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Books Reviewed

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BOOKS REVIEWED

GIUSNATURALISMO E POSITIVISMO GIURIDICO. By Norberto Bobbio. Milan: Edizioni di Comunità, 1965. Pp. 241. L. 2,000.

To those who have been accustomed to regarding Norberto Bobbio as one of Europe's most distinguished legal positivists, it may come as a surprise to see him admit publicly (on p. 146 of *Giusnaturalismo e positivismo giuridico*) to being a proponent of the natural law — at least from a certain point of view and on a certain level. The greatest emphasis must be placed, however, on Bobbio's *distinguo's* both at this point and throughout the volume. For Bobbio is a master in the art of careful, detailed philosophical analysis, the method of approach for which he frankly expresses a marked personal preference. *Giusnaturalismo e positivismo giuridico* is a collection of articles, written over a ten-year period, which exhibits an orderly arrangement of subjects but also many unexpected differences of nuance, if not outright inconsistencies. As a consequence, one must become rather analytical oneself in dealing with it; too synthetic a treatment would result in a failure to do the author justice, whatever the latter term might mean.

In the case in point, Bobbio is relying on a threefold division that is central to several of his chapters. In terms of this division, positivism and its polar opposite, the natural law, may be developed in any one of the following ways: (a) as methods of approach, depending upon whether all positive law or only laws deemed just are regarded as the proper objects of one's study; (b) as "theories about law," with regard to which the ancient opposition between voluntarism, usually connected with a doctrine of sovereignty, and rationalism plays an important role; or (c) as "ideologies." It is only in the third sense, and indeed only in the strongest formulations of the respective ideologies ("All positive laws are, as such, just, and all positive laws must be obeyed" *versus* "Some positive laws may not be just, and they must then not be obeyed"), that an absolute opposition between the two can be shown. It is only in this sense, too, that Bobbio states his preference for the natural law viewpoint, though he concludes the chapter without answering the intriguing question whether he is, in his own terms, an extreme natural law ideologist (that is, an advocate of active disobedience to every law deemed unjust) or a more or less moderate one, accepting the possibility of passive obedience to unjust laws. One suspects that he is the latter. As to the differences between natural law and positivism as *methods*, Bobbio expresses a no less clear-cut preference for positivism; and neither natural law nor positivism satisfies him as a theory about law, presumably because the arguments of the practitioners of the sociology of law, which poses as a third such type of theory, have impressed him more favorably.

It is in the nature of philosophical or social scientific analysis that, however

sincerely one may strive towards an imagined normative ideal of pure "objectivity," one's own hierarchically ordered criteria of relative importance will inevitably affect the outcome. If we are most unlikely to discover any glaring factual or logical errors in Bobbio's sometimes geometrically precise studies, we may nevertheless expect to find instances in which a difference of emphasis among the concepts chosen by him for analysis might have considerably altered the tone of his expressed preferences. This is most especially so in the case of his general antipathy to natural law ways of thinking; for, despite his previously mentioned acceptance, at one point, of natural law as an "ideology," Bobbio's more dominant theme is that natural law, "as a theory of ethics, is unfounded." (Introduction, p. 9)¹ Of the three major sections in *Giusnaturalismo e positivismo giuridico*, Part Two lays the groundwork for this theme by distinguishing among various meanings of legal positivism and their varying degrees, to Bobbio's way of thinking, of acceptability, and then Part Three attacks the theme directly. Accordingly, most of my own comments will be directed to aspects of Bobbio's analysis of natural law. First, however, a few remarks about the contents of Part One, entitled "Law and Philosophy."

Structurally, the discussion of "Law and Philosophy" is rather flawed, because the unity of development that has been imposed on its several themes is insufficient. At first, Bobbio discusses the recent history of the natural law revival and of other attacks on legal positivism, especially in Italy and secondarily in Germany. His remarks about the "nature and function of the philosophy of law," in which he attempts to divide the discipline into four distinct major areas, are interspersed both with references to its earlier history and with a discussion, of no immediate interest to the foreign reader, of the possible implications of his division for the teaching of legal philosophy in Italian universities. Meanwhile, underlying this entire proposal for reforming our ways of conceiving the philosophy of law is the sort of self-referential paradox into which most venturesome philosophers seem fated to be drawn sooner or later, in some way or other:² where, within Bobbio's fourfold division of legal philosophy into theory of justice, general theory of law, sociology of law, and legal methodology, does the text of *Giusnaturalismo e positivismo giuridico* itself fall? It has more to say about the second and fourth than about the first and third, and yet Bobbio's conclusions concerning natural law, for example, must have great relevance for any theory of justice. In other words, if one were to follow to the end Bobbio's recommendations for increased division of labor and specialization along one of these four lines of what is only improperly regarded, according to Bobbio, as a unitary discipline labeled "philosophy of law," then one would probably not be entitled to write the sort of wide-ranging book that Bobbio has written. That would be a pity. In any case, the total effect of this first section of the book is a rather confusing one.

The single point which seems to me, at least, to emerge most clearly and as

¹ All translations from the Italian are mine.

² A familiar form of the paradox is the alleged conundrum often posed with regard to Kant: what kind of knowledge, in terms of Kant's own scheme, is that contained in the *Critique of Pure Reason* itself?

being of the greatest importance from this section is not, as Bobbio himself apparently sees it, the plea for specialization, but rather the negative argument against considering the philosophy of law as an "*ancilla philosophiae*." (p. 40) Bobbio's most frequent criticism of any treatment of legal theory as if it were a dependent, "applied" branch of philosophy is that it must necessarily approach the law from an *external* point of view, which cannot possibly yield an adequate explanation of the phenomenon of law itself. As particularly bad examples of treatments of law that suffer from the vice of externality because of their systematic philosophical presuppositions, he cites Hegelianism and Thomism (which are further marred, he continues, by their reliance on a deductive method of reasoning) and also, more surprisingly, the philosophy of Hans Kelsen, whose neo-Kantian view of the *sollen* as a transcendental category of consciousness is said to have caused him needless difficulty until his latest writings. Bobbio then goes on (p. 43) to oppose "*filosofi-giuristi*" to "*giuristi-filosofi*," the former meaning the proponents of the external approach, the latter being those who have come to the philosophy of law through the concrete analysis and practice of law. With the possible exception of Hobbes and one or two other English philosophers, he implies, the lawyer-philosophers have been far more successful than their more professionally philosophical counterparts. Ihering is read and his contemporary, Lasson, is not; Giovanni Gentile's work on legal philosophy (1916) was a disastrous flight of speculative fancy, whereas Santi Romano's *L'ordinamento giuridico* (1918) ploughed much still fertile ground.

The difficulty with this sort of comment is that it must rely, to an even greater extent than Bobbio seems willing to admit, on personal preferences and on the purposes to which the individual believes legal philosophy ought to be directed. If, for instance, one chooses to teach a course in legal philosophy in which only a certain traditional way of looking at the law—for example, the way of legal positivism, or the approach of the historical school—is featured,³ then that is perfectly legitimate. The student is likely to gain in depth through this method. On the other hand, there are also pedagogical advantages to be gained by juxtaposing examples of two or three different types of legal philosophy in a single course. All this is obvious enough, but it brings out some of the difficulties inherent in Bobbio's criticisms. Progress in the study of legal theory, as perhaps of *any* type of theory, does not *always* consist in conducting more detailed researches along the main lines that have already been laid out either by a single great master or by consensus of the major writers in the field at a given time; greater progress is sometimes made, on the contrary, by the exceptional individual who is prepared to challenge, in a more or less radical way, the established ways of looking at things.⁴

Let us consider an example. I would emphatically agree with Bobbio that one of the greatest contributions made to recent legal theory is that of H.L.A. Hart, and I would contend that Hart's work is exciting and interesting in large

³ One of Bobbio's own published courses, *IL POSITIVISMO GIURIDICO* (ed. N. Morra, Turin, undated), is a very good example of just such a pedagogical choice.

⁴ This is the central thesis of one of the most widely discussed recent books in the philosophy of science, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS*, by THOMAS S. KUHN (1962).

measure because it (correctly) advertises itself as being "a fresh start,"⁵ a new look at old problems—a type of positivism, if you will, but with some significant differences. Up to this point, Bobbio would probably have no disagreement; but a closer analysis of the nature of Hart's "fresh start" leads to some further, more controversial conclusions. For, much of the cogency of the legal philosophy of Hart depends upon his judicious use of certain analogies and models, one of the most pervasive of which is that of systems of rules and rule-governed behavior. Of course, Hart is by no means the first to see a legal system primarily as a certain configuration of rules, but Hart's analysis of law as rules does contain new and distinctive features—for example, the way in which he develops the difference between rule-governed and merely habitual behavior. Now, it would have been perfectly conceivable if Hart had come to construct this, as well as other models that function as his analytic tools, strictly from his experience in legal practice (for Hart is, in biographical terms, one of Bobbio's "*giuristi-filosofi*"); but in point of historical fact, this can scarcely be said to have been the case. Hart himself makes plain his debt to Ludwig Wittgenstein, a philosopher who made very few explicit statements about the law, and to a number of other recent British philosophers who were similarly inspired by Wittgenstein's investigations.

The implication is that, once one goes beyond the most pedestrian restatement of the existing statutes of a given legal system at a given time and has thus begun to engage in theorizing about the law, one can never entirely avoid using certain extralegal presuppositions, whether merely of method and model or of an entire systematic metaphysics—presuppositions which we might as well, for want of a better word, dub "philosophical." And it is by no means self-evident that, as one could be led to conclude from Bobbio's criticisms, the theory with the least extensive basis in such presuppositions is necessarily the *best*, or even "the most useful." I have mentioned Bobbio's claim that Kelsen's neo-Kantian early treatment of the *sollen* had a deleterious effect on his theory; be this as it may, it is difficult for me to imagine that Kelsen would have had anything approaching the impact that he did have, if certain other underlying philosophical presuppositions of his, such as his application of a sort of hierarchical, "hypothetico-deductive" logical model to the law, or the Leibnizian and Kantian *horror vacui* which led to his quest for worldwide *Rechtskontinuität*,⁶ had been absent. Little, if anything, of these presuppositions remains in Hart. Yet both have made great contributions. No doubt Gentile's *Fondamenti di filosofia del diritto*⁷ is at best

⁵ H. L. A. HART, *THE CONCEPT OF LAW* 77 (1961).

⁶ For a particularly explicit expression of these metaphysical exigencies as felt by a member of the Kelsenian school, at a time when Kelsen's own thought, especially on the subject of international law, was still undergoing development, cf. Fritz Sander, *Das Faktum der Revolution und die Kontinuität der Rechtsordnung*, 1 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 132-164 (1919/20).

⁷ Incorrectly cited as LINEAMENTI DI FILOSOFIA DEL DIRITTO on p. 41 of GIUSNATURALISMO E POSITIVISMO GIURIDICO, but correctly cited on p. 43. The best-known contemporary exponent of Gentile's philosophy in the United States, H. S. Harris, himself dismisses this book somewhat lightly as "a rather condensed and gnostic account of [Gentile's] practical philosophy," thus, incidentally, making the point that FONDAMENTI DI FILOSOFIA DEL DIRITTO should probably not be judged primarily as legal philosophy, even from a Gentilean point of view. Cf. Introduction to Harris' translation of G. GENTILE, *GENESIS AND STRUCTURE OF SOCIETY* 3 (1960).

second-rate; but however bitter one may feel concerning the effects of a corrupted idealism in influencing Italian political thinking in the period after World War I, one cannot justly deny the great positive importance, for legal philosophy, of the philosopher in whose tradition this idealist movement is usually located, namely, Hegel.⁸

Hegel was certainly one of those who came to the study of the law from elsewhere, thus qualifying as one of the most "external" of legal philosophers, according to Bobbio's critique; but Hegel also claimed to be the sworn enemy of externality. For example, no one who has read the Introduction in the *Grundlinien der Philosophie des Rechts* can ever quite forget the scorn heaped by Hegel himself on Gustav Hugo for the superficiality, which for Hegel implies externality, of Hugo's treatment of Roman positive law (in the latter's *Lehrbuch der Geschichte des römischen Rechts*). Hugo had made comments rather similar to Bobbio's, favorably comparing juristic treatments of the law to philosophical ones, and adducing a comparison between remarks by Cicero, the lawyer, and Favorinus, the philosopher, regarding the Laws of the Twelve Tables. Hegel briefly analyzed part of an argument between Favorinus and another Roman lawyer, Sextus Caecilius, as recounted in Aulus Gellius' *Noctes Atticae*, showing that the philosopher was incorrect in criticizing the Twelve Tables as if they or any other positive laws had ever been intended to be eternally valid and useful across the tremendous historical changes that had taken place in Rome, but also taking Favorinus' side against the foolish defenses, made by both Caecilius and Hugo, of some rather trivial and irrational details in the Roman law.⁹ The parallels among the attitudes of Caecilius, Hugo, and Bobbio with philosophers who come to the law from outside are rather striking; and it is interesting, too, to note that Bobbio has elsewhere treated Hugo and the historical school of law in Germany as the forerunners, despite certain clear differences, of legal positivism.¹⁰ We may now ask the question as to which of the two, Hugo or Hegel, presents us with a more "external" treatment. Hegel's own analysis makes it clear, it seems to me, that to opt for either one or the other without qualification would be to give a practically meaningless answer. Hugo certainly paid more attention to certain details of Roman criminal law than did Hegel, for example, to comparable details of Prussian criminal law; but this did not prevent Hegel's philosophical treatment from having a great impact on thinking about law—even greater in the long run, perhaps, than Hugo's. Even the latter judgment cannot be made with absolute certitude: it is not sufficient, for example, to point out that Hegel is more widely read today, even by legal theorists, than is Hugo. Perhaps an insufficient length of time has passed. Cicero, after all, is much more widely quoted today than Favorinus.

