

## LAW AND THE LIBERAL SOCIETY: F. A. HAYEK'S CONSTITUTION OF LIBERTY

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The nature of political discourse has been significantly altered by the events of recent history, among which has been an accelerating shift of governmental regulation away from directing society by means of general rules to that of *ad hoc*, administrative commands and discretionary control. This has been accompanied by an apparent general lessening of respect for law and an increased interest in civil disobedience in the name of higher principles. These changes have led to a resurgence of interest in the concept of the rule of law as one of the primary protections which formally organized and highly complex societies can offer for personal freedom and an ordered society. Shifts in attitude toward law on the part of both government and citizens have encouraged political theorists to re-examine the classical liberal conception of the rule of law towards a better understanding of the inter-relationship between the nature, function, and extent of governmental rules on the one hand, and personal freedom and the sphere of activity wherein the individual may act solely as he pleases on the other.

This paper will focus on the work of F. A. Hayek, the leading modern exponent of the liberal conception of freedom and the rule of law. I intend in my analysis to lay bare the incongruities and weaknesses in Hayek's definition of freedom, and to show that a government under the rule of law, as he offers it, is no more a guarantee of personal freedom than is a government delegated broad discretionary powers — that one's freedom can be as much constrained under one system as under the other. I hope in the course of this paper to suggest the direction future theorists might take if they are to avoid certain pitfalls which prevent a more rigorous investigation of the relation-

ship between freedom and the activities of government.

### HAYEK'S CONCEPT OF FREEDOM

Hayek defines "liberty" or "freedom" — the terms are used synonymously — in a manner consistent with nineteenth-century English liberal theory.<sup>(1)</sup> "Individual or personal freedom", he writes, is "the state in which a man is not subject to coercion by the arbitrary will of another or others."<sup>(2)</sup> I see no problem with definitions of liberty which take the negative form Hayek here proposes. One essential criterion for any useful definition of individual freedom which is not metaphorical — and which is central to the notion of negative liberty — is, I suggest, that one's freedom never require that other human beings *act* in certain ways but only that they *do not act* in certain ways; that is, that my freedom entail *prohibitions* on others rather than *positive commands*. This distinction is negated in all positive conceptions of liberty. All sensible, non-vulgar uses of the term, however, suggest some notion of being let alone, of *not* being "forced", "required", "commanded" by others to do (or not to do) something, provided that one "can", "is able to", "has the capacity to" do it. What is crucial, of course, is how we proceed to distinguish the types of force impinging on us so that relevant distinctions are made between "being forced" or "being coerced" not to do something, and "not being able" to do something. I believe that this is impossible without prior recourse to a theory of rights and that all attempts to define freedom result in hopeless conceptual muddles without such a theory.<sup>(3)</sup> Hayek, however, attempts his definition of coercion without reference to rights. "Coercion", he continues, "occurs when one

man's actions are made to serve another man's will, not for his own but for the other's purpose".<sup>[4]</sup> But, he adds, coercion can occur *only* when the possibility of alternate action is open to the coerced. "Coercion implies that I still choose but that my mind is made someone else's tool, because 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>[5]</sup>

There is clearly an inadvertence here. Coercion, Hayek claims, does not occur when someone done violence is prevented from choosing at all. "If my hand is guided by physical force to trace my signature or my finger pressed against the trigger of a gun, I have not acted. Such violence, when it makes my body someone else's physical tool is, of course, as bad as coercion proper and must be prevented for the same reason."<sup>[6]</sup> But it is *not* coercion, and — not being coercion — I cannot be said to be unfree. The farcical implication is that if I am trussed up without the ability to move, I am, in Hayek's use of the term, still free!

There is an equally serious problem buried in this formulation, however. The absence of coercion (freedom), according to Hayek, obtains when the possible alternative actions open to me are not such that, through the manipulation of such alternatives by someone else, the least painful choice for me is that which is the most beneficial to him. Or, more simply, I am free when no one else manipulates my environment in such a way that my action (or actions) benefits him. Unqualified, this definition is useless, since under it the overwhelming preponderance of human interactions could be shown to be coercive. The primary difficulty with this definition is that we must distinguish "coercive" manipulations from the conditions or terms on which others are prepared to render us specific services or benefits, all of which are deliberate acts by others aimed at our subsequent action (or actions) benefiting them. Hayek attempts this distinction in the following way: "So long as the services of a particular person are not crucial to my existence or the preservation of what I most value, the conditions he exacts for rendering these services cannot properly be called 'coercion'."<sup>[7]</sup>

