NYU JOURNAL OF LAW & LIBERTY

THE LAW OF A FREE SOCIETY EMERGES LIKE THE LAWS OF ECONOMICS: F.A. HAYEK FROM *THE ROAD TO SERFDOM* TO *LAW, LEGISLATION & LIBERTY*

Orlan Lee*

Introduction: "The Interdependence of Economic, Social, and Institutional Phenomena"

In 1974, the Nobel Committee awarded the prize for economics to Gunnar Myrdal and F.A. Hayek: not, as hitherto, for "pure economics" alone, but also "for their penetrating analysis of the interdependence of economic, social and institutional phenomena."[1] It is well taken that this is how the work of both will best be known.

Friedrich August von Hayek—F.A. Hayek in his Anglo-American émigré career—was a descendant and interpreter of the "Austrian school" of economics. Other emigrant scholars representative of this school were also very prominent in the United States in the 1930s, during the war years, and after. These scholars included Gottfried Haberler at Harvard, Fritz Machlup and Oskar Morgenstern at Princeton, and Paul Rosenstein Rodan at MIT. Hayek's early work in economics was eclipsed during much of this time—the heyday of Keynesian economics—especially in the United States.

Hayek's economic and social theories have attracted renewed interest since his receiving of the Nobel Prize. However, as the Nobel committee observed, it is principally his work in social-science theory and social and legal theory—where his

* M.A., Dr.Jur., J.D., LL.M., Visiting Fellow and Life Member, Clare Hall, a College of Advanced Study in the University of Cambridge. An earlier, much shorter, version of this paper was prepared for *The Great Thinkers from A-Z* (Julian Baggini & Jeremy Stangroom eds., 2004).

[1] Erik Lundberg, Presentation Speech at the Bank of Sweden Prize in Economic Sciences in Memory of Alfred Nobel (1974), transcript *available at* http://nobelprize.org/economics/laureates/1974/presentation-speech.html.

ideas in economics led him—that contributed to what is perhaps his most enduring legacy.

I. Hayek's Early Career

Hayek studied in post–World War I Vienna, earning doctorates in law and in economics, in 1921 and 1923, respectively. His attraction to economics appears to have come from the desire to understand the social problems that had arisen after the war. Socialism was widely touted as a solution to these conditions. Ludwig von Mises's influential book, *Socialism: An Economic and Sociological Analysis*,[2] had just appeared, and Hayek joined the select group who attended a private seminar with Mises on the possibility of rational economic calculation in planning under socialism.[3] This became a concern that would dominate Hayek's work throughout the rest of his career.

When von Mises founded the Austrian Institute for Business Cycle Research in 1927, Hayek became its director.[4] In those days, Hayek was also quite active among intellectual circles in Vienna. His work on business cycles and prices and production[5] caught the attention of Lionel Robbins at the London School of Economics, and in 1931, Hayek was offered a chair at L.S.E.[6]

Hayek emerged on the academic scene as an economic thinker in the turbulent 1930s. His early work dealt with price theory and business cycles. The world was then concerned with the disaster to which business cycles had contributed. However, while attempting to understand how the economic collapse of the 1930s had come about might provide lessons on what to avoid, it did not promise clear solutions for future planning. Hayek's chief economic contribution in London, *The Pure Theory of Capital*,[7] overlapped with the rise to prominence of Keynesian economic theory, which did portend to offer solutions to current economic problems.

In London, Hayek was prominent among leading British and émigré scholars. In 1947, he organized the Mount Pelerin conference of intellectuals concerned with combating ideology and upholding the central values of civilization in the reconstruction of Europe. The University of Chicago was another meeting place of émigré and social and economic thinkers in those years, and in 1950 Hayek was invited to move there. Arguably, Hayek's most notable contributions came in the

---

[2] LUDWIG VON MISES, SOCIALISM: AN ECONOMIC AND SOCIOLOGICAL ANALYSIS (1922).

[3] *See* Friedrich A. Hayek, *Ludwig von Mises* (1977), *reprinted in* THE FORTUNES OF LIBERALISM: ESSAYS ON Austrian ECONOMICS AND THE IDEAL OF FREEDOM 153 (Peter G. Klein ed., 1992); *see also* Gerard Radnitzky, *Ludwig von Mises on His 120th Birthday*, POLICY, Spring 2001, *at* http://www.cis.org.au/Policy/Spring01/polspr01-10.pdf.

[4] *See* Radnitzky, *supra* note 3.

[5] *See, e.g.*, FRIEDRICH A. HAYEK, MONETARY THEORY AND THE TRADE CYCLE (1933); FRIEDRICH A. HAYEK, PRICES AND PRODUCTION (1931).

[6] For Oskar Morgenstern's recollection of how this invitation discretely followed Hayek's lecture on "Prices and Production" at the London School of Economics, see Richard M. Ebeling, *F.A. Hayek: A Biography* (2001) (book review) *at* http://www.mises.org/fullstory.aspx?control=638.

[7] FRIEDRICH A. HAYEK, THE PURE THEORY OF CAPITAL (1941).

Chicago period and after, and arose from his reflection on whether social science was in a position to provide the certain answers that champions of the new theories claimed for them. Hayek addressed the problem of certainty in economics and the social sciences in general. This would have immense implications for social-science theory, for legal and political thinking, and for understanding the development of free societies.

Hayek's most lasting contribution has been to demonstrate the limitations on the field of economics—and of the social sciences in general—to provide "scientific" answers to questions that are basically policy choices. Policy choices must, in turn, be able to look forward to the social structure of the kind of world to which implementation of such policy leads. Granted, this does not make application of economic policy, or any other social policy, easier. It may instead make intellectual demands on the public to consider the ability of scientific, economic, or political theory to achieve promised results when those who speak for the popular mind are only willing to listen to solutions.

