

Book Reviews

Economics and Clean Water

The Uncertain Search for Environmental Quality. By Bruce A. Ackerman & Susan Rose-Ackerman, James W. Sawyer, Jr., Dale W. Henderson. New York: The Free Press, 1974. Pp. x, 386. \$13.95.

Reviewed by William J. Baumol†

One of the great paradoxes of public decisionmaking is the contrast between the economists' evaluation of their own areas of knowledge and the places in which they have proved influential in public policy. Their GNP forecasts are eagerly solicited, and their views on inflation policies are usually consulted before decisions are arrived at, even though in both areas disagreements are frequent, and their occasional admissions of ignorance and uncertainty are as justified as they are refreshing. Yet in areas such as environmental policy where economists speak almost with one voice and with a high degree of confidence, their counsel rarely creates a ripple and has yet to produce a single case of significant influence on federal or local policy.

The authors of this very excellent book, *The Uncertain Search for Environmental Quality*,¹ have examined in great and illuminating detail the unhappy story of the program for the purification of the Delaware River, which is an illustration of this state of affairs. It is a tale which does involve a role for economic analysis, or rather for a cost-benefit analysis, carried out by a group referred to by the authors as "the technocrats." However, the programs ultimately put into effect are about as inconsistent as one can get with the policy prescriptions favored in the economic literature.

The volume, an outstanding piece of interdisciplinary work involving the expertise of lawyers, economists, and natural scientists, perhaps most clearly falls within the areas of public administration and poli-

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I. B. ACKERMAN & S. ROSE-ACKERMAN, J. SAWYER, D. HENDERSON, *THE UNCERTAIN SEARCH FOR ENVIRONMENTAL QUALITY* (1974) [hereinafter cited by page number only].

tical science. It represents, as the product of extensive research and documentation, a careful description and evaluation of the sequence of events and the organizational and political forces that led the Delaware program to a condition as unfortunate as the book judges it to be. The authors make a strong case. Even operated ideally, the program *as designed* promised benefits which were likely to be negligible—a slight reduction in the transportation time necessary for fishermen to reach good fishing areas, with no improvements in the quality of boating, no likelihood that the water would become suitable for swimming, and certainly no significant benefits for public health. The book concludes that “these benefits seem trivial in comparison to the costs we have estimated the . . . program will impose.”² Moreover, the program was organized in a manner that promised neither effectiveness nor efficiency. Strong evidence is provided showing a variety of respects in which it has broken down altogether or will incur costs well above the minimum required to achieve the program’s objectives. The evidence even offers a strong presumption of inequity in the treatment of similar producers, something the designers of the program apparently strove very hard to avoid.

Much of the book is devoted to a cogent analysis of the shortcomings of the arrangements for the control of the program. For example, it examines carefully the regional character of the problem, the fact that the pollution of the Delaware burdens the residents of at least four major cities, many smaller municipalities and at least three different states. Accordingly, the design of the program was left ultimately to four Governors (Hughes of New Jersey, Rockefeller of New York, Shafer of Pennsylvania and Terry of Delaware) and Stewart Udall, the Secretary of the Interior. The authors conclude:

Our study shows that when five *state* and *national* politicians are asked to serve intermittently in a *regional* agency, they will not make any effort to understand the distinctively regional implications of the issues before them. Instead . . . each of the five politicians will ask himself which of the programs will best further his interest in the *state* or *national* forum that is his primary concern. To make matters worse, because all of the decision makers spend virtually all their time and energy handling state or federal problems, they will look for advice primarily from the *state* or *national* aides on whom they ordinarily rely and only secondarily from those bureaucrats . . . who have attempted to view the distinctive regional implications of the issues.³

2. P. 123.

3. Pp. 167-68.

Significant conclusions such as this are based on interviews with a wide-ranging sample of the actors (both those with principal and minor roles), on painstaking examination of the data, and on careful reconstruction of the events and their sequence.

However, rather than pursuing these matters further, I want to revert to my initial theme—the standard advice of economists and the ways in which current policy conflicts with it. I will discuss two issues in particular—the choice of the priorities of environmental programs and the selection of instruments to carry them out.

One of the great curiosities of environmental policy has been the relatively low priority assigned to toxic substances and other serious hazards to human life and health. In the Delaware program, for example, the prime criterion of environmental improvement has been the dissolved oxygen (DO) content of the water. Dissolved oxygen content does have some significant consequences for water quality, and its widespread use *as one element* in the evaluation of water quality is certainly defensible. However, over a considerable range, improvement in DO may accomplish little other than make the water more hospitable for fish. It will not suffice to make the water safe for swimming, and “[i]f turbidity is reduced as a result of a BOD⁴ clean-up campaign, the algae may be in a perfect position to multiply. Increasing DO may simply mean that the valley is trading a brown river for a green one.”⁵ “And one that will smell when the algae begin to die.”⁶

More important, the absence of “disease-carrying organisms and toxic chemicals . . . is not assured by high DO levels.”⁷ Thus, the program which is expected to cost more than half a billion dollars is expected to do virtually nothing to control the discharge of poisons into the river. It is difficult to disagree with the authors’ conclusion that

[t]he most important problem in the Delaware River is not DO but the discharge of exotic chemicals and metallic compounds which may well be dangerous to human beings when they are present, even in small quantities, either in drinking water or in food. . . . Given the real (if unquantifiable) possibility of serious harm . . . a risk-avoidance strategy appears warranted in which a Poison Control Board should be given a strong statutory mandate

4. BOD, biochemical oxygen demand, is a measure of the oxygen depletion produced by an emission into a waterway. The depletion occurs through the consumption of oxygen in the oxidation of the wastes.

