

BOOK REVIEWS

PSYCHOANALYSIS, PSYCHIATRY AND LAW. BY JAY KATZ, JOSEPH GOLDSTEIN AND ALAN M. DERSHOWITZ. New York: The Free Press, 1967. Pp. 821. \$15.00.

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In this the third of three magnificent books produced by current law and behavioral science collaboration at the Yale Law School, one is treated to a vast and panoramic view of the theories of psychiatry and psychoanalysis, and their relationship to the law.¹ The materials reflect the development of dynamic theories about human behavior, and are presented in the casebook format familiar to all American law teachers.

Reading this book stirred several strong *deja vu* reactions. First, I felt I was reviewing virtually the whole of my professional training as a psychoanalyst. I do not recall that we covered substantive materials on human behavior any more thoroughly in the course work for qualification in that professional specialty. Second, it reactivated all of the questions of how best to present psychological materials to law students which have arisen during my 13 years as a "law teacher." It should not be necessary to add at this point that I have strong convictions, which will be reflected in this review, as to how such teaching should be done. The psychoanalytic truism that deeply held views, whether conscious or not, are reflected in a person's actions and thoughts has been given added authority in this book by citation to Mr. Justice Cardozo. (P. 28.) I concede this point at the outset, since I could not, at any rate, resist it. (Here I follow the dictum of that great strategist, Baron von Clausewitz, who advised never to fight a battle you have to lose if you can avoid it.)

As one without a legal education, who encountered its techniques of teaching after partaking of the more "spoon fed" approach of medical school, I am well aware of and deeply impressed by the success of the law school case method in honing intellectual skills. Nor has my respect for this method been diminished by my past year's observation of British legal education methods. Lawyers pride themselves (and rightly so) on being able to read and analyze anything. The

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¹ J. GOLDSTEIN & J. KATZ, *THE FAMILY AND THE LAW* (1965); J. GOLDSTEIN, R. DONNELLY & R. SCHWARTZ, *CRIMINAL LAW* (1962).

leaders and tradition-setters among American law teachers are deeply convinced that if they present the *relevant* materials on a particular subject, and then press on through a Socratic dialogue, at the end of the process their students not only will be aware of the substantive issues, but also will possess the ability to do tough, analytical thinking. Generally, this is true. However, definitional imprecision, as well as the fact that psychiatric theories of behavior and treatment are in a state of rapid evolution, makes it difficult to comprehend and interpret any given piece of literature in this field, unless its antecedents are known and understood. Many law teachers appear to overlook this fact when they approach the teaching of materials in the psychological sciences, and the results, at least, are abortive. It is analogous to the situation in some fields of law where a particular rule of law or a particular procedural device is quite incomprehensible without knowledge of its historical background. I believe some of the materials in this book well demonstrate this point. For this reason, I am of the opinion that there are serious drawbacks to the use of a casebook presentation in the teaching of behavioral science materials. This point will be further advanced below.

This book, as well as its two predecessors, is *very* long (821 large pages in this case), and I imagine many uninitiated readers will gasp (if they do not yawn) as they approach it. For example, the opening chapter, which sets forth the basic theory of personality has 357 pages. Despite its length, I contend that it does not permit a reader to draw valid conclusions about the relative merits of different personality theories; nor does it permit understanding of the historical development of those ideas, even within a more or less homogeneous group of psychoanalysts, notwithstanding the authors' excellent selections. At the same time, I doubt that most law teachers would suggest that there should be more material, even though what is at hand is inadequate for purposes of critical analysis. In short, one who would use a book such as this, must, in the end, trust that the authors have made appropriate selections which *illustrate* some of the problems of the theorists. It would be illusory (or delusional) to imagine that study of this volume could result in satisfactory critical analysis of the relative merits of the theory described, even though an enormous amount would have been learned by one who studied the book thoroughly.

This brings me to my next point. It is surely unnecessary to say that the reviewer approached this book as a highly sophisticated reader. Nearly all of the psychiatric and psychoanalytic material was at least familiar, if not well known, to me. Yet, I must confess that I often found myself working very hard to understand some of the inclusions. For example, if the Reich paper on "Character Formation" (p. 173) is to be understood by students, I would argue that they need much more background than they have at the time this article is encountered in the book. Even with the reviewer's competence, it

was a difficult paper to comprehend within its own system of value presumptions. The Arlow paper on "Structural Theory of the Personality" (p. 250) similarly would prove very tough going. There is certainly no objection to making students work hard, but there are easier ways to achieve the same result, and curriculum demands provide ample grounds for conserving time.

As I read the first sections of the book especially, I attempted to figure out why each paper was chosen for inclusion. In traditional law casebooks, cases are chosen and placed side by side to illustrate either the growth of a particular social policy, or to demonstrate narrow distinctions, if not contradictions, in principles of law. Even though I have some familiarity with the viewpoints of these authors, I was never exactly sure why they included certain of the papers. Sometimes I felt papers which revealed some travesty of logic were included to permit students to ferret out that fact. However, as I read further on in the book, I realized that to reach such a conclusion one would have to know what in fact the authors' theoretical views were in each instance. That would be difficult or impossible to ascertain from merely reading the materials. Yet, without such foreknowledge, the average teacher probably would have a difficult time deciding exactly where the book's strategy was taking him. This would raise handicaps and, perhaps, hazards in the use of the volume. Of course, this problem could be remedied easily through a "Teachers' Handbook." Possibly this need indicates a poor choice in some of the materials; or it may merely indicate a further job to be done by the authors.

In regard to this last point, there is very little *direct* expression of viewpoint by the authors of the volume. Although some questions are posed at the beginning of each chapter and part, these are sparse, even by law casebook standards. They do include several of their own papers at relevant points in the book. These are of such high caliber and penetrating insight that I kept wishing they had included more of their own opinions and "hidden agenda" as they developed the materials. It would have added immeasurably to the value of the book and many of its deficiencies would have been remedied thereby.

