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That there is a "crisis" in law is not denied by contemporary classical liberals (or neo-conservatives). The rise of statute and public law in the twentieth century and the decline of common law and private law has been commented on frequently by, to name just a few individualists, Leoni, Hayek, Mises, and the market economists. Furthermore, the rise of "sovereign" legislatures and the effects of majority-rule democracy have combined to turn law into a means for producing social "end-states" rather than general rules to guide individuals in the pursuit of their chosen purposes. Further, assiduous though legislatures and courts in western democracies have been in protecting civil liberties (although even this is less true of the United Kingdom than the United States), they have been active in the destruction of economic liberty, thus denying that symmetry between personal and economic freedom that is at the foundation of classical liberal social philosophy.

Law is intimately connected with freedom in classical law, not just in the trivial sense that a free society is a rule-governed order which diminishes the coercive power that political authorities have over individuals, but also in the theoretical sense that an explanation of liberty can be given which makes freedom and law consistent. Thus here the objection is to Bentham's observation that "[e]very law is an infraction of liberty."[1] For this implies that each freedom reducing act of law has to be justified on utilitarian or pragmatic grounds, opening up the possibilities of endless interventions with free actions on the ground that they advance some alleged collective good.

In the classical liberal theory of law, however, legal rules only vitiate liberty when the individual is directed to perform some action (as in the phenomena of taxation, conscription, and the direction of labor in a command economy). Most legal rules in classical law are prohibitions, forbidding certain courses of action, or authoritative procedures telling an individual how to do certain things (in Michael Oakeshott's phrase, proper law consists of "adverbial rules"[2]). The

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1 *See* I. BERLIN, *Two Concepts of Liberty*, in FOUR ESSAYS ON LIBERTY 148 (1969) (quoting Bentham).

2 Oakeshott, *The Rule of Law*, in ON HISTORY 119-64 (1983).

classical liberal maintains that free societies have been undermined precisely because the ambit of public law (involving the direction of people to specific purposes) has widened vastly, to the diminution of the range of private law. Of course, there are very serious difficulties for the classical lawyer in the question of the *content* of laws as prohibitions and authoritative procedures, and of the proper limits of public law since (with some exotic exceptions) most individualist jurists accept the necessity for a public realm. Nevertheless, the distinction between public and private is germane to the classical theory of law.

What is the foundation for the classical theory of law as a general system of rules for the guidance of individuals? The first thing to note is that classical law occupies a kind of midway position between what is conventionally known as natural law and positive law. The general anti-rationalist philosophical stance that most classical lawyers take means that they would deny that the human reason is capable of discerning an objective set of moral norms that can be used to validate all claims to law. A proper legal system is identified with traditional rules of conduct which have developed in response to human needs and circumstances, and these rules cannot be derived by the use of an unaided reason. However, classical lawyers cannot accept as "good" any rule or ukase merely because it emanates from a legislature or is consistent with a "rule of recoguition" (in the sense defined by H.L.A. Hart). Thus there can be standards of evaluation that derive from the notion of "law" itself rather than from some alleged objective morality. Furthermore, the classical lawyers' objections to some legislative enactments (and, indeed, court decisions) that are contrary to those natural regularities that economic science reveals show that there is a close connection between classical law and "natural" laws of economy and society. Thus, although many laws, regulations, and judicial decisions may be "legitimate" in a formal or positivist sense, their incongruence with what we know of social processes renders their claim to be law in the broad sense dubious: at the very least they will produce less complex orders.

The main feature of classical law that distinguishes it from almost all forms of positivism is its denial of the assumption that law requires an "author," some authoritative source that creates a legal order. Positivists in the English tradition of jurisprudence identify authorship with a sovereign while American Realists locate law creation in judicial activity itself, but both are at one in denying that rules to guide conduct can exist independently of the human will. But as Hayek and others have argued, this is an error, for a whole tradition of western legality shows that coherent and predictable

legal orders can develop independently of will, design, and intention. Of course, the common law is the paradigm case of this phenomenon and it is the *acceptance* of its rules as appropriate guides to conduct that constitutes their legality. As A.W.B. Simpson says: "Common Law rules enjoy whatever status they possess not because of the circumstances of their origin, but because of their continued reception."[3] Thus it is that the principles of the English law of contract have developed entirely without the aid of a single statute.