II. Economic Planning and Social Policy

Throughout most of his career Hayek was loved and hated for only one early, popular, but polemical piece, *The Road to Serfdom*.[8] This work—discussing the dangers of economic decline and the loss of social and political freedom resulting from ideological conflicts and undue reliance on the doctrines of central planning—is still widely regarded as one of the most influential books of the twentieth century. If read in context, it is an attack on the totalitarian systems of Soviet Russia and Nazi Germany, which both promoted social advances achievable through central planning, untrammeled by ordinary democratic due process.

John Maynard Keynes, a rising figure among Cambridge economists in those years, was widely experienced in finance. He had become an advocate of central planning, though he could not be compared with those whose absolutist theories dominated in Russia and Germany. However, he seemed to provide solutions for the economic distress of the depression years, and he definitely captured the ethos of economic advisers in the United States during the Roosevelt era. Keynes agreed that the dangers Hayek feared did exist, but he argued that, in a free society, economists like Hayek and himself would be able to prevent them. But Keynes dismissed Hayek's more serious reviews—for example, of Keynes's own *Treatise on Money*—saying simply, "I don't believe that any more."[9]

Actually, Keynes was far more fair-minded in his reviews of Hayek's work than were many of Keynes's own followers. In a letter to Hayek in 1944, Keynes wrote about the political dangers that Hayek foresaw in dictatorial planning, stat-

[8] FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM (1944).

[9] Compare, in particular, the changes in Keynes's ideas from his TREATISE ON MONEY (1930), with his GENERAL THEORY (1936). For a general survey of the issues and events underlying the Keynes-Hayek

ing that "[w]e all have the greatest reason to be grateful to you for saying so well what needs so much to be said." Nevertheless, he continued, "[w]hat we want is not no planning, or even less planning, indeed I should say that we almost certainly want more. But the planning should take place in a community in which as many people as possible, both leaders and followers, wholly share your own moral position."[10]

It would be equally mistaken, however, to assume that Hayek's fears of the abuses of central planning went so far that he would have disavowed all planning at the supra-individual level altogether. Rather, it is critical, rational, democratic "choice" that he championed, which might also include rational risk planning as a matter of "prudence."[11]

Many of the leaders of the free world in mid-century—Winston Churchill and Margaret Thatcher among them—acknowledged having been influenced by *The Road to Serfdom*.[12] Left-leaning scholars and advocates have, on the other hand, been even more forceful in denouncing the work, as if it presaged some sinister plot of the right.[13]

Admittedly, the book is an analytical piece of advocacy. Unquestionably, this was also Hayek's punchiest title. But, with respect, those Hayek admirers and enemies who still want to talk about *The Road to Serfdom* and nothing else are not addressing the real issues in Hayek's work. *The Road to Serfdom* has done its service. Dwelling unduly on what fair-minded students of social theory have acknowledged long ago makes it appear that Hayek's work stopped back in 1944. We never get over this hurdle because there are those who believe that a free society is so weak that only government intervention, regardless of its intrusiveness, can pull us out of our individualistic intellectual poverty, because their motives are "right." As Keynes put it, "dangerous acts can be done safely in a community which thinks and feels rightly, which would be the way to hell if they were executed by those who think and feel wrongly."[14]

III. Social Thought and Social Science Theory

In the Chicago years, social thought and the reasoning process of the social sciences became the academic focus of Hayek's scholarship. The Chicago years, and the Freiburg years that followed, saw an enormous amount of activity in

---

rivalry of that period (though the two remained personally on friendly terms), see Fritz Machlup, *Hayek's Contribution to Economics*, *in* ESSAYS ON HAYEK 18 (1976).

[10] ROY FORBES HARROD, THE LIFE OF JOHN MAYNARD KEYNES 463 (1982).

[11] Inferred from remarks to the author. Apparently Popper had raised the same issues.

[12] *See* Peter G. Klein, *Friedrich Hayek: A Biography, by Alan Ebenstein*, CHRONICLES MAG., Jan. 2002, *available at* http://web6.duc.auburn.edu/~garriro/klein.pdf.

[13] See, in particular, HERMAN FINER, THE ROAD TO REACTION (2d ed. 1963) (1945), one of the earliest of these works. See also the extensive bibliography of reviews, Greg Ransom, Hayek Center for MultiDisciplinary Research, *Writings on F.A. Hayek's* The Road to Serfdom, *at* http://www.hayekcenter.org/friedrichhayek/bibtrts.htm.

[14] HARROD, *supra* note 10, at 436.

Hayek's research and publication in various areas. Hayek himself speaks of this time as filled with "the work . . . of an economist who discovered that if he was to draw from his technical knowledge conclusions relevant to the public issues of our time, he had to make up his mind on many questions to which economics did not supply an answer."[15]

A. "Scientism": Attributing the Certainty of the Natural Sciences to Social Science

It is significant, both in terms of the recognition of Hayek's contribution to social science theory and social thought, and because Hayek's ideas on economics were out of fashion in the United States, that at the University of Chicago, Hayek was appointed to the Committee on Social Thought rather than to the Department of Economics. Hayek did maintain close relationships with members of the economics school at Chicago. But the approach of economic scholarship in the United States was beginning to rely much more on econometric modeling, which had little reference to his interests. In 1962, Hayek returned to Europe to the University of Freiburg, the center of liberal economic thought in Germany, where he continued to work at the same tempo. During those years, the publisher of the University of Chicago Press observed, "[w]e get a new book from him every year. We send it out for review of course. But the reviewers always tell us to publish it."[16]

The importance of adherence to the rigors of "scientific method" was central to the self-image of the social sciences at that time and to the belief that the results of such work carried the authority of scientific discovery. This was, of course, the area in which Karl Popper, Hayek's long-time friend and colleague in Vienna and London, first made his reputation.[17] Popper had dealt with the problem of defining the rigors of the steps undertaken in scientific discovery. Hayek addressed the subsequent, dialectical problem of "scientism": Those who uncritically identify the methodologies of the social sciences with those of the natural sciences lead us to unwarranted claims for certainty in the social sciences.[18] Like Popper, Hayek believed that letting exaggerated claims for scientific certainty in the work of economists and other social scientists go unchallenged would contribute to absolutist claims in public policy and to more intrusive government.

