HAYEK'S POLITICAL AND LEGAL PHILOSOPHY: AN INTRODUCTION

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I Introduction

Friedrich Hayek is one of those few thinkers able to master several theoretical disciplines and to make original and distinguished contributions to each. In the course of his long career Hayek has published work in economics, (social) scientific methodology and philosophy, social and political philosophy, theoretical psychology and jurisprudence. He has also forged important connections between these varied fields, and by drawing together his work in each he has constructed an imposing social theory which cannot be ignored by the specialists in any one of them.[1]

Born in 1899, Hayek studied law and political science as a student, but spent the first twenty-three years of his career (1927-1950) as a theoretical economist and in that capacity quickly acquired an international reputation. Concerned with the growing influence of economists in the formulation of public policy, and alarmed by their general ignorance of broader political and philosophical principles in his view vital to sound policy, he published *The Road to Serfdom* in 1944. That book sparked a heated controversy as to the desirability of increased governmental economic and social "planning", which Hayek condemned as incompatible with democracy and personal freedom. In 1950 Hayek accepted a chair in moral science at the University of Chicago where he spent the next ten years preparing his more extensive and sophisticated restatement of classical liberalism, *The Constitution of Liberty* (1960). In 1962 he was appointed Professor of Economic Policy at the University of Freiburg, and he has resided mainly in West Germany and Austria since then. He retired in 1969, but his conviction that the message of his earlier work was still widely resisted as a result of certain false but fashionable beliefs moved him to publish the three volumes of *Law, Legislation and Liberty* in the 1970s. This final reformulation of liberal principles is intended to supplement his 1960 magnum opus by refuting those beliefs.[2]

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The following abbreviations will be used:

CL *The Constitution of Liberty* (University of Chicago, 1960).
RO *Rules and Order* (Volume One of *Law, Legislation and Liberty*) (University of Chicago, 1973).
MSJ *The Mirage of Social Justice* (Volume Two of *Law, Legislation and Liberty*) (University of Chicago, 1976).
POFP *The Political Order of a Free People* (Volume Three of *Law, Legislation and Liberty*) (University of Chicago, 1979).

[1] Brief biographical information can be found in Norman Barry, *Hayek's Social and Economic Philosophy* (MacMillan, 1979) ix-xi.

[2] *RO* 2.

My principal object is to introduce Hayek's legal philosophy to those who are unfamiliar with it, by summarising its major themes and displaying its roots in his social and political philosophy. Critical comments are confined to some major gaps and deficiencies within this theoretical framework; an overall appraisal of his work in relevant fields (for example, his economic and historical theses) will not be attempted. We will be mainly concerned with *The Constitution of Liberty* and the first two volumes of *Law, Legislation and Liberty*.

II The Value of Freedom

As the titles of all his major books in the field suggest, the idea of freedom or liberty[3] is the core of Hayek's social and political philosophy. He defines freedom as the absence of coercion of men by other men,[4] coercion being the involuntary subjection of one man's will to that of another as a result of the latter's threat to inflict harm (and apparent ability to do so).[5] Hayek distinguishes freedom from other conditions which, although arguably good for other reasons, should not be (but often are) confused with it: "political freedom" (collective self-determination), "inner" or "subjective" freedom (from enslaving emotions and so on), and "positive" freedom (the power to realize one's desires).[6] Hayek is fully aware that those who advocate the latter have long disparaged "negative" freedom (which Hayek celebrates) as worthless without the actual ability to do what one chooses.[7] They advocate "equal liberty": the equal ability of all to fulfill their desires—which requires (so it is said) equal income and wealth.[8] Hayek insists that the terms freedom and liberty should not be used in this fashion; that while power may be a good thing it is not freedom.[9] But surely it would be more reasonable, and certainly more fruitful, to put aside the attempt to settle the substantive dispute by definition: those who advocate "positive" freedom should be allowed to use the word as long as it is clearly understood to refer to a different good than that of freedom from (human) coercion. The question of substance is whether conflict between these goods is inevitable and, if so, which should command our primary allegiance. (Nevertheless in this paper I will use the term "freedom" in Hayek's sense.)

Hayek declares that freedom as he conceives it is the first among all possible goods; indeed, it is the source and condition of most other goods.[10] By this he means partly that material prosperity, maximized in a free (market) society, enables us to pursue other good things, and is good for (provides a greater satisfaction of the needs of) everyone, including the least advantaged (this is Rawls' formulation, but Hayek makes precisely this claim for the free market).[11] But he also means that the practice of morality is enhanced in a free society: moral responsibility[12] and genuine

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[3] These two terms are treated as synonymous by Hayek: *CL* 421 n. 1.
[4] *Id.* 12.
[5] *Id.* 133-34.
[6] *Id.* 13-20.
[7] *Id.* 423-25 nn. 14-27 and text.
[8] *Id.* 17.
[9] *Id.* 17-19.
[10] *Id.* 6.
[11] *Id.* 46 and *MSJ* 131. For Rawls, see his *A Theory of Justice* (Harvard, 1971).
[12] *CL* 71-78.

altruism,[13] for example, are only meaningful when people can choose whether or not to do good. (Some would add other goods such as (moderate) self-love, genuine friendship, competition and the pursuit of one's own chosen purposes.)[14]

