Legal education is in 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.

(continued on page 5)

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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 Marxist-influenced social history have been their iconoclastic tendencies: the readiness to criticize accepted views, to explore new vistas and to experiment with new conceptions. 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.

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 Marxist theory, and are already establishing a socialist and coercive tradition among practitioners of the new vigorous history.

Genuinely liberal historians must equip themselves with the new historical techniques so that the iconoclastic results made possible by historical demography, microsimulation, census analysis, and Annales-school
**Critical Legal History (continued from page 1)**

"hистория толты" 7 and "histoire de la langue dure" 8 must not be made the sole intellectual property of statisticians.

**Three Directions**

There are three main directions in which liberal principles can be creatively applied using the new historical institutionalist approach and its established assumptions.

One is to question and provide an alternative to the traditional assumption (almost as if it were among "the common currency among liberals as among statisticians") 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." 9

**Classical Liberal Historians**

Classical liberal and libertarian historians have excelled in identifying the ways in which markets are distorted and abusive privilege perpetuated by the state, but they must not stop here. They must also be willing to identify institutions 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-rational" mentalities. 10 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 control over them, or to resell them, or to force 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 or aspects of "history."" 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 and Gibson in the eighteenth century, the discipline was captured by the nationalist German historians, Ranke, Treitschke, Droysen, and their followers. Both the "Whig" historians and the German historians suffered from a deep-seated cultural determinism, a concentration on national units, and an exclusive anarchy of 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 instilled additional assumptions about "social history" underlying accounts of changes in intellectual currents and political events were tested rigorously, often with recourse to local and apparently dry and mundane documentary sources — parish registers, tithe and tax accounts, local court records, town councils, and the like. 11

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

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 literate, and children rather than the adults. 12

Glaucow picks up the argument at the outset of Book II, and it is here that the implications of Thrasymuchus's attack on Socrates are most explicitly revealed. The life of the unjust man, Glaucow fears, is preferable to that of the just man. If, like the Lydian shepherd Gyes, we could be granted magical immunity from detection, we would all choose the path of injustice. Far from being a noble deed, it 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 or place forced to choose between the best and worst lives, it is simply because we are too weak to do otherwise.

**Glaucow's Problem**

Glaucow'sMorals of Agreement covers many areas of contemporary ethical philosophy, but if it has a single focus, it is providing an answer to Glaucow. Glaucow writes in the contractual tradition of Hobbes, Locke, and Rousseau, and he readily concedes at the outset that "the genuinely problematic element in a contractual theory is not the intrinsically political nature of morality, but the hypothetical agreement to actual moral constraint." 13 Glaucow 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 the impartiality characteristic of morality. To choose rationally, one must choose morally. Glaucow begins by defining subjective theories 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, Glaucow sets out to create a world of rational actors, with special attention to the "Prisoner's Dilemma" paradox, in which utility-maximizing individuals fails arise. A perfect market that produced an optimal distribution of goods, Glaucow contends, would be a "morally free zone." "There would be need to constrain the individual pursuit of utility in a world in which such pursuit perfectly coincided with the pursuits of others."

Glaucow 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 interest, to perform an action," he notes, "cooperation provides a visible hand." The argument is at its most technical here, and it is in this context that Glaucow defends his principle of "minimax relative concession." This principle states that in a bargaining situation that requires concession by some or all of the participants, an outcome that is free of any relative concession it requires as small as possible. Glaucow is concerned to establish the rationality of this narrow result, but for the purposes of the present discussion, it will suffice to say that he demonstrates the rationality of cooperation in general. It follows from this that 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 your faith in and upholding restrictions on individual pursuits, rationality will recommend morality.

But will there actually be rational reasons to cooperate? Is it one thing to make a promise, after all, but quite another to keep it, of course, is the heart of Glaucow's problem. It is also, as Glaucow has emphasized throughout his text, the traditional weakness of contractual moral theory. If cooperation arises through the actions of utility-maximizing individuals, then won't that same utility-maximizing propensity ensure its demise? Glaucow says that it is not, and his reason for so thinking is nearly 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. (continued on page 4)
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 self at Glaucon’s age, and through cooperation 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 rationality is the tendency to engage in self-reflective criticism. The fully rational being is able to reflect on his standard of deliberation, and to change that standard in the light of his new experience. In 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 to act for dishonesty, or whether 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 participating 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 implies that there is clearly in our interest to do so it is clearly not in our interest. We choose, therefore, to adopt a disposition to act honestly. And as a result of our decision, 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 longer any basis for answering it.