I find this formulation totally inadequate. How are we to determine what is "crucial to my existence" or what "preserves what I most value" in any but a purely subjective way? Hayek makes little effort to give precision to these terms and his examples are confused. Let us take a situation in which Hayek claims no coercion occurs. Suppose that the condition for my being invited to a dinner party were my wearing a dinner jacket. It is clear, Hayek claims, that in situations of this kind, no coercion takes place.<sup>[8]</sup> I take this to mean that such situations never involve threats to things "crucial to my existence" or to "the preservation of what I most value". But Hayek has here mistakenly translated "ordinarily involves no threat" to "never involve threats" in order to salvage his criteria for the existence of coercion from absurdity. For it follows from his argument that if (a) my social standing were one of the things I most valued and, (b) my not attending this party would damage my social standing, then it is indeed possible that I could find myself coerced by my host's demand. For example, if (c) my dinner jacket were at the cleaners and, (d) it were impossible for me to rent a dinner jacket except at a price I would otherwise be unwilling to pay, then my prospective host's requirement that I wear a dinner jacket as the "price" of access to his home would threaten the preservation of what I most value, my social standing, and would be invasive of my freedom.<sup>[9]</sup>

Hayek's argument suffers from a species of fallacy previously made by Isaiah Berlin. Berlin, in his *Two Concepts of Liberty*, contends that negative liberty resides in being left left to do what one "wants", "desires", "wishes", "chooses".<sup>[10]</sup> As Berlin himself later recognized, there is an absurdity implicit in this formulation "for if to be free — negatively — is simply not to be prevented by other persons from doing whatever one wishes, then one of the ways of attaining such freedom is by extinguishing one's wishes".<sup>[11]</sup> The same criticism applies equally to Hayek's criteria for coercion. For if freedom resides in the absence of certain types of threats to those things I feel are "crucial to my existence" or the "preservation of what I most value", then my freedom

can be enlarged by narrowing the set of things I find crucial to me or most value.

This fallacy lies at the root of yet another example of non-coercion which Hayek offers: "If I would very much like to be painted by a famous artist and if he refuses to paint me for less than a very high fee, it would clearly be absurd to say that I am coerced."<sup>121</sup> On the other hand, Hayek's argument implies that if it preserves what I most value, to be painted by a famous artist, and if he refuses to paint me for less than a very high fee, it follows that I am coerced. What does "very much like" mean and how does it differ from "most value"? Since both terms are inherently subjective, they are of little utility for an objective theory of individual freedom. Indeed, if my being free depends on others not threatening the preservation of what I most value, then I need only change my values in the presence of a threat to transmute an otherwise coercive act into a non-coercive one. The reverse, of course, also holds true and by a change in values I can create situations in which I am coerced where otherwise there was only a thwarting of desire. In the above example, I can narrow my area of freedom by upgrading my "very much liking" to be painted by a famous artist to "most valuing" being painted by him. It then becomes the case, within the framework of Hayek's argument, that if my not being painted by this artist threatens the preservation of what I most value, then my environment has been manipulated in such a way that the "least painful choice" for me (paying the high fee) is that which benefits the "manipulator" (the artist) and I am being coerced.

Inadvertently, Hayek has here blundered from a strictly negative conception of freedom into a positive one. I am unfree (coerced) to the extent that I am deliberately denied those things which I find preserve what I most value; this argument is constructed in such a way that my freedom can require that others be forced to act in a particular way — in this instance that an artist paint me when he otherwise would have refused.

The same philosophical muddle is apparent in a number of other examples Hayek offers. Although at one point he writes that "it cannot

legitimately be called coercion if a producer or dealer refuses to supply me with what I want except at his price", in the following paragraph he offers a case of "true coercion" which involves just such an instance. "A monopolist", Hayek writes, "could exercise true coercion . . . if he were . . . the owner of a spring in an oasis. Let us say that other persons settled there on the presumption that water would always be available at a reasonable price and then found . . . that they had no choice but to do whatever the owner of the spring demanded of them if they were to survive: here would be a clear case of coercion."<sup>123</sup> I assume that Hayek here means that any contract between the owner of the spring and the settlers for water by which the owner received any but a "reasonable price" would be coercive. But how are we to determine what a "reasonable price" is? It is possible that Hayek here means to suggest that a "reasonable price" is the "competitive price". But how is it possible to determine what the competitive price is in the absence of competition? Economics possesses no way of predicting the cardinal magnitude of any market price in the absence of a market. What, then, can we assume to be a "reasonable" price, or, more to the point, at what price does the contract alter its nature and become an instance of coercion? What if the owner of the spring demands nothing more than the friendship of the settlers? Is such a "price" coercive? By what principle can we decide when the agreement is a legitimate contractual one and when it is not?