Unfortunately Hayek places all his emphasis on the material goods which freedom enhances. Part One of *The Constitution of Liberty*, devoted to "The Value of Freedom", is largely a lengthy elaboration of the idea that the satisfaction of our desires is maximized in a social order which enables individuals to pursue their own goals, using knowledge of their own tastes, talents and opportunities that could not possibly be known to any bureaucratic planner. The core concepts are ignorance and experimentation. As to the former he states that "the case for individual freedom rests chiefly on the recognition of . . . ignorance"[15] and that "all institutions of freedom are adaptations to this fundamental fact of ignorance".[16] When economic activity is free the use of knowledge is maximized, whereas in an economy run by command according to some central plan knowledge that is not accessible to the planners (probably the greater part of existing knowledge) is wasted. But Hayek also means to refer to ignorance of future facts. Freedom maximizes experimentation and innovation, enabling us to benefit from the unpredictable.[17] No central planner can foresee the advance of knowledge or changes in habits and tastes, but a free society not only stimulates both but is able spontaneously to adjust itself to them.[18] Freedom not only permits but encourages diverse experimentation, even happenstance, out of which often arises "the discovery of appropriate practices or devices that, once found, can be accepted generally".[19] The evolution of the whole of our culture is best left largely to this process of creative innovation and imitation: intellectual knowledge, language, habits, emotional attitudes, practical skills, institutions, moral beliefs—all the cultural equipment so crucial to any successful human activity (and therefore the satisfaction of *all* of our ends) is best left to "the accumulated hard-earned result of trial and error".[20] Thus, not only the ability to satisfy desires but also the desires themselves develop through the imitation, which may spread to the whole of society, of successful innovations of individuals utilizing knowledge and acting on inspiration that is simply not subject to the command of authority.

As Norman Barry observes,[21] Hayek uses this thesis in an attempt to turn the tables on socialists who argue that the sheer complexity of modern society requires central co-ordination and control. To the contrary, Hayek asserts that through greater specialisation and the extension of the division of labour, which enable the harnessing of vastly more information than can be known to authority, free societies are much more complex than any planned society can be. Nor does such complexity cause instability

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[13] *Id.* 78-9, and *MSJ* 67.
[14] J. Mackie, *Ethics, Inventing Right and Wrong* 133 (Penguin, 1977).
[15] *CL* 29.
[16] *Id.* 30, and also 134 and 156.
[17] *Id.* 29.
[18] *Id.* 28.
[19] *Ibid.*
[20] *Id.* 60.
[21] Barry, *op. cit.* n. 1, 68.

which only planning can overcome: in fact it generates more stability because a free society is better able spontaneously to improve itself and adjust to external changes which inevitably disrupt long-term plans.

It should not be thought that Hayek completely ignores the question of moral right in favour of what might be called utility.[22] But his references to moral right are muted and indistinct compared with his lengthy paean to the material benefits of freedom. Only occasionally do we encounter statements such as this: "[c]oercion is evil precisely because it . . . eliminates an individual as a thinking and valuing person and makes him a bare tool in the achievement of the ends of another."[23] A mere handful of similar statements (none as unambiguous as this) are to be found in his major works.[24] Furthermore, it is hard to know what Hayek could *mean* by saying that apart from the benefits it fosters liberty is "desirable for itself on ethical grounds".[25] He does not seem to believe that moral principles are objective in the sense of having a foundation or authority "external" to (not created by) human beings themselves. In his view morality is a product of cultural evolution to be explained causally in terms of the improvement in the survival and well-being of social groups which it has made possible: groups whose members adopted moral sentiments and practices conducive to their well-being survived and prospered, while others tended to disappear.[26] Hayek's meta-ethical stance therefore seems very close to that of J. L. Mackie's moral scepticism,[27] which at the level of substantive moral argument leads quite naturally to consequentialism (the advocacy of moral principles according to the desirability of their consequences). Moral principles are human "inventions", not objective truths to be discovered or revealed; they must be chosen or agreed upon (and on what grounds other than the consequences of living by them?).

However, in the Introduction to *The Constitution of Liberty* Hayek says that his consequentialist approach is merely tactical. When others do not share our moral convictions, he explains, we cannot simply take them for granted; rather, we should try to demonstrate the concrete benefits they make possible.[28] Of course, there is much to be said for this view. To simply assert that there is a fundamental right to (negative) freedom will not impress those who do not share the intuition that this is so. But a non-consequentialist argument need not amount to dogmatic assertion (although arguably it must sooner or later posit premises which must be either accepted as true or rejected). If Hayek's consequentialism really is merely tactical (and the previous paragraph suggests that it is not), he may have miscalculated. It may play into the hands of those who believe that the utility of particular restrictions on freedom can be demonstrated, because it suggests that after all it is utility and not freedom which is of fundamental importance.[29] It also leads Hayek to overestimate the

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[22] Hayek does not use this term, and in fact attacks utilitarianism as excessively rationalistic: *MSJ* 17-24.

[23] *CL* 21, but see also 134 and 156.

[24] Others are at *CL* 79 and *MSJ* 71.

[25] *MSJ* 71.

[26] *POFP* 153-76, *RO* 30-1 and 74-6, *MSJ* 60.

[27] J. L. Mackie, *Ethics, Inventing Right and Wrong* (Penguin, 1977).

[28] *CL* 6.

[29] J. W. N. Watkins, "Philosophy", in *Agenda For a Free Society* 31, 48 (Arthur Seldon ed., Hutchinson, 1961).

effectiveness of his own argument. In *Law, Legislation and Liberty* he suggests on several occasions that the debate between the liberal and the socialist is really one of fact and logic, rather than value, and that it is therefore "capable of a definite scientific treatment".[30] But (to reverse the logic of the previous point) the socialist may reject Hayek's emphasis on utility and argue that there are other, over-riding moral considerations. The liberal should be equipped to argue on both levels. As J. W. N. Watkins concluded after reviewing *The Constitution of Liberty*, Hayek

> has certainly provided very strong social, economic and juristic arguments against coercion. But I feel that something is missing which stops it being a *comprehensive* restatement.[31]

III Social Order in a Free Society

Freedom as the absence of coercion depends on the existence of "some assured private sphere . . . some set of circumstances in [one's] environment with which others cannot interfere".[32] This private sphere, in turn, depends on the existence of rules which are generally obeyed and, when disobeyed, authoritatively enforced. Law is therefore not an infringement upon freedom but a necessary condition for it—provided that it is not abused by those in authority.