B. Two Kinds of Rationalism

Hayek distinguished between two kinds of rationalism, which ultimately underlie two approaches to the study of society, "critical rationalism" and "con-

---

[15] FRIEDRICH A. HAYEK, *Preface to* STUDIES IN PHILOSOPHY, POLITICS AND ECONOMICS vii (1967).
[16] Publisher Morris Phillipson, in conversation with the author.
[17] KARL POPPER, LOGIC OF SCIENTIFIC DISCOVERY (1934); KARL POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE (1963) .
[18] *See generally* FRIEDRICH A. HAYEK, THE COUNTER-REVOLUTION OF SCIENCE (1952).

structivist rationalism."[19] He traces the latter to inspiration from Descartes, whose thinking "made him refuse to accept anything as true which could not be logically derived from explicit premises that were 'clear and distinct,' and therefore . . . deprived of validity all those rules of conduct which could not be justified in this manner."[20]

The point is that, whereas Cartesian rationalism may encourage mathematical precision in purely logically constructed systems, it breaks down when applied to historical or social analysis. Historical societies are the legacies of their ancient pasts, not the creation of conscious design and intent. Oversimplified claims of exact data and the perception that social institutions had been deliberately created could easily delude the investigator into unwarranted conclusions:

> Such became the characteristic attitude of Cartesian constructivism with its contempt for tradition, custom, and history in general. Man's reason alone should enable him to construct society anew. This "rationalist" approach, however, meant in effect a relapse into earlier, anthropomorphic modes of thinking. It produced a renewed propensity to ascribe the origin of all institutions of culture to invention or design. Morals, religion and law, language and writing, money and the market, were thought of as having been deliberately constructed by somebody, or at least as owing whatever perfection they possessed to such design.[21]

The basis for this historical re-examination of the emergence of the "scientific method" in the seventeenth century has serious consequences for our own times. For, by assuming that the economy and society are susceptible to precise scientific analysis, we create the impression that economics and the social sciences in general offer powers of prediction and design that out-distance any other policy measures we have ever before employed. Moreover, unlike policy choices of the past, they cannot be re-examined in the same way—save to ask whether their calculations can be verified.

The response to the "scientism" of the modern economist, social scientist, and policy adviser lies in our inability to collect all the facts necessary for such complete mathematical calculation:

> Complete rationality of action in the Cartesian sense demands complete knowledge of all the relevant facts. A designer or engineer needs all the data and full power to control or manipulate them if he is to organize the material objects to produce the intended result. But the success of action in society depends on more particular facts than anyone can possibly know. And our whole civilization in consequence rests, and must rest, on our *believing* much that we cannot *know* to be true in the Cartesian sense.[22]

---

[19] HAYEK, *supra* note 15, at 186 (citing KARL POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE, *supra* note 17).
[20] 1 FRIEDRICH A. HAYEK, LAW LEGISLATION AND LIBERTY 10 (1973).
[21] *Id.*
[22] *Id.* at 12.

C. "Spontaneous Order" vs. Planning and Design

Ultimately, policy choice is both political and philosophical. What Hayek denies is that there is any basis for "scientific socialism,"—the claim that economics enables us to provide definite solutions to political problems. This was still a live political issue in the 1930s and 40s (and much later in the socialist-bloc countries) and claims for "scientific" precision continue to be widespread in the social sciences today.

Hayek stressed that the central question of economics was, therefore, not allocation of resources (planning), but how to use knowledge of the economic process (the market) to best advantage.[23] For Hayek, the appearance of "economic order" in society derived only from the market-driven reasoning of man. He argued that the practical experience of many individuals with respect to the opportunities they perceive contributes to the emergence of a "spontaneous order,"—a meeting of common interests between those who are aware of the supply side of the market and those who are aware of the distribution and demand side—which is the product of individual market-based reasoning and action, not the product of an overarching design:

> Even a limited similarity in the reactions of individuals—common rules, which determined only a few concerns of their overall behavior—is sufficient to construct an order of a general kind. What is essential is: (1) that this order represents an adjustment to the multiplicity of circumstances, which are known to the individual members, though not known in their full extent by any one member; and (2) that the order results, only on this account, because the various individuals follow similar rules in their reactions to the special circumstances known to them. That is not to say—and it is not necessary in order to bring about a kind of order—that different persons do exactly the same thing under similar circumstances. All that is meant, and that is necessary is that their reactions are similar to a certain degree, or that they are restricted to a certain area of activities which all have a few common attributes.[24]

Just as common interests of individuals from different segments of the economy arise in and meet in a "spontaneous order," customary law and legal tradition may also be drawn upon in a similar way. Law finding, as was typical of the medieval common law, relied on the courts' piecing together of principles of customary law and/or legal tradition, assembled in generations of past experience, but

---

[23] *See generally* FRIEDRICH A. HAYEK, *Economics and Knowledge* (1937), *reprinted in* INDIVIDUALISM AND ECONOMIC ORDER 33 (Univ. of Chicago Press ed., 1963); HAYEK, *Facts of the Social Sciences* (1943), *in* INDIVIDUALISM AND ECONOMIC ORDER, *supra*, at 57; HAYEK, *Use of Knowledge in Society* (1945), *in* INDIVIDUALISM AND ECONOMIC ORDER, *supra*, at 77.

