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THE COLLECTED WORKS OF  
F. A. Hayek

VOLUME XV

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THE MARKET AND  
OTHER ORDERS

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EDITED BY  
BRUCE CALDWELL



The University of Chicago Press

## THE COLLECTED WORKS OF F. A. HAYEK

F. A. HAYEK (1899–1992), recipient of the Presidential Medal of Freedom in 1991 and cowinner of the Nobel Memorial Prize in Economics in 1974, was a pioneer in monetary theory and a leading proponent of classical liberalism in the twentieth century. BRUCE CALDWELL is research professor of economics and the director of the Center for the History of Political Economy at Duke University. He is the author or editor of many books, including *Hayek's Challenge: An Intellectual Biography of F. A. Hayek*, also published by the University of Chicago Press.

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## EDITORIAL FOREWORD

This volume collects papers that span much of the career of Friedrich Hayek. Most of them are taken from three previous collections: *Individualism and Economic Order* (1948), *Studies in Philosophy, Politics and Economics* (1967), and *New Studies in Philosophy, Politics, Economics and the History of Ideas* (1978). I hope that the editor's introduction will make clear the rationale behind the selection.

Because Hayek's papers have appeared in both British and American publications, the question as to which conventions to follow regarding spelling and punctuation naturally arises. We have chosen to follow a "mixed system" that uses as a model the conventions followed in the 1967 *Studies* volume. Typographical errors have been silently corrected, as have minor inaccuracies in Hayek's quoting of others. More significant errors are noted. Because each of the chapters stands alone, the usual practice of providing a full reference at the first quotation and abbreviated ones thereafter holds only within each chapter.

I gratefully acknowledge the assistance of Jack Bladel, Eric Howard, Hansjoerg Klausinger, Jeremy Shearmur, and Michael Wohlgemuth in tracking down obscure references. Michaël Assous, Claire Caldwell, Hansjoerg Klausinger, John Lewis, and James Murphy translated passages from French, German, Latin, and Greek. Angela Zemonek, Sam Caldwell, and Matt Panhans aided me in preparing the final manuscript. Participants at the HOPE Workshop at Duke University in January 2012 provided comments on my editor's introduction. Faculty at the Advanced Austrian Economics seminar at the Foundation for Economic Education in August 2009, participants at the Fund for the Study of Spontaneous Orders meeting in February 2009 on "Manifestations of Spontaneous Order in Politics and Society", and Paul Lewis all provided comments on an earlier version. My thanks to them all.

I have been working on this manuscript for a number of years, and as a result, quite a few people at the University of Chicago Press have contributed to bringing it to press. My thanks to David Pervin, John Tryneski, Joe Jackson, Shenyun Wu, Rhonda Smith, Kelly Finefrock-Creed, and Carissa Vardanian for their good work and support.

with the will of the teacher or the punishment or the super-natural sanctions threatened by him.

Man does not so much choose between alternative actions according to their known consequences as prefer those the consequences of which are predictable over those the consequences of which are unknown. What he most fears, and what puts him in a state of terror when it has happened, is to lose his bearings and no longer to know what to do. Though we all tend to associate conscience with the fear of blame or punishment by another will, the state of mind which it represents is psychologically little different from the alarm experienced by somebody who, while manipulating a powerful and complicated machinery, has inadvertently pulled the wrong levers and thereby produced wholly unexpected movements. The resulting feeling that something dreadful is going to happen because one has infringed rules of conduct is but one form of the panic produced when one realizes that one has entered an unknown world. A bad conscience is the fear of the dangers to which one has thus exposed oneself by having left the known path and entered such an unknown world. The world is fairly predictable only so long as one adheres to the established procedures, but it becomes frightening when one deviates from them.

In order to live successfully and to achieve one's aims within a world which is only very partially understood, it is therefore quite as important to obey certain inhibiting rules which prevent one from exposing oneself to danger as to understand the rules on which this world operates. Taboos or negative rules acting through the paralysing action of fear will, as a kind of knowledge of what *not* to do, constitute just as significant information about the environment as any positive knowledge of the attributes of the objects of this environment. While the latter enables us to predict the consequences of particular actions, the former just warns us not to take certain kinds of action. At least so long as the normative rules consist of prohibitions, as most of them probably did before they were interpreted as commands of another will, the 'Thou shalt not' kind of rule may after all not be so very different from the rules giving us information about what is.<sup>21</sup>

<sup>21</sup>The possibility contemplated here is not that all normative rules can be interpreted as descriptive or explanatory rules, but that the latter may be meaningful only within a framework of a system of normative rules.

