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One of the most neglected of all major legal philosophers is David Hume. His neglect as a specifically legal philosopher has followed from at least two unrelated causes. First, Hume's work on ethics and on political philosophy was widely opposed and even dismissed in his own time. Second, a generation or so after his death, the positive law tradition of Jeremy Bentham and John Austin took center-stage in legal philosophy and dominated the Anglo-Saxon tradition for more than a century thereafter. This latter phenomenon might not have occluded attention to Hume except that Bentham ([1789] 1970) and Austin ([1832] 1954) took over a continental and quasi Hobbesian principle that was not necessary for their approach but which came to define it in the view of many. That principle is that there must be a primary law giver who is above the law.

One could read this principle as analogous to the Aristotelian assumption that there must be a first mover, in this case, a first mover to get law started. Or one could read it as a Hobbesian assumption that we require an all powerful sovereign who is above the law but who gives and enforces the law for all other citizens. Hobbes sees his requirement as both logically and causally necessary. With a better sociological grasp of social organization, he might have recognized that this assumption is causally unnecessary for reasons that Hume grasps. At the time of Bentham and Austin, it was an utterly retrograde principle that a reading of Hume should have blocked. Hume gives us an account of how law can govern even without draconian force — indeed, even of how it can govern the governors themselves. This account is grounded in Hume's analysis of convention and how it can control us more or less spontaneously without a system of official sanctions (see Ardal 1977; 59-67; Haakonssen 1981, 16-18; Hartogh 2002, especially chapters 1 and 11). In the case of a legal system in a large modern nation, furthermore, those who make the system work and who contribute to its content number in the thousands or millions.

Hume introduces another important innovation here, however, that flies against the entire positive law approach. That approach is definitionalist. Bentham, who could be called the greatest definitionalist, Austin (XXX), Hans Kelsen (XXX), and H. L. A. Hart (XXX), among many others, start by defining law or a legal system, the concept of law, and they often never get far beyond definition. Their claim for a sovereign then seemingly becomes part of the definition of a legal system. If Hume the empiricist were asked to comment on that move, he would presumably say it was contrary to sense because we first have to know how such a system can be made to work. Ought implies can, and if an apparently wonderful rationalist system cannot work, we should take no interest in it. It is pointless to define law without connecting it to the human world it is to govern.

The background normative assumption in Hume's practical account is that law is facilitative, that it serves a coordination function (Fuller 1981). This is a pleasing vision because it opens onto the prospect of constructing and maintaining law as a convention in Hume's technical sense. Through helping us coordinate our activities, law serves mutual advantage. It is concerned, for example, not with whether we make a particular exchange but whether, if we wish to do so or stand to gain from doing so, the law will facilitate our doing it. Lon Fuller argues that

contract law, tort law, and much of the rest of law are part of the facilitative branches of law. He even wants to say that laws that are not facilitative but that attempt to block voluntary mutual choices, such as laws against crimes without victims, fail because their "morality" as law is wrong. Law can be very well used, however, to enforce contract fulfillment, which serves mutual advantage at least ex ante in every case and systematically in general. The difficulty and the reason for the seeming failure of laws against crimes without victims is that those laws do not serve the mutual advantage even ex ante.

Collective Provision, Individual Welfare

Much of modern political theory has focused on the problem of collectively providing for individual welfare. This move defines the modern theory of law. We might even say that this focus is the core contribution of Anglo-Saxon political theorists. It was de facto the whole point of Thomas Hobbes's political theory and it is the central point of Hume's. Both of these philosophers assume that social order will serve mutual advantage. Even the theory of justice of John Rawls, which is supposedly rationally mandated for anyone with a modicum of risk aversion, is mutually advantageous (Rawls [1971] 1999, 66, 110; see also Barry 1989). Rawls (111-12) assumes what he calls the mutually disinterested nature of citizens. The central move of such theory is typically to create an institutional structure that will guarantee the welfare of individuals who act sensibly, which is commonly to say, who act according to the simple canons of rational choice. We create institutions that will secure collective results through individualistic actions by citizens. Such political theory therefore does not require a specific moral commitment from citizens.

