The Humane Studies Review: A Research and Study Guide

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David M. Hart • Editor

Introduction

In this issue, we are very pleased to publish Leon Trakman's introduction to *The Law Merchant*. Building upon the work of the Nobel Prize-winning economist Friedrich A. Hayek, Trakman considers the Law Merchant to be one of the best historical examples of the way in which a legal system develops out of customary practices and is able to adapt smoothly to changing economic and social circumstances. As he makes clear, the Law Merchant owes its flexibility to an environment that is essentially free from the meddling and interferences of monarchs, parliaments, and bureaucrats. In the international sphere, where anarchy reigned de facto, no one state was powerful enough to impose its conception of what was legal on the rest, and so the freedom required for a spontaneous order to develop was present. Merchants were at liberty to trade and to adjudicate their disputes as they saw fit. The result was the development of a system of law that we now know as the "Law Merchant."

Unlike most modern historians of law, Trakman explicitly interprets the development of the Law Merchant within a theoretical framework based upon the idea of spontaneous ordering. A topic that he touches upon indirectly concerns the relationship between spontaneous legal orders and spontaneous social and economic orders. The precise nature of the relationship between these different spontaneous orders is a complex one and unfortunately there is no space here to go into any detail; however, one can say that the relationship is a reciprocal one. Changes in the definition of property rights and the degree to which they are legally protected profoundly influence political and economic activity. Conversely, changes in social and economic practice exert considerable pressure on the legal system and demand to be recognized explicitly in law. If the legal system is free enough to adapt and absorb changes, and the English, American, and postwar Western European systems appear to be, then these changes will be gradually and peacefully accommodated. On the other hand, if the legal system is not free enough to accommodate economic and social changes, then the result can be revolution and a radical and violent restructuring of the legal system and the property rights it enforces. These issues require much further thought and development if the nature of spontaneous orders, as well as the nature of modern revolutions, are to be fully understood.

In our usual **Crosscurrents** section we bring your attention to some recent works on the revolutions taking place in Central America; the social and economic effects of war in nineteenth-century Europe and the opposition of liberals to its devastating consequences; Norman Barry's writings on political philosophy; John Gray's analysis of two giants of the classical liberal tradition, John Stuart Mill and Friedrich A. Hayek; and the recently-discovered environmental dangers of even a "limited" nuclear war.

Law Merchant

by Leon Trakman

Recommended Reading

Norman Barry, "The Tradition of Spontaneous Order," *Literature of Liberty,* Summer 1982, Vol. V, No. 2, pp. 7–58.

Levin Goldschmidt, "Handelsrecht," in *Handworterbuch der Staatswissenschaften,* ed. J. Conrad et al. (Jena: G. Fischer, 1909–11, 3rd revised edition), Vol. V, pp. 316–27.

F.A. Hayek, *Law, Legislation, and Liberty* (University of Chicago Press, 1973), Vol. I, Chapter 2, "Cosmos and Taxis," pp. 35–54.

F.A. Hayek, "The Results of Human Action but not of Human Design," in *Studies in Philosophy, Politics, and Economics* (University of Chicago Press, 1967), pp. 96–105.

William Mitchell, *An Essay on the Early History of the Law Merchant* (Cambridge University Press, 1904).

Peter Stein, *Legal Evolution: The Story of an Idea* (Cambridge University Press, 1980).

The classical liberal concept of spontaneous ordering is vital to any understanding of the complexities of large-scale, voluntary human activity. When large numbers of individual actors take steps to fulfill their plans, the unintended and unplanned result is a **spontaneous order,** an order that Hayek has defined as "the results of human action but not of human design" (borrowing from the eighteenth-century Scottish social philosopher Adam Ferguson). See Hayek's essay on this topic, "The Results of Human Action but not of Human Design," in *Studies in Philosophy, Politics, and Economics* (University of Chicago Press, 1967), pp. 96–105.

