This is to certify that the

dissertation entitled

Law and Social Order

in

Lon L. Fuller and F. A. Hayek

presented by

Stuart D. Warner

has been accepted towards fulfillment
of the requirements for

Ph.D. degree in Philosophy

Major professor

Date 7 August 1986

7 August 1986

LAW AND SOCIAL ORDER IN
LON L. FULLER
AND
F. A. HAYEK

BY

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A DISSERTATION

Submitted to
Michigan State University
in partial fulfillment of the requirements
for the degree

DOCTOR OF PHILOSOPHY

Department of Philosophy

1986

ABSTRACT

LAW AND SOCIAL ORDER IN
LON L. FULLER
AND
F. A. HAYEK

By

Stuart D. Warner

This dissertation focuses on the relationship between law and social order in the writings of Lon L. Fuller and F. A. Hayek.

This work is divided into two parts. The first part centers around Fuller. In this part I examine what Fuller calls "forms of social order," and the bearing they have on his theory of law. In the midst of this analysis I demonstrate that Fuller's famous doctrine of the internal morality of law is not a morality of law per se, but rather a morality of legislation. Also in this part, I present, what is to the best of my knowledge, the first analysis of Fuller's theory of freedom, and its role in his theory of social order.

The second part of this dissertation is on Hayek. Here the close-knit relationship between Hayek's epistemology, his analysis of spontaneous order, and his

theory of law is examined. One important finding in this part is that Hayek's theory of law underwent a significant evolution in the fifty years he has been writing on the subject. Indeed his jurisprudential work can be divided into three periods corresponding to his three politico-legal works, The Road to Serfdom, The Constitution of Liberty, and Law, Legislation and Liberty.

DEDICATION

To Gil Goldman

For those who understand, no explanation is necessary;
for those who do not, none is possible.

ACKNOWLEDGMENTS

In a letter to William James in 1907, Josiah Royce wrote, "Life is a sad long road, sometimes. Every friendly touch and word must be preciously guarded." Such is certainly the lot of the graduate student, and I feel very fortunate to have received so many friendly touches and words.

For general aid and counsel during my years at Michigan State University I am indebted to Professors Richard Hall, Joseph Hanna, Herbert Hendry, Albert Cafagna, Richard Peterson, Bruce Miller, Donald Koch, George Kerner, Winston Wilkinson, and, especially Charles McCracken and Ronald Suter.

For my work on Lon L. Fuller, I am extraordinarily grateful for the help I have received from Professor Kenneth I Winston, Fuller's literary executor. His willingness to share with me his great knowledge of Fuller has advanced my understanding immeasurably. Also, for my work on Fuller, I owe a debt to Erica Chadbourn, curator of the Harvard University Law Library, for helping me with the Fuller

Papers, and for providing such a friendly atmosphere to work in.

Professor Rhonda Kotzin provided extremely helpful and meticulous comments on the penultimate draft of my thesis, and has helped teach me how careful scholarship is done. Her friendship has also provided a great source of inspiration.

For financial aid, The Institute for Humane Studies came along when I thought all was lost, and I shall be forever in their debt. Walter Grinder and Randy Barnett of the Institute have been particularly helpful.

My three greatest debts are to Lisa Kaderabek, Gil Goldman, and Professor Harold T. Walsh.

Lisa, my wife, has been a constant source of love and inspiration, and her legal knowledge has been more than handy.

Gil has been my friend and intellectual companion for almost fifteen years. His dedication to the truth, and his incisive critical comments have made me a better philosopher than I otherwise would have been.

My indebtedness to Professor Walsh, both scholarly and personally, is impossible to calculate. I can only say that J. H. Randall could have been writing about Walsh and not Aristotle when he wrote, "The

'theoretical life' is not for him the life of quiet 'contemplation,' serene and unemotional, but the life of nous, or theoria, of intellectual, burning, immoderate, without bounds or limits. There is in him a tremendous energy, an indefatigable industry, a sheer power of thought, that fascinates anyone who takes the trouble to understand what he is doing."

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INTRODUCTION

As one examines the 20th century literature in Jurisprudence, one is struck by the numerous references to the relationship between law and social order. Whether the writer be Kelsen,[1] Pound,[2] Ehrlich,[3] or Carter,[4] there is the at least perfunctory comment on the importance of this relationship.

What is rarely found, however, is a detailed analysis as to what social order is, the mechanisms by which social order is achieved, and what bearing all of this has on the theory of law. Fortunately, there are two theoreticians for whom these questions are all important, and in whom we do find such detailed analyses, namely, Lon L. Fuller and F. A. Hayek. This essay is an attempt to explicate their views on these subjects.

My essay is divided into two parts. The first part is on Fuller. The emphasis here is on what Fuller calls "forms of social order." These forms are the social mechanisms for inducing social order.

The second part is on Hayek. Here the primary emphasis is on Hayek's distinction between two kinds of

social order, spontaneous and made, and two types of law associated with them.

Although in this essay I make few comparisons between Fuller and Hayek, I believe such comparisons can be made. Indeed, I believe that there are both subtle and fundamental similarities between them. I shall, however, leave this comparison to another occasion.

PART I

CHAPTER I

THE MORALITY OF LAW

Introduction

Lon L. Fuller was born in Texas in 1902 and died in 1978. He graduated from the Stanford Law School in 1926, and then proceeded to teach law at the University of Oregon, the University of Illinois, Duke University, and from 1939-1972, Harvard, where he succeeded Roscoe Pound as Carter Professor of Jurisprudence.

Had Fuller died in 1950, he would have left this earth with a reputation few legal scholars could match. His 1936 essay, "The Reliance Interest in Contract Damages,"[1] co-authored with William Perdue, a student of Fuller's at the Duke Law School, has been cited by P. S. Atiyah as being "probably . . . the most influential single article in the whole history of modern contract scholarship."[2] An assay of two years earlier, "American Legal Realism,"[3] won the prestigious Phillips Award from the American Philosophical Society. Two other essays, "Consideration and Form" (1941),[4] an essay dealing with the formal and substantive elements in the doctrine of consideration, and "Reason and Fiat in Case Law,"[5] an

article critical of the supposed antimony between reason and fiat in legal matters, are still held in the highest esteem by the legal profession, and are still frequently cited. His 1930-31 essays on "Legal Fictions"[6] are considered by some to be the standard work in the field. His contracts case book[7] influenced a generation of students.

Fuller's first book, a work that would influence Ronald Dworkin, was The Law in Quest of Itself.[8] This book constituted Fuller's first sustained effort in Jurisprudence. In it Fuller attacked several variants of legal positivism, and also put forth the claim that with reference to the purposive activities of man, no clear distinction could be drawn between the "is" and the "ought." After completing this work, Fuller wrote to Karl Llewellyn, telling him that he was finished writing on Jurisprudence and that the rest of his professional career would be spent in the area of contract law. As it turned out, nothing could be further from the truth, as jurisprudential problems dominated Fuller's attention to this death.

Notwithstanding the merit of these early works, Fuller is best known, and in many cases, especially among students and philosophers of law, only known, for an essay written in 1958, and The Mortality of Law, a book that was first published in 1964, and that was reissued

with a "Reply" from Fuller to his critics in 1969.[9] It is to these that, after a brief detour, I shall turn.

In 1957, the legal positivist H. L. A. Hart came to the Harvard Law School to deliver the prestigious Oliver Wendall Holmes Jr. Memorial Address. His topic was: "Positivism and the Separation of Law and Morals." This essay was then published in the Harvard Law Review.[10] Some of Hart's themes were: (1) the inadequacy of the imperative theory of law--the view that law is essentially a command (as Hart put it, "Law is surely not the gunman . . . writ large."[11]); (2) the presentation of his two-tiered analysis of a legal system with the legal system consisting of primary and secondary rules; and (3) the development and defense of the position that there is a separation between what a law is and what it ought to be. As John Austin put this same point some 125 years before Hart, "The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one inquiry, whether it be conformable to an assumed standard is a different inquiry."[12]

Hart treated of many other important jurisprudential matters which I cannot mention here. It is important to note, however, that most of the issues sketched out in the essay received much greater coverage in Hart's masterpiece, The Concept of Law.[13]

The 1958 issue of the Harvard Law Review that carried Hart's essay also carried a response, a famous response, by Fuller: "Positivism and Fidelity to Law--A reply to Professor Hart."[14] Although he agreed with Hart's criticisms of the imperative theory of law, Fuller dissented from almost every positive point of Hart's, especially the view that we can rigidly separate the law as it is from the law as it ought to be. Fuller maintained that the law is "infused" with a moral component. The law contains what Fuller called the internal morality of law. This notion is the crux of Fuller's influential claim that there is a necessary connection between law and morality. Since the internal morality of law receives only a cursory treatment in that essay, and a very extensive examination in The Morality of Law, let us turn to that work.

The Morality of Law

The express purpose of The Morality of Law was to examine the relation between law and morality.[15] The work was reviewed no fewer than 46 times before 1966, and it was the subject of many essays. Some of the more notable commentators were Hart, Ronald Dworkin, Marshall Cohen, and Robert Summers.

The focus of all of the commentators was on the second chapter of the work--the chapter that dealt with

the internal morality of law: "The Morality that Makes Law Possible." I will sketch out that part of the chapter on which the commentators concentrated.

Fuller beings his chapter with the allegory of King Rex. Rex tried as hard as he could to make law, yet he failed repeatedly, eight times in fact. The purpose of the story was to illustrate, ". . .that the attempt to create and maintain a system of legal rules may miscarry in at least eight ways: there are in this enterprise, if you will, eight distinct routes to disaster."[16]

What were these failures? (1) The failure to make any rules; (2) a failure to publicize the rules the citizen was expected to obey; (3) the abuse of retroactive legislation; (4) a failure to make the rules understandable; (5) the enactment of contradictory rules; (6) the enactment of rules that were impossible to follow; (7) the introduction of such frequent changes that the subject cannot guide his action by them; and (8) a lack of congruence between the rules as announced and their actual administration. (I should note that in a 1967 letter, Fuller offers a ninth failure, namely, passing statutes in which the means prescribed deserves the end declared.[17])

I must emphasize that, according to Fuller, it was not the case that Rex made bad law, or unjust law,

rather he made no law at all. Whatever it was he made, it was not law. As Fuller put it, "A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all. . . ."[18]

Corresponding to these failures are eight principles that should regulate the lawmaker's conduct: one should make general rules, publicize the rules the subject is expected to follow, and so forth. These eight principles constitute what Fuller calls the internal morality of law.[19] For Fuller, these eight principles are, remarkable enough, moral principles. And since they are necessary conditions for a legal system, there is, in Fuller's view, a necessary connection between law and morality.

If the internal morality of law was the centerpiece of the reviewers' attention, how was it received by them? Not well at all, especially among the more philosophically inclined critics. Often it was the recipient of scathing, and at times vituperative, attacks.[20]

Before looking at the central criticism made against Fuller, it is important to note one point on which Fuller and some of his staunchest critics were in agreement, namely, that a major departure from the aforementioned eight principles would result in something

that was not a legal system. The following comments of two of Fuller's major critics are fairly representative. Marshall Cohen writes, "Fuller's 'cannons' . . . are . . . a tolerable start at producing a set of conditions necessary for the presence of a (modern) legal system. . . ."[21] Dworkin writes, "I accept Fuller's conclusion that some degree of compliance with his eight canons of law is necessary to produce . . . any law, even bad law."[22]

Given this harmony, wherein was the primary disagreement? The primary contention in opposition to Fuller was that these eight principles were not moral principles at all; rather, they were principles of efficiency. In his review of The Morality of Law, Hart made this point succinctly.

> [T]he author's insistence on classifying these principles of legality as a "morality" is a source of confusion both for him and his readers. . . . [T]he crucial objection to the designation of these principles of good legal craftsmanship as morality . . . is that it perpetrates a confusion between two notions it is vital to hold apart: the notion of purposive activity, and morality. Poisoning is no doubt a purposive activity, and reflections on its purpose may show that it has its internal principles. ("Avoid poisons however lethal if they cause the victim to vomit.") But to call these principles of the poisoner's art "the morality of poisoning" would simply blur the distinction between the notion of efficiency for a purpose and those final judgements about activities and purposes with which morality in its various forms is concerned.[23]

These are simply principles necessary to have an effective legal system. The critics claimed that a legislator making unclear law may be an inefficacious lawmaker, but, they asked, how is he acting immorally?

In going through the reviews and articles on The Morality of law, even those of the past few years, one is struck by the fact that almost no one made reference to Fuller's other writings--these works were systematically ignored. With an eye toward Fuller's theory of social order, I would like to suggest one possible explanation for this. The Morality of Law was taken to be Fuller's analogue to Hart's The Concept of Law. It was read as if it were a comprehensive, general jurisprudential work, one that discussed the major questions in law. If one wanted Hart's answers to most of the central questions of Jurisprudence, for example, What is Law? What are its sources? What is the relationship between law and morality? et cetera, one needed only to turn to The Concept of Law. Fuller's book was read, I believe, in the same way: The Morality of Law was taken to be Fuller's "big book." As a result, all too many scholars believed that if one wanted Fuller's position on, for example, the nature of law, one should turn to The Morality of Law. Unfortunately, by simply reading this work alone, one can obtain what is at best a misguided

perception of Fuller's answer to the question, What is law? In fact, Fuller's position can only be grasped in the context of his theory of social order. Moreover, the position he put forth in the second chapter of The Mortality of Law can be understood only as part of a much broader jurisprudential framework, a framework informed predominantly by a theory of social order. Indeed, Fuller's overarching purpose in his jurisprudential work was to construct such a theory.

To be concerned with the jurisprudence of Lon Fuller is to be concerned with his theory of social order, and it is to Fuller's work on social order that I now turn.

CHAPTER II

FULLER'S EUNOMICAL PROJECT

On the Infinite Pliability of Social Arrangements

I shall begin not with the theory of social order that Fuller embraces, but rather with one he rejects. Fuller calls it, "the doctrine of the infinite pliability of social arrangements."[1] This is the view that "social institutions can always be shaped to any desired end."[2] Here it is implied that "given a sufficient agreement on ends or a dictator strong enough to impose his own ends, society can be so arranged as to effectuate (within the limits of its resources) any conceivable combination or hierarchy of ends."[3] In essence this theory maintains that "any social goal can be given suitable implementation."[4] Furthermore, according to Fuller, the assumption underlying this doctrine is that "the first goal of social philosophy is to establish a hierarchy of ends."[5]

What the doctrine of the infinite pliability of social arrangements presupposes foremost, according to Fuller, is that a radical distinction can be drawn

between social ends and social means; that the former can be meaningfully discussed and ascertained independently of any examination of the latter. Indeed, on this view, unless we can comprehend the ultimate values that human beings ought to pursue, any discussion about implementation is pointless: we must first determine our ends, and only then does the issue of social means become apposite.

For Fuller, the relationship between means and ends is a more complex affair: questions of the one cannot be fruitfully analyzed apart from those of the other. In trying to understand the means-ends relationship in social affairs, Fuller thought it was useful to compare it to that relationship in architecture. He believed that one could gain insights into social ends and means by examining how means and ends function in architecture. In fact, Fuller often called his won work in this area "social architecture."[6]

Consider, Fuller says, the theory of the primacy of architectural ends, which might be put thus:

> Architecture . . . exists for the satisfaction of certain human ends, which may be described as utility and beauty. The means to those ends are materials such as cement, lumber and steel to which must be added the technical skill necessary to assemble them. All of these means are subservient to the ends of utility and beauty. In any particular structure they take their character and color from the kinds of utility and beauty sought in designing that structure. It therefore follows that the study of architecture must begin with

> these ends . . . for it is only when these ends have been clarified that it is possible to deal intelligently with means. . . .[7]

From Fuller's perspective, it is futile to discuss architectural ends apart from the available means because, "We must know what is possible before discussing what is desirable."[8] Fuller gives the example of a home suspended in mid-air, which, although it might have aesthetic appeal and great utility, has no chance of being constructed.

One should not be misled into thinking that, on Fuller's statement of case, we first discuss the available social means and then proceed to social ends. Fuller rejects this as much as the converse position: the means-ends relationship is, Fuller likes to say, no one way affair. Means and ends must be analyzed together, with the analysis of each informing that of the other.

It cannot be denied that Fuller's views on this score were directly influenced by John Dewey. Fuller discusses this in a 1965 letter to Philip Selznick. He writes:

> About John Dewey. I was at one time quite influenced by his thought, and the influence, I suspect, lingers on. . . . His means-end continuum . . . [was] of course generally congenial to me,[9] and perhaps had a lot to do with my own thinking.

Fuller thought that Dewey had omitted one very important consideration from his analysis, as can be seen as we rejoin the letter:

> What I missed [in Dewey], however, was the Gestalt idea, that means-ends relations fall into a limited number of patterns--what I call 'forms of social order.'[10]

Fuller will expend much effort on this consideration.

In opposition to the doctrine of the infinite pliability of social arrangements, Fuller argues that we should not assume that simply because an end either seems or is socially desirable, that it is capable of implementation. Some ends that seem perfectly worthwhile are incapable of being achieved. The nature of the social means at the disposal of human beings does not allow for it. On this score Fuller writes,

> Some ends that seem attractive in the abstract lose their significance as soon as we discover that as things tend there is no prospect of devising any means for achieving them. Other ends are abandoned when we see that the available means for attaining them would entail an excessive sacrifice of competing ends. We assume, in short, that there is a resistant reality to which we must accommodate ourselves and which limits our sphere of possible action.[11]

Furthermore, what is possible, what social means are available, affects the nature of the end in question. Fuller writes, "a social end takes its 'character and color' from the means by which it is realized."[12] Social

means, for Fuller, should not, then, be thought of as if they were inert conduits.

What Fuller is advocating here is a procedural theory of natural law. There are, Fuller insists, natural laws of social order. He claims, "These 'laws' are . . . 'natural' in the sense that they represent compulsions necessarily contained in certain ways of organizing men's relations with one another."[13] Fuller goes on to say that,"Because of the confusions invited by the term 'natural law,' I believe we need a new name for the field of study I am here recommending."[14] Fuller's neologism is "eunomics," which he defines as, "the science, theory or study of good order and workable arrangements."[15] For Fuller, eunomics is an all too neglected part of jurisprudence, a part which should be the major focus of the jurisprudentialist's energies.

Although he first hit upon the term 'eunomics' in 1954, Fuller had already published an important essay on eunomics, "The Principles of Order," five years earlier as the final chapter of his "temporary" case book, The Problems of Jurisprudence.[16] In Fuller's mind, this chapter exploded into book length form, a book he was never to complete. It was to be called, The Principles of Social Order: An Essay in Eunomics. Indeed, with the exception of the opening chapter, "Means and Ends," and

perhaps a small section of text on Anarchism,[17] nothing else saw the light of day. Nevertheless, most of Fuller's post-1950 writings were either in eunomics per se or touched upon it. This can be seen most fully by examining Fuller's outline for the "book" in question.[18] In fact, I believe that The Morality of Law is best understood as an excursus in eunomics.

Given the definition of 'eunomics,' one might expect Fuller to have discussed at length the nature of social order and good social order, what makes for workable arrangements, and those processes which engender good order and workable arrangements. Indeed, given the essential character of eunomics, these seem to be its major subject areas. Unfortunately, perhaps, Fuller expended little energy on the theoretical underpinnings of eunomics, that is, on the nature of social order and workable arrangements; rather, he concentrated on the order-producing processes themselves. More specifically, most of Fuller's efforts were devoted to analyzing the nature, forms, and limits of such social processes. For this reason, the longest chapter of my essay will be devoted to an account of them. At this point, however, let us first examine those things Fuller did say about the nature of social order.

The fullest discussion of the essential character of social order appears in a still unpublished section of an essay, "The Lawyer as an Architect of Social Structures."[19] There Fuller considers an example of a group of soldiers standing in a straight line and ask, Are they in order? Yes, Fuller claims, if the purpose is to go marching, but no, if the purpose is to take a photograph. Social order, then, for Fuller is purpose-dependent. Social order is not valuable as an end in itself, only as a means to other ends. He claims, "People cannot be merely in order; they can only be in order for something."[20] Fuller, himself, raises the criticism that perhaps social order is valuable in itself. After all, some coherent structure is preferable to sheer chaos.

Fuller's response to this is, I believe, remarkably subtle. He reads the criticism as asking whether social order is worth aiming at for its own sake, and then remarks,

> But one cannot remove chaos by saying to people, "Organize your relations so that they will form some kind of structure, arrange yourselves in some appropriately non-chaotic fashion." The order that can remove chaos must itself be shaped by some end more meaningful than the mere negation of disorder. It is only order directed toward some such end that can produce the coherence, predictability and stability that are praised as the virtues of social order.[21]

Fuller is claiming, although without substantial argument, that aiming at the achievement of social order necessitates that we point to some end beyond it. Aiming merely at social order is empty. Whatever value social order does have it has because the order is guided by some end outside of itself.

It becomes clear in this analysis that Fuller's interest in social order was, if you will, action-oriented. His focus was on bringing about and/or maintaining order. And Fuller would say one does not want to bring into existence just any sort of order. Rather, one wants, or should want, to engender (or maintain) order so that one can achieve certain ends. To put this point otherwise, and in a manner that illuminates his view of social order, Fuller's analysis was animated by a concern with problems of institutional design. Indeed, Fuller's eunomical project was one of social design. In an unpublished essay on the theory of freedom, he writes,

> Since we are concerned with problems of social design, we must like the good architect know, not only what we seek to create, but also what can and what cannot be done with the materials with which we have to work. We must, in short, master the principles of social design and the limitations those principles impose on us.[22]

For Fuller, the most important question of legal philosophy is, "What can be obtained through a purposive

intervention that gives some particular structure to human relations?"[23] And finally on this point, in a comment that speaks directly to his concern with institutional design and natural law, Fuller says,

> Rejecting, then, the dogmatisms often associated with the theory of natural law, let us move to the opposite end of the scale of affirmation and present that theory as it might appear in its most modest form. Its fundamental tenet is an affirmation of the role of human reason in institutions. It asserts that there are principles of sound social architecture.[24]

Fuller writes that the purpose of eunomics is, "to examine, not simply the principles of social order, but the principles of _good_ social order."[25] On this same theme he says, "[W]e are not interested merely in order--the order, say, of a concentration camp--but in an order that is just, fair, workable, effective, and respectful of human dignity."[26] Fuller's comments concerning the relationship between eunomics and ends can, perhaps be misleading: for Fuller, eunomics is not _primarily_ concerned with questions about ultimate ends.[27] In what sense, then, we must ask, is eunomics concerned with _good_ order?

In trying to answer this question, I shall begin with three quotations from Fuller. The first is taken from an outline for an unwritten chapter, which was to replace "The Principles of Order," in _The Problems of Jurisprudence_, which Fuller distributed to his

Jurisprudence class in the mid-1950's. There Fuller writes, "Men may come together in numberless ways to their injury. We are concerned with those forms of 'coming together' or association which result in a benefit to all participants."[28] The second quotation comes from Fuller's essay, "American Legal Philosophy at Mid-Century." Here Fuller claims that, "[T]he primary concern of eunomics is with the means aspect of the means-end relation, and its contribution to the clarification of ends will lie in its analysis of the available means for achieving particular ends."[29] The third quotation is from "Means and Ends": "[T]he relation between ends and means is far from being simple. It is certainly not . . . [a] one-way affair. . . ."[30]

In these quotations we can see the following position take shape. Eunomics is concerned with the ways in which individuals can come together to benefit themselves. However, we find that Fuller gives "benefit" very little specification. For Fuller, "benefit" refers very broadly to "human satisfaction." The ordering processes which constitute the heartland of eunomics function primarily as means, and although the end, according to Fuller, does not have to be established in detail, there still must be at least some vague sense of it. We cannot, however, in contradistinction to what the

doctrine of the infinite pliability of social arrangements maintains, simple decide what ends are worth pursuing irrespective of means. We need to know, Fuller claims, what is possible. The reference to "human benefits" sets the boundaries within which to look for such means. Fuller writes, "Some vague conception of . . . ends at the outset is essential to define the range of means worthy of consideration. . . ."[31] "Good order," then, is order pregnant with the possibilities of benefits to all participants.

I now turn to a general analysis of the principles and forms of social order. We shall examine the forms of order in some detail two chapters hence.

CHAPTER III

THE PRINCIPLES AND FORMS OF SOCIAL ORDER

Introduction

Although Fuller sometimes called these order producing processes, "social processes," and "principles of social order,"[1] his usual designation, and the one I shall adopt here, was "forms of social order."

Fuller's most detailed statement as to the nature of these forms appears in, "Irrigation and Tyranny";

> By "forms of social order" I do not refer to the inert, traditional forms by which men's relations are often supposed to be structured, where conformity is assumed to take place automatically without any awareness of an alternative. Rather I have in mind those active processes of social decision by which deficiencies and conflicts are removes, and a stable foundation for future relationships is established.[2]

As we go on to examine these forms in some detail, the essence of this characterization will become clearer. For now it is important to notice and emphasize the reference to the removal of conflict and the establishment of stability in human relationships.

Over the course of some 25 years, Fuller enumerated these form of social order several times,[3] and

almost every enumeration was different than the one before it. Although he never offered a definitive, exhaustive, and exclusive list of the forms of social a order, one thing is clear from his analysis: namely, that Fuller was no monist. He was a pluralist to the core. This becomes clear, for example, in The Anatomy of Law, where he writes that, "There are a number of forms of order . . . and we have been concerned to show that no single form of social ordering has a first claim to being workable and just. . . ."[4]

The longest list of the forms appeared in Fuller's 1972 essay, "The Role of Contract in the Ordering Processes of Society Generally."[5] There he listed nine forms of social order. They were: customary law, contract law,[6] property, legislation, adjudication, managerial direction, voting, mediation, and the deliberate resort to chance.

Those which were of the greatest importance to Fuller, and the ones on which he spent his greatest energies, were legislation, adjudication, mediation, contract law, customary law, and managerial direction. For this reason, this essay shall focus on these forms of order.

Although in his published writings Fuller never rejected any candidate suggested as a form of social order, he did have some important unpublished notes on

the subject. It is instructive, I think, to very briefly say two things about one of the "rejected forms of social order," namely, the public interest.

The first point is this: For Fuller, "there is no simple concept that corresponds directly to 'the public interest' which is distinct from the interests of individuals."[7] Secondly, Fuller thought that, "In general 'the public interest' is in increasing the satisfactions of life through an application of different, and often conflicting, principles of order."[8] Fuller's view, then, is that an appeal to the public interest as a form of social order adds nothing that is not taken account of by the other forms.

In addition to the nine forms of social order, Fuller's theory of social order also includes two principles of social order: organization by common aims and organization by reciprocity. According to Fuller, "Without one or the other of these, nothing resembling a society can exist."[9] Furthermore, these two principles, "represent the two basic ways in which men may, by coming together, secure an advantage for all participants."[10] Organization by reciprocity revolves around the fact that people sometimes want different things. Organization by common aims is made possible by the fact that people sometimes want the same thing. In both kinds of association, the individuals involved cannot fulfill

their ends without the help of others, or at least the task is made easier by others. Fuller gives the following illustration of these two principles in action.

> A roadway connects two farms with a highway; it becomes blocked by a boulder. Neither farmer is strong enough to remove the boulder by himself. When the two join forces to remove the boulder we have, obviously, organization or association by common aims. Now let us suppose that our two farmers are to a considerable extent engaged in "subsistence" farming. One of them has a large crop of onions, the other an abundance of potatoes. A trade of a portion of their respective crops may make each richer; to the potato-raising farmer the "last" potato is not so valuable as the "first" onion, and, of course, a surfeit of onions will put the other farmer in the reverse position. Here we have . . . in its crassest and most obvious form organization or association by reciprocity.[11]

Each of the forms of social order either falls under one of the two principles of social order or is importantly related to it. We shall see this in more detail as we proceed.

Later in this essay we will examine in detail several of the forms of social order. However, before doing so, there are issues central to our inquiry that should first be addressed. First, the basis on which Fuller differentiates one form of social order from another deserves examination. Second, we must examine what, on a high level of generality, are the common properties of these forms. Third, it is essential to consider the relationship between the forms of social

order and what is called "the law." Finally, we shall explicate the role that purpose has for Fuller in understanding the forms of social order.

The Differentiation of the Forms of Social Order

Every Fullerian form of social order is a social process. As such, there are human beings who participate in each process, for example, there are the litigants in the process of adjudication, the labor union in a case of mediation, and so forth. In many of the forms of order, Fuller distinguishes between two fundamentally different kinds of participants, namely, what might be called the affected party and the process director. As one example of this: in adjudication the adjudicator is the process director, and the "litigants"[12] are the affected parties.

We should note that although there are always affected parties in Fuller's social processes, it is not the case that there is always a process director. One example of this is the contractual form of social order. (This will be developed further in the section on contract.)

For Fuller, the basis on which the processes of social order are to be differentiated from one another is the manner in which the affected party participates in the process: the nature of participation is different, for example, in adjudication than it is in mediation.

The distinguishing characteristic, then, for each form of social order is how the affected parties participate in it.

Fuller's position here raises the question as to how we determine what is essential to a form of social order and what is not. What we cannot do, Fuller claims, is look only at the actual institutional operation of the forms. For we would find along with that which is essential, nonessential accretions. In an analysis of adjudication, Fuller writes,

> Surely there is a certain amount of tosh--that is, superfluous rituals, rules of procedure without clear purpose, needless precautions preserved through habit--in the adjudicative process as we observe it in this country.[13]

Adjudication is, in its pure form, essentially something which "of necessity" is "something that never fully exists."[14]

What is needed, Fuller thinks, is an ideal or a model to guide our investigation. In the context, again, of an analysis of adjudication, Fuller writes of this Platonic[15] element:

> It is only with the aid of this nonexistent model that we can pass intelligent judgment on the accomplishments of adjudication as it actually is. Indeed, it is only with the aid of that model that we can distinguish adjudication as an existent institution from other social institutions and procedures by which decisions may be reached.[16]

Unfortunately, nowhere in his published or unpublished writings (including his correspondence) does Fuller give us anything approaching a detailed treatment of the role of models in legal theorizing. This is especially sad given Fuller's exquisite treatment of "fictions" in legal reasoning.[17]

Before leaving the subject of models, we should clear up one misstatement in the previous quotation from Fuller. This is where he speaks of "this nonexistent model." This is a gaffe since, if we can make use of the model, it all too obviously exists. What Fuller clearly means to say is that it has an ideal existence, and it does not exist as a denizen of physical reality.

The Common Properties of the Forms of Social Order

Having now examined the basis on which the forms of social order are differentiated, we can turn to the common features of these forms. Indeed, in a backhanded way, we have already discussed one of these features, namely, each form will have a characteristic way of acting for the affected parties. The second common feature is that for those processes that have process directors, these directors will also have a characteristic mode of action.

Thirdly, every form has an internal morality that is integral to it. In my first chapter we saw that the

central chapter of Fuller's work, The Morality of Law, is concerned with the nature of this morality for legislation; similarly, there is an internal morality for the process of adjudication, mediation, and the rest.[18] Fuller conceives the notion of an internal morality as a role or procedural morality. This is a morality attendant to certain roles or positions that individuals have. This internal morality does not apply to a person qua human being, but rather a person qua having a certain job. The specifics of this morality will be determined by the demands of the role. One of Fuller's most perspicuous discussions of this role morality occurs in "Irrigation and Tyranny," where he writes,

> Questions of morality are [usually conceived to be] entirely distinct from those of social procedures, since morals have to do with ends, while procedures are merely means to ends. Though a view like [this] . . . has become a commonplace of moral philosophy, it is, I believe, based on a profound misconception of the relations between morality and social forms. Today converging streams of ethical philosophy have nearly obliterated the notion of an institutional or procedural morality. . . . What is lacking in all these philosophies is the simple picture of human beings confronting one another in some social context, adjusting their relations reciprocally, negotiating, voting, arguing before some arbiter, and perhaps even reluctantly deciding to toss for it.[19]

A fourth property shared by Fuller's social processes, one that we hinted at in our discussion of the infinite pliability of social arrangements, is that the processes are competent to order human affairs in only

certain ways and not others. Each form has a domain of competence, certain problems and decisions which it is adroit at handling, and, as such, each is limited in what it can accomplish. Thus, to take an example that we will examine in more detail in a later section, contract is ill-suited to ordering the relations of a close-knit family, but is suited ordering the relations of "friendly strangers."

Furthermore, we should add in this context, the social and cultural setting in which people find themselves is a determining factor as to whether a form is apt for any particular situation. In some environments, certain forms of social order simply are not available for use. In perhaps his most famous example of this, Fuller argues that contract, as a device of social ordering, was unknown to primitive peoples. On this Fuller writes,

> If the lot is one of the most ancient modes of creating social order, contract or explicit reciprocity is, in its more sophisticated forms at least, one of the most recent. The simple idea of trading one thing for another is for us today an expedient so obvious as to require no explanation at all. . . . But in the actual development of social arrangements this insight was long in coming.[20]

In his essay, "The Law's Precarious Hold on Life," Fuller is making the same point with an illustration of a policeman trying to settle a violent dispute where the object of the disagreement was a

supposedly stolen pair of trousers. Fuller claims that in an environment where "people take things from each other so often that no one could tell what 'belongs' to whom,"[21] property, as a form of social ordering, cannot be projected on to it.

The fifth common property of the forms of social order revolves around the notion of purpose. This is of such great import to Fuller's account of social order that a separate chapter of this essay must be devoted to it. The chapter on purpose follows our next section which deals with law and the forms of social order.

