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Books Reviewed

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BOOKS REVIEWED

THE IDEA OF JUSTICE. By Otto A. Bird. New York: Frederick A. Praeger, 1967. Pp. xvi, 192. $5.95.

This is one of four volumes simultaneously published in a series entitled *Concepts in Western Thought,* from The Institute for Philosophical Research headed by Mortimer J. Adler. The others concern Love, Happiness, and Progress. Each is the result of several months' investigation by a team of researchers, but the respective authors are finally responsible for their volumes. In the present book the general editor, Mortimer J. Adler, writes a foreword to explain that the aim is nonhistorical and nonphilosophical; it is rather to give an impartial report "of all points of view and to deal with them in an objective and neutral manner." This approach is termed "dialectical"—"as if the documents represented the voices of participants confronting one another in actual discussion." Now, of course, a fictitious round-table conference at which, for instance, Plato, Aquinas, Hobbes, Bentham, and J. L. Austin are deemed to be present represents a considerable abstraction from time and place. Such an approach, which is that of what may be termed the orthodox Great Books philosophy, is repugnant to those who consider that the terms philosophers use and the overtones of those terms are conditioned by their historical setting, and that one cannot, therefore, thoroughly understand the mind of Plato or of Hobbes without entering rather thoroughly into the Greek world of the fourth century B.C. or the English one of the seventeenth century A.D. On the other side one has to admit that some kind of transspatial and transtemporal endeavor is involved to a small degree in any act of verbal communication whatever. An enterprise such as the one before us enlarges the scope of such an abstraction to a transsecular degree, and undoubtedly even the most thoroughgoing historian cannot altogether escape doing the same. Some intermediate course seems the most satisfactory, and the most usually adopted, but it is of interest to see one of the extreme possibilities in action.

Three main analyses of the idea of justice are detected, reducing justice to conformity with positive law, the promotion of social good, or a natural right. Paradigm statements of these theories are constructed, to which it is admitted that no author quite conforms but with regard to which the main authors, and a variety of others, can be dialectically located. Six fundamental issues are listed: 1. Is justice the same as legality? 2. Is justice a criterion of law? 3. Is justice based on natural right? 4. Is justice, in any sense other than that of legality, an objective norm of human action? 5. Is justice obligatory on its own, apart from legal or social sanctions? 6. Is justice a distinct virtue? The author evidently has a marked interest in the machinery engendered by the three paradigms and the six issues — more, one sometimes feels, than in the writers

themselves, who often prove reluctant to be pigeonholed in one of the ways thus made available, especially the "dialectically difficult" ones such as Plato, Kant, and Hegel.

A feature troublesome to the reader is the occurrence of some names in lists of writers subscribing to one or the other theory, without initials or dates or any mention elsewhere, even in the bibliography. They appear as the detritus of some background research which has left no other mark on the book. However, a very great deal of informative material is presented in an orderly way, which was certainly a prime aim.

The two weakest points in the book concern first, naturalistic ethics generally, and secondly, Aristotle.

In regard to the first we may take some phrases on p. 72 as typical. There we hear of a law "which is not merely hypothetical but categorical and moral"; lower on the same page we have "Hobbes's laws of nature are thus neither moral nor categorical, but individual and hypothetical." Such equations and contrasts appear repeatedly and may serve to show how difficult is the program to achieve a dialectical exposition free from philosophy. To identify moral and categorical obligation is, of course, to adopt a Kantian standpoint, but does it go without saying that this standpoint has to be adopted? There seem to be three main objections to a naturalistic ethic: the Humean one, that "ought" cannot be defined by "is"; the "naturalistic fallacy" objection, that to commend with reference to a standard or end is to deprive oneself of the possibility of meaningfully commending that standard or end; and the claim that a developed moral conscience apprehends moral obligations as unconditional. To Hume, on the other side, one might reply that his objection may apply to a categorical obligation but not, evidently, to a hypothetical one; a doctrine of analogical terms very plausibly circumvents the second objection; and the third, which, we suspect, often operates most powerfully with upholders of the Kantian view, is a simple assertion which one is under no compulsion to accept. There is a further point that needs attention in the second quotation above, the identification of "individual" with "hypothetical." The main values in Aristotle's ethical scheme are not the goals, intermediate or final, just for individuals, but are universal goals for man as such. They do not, indeed, have the status of Kant's values for all intelligent beings whatsoever, but what need does a human ethic have of that bonus of universality?

That brings us to the treatment accorded Aristotle, who seems to need more balanced consideration than being put without hesitation into the natural rights bag. The observation that commands his whole discussion of justice in *Nicomachean Ethics*, Bk. V, is that "in the popular mind the description 'unjust' is held to apply both to the man who takes more than his due and to the man who breaks the law."[1] "It follows that the man who does not break the law and the man who does not take more than he is entitled to will be 'just.' 'Just' therefore means (*a*) lawful and (*b*) what is 'equal,' that is fair." Here is one meaning accorded to the word "just" which would favor a positive

[1] Ch. 1, trans. J. A. K. Thomson, Penguin Classic (1953).

law theory in connection with Aristotle. A few lines later in the same chapter we read: "So here we have one meaning of the word 'just.' It is applied to whatever creates or conserves for a political association its happiness or the happiness of some part thereof." Here a good social theorist is given some ground to stand on. But then again the realization that "it is not always the same thing to be a good man and a good citizen" (ch. 2), the understanding that laws themselves may be just or unjust, and the general context which presents justice as a virtue regulating the appetites of man as such, seem to favor a natural right theory. I would not, therefore, favor classifying Aristotle with the "dialectically difficult" authors, but would rather say that he recognizes the existence of various usages according to which a man is said to be just, that these usages have persisted, and that their presence is what gives plausibility to the various theories of justice. Where these tend to go wrong is in their exclusiveness, motivated by a latent Platonism which assumes that there is only one thing called "justice." Such a standpoint is implied by the very title of this book, and if one surrenders it then the tight dialectical method employed, and the sharp confrontations engineered, have to be considerably loosened and dissipated. Which is not to say that the book is not a valuable map of the territory, only that the territory is more humanly habitable and less severely structured than the map suggests. This is commonly the way with maps.

On the surface the volume is exceptionally well designed. However, the following misprints have been noticed: *nominon* for *nomimon* p. 70 line 10; "triusm" for "truism" p. 73 line 8; *premieres* for *premières* p. 124 note 8; "responsiblity" for "responsibility" p. 151 line 17; *philosphie* for *philosophie* p. 183 s. v. Garin and p. 185 s. v. McKeon; *apriorisehen* for *apriorischen* p. 186 s. v. Reinach; *the* omitted before *Good* s. v. Ross, A.; *chretienne* for *chrétienne* p. 183 s. v. Gillet; *fundement* for *fondement* p. 183 s. v. Leclercq; *pertragtatum* for *pertractatum* p. 188 s. v. Wolff.

Something has gone wrong with the index at one place. The numerous names appearing on p. 121 are all listed at p. 120; the only name on p. 120 (Stone) is listed at p. 121 where it does not appear. Augustine and Kant are referred to both instead of only to p. 121. The numerous references to Maritain are indexed only partially and in a quite haphazard manner.

IVO THOMAS, O.P.

JURISPRUDENCE: READINGS AND CASES. By Mark R. MacGuigan. Toronto: University of Toronto Press, 1966. Pp. xx, 666. $20.00.

