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## Books Reviewed

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## BOOKS REVIEWED

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MARXISMUSSTUDIEN. Fourth Series. Edited by I. Fetscher. (Schriften der evangelischen Studiengemeinschaft 7) Tübingen: J.C.B. Mohr, 1962. Pp. vi, 258. DM 12.

When, sometime around 1952, the Research Commission of the German Evangelical Academies decided to establish a special committee for studies in Marxism, it probably did not foresee that within a few years the projected study group would become one of the West's major centers of studies in this field. However, in 1954, as the first collection of articles appeared in print, it was at once obvious that the Evangelical Academies had succeeded in gathering a number of highly competent historians, sociologists, economists, lawyers, philosophers, and theologians who had in common the desire to evaluate Marxist thought as objectively as possible and, at the same time, to rethink the tenets of Christianity in the light of this challenge. Though not all of them were Protestants, they all seemed to share in an attitude characteristic of today's German Protestant intellectuals, the conviction that in recent decades man and his centuries-old culture have set foot in a danger area and that this danger can be coped with only by a genuine understanding of the past and, in particular, by calling to account the contemporary relationship to the great spiritual tradition originating from German Idealism. Thereby, from the very beginning, the study group in question markedly differed from two other Christian groups interested in Marxism, from Catholic students of Marxism such as J. M. Bocheński and Gustav Wetter, on the one hand, and from Christian progressists such as the collaborators of the French review *Esprit* and the German monthly *Frankfurter Hefte*, on the other hand. Contrary to the former, it was interested more in Marx, especially the young one, than in contemporary Soviet ideology; also, it believed that original Marxism contained a number of valuable clues for the understanding of human history. Contrary to the latter, it clearly was aware of the abyss which separates Marx from his contemporary followers and of the impossibility of reaching any kind of spiritual agreement with orthodox Communists. Probably the best way to characterize the intentions of the study group is to quote a passage from the introduction to the first volume of *Marxismusstudien*, written by the committee's late chairman, Erwin Metzke:

Too often we content ourselves with opposing Marxism and Christianity as two fixed magnitudes, in an oddly ahistorical way. If, moreover, we characterize Christianity, as opposed to Marxist "materialism," by emphasizing its "spiritualism" and "other-worldliness," we completely forget that the Christian message is not an unworldly doctrine of the beyond, but that it centers around God's personal coming unto this reality of ours. Therefore, Marx's break through the spiritualist and idealist tradition is relevant pre-

cisely to the Christian . . . Do we consider sufficiently whether the premises from which our discussion with dialectical materialism proceeds are basic enough? Do we consider that Marx has called in question the whole history of the occidental understanding of the world and of human life? Does not this history appear in a new light as soon as we consider Leninism and Stalinism — in a twilight, as it were? Are we certain that, within our own walls, we are not dominated by ways of thinking which we oppose in others? Do we not often fight against consequences of principles which still operate at our own foundations? Is it not precisely the seeming obviousness of certain starting positions which requires a self-critical re-examination? Is it not true that only such a self-critical deepening of our criticism will lead us beyond discussions in which each side simply holds the opposite of that which the other side maintains?

One may disagree as to the reasonableness of so radically critical an attitude. However, its fruits are without doubt remarkable. The three issues of *Marxismusstudien*, published in 1954, 1957 and 1960 respectively, contain some of the best articles ever written on Marx and Marxism. To mention only some of them: in the first volume, the study on the history of interpretations of Marx by E. Thier is a basic essay which anyone interested in Marxism should study before approaching other secondary literature; in the second volume, I. Fetscher's paper on Marx's notion of the proletariat analyzes the difficult question as to the relation between Marx's philosophy proper and Marxist political ideology; in the third volume there is a probing analysis of Marxian dialectics by Husserl's pupil and last assistant, L. Landgrebe, presently professor at the University of Cologne.

The recently published fourth volume comprises five studies, of which three are concerned with Marxism and religion. The first essay, by far the longest (143 pages), entitled "The Marxist Critique of Religion and Christian Faith," is by H. Gollwitzer, professor of Protestant theology at the University of Bonn. Although he was a Soviet prisoner of war from 1945 to 1949 (an experience which he described in a famous book, *Another Will Lead Thee*), Gollwitzer belongs to the circle around the "red pastor" Niemöller and thus, politically at least, to the extreme left. The second article, "The Secularization of Politics and the Political Thought of Modern Times," is by a well-known professor of philosophy and sociology at the University of Lille, Eric Weil, author of *Hegel et l'Etat*. The third article, by H. D. Wendland from the University of Münster, discusses the "religious socialism" of Paul Tillich.

The other two articles concern the starting point and the most recent effect of Marx's critique of private property. The first analyzes paragraphs 34 to 81 of Hegel's *Philosophy of Right*; the author, J. Ritter, professor of philosophy at Münster, and presently rector magnificus, is one of Germany's greatest experts on Hegel. The last essay covers the present Soviet right of possession; its author, F. Christian Schroeder, is assistant to one of the world's outstanding experts on Soviet law, R. Maurach, of the University of Munich.

I shall restrict myself to discussing the papers of Gollwitzer and Weil.

Those not too well acquainted with Marx often believe that the founder of Communism was a militant atheist who considered the abolition of religion and, in particular, of Christianity one of his major tasks. This assumption is, to say

the least, "inexact. Of course, Marx was an atheist. He did not, however, ascribe to the antireligious fight the importance which it has, for example, in the view of contemporary Communists. Rather, he considered religion as a consequence of a more basic evil, the evil of a society in which man "has not yet found himself or has already lost himself again." This society "produces religion, a perverted world consciousness," because it is itself "a perverted world," just as an inflamed organ produces pus. Religion is nothing more than a perverted world translated into consciousness; it is "the general theory of that world, its encyclopedic compendium, its logic in popular form, its spiritualistic *point d'honneur*, its enthusiasm, its moral sanction, its solemn completion, its universal ground for consolation and justification."<sup>1</sup> Consequently, Marx was always somewhat astonished and, indeed, annoyed at the unswerving inveighing against religion of militant atheists such as the brothers Bauer or Feuerbach. He considered this frontal attack against religion both useless and misplaced: useless, because religion simply cannot be abolished as long as "the world" is not put straight; misplaced, because the real enemy is the perverted social order of which, as Marx puts it, religion is only the "spiritual aroma." After all, an efficient treatment has to be radical, it has to reach the roots of the evil. Religion is of interest only as a symptom. It is, of course, true that "the criticism of religion is the premise of all criticism," exactly as the discovery of pus is the premise of all treatment of an abscess. But as soon as the purulent character of religion has become obvious, one has to turn to its cause. Therefore, in 1844, less than three years after the publication of Feuerbach's *Essence of Christianity*, Marx could calmly declare that, for Germany at least, "the criticism of religion is in the main completed."<sup>2</sup>

Both Gollwitzer and Weil rightly insist on this point. As the latter puts it, Marx is not antireligious, but rather a religious thinker. He hardly needs to be an atheist; after all, one makes no fuss about one's being opposed to morbid delusion.

However, as Gollwitzer points out, this almost indolent attitude towards religion is, to the Christian, more shocking than pleasing. Indeed, in a sense at least, it is far more shocking than the profound hate which many of Marx's followers, such as Lenin, displayed. For it indicates with unsurpassable clarity the claim of Marxism to be the fulfillment of man's most ultimate needs. By shoving off religion as a minor matter, Marxism implies not only that it can answer all the questions concerning the end of man and the meaning of human life without borrowing anything from religion, but it implies further that it can answer such questions at a level fundamentally different from that of religion. The commonplace that Marxism is, after all, only a pseudoreligion oversimplifies the issue. It may be true, to some extent at least, as far as contemporary Soviet ideology is concerned. But as to Marx, it probably is wrong. For what is shocking in Marx is precisely his matter-of-fact attitude towards religion. Believers always are inclined to think that anyone consciously turning down religion

1. MARX-ENGELS HISTORISCH-KRITISCHE GESAMTAUSGABE (MEGA), Division I, vol. 1, pt. 1, p. 607 (Frankfurt, 1927).

2. *Idem*.

must end either in cynicism or in despair. Yet here they are confronted with a man who is so convinced that religion belongs to the past as to be hardly anymore interested in it — and who still sees a meaning in human life. Actually, Marx will go so far as to claim that the true meaning of human life comes to light only after religion has been unmasked (this is another sense in which “the criticism of religion is the premise of all other criticism”):

The criticism of religion disillusions man, to make him think and act and shape his reality like a man who has been disillusioned and has come to reason, so that he will revolve round himself and therefore round his true sun. Religion is only the illusory sun which revolves round man as long as he does not revolve round himself.<sup>3</sup>

Eric Weil's paper attempts to trace the origins of this peculiar Marxist atheism by analyzing the progressive secularization of political ideas in modern times. He carefully distinguishes between three basic types of conflicts between religion and politics: the conflict between Christianity and a dreamed-of “perfect state”; the conflict between the Church and secular politics; and finally the conflict between politics and religion *tout court*. The first type is exemplified in the writings of Machiavelli and Rousseau; according to them, a Christian nation cannot establish a good state, since Christian faith diverts attention from the business of the state and invites the citizens to endure even the worst of governments. This view is a criticism of Christianity, not of religion in general; a *religion civile* is still considered a necessity. The second type, on the other hand, leads only to a criticism of the actual organization of Christianity, not of Christian faith; this kind of criticism sometimes has been advanced even by prominent Christian rulers and politicians (Louis XIV, Joseph II, Cardinal Richelieu). Thus only the third conflict, that between the state and religion as such, is truly “radical.” According to Weil, the first thinker explicitly to assert the existence of such a conflict was Pierre Bayle (1647-1706). Whereas Hobbes, for example, in spite of his obvious atheism, still considered the unity of faith a political necessity, Bayle sees no positive relation between state and religion at all and therefore argues for a complete independence of politics from religious considerations, indeed for an “atheistic state.” How revolutionary this idea was is well described by Marx, who owes his interest in Bayle to Feuerbach: “Pierre Bayle . . . announces an atheistic society which soon will exist, by proving that a society consisting of atheists is possible, *that an atheist can be an honourable man.*”<sup>4</sup> Religion has nothing to do with politics; therefore, if it can be proved “that an atheist can be an honourable man,” it can be proved that an atheist society would be politically the most expedient one.

Incidentally, it seems worthwhile to point out that the kind of criticism of Christianity advanced, for example, by Rousseau almost inevitably leads to what Weil calls the “atheistic argument in politics.” For thinkers like Rousseau are no longer interested in the intrinsic truth of Christianity. That a good citizen might uphold his faith in spite of the fact that it creates an atmosphere un-

3. *Id.* at 608.

4. MEGA, Division I, vol. 3, p. 303 f. (My italics.)

favorable to the emergence of a "perfect state" never occurs to them. They look at religion from the point of view of political expediency. From this position it is only a small step to the assertion that the absence of any religion whatsoever would be politically most expedient, that the state would be better off without any religion at all.

The three positions — the anti-Christian, the anticlerical, and the anti-religious or atheist — are all latently present in the great philosophical synthesis of Marx's master, Hegel. Though Hegel considered himself a Christian, he argued for a complete laicization of social and political life, dissolving religion into philosophy; his anti-Catholic attitude made him distinctly anticlerical; and his reduction of God simultaneously to the whole course of concrete history and to the realm of pure thought ultimately accounts for the atheism among his pupils.

Hegel, of course, never considered his philosophy opposed to Christianity. Rather, he considered his Rational Philosophy and the Rational State ultimate realizations of the truth of Christianity. However, as he wanted to preserve only the abstract content of Christianity, not its historical form, it is easy to see why his pupils considered Christianity and, by the same token, all religion, to be superfluous. After all, Hegel himself had maintained that between philosophy and religion there is only a difference of form, not of content; what philosophy grasps in the medium of feeling and imagination, Rational Philosophy possesses in the most perfect way as thought. Thus it was perfectly natural that the Young Hegelians soon considered religion as *de jure* superfluous. Finally, Marx came to consider it his task to make it also *de facto* superfluous, by transforming the world of which religion is the dream.

But the revolution which was supposed to bring about the ultimate transformation did not occur for a long time. Therefore, after Marx's death, his pupils reached the conclusion that religion is a powerful ideology delaying the arrival of Communist society. Once more, religion became an enemy which had to be taken seriously. It is an ideology of resignation inviting man to accept this vale of woe; it is the representative of competing social doctrines; indeed, it is a competing supranational organization, especially in the form of the Catholic Church, which joins the antirevolutionary forces:

Marx was convinced that only a transformation of existing conditions can make religion superfluous and thus make it disappear; his followers, in an odd but quite understandable return to Feuerbach, came to the conclusion that the struggle against religion is a premise for the transformation of existing conditions. (p. 159)

Weil concludes his article with this paradoxical observation: Christianity itself is the ultimate cause of the modern secularization of politics. By relativizing the value of the antique *polis* which the Greeks and their heirs, the Romans, considered the highest good of man; by declaring the polity to be only a good of the children of Cain, not of the successors of Abel; by degrading the state to a need of *homo peccator* rather than treating it as a need of man as such — Christianity deprived the state of its sacrosanctity and, in particular, of its

universal pedagogical function; and a state which has lost its educative function inevitably turns into a purely technical organization.

Weil does not seem, however, to deplore this secularization. Between faith and a state which understands itself as a purely technical organization there cannot be a conflict — except when the state demands from its citizens a creed or when faith wants to turn the world into a heaven on earth.

It is far more than a cheap paradox to say that atheism at the level of politics is both a necessary and a sufficient condition of religious liberty. To say this is not to mean that the religion of a nation has no effect upon its political action; neither does it mean that the principles of a state are without influence on the historical content and the exterior appearance of religion. The state is the state of a nation of determined "customs," and the nation is the nation of a state with determined legal and social patterns. Neither does this position exclude the possibility that in some cases faith and civic duties may contradict each other. Yet it amounts to saying that such conflicts can emerge only if religion and politics violate the boundary between inner conviction and exterior action. (p. 161-2)

I do not want to question Weil's statement that it is Christianity itself which, in the last resort, is answerable for the rise of the religiously autonomous state.<sup>5</sup> What I want to question is the alleged gratifying nature of this development. Weil's assertion that political and religious acts cannot conflict as long as both remain faithful to the limits imposed by their natures leads at once to the question as to where exactly these limits ought to be sought. His position presupposes that the state qua state never takes steps which are relevant to man's ultimate commitments and view of life and that religion qua religion never encroaches upon the domain of the *polis*. Neither presupposition would seem to be correct. To name only one, rather topical, instance: When the state prohibits religiously colored instruction in public schools, it acts according to its nature; for it has to be "neutral" in philosophy or view of life. However, numerous subjects simply cannot be taught without touching upon the question of *weltanschauung*; in such subjects the absence of *weltanschauung* is itself a *weltanschauung*; a "neutral" instruction inevitably would be latently atheist. I may add that I am not prepared to accept the practice of American public schools as an argument to the contrary. Public school instruction in the United States is still pretty much religiously colored. It may be undenominational, but it clearly is not areligious.

One may object that believers always will have the possibility of establishing their own schools. But does not the church, by assuming the role of educator of citizens, encroach upon the domain of the *polis*?

Weil avoids this issue by opposing "inner conviction" to "exterior action" rather than religion to politics. But can one reduce religion to *Innerlichkeit*? Weil himself hints that Christianity desires to become the *forma mundi*. (p. 158) Is this desire illegitimate? Even Weil does not seem to think so. Yet why should

5. One might doubt, though, whether an *undivided* Christianity would have produced an equally "autonomous" state. It would seem to me that at least one of the reasons for the modern secularization of politics is the fact that a religiously committed state never could identify itself with the whole nation.

this leavening of the world to which Christianity invites us restrict itself to preaching and converting? May not this leavening, to some extent at least, take place, for example, by means of laws?

To be quite honest, I do not know the right answer myself. I am fully aware of the seamy side of any fusion of religion and politics (even when the religion in question is believed to be the only true one). Apart from everything else there is always the danger that the state, applying some of the very principles imparted by religion, will turn against the latter. As Weil himself indicates, modern totalitarian systems, in which the state judges the inner conviction of its citizens and in which eventually a criminal is preferred to the "heretic," are offsprings of Christian attempts to impregnate the political constitution with religious tenets, to establish the kingdom of heaven on earth.

Thus I cannot, and do not want to, do more than suggest that the modern secularization of politics does not seem to resolve the issue as smoothly as Weil believes. In particular, it would seem to me that, in the last centuries, the secularization of politics has rather outpaced its "neutralization" into a purely technical organization. As a matter of fact, the state has *not* turned into a merely technical organization, and I doubt that it ever will. And yet it has been more or less completely secularized.

Gollwitzer's paper is far more difficult to discuss and even to summarize. To begin with, I find it hard to discover what Gollwitzer's attitude towards Marxism is. Unlike Weil, Gollwitzer would seem to belong to the kind of Christians who, in the presence of Marxism, consider the empirical existence of Christianity, especially that of the nineteenth century and of our own time, to be a painful scandal. With Pastor Niemöller, he believes that the accusations which Communism prefers against Christian churches are largely justified.

As long as the church acknowledges atomic weapons as a suitable means of defense against the "bolshevist murder of souls"; as long as it considers the privileges granted to it by Western countries an indispensable condition of its existence; in short, as long as we believe that a Christian life is possible only behind a political rampart and under definite social conditions, so long do we corroborate the Communist doctrine of the class-character of religion and sanction the error in question. (p. 77)

In the past, Gollwitzer often has sided with political demands of the extreme left; and it is easy to suppose his motivation. He wanted to show (to himself or to the Communists?) that to be a Christian does not amount to being an advocate of the capitalist social order or an enemy of the social revolution.

Obviously, this attitude entails the concession that the basic social and political aims of contemporary Marxism are legitimate. One is not astonished, therefore, to find Gollwitzer criticizing the church for having always been radically opposed to any kind of social revolution and for treating the latter in terms of the traditional category of sedition. (pp. 74, 78) Also, he seems to believe that Marx's vision of a future society without exploitation is not as utopian as most people believe, that, indeed, it may be a "rationally discussable program." (p. 62)

At the same time, however, it would seem unfair to include Gollwitzer with progressists such as Ignace Lepp or Walter Dirks. Gollwitzer knows both theology



and Marxism far too well to be amenable to the shallow slogans by which the progressists have discredited themselves. Thus, for example, the way in which he justifies his sympathy for the social revolution to which Marxists aspire is very remarkable indeed:

Can the following image be satisfactory to a Christian — on the one hand, the atheist as an advocate of a great hope of humanity, and, on the other hand, the Christian as the advocate of skepticism, and this skepticism as a rampart of Christianity? . . . Can we permit that the contrast between Christianity and Marxism consists in that the Christian, in the name of a supra-natural hope, leaves the world to its incorrigibility and misery, whereas the Marxist, in his turn, to use August Bebel's words, leaves heaven to angels and sparrows? As a matter of fact, this would seem to be the contrast between Platonism and Marxism rather than that between Christianity and Marxism. Marxism may be a warning against a Platonization of Christianity. Nietzsche's exclamation "Brethren, remain faithful to the earth!" is opposed to Christian Platonism rather than to Christian faith as such which is, in fact, a new hope for this very world, a hope greater than that submitted by Marxism. (p. 86)

The best way to describe Gollwitzer's attitude is perhaps to say that he is looking for a position which will neither commit itself to the social order of the capitalist world nor abandon any genuinely Christian tenet in the presence of Marxist ideology. Contrary to all progressists, he is prepared to criticize Marxism wherever Christian truth is at stake; contrary to most Christians, he is not prepared to defend the Western social order against criticisms raised by Marxism. Moreover, he believes that the first thing Christianity has to do in the presence of Marxism is to atone for its accommodation to a world which, in the West, is not less atheist than in the East. Atheism is not

. . . a novel and malicious invention of communists. Communist atheism is original only insofar as it is truly consistent, whereas the church and its social position for a long time have lived off an atheistic world which does not want to do without the Christian decorations. Marxism simply draws the consequences from the old atheism of scientists, historians, psychologists, sociologists, from the materialism of capitalist economy, from the lack of influence of Christianity upon production, commerce and politics, from the schizophrenic cleavage of modern man, who is a pagan on workdays and a Christian on Sundays, from the failure to carry out Christian social doctrine, and from the alienation of the broad masses from the church. (p. 122)

The Christian has to recognize that he is living in a world which no longer accepts him; he must cease to be infatuated by the concessions granted to him by the Western world. For these concessions are given to "decorations," not to Christian faith as such.

