

# Law and Liberty: A Comparison of Hayek and Bastiat

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## I. Introduction

This paper compares the work of two pioneers in the field of law and liberty: F. A. Hayek and his predecessor, Frédéric Bastiat. Both these writers treat government by law as a necessary condition for the emergence of a free-market system; and they also warn that the substitution of distributive for commutative justice will impair individual freedom. Hayek, however, does not try to justify freedom from a rights standpoint; he merely *assumes* freedom is a fundamental value, and proceeds to illustrate its usefulness. Bastiat, on the other hand, justifies freedom via his theory of rights and derives the legitimate functions of government from his "rule of justice." Only later does he illustrate the usefulness of freedom as a means towards social order. Bastiat's insistence on a theory of rights leads him to advocate a more limited role for government than Hayek. Our investigation of these similarities and differences should shed further light on the relationship between law and liberty, and help place Hayek's work in its proper historical perspective.

Part II presents Hayek's major contributions to the law and liberty literature. Special attention is paid to his notion of justice and the legitimate role of government under the Hayekian rule of law. We also examine his main theme: the interrelationship between property protected by law, incentives to utilize relevant information, and economic behavior. Finally, the danger to freedom posed by the replacement of law by legislation designed to impose "social justice" is examined.

Part III investigates Bastiat's legal doctrine and its implications for freedom. His theory of rights is particularly important and receives close attention. The legitimate functions of government under Bastiat's "rule of justice" are examined, as well as his utilitarian argument for limited government. Finally, his analysis of the effects of replacing the principle of "universal justice" with the pseudo principle of "legal fraternity" is considered.

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Part IV evaluates Hayek's work in light of Bastiat's contributions to legal philosophy. The many areas in which Bastiat anticipated Hayek are reviewed, as well as their differences. Part V concludes that Hayek has overlooked Bastiat's importance as a legal philosopher: there are no references to Bastiat in *The Constitution of Liberty*, and only one minor reference to his legal doctrine in *Law, Legislation and Liberty*.

## II. Hayek's Exposition of Law and Liberty

Hayek's primary concern is with the type of legal framework necessary for the emergence of a free-market system. Gottfried Dietze notes that "freedom is the predominant value in Hayek's social thought."<sup>1</sup> Even so, Hayek does not attempt to build a theory of rights in order to justify freedom; he merely assumes that freedom is a fundamental principle to which all laws should conform.<sup>2</sup> His case for freedom under the law, therefore, rests on its *usefulness* in promoting social coordination. According to Hayek: "Under the enforcement of universal rules of just conduct, protecting a recognizable private domain of individuals, a spontaneous order of human activities of much greater complexity will form itself than could ever be produced by deliberate arrangement, and in consequence the coercive activities of government should be limited to the enforcement of such rules."<sup>3</sup> He believes that once individuals recognize the benefits of liberty, they will have an incentive to limit government.

Hayek defines freedom as "that condition of men in which coercion of some by others is reduced *as much as possible*" (emphasis added).<sup>4</sup> Thus, freedom is not absolute, nor is it independent of the law (force), since a certain amount of coercion is necessary to limit aggression and protect the equal rights of others.<sup>5</sup> In this sense, Hayek accepts Locke's dictum that "where there is no law there is no freedom. For liberty is to be free from restraint and violence from others; which cannot be where there is no law."<sup>6</sup> The function of the Hayekian rule of law, therefore, is to limit "all coercion to the enforcement of general rules of just conduct." This is "the fundamental principle of classical liberalism," says Hayek, and indicates "its definition of liberty."<sup>7</sup> Thus Hayek emphasizes that "freedom can be preserved only by following principles and is destroyed by following expediency."<sup>8</sup>

The principles Hayek refers to are those embodied in the rule of law, namely: generality, equality, certainty, and justice.<sup>9</sup> The rule of law, writes Hayek, is "a rule concerning what the law ought to be, a meta-legal doctrine or a political ideal."<sup>10</sup> First, the law ought to be *general*; i.e., it should apply to everyone, including government officials, and be stated as abstract rules that serve to guide individual behavior. Second, the law ought to be *equally applied*; legal privileges should be prohibited.<sup>11</sup> Third, the law ought to be *certain*; i.e., it should be in the form of long-run rules that are widely recog-

nized and not subject to arbitrary changes. Within such a stable legal framework, individuals will be able to efficiently coordinate their plans, resulting in social order and progress.<sup>12</sup>

Finally, the law ought to be "just"; that is, it should prevent injustice or the infringement of property rights so that a spontaneous market order can be established.<sup>13</sup> Hayek elaborates four central features of this classical concept of justice. First, justice can be applied meaningfully only to the conditions of individual action, not the results. Values, being subjective, cannot be aggregated in any meaningful fashion; hence, the application of social welfare criteria to public policy is a futile exercise. The real test of justice, according to Hayek, is not conformity to some notion of "social (or distributive) justice," but to the condition of freedom. If exchange is free and property rights well-defined, the results will be mutually beneficial. It is in this sense of commutative justice that public policy should be judged, not according to an arbitrary measure of social welfare. Indeed, attempts to maximize welfare and impose social justice will ultimately destroy a free society.<sup>14</sup>

Second, justice is essentially a negative concept; it refers to the prevention of injustice, not to the attainment of some positive result. Therefore, individuals should only be provided with general "rules of just conduct," within which they can pursue their own interests while respecting the equal rights of others.<sup>15</sup>

Third, justice is performed when the law is limited to the protection of property—Locke's "life, liberty, and possessions of a man"—including, says Hayek, "various claims on others and certain expectations."<sup>16</sup> These expectations presumably refer to the various actions an individual can reasonably expect to take and the rewards he can expect to capture.<sup>17</sup> If law is limited to protecting the private sphere, Hayek believes individuals will have the greatest opportunity and incentive to utilize their unique knowledge; the market price system will then be free to coordinate economic activity.<sup>18</sup>

Finally, justice requires that laws pass the "test of universal applicability."<sup>19</sup> This means that in applying a law to any particular circumstance, it must conform with the existing set of rules.<sup>20</sup> On the premise that freedom is a generally accepted value, Hayek argues that it would be inconsistent to argue that individuals have a right to maintain their relative positions in the market, for "this cannot be defended by a rule which could be equally applied to all."<sup>21</sup> This is about as close as Hayek comes to a non-utilitarian rights theory, since he proceeds to eliminate justice as a separate criterion of law by asserting that the generality, equality and certainty criteria capture all the essential features of justice. In particular, he emphasizes that "so far as its compatibility with a reign of freedom is concerned, we have no test for a law . . . other than its generality and equality."<sup>22</sup>

Hayek provides us with a theory of social organization based on natural

selection, which is impaired by the absence of freedom. His primary concern is with the usefulness of freedom and property rights, rather than with bridging the gap between "is" and "ought" that has preoccupied moral philosophers. In this sense, he argues that "the case for individual freedom rests chiefly on the recognition of the inevitable ignorance of all of us concerning a great many of the factors on which the achievement of our ends and welfare depends."<sup>23</sup> Thus, "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."<sup>24</sup> The rule of law is socially beneficial in this regard, because it provides the basis for effective property rights and competitive markets—a process of natural selection—through which "more knowledge is utilized than any one individual possesses or than it is possible to synthesize intellectually; and it is through such utilization of dispersed knowledge that achievements are made possible greater than any single mind can foresee."<sup>25</sup>

We can sum up Hayek's argument for freedom under the law as follows. (i) The basic economic problem is "a problem of utilization of knowledge which is not given to anyone in its totality."<sup>26</sup> (ii) The efficient utilization of knowledge, via the market process, requires that individuals be *free* to pursue their self-interest and *capture* the consequent rewards, provided they respect the equal rights of others. (iii) This principle of private property requires government by law, because unless property rights are protected by law, individuals will have little incentive to utilize their knowledge efficiently, and to search for what would otherwise be profitable exchange opportunities.<sup>27</sup> (iv) A corollary of this line of reasoning is that if individuals understand their opportunity sets are expanded under the rule of law, they will have an *incentive* to opt for limited government and a free-enterprise system.<sup>28</sup>

With several modifications, this argument would successfully, I proffer, solve the "is-ought" dilemma. All Hayek needs to do is begin with the *fact* that in acting man pursues his self-interest—this is his very nature; then emphasize the subjectivity of these interests or goals and, hence, the necessity of freedom in order to fulfill one's nature. In other words, the generic character of man's purposiveness and the subjective character of his interests provide the grounds for freedom as a fundamental ("natural") right or ethical principle. Indeed, it would be contradictory to argue otherwise. If I understand it correctly, this is the gist of Gewirth's "Principle of Generic Consistency" (PGC). However, Gewirth (somewhat oddly) argues that voluntariness itself is a generic feature of action and, therefore, that man ought to be free. According to Gewirth: the PGC "says to every agent that just as, in acting, he necessarily applies to himself and claims as rights for himself the generic features of action, voluntariness or freedom and purposiveness. . . , so he ought to apply these same generic features to all

the recipients of his actions."<sup>29</sup> It appears Gewirth's argument could be strengthened by arguing from purposiveness and subjectivity, as generic features of human action, to the necessity of freedom as a general principle.

