LIBERTARIANISM AND THE COMMON LAW

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Libertarians have long appealed to the common law as an exemplary form of human order. Murray Rothbard stated that the "common law has often been a good guide to the law consonant with the free market."[1] Elsewhere he claimed that "the justly celebrated common law . . . was developed over the centuries by competing judges applying time-honored principles rather than the shifting decrees of the State."[2] Todd Zywicki submits that "there is a long and deep affinity between libertarianism, law and economics, and the common law—libertarians clearly appreciate the pivotal historical importance of the English common law in the historical emergence of a free and commercial society."[3]

What are the qualities and characteristics of the common law that feature or reflect libertarianism? The common law is both a historical phenomenon and an active process or a juridical mode of settling disputes.[4] Therefore, a precise answer to questions about the compatibility between libertarianism and the common law is difficult to articulate. This Essay describes elements of the common law—both its manifestation in history and its theoretical approaches to judging—that illuminate its libertarian

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1. MURRAY N. ROTHBARD, MAN, ECONOMY, AND STATE WITH POWER AND MARKET, SCHOLARS EDITION, 749 (Ludwig von Mises Inst., 2d ed., 2009).

2. MURRAY N. ROTHBARD, FOR A NEW LIBERTY: A LIBERTARIAN MANIFESTO 283 (Ludwig von Mises Inst., 2d ed., 2006) ("These principles were not decided upon arbitrarily by any king or legislature; they grew up over centuries by applying rational—and very libertarian—principles to the cases before them. The idea of following precedent was developed, *not* as a blind service to the past, but because all the judges of the past had made their decisions in applying the generally accepted common law principles to specific cases and problems.").

3. Todd J. Zywicki, *Libertarianism, Law and Economics, and the Common Law,* 16 CHAP. L. REV. 309, 309 (2013).

4. *See id.* at 311.

attributes and tendencies. It suggests that the common law has epistemological importance as a kind of bottom-up ordering based on traceable patterns of human behavior.

The common law enables us to break down the continuous, spontaneous process of data accumulation about human action into immediately usable and discrete units, coordinate fragmentary and scattered knowledge to manage and resolve concrete cases, and differentiate precedential and binding decisions about situational variables to facilitate a resilient system of rules and principles. This system is the sum of individual cases that trends towards libertarian conceptions such as due process, trade and exchange, religious toleration, freedom of speech and association, freedom of the press, rule of law, separation of powers, and private property rights,[5] even if the outcomes of specific cases are, occasionally, contrary to these.[6] The common law economizes the knowledge that judges need to rule well and wisely because, in this system, they need not possess or hold in their mind the distributed information that the system writ large makes available for efficient and effective acquisition or application.

THE COMMON LAW AGGREGATES KNOWLEDGE

The interpretation of the common law presented here is an outgrowth of the jurisprudence of sixteenth and seventeenth century jurists in England.[7] It recalls the portrayal of English unwritten constitutionalism as having existed since time out of mind or derived from immemorial custom.[8] It animated landmark political documents such as the Virginia Charter of 1606,[9] the Petition of Right (1628),[10] the English Bill of Rights (1689),[11] the Virginia Declaration of Rights (1776),[12] the Declaration of Independence (1776),[13] and the United States Bill of Rights (1789–91).[14] Yet the common law is more ordinary and mundane than these grand

5. *See id.* at 309.

6. *See id.*

7. *See, e.g.*, J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY 30–55 (Cambridge Univ. Press, 1957).

8. *See generally* Harold Berman *The Origins of Historical Jurisprudence: Coke, Selden, Hale* 103 YALE L.J. 1651, 1651–1738 (1994) (offering a nuanced and detailed historical account of both the novelties and continuities introduced into the common law, and ideas about the common law, during the sixteenth and seventeenth centuries).

9. *See* J.C. HOLT, ET AL., THE ROOTS OF LIBERTY: MAGNA CARTA, ANCIENT CONSTITUTION, AND THE ANGLO-AMERICAN TRADITION OF RULE OF LAW 1–21 (Ellis Sandoz, 1993) (using the common law as one piece of a longer narrative about the ancient constitution in England that carried over to the United States).

