

## HAYEK AND POLITICAL ORDER: THE RULE OF LAW\*

WILLIAM P. BAUMGARTH

*Department of Political Science, Fordham University*

We might assume from the title of Hayek's earliest comprehensive treatment of the subject that the "rule of law" would appear as the summation of his political philosophy, as his legal ideal. Indeed, Hayek's formulation of the principles of the "rule of law" serves as a synthesis of his notions about man, mind, and society, as an application of his epistemological views on the limitations of the human intellect, of his modified rule utilitarianism, and of his notions of spontaneous order in society to the problem of the nature and limits of the liberal state.

In terms of his theory of knowledge, Hayek insists that the limits of the individual man are far more important than the exponents of Reason, with a capital R, would have us believe. Hubristic exaltation of Reason leads, Hayek contends, to demands for social engineering, for the dominance of one or a few minds possessed of true Reason. A realization of the immensity of knowledge synonymous with such social processes as language, the market and common law, that is to say an appreciation of the division of knowledge in society that enables the individual to perform more tasks without conscious effort than he could alone with full reflection, is a sobering experience for the theorist. The conclusion of such meditation upon the intellectual poverty of the single person, in the light of the enormous wealth of the impersonal social forces, is a disdain for subjugating the spontaneous order to the confines of the planner's all-too-limited intellect.

According to Hayek, we act on the basis of rules which we do not, nor cannot in all

probability, fully elucidate, much as the billiard player, in the famous Friedman-Savage example, makes use of mathematical laws without explicitly stating them.<sup>11</sup> So also we recognize "friendly faces", hostile glances, and a host of other social gestures without fully articulating the clues that enable us to do so. That is to say, the rules which govern human action are economical, in the sense that they are abstractions which enable us to act without a full consideration of all the facts before us. Men simply cannot be expected to take account of all the possible consequences of their actions, since they are dependent upon contingencies of time and place beyond their calculations.<sup>12</sup> Nor should they be expected to do so, since this would place responsibilities upon them too great to be fully executed.

In the course of the evolution of the human mind, individuals began to differ sufficiently to make it necessary for previously inarticulated social rules, necessary for survival, to be made communicable, so that deviate behavior could be corrected.<sup>13</sup> In fact, it is only when the intellect arises that such deviance, such a choice of accepting a rule or not, becomes possible. The purpose of such rules, articulated or not, is to diminish the uncertainties of human action. In short, the rules serve as knowledge of what not to do. In commenting on Hume, Hayek states,

His reason for the [insistence on abstract rules] is that human intelligence is quite insufficient to comprehend all the details of the complex human society, and it is this inadequacy of our reason to arrange such an order in detail which forces us to be content with abstract rules; and further that no single human intelligence is capable of inventing the most appropriate abstract rules because those rules which have evolved in the process of growth of society embody the experience of many more trials and errors than any individual mind could acquire.<sup>14</sup>

---

\*The original version of this paper was delivered at the First Libertarian Scholars Conference, October 1972, at New York City.

Man does not choose between actions according to their known consequences so much as he prefers those actions the consequences of which are predictable over those whose results are unknown. What he most fears, and what puts him in a state of terror when it has happened, is to lose his bearing and no longer know what to do.<sup>151</sup> Sticking to established norms renders the world predictable, whereas departures from them leave men in a state of confusion and fright. It is therefore just as important to obey these negative rules which preserve us from change, given our own partial understanding of the world, as it is to understand the rules whereby the natural order operates. The negative knowledge conveyed to us by these inhibiting rules is just as significant as positive knowledge of the environment, the latter enabling us to make predictions, the former warning us against the uncertain outcome of some actions.<sup>161</sup>

Rules, whether legal or social, in the sense of mores, have as their task the reduction of uncertainty, at least avoidable uncertainty.<sup>171</sup> Therefore they display attributes of generality and equality, in the sense that to be particular is to be treated unequally, entails arbitrariness, which in turn produces uncertainty. Rules, that is, are essentially different from commands in this respect. They do not subject us, according to Hayek, to the will of another, and therefore the data on which we act are unmanipulated.<sup>181</sup> The relation of rules in the social sense to the character of human knowledge is further suggested by the fact that just as all the rules governing social behavior are not, and probably cannot be, communicated, so the rules governing the mind, according to Hayek, cannot be fully articulated, for

if it ever were to acquire the capacity of communicating these rules, this would presuppose that it had acquired further higher rules which make the communication of the former possible but which themselves will still be incommunicable.<sup>191</sup>

The nature of social rules, being constructed in a process of interaction of human minds, shares in the character of those minds to a more than superficial degree, being, somehow, an extension of the mental sphere via the division of knowledge.

In society, rules permit the harmonious interchange between actors. The individual actor, however, is also faced with the problem of harmonizing his actions into a consistent plan, which is often not possible very far into the future, given changing conditions. But some consistency is brought into our actions if we adopt a framework of guiding rules which will make the general design, though not the particular details, predictable. These rules of guidance abbreviate the circumstances we need to take into account in acting, picking out certain classes of facts as by themselves decisive in determining our actions. But this process of abbreviation is also a process of abstraction, that is of disregard for other details. We can afford to ignore these details because, according to the rules, they are accidental, partial information which, even if we knew and evaluated all such facts, would probably not alter our intention of following the rule.

It is, in other words, our restricted horizon of knowledge of the concrete facts which makes it necessary to coordinate our actions by submitting to abstract rules rather than to attempt to decide each particular case solely in view of the limited set of relevant particular facts which we happen to know.<sup>101</sup>

These rules, after all, reflect the wisdom of the species, as they evolved in accordance with the survival needs of the given society.<sup>111</sup>

With respect to Hayek's theory of society, the abstract rules we have been discussing are but an aspect of that spontaneous social order, the result of human action, but not of the design of any one actor. They are suitably classified in the same set of processes as language, common law, or the market, i.e. neither natural nor artificial, in the sense of manufactured, but rather socially created:

These rules have never been invented, and no one, so far, has ever succeeded in producing a rational foundation of the whole of the existing system of ethical behavior. As I see them, these rules are genuine social growths, the results of a process of evolution and selection, the distilled essence of experience of which we ourselves have no knowledge. They have acquired general authority because the groups in which they held sway have proved themselves to be more effective than other groups.<sup>121</sup>

The body of formulated laws will only implicitly contain these rules, these general principles, which are the object of discovery, as

in the case of the legal system. The generalizations we can formulate legally are like all generalizations, i.e. probably dependent upon still higher, more abstract rules which, while governing the legal system, or our minds, are not explicitly known.<sup>1131</sup>

Hayek makes more explicit his notion of rules in describing the various types of order in society. If an order is achieved by arranging the relations between the parts of that order, there we have an organization. On the other hand, there is the type of order suggested by the social processes themselves, such as language. Here no law-giver exists to arrange the exact position of each word, the general usage of vocabulary. Though the elements of such an order are prearranged by no one, they still form an orderly whole, responding to changes in the environment by way of rules.<sup>1141</sup> These rules of the spontaneous order are different from the ones pertaining to an organization. The latter are rules for the performance of a set task and assume that the place of the individual in a fixed order has been deliberately decided — the rules applying to him depending upon his place in the organization. Such an organization Hayek later terms a *taxis*; its kind of rules he labels a *thesis*.<sup>1151</sup> This type of designed order is necessary however to enforce the rules required for the formulation of the spontaneous order, termed a *cosmos*. The rules of this order, *nomoi* in Hayek's terminology,<sup>1161</sup> even if given once and for all, would require for their enforcement the rationally coordinated efforts of many men. The improvement or changes in these rules may be, but need not be, also the object of rational collective effort.<sup>1171</sup> Here, of course, Hayek leaves open a possibility for common law type of judicially-made, or discovered, law. Though some *nomoi* the individuals will follow simply because of a similarity in their environment, and others because of common cultural heritage, still others they must be made to obey because of a public good argument: it would be in the interest of each to ignore these rules, though necessary for the overall order that they be obeyed.<sup>1181</sup> Thus, for example, though the desire for a larger share of the wealth in the form of income produces regularity of conduct in individuals in a society based on division of labor and

exchange, still this alone will leave the character of that order largely indeterminate, perhaps not beneficent. It is also necessary that certain conventional rules, which do not follow simply from the nature of the knowledge and aims of the individual private actors, in the form of morals and of law, must be followed.<sup>1191</sup>

The rules governing organizations range from specific commands to more general imperatives that leave much up to the actor and therefore take advantage of his particular knowledge.