Once the above "empirical" foundation is laid for freedom as a basic ethical principle, we could use Hayek's narrower argument to explain the usefulness of freedom in promoting social cooperation. Hayek's failure to step beyond an expediency argument, however, ultimately leads him away from the "minimal state." In fact, he drifts into the very welfare criteria for evaluating public policy that he initially cautioned against, based on the subjectivity of individual preferences.

Hayek emphasizes that in a market order, "all coercive functions of government must be guided by the overruling importance of... THE THREE GREAT NEGATIVES: PEACE, JUSTICE AND LIBERTY."<sup>30</sup> Thus, government should restrict its monopoly of coercion to "the enforcement of rules of just conduct, defense, and the levying of taxes to finance its activities."<sup>31</sup> In this respect, Hayek notes:

If there is to be an efficient adjustment of the different activities in the market, certain minimum requirements must be met; the more important of these are... the prevention of violence and fraud, the protection of property and the enforcement of contracts, and the recognition of equal rights of all individuals to produce in whatever quantities and sell at whatever prices they choose.<sup>32</sup>

Instead of adhering to this restricted view of the state, however, Hayek goes further: he is willing to allow individuals rights to be violated in specific cases *if it is deemed socially beneficial*. According to Hayek, such interventionist acts are compatible with the rule of law (and, hence, legitimate in Hayek's system) if they are limited to "exceptional cases, defined by rule, so that their justification does not rest on the arbitrary decision of any authority but can be reviewed by an independent court." Furthermore, Hayek insists that compensation should be paid to the injured parties, since this will assure that private rights are violated only if "the public gain is clearly greater than the harm done by the disappointment of normal individual expectations."<sup>33</sup> So much for the subjectivity of value, the aggregation problem, and freedom as a fundamental right.

On the basis of his utilitarian argument, Hayek would curtail various liberties during wartime, accept the "clear and present danger" test for free speech, and approve eminent domain.<sup>34</sup> Moreover, he argues that "a free system does not exclude on principle all those general regulations of economic activity which can be laid down in the form of general rules specifying conditions which everybody who engages in a certain activity must satisfy. They include, in particular, all regulations governing the techniques of production." Thus, "if night work is to be generally prohibited, the appropriateness of such [a measure] must be judged by comparing the over-

all costs with the gain; *it cannot be conclusively determined by appeal to a general principle*" (emphasis added). Finally, Hayek would apply this same argument to "most of the wide field of regulations known as 'factory legislation.'"<sup>35</sup>

Hayek pursues his utilitarianism further in the case of what he inappropriately calls the "non-coercive" functions of government. Twisting the normal meaning of words, Hayek argues that the government has certain "non-coercive" functions (though they are financed by compulsion) that are consistent with a libertarian society. However, the following conditions must hold: (1) government must not be given the exclusive right to provide "non-coercive" services; (2) these services must be financed by taxes based on "uniform principles" (taxes are not to be used for income redistribution); and (3) only the "collective wants of the community" should be satisfied, not those of special interest groups.<sup>36</sup> According to Hayek, the only question of importance here is: Are the "non-coercive" public goods worth what they cost? Thus, we see that Hayek is willing to allow significant government intervention if it is consistent with his rule of law (especially the generality and equality criteria), and expedient.<sup>37</sup>

Hayek lists several "non-coercive" services that he thinks the government ought to provide, since the market either fails to provide them or supplies less than the social optimum.<sup>38</sup> Among these public goods are: (a) "the provision of a reliable and efficient monetary system"; (b) "the setting of standards of weights and measures"; (c) "the providing of information gathered from surveying, land registration, statistics, etc."; and (d) "the support, if not also the organization, of some kind of education." Hayek justifies these activities on the grounds that they "provide a favorable framework for individual decisions." Other services that Hayek believes can be usefully performed by government include: (e) "most sanitary and health services"; (f) "often the construction and maintenance of roads"; and (g) "many of the amenities provided by municipalities for the inhabitants of cities." These services, notes Hayek, should be subcontracted to the private sector when feasible, since private management is normally more efficient.<sup>39</sup>

It is well-known that Hayek has changed his mind about the role of government since he recommended the above activities in 1960. For example, he would certainly dismiss the state from the provision of money, since he now believes the private sector can do it more efficiently.<sup>40</sup> However, the point is that Hayek's acceptance or rejection of government intervention depends on a cost-benefit calculation, rather than recourse to a more fundamental theory of rights. Such an approach poses serious difficulties for individual freedom. While aware of these problems, Hayek fails to address them squarely.

We can elaborate on several inconsistencies in Hayek's argument for an expansion of government beyond its minimal role of protecting person and

property. First, his distinction between the coercive and "non-coercive" functions of government is invalid. Insofar as the government finances its provision of public goods with compulsory taxes, one must regard *all* government activity as coercive. Consequently, if individuals are forced to pay taxes, it makes little sense to say that individual freedom will be protected if government has no monopoly privilege in the provision of "non-coercive" public goods.<sup>41</sup> The only relevant issue is the legitimate use of force, for which a theory of rights is needed.

Second, Hayek's claim that a general prohibition on night work must be judged on the basis of expediency rather than recourse to a general principle is unfounded. In fact, it is inconsistent with his proposed ban on price and quantity controls.<sup>42</sup> An individual's preference for night versus day work is part of a voluntary exchange between the worker and employer, which is reflected in the market wage rate for that type of labor. Prohibiting night work, therefore, interferes with a worker's job preference and eliminates mutually beneficial exchange opportunities. In this sense, such a regulation is unjust; it interferes with freedom of exchange, which is protected by the rule of law. The "expediency" of such a regulation is therefore irrelevant.

Finally, and perhaps most importantly, Hayek's utilitarian approach ignores the subjective nature of costs and benefits, and is inconsistent with his professed belief that individual freedom is "a principle that must be respected without asking whether the consequences in the particular instance will be beneficial. We shall not achieve the results we want if we do not accept it as a creed or presumption so strong *that no considerations of expediency can be allowed to limit it*" (emphasis added).<sup>43</sup> In sum, Hayek's lack of a strong theory of rights, from which he could consistently derive the legitimate functions of government, hampers his ability to defend the freedom that he values so highly.