The attraction of the common law system to liberal individualists should be obvious: it has developed through individuals settling their disputes by reference to its rules, rules that exist independently of will and which themselves embody, contrary to positivism, non-articulated moral notions. To quote Simpson again: "In the Common Law system no very clear distinction exists between saying that a particular solution to a problem is in accordance with the law, and saying that it is the rational, fair or just solution."[4]

It is of course true that a liberal individualist order can be conceived of in terms of written enactments, bills of rights, the *Rechsstaat*, constitutions, and so on. Indeed, Hayek in *The Constitution of Liberty*[5] seems to be indifferent between the common law and some fixed code as the most efficient guarantor of a free and predictable legal order. However, in *Rules and Order*[6] the emphasis is almost entirely on the virtues of spontaneous or unplanned legal orders because of an important philosophical reason concerning the nature of human knowledge. This reason is that the human mind (in this context, the legislative "mind") is constitutionally incapable of constructing a code of rules appropriate for all human circumstances. The complexity of an advanced society means that all legal rules must be necessarily abstract, in contrast, say, to the rules of a primitive society. Many of the rules of an advanced society are not articulated fully in a code yet have a coguitive significance in the rational description of a legal order, and most knowledge in a legal order is "tacit" knowledge.

Hence legal reasoning cannot be mechanistic or deductive, applying fully-articulated principles to particular cases. Hayek, and others in the classical tradition, liken judicial activity to "puzzle-solving" in which a judge tries to find an appropriate rule to fit a particular case. It is not the function of the judge to bring about some desirable state of affairs but to find objectively the right deci-

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3 Simpson, *The Common Law and Legal Theory*, in OXFORD ESSAYS IN JURISPRUDENCE 85-86 (A.W.B. Simpson ed. 2d ser. 1973).

4 *Id.* at 79.

5 F.A. HAYEK, THE CONSTITUTION OF LIBERTY ch. 13 (1960).

6 F.A. HAYEK, RULES AND ORDER ch. 4 (1973).

sion within the general system of rules, a system that exists independently of judicial activity itself.

What is important in the classical theory of law is a distinction between "law" and "legislation." Law deals with the actions of private agents and has no purpose beyond providing a predictable framework for individuals to pursue their private ends with the minimum of collision with each other. It might be thought, however, that this predictability is compromised by the fact that the development of law is a matter of judicial decision-making which is essentially subjective and unpredictable. But this is to make too much of "hard" or difficult cases, cases for which no articulated rule seems appropriate. In fact, the bulk of social life is conducted in accordance with rules that are not in dispute. The relevant contrast ought to be between the unpredictability of judicial decision-making and the unpredictability of a complete Benthamite statutory system—which is a function very largely of the caprice of legislators.

Yet classical jurisprudence does not exclude "legislation" or public law, that is, law with a specific purpose. The common law is entirely appropriate for a market society: to enable individuals to exchange for their mutual benefit with reasonable security. But those very same individuals will not generate all that is socially desirable by their mutual exchanges: some public purposes (or public goods) require a framework of legislation or "made" law. Thus, although the usefulness of the common law in the application of new rules to handle "externality" problems without the need for legislative intervention has often been under-estimated, it is undoubtedly the case that in the classical theory of law the rationale for *legislation* lay in the vexed question of market failure. The major problem in classical jurisprudence has been the restriction of legislation to those areas of social and economic life which have a genuine public dimension. The relative demise of classical law has come about through the intrusion of public law or legislation into what is essentially the private domain: the continued interference with contracts, the close regulation of economic life on behalf of an alleged "public interest," and the taking of property and the construction of welfare schemes on the *a priori* assumption that private arrangements could not generate such desirable states of affairs.

If the common law or classical law is interpreted as a more or less self-consistent (although necessarily untidy) body of rules, articulated and non-articulated, it has a validity in a natural law sense independent of a constitution, a rule of recognition, a Kelsenian *Grundnorm*, or a sovereign's command. The validity of particular rules will be a function of their consistency with the whole system and their conformity to certain more or less universally true princi-

ples of human nature first adumbrated by David Hume and Adam Smith. These principles include the recognition of (a not necessarily harmful) self-interest, scarcity (therefore the need for property rules), the propensity to value the present higher than the future (time-preference), and so on.

The most decisive contrast between classical law and modern positive law is in the question of justice. Justice in classical law is the impartial application of universal rules, rules that do not discriminate and which privilege no persons or groups. The point about classical law is that it is "neutral" with regard to the various outcomes that emerge from a rule-governed process; legality is doing justice to individuals and not about the generating of a particular state of affairs. Nevertheless, it should be pointed out in passing that in an *indirect* utilitarian sense this limited concept of justice has been instrumental in (unintentionally) generating highly complex social orders. Modern positive law, however, looks to legislation to create desirable end-states, justified under the general rubric of "social justice." These range from straightforward income redistribution through to the creation of "equal" opportunities for named groups, groups that are in no way discriminated by the *law* itself. Irrespective of the counter-productive nature (in a utilitarian sense) of these measures, they are condemnable from a classical law point of view because of the damage they do to legality.