In short, it is impossible to criticize Marxist atheism without criticizing ourselves too. Here Gollwitzer quotes from an article by Walter Dirks a passage which is impressive enough to be given in full:

Hundreds of years ago, as the proletariat opened its eyes and became conscious of itself, it did not haughtily reject Christ; rather, as it were, Christ wasn't there. Christ was invisible and inaudible. At a time when the Christian order of peasant and provincial society no longer touched the proletariat

because he belonged to a completely different society, Christ should have been made visible by Christians adopting the proletarians' way of life. This did not happen. And thus Christ remained invisible . . . Let's be honest: *this* is how "Marxism" came into existence. To be sure, the Marxists committed the error. But we Christians are to be blamed for it. This knowledge should kill at its very roots all self-reliance of Christians in the presence of Marxism. The burden of the proletarian unbelief is chargeable to us. This unbelief does not separate us from these people. As a matter of fact, it ties us to them. (p. 76)

It would be easy to reject this kind of criticism of Christianity's past as unfair. Too easy, perhaps. Whether one is prepared to accept Gollwitzer's conclusions or not, one hardly can decline his invitation to reflect upon our own responsibility for Marxist atheism. Indeed, why are we so embarrassed whenever we are asked to state why we oppose Marxism? What is it that we are defending against it? Is not our embarrassment due, to some extent at least, because we identify ourselves with a social order in which we — we, not man as such — are quite well off? I am not saying that, if this particular motive is unmasked, there are no other motives for opposing Communism, as the Communists themselves maintain. Not at all. What I mean is simply that, as long as this particular motive is for us a motive at all, our defense against Marxist accusations will always be somewhat weak. Up to this point, Gollwitzer is, I believe, right. Too often we claim to be defending Christianity, freedom, and the like, while we are, in fact, only alarmed for our private privileges.

However, it would seem to me that Gollwitzer's criticism overshoots the mark. In *The Trial of the Dinosaur* Arthur Koestler enumerates a number of misunderstandings which create confusion in the minds of Western intellectuals. One of these misunderstandings may be summarized thus: if I cannot get rid of a rash, I may as well be leprosy; indeed, I would be better off with leprosy. Gollwitzer tends to argue in a quite similar way: as the world does not take Christianity seriously anyway, Christianity would be better off if the world would hate and persecute it. It is better to live in a world in which one is *forced* to live authentically than in a world which *might seduce* one to accommodation out of indolence. In short, as it is atheistic anyway, the world would better be consistently atheist.

This attitude is based upon an improper inference, and it overlooks the truth that man is weak. It is based upon the inference that, as it is better to be cold than to be only tepid (Apoc. 3. 16), it is also better to be surrounded by cold fellow creatures than by tepid ones. It overlooks the probability that limit situations in which man has no choice other than to be a saint or an apostate, though likely to produce some saints, eventually result in the apostasy of the great majority.

Do we really have to dissociate ourselves from a world which, though it no longer takes our faith seriously, still grants us the freedom to be Christians? Do we have to side with political aims of Marxism in order to show that we are more than only an epiphenomenon of the capitalist class? I do not believe so. Of course, Christianity can never identify itself with the capitalist order; if it does, it forfeits its transhistorical universality. But this does not amount to saying that, in a worldwide struggle such as the present one, it cannot, and should not, take the part of that section of the world which, though tepid and inauthentic, still grants Christianity its freedom.

Perhaps it is not too unjust to say that Gollwitzer, as a Protestant, underestimates both the importance and the difficulties of Christianity *as a social body*. Like many other German Protestants, he believes that the church should be at least impartial as far as the contemporary East-West conflict is concerned. But how could it be? Of course, Christianity may survive, and, according to Christ's promise, it will survive even the most violent blows directed against its social body. But this hardly can mean that the church should not look for conditions which are favorable to its outward, i.e., social existence. It has to dispense the sacraments, and it has to teach. Thus it is only reasonable for Christianity to side with a society which grants it the freedom to do so instead of going of its own free will into a hard exile. The character of capitalism, "an economic order disturbed at its very roots" (John XXIII, *Mater et Magistra*, para. 12), does not mean that Christianity should side with social ideas of Communism which, though *in abstracto* less perverted, does not give it the chance to fulfill its obligations.

It is sometimes said that the Communist movement itself, precisely by predicting it, prevented the social revolution to which it aspired. The "capitalists" simply became aware of the threatening danger and gave in to most demands of the "proletariat." Thus the Western world became more and more "socialized" without, at the same time, undergoing the radical break of a revolution. This is paradoxical enough. But there is a still more paradoxical fact: the emergence of a "socialist society" such as that in the Soviet Union has slowed down this process of socialization rather than accelerated it. Thus, for example, many Christian Democratic Parties in Western Europe would be much farther left today if they were not shrinking back from the danger of being identified with Communists.

The same may be said of the churches. Socialism, which, as such, is probably more compatible with Christianity than capitalism, has become an impassable way, simply because it has been appropriated by Christianity's most radical opponent. Hundreds of years ago, Christianity might have, and perhaps even should have, taken the socialist road. But as it did not do it, and as a distinctly atheistic weltanschauung stole a march on Christianity, this road is blocked today.

What remains to be done for a Christian is to "Christianize" the present society rather than to aspire to its "socialization." This "Christianization" can consist only in exemplary deeds of saintly men, not in an inveighing against the worldly limitations of the church. This is the difference between saints and progressists anyway. The latter take delight in digging up and exposing to view the wrinkles on the face of Christianity; the former, without much fuss, proceed to smooth them out.

NICHOLAS LOBKOWICZ

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CRITIQUE DE LA RAISON DIALECTIQUE. By Jean-Paul Sartre. Paris: Gallimard, 1960. Pp. 755. 25 NF.

Despite his practical cooperation with the Communists during the Resistance and after the war, Jean-Paul Sartre was fundamentally opposed to the doctrine of both Marx and the Party. In *Qu'est-ce que la littérature?* he had affirmed that

it was indeed the responsibility of a writer to be committed, but committed to freedom and not to any particular party, church, or class. Moreover, the philosophy of *L'être et le néant* entailed the consequence that the meaning of the world and of history was a function of the attitude and point of view of the individual: I alone determine the significance and value for me of the configuration of events at any given moment. There is neither a human nature which would fix that meaning, nor are there values prior and exterior to my decision.

So closed did this position seem to any synthesis with Marxism that Sartre's approach to and finally joining forces with the Party (marked by his series of articles "Les communistes et la paix" in *Les Temps Modernes*, 1952-54) was seen by many as a kind of self-betrayal, brought about "by the concrete situation of the French intellectual"<sup>1</sup> rather than by any intrinsic reasonableness. No less eminent a critic than Maurice Merleau-Ponty, former coeditor with Sartre of *Les Temps Modernes*, has caustically shown the irreducible antitheses between Sartrean existentialism and the concrete operation of the Communist Party.<sup>2</sup> Briefly and broadly, these antitheses are two. 1) Communism involves a *totalisation*, a summing-up, overall view of the meaning of history, which is incompatible with the Sartrean subject who is "condemned to be free," i.e., free to choose what history means. 2) Communism assumes the priority of society over the individual, whose subjectivity is through and through an intersubjectivity, i.e., whose interiority is a function of social institutions; for Sartre the individual is radically autonomous and unsocial: the Other is a threat to my existence, a threat which renders impossible any real communality.

It seems, however, that it is precisely these antitheses which Sartre has seen in Hegelian fashion as needing each other. The lack of any objective or trans-individual standards of evaluation might be supportable by one who lives as an alien in society, but for one who engages in everyday political analysis and counsel it results in a living contradiction. (Bertrand Russell finds himself in the same difficulty, but refuses to let it disturb him.<sup>3</sup>) The Party claims such standards, and for Sartre the Party alone bears the banner of revolution today.

Sartre told me in 1958 that he considered the analyses of *L'être et le néant* as too "abstract," in (I take it) the Hegelian and Marxian sense of this term. Existentialism, until it is subsumed by Marxism, he says in the present work, "will thus appear as a fragment of the system, fallen outside," and "the present essay aims, according to the feeble measure of our abilities, at hastening the moment of its dissolution." (p. 111)<sup>4</sup> The "autonomy of the existential ideology" is only provisional, then, because "Marxism appears today as the only possible anthro-

1. E.g., H. SPIEGELBERG, 2 *THE PHENOMENOLOGICAL MOVEMENT* 420 (The Hague, 1960).

2. Merleau-Ponty, *Sartre et l'ultra-bolchevisme*, in *SIGNES* 131-271 (Paris, 1955). An equally acid riposte by Simon de Beauvoir: *Merleau-Ponty et le pseudo-Sartrisme*, *LES TEMPS MODERNES*, 11<sup>e</sup> année, no. 114-15. Incidentally, there is a balanced recounting by Sartre of the split between him and Merleau-Ponty in the memorial volume of *LES TEMPS MODERNES* devoted to the latter: *Merleau-Ponty vivant*, *ibid.*, 17<sup>e</sup> année, no. 184-85, pp. 304-376.

3. Cf. *THE PHILOSOPHY OF BERTRAND RUSSELL* 724 (Paul Schilpp ed., 1944).

4. It is amusing to note that Sartre now repudiates (as Heidegger, Marcel, and Jaspers have before) the term "existentialism": *CRITIQUE DE LA RAISON DIALECTIQUE* 9. The reason is that the "existential ideology," as he here calls it, is destined to disappear.

pology." (p. 107) It is the only one "which takes man in his totality, that is, in terms of the materiality of his condition."<sup>5</sup> This last aspect — fundamental of course to Marx — is precisely the one ignored by the early Sartre.

*L'être et le néant* described noneconomic man — an abstraction; and the first sign of the new view of Sartre is the inclusion of a new category in the set of characteristics of the human condition: negativity, transcendence, project, and need. Moreover, need is primary: "Everything is included in need: it is the first totalizing relation of that material thing, a man, with the material ensemble of which he is a part. It is through need, in fact, that there appears in matter the first negation of negation. . . ." (p. 166; cf. 105)

Thus it becomes clear that Sartre is tackling in this volume of 700 pages<sup>6</sup> (only Part I of the *Critique*) the second of the two antitheses referred to above. (The first, that of the *totalisation* of history, is reserved for the second volume.) He is going to try to base the genesis of the group on the *pour-soi* of his earlier work, through the categories of need and its correlative, scarcity. Scarcity plus need of course generates conflict, violence, as the classical state of nature theorists saw long ago.<sup>7</sup> Thus, instead of the Other being constituted as a threat to me directly by *le regard*, the relation is triadic: it is because of the (relative) scarcity of space and food (even oxygen, Sartre insists) that the Other imposes himself.<sup>8</sup>

This triadic relation founds the fundamental type of sociality, the world of collectivity with its structure of "seriality," of juxtaposition and discreteness. (p. 383)<sup>9</sup> The lived relations which constitute the "practico-inert" field of the collective are detailed at length, in descriptions of remarkable insight — e.g., the description of being a member of a bus queue. They are flavored with Hegelian paradoxes and social psychology and carry the shock of recognition.

On the basis of such an ensemble, there may arise the group (the "we-subject" of *L'être et le néant*), defined by its enterprise and constant movement of integration which tends to obliterate the inert discreteness of its members. The group thus constitutes itself as the negation of the collective, although this dialectical movement, focused by the consciousness of praxis, is unstable, ranging from groups where the passivity tends to disappear completely (e.g., in "very small" combat units) to collectives which have practically reabsorbed their groups.<sup>10</sup>

The group is always transitory, since once the task is achieved the goal is *en soi* — not only other than me but subject, in its significance, to the ever-widening contexts of history. The meaning of the group's achievement thus in-

5. The only thing which Sartre questions in contemporary Marxism is its "mechanistic determinism, which is precisely not Marxist." (p. 108)

6. For the 700 pages, there is a ridiculous table of contents of four lines (and of course, no index)!

7. In spite of the difference of approach and terminology, the reader cannot escape the *déjà vu* feeling of the resemblance referred to here.

8. The notion of scarcity is puzzling: Sartre admits that scarcity is a contingent and not a necessary condition, and yet insists that it is essential to what we understand by human existence. He thus passes silently by the whole significance of the relation between natural law and the myths of a Golden Age, Garden of Eden, etc. To say the least, this is a lacuna in his position.

9. For definitions of the collective and the group, see p. 307.

10. The priority of the collective is logical, not temporal, and Sartre says no answer can be given to the question which came first.

evitably is endangered, in flux, and consequently also the unity of the group is endangered. Hence the latter is now stabilized by vow (*serment*) and violence, by promises of loyalty and the sanction of coercion. This is the emergence of the group-institution (e.g., the state), in which serial order again predominates.

The interrelations and interactions of these two basic wholes, series and groups, form the substance of this volume.<sup>11</sup> The introductory essay of a hundred pages or so, previously published in a Polish journal and in *Les Temps Modernes*, represents a summary of the theses which are worked out in the following six hundred pages, and may serve to inform the less tenacious (or less interested) readers of Sartre's new views.

Apart from its intrinsic interest, the work represents a significant effort as the first attempt by any of the major "existentialists" to elaborate a philosophy of society. It is one which may not seem to arrive at what is for many the root of social existence, for there is here no genuine community, no *cum-esse*, no inter-subjectivity, no friendship. Furthermore, one wonders whether the Marxism with which Sartre is struggling to come to terms is not as abstract as the "existential ideology." It remains to be seen how he will come to grips with the crucial issue: whether the infallibility of the Party is compatible with "man is condemned to be free."

FREDERICK J. CROSSON

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11. The subtitle of this first volume is *Théories des ensembles pratiques*.

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SOVIET MARXISM AND NATURAL SCIENCE, 1917-1932. By David Joravsky. London: Routledge, 1961. Pp. xiv, 433. 45s.

This is the first general account of the relations between Soviet Marxism and natural science from the obscure backroom beginnings of Soviet Communism to the "Great Break" of 1929-32, when Stalin systematically destroyed autonomous expression in all fields. The writer is a careful historian who has accumulated thousands upon thousands of small facts in a footnote-loaded narrative that, it must be admitted, makes tough reading. The documentation is impressive and exhaustive; one feels that the next searcher in the archives will have to look hard if he wishes to find relevant details that Joravsky has overlooked. One wishes at times that the theoretical implications were more fully worked out and that a broader overview of the philosophical bases of the Marxism-science relation were given. But the author has certainly done the spade-work which others, more speculatively inclined, may quarry at their leisure. The book is thus a most important landmark in our attempt to understand the history of Soviet science.

It is important also for a less obvious reason. The history of the relations between the early Soviet thinkers and natural science is also the history of Soviet philosophy. The most pressing philosophical problem these men faced was that of the method and status of natural science, at once an indispensable ally and

a potential competitor of dialectical materialism. Without a vigorous science, the economic transformation which was the ultimate goal of Marxism could not be accomplished; with a vigorous science, international and neutral in philosophical and political character, the all-sufficiency of dialectics as an account both of thought and of natural process could easily be called in question. Furthermore, science and technology had changed so much since the time of Marx, and Marx himself had known so little about these fields and had said so little about their method and philosophical implications, that repetition of formulas from the "classics" seemed to carry far less weight here than in other fields. For these reasons, a reevaluation, or some sort of clarification at least, appeared to be called for in the general area of the philosophy of science. To trace official relations between science and the Party, then, is for the most part to trace the course of the philosophy of science, and thus in a very real sense that of philosophy as a whole. This book thus provides an account of philosophy in Russia during the first (pre-Stalin) period of the new regime; it gives, in fact, the most detailed historical account so far available.<sup>1</sup>

The story may be divided roughly into four periods: the "classical" one (Marx-Engels-Lenin); the period of struggle (1922-26) between the "mechanist" and the Hegelian factions, and the ultimate eclipse of the mechanists; the ascendancy of the Hegelian faction, under Deborin, 1926-29; the "Great Break" and the gradual suppression of all writings on philosophy other than commentaries on the authoritative and wilful dicta of Stalin (1929-32). The constant interweaving of political and philosophical considerations throughout these four periods is responsible for a murkiness of concept, a lack of reasoned argument, and a constant shifting of ground, that quite mark off the philosophy dealt with from that covered by any conventional history of philosophy. Beside these Soviet writers, the pre-Socratics look like models of completeness, consistency, and sweet reason.

The Soviet philosopher had to look to the "classics" as the final criterion of philosophical truth; but since the "classics" were at best incomplete and at worst inconsistent, this rule of evidence led straight to the swamps. Thus it was gradually supplemented by another as time went on: the Party was to be the final arbiter in matters philosophical, because philosophy is a key weapon in effecting the economic and political renewal to which the Party is dedicated and which, in the last analysis, gives meaning to philosophy itself as a speculative enterprise. Joravsky in an occasional aside suggests parallels, some of them a little uncritical, between this methodological situation and that of writers within the Church, with their reliance upon a Scripture supplemented by the declaration of doctrine on the part of a central authority. Insofar as this often-drawn comparison holds (and the ways in which it does *not* are really more interesting than the others), one would have to say that the Soviets are, comparatively, at a very early stage of methodology indeed, one which (as Blakeley has pointed

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1. It may be noted that the author does not attempt to chronicle Soviet achievements in science during this period; the book is concerned, rather, with political and philosophical attitudes *towards* science and scientists. The actual effects of these attitudes upon the progress of science are not within the book's scope.

out) is as yet nowhere near the sophistication of even the earliest medieval discussions of the interrelations of faith and reason.<sup>2</sup>

Within the works of Marx and Engels, one notes an obvious indecision about the philosophy of science. They sometimes speak as positivists, suggesting that the method of natural science is the proper method for all knowledge; at other times, they insist upon the existence and even the primacy of a metaphysics whose method is *not* drawn from science. Lastly, they sometimes speak of a division of labor, as though dialectics will handle all social questions and general problems about process, and natural science will take care of the rest. Explicit passages in support of each of these three views may be adduced from the "classics" without much difficulty. The reason for this vacillation lies in the tension between the original components of Marxism: the dialectical (metaphysical) component borrowed from Hegel and the "materialist" component which was Feuerbach's contribution. The former is indispensable to Marx's social doctrine; the certainty of the triumph of the proletariat rested on no mere inductive generalization from history or from science, but upon a confident metaphysical *a priori*. The central part played by the notion of *revolution* in Marxist theory could not be justified by a materialist or a positivist philosophy; yet upon this notion rested much of the attraction of Marxism to dissident elements in society. On the other hand, Marx's "materialism" was equally important in the plan to remake society, because it excluded religion and all other forms of "idealism" (i.e., the view that spirit is in some sense prior to matter) which could act as a brake on changes in the material or social order. The term "materialism" was of course a misnomer here; "antisupernaturalism" or "naturalism" would have been more correct, since Marx in no way wished to reduce the mental to the physical, mind to matter. To do thus would have been to sacrifice the privileged place of man at the forefront of the dialectical process. It was a question, rather, of priority, so that both "materialism" and "idealism" took on special (and notoriously misleading) senses.