What *can* be said about the more systematic philosophers who approach the law from their nonprofessional perspective is that they run a greater danger of

⁸ Although he says little else, none of it very favorable, about Hegel, Bobbio does acknowledge (p. 37) that the philosophy of law owes "the fortune of its name" in great part to him.

⁹ G. W. F. HEGEL, *PHILOSOPHY OF RIGHT* 16-20 (note to para. 3) (tr. T. M. Knox, Oxford, 1942).

¹⁰ *Op. cit. supra* note 3, at 40-43.

disaster than do the "lawyer-philosophers." If they fail to respect the peculiar features, whatever they are, that distinguish the phenomenon of law from all other phenomena, and if they consequently fail to treat law, in some sense or other, on its own grounds, then their efforts indeed merit scorn first, and then oblivion. This much is unquestionably true about Bobbio's comments, and at least in this sense his principal point, the rejection of the "*ancilla philosophiae*" view of legal theory, is certainly valid and no doubt necessary. But it is also obvious that the frequently useful freshness of approach supplied by the greatest of the "philosopher-lawyers," such as Bobbio's own examples of Hegel and St. Thomas, at least partially compensates for their deficiencies in legal experience in the eyes of most students of legal theory. They ought not to be looked down upon simply by virtue of their backgrounds! When they write on subjects in the general area of law, they ought, it is true, to be evaluated primarily as legal theorists rather than, for example, as metaphysicians or as philosophers of science; but it is equally true that contributions to legal theory may be of the most varied and often scarcely commensurable kinds. In his enthusiasm for the "lawyer-philosophers" Bobbio seems often to forget this.

Elsewhere in Part One, Bobbio expands on the division of labor which he envisages within the nonunitary set of academic pursuits known as "philosophy of law," and in so doing makes an interesting proposal that shows just how strongly he himself, in his better moments, actually supports the existence of variety in the field. He first refers to a rather commonplace, turn-of-the-century Italian classification of legal philosophy into deontological, ontological, and phenomenological components; he then assimilates these, with the addition of legal methodology, to his own proposed fourfold division, and proceeds to examine recent Italian developments in each. As far as legal deontology, the problem of justice, is concerned, he says, "*Il panorama che ci si presenta è piuttosto squallido*" (p. 56), with Del Vecchio serving as the single outstanding counterexample. At the same time, however, Bobbio evinces some recognition of the fact that theorists of natural law, in whom Italy has not been lacking of late, may reasonably be thought to have made some contributions of their own to legal deontology; in this context, however, he regards natural law theory as a development to be refuted rather than encouraged. The most promising means of refuting it, he feels (pp. 71-72), is the construction of a "phenomenology of justice." Both here and in an earlier passage (p. 47), he explains that this phenomenology of justice would consist of a comparative study of various past and present conceptions of "justice," viewed as criteria of evaluation which societies have sought to implement by means of their legal systems. The end result of such combined historical and analytic research, he suggests, might well be the natural law theorist's traditional center of reference, "the nature of man"; but the nature of man arrived at in this way, of course, would be the terminal point, rather than the starting point, of the investigation. Bearing in mind this interesting but rather unelaborated outline of a counterproposal, to be substituted for the natural law approach, we may now consider some aspects of the criticism of natural law which occupies a major portion of the final two-thirds of *Giusnaturalismo e positivismo giuridico*.

Precisely what sort of thing is this natural law which is to serve, for the most part, as the object of Bobbio's analytical criticism, though occasionally also of his faint praise? Since nearly every important writer on natural law has put forward a slightly different version of the concept—the existence of such a diversity being, perhaps, simply the sign of a living movement as opposed to a dead set of dogmas—it is not entirely Bobbio's fault that several different and somewhat incommensurable ways of looking at natural law emerge in the various chapters of his book. The first to appear explicitly (p. 129) is a broadly historical classification, with reference to the ways in which the superiority of natural over positive law has been asserted; the three "typical forms" listed are that of scholasticism, that of modern rationalism, and that of Hobbes. Bobbio subsequently claims (p. 133) that these three forms may be paired off with three historical forms of positivism. A second way in which Bobbio views natural law is as a theory about ethics, as distinguished from an ethical system; this, if anything, is the book's central thesis concerning "*giusnaturalismo*." Finally, he concludes his discussion of the subject, in the book's penultimate chapter, by borrowing a thesis from his colleague, Professor d'Entrèves, to the effect that what is important about natural law is its historical function.¹¹ (p. 191) He then asserts that this laudable historical function has now been successfully absorbed by other currents of thought, thus finally rendering natural law theory outmoded. I shall proceed to comment, in order, on each of these diverse phases of Bobbio's critique.

The three ways in which the "superiority" of natural law to positive law has been asserted, according to Bobbio, are the following: (1) Natural law is a system of a few first ethical principles (or is perhaps only one such principle), addressed primarily to lawmakers, on the basis of a further, more detailed specification of which the lawmakers are obliged to formulate the positive laws. (2) Natural law is the collection of the rules of right reason which govern relationships among individuals in the state of nature; the positive legal system simply reproduces the material content of these rules, but with the essential difference that positive law also provides the practical mechanisms of coercion for the enforcement of the law. (3) Natural law serves only as the "prime mover" of the positive law system, supporting it with some basic norm such as the requirement that "promises are to be kept"; however, none of the further material content of positive law is in any way dependent on the natural law. As I have already noted, Bobbio identifies these three forms with historical versions—the first with scholasticism and especially Thomism, the second primarily with Kant, the third almost exclusively with Hobbes. In an important sense, the Hobbesian version (natural law as providing only a first legitimatization of positive law) is the inverse of the Kantian (positive law as furnishing only the machinery for enforcing natural law).

The drawback in this sort of schematizing is that, although it may provide a somewhat different and interesting way of looking synthetically (despite Bobbio's preferences for analysis over synthesis) at the whole history of natural law theories, it tends to force the rich and numerous historical facts into a

¹¹ A. P. D'ENTRÈVES, *NATURAL LAW* 12 and *passim* (1951).

highly artificial pattern. This, again, may be desirable or undesirable, depending on one's purpose. From the context, it appears that Bobbio is more concerned with giving a logical typology than with historical detail, and so it might be inappropriate to raise at this point the extremely difficult problems in interpretation which a reading of the *Leviathan*, for example, suggests concerning the seventeen enumerated "laws of nature" that are said to bind only *in foro interno* and to have no practical consequences until *after* the formation of a commonwealth.¹² But just what is, then, Bobbio's purpose in presenting us with this typology? From the opening statement of Part Two of his book, it appears to be that of showing the necessity for considering the alleged antithesis between positivism and natural law "on various levels, in order to render more difficult sectarian rigidification." (p. 77) From this point of view, his classification schema is at best only partially successful, because it fails to take account of all the logically possible ways of asserting the "superiority" ("priority," understood in a logical and not a chronological sense, might be a *more apt* because less value-colored word) of natural law to positive law. To distinguish three forms of possible natural law priority is better, for the purposes of reducing polemic and increasing discussion, than to maintain that there can be only one; it would have been still better, however, to lay considerable emphasis on the fact that this typology is no more logically exhaustive than it is historically so.

As further alternatives to the three types of natural law mentioned by Bobbio, I shall suggest two more, selected more or less arbitrarily: (4) Natural law is a set of ethical first principles held in common by the actual or potential subjects of a positive legal system, on the basis of which they are obliged to decide whether to accept or to reject the positive laws promulgated by would-be law-makers. (5) Natural law is the collection of formal rules of correct procedure for creating, promulgating, and enforcing every positive legal system, regardless of the latter's material contents, and thus serves as a guide for us to judge whether a set of phenomena alleged to constitute a legal system is actually such, or is rather an incoherent chaos. In a certain sense, the fourth type is the opposite of Bobbio's first, since the latter places the onus of obeying the dictates of the natural law on the lawmakers and constrains subjects to obey all laws, even unjust ones, that are legitimately promulgated (p. 130), whereas my alternative places the onus of decision on the subjects. It is a natural law which sanctions, among other things, the so-called "right to revolution." Number 5 falls somewhere between the second and third, but is not, as far as I can see, reducible to either one; if one desires historical referents for it, then a certain reading of Hobbes with respect to his "laws of nature" might be one, and Professor Lon Fuller's recent book, *The Morality of Law*, would no doubt be another.¹³ At any rate, the existence of these two additional alternatives serves to demonstrate the incompleteness of Bobbio's typology.

¹² Hobbes lists nineteen such laws in all, the first two being the subject of *LEVIATHAN* I, 14, the rest being dealt with in Chapter 15. Most of the latter may be regarded, in one way or another, as basic rules governing judicial procedure. Cf. especially p. 103 in the Oakeshott edition (Oxford: Basil Blackwell, 1960).

¹³ New Haven: Yale University Press, 1964. On p. 96 he explicitly labels his approach a "procedural version of natural law."

Bobbio's failure to seek for any further "typical forms" of natural law in this chapter stems from the fact that the three that he has enumerated can be neatly paired with "three moments of the positivist critique" (p. 131) and with three forms, already formulated in the preceding chapter, of legal positivism. (p. 133) To the "scholastic" assertion of natural law priority may be opposed the denial of the existence of self-evident ethical principles and the historically (but not logically) consequent development of positivism as an *ideology*, according to which, it will be recalled, an obligation to obey the law merely by virtue of its being law is asserted. Against the Kantian view, as Bobbio has defined it, positivism maintains that the positive law may have any material content whatever, and not just those rules which are asserted to be the content of natural law; it is to the truth of this claim that positivism as a *theory* about law, which in its extreme form asserts that all law is reducible to statute law and that all statute law is reducible to the dictates of the sovereign, owes much of its force. Finally, against the Hobbesian assertion that a fundamental norm of natural law is the basis for all positive law systems, positivists simply point to positive law's *factual*, nonnormative origin; this extremely simple point explains, in large measure, why positivism as a *method* of approaching the philosophical study of the law appears highly attractive.

These tripartite pairings are just a bit *too* neat. In a parenthetical comment made in the "appendix" to Part Two, which is actually a review of Mario Cattaneo's recent book entitled *Il positivismo giuridico (Hobbes, Bentham, Austin)*,¹⁴ Bobbio remarks that the number three is always the philosophical number *par excellence*. (p. 148) This could be just a bit of whimsy, of course, but it appears to be less so if one reflects on the pervasiveness of the triadic *motif* throughout *Giusnaturalismo e positivismo giuridico*. I do not propose to draw any profound conclusions from this quirk, except to point out that, unsupported by its presence in any philosophical system such as Hegel's or Peirce's, it must strike the reader as being more like a quirk than like a carefully reasoned position. In the case of the pairings mentioned above, the third seems especially labored: to suggest that the positivist insistence on treating only positive law as the proper object of the study of legal philosophy should be seen as an *answer* to Hobbes, whose position Bobbio acknowledges to be transitional between natural law theory and legal positivism (p. 131), is an overstatement and perhaps even a paradox. Another, more clear-cut paradox of these pairings will be seen if we reconsider the statement of personal position with which Bobbio concludes the chapter under consideration, and to which reference was made at the beginning of this review. There, it will be remembered, Bobbio notes his personal allegiance to natural law rather than positivism *as an ideology*, and at the same time to positivism rather than natural law *as a method*. One can understand very well and sympathize with his reasons for taking this judicious position, but it seems a bit amusing in light of the original distinctions made at the beginning of the chapter. For it was precisely the *ideological* formulation of natural law which was pointed to as the boldest, the least contemporary in origin, and the least legally relevant of the "three forms." Does Bobbio really feel a greater

¹⁴ Milan: Giuffrè, 1962.

intellectual affinity with St. Thomas than with Kant or Hobbes? As a matter of fact, the paradox is probably due primarily to the somewhat artificial manipulation of the various triads. On the other hand, it also points to a profound tension in Bobbio's position, in which the rejection of all "objectivism" in ethics coexists in rather uneasy union with a strong sense of ethical commitment. The two poles of this tension will be the subjects of my two final sets of comments.