There is yet a further difficulty. Is the owner of the spring acting coercively if he refuses to sell his water at *any* price? Suppose, for example, he looks upon his spring as sacred and to offer its holy water to non-believers a sacrilege. Here is a situation which would not fall under Hayek's definition of coercion since the owner forces *no* action on the settlers. Yet it would appear, within Hayek's own framework, that were these conditions to prevail an even greater violence would be done the settlers since the only "choice" now open to them is that of dying of thirst.

Let us now turn to Hayek's use of the term "coercion" in contexts where it is possible for

someone who might otherwise be coerced to *foresee* the results his actions will have. He writes: "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 [i.e. I need never have my freedom curtailed]." (14) It follows from this, for example, that if Mr. Jones warns me that he will harm me in some way if I purchase any goods from Mr. Smith and provided that the goods are available elsewhere or are such that I can do without them, then Mr. Jones' action is non-coercive! The threatened party is no *less* free than he was before the threat was made *if* he can avoid the threatener's action. The threat itself is non-coercive; additionally, if the threat prohibits my acting in a certain way when it is within my power not to so act, I am not being coerced by the prohibition. With respect to my freedom, avoidability of the prohibited action is sufficient, according to this criterion, to set up a situation theoretically identical to one in which a threat does not occur at all. Thus, if I know in advance that I will be attacked by a gang if I were to enter a certain neighborhood and if I can avoid that neighborhood, then I need never be coerced by the gang nor are they curtailing my freedom.

This rather awkward relationship between avoidability of violence and coercion, where the presence of the former entails the absence of the latter, stems from Hayek's attempt to create a necessary connection between general rules which prohibit specific actions (the rule of law) and freedom. Hayek goes on to say that "in so far as the rules providing for coercion are not aimed at me personally but are so framed as to apply equally to all people in similar circumstances, they are no different from any of the natural obstacles that affect my plans". (15) Hence, one could regard a gang-infested neighborhood in the same way as a plague-infested swamp, both avoidable obstacles, neither personally aimed at me and therefore not limiting my freedom.

J. W. N. Watkins has examined this position and rightly argues that Hayek has been over-impressed by the logical distinction between a positive command and a prohibition to the

point where he has denied the coercive status of any prohibition. It is true that a prohibition leaves an agent free to act in any of the large number of ways compatible with not acting in the prohibited way while a positive command leaves him unfree to act in any but the commanded way, but it does not follow that all prohibitions are less coercive than all commands. "We must not be dazzled by the largeness of the number of alternative courses left open by a prohibition", Watkins notes. "After all, the agent can select only one of them. To measure the degree of penalisation which a prohibition involves, what we have to weigh against the prohibited course is not the whole class of unprohibited alternatives but just the unprohibited alternative which he dislikes least. Now it may be that his best unprohibited alternative will be little or no worse than the prohibited course, in which case he will not be penalised by the prohibition. But it may also be that he regards the best unprohibited alternative as *much* worse than the prohibited course." (16)

It is clearly erroneous to hold that prohibitions, taking the form of general rules, are non-coercive (or necessarily less coercive) because the consequences of violating such prohibitions are avoidable. These consequences are just as avoidable in the case of arbitrary, *ad hoc* commands, since one need only obey to avoid being penalized. But this relationship between general rules and freedom is, indeed, the most important characteristic of Hayek's theory of law. Individual freedom, for Hayek, is the logical consequence of a certain set of formal restrictions on the legal rules under which a society operates. He writes: "the conception of freedom under the law rests on the contention that when we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man's will and are therefore free". (17) The implication, of course, is that any abstract rule applied impartially is non-coercive. Further, the non-coercive nature of general rules seems to hold even when these rules occasionally take the form of specific directives rather than prohibitions. Though "taxation and the various compulsory services, especially the armed forces,

are not supposed to be avoidable, they are at least predictable and are enforced irrespective of how the individual would otherwise employ his energies: this deprives them largely of the evil nature of coercion".<sup>[18]</sup> This intimate connection between the structure of rules and Hayek's concept of freedom forms the foundation of his theory of law.

