

# HAYEK'S CONCEPTION OF FREEDOM, COERCION, AND THE RULE OF LAW

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IT IS F. A. HAYEK'S STATED OBJECTIVE in *The Constitution of Liberty*<sup>1</sup> to examine the state of liberty, that is, "the condition of men in which coercion by others is reduced as much as is possible in society" (p. 11). The crucial question to be raised about this work is, To what extent has this inquiry proved instructive in delimiting the range of both freedom and coercion compatible with a free individual's existence as a member of society?

That freedom is good for people to possess is not a moral injunction the force of which derives from natural rights, but rather, for Hayek, is a good that must be justified by recourse to arguments about the conditions that best further the growth of knowledge in civilization. Freedom, consequently, is not an absolute right but a qualified right, the strongest argument for which is the inability of humans to foresee which particular circumscriptions of liberty will be most deleterious to the future good of society.<sup>2</sup> "What is important," he writes, "is not what freedom I personally would like to exercise but what freedom some person may need in order to do things beneficial to society" (p. 32).

The corollary to this conception of liberty as instrumentally justifiable because people are largely ignorant of the future ramifications of their own actions is precisely this: that, should an instance arise in which there were an apparently overriding case for the suspension of a particular liberty in the interest of some other preponderant good, then that liberty should be curtailed in favor of this almost certain common benefit. In order to determine whether this conditional interpretation of liberty provides us with a principle that reduces coercion to the bare minimum and thus maximizes liberty, it is essential that we examine exactly what Hayek means when he uses the term *coercion*.

Hayek begins by distinguishing between the free man and the slave: the relevant distinction being that the former as opposed to

the latter is independent of the "arbitrary will of another." Individual freedom, "the state in which a man is not subject to coercion by the arbitrary will of another or others," means that its possessor has the opportunity to act in accordance with his own decisions, rather than being subject to the will of another "who by arbitrary decision could coerce him to act or not act in a specific way" (pp. 11, 12). This freedom refers solely to the relations among individuals and its only infringement is coercion by others; it does not apply to the range of physical capacities open to particular individuals or to their power to effect their ends. What the exercise of this freedom does depend upon is the securing of an assured private sphere, in which framework individual decisions can be undertaken.

Coercion is pernicious precisely because it prevents individuals from making the greatest contribution possible to the good of society (p. 134). It is Hayek's intention to define exactly what coercion means so that it will be clear in which cases it will be accurate to say that someone has, in fact, been coerced. According to his initial definition:

Coercion occurs when one man's actions are made to serve another man's will, not for his own but for the other's purpose. It is not that the coerced does not choose at all; if that were the case, we should not speak of his "action." 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, which makes my body someone else's physical tool is, of course, as bad as coercion proper and must be prevented for the same reason. Coercion implies, however, 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. Although coerced, it is still I who decide which is the least evil under the circumstances. [P. 133]

One is coerced, then, when another individual so controls one's environment that one is made to serve as a tool for the attainment of that person's ends.

As the discussion progresses, several crucial qualifications are appended to this original definition. "Coercion implies both the threat of inflicting harm and the intention thereby to bring about certain conduct." While the coerced still chooses, the alternatives open to him are determined by another so that he will choose what the

coercer wishes. The coerced is deprived of the possibility of using his knowledge for his own aims because the effective use of intelligence requires that one be able to foresee some of the conditions of one's environment and adhere to a plan of action. "But if the facts which determine our plans are under the sole control of another, our actions will be similarly controlled." (P. 134)

In order to exclude from the category of coercive actions those market activities in which one party has his expectations disappointed, Hayek introduces another qualification:

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." [P. 136]

But it is, he quickly assures us, only in exceptional cases that the sole control of a service or resource would enable another person to exercise true coercion over us. Thus, he presents his "oasis case" as an interesting rarity:

A monopolist could exercise true coercion, however, if he were, say, the owner of a spring in an oasis. Let us say that other persons settle there on the assumption that water would always be available at a reasonable price and then found, perhaps because a second spring dried up, 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*. One could conceive of a few other instances where a monopolist might control an essential commodity on which people were completely dependent. But unless a monopolist is in a position to withhold an indispensable supply, he cannot exercise coercion, however unpleasant his demands may be for those who rely on his services. [P. 136]

But what of cases in which the withholding of a benefit by another person, a person who does not hold monopoly powers, affects me drastically and adversely; are these cases examples of coercion? Hayek thinks not and therefore offers another modification of the term *coercion* to deal with these occurrences:

Even if the threat of starvation to me and perhaps to my family impels me to accept a distasteful job at a very low wage, I am not coerced by him or anybody else. So long as the act that has placed me in my predicament is not aimed at making me do or

not do specific things, so long as the intent of the act that harms me is not to make me serve another person's ends, its effect on my freedom is not different from that of any natural calamity—a fire or a flood that destroys my house or an accident that harms my health. [P. 137]

The discussion is brought to a close with the observation that what is coercion to some may not be coercion to others and that what we should be concerned about is the coercion which will affect the "normal, average person."

It is Hayek's contention, then, that the following conditions must be fulfilled in order to say that a person has been coerced: (1) the coerced person's environment must be controlled by another so that, while he does choose, he is made to choose what will serve the ends of another rather than his own ends; (2) the coercer must threaten to inflict harm with the intention, thereby, to bring about certain ends; (3) that which the coercer denies to me must be crucial to my existence or to what I most value; and, finally (4) the act of the coercer must be directed at me. Upon careful examination, it will become apparent that Hayek's definition of coercion is radically defective, primarily because it provides no objective and clearcut standard of what is a coercive act but rather leaves to individual judgment (with reference to what the individual most values) the determination of when a coercive action has been perpetrated.

Hayek's definition of coercion fails most conspicuously when we turn to an examination of monopoly cases. A clear case of coercion arises, he claims, when our oasis owner is able to exact whatever he demands from the settlers in return for water from his spring, this water being the only water available. In contrast to this case, we are offered that of a man who greatly desires to have his portrait painted by a famous artist who refuses to paint him except at an exorbitant fee. The artist would have a monopoly because the man desires to be painted by this particular artist with his particular skills and not just by any artist. But Hayek contends that this artist would not have coercive power over the man because he could do without the painter's services. The distinction he wishes to draw between these two cases is that in the former the commodity at issue is one that cannot be dispensed with, while in the latter the victim is not vitally affected as to life or the preservation of what he most values.

Now, it is apparent that conditions (1), (3), and (4) of coercion obtain in the oasis case, but it is not at all clear in what way (2) holds. If we assume that the oasis owner offers the settlers as a condition for

obtaining one cup of water the payment of one million dollars, without which payment they will not get the water and will most likely die, then it is incorrect to say that the owner has inflicted harm on the settlers in the event that they cannot pay his price for the water. Hayek claims that the mere power of withholding a benefit will not produce coercion, and that is all the owner has done. To then claim, as Hayek does, that in cases of monopoly ownership of essential services, the mere withholding of a benefit *will* produce coercion, is to import an *ad hoc* assumption to deal with this disturbing case, an assumption that does not follow from any principle he has given us.

How does this case differ from the case where there are three spring owners who, without operating in collusion, offer the following conditions—one cup of water in exchange for \$900,000, \$500,000, and \$50,000, respectively? They are not monopolists, and yet the people still cannot afford the price. In this second example, the spring owners, Hayek would have to say, were not acting coercively while the single spring owner was coercing. If he wished to assert that the three spring owners were acting coercively, because in some sense they collectively held a monopoly over the water supply, then it would follow that whenever an industry as a whole offered essential products at a price that *some individual* could not afford, then it would be acting coercively. This is surely not a consequence that Hayek could accept, because it would leave to every person arbitrary discretion over the prices at which he should get what he considers “essential” goods.