Marx himself realized something of this and felt obliged to campaign against the "vulgar" materialism of some of his German contemporaries, i.e., against materialism in the normal reductionist sense of this term. Furthermore, he rejected the positivism of Comte with disdain, seeing that it would eliminate the philosophical and evidential character of his own social doctrine. Finally he rejected idealism (despite the dependence of his dialectical theory upon it), and with it all forms of metaphysics which are not continuous with, and implemented in, human practice. By eliminating these three "pure" positions, Marx and Engels left themselves without a viable philosophy of science; subsequent reliance on the "classics" would thus bring about a vacillation between the three positions, with quotable texts in favor of, or in criticism of, any one of the three. Political considerations were likely to be the decisive factor at any given period in any debate on the matter, and this is in fact what happened.

At the turn of the century, two divisions arose within Marxism, neither of

2. See *supra*, p. 15, J. M. Bocheński, *Soviet Philosophy, Its Past and Present, and Prospects for the Future*. Cf. also *infra*, p. 159, Richard J. Barnet's review of Blakeley's *Soviet Scholasticism*.



them stemming from philosophical considerations, but both destined to muddy the philosophical waters even more. The debate between the "orthodox" Marxists (who regarded the works of Marx-Engels as in a secular sense "sacred," i.e., as carrying an assurance and a finality that in the last analysis did not depend on the evidence or the arguments they contained) and the "revisionists" (who, though they followed Marx-Engels in general, did not admit the "sacred" character of their writings) spilled over into the philosophy of science, and led the most prominent of the orthodox (e.g., Kautsky) to admit that Marxist social theory could be united (as it had been in Marx) with different forms of philosophy, with the implication that the philosophy of science was "free" as far as Marxist orthodoxy was concerned. The other division, purely political in origin, took place within Russian Marxism itself between the Bolshevik and the Menshevik factions. At first, the split had no sort of philosophical overtone, although the leading spokesman for one group, Plekhanov, was somewhat Humean in epistemology, and the leader of the other, Lenin, was at the time a rather naïve realist. Indeed, Lenin felt himself more attracted philosophically to Plekhanov than to some of his own Bolshevik allies like Bogdanov (who tended predominantly to mechanism or positivism). For this reason, as well as to protect the unity of the Bolshevik party, Lenin agreed to a philosophical "neutralism" for his party: outside of social doctrine, there was to be no "official" view. But the Mensheviks saw their chance to make their opponents seem "revisionist" on this point, and in addition to saddle them with the hated title "Machist," since the Bolshevik majority were, in fact, positivist in their philosophy of science.

This Menshevik attack led Lenin to write his sole major work, *Materialism and Empiriocriticism* (1908), in an attempt to dissociate from both of these stigmas the Bolshevik group he headed. In this work he attacked the positivism of his own political followers and supported in several ways the Hegelian tendencies of his political opponents. He thus completely separated philosophical from political issues; his notion of "partyiness" at this stage simply meant that any given philosophy is necessarily the expression of some social group. Marxists are committed to the philosophy of the proletariat, a philosophy of social action, not of epistemological theses. Joravsky shows, quite convincingly, that the later Stalinist ideal of "partyiness" (which would make philosophy the ideological instrument of the Party) finds only very indirect support in Lenin's writings. Lenin himself maintained dialectical materialism in some broad sense, and attacked both "vulgar" materialism and positivism because they weakened Marxist social action; but he explicitly refused to make political orthodoxy (Bolshevism, for him) a touchstone of philosophical orthodoxy, or, correspondingly, to make political "deviations" reflect philosophical "deviations" from dialectical materialism. This relatively pluralistic approach was not due, of course, to any sort of basic pluralism in Lenin's own thought: the "partyiness" of philosophy *did* commit him to Marxism to an extent that was never fully defined by him, and his apparent pluralism reflected nothing more fundamental than the total lack of correspondence between the political and the philosophical groupings of his own day. But this restricted pluralism was to continue, under his name, in Soviet philosophy throughout the twenties, until ended by Stalin in 1929.

In the Soviet rewriting of the history of this period, it is often claimed that the political separation into "leftist" (Trotsky), "rightist" (Bukharin) and "orthodox" (Stalin) groups mirrored a philosophical separation between idealism (or voluntarism), mechanism (or determinism), and dialectical materialism. Joravsky analyzes the evidence and shows that this wishful one-to-one correlation between politics and philosophy has practically no foundation in fact during this period, and furthermore that no effort was made in the bitter debates of the time to use such an alleged correlation either in support of, or against, any particular group, either philosophical or political. Had the debaters *believed* in any such political-philosophical tie, of the sort Stalin would later propose and impose, they would certainly have made use of it in controversy. Indeed it would almost seem as though the Party at this time was deliberately keeping philosophical and political modes of grouping apart, knowing full well that they could never be made to correspond. Even Stalin made no attempt in this direction until 1929. The Soviet philosophers of the twenties obviously did not consider themselves subordinate, philosophically speaking, to the Party politicians. Their obligations to Marxist orthodoxy were unmediated by Party decisions: the mortal blow was to show one's opponent to be non-Marxist, not non-Party. Joravsky notes that the character of the tasks to be achieved by the Party and by the philosophers at this time notably differed: the Party had to overcome *peasant* resistance to Sovietization whereas the philosophers had to overcome the resistance of the desperately needed older *scientists* to the ideology of the new regime. Philosophers who opposed it could be (and were) quickly liquidated, but some *modus vivendi* had to be reached with the scientists. This is one of the reasons why the philosophy of science was to be the central preoccupation of Soviet philosophers during this time.

The 1917-1929 period saw the Soviets in a profound dilemma vis-à-vis the "bourgeois specialists" (scientists, engineers, doctors) on whom they had still perforce to depend. The "Cultural Revolution," which would replace these specialists with men of a proletarian origin and a Marxist outlook, was only just beginning. How heavily could they press on the "specialists" without losing their aid? They could not leave them unopposed, or the Soviet transformation of education and technology would never come about. And they could not imprison, banish, or silence them, or the transformation of the economy would be crippled. So a compromise, changing and uneasy and entirely a matter of expedience, was adopted. As late even as 1928, scientists were assured by the Commissar of Education himself of their right to be non-Marxists, even though he added that science itself could be used to show the validity and ultimate inevitability of Marxism. But the powerful universities, scientific academies and institutes were steadily eroded by the introduction of Party members, often technically untrained, into key posts, and the gradual restriction of student entry to "safe" people. Non-Marxist works on the philosophy of science became fewer and fewer; access to foreign works on philosophy decreased. Yet until 1929, such works were still available, and leading scientists could still be non-Marxist and argue that science must be accorded full freedom if it were to be effective as science.

Not long before his death, Lenin attempted to force Marxist philosophers to

an explicit consideration of the philosophy of science (1922), on the plea that without it the campaign then beginning against religion could not have a proper "scientific" basis. But his essay supports two quite different possible approaches. One is that scientists are "natural" materialists and only need some protection from religious or positivist deviations. The other is that science itself has to be based on the "solid philosophical ground" of "Hegelian dialectics materialistically interpreted." Just how different these approaches to science could be, the next few years would show. No positive directives on the philosophy of science were given by the Party during this whole period; negatively, only "idealist" philosophies were automatically suspect. This absence of positive direction reflects not only an uncertainty as to where Marxist orthodoxy lay in the area of philosophy of science, but also the preoccupation of the Party with other affairs and its anxiety not to antagonize the "bourgeois" scientists needlessly.

In the earliest days of the Soviet state, the commonest philosophy of science was a sort of vague positivism or mechanism which held (in practice, at least) that the only basic knowledge of Nature was given by the physics of matter and motion, that dialectical materialism and physics were identical in this area, and that the former was separately important only as a social philosophy. Indeed, a few campaigned against philosophy in any form, proclaiming that it had been replaced by science. But the more moderate semipositivism ("semi" because not extended to social theory) of writers like Bukharin prevailed. This view found its chief support in the scientists, who disliked the implications of Hegelian directives and agreed that their sciences were philosophically sufficient to themselves. Even Trotsky leaned in this direction. Timiriazev, in particular, maintained that a good scientist was automatically a dialectical materialist by that very fact; no doubt he had the preservation of the goodwill of the "bourgeois specialists" in mind. Antireligionist propagandists generally made use of an exceptionally naïve mechanistic materialism for their own purposes.

The general effect of this positivist (or, more accurately, *reductionist*) drift was to instill alarm among some of the academic defenders of Marx's dialectical materialism, with its levels of irreducible qualities. They objected to the limiting of philosophy's role to social theory (i.e., historical materialism), to the virtual extinction of interest in those (like Descartes and Hegel) whom they regarded as forerunners or founders of dialectical materialism, and to the downgrading of the notion of *ideology* among the mechanists. Between 1922 and 1924, individual philosophers took up this challenge, but it was only after 1924 that definite factions came to be formed, with Deborin as the leader of the antimechanist forces, and Aksel'rod and Semkovskii as the principal professional philosophers on the mechanist side. The Deborin group urged that the mechanists were revisionists who had abandoned the Hegelian aspect of Marx's thought. The mechanists castigated their opponents as abstract theorists remote from the pressing technological and social problems of the day. The Deborinists were particularly irate with the way in which antireligious propagandists, like Stepanov, seemed to dismiss dialectics, and they called for a return to orthodoxy.

This clash occupied the center of the stage in the early development of Soviet philosophy. It hinged entirely around the philosophy of science. Both sides agreed,

in principle, on the universality of dialectics (though the mechanists frequently paid only lip service to this universality). They divided as to whether dialectics should issue from the study of concrete processes in Nature through the medium of the sciences (Timiriachev) or whether it proceeds from an overview of human knowledge as a whole and is of a sort that, in the words of Deborin, "cannot be overthrown by particular contingent facts which are themselves subject to critical examination from the point of view of the general methodology." In other words, the problem here was the old one of the sources of scientific methodology: should one take an a priori norm for science from metaphysics or should one scrutinize the practice of science itself to discover its norms? Aristotle had wrestled unsuccessfully with the question, taking the former line in the *Posterior Analytics* and the latter in his actual scientific works. It was a central problem throughout seventeenth century science, bitterly dividing Cartesians and Newtonians. As it appeared in Russia, however, in 1924-1929, it differed in that the a priori pattern suggested for science was no longer that of Euclidean axiomatics but that of Hegelian dialectics, and the impetus behind this suggestion came from practical and ideological sources, not from theoretical considerations.

At the beginning, nearly all scientists were ranged against the Deborinist approach, either as explicit semipositivists, or at least as mute protesters. And most of the old-time Marxists and Party members leaned in the same direction. Deborin showed himself uncommonly flexible; indeed, one of the striking things about the whole controversy was the combination of fog and extreme violence that enveloped it. The issues at stake were not simply academic: very soon they would decide political power and even mere survival. And the available guidelines were indecisive. So that everyone hedged about taking up definite positions: Deborin kept assuring scientists of their autonomy, and the mechanists kept asserting their devotion to dialectics. Polemics against persons took the place of attacks on theses: to attack a thesis meant to affirm its opposite, and affirmation was dangerous unless immediately qualified. The controversialists were themselves well aware of the foggy and confused character of their dicta, but could always plead dialectical logic as their justification.

The Deborinists, though at first in a tiny minority, had a powerful weapon in their arsenal: the appeal to Marxist orthodoxy. Despite the fact that orthodoxy on this matter was obscure, it was easier to picture the mechanists as deviationists, as calling in question the activist role of philosophy and ideology and substituting for it the neutrality of natural science, as secret sympathizers therefore with the "bourgeois" scientists who were still in control of many sectors of Soviet education. So the voice of the Deborinists grew stronger, denouncing the orthodoxy of their opponents, and gradually the mechanists grew silent. Deborin, like Lenin before him, had little concrete counsel to give to scientists about how dialectics would "raise natural science to a new, higher level," as he constantly claimed. In practice, he was perfectly willing to leave them to their own devices, provided that they accepted some sort of vague primacy of the dialectical method.

By 1926, official favor was swinging over heavily to the Deborinists; one of them formally appealed in *Pravda* for a Party decree outlawing mechanism. But the antireligionist propagandists still favored the mechanist side, and their influ-

ence helped to delay the decision. The Communist Academy held back, feeling that pluralism of the Leninist type was still politically desirable. But in April, 1929, mechanism was formally outlawed as "revisionist," ending the public debate, and ending with it the period of grace for natural scientists. The "bourgeois specialists" were swallowed up now in the huge numbers of newly graduated young Marxists: the vast expansion of higher education in Russia at this time was responsible as much as any other single factor for the rapid eclipse of the "experts." The decree of April, 1929, was the first instance of a philosophical position being established by an explicitly political act: not only was a new idea of "truth" being shaped, but the hesitations of the twenties, political as well as philosophical, were almost over.

Stalin's "Great Break," the decisive offensive of socialism against all the traditional cultural elements in town and country, lasted from 1929 to 1932. It was a time of widespread social unrest, of revolts in the villages, of secret arrests and executions. Some resistance was shown by older scientists. The Moscow Mathematical Society defied the attempts to bolshevize it; it was dissolved and its president died in prison. Scientists who did not positively support the Party were called "wreckers," and were brought to trial. Neutrality no longer sufficed, and indeed even declarations of loyalty (since they were so obviously exacted under duress) hardly sufficed on occasion, so great was the popular hysteria. Denunciations of teachers by their students were common. But it frequently remained possible for scientists to carry on their work as before, because the implications of Marxism for the working scientist remained so vague. Stalin was no philosopher, and the "Great Break" had a primarily political motive.

In philosophy, this period saw the rapid eclipse of the Deborinists. Stalin felt that "theoretical thought is not keeping pace with practical progress," that philosophy was not sufficiently directed towards those ever-pressing practical goals of social change that were the concern of the Party. Deborin's emphasis on the history of philosophy, on philosophy as a professional competence, angered the Leader, who knew nothing of philosophy but now wished as Leader to be able to speak here with the authority he commanded in other fields. Philosophy must cease to be a difficult academic subject; it must become something easily communicable in elementary catechetical form to Communist youth. The character of philosophy itself must, then, be altered. Deborin, as always, tried to bend with the wind, but now the issue was no longer really a philosophical one. From his earlier works his opponents quoted phrases of a sort that would anger present Party politicians. His school was made to seem "ivory tower," not in touch with the social realities, and "formalist," a new term that now came to have a heavily pejorative sense. His "Bolshevik" critics (as we may call them) maintained that devotion to the study of Hegelian dialectics was not enough; "practice must guide theory." This sounds like what the mechanists had been saying earlier, but in fact the "practice" here was now the directives of Stalin and the Party. Political orthodoxy and philosophical orthodoxy became one, and the former was to be primary. Lenin's pluralism was forgotten, and his notion of "partyness" transformed. The record itself had to be rewritten in order to bring Marx and Lenin into line. In the last analysis, the Party and its ideological needs were to be the

deciding factor in determining philosophical truth; Marxism-Leninism had yielded place to "Soviet" philosophy, properly so-called.

The Deborinists were condemned in a decree of Stalin's Central Committee in January, 1931, as "idealists" in philosophy and Mensheviks in politics (since political and philosophical deviations were now made to match one another). Deborin himself was demoted, and several of his supporters were imprisoned without trial. Riazanov, revered head of the Marx-Engels Institute, was struck down, because he allegedly put scholarship before Party and even suggested that Lenin was of limited talent as a philosopher. The Communist Academy was dissolved, and Stalin denounced all "archive rats" who showed suspicious interest in the past history of Bolshevism with all its twists and turns. Non-Party objectivity in the writing of history was denounced in the strongest terms as a relic of "bourgeois liberalism." Scholars were forced to "disarm" themselves, renounce their former works and the canons of evidence that guided them, and vow allegiance to "our dear and beloved teacher, Comrade Stalin." Naturally, this meant an end for the time of serious work in philosophy. But science escaped more easily, since Stalin had less to say there, and also the halting of scientific work would have wrecked his own political goals. The fury of the "Great Break" spent itself in science by 1932. In 1933 we find that even the Party was calling for an end of forcible "Bolshevization" in science, partly no doubt because it was no longer necessary, and partly too because the introduction of incompetent Marxist direction at all levels in science had hurt scientific progress in a way that was obvious even to the Party itself.

To finish his chronicle of the Soviet twenties, Joravsky turns briefly to physics and biology and examines two famous controversies that were beginning to form and that would come to a head only much later. The most striking new physical theory of the time was Einstein's relativity theory. In Russia, as elsewhere, it excited some opposition, not only because of the apparent relativization of Newtonian absolutes that it entailed, but even more because of the "formalist" character of its theoretical structure. Einstein excluded imaginative models, and worked directly with mathematical quantities. It seemed to many that this was the veriest positivism, the reduction of science to the cataloguing of phenomena in equations that provided no insight. The theory was hailed by the Vienna Circle as a scientific support for logical positivism; it was attacked by Thomson because of its apparent repudiation of the realistic models and claims to insight of the older natural science.

In Russia, most working scientists ignored the new theory (as their Western colleagues did, and to a large extent still do), since its implications for practical work in physics and chemistry were minimal. Those who took account of it can be placed in three categories. First were the old-line physicists (Timiriazev, Orlov) who saw in it a threat to the classical approach through mechanical models, and who consequently rejected it as "formalist." Then there were those old-line Marxists (like Bogdanov and Bazarov) who had adopted, against Lenin, a "Machist" reading of Marxist philosophy, and who saw in the new theory an admirable support for their positivist, or "Machist," approach to science. Last in the field was Semkovskii's view that relativity theory was essentially an applica-

tion of dialectical method to physics, and as such to be welcomed by the physicists. In 1927 Gessen maneuvered the Deborinists into backing this view, which thus made it, for the time, quasi-official. A more qualified support was given Einstein by writers like Maksimov and Tseitlin (a Cartesian), who welcomed most aspects of the theory but were hesitant about its "idealist" and its "anti-ether" aspects respectively. By the end of the twenties, support for Einstein's theory was thus fairly general, except for some few who still deplored its "formalism." The "Bolshevizing" of theoretical positions in 1929-1932, already mentioned, made little difference; Party control was light in areas where the Party saw no practical fruit. But later on in the thirties, the Einstein controversy would flare up again in a far more violent form, and some of the earlier notables (Gessen and Semkovskii) would be put to death as "enemies of the people." This struggle is chronicled in detail in Müller-Markus's recent monumental *Einstein und die Sowjet-philosophie*.