10. *See id.*

11. *See id.*

12. *See id.*

13. *See id.*

14. *See id.*

political statements. Its content is essentially and organically the multiplication of piecemeal, narrowly conceived decisions that over generations gained or lost momentum as they proved relevant, workable, and correct as binding precedents. For much of its history, the common law consisted of imperfectly rendered accounts of the arguments that lawyers made before courts, and less so the judicial rationale employed by judges in their findings or decisions, and the reporters who recorded these accounts "were of varied reliability until the nineteenth century in England."[15]

The manifestation of the present common-law system, which varies from country to country,[16] is different from historical antecedents in England that arose before the advent of written constitutions that instantiate the social-contract theories maturing during the sixteenth, seventeenth, and eighteenth centuries.[17] Under a written constitution, judicial decisions build on prior cases that interpret the supreme governing document—the constitution—which provides a set framework for all subsidiary laws within the jurisdiction. Today, decisions in constitutional systems build off custom and tradition only to the extent that a constitutional text embodies custom and tradition or, alternatively, the body of cases interpreting constitutional text implicates or involves custom and tradition.

In the United States, the common law evolves incongruently in the several states as it works through the manifold complications of federalism that transpire when laws between states, or between states and the federal government, interact or conflict. To conceptualize the common law in the United States as fifty common-law systems rather than one general federal common law is reasonable.[18] The common law of the several states has, to varying degrees, resisted the codification incentives of the American Law Institute and its *Restatements of Law* that pursue consistency and uniformity across competing jurisdictions with sometimes irreconcilable rules and practices.[19]

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15. Frederick G. Kempkin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800–1850*, 28 AM. J. OF LEGAL HIST. 3, 32 (1959).

16. *See* ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 1–6 (Francestown, N.H.: Marshall Jones Co., 1921).

17. Of course, there are varieties to the social contract theory popularized by Thomas Hobbes, John Locke, and Jean-Jacques Rosseau, among others, but I have in mind the general theoretical proposition that individuals in society voluntarily submit themselves to political authorities contractually to secure protection and property rights on the condition that governing bodies enforcing the controlling laws and rules are equally bound by those laws and rules.

18. *See* Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("There is no federal general common law."); *see also* Allen Mendenhall, *St. George Tucker's Jeffersonian Constitution*, LAW & LIBERTY (Oct. 1, 2019) (https://lawliberty.org/st-george-tuckers-jeffersonian-constitution/) ("Having been clipped from its English roots, the common law in the United States had, in Tucker's view, an organic opportunity to grow anew in the varying cultural environments of the sovereign states.").

19. Robert W. Gordon, *The American Codification Movement, A Study of Antebellum Legal Reform*, 36 VAND. L. REV. 431, 431 (1983).

Acclamation for the common law can go too far. After all, the common law flourished during centuries of slavery and royal prerogative which it did little to abolish or abate.[20] Nevertheless, because the common law comprises the prevailing norms, customs, traditions, and habits of the day, it should not be held to the exacting standards of the future that it never could have met in previous eras, nor condemned for its imperfections that reflect human flaws. The common law takes the shape of its social and political environment, but never fully or immediately. The gradualism inherent in this meliorative process ensures that change does not occur too radically or rapidly, and that the constructive elements of working rules and institutions are retained even as new insights and approaches are incorporated.[21]

The common law is nothing grander than "a mode of treating legal problems rather than a fixed body of definite rules," succeeding "everywhere in molding rules, whatever their origin, into accord with its principles and in maintaining those principles in the face of formidable attempts to overthrow or supersede them."[22] It is, conceptually, interesting not because it is ostentatious or bizarre but because it consists of a seemingly endless sequence of ordinary circumstances brought before countless judges following then-current formal procedures to extend rules and principles to unknown future litigants, courts, and beneficiaries. The common law is, then, extraordinarily ordinary and ordinarily extraordinary. It transmits to future generations accumulated knowledge in the form of written rationale, facts, and decisions embedded in the opinions of innumerable judges over time and dispersed across jurisdictions that may or may not overlap. Cases in the aggregate supply important data and guidance to later generations, containing within them more information than any one mind or group of minds could alone possess.[23]

