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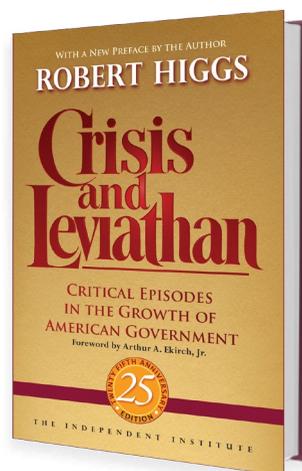
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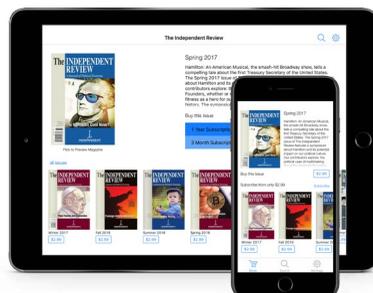
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# Gordon Tullock's Critique of the Common Law

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WILLIAM F. SHUGHART II

Wellington must now cede victory to Napoleon and the common law must give way to the civil code.

—Gordon Tullock, *The Case against the Common Law* (1997)

Gordon Tullock, trained in the law at the University of Chicago, was an implacable critic of the common law, which originated in England centuries ago and was transplanted to the United States, Canada, Australia, and other English-speaking nations during colonial times.<sup>1</sup> Tullock generally favored legal regimes based on civil law or “Roman civil law,” the latter being the phrase used by John Henry Merryman and Rogelio Pérez-Perdomo ([1969] 2007) to solve a terminological problem in the comparative legal studies literature.<sup>2</sup> Although applications of that regime differ from place to place and have evolved over time

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1. Although the Norman victory at Hastings in 1066 is the date usually given to mark the beginning of the common-law tradition (Merryman and Pérez-Perdomo [1969] 2007, 3), its roots go back at least a half-millennium earlier. Nevertheless, the civil-law tradition is much older, perhaps harkening to 450 B.C., “the supposed date of publication of the Twelve Tables in Rome” (Merryman and Pérez-Perdomo [1969] 2007, 2).

2. As used herein and in the literature on comparative legal systems, the term *civil law* should not be confused with the term *civil case law*, which refers to the branch of the common law that deals with noncriminal matters, such as litigation arising over private-property rights, contracts, and accidental harms to persons or property (torts). Confusion also threatens because lawyers in the civil-law tradition use the term *civil law* to refer to the “first three books of the Institutes of Justinian (Of Persons, Of Things, Of Obligations),” distinguishable from “public law,” which incorporates constitutional law “and administrative law—the law governing the public administration and its relations with private individuals” (Merryman and

(as, of course, has the common law), Tullock's preference is shared by most of the rest of the world, including Europe, many parts of Asia and Africa, all of Latin America, and "a few enclaves in the common law world (Louisiana, Quebec, and Puerto Rico)" (Merryman and Pérez-Perdomo [1969] 2007, 3).<sup>3</sup> The civil-law tradition can be traced to Rome, Germany, and France; the latter nation's Napoleonic Code of 1804 is its archetype (Merryman and Pérez-Perdomo [1969] 2007, 10).<sup>4</sup>

A stylized but, as we shall see, rather inaccurate description of the common law is that it is "judge made." The common law, in other words, is articulated by individual judges as they render decisions in the particular disputes that come before them, and those rulings are then confirmed or overturned by judges in other courts in other venues (or on appeal to higher courts within the same venue). The confirmed rulings eventually attain the status of precedent and therefore control the decisions handed down in later cases. The description "judge made" is erroneous, however, because in the common-law tradition judges are responsible not for *making* the law but rather for *finding* it in the customary practices of people or existing social norms, whether committed to paper or not. The Roman civil-law tradition, in contrast, is embodied in written codes, adopted and, if necessary, modified by legislatures, to which judges (ideally) are bound. Unlike their common-law counterparts, judges in civil-law regimes are selected on the basis of their knowledge of the written code, the understanding of which is assessed by performances on state-administered examinations and promoted on "some combination of demonstrated ability and seniority." Because of their ostensible lack of discretion, civil-law judges are "civil servants, functionaries" (Merryman and Pérez-Perdomo [1969] 2007, 35).

In this essay, I summarize Tullock's criticisms of the common law, which focus on the comparatively high error rates he observed in the decisions made by judges and juries as well as on the relatively high costs (economic inefficiencies) of the common law's adversarial procedures. I also contrast Tullock's analyses of English legal institutions with those of most other law-and-economics scholars of his generation, who liken common-law processes and outcomes to those generated by robustly competitive marketplaces for more ordinary goods and services. To set the stage, I supply an overview of the origins and evolutions of common-law and civil-law traditions in the next section. Then I reexamine Tullock's preference for civil-law regimes in light of his

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Pérez-Perdomo [1969] 2007, 6, 74). This essay ignores the third great specialized but now nearly moribund system of law that emerged during the early Middle Ages, canon law, which "touch[es] churchmen within the ecclesiastical hierarchy" and is enforced by ecclesiastical courts (Hogue [1966] 1986, 187); although such courts "still exist in modern England" (Hogue [1966] 1986, 148), canon law is beyond the scope of this study. I likewise ignore commercial law, originating in the medieval *lex mercatoria* (on which see Benson [1990] 2011, 30–35 and elsewhere in the same volume). On more modern developments in English commercial law, see Turner 2017.

