not be wholly achievable" in practice, but which nonetheless constitutes both an "indispensable condition of any rational policy" and "the chief contribution that [social] science can make to the solution of the problems of practical policy."⁸ By thus tracing the outlines of "a

⁶ *Id.* at 103-05.

⁷ In an earlier phase of his career, Hayek had argued that the efforts of Continental reformers at codification had been the crucial step in "the explicit formulation of some of the general principles underlying the rule of law," and had questioned whether "the much praised flexibility of the common law, which has been favorable to the evolution of the rule of law so long as that was the accepted political ideal, may not also mean less resistance to the tendencies undermining it, once that vigilance which is needed to keep liberty alive disappears." FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 198 (1960) [hereinafter HAYEK, *CONSTITUTION*]. More than a decade later, however, he had become convinced that the *Rechtsstaat* ideal of legal stability and predictability had been best served by the durability of the British common law tradition, which he believed was comparatively more resilient in the face of the sort of rent-seeking behavior that plagues the legislative process. See FRIEDRICH A. HAYEK, 1 *LAW, LEGISLATION AND LIBERTY: RULES AND ORDER* 82-85 (1973) [hereinafter HAYEK, *RULES AND ORDER*]. On the development of Hayek's legal thought, see JEREMY SHEARMUR, *HAYEK AND AFTER: HAYEKIAN LIBERALISM AS A RESEARCH PROGRAMME* 87-101 (1996).

⁸ HAYEK, *RULES AND ORDER*, *supra* note 7, at 65; see also HAYEK, *CONSTITUTION*, *supra* note 7, at 411, quoting ADAM SMITH, 1 *THE WEALTH OF NATIONS* 468 (R.H. Campbell & A.S. Skinner eds., 1981) (1795) ("The task of the political philosopher can only be to influence public opinion, not to organize people for action. He will do so effectively only if he is not concerned with what is now politically possible but consistently defends the 'general principles which are always the same.'"); *id.* at 399 ("There has never been a time when liberal ideals were fully realized and when liberalism did not look forward to further improvement of institutions.").

liberal Utopia" unconstrained by "what appears today as politically possible," Hayek aspired to "make the philosophic foundations of a free society once more a living intellectual issue, and its implementation a task which challenges the ingenuity and imagination of our liveliest minds."⁹

Understood in this context, Hasnas correctly points out that Hayek's jurisprudential thought contains a deep-seated tension between two rival and not wholly commensurable conceptions of law, a tension Hayek never resolved to his complete satisfaction. On the one hand, through his argument for the spontaneous order of the market as a means of coping with our constitutional ignorance of the complexities of concrete social reality,¹⁰ Hayek appeals to a conception of law as an emergent property of a dynamic process of dispute resolution. In Hayek's account, the central figure is the common law judge, whose case-sensitive decision-making sustains and improves the legal framework necessary to support an extended market order. The judge accomplishes this task by "discovering" abstract rules of just conduct, not in any dubious metaphysical sense, but by extracting them from the reasonable expectations of the parties, which may be grounded in either customary social practices or established legal precedents. Hayek maintains that the constantly refined structure of legitimate legal expectations arising from this adjudicative process, like the variegated array of holdings in the market, is an example of a spontaneous or "grown" order, "the result of human action but not of human design."

On the other hand, Hayek admittedly vacillates on the contentious matter of precisely whose conception of "reasonable"

⁹ F. A. Hayek, *The Intellectuals and Socialism*, 16 U. CHI. L. REV. 417, 432-33 (1949).

¹⁰ The epistemological function of the market, in which the price system functions as a mechanism to convey the widely dispersed and tacitly held information necessary for the efficient coordination of supply and demand, is widely recognized as Hayek's main contribution to social theory. See Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945); Friedrich A. Hayek, and *Economics and Knowledge*, 4 ECONOMICA 33 (1937).

we are talking about, and from whence such expectations arise. Though he certainly thinks that the common law process of dispute resolution described above is an indispensable condition for the maintenance of a complex modern social order, Hayek concedes that it is not an unqualified good. Perhaps most importantly, from a Hayekian perspective, the enforcement of customary social practices cannot be a sufficient condition for the maintenance of the Great Society for at least two closely-related reasons.

First, there is no special reason to suppose that the *ex post* resolution of legal disputes will necessarily lead to an optimal body of rules for the coordination of future actions. Nothing inherent in such decisions is directly analogous to a market transaction, in which the results of a voluntary exchange are by definition mutually advantageous and, in that formal sense, “reasonable.” The social landscape is further complicated by the fact that the overwhelming majority of legal disputes are resolved without any public pronouncement of a rule of decision that could serve predictably to guide the course of future actions.¹¹ Indeed, in any moderately complex dispute between strangers in a large, impersonal social environment (as opposed, say, to neighbors in a close-knit community), complete dependence upon customary norms would seriously underdetermine the outcome. Lawyers and litigants would thus have no way of knowing in advance how a particular case would be decided with any degree of confidence. The comparison with market transactions is therefore imprecise to say the least, since the arbitration of disputes does not serve the same epistemological function as do prices in a market, which operate as a *prospective* guide to economic agents, “not so much to

¹¹ Although it is notoriously difficult to obtain reliable data, as Lawrence Friedman notes, the available evidence suggests that “[t]he percentage of cases that go to the jury, in both civil and criminal cases, has probably been declining since 1800.” Lawrence W. Friedman, *Some Notes on the Civil Jury in Historical Perspective*, 48 DEPAUL L. REV. 201, 204 (1998). Moreover, even if Friedman is correct that most cases are resolved “in the shadow of what a jury is thought likely to do,” *id.* at 220, neither the private settlement of a dispute nor an untutored general jury verdict has any reliable precedential value.

reward people for what they have done as to tell them what in their own as well as in the general interest they ought to do.”¹²

Second, the enforcement of customary social practices by themselves, which, after all, may turn out to represent little more than the atavistic residue of instincts inherited from our primitive evolutionary past, obviously cannot guarantee outcomes consistent with the normative political ideals of classical liberalism. Illiberal traditions abound, and Hayek consistently worries that the cultural ethos appropriate to life in the relatively stagnant, agrarian social groupings, from which the scientific-industrial cultural traditions of the modern West emerged, could not be expected to naturally give rise to a legal framework appropriate to the task of preserving large-scale market institutions. “[W]e can’t have any morals we like or dream of,” he warns. “Morals, to be viable, must satisfy certain requirements . . . A system of morals [and the legal practices it underwrites] also must produce a functioning order, capable of maintaining the apparatus of civilization which it presupposes.”¹³

The possibility of continued social progress thus requires a certain kind of intellectual discipline. As Hayek sees it, this project requires, above all, the development of a body of impersonal rules that aim not at any particular social configuration, like the equal distribution of wealth, but rather at preventing arbitrary state action by maintaining a private space within which each person, considered severally, is free to utilize his own knowledge for his own purposes, restrained only by laws equally applicable to his

¹² FRIEDRICH A. HAYEK, 2 *LAW, LEGISLATION AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE* 71-72 (1976) [hereinafter HAYEK, *MIRAGE*]; see also Norman Barry, *Hayek on Liberty*, in *CONCEPTIONS OF LIBERTY IN POLITICAL PHILOSOPHY* 282 (John Gray & Zbigniew Pelczynski eds., 1984); SHEARMUR, *supra* note 7, at 91.

