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Books Reviewed

Ch. Perelman

Carl J. Friedrich

Herbert J. Spiro

John W. Chapman

BOOKS REVIEWED

NOMOS VI — JUSTICE. Yearbook of the American Society for Political and Legal Philosophy. Edited by Carl J. Friedrich and John W. Chapman. New York: Atherton Press, 1963. Pp. x, 325. $6.00.

This volume contains fifteen essays of which ten are theoretical and five historical in approach. The contributors are almost without exception specialists familiar both with the historical development of the idea of justice and with the many contemporary works on the subject.

At the head of the series — doubtless so placed in order to point up the usefulness of a certain amount of specialized knowledge to those who deal with this topic — is Professor Frank H. Knight's essay "On the Meaning of Justice." Knight, an economist at the University of Chicago, shows both cultivation and openness of mind; he appears, however, to be an amateur philosopher, not well versed in either the classical or the contemporary works devoted to the analysis of the idea of justice. He bases his entire approach on a fundamental opposition between the old idea of an authoritarian law, established once for all and fixed in its primitive state, and the modern idea of a body of law continually developing in the context of a liberal and egalitarian democracy. The authoritarian view of law he equates with a stress on conformity to established usages: "the scholastic writers were in accord with the facts of the time in holding the notion of an unjust law to be self-contradictory." (p. 2) In their society, what was not an established usage could be neither law nor justice; what was an established usage must be both. For Knight, it is only a democratic society that poses the problem of justice in terms of guiding the development and interpretation of a changing body of law.

This rather superficial dichotomy, which sets up authoritarian law of divine origin against democratic law expressive of societal aspirations toward justice, fails to take account of a basic problem confronting authoritarian law. The problem arises in the existence of merely human authorities who act as tyrants and who may create unjust laws (cf. Sophocles' *Antigone*) or violate the unwritten laws common to all peoples (cf. Aristotle's *Rhetoric* I, 1368^{b}). To be sure, natural law — supernaturally given law — cannot, by definition, be unjust; but for this very reason it serves as a touchstone of justice to apply to human law. It limits the arbitrary exercise of power by condemning as unjust those mandates of human authority that transgress its rules.[1] It is not the old authoritarian view of law but rather the modern school of legal positivism which tends so to identify

1. THOMAS AQUINAS, SUMMA THEOLOGICA IIa, IIae 57, 2.

justice with conformity to law as to negate all consideration of the problem of unjust laws.[2]

Knight reduces his entire discussion of justice to the problem of the just law. This involves him in a curiously contradictory conclusion:

> One who wishes to speak or write about justice should be clear and make it clear to others that he is not dealing with any general and positive ideal, but with the law, either as it is or as it might be if some rather specific *in*justice were removed or alleviated. (p. 23)

I am entirely in accord with the motive behind this conclusion, which is to avoid luxuriating in generalities; but I would very much like to know how Knight would explain in what "the specific injustice of a particular situation" consists since he refuses to apply the term *just* to anything but laws. One wonders too whether he would be certain to refuse to term unjust a clearly partisan judicial decision.[3]

Professor Carl Friedrich's essay "Justice, The Just Political Act" is conceived on a quite different level. The author limits his analysis to this question:

> What particular act or complex of acts and/or events, recurrent in all politics, what concrete political experience is meant when people speak of justice and injustice? (p. 25)

He insists that what is involved in this context is not a purely subjective feeling but an objective quality: "Justice expresses a political relation of persons and things and as such has a function in political situations." (p. 26) He goes on to define more precisely the nature of this relation:

> An action — and hence likewise a rule, a judgment, or a decision — may be said to be just when it involves a comparative evaluation of the persons affected by the action and when that comparison accords with the values and beliefs of the political community. This is the point of Aristotle's *isotes,* which is politically relevant and which can be summed up in the statement that equals should be treated equally. For the alleged equality can become a standard only when the values and beliefs relevant to a determination of equality are concretely stated. (pp. 27-28)

Thus, giving special protection to women and children — rescuing them before men, for example from a burning theater — will seem just to us because it reflects the values of our community. What seems just to us, then, is not absolute equality, but rather a kind of inequality or partiality which is not arbitrary, because it is based on the aspirations of the community. In this schema of

2. Cf. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 262 (Hart ed., 1954): "By the epithet *just* we mean that a given object to which we apply the epithet accords with the law to which we refer it as a test."

3. Cf. Ch. Perelman, *The Three Aspects of Justice,* in THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT 62-67 (London, 1963).

justice any norm which requires the impossible seems arbitrary and can therefore be ruled out as unjust: *"ultra posse nemo obligatur."*

Elsewhere in his article Friedrich opposes, albeit not by name, the thesis of Rawls, which identifies the ideal of justice, conceived in political and social terms, with the absolute equality of all citizens, and allows no deviations from equality except those which can be justified in terms of common consent, special contribution, or particular necessity. Friedrich finds that one of these three elements, the consent of the parties involved, does not by any means always assure an agreement we consider just. Even if all three elements are relevant criteria, it is not "very satisfactory, however, from a political standpoint, to erect an unreal standard — absolute numerical equality — as the norm and then to treat all real situations involving justice as deviations from it." (p. 29) Rawls' theory does indeed impose a norm of justice which is demonstrably external to the values and ideals of a political community; this is presumably what Friedrich means by an "unreal standard." Friedrich, on the other hand, propounds a conception of justice defined by relation to the aspirations of the community, a communal relativism taking into account the conflicts of value within the community. This conception leads to the possibility of acts being more or less just. "The most just act is the act which is compatible with the largest number of values and beliefs, allowance also being made for their intensity." (p. 31) It is as a consequence of the existence of value conflicts that the ideas of *authority* and of *legitimacy* take on so much importance (pp. 33-39); they compensate for the lack of techniques which would create a unanimous consensus in a dynamic and changing society:

> A just act is required to produce the legitimate ruler, whereas the legitimacy of the ruler helps render his actions just by providing them with an authority which bare or brute power does not possess. (p 37)

To be just, in Friedrich's view, a political decision must not only avoid the arbitrary and not demand the impossible; it must also not be based on false data; at least such data must not have been "crucial for arriving at the decision to act in that way." (p. 38) I assent to this ruling, provided that it does not exclude the possibility of having recourse to certain juridical fictions which present a deliberate negation of fact for the sake of a superior administration of justice. For example, in Belgium in a recent dramatic trial of the persons guilty of the death of a deformed child, the jury, having pity on the mother and the doctor involved, judged against all the facts that the accused did not commit murder, in order to allow the acquittal desired by public opinion.

Friedrich's penetrating analysis, written from the perspective of democratic political theory, equates the justice of a political act, as we have noted, with its conformity to community desires and values. It does not concern itself with the moral worth of these social aspirations, nor does it take up the basic question of whether there exists some basis other than that of brute force for adjudication, in the name of justice, of claims involving communities whose aims are totally incompatible.

Let us suppose (as a hypothesis) that the National-Socialist regime was

legitimate in the eyes of the German people and that the decisions of its leaders conformed to the aims and ideals of the majority of Germans; let us also assume that the institution of the Nuremberg tribunal and its manner of judging the leaders of defeated Germany were conformable to the aspirations of the Allies. Must we conclude that it was only brute power rather than principles of universal application which could lend prevailing strength to one or the other concept of justice? Or that the quest for ideals and values which will be acceptable to all mankind — merely because such a quest is not yet politically organized — is not the province of the political philosopher? Does an act become politically just simply by being conformable to the values and norms of a society, values and norms which themselves evade entirely the strictures of political justice through the use of the maxim *Vox populi, vox Dei?*

Can we thus attribute to the principle of majority rule an ultimate value in which content plays no part? Any voluntarist theory raises important difficulties, even when the will to which ultimate value is attached is that of God. In another of the essays in this volume, Professor David Granfield points out some of these difficulties in the course of an interesting comparison of the doctrines of Thomas Aquinas and William of Occam ("The Scholastic Dispute on Justice: Aquinas versus Ockham"). He shows the difficulties which voluntarist theologians such as Occam, working from a concept of justice as whatever God decides, encounter when they come to deal with natural law. But these theologians can at least found their arguments on the perfection and the oneness of God. How much more justified are Granfield's criticisms when we apply them to a similar voluntarist conception, but one in which the ultimate will is not that of God, but that of certain political entities, opposed to one another and obviously fallible? Must political philosophy give up a role traditional since the time of Plato, and like a vote-getting politician bow before mass opinion, rather than seek to inform and purify such opinion, by introducing conceptions more reasonable, more philosophically capable of inspiring the various human communities?

Although it is unquestionably true, as Professor Arnold Brecht's essay "The Ultimate Standard of Justice" clearly demonstrates, that the ideas of justice thus elaborated cannot be scientifically proved and do not form part of the *"scientia transmissibilis"* — despite the past and present opinion of many partisans of natural law — nonetheless there is still no dearth of attempts to give philosophical form to the ideal of a just society and to work out reasonable criteria for judging the value of positive law on some basis other than that of its conformity to the wishes of the majority. At least four of the essays in this volume represent such efforts: the philosophical analyses by Rawls and Jenkins and the historical expositions of the utilitarians by Bedau and of Marx by Tucker. It is true, I concede, that there is grave danger of wishing to impose debatable philosophical views by force. For this reason I would unhesitatingly set aside any recourse to the rule of a philosopher-king, who would inevitably become a more or less enlightened despot. The danger justifies the contention, made by Professor Clarence Morris in his essay on "Law, Justice and the Public Aspirations," that the legislator or judge in exercising his functions should think of himself as the instrument of the public, seeking to realize the aspirations of the latter and not his own private

aspirations. But the role of the philosopher as such is not to work through legislative or judicial channels or to use political authority to impose his ideas. He must content himself with setting forth and justifying his ideas, acting through the nonpolitical medium of philosophical discourse upon the aspirations and values of his hearers. If, as Morris shows, the role of political authority is to express in laws and judgments the aspirations of the community which he represents, the philosopher's role is to be the educator of the same community, the one who leads it toward a fuller justice and a greater rationality. There is a philosophical connection between the two roles: if the political justification of a law or judgment consists in showing its conformity with the aspirations of the public, the philosopher must judge these aspirations in the light of standards which he asserts are valid for all reasonable humanity. It is not by chance if the specific character of all philosophical thought is a self-development in relation to ideas and aspirations — like the real, the true, and all the values called absolute — which are acceptable by a universal audience.[4] If philosophical efforts do not furnish a demonstrable knowledge, there is yet no reason to deny all rationality to philosophical argument and to take from philosophy all moral and political significance.

Professor McKeon in his scrupulously clear study "Justice and Equality" stresses that:

> The equality of justice was never set forth as an equality of persons and natural abilities. It was always proportionate equality established between persons and things or circumstances. The basic ratio is between person and person, and that ratio, which might be established as a ratio of ability, knowledge, or virtue in the utopian state, is measured in all actual communities by two interrelated ratios—the ratio of honor, wealth, or other external assets at the disposition of the community and the ratio of law, custom, and opinion by which the community is ruled. (p. 53)

As he demonstrates, the different measuring standards invoking equality seem acceptable when set forth separately, but involve one in almost insurmountable conflicts when applied simultaneously:

> We recognize the claim that equality in the satisfaction of basic needs is justice, and we raise no question concerning equality under an impartial rule of law as justice. But the combination of the two in social justice is new, and the results of the combination are difficult to understand and difficult to put into action: the rights of the eighteenth century — the freedoms of worship, speech, and assembly — required political institutions to protect individual action; the rights of the twentieth century — the freedom from want, fear, and discrimination — require social education to form new communities of feelings and cooperative action to achieve new ends. (p. 60)

The two perspectives, liberal and social, are spelled out in mutually hostile terms, the liberal view demanding protection for individual enterprises, and

4. On the idea of universal audience, cf. CH. PERELMAN & L. OLBRECHTS-TYTEGA, TRAITÉ DE L'ARGUMENTATION sec. 6-9 (Paris, 1958).

thus allowing free play to existing natural and social inequalities, whereas the social view summons the state to reduce such inequalities, watching over and spurring on by all manner of techniques of intervention the equalization of its citizens and even of all mankind. Such an antinomy raises problems which cannot be resolved by referring to the sole idea of equality.

McKeon discerns a similar problem of resolution in the domain of constitutional law:

> . . . we recognize that equality of participation in common decisions is justice, and we raise no question concerning equality of man in dignity and in accomplishment as justice. But the combination of the two seems to involve an obvious contradiction, since the premature participation in decisions may provide no ground for a sense of getting somewhere in the accomplishment of values. (p. 60)

The equal exercise of political rights — a basic democratic phenomenon — cannot be enjoyed unless there is first present in the community one essential constitutive factor of any democratic regime — a common assent to the concept of the dignity of the person, which we express by the idea of the rights of man and of citizen. Without this common belief, the conditions justifying the inauguration of a democratic regime are cruelly lacking.

McKeon says in conclusion that as the antinomies he mentions make rational agreement on desirable ends impossible, the justice and rationality of political action can be determined only through a long process of adjustment of ideas and aspirations:

> The function of reason in human actions is not to lay down a master plan for imposition on all as the common interest, nor is its function to design a strategy for execution by some to secure private interests. Justice is the adjustment by rational means of the use of reason to secure material goods to the use of reason to establish a common treatment of men in the community. Justice is the adjustment by rational means of the use of one's own reason in making decisions to the use of common reason and consensus to analyze truths and to achieve goods. (p. 61)

I find it difficult to oppose such conclusions. But to be fully useful they ought to be accompanied by some indication of what reason is and what we are to understand by "the use of reason" and "adjustment by rational means" in the context of concrete problems of action, choice, and decision.

The object of Professor Feinberg's study "Justice and Personal Desert" is to show how the aspirations toward justice represented in the idea of personal desert are linked with the idea of rationality. With this point in mind he takes up the notion of desert, distinguishing it from such related ideas as "eligibility" or "entitlement" and showing that it correlates not with formally stipulated conditions but with conditions which are not specified in either fundamental or procedural rules:

> If a person is deserving of some sort of treatment he must, necessarily, be so *in virtue of* some characteristic or prior activity. It is because no one can deserve anything unless there is some basis or ostensible occasion for the desert that judgments of desert carry with them a commitment to the giving of reasons. (p. 72)

We must not identify the notion of desert with that of social utility. To treat someone in a particular way for reasons of social utility is in no way the same as to treat a person as he deserves. We have only to remember all the situations in which "reasons of State" have led to injustice. Moreover, a utilitarian standard is too speculative in nature to be a really useful criterion for judging even ordinary cases. If we are concerned to appraise a student's knowledge of mathematics, a "math exam" would surely be more useful for the purpose than a direct appeal to "utility."

One cannot always employ the standard of desert, however, because the judges' individual assessment of worth would thereby become too influential a factor in determining cases. It is clearly necessary that formal criteria of desert be elaborated in order to provide a safeguard against arbitrary judgments and to eliminate insecurity each time that subjective evaluation of merits risks producing injustice and conflict. Accordingly,

> Desert is always an important consideration in deciding how we are to treat persons, especially when we are not constrained by rules or where rules give us some discretion; but it is not the only consideration and is rarely a sufficient one. (p. 94-95)

To see the proper limitations of the idea of desert one should contrast it with the idea of "entitlement." Entitlement emanates from the law and its regulations; on the contrary,

> desert is a *moral* concept in the sense that it is logically prior to and independent of public institutions and their rules, not in the sense that it is an instrument of an ethereal "moral" counterpart of our public institutions. (p. 97)

Professor Rawls, whose conception of justice as "fairness" has been developed in several remarkable studies, is represented here by an essay "Constitutional Liberty and the Concept of Justice." He applies a conception of justice as reciprocity to the determination of what constitutes a just constitution and deduces in this way the principle of freedom of conscience:

> When applied to an institution (or a system of institutions), justice requires the elimination of arbitrary distinctions and the establishment within its structure of a proper balance or equilibrium between competing claims. (p. 99) An institution is just or fair, then, when it satisfies the principle which those who participate in it could propose to one another for mutual acceptance in an original position of equal liberty. (p. 103)

What then are the standards governing the establishment of just institutions of this kind? For Rawls there are two principles:

> . . . first, each person participating in an institution or affected by it has an equal right to the most extensive liberty compatible with a like liberty for all; and, second, inequalities as defined by the institutional structure or fostered by it are arbitrary unless it is reasonable to expect that they will work out to everyone's advantage and provided that the positions and offices to which they attach or from which they may be gained are open to all. (p. 100)

It follows that no departure from complete equality in the enjoyment of liberty can be accepted without some definite justification. On the other hand, any such departure can be accepted if, by meeting the conditions of general advantage and equal access, it can be shown to be not arbitrary and therefore not unjust.

As Rawls points out, it is not enough to prove that the constitution as structured will realize the maximum of social utility, because the demands of justice will not thereby be satisfied:

> The concept of justice is distinct from that of social utility in that justice takes the plurality of persons as fundamental, whereas the notion of social utility does not. This latter seeks to maximize some one thing, it being indifferent in which way it is shared among persons except insofar as it affects this one thing itself. (p. 124)

Rawls' hypothesis, as he indicates (p. 100, note 1), recalls the idea of the social contract. He recognizes, however, that the institutions under consideration need not be newly formed as the social contract theory presupposes; since they are already effectively functioning when we come to consider them, the only reasonable approach is to see if there is room to modify them in order to respond to the legitimate complaints of interested persons. With this end in mind, he formulates three rules for considering such complaints:

> It is understood (1) that, if the principles one proposes are accepted, the complaints of others will be similarly tried; (2) that no one's complaints will be heard until everyone is roughly of one mind as to how complaints are to be judged; and (3) that the principles proposed and acknowledged on any one occasion are binding, failing special circumstances, on all future occasions. (p. 104)

All the foregoing conditions seem acceptable and might even be followed to the letter if we were dealing with nothing more than a game, with rules set up to provide equal chances to all players. Actually in such an artificial situation there is no need to take account of the past, since the institution of the game rules constitutes an absolute beginning; similarly one can anticipate the future, predict all the possible results of the game and the conditions in which they will develop. But we have nothing of the sort confronting us when we deal with political institutions.

Let us suppose that our ancestors drew up a contract of the type proposed and agreed on a group of ground rules and rules of procedure. To what extent

are we bound by their provisions, by the precedents they established and the situations to which such precedents gave rise? Have we the right to call in question anew the institutions which they set up and their methods of revision? Can we escape the burden of the past, by force if necessary, in order to fashion a new social contract more just than the old one, more responsive to our convictions and aspirations? If at times it becomes necessary to resort to such violence and revolution to effect a change in institutions, this is because all those whose interests are affected will not always be unanimous in agreeing to adopt the changes recommended by some. And who would claim that justice is always on the side of either traditionalists or reformers? Each side will ordinarily be able to advance arguments for its viewpoint. Although the force of such arguments may incline us to favor one or the other faction, we could not justify our judgment without having recourse to criteria which in their turn can be questioned: practical judgment never leads to self-evident or demonstrable conclusions.

How far, then, should we conform to tradition, and to what extent depart from it for the sake of a better administration of justice? Even a cursory examination of the theory of American case law in areas where it is not affected by legislation reveals how delicate is the adjustment between the burden of the past and the pressures of the present.[5] For example, in order to assure an equal start for all citizens, as Rawls would wish, must we abolish the right of inheritance? Would we perhaps not have to limit or even abolish a man's right to dispose of his property during his lifetime if we propose to bestow on the coming generations a perfect freedom from the burdens of the past? But if we take account of the disadvantages in assimilating the functioning of political institutions to the rules of a game, because of the extreme instability thereby introduced, if we decide to take the past into consideration in some measure in the evaluations of social inequalities, then the question of what is just or unjust in the functioning of institutions will be decided by compromise, by adjustment to the needs and aspirations of the community.

Looked at in another way, the consensual system Rawls sets up depends on rules which all those participating in the functioning of the institutions will regard as just, and therefore acceptable, and which will be predictable in their practical consequences. Such a system fails to take sufficient note of the disillusionment which experience is apt to bring. In pursuing this point, we can profitably consider a distinction between two sorts of consent offered by Professor Charles Fried in his essay "Justice and Liberty." One kind of consent, which Fried calls "first order consensual practice," is found in cases where a man's rights and duties arise from express undertakings he has entered into — undertakings of whose scope he is fully aware, and which he must keep on the principle "*pacta sunt servanda.*" The other sort of consent, which Fried calls "second order practice," is that consensus which exists in a community with regard to the functioning of its institutions, such as the criminal law, or the draft, "where it is the practice itself which defines the sacrifices to be made." As Fried shows, if we

5. Cf. EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 8-27 (1961).

envisage the justice of institutions on the model of contractual justice, we are using a type of "first order practice" to characterize what are actually "second order practices."

