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Books Reviewed

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BOOKS REVIEWED

TOPIK UND JURISPRUDENZ. By Theodor Viehweg. Second revised edition. Munich: C. H. Beck'sche Verlagsbuchhandlung, 1963. Pp. viii, 75. DM 10.

This challenging little book was first published in 1953. Though it was regarded as significant enough to be translated into Italian and Spanish, it went almost wholly unnoticed in English-speaking countries. The present reprinting (with minor changes) offers an occasion for some attempt to right this balance.

For the book should be of interest to lawyers everywhere. Its basic concern is to clarify the kind of intellectual process that may be said to constitute "rational" or "valid" legal argument. This question has been the subject of an increasing body of literature in recent years.[1] It is doubtful whether any of this literature exceeds in value the book under review, which not only presents an interesting history of disputes about legal method but analyzes clearly and cogently why the attempt to apply the methods of deductive logic to legal reasoning is bound to fail.

The dream that the law may be shaped into an axiomatic system is an ancient and ever recurring one. Failures to achieve this ideal are likely to be attributed to human error and lack of foresight, rather than to the inappropriateness of the model chosen for emulation. Much the best part of Professor Viehweg's book lies in his analysis of the ways in which this model does and must fail. It is an analysis that penetrates much beyond such commonplace problems as that of the unforeseen case. He observes, for example, that a pervasive difficulty with the axiomatic model lies in the fact that the intentions and actions of men never coincide neatly with the lines laid out for their regulation by the law. What we commonly describe as an "application" of the law therefore involves in reality a reciprocal adjustment between the categories of law and those of life. (pp. 60-61)

A reading of the book helps one to realize the extent to which lawyers are constantly making inconspicuous but crucial decisions of legal method. These

[1] See, for example, the various books and articles of Chaim Perelman and his associates, especially PERELMAN and OLBRECHTS-TYTECA, LA NOVELLE RHÉTORIQUE — TRAITÉ DE L'ARGUMENTATION (1958); JAMES WARD SMITH, THEME FOR REASON (1957); RATIONAL DECISION, a collection of essays forming Vol. VII of NOMOS (1964); and Hart and McNaughton, *Evidence and Interference in the Law*, DAEDALUS 40-64 (Fall, 1958). On what may be called the epistemology of purposive actions and institutions as an object of human understanding, see MICHAEL POLANYI, THE LOGIC OF LIBERTY (1951) and PERSONAL KNOWLEDGE (1958); some interest may also be found in the exchange between Professor Ernest Nagel and the reviewer in 3 NATURAL LAW FORUM 68-108 (1958) and 4 NATURAL LAW FORUM 26-43 (1959). Useful analysis of the modes of thought appropriate to reasoning from precedents after the tradition of the Anglo-American common law will be found in CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1932); LEVI, AN INTRODUCTION TO LEGAL REASONING (1948); LLEWELLYN, THE COMMON LAW TRADITION (1960); WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION (1961).

decisions are often made intuitively and perhaps even without any awareness that an alternative was presented. They are, in any event, seldom defended or explained in any explicit way though they abound in the literature of the law. Scattered through the Restatements of the American Law Institute, for example, one will encounter repeated instances of a tacit choice between competing modes of dealing with the same kind of problem. Many sections of the Restatements have a structure that may be thus formalized:

> If in the case of hand *Facts A, B* and *C* are present, then *Legal Consequence X* attaches.

An alternative form of statement, adopted somewhat less frequently, reads:

> In determining whether *Legal Consequence Y* shall attach to a given set of facts, the following factors are to be taken into account: *D, E, F, G, H, I* and *J*.

In the Restatement of Contracts, for example, the rule concerning liability for "special damages" (the problem of *Hadley v. Baxendale,* 1854, 9 Exch. 341) takes the first form (§ 330), while the rule for determining whether a "material breach" of contract has occurred (with the appropriate consequences incident thereto) takes the second form (§ 275). A little reflection will reveal that each of these sections could be recast in the form of the other and that such a recasting, without producing any immediately foreseeable difference in the legal treatment of particular cases, would nevertheless alter the whole atmosphere of decision. Plainly the first of these two forms is congenial to the axiomatic method; the second openly deserts it. Perhaps existing practice might not be inaccurately described by saying that the draftsman will stick to the first form when he can and embrace the second when he must.

Like every other work in its general field, Viehweg's is stronger in its rejections than in its recommendations. It suggests that a useful model for sound legal reasoning is to be found in Aristotle's *Topics,* the title of the book itself being derived from this recommendation. The pervasive sense of purpose, or of biological growth toward an implicit end, which runs through all of Aristotle's thought, makes it congenial to those concerned with human sciences, who may find here some escape from mechanical models of patent artificiality. But this relief lies in the spirit of Aristotle's thought rather than in any clearly definable method it exemplifies. One will encounter this spirit not only in the *Topics,* but in the *Ethics* and the *Rhetoric.* Viehweg himself recognizes the vagueness of the recommended model by referring to it at times as a "style" of thought.

One may suggest that any more precise standard for good legal reasoning will require a separate consideration of the various branches of the law. Take, for example, the contrast in method exemplified by the criminal law as compared with the law of contracts. The law of contracts builds on a social ordering that develops outside the law. The law of crimes, in contrast, confronts what may be called social entropy. It is inevitable that this profound difference in subject matter should demand radically different methods of reasoning in the two branches of the law. Without attempting to develop the full implications

implicit in the taking of such distinctions, Viehweg's book nevertheless suggests their significance, especially in the chapter entitled "Topik und Zivilistik" (pp. 64-75), which examines the methods appropriate to what we could call roughly "private law."

If in the end we derive less help from Viehweg's little treatise than we had hoped, some comfort may be obtained from a realization that the alternative model (the axiomatic method) has itself come under a cloud in its own homeland, that of logic and mathematics. I quote from an article entitled "Gödel's Proof," by Ernest Nagel and James R. Newman:

> Gödel attacked a central problem in the foundations of mathematics. The axiomatic method invented by the Greeks has always been regarded as the strongest foundation for erecting systems of mathematical thinking. This method, as every student of logic knows, consists in assuming certain propositions or axioms (e.g., if equals be added to equals, the wholes are equal) and deriving other propositions or theorems from the axioms . . . Mathematicians came to hope and believe that the whole realm of mathematical reasoning could be brought into order by way of the axiomatic method.
>
> Gödel's paper put an end to this hope. He confronted mathematicians with proof that the axiomatic method has certain inherent limitations which rule out any possibility that even the ordinary arithmetic of whole numbers can ever be fully systematized by its means. What is more, his proofs brought the astounding and melancholy revelation that it is impossible to establish the logical consistency of any complex deductive system except by assuming principles of reasoning whose own internal consistency is as open to question as that of the system itself.[2]

In any field of thought the problem of the proper method to be followed turns out in the end to be the most exasperating of all. We know that the choice of method may be crucial to the success of the whole undertaking. J. W. N. Sullivan has demonstrated how scientific investigation was held back for centuries by the obvious-seeming notion that to understand natural phenomena we must first find out *why* things happen as they do. It was only when men gave up this once exciting inquiry, and indeed became bored with it, that modern science could take its beginnings in the more prosaic task of determining *how* things happen.[3] On the other hand we know that a naïve directness is often less damaging than limitations of method self-consciously imposed. The modern notion that man can best comprehend the actions of other men by applying to them the methods of the sciences of inanimate matter may seem to some future age as grotesque an error as that Sullivan ascribed to primitive science when it insisted on asking what a rock was trying to do when it fell to earth. Faced with the awesome choice between doing what comes naturally and trying to think our way toward the right way of thinking, we can, pending any final resolution of our dilemma, find solace and a modest guidance from such perceptive studies as that of Professor Viehweg.

LON L. FULLER

[2] 194 SCIENTIFIC AMERICAN 71 (1956).
[3] THE LIMITATIONS OF SCIENCE (1933).

LAW IN A SCIENTIFIC AGE. By Edwin W. Patterson. New York: Columbia University Press, 1963. Pp. 87. $3.50.

In three lectures given at the Law School of Columbia University, Professor Patterson explores three kinds of influence of science upon law: science has brought about societal changes which in turn have presented new problems for law to solve; scientific knowledge and devices have a bearing on the determination of factual issues in legal proceedings; and science represents a way of thought and possibly a measure of success suggestive for or critical of legal reasoning, systems, and institutions. Two of the essays elaborate the latter point; namely, the "ideal" influences of science upon law. Scientific method suggests for law the importance of "neutral, impersonal, reliable, evaluative determinations" — the "by-truth-possessed inquirer"; the importance of controlled experiments or statistical generalizations; the utility of laws and theories which make possible the logical structural frameworks necessary for further criticism and investigation.

Patterson classifies the uses of factual research of legal empiricism. Thus there are inquiries into the goals of law, such as Bentham's, Pound's, McDougal and Lasswell's, and Fuller's, where an appraisal of means, Patterson suggests, is required to give substance to the goals. The goals may be long range or intermediate. The inquiry may be as to the multiple purposes of a law, such as the Statute of Frauds; or as to the effect of means, which may be destructive of desirable objectives, as was the case with the national prohibition law. The inquiry may be as to the evaluative facts which will help create or explain those legal rules which will make law more orderly and understandable. Controlled experiments or statistical generalizations perhaps may be used to determine the effectiveness of such matters as capital punishment. And empirical statistical inquiries may be used to determine the results of legal procedure as was done by the Gluecks on the treatment of offenders and the prediction of juvenile delinquency, by the Chicago Jury Project to determine the effect of evidence and instructions, and by the Columbia Law School Project for Effective Justice on certain aspects of personal injury litigation and on devices that would lessen trial delays.

As must be apparent, the scope of the material covered in these three lectures is broad. The material is handled with an appealing skepticism and receptivity. The difficulties of controlled experiments are recognized. The meager fulfillment of the once cherished hope that the social sciences would provide scientific conclusions directly pertinent to legal evaluations is readily admitted. The difficulty of evaluating procedures or laws in controversial areas where "a little evidence and a big emotion are often decisive either way" (p. 65) is set forth clearly. There is an awareness of the high cost of organized scientific research and due recognition for the unscientific wisdom of judges and the unpretentious yet useful empirical investigations of law professors and students accomplished without the paraphernalia of elaborate designs. On balance the volume represents gracious encouragement for relevant empirical studies with an emphasis on the need for objective factual determinations. In this sense the thrust of the volume is to be found in the following sentences:

> The strict ethical standards that surround the judge and the deep sense of responsibility that judges in our society feel are the best guarantees of ethical neutralism is the making of judicial evaluations that we have as yet found. I believe that judges in their official conduct are more unbiased than are scientists in their political pronouncements, but still not as neutral as natural scientists in their laboratories. The standards of the latter deserve to be emulated by legal-empirical scientists who will seek to find the factual bases of legal determinations. (pp. 36-37)

Patterson has not overlooked the role of public dialectic as the forum in which "the distinction between statements of fact and statements of value serves to locate the points about which further factual inquiries may be made, and may lead to a reconciliation of competing evaluations." (pp. 33-34) Apparently his conclusion is that at least in actual practice the dialectic has not been an effective substitute for the "by-truth-possessed inquirer."

Most of Patterson's first lecture is devoted to a discussion of the material influences upon law of science and the products of its technology. Passing reference is made to the problem of controlling the use of the atom bomb, although the example is used as a way of indicating how much more complicated the control of men is than the control of particles of matter. Motor vehicles, drugs, the dwindling supply of fresh water, and the artificial seeding of the clouds are mentioned as items or conditions where legal problems have some relationship to technological changes or possibilities. To illustrate the problems using scientific knowledge in the legal process reference is made (1) to a Virginia statute requiring the destruction of red cedar trees determined to be hosts of cedar rust dangerous to apple crops; (2) to the right of a child to maintain an action for prenatal injury possibly caused by deep x-ray therapy to the mother; (3) to state statutes authorizing the sterilizing of mental defectives. The cedar rust statute is used to illustrate the utility of permitting administrative discretion to reactivate a statute presently unnecessary rather than repealing the statute no longer required unless cedar rust develops a strain immune to all known fungicides. The prenatal injury case illustrates the necessity for the legal order to be revised in the face of new facts, the point that proof of scientific "conclusions in court seems to be unduly cumbersome" (pp. 17-18), and the view that "the direct proof of scientific publication by qualified experts would be preferable to the 'chancy' procedure of judicial notice." (p. 18) The statutes authorizing sterilization are used to show that the Supreme Court was ill informed in the case of *Buck v. Bell,* and the larger error of the optimistic assumption that these laws would in a few generations eliminate mental defectives. Nevertheless Patterson concludes that these laws should not be repealed, for "the world needs desperately to upgrade the mental ability of its population, and every bit helps." (p. 22) Further it is said that the effects upon inmates who have been sterilized is beneficial, and even if the offspring were normal, it would be reared by "at least one socially inadequate parent." (p. 22)

Patterson's lectures are replete with examples of the kind of subjects upon which law scientists give judgments or have views. There is a brief discussion of the "logical-metaphysical separation of fact and value." This discussion is a kind of reference to disputes about the content of systems of jurisprudence or

the appropriate mechanism or authority for changes in the law well known to the readers of the FORUM. Goal-directed legal philosophies are also mentioned with the comment that

> such terms as "the public good," "freedom" are primarily rhetorical; they have emotive effects upon the participants of a legal order, to the extent that its society is a true community. They may have more specific meaning in the context of special theories of law, as in Aristotle's division of justice into rectificatory and distributive. Yet the notion that these vague terms, without such a context, will serve to harmonize and unify antagonistic groups of people has been shown more than once to be fatuous. (p. 51)

There are views on biological and sociological matters, as for example on the efficacy of sterilization. These views may be relevant to constitutional or legislative discussions. The appropriateness of administrative discretion for the enforcement or nonenforcement of a statute are of a somewhat different order since they relate more directly to the operations of the legal system. Conclusions as to the most appropriate way to bring before a tribunal the views of experts on radiation in the prenatal injury case are of this order also, although dealing with a different aspect of procedure. The propriety of changing legal concepts to permit a child to maintain an action for prenatal injuries deals in part with the arrangement and content of legal concepts, but as applied in the radiation type of case involves all kinds of considerations as to which law as a subject seems to have little to say.

Implicit in the lectures, then, is a disturbing question as to what law as a discipline is all about. The legal order, since it is made for men in society, of course must take account of the conditions of living which change, but this does not make law the discipline which from itself provides the knowledge for value judgments on all the events of living. Nor does it make law the normative or descriptive discipline of all the goals and all the mechanisms for the good society. Patterson, paraphrasing Mr. Justice Frankfurter, states that sociologists "may well be on tap, but not on top." (p. 56) Yet the range of goal-directed philosophies for law is from those which seek to describe the good society in full measure to those which seek to explain the special value of legal process. The psychological and political efficacy of vague terms is directly relevant to the special values of the legal process. But even here if facts and theories are to be found to challenge the conclusions derived at through undoubted on the job training in this realm, more than jurisprudence seems involved. This is only to suggest that along with empirical studies more work may be required if not as to what is properly law then at least as to the appropriate range of relevant disciplines for a variety of problems.

EDWARD H. LEVI

THE MORALITY OF LAW. By Lon L. Fuller. New Haven, Conn.: Yale University Press, 1964. Pp. viii, 202. $5.00.

The consciences of jurisprudential thinkers, especially those who are partisans of legal positivism, have been rudely challenged by the excesses of the Hitler regime. Well known in this context is the impressive conversion of G. Radbruch, the principal representative of positivism in the Germany of the period before 1933. The problem of respect owed the juridical order presented itself in practical terms to the German judges of the postwar era. To what extent should a law or precedent which runs counter to the "sense of justice of all right-thinking men" retain its validity for the judge who follows in the wake of a corrupt legal system? A parable of the sort which Lon Fuller likes, and which he publishes as an appendix to his study (pp. 187-95) under the title "The Problem of the Grudge Informer," clearly presents the moral, juridical, and political difficulties which faced those jurists who inherited the baneful legacy of Hitler's rule. Is there an obligation to respect the law ("Law is law") even if that law is opposed to the most elementary rules of conscience? No one has ever claimed this. Even the most intransigent positivists do not hesitate to recognize, especially after the Nazi experience, that moral duty should in certain cases take precedence over the respect due to law. For a positivist, however, the law commands a *certain* respect by the very fact that it is the law — that it possesses the formal characteristics which determine a juridical order. This is the thesis defended by H. L. A. Hart in his article, "Positivism and the Separation of Law and Morals,"[1] and in his brilliant book, *The Concept of Law*.[2] It is to this affirmation that Fuller takes exception, in the article written in response to Hart's "Positivism and Fidelity to Law, A Reply to Professor Hart,"[3] and in the present volume, *The Morality of Law*.

Fuller admits that a legal order is not necessarily an order conformable to the demands of morality — in its content it may violate particular moral principles. But it cannot be characterized as a legal *order* unless it is in some way oriented toward those conditions which constitute the sine qua non of all legality. These conditions of Fuller constitute the "internal morality of law," a morality which those who collaborate in the enterprise of law must respect if the law itself is to command respect.

Fuller regards the law not as a system of internally consistent rules, but as "the enterprise of subjecting human conduct to the governance of rules." If a legal system is to be an efficacious means of ensuring the ends that the law proposes for itself, it must satisfy insofar as possible eight conditions; if it fails, it risks failure in the "legal enterprise" in one way or another. These conditions are:

1. That there be general rules formed to guide particular actions.
2. That these rules be made known to the public, or at least to all those to whom they are addressed.
3. That they not be retroactive.

[1] 71 HARVARD LAW REVIEW 593 (1958).
[2] Oxford, Clarendon Press, 1961.
[3] 71 HARVARD LAW REVIEW 630 (1958).

4. That they be adequately clear and comprehensible.
5. That they not be inconsistent with one another.
6. That they not demand the impossible.
7. That they be reasonably stable, protected from continual changes.
8. That those charged to apply the law conform to its prescriptions.

This set of conditions which Fuller views as the "procedural version of natural law" (p. 96) corresponds to what American law characterizes as "due process of law." (p. 103)

These requirements were systematically disregarded by Hitlerian law. For Fuller it could not have been otherwise because a profoundly immoral law-making power cannot, in his view, without provoking outright scandal, observe the rules of internal morality of the law. On the other hand, no legal system can perfectly fulfill these conditions; they are no more than an ideal which can never be fully attained. Since the juridical enterprise is in reality either more or less effective, the existence of a legal system is for Fuller a question of degree; it exists to a greater or lesser degree insofar as the juridical enterprise has succeeded to a greater or lesser extent. Fuller does not hesitate to relate his conception of law to the idea which Michael Polanyi developed in his work *Personal Knowledge* to characterize the scientific enterprise. (p. 120)

It follows from Fuller's conception of law that there is no necessity for a single legal system to rule over a population living in a given territory; as he sees it, it is a lesson of history that for the most part the same populations are often subjected to different legal systems with individual laws and even different tribunals. Private institutions, such as universities, are free to elaborate their own rules; and these rules cannot be assimilated to contractual dispositions except by means of fictions.

At first sight the conception presented would seem to make it difficult to distinguish between law and morality. For Fuller, however, the fact that what is involved is a deliberate undertaking makes understandable the way in which it naturally leads to the establishment of legislative and judicial powers and also to recourse to a system of sanctions in order to guarantee respect for their decisions. Such a conception of law, which sees in legal texts a means toward the realization of certain ends, leads naturally to a teleological interpretation of these texts, as opposed to an analytical interpretation, and especially one which focuses on the sense of each term of the law to get its meaning.

For Fuller, all morality may be divided into a morality of duty and a morality of aspiration — the first imposing a minimum of obligations indispensable for life in society, the second seeking to realize an ideal of the good life. Since the law has only to impose the minimum of rules necessary for the life of society, it can be linked with the morality of duty, which is made known chiefly in prohibitions easy to formulate. As only a minimum of rules can be made binding upon all, it is essential in Fuller's view that individuals be permitted to have different moralities of aspiration, different ways of realizing their ideals of life. The distinction of this type, which sets the demands of life in society against the ideal of individual liberty without thereby raising conflicts, seems somewhat optimistic

to me, insofar as it seems to exclude conflicts between the morality of aspiration and the morality of duty or law. Can we not conceive of a morality of aspiration forcing us to oppose juridical laws? We have only to think of the problem posed by the conscientious objector to see at once that the scheme given us by Fuller somewhat oversimplifies reality by doing away with the possibility of conflict between moral and legal obligations.

What we should particularly note is that Fuller's analysis fails to give any great weight either to the statist aspect of law (a concept so pronounced in the work of Kelsen, for example) or to sanction, which is often considered characteristic of the rule of law.

The rules which express the internal morality of law enable a legal order to assure "legal certainty." What best satisfies the demand for such certainty is a long-standing custom, well known and respected on all sides, in a static society, so that there is never any need to have recourse to judges to interpret it and to ensure respect for it. Legal enterprise is chiefly indispensable to a society which is evolving and so in need of the capacity to adapt to new situations by the help of legislative intervention, judicial interpretation, and the sanctions necessary to assure respect for new rules. It is because it should be capable of innovation that law can be considered as an enterprise. But if it is to guarantee respect for its rules, if they are to guide effectively the conduct of men, is the internal morality of law as envisaged by Fuller adequate? Is it enough to assure legal certainty, and is it not equally important that those whose conduct we wish to regulate should respect, spontaneously, the legal norms, either because they recognize their utility and their justice, or because they admit the competence and the authority of those who have adopted and promulgated them? If law is indeed an enterprise to be judged by its success, that success will be all the greater if obedience to its norms is owing more to persuasion than to force, if it is recognized that its rules contribute to the realization of justice and the common good, if there is respect for the legislators charged with elaborating the rules and the judges charged with applying them. Sanction, resort to force, should, in this perspective, intervene only as the *ultima ratio regum,* the last and not the first motive for justifying obedience to the law. From this point of view we can understand the anarchistic dream of an ideal society in which force is forsworn, where no one looks to the State to apply force or to a law which envisages its use. Is not, in fact, the law which we conform to voluntarily, in the absence of any organized sanction, apt to be, like international public law, for example, the one most scrupulously concerned to convince those whom it seeks to regulate of the justice of its dispositions?

The merit and novelty of Fuller's attempt lie in its bringing out of the fact that what is regarded by positivists as the specific characteristic of law — the existence, that is, of legislators, judges, and gendarmes — constitutes no more than a group of techniques created to eliminate the inflexibility of old laws, their obscurity and the contempt into which they have fallen. Actually, insofar as the juridical enterprise is successful, its rules clear and unquestioned, those to whom these rules are addressed observe them of their own accord; they are like the rules of custom which, whatever their origin and inspiration, regulate without

incident the life of primitive societies. Do not the general principles of law, which we are considered to know independently of the legislator's intervention, present the same characteristics? By dint of taking as the specific features of the law those features which distinguish a system of law from religious, moral, or customary prescriptions, we have neglected what all these have in common — the aim of regulating the behavior of men.