Why has classical law broken down? The question is of course unanswerable in any uncontroversial sense. Nevertheless, we can point to certain movements of opinion, historical developments, and institutional arrangements which have summed to produce an intellectual and political atmosphere in almost all western democracies which is unfavorable to the traditional notion of liberty under the law.

From the point of view of jurisprudence, particularly damaging was the tendency to validate law by some external criterion, such as a constitution. This may sound odd, but in classical law a constitution was a kind of super structure, a body of rules for the organization of government itself: in other words, *law* had a self-generated permanence and stability and persisted through, possibly, transient political arrangements. The trouble was that this necessary distinction between law and politics depended upon a tacit acceptance by political rulers that there was, indeed, such a distinction. The problem has been particularly acute in Britain whose unwritten constitution has in the twentieth century permitted the erosion of law by politics. Although not since the seventeenth century has anyone dared to suggest that the common law is the embodiment of "right

reason" and thence superior to statute, nevertheless for a very long time legislative reticence was preserved. This is no longer so.

The issue here is the sovereignty of parliament, and the organization of that institution, under modern democratic conditions, on party lines. For common law is always vulnerable to statute once it becomes accepted that legal validity is a function of the decisions of a representative body. In the pre-legislative era of classical law it might have been trne to say, as Hayek does repeatedly, that the common law principle which holds that a person is permitted to do whatever is not forbidden by law did embody more "rights" than those that could be enumerated in some "positive" declaration, but that claim sounds hollow in late twentieth-century Britain. Yet, curiously enough, and to the chagrin of spontaneous order theorists, the principle that ultimate legal validity is a function of parliamentary sovereignty was not planned, designed, or even thought of by anybody: it just happened. Indeed it is a principle of the common law. It could even be said that it is so because it was said to be so in a famous textbook on constitutional law written by Dicey.[7] There are, nevertheless, a few English constitutional lawyers who say, along with George and Ira Gershwin, that "it ain't necessarily so." Their day may yet come, especially with the impact of EEC law and international human rights law on the United Kingdom.[8]

Americans have been more fortunate than the British since from the very beginning they have had all the paraphernalia of *proper* constitutionalism: federalism, the separation of powers, judicial review, and so on. These were designed, especially judicial review, presumably, to protect classical law and the traditional rights that it embodies from the intrusion of legislation. This is in contrast to the British tradition which precludes the courts from adjudicating on the *substance* of a statute; there judicial review is limited to ministerial or other action under a necessarily legitimate law. Thus, although American law is consistent with positive law jurisprudence in that the validity of purported claims to law is established by "testing" them against some other rule, in contrast to Hayekian quasi-natural law procedures (which embody the universability criterion), there is no substantive difference between traditional American constitutionalism and classical law since the protections for individuality contained in the document can be interpreted as declarations of general common law principles. These are the kind of protections British classical lawyers, in the face of the erosion of the common

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7 A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (10th ed. 1964).

8 *See* Bradley, *The Sovereignty of Parliament—in Perpetuity*, in THE CHANGING CONSTITUTION 23-47 (J. Jowell & D. Oliver eds. 1985).

law in the United Kingdom, are beginning to wish obtained in their country.

The fact that such classical law protections for individuality no longer hold in the United States in the economic sphere is now a matter of great concern to individualist economists and lawyers. Since 1937 a supine Supreme Court has permitted a massive rise of public law, of economic regulation and the promotion of state welfare, most of which flies in the face of those standards of legality proclaimed by classical law.[9] All of this legislation goes beyond the provision of public goods via public law that is permitted by classical law, and all of it is written in defiance of well-established truths of economic theory. From the point of view of classical law jurisprudence the Supreme Court is now in the curious position of refusing to enforce "agreed-on" limitations on the legislature, while at the same time "creating" law (for example, in the areas of enforced integration and affirmative action) in a manner quite inconsistent with the traditional ideal of judicial activity.

Why all this should have occurred is not my concern here. However, certain developments in twentieth century American thought created an atmosphere in which such departures from the classical ideal of law could become intellectually respectable. In jurisprudence America's major contribution to positivism, realist legal theory, has some quite damaging implications for classical law.