This is a substantial book, in more ways than one, and, as such, it implicitly calls for evaluation by those who wish to keep informed on developments, innovations, or trends, in the law. The author gives to his compilation of cases and readings the simple title of *Jurisprudence*. This immediately arouses a series of more or less unformulated questions: what is jurisprudence? why collect cases and readings on such a topic? what is the objective of the author? does the book

achieve its goal? is the result worthwhile? what impact could, should, or might it have upon the sound advancement of law? and many more, depending on the kind of preparation, training and experience the reader brings to his encounter with the publication.

To the first question — what is jurisprudence? — there is no single answer. In a French community, the word in general has to do with practice rather than theory, while writers in the German tradition are more likely to emphasize theoretical aspects. In the long history of the common law, sometimes spoken of as the Anglo-American legal system, the word was unfamiliar before 1832, when John Austin borrowed the title of his book from German writers upon theories, not to be found in the common law, but in the codes. It took the better part of the century before Roscoe Pound began to offer a regular course in the standard law school curriculum at Harvard, and was accordingly said to have made jurisprudence speak the language of gentlemen. Pound's manner of citing numerous books in the principal European languages to punctuate his sentences was rather flattering to his students, even if their daily work in other courses rarely prepared them to grasp the important divergences of the common law foundations from those of the codified systems. Some of the students, especially those who became teachers themselves, did derive from Pound's lectures an awareness of the need for some evaluation of juridical ideas and their implications. Gradually courses in jurisprudence came to be introduced into other university law schools, one by one. Such courses have not yet been universally accepted, however, and their importance has been regularly ignored in examinations for admission to the bar. For the many who concentrate on the practice of law, jurisprudence seems, therefore, to lack practical value. To them, a new book on jurisprudence is almost beyond comprehension.

Why, then, collect cases and readings in jurisprudence? This seems a fair question for those who have not yet mastered such a course. It tends to put the proponent on the defensive. At present, not only jurisprudence, but all law is finding itself on the defensive. Could it be that if jurisprudence were to become established in a stronger position, all law would be in a stronger position also? Looked at in this way, jurisprudence is much broader than practice. Although most professional philosophers have avoided the subject since the Middle Ages, it signifies nothing more nor less than the philosophy of law.

True, one rarely finds the philosophy of law set forth consciously in precise terms in the precedents and their evaluation. The implications have to be pricked out, to use Justice Cardozo's terminology. Once the pieces of the puzzle are matched, they are seen to form a pattern. It is then that the idea discoverable behind the pattern can be evaluated for its impact upon human beings and their behavior.

To date, very little of this kind of analysis and appraisal has been done in the common law system. Whether it makes a difference in maintaining respect for law, to hold that law must be punitive in order to be valid — *nulla lex sine poena* — or to hold that preventive law, which sets forth acceptable guidelines, is preferable, is not definitely known from the kinds of analysis in current use. The first step, then, on the way to progress, is to collect opinions and readings which

seem to import some detectable theory; then to arrange them in a useful sequence, and at length make them available for systematic analysis. This is the project the author has undertaken in this book. It offers something of an innovation in law school studies. Jerome Hall suggested the possibility of the method in his *Readings in Jurisprudence* (1937) but confined his selections to specific topics, apparently decided beforehand. Lon Fuller expanded the idea in his *Problems in Jurisprudence* (1940) by giving longer readings from fewer authors, interspersed by hypothetical cases, which proved to be a fascinating teaching device. John C. H. Wu presented the first rounded casebook in 1957, assigning important statements of *ratio decidendi,* or *dicta,* under a logically arranged sequence of chapters, supplemented by an extended list of additional readings. In the book under review, MacGuigan has limited his selections, for the most part, to writings which can be classified under three principal viewpoints which are currently influential. Although he writes out of the common law tradition, he has prepared his book for a jurisdiction in which codes derived from the Roman models are equally at home. The result is informative as well as introductory to a new way of appraising the soundness of the legal order.

The author challenges the students to find out for themselves how one opinion may differ radically from another in its assumptions, premises, or concepts, although all authorities may, at first glance, sound alike, since they speak in the name of the law. Because the field is profoundly difficult, and largely unexplored, the personal observations of the author set forth in the notes are helpful, especially to beginners, without unduly influencing the reader to accept his viewpoint. By presenting texts verbatim, or the "best evidence" of a writer's position as stated in his own words, the "hearsay" evidence feature of the outdated lecture-treatise method of teaching, which once characterized practically all discussions in the field of jurisprudence, is avoided. Understanding comes, not from *ex parte* indoctrination prepared by someone else, but rather from one's own effort in placing an author's statement in context in which he made it, noting intellectual clashes with others, under similar or different circumstances, analyzing the points of departure, comparing the effects, and reaching defensible conclusions on one's own responsibility. It seems likely that maturity of judgment, originality, and intellectual independence can be advanced more quickly in this way than by merely repetitious formulations of what experts of one persuasion or another are supposed to agree upon. The case method of teaching jurisprudence, as presented here, would seem to be much less alien to the genius of the common law than the lecture-treatise method, without being entirely foreign to the analytical tasks of interpretation and application which are characteristic in code states. Comprehension of the principal prevailing views comes from the recent selections presented by the author for concentrated analysis.

There are chapters on positivism, natural law thought, sociological jurisprudence, and the judicial process, with an appendix on jurisprudence in Canada. Although the author indicates that he personally finds the so-called natural law arguments the more persuasive of the three rival schools, his concern is for realities, and not at all for the concepts and abstractions, frequently identified with the natural law school, which are derived from unexamined assumptions.

The difficulty of conveying the significance of the literature usually classified under the natural law heading, comes out clearly here. The fact is that there is no one identifiable position throughout the history of thought, but rather, many different theories, that have been under continual criticism for one reason or another. Probably the best established involves the acknowledgment of an obviously superhuman pattern or plan, which sets our human lawgivers at naught unless their formulations conform with it successfully. "There's a divinity that shapes our ends, rough-hew them how we will." Another view is taken by those who do not profess to import anything superhuman in their theory, but rather find some measure of stability in fundamental, constitutional, or "higher" law, which is less subject to sudden change than ordinary statutes or decisions. For them, nothing more than this constitutes "higher" law. What these and similar schools share in common is their refusal to restrict their recognition of binding law within the "four corners" of a single piece of paper, or document, no matter how many official seals may attest the validity of the signatures affixed. If the term "positivist" can be used regularly to identify those who refuse to go beyond the four corners of a written document, then the term "natural law" can be applied to all those who refuse to be so confined in their search for validity in the legal order. There is little else upon which agreement can be found, and jurisprudence has a long way to go before reaching any degree of maturity, as long as so much confusion, instead of clarification, remains.

The chapter on natural law thought in this book provides a survey of the principal divergences to be found in the writings. Instead of inviting unquestioning assent to any one presentation, it stimulates careful analysis, comparison, and dissent. As a teaching tool it therefore achieves its purpose well. At the same time, it discloses a woeful want in the literature. What appears to be desperately needed is an essay, more or less extended, reconciling human expressions of law with the rest of the existing universe. The repetition of unexamined assumptions and concepts simply will not do as a basis for an acceptable legal order in an age when verifiable scientific observations multiply so rapidly that a voluminous index system is necessary to learn the latest results. If the natural law means nothing more nor less than the order of nature as it exists, and as it is sustained by a mind which obviously is much more complex than any known to human history, its exposition for purposes of comprehension must be coordinated with contemporary realities, or run the risk of repudiation. Concepts formulated in another day simply will not do, without being revalidated after close scrutiny. The rejection of concepts about the natural law does not mean that the law of nature is itself denied; in reality it couldn't be. It means instead that the search for the meaning of law, as for life, must be carried on without rest, to meet the actual needs of the people. A new cosmology and a new ontology, which account for both the legal and the scientific order in their impact on human lives and choices, are the urgent need of the space age, already ten years old. This task becomes the more obvious as one reexamines the traditional literature on the so-called natural law school, to which this chapter gives an introduction.