## THE RESULTS OF HUMAN ACTION BUT NOT OF HUMAN DESIGN<sup>1 2</sup>

The belief in the superiority of deliberate design and planning over the spontaneous forces of society enters European thought explicitly only through the rationalist constructivism of Descartes. But it has its sources in a much older erroneous dichotomy which derives from the ancient Greeks and still forms the greatest obstacle to a proper understanding of the distinct task of both social theory and social policy. This is the misleading division of all phenomena into those which are 'natural' and those which are 'artificial'.<sup>3</sup> Already the sophists of the fifth century B.C. had struggled with the problem and stated it as the false alternative that institutions and practices must be either due to nature (*physei*) or due to convention (*thesei* or *nomō*); and through Aristotle's adoption of this division it has become an integral part of European thought.<sup>4</sup>

<sup>1</sup>A French translation of this essay was published in: *Les fondements philosophiques des systèmes économiques: Textes de Jacques Rueff et essais rédigés en son honneur*, ed. Emil Claassen (Paris: Payot, 1967), pp. 98–106. [Reprinted in F. A. Hayek, *Studies in Philosophy, Politics and Economics* (Chicago: University of Chicago Press, 1967), pp. 96–105.—Ed.]

<sup>2</sup>Adam Ferguson, *An Essay on the History of Civil Society* (Edinburgh: Printed for A. Millar and T. Caddel, London, and A. Kincaid and J. Bell, Edinburgh, 1767), p. 187: "Nations stumble upon establishments, which are indeed the result of human action, but not the execution of any human design." Ferguson refers in this connection to the *Mémoires du Cardinal de Retz* (Paris: E. Ledoux, 1820), vol. 2, p. 497, presumably the reference to President de Bellièvre's statement that Cromwell once told him that "on ne montait jamais si haut que quand on sait où l'on va." [The next sentence of Ferguson's text reads, "If Cromwell said, that a man never mounts higher, than when he knows not whither he is going; it may with more reason be affirmed of communities, that they admit of the greatest revolutions where no change is intended, and that the most refined politicians do not always know whither they are leading the state by their projects."—Ed.]

<sup>3</sup>Cf. Felix Heimann, *Nomos und Physis: Herkunft und Bedeutung einer Antithese im griechischen Denken des 5. Jahrhunderts* (Basel: Friedrich Reinhardt, 1945).

<sup>4</sup>[In his paper "Nature, Custom, and Reason as the Explanatory and Practical Principles of Aristotelian Political Science" (*Review of Politics*, vol. 64, Summer 2002, pp. 469–95), James Murphy argues that Aristotle, like Hayek, employed a three part division in explaining social orders, a "nested hierarchy" consisting of nature, habit, and reason, such that "our habits presuppose human nature but cannot be reduced to it, just as our stipulated rational ideals presuppose our habits but cannot be reduced to them" (p. 473). Murphy thus would reject Hayek's lumping Aristotle in with the sophists on this matter.—Ed.]

It is misleading, however, because those terms make it possible to include a large and distinct group of phenomena either under the one or the other of the two terms, according as to which of two possible definitions is adopted that were never clearly distinguished and are to the present day constantly confused. Those terms could be used to describe either the contrast between something which was independent of human action and something which was the result of human action, or to describe the contrast between something which had come about without, and something which had come about as a result of, human design. This double meaning made it possible to represent all those institutions which in the eighteenth century Adam Ferguson at last clearly singled out as due to human action but not to human design either as natural or as conventional according as one or the other of these distinctions was adopted. Most thinkers, however, appear to have been hardly aware that there were two different distinctions possible.

Neither the Greeks of the fifth century B.C. nor their successors for the next two thousand years developed a systematic social theory which explicitly dealt with those unintended consequences of human action or accounted for the manner in which an order or regularity could form itself among those actions which none of the acting persons had intended. It therefore never became clear that what was really required was a three-fold division which inserted between the phenomena which were natural in the sense that they were wholly independent of human action, and those which were artificial or conventional<sup>5</sup> in the sense that they were the product of human design, a distinct middle category comprising all those unintended patterns and regularities which we find to exist in human society and which it is the task of social theory to explain. We still suffer, however, from the lack of a generally accepted term to describe this class of phenomena; and to avoid continuing confusion it seems to be urgently necessary that one should be adopted. Unfortunately the most obvious term which should be available for that purpose, namely 'social', has by a curious development come to mean almost the opposite of what is wanted: as a result of the personification of society, consequent on the very failure to recognize it as a spontaneous order, the word 'social' has come to be generally used to describe the aims of deliberate concerted action. And the new term 'societal' which, conscious of the difficulty, some sociologists have attempted to introduce, appears to have small prospect of establishing itself to fill that urgent need.<sup>6</sup>

<sup>5</sup>The ambiguity of the term 'conventional', which may refer either to explicit agreement or to habitual practices and their results, has further contributed to enhance the confusion.