By peacefully pursuing their own self-interest, millions of people spontaneously interact within the market place, settling upon the price of goods through the interaction of supply and demand, even though no law, no deliberate design, has required them to act in this manner. Adam Smith referred to this process of unplanned but coordinated action as the "invisible hand" (*Inquiry into the Nature and Causes of the Wealth of Nations,* ed R.H. Campbell and A.S. Skinner [Indianapolis: Liberty Classics, 1981], Vol. I, p. 456) because what made the market work was indeed "invisible" and not deliberately contrived.

Today we describe this process as spontaneous ordering and observe it in the evolution of law, economics, politics, and even language. Of vital importance for a liberal political order is that spontaneous structures contribute to social and economic well-being. This is because they have demonstrated by their existence and continued evolution that they have served and continue to

serve the common interests of the participants.

Some useful background material on the theory of spontaneous order includes Ludwig von Mises, *Human Action* (Chicago: Henry Regnery Co., 3rd revised edition, 1963); Friedrich A. Hayek, *Law, Legislation, and Liberty* (University of Chicago Press, 1973), Vol. I; Carl Menger, *Problems of Economics and Sociology* (Urbana: University of Illinois Press, 1963), ed. Louis Schneider; Michael Polanyi, *The Logic of Liberty: Reflections and Rejoinders* (University of Chicago Press, 1980); Thomas Sowell, *Knowledge and Decisions* (New York: Basic Books, 1980); Peter Stein, *Legal Evolution: The Story of an Idea* (Cambridge University Press, 1980); and Bruno Leoni, *Freedom and the Law* (Los Angeles: Nash, 1972).

A curiously neglected writer on spontaneous orders is the great classical liberal social theorist Herbert Spencer. See his essay, "Specialized Administration," in *Man versus the State: With Six Essays on Government, Society, and Freedom,* ed. Eric Mack (Indianapolis: Liberty Classics, 1981), pp. 435–86. However, the best and most comprehensive introduction is provided by Norman Barry in "The Tradition of Spontaneous Order," *Literature of Liberty,* Summer 1982, Vol. V, No. 2, pp. 7–58.

The evolution of the legal system is a paradigm of spontaneous ordering at work. For example, the evolution of the **common law** as a system is attributable in large measure to spontaneous ordering. After all, common law, as the name implies, grew out of the usages and customs that were common to communities of people associated with one another. As groups of people came into contact in social units, they fashioned habits of association that, through continual use, evolved into custom and ultimately into law itself. The legal rules so formed stemmed from the common assumptions that arose among people about how to act or not to act in a particular situation, not from the command of some superior authority that functioned independently of the social unit and imposed its will deliberately and forcefully on the community.

On the idea of legal evolution and its historical development, see Peter Stein, *Legal Evolution: The Story of an Idea* (Cambridge University Press, 1980). On the evolution of custom into law, the work of the German historical school is quite relevant, especially that of Friedrich Karl von Savigny, *Zum Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* (originally published in 1815), translated by A. Howard as *On the Vocation of Our Age for Legislation and Jurisprudence* (London, 1831; New York: Arno Press, 1975) and *System des heutigen Römischen Rechts* [*System of Contemporary Roman Law*] (Berlin: Veit, 1840-49), 8 volumes.

On the important transition from status-based law to law based on liberal notions of contract, see the many works of the great Victorian jurist Sir Henry James Sumner Maine, *Dissertations on Early Law and Custom* (London: J. Murray, 1891, revised edition); *Village Communities in the East and West* (London: J. Murray, 1871); and his most famous contribution to legal theory, *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas* (Original edition, London: J. Murray, 1861) and (London: Oxford University Press, 1930), ed. Sir Frederick Pollock. A complete bibliography of Maine's writings is contained in George Feaver, *From Status to Contract: A Biography of Sir Henry Maine, 1822–1888* (London: Longmans, Green, and Co., 1969). A more modern treatment of the same theme can be found in Bruno Leoni, *Freedom and the Law* (Los Angeles: Nash, 1972).