We might ask two major questions of this approach. Why should we go this way? And should we argue for law in the same way? The first question might be answered with another question: Why not build political theory on normative commitments that are not individualistic? After all, we know that people often do behave morally against their own interest, for example, when acting on behalf of their families or larger groups, when following moral rules of some kind, when being altruistic, or when being religious. In general, however, these motivations — perhaps apart from religious motivations — are sporadic and particular; they do not govern all behavior and we could not expect to achieve high levels of, for example, altruistic action if we designed our institutions to work well only if altruistic motivations were common or pervasive. Hume argues that we are in fact relatively generous and altruistic, but primarily toward our close associates, such as family members. Indeed, he supposes that the sum of all our concerns for others might even over weigh our self-love. But our concern for others is highly partial. Hume's (T3.2.1.12; SBN 481) formula for declining concern as others fade into the distance of our relationships recalls the quip of the geneticist J. B. S. Haldane on the evolution of altruism: I would lay down my life for two of my brothers or eight of my cousins.[i]

One might aspire to create a society of people for whom other-regarding motivations are very strong, as in the desire to create a new, publicly oriented Soviet man, a few of whom probably were created, or in the desire to create devout Muslims in Iran and Afghanistan, where many of whom surely have been created. But, in a mild variant of Hume's ([1741] 1985) dictum that we should design political institutions that would work well even if they were staffed with knaves, we can say that we should design social institutions that would work well even for citizens who are not generally and pervasively altruistic.

To the second question — whether law has a similar grounding with political theory

—it seems implausible for us to have a dramatically different normative foundation for law, whose purpose is largely to secure our political lives as well as our private lives, than we have for politics. Hobbes, Hume, and many other political theorists essentially put the two together without any argument for doing so. I think their instinct is right and I will do likewise, although I think we can actually reinforce the argument for politics from that for law.

We commonly can expect non-interested motivations to accomplish relatively specific and idiosyncratic — and usually local — purposes, but not to accomplish systematic public purposes. Moreover, we can generally expect individuals to see public interests or welfare as analogous to own-interests or welfare. That is, public welfare is merely the aggregation of individual welfares, especially when a particular action serves the welfare of virtually all. Much of what we must want of our political institutions is that they provide the collective equivalent of own-welfare. In an ordinal assessment, this is simply mutual advantage, which is own-welfare generalized to the collectivity. When altruistic and other ideal motivations enter, they can produce results that mutual-advantage considerations could not produce, and some of us may be grateful for such motivations in helping to eliminate racial inequality before the law and in attempting to reduce economic inequality through welfare programs. But we should also be grateful that general social order and much of the vast array of welfarist policies do not require such motivations. Indeed, we might even be grateful that interests have generally displaced passions in public debate and policy in many societies, as they did in England a couple of centuries ago (Hirschman 1977) and as they generally had done in the US until recently, when passions have made a grim and divisive return.[ii]

There presumably are and often have been societies that were governed relatively systematically by religious views, so that on many matters individuals might act for collective purposes or altruistically out of religious conviction. It is the initial legacy of liberalism that it cannot be grounded in the hope of any such resolution, because it was historically a response to religious division and deep disagreement. The first and still a central tenet of liberalism in politics is the toleration of varied religious beliefs (Locke[1689] 1950), as enunciated especially forcefully in the US constitutional provision of the separation of church and state. Moreover, much of the religious conviction at the time of Hobbes and John Locke, who were among the progenitors of liberal thinking, was specifically other worldly and antagonistic to welfare in this world. The seventeenth-century English Diggers, for example, preferred that people live the brutally poor life of subsistence farming because, they believed, one could attain proper Christian humility only in such a life (Winstanley [1652] 1973). If we do not share their religious views, we will not share their political views.

Virtually all of political philosophy in the rational choice mode has been directed at achieving relatively high levels of welfare, and Hobbes was very forceful in refusing to allow the focus of his concern to depart from welfare onto religious qualifications. Indeed, Hobbes's starting point is to found an all powerful government to secure the safety of individual citizens and to secure their possibilities of furthering their own welfare. We seek "not a bare preservation, but also all other contentments of life, which every man by lawful industry, without danger or hurt to the commonwealth, shall acquire to himself" (Hobbes, [1641] 1994) 30.1 [175]; see also 13.14 [63]). Few western political theorists since Hobbes have looked back from this stance, which is essentially foundational for modern western political theorists. Indeed, the nearest competitors with welfare as a moral political concern have been fairness and egalitarianism, which are themselves generally about the distribution of welfare and the

resources for providing welfare, and consent, which is a procedural or an ex ante concern and is often about welfare, fairness, or egalitarianism.