5. P. 27.

6. P. 27 n.20.

7. P. 27.

to outlaw or stringently limit the discharge of any substance which there is reason to believe may significantly injure human health.⁸

Unhappily, the strange ordering of priorities is by no means confined to this case. For example, in the case of air pollutants from vehicular emissions, the relative severity of restrictions on the different emissions by no means corresponds to the evidence of their dangers. Federal legislation on the control of poisonous substances in general is still in a fairly rudimentary state, and the programs are far less comprehensive than those for the improvement of water quality. As the Council on Environmental Quality states in its annual report for 1974, "[u]rgently needed Federal authority to deal with toxic substances has been proposed by the President but has yet to be enacted by the Congress."⁹ There are as yet no federal standards and few local controls on the use of toxic PCB (polychlorinated biphenyls) in fluorescent lamps, television sets, capacitors and generators which find their way into every household, threatening cancer and reproductive failure. Hundreds of pounds of PCB are poured directly into waterways, from which it enters the food chain and imbeds itself into the tissues of man and animals.

Relatively little is done about a number of science fiction-like but nevertheless very real environmental dangers. A noteworthy example is the disposal of wastes generated by nuclear power plants. The lethal radioactive emissions generated by such wastes will continue to be very substantial for tens and perhaps even hundreds of thousands of years! Yet man has devised no containers for them which can be relied upon to last more than a century or two. We certainly cannot afford to dispose of them in the oceans or even in deep caves which are very likely to undergo geological disturbances in the course of the long periods in question. The absurdity of current policy on this subject is illustrated by an official admonition to dispose of these wastes in sparsely inhabited areas, as if anyone can foresee which locations will have few inhabitants a century from now. No wonder the decision to undertake the construction of nuclear plants has been called a Faustian bargain. Yet these horrendous perils play a minor role, if any at all, in the decisionmaking process.

Our scrambled priorities are not easily explained. Certainly many more businesses, and indeed the more powerful ones, are affected by a war on BOD than by a program to control toxic emissions. Perhaps

8. P. 209 (footnote omitted).

9. FIFTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 151 (1974).

the problem is that the public is most strongly concerned by pollutants it can see or smell. Whatever the reason, it seems clear that a careful reexamination of priorities will offer society far more for the money it expends on environmental improvement.

The Delaware experience illustrates another major and widespread shortcoming of current environmental programs—their reliance on direct controls or on what the authors describe as a “legal orders” regime.¹⁰ Under this standard approach, each polluter is told precisely what modifications in his activities are required if he is not to be subject to punishment. He may, for example, be told to install a specified type of water purification equipment. Or, in water quality programs, he is frequently given an emissions quota specifying a maximum amount that he is permitted to discharge of each regulated pollutant. On grounds of fairness usually, these quotas approximate equal percentage reductions from initial emissions levels (with all sorts of modifications and exceptions granted to allow for special circumstances). To economists, the ancient lineage of this approach does not render it immune from charges of gross inefficiency, ineffectiveness, and even inequity. It is clearly inequitable for firms *A* and *B* each to be told to reduce its emissions by 40 percent if *A* had previously been civic-minded and had voluntarily instituted a control program of its own, while *B* had proceeded on the principle that the public be damned. It is also inequitable if *A* manufactures a product whose pollutants are cheaply and easily removed while *B*'s product line permits it to do so only at enormous cost.

But inequity is not the main reason for economists' distrust of the legal orders procedure. They believe it is ineffective because it is dependent upon the vigilance of the regulator, something that may well prove very transitory. Its effectiveness depends on the promptness with which orders are issued, the severity of their provisions, the strength of the regulator's resistance to demands for modifications, his effectiveness in detecting and documenting violations, his vigor and success in prosecuting them, and the severity of the penalties imposed by the judicial mechanism. It can be shown that the performance of environmental agencies on many of these counts has not been inspiring, at least so far, and one may well doubt that it is likely to improve spectacularly as public excitement over the issue begins to dampen. Instead, economists recommend more widespread use of the price mechanism, in the form of taxes on emissions or the sale of pollution permits at the maximal prices which a bidding

10. Pp. 225-26, 228.

process can extract from polluters. These depend not on the watchfulness of the regulator but on the reliable tenacity of the tax collector. They work by *inviting* the polluter to avoid his payments through the loophole deliberately left to him—the reduction of his emissions.

In the economists' view, this approach is more effective than legal orders for another reason. The latter proceeds by designating a thin line between vice and virtue. If polluter *A* is told to reduce his wastes by 100,000 pounds per day, he is in effect declared a good citizen if he removes 100,000 pounds, and a lawbreaker if he merely eliminates 99,900. Thus he is offered motivation to meet his quota, but none to go the slightest bit beyond it even if he can do so with little cost and effort. A tax on wastes, on the other hand, offers a reward that is continuous and has no arbitrary terminus. The more the polluter decreases his emissions, the larger the tax payment from which he is exempted.

Perhaps most important, the economists' approaches offer a large bonus in efficiency. They work for reduction of emissions to be undertaken preponderantly by those who can achieve them at least cost. At a tax of four cents per pound, firm *A* which can reduce emissions at a cost of 1.5 cents per pound will find it very profitable to do so, while firm *B* for which such reductions cost 10 cents will find it cheaper to pay the tax. Thus, if tax rates are set high enough to achieve their overall goals for, say, a waterway, they will do so far more cheaply than a program of legal orders with its approximately uniform quotas. If the available evidence is to be believed, the cost savings can be as high as 50 percent of the total, a matter of no minor interest to consumers.