¹³ HAYEK, *MIRAGE*, *supra* note 12, at 98; see also *id.* at 135-136 (“The values which still survive from the small end-connected groups whose coherence depended upon them are . . . often incompatible with the values which make possible the peaceful coexistence of large numbers in the Open Society. The belief that while we pursue the new ideal of this Great Society . . . we can also preserve the different ideals of the small closed society is an illusion.”).

fellow citizens.¹⁴ The limits of this private sphere of action, however, are not read directly off of a natural moral landscape, but rather are *constituted* by those legal “rules which state the conditions under which property can be acquired and transferred, valid contracts or wills made, or other ‘rights’ or ‘powers’ acquired or lost.”¹⁵ The purpose of such conventionally determined rules is thus “to define the conditions on which the law will grant the protection of enforceable rules of just conduct,” which contributes to the overall order of society by helping “to ensure that the parties [to a transaction] will understand each other in entering obligations.”¹⁶

For these reasons, Hayek argues that “in deciding what expectations were reasonable” in a particular case, an ideally motivated judge must resort not merely to the persistence of an “established custom” as such, but also to those “general principles on which ongoing order of society is based.”¹⁷ In the first instance, such principles are to be found embedded within past judicial decisions or in reasonable inferences to be drawn from them. But this conception of legal decision-making quite obviously leaves judges with a considerable measure of flexibility to arrive at morally sound judgments.

In particular, Hayek believed that a court’s decisions ought to be constrained by the substantive moral requirements of internal consistency and coherence as expressed in the Kantian test of universalizability. The good faith application of this principle, Hayek supposed, would invariably give rise to the requisite body of rules of just conduct, consisting almost entirely of negative duties of

¹⁴*Id.* at 37-38, 123; *see also* HAYEK, RULES AND ORDER, *supra* note 7, at 56; HAYEK, CONSTITUTION, *supra* note 7, at 11-13, 136-40; FRIEDRICH A. HAYEK, THE FATAL CONCEIT: THE ERRORS OF SOCIALISM 63 (1990) [hereinafter HAYEK, FATAL CONCEIT].

¹⁵HAYEK, MIRAGE, *supra* note 12, at 35.

¹⁶*Id.*

¹⁷HAYEK, RULES AND ORDER, *supra* note 7, at 86-87; *see also id.* at 122-23 (“[T]he rules of just conduct that emerge from the judicial process . . . are discovered either in the sense that they merely articulate already observed practices or in the sense that they are found to be required compliments of the already established rules if the order which rests on them is to operate smoothly and efficiently.”).

non-interference and forbearance.¹⁸ In this sense, the judicial use of reason is clearly *substantive*, and where the established rules “are in conflict with the general sense of justice,” the judge “should be free to modify his conclusions when he can find some unwritten rule which justifies such modification” in the service of “the exigencies of an ongoing order.”¹⁹

If this were not enough to raise significant doubts about the possibility of an exclusively customary conception of law in a just liberal state, Hayek also readily admits that, given these normative requirements, any actually existing judicial system may go off the rails for any number of reasons. This may occur, for example, either because the gradual development of case law is “too slow to bring about the desirable rapid adaptation of the law to wholly new circumstances,” or because a line of cases is recognized, in retrospect, as having been erroneously decided or productive of manifestly unjust results.²⁰ Hayek candidly observes that, historically, this has happened most frequently when “the development of the law has lain in the hands of members of a particular [social] class,” who were able to use their superior economic clout to distort the system to favor “their particular interests—especially where . . . it was one of the groups concerned which almost exclusively supplied the judges.”²¹

Whenever these sorts of seemingly inevitable malfunctions arise, it may be impractical to correct them on a case-by-case basis consistent with the inherent limitations of the common law conception of proper judicial decision-making. Although common

¹⁸ HAYEK, *MIRAGE*, *supra* note 12, at 27-29, 35-44, 166-67, n.24; *see also* FRIEDRICH A. HAYEK, *STUDIES IN PHILOSOPHY, POLITICS, AND ECONOMICS* 166-68 (1967); John Gray, *F. A. Hayek and the Rebirth of Classical Liberalism*, 5-4, in *LITERATURE OF LIBERTY* 19-101 (1982). Although I cannot pursue the issue further here, as I have written elsewhere, Hayek is mistaken about the exclusively negative character of the Kantian conception of rights. *See* Samuel T. Morison, *A Hayekian Theory of Social Justice*, 1 *N.Y.U. J. L. & LIBERTY* 225, 238-40 (2005).

¹⁹ HAYEK, *RULES AND ORDER*, *supra* note 7, at 118.

²⁰ *Id.* at 88-89.

²¹ *Id.* at 89.

law judges are certainly authorized to develop the law at the margins, “by deciding issues which are genuinely doubtful,”²² it would be fundamentally unfair for a single decision-maker to initiate unannounced wholesale changes in the law. This is especially true where the parties to the dispute at hand have formed expectations on the basis of preexisting legal doctrine. Accordingly, the interests in stability and predictability are best served by placing definite limits on the reach of legitimate judicial innovation.

Hence, while Hayek is at pains to insist that we are never in the position “to redesign completely the legal system as a whole, or to remake it out of whole cloth according to a coherent design,” he is prepared to concede that in these sorts of circumstances, “it is desirable that the new rule should become known before it is enforced; and this can be effected only by promulgating a new rule which is to be applied in the future,”²³ This sort of intervention is justified to ensure that the law fulfills its proper function—namely, to guide expectations. For this reason, Hayek concludes that we can never “altogether dispense with [the need for] legislation” to set the common law liberal state back on its proper course.²⁴

²² *Id.* at 88.

²³ *Id.* at 65, 89.

²⁴ *Id.* at 89; *see also id.* at 168 n.35 (arguing that we cannot “dispense with legislation even in the field of private law.”). The examples could be multiplied at length, but one striking illustration of Hayek’s point is the traditional common law rule that if either party to a tort action died while the case was pending, the cause of action expired as well, even if the plaintiff died as a result of the defendant’s tortious conduct. *Pinchon’s Case*, 77 Eng. Rep. 859 (K.B. 1609). Furthermore, the common law refused to recognize an independent cause of action by a decedent’s surviving heirs and dependents for their own damages. *Higgins v. Butcher*, 80 Eng. Rep. 61 (K.B. 1607). Whatever their original rationale may have been, in the context of the rapid process of mechanization that occurred in England during the Industrial Revolution, these “procedural” rules gave factory owners a perverse incentive toward the improvement of safety conditions in their manufacturing facilities, since they were literally better off, financially speaking, if an injured worker died. Not surprisingly, the prevailing legal structure produced exceedingly harsh results for the families of employees killed in industrial accidents, who were often left in destitution. This spectacle caused such a public outcry that the law was eventually changed in 1846 by The Fatal Accidents Act, which established for the first time a cause of action for wrongful death. *See* W. PAGE KEETON, ET AL., PROSSER AND KEETON ON TORTS § 127,