So far as providing a vehicle from which law students can learn a coherent theory about human behavior (and this surely should be one of the goals of any course in this area), I believe this book will tend to confuse, unless the class has the good fortune to find itself in the hands of teachers such as the authors. I have no doubt that *their* students come out of the course with a clear concept of the strengths and weaknesses of contemporary psychiatric and psychoanalytic theories. I only wish that some of the things which I am sure the authors say and do in class had been presented in the text of the book.

On the other hand, I think this book might be put to excellent use in the education of psychiatrists and psychoanalysts. I can say

from my own experience that I encountered only two teachers out of several dozen who forced a class of student psychoanalysts into the kind of intellectual interchange routinely used by good law professors and much needed by analytic teachers. Teaching with materials like these could do much to diminish the inclination to permit dogmatism to pass as science. A Socratic experience is urgently needed in most analytic training institutes and this book would facilitate the use of such an approach in that setting.

To return to questions of teaching technique, upon which my opinion differs widely from the authors', some might wish to attribute my views to "prejudice," "unanalyzed aggression," "narcissism" or various other labeled attitudes which carry much covert criticism when made by the psychologically sophisticated. I, of course, assign my views to the well-reasoned results of my experience, critically reviewed and analyzed. The reader will recognize them (I have no doubt) as expert opinion evidence. Having made these observations, I acknowledge that I read and reacted to the footnote on page three which opened, "* * * *Contra*, Watson . . .," and I have much more to say about the substance of this point!

Perhaps the point of principle divergence between the authors and myself relates to their comments in the foreword about "therapy" (their quotation marks) and "invasions of privacy" (here the quotation marks are mine). They also refer to the interpretation of "underlying dynamics" and designate these matters as what they "have come to call 'curbstone psychoanalysis'." How can I avoid picking up the gauntlet? These are the very issues about which much of my discussion of education for "professionalism" has focused in recent years.² Let me deal with these concepts one by one.

Traditional case methods for teaching law, if examined in relation to the process by which they are taught, thoroughly invade the "privacy" of the individual. One only need listen to a group of law professors discussing their first year classes, to see how relentlessly (or even ruthlessly) they assault and tear down their harassed students' preconceptions. If I may venture a layman's analysis of the concept of privacy, always a dangerous thing to do among lawyers, it involves an implied right which, under certain circumstances, is reinforced by contractual obligations, as in the confidential relationships between lawyer and client or doctor and patient. To avoid illegality in relation to privacy, "invasions" may be made only with permission of the one in possession of the right. This makes good sense and closely fits one's sense of social, legal and psychological propriety. (Caveat:

²Watson, *On the Low Status of the Criminal Bar: Psychological Contributions of the Law School*, 43 TEXAS L. REV. 289 (1965); Watson, *Reflections on the Teaching of Criminal Law*, 37 U. DET. L.J. 701 (1960); Watson, *Some Psychological Aspects of Teaching Professional Responsibility*, 16 J. LEGAL ED. 1 (1963); Watson, *Teaching Mental Health Concepts in the Law School*, 33 AM. J. ORTHOPSYCHIATRY 115 (1963).

What *are* the limits of a student's privacy?)

I would argue that most students coming into first year classes in a good law school have only the vaguest notion of what is about to happen to them. They arrive with the expectation of learning "the law"—which many good law teachers are loath to recognize as an appropriate aim for their teaching! The students also hope to learn how to think and act like lawyers, and law faculties generally will agree passionately with the first of these latter two goals, while they avoid the second like the plague. In short, students have highly inaccurate images of what their legal education will encompass; the potential recipient does not share goals and images with the purveyor. There is no "meeting of the minds." Nor does the conventional law teacher do anything to clarify what will be forthcoming. Indeed, if I may be permitted a word of art, many of these teachers take an almost sadistic pleasure in the way they "shake up" their anxious students, who only slowly come to believe the truth of what is happening to them. The students' comprehension and acceptance of their legal education is worked out only through the passage of time, coupled with their slowly increasing perception of what their contract for legal learning entails. We should note in passing that many students do not "buy" this and, therefore "drop out," "change" their career goals, become "ill," find they can't "afford" law school or just plain "fail." Many of these resolutions (as the quotes imply) are covert, unconscious rejections of the unstated contractual demand by the educational system to give up "privacy."

It is my impression that, for a great many students, the Socratic method of teaching law quite routinely introduces some of the personality stresses which psychotherapists, in their work, seek to resolve. This may produce undesirable effects on the character which can permanently inhibit a lawyer's professional effectiveness. Because of these observations and my opinions about them, I have quite purposefully called some of my teaching methods "therapeutic." When I approach students with the intention of teaching them about their involvement in the emotional processes of the classroom, I am merely making explicit what is already present in all its psychological complexity. The "un-noticed" sensations are made cognizable and replace blind and un-instructive reactions. The "contractual" prerogative to carry out this process of privacy invasion is progressively developed with the class members in its full emotional color and with open acknowledgment of their feelings, concerns and rights in the matter. I regard these ubiquitous emotional undercurrents to be so important to student effectiveness, that all teachers should be aware of their presence and learn how to de-sensitize them. Such awareness and skill would go far toward minimizing the attrition and anxieties of first year law classes. Of course, I can hear the immediate outcry that "such a method may work in your hands, doctor, but it is dan-

gerous to suggest as a general approach; too many people will misuse it." My answer is that such a method cannot possibly have more traumatic results than present procedures produce. There has been considerable confirmation of my opinion in this matter, following its presentation in previous papers.