All this and much more is discussed most illuminatingly in the book reviewed here. The authors are careful, incidentally, not to oversell the economists' approach; they point out its limitations and some circumstances in which other methods may be more promising. The volume can be regarded as many things—a careful and illuminating case study, a suggestive work on public administration as it applies to environmental programs, and a fine piece of economic analysis. But perhaps it serves above all as a searching examination of the processes through which profound irrationalities can find their way into public policies.

The Relevance of Responsibility

On Guilt, Responsibility and Punishment. By Alf Ross. Berkeley and Los Angeles: University of California Press, 1975. Pp. x, 183. \$10.00.

Reviewed by Thomas H. Morawetz†

I

In Samuel Butler's *Erewhon*,¹ persons who commit antisocial acts are treated for pathology. Erewhonians think of them as socially 'ill' in the way we think of persons who are physically ill. There is no question of blame or responsibility. Butler's fantasy is tantalizing because it is like such other skeptical suggestions as that what I regard as waking life may be a dream or that other persons may lack subjective consciousness just as plants and rocks lack it.² The notable feature of skeptical suggestions is simplification; the distinction between waking and dreaming or the distinction between persons and objects is erased. Butler's story is skeptical insofar as it dissolves the distinction between responsible and intentional action, on the one hand, and mere nonintentional events (such as the happening of illness).³

Skeptical stories become philosophical arguments by adding the claim that the eliminated distinction is unjustified or even meaningless, and that we are to expunge it from thought and action. But to act as if waking life is a dream, I must be able to *regard* waking life as a dream, and it is far from clear what this involves. This points to a general strategy for handling skeptical questions. The strategy is not to show that they are illogical or inconsistent; rather, the attack is two-pronged. The first step is to show that the skeptic's suggestion is impracticable (cannot be practiced). The second is to show that it is impractical—that if it were practicable, there would be nothing to be said for implementing it.

The theme of Alf Ross's new collection of essays, *On Guilt, Responsibility and Punishment*, is that certain Erewhonian recommendations

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1. S. BUTLER, *EREWHON OR OVER THE RANGE* (1872).

2. The problem is discussed by philosophers as the problem of other minds. See, e.g., Ayer, *One's Knowledge of Other Minds*, in *ESSAYS IN PHILOSOPHICAL PSYCHOLOGY* 346 (D. Gustafson ed. 1964); Malcolm, *Knowledge of Other Minds*, in *id.* at 365.

3. Actually, Butler retains and reverses the distinction: although individuals are not responsible for harm-causing acts, they are responsible and are held to blame for physical illness.

in criminology are impracticable and impractical. The book is doubly interesting: the issues are important and widely discussed,⁴ and Ross's strategy of argument, as I have already hinted, points beyond these issues. The major issues and arguments of the book are presented full-dress in essays three through six. Here Ross discusses and opposes the following familiar Erehonian arguments:

(1) The aim of punishment is to prevent crime; all means are to be adopted to the extent that they serve this end. Retribution is not an aim of punishment, and theories of retribution rest on the indefensible notion that only those who are morally responsible for crimes are to be punished and punished only to the extent of their responsibility (essay three).

(2) The notion of punishment, like that of retribution, is itself untenable. It should be replaced with the notion of treatment, aimed at cure, and of prevention by "precautionary measures, aimed at rendering the offender socially harmless"⁵ (essay four).

(3) An important theoretical argument is at the basis of arguments (1) and (2). Human action is causally explainable (by way of psychological causes, social causes, etc.) and is causally determined. It is incompatible with this 'scientific truth' to speak of responsibility for action, which presupposes freedom (indeterminateness). All such morally freighted notions rest on a mistake (essay five).

(4) A succinct way of making point (3) is this: to hold *A* morally responsible is equivalent to saying "He could have done otherwise." If his behavior is causally determined, we cannot say "He could have done otherwise," and so we cannot say he is responsible (essay six).

The four points are one continuous argument, and (3) is its heart. Ross's counterargument is both abstract and practical. He uses two strategies. He shows that the deterministic argument (3) and its subarguments (1) and (2) contain confusions and fallacies. In addition, he shows that the determinist's recommendations are impracticable, cannot be practiced—that is, we *cannot* think about behavior in the way the determinist says we must think. Ross does not differentiate between the two strategies, and I am not sure how he sees their relationship. Both seem to me necessary. The first alone is entirely negative; it is not an argument in support of the indispensability or adequacy of ordinary ways of regarding actors as responsible; it simply shows what is wrong with one kind of attack on these ordinary ways. The second

4. See, e.g., J. FEINBERG, *DOING AND DESERVING* (1970); H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* (1968); T. HONDERICH, *PUNISHMENT: THE SUPPOSED JUSTIFICATIONS* (1969).

5. A. ROSS, *ON GUILT, RESPONSIBILITY AND PUNISHMENT* 67 (1975) [hereinafter cited by page number only].

The Relevance of Responsibility

is an argument about indispensability, but without the first strategy, it suggests a dilemma. For if the incompatibility claim of thesis (3) is correct and yet cannot be practiced, we are in the untenable situation of having to think in ways that are logically impermissible. Therefore Ross needs both strategies.