For realism does presuppose that law must have an *author*. Since America has never had a sovereign legislature, and since the whole idea of judicial review necessitates that the courts play a crucial role in the determination of the content of law, it was almost inevitable that the judges should be seen as the *authors* of law. Hence the familiar expressions: "law is what the courts say it is" and "rules are only *sources* of law." The realist movement made all of its intellectual profit from the fact of its alertness to the simple truth that a mechanical jurisprudence is impossible. Because human language is necessarily imprecise (in Hart's memorable word, "open-textured") there can be no uncontroversial application of rules to particular cases; and this means that judges must have considerable discretion. The way that this is exercised will obviously have great significance for the development of law and society. Again, it was almost inevitable, given the nature of the "judicial decision," that attention should be directed towards all those *sociological* factors that were said to determine that decision. Thus there was a dramatic shift from a jurisprudence concerned with the *meaning* of rules to one in which rules have no objective existence at all. Fur-

9 *See* B. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980).

thermore, if judges are the real "authors" of law, then why should they not create a legal order which reflects social conditions and meets social demands? If there are no binding rules to guide conduct then the argument that social policy should replace law becomes almost irresistible.

The implications of this for classical law are serious. For the whole tradition of common law presupposes that an objective body of rules does *exist* (even though much of it may be incapable of precise articulation). If there were no independent and objective laws, a rule-governed society would be impossible. Although the law will develop spontaneously through interpretation of rules and the adjudication of difficult cases, classical law does not suppose that a judicial decision is therefore completely subjective, a disguised expression of class interest, or is determined by what the judges had for breakfast. The absence of a mechanical jurisprudence does not imply that discretion is entirely unfettered and that individuals cannot be guided by general rules, or judges bound by them, so that attention should be directed towards the prediction of court behavior on the basis of some extra-legal criteria. For this, to follow Hart's illuminating terminology, is to understand law entirely from the "external" point of view and leads to the elimination of those "internal" features of legality, for example, the obligatory nature of rules as constituting normative standards, which make a predictable legal order possible.[10]

In classical law, there is a specific role for the judiciary that depends upon their specialized *knowledge*. To quote Simpson yet again, law is "a body of practices observed and ideas received by a caste of lawyers."[11] In difficult cases, then, the criteria for adjudication should always be legal criteria rather than political criteria. The contemporary crisis in legal theory has come about largely through the erroneous belief that the courts have no other standards than those set by current social forces and transient coalitions of groups.

From this perspective, the dramatic shifts of opinion that have occurred in the Supreme Court, shifts that have done so much to lend credence to the realists' case, may not so much validate the claims of sociological determinism but simply illustrate the influence of erroneous *ideas*. I will mention briefly two: the idea that freedom is divisible and that "freedoms" can be hierarchically ordered; and the notion that legislatures, because they are democratically elected, require no further legal constraint (in America, the latter point applies only to economic legislation, the authors of

10 H.L.A. HART, THE CONCEPT OF LAW ch. 7 (1961).

11 Simpson, *supra* note 3, at 94.

which might just as well be called "sovereigns" despite all the apparatus of constitutionalism).

The role that classical law gives to the judiciary in a complex society must be that of enforcing general standards of legality even against the "democratic will" (as embodied in public law). The rationale for this is that in a complex society, characterized by competing and divergent ends and purposes, there is no such thing as a democratic will which is *not* also the imposition of some particular end-state or purpose on society at large. Even if there were a genuine majority will, as opposed to the coalition of interests that is a surrogate for the majority in all democratic societies, there is no reason why that should be decisive (least of all in America). Classical law presupposes only that there is a minimum of agreement on rules and practices. This requires judicial "creativity" only in the enforcement of such standards in difficult cases and in their protection against transient majorities in legislatures.

The restoration of the classical idea of law is a difficult task. As Hayek has often pointed out, the legal profession no longer resembles very closely Simpson's "caste" of experts, adept at puzzle-solving and the exploration of the meanings of rules. One legacy of realism is that lawyers have become obsessively concerned with the "social" aspects of law: less concerned with the *adjudication* of cases and more with the implementation of what they believe to be socially acceptable values. Again, as many individualists have pointed out, in economic judgments they have revealed themselves to be in the grip of erroneous doctrines.

Classical legal philosophers differ in their recommendations as to how an individualist legal order might be created and the rise of public law checked. There are two possibilities. First, that the courts might reassert the traditional role of review of economic legislation *or* that some reduction on the power of legislatures be instituted (perhaps a modification of the simply majority rule). Undoubtedly it is the "unreliability" of the courts that has led many individualists, from Hayek to Buchanan,[12] to demand more comprehensive constitutional rearrangements. Such constitutional rearrangements that have been proposed do not involve the creation of new law but rather the resurrection of traditional rules. They also recommend institutional forms which transmit genuine "opinion" more accurately than does conventional majority rule democracy.

12 *See* J. BUCHANAN, THE LIMITS OF LIBERTY (1975).