### THE RULE OF LAW

Hayek's goal in his political theory is to offer nothing less than a theoretical structure for a free society, a "constitution of liberty", in which the individual, secure within a broad, protected sphere, may act as he pleases, unharassed by the state. It is therefore essential that Hayek differentiate between acts of government which are consistent with such a society and those acts which are invasive or coercive. In order to do so he has recourse to the concept of the rule of law.

The rule of law is not itself the body of laws by which society is governed, but a higher order rule determining the formal structure of laws, consistency with which is the criterion for securing individual freedom in society. It requires that a particular law "in its ideal form be a 'once-and-for-all' command that is directed to unknown people and that is abstracted from all particular circumstances of time and place and refers only to such conditions as may occur anywhere and at any time".<sup>[19]</sup> From such a system of laws emanates the whole body of rights individuals possess. Rights do not logically antecede government but are formed and given substance by the legal arrangements which stem from the rule of law. They are defined in terms of the positive law under which society operates and are no more than guarantees against action falling outside the rule of law. "Under a reign of freedom", writes Hayek, "the free sphere of the individual [that area protected by rights] includes all action not explicitly restricted by a general law."<sup>[20]</sup>

Hayek stipulates several criteria which legal rules must meet to be consistent with the rule of law, that is, that they be consistent with individual freedom. All laws must be equally applicable to all members of the political com-

munity, they must be general in nature, and they must be certain. I will proceed to discuss each of these criteria with a view toward examining whether they, in fact, afford any protection to individual liberty and whether the results of possible government action consistent with these safeguards can so constrain individual conduct as to make useless these limitations on the form specific laws should take.

(i) Consistency with the rule of law, Hayek asserts, demands that all positive law be "equally applicable", that is, that no law distinguish among citizens in its application. In its strongest sense the "equal applicability" criterion requires that all governmental rules which command or prohibit actions to some, command or prohibit those actions to all. Toward this end, according to Hayek's understanding of the rule of law, government would be prohibited from making laws which explicitly apply only to specific persons or groups: "As a true law should not name particulars, so it should not single out any specific persons or group of persons."<sup>[21]</sup> Hayek finds himself forced to modify any strict interpretation of this prohibition, however, since it is apparent that certain "legitimate" rules can have application only to specific sets of people. An example of this, I would suppose, is the prohibition of rape, which in common law at least can be committed only by a male. Hayek suggests two criteria which, if met, would place laws regulating the behavior of specific groups outside the range of arbitrary governmental action and make them consistent with the rule of law. These criteria are, first, that no proper names be employed in the law and, second, that the distinctions which the law makes are supported by majorities both within and outside the group which is the subject of legislation.<sup>[22]</sup> Both criteria, I believe, present grave theoretical problems.

That no proper name be mentioned in a law does not protect against particular persons or groups being either harassed by laws which discriminate against them or granted privileges denied the rest of the population. A prohibition of this sort on the form laws may take is a specious guarantee of legal equality, since it is

always possible to contrive a set of descriptive terms which will apply exclusively to a person or group without recourse to proper names. One need only set up a description in such a way that the parameters delineating, and the characteristics possessed by, the person or group are neither over- nor under-inclusive; i.e. one need only create a one-member class. In this way legislation aimed at certain persons or groups avoids the apparently illegitimate device of singling them out by name. Further, groups, unlike specific individuals, are possessed of a set of *defining* characteristics which, when listed in the law, would serve the same function as the use of proper names.

Hayek's second criterion, that legislation referring to specific groups is permissible only when supported by majorities both within and outside the group, fares no better as a guarantee of legal equality. If the purpose of legislation is to grant privileges to a certain minority, rather than to discriminate against them, the majority of those "within the group" would most likely concur in such legislation. Hayek contends that a statute aimed at a specific group which is favored by majorities both within and outside the group can be presumed to serve the ends of both.<sup>[23]</sup> This strikes me as an unwarranted assumption. If the operational sense of "being favored by the majority outside the group" is understood to equate with "assented to by a majority outside the group", as it most often is in political discourse, there is persuasive empirical evidence that laws granting privileged status to select groups are commonly acquiesced in by larger majorities even when such laws run counter to their own ends. The history of law, particularly in the western democracies, is replete with legislation granting special economic privileges to certain minorities (tariffs, subsidies, restrictions on entry into professions and businesses, local monopolies, etc.) which are detrimental to the majority of the population. The dynamics of political life offer some insight into why such statutes can be enacted without serious opposition. 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, individually stand to lose only a

little or are unaware that they stand to lose at all, and are politically unorganized for the purpose of preventing the legislation. Almost invariably the result is that legislation of this sort is enacted and accepted, "assented to", by those "outside the group".