In biology the struggle earlier became intense partly because dialectical ideas were more easily introduced here, partly because the methodology of biology was not as solidly established, and also because of the special overtones of biological theories in agriculture, politically the most sensitive domain the Bolsheviks faced. The storm center was genetics, and specifically the issue was whether evolution was to be explained partly in terms of inherited acquired characters ("Lamarckism") or entirely in terms of small uncontrollable gene-mutations ("Morganism"). In the early period up to 1926, both views were freely defended. But in 1927 some "Morganist" biologists (Serevbrovskii, Agol) began to claim that their genetics was the biological version of dialectical materialism, and that the "Lamarckist" view, being (they said) essentially mechanist, ought to be proscribed. This effort to link the philosophical division between Deborinists and mechanists with that between Morganists and Lamarckists was a highly artificial one, but it was sufficiently effective to bring the Lamarckist view into political disrepute (though it was not actually proscribed) when the mechanistic philosophy with which it was supposed to correspond was repudiated in 1929.

The Morganists quickly found that they were wielding a two-edged sword. With the "Great Break" came the fall of the Deborinists and the inevitable repudiation of the Morganist genetics that was by now assumed to go with it. The Bolshevik strategists attacked the Morganist-Deborinist faction in biology as harboring "bourgeois specialists" and as being too independent of Party guidelines. Lamarckists and Morganists alike were chided for turning the energies of biologists into futile controversy when pressing practical questions of food raising and plant improving ought to have occupied them. It was evident by this time that *any* scientific theory sufficiently general in its scope to rival dialectical materialism in its explanatory power would be rejected as "bourgeois," meaning potentially dangerous to the Bolshevik Party control over theoretical thought. The suggestion was that a properly *Marxist* theory of biology had not yet been found: it would have to be at once "Marxist" (in *some* sense) and of immediate practical utility in solving the food shortages.

Later on in the thirties, Lysenko would start a sort of mass "Lamarckist" movement in wheat culture, the Party would intervene in a far more brutal way,

and the lives of the leading "Morganists" would be forfeited for their views on mutations as the sole factor of heredity. But already in 1930 the pattern is set: the imposition of Party control on scientific theory in the interests of social utility; the elimination of all "bourgeois specialists" who hold aloof from the Bolshevik directives; the tendency to repeat in science the splitting into factions, the invective, and the uncompromising fight-to-the-death attitudes that characterized the Soviet political arena of the day. It is not without significance that the Sputnik was the product of physicists, and that Soviet agriculture even today suffers from marked weaknesses. The heavy hand of "partyiness" à la Stalin showed itself far more in biology than in physics.<sup>3</sup>

But after all, there *was* a Sputnik; so that the story of Soviet physics 1932-62 has a happier ending than the earlier one. How the science of 1932 could give rise to that of 1962 is a question towards which one hopes Joravsky will soon turn his indefatigable talents.

ERNAN McMULLIN

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3. Cf. *supra*, pp. 40-49, D. Joravsky, *Soviet Marxism and Biology*.

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SOVIET SCHOLASTICISM. By Thomas J. Blakeley. Dordrecht: D. Reidel, 1961. Pp. xiv, 176. Fr. 19.75.

Although Soviet writers view Marxism-Leninism as both philosophy and ideology, the ideological component is the more significant. Thomas Blakeley has undertaken an analysis of Soviet thought which concentrates on internal structure and method. He begins by pointing out that Soviet philosophy rests on four basic axioms: a) the objective world is material; b) matter determines thought; c) knowledge is a reflection of the objective world; and d) reality is shaped by the dialectical process. These basic tenets are accepted as essential truths wherever Marxism-Leninism is preached as a key to history.

It is the next step in the Soviet philosophical method that provokes not only criticism in the West but disagreement in the Communist world itself. Proceeding from the above assumptions about the nature of matter, the Soviet theorist attempts to prove them by recourse to experience.

The entire course of world history for the last century irrefutably proves the truthfulness of the principles of Marxism-Leninism and of the laws revealed by it. Just as the Great October Socialist Revolution and the victory of socialism in the USSR, the victory of the Socialist revolution in China and a string of other countries was the triumph and the confirmation of the truth of the laws of Historical Materialism, so the striking discoveries of contemporary science are the triumph and confirmation of the truthfulness of Dialectical Materialism.<sup>1</sup>

Blakeley points out that the Soviet ideologue uses events to prove philosoph-

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1. OSNOVY MARKSISTSKOJ FILOSOFII [Fundamentals of Marxist Philosophy] (F. V. Konstantinov, ed., Moskva, 1958). Cited in J. M. BOCHENSKI & T. J. BLAKELEY, eds., *STUDIES IN SOVIET THOUGHT* 20 (1961).



ical theory and uses theory to support a tendentious interpretation of events. Thus negative cases which tend to disprove a thesis are excluded. Often the validity of theory is rested on a single case. The Chinese have given a recent example of this sort of selective verification. The editorial in *Jenmin Jhipao* of December 31, 1962, which contains a virtually overt attack on the Soviet ideological position, expresses the view that the reactionaries are "paper tigers" and will be defeated and swept aside. Addressing itself to Khrushchev's warning that the "paper tiger" (the United States) has "nuclear teeth," the editorial dismisses the danger on the grounds that all "reactionaries" are "paper tigers." It "proves" this thesis by pointing to its own success in defeating the militarily superior but "reactionary" Kuomintang in 1947. The occasions when Communists suffered military or political setbacks at the hands of "reactionaries" are not mentioned.

The Soviet ideologue would accept the same premises underlying the Chinese statement although he would disagree as to the significance of the particular case cited. He would agree that history is moving towards a predetermined goal, i.e., a set of utopian ideals that Blakeley characterizes as "Communist destiny." The ideologue would also agree that the "proletariat" has a special role in bringing about this goal. Both these propositions, as Blakeley points out, are set out dogmatically as acts of faith. Everything that happens is adduced to confirm these propositions. The translation of the basic philosophical dogma of Marx and Lenin into an operational political faith is accomplished, according to Blakeley, by "meta-dogma," i.e., the use of the concepts of "Communist destiny" and "proletarian redemption" as proof of the basic principles. This process depends in turn upon a second "act of faith," the absolute authority of the party in ideological matters. Acceptance of the authority of the party to interpret events is the pivot of the entire ideology. Since the whole Communist structure is based on a claim to a monopoly of truth, an ideological priesthood to restate the truth in each new historical situation is needed. As Blakeley suggests, Soviet philosophy has developed in such a way as to elevate and maintain the priestly role of the Party. The Chinese challenge to this idea emerges as the most significant aspect of the Sino-Soviet dispute.

Ideology serves many other functions as well, however. Blakeley might have dealt more extensively with these. Clearly, the Soviets do not approach philosophy as a purely academic pursuit. Soviet philosophical interpretation of past events, and, particularly, of contemporary history serves political functions.

One of these functions is the explanation of history. Soviet analysis of historical events is designed not only to demonstrate the inexorable movement of the world toward Communist goals but also to provide a context which will give meaning to the efforts of individuals and political groups and encourage them along courses of conduct desired by the Party.

A related function of ideology is the rationalization of experience. Recourse to the dialectical analysis has been used to justify oppression, obscurantism, and other political conditions which appear wholly inconsistent with the stated objectives of the ideology. It is the commitment to action which transforms philosophy into ideology. The programmatic aspect of the Marxist-Leninist

analysis is its most significant feature. The believer is taught that his own analytical insights give him moral as well as intellectual superiority and fit him alone for political leadership in the society in which he lives. Because he alone knows the way in which the world is moving, he is a chosen vessel of history.

Since the Marxist-Leninist analysis is used as a call to action as well as an explanation of actions already taken, it is peculiarly susceptible to modification by the pressure of events. Thus various doctrines such as the inevitability of war, the withering away of the state, and the role of the state in agriculture have undergone significant changes. The attempts of the Soviet leadership to preserve the fabric of the ideology while at the same time promoting major doctrinal changes is a phenomenon that invites analysis. For example, the tension between the "dogmatist" and the "revisionist" in Soviet doctrine has obviously important implications for the future of the ideology. Blakeley's analysis scarcely deals with these problems, however.

This book traces in detail the dogmatic structure of an ideology. Blakeley correctly shows that the system is designed to demonstrate that the Communist Party is always right. He also shows that many of its ideological claims cannot be proved. What he fails to show is the distinguishing features of this ideology. It is not exceptional for a system of belief to claim a monopoly of truth. Most proselytizing religions have taken this position. It is not unusual that a doctrine designed as a basis for action undergo continual modifications. What is unusual is the combination of an attempted scientific explanation of history, a justification of authority, and a guide for political action in a single philosophical theory. How the method of Soviet philosophy is adapted to these differing roles is a question that remains after reading Blakeley's analysis.

RICHARD J. BARNET

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INTERNATIONAL LAW [MEZHDUNARODNOE PRAVO]: A TEXTBOOK FOR USE IN LAW SCHOOLS. Edited by F. I. Kozhevnikov, for the Academy of Sciences of the U.S.S.R. Moscow: Foreign Languages Publishing House, 1957. Pp. 477.

The deceptively modest and general title *International Law*, issued by the Institute of State and Law of the Academy of Sciences of the U.S.S.R., denotes what is really a collective study bringing into collaboration three of the top names in Soviet international law — Professor E. A. Korovin, possibly the most articulate Soviet legal theorist since Pashukanis' downfall in the Stalin terror campaign of 1937; the late Professor S. B. Krylov, who was, for a number of years, the Soviet judge on the World Court at The Hague; and Professor F. I. Kozhevnikov, who acts as general editor of the volume. Each of these three jurists contributes two chapters to the volume. In addition, four other persons, who at the time of original publication in 1957 were Candidates of Law, but who have since become known as contributors to the general Soviet literature on international law, contribute each a single chapter to the volume.

The volume itself does not contain any indication as to the exact purpose it is designed to fulfill or the specific audience to whom it is directed. It is understood, however, that it is intended principally as an introductory text for foreign students studying law in the Soviet Union, or for students abroad and especially in the new countries of Southeast Asia and Africa studying in their home countries; and the fact that this particular volume has been so widely translated or rendered into foreign texts, beginning first with German several years ago, seems to confirm this suggestion. The book is written with great facility and simplicity of style, and is generally unencumbered by footnotes or qualifying references, though there is a small, selected Russian bibliography attached. In those occasional instances where footnote references are included to foreign, Western legal sources, the Western reader may feel some surprise both as to what is included and also as to what is omitted. There are some well-known Western juristic names there, but the actual process of recourse to Western sources seems curiously selective or episodic — not so much, I suspect, for political reasons, as simply because of rather casual or careless library methods. The direct canvassing of foreign literature is, in any case, fragmentary at best and certainly not comprehensive.

The liveliest chapters in the book are those written by Professor Korovin, although, because of the particular time at which the volume was written, these two chapters catch Professor Korovin at a certain state of intellectual transition. The year 1957 — four years after Stalin's death, when Khrushchev's power had first begun really to consolidate — was the time of the substantial inauguration in the Soviet Union itself of the campaign of legal de-Stalinization.<sup>1</sup> It was also the time of the inauguration of the major cultural and ideological offensive, outside the Soviet Union, in behalf of the special Khrushchev brand of "peaceful coexistence," which, while purporting to renounce nuclear war and direct military action as a means of resolution of fundamental East-West differences, proclaims the inevitability of a Soviet bloc victory by ideological means and in peaceful economic competition with the West, the latter to come about because of the asserted inherent superiority of the Soviet economic system and way of life in general.<sup>2</sup> Korovin's 1957 definition of international law, in any case, seeks to straddle both the old order and the new:

International Law can be defined as the aggregate of rules governing relations between States in the process of their conflict and cooperation, designed to safeguard their peaceful coexistence, expressing the will of the ruling classes of these States and defended in case of need by coercion applied by States individually or collectively. (p. 7)

Here is an attempt at a synthetic definition that is a curious compound of various elements of Soviet legal theory. The emphasis on the rules of inter-

1. See generally the editorial, "For complete elimination of the harmful consequences of the Personality Cult in Soviet Jurisprudence," in *Sovetskoe Gosudarstvo i Pravo* no. 4 (1962); also N. Khrushchev, *An Account to the Party and the People: Report of the Central Committee, Communist Party of the Soviet Union, to the 22nd Congress of the Party, October 17, 1961*, at 108 *et seq.* (1961).

2. Khrushchev, *op. cit. supra* note 1, esp. at 59-61.

national law being an expression of "the will of the ruling classes" of the various states is very close to the highly positivistic Soviet definition of internal municipal law, formulated in the Stalin era by Stalin's main legal mouthpiece, Andrei Vyshinsky, and his associates.<sup>3</sup> At the same time, the specification that international law is the "aggregate of rules governing relations between States in the process of their conflict and cooperation" seems to recognize the *de facto*, existential element in international legal relations — the essential condition of bipolarity in the particular phase of the cold war that was current then, as now: in effect Korovin comes very close here to embracing that American Legal Realist position (associated variously with Hans Morgenthau and George Kennan)<sup>4</sup> — that international law doctrine, if it is to be viable, must in certain minimum degree reflect the basic power relationships of the world community — which Soviet jurists still officially deride. Finally, in skilfully working the concept of peaceful coexistence into his definition, Korovin is able, in a masterly way, to plant one foot firmly in the camp of the post-Stalin reformers. In thus formulating a textbook definition that manages to face several ways at once, Korovin has achieved quite an intellectual *tour de force*, an exercise in academic gamesmanship.

But Korovin has changed his views before and has had the bitter experience of having to recant in public.<sup>5</sup> If the desire to avoid further painful public confessions of *mea culpa* may have induced him, in the 1957 textbook (when the "winds of change" in Soviet jurisprudence were apparent, but not necessarily their final direction), to play safe and to be consciously ambivalent in his formulation, it is to be noted that he has already changed his mind again. Korovin's new views do not seem to have any general or official Soviet acceptance as yet. They amount to a heretical campaign to use peaceful coexistence, contrary to the more moderate Khrushchev position, as a stratagem masking a wholesale rewriting of classical international law doctrine in order to reflect "proletarian internationalism" in the special sense of coordinated world revolution.<sup>6</sup> They are such as essentially to render dated or suspect his earlier, 1957 textbook views.

The new Korovin line also stands as a damning indictment, by one Soviet jurist at least applying what he conceives to be Soviet juristic standards, of the scientific validity and utility of the 1957 textbook's basic plan and scheme of

3. See generally VYSHINSKY (gen. ed.), *THE LAW OF THE SOVIET STATE* 50 (Babb trans., 1954); GOLUNSKY & STROGOVICH, *THE THEORY OF THE STATE AND LAW IN SOVIET LEGAL PHILOSOPHY* 370 (Babb trans., 1951).

4. See generally MORGENTHAU, *POLITICS AMONG NATIONS* (1st ed., 1948; 2nd ed., 1954); MORGENTHAU, *IN DEFENCE OF THE NATIONAL INTEREST* (1951); KENNAN, *AMERICAN DIPLOMACY 1900-1950* (1952); KENNAN, *RUSSIA, THE ATOM, AND THE WEST* (1958); KENNAN, *RUSSIA AND THE WEST UNDER LENIN AND STALIN* (1960).

5. See the comments by Tunkin, *Coexistence and International Law*, 95 *HAGUE RECUEIL* 1, 60 (1958).

6. On peaceful coexistence, consult generally McWhinney, "Peaceful Coexistence" and *Soviet-Western International Law*, 56 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 951 (1962); Crane, *Soviet Attitude toward International Space Law*, 56 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 685, 710 (1962); Crane, *Law and Strategy in Space*, 6 *ORBIS* 281, 289 (1962); Hazard, *Codifying Peaceful Coexistence*, 55 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 109 (1961).

organization of the study of international law. In his most recent philippic against classical international law, Korovin has publicly derided what he labelled as the "routine" system that he says has existed for more than a century in Russia for the study of international law, and he has called for its replacement by a system more attuned to the "epoch of the victory of Socialism and Communism on a world scale."<sup>7</sup> Under the "routine" system, according to Korovin, the study of international law was broken down variously into "concept of international law; subjects of international law; populations; territory; state organs; international organs, etc." In the 1957 textbook, with Korovin himself contributing the first two chapters, the breakdown by chapters is as follows:

The conception, sources and system of international law; the history of international law and its science; the subject of international law; population in international law; territory in international law; international treaties; organs of the states for their international relations; international organisations; pacific settlement of international disputes; laws and customs of war. (pp. 3-6)

As a study of Soviet international law doctrine, the 1957 textbook is not, unfortunately, comprehensive. The skimpy two-page discussion by Korovin as to the "sources" of international law is quite unsatisfactory in presenting distinctive Soviet views as to the relative priority of the different accepted sources, and their hierarchical ranking *inter se*. The book does not render, in any collected way, the clear Soviet preferences, over the years, for particular arenas for international lawmaking, and their preferred allocations of norm-making competence as to international law; though the pre-eminence accorded by Soviet international law, both doctrine and practice, to treaties, and especially bilateral treaties, for Soviet confrontations with other legal systems does come out quite clearly, if interstitially, in the discussion by Kozhevnikov on "International Treaties." (pp. 247-282) Here Kozhevnikov communicates very forcefully the Soviet embracing of the doctrine of *pacta sunt servanda*; the insistence on "strict," literal interpretation of treaties and the eschewing altogether of flexible, policy-oriented methods of treaty construction; the restriction of competence to interpret treaties to the signatories themselves, and a general denial of any broad, lawmaking power to the World Court in the interpretation of treaties; the distaste for, if not the actual denial of, the doctrine of *clausula rebus sic stantibus* as a basis for repudiation or novation of treaty obligations. Kozhevnikov does not, however, except for assorted pejorative remarks on the conduct of "capitalist States" and the "period of imperialism," ever try to render these distinctive and particularized Soviet international law attitudes into sociological terms by trying to explain their roots in specialized historical origins and in specialized societal conditions and demands in the Soviet Union in the years since the October Revolution.<sup>8</sup>

The late Professor Krylov's comments in the chapter on "Pacific Settlement

7. Korovin, *International Law Today*, INTERNATIONAL AFFAIRS 21-22 (1961): On the new Korovin compare Crane, 6 ORBIS 281, 291 (1962).

8. As to this, see the present writer's discussion in 56 AMERICAN JOURNAL OF INTERNATIONAL LAW 951, 955-8 (1962).

of International Disputes" invite especial attention because of his former status as the Soviet judge on the World Court at The Hague. There is a widespread attitude in the common law countries (one that the present writer does not, by the way, himself accept), that a former member of a final appellate tribunal should not make public comments on the decisions of that tribunal, *a fortiori* on decisions in which he has himself participated. Be that as it may, Krylov cuts a wide swath through the decisions of the World Court in the period from 1948 until the time of his writing his chapter for the Soviet textbook. He characterizes the Corfu Channel case decisions of 1948 and 1949 as "incorrectly placing the responsibility upon Albania" and as "without foundation"; he cites the 1952 decision in the Moroccan Nationality case as an example of a "reactionary judgment"; he derides the Advisory Opinion of 1950 regarding the regime of Southwest Africa, as "contrary to the Charter"; he considers the Advisory Opinion of 1950 regarding the Peace Treaties with Bulgaria, Hungary, and Rumania, as "hostile to the People's Democracies." (pp. 394-396) It is perhaps not surprising that, having begun in this vein, Krylov is able to conclude triumphantly: "The majority in the United Nations have tried to use the International Court of Justice to infringe the United Nation's Charter and to replace the Security Council." (p. 396) Krylov is remembered, by those in the West who had met him and who knew him both as professor attending international scientific legal conferences and as World Court judge, as a courtly and cultivated man. He did very well by the World Court, and it is a pity, perhaps, that his last words on that body have a somewhat ungenerous quality.