On the most plausible interpretation of Hayek's conception of rationally justifiable adjudication, then, an adequate body of legal doctrine must satisfy the basic moral requirements of protecting conventionally determined individual rights and promoting social utility in the broad sense of sustaining the efficient functioning of complex commercial and financial institutions, which are necessary for the maintenance of modern standards of living. To be sure, our limited powers of critical rational assessment may well mean that beneficial efforts towards progressive legal reform must be "piecemeal" at best. Nonetheless, Hayek insists that "if the separate steps are not guided by a body of coherent principles, the outcome is likely to be a suppression of individual freedom."²⁵

As Hasnas rightly notes, this conception of judicial law-making clearly presupposes a normative political ideal, namely maximizing individual liberty within the rule of law. The implementation of this political program does indeed require judges to both understand and deliberately enforce rules governing the appropriate use and exchange of property that would otherwise not be consistently followed. These rules are necessary because each individual's self-interested pursuit of her idiosyncratic objectives in a diverse and open society may not give her sufficient incentive to cooperate in the pursuit of collective goals. Among the genuine public goods that the market cannot efficiently deliver is the public legal infrastructure within which voluntary market transactions must take place.²⁶ It therefore follows that "people must also [be made to] observe some conventional rules, that is, rules which do

at 945 (5th ed. 1984). This is an instance, I think, in which the development of the common law was outstripped by changing economic circumstances and was thus ripe for corrective legislation.

²⁵ HAYEK, *RULES AND ORDER*, *supra* note 7, at 56.

²⁶ *See, e.g.*, CHRISTINA PETSOUHAS, *HAYEK'S LIBERALISM AND ITS ORIGINS: HIS IDEA OF SPONTANEOUS ORDER AND THE SCOTTISH ENLIGHTENMENT* 63-72 (2001); Richard A. Epstein, *Hayekian Socialism*, 58 *Md. L. Rev.* 271, 286-88 (1999). Hasnas quite implausibly implies that the substantive legal structure within which market transactions take place is not a genuine public good. *See* Hasnas, *supra* note 2, at 88 (arguing that the enforcement of customary norms is not intended to ensure

not simply follow from their desires and their insight into relations of cause and effect, but which are normative and tell them what they ought to or ought not to do.”²⁷ If this is correct, the judicial enforcement of rules of just conduct cannot in principle be an entirely spontaneous, “bottom up” process, since what we require in a set of legal conventions is not merely that they are consensual, but that they also adequately serve our social needs.²⁸

Finally, Hayek’s continuing attachment to the critical use of reason is, of course, further underscored by his willingness to engage in an ambitious program of constitutional construction that presupposes substantial knowledge about the consequences of institutional design on the functioning of the market.²⁹ In addition to “the legal rules of just conduct” administered by the courts, he observes, “there unquestionably also exists a genuine problem of justice in connection with the deliberate design of political institutions.”³⁰

In his more pessimistic moods, to be sure, Hayek sometimes suggests that the legal framework itself is nothing more than the unconscious product of a process of the natural selection of cultural traditions, which we can neither fully comprehend nor deliberately control, except at our peril.³¹ Although this is the version of Hayek’s jurisprudence that Hasnas evidently prefers, I would argue that, on any charitable reading, this sort of uncritical

“fairness or any other social value,” but to enable private agents “to better achieve their separate ends without necessarily advancing any particular collective end.”).

²⁷ HAYEK, *RULES AND ORDER*, *supra* note 7, at 45.

²⁸ See SHEARMUR, *supra* note 7, at 91.

²⁹ FRIEDRICH A. HAYEK, *A Model Constitution*, in 3 *LAW, LEGISLATION AND LIBERTY: THE POLITICAL ORDER OF A FREE PEOPLE* 105-27 (1979) [hereinafter HAYEK, *POLITICAL ORDER*].

³⁰ HAYEK, *MIRAGE*, *supra* note 12, at 100. In this regard, Hayek quotes with approval John Rawls’s statement that “the principles of justice define the crucial constraints which institutions and joint activities must satisfy if persons engaging in them are to have no complaints against them.” *Id.*, quoting John Rawls, *Constitutional Liberty and the Concept of Justice*, in *NOMOS IV, JUSTICE* 102 (C. J. Friedrich & John Chapman eds., 1963).

³¹ See HAYEK, *POLITICAL ORDER*, *supra* note 29, at 153-69.

traditionalism must surely be greatly discounted, since if taken at face value, it would completely disable Hayek's otherwise progressive reformist impulses. For such an aggressively historicist view ultimately leaves us "with no leverage . . . which might be used against the outcomes of the historical process," and we would thus be "bound to entrust ourselves to all the vagaries of mankind's random walk in historical space."³² As Hayek must surely allow, the mere fact that an inherited body of legal norms is perhaps a repository of collective experience that should not be lightly disregarded hardly entails "a limitation on our ability rationally to take in and self-consciously to learn from this experience. . . . [L]earning from the past also involves learning that time changes things, not just marginally but substantially, such that arrangements suitable in the past may turn out to be radically unsuited to altered conditions."³³ Indeed, Hayek himself distinguishes "the rules of morals and custom," which are spontaneously "grown," from "the rules of law," which "people gradually learned to improve" and which are therefore, at least in part, "the product of deliberate design."³⁴

Hence, notwithstanding Hayek's emphasis on the cultural "transmission" of moral traditions, in my view, his jurisprudence is most plausibly interpreted in a significantly more critical fashion.³⁵ From this perspective, the Hayekian conception of justice cannot be

³² Gray, *supra* note 18, at 28.

³³ GERALD POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 65 (1986); *see also* James Buchanan, *Hayek and the Forces of History*, 6 HUMANE STUD. REV. 3, 3 (1988) ("Let us acknowledge, with Hayek, that our civil order may crumble from an over-extension of ill-advised attempts at rational reconstruction of our rules. . . . [but] Hayek does not pay sufficient attention to the necessary distinction between the choice among processes, among rules, among constitutions, and the choice among end-states that may emerge within these sets of constraints. His generalization of the understanding of the spontaneous order of the market to the evolution of the institutions that constrain this order must, I think, ultimately be rejected.").

³⁴ HAYEK, RULES AND ORDER, *supra* note 7, at 45-46.

³⁵ HAYEK, FATAL CONCEIT, *supra* note 14, at 20 ("Recognizing that rules generally tend to be selected via competition, on the basis of their human survival value certainly does not protect those rules from critical scrutiny. This is so, if for no other reason, because there has so often been coercive interference in the process of cultural evolution.").

merely the serendipitous result of the blind unfolding of historical processes. Instead, to the extent it exists at all, justice must be the product of human will and imagination, which advances through a process of trial and error in a way analogous to the normal progress of the natural sciences, i.e., through an “experimental process of gradual improvement rather than any opportunity for drastic change.”³⁶ Given the judicial responsibility to consciously develop rules of just conduct in individual cases, the use of legislation to correct systemic maladjustments, and the deliberate elaboration of constitutional design, no conceptual space remains for the unreflective endorsement of customary social practices.