What of the case where proposed legislation would discriminate *against* a group? In such instances Hayek's requirement of assent by majorities both within and outside the group appears to offer stronger protection against discriminatory legislation. However, the criterion continues to suffer from an unfortunate majoritarian bias which does not preclude significant curtailments on individual freedom of action. For example, it is possible that proscription of interracial marriages would have the sanction of majorities of the races affected. At this point we would do well to keep in mind that Hayek *defines* freedom in terms of the legal guarantees of the rule of law. If any governmental action is consistent with the rule of law, as the proscription of interracial marriages in the above example appears to be, it then becomes meaningless for anyone wishing to intermarry to speak of the denial of his freedom to intermarry under such a law. Yet, in spite of this, it clearly appears that such a law does deny the freedom to marry whom one chooses to members of either group who favor miscegenation. I can find no way, within the terms of Hayek's argument, to reconcile this conflict.

There is another sense in which the "equal applicability" criterion can be understood, as Hayek uses it: that is, that the *formal effect* of legislation will be equal throughout the population. Examination indicates, however, that this limitation hardly serves as a serious constraint on the content of positive law. Hayek's analysis neglects the fact that *most* laws have a harsher impact on certain people than they do on others. For example, if it were thought necessary for some reason to institute a trade embargo with a particular country the law, in a sense, would formally affect all in some equal way; no one would be permitted to engage in such trade. But the *real effect* of the law would be to benefit some — in this case merchants who deal with countries exporting and impor-

ting the same or similar products as are affected by the embargo — at the expense of others, i.e. those engaged in the now prohibited trade. The greater proportion of laws does not, in this sense, apply equally to all. Nor, of course, does the “equal applicability” criterion curtail the power of government to enforce uniformity in those areas where it deems it desirable and thus to benefit some at the expense of others. Censorship and the prohibition of political and religious dissent and of “immoral” conduct, are all consistent with equal application of the law. By prohibiting *certain* things from being done by anybody, a government is in a position to strike at any particular person or group by legislating against behavior which is peculiar to that group.

But Hayek does not contend that the law *must* always be, in some formal sense, the same for all. Not all laws which are consistent with the rule of law are in any meaningful way “equally applicable”. Thus, we are told that conscription is compatible with his theory of the rule of law even when it applies only to a particular segment of the population. Hayek offers no criteria for determining when such exceptions to the equal applicability requirement can be made nor what, if any, are the general principles for deciding whether the content of the exception is legitimate or otherwise. Are licensing laws — which are merely prohibitory laws which stipulate the requirements for exemption — to be regarded as consonant with the rule of law? If licensing is allowable under the rule of law and if we lack a theory imposing limits on such government action, we are in the end faced with the possibility of a society of status — the very thing Hayek seeks to prevent — emerging from principles totally consistent with his theory of law.

The nature of Hayek’s equal applicability requirement is ultimately reducible to a requirement that all laws apply equally to those the law applies to. We are thus in a position to create any number of categories of people in order to apply “equal” laws to them. Those people in each group will be equal under the laws applying to them, despite the fact that other laws will treat other people in other groups differently.<sup>[24]</sup> It is hardly an effective

safeguard of individual freedom to be assured only that laws will be consistent in their application toward those people each law legislates against.

(ii) The rule of law, Hayek maintains, requires that all laws must be general in nature; they must be such that “they do not refer to particulars but apply whenever certain abstractly defined conditions are satisfied”.<sup>[25]</sup> What, in fact, would be prohibited by this criterion? In examining the efficacy of this principle of law we are confronted with much the same difficulty which was met in our analysis of proper names in the law. For, here too, inasmuch as a sufficiently specific general characterization fitting only one condition or a particular set of conditions can be provided, it remains possible to meet this requirement in law and yet structure legislation directed towards specific situations.

Indeed, it is the basic function of much law to aim at a certain level of specificity, as opposed to commanding or prohibiting at all times, in all places, and under all conditions. Hayek seems to recognize the legitimacy of specificity to general rules provided that the specifics be abstractly stipulated; “the law”, he writes, “will prohibit killing another person or killing except under certain conditions so defined that they may occur at any time or place”.<sup>[26]</sup> This dilution of the generality criterion is essential if we are to have a legal system at all. Killing is not always murder and it is murder which the law wishes to prohibit. But Hayek offers no guidelines to indicate in what way legal terms such as murder (or theft, rape, etc.) are to be defined. Abstractness alone is clearly insufficient.