A particular illustration of the growth of a common law system can be found in the laws of England. Indeed, the proper noun "Common Law" has acquired a specific meaning throughout the English-speaking world. It refers to laws that have arisen from the customs and usages that were "common" to the communities of England. As a system of law today, the common law has extended its reach across the globe, from Britain to the countries of the British Commonwealth and the United States. Yet this system grew out of the practices of people who lived and functioned in England in centuries gone by. These communities developed their own particular practices in response to the dictates of mutual need; these practices gradually solidified into wider usages as more people adhered to the same codes of behavior.

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From this natural process custom was born, and from custom the common law system tooks its form. The system of common law was not purposefully planned, nor did it grow out of the imposition of a set of higher legal commands upon the diverse communities of England. It acquired its shape instead from what people did in their daily lives, in the conduct of their family and business affairs, and in their relations with towns and villages across England. It was spontaneous, yet it gave rise to a vast body of law.

On the evolution of the English common law system, see Sir Frederick Pollock and Frederick William Maitland, *History of English Law before the Time of Edward I* (Cambridge University Press, 2nd edition, 1968), 2 volumes; T.F.T. Plucknett, *A Concise History of the Common Law* (Boston: Little, 1956); G.R.Y. Radcliffe and G. Cross, *The English Legal System* (London: Butterworths, 1964); Sir Carelton Kemp Allen, *Law in the Making* (Oxford: Clarendon Press, 1958); Roscoe Pound, *The Spirit of the Common Law* (Boston: Marshall Jones, 1921).

The process of spontaneous ordering is not peculiar to the common law system of England. Spontaneous activities have evolved wherever human beings have interacted in accordance with their natural interests, seeking to satisfy personal ends within a social framework that is free enough to incorporate and respond to such ends in a process of self-ordering. Another important example of spontaneous ordering can be found in the development of the body of law known as the **Law Merchant.** The Law Merchant evolved out of the practices of medieval merchants as they transacted their business across regional boundaries throughout Europe, Asia Minor, and North Africa. It is a body of law that arose spontaneously out of the needs of merchants and found its life-blood in the transportation and exchange of goods and services in the market places of the medieval world.

The classic account of the development of the Law Merchant and its eventual incorporation into English law is Gerard Malynes, *Consuetudo, vel Lex Mercatoria, or the Ancient Law Merchant* (London: 1622; facsimile reprint Amsterdam: Theatrum Orbis Terrarum Ltd; Norwood, New Jersey: Walter J. Johnson, 1979). The most comprehensive studies of the comparative development of the Law Merchant are the works of Levin Goldschmidt, especially *Handbuch des Handelsrechts* (Stuttgart: F. Encke, 1891, 3rd edition), Part I: *Universale Geschichte des Handelsrechts; Vermischte Schriften* (Berlin: 1901), 2 volumes; and his summary account in the article "Handelsrecht," in *Handwörterbuch der Staatswissenschaften* (Jena: G. Fischer, 1909–11, 3rd revised edition), ed. J. Conrad et al., Vol. V, pp. 316–27.

In English, the best introductions are provided by William Mitchell, *An Essay on the Early History of the Law Merchant* (Cambridge University Press, 1904), and Wyndam A. Bewes, *The Romance of the Law Merchant, being an introduction to the study of international and commercial law, with some account of the commerce and fairs of the Middle Ages* (London: 1923). The most recent account can be found in the early chapters of Leon E. Trakman, *The Law Merchant and the Evolution of Commercial Law* (Colorado: Fred B. Rothman, 1983).

The merchant codes, such as the Rolls of Oléron, the Laws of Wisby, and the Rhodian Laws, provided the legal framework for trade. These commercial codes grew out of the practices of merchants who met at the islands of Oléron or Rhodes or elsewhere in the domain of medieval traders. The medieval merchant codes are discussed in Gerard Malynes, *Lex Mercatoria* (facsimile edition, 1979) in Part I, Chapter 17, "On the beginning of the sea lawes," pp. 119–20; Part I, Chapter 33, "An abridgement of the imperiall sea lawes of the Haunce towns made in the year 1614," pp. 175–82; and Part III, Chapter 17, "On the lawes of severall countries, whereby the differences and controversies are determined," pp. 460–70. On the Rhodian Laws, see Robert D. Benedict, "The Historical Position of the Rhodian Law," *Yale Law Journal,* February 1909, Vol. XVIII, No. 4, pp. 223–42. In general, see Frederick Rockwell Sanborn, *Origins of the Early Maritime and Commercial Law* (New York: The Century Co., 1930).

