The problem with this is that we each have our intuitions. If we want them to match sufficiently to resolve conflicts, not among our own moral senses but between our moral senses and those of others, then we shall have to resort not only to reasoning but to argument. This is indicative of the basic weakness of Wilson's impressive book. He has no appreciation of that part of the Enlightenment legacy that sees morality as, in part, a public, inter-subjective process of discussion in which ideals of cogent argumentation hold sway. While the theory of humanity's moral nature suffices to reject the notion that anything goes and that 'autonomous individuals can freely choose, or will, their moral life' (p.250), it still leaves a wide open field of possibilities. The field is undoubtedly narrowed down by, among other factors, habitual 'aesthetic' intuitions of the balanced character. But central to the Enlightenment's 'dangerous' lessons is the habit of questioning habits, and it is in response to this that we have developed an intricate, sometimes institutionalised, culture of public moral and political discussion. Conventional moral philosophy in effect addresses such discussion by trying to supply criteria and ideals for moral decision-making. Wilson has little appreciation of this aspect of morality, but he is quite right in rejecting as naive the belief that traditional theories, such as utilitarianism, Kantianism, and rights-theories, exhaust the moral sphere. The contribution of this fine book is to give a sharp portrait of the moral nature which in the Enlightenment learnt the lesson that what it can do with itself is a matter of debate. This debate cannot be reduced to either sociobiology or aesthetic intuition.

Knud Haakonssen is Senior Fellow in the Research School of Social Sciences at the Australian National University.

Tradition and Innovation

Michael J. Lacey and Knud Haakonssen (eds), ***A Culture of Rights: The Bill of Rights in Philosophy, Politics, and Law — 1791 and 1991****, Woodrow Wilson International Center for Scholars and Cambridge University Press, Cambridge, 1991*

Reviewed by ***Charles Richardson***

Constitutional protection of human rights, which seemed to have gone out of fashion a few years ago, is now clearly back on the agenda in Australia and New Zealand (Moens & Trone, 1994; Mapp, 1994). The controversy over Australia's international obligations in relation to Tasmania's anti-homosexual laws is only the latest ingredient in a continuing debate over whether certain issues of individual rights should be put beyond the reach of legislative majorities. Recent decisions of the High Court, most notably in the 1992 political advertising case,[1] have suggested an

[1] *Australian Capital Television* v *Commonwealth*, (1992) 177 CLR 106, 108 ALR 577.

increasing trend of judicial activism in this area. It is therefore a good time to be looking more closely at the most durable model for such protection, the Bill of Rights of the United States. The Bill of Rights was adopted in 1791 as the first ten amendments to the US Constitution. Although other protections of individual rights have been added since, especially in the 'reconstruction' period following the Civil War, these ten amendments are of fundamental importance.

A Culture of Rights originated in a series of workshops conducted by the Woodrow Wilson Center in Washington to commemorate the bicentennial of the Bill of Rights (the whole Constitution is usefully printed as an appendix). Rather than giving a complete history or analysis of the Bill of Rights, the contributions focus on two historical periods: the Revolutionary era when the Bill of Rights was adopted, and the present day.

The book's title gives an important clue to its message: respect for individual rights has become a part of American culture, and understanding the way that rights are protected under the Constitution involves looking at much more than just legal theory. This echoes a point made by many conservatives in opposing the introduction of a Bill of Rights in Australia: purely 'formal' guarantees of rights, they say, are useless without a tradition which supports them. By taking the historical perspective, however, this book reminds us that traditions do not just appear out of nowhere. The Bill of Rights was not a product of 'conservatism'; it was created in a time of political and ideological ferment to meet an entirely new set of circumstances.

After a short introduction by the editors, the first four essays look at different aspects of this Revolutionary era. Knud Haakonssen locates the American philosophical debates of the period within the European 'natural law' tradition; James Hutson surveys the political process by which talk of rights developed in the American colonies and in the formation of the Constitution; Jack Rakove analyses the thinking of those who adopted the Bill of Rights, and particularly its author, James Madison; and Charles Griswold discusses the philosophy of rights held by Thomas Jefferson, as revealed in his views on slavery.

Taken together, these essays suggest that the history of the Bill of Rights is much more than merely historical interest. Professor Rakove in particular shows how today's arguments about constitutional interpretation have their roots in the debates of the 18th century, and that bad legal theory frequently rests on bad history. Writers like Robert Bork, whose interpretation depends on the 'original intent' of the Constitution's authors, come in for some criticism; as Rakove says, their 'pressing need to find determinate meanings at a fixed historical moment . . . cannot capture everything that was dynamic and creative — and thus uncertain and problematic — in Revolutionary constitutionalism' (pp.100-01).