Another instance in which Hayek sacrifices principle for expediency is the case of income redistribution. Hayek does not think taxes ought to be used for income redistribution.<sup>44</sup> Such a use of taxes, he believes, weakens private property rights, and impedes the formation of a spontaneous market order.<sup>45</sup> Nevertheless, he is willing to let government provide a minimum guaranteed income, because "security against severe physical privation" is not a privilege.<sup>46</sup> The strict libertarian, however, would argue that *any* government redistribution is unjust, since it involves the illegitimate use of force. What is at issue is the *voluntariness* of the transfer, not its public-good aspects, which are subject to interpersonal utility calculation problems. Thus, while an individual might be said to have a moral or ethical obligation to help others, the state has no right to enforce such an obligation, unless voluntarily entered into.<sup>47</sup>

One final example of Hayek's latent interventionism and inconsistency is the case of national parks. Although he pays lip service to voluntary arrangements to protect natural environments, he argues that government can

legitimately perform this function (even if it obtains land by means of "compulsory purchase"), provided "the community approves," given knowledge of the expected tax burden.<sup>48</sup> In effect, Hayek employs a majority rule to "justify" seizing private lands for the "public good," and the use of compulsion (taxes) to maintain nature preserves. We could list other areas where Hayek finds government intervention socially useful, such as the provision of social insurance, but the main point should be clear: He is prepared to allow considerable government intervention beyond the defense of person and property.<sup>49</sup>

Hayek emphasizes the usefulness of the rule of law and freedom in the hope that this will stimulate public support for a constitutional government. However, he recognizes that a proper understanding of his utilitarian justification for freedom requires a sound knowledge of economic principles. The lack of such an understanding, especially ignorance of the principle of spontaneous order, has led to the demise of the rule of law.<sup>50</sup> According to Hayek:

Much of the opposition to a system of freedom under general laws arises from the inability to conceive of an effective co-ordination of human activities without deliberate organization by a commanding intelligence. One of the achievements of economic theory has been to explain how such a mutual adjustment of the spontaneous activities of individuals is brought about by the market, provided that there is a known delimitation of the sphere of control of each individual. An understanding of that mechanism of mutual adjustment of individuals forms the most important part of the knowledge that ought to enter into the making of general rules limiting individual action.<sup>51</sup>

Hayek warns that, if the rule of law is perceived to be "an impracticable and even undesirable ideal," individual freedom will ultimately disappear.<sup>52</sup> He emphasizes that such an attitude is largely responsible for the virtually unlimited power of today's legislative bodies, which are dominated by special interest groups.<sup>53</sup> Thus, in a section in *The Political Order of a Free People*, entitled "Unlimited power [is] the fatal defect of the prevailing form of democracy,"<sup>54</sup> Hayek notes that "*today legislatures are no longer so called because they make the laws, but laws are so called because they emanate from legislatures*, whatever the form or content of their resolutions."<sup>55</sup>

In conclusion, Hayek offers us a formula for social organization rather than a theory of rights. He asserts that markets are a superior form of social organization relative to central planning; that freedom is a requirement for spontaneous order; and that limited government via the rule of law is a necessary condition for establishing freedom and permitting socially beneficial evolution. Hayek accepts freedom as a fundamental value but is unable to provide a rigorous defense of it when it appears that the sacrifice of freedom is socially beneficial. Indeed, he ignores his own strictures against social welfare criteria when he embraces his utilitarian argument for

government intervention. He fails to emphasize that what we see as "legitimate" costs and benefits stem from our prior understanding of rights; thus, a theory of rights is essential.

Finally, it is clear that Hayek opposes using the state to impose "social (or distributive) justice"<sup>56</sup> and that he favors limited government. Nevertheless, his false dichotomy between the coercive and "non-coercive" functions of government, his reliance on the generality and equality conditions of the rule of law to judge justice, and his insistence on cost-benefit analysis as the determining factor in the case of "non-coercive" public goods produces an interventionist bent. This is hard to reconcile with his insistence that freedom is a principle that should never be sacrificed for expediency.<sup>57</sup>

### III. Bastiat's Exposition of Law and Liberty

Frédéric Bastiat (1801–1850) provided both a moral and utilitarian argument for liberty under the law. He derived the legitimate role of government—the protection of the private sphere—from his theory of rights, and demonstrated how self-interest harnessed by liberty under the "law of justice" leads to economic harmony. He also explained why collectivism is both morally unjust and an impediment to the harmonization of interests. These ideas are examined in this section, while the following section evaluates Hayek's work in light of Bastiat's legal doctrine.

Bastiat was primarily interested in providing a moral justification for freedom and, therefore, for limiting the use of force to the protection of person and property.<sup>58</sup> His theory of rights, which specifies the legitimate functions of government, can be summarized as follows.

(i) Man acts to further his own self-interest, to satisfy his wants, which are subjective. This is his very nature; it is a universal fact that is incontestable and is the starting point for ethical science.<sup>59</sup>

(ii) To fulfill his nature, man must be free; he must have the right to "property," that is, the right to appropriate the value he produces, the right to voluntarily exchange it for an equivalent value, and the right to bequeath it. These are the sources of *legitimate* property rights and are merely another expression for liberty. To argue otherwise would be self-contradictory, since it would imply that theft and slavery are right.<sup>61</sup> Thus, for Bastiat, "property [or liberty] is a necessary consequence of the nature of man."<sup>62</sup>

(iii) A corollary of the right to property is the right to defend one's legitimate property and, hence, to protect one's life, liberty, and justly acquired possessions. This is the only legitimate use of force either by an individual or the state,<sup>63</sup> and is what Bastiat means by "universal justice." Once again, it would be self-contradictory to argue otherwise.<sup>64</sup> In a country where the basis of legislation is universal justice, says Bastiat, the rule is simply: "Everyone exercises his rights as he pleases, provided that he does not encroach on the rights of others."<sup>65</sup> Thus, individual freedom tends to be maximized under what Bastiat calls the "rule (or law) of justice," under

which all force is limited "to guaranteeing and safeguarding property rights."<sup>66</sup> We shall refer to this doctrine as the *principle of justice*, since it derives from Bastiat's theory of rights and occupies the major position in his legal doctrine. It would be equally appropriate to label it the *principle of freedom*, since justice is freedom from the illegitimate use of force.

This description of Bastiat's theory of rights reminds us of Gewirth's PGC, which we outlined above.<sup>67</sup> However, Bastiat is more consistent than Gewirth, since he grounds his argument in the purposiveness and subjectivity of man's nature; *after which*, he demonstrates that freedom is a universal right that cannot be denied without self-contradiction.<sup>68</sup> Thus, Bastiat's theory of rights answers our objections to Hayek's legal doctrine,<sup>69</sup> and also improves Gewirth's moral justification for freedom.

Bastiat emphasizes that the right to property is "prior and superior to the law."<sup>70</sup> Therefore, "it is not property that is a matter of agreement, but law."<sup>71</sup> Bastiat's notion of law stems from his theory of rights: "Law is the organization of *the natural right to legitimate self-defense*; it is the substitution of collective force for individual forces, to act in the sphere in which they have the right to act; to do what they have the right to do: to guarantee security to person, liberty, and property rights, to cause *justice* to reign over all" (emphasis added).<sup>72</sup>

For Bastiat, "law is justice,"<sup>73</sup> albeit in a negative sense. Accordingly, he writes: "The *object of the law is to prevent injustice from prevailing*. In fact, it is not justice, but injustice, that has an existence of its own. The first results from the absence of the second."<sup>74</sup> He therefore emphasizes that "when law and force confine a man within the bounds of justice, they do not impose anything on him but a mere negation. They impose on him only the obligation to refrain from injuring others. They do not infringe on his personality or his liberty or his property. They merely safeguard the personality, the liberty, and the property of others. They stand on the defensive; they defend the equal right of all."<sup>75</sup>

Certain characteristics are imparted to the law by Bastiat's principle of justice. First, the universal nature of justice means that laws ought to be *general*; they should prevent all violations of property rights and exchange. Second, the equality of rights inherent in the principle of justice implies that laws ought to be *equally applied*, without exception. Finally, the exactness of the principle of justice, which limits the state to the protection of person and property, imparts *certainty* to the law.<sup>76</sup> Hence, for Bastiat, the generality, equality, and certainty of the law are necessary consequences of the principle of justice. Moreover, the "law of justice" (property protected by law) and liberty are inseparable; justice is the absence of illegitimate coercion, which is what Bastiat means by liberty or freedom.<sup>77</sup>

Bastiat's theory of rights confines him to the position that the legislator has no authority "over our persons and our property, since they pre-exist him, and his task is to surround them with guarantees." Thus, the law cannot legitimately "regulate our consciences, our ideas, our wills, our edu-

cation, our opinions, our work, our trade, our talents, our recreation." Instead, "its function is to prevent the rights of one person from interfering with the rights of another in any of these matters." Finally, Bastiat emphasizes that the law cannot legitimately be used to impose distributive justice. According to Bastiat: "It is false to say that it [the law] may oppress man's person or plunder his property *even for a philanthropic end*, for its function is to protect both person and property" (emphasis added).<sup>78</sup>

Bastiat employs his principle of justice to narrowly limit the scope of government. He argues that "government action involves coercion by its very nature. . . . It proceeds by virtue of a law, and all men must submit, for law implies *punishment*"; thus, *its action is legitimate only where the intervention of force is itself legitimate*"; namely, "the case of legitimate defense." According to Bastiat, this is "the justification of government" and "the rational limit of its prerogatives."<sup>79</sup> Consequently, he argues, the proper role of government is "the maintenance of order, security, and justice" (in the negative sense); any further action, says Bastiat, must be considered "a usurpation upon conscience, upon intelligence, upon industry; in a word, upon human liberty."<sup>80</sup> The following passage summarizes Bastiat's view of the legitimate functions of government.