Law and the Forms of Social Order

Another name that Fuller gives to the forms of social order is "legal processes": adjudication, mediation, legislation, customary law, contract, and so forth are taken to be legal processes. Thus, for Fuller, an analysis of the forms of social order is truly an analysis of law. On this score, in a letter to Samuel Mermin in 1972, Fuller wrote, "I am trying to understand and describe the social processes that constitute what you and I call 'law.'"[22] For Fuller, then, law can be understood best as being a set of processes, rather than as a static product. We should keep in mind here that Fuller's analysis of the forms of social order falls under the rubric of Eunomics, "a neglected branch of Jurisprudence."[23]

Throughout his career, Fuller eschewed giving a definition of law. In fact, he thought such an attempt was misbegotten. The social processes, taken together, do not admit, he wrote to Mermin, of some, "ultimate simplistic definition of law; the processes we call law are too complex and varied for any such definition."[24] That Fuller never offered a definition of the law has not prevented a legion of commentators from saying that he did.

There is a problem in interpreting Fuller on the relationship between law and social order, a problem which the opening paragraph of this section glosses over. Fuller never states explicitly that all of the processes he calls social processes are legal processes. It is true that he does substitute one expression for the other in his discussions of adjudication, mediation, and so forth. However, as I pointed out earlier, Fuller never gave the same list of the form of social order twice. So might it not be the case that the legal processes to which he refers, constitute a subset of social processes? Fuller's writings make it clear that he conceives of adjudication, legislation, contract, customary law, mediation, and managerial direction as legal processes, but the case for voting and tossing for it are not quite so clear. Moreover, we should ask why Fuller counts such nonauthoritative processes as mediation and managerial

direction as legal processes. It is true that Fuller conceives of administrative law as a managerial process; however, he also uses the notion of "managerial direction" to refer to the direction of economic activity, and "a direction and coordination of efforts to achieve military and therapeutic ends."[25]

These are not easy questions, and I think they are best dealt with after a detailed analysis of some of the forms of social order; therefore, I will return to them in Chapter VI.

We have seen that in The Morality of Law, Fuller presented eight principles that Rex had to follow if he were to make law. Fuller claimed that a complete failure in any of those eight areas would result in Rex's making no law at all. The historical case that was in the back of Fuller's mind was Nazi Germany. Fuller wanted to claim that Nazi Germany was a lawless society because of its utter disregard for the internal morality of law. Nazi Germany, according to Fuller, lacked a legal system.

Fuller was castigated for his position. His critics claimed that he had not adequately distinguished between law on the one hand and good and bad law on the other. Hart and Dworkin claimed that the Nazis had bad law, but bad law was law nevertheless. Thus they thought Fuller was mistaken. For Fuller, the distinction between law on the one hand, and good or bad law on the other,

was not so easily drawn. Part of his rationale had to do with his view of the relationship between a legal system and social order.

In examining this relationship, I shall begin with a letter Fuller wrote to Samuel Mermin in late 1950. There Fuller said:

> When we talk about law as opposed to justice [good law], we do not really have a datum on one side and an ideal on the other, but one ideal pitted against another. If you permit me to be as vague as you about "scientific method" and "logic," I would define the ideal or goal or thing-to-be aimed-at indicated by the word law as that of "order."[26]

Before stating what I think is important in this quotation, I want to first clear up a possible misunderstanding. Fuller writes of law as being "opposed" to and "pitted" against justice. This, misleadingly, makes it sound as if the two are incompatible with one another. It was not, of course, Fuller's position that they were. I think he was just a bit slipshod with his words here.

In the letter to Mermin, Fuller is setting forth the doctrine that social order is the aim of a legal system.[27] We must be careful here due to Fuller's somewhat sloppy syntax; he is not claiming that law is order.[28] Moreover, Fuller is certainly not claiming that law aims at the social order of a Nazi concentration. That would hardly qualify as an ideal. The social order at which law, to be law, must aim is minimally good. To

the extent that the order is better than minimally good, is the extent to which law becomes just law. Although there is nothing even approaching a detailed treatment of justice in Fuller's writings, it seems to have been his position that law and just law lie on a continuum. For Fuller, there are, I believe, degrees of justice.

Fuller's position on the relationship between a legal system and social order can be clarified by examining an analogy he draws in The Law in Quest of Itself between law (legal system) and a steam engine! Of the steam engine, he writes,

> Common sense tells me that there is a clear distinction between a thing's being a steam engine and its being a good steam engine. Yet if I have a dubious assemblage of wheels, gears, and pistons before me and I ask, "Is this a steam engine?" it is clear that this inquiry mightily overlaps with the question: "Is this a good steam engine?" In the field of purposive human activity, which includes both steam engines and law, value and being are not two different things, but two aspects of an integral reality.[29]

Analogously, we can ask, if one has a dubious assemblage of legal rules, many kept in secret, changed at a moment's notice, a failure of generality, and so on, "Is this a legal system?"

On Fuller's analysis, the question of whether something is a steam engine "overlaps" that of whether it is a good one. Fuller is not prepared to call an assemblage of parts a steam engine unless (although there might be other conditions which have to be fulfilled) it

minimally satisfies the purposes for which human beings make, and try to make, steam engines. Similarly, for Fuller, unless certain rules at least minimally satisfy certain purposes, they are not legal rules, nor do we have a legal system. Fuller's position is that the purpose of a legal system is a certain quality of social order, and the enactments of the Nazi regime failed to fulfill that purpose. The so-called Nazi "law" was, for Fuller, a dubious assemblage of parts.

Before turning to the next chapter, "The Law as a Purposeful Enterprise," I want to digress to try to circumvent one possible misunderstanding of Fuller. Indeed, it is a misunderstanding that many commentators have committed, including, most recently, David Lyons.[30]

The moral of the allegory of Rex had to do with the failure to create a legal system. It was not concerned with whether a particular rule or edict was a legal one. Fuller never maintained that particular legal rules to be <u>legal</u> rules could not violate the eight principles. However, a <u>point</u> is reached when there is a gross failure of one of the principles or a combination thereof such that a legal system passes out of existence.

CHAPTER IV

THE LAW AS A PURPOSEFUL ENTERPRISE

Introduction

In almost all of his writings, Fuller emphasized the role of purpose in law. In many ways, for Fuller, law is, as a human activity, a purposive enterprise. In this section, I shall examine two of Fuller's jurisprudential analyses in which the notion of purpose is paramount. First, we will briefly look at the role purpose plays in Fuller's theory of statutory interpretation. Second, we will discuss Fuller's position that the law itself, as a whole, and the forms of social order exhibit purpose.

Statutory Interpretation

One of Fuller's uses of the concept of purpose is as an essential element of his theory of statutory interpretation. He maintains that one cannot understand and interpret any enacted law until one has comprehended its purpose. For Fuller, the meaning of a legal rule depends in very large measure on its purpose. Each enacted law is purposive--it has an aim.

Oftentimes Fuller was not as clear on this as he could have been. One of his better discussions occurs in a letter to Frederick Olafson in 1960. Fuller was recounting to Olafson a talk he had once with the American philosopher Sidney Hook. Hook tried to defend the proposition that one could understand a legal rule independently of whatever purpose it might have. Hook used as an example the rule that a will to be valid must be executed in the presence of two witnesses. Quoting Fuller,

> [Hook] implied that any fool could interpret such a rule; its meaning was perfectly plain. This was an unfortunate example. There is an considerable body of case law on the meaning of "presence," whether, for example, the two witnesses must both be present at the same time, and whether if they were both present when the will was signed by the testator they can sign their own names separately and out of the presence of one another. To answer these questions we have to inquire what the rule is for.[1]

This quotation raises some very difficult questions. What exactly is the status of this purpose? Does the purpose somehow inhere within the legal rule? Was it given this purpose by someone or some group of people? Fuller's best treatment of the problems involved here occurred in The Anatomy of Law.[2] As he often did, Fuller couched his analysis in terms of an illustration; and the illustration he used was the same one over which Hart and Fuller clashed in their 1958 Harvard Law Review articles.[3]

This is Fuller's example, and the question to which it leads:

> Let us suppose that in the centre of a large city there is a spacious and attractive park. To protect the park against unwelcome intrusions a statute is enacted making it a misdemeanor to bring any "vehicle" within the park area. What counts as a "vehicle" for the purpose of this law?[4]

Fuller points out that there are easy cases as to what counts as a vehicle: the ten-ton truck does, and hut is prohibited; the baby carriage does not, and hence is admitted. What makes these cases easy, Fuller claims, is not that we can look up the word "vehicle" in a dictionary, see whether the definition fits the truck and the carriage, and then judge accordingly. Consider, Fuller says, the definition that Webster's New International (2nd ed.) dictionary gives to "vehicle": "that in which or on which a person or thing is or may be carried. . . ."[5] If this definition were used as the basis for a decision, then the baby carriage would be prohibited along with the truck.

Fuller argues that the crux of the matter is not the meaning of the word "vehicle"; rather, we reach the conclusion that the truck should be excluded and the carriage allowed "by considering what is implicit in the notion of a park. . . . What we are basically interpreting, then, is not a word, but an institution and its meaning for the lives of the human beings affected by

it."[6] There are "self-applying" cases, for example, oral contracts in land are unenforceable, where such interpretation is not necessary; however, here we must, Fuller states, notice that such cases are few. Moreover, he claims, we do not have to explicitly raise the question of the purpose of the self-applying statutes because in these cases the purpose is transparent. We should not let this transparency mislead us into thinking that purpose is not involved and that such cases are ubiquitous. Fuller writes,

> The interpretation of statutes is, then, not simply a process of drawing out of the statutes what its maker put into it but is also in part, and in varying degrees, a process of adjusting the statute to the implicit demands and values of society to which it is to be applied. In this sense it may be said that no enacted law ever comes from its legislator wholly and fully "made."[7]

The upshot of this analysis is that statutes are given their purpose from two sources: (1) legislators, and (2) the implicit demands and values of society. Sadly, Fuller never explains, to the best of my knowledge, how these two are related to one another.[8] Perhaps it is worth commenting that however difficult it may be to ascertain the purpose that a legislative body had for a piece of legislation, it is much less clear how a judge or administrative agent can recognize the "implicit demands and values of society." Moreover, I would be remiss if I did not raise the question of

whether it makes sense to speak about society's making demands and having values. It is unfortunate that Fuller was never more exact about the nature of these demands and values.[9]

The Purpose of the Law

For Fuller, the fundamental purpose of the law is ordering and facilitating human interaction.[10] Its purpose is to provide a framework in which human beings can come together or associate with one another, not to their detriment, but to their benefit. Although the law can be seen as an instrument for social control,[11] as in, for example, the laws on victimless crimes, this is not the law's primary role. Indeed, Fuller is quite dubious of social control having any proper role in the law at all. In a letter to the legal anthropologist Max Gluckman. Fuller summed up his position nicely when he wrote, "'Law' in the broad sense . . . is an indispensable instrument for living together, and not simply a machine for putting the screws on the bad guy."[12]

This analysis again raises the issue of the status of purpose. In what way can an institution be purposeful? Fuller does not treat of this question in his published writings; however, in some undated notes, which I suspect were written in the mid-1950's, he does

have some comments which at least show the direction of his thought. There he says,

> Purpose may be imbedded in a social institution without all of those participating understanding it, conceivably without any one understanding it. Consider, for example, the routines of a bank. Why do they do certain things in the way they do? They don't know; they just always have. BUT then someone gets out of line, and things go wrong. Then it is learned why it was done that way. A social custom or fixed way of doing thins may be purposive in the sense that if is departed from, behavior will be brought back into line.[13]

I have said that Fuller's position is that the fundamental purpose of law is ordering and facilitating human interaction. Yet, this is not what Fuller says in the The Morality of law.[14] There he says, "I have attributed to the institution of law . . . a modest and sober [purpose], that of subjecting human conduct to the guidance and control of general rules."[15] How are these two views to be reconciled?

I think two things need to be said here--one rather straightforward, and the other more complex. First, why should we subject human conduct to the guidance and control of general rules? Clearly Fuller's answer is that general rules order and facilitate human interaction. Thus one could say that the quotation from The Morality of Law is expressive of a purpose of the law, but it is a purpose that is subsidiary to a facilitating purpose.

Now to my second comment: I think the answer to the question of two paragraphs ago which I have given is fine as far as it goes, however, simply to leave the matter at that would involve the perpetuation of a confusion--one that I would like to dispel.

To see what this confusion is, we must return to an issue only broached at the end of Chapter I of this essay, namely, what is the central subject matter of The Morality of Law? I suggested at that time that if one wanted to find Fuller's answer to the question, What is law? one would not, in a very important sense, discover it in that book. Ultimately, the reason for this claim is this: the primary focus of The Morality of Law is on a specific legal process, to wit, legislation. Indeed, I believe a more perspicacious title for the book would have been The Morality of Legislation.

Let me warn the reader that the defense of this position which is to follow is an interpretation of text. There is, alas, no clear-cut piece of Fuller's writings which clinches the matter.

Let me begin my analysis by distinguishing between two notions which are essential to Fuller's work in jurisprudence: "law" and "legal system" (or "system of law").

I noted earlier that Fuller disowned the project of giving a definition to "law," and that law, for

Fuller, was constituted by a set of social or legal processes. Fuller, then, used the notion of "law" very broadly, and in this broad sense it referred to legislation, adjudication, customary law, contract, managerial direction, and so forth. Unfortunately, Fuller oftentimes used the term "law" in two narrower senses, as I shall presently show.

In one of Fuller's most explicit statements about the nature of a legal system, he says, "There are three principal activities connected with the creation and operation of a legal system: legislation, adjudication, and administration (including enforcement)."[16] In a legal system we find legislators, judges, and enforcement officials who are constantly engaged in dealing with certain problems that constantly repeat themselves. Furthermore, a legal system is, "a continuous and open-ended process of enactment, interpretation, and application."[17] The primary "material" of a legal system is, of course, legal rules--rules which are made, interpreted, and administered by legislators, judge,s and administrators. A legal system, then, for Fuller, involves (minimally) two of the Fullerian legal processes, namely, legislation and adjudication; and we can see that 'law," in the broad sense, is a much broader term than "legal system."

Fuller uses the term "law" in two much more restricted ways than that of referring to a set of social processes. In the first narrow sense, "law" is used synonymously with "legal system." A cursory examination of chapters two through five of The Morality of Law shows this to be the case. In the second narrow sense, "law" is used to stand for enacted or declared law, these latter locutions pointing primarily to legislation and judge-made law. In this second restricted sense of "law," we again find the same two Fullerian social processes being invoked: legislation and adjudication. Thus, we find Fuller with one broad and two narrow meanings for the word "law."

At this juncture, let me return to the concept in The Morality of Law which dominated the critics's attention: the internal morality of law. To what does the term "law" refer when Fuller speaks of "the internal morality of law?" Is Fuller using "law" in the broad or in one of the narrow senses? In considering our answer to this question, we must, of course, keep in mind our previous characterization of the concept of an "internal morality."[18]

I think it is clear that we can eliminate the broader use: the referent in this use of the term is a set of social processes, and each of these processes has, on Fuller's account, its own internal morality. As

Fuller put it, "[every] form of social order contains, as it were, its own internal morality."[19] As we shall see in the next chapter, these internal moralities vary greatly: the internal morality of contract is quite different from that of managerial direction; and whatever these internal moralities do have in common, it is certainly not the eight principles that Fuller discusses under the heading of the internal morality of law. This in itself is, I think, sufficient reason to discount the broader sense of "law" as an answer to our question. Moreover, the actual texts in question support some narrow sense of the term "law."

In examining The Morality of Law, one gets the impression that the internal morality of law is the internal morality of law as legal system, a position Robert Summers recently put forth in his book, Lon L. Fuller.[20] Indeed, consider the failures of Rex in the previous illustration; let me quote once again Fuller's characterization of the consequences of those eight failures: "A total failure in any one of these eight directions does not simply result in bad system of law; it results in something that is not properly called a legal system at all. . . ."[21] We could conclude that the internal morality of The Morality of Law is a morality of legal systems. To draw this conclusion would be, I believe, although not completely misbegotten, still not

right on the mark, and not true to Fuller's purposes. I want to now argue that the "law" in the expression "the internal morality of law" is primarily law in the sense of enacted law, and refers foremost to legislation.

In making my case, I rely not only on The Morality of Law, but also on The Anatomy of Law, and on certain unpublished work of Fuller's. As to the former, we can do no better than to quote Fuller where he says, "Rex was resolved to . . . make his name in history as a great lawgiver."[22] Rex was going to create law; to make those legal rules that go to make up a legal system. It was in the role of lawgiver or lawmaker that Rex failed; and this means that he failed both as legislator and as judge, since both are makers of law. It was, therefore, the lawmaker who violated the principles of the internal morality of law.

It is also of no small significance, that in Fuller's detailed treatment of each of the eight principles of the internal morality of law in The Morality of Law, he very often refers to the legislator. In speaking of the moral injunction to make the law clear and understandable Fuller writes, "[I]t is obvious that obscure and incoherent legislation can make legality unattainable. . . ."[23] He goes on to say that even if we identify law with a hierarchy of power or command (which Fuller expressly inveighs against), "Being at the

top of the chain of command does not exempt the legislature from its responsibility to respect the demands of the internal morality of law."[24] As another example, when commenting on the avoidance of contradictions, Fuller states, "It is rather obvious that avoiding inadvertent contradictions in the law may demand a great deal of painstaking care on the part of the legislator."[25]

In his published work, Fuller treats of the internal morality of law not only in, "Positivism and Fidelity to Law--A reply to Professor Hart," and The Morality of Law, but also in The Anatomy of Law. In this latter work, Fuller is engaged, in part, in the task of showing that there are, and must be, certain implicit elements, certain "implicit laws of lawmaking," in "made or enacted law."[26] He writes,

> Every exercise of the lawmaking function is accompanied by certain tacit assumptions, or implicit expectations, about the kind of product that will emerge from the legislator's efforts and the form he will give to that product.[27]

The "implicit laws of lawmaking" are the principles of the internal morality of law. Shortly after these lines, Fuller says,

> Surely . . . there is implicit in the very notion of a law the assumption that its contents will, in some manner or other, be made accessible to the citizen so that he will have some chance to know what it says and be able to obey it. But to say this is to assert, in effect, that the lawmaking process is itself

> subject to implicit laws. . . . Nor does the difficulty end with unpublished laws. What shall we say of the wholly unintelligible law? The statute with an internal contradiction such that it appears to nullify itself? The law that purports to impose a duty to perform some act that lies beyond human capacities? The retrospective law declaring illegal an act that was perfectly lawful when performed? It may be said that the possibility of such legislative aberrations is ruled out by common sense and ordinary conceptions of decency. History, however, offers little support for this assurance.[28]

There are two important points in this for our purposes. First, the principles of the internal morality of law are, for Fuller, also implicit laws of lawmaking. Secondly, we should note how Fuller begins to trade off between lawmaking and legislation. (In fact, in the pages surrounding the material just quoted above, Fuller uses "lawmaking" and "legislation" [and "legislative"] fairly interchangeably.) We find Fuller referring to gross violations of the internal morality of law as "legislative aberrations." Not only, then, do we see the connection made between the internal morality of law and lawmaking in the Anatomy of Law, but even more specifically between the internal morality and legislation.

In addition to making the connection between the internal morality of law and lawmaking in general and legislation in particular in his published writings, there is also some material in Fuller's unpublished

papers that focuses on this connection. As but one example of this, Fuller very clearly intimates that Chapter II (the central chapter) of The Morality of Law focuses on legislation when, in an unpublished outline for an essay[29] (written approximately a year after the publication of The Morality of Law), under a section titled, "Legislation," he notes that one of the elements that should be included in the essay is, "problems a legislator faces in creating an effective legal system: herein of the matters dealt with in Chapter II ["The Morality that Makes the Law Possible"] of my [The] Morality of Law.[30]

I have covered much ground on the question before us; however, I am not yet ready to draw the conclusion that I think is ultimately warranted. There is one brief stage that must be added to my argument as it now stands.

This "stage" involves the following considerations: According to Fuller, as we have already seen, the internal morality is what he alternatively calls role, institutional, or procedural morality. It is a morality that attaches to a particular sort of activity within a specific kind of institutional arrangement. Perhaps more exactly, it is a morality that is applicable to persons who have certain roles to play within particular institutional arrangements.

Consequently, when Fuller is referring to, say, the internal morality of adjudication, the reference is to adjudication qua process or activity, and to the people who engage in that enterprise, who perform the job of adjudication.

In a 1970 letter from Fuller to the English philosopher Dorothy Emmet, there is line that helps illuminate Fuller's position here. In response to a comment she made in a previous letter, Fuller wrote of a "remark of one of [his] students to the effect that if [Fuller] could only speak of "a morality of lawing" most of the debate [between Fuller and his critics on the relationship between law and morality] would be over."[31] The whole letter shows that Fuller endorsed the position that the internal morality of law is more perspicuously conceived of as the internal morality of "lawing," that is, the morality a certain type of activity. In an earlier letter to Emmet, Fuller also mentioned the student's "suggestion," and wrote,

> The word "law" calls to mind books lying inertly on shelves, and of course bound pieces of paper are amoral. "lawing," on the other hand, would call to mind people in interaction with one another, and that picture in turn would suggest reciprocal responsibilities if the interaction is to proceed properly.[32]

I now want to return to the claim that Fuller's internal morality of law is really the internal morality of the legal system. If we construe the internal

morality of law in this way, then given the analysis of our previous two paragraphs, we can say that the internal morality of law is the internal morality of the activities of a legal system, namely, legislation, adjudication, and administration.

I think that this is close to Fuller's position, but it still misses the mark. I think it misses for the reason that with the exception of the third principal of the internal morality of law, that of promulgation, I do not see how this morality is applicable to the law-administrator. Furthermore, the whole gist of Fuller's position, as I think was shown, lies in its repeated emphasis on the lawgiver. As such, the internal morality of law is a morality of certain agents and activities of a legal system, namely, those agents who enact legal rules. We have here the internal morality of the lawgiver. If one wanted to speak "staticly," one would say that Fuller's internal morality of law is the internal morality of enacted law.

If this argument is correct, then, not only do we have Fuller's account of the internal morality of the lawgiver, but we also have <u>a fortiori</u> the internal morality of the legislator. After all, the legislator is the paragon case of the lawgiver. The question is whether this morality can be more insightfully seen as being foremost the internal morality of the legislator.

This question should be asked if only because of the fluctuation we have witnessed in Fuller's terminology between "lawgiver" and "legislator."

The answer is yes. Ultimately, the reason is this: for Fuller the paragon example of a lawmaker is the legislator: lawmaking is essentially his job; and this is a great difference between him and a judge. There is a great deal of textual evidence to support my affirmative answer. I have already cited some of this material in trying to make the wider claim that the internal morality to which we have been referring can be seen as the morality of the lawmaker, and this textual data can also be used, of course, to support the narrower claim.

At least three more pieces of text can be adduced that support my contention that Fuller was truly speaking of the internal morality of the legislator. In a 1965 letter to H. L. A. Hart, that is in part a response to Hart's review of The Morality of Law, Fuller wrote, "On the question of calling the principles of legality the internal morality of law I stand firm. In my book I spoke of the responsibility of the legislator as resting on 'a sense of trusteeship and the pride of the craftsman.'"[33] Here the explicit reference to the legislator is clear enough.

The second piece of text is a 1966 letter Fuller wrote to the Dean of the Harvard Law School, a letter which was a report of Fuller's work during his sabbatical leave of the previous academic year. In the midst of reciting his budding interest in the sociology of law, and his growing distress at the almost exclusive focus of that discipline on the interaction between law and society, Fuller wrote, "What is left out of the account are the problems of the lawgiver, the judge, [and] the negotiator of contracts. . . ."[34] What should be apprehended here is the separation of the lawgiver and the judge, leading us to conclude that the lawgiver refers foremost to the legislator.

The third item of evidence comes from a 1959 letter to Wolfgang Friedmann wherein Fuller is responding to criticisms made of his internal morality of law as presented in his 1958 Harvard Law Review response to Hart.

> Suppose two legislative draftsmen, both of whom realize that human misery and wasted energy may result from carelessly drawn statutes. Desiring to avoid these human costs of poor draftsmanship, one works overtime to make his statutes clear; the other saves his energies for more pleasant pursuits. Shall we deny that the first is a more "moral" draftsman than the second?[35]

Again, Fuller is referring to the legislator.

With this analysis now in hand, let us return to the problematic quotation from The Morality of Law--that

the purpose of law is to subject human beings to the control and guidance of general rules. When it is seen that here Fuller is referring not to the purpose of law, but rather to the purpose of legislation, the passage becomes clearer, and, with an eye on my reductionist first comment, reconcilable with my claim as to the purpose of law as a whole for Fuller. At this juncture we should move to the purpose of each of the forms of social order.

At a high level of generality, as might be expected, each of the forms of social order has the same purpose, namely, the ordering and facilitating of human interaction. Each form achieves that purpose in a different manner. At the risk of getting ahead of ourselves, let me briefly indicate the specific purposes of three of the forms of social order which allow them to effectuate the ordering and facilitating of human interaction. The purpose of legislation is to subject human conduct to the guidance and control of general rules. The purpose of contract is to provide for reciprocal self-determination. The purpose of mediation is to provide a harmonious settlement between certain parties. We can see in these three cases Fuller's contention that these social processes give rise to a social reality which allows for greater human benefit.

In the next chapter I will discuss adjudication, mediation, contract, managerial direction, customary law, and legislation in some detail.

CHAPTER V

THE MODELS OF THE FORMS OF SOCIAL ORDER

This chapter is an examination of six of the forms of social order. In my analysis of them, the reader should bear in mind that in the case of each form, Fuller is putting forth a model or ideal type.[1] Moreover, although there will be no further reference to this during the rest of this essay, the forms of social order do not operate in isolation from one another. Many social processes involve the activities of more than one form of order. As but one illustration, mediation is often used as a device to bring opposing legislative forces together in support of a compromise measure.

Adjudication

Fuller spent a great deal of time thinking and writing about adjudication. His principal written contribution to this area appears in his posthumously published essay, "The Forms and Limits of Adjudication."[2] I shall not be able to even approximate the subtlety of analysis that Fuller exhibits in that essay.

I begin by noting that Fuller uses the notion of adjudication very broadly. Some examples are: a father attempting to judge a dispute among his children; a labor arbitrator; a Senate trying the impeachment of a President; "the Congregation of Rites of the Roman Catholic Church hearing the arguments pro and con in a procedure for canonization;[3] and, a judge who sits on the bench.

In examining what Fuller takes to be the essential characteristic of adjudication, we should bear in mind how Fuller believes we are to distinguish one form of social order from another, namely, on the manner in which the affected party participates in the decision reached.

Fuller defines "adjudication" in the following way:

> The distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor.[4]

Fuller goes on to say that anything that heightens the significance of the participation brings adjudication closer to its ideal; anything that undercuts the meaning of that participation vitiates the integrity of the process. Cases of the latter condition would be a drunk judge, a judge who has been bribed, and a judge who is

hopelessly prejudiced In all of these cases,the giving of reasons loses its meaning.

One implication of this definition is that adjudication will involve the making of determinations concerning claims of right and accusations of guilt. Fuller gives a tightly argued proof for this.

> (1) Adjudication is a process of decision that grants to the affected party a form of participation that consists in the opportunity to present proofs and reasoned arguments. (2) The litigant must therefore, if his participation is to be meaningful, assert some principle or principles by which is arguments are sound and his proofs relevant. (3) A naked demand is disguished from a claim of right by the fact that the latter is a demand supported by a principle; likewise, a mere expression of displeasure or resentment is distinguished from an accusation by the fact that the latter rests upon some principle. Hence, (4) issues tried before an adjudicator tend to become claims of right or accusations of fault.[5]

In this light we can see that, for Fuller, adjudication provides for the ordering and facilitating of human interaction by settling claims of right and accusations of guilt. Furthermore, given the mode of participation of the affected party and the purpose of adjudication, we can see that the proper province for adjudication, that environment in which it is institutionally competent, is the area which involves claims of right and accusations of guilt.

We now turn the issue of the limits of adjudication: What kinds of social tasks is the

process of adjudication ill-suited to handle? Fuller focuses on two types of tasks. First, there are, he says, those human associations whose effectiveness would be obliterated if they were ordered by "formally" defined rights and wrongs. Fuller's chief example here is the family. The courts, he claims, have consistently refused "to enforce agreements between husband and wife affecting the internal organization of family life."[6]

The second task for which adjudication is not competent is one which is highly polycentric. Fuller takes the concept of polycentricity over from Michael Polanyi, who had a great influence on Fuller. Indeed, Fuller thought that Polanyi's, The Logic of Liberty[7] was one of the greatest works of political philosophy ever penned.[8]

Fuller, like Polanyi, introduces the very difficult idea of polycentricity through a model. Fuller writes:

> We may visualize . . . [a polycentric] situation by thinking of a spider web. A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strands too snap. This is a 'polycentric" situation because it is "many centered"--each crossing of strands is a distinct center for distributing tensions.[9]

A polycentric situation is one in which the consequences of an action are many and exceedingly complex. One of the examples Fuller gives is very helpful. Consider if the wages and prices within a country were to be set by a process of adjudication.[10] If "the court" allowed for a rise in the price of aluminum, this would effect the steel, plastic, and wood industries, and many others. It would also have an effect on many consumer goods, and also many of the wages in the country. This is a paradigm of a polycentric situation.

A polycentric task is a job that requires the solution of a problem which is a polycentric situation. It is just this sort of job for which adjudication is ill-suited. Fuller points out that all problems submitted for adjudication have polycentric elements. Those for which adjudication is maladroit are those that have a high degree of polycentricity. Thus, to conclude Fuller's example from the previous paragraph, adjudication is not competent to set prices and wages. That, Fuller believes, must be left to a regime of reciprocity--the free marketplace. In general, Fuller thinks that there are two forms of social order which are equipped to solve problems which are highly polycentric: managerial direction and contract.[11]

Before ending this discussion of polycentricity, one further point should be made; and this point connects up with Fuller's discussion about adjudication's province being claims of right and accusations of guilt. Let me quote Fuller on this point.

> A right is a demand founded on a principle--a principle regarded as appropriately controlling the relations of two parties. Now it is characteristic of a polycentric relationship that the relations of individual members to one another are not controlled by principles peculiar to those relations, just as it is impossible to build a bridge by establishing distinct principles governing the angle of every pair of girders.[12]

There is thus a close-knit relationship between Fuller's claim concerning the proper province of adjudication and the inability of adjudication with respect to highly polycentric situations. Now I turn briefly to the internal morality of adjudication.

With the exception of legislation, Fuller devoted little time to the internal morality of the other forms of social order. We do not,then, find a very detailed treatment of the role morality of adjudication. Part of the essence of the internal morality of adjudication is impartiality. Impartiality is a moral demand placed upon the adjudicator by the nature of the adjudicative process.[13] It is only by being impartial that the judge can make meaningful the presentation of proofs and reasoned arguments by the affected party, and it is only

by being impartial that the judge can properly decide claims of rights and accusations of guilt. Also, the judge must be willing to hear both sides of an argument. Without this, a reasoned participation makes little sense. Finally, we can add that the judge must equip himself intellectually to make such determinations: the adjudicator has to be able to understand the sides of the argument. The adjudicator's task is, indeed, an intellectual one. Adjudication is, for Fuller, then, both from the side of the participants and the process director, a rational process.

Mediation

Fuller's only systematic treatment of mediation occurs in his 1971 essay, "Mediation--Its Forms and Functions." There he writes that the central task for mediation is to provide a process which will,

> . . . reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another.[14]

We should note that Fuller does not say that the central task of mediation is to provide for a more harmonious relationship between the parties in question: mediation can be aimed at an amicable termination of a relationship.

In the mediative process, the mode of participation for the affected parties is negotiating and compromising. Through this, in conjunction with the mediator, they can reorient themselves toward one another in such a manner that will remove or lessen the conflict that previously infected their relationship.

So that we can see the characteristics of mediation in more detail, let us begin with one of Fuller's favorite examples: mediation that leads to a collective bargaining agreement between an employer and a labor union.[15] What are the properties that allow for mediation to be used, and used successfully, in this situation? Fuller focuses on six of them.

1. The relationship is dyadic.
2. There is a heavy degree of interdependence.
3. Each party wants something from the other.
4. The agreement must allow the parties to be able to "live together."
5. The negotiation is carried out not by the principals, but by agents.
6. The corporation has a dual role as an equal partner in negotiation and the operator of the plant.

It is not the case that all of these features are necessary if mediation is to take place. The first

two are, for Fuller, the most crucial for the process to take place and to be successful. Let us examine them more closely.

For Fuller, the two party relationship is best suited for mediation. He maintains that in a conflict in a three party relationship, it is very difficult for an outsider undertaking a mediative role not to become part of the internal machinations of the parties. Fuller illustrates and explains further:

> If X [the mediator] asks A's acquiescence in a proposed solution. A may reply that he will give his assent if X will undertake to persuade B to withdraw a concession B made in favor of C. X may thus end by becoming the manipulated tool of those he sought to guide. In this predicament he may face the alternative of retaining the empty title of mediator or becoming, in effect, a fourth member of the group and a participant in its internal games.[16]

The second feature concerns a heavy degree of interdependence; and Fuller's point here is fairly obvious. If two parties were not so dependent, they would not approach a mediator. It is because something of importance is at stake, and that the parties realize the significance of the other for its achievement, that they utilize a mediator.

With these two features in hand we can now state explicitly what Fuller takes to be the limits of the process of mediation. Fuller points to two limitations of the mediative process:

> (1) it cannot generally be used when more than two parties are involved; (2) it presupposes an intermeshing of interests of an intensity sufficient to make the parties willing to collaborate in the mediational effort.[17]

Another important limitation is that mediation cannot provide a determination of "legal" rights and duties. In this respect it is unlike adjudication.

Although Fuller barely treats of the subject, the internal morality of the mediator apparently has three components. First, the mediator qua mediator has, like the adjudicator, the obligation to be impartial, not to favor one side over another. If he is partial the chances of a successful mediation, one in which the parties can live with one another, depreciate.

The second element pertains to what the mediator should convey to each of the parties. According to Fuller, the duty of the mediator is to convey the substance of what is said. In part, this sometimes involves not communicating any recrimination or vile that might surround the substantive elements of what is said.

Thirdly, the mediator has the obligation to understand the aims of the opposing parties, and also to be capable of being sympathetic toward the declared aims of the opposing party.