Furthermore, the premise built into the example that the settlers moved to the oasis on the assumption that water would always be available at a reasonable price is both irrelevant and illicit. Since an “assumption” is not a contractual relationship, the spring owner owes these people nothing. Unless Hayek wishes to maintain that all those in need of some commodities or services have a claim upon those who, through foresight or skill, have possession of these goods, then the settlers have no legitimate claim upon the owner, and he cannot be said to have harmed them by refusing his services to those who do not meet his conditions. In fact, it is not clear that the first condition of coercion has been satisfied by this example, either, because the spring owner did not cause the second spring to be desiccated. The real difficulty here is that Hayek is introducing irrelevant factors by focusing upon the need of the people or the exclusive nature of the possession. If an owner of a business is justified in charging whatever price he wishes for the products he owns

when he is in a competitive market, then why should it be illegitimate for him to exercise this same right when his competitors have, for whatever reason, "dried up"? Hayek offers no principle for aborting this right; what he does is, in effect, assert that *he* doesn't think this right is desirable any longer because it endangers the communal good. But is his dislike any reason for expropriating the spring owner who, through no fault of his own, lost all his competitors?<sup>3</sup>

The difficulty will be made even clearer if we examine a case that excludes the question of ownership of natural resources. Take the example of a man on the verge of death who can only be saved by a new and difficult operation that can be performed only by one doctor, its inventor. Without this operation the man will most certainly die, but the doctor refuses to perform the delicate operation without receiving a certain fee that the sick man cannot afford. This case differs from the "painter" example, because the service withheld is crucial to the existence of the person affected and it parallels the oasis case because this is a monopoly situation. If the action of the spring owner is not coercive, as I have shown, then the action of the doctor is not coercive, either. But Hayek would have to claim that both cases are instances of coercion. What follows from this claim? It is Hayek's argument that the government must step in to protect people from coercion, so the doctor should be compelled to perform the operation just as the spring owner should be compelled to sell his water at prices that people can afford. But now look at the state of affairs that arises: (1) the doctor is being forced to serve as a tool for another man's ends that are not his own; (2) the state has threatened him, or else he would have stuck to his original conditions for the performance of the operation, (3) the state is depriving him of what he most values (that without which he cannot be free, says Hayek), the liberty to pursue his vocation as he sees fit; and (4) the act is clearly directed at him, since he is the only person who can perform the operation. Clearly, now, it is the doctor who meets Hayek's criteria of a coerced agent.

Even on Hayek's own instrumental grounds, such consequences would be clearly unacceptable, since they would have the effect of discouraging people from inventing new, life-saving procedures because they would know that their very success would deprive them of their liberty to pursue their own ends and would make them the helpless tools of anyone who needed their services. In no event could this be counted as a benefit to society. As we see, then, Hayek's criteria for coercive actions can be consistently applied in ways that

would be unacceptable to him. Furthermore, the oasis example, which was supposed to be a clear case of coercion, has been shown to be, at the very least, far from clear.

There is, in addition, a more fundamental difficulty, which lies in the third condition of coercion; that is, that which the coercer denies to me must be crucial to my existence or what I most value. But if, for whatever reason, it becomes crucial to my life or what I most value that I be painted by one particular painter (say I am on my deathbed, and only the sight of my portrait painted by this artist will give me the courage to fight on), then that painter is coercing me by withholding his talent. And as a consequence, presumably, the government should step in to prevent this act of coercion by forcing the painter to meet my terms. Hayek, apparently recognizing such an objection, introduces the notion of the "average, normal person" as a test of how much discomfort constitutes coercion. But this doesn't provide an objective standard upon which cases can be discriminated, because it is itself dependent upon some one authority defining who is an "average, normal person" and how much discomfort this person should be able to take. Because A does not value most highly what B values, or what the average person values (supposing that could ever be determined), there is no way that we could ever claim that condition (3) was not satisfied if the offended person claimed that it was. Since all four criteria must be met in order for an act to qualify as coercive, there will always be an equivocation built into any determination because of the subjectivism of this third criterion.