It is when we pass from the biggest organization, serving particular tasks, to the order of the whole of society which comprises the relations between them and the individuals and among the individuals, that this overall order relies entirely of a spontaneous character, with not even its skeleton determined by commands.<sup>1201</sup>

The problem is therefore one of how best to utilize the nature of the spontaneous order so as to take advantage of the knowledge possessed by the individual and to make it work for the common good. Substituting the command of authority for this knowledge entails the foregoing of the advantages of the division of knowledge for the limitation of the guidance of a single mind. We must take advantage of the *nomoi* in the same sense that the chemist takes advantage of the laws regarding the growth of a crystal, or the biologist of the laws of development of an organism: i.e. we must set the limits, or construct the surroundings wherein the process occurs.<sup>1211</sup> We will not, of course, be able to predict the exact position of each particle in the crystal experiment, but our resignation of the power to arrange the parts enlarges our ability to get a generally desirable effect (just as in science "the preference for the concrete is to renounce the power which thought gives us"<sup>1221</sup>). That is, we must set up the legal framework of society, particularly as regards the distinction between mine and thine, though the applications and changes in this framework may thereafter be left to gradual, spontaneous forces (such as the common law).<sup>1231</sup>

We are fortunate in this respect that men differ in their talents and desires, for otherwise we would have to treat each man differently in order to arrive at a social order,

and it is only owing to this that the differentiation of functions need not be determined by the arbitrary decisions of some organizing will but that, after

creating formal equality of the rules, applying in the same manner to all, we can leave each individual to find his own level.<sup>124</sup>

There is no other way to take advantage of societal forces, or to produce the crystal, than to forego power over the position of individual elements. The point made is not that the individual knows his own affairs better than anyone else does. It is simply that nobody knows who comprehends those affairs more thoroughly.<sup>125</sup> Similar considerations in Plato's *Statesman* leads to an advocacy of the rule of the law: no one can really say who the one wise law-giver is; all such claims will be looked on suspiciously because of the harm inherent in the wicked man gaining political control.<sup>126</sup> Hence subordination to general rules occurs because of considerations of the limitations of knowledge and the possible abuse of power on the part of pretenders to the claims of the wise.

Summing it up, general rules are necessary for important considerations of social utility: they enable us to get the maximum effects from the conditions of decentralized knowledge of particular times and circumstances that must, of necessity, be present in any society. They are a means whereby we can prevent clashes between competing aims; they do not themselves set social ends, i.e. the aims of any particular actor. Rather, they are means by which any participant in the social processes can pursue his own ends within the limits that they set. Given that a man is limited, as an individual, in his knowledge, they give necessary guidance in the face of an impossible task of calculating all the consequences of our actions. "So long as men are not omniscient, the only way in which freedom can be given to the individual is by such general rules to delimit the sphere to which the decision is his."<sup>127</sup> That is, in terms of ascription of ethical responsibility, a primary factor must be the nature of the knowledge of the moral actor. Act utilitarianism, by demanding a full deliberation of consequences, leads to an extension of the concept of responsibility to such a limit that the concept loses any meaning for the evaluation of a single act or set of ethical acts. Not only is ethical responsibility made meaningful by a submission to general rules, but also the ethical freedom of the individual, in the sense of his

choice's independence from the will of another and the unmanipulated status of the knowledge by which he makes such choices, is likewise made congruent with, indeed essential for, a minimum degree of societal order. Indeed, general disregard for norms not rationally demonstrated is disastrous for a civilization, in the same sense as the curtailing of the freedom of the individual would be for the possibility of spontaneous social order. The fate of general norms and of individual liberty seem closely intertwined.

The question of justice is, of course, also crucial to the ethical consideration of such rules. If the rules are to be general, that also entails equal treatment of all coming under their rubrics. Only this will provide us with the certainty that alone enables us to make plans, to take advantage of our own set of data and of talents. A distributive theory of justice, according to Hayek, however, runs amiss on these grounds. For a set of social norms treating all men equally leaves the results, in particular details, uncertain. Indeed, given the inequality of men's abilities and the hazards of fortune, equal treatment leads to unequal results.<sup>128</sup> General rules, in Hayek's sense, are a species of what Professor Robert Nozick terms "ethics of constraint".<sup>129</sup> That is, they set certain rules for the game, and whatever results occur are seen as ethically acceptable.<sup>130</sup> Distributive justice, however, aims at an allocation of goods in accordance with merit. That is to say, we can compare a system of allocation of resources in accordance with the desires and judgments of the participants regarding the utility of the acts of their fellows, with a system where such allocation is fully subordinated to ethical worth. Distributive justice is an example of the ethics of the maximization of an end product. Here, of course, the desired result is a just distribution on principles of merit. The mere setting up of the rules of the game is not enough. One must secure the proper reward for all those who merit it, regardless of fortune, or of the whims of the consumer. But the rectification of the result of social interaction to meet the demands of distributive justice entails that men of unequal abilities or moral worth must be treated unequally. Nor must any rules of the game place

limits on the final just outcome, just no longer because played in accordance with just rules, but because no rule, but rather a certain outcome, is desired. Given also the fact that men differ upon what constitutes moral worth, and therefore an authoritative judgment on such must come from a set of a few or one individual, the demands of distributive justice can only be met in an arbitrary fashion, in the sense of dependency of the bulk of the players on the will of some other few judges. Yet this nullifies our conditions of certainty and with it any hope of thoroughly tapping the pool of intellectual knowledge so widely decentralized over the various members of our society.<sup>131</sup> In place of our own data, we are given the data of the distributive judges, and therefore our individual knowledge is made less operable, and we lose the sense of freedom in choosing that which apparently must be the basis of ethical action. (Of course, one may be constrained to perform act *X* and still concur that act *X* is the only ethically acceptable action. Nevertheless, not only is it extremely dubious that such an authority will always order the right moral choices, not only is it probably safer, and more efficient in the long run, to permit men to discover the correct ethical act, but also, it seems dubious to ascribe ethical worth where we cannot know that the conditions for choice have been met.)

The domain of political philosophy is the study of the state, the "monopoly of legitimate coercion". How then does Hayek proceed from the nature of general rules to the concept of the liberal state with relation to the idea of coercion? It is basically through the notion, again, of the knowledge necessary for the individual actor in taking his part in the social process. Coercion does not imply that the actor had no choice in the situation, that he was simply unfree as far as the action is concerned, but rather that the coerced party's mind becomes the tool of someone else's will; i.e. "The alternatives before me have been so manipulated that the conduct that the coercer wants me to choose becomes for me the least painful one."<sup>132</sup> The coercer must therefore be able to foresee the coerced party's act, and must desire to bring such an act about. Coercion, for Hayek, does not include all instances of a person acting or

threatening to act in a manner "harmful"<sup>133</sup> to another with the intent of changing that second party's intentions. For example, the act of borrowing a book I need from the library, or of making unpleasant noises, will not be construed as coercion. Rather, "coercion implies both the threat of inflicting harm and the intention thereby to bring about certain conditions".<sup>134</sup> It is necessary that the act of coercion puts the coerced into a worse situation than if the act had not been performed.<sup>135</sup>

Coercion has to be distinguished from the conditions men place upon the rendering of particular services. Only in the particular monopoly position where a good or a service is either "crucial to my existence or the preservation of what I most value" can be withholding of said goods be considered coercive.<sup>136</sup> In such circumstances the state must act to ensure that such a monopolist treats all his customers alike, by charging single prices to all, by prohibiting discrimination, that is to say, by insisting upon the application of the rule of law to the operation of this coercive monopoly.