II

Let's look at what I call the strategy of practicability. We can make the strategy clear by looking at an example from Kant's *Critique of Pure Reason*.⁶ Kant asks us to consider the fact that persons think of objects as existing in space and time. Call this proposition (a). It is not a logical truth, like 'x = x,' whose denial is a self-contradiction. It is not a psychological truth, like the fact that persons rarely remember events from their first three years. We can imagine what it would be like for a psychological truth to be false, but what would it be like for objects not to exist in time and space? And it is not an empirical truth of any kind, for how could we find evidence against it? Kant says that the truth of (a) is a synthetic truth known *a priori*, a necessary truth of experience generally, a feature constitutive of experience. Some contemporary philosophers⁷ would make the same point by saying that it is like a rule in the practice or game of thinking and acting; it is not possible to act and think without treating objects as existing in space and time. It is a distinctive feature of the 'internal'⁸ aspect of acting and thinking.

We can make a similar argument about responsibility. It is not a matter of logic, or a 'mere' psychological fact, or an empirical conclusion that some persons are responsible for their actions and others not. Rather, it is not possible to think of action without using this distinction, because it is not possible to think of *ourselves* without it. Ross makes the point not in the way I am doing, by looking at an impossible thought experiment, but by saying that the distinction is unavoidable in applying any system of norms.⁹ Any legal system, even modified along determinist lines, is still a normative system. The institutional application of norms, Ross argues, inherently involves approval and disapproval.¹⁰ While it is possible for a non-

6. I. KANT, *CRITIQUE OF PURE REASON* 65-91 (N. Kemp Smith transl. 1929). The argument in question is from the section called "Transcendental Aesthetic."

7. See, e.g., L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (3d ed. 1967).

8. See pp. 22, 25-26.

9. P. 121.

10. "But it is not possible to bring a normative system's demands *to bear on an offender*, and so not just talk *about* but *in* the directive language of law and morality, without this amounting to an expression of disapproval." P. 37 (emphasis in original).

official to take an 'external' stance by describing conformity or non-conformity to rules without expressing approval or disapproval, it is not possible for an official—a judge, for example—to do so. In penalizing nonconformity, he unavoidably has the conviction that the offender was responsible, that he assaulted the rules of shared society and did so voluntarily.¹¹ Moreover, a judge cannot think in the same way of an actor who has caused harm accidentally or inadvertently or through madness. Such a person is not the proper object of disapproval.

Ross relies heavily on claims about psychology and emotion in replying to the determinist.¹² His view is close to such so-called 'emotivist' moral theories as that of Charles Stevenson, theories which hold that the essence (emotive meaning) of moral language is to express approval and disapproval.¹³ He is also close to J.L. Austin, who puts approving and disapproving among the "illocutionary forces" of language, pointing out that persons use language to describe and inform and at the same time to warn, praise, disapprove, etc.¹⁴ But this dependence on emotivism is the weakest part of Ross's argument because it makes him vulnerable to the following rebuttal: the fact that *we* cannot judge without disapproving is a contingent fact about how we think, and it is a characteristic of thought which will dissipate as determinism is culturally digested, just as the fact that men in the 16th century could not think of the earth as moving around the sun was a contingent fact and a contingent predicament. With time and change, rules of behavior may come to be applied without prejudice and without the taint of disapproval.

How can Ross reply to this? He has a reply—a strong one I think—but only if he gives up his distinction between emotion and cognition. Ross, we have seen, links the idea of responsibility to the emotive aspect of norms. His argument is weak to the extent that we can speak of legal norms being applied ("You are found guilty as charged") without the emotive aspect of disapproval. Even if we have to dispense with such emotionally charged disapproval-words as 'guilty,' we can conceive of officials doing the job of classifying persons without disapproving. The cognitive job (the determination of fact) seems separable from the emotive one.

Ross's argument is stronger in a different form. The cognitive job

11. Pp. 125, 127.

12. This is an important feature of Ross's criticism of the jurisprudence of H.L.A. Hart. While Hart speaks of the "internal aspect" of rules, he persists in defining law formally, as the conjunction of primary and secondary rules, without referring to the internal aspect.

13. See, e.g., C. STEVENSON, *ETHICS AND LANGUAGE* (1944).

14. See J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962).

The Relevance of Responsibility

is not just any job of classifying, but the job of classifying persons who are said to have committed harm by their actions. The argument in its strong form is that one cannot think of agents as persons without thinking that the question "Did they act freely and intentionally?" is essentially relevant to an understanding of the action. Indeed, the judge cannot think of his own actions as events to which that question is irrelevant.¹⁵ Ross's point can be made in this way without mentioning emotion and without asserting that judging has the illocutionary force of disapproving. To be sure, the cognitive matter is also a matter of 'feeling'; it is spontaneous and perhaps unavoidable to feel anger and resentment at intentional harm-doers.¹⁶ My emendation of Ross is that his point is best made in terms of cognition-cum-feeling and not simply in terms of emotion.

This conclusion points to a deeper difficulty with Ross's methodological assumptions. Repeatedly he scorns the suggestion that the principle of responsibility is inherent in our "common moral consciousness"¹⁷ and says that "the question of the conditions of responsibility . . . can only be answered on the basis of a certain normative system."¹⁸ This is misleading. As I understand him, Ross is echoing the emotivist (or positivist) claim that a normative system or moral system may have any substantive content whatever.¹⁹ Under this argument, it follows that the substantive feature, namely, of assuming the relevance of presuppositions about responsibility and freedom can be said to be a feature of the particular moral systems which *happen* to underlie our legal practices. But this is a much weaker claim than Ross is or should be making. The feature in question is distinctive of normative (both moral and legal) thinking in general. It is not like the feature of valuing certain kinds of property in certain kinds of ways, which is a contingent or accidental feature of a value system. Rather it is a feature which such a normative system must have to be recognizable as a normative system.

