

WHICH KIND OF LEGAL ORDER?

Logical Coherence and Praxeological Coherence

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1. Prologue

What does it mean to say that the common law is an "abstract order"? While classical liberals and Hayekian legal theorists, among others, use the term often, there is insufficient understanding of what it means. Although both words are difficult, the more difficult, by far, is the word "order." So it will be useful, at the beginning, to concentrate our attention on the meaning that Hayek attaches to this term, both in the context of the law and of an economy or "catallaxy." An order is a relatively permanent structure that "can be preserved throughout a process of change".¹ To marry thus the idea of order to the idea of change is a formidable intellectual challenge. Hayek was by no means the first to attempt this. He was preceded in this effort by the philosopher Henri Bergson² who sought to understand both the continuity and inventiveness of time. In the analysis of law and legal systems, there is also a large literature – some of which predates Hayek's work – among French and German jurists which is concerned with the closely related question of what it means to say that the law is a "system".³

Hayek makes it clear that the main sense in which he means the common law is an order is that the law produces, or better, allows to be produced, an "order of actions" on the part of individuals in the catallaxy.⁴ This order of actions is a coordination of the actions and plans of economic actors. Without right now inquiring into the nature of the coordination, suffice it to say that the law, in

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¹ Hayek-1978, p. 184.

² Bergson-1911.

³ Van De Kerchove/Ost-1994.

⁴ Hayek-1973, pp. 98-9.

Hayek's view, enhances the probability that individual actors can implement the plans they have made.⁵ So, at least *prima facie*, the order of the common law is not an order of the law *per se*, but an extra-legal order.⁶ An order made possible by a collection of laws and legal institutions.

There is, however, no reason to believe that a simple "collection" of laws is sufficient to generate the complex order of actions to which Hayek refers. A set of rules which is not coherent *in some way* is unlikely to give rise to a set of actions which is orderly along a praxeologically-relevant dimension. To be more specific, if market participants are to coordinate their plans and actions, these must be based upon common expectations of the rules of law to which their actions will be subject. The common and correct expectations of the relevant legal rules governing actions must be based on some as-yet unidentified characteristics of the collection of laws. Thus, it must be the case that to have an "order of actions" there must be an "order of rules."

If, then, "order" must be taken as referring not only to the actions of market participants but also to the interrelations among legal rules, we are faced with a problem. A completely static system of law cannot sustain a coordinated order of actions over real time, even in principle. As extra-legal circumstances change, a static legal order would be indeterminate with respect to the rights and liabilities of parties in unprecedented circumstances. On the other hand, an emergent system of law also cannot sustain an order of actions. This is because the dynamic quality of the law will itself upset the common expectations of the economic-legal actors. So the order of rules, upon which Hayek based his vision of a free society, must be an intermediate case between a static equilibrium system and a truly emergent process. It must somehow reconcile the certainty of the former with the adaptability of the latter. We shall explore this in greater depth in the next section.

2. The Question

Within any functioning legal order, there is a tension between the need for certainty and that for adaptation to new circumstances. This has been the subject of much scholarly discussion and debate over the role of precedent, or adherence to the previously-decided cases, in the common law. In his justly-famous twelve-volume, *A History of English Law*, Sir William Holdsworth declares his belief that the English common law dealt with this dual need in a unique way:

Both the general rule that decided cases are authoritative, and the reservations with which that rule is accompanied, are due historically to

⁵ Coordination in real time can be only a loose coordination because of both endogenous learning and exogenous shocks. See Rizzo-1996, pp. xiii-xxxiii.

⁶ Hayek-1973, pp. 115-18.