Before leaving the topic of mediation, there is one final point that should be made. For Fuller, what

mediation shows so very clearly is that there can be social order without its being imposed.

Managerial Direction

Much of Fuller's treatment of managerial direction as form of social order takes place in the context of contrasting it to legislation. In fact, he nowhere presents an independent[18] and systematic analysis of this social process. Fuller sees a great importance in distinguishing between that form of social order that deals with the relationship between the legislator and citizen, namely, legislation, and that form that treats of the relationship between manager or superior and subordinate or inferior, to wit, managerial direction. For, in Fuller's view, often the distinction between these two forms of order is passed over, and legislation is seen as being a relationship of order-giver and order-executor, as being the process of managerial direction.

Before discussing the characteristics of managerial direction, I think it would be best to first give some concrete examples of the relationships that Fuller sees as exhibiting this form of order. Fuller sees this process at work all along the social and political spectrum. Some examples of relationships that involve managerial direction that Fuller gives in his writings are: the baseball manager-baseball player,

regulatory agency-party being regulated, employer-employee, the watermaster-farmer, and the military officer-enlisted man.

Since Fuller discusses managerial direction in contrast to legislation, I will begin this examination of the characteristics of the former by a consideration of the fundamental difference between these two legal processes.

One way of attempting to differentiate between these two processes is to point to the generality of enacted law and claim that it is just this, generality that is lacking in managerial direction: legislation puts forth general rules and managerial direction issues specific orders. Fuller thinks this position is mistaken. He points out that managerial direction also can operate, and perhaps even exclusively so, with a bright and creative manager, under the guidance of general rules or orders. This is not to say, Fuller would add, that managerial direction does not oftentimes proceed by specific orders; it does, but not necessarily. Therefore, we cannot distinguish between the two forms of social order in the way suggested.

In The Morality of Law, Fuller succinctly states what he takes the essential difference to be between legislation and managerial direction.

> The directives issued in a managerial context are applied by the subordinate in order to serve a purpose set by his superior. The law-abiding citizen, on the other hand, does not apply legal rules to serve specific ends set by the lawgiver, but rather follows them in the conduct of his own affairs, the interests he is presumed to serve in following legal rules being those of society generally.[19]

At the risk of putting the matter too crudely, the fundamental difference, then, is this: under managerial direction, the manager tells the subordinate what to do--play left field, bring me a cup of coffee, et cetera; under legislation, the legislator provides baselines for the citizen, which set boundaries for the citizen's actions--he does not tell the citizen what to do. Here we see what, for Fuller, is the mode of participation by the affected party. The affected party, the subordinate, participates in the "decisions" of managerial direction by following the orders of the process director, the manager, to achieve the ends specified by him.

There is another important difference between these two forms of social order as regards the nature of their scope and regulation. On this matter Fuller writes:

> The directives of a managerial system regulate primarily the relations between the subordinate and his superior and only collaterally the relations of the subordinate with third persons. The rules of a legal system, on the other hand, normally serve the primary purpose of setting the citizen's relations with other citizens and only in a collateral manner his relations with the seat of authority from which the rules proceed.[20]

When the manager of the Detroit Tigers baseball team assigns a player to play right field, this has no "primary" effect on my relationship with my neighbor; however, the law of murder does have such an effect. Legislation, in this sense, has a much broader scope of application that does managerial direction.

Another significant difference to note is that whereas managerial direction is often exclusively other-referential, legislation is both self and other referential. When a salesmanager issues an order to his staff of salesmen and saleswomen, "Visit the retailers in your district twice each month," this order is applicable to other parties and not himself. On the other hand, when a State Legislature passes gun control legislation, this bears upon the actions of other parties, namely the citizens of the state, and it also has application to the legislators themselves.[21]

Before considering the internal morality of managerial direction, we must first examine the specific manner in which this process achieves the purpose of the ordering and facilitating of human interaction. We find that this form of social order is necessary in the coordination of certain types of collective enterprises, those enterprises where organization, in the strict sense of the term, is important in the production of certain

human benefits. The distinctness of this process is, thus, marked by the fact that coordination is achieved, ultimately, through the giving of orders or commands. An illustration will, I think prove helpful here.

In the cold, snowy winters of Michigan, boots are a necessity. Boots, of course, do not exist in nature: they must be produced. How can they be produced? Can it really be supposed that individuals are going to coordinate themselves toward this end spontaneously, to somehow all come together at the factory to make boots? Clearly the coordination that is necessary to this enterprise is one that must be initiated and directed by someone; hence, the need for managerial direction for the production of boots.

Another enterprise where managerial direction is necessary for orderly activity is the military. The order necessary for the successful operation of an armed service is not one that simply would grow by itself. The order is made through the assignment of particular ends, and this requires the role of a manager.

Through these examples, we can glean where managerial direction is most at home. What is distinctive about those enterprises where managerial direction is efficacious is that a goods and services must be allocated or distributed in accordance with

changing circumstances. Here determination of rights and duties would not be particularly helpful.

In his effort to compare legislation and managerial direction, Fuller considers whether the principles of the internal morality of legislation have any bearing on the process of managerial direction. He argues that five of the eight are "at home"[22] in a managerial setting. These five are the principles of promulgation, clarity, noncontradictoriness, possibility of execution, constancy through time. The three that are not applicable are the principles of generality, nonexcessive retroactivity, and congruence. I will first consider those principles that are not relevant to the process of managerial direction.

We have already seen that managerial directives do not have to take a general form. They can be very specific orders; for example, water the plants in the office. Indeed, it is often because such directions do not take a general form that they can order and facilitate human action as they do. Moreover, insofar as the superior party is not required to follow his own directives, including general rules, the principle of generality becomes inapplicable. This last point also tells against the principle of congruence being part of the internal morality of managerial direction; for, as

Fuller notes, it loses its relevance in this context. Lastly, on the principle against excessive retroactivity, Fuller writes, "The problem [of retroactivity] simply does not arise; no manager retaining a semblance of sanity would direct his subordinate today to do something on his behalf yesterday."[23]

The other five principles of the internal morality of legislation are also principles of the internal morality of managerial direction: they constitute moral demands of the role, or the job, in question. The manager cannot discharge his responsibilities properly, Fuller maintains, unless his orders are promulgated, clear, noncontradictory, executable, and consistent through time. To the extent that the manager violates any of these principles, he must fail to direct those under him in the hierarchical scale to the successful completion of the relevant end.

Contract

We turn now to contract law. As Fuller himself repeatedly emphasizes, by contract law, in this context, he does not mean the law "of" or "about" contract, but rather the law, that is, the rights and duties a contract brings into existence.[24]

For Fuller, the participants of a contract are actively engaged in the process of creating law--of

creating rules of conduct for themselves, and, as such, imposing these rules and order upon themselves.[25] In this regard, contract is very much like mediation: in both cases the order that arises among the parties does not come "from above," rather it is engendered by the participating parties.

Fuller recognizes contract as being an explicit form of reciprocitty. Therefore, in his discussions about contract as a form of social order, he is not referring to what might be called tacit contract.[26] Moreover, he states explicitly that his analysis does not pertain to spot sales. He says,

> In analyzing the contract as a form of social ordering we must begin by setting to one side simple contracts of sale on an open market, in which the only term is that setting the price, such agreements as that by which, for example, A sells one hundred bushels of grain to B at the going market. The "law" of such a contract, that is, the price term, results from the state of supply and demand; it is not really made by the parties, but is largely implicit in a balance of market forces. A contract which significantly serves to create legal rules is one that reaches into the future and sets the terms of a contemplated collaboration between the parties.[27]

Contract is, on this account, an institutional device that allows for an increase in human satisfaction through explicit exchange: conflicts can be reduced and benefits achieved through a mechanism by which individuals can voluntarily arrange their future relationships with one other.

Underlying contract is a regard for private autonomy. In "Consideration and Form," one of the two very important essays Fuller wrote in the field of contract law, Fuller states this very clearly.

> Among the basic conceptions of contract law the most pervasive and indispensable is the principle of private autonomy. This principle simply means that the law views private individuals as possessing a power to effect, within certain limits, changes in their legal relations.[28]

In a footnote on the same page just quoted, Fuller illuminates this quotation when he writes, "The problem generally discussed in this country under the heading "Freedom of Contract" is the problem of the limits on private autonomy."[29]

Insofar as contract is an explicit form of reciprocity, that is, explicit exchange, the conditions that we earlier discussed under the heading of the principle of reciprocity also apply mutatis mutandis here; that is, there must be a dual inequality of value--each party must have something that the other wants, and wants more than what he is willing to give up.

Given Fuller's analysis so far, we can say that the essence of contract as a form of social ordering lies in voluntary exchange; and the core of voluntary exchange lies in the consent and bargaining that allows such an exchange to take place. Thus, the "peculiar form of participation" for the affected parties provided by

contract as a social process is the persuasion, bargaining, and consent that terminates in an explicit agreement.

Let us now turn to the issue of where contract as a form of social ordering is ill-suited--where it is incompetent in providing for social order. Fuller focuses on three kinds of human relationships where contract is inept: intimate relationships, hostile relationships, and relationships between superior and inferior. I shall discuss the first two of these kinds.

Fuller's paradigm example of the intimate relationship is a marriage. Contract is maladroit at ordering the relations of the husband and wife for two reasons. The first can be put in "affective terms": the request for an explicit contract can be seen as a lack of trust, thus undermining the harmony of the relationship.

The second reason is an operational one. There are almost countless responsibilities that have to be allocated within a family, for example, working, doing the dishes, taking the car in to be fixed, going away on a business trip, and so forth. As Fuller puts it, "No amount of contractual foresight would be equal to dealing in advance with all of these permutations in the internal affairs of the family."[30]

Fuller's paradigm example of the hostile relationship is two unfriendly countries. As in the case of intimate relationships, contract amongst hostiles is a poor form of social ordering for both affective and operational reasons. The affective reason is that contract requires that the parties trust one another, and that is exactly one thing that is lacking.

The operational reason is this: one important condition that must be met if a contract is to be reached is that there be a disclosure of interests. The parties must know what each other wants if an agreement is to be made. The problem arises because this disclosure can be dangerous, especially if the negotiations collapse: one's interests are now revealed to the "enemy."

Between intimate and hostile relations there is a middle ground, "the habitat of friendly strangers,"[31] and it is here that contract is most "at home." It is in this social context that the problems faced by the aforementioned relations can be overcome; it is here that, as Fuller puts it, "interactional expectancies remain largely open and unpatterned."[32] There is an openness in the relationship amongst friendly strangers that allows negotiations and bargaining to take place as it cannot in intimate and hostile relationships.

The internal morality of contract has one important structural difference from the other forms of social order that we have covered so far, namely, that the focus of the internal morality of the other forms of order has been on the process director, however, there is no process director in the form of contract. Fuller is quite clear that irrespective of this fact, there is an internal morality of contract. To repeat something quoted earlier, Fuller writes that, "institutional arrangements (say, adjudication or contract) contain a kind of internal morality. . . ."[33]

Notwithstanding what has just been said, Fuller never explicitly lays out this internal morality. Nevertheless with the internal moralities of the other social processes as our guide, I think we can say that the internal morality of contact consists in the conditions of fair bargaining; and this involves, at the very least, the absence of coercion.

Customary Law

Fuller began to get very interested in customary law as form of social order in approximately 1966.[34] Part of this was certainly a reaction to those such as H. L. A. Hart who, in Fuller's perception of the matter, dismissed customary "law" as having no, or little, relevance to an advanced society. Since in this case, as

in many others, Fuller's views are to be best understood against the background of those theories that he rejects, I will begin this section with a brief discussion of certain positions of Hart that Fuller undoubtably had in mind as he worked up his analysis of customary law.

For Hart, it was the case that primitive societies could exist without a legislature, courts, or officials of any kind.[35] In this kind of society "the only means of social control is that general attitude of the group towards its own standard modes of behavior in terms of which we have characterized rules of obligation."[36] These rules Hart calls primary rules of obligation.

Such rules must have certain characteristics if they are to sustain any kind of society, but this is not what interests us in this context. Rather we are concerned with what Hart takes to intractable difficulties in living by such means. First, such a collection of rules is by its very nature unsystematic. According to Hart,

> [they] will simply be a set of separate standards, without any identifying or common mark, except of course that they are the rules which a particular group accepts. They will in this respect resemble our own rules of etiquette.[37]

Because of this, in any dispute about exactly what a rule holds or the scope of the rule, there is no authoritative

procedure for adjudicating the matter. Thus, Hart says such an aggregate of rules is uncertain.

A second problem is that such rules will be static. Without any authoritative means, such rules will change only by a slow process of growth. There can be no immediate change in response to a changing environment, et cetera.[38]

The third difficulty is the inefficiency of this collection of rules. In all but the smallest societies, Hart says, disputes will go on interminably. Moreover, without any authoritative mechanism, punishment will be a feckless enterprise.

According to Hart there is a remedy for these problems. This consists in the introduction of secondary rules, such as the rule of recognition, by which authoritative mechanisms are created. It is the introduction of these secondary rules that marks, for Hart, the transition from the pre-legal world to the legal one. The remedies that the secondary rules provide "are enough to convert the regime of primary rules into what is indisputably a legal system."[39] Thus, the primitive society that has been under discussion was without law.

Fuller thought that in such an analysis as Hart's, very important continuities between customary law

and officially declared law were grossly neglected. Furthermore, for Fuller, "we cannot understand 'ordinary' law (that is, officially declared or enacted law) unless we first obtain an understanding of what is called customary law."[40] To see why Fuller believed this, let me now turn to Fuller's analysis of customary law.

Fuller sometimes writes that customary law can be best described as "speaking" the language of interaction: it arises from the interaction of individuals. On Fuller's view, however, such law does not arise simply from habit or a regular pattern of behavior. For habits and regular patterns of behavior do not always, and perhaps even most of the time, engender obligations to be born. And customary law, insofar as it "imposes rights and duties,"[41] involves obligations. Fuller writes, "The fact that a man or group of men has for a long time acted uniformly in certain respects cannot of itself give anyone else a claim that this pattern of behavior should be continued."[42] Moreover, the notion of habit wrongly suggests that the interaction in question is one that has been taking place over a long period of time; yet, for Fuller, although this is sometimes the case, it certainly does not have to be so.

If customary law is an interactional phenomenon, and it imposes obligations, and it is not habit that

creates such customary law and obligations, the question to ask is, What does? Fuller's most explicit answer to this question appears in "Human Interaction and the Law," where he says the following:

> Where by his actions toward B, A has (whatever his actual intentions may have been) given B reasonably to understand that he (A) will in the future in similar situations act in a similar manner, and B has, in some substantial way, prudently adjusted his affairs to the expectation that A will in the future act in accordance with this expectation, then A is bound to follow the pattern set by his past actions toward B. This creates an obligation by A to B.[43]

The creation of an obligation and, hence, customary law, then, depends upon the following conditions being fulfilled:

1. A has to have acted toward B in the past.
2. These actions involved acting in similar ways in similar contexts.
3. Invoking a reasonable man standard, it would be reasonable for B, given the actions of A, to expect A to continue to act in this way in the future.
4. B must have adjusted his actions to those of A, and would not have adjusted his actions but for those of A.
5. The interests of A and B had to have been interwoven to some extent, otherwise B would not have adjusted his actions to those of A.

Perhaps this last point needs some explanation. If the interests of A and B were not interlaced in at least some minimal fashion, then they would not interact with each other and, as such, the kind of obligation that arises, could not.

When these conditions have been satisfied, customary law and obligation have been established. They get established when we have what Fuller sometimes called "stable interactional expectancies."[44]

I should note that for Fuller's purposes, it does not matter whether the expectancy is tacit or explicit. He writes,

> We shall be misled, for example, if we suppose that the relevant expectancy or anticipation must enter actively into consciousness. In fact the anticipation which most unequivocally shape our behavior and attitudes toward others are often precisely those that are operative without our being aware of their presence.[45]

Perhaps the best examples of this phenomenon are those that arose out of commercial practices, exemplified best, perhaps, in the kind of cases visited regularly in the Law Merchant. I will, however, use a less adroit example to illustrate Fuller's position, namely, a case of an obligation that a friend might have to another friend. I shall use this example because it does present, I believe, the sort of mechanism Fuller has in

mind; and, also, it raises an important problem to which I shall return shortly.

Sue and Ellen are both attorneys living and working in Chicago. Neither one enjoys taking the train so they both drive to work. When they find out that their offices are so near each other, they decide to drive together. With barely a word being uttered, Sue drives on Mondays, Wednesdays, and Fridays, and Ellen on Tuesdays and Thursdays. Both being hard workers, neither one takes a vacation, and they continue to drive each other to work in the same way for one and one-half years. Sue then decides to take one week off to visit a friend in Maine. She neglects to tell Ellen of her change in plans, leaves on Saturday, and Ellen is left to wait and wait on Monday morning, perhaps missing an important meeting at the office. In this example, Sue clearly has an obligation to Ellen that she violated. And what we find here is that the five conditions that Fuller has specified have all been fulfilled. There was a stable interactional expectancy that had been created and transgressed.

At this point the reader might, and indeed should, balk. Granted, he might admit, that I have aptly illustrated the mechanism formally stated above, what in the world does this have to do with law? Surely, it

might be said, it has to do with custom, and perhaps even morals, but what is its bearing to law? Indeed, one might go further and point out that Fuller's analysis does not give us any basis by which to demarcate customary law from morals, prudence, and etiquette. In fact, Fuller, himself, raises this problem of demarcation. He writes,

> now for the difficulties produced by the noun in the expression customary law. If we speak of a system of stabilized interactional expectancies as a more adequate way of describing what the treatises call customary law, we encounter the embarrassment that many of these expectancies relate to matters that seem remote for anything like a legal context. For example, rules of etiquette fully meet the suggested definition, yet one would scarcely be inclined to call rules of this sort rules of law.[46]

How then do we, according to Fuller, distinguish between customary law and these other social norms?

One attempt at demarcation that he rejects is that put forth by E. A. Hoebel. Hoebel proposes that as regards a primitive society

> . . . law may be defined in these terms: A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting.[47]

Fuller gives three reasons for his rejection. First, if, as is the case for Fuller, the purpose of law is ordering human interaction, and the law succeeds in

its purpose to such an extent that there are no violations of it, then there cannot be the application of physical force. But, Fuller asks, "Does its very success forfeit for such a system the right to be called by the prestigious name of 'law'?"[48]

Another criticism Fuller levels against Hoebel is that he fails to take account of the systematic quality of primitive law. Fuller states, "The law of the tribe or extended family is not simply a chart of do's and don'ts; it is a program for living together."[49] In a 1971 letter to Anthony D'Amato, Fuller offers an identical criticism against Hart:

> H. L. A Hart states that an important difference between enacted law (his kind of law) and customary law lies in the fact that the latter variety of law is 'unsystematic.' In my opinion he could not be wronger. . . . If we view customary law as a tacit program for living together it is inevitable that it will display an internal coherence, and that some of the most basic principles that shape it will not be perceived until a situation arises that throws them into relief.[50]

Customary law, on Fuller's view, has a systematic quality that it does not have for Hart. This systematic characteristic could not have as its origin a "systematizer." Therefore, for Fuller, the elements of customary law mutually adjust themselves to one another. On this analysis, customary law is a spontaneous order.

A final objection to Hoebel is more subtle, and it will be of some import in our conclusion as to

Fuller's distinction between customary law and other normative enterprises; therefore, I will quote it in full.

> Can it always be known in advance whether the infraction of some particular norm will be visited with forceful reprisal? The seriousness of the breach of any rule is always in some measure a function of context. One might be inclined to hazard a guess that few societies would regularly punish with violence infractions of the rules of etiquette. Suppose, however, that a peacemaking conference is held by delegations representing two tribes on the verge of war; a member of one delegation uses an insulting nickname in addressing his opposite number; the result is a bloody and disastrous war. It is likely that his fellow tribesman would be content to visit on the offender some moderate measure of social censure?[51]

Fuller also offers a more contemporary example. It is a legal principle that a person will suffer no liability for expressing a low opinion of another. But, Fuller asks, what if the individual is an attorney in a court of law, and the opinion is of the judge?

We have seen that in his essay "Human Interaction and the Law," Fuller raises the issue as to how to distinguish customary law from other social norms. Directly following the suggestion of the problem in that essay is his criticism of Hoebel. Presumably, if one were to continue reading that text, one would find Fuller giving an explicit solution to the problem. One would expect something like, "The way in which I demarcate customary law from such and such is in this way."

Unfortunately, no such explicit answer is given. Indeed, it even appears that prima facie the whole problem is dropped.

I believe that what Fuller has slyly, if misleadingly, done is to put forth his solution to the problem of demarcation in his last two objections to Hoebel. In making this case, we must recognize that Fuller had no truck for the exclusivity of distinctions. Throughout his whole intellectual life, he challenged the adequacy of the is-ought, the means-ends, the legal system-no legal system, the knowledge for its own sake-knowledge for the sake of something, and the contract-no contract distinctions, and various others. For Fuller, reality was much too complex to be chopped up so finely. Fuller tended to see continuums where others saw separation. And this was certainly the way in which he approached jurisprudential matters.

What I want to argue now, in turning to Fuller's criticisms of Hoebel, is that for Fuller, there is no criterion or criteria that provide necessary and sufficient conditions by which we can distinguish customary law from other customary modes of value, and this is the reason why no such criterion of demarcation appears in "Human Interaction and the Law," or anywhere else in Fuller for that matter.

Consider first the last objection to Hoebel that I presented. The point of the examples that Fuller puts forth appears to be that what is considered a rule of etiquette in one social context, is a rule of customary law in another. The same rule functions differently in various social situations. And as such, there is no way to draw a sharp line between customary law and other customary values.

Perhaps more important is the second objection above. Fuller claims, in contradistinction to both Hoebel and Hart, that customary law is systematic; it is a program for living together. One thing that this means for Fuller is that, "Some parts of the program may achieve articulation as distinct norms imposing specially defined sanctions. But the logic of customary law will continue to inhere in the system as a whole."[52] This being the case, we do not, according to Fuller, have distinct, insolable norms to which we can point and say, "This is a rule of etiquette," or "This is a rule of customary law."

Fuller describes customary law as "the inarticulate older brother of contract."[53] And clearly these two forms of social order are similar--both are, for example, interactional phenomena. The problem is not so much discovering similarities between contract and

customary law, but finding differences. Fuller takes up this issue and rejects many of the standard differentia that have been offered. An account of Fuller's analysis can, I believe, shed light on his view of customary law as a form of social ordering.

One way of making the distinction is to claim that contract creates order through words and customary law through action. For Fuller, this is a simplistic view of the matter. With an eye on our discussion in Chapter IV on purpose and statutory interpretation, words have to be interpreted. This does not involve looking up the pertinent terms in the dictionary. When the contract involves dealings that occur in a regular pattern, these standard practices tend to be read by the courts into the contract. Fuller writes, "Here, in effect, interactional expectancies in the world outside the contract are written into the contract in the process of interpretation."[54] Moreover, the meaning given to a contract may be determined by the actions of the parties of the contract, sometimes in opposition to the words of the contract. Deeds often do speak louder than words!

One might also attempt to draw the distinction between the two forms of social order by arguing that customary law "spreads" over a large, undefined area, whereas contract binds only the parties to it. For

Fuller, although this spread is common, it is not necessary. Fuller recognizes the existence of two party customary law, which although it does not involve the existence of a rule, a rule being general, is customary law nevertheless.[55] Moreover, Fuller writes, a contract tends to bind those who were not party to it.

> Only a tiny fraction of the "contracts" signed today are actually negotiated or represent anything like an explicit accommodation of the parties' respective interests. Even contracts drafted by lawyers, and in theory specially fitted to the parties' situation, are apt to be full of traditional or standard clauses borrowed from other contracts and from general practice. . . . But the realities of contracting practice are much farther removed from the picture of a "meeting of minds" than is suggested by a mere reference to standard clauses. In fact, the overwhelming majority of contracts are embodied in printed forms, prepared by one party to serve his interests and imposed on the other on a take-it-or-leave-it basis.[56]

One wonders if something has not gone amiss in Fuller's analysis. Has Fuller shown that a particular contract binds other parties to it? Of course, the answer depends on what is meant by "binds." If "binds" in this context refers to the future contracting of others being affected, then indeed a certain contract can bind others. But if "binds" refers to obligates, then Fuller has not demonstrated what he wanted to. For what if I do not contract with anyone; does the contract of another set of parties bind me? Moreover, to the extent that in my future dealings I might be "bound" by someone

else's contract, it would not be the material of the contract, but rather the form that would bind me. Contrast this with what is probably meant when people speak of customary law "spreading." The claim seems to be that people who were not privy to the origin of the customary law in question still are obligated by it the material or content of the law.

My last point raises the whole issue of how customary law spreads and what is meant by "spreading." It raises serious questions for Fuller's analysis about the nature of the interaction necessary to engender an obligation. How can Fuller's account provide an explanation for this "spreading" phenomenon? Fuller, himself, says very little about it, and I believe he recognized that more work needed to be done. Putting this brief digression aside, let us return to examine one other way that Fuller rejects for distinguishing contract from customary law.

A third proposal to be examined is this: perhaps the distinction can be shown to rest on the putative fact that "a contract comes into effect at once, when the parties stipulate it shall, while custom becomes law only through a usage observed to have persisted over a considerable period."[57] Fuller believes this proposal to be misbegotten. Customary law, he says, can develop with

extraordinary speed. Fuller quotes Judge Fitzmaurice, an expert in international law, to this effect:

> A new rule of customary international law based on the practice of States can emerge very quickly, and even almost suddenly, if new circumstances have arisen which imperatively call for regulation--though the time factor is never wholly irrelevant.[58]

The obverse of this point, for which Fuller also wants to argue, is that contract does not have to come into effect at once. Of course, the key to understanding Fuller's argument is grasping what he means by "coming into effect at once." And this is especially difficult since his meaning is far from transparent. We must first examine the connotation of a closely allied expression, namely, "coming into effect." I believe by this latter expression he is referring to the availability of remedy. By extension, I think that by "coming into effect at once" he is referring to the availability of remedy at the time promises are made or words are uttered.

In one respect Fuller has a difficulty in making his case here. For in the United States at present, the courts tend to enforce promise plus consideration. And here Fuller would admit that the contract does come into effect at once. But this is no great difficulty to Fuller's case because all he truly wants to show is that in some legal systems it is not unusual for a contract to

come into existence over a period of time. Fuller offers two cases, the first being that of the half-completed exchange. A delivers pastrami to B in expectation of exchange for bagels. B keeps the pastrami but does not deliver the bagels. In this situation, Fuller states, "the obligation enforced rests not on mere words, but primarily on the action (and inaction) that followed the words."[59]

The second case is that of the executory bilateral contract. A and B agree to an exchange, and when A shows up with the pastrami, B refuses it. A in this instance could have exchanged the pastrami with C or D, but did not because he had promised it to B. Clearly A has relied to his detriment on the actions of B. Fuller writes,

> Here once again the agreement becomes enforceable because its words have been underscored, as it were, by reliance on them--in this case, by an inferred neglect of other opportunities once the contract in question had been concluded.[60]

We have examined three ways by which we may distinguish customary law from contract, and we have seen that Fuller has rejected each of these ways. How is the distinction, then, to be drawn? The closest Fuller comes to an explicit answer is in The Anatomy of Law, but before turning there, a brief methodological note is in order.

The comparison of "Human Interaction and the Law," and The Anatomy of Law is complicated by the fact that in the latter Fuller is contrasting customary law with what he calls explicit contract. I shall assume for the moment that he is referring in the latter case simply to contract. This is for "strategic" purposes; I shall, in due course, return to examine the significance of the adjective.

In The Anatomy of Law, Fuller says the following about the distinction between customary and contact law.

> The first and most obvious observation is that the law of a contract normally differs from customary law by being more explicit: its terms are not left to inference, but are "spelled out" and put into words. This quality of explicitness extends not simply to the law created by the contract, but to other dimensions as well. With respect to the time when it goes into operation, the law of a contract normally presents no ambiguity. It will ordinarily be understood by the parties that it goes into effect at once, or if there is some postponement, a definite date, including perhaps even the hour of the day, will be stipulated as the time of its effectiveness. A custom, on the hand, commonly glides into being imperceptibly, as the interactions of the parties come increasingly to express a fixed pattern of reciprocal expectations. As with its birth, so it is with the extinction of a custom: characteristically it does not die suddenly, but gradually fades out of existence. A contract, in contrast, will normally stipulate a definite expiration date. Again, as with the element of time, so it is with the parties affected. A contract normally states clearly who are parties to it and therefore subject to its law. A custom, on the other hand, may or may not spread to persons who had no part in its original creation; often it is difficult to know when this extension by contagion has occurred, and if so, how wide it has become.[61]

This is, no doubt, rather astonishing. For here in The Anatomy of Law Fuller has drawn a line between two forms of social order in just the ways he denied it could be drawn in "Human Interaction and the Law." In trying to explain the difficulty, one might turn to the publication dates of each of the works, perhaps in the expectation that they were written at very different periods in time. One's hopes would be dashed very quickly, however, since the two pieces were published within one year of each other. I do think that all is not lost, and that when examined closely the two do not contradict one another.

I think the proper interpretation of the texts in question requires that one see their roles differently; that is, although Fuller is covering the same material in "Human Interaction and the Law," and The Anatomy of Law, he was after different things.

In the former work, he was examining whether a "clear line" could be drawn between customary law and contract. I think what this means, or at least close to what it means, is that he was investigating whether any necessary and sufficient conditions could be proffered by which the distinction could be sharply drawn. It was this possibility that he was rejecting. His rejection was ultimately based on what he took to be the fact that

the two forms of social order sometimes run so close together that a clear line cannot be drawn between them. In the former work, he leaned toward saying that the ways offered to draw the line were "too simple." In other words, the phenomena were too complex and closely allied to allow for necessary and sufficient conditions to be justifiably offered.

In The Anatomy of Law, on the other hand, he writes of what is normally and commonly the case, not what is always the case. He does not deny here that customary law and contract can shade into one another, but we do have for most purposes clear-cut cases of each. I think it is for this reason that in this work he speaks of "explicit contract." For it is to cases of this sort that we can go to draw the distinction best.

Having seen how we can generally distinguish between customary and contract law, I want now to turn to the manner of participation of the affected parties under customary law. Note that in this form of social order there is no process director, only affected parties.

The manner of participation of the affected parties in this form of social order is an "open-ended kind of bargaining."[62] For Fuller, the great advantage of customary law "is that in its inception it permits the parties subject to it 'to try it on for fit.'"[63] This

trying on for fit can involve both tacit and explicit elements. In one sense the bargaining is very much like that of contract, except that the latter is more explicit and usually leads to a more hard and fast relationship.

Given this form of participation, we can now look at the area of competence for customary law. It is here that it is so very different from contract. In a very illuminating passage that lays out the area of competence of customary law, and contracts it with the law of the contract, Fuller writes,

> Where the desirable future pattern of relations between the parties cannot confidently be foreseen--or "foresensed"--the wholly explicit contract, attempting to cover all contingencies in advance, may become an inept instrument for ordering human affairs. Such situations call for the "open-ended kind of bargaining" that characterizes the inception of customary law.[64]

Unlike contract, customary law is adroit at ordering relationships among intimates and those who are hostile to one another.[65] The law of contract requires that people "not [be] too near and not too distant";[66] they must, as we saw, be friendly strangers. Customary law does not suffer from this "incompetence." In the case of intimate relationships, the affairs of the parties can be ordered by a kind of tacit reciprocity that falls under customary law. Friends, relatives, and intimates in general engage in a tacit sort of bargaining where each profits from the other. But, in

contradistinction to contract, there are no hard boundaries. As for relations among enemies, perhaps the fact that international law is essentially customary law, speaks enough for the adroitness of this form of social order in this context. Fuller glosses on this when he writes

> Certainly no laboured argument is required to demonstrate that parties openly hostile to one another will find it difficult to subject their relations to control by explicit agreement. But here again man is not without an expedient. Where bargaining with words is impossible, it is often feasible to half-bargain with deeds and forebearance. Out of the imperfect communication thus achieved there may gradually arise a functioning system of customary law. As we have previously observed, it is precisely in curbing destructive hostilities that a customary law has historically performed its most important function.[67]

For Fuller, then, customary law is an apt mechanism for social order across the whole social spectrum. It does not, however, operate in the same manner in various social milieus. In intimate relationships customary law has more to do with the prescription of roles than with acts. Husbands and wives, for example, because of the establishment of stable interactional expectancies, assume different roles. In one family that I know, for example, the husband assumes the role of housekeeper and childraiser, while the wife earns the money. They have certain obligations because of these roles. Although in this

illustration it was through explicit communication that the roles were divided up, we can clearly see that something very similar to it could have taken place through tacit means. In either case, for Fuller, customary law is the ordering process.

In hostile relationships on the other hand, roles have almost no place within the purview of customary law. Fuller writes, "Here the prime desideratum is to achieve--through acts, of course, not words--the clear communication of messages of a rather limited and negative import; accordingly there is heavy concentration on symbolism and ritual."[68]

Before leaving the subject of customary law, we should be certain to recognize that, for Fuller, as for any careful theoretician, this form of law is not the same phenomenon as the common law. This is important to emphasize because some scholars ignore the distinction.[69] For Fuller, common law refers to adjudicative law, that is, "law incorporated in and derived from judicial decisions,"[70] while customary law is sans adjudicative agent.[71]

At the beginning of this section, I wrote of Fuller's antipathy to Hart's position on customary "law." We have seen some reasons for this so far. First of all, for Fuller, customary "law" is law; secondly, whatever it

is, it is far more systematic, writes Fuller, than Hart realizes. I also said that Fuller's position is that customary law is necessary to the understanding of enacted law, or as Fuller put it, "Law in Hart's sense." I shall discuss this point in the section to which I now turn, "Legislation."