The system of the Law Merchant was self-perpetuating in nature because it satisfied the expectations of the trading community and the needs of medieval consumers. It earned the tolerance of local rulers by providing them with much-needed taxes and other sources of revenue. The Law Merchant survived because it was capable of responding to a diverse yet interdependent body of reconcilable interests. Spontaneity allowed the system to adapt to different commercial and political circumstances and facilitated legal changes in accordance with merchant practice. Deliberate planning was avoided because it would have interfered with the market's fluctuating supplies and changing prices.

The Law Merchant operated widely, notwithstanding geographical distance, linguistic barriers, and political and military unrest, because the merchants themselves transported the Law Merchant to distant trade fairs and market towns. Communities accepted the customs of merchants as law because by doing so they advanced the commercial potential of the environment in which trade took place. For example, merchant courts, as opposed to non-merchant courts, willingly took merchant custom into consideration when making a decision. Oral testimony, unacceptable in non-merchant tribunals, was readily admitted before merchant judges. Informal hearings, not generally allowed in the ordinary courts of law, were common practice in merchant courts.

Even the judges of the Law Merchant were merchants. They were selected from the ranks of merchants and they applied the law in a way that recognized the needs of their colleagues. In each instance, the Law Merchant broke down rather than created barriers to trade and translated diverse cultural and linguistic heritages into the uniform language of commerce. Justice was rendered *ex aequo et bono,* equally and fairly, not in response to some higher sense of altruistic reason, but because the needs of trade demanded the application of equal and fair justice. Merchants who submitted to the jurisdiction of the Law Merchant expected to receive equal treatment and a fair settlement of their commercial disputes. To deny them their expectations would encourage merchants to shop around for a more sympathetic forum, thus bringing an end to the universal nature of the Law Merchant.

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Under these influences, the spontaneous ordering of the Law Merchant continued for hundreds of years throughout the medieval period and, in many respects, is still present in the twentieth century. Many current legal and commercial practices owe their origins to the spontaneous evolution of the Law Merchant. For example, the practice of marine insurance evolved in medieval times as merchants sought to insure their vessels and cargoes against the attacks of pirates, brigands, and the hazards of nature that constantly arose in the course of travel by sea. The growth of sophisticated commercial instruments (letters of credit, bills of exchange, and promissory notes) also occurred during the development of the medieval Law Merchant. Traders needed to finance their transactions in trans-regional ventures and they needed credit in order to exchange in distant markets. The development of commercial paper was a necessary step toward satisfying their desire to extend their trading networks. On these economic developments in general, see Roberto S. Lopez and Irvings W. Raymond, *Medieval Trade in the Mediterranean World* (Columbia University Press, 1955).

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None of this is to suggest that the medieval Law Merchant was a flawless system. Unfortunately, spontaneous ordering is not always an assurance of perfect ordering. In fact, it can also be

a source of potential disharmony. Not all commercial practices during the medieval period were uniform in nature, nor were all the usages developed by merchants fair and reasonable. Local merchant courts sometimes discriminated in favor of local merchants to the disadvantage of foreign traders. Procedures before merchant tribunals sometimes consumed needless time and cost, and hearings were occasionally more formal and complex than the circumstances justified. Nevertheless, none of these potential weaknesses destroyed the Law Merchant as a system of law. The acceptable characteristics of the system survived, namely those commercial institutions that had developed over many centuries through actual commercial experience.