[24] Friedrich A. Hayek, *Arten der Ordnung*, 14 ORDO: JAHRBUCH FÜR DIE ORDNUNG VON WIRTSCHAFT UND GESELLSCHAFT 3, 11 (1964) [hereinafter *Arten der Ordnung*]; *see also* FRIEDRICH A. HAYEK, *Notes on the Evolution of Systems of Rules of Conduct*, *in* STUDIES IN PHILOSOPHY, POLITICS AND ECONOMICS 73 (1967); Friedrich A. Hayek, *The Results of Human Action But Not of Human Design*, *in* STUDIES IN PHILOSOPHY, POLITICS AND ECONOMICS 96 (1967).

not necessarily articulated in the same manner in the past. Hayek appears to be describing traditional concepts of "good conscience" or of "unwritten law" when he proposes that "[e]ven if man has never existed without laws that he followed, he has lived for thousands of years without laws, that he knew in the sense, that he might have been capable of declaring what they were."[25]

Moreover, in an aside, we find the suggestion that the common conscience was fully able to act justly without written law until, with increased knowledge, an inevitable differentiation ensued:

> There appears, therefore, to be a grain of truth in the belief in an original golden age, in which everyone acted justly according to his own inner drive and without law (*sponte sua sine lege fidem rectumque colegat*), because he could not act in any other way, and in the idea that injustice came about only with increased knowledge.[26]

One more point should be considered in this context, that is, what the "spontaneous order" described by Hayek as underlying basic social behavior implies about the nature of consciousness. In another discussion of these matters, Hayek draws on Michael Polanyi to suggest that not only are similar forms of social order spontaneous in their origins, but that they are also "polycentric." Furthermore, the brain itself is a "polycentric order":

> Though we cannot here further pursue the question of the relationship of psychology to social theory, it will contribute to the main purpose of these notes if we add a few remarks on the difference between an order which is brought about by the direction of a central organ such as the brain, and the formation of an order determined by the regularity of the actions towards each other of the elements of a structure. Michael Polanyi has usefully described this distinction as that between a monocentric and a polycentric order. The first point which is important to note in this connection is that the brain of an organism which acts as the directing centre for that organism is itself a polycentric order. Its actions are determined by the relationship and mutual adjustment to each other of the elements of which it consists.[27]

D. Parallels with Eastern Philosophy

If one overlooks the fact that it is basically economic and customary-law behavior that Hayek is investigating, it is not difficult to see how one might draw a parallel between his description of "spontaneous order" in economics and society and the greater South and East Asian philosophical intuition of the roots of com-

---

[25] *Arten der Ordnung*, *supra* note 24, at 10–11.
[26] *Id.* at 10 n.10.
[27] HAYEK, *Notes on the Evolution of Systems of Rules of Conduct*, *supra* note 24, at 73; Hayek, *Results of Human Action But Not of Human Design*, *supra* note 24, at 96-105.

mon understanding. Indeed Hayek remarked in conversation that during his lectures in Japan the similarity of ideas was pointed out to him.[28]

I do not believe that Hayek himself ever pursued the connection with Far Eastern philosophy any further, though there is a long tradition of fascination with Eastern philosophy among European intellectuals. However, the parallel seemed to suggest itself to the modern Japanese reader who had sufficient knowledge of ancient Buddhist doctrine. Hayek has independently given a phenomenal explanation of "economic order," as the "spontaneous" and "polycentric" awareness that producing and consuming market participants have of one another. He also applies this phenomenal explanation to aspects of mind and biological order in general. He took the trouble, in the Chicago years, to return to an interest in psychological theory that he had as a student. He writes that, "though my work has led me away from psychology, the basic idea . . . conceived [as a very young man] has continued to occupy me; its outlines have gradually developed, and it has often proved helpful in dealing with the problems of the social sciences."[29]

Then, in a manner parallel to the way certain ancient Buddhist schools explained the apparent awareness we have of ourselves as individuals, and of individuals as members of society, Hayek began to explore aspects of stimulus-response theory that would later serve him in explaining the historical sociological phenomena of the rise of the market, and the descent of custom and tradition about law:

> The fact that the problem of psychology is the converse of the problem of the physical sciences means that while for the latter the facts of the phenomenal world are the data and the order of the physical world . . . psychology must take the physical world as represented by modern physics as given and try to reconstruct the process by which the organism classifies the physical events in the manner which is familiar to us as the order of sensory-qualities. In other words: psychology must start from stimuli defined in physical terms and proceed to show why and how the senses classify similar physical stimuli sometimes as alike and sometimes as different, and why different physical stimuli will sometimes appear as similar and sometimes as different.[30]

Fascination with Eastern philosophy and religion has entered our common global intellectual vernacular in recent years. Therefore, it is not entirely unfamiliar to the Western reader today to recall that ancient Brahman Hindu philosophy developed a concept of "self" (*atman*) which both explained the psychological nature of the individual and also, on a transcendent level, provided a center for meditation on the "unity" of all beings.[31] Ancient Buddhism arose as a dialectical alternative

---

[28] Mentioned in conversation with author.
[29] FRIEDRICH A. HAYEK, THE SENSORY ORDER v (1952).
[30] *Id.* at 8.
[31] The identification of the essence of the individual self with an eternal self is a doctrine that arises at various points in the Upanishads, ancient philosophical texts that probably reflect the thought of schools

understanding of the world. Its central doctrine was denial of any such substantial reality in the Brahman concept of "self." This doctrine (*anatman*) also provided a basis for meditation for those seeking to extinguish attachments (*nirvana*) binding them to a world of sorrow.[32]