To be fair, Hasnas does not dispute that Hayek’s jurisprudence readily lends itself to this sort of critical construction. Indeed, these are precisely the grounds upon which Hasnas objects, since it arguably undermines the alleged spontaneity of the substantive legal framework. But this objection is telling against Hayek only if we make the facile assumption that the *ad hoc* resolution of interpersonal disputes will somehow converge on prerequisites of a just liberal social order. In fact, just the reverse is likely to occur.³⁷

³⁶ FRIEDRICH A. HAYEK, *STUDIES IN PHILOSOPHY, POLITICS AND ECONOMICS* 92 (1967); see also HAYEK, *RULES AND ORDER*, *supra* note 7, at 63-65, 118.

³⁷ There is in fact little empirical support for the notion that reliance on customary practices is likely to result in the efficient allocation of resources, except perhaps within relatively insular, culturally homogeneous groups. Even so, whenever such groups grow in size to the point that they begin to lose their internal cohesion, or come into sustained contact with outsiders, the allocative efficacy of customary norms begins to break down. Daniel Fitzpatrick has recently argued, for example, that the chronic poverty, social conflict, and resource degradation that is endemic to Sub-Saharan Africa is caused precisely by the fact that, in the absence of a fair and effective legal framework, the competition among various customary “normative orders” and contingent “coalitions of interest” has overwhelmed the incentives that would otherwise result in the evolution of a stable set of exclusionary property rights. See Daniel Fitzpatrick, *Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Access*, 115 *YALE L. J.* 996 (2006). Conversely, there is a strong positive correlation between the judicial practices associated with the common law tradition, with its characteristic emphasis on securing conventionally determined property and contractual rights, and superior economic growth

II. The Artificial Reason of the Common Law

Turning to Hasnas' historical hypothesis, it is true that the partisans of the common law routinely claimed that the substance of the law applied in the king's courts reflected the supposedly "immemorial" customs and practices of the English people. Indeed, for the most influential jurists of the classical common law, such as Sir Edward Coke and Sir Matthew Hale, the putative customary basis of the law was no mere window dressing. In the view of the common lawyers, the notion of custom played a crucial ideological role in legitimating the court's decisions, particularly their aggressive assertion of jurisdictional authority over rival decisional forums, such as chancery, ecclesiastical, and manorial courts. For if the justice dispensed by the king's courts was grounded in organic social practices, the court's decisions could be justified not as the imposition of royal authority upon the people, but rather as a kind of constitutive expression "of the nature and will of the people themselves," which, in Blackstone's phrase, constitutes "one of the characteristic marks of English liberty."³⁸

But theory is one thing and practice is something else entirely, and such claims cannot simply be taken at face value. As James Whitman has shown in rich detail, the procedural practice that had prevailed during the Middle Ages, in which lawyers attempted to "prove custom" by conducting interviews of local "witnesses" organized into juries, who were supposed to attest the existence of relevant manorial or regional practices, "seems to have begun breaking down by the end of the thirteenth century."³⁹ By the early seventeenth century, the breakdown was essentially complete, at least as far as England was concerned. Thus, despite occasional "expressions of allegiance to the medieval tradition requiring the

compared with civil law jurisdictions. See, e.g., Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUD. 503 (2001).

³⁸ POSTEMA, *supra* note 33, at 73 (quoting WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND *74).

³⁹ James Q. Whitman, *Why Did The Revolutionary Lawyers Confuse Custom and Reason?*, 58 U. CHI. L. REV. 1321, 1335 (1991).

testimony of live witnesses," Whitman concludes that by this time the "procedure, in actual practice, was long dead."⁴⁰

Though the historical explanation for the demise of the substantive role of the jury is a complex story, the evidence Whitman adduces has a decidedly familiar ring in light of our prior discussion. At the risk of oversimplification, perhaps the most important factor is that during the Middle Ages, the resolution of interpersonal disputes was largely confined to small, face-to-face communities, typically composed of interlocking kinship groups. In this pastoral setting, the purpose of local "law-making" gatherings was to maintain social peace and avoid the outbreak of actual hostilities in the interest of communal survival, to "lower the emotional temperature [by] thrashing out the problem aloud."⁴¹ Given their parochial horizons, it is not likely to have occurred to these people, most of whom were functionally illiterate farmers, to insist upon reaching agreement on a settled practice, much less an explicit rule, that would have general application to future disputes. As a result, when the lawyers in the king's courts

set out to "prove" custom by consulting local witnesses, they were thus often asking the wrong question. In matters of any difficulty, local law-making involved not agreeing upon "the rule" but agreeing upon a peaceful solution. In such circumstances, it is not surprising that learned lawyers often failed to get witnesses to produce any rule at all.⁴²

The difficulty of extrapolating an articulable rule of decision "from the process of local discussion," which often left the court bereft of substantive guidance based on actual local practices, was thus the

⁴⁰ *Id.* at 1354, 1356.

⁴¹ *Id.* at 1336 (quoting Paul Hyams, *Trial By Ordeal: The Key to Proof in the Early Common Law*, in *ON THE LAWS AND CUSTOMS OF ENGLAND: ESSAYS IN HONOR OF SAMUEL E. THORNE* 97 (Morris Arnold et al. eds., 1981)).

⁴² *Id.* at 1337.

“worm in the rose of customary jurisprudence from its very beginning.”⁴³

This basic evidentiary dilemma, though present from the common law’s inception, was greatly exacerbated by the inexorable centralization of state power, the expansion and complication of commerce and technology, the rapid growth of urban population centers, and the concomitant breakdown in the moral authority of the established church and local civil society that characterized the early modern period in England. As Christopher Hill has observed, the cumulative effect of these developments during the sixteenth and seventeenth centuries transformed people’s experience:

Astronomical and geographical discoveries destroyed the old anthropocentric universe, created new conceptions of size and space. The beginnings of anthropology and comparative religion date from the European contact with America and the Far East. Nearer home, economic changes produced moral revolutions. In the fifteenth century . . . the practical man had practiced extortion and been told that it was wrong; for it was contrary to the law of God. In the seventeenth century he was to practice it and be told that it was right; for it was in accordance with the law of nature. Hierarchy gave place to atomic individualism. By 1725 the Presbyterian Francis Hutcheson, developing some hints of Thomas Hobbes’s, had proclaimed the principle “the greatest happiness for the greatest numbers.” Divine right had disappeared in most spheres. “To talk of a king as God’s viceregent on earth,” said the Tory David Hume in 1741, “would but excite laughter in everyone.” It had not been at all funny a century earlier. The inherited penalties for original sin were being questioned, just as were the hereditary principle in government and the apostolic succession of bishops. . . . In almost every sphere new ideas of what was reasonable were creeping in, disseminated by the

⁴³ *Id.* at 1338.

new craft of printing, by the new protestant emphasis on preaching and education.⁴⁴

In the midst of this turbulent social change, the centralized royal courts began, “by a kind of hydraulic process, to draw disputes to themselves.”⁴⁵ The common law judges assumed an increasingly important role in settling the myriad conflicts that inevitably arose, in an effort “to establish and maintain threatened social union and to introduce collective order and rationality into what they regarded as the anarchy of private judgment that threatened it.”⁴⁶ This was particularly true with respect to the incidents of property rights in the nascent commercial commonwealth, the elaboration of which had always been the special prerogative of the common law courts.