The rise of welfarist political theory was accompanied and stimulated by the rise of individualistic economic theory, as developed by Mandeville ([1714] 1965), Hume, Smith ([1776] 1976), and many others.[iii] Some of these theorists simultaneously presented rational choice political philosophies and individualistic market economic theories. Perhaps no one integrated the two better than Hume and J. S. Mill, for whom the two are clearly of a coherent piece. Most of these writers were utilitarians in political philosophy and more or less laissez faire market economists in economics. The development of economic theory and of moral philosophy largely separated over the course of the nineteenth century in Anglo-Saxon thought, and economic theory left political theory and utilitarian moral theory far behind in their technical developments in the twentieth century. Terence Hutchison (1988, 355) quips that Smith, who insisted on the joint enterprise of moral, political, and economic philosophy, was led as if by an invisible hand to bring about an end that was no part of his intention: "establishing political economy as a separate autonomous discipline." This was a disaster for political philosophy. The greater damage was done a century later by philosophers themselves, especially by G. E. Moore (1903) and his influence. The last major theorists who gave relatively equal consideration to moral and political theory on the one hand and to economic theory on the other were the philosopher Henry Sidgwick (1907) and the economist F. Y. Edgeworth (1881).

The value theory of this entire school of economic and political theory has been welfarist or mutual-advantage. Just as he does not lay out his strategic analysis as an abstract theory, so too Hume does not lay out his value theory as a whole apparel for the body of his moral psychology. He makes points about values almost always only in the context of whatever argument is at issue. It is therefore instructive to try to pull his views together, at least on the more important issues that seem to drive his major conclusions.

Unintended Consequences

A substantially neglected major argument of Hume is that social institutions are largely unplanned, they are products of social evolution. Hume's editors do not include this idea in their indexes [iv] In the phrase of Adam Ferguson ([1767] 1980, 122), writing a quarter-century after Hume, many of our institutions are "the result of human action, but not the execution of any design."[v] In the twentieth century, the strongest advocate of the thesis implicit in this phrase is F. A. Hayek with several discussions, including the paper "The Results of Human Action but not of Human Design."[vi] This principle is fundamentally important for Hume because he insists on naturalistic mechanisms against rationalist and teleological arguments for the creation of institutions of justice, the convention of promise-keeping, and the maintenance of social order, which are his three main explanatory concerns. Because there cannot be a single supreme authority making and securing all social arrangements over the centuries, the rationalist project is misguided. Hume's theory of law begins with the world of the ordinary people he analyzes in his moral and political philosophy and it immediately proceeds to explanation. His theory is therefore more a political-sociological explanation than it is a normative theory.

Hume (T3.2.6.6; SBN 529) repeatedly says such things as that the system of justice, "comprehending the interests of each individual, is of course advantageous to the public; tho' it be not intended for that purpose by the inventors." It is a social institution to be judged for its overall social benefits, but it is the product of individual contributions to its structure and

content. It is also true that even the maintenance of the system depends on individual actions taken for reasons other than concern for the public or collective benefit (see further, Hardin forthcoming, 49). This relationship is arguably the central issue in making Hume's political theory coherent and relatively complete and it would serve any legal theory that he might have devised equally well.

Implicit here is some device for the conversion of individual inputs into systematic structures, a device that is necessary if we are to avoid supposing that individuals in their own private interactions seek the overall justice of society. Surely they generally do not. Knud Haakonssen (1981, 20) says that, "to see justice in this way, as an unintended consequence of individual human actions, must be one of the boldest moves in the history of the philosophy of law." The irony is that this bold move sounds like mere common sense. Law is not planned, it evolves from the inputs of thousands of people over centuries. Other social norms grow and develop in like manner. Again, however, Hume had almost no impact on the development of British legal theory, which passed under the sway of continental rationalist legal theory. Hayek (1967a, 109) thinks Hume the greatest legal philosopher in Britain before Bentham, but his contributions are sorely neglected. The situation is better today.[vii]

Haakonssen (1981, 18) argues that the insight into unintended consequences allows Hume to escape the rationalism of Hobbes.[viii] And it lets him maintain his naturalist program of explanation of our sense of justice. He replaces natural law, in both its religious and its teleological variants, with a fully secular and empirical conception. These prior visions make law static, as though what is right today has always been right. Hume's evolutionary understanding allows us to fit today's law with today's conditions. Whereas killing in vengeance was once not merely legal but honorable, today it is murder. Property law under simpler conditions was simpler than it is today, when, among other things, it must take into consideration the external effects of the ways you might use your property. In essence, Hume sets the agenda for a modern understanding of law only to have his move blocked, however, by the positive law tradition with its often deadly definitional approach to law.