Fried goes on to make another point that can profitably be set against Rawls' system. Given the lack of consensus among the members of a community concerning fundamental questions on what we might call "questions of conscience" — can we characterize as just such institutions as compulsory education within a particular religious or ideological framework, even if they raise no question of unequal distribution? Can the founders past or present of such institutions argue that they alone know what is the true good of the community and of each of its members? In approaching this problem, Fried points out the possibility of an antinomy between rationality and liberty, and states his preference for liberty:

> But, if these conditions of rationality, and particularly the condition of knowing one's own interest, were taken at full value as necessary conditions of a situation of justice, it would be otiose to add, as I think we must, a notion of liberty as being one of several interests which individuals do in fact have. Furthermore, these conditions would render the concept of justice inapplicable in many important situations, for in many situations precisely what is claimed is that the "victim" does not know his own interests and hence is not rational. If we were to exclude situations where such claims could be made, the applicability of the concept would be drastically reduced. That is why justice must include the liberty to define — even incorrectly — one's own interests. (p. 145)

It is because we have imperfect knowledge, because the institutions which we create can have unforeseen and even unforseeable consequences, that, as Professor John Chapman points out in his essay "Justice and Fairness," the idea of "fairness," as Rawls conceives it, cannot afford an adequate definition of justice. For justice must concern itself equally with the needs of men and with the efficacy of concrete functioning institutions in actually meeting those needs. Here, according to Chapman, the doctrines of the utilitarians are superior to those of such men as Locke, who also focus on the "fair" functioning of institutions:

> When I say that Locke appears to have been concerned with what we should call fairness, I mean simply that he thought that, if the competition for wealth was conducted fairly, there was nothing more to be said on the matter. The outcome of the competition could not be challenged on the ground of justice. It is the way in which the competition is carried on, not its results, that counts for Locke. This concern with the process of competition is most aptly described, in my opinion, as a concern for fairness, and it avoids or evades recognition of the claims of need. It is these claims which are recognized by utilitarianism.
>
> Historically, I think utilitarianism is best viewed as ambiguous with respect to contractualism. On the one hand, there is a loss of grasp on the principles of the plurality and moral autonomy of persons; on the other, there is an advance on contractualist thought, whether this advance be interpreted as an enlargement of the meaning and scope of

> justice or as a shift in meaning from justice as fairness to justice as equality. On either interpretation, justice is seen as something more than reciprocity and fair play, and this something more involves recognition of the claims of need. (p. 153)

We can apply the idea of justice in a procedural sense to those institutional forms and processes whereby human relationships are governed; we can also apply it in a substantive sense to a state of affairs, a distribution of goods, a particular treatment. The considerations applicable to the substantive state of affairs become more important as procedural devices become attenuated in the course of time, as inequalities spring up out of the functioning of institutions, as the results of a given process of decision become less and less foreseeable, as the consent that validates the institutions becomes more and more a fiction. Therefore, we cannot limit our concern with the role of justice in the life of political institutions to the critical assessment of the rules for their functioning; we must also consider the justice of end results in the light of a sought individual and social ideal.

Professor Iredell Jenkins' contribution, "Justice as Ideal and Ideology," is of special interest because it challenges the basic orientation with which most contemporary writers approach the problems of legal and political philosophy. This orientation is characterized by a mistrust of metaphysical or utopian constructs, and a tendency to look for the positive content of justice in the aspirations of a community, the individual's sense of justice, "fair" rules of procedure, or a combination of these. This way of proceeding is noted by Jenkins in special reference to the essay by Morris, but the same orientation is to be found in the contributions of Knight, Friedrich, McKeon, and Rawls. Here is Jenkins' statement of the grounds of his objection to theories of this kind:

> In their very natures they leave unsettled what must always be the central issue, namely, the final values on which the society is grounded, the ideal ends it seeks to promote, the conditions it means to realize. To the extent that this issue is left vague and tentative, the entire quest for justice is unguided. As we have seen, the sense of justice speaks unequivocally and compellingly in particular cases; but its disclosures are neither generalized nor systematic, so they cannot offer the coherent direction that purposive action requires. In a word, the sense of justice is largely retrospective and corrective; the deficiencies it identifies can be finally repaired only by a body of doctrine that is prospective and creative. The procedural or operational approach suffers in a similar way; it must necessarily accept from elsewhere the substance, or contents, of justice, that is, the values that it is to recognize and the conditions that it seeks to further. Procedural justice is concerned with developing an apparatus that will serve as a fair and impartial means to the attainment of ends that it does not itself determine. (p. 197)

But the solutions that have been offered to this fundamental problem of how to determine the ends of a society, and what the law must be if it is to implement these ends, have been subject, Jenkins tells us, to two mutually opposed criticisms:

the ideals thus proposed have been considered either too debatable to be given general scope or too vague to be given concrete effect. He notes that these objections have both been made on genuine grounds; we can meet them only if we situate our proposed ideals within a framework in which "ideal" and "ideology" are carefully distinguished. The *ideal* of justice, conceived as the "fundamental constitutive idea of social organization and the ultimate regulative idea of legal and political action" (p. 195) should serve merely to provide a basic theoretical outline, an outline which the different *ideologies* of justice should fill in, each in its own way.[6]

According to Jenkins, "law must shape aspirations, not merely actualize them." (p. 199) Such aspirations may indeed be unjust if we define justice in terms of "fairness, equity, concern, interest, and altruism." (p. 199) If legal philosophy is to fulfill its function, "sooner or later, implicitly or explicitly, the concept of justice must be given an intrinsic meaning and an objective reference that can control the private intuitions and the public procedures of men." (p. 200)

In working out the answer to this fundamental problem, Jenkins uses a "genetic and functional approach." (p. 205) Law has a task to perform. What is it? It is the realization of a certain kind of working order:

> The concept of order embodies pure discovery of pattern and regularity, of stability and continuity, in our surroundings. It refers to the web of relations that we find connecting discrete objects and occurrences. Order indicates similarities among things and uniformities of sequence among events. To say that "order holds" is to say that we are in the presence of distinct entities that follow established courses and hang together as a whole, so as to compose a systematic structure. . . . I think it is apparent that the concept of order entails reference to four basic elements: a plurality of distinct entities that exhibit stable group characteristics; the organization of these into a series of higher-order entities; activities engaged in by these entities and energy exchanged among them; and all of this taking place in a regular and coherent manner. I shall identify these items respectively as "the many," "the one," "process," and "pattern . . . " (p. 204-205)

As soon as we begin to think of law as the principle of a just order, we will have to treat it as at once descriptive and prescriptive:

> In the human context, order appears as a goal as well as a fact; it is something to be created as much as something given. . . . law is a principle that not merely reflects an order that it inherits, but must also define and guarantee an order that could not exist without it. (p. 206)

Jenkins goes on to give us four objectives which a just order should realize. They correspond to the four basic elements he regards as inhering in the general notion of order:

1) With respect to individuals ("the many"), the objective should be "cul-

6. Cf. Iredell Jenkins, *The Matrix of Positive Law,* 6 NATURAL LAW FORUM 1-50 (1961).

tivation." "Cultivation must pass on a tradition and produce a coherent population while preserving the integrity of individuals." (p. 215) It must work against both indifferentism and indoctrination.

2) As regards the unity of the system ("the one"), the objective should be to create and maintain an authority that is at once effective, limited, and legitimate.

3) As regards the forms of interaction ("process"), with the concomitant notion of responsibility, the objective should be to draw the line between what is permitted and what is not; this line must be worked out in terms of a body of rights and duties.

4) To maintain the social milieu in which individuals act ("pattern"), the objective should be to preserve a certain continuity: "The task of continuity is to both respect and integrate the separated careers of men, preventing alike their isolation from and their submergence in the total group enterprise." (p. 216)

What are we to think of this prospectus which Jenkins offers for the work of legal philosophy? Does his schema escape, as it is intended to, the double reproach of being arbitrary and vague?

I think it is quite clear that the political philosopher must try to envision a model of the ideal society which men concerned in political affairs should be working to realize. But in doing this, is the philosopher seeking to realize within the society only *justice,* or is he seeking to realize *all* the qualities he thinks an ideal society should have? A political order should be not only just, but efficient and stable as well — it is not without reason that legal philosophers have seen as the goal of law not only justice but also security and the common good. It is worth noting that Rawls adopts as his thesis a limited conception of justice:

> Justice is but one of many virtues of political and social institutions, for an institution may be antiquated, inefficient, degrading, or any number of other things without being unjust. (p. 98)

For Jenkins, on the other hand, the place of justice among the ideals of a society is in no way specific:

> It makes little difference whether the covering name for these [the goals and the program of a society] is justice, the public interest, the general welfare, the common good, progress, democracy, communism, or the historic nexus. (pp. 202-203)

The trouble with such an approach as this is that in developing a general social ideal one is led to lose sight of the specific qualities associated with the idea of justice. Jenkins, for instance, does not treat at all the ideas of regularity, equality, proportion, and reciprocity which go to make up the element of rationality traditionally included in the concept of justice. It is significant that in the present volume objections similar to the foregoing are leveled against the utilitarians by Bedau (p. 289) and against Marx by Tucker (p. 318). If

the application of a human or social ideal within a system of law requires a global vision of man and society, it would seem wise not to present such a vision under the sole aegis of the idea of justice — unless we are to identify the thirst for justice with the quest for the Absolute Good.

Furthermore, I question whether the four elements which Jenkins isolates can serve as useful criteria for the elaboration of an ideal of human society. To be sure, they show the usefulness of drawing attention to certain elements which must be takén into account in elaborating an ideology. But these elements are subject to various interpretations, and in practice they have antinomical tendencies. How far should we limit the rights of the individual, how far the power of the authorities? How far can authority limit the autonomy of individual wills in their power to create obligations by mutual consent? To what extent can we constrain individuals in order to educate them? In what measure is it allowable for those in authority to work against societal traditions or individual values? It seems to me that the answers to such questions should be sought in debates and suggestions, but not imposed in the form of legal decrees except insofar as they conform to the aspirations of the bulk of the community. It may be the role of the philosopher to influence these aspirations, but the role of the modern legislator is limited to giving them effect.

The remaining essays in this volume are historical in nature. That of David Granfield, on the opposition between Thomas Aquinas and William of Occam, shows how effectively theological controversies can illuminate philosophical debates; the theological antithesis in this case relates to the two conceptions of law as justice and as commandment. (p. 230)

Locke's conception of justice is analyzed by Professor Cox in his "Justice as the Basis of Political Order in Locke" and by Professor Polin in his "Justice in Locke's Philosophy." The two presentations are widely divergent, because Cox deals only with those passages in Locke in which the word "justice" is specifically mentioned, whereas Polin takes note of anything which Locke might have considered relevant to natural law.

The very useful studies of Bedau (Justice and Classical Utilitarianism) and Robert Tucker (Marx and Distributive Justice) respectively examine the conceptions of justice held by the various utilitarians, and demonstrate the relatively subordinate position occupied by the idea of distributive justice in the thought of Marx.

This collection of essays, remarkable for its general level of competence and analytical penetration, as well as for its richness and diversity, provides a signal contribution to the analysis of the idea of justice — an idea difficult to grasp and formulate, but central nonetheless to moral, legal, and political philosophy.

CH. PERELMAN

Translated by JEANNE C. RODES.

CONSTITUTIONAL DEVELOPMENT IN NIGERIA. By Kalu Ezera. Cambridge University Press, 1960. Pp. xv, 274. $5.50.

THE NIGERIAN CONSTITUTION — HISTORY AND DEVELOPMENT. By Oluwole Idowu Odumosu. London: Sweet & Maxwell, African Universities Press, 1963. Pp. 407. 50sh.

THE POLITICAL DEVELOPMENT OF TANGANYIKA. By J. Clagett Taylor. Stanford and Oxford University Press, 1963. Pp. 254. $6.00.

SHAMBALA, THE CONSTITUTION OF A TRADITIONAL STATE. By Edgar V. Winans. Berkeley: University of California Press, 1962. Pp. xxxvii, 180. $5.00 ($1.95 paperback).

The ever-widening stream of books on African politics is in the four volumes here under review enlarged by four more rivulets from various directions. They share with many other such contributions, especially when produced by anthropologists, as seem to be the last two, a laudable but somewhat confusing attention to local details, reminiscent of the proverbial potsherds. They thus sadly contrast with such a volume as *Five African States* (ed. G. M. Carter), which rests upon a reasonably sophisticated theoretical approach. With the possible exception of Ezera, who at least cites some of the leading literature, these works are uninformed of any such elementary theory as that of a "constitution" or "constitutionalism" or of "power" or of "authority." The first of these key terms seems to stand as a synonym for any kind of political order; in Winans' study it is not even possible to discover what the constitution is.

To the student of natural law and legal philosophy, it is depressing that not even so standard a work as Hoebel's *The Law of Primitive Man* has evidently been consulted by these inquirers into the basic law of communities which, while not primitive, certainly are close to those informal legal systems which Hoebel so painstakingly and illuminatingly investigated. Nor has there been exploration to any extent of the questions which Hoebel formulated and sought to answer.

This much having been said to indicate the political and juristic weakness of the theory underlying these studies, it remains to discuss their relative strength. Professor Ezera's sketch of the Nigerian constitutional evolution, after tracing the colonial background, is primarily concerned with the period from 1946 to 1956, which saw constitution-making attempts in 1946, 1951, and 1954. It serves to demonstrate the instability of all such attempts to formalize governmental relations in terms of a constitution which rests upon a tradition of values and beliefs quite alien to the Nigerian context. A public unformed by centuries of wrestling with the convictional and philosophical problems, highlighted by Thomas Aquinas, Marsilius, Althusius, Locke, Montesquieu and others, is not likely to produce the constituent group for a sound constitutional framework. Ezera's account of what he calls "tribal nationalism" (though it might more properly be called tribalism) reveals by the vivid portrayal of a surface phenomenon how deep is the chasm which divides the public of these communities from the West. When the Weimar Constitution spoke in its preamble of "Germany, united in its tribes" it surely referred to a situation very different from

that confronting the builders of a viable political order in Nigeria. That impression is reinforced by a perusal of the study by Dr. Odumosu, a lawyer and lecturer on law. It is based on his doctoral dissertation at London, and is adorned by the paraphernalia of legal learning, including a series of cases, and a useful appendix containing the Constitution of the Federation of Nigeria. It culminates in an analysis of the emergency situation including the act of 1961 under which the government has been seeking to cope with the crisis (again we find no reference to the extended writings on constitutional dictatorship and emergency power, such as those of Rossiter and Watkins). The discussion conveys the eerie impression of a big battle of shadowboxing; there is no penetration to the heart of the matter: the absence of any really living constitution in Nigeria.

Taylor, a missionary and educator in the land with which he deals, displays a loving appreciation of the distinctive features of Tanganyika as a living community. Many at one time would have agreed with his optimistic estimate, formulated before independence was achieved. Recent events, however, have put a more somber note into this wide-felt hope for Tanganyika's paradigmatic role. Wracked by tribal conflict, infiltrated by Communist agents, and perplexed by economic difficulties, Tanganyika has seen its first bloody revolt. In spite of Nyerere's inspired leadership, political order appears to be a remote prospect rather than an impending reality. Taylor's careful account of the background and setting of the present involved situation is a good guide, even though lacking a sound basis in political theory for penetrating judgment.

Dr. Winans' study provides a more detailed supplement to Taylor's general portrayal. The term "state" employed in the title is somewhat misleading, since we are dealing with a subdivision of Tanganyika, and a curiously unstatelike subdivision at that. This is true even in the author's own antiquated terminology. For the ruler at the center does not claim a "monopoly upon the exercise of legitimate force" (Jellinek's and Weber's out-of-date "definition" of a state) but manipulates the "lineage segments in the elite clan" so as to balance them against each other — actually a phenomenon familiar enough from Europe's monarchical past, though not usually described in these clumsy "scientific" terms. As Taylor describes the Shambala structure it would seem to be tribal rule of the king-priest type, a system of rule antedating anything that can properly be described as a state.[1] It is curious that the concept of tradition, although apparently central to the author's analysis, nowhere receives any clarification or is even located by bibliographical hints in spite of the extended controversies surrounding it. As far as this reviewer can make out, tradition is confounded with myths, especially the foundation myth of Mbega which is called a tradition. A political tradition, as I have pointed out,[2] more specifically concerns the political community, its values and beliefs, including the conduct of men as political persons. Political tradition defines how rule is conducted. It would seem that Winans agrees, though he overstresses myth and underrates behavior (cf. pp. 79ff.). With this caveat one can praise Winans' effort to disentangle this

1. See ch. 10 of my MAN AND HIS GOVERNMENT 188ff. (1963).
2. MAN AND HIS GOVERNMENT 37-52.

particular "segmentary lineage system" along lines made familiar by M. G. Smith's study.[3]

In conclusion, it may bear repeating that the cumulative impact of these African studies would have been greatly increased if their authors had familiarized themselves with political and legal theory, ceased treating certain works like that of Fortes[4] as sources for such theory, and essayed to formulate conclusions which would relate their findings to the general corpus of political and legal science.

CARL J. FRIEDRICH

3. M. G. SMITH, GOVERNMENT IN ZAZZAU: 1800-1950 (1960).
4. MEYER FORTES & E. E. EVANS-PRITCHARD (eds.), AFRICAN POLITICAL SYSTEMS (1940).

THE CONSTITUTIONAL LAW OF GHANA (No. 5 in Butterworth's African Law Series). By F. A. R. Bennion. London: Butterworths, 1962. Pp. xxxvi, 527. 70 sh.

Ghana was the first of the Black African colonies to achieve independence, in 1957. It was the first of the former British colonies to adopt a republican constitution, in 1960. The organization of its independence movement, the Convention Peoples Party, was widely copied, and the constitutional experiment that Ghana launched in 1960 has also been of considerable influence, at least in the English-speaking African states. Both the politics of independence and the building of new institutions have been discussed extensively by scholars who, with a notable exception,[1] have paid much less attention to the work of "fleshing out" the body of laws, an effort in which Ghana of necessity also took the chronological lead. The new conditions of independence naturally called for the new-modelling or remodelling of not only constitutional law, but also other law from the customary "bush roots" on up to supreme court and parliamentary procedure. This task of fleshing out the new constitutional framework was taken in hand very deliberately in Ghana, largely under the direction of its controversial sometime Attorney General, Mr. Geoffrey Bing, Q.C. (who is not mentioned in the book under review).

Bennion addresses himself principally to the outcome of this process of putting meat on the constitutional skeleton, in full awareness of the fact that "the law is still in flux." (p. vii) In his Preface, he writes:

> The introduction of the Republic in 1960 made necessary a complete recasting of the law of Ghana, with consequent difficulty for those who had to teach, learn and administer it. To help in this situation I set out to explain some of the new laws I had helped to prepare.[2] I am not qualified to comment

1. L. RUBIN and P. MURRAY, THE CONSTITUTION AND GOVERNMENT OF GHANA (London, 1961). Two of Bennion's footnotes, on minor points, refer critically to this work.
2. Bennion is an English barrister and sometime lecturer and tutor in law at St. Edward's Hall, Oxford, who was from 1959 to 1961 Technical Adviser to the Government of Ghana on the preparation of legislation.

> on the political background, nor would it be right for me to do so. My aim has been to expound the provisions of the law as they exist, and to supply some *technical* help for practitioners, teachers and students who may feel themselves overwhelmed by the recent spate of legislation. (italics supplied)

The book achieves this aim. It even seems to go beyond it on occasions when the learned author may be trying to influence the interpretation of statutes by revealing legislative intent on his authority as legislative draftsman. (e.g., p. 452) His book will probably be most helpful to politicians, administrators, and members of the bar and bench of Ghana. The length of the Table of Cases (more than 125 are cited) and of the Table of Statutes and Statutory Instruments (20 pages) may serve as one index of its usefulness.

Does Bennion's book contribute answers to more general questions about lawmaking in relation to basic human needs in the new states? Despite the author's cited disclaimer, this query almost asks itself at a time when we read of the fifth reported attempt on the life of President Nkrumah, his setting aside of a Special Court's verdict in a treason case, his dismissal of the Chief Justice and that respected jurist's subsequent resignation from the Supreme Court, and of the constitutional referendum to confirm the one-party system in the fourth year of the Republic.

One might expect answers to such questions as the following: Were the President's actions "constitutional," and in what sense of the word? How does the republican constitution compare with others elsewhere? What does this Constitution, and the use to which it has been put so far, tell us about future constitutional trends, in Ghana and elsewhere in Black Africa? The expectation of direct answers to these questions would be disappointed, but careful reading of the book does yield a perspective from which to pursue the inquiry — a perspective different from but complementary to that provided by the efforts of political scientists like David E. Apter in his *Ghana In Transition.*

Bennion traces, for example, the process, begun in the nineteenth century, of mutual reconciliation and adaptation between customary law and the common law. As this process was conducted from the British side, it involved the introduction of natural law notions. In the Fanti Bond of 1844,

> the chiefs acknowledged the power and jurisdiction which had been *de facto* exercised in their territories adjacent to the British forts and settlements, and declared that "the first objects of law are the protection of individuals and of property" and that human sacrifices, panyarring or the kidnapping of hostages for debt, and other barbarous customs "are abominations and contrary to law." They agreed that serious crimes should be tried by the Queen's judicial officers sitting with the chiefs, "moulding the customs of the country to the general principles of British law." (p. 8)

These barbarous customs were outlawed early "on the ground of repugnancy to natural justice, equity and good conscience." (p. 410) In a manner not atypical of common law practice, no clear dividing line between "natural justice" and the "general principles of British law" was ever drawn. As elsewhere in the common law world, judicial interpretation played an important role in the process of blending the various notions of justice and legality. In the case of

the Gold Coast, a high proportion of appealed cases was decided by the West African Court of Appeal. (p. 449) From the establishment of the first Legislative Council, Royal Instructions issued to the Governor set forth that Ordinances "were to be drawn up 'in a simple and compendious form, avoiding, as far as may be, all prolixity and tautology,'" (p. 10) a demand for economy and elegance of language which could perhaps be derived from natural law.

Some provisions of the Constitution of 1960 apparently put an end to certain strands in this relatively old natural law tradition. Article 39 of the draft constitution published on March 7, 1960, before the referendum, "included in the laws of Ghana 'indigenous laws and customs not being repugnant to natural justice, equity and good conscience, insofar as their application is not inconsistent with any enactment for the time being in force.'" But this definition was found to be "unwise" by the time of publication of the Constitution Bill and, therefore, omitted from the Constitution. (p. 404) Again, though Article 42 of the Constitution, on "Jurisdiction," seems less one-sided on this than Bennion's gloss, he asserts that the Constitution was not meant to be subject to judicial interpretation:

> It is drafted on the assumption that the words used have a fixed and definite meaning and not a shifting or uncertain meaning; that they mean what they say and not what people would like them to mean; and that if they prove unsuitable they will be altered formally by Parliament and not twisted into new meanings by "interpretation." (p. 111)

However, there are other countervailing provisions in both Constitution and recent statute law which could be looked upon as continuations or even reinvigorations of the natural law traditions, both British and customary. For instance, such a meaning could be read into the wording of the presidential oath (". . . that I will do right to all manner of people according to law without fear or favour, affection or ill-will. So help me God." Article 12) and the presidential declaration of fundamental principles (". . . That freedom and justice should be honoured and maintained. . . . That every citizen of Ghana should receive his fair share of the produce yielded by the development of the country. . . ." Article 13).