Legislation

In the previous sections of this chapter, we have discussed the internal morality of legislation, the manner in which the affected parties participate in legislation, and the way in which legislation orders and facilitates human interaction. Let me summarize what we said for the sake of systematicity. (1) The internal morality of the legislator consists of the eight principles that Rex failed to follow: making general rules, making clear rules, and so forth. (2) The affected parties participate in legislation by following the rules of law. (3) Legislation orders human interaction by providing baselines against which individuals can pursue their own ends.

In this section, I will focus on three subjects: the areas of human life where legislation is "at home," the problems that are fit for legislative action, and the sense in which customary law is necessary to the understanding of enacted law.

Legislation is a competent ordering mechanism, according to Fuller, in the same social milieu as contract, namely, ordering the relations of friendly strangers. And like contract, it is inept with regard to the relations of intimates and adversaries. It is maladroit in the latter case because there must be some willingness to obey the rules if they are at all going to be successful, and this is unlikely in the case of adversaries. Perhaps the best way to see this point is to look at international law, a law, at least in part, of adversaries. It is no coincidence, Fuller would argue, that this law is of the customary variety. For legislation to succeed, people must have a willingness to abide by shared rules, which is usually lacking in hostile relationships. Legislation fails when applied to intimates, also. One cannot order the detailed specific relations of close-knit individuals by means of rules issued by others. Although some have projected contract as an apt means for ordering familial relations, no one to the best of my knowledge has projected legislation as an ordering device for these relations.[72]

Legislation is, according to Fuller, best suited to address problems having to do with the demarcation of rights and duties. This is an implication of Fuller's position that legislation orders human affairs by

providing baselines to serves as a framework for human conduct. These baselines, after all, are specifications of the rights and duties that a person has by law. In this respect, legislation is similar to adjudication.

Legislation is apt for friendly strangers, Fuller says, for here we have individuals who "stand open in the sense of not being prestructured by bonds of kinship or the repulsions of a shared kinship."[73]

Legislation is ill-suited, on Fuller's account, with regard to tasks that require constant shifting of energies and resources. In providing impersonal, general rules of conduct, legislation cannot provide a mechanism for making decisions as to when to buy or sell, relocate or rebuild, et cetera. Legislation fails, then, when managerial direction can succeed.

I now turn to Fuller's position that an understanding of customary law is necessary to the understanding of enacted law.

For Fuller, enacted law is as much an interactional phenomenon as customary law. Fuller often made this point by claiming that law is not a one-way projection of authority. Indeed, on Fuller's analysis, law is fundamentally misconceived if seen as an exercise of authority. For Fuller, enacted law "depends upon the discharge of interlocking responsibilities."[74] Fuller

writes that it is taken for granted that the citizen has certain moral obligations,[75] however, "I cannot talk about the citizen's duty to obey the law until I know what his opposite number in the process is doing. . . ."[76]

What are the stable interactional expectancies that obtain between lawgiver and citizen? Fuller writes,

> On the one hand, the lawgiver must be able to anticipate that the citizenry as a whole will accept as law and generally observe the body of rules he has promulgated. On the other hand, the legal subject must be able to anticipate that government will itself abide by its own declared rules when it comes to judge his actions, as in deciding, for example, whether he has committed a crime or claims property under a valid deed. A gross failure in the realization of either of these anticipations--of government toward citizen and of citizen toward government--can have the result that the most carefully drafted code will fail to become a functioning system of law.[77]

These stable interactional expectancies involve the internal morality of law.

How does this help us to grasp Fuller's claim that an understanding of customary law is necessary for that of enacted law? Fuller's point is this: unless we comprehend the manner in which obligations can arise noncontractually, and through what he calls stable interactional expectancies, that is, unless we understand customary law, then we cannot understand what a legal

system is. A legal system depends for its very existence on the internal morality of law.

CHAPTER VI

THE LAWYER AND SOCIAL ORDER

Having completed our look at Fuller's six major legal processes, we are now in a position to take up a question raised earlier pertaining to Fuller's use of "law" in the broad sense.

Fuller was not very much interested in what he called the "endless debates about definitions"[1] of law; rather his concern was with "an analysis of the social processes that constitute the reality of law."[2] He focused on law, "not in terms of definitions and authoritative sources, but in terms of problems and functions."[3] If one were disposed to see law as a social phenomenon that was processual, then it is likely one would countenance legislation and adjudication as being processes that, in part, constitute the law. But, we asked earlier, what of mediation, contract (in Fuller's sense of the term), managerial direction, and even voting? What rationale does, and can, Fuller have for counting these as <u>legal</u> processes? Although Fuller does not address this question explicitly, there is, I

believe, one important ground in his writings for the position that there is some propriety in calling them legal processes.

The rationale for Fuller's position lies in his conception of the lawyer. In opposition to some of the American legal realists, such as Oliver Wendall Holmes Jr.[4] and John Chipman Gray,[5] who believed that the distinguishing mark of the lawyer was "in his ability to predict where, and under what conditions, state power will strike,"[6] Fuller sees the lawyer as an "Architect of Social Structures." Fuller writes:

> By the necessities of his profession the lawyer is frequently called upon to become the architect of social structure. This is true not only where great affairs of state are involved and constitutions or international treaties are being brought into existence, but in the most commonplace arrangements, like working out a contract for a two years' supply of paper towels for the rest rooms of a chain of service stations.[7]

The lawyer drafts contracts, charters for corporations, legislation, administrative regulations, the bylaws of labor unions, consent decrees, wills, constitutions, treaties, et cetera. He is a negotiator of contracts, he enacts legislation, he acts as an adjudicator, he oversees election procedures, and so forth. This conception of the lawyer, in contradistinction to that of the Realists,[8] perceives the lawyer as a creator and guardian of social structure rather than as a mere litigator.

In his essay, "The Needs of American Legal Philosophy," Fuller gives us further insight into his view of the role of the lawyer.

> [The lawyer's] chief job is to devise a framework of dealings that will function between the parties, that will produce the results desired, and that will not give rise to disputes. A former colleague of mine has expressed this function of the lawyer by saying he is an expert in structure. He is a man who is called in to design a formal structure into which the parties' respective interests can be accommodated fairly, comfortably, and safely. . . . The lawyer's function as an expert in structure is most clearly seen in those frequent cases where he is called upon to draft an agreement known to be legally unenforceable, as for example . . . where the intervention of state power is expressly excluded in favor of a settlement of disputes by arbitration. In . . . [this] case the lawyer's responsibility includes working out a kind of private system of adjudication, so that his task is like that of the draftsman of those articles of a constitution that define the judicial power of the state.[9]

Fuller's position is eminently clear. Notice, particularly, that Fuller is claiming that the lawyer should not be viewed as an agent of state power, and his work cannot be identified with it.

This point is crucial, for if one is disposed to view the lawyer as the Realists do, as, in a very real sense, a functionary of the state, then one must draw a strict line between the processes of "adjudication by a judge, clothed with governmental authority, and adjudication by an arbitrator appointed by the parties."[10] Under Fuller's view of the lawyer, this is a

"false line,"[11] for both activities are instantiations of the same activity. The lawyer is, for Fuller, in a very important sense, neutral as regards the activities of the state.

Briefly, Fuller conceived of the lawyer in this way: the lawyer has an institutional role to play in all of the forms of social order, be it as legislator, mediator, adjudicator, or some type of managerial director.

With this analysis of the lawyer, we can make sense of Fuller's claim that it is sensible and insightful to speak of law as being constituted by certain social processes. If one sees law as essentially processual, then one is led to an examination of the agents of law. And for Fuller, "the man of law" is the lawyer. Thus, if you want to find out what law is, and this involves looking at the actual processes of law, the way in which you discover what these processes are, is to discover the processes in which those agents of the law qua agents of the law partake. Lawyers qua lawyers engage in those social processes that Fuller calls the forms of social order. Therefore, these social processes are legal processes. There is the old doctrine that if one wants to find out what science is, one should look at the activities of scientists. It appears to me that

Fuller is presenting a similar analysis applied to the law.

Before leaving this subject, I want to examine an early example of what might be called Fuller's instrumentalism, Fuller's 1939 review of Samuel Williston's famous work A Treatise on the Law of Contracts.

At the time of this review, Fuller was in the midst of what might be called his "contract law period." His justly famous essay "The Reliance Interest in Contract Damages" was published in 1936, and "Consideration and Form" would come out in 1941. During this period, Fuller was also working with Arthur Corbin on a projected new edition of the latter's contract case book.[12] Furthermore, Fuller's notes and letters show that his mind was taken up with the will theory of contracts, intent and contract, and other contractual matters.

In the review, Fuller criticizes Williston for, among other things, failing to recognize what he (Fuller) spent over 100 pages writing about in his "Reliance Interest" essay, namely, the extent to which judges actually consider the extent of reliance in the determination of contract damages. Fuller writes, "All such cases are, from the standpoint of Professor Williston's system, 'freaks', since in his view, the

reimbursement of reliance cannot be a legitimate interest of contract law."[13] Fuller then goes on to say, "This failure to take account of decisions which do not fit into its systematics constitutes, in my opinion, the most serious defect in Professor Williston's treatise from the standpoint of the practicing attorney."[14]

What we find, then, in Fuller, as early as 1939, is the position that we should look at the actual processes by which the law operates.

CHAPTER VII

THE ENDS OF SOCIAL ORDER

Introduction

Although Fuller's eunomical project centers upon the question of social means, it was, insofar as it was concerned with good order, drawn to the issue of the ends of social order.

In an outline for the projected book on social order, Fuller distinguished between two categories of ends of social order, namely, the material and the formal. Nowhere, to the best of my knowledge, in either his public or private papers, did he clarify the nature of the distinction. Nevertheless, he did list what he took to be the most important material and formal ends. For the material, he mentioned social efficacy, human satisfaction (happiness), and human development; for the formal, he listed freedom, and equality.[1]

Of these ends, the only one that he developed in any sort of theoretical detail was freedom. Indeed, all of Fuller's writings about the so-called material ends, were set in the context of an analysis of freedom. Since of all of the ends of social order, freedom occupied

center stage in Fuller's mind, most of this chapter will examine his theory of freedom. This analysis will include a discussion of the relationship of the three material ends to freedom.

The Theory of Freedom

Fuller spent more time reflecting on the nature of social freedom than his published output of two articles, a book review, and a few scattered pages would indicate.[2] There are close to 140 pages of unpublished material on freedom, the bulk of it from two sources. First, in the early 1960's, Fuller planned a book on freedom. Although he never completed it, he did write two drafts, with some important differences in content, of what would have been the first forty pages of it. Second, in 1958, Fuller gave the Edward Douglas White Lectures at Louisiana State University on the subject of freedom. The first lecture is written out almost verbatim, just short of fifty pages, double-spaced on legal size paper; the second is twenty-four pages typed, the bulk of which was delivered as written; for the third, the final, lecture, Fuller only prepared ten pages of notes.[3]

To understand what Fuller will ultimately say about the nature of freedom, we must begin by specifying the particular problem of freedom to which Fuller

directed his attention: the problem of freedom as a problem of social policy. Fuller says,

> When we discuss freedom as a problem of law, or politics, or economics, or ethics, we are really addressing ourselves to the question: How can the freedom of human beings be affected or advanced by social arrangements? . . .4

Occasionally Fuller will write of these questions of social policy as being ones that "must be asked by anyone concerned with legislation."[5] Here Fuller is using "legislation" in a very extended sense. He writes, "I use that term in a very broad sense to include not only the enactments of government but the hundred and one kinds of formal and informal rule making in which we all participate. . . ."[6] This rule making, or as Fuller more often likes to put it, decision making, need not be of the explicit variety. Such things as tacit agreement, or the interaction of individuals is that leads to a customary manner of acting also fall under the rubric of "legislation" as Fuller uses that term in this context. Moreover, "legislative action," in the broad sense, also encompasses thee choice not to alter these decision-making processes.

The solution to the problem of social policy or legislation involves asking such questions as,

> What is it I seek when I want liberty, not merely for myself, but for myself and my fellows standing in some ordered relation? If it is true that there are "wise restraints that make men free," how do we recognize such

> restraints and distinguish them from those that merely restrain?[7]

In pursuit of this problem Fuller is not interested in what he sometimes calls "'freedom' as a counter in a game of logic."[8] Rather, Fuller is concerned with "the ideal"[9] that the word "freedom" represents. He sums up these last two points on freedom and social policy, and freedom as an ideal in this passage.

> We want to know what [the] ideal [of freedom] demands of us when we are called upon to act formatively toward society, when we have the responsibility for establishing, changing, or taking steps to preserve particular forms of social order. . . .[10]

It was typical of Fuller's approach to jurisprudential matters, to lay out two positions that were commonly held, and then to steer a middle course between them, trying to demonstrate along the way that the two initial positions constituted a false alternative This is true of his theorizing about the problems of freedom.

The two positions that Fuller took to be false alternatives were freedom as the absence of constraint (negative freedom) and freedom as power (affirmative freedom). The first view he associated with Mill, Hayek, and F. H. Knight, and the latter position with John Dewey. Before considering Fuller's criticisms of these two doctrines, and why he believed them to be false

alternatives, we turn first to his characterization of each view.

According to Fuller, the ideal condition of freedom on the theory of negative freedom "would be one in which, unhampered by social arrangements of any kind, the individual would, in effect, choose everything for himself--his satisfactions, his mode of life, his relations with others."[11] According to this view, Fuller's states, all kinds of constraint, including the constraints inherent in the forms of social order, are antithetical to freedom.

Serious students of the literature must see that Fuller's characterization of the above theory is flawed. When people such as Mill, Hayek, and Isaiah Berlin defend the propriety of seeing the ideal of freedom as the absence of constraint, they do not mean just any kind of constraint Instead, they mean human constraint, as in the initiation of physical force by one individual against another. Nevertheless, even though Fuller's statement of case is mistaken, we must still keep <u>that</u> statement in mind if we are going to understand his criticism.

For Fuller, the theory of freedom as power is the doctrine for which the power of opportunity to choose among alternatives is paramount. Fuller writes,

> For this school of thought, there is almost an indecency in asserting that a man is free to follow a course of action simply because nothing prevents him from doing so except his own lack of the capacity or means necessary to enable him to do it. If Anatole France had employed his irony to support this view he might have written, "Freedom in her majestic equality permits both the rich and the poor to go to the opera and to give dinner parties at the Tour d'Argent.[12]

Although Fuller believes the distinction between negative and positive freedom to be "analytically untenable,"[13] a point we shall take up shortly, he claims that even if we assume the distinction to be a plausible one, there are telling criticisms that can be made against the two positions; and it is to these criticisms to which I now turn.

A guiding force behind one criticism that Fuller levies against both theories of freedom is his view that the problem of freedom is one of social or legislative policy. We must ask of any theory of freedom whether it "would be useful legislatively, that is, whether it would help us to perceive more clearly what it is we seek when we endeavor to protect, promote or extend freedom."[14] Implied in this quotation is Fuller's view that social policy should "endeavor to protect, promote and extend freedom." This is something for which Fuller does not argue.

Fuller finds that both the theories of negative and affirmative freedom fail this test and cannot provide

guidelines for social policy. If it is true that the essential meaning of freedom is power, then "[it] is true [that] there is hardly any conceivable object of legislative policy that cannot be viewed as a contribution to freedom."[15] Building a hospital can be seen as advancing the causes of freedom, because by promoting health, it can help people who are ill obtain the same powers or capacities as those who are well. By the same token, Fuller writes, requiring that every citizen pass a test in higher mathematics, or in the strategy of poker, would also advance the cause of freedom. Practically any object of social policy, then, can be perceived as resulting in an increase in power. Fuller concludes this criticism of affirmative power by stating that,

> If freedom signifies power then it loses all meaning as a distinct objective of legislative action--merging indistinguishably with welfare, efficiency, wisdom and opulence. One American philosopher--squarely in the tradition of American pragmatism--Ralph Baron Perry--asserts that it is impossible to distinguish freedom from welfare, and seems undisturbed by the fact that this consequences follows from the identification of freedom with power or capacity. . . . Most of us [are] not so happy.[16]

The theory of negative freedom also fails this "legislative test." Fuller writes,

> Here the most obvious way of striking at our opponent is the familiar and trite one of observing that if we leave a man completely alone he will starve to death. In order to be able to enjoy a situation of non-constraint,

> a man requires the contributions of a functioning society. Those contributions are impossible without organization, and organization in turn requires constraint. Freedom then is a mere gap in this general system of constraint, not a distinct object of policy.[12]

Fuller offers two other criticisms of the theory of negative freedom. Both of these criticisms depend for whatever cogency they might have on Fuller's reading of "the absence of constraint" as meaning the absence of any human or social constraint.

First, Fuller argues that this theory is committed to the view that unlimited choice is the ideal condition of freedom. If any constraint is anathema to freedom, then the ideal is the elimination of all constraints upon one's choices: hence, unlimited choice. Fuller finds this analysis to be defective because, "If the individual had in fact to choose everything for himself, the burden of choice would become so overwhelming that the choice itself would lose its meaning."[18] One would be strangled by choice, and the ideal of freedom, according to Fuller, could not possibly involve such a consequence: "By imposing on the individual an impossibly exigent burden of choice," the theory of negative freedom "deprives him of any <u>real</u> freedom to choose. . . ."[19] For Fuller, the ideal of freedom requires the existence of certain institutional

restraints which eliminate the need for certain choices. He writes,

> The complex network of institutional ways by which the bulk of our energies are directed and channeled is not an unfortunate limitation on freedom. It is essential to freedom itself. It preserves us from the suffocating vacuum of free choice into which we would be precipitated if we had to choose everything for ourselves.[20]

Fuller's second criticism is a ground for the first. Whereas Fuller first criticized the theory of negative freedom for upholding the ideal of unlimited choice, in his second criticism he takes it to task for maintaining that formal social arrangements are inimical to freedom. Fuller believed formal social arrangements, or the forms of social order, are essential for freedom because although freedom involves choice, this choice must be a meaningful one. They are also essential to freedom because the ideal of freedom, for Fuller, demands that in addition to choice being meaningful, it must also be effective. Let me explain this last point at greater length.

The more important choices that an individual makes in his life require, if they are going to be efficacious choices, the collaboration of others. This, of course, necessitates that our choices be given some social effect. They must be brought into "contact" with the actions of others. The way in which they are given

social effect is through some form of social order. However, these forms of social order have restraints that are intrinsic to them: they only allow certain forms of choice and not others. Therefore, effective human choice, an element of the ideal of freedom, requires for its effectuation certain restraints. Two examples that Fuller gives can, I think, help illuminate his position here.

The first example is that of an election.

> If men are to be given some share in choosing their lawmakers, a machinery of election is required. This machinery will in turn carry with it its own compulsions, for instance, against voting. Not only that, but the forms through which choice is channeled by an election law will of necessity exclude other forms of choice. Thus, if the election is to be by the system known as proportional representation (PR), the electorate must necessarily forego the form of choice involved in election by simple majority.[21]

The limitations of the PR election form allow the choices of the voters to be "effective." If the voters, individually, could have a choice as to whether each will vote by the majority rule system or the PR system or both or some other form, his choice, according to Fuller, could not be made effective.

The second example involves

> the most elementary form of social order by which individual choice can receive social effect--the simple agreement of two parties. This form of order . . . carries both a facilitation and a restriction of choice with it. Through an

> agreement the individual makes his own choice effective, but he does it at the cost of binding himself to the other party. Here, reduced to its simplest terms, is a characteristic of all forms of order by which individual choice is given social effect.[22]

In this example, as in the previous one, a person is granted effective choice only through, if you will, the "pipeline" of a form of social order, only by accepting certain limitations upon his actions.

Fuller not only claims that the theories of freedom as power and freedom as the absence of constraint are specious, for the reasons already given, but also that the distinction between them is "analytically unsound,"[23] that is, that we are examining a false antinomy, not a real one. We can see this, Fuller believes, when we cast our vision upon the problem of freedom men have debated about since time immemorial. This is the problem of freedom as it pertains to the forms of social order. The freedom men have argued about so ardently is, Fuller writes, "the kind . . . that men think may be promoted, or curtailed, by the ways in which men's relations be social, economic, political or legal."[24]

Given this perspective of the problem of freedom, freedom as the absence of constraint and freedom as power are not antithetical to one another, but are complementary to each other. For within any functioning

social order, or social process, we find both constraints and power. The absence of constraint that is involved pertains to the constraints that are imposed by people on other people. The power element consists of the power that is granted to do particular things by the forms of social order. For Fuller, then, the problem of social freedom around which "the ideal of freedom" revolves demands both the absence of constraint (of a specific type) and the instantiation of certain powers (engended by specific social mechanisms).

The complementariness of freedom as power and the absence of constraint does not lie simply in the fact that both are intrinsic to what Fuller sees as social freedom, however. They are complementary in the further sense that they stand in dynamic relation to one another. Fuller writes, "[T]he constraints and powers that make up a social order are in <u>interaction</u> with one another; each <u>serves</u> in part to determine the meaning and efficacy of the other."[25]

To illustrate Fuller's position here, I shall revert to the example about voting, more specifically voting in a United States presidential election. The right to vote that citizens of the United States enjoy is a power granted by a social process, and here, of course, we are speaking about freedom in the affirmative

sense. One's vote in such an election is a secret one, the secrecy being, according to Fuller, "a device for protecting the voter against constraints that might nullify his affirmative freedom to vote."[26] This secrecy thus conduces to freedom in the negative sense.

It is clear in this example, Fuller thinks, that each kind of freedom would be meaningless without the other. It would be pointless to protect the voter against the constraints of others if his vote was going to be tossed in the trashbin. On the other side of the ledger, it would be just as senseless to count the votes if the citizen's vote were a coerced one: we could simply ask the coercers whom they wanted.

Contract is another example. In discussing liberty of contract, Fuller asks whether that expression means (a) absence of restraints on contracting, or (b) a capacity to create legally binding contractual arrangements. His answer is, "It means in practice both, each kind of freedom here reinforces and complements the others."[27]

Within Fuller's critiques of these two analyses of freedom are the roots of Fuller's own account of freedom. This should come as no surprise to the reader, because, as stated, it was a practice of Fuller's to

dialectically put forth his own position as a result of criticizing those of others.

Before turning to a more systematic analysis of Fuller's position on the nature of social freedom, and then to a discussion of what he took the problem of freedom to be, a brief qualifying remark is in order. Fuller is sometimes lax in his terminological usage; there is perhaps no better example of this than in his theory of freedom. In writing on the essential characteristics of freedom, Fuller sometimes writes of "the definition of freedom," or "identifying something with freedom," or "if individual freedom is to be meaningful, then such and such conditions must be fulfilled," and in each and every case he is trying to identify the nature of freedom. There are more examples of this, but the one given will serve as a "Beware to Reader" sign.

For Fuller, freedom is not to be identified with power or the absence of constraint. Rather it is to be defined as "effective choice."[28] This notion of "effective choice" carries with it certain elements of the absence of constraint and social power. The first element here is more transparent than the second: freedom in some way involves the absence of constraint.

This obviously pertains to the aspect of choice in "effective choice."

The second element links up with the notion of "effectiveness." This necessitates "the presence of some appropriate form of order that will carry the effects of the individual decision over into the processes of society."[29] The forms of social order provide conduits for allowing choice to the effective choice.

There is a third element that is essential to Fuller's account of freedom, an element that is more opaque than the first two. I quote Fuller: "If individual freedom is to be meaningful, the decisions that are made for the individual must be congruent with and form a suitable framework for, his own decisions."[30] An individual cannot have "effective freedom" if every time he makes a decision, those decisions that are made by others for him impinge upon his own decisions. Fuller illustrates this in a manner that not only illuminates this point, but also several other issues we shall cover:

> A factory foreman may be given a wide discretion in handling discipline and promoting morale within his department. His superiors may interfere with that discretion infrequently and may be motivated by a genuine desire to leave his general freedom of action unimpaired. Yet his effective freedom may be destroyed in one stroke by a single inept order from the head office, projecting itself incongruously into a situation not understood by those who issued it. What may be called broadly "absentee" or uninformed direction from above can be just as great a

> destroyer of effective freedom as the imposition of explicit restraints.[31]

This quotation leads us to two other points of importance to Fuller's account of freedom. The first, about which I shall say very little, is that one's social freedom is not a matter of either/or; that is, there are degrees of freedom. An individual is not either free or not free. Rather one is free to more or less an extent. There is a greater degree of freedom of contract in Sweden than in the Soviet Union, but less than in the United States. And there is less freedom of contract in the 20th-century United States than there was in the 19th century. Although there is no explicit discussion of this point in Fuller's writings, it is implicit in much of what he say, and is in keeping with Fuller's general approach to jurisprudential matters. For example, we find Fuller arguing that it is false to say that either a legal system fully exists or that it exists not at all. For Fuller, the existence of a legal system is a matter of degree.[32]

Secondly, this passage shows that there are modes of freedom, for Fuller, and these modes correspond to the forms of social order. Freedom, then, is no one uniform thing.[33] This view rests on the rationale that it is the forms of social order that give shape to one's choices, that allow one's choices to be effective choices. The

forms of social order provide, for Fuller, multifarious areas of choice. Thus, one has various modes of choice, and, hence, different modes of freedom. Moreover, and this is of some moment, different forms of order provide for only certain kinds of freedom-each is limited as to how and where it can provide effective choice. We find Fuller writing that, for example, "majority vote is inherently incapable of providing the kind of freedom afforded by an economic market."[34] Majority voting cannot effectuate one's choice, as the marketplace can, in the production and purchasing of goods and services.

In grating men avenues of freedom, the forms of social order confer upon them participation in the forms of social order, that is, participation in various decision-making processes. I now want to consider in more detail how Fuller conceives of the problem of social freedom.

For Fuller, "The problem of freedom is the problem of allocating and implementing human choice."[35] Human beings cannot have any choice whatsoever within the confines of a particular form of social order; they cannot have, in other words, any form of participation. That choice must be limited if it is to be effective. And it is only by limiting some choices that others are

made possible. The channelling function of the forms of social order is, thus, also an exclusionary function.

The problem of freedom, them, for Fuller, "is not simply how much choice shall be afforded, but also how and on what terms it shall be granted."[36] Fuller gives two examples which clarify his position. The first concerns censorship and the holdings of a library. How are the holdings of a library to be determined? According to a great many "conservatives," the book collections of public libraries should be "cleansed" of immoral and subversive material, and the holdings should contain only "wholesome" material. The contemporary "liberal," on the other hand argues that the reader should be free to read whatever he wants. Both positions, Fuller argues, distort the reality of the situation. Fuller writes,

> An allocation of choice must, of necessity, be made to the reader, and that allocation must inevitably be a restricted one. The true question is: Who shall make the allocation and by what standards shall he be guided?[37]

An allocation of choice cannot be avoided: a public library cannot carry every book. Fuller believes that it would best to leave the decision in the hands of the librarian:

> There is much reason to believe that the allocation will, in the general run of cases, be more wisely made by librarians, guided by professional standards and animated by a sense of trusteeship, than if it

> were turned over to outsiders who sporadically intervene to advance special interests of their own.[38]

The other example of Fuller's that I want to mention deals with language. According to him, "usages of language grant and deny choice to us, particularly with reference to the forms of address we may use toward other persons."[39] When Fuller first joined the faculty at Harvard he had three options as to how he might address a colleague. He could use the formal "Mr. Cline," the familiar "Ed," or he could address him by a intermediate form and call him "Cline." Given the evolution of language, Fuller says, we no longer have the third option at our disposal. On the other hand, the Japanese have many more ways in which they may address other individuals; and unlike the case of addressing one's colleague, matters of rank and prestige are involved. An improper address can be a great insult.

Fuller's comment on this illustration, and it can be applied mutatis mutandis to the librarian case, is crucial to understanding his theory of freedom and its relationship to the forms of social order. He writes:

> The example of language can yield for us a deeper and more fundamental lesson. This is that its often inconvenient restraints are the price we pay for communication. To carry my thought into the mind of another, I must direct it along channels of speech familiar to both of us. If we shared no common linguistic map, charting and restricting the flow of thought between us, we would simply be

> unable to communicate. . . . In the usages of language, then, we have an example of the way choice may be allocated by social practices and institutions.[40]

To apply Fuller's analysis here to the problem of freedom, one can say something like this: The limitations inherent in the forms of social order are the price we pay for effective choice. To tie our actions to those of others, we need to direct them along certain channels, the forms of social order. And finally, the forms of social order allocate certain choices to us and not others.

Understanding what it might means to allocate and implement human choice by means of the forms of social order does not, of course, provide a solution for the problem of freedom. We still have not answered the questions of "how much choice," "how," and "on what terms." By what standards are we to judge how choice should be allocated within the framework of any particular form of social order? Unfortunately, Fuller never gives what could be considered to be a detailed, deep, theoretical answer to these questions. However, what he does say is of great importance.

On Fuller's view, the problem of freedom is capable of solution only given a certain theory of human nature. Let me first look at two theories of human

nature that Fuller rejects as being incompatible with social freedom.

The first theory maintains that "man's nature is wholly fixed and knowable," and for that reason we can assert categorically what he requires for his well being."[41] Given the fixity of human nature we can, on this view, determine exactly what an individual needs, and consequently there is no rationale for individual choice. This theory, according to Fuller, does not offer a solution to the problem of freedom. Under it, rather, freedom becomes meaningless. Certainly one upshot of Fuller's position in this context is that freedom is meaningful only if "we" do not know all of an individual's needs.

The second theory upholds the position that human nature is wholly plastic, that it is infinitely pliable. The problem of freedom does not admit of solution on this view either. Since, on this theory, human beings have an unlimited capacity, it is impossible to allocate choice as there is not an intelligible principle that could serve as a guide for such an allocation. Where should choice be granted, and where should it be restrained when human beings can become almost anything?

If freedom is to be meaningful and provide guidance for social policy, that is, if the problem of

freedom is to be soluble, then, Fuller writes, the following must be true about human beings:

> (1) Man's nature has [to have] some stability about it, some inner structure; (2) this structure must not be wholly determined, but must be capable of development in ways not now wholly predictable; (3) the lines of development must be clear enough to enable us to see where and how to facilitate them. We must be able to plan areas for unplanned creativity.[42]

For Fuller, the fact that there are variations within human development that are unpredictable in principle is what makes freedom desirable. This allows, of course, for the possibility of creativity, a value Fuller consistently emphasizes in his writings. And if it is the variation that makes freedom a desirable condition, it is the basic structure entailed by this conception of man that makes social freedom possible. There would be no guidelines for the allocation of choice unless human beings had this structure in common.

I have just said that, on Fuller's analysis, it is the variation in human development that makes freedom desirable. But I have not said <u>exactly</u> why this is the case. To do so, and hence to see more fully the relationship between the conception of man Fuller puts forth and the problem of freedom, it is necessary to examine the three material ends of social order and their relationship to freedom.

The Material Ends of Social Order

The three material ends of social order are social efficiency, human satisfaction, and human development. There is no detailed treatment of these phenomena to be found in Fuller's writings. So, for example, by social efficiency Fuller probably does not mean anything so elaborate as Pareto-optimality, but rather a common sense view of "doing the job well"; and by human satisfaction he means happiness or well-being.

Fuller conceives of social freedom as a necessary condition for the three material ends. It should come as no surprise that Fuller puts forth different arguments to try to substantiate this kind of connection for each of the ends in question. I will treat of each in turn beginning with the relationship between freedom and social efficiency.

On Fuller's view, social efficiency demands that the individual "doing the job" be given some discretion in his actions: the individual must be accorded some choice in the matter. A wooden literalness is antithetical to the demands of efficiency. As Fuller puts it in his much too neglected essay, "The Case of the Speluncean Explorers,"

> No superior wants a servant who lacks the capacity to read between the lines. The stupidest housemaid knows that when she is told "to peel the soup

> and skim the potatoes" her mistress does not mean what she says. She also knows that when her master tells her to "drop everything and come running" he has overlooked the possibility that she is at the moment in the act of rescuing the baby from the rain barrel.[43]

There are two considerations that underscore Fuller's claim that social efficiency requires the allocation of choice to the person "doing the job." The first is that, for Fuller, "the ultimate source of wealth is knowledge."[44] Moreover, on this same point, "the problem of social welfare [efficiency] is that of using knowledge effectively, wherever it may be."[45] The second pertains to "the limitations of human reason" and the "limitations on human powers of communication."

On the first consideration, the production of wealth, to say nothing of the efficient production of wealth, requires an extraordinary amount of knowledge, both theoretical and practical. There is the technical, theoretical knowledge as to how something can be produced, the practical knowledge as to the know-how in producing it, much of which is tacit knowledge and oftentimes incommunicable, and so forth. This knowledge exists in a dispersed form in the members of society, and the desideratum for any economic system is to somehow "bring" all (or a great deal) of this knowledge together. For Fuller, this can only be done if mean are granted a great deal of freedom in one the modes of social order

that fall under the principle of reciprocity. Let me quote Fuller at length on this point.

> Suppose you were starting an economy from scratch without predilections for any form: capitalist, socialist, regulated capitalism, or what not. You would recognize that in society there are scattered among people many wants--some felt, some latent--[and] many means of satisfying those wants, some developed, some only potentially existing. You would recognize also that knowledge of these actual or potential wants, and these actual and potential means of satisfying them, was scattered in an irregular pattern throughout society. You would want a system that would utilize this knowledge wherever it was. Furthermore, you would want a system that would allow this knowledge to be put to the test of practical application, wherever it was located. A free economy, functioning without central direction and on the principle of exchange, is the closest approach to this ideal that can be conceived.[46]

Social efficiency, then, requires an allocation of choice within certain forms of social order that is consonant with a free economy. Moreover, within the boundaries of reciprocity, only certain forms of order can achieve the result in question.

Our second consideration above provides the reason, on Fuller's analysis, as to why the allocation of choice is in the interest of social efficiency: there are limits to what any individual or group of individuals can consciously know and communicate. By granting an individual choice in the context of the production of goods and services, we are letting that person use the knowledge he has which, perhaps, his "manager' does not.