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 an attempt to refute Gauthier is to argue that, as rational, self-interest beings, we possess the ability to choose new dispositions, but to argue that Gauthier’s argument is flawed. 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 find no one who is not already honest. 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 off the back people here and there and 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 Glaucon’s prioritization of this text. It is much 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 that he is in the first paragraph of his book that “were duty more 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 behavior,” 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 amorality of rules, failing to do so fully justice in the way it is clearly not in our interest to do so itself clearly not in our interest. We choose, therefore, to adopt a disposition to act honestly. And as a result of our decision, 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 longer any basis for answering it.

Glaucon’s problem is one that has long haunted moral philosophers and it is likely to continue doing so. Its moral puzzles are, in a sense, the very essence 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, we need a way to 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 we do it. Perhaps this is part of what we mean by morality.

The alternative to ignoring Glaucon is to attempt to produce a more satisfying answer. As the preceding discussion has indicated, and as Gauthier would surely agree, the problems inherent in such an approach are potentially considerable. 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 too many, the idea of moral reason 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 stop.

Notes

1Republic 338c

2The definitional magnitude of a concession is the proportion is absolute magnitude bears to the difference between the upper range of claims and his claim and his utility in the initial bargaining position.”

Critical Legal Studies (continued from page 1)

Three of the most prominent “eldest statesman” of the CLS movement — Duncan Kennedy, Morton Horwitz, and Paul Bator — have long called for the use of goal writing and at Harvard. Refugees from the New Left of the 1960s, Kennedy and the others object to what they regard as system failures and injustices written at Harvard. Refugees from the New Left of the 1960s, Kennedy and the others object to what they regard as system failures and injustices.

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. Catterson 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 Texas) had announced: “Since the late 70s, it is my sad opinion that CLS has had an absolutely disastrous effect on the intellectual and institutional health of the 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.


What, exactly, is it that inspires both the outrage at and the support for 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 ‘sociocultural’ values determine his decision than neutral principles. A note entitled “Round and Round the Bramble Bush: From Legal Realism to CLS Scholarships” (Scribner, 1982) pp. 160-169) 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 abandonment of realism project.” But the affinity between these two approaches can be overemphasized. The note continues: “While the Realists used analytical criteria, to identify 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 the conflict between self and community, fact and value, civil society and sovereignty.”

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 insights to which the critical legal theorists as a whole would subscribe, they have been influenced, at least variably, 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 the belief in the importance of various forms of explanation in the social sciences, modeled on Saussure’s work in linguistics, and the “deconstruction” of the conscious individual as a subject and the “construction” of various forms of reductionism. A strong statement of this view is found in T. C. Helliwell’s article, “Structuralism and Critique: Another Look at the Frankfurt School’s Critical Theory” (New Republic, 127-198), where he states, the “account of the subject is fundamentally reductionist” and refers in this connection to “semiological and poststructural materialism.”

Jerry Frug, a professor of law at Harvard sympathetic to CLS, discussed the connection between these new innovations and the legal literature 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, their claims and their desires. They do not consider legal decision making simply ‘subjective.’ They think of a reader of law as much a prisoner of social forces as a conventional political and moral philosopher and as is 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 Legal Philosophy of The Politics of law and the late Leo Lowischer’s Principles of Social Order (Ethics, Vol. 94 [1983]) pp. 125-126), CLS’s main tenets include these beliefs:

(continued on page 6)
First, there is no such thing as distinctively legal reasoning. As Duncan Kennedy writes in "Laws of Legal Argument," "there is never a 'correct legal solution' that is other than the correct ethical and political solution to that legal problem." (Kairys, p. 31)

Second, the law and the state cannot be understood as operating independently of social relations and history. There are dissenters from which a judge is view disputes before him and rule with objectivity on them. In other words, the law has no privileged status Voluntary fabric of daily life.

Third, legal doctrines serve and legitimate 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 those not directly affected. 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 in what Sunstein has termed a symbolic reminder that legal questions are often questions of political theory, in the effort to explain away or suppress the reality of and the theory of the contingency of legal rules. All of those insights are useful corrections to much of what goes on in the courts and in the law schools. But, as critical scholars have attempted to reveal the ideological roots of both "interpretivism" in constitutionalism and the right-wing program 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 systems.