Although Fuller's study has not drawn *all* the consequences which seem to me to flow from his point of view, it has nevertheless the great merit of having focused attention upon certain of these consequences, those which relate to the achievement of legal certainty through what he calls the internal morality of law. With lucidity and force, in his habitual charming way, he brings us successfully further away from the trodden paths of legal positivism. Analyzing the idea of legal order he stresses his "procedural version of natural law." But respect for law demands more. We must be convinced that the laws are just and tend to the common good, or at least, we must recognize the authority and legitimacy of those who are legally qualified to decide what is just and realizes the common good.

CH. PERELMAN

Translated by JEANNE RODES.

LA LEGGE DELLA RAGIONE. By Guido Fassò. Bologna: Il Mulino, 1964. Pp. viii, 313. L. 3,000.

The audaciousness of the book's title is indicative of the scope of Fassò's subject matter. In eight chapters, he deals with many of the highlights in the history of natural law theory — or at least in the rationalist strain in that history as he conceives it — from classical to recent times. Professor Fassò's outstanding ability as a historian of legal philosophy is, of course, beyond question. He commands his texts with great mastery, and he seals his points by reproducing entire passages from relevant authors in a fifty-page appendix. In the very first sentence of his preface, however, Fassò informs us that his purpose is primarily not historical, but rather systematic: he proposes to inquire into the possible contemporary validity of the notion of natural law. We must take him at his word, and I shall direct most of my comments to systematic elements in the book. It will nevertheless be helpful to begin by recapitulating briefly some of the main points in Fassò's historical treatment. Thereafter, I shall want to raise some questions and to offer some criticisms concerning Fassò's handling of the following four general issues: (1) stereotypes, (2) metaphysics, (3) the meaning of reason, and (4) the meaning of morality and religion.

The highest form of "law" for the early Christians, according to Fassò, was not truly law at all, in the sense of a rational proposition or propositions directed to the will. (p. 24) The spirit of early Christianity was one of a mysticism not assimilable to philosophy, and this is seen very clearly in the strong antipathy that is to be found in the mature thought of St. Augustine towards the humanistic, rationalistic, classical conception of natural law. In the early Middle Ages, a

revival of interest in natural law and a tendency to return to the rationalist spirit of Pelagius are discernible in the writings of such figures as Rufinus, Anselm of Laon, and William of Auxerre. But the focal point of Fassò's study of rationalism in the history of natural law is, as one might well have expected, St. Thomas Aquinas. Fassò declares himself willing to go further than almost any other contemporary commentator in depicting "un san Tommaso 'laico'" (p. 72), the defender of a humanism which is not, as Maritain would have it, "theocentric," and the developer of a system of ethics which is, in an important sense, autonomous in relation to theology. Fassò meets the objection that Thomism was made to serve the interests of church against state by pointing out that curialism found itself just as much at home in the theories of St. Thomas's voluntarist opponents, and that the possibilities of diverse political interpretations of a moral doctrine do not necessarily detract from its validity. Even if the attitudes adopted by William of Ockham towards church-state relations in his day were more akin to dominant modern attitudes on the same subject than were those of St. Thomas, this is not sufficient to alter Fassò's appraisal of the Franciscan as the archvoluntarist and consequently the archfoe. Ockham's God is able to suppress any part of the moral law at whim, and this doctrine, in Fassò's eyes, is enough to overshadow a multitude of virtues. In summarizing his chapter on "Ragione e volontà" in the Middle Ages, Fassò praises the high moral tone of the Augustinian, Franciscan, mystical, voluntarist tradition, but concludes that its struggle against the institutionalization and pharisaism of Christianity is at the same time "lotta contro il diritto, contro lo Stato (anche se occasionalmente si serve di esso), contro la razionalità della vita sociale, contro l' *umanità* di questa." (p. 123) Fassò thus makes his preferences clear enough.

The famous assertion of Grotius that there would be a natural law even if there were no God is shown to be less original, in the light of the previous history, than it is sometimes thought. Among youthful influences against whom Grotius later reacted was Fernando Vázquez de Menchaca, an extreme Ockhamist; but the autonomous morality defended by another Vázquez, Gabriele, a Counter-Reformation Jesuit commentator on St. Thomas, was at least as daring as that of Grotius. Fassò has relatively little to say about Hobbes, whom he of course views primarily as an opponent, but he devotes considerable space to defending and lavishing praise on Locke. He recounts the development in Locke's thought, from a youthful voluntarism to the mature position of the *Treatises,* as it may be traced in W. von Leyden's edition of the Latin essays.[1] To the deeper philosophical problem of reconciling the epistemology of the *Essay Concerning Human Understanding* with that which seems to underlie the natural law theory of the *Second Treatise,* however, Fassò makes no contribution. He does not attempt to continue a chronological historical development beyond the time of Locke, but instead concentrates, in his final two chapters, on elaborating his reasons for upholding the value of the natural law concept today. The only valid natural law theory, according to our author, is one which is critical, antiabsolutist, tolerant, and historically oriented. At one time, he admits, he suggested that

[1] JOHN LOCKE, ESSAYS ON THE LAW OF NATURE (Oxford, 1954).

it was inappropriate to apply the expression "natural law" to any nonpositivist conception of law which failed to incorporate the quality of immutability; now, however, he has changed his mind concerning the appropriateness of this. Natural law theory is of immense worth, he feels, in combating various modern forms of irrationalism and, because it is critical by nature, in promoting a spirit of freedom in the everyday lives of individuals. (p. 215) He attempts to refute the old and superficially striking argument that natural law is seldom discussed in the country in which the very forms of rationality and constitutionalism which he himself most favors have their firmest roots, England, by stressing the importance of "the rule of law" in the English common law tradition. Finally, he raises and tries to answer the two objections to natural law which he considers most serious — that it is uncertain and that it fosters an ethical legalism which is in contradiction with the nature of true morality. I shall return later to a consideration of these last points.

1) *Stereotypes.* One of Fassò's principal wishes is to get away from stereotypes, or facile labels. A blatant example of labelling is what he calls "lo schema idealistico-spiritualistico-modernistico," which divides the history of Western thought into four clear-cut periods — ancient, early Christian, medieval, and modern — and contrasts the alleged objectivism of the first and third with the alleged subjectivism of the second and fourth. (p. 5) Fassò goes on to try to show that Cicero's conception of natural law, for example, is based on a recognition of the peculiar subjectivity of man as distinguished from the rest of nature, and that a modern Protestant thinker such as Locke is misunderstood if too great an emphasis is placed on the subjectivism of the social contract idea at the expense of the rationalistic, natural law side of his theory. In the end, though, Fassò does not appear to have escaped as completely as he would like to believe from the categories of the idealist interpretation of history which he admits to having accepted at one time. (p. 6) In an excellent passage leading to his discussion of Hobbes and Locke, he attacks the oversimplification and distortion involved in viewing later natural law theory as upholding the priority of subjective, innate natural rights over all objective *natural* (as distinguished from *positive*) law, and he correctly points out that "diritto soggettivo e diritto oggettivo" are, logically speaking, correlative terms. (p. 169) In another passage, however, Fassò vigorously denies that earlier Christianity can be regarded as in any way subjectivistic except with reference to the transcendent, absolute Subject, the Father. (p. 27) Fassò thus seems to find the labels of subjectivism and objectivism, despite their acknowledged correlativeness and susceptibility to oversimplification, to be very useful polemical tools under certain circumstances. If he really wants to get beyond the limitations imposed by the vocabulary of idealism, he cannot afford to make use of such categories as consistently and frequently as he does throughout most of *La legge della ragione.*

The author's major pair of contrasting terms is that suggested by the title and derived from a much earlier tradition than that of idealism, namely reason and will. Passages may be pointed to (p. 192, for example) in which Fassò concedes that rationalistic natural law theories are rarely found in unalloyed form,

devoid of all voluntarist or naturalist strains, and he makes a special point of admitting that voluntarism has contributed something, namely the sense of State sovereignty and autonomy, to modern legal and political thought. (p. 167) But Fassò seems satisfied only if and when he can place his writers squarely in one or the other camp, though he never, of course, resorts to tendentious interpretations of texts in order to achieve this result. Thus, he seems almost to regret the fact that the basically voluntaristic Duns Scotus can be interpreted rationalistically because of his view that the divine will cannot abrogate the first two commandments of the Decalogue; Fassò feels much more at home with the blatant voluntarism of Ockham than with the subtlety, or (to use Fassò's turn of phrase) the scrupulousness, of Scotus. In his constant effort to segregate the voluntarists from the rationalists in a clear-cut fashion, Fassò never conceals his strong sympathies for the latter. I, for one, share these sympathies with him, and yet I wonder whether his constant reliance on these two hoary contrast terms may not be so great as to vitiate his previously mentioned purpose of avoiding stereotypes in interpreting the history of legal thought. After all, as Fassò would be among the first to admit, reason and will are also correlative. One has only to recall Aristotle's analysis of deliberation and choice or St. Thomas's account of the will to be aware of the possibility and even of the necessity of going beyond the simple opposition of reason versus will in any fully elaborated philosophic theory.[2] Fassò's examination of natural law theories does, it is true, enable him to draw up a list of heroes and villains that differs markedly from the lists of popular voluntarists of today, and to eliminate certain stereotypes, while perhaps reinforcing others. A contemporary theologian of the Niebuhr school of thought, for example, is apt to be less confident in asserting the essential modernism of St. Augustine after having studied Fassò's analysis of this subject.[3] But, to take an opposite example, it is just too simple to resolve the objection that Locke is as much a voluntarist as Hobbes because the political theories of both are based on a contract, by saying that the will, for Locke, exists to serve the reason, whereas in Hobbes's commonwealth rationality is irrelevant. (p. 175) The gulf between the two theories is obvious enough, and the contrast between rationalism and voluntarism is of major assistance in accounting for it, but it is still necessary for the defender of Locke to answer the socialist criticism that Locke's doctrine of private property in a settled civil society amounts to nothing but a rationalization of an arbitrary, irrational existing state of affairs, and for the critic of Hobbes to explain how the latter could have developed his political voluntarism by using a deductive, "geometrical" method which many have regarded as being ultrarationalist.

In questioning the stereotypes or labels which are the essential tools both for Fassò's account of the history of natural law theory and for his view of the contemporary scene in legal philosophy, I certainly have no intention of suggesting that the categories of subjectivism-objectivism and especially of reason-

[2] Especially relevant is SUMMA THEOLOGIAE I, q. 82, art. 4, "Whether the Will Moves the Intellect."

[3] As an illustration of confident assertions on Augustine's modernity cf. REINHOLD NIEBUHR, CHRISTIAN REALISM AND POLITICAL PROBLEMS 145-146 (New York, 1953).

will are useless; far from it. Fassò's basic insight, namely, that what it is most important to retain today from among the various strands of the natural law tradition is the insistence upon reasonableness or rationality in the government of social institutions, is an excellent one, and it certainly merits the sort of detailed development that Fassò has been able to give it in this volume. But its potential weaknesses and one-sidedness ought not to be overlooked. Part of the reason why Fassò's rationalist-voluntarist divisions sometimes give the impression of being stereotypes is that the author appears to share with a great many continental legal philosophers a contempt for what is called "metaphysics," a contempt which makes it difficult for him, as in the example of the Hobbes-Locke contrast cited above, to take very seriously the ontological, psychological, and epistemological presuppositions which frequently underlie moral and legal philosophies and render a choice between any two of them considerably more complex than that suggested by the simple opposition between rationalism and voluntarism. This is my next critical point.

2) *Metaphysics.* In addition to the rationalist and voluntarist tendencies in the history of natural law theories, Fassò recognizes a third sort, naturalism. The chapter in which he deals briefly with the early Middle Ages is entitled "Dio, natura, ragione"; these headings are intended to refer to the three directions open to development by Christian natural law theory on the basis of Isidore of Seville's identification of God's law with nature. Natural law may be equated with God's will, God may be equated with nature, or natural law may be equated with reason. Of the three, only the development of the last-mentioned alternative is to serve as an important theme of Fassò's investigation, as he himself states explicitly. (p. 50) But he is just as unable to ignore the possibility that some theories of natural law may contain elements of *both* the naturalist and the rationalist strands, as he is to deny the correlativeness of reason and will that I mentioned earlier. Now, suppose we were to be confronted with a choice between two alternative natural law theories, one of which seemed to meet all the requirements of Fassò's kind of "rationalism" in its pure form, and the other of which consisted of a mixture, perhaps a fairly complex mixture, of rationalist and naturalist elements; on what grounds might we decide that one was preferable to the other? This seems to be a legitimate enough question, even though it is not the sort of question that is very often raised in this book; after all, the primary purpose of the entire book is to argue for the retention of that general variety of natural law theory, the rationalist variety, which Fassò deems best.

The answer that Fassò would undoubtedly first give to such a question would be an argument from practical consequences. He reasons from a felt *need* to control the will. His principal argument against naturalistic natural law theories is that such theories lead to the facile assertion of the natural necessity for the strongest individuals, peoples, races, or classes to govern. (p. 190) One has of course heard such arguments from evil consequences many times before, and recent European experience lends great strength as well as poignancy to Fassò's plea that all forms of irrationalism in legal and political theory be shunned. But such an argument by itself can never be entirely convincing, especially when we

recall Fassò's ready admission (in his defense of St. Thomas against the charge that Thomism nurtured curialism) that a moral doctrine may lend itself to *diverse* practical political interpretations. (pp. 82-83)

Quite another sort of reason for preferring a rationalistic natural law theory to a naturalistic one is that given by Fassò when, in the same passage as that previously cited from p. 190, he says that naturalism leads to the absorption of the human subject into a deterministic and objectivistic natural organism. Naturalism views man deterministically, Fassò seems to be saying here, and this is wrong because it is a distortion of the true nature of man. If this is indeed his view, there is nothing intensely original about it, but it is certainly a respectable and widely held one. At the same time, however, it sounds suspiciously like a simple, inchoate metaphysical theory, and Fassò vigorously disapproves of such things. For example, in explaining his apprehensions about natural law theories that arise from certain forms of historicism or from liberal Catholic thought, he says that it is the metaphysical premises of such theories which disturb him, "perché la libertà a cui aspiriamo è la libertà concreta, empirica, degli individui, degli uomini empirici, non la libertà metafisca dell' Uomo assoluto o largita all' uomo dall' Assoluto." (p. 217) Fassò has a horror of every absolute, and this seems to be the basis of his distrust of "metaphysics." But the term "metaphyics" is open to many diverse interpretations, and in a broad sense it is certainly applicable to a philosophy that holds that rationalism is preferable to naturalism, because naturalism sees man as determined whereas man is in fact free. The only satisfactory way in which Fassò could ultimately answer my question as to whether a purely rationalist natural law theory is to be preferred to a hypothetical theory which combined elements of rationalism with elements of naturalism would be to examine some of the underlying truth-claims concerning human psychology and knowledge upon which the two rival legal philosophies were based, even if such activity might cast him in the role of a "metaphysician."

This is not to say either that Fassò must ultimately be forced into an absolutist political theory akin to that of Plato's *Republic,* of which he manifests such a horror, or that any acceptable natural law theory must be of an "ontological" variety which sees the natural laws as eternal parts of the structure of the universe. But it *is* to say that Fassò's plea for the rationalistic form of natural law will fail to carry complete conviction until he acknowledges that his own preferences in legal philosophy, like those of most of the historical figures with whom he deals, are founded on certain beliefs — call them metaphysical, ontological, ideological, or whatever more neutral term can be found — about the nature of man. One of the least convincing aspects of Fassò's generally impressive treatment of St. Thomas is his assertion that Aquinas is modern in his ethics even though most of the other parts of his philosophy may remain *ancillae theologiae.* (pp. 72-73) Surely Thomistic ethics is, more than most, incapable of being separated from the rest of the philosopher's system without considerable distortion. But Fassò's fear of "dogmatism" is so great that he seems to regard large areas of systematic philosophy as "metaphysical" and therefore highly dangerous. Hence his at times patently untenable disregard of underlying philosophical premises.

3) *The Meaning of Reason.* A philosopher who steadfastly refuses to apply any "dogmatic" interpretation to the concepts of "reason" and "rationalism," and who at the same time strongly favors natural law theories in which reason rather than will or nature is proclaimed as the model for the conduct of social life, finds himself in a rather peculiar situation. This is the next problem in Fassò's work with which I wish to deal. The variety of meanings attached to such concepts as "reason," "rationalism," and "reasonableness" in the history of philosophy should give considerable pause to anyone who proposes to write a book about "the law of reason." Fassò is obviously aware of the potential pitfalls to which such a study may be subject, but it is difficult to escape the conclusion that, even at the end of the volume, he has failed to indicate with precision exactly what he understands by this family of concepts.

What is more, it is doubtful whether such precision is any part of his aim. To the objection that he himself raises near the end of his volume, to the effect that a nonlegislative natural law as he conceives it is radically uncertain, he replies by asking whether *legislative* law can, in a time of rapid social change such as our own, be any more certain. Indeed, he finds certainty, in the sense of rigid stipulation of detail, to be at best a doubtful asset; one of the bases of Fassò's great admiration for the common law tradition is the large scope that it gives to procedures of adjudication which are not minutely prescribed by codes.[4] His attitude towards highly detailed natural law philosophies is apparently the same as his attitude towards highly detailed codes: he regards Locke's refusal to enter "into the particulars of the Law of Nature" as being one of the most praiseworthy aspects of a generally praiseworthy theory. (p. 225) Fassò thus favors a deliberately vague conception of the natural law of reason, one which would permit the most extensive possible practice of the archvirtue of tolerance towards others. It is the alleged intolerance of "ideologies" and of metaphysical absolutisms which most arouses his ire against them.

The author's advocacy of reasonableness and tolerance is admirable and clearly rooted in deep conviction. But it is important to raise, even if impossible to answer here, an old and fundamental question which is suggested by a reading of *La legge della ragione*: is it necessary that a philosophical theory which argues for the virtues of vagueness in moral and political practice (i.e., free play, adjudication, tolerance beyond narrowly defined limits) be itself a vague theory? Of the two historical figures upon whom Fassò lavishes the greatest praise in this volume, St. Thomas and Locke, I think that it will generally be conceded that the legal philosophy of the former gives at least the superficial appearance of being considerably more precise than that of the latter. Are the precision and the tolerance of the two inversely proportional?[5] If so, is the philosophy of Locke to be preferred to that of St. Thomas by exactly the same ratio, other factors being equal? These would have been interesting questions

[4] Fassò should not overlook the fact that the looseness of the common law system has not always evoked universal enthusiasm for its "reasonableness." It is regrettable that he does not refer to Bentham, for example, in this connection.

[5] For some highly critical comments concerning St. Thomas on the question of tolerance, cf. A. P. d'Entrèves' introduction to his edition of AQUINAS — SELECTED POLITICAL WRITINGS xxii (Oxford, 1959).

for Fassò to comment upon. At any rate, the imprecision of Fassò's central concept of "reason" in his own legal philosophy remains undeniable.

The culminating paradox of Fassò's approach to the problem of how to define his "law of reason" occurs in his discussion of claimed immutability versus historical mutability. He says that the chief basis for the modern polemic against natural law is not that natural law clashes with positive law, but rather that natural laws are said by their proponents to be eternal. Any theory which fails to take into account the radical relativism produced by historical change, he further holds, cannot hope to have a place in modern thought. But Fassò has become convinced of the value of natural law for modern thought and therefore maintains that it is appropriate to apply the expression "natural law" even to a historically oriented nonpositivist conception of law. He acknowledges in passing, however, that the characteristic of immutability was one of the few, "per non dire il solo," that all the natural law doctrines of the past agreed in affirming. (p. 202) We may therefore suspect that the last common bond linking the entire tradition of natural law thinking has been severed. This would seem to make it all the more incumbent on the author to provide us with some fairly definite indications of exactly what it is about his "law of reason" which both relates it to, and distinguishes it from, the other possible approaches to natural law which he has enumerated. If Fassò's law of reason is a historically relative law, his readers would like to know just *how* relative it is. If it is in principle *entirely* relative, i.e., if there is no single element in it which is not subject to change, then is it not a strange locution to call it a "law"? Fassò frequently refers to his form of natural law as *critical*.[6] If his theory consists simply in the principle that positive law can and should be criticized from a point of view external to any existing positive law system but itself variable according to time and place, then Fassò's principle is important, it is worth stating and defending, but it is lacking in the definiteness that his title suggests; and it seems less than what his constant effort to contrast his with other kinds of natural law theories might have led one to expect.

Fassò tends to minimize the dangers inherent in the vagueness of his appeal to a relatively undefined (though clearly tolerant and nonabsolutist), intersubjective "reason." At the same time, he cautions strongly against the appeal to an intersubjective "justice," which is likely to remain, he says, on the level of vague sentiment, and which thus leaves itself open to the attractions of various forms of irrationalism. (p. 244) Some may not agree that the difference between the two appeals is as great as Fassò would have it.[7] The explanation of his position here lies in his conceptions of morality and of religion, and it is to this final critical issue that I now turn.

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[6] "Il solo giusnaturalismo che noi oggi possiamo accettare è un giusnaturalismo critico, non dogmatico." (p. 232)

[7] An interesting recent attempt to defend the applicability of the concept of "justice" to concrete situations in law is the work of a German legal philosopher, MARTIN KRIELE, KRITERIEN DER GERECHTIGKEIT (Berlin, 1963). He shows, I think convincingly, that "justice," even in everyday parlance, is not such a vague term as Fassò claims. In fact, Kriele's "justice" serves many of the same functions as Fassò's "reason," except that Kriele is more concerned than Fassò with detailed analyses of meaning and less concerned with historical precedents.

4) *The meaning of morality and religion.* In the last few pages of *La legge della ragione,* Fassò raises what he considers to be the most serious objection to his position, namely, the objection of those who, "seeing in natural law theory a characteristic form of ethical legalism, think that it contradicts the very essence of morality." (p. 243) He admits to having maintained at one time that sanctity was the only truly moral way of life, and he further admits to seeing some merit in this view even now. But he has also come to the conclusion that a would-be saint in this world could be a very dangerous person indeed. Perfect justice, apparently, would be one characteristic of perfect sanctity, and this helps to explain why Fassò objects so strongly to appeals based on an intersubjective "justice." His reasoning becomes even clearer in the light of one of his earlier works, *La storia come esperienza giuridica.*[8] There he argued that the idea of justice is contradictory, because it suggests at once an absolute and perfect state of harmony, which is a purely transcendent ideal, and the achievement of such a state in the necessarily pluralistic world of actual social institutions. Reason, he held in *La storia,* pertains to the governance of this world, and thus is incompatible with true morality: "Razionalità e socialità (o molteplicità che è lo stesso), essendo l' una in funzione dell' altra, del pari non può ammettersi una morale che sia razionale."[9] That is why, in the introduction to *La legge della ragione,* he says that philosophy can in no way appropriate to itself the purely transcendent, mystical vision of the early Christian religion. (p. 11) That is also why he has no hesitation in repeating, in the final pages of the same book, his contention that Ockham, whom he has criticized so severely, is more religious, and in that sense more "moral," than St. Thomas. (p. 245)

But Fassò offers no convincing reason why philosophy should refuse to deal with what is alleged to be transcendent. It is of course true that the philosopher, in the very act of conceptualizing what is alleged to be transcendent, detracts from its transcendence and renders it to some extent immanent. This, perhaps, is not such a bad thing. A religious philosopher, such as St. Thomas, does not necessarily make himself less religious by doing so; he violates only a certain narrow preconception of what religion must be. Similarly, a legal philosopher who advocates the constant and critical application of reason to the governance of social institutions is not necessarily taking the less moral path in departing from the contemplation of pure, absolute, unattainable moral ideals; perhaps a consideration of these ideals may be of assistance in understanding how social institutions can be made rational, and it may be in this very process of relating the ideal to the actual that "true" morality is to be found. The rather delightful, amusingly "Italian" view that St. Thomas is much to be preferred to Ockham precisely because the latter is more religious and, in a sense, more moral than the former is a paradox which Fassò might have done well to avoid. It betrays his lingering suspicion that the rational natural law (or, if one prefers the pejorative phrase, the "ethical legalism") which he has defended so vigorously is only a second-best form of morality; but this can hardly be the case if — con-

[8] Seminario Giuridico della Università di Bologna XVI (1953).
[9] *Op. cit.* at 111.

trary to those voluntarist and irrationalist opinions for which he retains what is probably, after all, an excessive respect — it is the only possible form.