The content of this private sphere is not spelt out in detail. Hayek regards the right to own and control property as an essential component—*no* coherent plan of action can be carried out without the ability to control material objects.[33] Indeed, the institution of private property lies at the very root of civilized life.[34] The protection of contractual agreement is also necessary if individual pursuits are to escape the arbitrary interference of others, especially since such pursuits usually require access to resources and services controlled by others. Thus, the private sphere that law must shelter includes not only property but "many other 'rights', such as security in certain uses of things or merely protection against interference with our actions".[35] Moreover, because of these other rights, even those who lack substantial personal property can be free: provided that the control of property is sufficiently dispersed that no-one is dependent on a particular person, group or official for what he needs, the ability to acquire these other rights "enables each member of a society to shape the content of his protected sphere and all members to recognize what belongs to their sphere and what does not".[36]

Hayek adds little to this brief discussion of the content of the private sphere,[37] which, in effect, merely restates Hume's three fundamental laws of nature ("stability of possession, of its transference by consent, and of the performance of promises").[38] There seem to be two reasons for this.

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[30] *RO* 5.
[31] Watkins, *op. cit.* n. 29, 49.
[32] *CL* 13, 21 and 139.
[33] *Id.* 140, *RO* 107-8, *MSJ* 53.
[34] *Ibid.*
[35] *CL* 140.
[36] *Id.* 140-41.
[37] He does recognize the need to protect privacy (*id.* 142) and personal behavior between consenting adults (*RO* 101, *MSJ* 57).
[38] Quoted by Hayek in *CL* 158 and *MSJ* 40.

One is that, as we will see,[39] he relies heavily on the *form* of law (abstractness, generality, equality) to protect individual liberty regardless of its content. The second is his distaste for abstract "blueprints" of rationally designed social orders, which assume that a society can and should be the object of deliberate contrivance. He denies that the concept of private property fell "ready made from heaven", and insists that in delineating private rights "we certainly have not yet found all the final answers".[40] He believes that "only experience will show what is the most expedient arrangement".[41] Law-making involves the cautious and incremental extension of principles which already provide the basis of an on-going social order: grandiose legislative schemes conceived solely on the basis of deduction from abstract "rational" principles and without reference to their coherence with that existing order are foolish and dangerous.[42]

Later in this paper we will consider whether Hayek's account of the social conditions for freedom is adequate, and whether the conditions he specifies are in fact necessary ones.[43]

IV Legal Order in a Free Society

The principal function of law is to declare and enforce the rules that protect the "private sphere" of free individuals.[44] By doing this, law does not restrict freedom but makes it possible.[45] But this requires that law should have a very specific *form*, which prevents its use as an instrument of coercion by those exercising authority. The several characteristics which together define this "law of liberty" are those with which traditional ideals of the "rule of law" are concerned.

The most important formal characteristic of the law of a free society is abstractness, of which generality and equality of application are aspects (but not the only ones). By abstractness, Hayek means that the law should not aim at particular goals or results but should lay down conditions to be met by individuals in pursuing their own freely chosen goals.[46] Because such a law merely provides a framework within which individuals are able to act autonomously, obedience does not subordinate the ends of individuals to the will of the lawmaker: the law alters the means that can be used, but not the ends that can be pursued.[47] Hayek also describes this characteristic in terms of the "negativity" of law which, with a handful of exceptions,[48] forbids actions but does not prescribe them. As long as the actions forbidden can be avoided in pursuing one's chosen ends one is still free: legal restrictions are like natural obstacles which must be taken into account in planning one's course of action, whereas freedom is infringed when particular actions are required.[49] This is, however,

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[39] See discussion *infra*, Parts IV and VII.
[40] *RO* 109.
[41] *CL* 158.
[42] *MSJ* 41.
[43] See discussion *infra.*, Part VII.
[44] *MSJ* 37.
[45] *RO* 51-2, *MSJ* 53, *CL* 148.
[46] *CL* 152.
[47] *Id.* 152-53.
[48] *CL* 142-44, *MSJ* 26, 36.
[49] *CL* 153. But see the searching criticism of the "natural obstacles" analogy by Watkins, *op. cit.* n. 29, 38-9.

obviously a question of degree—even "negative", purpose-neutral rules limit the range of actions that are permitted, the difference being that they do not determine what action within that range will be taken.[50]

Generality is a particular (but the most important) aspect of abstractness: laws should not be aimed at particular individuals or groups but should apply equally to all people in similar circumstances.[51] If the private spheres of particular persons can be altered at the will of the lawmaker they can be subjected to coercion. If the lawmaker cannot know in advance the particular cases in which his rules will apply he cannot be in a position to coerce individuals.[52]

Hayek acknowledges that there are difficulties here. First, the requirement of generality clearly cannot exclude the legitimate application of rules to particular *classes* of people designated by reference to qualities possessed only by their members—this is the very nature of legislation. The problem is that it is often possible to disguise a discrimination (or a privilege) as a law of this sort by the pretense that the lawmaker is ignorant of the particular individuals burdened (or benefited), and that their special treatment results from some legitimate general principle and not improper bias. Hayek's solution is to require that laws of this sort be recognized as reasonable by those inside and those outside the affected class (or rather, majorities of both): if the law is resented by either group then it must be an unfair measure which violates the criterion of generality.[53] The second difficulty is that even general, abstract rules which apply equally to everyone may severely restrict liberty.[54] In response, Hayek argues that this is unlikely given the requirement that the rules apply to the lawmakers and adjudicators as well as ordinary citizens. Occasionally, he admits, lawmakers will be willing to subject themselves to restrictions that some others deem unreasonable—inspired, for example, by religious beliefs—but these will be "comparatively innocuous . . . compared with those that are likely to be imposed only on some!"[55] Later in this paper these responses will be critically scrutinized.[56]