The mere withholding of benefits does not, Hayek insists, fall under this category of coercive activities. Even if the direct circumstances (need of an operation, possible starvation) should force me to take a job I do not desire, or to pay what seems to me an outrageous price, I am not coerced, for the situation that has arisen for me, in a competitive market, is not personally aimed against me, nor has any one person brought it about so as to make me do his will. It is the result of impersonal social forces, contends Hayek, which cannot be said to be either just or unjust, for only the actions of individual actors can be judged in these terms.<sup>137</sup> In this sense such difficulties are no more unjust than natural catastrophes.<sup>138</sup> The evil of coercion is essentially the substitution of another's will for my own, through the manipulation of the essential data of my action. This can be eliminated only by securing for the actor a sphere which will be protected against such manipulation or invasion. Of course, insofar as deception and fraud are also a manipulation of data, they also must be protected against.<sup>139</sup>

The institution which serves to protect the

individual is property in its larger, Lockean sense. Its protection necessitates, of course, the threat of coercion to prevent aggressive coercion. But the demarcation of the private sphere cannot be determined by any one man or a group of men, for then the power of coercion would be transferred to that agency (as we shall see, Hayek's concept of generality and equality do not escape this consequence). Nor can the content of that sphere be fixed once and for all (again seemingly in contrast to the later demand for certainty). Rather, it is desirable that the actors themselves, through the social process, presumably by the agency of the common law, in the larger sense, and exchange, in the personal sense, determine the content of their private spheres. What is essential here is not that everyone own property, in the narrower sense of the means of production, but that there be many providers of this means for the actor to pursue his ends, so that he will not be unconditionally subjected to the will of one such owner exclusively.<sup>140</sup>

It might be objected that Hayek so easily dismisses the calamities of the market by claiming that they are impersonal, so neither just nor unjust. In effect may not rules be judged as being just or unjust, apart from the moral disposition of the person designing them? A sympathetic answer to this might be twofold. First of all, the rules of the market are largely undesigned, in the sense of created by any one individual with a set purpose in mind, and it seems rather difficult, if not abusive of ethical discourse, to judge such rules with the *same* sense of the word just as we use in moral approbation. But secondly, may not justice here be interpreted in a way different from that describing a single moral actor? That is, may we not examine the rules of the market in the sense of justice as fairness about which Professor John Rawls speaks?<sup>141</sup> If so, then Hayek's contention would be that "once we have agreed to play the game and profited from its results, it is a moral obligation on us to abide by the results even if they turn against us".<sup>142</sup> That is, if the rules are just, the result is just, in the sense of fair, even if they sometimes produce calamities. Hayek's attempt to show that the market alone is the compatible economic

corollary of the rule of law, which he takes to be fair, emerges as the vindication of the fairness of the market itself. A defense of Hayek on this point necessitates a redefinition of justice, so that individual actors can be rule-abiding in a sense that, of course, the rules themselves cannot be.

What of Hayek's basic notion of coercion? It seems both too narrow and too wide in its application. Professor Ronald Hamowy notes that, with respect to Hayek's inclusion of the test of "preserving what I most value", the invitation to a party which I expect, given my great stress on social standing, will become a coercive matter if (a) it is not forthcoming, or (b) some humiliating requirement, such as my washing the dishes, is set as a price for the affair.<sup>143</sup> The case of a water monopoly, with respect to a man dying of thirst, is coercive if such water is not made available at a "reasonable price". But Professor Hayek's Austrian economics seems to suggest that the "reasonable" or just price is whatever price appears on the market — that a competitive price cannot be used as a measure in the absence of competition. Furthermore, if the owner refuses to sell the water at all, as Professor Hamowy puts it, for religious reasons, then the only choice left for the unsuccessful buyer is death by dehydration, surely making him worse off, in Hayek's definition of coercion.<sup>144</sup> Therefore inaction can, paradoxically, be considered coercive. Surely if being "worse off than if the act had never been performed", then I, being a bibliophile, will be worse off if I am informed of the existence of a book which I desire and which the owner will not sell. Certainly the non-performance of this act of selling will not seem coercive, but according to Hayek's criteria even such inaction must be judged as coercive. The invitation to the party must also seem so from the point of view of a worsened situation regarding things I value most, given extreme socially conscious aspirations, as do other situations where, even if my options are widened, the whole situation has made me worse off.<sup>145</sup>

Hayek's delimitation of coercion appears also to eliminate from the notion certain cases that intuitively appear coercive. With respect to the

rules of the state falling under the metalegal principle of the rule of law, Hayek remarks,

Provided that I know beforehand that if I place myself in a particular position, I shall be coerced and provided that I can avoid putting myself in such a position, I need never be coerced. At least insofar as the rules providing for coercion are not aimed at me personally but are so framed as to apply to all people in similar circumstances, they are no different from any of the natural obstacles that affect my plans. In that they tell me what will happen if I do this or that, the laws of the state have the same significance for me as the laws of nature and I can use my knowledge of the laws of the state to achieve my own aims as I use my knowledge of the laws of nature.

The problems in this formulation are various and grave. First of all, the laws of the state are created in a way that the laws of nature are not. They can, being *theses* and not *nomoi*, be changed. If the analogy between the two were to hold, then one would choose to disobey the laws of the state whenever one could get away with it, just as one would choose to avoid getting in the way of one of the harmful manifestations of the laws of nature, hardly an attitude conducive to a spirit of rule of law. Secondly, as Watkins points out, prohibitions may be every bit as costly to the individual as direct commands may be. That is, though more options are open to the individual if he is prohibited from doing some one thing, rather than commanded to do some specific act, still,

To measure the degree of penalization which a prohibition involves, what we have to weigh against the prohibited course is not the whole class of unprohibited alternatives but just that unprohibited alternative which he (the prohibited party) dislikes least.<sup>147)</sup>

In some cases, of course, one would prefer, or be morally bound, to break the stipulations of the prohibition, simply because none of the remaining alternatives mean so much to us as what we are deprived of. Furthermore, giving enough negative rules sometimes narrows one down to a single practical course of action as much as a direct command might do.

The laws of the state are rules that are aimed at limiting coercion by the threat of coercion. "The threat of coercion has a very different effect from that of actual and unavoidable coercion, if it refers only to known circumstances which can be avoided by the potential object of coercion."<sup>148)</sup> These laws for the most

part either prohibit certain actions or force the individual to fulfill obligations he has voluntarily assumed. The crux of the problem here is that "according to the logical structure of this argument, 'threatening coercion' is not coercion".<sup>149)</sup> That is to say, the form of the laws of the state, according to Hayek's criteria of avoidance, differ not at all from the general case where party *p* has been told to do an act *x* by a party *q*, under pain of incurring harm *h*. In fact, in accordance with this thinking, no distinction can be made at all between a person's being unfree to perform an act, or being coerced into performing it. Obviously, if I do not know the intention of my coercer, I shall not be coerced, although some harm may come to me. But Hayek says that choice is always involved in the coercive relationship. Hence threats, which are in part the announcement of the intent of the coercer, are essential to that relationship.<sup>150)</sup> But then the laws of the state, the "threat of coercion", are no different than coercion proper. The real question, it seems, is not whether the acts of the state are coercive with respect to the question of crime and punishment (and, one might add, with respect to taxation and such advantages accruing from that as subsidies to state-run services), which of course they must be. The real question is rather, is the particular act of coercion, whether by the state or the individual, just? Or to formulate it in a way that both Professor Hayek and Professor Nozick do not explicitly state, is the act of coercion within the rights of a particular party? That is to say, an independent ethical criterion seems necessary in judging the status of coercion. As a major objection, what seems necessary is not only the use of coercion to prevent unjust coercion, but more generally to prevent all unjust violence, of which coercion appears as only a specific threat.

The question of the relation of coercion to the manipulation of essential data is also confusing. What of Watkins' example of the worker in a factory whose processes are too complicated for him to understand? If his job is either "crucial to his existence" or "preserves what he most values", are not the orders he receives a manipulation of his data? Will he not believe that the will of another is being substituted for

his own in this instance?<sup>151</sup> An objection might be made that this question implies a subjectivistic theory of freedom. That is, it might be contended, a person may well be free from the arbitrary will of another and still believe himself to be unfree. Yet surely this subjective dimension is important to a discussion of freedom. After all, in the notion of coercion the element of threat dominates, yet the threat may very well be a bluff. To the extent to which I find the threat credible, I may be coerced. No one would doubt that the bank teller who handed over the money to a robber brandishing a water gun was coerced, even if, as was the fact, he was free not to do so. Just so, the worker described above may, for all practical purposes, feel coerced, or manipulated, with respect to the job at hand. He will, that is, think of himself as a mere tool. Here the objective criteria come into play: is the worker really being threatened? Is his employment something rightfully owed to him, or is it rather an offer than a threat? Complications arise here over the question of when to apply the objective as opposed to subjective notions of freedom in analyzing some case. In the instance of threats, it seems that we must always ask about the ethical propriety of the threat if we are to discover whether the person was justly coerced, after we have determined whether the threat is or is not credible to the threatened party, which is a means of determining whether the situation is coercive. In terms of the manipulation of data, we must always ascertain whether the situation is one of a threat, or an offer, and then, if the former, again apply whatever canons of justice we possess to its propriety.<sup>152</sup>

But, proceeding from our conclusions that even negative rules may well be coercive, we must further ask whether it can really be said that obedience to general rules makes us freer than obedience to commands.<sup>153</sup> After all, we might counterpose two systems, one where commands are dominant, but do not touch upon things "crucial to my existence" or related to "things I value most", the other where general rules do infringe (taxation, conscription) upon these areas and are in control of much of our daily activities. Shades of gradation between these poles are possible, and it is by no means

obvious that general rules would always be preferred in order to maximize liberty, although perhaps general rules have other desirable qualities that make a trade-off with liberty seem desirable. The content, rather than the form, of the general rule, just as the content rather than the form of the command, seems the chief criterion for judgment, at least as far as libertarian sentiments are concerned.