III

I have stressed the practicability argument because it is as elusive as it is interesting and original. Equally important in Ross's treatment

15. A very similar argument about the concept of a person is offered in P. STRAWSON, *INDIVIDUALS* ch. 3 (1959).

16. See P. STRAWSON, *FREEDOM AND RESENTMENT* 4-5 (1974).

17. Pp. 119-20.

18. P. 29.

19. Emotivism is associated with positivism and is a form of noncognitivism. The basic assumption is that normative systems, as for example moral and legal systems, have no natural or necessary content. Rather, their content is simply conventional.

is a second strategy of dissecting the mistakes and fallacies in points (1) through (4). Ross gives a thorough discussion of causal determinism and the ascription of responsibility to show that they are compatible.²⁰ This is followed by a demonstration that the claim "He could have acted otherwise" does not preclude causal determination and causal explanation of the action, but only precludes *some kinds* of explanations.²¹ With regard to punishment, Ross offers a taxonomy of different questions about the aim of punishment, and he argues that the notion of retribution is relevant to questions about the justification rather than the aim of punishment. This is a negative condition: punishment is justifiable only where the agent is the proper object of censure (*i.e.*, of 'feelings' of retribution).²²

The strategies I have mentioned are directed against the theoretical version of the determinist argument summarized in points (1) through (4). Ross is aware of, and responds to, a practical version which is more or less independent of theory.²³ This is the recommendation that we exclude judgments of responsibility in making harm-doers "clutchable" by law,²⁴ and that treatment be fitted to the causal factors of the particular case. Ross reviews the practical defects of this suggestion, many of which are familiar from other writers.²⁵

IV

I have not yet discussed the first two essays. The first is an impressionistic essay on the psychology of guilt; the second is a potpourri of parts of arguments from the longer essays. At least one section of chapter two, several pages long, is repeated almost word-for-word in chapter five.²⁶ The problem is general; the book, a collection of papers which appeared originally in Danish and which were written for various occasions, is badly edited and repetitive. The argument is broken into short subsections with pungent headings, sometimes to the effect

20. See essay five in response to point (3).

21. See essay six in response to point (4). See also J.L. Austin, *A Plea for Excuses*, in *PHILOSOPHICAL PAPERS* 123 (J. Urmson & G. Warnock eds. 1961).

22. See essays three and four in response to points (1) and (2).

23. The practical argument is, however, considerably weakened by the failure of the theoretical argument.

24. That is, liable to treatment or punishment. The term is used by Feinberg in discussing the suggestion that inquiry into the mental state and blameworthiness of an offender be postponed until after a preliminary determination that the individual has committed an illegal act and has thus "forfeit[ed] his right to determine his future by his own choice." J. FEINBERG, *supra* note 4, at 265. Ross and Feinberg are both responding to suggestions made by Barbara Wootton in B. WOOTTON, *SOCIAL SCIENCE AND SOCIAL PATHOLOGY* (1959).

25. *E.g.*, J. FEINBERG, *supra* note 4; H.L.A. HART, *supra* note 4.

26. Pp. 25-27, 110-12.

The Relevance of Responsibility

that a particular view is self-contradictory or absurd. Ross's style, in translation at least, is dry but clear.

Ross is the author of several influential books in practical philosophy and jurisprudence over three decades. Like his contemporary, H.L.A. Hart, he is concerned to remedy the defects of formal legal positivism as inherited from Hans Kelsen.²⁷ For both of these critics of Kelsen, law is best understood not as a formal structure of rules which specify norms and sanctions, but as an institution in which there are characteristic internal attitudes of participants. Ross goes further than Hart in stressing the internal aspect and in dissociating himself from positivism. Responsibility and punishment are topics which are particularly well-suited to this approach. These essays are conservative in a literal sense; they are not politically conservative, but they argue for the clarification and preservation of much that is useful in our institutions and ways of thought.

27. See, e.g., H. Kelsen, *GENERAL THEORY OF LAW AND STATE* (Russell pub. 1961).

Marshall the Man

John Marshall: A Life in Law. By Leonard Baker. New York: MacMillan, 1974. Pp. x, 845, with illustrations. \$17.95.

Reviewed by J. Allen Smith[†]

John Marshall is a figure whose personality has been obscured by his achievements. The brilliance, clarity, and austerity of his opinions present Marshall as the aloof, esteemed Great Chief Justice. Too easily lost behind such an image is the reality of the man. It is appropriate, then, that a new biography should now appear by an accomplished writer, Leonard Baker. Each generation needs a study of Marshall's life to describe his intriguing career with contemporary interpretation.

The book is especially timely, since it appears as the country begins to celebrate its bicentennial. In 1776, Marshall, who was 21 years of age, did not rank with Jefferson, nor with Hamilton, who was soon to become Washington's dashing aide. Marshall is, however, a Founding Father, though one born out of time; it was only in 1801 that he began to make his contribution to the development of the American legal system as we know it today.

Baker has had the opportunity to study the Marshall papers at the College of William and Mary, papers that are being edited for publication by the Institute of American History. He has reevaluated material available at Harvard and has benefited from family lore recounted to him by some of Marshall's descendants. The Baker book represents a remarkable fact-gathering effort, the more valuable for its presentation of those facts in an engaging and easy manner. It is very much within the genre of the traditional historical biography, interplaying a chronological narrative of Marshall's life with the political and social events of his time, and emphasizing Marshall's not inconsiderable participation in many of those events. Into this narrative Baker occasionally interjects himself as the omniscient narrator, emphasizing, apologizing, and criticizing, all with the perspicacity provided only by the passage of time.