What follows from these objections is that under Hayek's definition of coercion a free market could not exist, since he leaves to every individual the discretion to claim coercion when some good that he considers crucial to his existence is offered only at a price that he cannot or is unwilling to pay. He is, then, perfectly within his rights to call in the government to stop the coercer and force him to offer the good at a price that he considers reasonable. This is an odd consequence, indeed, for a conception that was supposed to lay the groundwork for a free-market economy and a free society.

Hayek's attempt to relate his theory of coercion to the critical case of state action leads him on to even greater difficulties than were encountered with his initial formulation of the definition of coercion. He begins by asserting that coercion must be the exclusive instrument of the government to be exercised for the sole purpose of

preventing instances of far more harmful coercion of one individual or group by another.

Coercion, however, cannot be altogether avoided because the only way to prevent it is by the threat of coercion. Free society has met this problem by conferring the monopoly of coercion on the state and by attempting to limit this power of the state to instances where it is required to prevent coercion by private persons. This is possible only by the state's protecting known private spheres of the individual against interference by others and delimiting these private spheres, not by specific assignation, but by creating conditions under which the individual can determine his own sphere by relying on the rules which tell him what the government will do in different types of situations. [P. 21]

In order to establish these private protected spheres in which individuals are, then, free to act, it is necessary that the government have within its power the ability to coerce individuals. The recognition of property is the first step in delimiting the private sphere, and the established network of rights created by contract is the framework of exchange. By ensuring that the individual spheres are not drawn up by government with reference to particular things or particular persons, the expectation is that this necessary exercise of governmental coercion will largely lose its potentially menacing nature.

Governmental coercion can be reduced to a minimum by observing the following conditions: (1) it must be limited by known, general, abstract rules; (2) the effect of these laws on specific individuals must not be foreseen by the lawgivers; (3) the law must only prescribe limited and foreseeable duties; and (4) the law must leave the individual free of the arbitrary will of another:

The coercion which a government must still use for this end is reduced to a minimum and made as innocuous as possible by restraining it through known general rules, so that in most instances the individual need never be coerced unless he has placed himself in a position where he knows he will be coerced. Even when coercion is not avoidable, it is deprived of its most harmful effects by being confined to limited and foreseeable duties, or at least made independent of the arbitrary will of another person. Being made impersonal and dependent upon general, abstract rules, whose effect on particular individuals cannot be foreseen at the time they are laid down, even the coercive acts of government become data on which the individual



can base his own plans. Coercion according to known rules, which is generally the result of circumstances in which the person to be coerced has placed himself, then becomes an instrument assisting the individuals in the pursuit of their own ends and not a means to be used for the ends of others. [P. 21]

Particular laws, then, must be abstract, general, and of the nature of 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" (p. 150). Furthermore, these laws must be known and certain and be applied equally to all persons without respect to individual differences. To be governed always by the rule of law and not of men means that administrative or judicial discretion must be limited as far as that is possible.

Laws of this nature are largely deprived of their coercive nature; they become fixed givens of our environment, similar to the laws of nature:

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 equally 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. [P. 142]

Conscription and taxation being avoidable or at least predictable, Hayek is willing to categorize them as practically noncoercive governmental acts:

Of course, in some respects the state uses coercion to make us perform particular actions. The most important of these are taxation and the various compulsory services, especially in the armed forces. Though these 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. If the known necessity of paying a certain amount in taxes becomes the basis of all my plans, if a period of military service is a fore-

seeable part of my career, then I can follow a general plan of life of my own making and am as independent of the will of another person as men have learned to be in society. [P. 143]