Suggestions on how to proceed can also be detected here. Excerpts on anthropology, economics, and sociological jurisprudence indicate one way to

expand the realities of the law so as to accord with the aspects of reality found in the other sciences. If one is unhappy with the rationalizations of the dialogues of "Doctor and Student" (p. 284), one recalls that a very great realist in law, Thomas More, was highly critical of Christopher Saint Germain's arguments concerning the mundane and the divine. A more persuasive approach to a new ontology, combining the realities — not the concepts — of law and justice, is to be found in the paragraphs of *Pacem in Terris*, which are here set out.

MacGuigan has presented a concise and cogent introduction to the analysis of the foundations of the legal order that calls for dedicated concentration at the present time. Will any of his readers, no longer willing to remain in the perennial elementary stages of legal studies, now be stimulated to take up the urgent task of formulating the needed ontology? By this test, the success of the author's effort may be ultimately measured.

MIRIAM THERESA ROONEY

JURISPRUDENCE. By B. A. Wortley. Manchester: Manchester University Press; New York: Oceana Publications, Inc., 1967. Pp. xxi, 473. $9.00.

This clearly written and scholarly volume on the science of law embodies the juridical thought of a veteran scholar and teacher, professor of jurisprudence at Manchester, as it has evolved over a period of forty years, and as it relates to the solution of numerous contemporary sociopolitical problems, particularly in England. It is the expression of Professor Wortley's juridical faith, as contained in numerous scattered publications. These have been skillfully synthesized.

The original articles on which many of the respective chapters are based have been cited in footnotes. These previously prepared materials have been worked into the organic unity of a single volume. The synthesis of previous writings has been given a modern accent. Thus, stress is put on the significance of the European Convention on Human Rights, as well as on the accompanying procedures which the British Government has accepted as the legal basis for the right of individual petition. Another illustration of the contemporary relevance of the work may be seen in the discussion of such problems as unification and codification which now confront the Law Commissioners.

The author strikes at the heart of the matter by posing the basic question "What is man?" He shows that the answer to this question invariably predetermines a person's concept of all the basic conclusions of jurisprudence. Only the true answer to this question and its implementation will lead to peace and just order; all other answers will lead to anarchy, nihilism, and unjust war. Wortley believes that Stoic-Thomistic philosophy has given the correct answer by evaluating man as a rational, social animal, with inherent worth, differing from the brute in both quality and quantity. Adoption of the Stoic-Thomistic concept of man leads Wortley to embrace all the basic conclusions of objective natural thinking. I am in complete agreement with these conclusions.

Admirable is the scholastic treatment of the concept of the metaphysical basis

of law, the nature and kinds of justice, the place of equity, the limits of legislative and traditional sources of law, the right of property, the role of force, and the claims of conflicting legal systems. This book is a refreshing reaffirmation of the view that there is a legal order "out there," which makes it possible to think of law not only as rule, prediction, and expectation, but also as justice and a sense of value. By recourse to an Aristotelian-Thomistic concept of justice as the giving to each his due, and of equity as "a means of avoiding too rigid a solution caused by the generality of a rule" (p. 425), the author avoids the error of positivism which identifies the essence of law with coercion or punishment. He convincingly shows that "the problem of law enforcement is a separate one from that of defining law." (p. 453) He also demonstrates, especially by reference to the international legal order, that moral principles may become juridical law, although a "sanction is not always and invariably effective to enforce them." (p. 132) Human rights are in final analysis means for the protection and promotion of human worth. A legal order giving effect to such rights takes precedence over one which does not do so. Codes are to be interpreted in the light of these rights, as the scholastic Gény so well demonstrated. (p. 208)

Wortley has left no doubt as to the fruits which have sprung from the tree of mistaken notions of the nature of man, and their contrast with those which have been borne by the tree of truth. Erroneous notions of the nature of man have spawned anarchic syndicalism, totalitarianism, communism, positivism, Austinism, and Kelsenism. An excessively optimistic view of man has resulted in the fearful errors of nihilism and communism. Mistaken notions of the nature of man have caused anarchists to accept a "naively optimistic view," believing "that if legal inducements or pressures to act in accordance with rules are abolished, all will be well and the lion will lie down with the lamb, as in the mythical Golden Age of some mediaeval writers and of Rousseau." (pp. 22-23) It was this erroneous view that led Marx to believe that the state would wither away in the golden age of communism. An unreasonably pessimistic idea of the nature of man led to a different type of totalitarianism. It inspired the writings of Hobbes and Austin. A perpetual "Leviathan to maintain order by force" was demanded. (p. 135) Still another mistaken view, namely, that man is only a high-grade gorilla, justified the use of ruthless force by self-centered dictators uninhibited by any legal or moral order.

In contrast with the disorder and human misery and unhappiness which have resulted from erroneous notions of man are the fruits of the scholastic notion. Among these, for example, are the Anglo-American legal system and the international legal order. Wortley conclusively shows that scholastic thinking is at the core of Anglo-American law, and that it is indispensable for the survival of international law. Objective natural law thinking has permeated the English common law. The view of the common law lawyer is "very close to the scholastics, the successors of Aquinas, and to the neo-scholastic writers on law of modern times." (p. 423) That view is also in accord with the idealist school of jurisprudence. It is "the best statement of fundamentals and the most in harmony with fundamental human rights, when faced with conflicts to solve. In the words of St. Thomas (*Summa Theologica* 1a 2ae, q.90, arts. 1 and 2) cited by Pound and

Patterson and many others, 'Law is a rule or measure of acts . . . now the rule and measure of human acts is reason.' " (p. 425) I am in hearty accord with the author's conclusions that the Anglo-American legal system conceives man as a reasonable being, and that law needs reason and that reason needs law. The concept of reason is the equivalent of that of the Stoic-Thomistic *ratio recta,* which is the basis of the sociolegal order for the protection and promotion of man's inherent dignity.

The author further shows that objective natural law philosophy is indispensable for the creation and maintenance of an international legal order and a proper understanding of *The Universal Declaration of Human Rights.* In elaborating the meaning of the definition of jurisprudence as "the knowledge of law in its various forms and manifestations" (p. 456), Wortley is chiefly concerned with its manifestation in the international legal order. This legal order is meaningless unless it is based on certain Suarezian starting points. Among these are the affirmations that the world is a society of rational human beings, and that "the international legal order is composed of the family of States; its rules are designed to secure peace with justice." (p. 162) It is manifest that the idea of the sovereign-limiting "general principles of law" is a conception which is the direct descendant of the law of nature of the Roman and the medieval lawyers.