The common law, therefore, is a vast deposit of the evidence, argumentation, reasoning, inference, and interpretation that enable the inadvertently ordered flow of general human experience.[24] It is neither static nor monolithic. The product of countless judgments and processes that are mutually constraining or enabling according to circumstances, the

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20. *See* St. George Tucker, *On the Study of Law*, *in* VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS 9 (Indianapolis: Liberty Fund, 1999) ("the abolition of *entails*; of the right of *primogeniture*; of the preference heretofore given to the *male* line, in respect to real estates of inheritance; and of the *jus accrescendi*, or right of survivorship between *joint-tenants*; the *ascending* quality communicated to real estates; the heritability of the *half-blood*; and of *bastards*; the *legitimation* of the latter, in certain cases; and many other instances in which the rules of the common law, or the provisions of a statute, are totally changed.").

21. *See* Mendenhall, *supra* note 18 ("he anticipated Justice Holmes's claim that the law 'is forever adopting new principles from life at one end' while retaining 'old ones from history at the other, which have not yet been absorbed or sloughed off.'").

22. POUND, *supra* note 16, at 1.

23. *See id.* at 31.

24. *See id.* at 182.

common law is a densely structured system within which rules and principles evolve gradually. It is also a textual and historical process for judging—i.e., it is a *mode* of judging—grounded in the doctrine of *stare decisis*, which requires jurists to mine precedents to analogize present facts and operative principles to past cases and holdings.[25] The result is a web of interrelated cases, each embedding rules and principles that furnish future litigants and judges with a suitable rationale rooted in the substantive references and citational authority relevant to that context.

The constant filing and disposing of cases, the numerous and diverse opinions that resolve complex situations, the cumulative reliance of lawyers and parties on past decisions and settled rules: these create a synergy out of which emerges binding consensus regarding the organizing rules and principles that control human behavior within a specified field of business or conduct—or within a defined jurisdiction. Each jurisdiction is an experiential proving ground for the validity and practicality of judicial determinations regarding acrimonious disputes.

What is meant by *rules* and *principles*? A rule is an expressed or tacitly understood regulation over *specific* actions or events that describes what is or is not permissible.[26] A principle, by contrast, is a *general proposition* that frames discussions about behaviors or circumstances.[27] Principles deal with fundamentals whereas rules deal with specificities and expediencies.[28] The distinction is highlighted here, parenthetically and for clarity, because these terms appear throughout this Essay.

The doctrine of *stare decisis* and precedent requires judges to study and practice history and epistemology regardless of whether they recognize that scholarly function of their job. "Precedent is a rather obvious breeding ground for tackling the issue of how history matters to legal epistemology," explains Maksymilian Del Mar, "for precedent is a concept that connects the present exercise of legal judgement [sic] with such exercises in the past."[29] He adds that "past decisions are not only potentially helpful

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25. *See Stare Decisis*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation.").

26. *See Rule*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Generally, an established and authoritative standard or principle; a general norm mandating or guiding conduct or action in a given type of situation.") (Although this definition contains the term *principle* within it, my definition attempts to show that *principle* signifies a broader concept than the one associated with the term *rule*.).

27. *See Principle*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Basic rule, law or doctrine; esp., one of the fundamental tenets of a system.") (My definition suggests that a principle is more than a basic rule or law; it is more like "the fundamental tenets of a system.").

28. *See id.;* BLACK'S LAW DICTIONARY, *supra* note 26.