It was during this period, in particular, that Parliament initiated the acrimonious process of reallocating agrarian land rights by enclosing the common fields. At the same time, private landowners began to challenge the remnants of feudal common-use rights—such as those pertaining to grazing domestic animals, taking wood for fuel, hunting wild game, and gleaning leftover grain—that had been “vested in tenants or villagers and co-existing with the proprietary rights of farmers or landlords.”⁴⁷ “[W]ith the demise of feudalism in England,” then, the judges of the king’s courts assumed the authority to devise “new legal protections for free landholders,” with the decisive issue being the “reasonableness” of a given custom.⁴⁸

⁴⁴ Christopher Hill, “Reason” and “Reasonableness” in *Seventeenth-Century England*, 20 BRIT. J. SOC. 235, 236-37 (1969) (citations omitted); see also POSTEMA, *supra* note 33, at 39-40; Whitman, *supra* note 39, at 1340-41; JOYCE APPLEBY, LIBERALISM AND REPUBLICANISM IN THE HISTORICAL IMAGINATION 59 (1992).

⁴⁵ Whitman, *supra* note 39, at 1353.

⁴⁶ POSTEMA, *supra* note 33, at 39.

⁴⁷ Robert Gordon, *Hayek and Cooter on Custom and Reason*, 23 Sw. U. L. Rev. 453, 458 (1994). For more on the enclosure movement and customary use rights, see E. P. THOMPSON, CUSTOMS IN COMMON (1991).

⁴⁸ Gerald Postema, *Classical Common Law Jurisprudence (Part I)*, 2 Oxford U. Commonwealth L. J. 155, 164 (2002).

Not surprisingly, judgments about what constituted a reasonable practice differed sharply depending upon one's perspective on the interests at stake. As Hill characterizes the ensuing struggle,

[i]n conflicts over manorial custom . . . the views of tenants differed from those of lords. Judges sometimes used the concept of "reasonableness" to limit the arbitrariness of lords of manors; but some old customs beneficial to tenants could seem very "unreasonable" to improving landlords in an inflationary age.⁴⁹

In 1788, for example, the Court of Common Pleas famously held that the practice of gleaning was inconsistent with the property rights of landowning farmers.⁵⁰ "To the gleaners," Robert Gordon sardonically observes, "none of this had the sound of spontaneous order. It was as abstract, as ideological, as alien and as ruthless as any Socialist Central Plan."⁵¹ This was not merely a late eighteenth century development: the practice of refusing to sanction local customary practices that, in the court's view, unreasonably interfered with private property rights was already well-established by the fifteenth century, and continued throughout the period under consideration.⁵² As Joyce Appleby notes, "While much has been made of the congruence between freedom and capitalism, it was the freedom of property owners from social obligations which was critical to capitalistic growth in the seventeenth century. Ideas which promoted choice among the poor were inherently dangerous to entrepreneurs."⁵³

⁴⁹ Hill, *supra* note 44, at 237.

⁵⁰ *Steel v. Houghton*, 126 Eng. Rep. 32 (C.P. 1788).

⁵¹ Gordon, *supra* note 47, at 459.

⁵² See Barbara A. Singer, *The Reason of the Common Law*, 37 U. MIAMI L. REV. 797, 804-06, 810-11, 816-20 (1983); see also THEODORE F. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 277 (2nd ed. 1936) ("it is clear that in the sixteenth century . . . custom had largely ceased to be a familiar notion to the common lawyers, who regarded it . . . as a troublesome and perhaps dangerous anomaly which must be confined as strictly as possible within harmless limits.").

⁵³ APPLEBY, *supra* note 44, at 54.

In this way, property owners' strategic use of litigation to relieve themselves of customary obligations and common law judges' sharpening of the contours of property rights combined with legislative innovations to gradually but deliberately fashion the institutional conditions that led to a flourishing modern industrial economy. It is thus difficult to escape the conclusion, as Ronald Hamowy puts it, that

[h]istorically . . . the laws that developed in England that proved necessary for the operation of an advanced commercial society seem to have been far too complex to have relied solely on rules that were never made explicit and that did not grow by deliberate design. Its principles had first to have been contrived and consciously applied by judges who had learned the law and then applied it.⁵⁴

Though jurists and practitioners were formally committed to the primacy of custom, the divergence between theory and practice created a kind of collective cognitive dissonance among them that required coherent explanation. The answer was to be found in the idea, most famously elaborated by Coke, of the "artificial reason" of the law, which was specifically intended to give an account of how the common law could legitimately "claim . . . the force of custom, without the ordinary customary forms of proof."⁵⁵

⁵⁴ Ronald Hamowy, *F. A. Hayek and the Common Law*, 23 CATO J. 241, 259 (2003). In addition, as Hamowy points out, the law of equity, large portions of which were absorbed into the body of the common law in the eighteenth century, played a crucial role in moderating the Byzantine complexity of common law doctrine and procedure, and was thus an important contributing factor in the rise of the modern British economy. *Id.*, citing P. S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 135 (1979) ("Between 1688 and 1770, the common law, with the aid of the Court of Chancery, created the legal principles necessary to support . . . [a] credit system [compatible with a flourishing market economy], though not without travail, and not wholly successfully."). On the role of Parliament, see George L. Cherry, *The Development of the English Free Trade Movement in Parliament, 1689-1702*, 25 J. MODERN HIST. 103 (1953).

⁵⁵ Whitman, *supra* note 39, at 1358.

In this view, the legal exercise of reason was conceived, in explicitly Aristotelian terms, as a kind of specialized deliberative capacity, analogous to that of a skilled artisan, who through training and experience is steeped in the knowledge and practice of a particular craft.⁵⁶ Furthermore, this craftsman-like conception of legal reasoning was not derived from the deductive insight of the learned few, but was instead an inherently discursive and therefore “public process of reasoning in which practical problems of daily social life were addressed.”⁵⁷

The social practices that withstood the scrutiny of this winnowing process were “never merely predictable patterns of behavior in a community,” but rather those principles of conduct that “emerged in the course of the attempts by lawyers and judges, through reasoned discourse and argument, to articulate and apply reasonable rules to solve concrete disputes.”⁵⁸ With this conception of reason in mind, Coke asserts that “only this incident inseparable every custom must have, viz., that it be consonant to reason; for how long soever it hath continued, if it be against reason, it is of no force in law.”⁵⁹

Hence, the canonical formulation of the Cokean theory of “artificial reason,” already in full bloom by the beginning of the seventeenth century, is a thoroughly judge-centered conception of

⁵⁶ The notion was hardly original to Coke, however. Writing sometime in the 1470's, Sir John Fortescue, who preceded Coke as chief justice of the King's Bench, asserted that “it will not be expedient for you to investigate the sacred mysteries of the law by the exertion of your own reason, these rather should be left to your judges and advocates who in the kingdom of England are called serjeants-at-law, and also to others skilled in the law who are commonly called apprentices.” SIR JOHN FORTESCUE, *ON THE LAWS AND GOVERNANCE OF ENGLAND* 16 (Shelly Lockwood ed., Cambridge Texts in the History of Political Thought 1997); see also Allen Dillard Boyer, “*Understanding, Authority, and Will*”: Sir Edward Coke and the Elizabethan Origins of Judicial Review, 39 B.C. L. REV. 43, 49-50 (1997). For a modern statement of the craftsman-like conception of judicial reason, see KARL N. LLEWWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960).