At what point, then, are laws *too* specific to be considered compatible with the rule of law? What Hayek is aiming at is a legal system which precludes the existence of administrative agencies possessed of discretionary power to make *ad hoc* decisions. The requirement that all laws be general, he contends, would limit the courts and any other judicial and quasi-judicial agencies of government from rendering such decisions. But if there is no limitation on the level of specificity of general rules other than that the specificity be abstractly formulated, then

there are an infinite number of genera under which general rules may be contrived. An administrative decision, in reality an *ad hoc* command or prohibition, need only be formulated in terms of an abstract rule of sufficient specificity to permit its compatibility with the rule of law.<sup>1271</sup>

(iii) We have yet to consider that requirement which Hayek contends is the most important aspect of the rule of law, that the law be certain. "There is probably no single factor which has contributed more to the prosperity of the West", he writes, "than the relative certainty of the law which has prevailed here."<sup>1281</sup> What Hayek here means by "certainty" is suggested in *The Road to Serfdom*, where he defines the rule of law in the following way: "Stripped of all its technicalities, [the rule of law] means that government in all its actions is bound by rules fixed and announced beforehand — rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge."<sup>1291</sup>

But how can the government be bound *in all its actions* by fixed rules, announced beforehand? In his commentary on Hayek's theory of law, Kenneth Davis has pointed out that this statement is either an absurdity or an inadvertence since the legislature, obviously, cannot be so bound.<sup>1301</sup> It is possible, however, to salvage Hayek's criterion if it is restructured in the following way: the legislature, if it is to act consistently with the rule of law, is limited to passing into law only fixed rules which then must be made known, and the other branches of government are constrained to act only under such rules. Thus reformulated, the "certainty of the law" resides in specific rules being framed in such a way that one can predict when and how the executive and the courts will use their coercive powers. This has as its corollary that the executive and the courts will not legislate with respect to the cases before it.

Although this requirement appears to offer somewhat stronger protection against arbitrary government than do Hayek's other criteria, it is, I think, predicated on a false assumption. Hayek seriously underestimates the discre-

tionary powers inherent in the functions of the executive and judicial branches of government. The area of discretionary power possessed by the executive and its servants and by the courts touches on the average person to a far greater degree than that area governed by rigid rules. We are all subject to a huge range of legal rules covering almost all aspects of human interaction. Whether and how these rules are invoked ultimately depends on the government's representative of first resort, the policeman. He must decide, at the least, whether a rule has or has not been broken and, often, whether invoking a criminal sanction is too severe a response to even a clear violation of a rule. This discretion is not a weakness of law but an integral part of it.

To be certain that if I act in a particular way a specific legal sanction will follow, I must know that the act was a violation of a specific rule and I must be able to predict:

- (a) that I will be caught;
- (b) that the policeman will act to enforce the specific rule;
- (c) that there is sufficient evidence to present before a court that I had violated the rule;
- (d) that the prosecutor will prosecute;
- (e) that the judge or jury will convict;
- (f) that I will be given a predictable punishment;
- (g) that I will not be pardoned.

Foreknowledge of all these outcomes is impossible. The legal arrangements under which men live can never provide certainty that all offenders will be caught and these same arrangements more often than not provide discretionary powers with respect to arrest, prosecution, and sentencing. At one time the authorities will use their coercive powers in one way, at another time, in another. I can never be certain that if I violate a rule I will be punished, much less exactly how I will be punished.

I suspect, however, that Hayek's main interest, when he identifies individual freedom with the criterion that the law be certain, is not so much certainty that a legal sanction will follow upon commission of a prohibited act, but more the following: when a legal sanction *is* invoked, *if* it is invoked, it will always be



preceded by an act which one could have predicted was prohibited. Hayek's theorem formulated in this negative manner is much stronger. For, although elements of all legal systems — especially those which Hayek holds must consistently reflect the rule of law — permit discretion in *not* invoking criminal sanctions when legal rules are broken, those systems he most admires allow far less discretion in invoking criminal sanctions when one could not have predicted that an act fell under the rubric of a prohibitory law. Even here, however, there are areas (areas with which Hayek finds no fault) which involve some degree of unpredictability.