We come now to the aspect of Bobbio's treatment of natural law which he himself regards as central to the third and final section of his book, the section entitled "*Del Giusnaturalismo*." The thesis is stated most strongly in the Introduction (p. 9), as follows: "*Il giusnaturalismo non è una determinata morale ma una determinata teoria della morale, e per di più, come teoria della morale, è infondato.*" What calls for further analysis at this point is the first half of Bobbio's thesis, to wit, that natural law is an ethical theory rather than an ethics. Such an analysis should in turn serve to provide evidence, though of course no absolutely decisive proof or disproof, concerning the value judgment in the second half of the thesis.

The distinction between an ethics and a theory about ethics, as Bobbio explains it (p. 181), is clear enough. The former is a set of moral norms, systematically and hierarchically ordered on the basis of a few fundamental precepts, and usually resting on the acceptance of a single highest value. A theory about ethics is an ordered set of rational arguments intended to justify a particular ethics. Many of the most famous philosophers develop both ethical systems and theories about these systems, of course, and indeed the two types of enterprise are often found interspersed in their writings. Nevertheless, Bobbio claims, the logical distinction is absolutely clear-cut, and it becomes important when we are confronted with a case like that of natural law, in which the same theories have been employed to justify the most diverse values.

In the long run, I suspect, this thesis may prove less exciting or original than it at first appears to be. Bobbio has stipulated a certain definition of "natural law" as a means of imposing a certain kind of order on the relative chaos with which the history of the concept presents us. We are free to accept this stipulation if we so choose, but we should not permit ourselves to believe that a rejection of it would be illogical. "Natural law" has also been used, by various writers, to refer to a proposed, specified set of ethical norms, as well as to a certain philosophical theory, or theories, justifying the acceptance of these norms. In dismissing the usage of "natural law" whereby it has been taken to refer to actual norms, Bobbio contends that only a single maxim, "Act according to nature," can be directly formulated in response to a felt need to use nature as the guide of conduct; this essentially empty axiom, he points out, can be filled in with practically any imaginable content, depending on one's understanding of "nature." This is obviously correct, and the history of the concept does, indeed, amply illustrate the conceivable diversity of content. But the existence of this diversity does not imply that we must automatically disqualify all proposed natural law *systems of ethics*, refusing them the name of "natural law" because there are too many of them and they are too disparate. Most of the philosophers who

formulated such systems did so in the belief that their own formulations were, in some sense or other, *better* rules of human conduct, more fully in accordance with the basic principle of acting according to nature, than were all other possible formulations. Unless one is a total ethical relativist, one cannot make a prejudgment to the effect either that they are all equally indefensible or that they are all equally undeserving of the label "natural law" which their proponents have affixed to them.

The case of "utilitarianism," to which Bobbio himself points in illustration of his distinction between ethics and theories about ethics, may be sufficiently parallel to be illuminating. Bobbio points out, rightly, that the phrase "utilitarian ethics" may refer either to an ethical system based on the principle of utility, or to the various arguments used by Bentham and his followers in their attempts to persuade others to adopt the principle of utility. But the precept, "Act in order to maximize utility," or even the slightly more explicit, "Act in order to promote the greatest good of the greatest number," is sufficiently empty to permit, logically speaking, the most diverse interpretations in the process of further specifying it. From a logical point of view, it is simply a historical accident that the utilitarians formed something more like a single school than did natural law theorists, and that their movement, at least up to the present, has enjoyed a shorter life span. Even so, the differences in detail between the ethical *system* of Bentham and that of John Stuart Mill or of G. E. Moore are quite considerable; in this case, too, perhaps the *theory* about ethics espoused by them exhibits a greater uniformity than do the values themselves. Of course, it is not very helpful to say of a given writer that he has developed a natural law system of ethical values, unless one goes on to specify what *sort* of natural law system it is; but the same is also true, in principle, of a utilitarian system. Bobbio has failed to convince me that the case of natural law is unique, except perhaps by virtue of its historical longevity.

Appalled as he is by the lack of commonality among the various systems of ethics to which the "natural law" label has been applied, Bobbio claims to find a more intellectually satisfying basic agreement among the Doctors when he turns to the conception of natural law as a theory about ethics. He defines it as "that theory according to which the basis of the rules of human conduct is not to be discovered in the will of the legislator (divine and human), an essentially changeable entity, but in the constant, uniform, eternal nature of man." (pp. 139-140) It is, in short, an *objectivist* theory of ethics. This may *seem* to be a sufficiently minimal definition to include all possible varieties of natural law theory, but the appearance of unanimity even at this rather advanced level of generality may be illusory. For example, there are those who have defended the notion of a historically relative kind of natural law; Guido Fassò, to whom Bobbio refers on numerous occasions in his book, is one such.¹⁵ Whether or not one favors extending the label "natural law" to include such a conception, this usage does seem to be permitted by Bobbio himself, in his penultimate chapter, when he lists the identification "between nature and the desirable and ascertainable ends in a determinate factual situation" (p. 189) as being one possible way in which

¹⁵ See esp. p. 208 of G. Fassò, *LA LEGGE DELLA RAGIONE* (1964).

a natural law theorist might understand the term "nature." If we admit that there exist certain determinate factual situations in today's world which never existed at any time in the past,¹⁶ and if we also admit that an ethico-legal theory advocating the basing of value judgments on determinate factual situations can be called a "natural law theory," then surely that part of Bobbio's definition which refers to "the constant, uniform, eternal nature of man" must be faulted for failing to include every version of the theory.

This last criticism might amount to little more than mere nit-picking, were it not for the fact that Bobbio's definition of what he understands to be common to all versions of natural law as a theory about ethics serves as an important step on the way to his general rejection of it. It is, of course, impossible to criticize a theory that eludes all attempts at definition, except by noting the fact of this elusiveness and making the value judgment that such elusiveness is a bad thing, and so Bobbio can hardly be blamed for *trying* to find the common element in all natural law theory which will allow it to be critically examined. But his allusion to the alleged immutability of human nature does not, as we have seen, fit all possible versions of the theory. What still remains, however, is the characteristic of ethical "objectivism," and it does seem fair enough to attach *this* label to all the variants of the almost ageless view that *physis* ought not to be disregarded in the formulation of *nomoi*. "Objectivism" itself, however, is one of the less precise terms in the philosophical vocabulary. Bobbio contrasts it, not with "subjectivism," but rather with "ethical relativism." The latter, too, is a theory about ethics, he says, rather than a determinate ethical system. It, too, is "a means of conceiving of the origin and the validity of moral values." (p. 185) But "objectivism" by itself would apparently not be a sufficient label to permit Bobbio to distinguish natural law theory from several other types; in the middle of his criticism of Cattaneo for failing to see that ethical relativism is by no means an essential part of the legal positivist position, even though many legal positivists, such as Kelsen, have also been ethical relativists, Bobbio points out that the very English philosophers whom Cattaneo had studied most closely were "adherents of an objectivistic ethical philosophy (utilitarianism)." (p. 151) Whatever may be the shortcomings of objectivism, then, it is not a unique characteristic of natural law ethics; if natural law theory is ultimately to be rejected because it is objectivistic, then other forms of ethical theory, as well, will have to succumb to the same ban.

But what, to Bobbio's way of thinking, is objectionable about objectivism? The answer is repeated many, many times in the closing chapters of his book: objectivism illegitimately pretends that values can be derived from facts. This is no longer a new point; in its Humean version, referring to the logical impermissibility of illation from a fact-proposition to a value-proposition, let it be conceded.

¹⁶ In briefly criticizing the identification between nature and "the desirable and ascertainable ends in a determinate factual situation," Bobbio cleverly but tendentiously selects an example of a very old kind of factual situation, about which natural law claims have recently been raised. The example concerns literary creation, and the claims have to do with the rights of authorship. Bobbio correctly points out (p. 190) that literary creation is not a new phenomenon. But innumerable sorts of factual situations in today's world *are* new, and they are the more interesting cases to consider in light of this particular interpretation of what is "natural" in the expression "natural law."

But this, as has been pointed out on countless occasions, leaves most of the important questions still to be settled. If one is willing to allow certain facts to function as *evidence* (rather than conclusive logical proof) in the formation of value judgments, and if one is further willing to admit that reasons can be given for considering certain facts more relevant than others in this process, then one cannot regard "objectivism" as being wholly wrongheaded, even if the claims of many individual objectivists may have been misconceived and excessively exuberant. To this view, complete ethical relativism is not just one possible alternative theory about ethics, but is in fact the *only* possible alternative. Does Bobbio wish wholeheartedly to embrace that alternative? It seems unlikely.

At this point, it might be well to recall the suggestion, made earlier in Bobbio's book, that the comparative study of the "phenomenology of justice" should be advanced as a means of "refuting" natural law. If relativism is to be viewed primarily as a certain theory about the means of conceiving of the origin of values, then this cryptic suggestion by Bobbio would seem, at first sight, to be a striking illustration of the relativist method in the domain of legal deontology. The methodological problems involved in such a study would, of course, be tremendous. For example, the Cromwellian legal system reflected the views of Colonel Ireton (mentioned by Bobbio, p. 171), but could the "phenomenology of justice" of that period be considered complete if it failed to give any weight to the Levellers' conception of justice, as well? But let us assume that the methodological obstacles could be partly overcome. What, then, would be the final product of this lengthy study? Bobbio, at his most optimistic here, says that it would be a positivistically determined "nature of man," the much-discussed but never agreed-upon starting point of the natural law theorists. Now, to say this is to make rather light of the tremendous discrepancies among different historical societies' conceptions of justice, discrepancies beside which the vaunted lack of agreement among natural law theorists concerning the rules and values of natural law might well pall to insignificance. But it remains an interesting suggestion for further study, and perhaps the final results with regard to views of justice and of the nature of man could be expressed in a series of disjunctive phrases, if no better means of reconciling them with one another could be found. The truly curious point, however, is that an outcome which is so nonrelativist, at least in form, as a general conception of human nature should issue from what seemed to be an eminently relativistic procedure. Bobbio may not wish to regard this suggestion of his as a plea for a new kind of objectivism, but it certainly shows how easily the line between these two allegedly opposite types of ethical philosophy can be crossed.

On the other hand, a certain (modified) theory of relativism, quite different in method from that inherent in Bobbio's suggested "phenomenology of justice," is latent in every conception of a "historically relative natural law." We must again assume, both for purposes of argument and in keeping with one of Bobbio's own classifications, that this phrase is not a contradiction in terms. One common, dramatic way of expressing the meaning of such a conception is to say that "human nature is not yet," that is, that many innate human possibilities for developing better rules to govern behavior have not yet been actualized.

To the extent to which such better rules can be found and pointed to, according to their theory, they may be taken to constitute the natural law, having some form of priority over positive legal systems. But the contents of such rules would, by definition, be continually changing. This kind of natural law stands in striking contrast to the alleged outcome of Bobbio's "phenomenology of justice." Between the two, the former would be considerably more "relativistic," in some meaningful sense of that word; and the latter would be far more conservative, since it could only deal with new views of justice after they had been incorporated in some positive institution, such as a legal system, or in some known body of public opinion.

With this blurring of lines and interchanging of positions, Bobbio's attack on the fundamental "objectivist" logic of the natural law position is seen to lose most of its force. Of course, he still can — and does — point out the many historical conflicts between contradictory values and/or conceptions of nature that have paraded under the natural law banner, as well as the extent to which natural law theories in the past have served as apologies for various religious and other traditional authorities; but he has downgraded in advance the importance of these arguments by making his preliminary distinction between natural law as an ethical system and natural law as a theory about ethics, and by choosing to focus his attention on the latter. If we accept literally Bobbio's theses that "natural law is not an ethics," but that it is "a theory about ethics," then, strictly speaking, the notorious existence of widely diverse "natural law" systems can no more serve as evidence against the natural law position than could the existence of diverse and frequently contradictory legal norms in different systems serve as evidence against the method of legal positivism. That is why it has been important to concentrate here on Bobbio's criticism of natural law theory on the grounds that it is an essentially objectivist ethical philosophy, and to show that that criticism is, as it stands, inconclusive. It will be recalled that the second half of his central thesis in this final section of *Giusnaturalismo e positivismo giuridico* is that "*come teoria della morale il giusnaturalismo è insostenibile*." (p. 187) This must be in large part, as I have already noted, a value judgment, and a reading of Bobbio's own strictures in this regard can only contribute to one's usual caution, despite Bobbio's unwonted lack of caution on this occasion, about passing such a judgment. No absolutely decisive proof is available, I repeat, on either side of the issue; we can only weigh the available evidence. Bobbio, at any rate, has not brought forward sufficient evidence for us to accept *his* particular judgment on the matter.