Hayek's conception of general, abstract rules of law does not, however, exclude the government from legislating with reference to specific classes of people, providing only that both those within and those outside of the particular group concur as to the advisability of the law. But the final "justification of any particular rule of law must be its usefulness" (p. 159). His position is articulated most succinctly in the following passage:

The conception of freedom under the law that is the chief concern of this book 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. It is because the lawgiver does not know the particular cases to which his rules will apply, and it is because the judge who applies them has no choice in drawing the conclusions that follow from the existing body of rules and the particular facts of the case, that it can be said that laws and not men rule. Because the rule is laid down in ignorance of the particular case and no man's will decides the coercion used to enforce it, the law is not arbitrary. This, however, is true only if by "law" we mean the general rules that apply equally to everybody. This generality is probably the most important aspect of that attribute of law which we have called its "abstractness." As a true law should not name any particulars, so it should especially not single out any specific persons or group of persons. [P. 153]

Now, the crucial question to be posed concerning Hayek's view of the rule of law is, Does this concept provide an adequate and unambiguous standard for differentiating between those governmental actions that are coercive and those that are not? Upon examination, the rule of law as expounded by Hayek will be shown to offer no principle by which laws dangerous to a free society, yet satisfying the conditions of a legitimate law, can be condemned. The rule of law is a framework, a necessary condition, for a free society that coerces only those citizens who are themselves coercers; but it is not a sufficient condition, precisely because it gives us no principle for determining what the contents of "rules of law" should be or what areas are by their very nature outside the purview of governmental action.<sup>4</sup>

For Hayek to maintain (a) that the government should coerce individuals only to protect individuals from coercion by others and (b) that individuals should be coerced, in most cases, only when they have engaged in a deliberate act that they knew would place them in such a situation, and then for him to claim that taxation and conscription are largely deprived of their coercive nature by being predictable, is to argue for a contradiction. For a man who contends that the goal of achieving equalization of income is not a proper justification for governmental use of coercion because no individual or group of individuals can determine the potentialities of others, it seems rather inconsistent for him to contend in the case of conscription, which is a far more serious case, that some people do know better than others what ends those others' lives should serve and what the real dangers to their lives are. To A, an unwilling conscript, the distant danger that barbarian hordes from country *X* may sweep down on his own country and destroy him, seems a far more remote possibility of coercion than the order of his own government that conscripts him and sends him to fight country *X* on its own remote shores. The claim that conscription is justified is tantamount to positing the existence of some group of individuals (some elite) who know best what ends the lives of individuals should serve. While this might be a satisfactory conclusion for an advocate of totalitarianism, it could hardly be consistent with Hayek's stated objective of establishing the conditions for a free society.

In point of fact, there are an unlimited number of possible legislative actions that would satisfy Hayek's condition of consistency with the rule of law and yet be extremely threatening to the lives and property of putatively free citizens. A law, for example, proscribing abortion might satisfy all the conditions including that of being agreed to by majorities both inside and outside the affected group, yet A, who desires an abortion and cannot receive one because of this law, is clearly coerced while neither having engaged in nor threatened any person with a coercive act of her own. And a far more difficult question is, How can the legislator determine when majorities inside and outside the affected group would concur; this is especially difficult when we recall that these laws were supposed to be once-and-for-all enactments that refer to as-yet unknown persons.

The fact that person B knows that from his \$10,000 income 25 percent will be forcibly taken from him by taxation to pay for (a) the sustenance of indigent people whom he would otherwise not wish to aid, (b) the education of other peoples' children in doctrines that he

abhors, (c) the erection of municipal buildings, swimming pools, etc., that he neither desires nor will use, (d) the prosecution of a war of which he does not approve, and (e) whatever other projects the majority can dream up on which to spend his money in ways that he would not choose to have it spent if it had not been extorted from him, is hardly to contend that B is a free and noncoerced agent. If no matter how much he limits his income, he cannot help supporting causes that he heartily detests (except by reducing his earnings to zero), then B has been made to serve the ends of others. The knowledge that this particular tax was not directed specifically at B would hardly convince B that he was not being coerced, nor should it. And is he not, also, subject to the arbitrary will of another, that is, the will of a majority who determine how the products of his labor are to be utilized?<sup>5</sup>