In theory, it is enough that the government have the necessary instrumentality of *force* at hand for us to know what private services can legitimately be converted into *public services*. They are those services whose object is the maintenance of liberty, property, and individual rights, the prevention of crime—in a word, all that relates to the *public safety*.

Governments also have another function.

In all countries there is a certain amount of public property, some goods used collectively by all citizens, like rivers, forests, and highways. On the other hand, there are also, unfortunately, debts. It is the government's duty to administer these active and passive parts of the public domain.

Finally, from these two functions stems a third: that of levying the taxes necessary for the efficient administration of *public services*.<sup>81</sup>

Although Bastiat's primary interest is the moral justification of freedom, he recognizes that "intelligent spontaneity" is useful, for it promotes social coordination and progress.<sup>82</sup> Bastiat's "rules-utilitarian" argument for a free society stems from his recognition of human ignorance. He argues that if legislators were omniscient, they could impose the truth on the rest of mankind via the force of the law. Universal public education, for example, would be preferable to a diversity of private education if legislators had a monopoly on truth. Bastiat notes, however, that legislators and education ministers are not infallible; truth is therefore best promoted when "room is left for diversity, trial and error, experimentation, and individual efforts guided by a self-regarding *interest in the outcome*—in a word, where there is freedom."<sup>83</sup>

The *freedom* to discover truth is what Bastiat means by competition: "Competition is Liberty" and "the absence of arbitrary authority as judge of exchanges."<sup>84</sup> The subjectivity of human wants implies that only individuals participating in an exchange can be the legitimate judges of their interests; commutative justice depends on this. Therefore, Bastiat warns that if "a social authority" is substituted for the judgment of individuals who have a stake in the exchange, "the most fallible" and "the most impossible" tyranny will arise.<sup>85</sup> In effect, Bastiat views competition as a learning process, while the function of profit (effective property rights or appropriability) is to make individuals responsible for their mistakes and give them an incentive to learn.<sup>86</sup> According to Bastiat: if individuals are held responsible for their mistakes, they won't "look to government for everything," and "the depositaries of power, instead of disturbing, would contribute to the universal harmony, — a harmony which does not indeed exclude evil [error], but which leaves less and less room for those ills which are inseparable from the ignorance and perversity of our feeble nature, and whose mission it is to prevent or chastise that ignorance and perversity."<sup>87</sup>

Hence, under the "law of justice," which safeguards liberty and property, Bastiat tells us that individuals need not "fear that the legislature may, with one decree after another, stifle effort, upset plans, [and] frustrate foresight."<sup>88</sup> Markets will then function smoothly so that individual plans or interests will "tend to adjust themselves naturally [spontaneously] in the most harmonious way."<sup>89</sup>

Besides facilitating the use of knowledge and social cooperation, Bastiat offers several other reasons why freedom is useful. First, the certainty and lower taxes that result from limited government will encourage private investment. This will increase the productivity of labor, and raise the standard of living.<sup>90</sup> Second, the absence of government intervention in foreign trade, together with a non-interventionist military policy, will promote world peace.<sup>91</sup> Finally, Bastiat argues that with an enlarged private sector, there will be an increase in private charity.<sup>92</sup>

In conclusion, Bastiat believes that "the solution to the social [coordination] problem lies in liberty"; indeed, "it is under the law of justice, under the rule of right, under the influence of liberty, security, stability, and responsibility, that every man will attain to the full worth and dignity of his being, and that mankind will achieve, in a calm and orderly way. . . the progress to which it is destined."<sup>93</sup> Hence, "we ought to set ourselves unceasingly and without compunction to emancipate the entire domain of private enterprise from the encroachments of power."<sup>94</sup>

Bastiat contrasts his principle of justice with the pseudo principle of "legal fraternity," i.e., use of the law to impose self-sacrifice ("fraternity") and to achieve distributive justice.<sup>95</sup> He points out that this principle is generally accepted by the "socialists," by which he means "those [schools] which seek the solution of the social problem in an artificial organization."<sup>96</sup>

In particular, socialists reject the idea that property is a natural right; they see the right to property stemming from the law or the state.<sup>97</sup> Under this doctrine, the legislator's function is "to organize, modify and even eliminate property if he deems it good to do so."<sup>98</sup> Bastiat, therefore, refers to the socialist doctrine of legal fraternity as a type of "legal plunder"—using the force of law to violate property rights and individual freedom.<sup>99</sup>

The socialists base their principle of legal fraternity on what Bastiat calls the "theory of dissonances,"<sup>100</sup> which can be summarized as follows. (i) The "governors and lawgivers" are omniscient and virtuous, while mankind is ignorant and selfish. (ii) Without the "mysterious hand of the legislator," the free pursuit of self-interest will lead to social disorder and degeneracy. (iii) The government must therefore restrict individual freedom and impose social justice for the good of mankind. (iv) However, to accomplish this, the legislators must have the right to make the law.<sup>101</sup> This doctrine, then, views men's interests as being basically antagonistic rather than harmonious, and coercion as being necessary for the imposition of an artificial social order.<sup>102</sup> Most importantly, there is no limit to the power of government in its pursuit of social justice—law is virtually unlimited.<sup>103</sup>

Bastiat traces the socialist legal doctrine to classical thought and Roman law, which held "that the right to property is socially instituted, that it is an invention of the legislator, a creation of the law."<sup>104</sup> For example, Bastiat notes that Robespierre "considered property as a social institution, as a convention. He did not connect it at all with its true justification, which is labor [effort]. It is the right, he said, to dispose of the portion of goods *guaranteed by law*."<sup>105</sup> The influence of classical thought on Bastiat's contemporaries was revealed by the general acceptance of what he referred to as the "triple hypothesis—the fundamental inertia of mankind, the omnipotence of the law, and the infallibility of the lawgiver."<sup>106</sup>

Bastiat attacks socialist legal philosophy on two grounds: first, he questions its assumptions about the nature of man and, therefore, its moral basis; second, he criticizes the premise that the necessary consequence of liberty is anarchy. On the first front, Bastiat reasons that *all* men are imperfect and pursue their self-interest, including legislators.<sup>107</sup> Hence, the socialist legal doctrine is false, because it contradicts the universal nature of man, and unjust, because it violates the principles of individual freedom and private property.<sup>108</sup> Bastiat, accordingly, regards the notion of "legal fraternity" a sham; the true characteristic of fraternity is "*voluntary sacrifice determined by fraternal feeling*." Fraternity, therefore, loses its meaning when it is enforced by law (coercion); it simply becomes "legal plunder," and "an act of injustice."<sup>109</sup>

On the second front, Bastiat contends that liberty under the "rule of justice" results in harmony and that it is only when the state violates the principle of justice that disorder appears.<sup>110</sup> He criticizes the socialists for failing to trace the ultimate effects of liberty; indeed, it is their myopia that

prevents them from understanding the notion of a spontaneous market order.<sup>111</sup>

Bastiat notes that the substitution of distributive justice (coercion) for commutative justice (freedom) will cause the following results. First, "a frightful uncertainty, a deadly insecurity, will hover over the whole domain of private activity; for fraternity can express itself in billions of unknown forms and, consequently, billions of unforeseen decrees. Innumerable proposals will each day come to threaten all established relations."<sup>112</sup>