Achievement of a just world peace through the rule of law depends upon rejection of the notion of absolute national sovereignty, as well as the rejection of any theory which regards social order as merely an end in itself rather than as a means to human happiness. Truly, "it has taken two catastrophic world wars to make it clear that absolute and unfettered sovereignty cannot co-exist with the rule of law in international affairs." (p. 22)

A masterful presentation is made of the concept of the just war from the time of St. Augustine in the fifth century, its elaboration by St. Thomas Aquinas in the thirteenth, and its utilization in the sixteenth century by Grotius in his great work *De Jure Belli ac Pacis,* "an encyclopaedic attempt to sum up more than sixteen centuries of thought about and of experience of the law of nations." (p. 148) A just war is one conducted for a just cause and with a just intention. Despite the influence of Machiavelli in sixteenth century Italy and Hobbes in seventeenth century England in spreading "the idea of absolute sovereignty, free from the constraint of external law," nevertheless, "so deeply has the doctrine of the just war been absorbed into the legal and political thinking of the world, that the most arrogant tyrant does not think of going to war, even today, without claiming, or manufacturing, a so-called just cause." (p. 145)

The format of the volume is excellent. It has a preface, table of cases, two appendices, containing the Declaration by the Lord Chancellor on Precedent (1966) and the Race Relations Act (1965) respectively, and a general index to authors and subject matter. A unique device is a compact conclusion at the end of each chapter, as well as a final chapter containing a restatement of all the conclusions included in each of the twenty-one preceding chapters, followed by definitions of "law," "jurisprudence," "civilized system of law," "effective system of law," and "well-developed legal order."

The only limitation of the book, perhaps, is structural. This is the result of

the author's decision to use his previously written material as the basis of many of the chapters. As a consequence, the book cannot be expected to have the same degree of coherence as a book planned from the beginning. Also, some jurists might have preferred not to use the word "rules" in a generic sense, but to distinguish between the transitory, and less important, legal guides, known as "rules," and the more important, lasting juridical controls, designated doctrines, principles, norms, and moral guides.

I congratulate the author on a notable implementation of scholastic natural law philosophy. It is a welcome and influential contribution to the objective natural law concept of man and the various orders which he has created, especially the juridical.

BRENDAN F. BROWN

EQUALITY. By John Wilson. London: Hutchinson & Co., 1966. Pp. 216. 12/6. New York: Harcourt, Brace & World. $4.75.

It is not altogether clear what we now need most from a book-length study of equality. It is nearly forty years since Tawney's lectures on equality were published, the modern landmark on the subject,[1] and there is ample reason to update his socioeconomic and political indictment of the established order (a task several recent books have only partially succeeded in doing for mid-century American society[2]). Wilson does not undertake to supersede Tawney, and probably it is just as well; not many authors would survive comparison with Tawney's masterful style and superb command of both factual and rhetorical resources. Yet there is a good deal that Tawney even at his best failed to provide, though it is necessary for a full-scale and comprehensive account of equality. For one thing, Tawney showed almost no scholarly interest in the traditions and tergiversations of egalitarianism. Professor Lakoff has recently helped to fill this lack with a careful study of egalitarian thought in European political theory.[3] Wilson, by contrast, is wholly indifferent to the deposit of materials awaiting further study by scholars of egalitarianism. Save for drawing upon some remarks (mainly for their brevity and clarity) of his Oxford colleague, Richard M. Hare,[4] there are no citations, quotations, or bibliographical references anywhere in the volume; after reading it, one is nearly as ignorant as before of what others have said about equality. Nor will one find in Wilson any of the delicious irony Michael Young supplied a decade ago in his attack on the meritarian (and, to that extent,

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[1] R. H. TAWNEY, EQUALITY (4th ed., New York, 1952) (Halley Stewart Lectures, 1929).

[2] ROBERT L. CARTER, *et al.*, EQUALITY (New York, 1965); NAT HENTOFF, THE NEW EQUALITY (New York, 1964); TOM KAHN, ECONOMICS OF EQUALITY (New York, 1964); WHITNEY M. YOUNG, JR., TO BE EQUAL (New York, 1964).

[3] SANFORD LAKOFF, EQUALITY IN POLITICAL PHILOSOPHY (Cambridge, Mass., 1964).

[4] R. M. HARE, FREEDOM AND REASON (Oxford, 1963), cited by WILSON, EQUALITY, at pp. 109, 111, 115, 125ff., 132.

antiegalitarian) bias in contemporary social thought.[5] Wilson, while not exactly humorless to the point of boredom, does not deploy any of the imaginative literary devices which made Young's essay sparkle as it mounted its assault on our "liberal" sentiments. These are, then, three of the kinds of things Wilson has not undertaken to improve upon, even though egalitarian thought could be expected to profit from further work along these lines.

Instead, Wilson's aim is throughout philosophical, not socioeconomic, historical or political. His study of the philosophy of equality requires him not only to map the conceptual network in which "equality"-locutions have their place, but also and primarily to study the justification (and especially the justificatory criteria, pp. 142f.) of egalitarianism, as well as to show how it is situated within "liberalism" generally (pp. 128ff.) and how it embodies a general theory of morality as a "rule"-governed activity (pp. 22, 109, 116) to which "ideals" of aspiration are indispensable (pp. 126ff.). It would be unfair if I did not promptly say that Wilson's essay is by far the most ambitious and successful philosophical examination of equality I have seen.[6] Any social philosopher ought to ponder all of the issues he discusses; and unless one is thoroughly hostile to contemporary analytic philosophy, he is bound to admire the variety of detail and applaud the skill with which Wilson unfolds his argument. If anything can vindicate (in the words of the general preface to the series, "Philosophy at Work," of which this book is one[7]) "the practical relevance of philosophy," surely Wilson's essay will. Although the book is not aimed at the scholarly community in particular, nevertheless it can be recommended to serious readers as an obvious starting point for the study of egalitarian theory.

The general layout of the discussion is divided into three unequal parts. The first (Preface and Introduction) sketches in rapid fashion the general idea of "modern analytic philosophy" as having a proper role in any rational political theory, reviews some of the elementary considerations underlying any discussion of equality (e.g., the distinction between "equality" as a term of pure description, and its more subtle uses as a term of evaluation[8]), and, finally, presents a concise advance summary of the argument to follow. The bulk of the book

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[5] MICHAEL YOUNG, THE RISE OF THE MERITOCRACY, 1870-2033 (London, 1958).

[6] This is not meant to be faint praise, though it is true that next to nothing of book-length has been published since Rousseau's *Discours* in 1755 purporting to offer a philosophical analysis of equality. Collections, e.g., ASPECTS OF HUMAN EQUALITY (Bryson ed., 1956) and NOMOS IX: EQUALITY (Pennock and Chapman, eds., 1967), of course, as well as isolated articles and symposia, e.g., Richard Wollheim and Isaiah Berlin, *Equality*, 56 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 281-326 (1956), are available and of much value. But, apart from these materials, one has nothing to fall back upon except such volumes as H. A. MYERS, ARE MEN EQUAL (New York, 1945) or DAVID THOMSON, EQUALITY (Cambridge, 1949), which are useful but clearly inadequate.

[7] Other volumes in the series (edited by Patrick Corbett) include: ANTONY FLEW, GOD AND PHILOSOPHY; E. D. R. HONDERICH, CRIME AND PUNISHMENT; W. B. GALLIE, WAR AND MORALITY; RONALD ATKINSON, SEXUAL MORALITY; and PATRICK CORBETT, IDEOLOGIES (1966).

[8] Wilson nowhere alludes to the genuine difficulties which must be faced by anyone who wishes to "treat others equally," difficulties which arise because the descriptive significance of this phrase in concrete cases is far from clear. For a sobering discussion of what these difficulties involve and how they may be surmounted, see H. R. Alker, Jr., and B. M. Russell, *On Measuring Inequality*, 9 BEHAVIORAL SCIENCE 207-18 (1964).