Despite the growth of the nation-state in post-medieval times, the international flavor of the Law Merchant has prevailed to the present. The fragmentation of commercial law into state codes and diverse decisions of national courts has not completely destroyed the Law Merchant and some of its institutions still remain. International commercial arbitration in modern times responds to the same motives as the medieval merchant court: a desire to base legal decisions upon commercial usage, a concern to avoid complex legal procedures, and a need to conduct informal hearings *ex aequo et bono.* Thus, international merchants have found it useful to retain commercial custom and usage as the basis of their trade relations. They have included uniform trade terms in their contracts and incorporated the usages of the industry into their arrangements. They have also altered the conditions of each contract in response to the alterations in political, social and economic forces in the global domain. For example, world wars have led to the alteration of "war clauses" in trade contracts, while variations in import and export licensing have induced international merchants to modify their "government direction" clauses.

On the influence of the medieval Law Merchant on the development of modern commercial law, see John Honnold, "The Influence of the Law of International Trade on the Development and Character of English and American Commercial Law," in *The Sources of the Law of International Trade, with Special Reference to East-West Trade,* ed. Clive M. Schmitthoff (New York: Praeger, 1964), pp. 70–87; Harold J. Berman and Colin Kaufman, "The Law of International Commercial Transactions (Lex Mercatoria)," *Harvard International Law Journal,* 1978, Vol. XIX, No. 1, pp. 221–77.

On the benefits of a truly spontaneous modern international merchant law, see Clive M. Schmitthoff, "International Business Law: A New Law Merchant," *Current Law and Social Problems,* 1961, Vol. II, No. 1, pp. 129–53; Aleksander Goldstajn, "The New Law Merchant," *Journal of Business Law,* 1961, Vol. XII, pp. 12–17; and Leon E. Trakman, *The Law Merchant: The Evolution of Commercial Law* (Colorado: Fred B. Rothman, 1983).

Let me conclude with a few reflections. Spontaneous ordering in law is not an irrational process. Quite the contrary: if allowed to develop freely, law evolves out of customs based upon need and experience. Men and women develop means of conducting their contractual relationships based upon the belief that a self-ordered relationship is mutually beneficial and superior to conflict or an arbitrarily imposed order. Individuals engage in trade on the common-sense realization that deficiences in the agreement process can be identified over time and removed if necessary. It must be appreciated that, in order for law to evolve naturally, the legal system should be based upon the attitudes and behavior of those whom the legal system actually affects. Thus, certain aspects of spontaneously-ordered social and economic systems inevitably find their way into a spontaneously-ordered legal system. The main insight that we can gain from the theory of spontaneous ordering is, as Michael Polanyi put it in *The Logic of Liberty: Reflections and Rejoinders* (University of Chicago Press, 1980), "Wherever we see a well-ordered arrangement of things or men" we should not "instinctively assume that someone has intentionally placed them that way." Indeed, wherever we find a well-ordered legal system (the Law Merchant or the Common Law system itself), we should appreciate that much of its growth has evolved spontaneously and naturally out of the needs and experiences of men and women.

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Leon Trakman is a Professor of Law at the Dalhousie Law School, Halifax, Canada. He was a Summer Fellow at the Institute for Humane Studies in 1982 and is the author of **The Law Merchant and The Evolution of Commercial Law** (Colorado: Fred B. Rothman, 1983).

Crosscurrents

Revolution in Central America

Several recent books are very helpful in understanding the complex events taking place in Latin America. On the struggle by Christians for human dignity and human rights in the face of ruthless and brutal régimes, see Penny Lernoux, *Cry of the People: The Struggle for Human Rights in Latin America—The Catholic Church in Conflict with U.S. Policy* (New York: Penguin, 1982). A useful collection of essays, along with an excellent bibliography, by a group sympathetic to the popular movements and opposed to current U.S. policy, is *Revolution in Central America,* ed. Stanford Central America Action Network (Boulder, CO: Westview Press, 1983). For a concise history of U.S. involvement in Central America, see Jenny Pearce, *Under the Eagle: U.S. Intervention on Central America and the Caribbean* (Boston: South End Press, 1982). On the problems of one of the key countries in U.S. Central American foreign policy, see *El Salvador: Central America in the Cold War,* ed. Marvin E. Gettleman et al. (New York: Grove, 1981), and *Report on Human Rights in El Salvador,* compiled by the Americas Watch Committee and the American Civil Liberties Union (New York: Vintage, 1982).