<sup>6</sup>See F. Stuart Chapin, *Cultural Change* (New York: Century, 1928), and Maurice Mandelbaum, "Societal Facts", in *Theories of History*, ed. Patrick Gardiner (London, Allen and Unwin, 1959), pp. 476–88. The term 'cultural' which social anthropologists have adopted as a technical term to describe these phenomena will hardly do for general usage, since most people would hesitate to include, e.g., cannibalism under 'cultural' institutions.

It is important to remember, however, that up to the appearance of modern social theory in the eighteenth century, the only generally understood term through which it could be expressed that certain observed regularities in human affairs were not the product of design was the term 'natural.' And, indeed, until the rationalist reinterpretation of the law of nature in the seventeenth century, the term 'natural' was used to describe an orderliness or regularity that was not the product of deliberate human will. Together with 'organism' it was one of the two terms generally understood to refer to the spontaneously grown in contrast to the invented or designed. Its use in this sense had been inherited from the stoic philosophy, had been revived in the twelfth century,<sup>7</sup> and it was finally under its flag that the late Spanish Schoolmen developed the foundations of the genesis and functioning of spontaneously formed social institutions.<sup>8</sup>

It was through asking how things would have developed if no deliberate acts of legislation had ever interfered that successively all the problems of social and particularly economic theory emerged. In the seventeenth century, however, this older natural law tradition was submerged by another and very different one, a view which in the spirit of the then rising constructivist rationalism interpreted the 'natural' as the product of designing reason.<sup>9</sup> It was

<sup>7</sup>Cf. particularly the account in Sten Gagnér, *Studien zur Ideengeschichte der Gesetzgebung* (Stockholm: Almqvist and Wiksell, 1960), pp. 225–40, of the work of Guillaume des Conches, especially the passage quoted on p. 231: "Et est positiva que est ab hominibus inventa. . . . Naturalis vero que non est homine inventa." ["The positive is that which is contrived by men. . . . The natural is that which is not contrived by men." —Ed.]

<sup>8</sup>See particularly Luis Molina, *De iustitia et iure*, Cologne, 1596–1600, especially Tome II, disputation 347, no. 3, where he says of natural price that "naturale dicitur, quoniam et ipsis rebus, seclusa quacumque humana lege eo decreto consurgit, dependet tamen a multis circumstantiis, quibus variatur, atque ab hominum affectu, ac aestimatione, comparatione diversum usum, interdum pro solo hominum beneplacito et arbitrio." ["It is called natural because it derives from the thing itself, exclusive of any human law or decree, but is dependent on the many circumstances which alter it, and on the sentiments and opinions of men in comparing various uses, even sometimes on the pleasures and whims of men." —Ed.] In an interesting but unpublished doctoral thesis of Harvard University (William Seavey Joyce, *The Economics of Louis de Molina: A Study in the Development of Scholastic Economics in the Sixteenth Century*, 1949, pp. 2–3 of the Appendix, "Molina on Natural Law"), the author rightly says that "Molina explains that, unlike positive law, natural law is 'de objecto'—an untranslatable, but very handy scholastic term which means pretty much, 'in the nature of the case'—because from the very nature of the thing (*ex ipsam natura rei*) it follows that, for the preservation of virtue or the avoiding of vice, that action should be commanded or forbidden, which the (natural) law commands or forbids. . . . Hence, Molina continues, 'what is commanded or forbidden results from the nature of the case and not from the arbitrary will (*ex voluntate et libito*) of the legislator.'"

<sup>9</sup>The change in the meaning of the concept of reason which this transition involves is clearly shown by a passage in John Locke's early *Essays on the Law of Nature*, ed. W. von Leyden (Oxford: Clarendon Press, 1954), p. 111, in which he explains that "By reason, however, I do not think is meant here that faculty of the understanding which forms trains of thought and deduces proofs, but certain definite principles of action from which spring all virtues and whatever is necessary

finally in reaction to this Cartesian rationalism that the British moral philosophers of the eighteenth century, starting from the theory of the common law as much as from that of the law of nature, built up a social theory which made the undesigned results of individual action its central object, and in particular provided a comprehensive theory of the spontaneous order of the market.

There can be little question that the author to whom more than to any other this ‘anti-rationalist’ reaction is due was Bernard Mandeville.<sup>10</sup> But the full development comes only with Montesquieu<sup>11</sup> and particularly with David Hume,<sup>12</sup> Josiah Tucker, Adam Ferguson, and Adam Smith. The uncompre-

for the proper moulding of morals.” Cf. also *ibid.*, p. 149: “For right reason of this sort is nothing but the law of nature itself already known.”