On a practical level, Buddhist philosophers, nevertheless, felt themselves called upon to explain the common appearance of a reality of "self." They did this in terms of an ancient stimulus-response theory. One of these schools is described with eloquence and clarity by an early encyclopedic Orientalist:

> The self, they argued, is a long series . . . of phenomenal elements, each member of which exists only for a moment so infinitesimal that its apparition and destruction may be said to be simultaneous. Each momentary member of the series is both an effect and a cause, yet possesses no real activity . . . . Thus there is no identity, no continuous existence. On the other hand, they declared this self, consisting of a phenomenal series, to be autonomous; for "all we are is the result of what we have thought." They also hold the self to be self-conscious, conscious directly of self and indirectly of other things.[33]

Hayek was not alone in parallels with Eastern thinking in those years, although, to my knowledge he did not attempt any systematic study of Eastern philosophy. F.S.C. Northrop, a philosopher of law and of scientific method,[34] played a major role in introducing Western lawyers to the Eastern mediational approach to settling disputes.[35] For Northrop, the appeal of the doctrine of the "true self" was that it provided a source of access to a "field consciousness," a level of common understanding that allowed individuals joined by membership in communal organizations or in extended communities to mediate differences without going to law, because of common interests or beliefs.

In the process, it will be obvious that Northrop takes the "essentialist" (Brahman, but in a way also Mahayana Buddhist) position, while Hayek had found himself taking the "phenomenalist" (early Buddhist and Hinayana Buddhist) position. Nevertheless, whether for the mediational resolution of disputes or for the better understanding of the function of the market, what these parallels offer for the

---

rather than individual thinkers. In any event, they do express the high point of this particular line of development. *See, e.g.*, THE THIRTEEN PRINCIPAL UPANISHADS 246, 301, 306, 391 (Robert E. Hume trans., 2d ed. 1934).

[32] *See generally* HERMANN OLDENBERG, BUDDHA, SEIN LEBEN, SEIN LEHRE, SEIN GEMEINDE (1961).

[33] J.N. FARQUHAR, AN OUTLINE OF THE RELIGIOUS LITERATURE OF INDIA 106 (1967); *see also* OLDENBERG, *supra* note 32. This represents Buddhism (and other related ancient doctrines) at their most abstruse. These doctrines attracted F.S.C. Northorp and others, Asian and Western, who shared an interest in the concept of "field consciousness." Still, Paul Mus, a leading scholar of Buddhism in the 20th century, jokes, "How many [Buddhists] would there be . . . if strict knowledge of [such] doctrines were the test?" Paul Mus, *Bouddhisme et monde occidental, pour une nouvelle méthode*, *in* PRÉSENCE DU BOUDDHISME 198 (Rene De Berval ed., 1959).

[34] *See, e.g.*, F.S.C. NORTHROP, THE LOGIC OF THE SCIENCES AND THE HUMANITIES (1947) .

[35] *See* F.S.C. Northrop, *The Mediational Approval Theory of Law in American Legal Realism*, 44 VA. L. REV. 347, 354–60 (1958); *see also* F.S.C. NORTHROP, MEETING OF EAST AND WEST 9–20 (1946).

benefit of the individual in society is that an understanding of common social and moral purpose is probably of far more practical social value than what either the "essentialist" or "phenomenalist" school can say definitely regarding the truth about nature.

IV. Concepts of Law and Liberty

In Hayek's last book (actually a trilogy), *Law, Legislation and Liberty*, Hayek summarized and systematized his ideas and his intellectual contribution. He begins with an insight which became central to his scholarship over the years and crucial to his work from the time he began to deal with the arguments for policy based on economic theory: "The central concept around which the discussion of this book will turn is that of order, and particularly the distinction between two kinds of order which we will provisionally call 'made' and 'grown.'"[36]

A. Law Handed Down from Above vs. Law that Grows of its Own Vitality

The first dilemma that Hayek addresses is whether economics, or any social science, affords the certainty for long-term social planning (order "made") as well as means of interpretation of the past (order "grown"). The other concern is whether the concept of society that permits government to regulate and design our economic and social environment in the name of national or social welfare also leads us away from political freedom, the preservation of which is a more important goal in the "liberal constitutional" societies.

Once again, the dichotomy between those two groups who both regard themselves as political and philosophical "liberals" (i.e., the "critical rationalists" and the "constructive rationalists") is this: The one group sees liberty as the result of limitations on the power of government. The other is bent on creating new rights—along with greater central power to implement those rights. The latter theory relies on the belief that planned social action can create what the former theory attributes to largely evolutionary historical development.

This takes us back to the first dilemma of the economist or social scientist—the distinction between two kinds of order, the "made" and the "grown." While looking ahead to the implications for law and liberal democratic society, I hope the reader will forgive my substituting here the ringing words of Sir Carleton Allen, known so well to students of jurisprudence for this distinction in the field of law:

> [I]t is still necessary for every student of jurisprudence to define his attitude towards these two conflicting views. In the one, the essence of law is that it is imposed upon society by a sovereign will. In the other, the essence of law is that it develops within society of its own vitality.[37]

For it is, ultimately, this latter concern to which Hayek is leading us:

---

[36] *See* 1 HAYEK, *supra* note 20, at 35.
[37] SIR CARLETON ALLEN, LAW IN THE MAKING 1 (7th ed. 1964).