Also recommended is the interview with the Colombian Nobel Laureate for Literature, Gabriel Garcia Márquez, in *Playboy,* February 1983. In this interview the author of *One Hundred Years of Solitude* and *The Autumn of the Patriarch* talks about the important role politics plays in his writings and the unfortunate misunderstandings many North Americans have about the nature of the revolutions currently taking place

Geoffrey Best has also written a history of the attempts to mollify the destructive effects of war, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts* (London: Methuen, 1983). The belief that war could be limited by certain customary practices and the strict adherence to an international code of law is a legacy of the optimism of the liberal enlightenment. It became a platitude of nineteenth-century liberalism that industrial development and material progress would eliminate once and for all the major causes of war. See the classic work by Edmund Silberner, *The Problem of War in Nineteenth-Century Economic Thought* (New Jersey: Princeton University Press, 1946) and W.B. Gallie, *Philosophers of Peace and War: Kant, Clausewitz, Marx, Engels, and Tolstoy* (Cambridge University Press, 1979) for a discussion of the pacific legacy of the enlightenment and the naive optimism of nineteenth-century liberalism.

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Cookson

particular interest in Cookson's book is Chapter Three, "The Warring Society," in which the pacific tendency of the market is contrasted with the warlike qualities of the aristocracy and the problems of class and class interest figure prominently.

Textbook on Modern Political Theory

In the previous issue of the Humane Studies Review we reviewed a guide to economics textbooks for those looking for free-market alternatives to the usually unpleasant fare foisted upon undergraduates. The same problem is faced by students of political science and, although there is no guide to textbooks as such, there is at least one textbook on political theory we are happy to recommend: Norman Barry's *An Introduction to Modern Political Theory* (London: Macmillan, 1981). It is refreshing to see a textbook that explicitly adopts what Barry calls a "liberal-rationalist" position and where the ideas of Hayek, Friedman, Rothbard, Nozick, and Buchanan are taken seriously and discussed at length. However, the book lacks a discussion of class analysis (apart from a rather brief and unsatisfactory mention of Pareto's and Mosca's theory of elites), a subject that is of central importance to libertarian political theory. The best introduction to libertarian class theory is still Albert Jay Nock, *Our Enemy the State* (New York: Free Life Editions, 1973), introduced by Walter E. Grinder.

Barry's thoughts on liberalism are also presented at some length in a review article on "The New Liberalism," *British Journal of Political Science,* Vol. XIII, No. 1, January 1983, pp. 93–123, where he distinguishes between the "consequentialists" (The *Wertfrei* approach of the Chicago, Austrian, and Virginia Schools) and the "rights" traditions (Rand, Nozick, and Rothbard) in modern libertarian thought.

Locke and Property Rights

Three important books on John Locke's political philosophy have recently been republished in paperback. The first is by John Dunn, *The Political Thought of John Locke: An Historical Account of the Argument of the "Two Treatises of Government"*

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"The U.S. government has increased its diplomatic, economic, and military support for El Salvador precisely during the period when human rights violations there have accelerated."

"The violations of human rights taking place in El Salvador are not aberrations. Rather, they are selectively directed against those perceived as opposing the country's economic and political system."

Report on Human Rights in El Salvador

"The Reagan administration sees any nonconformity by the people of Latin America not as an end product of the miserable condition in those countries but as some kind of Soviet operation. In believing that, the Reagan administration is creating a self-fulfilling prophecy."

Márquez

War Studies

A recent series from the British publisher Fontana, *The Fontana History of European War and Society,* ed. Geoffrey Best, aims to summarize the massive amount of recent literature on the interrelationship between war and the social, political, and economic development of modern Europe. Three volumes have appeared so far: Geoffrey Best, *War and Society in Revolutionary Europe, 1770–1870* (London: Fontana, 1982); V.G. Kiernan, *European Empires from Conquest to Collapse, 1815–1960* (London: Fontana, 1982); Brian Bond, *War and Europe, 1865–1955* (London: Fontana, 1984).