The use of oaths, according to Rattray's *Ashanti Law and Constitution,* has precolonial roots, not only for purposes of defining relations between a tribe and its chief, but also in trying suits between individuals. The latter practice has been preserved in the Local Courts Procedure Regulations, 1959: the oaths which are lawful for this purpose are limited by the Regulations to

> the state or local oath or oaths recognized in each state (as distinct from fetish or religious oaths) in use in the area of jurisdiction of the respective local courts. (p. 433)

As this passage suggests, harmful or criminal fetish worship is still subject to heavy penalties, under an Ordinance originally made in 1892. (p. 235)

According to the Standing Orders of the National Assembly, members'

speeches must not contain "blasphemous" words. (p. 314) Sittings of the National Assembly open with prayers, read by the Clerk and "specially composed for the Republican Parliament," which are addressed to "Almighty God" and sound rather Christian. (p. 312)

As others, including this reviewer elsewhere,[3] have observed, the Constitution of 1960 apparently succeeded in blending pragmatically those Western and African institutions and procedures which seemed most useful to President Nkrumah and his constitutional advisers. This blending also involved a good deal of imaginative innovation. The Constituent Assembly and Plebiscite Bill of February 23, 1960, authorized the National Assembly ". . . to resolve itself from time to time into a Constituent Assembly. . . ." Bennion believes this to be unique:

> Although *ad hoc* Constituent Assemblies are commonly set up to make new constitutions and frequently, as in the case of India and Pakistan, to exercise the functions of an ordinary legislature at the same time, no previous example was known to the Ghana Government of an existing legislature being given this double personality. (p. 82)

More interesting than this is the continuation of this same Parliament, to which ten women members were added, after the plebiscite which overwhelmingly approved of the new Constitution and elected Kwame Nkrumah as President of Ghana.

This is not the place for an evaluation of the republican constitution, of which Bennion gives a detailed elucidation. His evaluation agrees with that of the *Times* (London), which he quotes as expressing the view that "It is an ingenious constitution, avowedly aimed at efficient government during the early stages of development and expertly framed to suit Ghanaian conditions." (p. 86) The book is particularly useful in explaining the powers of the president in relation to the other constitutional organs, and the special powers conferred by Article 55 upon the first president. Bennion shows, for instance, that,

> Following a suggestion made by Government backbenchers, the position of the Chief Justice was altered to enable him to be dismissed at will from his office of Chief Justice, though not from his judgeship. (p. 92)

The author thereby provides at least a "strict constructionist" answer to the question about the propriety of the dismissal of Sir Arku Korsah. In Chapter 5, "Liberty and State Security," he performs a similar service with respect to the various civil liberties, remedies against the state, and emergency powers.

The overall impression that emerges is one of considerable, perhaps surprising, continuity not only between the republican constitution and its predecessors, but also between the evolving contemporary system of laws and its British colonial forerunner. This is still above all a common law system. Comparison would probably show that legal and parliamentary procedure in Ghana and, say, Guinea, shares less in common than in Ghana and Tanganyika or, as for that

3. HERBERT J. SPIRO, POLITICS IN AFRICA: PROSPECTS SOUTH OF THE SAHARA 152-156 (1962).

matter, England. Ghana had one advantage over Tanganyika and other East African territories in the availability, at the time of independence, of a relatively high number — about two hundred — of trained lawyers. Even throughout the troubles of the last few years, the underlying commitment to observance of proper procedures, which generally characterizes the common law world, could be detected in Ghana. To this interpretation the objection has been raised that it does the victims little good if preventive detention acts, emergency powers acts, and the statutes setting up special tribunals to try them were indeed products of proper constitutional procedures. This objection overlooks a crucial difference: Even when it is accused of violating the rights of its citizens, the government of Ghana has sought to justify its actions in terms of the framework of constitutional procedures and its own determination to preserve this framework. Governments of certain other new states, ex-colonies of continental European powers, have sought to justify their parallel actions in terms of their single-minded dedication to pursuit of some substantive goal, like economic development or antineocolonialism.[4] It is Ghana's apparent continuing procedural rather than substantive commitment that warrants optimism about the future evolution of its constitution.[5] Bennion's *Constitutional Law of Ghana* bears detailed and informed witness to this procedural commitment, at least for the period with which it deals.

At the same time, the book also corroborates its author's assertion, in his Preface, that "the law is still in flux." It is very much in flux, not only in Ghana, but elsewhere in the new states of Black Africa. Because of their understandable preoccupation with pressing immediate problems, the leaders of these new states simply have not had the time to address themselves to the more fundamental and theoretical problems of constitutional and legal development over the longer run. But even in this realm one can discern the shape of certain distinctively African features of things to come, which may ultimately receive recognition as creative contributions to the growing corpus of global legal theory. These contributions can be expected to have deep roots in the precolonial past. British colonial administration showed an early awareness of both the distinctiveness and the potential beneficence of some of the traditions that provide these roots.

The Supreme Court Ordinance of 1876 may serve as an illustration:

> A notable provision was the duty imposed on the court to promote reconciliation of differences among persons over whom it had jurisdiction, and to "encourage and facilitate the settlement in an amicable way, and without recourse to litigation, of matters in difference between them." This duty extended not only to civil disputes but criminal matters "not amounting to felony and not aggravated in degree." (p. 19)

This ordinance seems to recognize African inclinations towards litigiousness — Bennion reports that most litigation today still involves questions of title to land

4. For an elaboration of this difference, see my critique of the concept of "Totalitarianism," in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES (forthcoming).

5. For an elaboration of the distinction between procedural and substantive sources of authority, see Herbert J. Spiro, *Comparative Politics: A Comprehensive Approach*, 56 AMERICAN POLITICAL SCIENCE REVIEW 577-595 (1962); applied to the new states, esp. 588f.

(p. 454) — in its proper context of aversion to adversary proceedings and preference for conciliatory procedures designed to restore old and build up new consensus.[6] According to one interpretation, this preference is today reflected in the rejection of oppositional patterns of politics in favor of more or less consensual "one-party systems," not only by President Nkrumah, who has been criticized in the West for taking this position, but also by President Nyerere, who has escaped such criticism.

This suggests that one of the chief benefits we can derive from the comparative study of law and politics in the new states is a broadening of perspective that may enable us to get down to the rock bottom of truly universal human needs of justice. We may learn, for example, that there is nothing "natural" about two-sided, "either/or" adversary proceedings, in courts, in parliaments, or in world politics of the era of the cold war. If and when we do learn lessons like this, the grafting of African branches onto the tree of the "Common Law of Mankind" will yield good fruit.

HERBERT J. SPIRO

6. SPIRO, *op. cit. supra* note 3, pp. 127-129 and *passim.*

THE POLITICS OF THE DEVELOPING AREAS. By Gabriel A. Almond, James S. Coleman, *et al.* Princeton: Princeton University Press, 1960. Pp. xii, 591. $8.50.

The systematic study of politics has usually been undertaken from the standpoint of "structure," as MacIver does in *The Modern State,* or from the standpoint of "process," an illustration of which is Lasswell's *Power and Society.* These alternative orientations are not mutually exclusive but rather complementary, indicative of emphasis, and productive of types of question that arise naturally in the flow of analysis. Structurally oriented investigation moves readily in either of two directions. One may concentrate upon the display of the nature of the state and the analysis of the purposes of political activity, a path followed by Hocking in his *Man and the State.* Or starting from a specification of the principles of governmental structure, as does Macmahon in his classic essay on American government in the *Encyclopedia of the Social Sciences,* one may proceed to an account of the ways in which structures influence and shape their constituent processes and ultimately to definition of the distinctive kind of politics generated by the system of institutions under consideration. On the other hand, to begin with a focus on "process" not only raises questions of power and policy directly but also may lead to the identification of political "functions," seen as being performed by "structures." Here emerges what may be called the "functional" approach to the study of politics, the methodological design that gives direction and form to the ambitious enterprise of Gabriel A. Almond, James S. Coleman, and their collaborators in *The Politics of the Developing Areas.*

As defined and used in this work, the functional orientation differs from

both the structural or institutional approach to the study of politics and the process or behavioral approach, as these are ordinarily conceived. In functionalism, on the one hand, the concepts of purpose and policy are avoided; on the other, the notion of process is given a multi-institutional dimension in the shape of the concept of function. The aim of these conceptual selections and innovations is an analytic and predictive methodology of universal applicability. The claim advanced is that the functional approach permits comparative analysis of the politics of both developed and developing polities in a scientific manner. Functional concepts standardize political activity and so clear the way for its statistical investigation.

This is a remarkable volume which testifies to the value of cooperative endeavor. It deserves attention not only from specialists in comparative analysis but also from those concerned with political theory and the theory of political development. Few books in recent years promise so much by way of increasing our understanding of political modernization, and none comes so tantalizingly close to fulfillment of promise. Spectacular conceptual innovation allied with distinguished application to a wide range of societies offers the theorist much to ponder and the generalist a swift and lucid introduction to the panoramas of backward areas. The scope and the ambition of the work demand comment from many perspectives, but only two will be employed here, at the expense of justice to what is unquestionably a noteworthy achievement. First, examination of the assumptions and of the modes of analysis used by Almond and Coleman raises theoretical problems which require consideration for their own sake. The utility of a functional political science depends in no small measure upon the validity of the conception of politics and political activity upon which it is based. Secondly, the results of their analysis in the form of contributions to the theory of political development bear directly upon questions of high policy and do much to establish reliable indicators amidst the bewildering complexity of change that is too often stereotyped with the term "developing." Formulation of the principles of political development is the most challenging task in the path of contemporary political science.

In his theoretical introduction to the book, Almond argues that the functional is to be preferred to institutional and legal perspectives in the comparative analysis of developed and developing polities. He does not examine the full range of alternative conceptual orientations, but quickly, perhaps somewhat cavalierly, the concept of the state and its traditional correlative conceptions are discarded as sterile and unilluminating. Attention is directed to political reality by means of concepts such as "articulation" and "aggregation" of interests, and these constitute only two from the spectrum of functional categories produced in a theoretical effort that is at once both powerful and constricted. This functional apparatus is held to have the very great virtue of recognizing the existence of a "continuum" of polities and so forestalling the temptation to dichotomize polities into those which are states and those which are not. Adoption of functionalism is recommended on the ground that it alone makes possible systematic comparison of polities along the continuum with a view to the eventual acquisition of a genuinely scientific political science. Both the operational failure of

the institutional and the cultural limitations of the behavioral methodologies are noticed as considerations reinforcing the invitation to functionalism.

The theoretical and empirical impact of functionalism is indeed energizing. Still one need not be overly Hegelian to wonder whether comparison of polities along a functionally defined continuum may not unduly minimize the significance of that singular product of Western political development, the constitutional and national state. Perhaps no analytical apparatus could entirely dispense with the concept of state, and equivalents for it must be found in expressions such as "the modern political system." In his theoretical essay, Almond explains:

> What is unique in the modern political system is a political socialization function which creates a distinct loyalty and membership on the part of the individual in the general political system, and a tendency to penetrate and affect the socialization processes of other social systems, such as the family and church, so that they introduce general citizenship content into their socialization processes. (p. 30)

No doubt a clinical tone and stance, rather than metaphysical humility, are appropriate when confronting states. Nevertheless, the record of Western political experience does suggest that the type of political system called a state characteristically generates and sustains, despite deflections and regressions, a uniquely purposive kind of political activity. Is not more involved in the invention and the definition of state, especially in the perspectives of comparative political development, than a distinctive "political socialization function"? Reliance upon law and legal techniques rather than upon ethical maxims enforced through stultifying forms of bureaucratic and social control; steady reflection upon the proper scope and the effective control of political authority; universalistic rather than particularistic avenues to security, compatible with personal initiative and moral freedom; a concern with justice as one chief goal of political activity, coeval with the inclusiveness of political society; qualities of character and personality that John Stuart Mill summed up in the term "active"; the institutional articulation of shared purpose — all of these features of Western civilization as well as its characteristic rationality would appear to be connected with the appearance and the consolidation of those political structures known as states. Almond's functional description of political activity does enable him to locate polities along a continuum. The price, however, would appear to be neglect of the special purposes and consequences of political activity when that is organized within and directed through the framework of the constitutional and national state. The difference between state politics and polity politics may ultimately be only a matter of degree, but if so, surely it would be imprudent at this stage of the investigation to minimize that difference.

These reflections suggest that the analysis of the differences between Western political experience and the experience of the developing areas is not likely to be complete if reliance is placed entirely upon a conceptual apparatus that dissolves the significance of statehood. This result would hold even though in highly fluid and unstable polities, where structures undergo constant change, the functional approach should prove to be the more appropriate and useful.

Institutional flux produces political behavior in the raw, unshaped by institutions and peculiarly suitable to functionalist and behaviorist techniques of investigation. Discovery of principles of political development, however, may require more historical and less statistical modes of analysis.

It would be more than merely elegant to design a conceptual apparatus applicable equally to developed and developing polities along functional lines. If such could be done without serious distortions of historical experience, it would constitute a finding of immense cultural significance. However, in the present state of our knowledge, it cannot be assumed that universal analytical tools must be functional in design. In advanced and stable societies institutional modes of analysis have much to contribute to our grasp of political phenomena. Functionalism and behaviorism seem especially useful in the contexts of change and instability. In any event, adaptation of conceptual tools to circumstance does not require as a premise dismissal of the "state" and related concepts as inherited hindrances. Contributors to the volume remark that the idea of the state comes to the developing areas as an ideal and as an aspiration. This state of affairs in itself cautions against replacement of concepts intrinsic to Western political development by functional definitions of political activity in order to achieve statistical comparability.

There is a disconcerting obliqueness, the source of which is difficult to locate, to the theoretical portions of *The Politics of the Developing Areas.*[1] Perhaps more explicit recognition of the historical purposes of political activity revealed in Western political development would serve adequately both to correct and to enlarge the functionalist angle of vision. One can readily assent to the proposition that "The mode of performance of the aggregative function is crucial to the performance of the political system as a whole." (p. 44) Moreover, this statement has a bracing ethical neutrality combined with a generality that has the stamp of science. The trouble is that if one excludes from one's analytic equipment concepts that are normative and purposive, both produced from and essential to the description of Western political experience, such as justice and constitutionalism, then it becomes difficult to formulate principles descriptive of that experience. The interrelationships that arise among values and institutions in a historical process that could be phrased in terms of principles resist a functional definition. Further, to substitute the concept of function for that of purpose in the analysis of political activity may lead one to overlook consideration of the extent to which convergent development of political institutions may be anticipated. The logical and the psychological connections between values and institutions may be more strict than the vocabulary of functionalism appears to imply.

Clearly the problem of designing a conceptual framework adequate for comparative explication of the processes of political development is a massive one. It cannot be solved through stylized confrontations of institutional and behavioral categories. Only through their empirical application can programs of

1. In this connection, see Roy Pierce, *Comparative Politics: Liberty and Policy as Variables,* 57 THE AMERICAN POLITICAL SCIENCE REVIEW 655-60 (1963).

analysis be finally tested. In this connection, it is worth noticing Coleman's concluding observation that the secondary purpose of *The Politics of the Developing Areas,* improvement of our understanding of the processes of political change or modernization, "has been fulfilled only to a very limited extent." (p. 576) The constant danger in social and political analysis is that one's selection of concepts may contain unsuspected limitations and so fail to disclose all relevant empirical regularities and relationships. Functionalism runs this danger through its present exclusion of value and institutional categories inherent in older historical modes of analysis. It may be remarked that in the essays devoted to the developing areas more use is made of these categories than undiluted functionalism would perhaps allow. The question of the most inclusive and most appropriate conceptual framework in terms of which to compare the development of Western and non-Western polities remains an open one.

A paradoxical outcome of *The Politics of the Developing Areas* is that the functional approach when applied in a comparative manner would appear to produce essentially undynamic results. Statistical comparisons seem to summarize data into a sort of map of the existing situation in the developing areas rather than to provide a set of principles or hypotheses descriptive of the dynamics of political development. Still the data presented, combined with the analyses of specific polities, support a description of social and political change as "tide-like," an expression used to describe such phenomena in a forthcoming work on political science by J. Roland Pennock and David G. Smith. It is of even greater interest that statistical compilation and analysis lend support to the hypothesis that economic development and political competitiveness are positively correlated. Statistical methods do not disclose the ways in which politics and economics are interdependent; but the correlation is quite consistent with results achieved by more institutional modes of analysis, as for example, in MacIver's contention that democracy is inherent in industrial civilization. Yet alongside of this generalization we may place the finding that the introduction of universal suffrage would appear initially to reinforce attitudes and attachments that are incompatible with modern political society. Inevitably the process of modernization is an uneven, tide-like process, itself composed of disparate tendencies, the management of which demands political leadership and institutional innovation of a very high order if competitive politics within the framework of constitutional and national states is to be established and sustained.

The experience of both the developed and the developing polities shows that political development is a process far from smooth. However, in view of the fundamental correlation between economic and political development which this volume brings so strikingly to light, there is ground perhaps for something more than the attitude of cheerful pessimism recommended by Raymond Aron. The volatility of politics and the fragility of many of the developing polities together render political forecasting a perilous business. Still the statistical tides beneath the waves of politics and the story of Western development both invite a cautious optimism.

The Politics of the Developing Areas rises to the challenge of our time and attempts the heroic task of conceptual innovation followed by empirical ap-

plication. The magnitude and the relevance of the effort of its authors cannot but evoke admiration and promote reflection in basic directions. To what extent are functional categories of analysis adequate to the discovery of principles of political development? How far does functionalism require supplementation with concepts drawn from more traditional modes of analysis? These are the questions, I suggest, that students of political theory and political development will find compelling. On the basis of the volume itself, the functional approach would appear, so far at least, to be most appropriate to the construction of a map of the political situation in the developing areas. A map is a very useful thing, and some developmental principles of great importance may be discerned. But a map lacks those historical, purposive, and institutional dimensions without which our understanding of both political activity and political development will remain imperfect. In the end, *The Politics of the Developing Areas* is a magnificent demonstration of the vitality of political science and suggests the desirability of making that discipline more cumulative.

JOHN W. CHAPMAN

THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW. By Eugene V. Rostow. New Haven: Yale University Press, 1962. Pp. xxxix, 318. $6.00.

Dean Rostow's title — and his theme — are taken from Holmes: "Where there is doubt the simple tool of logic does not suffice, and even if it is disguised and unconscious, the judges are called on to exercise the sovereign prerogative of choice."[1] It is a theme which academic criticism of the Supreme Court's performance has recently tended to neglect. Rostow's book may help restore perspective.

The Sovereign Prerogative is a collection of papers originally prepared for delivery as lectures or for periodical publication or both. The basic points the book makes with respect to the Supreme Court are found primarily in the four papers "American Legal Realism and the Sense of the Profession,"[2] "The Court and Its Critics,"[3] "The Supreme Court and the People's Will,"[4] and "The Democratic Character of Judicial Review."[5] All of these papers teach a central lesson: that the process of constitutional adjudication in the United States is essentially a common law process; and that at its best that process has been informed with that avoidance of generality, that concentration on the facts of the particular case, that suspicion of purely logical judgments, and that attunement to the teaching of experience which characterize the common law approach.

1. *Law in Science and Science in Law*, in COLLECTED LEGAL PAPERS 239 (1920).
2. Originally published at 34 ROCKY MOUNTAIN LAW REVIEW 123 (1962).
3. Originally published at 4 SOUTH TEXAS LAW JOURNAL 160 (1959).
4. Originally published at 33 NOTRE DAME LAWYER 573 (1958).
5. Originally published at 66 HARVARD LAW REVIEW 193 (1952).

This is a lesson easily remembered — that "The life of the law has not been logic: it has been experience"[6] is now a commonplace; but it is one also easily forgotten. Application of the lesson demands critical wisdom and humility. Some very learned critics of the Court have ignored it. It is in the long run vain to suppose that a few brilliantly conceived general principles will carry the day and can be a substitute for the processes of case-by-case adjudication, erratic and untidy as they may seem.[7] Only a general revision of human nature — not likely to be achieved, despite academic efforts — might bring this about.[8]

The great triumphs of the present-day Court have been triumphs in the common law tradition. The classic example to this reviewer is the steady growth of the exclusionary rule — that evidence obtained by an unlawful search and seizure was not to be received in a criminal trial. The logical arguments are against the rule — Professor Wigmore, as a matter of logic, virtually demolished it in a celebrated passage of logical brilliance and scholarly wrongheadedness that has hardly been equalled.[9] The historical logical basis of the rule's introduction as one binding in federal criminal prosecutions might not bear analytic scrutiny.[10] Yet the rule survived as one binding in the Federal Courts, was embraced by a growing number of state courts, and finally was held to be binding on the states under the Federal Constitution.[11] The reason was a powerful one: experience taught that without the rule the constitutional protection against unreasonable searches and seizures was a dead letter.[12] The growth of the rule was in the case-by-case, pragmatic manner of the common law.

Rostow wisely does not deny that logic and doctrinal analysis have a place in constitutional adjudication. They are important values, and it is well that much time is spent on them; but it is wrong to view them as absolutes. Searching academic criticism of the Court's opinions is important. But it is wrong to put a primary emphasis on doctrinal considerations in judging the Court's product. The spirit that experiences an apocalyptic vision upon encountering a logical difficulty or inconsistency in a judicial decision (if its prophecy of doom is not adopted simply as a pose or pedagogical device), reveals a failure to understand the nature of the common law judicial process. It is entirely possible, one might add, to conduct a brilliant — and searching — sustained critical analysis of the doctrinal adequacies or inadequacies of judicial opinions without continually announcing the sounding of the last trumpet. The late Professor T. R. Powell's work might be cited as a model of this.[13]

Unfortunately, this overemphasis on doctrinal considerations often has as its

6. O. W. HOLMES, THE COMMON LAW 1 (1881).
7. Cf. Henry Hart, *The Time Chart of the Justices,* 73 HARVARD LAW REVIEW 84, 98-100 (1959).
8. Compare the theory of collective and general failure adumbrated in *id.* at 121, 125.
9. WIGMORE, 8 EVIDENCE (3rd ed., 1940) 36-40 (primarily at 40).
10. *Id.* at 31-34.
11. Mapp v. Ohio, 367 U.S. 643 (1961).
12. See *id.* at 670 (concurring opinion).
13. Contrast even the passage at *Some Aspects of American Constitutional Law,* 53 HARVARD LAW REVIEW 529, 549-53 (1940) with Hart, *op. cit. supra* note 7, or Herbert Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARVARD LAW REVIEW 1 (1959). Cf. *id.* at 20.

handmaiden the attitude that the Courts should not solve questions that do not readily yield themselves to a solution in terms of logical analysis. Under it, for example, the idea has been expressed that Courts must keep hands off the area of freedom of expression and leave the matter to the other branches of government and to an informed public opinion. Some of Judge Learned Hand's writings[14] and a celebrated article of Elliott Richardson[15] are the classic examples. Sometimes, under the influence of this point of view, the recurrent pipe dream is expressed that dependence on the courts as the protector of constitutional liberties causes a debility in the other agencies of government, and that the general constitutional tone might be improved if the courts took a hands-off attitude. It is probably fair to say that this attitude — a prevalent one, appropriately enough, in the early 1950's — has had a disastrous effect on the constitutional guaranties. Rostow's view of the Court's functions has no place for it.