> Constitutionalism means limited government. But the interpretation given to the traditional formulae of constitutionalism has made it possible to reconcile these with a conception of democracy according to which this is a form of government where the will of the majority on any particular matter is unlimited. As a result [of the theory of unlimited majoritarian democracy] it has already been seriously suggested that constitutions are an antiquated survival which have no place in the modern conception of government.[38]

B. "Liberal Constitutionalism" vs. "Constructivist Liberalism"

In *The Constitution of Liberty*, Hayek traces the historical emergence of the concept of political liberty in the Anglo-American tradition to which he had become a devoted adherent.[39] That tradition has, at least as far back as Magna Carta, been devoutly dedicated to the concept of limited government. The purpose of this constitution is not simply well-ordered government, but primarily protection from overreaching government.

Hayek certainly thought of himself as a descendant of eighteenth and nineteenth century European and American "individualistic liberalism" and "economic liberalism," where both appeared as movements whose aims were to overcome the tight controls of the "conservative" past, both in government and in economics. It is the political philosophy of strong government supported by a class-based society and socially dominant religious tradition that Hayek disavows in "Why I Am Not a Conservative," the postscript to *The Constitution of Liberty*.[40]

In the United States—a nation which arose from the birth of the "individualistic liberal" movement and was strongly influenced by the *laissez faire* "economic liberalism" that was the prevailing persuasion of the economic and industrial leadership in the nineteenth and early twentieth centuries—this economic and political outlook had ironically come to be considered "conservative" by the mid-twentieth century.

The social reformist movements in the United States, seeking to overcome the exploitative forces of industrial capitalism, came to consider themselves harbingers of a new "liberal" philosophy. As a result, the term "liberalism" was preempted in the American context, by "progressive" liberalism—what Hayek refers to as "constructivist" liberalism. Yet, Hayek was unwilling to call himself a "conservative" by European standards. He would have preferred the description "liberal constitutionalist," insofar as that was the philosophical position of the founding fathers of American liberal democracy. So, unable to call himself a "liberal" in the socially liberal and Keynesian-influenced use of the term in America—where economic and other forms of regulation involved a new, strong-government phi-

---

[38] 1 HAYEK, *supra* note 20, at 1.
[39] FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY (1960).
[40] FRIEDRICH A. HAYEK, *Why I Am Not a Conservative*, *Postscript to* THE CONSTITUTION OF LIBERTY, *supra* note 39, at 397.

losophy—Hayek was left with only the somewhat inadequate description "libertarian."

The outlook of the British "conservative" (Tory) social-political philosophy, led by an enlightened upper, or upper-middle, social and intellectual class with a strong national, but also somewhat "collectivist," spirit has had largely only regional and historical importance in the United States. However, it remained alive in Canada, where its social ambitions have recently been well articulated by a "conservative" thinker, lamenting both the demise of the long-time majority—Canadian Progressive Conservative Party—and also the worldwide problem of party politics that stand for nothing. David Orchard has written, "[m]y encyclopedia defines 'conservative as: 'A political outlook that involves a preference for institutions and practices that have evolved historically, over radical innovations and blueprints for reshaping society.' Edmund Burke coined its classic definition: 'A disposition to preserve and an ability to improve.'"[41]

This particular view of "conservatism" would, I believe, find more resonance than Mr. Orchard might think among those in the United States who also claim to be "conservatives."[42] A similar, slightly collectivist, conservative view is also favored by religious groups who often tend to see society as ideally a union of religion and social order, which, in its stricter forms, tends to mirror many of the ideological "collectivist" demands seen on the left. Short of these "collectivist" social ambitions, which also look to a kind of strong central government, the historical, evolutionary views of the emergence of law and society would certainly not be out of keeping with Hayek's philosophy.

There is also something of this Tory, collectivist social model of "conservatism" in the "social market economy" (*soziale Marktwirtschaft*) model championed in post–World War II West Germany by Ludwig Erhard. Erhard and his wing of German "liberal" economists supported a basic welfare policy along with (then re-

---

[41] David Orchard, *What Makes Me a Conservative*, THE GLOBE AND MAIL (Toronto), Mar. 6, 2000, at A15, *available at* http://www.davidorchard.com/online/2do-index.html. Appealing as it is to hear a politician who "stands for something," the views of Canadian and British Tories today are not what they were in the eighteenth century. Burke considered himself an Old Whig and would have cringed at being called a Tory. Clearly the political spectrum has shifted—in the U.S. as well as in Britain and Canada.

[42] A similar conservative position is described by Madsen Pirie, *Why F.A. Hayek Is a Conservative*, *in* HAYEK—ON THE FABRIC OF HUMAN SOCIETY (1987), *available at* http://www.adamsmith.org/hayek/HayekConservative.pdf. Hayek, however, objected to being included in conservatism because of the propensity of many in that political family to resist change:

> Conservatism proper is a legitimate, probably necessary, and certainly widespread opposition to drastic change . . . [B]y its very nature, it cannot offer an alternative to the direction in which we are moving. It may succeed by its resistance, to current tendencies, in slowing down undesirable developments, but, since it does not indicate another direction, it cannot prevent their continuance. It has, for this reason, invariably been the fate of conservatism to be dragged along a path not of its own choosing.

HAYEK, *supra* note 40. Hayek also quipped, "The more I learn about the evolution of ideas, the more I have become aware that I am simply an unrepentant Old Whig—with the stress on the "old.'" *Id.* at 409.

viving) free-market competition.[43] The moderate social-welfare policies of the late 1940s and '50s seemed necessary in light of Germany's impoverishment in the post-war years and in consideration of the socialist challenge in East Germany. However, the growth of welfare demands in the less vibrant economy of the late 1970s and '80s, and the additional costs of reunification in the 1990s, have resulted in a very heavy tax burden and led to considerable disillusionment with the policy as it exists today and disaffection among free-market, or Ordo liberals.