The authors of this book also assert that my approach to teaching "goes counter to all that psychoanalytic theory intends to convey." Perhaps it does, but I doubt it. At any rate, some of the new information, vigorously developing from collateral lines of theory, supports the utilization of a group's process as valid data for exploring human emotions and their general relationship to behavior, professional and otherwise. Most intelligent students reading the excellent selections in this book still will wonder if they are true (such of them as are!). They will want to know how one goes about proving whether or not the ideas should be taken seriously by lawyers and judges. Personally, I doubt that this kind of challenge can be met in the classroom by purely intellectual means. Few law students have the scientific background to test validity, to understand experimental methods or to pursue other techniques needed to "know" whether or not they can accept these psychological propositions as fact. They are sufficiently sophisticated to know that logic alone is not enough to prove the point. It is just for this reason that classroom procedures of a "therapeutic" nature can be helpful in establishing "proofs." For example, the existence of an ubiquitous unconscious and preconscious may easily be demonstrated without wounding feelings, invading privacy or dealing with anything but the obvious (obvious, that is, to all except the individual involved in the specific classroom transaction). Naturally, this involves some "teaching" skill, but luckily such skill is a mere extension of the Socratic method, applied to a slightly different type of data. Needless to say, I do not object to full employment of the critical faculties of the intellect for exploring concepts of the psychological sciences as they relate to law.

One can also conceptualize this teaching technique as a method for improving the communication skills of law students and, ultimately, of lawyers. It involves making explicit some of the "latent" messages which flow through the group, messages to which it will react without full awareness. Since communication awareness and skill is a fundamental need and obligation of most lawyers, I do not see how law teachers legitimately can avoid dealing with this kind of data, and dealing with it effectively. Much of the insensitivity which lawyers often manifest relates to their lack of capacity for recognizing the covert messages which pass between themselves and people with whom they are dealing. If they do not learn to handle this kind of data, they will not be able to improve their professional behavior, no matter how much intellectual knowledge about personality they possess. Perhaps the authors would set such considerations aside as not relating

to their focus of interest, but I do not believe they can do so and achieve in full measure the goals they seek. If I were to use this book in a class, I would most certainly utilize the reactions I know it would stir up in my students. I would do so in order to help them learn how their own reactions mirror, as well as distort, the facts set forth in the book. I would feel they were getting only a part, and the smaller part, of the value of the materials, were this not done. Also, as I have noted elsewhere, to fail to deal with these reactions is to give a "silent" message that emotions are to be ignored and denied. Surely this is not the lesson we seek to teach. I should add in passing that each of the previous volumes by these authors has been of enormous use for teaching in the manner I have just described.

In the Preface, the authors state that the book has been developed in sections which may be used separately if desired. This follows the format of the earlier two volumes and is a useful system of organization, notwithstanding the fact that so long as it is impossible to obtain the parts separately, one would hesitate to assign the book for use in a two-credit seminar, since it is so expensive. (This volume sells for \$15.00.) The authors also state that each section will stand alone and adequately cover the relevant materials. I would now like to examine that proposition, as well as look at the content of the various parts of the book.

The tables of contents of this book deserve special comment. I have felt in the past that, in a book involving interdisciplinary materials, one of the measures of its usefulness lies in its table of contents and index. In this book the authors include two tables; the "Condensed Table of Contents" and the "Analytical Table of Contents." The former is reproduced before each chapter of the book, so the reader need not thumb back to the beginning to see where he is headed. In a book as complex as this one, it provides a very useful aid. The condensed table sets out the bare bones of the book's organization; in a sense, it poses the questions which are to be dealt with in each section. By contrast, the analytical table lists, by author and title, all of the papers and excerpts which are included. While an uninitiated reader hardly will know what he is getting into when he glances through this formidable list of titles (there are 196 articles excerpted, sometimes in their lengthy entirety), after he has read the book he will have an invaluable encyclopaedia of personality theory, with many of its relevant legal applications. This will surely be of great use to practitioners who have occasion to explore subjects involving law and psychology.

I made several experimental excursions into the index, looking for topics involving legal applications of psychology which one might like to look up. Generally, I found a fairly extensive assortment of items from which to draw. If their bibliographies were used as leads to the library, research on the topic would be well on the way. I did

find several anticipated subjects missing, such as "credibility," "competence to marry," and "competence to contract." But to criticize such omissions is surely "nit-picking." The index is of exceptionally high quality and usefulness, which is unusual in this type of book. Also, there is material present in the book which could be extrapolated from and utilized to study even those questions not covered. Such a task, however, is the kind which stumps the neophyte.

Chapter One is entitled, "Psychoanalysis and the Law—Theories of Man." In this Chapter, the authors present materials which will delineate ". . . a tentative image of the 'lawmaking,' 'law abiding,' and 'law breaking' man; and to explore in detail the psychoanalytic theory of man." After Part One of Chapter One has established the "need" for a psychological image of man by use of many interesting legal and jurisprudential quotations, Part Two proceeds to prove that lawyers and psychoanalysts share a certain image about the nature of man: that he is a being who needs, and learns from his environment, internal controls over his impulses which operate at various levels of consciousness. This presentation begins with a very long excerpt from one of Freud's classic case studies,³ and with some short statements about general psychoanalytic theory. Then in Part Three, the concept of the unconscious is laid out and illustrated with sample legal cases and propositions. These are well selected to demonstrate that psychoanalytic principles apply to all fields of law, and not just to the criminal law.

Reading these three sections demonstrates to a sophisticated reader that many of the concepts which are the foundation-stones of psychoanalytic theory have been discerned by philosophers and others well before the time of Freud. One can assume that after studying these sections, a beginning student may have gained some awareness that psychoanalytic theory is not going to lead him off into esoteric areas which are of no relevance to his law career. However, there are enough tough questions of theory raised, in sufficiently technical analytic language, that a teacher using these materials will have to have considerable skill to keep his charges from riding off wildly in all directions at once like Don Quixote.