Finally, we may turn to consider briefly the new and again rather different way of looking at natural law which emerges in the last five pages of the book's penultimate chapter, the pages which clearly serve (despite a final chapter on the *Natur der Sache* doctrine and two further appendices) as Bobbio's concluding remarks concerning his principal subject. "What counts about natural law theory is its historical function" (p. 190), "but the historical function of natural law theory is today generally absorbed by other currents of thought." (p. 192) At this point, the role of the analyst is more or less laid aside in favor of that of

the cultural historian and critic. Those who speak of the eternal rebirth of natural law (unaware, parenthetically, of the obstacles that this recurrent process places in the path of its attaining adulthood) cannot, according to Bobbio, mean the return to favor of a certain fixed set of ethical values, and yet they intend something a bit more universally exciting than a renewal of interest in a certain method of doing ethical philosophy. The historical function of natural law has been to serve as a theoretical expression of the need to impose limits on authorities' claims of absolute power over their subjects. This need is very strongly felt today, he concludes, but other and better means are available for meeting it. As examples, he mentions the growth of constitutionalism in formerly totalitarian states, the United Nations' universal declaration of the rights of man,¹⁷ and popular resistance movements against fascism, colonialism, and unjust wars.

There is no longer any room for doubt about it: if "relativism," of which several rather technical definitions have arisen in the course of our analysis, is understood in its ordinary language sense as implying an attitude of impotence to choose among conflicting moral standards, then few writers are as far removed from relativism as is Bobbio. Despite his sometimes almost scholastic devotion to careful, analytic procedures, the tone of passages such as this one is closer to a "*fiat justitia, pereat theoria*" than to that of the detached intellectual. This is not intended as a criticism; Bobbio's sense of commitment is admirable, and the fact that it coincides so well with the attitudes of so many contemporary theorists of natural law sheds new light on the reasons for his otherwise unexpected expression of allegiance to natural law as an "ideology." One does wish, however, that the relationship between this ideology and Bobbio's theory about ethical theories could be more clearly delineated than he has yet succeeded in doing.

Although it is a hard fact for our rationalist temperaments to confront, the process of theory-building today still remains, as often as not, a case of "*fides quaerens intellectum*." In the present context, this remark is not intended to have any reference to problems of religion, but simply to the way in which, in fact, philosophers construct and/or reject theories about ethics. Many natural law theorists fully share Bobbio's principal values, as he readily admits; but he and they disagree about the best (meaning both "the most appropriate" and "the truest") intellectual framework for justifying these values. Both he and they share, as intellectuals, the feeling that such a framework is in some sense a requirement of the human mind; both he and they would regard the total absence of such frameworks as a dangerous state of affairs for any human society; and both he and they would, I think, agree that a group of human automata who were somehow "programmed" to act in accordance with a certain desirable set of values, but who could give no *reasons* for their actions, would not be exemplifying the highest possibilities latent in human nature.

Bobbio would no doubt be displeased, however, about some of the terminol-

¹⁷ It may be objected that this declaration is itself based on a type of natural law view. What interests Bobbio about it, however, is the fact that it is, in a sense, a document of *positive* (international) law, and thus represents a first step "towards international jurisdictional protection of the rights of citizens against their own state." (p. 194)

ogy, suggestive as it is of certain natural law ways of thinking, with which I have described this assumed agreement. But his objections might serve, in this event, as the basis of a potentially fruitful further debate. As a matter of fact, this openness to debate seems to be the dominant spirit, despite some excessively polemical passages, of *Giustnaturalismo e positivismo giuridico*, and it is in this spirit that I have attempted to offer some criticisms.

WILLIAM LEON MCBRIDE

WSPÓŁCZESNA TEORIA I SOCJOLOGIA PRAWA W STANACH ZJEDNOCZONYCH
(CONTEMPORARY THEORY AND SOCIOLOGY OF LAW IN THE UNITED
STATES). By Kazimierz Opalek and Jerzy Wróblewski. Warsaw, Poland:
Państwowe Wydawnictwo Naukowe, 1963. Pp. 320. Index of names,
summaries in Russian and English. Zł. 45.00.

This book, written by a team of two Polish law professors who have co-authored some other contributions to legal science published in Poland, testifies to the interest in developments and thoughts in foreign countries prevailing in Polish legal circles. It should be stated that legal science in Poland is flourishing. The output of serious publications is great, and numerous legal and related periodicals discuss timely topics of law, its relationship to other social sciences, and the administration of justice.

It is true that in the political system existing in Poland it is impossible to have a book published if the authorities do not approve of its contents. Freedom of the press has been eliminated with the "advent of socialism." In particular, in the field of law it would be inconceivable to publish ideas contrary to these officially enunciated, at least in their axiomatic nuclei. But the mind of the Poles is searching, and their desire to keep abreast of the progress of social and other sciences in the West is great. It is the usual practice, in writings published in Poland, to pay lip service to Marx, Lenin, or other communist theorists, and to evaluate negatively all which does not conform. With those standard additions, the article or book has a good chance of appearing in print, provided that it is otherwise a valuable study. Often, it will be difficult for the reader to ascertain the author's stand, and to what extent he believes in his own comments. But this is a secondary issue, the primary one being to impart some information.

Undoubtedly, as to information, the efforts of the authors of the present book were serious. They collected a wealth of material about some of the trends in contemporary American legal thinking. After extensive preparation in Poland, they spent a year studying the problem on the spot in the United States, visiting a number of law schools and holding many discussions. The task of classifying and pointing out the currents in American legal philosophy is by no means easy. In a book review, an American law professor stated that the author he was reviewing "combines training in philosophy and in law, and his work shows the confluence of these disciplines." He went on to say: "While this combination may not be unusual on the European continent, where training in law often has a humanistic setting, it is much less common than it should be in our

country, where legal education is almost exclusively oriented toward bar examinations and professionalism."¹ Professors Opalek and Wróblewski emphasize, in their book, that in continental Europe, legal theory is much easier to ascertain than in the United States. In Europe, sources of juridical schools may be found in law school teachings, textbooks, and monographs; in the United States, legal ideas are primarily expressed in innumerable articles, often difficult to be found and not giving the reader much insight as to their influence and significance. The authors add that those difficulties "are also connected with the well-known phenomenon of the methodological and theoretical chaos in the contemporary bourgeois learning; this comes in relief in the existence of very numerous schools and trends, which can still be subclassified into different variants and nuances." In addition, many jurisprudential considerations appear quite unexpectedly in writings dealing with some specific legal questions, the result of a tendency to analyze theoretical problems of a legal and sociological character against the background of more detailed considerations. (p. 11)

The reason for undertaking their research and writing the book was, the authors state, that they were "interested in the survey of other people's experiences in this field and in confronting them with the Marxist methodology." (p. 312) Before getting to a presentation of the ideas of various American legal thinkers, the authors explain the common law terminology and compare it with the civil law use of terms. They state that "jurisprudence" corresponds to the European "theory of the law," and that "it includes today, according to contemporary English writers, all scholarly legal output except the technical presentation of the different branches of the law." (p. 10) Although the precise scope of the terms is far from being clear even to American scholars, it would be worthwhile to point out that while "jurisprudence" is a more inclusive term, "legal philosophy," as used in the United States, is often understood as referring to more abstract legal reasoning, critically analyzing the purpose, effect, and nature of legal norms and their relationship to other social sciences. The authors do not mention the term "legal philosophy" at all in their book. They refer only to "philosophical jurisprudence" as a school of thought, contrasted to analytical and historical jurisprudence.

In the introduction to the book, the authors compare the continental and the common law legal theories, trace their development in the United States, and conclude that legal thinking in the nineteenth century in this country was similar to that in England, although it underwent a stronger influence from the concept of natural law. Then, in the twentieth century, jurisprudential theories in the United States came closer to those of the European continent. However, by today, they have some originality; American legal thought is independent; and it is possible to speak about "American jurisprudence." In particular, sociological jurisprudence is a product of American legal scholars.

The authors note the decline of analytical jurisprudence in the United States and the disapproval of the English "Oxford School" of modernized analytical jurisprudence led by H. L. A. Hart; they add that the school of natural law, never completely dormant, experienced a revival in recent times. As the main

¹ Milton R. Konvitz, [Book Review] 7 NATURAL LAW FORUM 221 (1962).

causes for this phenomenon, given by the Americans themselves, the authors refer to the tragedy of World War II and the experiences of Fascist regimes leading to the search for legal norms based on moral values in contradistinction to lawlessness hidden behind a façade of legal enactments; there was also some continuity of natural law ideas in the United States.

Besides these reasons, the authors find another factor:

In spite of the fact that American scholars rarely acknowledge it openly, elements of politico-ideological nature, connected with the conflict of the two camps, socialist and imperialist, have a very great significance. Defensive and offensive purposes, which anyhow are strictly connected with each other, come here into the picture. Repeatedly, the ideological weakness of the West, which does not have any great constructive ideology able to be opposed to Marxism-Leninism, is being emphasized. As a consequence, there were endeavors to establish such an ideology in different disciplines, among others, in the law. (p. 19)

These attempts, according to the authors, result in such formulas as "Western Christian civilization," "democracy," "freedom and human dignity" in order to argue that capitalist legal systems are superior to the socialist ones and to conclude that capitalist law is the embodiment of ethical ideals, justice, natural law, etc.

After pointing out that while formalism was influential in England, realism was espoused by many American jurists, led by Gray and Holmes, the authors state that the first part of the twentieth century witnessed a fight between realism and the idealism reflected primarily in the writings of Roscoe Pound. The basic differences between these two schools of thinking were blurred in the thirties, due to concessions on both sides—a down-to-earth and less speculative approach by the idealists, for whom, however, social purposes and ideals to be promoted by the law remained primary considerations and a willingness by the realists to consider values embodied in the law and the elements of justice in addition to analyzing mere facts and their relationships to the existing norms. These concessions resulted in a limited merger of the two ways of thinking in the school of sociological jurisprudence.

Although the authors state that the "influential trends of the contemporary law of Nature" have "unacceptable philosophical and ideological foundations," it appears to them that a "critical evaluation" of this line of thought is "indispensable." (p. 312) Thus the book's longest chapter discusses the concept of natural law in modern American theories. Among the many views expressed by this school, the authors present four with particular emphasis.

The "dynamic" theory of natural law, represented with great force by John Wild, is strictly connected with the Christian ideology but does not base its foundations on the existence of a supernatural being. The roots of legal norms should be found in the structure of the world and the nature of man, whose prevailing feelings about the necessity of some behavior results in the establishment of norms having ethical connotations but amounting to legal phenomena. This approach is said to confuse "pseudo-descriptive elements with value judgments." (p. 33)

F. S. C. Northrop, in his "philosophical anthropology," connects norms of natural law with natural sciences, in a complicated way. The evaluation of the correctness or falsity of normative social theories depends on the question of whether they are based on a correct or false concept of the natural sciences and the nature of man. The main foundations of Northrop's concept of natural law are the premises of equality and freedom. He looks for a synthesis based on elements of Western and Eastern cultures, emphasizes the conventional element in establishing a legal order, promotes adherence to international law, and, applying his theoretical premises to concrete issues, takes a liberal approach to timely American legal and political problems such as desegregation. This merits him the classification of a rather progressive thinker, even though the authors add that he switched from a position advancing ideas of harmonious cooperation between the Soviet Union and the traditional democracies to a stand supporting the cold war. (p. 62)

The next theory which merits an extensive discussion by the authors is Fuller's "eunomy." They begin by stating that Fuller rejects many traditional beliefs of the natural law school, particularly the belief that a higher legal order exists which is the yardstick of the validity of positive law. (p. 63) They see the essence of "eunomy" in the assumption "that the sources of the rules of natural law are the elementary structural and functional properties of good social order," and its purpose—in the quest for "those principles of the social order which make it possible for people to achieve a satisfactory common life." (p. 314) They find that in opposing both the traditional doctrines of natural law and legal positivism, Fuller attempted to tread the middle way rather inconsistently, but recognize his approach as "one of the most thoroughly elaborated among the contemporary versions of the natural law theory." (p. 86)

The fourth school of thought which the authors classify as belonging to natural law (as it "proclaims the valuations of injustice to be something absolute") is the psychological theory expounded by Edmund Cahn. (p. 314) Its starting point is a sense of injustice experienced by those who face a wrong and are thereby induced to counteract. Although the authors mention the theories of Petrážycki more than once, they do not, as might be expected, compare them to those of Cahn.

The authors make it clear that they are unable to deal with all trends and doctrines. Unfortunately, they did not include in their study the integrative jurisprudence of Jerome Hall, and make only short references to the ideas of this scholar. Again, they describe Chroust as an influential neo-Thomist (p. 21), but do not devote any time to present his approach.

After discussing the natural law theories, Opalek and Wróblewski pass to sociological jurisprudence. In Pound's writings, they stress his approach to the law from the angle of the functional method, analyzing the concept of the law as a means of social control, and opposing the law in action with its direct influence on social relations to the law in books. They summarize his ideas about the most important function of the law by stating that he would like, "by means of the appropriate sociological research . . . [to] make law into an instrument for influencing social life in the desired direction (social engineering through law)."