*the very gradual way in which our modern theory as to the authority of decided cases was developed. As a result of that evolution English lawyers have invented a wholly original method of developing law. It is a method of developing law which preserves the continuity of legal doctrine, and is at the same time eminently adaptable to the needs of a changing society.*⁷

If we can overlook the self-congratulatory tone, we can appreciate the implication of his claim, namely, that the central problems of "continuity" and adaptation are at the heart of the common law method. In Holdsworth's view, the common law is unique in that "it hits the golden mean between too much flexibility and too much rigidity".⁸ In effect, the claim is being made that the English common law has at least two virtues: first, it creates a framework in which actors have certainty, relative to the "Continental system," as to what the law requires, and, second, that the law is not static, but is capable of adapting to new, extra-legal circumstances. The familiarity of these asserted virtues should not inure us to the, at least *prima facie*, incompatibility of certainty and adaptability. It would seem that adaptability implies change in the law, and that such change introduces an unpredictable element in the legal framework. Thus, the asserted twin virtues of the English common law constitute a paradox. How can the same legal system embody both virtues? We shall attempt to dissolve the paradox by focusing our analysis on the following question: *How can the traditional common law adapt to novel circumstances and still promote the certainty of legal expectations and, hence, the general coordination of plans?*

There are a number of approaches that can be taken in answering this question. The route that might be most expected of an economist is to follow Holdsworth's lead in thinking of the common law as striking a balance at the margin between the two incompatibles, certainty and flexibility. As attractive as this may be to some, we can see no point in following this route. In the absence of either a central decision-maker choosing the "optimal" point or a clear understanding of the decentralized common-law decision process (which is not available at this time), it is nothing more than crude holistic reasoning to imagine that somehow a socially-optimal balance is struck between the two competing virtues. It is even more misguided to claim, without evidence, that the English common law "hits the golden mean between too much flexibility and too much rigidity."

Our approach is, at once, more modest and more ambitious than the route mapped out by optimal tradeoffs at the margin. It is more modest because it makes no grand claim of social optimality. But it is more ambitious in that it attempts to show that "certainty" and adaptability are not incompatible. In fact, in a world of change in the extra-legal environment, certainty is not possible without adaptability. The law endures by changing.

⁷ Holdsworth-1938, vol. 12, p. 157.

⁸ Holdsworth-1938, vol. 12, p. 160.

3. Kinds of Order

It will be useful in the analysis that follows to distinguish between two kinds of order, both of which have been called "legal order." The first is the order or logical coherence of the law itself. The second is the order, in the sense of coordination, of the individual actions to which the law gives rise, or praxeological coherence. Some thinkers have believed that law which is, from a logical point of view, the most coherent or orderly will produce the most orderly individual actions and plans, that is, the most coordinated plans. It is quite "Cartesian" to believe that the intellectual order displayed by a code or other statement of the law will be mirrored, in the practical realm, by the harmonious behavior of those subject to the law. While there is nothing wrong with logical coherence *per se*, it is simply the case that such coherence is neither necessary nor sufficient to generate the coordination of plans.

3.1. Order of Law: Logical Coherence

The subject of coherence is extremely complex and cannot be treated adequately here. For our purposes, however, only a few aspects of this topic must be discussed. We are primarily interested in fixing the reader's attention on an example of a logically coherent system of law, and demonstrating how such a system does not in itself generate, or allow to be generated, a coordination of plans.

Let us begin with an interesting statement by the German philosopher, G.W.F. Leibniz, who had the ambition of rendering law as a complete axiomatic system. In criticizing some aspects of Roman law, Leibniz said that he

*wishes to construct [a legal] order corresponding to nature, and that can only be geometrical: commencing from first truths, to draw their direct consequences, and from consequence to consequence, arrive in the most logical way possible at an axiomatic system.*⁹

It was the view of those legal "geometers" following Leibniz that "[o]nce one accepted that law could be made logical and that legal argument could be shaped along deductive lines, legal results became more predictable, certain and comprehensible".¹⁰ This idea spread not only throughout the Continent, but also to the common-law jurisdictions in the late eighteenth and early nineteenth centuries. However, the main problem one would encounter in trying to implement this ambitious program is in the choice of premises. An axiomatic system of law would stand little chance of enhancing plan coordination if the premises were continually changing since presumably the deductions from them would also be

⁹ Van De Kerchove/Ost-1994, p. 39.