Taken as a whole, and considered now purely as a student text, *International Law* has the advantage, in terms of its marketability, of seeing things in clear and simple, black-and-white terms. The student in a hurry will not be troubled by all the complex nuances of particular problem-situations: it is never sought to be communicated to him, at any stage, that the task, in international law, is all too often one of choosing among competing, and sometimes quite evenly balanced, interests of the different parties; he is never told that abstract general propositions, which come so easily off the tongue, only take on real meaning when applied in concrete fact-settings. For all these reasons, as well as for its easy, flowing style, *International Law* should be considered chiefly as a cold war ideological weapon. Even the chapter subheadings have a ready-made, rhetorical quality: thus, Chapter 1(5), by Korovin, "The Imperialist States' Violation of Generally Recognised Principles and Rules of International Law"; Chapter 7(2), by V. M. Shurshalov, "Diplomacy of Exploiter States and Soviet Diplomacy"; Chapter 10(4), by Kozhevnikov, "Violation by the Capitalist States of the Laws and Customs of War"; followed by the same author immediately, and without so much as a smile or a "by your leave," by Chapter 10(5), "The Soviet Union's Unswerving Observance of the Laws and Customs of War."

All the same, one cannot help feeling that it is a pity that the solid achievements of Soviet legal science over the years are not better reflected in a text slated for such wide and general circulation and distribution in so many countries outside the Soviet Union. All of the main contributors to the present text — Professors Korovin and Kozhevnikov and the late Judge Krylov — have

established distinguished academic reputations throughout the world on the basis of their past solo works which, whatever their special ideological base, nevertheless rested on systematic research and sober reflection and careful writing. The present collective work, unfortunately, is evidently not designed as any such serious scientific venture; for in seeking to be popular, it has ended up in becoming polemical. Soviet legal science has surely deserved a more durable representation than this abroad.<sup>9</sup>

EDWARD McWHINNEY

9. For a recent production of Soviet legal science, on international law, without the special cold war propaganda undertones of the Kozhevnikov-edited 1957 textbook, see TUNKIN, *VOPROSY TEORII MEZHDUNARODNOGO PRAVA* [Theoretical Problems of International Law] (1962).

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POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURES FOR POLITICAL ENDS. By Otto Kirchheimer. Princeton, N.J.: Princeton University Press, 1961. Pp. xiv, 452. \$8.50.

The idea of a book on political justice excites the mind to questions and perplexities. Perhaps chief among them is whether the discipline of law can tame the unruliness and opportunism of the political game. Or must politics inevitably gain the upper hand and subject the law to unseemly indignities by impressing age-old doctrines and procedures into new and unfamiliar service?

"Political justice" is not used in this book in the sense of an ideal order of government in which all citizens communicate with the body politic to assure its highest perfection. Rather it is used to define that segment of law in which the devices of justice are used to bolster or create new power positions against real or imagined enemies of the state. The author explains that the book is neither a history of political justice nor a collection of its most noteworthy cases, thus explaining the absence from its pages of such a cause célèbre as the Dreyfus case. The book is designed to expose the underlying mechanisms of political trials by relating their political content to the juridical form in which cases take place.

Professor Kirchheimer, a native of Germany and now a professor of government at Columbia University, has lavished comprehensive and painstaking research on his subject in the tradition of good European scholarship. He has capitalized on most of the opportunities presented by the vast field he surveys. Although the book is flawed by meandering and by a heaviness of language, it strikes this reviewer as a highly valuable contribution.

The ambitiousness of the project is easily appreciated by its range of problems: When will a regime find it necessary, possible, or convenient to resort to the judicial process for political ends? How do the actors in political trials—judge, jury, prosecution and defense counsel—respond to their new roles as they are willy-nilly thrust in the spotlight of conflict for political advantage and power? What part is played by the supporting cast of informers, collaborators,

defectors, and security police? To what degree can political justice enable a regime to "legitimize" its status, marshal public opinion to its ideology and objectives, and dispose of its enemies? How do clemency and asylum mitigate the consequences of political justice? Finally, in what circumstances, if any, can resort to the courts to validate political goals be justified in normative terms?

A basic question is whether political trials can be distinguished from the usual run of judicial business. Do not all questions of tort and contract, not to mention constitutional law and labor law, ultimately involve adjustments between competing social and economic forces, and are not such adjustments what politics is all about? Kirchheimer handles this question skillfully. Recognizing that most trials may harbor long-range socioeconomic effects, he nevertheless argues persuasively that there is a critical difference between the usual courtroom conflict and those cases in which the judiciary is called upon to exert immediate influence on the distribution of political power. In such cases, the trial serves to advance or harm the interests of a definable political group. To elucidate the distinction, he points to the differences between a perjury trial growing out of alimony proceedings and one turning on statements made before the House Committee on Un-American Activities; between a homicide trial of a doctor's wife in Cleveland and a trial for the murder, after a hotly contested campaign, of a candidate for Governor of Kentucky; and between a trial for conspiracy to rob a bank and a trial for conspiracy to advocate the overthrow of government by force and violence.

The most solemn and far-reaching political cases — indeed, cases which throughout history have tested and tormented established governments — arise when a regime turns to the courts for assistance in repressing hostile political organizations. The author introduces this theme by lengthy comparative treatment of the varying conclusions reached by the Western countries as how best to proceed against domestic Communist movements after World War II. While Germany and the United States in different ways employed the courts to combat the Communist Party, France and Italy resisted this temptation but discriminated against the Party in the administration of election laws and within the parliamentary system. Great Britain and the Scandinavian countries resorted to neither of these forms of repression, but consistently adhered to a "policy of equal treatment" for all political groups.

Kirchheimer valiantly attempts to derive the causes for these disparities of policy. As one might expect, they are complex. A nation's cultural traditions and transitory leadership both play a part. But hard political facts more often lie at the root, including the strength of the Party within each Western country and the likely reaction of the mass of people to different policies. Open repression must risk, apart from the uncertainties of trial, the revulsion of former friends from a pattern of persecution, the martyrdom of victims, and the consequences of driving opposition underground. Displaying erudition and a shrewd political sense, Kirchheimer provides telling insights into the manipulation of means to cope with domestic movements believed a threat to stability. It is not to detract from these insights that this reviewer suggests that neither history nor what we have been able to learn of the nature of man supports



the author's conclusion that "legal repression of democratic mass movements is bound to be futile in the long run." (p. 171) Throughout recorded history, exactly such repression has taken place, and the hegemony of "democratic mass movements" still remains mostly a dream. In addition, it must be said that not everyone is interested in the long run, and this perhaps explains the undiminished ardor with which such repression is widely attempted.

Since finally the trial's the thing, it is to it that we turn with special interest. In such high drama no participant is immune from the severe psychological strain of resolving the inconsistent pulls of duty, fairness, and self-interest. Whether the trial is in France, Germany, the United States, or elsewhere, there is a judge torn between the duty of impartiality and the pressures to vindicate fundamental political goals of a regime from whose establishment he is recruited; a prosecutor weighing political as well as legal risks every step of the way, from the initial, tough decision whether to prosecute at all to the recommendation of appropriate punishment after conviction; and a jury, historically a buffer between the state and the accused, but here acting under manifold compulsions to sustain the state. The agents of the state are not alone in finding themselves in awkward roles. At every turn the defendant will ponder his legal and political objectives; that they are often in reciprocal relation will mean that one or the other must be sacrificed. Defense counsel, too, must face some hard facts. If he is part of the apparatus of the prosecuted political party, the political goal of preserving the public image of his cause may create legal risks to both client and lawyer;<sup>1</sup> on the other hand, if he does not share the politics of his client, he frequently will endure the irony of public obloquy for services rendered to a national enemy, while in fact he may be responding to subterranean needs to vindicate the regime.

After all concerned play out their roles, it is the judiciary who must make an ultimate determination concerning the legality of a political group or of governmental action designed to curb it and its membership. This decision ordinarily involves an estimate of the purposes and strength of the group matched against the power and determination of the existing government. The decision thus becomes, in the words of the late Justice Jackson, "a prophecy . . . in the guise of a legal decision."<sup>2</sup>

The degree to which the judge has authentic intellectual independence in reaching a decision will vary, of course, with political conditions. All executives move to destroy what Kirchheimer calls "judicial space" — the uncertainty of result in political trials. Such uncertainty was completely wiped out in the show-trials of Hitler's Germany and Stalin's Soviet Union, where the judge acted purely as the political agent of the regime. But even in democratic coun-

1. The legal risks to the client are well known. But the lawyer's troubles after trial may be virtually as painful. See *Sacher v. United States*, 343 U.S. 1 (1952) (criminal contempt conviction of counsel for Smith Act defendants upheld), *Sacher v. Association of the Bar*, 347 U.S. 388 (1954) (permanent disbarment set aside as too severe); *In re Isserman*, 9 N.J. 269, 87 A.2d 903 (1952) (another counsel for Smith Act defendants disbarred in New Jersey), *In re Isserman*, 345 U.S. 286 (1953) (disbarment sustained by Supreme Court by evenly divided Court), set aside on rehearing, 348 U.S. 1 (1954). See also *In re Sawyer*, 360 U.S. 622 (1959).

2. *Dennis v. United States*, 341 U.S. 494, 570 (1951).

tries the judge acts within a narrow compass when the enemy of the state sits in the dock and the engines producing national conformity are open full throttle.

That "judicial space" is compressed in the United States will be apparent to anyone who inspects the opinions of the Supreme Court sustaining, for example, the convictions of Eugene Debs and Benjamin Gitlow after World War I<sup>3</sup> and of Eugene Dennis and Junius Scales a generation later.<sup>4</sup> That some "judicial space" remains, however, perhaps more than commonly recognized, is apparent from decisions limiting the inquisitorial license of legislative committees<sup>5</sup> and other decisions cutting back the executive's power to utilize political grounds to deport aliens,<sup>6</sup> restrict travel,<sup>7</sup> and strip individuals of citizenship.<sup>8</sup>

Ward politicians and political science purists alike may balk at the concept of "judicial space." Politicians because they know that everyone must "go along," even if he is a judge ("How else did he get the job?"). Purists because they may regard a catchy tag line for a familiar theory of the nature of freedom superfluous and confusing. Vincent Starzinger suggests this point in an excellent analysis of the book under review:

. . . American society does trust its judiciary with the adjudication of high policy issues precisely because we are assured from the start that courts will confine their speculation to a relatively narrow range of value alternatives. As with the secure totalitarian regime which can begin to tolerate a neutral referee, we permit judicial space because we know fairly well in advance what courts are likely to do within that space. This of course suggests an eternal paradox of freedom in general: societies and regimes usually grant freedom when they are reasonably confident that individuals will exercise it in conformity with certain basic norms — in other words, when those receiving freedom are already *unfree* in the sense of having been conditioned by common habit, custom, and ideology.<sup>9</sup>

Is political justice ever acceptable? Kirchheimer adduces two possible justifications: (1) political justice may be harmless, as when the purpose is to bolster the public image of a regime or to put an official stamp on the already achieved defeat of a political opposition, or (2) the alternative to political justice may be worse, as when a regime would act more arbitrarily and perhaps violently if it had no recourse to the courts.

But these justifications will not wash. For political justice can never be harmless when the result is to send a man to jail or when the merits of

3. *Debs v. United States*, 249 U.S. 211 (1919), *Gitlow v. New York*, 268 U.S. 652 (1925).

4. *Dennis v. United States*, 341 U.S. 494 (1951), *Scales v. United States*, 367 U.S. 203 (1961).

5. *Watkins v. United States*, 354 U.S. 178 (1957), *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

6. *Rowoldt v. Perfetto*, 355 U.S. 115 (1957). But see *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), *Galvan v. Press*, 347 U.S. 522 (1954), and *Niukkanen v. McAlexander*, 362 U.S. 390 (1960).

7. *Kent v. Dulles*, 357 U.S. 116 (1958), *Dayton v. Dulles*, 357 U.S. 144 (1958).

8. *Nowak v. United States*, 356 U.S. 660 (1958), *Maisenberg v. United States*, 356 U.S. 670 (1958).

9. Starzinger [Book Review], 71 *YALE LAW JOURNAL* 1364, 1368 (1962).

a particular government are sold to the citizenry like a cake of soap or a compact car. The second justification is not capable of proof because there is no valid way of estimating a regime's response to political opposition if it lacked the opportunity to implicate the judiciary. Indeed, the trappings of legality may facilitate repression by enabling more people to overcome scruples.

It may be objected that to dispose of these two lines of argument does not dispose of the problem. Need a regime sit idly if it is sincerely convinced that a political conspiracy will use force to destroy it, and are not the courts the most available and decent forum for state defensive action? This has been proposed as the testing case for those who deplore the use of the judiciary for political ends.

A response must initially draw the line between political conspiracies that have resorted to violence and those that are yet inchoate. As to the former, there would seem an inherent right of self-defense, as well as the right to judicial enforcement of laws designed to punish acts of insurrection. The real question is how to handle conspiracies that are in the talking stage. As to these, one must for himself accept or reject Kirchheimer's conclusion that political justice is fundamentally inconsistent with "the essence of the . . . democratic political system, [that is,] majority rule with unconditional protection of minorities, including the right to turn into a majority." (p. 169) Kirchheimer's premise, of course, is that if a minority is disposed to act through force rather than ballots it will be time enough to thwart such action when it occurs; in the meantime, the political process should be open to all points of view, and let the chips fall where they may. The alternative course of proceeding against a conspiracy before it acts violently not only imposes intolerable burdens on the judicial system, but also opens the door to elimination of political enemies through the convenient self-delusion that force is inevitable and imminent.

But will there be time for successful defense when the enemy finally strikes? The answer to this highly practical question may not be the same for all governments and for all times. The period since World War II provides material for arguments on both sides. The coup d'état in Czechoslovakia may be thought to illustrate the perils of leaving jail cells empty for too long. On the other hand, an observer of the American scene can conclude that there has been insufficient risk of violent overthrow of government to justify the political trials under the Smith Act and the McCarran Act.

Kirchheimer believes that when a regime resorts to the courts for political ends it is responding to the twin spurs of fear and self-doubt. The dedication of the present volume to "the past, present and future victims of political justice" suggests the author's conviction that these motivations will continue to induce governments to contain domestic enemies with the aid of the courts. Those devoted to freedom will join Kirchheimer in regretting this, while recognizing at the same time that the problem is many-sided and subtle, and that the absolute undesirability of invoking political justice has not yet been justified logically or historically, and perhaps cannot be.

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NORMAN DORSEN

**LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION.** By Myres S. McDougal and Florentino P. Feliciano. Introduction by Harold D. Lasswell. London and New Haven: Yale University Press, 1961. Pp. xxvi, 872. \$12.50.

The contemporary situation of mankind gives an acknowledged prominence to two intertwined challenges: the prospect of thermonuclear catastrophe and the spread of totalitarianism. These dangers seem so overwhelming that many choose paths of despair or evasion, thereby renouncing the freedom of responsibility to use human energy to shape human destiny. The crisis of our age requires moral courage to defend a way of life and yet the spiritual wisdom to avoid a means of defense that is itself the occasion of unprecedented suffering and destruction. This dangerous and inevitably ambiguous moral imperative, supported now by a slowly forming consensus, solicits every resource of will and mind available in a nontotalitarian society.

Myres S. McDougal consciously responds to this condition of urgency with extraordinary insight and industry. McDougal has joined with Harold D. Lasswell to develop techniques that bolster the prospects for the peaceful preservation of our way of life at this historic time of awesome danger.

Of course, it is a presumption to usurp the prerogatives of future generations by identifying McDougal as the great international jurist of the current era. But it is my conviction that he is, and to repress this conviction's expression would merely camouflage my judgment of McDougal's work. Perhaps I can somewhat indicate the extent of my affirmation by claiming that one must go back to Christian Wolff to find an international jurist of scope and depth comparable to McDougal. This judgment seemed reasonable after the publication of *Studies in World Public Order* in 1960. And it seemed decisively confirmed by the publication in 1961 of the present book and the appearance in 1962 of *The Public Order of the Oceans: A Contemporary International Law of the Sea*, written with William T. Burke. A fourth major volume written with Lasswell and Ivan Vlasic — *Law and Public Order in Space* — is also expected soon. The magnitude of achievement — over 4,000 pages of innovative analysis, description, and recommendation — is itself formidable, especially in view of the careful craftsmanship, depth and breadth of research, and the originality of conceptual focus. It is a special tribute to McDougal and Lasswell that they have attracted as collaborators younger scholars of such high talent and industry as Burke, Feliciano, and Vlasic. Certainly this collaboration has permitted the more rapid completion of the basic work, as well as undoubtedly enriching the fundamental perspective. In view of the jointness of venture it is especially surprising that McDougal's style of analysis dominates these separate books undertaken with collaborators of different outlook, experience, and aptitude.

One of McDougal's distinctive achievements is to transform the *critical* tools sharpened by the legal realist movement into tools of *construction* for the development of a new vision of a value-oriented legal order.<sup>1</sup> The critical perspective

1. I have tried to outline an interpretation of McDougal's general jurisprudence elsewhere: Richard A. Falk [Book Review], 10 AMERICAN JOURNAL OF COMPARATIVE LAW 297 (1961).

of the Realists allows law to remain liberated from myths of logical and doctrinal restraint. These myths had embodied a falsely mechanical image of the legal process that conceived of law as a method for achieving the objective application of the single rule that alone properly governs the outcome of a legal controversy. McDougal has proceeded from the destruction of this myth to a primary emphasis on ways to assure the subordination of law to the moral and social service of the community. McDougal's concern with values and community policies, as ascertained objectively by the techniques of social science (not, as he is so often misunderstood as advocating, by the arbitrarily relevant values and policies of the authorized decision-maker), reintroduces into the legal process a pervasive and nonexpedient source of restraint historically associated with the rise of natural law in Western moral philosophy. However, McDougal substitutes the empirical generalizations of social science for the metaphysically based propositions of reason and religion. On top of this foundation for his moral universe McDougal erects, somewhat disarmingly, a set of community goals called "the values of a public order of human dignity" that are *postulated* as a preferred orientation. McDougal's typically modern distrust of authoritative epistemologies is forthrightly indicated: "Any derivations by others which support our postulated goals are regarded as acceptable."<sup>2</sup> In a world of diverse cultures, religions, and races McDougal pleads for an effective use of the moral convergencies that exist, discarding as irrelevant luxuries of earlier ages the classical inquiries into the grounds as well as the content of moral commitments. Whether such a postulation transcends the currently prevailing moral ideals of Western liberal democracies is of vital concern to the philosopher who seeks to evaluate the claim made by McDougal to resolve contemporary legal conflicts by a value- and policy-oriented jurisprudence.<sup>3</sup>

McDougal perceives the phenomena of international affairs in light of the distinctive structural and processive characteristics of international law. Adequate account is taken of the special ordering characteristics of a decentralized legal system that must depend heavily upon patterns of voluntary compliance by national officials who have been entrusted with a primary responsibility for maximizing the exclusive interests of their particular nation. McDougal, building upon the work of George Scelle, brilliantly demonstrates the wide and significant compatibility between national and international interests that allows a national official to serve simultaneously his own society and the interests of the world community. Lasswell vividly praises McDougal in his Introduction for recognizing "the role that scholars, and particularly legal scholars, can play in perceiving the realities of the inclusive interests of mankind, and showing how the traditional instruments of legal order can be flexibly adapted to the urgencies of the age." (p. xxvi) This comment highlights the importance that McDougal attrib-

2. McDougal, *Some Basic Theoretical Concepts about International Law: A Policy-Oriented Framework of Inquiry*, 4 JOURNAL OF CONFLICT RESOLUTION 337, 343 (1960).