<sup>10</sup>The basic idea is already contained in many passages of the original poems of 1705, especially

The worst of all the multitude  
Did something for the common good,

but the fully developed conception occurs only in the second part of the prose commentary added more than twenty years later to *The Fable of the Bees* (see Bernard Mandeville, *The Fable of the Bees: Or, Private Vices, Publick Benefits*, ed. F. B. Kaye (Oxford: Clarendon, 1924), vol. 2, especially pp. 142, 287–88, and 349–50, and compare Chiaki Nishiyama, *The Theory of Self-Love. An Essay on the Methodology of the Social Sciences, and Especially of Economics, with Special Reference to Bernard Mandeville*, Chicago Ph.D. thesis, June 1960, especially for the relation of Mandeville’s theories to Menger’s). [Hayek was Chiaki Nishiyama’s dissertation supervisor; the title of the dissertation is evidently patterned on Menger’s *Investigations into the Method of the Social Sciences, with Special Reference to Economics*.—Ed.]

<sup>11</sup>On the influence of Mandeville on Montesquieu see Joseph Dedieu, *Montesquieu et la tradition politique anglaise en France: Les sources anglaises de “L’Esprit des lois”* (Paris: J. Gabalda, 1909).

<sup>12</sup>David Hume, *The Philosophical Works*, ed. Thomas Hill Green and Thomas Hodge Grose (London: Longmans, Green, 1890), vols. 1 and 2, *A Treatise of Human Nature*, vols. 3 and 4, *Essays, Moral, Political, and Literary*, esp. vol. 2, p. 296: “advantageous to the public; though it be not intended for that purpose by the inventors”; also vol. 3, p. 99: “if the particular checks and controls, provided by the constitution . . . made it not the interest, even of bad men, to act for the public good”; as well as vol. 2, p. 289: “I learn to do a service to another, without bearing him any real kindness”; and vol. 4, p. 195: “all these institutions arise merely from the necessities of human society.” It is interesting to observe the terminological difficulties into which Hume is led because, as a result of his opposition to contemporary natural law doctrines, he has chosen to describe as ‘artifactual’, ‘artifice’, and ‘artificial’ precisely what the older natural law theorists had described as ‘natural’, cf. esp. vol. 2, p. 258: “where an invention is obvious and absolutely necessary, it may as properly be said to be natural as anything that proceeds immediately from original principles; without the intervention of thought or reflection. Though the rules of justice be *artificial*, they are not *arbitrary*. Nor is the expression improper to call them *Laws of Nature*; if by natural we understand what is common to any species, or even if we confine it to mean what is inseparable from the species.” Cf. my essay on “The Legal and Political Philosophy of David Hume”, reprinted in *Studies in Philosophy, Politics and Economics*. [This essay is now reprinted as chapter 7 of *The Trend of Economic Thinking*, ed. W. W. Bartley III and Stephen Kresge, vol. 3 (1991) of *The Collected Works of F. A. Hayek* (Chicago: University of Chicago Press; London: Routledge), pp. 101–18.—Ed.] Professor Bruno Leoni has drawn my attention to the fact that Hume’s use of ‘artificial’ in this connection derives probably from Edward Coke’s conception of law as ‘artificial reason’ which is of course closer to the meaning the later scholastics had given to ‘natural’ than to the usual meaning of ‘artificial’.

hending ridicule later poured on the latter’s expression of the ‘invisible hand’ by which ‘man is led to promote an end which was no part of his intention’,<sup>13</sup> however, once more submerged this profound insight into the object of all social theory, and it was not until a century later that Carl Menger at last resuscitated it in a form which now, yet another eighty years later, seems to have become widely accepted,<sup>14</sup> at least within the field of social theory proper.

There was perhaps some excuse for the revulsion against Smith’s formula

<sup>13</sup>Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* [1776], ed. Edwin Cannan (London: Methuen, 1904), vol. 1, p. 421. [See now Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, ed. W. B. Todd, vol. 2 of *The Glasgow Edition of the Works and Correspondence of Adam Smith* (Glasgow: University of Glasgow, 1976; reprinted, Indianapolis, IN: Liberty Fund, 1981), book 4, chapter 2, p. 456.—Ed.]