29. Maksymilian Del Mar, *What Does History Matter to Legal Epistemology*, 5 J. PHIL. HIST. 383, 385 (2011) (demonstrating that common-law decisions, which consist of rhetoric and rationale rather than merely plain and simple conclusions, are dynamic, leaving room for interpretation. They are not static or frozen for mechanical, automatic application).

resources that judges may take into account when dealing with the dispute before them: they are resources that judges are obliged to take into account."[30]

Divergent paths of case precedent in a common-law system may be causally dissimilar or unconnected until an unexpected fact or chain of events yields their improbable intersection. As they progress through their career, rules modify not by prescription or design, but by unplanned responses to chance, precipitating actions and events. In each case, a judge exercises his or her agency and reason to render a judgment or ruling, but the agglomeration of those judgments and rulings does not and cannot represent a single, uniform purpose or intent. Those judgments and rulings settle into patterns of recognizable rules that reflect the governing values and cultures of diverse people within a circumscribed territory.

Rules passing through cases are plastic and malleable but only within fixed parameters established by custom and precedent, and only when factual contexts or exigencies necessitate reasonable adaptation. Radical departure from precedent rarely occurs,[31] and in that sense the common law is inherently conservative while nevertheless contemplating internal changes and adjustments. The common law changes incrementally, tending to preserve rules if only by tinkering with their application.[32]

Think of a circle having clear boundaries within which rules enjoy play and fluidity to address difficult problems. That circle is, in this example, a jurisdiction, the outer limits of the governing authority. Institutional restraint, customary practice, seasoned protocols, and procedural habits limit the elasticity of rules within the jurisdiction. By analogy, a poet adhering to the traditional sonnet form—a jurisdiction of sorts—takes creative liberty with diction, tone, metaphor, alliteration, assonance, and so on, while adhering to the strict, overarching structure that makes the sonnet a sonnet. Just as jurisdictions display different features, so sonnets display different rhyme schemes or metrical feet. No two jurisdictions are the same; no two sonnets are the same.

Individual judges may not know much about a specific area of law, yet the common-law system compensates for the ignorance of individuals. When rules and cases multiply within a common-law system, knowledge grows in the aggregate. The system enables the utilization of dispersed knowledge that no single mind could possess. The probability of error in future decisions gradually reduces as the system receives more data, in part because society begins to rely on established rules and principles that have emerged in cases. In other words, judges contribute to the sum of knowledge each time they render a decision, especially when they write opinions that describe their dispositive reasoning and rationale. It is not that

30. *Id.*

31. *See generally* Carol M. Bast & Ransford C. Pyle, *Legal Research in the Computer Age: A Paradigm Shift?*, 93 LAW LIBR. J. 285, 285 (2001).

32. *See generally id.*

each judge in successive stages of legal development possesses more knowledge than judges in previous eras; rather, the judge in a mature legal system needs *less* personal knowledge because the system in its totality contains within it more readily available information than infant or nascent systems do. Technological advances and research services like Westlaw or LexisNexis enable judges and attorneys efficiently to use extant knowledge that they do not and cannot retain in their fallible and limited minds.[33] A case that gains citations earns an improved pedigree that commands heightened attention.[34] A judge is likely to consider it binding or authoritative, or to use it as the standard against which present facts and issues should be measured, if Westlaw or LexisNexis reveals a cluster of holdings that, although different in their discrete particulars, consistently and reliably share the same or similar rules and principles.[35]

A judge rules based on standards of review, precedents, and procedures whose origins and sources are unknown to him or her, but which persist in disembodied form—i.e., within the system but not within some omniscient human brain. In this respect, the common law economizes knowledge, obviating the need for judges to specialize or to determine the genesis of operative rules or principles at stake in a given case.[36] A judicial decision has additive value whenever it registers dispositive reasoning and rationale that connects with past cases because in this manner there develops a readily recognizable family of precedents containing within them a series of applied rules and principles from which future attorneys and jurists can draw.

Judges, as individuals, possess only the smallest fraction of the knowledge scattered throughout society and held by all sorts of people and

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33. Matthew S. Novak, *Legal Research in the Digital Age: Authentication and Preservation of Primary Material*, NEB. LAW., Jul.–Aug. 2010, at 19.

