

# Humane Studies Review

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- ◆ What is Critical Legal Studies? What are its main tenets? What does it have to say about the liberal conception of human responsibility and agency? Drew Clark criticizes the "critters."
- ◆ Historian and social scientist Sheilagh Ogilvie challenges classical liberals to create a new liberal history.
- ◆ Can a contractarian theory of morals in the tradition of Hobbes answer the question, "Why be moral?". David Boonin looks at *Morals by Agreement* by philosopher David Gauthier.
- ◆ Discussion: Communitarians and Liberals; Taxpayers' History.

## Current Issues in Law

### The Critical Legal Studies Movement by Andrew P. Clark

Legal education is in a ferment. The long-standing acceptance of legal positivism is being seriously challenged for dominance in the law-school curriculum. As recently as a decade ago, "the law" usually meant the sum total of actually enacted statutes and regulations, and the actions of judges that, like it or not, were fundamentally backed by force or the threat of force. Any hint of an underlying moral character — any "natural law" that explicitly expressed values to which the law should aspire — was ruled out of court by those who felt that they should concern themselves with what the law *is*, and not with what the law *should be*.

Today, this perspective on the world is beset by objections from all sides. Besides the resurgence of normative, natural-rights theories in the law (to which I will return later), one of the most interesting new movements to challenge much of the received legal wisdom goes by the name of Critical Legal Studies (CLS). Its practitioners, often referred to as "critters," in the Conference of Critical Legal Studies are largely law professors at elite universities, including Rutgers, Stanford, Georgetown, Miami, and, most significantly, Harvard.

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## Bibliographic Essay

### Toward a Critical Classical Liberal History by Sheilagh Ogilvie

Few men will deny that our views about the goodness or badness of different institutions are largely determined by what we believe to have been their effects in the past. There is scarcely a political ideal or concept which does not involve opinions about a whole series of past events . . . . Historical myths have perhaps played nearly as great a role in shaping opinion as historical facts . . . . The influence which the writers of history thus exercise on public opinion is probably more immediate and extensive than that of the political theorists who launch new ideas.<sup>1</sup>

Even more pernicious than the type of historical myth here castigated by Professor Hayek are unquestioned historical assumptions. Among the influences that have drawn the most dynamic young historians in the last generation to new methodologies and to Marxian-influenced social history have been their iconoclastic tendencies: the readiness "to criticize accepted views, to explore new vistas and to experiment with new conceptions."<sup>2</sup> Using new techniques and hitherto-neglected documentary sources, historians have been able to question and falsify basic historical assumptions (especially concerning the beliefs and behavior of the great illiterate mass of the common population in the past) that had previously been thought to be untestable, a matter only of literary interpretation or dogma.<sup>3</sup>

Unfortunately, few liberal historians have yet turned to the new, rigorous social, economic, and demographic history, and thus, although some false assumptions about the past are being questioned, others (for instance, the pernicious effects of the transition to capitalism, the benefits of state and corporate intervention in the economy and in social behavior, and the irrational and harmful effects of individual decision-making) persist uncriticized. The new theories being put forward to replace the falsified assumptions, and benefiting from the iconoclastic glamor, tend to derive from Marxian theory, and are already establishing a socialist and coercive tradition among practitioners of the new rigorous history.

Genuinely liberal historians must equip themselves with the new historical techniques so that the iconoclastic results made possible by historical demography,<sup>4</sup> microsimulation,<sup>5</sup> census analysis,<sup>6</sup> and *Annales*-school

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*Classical Liberal History (continued from page 1)*

"*histoire totale*"<sup>7</sup> and "*histoire de la longue durée*"<sup>8</sup> not be made the sole intellectual property of statist.

**Three Directions**

There are three main directions in which liberal principles can be creatively applied using the new historical techniques to debunk established assumptions. One is to question and provide an alternative to the traditional assumption (almost as rife among "conservatives" and nineteenth-century liberals as among *étatistes*) that the nation-state is the natural and inevitable unit of historical analysis.

Another is, in Professor Hayek's formulation, to have the courage to "defend capitalism from the capitalists."<sup>9</sup> Classical liberal and libertarian historians have excelled in identifying the ways in which markets are distorted and abusive privilege perpetuated by the state,<sup>10</sup> but they must not stop here. They must also be willing to identify institutions other than the state that distort markets in goods and information, and that appear repeatedly in history as beneficiaries of state coercion: merchant cartels and occupational corporations are two such potent and little-discussed sources of entrenched privilege.

And finally, classical liberal historians must cease to accept the assumption of the *Kulturhistoriker* that rational behavior was invented only in the eighteenth century, and that the actions of people in the past are comprehensible only in terms of "peasant irrationality" and "pre-industrial mentalities."<sup>11</sup> Unless individuals can be trusted to have acted in their own interests, using the best knowledge available within the constraints of their situations, the assumption that it is and historically always has been beneficial and necessary to establish coercive organs to protect them from harming themselves will continue to gather support from historical studies.

**Questioning the Nation-State**

I have argued that unquestioned historical assumptions are more dangerous than even historical "myths" about specific events. The assumption that "history" is the history of the development and interactions between national states was, until recently, such an unquestioned assumption. It is ironic that it was most energetically promoted by precisely those nineteenth-century nationalist liberals, those "Whig" historians, whose reputation Hayek essayed to rescue from Herbert Butterfield's strictures.<sup>12</sup> After the flowering of liberal history at the hands of Hume, Robertson, Ferguson, and Gibbon in the eighteenth century, the discipline was captured by the irrationalist German historicists, Ranke, Treitschke, Droysen, and their followers. Both the "Whig" historians criticized by Butterfield and the German historicists suffered from a deep-seated cultural determinism, a concentration on national units, and an exclusive attention to political and cultural elites.

It was only with the advent, since 1945, of the *Annales* school in France and the Cambridge school in Britain, both concerned to turn history into a science, that the vast

productive, taxpaying common population of the past has begun to be studied, instead of merely the state that ruled it. Both new schools insisted that the traditional assumptions about "social history" underlying accounts of changes in intellectual currents and political events be tested rigorously, often with recourse to local and apparently dry and mundane documentary sources — parish registers, tithe and tax accounts, local court minutes — hitherto ignored by all but genealogists and antiquarians.<sup>13</sup> In the last two decades assumptions about the family and demographic behavior,<sup>14</sup> economic attitudes and actions,<sup>15</sup> popular culture and religion,<sup>16</sup> and the harmonious and egalitarian nature of pre-industrial communities,<sup>17</sup> have all variously been submitted to the test of new records, of exploiting old records in new ways, or simply of exposing traditional notions to the light of criticism.

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*These two schools partly derive their attraction from their willingness to transcend national boundaries, a tendency very much in accord with classical liberalism, but which has been unaccountably neglected by classical liberal historians.*

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These two historical schools have captured the imagination of the younger generation of historians because of their willingness to be iconoclastic, and their insistence on studying hitherto neglected and "invisible" groups: the governed rather than the governors, the taxed rather than the taxmen, workers rather than capitalists, the illiterate rather than the elite, women and children rather than adult males, the vast rural population rather than the tiny minority in urban centers. These historical schools have also accomplished the necessary and desirable step of rejecting the national state as the unit of historical analysis and looking at these neglected groups across cultures. Demographic patterns and family structures have been compared between societies in the European past.<sup>18</sup> Theories have been advanced to explain contemporaneous social unrest in seventeenth-century European states, invoking the concept of a European "General Crisis of the seventeenth century."<sup>19</sup> And an attempt has been made to explain that unique European phenomenon, industrialization, in terms of the rapid expansion of cottage industry for foreign markets ("proto-industrialization," as it is called), all over Europe in the seventeenth and eighteenth centuries.<sup>20</sup>

Thus, these two schools partly derive their attraction from their willingness to transcend national boundaries, a tendency very much in accord with the principles of classical liberalism, but which has been unaccountably

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**Reviews****Glaucon's Problem  
by David Boonin**

Morals by Agreement

by David Gauthier

(Oxford: The Clarendon Press, 1986)

Justice, declares Thrasymachus in Plato's *Republic*, is nothing but the advantage of the stronger.<sup>1</sup> When the strong can take advantage of the weak, they will do so, and this is all that can be said on the subject. Thrasymachus reluctantly abandons this position at the end of Book I, unable to defend himself against the pestering questions of Socrates. But the dialogue does not end with his resignation because Glaucon has a problem: he remains unconvinced.

Glaucon picks up the argument at the outset of Book II, and it is here that the implications of Thrasymachus's attack on Socrates are most explicitly revealed. The life of the unjust man, Glaucon fears, is preferable to that of the just man. If, like the Lydian shepherd Gyges, we could be granted magical immunity from detection, we would all choose the path of injustice. Far from being a noble ideal, then, justice is simply a compromise between the best life — that of committing injustice with impunity — and the worst life — that of suffering injustice without compensation. If we find ourselves at any particular time abiding by the dictates of justice, it is simply because we are too weak to do otherwise.

