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Crisis
in Law

Norman Barry

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CIS Occasional Papers 23

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THE CENTRE FOR INDEPENDENT STUDIES
1989

Published January 1989 by

The Centre for Independent Studies Limited

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National Library of Australia

Cataloguing-in-Publication Data

Barry, Norman P.
The crisis in law.

Bibliography.
ISBN 0 949769 46 0.

1. Law — Philosophy. 2. Liberalism. 3. Law and politics.
I. Centre for Independent Studies (Australia) . II.
Title. (Series : CIS Occasional papers; 23).

340'.11

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Foreword

Geoffrey de Q. Walker

Few people, indeed few lawyers, appreciate the magnitude of the damage done to the rule of law, the economy and society by the doctrines of legal positivism and legal 'realism' as taught in law schools throughout the English-speaking world for much of this century. Paternalism in contract, uncertainty in commercial transactions, the explosion of tort liability that has annihilated some socially desirable industries, arbitrariness in tax law, the destruction of marriage as a legal institution, runaway appeal courts and what Bastiat called 'legislative plunder' are the results of the climate of cynicism about legal adjudication and the rejection of long-standing insights into the nature and function of law. To borrow Professor Barry's words from this short but penetrating monograph, such developments 'simply illustrate the influence of erroneous ideas'.

Professor Barry goes to the heart of the weakness of the idea of a consciously planned legal order, which is the inability of the human mind to construct a code of rules appropriate for all human circumstances, especially in complex advanced societies.

The author is a trifle more pessimistic about the prospects for the restoration of the classical ideal of law than I would be. It is indeed currently at its lowest ebb, and is suffering additional onslaughts from the nihilist and ultimately totalitarian doctrines espoused by the Critical Legal Studies movement. Nevertheless, countervailing forces are in play. Modern public choice theory has demolished the pretensions of parliamentary legislation to being an exact science. The philosophical and epistemological foundations of classical legal theory have been clarified and rejuvenated by Hayek, Popper, Sowell, Fuller, O'Hair and others. More policy-makers (even in China, and now in the Soviet Union) are coming to appreciate the importance of a predictable legal system for economic growth. Finally, classical theory is more consistent with the new socio-cultural paradigm that appears to be emerging throughout the Western world. The old world-view of the universe

as a machine with separate and discrete components that has guided philosophical and scientific thought since Descartés is giving way to a new 'systems' view of the universe that emphasises the interconnectedness of all the parts and of all phenomena. Classical legal theory has a measure of caution and humility that makes it more congruent with this new outlook, while positivism and legal realism, with their view of law as social engineering, exemplify the myopia and arrogance of the old paradigm at its worst. But before the tide can be turned, the problem must be understood, and in this inquiry Professor Barry's paper is a lucid and percipient contribution.

About the Author

Norman Barry has been Professor of Politics at the University of Buckingham since 1984. He has taught Politics at the University of Exeter, the Queen's University of Belfast and the City of Birmingham Polytechnic. He has written extensively in the fields of political philosophy, political economy, public policy, classical liberalism and Austrian economics. His books include *Hayek's Social and Economic Philosophy* (1979), *An Introduction to Modern Political Theory* (1981), *On Classical Liberalism and Libertarianism* (1986) and *The New Right* (1987). He has published widely in academic journals and is a regular contributor to the Institute of Economic Affairs journal, *Economic Affairs*. He is also an occasional contributor to the Centre for Independent Studies journal, *Policy*. He is a trustee of the David Hume Institute, Edinburgh.

The Crisis in Law

Norman Barry

What Is the 'Crisis'?

That there is a 'crisis' in law is not denied by contemporary classical liberals (or neo-conservatives). The rise of statute and public law in the 20th century and the decline of common law and private law have been commented on frequently by, to name just a few individualists, Leoni, Hayek, Mises and the market economists. Furthermore, the rise of 'sovereign' legislatures and the effects of majority-rule democracy have combined to produce laws designed to create particular 'end-states' (Barry, 1988) or desirable patterns of social and economic organisation rather than general rules to guide individuals in the pursuit of their chosen ends. Further, assiduous though legislatures and courts in western democracies have been in protecting civil liberties (although even this is less true of the United Kingdom than the United States), they have been active in the destruction of economic liberty: thus denying that symmetry between personal and economic freedom that is at the foundation of classical liberal social philosophy.