¹⁰ Hoeflich-1986, p. 102.

changing, and hence the legal consequences of individual behavior would become more uncertain. On the other hand, fixed premises cannot be particularistic because such premises would not permit application of the law to future situations to the extent that the same circumstances do not recur. To see this, consider the following illustration. Suppose a rule of law is established that says: "Whenever a person riding a horse runs into pigs crossing the road he is liable for damages to the pigs." Can this rule be used as a premise in a legal argument in future cases? Presumably it can, but only if the facts recur. Future situations, however, will always differ to some degree from the original fact pattern. If the accident is between a person riding in coach and the pigs, does the rule still govern? Or suppose it is between an automobile and a pedestrian? Clearly, a premise as specific to individual circumstances as the original rule will not be adequate to make the law or its application "certain" in any but the most static societies.

We are led, therefore, to the conclusion that a coherent system of law must have premises that are both fixed and abstract (or general) in order to meet the necessary conditions for certainty. Let us now consider this point a little more deeply. How would one go about rendering the above rule in more abstract terms? This is a very difficult question, but it is obvious that there is more than one direction in which we could go. To "abstract" is to eliminate irrelevant specifics and to focus on what is essential in the rule. Among the possibilities is that the nature of the colliding entities is unimportant, but what is important is the character of their interaction. Perhaps the idea of "causing harm" is central. So now it does not matter whether the parties are men-on-horses or automobiles, or pigs or pedestrians. What matters is who caused harm to whom. On the other hand, one could imagine that the direction of causation is not essential, but the relative avoidance capacities of the parties is. "Who could have avoided the interaction at lesser cost?" then becomes the essential issue. It is easy to see that the process of abstraction tends to replace concrete rules with general standards. In the last case, the standard is one of economic efficiency or wealth maximization.

Our brief story of legal coherence and deductivism began with the philosopher Leibniz and now ends with a contemporary example of the Leibnizian approach to law: the so-called economic or, more exactly, the wealth-maximization theory of the law. This hypothesis has been associated with, among others, William Landes and Richard Posner.

For the purposes of our analysis, the reader should fix in his mind the wealth-maximization standard as the highest-level, or most general, premise of a logically coherent system of law. When we speak of the "order of the law" it will be useful for the reader to think of this efficiency approach, at least in its ideal form, as an extreme example of legal coherence.¹¹

¹¹ The logical form of legal coherence should not be confused with deduction *per se*. The former embraces more than the deductive style of reasoning. As explained in the text above, "logical coherence" requires fixed and general premises.

3.2. Order of Actions: Praxeological Coherence

The order of actions that, in Hayek's view, the common law enhances is a mutual consistency or coordination of plans. But for plans to be coordinated in an *ex ante* sense, expectations of the future must be consistent, that is, it must be possible in principle for all the relevant plans to be carried out successfully. When, for example, two contracting individuals have inconsistent expectations then at least one of the parties will not be able to implement his plan in an optimal fashion. In the context of a legal system, this must mean that the relevant parties' expectations of the law – their legal rights and obligations – must be the same or tolerably¹² in agreement. This form of consistency is obviously not sufficient to produce a full coordination of plans between the contracting parties because there are many extra-legal factors on which the success of plans depends. Nevertheless, consistency of legal expectations is necessary: Each party must be able to predict what the other will do in legally relevant circumstances.

The requirement of consistency also extends to the judges' expectations about each other's behavior. Will fellow judges decide similar cases (or the same case on appeal) in the same way? In general, judges do not like to be out of step with their colleagues nor do they like to be over-ruled by higher courts. Even in those cases where a judge departs from previous rules to respond creatively to a new situation, he wants other judges to see the wisdom of his departure and follow him in future similar cases. Thus, judges must be able to predict the behavior of other judges in order, in most situations, to avoid going outside of the range of "acceptable" opinion. In those cases where a judge seeks to depart, he must not only have a good idea of what he is departing from, but also will be concerned that other judges could, in principle, follow his legal innovation.