Second:

Under the philanthropical pretext of developing among men a factitious Solidarity, we render Responsibility more and more inert and inefficacious. By an improper application of the public force, we alter the relation of labour to its remuneration, we disturb the laws of industry and of exchange, we offer violence to the natural development of education, *we give a wrong direction to capital and labour*, . . . we change the centres of population, we render experience itself useless, — in a word, we give to all interests artificial foundations.<sup>113</sup> (Emphasis added)

Third, the increased uncertainty caused by the pursuit of social justice will discourage capital formation and reduce the standard of living.<sup>114</sup> Capital will also become concentrated in the hands of the state. Thus private investment opportunities will diminish, and the gap between social classes will widen.<sup>115</sup>

Finally, "when the state is responsible for furnishing everything to everybody," individuals "will be crushed under the burden of taxes; loan after loan will be floated; after having drained the present, the state will devour the future."<sup>116</sup>

In sum, Bastiat sees the substitution of the pseudo principle of "legal fraternity" for his principle of justice causing the very anarchy socialists want to avoid. His main argument against "legal fraternity," however, is not directed against its social costs, but against its *injustice*; it is a violation of man's natural rights to liberty and property.<sup>117</sup> According to Bastiat: "It is quite impossible for me to conceive of fraternity as *legally* enforced, without liberty being *legally* destroyed, and justice being *legally* trampled underfoot."<sup>118</sup>

#### IV. An Evaluation of Hayek's Work on Law and Liberty in Light of Bastiat's Contributions

It should now be clear that Bastiat anticipated many of Hayek's ideas on the relation between law and liberty. First, Bastiat recognized that individual freedom requires effective appropriability, and that this is made possible by the "law of justice." Second, Bastiat rejected legal positivism, which places law above property. According to Bastiat, the purpose of law is to safeguard property (broadly defined as an individual's rights to life, liberty, and

his rightful possessions), not to destroy it. Thus, the "law of justice" should prevent injustice, rather than impose "legal fraternity" or social justice. Third, Bastiat held that the "law of justice" should be general, equal, and certain. Fourth, the interconnection between property rights, incentives to utilize knowledge, and economic behavior was emphasized by Bastiat. He recognized that self-interest harnessed by competition, by which he meant freedom under the law, would lead to social cooperation and efficient use of knowledge. Moreover, he saw that the certainty created by the "rule of justice" creates a favorable atmosphere for investment and promotes economic growth.

Fifth, Bastiat warned that, if the principle of justice is replaced by the false principle of "legal fraternity," the market process will be thwarted and individual freedom destroyed. Finally, Bastiat emphasized that, if freedom is to be preserved, individuals must have an understanding of economic principles, especially the principle of spontaneous order or "social harmony." Thus, Bastiat sought to demonstrate that the long-run consequence of freedom under the "law of justice," is social coordination, not anarchy. Such an understanding, he thought, would provide individuals with an incentive to limit government to its proper sphere.

Although Bastiat is Hayek's predecessor on the above points, he differs from Hayek in two important respects. First, instead of merely asserting that freedom is a fundamental value, he grounds freedom in fact. He argues that the generic features of human action (purposiveness and subjectivity) imply the right to private property and individual freedom. Moreover, he demonstrates that it would be self-contradictory to deny the legitimacy of these fundamental rights. Thus, although Bastiat recognizes the usefulness of property and freedom, he considers this of secondary importance compared to providing a non-utilitarian theory of rights. His principle of justice constrains the legitimate use of force to the protection of person and property, *regardless of cost-benefit considerations*.

Hayek, on the other hand, abandons the search for ethical science in favor of a utilitarian justification for freedom. His concern with the usefulness of freedom, however, leads him to subject the freedom-intervention choice to cost-benefit analysis. Thus, left without a true theory of rights, Hayek falls into the very trap of expediency and social welfare comparisons that he initially warned his readers against.<sup>116</sup> As such, he is willing to compromise freedom when it is deemed socially useful, even though he is aware of the impossibility of interpersonal utility comparisons.

The weakness of Hayek's rule of law is that it does not provide us with a solid criterion for judging the use of force; it lacks a real justification for freedom, and, *thence, must be supplemented by the test of expediency*.<sup>120</sup> This ultimately leads Hayek to reject the "minimal state."<sup>121</sup> Bastiat, however, offers us a superior "rule of justice" based on a theory of rights; this leads him to accept the "minimal state" and at the same time illustrate its

usefulness. Consequently, Bastiat's approach to "justification" is more consistent and offers us better protection against interventionism than does Hayek's so-called "rules utilitarianism."

The second point of difference, which is closely related to the first, is that Bastiat would reject Hayek's false dichotomy between the coercive and "non-coercive" functions of government. In Bastiat's mind, *all* government action is coercive, since it acts through the law. The real question is: What constitutes the legitimate use of force?<sup>122</sup> Hence, we are back to the need for a theory of rights and Bastiat's superiority. As we have seen, Bastiat argues that "force may be used legitimately, not in order to sacrifice liberty, but to safeguard it."<sup>123</sup>

Hayek bases his argument for the expansion of government beyond defense of property on the theory of public goods. Pure public goods, however, are rare; perhaps national defense and other government provisions for the safeguarding of property are the only legitimate cases. If this is true, there would seem to be no valid argument for expanding the role of government beyond defense. This, of course, is Bastiat's position, reached via his theory of rights and principle of justice. Nevertheless, Bastiat would probably not object to various other service functions of government, provided user fees were charged and freedom of entry were assured. Consequently, his principle of justice is consistent with the provision of pure public goods, but constrains government action on the basis of justice rather than expediency.<sup>124</sup>

## V. Conclusion

The close connection between Bastiat and Hayek suggests that Hayek ought to acknowledge the importance of Bastiat's legal philosophy. Strangely enough, there is virtually no mention of Bastiat in Hayek's major works on law and liberty. Bastiat is totally ignored in *The Road to Serfdom*, *The Constitution of Liberty*, and "The Principles of a Liberal Social Order." Hayek does refer to Bastiat's essay "What Is Seen and What is Not Seen" in *Rules and Order*, where he calls it Bastiat's "most brilliant essay."<sup>125</sup> This essay, however, has little relevance for Bastiat's legal philosophy; it is primarily an exposition of economic fallacies, rather than a treatise on rights and justice. Hence, we are left with only a single reference to Bastiat's legal doctrine; this appears in *The Mirage of Social Justice*, where Hayek notes that Bastiat employed the negative concept of justice in his essay, "The Law."<sup>126</sup>

One might wish to conclude that Hayek was simply unaware of Bastiat's legal philosophy. This might be a legitimate reason why Hayek neglected Bastiat before 1964, but it fails after that date, since Hayek wrote the Introduction to Bastiat's *Selected Essays* in that year. These essays contain the bulk of Bastiat's studies in law and liberty; indeed, they present both his theory of rights (his moral justification of freedom), and his utilitarian

argument for liberty under the "law of justice." In his introduction to these essays, Hayek notes that the title of Bastiat's essay "What Is Seen and What Is Not Seen" clearly indicates the "central difficulty of a rational economic policy and...the decisive argument for economic freedom";<sup>127</sup> thus, echoing his own utilitarian bias. However, Hayek also notes that:

Bastiat was indeed right in treating freedom of choice as a moral principle *that must never be sacrificed to conditions of expediency*; because there is perhaps no aspect of freedom that would not be abolished if it were to be respected only where the concrete damage caused by its abolition can be pointed out.<sup>128</sup> (Emphasis added)

It is indeed strange that Hayek so unequivocally accepted Bastiat's principle of freedom, yet so often allowed himself to violate its substance on the basis of expediency. For some reason Hayek lost sight of Bastiat's rights theory; indeed, as late as 1976, Hayek was under the impression that little progress had been made in systematically deriving the implications of justice (in the negative sense) for the legitimate scope of government.<sup>129</sup>

We can offer several reasons why Hayek failed to consider seriously Bastiat's contributions to legal philosophy in his own work. First, Bastiat's reputation as a publicist may have deterred academics like Hayek from taking a scholarly interest in his work.<sup>130</sup> Second, Hayek's preoccupation with Bastiat's popular essay "What Is Seen and What Is Not Seen" may have caused him to overlook Bastiat's larger work in law and liberty. Finally, Hayek may not have seen Bastiat as an original thinker, and, therefore, felt no obligation to cite either his moral or utilitarian argument for freedom. As far as this writer can see, however, Bastiat must be placed alongside Hayek as one of the pioneers in systematizing the relation between law and liberty. Moreover, Bastiat went further than Hayek in integrating ethics, law, and economics. In particular, Bastiat's principle of justice provides a more rigorous and consistent test for the legitimate use of force (and hence government) than Hayek's rule of law because it rests on a theory of rights embedded in human action.