<sup>14</sup>Carl Menger, *Untersuchungen über die Methode der Socialwissenschaften und der Politischen Ökonomie insbesondere* (Leipzig: Duncker & Humblot, 1883), p. 182: “. . . die unbeabsichtigte Resultante individueller d. i. individuelle Interessen verfolgender Bestrebungen der Volksglieder . . . die unbeabsichtigte sociale Resultante individuel-teleologischer Faktoren”, in the English translation of this work by F. J. Nock, *Problems of Economics and Sociology*, ed. Louis Schneider (Urbana, IL: University of Illinois Press, 1963), p. 158. [See now the retitled edition of Menger’s work, *Investigations into the Method of the Social Sciences, with Special Reference to Economics*, ed. Louis Schneider, translated by Francis Nock (New York: New York University Press, 1985), p. 158, where this translation is offered: “the unintended result of individual efforts of members of society, i.e., of efforts in the pursuit of individual interests . . . the unintended social result of individually teleological factors.”—Ed.] The more recent revival of this conception seems to date from my own article on “Scientism and the Study of Society”, *Economica*, n.s., vol. 9, August 1942, p. 276, or in the reprint in *The Counter-Revolution of Science* (Glencoe, IL: The Free Press, 1952), p. 41, where I argued that the aim of social studies is “to explain the unintended or undesigned results of the actions of many men.” [Now see F. A. Hayek, *Studies on the Abuse and Decline of Reason: Texts and Documents*, ed. Bruce Caldwell, vol. 13 (2010) of *The Collected Works of F. A. Hayek*, p. 88.—Ed.] From this it appears to have been adopted by Karl Popper, “The Poverty of Historicism”, *Economica*, n.s., vol. 11, August 1944, p. 122, or in the book edition (London: Routledge and Kegan Paul, 1957), p. 65, where he speaks of “the undesigned results of human actions” and adds in a note that “undesigned social institutions may develop as *unintended consequences of rational actions*”; as well as in *The Open Society and Its Enemies*, 4th ed. (Princeton: Princeton University Press, 1963), vol. 2, p. 93, where he speaks of “the indirect, the unintended and often the unwanted by-products of such actions” (i.e., “conscious and intentional human actions”). (I cannot agree, however, with the statement, *ibid.*, p. 323, based on a suggestion of Karl Polanyi, that “it was Marx who first conceived social theory as the study of the *unwanted social repercussions of nearly all our actions*.” The idea was clearly expressed by Adam Ferguson and Adam Smith, to mention only the authors to whom Marx was unquestionably indebted.) The conception is also used (though perhaps not adopted) by Ernest Nagel, “Problems of Concept and Theory Formation in the Social Sciences”, in *Science, Language and Human Rights*, American Philosophical Association, Eastern Division, (Philadelphia: University of Pennsylvania Press, 1952), p. 54, where he says that “social phenomena are indeed not generally the intended resultants of individual actions; nevertheless the central task of social science is the explanation of phenomena as the unintended outcome of springs of action.” Similar though not identical is K. R. Merton’s conception of “the unanticipated consequences of purposive social action”; see his article under that title in *American Sociological Review*, vol. 1, December 1936, pp. 894–904, and the further discussion in *Social Theory and Social Structure*, rev. ed. (Glencoe, IL: Free Press, 1957), pp. 61–62.

because he may have seemed to treat it as too obvious that the order which formed itself spontaneously was also the best order possible. His implied assumption, however, that the extensive division of labour of a complex society from which we all profited could only have been brought about by spontaneous ordering forces and not by design was largely justified. At any rate, neither Smith nor any other reputable author I know has ever maintained that there existed some original harmony of interests irrespective of those grown institutions. What they did maintain, and what one of Smith's contemporaries, indeed, expressed much more clearly than Smith himself ever did, was that institutions had developed by a process of the elimination of the less effective which did bring about a reconciliation of the divergent interests. Josiah Tucker's claim was not that "the universal mover in human nature, self love" always did receive, but that it "may receive such a direction in this case (as in all others) as to promote the public interest by those efforts it shall make towards pursuing its own."<sup>15</sup>

The point in this which was long not fully understood until at last Carl Menger explained it clearly, was that the problem of the origin or formation and that of the manner of functioning of social institutions was essentially the same: the institutions did develop in a particular way because the co-ordination of the actions of the parts which they secured proved more effective than the alternative institutions with which they had competed and which they had displaced. The theory of evolution of traditions and habits which made the formation of spontaneous orders possible stands therefore in a close relation to the theory of evolution of the particular kinds of spontaneous orders which we call organisms, and has in fact provided the essential concepts on which the latter was built.<sup>16</sup>

But if in the theoretical social sciences these insights appear at last to have firmly established themselves, another branch of knowledge of much greater

<sup>15</sup>Josiah Tucker, *The Elements of Commerce and Theory of Taxes* (1755), reprinted in *Josiah Tucker: A Selection from His Economic and Political Writings*, ed. Robert L. Schuyler (New York: Columbia University Press, 1931), p. 92. Cf. also my *Individualism and Economic Order* (Chicago: University of Chicago Press, 1948), p. 7. [Hayek refers to his essay "Individualism: True and False", now reprinted in *Studies on the Abuse and Decline of Reason*, vol. 13 (2010) of *The Collected Works of F.A. Hayek*. Josiah Tucker (1712–1799) was an English rector, pamphleteer, and controversialist who wrote on a wide variety of subjects.—Ed.]

