



REJOINDER TO HASNAS

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In this brief rejoinder, there is relatively little to say further about Hayek, since Professor Hasnas and I largely agree, I think, on the issue in dispute. In his response, Hasnas reiterates his position that “Hayek’s purpose in Volume I of *Law, Legislation and Liberty* is to offer the law produced by evolutionary forces as an alternative to legislation.”¹ If this is indeed the last word, then Hayek’s reliance on the conscious law-making activities common law judges is arguably misplaced, as Hasnas contends, since “there is no reason to believe that [judge-made] law is morally superior to legislation,” given that “it simply imposes the normative preferences” of judges rather than legislators on the members of the public.²

In my reply, I did not deny that there is some textual support for this reading of Hayek’s jurisprudence. Nevertheless, Hasnas’ professed concern about the imposition of values is quite beside the point, since the validation of rights claims, in litigation or otherwise, invariably involves the imposition of a normative standard of some sort. This is no less true of the enforcement of persons’ expectations arising from customary social and economic practices, which, as I pointed out, may embody deeply illiberal

¹ John Hasnas, *Hayek, the Common Law, and Fluid Drive*, 1 N.Y.U. J. L. & LIBERTY 79, 105 (2005).

² *Id.*; see also John Hasnas, *Confusion About Hayek’s Confusion: A Response to Morison*, 2 N.Y.U. J. L. & LIBERTY 244-45 (2007).

values. Suppose, for example, that the settled custom in a particular community relegates women to a subordinate legal status. A dispute then arises over the validity of a contract entered into by a woman without her husband's permission, as required by the community's entrenched social norms. Though he presumably would resist the conclusion, Hasnas seems to imply that, on Hayekian grounds, the promotion of liberty would require the parties' rights to be determined by a jury, in the absence of any substantive guidance from a court or the legislature, according to its view of the parties' "custom-derived expectations." Under these circumstances, the prospects for a liberal outcome would not be promising, to say the least.

More to the point, I do not think any such view can be fairly attributed to Hayek. For that reason, his jurisprudence cannot plausibly be interpreted to establish the exclusive priority of an evolutionary conception of law, grounded in customary practices, as *constitutive* of liberty. Instead, Hayek consistently assumes that it is a condition of a just liberal state that political actors, including judges and legislators, consciously aim at the preservation and progressive improvement of the rules governing the efficient functioning of markets, precisely because we correctly perceive the material and moral advantages of such practices.³ Thus, while Hayek was anxious to guard against the "constructivist fallacy" inherent in positivist conceptions of social science, he did not reject altogether the critical use of reason in public life. His social theory is, therefore, better read in light of his principled commitment to the normative ideals of classical liberalism. If this means I share Hayek's alleged "confusion" about the "driving force" of the common law, then I can take solace in the fact that I am in good company.

³ See FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 41 (1944) ("The liberal argument is in favor of making the best possible use of the forces of competition as a means of coordinating human efforts, not an argument for leaving things just as they are. . . . It does not deny, but even emphasizes, that, in order that competition should work beneficially, a carefully thought-out legal framework is required, and that neither the existing nor the past legal rules are free from grave defects.").

Furthermore, the Hayekian conception of legal innovation presupposes that we are capable of learning from our experience about how societies function, but this is clearly a matter of degree. I certainly did not make the naive assumption, as Hasnas implies, that the lawyers and judges of the early modern period were the self-conscious ideological vanguard of *laissez faire* liberalism, which did not materialize until much later. More modestly, my contention is that their preoccupation with the integrity of property rights, increasingly unburdened by the constraints of traditional customary obligations, was a necessary condition, among others, of the eventual emergence of industrial capitalism. This is consistent with the fact that the common law rules governing property rights were fashioned by judges who “had an interest in creating and preserving the rules favoring the land-owning class of which they were members.”⁴ This is also consistent with the fact that the common law courts only gradually extended their jurisdiction over other areas of commercial life, as I expressly acknowledged.⁵ But the gradual refinement of market institutions is entirely compatible with the claim that, by the late eighteenth century, common law judges had been routinely asserting their authority in economic affairs for a very long time, which, in turn, contributed to the rapid growth in wealth so memorably documented by Adam Smith.

Finally, Hasnas professes to be puzzled by my discussion of the demise of the jury’s *de jure* authority to decide substantive issues of law in the United States in the early nineteenth century.⁶

⁴ Hasnas, *Confusion About Hayek’s Confusion*, at 244. Curiously, Hasnas concedes my argument that the medieval practice of “proving custom” irretrievably broke down, because primitive “law-making” gatherings failed to produce a coherent body of rules capable of guiding the resolution of future disputes. *Id.* at 251. Yet, he insists that “the common law originated in precisely the manner” in which I described those very same primitive “law-making” gatherings. *Id.* at 252. Needless to say, it is not obvious that both these propositions can be simultaneously true.

⁵ Samuel T. Morison, *Custom, Reason, and the Common Law: A Reply to Hasnas*, 2 N.Y.U. J. L. & LIBERTY 231 (2007).

⁶ Hasnas also doubts the relevance of my discussion of jury practices in colonial America. The essential point is to highlight the source of the distinctive American attachment to an idealized conception of the jury, which is grounded in the image of colonial resistance to British authority by both criminal and civil juries. This helps to explain, I think, the persistence of the “folk vision” of law, according to which lay jurors are fully capable of “doing justice” without the substantive guidance of legal

To the extent this discussion is relevant at all, he asserts, it unwittingly bolsters rather than contradicts his historical thesis. This is, perhaps, a clever rhetorical strategy, but it distorts the argument I advanced in my reply. My point is really quite simple. Hasnas's historical hypothesis is that in England, prior to about 1800, the substantive rules of the common law were not judge-made at all, but rather were an expression of "the community's sense of fairness" as determined by lay jurors without instruction by the court. In contrast, my contention is that the practice of substantive judicial law-making was an integral part of English legal practice at least two centuries earlier.

That said, I frankly thought it was obvious that developments in England's legal system did not necessarily occur contemporaneously with similar developments in the United States. I take it as uncontroversial that, during the seventeenth and eighteenth centuries, England emerged as a dominant economic force in the world, with a concomitantly sophisticated legal system, whereas institutional conditions prevailing in the American frontier were relatively crude. The point of the comparison is thus to suggest that, as the newly established United States began to emerge as an economic power in its own right in the early nineteenth century, the American legal system underwent a transformation that was remarkably similar in at least one sense to what had long since transpired in England. That is, in both cases, the rapid growth of social and economic complexity was accompanied by the maturation of legal doctrine and practice and the gradual displacement of customary forms of adjudication grounded in provincial notions of fairness. The analogy may be inexact, to be sure, but a moment's reflection makes it clear that an account of American legal practices in the early nineteenth century cannot be conflated with events occurring at the same time, under very different social circumstances, in England.

professionals. I leave it to the reader to judge whether any of this is relevant to the debate over the jury's law-making function in nineteenth century America.