Most of my comments in this review have been directed to what I regard as areas of potential controversy in the more *systematic* thought of *La legge della ragione*. I repeat that I have concentrated on these questions, much to the neglect of the many interesting historical points made throughout the book, because of Fassò's own expressed concern to emphasize the contemporary relevance of natural law. It is because I share that concern, and especially because the kind of natural law theory which Fassò favors seems so attractive in its basic characteristics (reasonableness, tolerance, capacity for adjustment to historical change), that I have been anxious to suggest a few possible difficulties with a view to its further elucidation and strengthening.

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LAW IN JAPAN. THE LEGAL ORDER IN A CHANGING SOCIETY. Edited and with Commentary by Arthur Taylor von Mehren. Cambridge: Harvard University Press, 1963. Pp. xxxviii, 706. $15.00.

This volume is a collection of seventeen papers by Japanese legal scholars presented at the Conference on Japanese Law (Harvard Law School, Sept. 5-9, 1961) which concluded the Japanese-American Program for Cooperation in Legal Studies (1954-61). They are divided into three parts: The Legal System and the Law's Processes; The Individual, the State, and the Law; The Law and the Economy. Each part is followed by a commentary by the editor, which sums up the highlights of discussions at the conference. These commentaries and the record of other comments made at the conference by some of forty participants, which are dispersed in the form of footnotes, serve to show the context of these papers and sometimes to counterbalance some of the observations in the papers. The papers, taken together, are designed "to explore significant aspects of the contemporary Japanese legal order." (p. vi) As the editor points out, the essays contained in this volume, instead of seeking to be self-sufficient individually, are arranged in such a way that, through mutual complement, they might present accurately the concrete historico-social reality that is the legal order in Japan. The writers consider their respective branch of law, not as an abstract system, but as it actually functions in society. The method generally adopted, therefore, may be characterized as that of sociological jurisprudence. The editor is to be commended for the success of giving to this work a coherence and organic unity by his coordinating skill as well as his comprehension of the subject matter. Those who know that the barrier of language is by no means a minor problem for Japanese scholars can appreciate the value of editorial assistance given by American collaborators. The result is the first major introductory work on Japanese law by Japanese scholars in *readable* English.

At the opening of the book, the genesis and several phases of the program are described by its architect, Professor Cavers of Harvard Law School. He emphasizes the sense of responsibility on the part of American jurists which led to the creation of the program. Toward the end of the period of military occupation in Japan, American legal scholars were informed of the predicament of the Japanese legal profession: They were called to apply and to teach laws and legal institutions derived from a legal system with which few of them had had any previous acquaintance, as the result of extensive changes which had been wrought in Japanese law under the stimulus or direction of the occupation. This legal reform, which is fittingly termed "bold experiment," along with other equally drastic reforms, had the effect of revolutionizing Japan. As the problems were immediate and serious, a normal, gradual process of academic interchange seemed obviously inadequate to overcome them. Hence, "a cooperative program designed to promote understanding on the part of jurists and scholars in both systems suggested itself." (p. xvi) The accomplishments of the program are described accurately, and with reserve. I may add that the work of the program is being continued by the Japanese American Society for Legal Studies, founded in September, 1964, at the initiative of the participants of the program.

"The history of Japanese law since the Restoration of 1868 is almost synonymous with an account of the reception of occidental law and legal science." (p. 37) With this observation Professor Takayanagi, chairman of the Constitution Investigation Commission which has been the center of heated disputes for the past seven years, sums up his article, "A Century of Innovation: The Development of Japanese Law 1868-1961." His succinct description of the history of almost a century's transplantation of Western legal systems and science into Japan provides a proper framework for the discussion of the postwar influx of Anglo-American legal system and thinking by other contributors.

The shorter course of importation of a finished legal product, instead of gradual formation of a distinctively Japanese legal system by working on the old materials of the indigenous law, was dictated by international as well as domestic exigencies. There was the need to create a unified, centralized state, powerful enough to repel Western colonialism in the shortest possible time. "The Meiji statesmen had also to take account of the modern democratic developments . . . if for no other reason than to ensure the abolition of consular jurisdiction" (p. 7) or of extraterritoriality, which became the national aspiration in the early years of the Meiji era. I might add that the Meiji government was called upon, from the very beginning, to achieve these twofold objectives, which were "in a sense antagonistic to each other"; this dilemma is behind those political phenomena in subsequent periods, which often puzzle Western observers. Both militaristic Japan and her postwar conversion to democracy, for instance, have their root in those conflicting tendencies in the formative era of modern Japan.

As regards the postwar constitutional reforms which were inspired primarily by Anglo-American legal conceptions, the author places special emphasis on the replacement of the rule *by* law by the rule *of* law. Hitherto Japanese

lawyers and administrators had striven to master the "art of rule by law," which presupposes the "authoritarian conception of law as an aggregate of legal rules imposed by sovereign authority rather than an embodiment of reason and justice." (p. 38) The principle of the supremacy of law introduced by the new Constitution in 1946 is, then, faced with a formidable challenge in this old, still prevalent, positivistic conception of law as the command of a sovereign. For the establishment of this principle, the author notes, "Japanese jurists as well as the nation at large might profitably imbibe the spirit of common law." (p. 38) Here I shall make two observations. First, the authoritarian conception of law, which identifies law with expression of superior power or the organ of rule, antedated by centuries the "introduction of codified Constitutional law." (p. 38) In fact, the idea of law as the basic rules of social life dictated by reason seems to have been singularly absent from the traditional thinking in Japan. Hence, secondly, an effective realization of the rule of law in Japan requires a profound change in the people's conception of law, which in turn presupposes a general acceptance of some kind of natural law, not indeed "any theological or philosophical doctrines of natural law," but the natural law which is "the common sense of the plain man." (p. 26) The "natural" of natural law signifies primarily that it is opposed to arbitrariness. Without a recognition of some higher law which is beyond and opposed to all forms of human arbitrariness, including the one which goes under the guise of law, the idea of the rule of law will lack its ultimate justification.

The origin of the problem of natural law in modern Japan is to be sought, as the author points out (p. 25), in Dajokan (Great Council of State) Decree 103 (1875), article 3, which states: in civil trials, those matters for which there is no written law are governed by custom, and those matters for which there is no custom shall be adjudicated by inference from reason (jori). The idea of jori or dori (right reason) played an important role in the introduction of Western law under the influence of Émile G. Boissonade, adviser to the Meiji government, who was instrumental in the drafting of criminal and civil codes. Boissonade's appeal to the idea of natural law seems to have been motivated by his idea of making the modern codes drafted by him acceptable to Japanese, by presenting them as an embodiment of reason, rather than as the historical product of particular nations. Many Japanese jurists seem to have embraced this idea, recognizing in these modern codes a model of civilized law and justice. Prominent American lawyers in Japan at that time, notably Henry T. Terry and John H. Wigmore, did not hide their disdain of the idea of natural law. It is an irony of history that a constitutional reform which strongly savors of natural law should be introduced by Americans about a half century later.

In his essay, "Dispute Resolution in Contemporary Japan," Professor Kawashima seeks the principal factor contributing to the reluctance of Japanese people to resort to litigation as a formal means of dispute resolution in the nature of traditional social groups in Japanese society, for, as he says:

> Litigation presupposes and admits the existence of dispute and leads to

> a decision which makes clear who is right or wrong in accordance with [universalistic] standards that are independent of the wills of disputants. Furthermore, judicial decisions emphasize the conflict between the parties, deprive them of participation in the settlement, and assign a moral fault which can be avoided in a compromise solution. (p. 43)

The basic principle of social ordering in Japan is "harmony," or a harmonious social tie, which abhors dispute and condemns litigious men as morally wrong, subversive and rebellious, regardless of their cause. Social groups, not only village community and family, but even contractual relationships, are hierarchical, a characteristic which formally forecloses disputes within themselves. Relationships between people generally have been "paternalistic" and "functionally diffuse," characteristics which again are incompatible with judicial procedure which clearly defines, in universalistic terms, the rights and duties of the parties concerned. Consequently, the preferred means of settling disputes has been the one in which the solution is, or at least is pretended to be, reached through agreement by both parties. Nobody is condemned or vindicated in clear-cut decision. Harmony is restored as if no dispute had ever existed. Thus, the basic form of dispute resolution in the traditional culture of Japan is the "extrajudicial means of reconcilement, that is, the process by which parties in the disputes confer with each other (often through the mediation of a third person) and reach a point at which they can come to terms and restore or create harmonious relationships." (p. 50)

To confirm his thesis, the author refers to the fact that even today the prevailing method of group decision is that of unanimous consent, rather than the majority rule as in most other modern societies, because "there is a strong expectation that a dispute should not and will not arise." (p. 44) Another instance that supports this thesis is the fact that there have been and are many litigations outside of social groups, where harmonious relationship is precluded from the beginning, as, for example, in the relationship between usurer and his debtor, or between employer and employee. The third fact which indirectly supports the author's contention and which may interest Western readers is the absence of distinction between mediation and arbitration: "as the third person who intervenes to settle a dispute is supposed to be a man of higher status than the disputants, his prestige and authority are sufficient to persuade the two parties to accept the settlement." (p. 50)

As the author points out, there is some rational calculation behind the dominance of private, informal means of dispute settlement. The compensation awarded by the court gives the plaintiff just as little as, or quite often less than, what he would obtain through extrajudicial means, as a survey of litigation in traffic accident cases indicates. Consequently, "who would resort to a lawsuit . . . except pugnacious, litigious fellows?" (p. 49) Here is clearly a problem for the court and legal profession in general of Japan. As a result of the disappearance of hierarchical order from Japanese society, the author notes, on the other hand, the number of lawsuits is expected to increase, one indication being the large number of disputes brought to the Family Courts in the postwar era. (p. 58) To what extent this trend is to be attributed to

social disintegration, and to what extent to the increasing awareness of the rights and dignity of the individual human person, is both a difficult and decisive question. Whereas the Japanese have been traditionally quite zealous in maintaining harmonious social order, there has generally been little sign of reflection on the ultimate end or value for the attainment of which the harmonious social order is a necessary condition. Harmony possesses undoubtedly some intrinsic value in itself. It is not, however, the ultimate, absolute value. I suggest that the distinctive characteristics of the Japanese social attitude are the lack of concern for absolute value and the insistence on order or harmony for its own sake.

Through the postwar Civil Procedure reform, promoted by the personnel of the American occupation, judges were stripped of their leading role and were made to play the role of umpire in a contest between two adversaries. The late Judge Tanabe's paper, "The Process of Litigation: An Experiment with the Adversary System," is an attempt to answer the question whether this procedural experiment is going to succeed in Japan, by reflecting on thirteen years' experience of Japanese legal profession with this newly introduced procedure. There is, on the one hand, a pessimistic view as to the future of the adversary system. A reaction set in after the initial acceptance of the idea, and confusion was caused by judicial restraint coupled with the insufficient skills of counsel. The pessimists argue that the Japanese bar lacks the capacity to make the adversary system work, and urges the restoration of the court's clarifying function which relieves the lawyers from the burden of pretrial investigation of fact and law. Opposed to this view is an exaggerated and idealistic one which demands a drastic minimization of clarification, depriving trial judges of their directive power completely. According to the author, neither of these extreme views is practicable and desirable. Instead, he recommends a middle path which combines the continental and the Anglo-American conceptions, and to which trial judges are said to be in fact "steadily gravitating." (p. 95) This middle path insists on utilizing the skill and knowledge of the judge "to assure that the case will develop in a proper and fair way," guarding at the same time against "an overly paternalistic exercise of the clarifying function." It emphasizes, on the other hand, the responsibility of the litigant and his lawyer for the development of the case of defenses. This midway position is, in the words of the author, a fusion of the continental and the Anglo-American philosophies in a real sense. It has the advantage of "utilizing the capacity of the judges without putting an undue strain on the potential capacity of the lawyers." (p. 110) The author believes that the "unique Japanese experiment will ultimately contribute a new workable pattern which will be of benefit to all procedural systems." (p. 111) I may add that to the extent that this vision materializes, we shall witness the emergence of a procedural law which can be called distinctively Japanese.

Judge Hattori, in discussing the origin and development of the modern Japanese legal profession, in its three branches, judiciary, procuracy, and

private practice, points out the inferior estimate accorded to the last branch. It was only after 1923, for example, that the lawyers were required to pass the same examination as the judges and procurators. The postwar legal reform did much to elevate the status of the Japanese bar. The scope of a lawyer's activity was enlarged through new legislation (for instance, the adoption of the adversary system); autonomy as to the screening, enrollment, and the disciplinary action was gained; and the training system for lawyers was merged with that of judges and procurators.

The author refers to a curious paradox in the Japanese legal profession. The public makes relatively little use of lawyers for the reasons mentioned in Professor Kawashima's essay, while lawyers are too busy to give proper attention to many legal matters. This paradox presents itself in a kind of vicious circle. The shortage of lawyers makes legal consultation inaccessible for the general public, which in turn causes the increase of disputes that could easily be avoided. Overloaded courts and overworked lawyers are unable to meet public expectation in the administration of justice. Thus the disappointed public feels justified in seeking extrajudicial, nonlegal settlement. The key to this paradox is, according to the author, the assumption entertained on the part of the Japanese legal profession that a "significant expansion in numbers is neither necessary nor desirable." (p. 147) There are several reasons why the size of the Japanese bar has been very small. One reason is the fact that those functions which will be best handled by lawyers have been, and are, for the most part performed by nonlawyer specialists. Another is that "lawyers themselves often have opposed, or at least have been reluctant to see, an increase in the size of the bar for fear of excessive competition." (p. 145) This negativistic attitude is untenable, according to the author, in view of the roles which the new Constitution formally assigns to Japanese lawyers. The first necessary step toward the solution, he suggests, is that a "sufficient number of highly competent individuals be attracted to the profession." (p. 148)

What is the criterion, I might ask, to determine the "sufficient number"? How may outstanding individuals be "attracted" to the profession? Economic prospect is not an answer. "The spirit of the 1946 Constitution," mentioned by the author, I submit, is too vague to be an adequate criterion or an effective source of inspiration. What is needed is a "collaborative articulation" of the vision of social life and its various functions, something distinctively Japanese.

In the essay titled "Education of the Legal Profession in Japan," Judge Abe discusses the legal training given to legal apprentices by the Legal Training and Research Institute, which may be considered the Japanese counterpart of an American law school. The Institute, founded in 1947 as an agency of the Supreme Court of Japan, "did not result from positive suggestion of the occupation authorities, but is entirely the independent, original conception of the Japanese legal profession." (p. 155) At present, it is the sole source of supply for the Japanese legal profession, with about 350 graduates a year, selected by a national legal examination from about 8,000 university graduate students.

As the objective of the Institute is to supplement and complete the legal

education at a university law department, which is more like an American undergraduate political science department, Judge Abe makes a critical survey of the latter. The legal education at these law departments, with their almost exclusive interest in a general knowledge of the content and interpretation of the so-called "Six Codes," "does not impart legal knowledge at a professional level or capacity for legal thinking of a professional character." (p. 161) What is worse, the postwar educational reform has tended to lower the academic standard of Japanese universities. The national legal examination, which in some way supplements the university legal education, at the same time distorts it, for the average university graduate has to make about five trials before he passes the examination; and five years of study wholly geared to the passing of the examination are far from an ideal type of legal education. In conclusion the author observes that the most important issue now confronting those engaged in Japanese legal education is the "problem of reconstructing legal education in the broadest meaning of the term, in such a way that it will be brought into better balance with the size and composition of the profession." (p. 185)

Judge Abe makes significant remarks concerning the transformation of the image of a lawyer in postwar Japan. Whereas members of the legal profession in the prewar period were supposed to be a "body of legal (or procedural) technicians," today they are expected to be the ultimate protector of human rights. Not a narrow professionalism, but leadership and statesmanship are required for them. In this connection, the author emphasizes the need of knowledge in the field of "politics, economics, labor and administration." (p. 173) I would rather suggest that what is at stake here is what Professor Lon Fuller terms "the internal morality of law."[1] The basic requirements which are necessary for a law in order to be a law in a true sense are not neutral to morality, in that they presuppose a definite idea of man. Hence the law cannot be considered as a mere organ for the perpetuation of status quo. It follows that a lawyer cannot remain indifferent to the objectives of law. I submit that what the Japanese legal profession needs is philosophy, in the sense of deep reflection on such basic issues as the relationship of law and morality, more than those disciplines mentioned above.

The new Japanese Constitution legalizes the doctrine of the rule of law in two ways: by explicit provision of fundamental rights; by the institution of judicial review, inspired by American constitutional law. The theme of Professor Ito's paper, "The Rule of Law: Constitutional Development," is a critical evaluation of the exercise of the power of judicial review by the Japanese courts with a view to the proper balance between the rights of the individual and the public welfare. The analysis is clear and confident, as may be expected from the author of *Freedom of Speech and Press,* which received the award of the Japan Academy (1960). Professor Ito is not, however, sanguine about the future of this institution, for, as he says, "it would seem that there are many difficulties to overcome before the power of judicial review, transplanted by the new Constitution, can grow up on the soil of Japan." (p. 238)

[1] FULLER, THE MORALITY OF LAW 33 (1964).

This caution is motivated by the court's "simplistic logic" and its presumption that the necessity of maintaining peace and order is superior to the individual's exercise of basic rights and freedoms. This is the fundamental problem of social philosophy, which has been widely discussed in postwar Japan. No simple formula suffices for the solution of this problem. I would suggest that the prevalent individualistic interpretation of human rights makes a theoretical solution of this problem impossible, because the demand of the whole and that of part will remain incompatible in principle from that viewpoint. Finally, the author does not explain how the principle of the "sovereignty of the people," which he identifies as "a principle of the first importance in the Japanese Constitution" (p. 213), can be reconciled with the idea of the rule of law. If the people are sovereign, how can they be subjected to the law?

In his paper, "The Rule of Law: Some Aspects of Judicial Review of Administrative Action," Professor Hashimoto discusses in what way the courts may "strike the right balance between private rights and the necessities of government" in their exercise of the power of judicial review of administrative action, conferred by the 1946 Constitution. He observes, in connection with the question of administrative discretion, that the courts, by excessive self-restraint, should not refuse and thus deprive individuals of judicial remedies. He warns, on the other hand, that the maximization of judicial review may not always result in the right balance. He advocates, rather, a flexible, dynamic approach to this problem. Obviously the course suggested by the author does not dispense with the need of clarifying certain basic principles. Thus the same problem remains as in Professor Ito's paper.

The characteristics of the Japanese criminal law are identified (in "The Accused and Society: Some Aspects of Japanese Criminal Law") by Professor Hirano as "restraint in the sense of a consciousness of practical limitations on the law's effectiveness, and subjectivity in the form of pronounced emphasis upon the defendant's moral blameworthiness." (p. 290) The first feature, which derives from the underlying character of traditional Japanese culture, is illustrated by the extremely objective standard in assessing the criminality of an action. In this connection, it is interesting to note that "a large number of acts, particularly those involving sexual crimes and crimes against the family, such as homosexuality, incest, and adultery, fall outside the bounds of criminality in Japan, although they are widely punished in Europe and the United States." (p. 280) The law's "extremely lenient attitude" towards abortion, not without criticism from various quarters here, is another noteworthy example. The second characteristic, which is apparently incongruous with the first, the author observes, can be explained by the patriarchal role assumed by the Meiji government.

Mr. Nagashima's discussion of the major difficulties in the administration of criminal justice in Japan ("The Accused and Society: The Administration of Criminal Justice") is focused on the "very wide discretionary power" granted

to the public procurator. In spite of various proposals to restrict it, the author observes that "the traditions of procuracy in Japan are firmly rooted, and the public reliance on the discretionary power of procurators will not soon change." (p. 304) His discussion of the past history of the jury system and its future in Japan may be of interest to others. The jury system introduced in 1923 was suspended in 1943. One reason why this system did not thrive in Japan is that 98 per cent of the accused waived trial by jury, assuming that the jury would be harsher than the judge. The author predicts that while it is not likely that the jury system will be reinstituted in Japan in the near future in view of the public reliance upon the trial by judge, with the progress of the transition from the inquisitorial to the accusatorial process in the administration of criminal justice, the road will be opened to the introduction of the jury trial. (p. 321)

Procurator Abe's essay, "The Accused and Society: Therapeutic and Preventive Aspect of Criminal Justice," analyzes the unique phenomena of judicial leniency in Japan. In addition to the general leniency of the Japanese mentality towards offenses against human dignity, "certain personality attributes cultivated in the social milieu of the Japanese legal profession contribute to this leniency." (p. 337) Although such leniency is usually motivated by a deeper insight into the real cause of crime, professional calmness and objectivity, and other virtues, the danger of sentimentalism and misled idealism is not excluded. The author's verdict is that "judicial leniency without scientific basis amounts to an evasion and abdication of judicial function." (p. 338)

While I can understand the author's appreciation of the cooperation derived from psychiatry, psychology, and sociology in the furtherance of the crime prevention program, I fail to comprehend his vision when he observes that the future function of the criminal law will be that of "coordinator among sciences." (p. 359)

As Professor Watanabe points out in his paper, "The Family and the Law: The Individualistic Premise and Modern Japanese Family Law," the traditional family system was closely tied with the old regime, and the postwar collapse of the latter entailed the distintegration of the former. In discussing the impact of postwar reform of family law upon Japanese society, the author emphasizes the diversity of contemporary Japanese attitudes towards the individualistic principle of equality, which is the premise of the reform, relative to age, locality, income and other factors.

The evolution of the law of motor vehicle accident liability, presented in Professor Kato's essay, "The Treatment of Motor-Vehicle Accidents: The Impact of Technological Change on Legal Relations," is indicative of the process of social transformation, involving the interplay of Japan's traditional mores, accelerated technological and economic progress, and humanitarian ideas of Western origins. Professor Kato observes that the Automobile Damage Compensation Security Law (1955) has, "with all its shortcomings (notably the unduly low insurance coverage and government compensation), assisted persons suffering injuries." (p. 417) The author notes, in conclusion, that this law will eventually help to liberate Japanese legal thinking from its exclusive inter-

est in theoretical problems, and will induce it to direct its attention to concrete issues and practical matters.