⁵⁷ Postema, *supra* note 48, at 167.

⁵⁸ *Id.*

⁵⁹ SIR EDWARD COKE, *COMMENTARY UPON LITTLETON* 62a (Charles Butler ed., 18th ed., Legal Classics Library 1985) (1628).

adjudication. The crucial issue was never whether the courts would entertain the enforcement of social custom as such, but rather who had the authority to decide what constituted a reasonable practice. While the substance of the law might reflect actual usage, it was invariably “custom as settled by the judges. [Coke’s] belief in the excellence of the common law is not a belief in the just prevalence and practicality of custom; it reflects a judge’s faith in the communal, professional wisdom of the bar – intelligence refined by training.”⁶⁰ This view was reiterated a generation later by Hale, Coke’s influential successor as chief justice of the King’s Bench, for whom the process of accommodating “the law into the lives of the people subject to it” was likewise “not the work of an invisible hand, but the unique responsibility and product of a disciplined judiciary.”⁶¹

Nor, as Hasnas claims, was the diminution of the jury’s role limited to the determination of technical issues of pleading and trial practice that were the special province of the legal profession. Quite to the contrary, “[a]s the system matured,” the professional bench and bar predictably

took an increasing role in formulating and arguing the substantive issues that eventually were presented to the

⁶⁰ Boyer, *supra* note 56, at 49.

⁶¹ Postema, *supra* note 48, at 175. As Whitman perceptively notes, when Hale famously elaborated the “declaratory” theory of precedent, according to which the past decisions of the courts were “a greater evidence” of the law “than the opinion of any private persons,” he was specifically referring to “the villagers who, in earlier centuries, had served as the repositories of common custom.” Whitman, *supra* note 39, at 1360, referencing MATTHEW HALE, *THE HISTORY OF THE COMMON LAW OF ENGLAND* 45 (Chicago, 1971). By the late eighteenth century, however, this sensibility seems to have largely faded from consciousness: “The deductive tradition associated with Descartes and Grotius had established itself powerfully. Accordingly, when eighteenth century lawyers spoke of ‘reason,’ they most often meant, not craftsman-like reason, nor revealed truth, but the activity of reasoning from first principles.” *Id.* at 1362. Blackstone thus writes that prior “judicial decisions are the principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law,” but “this rule admits of exception, where the former determination is most evidently contrary to reason.” BLACKSTONE, *supra* note 38, at 69.

jury for decision. As issues became subtler, lawyers sought decision on substantive issues from the trained judge rather than the lay jury members, and increasingly participated in the formulation of substantive doctrine. Lawyers took over the power to decide matters that had been left to common sense and common judgment. There arose the distinction, still in use in common law jurisdictions today, between matters of law (for the judge) and matters of fact (for the jury). . . . These developments had reached full maturity in the early 17th century.⁶²

Interestingly enough, although Hasnas does not make the connection, if we turn our attention from early modern England to post-Revolutionary America, we can trace a similar social evolution that resulted in the derogation of the jury's role from an arbiter of the substantive law to a trier of fact.

Throughout the eighteenth century, while the American legal profession was still in its infancy, colonial juries played an important role in constraining what the colonists perceived to be the illegitimate encroachments of the British government upon their rights as British citizens. Perhaps the most famous example of this phenomenon occurred in 1735, when John Peter Zenger, the publisher of a weekly journal of political criticism, was charged with seditious libel after publishing an article mocking the royal governor of New York.⁶³ Despite the fact that Zenger had no viable

⁶² Postema, *supra* note 48, at 164-65. The earliest recorded instance of the law-fact distinction in the case law seems to have occurred in the mid-sixteenth century. See *Townsend's Case*, 1 Plow. 110a, 114a (K.B. 1554) ("For the office of 12 men is no other than to inquire of matters of fact and not to adjudge what the law is, for that is the office of the court and not of the jury."). The most celebrated pronouncement is from Coke's treatise: "The most usual trial of matters of fact is by 12 such men . . . and in matters of law the judges ought to decide and discuss." COKE, *supra* note 59, at 155b.

⁶³ The case subsequently achieved iconic status through the efforts of pamphleteers. See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 873-74 (1994) ("Accounts of the trial appeared in newspapers throughout the colonies and in . . . the half century between Zenger's trial and the ratification of the Sixth Amendment, [a pamphlet account of the trial]

legal defense (truth being no defense to a charge of seditious libel), the jury refused to convict him after Zenger's lawyer entreated jurors to ignore the court's legal instructions in service of "the cause of liberty."⁶⁴ This result was not an aberration. As Albert Alschuler and Andrew Deiss explain,

during the pre-Revolutionary period, juries and grand juries all but nullified the law of seditious libel in the colonies. Hundreds of defendants were convicted of this crime in England during the seventeenth and eighteenth centuries, but there seem to have been no more than a half-dozen prosecutions and only two convictions in America throughout the colonial period. Grand juries were reluctant to indict and petit juries reluctant to convict. Juries hindered the enforcement of other English laws as well. . . . As juries exonerated those who resisted English colonial policy, they harassed those who enforced it.⁶⁵

Given this fund of historical experience, it is not surprising that a romanticized conception of the jury has deep roots in the American political imagination. As Leonard Levy has noted, for example, the only right enumerated in all twelve state constitutions written prior to 1787 was the guarantee of the right to trial by jury in criminal cases.⁶⁶ Among those charges in the bill of particulars leveled against King George III in the Declaration of Independence was the allegation that he had deprived the colonists "of the benefits of Trial by Jury." The right to a jury trial in criminal cases is also one of the few individual rights included in the text of the

was reprinted fourteen times. More than any formal law book, it became the American primer on the role and duties of jurors.").

⁶⁴ See LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* 39-44 (1985).

⁶⁵ Alschuler & Deiss, *supra* note 63, at 874. As Alschuler and Deiss point out, the resistance of colonial juries to the enforcement of English policies occurred in civil cases as well, particularly as it related to the collection of revenues. For example, civil juries awarded damages to American ship owners whose vessels had been seized by British customs officials. *Id.* at 874-75.

⁶⁶ Leonard Levy, *Bill of Rights*, in *ESSAYS ON THE MAKING OF THE CONSTITUTION* 258, 269 (Leonard Levy ed., 1987).