Rostow brilliantly defends the consistency of the Court's function in constitutional review with the democratic concept. He demolishes the view that would defend the *faineant* approach on the theory that it is more "democratic" for appointive judges not to interfere in these matters. As to matters of state power, he cogently points out that there is no area of substantive state action that the present Court has barred to the States. In fact, the Court was interpreted by Congress as going so far in permitting the taxation by the States of businesses engaged in interstate commerce that Congress set limits to state action by statute.[16] It is in the area of procedure that the Court moves mainly when reviewing State action. The celebrated cases of the last few years — *Baker v. Carr*,[17] *Mapp v. Ohio*,[18] and *Gideon v. Wainwright*[19] — are object lessons.

Rostow's book has — though not to a disabling degree — the common weaknesses of books which are collections of papers delivered over the course of years. Some of the papers are tangential to the main theme. Others are rather dated (the papers have not been updated for book publication). But this latter fault is not without its virtues. The reader is stimulated to find applications of Rostow's ideas in the more recent product of the Court. And one is favorably struck with the fact that the passage of time has treated these essays well — better, this reviewer thinks, than it has "Freedom of Expression and the Function of Courts," "The Time Chart of the Justices," and "Toward Neutral Principles of Constitutional Law" — essays whose thinking is at odds with Rostow's. That is one of the ultimate tests of a set of ideas about the law; and so far Rostow's show every sign of passing it.

DENNIS G. LYONS

14. Primarily in *The Contribution of an Independent Judiciary to Civilization*, in THE SPIRIT OF LIBERTY 172 (1952).
15. *Freedom of Expression and the Function of Courts*, 65 HARVARD LAW REVIEW 1 (1951).
16. Public Law 86-272, 73 Stat. 555 (1959), 15 U.S.C. §§ 381 *et seq.* The legislation symbolized the passage out of the realm of active constitutional litigation of a subject which had generated an enormous volume of Supreme Court adjudication in the past. This is not to say that the statute itself will not produce questions for litigation.
17. 369 U.S. 186 (1962).
18. 367 U.S. 643 (1961).
19. 372 U.S. 335 (1963).

LAW, LIBERTY, AND MORALITY. By H. L. A. Hart. Stanford: Stanford University Press, 1963. Pp. 88. $3.00.

The three lectures collected in this slim but important volume resume a controversy that has been one of the recurrent themes of legal philosophy: is it the function of law to enforce the moral convictions of a community, or is the function of law a more limited one, as expressed classically by John Stuart Mill in his essay *On Liberty* — "the only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others"? The controversy has recently been revived in England in various exchanges between Professor Hart and Lord Devlin.[1] Dean Rostow of the Yale Law School has contributed to the controversy by an article first published in the *Cambridge Law Journal* and recently republished in *The Sovereign Prerogative* (1962).

Topical and concrete significance has been given to this age-old problem by a hotly debated decision of the House of Lords of 1961, which supplies the subject matter of a major part of Hart's first lecture. In *Shaw v. Director of Public Prosecution*,[2] the House of Lords resurrected the old common law offense called "conspiracy to corrupt public morals," created by the Star Chamber, from what, in Hart's expression, "many had thought was its grave, the 18th century," by making it a concurrent ground (not an obiter dictum) for the conviction of Mr. Shaw. In an attempt to bypass the Street Offenses Act of 1959, which sought to drive prostitutes off the streets by imposing heavy penalties for solicitation, this ingenious defendant had composed, and procured the publication of, a magazine called *The Ladies' Directory*. This gave the names and addresses of prostitutes as well as their nude photographs and an indication in code of their sexual practices. Although it would seem that the courts could have rested Shaw's conviction on the statutory offense against the Sexual Offenses Act of 1956 and the Obscene Publication Act of 1959, the House specifically and emphatically — with one dissent — affirmed the conviction under the common law offense. It thus revived the controversy not only on the law's function as protector of morality, but also on the role of the judiciary in the creation of new criminal offenses under the guise of the application of an old common law offense of such a general and ubiquitous ambit as to give virtual carte blanche.

Hart does not concern himself principally in these lectures with the second aspect, which has also been amply discussed in the debate following this decision. Suffice it to say that in the opinion of the present reviewer, as in that of the majority of commentators, the emphatic assertion, especially by Lord Simonds, of the power and duty of the courts to use long-entombed common law offenses preceding the age of developed statutory law, as a vehicle for the translation of moral indignation into criminal offense, is a regrettable example of judicial lawmaking in the wrong sphere and for the wrong reasons. No one has been more emphatic than Lord Simonds in rejecting the function of the courts in the de-

1. Lord Devlin has twice expressed himself on this question, first in his Maccabean lectures of 1959, ENFORCEMENT OF MORALS, and again in *Law, Democracy and Morality*, 110 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 635 (1962).
2. [1961] 2 All E. R. 446.

velopment of the civil common law, e.g., in the field of contracts or torts, where Parliament seldom finds time to intervene. Typical of this approach are his statements in *Jacobs v. L. C. C.*[3] and in *Scruttons v. Midland Silicones.*[4] In the former case, where the House of Lords rejected an obvious opportunity to overcome the absurd distinctions — since abolished — between licensees and invitees, Lord Simonds observed as follows:

> . . . it would, I think, be to deny the importance, I would say the paramount importance, of certainty in the law to give less than coercive effect to the unequivocal statement of the law made after argument by three members of this House in *Fairman's* case. Nor, perhaps I may add, are your Lordships entitled to disregard such a statement because you would have the law otherwise. To determine what the law is, not what it ought to be, is our present task.

In the latter case, he rejected any departure from the doctrine of privity of contract in the following words:

> For to me heterodoxy, or, as some might say, heresy, is not the more attractive because it is dignified by the name of reform. Nor will I easily be led by an undiscerning zeal for some abstract kind of justice to ignore our first duty, which is to administer justice according to law, the law which is established for us by Act of Parliament or the binding authority of precedent. The law is developed by the application of old principles to new circumstances. Therein lies its genius. Its reform by the abrogation of these principles is the task not of the courts of law but of Parliament.

But when it came to the sweeping extension of an old common law offense in a manner that was in effect lawmaking, the above-mentioned statement of the same learned Law Lord reveals a diametrically opposite approach. It revives in substance the attempt made by the Court of Criminal Appeal in 1933[5] to declare any "acts or attempts as tend to the prejudice of the community" to be indictable offenses. This attempt had been all but universally condemned by legal commentators.[6]

In his dissenting judgment Lord Reed convincingly protested against this way of usurping the function of Parliament, in a situation where Parliament had recently acted, and where, moreover, it was possible to base the conviction of the defendant on statutory offenses. The observation of Lord Simonds — "must we wait till Parliament finds time to deal with such conduct? I say, my Lords, that if the common law is powerless in such an event then we should no longer do her reverence. But I say that her hand is still powerful and that it is for her Majesty's Judges to play the part which Lord Mansfield points out to them" — is characterized by Hart with a subtle irony, as a "fine specimen of English judicial rhetoric in the baroque manner." It does, however, point to a deeper problem of jurisprudence and directly leads to Hart's principal concern, the use of law — in the form of what is virtually an unlimited brief for the potential creation of a new offense — as an outlet for moral indignation. One of the most eminent of con-

3. [1950] A.C. 361 at 373.
4. [1962] A.C. 446 at 467-68.
5. The King v. Manly, [1933] 1 K. B. 529.
6. See the discussion in GLANVILLE WILLIAMS, CRIMINAL LAW 455ff. (1953).

temporary British jurists, Lord Devlin, generally affirms that law does have the task of enforcing morals, in opposition to the Wolfenden Committee's report on the punishment of homosexuality, "that there must be a realm of morality and immorality which is not the law's business."[7] But Lord Devlin's thesis that "suppression of vice is as much the law's business as the suppression of subversive activity" appears to be more moderate than Lord Simonds' statement in *Shaw's* case. The task of the law in the enforcement of morality is essentially justified by Lord Devlin as necessary for the preservation of society. Hart characterizes it as a "moderate" as compared with the "extreme" thesis, which regards it as a duty of the law to enforce morality "as a thing of value even if immoral acts harm no one directly, or indirectly, by weakening the moral cement of society." This latter thesis appears to be the one held by Lord Simonds.

Hart opposes this moralizing view of the law and generally supports John Stuart Mill's view that the law has the more limited function of protecting the social order. In Hart's subtle and restrained discussion of this issue, two interconnected aspects appear to this reviewer to be outstanding in importance. The first is that the theory which regards the law as the proper vehicle for the enforcement of morality assumes that the moral convictions of the society in question are clear and unanimous. This, however, is emphatically not true of a society which is based on freedom of criticism and which is pluralistic, as distinguished from the monolithic character of a rigidly doctrinaire society, whether of the fascist, communist, or theocratic pattern. The subject of the Wolfenden Committee report well illustrates this point. The Committee recommended that the criminal law of England should be amended so as to abolish the criminality of homosexual activities carried on between adult males in private, without involving any element of public order. The reason for widespread doubt about the social or even the ethical value of the present state of the law is not, of course, the approval of homosexuality between males (homosexuality between females has never been considered as a criminal offense) but that homosexual inclinations are more a matter for medical and psychiatric treatment than for legal punishment, and that the characterization of such inclinations as criminal has been used mainly for blackmail and other forms of extortion which are neither socially nor morally desirable. The recommendations of the Wolfenden Committee, which proposed the abolition of the offense by a majority of twelve to one, failed to be translated into law by a Government fearful of reactions in Parliament, and especially in the House of Lords, where the views expressed by Lord Simonds' observations in *Shaw's* case are fairly representative.

Nobody would assert that this Committee, composed of highly respected, responsible, and distinguished citizens, was indifferent to the preservation of moral standards in contemporary Britain. What led to its all but unanimous recommendation was the appreciation of the balance of considerations of public policy which, in the Committee's view, made the preservation of the criminal offense socially and ethically much more undesirable than its abolition. Apart from this consideration of the balance of social values and interests, which made it seem

7. Committee on Homosexual Offences and Prostitution, *Report*, Cmnd., No. 247 (1957).

more important to block a source of unscrupulous blackmail than to continue to use the law as a vehicle for the expression of the sexual morality of the average man, the Committee also displayed a wise insight into the limitations of law: "There must remain a realm of private morality and immorality which is in brief, in crude terms, not the law's business."

The second of Hart's major contentions is that the use of criminal law as the guardian of morality is a way of impeding the response of law to social change. The change which has unquestionably occurred in the modern appraisal of homosexuality by many sections of public opinion in many countries, largely as the result of modern medical and psychological research, is equally evident in other spheres of even greater social importance, e.g., in the fields of divorce and birth control. This is not the place to discuss the pros and cons of a liberalization of divorce laws or the legitimation of birth control by contraceptive device. In both these fields, there are deeply felt clashes of religious, ethical, and social convictions, especially between the Catholic Church and other religious and nonreligious philosophies. Whatever one's personal views may be on this matter, it can surely not be denied that the issues of divorce and birth control do present the most serious problems. Thus, the discrepancy between the laws of divorce, as they still prevail in the Eastern States, and the practice of divorce, does seriously undermine the respect for legal order by giving official sanction to systematic fraud and collusion; again, the continued criminality of abortion in all but very extreme cases leads to a proliferation of illegal and undetected abortions, while the opposition to official centers for family planning may contribute to the ultimate extermination of mankind, not by nuclear bombs but by an intolerable rate of acceleration in an already frightening increase in the population, especially of the poorest countries.

The significance of Hart's discussion lies precisely in this: that the expansion of law beyond its universally accepted province of protecting the public order and preventing harm tends to suppress or intolerably delay the translation of social change into legal change. The causes of social change are many: new scientific insights, changing social conditions (such as the revolutionary change in the ratio of births and deaths in the contemporary world), changing ethical beliefs, or changes in the political pattern of society. It is important, at least in any legal system that prides itself on being the expression of a "free society," not to block the legitimate outlets for these manifold streams of social life by using the law to enforce the convictions of what is almost invariably the morality of a previous age defended by the most conservative sections of society. Ultimately the consequences of such an undue extension of the province of law can only be an increasingly widespread contempt for the law — as illustrated by modern divorce procedure or the practice of abortion in the countries in which it is theoretically outlawed — or else, in the most serious cases, revolution.

Hart has discussed only certain aspects of this enormously important problem, but the way in which he has underlined and sharpened the basic issues makes a study of his lectures indispensable reading for anybody who wishes to have an insight into the proper function of law, beyond the easy rhetoric of moral indignation.

W. FRIEDMANN

SYSTEMATIC POLITICS. By George E. Gordon Catlin. University of Toronto Press, 1962. Pp. xviii, 434. $7.50.

As is well known, the social sciences have been plagued with conceptual difficulties during this century. It is widely perceived that theoretical models of our social experience, models relevant to the unique problems of this era, are required if we are to have much chance of adapting successfully our mores and institutions to its revolutionary tempo of change. It is scarcely surprising in this context of perplexity that a revival of interest in natural law and the *ens moralia* of civil society has appeared in recent years in the wider scholarly community. Parallel to such scholarly inquiry has been the visible growth among lay publics of a quest for conceptual systems or ideologies which purport to order the chaos implicit in our complex and immensely mutable social life. On one level, this urge to order has been most obviously manifested in the mass attractions to Marxist-Leninist or Fascist models of man and society, and on quite another level in the widespread influence which works like Spengler's *Decline of the West* and Toynbee's *A Study of History* have enjoyed among lay publics in this country.

A difficulty arises here, however — one which drives a wedge quite deeply between most contemporary social scientists and the publics outside academe. These scholars are keenly aware of the urgent, continuing need for empirical research and reasonably hard data as preconditions for the construction of models which can genuinely illumine their fields of study. The more lacking such data are, and the more traditionally "impressionist" the field is within the broader spectrum of the social sciences, the more likely it will be that any effort to construct grand theory will prove premature and abortive. It would seem, for example, that in many subdivisions of political science the really pressing need of the times is for middle-level theory which is constructed from careful research and a mastery of the relevant data.

Such social scientists are likely to view premature grand theory with some measure of justified skepticism. Thus the *Fachwissenschaftler* within the historical profession, for example, have easily exploded those sections of Spengler's or Toynbee's works which intersect their own specialties; by so doing, they seem to discredit not only the latters' systems but systematizing in general. The consequence of all this, not surprisingly, has been to inhibit the creation of syntheses of knowledge within many of the social sciences and, indeed, to create a marked theoretical anemia among many of its research specialists. Within political science the result has tended to include the proliferation of research with no visible conceptual center and, as David Easton remarked a decade ago, the degeneration of political theory into a descriptive historicism.

I

George E. Gordon Catlin of McGill University has, over the decades, been one of the very few writers in North America who have sought to bridge this gap between grand theory and research projects and to provide us with orienting concepts which can be genuinely useful tools of political analysis. *Systematic*

Politics is the massive fruit of four decades of thought about the nature and behavioral uniformities of political man. It is an impressive achievement.

There is naturally some danger involved for a reviewer who attempts concisely to summarize the argument of a 400-page book, especially when the author weaves so rich a verbal tapestry as does Catlin. Nevertheless, the major outlines of the argument of *Systematic Politics* are not difficult to follow, though the involutions of the author's prose sometimes are. This work is divided into two major parts: "Political Science," which deals with the behavioral and institutional patterns centering upon the exercise of power; and "Political Theory," in which the author seeks to relate power, its uses and manifestations, to the larger individual and corporate ends of political society.

Catlin was one of the first political scientists to make a decisive break with the descriptive-institutional approach which dominated the field for so many decades. He has long emphasized the interrelated character of the study of politics and sociology; here he reiterates this view to the extent of asserting that the two are virtually indivisible. The author has also been well known for his view that the concept of power is a central frame of reference for the political scientist — above all for the isolation and definition of the political act. This view Catlin also reiterates in *Systematic Politics*. Politics is concerned with the social function which is performed by control, and with the behavior patterns and institutional structures which result from the control relationships of human wills. Catlin argues, in the classical vein which is an extremely prominent aspect of this entire work, that the will is the agent by which each of us seeks to pursue his ends; power alone provides the freedom to do this, and to determine which will shall prevail. This power, of course, need not manifest itself in brute force; but, whatever its form, everyone pursues it as the indispensable means whereby he may be liberated to realize his ends. Consequently, the author asserts, all politics is by its nature power politics, whether practiced by ecclesiastics, political bosses, capitalists, or commissars.

Catlin's discussion of freedom and authority follows logically from this view. There is, he argues, a primordial urge to freedom in man. This urge is literally an instinct, though he hastens to add that its particular time- and culture-bound expressions are not instinctive but are culturally conditioned liberty (or liberties). But freedom, like all other goods, exists in a finite world of limitations whose chief political law seems to be that one has to choose between obtaining goods and paying for them, or not having them. This analogy to the economic marketplace upon which Catlin relies extensively involves among other things the recognition that freedom and authority exist not in a sharply dualistic or dichotomous relationship, but in a dialectical polarity. Discussing either *in vacuo* — as though freedom could ever exist in any human society without that system of social controls and constraints known as authority — is endlessly productive of distorted thinking about politics.

From this general law of the political market another is derived: that the achievement of any particular liberty by political means involves sacrificing a more generalized freedom to do as we wish. Moreover, this idea of the market, with its relatively distinct categories of producer and consumer, is employed

shrewdly to explore the relationship between government and citizen in democratic societies, the differences between democracies and dictatorships, and the preconditions of revolution. In theory democracy conforms to a consumers' market in which freedom is maximized: that is, the consumers (the electorate) exercise controls over the producers (governmental officials) through demands upon them which may achieve legitimate institutional expression (party politics), with the ultimate sanction of replacing the producers temporarily in charge with others if they fail to deliver the goods desired actively by most of the consumers. This model, of course, applies only to what is usually called representative democracy. Elements of pure democracy, as Catlin sagely observes, tend strongly to be resisted by the producers — who, of course, develop a specific set of interests of their own in preserving their decision-making roles — unless the producers can reasonably be assured that effective power will still remain in governmental hands. One could write much of American political history with this insight at its center. Struggles for control between consumer and producer elements have included the original struggles for and against universal suffrage; the popular movements at the turn of this century which led to the direct election of senators, the initiative, referendum and recall, and the introduction of the direct primary; and the repeated attacks upon and defenses of the Supreme Court's exercise between 1890 and 1937 of a broad veto over socioeconomic legislation.

A governmental regime which is consumer-oriented labors under a number of well-known disadvantages. It has difficulty in raising the costs of government to its supporters in time of need or emergency. An obvious, though perhaps less than supremely important, example at present is found in the taxpayers' revolts against new bond issues for expansion of local educational and social services which have been necessitated by the growth of the population. Another major difficulty which Catlin mentions is that involved in restriction of customary liberties by government, even in the face of dangerous international competition. The more or less extreme dispersiveness of a democratic regime may be one of its chief glories, but it may prove a fatal defect not only in contests with centralized dictatorships, but domestically when dispersiveness produces deadlock and renders excessively difficult the timely resolution of issues and the distribution of governmental goods for which there is steadily increasing demand. The consequence may be popular acceptance of dictatorship — a form of government akin to a monopolistic producers' market, with authority maximized.

As Catlin quite correctly, though not originally, observes, every government is actually to a degree an oligarchy. Preponderant power will be lodged in the hands of those few who actively work to sustain the established authorities. There is a chronic source of danger to the stability of all regimes, whether theoretically producer- or consumer-oriented: their unwillingness or actual inability to provide political goods for which there is strong demand. The few who are in control of the apparatus may well find it a far simpler matter to shape consumer opinion into demanding that which the regime can supply than to attempt to supply those goods which might undercut the position of the producers themselves. This obviously valid insight applies not only to the

centralized control structure of totalitarian regimes but also, it is becoming increasingly clear, to the more dispersed but manipulative elites within such formal representative democracies as the United States. This insight is worthy of more extended analytical treatment than Catlin gives it in *Systematic Politics* — if only because it touches so centrally upon political issues which are of the most direct concern to us today.

At this point Catlin's discussion shifts toward an examination of the Good Polity — the end to which politics and the uses of power are means. This discussion, like the larger argument of the book itself, bears a heavy classical stamp. There is a grand tradition of civilized values which can be learned from a study of history and other humanistic disciplines. This tradition is one of the primary sources for ascertaining the objective existence and characteristics of natural law. For, as Catlin insists, "The basis of sound law lies in human nature itself" (p. 351), and the Good Polity — whatever its specific cultural characteristics — will seek to organize its law and the education of its citizens so that the closest possible harmony exists between the uniformities of human nature and the political institutions and behavior of the society itself.

Perhaps Catlin would accept as a short summary of the kind of natural law which he has in mind Justinian's austerely concise formulation: *honestum vivere, alienum non laedere, suum cuique tribuere.* In any event, he takes sharp issue with those who seek to construct an elaborate system of morally charged deductions from the highly general principles of natural law. Specific codes of morality, he argues, can be excluded from consideration without denying the objective existence of natural law itself or its central importance to a realistic science of politics. For instance, the experience of mankind has been quite uniform concerning the personal and social effects of repeated alcoholic bouts. Indicative as such bouts are of a serious disruption of the individual's own potential harmony, they ultimately, if persisted in, lead to incapacitation and death. One is legally free to walk off a cliff if he chooses; but if he does so, certain consequences will inexorably follow from that choice. This is not to say that natural law has no *moral* component for Catlin, but rather, perhaps, that it has no *moralistic* component. He seeks carefully to distinguish between the categorical-moral-imperative approach to natural law which has so frequently dominated discussion of the subject and the descriptive function which he regards as primary for his purposes.