<sup>16</sup>Carl Menger, *Untersuchungen*, p. 88: "Dies genetische Element ist untrennbar von der Idee theoretischer Wissenschaften." [In the English translation, this is rendered, "This genetic element is inseparable from the idea of theoretical sciences."—Ed.]; also Nishiyama, *Theory of Self-Love*. It is interesting to compare this with the insight from the biological field stressed by Ludwig von Bertalanffy, *Problems of Life* (New York: John Wiley and Sons, 1952), p. 134: "What are called structures are slow processes of long duration, functions are quick processes of short duration. If we say that a function such as the contraction of a muscle is performed by a structure, it means that a quick and short process wave is superimposed on a long-lasting and slowly running wave."

practical influence, jurisprudence, is still almost wholly unaffected by it. The philosophy dominant in this field, legal positivism, still clings to the essentially anthropomorphic view which regards all rules of justice as the product of deliberate invention or design, and even prides itself to have at last escaped from all influence of that 'metaphysical' conception of 'natural law' from the pursuit of which, as we have seen, all theoretical understanding of social phenomena springs. This may be accounted for by the fact that the natural law concept against which modern jurisprudence reacted was the perverted rationalist conception which interpreted the law of nature as the deductive constructions of 'natural reason' rather than as the undesigned outcome of a process of growth in which the test of what is justice was not anybody's arbitrary will but compatibility with a whole system of inherited but partly inarticulated rules. Yet the fear of contamination by what was regarded as a metaphysical conception has not only driven legal theory into much more unscientific fictions, but these fictions have in effect deprived law of all that connection with justice which made it an intelligible instrument for the inducement of a spontaneous order.

The whole conception, however, that law is only what a legislator has willed and that the existence of law presupposes a previous articulation of the will of a legislator is both factually false and cannot even be consistently put into practice. Law is not only much older than legislation or even an organized state: the whole authority of the legislator and of the state derives from pre-existing conceptions of justice, and no system of articulated law can be applied except within a framework of generally recognized but often unarticulated rules of justice.<sup>17</sup> There never has been and there never can be a 'gap-less' (*lückenlos*) system of formulated rules. Not only does all made law *aim* at justice and *not create* justice, not only has no made law ever succeeded in replacing all the already recognized rules of justice which it presupposes or even succeeded in dispensing with explicit references to such unarticulated conceptions of justice; but the whole process of development, change and interpretation of law would become wholly unintelligible if we closed our eyes to the existence of a framework of such unarticulated rules from which the articulated law receives its meaning.<sup>18</sup> The whole of this positivist conception of law derives from that

<sup>17</sup>Cf. Paulus (*Dig.* 50, 17, 1) "non ex regula ius sumatur, sed ex iure quod est regula fiat"; and Accursius (*Gloss* 9 on *Dig.* I, 1, 1) "Est autem ius a iustitia, sicut a matre sua, ergo prius fuit iustitia quam ius." [The first passage, taken from the *Digest*, a compendium of legal writings by ancient jurists that was completed under the reign of the Roman emperor Justinian, might be rendered, "The law may not be derived from a rule, but a rule must arise from the law as it is." The second, a commentary on the *Digest* by the glossator Accursius, might be rendered, "Therefore law is from justice, as if from its mother, because there was justice before law."—Ed.]

<sup>18</sup>Cf. Hermann Kantorowicz, *The Definition of Law*, ed. A. H. Campbell (London: Cambridge University Press, 1958) p. 35: "The whole history of legal science, particularly the work of the

factualy untrue anthropomorphic interpretation of grown institutions as the product of design which we owe to constructivist rationalism.

The most serious effect of the dominance of that view has been that it leads necessarily to the destruction of all belief in a justice which can be found and not merely decreed by the will of a legislator. If law is wholly the product of deliberate design, whatever the designer decrees to be law is just by definition and unjust law becomes a contradiction in terms.<sup>19</sup> The will of the duly authorized legislator is then wholly unfettered and guided solely by his concrete interests. As the most consistent representative of contemporary legal positivism has put it, "From the point of view of rational cognition, there are only interests of human beings and hence conflicts of interests. The solution of these conflicts can be brought about either by satisfying one interest at the expense of the other, or by a compromise between the conflicting interests."<sup>20</sup>

All that is proved by this argument, however, is that the approach of rationalist constructivism cannot arrive at any criterion of justice. If we realize that law is never wholly the product of design but is judged and tested within a framework of rules of justice which nobody has invented and which guided people's thinking and actions even before those rules were ever expressed in words, we obtain, though not a positive, yet still a negative criterion of justice which enables us, by progressively eliminating all rules which are incompatible with the rest of the system,<sup>21</sup> gradually to approach (though perhaps never to reach) absolute justice.<sup>22</sup> This means that those who endeavoured to discover something 'naturally' (i.e., undesignedly) given were nearer the truth and therefore more 'scientific' than those who insisted that all law had been set ('posited') by the deliberate will of men. The task of applying the insight

Italian glossators and the German pandectists, would become unintelligible if law were to be considered as a body of commands of the sovereign."