This crisis in law undoubtedly reflects a crisis in jurisprudence; if 'ideas' are ultimately decisive in the determination of social events, it is to mistaken theories of law, and their influence on public policy-makers, that we must look for an explanation of the present predicament. The problem is that classical liberal social thinkers (with the notable exception of Hayek) have, historically at least, been less successful in articulating a fully-fledged theory of law than they have been in demonstrating the virtues of a free economy. This omission has occurred despite the fact that most liberal economists have seen a methodological similarity between explanations of markets and common law systems: the structures of both are unintended consequences

This CIS Occasional Paper is a revised version of a lecture, 'The Classical Theory of Law', delivered at the Federalist Society Symposium, 'Classical Law and the Crisis in Jurisprudence', held at the University of Chicago Law School in 1987. The lecture was published, under the same title, in the *Cornell Law Review*, 1988, vol. 73, no.2, pp. 283-91.

of individual action (Invisible Hand explanations) rather than the products of deliberate intention and design. Thus, individualistic theories of law are 'neutral' with regard to particular outcomes or end-states that may emerge from individuals following general rules.

Law and Liberty

Law is intimately connected with freedom in classical¹ law: not just in the trivial sense that a free society is a rule-governed order which diminishes the coercive power that political authorities have over individuals but in the theoretical sense that an explanation of liberty can be given which makes freedom and law consistent. Here the objection is to Bentham's observation that 'every law is an infraction of liberty'. For this implies that each freedom-reducing act of law has to be justified on utilitarian or pragmatic grounds, opening up the possibilities of endless interventions in free actions on the ground that they advance some alleged collective good.

In the classical liberal theory of law, however, legal rules only vitiate liberty when the individual is directed to perform some action (as in the phenomena of taxation, conscription and the direction of labour in a command economy). Most legal rules in classical law are prohibitions, forbidding certain courses of action, or authoritative procedures telling an individual how to do certain things. In Michael Oakeshott's instructive phrase, proper law consists of 'adverbial rules' (Oakeshott, 1983:119-64). The classical liberal maintains that free societies have been undermined precisely because the ambit of public law (involving the direction of people to specific purposes) has widened vastly, to the diminution of the range of private law. Of course, there are very serious difficulties for the classical lawyer in the question of the content of laws as prohibitions and authoritative procedures, and of the proper limits of public law since (with some exotic exceptions²) most individualist jurists accept the necessity for a public realm. Nevertheless, the distinction between public and private is germane to the classical theory of law.

1. I use the word 'classical' throughout this essay to describe the system of common law, which is such a feature of traditional English legal development. Nevertheless, it could well be used to describe codified systems that are designed for the protection of individual interests. It is to be contrasted with public law — the body of written enactments designed to promote collective ends.

2. They are anarcho-capitalists, who maintain that individuals under private law can produce any wanted good, including defence (See Rothbard, 1973; Friedman, 1973). In anarcho-capitalism law has a validity independently of the state (a proposition which has some historical justification).

What is 'Law'?

What is the foundation for the classical theory of law as a general system of rules for the guidance of individuals? The first thing to note is that classical law occupies a kind of mid-way position between what is conventionally known as natural law and positive law. The general anti-rationalist philosophical stance that most classical lawyers take means that they would deny that the human reason is capable of discerning an objective set of moral norms that can be used to validate all claims to law. A proper legal system is identified with traditional rules of conduct which have developed in response to human needs and circumstances and these rules cannot be derived by the use of an unaided reason. However, classical lawyers cannot accept as 'lawful' any rule or ukase that emanates from a legislature, or is consistent with a 'rule of recognition' (in the sense defined by H.L.A. Hart³). Thus there can be standards of evaluation that derive from the notion of 'law' itself rather than from some alleged objective morality. Furthermore, the classical lawyers' objections to some legislative enactments (and, indeed, court decisions) that are contrary to those natural regularities that economic science reveals show that there is a close connection between classical law and 'natural' laws of economy and society. Thus although many laws, regulations and judicial decisions may be 'legitimate' in a formal or positivist sense, their incongruence with what we know of social processes renders their claim to be law in the broad sense dubious: at the very least they will produce less complex orders.