3. We seek also to know whether morality can contribute something more authoritative than a statement of social preferences. This depends upon the epistemological basis for moral judgments.

utes to exercising influence upon those responsible for making decisions. The decision-maker is the appropriate target for any policy approach that hopes to influence behavior and, hence, improve the capacities of men and nations to fulfill the conditions of human welfare. Thus the reform of the international legal order depends not only upon "the invention and establishment of institutionalized sanctioning practices — the authority structures and procedures" but also on the creation and fostering of the necessary predispositions in effective decision-makers to put such structures and procedures into operation. (p. 263. See also pp. 375, 260)

This orientation profoundly suggests that the task of highest scholarly priority is to influence the patterns of awareness held by elite actors. The goal is to gain acceptance for views that more fully reflect the needs of legal order in the contemporary world. Continuing demands of sovereign prerogative, for instance, should be overcome by reorientation of loyalty. Such shifts might partially arise from an acceptance of the insight that mutual security is now often promoted more by supranational than by national agencies of control; it does not advance the cause of world order to manufacture blueprints, however ingenious, that would distribute international power differently until dominant groups are persuaded of the necessity for a new power structure. For once the appropriate supranationalizing disposition emerges, the development of implementing techniques would be easily achieved; and without it, nothing else matters much. However, the *existence* of a persuasive blueprint itself acts to convince skeptical people of its feasibility.

The primary work of the legal scholar is the presentation of reality to encourage the perception of significant contradictions between preferred values and existing behavioral patterns. For as the field of awareness alters, an assurance is born that obsolete patterns of response will be correspondingly changed. Accordingly, McDougal and Feliciano implore "every one genuinely committed to the goal values of a world public order of human dignity" to take on the job "of creating in all peoples of the world the perspectives necessary both to their realistic understanding of this common interest and to their acceptance and initiation of the detailed measures in sanctioning process appropriately designed to secure such interest." (p. 376) This recommended reorientation of perspective is critical for the future of world order in view of the continuing decentralization of power and authority in the international system. For international restraints relating to the use of force become effective only when reinforced by voluntary compliance, a reinforcement that cannot come about until the major national actors realize that their self-interest is served by conforming national policy to the common interests of the world community. This emphasis by McDougal upon the importance of actor perception — so novel for international jurists habitually concerned with the intricacies of doctrine, or at best, with the interplay of legal rules and social facts — helps to distinguish sharply between the existence and the perception of common interests. With respect to the development of international law it is the policy function of the scholar to overcome the perceptual lag that arises from the failure of leaders and their peoples to understand the impact of the interdependent and nuclear modern world upon the character of national self-

interest.<sup>4</sup> McDougal and Feliciano readjust traditional calculations about the balance between national (exclusive) and international (inclusive) interests. This readjustment is achieved by a demonstration of the radical relevance of such developments as nuclear technology and ideological conflict. Too little attention is given by the authors to the importance of the new nations and their distinctive perspectives.

In the context of coercion it is asserted, "From an objective vantage point, certainly the most conspicuous fact about the contemporary world social process must be the common interest of all peoples, whatever the comprehensive public order to which they adhere, in the maintenance of minimum order." (p. 375) This is a complicated way of saying that there are no political objectives in the world today, however justifiable they may appear to be, that are worth major recourse to the instruments of war. The basic principle of minimum order is "that force and intense coercion are not to be used for the expansion of values"; it is defended as basic to goals of the proponents of human dignity and considered to be "perhaps even the price of survival." (p. 377) Such advocacy certainly seems persuasive when the risks of nuclear conflict are great; for example, if the threatening expansion of values involves international violence undertaken by a cold war rival. It is less clear when use of "intense coercion" to expand values is made outside the main cold war confrontations, as when India absorbs Goa, or Indonesia proceeds against West Irian, or the African states prepare to coerce the Republic of South Africa. Thus the principle of minimum order appears presently to operate as a special principle applicable to the bilateral confrontation of the United States and the Soviet Union; it does not yet serve as an adequate statement of required conduct for every actor in the contemporary international system. Even the superpowers seem able, especially the Soviet Union, to make selective use of intense instruments of violence to promote political expansion if the arena of conflict is within rather than between national societies.<sup>5</sup> In this regard, McDougal and Feliciano do not give enough attention to the distinction between internal and international wars in their formulation of the principle of minimum order.<sup>6</sup>

The authors reveal a deep realization that the decentralization of the international legal order "has infected with formidable ambiguity both the characterization of unlawful coercion and the detailed prescriptions of the fundamental policy of minimum destruction of values." (p. 59) The tendencies to self-interpret the content of self-defense and military necessity jeopardize the community policies expressed in the restraining norms of behavior. For the perspective of the actor outweighs his sense of just proportion between potentially antagonistic claims of national aspiration and world peace. Here, as elsewhere, McDougal accepts the pervasive reality of legal indeterminacy that is a consequence of the logical applicability of complementary structures of norms to any set of facts in contention. (Cf.

4. Lasswell in his Introduction (p. xxv) suggests that the facts of interdependence may actually inhibit centralizations of loyalty by accentuating the concern of system units with their own particular identity and interests.

5. This capability of the two superpowers is well developed by Samuel Huntington, *Patterns of Violence in World Politics*, in HUNTINGTON (ed.), *CHANGING PATTERNS OF MILITARY POLITICS* 17-50 (1962).

6. Some attempt to carry through this line of analysis is made in FALK, *LAW, MORALITY AND WAR IN THE CONTEMPORARY WORLD* (1963).

56-59)<sup>7</sup> And here, as elsewhere, reliance must accordingly be placed upon the governing norm of "reasonableness" that is supposed to mediate between the conflicting policies expressed by contradictory rules of law that are simultaneously applicable. When intermediate range missiles are stationed in Cuba, their removal by a coercive claim challenges every national perspective to choose between the principles of minimum destruction and self-defense; a reasonable unilateral claim must, at least, threaten to use as little force as is essential to achieve its security goal. Thus McDougal and Feliciano stress this inevitable reliance upon rational choice and the nonarbitrary character of the test of reasonableness:

Reasonableness in particular context does not mean arbitrariness in decision but in fact its exact opposite, the disciplined ascription of policy import to varying factors in appraising their operational and functional significance for community goals in given instances of coercion. (p. 218)

This characterization of decision-making is accurate only to the extent that "policy" is specified by the objective methods of the social sciences rather than by the preferences and particular aims of the individuals entrusted with the power of decision. In international affairs the decision-maker is often acting in a role in which the paramount commitment is to serve the exclusive and perhaps antagonistic interests of the national community, and this commitment is understood by everyone in the system. Even the International Court of Justice, perhaps the most objective decision-making authority in international affairs, makes statutory provision for the appointment of a national judge in the event that a litigant is not already represented on the bench. This approach contrasts interestingly with domestic adjudication in which an assumed similarity of outlook that joins a judge to a litigant — say, the outlook shared by members of the same family — would lead to the immediate disqualification of a judge.

McDougal has been fairly and unfairly criticized for his appreciations of the role of the committed decision-maker in international law. Quincy Wright takes issue with McDougal:

It is difficult to conceive how a game could proceed unless its rules are distinguished from the strategies of the players. . . . It is no less difficult to conceive of a stable society in which the laws defining its basic order are not distinguished from the policy and strategy of parties and people.<sup>8</sup>

Roger Fisher offers similar criticism:

It is one thing to urge an organized national community, in which the common values are widely shared, to construe its rules in the light of those values. It is another thing to tell the world community, a community whose members hold sharply conflicting views, that their conduct should not be governed by rules, that each nation should pursue its ends by whatever means seem reasonable to it. Such advice seems ill suited to the task of persuading governments

7. For a more jurisprudential statement see McDougal, *The Ethics of Applying Systems of Authority: The Balanced Opposites of a Legal System*, 221-240 in LASSWELL & CLEVELAND, *THE ETHICS OF POWER* (1962).

8. Quincy Wright [Book Review], 39 *UNIVERSITY OF DETROIT LAW JOURNAL* 145, 148 (1961).



that their enlightened self-interest lies in exercising restraint along lines which other governments may also be prepared to respect.<sup>9</sup>

Such criticisms, often made in crude forms,<sup>10</sup> are unfair whenever they imply that McDougal is trying to instruct states to substitute the perspectives of national policy for those of international order. McDougal's argument arises from his understanding of the nature of law, regardless of the character of the social order. It is not that McDougal desires judges to substitute policy for rules, but rather he is arguing for explicit policy-making instead of implicit policy-making. The existence of complementary sets of norms with equal relevance necessarily throws the real basis of legal decision onto some nonobjective level of preference. If the preference is obscured by the mystique of traditional legal dogmatics then it is hard, according to the McDougal canon, to hold the decision-maker accountable. For such a tradition persuades the community to receive the decision as a technical matter in which the decision-maker had no range of discretion. Furthermore, unless the decision-maker is made aware of the policy basis of law, rational decision-making is frustrated; for there is no consideration given to the relative merits of the policies promoted by the alternative normative directions of decision. Thus an inquiry into the policies at stake is essential both to the *discovery* of the most rational decision and for its *justification* to other actors and to the community.<sup>11</sup> In this respect Fisher seems to miss McDougal's point when he objects, "to accept his policy-science is all but to ignore the policy of having law."<sup>12</sup> McDougal presupposes that it is a policy that we promote whenever we apply law, whether it is realized or not, whether it is liked or not. McDougal does not mean to assume an attitude towards law; he purports to describe the real demythologized nature of law.

There is, however, a crucial matter of political self-interest involved in McDougal's argument about international legal order; for McDougal considers that the failure to perceive law as an instrument of policy produces defeat for the policies favored by one's own value system. Therefore, the very conflict in policy mentioned by Fisher as characteristic of contemporary international politics makes it especially necessary for McDougal to disclose, rather than to disguise, the policy consequences of alternative interpretations of law. In domestic society the presence of a comparative harmony of values makes it somewhat less dangerous to obscure a particular policy choice.

This general point is made specific by McDougal's perception of the cold war. First of all, for McDougal, the cold war represents a value conflict between Communist totalitarian myths and the Western defense of human dignity and liberal democracy; thus the outcome of the struggle has a crucial significance for all that we cherish as nontotalitarians.<sup>13</sup> Second, the Communist strategists are fully

9. Roger Fisher, 135 *SCIENCE* 658, 660 (1962).

10. E.g., Anthony D'Amato [Book Review], 75 *HARVARD LAW REVIEW* 458 (1961).

11. The separation of these two modes of endeavor is suggested in general terms by Hans Reichenbach. It makes particular sense in a legal context where it is one discipline to determine the appropriate decision and another to communicate to the relevant community a decision that has been reached.

12. Fisher, *op. cit.*, *supra* note 9, at 660.

13. E.g., 43, 60, 70ff., 75, 88ff., 91, 262, 279, 356, 377 of the book under review.

aware that law is really a process for the promotion of policies and are adept at manipulating legal doctrine to serve Communist policies.<sup>14</sup> Third, a mechanical subservience to legal restraint by Western nations, independent of policy implications, handicaps our side in the cold war and gives the Sino-Soviet bloc a pervasive and unnecessary advantage that may prove to be decisive. In view of this situation it is a matter of moral and political survival, as well as jurisprudential integrity, to acknowledge that a public official properly applies the law only when he promotes the policies of the moral community which he serves. There is no existing universal moral order. Without such universality the world exhibits contending systems as its primary characteristic and it is up to those on our side to help it prevail. Thus Quincy Wright is naive to assume, as he does, that

... the prime function of law must be to maintain a basic order among members of a society who differ in values, goals, and interests except that they share a common interest in order, permitting all to formulate and pursue policies and strategies within the limitations of the law, secure in reliance that the basic order will be observed by others.<sup>15</sup>

McDougal dissents on both jurisprudential and sociological grounds. Rational actors use every means at their disposal, including law, to maximize their values. The quality of human rationality depends upon the extent to which an actor perceives opportunities for the maximization of values. Normative indeterminacy prevents a choice of "basic order" as the means to maximize values; there is no neutral decision, for every decision chooses between relevant rules which represent relevant dominant policies. Furthermore, the Communists behave in an extremely policy-oriented fashion, disregarding rules whenever they conflict seriously with policies that permit pursuit by behavior that violates the rules. For example, in the Communist bloc the stress is placed on conservative norms of national sovereignty, territorial jurisdiction, and nonintervention, whereas elsewhere in the world, practice and doctrine are mobilized to support just wars of national liberation.<sup>16</sup> The apparent contradiction on the levels of norms is resolved on the level of policy where both claims, confined to their proper context, help the Communist system to maximize its goals in the present world.

McDougal's philosophical premises are kept too implicit for a direct jurisprudential appreciation. If I understand his work correctly he is making an

14. McDougal and Feliciano apparently accept without question (at least they do not disclose any questioning) the image of the cold war put forward by ROBERT STRAUSS-HUPÉ and others in *PROTRACTED CONFLICT* (1959); see, e.g., 279 *et passim*. I find this image to be an unacceptably self-serving interpretation of the cold war that overrigidifies "the enemy" and is *too clear* about his objectives. Such a perception of the main patterns of international conflict influences the relative roles of law and force in world affairs. For if a major actor is identified unambiguously as an aggressor, then the premise of mutuality that underlies the validity of rules of legal restraint is undercut. I would agree that such a premise is lacking for rules governing participation in internal wars, thereby suspending non-intervention norms, but that it is emphatically present for military conflict across boundaries. This argument is spelled out in Falk, "Janus Tormented: The International Law of Internal War" (mimeographed essay), to appear in a volume of essays on the international aspects of political violence under the editorship of James N. Rosenau. This note should also be read as applicable to the text accompanying note 13.

15. Wright, *op. cit. supra* note 8, at 148.

16. Cf. Leon Lipson, *Outer Space and International Law* (RAND Paper P-1434) (1958).

authoritative judgment that legality depends upon the extent to which decisions by officials (wherever situated in the social order)<sup>17</sup> implement the policies that promote "human dignity" as it has been interpreted by Western moral and political tradition, and including evidently the welfare of Western democratic states.<sup>18</sup> It is important to recall that this orientation is "postulated" without any argument for its validity as measured against other conceptions of welfare that could easily be articulated, with sincerity, in the rhetoric of human dignity. Certainly a convinced Marxist could promise to deliver man from the purportedly frightful alienation of capitalist society by ushering in the classless community; this vision remains the dream of certain socialists.<sup>19</sup> But is it proper to base a social order of diverse normative systems upon the presumed superiority of one's own system? Is not such self-validating assurance itself a defection from one of the prime discoveries of those seeking to promote the values of human dignity in the West? We have come a long way from the lethal certitude that provided a moral underpinning for the Inquisition and the Crusades. Or have we?

It is one thing to commit oneself to the preservation of a moral position, even risking death and destruction to maintain spiritual integrity. Such resolve is essential to the vitality of any morality of significance. It is quite another to transform this commitment into a holy mission that claims for itself a privileged position from the perspective of law. It should be apparent that very practical consequences follow from McDougal's formulation if it is accepted as a serious jurisprudential appeal. Actors that accept McDougal's concept of human dignity are entitled to contaminate the atmosphere by nuclear testing, propose "defensive" invasions of Cuba and station attack missiles around the borders of a potential enemy — and thereby *fulfill* the law! For the law turns out to be what helps a certain set of policies to prevail in the struggle for power. Identical claims to act by the enemies of McDougal's version of human dignity are, by the same reasoning, illegal, as their objectives deny the values of human dignity upon which law rests. This suggests an all-pervasive asymmetry between the United States and the Soviet Union with respect to the use of force. The United States missiles in Turkey are permissible, the Soviet missiles in Cuba are illegal. Are Soviet missiles in Russia also illegal? Why not? Does an opponent of "human dignity" have the right of self-defense under international law? Is it a narrower right than that granted by the same Charter norm (Art. 51) to the proponents of "human dignity"? Is this something that should be decided by the actor claiming the privileged position, or is it more appropriately assessed by the portion of the world community that has sought to withdraw from the normative conflict by the pursuit of nonalignment policies?

Some of these questions can only be answered by making a decision about how to interpret applicable legal objections. It is perhaps useful to suggest that

17. That is, whether the decision-maker is a national official in foreign office, an international civil servant, or a judge of (say) the International Court of Justice.

18. For a sympathetic review emphasizing McDougal's choice of human dignity as an axiological base, see Fernando, *An International Law of Human Dignity*, 1 PHILIPPINE INTERNATIONAL LAW JOURNAL 178 (1962).

19. See, e.g., precisely this insistence upon human dignity by a socialist in MARTIN BUBER, *PATHS IN UTOPIA* (1949). Marx's critique of capitalism emphasizes the alienation of man in a class society and the reacquisition of human dignity in a classless society.

the quality of complementariness of legal norms is itself a matter of degree that can be emphasized or diminished. Thus nations can find a norm to support their preferred policy by stretching language and expectations — we can identify a United States invasion of a hostile Cuba as “self-defense.” But nations can also try to fit their policies within the boundaries set by the common understanding of applicable legal obligations — a nation does not act in self-defense when it initiates an armed attack designed to overthrow the incumbent government in a weak neighbor like Cuba. The point is that the extent of policy and normative flexibility represents less a jurisprudential “fact” (as it appears to be in McDougal’s work) than a policy chosen because it promotes other policies (here: the successful prosecution of the cold war). In this regard, I feel that McDougal sacrifices too much of the stabilizing benefits of a rule-oriented approach to international law by stressing policy flexibility. This sacrifice is especially great in international affairs where, as Fisher suggests, policy conflict and insufficient institutions make the reality of restraining norms depend on the comparative autonomy of rules symmetrically perceived and applied. I think an orientation toward rules in this sense serves the United States better today even if the hypothesis is correct that Communist states accept international law only to the extent that it conforms to their political policies.