Professor Ishikawa's paper, "The Regulation of the Employer-Employee Relationship: Japanese Labor Relations Law," exposes the perplexing issue of the legality of "acts of labor disputes" (p. 444), that is, the fact that acts which in other circumstances would be deemed illegal, under criminal or civil law, or both, have been viewed as permissible within the context of labor-management strife. These acts, or labor union tactics, which are sheer expressions of physical strength, often indistinguishable from violence, are justified by militant scholars inspired by the ideology of class struggle in the name of necessity. Another curious feature of the postwar labor legislation is a provision (applicable only to employers) forbidding improper labor acts. The author concludes with a note of warning directed towards an ideology-tinted approach which obstructs genuine understanding of the real problems and of the labor union movement with its strong power consciousness. It is hoped that the author's appeal to management and labor to pay closer attention to procedures will have sobering effects. The establishment of fair procedures is the only way leading to mutual trust.

Of the remaining four essays I can only list their titles: Kanazawa, "The Regulation of Corporate Enterprise: The Law of Unfair Competition and the Control of Monopoly Power"; Michida, "The Legal Structure for Economic Enterprise: Some Aspects of Japanese Commercial Law"; Yazawa, "The Legal Structure for Corporate Enterprise: Shareholder-Management Relations Under Japanese Law"; Uematsu, "Computation of Income in Japanese Income Taxation: A Study in the Adjustment of Theory to Reality."

There is no extensive discussion in this book, of the most controversial constitutional issue in recent years. It is the problem of Article 9 (of the 1946 Constitution), which provides for the renouncement of war and arms, thus giving rise to the problem of constitutionality of the Self-Defence Force. While this absence is understandable in view of the editorial inclination towards concrete problems, a chapter on this article would not be out of place in a book on Japanese law, because of its uniqueness and its importance in the shaping of policies and ideology in postwar Japan.

The legal order, or the rule of law in Japan, is still in an inchoate stage. A modern legal system that is distinctively Japanese is still in the making. In order to make it a reality, not merely a technical elaboration, but also the creation of vision and a public consensus which is the basis and prerequisite of a legal system are urgent. Such consensus would make anachronistic the prevalent ideological conflict, now a major threat to the establishment of legal order. This book presents a challenge to the Japanese reader to build a legal system which is distinctively Japanese. At the same time it is an excellently informative account of the present state of the system for foreign readers.

B. RYOSUKE INAGAKI

MAN AND HIS GOVERNMENT: AN EMPIRICAL THEORY OF POLITICS. By Carl J. Friedrich. New York: McGraw-Hill Book Company, Inc., 1963. Pp. xiii, 737. $9.95.

What can one say of a book such as this? What adjectives or nouns should describe it? Nearly 700 closely packed pages give the author's opinions on the state — that is, society politically organized — and Government — that is, the state's machinery which men run to rule themselves and their fellow men. There is ample quotation of the political philosophers of all ages. (A good many contemporary writers on government ignore political theory or argue that it is irrelevant. I sometimes suspect that they ignore it because they are ignorant of it.) Footnotes number more than 1300. Happily they are not kenneled in an appendix where they are difficult to discover and from which a return to the text is often more difficult. They are at the bottoms of the pages, where Agnes Repplier told us they should be — little dogs barking pleasantly at the larger type that is above. A great many of these footnotes refer us to the author's published lucubrations of the past thirty years. The bibliography contains nearly 1200 items. Monumental? Stupendous? Authoritative? Encyclopedic? If one prefers nouns the two most fitting that occur to me are from languages other than English: tour de force and magnum opus. A work such as this demands something more than a traditional review. The admiring and critical reader will find that his perusal raises questions and stimulates reflections. I proceed to discuss some reflections that have entered the mind of the present reviewer. If what is said seems banal or unimportant this is because the reviewer has not risen to the occasion and not because Friedrich's text has failed to be stimulating.

I

Friedrich begins by quoting the first two lines of Sonnet 30 by Shakespeare:

> When to the sessions of sweet silent thought
> I summon up remembrance of things past,

and some readers will ask themselves whether he debated and decided against quoting the two following lines:

> I sigh the lack of many a thing I sought,
> And with old woes new wail my dear time's waste.

The intention is to "review and summarize the political experience of mankind in order to see whether it does not yield some fairly general conclusions about what contributes to political order and the good life and what detracts from these universal goals." This is "as much needed a task as it is a foolhardy one to undertake." A first chapter deals with "The Theory of Politics as Human Experience," and its text is the subtitle of the book, "An Empirical Theory of Politics."

Many academic writers on government now announce that they are "em-

piricists" or that their approach is "empirical." They rarely pause to define their terms precisely.[1]

On succeeding to The London School of Economics' Chair which had been occupied by Graham Wallas and Harold Laski, Michael Oakeshott delivered an inaugural lecture, "Political Education" (1951). There followed a debate by British students of politics that was spirited, admiring, and critical.

"In the understanding of some people," Oakeshott said,

> politics are what may be called an empirical activity. Attending to the arrangements of a society is waking up each morning and considering, "What would I like to do?" or "What would somebody else (whom I desire to please) like to see done?" and doing it. This understanding of political activity may be called politics without a policy. On the briefest inspection it will appear a concept of politics difficult to substantiate; it does not look like a possible manner of activity at all.[2]

Two passages in the inaugural lecture have become famous:

> In political activity, then, men sail a boundless and bottomless sea; there is neither harbour for shelter nor floor for anchorage, neither starting-place nor appointed destination. The enterprise is to keep afloat on an even keel; the sea is both friend and enemy; and the seamanship consists in using the resources of a traditional manner of behaviour in order to make a friend of every hostile occasion.[3]

And

> The more profound our understanding of political activity, the less we shall be at the mercy of plausible but mistaken analogy, the less we shall be tempted by a false or irrelevant model. And the more thoroughly we understand our own political tradition, the more readily its whole resources are available to us, the less likely we shall be to embrace the illusion that in politics we can get on without a tradition of behaviour, the illusion that the abridgment of a tradition is itself a sufficient guide, and the illusion that in politics there is anywhere a safe harbour, a destination to be reached or even a detectable strand of progress. "The world is the best of all possible worlds, and everything in it is a necessary evil."[4]

Oakeshott appears in the Friedrich bibliography and is cited in several foot-

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[1] I quote the Shorter Oxford English Dictionary:

> Empirical
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> 1. *Med.* Based on, or guided by, the results of observation and experiment only.
>
> 2. That practices physic or surgery without scientific knowledge; quack, 1680.
>
> 3. *gen.* That is guided by mere experience, without knowledge of principles. Often *transf* from 2: charlatan. 4. Pertaining to or derived from experience.
>
> "An empirical law, then, is an observed uniformity, presumed to be resolvable into simplex laws, but not yet resolved into them." Mill.

[2] MICHAEL OAKESHOTT, RATIONALISM IN POLITICS AND OTHER ESSAYS 114 (London, 1962).

[3] *Id.* at 127.

[4] *Id.* at 133.

notes. It would have been interesting if the American had paid his severely critical respects to the Englishman's inaugural lecture.

II

Reading Friedrich (and Oakeshott) suggests a caveat that I have made several times before.[5] "Define your terms, you will permit me again to say, or we shall never understand one another," wrote Voltaire. Dr. Johnson once said of Poll Carmichael: "I never could persuade her to be categorical." The felicitous essayist, F. L. Lucas, has complained of "a type of philosopher who from a sound instinct of self-preservation consistently refuses to illustrate his meaning by *examples.*" The Yale philosopher, Brand Blanshard, made the same complaint at greater length in his lecture "On Philosophical Style." I do not know whether philosophers have obeyed his injunction, but academic writers on politics certainly have not.

Blanshard tells us that "most men's minds are so constituted that they have to think by means of examples: if you do not supply these they will supply them for themselves and if you leave it wholly to them they will do it badly"; or, I add, they may not be able to do it at all. "On the other hand, if you start from familiar things, they are quick to make the necessary generalizations." Or, as Frederic William Maitland told us, "People cannot understand old law unless you give a few concrete illustrations: at least I can't," and Maitland was a "royal intellect" of the Victorian era. Without more "concrete illustrations," those who do not have "royal intellects" will have difficulty in understanding what Friedrich really has in mind. In one of his casual speeches, Mr. Justice Holmes made this remark: "I dare say that I have worked off my fundamental formula on you that the chief end of men is to find general propositions, and that no general proposition is worth a damn." Or, as A. J. Carlyle, the co-author of a very learned history of medieval political theory, put it: "All generalizations are wrong, gentlemen, even this one. . . ." There are many sections of *Man and His Government* which could be cited to illustrate the point made by Voltaire, Blanshard, et al. I first choose Friedrich's discussion of bureaucracy.

III

Less than a year after she had attended to her first official business and had asked, "Now Mama, am I really Queen?" the young Victoria read a dispatch from one of her ambassadors who reported that the permanent officials of the Prussian Foreign Office were espousing a particular policy. She wrote to her Foreign Secretary and asked how it was that on the Continent such a class of persons could exercise more power and influence than the corresponding class of persons could exercise in England. This inquiry was a text on which Lord Palmerston delivered a short lecture to his Queen (February 25, 1838).

In England, he explained, the ministers had to make daily defenses of them-

[5] Most recently in *This Is Where I Came In; An Autobiographical Indiscretion,* in ROBERT H. CONNERY (ed.), TEACHING POLITICAL SCIENCE 35 (Duke University Press, 1965).

selves in Parliament. Hence they must be "minutely acquainted with all the details of the business of their offices." On the Continent, ministers were not liable to be called to account and they therefore could leave details to undersecretaries and chief clerks. Lord Palmerston thought that save on important occasions the foreign ministers of the principal European countries rarely took the trouble of writing their own dispatches.

"Your Majesty," wrote Lord Palmerston,

> will easily see how greatly such a system must place in the hands of the subordinate members of the public department the power of directing the policy and the measures of the Government; because the value and tendency, and the consequences of a measure, frequently depend as much upon the manner in which that measure is worked out, as upon the intention and spirit with which it was planned.

On the Continent, furthermore, the undersecretaries were more permanent than in England. There, when the heads of departments changed, the undersecretaries changed also; the latter who had come in with their chiefs were no less junior in experience. An undersecretary, therefore, "can seldom set up his own knowledge to overrule the opinion, or to guide the judgment, of his superior."

On the other hand there were

> in all the public offices abroad a number of men who have spent the greater part of their lives in their respective departments, and who by their long experience are full of knowledge of what has been done in former times, and of the most convenient and easy manner of doing what may be required in the time present. This affords to the Chiefs an additional motive for leaning upon their subordinates; and gives to those subordinates still more real influence.

Such conditions made possible bureaucracy which Lord Palmerston proceeded to explain etymologically.

"This class of subordinate men has," he said,

> from the fact of its being possessed of so much power, been invested by the jargon of the day with the title of "bureaucratic" — a name fabricated in imitation of the words, "aristocratic" and "democratic," each being compounded of the word "cratic," which is a corruption from the Greek word "kratos," which means power; and the prefix, denoting the particular class of society whose power is meant to be expressed. Thus "aristo-cratic" is the power of the upper, or, as in Greek it is called, the "aristos" class of society; "demo-cratic" is the power of the people, which in Greek is called the "demos"; and "bureau-cratic" is the power of the public offices of "bureaus," for which latter the French name has been taken instead of a Greek word.

Let us hope that the Queen was satisfied, but if Lord Palmerston's distinction was then a reasonably clear one, it soon became cloudy. In Great Britain permanent officials became undersecretaries, and the excellence of the permanent staff made it unnecessary for the ministers to work too hard in learning the business of their departments. They could be amateurs who relied on the knowledge

of the professionals. Thus when Lord Randolph Churchill was Chancellor of the Exchequer he was puzzled by some figures which a clerk was explaining to him. The latter said that he had reduced the figures to decimals. "Oh," said Lord Randolph, "I could never make out what those damned dots meant." In his life of his father, Winston Churchill faintly denies the story by saying that the remark was made "only to tease."

Another British statesman, Sir William Harcourt, declared that the country could be admirably governed by permanent officials for a year or so without their decisions being interfered with by the political heads but that then the public would hang the civil servants to the nearest lampposts. "The value of the political heads of departments," he declared, "is to tell the permanent officials what the public will not stand." Despite constantly growing powers of the civil service, England never developed a corps of administrators who could be called a bureaucracy in the sense that the word was employed in connection with Prussian administration.

Friedrich has some interesting but general remarks on "Busoga bureaucracy" and on the bureaucracies in India, Egypt, and China. But there is little detail relating to the matters on which Lord Palmerston pontificated. Have certain permanent undersecretaries of the British Foreign Office been too powerful? Should others (Vansittart, for example) have been listened to more intently? It was Macaulay's view, long accepted, that a man who did well in the subjects currently stressed at British universities could do well in the civil service. If the emphasis was on Sanskrit rather than the Classics, that would be all right. Do the tasks of modern government make it desirable that intending civil servants have considerable pre-entry training in economics and science?

Is there anything in the argument of Professor Brian Chapman that the French civil service is now superior to the British civil service in two respects: in excogitating plans for the future and in demonstrating the truth of Sir Henry Taylor's dictum: "Wise men have always perceived that the execution of political measures is in reality the essence of them"? Friedrich barely mentions the delicate and complex issues of civil-military relationships. He says little or nothing of those governing groups which have been called the "invisible" government. Sometimes it is thought that anonymity will make for greater efficiency, and sometimes the anonymity is ordained by executive and legislative fiats for intelligence services and espionage agents.

But Friedrich is often interesting on points which will not have occurred to most of his readers. I give two examples:

> Officials are punctual in Britain and Switzerland, they are tardy in more southern latitudes. This seemingly small matter actually is expressive of a great many other detailed features of official conduct. Evidently it cannot be detached from cultural context, and such a yardstick as "rationality" is likely itself to be culturally determined, as it expresses a particular religious and convictional background which shapes the notion of what reason and rationality demand.

And

> The behavior of all persons in a particular cultural context is bound to be moulded by the values and beliefs prevalent in that culture. Thus the Chinese official, motivated by the doctrine of Confucius and his followers, will be much more concerned with good manners than the Swiss official, while the latter, motivated by the teachings of Christianity and more especially (typically) by a Protestant and Pietist version of Christian beliefs, will be much more concerned with honesty and duty.
>
> Chacun à son goût.

IV

In his chapter entitled "Rational Conduct, Organization, and Political Style" the author asks, "What is style, and more especially political style?" and he answers that it is "closely related to the preferred modes of political conduct." It varies not only from country to country

> but also from age to age and it is strikingly revealed in the record of conduct in official business. Style is, as a matter of fact, an important principle of historical interpretation and of periodization. How styles come into being is highly controversial, but it would seem that political life has much to do with it. It provides the setting within which basic changes of experience occur and take shape. [There is a] genuine problem of style as a concept for interpreting political and social reality. . . . Thus the style of an organization and indeed any political style is the visible manifestation of its core values, beliefs and purposes. Consequently the task of stylistic analysis is that of uncovering and understanding the basic norm as the rationalized basic *experience* which characterizes an epoch, a group, or an organization.

Friedrich makes this generalization illumine as well as glitter by giving three examples (if there are other examples of what he has in mind, I have failed to discover them): (1) "As the needs for effective cooperation between men from Alabama and New England have multiplied, their regionally determined personal style of conduct has had to be transcended by a style now common to an increasing number of business organizations in the United States." (2) "It has been remarked how different are the styles of, say, the State Department and the Department of Agriculture." (3) "Thus the 'style' of the American administrative services is strikingly different from that of European countries, which in turn markedly differ from each other. These differences are, of course, subtly related to what is commonly referred to as national character,[6] but this category is not very satisfactory, as the cases of Switzerland and Bavaria demonstrate." There are no (or at least insufficient) *"examples,"* but to some, at least, of Friedrich's readers, many examples will come to their minds. Perhaps they will not be the best examples, but they will be both institutional and personal.

[6] Frederic William Maitland described "national character" as a "wonder-working spirit at the beck and call of every embarrassed historian; a sort of *deus ex machina* which is invoked to settle any problem which cannot be readily solved by ordinary methods of rational investigation." If the sociologists say that Maitland was only a historian, I remind them of their Pope, Max Weber, who said that resort to the term "national character" was "a mere confession of ignorance."

A century ago Bagehot said that the cure for admiring the House of Lords was to go look at it. If he were writing now, he would say that spectators were justified in thinking highly of the noble peers who now *itch* to deal with matters *which* they really understand. As the members of one African legislature approach the time to vote they burst in uncontrollable laughter, and hysteria causes adjournment. Are there other legislative bodies whose observers should laugh heartily?

The British House of Commons has great pride in itself as an institution and does not wish to have as a member any man (or woman) who departs from certain indefinite but generally accepted standards of conduct. A few years ago a Labour member became *persona non grata* and an un-member when it transpired that he had allowed an agent to use his personal railroad pass. His excuse was that he was short of funds and at Westminster badly needed some papers that were in the town in which he lived. Perhaps the House of Commons is different now from what it was in Anthony Trollope's day. Then a member declared that he "would get such a round of applause" as he could "never achieve in any other way" if, questioned in the House about the murder of his grandmother, he made it his chief concern that he had let his fellow members down:

> I regret to say, sir, that the old woman did get in my way when I was in a passion. Unfortunately, I had a very heavy stick in my hand and I did strike her over the head. Nobody can regret it so much as I do. Nobody can feel so acutely the position in which I am placed. I have sat in this House for many years and many gentlemen know me well. . . . Sir, I am sorry for what I did in a moment of heat, I have now spoken the truth and I shall leave myself in the hands of the House.

Perhaps the member who loaned his railroad pass did not throw himself on the mercy of the House, but was arrogant. Members of the House of Representatives need not bother, for it has a different style. Members, even when convicted of crime, do not have to resign and have been permitted to draw their salaries until the expiration of the terms for which they were elected.

One reader of *Man and His Government* was reminded, perhaps unfairly, of Bagehot's feelings when he was reading Guizot's *History of Civilization:* "The principle of Legitimacy, the principle of Feudalism, the principle of Democracy." One principle grew, another declined, and a third crept slowly on. "The mind is immensely edified," said Bagehot, "when perhaps at the 315th page a proper name occurs, and you mutter, 'Dear me — why, if there were not people in the time of Charlemagne! who would have thought that.'" Men strut through Friedrich's pages, but there are more political philosophers than statesmen, and the latter appear rather capriciously. "Le style est l'homme même," Buffon told us, and Gibbon said much the same thing by calling it "the image of character." The styles of statesmen frequently determine the kind of governance man has to endure. I give some examples but confine them to the occupants of 10 Downing Street.

Of the first Lord Liverpool, Lord Acton said, "The secret of his policy was that he had none," and a Frenchman remarked that if Liverpool had been

present at the creation of the world he would have said, "Mon Dieu, conservons le chaos." The impervious Lord John Russell? He, Sydney Smith said, "would perform the operation for the stone — build St. Peter's — or assume (with or without ten minutes' notice) the command of the Channel fleet; and no one would discover by his manner that the patient had died, the church tumbled down, and the Channel fleet had been knocked to atoms."

Disraeli, whose political future had not become dimmer when he ceded a mistress to Lord Lyndhurst, wrote to a feminine friend: "Yes, I have climbed to the top of the greasy pole." A year later, on becoming Prime Minister, Gladstone confided to his diary: "I ascend a steepening path, with a burden ever gathering weight. The Almighty seems to sustain and spare me for some purpose of His own, deeply unworthy as I know myself to be. Glory to His name!" The Right Honorable Ramsay MacDonald, as Prime Minister, so ardently desired to be a social lion that politically he became a tame animal. In a speech shortly after Munich, Neville Chamberlain was vain enough to compare himself to the younger Pitt, who had also faced a Europe full of dire ferment. The severe but accurate reply could have been that he and Pitt had only two things in common: fathers abler than they and a tendency to gout.

The name of Sir Winston Churchill appears on six of Friedrich's pages. The first three mentions are identical: "The old imperialist" is quoted as having said in 1944 that "The Empires of the future are the empires of the mind." Another quotation of no great significance is attributed to him, and he is classed with Robert Schuman, Adenauer, Spaak, and Monnet as having played "a significant role" in beginning to make a new European political order.

In discussing the utility of political equality in "its discovery of hidden political talent" Friedrich says that a comparison of American presidents with English prime ministers would be illuminating and asks: "Is there any English prime minister to compare with F. D. Roosevelt or Wilson in this century except Churchill?" My answer is "yes": that David Lloyd George as a war prime minister is certainly comparable. But I would put the Friedrich question differently. Is there any American president of this century who can be compared to Winston Churchill? In declining to deal with Churchill in any detail, Friedrich missed a magnificent opportunity of illustrating what political style can be. Two facets that occur to me are worthy of mention.

Some statesmen while not exactly inarticulate would never have drawn the jibe that Disraeli applied to Gladstone: "Intoxicated with the exuberance of his own verbosity." Excessive loquacity is rarely a political asset, but it proved to be so in Churchill's case. Until he took office in Great Britain's "finest hour" Winston Churchill had displayed a kind of verbosity which his critics claimed justified a belief that his behavior in high office would be uncertain and that he would be impetuous in action as well as impetuous in speech. The hours of 1940 and of the years until the war was won were hours which called for rhetoric — rhetoric that would have been far less effective if it had come from any one of the group of contemporary statesmen whom Sir Winston associated with him. Peoples that were struggling to maintain or regain their freedom needed to hear eloquent words that described the aspirations in their hearts.

They got them from Churchill. Historians will debate the wisdom of some diplomatic maneuverings and of some decisions in the realm of civil-military relations. All the historians will agree that Churchill was superior in declamation at a time when a stellar declaimer was needed.

I now quote from the Field Marshal, The Viscount Alanbrooke's *Notes on My Life.*

> As we were leaving Simpson's H.Q., Simpson [Lieut. Gen. W. H., commanding the Ninth Army] asked Winston whether he wished to make use of the lavatory before starting. Without a moment's hesitation he asked, "How far is the Siegfried Line?" On being told about half-an-hour's run, he replied that he would not visit the lavatory but that we should halt on reaching the Siegfried Line. On arrival there the column of some twenty or thirty cars halted, we processed solemnly out and lined up along the Line. As the photographers had all rushed up to secure good vantage points, he turned to them and said, "This is one of the operations connected with this great war which must not be reproduced graphically." To give them credit they obeyed their orders, and in doing so, missed a chance of publishing the greatest photographic catch of the war! I shall never forget the childish grin of intense satisfaction that spread all over his face as he looked down at that critical moment.[7]

V

Friedrich's canvases are so vast that on them his readers are bound to see what they think are careless splotches, but considering the book's detail there is really very little that calls for correction. I cite two matters, not because they are important, but because they permit me to be precocious.