For Fuller, the more complex the organization, the more complex the society, the more urgent it is to "pool" our intellectual resources. Following the lengthy quotation cited above, Fuller concludes by remarking,

> If you accept this conclusion, you will agree, I think, that individualism is in a profound sense more truly social[47] in its implications than collectivism; it seeks to use all of society's knowledge; it does not suffer from the delusion that a small body of experts can combine that knowledge in their heads. As Hayek says, in this sense, individualism has more humility before the social process, than the collectivist demand for central control.[48]

The need for freedom for human satisfaction and development, the second and third material ends, can be covered more quickly. As to human satisfaction, it seems very clear, Fuller writes, that human beings cannot be happy unless they have some exercise of choice. And as to human development, freedom is of the moment if the individual is to develop himself.

Is it the case, we might ask at this juncture that the need for the allocation of choice to provide for one of the material ends is antithetical to such choice within the other ends? Although the demands of each of the material ends can conflict, Fuller thinks "the situation is [not] quite so desperate."[49] He argues, for example, that individual happiness conduces to social efficiency, and human development often induces happiness and efficaciousness.

What Fuller does not put forth is a set of rules of priority to adjudicate all disputes that might arise between the various modes of freedom. This last point deserves further mention. For a very long time those political philosophers who eschewed a narrow minded monism have had to come to grips with problems over the clash of political values, with liberty versus some form of equality perhaps constituting the standard battleground. Indeed, for some, such as Isaiah Berlin,[50] this is the focal point of their political theory. The question then becomes, as it does so very clearly for John Rawls,[51] whether a rule of priority can be formulated to weigh the competing values. What is extraordinary in Fuller's case is that, for him, the values in question are the various modes of one value, namely, freedom.

All of this, however, not only does not solve the problem of allocating and implementing human choice, but it exacerbates it. There are, though, two things that Fuller does say, that I have touched on only tangentially, that are noteworthy in trying to grasp his position.

First, the allocation of choice should serve as best it can the putative fact of human creativity and purposiveness; the allocation should facilitate the

creative powers of human beings. There cannot, on Fuller's account, be any quantitative measure of this, however.

Second, the forms of social order intrinsically limit how choice can be allocated. I hope one example will be sufficient in this context. One choice that cannot be countenanced in allocating choice within the framework of contract is fraud. The allowance of that choice would undermine contract as a form of order.

By using such expressions as "allocating choice," I have, been speaking loosely about the actual processes of allocation. It is now necessary to begin to be more precise as to the mechanism of the allocation of choice, as Fuller sees the matter. In this context I shall briefly examine a very small fragment of this mechanism, namely, the role of the process director in the allocation of human choice. I will focus on what Fuller calls a sense of trusteeship.

Recall the problem as to who should be the decision maker for the purchase of books for public libraries. We saw that Fuller threw his cards in the direction of librarian. His reason is worth requoting:

> There is much reason to believe that the allocation will, in the general run of cases, be more wisely made by librarians, guided by professional standards and animated by a sense of trusteeship, than if it were turned over to outsiders who

> sporadically intervene to advance special interests of their own.[52]

The librarian, for Fuller, is a trustee of a particular institution. As such, he has an institutional role to fill. With this role goes a responsibility to maintain the integrity of the institution. In Fuller's eyes, moral demands are placed upon the librarian. At the risk of digressing slightly, we can say that in Fuller's terms there is an internal morality of librarianship. In determining how the scarce resources are to be used, the librarian must act with a sense of responsibility to the institution that he serves, however we might describe that institution.

Fuller wants to apply this analysis mutatis mutandis to the process directors of the forms of social order: the legislator, the adjudicator, the mediator, et cetera. These institutional roles carry with them certain moral demands because of the nature of the job. As with the librarian, so too here, the legislator, the judge, and so forth, must act with a sense of responsibility to the institution that each serves. This involves taking into account the purpose of the institution, or form of social order, in question.

As we saw in Chapter IV, Fuller tells us that the purpose of the forms of social order is the ordering and facilitating of human interaction. However, the

satisfaction of this purpose is only instrumentally valuable. On Fuller's account, this has value because it is generative of the formal and material ends of social order. This is why on one occasion Fuller writes of the "forms of social order . . . hav[ing] their raison d'etre in facilitating or giving expression to human choice,"[53] that is, freedom. In carrying out their institutional responsibilities, then, the process directors must keep these ends in mind.

There is something else that we can say in this regard. When the formal and material ends have been given expression, what has also been given expression is human creativity. Fuller places great stock in this notion of "human creativity." In his essay, "Freedom--A Suggested Analysis," Fuller writes of that "one general social objective without which all others lose their meaning"; and that objective is "keeping alive the creative, choosing and purposive side of man's nature."[54]

In satisfying the responsibility of trusteeship, then, the process directors must allocate effective choice in such a way as to engender, provide for, or maintain social efficiency, human satisfaction, human development, and, in general, human creativity.

Fuller does not give us any detailed recipes as to exactly in what human creativity and the material ends

of social order consist. Indeed, I do not believe he ever worked this out in his own mind. Irrespective of how much detail Fuller might have given us on these points, I suspect he would argue that the exercise of the institutional roles involved in the forms of social order is a matter of art, of judgment, and not of science.[55]

PART II

CHAPTER VIII

HAYEK ON KNOWLEDGE AND RULES

Biographical Introduction

Because Hayek may not be known to my readers, I shall begin with a short biographical account.

Friedrich August von Hayek was born May 8, 1899. His father was a physician and a botanist. He received degrees in law and political science from the University of Vienna in 1921 and 1923. While there he studied economics under Friedrich von Wieser, an early member of the Austrian School of Economics. During this period of time, Hayek was attracted by Fabian Socialism.

From 1921 through 1923, Hayek worked in a post-war government office, one of the directors of which was the economist Ludwig von Mises; in 1927 the two of them founded the Austrian Institute for Business Cycle Research, where Hayek worked until 1931. Mises, Hayek's senior by 18 years, had a profound effect on Hayek intellectually, especially in converting Hayek away from socialism and to classical liberalism. In his work, Socialism (1922),[1] Mises argued that rational economic calculation under socialism was impossible: without a

market for producers goods, there could be no prices for them, and hence no efficient use of resources. This argument began to sway Hayek.

In 1931, Hayek took a Professorship at the London School of Economics where he stayed until 1949. With a few exceptions, most of Hayek's writings during the 1920's and 1930's were concerned with pure economic theory, especially, monetary theory, the theory of the trade cycle, the theory of capital, and problems involved with central planning. He published five books and some fifty essays during this period. It was for "his theory of business cycles and his conception of the effects of monetary and credit policies,"[2] that Hayek was awarded the Nobel Prize in Economic Science in 1974.

In the middle part of the 1930's, Hayek began to get interested in certain epistemological problems which were of special concern to the economist. As he put it in his first important essay in this area, "Economics and Knowledge,"

> The really central problem of economics . . . is how the spontaneous interaction of a number of people, each possessing only bits of knowledge, brings about a state of affairs . . . which could be brought about by deliberate direction only by somebody who possessed the combined knowledge of all these individuals.[3]

Hayek claims it was this article that "led [him] from technical economics into all kinds of questions usually regarded as philosophical."[4]

During the early 1940's, he began to move further away from pure economic theory with the publication of several articles dealing with methodological problems in the social sciences. These essays would later be published in book form in 1952 as The Counter-Revolution of Science.[5]

In 1944, building on the work of his 1938 public policy pamphlet, "Freedom and the Economic System,"[6] Hayek published his first major work in legal and political philosophy, The Road to Serfdom.[7] The general theme of this work was that a central planning of a nation's "economy"[8] would eventually lead to totalitarianism.

During his student days in Vienna, Hayek was torn between becoming a theoretical psychologist or an economist. He chose the latter, however, he did not give up his interest in the former. In 1952, working from an outline written as a student, Hayek published The Sensory Order[9]--a work defending a distinctively Kantian view of sense-perception,and emphasizing, as Hayek puts it in another essay, "the primacy of the abstract."[10]

Hayek left the London School of Economics in 1949 and spent one term teaching at the University of Arkansas; shortly after that he moved on to the University of Chicago where he taught until 1962.

In 1960 Hayek published what is still his most comprehensive work in legal and political philosophy, The Constitution of Liberty.[11] This over-500-page work had as its goal the effective restatement of "that ideal of freedom which inspired western civilization."[12] Among other things this book contains Hayek's most thorough analysis of liberty and coercion, a theory of progress, a critique of distributive justice, an analysis of the rule of law, and his answers to public policy questions on labor unions, unemployment, taxation, and education.

After leaving the University of Chicago in 1962, Hayek took a Professorship in Political Economy at the University of Freiburg where he stayed until 1969. From 1969 to 1977 Hayek was a visiting professor at the University of Salzburg, his last academic post.

Studies in Philosophy, Political and Economics[13] appeared in 1967. This is a collection of almost 30 essays, all but one of which were published earlier. Many of the essays were preparatory to Hayek's next major work, the three volume Law, Legislation and Liberty. In 19778, New Studies in Philosophy, Politics, Economics and the History of Ideas,[14] another collection of essays preparatory to Law, Legislation and Liberty, was issued.

Law, Legislation and Liberty were published in 1973, 1976, and 1979. The individual volumes are titled: "Rules and Order," "The Mirage of Social Justice," and

"The Political Order of a Free People." The work as a whole is subtitled: "A New Statement of the Liberal Principles of Justice and Political Economy."

Hayek describes its relationship to The Constitution of Liberty as follows:

> [Law, Legislation and Liberty] was never intended to give an exhaustive or comprehensive examination of the basic principles on which a society of free man [sic] could be maintained, but was meant to fill the gaps which I discovered after I had made an attempt to restate, in The Constitution of Liberty, for the contemporary reader the traditional doctrines of classical liberalism in a form suited to contemporary problems and thinking. It is for this reason a much less complete, much more difficult and personal but, I hope also more original work than the former.[15]

Three "gaps," three positions adumbrated in Law, Legislation and Liberty, that Hayek claimed had never been "adequately expounded" previously, were: (1) that spontaneous or self-generating orders (systems) are distinct from organizations, and that the kind of rules which govern one do not govern the other; (2) social justice is "meaningless" in a free or Great Society; and (3) a democracy in which the same branch of government lays down rules of just conduct and directs government will inexorably lead to a "totalitarian system conducted in the service of some coalition of organized interests."[16]

I should note here that in this essay I shall be concerned with only the first of the above three "gaps";

Hayek argues for this position in the first volume of Law, Legislation and Liberty. Perhaps it is not altogether inappropriate to add here that Karl Popper, after reading this volume, called it the greatest work of political philosophy ever published.

Since 1979 Hayek has published more than fifteen essays, several pertaining to a monograph in which he argues for a denationalization of money. Hayek is presently working on another major study: The Fatal Conceit: The Intellectual Errors of Socialism.

Hayek's Epistemology

Unlike many jurisprudentialists, including Fuller, Hayek grounds his legal theory in a broader system of ideas. Crucial to our enterprise here is the fact that certain of Hayek's epistemological positions are of paramount importance in understanding his legal thought. There are two positions in particular which inform all of the Hayekean system and a fortiori his legal philosophy: (1) that individuals are ignorant of the particular facts which make up the social order; and (2) that there is a good deal of knowledge which cannot properly be called scientific knowledge. I will treat each in turn.

The Ignorance of Particular Facts

For Hayek, the "fundamental fact"[17] with which all social, political, and legal theorizing must begin is "the impossibility for knowing all the particular facts on which the overall order of the activities in a Great Society is based."[18] We are incurably ignorant of the impulses that drive individuals, the ends that they will pursue, and the knowledge that they have about the circumstances which surround their lives, that is, we are ignorant of the concrete facts that make up the social order.

This ignorance, Hayek, says, "is the source of the central problem of all social order,"[19] namely, how to make use of the knowledge which is dispersed among countless individuals, knowledge nowhere existing in an integrated whole.

Hayek first posed this problem one-half century ago during an important debate taking place in economic theory concerning whether rational economic calculation was possible under socialism--could resources be utilized effectively.[10] For Hayek, under socialism it was impossible to do this because it is impossible for the central planners of a socialist commonwealth to make use of much of the knowledge which is fragmented among

different individuals. Such data could not be communicated to these planners in such a form that they could take cognizance of it. In 1945 Hayek wrote,

> The common idea seems to be that all such knowledge should as a matter of course should be readily at the command of everybody. . . . This view disregards the fact that the method by which such knowledge can be made as widely available as possible is precisely the problem to which we have to find an answer.[21]

We do, in fact, according to Hayek, have the devices to solve this problem, for individuals can and do utilize more knowledge than they possess. Furthermore, Hayek writes,

> [I]t is largely because civilization enables us constantly to profit from knowledge which we individually do not possess and because each individual's use of his particular knowledge may serve to assist others unknown to him in achieving their ends that men as members of civilized society can pursue their individual ends so much more successfully than they could.[22]

Two of the devices for solving this problem about which Hayek writes most are: (a) market prices, and (b) social rules. These instruments are, for Hayek, what I shall call carriers of cognitive content.[13]

Hayek likens the price mechanism to telecommunications system.[24] It is a tool for communicating information. The price functions as a symbol representing data concerning the scarcity of resources and their perceived value. Individuals can use

the information "contained" in the price for their own purposes. Hayek claims that the individual's adjustment of his actions based upon a price is nothing short of a marvel. In his most perspicuous statement of this point, he writes,

> The marvel is that in a case like that of a scarcity of one raw material, without an order being issued, without more than perhaps a handful of people knowing the cause, tens of thousands of people whose identity could not be ascertained by months of investigation, are made to use the material or its products more sparingly; that is, they move in the right direction.[25]

Prices, then, allow the individual to make use of knowledge which he does not possess, and as such, prices are carriers of cognitive content.

If prices are bearers of knowledge, then, competition is a generator of knowledge; or, as Hayek puts it, competition is a discovery procedure. Competition involves different individuals or groups of individuals pursuing different plans of action. It is as a result of the clash of these plans that we discover which goods are goods, and which ones are more relatively scarce than others. We discover what people want, what they are willing to pay, and alternative uses for goods. It is through competition that information is gathered that is summarized in a price. For Hayek, it is via the competitive process that facts are discovered that

otherwise would not have been, and/or certain information is utilized that otherwise would have remained fallow.

Social rules are the second institutional device for solving the problem of the dispersion of knowledge. In general, it is Hayek's opinion that, "Rules are a device for coping with our constitutional ignorance."[26] It is our ignorance of the facts that make up the social order that makes rules a necessary feature of the human enterprise. Hayek is quite explicit that it is such ignorance that makes necessary moral rules and a certain kind, the most important kind, of legal rules, namely, what Hayek calls Nomos. In an early section of the first volume of Law, Legislation and Liberty, Hayek writes,

> It will be one of our chief contentions that most of the rules of conduct which govern our actions . . . are adaptations to the impossibility of anyone taking conscious account of all the particular facts which enter into the order of society. We shall see, in particular, that the possibility of justice rests on this necessary limitation of our factual knowledge. . . .[27]

In order to see how rules are, like market prices, carriers of cognitive content, and devices for allowing an individual to make use of more knowledge than he himself possesses, we must look at Hayek's conception of the nature of rules.

Hayek uses the concept of a rule in several distinct senses; we will examine two of them in this context.[28] Although different, these two senses are

closely related to one another in that both make some kind of reference to the regularity of behavior.

In one sense the term "rule" stands for a statement by which the regularity of the behavior of things can be described. I say "things" here rather than "persons" because, for Hayek, the concept of rule has a broader application than human conduct. The regular behavior (or action) of anything is in Hayek's analysis "rule-governed." Furthermore, and this is especially pertinent for human action, an action is said to follow a rule, "irrespective of whether such a rule is 'known' to the individuals in any other sense than that they normally act in accordance with it."[29]

The second, and perhaps more interesting, sense of "rule' refers to the disposition of entities to act in general sorts of ways. Hayek writes, "'Rule' in this context means simply a propensity or disposition to act or not to act in a certain way."[30] Here Hayek was probably influenced by Gilbert Ryle's dispositional analysis of belief as set forth in The Concept of Mind.[31]

For Hayek, man is essentially a rule-following animal. Hayek goes so far as to say that, "we ought to regard what we call mind as a system of abstract rules of action."[32] He also refers to understanding as a system of rules.

Broadly speaking, human action follows three kinds of rules. First, there are those rules that are observed in fact, but have never been stated in words. Hayek writes, "[I]f we speak of the 'sense of justice' or 'the feeling for language' we refer to such rules which we are able to apply, but do not know explicitly."[33] Second, there are rules that "though they have been stated in words, still merely express approximately what has long before been generally observed in action."[34] Third, there are rules that have been deliberately designed and "therefore necessarily exist as words set out in sentences."[35] For Hayek, every action is always guided by many rules. Moreover,

> [A]ll our actions must be conceived of as being guided by rules of which we are not conscious but which in their joint influence enable us to exercise complicated skills without having any idea of the particular sequence of movements involved.[36]

The rules that guide human beings are either innate or learned. To say that human beings are guided by innate rules is to say that they are born with dispositions to act in certain regular patterns.

According to Hayek, most rules of conduct orriginally were "observed in action without being known to the acting person in articulated ('verbalized' or explicit) form."[37] Indeed, most of the rules that human beings still follow are unknown too them. To the point

here, of course, is why such rules came to be observed. Hayek's position is that the rules were observed because they "gave the group that followed them superior strength."[38] That they had such an effect was not known (generally) to those observing the rules. These rules were not, then, observed because the acting agents knew the beneficial results that would accrue to the group. Hayek writes,

> These rules of conduct have thus not developed as the recognized conditions for the achievement of a known purpose, but have evolved because the groups who practiced them were more successful and displaced others. They were rules which, given the kind of environment in which man lived, secured that a greater number of the groups or individuals practising them would survive.[39]

In general, the kind of rules that Hayek has in mind here are manners, morals, and law. More specifically, there were three rules which were followed which made civilization as we know it possible, and without which civilization would collapse in a rubble. These rules are the three "Laws of Nature" put forth by David Hume in his A Treatise of Human Nature: (1) the stability of possession; (2) transfer by consent,; and (3) the performance of promises....[40]

The cultural heritage into which men are born consists, in Hayek's account, largely of rules, which "by a process of selection . . . have evolved . . . in a

manner which makes social life possible."[41] Man's thinking and acting are guided by such rules, and most of these rules are learned by experience. In a remark of the utmost import, Hayek writes,

> "learning from experience" among men no less than among animals, is a process not primarily of reasoning, but of the observation, spreading, transmission and development of practices which have prevailed because they were successful. . . .[42]

When we juxtapose the following quotation with this one, we can see the importance of Hayek's theory of mind to this theory or rules, and as we shall see shortly his theory of social order.

> The mind does not so much make rules as consist of rules of action, a complex of rules that is, which it has not made, but which have come to govern the actions of the individuals because actions in accordance with them have proved more successful than those of competing individuals or groups.[43]

The rules, then, that come to govern men's thinking and action "are thus the product of the experience of generations."[44] These rules, in carrying what has been successful in the past with them, are carriers of a great deal of knowledge about how to act and think in the world. A person and a group do not begin de novo in this context. Indeed, for Hayek, a person or a group could not begin de novo and succeed, because due to the constitutional ignorance of human beings we are incapable of comprehending ab initio what

rules would be successful and which would not. Rules are thus carriers of cognitive content, and, as evolved devices, indispensable to successful living.

At the beginning of this section on Hayek's epistemology I said that there were two epistemological positions crucial to understanding this theory of social order. I have now completed the analysis of the first, and turn to the second position on the existence of nonscientific knowledge.

Practical Knowledge

For Hayek, knowledge consists of much more than scientific knowledge. There is, first of all, what Hayek calls "knowledge of the particular circumstances of time and place."[45] By this Hayek has in mind such phenomena as the baker who knows what his customers now like, the shipper who knows of an empty ship he can now use to ship an emergency freight, the factory owner who knows of someone's skills that can be put to better use, and, in general, individuals we know, as best that can be known, their own ends, those of others and so forth. This is the knowledge of "the man on the spot." In each of these cases, Hayek says individuals have knowledge, yet it is not scientific, that is, it is not a systematic body of knowledge nor contained in such.

Another kind of knowledge for Hayek is "knowing-how."[46] Here the reference is to the skills of the individual in doing things. Some of the examples Hayek uses are "knowing-how" to carve, to ride a bicycle, to ski, to tie a knot, and the knowledge of how to do something of the craftsman and the athlete.[47] To "know-how," for Hayek, it is not necessary that the individual know <u>that</u> he "knows-how" to do something. As an elementary example of this, small children know how to speak a natural language, however, they do not know that this is what they are doing. One need only remember Moliere's M. Jourdain, who finally found out late in life that he had all his life been speaking prose. Furthermore, we should note here, that given Hayek's account of rules, all will "know-how" to follow many rules without even knowing that such rules exist, much less are being followed.

Still another kind of practical knowledge on Hayek's account is the knowledge embodied in "our habit sand skills, our emotional attitudes, our tools and our institutions." Hayek says that, "knowledge in this sense is [not] part of our intellect.[48] Although it is beyond the scope of this discussion, we should note that there is an important relationship between this kind of knowledge and what Karl Popper calls World 3.[49]

Earlier I wrote that it was Hayek's position that one reason why socialism cannot engage in rational economic calculation is that the planners cannot utilize knowledge dispersed among countless individuals. At that time I did not give Hayek's reason[50] for this stand. Now I am in a position to say that it is just the sort of knowledge, practical knowledge, that we have covered in this section that Hayek has most in mind when he makes that claim. Knowledge of time and place, "knowing-how," and the knowledge contained in our rules, etc., cannot be communicated to central planners in a form that they could utilize.[51]

CHAPTER IX

HAYEK ON LIBERTY AND COERCION

As a classical liberal, Hayek's theory of liberty and coercion is central to his overall system of ideas and to his theory of social order. Although the concepts of liberty and coercion have a role to play in many of Hayek's writings, their most detailed treatment occurs in The Constitution of Liberty.

In the first chapter of that work, Hayek defines "liberty" or "freedom"--he uses the two interchangeably--in terms of coercion. This forces Hayek to spend a great deal of time on this latter concept, and this he does in the ninth chapter. I shall first make a few remarks about the doctrine in the first chapter and then about the ninth.

Hayek On Liberty

Hayek offers not one but two definitions of the concept of liberty. Since this already has been a source of confusion in the literature, let me begin with a discussion of them.[1]

The first definition enunciated is that liberty is the absence of coercion. It is this definition that gets repeated throughout most of The Constitution of Liberty.

The second definition, which like the first is put forth in the first chapter of the work in question, is not referred to again in the rest of the work. In his statement of this definition Hayek says, "[T]o be precise, we should probably define liberty as the absence of restraint and constraint."[2] Since Hayek takes "constraint" to be synonymous with "coercion," I will substitute the latter for the former to allow for greater ease in comparisons it to the first definition.

On this second definition there are two sorts of liberty depriving actions: restraint and coercion. By "restraint" Hayek is referring to the phenomenon of depriving a person of his liberty by preventing him from doing something, for example, we shoot him. Another example is tying someone up. "Coercion," on the other hand, refers to the phenomenon of one making another do his bidding. The clear-cut case is, "Your money or your life," where the person hands over the money.

It is important to note here that, given either definition, liberty is an inherently relational notion and refers solely to a relation of men to other men.

Given our brief characterization of Hayek's notion of coercion, it is clear that the first definition of "liberty as the absence of coercion" is inadequate. On anyone's account, gratuitously tying someone up and beating them is depriving that person of his liberty. Why, then, does Hayek adhere to this definition throughout the rest of The Constitution of Liberty? I think the answer is that Hayek was wary of the concept of restraint being used to apply to other than human action. For example, a rock climber gets his foot caught and cannot escape. The rock may be said to be restraining him. Hayek seems to think that it would be easy to pass from liberty as (in part) the absence of restraint to something like, liberty as "absence of external impediments," or liberty as "absence of obstacles to the realization of one's desires." Both of these are anathema to Hayek's views. Hayek feared the possibility of his words being misread or their taking on a life of their own, and for these reasons resisted the second definition.

Not only is Hayek's first definition of liberty inadequate, but so is the second--and on Hayek's own explicit terms. For he says, and quite correctly, that neither fraud nor deception is captured by the notions of "restraint" and "coercion." And both of these he

believes are violations of liberty. Nevertheless, one could certainly produce a "Hayekean" definition of liberty which did take account of these violations. What is, and would be, essential to any such definition, for Hayek, is the notion of coercion; therefore, let us turn to Hayek's analysis of it.

Hayek on Coercion

Hayek nowhere states that he is giving a definition of "coercion." Nevertheless, there is one remark in The Constitution of Liberty which if not definitional, surely comes close. This is where Hayek writes, "Coercion occurs when one man's actions are made to serve another's will not for his own but for the other's purpose."[3] Let us see what is involved in this characterization.

First, coercion involves a relationship that pertains to human interaction. People coerce other people. Hayek distinguishes between coercion and compulsion. One can be compelled by nonhuman forces, but never coerced by them.

Second, coercion involves action on the part of the person being coerced. If Peter ties John up and makes no demands upon him, Peter has not coerced John, rather he has restrained him.

Third, the alternatives faced by the coerced party "have been so manipulated that the conduct that the coercer wants [him] to choose becomes for [him] the least painful one."[4] Hayek is a bit more explicit on this point here when he says, "Though the coerced still chooses, the alternatives are determined for him by the coercer so that he will choose what the coercer wants."[5] In other words, a necessary condition for an action to be a coerced one is that the coerced party do what the coercer wants him to do.

Fourth, coercion requires that the coerced person be threatened in some way. The coercer makes the subject of his coercion serve his will by threatening him with some evil. Hayek claims that this is usually in the form of bodily harm; however, it need not be so. Hayek gives the following example of a threat:

> One may frustrate another's every attempt at spontaneous action by placing in his path an infinite variety of minor obstacles: guile and malice may well find the means of coercing the physically stronger. It is not impossible for a horde of cunning boys to drive an unpopular person out of town.[6]

The important point to emphasis here is that coercion necessarily involves the notion of a threat.

Fifth, although Hayek does not attend to this explicitly, it follows from his account that the threat does not have to be verbal. Furthermore, the action

desired by the coercer does not have to be expressed verbally. For example: one is counting one's earnings from a backalley dicegame when someone puts a knife to that person's throat. The threat is clear as is the desired action, namely, hand over the money or I will slit your throat.

Sixth, insofar as one man's actions are made to serve the will of another, the mind of the coerced party is made the tool of another.

Seventh, for an action to be coercive it is necessary that the coerced individual be in a position which he regards as one that is worse than he would have been in absent the action of the coercer.

To understand Hayek's account of coercion more fully, we must examine two distinctions that he draws concerning it.

The first is a distinction between degrees of coercion: coercion can range from more or less extreme. The example Hayek gives of the extreme case is the master-slave relationship; the example offered of the less extreme case is the one-time single threat of bodily harm. The distinguishing mark between these two cases has to do, according to Hayek, with the degree of the submission of will. Hayek writes that the master-slave relationship is a case, "where the unlimited power of

punishment exacts complete submission to the will of the master."[7] Because the master holds a threat over the head of his slave at virtually any moment, and the robber over his victim only at the moment of the robbery, the former case constitutes a greater degree of coercion.

It should be pointed out that nowhere does Hayek claim that the greater the degree of coercion, the greater the evil perpetrated. He does not attend to this issue, although I see nothing in his writings that would not allow him to embrace this claim.

The second distinction is between "the more severe forms of coercion which we should prevent, and the lesser forms, which ought not to be the concern of authority."[8] What is curious about this quotation is Hayek's use of the scalar notions of "severe and lesser forms." For it appears that he simply wants to distinguish between certain acts of coercion which are going to be considered either legally or morally legitimate, for example, certain acts of coercion by the government, and those which will be considered illegitimate. Severe and lesser implies a continuum which is misleading in this content.

We need now to consider those examples of what Hayek takes to be the lesser forms of coercion as these

are very instructive in understanding his analysis of coercion. Hayek writes,

> In some degree all close relationships between men, whether they are tied to one another by affection, economic necessity, or physical circumstances (such as on a ship or an expedition), provide opportunities for coercion. The conditions of personal domestic service, like all more intimate relations, undoubtedly offer opportunities for coercion of a peculiarly oppressive kind and are, in consequence, felt as restrictions on personal liberty. And a morose husband, a nagging wife, or a [sic] hysterical mother may make life intolerable unless their every mood is obeyed.[9]

Although the above are examples of coercive actions on Hayek's view, still the authorities should not intervene. Hayek's reasons for this are more than interesting. He says,

> Any attempt to regulate these intimate associations further would clearly involve such far-reaching restrictions on choice and conduct as to produce even greater coercion: if people are to be free to choose their associates and intimates, the coercion that arises from voluntary association cannot be the concern of government.[10]

This position differentiates Hayek from many other classical liberals and Libertarians. For especially the latter group, one's moral and legal rights properly conceived are violated when coercion is exercised against them: not so for Hayek. It is perhaps apposite to note another difference between Hayek and contemporary Libertarians in this context: For the Libertarians, "coercion" refers to the aggressive use of physical force or the threat of such against another

individual or his property,[11] and this clearly is not Hayek's sense of "coercion."

The Rationale for Liberty

It is Hayek's position that liberty is not good for its own sake, but rather it has instrumental value. The case for liberty, then, rests upon the value of what it leads to, and not upon any value it might have in itself.

Hayek, in an argument reminiscent of Hume, claims that it is only because of our inevitable and incurable ignorance of most of the particulars which form an order of actions that liberty is important to us. In a passage the importance of which cannot be denied, Hayek writes,

> All institutions of freedom are adaptations to this fundamental fact of ignorance. . . . Certainty we cannot achieve in human affairs, and it is for this reason that, to make the best use of what knowledge we have, we must adhere to rules which experience has shown to serve best on the whole,, though we do not know what will be the consequences of obeying them in the particular instance.[12]

If human beings were omniscient, and knew all of the facts that made up the social order, and knew what ends were objectively valuable and should be pursued, liberty would be without value. Liberty is valuable because it allows for the opportunity of the development of that which is unforeseeable and unpredictable. And

this bespeaks the importance of competition, of individuals having rivalrous plans of action. Hayek says,

> [W] want [liberty] because we have learned to expect from it the opportunity of realizing many of our aims. It is because every individual knows so little and, in particular, because we rarely know which of us knows best that we trust the independent and competitive efforts of many to induce the emergence of what we shall want when we see it.[13]

By allowing for liberty, we allow individuals to use their knowledge of their own ends (as best they can know them) and their circumstances to benefit themselves and others to an extent to which no other institutional mechanism can. Hayek is pointing to this when he writes,, "In civilized society it is indeed not so much the greater knowledge that the individual can acquire, as the greater benefit he receives from the knowledge possessed by others. . . ."[14] We can achieve the benefits of civilized life, according to Hayek, only by making countless different individuals, and we can do this best by "a condition of liberty."[15]

Hayek also maintains that coercion is instrumentally wrong and not intrinsically so. It is instrumentally wrong for two reasons. One, it deprives an individual of the chance for using his knowledge for his own sake; and, two, consequently, he cannot make the contribution to society that he otherwise could make.

John Gray, an important Hayek scholar from Oxford, has suggested to me that although liberty is of instrumental value for Hayek, coercion is, on Hayek's view, contrary to my claim, intrinsically evil.[16] This would be of great importance if Gray is correct, however, I find nothing in the texts with which I am familiar to support this claim.

The Reduction of Coercion

For Hayek, in lieu of a society in which all members strictly abide by a moral code in which coercion is banned, coercion is a necessary feature of social life. Without such a society, Hayek writes "all we can hope for is to create conditions in which people are prevented from coercing each other. But to prevent people from coercing others is to coerce them."[17] Given this, coercion can be reduced, but not eliminated. In Hayek's account, the government is the institution charged with preventing people from coercing others.

According to Hayek, the best method yet hit upon by human beings to minimize coercion is by the delimitation of protected domains. This involves demarcating "for every individual range of permitted actions by designating (or rather making recognizable by the application of rules to the concrete facts) ranges of objects over which only particular individuals are

allowed to dispose and from the control of which all others are excluded."[18] This, of course, necessitates rules, legal rules, to allow us to determine the boundaries of the protected domain of each individual. Anther way of referring to these protected domains, and perhaps the standard locution, is to refer to an individual's property. We can now begin to see why for Hayek "Law, liberty, and property are an inseparable trinity."[19]

For Hayek, law and liberty are not antithetical to one another as they are, for example, for Thomas Hobbes. Limiting a person's range of action through law does not limit his liberty, rather it allows for there to be liberty. By obeying general, abstract rules of conduct, which satisfy the requirements of the rule of Law, we are not subject, Hayek claims, to the arbitrary will of another.[20] Here Hayek is echoing the comments of Adam Ferguson, the 18th century Scottish Enlightenment figure, who wrote,

> Liberty or freedom is not, as the origin of the name may seem to imply, an exemption from all restraint, but rather the most effectual application of every just restraint to all the members of a free state, whether they be magistrates or subjects. It is under just restraints only that every person is safe, and cannot be invaded, either in the freedom of his person, his property, or innocent action. . . .[21]

CHAPTER X

HAYEK'S THEORY OF SOCIAL ORDER

Constructivistic and Evolutionary Rationalism

In 1939 Hayek hit upon the idea of writing a book to be called, The Abuse and Decline of Reason.[1] The book per se was never completed, although preparatory work on it was published as The Counter-Revolution of Science: Studies on the Abuse of Reason. The first part of the work was to be titled "The Hubris of Reason."[2] We can see how Hayek might have been led to this work given his earlier interest in the middle 1930's with problems having to do with the dispersion of knowledge. For certainly implicit, if not explicit, in, for example, "Economics and Knowledge," were questions having to do with the limits of reason. Hayek having thus raised these questions with regard to economic matters, began in 1939 to ask them of social matters in general. Indeed, as Hayek himself admitted in 1979, he had spent the previous forty years trying to think these matters through.[3]

It is within this context that we should consider a distinction that Hayek draws between two accounts of reason, namely, naive rationalism or rationalist constructivism, and critical or evolutionary rationalism.[4] The first he associates foremost with Rene Descartes, and also with Thomas Hobbes, Jean-Jacques Rousseau, and Jeremy Bentham;[5] the second he affiliates with Hume, Bernard Mandeville, Edmund Burke, Adam Smith, Adam Ferguson, and Carl Menger.[6]

Both kinds of rationalism are theories concerning the formation of institutions, when and why they are successful in allowing individuals to pursue their own ends, and under what conditions they can be changed. Prima facie, it is not obvious what these issues have to do with the limits of reason; however, the manner in which they do will become clear as we proceed.