C. The Role of Legislation vs. Common Law and Tradition

Hayek demonstrated that basic concepts and principles of law, like the "laws" of economics, have emerged from what we do. Historically, or sociologically, mankind did not undertake a set of deliberate acts to form a society. Rather, those who have interpreted our customary laws and traditions over the centuries looked back toward our historical origins and informed us of how things have always been:

> As all other early law [the law of Rome] was formed at a time when "law and the institutions of social life were considered to have always existed and nobody asked for their origin. The idea that law might be created by men is alien to the thinking of early people." It was only "the naïve belief of later more advanced ages that all law must rest on legislation." In fact, the classical Roman civil law, on which the final compilation of Justinian was based, is almost entirely the product of law-finding by jurists and only to a very small extent the product of legislation.[44]

Ideally, the laws of society, like the laws of economics, should be seen only as practical, historical means of meeting social needs:

> Th[e] authoritarian connotation of the concept of order derives . . . entirely from the belief that order can be created only by forces outside the system . . . . It does not apply to an equilibrium set up from within . . . such as that which the general theory of the market endeavours to explain. A spontaneous order of this kind has in many respects properties different from those of a made order.
>
> The study of spontaneous orders has long been the peculiar task of economic theory, although, of course, biology has from its beginnings been concerned with that special kind of spontaneous order which we call an organism. Only recently has there arisen within the physical sciences under the name of cybernetics a special discipline which is also concerned with what are called self-organizing or self generating systems.[45]

---

[43] The post-war Freiburg School of economists—also referred to as the "Ordo liberals" after the journal started by Walter Eucken, *Arten der Ordnung*—argued in favor of a free-market competition that expressly avoided monopoly capitalism, attributed to pure laissez-faire economics.

[44] 1 HAYEK, *supra* note 20, at 82 (citations omitted).

[45] *Id.* at 36.

Legislation, by contrast, serves two purposes: first, the codification of law that is spread over texts of custom, tradition, and case law; and second, the regulation of social conduct through specially enacted laws. Liberty, Hayek stresses, is ancient. It is first explained in theory as a state in which no overlord and no central authority impinges on the "ancient liberties" of the people. Obviously, the ancient liberties, in this perception, applied to very few. They are the "natural law" liberties of Bracton and the medieval legal theorists, and the "feudal liberties" of Magna Carta.[46]

Society has changed enormously in the intervening centuries. Yet, in our perceptions of ourselves in continuity with the past, the modern citizen is unlikely to think of himself as heir to the serf bound to the land, or the exploited worker of the industrial revolution, but rather, as heir to the freeman, heir to the lord of the manor, even heir to the entrepreneurial dream of becoming a millionaire.

Legislation, which social reformers have seen as the manner of bringing about civil and economic rights, comes in two forms. On the one hand, it codifies the expectations that are already found in our juridical and social thought. On the other, it manifests the efforts of some to create a political and/or economic design for society. What Hayek emphasizes is that, just as efforts at economic planning often impose controls never contemplated, legislative planning, intended to create new liberties, is similarly capable of creating new controls. What troubled him was the same problem he faced since the advent of new economic and political ideologies in Europe in the 1920s and '30s. Hayek's concern is that undue emphasis on transitory majorities deprives society of the protection of "liberal constitutionalism."

D. Democratic Due Process vs. "Social Justice"

The concept of "scientific socialism" suffered greatly in the discrediting of the Soviet, East European, and Asian communist systems. One of the concepts that still survives in the Western social-reform political philosophies is the notion of "distributive" or "social justice," the theory that legal justice can only be attained by giving certain institutional benefits to particular groups. Hayek seems to have been greatly incensed by the indiscriminate charge that "liberal constitutionalism" could not produce a "just" society without pursuing these particularistic commitments—the entire second volume of *Law, Legislation and Liberty*, entitled "The Mirage of Social Justice," is devoted to this subject.

Hayek is not so much concerned that society should not provide certain benefits when needed, but rather that particular interest groups presume to dictate that society must adopt an institutional structure committed to dealing with certain particularistic concerns and nothing else. Hayek reiterates here in more systematic manner what he said with few and crystal clear words sixteen years earlier, not that

[46] For a survey of this literature, see EDWARD S. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW (1955).

there were no grounds for a variety of social concerns, but rather that certain social planners were "led more by a desire to impose upon the world a preconceived rational pattern than to provide opportunity for free growth."[47]

After *The Road to Serfdom*, Hayek expressed himself on social concerns only in very abstract language. But, with respect, we do not have to go back to the dangers for global society in the contending ideologies of the 1930s and 40s in order to identify the ideological tensions of today. In the university, as elsewhere in society, we see the same problem of the desire to impose a set "rational pattern" instead of a deliberative, evolutionary dedication to due process. Hayek's later work contributes, in this respect, to recognition of (1) overreliance on the claims of some in the social sciences to have obtained results that rival the physical sciences in certainty; (2) conflicting results of individualistic and "constructivist" forms of rationalism which in turn feed conflicting notions of "liberalism;" and (3) the impact of errors of "scientism" and "constructivism" in their effect on legislation enacted in the pursuit of extended "rights," but conversely carrying with them the threat of far greater control over the individual. Above, I suggested that *The Road to Serfdom* had done its work and that more attention should be paid to Hayek's contributions of later years. In part this is wishful thinking. In the 1960s, we were also impressed with some of the conclusions of Daniel Bell's *The End of Ideology*: that "people of good will,"[48] as Hayek acknowledged, who had pursued utopian political policies, also recognized the dangers of bureaucratic absolutism and would now pursue their objectives with less ideological fervor.[49] What Hayek's later work reveals is that the ideologies to which we are subject do not necessarily have to involve overtly political philosophical goals. Today, access to universities, satisfaction of non-academic university requirements and, ultimately, jobs have all become subject to this new form of ideological thought control.