Furthermore, Hayek's claim that civil laws promulgated in accordance with his standards of the rule of law would be similar to the natural laws of physics seems fallacious, indeed. Natural laws have as their essential feature a claim to necessity and immutability as regards this world, and they are not dependent for their validity upon the creation, discovery, or acceptance by human beings; they are contingent upon neither the will, choice, nor acknowledgment of some human beings. The same can, surely, not be said for civil laws, which are quite clearly the work of specific people—the result of their particular will, choice, and acknowledgment. The fact that if I jump from a ten-story building I will not fly gracefully through the air, but will instead plummet thunderously to the ground, is the result of my inability to abrogate the laws of nature; the fact that if I refuse to stop at a red light I may be apprehended by a policeman and made to pay some penalty is a case that bears only superficial resemblance to the first, although penalties are paid by me in both instances. In the first case, the fact that I cannot fly is dependent upon the will of no human agent; it holds true everywhere on earth; it is true of all persons; and it is not contingent upon the observation or apprehension of any agent—in short, the penalty I must pay is absolutely necessary. In the second case, the penalty I must pay is dependent upon the will of another human agent (the legislator); it obtains in some places on earth and not in others; and it is contingent upon the presence of some agent to apprehend my transgression—all of which renders the penalty purely contingent. So much for Hayek's attempt to sanctify civil laws by assimilating to them the properties of natural, physical laws.

If, under Hayek's system, the state can conscript citizens to serve

against their will and force them to pay taxes to serve ends that they have not approved, and yet still not be acting illegitimately, while the spring owner and the doctor who simply attempt to sell their services at prices that make such a sale worthwhile to them are considered coercive agents, then something has gone radically awry with Hayek's definition of coercion and its application to the state in the guise of the rule of law.

Apart from its function as a coercive agency, the government may, on Hayek's view, also, perform as a service agency. But to perform these services it must tax; that is, as he now concedes, to act coercively. Here, he does label taxation a coercive act; but he does so not to oppose it; rather, he says that most people will find it expedient to obey, so, in their own turn, they can coerce others to do their bidding.

It is not to be expected that there will ever be complete unanimity on the desirability or the extent of such services, and it is at least not obvious that coercing people to contribute to the achievement of ends in which they are not interested can be morally justified. Up to a point, most of us find it expedient, however, to make such contributions on the understanding that we will in turn profit from similar contributions of others toward the realization of our own ends. [P. 144]

It is lamentable, indeed, that Hayek raises the question of the morality of coercing people through taxation to support causes of which they disapprove, only to have him deflect the issue with the claim that expediency should be the relevant criterion.

But, though a few theorists have demanded that the activities of government should be limited to the maintenance of law and order, such a stand cannot be justified by the principle of liberty. Only the coercive measures of government need to be strictly limited. We have already seen that there is undeniably a wide field for non-coercive activities of government and that there is a clear need for financing them by taxation. [P. 257]

Once again, Hayek fails to recognize that the service activities of government cannot be noncoercive if they employ taxation. To argue, as he does, that because *he* (or a lot of other people) sees a clear need for these kinds of services they can be legitimately undertaken by the government, is to establish himself (or some other judge) as the arbiter of what individual ends should be. For

determining that “beyond this point the government cannot act,” he has provided us with no principle except expediency (a standard that is no fixed guide because it implies either that every person should judge what is most expedient for him, which would exclude precisely those activities Hayek is arguing for, or that there be some final, all-knowing judge of what is expedient for “society”). For example, in his discussion of governmental expropriation of the property of individuals, he says that such an act should only be undertaken if the public good outweighs the private harm. And again we face these same, persistent problems—Who is to be the judge, by what standards, by what right, and expedient or for the good of which people? How can the judge quantify public good, and by what criteria is he entitled to say that the good of some members of society should be maximized at the expense of others?