The last three essays deal with the Bill of Rights in contemporary America. William Galston gives an excellent survey of recent work in the philosophy of rights, approached from a practical standpoint, asking what 20th-century philosophy has to offer in understanding rights. William Fisher writes on the fragmented nature of modern American legal theory, beginning with the Legal Realists of the 1920s and continuing to such recent developments as Critical Legal Studies. In the final essay, Alan

Ryan compares attitudes to rights in the United States and the United Kingdom, exposing cultural differences that strike some familiar chords with Australians, who lie somewhere midway between the British and American constitutional traditions.

Some of the individual essays show the pitfalls of interdisciplinary studies, as different writers grapple with issues from outside their own fields. James Hutson, for example, gives a fine historical analysis of 18th-century politics, but seems at sea when trying to distinguish the different philosophical positions that the participants held. Professor Griswold is clearly more at home with the abstract philosophical side of Jefferson's thought than with the practical political constraints under which he operated. On the other hand, Rakove, Galston and Ryan all represent the interdisciplinary approach at its best. Taken as a whole, the book is a successful effort, showing that history, law, and political and moral philosophy are all important in understanding the constitutional status of rights.

It may be dangerous, however, to try to draw too many lessons from history. One thing that emerges from the historical accounts is the remarkable extent to which the framers of the Constitution and the Bill of Rights agreed on which rights needed protection, despite the varied and uncertain nature of their philosophical foundations. What was novel and interesting about their situation, and therefore most hotly debated, was the problem of finding a way of protecting those rights in a new political environment. Clearly, political progress can sometimes be made despite deep philosophical disagreement. But it is not clear that even the basic practical consensus on what rights are worth protecting is present today in Australia and other Western countries. Indeed, readers of this book will be immediately struck by the decline since the 18th century in the quality of philosophical thought applied to public policy. Today's philosophers rarely venture outside of their ivory towers, and today's politicians are ill-equipped to understand them when they do. Modern-day Jeffersons and Madisons, sadly, are in short supply.

The reader will also be struck by many differences between the Australian and American experiences. A Bill of Rights for Australia, whatever form it may take, would have to do more than copy some available model; it would have to be anchored in Australian traditions in order to win acceptance. The error made by the conservatives is to assume that tradition alone will do the work for us. A culture, whether it involves respect for rights or something quite different, seems to lie somewhere between natural organism and human artefact. To get the culture that we want, we have to be prepared to take deliberate steps, although we should be aware that the result may turn out to be not quite what we expected.

The 'culture' of rights, from its enigmatic beginnings in the 18th century, is now a worldwide phenomenon. America's lessons, such as they are, are our lessons as well. It is only natural that, in times of constitutional contention such as the present, people will continue to look to the American experience of judicial review, in the hope of discovering how best to protect and preserve that culture for themselves. This book would be a good place to start.

References

Mapp, W. (1994), 'New Zealand's Bill of Rights: A Provisional Assessment', *Agenda* 1(1): 81-9.

Moens, G. & J. Trone (1994), 'Is There an Implied Constitutional Right of Freedom of Communication?', *Agenda* 1(1): 71-9.

Charles Richardson is a moral and political philosopher currently working as an adviser to the Victorian government.

Fatal Legacy

*Myron Magnet, **The Dream and the Nightmare: the Sixties' Legacy to the Underclass**, William Morrow, New York, 1993*

*Reviewed by **Roger Sandall***

Ten years after Charles Murray's *Losing Ground*, a lot more ground has been lost. And eight years after Lawrence Mead's *Beyond Entitlement* much of that ground has been occupied by people whose defiance of civic obligation goes well beyond anything Mead foresaw. Whole districts of American cities are now living without law. According to Myron Magnet, after a stray bullet had killed an innocent nine-year-old girl in Brooklyn a neighbour lamented: 'Our lives have been reduced to the lowest levels of human existence' (p.172). It is this barbarising of American urban life, and the steady destruction of civic culture that has followed each well-intended subversion of public order (much of it undertaken at the behest of the Supreme Court), which is the 'nightmare' Magnet's book describes.

How could the American Dream end like this? The 1964 Civil Rights Act was inspired by a noble vision of racial equality. Yet the quota-driven affirmative action programs that followed it have sharply increased ill-feeling on both sides. In the words of the black writer Shelby Steele, instead of making all men one, quotas 'make blacks something of a separate species for whom normal standards and values do not apply'. When tens of thousands of psychiatric patients were released into the streets this was hailed as a liberation equal to the fall of the Bastille. It was not foreseen that when public shelters were provided for these and other 'homeless' they would turn into 'huge, ravenously expensive, permanent bureaucracies with specious "entitlements" that continually expand the clientele and sink clients into permanent dependency' (p.113).

And then there's the Teenage Mother Syndrome now being addressed by President Clinton himself. Aid to Families with Dependent Children was meant to