But if Catlin seems to dismiss elaborate deductive systems, his approach to natural law may still be regarded as very close to the classical Catholic tradition. He emphasizes — as, he notes, have Catholic theorists — the primacy of reason in this field and the strong need for avoiding mere subjective sentimentalities in dealing with it. His criticisms both of the Erastian, sultanist interpretations of law-as-command and of sovereignty arising from the Renaissance, and of the atomistic, subjectivist natural-rights philosophies arising from the Reformation and the Enlightenment, are alike deeply rooted in this view of natural law. The Good Polity is first and foremost a *community.* This community is sustained by right education of its citizens in such matters as their reciprocal rights and duties, the importance of self-limitation of impulses toward unrestrained freedom, the

legitimate role of an aristocracy of virtue within the political system, and the right understanding of human fraternity as a religio-moral imperative quite at variance with the false doctrine of unlimited human equality. The harmony which arises from a just equipoise of freedom and authority, of self-fulfillment and self-restraint, and from a recognition of the falsity of political doctrines rooted in rigid dichotomies between individual and collective, is thus a basic end of political action.

With all his concern for political behavior, then, Catlin remains in the last analysis within a tradition which finds its roots in the Greeks, and which has recently been restated by such writers as John Courtney Murray and Walter Lippmann. Let us turn to an analysis of this contribution to the Great Tradition.

II

There are both methodological and substantive grounds for criticism of *Systematic Politics.* One drawback which can be mentioned at the outset is the author's style. Normally the critic should do the author the courtesy of letting him develop his material in his own way, but a rigid adherence to this rule would make criticism itself impossible in many instances. This book repays reading, but there can be no doubt that the opacities of Catlin's prose are likely to discourage all but the most pertinacious from following his reasoning as closely as it merits. Catlin also rather overplays the citation and quotation of other — mostly contemporary — authors in his text. That he has read vastly there is no doubt. But the piling of name upon name, reference upon reference, and quotation upon quotation, distracts the reader — and one may perhaps suspect, the writer as well. Not surprisingly, the uses to which some of these references are put — most notably the contributions of C. Wright Mills and the Marxists — do considerably less than justice either to their valid insights into the problems of power in industrial society or to their contributions to contemporary social theory.

There is also a serious question as to the analytical usefulness of Catlin's views concerning the nature of political science as a discipline. He has been a trail blazer who has significantly assisted generations of scholars to turn their attention toward political sociology and political behavior. Great honor is due him for these contributions. But his insistence upon the virtual identity of political science and sociology appears quite misplaced. The definition of political science as "the study of society as organized" seems so broad and vague as to be virtually useless as a frame of analytical reference. Economics certainly deals with essential aspects of society as organized, as do sociology, anthropology, and social psychology. There can be no question but that each of these disciplines, *as they intersect essentially political concerns,* can immensely fertilize understanding of political action and institutions. Political scientists must consequently assimilate such of these insights as they can into their own work. It is suggested, however, that as a detailed knowledge of marginal analysis or of totemism and exogamy is not actually required for the study of politics, neither are such purely sociological concerns as marriage and the family, suicide, or adolescent-gang behavior an integral part of political science as a discipline.

It seems probable that this sweeping merger of politics and sociology is a logical corollary of Catlin's preoccupation with power as a central concern of political science. Power, as he points out, is relational; it is the fruit of human interaction. Consequently, it is found in every conceivable kind of social situation — within the family or tribe, in primary work- and play-groups, and so on. But is political science concerned with every kind of power relationship existing in society? The answer, rather clearly, is no. That power is a central aspect of politics goes without saying; but only those species of power relationships which are related not only to individual and group interaction but to authoritative social institutions can be considered directly relevant to political science as a discipline. It is incidentally worth noting that this argument may be inclusive as well as exclusive: for instance, as such nominally "private" organizations as labor unions and especially industrial corporations acquire ever wider decision-making power in contemporary "society as organized" — to the extent that they may quite accurately be described as private governments — they become quite legitimately part of the political scientist's business. Organization theory, of great importance to the study of public administration, should and does rely heavily upon the structural characteristics of such industrial entities.

In view of the foregoing argument, it might be better to move away from power as a primary frame of reference and toward the kind of definition which David Easton has sought to provide in *The Political System* (1953)—the authoritative allocation of values. As Easton observes, this is a triune definition. What is done is *authoritative;* that is, the arrangements involved are binding upon the entire polity to the extent that the binding agency enjoys the accepted authority (including, if necessary, the coercive means) to carry them out. It is an *allocation;* that is, the consequence of the action is to distribute, necessarily unequally, a limited supply of certain things to the individuals and groups of which the polity is composed. Finally, that which is thus authoritatively allocated is a *value* or *values,* which may be in the areas of material benefits, social status or prestige, or ideological or morally charged values, or (as is very often the case) a composite of all of these. The insistence upon authoritativeness excludes power relationships which have no obvious bearing upon public policy, as the insistence upon values tends to exclude, for the most part, that allocation of material goods and services which is primarily the legitimate concern of economics.

As we have said, there are not a few fruitful insights which can be found in the pages of *Systematic Politics.* Catlin's producer-consumer model sheds a great deal of light upon the behavioral relationships between power-holders and power-addressees in any society. Edmond Cahn has been exploring the usefulness of a similar model in the field of public law and, especially in his most recent work, *The Predicament of Democratic Man* (1961), has employed it with considerable success. Catlin's models of democracy as a maximized consumers' market and of dictatorship as a maximized producers' market seem quite reasonable and potentially useful approximations to political reality. So too is his observation that political *dirigeants* will prefer to manipulate consumer demand into safe channels rather than permit that demand to focus upon political goods which they are not equipped to supply. The author's insistence upon the indispensability

to any viable polity of a community rooted in law which is congruent to the basic structure of human nature is, of course, much more debatable in the scholarly world at large. The noisy intellectual battle between Platonists and anti-Platonists, between "the open society" and "its enemies" (to borrow Professor Karl Popper's phrase), continues unabated down to the present day. Nevertheless, this reviewer finds the general line of this argument persuasive and believes with Catlin that abundant evidence exists in human history to sustain this view.

In one most important aspect, unfortunately, *Systematic Politics* fails to live up to its promise. The most pressing task of political theory in the midtwentieth century is to take adequate account not only of universals which were first expounded systematically 2,500 years ago, but of the unique social circumstances under which we live at the present time — and to build a bridge of relevance between the universals and the specific social context of today. These special circumstances are to be found in the fact that ours is an age of rapid, incessant movement specifically marked by population explosion, an extreme complexity of economic and social organization, and above all an unprecedented velocity of technologically conditioned change — visible within the lifetime of individuals — in the foundations of individual and social existence. It remains to be demonstrated that man, an essentially conservative animal, can work out an accommodation to this markedly unsettling social environment without sacrificing his last ties to the civilized values inherent in the Great Tradition of which Catlin speaks.

It may be said — perhaps with much truth — that we are faced today with the challenge which faced the builders of the Tower of Babel, and that we may expect their fate. But unless we choose to adopt this hopeless view, we have no choice but to think and act with this unprecedented social instability as the basic reality of our lives in the secular world. This involves, among other things, changing our intellectual stance so that we may ask relevant and constructive questions of our contemporary environment. An *aggiornamento* is clearly required not only of the churches but of the social sciences as well. Neither the basic truths of classical political philosophy nor the vital significance of natural law has been essentially diminished in our generation. But their formal statement in traditional form often appears glaringly irrelevant to the challenges of the present.

Despite his sociological consciousness and the fertility of some of his insights, Catlin has chosen to write an essentially traditionalist synthesis of political knowledge. It is a work which, with all of its author's awareness of contemporary social thought, remains surprisingly static — a work which tends to discuss such classic concerns of political science as freedom and authority, despite appearances, in a social vacuum. The author, therefore, tends at times to miss the point aimed at by the thinkers to whom he refers so voluminously.

One thinks at once, for example, of his references to Marxism and his general discussion of "freedom." It is, of course, quite true that Marx himself was "too good a capitalist," rather closely mirroring the aggressiveness and self-assertiveness of his own day. Pope Pius XI was also entirely right when he asserted in *Quadragesimo Anno* that Marxist Socialism was the child of the

atomistic, anticommunitarian political culture of the capitalist Liberalism which immediately preceded it. But to say this — or to reiterate the obvious truth that power struggles and, hence, politics would continue, *contra* Marx, under any mode of social organization — bypasses the significant contribution to the understanding of society which the Marxists have made.

Two aspects of this contribution are of immediate concern: the awareness of the social relativity of manifestations and definitions of freedom which have tended elsewhere to be regarded as absolutes, and the awareness of the devastating consequences of uncontrolled industrialization upon individual men and their communities. Whether most of us choose to acknowledge this debt or not, the Marxists were among the first fully to recognize that unless certain material minimum standards of life were reached by the individual, the life which he led could not be called fully human. Today this awareness has become virtually a commonplace, but its implications for freedom and other cardinal preoccupations of political theory have by no means been fully explored. This Marxist tradition — and non-Marxist social scientists who have picked up these insights — insists upon the importance of making discussions of freedom contingent upon the concrete socioeconomic context rather than upon abstract models of theoretical governmental forms.

Of course, the Marxists have not been alone in their recognition of this relativity of certain forms of individual freedom. Nor have they been the only school of social thought to perceive and seek understanding of the unique capacity of modern industrialization ruthlessly to destroy all preceding forms of human community, and its equally glaring failure to provide a humanly satisfying substitute for these destroyed communities. Great papal encyclicals, such as *Quadragesimo Anno* and *Pacem in Terris;* the works of men like Freud, Herbert Marcuse (*Eros and Civilization,* 1955), and Erich Fromm (*The Sane Society,* 1955), who start from essentially psychoanalytic premises; and works by Christian Socialists, Christian Democrats and Fabian, non-Marxist socialists, all have shared this same vision. The end product of the developments described is our contemporary phenomenon, mass society — a society composed of individuals who are atomized; subject to mobilization and manipulation by the powerful; and additionally, if they belong to underdeveloped strata within the Western metropole, or to underdeveloped countries outside it, subject to rapacious exploitation by organized entities too large for them to comprehend and hence condemned to an existence which is markedly less than human.

Why do masses of people in the modern world seem to choose what the more physically and psychologically comfortable in the West call unfreedom? Is not one answer — in addition to Catlin's — that they do so because the traditional definitions, rhetoric and institutional practices of representative democracy become irrelevant when man lives in a society in which he is supremely vulnerable to irresponsible, impersonal forces which he cannot control? In any event, perverse and distorted though we may believe their concepts of man and his higher destiny to be, the Marxists have been virtually the only school of secular thinkers to organize their social and political thought around the reality of permanent, technologically conditioned revolution; and, reflecting the

progressive, optimistic wing of Western political thought, they have been among the very few to insist that the titanic forces unleashed by this ongoing revolution *can be rationally controlled and shaped toward humane ends.* It is what might be called the psychological relevance of this philosophy which, far more than the merits of its economic analysis, has contributed to its rapid spread among the dispossessed classes and nations of the postwar world. To the extent that it has stressed the importance of socioeconomic limits upon freedom, and above all to the extent that it has recognized the absolute necessity of genuine community, it may even be argued that it has incorporated basic principles of Catlin's natural law into its world view. In view of all this, it is unfortunate that Catlin's discussion dealt so little with these central insights.

What is needed is a reordering of the dialogue along lines which fully incorporate our permanent revolution as the primary frame of social reference. We need to ask questions such as the following. What are the constraints which current modes of social and economic organization place upon individual freedom? To what extent, if any, does the development of these modes of organization make irrelevant, or even repressive, definitions and institutionalized practices of freedom developed in an earlier and less complex age? (Catlin does discuss this, but only in the context of his no doubt sound view that the nation-state has become obsolescent and dangerous.) What general theoretical orientations and concrete steps should be taken by the polity at large to minimize the socially disruptive effects of technologically forced change and also to maximize the chances that rational control over this change may be secured or maintained? Recognizing that our age is *de facto* collectivist in its organizational structure — and cannot be otherwise in view of the necessary complexity and interdependence of social life — by what means can we continue under such difficult conditions to protect individuality and to transmit the great tradition of the good society?

These are, of course, extremely difficult questions, and they by no means exhaust the list. So hard are they, indeed, that it is only too easy for scholars and savants (often pleading the specialization which comes from an ever-finer division of academic labor) either to take refuge in a traditional restatement of essentials or in a culturally impoverished behaviorism which rigidly excludes all questions involving value judgments. Catlin has produced an impressive attempt to provide a bridge across this chasm. But his basically traditionalist perspective is such as to make *Systematic Politics* only partially useful to the bridgebuilders of the future. Effective integration, not only in the realm of political theory but in the practical world of political power and political community, is needed if we are to have much chance of reconciling technological imperatives and civilized values. Without it, as the experience of this century in both the Western and non-Western worlds abundantly demonstrates, we shall one day be confronted with a "theory" which is a monolithic social ideology justifying someone's claims to absolute power, and with a "community" which is the pseudocommunity imposed by some latter-day version of Big Brother.

WALTER DEAN BURNHAM

LEGAL POSITIVISM: ITS SCOPE AND LIMITATIONS. By Samuel I. Shuman. Detroit: Wayne State University Press, 1963. Pp. vi, 265. $8.50.

In this book Professor Shuman has applied himself to an inquiry the desirability of which one can enthusiastically commend, though it may be felt that the project was somewhat overambitious for a work of this size. A listing of the chapter headings will give a glimpse of the dimensions of the task: The Identification of Discernibles; Why Legal Theories; Ethics and Obligation; Legal and Moral Response to Purposive Conduct; The Is-Ought Dichotomy; Legal Positivism and the Morality of Law; Ultimate Goals, The Nature of Man and Science; The Politics of Philosophy. One who will attempt to dispose of these questions in a good deal less than three hundred pages must at the least not lack confidence.

Right at the outset the reader of this book is confronted by one curious circumstance. This is that in a book the theme of which is legal positivism, Shuman advances a stipulative definition of legal positivism in rather unorthodox terms. If a common law student of jurisprudence were asked to point to the model of the positivist jurist par excellence, there can be little doubt that he would invoke the name of Austin. But Shuman tells us, "Neither Austin's 'system' nor Austin's philosophic outlook was positivistic." (p. 11) The reason advanced for this characterization is that Austin advocated that students in his ideal law school would receive instruction in the law that ought to be. (p. 11) If an interest in what the law ought to be disqualifies one from being a positivist, then there are almost certainly no positivist jurists and Shuman's book need not have been written. A few pages later we come to a more affirmative statement of Shuman's views of the criteria that must be satisfied before he will admit a jurist to the title of positivist. He tells us that a legal positivist is one who "II (a) Maintains that law and morals are separate, and II (b) Maintains a certain view as to the nature of morals." (p. 15)

The certain view as to the nature of morals that must be held is one that is described as "some form of noncognitivism." (p. 15) Shuman tells us that "it is perhaps fair to advise the reader that distinctions here proposed are recognized as other than those which are thought of as being characteristic and also unlike those which traditionally appear in the literature." (p. 12) This is a reasonable warning that we are about to meet an unusual elucidation of the term "positivism," but it is somewhat marred by the author's assertion three pages later that "contrary to generally prevailing views the test for legal positivism involves. . . ." (p. 15) This sounds like a suggestion of one proper meaning for "positivism" and is an odd statement by a writer who is as familiar as is Shuman with the linguistic sophistication of contemporary philosophy.

The whole business of classifying jurists in or outside the positivist pigeonhole is perhaps now becoming rather ludicrous. For Shuman, Austin is no positivist because he subscribed to the general utilitarian ethic, but Kelsen is very much of a positivist because he takes up a noncognitivist position on ethics. Shuman also seems to accept Alf Ross as a positivist for the same reason. Now Ross has recently told us that Kelsen is no more than a quasi-positivist, for the

reason that Ross finds in Kelsen's doctrine of the basic norm an ethical principle enjoining obedience to the law.[1] Professor Friedmann complicates things further by telling us that Kelsen is "anti-empiricist but not anti-positivist."[2] It is all rather reminiscent of Leopold I's famous retort, on being told that he was King of the Belgians: "There are no Belgians." Whether there are really any positivists or not, it would certainly be a good deal healthier to devote more attention to discussing what individual jurists have said than to debate endlessly about how they are to be docketed in one's private museum.

But there remain two criticisms of Shuman's whole approach in this book that emerge from this introductory point. In the first place it is an odd procedure to employ the term "Legal Positivism" on one's title page and then to adopt a meaning of positivism that is much narrower than the usual jurisprudential meanings. In the second place this is particularly unjustifiable since Shuman has made no very serious attempt to canvass at the outset the variety of possible meanings that cluster around the phrase "legal positivism." In a book in which he is constantly inviting us to regress further and further to question and elucidate the terms that we employ in asking our questions he devotes no more than six pages to this extremely important initial question. Professor H. L. A. Hart has suggested five possible meanings of positivism in a jurisprudential context:

> (1) That laws are commands of human beings; (2) that there is no necessary connection between law and morals, or law as it is and law as it ought to be; (3) that the analysis or study of meanings of legal concepts is an important study to be distinguished from (though in no way hostile to) historical inquiries, sociological inquiries, and the critical appraisal of law in terms of morals, social aims, functions etc.; (4) that a legal system is a "closed logical system" in which correct decisions can be deduced from predetermined legal rules by logical means alone; (5) that moral judgments cannot be established, as statements of fact can, by rational argument, evidence or proof ("noncognitivism in ethics").[3]

Shuman briefly notes this set of possible meanings suggested by Hart but does not carry the inquiry much further. He has apparently not noticed at all the very important discussion of the legal positivist tradition by Ago. Ago's article contains a careful and learned tracing of the history of the term "positive law" and of the term "positivism" as applied in jurisprudence which we could reasonably have expected Shuman in a book of this kind to have taken into account.[4]

A graver objection is that there is in the whole of this book remarkably little detailed discussion of the views even of those few jurists whom Shuman is willing to characterize as positivists. It is difficult to see how a book can be

1. Alf Ross, *Validity and the Conflict Between Legal Positivism and Natural Law,* 1961 REVISTA JURIDICA DE BUENOS AIRES 46, 78-83.
2. W. FRIEDMANN, LEGAL THEORY 112 (3rd ed., 1953).
3. H. L. A. Hart, *Positivism and the Separation of Law and Morals,* 71 HARVARD LAW REVIEW 593, 601 n. 25 (1958).
4. Roberto Ago, *Positive Law and International Law,* 51 AMERICAN JOURNAL OF INTERNATIONAL LAW 691 (1957).

thought to have dealt adequately with the scope and limitations of positivism if there is no serious attempt to arrive at general estimates of the contributions of writers such as Kelsen, Ross, and Hart. Of these three jurists Kelsen is accorded the better part of one chapter in Shuman's book, and this chapter contains a useful discussion of Kelsen's general philosophical background. Shuman does touch here upon that most difficult of Kelsen's concepts, the notion of the basic norm, but he does not get to grips with some of the features of that concept which one would have thought most interesting in the context of the theme of his book. He does tell us, in passing as it were, that Kelsen is guilty of "an incredible confusion as to the notion of validity." (p. 20; see also p. 203) Now, if a jurist of Kelsen's general subtlety and profundity is guilty of some heinous philosophical crime (which may well be the case), then the reader ought to have it spelled out for him; but a reading of this book does not serve to make it clear what that crime might be.

What is perhaps in Shuman's mind is the point that Ross has raised about the character of Kelsen's concept of the basic norm.[5] The argument runs something like this. Kelsen expresses his basic norm to be a proposition that the will of the original constitution makers (the founding fathers) ought to be obeyed.[6] This norm by definition cannot be valid in the sense that a particular norm of the law can be valid, for the validity of a particular norm of the law is meaningful in the sense that there is a superior norm standing above it and from which it is derived (at least procedurally), while the very essence of the basic norm is that there is no norm standing above it. If the basic norm imposes a "duty to obey the law" we must ask what can be meant by a duty to obey the law over and above a duty to fulfill the demands of a particular legal prescription. In a legal context we know what we mean when we say "X has a duty to pay Y $1,000." What would we add to this if we said "X has a duty to do his duty to pay Y $1,000"? There might of course be a general constitutional or statutory provision in a particular legal system to the effect that there is a general duty to obey the law, but it is difficult to see how this would add anything of significance to the individual prescriptions of the system. If there were such a general provision, then in the statement "X has a duty to do his duty to pay Y $1,000," both uses of *duty* would refer or might refer to a legal duty. But this would verge on surplusage. To accord any importance to such a statement we shall have to say that the first sense of the word "duty" is quite unlike the second sense, that the first sense does not refer to a legal duty and must therefore refer to a moral duty. But since, for Kelsen, a system of norms constitutes a legal system when it is generally effective, we now arrive at the position that there is a moral duty to comply with the prescriptions of a generally effective system of coercive prescriptions. It is in this kind of thinking that we may legitimately perceive the more sinister implications of the slogan *Gesetz ist Gesetz*. But, as Ross points out, if we can fairly read this into Kelsen's scheme of things, then the encouragement to totalitarian regimes begins precisely where Kelsen ceases to be a positivist, precisely where he introduces a colossal natural

5. *Op. cit. supra* note 1, at 62-64.
6. HANS KELSEN, GENERAL THEORY OF LAW AND STATE 115 (1944).

law idea — that there is a moral duty to comply with the norms of a generally effective system of coercive norms.