Another essential characteristic of the law of liberty is that it must be predictable. This has several ramifications: the law must be public,[57] prospective,[58] certain,[59] inflexible,[60] and its application in particular cases must not depend on circumstances which cannot be known in advance.[61] But the law need not be a system only of rules: Hayek recognizes the importance of general principles, even ones which are not explicit in the sense of being "written down . . . in so many words".[62] Law can be reasonably certain even if in many cases its major premises are only implicit

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[50] *MSJ* 37.
[51] *CL* 142.
[52] *Id.* 153-55.
[53] *Id.* 154 and 209-10.
[54] *Id.* 154-55.
[55] *Id.* 155.
[56] See discussion *infra.*, text to nn. 144-47 and Part VII.
[57] *CL* 208. But rules can be "public" without being "announced" or "promulgated" by authority: see *RO* 118.
[58] *Ibid.*
[59] *Ibid.*, but see *RO* 117-18.
[60] *CL* 158-59; *RO* 56-7, 60; *MSJ* 16-7 *but* emergency exceptions may be permissible: *CL* 217-18.
[61] *CL* 157.
[62] *CL* 208, 215; *RO* 117-18.

in the body of formulated laws—indeed, it is a characteristic of all generalisations that they depend on still higher generalisations which are not explicitly articulated but nevertheless govern our thought.[63] Hayek distinguishes considerations of "policy", however: the pursuit of the concrete, ever changing aims of government cannot be allowed to affect the legal duties of citizens.[64]

The law of liberty attempts to utilize a division of knowledge between authority and individual citizens. It allows individuals to use their knowledge of particular facts (talents, tastes and opportunities at hand) by protecting their private spheres of rights from the interference of others; within those spheres individuals are free to pursue their own goals. But in framing the general rules which individuals use to construct their private spheres the law draws on knowledge *not* known to particular individuals—namely, how the pursuit of the particular goals of each can best be brought into harmony with more general and permanent characteristics of the society as a whole[65] (but note that this "knowledge" need not be explicitly known to those in authority; for the most part, law evolves through the largely unconscious "selection" of more efficient principles and thereby comes to embody a "wisdom" that is not necessarily ever fully understood[66]). In this way the law provides the preconditions for the creation of the spontaneous or self-generating order of a free society.

Hayek contrasts law defined in this sense with a different kind of rule—namely, "command". The difference is one of degree,[67] along the dimensions of abstractness, generality and predictability. In contrast to law, commands are concrete, specific and positive; they are addressed to particular persons or groups, directing them to act in particular ways in the service of goals determined by the source of the command. Commands are less predictable because they cannot be known in advance. These two different kinds of rule, law and command, are appropriate to different types of social order. The spontaneous order of a free society (which he calls *cosmos*[68]) forms within a framework of general, abstract laws (which he calls *nomos*[69]). Commands (called *thesis*[70]) are associated with the order of organisation (*taxis*[71]) whose members are directed from above in the pursuit of given, collective goals.

Hayek does *not* maintain that only *nomos* is appropriate in free societies. Government, in contrast to the society in which it exists, *is* an organisation charged with various specific tasks, and in carrying out those tasks and administering the personal and material resources given to it for that purpose it must often govern itself by *thesis*. The primary function of government is the enforcement of *nomos*, but it has other legitimate tasks such as the provision of collective goods financed through taxation (roads, parks, subsidies for the arts, defence, social welfare and so on).[72]

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[63] *Ibid.*
[64] *CL* 215; *RO* 139-40.
[65] *CL* 150, 157.
[66] *Id.* 148-49, 160-61.
[67] *Id.* 149.
[68] *RO* ch. 2.
[69] *RO* ch. 5.
[70] *RO* ch. 6.
[71] *RO* ch. 2.
[72] *CL* 259; *RO* 47-8; *MSJ* 6-8; *POFP* 41ff.

Government must administer the resources put at its disposal for given ends which it is not free to change; it is necessarily committed to the organisational form and the rules appropriate to that form. But it should never confuse the resources which it may legitimately employ, with the resources and activities of private citizens which are protected by law (*nomos*): while it must inevitably direct its employees through commands the efforts of citizens should not be similarly administered.[73] Unfortunately many pressures have led to precisely this confusion, including the use of the word "law" to refer to both *nomos* and *thesis*,[74] the assignment to the same body (the legislature) of the tasks of issuing both types of rule,[75] the growing proportion of individuals who work in large organisations and are dominated by organisational thinking,[76] the rise of positivism in legal philosophy which systematically denies the distinction,[77] and the growing popularity of a political philosophy (socialism) committed to ideals, such as that of "distributive" justice, whose pursuit is incompatible with the rule of law.[78]

V Common Law and Statute

In *The Constitution of Liberty* (1960) Hayek suggested that the codification of law in statute form was an improvement over common law because it made the rule of law more secure. He went so far as to postulate "a prima facie conflict between the ideal of the rule of law and a system of case law" due to the combination in one institution of law-making and law-applying functions (endangering the generality of law), and also the flexibility of common law which can be of value but is a source of danger when the ideal of the rule of law is in decline.[79] But by 1973 Hayek had reversed this assessment, explaining that his "return to a civil law atmosphere" had led him to question the "deeply rooted prejudice" that "codification . . . increases the predictability of judicial decisions".[80] Much of *Rules and Order* is a celebration of the common law process on the ground that it is more conducive than legislation to the emergence of rules which are abstract and general. He realizes that the contrary view is more popular, especially on the Continent. As well as his change in residence, the following factors seem to have contributed to his conversion: his generally more conservative attitude evident throughout *Law, Legislation and Liberty*, in which he continually urges that legal reform be gradual, experimental and incremental; his bitter disillusionment with the contemporary legislative process, which he attacks in *The Political Order of a Free People* as an unprincipled auction in which selfish interest groups sell their support in return for special privileges which violate the rule of law; and the belief that by its very nature the legislative process encourages the false, positivist view of law as a deliberately made product of human will expressing the purposes of the lawmaker rather than

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[73] *CL* 207; *RO* 131, 133.
[74] *POFP* 100-102.
[75] *POFP* chs. 12 and 13, *RO* 89-90.
[76] *MSJ* 134-35.
[77] *MSJ* 44-8; *CL* 236-39.
[78] *MSJ* ch. 9.
[79] *CL* 198.
[80] *RO* 116.

providing a framework for the pursuit by individuals of their own freely chosen ends.