David Gauthier's *Morals by Agreement* covers many of the areas familiar to readers of contemporary political philosophy, but if it has a single focus, it is providing an answer to Glaucon. Gauthier writes in the contractarian tradition of Hobbes (and, indeed, of Glaucon), and he readily concedes at the outset that "the genuinely problematic element in a contractarian theory is not the introduction of the idea of morality, but the step from hypothetical agreement to actual moral constraint." Gauthier wishes to demonstrate not merely the rationality of moral principles, but the rationality of moral behavior.

Our claim is that in certain situations involving interaction with others, an individual chooses rationally only in so far as he constrains his pursuit of his own interest or advantage to conform to principles expressing

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the impartiality characteristic of morality. To choose rationally, one must choose morally.

Gauthier begins by defending a subjective theory of value and good. Value he takes to be a measure of individual preference, and what is good, he says, "is good ultimately because it is preferred, and it is good from the standpoint of those and only those who prefer it." Starting from this strongly subjectivistic and relativistic foundation, he traces out its implications in a world of rational actors, with special attention to the "Prisoner's Dilemma" paradox, in which utility-maximizing individuals fail to maximize their utility (that is, to achieve their preferred states). From these highly restrictive and "nonmoral" premises, Gauthier proposes to generate morally binding restraints on individual behavior.

All of this serves, then, as preface to Gauthier's considerations of morality. Morality, he states, "arises from market failure." It is in those situations in which the pursuit of individual gain does not insure mutual benefit that moral constraints arise. A perfect market that produced an optimal distribution of goods, Gauthier contends, would be a "morally free zone." There would be no need to constrain the individual pursuit of utility in a world in which such pursuit perfectly coincided with the pursuits of others.

Gauthier develops this argument in conjunction with his treatment of bargaining and cooperation. "Where the invisible hand fails to direct each person, mindful only of her own gain, to promote the benefit of all," he notes, "cooperation provides a visible hand." The argument is at its most technical here, and it is in this context that Gauthier defends his principle of "minimax relative concession." This principle states that in a bargaining situation that requires concession by some or all participants, an outcome will be selected only if the greatest relative concession it requires is as small as possible.<sup>2</sup> Gauthier is concerned to establish the rationality of this narrow principle, but for the purposes of the present discussion, it will suffice to say that he demonstrates the rationality of cooperation in general. If rationality is understood as utility-maximization, then it is clear that it will often be rational to enter into cooperative ventures with others. To the extent that such cooperation necessarily entails placing fair and impartial restrictions on individual pursuits, rationality will recommend morality.

But will there actually be rational reasons to cooperate? It is one thing to make a promise, after all, but quite another to keep it. This, of course, is the heart of Glaucon's problem. It is also, as Gauthier has emphasized throughout his text, the traditional weakness of contractarian moral theory. If cooperation arises through the actions of utility-maximizing individuals, then won't that same utility-maximizing propensity ensure its demise? Gauthier thinks not, and his reason for so thinking is neatly summarized in his claim that a rational man "makes a choice about how to make further choices; he chooses, on utility-maximizing grounds, not to make further choices on those grounds." Several important points are embedded in this claim.

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*Glaucon's Problem (continued from page 3)*

The first point to be brought out is that Gauthier views man as the creator of his own character. Initially, as a rational being, man is guided by a disposition to maximize his utility. Presumably this disposition is in some sense innate, and is not the result of a conscious choice on man's part. Yet through developing an understanding of the dynamics of social interaction and cooperation, man is led to abandon this disposition for a new one. Gauthier is quite explicit on this point: "At the core of our rational capacity is the ability to engage in self-critical reflection. The fully rational being is able to reflect on his standard of deliberation, and to change that standard in the light of reflection." The very manner in which we choose, in other words, is itself an object of choice. And we choose it, as we choose everything else, in attempting to maximize our utility.

With this understanding of man in mind, the conclusion of Gauthier's argument is quite straightforward. When deciding whether, for example, to be honest or dishonest, we do not decide on a case-by-case basis, attempting in each instance to maximize our utility. To do so, we recognize, would earn us a reputation for dishonesty, and would thus preclude us from participation in many valuable forms of cooperation. This is the crucial point in Gauthier's argument: the disposition we choose will affect the situations in which we may expect to find ourselves. Because of this, we recognize that adopting the disposition to be honest only when it is clearly in our interest to do so is itself clearly not in our interest. We choose, therefore, to adopt a disposition to act honestly. And as a result of our choice, we are no longer able to take advantage of those cases where our dishonesty would be rewarded. Once we choose our new disposition, it seems, there is no going back to the old one.

Gauthier's argument may well prove the strongest argument for moral compliance that the contractarian can make. Whether it is strong enough, however, is by no means clear.

One direction the moral skeptic may follow in attempting a rebuttal to Gauthier's argument is to agree that, as rational, self-critical beings, we possess the ability to choose new dispositions, but to argue that Gauthier has chosen the wrong one. The skeptic may concede that once we choose the disposition to be honest, or, more plainly, once we are in fact disposed to be honest, we will not be the sort of people who take advantage of others when the opportunity arises. We could, however, recognize this as a lost opportunity to exploit others before we adopt such disposition, and perhaps choose to adopt a modified disposition instead. We could adopt a disposition always to be honest in certain sorts of situations but to be occasionally (and prudently) dishonest in others. It may be objected that this is no disposition at all, but merely the old case-by-case utility maximization in a new disguise. Yet I see no reason why our dispositions must be all-or-nothing propositions, strategies to be implemented independently of context. I may have, for example, a disposition to loan money to friends but not to strangers, or a propensity to be polite at church functions but not in the classroom. The new, less-than-completely-honest disposition may, of

course, still prevent me from being dishonest in some cases where my dishonesty would in fact have paid off. The point is that I may get away with ripping off a few people here and there while still adopting a disposition sufficiently "honest" to protect my reputation. I may thus secure the benefits of honesty without incurring all of the costs.

There is another direction in which criticism may be aimed at Gauthier, and it is an attack that the text may be less prepared to withstand. Rather than arguing that his justification for moral behavior is too weak, it may be objected that it is too strong. If the behavior Gauthier advocates can be derived purely from nonmoral premises, after all, why talk about morality at all? While Gauthier recognizes in the first paragraph of his book that "were duty no more than interest, morals would be superfluous," in framing his justification for moral constraints as the rational choice of utility-maximizing individuals he seems to equate duty and interest. "If moral appeals are entitled to some practical effect, some influence on our behaviour," he writes, "it is not because they whisper invitingly to our desires, but because they convince our intellect." But in trying to convince the intellect of Glaucon, Gauthier is ultimately forced to do so through Glaucon's desires. As Gauthier himself writes, "duty overrides advantage, but the acceptance of duty is truly advantageous."

After a great deal of effort, Gauthier may simply have illuminated the amoral dimensions of rules, failing to do full justice to their morality.

Glaucon's problem is one that has long haunted moral philosophers and it is likely to continue doing so. There are at least two ways of addressing it. The first is to ignore it, and this may not, on reflection, be such a misguided response. If Glaucon's question ultimately is "why should I be moral?" the answer, after all, may simply be that there are no reasons, that there could be no reasons. That a given act is moral is itself the reason it should be done. Perhaps this is part of what we mean by morality.

The alternative to ignoring Glaucon is to attempt to produce nonmoral reasons for behaving morally. As the preceding discussion has indicated, and as Gauthier would surely agree, the problems inherent in such an approach are great. One faces the difficulty of providing the reasons on the one hand, and of preserving the distinctive features that characterize morality on the other. For those who seek to answer Glaucon in this way, David Gauthier's *Morals by Agreement* is an excellent place to start. It is unlikely, however, to be a good place to end.

**Notes**

<sup>1</sup>Republic 338c

<sup>2</sup>"The relative magnitude of a concession is the proportion its absolute magnitude bears to the difference between the utility of the person's claim and his utility in the initial bargaining position."

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*Critical Legal Studies (continued from page 1)*

Three of the most prominent "elder statesmen" of the CLS movement — Duncan Kennedy, Morton Horwitz, and Roberto Mangabeira Unger — have all long taught and written at Harvard. Refugees from the New Left of the 1960s, Kennedy and the others object to what they regard as a system of legal education that simply perpetuates inequalities and reinforces unjust hierarchical arrangements.

*The sound and fury are not, however, simply departmental politics, for on the scholarly front, CLS has been quite successful, and the movement is beginning to spawn large numbers of journal articles and books.*

CLS is nothing if not controversial. In an article in the March 1984 *Journal of Legal Education*, Dean Paul D. Carrington of Duke Law School contended that professors with an orientation toward CLS have "an ethical duty to depart the law school" because of the effect of their cynicism about the law. The Federalist Society, a national organization of law students, together with one of its campus chapters, the Harvard Society for Law and Public Policy, sponsored "A Discussion on Critical Legal Studies at the Harvard Law School" at which Professor Paul Bator (who later gave up his tenured post at Harvard to move to the University of Chicago) announced: "Since the late 70s, it is my sad opinion that CLS has had an absolutely disastrous effect on the intellectual and institutional life of Harvard Law School."