(p. 315) This purpose is served by the theory of social interests, explained by the authors in a way which raises some doubts about its clarity:

[This] theory . . . on the one hand, registers the interests which make their appearance in society at the present stage of civilization, and the degree of their insuring by law, and, on the other hand, formulates postulates of their best possible securing by solving the appearing conflicts of interests, while limiting in so far as possible social friction and waste, which result from the infringement of certain interests. (p. 315)

Opalek and Wróblewski give Pound credit for providing "a widely elaborated attempt at solving the problem of legal policies," but object to his closeness to the concept of "law of Nature with variable contents," as its "principles are derived from contemporary Capitalists' ideology." (p. 315)

It would exceed the limits of a simple book review to summarize the contents of the remaining chapters, to point out what features of the various theories are recognized by the authors as salient and what their comments are. It should be mentioned that in the chapter on realism, after discussing its forerunners, the authors attach a particular attention to writings by such persons as Arnold, Frank, Garlan, Hutchinson, and Llewellyn. The next chapter deals with "legal science and behavioral sciences" and includes a rather intensive treatment of the Chicago Law School's Jury Project as well as of such undertakings as the Arbitration Project, Interstate Inheritance Project, and Columbia's Project for Effective Justice.

Passing to "experimental legal science," the authors linger on ideas expressed by Cowan. The last part of the book is entitled "The Policy-oriented Jurisprudence" and is particularly devoted to Lasswell and McDougal. Opalek and Wróblewski note the connection of their way of thinking with some aspects of other American jurisprudential schools, and particularly that of the law of nature, and summarize their evaluation of this approach to the law in the following words:

The political aspect of such considerations, which take up the fighting anti-communist watchwords of "Western Democracy" is perfectly clear, while the authors' general theoretical discussions concerning the notion of the law, the tasks of jurisprudence, etc., are not clear. In the unrealized program, apart from its weaknesses which flow from the acceptance of a certain system of absolute values, there comes to light a sound tendency to a systematic elaboration of problems of legal policy. (p. 318)

The authors add that the understanding of the writings by Lasswell and McDougal is not easy, because of vague and changing definitions that they give, repetitions of the same ideas in different words, complicated and artificial terminology, and high degree of abstraction; the reader is described as uncertain as to whether they have changed their approach or not. Opalek and Wróblewski would like to see "a concrete application" of their postulates, in order to find out what they really mean by them and also "to see what those postulates are worth in practice." (p. 271)

On the margin of their main topic, the authors make some interesting comparisons between some developments in the United States and in Europe. They

recognize that legal sociology is farther advanced here. Comparing the role of judges in the United States and in England, they stress that here judicial functions are conceived of in a lively way: the judge fashions the law in a creative manner, while in England "there is a tendency to treat the function of the courts as mechanical." (p. 22) They emphasize that in the United States the courts have a primordial role in the society, which is to a large extent due to their power of judicial review, and overemphasize the fact that election of judges and their "far-reaching yielding to political influences" result in "judicial decisions being determined by a number of extralegal circumstances." (p. 24)

Of course, it is impossible to agree with many comments and classifications of the authors, in part because they look (or have to look) on the developments and ideas in the Western world through the prism of the official theories mandatory in their part of the world. However, it is certain that the problems dealt with are most controversial and do not lend themselves to any standard approach either in the United States or anywhere else. The main purpose of the book, to present to Polish readers at least some idea of contemporary American jurisprudence, has been to some extent achieved, and the presentation itself includes many uncontroversial data. Some minor errors and questionable statements² as to facts are of no significance.

The interest that the book aroused and the fact that American legal thought is familiar to some Polish scholars are evidenced by the controversy about the book, reflected in reviews which appeared in the official organ of the Institute of Legal Sciences of the Polish Academy of Arts and Sciences, *Państwo i Prawo*. In one of the reviews, by Kowalski, some comments of the authors are objected to, but the book is praised as giving interesting information which may stimulate theoretical speculation. As to the last parts of the book, criticizing "trends which do not engage in scholarly considerations as much as in anti-communist propaganda," the reviewer states that the authors "show the frail scholarly foundations of these tendencies in an expert, quiet manner, devoid of passion, giving them justice which possibly they did not merit, by pointing out some of their able methodological aspects."³

Another reviewer, Podgórecki, excepts to the statement by Opalek and Wróblewski that behavioral sciences are new, to their carelessness in making generalizations, lack of solid foundations for some assertions, and arbitrariness in their selection of theories which they analyze. This, according to the reviewer, resulted in a distorted picture of American jurisprudence and sociology.⁴ He enumerates a number of authors and books which should necessarily be included in the authors' study.

W. J. WAGNER

² E.g., the classification of Stanford as a second-rate university (n. 31, at 16) or the misspelling of some names like Mentschikoff.

³ *PANSTWO I PRAWO* (1964) no. 5-6, pp. 906, 908.

⁴ *Id.* at 909, 911.

GEORG LUKÁCS' MARXISM: ALIENATION, DIALECTICS, REVOLUTION. By Victor Zitta. The Hague: Martinus Nijhoff, 1964. Pp. xv, 305. \$9.75.

This study is devoted to the intellectual development of a thinker who has been rightly described as the most important Marxist theoretician since Marx and as the sole communist thinker who is taken seriously in the West. Even though he often refers to Lukács' more recent writings, Zitta traces only Lukács' development up to 1923, the year in which *Geschichte und Klassenbewusstsein* was published. The underlying assumption would seem to be that in 1923 Lukács had reached what Zitta calls his "fully developed Marxist weltanschauung" (p. 246) and that everything that Lukács wrote later was either an articulation of this weltanschauung or else a relapse into the orthodox and therefore uninteresting Marxist-Leninist view. To some extent, this assumption certainly is correct. But it would have been worthwhile to pay somewhat closer attention to studies such as that on the young Hegel (1948), or on Marxism and existentialism (1951), or even the much-discussed *Zerstörung der Vernunft* (1954). The suggestion that these studies are theoretically of little significance because they are relatively orthodox in the Marxist-Leninist sense is not overly convincing; for Lukács' genius consists among other things in his fascinating ability to write meaningfully about subjects which other Communist authors do not succeed in lifting from the morass of trivialities and dogmatism.

Moreover, as it ends with the year 1923, Zitta's study throws relatively little light upon the interesting subject of Lukács' influence upon European thought. It would be rather easy to show that virtually everything written on Hegel and Marx after World War I reflects Lukács' direct or indirect influence. Mannheim's sociology is unthinkable without Lukács, just as Weberian sociology is unthinkable without Marx. It even could be argued that thinkers such as Scheler and Heidegger owe many of their insights to this strange Hungarian aristocrat of Jewish origin who feels at home in the world of German classical and romantic literature and philosophy no less than in the austere universe of Lenin.

The main merit of Zitta's study undoubtedly is that it is highly informative. The more than forty pages of bibliography (three fourths of which contains books and articles by Lukács himself) indicate how enormous the material was which Zitta had to take into account. About one third of the book is devoted to a detailed analysis of *Geschichte und Klassenbewusstsein*. As this famous pamphlet never was translated into English, and even the German original is not readily available in the United States, this part probably is the most useful for an American reader interested in Marxism.

I shall restrict myself to two critical remarks. Zitta's treatment suffers somewhat from the fact that he does not seem able to summon up the basic sympathy for a subject which is always prerequisite to objective analysis. Such a basic sympathy could, I think, go hand in hand with an equally basic disagreement. In any case, basic disagreement should not exclude describing and judging a thinker on his own terms. To me, the basic indication that Zitta fails to do this (and thus to some extent fails to do justice to Lukács) is that he

never for a moment considers whether what Lukács says is interesting or even true; instead, he always "psychologizes" and very often "psychopathologizes." I found only one statement which suggests that Zitta would grant to Lukács that he has to say something objectively interesting (p. 66). When one reads that "in its totality, Lukács' work is more valuable as an analysis of himself . . . than it may be for other reasons" (p. 51), or that Lukács' decision to join the Communists "suggests a pathology" (p. 87), or that "Communists are generally noted for a pretentious readiness to sacrifice their self and their love—both of which are quaint—for an abstract, basically nihilistic ideal" (p. 89), one wonders whether the author ever was willing to consider the possibility that Lukács' ideas and Marxist notions in general might be honestly entertained by an intellectually and morally responsible mind. Occasionally, one has the impression that the author intends to be witty or rather intends to be what the Germans call *geistreich*. Very often, however, the result is distinctly embarrassing, as when Zitta claims that Lukács' ideals "were in a sense sublimations for the urge for suicide," (p. 90) or that it is the nature of dialectics to "transmogrify confusion into society by transmitting mystery into practice" (p. 112), or that Lukács' famous treatment of *Verdinglichung* is "rather lengthy, tedious, involved and incoherent" (p. 153), or that Dostoyevsky was a "religious radical" (p. 45).

The second critical remark concerns what I would call Zitta's overerudition. When one uses expressions such as "Platonism" (p. 26), "gnosticism" (p. 54), "romanticism" (p. 41), it certainly is not necessary to list a number of books discussing this subject or even to engage in learned discussions about subjects such as Meister Eckhart which have nothing to do with Lukács or his ideas. Apart from everything else, most of these quotations contain ideas with which everyone likely to read Zitta's book would certainly be familiar. This overlearning is all the more embarrassing as Zitta makes several factual mistakes; of course, everybody makes mistakes—but when one has read learned discussions about perfectly secondary points it is unpleasant to find stated that Iring Fetscher is a theologian and "not explicitly a Marxist" (while in actual fact he is not a theologian and very explicitly not a Marxist), or that Husserl owes much to Hegel (while in fact the expression "Phenomenology" would seem to be the only thing which he owes to him) (pp. 4, 126). Translations published in Bratislava are obviously not Slovene but Slovak (pp. 261 ff.); on p. 285 a Slovak translation is listed as "Croat and Slovene" and another as "Czech"; on the same page are several misspellings of Czech and Slovak titles, as also of Russian titles on pp. 282 ff.; the article by Hyppolite listed on p. 286 was published in *Etudes Germaniques*, not *Etude Germaine*. Minor misprints are found on pp. 8, 106, and 133.

N. LOBKOWICZ

THE SPIRIT OF THE COMMON LAW. A Representative Collection of the Papers of Richard O'Sullivan. Selected and edited by B. A. Wortley. Tenbury Wells, England: Fowler Wright Books Ltd., 1965. Pp. 224. \$2.50.

A friendly foreword to the book by Professor Wortley of Manchester University says that three of O'Sullivan's enthusiasms were Sir Thomas More, the Middle Temple, and "above all" the common law, and that he was "Catholic, lawyer and scholar." Sir Thomas More, O'Sullivan's "hero," is the subject of the first paper, and Edmund Plowden, also a sixteenth-century "papist," is the subject of the second. These two are deeply felt writings about persons whose lives and work represent the finest common law tradition and who were dear to the heart of O'Sullivan. They were wisely placed at the beginning of the book.

In his early reading in the common law tradition, O'Sullivan came across the *liber et legalis homo* in Glanvill. This "free and lawful man" came to crystallize common law for him. O'Sullivan met him in Bracton, Fortescue, Littleton, Coke, Finch, Mansfield, and Holt — free by nature, responsibly obedient to law, family man, innocent, of goodwill and reputation. He was Everyman who needed to speak and write freely to Everyman, and he had thoughts which were "not triable." All of these characteristics flowed from "the dynamic tendencies that are proper to man as a rational being" — O'Sullivan's statement of natural law, a standard refined by Christianity, he says, to become the guiding spirit of the common law men.

Thomas More personified the *liber et legalis homo*. O'Sullivan re-created this Catholic, lawyer, and scholar in "In the City," "At the Court," and "In the Tower." Family men reading this paper will enjoy the discussion of More's trouble finding time to write at home after a busy day, while also dutifully listening to his wife's laments, helping his children, and instructing his servants. Defense lawyers will like Lord Chancellor More chiding common law judges about their fear of directing verdicts. More died in defense of Everyman's conscience. O'Sullivan says that More's trial and death confused human and divine law, clouding the old distinctions between "the law of God, the law of reason (or of nature), and the law of the land." And it was these events, he thought, and not the Tudor victory on Bosworth Field in 1485, that "worked a revolution" — the privacy of the individual conscience was no longer secure against the State.

O'Sullivan's devotion to the Middle Temple inspired the paper on Edmund Plowden, who himself devoted many years in the sixteenth century to the building of the original Temple. Plowden was reporter of the first English Reports, written in post-Norman Invasion "Law French," and was England's "most learned lawyer in a century of learned lawyers."

As their titles indicate, "The Philosophy of the Common Law," "Natural Law and Common Law," and "A Scale of Values in the Common Law" discuss essentially the same ideas. It is more convenient therefore to review the three papers as if they were one, even though the slant of each is different.