3. The list of Roman law enclaves should include Scotland, to which "it came late; but . . . came to stay" (Maitland and Montague 1915, 40).

4. See Glaeser and Shleifer 2002 and La Porta, Lopez-de-Salinas, and Shleifer 2008 for discussions of the historical roots of the common-law and civil-law traditions, along with observations on their broader social and economic implications.

own and other scholars' work on bureaucracies and judges' motivations. In so doing, I bring to bear more recent literature—that is, literature not available to Tullock when he was writing about the institutions of the common law and civil law—to document political influences on the so-called independent judiciary, ostensibly a hallmark of the third branch of government in Western nations that have adopted common-law institutions for adjudicating disputes and enforcing the laws of property, contract, tort, and crime. The final section summarizes what has gone before it and offers some concluding remarks.

## The Origins of the Common Law and the Civil Law, in Brief

One cannot delve very deeply into the origins of the law, whether common or civil, in the space allotted to one academic journal article. The roots of both legal traditions go too far back in time to summarize adequately under such space constraints; the relevant literature is far too extensive.<sup>5</sup> I nevertheless attempt here to survey legal history's commanding heights to put Tullock's critique of the common law in broader perspective. It is worth noting at the outset that Tullock's descriptions of the institutions of the common law and the civil law only scratch the surface, perhaps because he focused mainly on the efficiency of legal processes (judicial decision-making accuracy and its resource costs) and, moreover, intended to be provocative, even iconoclastic (Voigt 2017).

### *The Common Law*

The life of the law has not been logic, it has been experience.

—Oliver Wendell Holmes Jr., *The Common Law* ([1881] 2009)

The common law originated in the customary practices of English men and women midway through the fifth century (Benson [1990] 2011). Like language, money, and the institutions of ordinary markets, rules governing the interactions of individuals in a peaceable, civil society emerged spontaneously and evolved over time to create an order that “while indeed the result of human action” was not “the execution of any human design” (Hayek [1960] 2011, 112, quoting Ferguson [1767] 1996, 187; also see Reksulak, Shughart, and Tollison 2004). Had language, money, or markets actually been conceived by the mind of a single man or woman (or even by small groups of

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5. A recent edition of a “concise” history of the common law (Plucknett [1956] 2010) runs to 828 pages. On the common law's origins, Hogue [1966] 1986, covering the years from 1154 to 1307, is more accessible but less comprehensive than Pollock and Maitland [1895] 2010, the classic reference. Maitland and Montague 1915 contains an excellent collection of essays on English legal history from the earliest days (600–1066) until the beginning of twentieth century, along with some very valuable appendices, including “The Laws of King Æthelbert, A.D. 600,” a list of ninety “dooms” (i.e., monetary fines or *bots*), some of which escheated to the king and were assessed for various crimes committed against persons or property.

them), the discovery would be considered the greatest invention produced in all of human history and its inventor celebrated down through the ages.

What Bruce Benson ([1990] 2011) calls “customary law,” which F. A. Hayek ([1960] 2011) distinguishes sharply from statutory laws promulgated by monarchical edict or enacted by legislatures, the second category of which Benson calls “authoritarian law,” arose in response to demands for protection of lives and property at a time when nothing like what we now think of as a “government” existed: there were no sheriffs, no public prosecutors, no formal court system, no judges, no prisons or jails, and no lawyers to which people could appeal for redressing the wrongs committed by others. Nevertheless, the Anglo-Saxons inhabiting the small farms and villages of Britain from about 450 A.D. on did not live in chaos or in a Hobbesian jungle characterized by a “war of all against all.” They instead maintained the “peace” to which every freeman’s household was entitled by relying on ancient, customary rules of behavior to govern their daily lives, or what is known nowadays as “self-help.” The members of even the most primitive of societies recognized the collective benefits of reducing the incidences of theft of personal property and bodily harm, including rape and the loss of life or limb, and so when one villager was harmed, it was in the collective interest of all to catch the perpetrator and then to see that, to the extent possible, the victim was “made whole”—that is, returned to the status quo ante.

All offenses under customary law—called “breaking the peace” or “trespasses”—were treated as torts, and restitution from trespasser to victim was the usual remedy. Restitution (*bot*, “boot” or “amends”) could be made either by returning stolen goods to the owner or by compensating the victim (or the victim’s family) for the value of the things taken or for bodily harm committed, up to and including murder, by paying a “man price” (*wergeld*) (Benson [1990] 2011, 26). Once the victim had accused another person of committing a trespass, the victim was responsible for capturing and detaining the alleged peace breaker (with the help of neighbors) as well as for bearing the expense of confining and feeding the accused until a trial could be held before a gathering of the adult villagers. Those neighbors often knew the parties involved and could be called upon to testify as to their characters and personal knowledge of the event, render a verdict of guilt or innocence, and, if the trespasser were found guilty, order appropriate restitution.

The peace was restored (“bought back”) when restitution was made. If the *bot* or *wergeld* ordered exceeded the trespasser’s immediate ability to pay, a year might be given to make restitution, or, alternatively, the peace breaker essentially became the victim’s slave, providing services in-kind until the victim had fully been reimbursed (Benson [1990] 2011, 24–25). In the event of escape or refusal to pay, the trespasser was declared to be an outlaw, subject to a death sentence meted out by the victim and his neighbors, who were duty bound to pursue and capture him, the only circumstance in which capital punishment was imposed on breakers of the peace.