It has been the contention of this critique of Hayek’s conception of coercion and his treatment of the question of coercion and the state that his analysis does not provide us with a clear and nonobfuscatory criterion for delimiting those actions, be they individual or governmental, that fall under the category of coercive actions. Regarding the original question about the extent to which Hayek’s conception of liberty leads to the minimization of coercion in the state, the answer must be that, rather than limiting coercion to the bare minimum, he has opened the floodgates to a whole host of governmental measures financed by compulsory taxation and judged primarily on a standard of expediency.<sup>6</sup> Perhaps it is not too harsh to say that Hayek himself has in his discussion of this subject done much to “blur the fundamental distinctions.”

Thus, the bankruptcy of Hayek’s instrumental justification of liberty has been demonstrated. Such a “utilitarian” approach, one that sanctions liberty as a means to maximize social well-being and judges all legislation on an expediency standard, cannot provide an inviolable foundation for personal liberty, private property, and the free market. On a natural-rights moral foundation, one that Hayek would reject, liberty would be an imprescriptible end in itself, not the means to a supposedly higher end of “social benefit.” This alternative moral underpinning offers certain other advantages to a defense of a free-market system; that is, it eliminates the oasis owner as a coercer because he has absolute ownership of his property, and no one else can claim “need” or “the public good” to demand his product from him; it places boundaries on the concept of the “rule of law” by delimiting individual private claims (or rights) that cannot be proscribed by any majority decisions; and it eliminates the

taxation and conscription cases as clear violations of the rights to property and life.

It is apparent that Hayek, like the utilitarians, rejected rights arguments with the obvious strategic advantages that they bring. Presumably, he would condemn them for the traditional Benthamite reasons (that they are merely metaphysical and unproven),<sup>7</sup> but his transition to an efficiency or social-benefit standard does provide him with the flexibility that a natural-rights underpinning would have eliminated. Just as John Stuart Mill attacked the reification of the "noninterference" principle and proceeded to embrace social welfarism, if not socialism,<sup>8</sup> so Hayek, through the same strategy, has come to acquiesce to taxation, conscription, and state provision for the disadvantaged.

1. Chicago: University of Chicago Press, 1960. All parenthetical page references in the text are to this work.

2. The centrality of the argument from human ignorance to Hayek's defense of freedom is displayed with even more clarity in a later work, *Law, Legislation and Liberty*, vol. 1 (London: Routledge and Kegan Paul, 1973). Here, Hayek attacks what he terms "constructivist rationalism," the view that institutions exist by human design to fulfill designated purposes and that they can be redesigned to better fit these purposes. A spontaneous order—one in which individuals operating with fragmented pieces of knowledge pursue their own ends, is maintained by rules of law, and societal purposes are not planned—is the opposing vision that Hayek endorses. For example:

Economics has long stressed the "division of labour" which such a situation involves. But it has laid much less stress on the fragmentation of *knowledge*, on the fact that each member of society can have only a small fraction of the knowledge possessed by all, and that each is therefore ignorant of most of the facts on which the working of society rests. Yet it is the utilization of much more knowledge than anyone can possess, and therefore the fact that each moves within a coherent structure most of whose determinants are unknown to him, that constitutes the distinctive feature of all advanced civilization. [P. 14]

3. Ronald Hammoway, in an article entitled "Hayek's Concept of Freedom" (*New Individualist Review* 1 (1961)), offers a parallel analysis of Hayek's oasis case. He analyzes the concept "reasonable price," arguing that if *reasonable* means "competitive," no determination of "reasonable price" could be made where no competitive market exists (p. 29).