<sup>19</sup>Cf. Thomas Hobbes, *Leviathan*, ed. Michael Oakeshott (Oxford: Blackwell, 1946), chapter 30, p. 227: "no law can be unjust."

<sup>20</sup>Hans Kelsen, *What is Justice? Justice, Law, and Politics in the Mirror of Science: Collected Essays* (Berkeley, Ca.: University of California Press, 1957), pp. 21–22.

<sup>21</sup>On the problem of compatibility of the several rules as test, see now the interesting studies by Jürgen von Kempinski, collected in *Recht und Politik: Studien zur Einheit der Sozialwissenschaft* (Stuttgart: W. Kohlhammer, 1965), and his essay "Grundlegung zu einer Strukturtheorie des Rechts", *Abhandlungen der Geistes- und Sozialwissenschaftlichen Klasse* (Mainz: Akademie der Wissenschaften und der Literatur, 1961), no. 2.

<sup>22</sup>The conception of a negative test of the justice of legal rules (essentially of the kind at which the legal philosophy of Immanuel Kant aimed) which would enable us continuously to approach justice by eliminating all inconsistencies or incompatibilities from the whole body of rules of justice, of which at any one time a large part is always the common and undisputed possession of the members of a given civilization, is one of the central points of a book on which I am at present working.

of social theory to the understanding of law has, however, yet to be accomplished, after a century of the dominance of positivism has almost entirely obliterated what had already been accomplished in this direction.

Because there has been a period in which those insights of social theory had begun to affect legal theory; Savigny and his older historical school, largely based on the conception of a grown order elaborated by the Scottish philosophers of the eighteenth century, continued their efforts in what we now call social anthropology and even appear to have been the main channel through which those ideas reached Carl Menger and made the revival of their conceptions possible.<sup>23</sup> That in this respect Savigny continued or resumed the aim of the older natural law theorists has been concealed by his rightly directing his argument against the rationalist natural law theories of the seventeenth and eighteenth centuries. But though he thereby helped to discredit that conception of natural law, his whole concern had been to discover how law had arisen largely without design, and even to demonstrate that it was impossible by design adequately to replace the outcome of such natural growth. The natural

<sup>23</sup>For the channels through which the ideas of Burke (and through Burke, those of David Hume) appear to have reached Savigny see Heinrich Ahrens, *Die Rechtsphilosophie, oder das Naturrecht, auf philosophisch-anthropologischer Grundlage*, 4th ed. (Vienna: C. Gerold, 1852), p. 64. This book was probably also one of Carl Menger's first sources of information. On Savigny and his school, cf. also the acute observations of Eugen Ehrlich, *Die juristische Logik* (Tübingen: J. C. B. Mohr, 1918), p. 84: "Burke, Savigny and Puchta . . . verstehen, was immer verkannt wird, unter Volk oder Nation dasselbe, was wir heute als Gesellschaft im Gegensatz zum Staate bezeichnen, allerdings in nationaler Begrenzung" ["It has always been thought, incorrectly, that Burke, Savigny, and Puchta identified the 'people' or 'nation' with the 'state', rather than with 'society'; however, they could only conceive of a 'people' or 'nation'—hence 'society'—as existing within national borders."—Ed.]; and Sir Frederick Pollock, *Oxford Lectures and Other Discourses*, (London: Macmillan, 1890), pp. 41–42: "The doctrine of evolution is nothing else than the historical method applied to the facts of nature; the historical method is nothing else than the doctrine of evolution applied to human societies and institutions. When Charles Darwin created the philosophy of natural history . . . he was working in the same spirit and towards the same ends as the great publicists who, heeding his fields of labour as little as he heeded theirs, had laid in the patient study of historical fact the bases of a solid and rational philosophy of politics and law. Savigny, whom we do not yet know or honour enough, and our own Burke, whom we know and honour, but cannot honour too much, were Darwinians before Darwin. In some measure the same may be said of the great Frenchman Montesquieu, whose unequal but illuminating genius was lost in a generation of formalists." The claim to have been 'Darwinians before Darwin' was, however, first advanced by the theorists of language: see August Schleicher, *Die Darwinische Theorie und die Sprachwissenschaft* (Weimar, Böhlau, 1863), and Max Müller, "Lectures on Mr. Darwin's Philosophy of Language", *Fraser's Magazine*, vol. 7, June 1893 [1873—Ed.], p. 662, from whom Pollock seems to have borrowed the phrase. [For a translation of Schleicher's book, see *Darwinism Tested by the Science of Language*, translated by Alex. V. W. Bikkers (London: J. C. Hotten, 1869). The German jurist Friedrich Karl von Savigny (1779–1861) was a founder of the German historical school of law.—Ed.]

law which he opposed was not the natural law to be discovered but the natural law which was deductively derived from natural reason.