To the extent that a legal system can produce consistent expectations among those governed by the law as well as among those judges who are making initial decisions or taking appeals, it generates a kind of "coherence." Here we are not referring to the logical coherence of the law itself, as we did in the previous section, but to the "coherence" or compatibility of the plans of the relevant actors in the legal system. We call the latter "praxeological coherence" and the former "logical coherence."

In our attempt to answer the central question of this Article, we must first inquire whether a logically coherent system of law has the capacity to engender praxeological coherence, or perhaps more descriptively, the coordination of legal expectations and plans? If the answer is no, as we shall argue it is, then we can approach an answer to our central question by understanding how the system which Hayek had in mind overcomes the deficiencies of a Leibnizian axiomatic system of law.

¹² This is an example of the point made in note 5 that coordination in real time cannot be exact.

4. The Mirage of Wealth Maximization

In order to add specificity to our discussion of the consequences of a logically coherent system of law, we shall imagine an "ideal" legal system which has as its central goal, social wealth maximization. In effect, the highest-level normative premise underlying all logical arguments in such a system is that legal rights and obligations should be determined such that wealth is maximized. If this serves as our "proxy" for a logically coherent system of law, then we must ask whether the requirements of a wealth-maximizing legal order are of such a nature as to bring about the coordination of legal plans. Will logical coherence, in the form of wealth-maximization, bring about praxeological coherence?

Consider a case characterized by a novel set of circumstances – perhaps the first accident between the driver of an automobile and a pedestrian crossing the road. How should the judge decide? More specifically, what style of reasoning should the judge adopt? For our purposes there are two classes of alternatives: top-down reasoning and bottom-up reasoning.

4.1. Top-Down Legal Reasoning

This form of reasoning is similar to the technique followed by natural scientists, and therefore has acquired an appeal in many disciplines which are trying to emulate the successes of "science" without, of course, paying much attention to the differences in subject matter. Nevertheless, in top-down reasoning a hypothesis is somehow generated and then it is tested against future or not-yet-observed events. A straight-forward description of this method in law has been given by Richard Posner:

In reasoning from the top down, the judge or other legal analyst invents or adopts a theory about an area of law — perhaps about all law — and uses it to organize, criticize, accept or reject, explain or explain away, distinguish or amplify the decided cases to make them conform to the theory and to generate an outcome in each new case as it arises that will be consistent with the theory and with the cases accepted as authoritative within the theory. The theory need not be, perhaps never can be, drawn "from" law; it surely need not be articulated in lawyers' jargon.¹³

The reader should note a certain lack of concern for the origin or source of the theory. What matters to a top-down legal theorist is not where the theory comes from, but how successful it is. Lack of concern for the source of a theory requires, at a minimum, a relatively unambiguous criterion of success. Unfortunately,

¹³ Posner-1995, p. 172.

as the reader will also note, there is certain casualness about the nature of "success." Is it purely positive ("organize," "explain," "distinguish or amplify") or purely normative ("criticize, accept or reject," "explain away")? Does it refer to the already-decided cases or to new cases? Before one rushes to say "any or all the above" we should pause to consider that the same theory might be good at some of these tasks and not so good at others. Most importantly, however, there is a fundamental tension between the positive and normative measures of success. If one rationalizes the existing or decided cases according to a certain hypothesis, and a new case arises (which, for the ease of argument, we shall assume is in the same class of cases) why should the new case be decided in accordance with the existing hypothesis? Suppose the case can be decided differently and then the now-larger group of cases can be re-rationalized according to another hypothesis, what is wrong with this? How can we tell the difference between a genuine change in the law and a mistake made in generating the previous hypothesis on the basis of "insufficient" observations?

Criticisms aside, the top-down approach is not "derived" from the law; it involves the superimposition of a theory upon the decided cases (or more precisely, their outcomes). Wealth maximization is a superimposition from economics but, obviously, there can be theories from philosophy, sociology, anthropology, and many other fields as well.

4.2. Bottom-Up Legal Reasoning

This form of legal reasoning strives for a certain autonomy from the social sciences, especially, but also from philosophy, "feminism", and other disciplines *a la mode*. The idea is that law itself can be an autonomous discipline and have a method unto itself.