It would be bad enough, from the libertarian point of view, if the state prohibited certain actions whose coercive character was dubious (gambling, drugs, prostitution). Hayek's characterization of the limits of law goes beyond this and enjoins laws compelling positive actions: in those instances where all are treated equally (as in non-progressive or non-regressive taxation), and in those instances where citizens are seemingly treated unequally (the draft). The saving grace of these state actions, according to Hayek, is that they are predictable:<sup>154</sup> one can make one's plans on the sure knowledge of both death and taxes. But the line is not drawn even at this limit, that of certainty. The state may also act where such positive rules are neither avoidable nor predictable, as in the case of jury duty, or service as a deputy constable. Here, what is important is that

the decision as to who must serve is made to rest on fortuitous processes, such as the drawing of lots. The unpredictable acts of coercion, which follow from unpredictable events but conform to know rules, affect our lives as do other "acts of God", but do not subject us to the arbitrary will of another person.<sup>155</sup>

Again, it might be questioned whether these unpredictable events are so like natural happenings as Hayek suggests. After all, an individual performing, or threatening to perform, an act in order to prevent me from doing some other act makes me, of course, unfree. But so does the individual who sets up some rules (use of lots, etc.) in the present that at some future time will have an undesirable effect on my choice of actions.<sup>156</sup> At this point, Hayek allows far more discretion than he later finds justifiable.

This of course suggests the deficiency of Hayek's presentation with respect to the question of human rights. Although admitting that interference by the state into the envisioned



private sphere, such as laws against homosexuality, is undesirably coercive, Hayek's conceptual dependency of rights upon the principle of the rule of law deprives the former of any use as an independent criterion of judging laws. Although in a later essay he defines the rule of law as "uniform rules of just conduct towards one's fellows",<sup>157)</sup> he tells us in *The Constitution of Liberty* that,

Though there can be no doubt that, in order to be effective, it [a law] must be accepted as just by most people, it is doubtful whether we possess any other formal criteria of justice than generality and equality — unless, that is, we can test the law for conformity with more general rules which, though perhaps unwritten, are generally accepted, once they have been formulated. But, so far as its compatibility with a reign of freedom is concerned, we have no test for a law that confines itself to regulating the relations between different persons and does not interfere with the purely private concerns of an individual other than its generality and equality.<sup>158)</sup>

But the "purely private concerns" of an individual are the sum of "all actions not explicitly restricted by a general law"<sup>159)</sup> That is to say, all rights are merely legal guarantees that the government will not act in a certain sphere, that is, a logical consequence of the rule of law. The content of such rights is set by the given governmental rules, and is neither absolute nor immutable.

In actual fact they cannot mean more than that the normal running of society is based upon them and that any departure from them requires special justification. Even the most fundamental principles of a free society, however, may have to be temporarily sacrificed when, but only when, it is a question of preserving liberty in the long run, as in the case of war.<sup>160)</sup>

But even in less pressing times than war the "public interest" may demand the infringement of the rights of particular individuals and groups. In "clear and present danger" situations, the right of freedom of speech may be curtailed to the same extent that habeas corpus might be suspended in a time of siege. Furthermore, the right of eminent domain is granted by Hayek as a necessary and regular power of government provided (a) that it is defined by cases defined by general law and reviewable by the courts and (b) that "full" indemnification for any damage be given to individuals whose "legitimate expectations" have been frustrated.<sup>161)</sup>

Though Hayek insists that "In particular, the

pleasure or pain that may be caused by the knowledge of other people's actions should never be regarded as a legitimate cause for coercion", and therefore that laws against religious practices or homosexuality among consenting adults are illegitimate,<sup>162)</sup> such a judgment cannot be derived from the formulation of the "rule of law" notion, but only from some notion of substantive rights. Though "the morality of action within the private sphere is not a proper object for coercive control by the state",<sup>163)</sup> it must be remembered that the definition of the private sphere is itself the result of state action. The content of rights, such as property or "freedom of contract", is not the same as the recognition of those elements of the private sphere.<sup>164)</sup> If such rights are variable, if the private sphere is mutable, what happens to the much vaunted claim of certainty which the general rule entails, particularly if the changing of that content is subject to legislative action? As far as the question of "absolute rights" is concerned, it seems that we must either come down on the side of the collective or of the individual in terms of precedent. Hayek clearly favors the group, and individual rights seem to be stressed only for reasons of social utility. As far as the argument from the public interest is concerned, we might reply to Hayek in the same words he quotes from William Pitt at the beginning of Lecture IV in *The Political Ideal of the Rule of Law*: "Necessity is the plea for every infringement of human freedom. It is the argument of tyrants; it is the creed of slaves."<sup>165)</sup> The "public interest", as Hayek should know, is the slogan of the ideology of statism; it is as vague a phrase and as subject to redefinition as is Hayek's notion of human rights. But clearly the tendency is for the contents of the former to expand, while the content of the latter becomes trivialized. As far as restitution or indemnification in the full is concerned, how can one judge such a price except in a competitive market? But it was the reluctance of the buyers to raise the price, or, more likely, the reluctance of the holder of the property to sell, that forced the state to resort to eminent domain proceedings. Is any price the "frustrated" party now quotes to be paid? Of, again more likely, is the state's compulsory price to be the last word in

indemnification?

If the question of rights cannot be raised without the prior concept of the rule of law being defined, we need to define that doctrine more thoroughly in order to see which governmental actions are just and which are not. As we have seen, coercion is necessary to prevent aggression, the "threat of coercion" is the only guarantee of the private sphere. Government, therefore, is necessitated because of the requirements for a guarantee, a requirement which Hayek assumes can only be forthcoming by a monopoly of legitimate coercion. The limitation of the coercive activities of government to the rule of law, however, is not the same thing as the limitation of the proper role of government. Government may provide other services which are only coercive insofar as their financing is concerned. All arguments against governmental activities in the economic sphere that are in accord with the "rule of law" must be matters of expediency "either because they will fail or because their costs will outweigh their advantages".<sup>166</sup> If the government undertakes to provide services that would not be supplied at all (because of the difficulty of restricting the benefits to those who pay for them), then the question becomes one of whether the cost is worth it. Government may legitimately engage in activities facilitating the acquisition of knowledge or of facts of general value. State enterprise, therefore, is not ruled out. Indeed, situations may arise where it is possible to provide certain goods or services by private effort, but not all the costs or benefits involved would enter into market calculations, and where the state could legitimately assist with production.<sup>167</sup> What is important, however, is that the state be given the monopoly of force alone — and not be granted monopolies in these economic situations, since that would, as we shall see, constitute an infringement of the rule of law.<sup>168</sup>

The first point that must be stressed is that, because the rule of law means that government must never coerce an individual except in the enforcement of a known rule, it constitutes a limitation on the power of all government, including the powers of the legislature. It is a doctrine concerning what the law ought to be, concerning the general attributes that particular laws should possess . . . The rule of law, therefore, is also more than

constitutionalism: it requires that all laws conform to certain principles.<sup>169</sup>

The rule of law is therefore not a rule of the law but rather a meta-legal principle.