Incidentally, it is in this developmental sense that we have to understand Hume's so-called laws of nature. As with Hobbes, these are sociological laws, not moral or "natural" laws (Hume, T3.2.1.19; SBN 484; T3.2.4.1; SBN 514). They therefore change as the sociological context changes. No one today would want to be governed by the laws of medieval Europe or Japan. Indeed, the very idea is revolting. But those laws probably made considerable sense in the conditions of their times and for the people they governed.

Mutual Advantage

The ultimate collective value for an ordinalist is mutual advantage, which is, again, *the collective implication of self interest*. It is also the ordinal utilitarian principal of value or welfare. To say that an outcome of our choices is mutually advantageous is to say that it serves the interest of each and every one of us in comparison to the status quo ante. One could say that, in this view, collective value is emergent, it is merely what individuals want. But one could also say that this is what the value is: to let individual values prevail. To speak of collective value in any other sense is to import some additional notion of value into the discussion beyond the interests of individuals. Hobbes may have been constitutionally oblivious of any such additional notions of value; Vilfredo Pareto ([1927] 1971, 47-51) evidently believed them perverse. Hume does not assert a position on this issue, but the central concern of Hume's vision is the interests

and the psychologies of individuals, because understanding their interests and psychologies yields explanations of their social and moral views.[ix]

Incidentally, mutual advantage is the *only* plausible collective analog of self interest. Consider a cardinally additive measure, for example. More utility to you can compensate for less utility to me in such an additive measure. Of course, it cannot be my interest for you to benefit at my expense. Hence, a cardinally additive measure is not a collective analog of individual-level self interest.

When Hume generalizes beyond the individual it is from the individual's limited sympathy with the general run of the populace that he can say individuals would tend to approve general laws and institutions that would be in the interest of everyone. That is to say, his public vision is of the mutual advantage of all. Very few specific programs are likely to serve the interests of everyone, but the general creation of social order is a mutual-advantage program. In the first instance, of course, the creation of government is to the mutual advantage. This is a vision that Hume shares with Hobbes, for whom this is the only purpose of government: to create order in which individuals might by their own efforts come to prosper and, of course, in which individuals might be protected against violent harm from their fellow citizens. Similarly the general appeal of contract theories of government is that a contract to which all assent must inherently be expected ex ante to serve the mutual advantage.

Pareto combined the normative principle of mutual advantage with marginalist concern. Indeed, Pareto formulated what are now called the Pareto principles to avoid interpersonal comparisons and attendant moral judgments (Pareto [1927] 1971, 47-51). Hence, Pareto was Humean and Hobbesian in his motivations, at least in part. The criteria were introduced by Pareto not for recommending individual action but for making ordinal value judgments about states of affairs. They might therefore be used by a policy maker.

Hume states the vision of mutual advantage often. In his summary comparison of justice and various personal virtues and vices. For example, he says of justice that its distinguishing feature is that it serves the mutual advantage, and not merely the utility or interest of particular individuals Hume, T3.3.1.12; SBN 579). "The whole scheme … of law and justice is advantageous to the society and to every individual." The final phrase, "and to every individual," might clarify for many readers, but it merely defines mutual advantage, which is Hume's central motivating social principle. We all want the mutual advantage to be served because we all gain thereby. Brian Barry rightly characterizes Rawls's theory of justice as being a blend of mutual-advantage and egalitarian elements. He attributes to "Rawls as well as Hume the idea that justice represents the terms of rational cooperation for mutual advantage under the circumstances of justice" (Barry 1989, 148).

Mutual-advantage theories, however, have a major flaw that they share with the Pareto criteria: They are radically indeterminate. As in a claim for a Pareto improvement from some state of affairs to another in which everyone is better off or at least some are better off and no one is worse off, the principle of mutual advantage gives no criterion for selecting one of many possible mutual-advantage forms of government. For Hobbes, the order brought by any sovereign is better than the disorder in his awful state of nature. This is the only determinate claim one can make for any particular mutual-advantage resolution: that it is better than the world with no resolution. Moreover, indeterminacy is desirable in our theory here because it is the world of strategic interaction, which is indeterminate in general. We can achieve much greater determinacy in combining individuals' values only by use of crude devices that would be

far more objectionable than indeterminacy (Hardin 2003).