This does not mean that the law is or should be uninformed about developments in, say, economics. Neither does it mean that economic insights cannot be used in the application, interpretation or even formulation of legal rules, but it does mean that the law does not and ought not to substitute an economic criterion of "goodness" for its own incrementally developed criteria. Most importantly, for our purposes here, it means that the concepts and implicit theories adopted by judges must be derived from those of the governed.

A judge who follows the bottom-up method reasons about the new case by analogy to the old, already-decided, cases. He appeals to precedent, and thus to a rule in the instant case which is naturally projectable from the body of settled law.

Virtually everything said in the preceding paragraph is subject to misinterpretation. It would be useful to forestall such mistakes by more closely examining the terms used.

First, what does "naturally projectable from the body of settled law" mean? It means that the analogy used by the judge to bridge the gap between the instant case and the previous cases is one which is consistent with the expectations of the community of judges and of those governed by the particular area of law. It is in

this sense that the common law judge does not create new law, but simply "finds" existing law. What is "naturally projectable" is there all along *in nuce*. So it is not created but drawn out. Obviously, whether a rule is said to be created or found depends on the expectations of the parties. The more a rule departs from these expectations the more likely it will be called "created" or "created *ex nihilo*" if one desires to be highly critical.

Secondly, analogous reasoning is not anti-theoretical. To make an analogy requires that the similarities between two cases be stressed and the differences be downplayed. To determine that certain aspects of cases are important and others are not, so that one can both distinguish and assimilate, requires a "theory." The theory is in part normative and in part descriptive. The precise nature of analogies and the theories underlying them is a very complex subject and beyond our capacity here. Suffice it to say, however, that all expectations are embodied in a theory, whether it is implicitly or explicitly held. Thus the difference between top-down and bottom-up legal reasoning does not lie in its use of theory. But it does lie in the nature of the theory used. Recall that the top-down judge exhibits an indifference with regard to the origin of the theoretical constructs used in his decisions. (More exactly, he prefers theories from extra-legal sources.) For the bottom-up judge the origin is extremely important. His theories are based on legal materials which, in an ideal common law system, are derived ultimately from those common-sense understandings held by the governed. The continuity of decisions with the expectations of the community of judges and those governed by the law is thus essential in this conception of the law. Perhaps this continuity explains the statement of Montesquieu, "Among the three powers [legislative, executive, and judicial]... that of judging is, in some fashion, null".¹⁴

4.3. Coherence, Top-Down, and Coordination

The logical coherentist vision of a system of law is usually associated with the top-down method of reasoning. The wealth-maximization approach is a very good example of an attempt to establish logical coherence through the superimposition of an economics framework. We shall now examine, as a particular case of our general project, the impact of wealth maximization on the coordination of the plans of the relevant legal actors.

In a wealth-maximization approach legal actors are treated as if they were economic actors. Before my fellow economists "jump for joy" at this turn of events, they ought to bear in mind what this implies about the knowledge assumptions made regarding these actors. Let us be specific.

The wealth-maximization framework would require, in order to enhance the coordination of plans, that both other judges and the members of the governed

¹⁴ Montesquieu-1989, p. 160.

public be able to predict tolerably well the results of judicial cost-benefit analyses. Recall that the essence of wealth maximization is to adopt or adapt legal rules such that, in the area of accident law, for example, the sum of expected accident and accident avoidance costs is minimized. To do this, it is required that the courts can compare the costs of avoidance with the expected benefits — reduction in accident costs — of avoidance activity. Thus the wealth-maximization approach has a very specifically-defined and delimited set of costs to minimize. Or, to put matters another way, there is a narrow set of costs and benefits it seeks to balance.