34. *See* John Henry Merryman, *The Authority of Authority: What the California Supreme Court Cited in 1950*, 6 STAN. L. REV. 613, 613 (1954).

35. *See id.*

36. I have not undertaken empirical or quantitative work to determine whether the common-law system is in fact more efficient than alternative systems, but I acknowledge here some literature addressing that question. *See* Richard Posner, *Economic Analysis of Law* 22 (New York: Little Brown, 2d ed. 1986) (generating an ongoing conversation regarding this subject); *see also* Paul H. Rubin, *Why is the Common Law Efficient?,* 6 J. LEGAL STUD. 51 (1977); G.L. Priest, *Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977); Gordon Tullock, The Case Against the Common Law, in G. Rowley (ed.), *The Selected Works of Gordon Tullock, Vol. 9* 399–455 (G. Rowley, 2005); Anthony Niblett, *On the Efficiency of the Common Law: An Application to the Recovery of Rewards*, 43 EUR. J. L. & ECON. 393 (2017); Nicola Gennaioli & Andrei Shleifer, *The Evolution of the Common Law*, 115 J. POL. ECON., 43 (2007); William F. Shughart II, *Gordon Tullock's Critique of the Common Law*, 23 INDEP. REV. 209 (2018); TODD ZYWICKI & EDWARD STRINGHAM, *COMMON LAW AND ECONOMIC EFFICIENCY,* in *The Production of Legal Rules* 107–31 (F. Parisi, 2013); Todd Zywicki, *Spontaneous Order and the Common Law: Gordon Tullock's Critique*, 135 PUB. CHOICE 35–53 (2008); Todd Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 Nw. U. L. Rev.1551 (2003).

professions with whom or with which judges have little to no felt experience. What does a judge know firsthand about insurance subrogation, microchips, priesthood, cattle, aeronautics, sewage, rowing, hairdressing, fashion, zookeeping, nursing, fisheries, sailing, oceanography, trucking, marine biology, mapmaking, dermatology, embalming, ballet, lobbying, painting, opera, construction, forestry, carpentry, shoemaking, chemistry, acupuncture, piloting, banking, firearms, mechanical engineering, interior design, acting, meteorology, journalism, accounting, counseling, capital markets, cuisine, curators, law enforcement, computers, oil rigging, plumbing, tourism, weightlifting, photography, dentistry, trains, astronomy, university administration, video games, oil and gas, roofing, architecture, firefighting, mining, papermaking, jewelry, fundraising, philanthropy, lumber yards, optometry, securities, telemarketing, nursing homes, anesthesiology, taxidermy, pharmaceuticals, and so on and so forth?[37] Who is to say that judges are more intelligent than the farmer, the mason, the gardener, or the taxi driver, whose locus and spectrum of knowledge are merely different from the judge's? Perhaps they are all equally knowledgeable, only about different subject matters. The common law, regardless, provides a mechanism for capturing their scattered knowledge within a single system characterized by an ongoing process of information transferal.

An official nomenclature for rules and principles develops as judges sort rules and principles into units or categories to taxonomize dispersed knowledge, making it less difficult or costly to evaluate the mundane trends and patterns that emerge out of the quotidian interfacing of innumerable agents acting throughout society. Judges or parties considering the rule governing immediate circumstances may, for the sake of argument or persuasion, suppose or suggest that it is an unchanging, immutable fixity when in fact it is a combination of disparate factors and elements. Neither the judges nor the parties to a case know firsthand or definitively the original causes of the operative rule or principle at stake in a dispute; all they know is that the rule or principle remains authoritative and precedential in their unique situation.

Judges do not survey the entire field and history of law before issuing their decisions, rulings, or opinions; they look only to those germane prior decisions, statutes, and constitutional provisions needed to dispose of a case reasonably and expeditiously.[38] In modern times, with certain exceptions of course, judges limit their analyses to only those laws and issues raised by parties to a present case.[39] To decide cases, in other words, judges will not conduct independent research, or rarely will, because

37. *See* BARBARA A. SPELLMAN, JUDGES, EXPERTISE, AND ANALOGY, 7 (Univ. Va. L. Sch. Pub. L. & Legal Theory Rsrch. Paper Series No. 2009–20, 2010).