Law and Authority

The main feature of classical law that distinguishes it from almost all forms of positivism is its denial of the assumption that law requires an 'author'; some authoritative source that creates a legal order. Positivists in the English tradition of jurisprudence identify authorship with a sovereign, whereas American realists locate law creation in judicial activity itself; but they are at one in denying that rules to guide conduct can exist independently of the human will. But as Hayek and others have argued, this is an error, for a whole tradition of Western legality shows that coherent and predictable legal orders can develop independently of will, design and intention. Of course, the common law is the paradigm case of this phenomenon and it is the acceptance

3. A rule of recognition is the fundamental rule of a legal system that validates all subordinate legal rules, while it cannot be itself so validated. An example is the rule of British constitutional law which holds that 'parliament is sovereign'. There has recently been a shift in the rule of recognition in Britain (see footnote 4).

of its rules as appropriate guides to conduct that constitutes their legality. As A.W.B. Simpson says (1973:85-6): '... common law rules enjoy whatever status they possess not because of the circumstances of their origin, but because of their continued reception'. Thus it is that the principles of the English law of contract have developed entirely without the aid of a single statute.

The 'Wisdom' of Common Law

The attraction of the common law system to liberal individualists should be obvious: it has developed through individuals settling their disputes by reference to its rules; rules that exist independently of will and which themselves embody, contrary to positivism, non-articulated moral notions. To quote Simpson again: 'In the Common Law system no very clear distinction exists between saying that a particular solution to a problem is in accordance with the law, and saying that it is the rational, fair or just solution' (1973:79).

It is of course true that a liberal individualist order can be conceived of in terms of written enactments, bills of rights, the *Rechtsstaat*, constitutions and so on. Indeed, Hayek in *The Constitution of Liberty* (1960:ch. 13) seems to be indifferent between the common law and some fixed code as the most efficient guarantor of a free and predictable legal order. However, in *Rules and Order* (1973:ch. 4) the emphasis is almost entirely on the virtues of spontaneous or unplanned legal orders because of an important philosophical reason to do with the nature of human knowledge. The reason is that the human mind (in this context, the legislative 'mind') is constitutionally incapable of constructing a code of rules appropriate for all human circumstances. The complexity of an advanced society means that all legal rules must be necessarily abstract: in contrast, say, to the rules of a primitive society. Many of the rules of an advanced society are not articulated fully in a code yet have a cognitive significance in the rational description of a legal order, and most of legal knowledge in a legal order is 'tacit' knowledge, i.e. knowledge that cannot be precisely formulated.

Hence legal reasoning cannot be mechanistic or deductive, applying fully-articulated principles to particular cases. Hayek, and others in the classical tradition, liken judicial activity to 'puzzle-solving' in which a judge tries to find an appropriate rule to fit a particular case. It is not the function of the judge to bring about some desirable state of affairs but to find objectively the right decision within the general system of rules; a system that exists independently of judicial activity itself.

Law and Legislation

What is important in the classical theory of law is a distinction between 'law' and 'legislation'. Law deals with the actions of private agents and has no purpose beyond providing a predictable framework for individuals to pursue their private ends with the minimum of collision with each other. It might be thought, however, that this predictability is compromised by the fact that the development of law is a matter of judicial decision-making which is essentially subjective and unpredictable. But this is to make too much of 'hard' or difficult cases, i.e. cases for which no articulated rule seems appropriate. In fact, the bulk of social life is conducted in accordance with rules that are not in dispute. The relevant contrast ought to be between the unpredictability of judicial decision-making and the unpredictability of a complete Benthamite statutory system, which is a function very largely of the caprice of legislators.

Yet classical jurisprudence does not exclude 'legislation' or public law, i.e. law with a specific purpose. The common law is entirely appropriate for market society: to enable individuals to exchange for their mutual benefit with reasonable security. But those very same individuals will not generate all that is socially desirable by their mutual exchanges: there are then some public purposes (or public goods) which require a framework of legislation or 'made' law. Thus, although the usefulness of the common law in the creation of new rules to handle 'externality' problems without the need for legislative intervention has often been underestimated, it is undoubtedly the case that in the classical theory of law the rationale for legislation lay in the vexed question of market failure. The major problem in classical jurisprudence has been how to restrict legislation to those areas of social and economic life which have a genuine public dimension. The relative demise of classical law has come about through the intrusion of public law or legislation into what is essentially the private domain: the continued interference with contracts, the close regulation of economic life on behalf of an alleged 'public interest', the taking of property and the construction of welfare schemes on the *a priori* assumption that private arrangements could not generate such desirable states of affairs.