It is Part Four of this First Chapter which raises the most serious problems for me. It is this part which I believe will give pause to all but the most hearty, and especially to those who are not favored with a Katz and a Goldstein for teachers. Though, beyond doubt, all of the inclusions are important, either as historical pieces or as keystones of contemporary theory, these selections will place greater intellectual

³ These few summary remarks about the content of the book provide me with the opportunity of saying that, as I re-read the passages from Freud in this volume I again thrilled at the penetrating insights and speculations which he made. At the same time, some of the passages which I formerly thought I understood, now seemed incomprehensible to me.

demands upon students than they generally can meet. The law students I have been teaching are the intellectual equal of most, but I do not believe that they could master these materials, or even grasp most of them, in the period of time they would be devoting to a seminar or course on these subjects. Some of the papers, to be fully understood, would have to stand alone as the subject of a full seminar. For example, the Arlow and Brenner paper on "Psychoanalytic Concepts and the Structural Theory" would, I think, slow a law class to a mere crawl. To include it as merely one piece in a whole fabric of theory appears to be nearly impossible to me.

There also appear to be many papers which go over approximately the same theoretical ground. While they do present slightly or strongly different views of the same topic, to be seen in proper perspective, they need to be read in a wider context than most students can muster. Not only will this kind of presentation tend to mislead many, if not most, students, but also in terms of the economics of class time, I should think the repetitions are not logistically appropriate. Finally, I think it would be a rare law student who could carry out the integrative process needed to put the materials of this section together into a theory of human behavior which he could utilize in his legal thinking and activity.

It appears that each section's tactical approach is to present an overall discussion of theory, and then to come back to it several times in the context of different areas of legal principle. As different legal issues are raised, new aspects of theory are added which "re-do" the theory, often in very different words. For example, Section G, "The Total Personality," goes over a kind of summation of Sections B, C and D. Since most of the authors quoted in Section G are more or less recent, they tend to use a vocabulary different from the more "classical" language employed by the authors of the earlier sections. G Section's theory is then followed by a superb set of legal cases which invite application of the theory to them. To repeat my caveat, does the re-elaboration in new words help or hinder the students' attempts to utilize the theories? My experience leads me to believe they would be confused by such a confrontation, although, as noted earlier, such experiences would be superb for psychoanalytic students. All in all, I have to conclude that this chapter of the book presents challenges which are just too difficult to enable law students to achieve the intellectual goals sought.

Chapter Two is much more to my liking. In it we encounter the systematic exploration and presentation of some of the oldest problems which exist between lawyers and psychiatrists. These materials demonstrate clearly that, for the most part, the members of these two professions only rarely speak the same language when they communicate with each other in or out of court. Reading the cases in this chapter would certainly not lead one to conclude that psychiatry has much that is

useful to offer the law. This observation points to the main criticism I would make of the chapter. Unless the student has totally mastered the content of Chapter One and is prepared to extrapolate and apply it skillfully, he cannot learn how communications between law and psychiatry *might* be made effectively. I do not think it could be regarded as excessive spoon-feeding if there were several inclusions of "good" psychiatric testimony in the book, so that the reader could see how it should be done. Neither reflection upon what I read, nor a quick post-reading thumb-through of the book, provided me with a single instance of what I would call effective psychiatric testimony drawn from contemporary cases. Paradoxically, there are some examples of at least proper role fulfillment by expert witnesses in the *early* testimony of the 1923 *Savarese Case*. (P. 634.) As the record of that case brings us closer to the present, the doctors presented more and more jargonistic conclusions, and less and less of the observations from which they deduced their opinion testimony. Some of the cases referred to *did* in fact have testimony of a very different order.⁴

The last portion of Chapter Two also makes use of some excellent articles from the literature of sociology. They tend, on the whole, to reflect favorably on psychoanalytic viewpoints and add a parameter of observation which is very useful. I often found myself wishing that Chapter One also had utilized some non-analytic materials which challenge as well as confirm some of the psychoanalytic premises about human behavior. Some examples of this could be drawn from the "new biology" of *ethology*. Occasionally, one wondered about omissions in the material, such as the recent studies on the outcome of those committed to mental hospitals as "incompetent to stand trial." Such inclusions could have lent further sweep and perspective and could well have been traded for some of the lengthy repetitions of psychoanalytic theory.

The reviewer is of the opinion that the length of his review is well justified by the importance of this book. Katz and his co-authors have provided a most valuable reference for all who are interested in the relationships between law and the psychological sciences. Though I doubt it will be much used as a textbook in undergraduate law courses or seminars, it well may be so used elsewhere. It is a brilliant assembly of relevant psychoanalytic, psychiatric and legal literature which can be used by experts in all these fields. I only hope that the authors, in the next edition of their book, will break with tradition and favor us with more of their own views and opinions on these subjects.

⁴ See, e.g., *People v. Gorshen*, 51 Cal. 2d 716, 336 P.2d 492 (1959).

THE PRINCIPLES OF POLITICS. By J. R. LUCAS. Oxford:
The Clarendon Press, 1966. Pp. xiv, 380. 50s.

Bertram Morris †

J. R. Lucas' *The Principles of Politics* is a major event in political theory. Broadly conceived, it stands as a challenge to students of political theory and jurisprudence alike. It marks a continuation of political and legal thought from Cicero, Locke and Mill to present-day constitutional democracy, which is vulnerable, on the one side, to arbitrary, coercive power and, on the other, to the chaos that results from withholding power from responsible and effective agents of civil life. As the title indicates, Lucas is concerned with setting forth the *principles* of politics, and he does so with clarity and forthrightness reminiscent of the greatest English writer on the subject—Thomas Hobbes. His style is crisp ("We forbid murder not so much because it is wrong for the killer to kill as because it is bad for the killed to be dead.") (p. 344); his humor is engaging ("Similarly in a beauty competition we may require the contenders to wear only bathing dresses, in order that the judges may reach their conclusion in the light of facial charms only, and not any adventitious elegancies of dress.") (p. 248); his commitments are admirable ("Not to be free is to be frustrated, impotent, futile. To be free, is to be able to shape the future, to be able to translate one's ideals into reality, to actualise one's potentialities as a person. Not to be free is not to be responsible, not to be able to be responsive, not to be human. Freedom is a good, if anything is.") (p. 144); and, finally, I would add that the argument is uncommonly clear, packed and cogent, and his illustrations especially felicitous in drawing parallels between British and American legal institutions and practices.