The bibliography has an entry, "Lewis, George C., *An Essay on the Influence of Authority,* 1849." This is the first time I have ever seen (Sir) George Cornewall Lewis so listed, and the full title of his book is *The Influence of Authority in Matters of Opinion.* Bagehot said that Sir George had written "a book to prove that when you wanted to know anything you asked someone who knew something about it."

"Old slogans," writes Friedrich, "such as the saying about ambassadors being 'gentlemen going abroad to lie for the good of their country' provide folkloristic insight [*sic*] into this complex issue," which apparently is "discipline in organizations" engaged in war or conducting business enterprises. But the definition of an ambassador was not an "old slogan"; it was a pun made by Sir Henry Wotton when he explained his remark to James I. The original, a Latin sentence scrawled in the guest book of a German host, had used the phrase, "*ad mentiendum Reipublicae causa,*" was reported in England, and came to the attention of the King. The age was one of Ambassadors going on special missions more often than they went to stay in countries, so Sir Henry told the King jestingly that his English translation would be this: "An Ambassador is an honest man sent to lie abroad for the good of his country."

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[7] Sir Arthur Bryant, The Triumph in the West, 1943-1946, at 422 (London, 1959).

Friedrich could justifiably quote back to me another saying of Sir Henry Wotton's: "A critic is only a brusher of noblemen's clothes."

VI

Twelve hundred items are in the Friedrich bibliography, which the author says "is by no means exhaustive. I have omitted many items given in the bibliographies appended to my other works cited below." One is reminded of Ortega y Gasset's warning that "if each generation accumulates printed material at the rate of recent ones, the culture which liberated man from the jungle will thrust him anew into a jungle of books."

Tens of thousands of pages on political science appear annually in bound covers. The research, speculations, hypotheses, announcements of new "methods" of attack that are "potted" in periodicals are truly formidable — and the word should be pronounced as the French do: *formidáble.* The quarterly *International Political Science Abstracts* (supported by UNESCO) gives its recipients summaries of articles that have appeared in more than 125 journals — 35 of them American, and there are some journals that the UNESCO editors ignore. New channels of publications spring into existence with frightening regularity. One who goes to the library to investigate or who looks at the abstracts is appalled and is reminded of Anatole France's story (*Penguin Island*) of the French Minister of War who collected so many proofs of the guilt of Dreyfus that the floors of the building collapsed and the debris killed some of the collectors.

The Fondation Nationale des Sciences Politiques in Paris proudly announces that its library receives 2,000 reviews from which annually between 25,000 and 30,000 *fiches* are torn and indexed for the use of students. The journals abstracted or torn from have few, if any, subscribers save libraries and actual and aspiring contributors. Few of the journals are available even in the university bookstores unless perchance there is a desire to publicize home talent, and practically none appear on the newsstands to attract the laity.

In the natural sciences the developments have been even more striking. Something more than a century ago, T. H. Huxley started a weekly, *Nature,* whose purpose was to tell readers with an ordinary education what was going on in the world of science. "Today," says Magnus Pyke, "it is a trade journal, far too technical to be read with comprehension by anyone other than a professional scientist, and even then no single scientist will understand more than part of it."

Fifty thousand technical journals publish annually more than a million articles, and 100,000 research reports are distributed among those who are especially interested. "Printing was a long time coming; but now it has started, like the Sorcerer's Apprentice, there is no stopping it." Much of the writing by scientists is about experiments they have actually made. We see the results in our daily life — in transistors, antibiotics, etc. In the field of politics, there are no comparable results. Little of what is potted in journals oozes out in any form to enlighten editorial writers, electorates or statesmen.[8] Whatever ad-

[8] I am, of course, not referring to journals like *Foreign Affairs, Political Science Quarterly, Encounter, Commentary,* etc.

vances have been made, for example, in the field of public administration and whatever setbacks have occurred in the conduct of foreign relations have resulted from intelligence or lack of intelligence — not from new methodologies, successful searches for "theory," or the discovery of hypotheses, or the construction of models. Donald R. Young, the director of the Russell Sage Foundation, has said that despite the millions spent on studies of racial tensions, we know little, if anything, more about causes or cures than we knew before the expenditures began.

When something over a century ago Sir George Cornewall Lewis wrote his two volumes, *On Methods of Observation and Reasoning in Politics,* he could be familiar with everything — even trivial things — that all his predecessors had written in several languages. When Freeman lectured at Johns Hopkins in the eighties and President Gilman asked him where he had written his *History of the Norman Conquest,* Freeman replied with some surprise: "Why, in my own library, of course." When Messrs. Langer and Gleason (authors of *The Challenge to Isolation, 1937-1940*) get around to chronicling the influence of the Joint Chiefs of Staff in political matters from 1941 on, they will want to use a motorcycle: the files with the documents extend for miles.

The students of our students, when they are at the height of their powers (c. A.D. 2040), and if they happen to be at Yale (for whose library estimates have been made), will have access to two hundred million volumes resting on six thousand miles of shelves. These volumes will be catalogued in 750,000 drawers, which will occupy eight acres of floor space.

Morris Bishop, president of The Modern Language Association, recently told its members that "if publication is a virtue, so is refraining from publishing." He is optimistic that the flood will recede.

> I expect a revolt on the part of overburdened libraries, administrations and scholars. Foundations, discouraged by the outcome, will be more chary of demanding publication. Their subsidies may be rather for crop limitation than for production. Literary research will dwell less on the disinterment of dead facts, more on the communication of live ideas.

Scholarship, adds Mr. Bishop, should be aimed "not toward the fellow specialist but toward the eloquent amateur." The Regius Professor of Modern History in the University of Oxford agrees.

VII

In his brilliant inaugural lecture (1957), "History: Professional and Lay,"[9] H. R. Trevor-Roper asserted his belief that history was a humane subject. If this is true, and I believe it is, then the study of politics, which instantaneously becomes history, is the study of a humane subject also. Humane subjects, Trevor-Roper declares, "have no direct scientific use; they owe their title to existence to the interest and comprehension of the laity; they exist primarily not for the training of professionals but for the education of laymen." Technical specialization in respect of humane subjects

[9] Oxford: At the Clarendon Press (1957).

> has no value in itself; it owes whatever value it has entirely to that degree to which it makes those subjects clearer, more comprehensible and more interesting to the intelligent laity. I do not dispute that by a completer professionalism we may arrive at a more perfect knowledge of history [politics] and literature: I merely state that perfect knowledge may be so fine and so uninteresting that nobody, except its discoverers, will wish to possess it. If we believe, as I do, that a knowledge of history and literature is essential to a civilized society, this would be a great loss.

For my part, I agree with Trevor-Roper, but in reading Friedrich's book I often wondered how far he was in agreement.

LINDSAY ROGERS

NOMOS VII: RATIONAL DECISION. Yearbook of the American Society for Political and Legal Philosophy. Edited by Carl J. Friedrich. New York: Atherton Press, 1964. Pp. 288. $6.50.

When social processes, particularly the political and legal, are viewed as processes of decision, many of the traditional concepts used in describing and evaluating the ethics, art, and science of politics and law are subjected to substantial reexamination. The impact of such a shift in observational standpoint is reflected in *Nomos VII: Rational Decision*. Professor Friedrich's initial assumption is that social scientists generally have given inadequate attention to the problem of rationality in its relation to decision making. In order to remedy this deficiency, he has here sought from a group of social scientists, political and legal philosophers, a clarification of the "interdependence of institutions, decisions, and policy."

Definition and description of "decision" is a minor theme in this volume. None of the sixteen contributors fully articulate the features of a comprehensive model of the decision-making process. Neither do they subscribe to a common definition of "rational." Consequently, neither uniform criteria for making effective judgments nor criteria for evaluating their rationality emerge. *Nomos VII* does not offer a new synthesis, but it does touch upon some of the fundamental considerations that must be taken into account in making one. Throughout the essays there are frequent references to one or more phases of decision making. If the analyses, criticisms, and suggestions made in these papers are related to a comprehensive model of the legal-policy decision process, many of the apparently divergent views presented can be shown to be compatible with and even mutually supportive of each other. For these reasons, it is best to begin by extracting from these essays the essential framework of a decision-making model. With the details of such a framework in mind, it will be easier to demonstrate how such inquiries may contribute toward the development of useful guides for rational decision.

I. THE DECISION PROCESS

Implicit in the first paper, "Decisionism," by Judith N. Shklar, is a call for a comprehensive model. In tracing the recent history of political and legal theory,

she describes as decisionist all those theories in which (1) decision plays a central part, and (2) rules, norms, or standards for guiding decision are rejected as legalism. Their current popularity establishes the "fundamental historical reality," she says, "that the formal concepts of traditional thought no longer serve any descriptive or prescriptive purpose in a social world that has for decades defied the inherited categories of political theory." (p. 17) Separate decision-making models have been projected for internal or domestic politics and for external or international affairs. The purpose of the latter, developed by the strategists (neo-Machiavellian power politicians, for example), is to reduce the data of a chaotic international scene to a set of manageable, orderly variables upon which to base calculable and predictable moves. The principal emphasis of theorists and practitioners is upon "decisiveness," with little or no concern with who should decide or the content of the decision. The central element in the national model — projected by nineteenth century Romanticists, American Legal Realists, the adherents of the European "free-law" school, and contemporary existentialists — is the so-called *mature* decision maker. In both models, the decisionists clearly specify "the conditions under which choice is made, and . . . the necessity of making decisions, but nothing is said about the content, purpose, or the validity of these choices" (p. 16), other than that traditional rules for identifying rationality are unacceptable. This negative view leaves open, however, questions of the possibility and desirability of a new form of rationality.

These models exhibit several disturbing features. Mrs. Shklar points out one of them by asking "whether *any* legal system can survive without some form of the basic myth" (p. 10), that is, some faith in articulated community goals as overriding principles or guides for the procedural requirements and the content of decision. The wisdom, indeed the viability, of political thought and action not guided by commitment to fundamental goals is seriously questioned in this and several other papers collected here.

Mrs. Shklar, together with some of her fellow contributors, also criticizes the limited scope of the decisionists' models. For example, those that assimilate foreign policy to strategic calculations, she observes, could hardly cover the routine conduct of foreign affairs. Such models "have little relevance to situations which are not crises, in which no spectacular acts of choice are expected, and which are characterized by the slow, grinding routine processes of politics-as-accommodation." (p. 14)

A more detailed, value-outcome version of decision making is briefly sketched by Felix E. Oppenheim:

> To arrive at a rational decision, one does not start with the arbitrary selection of some ultimate end and then proceed to the choice of whatever means are most conducive to its realization. Means have consequences other than the goal, and the negative utility of the former may outweigh the positive utility of the latter. A rational actor must therefore predict (with as high a degree of probability as possible) the *total* outcome of each alternative action open to him in the given situation. Then he must establish a preference rank order among these total outcomes. The preferred outcome may include elements which the actor would disvalue if he considered them in isolation, and it need not include his original, but ten-

> tative, ultimate goal. Intrinsic valuations in connection with rational choice do not pertain to separate goals but to total outcomes. (p. 219)

Many of these components of the decision process also figure in the thinking of J. Roland Pennock. "Rational solution," he says,

> involves bringing to bear on the decision process a vast array of facts, a number of complicated lines of reasoning about probable consequences of the alternative solutions, and a weighing of values that involves a subtle appreciation of the impact of a particular state of affairs on each of a number of variously conditioned groups of people. (p. 103)

When decisions are made by a collective body, the effectiveness of decision making is affected by the peculiar patterns of interaction among the members acting as a decision-making group, by the manner in which they are informed, and by the procedures they follow in their various deliberations. Pennock also recognizes the crucial role of leadership, "official and unofficial, at all levels from nation-wide to the most parochial" (p. 105), in identifying problems, analyzing them, and calculating and proposing solutions in imaginative ways that enlist support.

Four of the elements of decision-making models mentioned by Shklar, Oppenheim, and Pennock are singled out by Murray L. Schwartz as the distinguishing features of a paradigm of *legal* decision. Legal decisions are those made by officials or public institutions created for the purpose, *inter alia,* of making decisions that affect the legal status of others. "[F]or a [legal] decision to be recognized as a valid one, the decision-maker must have followed a prescribed procedure." (p. 93) The principles or guides or justifications invoked to explain the decisions are expected to be relevant to the issues presented, and a legal decision, unlike other types of decision, must proximately affect a legal status or a legal relationship.

Other authors, whose professional credentials entitle them to speak at length on the subject, do not concern themselves with a model of the decision process. They concentrate instead upon the rationality of specific phases of decision making. Paul A. Freund, incorporating by reference Justice Cardozo's analysis of the judicial process,[1] emphasizes logic, precedent, history, and social utility. Charles E. Lindblom does not here summarize the model more fully articulated in *A Strategy of Decision,*[2] and Abraham Kaplan does not explicate here the politico-legal decision-making model contemplated in his collaborative work with Harold D. Lasswell, *Power and Society.*[3] The basic framework of that model, more recently developed by Lasswell, Myres S. McDougal and others, is evident in the partial formulations cited above: *Who,* in what *interactions,* for what value *goals,* using what *competences* and other bases of power, by what *strategies,* makes what kinds of *decisions,* having value *effects* on *whom?*

II. A Communications Model of the Decision Process

A comprehensive model of politico-legal decision making, taking all of these

[1] Benjamin N. Cardozo, The Nature of the Judicial Process (1921).
[2] David Braybrooke and Charles E. Lindblom (1963).
[3] 1950.

variables into account, would begin by eradicating the traditional, artificial boundaries between politics and law. It would view man as a collection of selves and mankind as interrelated communities seeking through political and legal institutions to achieve harmonious accommodation of individual and collective values. The most conspicuous feature of the comprehensive process is the territorially based community within which influential individuals and groups effectively constitute and maintain a decision-making structure which is regarded by the members of the community as "official" or authoritative. The ongoing quality of this constitutive process can be more accurately described in terms of a communications model in which effective communicators project overriding policy goals, designate procedures for selecting decision makers and creating decision-making arenas, allocate power competences, specify limitations upon those grants of power, and prescribe procedures for their exercise. These communications are either explicit, formal, written (as, for example, in constitutions, statutes, and international agreements), or informal, less explicit and customary ("precedents" and a wide range of official and nonofficial practices). The meaning or content of such communications is not determined solely by the intention of the communicators, however, and no inherent or plain meaning of the words or practices employed can give them a mystical meaning, force, or validity of their own. A communications model requires that an audience attend and comprehend, and "meaning" is reflected by the shared understanding or belief of communicator and audience about how decisions will be made and by whom. Given the ambiguities of communication and the perpetual flux of social change, interpretation and reinterpretation of policy projections by successive communicators and their audiences are not only desirable, but inevitable.

The decision making engaged in by the community, through its effective leadership, for the constitution of an authoritative decision process involves the same sort of intellectual activity as that required of the decision makers so constituted in creating and maintaining a public order. Four interrelated operations, mentioned by several of the contributors to *Rational Decision,* are commonly regarded as essential. They include deliberate consideration of (1) the relevant community goals, (2) history (past trends) with emphasis upon the analysis of conditions that appear to account for past trends, (3) the array of alternatives available, and (4) predicted costs and impact of each alternative in the context of all relevant community goals.

Under the communications model, the principal goals of authoritative decision makers are to project and to apply policy in conformity with the shared expectations of the communities they serve about how decisions will and should be made. The search for evidence of those expectations — the subjectivities of individual human beings — and the integration of these expectations into decisions giving effect to the community's basic public order goals are their primary task. Decision makers traditionally have relied upon practices to assist in the assembly and evaluation of relevant and credible evidence. Many of these practices have been articulated as principles or rules of evidence and procedure, and, as such, enjoin the decision makers to advert or not to advert to this or that feature of the decision-making process itself, or to specified variables in the con-

text of the problem that occasions the decision. Adoption of a communications model of the decision process entails a reexamination of these traditional practices and principles with a view toward improving the rationality of decision making.

III. Goal Clarification

The communications model, incorporating many of the elements of the decision process which were perceived as crucial by the American Legal Realists, represents a radical departure from their pessimism in that it focuses upon goals. Mrs. Shklar recalls that the realists demanded maturity and expertise in decision makers and rejected traditional guides for decision as myths, illusions, and clichés. The criteria for rationality thus expressed were wholly negative, or when positive, wholly vague. In contrast, the international strategists' doctrine is didactic: "Politics should be a matter of decisions, taken by those who have the power to make them stick." (p. 11) Their principal concern is with expedient employment of bases of power and strategies in pursuit of a vaguely articulated, but passionately adhered to "national interest." Like the elitists who preceded them, they envisage "a limited number of political actors engaged in making calculated choices among clearly conceived alternatives." (p. 13) However, unclarified goals and concurrent rejection of traditional guides for decision reduce the realists' and strategists' models to mere formal frameworks *for* rational deciding without any hint of standards for judging whether such deciding is rational.

As limited in vision and scope as these theoretical models are, however, their authors do not deny man's capacity for rational action. Gottfried Dietze does. Positing the imperfection of man and hence his essential irrationality, Dietze concludes that "law as recognized or made by man . . . is irrational, unjust, wrong, and thus a limitation upon rationality." (p. 87) There is, according to him, such a thing as a perfect law — one that is not a limitation upon rationality — and he believes that occasionally, perhaps, "the perfect law may be revealed to men." However, in his essay devoted to establishing the fact that natural law, customary and common law, codified law and constitutions all constitute limitations upon rationality, he makes no mention of an occasion on which such a revelation had occurred. Given the assumption of the essential irrationality of man, Dietze's suggestion that irrationality is on the increase (because of a decline in the caliber of lawmakers and a radical increase in the number of laws motivated by human passion rather than reason) is a curious admission of *degrees* of irrationality — an admission which should have been the starting point of a serious essay on guides for *more* rational decision by admittedly imperfect man.

Charles E. Lindblom's view is less pessimistic than Dietze's, but more limited in aspiration than that of those who espouse the goal-oriented communications model sketched out above. Lindblom takes the position that conventional decision theory, endorsing "clarification of values when they will nevertheless remain obscure, . . . systematic canvassing of alternative means, when alternatives are countless, and . . . exhaustive tracking of consequences, when consequences go

on forever" (p. 227), is beyond man's capacity. However, the level of rationality in political decision making can be raised, he says, without a daring new political philosophy, by specific calculated adaptations to the discrepancy between man's cognitive facilities and the enormous complexity of the problems demanding decision.

Abraham Kaplan's opinion of rational man is scarcely more sanguine. He cites the theory of games, of information, and of decision making, and their associated techniques and technology as contributors of new insights into the nature of rational choice, but believes that expectations about their potential applicability to law and politics should be moderated. Necessary to any theory, he states, is the determination of what values are sought in political action, but this is a problem Kaplan "is not yet competent to solve." It is also necessary for rational decision makers to assume the responsibility of "judging the relative worth of disparate and perhaps conflicting values" (p. 58), but this problem has not been resolved even in game theory; and it constitutes *the* problem of politics. Finally, since values enter into calculations of the probability of the attainment of certain future states of affairs by alternative courses of action, a theory of rational decision needs a probability theory for political action more acceptable than the theories now available.

While Lindblom and Kaplan differ on man's capacity for rational goal clarification, they both consider the problem as one within the domain of "rational." Felix E. Oppenheim disagrees. Believing that intrinsic value judgments — such as adoption of the principle of utility as a goal — are matters of subjective commitment, not of "objective" truth, Oppenheim regards such commitments as nonrational. Rational decision, he says, is concerned with prediction of the total outcome of alternative actions open to a decision maker. However, there is no criterion of validity in the intersubjective or scientific sense for the establishment of a rank order among those total outcomes.

Of all the contributors, only Sir Isaiah Berlin takes the position contrary to the gloomy pessimism and denial expressed by the authors cited above. There is, he believes, a core of values common to sane human beings, and although these values do not remain constant in time and space, persons lacking such values cannot be described as "human." This being so, the "pursuit of, or failure to pursue, certain ends can be regarded as evidence of — and in extreme cases part of the definition of — irrationality." (p. 223)

If these were the only observations on the interdependence of institutions, decisions, and policy evoked by Friedrich's call for criteria of rational decision, it would be easy to dismiss *Nomos VII* as an exercise in futility. The reader will search in vain for a forthright effort to come to grips with the admittedly tough problems of goal clarification and specification. The purely negativist views expressed here (that rationality is impossible, that goals are irrelevant, that goal clarification is beyond man's capacity, that identification of values sought in political action is not yet possible, and that commitments to value judgments are nonrational) are distressing to those who seek some indication that contemporary thinkers are ready to challenge ancient philosophical stalemates.

Sir Isaiah's two-page comment on the temporal and spatial domain of universal criteria of the sane or rational man may or may not be supported by an anthropologist's survey of universal culture traits or by contemporary psychiatric theory, but it does remind us of some of the interesting questions relating to decision theory. Shall we adopt the postulate that man seeks to maximize both conscious and unconscious values? Can we devise a set of categories for describing such values? Can we rationally commit ourselves to an overriding value such as, for example, human dignity? Are there rational criteria for the empirical specification of such a commitment in terms of preferred outcomes in the social process? These are not new questions. Their novelty resides only in the fact that they are asked out of traditional context.

Carl J. Friedrich's essay, concerned with reason, rationality, and religion, places these kinds of inquiries in historical context. What constitutes rationality in general is by no means self-evident to Friedrich. He conceives, as Dietze did not, the dichotomous distinction of "rational" and "irrational" to be but the "unreal" ends on a continuum of decisions in which reasoning has been involved to a greater or lesser extent. Such reasoning includes explicit relating of means to ends and the "reasoning" implicit in habit and tradition. Philosophers have long busied themselves with questions about how men decide what is to be done or left undone; but because political and legal decisions are public, and often urgent, some thinkers have made an absolute out of the decision. In the historical movement from the search for truth to the critique of reasoning to radical skepticism, the focus shifted to inquiry about how men *decide* rather than how they *reason* upon the grounds for their decisions. Friedrich is profoundly interested in the historical role of religion in politics, and regards that role as relevant to theories of rational decision, rational action, and rational law. In so doing, he takes his stand with those who are concerned with the substantive goal of human action, which, he says, "leads to the religious or pseudoreligious sources of human reasoning." To the extent that contemporary thinkers rely upon purely operational rationalistic scientism or are involved in existentialist activitism — deciding without any conviction as to what is right — they run the risk of "surrender to some 'decision-maker,' whether man or movement, who claims legitimacy on the ground of some species of inevitability." (p. 196)

The assumption that men share a common understanding of community goals, however arrived at, does not necessarily augur well for rational decision. Harvey C. Mansfield explores this theme in an essay on the rationality of representative government. Such government is rational, he says, because it is based on the opinions of a multitude of men supported by their power and their reason, and irrational because it compromises the true reasoning of the few with the inexact reasoning and opinion of the many. Since the seventeenth century, representative government has been regarded as "that compromise which assumes that the inexact reasoning of the people is true enough to form the basis for the decisions of the government." (p. 199) Given this assumption, Mansfield believes that it is an easy shift in emphasis from rationality to decisionism. If decision makers assume that the people know the goal or end of

government, a mere choice often serves as well as a wise choice. "Decisiveness in government may be sufficient wisdom, as a counterpart to the steadiness of the people in their desire for security, which is also sufficient wisdom." (p. 199) Thus, unlike Dietze who, overwhelmed by man's essential imperfection, has not dared to answer the call for a new approach to rationality, Mansfield asserts that the multitude's innate rationality in truly important concerns makes the need for wisdom in choice superfluous.