For example in criminal law where, because of the nature of the crime, the statute is necessarily vague — generally those concerning a lower order of offenses involving personal conduct — there is a whole range of acts the illegality of which ultimately depends on a decision of a policeman. Among these are loitering, disturbing the peace, vagrancy, disorderly conduct, illegal assembly, failure to disperse, offending public morals, creating a nuisance, "public" drunkenness, inciting to riot, interfering with the duties of a police officer; some traffic offenses such as reckless driving and driving too fast for conditions; and aspects of all health, sanitation, and fire codes. Predictability in these areas, whether a specific act either is or is not illegal, is either minimal or nonexistent *until* a decision has been made by a servant of the law.

With respect to tort law, whether a civil action will lie in one's act rests on whether the act is wrongful and the determination of whether an act is wrongful depends on the attitude of the prospective plaintiff. Although it is true that not any act can be held wrongful, those acts which can be so held can also be held not to be, dependent on the discretion of the person affected. If there is predictability here it is certainly not over the form the law takes, as Hayek would have it, but because of factors extraneous to Hayek's argument.

Finally, there is yet another way in which the predictability of the law is limited. The body of law owes much to the decisions of judges acting as legislators. In any instance where the

language of a law is somewhat vague or imprecise and a particular act is charged as being in violation of the law, courts have the option of extending the sense of the law by construing it as covering the act before the bench. Even when the language of a statute is precise and detailed, there will occur cases falling within the necessarily imprecise border areas of a law's applicability, where special situations of fact arise. Where these conditions prevail, the defendant can be denied warning that his act was in violation of any law, since judge-made law, whether criminal or civil, is always retrospective law to the case at hand. There is no way of circumventing this uncertainty.

It is, I think, clear that all legal systems, of necessity, permit — at times even encourage — a fair amount of discretion to both the executive and judicial branches. The structure of legal arrangements cannot but allow a certain measure of unpredictability to the course the law will take. But what if we were to take Hayek's "certainty" safeguard as an absolute requirement to which all laws must conform. Assume a body of written laws, precisely worded and unambiguous, certain of enforcement and allowing a minimum of judicial discretion concerning either its application or the penalties imposed for its transgression. As Bruno Leoni has pointed out, even in such a case, although we are always certain as far as the literal content of each rule is concerned at any given moment, we can never be certain that the rules under which we are operating today will be the same rules under which we shall have to operate tomorrow.<sup>[31]</sup> Since the legislature cannot by its nature be bound by rules "fixed and announced beforehand", long-run certainty of the sort that Hayek regards as a prerequisite of a free society is unattainable.

## CONCLUSION

The rule of law has held a unique place in the liberal conception of a free society. Liberal legal theorists from Dicey<sup>[32]</sup> to Lord Hewart<sup>[33]</sup> and Hayek have all juxtaposed the rule of law with arbitrary government; they have identified its absence with despotism and its presence with an open society. More impor-

tantly, they all share the presumption that a government operating under its principles is a sufficient condition for individual freedom. This identification of personal liberty with the rule of law is especially true in Hayek's formulation. Hayek's preoccupation with the *formal* structure of law has led him to disregard the substantive limitations on law without which personal liberty cannot be insured. In the absence of additional substantive limitations which go beyond the satisfaction of mere structural requirements, the law can become an instrument of government power as repressive as any which would exist under an arbitrary despotism.

Inasmuch as Hayek defines "freedom" in terms of the rule of law, those who regard certain legislation as invasive of that freedom are left in somewhat of a theoretical bind. For, although it might be shown that a particular prohibition on individual behavior would be harmful to some, or even to all, so long as the prohibition meets the criteria Hayek sets down for the rule of law, it could not be held to be invasive of individual freedom. Once consistency with the rule of law is taken as the sole basis for determining legitimate government action, we can no longer bring to bear a discussion of the government's interference with personal liberty. Indeed, Hayek himself acknowledges this restriction on political discourse. At one point he writes: "so long as [government measures] are compatible with the rule of law, they cannot be rejected out of hand as government intervention but must be examined in each instance from the standpoint of expediency".<sup>134</sup>

The rule of law, as Hayek propounds it, requires no more than that legislation be characterized by equality, generality, and certainty. It would not preclude far-reaching government regulation of private life. The rule of law would simply require that such regulation take the form of more or less fixed rules rather than direction via administrative bodies armed with extensive discretionary powers. Even here it is not certain whether the rule of law as postulated would prohibit the legislature from delegating its authority to administrative agencies provided that meaningful standards governing administrative policy-making are in-

corporated into the statute and provided that judicial review of administrative decisions is allowed.<sup>135</sup> One of Hayek's primary purposes in offering his criteria for the rule of law is to supply a theoretical framework within which individual freedom is maximized. Yet this framework, when examined, appears to allow for the concentration of use of power by the state which is inimical to personal freedom. In the final analysis the rule of law, as he offers it, appears to allow such far-reaching powers to government that freedom as we commonly understand it rests on a foundation no more secure than governmental good will.