Fast forward to the twelfth century. Perhaps the most significant legal reforms in English history were instituted under Henry II (1154–89). Prior to his reign, “the great bulk of all justice that was done, was done by local courts, by those shire-moots and hundred-moots which the Conqueror [William of Normandy] and Henry I had maintained as part of the ancient order” (Maitland and Montague 1915, 30).<sup>6</sup> Grasping that the restitutions then being ordered by local courts to the victims of trespasses could become a source of royal revenue,<sup>7</sup> Henry II’s “own court flung open its doors to all manner of people” (Maitland and Montague 1915, 31). By institutionalizing a system of itinerant justices (“Justices in Eyre”), “professionally expert in the law,” to hear cases throughout his realm, Henry II began “the process which makes the king’s court the common law of England” (Maitland and Montague 1915, 36, 31). Although it might be that “the reasons for . . . [suppressing] local courts (and the gradual concentration of justice in the royal courts) are to be found in the superior and even justice administered by the royal courts” (Maitland and Montague 1915, 36 n. 1), more narrow interests undoubtedly were in play.

“The peace” became “the king’s peace” under Henry II. Breakers of that peace no longer were compelled to compensate their victims; instead, restitution was transformed into monetary fines paid into the king’s treasury, to be disposed of as he saw fit. Although victims thus were relieved of the expense of catching, detaining, feeding, and prosecuting the breakers of the peace, they and their fellow subjects thenceforth were required to finance the new system of justice—the sheriffs, public prosecutors, jails, and jailers responsible for administering the king’s peace. In more modern times, replacement of the peace by the king’s peace means that victims of crimes can seek compensation only by filing a separate follow-on civil lawsuit against the person who harmed them, whether that person was found guilty or not in a publicly financed trial.

Judge Richard A. Posner, recently retired chief judge of the Seventh Circuit’s Court of Appeals, which sits in Chicago, is the staunchest contemporary defender of the efficiency of the common law, according to Tullock (1997, 53).<sup>8</sup> Posner and most of the contributors to the field of law and economics that emerged in the second half of the twentieth century liken the common law’s workings to those of robustly competitive marketplaces for more ordinary goods and services. The availability of alternative venues for adjudicating disputes—that is, multiple geographically defined trial-court districts

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6. Even after Henry II’s reforms, customary law and self-help controlled intergroup conflicts in the Anglo-Scottish borderlands (the “Marches”) roughly between 1249 and 1603, a history recounted vividly by George MacDonald Fraser ([1971] 2008); his shorter fictional account of the “reivers” (cattle thieves) on both sides of the porous border (Fraser 2011) is both fascinating and historically accurate. See the chapter entitled “The Laws of Lawlessness” in Leeson 2014 for an economic analysis of the rules that governed English–Scottish interactions largely in the absence of formal laws and enforcement institutions.

7. “He could thus win money—in the Middle Ages no one did justice for nothing” (Maitland and Montague 1915, 36).

8. Posner’s justly admired and widely adopted textbook *Economic Analysis of Law*, now in its ninth edition (Posner 2014), was first published in 1973, not long after Tullock’s ([1971] 1987) initial book-length foray into the law’s “logic.”

plus two somewhat separate (state and federal) judicial systems, opportunities for losing parties to appeal lower-court decisions to intermediate and supreme courts, as well as an “independent” third (judicial) branch of government—is thought to reduce errors and to promote the adoption and evolution of legal rules toward those that enhance the efficient allocation of the economy’s scarce resources. Moreover, the common law’s methodology of deciding current cases by referring to precedent and not overturning earlier decisions without good cause (*stare decisis*) reduces the uncertainty facing future adversaries, creating expectations that similar cases will be decided similarly.<sup>9</sup>

Tullock, as mentioned previously, denied the common law’s efficiency, mainly for three reasons. First, he questioned the usefulness of the jury system, a hallmark of English legal procedure since at least 1066 (Tullock 1997, 28), thus predating the Magna Carta. Second, Tullock never liked the so-called adversarial character of common-law trials,<sup>10</sup> in which the parties at the bar of justice hire lawyers to plead their cases, conferring considerable advantage on the (usually well-heeled) party able to retain counsel more effective at swaying jurors, a process that results in both excessive litigation costs and high error rates in jury verdicts. Third, Tullock criticized some of the common law’s rules of evidence as they have evolved in the United States, especially the inadmissibility of hearsay testimony and the exclusion of evidence obtained illegally (e.g., without a properly executed search warrant) by police officers or other public officials (1997, 40–41).

Corruption, errors of fact and of law, rent seeking, and other serious defects undoubtedly arise, perhaps frequently, in any legal system administered by human beings over human beings. What is true of Tullock’s criticisms of the common law also is largely true of Roman civil law, to which we now turn.

### *Code Law*

Although Roman civil law is much older than the common law, “traceable and codified under Justinian in the sixth century A.D.” (Merryman and Pérez-Perdomo [1969] 2007, 6), its modern reincarnation originates in the Napoleonic Code,<sup>11</sup> adopted in 1804 in reaction to the murderous Directory that followed the French Revolution,

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9. “Ever since Henry II’s time, the king’s court has been hard at work amassing precedent, devising writs, and commenting upon them. . . . For [Bracton, an early compiler of and commentator on the institutional developments,] English law is already ‘case law’; a judgment is a precedent” (Maitland and Montague 1915, 44–45).