McDougal’s policy orientation also presupposes a certain kind of epistemological confidence which he never sustains with solid evidence. How do we achieve knowledge about the content of human dignity? Can there be diverse conceptions of human dignity several of which have an equivalent epistemological status? Can human reason ever invoke the methods of the social sciences to assure unambiguous access to truth? Can decision-makers find a rational vindication for recourse to nuclear warfare? Can a decision for which no adequate comparison exists ever satisfy McDougal’s quest for reasonableness? Must not the preparation for and the resolve to use nuclear weapons rest instead upon either some spiritual commitment to defend the moral integrity of a particular social order or upon some commitment to express a biological adherence to a way of life? A decision which involves a potential willingness to inflict death and suffering upon millions of helpless and innocent people and to reduce to ashes the great centers of human civilization does not appear susceptible of rational justification.<sup>20</sup>

20. Perhaps it is appropriate to note here that a rational contemplation of the connections between law and war in the nuclear age needs desperately to fuse the analyses produced by legal consciousness and the illuminations made possible by literary consciousness. A sense for the law governing coercion can no longer be exclusively entrusted to the guidance of the “rational technologist” who “simply places his knowledge and skill at the disposal of others” after he has uncovered the possibilities for legitimate action. ALF ROSS, *ON LAW AND JUSTICE* 377 (1958). We need, as well, to take account of the culminating insight achieved by the heroine of a recent remarkable novel by Doris Lessing: “. . . I had known, finally, that the truth for our time was war, the immanence of war.” *THE GOLDEN NOTEBOOK* 505 (1962). This is not just a dramatic part of the tableau, it is central to the very possibility of personality: “. . . I was experiencing the fear of war as one does in nightmares, not the intellectual balancing of probabilities, possibilities, but knowing, with my nerves and imagination, the fear of war.” *Id.* at 503. This absolute awareness is reached during a routine London life far from battlefields. Lessing provides us with an incongruous cultural complement to the calm and influential calculations of RAND specialists. It is not that we can dispense with these specialists, but we must come to recognize that they are not able by themselves to form a just response to all that imperils our moral and physical existence.

In fact, the customary self-restraining humility that arises from rational analysis forbids such a high risk to achieve a contingent secular objective. It is the nonnuclear states, fearing their agonizing witness to the folly of nuclear conflict, that express more clearly the demands of reason. And so one finds a Resolution of the General Assembly, supported by a large majority of Members, that states the case for the advocates of rational restraint; it sets the stage with a countdown:

Recalling that the use of weapons of mass destruction, causing unnecessary human suffering, was in the past prohibited as being contrary to the laws of humanity and to the principles of international law, by international declarations and binding agreements, such as the Declaration of St. Petersburg of 1868, the Declaration of the Brussels Convention of 1874, the Conventions of The Hague Peace Conferences of 1899 and 1907, and the Geneva Protocol of 1925, to which the majority of nations are still parties.<sup>21</sup>

The Resolution goes on to declare that the use of nuclear weapons "is contrary to the spirit, letter and aims of the United Nations and, as such, a direct violation of the Charter," that such use "would exceed even the cause of war and cause indiscriminate suffering . . . and . . . is contrary to the rules of international law and to the laws of humanity"; that any employment of nuclear weapons "is a war directed not against an enemy or enemies alone but also against mankind in general"; and that, as such, the state making such a use "is to be considered as violating the Charter . . . as acting contrary to the laws of humanity and as committing a crime against mankind and civilization."

McDougal's position starts from a premise developed in an earlier study with Norbert Schlei: "It is not the physical modality of destruction that is relevant to law and policy but rather the purposes and the effects of the destruction and the relation of these purposes and effects to the values of a free world society."<sup>22</sup>

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McDougal, despite assuming the costume and gesture of a rational technologist, provides an intellectual foundation for closing this gap that separates these two orders of analytic and intuitive awareness. He insists that a legal decision always should promote the values that sustain the dignity of the individual person. Thus he is committed, in principle at least, to the acceptance of Doris Lessing's form of awareness, although not necessarily its method or its content. It is somewhat odd, I suppose, that I praise McDougal for doing something that he apparently denigrates; witness, for instance, the irony in this respect, of this wry comment directed at Lon Fuller: "If I have mistaken for a serious essay, what was intended as poetry. . ." McDougal, *Fuller v. The American Realists*, 50 *YALE LAW REVIEW* 827, 840 (note 41) (1940-41). My contention is that it is almost no longer possible to write a serious essay on war that does not also include the world of poetry — poetry conceived of as a way of knowing, not as a metrical arrangement of words. We can no longer afford to compartmentalize our approaches to reality. They must enrich one another or they each exist as an abstraction, too partial to serve well this urgent quest for awareness. Such an intellectual program awaits fulfillment. In the meantime, it is essential to explicate as fully as possible the meanings of our commitments to use force to promote political objectives and to reaffirm the restraints of law and morality that are able to survive nuclear technology. McDougal and Feliciano deserve our deep gratitude for disclosing just how much law continues to be usefully relevant to decisions about the application of coercion.

21. Declaration on the Prohibition of Nuclear Weapons, G. A. 1653 (xvi); and see Ninčić, *Nuclear Weapons and the Charter of the United Nations*, 2 *JUGOSLOVENSKA REVIJA ZA MEĐUNARODNO PRAVO* 197 (1962).

22. McDougal and Associates, *STUDIES IN WORLD PUBLIC ORDER* 817 (1960); cf. McDougal and Feliciano at 79: "... the purpose and level of destruction obtained are of prime import to legal policy."

Thus the combatant state is authorized to use nuclear weapons if use is otherwise consistent with the broad restraining norms of international law: proportionality of response and a minimum destruction of values consistent with the successful attainment of the military objective. The development and destructiveness of nuclear weapons lead McDougal and Feliciano to state that "a very strong case would have to be made to establish that no possible use of nuclear and thermonuclear weapons could conceivably be within the scope of military necessity for objectives legitimate by standards making reference to human dignity." Indeed, the presence of nuclear weapons and the difficulties of agreeing about their effective control "must suggest expectations of their military effectiveness and the perils of relying upon any *alleged limitations* derived from analogies" (e.g., prohibition of poison gas). But what of the perils of refusing any limitations? And why, after the sentence about human dignity, should the prospect of military effectiveness reassimilate decisions about the use of nuclear weapons into the usual framework for decisions about the use of force in international affairs? McDougal and Feliciano end up at precisely this position:

The *rational position* would appear to be that the lawfulness of any particular use or type of use of nuclear or thermonuclear weapons must be judged, *like the use of any weapon or technique of warfare*, by the level of destruction effected — in other words, by its *reasonableness in the total context of a particular use*.<sup>23</sup>

But whose version of reasonableness? Are we once more to retreat to the bloody terrain of subjective appreciation? So often in the past national leaders have plunged their society into bloody turmoil that appears fruitless in retrospect. Now the backward glance may be all but denied if we do not invent restraints upon the use of force that satisfy the inclusive interests of mankind in the maintenance of peace.

This issue has been developed in detail because it bears so crucially upon the moral foundations of the theory of coercion developed by McDougal and Feliciano as the appropriate basis for the examination of all traditional problems in the area. The same style of analysis leads them to reject a strict interpretation of the right of self-defense and not to attempt stable definition of aggression across an international frontier. Even in an inflamed world of distrust McDougal and Feliciano prefer to entrust the guidance of behavior to self-determining decisions of reasonableness by the participants in a conflict situation rather than to impose common restraining limits upon human discretion; this preference seems to hold regardless of the temptations that may exist in some instances to coerce a favorable outcome by recourse to nuclear warfare.

The McDougal-Feliciano approach to decisions involving the use of nuclear weapons appears to me deficient in several respects:

First, it places excessive trust in the capacity of national officials to determine the nature of reasonableness in situations where the outcome of conflict is perceived as a matter of vital national interests.

23. All quotations in this paragraph are taken from p. 78 (italics added); cf. also 244, 659-668 for further exposition of the McDougal-Feliciano position on nuclear weapons.

Second, it fails to differentiate between present decisions to use military force and prenuclear decisions. As a result, it is overly pessimistic about the failure of past efforts of law to discourage the use of weapons with military importance. It seems to overlook the widespread perception that before nuclear weapons some international actors could always expect to gain by the major use of force in an aggressive manner, whereas today it is implausible for anyone to contemplate such gain. The new situation reinforces any scheme of prohibition, as there is so much less incentive to violate.

Third, it purports to classify authorizations of nuclear warfare as potentially reasonable, thereby neglecting their radical and problematical relevance to the human situation.

Fourth, it makes no attempt to indicate in illustrative detail how the proponents of human dignity would rationalize recourse to nuclear weapons or provide certain limiting conditions (e.g., targeting restrictions or a restriction to second use or a restriction to use in response to massive conventional armed attack for which no other defense exists).

Fifth, it does not rely upon the values of human dignity to alter the character of military objectives in light of the unprecedented risks of contemporary warfare. If human dignity does not give a distinctive operational direction to decision-makers in the context of nuclear weapons, then it hardly serves as a moral orientation towards life. For if it fails to guide our response to this challenge to the cultural and biological survival of mankind, then it merely offers a new ideological rhetoric that helps with the creation of a rationalizing myth. This myth might produce a higher vindication of self-interested behavior. It does not, however, as it implies, provide rational guidance based either upon empirical inferences or upon the application of *a priori* principles of minimum public order.

The McDougal-Feliciano position also neglects the special hazards and the peculiar ordering potentialities of the international system as a decentralized system. The difficulties of achieving explicit agreement between hostile actors urge us to consider far greater reliance upon tacit restraints that are adopted to promote the universal interest in the avoidance of nuclear war.<sup>24</sup> Such a regime of tacit restraint depends upon the development of limitations of national discretion that are based upon relatively objective boundaries. These boundaries should be easily discernible regardless of moral or cultural perspective. The dividing line between nuclear and nonnuclear weapons, the requirement that an armed attack precede a claim of self-defense, and the distinction between initiating force *across* boundaries (direct aggression) and using force *within* boundaries, appear crucial in this respect.

Such a regime also depends upon symmetry as an essential ordering characteristic. What is claimed by one state must, by this logic, be permitted to all other states. United States missiles in Turkey do legitimize an equivalent claim by the Soviet Union. An aggressor must be restrained, but not by our asymmetrical interpretation of rights of self-defense and other governing norms. Such unilateral interpretation would undermine the basis of respect for law. It also

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24. Cf. THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 83-118 (1960).

would jeopardize adherence to common restraints, the effectiveness of which might increase the prospects for maintaining peace in the decades ahead. Symmetry would, moreover, guard against the distorting determinations of world community welfare that are made by national officials when they are subject to intense domestic pressures.<sup>25</sup> These pressures make the advocacy of noncoercive methods for the resolution of conflicts tantamount to treason during certain periods of crisis. We in the United States need the protection of these fixed restraints on our use of coercion, especially if the American public and its legislative leadership do not adapt their expectations somewhat to the staggering dangers and costs of warfare in the contemporary world.

Unfortunately, McDougal and Feliciano do not use their formidable talents to advance an understanding of the desiderata of world order. Little light is shed upon the legal relevance of choosing an invulnerable second strike military posture as opposed to Secretary McNamara's "no cities" strategy or the Air Force's advocacy of counterforce capabilities. No attempt is made to examine the potentialities for arms control and disarmament through various modes of negotiation and mutual self-restraint, nor is the quest for disarmament or the curtailment of the arms race made an explicit concern of these advocates of human dignity. Furthermore, there is no attempt made to balance the claims by supranational actors (for example, the organs of the United Nations) to serve as authoritative decision-makers against the claims of national actors. If the General Assembly prohibits further nuclear testing, should the United States consider itself free to test anyway if its prevailing experts deem it to be militarily necessary? How do we distinguish authoritative decision-making from conscientious determinations of national interests? Is it not precisely the gradual willingness to sacrifice the caprices of national will to the emerging vividness of world community consensus that provides the one solid foundation for the growth of a stable and just world order? McDougal and Feliciano are themselves led to comment, albeit in a footnote, that ". . . whatever the specific type of decision and whatever the degree of involvement of the general community, continuous and purposeful focus upon long-term goals and policies may help in promoting rationality in decision." (p. 156, n. 93) Nevertheless the authors, despite their definitive account of law governing coercion within the traditional framework of war, accord very little attention to the ways in which national decision-makers should translate the significance of such new developments as the growth of the United Nations or the destructive potential of the new generation of nuclear weapons into action. There is, that is, no attempt made to revise the framework for decision in a manner that is operationally relevant. This failure seems to neglect the radical developments of the age to which the authors attribute their own primary motivation. Thus rationality of decision, the prime objective of a jurist with McDougal's orientation, seems to suffer from insufficient attention as the longer term needs of world order are not adequately assimilated into the framework of analysis.

25. E.g., Robert C. North, *Decision-Making in Crisis: An Introduction*, 6 JOURNAL OF CONFLICT RESOLUTION 197 (1962): "During these investigations it became apparent that the high stress that is almost universally characteristic of international crisis situations tends to have a crucial effect upon the decision-making of the leaderships involved."



Beyond this, the prospect for rationality is itself conceived somewhat uncritically. McDougal and Feliciano do not acknowledge the problems that arise from the limits of rational analysis. Choices between competing policies can often not be resolved by the methods of policy science. How reasonable is it to kill? Such a question transcends my comprehension of the outer limits of reason and yet states the abiding issue for officials responsible for making decisions about violence. No matter how much we flee from the soft center of human resolve it remains to torment us with the ambiguity of every human resolve. One cannot permanently ignore the wisdom of Nicholas Berdyaev, who suggests that "The inconsistencies and contradictions which are to be found in my thought are expressions of spiritual conflict, of contradictions which lie at the very heart of existence itself, and are not to be disguised by a façade of logical unity."<sup>26</sup> The existentialist critique of rationality deserves a most serious response from jurists who propose to rely upon reasonableness as the rudder that will steer us away from the rocks of destruction.

RICHARD A. FALK

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26. NICHOLAS BERDYAEV, *SLAVERY AND FREEDOM* 8 (1943).

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OXFORD ESSAYS IN JURISPRUDENCE. A Collaborative Work. Edited by A. G. Guest. Oxford: Oxford University Press, 1961. Pp. xviii, 292.

If this book can be taken as a faithful mirror of contemporary English (or shall we say Oxford?) legal theory, its interest certainly reaches, as the editor hoped it should reach, well beyond the small circle of professional lawyers to the wider one of the students of philosophy and politics.

I have deliberately used the phrase "legal theory" rather than "legal philosophy." The English word "jurisprudence" is ambiguous. It can be taken, so the *Oxford Dictionary* tells us, to indicate both the "science" and the "philosophy" of law. In fact, there is much in this volume that is "scientific," granted that the science of law can be strictly "descriptive" and "positive." But there is also a lot to be found which indicates an awareness of the philosophical issues which law involves by the mere fact of its existence. This alone would be enough to make this "collaborative work" highly significant and timely. One is tempted to turn to its pages with the same curiosity with which one turns to the second collection of essays which Peter Laslett and W. G. Runciman have recently edited with the title *Philosophy, Politics and Society*.<sup>1</sup> The questions which the reader hopes to find answered in both volumes are: How deeply has British analytical philosophy affected the traditional problems of legal and political thought? Is this influence a lasting one, or is it already on the wane?

Whatever may be the answer which Mr. Laslett's collections provide to this question, the inferences that can be drawn from Mr. Guest's volume are far from definite and clear. All that can be said is that the impact of analytical techniques and assumptions seems less pronounced, and less devastating, in the field of the

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1. Second Series, Oxford, 1962. The First Series appeared in 1956.

law than in that of political theory. Of course, one does not fail to come across the orthodox doctrine a number of times, that the basic (and primary) question to be asked about any statement is: "What do we mean when we say this or that?" Yet not all the contributors seem willing to accept as an unquestionable truism what one of them describes as a definite and final advance in legal theory, viz., that "Professor Hart has shown us that it is impossible to *define* a legal concept, and that the task of legal writers should be rather to *describe* the use of a word . . . in the particular legal rules in which it occurs." (pp. 69-70) Some among them do not seem entirely happy with this kind of "nominalism." Were it only because their historical training has made them aware of the recurrent similarities of legal institutions, they are ready to admit the importance of assessing the "common features transcending particular systems" (p. 108), thereby restoring some kind of "general jurisprudence" which is bound to "transcend" the "empirical and commonsense approach" which the editor stresses as the main feature of the book. Problems of value, metaempirical problems, keep cropping up all through the pages of this fascinating volume. It will remain as a significant document not only of the relevance of philosophical trends for legal theory, but also of the moral convictions which the average British lawyer seems all too ready to take for granted.

Roughly, the essays fall into two main categories: those which are mainly concerned with what we on the Continent would call the sphere of "private law," and those which, dealing as they do with "public law" and constitutional problems, border on the frontier of political rather than of strictly legal theory.

Among the first, Professor Hart's article, "Negligence, *Mens Rea* and Criminal Responsibility," provides a good illustration of the remarkable competence of an outstanding legal philosopher in the technicalities of a particular legal system. As with all Professor Hart's writings, one does not know whether to praise more his knowledge of the law or his mastery of philosophical argument. The manner in which he disposes of the question of "determinism," as well as his analysis of the "subjective" and the "objective" element in criminal responsibility, is an important contribution to one of the most vexed questions in legal philosophy. They will prove of great help also to the Continental lawyer, to whom the intricacies of English criminal law have always been perplexing and baffling.

But the real gem in this first section of the volume is Mr. Honoré's admirably concise treatment of "Ownership." Here indeed is the place for remembering and testing the remarks which I have just made about the importance of the historical perspective to the legal theorist. Mr. Honoré is widely versed in Roman law. He brings his knowledge to bear upon his approach to the problem of property. One has only to compare his essay with that of Mr. Harris on "Possession," which immediately precedes it, to see the difference between this kind of approach and the narrowly positivist. Surely it is impossible to deal adequately with the notion of property without reference to Roman law. But neither does it seem possible (or at any rate it seems impossible to the present reviewer) to deal adequately with the concept of possession without regard to the development of that concept in medieval, and especially in canon, law; nor is the part which it played in some legal philosophies, such as Kant's, entirely irrelevant.

Only by recognizing that certain institutions are inextricably interwoven with human society, only (to use Mr. Honoré's words) by trying to explain them "by the common needs of mankind and the common conditions of human life" (p. 109), does it seem possible to rise above the niceties of linguistic analysis and to see the problem of law in the wider context of man's nature.

The last three essays in the volume are the ones which, as I said, border on the wider issues of political philosophy. I hope that I may be excused for dwelling on them at greater length than on the others.

The very problem of "Justiciability," which Mr. Marshall discusses in the article that comes last in the series, raises an issue which is deeply felt today in all countries in the world, that of drawing the line between politics and law, between "policy" and "justice." Who is to decide whether an issue should be settled in a political or in a judicial way? Mr. Marshall's conclusion is, that the decision ultimately lies with the legislator. This seems a somewhat cavalier way of closing an argument which, if I understand it correctly, is precisely one about the limits of political interference. Actually, as Mr. Marshall points out (aptly invoking Tocqueville's authority), there is one country in the world where a whole "system of government" has been founded on the assumption, that it is possible to "convert a political matter into a legal matter . . . by asking the opinion of a judge about it." (p. 267) I leave it to the American reader to say whether the "tasks of the Supreme Court" are as "unhappy" as Mr. Marshall seems to believe. What matters is the indication, clearly evidenced here, that to the British lawyer the definition of what parliamentary sovereignty really involves is still an open question.