It is thus that law is fundamentally value-laden—that means 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 means of social coordination, management, and adjudication of disputes that courts turn to are shaped by and 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 position is precisely what the puritans of law—can find no way out of the dilemmas of ethical relativism, a doctrine to which CLS followers respond with varying degrees of sympathy and disdain.

Harvard Law Professor Clare Dalton sensibly takes on the charge of "militant" by saying that "people who believe in objectivity can say something other than unbiblical subjectivity." But Mark V. Tushnet, a professor of law at Georgetown who is a leader of the CLS movement, seems to reject the charge when it comes to legal interpretation: "There is no method of constitutional interpretation that allows some judicial text but not at the same time limits another."

That is, the CLS 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. (T "A Symposium on Judicial Activism: Problems and Reponses," Harvard Journal of Law and Public Policy, Vol. 7 [1984] pp. 7-79)

There is no room for law that transcends power or desire.

Tushnet's argument shows the strange affinity CLS has with judicial restraints 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 the seat 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 probably very little. Much of what it prohibits it, I feel, is a mistake. The Bill of Rights, which is over a hundred years old, is not a very important law, 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 movement. But Critical Legal Studies has close ties with the most 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 politics. That's just an ideology. It's just a system of law, or majority groups laws about the free, highly concentrated industries that stand to benefit from restricted competition. Who loses? Everyone. Consumer, by just a little—demonstrating that even if 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 the only 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 case CLS is simply a form of statist political theory) or "there is such a thing as a law to be perverted" or it collapses into a tautology, in which those who have power have power because they have power.

CLS scholars, along with many "communitarian" critics of liberalism, often claim that a socialism'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, or ignorance of, the values 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 the holders of power, 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 the doctrine and the law that recognize 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 whatever it must apply in all cases. If CLS scholars recognize the legal system'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 promote certain concrete values: among them toleration, free inquiry, freedom of religion, and respect for others. One might argue in opposition, that the law, by toleration, etc., and many critical legal scholars have, but they clearly are values, and battles about the legal system of which they are a part 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 it seems they will accept and legitimize theories that are incompatible. They casually invoke various "redutuctionist" theories to call into question the idea that the law is used by classical liberalism, while providing little evidence that these theories are true or consistent. More important, however, they seem to flirt with the notion of the existence of all theoretical claims whatever, while seemingly oblivious to the fact that this would also apply to their own claims, including the rest of the CLS movement. The "performativity inconsistency" lies at the heart of CLS and vitrates the validity of its claims.

There is much that is stimulating and provocative in their writings: they exhibit interest in a wide range of ideas, and there is much in their work that might seem refreshing. However, 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 at least anything that might be entertained—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.
Crosscurrents

IHS Fellow Gets Ph.D.

Jeremy Shearmur, now senior research fellow at the Institute for Humane Studies, successfully defended his dissertation, "The Proverbs of 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 certain of Popper'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 are a rich 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 some communitarian criticisms of classical liberalism.

Journal Examine Philosophy and Law


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 In the World of Open Court: 1982), is again influencing French intellectual life with his Pourquoi la Propriete (Hachette: 1987). Currently available only in French, he 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. The book 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 complexity of economic activities, George Mason University, 4400 University Drive, Fairfax, VA 22030. Recommendations from faculty and students of potential interest to the reader are invited.

The Center for Study of Public Choice at George Mason University will hold a seminar June 14-19, featuring the author of The Myth of Sisyphus, James Buchanan, and Robert Nozick, professor of philosophy at the University of Pennsylvania, who are among the leading scholars in the development of public choice theory. The seminar will be 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 of Study of Public Choice, George Mason University, Fairfax, VA 22030.

New Journal Launched


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 Carol Webb and Aaron Wilds (New York, 1984) is an exhaustive, well-written, and welcome piece of research, a careful scrutiny of the precepts of the modern state: taxation. How the west reacted to its current fiscal status is not only a fascinating story, running from ancient Greece to the 20th century, but also an understanding of this process is crucial for historians, economists, sociologists, and political theorists working in the field of political economy. It is especially interesting in the nation-state building period between 1300 and 1700 A.D.

Although Webb and Wilds's model, historiographical perspective, and obvious ideological preference (i.e., for, strong, smoothly functioning central states) must lead them to the best of their intentions, and as the end of the book shows, this book's faults are minor when compared to the service of finally bringing together much of the important secondary literature. The 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 reviews and dissertation topics in every chapter of this noteworthy work.