Dicey had expressed that principle by the requirements that there be no punishment without a crime (the fact of which is established in an ordinary court); that every man be subject to the ordinary law of the land and to the jurisdiction of the ordinary courts, and by the fact that the general principles of the British Constitution were "the results of judicial decisions determining the rights of private persons in particular cases brought before the court".<sup>170</sup> Lord Hewart remarks that

No one can lawfully be restrained or punished or condemned in damages except for a violation of the law established to the satisfaction of a judge or jury or magistrate in proceedings regularly instituted in one of the ordinary Courts of Justice.<sup>171</sup>

Hayek's stipulation that all rules of law be general, equally applied, and certain has kindred connotations. The reasons for Hayek's formulation differ considerably from that of these Old Whigs. The latter are simply defending the Ancient Constitution. Lawyers in this tradition have already begun to make their peace with collectivist arbitration.<sup>172</sup> Hayek's concept, however, is based upon more of a rationalist than historicist suppositions; that is to say, it is more interested in principles than in tradition, particularly when that tradition can easily become a conveyor of anti-liberal institutions. Not commitment to tradition alone, but defense of traditional institutions of liberty seems to characterize Hayek's insistence on the "rule of law".

Law should be general and equally applied, that is, it should not pick out particular persons or groups. To allow otherwise is to invite arbitrary action, to change the law from a tool to be used by the citizenry into an end which they must serve. Law must be essentially a matter of long-term measures, referring to unknown cases or persons, so that the particular will of the legislators will not dominate the data of present or future actors and hence direct them toward the legislators' ends. Of course, law must always be prospective, not retrospective, in its effects.<sup>173</sup>

Yet certain groups are singled out necessarily by laws (such as those against rape). Hayek suggests that such laws will be consistent with the rule of law if (a) no proper names are used in the law and (b) such distinctions are acceptable to a "majority both inside and outside the group",<sup>1741</sup> i.e. if equal applicability is to prevail.

As regards the exclusion of proper names, this is not sufficient for the exclusion of discriminatory legislation. In principle it is always possible to contrive a set of general descriptions that, by their common factors, single out a unique person or class. Thus Professor Hamowy indicates that the city of New York need never be mentioned explicitly in laws of that state's legislature. Rather, references are made to any "city containing a population of more than one million inhabitants according to the last Federal census". So also goes the case with respect to Atlanta, Georgia.<sup>1751</sup> All that is necessary for these purposes is for the general characteristics to apply to the required minority or majority group. Hayek admits this possibility and illustrates the lengths to which discrimination is possible in a footnote in *The Constitution of Liberty*.<sup>1761</sup> He confesses that "no entirely satisfactory criterion has been found that would always tell us what kind of classification is compatible with equality before the law. To say, as has often been said, that the law must not make irrelevant distinctions or that it must not discriminate between persons for reasons which have no connection with the purpose of the law is little more than evading the issue."<sup>1771</sup> Generality, like equality before the law, may always remain therefore an ideal beyond our ability of accomplishment — though not a meaningless one, according to Hayek. That is, it is more the spirit guiding us into framing laws for unknown persons, than the formal generality, that must be the final safeguard. As Leoni points out, there are many genera under which a rule may be subsumed, and many more species under each genus, so that the formal requirement may amount to less than nothing as a safeguard.<sup>1781</sup>

With respect to the stipulation of a majority within and without the group favoring legal

discrimination, Professor Hamowy's criticism presents a severe obstacle to its practical utilization. Either the word "group" refers to the specific object of the legislation, or to a wider class concerned with such legislation. The former interpretation seems dubious: most members within the group, in the case of discrimination, would be against; in the case of privileges granted, they would certainly favor the law, thus trivializing the standard. The second sense, however, yields an ever-widening circle of groups "concerned" with the legislation. The dividing line here would be of a very arbitrary character. The gerrymandering process of evaluating this line would, of course, leave the majority in full control of determining the composition of the group.<sup>1791</sup> As far as privileges go,

if being favored by the majority outside the group of a statute granting special privileges to a minority is imply the acquiescence of the majority to the statute, [then] the few who stand to gain by the legislation stand to gain much and will lobby accordingly; those who stand to lose, the bulk of the population each individually, stand to lose only a little and are politically unorganized for the purpose of preventing the legislation. In addition, proponents of the legislation often gain the acquiescence of many people by invoking the "national interest" or "our defense posture". The result, almost invariably, is that the legislation is passed and accepted by those "outside the group"<sup>1801</sup>.

Furthermore, since rights are being left out of the question, it is possible that a coercive law, acceptable to both those inside and outside the group, where the group is narrowly defined, would materialize.<sup>1811</sup> These may be laws banning interracial marriage, or interreligious housing, or, for different reasons, laws banning certain drugs and therefore creating a black market desired by the "illegal" producing group.

This second requirement of the law, equality, or rather equal application, attempts to render the content of the law more libertarian, insofar as both governors and the governed will come under its aegis. Hayek admits that certain areas, e.g. religion, may well not be protected by this stipulation if governors and governed differ in their beliefs, or, in a democracy, with respect to unpopular minority fates.<sup>1821</sup> Here, of course, the same problem arises of the possibility of group discrimination as did in the case of the

rubric of generalization of rules. Some laws clearly have a greater impact upon some groups than upon others, particularly economic regulations such as tariffs and licensing, so effective in the suppression of various minority ethnic groups specialized in certain professions. Furthermore,

All of the following laws meet the criterion of being "equally applicable"; it is a punishable offense to support subversive political groups (defined in the law as all groups other than the one presently in power); it is a punishable offense to undermine faith in the United States government (thereby curtailing all political criticism); it is a punishable offense to read any literature not approved by the censor, to smoke, to take certain drugs, to drink alcoholic beverages, to engage in "immoral" sexual activities, etc.<sup>[83]</sup>

To which list we might add, "it is a punishable offense to cast doubt upon the soundness of U.S. currency or undermine faith in the value of the U.S. dollar and the Federal Reserve System", which would effectively make illegal the teachings of the Austrian School of Economics. Thus Hayek's criterion of equal applicability becomes Leoni's nightmare of "equal application to all those the law applies to"; within each class equal treatment, but as many classes as one wishes and therefore as many laws of the land as one requires for discriminatory purposes.<sup>[84]</sup>

The first requirement of the rule of law, generality, as described above, refers to the proscriptive character of the rule, its reference to abstractly defined rather than to particular conditions.<sup>[85]</sup> "Rule of law" theorists particularly object to the discretionary quality of administrative actions that tend to be invasive of the private sphere, and are permitted such powers by delegated legislative authority. It is against the *ad hoc* nature of the actions of these bureaus and of administrative tribunals that the norm of generality is invoked. Discretionary powers are, according to Hayek, perfectly justifiable when they pertain to the direction of resources belonging to the government and its agents. When discretion is widened to include the relationship between the state and the private citizen, then it goes beyond the legitimacy of the "rule of law". Here the same difficulty presents itself as it did in the case of equal application of the laws. Any circumstance of time or place can be made specific, particular,

simply by finding a set of general characteristics that apply to it alone.<sup>[86]</sup> Although in a formal sense no judicial or administrative body, under this principle, could render *ad hoc* decisions, it could easily get around the requirement by this device.

The question of discretion, however, is more complex than Hayek assumes. Not only is there much discretion possible even in a "rule of law" body politic, as we shall see below, but it is not so obvious that discretion, in the sense of Davis's "individualized justice",<sup>[87]</sup> is an unmixed curse. After all, Hayek makes room for "exceptions to general proscription of stipulated physical actions" since "the law is interested not so much in the physical act (generally) as in attempts to subvert the structure of ordered relationships by contravening the intent of the laws", even if he does not give any guidelines for the definition of the legal terms involved.<sup>[88]</sup> Killing, for example, is not illegal if performed under such and such a circumstance by a given agent of the law or in self-defense. But surely the concrete circumstances of time and place require discretion, i.e. require the data available to the actor on the scene to be utilized to the fullest. The same desire that decentralized knowledge be utilized in the fullest possible fashion, within the confines of highly abstract rules, also seems to vindicate a like utilization of the expert judgment of the agent of the law faced with a specific judgment regarding application of the principles of that law, regardless of whether that agent be a policeman or a judge. Any sound organizational *theses*, claims Hayek, leave room for the adjustment of the individual to changing circumstances, which it is assumed he knows best.<sup>[89]</sup> After all, *theses* are rules, not direct commands. Only specific orders, i.e. commands, would eliminate discretion, and why should we treasure individual judgment less in matters of justice than in matters of production? Perhaps, it might be replied, because the matters of justice involve the use of force, and hence are a matter of suspicion where closer vigilance is necessary. But how then are laws to be changed, how are judges to make precedent decisions unless some discretion is possible?<sup>[90]</sup> Of course, institutional checks are necessary so that

alternative judgments are possible — thus, given a spontaneous order, the legal entrepreneur will have to compete with others for the general acceptance of his judgment as a judicial precedent. Nevertheless, Hayek seems unaware even of the possibility of a trade-off between rule-abidingness and individualized justice. Any resort to a redefinition of strict adherence to the general rules as entailing rather a devotion to the spirit of the laws, must necessarily introduce a notion of discretion.