Both Hobbes and Hume suppose that any extant government is likely to be better than what would happen if we try to change the government because the change is apt to involve a chaotic and destructive period of transition. For them, this is not a conservative reluctance to see change or a mere prejudice in favor of the status quo, but is a deeply theoretical concern about causal relations. For Hobbes the hostility to changing the form of government would apply to a democratic as well as a draconian monarchical government. The problem is the costs and difficulty of re-coordinating from a present regime to a new one. One might suppose that these costs would seem even more difficult to Hume because it is not merely re-coordinating that is required but the creation of a new convention to replace a present convention.

Hume has a resolution of the general problem of normative indeterminacy. He supposes an actual government is an unintended consequence of actions taken for many reasons. We did not sit down to design our political order, and we therefore missed the opportunity to quarrel over exactly which form we should adopt. This dodge is especially apt for Hume because he will not make any normative argument in favor of a form of government beyond its serving mutual advantage, which includes the protection of individual liberties and the consequent enabling of economic creativity and progress. What he wants is explanation, not justification. And the evolution of government from earlier stages of social organization is explanation.[x]

One could make mutual advantage a normative principle, as it arguably is in Rawls's theory of justice. But for Hume mutual advantage is sometimes merely functional in that it satisfies our interests to some degree. He often argues for mutual advantage not because it is utilitarian but because it is the aggregate implication or version of self interest — he is evidently explaining, not evaluating. Mutual advantage is a value only in the sense that it gives each of us what we want in comparison to some other state of affairs. It is just self interest in the sense that I get the improvement in my own state of affairs only through the mutual-advantage move that also makes others better off. I therefore can be motivated for the mutual advantage entirely from my own interests. If I view the fates of all others with at least mild sympathy and I also see that the improvement in their fates is coupled with improvement in my own, then I have very strong reason to support a mutual-advantage move for all of us. Moreover, because I know that others will not favor special treatment of me that is not coupled with mutual advantage, I am likely to see any mutual-advantage move as about as good a public choice as I can expect.

Incidentally, contractarianism in Hobbes's limited variant, in which the compact does nothing more than select a government, is a mutual-advantage theory. It becomes a normative theory only if it is further assumed, as by Locke and many contemporary contractarians, that our agreement to the social compact gives us an obligation of the kind that promising is also thought to give us. Hobbes supposes that the agreement has no binding force over us but that the regime, once in place, does have. Hume ([1748] 1985) rightly thinks the whole exercise of asserting an argument from a social contract is absurd.

In debates on these arguments, by far the most common query or challenge is to pose a particular case in which a person is a loser from the application of the law, the rules of property, or some other convention that is justified by an argument from mutual advantage. Such an objection is based on a fundamental misconception. The argument for a mutual-advantage convention is that having the overall system — for example, of law — makes us better off than we would have been without the system of law. This is an ex ante argument. Moreover, the formulation of the commonplace objection is wrong-headed in that it typically supposes a one-

off example. To be a credible objection it must be formulated as a whole-cloth assertion of the idea that the chaos of an unordered society would be preferred by at least one person over a well-ordered society. Ex ante it is virtually inconceivable that this is true. Even a dedicated criminal who wishes to live by theft must want the society to be well ordered enough to lead to great productivity.

What is true, of course, and what might be objectionable, is that any change of current rules or institutions is likely to have losers who would have been better off keeping the old rules or institutions. But if the possibilities for change are themselves part of the old system, this objection does not work either. One can object that replacing the former Soviet system with a developing market economy and an open democracy has produced many losers. That is true — indeed, a large fraction of those over age fifty at the time of the initial change must have been losers and must have little hope of ever being winners. But one probably cannot design the institution that would have guaranteed the permanent stability of the prior system, which, as static as it may have been, was inherently subject to endogenous change, including the possibility of collapse that would have produced more and bigger losers.

Hume lived before the age of the democratic revolution,[xi] which we could date with the Declaration of Independence of the US colonies from Great Britain in the year Hume died. But his political philosophy is democratic in the sense that it commends aggregation of the individual interests or welfares of citizens into a mutually advantageous outcome under mutual-advantage political institutions. Of course, even in liberal nations actual political institutions often fail to represent mutual advantage because they are, for example, captured by well organized groups or corporations that can use the institutions to their own advantage. Seeking one's own welfare is not equivalent to seeking mutual-advantage outcomes. Institutional design can mitigate these problems by channeling the urge to enhance own-welfare in less destructive ways. Contemporary Humean political philosophers should put such design issues at the core of their applied theory.