Humane Studies Review is devoted to advancing scholarship in the classical liberal tradition. Contributions deal with methodological 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. Contributions may be in the form of essays, book reviews, or reviews of 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 an issue currently in the news; a legal, economic, or political topic (suggested length: 3500-4700 words); a review of a recent book treating economic or political issues (suggested length: 3500-4700 words). Contributors are encouraged to submit essays that raise issues of current importance for the common good, and may not have 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. Manuscripts may be submitted in holograph manuscript. Authors are encouraged to submit a minimum and should appear at the end of the manuscript. Quotations and citations should be carefully verified. Rulers 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. Subscriptions are available from the Institute for Humane Studies at George Mason University. Requests for sample copies or additional information should be addressed to the Editor.
Discussion

Whither Liberalism

It is now more than ten years since John Rawls' Theory of Justice heralded the renascence of substantive political investigation in Anglo-American philosophy. The claim of the theory have been turbo-charged. First came the wave of "Rawlsians," among whom, with due qualifications, one can include Nozick and Dworkin. A second wave of Rawls has been 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 ("Liberals and Their Critics," Houston Studies Review, Winter 1966-67) gives a exemplary scorecard. Indeed, he has said so much so well about the current condition of liberal political theory that I suspect it is easy to get 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 the latest version of another 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 antireturns retributionism of liberalism to which Kukathas refers lacks the systematic foundation that Kantianism has (A Theory of Justice). But when they seek theoretical support, it is to Kant whom they turn. Dworkin posits a fundamental right against social injustice, and the inalienability resonates with Kantian overtones. Nozick explicitly credits Locke with having stated what rights we have. Still, when Nozick refuses the Kantian ethics, in the first place, it is reasonable to suppose that individuals are protected by rights serving as side constraints blocking approximation, it is not Locke whom he invokes but Kant.

The Kantian connection can be further specified. For each of the three (37) provers, what is morally central about an individual is their autonomy. The dignity of persons is to choose, and to do so with a radical freedom. Kant's connection is to the notion of community, or tradition, or kin. (It is significant in this regard how little is seen in their works of children/humanity. The Rawlsian agent seques to an autonomous foundation but it is a "metaphysical" autarky. Nozick's ignominy here is this "disenfranchised." Erudite idealized autonomy individual confronts the world in its own terms. He is an Adam on the seventh day of Creation — or a Kantian ego inquiring surveying the world from a nonhuman perch. It is intolerable for such a being to be the beneficiaries of the society in which he finds himself, including, importantly, established patterns of property holdings. In this regard,


The Tax Revolt and American Politics

Tax revolts are not a blind spell across the American psyche, but its attempt to combine a defense of liberty with endorsement of unbridled autonomy (borrowed from Kant via Continental romanticism). The Tax revolt is a great promise for refocusing attention on a phenomenon that ranged from grass-roots activity to constitutional theory. The tax revolt has a temperature such as to provoke much in American history, but even if it is a great deal of history, it is not always a key to understanding our political and constitutional character. The behavioralism is preserved and press or lower-middle and working class attitudes during the Great Depression. As he shows for Chicago, many from this constituency, supposed 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. But the politicians in Ohio and Michigan in 1932 imposed property-tax limits that are still in force. It would be well worth checking to see if this former "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 limit.

Although New Deal historians have had understandable trouble assimilating the tax revolt to its own version of the period, the problem does not end there. The premier of tax limitation itself comes from a school of political economics that early twentieth century "Progressive" historians tried their best to bury — namely the free-market tradition. The Perry survey of nineteen century tax- and spending-limit debates shows how deeply these economic principles had been cleaved. The dominant thought was that the capitalist period itself is largely incomprehensible without specific reference to Smith and Say. Its most influential authors on public policy and political economy, especially Turgot, Adam Smith, provided a conception of moral community within which individuals are to enjoy not a metaphysical incommutation but rather a more homey entitlement to direct their lives according to their own lights. The essentially social foundation of political economy has become part of the economic policy was a function of economic interests.

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


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Classical Liberal History (continued from page 2)

neglected by classical liberal historians. This issue is important precisely because most modern political thinking, accepting 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.)