Hayek describes the origin of law as follows. Long before they are articulated rules guide human conduct; indeed, human communities like animal communities were undoubtedly facilitated by enforced rules of conduct before the development of language able to express them.[81] People can "know how" to act without being able to articulate the rules guiding them, and often even without knowing that they are being guided by rules.[82] These rules evolved because they contributed to the survival and efficiency of the groups guided by them (although there are as well some rules which are "innate").[83] Gradually man learnt to use his developing skills of reason and language to teach and enforce the rules, but they had not been "invented" and did not express a "purpose" known to him.[84] Moreover, language is inherently unable to capture precisely all the many-sided aspects and applications of such rules—we are often incapable of expressing in words "what we well know how to practise".[85] Nevertheless the attempt to articulate rules became necessary for purposes of teaching, enforcement and dispute settlement.[86] For centuries mankind knew that this was indeed an attempt to express already existing rules rather than to construct new ones; although law continued to change, this was nevertheless not usually a result of some lawmaker's design (although rulers exercised the recognized power to issue commands (*thesis*) for particular purposes, as in hunting expeditions, migrations and warfare, these rules were distinct from the body of customary law governing general conduct).[87]

The common law developed in an intellectual climate in which this understanding of law was still paramount. The judge's task was to consider which of the conflicting expectations of the parties before him, both pursuing their own independent purposes, was most reasonable in the light of customary practices and rules which should have been known to them.[88]

> The question for the judge here can never be whether the action in fact taken was expedient from some higher point of view, or served a particular result desired by authority, but only whether the conduct under dispute conformed to recognized rules.[89]

The common law process by its very nature requires the articulation of rules which are general and abstract, rather than concrete and particular. It was this process which provided the model for the ideal of legislation expressed in the form of abstract rules: rulers concerned with obtaining particular results would never have invented such an ideal.[90]

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[81] *RO* 72, 74.
[82] *Id.* 72, 76.
[83] *Id.* 74; *POFP*, 153ff.
[84] *RO* 75. Hence the sentence in the text immediately following n. 27, *supra*, where the term "invention" is used, must be qualified: morality is a human invention in the sense that it has been created by us, but not in the sense that it has been *deliberately* created.
[85] *RO* 77.
[86] *Ibid.*
[87] *Ibid.*
[88] *Id.* 86-7.
[89] *Id.* 87.
[90] *Id.* 88.

This does not mean that the common law was or should have been static. There must inevitably be "gaps" in any legal code, where the existing body of rules and principles leaves genuine doubt as to what should have been done,[91] and the judge must here introduce a new norm or at least recognize a principle as being "implicit" in the existing rules, not in being logically derivable from them but in being required, as a practical matter, "if the other rules are to achieve their aim".[92] But the common law resisted the burgeoning rationalism of the Continent, which gradually (and harmfully) revolutionized the traditional conception of law by characterising it as "an act of the deliberate and unfettered will of the ruler".[93] At first this revolution was restrained by natural law theory, but it too succumbed when it came to be understood as the design of "natural reason".[94]

Hayek does not deny that particular developments in the common law process can be, and were, highly undesirable, or that in such cases legislation may be the only solution.[95] This may happen because common law fails to adjust to new circumstances, which require the adoption of a new rule which for the sake of predictability (essential to the rule of law and the freedom it protects) must be announced prospectively (which a common law court cannot do).[96] Alternatively, such a development may have been a result of a simple error, or of prejudice on the part of judges traditionally drawn from the ranks of a particular, narrow class. Since government existed (partly) to enforce the law, it was natural to entrust to it the power to amend the law when necessary for these reasons. But this was a development fraught with danger, since government also exercised the quite distinct power of issuing commands directed to its officials and servants and aimed at furthering its organisational purposes. The danger, which Hayek alleges has eventuated, was that the tasks of law-making and commanding government would be confused.[97]

Hayek's account of the process of judging in a common law system is in some respects unclear. The task of the judge is to apply, articulate and improve a set of rules which as a whole has not been deliberately made by anyone and which at all times provides the framework for ongoing processes of spontaneous ordering in society. The function of that framework is to secure "private spheres" within which individuals can pursue their own ends free from the coercion of others.[98] Ultimately the spontaneous order created by the interdependent actions of individuals rests on their being able to form secure expectations about the actions of their fellows.[99] The duty of the judge arises when the expectations of one or both parties as to the other's actions have been disappointed. The question for the judge is

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[91] *RO* 100, 117-18.
[92] *Id.* 78.
[93] *Id.* 84.
[94] *Ibid.*
[95] *Id.* 88.
[96] *Id.* 89.
[97] *Id.* 90-1.
[98] *RO* 94-5.
[99] *Id.* 96.