10. “The adversary system places little or no value on searching for the truth” (Tullock [1971] 1987, 26); the chapter on common-law trials in Tullock’s book *The Case against the Common Law* is titled “The Play’s the Thing” (1997, 35–44). Many commentators on adversarial legal procedures trace the origins of these procedures to medieval trials by ordeal or trials by battle (Maitland and Montague 1915, 48–50). See Leeson 2017 for an instructive discussion of the former’s truth-revealing properties.

11. The Napoleonic Code, “liberally translated from the original and official edition,” runs to 927 pages (A Barrister of the Inner Temple [1804] 1999).

which exercised its authority ruthlessly with the assistance of the invention often attributed erroneously to Dr. Joseph-Ignace Guillotin. If intent can be attributed to France's new legal regime, the aim was to institutionalize a strict separation of powers between the legislative and judicial branches of government: "The revolutionary insistence that the law could be made only by a representative legislature meant that the law could not be made, either directly or indirectly, by judges. One expression of this attitude was the requirement that judges use only 'the law' in deciding a case, and this meant . . . that they could not base their decisions on prior judicial decisions. The doctrine of *stare decisis* was rejected" (Merryman and Pérez-Perdomo [1969] 2007, 36). The Napoleonic Code's ideal judge was a person with absolutely no discretion: "The picture of the judicial process that emerges is one of fairly routine activity; the judge becomes a kind of expert clerk. . . . [T]he judge's function is merely to find the right legislative provision, couple it with the fact situation, and bless the solution that is more or less automatically produced from the union. . . . The net image is of judges as operators of a machine designed and built by legislators[,] . . . civil servant[s] who perform[] important but essentially uncreative functions" (Merryman and Pérez-Perdomo [1969] 2007, 36–37). Moreover, because judges could not be expected to "interpret incomplete, conflicting, or unclear legislation," they were expected to "refer such questions to the legislature for authoritative interpretation" (Merryman and Pérez-Perdomo [1969] 2007, 36).

The ideal of judges as bureaucratic ciphers is reinforced by the standard civil-law legal procedure of having cases heard by panels of three or more judges,<sup>12</sup> whose decisions are rendered by majority vote ("without enumeration of votes pro and con among the judges") and announced by the court as a whole: "In most jurisdictions, separate concurring opinions and dissenting opinions are not written or published, nor are dissenting votes noted. The tendency is to think of the court as a faceless unit" (Merryman and Pérez-Perdomo [1969] 2007, 36).

The civil law in France and elsewhere has of course evolved over time. Even the strict separation of the judiciary from the legislature has been weakened by the code's silence or incompleteness on important matters of law.<sup>13</sup> For example, although "the term *tort* is French" (Tulloch 1997, 11) and "the Code Napoleon is still in force, the law

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12. A single judge presides over trials in state and federal U.S. courts. Appeals of verdicts handed down by "courts of first instance" (trial courts) are heard by panels of at least three judges at the intermediate and Supreme Court levels, often but not always *en banc*—that is, by all appeals-court justices serving in a given court district. Decisions on appeals are taken by majority vote and, as such, are predicted to exhibit less variation over time than the decisions rendered by a single judge, a conclusion drawn in Goff, Shughart, and Tollison 1986 from comparisons of antitrust law enforcement decisions by the five-member Federal Trade Commission with those decisions taken at the sole authority of the U.S. attorney general, who heads the Department of Justice.

13. "Since in all jurisdictions judges are required to decide the cases before them and cannot give up on the ground that the law is unclear, judges continually make law in civil law jurisdictions. . . . [T]hey improvise" (Merryman and Pérez-Perdomo ([1969] 2007, 83). Some improvisation (judicial discretion) is unavoidable

of torts is almost entirely the product of judicial decisions based on a few very general provisions of the code” (Merryman and Pérez-Perdomo [1969] 2007, 83). But Roman civil law, bound as it is by statute, is in general more rigid (by human design) than is the common law. No legislature can be expected to write a code that is complete and unambiguous.

Tullock’s preference for code law over common law was based not only on the defects he and others identified in the latter but also on some of the code law’s positive aspects, at least as he saw them. One positive aspect is that “an efficient criminal justice system will seek to minimize the joint cost of crime and punishment” (Tullock 1997, 37), a goal that in his view is undermined by the common law’s adversarial (time-consuming and very expensive) litigation procedure. That defect ostensibly is remedied in civil-law jurisdictions by utilizing an “inquisitorial system, whereby the judge (or magistrate) takes the lead in gathering evidence and forming the issues of the case. In such a system, lawyers have a subordinate role, much less than principal players in the litigation process” (Tullock 1997, 56).

In civil-law regimes, pretrial proceedings are kept to a minimum, and court appearances are infrequent while evidence is being gathered by the magistrate or judge because an “appearance is usually for the purpose of examining only one witness or of introducing only one or two pieces of material evidence” (Merryman and Pérez-Perdomo [1969] 2007, 114). Because the accused “is involved throughout” the evidence-gathering and case-building stage (Tullock 1997, 57), “the element of surprise” (a common courtroom tactic of common-law litigators) “is reduced” (Merryman and Pérez-Perdomo [1969] 2007, 114). According to Merryman and Pérez-Perdomo, “a second characteristic of the traditional civil law proceeding is that evidence is received and the summary record prepared by someone other than the judge who will decide the case” ([1969] 2007, 114). Although that characteristic of Roman civil law helps spare judges’ time and energy for the courtroom, it also can be “a defect because it deprives the judge of the opportunity to see and hear the parties, to observe their demeanor, and to evaluate their statements directly” (Merryman and Pérez-Perdomo [1969] 2007, 115).