This unsatisfactory, and occasionally unsettling, lack of consensus on the need for or possibility of goal clarification in the decision process is offset somewhat by more creative contributions to other aspects of policy making and problem solving. While they are made by these authors in the context of particular institutional patterns, they are susceptible to more general application.

IV. The Specification of Guiding Principles for Decision

In accounting for and discounting the effects of the decision maker's overwhelming influence on the decision process, one might say that the principle of indeterminacy operates in decision making. Observation of the context of the problem demanding choice includes the self-observation of the decision maker as a part of that context and as affecting it by his observational and decisional activity. This being so, guides for rational decision must be directed to the decision-making process as well as to the social context of the questions to be decided. Many of the contributors to *Rational Decision* have addressed themselves to the problems involved in formulating both types of standards or guides. Others are concerned with only one of these aspects of rational action and judgment.

Principles that are related to the process of decision are directed toward the preservation of that process as an effective institutional basis for the maintenance of public order. They call for impartiality of the decision makers and their explicit identification with the objectives of the several communities affected by their decisions. They remind decision makers of the purposes they have been designated to serve and of the necessity for maintaining public confidence in the decisional structures of which they are a part. They demand constant attention to the authoritative process as a whole, calling for appropriate deference to other decision makers. They express community-wide demands for publicly announced reasoned justifications, candidly and lucidly expressed, and they specify practices and presumptions deemed most likely to bring about rationality in decision procedures. Among these are the counsel of economy of effort and standards for assessing the credibility of evidence. One of these decisional principles requires the development and use of other principles that focus on the content and context of particular social policies to be projected and applied. Occasions for decision, whatever the value impact of their solution on the community at large, arise in the context of an ongoing social process. Rational decision requires some contextual guides to aid decision makers in their assessment of the total outcome of alternative choices and in their estimation of community expectations about what choices should be made. Many of the elements that enter into the formulation of decisional and

contextual guides are considered at length by the contributors to *Rational Decision.*

J. Roland Pennock is concerned with both types of principles as guides for legislative decision. Conventionally stated standards, such as those enjoining legislators to treat like cases alike, to prescribe classifications that are relevant to some socially approved purpose, and to be responsible to public opinion, do no more than frame the problem of rationality. They must be specified in particular contexts. Two of the strategies available for attaining generality, regularity, and consistency in legislative policy making, for example, are (1) the enactment of complex, detailed legislation for the ever-increasing complexity of situations to which it applies, and (2) the delegation of discretionary authority to administrators. Since neither of these strategies is a guarantee that like cases will be treated alike or that regularity and consistency will be effected, rational (and creative) decision calls for the invention of other alternatives, such as delegation accompanied by "adequate" policy directives. The act of delegation itself calls for a rational balance of respect for and skepticism of other decision makers, and appraisal of the entire structure of authority — including the delegating organ itself. This and other internal practices of legislatures, such as voting procedures and the justification of its policy acts, demand a comprehensive understanding of the social process as a whole. Pennock observes that the complexity of the legislative process does not dictate its intractability, for persuasion, bargaining, and "politicking" are available and can be used to integrate partialities. Such integrative solutions build community consensus where there was none before. Consensus formation may also be promoted by the justifications announced by legislatures if they are presented in terms that clearly reflect rational calculation of the consequences and a conscious weighing of the values at stake.

That the contents of such guiding principles are not and should not be identical for decision-making structures specialized to different functions is Margaret Spahr's major theme. Acknowledging that both courts and legislatures "make law," she questions whether the criteria of rationality for the two types of decision are the same. From sound but unoriginal premises, Miss Spahr draws several conclusions about the appropriate roles of legislatures, courts, and constitutional amending procedures, without suggesting criteria for judging whether their functions are being appropriately or rationally fulfilled. Reason is used by legislatures in prospective decision making, says Miss Spahr, "in devising the most effective means for securing desired ends," while courts in decisions that are characteristically retroactive "best serve justice by using established procedure to assign to each that which is his due under existing law." (p. 161) To a court, therefore, reason is primarily analysis, analogy, and deduction, not the implementation of volition. Irrationality of court decisions is best exemplified in interpretations of the Constitution "in accordance with policy rather than in strict conformity with the standards of judicial reason." (p. 162) Notwithstanding the unquestioned benefits that have resulted, she believes that the fluctuating preferences of the Supreme Court of the United States in handling decisions relating to the American Negro, from *Dred Scott* to *Brown* v. *Board*

of Education of Topeka, have endangered the status of the Court as the oracle of the Constitution. The modification of law in the interest of greater justice is the appropriate function of the legislature. When it is a question of modifying the fundamental law of the Constitution, "all but infinitesimal changes should be left to the process of Constitutional amendment." (p. 173) A division of decision-making labor exists and is probably desirable in most communities, but Miss Spahr does not explain how and when a court should go about deciding whether to act or defer to the superior competence of legislatures or constitutional amending procedures.

The courts have enjoyed a friendlier reception from A. A. Mavrinac. An examination of recent trends in the handling of judicial discourse in the right to privacy cases is the subject of his essay. The emergence of the concept of privacy is an example of the ways in which decision makers introduce new terms in order to present their decisions "in rational, that is, self-comprehensible and extracomprehensible, terms." (p. 159) In these cases, Mavrinac says, one finds an expression of the will to ground the political system and its institutions in the human being as he develops his potentials in political, social, legal, familial, and individual systems. Since each of these systems evolved by man for the expression of his own creativity seeks internal coherence and stability, rational political and legal decisions are required to protect the development and integration of each and all of them.

> The language of the law in dealing with privacy problems is not the language of privacy itself, but is rather the language that binds the private and the political arenas. Freedom of assembly, freedom from unreasonable search and seizure, freedom to enter into contractual relationships, all such language conveys the bipolar concerns involved. It presents, that is, in one unified expression the logic of each system involved and represents at the same time a permanent reference point in the refinement of the nature of each such value system. (p. 152)

This creative use of concept formation also promotes rational continuity of decision in a long sequence by providing new reference points for persuasive justification. By his open admiration for what he regards as skillful and creative use of persuasive discourse, Mavrinac clearly dissociates himself from the American Realists.

The realists are also rejected by William K. Frankena. They cannot assert themselves, as they have done and do, unless they inconsistently talk in terms they condemn. Granted the "familiar arguments against the credulous use of words like 'good,' 'right,' 'justified,' " Frankena notes that the realist vocabulary — "mistaken," "dishonest," "pretense," "reprehensible," and "self-deceptive" — appeals to claims of intersubjective validity just as much as the terms the realists so vigorously condemned. If the use of words such as "right," "valid," and "rational" depends upon an unarticulated decision to espouse some standard, point of view, or way of life, and on an implicit claim of a kind of "public justifiability for one's opinions, decisions, and way of life" (p. 23), such decisions *may* be arbitrary but not necessarily irrational. "A decision," claims

Frankena, "is not irrational merely because it is a decision or because it cannot be a conclusion of a logical inference, simple or complex." (p. 24)

Abraham Kaplan does not undertake to condemn or extol the practices of existing institutional structures. His emphasis is upon more the universal, less idiosyncratic features of decision making. After all, decisions are made by people, he says, and it may be "perfectly rational not to be *perfectly* rational." (p. 62) Rationality requires that we do not tacitly equate "rationality" with self-conscious, deliberate, and calculated decisions only. Ultimately, the soundness and acceptability of a decision maker's choice will depend upon his sense of his own autonomy, his awareness and acceptance "both of the self which makes the decision and of the consequences which follow from it." (pp. 63-64) In addition to this need for psychically well-adjusted decision makers, an inquiry into decision making with a view to improving its rationality demands intensive study of the whole way of working and style of performance of decision-making persons and institutions in order to fix on the genuine locus of their decisions. Kaplan also directs attention to the need for contextual guides in the assessment of risk involved in alternative solutions to particular problems. There is need of serious study of the value of the future, "that is, of how utilities are affected by the mere fact that they lie in the future." (p. 59) On a more practical and immediately feasible level, Kaplan calls for a reduction in the disparity "between the logic-in-use in rational decisions and the reconstructed logic which purports to give an account of the process insofar as it is rational." (p. 60)

This disparity between logic-in-use and the reconstructed logic of legal decisions is the core of John Ladd's interest in the problem of rational decision. His thesis is that there are types of rationality other than those represented by formal logic and the scientific method and that a reconsideration of Aristotle's "practical reason" — reason that issues in action rather than belief — may be fruitful for answering the question of how judicial decisions, for example, can be made rational. Focusing upon the performance of an act and the legal effects of that act, Ladd declares that "when the judge renders his decision, he is not asserting a proposition at all. His decision is an action, not the assertion of a proposition." (p. 129) And the reasons for such action include nonpropositional occurrences such as desires and wants as well as propositional premises and conclusions. To be rational, justifying explanations must take into account the ways in which *both* types of reasons affect decision makers' choices among conflicting goals. The immediate aim of the justifying process is self-preservative: to have the rationality of the decision accepted by all parties despite the fact that it may be regarded by some of them as wrong. But the chief purpose is a moral one: "to treat a rational being rationally, that is, as a rational being, by *explaining* to him through reasons why a decision . . . has been reached." (p. 144)

Paul A. Freund lodges in courts primary responsibility for rational uses of legal reasoning in judicial decisions. Judicial creativity, according to him, is similar to creativity in science: "both depend on seeing new connections, on reexamining postulates, on formulating new statements that promise to be more satisfying (because more inclusive or economical or fruitful) than the old."

(p. 117) Much of the success or failure of creative effort depends upon the forms and manners of the decision makers and the skill with which they echo the old while disguising the new. Noting that many of the most creative judicial decisions in the past were highly ambiguous and thus left open for future decision appropriate extensions or limitations of an apparently new course, Freund asserts that rational creativity calls for a careful consideration of the extent to which a new position should be formulated in detail or left inchoate. Of course, where judicial creativity may be upsetting to legitimate expectations in terms of anticipated dislocations as a result of a decision, or where the subject is more amenable to general prospective legislation, or judicial declarations applicable only to future transactions are not feasible, rationality calls not for judicial creativity but for deference to other decision makers — those in the legislative arena.

Freund finds, as have others before him, that observance of Justice Cardozo's four elements in judicial reasoning — logic, precedent, history, and social utility — provides no warranty that decision-making inquiry has been carried on appropriately. Each of these techniques may be exercised in ways that produce rational or nonrational or irrational decisions. Rational uses of logic, precedent, and history, and rational imposition of order without suppressing freedom, require impartiality, as well as creativity, on the part of the decision makers. The "selves" constituting the personality of a decision maker have an important bearing upon the rationality of the decision process, but an endeavor to offset an illegitimate bias by self-awareness and deliberate counterbias also poses problems of rationality. Such an effort, he says, may well produce counter-distortion rather than neutrality.

Charles E. Lindblom joins with Kaplan and Freund in the demand for deference to the competence of other decision makers, and calls for special attention to two other decisional principles: economy of effort and conscious relation of the problem at hand to the sequential chain of past and probably future decisions. The specific contents of some of the "economy" principles violate the canons of what is ordinarily considered to be rational choice. Examples are: "In collective decision-making, do not try to clarify values if the parties concerned can agree on policies, as they often can, despite their disagreement on values." "Neglect those consequences of possible decisions for which there exist watchdogs elsewhere in the society who will probably attend to the neglect." "Cut off the analysis of consequences at any point at which you yourself can probably at a next step in a sequence of decisions attend to them if unfavorable." (pp. 227, 228) Unfortunately, the dangerous assumptions underlying these strategies of expedience and the potential effects on total outcomes of their application were not challenged or debated by the other contributors to *Rational Decision*.

Heinz Eulau explores a quite different aspect of rational procedures in collective decision making: whether unanimity satisfies criteria of rationality. Excepting crisis situations threatening community survival, where unanimity is the preferred decision norm, he hypothesizes that a "democratic legislature is an institution composed of opposed sides, and, the more the lines of division

follow predictable lines, the more rational would the legislative process seem to be." (p. 29) On the assumption that men engaged in collective action seek to advance *both* their individual interests and those of the groups to which they belong, Eulau develops a typology of unanimity and evaluates the rationality of each.

The typology is based upon three specified ways of "decision handling" and two categories of individual and group interest articulation. The former are described as: (1) highly stable, but weakly institutionalized *consensual* or informal, traditionally interpersonal procedures; (2) *ministerial* or formal, impersonal and bureaucratized procedures; and (3) *political* procedures, which include elements of both the informal and the formal patterns. Interest articulation is *diffuse* "if the demands that are made, either by an individual or a group, do not constitute a hierarchy of preferences which would give priority in decision-making to one demand over another," and *specific,* "if the different demands that are made . . . can be readily located within some hierarchy of preferences." (p. 39) A six-cell unanimity matrix represents the typology:

Ways of Interest Articulation	*Ways of Decision Handling*		
	Consensual	*Political*	*Ministerial*
Group-specific Individual-diffuse	(1) Ancestral	(3) Bargained	(5) Functional
Group-diffuse Individual-specific	(2) False	(4) Projected	(6) Injunctive

He specifies the conditions of rationality as follows: "A unanimous decision is rational if it is made in a situation that has the potential for free choice among alternate decisional patterns. . . . A unanimous decision is rational if it is consciously chosen from alternate decisional patterns." (p. 48) To what extent do these six types of unanimous decision meet the specified conditions of rationality? Eulau concludes that: (1) Ancestral unanimity seems to be *prerational* because customary agreement on unanimity as a preferred procedure in making collective decisions precludes the genuine availability of alternatives. (2) False unanimity is "a kind of *counterrationality* of fear which deters individuals from pursuing certain of their interests and which leads them to act counter to these interests in order to achieve a group interest that is poorly articulated." (p. 49) (3) Since bargained unanimity is "good enough" for the attainment of individual interests (majority voting would be preferable), Eulau groups it with rational decisions under the label *satisfying rationality.* (4) Projected unanimity involves the unconscious projection of specific individual interests upon diffusely articulated group interests and is *irrational* in the sense of being accidental or essentially random. (5) Functional unanimity provides *procedural rationality* for it is "likely to occur only after alternate decisional patterns have been consciously eliminated as a result of convincing argument that the choice to be made cannot be anything but unanimous." (p. 50) (6) Injunctive unanimity reflects *maximizing rationality* of individual interests,

where individuals prefer action to deadlock and continue to debate an issue and alternate decisional patterns until unanimity is reached.

This essay is unique in its scope and method; it hardly seems to belong here. This is not meant to be disparaging to the neatly systematic and disciplined manner in which Eulau explored one of the hundreds of problems that are raised by the quest for creative thinking about rational decision making. There are materials aplenty in this volume and elsewhere that lend themselves to similar treatment. It is unfortunate that other contributors did not undertake to do so.

If *Nomos VII* does not clarify the interdependence of institutions, decisions, and policy, as Editor Friedrich had hoped, it does reflect a reaffirmation of their interdependence. Rational decision is a serious subject and has been treated solemnly. Seldom do these essays exhibit intensity or passion, impatience or spirit. Even opinions that contradict conventional notions of rationality are expressed with such sweet temperance that one almost overlooks their horrifying implications.

There is no thumping call here — not even a "bargained" unanimity — for decisional and contextual principles to guide decision. Yet faith in man's capacity to increase his rationality and urgent concern that he do so without delay are recurrent themes in this volume. Felix E. Oppenheim, unwilling to regard commitments to values as subject to tests of rationality, recognizes that there is a wide range of problems that are susceptible to rational judgment. Since we "base our decisions on predictions which fall short of even our limited capacity for estimating probabilities, compute our utilities on the basis of isolated goals rather than total outcomes, and cling to incompatible goals" (p. 220), there is still a large area in which we need further specification of criteria of rationality.

Whether such criteria can be specified without reference to a comprehensive theory of politico-legal decision is doubtful. The communications model sketched out in rough outline above, like all such metaphors, is admittedly incomplete. It presupposes an articulate analytical framework for the description of the entire social process of which the authoritative power process is only a part. Nevertheless, with its emphasis on the continuing dialogue between the rulers and the ruled, the governors and the governed, it reminds all participants in the process that they are both actors and targets, communicators and audience. What may be of even greater importance is the fact that each of these roles imports its own ethic of responsibility. If contemporary society is viewed as engaging in continuing communication with the "founding fathers" and with all subsequent interpreters and reinterpreters who project community policy, it is easier to account for evidences of continuity and change. Communication in any serious decision making includes deliberation, dispute, and efforts to persuade. Facts are adduced, predictions are made, existing policy is appraised, alternative policies for future interaction are examined, and recommendations are tendered. Decision — to prescribe, to invoke, to apply, or to terminate policy — is taken, and it becomes a part of the endless communication by and through which men govern themselves.

If, as suggested by some, crucial decisions are and must be made without benefit of leisurely deliberation, there is an urgent need for institutional practices that anticipate the demands of "instant decision making." No decision model contemplates waiting until all the facts are in, all the alternatives canvassed, and all the future outcomes predicted with certainty. But, as most of the contributions here attest, rational decision requires that efforts be made to approximate such conditions. Thus, the persistence of the call for principles to guide the grand long-range aspirations of society, to facilitate critical emergency decisions, or to give direction and coherence to the routine choices of appliers and administrators is justified by its importance. It remains, unfortunately, unanswered by the authors of *Rational Decision*.

MARY ELLEN CALDWELL

LAW, FREEDOM AND WELFARE. By C. Wilfred Jenks. London: Stevens & Son; Dobbs Ferry, New York: Oceana Publications, 1963. Pp. xi, 162. $6.00.

Like some of his earlier works, among them *The Common Law of Mankind* (1958), Jenks's book here under review is a collection of contributions to *Festschriften* (for *François, Marikadis, Rolin* and *Basdevant*) and of addresses delivered over a period of four years (1959 to 1963). The book is nevertheless an integrated whole expressing the author's basic philosophy on some of the fundamental problems of present-day international law and his views of the tasks and obligations of the international lawyer of our time. In a review of *Law, Freedom and Welfare* a learned writer has said that "Dr. Jenks is among us like an Old Testament prophet, for in all that he writes there is eloquence, moral fervour and vision."[1] To a comment made on *The Common Law of Mankind,* that it has "the ring of a manifesto" Jenks now replies: "It was so intended." (p. 67) Elsewhere in the book Jenks says that "the born pessimist, who attempts to reconcile us to his pessimism by calling it realism, will achieve nothing, and may ultimately be taken aback by what the optimists have quietly accomplished while he has been explaining why it is impossible." (p. 140) "Despair," he emphasizes,

> is neither a wise nor a prudent counsellor and a corrosive cynicism is no proof of either subtlety or statesmanship. The international lawyer's part in the matter [of the protection of existing legal rights by compulsory adjudication and the adjustment of established legal rights to changing political, economic and social needs and views] is not so to compound the difficulties that they become insoluble, but so to combine moral tenacity with technical resourcefulness as to make a positive contribution to their solution. (p. 55)

These sentiments might be brushed aside by the "*Realpolitiker* who emphasize the inevitable weakness of law and international authority in the face of

[1] J. E. S. Fawcett, 13 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 719 (1964).

power and the widespread assault on the *status quo*"[2] if they were conceived in his ivory tower by a scholar inexperienced in the ways of men. It so happens, however, that these exhortations are expressed by one of the great craftsmen of international law, by a man with a unique practical experience of the working of international organization and procedures, by a "visionary and moralist" who combines common sense and understanding of what is practicable with an unequalled mastery of the minutiae of his subject.

The wide range of the book is indicated by the titles of the seven papers which it contains: "Law, Freedom and Welfare in Action for Peace," "The Laws[3] of Nature and International Law," "International Law in Times of Stress," "Interdependence as the Basic Concept of Contemporary International Law," "The Will of the World Community as the Basis of Obligation in International Law," "The Corpus Juris of Social Justice," and "The Challenge of Universality."

Law almost always lags behind life. The task of the rising generation of international lawyers is to meet the challenge presented by the change in the nature of their responsibilities which arises out of the vacuum created by the disappearance of the empires after the two world wars and the revolutionary transformation of the world which has taken place. Scholarly exposition played a major role in the development of international law during the period immediately following the First World War, but in recent years it has been less constructive in spirit. A number of different national attitudes must share the responsibility for the unsatisfactory situation. A negative or hesitant approach to international adjudication and international legislation has not been confined to any one group of states or to any particular school of political or economic thought. Nor have the international organizations been blameless. Technical assistance and related operational activities brought about a shift of emphasis "from law to action" in their work. However, Jenks sees signs of the necessary balance of law and action tending to be restored. (p. 13)

The Universal Declaration of Human Rights of 1948 represents, Jenks says, a major step towards the definition and recognition of the human rights postulated by the Charter. The attempt to express its principles in the form of world-wide international conventions, the "Covenants on Human Rights," has, he feels, remained unsuccessful. The Covenants, in Professor Holcombe's words, "a project for a piece of international legislation, more ambitious and perhaps more important than any other in the history of International Law,"[4] have not yet been opened for signature and ratification. Whether Jenks does not go too far when he speaks of a deadlock (p. 15) is a matter of opinion, considering that, by the end of 1963, the competent General Assembly Committee of the whole had succeeded in completing its work on all the general and substantive articles of the draft instruments. The author recommends the "piecemeal approach" which has been so successfully practiced by the International Labor Organiza-

[2] See Oscar Schachter, *The Relation of Law, Politics and Action in the United Nations*, 1 RECUEIL DES COURS 172 (1963).

[3] The chapter deals with the *laws* of nature, not with natural law.

[4] Holcombe, *The Covenant on Human Rights*, 14 LAW AND CONTEMPORARY PROBLEMS 413 (1949).

tion, i.e., the method of breaking down general aspirations into a series of definable problems and tackling each on its merits. This method, applied to other human rights and fundamental freedoms, might bear fruit in a series of conventions which are not too rigid and accept the principle of progressive action, thus making it possible to take advantage of opportunities as they occur. (pp. 58-59)

In this regard, it might be pointed out that the United Nations has been committed to the idea of enacting an "International Bill of Rights," i.e., a series of instruments of universal scope and universal application since its beginnings, and even before the Charter entered into force. It would have been an act of doubtful merit and, certainly, not one of great popularity for a state or a group of states to propose the abandonment of the ambitious plan. The nearest approach to such an attitude, the Eisenhower-Dulles policy against "treaty coercion" and against "formal undertakings" in regard to human rights[5] did certainly not add to the stature of the United States as a leader in the struggle for freedom and welfare. Although it is not mentioned by name, this policy brought the United States within Jenks's stricture when he describes as discouraging "the reluctance of certain states to contract international engagements on other matters of vital international importance, including the protection of human rights." (p. 11) Moreover, ever since they succeeded, early in their legislative history, in inserting in the two draft Covenants clauses on the right of self-determination of all peoples, on their right freely to dispose of their natural wealth and resources and on the automatic application of the Covenants to dependent territories, the Asian, African and Latin-American states have fought for the all-embracing project as one in which they have a sort of vested interest. As a consequence of the decolonization which took place in the last few years these provisions aimed at the former colonial powers will be much less of an obstacle to the acceptance of the Covenants by those powers than was feared at the time they were inserted in the drafts by decisions of the majority.