The lasting relevance of *The Road to Serfdom* is that ideology, which may derive from application of a "rational pattern," is averse to the continued application of rational thought to ongoing re-examination of its own premises. It is immaterial whether that "rational pattern" is part of a greater political philosophy or not. We had learned through the scientific method, we thought, to verify (and/or be prepared to "falsify") our results. It is the inclination of ideology, on the other hand, to prevent us from questioning truths that have already been established. In part, it does this by attributing good names to intended results. To inquire into whether we are calling things by their right names, however, risks calling into question our solidarity with the "politically correct" set "rational pattern."

Keynes's notion of "a community that thinks and feels rightly" notwithstanding, it is the faceless operatives who have laid down the set "rational pattern" but who we cannot see or question who concern us. Today's social planners disre-

---

[47] HAYEK, *supra* note 40, at 407.
[48] *See* HAYEK, *supra* note 8, at 3, 5, 8.
[49] DANIEL BELL, THE END OF IDEOLOGY: ON THE EXHAUSTION OF POLITICAL IDEAS IN THE FIFTIES (1962).

gard what Keynes also calls for—that "planning should take place in a community in which as many people as possible, both leaders and followers, wholly share [a] moral position."[50]

At one point, without denying the obligation to deal with those in need, Hayek looks for a means of attending to social-welfare concerns generally, without ideological institutional commitment to dealing with a multitude of particularistic concerns that have never undergone any democratic review. He postulates that "[m]others who could never agree whose desperately ill child the doctor should attend first, will readily agree before the event that it would be in the interest of all if he attend the children in some regular order which increased his efficiency."[51]

V. The Hayek Revival

Hayek's views in economic theory had been influential in the early 1930s, but lost ground to Keynes's, as the latter's theories for recovering from the great depression and financing World War II became dominant. The current widespread interest in Hayek's work in economic theory and his latter contributions is a very recent phenomenon. In the 1980s, the Reagan administration in the United States and the Thatcher government in Britain openly avowed the free-market economic ideas of Hayek and of Milton Friedman for combating the results of the inflationary policies of the 1970s, and the mismanagement that often followed nationalization of industry—because national or social interests are not identical with the economic interests of sound enterprise.

Hayek had always had a kind of philosophical following among business and industrial leaders in the United States, Europe, and Japan. But he did not attract the much wider academic following that he has today until much later. Only in the 1990s did one find Hayek societies springing up around the world, even at the London School of Economics—something which would have been unthinkable in the left-leaning atmosphere in Britain during much of the period from the 1960s through the 80s—and in China, the last major society officially committed to Marxist communism.

Surprisingly, the difficulty of some of Hayek's terminology seems to make little difference to the new community of adherents on the internet, who express their attachment to Hayek's ideas. The concept of "spontaneous order," for example, inspired one author to collect an entire bibliography of writings, mostly pre-Hayek, which support the theory, or since Hayek, which apply it.[52] In the later case, Thomas Sowell's work[53] was regarded by Hayek himself as translating his own abstract theory into a discussion of practical instances of dispersed knowledge drawn together by various communities of users.

---

[50] HARROD, *supra* note 10, at 463.
[51] 2 HAYEK, LAW, LEGISLATION AND LIBERTY 4 (1978).
[52] Norman Barry, *The Tradition of Spontaneous Order* (2004), *at* http://oll.libertyfund.org/essays/bibliographical/barry0312/spontaneousorder.html.

The privatization that swept through Britain and, to a lesser extent, America in the 1980s came as public affirmation of the belief that enterprise must operate on sound economic principles in order to be productive for society. Privatization, on the same principle, created an economic revolution in the former socialist countries in the 1990s. In many cases, regrettably, no distinction was made between permitting an industry to become economically sound and allowing a few individuals to profit unduly from the privatization of public property.

The latter errors do not demonstrate that the economic principle—that an enterprise must be economically viable to succeed—is not sound. They merely demonstrate that wholesale mismanagement of the economy can continue when the same figures—who were previously in command of industry—emerge still in command of industry after the prior social-welfare links of the institution have disappeared, and the social functions that a fiscally weak enterprise could no longer support have found no replacement.[54] This does not prove that Hayek's economics, or Austrian economics, or even *laissez faire* economics is wrong. It may suggest that the laws of society, like the laws of economics, must be connected to the needs, understanding, and trust of the individuals in that society. Law by command is no more sound than economics by command.

---

[53] THOMAS SOWELL, KNOWLEDGE AND DECISIONS (1980).

[54] The author has touched on some of the problems that emerge in the course of opening up the economy to private enterprise and the privatization of state-owned enterprises in China. Progressive social legislation has mainly impacted bureaucratic realms, rather than the laborers whom it chiefly concerns. Similarly, the welfare functions of state-owned enterprises have been disestablished with no replacements. Orlan Lee, *The Many Realms of Chinese Labour Law: Theory and Implementation of PRC Labour Law Reform*, *in* OXFORD UNIVERSITY COMPARATIVE LAW FORUM 2 (2003), *available at* http://ouclf.iuscomp.org/articles/lee.shtml; Orlan Lee, *What Ever Happened to Socialist Law? Back to the Industrial Revolution in China's Joint Enterprises*, *in* 5 ADVANCES IN CHINESE INDUSTRIAL STUDIES 173 (Sally Stewart & Anne Carver eds., 1997).