But if there is to be legal and judicial discretion, how will this affect the third requirement of the “rule of law”, certainty? Given the bulk of legislation produced, and the inability of higher executive organs to directly enforce the laws, much of the application of the law will fall as a duty upon the police, who must, therefore, possess a good deal of discretion. But so must the prosecutor, the judge, the respective chief executive in the case of criminal law. The entire process of criminal proceedings from the decision to arrest or not to the judgment of the executive on pardon are matters of discretion.

We have not yet found a way to eliminate discretion with respect to arresting, prosecuting, sentencing, paroling and pardoning without destroying critical values we want to preserve. Perhaps it is not too much to say that the essence of criminal justice lies in the exercise of discretionary power, despite the continuing importance of the jury trial.<sup>191</sup>

With respect to civil law, the need for discretion as well as rules is manifested in the subject of equity, “which is essentially a reaction against the tendency to govern too much through rigid rules and the main purpose of which is to replace rules with some measure of discretion”.<sup>192</sup>

Thus the discretionary power of the policeman, after he has evaluated the situation, includes not only the power to arrest, or to refuse to do so, but extends to areas where crime is not involved, such as “suspicion” or “holding for investigation”.<sup>193</sup> Certain vaguely worded crimes, such as vagrancy, or unlawful assembly (at what point does a few people become an assembly? When does a conversion on the common become a public incitement to riot?) preclude any prediction of when the crime has occurred. In many such cases the difference between committing and not committing the

crime is solely the discretionary decision of an officer present to press charges or not.

The law courts also exercise discretion, sometimes amounting to a validation of the discretion of the arresting officer, since, unless overwhelming evidence to the contrary is forthcoming, his decision will be upheld. But judicial discretion, which includes not only minor infringements of the law but also constitutional questions, makes certainty even harder to achieve. Changes in the interpretation of such constitutional issues, exemplified by Hamowy in pornography and drug decisions, make it difficult to predict one’s position *vis-à-vis* the law.<sup>194</sup> The question also arises not only of what are the facts in a given dispute, but also in numerous borderline cases, of whether the case falls within a law’s scope of applicability.

The judge’s task would be a fairly easy one if it were confined to determining the admissibility of certain evidence or to deciding on the truth or falsity of evidence presented to the Court. But he is further faced with ascertaining law in each case. If decisions concerning questions of law could be predicted with a good measure of certainty, there would be little disagreement among trained lawyers over such question. The very existence of appellate courts belies this.<sup>195</sup>

Perhaps the most original critique of Hayek on the issue of certainty, and also the most succinct on the principle of equality, is that of Bruno Leoni in *Freedom and the Law*. On the latter point we note that Hayek sides with the *Rechtsstaat* theorist R. Gneist against the proponents of justicialism, on the question of separate administrative courts. The justicialists took the position that all acts of administrative discretion were to be reviewed by the ordinary courts of law. Hayek and Gneist opt for separate administrative courts, whose independence is made necessary for the sake of expertise.<sup>196</sup> Hayek contends that Dicey’s insistence on the role of the ordinary courts and neglect of Continental administrative law prevented the rise of institutional checks on bureaucratic discretion for England. Perhaps Hayek has underestimated Dicey’s knowledge of the Conseil d’Etat, and the effect that its unexemplary role in the Second Empire might have had upon him.<sup>197</sup> At any rate, Leoni charges that separate court systems are identical with separate laws of the land, insofar as

different people will be treated differently depending on which class of cases of law they fit into. Since "state officials, as representatives of the public administration, are regarded as people having *eminentia jura* (preeminent rights) over the citizens", cases judged according to separate administrative law might tend to favor the proponents of the public good rather than the private citizen whose "particular will" will always be suspect in the light of an appeal to the "general will".<sup>198</sup>

Other students of administrative law, even advocates of the welfare state, who value the "rule of law" concept, have found "internal institutional safeguards" in the administrative branch of little value as a check on abusive discretion. Bernard Schwartz, who does not take the position of Leoni on independent courts, notes that, for the following reasons, administrators can never wholly acquire a "judicial mind". First of all, they lack the independence which characterizes the judge, being, of course, instruments of public policy (in a restricted sense).

Nor can the administrator decide disputes with that "cold neutrality of an independent judge", of which Burke speaks. The very purpose of administration is to get things done. The administrative agency is created to accomplish certain purposes and it would be derelict in its duty if it were not biased in favor of those objects for which it has been created.

Finally,

these defects are inherent in administration. Attempts to ameliorate them through pure internal checks lose sight of the fact that administration and not justice is the prime purpose of the administrative process. What is needed, rather, is the assertion of judicial control over administrative excesses.<sup>199</sup>

Professor Schwartz recognizes both the role of individual rights, and the necessity of judicial review of *ultra vires*, canons of fair play, the presence of evidence of a probative value in acts of discretion, and the issue of constitutionality in checking abuses.<sup>100</sup>

Leoni's argument goes a step farther. The progress of science in this century has for some theorists of the law created the impression that "progress" in law making is analogous to the extension of our ability to control nature. That is to say, law-making is looked upon in the same fashion as any process of manufacturing.<sup>101</sup>

Legislation becomes industrialized, so to speak, and mass-produced regulations, with varying degrees of obsolescence, are the result. This is certainly no boon to the proponent of certainty in the law, not short-run certainty, for today's law may be repealed tomorrow, but a more tradition-bound certainty that is only possible in a system of judge-made, or discovered, law.

Judges differ from legislators in a number of respects, according to Leoni. They intervene only when asked to do so by the parties involved, and, for their decision to be reached and be effectively applied entails a continuous collaboration of the parties themselves, at least in civil matters. The decisions reached by judicial process in such cases affects mainly only the parties concerned, to a lesser extent third parties, and is practically never operative with respect to people having no connection with the given disputants. Furthermore, such judicial decisions are rarely arrived at *ex nihilo*, but reference is usually made to other decisions in similar cases, and therefore the procedure involves a collaboration of all parties concerned, both past and present.

"All this means is that the authors of these decisions have no real power over other citizens beyond what those citizens themselves are prepared to give them by virtue of requesting a decision in a particular case."<sup>102</sup>

The common law represents for Leoni the same spontaneous order as do language and the market. Legislation, on the other hand, can be likened to a centralized economy, whereas the market society is analogous to and seems compatible only with a system of judge-discovered laws.<sup>103</sup> Where legislation is dominant, regulations abound, and spontaneity withers away in direct proportion.