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Marshall the Man

The Baker book succeeds excellently within its scope. A major contribution is the division of Marshall's life into four discrete careers: Marshall as soldier, as lawyer and politician, as diplomat, and as judge. The three formative careers constitute almost half of the book. By describing in detail Marshall's activities in his three earlier careers, Baker prepares us for the final and outstanding role of Marshall as jurist. Weaknesses of the book as conceived are few. Baker is admittedly a friendly biographer, and his admiration for Marshall's role in American history is unashamed. Only occasionally does Baker allow this admiration to become a bias. The principal examples are the treatments of Marshall's attitude toward slavery, his enmity toward Jefferson, and his economic acquisitiveness.

The primary criticism of Baker's book is directed not at what the book does, but rather at what it does not do (and, in fairness, does not attempt to do). The book does not contain an exciting and imaginative analysis of Marshall, the man. No biographer, including Baker and even Beveridge,¹ has yet written an account that can rank with Dr. Johnson's *Life of Savage*² or Lord David Cecil's *Melbourne*.³ Although it would be foolish to attempt to divorce a person of Marshall's stature from his achievements, the public needs a biography that not only presents the facts, but also interprets them in a manner which illuminates Marshall's personality. No one yet has succeeded in interpreting through Marshall the problems of power and personality, to use Professor Harold Lasswell's phrase⁴—interpretations that Campbell⁵ and Professor Heuston⁶ provided through the English Lord Chancellors. As a result, Marshall has become a figure larger than life. As Beveridge observed:

[S]o little has been written of his personal life, and such exalted, if vague, encomium has been paid him, that, even to the legal profession, he has become a kind of mythical being, endowed with virtues and wisdom not of this earth.⁷

The neglect of the personal side of Marshall's life is attributable in large measure to the plethora of material on his judicial opinions.

1. A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* (Riverside Press 1929).
2. S. JOHNSON, *Savage*, in *LIVES OF THE ENGLISH POETS* 93 (World's Classics 1956).
3. D. CECIL, *MELBOURNE* (1954).
4. See H. LASSWELL, *POWER AND PERSONALITY* (1962); *WORLD REVOLUTIONARY ELITES* (H. Lasswell & D. Lerner eds. 1965).
5. J. CAMPBELL, *LIVES OF THE LORD CHANCELLORS AND CHIEF JUSTICES OF ENGLAND* (1881).
6. R. HEUSTON, *LIVES OF THE LORD CHANCELLORS 1885-1940* (1964). See Smith, *Book Review*, 21 *RUTGERS L. REV.* 179 (1966).
7. 1-2 A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* v (1916).

The principal writers are interested mainly in what Marshall did with his power once he established a Court with prestige. Most of them cannot resist summarizing the issues in the leading decisions and commenting at length on each one of them.

In order to get to the man, the student must read not only Baker's book but several other biographies and papers as well. From a literary point of view, most of these writings are of rather high quality. There is, first, the indispensable biography by Beveridge,⁸ followed by the classic by Corwin.⁹ Next should come the two most recent biographies: Baker's and the study published in 1964 by Samuel J. Konefsky¹⁰ on the relationship between Marshall and Hamilton. Three other earlier biographies can then be added, those by Loth,¹¹ Palmer,¹² and Magruder.¹³ These selections can be followed by four good essays, those of James Bradley Thayer,¹⁴ Holmes,¹⁵ Henry Cabot Lodge,¹⁶ and Frankfurter.¹⁷ Although there is necessarily some repetition in these books and articles, each author establishes his own perspective; the reader who goes through all of them will not be bored. Less detailed accounts of Marshall's life are provided in the recent biographies of Washington¹⁸ and Jefferson.¹⁹ Finally, the surveys of the history of the Supreme Court by Warren²⁰ and Myers²¹ are good, entertaining reference works, although the latter book uses a considerable amount of socialist bombast in arguing that Marshall was a powerful instrument of the oppressor class. A reader needs all of these writings to sift out the biographical data on which to base a satisfactory portrait of Marshall as a man. The following sketch outlines some of the features that should be included in a full scale portrait.

An effort to understand Marshall's personality may profitably be-

8. A. BEVERIDGE, *supra* note 1.
9. E. CORWIN, JOHN MARSHALL AND THE CONSTITUTION (1919).
10. S. KONEFSKY, JOHN MARSHALL AND ALEXANDER HAMILTON (1964).
11. D. LOTH, CHIEF JUSTICE: JOHN MARSHALL AND THE GROWTH OF THE REPUBLIC (1949).
12. B. PALMER, MARSHALL AND TANNEY: STATESMEN OF THE LAW (1939).
13. A. MAGRUDER, JOHN MARSHALL (1888).
14. J. THAYER, JOHN MARSHALL (1901).
15. Holmes, *John Marshall: Remarks on a One-Hundredth Anniversary*, in JAMES BRADLEY THAYER, OLIVER WENDELL HOLMES AND FELIX FRANKFURTER ON JOHN MARSHALL (M. Howe ed. 1967).
16. Address by Henry Cabot Lodge, John Marshall Day, Feb. 4, 1901. The entire speech appears in 2 J. DILLON, JOHN MARSHALL: LIFE, CHARACTER, AND JUDICIAL SERVICES (1903).
17. Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217 (1955).
18. I J. FLEXNER, GEORGE WASHINGTON (1965).
19. F. BRODIE, THOMAS JEFFERSON: AN INTIMATE HISTORY (1974).
20. C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1922).
21. G. MYERS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES (1912).