The United Nations has never, either in principle or in practice, rejected the "piecemeal approach" which Jenks recommends; it has succeeded in putting a number of conventions of varying importance on the international statute book: Genocide, 1948; the International Right of Correction, 1952; Political Rights of Women, 1952; Status of Refugees, 1951; Status of Stateless Persons, 1954; Supplementary Convention on the Abolition of Slavery, the Slave Trade and similar Institutions and Practices, 1956; Nationality of Married Women, 1957; Reduction of Statelessness, 1961; and, last but not least, an instrument regulating a subject which is essential to the social and economic progress of the underdeveloped world, and of great significance for the goal of human dignity — the Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages, 1962. The Convention against Discrimination in Education, 1960, was adopted by the General Conference of UNESCO on United Nations initiative. In other respects, such as in regard to freedom of information, the Organization was less successful, although some progress has been achieved even

[5] Letter dated April 3, 1953, from Mr. Dulles to the United States representative on the Commission on Human Rights and statement by Mr. Dulles before the United States Senate Judiciary Committee of April 6, 1953, both reprinted in "Review of the United Nations Charter," 83rd Congress, Document No. 87, p. 263 and p. 293.

there. Freedom of information is a field where, in the words of a more general statement by the author, "ideological conflict is most apt to be acute and commitments in general language to be illusory." (p. 58) At its 1964-65 session, the draft of an "International Convention on the Elimination of All Forms of Racial Discrimination" was before the General Assembly of the United Nations. This is a project which precisely meets Jenks's criterion when he says that "periods of acute international tension, so far from rendering impossible any progress in the matter, often create the sense of urgency necessary to give the momentum required for such progress." There is reason to believe that when what Assistant Secretary of State Harlan Cleveland has called the "hospitalization of the General Assembly" caused by the conflict about the expenses of peace-keeping operations comes to an end, positive action on the draft will be taken.

In 1927, when it decided the Lotus Case, it was still possible for a majority, but only a bare majority, of the Permanent Court of International Justice to declare that international law regulates the relations between "coexisting independent communities" and that "restrictions upon the independence of states cannot therefore be presumed." A generation later we are evolving towards a position in which it is the denial of interdependence of states which "cannot be presumed." (p. 72) "The concept of interdependence is not an incantation by reciting which everyday problems can be resolved." (p. 81) However, an approach dictated by the conviction that the interdependence rather than the independence of states is the basic conception of contemporary international law will lead to results radically different from, and infinitely more constructive than, those which would derive from an outworn dogma of independence.

In a very important chapter Jenks attempts an imaginative approach towards an explanation of the basis of obligation in international law, a task which has perplexed, and divided, legal philosophers and international lawyers since the beginning of international law. "Can we really expect," he asks,

> to find in a postulate which expresses itself in a somewhat trite Latin maxim [*pacta sunt servanda*] or in a fundamental norm which, whether we regard it as a hypothesis [Kelsen] or an axiom [Verdross], is essentially an intellectual abstraction, a source of the moral dignity, emotional power and political authority necessary to give vitality to the obligation of international law?

The concept proposed by Jenks, that the basis of obligation is to be found in the will of the world community, represents "the fruition rather than the rejection of previous legal thinking,"

> a synthesis of rival and apparently conflicting views in which each of them . . . makes a significant contribution towards a concept which has the simplicity, the authority and the dynamic quality necessary to establish the obligation of international law in the hearts and minds of the people. (pp. 88-89)

In one of the chapters (pp. 101 *et seq.*) the author gives an impressive picture of the legislative and quasi-legislative work of the International Labor Organization, in the service of which he has spent a lifetime and to the success

of which he has contributed and continues to contribute so much. Influenced, no doubt, by the *genius loci* (the paper was delivered at the School of Law of the University of Bologna), Jenks constructs a parallel between the legislative enactments which constitute Justinian's *corpus juris civilis* and the result of the work of the I. L. O., which he calls the *Corpus Juris of Social Justice.* Technically, there are fundamental differences between the "International Labor Code" on the one hand and the great civil law codifications of Justinian, and, for that matter, of Napoleon and the authors of the other great national civil codes, on the other. While his Bologna audience may have had a sufficient knowledge of Roman law to perceive these differences, to avoid misunderstanding by the general reader of *Law, Freedom and Welfare,* it might have been useful if the author had elaborated upon them somewhat more than he did. The "International Labor Code" is a systematic compilation by the Secretariat (i.e., the International Labor Office) of existing international labor conventions and recommendations which does not add anything to the validity and field of application of these instruments. Justinian's *codex,* of which this Secretariat compilation is supposed to be the equivalent, was the re-enactment, with additions, modifications and omissions, of the legislation of the various Roman emperors (*constitutiones*). The *codex* replaced all the previous legislation of the emperors and previous compilations thereof.

The Digests (*Justiniani Digesta*), another part of the emperor's codification, is also an enactment by the emperor based on, and replacing, the writings of Roman lawyers who, centuries earlier, had been granted the *ius respondendi.* The law set forth by those lawyers lost its status as a source of law and remained applicable only as re-enacted in Justinian's Digests. No equivalent to this exists in the *Corpus Juris of Social Justice* today. Jenks speaks of a prospective digest gradually emerging which, one day, will consist of a systematic arrangement of analogues of decided cases supplemented by analogues of law officers' opinions.

Another part of Justinian's legislative work is the *novellae,* i.e., about 150 laws enacted by Justinian in the thirty years (A. D. 535 to 565) following the enactment of the *corpus juris.* They were not made part of the *codex.* As a consequence, each of them is an independent statute. It is not surprising that an equivalent to this does exist in the international labor field, and, for that matter, wherever a codification or a compilation has taken place. The International Labor Code can be rearranged and reissued only at relatively infrequent intervals, and there are therefore at any given time almost always a number of conventions and recommendations adopted since the last compilation. Jenks's *novellae* of social justice would also include a wide range of international standards of social legislation and policy which have not been embodied in conventions or recommendations, as well as regional supplements and standards for particular industries. (p. 129)

Justinian's *institutiones* are both a textbook and a law.[6] That the *corpus juris* of social justice still lacks its Institutes is a matter for neither surprise nor regret. (p. 130) Almost a thousand years elapsed between the time when the

[6] *"plenissimum nostrarum constitutionum robur eis accommodavimus" (constitutio Imperatoriam maiestatem* of November 21, 533).

Law of the Twelve Tables is assumed to have been enacted (451-450 B.C.) and the enactment of the Institutes of Justinian (A.D. 533). Jenks submits that we have been favored rather than unfortunate in the fact that the Institutes of social justice remain to be written. If they had been written a generation or even a decade ago the emphasis would have been quite different from that which the needs of the future require. They would inevitably have reflected a view of the world projected from the traditional heartland of international labor legislation in Western Europe rather than the more broadly based and more balanced view which has now become intellectually possible simultaneously with its becoming politically and morally indispensable. Even for the remote future Jenks does not, of course, consider the adoption of a textbook in the form of an international labor convention and he contemplates that the time will come "for the Gaian, though not yet [?] the Justinianan Institutes of Social Justice." (p. 131)

While the parallel between the International Labor Code and the work of codification of Justinian may be open to challenge on strictly technical grounds, on the philosophical, ideological, and jurisprudential level there is much that can be said in support of such an analogy.

Just one hundred years ago Rudolph v. Ihering said about "The Importance of Roman Law for the Modern World" that "The world-historical role and mission of Rome may be summed up in one word as the over-coming of the principle of nationality by the concept of universality." This statement can certainly also be applied to the impressive body of international labor legislation of the twentieth century.

Ihering went on to say about the system of Roman law:

> A strange phenomenon! A dead body of law awakening to new life! A body of law, laid down in a foreign tongue, accessible to the scholar only, which meets with resistance everywhere in life and yet pertinaciously forges ahead, finally gaining admittance and victory. What it had failed to achieve at the time of its operation, of its flowering and full force: to regenerate the laws of foreign peoples — it did achieve five hundred years later. It had to die before it could unfold in full vigor. And how it did this! Nothing, at first, but a grammar of law in the hands of those desirous of learning, it soon rises to the rank of a code of law, in order, finally — its *formal* authority having been called in question and nearly completely rejected — to assume in exchange for such status the far higher authority of a canon of our whole legal thinking.
>
> The importance of Roman Law for the modern world does not lie in the fact that for a period of time it was in operation as a source of law — in this role, its significance was indeed transient — but rather in the fact that it effected a total change within, that it has completely transformed our legal thinking. Like Christianity, Roman Law is a component of modern civilization.[7]

For the context of Jenks's book one might add that Roman law has been, not

[7] RUDOLPH V. IHERING, BEDEUTUNG DES RÖMISCHEN RECHTS FÜR DIE MODERNE WELT 6 (Leipzig, 1865). Printed also in the second and later editions of Ihering's GEIST DES RÖMISCHEN RECHTS.

only in the civil law countries, one of the essential elements in the development of international law.

When read after one hundred years, this brilliant passage sounds, in part, both parochial and dated: parochial, because the great civil lawyer proceeded as if the common law system did not exist; dated, because in the one hundred years since 1865 the principles for which the International Labor Organization stands — from the regulation of the hours of work and the protection of the worker against sickness, disease and injury, to the effective recognition of the right of collective bargaining and the combating of discrimination in employment and occupation — have made an inroad into the "grammar of law" and have made social and labor legislation, international and national, a no less important component of modern civilization than Roman law.

Law, Freedom and Welfare shows imagination and sweep; it is a mine of information on broad developments as well as on many little-known details of the law; it is an inspiration to those who, as judges, as counsel, as international or national administrators, as teachers or as scholars work in the field of international law. Only a few indications of some of the questions dealt with in the book in a masterly fashion could be given in this review.[8]

EGON SCHWELB

[8] It is a great pity that the printer of so distinguished a work appears to be in a state of war with the Latin language. The printer communicated with the reader on the *Corpus Juris Justinianus* (p. 113); according to him Suarez wrote *De legibus ac dea legislatore*. (p. 84)

IN SOLITARY WITNESS: THE LIFE AND DEATH OF FRANZ JAGERSTATTER. By Gordon Zahn. New York: Holt, Rinehart and Winston, 1964. Pp. 277. $5.95.

Professor Zahn here reports the results of a mission somewhat like that of the English monsignor in Morris West's novel, *The Devil's Advocate*. In each, the subject of inquiry was an extraordinary Christian, a man whose example was largely ignored by the people who knew him best until canonization seemed the only way for them to catch up. The stories are not, however, entirely alike. The monsignor had an ecclesiastical commission to study miracles; the professor had a grant to study behavior, and found no miracles[1] except an Austrian peasant who was able to resist literally every tangible inducement to support the Third Reich.

Franz Jagerstatter was a farmer and parish sexton in the village of St. Radegund, a part of the same district in Austria which produced Adolf Hitler (Braunau-am-Inn) and Adolf Eichmann (Linz). He was exceptional, if at all, only for a somewhat more pronounced piety than the villagers ordinarily thought necessary for agriculture, and for relatively strong misgivings about the *anschluss* of 1938 and the growth of National Socialism, in the fragments in which it was

[1] This may be too flippant. Zahn mentions an Austrian nun who said she "had extraordinary help in a spiritual manner through Jagerstatter's intercession." (pp. 106-7)

manifested in rural Austria. He was married, the father of three children and the support of his mother.

Jagerstatter was summoned for compulsory military training in 1942, reported and served an apparently obedient novitiate in the German army. In 1943 he was ordered to the seat of his diocese, Linz, for induction into active duty. When he arrived at the induction center he refused to accept service or to take the oath required of noncombatant soldiers. He was arrested, imprisoned, tried by a military tribunal for the statutory crime of resisting the war effort, sentenced to death, and, on August 9, 1943, in Berlin, beheaded.

Zahn first learned of Jagerstatter in Heinrich Kreuzberg's book on another rebel, Franz Reinisch, a priest who was killed in 1942 for resisting the war effort.[2] With the assistance of a research grant for sociological study (from the Penrose Fund of the American Philosophical Society), Zahn spent the summer of 1963 in Austria and Germany assembling the interview notes and sparse documentation on which this study is built. Because the book can be viewed in several perspectives, it is important to note that it appears to contain virtually everything that is available on Jagerstatter. Zahn analyzes the results of innumerable interviews with villagers, chaplains, former prisoners who knew Jagerstatter — virtually everyone who could be found who had information about him. He adds to these, in his textual discussion or in the appendix, all of Jagerstatter's writings, a thin collection as personal papers go, but a remarkable achievement for a man who, but for Hitler, would probably never have written anything more extensive than an entry in the family Bible.

The resulting study can be viewed as an attempt to explain the psychology of this "solitary witness"; or it can be analyzed as a sociological study, with all of the application of scientific measurement to human life that profession ordinarily attempts. It can be regarded as an addition to the growing literature on the atrophy of Christian institutions in "the greater Reich" during the rise and fall of National Socialism, or, in a more positive sense, as a triumph of conscience acting outside of those institutions.

The greater part of Zahn's effort was directed to the first of these perspectives. Why did Franz Jagerstatter resist not only the pressures of his government but the advice of *every* member of his family, *every* friend, *every* priest he consulted, his legal counsel, and the members of the military tribunal who tried him? One immediate possibility is that Jagerstatter was a fanatic; it was perhaps easier to make that judgment in Austria in 1943 than it is to make it now at Loyola University — where Zahn is professor of sociology — but Zahn considers the possibility compelling enough to justify a good deal of time to disprove it.

The first priest — a temporary curate — to advise Jagerstatter on the immediate issue of induction thought him "thoroughly sound in his approach to religious matters." This was also the judgment of other priests who advised him and of his defense counsel, all of whom Zahn interviewed. But most laymen who knew Jagerstatter thought he was too pious — *frömmigkeit* is the word they used. Fifty-seven of the village's sons died in military action for the Third Reich,

[2] FRANZ REINISCH: EIN MARTYRER UNSERER ZEIT (1953), an appendix to which discusses Jagerstatter's case.

these people pointed out, thirty-three of them in Russia. The isolated reaction of one villager, patently hostile to this loyal response, was, they thought, best attributed to mental instability. On the other hand, a good many of the villagers expressed support for Jagerstatter's canonization, because he acted in obedience to his conscience, and, ironically, Jagerstatter's name is on the village war memorial; his ashes are buried in a place of singular honor in the churchyard.

A number of motives other than fanaticism are suggested in Jagerstatter's letters and essays and in the village interviews. He said on several occasions that he would not support a regime that persecuted the Church — something that must have embarrassed the clerics who, when National Socialism was no more than a political party, had denied communion to its adherents, but who found it possible to advise loyalty after the party began winning elections. He also told more than one person that he refused to enter the military life because it involved too many temptations to an unvirtuous life; these remarks seem hardly consistent with his acceptance of military training and are probably best understood as conversational arguments.

Another explanation is that Jagerstatter was a pacifist. He had contact with members of the Jehovah's Witnesses sect — a cousin of his, in fact, was a local proselytizer for it, and at least twenty Austrian adherents of the sect had been executed for refusing to accept military service at the time Jagerstatter came to trial. Jagerstatter's bishop, Bishop Fleisser, writing after the war, pointedly remarked that the two positions were similar, then concluded that, although "all respect is due the innocently erroneous conscience . . . for the instruction of *men*,[3] the better models are to be found in the example set by the heroes who conducted themselves 'consistently' in the light of a clear and correct conscience." (p. 166) But Zahn is convinced, principally from the village interviews, that Jagerstatter would have taken up arms against Germany had the *anschluss* been decided the other way. (Jagerstatter was the only citizen in his village to vote *"nein"* in that election.)

A final explanation for Jagerstatter's martyrdom is that he believed the German army was waging an unjust war and — more important — that the individual Christian, once he had reached that conclusion, was obliged to resist his own country's war effort. "I cannot and may not take an oath in favor of a government that is fighting an unjust war" (pp. 106-7) — these were Jagerstatter's dying words.[4] "Naturally," he had written[5] a year or so earlier, "the words sound sweet to our ears when we are told that others bear the responsibility for the results." (p. 229)

[3] This virile use of "men," by Bishop Fleisser, confined to those who fought for the Fatherland, bears comparison with a short passage from Thoreau which Zahn quotes at 201-02:

> Must the citizen ever for a moment, or in the least degree, resign his conscience to the legislator? Why has every man a conscience then? I think we should be *men* first and subject afterward. (Emphasis added.)

Zahn draws no parallel, but the juxtaposition may not have escaped him.

[4] He is reported to have said this to the prison chaplain in Berlin on the night of the execution.

[5] In "On Responsibility," one of nine essays written at St. Radegund, probably in 1942; they are reproduced by Zahn, one of them in the text, the remainder in an appendix.

Because Jagerstatter had been convinced that the Nazi regime was unjust before it even became a regime, his conclusion that its wars of conquest were unjust was hardly surprising. His immediate problem was not this intellectual judgment, but the question of what he should do about induction. His experience, his reading, and his introspection all argued for resistance, but, like More, he was unwilling to resist if there was a moral alternative.[6] Almost everything Zahn's considerable research has unearthed argues against Bishop Fleisser's somewhat flippant postwar conclusion that Jagerstatter "thirsted for martyrdom and for the expiation of sin." (p. 165) The more persuasive conclusion is that Jagerstatter thirsted for any kind of pastoral advice against martyrdom which was not patent accommodation. "[T]here is no longer any likelihood that there will be a bloody persecution of Christians here, for virtually anything the Nazis want or demand Christians will yield," he said. (pp. 113, 214)[7] "Almost all of us are quite willing to glut ourselves on the spoils of thievery, but we want to saddle the responsibility for the whole dirty business on one person alone!" (p. 224)[8] His essays and letters are filled with this almost despairing cry for courageous guidance: "I cannot turn the responsibility for my action over to the Führer," (p. 105)[9] and from the essay "On Responsibility": "No one wants to accept responsibility for anything." (p. 227) Elsewhere he wrote:

> One really has no cause to be astonished that there are those who can no longer find their way in the great confusion of our day. People we think we can trust, who ought to be leading the way and setting a good example, are running along with the crowd. No one gives enlightenment, whether in word or in writing. (p. 229)

> If road signs were ever stuck so loosely in the earth that every wind could break them off or blow them about, would anyone who did not know the road be able to find his way? And how much worse is it if those to whom one turns for information refuse to give him an answer or, at most, give him the wrong direction just to be rid of him as quickly as possible! (p. 230) [10]

> If people took as much trouble to warn men against the serious sins which bring eternal death, and thus keep them from such sins, as they are taking

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[6] Compare More's careful position on the oath demanded of him by Henry VIII — that he refused the oath, but refused also to risk greater royal displeasure by explaining why he refused the oath. Letter of April 17, 1534, from More to Margaret Roper, in ELIZABETH F. ROGERS (ed.), ST. THOMAS MORE: SELECTED LETTERS 216, 220 (1961):

> I feared lest the King's Highness would as they said take displeasure enough toward me for the only refusal of the oath. And that if I should open and disclose the causes why, I should therewith but further exasperate his Highness, which I would in no wise do, but rather would I abide all the danger and harm that might come toward me, than give his Highness any occasion of further displeasure than the offering of the oath unto me of pure necessity constrained me.

[7] From the essay, "On the Question of Our Day: Catholic or Nazi."

[8] From the essay, "Little Thoughts Concerning Our Past, Present and Future."

[9] A remark, shortly before his death, to the prison chaplain.

[10] This paragraph and the preceding one are from the essay, "Is There Anything the Individual Can Still Do?"

> to warn me against a dishonorable death, I think Satan could count on no more than a meager harvest in the last days. (p. 233)[11]

No one, to be sure, wanted to see Jagerstatter die. No one counselled him that his accepting death rather than military service was subjectively sinful — although many, including his bishop, continued to believe, even after the war, that Jagerstatter was in error. The argument made to him — by village curate, prison chaplains, bishop, defense counsel, and military judges — was that he should think first of his farm and his family. And Jagerstatter answered: "[I]f I had ten children, the greatest demand upon me is still the one I must make of myself." (p. 53) They argued that there was a distinction between defense of the Fatherland and support, incidental support perhaps, of a regime that could be overthrown after the war was won. But Jagerstatter found it impossible to support the regime without bearing guilt for what it did. "Many people believe quite simply that things have to be the way they are," he said. "If this should happen to mean that they are obliged to commit injustice, then they believe that others are responsible." (p. 101)[12]

Jagerstatter's choice was an utterly lonely one. In all of the months he faced death, and at every moment could have escaped death with the moral rationalization urged upon him by his confessors and his bishop, he found only one scrap of encouragement — the news that Franz Reinisch had been executed for the same crime. (The evidence, mainly the observations of persons near Jagerstatter when he received this news, is that it had an enormous influence upon him.) The effect that a word or two of encouragement meant to a resister in those dark days is described by Sartre:

> Because the Nazi venom seeped into our thoughts, every accurate thought was a conquest. Because an all-powerful police tried to force us to hold our tongues, every word took on the value of a declaration of principles. Because we were hunted down every one of our gestures had the weight of a solemn commitment.[13]

But no word of encouragement came to Jagerstatter; the Austrian Church had long since capitulated:

> For us Austrians, our Maundy Thursday was that infamous April 10, 1938, the day the Austrian Church let herself be taken prisoner, and ever since, she has lain in chains. And not before this *Ja* (which even then was given very hesitantly and anxiously by many Catholics) is balanced by a resounding *Nein* will there be for us, too, a Good Friday. We are already being called upon to die, but not for Christ.[14]

In C. P. Snow's novel, *The Light and the Dark,* the two central figures, both

[11] From a statement he wrote on a piece of cardboard in the Berlin prison.

[12] Cf. JEAN-PAUL SARTRE, EXISTENTIALISM 48 (Frechtman tr., 1947): "[W]hat is not possible is not to choose. I can always choose, but I ought to know that if I do not choose, I am still choosing." Also: "I am responsible for myself and for everyone else. I am creating a certain image of man of my choosing." *Id.* at 21.

[13] SARTRE, THE REPUBLIC OF SILENCE, quoted at WILLIAM BARRETT, IRRATIONAL MAN 211 (1958).

[14] From the essay, "Little Thoughts Concerning Our Past, Present and Future."

English academics, visit the Berlin of the early, ambiguous days of Hitler's regime and there meet a Nazi propaganda official. His program for solidifying support of National Socialism is that "in the long run, people believe what they hear — if they hear nothing else."[15] This implies, on the one hand, that the engines of popular support must be active — and Zahn hardly needed to assemble evidence that they were active in Austria in 1942 and 1943; the most persuasive propaganda in those months would have been simple news reports of the campaign in Russia. On the other hand, the people must hear nothing else; the possible engines of resistance must be silenced. The utter pathos of the German-Austrian Church which sounds through the documents of Franz Jagerstatter is that it did not even need to be silenced. It not only willingly retreated to its corner, it advanced the Nazi war effort and even, at times, tolerated the domestic programs of sterilization and abortion.