On the basis of the arguments offered in this essay there appear to be two overriding difficulties posed by Hayek's theory. First, Hayek's concept of "freedom" is logically linked to the rule of law rather than being definitionally independent. As a result, the term, in its restricted sense, loses much of its value as a political concept and unreasonably limits the range of political discourse. Second, the rule of law, whose presence is perhaps a *necessary* condition for a free society, is offered as a *sufficient* condition. Since Hayek's concept of the rule of law is open to serious criticism on the grounds that it permits a number of seemingly peaceful, voluntary actions of individuals to be classified as coercive and, further, that it excludes from the category of coercive activity an enormous range of governmental actions which we should ordinarily call coercive, one can only conclude that it must be rejected as a valid account of the nature of freedom and a free society.

## NOTES

1. See W. L. Weinstein, "The Concept of Liberty in Nineteenth Century English Political Thought", *Political Studies*, XIII (1965), pp. 145-162, for a fuller discussion of the classical liberal conception of freedom from Locke through Sidgwick, as contrasted with its later liberal revision associated with T. H. Green.
2. *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960) [Hereafter cited as *COL*], p. 11.
3. "The historically important concept of negative liberty is that of non-interference with rights, where rights, their content, nature and grounds are variously conceived and where liberty is usually thought of as one among other rights as well as consisting in liberty to en-

- joy rights in general." H. J. McCloskey, "A Critique of the Ideals of Liberty", *Mind*, LXXIV (1965), p. 489.
4. *COL*, p. 133.
  5. *Ibid.*
  6. *Ibid.*
  7. *COL*, p. 136.
  8. *COL*, p. 135.
  9. Hayek states: "To constitute coercion it is also necessary that the action of the coercer should put the coerced in a position which he regards as worse than that in which he would have been without that action." "Freedom and Coercion: Some Comments on a Critique by Mr. Ronald Hamowy", *Studies in Philosophy, Politics and Economics* (Chicago: University of Chicago Press, 1967), p. 349. The case described meets this condition; for, while it is true that my would-be host has widened my range of alternatives by the invitation, the *whole* situation is worse from my point of view than that which obtained before my host had decided to hold a party at that particular time.
  10. (Oxford: The Clarendon Press, 1958), pp. 7–16.
  11. *Four Essays on Liberty* (New York: Oxford University Press, 1969), p. xxxviii.
  12. *COL*, p. 136.
  13. *Ibid.*
  14. *COL*, p. 142.
  15. *Ibid.*
  16. "Philosophy", in *Agenda for a Free Society: Essays on Hayek's The Constitution of Liberty*, Arthur Seldon, ed. (London: Published for the Institute of Economic Affairs by Hutchinson, 1961), p. 39.
  17. *COL*, p. 153.
  18. *COL*, p. 143.
  19. *COL*, pp. 149–150.
  20. *COL*, p. 216.
  21. *COL*, pp. 153–154.
  22. *COL*, p. 134.
  23. *Ibid.*
  24. Bruno Leoni makes this point in his analysis of the rule of law. See his *Freedom and the Law* (Princeton, N.J.: D. Van Nostrand Co., 1961), pp. 68–69.
  25. F. A. Hayek, *The Political Ideal of the Rule of Law* (Cairo: National Bank of Egypt, n.d.), p. 35.
  26. *COL*, p. 152.
  27. See Leoni, *Freedom and the Law*, p. 70.
  28. *COL*, p. 208.
  29. *The Road to Serfdom* Chicago: University of Chicago Press, 1944, p. 72.
  30. *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge, La.: Louisiana State University Press, 1969), p. 28.
  31. *Freedom and the Law*, p. 76.
  32. A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed.; London: Macmillan and Company, 1959), pp. 188–196. Dicey's study was originally published in 1885.
  33. The Rt. Hon. Lord Hewart of Bury, *The New Despotism* (London: Ernest Benn Ltd., 1929), pp. 26–27.
  34. *COL*, p. 221.
  35. *COL*, pp. 213–214.