## NOTES

1. Gottfried Dietze, "Hayek on the Rule of Law," in *Essays on Hayek*, ed. Fritz Machlup (Hillsdale, Mich.: Hillsdale College Press, 1976), p. 107.
2. Friedrich A. Hayek, *The Constitution of Liberty*, 1st Gateway ed. (Chicago: Henry Regnery Co., 1972), p. 68.
3. Hayek, "The Principles of a Liberal Social Order," in *Studies in Philosophy, Politics and Economics* (Chicago: University of Chicago Press, 1967), p. 162. "Spontaneous order" refers to a system in which the adjustment of conflicting plans occurs through voluntary exchange rather than an artificial organization; it is the consequence of human interaction, but not of deliberate design. Hayek, *Constitution*, p. 160; and *Rules and Order*, vol. 1, *Law, Legislation and Liberty* (Chicago: University of Chicago Press, 1973), pp. 36-37.

According to O'Driscoll, "the principle of spontaneous order—or of 'undesigned order,' as it might more properly be called—can be viewed as the first principle of economics" (Gerald P. O'Driscoll, Jr., "Spontaneous Order and the Coordination of Economic Activities," *Journal of Libertarian Studies* 1 [Spring 1977]: 139).

4. Hayek, *Constitution*, p. 11.
  5. See *ibid.*, p. 21.
  6. John Locke, *Of Civil Government: Second Treatise*, Introduction by Russell Kirk, Gateway ed. (Chicago: Henry Regnery Co., 1955), sec. 57, p. 44; cited in Hayek, *Constitution*, p. 162.
  7. Hayek, "Economic Freedom and Representative Government," in *New Studies in Philosophy, Politics, Economics and the History of Ideas* (Chicago: University of Chicago Press, 1978), p. 109.
  8. Hayek, *Rules and Order*, p. 56.
  9. See Hayek, *Constitution*, pp. 208–10.
  10. *Ibid.*, p. 206.
  11. In Hayek's opinion: "It is the Rule of Law, . . . the absence of legal privileges of particular people designated by authority, which safeguards that equality before the law which is the opposite of arbitrary government" (*The Road to Serfdom* [Chicago: University of Chicago Press, 1944], p. 79). A discussion of Hayek's opposition to legal privilege can be found in *Constitution*, pp. 37, 153–54.
- Hayek believes the generality and equality requirements will provide an effective means towards a free society, since "if even authority has no special powers except that of enforcing the law, little that anybody may reasonably wish to do is likely to be prohibited" (*ibid.*, p. 155). Finally, he points out that equality before the law is the only type of equality consistent with individual freedom (*ibid.*, pp. 85–87).
12. Hayek, *Constitution*, pp. 153–55, 208–10. See also *Road to Serfdom*, chap. 6; and "The Errors of Constructivism," in *New Studies*, p. 7.
  13. Hayek, *Constitution*, p. 210; and "Principles," p. 166.
  14. See Hayek, "Principles," pp. 166–67, 171, 173–177; and *The Mirage of Social Justice* (1976), vol. 2, *Law, Legislation and Liberty*, pp. 31–33, 96–100. Also see Leland B. Yeager, "Economics and Principles," *Southern Economic Journal* 42 (April 1976): 556–60.
- According to Hayek: "We can judge the value of the results [of competition] only by the conditions under which it was conducted, not by the results. It therefore cannot be said of competition . . . that it leads to a maximization of any measurable results. It merely leads, under favorable conditions, to the use of more skill and knowledge than any other known procedure. Though every successful use of skill and knowledge can be regarded as a gain, and therefore each additional act of exchange in which both parties prefer what they get for what they give can be regarded as an advantage, we can never say by what aggregate amount the net benefits available to the people have increased. We have not to deal with measurable or additive magnitudes, but must accept as the possible optimum the results of those general conditions which are most likely to lead to the discovery of the largest number of opportunities" (*The Political Order of a Free People* [1979], vol. 3, *Law, Legislation and Liberty*, pp. 68–69).
15. Hayek, "Principles," pp. 166–67; and *Mirage*, pp. 35–38.
  16. Hayek, "Principles," p. 167.
  17. This broad definition of property is consistent with the current usage found in the literature on property rights and economic behavior. McKean, for example, states that: "I use the term 'property rights' in a broad sense that includes one's effective rights to do things and his effective claims to rewards (positive or negative) as a result of his actions" (Ronald N. McKean, "Property Rights Within Government and Devices to Increase Governmental Efficiency," *Southern Economic Journal* 39 [October 1972]: 177).
  18. See Hayek, *Constitution*, pp. 139–42, 156–57.
  19. Hayek, "Principles," p. 166.
  20. *Ibid.*, p. 168.
  21. *Ibid.*, p. 173.
  22. Hayek, *Constitution*, p. 210.

23. *Ibid.*, p. 29.
24. *Ibid.*, p. 30.
25. *Ibid.*, pp. 30-31. Hayek emphasizes that: "Competition is . . . first and foremost a discovery procedure. . . . The real issue is how we can best assist the optimum utilization of knowledge, skills and opportunities to acquire knowledge, that are dispersed among hundreds of thousands of people, but given to nobody in their entirety. Competition must be seen as a process in which people acquire and communicate knowledge; to treat it as if all this knowledge were available to any one person at the outset is to make nonsense of it" (*Political Order*, p. 68).
26. Hayek, "The Use of Knowledge in Society," in *Individualism and Economic Order*, Gateway ed. (Chicago: Henry Regnery Co., 1948), pp. 77-78.
27. This line of argument incorporates three key areas in Hayek's work: (1) his work on the market as an institution for pooling useful information and discovering new opportunities (see, for example, the three essays in *Individualism and Economic Order*, "Economics and Knowledge," "Use of Knowledge," and "The Meaning of Competition"; and "Competition as a Discovery Procedure," in *New Studies*); (2) his work in the field of comparative economic systems in which he shows the interconnection between property rights, incentives, and economic behavior (see, for example, "Socialist Calculation: The Competitive 'Solution,'" *Economica*, n.s. 7 [May 1940]: 125-49); and (3) his work in law and liberty in which he shows the interrelation between government by law and individual freedom (see, for example: *Constitution*; "Principles," pp. 160-77; *Rules and Order*; *Mirage*; and *Political Order*).
28. Hayek has emphasized that the rule of law is a necessary, but not sufficient condition for a free society (*Rules and Order*, p. 112; and *Constitution*, p. 222). Ultimately, what is needed is a common acceptance of the value of freedom, and this can be fostered, according to Hayek, by an increased awareness of economic principles. In particular, if voters understand the notion of spontaneous order and the difficulty of centralizing useful knowledge, they will have an incentive to limit government. In such an atmosphere, legislators will feel bound by the rule of law and thence be more inclined to preserve freedom (*Constitution*, pp. 108, 159, 206; and *Rules and Order*, pp. 67-71). Cf. Yeager, "Economics."
29. Alan Gewirth, "The 'Is-Ought' Problem Resolved," *Proceedings and Addresses of the American Philosophical Association* 47 (1974): 57.
30. Hayek, "Principles," p. 177.
31. Hayek, *Political Order*, p. 42.
32. Hayek, *Constitution*, p. 229. Hayek suggests that in order to ensure freedom of any occupation or trade: (1) contracts in restraint of trade should be made "void and unenforceable," and (2) "multiple damages" should be levied on parties involved in "all discriminatory or other [actions aimed] towards an actual or potential competitor intended to make him observe certain rules of market conduct" ("Principles," pp. 176-77).
33. Hayek, *Constitution*, pp. 217-18. Hayek recognizes the difficulty of measuring costs and benefits in a non-market situation; hence, he qualifies this statement by saying: "This means, after all, no more than that the public gain must *clearly and substantially* exceed the loss if an exception to the normal rule is to be allowed" (*Constitution*, p. 218, emphasis added).
34. *Ibid.*, p. 217.
35. *Ibid.*, p. 224-25.
36. Hayek, "Economic Freedom," p. 111.
37. Hayek, *Constitution*, pp. 222, 231.
38. Hayek accepts the idea of "market failure" as a justification for the expansion of the state beyond its defense and law enforcement functions. (See *Political Order*, p. 41; and *Constitution*, pp. 222-23.) According to Hayek: "Though the position that the state should have nothing to do with matters not related to the maintenance of law and order may seem logical so long as we think of the state solely as a coercive apparatus, we must recognize that, as a service agency, it may assist without harm in the achievement of desirable aims which could not be achieved otherwise" (*Constitution*, p. 258).
39. *Ibid.*, pp. 223-24.