Kelsen would assuredly repudiate any such view of his theory of law. His answer would probably be that the "ought" contained in his statement of the basic norm does not imply a moral duty at all. But Kelsen's whole exposition of the sense in which he uses "ought" is hazy and raises problems. It will be remembered that in Kelsen's view, the ought in the legal norm is addressed to officials. The notion of duty imposed on the public at large is for him a secondary construct. He makes it plain that the official organ which ought to execute the sanction is not to be considered as under a duty unless there is a further norm applying a sanction to the official organ if it has failed to execute the original sanction. As far as the primary addressee (the official organ) is concerned, the "ought" of a legal norm does not indicate a duty. "The word 'ought' only denotes the specific sense in which the sanction is stipulated, provided, determined in the norm."[7] And so Kelsen would presumably say of the basic norm. It should not be taken as imposing a duty at all. But the whole idea of an *ought* proposition that does not impose a duty is a curious one (unless we understand it as referring to a causal connection which is clearly not Kelsen's intention) and, together with his vacillations in his formulation of the basic norm, is one of the primary weaknesses in Kelsen's system.[8]

On the other hand, if we are concerned with the contribution of the positivist tradition to the battle against totalitarian political structures, we must surely take careful note of Kelsen's theory of the nature of the state.[9] In his demonstration that the concept of the state is but a concept of the legal order viewed from a certain angle, in his argument that any talk of the primacy of the state over law is but disguised ideology, Kelsen has surely rendered a great service and valuable ammunition to those who wish to challenge the mystical propositions of totalitarian political theory. One is at a loss to see how these issues can be left undiscussed in a book which professes to take as one of its central themes the connection between legal positivism and forms of government.

If we turn to the work of Hart, it is true that Shuman's book was written before Hart's *The Concept of Law* had appeared. But enough issues were raised in Hart's earlier writings to have formed a necessary subject of discussion in a book on legal positivism. Hart, for example, has sought to avoid the thorny issues raised by Kelsen's doctrine of the basic norm by substituting for it the notion of acceptance of basic rules of recognition.[10] According to this view we should not conceive of the basis of a legal system as a *duty* at all but rather as a set of criteria which are in fact used by officials and others for identifying valid law. In this way the statement of the rule of recognition in a particular society is the product of an empirical investigation of behavior in that society. This in turn leaves this reviewer with some puzzles which he would have ex-

7. *Id.* at 60.
8. See Julius Stone, *Mystery and Mystique in the Basic Norm,* 26 MODERN LAW REVIEW 34 (1963).
9. KELSEN, *op. cit. supra* note 6, at 182-388.
10. Hart, *Legal and Moral Obligation* in ESSAYS IN MORAL PHILOSOPHY (Melden ed., 1958) and HART, THE CONCEPT OF LAW 77-120 (1961).

pected Shuman at least to note in the course of his book. If the "rule of recognition" can be reduced to observation of regularities on the part of officials and perhaps of citizens at large, in what sense is it a "rule" at all? Hart's answer would perhaps be that it is a rule because it is more than a mere observable regularity of behavior; officials *consciously* regulate their conduct in its light and make it a basis for criticizing others, etc. This is the "internal" point of view. But at the same time Hart classifies the rule of recognition not as a duty imposing rule (a "primary" one in his lexicon) but as a power conferring rule (a "secondary" one).[11] However, it is very difficult to see that the rule of recognition is the same kind of rule as the rule which empowers me to make a will by prescribing the correct procedure that I must follow if I wish to achieve a certain result. The rule of recognition does not say to officials, "If you want X you must do Y." If we are to think of it as a rule at all it seems rather to say, "This is what you must do," and in that sense to be much closer to rules that impose duties. But the meaningfulness of the "must" here is in the fact that this is the way in which officials do behave in the given society and therefore would seem to lead us back to the proposition that valid law consists of those rules which do strike a certain response from officials. Hart's rule of recognition is a generalization based on observation of past official response and prediction of future official response which makes it more and more strained to see it as a power conferring rule or indeed as a rule at all. This is not to fall into the old realist exaggeration of saying that law is what officials do. It is to say, rather, that the criteria for identifying valid law in a modern state are statements about community patterns of behavior and are therefore empirical descriptive statements.

Professor Hart comes close to acknowledging this but clouds the issue by talking about the "acceptance" of rules of recognition. The whole notion of "accepting" rules is an important one in Hart's scheme but it is one that is not free from obscurity.[12] What do I do when I accept a rule? Do I accept the rule that creates a crime of murder by not committing murders? Do I not accept it if I commit a murder? Do I accept a rule imposing a speed limit of fifty miles per hour if I say that I consider that it is unreasonable, but that I will comply with it because I am afraid of being prosecuted? if I say that it is unreasonable but that I will comply with it because I recognize an overriding interest in general compliance with rules of law? if I say that, although I recognize it as a properly enacted law, I will not comply with it because it is so unreasonable? We can agree with Hart that a rule of law may impose an obligation on me even though I do not feel bound by it. But do I *accept* it if I do not feel bound by it? and how exactly must I feel bound by it to accept it, if feeling bound in some sense is a part of the notion of acceptance? Hart might reply that the notion of acceptance is not a part of his analysis of the existence of a primary rule of obligation but is only relevant to his concept of a funda-

11. HART, THE CONCEPT OF LAW 91-96 (1961).

12. This point was raised earlier in my article, *The Existence of a Legal System*, 35 NEW YORK UNIVERSITY LAW REVIEW 1001 (1960). Hart responds to the criticism in THE CONCEPT OF LAW at 247-248, note to p. 109, but his elucidation of "acceptance" still appears inadequate.

mental rule of recognition. But this would not dissipate the difficulty. For what are we saying about official behavior when we say that officials accept rules of recognition? If we are referring to legislators what can we mean other than that they *do* as a matter of fact go about their business in a certain way and that they have a certain feeling that this is the only proper way of doing things? If we are speaking of judges what can we mean other than that they *do* as a matter of fact locate the rules that they apply in a certain way and that they have a feeling that this is the only proper way? It may be helpful here to turn to the analogy of games which is so fashionable a reference in philosophy from Wittgenstein onwards. If we are interested in isolating for purposes of study a particular game such as baseball or chess, it will be necessary to employ the notion of different rules of recognition in baseball and chess in order to differentiate the different rules of the different games. Similarly with law the notion of rules of recognition will be useful if our main concern is to know in what sense the law of the United States is not the law of Mexico. If our principal interest were rather in the concept of "game" in general then we should surely need to speak in broader terms of a kind of human activity directed to certain ends. We should need to include the notions of competition, diversion, spectacle, etc., which are not expressed by the concept of rules and nothing more. And if our principal interest is in the general notion of "legal system" we shall need to have broader "key" concepts than the concept of rules.

In this vein a recent commentator has perceptively noticed a tendency to reductionism in Hart's legal philosophy.[13] It may indeed not be possible to construct an adequate picture of a legal system without taking account of the concept of a rule. The American realists were almost certainly mistaken if they thought this could be done. But it may be equally mistaken to seize in a monocular fashion upon the notion of rule or norm, as both Kelsen and Hart do, as the "essence" of a legal system. If one starts with the very simplified but probably generally acceptable observation that in a primitive society law and morality are (from the standpoint of our hindsight) much confused with each other, then we may say that one of the tasks of the jurist is to show how in modern societies it is possible to make a sharp distinction between moral rules and legal rules. Two key ideas to assist in this task will be the ideas of "process" and "institution." We have a legal system when we have articulated organs and procedures for making rules, for adjudicating disputes, and for applying coercive sanctions. We must therefore give prominence to such concepts as legislatures, courts, police forces, legislative processes, judicial processes, and law-enforcement processes. The question then becomes whether such institutions and processes can be fully elucidated and satisfactorily understood by reducing them to pyramids of rules. Historically it would seem that basic rules of recognition are often the product of the continuing activities of these institutions, and in this sense it is certainly misleading to explain these phenomena as being rooted in the *acceptance* of rules of recognition. To gain an insight into the nature of legal systems we would be more gainfully employed in investigating how in fact

13. Robert S. Summers, *Professor H. L. A. Hart's* THE CONCEPT OF LAW, 1963 DUKE LAW JOURNAL 629, 640-645.

people have collaborated and do collaborate for the solution of disputes. This might well show that the special characteristics of the standard uses of the words "law" and "legal system" involve very centrally the ideas of institutions proceeding according to certain techniques of reasoning and action, ideas which are not adequately explained by the concept of rule alone.

If Shuman does not grapple with some of the most central and obscure concepts of Hart's jurisprudence, he makes no attempt at all to appraise the work of Alf Ross. Indeed if we turn to the name index at the end of the book we find that the only Ross who appears there is a "Ross, Sir. W. David." It is very difficult to understand this omission, especially since Alf Ross would seem to fit Shuman's own restricted definition of a positivist jurist. This review is no place to embark on a general discussion of the importance of Ross, but it may be proper to indicate briefly one reason why no general discussion of positivist thought can be complete without an appraisal of his position. If there is a major division in positivist writing it is between those jurists who define valid law in terms of derivation from a basic rule and those who define it in terms of the response of people to particular rules. Both Kelsen and Hart are of course in the first camp; the most articulate exponent of the other viewpoint is Ross. The question is by no means academic, for it involves a clear difference of opinion about whether a proffered rule can in certain circumstances be regarded as law or not. If there is a penal offense of fornication on the statute book but no prosecuting official has invoked this rule for a century while sociological studies reveal a high incidence of easily detectable fornication in that society, is there a legal duty not to commit fornication in that society? Presumably Hart and Kelsen would both say yes, while Ross would say no. The matter might seem to depend on the nature of the particular legal system, for some systems have a doctrine of *desuetudo,* whereas common law systems generally do not. Kelsen and Hart might of course retort that their position would hold good even in a system which operated a doctrine of *desuetudo,* for all that one would need to do would be to revise one's formulation of the basic norm or basic rules of recognition in that society to incorporate the element of *desuetudo.* So one might then say that valid law in that society comprises all rules made in compliance with basic rules of recognition, X, Y, and Z, except rules made in this manner which have not been enforced for more than a century. But to do this would of course only be to recognize the response of officials to particular rules as a vital element in the basic rule of recognition and lead us back to the question posed earlier in this review of how helpful it then is to talk at all in terms of "accepting rules." One of the many significant features of Ross's analysis is that it serves to lead us to this inquiry.

This review has been occupied this far with suggesting that Shuman's book ignores so many of the central issues in positivist writing that it cannot be accepted as an adequate fulfillment of the promise held out in its title. There are places in the book where Shuman seems to be approaching a discussion of some of these questions but he always veers off before he really comes to grips with them. His book is principally a discussion of noncognitivism in ethics as a general philosophic position with some reference to the impact of this position

on legal philosophy. As a writer on this theme Shuman displays close familiarity with most of the important recent philosophical writing. From the writings cited in his notes there could be compiled a most useful bibliography in this area. This reviewer is certainly not competent to pass judgment on topics that so excite professional philosophers. But perhaps the comment may be ventured that if clarity of style in an author is very much needed to guide the amateur in philosophy through these thickets, such a reader may not find Shuman's book very helpful. Large tracts of this book read like a densely packed summary and critique of the contents of the most prominent philosophical journals in the last decade or so. In the face of this kind of writing this reviewer is always very ready to incline to the humble position that his lack of enlightenment is due to his own slow-wittedness, but the suspicion hopefully intrudes that perhaps the author of the book is at least in part to blame.

GRAHAM HUGHES

MORALITY AND THE LANGUAGE OF CONDUCT. Edited by Hector-Neri Castañeda and George Nakhnikian. Detroit: Wayne State University Press, 1963. Pp. viii, 367. $9.75.

The nine essays in this volume were written by American philosophers, and, with the exception of the essays by Aiken and Sellars, they appear in print here for the first time. The range of topics includes the nature of morality itself, the relation of utility to right action, the relation of *oughts* to imperatives, and the nature of motivation by duty. In many of the essays there is, at various levels of explicitness, critical commentary on the ethical theories of the past fifteen years. The work of the English moralists R. M. Hare, S. E. Toulmin, and P. H. Nowell-Smith bulks large in the background. Yet the critical commentary is a propaedeutic for positive suggestions. The least common denominator of these suggestions can be labeled ethical objectivism. It is in any event something which contrasts with the earlier imperativist and resolutivist theories. Frankena rejects the idea that a moral disagreement could be a *de gustibus* one; Aiken finds objectionable a moral autonomism which makes agents laws unto themselves; Brandt puts the rule productive of utility before the rule merely accepted by the group; and Sellars finds that a moral disagreement is reducible to one about matters of fact, not to one about personal intentions. The influence of linguistic analysis is evident in the contributors' methods of attacking problems. In this regard there is considerable fence straddling; linguistic analysis is felt to be important but not always sufficient. It is not said, however, from what quarter one is to look for help when one has reached the end of one's linguistic tether. In all, this volume represents an attempt to accommodate ethical theory to what remains of the framework of assumptions and methods advanced at midcentury.

In the opening essay, "Recent Conceptions of Morality," William K. Frankena

discusses moral judgments. By a moral judgment he means one which attempts to settle a question of morality, and thus for him a judgment is not moral just when it is itself good or legitimate. The judgment that gold is heavier than iron is nonmoral. The status of your judgment that you owe yourself a vacation every summer would be decided differently under differing conceptions of morality. Frankena distinguishes a formal and a material concept of morality. One kind of formalist would say that a judgment is moral if it is a personal decision for which one claims intersubjective validity. The element of personal autonomy in regard to the making of the judgment is all important. On one kind of material view of morality, it would be said that for a judgment to be moral it must be made for the purpose of advancing the social good. Personal autonomy together with a claim of intersubjective validity is not enough. On the material view, being moral in outlook involves having a social concern; on the formal view, a moral outlook is compatible with both selfishness and selflessness. The judgment that you owe yourself a vacation every summer could be moral only for the formalist. Frankena comments that each view can be advocated in two ways. It can be advocated either as the correct description of the word "moral" or, rejecting current usage, as the best recommendation for its use. These distinctions provide a matrix for the discussion of the essays by Falk and Aiken.

W. D. Falk, in "Morality, Self, and Others," argues convincingly that commitments to oneself can be as binding as those to others. But, he asks, can commitments to oneself, as opposed to social commitments, be called moral, rather than merely prudential? Both the formalist and the nonformalist have strong arguments from usage. The expressions "moral freedom" and "moral strength" suggest the legitimacy of calling a personal *ought* a moral *ought*. Yet, Falk claims, the expression "morally good man" connects with "selfless man," and thus favors the material conception of morality. It is then to strain the usual associations of language to the limit either to affirm or to deny that no commitment to put one's own good before that of another is moral. Falk refrains from resolving by a recommendation for future usage the issue left indeterminate by present usage. Yet Falk's documentation of the supposed linguistic strain implied by saying either *yes* or *no* is too skimpy. It is insufficient for his case to point out that "morally good man" connects with "selfless man," for it also connects with "man of conscience," and it is admitted that the personal *ought* can be as binding in conscience as the social one. It is not then shown conclusively that one cannot call both "I owe it to myself to X" and "I owe it to another to X" moral without linguistic strain.

In "The Concept of Moral Objectivity" H. D. Aiken sets out to analyze the concept of moral objectivity and ends by advocating the moral principle — the principle of moral objectivity — that we scrutinize our decisions in the light of facts and commitments. But this passage from description to recommendation is consistent with his remark that in philosophy no question about the meaning of a word is purely irenic. For Aiken, objectivity in morals is not to be equated with the existence of universal and necessary principles in terms of which every disagreement can be resolved. For it is doubtful that there are such principles. Rather, in morals, objectivity is a feature of particular judgments

which have survived the test of criticism in the face of all of our moral commitments. An objective judgment is one which coheres in a moral system. Judgments leading to contradictory actions can, when made in different moral communities, both be morally true. A thoroughgoing system of moral evil would, for Aiken, be a contradiction in terms. Thus to the extent that murder has been made into a system by some groups in our midst, it would, to that extent, have to be allowed that "We ought to do away with Officer O'Reilly" can be morally true. One would have welcomed some indication from Aiken as to how to avoid such an intolerable result.

The utilitarian principle proposed by Richard B. Brandt in his "Toward a Credible Utilitarianism" attempts to avoid the utopian character of some forms of utilitarianism by recognizing the demands both of utility and of current social acceptance of possibly nonutilitarian norms. If the criterion for rightness is conformity to rules which, *if adopted by everyone,* would maximize utility, then a right act could be harmful when performed in a context in which not everyone agreed to those rules. Thus Brandt proposes that an act is right when it conforms to rules which, *if adopted by everyone except those of already fixed moral convictions,* would maximize utility. But this proposal leads to a dilemma over the question of rightness for one of fixed moral convictions, when those convictions differ from the rules mentioned in the proposal and could replace those rules only at the expense of utility. If such a person acts on rules which, when acted on by all but some including himself, maximize utility, then he prevents the maximization of utility. If he does not act on rules which, when acted on by all but some including himself, maximize utility, then he does what is wrong. Hence, he either prevents the maximization of utility or does what is wrong each time he acts.

Whereas Brandt recommends a criterion for rightness, Nakhnikian, Sellars, and Castañeda move closer to the analytic task of describing the usage of ethical and related terms. "On the Naturalistic Fallacy," by George Nakhnikian, revisits G. E. Moore's *Principia Ethica,* and, among other things, concludes with Moore that an evaluative assertion cannot be made with a sentence containing ethical terms if that sentence is analytic. One does not make an evaluation when one asserts the analytic sentence "All good things are good." There is no evaluation since one is already present in identifying good things and will then not be repeated by the addition of the predicate. But from examples like this it is doubtful that Nakhnikian's general conclusion follows. Anyone who would deny the sentence "Taking an infant from its mother and removing its eyes, tongue, feet, and hands is wrong" would surely be making a conceptual blunder. Hence the sentence is, in at least one important sense, analytic. Nonetheless, it can be used in making an evaluation. It will not do to reply that, since a moral monster might not think it wrong to mutilate innocents, the denial of our sentence is consistently thinkable. For it would not be claimed that, because a schizophrenic thinks himself his own father, the sentence "Nobody is father to himself" is not analytic.

Wilfrid Sellars, in "Imperatives, Intentions, and the Logic of 'Ought,'" and Hector-Neri Castañeda, in "Imperatives, Decisions, and 'Oughts': A Logico-

Metaphysical Investigation," provide analyses of "*X* ought to do *A*," intended to avoid the difficulties of Hare's analysis. Implicitly, Castañeda's essay undercuts Sellars'. Castañeda argues successfully the point that resolves cannot occur in the subordinate clauses of conditionals. The main clause of "I shall do *A* if *p*" is a resolve, but the subordinate clause (i.e., the antecedent) of "If I shall do *A* then *p*" does not express a resolve. But for Sellars *oughts* are in part resolves. He holds that "*X* ought in circumstances *C* to do *A*" means the same as "We the group are resolved that *X* do *A* because *X* is in *C* and it is a first principle of moral reasoning that we are resolved that *X* do *A* if *X* is in *C*." Since this *because*-sentence contains the resolutive "We the group are resolved that *X* do *A*," *oughts* are taken to be in part resolves. But, as Castañeda points out, an *ought* can, whereas a resolve cannot, occur as a subordinate clause in a conditional. Thus we can have "*A* is possible if *X* ought to do *A*," but the subordinate clause of "The question is settled if we are resolved that *X* do *A*," though it uses the word "resolved," is not a resolve. Thus, for Castañeda, it will not do to claim that *oughts* are in part resolves; *oughts* can be expressed in places in sentences where resolves cannot be made. This criticism is sound if "ought" has the same meaning in both "*X* ought to do *A*" and "*p* if *X* ought to do *A*."

Castañeda himself holds that "*X* ought to do *A*" implies and is implied by the metalinguistic claim "The imperative '*X*, do *A*!' is justified," where justification is relative to the ends, facts, and conventions of the case. This shift to the metalanguage is designed to circumvent criticism of the sort just given of Sellars' view and applicable to any view holding that *oughts* are in whole or in part imperatives or resolutives. Since, for Castañeda, such metalinguistic claims have the same practical function as normative claims, normative discourse is superfluous. Yet this analysis seems to run up against the fact that there can be duties where imperatives are unjustified. Gentle persuasion, not raw imperative, is needed in bringing many people around to their duty. John's overly sensitive son, Peter, ought to tell the truth, and so "Peter ought to tell the truth" is true. But John's telling Peter to tell the truth will only force Peter into deeper conflict with the ideal of family harmony, and so "The imperative 'Peter, tell the truth!' is justified" is false. The claimed equivalence is then upset. Moreover, though undiplomatic, the second person directive "You ought to tell the truth," issued by John to Peter, will be true, and Castañeda's metalinguistic counterpart "The imperative 'Peter, tell the truth!' is justified" will again be false.

The last two essays discussed complement one another in a helpful way and can be admired for their systematic thoroughness. Further, Castañeda's critique of the (nonmetalinguistic) imperativist, resolutivist, and good-reasons approaches to "ought" provides an excellent tract on fallacies in recent ethical theory. And Sellars' essay contains the challenging denial that there is such a thing as imperative inference. One is inclined to agree with Sellars that it would be odd to reason "Get inside if it rains! But it is raining. So get inside!" But there is nothing odd about "It is raining. So get inside!" Thus, though there may well be no inferences from imperatives to imperatives, there are imperative inferences in that there are inferences from nonimperatives to imperatives. If "It is raining. So get inside!" were claimed to be incomplete, as Hare would claim it is, the needed

premise would be the nonimperative "You should get inside if it rains," rather than the imperative "Get inside if it rains!" Over all, Sellars' essay is brilliant and bewildering. A first reading may not reveal its coherence and the insights deepened by its many logical reminders. But it is likely to commit one to a quest for them. These features are not new to the exasperated but persevering readers of the epistemological Sellars.

To come to the main point of his essay "The Desire to Do One's Duty for Its Own Sake," John Ladd distinguishes desires from motives. He points out that, whereas motives can be used to justify as well as to explain actions, desires can be used only to explain them. Motives but not desires are answers to questions of the form "Why should *X* do *A*?" He agrees with H. A. Prichard and A. C. Ewing that the thought that *A* is a duty can function as a motive for doing *A*, and hence as a reason for doing *A* and also as a reason for wanting to do *A*. But, he asks, doesn't it follow that duty's being a motive involves having a desire to do one's duty for its own sake? For, if the thought that *A* is one's duty motivates one's doing *A*, then it makes one want to do *A*, i.e., makes one desire to do one's duty, *A*, for no other reason or motive than that it is one's duty. Yet Ladd answers this question negatively, after having distinguished formal from material reasons. If I say that I am frightened by *X* because *X* is frightening, I am giving a formal reason; if I say that I am frightened by *X* because *X* has long teeth, I am giving a material reason. But formal reasons are empty, in that in justifying them we have to turn to the corresponding material reasons. Why is *X* frightening? Because *X* has long teeth.