A volume like this is much too dense for its inner workings to be penetrated in a review, even a long one. Yet, the major theme is apparent from the outset and can be simply stated. As for its development, however, I will content myself with the following: (1) to restate briefly Lucas' assumptions, (2) to define the state in his terms, (3) to discuss more fully how he thinks the state may be shaped to best serve human ends and (4) to observe the consequences he draws for law and morality. Then I shall offer some critical suggestions.

(1) Simply stated, Lucas' theme is dictated by his search for an answer to the question: How can men settle their disputes without resorting to violence? The answer is made difficult because the terms that need to be satisfied are bi-polar. On the one hand, they must satisfy a person's ambitions and, on the other, the requirements for civil life. The ambitions consist of drives and aspirations that the author never does, and certainly could not, spell out. And no less difficult is his task of setting forth the requirements of civil life that

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can express the ever-changing interests of the community. Hence, the need for the institutions to change and still provide stability—in the law, in policy decisions, as well as in matters of finance, education, technological innovation, domestic relations, *ad indefinitum*. Aware of the complexity of the problem, Lucas enunciates the indispensable assumptions by which constitutional democracy can be maintained. Hence, he turns the spotlight on the fundamentals of human life that dictate the necessity for, and the limitations of, political organization.

Political organization would not be possible unless, first, there is some interaction among human beings and, second, some shared values. These assumptions certainly seem to be eminently reasonable if there is to be any communal coexistence. Surely people must have some physical confrontation and some common beliefs, attitudes and aims, if they are to hold together as a society. In addition, Lucas acknowledges three conditions of imperfection without which society is not viable—incomplete unselfishness, fallible judgment and imperfect information. With this arsenal of assumptions, he believes he can master the principles of constitutional democracy and also show how the denial of one or more of these assumptions leads to a gamut of theories, from the various forms of anarchy to a variety of idealistic and realistic theories of statism, heavenly and not so heavenly. The reader may well find it profitable to review the gamut of theories with Lucas as his tutor.

(2) The state then is a community which not only has a common method for settling disputes, but also one in which decisions are made effective by coercion. In fact, the state has a monopoly on coercion, or else it is not really a state. It has the power to imprison and to execute and, therefore, to defeat the freedom of its citizens. Voluntary associations may enforce sanctions against their members, but they may not employ the ultimate sanction of the deprivation of freedom. This distinction the author holds to be crucial. Because of this monopoly of coercion, the state may exercise tyrannical power, and sovereignty can become settled in a single body, such as Hobbes insisted upon in his *Leviathan*. The major argument of Lucas' treatise shows how *Leviathan* can be tamed. This is the fascinating part of the book, progressively penetrating the layers of the body politic to display its underlying anatomy.

(3) Constitutionalism is beset on the one side by the minimum state and on the other by the totalitarian, neither of which can satisfy the demands of human nature as characterized by the five assumptions set forth above. No wonder then that the argument is complicated and dialectical: it attempts constantly to provide for the liberation of the human spirit and for the promotion of public policy which will safeguard the cherished values of the life of the community. Lucas provides for these in a great variety of ways. He attaches single importance to the "process of law," which is "an instruction to those in power not to use coercion except with legal authorization." (P. 83.)

Habeas corpus and the *Mallory* rule, limiting the time for which a prisoner may be held before being brought before a magistrate, serve as devices to this end. Neither is foolproof; indeed, there is no device that is foolproof. Yet, in the mind of the author, the best constitutional control is that of separation of powers.

Separation is, in its ideal formulation, the "rule of law" in which: (i) The Judiciary must apply existing law, not make up new laws. (ii) The Executive must act only on the instructions of the Judiciary in applying coercion. (iii) The Legislature must enact only general laws, not Acts of Attainder, nor retrospective laws." (P. 113.) These prescriptions are by no means intended as absolutes. Judicial interpretation is inevitable, and judicial innovation (in small doses) is welcome, even if judicial supremacy is not quite tolerable. The view that the Supreme Court has become "the expositor of Natural Law" or is "the mouthpiece of the moral law" (p. 39) deserves respect, but "it does not follow that the Supreme Court is the Sovereign Body of the United States. . . . A Roman emperor could make his horse a consul, but the Supreme Court is unlikely ever to do more than adjudicate between two candidates, both human, both moderately well qualified, who have at least a faceable claim to the Presidency." (P. 40.) Lucas observes that although the Court's powers of interpretation are wide, they are not infinitely wide.

Appropriate arguments are also marshalled against usurpation of power by the executive and legislative branches. Executives necessarily do make law, but in a limited way. And Parliament may serve as a supreme decision-making authority. What then may be done in the face of abuse of authority? "[A]ll we can do is to ensure that if it is abused, it will be abused by the supreme authority, in the full glare of publicity, and subject to powerful and probing criticism. Constitutional Limitation is impossible: we must therefore make Constitutional Criticism as effective as possible." (P. 227.) The appeal must be made to justice, respect and humanity. Failing this, men can, in the extreme, rely upon the right of rebellion and the duty of disobedience—but only after all else has failed.

(4) The consequence is that law and morality are intimately intertwined. Lucas rejects Austinian positivism and Hart's separation of law and morality. The legal system has built into it public morality from which it can never be purged. By the same token, "[t]ough-minded lawyers take too limited a view of the law." Solicitors may advise a bad man to his own bent, "[b]ut the latitude given to bad men, and to all of us in our bad moments, is only feasible and, more, only intelligible, against the background assumption that we are not all of us altogether bad all the time." And he adds decisively: "The law would wear a very different aspect if juries were composed of Twelve Bad Men and False." (P. 314.)