Marshall the Man

gin with an examination of the influence of his father. Thomas Marshall was a successful frontier farmer in Virginia and a manager of some of the lands Lord Fairfax owned in the Great Neck region. When Thomas Marshall married into the Randolph family, he acquired at least tenuous connections with the gentry of the Tidewater. In a society built on strong class ties, John Marshall, the son, unlike his self-made father, was born with the right mark on his forehead, although he was 20 years old before he ever visited a household of true affluence and power.

Perhaps because of his mother's responsibilities with 15 children, of whom Marshall was the eldest, he looked to his father for guidance. The father's principal influences on the son were two: first, he led his son to embrace an unwavering belief in Federalism as personified by George Washington—with whom Thomas Marshall had surveyed some of the Fairfax estate, and for whom he had developed a hero worship during the French and Indian War;²² and second, the father gave John Marshall the best education that the provincial colony could provide. Father and son read at home together from a small collection of classics, including their favorite, Pope. At 14, Marshall went to an academy for the usual classical course. Later he went to the College of William and Mary, where he attended lectures for a short period during the Revolutionary War while he was still on active duty. His best teacher was George Wythe, who signed the Declaration of Independence and who also taught Monroe, Clay, and Jefferson.

The Marshall family was nominally Christian, but the decadence of the Virginia clergy of the time,²³ together with deistic notions that competed with the broad churchmanship of the period, led Marshall to express political rather than religious fervor. This lay religion was translated into Federalist politics, simplified into a belief in a strong central government, a loyalty to the colonies as a whole and not principally to Virginia, and a commitment to anything that General Washington might propose (mostly notably evidenced by Washington's less than subtle pressuring of Marshall to run for Congress).²⁴

22. L. BAKER, *JOHN MARSHALL: A LIFE IN LAW* 6 (1974) [hereinafter cited by page number only].

23. P. 751.

24. Washington, then well into retirement, had hoped to stay out of politics, but gradually had decided that he should recruit new blood into Congress to support his views. Washington had watched Marshall develop, knew his reputation as one of the ablest Federalists in the country, and decided that Marshall was his man. At first Marshall refused, giving as his excuse his commitment to the practice of law. But, a day later, when Washington "moved from entreaty to 'a peremptory and angrily expressed command,'" Marshall accepted the charge, ran, and won by a narrow margin. 4 J. FLEXNER, *GEORGE WASHINGTON* 423 (1969).

When the Revolutionary War broke out, both of the Marshalls entered the army as rapidly as possible—the father as a major, the son as a lieutenant. The service in the army solidified and further developed the predisposition John Marshall had acquired as a boy on the farm with his father. His war experience was not unlike that of Holmes in the Civil War. For both men, wartime service strengthened their support of the nation against state and regional interests. In the war young Marshall also met Washington and his aide, Hamilton. Marshall found in the General the hero that his father had brought him up to revere and to whom he looked to transform the colonies into a nation.

Throughout Marshall's life, most people who knew him thought that he possessed two qualities in abundance: intelligence²⁵ and charm.²⁶ Everyone, including Marshall himself, knew that he had a first-rate mind. Only a few men, such as Hamilton, Jefferson, and John Adams could compete with him. Even Daniel Webster said that he had never met a brighter man.²⁷ Nonetheless, his mind had its limitations. Holmes believed that Marshall got his main ideas from Hamilton and the *Federalist Papers*.²⁸ These ideas, of course, can be traced back through a line of theorists. But even if Marshall developed some of the Federalist positions concurrently with Hamilton, Marshall was not a John Locke. Marshall's mind, trained primarily in logic and what was then referred to as oratory, exhibited clarity of style in both the written and spoken word. Marshall could see and define the main issues; he could argue from strength. His mind was not diffuse, nor is there any suggestion of unusual intuitive ability. His associates thought that he had a superior mental apparatus, but one that differed in degree, not in kind, from other able men of affairs.

After his intelligence, Marshall was known for his personal charm. In Richmond, where he made his early success, six or seven members of the bar ranked with the best lawyers in New York and Philadelphia, though Richmond was but a small boom town. These men were as proud as they were able and certainly would have closed ranks against a newcomer, however talented, who appeared brash. Instead, in Marshall's case, they made room for him and helped him in his phenomenal rise. Later, when he ran for Congress as a Federalist, his victory in Jefferson territory, was largely attributable to this personal magnetism.²⁹

25. P. 709.

26. P. 446.

27. P. 653.

28. Holmes, *supra* note 15.

29. P. 312.

Marshall the Man

When he became Chief Justice, Marshall led the Court, at first perhaps because some of the other Justices had long held similar views; but his leadership continued later as Madison began to make appointments. His influence with Joseph Story is perhaps the best example of Marshall's combination of intelligence and charm. Madison appointed Story to the bench because he was an active Republican-Democrat and opponent of the Federalists. Upon taking his seat, Story began his first serious study of the Constitution under the tutelage of Marshall. As a result of this endeavor Story became converted to many of Marshall's ideas and began a long career in jurisprudence in which he was to become a memorable figure in his own right.³⁰

Marshall's biographers have not discovered moral blemishes on his character, or even those eccentricities that accompany the abilities of most men of mark.³¹ In Marshall's case, though he lived in an age of personal invective, there are few hints of even indecorous behavior on his part.³² While it is true that he and others were burned in effigy after the Burr trial, even the most radical Jeffersonian realized after the acquittal of Chase that Marshall could not be impeached merely because of his political views, and there was no other ground on which his opponents could attack him.³³

The more one reads of Marshall, the more likely one will find him a hero; yet one asks if there are not some frailties to round out his humanity. Three suggestions come to mind—thoughts that might

30. It is wrong to regard Story as a toady to Marshall. Story's later work at Harvard demonstrated his own great abilities. See, e.g., J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE (3d ed. 1843).