Now duty, claims Ladd, is only a formal reason. To say that one does *A* because *A* is one's duty is to give a formal reason, which will thus be justified by the material reasons *a, b, c*. From this Ladd believes he can infer there is no desire to do duty for its own sake. The supposed desire to do one's duty, *A*, for no other reason than the formal one that *A* is one's duty disappears, and in its place we have the desire to do one's duty, *A*, for the material reasons *a, b, c*. But granting that duty is a formal reason, does it follow, as Ladd claims it does, that duty for its own sake is unreal while duty for material reasons' sake is real? Is Red Ridinghood's disliking Wolf for the reason that he is frightening unreal? Is only her disliking Wolf for the reason that he has long teeth real? Surely not. It follows from Ladd's premises only that a person who says he wanted to do *A* because it was his duty could also say he wanted to do *A* because of *a, b, c*. Saying the second would be compatible with saying the first since *a, b, c* are equally reasons for *A*'s being a duty and reasons for wanting to do *A*.

Our volume's concluding essay is Francis V. Raab's "The Relevance of Morals to Our Denials of Responsibility." Raab considers it obvious that, if one is not responsible for a deed, one ought not to be punished for it. Yet the truth of this implication does not require that criteria for responsibility remain fixed through time or be precise at a given time. Changing moral attitudes can change criteria of responsibility, and present moral attitudes can influence responsibility claims where according to recognized criteria of responsibility there are borderline cases. Moral attitudes are then partial determinants of denials of responsibility in difficult cases. This is understandable since a denial of responsibility is itself a

moral ground for withholding punishment. Raab's view would be opposed to one according to which responsibility or the lack of it is ascribed purely by reference to descriptive regularities. If morals are relevant to responsibility, in the way Raab claims, then the criteria of responsibility used by the law are subject to review by the moralist.

There is a high level of philosophical argumentation running through all of these essays. The critical spadework done in them should hasten the advent of a new era in ethical theory. The lay philosopher interested in taking stock of present American ethics will find all of these essays accessible to him, except the extremely technical ones of Sellars and Castañeda.

MILTON FISK

NATURAL LAW AND MODERN SOCIETY. By John Cogley, Robert M. Hutchins, John Courtney Murray, S.J., Scott Buchanan, Philip Selznick, Harvey Wheeler, Robert Gordis. Cleveland: World Publishing Co., 1963. Pp. 285. $4.00.

Prepared for discussions on the natural law at the Center for the Study of Democratic Institutions at Santa Barbara, California, these papers represent a high level of achievement of the aim of the Center: a community of scholars investigating profoundly a subject not immediately the object of their competence and doing so with a stylistic grace that leaves their efforts accessible to an educated public and with an analytic rigor that warrants the interest of their academic fellows. The subject, moreover, is set in the contemporary problematic of rapidly evolving social and economic institutions where the use of power seems inevitably to outdistance society's efforts to legitimize it. Since these questions are far too important to leave to the experts alone, the views of sociologists and political scientists are contrasted with those of a theologian and a churchman. None is a specialist in jurisprudence; some, recognized as "generalists," find themselves readily at home on an issue as close to the traditions and culture of the West as the natural law.

The question whether or not natural law exists is not asked in any of the papers, and no positivist or language analyst was invited to this "great conversation" at Santa Barbara. These authors generally agree that a new and more accurate understanding of natural law exists today. In order to locate their differences of viewpoint, a threefold division of natural law might be useful. First, natural law can be considered operationally as actually effecting order in legislation, the judiciary, the development of such institutions as the family and the state. All the authors would grant that the reality designated by the expression "natural law" is an objective source of intelligibility affording society a bulwark against egoism, tyranny, expediency. It represents man's belief that there is some consistency to human affairs against which the recurrent

novelty of the present can be measured with certainty by good men who examine their lives attentively and dispassionately. A second way of approaching the phenomenon of natural law consists in constructing theories about how such norms arise out of human experience. Here, positions in this book differ considerably, ranging from Hutchins' "reasoning back to nature" to Wheeler's opinion that natural law is a protoscientific projection of the regularities of a going social system into utopianized norms. A third set of questions would center on the metaphysical or religious justification of the presence of some kind of natural direction in human affairs. Each of the contributors maintains that natural law, as a determinant of the shape of society, need not be associated with any specific ultimate world view. Robert Gordis, however, comments pertinently on the relation between natural law imperatives and the ultimate source of their obligatory demands.

What strikes the reader immediately is that this book clears away a good many stereotypes of what natural law is not. Natural law is not a code, though always seeking formulation; not a statement made once at a particular moment in history and then held forever valid, but always subject to the importunities of the temporal unfolding of the human condition; not a vague aspiration, but a workable set of criteria to which appeals are to be made in juridical procedure; not a statement of man's biophysical necessities, but the creative interpretation of a developing human culture; not simply a conserving principle, limiting and restraining, but a liberating force able to reform and reconstitute; not self-evident or known intuitively as something "written in the heart," but open to rational analysis and actualized in principled decision making.

In his introduction, John Cogley, after singling out some of the distortions of the past and anticipating some of the contributions of the other essays, rightly stresses a growing sensitivity toward the historical dimension of human nature, with its attendant problem of just how to reconcile a principle of development with one of constancy. "There is nothing wrong with the system that either an exaggerated essentialism or a freewheeling existentialism can fix." (p. 25)

In his paper, "Natural Law and Public Consensus," John Courtney Murray, S.J., introduces his carefully disciplined remarks by an admiring commentary on Adolph A. Berle's Stafford Little lectures on the containment of economic power through a "public consensus." He goes on to a more general treatment of the process of natural law as a dialectic of experience and thought, always developing new "operative imperatives" through the creative discoveries of "workers on the margin" — the wise of the universities associated in discussion with responsible journalists, political leaders, and, of course, members of the legal profession.

With careful distinctions and a feeling for the procedures of public affairs, Murray emphasizes the historical character of natural law thinking. For him, "man's free existence is a forward-looking historicity whose structure, which has been conditioned by the historical past, is the matrix of projects for the future." (p. 50) New situations, relations, institutions alter in a real sense the nature of human existence, requiring new practical insights for the determination of an orderly society. The minimum assumptions of natural law are nicely stressed: man is intelligent, human experience is intelligible, and as derivative from the

reality of human life, a set of natural law principles can be recognized as obligatory. As civilization progresses, with a growing complexity of human conduct and multiplicity of institutions, more specialized experience and science become necessary, however, for the development of more "remote" principles. The consensus, or the natural law incorporated into the values of the citizens, firms through the leadership of the more intelligent and more virtuous who articulate its demands into reasoned form for the affirmation of the generality of society.

As a closely reasoned statement of the specific function of natural law thinking in the good society, clearly distinguished from theological roots on one hand, and legal expression in positive law and judicial decision on the other, this essay is one of the best available today to the general student.

Robert M. Hutchins, in his "Natural Law and Jurisprudence," stresses the actual universal ends of human nature: self-preservation, self-perfection, self-propagation, and social fellowship. Natural law is essentially a commitment to purpose and to reason as the instrumentality through which ends and means are discovered. Acknowledging both the revolutionary technological change of the world and man's freedom to reason about his own situation, he advances as supported by natural law doctrine such propositions, among others, as the necessity of world government, the greater role of government in economic life through maintenance of full employment, progressive income taxes, support of small businesses and small farmers, and many other programs sought by contemporary liberals. Contrary to some other participants in the discussion, Hutchins holds that natural law sanctions divorce and birth control. When he maintains, "There are confusions, contradictions, and inadequacies in natural law doctrine itself," he implies, of course, that not all "reasoning back to nature" is correct and that such reasoning is open to modification as situations change.

The Buchanan, Wheeler, and Selznick essays are especially stimulating in their accounts of how natural law "naturally" emerges from the human condition. Demanding very close attention in its comprehensive judgments about historical periods and their predominant philosophies, Scott Buchanan's paper, "Natural Law and Teleology," presents a history of natural law as an account of man's grappling with crises that totally threaten his existence. Today's crisis, he believes, is that of succumbing to a demonic control, independent of human purpose, inherent in a highly technological system whose obsessive evil has been described in *La Technique* by Jacques Ellul. Our situation is analogous to Plato's facing the problem of introducing order among the arts, considered as a system of power asking for efficient use, through a dialectic moving upward from the empirical to the rational. Socrates, he notes, was accused by a poet and a politician and two representatives of the Athenian arts.

If we do not recognize finality in nature and see it one with human purpose, Buchanan feels natural law becomes a "mere humanism" unable to penetrate the equations and mechanisms of natural and social science. The solution to our contemporary crisis of technology and scientific knowledge and their imperviousness to moral values lies, he thinks, in a reconstitution of Kant's categorical imperative. Buchanan sees the ideal of purpose in the universe as

an ideal of reason which issues an imperative to the biologist, for example, to conceive an organism as a system of reciprocal means and ends, and then trace the instrumental relations in the mechanism of reciprocal efficient causes. In jurisprudence, similarly, legislative enactment must have reasoned preambles, and judicial decisions must be reasonable opinions. Natural law, as internal teacher of judges, lawyers, citizens, is a "book of rules for the making, administration, and adjudication of positive laws." (p. 136) Kant's kingdom of ends should then be extended to include all natural things. The exploitation of natural resources, of which we have a long, unhappy experience, would be recognized as not "true" mining or "true" farming. The same reasoning should apply to national economies and the world community as teleological fields where all agents must be seen as reciprocally interacting as ends and means.

If Buchanan had given more attention to the teleology of human groups, such as considered by Wheeler and Selznick, for which greater self-awareness and reflective evaluation of common purposes have become increasingly feasible, he might have been saved from confusing the levels of discourse of scientific knowledge and human action. Those responsible for the values of emerging society, and the legal structures through which they can be preserved, have more to gain from the vitality of the social sciences and their practical extension into the new fields of economic development and public administration than from this construct of a Kantian-Aristotelian kingdom of ends.

Philip Selznick's "Natural Law and Sociology," which appeared in the 1961 NATURAL LAW FORUM, sees the study of normative systems as a way of discovering latent values in the world of fact. Normative systems would include, beyond the more familiar organization for survival, such living realities as friendship, public opinion, fatherhood, and democracy, in which norms for full functioning could be derived from detached observation of how new circumstances alter the relation of the system with the master ideal. The moral relativism which characterizes social sciences, moreover, facilitates a psychological "openness," a reverence for man in his cultural diversity, and the insight to define psychic health and well-being of human nature. In society's quest for legality, understood as the way rules are made and creatively applied by the judiciary, social science also has much to contribute. Tradition not being ignored, "judicial conclusions gain in *legal* authority as they are based on good reasoning, including sound knowledge of human personality, human groups, human institutions." (p. 175) If the central task of jurisprudence is the reduction of arbitrariness, legal norms or principles become "natural law" to the extent they are based on scientific generalizations grounded in warranted assertions about the human condition.

Harvey Wheeler's "Natural Law and Human Culture" conceives natural law as a relationship that ought to exist in a culture if men are to provide themselves with the greatest welfare. It comes to exist as an anthropomorphic projection into the universe of the regularities of one's own civilization. For the Greeks, "It was an order of obligation and morality administered by God in the same way that the early order of obligation and morality was administered by the priest-king-paterfamilias." (p. 215) Then, as visible "in the heavens," natural law could be recognized as such and counterprojected back, as ideal-

typical norms, to the institutions of earth from which it had been derived. Aristotle's notion of a final cause was the last step in the rationalization of the natural law.

More generally, the growth of culture initially brings the production of natural law as the mythic projection of behavioral norms; then, in a way analogous to the passage from astrology to astronomy, natural law becomes demythologized and recognized as the policy recommendations of a developing political science. At first self-validating, because it simply mirrors functioning cultural institutions, the "higher law" is later seen in its long-run, general, collective implications and is accepted only because it is a logically necessary efficient cause for a given final cause. Wheeler illustrates his thesis by the growth of common law, the rule of law, and constitutional theory in England. He stresses, nonetheless, the reforming capability of natural law: "It is not merely deriving the prescriptive implications of going institutions that provides sound social science projections, but rather deriving the prescriptive implications of the most rational possible institutions." (p. 237)

While aware as any of the other writers in this book of the independence of any natural law activity from a specific philosophic or religious interpretation of the universe, Rabbi Robert Gordis, in "Natural Law and Religion," points out that the conservative bias found in the history of the concept can be attributed to its origin in Greco-Roman thought which saw life as an unchanging and human history going through repetitive cycles. If natural law thinking does have implications for the understanding of the ultimate nature of the universe and if we do not limit arbitrarily the scope of human inquiry, the Judeo-Christian source for natural law should not be ignored. Its claim to our attention rests especially on the biblical view of the unity of the moral and the natural in their divine origin and the revelation of the radical historicity of the human condition. Both aspects would contribute greatly toward understanding contemporary natural law problems in a period of accelerated social adaptation. Advocating the same reverence for a comprehensive kingdom of ends as Buchanan, Gordis urges a religious framework of all elements of nature. "The recognition has been growing," he holds, "that man has duties to his 'little brothers,' the animals, and even to his more distant cousins, the trees and flowers, as well as to the mineral resources and the earth itself, which is his mother. But the conservation of natural resources is more than good husbandry, or, to use the term in its etymological sense, good economics." (p. 266)

Natural law inquiry and reflection may thrive better under such a horizon rather than another or none at all. All that Gordis requests is that those unwilling to go beyond the pragmatic values of a natural law jurisprudence to some metaphysical justification would not deny its possibility. Indeed, one of the chief merits of this set of essays is their nondoctrinaire approach, permitting a real complementarity of viewpoint that affords the general reader a deeper understanding of varied approaches and possibilities of natural law.

K. Basil O'Leary, F.S.C.

NICHOLAS OF CUSA AND MEDIEVAL POLITICAL THOUGHT. By Paul E. Sigmund. Cambridge, Mass.: Harvard University Press, 1963. Pp. vii, 335. $6.95.

This very able analysis of the political writings of Nicholas of Cusa fills a chapter in the history of late medieval thought that has long been desired. Whereas previous treatments of the fifteenth century Cardinal's political theories have been fragmentary and concentrated on his ideas of consent and representation almost exclusively in terms of his first great work, the *De Concordantia Catholica,* Professor Sigmund has widened the spectrum of interpretation by including Cusa's more mature works, notably the *De Docta Ignorantia,* the *De Auctoritate Presidendi Concilio Generali,* and the *De Pace Fidei.* The quality of research is evident on every page, and the author exhibits a fine knowledge of current work that is being done by continental scholars.

Delineating the sources of Cusa's thought against the background of Neo-Platonic Christianity and his "legal antecedents," the author constructs a penetrating appraisal of the influence of John of Paris, William of Occam, and Marsilius of Padua. He also notes the parallel between Cusa and Gerson in their rejection of a canonistic notion of the Church and their dependence upon Augustine and the Victorines. In so doing he deftly avoids depreciating the originality of Cusa by exposing him to a charge of eclecticism. Chapters five to nine are an illuminating study of the Cardinal's underlying theme, a *renovatio* of the Empire and the Church in terms of a better coordinated relationship between the sacerdotium and the imperium. Hierarchical and functional interdependence are articulated in explaining Cusa's concept of the ecclesia in the hierarchical and triadic order of the universe. In the Neo-Platonic tradition the political and social system is linked with a grander scheme which unites all created things with their Creator in a series of ascending values. For Cusa there is a double hierarchy in the Church: sacramental, based upon the power of orders and culminating in the episcopacy; and governmental or administrative, of which the pope is the supreme example.

The work is especially enhanced by the author's presentation of Cusa within the complicated background of the fifteenth century ecclesiastical history. His work at the Council of Basel, his reformatory efforts as papal legate in the Empire and his attempts to reform the diocese of Brixen are given a lively treatment. At times the author seems at pains to reconcile Cusa's earlier conciliarism with his return to the papal camp after Basel. Perhaps Cusa emerges as the classic example of a failure to bridge the gulf between the extreme hierocrats who confused logic with reasonableness and the defenders of the lay thesis who denied all papal authority except the *plenitudo potestatis.*

As is inevitable in works of this nature, there are a few matters of historical fact that may be questionable. Whether Cusa was the first to expose the historical falsity of the well-known skeleton in the ecclesiastical closet, the Donation of Constantine, might be doubted. Lupold of Babenberg by appealing to historical sources seems to have reached the same conclusion in the previous century. The contemporary bishop of Chichester, Reginald Pecock, in contrast to the uncertain vacillation of Cusa is far more exact in his historical investigation and certainly

more conclusive in his rejection of it. The Council of Basel was opened by the Dominican John of Ragusa and John of Palomar in July of 1431. It is curious that the author refers to the decree *Haec Sancta* of Constance as the *Sacrosancta* since the later designation was not used until the Council of Basel and then only for the first time in the decree of May 16, 1439. Previous to that, in 1432 and again in 1434, it used the original title, *Haec Sancta.*

Not only students of political science, but historians, theologians, and all who are seriously interested in ecumenism will welcome this excellent work. The bibliography is the most comprehensive of any work on this subject in English.

JOHN P. DOLAN

JEAN BODIN AND THE SIXTEENTH-CENTURY REVOLUTION IN THE METHODOLOGY OF LAW AND HISTORY. By Julian Franklin. New York: Columbia University Press, 1963. Pp. 160. $4.00.

This book is about the contributions of Jean Bodin, sixteenth century French political writer and jurist, to the methodology of law and history. The author, associate professor of political science at Columbia, sums up as follows:

> My essential point, from the perspective of the history of method, is that the methodological thinking of the eighteenth century, on which the present is itself dependent, is the fruit of a continuous tradition which arises in the later sixteenth century. (p. 154)

I do not find the case convincing. I shall suggest in a moment that the chief difficulty with this study is that it is at once too narrow and too broad. But beyond this I find two shortcomings. The first and more important is that Franklin does not seem to have a very clear idea of *contemporary* methodology in law and history. I should have thought it widely agreed that the process of discovery itself, whether it be of discovery of new evidence or of a new synthesis of available data, may not have, indeed usually does not have, a logical structure. In any case it lacks the formal structure of the presentation that is made to explain and defend a claim of discovery. Franklin seems confused at this starting point and never so far as I can see makes it clear whether he is talking about, on the one hand, how Bodin came to his views about law and history, or, on the other hand, how Bodin undertook to justify those views.

A second and related shortcoming is the poverty of Franklin's own argument. He seems to have read most of what he should have read concerning his immediate subject, though I do not know enough to express an opinion in this respect. But the analysis of the material and the development of the subject is a tepid mush of loose propositions qualified into unintelligibility. Franklin makes use of adverbs such as "especially" (e.g., pp. 26, 59, 78, 86), "generally" (e.g., pp. 9, 10, 11, 17, 18, 30, 32, 84, 85, 86), "explicitly" (e.g., pp. 17, 31, 85, 87), and "relatively" (e.g., pp. 11, 13, 26) to help himself through passages that might otherwise be subject to interpretation. I so lost my sense of direction in Franklin's quag-

mire of unstatements that I could not state just what his point about Bodin is or why he believes it valid. This may not be Franklin's fault, but rather the product of cautionary emendations inserted by a tremulous editorial committee. In any case, the resulting exposition is hard to follow.

Some comment is appropriate on the problem to which Franklin's book is addressed. In its broadest statement, the problem is how and what man knows of himself and of the (apparitional?) world about him. From the time the thought first occurred that there might be more to it all than what lies before the eyes, this problem has excited man's attention and disturbed his peace of mind. It was and is a problem with which he who would speak or think about matters of consequence must come to some sort of terms. Surely this is true at least for the historian and the jurist. For unless there is some accepted answer, however provisional, to the elementary epistemological and ethical questions posed by present experience, it is difficult to see how one can proceed to consider past experience (history) or the more complex normative issues generated by reflection on experience (law).

Now in order to write a fragment of history or of law it is neither desirable nor possible to rehearse in detail the abiding issues of philosophy. The working historian or jurist need not have Plato, St. Thomas, and Hume for breakfast every day. I do not see how he can do his job very well if he has not at some stage thought seriously and carefully about philosophy's great questions. Having done so, however, he can go through the pick and shovel work of locating, assembling, and evaluating the relevant primary data without formal methodological refreshers. And so if one were to undertake to do a pick and shovel job on the history of a particular subject at a particular period, as Franklin has not attempted to do, it would be in order to shortcut all the fancy stuff and just lay out what you've got. But this is only because one can count on a sturdy foundation of presuppositions to support the exposition as it progresses. We and our correspondents are men of a time, a place, a language and a culture, and we all know it. In ordinary discourse we can pass by semantic, analytical, and evidentiary difficulties, knowing that our passing has been noticed and understood as an omission in the interest of expediency.

There are occasions, however, when the presuppositions of ordinary discourse may not be indulged. Such is the case in discourse with foreigners, as travelers abroad and treaty negotiators well know. In those circumstances it is not possible to count on shared experience and shared values to complete the ellipsis of normal conversation, and special care must be taken to say what is meant and to see whether what is said is understood as intended. Those who do well at talking with foreigners though they be no philosophers know a great deal of themselves and of the world.

A similar occasion is presented in undertaking to examine the presuppositions of a culture such as ours of the modern West. In such an examination that which is ordinarily presupposed in inquiry is itself made the object of inquiry. The presuppositions of a culture cannot be used to explain themselves; if they are to be explained, it must be by use of terms and by stages that are semantically, analytically, and evidentially more precise and circumspect than those

of ordinary discourse. I trust that it takes no argument to carry the suggestion that an inquiry concerning "the theory of history" (p. 1), "the logical basis of historical belief" (p. 7), and the "history of method" (p. 154) is an examination of important presuppositions. One would expect that such an inquiry would display an appreciation of the traditional problems of philosophy.