Validity, Law and Justice

If the common law or classical law is interpreted as a more or less self-consistent (although necessarily untidy) body of rules, articulated and non-articulated, it has a validity in a natural law sense independently of a constitution, a rule of recognition, a Kelsenian *Grundnorm* or a sovereign's command. The validity of particular rules will be a function of their

consistency with the whole system and their conformity to certain more or less universally true principles of human nature first adumbrated by David Hume and Adam Smith. These principles include the recognition of a (not necessarily harmful) self-interest, scarcity (therefore the need for property rules), the propensity to value the present higher than the future (time-preference), all-pervading ignorance, and so on.

The most decisive contrast between classical law and modern positive law is in the question of justice. Justice in classical law is the impartial application of universal rules; rules that do not discriminate and which favour no persons or groups. The point about classical law is that it is indifferent with respect to the various outcomes that emerge from a rule-governed process as long as the rules are themselves fair. Thus legality is doing justice to individuals, not generating particular states of affairs. Nevertheless, it should be pointed out in passing that in an indirect utilitarian sense this limited concept of justice has been instrumental in (unintentionally) generating highly complex social orders. Modern positive law, however, looks to legislation to create desirable end-states, justified under the general rubric of 'social justice'. These range from straightforward income redistribution, through to the creation of 'equal' opportunities for named groups; groups that are in no way discriminated by the law itself. Irrespective of the counter-productive nature (in a utilitarian sense) of these measures, they are condemnable from a classical law point of view because of the damage they do to legality.

Sovereignty and the Disintegration of Common Law

Why has classical law broken down? The question is, of course, unanswerable in any uncontroversial sense. Nevertheless, we can point to certain movements of opinion, historical developments and institutional arrangements which have summed to produce an intellectual and political atmosphere in almost all Western democracies which is unfavourable to the traditional notion of liberty under the law.

From the point of view of jurisprudence, particularly damaging was the tendency to validate law by some external criterion, such as a constitution. It may sound odd, but in classical law a constitution was a kind of superstructure, a body of rules for the organisation of government itself: in other words, law had a self-generated permanence and stability and persisted through possibly transient political arrangements. The trouble was that this necessary distinction between law and politics depended upon a tacit acceptance by political rulers that there was, indeed, such a distinction. The problem has been particularly acute in Britain whose unwritten constitution has in the 20th century permitted the erosion of law by politics. Although not since the 17th

century has anyone dared to suggest that the common law was the embodiment of 'right reason' and thence superior to statute, nevertheless for a very long time legislative reticence was preserved. This is no longer so.

The issue here is the sovereignty of Parliament, and the organisation of that institution, under modern democratic conditions, on party lines. For common law is always vulnerable to statute once it becomes accepted that legal validity is a function of the decisions of a representative body. In the pre-legislative era of classical law it might have been true to say, as Hayek does repeatedly, that the common law principle which holds that a person is permitted to do whatever is not forbidden by law did embody more 'rights' than those that could be enumerated in some 'positive' declaration, but that claim sounds hollow in late 20th-century Britain. Yet, curiously enough, and to the chagrin of spontaneous order theorists, the principle that ultimate legal validity is a function of parliamentary sovereignty was not planned, designed or even thought of by anybody: it just happened. Indeed, it is a principle of the common law. It could even be said that it is so because it was said to be so in a famous textbook on constitutional law written in 1885 by Dicey. There are, nevertheless, a few English constitutional lawyers who say, along with George and Ira Gershwin, that 'it ain't necessarily so'. Their day may yet come, especially with the impact of EEC law and international human rights law on the United Kingdom⁴ (*see* Bradley, 1985).