(Parts One through Four, pp. 27-168) is devoted to this argument, and I shall examine it below. The volume ends (Part Five and Epilogue) with applications to three concrete social issues of the conclusions of the preceding argument: 1) Do the functional inequalities which produce a "power élite" in every society constitute any decisive limitation to egalitarianism? No. 2) Does the existing money economy reinforce class distinctions in ways which deservedly provoke egalitarian criticism of that economy? Yes. 3) Can the emancipation of women yield equality of the sexes as well as a sense of happiness and fulfillment for women? Apparently not. Wilson closes the book by showing that if we accept the burden of his argument and are serious about our egalitarianism, then enormous social and ideological reconstruction must be undertaken, in which the social philosopher, armed with the techniques of conceptual analysis,[9] will be a vital member of the "team of experts" (p. 208f.) necessary for this job.

The main body of the book is given over to developing "as a coherent thesis, in which the argument is cumulative and not just a series of independent and isolated points," a conception of equality which shows it operating in four "roles": "equality as a political principle, equality as a fact, equality as a formal principle, and equality as an ideal" (p. 21). It is the last of these "roles," Wilson asserts, which is "central, and gives importance to the other three" (p. 21, and cf. p. 129). Perhaps it does, but there is some inevitable unclarity in putting it this way. Wilson never makes it clear whether the political, factual, formal and ideal aspects of egalitarianism are taken up in that order because of the inherent logic of the concept of equality, or whether this sequence simply proves convenient for purposes of exposition and organization. Perhaps he believes that his strategy answers to both considerations; for my part, I doubt whether it copes with either. Wilson must concede that there are "political" implications of "factual," "formal" and "ideal" equality (indeed, it is fundamental to his entire argument), and that these cannot be identified and assessed until each of the latter three "roles" has itself been delineated. But then discussing (as he does) the political role first is inevitably misleading and incomplete. Moreover, the very notion of a "political role" for equality is suspect. Equality, i.e., principles of equality, equal treatment, etc., have no "political role" as such, independent of appeal to their factual, formal and ideal meaning and basis; whereas equality as a fact, equality as a logical consequence of the idea of a rule, and equality as a moral ideal do exist to some extent in considerable independence of each other. To put it another way, egalitarianism *is* the sociopolitical consequences derivable from factual, formal and ideal equality. Not surprisingly, Wilson's use of the term, a "political role," actually turns out to be merely a chapter heading to cover certain preliminary matters before he launches into the genuinely and legitimately tripartite structure of his argument. Not that these preliminary matters are not vital; they are. But they are not peculiarly or solely political (as though the issues to be dealt with subsequently were nonpolitical — because they are

[9] Another book by John Wilson deserves mention in this connection: THINKING WITH CONCEPTS (Cambridge University Press, 1963). It is, in my judgment, an unusually successful introduction to the elementary methods of conceptual analysis widely practiced by contemporary analytic philosophers.

"factual," "formal" and "ideal"). Unfortunately, on the most important of these topics — the one raised in the section titled, "Is there an Absolute Principle of Equality?" (p. 57) — Wilson's position is not as clear as it should be. He never explains what, precisely, the egalitarian would *do* with such a principle if he had it. (Would it tell him *what* to do in order to treat others equally, or would it tell him *why* to treat them in this way?) Nor is it clear what his answer is to his own question; he concludes the section by asserting that "two principles of equality" have been identified and that they are "among the most important that the concept will yield" (p. 76) (viz., that society should foster policies which will enable men to do what they do "of their own choice," p. 75; and that what they should choose to do is to "combine" rather than to hurt, frighten, or neglect one another, p. 76). But Wilson does not go on to say whether these principles are "absolute" (one gathers they are not) nor why they are specially or distinctively egalitarian (though one gathers he thinks they are).

Let us turn now to the main issue, the development of the "factual," "formal" and "ideal roles" of equality. As to the first, Wilson argues that "all men are equal" is true in the sense that there is a "natural," "intrinsic" equality among all men insofar as they are all "choosers and creators of value" (p. 97). This is despite the evident fact that they are not all equally good at choosing values, i.e., at actually choosing rational values. Men's "varying abilities to reflect and deliberate" are incidental to the fact that as choosers they all have the same "status" (p. 97); they all "come into a particular category or mode of being" (p. 103). Now, from the fact that all men have this "status" (not a status in the usual sense of this term, because that refers typically to "artificial" inequalities rather than to "natural" equality, pp. 40f.), one would think that Wilson could then argue that all men in at least some situations and in some respects *deserve* to be treated (considered, valued, etc.) equally: for the term "status" possesses the double semantic function of designating a fact about men and conveying a normative point about them as well, thereby requiring that anyone who grants this factual premise must go on to draw the moral conclusion. Wilson himself notes elsewhere that there is an intimate connection between the "factual" claim that all men are equal in that they have "an equal ability to frame . . . [a] world-view" and the moral claim that all men have "an *equal* right to do [so]" (p. 104), as though no further reason could be needed on behalf of the moral claim beyond what is contained in the factual claim. But, Wilson argues, there is: "the relevance of the fact that other people have wills just like my own depends on my own values and criteria" (pp. 104-05); also, "I might accept that people are equals, but fail to see why it should be a good thing to turn infants (or all infants) into people" (p. 105); and, finally, why should the natural equality of men, no matter how intrinsic it may be, force us to rest any differences in treatment on "the distinction between intelligent and non-intelligent life" (p. 105)? These are the deep reasons which force Wilson (and most other philosophers with him) to the reluctant conclusion that "there is an important gap between simply *noting the metaphysical or logical fact* that all men are equal, and *determining to treat people as equals*" (p. 158). (His point would be clearer, if instead of "determining" he had written "being obligated" or "knowing one ought.")

How, then, is the gap to be bridged? Not, Wilson argues, by falling back on the purely "formal" aspects of equality. Equality as a purely formal consideration is simply "the principle of universalisability" (viz., "one cannot make different moral judgments about similar cases," p. 111), which though true enough "as a strictly formal principle" (p. 121) in the very conception of moral conduct and moral rules, is by itself insufficient to tell us how to treat people because it contains no criterion for telling what are and what are not "similar cases." If, however, we try to express equality in terms of "the impartiality principle," we have "more than a formal principle" on our hands (p. 119); this principle is on the other side of the gap and therefore cannot help bridge it. Impartiality (at least as Wilson uses this term) enjoins us to treat persons (not merely "similar cases") similarly; it thus presupposes the principle of universalisability but is not entailed by it. It is a substantive moral principle expressive of egalitarianism, not a neutral, formal or purely logical consideration implied in the concept of a moral rule at all.

What remains with which to bridge this gap? In a fundamental sense nothing does because nothing can. The gap in question is the familiar one between "is" and "ought," and Wilson is one of those (old-style?) analytic philosophers who know of no legitimate and adequate way to close it (he cites Hume and G. E. Moore, p. 137, with approval on this point). Instead, what Wilson does do (and I think he can be faulted for not making this adequately clear) is to shift his task to showing that it is *reasonable* (and therefore justifiable) to treat others as equals and to treat them equally, and that "a belief in intrinsic equality is a necessary moral belief . . . an ideal of practical living" (p. 129). His entire answer is too intricate and too long to convey in a few sentences, but roughly it goes like this: In the very *fact* of being alive and self-conscious, one discovers *criteria* for living *rationally* that arise from one's natural wish to prolong, intensify, vary and understand his own *desires* and their *satisfaction* (pp. 140-147). At the same time, one discovers himself in a world of others with precisely the same nature and the same aspirations — indeed, as one among other creatures whose need and capacity for "communication" in a common language contains within itself implicit egalitarian commitments (pp. 153-161). On these facts, the "ideal" of treating others as equals ("as ends in themselves," p. 127) simply expresses a necessary condition of behaving rationally, with the added advantage that behaving in this way "is what would *make people rational*" (p. 152).