Another key difference between civil-law and common-law procedures is the former’s distinctive trial hearings, when “questions are put to witnesses by the judge rather than by counsel for the parties,” although questions from the bench “are often asked . . . on the basis of questions submitted [to the judge] in writing by” the attorneys representing the disputants (Merryman and Pérez-Perdomo [1969] 2007, 115). That procedure explains why Tullock and other legal scholars have characterized Roman civil law as “inquisitorial” rather than adversarial. However, as Merryman and Pérez-Perdomo point out, both characterizations are somewhat “misleading” because the common law also embodies inquisitorial elements: prior to deciding whether a case will

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because all contracts (the code, in this case) are necessarily incomplete: “the ability of scholars working in the tradition of pure legal science to design a satisfactory law machine is in doubt. The doctrine of legislative infallibility has been fundamentally shaken. The image of the judicial function steadily expands” (Merryman and Pérez-Perdomo [1969] 2007, 84).

be brought to trial or not, public prosecutors examine defendants and witnesses, evaluate the credibility of their likely testimony, and collect and evaluate any probative physical evidence ([1969] 2007, 115). Moreover, although counsel for the two parties take the lead in questioning witnesses and introducing evidence in common-law trials, the questions put to witnesses by civil-law judges “*are limited to those submitted by the lawyers*” (Merryman and Pérez-Perdomo [1969] 2007, 115–16, emphasis added).

“Cross-examination [by opposing counsel] . . . seems foreign to the civil law proceeding. There never has been a jury to influence [in the latter]” (Merryman and Pérez-Perdomo [1969] 2007, 116). For that same reason, the rules of evidence differ sharply between the two regimes. In particular, so-called hearsay testimony is not excluded in Roman civil-law trials, presumably because the hearing judge or panel of judges can weigh such evidence better than juries comprising ordinary people (“laymen”) can and, unlike in common-law processes, will not be as susceptible to the procedural objections of “skillful attorneys” intended “primarily to interrupt the judge’s and jury’s train of thought in order to diminish the effectiveness of witness testimony” (Tulloch 1997, 26).<sup>14</sup> “Nothing comparable to the common law notion of civil contempt of court”—for example, a witness’s refusal to answer a question—exists in Roman law jurisdictions (Merryman and Pérez-Perdomo [1969] 2007, 123).

Civil-law regimes downplay the importance of oral arguments at trial, and although “the hearing judge will make notes,” no printed record (verbatim transcript) prepared by a court reporter is made available to the presiding judge or panel of judges or to counsel (Merryman and Pérez-Perdomo [1969] 2007, 117). The absence of a written trial record means that “[e]ven if the deciding panel includes the hearing judge, . . . the written record strictly limits the determination of facts. The hearing judge’s recollection of the witness’s hesitancy, furtive demeanor, or patent insincerity—unless reflected in the written summary of testimony in the record—cannot affect the findings of fact” (Merryman and Pérez-Perdomo [1969] 2007, 117).

“In civil law countries, as in England, the loser usually pays the winner’s counsel fees”; contingent fee arrangements are prohibited there (Merryman and Pérez-Perdomo [1969] 2007, 120–21). Unlike in common-law regimes, “in the civil law tradition, the right of appeal includes the right to factual as well as legal issues”; in many of those jurisdictions, “the parties have the right to introduce new evidence at the appellate level” (Merryman and Pérez-Perdomo [1969] 2007, 121). However, in civil-law regimes “the power to compel the production of documents, business records, and other evidence or to subject a party or the party’s property to inspection is much weaker than it is in common law jurisdictions” (Merryman and Pérez-Perdomo [1969] 2007, 123).

Civil codes were conceived as a way of guaranteeing certainty in the law’s application, but perhaps more so owing to “the distrust of judges” or as “an expression of

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14. Evidentiary rules in common-law trials, which control “the admissibility or inadmissibility of offered evidence, have as their prime historical explanation the desire to prevent the jury from being misled by untrustworthy evidence” (Merryman and Pérez-Perdomo [1969] 2007, 118).

the desire to make the law judge-proof.” Although “certainty is, of course an objective in all legal systems, . . . in the civil law tradition it has come to be a kind of supreme value, an unquestioned dogma, a fundamental goal” (Merryman and Pérez-Perdomo [1969] 2007, 48).<sup>15</sup> In insisting that the making of law is a proper function of legislatures only and not of judges or ordinary people interacting in daily life, Roman civil law tends to centralize governmental power in the hands of small groups of elite lawmakers, to impose the same laws everywhere, and thereby to ignore Hayekian dispersed knowledge and the particular circumstances of time and place. The supremacies achieved by central governments in modern, ostensibly federalist, common-law regimes tend in the same direction.

## Comparative Legal Systems

Which is better? At one level, this is a foolish question. It is like asking whether the French language is superior to the English language.

—John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition* ([1969] 2007)

In sketching the evolution of the institutions of the common law and the civil law, the discussion thus far has highlighted some important differences between the world’s two great legal systems. Gordon Tullock preferred the latter, principally because of three defects he identified in the common law’s procedures for adjudicating legal disputes.