American Constitutionalism and its Demise

Americans have been more fortunate than the British since from the very beginning they have had all the paraphernalia of proper constitutionalism: federalism, the separation of powers, judicial review and so on. These were designed, especially judicial review, presumably to protect classical law and the traditional rights that it embodies from the intrusion of legislation. This is in contrast to the British tradition which precludes the courts from adjudicating on the substance of a statute; there, judicial review is limited to ministerial or other action under a necessarily legitimate law. Thus, although American law is consistent with positive law jurisprudence in that the validity of purported claims to law is established by 'testing' them against some other rule (in contrast to Hayekian quasi-natural law procedures, which

4. It is now clear that a British court would uphold European Community law should there be a conflict between it and a parliamentary statute. Also, British governments change domestic law whenever a ruling of the European Court of Human Rights requires this. However, European human rights law is not a part of British domestic law, and were it to be so incorporated it could always be repealed by a future parliament.

embody the universalisability criterion),⁵ there is no substantive difference between American constitutionalism and classical law, since the protections for individuality contained in the document can be interpreted as declarations of general common law principles. These are the kinds of protection British classical lawyers, in the face of the erosion of the common law in the UK, are beginning to wish obtained in their country.

The fact that such classical law protections for individuality no longer hold in the US in the economic sphere is now a matter of great concern to individualist economists and lawyers. Since 1937 a supine Supreme Court has permitted a massive rise in public law, in economic regulation and in the promotion of state welfare; most of which flies in the face of those standards of legality proclaimed by classical law (*see* Siegan, 1980). All of this legislation goes beyond the provision of public goods via public law that is permitted by classical law, and all of it is written in defiance of well-established truths of economic theory. From the point of view of classical law jurisprudence, the Supreme Court is now in the curious position of refusing to enforce 'agreed-on' limitations on the legislature while at the same time 'creating' law (e.g. in the areas of enforced integration and affirmative action) in a manner quite inconsistent with the traditional ideal of judicial activity.

The Errors of Legal Realism

Why all this should have occurred is not my concern here. However, certain developments in 20th-century American thought created an atmosphere in which such departures from the classical ideal of law could become intellectually respectable. In jurisprudence, America's major contribution to positivism — realist legal theory — has some quite damaging implications for classical law.

For realism does presuppose that law must have an **author**. Since America has never had a sovereign legislature, and since the whole idea of judicial review requires that the courts play a crucial role in the determination of the content of law, it was almost inevitable that the judges should be seen as the **authors** of law. Hence the familiar expressions: 'law is what the courts say it is' and 'rules are only sources of law'. The realist movement made all of its intellectual profit from its alertness to the simple truth that a mechanical jurisprudence is impossible. Because human language is necessarily impre-

5. Hayek's jurisprudence would imply that a legal rule, despite its consistency with a constitution, was not properly a law if it could not be made perfectly general within an ongoing set of rules. However, it is difficult for some rules to be made perfectly general (*see* Barry, 1979:95-100).

cise (in Hart's memorable word, 'open-textured') there can be no uncontroversial application of rules to particular cases; and this means that judges must have considerable discretion. The way that this is exercised will obviously have great significance for the development of law and society. Again, it was almost inevitable, given the nature of the 'judicial decision', that attention should be directed towards all those sociological factors that were said to determine that decision. Thus there was a dramatic shift from a jurisprudence concerned with the meaning of rules to one in which rules have no objective existence at all. Furthermore, if judges are the real 'authors' of law, then why should they not create a legal order which reflects social conditions and meets social demands? If there are no binding rules to guide judicial conduct, then the argument that social policy should replace law becomes almost irresistible.

The implications of this for classical law are serious. For the whole tradition of common law presupposes that an objective body of rules does exist (even though much of it may be incapable of precise articulation). If there were no independent and objective laws a rule-governed society would be impossible. Although the law will develop spontaneously through interpretation of rules and the adjudication of difficult cases, classical law does not suppose that a judicial decision is therefore completely subjective, a disguised expression of class interest, or is determined by what the judges had for breakfast. The absence of a mechanical jurisprudence does not imply that discretion is entirely unfettered and that individuals cannot be guided by general rules, or judges bound by them, so that attention should be directed towards the prediction of court behaviour on the basis of some extra-legal criteria. For this, to follow Hart's illuminating terminology (1961:ch. 7), is to understand law entirely from the 'external' point of view and leads to the elimination of those 'internal' features of legality, such as the obligatory nature of rules as constituting normative standards, which make a predictable legal order possible.