Legislation is the commitment of law-making to the direction of a few, just as judge-made law invites the highest possible participation of all involved. In the legislative process itself, coercion is present in the very procedure of majority rule. A vote cast for the losing side is a vote lost, yet the resulting victory for the other side may spell less freedom for the voter in the future.<sup>104</sup> Furthermore, Leoni contends, the actual result of parliamentary proceedings is the possible victory of a minority, based upon fleeting coalitions that seem hell-bent upon retribution toward their opponents while their

voting coalition holds together. Legislation should be rejected when it is a means of subjugating minorities to treat them as losers, when it is possible for the individuals involved to pursue their ends without relying upon a coercive group decision and without compelling other parties to do what they would not do without that compulsion. Whenever there is doubt about the desirability of legislative action, as compared with some alternate process, the adoption of the former must be the result of an acute critical assessment.<sup>1105</sup> Group decisions and individual decisions will be in conformity insofar as the former punish all forms of behavior which all the members of a society, if a reversibility test were included, would agree should be punished or redressed, insofar as the former "reflect the result of a spontaneous participation of all the members of the group in the formation of a 'common will'", as in a process of law-making similar to the common law. And "Finally, individual freedom is perfectly compatible with all those processes the result of which is the formation of a common will without recourse to decision groups and group decisions."<sup>1106</sup>

Hayek clearly prefers a written law, after the fashion of the Continental code, to a pure common law tradition because the frequency of law creation, as opposed to discovery, may be no less in the latter system than in the system of codified law. There appears to be a *prima facie* conflict between a system of case law and the ideal of the rule of law, according to Hayek, insofar as

The explicit recognition that jurisdiction as well as legislation is the source of law, though in accord with the evolutionary theory underlying the British tradition, tends to obscure the distinction between the creation and the application of law. And it is a question whether the much praised flexibility of the common law, which has been favorable to the evolution of the rule of law so long as that was the accepted political ideal, may not also mean less resistance to the tendencies undermining it, once that vigilance which is needed to keep liberty alive disappears.<sup>1107</sup>

Leoni, on the contrary, views written law as defective in certainty precisely because of its legislative character, that is, its very short-run certainty. The certainty Leoni wishes to secure is

The possibility open to individuals of making long-run plans on the basis of a series of rules spontaneously

adopted by people in common and eventually ascertained by judges through centuries and generations.<sup>1108</sup>

Who appoints these judges? That question, says Leoni, is subordinate to the question of what the judges are to do. Who, asks Leoni in turn, appoints the scientists or the doctors? "It is, in fact, based on a widespread consent on the part of clients without which no appointment is really effective."<sup>1109</sup> But will not the judges also exercise personal interference into the private sphere of the parties in an adjudication? Perhaps, but their interference will be less far-reaching and decisive than that of legislation, even if interference is never avoidable.<sup>1110</sup> The law is not, nor should not be, the exclusive domain of legislation, i.e. the will of the few. It is rather

in the last analysis something which everyone makes everyday with his behavior, his spontaneous acceptance and observance of the rules that everyone helps to establish, and finally, even if it seems paradoxical, with the disagreements themselves which eventually arise among the various individuals on the observance of these rules.<sup>1111</sup>

Surely, however, given the possibility of creativity among judges, Leoni's process of common law adjudication would not be *ipso facto* as certain as some libertarians might wish it to be. Nor would its contents, simply because they were the result of a tradition, be more libertarian than some legal code or constitution. What alone makes for long-run certitude, as also for a check upon power, is some notion of, some provision for substantive rights. Professor Rothbard clearly points out the deficiencies in the various criteria Leoni employs to judge the content of the law. The first, unanimity, is obviously not practical as a test of the compatibility of liberty with law. The negative Golden Rule (Do not do unto others what you would not wish them to do to you), cannot exclude sado-masochists, and would also make charity legally compulsory.<sup>1112</sup> The crux of the problem, however, in Leoni and in Hayek, appears to be a deficient definition of coercion or freedom. The Leoni version stresses the subjective side of the concept, but says nothing about any other requirements for judging the presence of freedom.

What then may we conclude about the effectiveness of Hayek's concept of the "rule of

law" on state action? In the economic realm, Hayek permits much state intervention, not only through taxation, monetary policy, and regulation of industry, but also by direct state ownership or subsidy to enterprises. Tariffs, licensing, exclusion of certain trades are all permitted within the formal confines of the "rule of law". Licensing in particular would permit a society of status within the jurisdiction of the "rule of law".<sup>113</sup> State monopoly, on the other hand, seems excluded. Price controls become impossible because they cannot be expressed as general rules but rather as specific commands and so they cannot be long-run measures, but rather *ad hoc* decisions for the short run.<sup>114</sup> They seem to be arbitrary measures, that is, simply expressions of the will of the controller, and it is against that arbitrariness that the "rule of law" stipulates the necessity of general, prospective rules. Generally speaking, under the "rule of law" requirements, direct administrative commands for specific actions might be curtailed, and review of such discretion as occurs would be guaranteed to the citizens. It might be harder to impose generally unpopular legislation, but liberties considered essential by unpopular minority groups would be largely unprotected.

Lest this discussion be construed as an attempt to prove the worthlessness of Professor Hayek's theory of laws, it should be borne in mind that, "a full theory of freedom would, as well as specifying the optimal pattern of freedom and unfreedom, concern itself with choices among such suboptimal patterns".<sup>115</sup> That is to say, in the sense of the classical philosophers, we must discuss the best possible regime along with the best regime, and, sometimes, content ourselves with reforming our situation so as to arrive at the best regime possible under the circumstances. Certainly Hayek's economic arguments, showing the inefficiencies of state interference in the market place, are not a full moral defense of economic liberty, but they are a necessary defense. So also the theory of the "rule of law", while not substantially libertarian, may be a necessary formal requirement of law in a free society. Perhaps a resurrection of "rule of law" theorizing would put us in a much better

position *vis-à-vis* freedom than we are now. So also, despite some non-libertarian content, most classical liberals, I think, would prefer living in a common law tradition society à la Leoni to a society based upon liberal legislation which, given the vicissitudes of law-makers, would more rapidly transform into its opposite than would the common law system. Thus we are faced with some possible trade-offs between the long-run, though not quite so libertarian, guarantees of one liberal society, and the more libertarian, though lacking any institutional long-run certitudes, policies of another.

The rationalist libertarian may well chaff under the general rules provisions of the "rule of law". Here again we come to grips with the problem of more latitude to decide cases in accordance with individual needs, which may well degenerate into arbitrariness, versus the willingness to abide by such rules, which may result in injustice in the short run. The rationalist libertarian must be brought to the defense of his position against the suggestion of Hayek and Leoni that more wisdom is contained in spontaneous orders (which include the common law) than in the mind of the single individual. The conservative choice of Hayek, that is to remain with general age-proven rules, is not obviously an irrational choice, and may well be the most practical one for a free society, if we grant that the giving up of discretion to the greatest degree possible is preferable to the dangers that the propensity to break rules for the sake of individualized justice might entail. It is not an easy decision to make, but Hayek at least aids us in seeing what the reasons for such a trade-off would be from a conservative libertarian position.

#### NOTES

1. F. A. Hayek, "Rules, Perception and Intelligibility," *Studies in Philosophy, Politics and Economics* (London, 1967), p. 43.
2. "Kinds of Rationalism", *Ibid.*, p. 90.
3. F. A. Hayek, "Kinds of Order in Society," *New Individualist Review*, Vol. III, No. 2 (1960), p. 7.
4. Hayek, "Kinds of Rationalism," p. 88.
5. Hayek, "Notes on the Evolution of Systems of Rules of Conduct," *Studies*, p. 80.
6. *Ibid.*, p. 81.
7. Hayek, *The Political Ideal of the Rule of Law* (Cairo, 1955), p. 32.
8. Hayek, *The Constitution of Liberty* (Chicago, 1960), p. 153.