Excessively high error rates in jury trials stand first and foremost among the common law’s flaws; according to Tullock, about one in eight cases is decided wrongly (1980, 19); “thirty-six per cent [*sic*] of guilty persons and four per cent of innocent persons will be convicted” (1997, 47). Juries can err for a number of reasons, including the pretrial processes for selecting their members: rather than being generated from a random sample of the adult population, juries tend to comprise “individuals of below average intelligence, . . . below average income and . . . below average productivity” (Tullock 1997, 32).<sup>16</sup> Chosen to maintain preconceived balances along lines of sex, race, and ethnicity, and constrained further by rules that eliminate from jury service anyone associated more than passingly with the parties involved or having knowledge beyond media accounts of the matter before the court, modern juries are not cross-sections of the defendant’s “peers.”<sup>17</sup> Limited nowadays to the role of finders of

15. On the importance of the law’s function in creating expectations rather than imposing constraints on human behavior, see Leoni [1961] 1991.

16. Less charitably, Tullock wrote on the same page that juries “are made up disproportionately of the old, the lame and the unemployed.”

17. The notion that juries ought to consist of “one’s peers” is a corruption of the original meaning of that phrase. Magna Carta provided that “earls and barons shall not be amerced but by their peers, and according to the degree of the offence” (Maitland and Montague 1915, 207). In other words, the fines assessed or restitutions ordered against earls or barons were to be set only by other peers of the realm and scaled to the seriousness of the trespass committed. Villeins and commoners did not sit in judgment of their betters.

fact,<sup>18</sup> juries are hindered, in Tullock's view, by rules of evidence that exclude the introduction of possibly relevant information because it was obtained improperly and is based on "hearsay" as well as by the frequent interruption of witness testimony (always vulnerable to imperfect recall of events) by procedural objections that divert judges' and jurors' attentions and derail their trains of thought.

Tullock's criticisms of the common law by and large rest on thin empirical evidence. Even his last word on the topic (Tullock 1997) refers to a few estimates of error rates in common-law trials published by other scholars he had cited nearly two decades earlier (Tullock 1980). Serious scholarly study of the motivations and behavior of common-law judges admittedly did not begin being published until the mid-1970s (see the later discussion of this work), a gap in the literature to which Tullock helped direct attention, but his one attempt to bring the common law into public-choice perspective (recognizing that the legal system "must be viewed as an integral part of the political process") runs to fewer than one and a half pages (Tullock 1997, 14–15).

Furthermore, Tullock's utilitarian focus on the production-cost efficiency of common-law trials seems to have missed the mark, at least in hindsight: according to Stefan Voigt, "faster courts have not been found to produce lower quality decisions (measured by the percentage of cases appealed on the next level)" (2017, 46). Tullock's claim that international business enterprises prefer common-law to civil-law jurisdictions for arbitrating disputes (1997, 59) likewise is in doubt: "U.S. American law is chosen less frequently than expected and French, but also Swiss law, are [*sic*] chosen more frequently than could be expected" (Voigt 2017, 44) if the common law were the more efficient legal system (with "more accurate verdicts at a significantly lower cost," according to Tullock [1997, 59]). Finally, considerable evidence exists that modern nations emerging from British colonial origins are richer and exhibit faster rates of economic growth than do nations of French or other civil-law origins (La Porta, Lopez-Silanes, and Shleifer 2008).

The common law's ancient right of trial by jury undoubtedly introduces systematic errors into the procedures for resolving legal disputes and determining the guilt or innocence of accused criminals, as Tullock emphasized throughout his writings on the subject. His preference for legal procedures as they evolved under the Napoleonic Code was, however, based on absolutely no empirical evidence; he sounded a clarion call for the production of such evidence, but it has been taken up, to my knowledge, only by a few students of that tradition. It nevertheless is astounding that Tullock failed to connect the dots between civil-law regimes and his own work on bureaucracy (Tullock [1965] 2005), for, as we saw in the previous section, civil-law judges are bureaucrats in all but name. Their behavior thus should be amenable to explanation in terms of such models, but Tullock didn't apply his own thinking about the motivations of bureaucrats to civil-law judges, even though the former predates the latter. Although Tullock's work

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18. Prior to 1835, "the American jury retained its colonial right to decide the law as well as the facts of a case, always assuming the law decided was constitutional" (Tullock 1997, 29).

on bureaucracy has been criticized as excessively anecdotal, based as it was on his own experiences in the U.S. State Department, it does contain a grain of truth—namely, that bureaucrats want to please their supervisors. More complete understandings of bureaucratic behavior awaited William Niskanen (1971) and later contributors to the relevant literature, but Tullock can be faulted for failing to think more seriously about the self-interested motives of civil-law judges, who, after all, are appointed to office and promoted based on their knowledge of the civil code and their performances in office, as evaluated by their superiors.

An important question, not asked or answered by Tullock (or by anyone else before the mid-1970s, for that matter) is, What do judges do? Given the fundamental differences in the institutions within which they operate, we expect common-law judges to behave differently than their civil-law counterparts, but, unfortunately, we know considerably less about the latter a half-century after Tullock called for additional empirical study of the world's two great legal traditions.