Best deals with the military and social changes brought about by the transformation of the French Revolution from a liberal revolution (1789–1792) into the political despotism that culminated in the Napoleonic Empire (1793–1815). Kiernan discusses the savage and bloody manner in which the European powers forged and defended their colonial empires from the end of Napoleon until the period of decolonization after the Second World War. Bond deals with the revolutionary changes in destructive capacity that technology, industrialism, and the authority of the modern state make possible.

The deleterious effects of war, both internal and external, were understood by English liberals, many of whom worked assiduously to oppose war and militarism. This is the fascinating subject of J.E. Cookson's *The Friends of Peace: Anti-War Liberalism in England, 1793–1815* (Cambridge University Press, 1982). Once again, it is clear that liberalism is intimately tied to opposing the twin evils of war and imperialism. Of particular interest in Cookson's book is Chapter Three, "The Warring Society," in which the pacific tendency of the market is contrasted with the warlike qualities of the aristocracy and the problems of class and class interest figure prominently.

Geoffrey Best has also written a history of the attempts to mollify the destructive effects of war, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts* (London: Methuen, 1983). The belief that war could be limited by certain customary practices and the strict adherence to an international code of law is a legacy of the optimism of the liberal enlightenment. It became a platitude of nineteenth-century liberalism that industrial development and material progress would eliminate once and for all the major causes of war. See the classic work by Edmund Silberner, *The Problem of War in Nineteenth-Century Economic Thought* (New Jersey: Princeton University Press, 1946) and W.B. Gallie, *Philosophers*

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Locke and Property Rights

Three important books on John Locke's political philosophy have recently been republished in paperback. The first is by John Dunn, *The Political Thought of John Locke: An Historical Account of the Argument of the "Two Treatises of Government"*

(Cambridge University Press, 1982), who stresses that Locke's theological assumptions provide the basis for his political theory. The second is by James Tully, *A Discourse on Property: John Locke and His Adversaries* (Cambridge University Press, 1982), who places Locke's Second Treatise in the context of the important seventeenth-century debate on natural rights, in order to ascertain precisely what aspects of Locke's property rights theory are a unique contribution to political theory and what were the common assumptions of the age. The third contribution to Lockean political studies, Julian Franklin's *John Locke and the Theory of Sovereignty: Mixed Monarchy and the Right of Resistance in the Political Thought of the English Revolution* (Cambridge University Press, 1981), continues the important scholarly process of demonstrating how radical Locke really is. Franklin argues that Locke transformed the traditional theory of sovereignty (which gave the right to resist a tyrant only to certain representatives of the people) into a much more radical view in which sovereignty and, hence, the right of resistance, was granted to the people themselves rather than to any intermediate representative body.

"For Locke, however, a distinction must be drawn between isolated acts of tyranny—or occasional abuses of executive authority that do not disrupt the law in general—and a calculated design to subvert the law and public liberty as such. . .(in the former case) where recourse to appeal is still available the use of force is always premature. . .(in the latter case) revolution is appropriate."

Franklin

The collection of essays entitled *Theories of Property: Aristotle to the Present* (Waterloo, Ontario: Wilfrid Laurier University Press, 1979), ed. Anthony Parel and Thomas Flanagan, has some valuable pieces that should be of interest to our readers. It includes essays on the notion of property in the work of such thinkers as John Locke (J. Tully), John Stuart Mill (John Gray), F.A. Hayek (T.E. Flanagan), and Robert Nozick (S.B. Drury). Also of note is the essay on "The Mobility of Property and the Rise of Eighteenth Century Sociology" by J.G.A. Pocock.

Gray on Mill and Hayek

The Oxford political philosopher John N. Gray has written a challenging book on John Stuart Mill's theory of liberty, *Mill on Liberty: A Defense* (London: Routledge and Kegan Paul, 1983). According to Gray, Mill can be interpreted as an advocate of "indirect" rather than "direct" utilitarianism. By this, Gray means that the direct promotion of happiness, sometimes at the expense of liberty, is self-defeating. Gray argues that, on the other hand, in a theory of indirect utilitarianism, "there are utilitarian reasons for according the vital interests in autonomy and security a priviledged immunity from utilitarian trade-off" (p. 128). We recommend it to those natural-rights advocates who have dismissed utilitarianism out-of-hand as an unsuitable defense of liberty.