Constitution,⁶⁷ and jury-related provisions, both civil and criminal, are a central feature of the Bill of Rights.⁶⁸

Tocqueville, writing in the early 1830's, was thus correct to observe that Americans considered the institution of the jury to be not only an important individual right of the criminally accused, but also a centrally important structural element in the allocation of political power in both civil and criminal cases. As he famously put it, in the prevalent American view, the institution of the jury was not merely a judicial institution, but "above all, a political institution," which effectively "places the real direction of the society in the hands of the governed or of a portion of them, and not in those of the governors."⁶⁹ What Tocqueville seemed to have in mind was that a jury—a group of ordinary citizens randomly drawn from the community to exercise their collective judgment about the application of the law in a particular legal dispute—serves as a kind of mediating institution between the government and civil society.⁷⁰

But while the jury has been justly celebrated as a bulwark against government overreaching, at least in criminal cases,⁷¹ a variety of factors conspired to constrain the influence of the jury as an institution in American public life and, hence, to undermine the

⁶⁷ U.S. CONST. art. III, § 2 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.")

⁶⁸ U.S. CONST. amends. V-VII (sections on: role of grand jury in presenting criminal indictments; right to an "impartial" petit jury in criminal cases; and right to a jury in civil cases). In addition, as Akhil Amar notes, the historical evidence suggests that the *absence* of these provisions in the original Constitution "strongly influenced the judge-restricting doctrines underlying three other amendments (the First, Fourth, and Eighth)." Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L. J. 1131, 1190 (1991).

⁶⁹ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 124 (Stephen D. Grant trans., 2000).

⁷⁰ *Id.*

⁷¹ See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) ("The purpose of a jury is to guard against the exercise of arbitrary power - to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of the judge.")

continuing plausibility of Tocqueville's provocative analysis of the jury as a political institution. One such factor is the increased societal acceptance of the role of the judge as an arbiter and interpreter of the common law. The pre-Revolutionary conception of the jury was, of course, forged in the midst of an intense ideological dispute between citizen jurors and colonial administrators and judges, who were widely viewed, in effect, as the representatives of a hostile foreign power.⁷² With independence, however, judges were either elected or appointed by democratically elected officials, and the basic political legitimacy of the judiciary was no longer seriously called into question.⁷³

Perhaps most importantly, however, the growing complexity of American social and economic life resulted in the gradual disappearance of the jury's *de jure* authority to decide contested issues of law. As John Langbein has written,

In the first decades of American independence there occurred a titanic struggle about the character of American law. . . . Arrayed on one side were people who were hostile to lawyers and legal doctrine. They viewed the legal system as serving an essentially arbitral function: Ordinary people, applying common sense notions of right and wrong, could resolve the disputes of common life. . . . Opposing this vision of folk law were those who understood that the intrinsic complexity of

⁷² See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 74, 108-09 (1967); Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 *YALE L. J.* 170, 171 (1964) ("The popularity of the jury in eighteenth century England, where it was regarded as a check on the manipulation of the law as an instrument of royal despotism, was shared by the colonies with an added patriotic coloration. The colonial jury was preferred to royal judges."); Mark DeWolf Howe, *Juries as Judges of Criminal Law*, 52 *HARV. L. REV.* 582, 591 (1939) (arguing that the independence of colonial juries "received patriotic justification in the growing antipathy of the colonists to royal officials.").

⁷³ Occasional episodes of juries' resistance to the enforcement of unpopular laws have tended to occur only in circumstances where the political character of the conflict was especially acute, such as the benighted attempt to vindicate Southern slave owners' property rights through the Fugitive Slave Act. See, e.g., Nancy Jean King, *The American Criminal Jury*, 62 *LAW & CONTEMP. PROBS.* 41, 50-51 (1999).

human affairs begets unavoidable complexity in legal rules and procedures. With legal complexity comes legal professionalism. Specialists accumulate knowledge and skill in applying the law, and they assist clients both in the conduct of litigation and in the shaping of transactions to avoid litigation. The legal professionals insisted that law had to be, in this special sense, learned.⁷⁴

The dispute between bench and laity never concerned simply whether the jury had the *power* to render a general verdict against the court's instructions without suffering any adverse consequences,⁷⁵ but whether the court's instructions were to be regarded as mandatory or merely advisory, that is, "whether a jury has the legal right—perhaps even the duty—to refuse to follow a law it deems unconstitutional."⁷⁶ In late eighteenth century America, it was still widely accepted that juries had such authority, which was perhaps understandable in an era in which judges were often laymen themselves, and written judicial opinions were scarce or non-existent, to say nothing of standard form jury instructions.⁷⁷ But the relative dearth of dependable legal authority was not considered to be especially problematic because, as John Adams wrote in 1771, the "general rules of law and common regulations of society, under which ordinary transactions arrange themselves," as well as the "great principles of the constitution," seemed to him to

⁷⁴ John Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 566 (1993); see also Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 378, 386-93.

⁷⁵ It has been an established principle of Anglo-American jurisprudence since the late seventeenth century that jurors may be neither punished nor threatened with punishment for rendering a verdict. *Bushell's Case*, 124 Eng. Rep. 1006 (C.P. 1670).

⁷⁶ Amar, *supra* note 68, at 1191.

⁷⁷ Howe, *supra* note 72, at 591 (arguing that "the basic explanation may well lie in the practical consideration that a large percentage of judges were laymen. Lacking the professional qualifications which would have made their instructions convincing, it is not surprising that they surrendered to the jury the awkward responsibility of preferring one neighbor's claim to another's."); see also Harrington, *supra* note 72, at 378-79, 416; Note, *supra* note 72, at 171, n.6.

be well within the grasp of “ordinary jurors.”⁷⁸ As such, it struck him as “an absurdity to suppose that the law would oblige [jurors] to find a verdict according to the direction of the court, against their own opinion, judgment, and conscience.”⁷⁹

Likewise, in one of its earliest decisions, the Supreme Court essentially agreed with Adams’s sentiment. Sitting as a trial court in a civil dispute in 1794, the Court unanimously approved Chief Justice John Jay’s charge to the jury that while they should accord due respect to the court’s legal instructions, “you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. . . . [B]oth objects are lawfully, within your power of decision.”⁸⁰

As Langbein suggests, however, the growing complexity and diversity of American social life quickly rendered the nostalgic conception of the jury increasingly untenable. During the nineteenth century, America was transitioning from a colonial backwater into a major world power as a result (among other factors) of rapid population growth (including several massive waves of immigration), westward territorial expansion, an unprecedented explosion of commercial activity and technological innovation, and the political consequences of the dispute over slavery. These demographic, economic, and political changes were accompanied by a dramatic increase in the complexity of legal doctrine and procedures, and a concomitant rise in the sophistication and professional stature of lawyers and judges.

⁷⁸ JOHN ADAMS, 2 COLLECTED WORKS 253-55, quoted in *Sparf v. United States*, 156 U.S. 51, 143-44 (1895) (Gray, J., dissenting).

⁷⁹ *Id.*

⁸⁰ *Georgia v. Brailsford*, 3 U.S. 1, 4 (1794); see also *Bingham v. Cabbot*, 3 U.S. 19, 33 (1795) (Iredell, J.) (“[T]hough the jury will generally respect the sentiments of the court on points of law, they are not bound to deliver a verdict conformably to them.”); *Van Horn’s Lessee v. Dorrance*, 2 U.S. 304, 306-307 (C.C. Pa. 1795) (Patterson, J.) (“In general verdicts, it frequently becomes necessary for juries to decide upon the law as well as the facts.”).