38. *See id.*

39. *See id.*

their dockets are too large and burdensome for such onerous work.[40] Judges disposing of cases do not require an exhaustive historical account of the governing principle, or full mastery of its philosophical underpinnings, to know how and whether to apply the operative rules or principles in a particularized context. That is because the common-law system grew out of longstanding habits and practices that, through succeeding eras, facilitated workable processes for managing and mediating human complexities.

For example, when a homeowner's association—an HOA—sues a homeowner for breaching the neighborhood covenants, it does not trace the applicable rules back to Henry II before serving the alleged offender with an itemized complaint. The homeowner's association, working with its lawyer, simply knows what to do, procedurally, to seek the desired redress, remedy, or relief. The typical judge assessing the law or the typical jury evaluating the facts about the alleged breach, moreover, will not undertake a rigorous anthropological or philosophical dissertation to reach whatever minimal conclusions are necessary to finalize a judgment.[41] More likely they will do as little as possible to satisfy all formal requirements to resolve the proceedings and then pivot to the next task or, happily, to more leisurely pursuits.[42]

THE COMMON LAW MANAGES COMPLEXITY

Interdependent cases in the common law reconcile disparate facts into rules or principles and convey knowledge to the future about a specific area of law. The long inheritance of repeated error or illogicality can, however, trap society in a quiescent state of unconstructive, ineffectual inertia as bad precedents build on bad precedents, rigidifying inefficiencies, mistakes, or injustices. A static rule that is good and right is one thing; a static rule that is bad and wrong is quite another. What can a judge do if faced with a chain of flawed precedents that seem to cabin his or her decision? One solution is to author an opinion abiding by the operative precedents but pleading for the legislature to intervene to change the applicable law. Another is for judges to demarcate exceptions that serve as bases for new lines of precedent that are more consistent with social expectations. Jason Kuznicki champions this latter approach, by which, he argues, judges by slow degrees have eroded the repressive force and effect of the laws of coverture.[43]

A society accustomed to the application of nested rules and principles naturally resents their sudden alteration or displacement. The

40. *See id.*
41. *See id.*
42. *See id.*
43. *See generally* Jason Kuznicki, *Law, legislation, and local minima: Solving a problem in Hayek's theory of common law judging, with historical examples*, 24 REV. AUSTRIAN ECON. 293, 293–309 (2011).

common law illustrates a conservative approach to the reality of necessary change.[44] The common law is not an impersonal, deterministic product of natural forces divorced from human agency. Rather, it is the sum of human agency, the product of multiple actions and intents across an expansive network that in its totality defies full comprehension by limited human faculties. No individual—not even a collection of individuals—could know the entire common law, which, after all, is a deposit of legal knowledge recorded in text for reference, study, explanation, and counsel. Each legal opinion has consequences far beyond the parties involved in the case, yet precisely how it will guide posterity is unknown and unknowable in its own moment. The benefits or burdens of a decision in a case of first impression, especially, are postponed or delayed.

Here we might recall F. A. Hayek's observation that "the knowledge of the circumstances of which we must make use never exists in concentrated or integrated form, but solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess."[45] Hayek had in mind "the problem of a rational economic order,"[46] which parallels a legal order. Both orders are unknowable in full. They possess within them too much information for individual humans, even numerous groups of humans, to comprehend, but they regulate human behavior without the impetus of a single design. They manifest a propensity towards harmony and correction, facilitating commerce and exchange, developing and formalizing customs.