England in medieval times had turned away from Roman Law to formulate

its own common law system, and O'Sullivan tells how the great traditional common law writers drew heavily upon the Old and New Testaments and upon Christian doctrine and "Christian philosophy" — Saints Ambrose, Thomas Aquinas, Augustine, and Isidore. The common law embraced "the traditional philosophy, everywhere alive, of classical and Christian jurisprudence . . . to give counsel according to law, that is to say, the law of God, the law of reason and the law of the land." The king was under God and under law.

Everyman, the *liber et legalis homo*, and the great tradition came to America with the colonists. Thus was introduced here, says O'Sullivan, a scale of values in the common law: "contract, conveyance, property, bodily well-being and integrity (the sources of life) and the life of the free citizen." And, as he says, all of this found its way into the minds of our founding fathers and Supreme Court justices and into the fundamental laws of our states. (Each of the United States, except Louisiana, has adopted the common law up to a specified time as the basis of its jurisprudence — Illinois, for instance, adopted the common law prior to the fourth year of the reign of James the First.)

The Spirit of the Common Law gives evidence of O'Sullivan's broad scholarship and reading, especially in the natural law and common law tradition which preoccupied him during his career. His facility with Latin and French is striking. It could also be mildly frustrating to readers who, less facile linguists, like this reviewer, will meet long quotations in Latin and French with no translations in text or footnote. Other readers may question the use of the term "Christian philosophy." And still others will probably think O'Sullivan goes too far in supposing the link of certain ideas of the common law men to writings of saints. But none should fail to see that for O'Sullivan the roots of the common law were in natural law philosophy and Christian doctrine.

I wish I could predict that *The Spirit of the Common Law* would prosper generally among members of Bench and Bar in this country. I'm afraid it won't. The book has a quaintness unsuitable for many in today's world. Like other cherished values of a glorious past, the traditional philosophy of the common law is not honored in a busy pragmatic world which demands the quick solution of problems. How many law men, except perhaps those in the schools, turn now and then to look back at the roots of our jurisprudence? Perhaps it is too much to ask today when the view of law as a passive guide of conduct or protector of rights is pretty much "out" and the "in" view of law is that of a positive instrument for discovering and enforcing rights and educating the people to the "proper" concepts of justice. The preoccupation is with what law can do, instead of where it came from and how it got here. The new look is forward.

But this little book would serve even the antitraditionalists well — reformers and civil disobedients impatient with delay, and the "new breed" demanding an intuitive or situational method of decision. In reading *The Spirit of the Common Law* one sees in a rather capsule form that the common law process is not a medieval restraint on reasonable innovations. On the contrary, one will learn that the common law process, inspired by its tradition, has historically induced innovation to meet changing conditions. This is as true in this country as in England. Our great innovators in law have built upon the common law tradi-

tion to introduce new concepts in the ongoing process: Brandeis and Warren, for example, in developing the right of privacy for incorporation into our jurisprudence, and Cardozo, in the celebrated case of *MacPherson v. Buick Motor Company*.

Because the book has this value, it will be unfortunate for our jurisprudence if my prediction about its limited appeal is true.

ROGER KILEY

COLLABORATION WITH TYRANNY IN RABBINIC LAW. By David Daube. Oxford University Press, 1965. Pp. 104. \$2.40.

The Regius Professor of Civil Law at Oxford directs attention to a problem, which, typically Jewish, has universal application. Put shortly, the problem is this: if a group of people are called upon to surrender one of their number to be put to death under threat of mass execution, should they comply or all die together? Although there were differences of opinion and emphasis between rabbis in successive centuries, the general thread of Rabbinic law requires them to comply if the request is for a named male, but to refuse if it is for an unspecified male, and always to refuse to deliver up a woman to a fate worse than death.

The considerations upon which the rabbis delivered their advice seems to this reviewer, at least, to relate particularly to Jewish traditions as they had evolved by the period shortly after the time of Our Lord. They do not in any way refer to the fact that the most notable Jew of all time had no hesitation in deciding that it was his duty to offer Himself up as a sacrifice for all mankind. Yet because the example of Jesus is so preeminently clear, it is an important exercise for Christians to discuss among themselves why they are so shy to follow it. Captain Oates, who walked out of Scott's tent to freeze to death in the Antarctic rather than eat his companions' food, is still regarded as an eccentric hero.

Christians, clerical as well as lay, have devoted almost as much intellectual skill as the rabbis in finding valid reasons for avoiding putting the precept of life-sacrifice into practice. While Captain Oates may be praised, Norman Morrison, the Quaker who burned himself to death in front of the White House to draw attention to the suffering in Viet Nam, is only too frequently condemned as unbalanced. May it not be a convenient escape from any obligation to follow in his footsteps which leads us to question the balance of Morrison's mind?

The grounds advanced as reasons for not following Christ's example are worth collecting. This list is not comprehensive. First, the argument about pride: it is presumptuous to decide to terminate a life started by God. Second, the obligation to family: it is wrong to hurt next of kin psychologically and to damage them financially. Third, the argument in favor of humility: exhibitionism is to be avoided. Fourth, and most generally used, isolated sacrifice is pointless: it is better to seek allies, prepare, and ultimately succeed.

These are a formidable collection of arguments, more especially as those Christians inclined to accept them usually complete the process by saying to themselves that they did not apply to Jesus, because He was God. Yet Christians

now living in South Africa, like the last generation in Nazi Germany, are in the end bound to ask themselves the question: is there not some point beyond which even I cannot go? Contrariwise, there are many pacifists who must have worried over the famous catch-question: would you really stand aside and let your mother be killed?

The moral, I think, comes from the story of J. Robert Oppenheimer, now brought to a wider audience by a recent and brilliant piece of theatre. There came a point when, with the development of the thermonuclear hydrogen bomb the parent of the atomic bomb found himself saying to himself: I cannot go any further. The Security Board which refused him a clearance in 1954 found him illogical: if the atomic bomb, then why not the hydrogen bomb? Yet the audience to the play walk out into the dark stunned by a comprehension of the great scientist's appalling moral dilemma. The moral of the case is that he never asked himself in advance: how far will my conscience let me go? at what point must I jump off the train?

I believe that the true obligation of the Christian is to ponder upon these things so that he himself knows well in advance when he must say, "*Ich kann nicht anders*"; and he must notify his family, his friends, and the authorities so that none have any doubt about his intentions. Then he must seek the strength to carry out the dictates of conscience. In all these processes this slim but important book will help him.

PETER BENENSON

WILL IN WESTERN THOUGHT: AN HISTORICO-CRITICAL SURVEY. By Vernon J. Bourke. New York: Sheed and Ward, 1964. Pp. vi, 247. \$5.00.

As men have endeavored, through various intellectual disciplines, to examine and direct their lives and their institutions, problems concerning the human will have been both pervasive and sharply divisive. For jurists, the classical question of the primacy of will as the source of law divides legal positivists from their opponents. Conflicting convictions on the problem of freedom versus determinism have divided philosophers since the time of Socrates, especially those concerned with moral and political philosophy.¹ Among theologians, polemical writings entitled *De Libero Arbitrio* (or, conversely, *De Servo Arbitrio*) have abounded since at least the time of St. Augustine. And theological doctrines concerning the relationship of human freedom to divine grace, foreknowledge, and predestination have been transformed, through the process of ecumenical dialogue, from items of historical or even antiquarian interest into highly relevant and sharply debated contemporary issues.

This division, more than most, has produced cleavages that amount to chasms, usually unbridged and perhaps unbridgeable. This debate, more than most, has been fiercely polemical, acrimonious, even deadly. And no wonder. For this

¹ A recent example of the perennial interest in the philosophical dimension of this problem is *FREE WILL AND DETERMINISM* (ed. by Bernard Berofsky, New York, 1966).

is a theoretical issue with immediately practical consequences; it comes out of the study into the street, perhaps even as far as Dachau and Walden Two. For on the resolution of this issue hang the existence of human rights and the real basis of men's hard-won personal and political liberties. On it, too, depends the possibility of personal immortality. It is difficult to envision a question more central to human life.

Other disciplines, too, have raised the problem of human freedom, each in the manner and from the point of view of its own concerns. In the related fields of psychiatry, psychotherapy, and clinical psychology, the earlier determinism of the strict Freudians is being vigorously opposed in many quarters. Sometimes, indeed, the question arises in such an area as physics when in fact it should not. For example, though the principle of indeterminacy formulated by physicists says nothing for or against the philosophical notion of the freedom of the will, it has often been introduced into that controversy as putative evidence.² Again, a behavioristic psychologist who tends to equate prediction and control, science and technology, is led to argue that "If man is free, then a technology of behavior is impossible."³

It is true that on the question of freedom and determinism men who clearly understand each others' conclusions and the reasoning leading to those conclusions can and often do remain in firm disagreement. But it is also true that some of the differences stem from one man's misunderstanding of what another man means when he uses such a word as *will*. If there exist semantic differences on this point, and there do, then further fruitful discussion would seem to require either a general agreement on meaning (an unlikely event) or a better understanding of the varieties of meaning with which such key terms as *will* have historically been used. In *Will in Western Thought* a notable contribution to this cause has been made by Vernon Bourke.

In his opening sentence Bourke lays down his program: "We propose to study the chief meanings that have been given to *will* in Occidental philosophy and then try to determine whether there is one univocal way of using will, a meaning that would seem most appropriate for contemporary philosophical work." In both parts of this undertaking he has been strikingly successful.

The organization of the book is simple and direct. After careful analysis, the author finds that the meanings attached to *will* in philosophical literature (there are also references to theological and psychological writings) reduce to eight principal ones. After an introduction which summarizes the findings of the book, one chapter is devoted to each of the eight basic meanings. A final chapter investigates the use of *will* in contemporary psychological literature, and concludes with the author's own descriptive definition. This definition he offers not "as normative but simply as an effort at unifying an admittedly diffuse and variegated mass of meanings" to the end of enabling "philosophers and other

² Among those who have fallen into this confusion are Arthur Compton and Sir Arthur Eddington. More recently a biologist, George Wald, has made the same error of confusing two meanings of "determine," to the point that he equates free will with unpredictability of behavior. See his *Determinacy, Individuality, and the Problem of Free Will*, in *NEW VIEWS ON THE NATURE OF MAN* 34-36 (ed. by John R. Platt, Chicago, 1965).

³ B. F. SKINNER, *WALDEN TWO* 256 (New York, 1962).

serious students of human activities to discuss volition with some mutual understanding." One can applaud both the purpose and the performance.

Probably chapters seven and eight would be of even greater interest than the others for readers of *NATURAL LAW FORUM*; these deal with the notion of the will of the people and with will as the source of law. Bourke explains Rousseau's notion of the general will against the background of its author's other philosophical positions, and sees it as constituting "a new concept of volition." He then relates this concept both to "later German notions on community" and to "the democratic theory of majority rule, as well as, by way of reaction, to the conservatism of Edmund Burke." The treatment of logical positivism, though brief, is good, and justifies the term "critical" used in the book's title.

Of interest to Thomists — if there still survive any acknowledged members of that once flourishing tribe — is the dispelling of a number of popular myths. For example: "Very few modern 'Thomists' offer an explanation of willing that is recognizable as that of Aquinas. Modern Scholasticism has adopted a view of volition that incorporates factors from Scotism, Suarezianism, Cartesianism and even from British Associationism." The root of this alteration is to be found in the fourteenth century. Again, in his commentary on the *De anima*, St. Thomas is shown as misinterpreting Aristotle on the subject of appetite in the human soul.

The erudition and thoroughness that one associates with Bourke's work are again in evidence. He has a command of both primary sources and secondary literature. He pursues his theme into such areas as contemporary games theory and decision making, and into psychotherapy and clinical psychology. Gabriel Marcel, among contemporary thinkers, is accorded considerable treatment, though one looks in vain for mention of Sartre or Merleau-Ponty, both of them influential on this subject.

The author might possibly have tackled his project chronologically and have written a history of the problem of volition philosophically considered. Instead, and no doubt wisely, he chose to organize the book on the basis of the meanings that have historically been given the term *will*, thus covering immense chronological developments in nearly every chapter. This procedure, however, leads to a certain jerkiness and discontinuity that impede smooth transitions of thought. It also results in a degree of overlapping and repetition, with the same men being treated in a number of chapters. After a first reading, one realizes that this is a book to be consulted rather than to be read through again. For anyone concerned with the question of *will* in any of its forms, it is a book to be consulted frequently and fruitfully.

HERBERT JOHNSTON

THE DEFENSE OF "OBEDIENCE TO SUPERIOR ORDERS" IN INTERNATIONAL LAW.
By Yoram Dinstein. A. W. Sijthoff, 1965. Pp. xvi, 278.