A fundamental difficulty, to which we can only allude here, is that a very narrow conception of the relevant costs and benefits has little normative appeal and that a broader conception of costs and benefits is difficult to operationalize.¹⁵ This tension is evident in Posner who, in a normative context, defines the wealth that he seeks to maximize as "the value in dollars or dollar equivalents ... of everything in society".¹⁶ "Everything" is quite a lot indeed. Moralisms, avoidance of risk, relational and distributional concerns are all part of everything and valued by individuals on the "hypothetical markets" the wealth-maximization theory needs to make it work. But how can we measure them?¹⁷ Furthermore, even when the set of costs and benefits is taken as non-problematic, "realistic" models of efficiency involve complex interactions and ambiguous quantitative relationships.¹⁸ The conclusion toward which all of these arguments take us is that once courts enter the terrain of cost-benefit analyses the uncertainty to which legal decisions are subject increases. Thus a decision by a single court is subject to so many difficult-to-measure cost or benefit components, as well as complex interaction effects, that is hard to believe its conclusions can be easily reproduced by other courts or predicted by relevant governed parties. Such a decision does not have the requisite determinacy to render the expectations of legal actors "certain" relative to a rule-oriented precedential approach.¹⁹

5. Preliminary Conclusions

(1.) The wealth-maximization framework can be viewed as a form of legal coherence that attempts to accommodate change.²⁰ The "permanence" that it offers is the fixed standard of efficiency. All of the data relevant to any case is to be processed through the objective function of cost-minimization. The "adaptation to change" it offers is the adjustment in legal outcomes that is optimal with respect to the changed data.

¹⁵ Rizzo-1980a, pp. 643-47.

¹⁶ Posner-1979, p. 119.

¹⁷ Rizzo-1980a, pp. 648-54.

¹⁸ *Ibid.*, pp. 652-53.

¹⁹ Rizzo-1985.

²⁰ Rizzo-1980b.

But can this form of flexible coherence enhance the coordination of plans? In general, the answer is no. Coherence of the law does not imply the coordination of plans. Logical coherence is not equivalent to praxeological coherence. This is because, in the general case, wealth maximizing outcomes are not manifest to the relevant parties; they do not successfully focus the expectations of these parties.

(2.) The bottom-up method of legal reasoning is more likely to enhance the coordination of plans than the top-down approach (a characteristic of logical coherentism). The former is an expectations approach to legal change. The analogous reasoning it employs is based on what is reasonably projectable from existing law. Therefore, the "permanence" it offers is the continuity with existing law or rules. The "adaptation to (extra-legal) change" it offers is that the change is expected, or nearly so. From a praxeological point of view, expected changes are not changes at all, thus they allow relatively easy individual planning and, to the extent that the expectations are shared, interpersonal consistency of plans.

6. Possible Objections

6.1. Are not expectations divergent?

The claim that a bottom-up method of legal reasoning, based on "reasonable projections" from the existing body of precedent, can enhance the coordination of plans requires that the relevant legal actors be in some kind of agreement regarding what to expect. The first matter to clarify is the form of agreement necessary. The second matter is to assess, at least in general terms, the likelihood of its existence.

If we were interested in the exact coordination of plans (both legal and "economic"), then it would be necessary for the relevant parties to have identical expectations regarding the extension or application of existing rules to new circumstances. This is not only unrealistic, but inconsistent with the observed process of learning. Instead, the kind of coordination in which we are interested is a loose, imprecisely defined kind of coordination, more akin to a scientific research program than a traditional economic equilibrium.²¹ Those working in a particular scientific research program will often have a class of reasonable expectations regarding the results of new applications or tests of a theory within the program. Similarly, those in a particular legal area defined by a set of precedents may also have a class of reasonable and common expectations about the application of existing rules to new circumstances.

Another way to state this is that while the relevant legal actors may not be in exact agreement regarding their expectations of adjustments in the law, their disagreement is limited, and thus any one of a number of outcomes would not be surprising. There may be disagreement with respect to specific expectations, but agreement with respect to a class of expectations.

²¹ Rizzo-2000, pp. 184-85; Rizzo-1996, pp. xxvii-xxix.

It seems plausible to claim that such expectational homogeneity as is needed for a loose form of coordination is likely when the changes contemplated are small. Legal actors will have more agreement the smaller the change. This is the usual economic escape-route of marginality. But the "escape" is not limited to economists. Jurisprudential theories, as well, seem to have difficulty explaining or justifying large changes in the law or its application.