To the traditional problems of philosophy there have been essentially two approaches, epitomized as those of the hedgehog and those of the fox.[1] The hedgehog would know the world by seeing it through the lattice of a great organizing concept. His range is wide, his strokes broad, his sighting telescopic. The fox would know the world by studying his own back yard. His range is short, his strokes pointillist, his sighting microscopic. Both methods have their uses, and both have their limitations. The most serious limitation of large-scale inquiry is imprecision, the most serious limitation of small-scale inquiry is insignificance. But surely it would be incongruous to undertake a small-scale inquiry with large-scale methods, and thus to encounter both limitations.

Yet I fear that this is what Franklin has done. The scale of the stated inquiry is heroic: How many questions are there that are broader than "the history of method"? Yet the response turns out to be the gleanings from the work of a demipersonage appearing midway in the two-millennial epoch known as Western civilization. I come away with the impression of having read Toynbee in the *Reader's Digest.*

The problem of scale which I think has presented insurmountable difficulties for Franklin's book is widely encountered in contemporary letters and science. It is the technical aspect of what is called overspecialization. "Overspecialization" is the condition of a specialist who wishes he were a generalist. The reason why he is a specialist is that the marketplace, commercial and academic, says it wants specialists, or at any rate people who have a specialist M.O.S. whatever else they may be. He wishes to be a generalist because the general problems — war, famine, hatred, stupidity, and the downtown parking situation — are the ones that worry him and that command his respect as a mind. As a specialist, he is afraid for very good reasons to publish anything unless it is either documented so exhaustively or stated so elusively as to be unassailable. As a thoughtful human being, he wants to take aim at the big questions and try to say something useful about them. In doing so, he may be (as I think Franklin may have been) half bold, and that is fatal. Perhaps he raises his glass to the heavens and suddenly discovers that the only technique he has mastered is microscopy. In any case, it is a humiliating experience and one painful to observe.

I should like to mention another dimension of the topic which Franklin undertook to discuss. This is the problem of the emergence of scientific method as the accepted mode of description and verification of palpable phenomena in Western culture. The generally shared notion of how this occurred is that the scientific method gradually superseded the method of authority represented by the Church by undermining the bases of religious belief. The gradients in the path of supersession were the degree of religious skepticism and the decline in the secular power of the Roman Church. From a Church ascendant in an

1. ISAIAH BERLIN, THE HEDGEHOG AND THE FOX (1953).

ignorant world of the Dark Ages to a Church quiescent in an intelligent, knowledgeable modern world, this is the upward march.

There is, it seems to me, a complementary view, one that no doubt has found expression elsewhere. This is that the Church was not, or at least not simply, an obstacle which science had to overcome, but the foundation on which science was built. I would suggest that there are at least two cornerstones in that foundation, one a matter of faith and the other more mundane. As to the matter of faith, the Church held out that men, at least men who acknowledged Christ, were equally the children of God whatever their earthly condition or estate. We need not pause over the question, still a puzzling one, "Equal in what respects?" To assert that men were equal in *any* important respects was revolutionary doctrine, doctrine that no other major social institution had ever before propounded. The notion that men are equal it seems to me is the crucial first step in establishing a scientific method of proof. If men are equal in "reason" (to use the old-fashioned term meaning general "perceptive-cognitive-reflective capacity"), then a method of description and verification must be developed that by its terms does not depend on differences in estate or official capacity among those who would describe and verify. This requirement is met only by a system of "objective proof," i.e., proofs intelligible to any human observer and not a special class of, e.g., priests or seers. At bottom this is what modern science, including modern historiography, is all about.

I do not suggest that the theme of the Church as the Father of Science can be read unambiguously between the lines of Church history. Like most fathers, the Church was often confused, often at cross-purposes and often wrong in respect to its progeny, and its record in regard to science is surely an ambivalent one. What I am suggesting is that the record is indeed ambivalent and that the elemental values which the Church was furthering included not only the spiritual and secular ascendancy of the Holy See but also the dignity and autonomy of the individual person. It was in the conflict between these values that scientific method emerged. At least a hedgehog might undertake to put it in that perspective.

The other cornerstone also relates to the role of the Church. This is the decision taken at the Fourth Lateran Council in 1215 to proscribe the ordeal as an authorized method of trial. It is recognized that this decision had major effects on trial procedure in England,[2] and it is difficult to believe that it did not have similar effects elsewhere, for if trial by ordeal was not widespread it would be hard to understand why it would warrant an ecumenical decree.

It seems to me quite possible that this decision played a major role in the development of scientific method in the late medieval and early Renaissance period. If divine intervention was to be supplanted by evidential proofs of some sort in judicial inquiries, would it not soon come to mind that this kind of proof should be required in other types of inquiry? Could it not be that some of the impetus to rational generalization in science, including the science of history, came from the processes of rational particularization that from 1215

2. See, e.g., JOHN P. DAWSON, A HISTORY OF LAY JUDGES 121 (1960).

onward the civil courts were increasingly compelled to observe? Such a development, of course, would have to be traced in the light of the Church's already established rules of evidence in its own courts, where again emphasis was given to observable evidence. In the end there may be no evidence to support the conjecture I have tendered here. Still, it would pique not only the sense of history but the sense of irony as well if it should appear that the Lateran Council, chiefly concerned with the doctrinal and secular supremacy of the Church organization, lit the spark that by and by enkindled the minds of Newton and Descartes. At least it would be a challenge to the historical foxes.

GEOFFREY C. HAZARD, JR.

THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT. By Ch. Perelman. Translated from the French by John Petrie. With an Introduction by H. L. A. Hart. London: Routledge and Kegan Paul; New York: The Humanities Press, 1963. Pp. xi, 212. $5.50.

This book is a happy exception to the usual rule that when an author brings together several of his separate essays the outcome is a work that lacks any internal principles of either pattern or development. This volume does share some of the unfortunate characteristics of most collections: there is a certain amount of repetitiveness; there are lacunae that one would like to see bridged; there are suggestions that never get fulfilled. But in the present case these faults are largely transmuted into virtues. The manner in which this occurs is quite simple: we here see a mind in action, exploring certain phenomenal fields, grappling with problems that its own inquiries expose, moving from position to position, and accumulating its results without positing any final conclusions. In short, we are apparently confronted with a case where the order of presentation reflects the order of discovery. This deprives us of the advantage we usually enjoy of being able to anticipate an argument and its outcome. But it affords us the much greater privilege of watching issues as they emerge, deliberations as they take place, and solutions as they are given shape.

The two themes woven into all of these essays, binding them together, are those of "justice" and "argument." Of these, justice constitutes the central subject matter, from which arise the problems that are the author's primary concern. The theory of argument is then developed in order to afford a more satisfactory way of dealing with these problems than is permitted by contemporary notions of formal logic and scientific methodology. The chronology of these essays certainly seems to support such an interpretation. The longest and most substantial of these pieces, "Concerning Justice," is also much the earliest, dating from 1945, and is placed first in this volume. It is devoted to a rigorous analysis of the concept of justice, and reaches two general conclusions: first, that insofar as justice is a rational idea it is also quite formal and empty, requiring only "fidelity to rule, obedience to a system" (p. 41); second, that the contents of these rules, and

hence the values they seek to promote, are altogether arbitrary and incapable of justification. The rest of the essays are dated considerably later, ranging from 1954 to 1960: they all seek to complement this abstract doctrine by indicating how our judgments of value — of concrete justice — can escape arbitrariness and be rendered reasonable, so as to be at least supported and purified, if not completely guaranteed. With this brief glance at the pattern of the work, we can now follow more carefully the movement of thought through its several parts.

I

In introducing his analysis of justice, Perelman stresses two prominent features of this concept: it carries a heavy emotional charge, and it is interpreted in radically different and conflicting ways. Whenever the idea of justice is invoked, it is appealed to as a supreme and self-sustaining value that everyone must immediately acknowledge. But the actions and states-of-affairs that are recommended under the aegis of this idea exhibit great variation. That is, the term has a plurality of meanings, and six of these are here singled out for special consideration: some hold that all persons should be treated in exactly the same way, independently of any qualifying traits; others hold variously that persons should be treated according to their merits, their works, their needs, their rank, or their legal entitlement.

Given the presence and active influence of these irreconcilable formulas of justice, three possible standpoints can be adopted. "The first would consist in declaring that these differing conceptions of justice have absolutely nothing in common . . . and these meanings are not united by any conceptual link." (p. 10) This is tantamount to saying that further discussion of justice, on either the theoretical or the practical plane, is fruitless: the word is a mere euphemism under which we seek to disguise our personal prejudices and preferences; and the sooner we eliminate the concept, which is as emotionally full as it is rationally empty, the better will be our chances of discussing our differences more calmly and clearly. A second standpoint would be to choose one of these formulas and insist that it alone yields the true meaning of justice. But since different people will certainly give their allegiance to different formulas, this can only lead to conflict that will be the more bitter because no party will admit the possibility of a further appeal. There remains one further alternative: that of "seeking out what there is in common between these various conceptions of justice." (p. 11) This standpoint assumes, and seeks to identify, a single generic meaning of justice of which the competing and more concrete conceptions are so many specifications.

Perelman, in adopting this approach, makes it clear that he is aware of the task it imposes. He puts it in these terms:

> The question is to find a formula of justice which is common to the different conceptions we have analyzed. This formula must contain an indeterminate element — what in mathematics is called a variable — the determination of which will give now one, now another, conception of justice. The common idea will constitute a definition of *formal* or *abstract* justice.

> Each particular or *concrete* formula of justice will constitute one of the innumerable values of formal justice. (p. 15)

The next step in the argument is to define formal justice. This is done by reference to the concept of equality: justice demands that equals be treated equally. This identification is in turn supported by a twin appeal to common sense and the history of moral and legal opinion. Both of these, the author holds, agree that justice is intimately associated with a proper application of the notions of equality and proportionality; and he propounds his definition of formal justice in these terms:

> Whatever, then, their disagreement on other points, they are all agreed that to be just is to give the same treatment to those who are equal from some particular point of view, who possess one characteristic, *and the only one to which regard must be had in the administration of justice.* Let us qualify this characteristic as *essential.* . . . We can, then, define formal or abstract justice as a *principle of action in accordance with which beings of one and the same essential category must be treated in the same way.* (p 16)

This manner of distinguishing and delineating formal and concrete justice yields great immediate advantages. It gives us a precise conception of abstract justice, devoid of emotional charge. It enables us to deal separately and calmly with the complex procedural and administrative problems that are involved in the effort to establish a system that will guarantee formal justice. And it marks out, for independent treatment, the difficulties that arise from the relation of formal and concrete justice.

But Perelman is emphatic in pointing out that this interpretation of justice also has stringent limitations. There are two of these that are particularly important: in the first place, this formal definition, since it leaves the issue of concrete justice quite untouched, "tells us neither when two beings participate in an essential category nor how they ought to be treated" (p. 16); in the second place, the justice that would be meted out by the strict application of this formula would be absolutely rigid and impersonal, permitting no qualifications or exceptions. In short, this approach leaves us with a notion of justice that is devoid of content and incapable of accommodation. These are serious deficiencies, and Perelman devotes a large part of his principal essay to a consideration of the means by which, and the degree to which, they can be made good in the actual administration of justice.

As regards the measures we adopt to mitigate the strict rule of formal justice, these are largely embodied in the doctrines and procedures of equity. Life is neither as simple nor as categorical as this rule implies, and as its application would require. The actual situations with which law has to deal are complex and fluid: they expose several facets, all of which assert themselves as equally essential but each of which demands its own distinctive and different manner of treatment. Any strict solution of such a case would at once satisfy and flout the requirements of formal justice, depending upon the specific characteristic that one selects as essential. To avoid such outcomes, we modify and compromise the competing demands, allowing some weight to each: that is, we qualify the

general and abstract rule as we apply it to particular and concrete cases. Equity is the technique by which we accomplish this transformation: equity seeks to combine the individual appropriateness of justice at the palace gate with the stability and certainty of justice in the court of law.

Equity is essentially a pragmatic and procedural device, trying to temper injustice in practice but without really coming to grips with the problem of justice in theory: as the author puts it, "equity is the crutch of justice." If we want a cure and not merely a corrective, we must cut deeper than this, moving from the level of formal justice to that of concrete justice. Formal justice tells us that we must adhere to certain stated rules. But it does not tell us how to determine which rules are themselves just or unjust: that is, it does not afford us any hold on the content of justice. So the critical question that is now posed is this: How can we decide among varying formulas of concrete justice, and identify the true content of the just rule? Or, stated differently, how can we move from procedural to substantive justice?

The final sections of the essay "Concerning Justice" deal with this question at length. The treatment is based on an analysis that distinguishes three elements in justice: "the value that is its foundation, the rule that sets it out, the act that gives it effect." (p. 56) The two latter elements fall under the purview of formal justice, and so are subject to the requirements of reason: given a set of values, we can establish a system of rules that will express these values; and given this system of rules, we can define acts that are in accord with them. But it is quite otherwise with the values that ground this whole structure and give content to the rules of concrete justice. As Perelman saw the matter at the time of this essay, value judgments are sheerly emotional and preferential; they have no logical or empirical basis. Once we have accepted certain concrete values — certain goals and norms — then we can state absolutely that formal justice demands that the rules that derive from and support these values should be applied with *coherence* and *regularity:* these latter two are, so to speak, intrinsic values of justice as such. But the ultimate moral and social values on which these depend cannot themselves be rationally justified, or "proved." The selection of these values is the result of a decision, not a deduction or an inference: they are objects of choice and commitment rather than demonstration and proof. In sum, values are personal and relative. And Perelman sums up the conclusions of this phase of his inquiry in these words:

> As for the value that is the foundation of the normative system, we cannot subject it to any rational criterion: it is utterly arbitrary and logically indeterminate. . . . The idea of value is, in effect, incompatible both with formal necessity and with experiential universality. There is no value which is not logically arbitrary. (pp. 56-57)

II

The preceding analysis of justice is extremely illuminating and fruitful when looked at from a strictly legal point of view. The distinction of formal and concrete justice permits us to mark off those problems with which the admin-

istration of law is properly concerned, and so to avoid the distorting intrusion into these problems of extraneous moral and political considerations. But the conclusions to which this analysis leads are quite unsatisfactory when looked at from a larger human and social point of view. For the formula of abstract justice tells us nothing at all as to how we should divide men into essentially different groups, or classes, nor as to the ways in which we should treat those different groups. This formula is devoid of material content: it leaves altogether indeterminate the ends to be sought and the conditions to be promoted by the rule of justice. Such a conception, however relevant in some respects, is obviously incomplete: it cannot be made operative until its abstract form has been filled in with a concrete content; that is, there must be a determination of the goals that formal justice should realize, the purposes it should further, the norms it should impose, and the values it should support.

Perelman is perfectly aware of this problem, and the rest of the essays in the volume are all explorations toward its solution. There are evidently two general ways in which one can try to deal with this problem. One of these would consist in supplying a definite content to the concept of justice. This would entail, at the most basic level, the projection of "an ideal vision of man and society": from this there could then be derived more precise values and norms; these in turn would determine the modes of behavior and the manners of treatment that men are required to observe; and these could be formulated in exact rules. This would constitute a substantive approach to the problem of concrete justice, and it is essentially moral and political in character: it defines the just person, the just act, and the just rule by reference to an idealized conception of man and society. Furthermore, it is obvious that some such "solution" to the problem of justice stands at the basis of every society: it is embodied in tradition, and it guarantees the stability and continuity of the social order. The controlling factor in this process is what Perelman calls the "principle of inertia": the tendency of men to regard as right and proper — that is, as "just" — whatever is already established or is in conformity with precedent. Perelman is aware of the extreme importance of this notion of justice in any actual society. But he is equally aware of its shortcomings, which he epitomizes by referring to it as "static justice": it perpetuates the *status quo,* and has no provision for accommodating changes in either society's actual circumstances or man's ideal aspirations.

Such a substantive concept of justice, then, is always present, and is not so much *a problem* as *a given;* or, more exactly, it *is* a given and it *poses* a problem. Static justice serves as the continuing fabric of society, and it continually challenges us to refine and improve it. This challenge constitutes the problem of dynamic justice. And the kind of solution that it demands is not substantive, but methodological. This challenge, since its terms are always changing, does not permit of any final and definitive solution; rather, it requires that we develop a technique for dealing with the novel issues to which it ever gives rise. That is, there is no abstract and formal solution to the problem of dynamic justice; the best that we can look for here is a way of settling the endless stream of concrete and material problems with which it confronts us. In this context, it is a method to which we must commit ourselves, not a set of answers.

It is this aspect of the problematic of justice in which Perelman is primarily interested. His mature deliberations and conclusions on this subject have been presented in a book of major importance;[1] most of the essays in the present volume are either preliminary explorations leading toward that work or later developments of some of its themes. The broad argument that binds all of these efforts together can be summarized in a series of propositions: The concept of concrete justice depends upon the concept of value; the content of the rules of justice can be determined only by reference to explicit ideals, goals, and norms. But presently entrenched interpretations and criteria of validity and truth — of inductive and deductive procedures, of analytic and synthetic propositions, of postulation and verification — put values beyond the reach of sound logical inquiry: it is held that values cannot be known and established by either rational or empirical methods. Consequently, the values that ground justice are themselves unjustifiable: they can only be asserted arbitrarily. And, finally, the concrete rules of justice are vitiated by this same groundlessness: their content is determined more by tradition and force than by reason and evidence. If this conclusion is to be avoided, and its consequences averted, it is necessary to find "a way of reasoning about values." (p. 57)

The present essays do no more than adumbrate some of the salient features of such reasoning, the full analysis of which is contained in the work referred to above; but their significance is nevertheless great, for they deal in an extremely lucid manner with issues that are basic to our culture. Perelman attacks the problem of "reasoning about values" on two levels: he first indicates the assumptions that are advanced to invalidate such reasoning; he then argues that these assumptions are themselves invalid.

The gist of the first phase of this discussion is the insistence that the current conception of logical techniques — of what constitutes valid inquiry — is entirely too narrow, rigid, and arbitrary. This conception is summarized in the doctrine that "only that which conforms to scientific method is rational." (p. 135) And the theory of scientific method is itself based on the still more primitive axiom of "self-evidence." So it is this latter notion that must be closely examined and corrected. The author points out that both rationalism and empiricism, drawing their inspirations from Descartes and Locke, alike take the notion of self-evidence as basic. They differ in their identifications both of self-evident elements, and of the methods of drawing further conclusions from these: the rationalists start with clear and distinct ideas of certain general and fundamental characteristics of reality, and they infer from these deductively; the empiricists start with simple ideas of primary qualities, and infer from these inductively. But both schools agree that inquiry must take its departure from truths that are certain, complete, and unchanging. Perelman argues cogently that these criteria can never in fact be satisfied: they are dogmatic, artificial, and unhistorical. Furthermore, this doctrine has the disastrous effect of putting stringent limitations on the idea of

1. Ch. Perelman and L. Olbrechts-Tytega, *Traité de l'argumentation. La nouvelle rhetorique* (Paris, Presses Universitaires de France, 1958). Reviewed in 7 NATURAL LAW FORUM 199 (1962).

reason: it confronts us with a crude alternative "beween complete scepticism and knowledge founded on infallible self-evidence." (p. 115)

The corrective to this situation is a radical transformation of our conceptions of "truth," "reason," "inquiry," and other related notions. Perelman moves toward this goal along several paths. One of these consists in a return to Aristotle's distinction between analytical and dialectical proofs, or demonstration and argumentation. With regard to many matters, and notably in the human context, we cannot demonstrate analytically because we lack both clearly defined primitive terms and universally accepted premises. So we can only argue dialectically: our principles must be provisional, we have to persuade our audience to accept and test them, and they are gradually established by their outcomes. Argument, then, is neither certain nor arbitrary: it is relatively probable, convincing, and fruitful.

A second path toward epistemological reform is guided by an insistence on the historical and social character of inquiry and knowledge. It is the teaching of Descartes and Locke that our "self-evident" ideas come to us by direct contact with their objects, undistorted by personal idiosyncrasies or traditional prejudices. But this is absurd. The use of reason is an apprenticeship that continues through both individual lives and successive generations. And the knowledge that it yields is not a series of additions, but rather a synthetic whole that changes as it grows.

The most interesting path Perelman explores — especially from the perspective of law and justice — is traced by the notion of *precedent.* What Perelman does here is draw a parallel between "the rule of justice and the basis of induction" in the sciences: he argues that the general principle governing both of these procedures is that of "treating like cases alike." In law, every decision establishes a presumption that similar cases will be similarly decided in the future; in empirical inquiry, every phenomenon is treated as "the manifestation of an implicit rule according to which essentially similar phenomena manifest the same properties." (p. 83) Both in dispensing justice under law and in carrying on scientific investigations, two things are prerequisite: an established framework that guarantees the stability, coherence, and continuity of our interpretations; and a method for continually extending and refining this framework so that it can satisfactorily accommodate the new instances that we encounter and must bring under it. In the case of justice these are supplied, speaking roughly, by a constitution and by principles of judicial procedure — by "due process of law" in a broad sense of that term. In the case of science they are supplied, again speaking roughly, by the primitive concepts and postulates of a theory and by the principles of logic and methodology. Furthermore, and this point is of crucial importance, these substantive and procedural foundations of justice and science are neither self-evident nor absolute. They are gradual accretions and they undergo continual modification.

There thus turn out to be very close similarities between these apparently quite different enterprises. Neither the quest of law for justice nor the quest of science for truth can be expected to attain to — much less start from — any self-evident certainties. Law and science alike rest upon foundations both fallible and

shifting; and the methods they employ, while carefully devised to minimize error, cannot immunize us against it. Neither facts nor values can be absolutely guaranteed. But this does not mean that values, any more than facts, need be arbitrary or capricious. Rather, both facts and values, which embody our considered opinions of the true and the good, represent tentative but testable probabilities.

Working within this context and toward these conclusions, the high merit of Perelman's analyses is twofold: first, he has mounted a cogent attack upon the separation *in principle* of fact and value, truth and opinion, rational proof and arational arbitrariness; second, he has developed a method by which *in practice* we can investigate problems concerning values, and so can give reasonable content to the rules of justice and morality.

IREDELL JENKINS