The author, lecturer on international law at the Hebrew University of Jerusalem, has done an exceptionally careful job in considering the problem of obedience to superior orders. Readers of this journal are likely to be interested in a relatively small part of the book, that is, the sections dealing with what the author calls international theory. However, the book also contains an examination of the topic within the wider context of both national law prior to the development of the defense in the Nuremberg and Tokyo trials, and the relevant international legislation and the cases which were tried pursuant to that legislation. Also included is a section on international legislation since 1946 wherein Dinstein reviews the 1948 Genocide Convention and 1949 Red Cross Convention as well as the work of the International Law Commission.

I shall not review his essentially reportorial treatment of the cases or legislation except to mention that he finds that there is "only one solid element which does emerge from the examination of all the cases," and that is "the most conclusive repudiation of the doctrine of *respondeat superior* in almost all the judgements." He also concludes, although more tentatively, that the cases appear to suggest the trend which supports his general theory on the relevance of superior orders as a defense to prosecution. I now move to his more theoretical consideration of the doctrine where his theory is offered.

In addition to the theory which the author proposes, one will find in the literature five general theories dealing with the defense of obedience to superior orders: the manifest illegality principle, the personal knowledge principle, the doctrine of *respondeat superior*, the act of state doctrine, and the doctrine of absolute liability. Pursuant to manifest illegality, the defense of obedience to superior orders will not be effective when the individual claiming the defense should have known that the act was a crime and that it was obviously and clearly criminal in character. The supposition here is that the actor was a reasonable man with normal intelligence and gifted with not more than ordinary understanding. Some cases recognize this as the minimum standard and that the defendant who is more intelligent, or in a position of greater understanding, may be subjected to a higher test. Dinstein, in analyzing the manifest illegality principle, argues that it generally becomes reduced to what he calls the personal knowledge theory, whereby the actor will not be responsible for the criminal act committed in response to a superior order if he acted without being aware of the illegality of the act. Dinstein rejects this formulation as well as the inherent principle of manifest illegality on the grounds that it constitutes a clear departure from the generally accepted tenet that ignorance of law is not an exculpatory ground.

Dinstein points out that numerous writers have argued that because of the greater vagueness of the laws of war, there should be some exception from the principle *ignorantia juris non excusat*. However, Dinstein rejects this on the ground that the personal knowledge theory and the manifest illegality principle

(which is to be subsumed under the personal knowledge theory) both have at their heart the principle that mistake of law is a valid defense in international law. Since under most national law systems the defense of mistake of law is not available and since the position of criminal law is such that its importance for both international and domestic systems should not be underestimated, the author would similarly reject this defense. Consequently, he rejects the manifest illegality and personal knowledge theories. We shall see that the mistake of law defense rejected here in order to sink the manifest illegality theory is resuscitated later to provide one of the contexts within which Dinstein attempts to resolve the superior orders defense.

The author's chapter on the doctrine of *respondeat superior* is the strongest. He there examines carefully the literature in support of the doctrine, points out the logical dilemmas generated by the doctrine, and ultimately shows that the doctrine rests on a combination of a compulsion theory and mistake of law theory. He concludes that when it is recognized that compulsion alone will not suffice as a defense, then neither will *respondeat superior* avail the individual who seeks to shield himself behind this defense.

Dinstein also deals with the literature which attempts to distinguish the act of state doctrine from the *respondeat superior* defense, pointing out, I think quite rightly, that it is a mistake to think that there is a separate defense of act of state; rather, it is only a subspecies of the *respondeat superior* theory. He concludes then that all the theories ultimately rest on the foundation of mistake of law and compulsion, if they rest on anything worthwhile.

The author turns next to the doctrine of absolute liability. Because he has rejected the defenses on the general grounds that they would undermine the interest in preventing crimes, one might think he would support the doctrine of absolute liability. However, his analytical treatment of this subject compels him to conclude that the proponents of the doctrine do not, in fact, reject the possibility of obedience to orders as a relevant consideration; instead they treat it not as a sufficient justification for exculpation, but take it "into account among other extenuating circumstances when sentence is passed." (p. 74)

Based upon the analyses of the several different defenses and their rejection by the absolutists, Dinstein then turns to what he regards as the two critical underlying elements which have played the decisive role in all the various attempts to develop a theory for obedience to superior orders: mistake of the law and compulsion. The author develops his theory around these elements and concludes

that the fact of obedience to superior orders may be taken into account in appropriate cases for the purposes of defense, but only within the scope of other defenses, namely, those of mistake of law and compulsion, insofar as the latter really constitute valid defenses under international law. (p. 81)

Obedience to superior orders does not constitute a defense, but only a factual element that may be weighed, in conjunction with the other circumstances of the concrete case, when the offender acts under mistake of law or compulsion. (p. 82)

This general theory is regarded by Dinstein as a formulation of what he calls

the *mens rea* principle pursuant to which "only lack of *mens rea*, of which obedience to orders constitutes circumstantial evidence, serves to protect from criminal responsibility . . ." (p. 88)

In what follows I wish to question the author's "*mens rea*" theory. Elsewhere I have suggested that "*mens rea*" may not be a very reliable device for describing criminal responsibility in the wholly domestic situation.¹ This conclusion was reached because it seems to me that the context of inquiry is not, "Is D guilty?" but "What shall we do to, with, or for D?" When it is pointed out that this is the context of inquiry and not simply ascertaining whether or not D has a certain disease (i.e., guilt) then one more readily sees why *mens rea* is not a very convincing test, let alone a litmus paper test either for exculpation or for the ascription of responsibility. Now then, the interesting question here is this: Is Dinstein's *mens rea* test for exculpation in international law acceptable because the case is one of international law, whereas the same test is unacceptable in the wholly domestic situation?

We begin with the premises that whatever test is used for determining what shall be done about D shall at least be not wholly irrational, and further, that the test be thought rationally related to what is believed, or held, or given to be of moral or social value in the given society. On this basis we may be in a position to evaluate Dinstein's conclusion that obedience to superior orders is really only a subdefense under the general defense of *mens rea*.

If the only reason an individual soldier is tried for an alleged crime in international law is that we want to decide what should be done to, with, or for that soldier, then the same general objection which obtains in connection with the use of *mens rea* for a wholly domestic crime is equally applicable. However, it is perfectly clear, I take it, that in the international sphere, while there may be cases highly analogous to those of a wholly domestic crime, there are additional cases wholly unlike the cases which occur in domestic criminal law. Even if one compares a crime such as that which recently occurred in Texas where an individual killed more than a dozen people, thus perhaps approaching the mass killing, which is sometimes thought more characteristic of crimes in international law, there is no doubt that this would have been, had the defendant survived, a wholly domestic matter.

The difference begins where the order of the crime in the international sphere approaches that for which the war criminals were tried at the conclusion of the Second World War, where the character of the crimes was such that they were unlike the typical domestic crime both as to the magnitude and, even more important, as to the reasons for the crime. In such cases, there may well be less objection to the utilization of *mens rea* as a kind of test for guilt, as distinguished from a test for decision about what should be done with the actor. That is, *mens rea* is an appropriate test, if it be a test at all, for determining guilt, and guilt is an important decision to make about an individual, where the crime which has been alleged is one for which the moral condemnation is more impor-

¹ *Act and Omission in Criminal Law: Towards a Nonsubjective Theory*, 17 JOURNAL OF LEGAL EDUCATION 16 (1964).

tant than a decision about what shall be done with the offender. That Spander was imprisoned in Berlin for a long period of time is much less important than the fact that he was found to have been guilty of a war crime. Where the issue is condemnation of the actor as a moral (or rather immoral) type I find Dinstein's *mens rea* approach appropriate, and I accept his thesis that obedience to a superior order is but evidence of the actor's character and intentions. However, when the question is not, for example, condemnation of a defendant or who, while a soldier, shot a civilian in order to steal his wristwatch, but rather what shall be done with that soldier, then it seems to me that Dinstein's approach is unacceptable.

The important point here is recognition of the fact that the category, "crimes in international law," is simply too large. It is too diffuse to be useful for determining the proper function of obedience to superior orders as a defense. It is necessary to differentiate among the different classes of crimes in international law before the special application of duress as a defense (obedience to superior orders) will be manageable.

The absolute liability principle which Dinstein has rejected is essentially based upon the following line of analysis: for the class of offense which involves an individual soldier, his defense, based on duress because of a superior order, ought not be treated differently than the duress defense would be in the wholly domestic case. This is especially true where the alleged offense is a single or separate killing not part of a pattern of killing attempted in order to facilitate a plan, for example, of genocide. The duress defense for an international crime which is nonetheless more nearly like a typical domestic case, and the duress defense for an international crime more nearly like a war crime, are not separated by a sharp line any more than reasonableness and unreasonableness are so separated. A line can only be drawn on a case to case basis, and this is precisely what is lacking in the analysis of the concept of obedience to superior orders as a defense. However, to recognize that no precise line can be drawn should not blind us to the fact that there are more than differences of degree between the case of the individual soldier killing for a wristwatch and the individual general carrying out a policy of genocide. To imagine that both cases would or should be treated identically — as regards any defense, let alone one so checkered in history as duress — is to expect too much.

My objection then to Dinstein's analysis is that he, like most writers on the subject of international law, has tended to treat all the cases as if they could be subsumed under the same general theoretical formulation and thus disposed of. On the contrary, it is clear that only if the cases are differentiated and placed on some kind of scale will it then be possible to understand why duress because of a superior order ought to have a function different in international law than that which it has in the typical domestic legal systems. I have little difficulty with, for example, the major war criminals charged with atrocities, such as implementing a genocide policy or actually directing the operation of physical instrumentalities used for death. There are no comparable domestic criminal law cases in which it would have been possible to find an analogue to the duress defense. This alone should suffice to suggest that only by differentiating the

cases on some kind of scale will it be possible to make an analysis of the obedience to superior orders defense.

However, when we come to the case of the individual soldier who, in time of war and acting on his own, but knowing of the general policy, implements the policy of genocide by exterminating selected victims, then the case does, indeed, become more difficult. Now we have a situation roughly comparable to that found in many domestic criminal law cases. Yet, what would be extraordinary would be to find a case in a domestic system in which duress could even be thought to have been entertained as a defense for such selected killings and where, as in my hypothetical case, the soldier acts on his own in order, shall we say, to curry favor. When we consider the case of the individual soldier who indiscriminately shoots civilians on several different occasions in order to facilitate the theft of their property, then we do not have the same difficulties. Now, we must extrapolate from the domestic Dillinger case to that of an international Dillinger. It simply is not a case comparable to those of the major war criminals.

There is a further area which might involve the defense to superior orders which I would like to see analyzed by some competent expert in the field of international law. It concerns the utilization of the defense for offenses under international law other than killing. For example, how would the special duress defense of obedience to superior orders operate in the context of crimes such as the improper utilization of private property contrary to the rules of war, or the abuse of individuals which did not amount to killing, or other violations of applicable international conventions which do not assume the degree of importance presented by the cases which have thus far reached the stage of litigation before an international tribunal? Were this class of case to be analyzed for the applicability of the obedience to superior orders defense, it might become more apparent that there is indeed a gradation in the class of case in which the defense might be available—ranging from relatively modest offenses against property through killings. The attempt to analyze these cases would buttress the argument I have made above that not even all killings can be treated alike so far as regards the *mens rea* argument and certainly not as regards the defense of obedience to superior orders.

SAMUEL I. SHUMAN

THE LAWS OF WAR IN THE LATE MIDDLE AGES. By M. H. Keen. London: Routledge & Kegan Paul; Toronto: University of Toronto Press, 1965. Pp. xi, 291. 45 s. (\$7.50)

There is a passage in Froissart (so Keen begins), telling of an English army that lay before Limoges in the year 1370:

Because that city's bishop, the Prince's one time councillor, had turned his people to the French, the English commander had ordered that no terms for surrender were to be accepted, but that the town was to be taken by assault and without quarter. After a considerable siege the walls were undermined, and the city taken by storm. In his account of the fighting within the town, Froissart records a curious incident. Three French knights, who had de-

fended themselves gallantly, seeing at length no alternative to surrender, threw themselves on the mercy of John of Gaunt and the Earl [of Cambridge]. "My lords," they cried, "we are yours: you vanquished us. Act therefore [according] to the law of arms." (p. 1)

What, Keen asks, was this law (elsewhere in the chronicles referred to as the *droit de guerre* or the *jus belli*), to which the French knights appealed, claiming a right to quarter? From the words of the French knights, spoken in 1370 and quoted above, one may infer a well-established, generally understood code of military conduct, and the Hundred Years' War between England and France, which at one stage or another involved most European states or principalities west of Poland, is an admirable field of battle to test a historical theory.

Further, there was a vast amount of theorizing in the voluminous writings of the canonists and civilians in the period from 1200 to 1400, so that one can "piece together the outlines of a well-developed theory of the 'just war,' which was for them the only legitimate form of warfare," and there is then much interest in inquiring how closely related these theorizings were to practice: we may well ask, how far did the theoretical views of the commentators and glossators on war have any practical significance?