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 "management" show, where government responded creatively and helpfully to "social" (or other) problems, thereby adding yet another function to those previously exercised by 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. 2 The Annales and Cambridge schools have taken one step further, is demonstrating conclusively that the nation-state is not the natural, the inevitable, or the barest vestige of history. Since there are 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. 2 Historical generalizations are no longer immune from criticism, but are expected to conform to the same "rules of grammar" (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 forces. The best-known to emanate from the Annales group, Fernand Braudel's panoramic Mediterranean, was in fact (continued on page 12)
written to show how utterly constrained the political actors (including Philip II himself) were by their geography, climate, and circumstances. A geographical entity (the Mediterranean) is chosen as the unit of analysis, rather than a political state. The book is in three parts: "Encounters", "superstructures" (situations and conjunctures), and "Events" (events). The political narrative of the final part is designed to show that, given the "constraining" effects 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. This is of course the Marxian diagnosis of institutions and ideas as "superstructure" to the forms and relations of production, which are seen as fundamental.37

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 developed into being is to understand that its existence and present nature are not inevitable. Such assertions may surprise the nonhistorian. Surely, we say, the state is a more or less recent invention that is universal, and has always been with us. This commonplace view misses the critical point that coercion is context-specific (the state is not a correct entity in a specific institutional context. To believe that coercion is endemic to all forms of human organization is both pessimistic and empirically incorrect. John Stuart Mill 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 western development. Historians have only recently focused on the state itself (rather than the group of which it is a "superstructure," or the history of political institutions as an object of research. Like economists who have made the state itself a focus of research in recent years, they have found that the state has its own "life" 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 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, and the reaction of governments that acted in a revolutionary manner: the tax demands disrupted the social balance. Those who do not create a revolutionary situation: they are in themselves a revolution.37

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 determinist approach of the Annales school's "histoire totale."38

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 is to make sure that all the sources of oppression and coercion in past societies are laid bare, not only those that proceed from within the state. It is precisely this that historians have the courage to recognize and proclaim the existence of social injustice and oppression wherever he sees it, rather than merely celebrate history's "great achievements."39 Enforcing the rule of law will not be enough unless we are willing to test his theories about the true causes of oppression, by taking up the new and demanding methods of historiographical democracy. (The increasing number of long documentary series, microsimulation) that classical liberal historians have hitherto in their folly left to the statisticians. 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-serving, rationale. 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 "natural state," but from specific, male-dominated social and institutional: the state, corporations such as guilds, merchant cartels, communities of male citizens, and trade unions.39 By questioning traditional assumptions concerning the alleged capitalist oppression of women, the libertarian historian can show in a 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, or any willingness to assume that the society is in any way dominated. 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 liberal historian of the next decade must be to see in being to defending capitalism against the abuses of "capitalists"—against private monopolies, oligarchs, politicians, against "capitalist"-carlists, against the purchase of bureaucratic and legislative favor by any, 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 have referred to as "privileged" groups 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" (Samoskop) in which the state licensed out monopolistic privileges to merchant cartels, producer-monopolies, and professional corporations.39

Small wonder that Central Europeans (with some examples 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.

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.

"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 individual actors. To determine what had been 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 stem 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 not been able to take this step. A group of 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 to which it is impervious to the explicit initiatives of those who claim to control or guide it, and which always has confounded and always will confound critical and Utopian intellectuals. What the liberal historian must bring to this is the perception precisely for this reason the official versions of history (recorded from above) are likely to be misleading. He must also, however, bring the perception that although state action often fails in achieving its goals, it is also true that states are the most drastic 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 privileged groups lies the state. With the rise of interdisciplin ary approaches to "science: history is the last two decades, historians have been searching in vain for a new focus for history: what, ultimately, is history "about"? The nineteenthcentury 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 the state and 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 statements 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.40 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 kind of symbolic value determined historically, "limited good," which would not deprive his neighbors in the peasant commune of their slice of a "cake" of fixed size.41 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 century.42 Thus a majority of historians joins the many social scientists who would argue that human societies, or peasant societies, or western societies before a certain date, or the "worker" sector of emergent capitalist societies, lack the mentality required..."
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.

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.

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.

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 worker-craftsman 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 hypothesis that the peasant-cooperative sector was commercially distorted by social and legal institutions. 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 behavior can be explained without having to resort to a different logical framework; his uncertainties are phrased differently, perhaps, but his reactions to them are the same as ours.

Pasnett are not endowed with a different or a new 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 less informed about the realities of their physical, social, and economic world than we are.

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 portray him to be in the past) — but he may be pursuing non pecuniary values (esteem, security, and so forth).

The recognition that the individual is, and historically always has been, capable of weighing the situation in the light of his own values is not only a necessary step in recognizing his dignity and worth. It is a moral and dialectical development 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 to clear away 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.