To be sure law must have its identity and its inner power, but that power, except in "a pathological system," (p. 327) can never assert itself apart from a morality built into its system.

There are reasons why the tough-minded lawyer, the cynic or the legal positivist is in a position to support the law only as Leviathan untamed. Such persons' attachment can be only to a system of unlimited sovereignty. They possess no tools for criticism of the alleged sovereignty of law. On the contrary, our author insists, they can only accept the law under the throne. Thus, their freedom is at the mercy of the sovereign and is not a moral right to which they can lay claim. Although a constable may be accountable to his superior officer, the supreme officer is not accountable, even in the vaguest sense, to God or to the community in which values are supposed to reside.

Lucas concedes that a formalistic theory of law may serve under normal conditions, but that it fails by extrapolating too rigidly from normal to abnormal conditions. An appeal to natural law which "enshrines the shared values on which the very existence of the community depends" is thus required. He concludes that natural law "represents the principle of Constitutionalism in its moral aspect. It provides us with a ground for Constitutional Criticism, and affords us, correspondingly, with a reason for political obedience." (P. 388.)

This review unfortunately cannot convey to the reader the well-knit analyses and arguments by which Lucas supports his conclusions. Nor can it survey the many topics which, however old, are freshly treated—freedom of speech, toleration, civil disobedience and many more. I can only urge the reader to pursue them for himself and recommend that he do so because this one found them eminently rewarding.

Although it may seem ungenerous to ask more from the author than the fare he has provided, I think it only right to confront him with what I regard as, first, a serious blemish and, second, a supplementary interpretation of his principles related to the blemish.

First, for the blemish. In choosing his models, Lucas has studiously avoided the thinkers who have most greatly challenged twentieth-century thought and attitudes—especially Darwin, Freud and Marx. I would not cavil with him on the necessity of including them except that, in each case, they have altered the dialogue in a way relevant to, but inadequately coped with by, our author's intent. Failing to acknowledge the impact of the Darwinian point of view, Lucas fails to cope with the radical disjunctions in contemporary society, and consequently with the grossly altered circumstances of life to which they have given rise. He relies, too much I think, on the allegedly infinite complexity of human affairs, and too little on the abrupt intrusions, the mutations, that upset the regimentation of social affairs. Infinite complexities cannot be adequately taken into account in human decisions; but new weapons, new institutions, new discoveries theoretically can and must—even if haltingly and through trial and error, and, indeed, even if error predominates. Thus, the discontinuities of life, the episodic things, need to be faced more boldly. (On this score, it is significant that Lucas fails to give attention to administra-

tive law which, although it does not fit the traditional separation of powers, does come to terms with the less formal avenues for settling disputes.)

With regard to Freud, Lucas' discussion may well still stand, for if there are no rational decisions possible, neither constitutionalism nor democracy is possible either. Yet Lucas could improve his analysis by acknowledging the distractions in contemporary society—not just as “noise,” but as noises that are neither true nor false nor interpretative, but are manipulative. Classical liberalism has failed to take this into account. So does Lucas.

As for Marx, Lucas' discussion is marred by a failure to reckon with the divisions of society, and by a complacency which finds a moral rectitude in British and American society. In the face of current unrests, one cannot convincingly assume that divisions do not exist. It well may be that they do not correspond to the classical Marxist treatment of economic causes. Still, divisive economic factors exist, however much more there is that must also be reckoned with. What the implications of these unrests are for constitutionalism are not very clear. But certainly, they are not of the kind that are going to be cured by securing more estimable judges in the courts of law or by the “happy history” by which we have been able “to hold Leviathan by the ears.” (P. 341.)

Finally, I would say a concluding word about supplementing the interpretation that Lucas gives of constitutionalism. A reading of his *Principles* plainly shows that, of the various values, he places freedom first. In this he well may be justified. But I cannot believe that he, therefore, is justified in belittling the virtues of equality and fraternity. He may be correct in stating that thinking about equality is muddled. Even though he qualifies his charges that the notion of equality is “dangerous” (p. 243) and, that taken out of context, it is “viciously vague,” (p. 249) he seems to regard it basically in terms of a race, a competition, in which the end is inequality. Were he to change his paradigm case to that of the “races of man,” despite such proposals as “head starts,” he might well discover more disquieting reasons for elevating the importance of equality as a near contender for, or even as a winner of, the prize in a contest for first place between it and freedom.

Moreover, were equality placed in the context of fraternity and conceived of not in terms of the nation-state and national sovereignty, but in the context of the family of nations, Lucas would surely be more hospitable to the experiments in democracy in other than English-speaking nations. For an understanding of the enlarged community, however, one could well profit by a clear apprehension of it in terms of the principles Lucas has so admirably expounded. But in tracing the implications, one may be surprised to discover that political philosophy has shifted subtly from the tradition of Locke and Mill to that of the Levellers and Bentham.

MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787. BY CATHERINE DRINKER BOWEN. Boston: Little, Brown and Company, 1966. Pp. xx, 346. \$7.50.

Edward Dumbauld †

The magnificent achievement wrought by the fifty-five Founding Fathers who met in 1787 at the Constitutional Convention in Philadelphia is a continuing source of just pride to all Americans, and particularly to Pennsylvanians. Hence it is fitting, and not surprising, that the saga of their labors has been narrated many times.