Legal theories and experiments abound; the common law provides a continuous authentication process for channeling them into usable knowledge and practical application. The locus of decision-making remains mostly with individual judges, who assess the relative merits of the arguments before them.[47] The multiplication of judicial decisions makes up an organic whole, the ever-growing system itself. Even in an appellate system in which some courts are subordinate to others, the information flow is from the bottom up. An appellate court, including a supreme court, cannot issue binding commands or proclamations absent some intermediary tribunal; it must address the facts and issues raised by parties in the lower courts, where the trial judges had more intimate knowledge of the relevant circumstances and, with the parties, created a record to transmit knowledge up the chain of authority. The work of the lower courts with fact-finding and rule specificity enables appellate courts to deal in generalities, in principles.[48] It would be costly and inefficient for an appellate court to rework the activity of subordinate courts; the hierarchical structure

44. *See* POUND, *supra* note 16, at 2–3.

45. F. A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 519 (1945).

46. *Id.*

47. *See generally* POUND, *supra* note 16.

48. *See generally id.*

facilitates the resourceful and efficient transfer of knowledge from the subordinate to the higher juridical body.[49] The process of authenticating and accumulating knowledge in the common-law system is, therefore, decentralized. The standardization of knowledge, the emergence of consensus about practices or procedures, and the development of rules or principles arise from local litigation and decision-making, which, of course, appellate courts formalize through repeated acceptance or recognition as well as official authentication through expressed approval.

There is, as I have suggested, danger in celebrating or romanticizing the common law because, whatever its merits as a theory, it has not always borne out constructively or desirably in practice. The common law did not ineluctably yield what would commonly be considered libertarian results, in other words. "The common law of England," wrote John Maxcy Zane, "which has been the subject of so much laudation, really does not deserve . . . the eulogiums that it has uniformly received from its practitioners."[50] Sir William Blackstone's treatment of freedom of speech or parliamentary supremacy does not square with modern libertarian jurisprudence or political theory, for instance.[51] Slavery, coverture, and other abolished practices flourished during periods of the common law.[52] Yet the common law "continues as always to reflect the character of the social order";[53] thus, the common law could not reflect modern libertarianism during eras when modern libertarianism was inconceivable.

THE COMMON LAW AS EPISTEMOLOGY

The object of epistemology is to study what humans know and, more importantly, how, why, or whether we know it.[54] These exercises demand rigorous questioning of the methods and modes by which knowledge enters our possession and spreads from person to person, society

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49. *See generally id.*

50. JOHN MAXCY ZANE, THE STORY OF LAW 234 (Indianapolis: Liberty Fund, 2d ed. 1998).

51. *See* Albert W. Alschuler, *Rediscovering Blackstone*, 145 PA. L. REV. 35–36 (1996) ("Like John Locke, Adam Smith, and other Enlightenment thinkers, Blackstone should not be mistaken for a twentieth-century libertarian.").

52. *See* Holly Brewer, *Creating a Common Law of Slavery for England and its New World Empire*, 39 L. & HIST. REV. 766 (2021) ("In the seventeenth century the English common law became an instrument—the best the Stuart kings of England had—to create new laws, in the form of new precedents, and thus to both expand their own power and to legitimate slavery.").

53. ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 3 (Indianapolis: Liberty Fund, 1986).

54. *See* Barbara K. Hofer and Paul R. Pintrich, *The Development of Epistemological Theories: Beliefs About Knowledge and Knowing and Their Relation to Learning*, 67 REV. EDUC. RSCH. 88, 88 (1997). Epistemology is "a branch of philosophy that investigates the origin, nature, methods, and limits of human knowledge." RANDOM HOUSE DICTIONARY (2023).

to society, age to age. No knowledge passes from one mind to another without the deliberate exercise of individual agency, save for lessons learned by witnessing chance events or accidental occurrences. Therein lies the chief difference between teaching and observation, the former involving an *intent* to convey data or wisdom from human to human, and the latter, without premeditated decisions to communicate knowledge or to instruct, nevertheless communicating knowledge or instructing.[55]

To know *if* we know well or rightly—to be sure that our knowledge is predicated on the right or the true and not merely on presumption or error—requires collecting and aggregating information among several and disparate peoples and building reliable consensus regarding governing principles.