Because Jagerstatter's was a "social background one would not ordinarily associate with such an overtly rebellious act" (p. 4), he seemed to pose significance to Zahn as a sociologist. In a way the professional appeal is regrettable because scientific interest is sometimes an obstacle to the far more important task of presenting a balanced picture of an unusual man; certainly the sociological apparatus — whether or not one wishes to call that apparatus "scientific" — usually shows up as an unnecessary complication in the story.[16] (Zahn admits that, because he is both a Catholic and a conscientious objector, his personal involvement in the story was not entirely consistent with his "scientific" interest in it.[17]) But his principal sociological comment, fortunately, is confined to a final chapter on rebellion against civil authority. In this chapter he makes two significant distinctions — between, on the one hand, a rebel who cannot identify himself with any institutional or historical position and a rebel who looks for support to an institution to which he can remain loyal even while he defies his society; and, on the other hand, between the Church as an almost governmental institution, something which finds it awkward to resist what civil authority does, and the Church as a community of believers which looks to its own historical tradition for its sanctions rather than to the values of the society which surrounds it.

Zahn therefore sees Jagerstatter as a rebel who sought his sanction in the Scriptures and the stories of saints, which were almost his only adult reading, rather than as a rebel who had no historical identification at all. The institution failed to produce a similar communal reaction because it ignored its history. It takes no great sophistication in behavioral science to understand that; at any rate, Franz Jagerstatter appears to have understood it. "[M]ost institutions," as William James put it, "by the purely technical and professional manner in which

[15] SNOW, THE LIGHT AND THE DARK 263 (1947).

[16] This is particularly apparent in the early chapters of the book, where his penchant for sociological jargon — "extreme social deviant," "social codes," "deviant individual or family," etc. — is more apparent than in the later chapters, when, one might conjecture, Jagerstatter begins to dominate his thought as a man rather than as a phenomenon.

[17] "It was not very long . . . before it became clear that I was 'involved' in the unfolding story . . . as a Catholic [and] . . . as a conscientious objector." (p. 6) Zahn has done a significant amount of scholarship on the sociology of conscientious objection, notably in his doctoral thesis at the Catholic University of America.

they come to be administered, end by becoming obstacles to the very purposes which their founders had in view."[18] At least to the devout Catholic, that sort of judgment about his Church as a community of believers is difficult; it clearly formed no part of Jagerstatter's rebellion. But the judgment is almost inevitable when one considers the German and Austrian Church, and neither Jagerstatter nor Zahn evaded it:

> The Church with which he linked his refusal to serve was the Church of prophets and martyrs that had been abandoned and rejected by those who constituted the acting Church in Nazi Germany and Austria. (p. 192)

> If the Nazi war effort did not meet the traditional requisite conditions of "the just war," and I have seen no serious theological effort to prove the contrary, it would seem that . . . the Bishop, not the peasant, and all of the Catholics he regarded as "greater heroes" were acting in erroneous conscience, that only Jagerstatter acted in accordance with the *objective* fact that Hitler's wars were not the just wars in which the Christian is permitted to bear arms. (p. 171)

In the last analysis Jagerstatter's witness does not yield to concepts; it was a total human response, a courageous acceptance of responsibility for the injustice of Hitler's wars that few men were willing to bear at that time and place. For this reason, sociological restatement of what he did seems faintly irreverent, and philosophical analysis in terms of moral postulates seems inadequate. The contribution this book makes is that it competently assembles information. The Jagerstatter story is more exciting than West's story of the English monsignor and the Italian saint, for the Jagerstatter story happened. But there remains here a task for poets; the last word about Franz Jagerstatter will be written by a Morris West or Jean Anouilh or Robert Bolt of the future.

THOMAS L. SHAFFER

[18] JAMES, A PLURALISTIC UNIVERSE 96 (1932 ed.).

THE CITY OF THE GODS: A STUDY IN MYTH AND MORTALITY. By John S. Dunne, C.S.C. New York: The Macmillan Co., 1965. Pp. xii, 243. $5.95.

Every man, conscious of the meaning of being human in his society and age, is aware that he will die and that he desires to live. It is the contention of John Dunne's *The City of the Gods* that in each society and age there is a characteristic expression of this awareness, this desire, and their reconciliation. This expression is here called a "myth." The reconciliation is effected as a problem is solved. Each myth purports to be a solution to the problem of death.

In itself Dunne's theme is not entirely new. As he observes, he has been influenced by Heidegger's view of human existence as a "being towards death." (p. vii) Miguel Unamuno has distinguished men from animals by man's care for his dead, and has seen all love as a search for eternity.[1] Sigmund Freud has

[1] "¡Eternidad! ¡eternidad! Este es el anhelo; la sed de eternidad es lo que se llama amor entre los hombres; y quien o otro ama es que quiere eternizarse en el." MIGUEL

said, "the evolution of civilization may be simply described as the struggle of the human species for existence."[2] Norman Brown has attempted to combine anthropology and psychology in explaining how man "represses his own death" and "aggressively builds immortal cultures and makes history in order to fight death."[3] These statements have affinity to Dunne's thesis, and the psychoanalytic approach of discovering hidden meaning beneath the apparent purpose of human gestures has affinity with Dunne's approach. Yet Dunne's formulation of cultural history in terms of the problem of death and its mythical solution is original. In relating his theme to a variety of cultures, he gives it concreteness, richness, power — in a word, a development which constitutes a subtle and perceptive contribution to the investigation of human purpose.

Three examples may suffice to specify Dunne's general thesis. The myth of the post-Homeric, pre-Platonic Greek city-state was the immortality of the past. A man was his deeds; his deeds were immortal. Man and his city lived forever in deeds that could not be undone. In a society of this kind, tragedy as Aeschylus testified, consisted in this, that evil deeds once done could never be undone. In such a society, law was set by the immortal past. In such a society, Pericles could be sure that the Athenian warriors had not died in vain, for, whatever the future of Athens, their deeds, and so the city itself, would never die. The myth governed the approach to art, to law, to political existence. (pp. 93-99)

The myth of the hierarchical society of medieval Europe was that the office or role of a man was immortal. Discord existed if a man was not in his proper office, but there was no tragedy; for a harmonious rearrangement fitting everyone to his proper place in an actualization of all the potentialities of the hierarchy was possible, as Dante contended in *Monarchy,* and showed in *The Divine Comedy.* The function of law, as Gratian witnessed, was to make harmony of discord. Law kept man in his proper role. No office died. At the summit of society was the emperor or king assimilated in his body politic to Christ in his risen body. The state was immortal as its ruler was immortal. (pp. 163-72)

In modern Western society the myth is that the future is at man's disposal. In this society, tragedy lies in not having a future, as Arthur Miller demonstrates in *Death of a Salesman.* The purpose of law is to channel future action; it looks to results more than precedents. The society itself is immortal as long as its future lies ahead. Unlike Pericles at Athens, Lincoln at Gettysburg could believe that the fallen Union soldiers had not died in vain only if the future vindicated them. (pp. 205-12)[4]

In describing these different attitudes toward death as myths, does Dunne imply that each statement is untrue? The answer is, no and yes. Each myth,

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UNAMUNO, DEL SENTIMENTO TRAGICO DE LA VIDA EN LOS HOMBRES Y EN LOS PUEBLOS 38-39 (Buenos Aires, 1937).

[2] Freud treats Eros or "the instincts of life" as a force engaged in perpetual struggle with Death or "the instincts of destruction." SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 103 (tr. by Joan Riviere, London, 1930).

[3] NORMAN O. BROWN, LIFE AGAINST DEATH: THE PSYCHOANALYTIC MEANING OF HISTORY 101 (New York, 1959).

[4] Gratian and Miller are added here; their addition may suggest how satisfactorily the thesis of the book may be extended beyond the examples it itself provides.

in fact, reflects some human experience. Some deeds cannot ever be literally undone, and some men may be unforgettable by virtue of their deeds. Status has actually survived those who enjoyed it. The future has vindicated the sacrifice of some who have fallen. Yet, while the myths reflect experience, they are false as solutions to the problem of death; indeed, they reflect a basic misconception. There is, Dunne holds, no solution and no problem; there is only a mystery which man can never by his own efforts solve.[5] Among the responses to the facts of death and the desire for life, Christianity holds a privileged position because it denies neither the one nor the other and yet offers no human solution, leaving the mystery to the God to whom Abraham and Isaac are alive. This view of Christianity is the evaluation of Dunne, a Christian theologian. Whether this evaluation is accepted or not, his account of the myths may be accepted independently. It rests on a combination of anthropological, political, legal, and literary evidence, and on a judgment on the nature of man.

There are, it seems to me, two tests by which to measure the value of an insight claiming to account for a great variety of human action: Does it focus on a human element of great importance? Is it heuristic? Obviously, I should say, no single insight, however perceptive, will suffice to account for everything. Class warfare is one phenomenon from which a perspective may be gained on all society; the sexual drive, in all its manifestations and sublimations, another. The history of the West may be read as the development of a will to die, or as a series of challenges and responses. None of these theories, however inclusive its author purported to make it, has been persuasive to the disinterested observer as a full explanation of all the phenomena it undertook to explain. The value of each of them, however, has been measurable in terms of the two tests applicable here.

In the present instance the author is too modest and too sagacious to proceed with the fanatical certainty that has marked some of the famous theorists of human action. Nonetheless, he presses boldly his claim that most societies have been built on their solutions to the problem of death. I react to generalizations of this breadth with the conviction that any such statement cannot be adequate to embrace the phenomena of human life. The reductive method finding "this" is "essentially" "that," catches one aspect but loses another. In particular, it seems to me that the drive to love and to be loved is distinct from the desire for life. "Neither Creator nor creature ever was without love," teaches Dante.[6] When Unamuno says that love means to eternalize oneself in one's beloved, he ignores Dante's example of Francesca da Rimini and her beloved caught in an eternal loveless union.[7] Dunne reads the Tithonus myth as a "sour grapes" rejection of immortality. (p. 70) I read it as a statement that life without love

[5] Dunne's use of "problem" and "mystery" may be compared with that of Marcel's distinction between a problem as an objective matter which can be solved and a mystery as "something in which I am myself engaged." GABRIEL MARCEL, ETRE ET AVOIR 169 (Paris, 1935).

As for Marcel, so for Dunne, the idea of mystery may be "bound up with the very idea of God." GABRIEL MARCEL, METAPHYSICAL JOURNAL 161 (tr. by Bernard Wall, London, 1952).

[6] DANTE, PURGATORIO, 17.92.

[7] DANTE, INFERNO, 5.

is intolerable. Only in the spirit of pushing a thesis to its logical limit could it be asserted that "when desire is specified . . . it invariably turns out to be a form of the desire to live." (p. 221) Dunne's thesis, however, is not to be judged at its logical limit. It is to be measured by the two relevant tests: Does it focus on a human element of great importance? Is it heuristic?

The answer to the first question depends, in part, on common-sense observation, in part, on detailed, specialized investigation and interpretation. The fact that man dies is as obvious as that man has sexual tendencies. The fact that man desires to live is, perhaps, equally obvious. That the reconciliation of death and the desire to live underlies some human acts, such as praying for longevity, is as obvious as that the sexual impulse often leads to marriage. The difficult task is to show that the impulse, so evident in certain public ways, is also at work in a multitude of unacknowledged channels.

The evidence Dunne adduces here is drawn from a range extending from Babylonian society to modern Russia. It is taken principally from literature and law. Evidence is necessarily selective; it is helpful evidence if it is given without the suppression of counterevidence, presented with a candid estimation of its probativeness, chosen with a sense of relevance which excludes the farfetched and the repetitious. On these scores Dunne's evidence is helpful. It is fairly, candidly, relevantly selected. It is not massive; a Frazer might have written a book for each of Dunne's chapters. This sparseness of documentation is both a weakness and a strength. The evidence is not accumulated to the point where assent is compelled. Yet enough evidence is presented to suggest that Dunne's view is not fantastic or purely speculative; and the reader's mind, not overwhelmed by data, is led to focus on prime clues. Only a good anthropologist could assess the validity of Dunne's use of the evidence from early societies to show that cities were once built so that men could live with the gods (pp. 30-34), or that councils were organized so that men could sit and deliberate like gods. (p. 43) Only a close student of literature could evaluate decisively the interpretation of *The Iliad* as parody (pp. 50-52), or of *The Divine Comedy* as a comedy. (pp. 163-72) A less specialized reader can only report that Dunne appeals to good authorities, that his reading of the data is perceptive and nuanced, and that each piece of evidence has been chosen by a discriminating intelligence. The evidence is, I think, sufficient to establish that mythical solutions of the problem of death have played a substantial role in human cultures. The reader, faced with the manifold implications of the myths, is not coerced, but he is attracted by the thesis, stimulated by its development, and himself, perhaps, led to speculate.

By this second test, its power to cause investigation and discovery, the book is as successful as by the test of the significance of the human tendencies explored. In the area of law, Dunne's proposition bears both on the general nature of law and on particular legal institutions. It may be useful to consider the kind of questions his book directly or indirectly raises.

If natural law is conceived of as based on human wants and human limits, then Dunne's work brings needed emphasis to a fundamental aspect of natural law. The basic facts of immortal longings and mortality may be obvious; their

impact on the structure of law is not. Dunne's thesis that human law-making is radically affected by solutions to the problem of death invites a jurisprudential response. A jurisprudence appealing to man's nature must call attention to the permanent roots of the myth-making and describe the danger in each inadequate solution to the problem. "Natural law" thinking then will function as useful agnosticism before solutions to what is a mystery.

From this perspective such an old concept of jurisprudence as "equality" may be freshly examined. In recent discussion it has seemed that this term was perfectly empty, since no one is willing to say that all men are equal in all respects.[8] Men are equal to other men in some respects and are entitled to equal treatment in some ways. How do you establish what respects are relevant? It has been difficult to answer this vital question by another resort to "equality." In a society which believed in God, it would seem that the question might be answered theologically, by an appeal to man's relation to the living God: all men, it could be said, are equal before God, in the sense that no man has a more valid claim to eternal life than any other man. If the society does not believe in God, the most evident respect in which all men are equal is their mortality. In either case, the view of death, and the solution of the problem of death, affect the determination of equality. "Equality under God and the law" suggests certain respects in which men will be differentiated; "equality before death and the law" suggests other respects. The difference between the two formulas is not enough from which to deduce all the differences between a society accepting one and a society accepting the other; it is a starting point for observation. The formulas, differing in their view of death, imply consequences which the bare abstraction "equality," unrelated to the problem of death, fails to convey. There is usefulness, then, here in Dunne's hypothesis.

Dunne's approach might also be used to illuminate various types of natural law theories. He himself applies it to two natural law theories of the Roman empire. The late republic and early empire, he contends, solved the problem of death by insisting on the uniformity of human experience; in forty years, as Marcus Aurelius said, a wise man had experienced everything.[9] In the context of this solution a natural law was posited which took it that the experience of all men was the same. (pp. 141-43) In the later empire, the diversity of legal patterns tolerated in the Roman system made men think that all men had in common was their animal nature; the old view of natural law was rejected; and with its rejection went the myth of uniform experience. A new solution to the problem of death became necessary. (pp. 147-48)

Clearly, the Stoic view of natural law has much in common with Aristotle's; the Roman myth on the solution of the problem of death, so different from the Athenian one, cannot be the sole reason that Stoic natural law was congenial to first century Roman minds. Yet the relation between the myth's teaching of the sameness of human experience and the prevalence of natural law is worth

[8] Cf. HANS KELSEN, LE DROIT NATUREL 47-57 (Paris, 1959).

[9] MARCUS AURELIUS, MEDITATIONS 11.1 (ed. & tr. by A. S. L. Farquharson, Oxford, 1944).

exploring. As Hume maintained, and as Dunne repeats (p. 142), our own modern beliefs on the probative force of experience rest on shaky ground.[10] If the Roman myth of recurrent experience strikes us now as unlikely, it may aid our modern understanding of a natural law "based on experience" to examine a natural law "based on recurrent experience," and to ponder the relation between the solution of the problem of death and the motives for accepting the concept of natural law.

Of the legal institutions to which Dunne's approach might be profitably applied the most universal is war; for if law is the direction of human conduct in accordance with distinct rules, war is a distinct legal state, with rules and objectives, whose varieties may well be partially accounted for by differing views of the problem of death. As this is one institution which may bring death quickly to many men, it might indeed be expected that the current myth would have a substantial effect on its conduct. Why do men fight rather than negotiate? If the cause is hopeless, why do they fight rather than surrender? Why in an ancient age could the result of the combat of two champions decide the fate of an empire, while in a more civilized age it is necessary to destroy women and infants by bombing? Dunne's book does not go far in the explorations of these questions, but far enough to suggest the relevance of his central theme to the perceptible variations in the violence and extent of war. For example, he suggests that the total destruction of a city in Mesopotamian warfare was related to the idea that cities were the abode of gods, and a defeated city had to be destroyed to force its gods to abandon it. (p. 29) Extending his approach to a modern situation one might suggest that the concept of the equality of men in their mortality is related to the use of mass armies to decide national quarrels. Such a suggestion might be compared with De Rougemont's contention that a society's view of love affects its view of war.[11] This kind of hypothesis is not capable of satisfactory proof and is evidently mistaken if intended as a comprehensive explanation. But as furnishing an insight, an approach, it may be helpful. In approaching a legal phenomenon as serious and as little understood as war, the lines suggested by Dunne seem to be of use.

There are more particular legal institutions which offer themselves as prime objectives for analysis in terms of solution of the problem of death. The will is the most obvious one, as on its face it attempts to solve some problems created by death; and one might suspect that the treatment of these secondary problems — the disposition of property, the treatment of the body, provision for the soul's welfare — would be affected by a society's view of the main problem. The trust, in its testamentary form, is an extension of the will which permits a dead man's directions to affect the property of individuals and the conduct of institutions, it may be, for generations; in its inter vivos form it may assure the same kind of influence over the future to a living grantor. The corporation, like the inter vivos trust, permits the living to establish channels for human behavior

[10] DAVID HUME, A TREATISE OF HUMAN NATURE, in 1 PHILOSOPHICAL WORKS 116-20 (Boston, 1854).

[11] DENIS DE ROUGEMONT, LOVE IN THE WESTERN WORLD 243-71 (rev. ed., tr. by Montgomery Belgion, New York, 1956).

which will last long after they themselves are dead. The will, the trust, and the corporation are all peculiarly legal solutions to the problem of death.

Dunne's book itself deals with none of these forms. Lawyers themselves, although they deal with them all the time, rarely advert to their functions in relation to death. Most clients, when having their wills drawn, are able to suppose that in some way they will be affected by what happens to their property after they die and can be sensibly excited by the thought of its falling into the wrong hands, but neither they nor their legal draftsmen speculate on how the actual disposition of the decedent's estate could make the slightest difference to the client now deceased. He remains, personified indeed, as the decedent. The administration and judicial supervision of wills and trusts are undertaken with attention to his express or presumed wishes. The myth is sedulously preserved that by means of the will the client's own living willful intention is still present directing the uses to which his old property is put. The myth that death is overcome by living directions for the future is, perhaps, even more important in the establishment of corporations and charitable institutions designed to live in perpetuity.

The connection between wills and a society's view of death has been noted by the legal historians.[12] Sheehan's recent account of the development of the institution in England begins with the Anglo-Saxon era, in which the will was unknown; the family normally succeeded to the deceased's property, but certain equipment was buried with the body.[13] The Christian view was that the soul lives after death, and with this notion came the idea that the soul's welfare could be influenced by charitable almsgiving at the time of death. Some property — one quarter or one third — should, then, be set aside for almsgiving. This patristic idea of "the soul's share" was introduced to the Anglo-Saxons and became the germ of the institution of the will.[14] Well into the fourteenth century the religious aspect of the will, and the religious motivations for making it, were dominant in England. That testamentary capacity was claimed even for a married woman or a villein who had no general property rights was linked to the view that the will provided for the soul.[15] This relation between the English will and one aspect of Christian theology is well established. What has not been investigated is the relation between modern views of death and the evolution of the will. Land became subject to wills about the time the medieval myth on death was rejected. Would a detailed examination show the spread in the United States of the trust of personal property to be a peculiarly American response to death? How great is the connection between the desire for institutional immortality and the vast amount of private American philanthropy? Does the difference between the American legal form of testamentary arrangements and, say, the Spanish, respond to different views of the problem of death? The close examination of American legal rules, and comparative analysis, would provide a way for testing Dunne's hypothesis that societies are organized around the

[12] E.g., E. F. Bruck's *Totentiel und Seelgerat im greischen Recht* (Munich, 1926).
[13] MICHAEL M. SHEEHAN, THE WILL IN MEDIEVAL ENGLAND 5-6 (Toronto, 1963).
[14] *Id.* at 8.
[15] *Id.* at 16 and at 105.

views of the problem and its solution. I suspect that a study organized to test this hypothesis here would be fruitful.

The connection between the concept of the corporation and Christian theology was explored in much detail eight years ago by Ernst H. Kantorowicz in *The King's Two Bodies.* Shamefully, no American law review considered this work germane enough to the interests of its readers to warrant review. The sole English legal reviewer, S. B. Chrimes, complained, with some justice, that despite the erudition he brought to his examination, Kantorowicz had failed to come "to closer grips with the practical problems and the hard realities which confronted the English common lawyers."[16] Kantorowicz showed that the theology of the divine and the human nature of Christ and the theology of the mystical body of the Church had been applied by canonists to ecclesiastical institutions, by legists to imperial institutions, and eventually by English common lawyers to the Crown. He offered no real hypothesis as to why this kind of adaptation went on. Drawing on Kantorowicz's work for his consideration of the medieval myth, Dunne makes the whole process intelligible by analyzing it as a response to the problem of death. The same kind of analysis might be attempted for the corporation. As Kantorowicz shows, the corporation sole acquired in legal thought the attributes theology assigned to the angels.[17] To say that the lawyers here took over the language of the theologians is to stop at one level of explanation; to say that the lawyers had to solve certain hard practical problems and found appropriate language somewhere is to stop at another level; to suggest that both the problems and the kind of language chosen were a form of response to a universal human situation is to offer a hypothesis of greater explanatory power, however qualifications and caveats must finally limit it. The perspective afforded by *The City of the Gods* leads to this sort of speculation; and this sort of hypothesis as to the more universal function of the legal solutions would seem, in fact, to be germane even to the work of lawyers and judges concerned with the immediate questions of corporate powers and purposes.

We may exorcise death as not proud but pitiful, "slave to Fate, Chance, Kings, and desperate men"; but we cannot legislate or guarantee "Death, thou shalt die."[18] As long as we cannot, Dunne is right in seeing mythical solutions to the problem of death as pervasive in our attempts to order experience. In brilliantly directing our averted attention to the myths, he has done a service of great value.

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[16] S. B. Chrimes [Book Review], 75 LAW QUARTERLY REVIEW 281 (1959).
[17] ERNST H. KANTOROWICZ, THE KING'S TWO BODIES 8 and 394 (Princeton, 1957).
[18] John Donne, "Divine Poems: Holy Sonnets 11," in THE POEMS OF JOHN DONNE 277 (ed. H. J. C. Grierson, London, 1933).