The *sedes materiae*, of course, is Max Farrand's three thick volumes published in 1911, supplemented by a slender fourth in 1937.¹ Here, in chronological order, one finds not only the formal Journal of the convention (published by Secretary of State John Quincy Adams in 1819) as well as the notes meticulously kept by James Madison² (which constitute the principal source of our knowledge of the debates within Independence Hall), but also material gleaned from the notes of Robert Yates of New York,³ George Mason of Virginia,⁴ Rufus

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¹ FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (4 vols. 1911-1937). A reprint, available in paperback, was published in 1966. This reviewer must confess that he had never read Farrand straight through until ten years ago, when his publisher suggested that he write a treatise on the Constitution. He must also confess that, having begun to peruse the fat tomes, he found them fascinating, and required no further urging to proceed with the preparation of THE CONSTITUTION OF THE UNITED STATES (1964).

² Madison's notes were first published in 1841 by Henry D. Gilpin, in his edition of Madison's writings. They were given wider circulation when added in 1845 to the third edition of JONATHAN ELLIOT, DEBATES as Volume V (becoming Volume I in subsequent editions). Gilpin used a duplicate manuscript purchased by Congress from Madison's widow. Extracts from Elliot's text, topically arranged, are found in SAUL K. PADOVER, TO SECURE THESE BLESSINGS (1962). Madison's notes were edited from his original manuscript by Andrew Hussey Allen, appearing in 1900 in Volume III of the DOCUMENTARY HISTORY OF THE CONSTITUTION, issued by the Department of State. Two new scholarly editions were published by Gaillard Hunt. The first is found in Volumes III (1902) and IV (1903) of his THE WRITINGS OF JAMES MADISON; the second in THE DEBATES IN THE FEDERAL CONVENTION OF 1787 (1920), which can conveniently be consulted as reprinted in CHARLES C. TANSILL, DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H. DOC. NO. 398, 69th Cong., 1st Sess. 109-745 (1927). Tansill's text is used in JANE BUTZNER, CONSTITUTIONAL CHAFF (1941), an account of proposals rejected by the convention. An unorthodox recent writer questions Madison's trustworthiness. See 1 WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION 7-8 (1953). An edition of Madison's notes with an introduction by Adrienne Koch recently has been issued by the University of Ohio Press.

³ The notes of Yates and a report made to the legislature of Maryland by Luther Martin were published in 1821 in SECRET PROCEEDINGS AND DEBATES OF THE CONVENTION AT PHILADELPHIA.

⁴ Printed in 1892 in KATE MASON ROWLAND, LIFE OF GEORGE MASON.

King of Massachusetts,⁵ James McHenry of Maryland,⁶ William Pierce of Georgia,⁷ William Patterson of New Jersey,⁸ Alexander Hamilton of New York⁹ and Charles Pinckney of South Carolina.¹⁰ Supplementing Farrand, there appeared in 1939 a small volume containing notes of John Lansing, Jr., another delegate from New York.¹¹

Among the writers who have told the story of the convention's work are George Bancroft,¹² Sydney G. Fisher,¹³ William M. Meigs,¹⁴ Francis N. Thorpe,¹⁵ Max Farrand,¹⁶ Charles Warren,¹⁷ Carl Van Doren,¹⁸ Irving Brant,¹⁹ the present reviewer,²⁰ Merrill Jensen,²¹ Broadus and Louise Mitchell,²² Clinton Rossiter²³ and now Catherine

⁵ First published in 1894 as an appendix to Volume I of *THE LIFE AND CORRESPONDENCE OF RUFUS KING* by Dr. Charles R. King, his grandson.

⁶ Published in 11 *AM. HIST. REV.*, No. 3, 595-624 (April 1906).

⁷ First published in *THE SAVANNAH GEORGIAN* in 1828; reprinted from the original manuscript in 3 *AM. HIST. REV.*, No. 2, 310-34 (Jan. 1898).

⁸ Published in 9 *AM. HIST. REV.*, No. 2, 310-40 (Jan. 1904).

⁹ Published in 10 *AM. HIST. REV.*, No. 1, 97-109 (Oct. 1904).

¹⁰ What seems to be an outline of the proposals laid before the convention by Pinckney on May 29, 1787, has been found among the James Wilson papers in the Historical Society of Pennsylvania. 8 *AM. HIST. REV.*, No. 3, 509-11 (April 1903). 9 *AM. HIST. REV.*, No. 4, 735-47 (July 1904). See also John Jameson, *Studies in the History of the Federal Convention of 1787*, 1 *ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION* 89-167 (1902). 4 *FARRAND*, *supra* note 1, at 14, states that certain papers of Charles Cotesworth Pinckney of South Carolina have been found, but are not available for editorial use. "Among them are drafts of documents presented to the Federal Convention, with annotations by Pinckney, together with some notes that he made during the proceedings." These may be among the Pinckney papers purchased in 1939 by the Library of Congress.

¹¹ *THE DELEGATE FROM NEW YORK* (J. R. Strayer ed. 1939).

¹² *HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES* (2 vols. 1882).

¹³ *THE EVOLUTION OF THE CONSTITUTION OF THE UNITED STATES* (1897). This book traces features of the Constitution to colonial experience and historical precedents rather than stressing the course of debates in the convention.

¹⁴ *THE GROWTH OF THE CONSTITUTION IN THE FEDERAL CONVENTION OF 1787* (1900).

¹⁵ 1 *THE CONSTITUTIONAL HISTORY OF THE UNITED STATES* 291-595 (1901).

¹⁶ *THE FRAMING OF THE CONSTITUTION* (1913). This concise summary by the distinguished editor of the *Records* is rather prosaic, in comparison with Charles Warren's chronological account, which not only treats the convention's proceedings day by day, but is enriched by colorful material from newspapers and correspondence describing contemporaneous events outside the convention hall.

¹⁷ *THE MAKING OF THE CONSTITUTION* (1928).

¹⁸ *THE GREAT REHEARSAL* (1948). This book treats the American experience in 1787 as an example to encourage the rule of law in international affairs. The same notion underlay the publication by the Carnegie Endowment for International Peace of Hunt's 1920 edition of Madison's notes and JAMES BROWN SCOTT, *JUDICIAL SETTLEMENT OF CONTROVERSIES BETWEEN STATES OF THE AMERICAN UNION* (2 vols. 1918).