I have not the space to expand on Wilson's defense of equality as "the formal aspect of a liberal ideal" (p. 153). Generally, he quite blurs the differences between what Professor MacPherson has called "possessive individualism,"[10] what Professor Schaar has formulated as "the equal right to become unequal by competing against one's fellows"[11] — what I take to be the egalitarianism of classic Anglo-American liberalism — and the kind of egalitarianism developed in this century, in which "levelling up" and enforced cooperation rather

[10] C. B. MacPherson, The Political Theory of Possessive Individualism (Oxford, 1962).

[11] John Schaar, *Equality of Opportunity, and Beyond,* in Nomos ix: Equality 228, 241 (Pennock and Chapman, eds., 1967).

than voluntary competition has become the overriding concern.[12] The former is about as much a form of liberalism as the Fabians were a wing of the Liberals. It is plain that however much others might want to contrast classic liberal egalitarianism and, more recent, socialist egalitarianism, Wilson is not among them. He argues throughout for the importance to egalitarianism of substituting "fraternity" and "cooperation" for competition (pp. 23, 75, 153ff., 160, 183, 190); this, more than any other single notion in his book, expresses his understanding of the social ideal to which the egalitarian is committed. It may be that the only "liberalism" worth defending is of this sort, but Locke and even the Utilitarians would have been shocked to learn so. This may be only a minor point, but it is one of many which show that Wilson's book would have been better by being more scholarly.

What is acutely regrettable is that the book contains no index. The volume is full of useful and (so far as I know) often original comments on the concept of equality which are beyond recovery by the reader unless he is willing to construct his own working index. The errata are few, inconsequential, and unproductive of surprises save in one case; what is all but unobtainable "except by chance" is not a "six-foot statue" (p. 193), but a six-foot stature.

HUGO ADAM BEDAU

PRIMARY PHILOSOPHY. By Michael Scriven. New York: McGraw-Hill, 1966. Pp. xvi, 320. $7.95; text ed. $5.75.

There is something homespun about this book. It is written in defense of reason by a philosopher whose life is structured upon reason, and the book gives us his reflections about his structuring his life. We are told, for example that "The system of a man's values is a net and not a knotted string. It is a web that stretches across our lives and actions and connects them with the threads of reason"(48). The rest of the paragraph is replete with some plausible descriptions of how values might be acquired and sustained, all of which concludes with the observation that "the picture of ultimate values, from which all others hang like onions on a string, is completely wrong" (48-49). Yet one's preference for webs over onions may or may not be a reasonable one. It is unfortunate that this book is "primary" more in the sense of reflecting Professor Scriven's preferences than in actually coming to grips with the set of topics classically comprising "primary philosophy." This is all the more unfortunate in that the book apparently does range over these topics: philosophy itself, knowledge, art, God, man, responsibility and morality — an impressive list, one which would probably paralyze a less intrepid adventurer than Scriven. And since this reviewer is less intrepid than he, I shall concentrate on one of the topics alone: God.

In his treatment of God and "the proofs for God," Scriven reveals clearly

[12] See Roy Jenkins, *Equality*, in NEW FABIAN ESSAYS (Crossman ed., 1953), and the comments on his essay in the preface by Margaret Cole and the editor.

what *rationality* means for him. Apparently there is a basic logic, closely tied to something like scientific knowledge/everyday experience/reason, which provides the criteria of plausibility for statements about anything whatsoever(102). This allows us to rewrite any arena of philosophical discourse according to these criteria. Hence any talk about God must conform to a (constituted) "basic God," which comprises any God ever conceived. For Scriven feels that "God is normally conceived as an extremely powerful Being . . . , and as extremely wise and good . . ." (88-89). Furthermore "If there is an *infinitely good, omnipotent, omnipresent, and omniscient* God, then there is a More-than-Basic God, which of course is a stronger claim" (89). Since a refutation of the logically weaker claim a fortiori refutes the logically stronger claim, Scriven presumes that his Basic God is an adequate instrument for examining the logic of discourse about a transcendent being whom "all men call God"(Aquinas). But here of course lies a tale. The radical difference between Aquinas and Scriven is that Scriven's God is part of the world. His refutation of any existence argument follows from a general logic of existence arguments which presuppose the normal background of the world. The very semantics, however, of discourse about God presumes His transcendence. One can refuse to raise the question about the origin of the universe, but one must take it up if he does take it up, in the logical terms of the question itself. This logic is tricky, perhaps too tricky, but one cannot for that reason simply bypass it: "If God exists, He is in that group [the group of existents] whether as ground for the existence of all the other members (whatever that means) or in any other role"(119, n.18). Here Scriven simply overlooks the necessity for acknowledging a special logic to handle the One from whom presumably "everything that exists" originates. For once one admits that sort of discourse, then clearly God — even though He exists — does not do so as a member of the set which he originates. At this point the very logic of the discourse forces us to define God as unoriginated; and while this is a large step, it at least closes off serious objections which take God to task since His "own origin simply reintroduces the mystery which it was His function to eliminate"(120).

Perhaps the logic of discourse about God is the best place to discern whether one's allegiance to Reason is a matter of scrupulous fidelity to logic or an infatuation with something less austere like "scientific plausibility." Now primary philosophy in the classical sense of metaphysics is ever emerging from its mythic origins, and the test of full emergence has always been one of logical consistency. Attention to logic in its more austere sense is one of the best (though not certainly the only) criteria we have for discriminating myth from metaphysics. Contemporary prejudices, knit together into a web or hanging like onions, as one may prefer, can of course constitute a myth in their own right. Reason in its critical role has classically been seen as the best tool man has to put myth to use where it cannot be eliminated. But the critical tool must cut in the direction of the reasoner himself as well as his protagonist. This Scriven will not allow.

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THE ITALIAN LEGAL SYSTEM. AN INTRODUCTION. By Mauro Cappelletti, John Henry Merryman, and Joseph M. Perillo. Stanford: Stanford University Press, 1967. Pp. xii, 462. $10.00.

This crisp and penetrating study excellently accomplishes its objective of providing an introduction to the Italian legal system. It does more: it provides a lively commentary on the relation of jurisprudential theory to practice in the specific context of Italy and affords instructive comparisons and contrasts with Anglo-American law. It contributes to the comprehension of the human enterprise of constructing law and so to this enterprise itself.

The joint work of Cappelletti of Florence, Merryman of Stanford, and Perillo of Fordham, the book is a model of collaborative effort. Each author publicly takes primary responsibility for certain chapters, while each has criticized and supplemented the efforts of his collaborators; so that there is unity of perspective and integration of ideas. Generalizations are offered; they are supported by concrete citation and example. The tone is moderate, modest, good-humored. Deficiencies in the system are pointed out, but not without awareness of the defects of other systems. Judgments, negative and positive, are made; they are balanced; the prevailing note is that of good sense.

Compared with the American system, the Italian looks best in its education and selection of judges. A law school graduate decides on a judicial career soon after graduation. He takes a difficult examination and, if successful, spends at least one year's apprenticeship with a court of first instance or a prosecutor's office. He takes a second examination and advances to the functions of tribunal magistrate. After three years' service, the District Council of Judges may find him unfit and remove him from judicial service or confirm him with tenure. A tenured magistrate advances by seniority to being a court-of-appeal judge. A court-of-appeal judge is then eligible to reach the highest judicial rank by competitive examination or by evaluation of his "culture, diligence and reputation" by a commission of judges (pp. 102-105). Here, in short, is a system where ability determines both entrance and achievement of the highest levels, where judges are evaluated by judges, where tenure is secure but only after three tests, where experience is rewarded but highly rewarded only if coupled with legal skill. The American system, in which lawyers run for election to the bench or help in the campaigns of governors or presidents in order to obtain appointment to the bench, looks sick in contrast. The rational superiority of the Italian approach seems evident.