### *Common-Law Judges*

The modern literature on the motivations of judges serving in common-law courts began not with Gordon Tullock but with William Landes and Richard Posner (1975). The problem with which Landes and Posner grappled was how to explain, in a rational-choice framework, the behaviors of individuals appointed to a branch of government enjoying constitutional protections, once these individuals are appointed and confirmed in their offices, against influence by the chief executive and the legislature. In the American political system, for example, federal judges are granted life tenure, cannot have their salaries reduced while serving on the bench, and can be removed from their posts only upon impeachment by the U.S. House of Representatives and conviction at trial before the U.S. Senate for being guilty of treason or accepting bribes or committing “high crimes and misdemeanors.” Not more than ten federal judges have suffered the latter fate throughout U.S. history. Judges appointed or elected to state court systems do not have as much job security but usually cannot be removed from the bench as easily as governors and legislators can be discharged from their public offices.

Dissatisfied with existing claims that judges want to protect the interests of minorities or of other groups otherwise underrepresented in the political process from the tyranny of the majority, to serve as a counterweight to the two other branches of government, or, as Posner had suggested earlier, simply to maximize their own utilities by imposing their personal policy preferences on society,<sup>19</sup> Landes and Posner (1975) proposed a theory in which an independent judiciary—independent, that is, of the current or sitting legislature—protects the integrity (durability) of deals between special-interest groups seeking legislative favors and the voting majority that has granted

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19. Posner (2008) later expanded to nine the list of possible theories of judicial behavior.

those favors.<sup>20</sup> Nothing prevents the elected representatives holding seats in one legislative session from repealing a tax break or a subsidy given to a particular special-interest group by a previous legislative majority. But if such repeals were commonplace, legislative favors would be worth less to the favor seekers, who would not then be willing to spend as much (in the form of political campaign contributions or outright bribes) to secure those favors in the first place. Landes and Posner thus conceived of an independent judicial branch of government as an institution for enforcing contracts between legislatures and interest groups, a function facilitated by jurisprudence guided by legislative “intent” in enacting particular laws (as Landes and Posner put it, “the original understanding of the ‘contract’” [1975, 885]) and by deference to earlier judicial decisions (*stare decisis*).

Whether the Landes and Posner (1975) model is descriptive or predictive of judicial behavior,<sup>21</sup> their seminal article prompted other scholars to think more seriously about the external influences on—and the personal motivations of—judges. In a study of more than six hundred criminal Sherman Act (1890) convictions between 1955 and 1980, Mark A. Cohen (1992) reported that the jail sentences imposed on defendants tended to be longer, monetary fines tended to be higher, and *nolo contendere* pleas were less likely to be accepted in the face of governmental objections when the judge hearing the case perceived an opportunity for promotion to a higher court.<sup>22</sup> Cohen also found that the defendants who opted to contest the criminal antitrust charges against them at trial received stiffer penalties, on the average, the more crowded the sitting judge’s court docket was. Other things equal, being a “hanging judge” has its benefits: defendants awaiting trial when a harsh sentence is handed down have stronger incentives to settle their cases out of court, thus reducing the judge’s workload.

Additional evidence speaks to congressional influence on the decisions of the U.S. Supreme Court. The salaries of sitting federal judges cannot be reduced, but Congress determines the judicial branch’s annual budget, which, among other things, finances federal court buildings, courtrooms, judges’ chambers, and the salaries and numbers of clerks, paralegals, and other support personnel doing legal research, drafting briefs, and helping judges write their opinions. Eugenia Toma (1991) hypothesized that the more closely the Court’s decisions aligned ideologically with congressional preferences, the

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20. See Shughart and Tollison 1998 for a more detailed summary of Landes and Posner’s ideas; for a review of more recent literature, see Fleck and Hanssen 2013.

21. For some evidence supporting Landes and Posner’s (1975) theory regarding U.S. state courts, across which the methods of selection and tenures of judges vary considerably, see Anderson, Shughart, and Tollison 1989. Additional empirical state-level support for Landes and Posner (1975) is reported in Anderson et al. 1990, which controls for the annual salaries of judges serving on state courts of last resort, their workloads, the opportunity cost of being a state-court judge, and state constitutional determinants of judicial independence. The analytical framework for Anderson et al. 1990 is laid out more fully in Crain and Tollison 1979.

22. Criminal antitrust law violations under the Sherman Act are prosecuted by attorneys representing the U.S. Department of Justice, a bureau that also makes recommendations to presidents filling vacancies on the federal bench.

larger its budget would be. During the period she examined (1946–77), members of Congress were more conservative than the sitting Supreme Court justices. Toma’s results indicate that, other things being equal, the Court was rewarded with larger budgets the more conservative the rulings it handed down became. If the Court moved left, its budget increases became smaller or funding for the judicial branch actually was cut (in real terms). Causality also ran in the reverse: the Court responded to budget increases by moving to the right.