For Hayek, the intellectual battle between these two theories of reason is no idle matter. He says,

> I have indeed been led to the conviction that not only some of the scientists but also the most important political (or "ideological") differences of our time rest ultimately on certain basic phi-osophical differences between [these] two schools of thought.[7]

For Hayek, there are three basic tenets of what he calls constructivistic rationalism. The first tenet is that human beings have designed and created the institutions of civilization through a conscious,

purposeful effort. The second is that if an institution has been useful to the achievement of human purposes, then it has been designed by human beings for those purposes, as Hayek puts it in The Counter-Revolution of Science.

> From the belief that nothing which has not been consciously designed can be useful or even essential to the achievement of human purposes, it is an easy transition to the belief that since all "institutions" have been made by man, we must have complete power to refashion them in any way we desire.[8]

Lastly, institutions will serve human purposes if and only if they have been designed for those purposes.

On this view, social order results from human design. Social order, then, is always an imposed order, and it is imposed in virtue of something known to one or more human minds.

An assumption of constructivistic rationalism is according to Hayek, that the knowledge used in constructing an institution is an explicit kind of knowledge that something is the case. Moreover, such "knowledge" is, for constructivistic rationalism, justifiable only if it either is self-evidently true or is derived from premises which are.

Hayek writes that given this view of knowledge, it is a short jump to the claim that the only actions which are justifiable are those which are "determined

entirely by known and demonstrable truths."[9] In short, we should believe and act only on that which can be shown to be true in the aforementioned way.

Hayek takes constructivistic rationalism to be factually false. It is a position, he claims, which is "pleasing to human vanity," a position which "gives us a sense of unlimited power to realize our wishes," a position which imputes to human reason great powers, but it is a position which "is simply not true."[10]

In contrast to constructivistic rationalism is evolutionary rationalism, the view which Hayek champions. The essence of this kind of rationalism is that,

> . . . that orderliness of society which greatly increased the effectiveness of individual action was not due solely to institutions and practices which had been invented or designed for that purpose, but was largely due to a process described at first as "growth" and later as "evolution", a process in which practices which had first been adapted for other reasons, or even purely accidently, were preserved because they enabled the groups in which they had arisen to prevail over others.[11]

For evolutionary rationalism, social order can be produced by a process which, although it involves human action, does not involve human design. Institutions are "created" even though no one aimed at their creation nor did anyone know they were being brought into existence. Beneficial institutions, on this account, are characteristically the unintended consequences of human

action. Reason, here, is given a much more limited role than under constructivistic rationalism.

The Results of Human Action, But Not of Human Design

As Hayek sees the world, phenomena which are the result of human action, but not of human design, are ubiquitous. There is the simple case of an individual's choosing the shortest path between two points and unintentionally creating a footpath in the grass. Walking across this footpath tends to become a pattern for some human movements in that area. Money, natural language, and the market place are other examples, for Hayek, of phenomena formed as a consequence of human action, but not consciously designed. And it is the fact that anthropologists have proven without doubt that these last three phenomena were not designed that is for Hayek a telling blow against constructivistic rationalism.

Paramount in Hayek's system of ideas is that the phenomena used as illustrative material above, all exhibit order. There are other things brought into existence by human action, but not by design, which are not orderly in any usual sense of the term; nevertheless, the more theoretically interesting ones for a theory of social order are those that do exhibit order. In fact, as Hayek sees the matter, and he is certainly not alone

in this, it is such undesigned, orderly phenomena which form the subject of the social sciences. In The Counter-Revolution of Science, Hayek states,

> If social phenomena showed no order except in so far as they were consciously designed, there would indeed be no room for theoretical sciences of society and there would be, as is often argued, only problems of psychology. It is only in so far as some sort of order arises as a result of individual action but without being designed by any individual that a problem is raised which demands a theoretical explanation.[12]

A deep and abiding intellectual concern for phenomena of this kind was probably institutionalized into western thought by some of the 18th century evolutionary rationalists such as Mandeville, Ferguson, Hume, and Smith. Many have argued that each of these thinkers was concerned, albeit in multifarious ways, with showing how self-interested actions often brought forth socially desirable consequences that were unintended. We find Mandeville saying, for example,

> The worst of all the multitude
> Did something for the common.[13]

The most famous expression of this view is Adam Smith's oft-quoted use of the "invisible hand":

> Every individual intends only his own gain, and he is in this, as in so many other cases, led by an invisible had to promote an end which was no part of his intentions.[14]

For our purposes, it is not so much their attention to self-interest, but rather their interest in

undesigned social orders that is important. For exemplary material, two further examples will suffice. We find Ferguson writing, "Nations stumble upon establishments which are indeed the result of human action, but not the execution of human design."[15] Smith speaks of, "The division of labor, from which so many advantages are derived is not originally the effect of any human wisdom."[16]

Before turning back to Hayek, I want to briefly indicate a distinction which is at best only implicitly drawn by the 18th century thinkers I have touched upon. The distinction can be brought out when we compare Smith's remark about the division of labor to another comment of his, to wit, "It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest."[17] It is certainly plausible to say that although it was in part of the intention of the butcher, etc., to provide dinner for the patron, he knew that that is what he was doing. We can, then, it seems to me, knowingly, yet unintentionally, bring about socially desirable consequences. In Smith's remark about the division of labor we have, on contrast to the butcher example, a case in which socially desirable consequences are engendered both unintentionally and unknowingly.

I have, so far, said very general things about Hayek's conception of social order. I should now be more specific, and I shall begin by explicating Hayek's conception of order.

Hayek on Order

At the risk of asserting the obvious, central to Hayek's theory of social order is the concept of order.[18] His notion of order is far from ordinary, therefore, I shall begin with three quotations.

In Law, Legislation and Liberty, Hayek writes,

> By order we shall . . . describe a state of affairs in which a multiplicity of elements of various kinds are so related to each other that we may learn from our acquaintance with some spatial or temporal part of the whole to form correct expectations concerning the rest, or at least expectations which have a good chance of proving correct.[19]

The second quotation is from "The Confusion of Language in Political Thought."

> The definition we have given ["order" is] a condition of affairs in which we can successfully form expectations and hypotheses about the future.[20]

The Sensory Order is the source of the third passage.

> The peculiar order of events which we have called the phenomenal order manifests itself only in the responses of certain kinds or organisms to these events, and not in the relation of these events to each other. . . .[21]

What these passages reveal is that, for Hayek, order is, in a very important respect, essentially

cognitive: without knowers, there is no order. For there to be order, there must be certain elements that have a certain relationship to one another; they form a structure. These relations can either be static or dynamic, although Hayek's interest lies foremost in the latter. These structures have a certain character, one that is, to the best of my knowledge, never adumbrated by Hayek, which makes the structure knowable. The knowability that is involved here is one of predictability: order requires that there be the possibility of forming correct expectations. Structures which lack that characteristic that makes predictability possible, are without order. Order, then, is a relationship that holds between knower and known.

It should be noted that Hayek's position is that for order to exist, there must be the possibility of prediction; he does not claim that the prediction must be actual. Of course, this raises the time referential problem as to how far this possibility extends. Does it refer to human beings as we find them now, or as more highly evolved beings? Hayek never says.

Order is, for Hayek, not a matter of either/or; rather, he maintains that there are degrees of order. He is very clear about this in Law, Legislation and Liberty, where he writes

> It is important to note here that there are two different respects in which order may be a matter of degree. How well ordered a set of objects or events is depends on how many of the attributes we can learn to predict. Different orders may in this respect differ from each other in either or both of two ways: the orderliness may concern only very few relations between the elements, or a great many; and second, the regularity thus defined may be great in the sense that it will be confirmed by all or nearly all instances, or it may be found to prevail only in a majority of the instances and thus allow us to predict its occurrence only with a certain degree of probability.[22]

Two Kinds of Order

For the last half-century, Hayek has been attempting to clearly distinguish between two kinds of order. The analysis here sets the foundation for a distinction he will draw with respect to two different kinds of law.

Before examining this analysis, a terminological note is appropriate. In his first investigation of the subject in his 1933 Inaugural Lecture at the London School of Economics, "The Trend of Economic Thinking,"[23] Hayek used the terms "organism" and "organization" to label the terms of the distinction. In his more mature treatments, he refers to what he alternatively calls "spontaneous order," "self-generating order," or "cosmos," on the one hand, and "made order," "deliberate arrangement," "taxis," or "organization," on the other. For the sake of clarity, I will use "spontaneous order"

and "made order" to stand for the two general terms of the distinction.

Spontaneous Order

The following are some of the examples of spontaneous order to which Hayek refers in his writings: living organisms, crystals, complex organic compounds, galaxies, law, morals, money, the price mechanism, the division of labor, and natural language. As we can see from these examples, the concept of spontaneous order applies to a broader scope than the social domain merely.

Let us consider now what for Hayek are the distinguishing characteristics of spontaneous orders.

First, spontaneous orders are not made orders: no one puts the elements of the order in their place. Hayek makes this point sometimes by saying that spontaneous orders are formed endogenously. These orders are undesigned, and, hence, social spontaneous orders are the result of human action, but not of human design.

Secondly, insofar as a spontaneous order is not designed and made by someone, it does not have a purpose. It can be used by human beings in the pursuit of their own particular purposes, but the order itself is without one.[24]

Thirdly, spontaneous orders are not limited in their complexity by the bounds of understanding of a

human mind. These orders can, according to Hayek, "achieve any degree of complexity."[25] Perhaps more importantly, "We can," Hayek states, "achieve an order of a much more complex set of facts than we could ever achieve by deliberate arrangement."[26] Here we are not confined, as it made order, to the degree of complexity that can be grasped by the maker of a made order.

Fourth, spontaneous orders are oftentimes, although not always, abstract as opposed to being concrete orders. Although Hayek's treatment of this is at times opaque, his principal point seems to be that orders of this kind are not able to be "intuitively perceived."[27] An example here would be the order of the market place. This order cannot be seen, but rather must be "mentally reconstructed."[28] We would not be able to recognize the existence of the market order "except on the basis of a theory accounting for [its] character."[29]

Made Orders

The first thing to note is that made orders are designed orders: they are the result of human action and human design. There is an important sense, one that will be developed in more detail as we proceed, in which the elements of the order are put in their place.

Secondly, in so far as made orders are designed orders, they are directed by human will toward the

achievement of certain ends or purposes. As Hayek puts it, "[I]n a [made order] the knowledge and purposes of the organizer will determine the resulting order."[30] This does not mean that both the design and the order cannot change--and here I bypass the problem of whether it would remain the same order and assume it would--they can. Nevertheless the order exhibited would be a designed order, and the order would exist for a purpose.

Thirdly, made orders are restricted in the complexity they can achieve by the limits of understanding of the human minds who created it. In as much as the order is deliberately created, its actualization rest upon the complexity that can be imparted to it by the mind. These orders, then, tend to be relatively simple ones.

Fourthly, made orders, unlike abstract spontaneous orders, "are usually concrete in the sense . . . that their existence can be intuitively perceived by inspection."[31]

The most important kind of made orders are those Hayek calls organizations. Hayek writes, "In the social field, the kind of order achieved by arranging the relations between the parts according to a preconceived plan is called an organization.[32] The four points given above are applicable, mutatis mutandis, to organizations.

As examples of organizations he gives the farm, the plant, the firm, the corporation, the government, and, interestingly enough, the family.

(Perhaps this is the place to note that Hayek is using "organization" in a much narrower sense than some. He could not countenance calling "society" an organization on this account--it is for Hayek a spontaneous order.)

The Determinants of Spontaneous Order

I want to now consider what for Hayek are the various determinants of any spontaneous order. Here we must distinguish two elements of any such order: its general character and its particular manifestation.

What Hayek refers to as the general character of a spontaneous order is determined by the rules that the elements of the order follow. Hayek puts this point as follows: "[T]he regularity of the conduct of the elements will determine the general character of the resulting order."[33] By the regularity of the conduct of the elements, Hayek means, as was indicated earlier, the rules which govern the actions of the elements. A regular pattern of behavior, then, be it the behavior of the elements of a spontaneous order of nature, or a social spontaneous order, can be expressed as a rule.

Although certain rules determine the general character of a spontaneous order, they do not "determine . . . the detail of its particular manifestation."[34] The particularity of the order will be contingent upon the position of the elements, the circumstances of their environment, and the way in which they react to one another.[34] The particularity of the order will be contingent upon the position of the elements, the circumstances of their environment, and the way in which they react to one another.[35] Let me emphasize that this is applicable to <u>all</u> spontaneous orders. In the case of the social variety, there need be no reference to free-will for Hayek as he embraces a version of compatibilism.[36]

Implicit in the preceding paragraph is a crucial element in Hayek's account: A spontaneous order will involve the individual elements <u>adapting</u> themselves to their environment, and in part this will involve their mutually adjusting their behavior to each other. Michael Polanyi, whose analysis of spontaneous order is favorably cited by Hayek,[37] has two very fine examples of this process of mutual adjustment. In reading the first example, we should note that it concerns a rather mundane spontaneous order; in the case of the second, remember that Polanyi was writing this in 1948.

The first example:

> Passengers will distribute themselves over the compartments of a train by mutual adjustment in an orderly fashion, first by filling all window seats and the corridor corner seats, etc., until all seats are filled, with passengers occupying the various grades of places in descending sequence of advantage in accordance with their arrival on the platform.[38]

The second example:

> Think, for example, of the consumers of gas at a time when there is a shortage resulting in abnormally low gas-pressure. A number of people will be unable to heat their bath water to an acceptable temperature and will rather not have a bath. Every person deciding in view of the existing gas-pressure for or against having a bath will directly affect the decision of all other consumers, making up their minds on the same question about the same time. We have here a system of mutual adjustments, each which affects thousands of relations.[39]

I think these examples make clear, at least in the social domain, Hayek's point about the elements (human beings in Polanyi's examples) adjusting their behavior to the environment and *a fortiori* to other elements of the order.

The Indirect Method of Bringing About A Spontaneous Order

The photographer wants the subjects of his picture in a certain order. He can create the order he wants by arranging or rearranging the elements and putting each in the desired relation to the others. By the very nature of a spontaneous order, this cannot be

done. The mutual adjustment which is the sine qua non of a spontaneous order is antithetical to this kind of "arrangement." There is, Hayek argues, no direct method of bringing about a spontaneous order. We do, however, have at our disposal an indirect method for bringing about such an order or changing a previously existing one. On this score, Hayek claims, "If we understand the forces that determine such an order, we can use them by creating conditions under which such an order will form itself."[40]

We have seen that in the theory under consideration, essentially there are two elements that make up a spontaneous order: the rules governing the abstract nature of the order, and the elements of the order which are paramount in determining the particular manifestation of the order. In anything closely approximating a complex social spontaneous order, we are quite ignorant of the particulars of that order; so even if we wanted to control the particulars directly, and could at the same time maintain the order as a spontaneous one, we would not have the knowledge to exercise such control. After all, is this not, Hayek would argue, the moral of the argument over the possibility of central planning. The planners could not exercise direct control over the particulars of the

"economy" because of their inexorable failure to know the particulars that make up the social order. Thus we cannot "control" such an order by manipulating the particulars. We can at best alter the rules governing an already existing spontaneous order or change them to induce a new one into existence.

The indirect method thus involves a change or modification of the rules pertaining to a spontaneous order. If we are going to maintain a truly spontaneous order, no other method of change is available to us. Hayek claims that this method has both its drawbacks and advantages.

Its major drawback is that, "it enables us to determine only the general character of the resulting order and not its detail."[41] There will not be as much power over the details of the order as there will over a mode order. With a spontaneous order, we are never in the position of the photographer arranging his subjects.

There are two major advantages of the indirect method, according to Hayek. One, we can induce the formation of an order which has a greater complexity than is possible with the direct method. This is, we should note, contrary to those who argue that because society has grown complex, more and more direct planning is needed. On this, Hayek writes,

> To maintain that we must deliberately plan modern society because it has become so complex is therefore paradoxical, and the result of a complete misunderstanding of these circumstances. The fact is, rather, that we can preserve an order of such complexity not by the method of directing the members, but only indirectly by enforcing and improving the rules conducive to the formation of a spontaneous order.[42]

Secondly, by "enforcing and improving the rules conducive to the formation of a spontaneous order,"[43] especially legal rules, and forsaking the direct method, which is the method, by and large, of organizations, we can utilize as much of the knowledge that is dispersed among the member of the order as we can. This is, after all, the morale of Hayek's argument against central planning.

Order and Rules

Given the obvious importance of rules to the theory of spontaneous orders, we will do well to circumvent one possible misunderstanding of Hayeks' position. The view which might mistakenly be attributed to Hayek is this: the regularity of the behavior of the elements <u>is</u> the order.

Hayek explicitly disassociates himself from that position several times in <u>Law, Legislation and Liberty</u>, stating that a spontaneous order "is a factual state of affairs <u>distinct</u> from the rules which contribute to its formation."[44]

Hayek's most systematic arguments to this effect appear in his article "Notes on the Evolution of Systems of Rules of Conduct."[45] The aim of this essay is

> . . . to make clear the important distinction between the systems of rules of conduct which govern the behavior of the individual members of a group (or of the elements of any order) on the one hand and, on the other, the order or pattern of actions which results from this for the group as a whole.[46]

In the present context, we would be ill-advised to discuss all of the "considerations" Hayek produces, however, we will indicate some of the more significant ones.

Hayek's principal point is this:

> Not every system of rules of individual conduct will produce an overall order of actions or a group of individuals; and whether a given system of rules of individual conduct will produce an order of actions, and what kind of order, will depend on the circumstances in which the individuals act.[47]

There are two reasons for this. First, although insofar as the individuals are acting in accordance with rules, their behavior exhibits regularity, for an order of actions of a group to result, these regularities must be connected in particular ways. Second, an order requires not only a certain regularity of the elements, but also these elements must stand in a certain relation to the outside world.

There are rules, Hayek is saying, which do not produce an order of actions in a group. Examples of such

rules are: "Everyone should kill the first person he meets." "Every time anyone encounters someone, he should run away." There are many rules which produce not order, but disorder. Hayek's argument is, then, that the rules of an order cannot be identical with the order itself. If they were so identical, the sheer regularity of behavior would mean ipso facto there was an order.

Hayek adduces several other reasons to support his contention there; I shall briefly discuss three of them.

First, the same rules of conduct can bring about different orders of action depending upon the external circumstances that the elements are facing. The rules, then, could not be identical with the order.

Secondly, Hayek says, "[I]t is at least conceivable that the same overall order of actions may be produced by different sets of rules of individual conduct."[48] Again, the rules must be different from the order.

Thirdly, because we can often recognize an order of actions without grasping any of the rules which the agents are following, the rules must be distinct from the order.

Before ending this section, I want to return to Hayek's principal point as presented above. For here we

find a theme that runs throughout Hayek's discussion of socialism and economic calculation, as well as the differences he draws between spontaneous and made orders. The theme has to do with what might be called the problem of the pliability of social arrangements. Hayek's contention, and the theme in question, perhaps, can be put as follows: the rules that one finds desirable might not be compatible with anything closely approximating a socially desirable order. We cannot, Hayek is telling us, fashion things however we wish.

There is a deeper question Hayek wants to raise on this score:

> The question which is of central importance as much for social theory as for social policy is . . . what properties the rules must possess so that the separate actions of the individuals will produce an overall order.[49]

In our next section we will begin to see Hayek's answer to this question.

The Rules of Spontaneous Orders and Organizations

In Hayek's view, every spontaneous order and organization (with rare exception) requires rules for the production and maintenance of order. The rules, however, are radically different between the two kinds of order, and confusing one with the other can lead to untoward consequences. I will first examine the kind of rules organizations must utilize, and then compare it to the

rules governing spontaneous orders. Since our main concern is with social order, I will focus upon social spontaneous orders in this analysis.

Let me begin by reminding the reader of two points made earlier. Organizations are made social orders, and, as such, they are designed and made for the purpose of fulfilling certain particular ends. Qua made order, in some sense the elements are put in place, or they are arranged.

In a nonsocial made order the elements can literally be put in place. Consider an arrangement of planted flowers in a garden, each flower in a row--an orderly arrangement. Here the order was created by actually placing the elements, the flowers, in an orderly way. This literal placement does not happen often in the human domain, and certainly not in the interesting cases. Organizations are not (with rare exception) arranged in such a fashion--not if they are to achieve their ends.

On Hayek's account, in an organization, what puts the elements "in their place," to the extent that they are, is a command. Examples of this are: "The chairman of a philosophy department tells a department member, 'You are teaching philosophy of law.'" "A manager of a McDonald's Restaurant tells an employee, 'You mop the floors tonight.'" "A publisher tells an editor to procure a certain book." The commands, in part, involve

the assignment of function: This is your function (job), this is what you do. The function will be given in order to facilitate the purpose or end of the organization. In an important passage, Hayek writes,

> Every organization in which the members are not mere tools of the organizer will determine by commands only the function to be performed by each member, the purposes to be achieved, and certain general aspects of the methods to be employed. . . .[50]

These general aspects of the methods to be employed are for Hayek rules that will govern the performance of a function within the organization. We must now proceed to say something about the nature of these rules of organizations.

To understand the nature and function of these rules, let us begin with a lengthy quotation from The Constitution of Liberty, for here is where Hayek is the most illuminating. By way of providing a context for the quotation, in the passage Hayek is in part concerned with some alternative ways in which the chief of a primitive tribe, or the head of a household, may regulate its subordinates.

> At the one extreme will be an instance where he relies entirely on specific orders and his subjects are not allowed to act except as ordered. If the chief prescribes on every occasion every detail of the actions of his subordinates, they will be mere tools, without an opportunity of using their own knowledge and judgment, and . . . all the knowledge utilized will be [that] of the chief. In most circumstances, however,

> it will better suit his purposes if he gives merely general instructions about the kinds of actions to be performed or the ends to be achieved at certain times, and leaves it to the different individuals to fill in the details according to circumstances-that is, according to their knowledge. Such general instructions will already constitute rules of kind, and the action under them will be guided partly by the knowledge of the chief and partly by that of the acting persons.[51]

This analysis applies mutatis mutandis to all "Hayekean' organizations.

On the basis of this quotation we can say the following about Hayek's position on the rules of organization.

1. One crucial function of the rules is to allow individuals to use their knowledge of "time and place," their "practical knowledge." The managers of the organization are attempting, through the use of rules, to use knowledge which they themselves do not possess.

2. The rules function in such a way as to help achieve the ends or purposes of the organizations: the rules, then, can be said to be purpose-laden.

3. The rules attempt to fill in gaps left by specific commands, and, as such, are subsidiary to the commands.[52] They assist the subordinate in fulfilling the responsibilities of his position.

4. Given number 3, "Without the assignment of a function and the determination of the ends to be pursued

by particular commands, the bare abstract rule would not be sufficient to tell each individual what he should do."[53]

5. The rules of the organization are job-dependent, that is, the rules will be idiosyncratic to the task or function at hand.

Let me present the following example as a way of illuminating Hayek's five previous points. The sales manager tells the salesman, "Visit each of the retail store in your area at least once a month to take and pick up orders." This is a typical "general instruction." The salesman knows: (1) Retailer A views salesmen with disdain, and, therefore, he should only be visited once a month; (2) Retailer B enjoys chatting to salesmen, and gives large orders to salesmen to whom he can talk; (3) Retailer C sometimes likes to talk to salesmen, and sometimes not: it all depends on his mood, which our salesman has learned to judge accurately; (4) Retailer D likes certain items in the salesman's "line" and not others. Our salesman has a "feel" for which ones D wants, and, thus, which should be "pushed."

With this example in hand, let us look at Hayek's "five points" through it.

First, the sales manager's general instruction functions as a rule allowing the salesman to use the knowledge that the salesman has which he himself does

not. Were the sales manager to order the salesman as to when he should see the retailers and how often, etc., this knowledge would go to waste. Through the use of rules, then, the organization is making greater use of dispersed knowledge than it could through commands only.

Second, the rule, "Visit all of, . . ." aims at the achievement of the ends of the organization--simply put, increased sales.

Third, this rule fills in "the gaps" left by commands such as, "Sell more widgets."

Fourth, unless the salesman knew he was to sell a product (his function), and knew the end of the organization (determination of end), the rule, "Visit all of, . . ." would not be able to tell the salesman what to do. It would not allow him to use the knowledge that he possesses.

Fifth, this rule, although of great help to the salesman, would do the accounts payable department of the organization little good.

Having seen the nature and function of rules for organizations, let us turn to Hayek's account of such for the rules of spontaneous orders. It will be helpful in our analysis if we especially keep in mind one characteristic of spontaneous orders, namely, not having

been designed, they do not have purposes, they do not aim at the achievement of particular ends.

The first characteristic of the rules of spontaneous orders has been indicated previously, however, I will make it explicit here for the sake of systematicity: the rules aim at an abstract order, that is, the abstract character of the order, and not at the detail of the order. As I stated earlier, the details of the order are to be determined by the particular elements and the circumstances in which they find themselves. Given this, whereas the rules of an organization, "serve particular results aimed at by those who are in command of the organization,"[54] the rules of a spontaneous order aim at an abstract order, "the particular or concrete content of which is not known or forseen by anyone."[55] Simply from the rules being followed, one cannot know the details, or at least very many of the details, of the order, that is, who will have what position, who will succeed, and who will fail.

Secondly, since the orders in question arise spontaneously and are not designed, they have no purpose. As such, the rules governing them have no purpose. We should add here that by "purpose" Hayek means, "[T]he anticipation of a particular, foreseeable event."[56] (I shall discuss ends and purposes in detail in the next section.)

Third, the order must be the same for all persons or whole classes of individuals. As such, the rules must be general and abstract.

Fourth, the rules, by only specifying an abstract character, will allow the individual elements to adapt their actions to those of the other elements.

Fifth, the rules of a social spontaneous order, especially legal rules, allow individuals to make use of the dispersed knowledge they possess, and attempt to discover new knowledge, for their own purposes.

Ends and Values

Crucial to Hayek's account of the role rules play, especially moral and legal ones, in the formation of a spontaneous order, are two pairs of distinctions he draws between will and opinion onn the one hand, and ends and values on the other. Although there are hints of these distinctions in Hayek's earlier writings, his first explicit analysis of them occurs in a 1968 essay, "The Confusion of Language in Political Thought.' The analysis is visited by him again in the second volume of Law, Legislation and Liberty..

Hayek maintains that the concepts of will, opinion, values, and ends are essential to doing political and legal philosophy, however, the terms are

used in varying and conflicting ways. This leads him to offer a stimpulative characterization of each concept: "Ordinary language is so imprecise with respect to some of the key terms that it seems necessary to adopt certain conventions in our use of them."[57]

According to Hayek, the most important of the pair of concepts is that of will and opinion, for he thinks that the "disregard of this distinction has caused the greatest confusion in political theory. . . ."[58] Moreover, the end-value distinction, as we shall see, is parasitical upon the former one.

Hayek says, "We shall call <u>will</u> only the aiming at a particular concrete result which together with the known particular circumstances of the moment, will suffice to determine a particular action."[59] As an illustration of his position: I am at eating a chocolate ice cream cone (the particular concrete result), and I am outside of the ice cream parlor with more than enough money to buy the cone, etc., (the particular circumstances), so I go inside the store and order one and start eating (the particular action).

Will is an <u>impulse</u> directing a person to a particular result. This result Hayek calls an end. The ends of our will are always particulars. Examples of ends are: eating a chocolate ice cream cone, reading

Sports Illustrated, getting a tan at the beach, listening to Bach, and so forth.

Hayek also claims that, "[T]he will ceases when the action is taken and the end (terminus) reached."[60] Unless I have missed Hayek's point, this is too strong of a statement. For we may recognize that we cannot achieve an end for which we have been willing, and for that reason we stop aiming at the end. The will here ceases before the end has been achieved.

Hayek stipulates a very narrow meaning for "opinion":

> [W]e shall call opinion the view about the desirability or undesirability of different forms of actions, or actions of certain kinds, which leads to the approval or disapproval of the conduct of particular persons according as they do or do not conform to that view.[16]

We have on this view, opinions about the desirability of murder in general, honesty in general, justice in general, etc. We use these opinions to approve of particular cases of murder, etc., however, the opinion per se has the (un)desirability of a general class of actions as its referent.

For Hayek, opinions are about right and wrong--presumably both legal and moral. Moreover, opinions do not have a purpose known to the individuals who have them. Hayek maintains, "[W]e should rightly suspect an

opinion . . . if we found that it was held for a purpose."[62]

As will aims at ends, opinions are about values.. "Values" refers to those generic classes of action that are "generally regarded as desirable."[63] By generally regarded as desirable, Hayek is not making reference to the finding of the general public. Rather he is pointing to "a lasting attitude of one or more persons. . . ."[64] These values, which a person may not be aware of "guide a person's actions throughout most of his life as distinct from concrete ends which determine his actions at any particular moment." Furthermore, these values are for the most part "culturally transmitted."[65]

CHAPTER XI

HAYEK'S THEORY OF LAW

Introduction

In this writer's estimation, Law, Legislation and Liberty is one of the most formidable works published on the philosophy of law this century. The work has, unfortunately, received little scholarly attention. I think there are several reasons for this, but only one concerns me in the present context. I have been told by several scholars in the field of the philosophy of law that one reason why they have not paid attention to the trilogy is that they suspect that Hayek is saying the same things that he already wrote about in The Road to Serfdom and The Constitution of Liberty. However, not only is Law, Legislation and Liberty different in theoretically significant ways from the other two works, but also these latter two works are significantly different from each other. Indeed, I think we can distinguish "Three Hayeks" in his theory of law. I shall refer to these as the Early, Middle, and Later Hayek.

In this section of my essay, I shall first sketch out very briefly certain doctrines of the Early and Middle Hayek. Then we shall turn to the Later Hayek, where we will encounter Hayek's most mature and sophisticated legal theorizing.

Before proceeding to the "Early Hayek," a methodological note is in order. There are some instances in which it is possible to specify exactly the year in which an author's position underwent change. These cases usually involve the author's making a biographical remark to that effect. Hayek, unfortunately, has never stated in his published works exactly when his thinking on legal matters changed. Consequently, the expressions "early," "middle," and "later," do not refer to precise time boundaries.

The Early Hayek

The phase I call the Early Hayek centers on Hayek's jurisprudential remarks made between the years 1935 and 1945. The term "remarks" in the previous sentence should be taken literally as there is no systematic work by Hayek on law in this period. Other than the 15 page chapter on "Planning and the Rule of Law" in The Road to Serfdom, there are only some scattered remarks in "Socialist Calculation I: The Nature and History of the Problem," "Socialist

Calculation II: The State of the Debate," "Freedom and the Economic System," and "Scientism and the Study of Society."

I shall begin with some representative quotations from Hayek.

> We can "plan" a system of general rules [law] equally applicable to all people and intended to be permanent. . . .[1]

> While [the] distinction between the construction of a rational system of law, under the rule of which people are allowed to follow their preferences, and a system of specific orders and prohibitions is clear enough as a general principle, it is not easy to define it exactly. . . .[2]

> By the construction of a rational framework of general and permanent rules [law] a mechanism is created through which production is to be directed. . . .[3]

> [I]t must be admitted that this task of creating a rational framework of law has by no means been carried through consistently by the early liberals.[4]

> The term institution itself is rather misleading . . . as it suggests something deliberately instituted. It would probably be better if this term were confined to particular contrivances, like particular laws and organizations, which have been created for a specific purpose.[5]

Although there is no systematic analysis in the quotations, what they suggest is clear. As Hayek <u>saw</u> the matter, law has been designed and constructed in the past, and it should be designed in the future. There is no sense that these rules somehow form a spontaneous order nor of their being of a spontaneous origin. There is, in other words, not a hint of law's being a result of

human action but not of human design, a doctrine Hayek will embrace in Law, Legislation and Liberty.

Furthermore, it is instructive in this regard to examine the examples of spontaneous orders that Hayek gave during this time period. One list appears in "Scientism and the Study of Society," where Hayek mentions language, money, the market, and morals as phenomena which "are not the product of deliberate creation";[6] they are not "real artifacts."[7] What is so instructive about this list is that such a list appears throughout the bulk of Hayek's writings; however, by the time of The Constitution of Liberty in 1960, there is an addendum to it, namely, law.

The "Early" Hayek did have a conception of spontaneous order, one that was applicable across a whole range of phenomena, especially on the economic variety, nevertheless, at this juncture it was not applied to the law.

The Middle Hayek

The two primary pieces of text that make up the "Middle" Hayek are the 1955 essay, "The Political Ideal of the Rule of Law," and the 1960 book, The Constitution of Liberty. This period in Hayek's legal thinking is different from the "Early" Hayek in important respects.

Changes in doctrine notwithstanding, we find that the two above works are, unlike the writings of the "Early Hayek," fairly systematic tracts in legal philosophy. Where Hayek echoes the views put forth in, let us say, The Road to Serfdom, in these later writings, we find a depth, subtlety, and sophistication of doctrine that cannot be found in the sketchy treatment of the former. This alone would justify us, I believe, in distinguishing between these two Hayeks. Nevertheless, there are some important substantive differences that validate the differentiation even more.