> not . . . whether the parties have obeyed anybody's will, but whether their actions have conformed to expectations which the other parties had reasonably formed because they corresponded to the practices on which the everyday conduct of the members of the group was based.[100]

The judge must decide "what private persons have 'legitimate' reasons to expect, where 'legitimate' refers to the kind of expectations on which generally his [sic] actions in that society have been based".[101]

But which expectation is legitimate when social practice and the rules (and principles) describing that practice are unclear, indeterminate, or inconsistent? Clearly the judge cannot impose whatever rule he likes: his decision must fill a gap in the body of existing rules in a manner that will serve to "maintain and improve that order of actions which [these] rules make possible".[102] Nor is it possible to protect *all* expectations—one of the parties must be disappointed.[103] Hayek offers this suggestion: "[w]hich expectations ought to be protected must . . . depend on how we can maximize the fulfilment of expectations as a whole".[104] (As an example he points out that protecting a businessman's expectation that his customers will not switch their patronage to a competitor would, by suppressing their ability to adjust to changed circumstances, reduce the overall fulfilment of expectations and paralysis would gradually spread throughout the social order.)[105] Judges could *not* apply this test by purely logical deduction or induction from existing rules: they must consider the *factual* question of whether actions permitted by the new norm(s) to be introduced will be consistent with the existing order of expectations and actions.[106] There can be no pure "science of norms".[107] The test of the justice of a norm is "negative" in that it concerns the compatibility of the norm with an order of actions based on a body of other norms which the judge must take as given and which exists independently of his, and everybody else's will.[108]

Hayek's conception of "consistency" may present some difficulties. He insists that it is not a matter of "logical" consistency between rules as such; rather, it concerns the compatibility of actions which the rules permit. He seems to think that this is a more stringent requirement:

> a new norm that logically may seem to be wholly consistent with the already recognized ones may yet prove to be in conflict with them if in some set of circumstances it allows actions which will clash with others permitted by the existing norms.[109]

He says that it is not a question of logic, but of fact or "a sort of 'situational logic' ".[110] But it may be that actions are more easily reconciled than the

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[100] *Ibid.*
[101] *Id.* 98.
[102] *RO* 100.
[103] *Id.* 102-3.
[104] *Id.* 103. See also 107.
[105] *Id.* 102-4.
[106] *Id.* 105-6, 106-7; *MSJ* 24-5, 51, 60.
[107] *RO* 105.
[108] *MSJ* 51, 60.
[109] *RO* 106.
[110] *Id.* 115. See also *MSJ* 24-5.

norms that authorize them; indeed, Hayek's test may be of little practical assistance in many "hard cases" if an outcome favouring either party would be equally consistent with the overall "order of actions". Hayek is confident that "in most instances it will be difficult enough to find even one solution which fits all the conditions it must satisfy",[111] but this is not obvious. While most disputes involve a conflict between the actions (actual or intended) of the immediate parties, once that conflict is resolved (by a decision either way) it may be quite unclear whether further conflicts with other possible actions in the social order are likely. It is hard to see how a judge could anticipate such conflicts.[112] On the other hand even if no further conflicts between actions are likely they may still be authorized by rules or principles which are normatively incompatible, and anyway the most reliable guarantee of consistency among actions may well be the consistency of norms. In a sense the system of norms is simply a highly abstract description of the order of actions permitted, which enables the latter to be conceptually grasped and manipulated without the need for enumerating all (an infinite number) the particular actions denoted. Given Hayek's emphasis on ignorance and the need for abstract rules to cope with it we might have expected him to propose a test of normative consistency rather than what seems an impossibly difficult empirical enquiry (or, to be more accurate, speculation).

In fact he does occasionally suggest that judges may take an easier road. At two points he recommends "intuition" as a guide to right results (admittedly he contrasts this with "logic", not his own factual test).[113] But in other places he insists that justice is "not simply a matter of 'opinion' or 'feeling', but depends on the requirements of an existing order"[114]—the judge's task being "an intellectual task, not one [involving] his emotions".[115] I am not suggesting that judging should be done intuitively, but rather that even the Herculean labours of Dworkin's hypothetical ideal judge, who must create total consistency among all legal norms, seem easy beside the empirical enquiries required by Hayek.

Hayek's approach also seems to advocate "efficiency" criteria of the sort endorsed in Posner-style economic analysis of law. He wants not only consistency, but the overall "maximization of expectations". A further problem may arise if in particular cases the most satisfactory rule by this criterion conflicts with widespread sentiments of justice. Hayek himself insists that we often do not know the true value of rules that we accept (although they evolved by contributing to social well-being, we cannot necessarily know how), and that as a result we must be guided by our sense of justice rather than assessments of the utility of particular rules.[116] If that sense of justice is offended by a judge introducing a new rule on the basis of utility, then the result may be counterproductive because the stability of the order of rules as a whole might be undermined. Nevertheless Hayek says that the judge "may sometimes have to decide that what *prima*

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[111] *RO* 100. See also *id.* 120.

[112] At *id.* 102, he accepts that this is difficult and adds that it will be a matter of "trial and error", which is why the common law is particularly suited to the task.

[113] *RO* 117 and 120.

[114] *Id.* 116.

[115] *Id.* 101.

[116] See e.g., *RO* 110-11.

facie appears to be just may not be so because it disappoints legitimate expectations"[117] (which, as we have seen, are those tending to maximize expectations as a whole).[118] The use of "efficiency" rather than other normative criteria may also increase the uncertainty of legal rules, if—as Hayek at one point suggests[119]—rules previously deemed to be valid can be challenged as "mistakes" because they fail to maximize expectations.