The sound and fury are not, however, simply departmental politics, for on the scholarly front CLS has been quite successful, and the movement is beginning to spawn large numbers of journal articles and books. Roberto Unger, one of Harvard's founding trio and a well-respected social theorist, has just published his major work on the law: *The Critical Legal Studies Movement* (Cambridge, Mass., 1986), based on an earlier, lengthy article by that title, which appeared in the *Harvard Law Review* (Vol. 96 [1983]). His two major earlier works, *Law and Modern Society* (New York, 1976) and *Knowledge and Politics* (New York, 1975), also deal with his view of the law, but concentrate on broader concerns such as ethics, the theory of knowledge, and liberation theology.

The first anthology of work by Critical Legal Scholars was a book entitled *The Politics of Law: A Progressive Critique* (edited by David Kairys, New York, 1982), followed shortly by the "Critical Legal Studies Symposium" in the *Stanford Law Review* (Vol. 36 [1984]). Another very good collection of essays on this topic, though not exclusively or even primarily devoted to CLS views, is the issue of the *Yale Law Journal* titled "Legal Scholarship: Its Nature and Purposes" (Vol. 90 [1981] pp. 955-1296).

What, exactly, is it that inspires both the outrage at and the energy behind the Critical Legal Studies movement? The CLS approach emerges against a background formed

by two significant intellectual movements. One is the legal realism movement. Active during the New Deal era, legal realists were highly skeptical about claims for logical reasoning and suggested that a judge's socioeconomic class was more likely to determine his decision than neutral principles. A note entitled "Round and Round the Bramble Bush: From Legal Realism to CLS Scholarship" (*HLR*, Vol. 95 [1982] pp. 1669-1690) asserts that many of the CLS scholars of today "locate the genesis of today's crises in the Realists' legacy and see their task as the continuation of an abandoned Realist project." But the affinity between these two approaches can be overemphasized. The note continues: "While the Realists used analytic critique selectively, to discredit existing dogmas and suggest specific avenues of law reform, the CLS scholar is more concerned with the entire framework of liberal thought. He exploits the 'tension between normative ideals and social structure' and the repercussive effects of a belief in liberalism's particular articulation of boundaries between self and community, fact and value, civil society and sovereign."

The reason for this larger, "total critique" may be due to the other, and in my opinion, more significant, progenitors of CLS. While there is no single body of theoretical ideas to which the critical legal theorists as a whole would subscribe, they have been influenced, variously, by the Frankfurt school and by structuralist and poststructuralist thought, movements that have been especially influential in the teaching of English, literary theory, and sociology.

Two interests that are widely shared by adherents to these movements are holistic or nonindividualistic forms of explanation in the social sciences, modeled on Saussure's work in linguistics, and the "deconstruction" of the conscious rational agent by the invocation of various forms of reductionism. A strong statement of this view is found in T. C. Heller's article, "Structuralism and Critique" (*Stanford Law Review*, Vol. 36 [1984] pp. 127-198), where he states, the "account of the subject is fundamentally reductionist" and refers in this connection to "semiotics, psychoanalysis or historical materialism."

Jerry Frug, a professor of law at Harvard sympathetic to CLS, discussed the connection between these new innovations in literary theory and law in the February 16, 1986, *New York Times Book Review*: "A growing number of lawyers, however, see law not in terms of its stability and predictability but in an endless process of interpretation, reinterpretation and counterinterpretation. They assert that interpreting law always engages people's passions and politics as well as their reason. They do not consider legal decision making simply 'subjective.' They think a reader of law is as much a prisoner of conventional political and moral views — and is as able to transform them — as any other reader. They consider law not as separable from the rest of social life but as a product of, and a contributor to, the way we understand ourselves and our society."

Cass R. Sunstein bravely attempts to summarize CLS in his excellent dual review of *The Politics of Law* and the late Lon Fuller's *Principles of Social Order* (*Ethics*, Vol. 94 [1983] pp. 126-135), CLS's main tenets include these beliefs:

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*Critical Legal Studies (continued from page 5)*

First, there is no such thing as distinctively legal reasoning. As Duncan Kennedy writes in "Legal Education as Training for Hierarchy": "There is never a 'correct legal solution' that is other than the correct ethical and political solution to that legal problem." (Kairys, p. 47)

Second, the law and the state cannot be understood as operating independently of social relations and history. There is no "Archimedean point" from which a judge can view disputes before him and rule with objectivity on them. In other words, the law has no privileged status independent from its role in the fabric of daily life.

Third, legal doctrines serve and legitimize the class interest of those with political power. As Sunstein summarizes: "The historic function of the law has been to protect existing social and political structures, a task accomplished by obtaining the consent or acquiescence of the lower classes. Such consent derives from a perception of the autonomy and legitimacy of the legal process, which depends in turn on the myth that the law is neutral and objective in nature."

Finally, the legal system of the United States rests on a false understanding of democracy. Sunstein writes: "The legal system purports to promote democracy through protecting the right to vote and the traditional freedom of expression; but those rights do not allow for democracy in the private sector, where critical decisions are also made."

While Sunstein does not endorse this criticism, he has some interesting thoughts, which are worth quoting at length:

The central achievements of the movement consist, it seems to me, in the emphatic reminder that legal questions are often questions of political theory, in the effort to explore the underlying premises of legal doctrine, in the constant attack on the notion of a value-free legal science, and in the emphasis on the historical contingency of legal rules. All of those insights are useful correctives to much of what goes on in the courts and in legal scholarship . . . critical scholars have attempted to reveal the ideological roots both of "interpretivism" in constitutional theory and of the normative dimension of the law-and-economics movement. Efforts to show the ethical vision that underlies legal doctrine have produced and should continue to yield valuable contributions to the study of legal system.

It is precisely this insight — that law is fundamentally value-laden — that leads me to think that critical legal scholars are largely correct in their first and second criticisms above, but mistaken in the third and fourth. They are right on target when they assert that the methods of social coordination, management, and adjudication of disputes that nations turn to implicitly rest on standards of right and wrong, which often remain hidden and unacknowledged. But to the extent that they infer that this spells the end for any rationally justifiable system of

rules, they are sorely misguided. Such an extreme skepticism about the law — or even the possibility of law — can find no way out of the dilemmas of ethical relativism, a doctrine to which CLS followers respond with varying degrees of ambiguity.

Harvard Law Professor Clare Dalton sensibly takes on the charge of "nihilism" by saying that "people who believe in objectivity can't see any alternative other than unbridled subjectivity." But Mark V. Tushnet, a professor of law at Georgetown who is a leader of the CLS movement, sees no room for middle ground when it comes to legal interpretation: "There is no method of constitutional interpretation that allows some judicial review but at the same time limits its reach. Judicial review is an 'all or nothing' proposition. Either one allows judges to do whatever they want or one allows majorities to do whatever they want." ("A Symposium on Judicial Activism: Problems and Responses," *Harvard Journal of Law and Public Policy*, Vol. 7 [1984] pp. 77-79). There is no room for law that transcends power or desire.

Tushnet's argument shows the strange affinity CLS has with judicial restrainers of the right, who also believe that judicial review is an "all or nothing" proposition. Consider the views of Professor Lino Graglia of the University of Texas, a foe of judicial activism who once encouraged residents of Austin, Texas, to resist a court order to desegregate public schools, and who was once considered for a vacancy on the Fifth Circuit Court of Appeals. Graglia does not believe the Constitution was designed to create or enforce rights, natural or otherwise. He recently told me that "the Constitution was not designed to restrain a system of government, and, happily, it prohibits very little. Much of what it prohibits is, I feel, a mistake. The Bill of Rights, which was added two years later, is not a very important list, but since it applies only to the federal government, it doesn't get violated."

Hostility to civil rights and the First Amendment are not usually associated with a progressive legal mind, but Critical Legal Studies has found a natural ally in Graglia. As he explained to me, "Their view is, and I agree with it, that constitutional law has nothing to do with law — it's just politics. They are perfectly right when they say that the Constitution does not actually prohibit any of these things that the courts hold unconstitutional." He believes, in other words, that "insofar as the critters are legal realists and are pressing the [legal] realist line, I personally think it's a healthy thing. Insofar as they are insisting that most law is bullshit, they are right."

Seen in light of their positions on judicial activism, the fourth CLS criticism listed above — that our legal system is insufficiently democratic — rests on an ambiguous understanding of "democracy." Do they mean by this term a framework for political interaction, or unbridled majoritarianism? Both approaches — CLS and judicial restraint — seem to share the view (as Sunstein describes it) "that law, like politics, is simply a matter of arbitrary preference. The notion is largely Hobbesian: law is a struggle between self-interested groups for material and political advantage. Because the critical scholars suggest

that law is only a struggle for power, [their] positive program is to use it in such a way as to take power from the powerful and give it to the powerless."