All of these differences revolve around Hayek's growing recognition that law itself is a spontaneous order and a deeper understanding that it serves as the framework for the growth of a spontaneous order of action. In The Constitution of Liberty, for example, law is put forth along with morals and language as being human institutions that "have evolved by a process of cumulative growth."[8] Most of the rules of law "have never been deliberately invented but have grown through a gradual process of trial and error in which the experience of successive generations has helped to make them what they are."[9] There is certainly no hint here, as there was in the "Early" Hayek, that a legal system may be constructed to meet our needs. For the "Middle"

Hayek, the belief that we can design a legal system better than our past liberal brethren cannot be countenanced. Designing such a system is a misbegotten enterprise: we simply do not know enough to do so. What we find in the "Middle Hayek," then, is in argument against what might be called "the central planning of law."

As important as the differences between the "Early" and the "Middle" Hayek might be, the importance pales in comparison with the differences between the "Middle" and "Later" stages. It could be said, after all, and quite fairly, that there is so little content to the "Early" Hayek that perhaps it is unfair to categorize this period in Hayek's legal work. Moreover, it is the "Later" Hayek that many are ignoring; and the legal theorizing of the latter two Hayeks is, indeed, of greater philosophical importance. Therefore, I shall spend the rest of this section setting forth certain elements of the "Middle" Hayek that will be of no small moment for our next section. To be precise, I shall examine Hayek's analysis as to the nature of the Rule of Law, and the relationship between it and case law.

For Hayek, the Rule of Law is a meta-legal doctrine. It is a doctrine specifying what in broad terms the law ought to be like. It will be of some aid

here to detail the sense in which Hayek is using the term "law." The laws he classifies as falling under the rule of Law are "substantive laws regulating the relations between private persons or between persons and the state."[10] These laws grant to each individual a protected domain "within which he can decide on his actions . . . [in order] to enable him to make the fullest use of his knowledge, especially of his concrete and often unique knowledge of the particular circumstances of time and place."[11] It is this sort of law, which in The Constitution of Liberty Hayek calls "True Law,"[12] to which the Rule of Law applies. There is another sense of "law" to which it does not--this type of "law' refers primarily to the rules which govern the organization we call government. "Law" in this sense essentially refers to commands or instructions "issued by the state to its servants concerning the manner in which they are to direct the apparatus of government and the means which are at their disposal."[13]

The cardinal purpose of the Rule of Law is to limit the use of coercion by the government to the enforcement of known rules. It is a weapon, for Hayek, against the use of unlimited force by government.

There are, for Hayek, three requirements of the Rule of Law. These are, broadly speaking, that the law

be general, known and certain, and applied equally. I shall discuss each in turn.

The first requirement is that legal rules should be general. For Hayek, this means that the rules must be long-term measures which apply to unknown future cases. This implies that the laws must be "prospective, never retrospective in their effect."[14] Moreover, a legal rule should not make any reference to particular persons, places, or objects.

The second requirement is that the laws must be capable of being known and certain. The quest for certainty in the law is, according to Hayek, an ideal never completely realizable. Although Hayek is not particularly explicit on this point, it does seem to be his position that a legal rule which is articulated in written form is ceteris paribus more certain than one which is not.

The attribute of certainty is essential if individuals are going to be able to form correct expectations or have a good chance of forming correct expectations about the actions of others. Certainty is, therefore, of great importance to the well-being of the economic system of a free society: long-term capital investment would be, for example, almost nonexistent without it.

The third requirement is equality, and it is, like certainty, an ideal never to be achieved. According to Hayek, comprehending exactly what the ideal of equality demands is an intractable problem. He writes:

> That any law should apply equally to all means more than it should be general in the sense we have defined. A law may be perfectly general in referring only to formal characteristics of the persons involved and yet make different provisions for different classes of people. Some such classifications, even within the group of fully responsible citizens, is clearly inevitable. But classification in abstract terms can always be carried to the point at which, in fact, the class singled out consists only of particular known persons or even a single individual. It must be admitted that, in spite of many ingenious attempts to solve this problem, no entirely satisfactory criterion has been found that would always tell us what kind of classification is compatible with equality before the law. To say . . . that the law must not make irrelevant distinctions or that it must not discriminate between persons for reasons which have no connection with the purpose of the law is little more than evading the issue.[15]

Hayek does, however, adumbrate one principle that, although not completely satisfactory, must be met if a legal rule can with propriety refer to classes of individuals such as children, women, or the physically handicapped. This principle demands that the rule in question be approved by the majority of both members and nonmembers of the class alike. If the law is favored by only those to whom it applies specifically, the result is privilege; if the law is favored by only those outside of the group, the result is discrimination. The ideal of

equality, in this context, whatever its complete specification, sanctions neither.

As we have seen, the aim of the Rule of Law is to limit the use of coercion by the state--to prevent infringements of individual liberty. Since the Rule of Law is without substantive content, as, for example, a principle of justice, and is, if you will, purely formal, a question arises as to how it can maintain a reign of freedom. It seems perfectly possible to have laws that are general, certain, and applied equally to all citizens, yet for all of that constitute serious violations of liberty. This is possible, Hayek claims; however, he thinks laws such as these are unlikely. There is, Hayek believes, a safeguard against this--namely, that laws apply to those "who lay them down and those who apply them,"[16] as well as to the governed. Hayek writes,

> If all that is prohibited and enjoined is prohibited and enjoined for all without exception (unless such authority follows from another general rule) and if even authority has no special power except that of enforcing the law, little that anybody may reasonably wish to do is likely to be prohibited.[17]

Hayek was attacked for this argument, especially by certain libertarian political thinkers.[18] These critics thought that much of government intrusion into the economic affairs of men, as well as into their "civil liberties," was consonant with the requirements of

Hayek's Rule of Law. As we shall see in the next section of this chapter, in the first volume of Law, Legislation and Liberty,[19] Hayek offers another argument to show that it is not likely that the Rule of Law would sanction gross violations of individual freedom.

For the "Middle" Hayek, the Rule of Law was animated not only by the three principles discussed above, but also by the need for a distinction between the functions of the legislator or lawgiver and those of the judge. The nature of this separation of power is succinctly stated in a passage that Hayek says is "probably the fullest statement of the doctrine of the rule of law."[20] The author of the passage is the 18th century English philosopher and theologian William Paley. I shall here repeat most of the lines quoted approvingly by Hayek.

> The first maxim of a free state is, that the laws be made by one set of men, and administered by another; in other words, that the legislative and the judicial character be kept separate. When these offices are united in the same person or assembly, particular laws are made for particular cases, springing often times from partial motives, and directed to private ends; whilst they are kept separate, general laws are made by one body of men, without foreseeing whom they will affect, and when they will. . . . When the parties and interests to be affected by the laws were known, the inclination of the law makers would inevitably attach to one side or the other: and where there were neither any fixed rules to control their proceedings, these inclinations would interfere with the integrity of public justice. The consequence of which must be, that the subjects of such a constitution would live either

> without constant laws, that is, without any known preestablished rules of adjudication whatever; or under laws made for particular persons, and partaking of the contradictions and inequity of the motives to which they owed their origin.[21]

Ideally, for Hayek, legislators should enact law which is general, can be known with certainty, and applies to all alike, and judges should enforce such law. We find, indeed, that passages to this effect abound in The Constitution of Liberty. Furthermore, it is not unfair to say that, on Hayek's analysis, the Rule of Law is a mechanism that primarily affects the activities of the legislator. This is clear, I think, when one examines Hayek's claim that the Rule of Law is best conceived as a meta-legal doctrine. In justifying his position, he writes, "From the fact that the rule of law is a limitation upon all legislation, it follows that it cannot itself be a law in the same sense as the laws passed by the legislator."[22]

At this point, we must ask how Hayek can reconcile his previously remarked claim that, "Most of the rules [of law] have never been deliberately invented but have grown through a process of trial and error. . . ,"[23] with his repeated emphasis in The Constitution of Liberty on statutory law, and the guidelines (the Rule of Law) for it. I think the reconciliation is accomplished, for Hayek, through

codification. Although there are no lengthy treatments of codification to be found in the "Middle" Hayek, it does come in for commendation in his historical treatment of the Rule of Law. The codification of both civil an criminal law is seen by Hayek as a desideratum that places into written form law that has proved successful, and as such, renders it more certain, or certainly no less certain, than it was.

All of this notwithstanding, Hayek clearly does not envisage all legislation, or perhaps even most as simply codification. Furthermore, in trying to perceive "the whole picture" in the "Middle Hayek, one cannot help but feel some friction between the emphasis on the ignorance of human beings and the need for custom and tradition on the one hand, and the trust in legislation on the other.

Perhaps it should come as no surprise that given the analysis of the Rule of Law that he embraces, Hayek maintains that case law is antithetical to the Rule of Law. In a passage of some importance, Hayek writes,

> There is some inherent conflict between a system of case law and the ideal of the rule of law. Since under case law the judge constantly creates law, the principle that he merely applies pre-existing rules can under that system be approached even less perfectly than where the law is codified. And though the much lauded flexibility of the common law may have been favourable to the rise of the Rule of Law so long as general opinion tended in that direction, the common law also shows, I am

> afraid, less resistance to its decay once that vigilance is relaxed which alone can keep liberty alive.[24]

A system of common law, then, lends itself to judges making more law than they would under a system of greater codification and legislative supremacy. Furthermore, for Hayek, legislative codification tends to be more impervious to change in periods in which opinion runs against the ideal of the Rule of Law. Hayek apparently believes that judge-made law is more open to the winds of opinion and, as such, can change easier and more quickly than codified law, leading to less certainty in the law and a greater likelihood of the impairment of individual liberty.

The Later Hayek

I now turn to the "Later" Hayek, and with it Hayek's contemporary jurisprudential work. This period begins somewhere around 1962, and the fundamental piece of text for our purposes is Hayek's three volume magnum opus, Law, Legislation and Liberty. Our attention will be focused especially on the first volume, "Rules and Order," and on the third, "The Political Order of a Free People." We shall find that Hayek almost completely reverses the claim of the "Middle" Hayek that case law is anathema to the Rule of Law, and argues that case law is a necessary condition of the Rule of Law.

Before turning to an explicit analysis of Hayek's later work in law, I want to first briefly mention a difference in tone if not of doctrine between The Constitution of Liberty and Law, Legislation and Liberty. In the former work, when discussing the relationships between rules and the formation of a spontaneous order, the emphasis is on moral rules. Indeed, in that work Hayek writes, "Of these conventions and customs of human intercourse, the moral rules are the most important. . . ."[25] In the latter work, although it is never stated explicitly, one gets the impression that Hayek now considers generral rules of law to be the most important to the formation of a spontaneous order of actions. Certainly there is a much more informed account of this relationship, on law as an "ordering mechanism," in Law, Legislation and Liberty, than is to be found in The Constitution of Liberty. Indeed, "Rules" in the title of the first volume of Law, Legislation and Liberty refers foremost to legal rules.

Since the relationship between rules and social order is the leitmotif of Hayek's later work, I shall begin by examining a distinction he draws between two different kinds of legal rules, and the implications these rules have for two diverse orders, namely, spontaneous and made orders.

In the first volume of Law, Legislation and Liberty, Hayek distinguishes between what he calls Nomos, the law of liberty, and Thesis, the law of legislation.[26] Nomos, roughly includes private law and criminal law, whereas Thesis consists of public law. Thus, Nomos involves the laws of contract, tort, property, estates, murder, and so forth, while public law involves the rules of the organization we call government, which includes, for Hayek, constitutional law.[27] Let me now make a more exact examination of the nature of Nomos and Thesis.

For Hayek, Nomos, the law of liberty,

> . . . will consist of purpose-independent rules which govern the conduct of individuals towards each other, are intended to apply to an unknown number of further instances, and by defining a protected domain of each, enable an order of actions to form itself wherein the individuals can make feasible plans.[28]

In understanding the sense in which Nomoi are "purpose-independent' rules we must bear in mind that purpose, for Hayek, entails aiming at a particular concrete end. Nomoi, private law, or the law of liberty does not do this. Rather, for Hayek, they establish conditions wherein individuals can pursue their own ends, their own purposes. To put this same point slightly differently, Nomoi do not aim at any particular concrete result. An example may help clarify this point. For Hayek, the law of estates which says that a will, to be valid, must be

signed before the presence of two witnesses, does not aim at any particular concrete result-that is, it does not aim at the particular result that John Doe will be better off than Peter Smith.

Another way of characterizing Nomoi, a way that captures very nicely both the attribute of applying to unknown future cases and the protection of certain domains, is to call them general, or abstract, rules of just conduct. Being abstract they will be applicable to all cases that fall under the particular description of the rule. As such, the rules will apply to all future cases they refer to, irrespective of the concrete consequences which result in the individual cases. The adjective "just" is used by Hayek because, for him, justice has to do with protected domains.[29] Here, of course, Hayek is echoing the remarks of David Hume that the general rules of justice should be applied inflexibly regardless of the utility that is produced.[30]

By providing a protected domain, that is permitted range of actions,[31] the law of liberty provides for a situation in which individuals can use their knowledge for their own sakes. This should not be misread as the endorsement of some theory of egoism, for the altruist can use his knowledge to attempt to satisfy his altruistic ends.[32]

These rules of just conduct are perhaps best described as being negative rules of conduct. Insofar as these rules are end-independent, they do not specify the particular action that an individual ought to pursue; rather they provide a limitation on what is allowable.

The second kind of law Hayek refers to as Thesis: this is the law of legislation. Hayek describes this law as follows:

> There is no single term in English which clearly and unambiguously distinguishes any prescription which has been made, or "set" or "posited" by authority from one which is generally accepted without awareness of its source. Sometimes we can speak of an "enactment," while the more familiar term "statute" is usually confined to enactments which contain more or less general rules. When we need a precise single term we shall . . . employ the Greek word thesis to describe such "set" law.[33]

The authority to which Hayek is referring is that of legislation. Law that is "set" by such an authority Hayek calls Thesis.

The central concern for legislatures has always been, claims Hayek, the direction of government: providing commands, and the rules for the control and operation of the organization of government. These rules of organization will have a quite different quality from Nomos. For the former rules have as their raison d'etre the ends of government--the rules are designed for the pursuit of certain purposes, certain particular ends. These rules are thus parasitical upon the ends commanded,

and, as such, "fill in the gaps" left by these commands. Hayek writes that these rules,

> will be subsidiary to particular commands that indicate the ends to be pursued and the tasks of the different agencies. Their application to a particular case will depend on the particular task assigned to the particular agency and on the momentary ends of government.[34]

One of the tasks of the organization of government, of course, will be the enforcement of the just rules of conduct Hayek calls Nomos.

The distinction between Nomos and Thesis is not a mutually exclusive one. For in addition to the rules of organization, the Legislature can also issue rules of just conduct. Thus what is Thesis can also be Nomos.

Having raised the question as to whether Nomos and Thesis are mutually exclusive, I feel obligated to ask whether, for Hayek, they are jointly exhaustive of law. I take it that the logic of Hayek's position is that they are not, although I am less than certain that Hayek recognizes this.

The obvious examples of legal rules that fall through the crack are those that govern the activities of the judge. For example, stare decisis, and the rule which holds that in case of conflicting precedents, the later one shall be enforced are rules for judges. These are not rules of just conduct, they do not specify a

protected domain for individuals, and they have not been "set" down. Moreover, although this is not true in the Anglo-American world today, it certainly was once the case that the law of evidence did not fit the criteria of either Nomos or Thesis.

On the "laws of procedure and the laws setting up the organization of the courts" Hayek states explicitly that they are "rules of organization and not rules of just conduct."[35] Hayek does not say overtly that such laws are not Thesis, and since he very often describes Thesis simply as the rules of the organization of government, one is left to wonder as to whether he recognizes the Nomos-Thesis distinction is not a jointly exhaustive one.

Nomos and Spontaneous Order

For Hayek, we can distinguish between two elements of a spontaneous order: its general character and its particular manifestation. Its general character is, as we saw in Chapter X, determined by the rules that the elements of the order follow.

In Hayek's work as a social and legal theorist, the spontaneous order that most attracts his attention is the one he calls a "spontaneous order of action."[36] Although he never, to the best of my knowledge, defined this expression, Hayek seems to mean by it a spontaneous

order of a free society, the elements of which are human beings. As with all spontaneous orders, this one will also have a general and particular character.

Among the rules that are most important for determining a spontaneous order of action are legal rules; and more specifically, those legal rules Hayek calls Nomoi. Indeed, it is Nomos and not Thesis that is capable of sustaining a spontaneous order. The reason for this is not very hard to find. Thesis, fundamentally, provides rules for the operation of an organization, namely, government. As such, these rules are directed toward the achievement of certain ends. A social spontaneous order, on the other hand, rests on abstract rules of conduct which do not aim at the fulfillment of certain results, that apply to unknown future cases, and that allow individuals to use their own knowledge for their own ends. The spontaneous order of a free society rests upon Nomos. Nomos, the law of liberty, consists of purpose-independent rules, that apply to unknown future cases, and that provides a protected domain for individuals which allows them to know what means they may use in the pursuit of their own ends--which, in turn, allows them to be able to <u>adjust</u> their activities to those of others. And we should not neglect the fact, in this context, that Nomos has value

foremost in a pluralistic society, where there is not a unitary hierarchy of ends to which all or most agree.

Although Nomos governs the abstract character of a spontaneous order of action, it does not dictate its particular manifestation. Such results are, according to Hayek, unpredictable: they depend upon the actions of the elements of the order. Indeed, according to Hayek, it is because the results of human beings following the laws of liberty are unpredictable that people can agree upon such laws. Let me quote Hayek at length on this point because he is particularly lucid.

> It was the discovery that an order definable only by certain abstract characteristic (sic) would assist in the pursuit of a great multiplicity of different ends which persuaded people pursuing wholly different ends to agree on certain multi-purpose instruments which were likely to assist everybody. Such agreement became possible not only in spite of but also because of the fact that the particular results it would produce could not be foreseen. It is only because we cannot predict the actual result of the adaptation of a particular rule, that we can assume it to increase everyone's chances equally. . . . When in agreement on such a rule, we say that "it is better for all of us if . . ." we mean not that we are certain that it will in the end benefit all of us, but that, on the basis of our present knowledge, it gives us all a better chance, though some will certainly in the end be worse off than they would have been if a different rule had been adopted.[37]

Any attempt to determine the outcomes in a spontaneous order is to undermine that order; it will prevent individuals from using their knowledge for their

own ends and adjusting their actions to one another in a manner that makes the best use of that knowledge.

The Judge as Guardian of the Spontaneous Order of a Free Society

The distinction between Nomos and Thesis is Law, Legislation and Liberty corresponds roughly to the one drawn between True Law and Commands in The Constitution of Liberty. In Law, Legislation and Liberty, however, there is an intricate analysis as to the relationship between law and a spontaneous order of actions that is lacking in The Constitution of Liberty. The difference is not merely one of tone or emphasis, but rather of doctrine. Indeed, Hayek admits as much in "Rules and Order" when he writes,

> What led me to write another book on the same general theme as the earlier one [The Constitution of Liberty] was the recognition that the preservation of a society of free men depends on three fundamental insights which have never been adequately expounded. . . . The first of these is that a self-generating or spontaneous order and an organization are distinct, and their distinctiveness is related to the two different kinds of rules or laws which prevail in them.[38]

Hayek's statement as to his development is certainly verified by even a cursory glance at his post-The Constitution of Liberty writings, most of which are concerned, in one way or another, with social rules and social order.[39]

A more adequate analysis of the nature of the relationship between the various kinds of social order and two types of law, gave rise to the question as to what sort of institutional mechanism will best lead to those rules on which a spontaneous order of a free society depends. It is in his answer to this question that Hayek most forsakes certain important jurisprudential doctrines contained in "The Political Ideal of the Rule of Law" and The Constitution of Liberty. More specifically, Hayek rejects the claim that case law is anathema to the Rule of Law and the maintenance of a free society; moreover, he also spurns the doctrine that codified law is more certain than case law. In Law, Legislation and Liberty, the mechanism of case law is put forth as the instrument best suited to maintain, and allow for the development of, a spontaneous order of a free society. Indeed, in that work Hayek claims that "judge-made law will of necessity possess certain attributes which the decrees of the legislator need not possess and are likely to possess only if the legislator takes judge-made law for his model."[40]

What are those distinctive attributes that judge-made or case law must of necessity possess? Judge-made law will consist of purpose-independent rules that govern the conduct of individuals toward one another, and these

rules will govern cases, they will provide a protected domain for individuals, and so forth. In other words, judge-made law in the law of liberty, that is, Nomos.

Hayek's claim that a law which rests on precedent and custom will necessarily have certain attributes is remarkable. It is certainly historically accurate to say that judge-made law has characteristically had these attributes, but that is a far cry from the modal claim. In order to try to understand Hayek's position we must turn to his conception of the judge.

Judges are called upon when there is a dispute. Individuals have acted in pursuit of their own purposes, and a conflict has arisen. The expectations of at least one of the parties, if not both, has been dashed. What is the role of the judge here? Hayek writes,

> The chief concern of a common law judge must be the expectations which the parties in a transaction would have reasonably formed on the basis of the general practices that the ongoing order of actions rests on. In deciding what expectations were reasonable in this sense he can take account only of such practices (customs or rules) as in fact could determine the expectations of the parties and such facts as may be presumed to have been known to them.[41]

In fulfilling this task the judge might have to do one of several things. It may be the case that there is a legal rule that has already been articulated, and this rule is applicable to the dispute in question; and

here the judge's job is to discover and apply the rule. It may also be the case that although certain rules are governing the actions of individuals, they have never before been articulated in practice. Here too, says Hayek, the judge's job is one of discovery and application, but it is also one of articulation. The process of discovery is different from the previous possibility, for here the judge has to find what does not already exist in articulated form. In neither of these adjudicative actions is the judge making a new rule. There is a third possibility: judges may be called upon to adjudicate a dispute for which there are no rules or practices which were determining the actions of the disputants. In articulating his decision the judge must, according to Hayek, decide on the basis of what decision would be consistent with the ongoing order of actions in which the disputants find themselves.

What we find, according to Hayek, is that the judge is called upon "to correct disturbances of an order that has not been made by anyone and does not rest on the individuals' having been told what they must do."[42] The correction of the derangement requires that the judge ascertain what were the reasonable expectations of the disputants; and this is an intellectual task.

The office of judge is, for Hayek, to be understood functionally, and not, if you will, morphologically. Simply because a person has a law degree, wears a black robe, and so forth, does not mean that when he is deciding a case that he is acting as a judge: he may be demitting the office of judge by his actions. The judge, on Hayek's analysis, has a certain job to perform, namely, the guardian of a spontaneous order of action. When he does not fulfill this function, he is not acting as judge. This does not imply, however, that the judge cannot make mistakes; he can, and indeed does; however, these errors must be ones of intellectual judgment. What cannot be countenanced, however, are moral errors, for example, deciding a case on the basis of whose bribe is the largest.

Case law, and its development, require that judges act as judges, that they satisfy the function of correcting disturbances in a spontaneous order of action. Those who do not, are not acting as judges. It is in the light of this analysis that we can understand Hayek's claim that "a socialist judge would really be a contradiction in terms; for his persuasion must prevent him from applying only those general principles which underlie a spontaneous order of action. . . ."[43] His persuasion, as Hayek sees it, would demand that he make

decisions on the basis of trying to achieve particular results for particular people or groups of people. The judge can be a socialist on his own time, as it were, but not insofar as he is acting in accordance with the judicial function.

Having examined Hayek's conception of the judge, we can now more profitably consider his remarkable claim that "as a necessary consequence of case law procedure, law based on precedent must consist exclusively of end-independent abstract rules of conduct of universal intent."[44]

For a legal rule to be end-independent means, for Hayek, that it does not aim at a particular result. This is, Hayek believes a necessary consequence of case law for the following reason. Case law involves the activities of judges; the activities of an office which attempts to discover, on the basis of past practices, what the reasonable expectations were for the disputants. The decision of the judge qua judge is to be based, then, on the discernment of what it was reasonable for individuals within a spontaneous order of actions to expect from their fellows. The rules that result from this activity will aim at the maintenance of a spontaneous order and not anyone or any group in particular benefiting. Insofar as (1) the rules that

result are end-independent, and (2) being judged to involve reasonable expectations these rules either remain or become part of the custom, these rules will then apply to unknown future cases.

When discovering or determining what are the reasonable expectations of individuals, judges are in effect, assigning protected domains to individuals. For they are stating, in effect, what actions an individual should not take against others, and what actions he may take without undermining the reasonable expectations of others. Thus, for Hayek, the assignment of protected domains is a necessary consequence of case law.

In the section on the "Middle" Hayek I mentioned that some scholars were critical of Hayek's claim that the Rule of Law, as a formal mechanism, would provide a secure safeguard against government intrusions into the lives of individuals. Hayek himself became dissatisfied with his argument in The Constitution of Liberty and in Law, Legislation and Liberty we find another--this one based on Hayek's more mature conception of case law and the function of the judge. In this later work Hayek argues that for a case to come before the judge there first had to be a dispute. The rules which would be developed by the system of case law, then, would pertain to those actions of individuals as they affect others;

and they would leave alone an individual's self-regarding actions. Hayek writes,

> This is important because it answers a problem that has often worried students of these matters, namely that even rules which are perfectly general and abstract might still be serious and unnecessary restrictions on individual liberty. Indeed such general rules as those requiring religious conformity may well be felt to be the most severe infringement of personal liberty. Yet the fact is simply that such rules are not rules limiting conduct towards others or . . . rules delimiting a protected domain of individuals.[45]

Rules pertaining to what an individual does within his own four walls simply would not come up.

Legislation, Certainty, and the Correction of Case Law

In Freedom and the Law,[46] the Italian jurist Bruno Leoni argued that in the field of private law, legislation was dispensable. Part of his argument involved a polemic against the claim that insofar as legislation was in the form of written law, it was more certain that judge-made law. Leoni maintained that elected officials were subject to the pressures of the electorate and special interest groups, and, as such, the law that they made was inherently uncertain. On the other hand, judge-made law, which rested on custom and precedent, and resulted in a gradual change of the law, was, because of these factors, more certain than legislation.

Leoni's work, published in 1961, but based on lectures delivered in 1958,[47] clearly influenced Hayek.[48] One of the positions that Hayek most fully embraced in Law, Legislation and Liberty was this one concerning the certainty of the law.[49] And this constituted a departure from the doctrine in The Constitution of Liberty where the judge was compelled to administer the law which was put forth by the legislature.[50] It is instructive to compare Hayek's glowing comments on John Locke in The Constitution of Liberty,[51] with those on Locke in Law, Legislation and Liberty where Hayek wrote that "John Locke's contention that in a free society all law must be "promulgated" or "announced" beforehand would seem to be a product of the constructivist idea of all law as being deliberately made."[52]

However much Hayek sides with Leoni on questions pertinent to the certainty of law, he parts company on Leoni's contention that legislation was dispensable in the field of private law. For Hayek, case law sometimes goes astray and requires corrective measures that a legislative body can provide. Hayek writes,

> The development of case-law is in some respects a sort of one-way street" when it has already moved a considerable distance in one direction, it often cannot retrace its steps when some implications of earlier decisions are seen to be clearly undesirable. The fact that law that has

> evolved in this way has certain desirable properties does not prove that it will always be good law or even that some of its rules may not be very bad.[53]

When the grown law does take on untoward consequences it is difficult for a judge to reverse this trend. The reason is, Hayek writes, "The judge is not performing his function if he disappoints reasonable expectations created by earlier decisions."[54] Since judges decide on disputes which have occurred in the past, it would be unfair for them to decide a case on the basis of a rule which had no role to play in the reasonable expectations of the disputants. Hayek claims, "In such situations it is desirable that the new rule should become known before it is enforced; and this can be effected only by promulgating a new rule which is to be applied only in the future."[55] Thus the need for legislative enactment. These statutes should, on Hayek's account, be in the form of Nomoi.

The legislature is charged with two very different tasks. Foremost is the operation of government: this, historically, has been its primary function. Its second task is the making of Nomoi. Case law must necessarily give rise to Nomos, but even those statutes which are aimed at the development of private law need not have the qualities of Nomos. Indeed, Hayek

believes that it is because of the first task that legislative bodies have difficulty with the second. Hayek argues that an assembly that is devoted to the ends and direction of government will find it difficult to enact end-independent rules of conduct. Hayek claims, in a passage that has recently become prophetic,[56] that,

> Increasingly and inevitably an assembly occupied in the former way tends to think of itself as a body that not merely provides some services for independently functioning order but "runs the country" as one runs a factory or any other organization.[57]

Moreover, as the legislature sees itself more and more as an institution directed toward the achievement of nongovernmental ends, it will see itself as an institution which should remove all difficulties and settle all grievances. As it does this, it begins to pass "social" legislation, the aim of which is not providing for universal rules of conduct, but rather "to direct private activity towards particular ends and to the benefit of particular groups."[58] As such, government is not limiting the use of coercion to the enforcement of general rules of conduct, a position which Hayek endorses, of course, but is using coercion for the achievement of concrete purposes.

It is because he sees the two tasks of legislative bodies as being irreconcilable with each

other than in recent years Hayek has developed a "Model Constitution" in which there are two legislative assembly bodies. One body, the Nomothetae, is charged with the providing for universal, end-independent rules of conduct. Its task will be not only to correct grown law, but also to enact principles of taxation and "those regulations of safety and health, including production or construction, that have to be enforced in the general interest and should be stated in the form of general rules."[59]

The second assembly, the Governmental Assembly, will be in charge of the rules of the organization of government, the ends of government, the budget, and so forth.

It is beyond the scope of our inquiry to pursue the details of Hayek's radical plan. This would involve an analysis of the relationship between these two bodies, the Constitutional Court which is to oversee these two bodies, the requirements for entry into these bodies, the length of term et cetera.

What is noteworthy for us is the reason why Hayek puts forth this proposal. For Hayek, the present separation of powers has failed, and a new division is needed: one that takes a greater account of the tasks to be achieved and the mechanisms necessary to achieve them.

CONCLUSION

This dissertation has presented two studies in the field of the philosophy of law. More specifically, it has examined the relationship between law and social order in two contemporary jurisprudes, to wit, Lon L. Fuller and F. A. Hayek.

In examining the relationship in question, I have tried to show the degree to which, and the manner in which, the legal theories of each man are informed by a rather well developed theory of social order.

In the case of Fuller, one is almost tempted to say that the social theory <u>becomes</u> the legal theory. For the processes that Fuller expends so much theoretical energy upon are at the same time both social and legal. Needless to say, this is of no bother to Fuller as he had little truck with what he took to be rather arbitrary divisions between so-called "different" disciplines.

We have seen, I believe, that Fuller's analysis of social order is, in a very important sense, less abstract than that of Hayek. Whereas Hayek's attention is directed to two principles of social order, namely,

the principles of spontaneous and made order, Fuller focuses on much more specific processes by which social order is achieved.

In the introduction to this dissertation, I hinted that I thought there were several important similarities between Fuller and Hayek, similarities of which it as not the purpose of this work to pursue. In closing I would like to simply mention what I take to be the most important of these. And that similarity is this: I take it to be the case that both men are concerned with what I call problems of institutional competence. This is clearly true for Fuller, but it also is true in Hayek's case. For implicit in his discussion of the differences between spontaneous and made orders is an analysis of the circumstances under which one kind of order is more efficacious than the other. And I think that further investigation can show that dissimilarities in terminology and philosophical foundations notwithstanding, many of the arguments that each gives, and most of the conclusions each reaches, on questions having to do with institutional competence, are remarkably similar, and where not similar, complementary. But that investigation is the subject of another work.

ENDNOTES

ENDNOTES

INTRODUCTION

[1]Cf. generally Hans Kelsen, General Theory of Law and State, trans. by Anders Wedberg (Cambridge: Harvard University Press, 1945).

[2]Cf. generally Roscoe Pound, An Introduction to the Philosophy of Law (New Haven: Yale University Press, 1922).

[3]Cf. generally Eugen Ehrlich, Fundamental Principles of the Sociology of Law, trans. by Walter Moll (Cambridge: Harvard Univerity Press, 1936).

[4]Cf. generally James Coolidge Carter, Law: Its Origin, Growth and Function (New York: Da Capo, 1974, originally published 1907).

CHAPTER I

[1]Lon L. Fuller, "The Reliance Interest in Contract Damages," Yale Law Journal 64 (1936-37).

[2]P. S. Atiyah, "Book Review of The Principles of Social Order," Duke Law Journal (1983): p. 669.

[3]Lon L. Fuller, "American Legal Realism," University of Pennsylvania Law Review 82 (1934).

[4]Lon L. Fuller, "Consideration and Form," Columbia Law Review 41 (1941).

[5]Lon L. Fuller, "Reason and Fiat in Case Law," Harvard Law Review 59 (1946).

[6]Lon L. Fuller, "Legal Fictions," Illinois Law Review 25 (1930-31).

[7]Lon L. Fuller, Basic Contract Law (St Paul: West Publishing Co., 1947).

[8]Lon L. Fuller, The Morality of Law, 2nd ed. revised (New Haven: Yale University Press, 1969).

[9]Lon L. Fuller, The Law in Quest of Itself (Evanston: Northwestern University Press, 1940).

[10]H. L. A. Hart, "Positivism and the Separation of Law and Morals," Harvard Law Review 71 (1958).

[11]H. L. A. Hart, "Positivism and the Separation of Law and Morals," reprinted in Essays in Philosophy and Jurisprudence (Oxford: At the Clarendon Press, 1983), p. 59.

[12]John Auston, The Province of Jurisprudence Determined (New York: Library of Ideas, 1954), p. 184.

[13]H. L. A. Hart, The Concept of Law (Oxford: At the Clarendon Press, 1961).

[14]Lon L. Fuller, "Positivism and Fidelity to Law--A Reply to Professor Hart," Harvard Law Review 71 (1958).

[15]Lon L. Fuller, The Morality of Law 2nd ed. revised (New Haven: Yale University Press, 1969), p. 3.

[16]Ibid., pp. 38-39.

[17]Harvard Law School Library, Lon L. Fuller Papers, Fuller to K. Lewan, December 14, 1967. Hereafter all references to these papers will be put thus: "Fuller Papers."