40. Hayek, *Political Order*, p. 248.
41. Hayek admits that taxes are coercive, but proceeds to "justify" them on the basis of expediency (*Constitution*, p. 144).
42. See p. 379 *supra*.
43. Hayek, *Constitution*, p. 68.
44. See p. 380 *supra*.
45. Hayek, *Constitution*, pp. 231-32.
46. *Ibid.*, pp. 257-59.
47. The basic charitable unit is the family, which is a voluntary association where members have certain rights and obligations enforced by law. However, "families" cannot be legitimately forced to help "outsiders" without violating the basic ethical principle of freedom.
48. Hayek, *Constitution*, p. 375.
49. *Ibid.*, p. 258. See also *ibid.*, p. 231.
50. See n.1 *supra*.
51. Hayek, *Constitution*, p. 159. See also *Rules and Order*, pp. 67-71.
52. Hayek, *Constitution*, p. 206.
53. *Ibid.*, p. 237; and "Economic Freedom," pp. 109-10.
54. Hayek, *Political Order*, p. 3.
55. *Ibid.*, p. 4.
56. Hayek, "Economic Freedom," pp. 110-11.
57. See p. 381 *supra*.

58. Bastiat defines property as "appropriation that labor [effort] has made a right" ("Property and Law," in *Selected Essays on Political Economy*, trans. Seymour Cain, ed. George B. de Huszar [Irvington-on-Hudson, N.Y.: Foundation for Economic Education, 1964], p. 100). In his view: "Property does not exist because there are laws, but laws exist because there is property" (*ibid.*, p. 97).

Finally, Bastiat emphasizes the inseparability between property protected by law and liberty: "Property, the right to enjoy the fruits of one's labor, the right to work, to develop, to exercise one's faculties, according to one's own understanding, without the state intervening otherwise than by its protective action—this is what is meant by liberty" (*ibid.*, pp. 109-10). See *Harmonies of Political Economy*, (hereafter, *Political Economy*) trans. Patrick James Stirling (London: John Murray, 1860), p. 294. *Political Economy* was first published in France, 1850.)

The essence of man, writes Bastiat, is his "personality, liberty, [and] property"; the function of law is to protect these natural rights so man can fulfill his nature ("The Law," in *Selected Essays*, pp. 51-52). If we think of property in the Lockean sense of "life, liberty and estate" (*Second Treatise*, sec. 87, p. 68), Bastiat's view of the law can be expressed as the defense of property.

59. Bastiat, *Economic Harmonies*, trans. W. Hayden Boyers, ed. George B. De Huszar (Irvington-on-Hudson, N.Y.: Foundation for Economic Education, 1964), p. 27. Also see *ibid.*, chap. 22, pp. 25-31, 145, 229; and *Selected Essays*, p. 177.
60. Bastiat, *Economic Harmonies*, pp. 29, 210, 220; and "Property and Law," p. 98.
61. Bastiat, *Economic Harmonies*, pp. 206-209, 232, 319; see also p. 203.
62. Bastiat, "Property and Law," p. 99.
63. Bastiat notes that any legitimate right of the state must first reside in the individual: "If each man has the right to defend, even by force, his person, his liberty, and his property, several men have the right to get together, come to an understanding, and organize a collective force to provide regularly for this defense.

"Collective right, then, has its principle, its *raison d'être*, its legitimate basis, in individual right; and the collective force can rationally have no other end, no other function, than that of the individual forces for which it substitutes.

"Thus, as an individual cannot legitimately use force against the person, liberty, or property of another individual, for the same reason collective force cannot legitimately be applied to destroy the person, liberty, and property of individuals or classes" ("The Law" [1850], in *Selected Essays*, p. 52.) See also *Economic Harmonies*, pp. 457-58.

64. Bastiat, "The Law" (pp. 51-52), "Property and Law" (pp. 97-100, 109-10, 112), and "Justice and Fraternity" (p. 122), in *Selected Essays*. (The latter two essays were first published in 1848.)
65. Bastiat, "Justice and Fraternity," p. 122.
66. Bastiat, "The Law," p. 94; "Property and Law," p. 98; and *Economic Harmonies*, p. 457. Bastiat also refers to the principle as "the [classical] economist's principle, the principle that derives the right to property from labor [effort], and not from the law, the principle which says: Property is prior to law; the sole function of the law is to safeguard the right to property wherever it exists, wherever it is formed, in whatever manner the worker [the owner] produces it, whether individually or in association, *provided that he respects the rights of others*" ("Property and Law," p. 109, emphasis added).
67. See p. 378 *supra*.
68. Bastiat accepts the idea that an individual cannot logically claim as a right what is denied to all others, namely, the right to use force to destroy the "person, liberty, or property of another individual," without denying his common status as a man ("The Law," p. 52). Moreover, he emphasizes that it is impossible to argue against the idea that free exchange is the legitimate basis of property; "for, to say that certain men must render services that are not paid for means that other men must receive services that they do not pay for, which is certainly slavery. Now, if he says that this gratuitous gift must be reciprocal, he is merely quibbling; for, either the exchange will be made with a certain degree of justice, in which case the services will be in some way or other *evaluated* and paid for; or else they will not be evaluated and paid for, and, in that case . . . we are back to slavery." Finally, Bastiat recognizes that the existence of forced exchanges does not weaken the "principle of property," but confirms it. "The principle is violated; therefore, it exists." In other words, "property" and "plunder" are opposites pure and simple; a denial of this fact and the acceptance of Proudhon's proposition that "*property is theft*" would be absurd. "It would be no less outlandish to say that *theft is property*; that what is legal is illegal; that what is, is not, etc." (*Economic Harmonies*, pp. 206-207).
69. See p. 378 *supra*.
70. Bastiat, "Property and Law," p. 98.
71. *Ibid.*, p. 100.
72. Bastiat, "The Law," p. 52.
73. *Ibid.*, p. 91.
74. *Ibid.*, p. 66.
75. *Ibid.*, p. 65.
76. *Ibid.*, pp. 91-93; "Property and Law," pp. 111, 115; and "Justice and Fraternity," p. 124.
77. Bastiat, "Property and Law," pp. 109-10; "Justice and Fraternity," p. 129; and *Political Economy*, p. 294.
78. Bastiat, "The Law," p. 91. Bastiat opposes the notion that the law should attempt to impose justice in any positive sense (*ibid.*, pp. 66-67). He argues that "the law has only to require the fulfillment of contracts and to prevent or punish misrepresentation, violence, and fraud" ("Justice and Fraternity," p. 120). Hence, he emphasizes that "it is permitted to force someone to be just [in the negative sense of preventing the violation of individual rights], but not to force him to be charitable. Law, when it would do by force what ethics does by persuasion, far from rising to the region of charity, falls into the domain of plunder" (*Selected Essays*, p. 328, n. 7).
- Finally, Bastiat claims that if government were limited to the protection of person and property, taxes could be significantly reduced, and the multitude of taxes could be replaced by "a single tax, proportional to the amount of property owned, levied on each household" ("Justice and Fraternity," pp. 124-25).
79. Bastiat, *Economic Harmonies*, pp. 455-57.
80. Bastiat, *Political Economy*, pp. 13-14.
81. Bastiat, *Economic Harmonies*, p. 459.
82. Bastiat, *Political Economy*, p. 9.
83. Bastiat, "Justice and Fraternity," p. 131.