*If the statement that law serves the powerful is true in every case, then it becomes simply an empty tautology.*

Randy Barnett of the Illinois Institute of Technology-Kent College of Law has, in "Contract Scholarship and the Reemergence of Legal Philosophy," (*HLR*, Vol. 97 [1984] pp. 1214-1245) reached a similar conclusion: the Conference on Critical Legal Studies is actually quite reactionary in nature. "The CLS position borrows heavily from the realist tradition's contention that legal analysis is, and cannot be anything other than, a smokescreen covering other motives for judicial conduct. In place of the now-unfashionable psychoanalyzing performed by the realists, the CLS analysis substitutes a neo-Marxist, materialist account of judicial behavior." The reemergence of normative legal philosophy in the past fifteen years has provided a moral basis for law and hence undercut many of CLS's (formerly) valid arguments about unprincipled and incoherent judicial reasoning. But even with the scholarship of such varied thinkers as Bruce A. Ackerman, Ronald Dworkin, Richard Epstein, John Finnis, George Fletcher, Charles Fried, and Anthony Kronman, CLS professors have largely avoided these, preferring "to direct their fire at nineteenth century legal thought and the law-and-economics approach." As Barnett concludes, "The definitive showdown between the CLS group and the new normative philosophers has yet to occur."

The third CLS criticism listed above, that the law simply serves political power and can do this only by feigning neutrality, is more complex because it is really several objections bundled into one. One might agree that laws often do serve the interests of those with the most political power or that many laws are unjust. When Congress passes legislation imposing tariffs and quotas on imported goods, for example, it serves the interests of the few, highly concentrated industries that stand to benefit from restricted competition. Who loses? Every consumer, by just a little — demonstrating that even though the overall effect on society is negative, the widely spread economic interests of the many are not powerful enough to overcome the concentrated interests of the few.

But if the statement that law serves the powerful is true in every case (as many CLS advocates seem to think) then it becomes simply an empty tautology. If instead of passing, the tariff had failed, what sense does it make to say that the law serves only the powerful? Is everyone who buys shoes, clothes, or autos a member of the power elite? The assertion either fails to hold up in every case (in which the perversion of the law at least assumes there is such a thing as a law to be perverted) or it collapses into a truism, in which those who have power have power because they have power.

CLS scholars, along with many "communitarian" critics of liberalism, often charge that liberalism's claims on behalf of the rule of law, equality before the law, and abstract and neutral principles of law conceal a lack of commitment to any principles at all, that is, of total indifference to moral or value claims. More to the point, CLS scholars claim that the "myth" of neutrality conceals a bias in favor of certain classes over others, and that the alleged neutrality is a mere device to legitimate domination.

One problem with this criticism is that it confuses at least two different kinds of "neutrality." Take the right to freedom of speech and assembly clearly set forth in the First Amendment. Both pro- and anti-abortion groups are recognized as having rights to speak out, to organize, and to assemble peacefully, all in pursuit of incompatible goals. Allowing all such peaceful efforts — regardless of their "merits" — is a fair sense of the word "neutral," and for the law to have any weight whatsoever it must apply in all cases. If CLS is charging that the law's legitimacy depends on its equal enforcement, they are right. But if they are making another charge, that the law itself, and not simply its enforcement, depends on a myth of neutrality, that is, of total indifference to moral or value claims, one could easily respond that the First Amendment does indeed promulgate certain concrete values: among them tolerance, free inquiry, freedom of religion, and respect for others. One might argue in opposition to such values (freedom, tolerance, etc.) — and many critical legal scholars have, but they clearly *are* values, and battles about the legal system of which they are a part will have to be fought on the grounds of whether or not they are good or proper values.

A basic flaw with the critical legal scholars is that they seem willing to work eclectically with theories that are incompatible. They casually invoke various "reductionistic" theories to call into question the idea of the acting subject as used by classical liberalism, while providing little evidence that these theories are true or consistent. More importantly, however, they flirt with ideas that question the status of all theoretical claims whatever, while seemingly oblivious to the fact that this would also apply to their own claims, including their criticisms of liberalism. This "performative inconsistency" lies at the heart of CLS and vitiates the validity of its claims.

There is much that is stimulating and provocative in their writings: they exhibit interest in a whole range of ideas, and there is much in their work that might seem refreshingly tentative and undogmatic. But at a deeper level, a pseudo-unity is given to their work by a dogmatic and unargued attachment to political "progressivism" and to the assumption that (or so it would seem) *anything* may be entertained — provided that it is critical of the liberal tradition. What critical legal theorists have to recognize is that they cannot have their cake and eat it, too. They cannot undermine contemporary political life while simultaneously advancing a particular narrow form of it.

*Andrew P. Clark is a senior in philosophy at Swarthmore College.*

# Crosscurrents

## IHS Fellow Gets Ph.D.

Jeremy Shearmur, now senior research fellow at the Institute for Humane Studies, successfully defended his dissertation, "The Political Thought of F. A. von Hayek" (London School of Economics, University of London) in December 1986. Shearmur, formerly research assistant to Karl Popper, argues that Hayek's arguments on behalf of liberty are strengthened if linked, as Hayek himself suggests, with the critical rationalism of Popper. Hayek's attempt to extract the maxim that each individual is to be treated as an end in himself from utilitarian considerations can be fortified when the concern for truth is brought in. Utilitarians have a concern with truth, and anyone concerned with truth should accord others what Shearmur calls "dialogue rights," the implications for society of which he explores in some detail. Shearmur uses these "dialogue rights" to lay a foundation for classical liberalism that is slightly more rationalistic than Hayek's. He concludes by resolving some problems in Hayek's work and answering certain communitarian criticisms of classical liberalism. ♦

## Journal Examines Philosophy and Law

The Autumn 1986 issue of *Social Philosophy and Policy*, published by Basil Blackwell for the Social Philosophy and Policy Center at Bowling Green State University in Ohio, is devoted to an examination of the relationship between law and philosophy. Essays include Richard Epstein on "Taxation in a Lockean World," Philip Soper on "Choosing a Legal Theory on Moral Grounds," and Randy E. Barnett on "Contract Remedies and Inalienable Rights." The issue provides a useful overview of some of the questions involved in the relationship between law, morality, and justice. *Social Philosophy and Policy* is published twice yearly. For more information, contact: Social Philosophy and Policy Center, Bowling Green State University, Bowling Green, OH 43403. ♦

## Book Examines Economic, Ethical, Historical Dimensions of Property

Henri Lepage, the author of the excellent introduction to modern political economy, *Demain le Capitalisme* (translated as *Tomorrow, Capitalism*, Open Court: 1982), is again influencing French intellectual life with his *Pourquoi la Propriete* (Hachette: 1985). Currently available only in French, the book offers a brilliant examination of the inevitability of property and the case for property rights within a classical liberal framework. Among the chapters in the book are essays on property and environmental conservation; property and knowledge; property, the market, and morality, and property and liberty. Lepage is currently working on a book on human rights. ♦

## Early Capitalists Examined

A recent attempt to use rigorous historical methods to

assess the origins of the "first capitalists" in England has shown the varied classes, occupations, and social backgrounds from which they came. *The First Industrialists: The Problem of Origins* (Cambridge University Press: 1985) by French historian Francois Crouzet shows a majority to have arisen from the middle class, with a large enough proportion from the lower-middle class to raise "the myth of the self-made man phoenix-like, from its ashes." The work is richly documented, with 54 pages of footnotes and references and many tables presenting evidence on over 300 leading industrialists from 1750 to 1850. The first industrialists, claims Crouzet, were "revolutionaries; they introduced new machinery, new processes, new products." ♦

## Adam Smith on Tape

A group of scholars associated with the Institute is responsible for one of the most innovative and exciting developments in teaching today. In a series of skillfully edited and narrated tapes, the ideas of seminal thinkers, such as Adam Smith, Thomas Jefferson, Rousseau, Marx, Machiavelli, the authors of the *Federalist Papers*, and other important thinkers in political, social, and economic theory, are brought to life. The scholarship maintains a consistently high level, while managing to keep the listener's attention through the use of professional actors and engaging voice characterizations. Using varying accents and voices while reading from letters, diaries, books, and other historical sources, the narrators manage to create the impression of a grand and fascinating conversation, to which we are privileged to listen. These tapes, produced by Knowledge Products, Inc., are highly recommended for students eager to understand both the history of ideas and the contemporary relevance of the key insights of the great thinkers.

The four tapes on Adam Smith (with a retail value of \$50) are made available free of charge by the Institute to students and faculty on a selective basis. All that is required is that the sponsor supply the Institute with written commitments from five or more students to listen to the tapes from start to finish. For more information, contact the "Adam Smith Tape Program" care of IHS. ♦

## Summer Seminars on Liberty & Society, Public Choice

Seminars for undergraduate juniors and seniors and first-year graduate and professional students will be held this summer by the Institute and the Center for Study of Public Choice.

The IHS Liberty & Society seminars will be held June 21-27 at Marymount University and George Mason University in northern Virginia and August 2-8 at the College of Notre Dame in northern California. The Liberty & Society program is interdisciplinary, and offers a thoroughgoing introduction to the foundations of classical liberal thought. The faculty includes noted economist Israel Kirzner, author of *Competition and Entrepreneurship* and many other works; philosopher George Smith; law professor Randy Barnett, and historians Ralph Raico and Leonard Liggi. Information on the program, including full scholarships, is available

by writing to the Liberty & Society Summer Seminar Director, Institute for Humane Studies, George Mason University, 4400 University Drive, Fairfax, VA 22030. Recommendations from faculty and students of potential invitees are welcomed.