Finally, in the appeal to honor, and the sense of military conduct (at least among some of the participants, if not always among others) there is obviously the assumption of a code of chivalry. The ancient, and all-but-forgotten, court in England for cases arising from conflicts in the law of arms, was indeed called the Court of Chivalry. The author of the book under review inquires into the relation between the law of arms and the contemporary cult of chivalry.

Beyond this, there is the intensely interesting problem of investigating a system of jurisdiction and procedure which lay at the intersection of canon and Roman law; the full history of the law of arms is indeed "part of a much larger story, the story of the reception of Roman law into the customary laws of Europe." (p. 22)

In outline, the book moves as follows: Introduction; Part One: The Legal Basis of the Law of Arms and its Administration (developing the legal basis, the trial of military cases, and the authority of military courts); Part Two: The Just War and its Conditions (the legal theory of just war, problems of allegiance and illicit war, the signs of war, and sieges); Part Three: The "Incidents" of Just War (Gains of War, Ransom); Part Four: Interludes in War and Peace (immunity, letters of marque and defiance, conclusions); and Appendices (the legal implications of *appatis*, the peerage of soldiers, and illustrative cases). There is a ten-page bibliography (nearly four pages of which discuss manuscript sources), and an index which is neither complete nor completely accurate; typographical errors are relatively few.

Readers of the FORUM will likely be most interested in Part Two, and one must praise the economy of means and space with which the author deals with the legal theory of just war, bringing together canonists and theologians (Raymond of Pennaforte, Nicholas of Tudeschi, Johannes Andreas, Paris of Pozzo,

and other commentators on canon law¹), as well as such Romans and imperialists as Bartolus, whose tradition carries down to Jacob Meyer's *Commentaria sive Annales rerum Flandicarum* (Antwerp, 1561), with a third position between these two views of feudalists and imperialists, that of the apologists of the rising *regna*, among whose names are those of Andrew of Isernia and William Durandus.

The principles which Keen educes from these several traditions of speculation and teaching on the legal theory of just war are these: (1) rights to spoil and ransom could not arise out of a private war; and (2) a public war required sovereign authority on the part of the person declaring it (with room for debate on the meaning of sovereign authority). In public wars, he writes,

all rights allowed under the law of arms would apply, because they were "open wars," disrupting time of peace in a way which the "covered wars" of the feudality did not. In disputes arising out of such wars only persons with military jurisdiction could judge. It is this kind of war, the only kind of war which can be properly so called, that the statutes and ordinances defining the powers of constables and marshals refer, and it was in its course alone that spoil and ransom could be freely taken. (p. 81)

While the author has allowed to the modern scholar "room for debate as to just what sovereign authority meant," many readers familiar with the current scholarship of Walter Ullmann, Michael J. Wilks, Brian Tierney (to name some authorities in English alone) will not be completely satisfied.² And indeed, the beginning student — and, in a sense, anyone coming to such a field from related but discrete disciplines of history, literature, or philosophy, will be commencing *de novo* — would be grateful for indication of such discussions on the nature of medieval society as those of Bloch, Eschmann, Kuttner, Le Bras, Raftis, and Rivi re; or on medieval concepts of law such as those of d'Entr ves, Le Bras, Lottin, Tierney, and Ullmann; or on medieval ecclesiology such as those of Chenu, LeClercq, and others. It is perhaps relevant to observe that the name of Ullmann is the only one of the last ten or twelve names cited to appear in either the bibliography or the index; the point is not that one expects a general bibliography for all related works for such a beginning student (even though Potthast, Paetow, and all that, will scarcely be more than a start), but that precisely because there is no previous history of the law of arms — and because no attempt can be made here to relate that law to its society in any fullness, or to concepts of the church and its contributions to or demands upon such a law and system, or to all the complex interrelationships of that law and military practice and literary expression — some further bibliographical guides would be very helpful indeed. And, a final suggestion along these lines, considerable light-

¹ There is an interesting use (at p. 67) of John of Legnano's *Tractatus de Bello* (in the edition by Holland, Oxford, 1917), and it is of some point to observe that this canonist was cited by name in Chaucer's *The Canterbury Tales*: the circulation of John of Legnano's manuscripts and his general influence — through his teaching at Bologna as well as through his several treatises: *De Pace* (1364), *Somnium* (on civil and canon law, 1372), *De Juribus Ecclesiae in Civitatem Bononiae* (1376) — are discussed most recently by John P. McCall, 40 *SPECULUM* 484-89 (1965).

² A discussion of current scholarship on medieval sovereignty is planned for a forthcoming issue of the *FORUM*.

ing from linguistics could have been brought to bear: there is a valuable appendix on *appatis* (one of the names for agreement between local inhabitants and soldiers living off the land); one feels the need for similar discussions of the term *écorcheurs* and *routiers*, especially for those who are not students of French history and literature.

This work illuminates some of the more technical discussions in Squibb's *High Court of Chivalry*, and admirably develops several cases not used by Squibb.³ A notable use has been made of a set of records in the Public Record Office (London). The heraldic cases in these have already been used quite thoroughly by Squibb, but here the military cases of *Gerard v. Chamberlain* and *Hawley v. des Roches* are carefully studied (with the note that for these there are full records of proceedings). The extent to which records and other resources from France⁴ have been used in parallel with those from Britain is a fascinating example of *Methodenlehre*: especially in a field of research like that of the Hundred Years' War it must be obvious that one cannot learn the full story from one set or series of records alone.

While from one point of view it may justly be said that under scrutiny, "the whole theory of chivalry, of an order of knighthood whose Christian duty is the protection of the needy and defenceless, becomes meaningless" (p. 243), it must also be said, as by Huizinga, that "the notion of a law of nations was preceded and prepared for by the chivalric ideal of a good life of honour and loyalty."⁵ Although in a full view of the history of war and of knighthood both views must be subsumed in a larger perspective; yet if one had to choose between the two, that of Huizinga would doubtless be nearer the truth of the matter.

The matter of loyalty requires separate discussion. Keen summarily presents loyalty as that which tied a given Christian soldier to one or a series of masters:

to one man, perhaps, he was bound by a sworn contract to serve him for a stated period, to another because he wore his order of chivalry, to others again by the tenure of fiefs. (p. 240)

Not only must it be said that a law of war was something widely accepted and generally operative, "a law which was accepted and enforced in properly constituted courts, and whose intricacies were argued by trained lawyers" (p. 241), it must be added that loyalty was perhaps what made that world go round. That the entire system (at least on one level) operated by virtue of an intricate pattern of relationships of personal loyalty is abundantly clear in the Latin and vernacular literature of this period (which might well have been used, or at least referred to, simply to throw light upon those caught within patterns of conflicting loyalties as upon those who lived a more simple course). From the *Chanson de Roland* in France, and the Germanic heroic poems of the *Battle of Maldon*, *Beowulf*, and the *Finn* fragment, down to such later poems as the

³ Cf. the present writer's review of this in 35 NOTRE DAME LAWYER 482-87 (1960).

⁴ Especially registers of civil cases and the like, for the years 1348-80 and 1415-53.

⁵ J. Huizinga, *The Political and Military Significance of Chivalric Ideas in the Late Middle Ages*, in MEN AND IDEAS 203 (London, 1960).

Hildebrandslied, this courtly literature enables us to see not only that "conflicts of loyalty were a problem for the individual," but more deeply how much the ties of loyalty were the bonds that held otherwise centrifugal forces (of society, of political ideas) together.

The great changes occurred during the Hundred Years' War, for several reasons:

The idea of chivalry, of a united order of Christian soldiers pledged to the armed defense of justice, was a legacy of the age of the crusades; it had little significance in the contemporary world of emergent nation states. By this time the open profiteering of professional soldiers had debased the old principle, that the spoils of war were the equitable reward of the man who risked his life in a just cause. (p. 246)

But what is still of consequence to us is that there were certain principles and rules of conduct generally accepted: "it was on this belief, that there are general laws binding on all men regardless of nationality, that Grotius founded his theory of international law." And however paradoxical it may seem to our sometimes romantic notions of law, Huizinga was right: "the chivalrous conceptions of honour and loyalty of an age when the idea of nationality was not fully understood prepared the way for the notion of a law of nations." (p. 247)

The reflections upon and considerations of this volume can be extended in still another way. If law lies at the intersection of logic and life (as Maitland suggested), we may at times be impatient if in legal literature we read too much of the logic and too little of the life—as, conversely, we may become restive when the nonprofessional writer on law, the historical novelist perhaps, does not provide enough of the logic to give the skeleton behind his presentation. In all of the richness of Keen's analysis of the laws of war, there is a good deal of logic but not so much of the life as there might be. Certainly, during the fourteenth century, the strength of knighthood lies not so much "in numbers who followed the Rule [of knighthood], but in the widespread acceptance of ideals in which medieval man had a belief as profound as in Christianity itself, and which he bequeathed to succeeding generations."⁶ Chaucer's Knight in *The Canterbury Tales* may well be taken as a "personification of those ideals," yet we must remember that even at the end of the fourteenth century and the beginning of the fifteenth, that ideal seems to have been more honored in the breach than in the observance (and the tension between the ideal and the actuality provides for much of the dynamics in Chaucer's portrait of his Knight). That eloquent moralist and manualist, the late-fourteenth century Dominican John Bromyard, laments the fact that knights of his time tend to choose to remain at home "in delights and sins" and few now take the Cross, "either in the letter or in spirit"; when these men (Bromyard sermonizes) are

decorated with the belt of knighthood, they rise up against their fellow Christians, rage violently against the Patrimony of Christ, plunder and spoil the

⁶ Muriel Bowden, *The Perfect Knight*, in *A COMMENTARY ON THE GENERAL PROLOGUE TO THE CANTERBURY TALES* 44 (New York, 1948).

poor subject to them, afflict the wretched pitiably and pitilessly, and fulfill their extravagant wills and lusts.⁷

Especially now that we have such admirable guidelines provided by Keen, future students of the later Middle Ages can work more profitably in the rich literature provided by the chronicles (especially Froissart); by the poetry of Chaucer and one of his French models, Guillaume de Machaut (particularly his *La Prise d'Alexandrie*, with its celebration of a fourteenth century prince as a true *chevalier* who founds a new order of chivalry with brighter ideals); but perhaps most of all by a poet, little known except for his interest to students of Chaucer, Watriquet de Couvin. Watriquet, a poet of Hainault (the home of Queen Philippa), was a generation older than Chaucer, and in an elegy of 300-odd lines, the *Dit du Connestable de France*, describes a knight-constable in these idealized terms:

Prouesce faisoit esveillier
 Courtoisie, honneur, et largesse
 Et loiauté, qui de noblesce
 Toutes les autres vertus passe.

* * * *

Tant fust plains de courouz ne d'ire
 Onques n'issi hors de sa bouche
 Vilains mos; maniere avoit douche,
 Plus que dame ne damoisele.⁸

Here we may note the stress not only upon courtesy and honor, but also upon largesse and loyalty, two virtues the importance of which in the system of chivalry and a codified law of war have now been made more clear by Keen.

Indeed, it might well be suggested that literature can still throw light upon the origins of chivalry as we have come to understand that institution after the fact. While one may accept Urban II as a father of knighthood — in his proclaiming the First Crusade and welding together Cross and Sword⁹ — and recognize the force of the crusades in giving currency to the ideal of the Christian knight throughout Christendom, so that everyone knew what the code was supposed to be, nonetheless a reader of the earlier literature of the Anglo-Saxons, with their strong codes of loyalty, largesse, and honor (and these in turn were very much recognized through the regions where Old and Middle High German epics and lyrics were sung), might with strong reason suppose that Urban was building upon already-existing ideals and fusing them to a particular purpose in a moment of crisis.

⁷ *Id.* at 45-46.

⁸ I have quoted from the more accessible presentation by Bowden, *op. cit. supra* note 6, at 47. The word *constable* in Middle English derives from the Old French *conestable* and is rich in denotative as well as connotative significations. See KURATH-KUHN, *MIDDLE ENGLISH DICTIONARY* pt. C.5 (University of Michigan Press, 1960).

⁹ Thus Bowden, at 45.

In the not yet completely explored domain of medieval political theology — however much we have learned about the liturgical overtones of coronation oaths and related symbols and symbolic actions, however much we are indebted to such brilliant researches as those of the late Ernst Kantorowicz in illuminating the medieval development of the concept of the King's two bodies, with all of the clouds of more than earthly glory and intimations of Christlike roles that trail behind this concept¹⁰ — we cannot yet speak as though we know, and have felt, all that a fourteenth century knight or cleric would have felt in the midst of such moving matters.

But one must not close on a note that suggests anything less than very high praise for so splendidly controlled a piece of scholarship and for so lucid a presentation. It is a book which medievalists, legal historians, and all of those concerned with the structures of and attitudes towards war must read, and from which we shall continue to learn.

R. J. SCHOECK

¹⁰ See my review of E. H. Kantorowicz, *The King's Two Bodies* under the title of "Political Theology and Legal Fiction" in 22 *REVIEW OF POLITICS* 281-84 (1960).