The Role of the Judiciary

In classical law, there is a specific role for the judiciary that depends upon their specialised knowledge. To quote Simpson yet again, law is 'a body of traditional ideas received within a caste of experts' (1973:94). In difficult cases, then, the criteria for adjudication should always be legal rather than political. The contemporary crisis in legal theory has come about largely through the erroneous belief that the courts have no other standards than those set by current social forces and transient coalitions of groups.

From this perspective, the dramatic shifts of opinion that have occurred in the Supreme Court, shifts that have done so much to lend credence to the

realists' case, may not so much validate the claims of sociological determinism as simply illustrate the influence of erroneous ideas. I will mention briefly two: the idea that freedom is divisible and that 'freedoms' can be hierarchically ordered; and the notion that legislatures, because they are democratically elected, require no further legal constraint (in America, the latter point applies only to economic legislation, the authors of which might just as well be called 'sovereigns' despite all the apparatus of constitutionalism).

The role that classical law gives to the judiciary in a complex society must be that of enforcing general standards of legality even against the 'democratic will' (as embodied in public law). The rationale for this is that in a complex society, characterised by competing and divergent ends and purposes, there is no such thing as a democratic will which is not also the imposition of some particular end-state or purpose on society at large. Even if there were a genuine majority will, as opposed to the coalition of interests that is a surrogate for the majority in all democratic societies, there is no reason why that should be decisive (least of all in America). Classical law presupposes only that there is a minimum of agreement on rules and practices. This requires judicial 'creativity' only in the enforcement of such standards in difficult cases and in their protection against transient majorities in legislatures.

Towards a New Legal Order

The restoration of the classical idea of law is a difficult task. As Hayek has often pointed out, the legal profession no longer resembles very closely Simpson's 'caste' of experts, adept at puzzle-solving and the exploration of the meanings of rules. One legacy of realism is that lawyers have become obsessively concerned with the 'social' aspects of law: less concerned with the adjudication of cases and more with the implementing of what they believe to be socially acceptable values. Again, as many individualists have pointed out, in economic judgements they have revealed themselves to be in the grip of erroneous doctrines.

Classical legal philosophers differ in their recommendations as to how an individualist legal order might be created and the rise of public law checked. There are two possibilities. First, that the courts might reassert the traditional role of review of economic legislation or that some reduction on

6. It is richly ironic that the post-1979 Conservative Government under Mrs Thatcher has shown no interest in constitutional reform. But that lax constitutional system which has been used to move the United Kingdom away from collectivism can just as easily be used to reimpose it. For a sophisticated statement of conservative constitutionalism, see Johnson (1977).

the power of legislatures be instituted (perhaps a modification of the simple majority rule). Undoubtedly it is the 'unreliability' of the courts that has led many individualists, from Hayek (1979) to Buchanan (1975), to demand more comprehensive constitutional rearrangements.⁶ Such constitutional rearrangements that have been proposed do not involve the creation of new law but rather the resurrection of traditional rules. They also recommend institutional forms which transmit genuine opinion more accurately than does conventional majority rule democracy.

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The Crisis in Law

Norman Barry

In this Occasional Paper, Professor Norman Barry argues that the current crisis in the law stems from the demise of the common law (which consists of general rules of conduct guiding individuals in the pursuit of their self-chosen goals) and the corresponding rise of statute law (which is used to promote particular social outcomes). The classical idea of justice as the impartial application of universal rules has, under majoritarian democracy, given way to politicised conceptions of 'social justice' in which particular classes of citizens are singled out for special treatment. Modern legal doctrines insisting that the law must have an author have resulted in the replacement of traditional legal reasoning with a sociological approach that explains judicial decisions solely in terms of social forces.

Although there is no obvious way in which the classical idea of law can be revived, any progress in that direction would have to involve both a reassertion of the courts' role in reviewing economic legislation and some reduction of the powers of legislatures, whether by a modification of the simple majority rule or by more comprehensive constitutional rearrangements.

Norman Barry has been Professor of Politics at the University of Buckingham since 1984. He has written extensively in the fields of political philosophy, political economy, public policy, classical liberalism and Austrian economics. His books include *Hayek's Social and Economic Philosophy* (1979), *An Introduction to Modern Political Theory* (1981), *On Classical Liberalism and Libertarianism* (1986) and *The New Right* (1987).