¹⁹ 3 *JAMES MADISON: FATHER OF THE CONSTITUTION* 11-160 (1950). This is the third volume of his magistral biography, *JAMES MADISON* (6 vols. 1941-1961).

²⁰ This reviewer often jocosely advises lawyers that for a busy and prosperous practitioner with little time to devote to the minutiae of scholarly research, there is no better twenty-page summary of the work of the constitutional convention in a "nutshell" than is to be found in the Introduction to E. DUMBAULD, *THE CONSTITUTION OF THE UNITED STATES* 38-58 (1964).

²¹ *THE MAKING OF THE AMERICAN CONSTITUTION* (1964).

²² *A BIOGRAPHY OF THE CONSTITUTION OF THE UNITED STATES* (1964).

²³ 1787: *THE GRAND CONVENTION* (1966). Rossiter emphasizes that the Constitution was an irrevocable confirmation of the principles of 1776, and that many members of the convention were veterans of the Revolution. *Id.* at 145, 261.

Drinker Bowen, a famous Philadelphia author.²⁴

Mrs. Bowen's previous colorful evocations of the life and times of John Adams²⁵ and of Justice Holmes²⁶ aroused this reader's anticipation and appetite for the work at hand. Because of the influence of English constitutional law upon American constitutional law and the influence of Sir Edward Coke upon English constitutional law, her fascinating biography of Lord Coke²⁷ should also give her peculiar qualifications to deal with the origins of American fundamental law.

Moreover, the seething political and sectional conflicts, pregnant with the fate of a nascent nation, which raged during that hot summer within the stately precincts of Independence Hall were sufficiently dramatic and glamorous to furnish a worthy topic for Mrs. Bowen's extraordinary literary talent. However, perhaps because of having expected too much, this reviewer felt that *Miracle at Philadelphia* was perhaps a less miraculous masterpiece than he had anticipated.²⁸ To be sure, it is an excellent book, but one that any diligent scholar might have produced. The magic *cachet* that marks Mrs. Bowen's genius does not seem to make its presence felt. It is as if Erle Stanley Gardner were to write about the Constitution, and the resulting narrative resembled just what Herbert Wechsler or Earl Warren might have said.

Nevertheless, Mrs. Bowen has provided a well-written and reliable²⁹ account of the convention's work. It will be of considerable value to the general reader,³⁰ although both for the general reader and the scholar Charles Warren's volume is still probably the most useful

²⁴ The author's brother was a distinguished Philadelphia lawyer who wrote a modern restatement of the ethical rules governing the legal profession. HENRY S. DRINKER, *LEGAL ETHICS* (1953).

²⁵ JOHN ADAMS AND THE AMERICAN REVOLUTION (1950).

²⁶ YANKEE FROM OLYMPUS: JUSTICE HOLMES AND HIS FAMILY (1944).

²⁷ THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE 1552-1634 (1957).

²⁸ Likewise, in this reviewer's personal opinion, Mrs. Bowen's biography of Coke's rival, FRANCIS BACON: THE TEMPER OF A MAN (1963), was somewhat duller than her other books. *Miracle at Philadelphia* ranks much higher than *Bacon*, though beneath her other works mentioned above.

²⁹ The only statement of questionable accuracy noted in the book was that "Five delegates in the end would refuse to sign"—Gerry, Mason, Randolph, and also Yates and Lansing of New York. (P. 34.) Yates and Lansing had left the convention on July 10, 1787, in disgust, and never returned. They were not present on the date of signing (September 17). It is therefore somewhat misleading to dilute the distinction enjoyed by the three who made *il gran rifiuto*.

³⁰ Somewhat surprisingly, it is the reviewer's belief that Rossiter's volume, though written by a professional historian, is perhaps more readable and attractive in appearance than Mrs. Bowen's book, and should prove to be a strong rival in popular appeal. Moreover, serious students might prefer Rossiter's treatment, since his ten page bibliography (which Mrs. Bowen praises at p. 330) surpasses her own two pages, and he also prints his footnote references rather than contenting himself as Mrs. Bowen does (p. 329) with the statement: "Citations for quotations are in my files should anyone care to see them."

and interesting treatment of the subject.³¹

The arresting (and justified) title of the book comes from Washington's and Madison's correspondence. The former wrote to Lafayette on February 7, 1788: "It appears to me, then, little short of a miracle, that the Delegates from so many different States . . . should unite in forming a system of national Government, so little liable to well founded objections."³² (P. xvii.) Madison had declared to Jefferson on October 24, 1787, that it was impossible "to consider the degree of concord which ultimately prevailed as less than a miracle."³³ (P. 279.)

The author's account of the proceedings of the convention is clear and connected. A digression in Chapters XII, XIII and XIV interrupts the chronicle of debates within the convention hall in order to give a description of the American scene of the era. Chapters XXII, XXIV and XXV deal with the fight for ratification. The text of the Constitution, and of the Bill of Rights, is appended. Mrs. Bowen's volume is a worthy addition to the literature dealing with the framing of the Constitution.

³¹ The reviewer agrees with Merrill Jensen: "By all odds the best detailed study of the writing of the Constitution is CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* (1928). Warren goes through the Convention day by day and with great learning discusses the issues involved, and, in addition, outlines the development of the Constitution after 1789." M. JENSEN, *THE MAKING OF THE AMERICAN CONSTITUTION* 188 (1964). Strangely enough, Warren's book is not mentioned by the Mitchells in their half-page "selected list of books on the Constitution."

³² 29 *THE WRITINGS OF GEORGE WASHINGTON* 409-10 (J. Fitzpatrick ed. 1939).

³³ 5 *THE WRITINGS OF JAMES MADISON* 20 (Hunt ed. 1904).