The Center for Study of Public Choice at George Mason University will hold a seminar June 14-19, featuring Nobel Laureate James Buchanan and Gordon Tullock, co-authors of *The Calculus of Consent*; Carolyn Weaver, editor of *Regulation* magazine; Charles Goetz of the University of Virginia law school; Ron Heiner of the Brigham Young University economics department, and other leaders in public choice theory. The seminar will serve as an introduction to the growing field of public choice, the application of economic thinking to political and legal institutions. It will conclude with lectures and discussions on constitutional economics. The Center offers fully paid scholarships and small stipends to qualified applicants. For more information or to submit recommendations of students, contact Prof. Jennifer Roback, Center for Study of Public Choice, George Mason University, Fairfax, VA 22030. ♦

## New Journal Launched

A new quarterly journal has been launched featuring essays by several scholars associated with the Institute. The first issue of *Critical Review: A Journal of Books and Ideas*, edited by Kurt Schuler, featured Jeremy Shearmur on "Popper and Marx"; IHS Fellow Don Lavoie on the "Political and Economic Illusions of Socialism"; IHS associates Pete Boettke, Steve Horwitz, and David L. Prychitko on "The Roots of Apartheid"; IHS Claude Lambe Fellow Lee Cronk (now doing anthropological field work in Kenya) on "The Anthropology of Tyranny," and other essays. The second issue will feature IHS Claude Lambe Fellow Randy Kroszner on "Technology and the Control of Labor"; Mark Blaug on IHS associate scholar Donald McCloskey's book, *The Rhetoric of Economics*; IHS Postdoctoral Fellow David Beito on government's role in America's suburbanization, and Gus diZerega on "Postmodern Liberalism and Green Politics."

Subscriptions are \$15 per year and are available from *Critical Review*, 532 Broadway, 7th Floor, New York, NY 10012. ♦

## History of Taxation Examined

*A History of Taxation and Expenditure in the Western World* by Carolyn Webber and Aaron Wildavsky (New York, 1986) is an ambitious, important, and welcome project, a careful scrutiny of the lynchpin of the modern state: taxation. How the west reached its current fiscal status is not only a fascinating story, running from ancient Greece and Rome to the 20th century, but an understanding of this process is crucial for historians, economists, sociologists, and political theorists working in the classical liberal tradition. This is especially true of the nation-state building period between 1300 and 1700 A.D.

Although Webber and Wildavsky's model, historiographical perspective, and obvious ideological

preference (i.e., for strong, smoothly functioning central states) all lead them to an uneven interpretation of events, this book's faults are minor when compared to the service of finally bringing together much of the important secondary literature on the topic. Rather than the final word on the subject, this book marks the beginning of an important and exciting research program. Classical liberal scholars will find numerous research and dissertation topics in every chapter of this noteworthy project. ♦

*Humane Studies Review* is devoted to advancing scholarship in the classical liberal tradition. Contributions dealing with questions or problems of special relevance to classical liberal scholarship in any of the humane sciences are welcomed. The humane sciences include, but are not limited to, history, sociology, economics, law, philosophy, anthropology, literature, and political science.

*Humane Studies Review* features three main essays in each issue: a bibliographical review essay, which unfolds a theme or problem through a broad review of the relevant literature (suggested length: 3500-4700 words); an essay on a current issue in law, philosophy, history, economics, or any other of the humane sciences, which explores a well-defined issue and raises possibilities for liberal scholarship (suggested length: 2500 words), and a review of a recent book treating problems central to liberal thought (suggested length: 3500-4700 words).

Contributors are encouraged to submit essays that raise questions and present challenges, rather than papers that attempt only to sustain a thesis. The goal of the review is to encourage thought and discussion, to promote research, and to serve as a "seminar in print."

Manuscripts should be typewritten and double-spaced on high-quality opaque paper with substantial margins. (Computer disks are encouraged; call to ascertain format.) Footnotes should be kept to a minimum and should appear at the end of the manuscript. Quotations and citations should be carefully verified. Rules of grammar and punctuation should conform to the *Chicago Manual of Style*. Contributors should retain a copy of their manuscripts. Authors will receive twenty copies free of charge; arrangements for additional copies may be made with the editor.

*Humane Studies Review* is published three times during the academic year by the Institute for Humane Studies at George Mason University. Requests for sample copies or additional information should be addressed to the Editor.

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## Discussion

### Whither Liberalism?

Has it really been no more than fifteen years since John Rawls's *Theory of Justice* heralded the renaissance of substantive political investigation in Anglo-American philosophy? Since then, the spinings of theory have been turbo-charged. First came the wave of "Rawlsians," among whom, with due qualifications, one can include Nozick and Dworkin. Snapping hard at their heels were the "new communitarians." Now comes the sorting-out stage in which liberal individualism must directly confront the claims of moral community. It's increasingly difficult to keep track of the players; Chandran Kukathas ("Liberalism and Its Critics," *Humane Studies Review*, Winter 1986-87) provides us an exemplary scorecard. Indeed, he has said so much so well about the current condition of liberal political theory that I suspect it is rash of me to do more than append a simple "Bravo!"

What may require some additional explanation, though, is what enabled the pace of activity to be so frenetic. Might some of the debate's momentum have been borrowed from a source already at hand? I want to suggest that what we are seeing is but the latest version of an enterprise that is almost two centuries old: it is the attempt by moral philosophy to exorcise the ghost of old Immanuel Kant.

It is no secret to anyone that Rawls describes his construction as Kantian. The alternative rewritings of liberalism to which Kukathas refers lack the systematic foundation-building that distinguishes *A Theory of Justice*. But when they seek theoretical support, it is to Kant whom they turn. Dworkin posits a fundamental right to equal regard and respect; the language resonates with Kantian overtones. Nozick explicitly credits Locke with having stated what rights we have. Still, when Nozick tosses out a few hints to explain why, in the first place, it is reasonable to suppose that individuals are protected by rights serving as side constraints blocking encroachments, it is not Locke whom he invokes but Kant.

The Kantian connection can be further specified. For each of these philosophers, what is morally central about individuals is their *autonomy*. The dignity of persons is to choose, and to do so with a radical freedom unconstrained by prior ties to community, tradition, or kin. (It is significant in this regard how little is seen in their works of children/family.) The Rawlsian agent sequestered behind a veil of ignorance epitomizes this enthronement of autonomy.

An idealized autonomous individual confronts the world as if *de novo*. He is an Adam on the seventh day of Creation — or a Kantian ego imperially surveying the world from a noumenal perch. It is intolerable for such a being to be bound by prior conventions of the society in which he finds himself, including, importantly, established patterns of property holdings. In this regard,

the example of J. S. Mill is instructive. *On Liberty* may be the premiere liberal manifesto of the previous century, but its attempt to combine a defense of liberty with endorsement of unbridled autonomy (borrowed from Kant via Continental romanticism) is unstable. John Gray has shown us how the combination breeds Mill's later socialism. More recently, Rawls and Dworkin have announced that property relations are infinitely malleable. Even Nozick's libertarianism contains a principle of rectification that, apparently, leaves almost all extant claims to property very much in jeopardy.

The communitarians clearly position themselves against the Rawlsians as opponents of so expansive an autonomy. Individuals, they remind us, draw on a social capital for their loyalties as much as for their language. If callings and virtues satisfactory for a human life were not available to be unselfconsciously assumed, we could not invent them. Bellah and MacIntyre, in particular, profess to find the social stock dangerously depleted. They prescribe, more than a little implausibly, policies of studied reaction. (Bellah, *et al*, seem to be satisfied with nineteenth-century arrangements; MacIntyre would retreat to medieval modes.) Even the less apocalyptic communitarians call for enhanced attention to the traditions, practices, and codes whose familiarity enables persons to take their moral bearings. Conspicuously absent, though, is acknowledgment of firm rights to property as having a significant role in marking the contours of the moral landscape. That is probably because the communitarians only marginally locate themselves within the liberal tradition. More prepossessing founts of inspiration for them are Marx and the monastery.

Where then stands classical liberalism? Between a rock and a hard place. The new communitarians are neither willing nor able to supplement their critique of Kantian autonomy with an equivalent critique of property arrangements perpetually up for grabs. However, there are other, non-Kantian quarters within the tradition of liberalism to which theorists can turn. Philosophers of the Scottish Enlightenment, especially David Hume and Adam Smith, provide a conception of moral community within which individuals are to enjoy not a metaphysically extravagant autonomy but rather a more homey entitlement to direct their lives according to their own lights. The essentially social faculty of *sympathy* assumes a prominent position in their work. So too do robust protections of property holdings. Similarly, the strand of liberalism that descends from Aristotle via the natural law tradition has been too little seen in contemporary discussions. Return to these non-Kantian roots may provide for classical liberalism much needed invigoration. We shall see. In the meantime, Chandran Kukathas has helped us better understand the current uneasy status of liberal theory.