[18]Fuller, Morality, p. 39.

[19]Ibid., cf. Chapter II.

[20]Cf. Marshall Cohen, "Law, Morality and Purpose," Villanova Law Review 10 (1965).

[21]Ibid., p. 648.

[22]Ronald Dworking, "Philosophy, Morality, and Law--Observations Prompted by Professor Fuller's Novel Claim," University of Pennsylvania Law Review 113 (196), p. 669.

[23]H. L. A. Hart, "Lon L. Fuller: The Morality of Law," Harvard Law Review 78 (1965), pp. 1285-86.

CHAPTER II

[1]Lon L. Fuller, "American Legal Philosohy at Mid-Century," Journal of Legal Education 6 (1954), p. 474.

[2]Lon L. Fuller, "Means and Ends," in The Principles of Social Order, ed. with an introduction by Kenneth I. Winston (Durham: Duke University Press, 1981), p. 56.

[3]Fuller, "American Legal Philosophy," p. 474.

[4]Fuller, "Means and Ends," p. 62.

[5]Ibid., p. 62.

[6]Ibid., p. 52.

[7]Ibid., p. 50.

[8]Ibid.

[9]Fuller Papers, Lon L. Fuller to Philip Selznick, August 18, 1965.

[10]Ibid.

[11]Fuller Papers, "The Lawyer as an Architect of Social Structure," section 2, p. 5. All other sections of this essay have been published under the same title in Social Order. The copy of this essay which is in my possession was a supplementary reading for Fuller's class in Jurisprudence in the 1952-1953 academic year.

[12]Fuller, "Means and Ends," p. 55.

[13]Fuller, "American Legal Philosophy," p. 476.

[14]Ibid., p. 477.

[15]Ibid.

[16]Lon L. Fuller, The Problems of Jurisprudence (New York: Foundation Press, 1949).

[17]Whether the essay was in a final polished form is questionable; however, it was to be a section of the book, and Fuller did at least some editing of it.

[18]Fuller Papers, Outline for "The Principles of Social Order: An Essay in Eunomics."

[19]See n. 11, supra.

[20]Ibid., p. 4.

[21]Ibid.

[22]Fuller Papers, "The Meaning of Freedom," p. 13. This piece seems to have been written either very late in the 1950's or early in the 1960's.

[23]Lon L. Fuller, "The Needs of American Legal Pnhilosophy," in The Principles of Social Order (Durham: Duke University Press, 1981), p. 256.

[24]Lon L. Fuller, The Anatomy of Law (Evanston: Northwestern University Press, 1940), p. 116.

[25]Fuller, "Means and Ends," p. 48.

[26]Ibid., p. 47.

[27]Fuller, "American Legal Philosophy," p. 478.

[28]Fuller Papers, outline of "The Principles of Social Order: An Essay in Eunomics," p. 2.

[29]Fuller, "American Legal Philosophy, p. 478.

[30]Fuller, "Means and Ends," p. 51.

[31]Ibid., p. 52.

CHAPTER III

[1]Fuller does, however, distinguish between the principles and forms of social order: the two expressions are by no means synonomous. Occasionally Fuller's use of terminology was not as clear as one would have liked.

[2]Lon L. Fuller, "Irrigation and Tyranny," in The Principles of Social Order (Durham: Duke University Press, 1981), p. 198.

[3]Cf., for example, "Mediation," in The Principles of Social Order, p. 127, and "The Forms and Limits of Adjudiation," Harvard Law Review 92 (1978), p. 363.

[4]Fuller, Anatomy, p. 84.

[5]Lon L. Fuller, "The Role of Contract in the Ordering Processes of Society Generally," in The Principles of Social Order (Durham: Duke University Press, 1981), pp. 170-71.

[6]In Chapter V we will see in some detail that this form of social order refers not to the rules and principles of the law and contract, but rather to the rights an duties that come into existence through a contract.

[7]Fuller Paper, "Notes." These seem to have been written somewhere in the middle 1950's.

[8]Ibid.

[9]Fuller, "Adjudication," p. 357.

[10]Ibid.

[11]Ibid., pp. 357-58.

[12]"Litigants" is being used in a very broad sense here to refer to the affected parties of any adjudicative process.

[13]Fuller, "Adjudication," p. 346.

[14]Ibid., p. 357.

[15]Ibid.

[16]Ibid.

[17]Cf. "Legal Fictions."

[18]Cf. "Human Purpose and Natural Law," Journal of Philosophy 53 (1956), p. 704, where Fuller remarks, "any form of social order contains . . . its own internal morality." Also, in a letter to Noel Annan, dated April 29, 1959, Fuller writes, "institutional arrangements (say, adjudication or contract) contain a kind of internal morality that must be respected if they are to achieve their goals."

[19]Fuller, "Irrigation," p. 201.

[20]Ibid., p. 199.

[21]Lon L. Fuller, "The Law's Precarious Hold on Life," Georgia Law Review 3 (1969), p. 532. Fuller is here quoting B. Bittner, "The Police on Skid-Row: A Study in Peace Keeping," American Sociological Review 32 (1967), p. 699.

[22]Fuller Papers, LLF to Samuel Mermin, September 27, 1972.

[23]Fuller, "American Legal Philosohy," p. 473, my emphasis.

[24]Fuller Papers, LLF to Mermin, September 27, 1972.

[25]Fuller, "The Role of Contract," p. 171.

[26]Fuller Papers, LLF to Samuel Mermin, November 22, 1950.

[27]By "law" in the Mermin letter, Fuller means "legal system."

[28]Indeed, at times he says "Law is Order," however, this is not his position. Cf. "Fidelity to the Law," p. 644.

[29]Fuller, The Law in Quest, p. 11.

[30]Cf. David Lyons, Ethics and the Rule of Law (Cambridge: Cambridge Univerity Press, 1984), p. 76.

CHAPTER IV

[1]Fuller Papers, letter from LLF to Frederick Olafson, March 22, 1960.

[2]Lon L. Fuller, The Anatomy of Law (New York: Praeger, 1968).

[3]I believe that the actual case in the back of their minds was McBoyle v. United States, 283, US 25 (1931).

[4]Fuller, Anatomy, pp. 57-8.

[5]Ibid., p. 58.

[6]Ibid.

[7]Ibid., p. 59.

[8]Cf., however, The Morality of Law, pp. 229, 231.

[9]Fuller has many very subtle and detailed things to say about statutory interpretation; however, they are beyond the pale of this work.

[10]Lon L. Fuller, "Law an Instrument of Social Control and Law as a Facilitation of Human Interaction," Brigham Young University Law Review 89 (1975).

[11]Ibid., pp. 89-98.

[12]Fuller Papers, letter from LLF to Max Gluckman, October 26, 1971.

[13]Fuller Papers. These notes deal with spontaneous order and eunomics in general. I have edited two of the sentences.

[14]There are many comments in the "Reply" to Fuller's critics in the added last chapter of the revised edition of The Morality of Law in which Fuller does write about the ordering and facilitating function of law.

[15]Fuller, The Morality of Law, p. 146.

[15]Fuller, The Morality of Law, p. 146.

[16]Fuller Papers, "Tentative Outline for Roof Article on 'Legal Order,'" p. 3. Cf. note 29 infra.

[17]Lon L. Fuller, "Jurisprudence,"Encyclopedia Britannica, vol. 13, 14th edition, p. 151.

[18]Cf. pp. 28-9 of the present work.

[19]Fuller, "Human Purpose and Natural Law," p. 704.

[20]Robert Summers, Lon L. Fuller (Stanford: Stanford Univesity Press, 1984), pp. 27-40.

[21]Fuller, The Morality of Law, p. 39.

[22]Ibid., p. 34.

[23]Ibid., p. 63.

[24]Ibid., p. 64.

[25]Ibid., p. 65.

[26]Cf. Fuller, The Anatomy of Law, pp. 57-69.

[27]Ibid., p. 60.

[28]Ibid., p. 61.

[29]This outline, "Tentative Outline for Roof Article on 'Legal Order,' was for an essay that eventually turned into The Anatomy of Law. There are all too numerous subjects mentioned in the outline that receive no treatment at all in The Anatomy of Law.

[30]Ibid., p. 3.

[31]Fuller Papers, letter from LLF to Dorothy Emmet, February 9, 1970.

[32]Fuller Papers, letter from LLF to Dorothy Emmet, October 7, 1966.

[33]Fuller Papers, letter from LLF to H. L. A. Hart, February 3, 1965.

[34]Fuller Papers, letter from LLF to John P. Dawson, November 30, 1966.

[35]Fuller Papers, letter from LLF to Wolfgang Friedmann, October 9, 1959.

CHAPTER V

[1]Cf. pp. 26-7 of this essay.

[2]Lon L. Fuller, "The Forms and Limits of Adjudication," Harvard Law Review 92 (1978).

[3]Ibid., p. 354.

[4]Ibid., p. 364.

[5]Ibid.

[6]Ibid., p. 369.

[7]Ibid., p. 371.

[8]Michael Polanyi, The Logic of Liberty (Chicago: University of Chicago Press, 1951). Fuller's personal copy of this work ws annotated by him to an extraordinary degree.

[9]Lon L. Fuller, "Freedom--A Suggested Analysis, "Harvard Law Review 68 (1955): p. 47.

[10]Fuller, "Adjudication," p. 395.

[11]Ibid., p. 398.

[12]Ibid., p. 404.

[13]Ibid., p. 365.

[14]Lon L. Fuller, "Mediation--Its Forms and Functions," in The Principles of Social Order (Durham: Duke Univeristy Press, 1981), p. 144.

[15]Fuller, "Mediation," pp. 130-31.

[16]Ibid., p. 133.

[17]Ibid, p. 148.

[18]The subject matter of "Irrigation and Tyranny" is in large measure a study of managerial direction, however, it is not a systematic and analytical study of this form of social ordering.

[19]Fuller, The Morality of Law, p. 207.

[20]Ibid.

[21]There is, however, the problem of legislative immunity.

[22]Fuller, The Morality of Law, pp. 208-09.

[23]Ibid., p. 209.

[24]Lon L. Fuller, "Human Interaction and the Law," in The Principles of Social Order (Durham: Duke University Press, 1981), p. 224.

[25]Ibid.

[26]There is no context in which this is not true, however. Cf. "Human Interaction," pp. 224-30. Also, cf., pp. 89-97 of this work.

[27]Lon L. Fuller, The Anatomy of Law (New York: Praeger, 1968), p. 72.

[28]Fuller, "Consideration and Form," p. 806.

[29]Ibid., p. 806, n. 9.

[30]Fuller, "Human Interaction," p. 238.

[31]Ibid., p. 239. In his appeal to the friendly stranger, Fuller was influenced by the writings of Georg Simmel. Cf., for example, The Sociology of Georg Simmel, ed. by Kurt Wolff (New York: Free Press, 1950), especially pp. 402-08.

[32]Fuller, "Human Interaction," p. 239.

[33]Fuller Papers, letter from LLF to Noel Annan, April 29, 1959.

[34]Fuller Papers, letter from LLF to Anthony D'Amato, January 10, 1971.

[35]H. L. A. Hart, The Concept of Law (Oxford: At the Clarendon Press, 1961), p. 89. Kenneth I. Winston first suggested the juxtaposition of Hart and Fuller on these issues in an editorial note on p. 210 in The Principles of Social Order.

[36]Ibid.

[37]Ibid., p. 90.

[38]Ibid., pp. 90-1.

[39]Ibid., p. 91.

[40]Fuller, "Human Interaction," p. 230.

[41]Fuller, Anatomy, p. 73.

[42]Ibid.

[43]Fuller, "Human Interaction," p. 227.

[44]Ibid., pp. 219-20.

[45]Ibid., p. 220.

[46]Ibid., pp. 220-21.

[47]E. Adamson Hoebel, The Law of Primitive Man (Cambridge: Harvard University Press, 1954), p. 28.

[48]Fuller, "Human Interaction, p. 221.

[49]Ibid., p. 222.

[50]Fuller Papers, LLf to Anthony D'Amato, January 10, 1971.

[51]Fuller, "Human Interaction," p. 221.

[52]Ibid., p. 222.

[53]Fuller, "The Role of Contract," p. 176.

[54]Fuller, "Human Interaction," p. 225.

[55]Ibid., p. 227.

[56]Fuller, "Human Interaction," p. 228.

[57]Ibid., pp. 228-29.

[58]Ibid., p. 229. The Fitzmaurice quotation appeared in Olive Parry, The Source and Evidence of International Law (Manchester: Manchester University Press, 1965), p. 60n.

[59]Fuller, "Human Interaction," p. 230.

[60]Ibid.

[61]Fuller, Anatomy, p. 76.

[62]Ibid., p. 77.

[63]Ibid.

[64]Ibid.

[65]It is also competent in superior-subordinate relationships. Cf. Ibid., pp,. 79-80.

[66]Ibid., p. 77.

[67]Ibid., p. 79.

[68]Fuller, "Human Interaction," pp. 241-242.

[69]Fuller, Anatomy, p. 86.

[70]Ibid.

[71]There is not a discussion of the internal morality of customary law in this section. There are two reasons for this. First, Fuller himself never discusses the matter. This would not be too great of a stumbling block if what he would say were implicit in other things on which he does remark. This takes me to my second reason. It is not at all clear to me what the internal morality of customary law is. This is because of the ubiquitousness of customary law. Fuller tends not to draw any lines between morals, law, and etiquette, so much so that it is opaque to me at least what the differences are between those obligations that arise from customary law, and constitute a separate role morality, and those that result from other modes of value.

[72]Fuller recognizes, of course, the propriety of laws concerning child abuse and the like.

[73]Fuller, "Human Interaction," p. 243.

[74]Fuller, The Morality of Law, p. 216.

[75]Cf. Fuller Papers, letter from LLF to William Evan, March 29, 1965.

[76]Fuller Papers, letter from LLF to Marion Benfield, June 7, 1965.

[77]Fuller, "Human Interaction," p. 234.

CHAPTER VI

[1]Fuller Papers, letter from LLF to Samuel Mermin, September 27, 1972.

[2]Ibid.

[3]Fuller, "Reason and Fiat in Case Law," p. 382.

[4]Cf. Oliver Wendell Holmes Jr., "The Path of Law," edited with commentary by Lon L. Fuller, in American Primer, ed. by Daniel Boorstin (Chicago: University of Chicago Press, 1966).

[5]Cf. John Chipman Gray, The Nature and Sources of Law (New York: Columbia University Press, 1921).

[6]Lon L. Fuller, "The Needs of American Legal Philosophy," in The Principles of Social Order (Durham: Duke University Press, 1981), p. 251.

[7]Fuller, "The Lawyer as an Architect of Social Structures," pp. 264-65.

[8]Fuller, "The Needs of ALP," pp. 251-52.

[9]Ibid., p. 253.

[10]Ibid., p. 261.

[11]Ibid.

[12]Due to the war and certain philosophical differences, the collaboration was never completed. One of the differences is worth noting: Fuller thought a contracts case book should begin not with contract versus no contract, but rather with remedies. It was with remedies that Fuller began his own case book in contracts.

[13]Lon L. Fuller, "Williston on Contracts," North Carolina Law Review 18 (1939), p. 3.

[14]Ibid., p. 5.

CHAPTER VII

[1]Fuller Papers, "Principles of Social Order" outline, p.5. These are also discussed, although not by name, in "Freedom as a Problem of Allocating Choice," Proceedings of the American Philosophical Society 112 (1968), pp. 105-06.

[2]The two articles are: "Freedom as a Problem of Allocating Choice'; and "Freedom--A Suggested Analysis, Harvard Law Review 68 (1955). The book review is "Some Reflections of Legal and Economic Freedoms--A Review of Robert L. Hale's 'Freedom through law,'" Columbia Law Review 54 (1954). In future references I shalll refer to these as "Freedom," "Allocating Choice," and "Hale Review," respectively.

[3]These unpublished writings are to be found in the Fuller Papers. I shall refer to these in the following way. The three Louisiana State University Lectures shall be called LSU I, LSU II, LSU III. I shall call what I take to be the first of the two drafts of the book on freedom, "The Meaning of Freedom." This was to be either the name of the first chapter or the book as a whole. The other draft is broken into two chapters, each with a separate pagination. I shall call the first, "Introduction I," and the second, "Introduction II."

[4]Fuller, "Freedom," p. 37.

[5]Fuller Papers, "The Meaning of Freedom," p. 9.

[6]Ibid., p. 10.

[7]Ibid., p. 8.

[8]Fuller, "Freedom," p. 37.

[9]Ibid.

[10]Ibid., pp. 37-8.

[11]Ibid., p. 38.

[12]Fuller Papers, LSU I, p. 13.

[13]Ibid., p. 14.

[14]Ibid.

[15]Ibid., p. 15.

[16]Ibid., p. 16.

[17]Ibid., p. 18.

[18]Fuller, "Freedom," p. 38.

[19]Fuller Papers, "Tendencies Inherent in the Principle of Reciprocity: What a Utopia of Reciprocity Would Be Like," p. 8. This is the essay on Anarchism to which I referred in Chapter II, n. 17.

[20]Fuller, "Freedom," p. 38.

[21]Ibid., p. 40.

[22]Ibid.

[23]Fuller Papers, LSU I, p. 26.

[24]Ibid., p. 27.

[25]Ibid., p. 28.

[26]Ibid., p. 29.

[27]Fuller Papers, "Introduction I," p. 5.

[28]Fuller Papers, LSU I, p. 46.

[29]Fuller, "Freedom," p. 41.

[30]Ibid.

[31]Ibid., pp. 41-2.

[32]Cf. Fuller, The Morality of Law, pp. 122-23, 198-99.

[33]Cf. Fuller Papers, LSU I, p. 10.

[34]Fuller Papers, "Introduction I," p. 14.

[35]Fuller Papers, LSU I, p. 45.

[36]Fuller, "Allocating Choce," p. 104.

[37]Ibid.

[38]Ibid.

[39]Ibid., p. 101.

[40]Ibid., p. 102.

[41]Fuller Papers, LSU II, p. 3.

[42]Fuller Papers, "Introduction I," p. 8.

[43]Fuller, "The Case of the Speluncean Explorers," p. 625.

[44]Fuller Papers, "Notes," p. 23. These notes consist of six short three to four page essays, ranging from subjects such as "Managerial Direction versus the Rule of Law," and "Distributive and Corrective Justice," to the present one. They were probably composed somewhere between the late 1950's and early 1960's.

[45]Ibid.

[46]Ibid., p. 25.

[47]Cf. F. A. Hayek, "What is 'Social'? What Does it Mean?" in Studies in Philosophy, Politics and Economics (Chicago: University of Chicago Press, 1967).

[48]Fuller Papers, "Notes," pp. 25-6.

[49]Fuller Papers, LSU II, p. 19.

[50]Cf. Isaish Berlin, Four Essays on Liberty (New York: Oxford University Press, 1961).

[51]Cf. John Rawls, A Theory of Justice (Cambridge: Harvard University Press, 1971).

[52]Fuller, "Allocation of Choice," p. 104.

[53]Fuller Papers, "Introduction I," p. 2.

[54]Fuller, "Freedom," p. 41.

[55]This is the reason why a sense of trusteeship is needed.

CHAPTER VIII

[1]Ludwig von Mises, Socialism, rev. ed., trans. by J. Kahane (New Haven: Yale University Press, 1952; originally published in German in 1922).

[2]From the "Official Announcement of the Royal Academy of Sciences," quoted in Fritz Machlup, ed., Essays in Hayek (New York: New York University Press, 1976), p. xvi.

[3]F. A. Hayek, "Economics and Knowledge," in Individualism and Economic Order (Chicago: University of Chicago Press, 1948), pp. 50-1.

[4]F. A. Hayek, "Kinds of Rationalism," in Studies in Philosophy, Politics and Economics (Chicago: University of Chicago Press, 1967), p. 71.

[5]F. A. Hayek, The Counter-Revolution of Science (Glencoe: Free Press, 1952; reprint ed. Liberty Press, 1979).

[6]F. A. Hayek, "Freedom and the Economic System" (Chicago: University of Chicago Press, Public Policy Pamphlet No. 29, 1939).

[7]F. A. Hayek, The Road to Serfdom (Chicago: University of Chicago Press, 1944; also 1969 ed. with new introduction by Hayek).

[8]Hayek argues that the term "economy" is misleading used when applied to something other than an organization. He writes, "An economy, in the strict sense of the word in which a household, a farm, or an enterprise can be called economies, consists of a complex of activities by which a given set of means is allocated in accordance with a unitary plan among the competing ends according to their relative importance. The market order serves not such single order of ends." This quotation comes from Law, Legislation and Liberty, 3 vols. (Chicago: University of Chicago Press, 1973, 1976, 1979), vol. II, p. 107. Hereafter, all reference will be given as LLL followed by the volume number and page number.

[9]F. A. Hayek, The Sensory Order (Chicago: University of Chicago Press, 1952).

[10]F. A. Hayek, "The Primacy of the Absract," in Beyond Reductionism, ed. by Arthur Koestler and J. R. Smythe (London: The Hutchinson Publishing Group Ltd., 1969).

[11]F. A. Hayek, The Contitution of Liberty (Chicago: University of Chicago Pres, 1960).

[12]Ibid., p. 1.

[13]F. A. Hayek, Studies in Philosophy, Politics and Economics (Chicago: University of Chicago Press, 1967).

[14]F. A. Hayek, New Studies in Philosophy, Politics, Economics and the History of Ideas (Chicago: University of Chicago Press, 1978).

[15]Hayek, LLL III, pp. xii-xiii.

[16]Hayek, LLL I, p. 2.

[17]Hayek, LLL II, p. 8.

[18]Ibid.

[19]Hayek, LLL I, p. 12.

[20]Three of these essays which were exclusively about the "debate," two written during it, and one as an afterword, are collected in Individualism and Economic Order. They are "Socialist Calculation I: The Nature and History of the Problem," "Socialist Calculation II: The State of the Debate (1935)," and "Socialist Calculation III: The Competitive 'Solution.'"

[21]F. A. Hayek, "Th Use of Knowledge in Society," in Individualism and Economic Order (Chicago: University of Chicago Press, 1948), p. 87.

[22]Ibid.

[23]I owe this expression to Peter Asquith, however, he applies it in a different way than I do, namely, in the context of theoretical knowledge.

[24]Hayek, "The Use of Knowledge," p. 87.

[25]Ibid.

[26]Hayek, LLL II, p. 8

[27]Hayek, LLL I, p. 13.

[28]A rule as a norm will be discussed in Chapter XI.

[29]F. A. Hayek, "Notes on the Evolution of Systems of Rules of Conduct," in Studies in Philosophy, Politics and Economics (Chicago: Unviersity of Chicago Press, 1967), p. 67.

[30]Hayek, LLL I, p. 75.

[31]Gilbert Ryle, The Concept of Mind (New York: Barnes and Noble, 1949).

[32]Hayek, "The Primacy of the Abstract," p. 43.

[33]F. A. Hayek, "The Errors of Constructivism," in New Studies in Philosophy, Politics and Economics (Chicago: University of Chicago Press, 1978), p. 8.

[34]Ibid., pp. 8-9.

[35]Ibid., p. 9.

[36]Hayek, "The Primary of the Abstract," p. 38.

[37]Hayek, LLL I, p. 19.

[38]Ibid.

[39]Ibid., p. 18.

[40]David Hume, A Treatise of Human Nature, ed. by L. A. Selsby-Bigge (Oxford: At the Clarendon Press, 1888; originally published 1739-40), see especially pp. 484-526. What is rarely noted about Hume's account of promises is that it pertains to self-interested commerce. Hume writes, "Tho' . . . self-interest commerce of men begins to take place, and to predominate in society, it does not entirely abolish the more generous and noble intercourse of friendship and good offices. I may still do services to such persons as I love, and am more particularly acquainted with without any prospect of

advantage; and they may make me a return in the same manner, without any view but that of recompensing my past services. In order, therefore, to distinguish those two different sorts of commerce, the interested and disinterested, there is a certain form of words invented for the former, by which we bind ourselves to the performance of any action. This form of words constitutes what we call a promise, which is the sanction of the interested commerce of mankind" (pp. 521-22).

[41]Hayek, "Notes on the Evolution," p. 67.

[42]Hayek, LLL I, p. 18.

[43]Ibid.

[44]Ibid.

[45]Hayek, "The Use of Knowledge," p. 80.

[46]Hayek undoubtably got this expression from Ryle. See the latter's "Knowing How and Knowing That," in The Proceedings of the Aristotelian Society 1945-46. Hayek was also sypathetic to Polanyi's work in this area, especially the Chapters on "Skills," and "Articulation," in the latter's Personal Knowledge (Chicago: University of Chicago Press, 1958), cf. LLl I, p. 164, no. 15.

[47]F. A. Hayek, "Rules, Perception and Intelligibility," in Philosophy, Politics and Economics (Chicago: University of Chicago Press, 1967), p. 43.

[48]Hayek, The Constitution of Liberty, p. 26.

[49]Karl Popper, Objective Knowledge, revised ed. (Oxford: At the Clarendon Press, 1979), especially "On the Theory of Objective Mind."

[50]Cf. pp. 148-50 of this work.

[51]For an account of Hayek's place in the "Calculation Debate," see the definitive work by Don Lavoie, Rivalry and Central Planning (Cambridge: Cambridge University Press, 1985).

CHAPTER IX

[1]For one misbegotton effort cf. Murray Rothbard, "F. A. Hayek and the Concept of Coercion," in The Ethics of Liberty (New Jersey: Humanities Press, 1981).

[2]Hayek, The Constitution of Liberty, p. 17. All other references to this work will be noted as CL.

[3]Hayek, CL, p. 133.

[4]Ibid.

[5]Ibid., p. 134.

[6]Ibid., p. 138.

[7]Ibid.

[8]Ibid., pp. 138-39.

[9]Ibid., p. 138.

[10]Ibid.

[11]Cf., for example, Ayn Rand, "Man's Rights," in The Virtue of Selfishness (New York: Signet Books, 1961).

[12]Hayek, CL, p. 30.

[13]Ibid.

[14]Ibid., p. 32.

[15]Cf. CL generally, especially Chapters 1-4, 9-10, and 14.

[16]Private conversation, January 1985.

[17]Hayek, CL, p. 32.

[18]Hayek, LLL I, p. 107.

[19]These rules of conduct will, in large measure, constitute the subject matter of Chapter XI of this essay.

[20]Ibid.

[21]Adam Ferguson, Principles of Moral and Political Science (Edinburgh, 1792), vol. 2, p. 258 et seq; quote in Hayek, LLL I, p. 157, n. 14.

CHAPTER X

[1]Cf. Hayek, LLL III, pp. 152, 196 no. 19.

[2]Hayek, LLL III, p. 196 n. 19.

[3]Ibid. Commenting on the 1939 never to be compeleted work, Hayek said, "It took me forty years to think through the original idea."

[4]Cf. "Kinds of Rationalism," pp. 84-85, and LLL I, pp. 5, 8-17.

[5]Ibid.

[6]Cf. the works mentioned in n. 4 supra generally.

[7]Hayek, LLL I, p. 5.

[8]Hayek, The Counter-Revolution of Science, p. 83.

[9]Hayek, LLL I, 10.

[10]Ibid., pp. 8, 10.

[11]Ibid., p. 9.

[12]Hayek, The Counter-Revolution of Science, p. 39.

[13]From The Fable of the Bees, quoted in Hayek, "The Results of Human Action, but Not of Human Design," in Studies, p. 99 n. 8.

[14]Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations, Bk. IV, ii.

[15]Ibid.

[16]Adam Ferguson, An Essay on the History of Civil Society (Boston: Transaction Books, 1980 [originally published 1767]), p. 187.

[17]Smith, Wealth of Nations, I, ii.

[18]"The central concept around which the discussion of this book will turn is that of order. . . ." LLL I, p. 35.

[19]Ibid., p. 36.

[20]Hayek, "The Confusion of Language in Political Thought," in New Studies, p. 73.

[21]Hayek, The Sensory Order, p. 7 (1.20).

[22]Hayek, LLL I, p. 42.

[23]F. A. Hayek, "The Trend of Economic Thinking," Economica 13 (May 1933).

[24]Cf. Hayek, LLl I, p. 38.

[25]Ibid.

[26]F. A. Hayek, "The Principles of a Liberal Social Order," in Studies in Philosophy, Politics and Economics (Chicago: University of Chicago Press, 1967), p. 163.

[27]Hayek, LLL I, p. 38.

[28]Ibid.

[29]Ibid.

[30]Hayek, "The Confusion of Language," p. 75.

[31]Hayek, LLL I, p. 38.

[32]F. A. Hayek, "Kinds of Order in Society," New Individualist Review 3 (Winter 1964), p. 5.

[33]Hayek, LLL I, p. 40.

[34]Ibid.

[35]Ibid.

[36]Cf. Hayek, The Constitution of Liberty, pp. 72-75.

[37]F. A. Hayek, "Notes on the Evolution of Systems of Rules of Conduct," in Studies in Philosophy, Politics and Economics (Chicago: University of Chicago Press, 1967), p. 73.

[38]Michael Polanyi, "The Span of Central Direction," in The Logic of Liberty (Chicago: University of Chicago Press, 1951), p. 115.

[39]Ibid., pp. 117-18.

[40]Hayek, "Kinds of Order," pp. 5-6.

[41]Ibid., p. 6.

[42]Hayek, LLL I, pp. 50-1.

[43]Ibid., p. 113. Also, cf. F. A. Hayek, "The Errors of Constructivism," in New Studies in Philosophy, Politics, Economics and the History of Ideas (Chicago: University of Chicago Press, 1978), p. 9.

[44]Hayek, LLL I, p. 66.

[45]Ibid., p. 67.

[46]F. A. Hayek, "Notes on the Evolution of Systems of Rules of Conduct," in Studies in Philosophy, Politics and Economics (Chicago: University of Chicago Press, 1967).

[47]Ibid., p. 66.

[48]Ibid., p. 67.

[49]Ibid., p. 68.

[50]Hayek, LLL I, p. 45.

[51]Ibid., p. 49.

[52]Hayek, The Constitution of Liberty, p. 150.

[53]Hayek, LLL I, p. 49.

[54]Ibid., pp. 49-50.

[55]Ibid., p. 50.

[56]Ibid.

[57]Ibid., p. 113.

[58]Hayek, LLL II, p. 13.

[59]Ibid.

[60]Hayek, "Confusion of Language," p. 85.

[61]Hayek, LLL II, p. 13.

[62]Hayek, "Confusion of Language," p. 85.

[63]Hayek, LLL II, p. 14.

[64]Ibid.

[65]Hayek, "Confusion of Language," p. 87.

CHAPTER XI

[1]Hayek, "Freedom and the Economic System," p. 8.

[2]Ibid., p. 9.

[3]Ibid., p. 10.

[4]Ibid., p. 11.

[5]Hayek, "Scientism and the Study of Society," in The Counter-Revolution of Science, Liberty Press ed., p. 147.

[6]Ibid., p. 148.

[7]Ibid.

[8]Hayek, The Constitution of Liberty, p. 57.

[9]Ibid.

[10]Hayek, CL, p. 207.

[11]Ibid., p. 156.

[12]Ibid., p. 113.

[13]Ibid.

[14]Ibid., p. 208.

[15]Ibid., p. 209.

[16]Ibid., p. 155.

[17]Ibid.

[18]Cf., for exmaple, Rothbard, "F. A. Hayek and the Concept of Coercion."

[19]Cf. my essay, pp. 232-33.

[20]Hayek, CL, p. 173.

[21]William Paley, The Principles of Moral and Political Philosophy (1785), edition of 1824, p. 348 et seq; quoted in Hayek, CL, p. 173.

[22]Hayek, CL, p. 205.

[23]Cf. n. 8 supra.

[24]Hayek, "The Political Ideal of the Rule of Law," p. 19.

[25]Hayek, CL, p. 62.

[26]Cf. Hayek, LLL I, Chapters 5 and 6. Hayek capitalizes Nomos and Thesis and I shall follow suit.

[27]Ibid., pp. 134-46.

[28]Ibid., p. 85-6.

[29]For Hayek's most mature views on justice, cf. LLL II.

[30]David Hume, The Treatise of Human Nature, pp. 497-98.

[31]Cf. Hayek, LLL I, p. 107.

[32]Cf. Hayek, LLl II, p. 153 n. 7.

[33]Hayek, LLL I, p. 126.

[34]Ibid., p. 125.

[35]Ibid.

[36]Cf. Ibid., p. 108.

[37]Hayek, LLL II, p. 4.

[38]Hayek, LLL I, p. 2.

[39]Cf., for example, Studies in Philosophy, Economics and Politics and New Studies in Philosphy, Econmics, Politics and the History of Ideas.

[40]Hayek, LLL I, p. 94; my emphasis.

[41]Ibid., p 86.

[42] Ibid., p. 94-5.

[43]Ibid., p. 121.

[44]Hayek, "The Confusion of Language in Political Thought," p. 79.

[45]Hayek, LLL I, p. 101.

[46]Bruno Leoni, Freedom and the Law (Princeton: D. Van Nostrand, 1961). This very fine work has been grossly ignored.

[47]There is a very good chance that Hayek received a manuscript copy of the lectures in that year.

[48]Cf. Hayek, LLL I, p. 168 n 35. Also, Hayek and Leoni were friends, and when Leoni was killed, Hayek wrote an obiturary on him in Il Politico, the journal that Leoni had edited.

[49]Cf. Hayek, LLL I, pp. 116-18.

[50]Cf n. 21 supra.

[51]Cf. Hayek, CL, pp. 170-71.

[52]Hayek, LLL I, p. 118.

[53]Ibid., p. 88.

[54]Ibid.

[55]Ibid., p. 89.

[56]During President Reagan's 1985 illness, Donald Regan led reporters to think that he (Regan) was "in charge." Larry Speakes, the White House spokesman, assured the reporters that President Reagan was still "running the country."

[57]Hayek, LLL I, p. 143.

[58]Ibid., p. 142.

[59]Hayek, LLL III, p. 115.

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