4. Similar objections have been lodged by other critics, e.g., R. Hammoway, "Hayek's Concept of Freedom"; J. C. Rees, *Philosophy* 38 (1963); Lord Robbins, *Economica*, Feb. 1961. Hayek's attempt to refute these objections appears in *Law, Legislation and Liberty*, 1: 101. Here, he embraces a Millian distinction between activities that affect (later he amends this to "affect and harm") others and those that only affect the individual actor. The claim is that only the former activities fall under the purview of the law and hence that his stipulations for generality in the law would be applied only to those actions that are other-regarding and affect others. Does this reformulation solve the problem? As generations of critics have argued, however, since the publication of J. S. Mill's *On Liberty*, the "harm" principle is ambiguous and subject to interpretation. (What activity, no matter how personal or insignificant

it might be, cannot be construed by someone as affecting the interest of another? For example, if I eat this piece of cake, you can't. You are, clearly, affected; and if it is the last piece, you are harmed.) It can provide no clear standard to curtail legitimate law-making fields from illegitimate. And Hayek's example of religious conformity, in which such stipulations would fall outside of the public domain, seems to dissolve in his hands.

At least where it is not believed that the whole group may be punished by a supernatural power for the sins of individuals, there can arise no such rules from the limitation of conduct towards others. . . . [P. 101]

By implication, then, when the group believes that such supernatural power will be visited upon the collectivity, it would be justified in legally proscribing sacreligious conduct. Once again, the "affect or harm"-others criterion provides no delimiting principle. Hayek's problems multiply when he goes on to attempt a definition of actions that harms others. The harm criteria themselves, it seems, will be subject to continuous reinterpretation by judges and legislators.

5. This problem is not remedied in Hayek's more recent work (e.g., *Law, Legislation and Liberty*, 1: 142), in which he argues that social legislation that establishes provisions for certain minorities and would require additional taxation need not violate "general rules of conduct." "It would not make the private citizen in any way the object of administration; he would still be free to use his knowledge for his purposes and not have to serve the purposes of an organization." It is only "social" legislation that aims at particular purposes with respect to favored groups that Hayek finds offensive, because it cannot be framed as "general rules of conduct."

6. Hayek attempts in *Law, Legislation and Liberty*, 1: 57-61, to rescue freedom from expediency assessments; but, still abjuring the designation of liberty as a natural right, he fails in this attempt, too.

A successful defense of freedom must therefore be dogmatic and make no concessions to expediency, even where it is not possible to show that, besides the known beneficial effects, some particular harmful result would also follow from its infringement. Freedom will prevail only if it is accepted as a general principle, whose application to particular instances requires no justification. [P. 61]

Hayek contends that an ideology (and presumably the principle of freedom that he endorses) cannot be "proved" or demonstrated (p. 58). From where, then, does this "general principle" derive its status? Freedom, he asserts, is a higher-order principle, one that ought to be held above the fray of pragmatic trade-offs with other values. On an evolutionist account of the formation of law and, indeed, of morality, such an inviolable principle cannot be postulated. It is contradictory to claim, as Hayek does repeatedly, that all societal rules must evolve, that individuals ignorant of the myriad events and plethora of knowledge that constitute society cannot create law volitionally, and then to declare that freedom is somehow an indubitable value. Clearly, the latter view of liberty is incompatible with an evolutionist conception of jurisprudence and morality. Regimes whose regnant principle is *unfreedom* have proliferated and flourished throughout the evolutionary process. Indeed, coercive societies abound in our own age and have succeeded in perfecting the technology of repression. The evolutionary, or historical process, cannot grant ultimate moral sanction to the principles of freedom. To argue that it can would be to fall precisely into the historicist camp that Hayek has so eloquently condemned.

7. Jeremy Bentham, *Anarchical Fallacies*, in *The Works of Jeremy Bentham*, ed. John Bowring (Edinburgh: William Tait, 1839).

8. John Stuart Mill, *The Principles of Political Economy*, ed. Sir William Ashley, 1909 (New York: Augustus M. Kelley, 1969).