### Loren E. Lomasky

Loren E. Lomasky is chairman of the Department of Philosophy, University of Minnesota, Duluth, and author of *Persons, Rights, and the Moral Community* (Oxford University Press, 1987).

### The Tax Revolt and American Politics

Tax revolts have been a blind spot in American history writing since about the mid-thirties. Work like David Beito's ("Tax Revolts in American History," *Humane Studies Review*, Winter 1986-87) holds great promise for refocusing attention on a phenomenon that ranged from grass-roots activity to constitutional theory. The tax-limitation issue has been so pervasive in American history that it is nothing short of a key to understanding our political and constitutional character.

Dr. Beito is radically changing our impression of lower-middle and working class attitudes during the Great Depression. As he shows for Chicago, many from this constituency, supposedly the main force for social reform, actually responded to the economic dislocation by calling for lower taxes and reduced government. The pattern holds through the industrial Midwest. Ballot initiatives in Ohio and Michigan in 1932 imposed property-tax limits that are still in force. It would be well worth researching the extent to which this ferment overlapped or fed into the period's better-known cases of labor unrest. Flint, Michigan, site of the sit-down strikes that led to the founding of the United Auto Workers, was one of the charter cities that voted to accept the stringent property-tax limits.

Although New Deal historians have had understandable trouble assimilating the tax revolt to their own version of the period, the problem doesn't end there. The premise of tax limitation itself comes from a school of political economy that early twentieth century "Progressive" historians tried their best to bury — namely the free-market theory of Adam Smith and J. B. Say. A cursory survey of nineteenth century tax- and spending-limit debates shows how deeply these economic principles had been engrained in American fiscal policy. The Jacksonian period itself is largely incomprehensible without specific reference to Smith and Say, its most influential authors on public policy. Several waves of state constitutional amendment, invariably in response to rapidly rising tax burdens, codified these principles of limited state spending. When the Progressive Era propagandists tried to promote more active government, this entrenched public philosophy was their greatest obstacle. To defeat it, they had to deny that it existed. Hence there appeared a spate of articles and books claiming that the American republic had no philosophy, that the Founders were shallow and "pragmatic" thinkers and that economic policy was a function of economic interests.

The study of the tax revolt shows, on the contrary, that a broad and consistent political economy does run through American history, emerging in periodical revisions of state constitutions and in popular ferment. Dr. Beito's essay points to just a part of this tradition, which awaits further rediscovery.

### James Ring Adams

James Ring Adams is Senior Editor of *Forbes* magazine and author of *Secrets of the Tax Revolt* (Harcourt Brace Jovanovich, 1984).

### Classical Liberal History (continued from page 2)

neglected by classical liberal historians. This issue is important precisely because most modern political thinking accepts the nineteenth-century historians' assumption that national states are timeless and inevitable: the question is not whether to have national states, but how to organize them, or how to prevent them from blowing one another up. One of the first jobs of the classical liberal, therefore, in attempting to counter this unquestioning acceptance of the state, is to show that the national state is contingent rather than necessary, and to trace the steps by which it came into being and came to dominate all other forms of organization in early modern Europe.

*Fernand Braudel's Mediterranean was written to show how utterly constrained the political actors (including Philip II himself) were by their geographic, social, and economic circumstances.*

History books have generally displayed one of two attitudes toward the state. Either they have adopted a "Whig" attitude, showing how government responded creatively and helpfully to "social" (or other) "problems," thereby adding yet another function to those previously exercised by it.<sup>21</sup> Or they have seen the state as a tool of a particular class, and have focused their historical attention on that group at the expense of the state itself.<sup>22</sup> The *Annales* and Cambridge schools have taken one step forward, in demonstrating conclusively that the nation-state is not the natural, the inevitable, or the best unit of historical analysis and explanation, any more than the actions and words of the governing groups (monarchs, counsellors, officials, elected representatives, military figures) provide the natural, the inevitable, or the best window onto the human past. No longer can the "social background" to political and intellectual changes be dealt with in a handful of quotations from the writings of literate contemporaries.<sup>23</sup> Historical generalizations are no longer immune from criticism, but are expected to conform to the same standards of rigor (for example, consistency and falsifiability) as statements in other sciences.

In the process of moving away from the purely literary, however, history has been steered in the direction of the less rigorous (and more ideological) social sciences. The process of demystifying the state and its personnel as the natural spokesmen for the human past has not been undertaken systematically.

Both the *Annales* and Cambridge schools have tended to err in the opposite direction, often writing as if political and institutional structures are entirely passive to "underlying" social, economic, and ecological forces. The best-known to emanate from the *Annales* group, Fernand Braudel's panoramic *Mediterranean*, was in fact (continued on page 12)

*Classical Liberal History (continued from page 11)*

written to show how utterly constrained the political actors (including Philip II himself) were by their geographic, social, and economic circumstances. A geographic entity (the Mediterranean) is chosen as the unit of analysis, rather than a political state. The book is in three parts: "Structures," "Conjonctures" (situations and conjunctures), and "Evenements" (events). The political narrative of the final part is designed to show that, given the "structures" and "conjonctures" of the first two parts, nothing was left to human choice. As Braudel puts it in his introduction, political events are the "foam on the surface" of the sea of history.<sup>24</sup> This of course reflects the Marxian diagnosis of institutions and ideas as "superstructure" to the forms and relations of production, which are seen as fundamental.<sup>25</sup>

For the liberal historian it is not enough, therefore, to show that human history is not the history of the state. In fact, the specific contribution of the liberal historian can be, paradoxically, to draw attention to the state and stress its fundamental importance in human affairs. To imagine a society without pervasive state influence, it is essential to know how the state developed and came to dominate all other forms of political organization. Conversely, to understand how the state came into being is to understand that its existence and present nature are not inevitable.

Such assertions may surprise the nonhistorian. Surely, she will think, coercive political organization is universal, and has always been with us. This commonplace view misses the critical point that coercion is context-specific; it can be identified and corrected only in a specific institutional context. To believe that coercion is endemic to *all* forms of human organization is both pessimistic and untestable — and only the darkest cynic would say that there are no differences between human societies in this respect. These differences, if one believes in them, are institutional differences, and we simply do not know how far coercion can be reduced under different institutional forms.

The specific institution through which most political coercion is presently mediated is the national state, the characteristic political structure of modernity. It came into existence at a specific time, the fifteenth and early sixteenth centuries, and in a particular place, western Europe. Like industrialization, the national state was in its origins a uniquely European phenomenon.

Historians have only recently focused on the state itself (rather than the group of which it is a "superstructure," or the history of particular states) as a subject of research. Like economists who have made the state itself a focus of research in recent years,<sup>26</sup> they have found that the state has its own dynamic, independent of those in whose interests it is supposedly run. Niels Steensgaard, in a remarkable article criticizing the debate about the mid-seventeenth-century "General Crisis" (a phenomenon well known to contemporaries, but which was then forgotten until the 1950s because historians were so narrowly focused on individual national states) was perhaps the first to point out that the growth of the state

was in itself the dominant historical trend of early modern Europe:

Behind the conflict we find the same thing everywhere: the State's demand for higher revenues . . . in every case it was the governments that acted in a revolutionary manner: the tax demands disrupted the social balance. They did not create a revolutionary situation: they were in themselves a revolution.<sup>27</sup>

Though this approach has not yet found a wide following, it does provide the framework for what could be a fruitful research program for economic and social history — even for political and institutional history. In fact, it provides a framework for integrating these different "kinds" of history — economic, political, social, intellectual — that is potentially much more powerful than the rigidly deterministic approach of the *Annales* school's "histoire totale."<sup>28</sup>

#### Other Sources of Coercion

While modern western societies represent a great improvement over the past in many respects, coercion, privilege, and oppression survive and flourish. The new schools of history have captured the imagination of so many dynamic and critical young historians precisely because they insist on looking at the oppressed rather than the oppressors. The task of the historian with clear and critical liberal principles must now be to ensure that *all* the sources of oppression and coercion in past societies are laid bare, not only those that proceed from the state. The libertarian historian must have the courage to recognize and proclaim the existence of social injustice and oppression wherever he sees it, rather than merely celebrate historical "progress." Furthermore, he must be willing to test his theories about the true causes of oppression, by taking up the new and demanding methods (historical demography, computer analysis of long documentary series, microsimulation) that classical liberal historians have hitherto in their folly left to the statist.

Only by doing so can the libertarian show that the state is not the instrument of a particular class, but an entity with its own, self-perpetuating, rationally self-serving dynamic, often horrifyingly independent of both ruler and ruled, but in pursuit of whose support many groups in society will always be willing to make large investments. Only so can the liberal historian show that the systematic oppression of certain groups in the past (such as women) did not result from the free operation of markets, but from specific, male-dominated legal and social institutions: the state, corporations such as guilds, merchant cartels, communities of male citizens, and trade unions.<sup>29</sup> By questioning traditional assumptions concerning the alleged capitalist oppression of women, the libertarian historian can show in quite a new way that the state and protective corporate groups were not sources of liberalization and progressive social justice, but rather operated to protect established (in this case male) interests.