The Supreme Court likewise is influenced by the executive branch, primarily through the president’s power to nominate a member after a sitting justice has resigned, retired, or died in office but also from time to time through a more direct exercising of his powers. The most notorious example of direct influence is President Franklin Delano Roosevelt’s threat to “pack” the Court by asking Congress to authorize the immediate appointment of up to five new justices to offset the so-called five horsemen of the apocalypse who had thwarted New Deal legislation during FDR’s first term in office (1933–37). Although that threat died in the Senate following the fatal heart attack of Senator Joseph Robinson (D–Ark.), the bill’s legislative champion, the threat succeeded in the sense that one justice switched his vote on an important case decided prior to FDR’s landslide reelection in November 1936 but not announced until the following year, which shifted the Court’s 5–4 anti-Roosevelt majority to a 5–4 vote in favor of the constitutionality of New Deal legislation enacted from then on. Because the Supreme Court’s deliberations prior to issuing decisions are held in secret, the reason for the “switch in time that saved nine” is not known, but that shift in Supreme Court voting is the origin of the stock phrase that the “Supreme Court reads the election returns” (see Shughart 2004).<sup>23</sup>

### *Civil-Law Judges*

Unfortunately, evidence that judges in civil-law jurisdictions are similarly vulnerable to external influence is spotty at best. I know of only a few careful studies of judges in Japan, a civil-law country, but all of them conclude that judicial institutions therein function in ways that limit judges’ independence, in particular independence of the Diet, Japan’s national legislature (Ramseyer 1994; Ramseyer and Rasmussen 1997, 2003). For instance, judges who rule contrary to legislative preferences are reassigned to less-desirable court venues. The takeaway from this limited evidence seems to be that, although the origins and evolutions of common-law and civil-law traditions differ considerably, especially with respect to norms of judicial discretion, judges are part of the political process (Tullock 1997, 15) and are perhaps subservient to it in both legal regimes.

Civil codes may have been intended to make “the law judge-proof” (Merryman and Pérez-Perdomo [1969] 2007, 48), but they apparently cannot make judges politics

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23. For a fuller application of the rational-choice framework to federal judges, see Epstein, Landes, and Posner 2013. For additional insights on the federal courts and the scholarly literature that dives deeply into existing models of judicial behavior, see Posner 2013, 2016.

proof, at least in the case of Japan. As Tullock wrote, however, firm conclusions of that kind can be reached only after much more scholarly attention is devoted to comparative legal institutional analysis.

## Conclusions

It should be emphasized that Tullock, as a student of human behavior with its obvious fallibility, did not think that Roman civil law “is in any sense ideal.” In his judgment, such a conclusion could be drawn “definitively only if the whole discussion is opened up to scientific investigation”—that is, “by engaging in the kind of comparative institution[al] analysis [that] is sorely lacking in this field” (1997, 53). But Tullock tended to write a book or journal article about a topic that caught his interest and then to move on to something else (Shughart and Tollison 2016), contenting himself with being a provocateur rather than developing his ideas thoroughly.

That criticism applies with full force to Tullock’s writings on the common law and civil law, which led him to prefer the latter to the former. His discussion of the institutions that emerged from the two legal traditions borders on the superficial, especially so with respect to the civil law, on which Tullock evidently did not read deeply. He seems to have assumed, based on a rather incomplete understanding of civil-law regimes, that judges working in that tradition are more learned and less susceptible to external influences than their common-law counterparts and that a legal code crafted by a legislature (Benson’s [(1990) 2011] “authoritarian law;” Hayek’s [(1960) 2011] “statutory law”) is better (“superior in clarity, precision and implementation” [Tullock 1997, 59]) than laws evolving from the customary practices of ordinary people.

Voigt finds it “astonishing that [Tullock] makes no reference at all to his constitutional thinking in any of [his] . . . Law and Economics writings” (2017, 46). I find it even more astonishing that Tullock never, to my knowledge, connected the dots between the judicial institutions of the civil law and his own writings on bureaucracy (Tullock [1965] 2005). Nor did he bring to bear on his analysis of comparative legal procedures any of the reasoning or principles of public choice, the very field he helped launch (Buchanan and Tullock [1962] 2004). Readers will find that Tullock had very little or nothing to say about the influence of special-interest groups with stakes in the contours of civil-law codes on the legislatures promulgating those codes and on the judges hearing and deciding cases brought in civil-law jurisdictions or about the tendencies of civil-law regimes to concentrate governmental power at the center.

Much more scholarly work needs to be done on the world’s legal traditions, a conclusion that Gordon Tullock surely would endorse. Three paths forward quickly come to mind. First, does the dispute over “rules” versus “discretion,” once a hot topic in monetary policy and central banking, have anything to teach us about legal systems and the behavior of judges within those systems? Second, can insights into civil-law regimes be gleaned by paying closer attention to the procedures adopted by and the

decisions handed down by the administrative law courts that operate in the shadow of the common law under the auspices of some U.S. federal regulatory agencies? Third, the common law and the civil law are ripe for comparative study in the context of Ostromian “polycentric” governance (Ostrom, Tiebout, and Warren 1961).

Although comparative legal scholars have documented convergence over time between some aspects of common-law and civil-law procedures (Merryman and Pérez-Perdomo [1969] 2007), because legal institutions are path dependent and one of the law’s most important functions is to promote certainty in the expectations individuals form about the consequences of their actions (Leoni [1961] 1991), no nation is any more likely to switch from one legal regime to the other than it is to change the side of the road on which people drive.<sup>24</sup> Tullock’s preference for the civil law never will be realized in practice here or elsewhere in the English-speaking world. Nevertheless, he might have taken comfort from the comparative legal scholar who once said that “if he were innocent [of committing a crime], he would prefer to be tried by a civil law court, but . . . if he were guilty, he would prefer to be tried by a common law court” (quoted in Merryman and Pérez-Perdomo [1969] 2007, 133).

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24. Contrary to expectations, Sweden managed to do so nationwide on Dagen H, September 3, 1967; only 157 “minor” traffic accidents were reported that day. See <https://rarehistoricalphotos.com/dagen-h-sweden-1967/>, accessed May 28, 2018.

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