The Italian system, in fact, does assure a level of legal competence in all members of the judiciary. The judiciary is largely independent of the rest of the government, and so, substantially immune from political pressures. Corruption "is believed to be almost nonexistent" (p. 107). If one compares this quiet and assured estimate with the picture of the wholesale corruption of judges which was taken for granted in classical Roman times, one has a sense of immense progress in nineteen hundred years;[1] the ideal of a just judge seems

[1] For a picture drawn from classical authors of the corruption that characterized classical Roman litigation see the pioneering study of JOHN M. KELLY, ROMAN LITIGATION 34-68 (1966).

to have advanced from a rhetorical wish to an expectable and regular phenomenon. If one thinks what would have to be said of politics and corruption in the municipal courts in many large American cities or of the level of competence in the superior courts and even supreme courts of some states, one has to recognize that the Italians have done far better than the Americans in realizing the ideal.

In America it has been a principle that a biased judge is no judge at all;[2] but the principle in practice has been curtailed in two important ways: In both the higher and the lower courts there is no custom of disqualifying a judge because of his political sympathies or political ties. In the lower courts in particular, and above all in the administration of estates, trusts, receiverships, and reorganizations, the judge often appoints a friend to do a job which the judge is meant to supervise judicially. Federal law prohibits a federal judge from appointing to any office in his court anyone related to him by affinity or consanguinity within the degree of first cousin (28 U. S. C. 458), and requires him to disqualify himself in other cases where his connection with party or attorney renders it "improper in his opinion" to sit (28 U. S. C. 455). But neither the statutes, nor practice in many places, prohibits him from appointing a near relative's law partner. In Italy a judge of the lower courts must be transferred to another community if his relative or his wife's relative practices law in the community where he is a judge (p. 107). Such a rule would have a salutary effect in many American jurisdictions.

The insulation of the Italian judiciary has been not only a protection against the crude influences of relationship or party. In Fascist times this insulation acted as a brake on attempts to introduce ideological factors into judicial decisions (p. 193). Resistance to personal or political arbitrariness in judgment has been the positive meaning of "certainty of law" which is so reverently prized by Italian jurists as a central value of the legal system.

Yet with better selected, better trained, less biased judges, the Italian legal system does not give the impression of working as well as the American. Why not? The emphasis on certainty leads to a mechanical application of inappropriate precedents by the less imaginative judges; the evils of slot-machine jurisprudence are encouraged (pp. 243-245). The judge who is a career judge lacks the sense of creative power in the law that many an American lawyer brings to the bench from practice. The insulation from politics becomes an isolation from the most vital problems of the community.

The judge's position is part of a larger insulation of legal institutions from the culture as a whole. Italian law reflects a jurisprudence that seriously believes that law is a science. The dominant theorists have for a long time maintained that law "is a self-contained discipline or phenomenon that can be understood and perfected by systematic study" (p. 170). They have considered their work to be "not concerned so much with the solution of juridical problems as with the search for scientific truth, for ultimates and fundamentals" (*ibid.*). By deliberate design the law is pervaded by a cultural agnosticism, which shuns philosophy, sociology, economics, history, and politics in the elaboration of judi-

[2] Hall v. Thayer, 9 Browne 219 (Mass. 1870).

cial decisions (pp. 179-180). Both in theory, then, and in judicial practice, the law is given a kind of autonomy. This autonomy in fact makes it ill-adapted to serve many human needs.

In the Anglo-American world the idea that law is a science has been put forward from time to time by jurisprudential writers and most recently by H. L. A. Hart.[3] Langdell believed that a study of cases would lend to the scientific perception of the truth.[4] A science of federalism seems to underlie Henry Hart's approach to the federal courts.[5] It may be doubted, however, if many American judges, lawyers, or law professors take the analogies or rhetoric of science seriously. They know that they pursue a discipline, that it has concepts, rules, and a history. But they are too much caught up in the pragmatic, creative task of shaping rules to human needs to believe that they are discovering legal principles, deducing legal truths, or systematically perfecting a self-contained phenomenon. If Justice Cardozo believed the judge to be "expounding a science, or a body of truth which he seeks to assimilate to a science," he also insisted that "in the process of exposition he is practicing an art."[6] Lawyers, legislators, and judges alike see themselves not observers of the given, but as creative participants in a process.

What the Italian assumptions can mean in practice is nicely illustrated by the record of a case, Toscano v. S.M.S., translated and printed in its entirety from page 317 to page 436 of the present work: A workman on his way home one night on a bicycle fell into an excavation in the street made by a construction company. His face required extensive surgery. He sought damages from the company for his injuries. The accident occurred October 11, 1951. Final judgment was registered in favor of the plaintiff on March 2, 1962. To state these dates is to point to the inadequacy of the system.

How had the time gone by? Nearly three years were lost in a proceeding for criminal negligence, in which, according to Italian practice, the plaintiff also pressed his civil claim. The criminal case was wiped out by an amnesty, and the civil case had to begin again. Such a result is not unusual in the system. Amnesties have a humanitarian motive and are also designed to clear courts of current congestion. Speculating with reason that an amnesty may be given if they wait long enough, criminal defendants spin out the process by "every possible dilatory tactic." The result is a vicious circle in which speculation on the amnesty, designed to reduce congestion, increases the congestion and makes an amnesty more desirable and likely (p. 318).

Once the civil process had begun, over three years passed in the taking of testimony. Again this result was not unusual. The system does not function in terms of providing a "day in court." Rather, it operates in "dental clinic" style: the lawyers keep returning to the court to provide bits and pieces of evidence. There are several hearings spread over a protracted period of time

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[3] H. L. A. HART, THE CONCEPT OF LAW 2 (1961).

[4] C. C. LANGDELL, 1 A SELECTION OF CASES ON THE LAW OF CONTRACTS viii (1871).

[5] See HENRY M. HART, JR. and HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM *passim* — for example, the discussion of "standing to litigate," pp. 166-75 (1953).

[6] BENJAMIN N. CARDOZO, LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 40 (1931).

(p. 128). This approach by itself is guaranteed to produce substantial delays. The delay is multiplied when the lawyers, overburdened with other matters and unmindful of any duty to provide prompt help to their clients, fail to attend one of the scheduled hearings. Absence from a hearing does not result in any sanction but merely in postponement of the case (pp. 322, 329). In this case, nonattendance by one or both lawyers at several scheduled hearings was one of the serious causes of delay.

The regular process of trial itself also produces a time lag. Although the lawyers have collected relevant documents and conferred with their clients, they have not made extensive investigations before the trial, nor is there any general procedure for discovery (p. 137). The parties may talk to witnesses, but it "verges on violations of the canons of ethics" for the lawyers themselves to do so, and rarely are the witnesses interviewed in advance of trial (p. 336). The parties themselves cannot be witnesses (p. 134). These rules are designed to protect the court from perjury by witnesses and the witnesses from inquisitional tactics by lawyers (p. 137). They operate to forestall what sometimes happens in American trials in the coaching of a favorable witness to the point of inducing him to testify falsely, or in the cross-examining of a hostile witness in an unfair and defamatory way. But the price paid to avoid these evils is a substantially less vigorous presentation of the case by the only persons who could present it, the lawyers. The judge himself conducts the questioning, familiarizing himself with the case as it unfolds, using the questions submitted to him in advance by counsel for the litigants, and calling experts on his own motion. The informed, impartial judgment which is being sought is an excellent goal; but, given the present mentality of the Italian judiciary, the judge does not have any strong sense that he should reach this judgment rapidly; and he lacks a lawyer's sense of the pressing needs of his client. Determination of the facts thus proceeds at the pace of a slow bureaucracy wearily processing an unending series of claims in which the presiding bureaucrat has no keen personal involvement.