VI Justice in a Free Society

The idea of justice only applies to intentional human conduct—actions for which persons can be held responsible.[120] Although the distribution of goods in a free society is a result or, at least, byproduct of human conduct it is not and cannot be intended by any individual or group (including government): no one can be held responsible for it.[121] Because the *cosmos* (order) of a free society is the spontaneous aggregate result of the pursuit by each individual of his or her own freely chosen goals, it cannot itself have a purpose or goal other than the maintenance of the conditions (rules) necessary for its own continuation.[122] It is an abstract order in the sense that it can aim only at the preservation of abstract rules which facilitate the pursuit of "countless different purposes of different individuals", the overall results of which cannot be intended or even predicted and which therefore cannot be described as just or unjust. The notion of "social" or "distributive" justice is meaningless or, at least, totally inapplicable in a free society: it is, as the title of the second volume of *Law, Legislation and Liberty* suggests, a "mirage". Hayek's view of justice is "procedural", similar in some respects to Rawls' notion of "pure" procedural justice or Nozick's "historical" entitlement theory of justice, but with this difference—in Hayek's view justice concerns *only* rules and procedures and individual actions to which they apply, and *not* to the overall, unintended results of some aggregation of individual actions. While Rawls and Nozick are prepared to describe such overall results as just (if the individual actions comprising them are just), Hayek dismisses this as a misuse of the term: such results cannot properly be called just *or* unjust, only individual actions and the rules governing them.[123] Nor can those individual actions or rules be condemned as unjust because the overall results fail to meet some distributive preference or ideal: neither the individuals concerned, nor those charged with making the rules, can be held responsible for those results. As to the rule-makers, this would be to misconceive the purpose of rules in a free society. As to the individuals, this would stretch the demands of moral responsibility beyond reasonable bounds: "[t]he essential condition of responsibility is that it refer to circumstances that the individual can judge, to problems that, without too much strain of the imagination, man can make his

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[117] *Id.* 115.
[118] *Id.* 103, referred to supra at n. 104.
[119] *Id.* 102; *MSJ* 50-1.
[120] *MSJ* 31, 20.
[121] *Id.* 33.
[122] *RO* 112-13.
[123] *MSJ* 33, 38, 70. For Rawls and Nozick, see J. Rawls, *A Theory of Justice* (Harvard 1971) and R. Nozick, *Anarchy, State and Utopia* (Basic Books 1974). Hayek's thesis here is criticised by A. M. MacLeod in "Justice and the Market" 13 *Canadian Journal of Philosophy* 551 (1983) (which is followed by replies from A. W. Cragg and E. Mack and then a response from MacLeod).

order the question is whether or not we should adopt such an order. Hayek admits this when he says that the "primary question [is] whether there exists a moral duty to submit to a power which can coordinate the efforts of the members of society with the aim of achieving a particular pattern of distribution regarded as just".[135] He offers two reasons for answering this in the negative. First, the exercise of such a power would inevitably violate the requirement that rules of conduct be general in the sense of applying equally to all—government would have to treat people unequally in order to make them more equal materially.[136] But this reason is flawed. All laws treat different persons differently: the question is whether particular differential treatment is unfair and in the case of redistribution the question of fairness should not be begged. Furthermore, as we noted previously[137] Hayek has proposed a test for unfairness in such cases: it is whether or not majorities of both the group specially treated and other groups agree that the treatment is fair. But in a community convinced that "distributive justice" is morally required, this test would be met! Hayek again needs objective moral reasons which make the necessary discriminations unfair (something like Nozick's idea of inviolable rights, perhaps), but as we have seen this is just what his theory lacks. He gives a second reason for rejecting a duty to institute social justice, which he says is more important: to bring about any particular distribution of rewards the state "would have to undertake to tell people what to do", because once rewards no longer function to indicate where effort is best directed only a directing authority could do so. But this response assumes a very radical restructuring of rewards, whereas a more modest redistribution might secure social justice without destroying the guiding function of rewards.

To illustrate this, we need only look to a very limited form of redistribution that Hayek explicitly favours—social security for the aged, handicapped, ill or those otherwise unable to support themselves.[138] Hayek does *not* support this only on the ground that it is in the interests of all (insurance against contingencies that might afflict anyone): he concedes that "it may be felt to be a clear moral duty to assist, within the organized community, those who cannot help themselves"—"a necessary part of the Great Society in which the individual no longer has specific claims on the members of the particular small group into which he was born".[139] But if there can be such a moral duty, which can only be carried out through the "organized community" (that is, government), and if the burden of taxation required to do so need not threaten the efficacy of market incentives, perhaps there is a broader duty to contribute to the material welfare of others which should be discharged in a similar manner—for instance, a duty to improve the conditions for "self-realization", or equality of opportunity.[140] We noted earlier Hayek's refusal to recognize the ideal of "collective responsibility",[141] on the grounds that it is incompatible with moral responsibility which is

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[135] *MSJ* 64.
[136] *Id.* 82.
[137] See *supra* text to n. 53.
[138] *RO* 141-42.
[139] *MSJ* 87 and *POFP* 55 respectively. See also *CL* 285.
[140] He discusses these claims at *MSJ* 87-8 and 84-5 respectively.
[141] See *supra* text to n. 124.

necessarily limited in scope. But the provision of social security funded by compulsorily collected taxes is clearly an instance of just that. Although our moral duty to contribute to the well-being of others may not extend beyond the provision of basic needs, this can only be established by moral argument, but Hayek does not attempt this. It is also unlikely that he can rest his case on the likely destruction of market incentives, because if this has not occurred in the case of taxation used to fund social welfare how can he assume that it will do so as soon as taxation is increased beyond current levels? At any rate, it is a purely empirical question *when* rewards would be interfered with to such an extent that the market would be endangered. Hayek does enlist the tried (but not always true) "slippery slope" argument,[142] warning that if we dabble with distributive justice at all we will inevitably be drawn further and further into a quagmire, but again: if this need not result from our dabbling with social security, why not go further?