Freedom is not served by complacency with existing states of society, the results of historical progress, and the continued dominance of traditionally dominant powers. Rather, it arises from skepticism and criticism of accepted assumptions and inadequate theories, and an aspiration toward a better state of society in which the institutions that perpetuate established evils and entrenched privileges and abuses shall be abolished. The role of the liberal historian in the next decade must be to be *seen* to be defending capitalism against the abuses even of "capitalists" — against private monopolies as well as public ones, against "capitalist" cartels, against the purchase of bureaucratic and legislative favor by *anyone*, even those who identify themselves politically as "in favor of capitalism." Liberal historians have not sufficiently dissociated capitalism from entrenched privilege and the abuses arising from the existence of regulatory initiatives, which can be "purchased" by business.

My own research has shown that what German historians of all political persuasions have blindly accepted as the "transition to capitalism" in Germany was in fact something very different from the mobile and relatively unregulated commerce enjoyed by western European societies such as England. It was in fact a transition to "state monopoly capitalism" (*Stamokap*) in which the state licensed out monopolistic privileges to merchant cartels, producer-monopolies, and professional corporations.<sup>30</sup> Small wonder that Central Europeans (most eloquently but by no means uniquely Marx and Engels) saw the "transition to capitalism" as bringing with it the economic and political oppression of industrial workers by a privileged few.

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*To imagine a society without pervasive state influence, it is essential to know how the state developed and came to dominate all other forms of political organization.*

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It is the task of the classical liberal historian to show the importance of investigating and identifying *all* barriers to the free operation of markets: both the state and individuals and groups that have, historically, frequently benefited from state support and have in turn helped to strengthen the state. It is imperative that the liberal historian find the courage and ingenuity to identify *all* sources of coercion and market distortion, lest he or she seem to the critical and Utopian intellectual to be more a political apologist than a seeker after truth.

I have argued that the new "scientific" historians have set off a revolution, which liberal historians would do well to adopt as their own. In demonstrating the fruitfulness of cross-cultural comparisons, the new historical schools have rejected the nation-state as the unit of analysis. In turning to hitherto-unplumbed

documents and to "history from below," they have shown that there is a great iceberg of social behavior underneath the level of the central state that is impervious to the explicit initiatives of those who claim to control or guide it, and which always has confounded and always will confound political programs.<sup>31</sup> What the liberal historian must bring to this is the perception that precisely for this reason the official versions of history (recorded from above by officials and intellectuals) are likely to be misleading. He must also, however, bring the perception that although state action often fails in achieving the results it *intends*, it can seriously distort markets, and have far-reaching *unintended* consequences. He must show that there are other powerful coercive institutions at work in most societies which, so long as they benefit from *some* state enforcement, can also seriously distort markets, and perpetuate inequalities and abuses.

The uniquely powerful perception of the liberal historian is that behind the enduring corporate institutions, and behind all entrenched privilege, lies the state. With the rise of interdisciplinary approaches to "scientific" history in the last two decades, historians have been searching in vain for a new focus for history: what, ultimately, is history "about"? The nineteenth-century nationalist-liberal research program is played out; the *Annales* and Cambridge schools ignore the institutional dimension; the classical-liberal research program should be a candidate to fill the vacuum. The history of national states would then be replaced by the history of the state.

#### Individual Rationality

One of the props of coercive regimes and one of the favorite arguments of Utopian socialists is that the state is necessary to protect people from the harmful results of their own irrational choices. The assumption that many human decision-making mechanisms are irrational is based on innumerable studies by social scientists who have fallen back on "human nature" when they have found a social structure or a pattern of behavior too complex for their explanatory models.<sup>32</sup> Historians have contributed to this in two ways. They have explained the economic and other choices of pre-industrial Europeans in terms of concepts such as "the moral economy of the peasant": according to this, the peasant was not concerned with rational maximization, but with achieving some culturally or economically determined standard of "limited good," which would not deprive his neighbors in the peasant commune of their slice of a "cake" of fixed size.<sup>33</sup> Rational maximization, according to a second, concomitant assumption of many historians, came into being only with the rise of a "capitalist mentality" in the seventeenth or eighteenth century.<sup>34</sup> Thus a majority of historians joins the many social scientists outside the field of economics who hold that hunting societies, or peasant societies, or western societies before a certain date, or the "worker" sector of emergent capitalist societies, lack the mentality required

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## Classical Liberal History (continued from page 13)

for the economist's tools to be applicable to them, and for the political theorist to be able to expect that they will make choices that are in their own best interests.

One of the most vital tasks for the libertarian historian is to refute this patronizing assumption that human beings in the past were incapable of rational calculation. It is possible to advance explanations of human behavior and social structures in the past that are consistent with individual rational choice rather than collective irrationality. The belief of many historians — even among classical liberals — that rational maximization was invented in Europe only in the seventeenth or eighteenth century is one of the more damaging injuries to the liberal recognition of the dignity and worth of individuals.

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In my own doctoral research I succeeded in falsifying a new and powerful historical theory by showing that the economic and demographic behavior of proto-industrial workers in Central Europe in the eighteenth century did not follow the theory's assumption of peasant and artisan irrationality, but rather was wholly consistent with the rational behavior of individuals in markets seriously distorted by social and legal institutions.<sup>35</sup> This led me to prefer the formulation of Sutti Ortiz, an anthropologist who studied peasant corporatism in modern Colombia:

The peasant's goals and aspirations are not altogether different from our own; his behaviour can be explained without having to resort to a different logical framework; his uncertainties are phrased differently, perhaps, but his response to them is similar to ours. Peasants are not endowed with a different soul or a different perception of the world from ours. If they behave differently, if they shy away from recommended policies it is because they are either less informed about certain events, or perhaps better informed about the realities of their physical, social and economic world than we are.<sup>36</sup>

Thus, even more important than the recognition that the state is not the inevitable unit of historical analysis is the recognition that the individual — however lowly his status or undeveloped his education — is the proper unit

of analysis. He probably will not be pursuing pecuniary maximization (as caricatures of classical liberal principles try to portray), for most markets in the past — as in the present — are distorted by political coercion, and since every individual, nowadays as well as in the past, also maximizes nonpecuniary values (esteem, security, and so forth).<sup>37</sup>

The recognition that the individual is, and historically always has been, equipped to make the best of his situation in the light of his own values is not only a necessary step in recognizing his dignity and worth. It is a radical and Utopian reinterpretation of social developments in the past, and an indispensable component of the belief in voluntarism in human relations.

Three possible approaches have been suggested by which a sound understanding of classical liberal principles could revolutionize the academic practice of history. By pursuing any of these approaches (as well, no doubt, as many others I have not mentioned), liberal historians can help their readers to understand the nature and origins of coercion in human societies. To an academic profession searching for a role in modern life, this is a brilliant prospect.

## Notes

<sup>1</sup>F. A. Hayek, "History and Politics," *Studies in Philosophy, Politics and Economics* (Chicago, 1967), p. 201.

<sup>2</sup>F. A. Hayek, "The Intellectuals and Socialism," *Studies*, p. 193.  
<sup>3</sup>These new techniques and sources are discussed and exemplified in Peter Laslett, *The World We Have Lost* (London, 2nd ed. 1971); and in Keith Wrightson, *English Society 1580-1680* (London, 1982), esp. p. 11. Some of the French tendencies are illustrated in Marc Bloch, *French Rural History: An essay on its basic characteristics* (London, 1966).

<sup>4</sup>An excellent instance is John Hajnal's seminal essay, "European Marriage Patterns in Perspective," in D. V. Glass & D. E. C. Eversley (eds.), *Population in History* (London, 1965), pp. 101-43. Other controversial results are discussed in E. A. Wrigley, *Population in History* (London, 1969), and other basic texts of the Cambridge Group for the History of Population and Social Structure.

<sup>5</sup>See, for instance, Kenneth W. Wachter with Eugene A. Hammel and Peter Laslett, *Statistical Studies of Historical Social Structure* (New York, 1978).

<sup>6</sup>Peter Laslett & Richard Wall (eds.), *Household and Family in Past Time* (Cambridge, 1972); Richard Wall, Peter Laslett & Jean Robin (eds.), *Family Forms in Historic Europe* (Cambridge, 1983).

<sup>7</sup>& <sup>8</sup>Defended and demonstrated in Fernand Braudel, *The Mediterranean and the Mediterranean World in the Age of Philip II* (New York, 1972), and in Emmanuel LeRoy Ladurie, *Les Paysans de Languedoc* (Paris, 1966).

<sup>9</sup>F. A. Hayek, "The Intellectuals and Socialism," p. 192.

<sup>10</sup>For instance, Douglass C. North & Robert Paul Thomas, *The Rise of the Western World: A new economic history* (Cambridge, 1973); or the essays in F. A. Hayek (ed.), *Capitalism and the Historians* (Chicago, 1954).

<sup>11</sup>See Joyce Oldham Appleby, *Economic Thought and Ideology in Seventeenth-Century England* (Princeton, 1978), which was written to explain the "puzzle" of "how Adam Smith was able to assume that human beings possessed an innate commercial mentality," p. ix. But see also a myriad of precursors, among whom R. H. Tawney, *The Acquisitive Society* (London, 1921), p. 17 and *passim*.