These developments increasingly challenged Adams's faith in the home-spun wisdom of lay jurors to resolve complex legal issues. The bench accordingly began to assert its dominance over juries, in large part by displacing their discretion to decide issues of law. Importantly, for our purposes, the movement to displace the law-finding function of juries took hold "much earlier in the civil context because it was seen to be a drag on the development of predictable legal rules. The desire of the commercial classes for predictability was nothing more than a demand to know the nature of the laws that would govern their economic relations."⁸¹ Confronted with the demands of an increasingly sophisticated economy and the breakdown in the belief that jury verdicts were a genuine expression of a local moral consensus, common law judges in early nineteenth century America—much like their counterparts in early modern England—"sought ways to use the law to effect an improvement in social and commercial conditions, with the attendant result that all rules of law were subject to scrutiny on the basis of their apparent utility to the new nation's developing commercial climate."⁸²

Acting largely on their own initiative, the judiciary began to "sharpen the law-fact dichotomy and give it concrete institutional expression" through the use of a variety of procedural and evidentiary devices, including directed verdicts, special interrogatories, detailed legal instructions, and the doctrine of judicial notice.⁸³ These innovations were "judicially developed tools [designed] to curtail the jury's power to decide questions of law," primarily in the service of the stability of proprietary rights.⁸⁴ The courts, ably abetted by attorneys representing emerging commercial interests, were thus able to exercise a decisive measure of control

⁸¹ Harrington, *supra* note 74, at 437-38.

⁸² *Id.* at 416; see also Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. Chi. Legal F. 33, 44-45; MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 28-29, 84, 141-43, 228 (1977); WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW* 54-63, 165-71 (1975).

⁸³ Note, *supra* note 72, at 173.

⁸⁴ *Id.* at 185.

over the trial process. They not only assumed the authority to reverse verdicts that were inconsistent with the court's instructions or against the weight of the evidence, but they also provided the jury with a single, authoritative statement of the law governing the matter at hand, and limited the information presented to the jury by barring evidence or argument in support of a proposition deemed legally irrelevant.⁸⁵ "This program was so successful," Matthew Harrington notes, "that by 1820, the jury's power over law [in civil cases] had all but disappeared."⁸⁶

The process took longer in criminal cases, to be sure, but as early as 1835, the same year that the first installment of *Democracy in America* was published, Justice Joseph Story, acting in his capacity as a circuit judge, instructed a jury that while they had "the physical power to disregard the law, as laid down to them by the court," they did not "have the moral right to decide the law according to their own notions, or pleasure. . . . It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court."⁸⁷ The issue was not finally settled in the federal courts until 1895, when the Supreme Court held (over a vigorous dissenting opinion joined by two justices) that, in criminal as well as civil cases, it is

the duty of the court to expound the law, and that of the jury to apply the law thus declared to the facts as ascertained by them. . . . Those functions cannot be confounded or disregarded without endangering the

⁸⁵ Harrington, *supra* note 74, at 418-21.

⁸⁶ *Id.* at 379. As Langbein shows, this is also the period in which the American practice of publishing written judicial opinions in official case reports was deliberately established in order to provide a rational basis for guiding future conduct and adjudication. Langbein, *supra* note 74, at 571-84.

⁸⁷ *United States v. Battiste*, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14,545); see also *Stettinius v. United States*, 22 F. Cas. 1322, 1332-33 (C.C. D.C. 1839) (No. 13,387); *United States v. Morris*, 26 F. Cas. 1323, 1331-36 (C.C.D. Mass. 1851) (No. 15,815); *Pierce v. State*, 13 N.H. 536, 542-70 (1843); *Commonwealth v. Porter*, 51 Mass. (10 Met.) 263, 275-87 (1845).

stability of public justice, as well as the security of private and personal rights.⁸⁸

Today, as a formal matter, it is the law in every state except Maryland, Indiana, and Georgia that the jury is duty-bound to accept the court's legal instructions.⁸⁹ The constitutions of these three states provide a role for the jury in deciding questions of law. In each instance, however, these provisions have been essentially nullified by judicial interpretation.⁹⁰

Conclusion

If the social history adumbrated above is substantially correct, it cannot be maintained that an unadulterated system of customary adjudication, in which lay juries determined the substantive law on the basis of unitary social practices and common sense notions of morality, prevailed in England until the beginning of the nineteenth century. Instead, contrary to Hasnas' historical thesis, a thoroughly judge-centered conception of legal reason was already firmly entrenched in the British common law tradition no later than the early seventeenth century and probably much earlier.

Moreover, it was precisely the deliberate judicial refinement of proprietary rights, in conjunction with the passage of positive legislative reforms, that was responsible for gradually, albeit haltingly and imperfectly, creating the institutional conditions for the Industrial Revolution and, eventually, the modern welfare state. In the United States, the law-finding function of the civil jury

⁸⁸ *Sparf v. United States*, 156 U.S. 51, 106 (1895).

⁸⁹ Alschuler & Deiss, *supra* note 63, at 911.

⁹⁰ See *Sparks v. State*, 603 A.2d 1258, 1277 (Md. Ct. Spec. App. 1992) ("[C]ase law has made it clear that that curious constitutional relic has, through the interpretive process, been shriveled up to almost nothing"); *Carman v. State*, 396 N.E.2d 344, 346 (Ind. 1979) ("Although our Constitution grants to juries the right to determine the law, it is to do so under the guidance of the trial judge, and in so doing, it may not disregard the law."); *Conklin v. State*, 331 S.E.2d 532, 543 (Ga. 1985) ("It is the province of the court to construe the law and give it in charge, and of the jury to take the law as given, apply it to the facts as found by them, and bring in a general verdict.") (quoting *Harris v. State*, 9 S.E.2d 183, 187 (Ga. 1940)).

was not formally abrogated until the early decades of the nineteenth century. Yet, it is instructive to notice that the American judiciary's refinement of proprietary rights in response to changing socio-economic circumstances in large measure mirrored the earlier English experience.

The sociological evidence thus seems to confirm Hayek's basic insight that the native practices of close-knit customary communities are inadequate to sustain the institutional framework of a diverse and open society with a flourishing market economy. Even if one accepts that comprehensive central control of concrete economic outcomes is beyond our conceptual reach, complexity begets the need for rational guidance. As such, my contention is that both theoretical analysis and historical reflection undermine the plausibility of Hasnas' vision for the revival of an essentially medieval conception of adjudication, at least insofar as we are unwilling to forgo the political and material advantages of the Great Society.⁹¹

⁹¹ See Samuel Freeman, *Illiberal Libertarians: Why Libertarianism is Not a Liberal View*, 30 PHIL. & PUB. AFF. 105, 107 (2001) (arguing that "[L]ibertarianism resembles a view that liberalism historically defined itself against, the doctrine of private political power that underlies feudalism. Like feudalism, libertarianism conceives of justified political power as based in a network of private contracts. It rejects the idea, essential to liberalism, that political power is a public power, to be impartially exercised for the common good.").