84. Bastiat, *Political Economy*, pp. 263–64.
85. *Ibid.*, p. 263.
86. See Bastiat, *Economic Harmonies*, chap. 20, and p. 534.
87. Bastiat, *Political Economy*, p. 14; see pp. 10, 279.
88. Bastiat, "Property and Law," p. 110.
89. Bastiat, "Justice and Fraternity," pp. 123, 136. The principle of freedom (competition) and the principle of property (and by implication, self-interest or the profit motive) play an important role in Bastiat's explanation of social order. See *Political Economy*, p. 294.
- Hence, Bastiat notes that: "Personal Interest [the drive to acquire property and make profits] is that irrepressible force belonging to the individual which urges us on to progress and discovery, which spurs us on to exertion, but leads also to monopoly. Competition [freedom] is that force belonging to the species which is not less irrepressible, and which snatches progress, as it is realized, from individual hands, and makes it the common inheritance of the great family of mankind. These two forces, in each of which, considered individually, we might find something to blame, thus constitute social Harmony, by the play of their combinations, when regarded in conjunction" (*Political Economy*, p. 267).
- Along the same line, Bastiat writes: "Man, as a producer, is necessarily, inevitably, attracted by excessive returns, which he thus reduces to the ordinary rate. He pursues his own interest; and without knowing it, without wishing it, without seeking it, he promotes the general good" (*ibid.*, p. 270). Bastiat's argument, of course, reflects Adam Smith's "Invisible Hand Doctrine," or the principle of spontaneous order.
90. Bastiat, "Justice and Fraternity," pp. 123–24.
91. *Ibid.*, p. 124.
92. *Ibid.*, p. 126.
93. Bastiat, "The Law," p. 94.
94. Bastiat, *Political Economy*, p. 14.
95. Bastiat, "Justice and Fraternity," pp. 116, 129.
96. Bastiat, *Political Economy*, p. 3.
97. Bastiat, "Property and Law," p. 109.
98. *Ibid.*, p. 98.
99. Bastiat, "The Law," pp. 60–62, 64, 67. See also "Justice and Fraternity," p. 133.
100. Bastiat, *Political Economy*, p. 7.
101. Bastiat, "The Law," pp. 68–71; see p. 83.
102. Bastiat, "Justice and Fraternity," p. 136. See *Political Economy*, pp. 1–15.
103. Bastiat, "Property and Law," p. 104; "Justice and Fraternity," p. 127.
104. Bastiat, "Property and Law," p. 103; see p. 101.
105. *Ibid.*, p. 103; see p. 97.
106. Bastiat, "The Law," p. 86.
107. Bastiat, *Political Economy*, p. 3; and *Economic Harmonies*, pp. 493–94.
108. Bastiat, "The Law," pp. 52, 67. See *Economic Harmonies*, pp. 206–208 on the illogic of the socialist "principle" of plunder.
109. Bastiat, "Justice and Fraternity," p. 133.
110. Bastiat, *Political Economy*, p. 13, 294.
111. Bastiat, "Justice and Fraternity," p. 138.
112. *Ibid.*, p. 127. According to Bastiat, once it is "accepted in principle that the state is responsible for establishing fraternity on behalf of its citizens, we shall see the entire people transformed into petitioners. Landed property, agriculture, industry, commerce, shipping, industrial companies, all will bestir themselves to claim favors from the state. The public treasury will be literally pillaged. Everyone will have good reasons to prove that legal fraternity should be interpreted in this sense: 'Let me have the benefits, and let the others pay the costs.' Everyone's effort will be directed toward snatching a scrap of fraternal privilege from the legislature" (*ibid.*, p. 128). See also *Selected Essays*, p. 239.
- Likewise, Bastiat argues that if you try to "make the law religious, fraternal, egalitarian, philanthropic, industrial, literary, or artistic, you will be immediately lost in vagueness and uncertainty, on unknown terrain, in a utopia imposed by force or, worse

still, amidst the multitude of utopias struggling to gain possession of the law and to impose themselves upon you; for fraternity and philanthropy have no fixed limits, like justice" ("The Law," pp. 91-92).

113. Bastiat, *Political Economy*, p. 10.
114. With regard to the reduction in capital formation, Bastiat reasons that when the legislator is separated "from other men and believes, in all conscience, that he can dispose of their time, their labor, and their transactions, all of which are their *property*, what man in the whole country has the least knowledge of the position in which the law will forcibly place him and his line of work tomorrow? And, under such conditions, who can or will undertake anything?" ("Property and Law," pp. 107-108).  
 With respect to the reduction in the standard of living occasioned by the imposition of "legal fraternity," Bastiat remarks: "I certainly do not deny that among the innumerable systems that this false principle gives rise to, a great number, the greater number even, originate from benevolent and generous intentions. But what is vicious is the principle itself. The manifest end of each particular plan is to equalize prosperity. But the still more manifest result of the principle on which these plans are founded is to equalize poverty; nay more, the effect is to force the well-to-do families down into the ranks of the poor and to decimate the families of the poor by sickness and starvation" (*ibid.*, p. 108).
115. Bastiat, "Justice and Fraternity," p. 128. See also "Property and Law," p. 109.
116. Bastiat, "Justice and Fraternity," p. 128.
117. Although Bastiat rejects the notion of "legal fraternity" as a principle of justice, he does accept a minor role for the state in time of disaster. In particular: he agrees "that under extraordinary circumstances, for urgent cases, the state should set aside some resources to assist certain unfortunate people, to help them adjust to changing conditions. . . . There is, however, a point on this road that must not be passed; it is the point where governmental foresight would step in to replace individual foresight and thus destroy it. It is quite evident that organized charity would, in this case, do much more permanent harm than temporary good" (*ibid.*, p. 120).
118. Bastiat, "The Law," p. 64.
119. The absence of a theory of rights underlying Hayek's rule of law, and the danger which this poses for individual freedom, has been discussed by Ronald Hamowy, "Law and the Liberal Society: F. A. Hayek's Constitution of Liberty," *Journal of Libertarian Studies* 2 (Winter 1978): esp. 287, 293, 296. Hamowy, however, takes a piecemeal approach to the Hayekian rule of law, and misrepresents Hayek on several important issues. In particular, he incorrectly interprets Hayek as saying that the rule of law is a sufficient, rather than necessary, condition for individual freedom (*ibid.*, p. 296).
120. See Hayek, *Constitution*, p. 222.
121. See Hayek, *Political Order*, chap. 14.
122. Bastiat, *Economic Harmonies*, pp. 455-57.
123. *Ibid.*, p. 456.
124. See *ibid.*, chap. 17.
125. Hayek, *Rules and Order*, p. 160, n. 6.
126. Hayek, *Mirage*, p. 163, n. 9.
127. Bastiat, *Selected Essays*, p. ix.
128. *Ibid.*, p. x.
129. Hayek, *Mirage*, p. 36.
130. In his Introduction to Bastiat's *Selected Essays*, Hayek refers to Bastiat as a "publicist of genius" (p. ix). Furthermore, he focuses primarily on Bastiat's essay "What Is Seen and What Is Not Seen," while ignoring his legal studies. It is interesting that Hayek attributes to Schumpeter the notion that Bastiat was "the most brilliant economic journalist who ever lived" (*ibid.*). In fact, Schumpeter said: "Admired by sympathizers, reviled by opponents, his [Bastiat's] name *might* have gone down to posterity as the most brilliant economic journalist who ever lived" had it not been for the publication of his *Economic Harmonies* (Joseph A. Schumpeter, *History of Economic Analysis*, ed. Elizabeth Boody Schumpeter [New York: Oxford University Press, 1954], p. 500, emphasis added).