John Gray has also written an important appraisal of Hayek and his contribution to the rebirth of the classical liberal tradition in this century, *Hayek on Liberty* (New York: Basil Blackwell, 1984). In this study, which originally appeared as "F.A. Hayek and the Rebirth of Classical Liberalism," *Literature of Liberty,* Vol. V, No. 4, Winter 1982, pp. 19–66, Gray concludes that Hayek has been able to fuse certain aspects of the rival paradigms of conservatism and libertarianism with his theory of social evolution and "voluntaristic traditionalism." How well this marriage of conservative and libertarian values works is left for the reader to decide. This issue of *Literature of Liberty* also contains the most comprehensive bibliography to date of writing by and on Hayek, compiled by John Cody. This fine bibliography, in expanded form, also appears in Gray's book.

"These vital interests (autonomy and security) are to be protected before any others a man may have and they are not to be invaded or damaged simply because it seems that a greater satisfaction of overall preferences might thereby be achieved."

Gray

Alternative Defense

The current re-thinking of the role of nuclear weapons by some senior military figures on both sides of the Atlantic has been brought about by the growing awareness that nuclear weapons are, for all intents and purposes, unusable. Four very senior ex-officials have recently confirmed this view by calling for the urgent adoption of a "no first use" policy in order to ease international tension. See McGeorge Bundy, George F. Kennan, Robert S. McNamara, Gerard Smith, "Nuclear Weapons and the Atlantic Alliance," *Foreign Affairs,* Spring 1982, Vol. LX, No. 4, pp. 753–68, and the debate that followed in ibid., Vol. LX, No. 5, especially the comment by Earl C. Ravenal, pp. 1174–76.

"In any large-scale nuclear exchange between the superpowers, global environmental changes sufficient to cause the extinction of a major fraction of the plant and animal species on the Earth are likely. In that event, the possibility of the extinction of homo sapiens cannot be excluded."

Nuclear Winter

A view is beginning to emerge that considers any use of nuclear weapons, in the words of Andrei Sakharov, "the collective suicide of mankind." See Sakharov's open letter, "The Dangers of Thermonuclear War: An Open Letter to Dr. Sidney Drell," *Foreign Affairs,* Summer 1983, Vol. LXI, No. 5, pp. 1001–16. According to this interpretation the use of nuclear weapons is viewed as suicidal, for two reasons. First of all, on a purely tactical level, in densely populated areas such as western Europe it is impossible to use nuclear weapons to defend life and property without destroying that which one is supposed to be defending. Far more importantly, on a global level, there is also the likelihood that the detonation of several hundred nuclear warheads would bring on a devastating "nuclear winter." See R.P. Turco, O.B. Toon, T.P. Ackerman, J.B. Pollack, and Carl Sagan, "Nuclear Winter: Global Consequences of Multiple Nuclear Explosions," *Science,* 23 December 1983, Vol. CCXXII, No. 4630, pp. 1283–92; Paul Ehrlich, et al., "The Long-Term Biological Consequences of Nuclear War," ibid., pp. 1283–1300; Carl Sagan, "Nuclear War and Climatic Catastrophe: Some Policy Implications," *Foreign Affairs,* Winter 1983–84, Vol. LXII, No. 2, pp. 257–92; Anne Ehrlich, "Nuclear Winter," *Special Supplement, Bulletin of the Atomic Scientists,* April 1984, Vol. XL, No. 4; and the collection of essays in *Nuclear War: The Aftermath: A Special AMBIO Publication* (New York: Pergamon Press, 1983).

The second reason for becoming disillusioned with the idea of nuclear "defense" is tied up with the broader disillusionment of being involved in a conflict between two military blocs. *Defense without the Bomb: The Report of the Alternative Defense Commission* (New York: International Publications Service, Taylor and Francis Inc., 1983) suggests a range of options for European countries to insure adequate defense without recourse to nuclear weapons or dependence on nuclear allies.

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