<sup>12</sup>F. A. Hayek, "History and Politics," pp. 202-3. This nineteenth-century assumption, which generalizes the mistake Hayek calls "monetary nationalism," is well described in the following definition of monetary nationalism: "The monetary relations between small adjoining areas are alleged to differ from those between larger regions or countries

and this difference is supposed to justify or demand different monetary arrangements." F. A. Hayek, *Monetary Nationalism and International Stability* (London, 1937), p. 4. See also F. A. Hayek's *Denationalization of Money: An analysis of the theory and practice of concurrent currencies* (London, 1976) for a discussion of one of the many areas of human activity that would have to be fundamentally rethought if the libertarian historian were successful in bringing to the intellectual consciousness how pervasive (yet how unquestioned) the national state is, and how contingent on a unique historical path its development in fact was.

<sup>13</sup>The definitive treatise on the new methodology of record-analysis was Alan Macfarlane's *Reconstructing Historical Communities* (Cambridge, 1977), although indications of it had already appeared much earlier, e.g., in T. H. Hollingsworth, *Historical Demography* (Cambridge, 1969).

<sup>14</sup>Summarized (for their eras) in E. A. Wrigley, *Population in History* (London, 1969) and Jean-Louis Flandrin, *Familles: Parenté, maison, sexualité dans l'ancienne société* (Paris, 1976).

<sup>15</sup>Foremost Alan Macfarlane's brilliant *The Origins of English Individualism: The family, property and social transition* (Oxford, 1978); but also Samuel Popkin, *The Rational Peasant: The political economy of rural society in Vietnam* (Berkeley, 1979); and, much in the same line, Carl Dahlman, *The Open Field System and Beyond* (Cambridge, 1980).

<sup>16</sup>Keith Wrightson, *Poverty and Piety in an English Village* (New York, 1978); Carlo Ginzburg, *The Cheese and the Worms: The cosmos of a sixteenth-century miller* (London, 1980); Robert Mandrou, *De la Culture Populaire au 17e et 18e Siècle: La bibliothèque bleue de Troyes* (Paris, 1964); Michel Vovelle, *Piété Baroque et Déchristianisation en Provence au XVIIIe Siècle* (Paris, 1973); Brian Pullan, *The Jews of Europe and the Inquisition of Venice 1550-1670* (Oxford, 1983).

<sup>17</sup>Alan Macfarlane, *The Origins of English Individualism* and Keith Wrightson, *English Society 1580-1680*. Both books emphasize continuity over change in viewing English society between medieval and modern times.

<sup>18</sup>Laslett & Wall, *Household and Family in Past Time* set the stage for this sort of systematic cross-cultural comparison. It has since been overtaken by other such exercises.

<sup>19</sup>People at the time were aware of the international nature of the crisis of the seventeenth century: from seventeenth-century diarists, through Hobbes to Voltaire, who remarked on the contemporaneous revolutions in European countries, as well as in Poland, Russia and China, in his *Essai sur les Moeurs et l'Esprit des Nations* (Paris, 1756). The nineteenth-century obsession with the nation-state caused these observations to be submerged and forgotten until the 1950s. The two basic essays, from diametrically opposite ends of the political spectrum, are E. Hobsbawm, "The crisis of the seventeenth century," *Past and Present* 5-6 (1954), and H. R. Trevor-Roper, "The general crisis of the seventeenth century," *Past and Present* 16 (1959). These and the other "general crisis" essays were collected in two volumes over the next two decades, a symptom of the growth of the supranational historical perspective: Trevor Aston (ed.), *Crisis in Europe 1560-1660* (London, 1965); and Geoffrey Parker & Lesley M. Smith (eds.), *The General Crisis of the Seventeenth Century* (London, 1978).

<sup>20</sup>The basic texts for the theory of proto-industrialization are F. F. Mendels, "Proto-industrialization: the first phase of the industrialization process," *Journal of Economic History* 32 (1972) and Peter Kriedte, Hans Medick & Jürgen Schlumbohm, *Industrialization before Industrialization: Rural Industry in the Genesis of Capitalism* (Cambridge, 1981), translated by Beate Schempp, first published as *Industrialisierung vor der Industrialisierung* (Göttingen, 1977).

<sup>21</sup>This process, whereby successively more and more functions were taken over by the state, runs straight through European history, from the Reformation to antitrust laws. See, for instance, the seldom-noted statism which emerges in any standard account of the Reformation, e.g., A. G. Dickens, *The English Reformation* (London, 1964) or Kurt Aland, *Die Reformation Martin Luthers* (Gutersloh, 1982).

<sup>22</sup>An example is the Hobsbawm article referred to in footnote 19. The notion of the "capture theory" so beloved of Marxists has recently been argued against by Sam Peltzman, "Toward a More General Theory of Regulation," *Journal of Law and Economics* 19 (1976), pp. 211-40; by Gary S. Becker, "Comment," *ibid.*, pp. 245-8, and by Gary S. Becker, "A Theory of Competition Among Pressure Groups for Political Influence," *Quarterly Journal of Economics* (1983).

<sup>23</sup>Although eloquent and entertaining attempts are made by Lawrence Stone, *Family, Sex and Marriage in England, 1500-1800* (London, 1977); Keith Thomas, *Religion and the Decline of Magic: Studies in popular beliefs in sixteenth- and seventeenth-century England* (London, 1971), and Philippe Ariès, *L'Enfant et la Vie Familiale sous l'Ancien Régime* (Paris, 1973).

<sup>24</sup>Braudel, *The Mediterranean*, vol. I, p. 21: Braudel refers to "l'histoire événementielle" (the history of events) as "surface disturbances, crests of foam that the tides of history carry on their strong backs."

<sup>25</sup>V. I. Lenin, *The State and Revolution: The Marxist theory of the state and the tasks of the proletariat in the revolution* (Moscow, 1972), which relies heavily on Engels's *Anti-Dühring*. See also Ralph Miliband, *The State in Capitalist Society: The analysis of the western system of power* (London, 1969).

<sup>26</sup>See George Stigler, "The Economics of Regulation," *Bell Journal of Economics and Management Science*, (Spring 1971); Richard A. Posner, "Theories of Economic Regulation," *Bell Journal of Economics and Management Science*, (Autumn 1974); Sam Peltzman, "Towards a More General Theory of Regulation"; Gary S. Becker, "A Theory of Competition Among Pressure Groups," and, of course, the works of the Public Choice school, for instance J. M. Buchanan, *The Limits of Liberty: Between Anarchy and Leviathan* (Chicago, 1975).

<sup>27</sup>Niels Steensgaard, "The Seventeenth-century Crisis," in Parker and Smith, *The General Crisis of the Seventeenth Century* (London, 1978), p. 44.

<sup>28</sup>As outlined in the "Preface" to Braudel's *Mediterranean* (see note 24).

<sup>29</sup>This argument is put forward in my forthcoming article "Women, Proto-industrialisation and the Corporate Society: Württemberg Woollen Weaving, 1590-1740," in W. R. Lee & P. Hudson (eds.), *Women's Work, Family Income and the Structure of the Family in Historical Perspective* (Manchester, 1987).

<sup>30</sup>This argument is put forward in my *Corporatism and Regulation in Rural Industry: Woollen Weaving in Württemberg 1590-1740* (Ph.D. diss., Cambridge, 1985). It is corroborated by numerous studies of the overweening role of the State in German industrialization, among which (for Württemberg), Friedrich-Franz Waackuhn, *Die Anfänge der württembergischen Textilindustrie im Rahmen der Staatlichen Gewerbepolitik 1806-1848* (diss., Hamburg, 1974).

<sup>31</sup>It is well known, for instance, that state birth control programs in India and other third-world countries experience a marked lack of success as long as the "demand" for a large quantity of children persists.

<sup>32</sup>A number of studies advancing "nonrational" or outright "irrational" explanations for human behavior are rightly castigated in Gary Becker, *The Economic Approach to Human Behavior* (Chicago, 1976), p. 7.

<sup>33</sup>The idea of the moral economy attitude is put forward by James C. Scott, *The Moral Economy of the Peasant: Rebellion and Subsistence in Southeast Asia*. The classic evocation of "the peasant" in anthropology is in E. C. Banfield, *The Moral Basis of a Backward Society* (New York, 1958); and G. M. Foster, "Peasant society and the image of limited good," *American Anthropologist* 67 (1965), pp. 293-315.

<sup>34</sup>See note 11.

<sup>35</sup>Sheilagh C. Ogilvie, *Early Proto-Industry, Corporatism, and the State: Wildberg Weavers and Calw Merchant-Dyers 1600-1740* (fellowship diss., Trinity College, Cambridge, 1984).

<sup>36</sup>Sutti Reissig Ortiz, *Uncertainties in Peasant Farming: A Colombian Case* (London, 1973), p. 1.

<sup>37</sup>George J. Stigler & Gary S. Becker, "De Gustibus Non Est Disputandum," *American Economic Review* 67 (2) (1977), pp. 76-90.

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