In court there is a preference for documentary to oral evidence, and little sense that the judge hearing the witnesses may be in a better position to estimate their credibility than a judge who has not seen them. In the instant case the examining judge, after completion of all the testimony, on January 27, 1958, asked to be removed from the case because he had been the judge in the uncompleted, amnestied criminal case. He was accordingly replaced, and a judge who, up to this point, had known nothing of the case was assigned to report it to the usual three-judge panel. As testimony itself is not recorded verbatim, but reduced to summaries compiled by the clerk of court at the judge's direction (p. 322), these judges, in this court of first instance, decided the case on the basis of a summary of the oral testimony.

With the same preference for writing to speech, oral argument was, as is customary, waived (p. 348). Briefs and reply memoranda to briefs were exchanged in February, 1958. With edifying speed the case was decided in favor of the plaintiff by the court on Feb. 21, 1958, and the judgment was registered in court on March 20. The proceeding delays were caused by appeals. A year after the trial judgment was given, the Court of Appeal reformed the judgment

by substantially reducing the damages allowed for the plaintiff's lost earnings. Almost three months later this judgment was registered, and, another three months later, appeal from it was filed by the plaintiff, to be followed by a cross-appeal of the defendant. On July 7, 1960, a year after the plaintiff's appeal had been filed, the Supreme Court of Cassation granted it in an opinion devoted substantially to what was meant in law by the "implicit decision" of an appeal by an appeals court. (Its remarks on this abstruse legal point are the only portions of the case to be published in any general legal source available as a precedent for later cases.) The cause was remanded for further hearing by another section of the Court of Appeal. The parties were cited before it Jan. 16, 1961, but the case was not decided until Feb. 1, 1963. The plaintiff then received about $10,000 in damages, about $2,000 more than he had won on the first judgment in 1958.

These long delays did not greatly enrich the attorneys. Counsel fees of the plaintiff, to be borne by the defendant, were $300 in 1958, and $1400 by 1962. These typical sums seem modest by American standards, and their size may afford a clue to the more general problem. The lawyers are not paid enough to concentrate on a few good cases; they live by nursing along a variety of causes. The compensation of the attorneys reflects the same sense that the work of justice is to be done by the state, that the attorneys are not the principal participants in this process, that characterizes the limitations on the lawyers in court.

The final result in this case strikes the reader as a just one. On evidence fairly examined, the defendant's negligence was proved; after careful evaluation, all the damages suffered thereby were reimbursed to the plaintiff; his just recovery was not diminished by a whopping counsel fee. Who could complain that substantial justice was not done? But for 10½ years to elapse between accident and reimbursement! Who could suppose that such a result came from a system designed for human needs?

The inhumanity of the process seems indeed to flow from the misconception of law as a science in which certainty of law is the principal value. Immunized to life by this misconception, the lawyers and judges forget that they are dealing with a human problem in their anxiety to have the process run correctly. They become technicians of a system, forgetting that they too are men; that justice does not exhaust the virtues of man; that charity is what binds men together. As technicians, they neglect the purpose of what they are doing; they understand the rules of law without knowing the ends of law. What they need is to see law not as abstract, scientific unfolding of concepts, but as a process in which persons act and play creative parts. "Law" is not an "it"; law is a related series of decisions by human persons affecting other human persons. Law serves human beings only if the participants' purpose is to serve human needs and only if the participants are animated by charity. Concretely, in this case, it seems to me unlikely that two lawyers desirous to solve the case fairly, sensibly, and humanely could not have reached a compromise settlement of about $9000 sometime in 1952.

To the student of canon law and the Catholic Church, there are striking

analogies between the Italian legal system and the systems of the Church. As far as personnel is concerned, candidates for the priesthood are ordained only after a four-year period of intellectual and moral testing. For promotion to bishoprics their character and ability must be approved by bishops in office. At both the entrance level, then, and at the level of important promotion, there is a deliberate effort to choose on merit. But the system has one substantial defect. In the intermediate range between young priest and bishop it operates largely on a seniority basis, and the weight attached to seniority is sufficient to discourage some from applying, to dampen the spirits of the best of those recruited, to kill the enthusiasm of many, and to inject attitudes of caution, careerism, and bureaucracy into very many. What *The Italian Legal System* has to say about the middle range of Italian judges (p. 109) could be said of the middle range of Catholic priests.

The value which Italian jurisprudence gives to concepts in a closed legal system is reinforced in canon law by the relation of this law to theology. Theology both furnishes some of the basic assumptions of the canonical system and at the same time provides a model of a closed system of concepts. As scholastic theology has existed since the great creative outburst of the twelfth and thirteenth centuries, it has been largely such a system; conscious appropriation from the culture, creative innovation, and responsiveness to human needs has not been highly prized by the main purveyors of theory. The emphasis has been on system-building, cultural agnosticism, "the attainability and importance of certainty." The intellectual characteristics ascribed to Italian jurisprudence sound remarkably like the characteristics of this theology (pp. 171-172, 185-187, 191, 195-196).

Is the theology the model for the canon law and the Italian system? Or did the idea of law embodied in civil and canonical systems dominate the theology? Or did the Italian temperament and the Italian historical experience produce all three as systematizations necessary for stability and peace in Italy? The present book does not attempt to explore these questions, and they do not seem capable of simple or categoric answers. As in most matters of historical causality, interaction and mutual influence have been at work. If the idea of law had been different — say the common law idea — it does not seem that the theology, especially the moral theology, could have escaped its influence. If the theology had been different — say the theology of Hindu mysticism — it seems unlikely that the same kind of law would have developed. If the history of Italy had been different — say the history of a strong united country from 1500 — both law and theology would have been different.

The present affords opportunity to test hypotheses as to the mutual interaction of these factors. Italy for twenty years has been a united, democratic, relatively stable nation, operating under a constitution (translated and set out in this book) which is in many respects a model of republican constitutions; the experience under such a constitution is a new one for Italy as a whole. The Church is in ferment. The Second Vatican Council has provided a charter for religious freedom, an emphasis on the role of the laity, and a new vision of the Christian community in the world. The theology — chiefly from Germany, France, and Holland — supporting these changes and issuing from them, strikes

notes, biblical and existential, which ring differently from scholasticism or neo-scholasticism. The canon law itself is undergoing examination, with American canonists at least admitting the need for substantial revision. At the same time critics of the formalism and the advocates of pragmatism multiply in Italian legal circles (pp. 261-265, 273-276). The changes which are occurring in the worldwide Church mirror and reinforce the changes occurring in the Italian consciousness. The legal system of Italy is infused with new ideas and responds in turn.

One gauges the future by looking at the present, looking back where one has been. To know where the legal system of Italy stands today one may consult this book. It accurately assesses the system's strength, weakness, and potential. To look with the eyes of the book's authors, one may see how far the lawyers of Italy have gone in satisfying the human thirst for justice and for peace, how far they yet have to go to unite law to human need and love.

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