Epistemology is a field of philosophy that operates as a science, which is also, incidentally, one of its principal subjects.[56] The prevailing approach to science is, first, acquiring information or data through hypothesis and experimentation and, next, subjecting the subsequent findings to a community of inquiry that tests, verifies, or undermines conclusions in good faith to achieve clarity and understanding. Conclusions derived from science are, however, provisional, yielding in time new conclusions, each of which undergoes renewed scrutiny in turn.

So it is with the common law system, which developed long before the birth of modern science but which anticipated and now reflects modern science in its meliorative, revisionary qualities and characteristics.

How wonderful and beautiful that the uncoordinated actions of innumerable people contribute to a coherent process that developed not by central design, but by mutual adjustments to urgent problems requiring legal solutions. These adjustments multiplied to form a nameable system: the common law, a composite of interrelated, binding legal opinions that govern human behavior not according to an abstract, unified plan but arising out of a multiplicity of cases, each involving an intimate understanding of intricate facts and immediate circumstances.

We cannot resolve Hayek's "knowledge problem"[57]—not even in this age of artificial intelligence and machine learning—but the common law establishes a practical tool for distilling and sorting information. It possesses and preserves knowledge for utilization and ensures that judges never act alone because they are always part of a broader community of minds.

"The individual is foolish," intoned Edmund Burke in a speech before the British House of Commons, adding that the "multitude for the moment is foolish, when they act without deliberation; but the species is wise, and when time is given to it, as a species it almost always acts

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55. *See Observe*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("To see and notice."); *see also Teach*, MERRIAM-WEBSTER'S DICTIONARY (2016) ("To cause to know something.").

56. *See generally* Otavio Bueno, EPISTEMOLOGY AND PHILOSOPHY OF SCIENCE (2016).

57. *See* Hayek, *supra* note 45.

right."[58] This hopeful sentiment captures the essence of the common law: it is the sum of human understanding about the governing rules and principles in a specified jurisdiction, and, in the long run, it produces order without a purposeful design or teleology. The common law is not the enacted rationality of one person or even a small group of persons; nor can it be random—entirely chance—because it is an agglomeration of reasoned conclusions and rational decisions about actual circumstances involving human agency. The common law exists in its current manifestation not because someone willed or desired it to look or to be that way, but because uncountable individuals acting intentionally ran into conflicts that they could not resolve among themselves. They thus resorted to formal adjudication that resulted in binding legal decisions. This non-random yet non-deliberate society-wide process was repeated over time, with some cases climbing from the trial to the appellate levels, until emergent patterns, habits, and practices settled into compulsory rules or principles.

The unforeseeable disruptions of technology and innovation cannot destroy the resilient common-law system that is sufficiently flexible to absorb qualitative changes in quotidian circumstances while sufficiently rigid to provide reliable guidance to all competent actors in society. As more judicial opinions and all that those entail—factual variables, the application of rules, analogies to past cases—are deposited into the stock of cases, the net result is an epistemological system that simplifies future decision-making. The expanding complexity of the system does not require judges or litigants to know more, but rather relieves them of that burden. The system in its entirety holds the disseminated and localized knowledge that individual minds cannot possess or retain. Jurists, who, like everyone, have limited faculties and partial perspectives, need not know the exact or perfect remedy in absolute terms but only how to discover, discern, and apply the tacit knowledge channeled through the system as precipitating events so necessitate. The observable order of the system is not attributable to the realized intent or will of individual judges. It is rather the aggregation of innumerable cases stretching back in time and resolving countless conflicts between numerous actors pursuing different ends. The common law possesses knowledge without any agency of its own. That is what makes it simultaneously interesting and uninteresting, fascinating in its banality.

58. EDMUND BURKE, *Speech: On a Motion Made in the House of Commons, the 7th of May, 1782, for a Committee to Inquire into the State of the Representation of the Commons in Parliament*, *in* THE WORKS OF EDMUND BURKE, WITH A MEMOIR 469 (George Dearborn ed., 1834).