Hayek might attempt to resist this argument by suggesting that progressive taxation would be needed to fund the redistribution we are considering. He opposes progressive taxation in principle, on the ground that it is discriminatory and so fails to meet the criteria of generality and equality which in part define the rule of law. Proportional taxation used for the purpose of social security is justified in his view because the majority is free to burden itself to assist a minority, but this is clearly different from cases where a majority places on a minority (the wealthy) burdens that it is not willing to shoulder itself.[143] Here Hayek refers to his earlier proposal[144] that since discrimination can be disguised as a general law applying to an anonymous class the test must be whether the distinctions drawn are recognized as relevant and reasonable by majorities of both those inside and those outside the class specially treated.[145]

But we have already seen that there are problems with this proposal. J. Watkins asks whether a law against sexual assault must be deemed discriminatory if the majority of those inclined to commit such assaults would not accept it as fair.[146] Hayek seeks a definite criterion for equality before the law which does not depend on a moral evaluation of its purposes; Watkins' example (which has also been used by Nozick to make the same point)[147] suggests that this may not be possible. Ultimately we can identify unfair discrimination only by judging whether differential treatment can fairly be said to be justified on moral grounds. Even when we know that a law was motivated by feelings of ill-will toward the group in question, we must decide whether or not that ill-will is justified or at least reasonable. If this is so, then Hayek has not shown that progressive taxation cannot in principle be justified: he must rebut arguments that there is an enforceable moral duty on the part of the wealthy to contribute to the welfare of those less fortunate. This is *not* to say that these arguments cannot be rebutted—just that he has not done this. Moreover, as we see

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[142] *MSJ* 68; *POFP* 103, 142-43.
[143] *CL* 314.
[144] See *supra* text to n. 53.
[145] *CL* 314.
[146] Watkins, *op. cit.* n. 29, 40.
[147] R. Nozick, *op. cit.* n. 123, 272-73.

yet again, his lack of any clear, "objective" (in a substantive, not formal sense) moral principles may prevent him from doing so.

VII Freedom and the Rule of Law

Hayek's strategy in opposing progressive taxation exemplifies his general approach to the question of the protection of individual freedom, which is not to argue that particular conduct should not be restricted but rather that any restriction should satisfy the criteria of the rule of law (abstractness, generality, predictability). His strategy is to question form rather than content—the "method" of a rule rather than its aim.[148] In the form of commands rules disrupt the spontaneous order and the complex balance which is established only by the free interaction of individuals pursuing their own ends in conformity to general rules. This, he says, is "the gist of the argument against 'interference' or 'intervention' in the market order".[149]

Although he argues that *some* of the aims currently pursued by governments cannot possibly be pursued in any way other than that of organizational-style command (for example price control), many of them clearly can be. The question arises whether the test of conformity with the requirements of the rule of law is sufficient to protect individual freedom and the spontaneous order (as Hayek himself conceives them) from damage.

At times Hayek *defines* freedom as that state in which choice is restricted only by "general abstract rules laid down irrespective of their application to us".[150] But as Watkins points out, this has the odd consequence that a general, abstract rule, equally applicable to all, which forbids foreign travel, does not restrict the freedom of those subject to it.[151] At other times Hayek acknowledges that conformity with the rule of law criteria is necessary but not sufficient for the preservation of freedom. But as we have seen,[152] he is confident that the requirement that lawmakers be subject to their own laws makes it unlikely that undue repression will occur, and when it does—possibly inspired by religious belief—it will be "comparatively innocuous". But this is surely to underestimate the willingness of zealots to subject themselves along with their hapless subjects to severe constraint. While democratic procedures undoubtedly reduce this risk, it was nevertheless a democracy which enacted Prohibition. Furthermore, Hayek himself argues elsewhere that freedoms are particularly precious when they are not widely enjoyed, because they provide rare opportunities for experimentation and the acquisition of new tastes and skills which might then be adopted by others. But because such freedoms are not widely enjoyed it is dangerous to rest their protection upon the revulsion of the majority for restraint—they may not care.[153]

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[148] *CL* 221.
[149] *RO* 51 see also *CL* 144-45.
[150] *CL* 153.
[151] Watkins, *op. cit.* n. 29, 39.
[152] *Supra* text to n. 55.
[153] *CL* 32.

Hayek has consistently argued that the law should not be used to restrict the private activities of consenting adults, as long as others are not adversely affected.[154] But of course this can be done by rules that conform scrupulously to the rule of law criteria. Sometimes he makes statements such as this:

> [W]ithin a spontaneous order the use of coercion can be justified only where this is necessary to secure the private domain of the individual against interference by others.[155]

But either this is empty, if the "private domain" to be protected by coercion may be whatever the government chooses (as long as it is defined in accordance with the rule of law criteria), or Hayek needs some independent substantive moral standards for delimiting that domain. We have returned to the concerns of Part III—the definition of the "private sphere" that the state should protect. We noted there that Hayek provides little assistance on this score.

It is not simply that "private acts between consenting adults" can be restricted by perfectly general laws. Hayek's core economic liberties are just as vulnerable. This was, of course, the argument in the preceding Part of this paper: that redistribution of wealth might be carried out consistently with the rule of law. But worse still, from Hayek's standpoint, it would seem that private property itself might be abolished without a violation of the rule of law. It is not inevitable that a liberal regime be replaced by a centralised, "command" economy in which freedom is extinguished. A socialist market economy in which economic units owned by worker collectives or even public agencies compete and exchange might be consistent with Hayek's definition of freedom. After all, he has insisted that individuals need not own property themselves to be free—it is enough that holdings are sufficiently dispersed so that coercion of the propertyless by property owners cannot occur, a condition which in principle might be satisfied in a socialist market system of this sort. Out of such a system there might emerge a spontaneous order, formed on the basis of perfectly abstract, general rules of the kind Hayek admires.

In summary, the formal test of conformity to the rule of law criteria seems incapable of satisfying Hayek's own sense of when and what freedoms should be protected. Furthermore, as noted at the end of the preceding Part, at least one key aspect of that test—equality—itself requires explication. Hayek requires a more complete moral theory in order to explain the nature and value of freedom, and the inviolability of particular rights essential to its enjoyment.

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[154] *CL* 145; *RO* 101; *MSJ* 57; *POFP* 111.
[155] *MSJ* 57; also *CL* 144, and *POFP* 139.