But if for the older historical school, though they spurned the word ‘natural’, law and justice were still given objects to be discovered and explained, the whole idea of law as something objectively given was abandoned by positivism, according to which it was regarded as wholly the product of the deliberate will of the legislator. The positivists no longer understood that something might be objectively given although it was not part of material nature but a result of men’s actions; and that law indeed could be an object for a science only in so far as at least part of it was given independently of any particular human will: it led to the paradox of a science which explicitly denied that it had an object.<sup>24</sup> Because, if “there can be no law without a legislative act”,<sup>25</sup> there may arise problems for psychology or sociology but not for a science of law.

The attitude found its expression in the slogan which governed the whole positivist period: that ‘what man has made he can also alter to suit his desires.’ This is, however, a complete *non sequitur* if ‘made’ is understood to include what has arisen from man’s actions without his design. This whole belief, of which legal positivism is but a particular form, is entirely a product of that Cartesian constructivism which must deny that there are rules of justice to be discovered because it has no room for anything which is ‘the result of human action but not of human design’ and therefore no place for social theory. While on the whole we have now successfully expelled this influence from the theoretical sciences of society—and had to, to make them possible—the conceptions which today guide legal theory and legislation still belong almost wholly to this pre-scientific approach. And though it was French social scientists who earlier than others had clearly seen that from the famous *Discours de la Méthode* “il était sorti autant de déraison sociale et d’aberrations métaphysiques, d’abstractions et d’utopies que de données positives, que s’il menait à Comte il avait aussi mené à Rousseau”,<sup>26</sup> it would seem at least to the outsider that in France, even more than elsewhere, law is still under its influence.

<sup>24</sup>Cf. Leonard Nelson, *Die Rechtswissenschaft ohne Recht: Kritische Betrachtungen über die Grundlagen des Staats- und Völkerrechts, insbesondere über die Lehre von der Souveränität* (Leipzig: Viet, 1917).

<sup>25</sup>John Austin, *Lectures on Jurisprudence, or the Philosophy of Positive Law*, 3rd ed. (London: John Murray, 1872 [1869—Ed.]), vol. 2, p. 555.

<sup>26</sup>Albert Sorel, “Comment j’ai lu la ‘Réforme Sociale’”, *Réforme sociale*, November 1, 1906, p. 614, quoted by Albert Schatz, *L’individualisme économique et sociale* (Paris: A. Colin, 1907), p. 41, which together with Henry Michel, *L’idée de l’état*, 3rd ed. (Paris: Hachette, 1898), is most instructive on this influence of Cartesianism on French social thought. [Sorel’s claim was that Descartes’s *Discourse on Method* “had given vent as much to social unreasonableness, metaphysical aberration, and abstract utopian speculation as to positive data, and that if it led to Comte it had led to Rousseau as well.”—Ed.]

#### Supplementary Notes

1. Sten Gagnér, *Studien zur Ideengeschichte der Gesetzgebung*, pp. 208 and 242, shows that the terms ‘natural law’ and ‘positive law’ derive from the introduction by Gellius in the second century A.D. of the Latin adjectives *naturalis* and *positivus* to render the meaning of the Greek nouns *physis* and *thesis*. This indicates that the whole confusion involved in the dispute between legal positivism and the theories of the law of nature traces back directly to the false dichotomy here discussed, since it should be obvious that systems of legal rules (and therefore also the individual rules which have meaning only as part of such a system) belong to those cultural phenomena which are ‘the result of human action but not of human design.’ See on this also chapter 4 above. [Hayek refers in this citation to where “Notes on the Evolution of Systems of Rules of Conduct” appears in *Studies in Philosophy, Politics and Economics*. In the present volume, that essay is chapter 10.—Ed.]

2. Herr Christoph Eucken has drawn my attention to the fact that the contrast that is drawn in the opening sentence of Herodotus’s *Histories* between what has arisen from [the actions of] men (*ta genomena ex anthrōpōn*) and their great and astounding works (*erga megala kai thōmasta*) suggests that he was more aware of the distinction here made than was true of many of the later ancient Greeks. [Hayek added the material in square brackets.—Ed.]