6.2. Is not an expanded and improved wealth-maximization approach possible?

In principle, it should be possible to incorporate expectational coordination into a wealth-maximizing framework. To the degree that plans are frustrated by judicial decisions outside of the range of projectable precedents, there will be costs to the actors. So the minimization of costs overall would require the coordination of plans and the consistency of expectations. It seems possible, therefore, (although I am not sure) that such an expanded wealth-maximization framework would yield the same results in specific cases as the expectations approach.²² For purposes of argument, then, let us assume this is true. Can we then conclude that the logical coherentist is correct and that a logically coherent system of law is both necessary and sufficient for plan coordination? Obviously not. The coherentist is simply incorporating the importance of plan and expectational coordination into his own calculus of costs and benefits. But the idea has been taken from another approach, and so logical coherence itself cannot be *necessary* for coordination. The coherence of the wealth-maximization framework is derived, in this case, from the plans and expectations of the actors. It is not a mere logical coherence, but a praxeological coherence. Hence the expanded wealth-maximizing framework is really the bottom-up, expectations approach in disguise. Furthermore, as we have previously seen, logical coherentism is not *sufficient* for plan coordination. The mere logical coherence of a framework, regardless of its origins, cannot generate expectational consistency and hence the coordination of plans. Fundamentally, this is because indeterminate and complex conceptual frameworks, often characteristic of the logical coherentist approach, cannot serve as a focus of expectations.

7. Overall Conclusion and Implications

Earlier in this Article we posed our central question: How can the common law adapt to novel circumstances and still promote the certainty of legal expectations and, hence, the general coordination of plans? We are now in a position to answer the question succinctly. The common law adapts by extending the law, by small degrees, in accordance with the expectations of the relevant legal actors. To the

²² If two frameworks yield the same results then they are extensionally equivalent. This does not mean, however, that the rationale for the result must be the same in each framework. Extensional equivalence can be a superficial characteristic.

extent that either of these two methods fail, the common law is ineffective. In other words, the common law does not deal well with non-marginal changes largely because, for such changes, the existence of common expectations by both judges and those governed by the law is in doubt. The failure of the marginality condition usually means the failure of the expectations condition. Nevertheless, it is still possible that in certain cases there may be a broad consensus about the direction the law should take in response to relatively large changes in extra-legal circumstances. In these cases the common-law method will succeed.

One of the central implications of this research is that the "certainty" of the common law is enhanced, not compromised, by its adaptability. In a changing world, a completely static legal system would create a crisis of expectations as novel circumstances would result in indeterminate legalities. So the law must be a flexible structure — an "order" — that will adapt. Logical coherence, that is, a deductive system of law with fixed, general premises is not an adequate alternative to a static legal system. Sheer logical coherence need not produce, nor allow to be produced, the coordination of plans or what we have called praxeological coherence. Furthermore, logical coherence in the form of a wealth-maximization framework is definitely not consistent with praxeological coherence. In fact, the approach of logical coherence produces only an illusion of certainty as it confuses the world of jurisprudential analysis with the world of human action. In that sense, it is a thoroughly "Cartesian" fallacy.

Certainty in a changing world is promoted by the law's dynamic properties. Its structure is a structure of allowable change. Since the compatibility of certainty and change depends on the expectations of the relevant parties, the focus of law, if it is even to approximate the twin virtues asserted by Holdsworth, must be on expectations.²³

²³ In a description of the common-law process, according to the great seventeenth-century jurist Sir Matthew Hale, Postema [1987:18] says: "The rules, at first rough and clumsy, are broken in over time, their hard edges smoothed off and softened to fit the contours of community life. At the same time, Hale clearly maintains, participating in the practice described by the rules shapes the dispositions, beliefs, expectations, and attitudes of the people. Thus, what counts as reasonable in large part depends on what can be regarded as continuous with the past history of the people and its law, and what can be regarded as continuous with that past in large part depends on what can be regarded as reasonable projections from laws and arrangements of the past to problems and situations of the present."

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