9. Hayek, "Rules, Perception and Intelligibility," p. 62.
10. Hayek, "Kinds of Order in Society," pp. 11–12.
11. Hayek, "Notes on the Evolution of Systems of Rules of Conduct," p. 71.
12. Hayek, "What is 'Social'? — What Does It Mean?," *Studies*, p. 243.
13. *The Constitution of Liberty*, p. 209.
14. "Kinds of Order in Society," p. 7.
15. Hayek, *The Confusion of Language in Political Thought* (London, 1968), pp. 11–15.
16. *Ibid.*, pp. 12–13.
17. "Kinds of Order in Society," p. 8.
18. *Ibid.*, p. 8.
19. *Ibid.*, p. 8.
20. *Ibid.*, p. 10.
21. *The Political Ideal of the Rule of Law*, p. 30.
22. "Kinds of Order in Society," p. 12.
23. *The Constitution of Liberty*, p. 231.
24. Hayek, "Individualism: True and False," *Individualism and Economic Order* (Chicago, 1948), pp. 15–16.
25. *Ibid.*, p. 15.
26. Plato, *The Statesman*, 292a–303d.
27. "Individualism: True and False", p. 19.
28. *The Constitution of Liberty*, p. 87.
29. Robert Nozick, "On the Randian Argument," *The Personalist*, LII, No. 2 (Spring, 1971), fn. 4, pp. 299–300.
30. Hayek, "The Principles of a Liberal Social Order," *Studies*, p. 175.
31. *Ibid.*, p. 172.
32. *The Constitution of Liberty*, p. 133.
33. It is difficult to say what it is that Hayek means by harmful in this context. The example of the borrowed book is simple enough, as also the further example of unpleasant noise-making. In this context we might substitute "annoyance" for "harmful". Yet the further example on p. 134 of *The Constitution of Liberty* involving someone deliberately stepping in my way seems to be coercive, particularly if he is bigger than I. Hayek's further criteria of "crucial to existence" and "preserving what one most values", discussed below, seem relevant to the concept of harm in this context.
34. *The Constitution of Liberty*, p. 133.
35. "Freedom and Coercion," *Studies*, p. 349.
36. *The Constitution of Liberty*, p. 136.
37. "The Principles of a Liberal Social Order," p. 167.
38. *The Constitution of Liberty*, p. 137.
39. *Ibid.*, pp. 143–144.
40. *Ibid.*, p. 140.
41. *A Theory of Justice* (Cambridge, Mass., 1972). See especially pp. 83–90.
42. "The Principles of a Liberal Social Order," pp. 174–175.
43. Ronald Hamowy, "Hayek's Concept of Freedom: A Critique," *New Individualist Review*, Vol. 1, No. 1 (April, 1961) pp. 28–29.
44. *Ibid.*, p. 29.
45. Hamowy, "Freedom and the Rule of Law in F. A. Hayek," *II Politico*, Vol. XXXVI, No. 2 (Giugno, 1972), fn. 17, p. 354.
46. *The Constitution of Liberty*, p. 142.
47. J. W. N. Watkins, "Philosophy," *Agenda for a Free Society*, Arthur Seldon, ed. (London, 1961), p. 39.
48. *The Constitution of Liberty*, p. 142.
49. Hamowy, "Freedom and the Rule of Law in F. A. Hayek," fn. 22, p. 356.
50. Nozick, "Coercion," *Philosophy, Science, and Method*, S. Morgenbesser, P. Suppes and M. White, eds.) (New York, 1969), see especially the discussion of threats and offers, p. 462. Professor Nozick lists what he believes to be the necessary and sufficient conditions for coercion, pp. 441–443, here listed in their final form:  
 "Person P coerces person Q into not doing act A if and only if:  
 1. Part of the Q's reason for not doing A is to avoid (or lessen the likelihood of) the consequences which P has threatened to bring about or have brought about.  
 2. P threatens to bring about or have brought about some consequence if Q does A (and knows he is threatening to do this).  
 3. A with this threatened consequence is rendered substantially less eligible as a course of conduct for Q than A was without the threatened consequence.  
 4. If P has not decided to bring about the consequence, or have it brought about, if Q does A, then (part of) P's reason for saying that he will bring about the consequence, or have it brought about, if Q does A is that (P believes) Q will believe this consequence worsens Q's alternative of doing A.  
 5. Q does not do A.  
 6. Q knows that P has threatened to do the something mentioned in 2, if he, Q, does A.  
 7. Q believes that, and P believes that Q believes that P's threatened consequence would leave Q worse off, having done A, than if Q didn't do A and P didn't bring about the consequence."  
 These conditions are congruent with Hayek's categorization of the rules of law discussed above, and hence, these laws coerce.
51. Watkins, p. 43.
52. This is not meant to undervalue our subjective experience of freedom. Undoubtedly, judging whether our will is dominant, or another's is substituted for it, is crucial to the existence of liberty. What seems important, in judging the factory case, is whether any other system but the market allows us the relative dominance of our own wills in the whole area of choice that surrounds us.
53. Watkins, pp. 150–151.
54. *The Constitution of Liberty*, p. 143.
55. *Ibid.*, p. 143.
56. Nozick, "Coercion," p. 444.
57. "The Principles of a Liberal Social Order," p. 165.
58. p. 210.
59. *Ibid.*, p. 216.
60. *Ibid.*, p. 217.
61. *Ibid.*, p. 217.
62. *Ibid.*, p. 145.
63. *Ibid.*, p. 145.
64. *Ibid.*, p. 229.
65. House of Commons, 18 November 1783, p. 46.
66. *The Constitution of Liberty*, p. 221.
67. *Ibid.*, fn. 6. 492.
68. *Ibid.*, pp. 222–223.
69. *Ibid.*, p. 205.
70. A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th edn. (London, 1959), p. 188.
71. Lord Hewart of Bury, *The New Despotism* (London, 1929), p. 26.
72. Judith N. Shklar, *Law v. Administration: The Old Whigs* (unpublished manuscript), pp. 7–22. Professor

- Shklar makes the point that "It is change, as such, with its disorders, that legalism abhors", and that the individualistic propensities of Whig legal thought are historically accidental. Hayek's liberalism, of course, is not opposed to change *per se*.
73. *The Constitution of Liberty*, p. 208.
  74. *Ibid.*, p. 154.
  75. Hamowy, "Freedom and the Rule of Law in F. A. Hayek", fn. 33; N.Y. Rapid Transit act (April 28 Laws 1941), Chapter 800 (Chapter 48(a) of the Consolidated Laws. Section 2a(7)), p. 360.
  76. N. 19, p. 489 cites a regulation quoted in G. Haberler, *The Theory of International Trade* (London, 1936), p. 339, providing for a special rate of duty for "brown or dappled cows reared on a level of at least 300 metres above the sea and passing at least one month in every summer at a height of at least 800 metres."
  77. *Ibid.*, p. 209.
  78. Bruno Leoni, *Freedom and the Law* (California, 1972), p. 75.
  79. Hamowy, "Freedom and the Rule of Law in F. A. Hayek." pp. 360-361.
  80. *Ibid.*, n. 34, pp. 360-361.
  81. *Ibid.*, p. 362.
  82. *The Constitution of Liberty*, p. 155.
  83. Hamowy, "Freedom and the Rule of Law in F. A. Hayek", p.363.
  84. Leoni, p. 69.
  85. *The Political Ideal of Rule of Law*, p. 35.
  86. Hamowy, "Freedom and the Rule of Law in F. A. Hayek." p. 363.
  87. Kenneth Davis, *Discretionary Justice* (Baton Rouge, 1969) answers the question of "why not rules alone?" by the following observations:  
 (1) "Much discretionary justice not now governed by rules should be"  
 but (2) "Much discretionary justice is without rules because no one knows how to formulate rules."  
 and (3) "Much discretionary justice is without rules because discretion is preferred to any rule that might be formulated; individualized justice is often better, or thought to be better, than the results produced by precise rules", p. 15.
  88. Hamowy, "Freedom and the Rule of Law in F. A. Hayek," p. 364.
  89. "Kinds of Order in Society," p. 9.
  90. Davis, p. 29. But see Hayek's latest analysis of judge-discovered law, *Law, Liberty and Legislation*, I, "Rules and Order" (Chicago, 1973), pp. 115-118.
  91. Davis, p. 18.
  92. *Ibid.*, p. 18.
  93. Hamowy, "Freedom and the Rule of Law in F. A. Hayek," p. 364.
  94. *Ibid.*, pp. 369-370.
  95. *Ibid.*, p. 373.
  96. *The Political Ideal of the Rule of Law*, pp. 28-29.
  97. Shklar, pp. 5-6.
  98. Leoni, p. 67.
  99. Bernard Schwartz, "Executive Power and the Disappearance of Law," *New York University Law Quarterly Review*, Vol. XXI, No. 4 (October, 1946), p. 505.
  100. *Ibid.*, p. 505.
  101. Leoni, "'Consumer Sovereignty' and the Law," *New Individualist Review*, Vol. III, No. 1 (Summer, 1963), p. 17.
  102. Leoni, *Freedom and the Law*, p. 21.
  103. *Ibid.*, pp. 21-22.
  104. *Ibid.*, p. 110.
  105. *Ibid.*, pp. 13-14.
  106. *Ibid.*, p. 154.
  107. *The Constitution of Liberty*, p. 198.
  108. Leoni, *Freedom and the Law*, p. 95.
  109. *Ibid.*, p. 183.
  110. *Ibid.*, p. 187.
  111. Leoni, "'Consumer Sovereignty. and the Law," p. 19.
  112. Murray N. Rothbard, "On Freedom and the Law," *New Individualist Review*, Vol. I, No. 4 (Winter 1961), p. 39.
  113. Hamowy, "Freedom and the Rule of Law in F. A. Hayek," p. 364.
  114. *The Constitution of Liberty*, p. 228.
  115. Nozick, "Coercion," p. 457.