Growth of a Legal System

If justice or, more accurately, the institutions of justice as order are unintended consequences of our actions primarily for our own interests and the interests of our near associates, should we expect them to produce such justice? And why? Hobbes gives us half of a solution to the problem of social order with his all-powerful sovereign, and the positive law theorists give us half of a solution to the problem of the establishment and maintenance of a legal system with their sovereign law-giver who is above the law. Hume rejects their half solutions and gives a complete solution to both problems with his argument from convention. Indeed, we can frame his argument as the dual convention theory of social and legal order. The populace follow the convention of acquiescing in what government does, and the personnel of government follow the convention of supporting that government by fulfilling their roles in it. The power of convention is such that we have no need of an all-powerful sovereign or a law-giver above the law to constrain either of these groups. Members of both groups are fully subject to law.[xii]

Once we have resolved the traditional problems of the sources of social order and of a stable system of law, we face a new and more complex problem: Why does law grow, as it seems to do in relatively well ordered societies? This is similar to the question posed in law and economics of why we should expect the common law to become increasingly efficient in any realm to which it is applied (Priest 1977; Rubin 1977). But it is more general that this question. If

it is accepted that law typically (although not always) serves the mutual advantage, then we may have the beginnings of an answer to the question.

In postwar Anglo-American legal theory, perhaps the most persistent voice in favor of seeing law as serving the mutual advantage has been Lon Fuller (1981, 72-3), who speaks of the coordination function of laws in certain branches, which serve "to order and facilitate interaction." To say that such branches of law as contract, agency, marriage and divorce, property, and rules of court procedure "would be unnecessary if men were moral is like saying language could be dispensed with if only men were intelligent enough to communicate without it." Fuller implicitly carries the argument further: having certain laws helps us to coordinate, hence to produce further laws, hence to coordinate better.

Not surprisingly, because a legal system is established as a convention, this is a functional explanation of legal development. Define: X is the legal system (even a very primitive one); F is the growth of law to coordinate the populace; P is the populace. Now F is an effect of X; F is beneficial for P; and F maintains X by a causal feedback loop passing through P:

1. Growth of law (F) is an *effect* of the legal system (X);
2. Growth of law (F) is *beneficial* for the populace (P);
3. Growth of law (F) maintains the legal system (X) by a causal *feedback* loop passing through the populace (P) who in their own interest bring cases or support legislation that pushes legal development.

Note three aspects of this model of the growth of law. At least piecemeal, the changes have a direction toward greater complexity and detail in the law. And, by settling details, they will tend to increase the refinement of expectations for the outcomes of future interactions. But this means that they will typically contribute to the mutual advantage in at least one simple if limited way. The more each of us can act according to stable expectations, the better we can organize our activities and interactions to best serve our interests. Given this value, one may sensibly say that in the adjudication of any legislation, the judicial focus should be "not the resolution of the immediate dispute but its impact on the future conduct of others" (Scott 1975, 938). This sounds like a variant of Judge Learned Hand's dictum (the Hand rule) that, when a judge decides a case that goes beyond settled law, the most important part of the resolution is the effect of the ruling on future behavior, on the expectations and therefore the plans and actions of many people. Hence, judges should be deliberately concerned with this future aspect of their decisions.

To go much further and to say that adjudication and litigation generally push law in ways that serve mutual advantage will be very difficult, but that is the program we must undertake if we are to settle the issue whether law grows in good ways through natural, unregulated inputs. Hartogh discusses a Dutch legal case that almost fits the functional model here. In bare outline, this is the case. Maring's farmhouse burned down and he expected his insurance to cover the costs of rebuilding it. His insurance company wished to pay the lesser amount of the value his farmhouse would have had in the market, and its choice was supported by insurance law. The Dutch high court ruled that restrictions in the law that limited recovery to the market value ran against the larger public interest of customs that had developed in the rental market. Those customs had developed to fit the mutual advantage in accepting the risks of renting out one's property.

To produce the wanted growth of law in a good direction, however, the Dutch high court had to specifically take the mutual advantage of a social practice into account. Hume

suggests why this seemingly public interested motivation might prevail. Just because the judges have no stake in the present case, they can rule in a public spirited way. And if their legal system favors mutual advantage, they will rule for the mutual advantage rule in the present case and will therefore likely affect action to block future cases of the same kind. (We might also suppose that if law does not develop in the face of experience and changing circumstances, it will begin to break down.)