31. Professor Heuston's recent studies of the Lord Chancellors of England provide material on those judges and administrators that is somber, pathetic and even bizarre. See R. HEUSTON, *supra* note 6.

32. At one point Marshall showed a spirit of glee over the embarrassment caused to Jefferson by the publication of witty, scurrilous verse about Jefferson's alleged liaison with a slave woman at Monticello. Someone in turn suggested that Marshall might also have been intimate with one of his slaves, but this rumor quickly died, an unsuccessful riposte. F. BRODIE, *supra* note 19, at 355.

33. Justice Samuel Chase was one of the many Federalist judges who came under attack by Jefferson's Republicans in the first decade of the 19th century. They thought him a good initial target for impeachment because of the unpopularity of his political statements from the bench and his conduct of several vindictive sedition and treason trials. But his Senate impeachment trial in 1805 resulted in acquittal.

In 1806 Jefferson became convinced (with some justification) that Aaron Burr was attempting to precipitate a war with Spain over Mexico and to establish a separate government in the states west of the Allegheny mountains. In his capacity as Justice, Marshall granted a writ of habeas corpus to two of Burr's accomplices. Sitting as trial judge in Richmond he bound Burr over to the grand jury on the misdemeanor charges of violating the neutrality laws and released him on bail. In each case he found insufficient evidence of treason. The grand jury included an indictment for treason, but at trial Marshall ruled inadmissible practically all of the evidence against Burr. Upon Burr's acquittal, Marshall was a target of furious attack by Republican politicians and newspapers. See pp. 417-518; C. WARREN, *supra* note 20, at 269-315.

be of some interest to future biographers.

First, Marshall's personality lacked the introspective side that frequently goes with genius. Certainly men in the public arena would not be there if they were constantly questioning their beliefs. But there is no evidence to suggest that Marshall, once he achieved manhood, ever asked himself whether his basic outlook was right, wrong, or somewhere in between. There was never the possibility of an about-face at middle age.

Second, there is Marshall's preoccupation with property, evidenced by his acquisition of the Fairfax properties in the Great Neck and his determination to hold onto them at almost any cost.³⁴ Even while Chief Justice, he wrote a biography of the life of Washington, hoping that it would be a best seller which would help him pay off his debts.³⁵ It must be emphasized that Marshall was honest in his dealings. In *Martin v. Hunter's Lessee*³⁶ and *Fairfax's Devisee v. Hunter's Lessee*,³⁷ the two cases that indirectly upheld Marshall's interest in the Great Neck land, Story did not write the opinions as a sycophant. Moreover, Marshall's business judgment was in fact excellent. The complaint would be that Marshall's interest in property exceeded mere acquisitiveness and bordered on obsession. No one objects to the fact that Brandeis and Hughes earned fortunes in the practice of law. They even have our admiration for it. These jurists, however, surrendered their interests in the marketplace to increase their freedom as decisionmakers. Moreover, while on the bench, Brandeis sought to analyze and to control untoward acquisitions of wealth and to explore subtly the problem of the allocation of governmental power; Marshall, who well understood economic and political problems of his time, remained glued to the interests of his party. He was not above the party of property; rather, he led it.

The third disappointment that comes from a study of Marshall's life is the lack of magnanimity—indeed the implacable hatred—in his relationship with Jefferson. It is possible, of course, that the relentlessness of the antagonism between the two mental giants may have been the fault of Jefferson, or that each was equally intransigent. Whatever the case, it is regrettable that these leaders could not understand that the nation would develop a continuing dialectic for which the two points of view set the foundation. It is painful to contrast the feelings between Marshall and Jefferson with those be-

34. Pp. 293-98.

35. P. 558.

36. 14 U.S. (1 Wheat.) 304 (1816).

37. 11 U.S. (7 Cranch) 603 (1812).

Marshall the Man

tween Jefferson and Adams. There were certainly sharp intellectual, religious, and moral differences between Adams and Jefferson, but they were able, after more than a seven year break in personal relations, to bring about the great reconciliation of America's history. The friendship, with its exchange of letters between these two patriots during the coda of their lives, is a splendid vignette in the American annals.³⁸ Marshall thought Jefferson was a liar, a manipulator of Congress and the people for personal power, a cosmopolitan with alien interests, and an agrarian who would hold back the consolidation and growth of America. In his turn, Jefferson thought that Marshall was a hypocrite who spoke for an outmoded Federalism, who used his voice for group interests opposed to the clear majority of the electorate, who sought personal power from behind the cover of a robe rather than through a constituency, and who sought to foster the cravings of the merchants and bankers at the expense of the yeomanry. But the hatred transcended even these considerations. It was chemical.

In his later years, Marshall wrote a letter of advice to his grandson in which Marshall advised the youth to read Cicero, whom Marshall described as a great philosopher and orator. Although neither Marshall nor Cicero was a philosopher, both were quintessential lawyers, who usually operated in their best ranges. Both took the conservative side and justified their positions in the name of liberty. Both sought to uphold an independently wealthy class as a bulwark against demagoguery. More significantly, each sought to bring caesars, presidents, and assemblies under the supervision of law. As an old man Cicero was captured and beheaded by his enemies. Marshall won.

38. See P. WILSTACH, *CORRESPONDENCE OF JOHN ADAMS AND THOMAS JEFFERSON 1812-1826*, at 11-12 (1925).

*The Editors are pleased to dedicate this issue to
Professor Thomas Emerson, Lines Professor of Law,
upon his retirement from teaching.*



PROFESSOR THOMAS EMERSON