To argue for the tendency of the system to grow in beneficial directions might seem to require a less overt mechanism than judicial commitment to that value. An obvious candidate is the supposition that, when the system does not produce mutually advantageous rules for future interactions, those at a disadvantage will challenge those rules. But we might also invoke a quasi interested reason for judges to rule in this way. Insofar as the present case is one in which they have no interest, they can rule in the way that would most likely serve their interest in the future. That would commonly be in favor of a mutual-advantage rule, especially if they have no reason to expect that they will far more likely fall on one side of the rule than the other.

We may neither intend nor recognize the secondary coordination benefit of the development of laws. Moreover, our system of law will grow in various ways in response to contingencies along the way, so that it will likely be quite different from the system that grows in similar ways in a neighboring jurisdiction. As Hume (T3.2.3.n17¶13; SBN 513n) says, it is the proper business of municipal law to fix what the principles of human nature have left undetermined, which is virtually all of the detail of the law. Fixing the law happens by trial and error and further fixing.

What is important, again, is that we have a structure within which to build stable mutual expectations. It is less important whether we have a French or English legal system than that we have some well-developed legal system. Which of a vast array of possible structures we come to have is a matter of convention and of happenstance. Overall what we have after a generation or more will be an unintended consequence and not a "rational" design. For example, as Hume (EPM3.42; SBN 202) notes, the words "*inheritance* and *contract*, stand for ideas infinitely complicated; and to define them exactly, a hundred volumes of laws, and a thousand volumes of commentators, have not been found sufficient." Such complexity argues against a rationalist account of the rightness of these detailed laws. "Does nature, whose instincts in men are all simple, embrace such complicated and artificial objects, and create a rational creature, without trusting any thing to the operation of his reason?" No, and therefore these laws are artificial devices for regulating social order.

To argue that a particular system is "necessary" or "right" is very hard, because there is commonly evidence that other possibilities are attractive, plausibly even superior in principle. But it may also be clear that to change from a system that we already have in place to some in-principle more attractive alternative would be very difficult and plausibly too costly to justify the change. The more pervasive, articulated, and important the system is, the more likely this will be true. Swedes could change their convention of driving on the left to driving on the right at modest cost; they could not change their system of jurisprudence at low enough cost to justify serious thought to select superior systems. To this day, the people of the state of Louisiana, formerly part of colonial France, live under a legal system that is based on the Napoleonic Code, while the US Federal system and the systems of the other forty-nine states are based on the British common law. The only thing that might make an extant system right in such cases is that it is extant. We could not expect to design an ideal or even a much better system, if we include

the costs of transition as a liability of the supposedly superior systsem. This is merely an instance of Hume's general claims that rationalist theories of morality and government are inherently irrelevant to our lives (Hardin forthcoming, chapter 1). We might, however, be able to revise our system by drawing on the experience of others.

Self-reinforcing conventions can be harmful as well as beneficial. For example, the very strong Chinese convention of foot-binding was horrendously harmful and the still surviving convention of female genital mutilation is similarly horrendously brutal. If we could redesign government, law, norms, practices, and so forth, we might immediately choose to do so when they go this badly wrong. The foot-binding convention was deliberately changed (Mackie 1966), and the practice of female genital mutilation is being eradicated in some parts of Africa. Both cases have involved substantial efforts to re-coordinate a population's beliefs about beauty and the role of women.

In the light of such harmful norms, we must grant in general that it is possible to contest whether some pervasive convention costs us more than it harms us. This fact fits Hume's general view that conventions do not have a normative valence per se (almost nothing does). Some are beneficial and some are harmful. Some may be generally beneficial when they get underway only later to turn less than optimal or even fairly harmful. But then a particular convention might have power to reinforce itself through the functional feedback system that has been operating for it. The Swedish driving rule is an obvious case in point.

To replace an extant self-enforcing convention can be extremely difficult. It will most likely have come into existence spontaneously, through piecemeal individual-level coordinations that finally induce virtually everyone to join the coordination, so that then its resolution is a convention. Re-coordination on a new convention cannot be that easy because it will require the virtually simultaneous switch of almost everyone to the new coordination. In the Swedish driving case, this was accomplished by a powerful central government that could mobilize massive resources, coordinate many activities of officials across the nation, and simply mandate that all traffic stop one early morning while traffic signs and signals were instantly switched over, all at once, across the entire city of Stockholm and the entire nation. When the British took their driving convention to India and Australia, they could impose it with no significant cost because there was no pervasive convention to be replaced.

Hume places such value on legal stability that he supposes it is necessary for us to accept the finality of judges' decisions in court cases: "Judges too, even though their sentence be erroneous and illegal, must be allowed, for the sake of peace and order, to have decisive authority, and ultimately to determine property" (Hume, EPM3.43; SBN 202). He must have at least two related reasons for this conclusion. First, we generally benefit from reaching conclusive resolutions. In advance of our involvement in any particular legal conflict, we would all prefer to have a system that reaches conclusive resolution without too great delay or cost. Having such a system is ex ante mutually advantageous. Second, we benefit from having designated agencies that reach finality. The buck should stop somewhere, preferably without too long a trip getting there. Again, this is a claim of mutual advantage. We all must want, ex ante, to have a system in which it is clear to all where and when a dispute is over so that we can move on with our lives.[xiii] Knowing that there will be conclusive resolutions and that there are final authorities gives all of us at least some stable expectations that enable us to have greater control over our own lives. If we were saying what features we most want from our legal system, such stable expectations would rank high in the list.

Concluding Remarks

What many theorists want is system-level justification and assessment of law and a legal system. What we have in its production is individual-level inputs with occasionally middle-level revisions that are relatively systematic for small pieces of the system. The conversion of these inputs into anything systematic is our biggest burden in understanding law. This is not a claim of legal theory but of the sociology of law. We can occasionally step back and draft or revise some major part of the law, as various "restatements" have done in the US. But we cannot generally escape the fact that the system as it comes to us is a vast unintended consequence whose overall structure we cannot grasp.

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[*] An earlier, rough version of this paper was presented at the meetings of the ALSP, Dublin, June 2006.

[i] See further, Hardin 2006.

[ii] In the short run of the past decade, passions seem to be gaining ground in the US as American politics has become vitriolic and vile. Oddly, however, one might argue that the real conflict is over interests with massive redistribution upward from the middle and poorer classes contributing to the wealthy class.

[iii] Although he did not add major new insights, Mill ([1848] 1965) gives an articulate survey of economic theory in his time and essentially joins it with his utilitarian moral theory.

[iv] The editors are Norton and Norton, Beauchamp, and Selby-Bigge and Nidditch.

[v] Ferguson, writing nearly three decades after Hume's discussion, attributes this insight to Cardinal de Retz's *Memoirs*, which are available online from Project Gutenberg, where they can be searched for each of the main words in Ferguson's formula. I cannot find any near equivalent of his phrase there. The nearest is a strictly individual-level, not societal-level, claim: "With a design to do good, he did evil."

[vi] Hayek, checking the *Memoirs* of de Retz, finds only Cromwell's supposed claim that one never climbs higher than when one does not know where one is going (Hayek 1967b, 96n). One would not have wanted to quote that line to Sir Edmund Hillary.

[vii] For example, see Haakonssen's (1981) treatment of the jurisprudence of Hume and Smith.

[viii] As argued in Hardin (forthcoming, chapter 9), this is one of three ways in which

Hume's understanding of convention resolves a problem in Hobbes.

[ix] Frank Knight (1956, 267) says, "The supreme and inestimable merit of the exchange mechanism is that it enables a vast number of people to co-operate in the use of means to achieve ends as far as their interests are mutual, without arguing or in any way agreeing about either the ends or the methods of achieving them." Mutual advantage does not entail agreement on ends. Exchange requires either differential efficiency in producing things or differential tastes in consuming things. It also does not entail interpersonal comparisons of our valuations of things we exchange. Without such comparisons, we can have only mutual advantage, not equality, as a measure of improvement of our joint state of affairs.

[x] There is a branch of game theory that partially assumes away the problem of Hobbes's state of nature. In cooperative game theory it is assumed that players can make binding agreements. Of course, if we can make binding agreements, we can resolve ordinary exchange in two-person prisoner's dilemmas. The problem that provokes Hume's and Hobbes's concern when there is no government is the inability to make binding mutually beneficial agreements or exchanges. The creation of government makes it possible for us to reach such agreements in many contexts, so that it enables us to reach far better outcomes for ourselves. Hume recognizes additionally that we can be fairly bound by the incentive structure of ongoing relationships and of conventions and their norms. This works in small societies and in subgroups of large societies.

[xi] Palmer ( ).

[xii] Although they might use their power of office to delay or subvert efforts to bring them to account.

[xiii] General Leslie Groves, who directed the Manhattan Project, reputedly gave a final

speech at the end of the program and the war, saying to his employee-colleagues, now it is time for all of us to go back to the rest of our lives.