This is precisely what makes Mr. Heuston on "Sovereignty" and Mr. Marsh on "The Rule of Law as a Supra-National Concept" such excellent reading. Mr. Heuston starts off in a humorous vein, when he describes the doctrine of parliamentary sovereignty as "almost entirely the work of Oxford men," the product of All Souls common room. His serious contention is that, at any rate in its new and up-to-date version, the concept of sovereignty is "at once more complex and less terrifying" than is usually believed. The essence of the new doctrine (which has an unmistakable Kelsenian flavor) is that sovereignty is not a political, but a legal, concept. In order to be able to speak of a "sovereign," there must be "rules of law," "logically prior to him," identifying him and describing his features and functions. The author then proceeds to show that, in English practice, even though the Courts are incompetent to question the "area of power of a sovereign legislature," yet they have jurisdiction to question the validity of an Act of Parliament from the point of view of the "composition" and the "procedure" of the legislature. Composition and procedure are established by law (since 1911, partly by Common Law, partly by Statute). Hence the new doctrine of parliamentary sovereignty, according to Mr. Heuston, can be said to imply a) an affirmation of the supremacy of law in times of stress, b) an important development in the history of political thought, and c) an indication that the Common Law can show its "instinctive wisdom" without recourse to "fundamental rights," to the "evasive principles of natural justice," or to the speculations of "jurists trained in Germany or North America." (pp. 221-222)

This is all very well — or perhaps not quite so! But the candid reader may well feel inclined to object that, notwithstanding this admirable analysis, and actually as clearly shown by it, the “area of power” of the sovereign is what ultimately matters; and that with regard to that area there clearly is not, nor can there be, according to the theory which Mr. Heuston expounds, any limit to parliamentary sovereignty. Leviathan is still unfettered. The doctrine of sovereignty still challenges the political theorist. If Parliament can do anything, there remains to be explained, as Leslie Stephen pointed out to Dicey, why it has never commanded all blue-eyed babies to be put to death — or all Jews to be taken to the gas chamber. There must be some “reason” for this; and if there is, it should be discovered. This is precisely the point where Mr. Marsh’s discussion of the “Rule of Law” takes over the very issue of sovereignty. The reason why the modern “sovereign” does not do certain things which it could do without breaking the law, and actually by using the law as its instrument, is that the “modern State” is not merely a *Rechtsstaat*, a legal order where the “rules of law” only contrive to identify the sovereign and to prescribe about its composition and functions. It is an institution which exists for the sake of a “free society,” whose ends it “must serve.” Indeed, as Mr. Marsh cogently points out, the “rule of law” should not be confused with the principle of “legality,” nor is it necessarily linked to “constitutionalism.” Even where, as is the case in England, there is no written constitution, there may be “standards of constitutional behaviour” so deeply embedded in tradition and practice as to ensure the respect of these basic values, of that “justice” without which, as Saint Augustine put it once and for ever, “States” are nothing more than *magna latrocinia*. Thus, according to Mr. Marsh, the main issue about the “rule of law” is not “a matter of institutions and procedures,” but one of “substantive values.” (pp. 245-246) Without continuous reference to such values, viz., to a “moral judgment,” even “equality” and the “certainty of law” — the two mainstays of the *Rechtsstaat* — can easily be reduced to an empty shell, to mere window dressing for some new kind of tyranny. Continental readers will surely agree with Mr. Marsh on this point, even though they might find it difficult to share his optimistic conclusion, that once the “status and dignity of the individual” is established, institutions and procedures will necessarily follow. To create a “climate of opinion” in international law is certainly a noble task; but, as Justice Frankfurter once put it, it is equally essential that “the standards of reason and fair dealing” should be “bred in the bones of the people” if the “rule of law” is to be a meaningful political principle.<sup>2</sup> The sad fate of the *Rechtsstaat* on the Continent is a reminder that legality is not enough, that it must be nurtured and buttressed with moral conviction.<sup>3</sup>

I have kept my discussion of Mr. Guest’s article, “Logic in the Law,” for the end. Since Mr. Guest is the editor of these *Oxford Essays* it seems right that his contribution should be given pride of place in the review of his volume. But I confess that I was slightly disappointed with his treatment of so important

2. Felix Frankfurter, *John Marshall and the Judicial Function*, in *GOVERNMENT UNDER LAW* 28 (A. E. Sutherland, ed., 1956).

3. I have developed this point at greater length in an article on “Legality and Legitimacy,” forthcoming in the *REVIEW OF METAPHYSICS*.

a subject. The problem of the relationship between law and logic has been very much in the limelight of late. Far from still expressing the popular view, Holmes's famous dictum that the life of the law is not logic but experience is today challenged from many sides. Mr. Guest appears to be pleading for a partial rehabilitation of logic, were it only, as he puts it in Professor Ryle's words, as "a kind of geography." "The achievements which have been made in the field of analysing and testing legal principles," he points out, "have been due in no small measure to the use of this 'geographical' technique." (p. 197) He has many important and interesting things to say about the "logic" which judges resort to in making decisions or in finding reasoned justifications of decisions once made. But it seems to me that the question is not merely one of examining the part which logical arguments may or may not play in the judicial process. It is one of assessing the "status" of logic in "legal thought processes" as a whole. Mr. Guest himself acknowledges that "a legal system involves a *corpus* of legal rules, consisting of normative propositions of a more or less general kind." (p. 185) It is somewhat surprising that he should fail to mention any of the interesting explorations which have been recently made in the field of "deontic logic," i.e., in the logic of normative propositions.<sup>4</sup> His silence is bound to perplex the foreign reader who has heard about this kind of research being eagerly pursued also at Oxford, as it is in other parts of the world. Not having much knowledge of the field except by hearsay, I must refrain from pressing this kind of criticism any further. But, in closing this review, I cannot help saying how much Mr. Guest's book reminds me of the unforgotten atmosphere of Oxford. There is much conversation going on there, much collaborative work. But there is also a certain amount of secretiveness and solitary enterprise. This book might be taken as an example of both.

A. P. D'ENTRÈVES

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4. A complete survey of the publications in this field in the last two decades has been made by one of our Assistants here in Turin: see A. G. Conte, *Bibliography of Normative Logic, 1936-1960*, in MULL (June and September, 1962).

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THE THEOLOGICAL FOUNDATION OF LAW. By Jacques Ellul. Translated from the French by Marguerite Wieser. Garden City: Doubleday and Company, 1960. Pp. 140. \$3.95.

# I

Certain American Protestant legal thinkers — not yet numerous enough to be characterized as a movement — have been concerning themselves for the past few years with clarifying the relations between Christianity and law.<sup>1</sup>

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1. See *A Symposium on Law and Christianity* (Papers by Wilber G. Katz, Samuel E. Stumpf, William S. Ellis, F. B. Mackinnon, and William Stringfellow), 10 VANDERBILT LAW REVIEW 879-968 (1957); *A Symposium on Law and Christianity* (Papers by James A. Pike, Albert Theodore Mollegan, Harold J. Berman, Paul Lehmann, John Mulder and Karl Olsson, and Jacques Ellul) 12 OKLAHOMA LAW REVIEW 45-146 (1959).

Their work is entitled to a good deal more attention than it has received. The theological presuppositions from which they work are in great part common to most denominations of Christians, including Catholics, and their vigorous controversy over the place of natural law in the Christian scheme of things might give pause to those thinkers, Christian and non-Christian alike, who have come to regard Christianity as a kind of natural habitat for natural law thought.

It is presumably in connection with the inquiries of this group of Protestant jurists that Jacques Ellul's *Fondement Théologique du Droit*, which first appeared in France in 1946, has been published in an English translation. The translation, incidentally, although we can quarrel with some of its technical renderings, seems a remarkably good one, preserving much of the vigor and lucidity of the original.

Ellul's brilliant and impassioned challenge to the conventional patterns of Christian legal thinking is easier to pigeonhole in its appropriate school of Protestant theology than to meet on its own firmly scriptural terms. The latter course involves a good deal of time and effort — for under the brilliant surface the book is heavy going — but for any jurist who takes the Christian religion and its implications seriously the time and effort will be well repaid.

Although his book is presented as "A Radical Critique of Natural Law," Ellul begins by admitting that natural law exists. Between the time the law of a given society first becomes articulate and differentiated from religion and the time it becomes a neutral technique to be applied to any end we choose, it develops a content so like that of other systems in the same stage of their development that we must suppose the root principles to be in some way common to all mankind. These root principles as Ellul conceives them are not, as the philosophers would make them, a link with pristine innocence or eternal truth. They are simply the juridical données of the created world in which man has existed since the Fall. There are three of these. First come certain institutions — marriage, contract, law itself, the state — which are part of creation in the same sense that a tree is part of creation. Man does not invent them; he simply finds them in existence and takes them into account. Second, there are human rights. Man "knows them within his own personal situation, not through an objective instinct for justice, but through a genuine instinct of self-preservation." (p. 82) He claims them for himself because they are his conditions for existence, but without divine intervention he can neither justify them in himself nor recognize them in others except on a basis of reciprocity. Human rights without God are founded either on armed truce or on violence. Finally, there is justice, i.e., human justice, which is simply the technical skill of the jurist in forming a viable legal order, and can in no way be likened to the righteousness of God. The translator points up the distinction by generally adopting "righteousness" instead of "justice" to render the French *justice* when attributed to God.

Neither on these principles nor on anything else will Ellul allow us to found a philosophical theory of natural law. The insuperable obstacles to any such theory are for him first the incapacity of human reason, and second, the dynamic character of divine justice. Ellul denies the residue of the divine image discerned by most Catholic theologians in postlapsarian man, and in-

sists that it is only by divine intervention that man can obtain any contact with things external. At the same time, he denies that there is any fixed principle of justice with which man could make contact if he were able. He holds that justice is neither more nor less than the will of God — a will not static, but dynamic, and revealed in a series of particular judgments culminating in the final judgment and pardon that is our redemption through Jesus Christ.

It is in terms of this dynamic and redemptive will that Ellul formulates the far-reaching scriptural analysis that constitutes the basis for his own theory of law. This will is justice, and before it all human justice is unjust. The judgments in which it is revealed show forth the injustice of human justice — culminating in the crucifixion of Jesus Christ, which is God's ultimate judgment upon man, his world, and his justice.

But God's justice is "substitutive." It takes up the human works on which its judgment is pronounced, and makes them thereby instruments of God's will, and therefore of true "justice." Thus, for instance, God assumed in the person of David the Israelite kingship whose original establishment had been judged as a rejection of God's personal rule over His people. In a somewhat analogous way, Christ, by submitting to baptism, imparted salvific efficacy to that rite, which had no such efficacy of its own.

It is in terms of this substitutive justice that Ellul would have us see the divine authority for human law. By taking it up, by submitting to it, by making it an instrument for the working of His redemptive will, God imparts validity to human law. It is not an idealized or more just version of human law that God thus validates, but human law exactly as He finds it, and unjust as it is. In thus assuming it, God will purge it of whatever is found unworthy in it, but the time and the seasons of this purgation are for Him, not for us, to know.

This taking up of human law into the redemptive justice of God is through covenant. God's redemptive action is unfolded in a whole series of transactions in this form. Each such transaction is in form a judgment of death, followed by a promise of life under given conditions which man is free to choose. In the Old Testament, God dealt in this way with Adam, with Cain, with Noah, and with Abraham and his descendants. In the New Testament, He deals in this way with His own Son on behalf of all mankind. In these transactions, man is given a juridical status by God, and man's juridical institutions are validated through supplying the form in which God deals with man. Man has, then, through this aspect of the redemptive action of God, the right to life and the right to salvation, and his juridical forms are validated through their place in the implementation of these rights.

From the foregoing analysis of the juridical action of God, Ellul derives his understanding of the proper scope of the juridical action of the Christian in the world. In the first place, as law is the chosen instrument of God for the effectuation of His will in judgment, the Christian in submitting himself to law shows his willingness to submit to the will and judgment of God. By submitting to the rule of law, the Christian admits that his rights cannot be founded on his own power, and thereby brings himself into the class of those who receive their rights from Christ.

Next, as God's redemptive will is introduced into the juridical order by means of covenant, it is the business of the Christian jurist to work for the establishment and maintenance of the conditions presupposed by the covenant. The covenant, as we have seen, is twofold, embracing God's primordial promise of life to Adam and his descendants, and His ultimate promise of salvation to and through Jesus Christ. This twofold covenant imposes on the Christian jurist a twofold responsibility for the content of the legal system. Man must be permitted to live, and must be free to hear and respond to the offer of salvation. In shaping the legal system to correspond to these imperatives of God's redemptive purpose, the Christian does not give effect to the justice of God, but he affords the secular environment in which that justice operates.

Finally, it is part of God's redemptive will that the world be preserved until its consummation. To this end, the Christian, as *homo faber*, contributes by producing a viable legal system. Such a system must of necessity take due account of the divinely created institutions that belong to the existential reality of the natural law. These the jurist must take into account much as the architect must take the law of gravity into account — not because they embody divine justice, but because they are the conditions for the successful exercise of his craft. It is the business of the Christian jurist to exercise his craft successfully because in so doing he assists in God's work of preserving the world until its final consummation.

## II

While Ellul furnishes a powerful and instructive statement of the theological bases of the legal order, it does not seem to me that he makes good his case against natural law theory. That case rests upon two points: first, that divine justice cannot form a basis for natural law because human reason cannot attain to divine justice; second, that the *fact* of natural law cannot furnish a basis for a *doctrine* of natural law because of the corruption of nature. Let us consider these two points in order.

First, as to the incapacity of human reason to attain to divine justice, Ellul begins by disposing of the objection that man's reason is not corrupted by the Fall, but only his will — his capacity to implement the dictates of reason. This view does not help the proponents of natural law, Ellul says, because if man is capable of discerning justice, but not implementing it, then natural law cannot live up to the claim that it furnishes a basis for the implementation of divine justice in human law. Man's law cannot be regarded as an implementation of something man is incapable of implementing. This analysis, however, leaves out of account the possibility that man's laws may themselves be what man is incapable of implementing. Ellul does not convict man of incapacity to frame legal dispositions on paper that correspond to divine justice, but only of incapacity to give effect to the legal dispositions he so frames. Such an incapacity is not inconsistent with a doctrine of natural law as Christians generally understand the doctrine. Ellul is quite right in insisting that the justice or injustice of a legal system depends on how it works out in practice, and not on how it looks on paper; but Christian natural law theorists have never con-



tended that natural law will make men just — as grace will — but only that it will show them what is just.

But the foregoing argument is merely peripheral. Ellul's main argument as to the incapacity of human reason to attain to divine justice rests on his identification of divine justice with the dynamic will of God. He insists that the proponent of natural law doctrine looks to a conception of justice as something static and existing apart from God, whereas justice is actually so identified with God's dynamic will that knowledge of it apart from a dynamic relationship to that will is meaningless.

The short answer to Ellul here is that the proponent of natural law doctrine does nothing of the sort unless he happens also to be a Platonist. Whether a Platonist natural law system is compatible with Christian theology I will leave to a Platonist to decide. For my own part, I see natural law as founded in an intrinsic aspiration of human nature, and related to God's justice, to God's dynamic will, in that the end of God's will is man's salvation — a state in which that aspiration will be wholly met.

From this standpoint, Ellul's argument seems a *petitio principii*. God's will is dynamic only insofar as the constants of human nature form no part of it; and if the constants of human nature are no part of God's will (justice), there is no natural law.

The same *petitio principii* is more apparent where Ellul treats the theory that natural law was given to the Gentiles for their condemnation — to convince them of their need for redemption because of their inability to live up to it. Of this theory, he says:

... if this law is to fulfill its role, man must recognize it as God's law; but then it is a revealed law. For if this law is simply an outgrowth of his conscience, man has no reason whatever to acknowledge condemnation on the ground that he did not follow a part of his nature! (p. 62)

But in the usual natural law formulation, man's failure to follow his nature is not only the ground of his condemnation, but the essence of it. Man knows what he ought to do because he knows what his nature requires of him; his condemnation when he has not done it consists in his nature's lacking something it requires.

The difficulties involved in Ellul's position in this regard are less apparent than they would have been had he given a full treatment to St. Paul's doctrine of the Mosaic Law as set forth in the Epistle to the Galatians. The problem raised by this Epistle is not avoided by Ellul's disclaimer of any intent to give us "a critique of the law of Moses." St. Paul makes it clear that the Mosaic Law was given to the Israelites for their condemnation — that God gave these commandments not with the expectation that His people would follow them, but with the expectation that they would fail to follow them, and thereby be convinced of the need for a Redeemer. But if the condemnation inherent in the Law does not in some way correspond to a condemnation inherent in man's nature, then the Israelites are condemned not by their own failings, but by the gratuitous act of God. Thus, Ellul's doctrine, if carried to its logical conclusion,

will make God the author of sin. This difficulty seems to be present in every theological rejection of natural law from Occam on down.

But Ellul does not carry his rejection of natural law to its logical conclusion; quite the opposite, he radically undermines it with his admission of natural law as a fact. This brings us to the second point in his case against natural law doctrine — that the fact of natural law is incapable of grounding a doctrine of natural law. His showing on this point rests on a general view that what corresponds to nature is not for that reason good or just, since nature is corrupted by the Fall. This corruption, if it extends only to man's capacity to produce good things, does not prove Ellul's point, since he does not regard natural law as a work of man. Ellul goes on, however, to extend the consequences of the Fall to all creation, citing to this effect a text from the eighth chapter of Romans:

For the creation waits with eager longing for the revealing of the sons of God; for the creation was subjected to futility, not of its own will but by the will of him who subjected it in hope.

This text seems inadequate to carry the burden of Ellul's argument. He insists that "subject to futility" is the very opposite of justice as he has discerned that concept in the Bible. He does not elaborate on this opposition, but it seems inconsistent with his definition of justice as the will of God, since his text assures us that it is by the will of God that creation was subjected to futility. This is an important point, and I will deal further with it in due course. Meanwhile, it should be noted that futility is not generally taken to be a defect in the object itself, but rather in the external circumstances that prevent it from achieving its purpose. Here, it seems that the futility to which creation is subject can well be attributed to God's exclusion of man from that Paradise in which each thing serves its turn.

With this theological objection met, it seems that the fact of natural law as Ellul discerns it *can* form the basis of a doctrine of natural law. Not a terribly pretentious doctrine, to be sure, but a perfectly adequate one nonetheless. This doctrine, as I would conceive it, consists of the following principles:

1. Natural law exists.
2. It inheres in human nature.
3. It is just.
4. It is discernible by reason.
5. It furnishes a guide or foundation for human law.

Let us take up these principles in order:

1. *Natural law exists.* This Ellul holds, and, in my opinion, demonstrates.
2. *Natural law inheres in human nature.* Unless we are to accept natural law and its institutions as material objects or as Platonic ideals, it is difficult to see how we can accept them as other than aspects of human nature. Ellul regards them as "a quite fundamental part of creation" (p. 77), yet it is apparent that they have no concrete existence except as part of a concrete human situation. But the only element of continuity between one such human situation and another is human nature itself; so it is in human nature that any continuing institution must subsist.

3. *Natural law is just.* This follows from Ellul's own definition of justice as that which is in accordance with the will of God. But except for the productions of His rebellious and free-willed creatures, nothing exists but what is in accordance with His will. Thus, since natural law exists, and was created neither by man nor by devils, it must be in accordance with the will of God, and, therefore, by Ellul's definition, must be just.

Lest this formulation seem too glib, let me pursue the point further in terms of the text from Romans quoted above. I have already suggested that the futility to which St. Paul sees all nature as being subject is an important part of God's redemptive will, and therefore, of His justice. But it is the implementation of this very frustration — this very aspect of God's justice — that is the most important and persuasive of the roles that modern Christian thinking assigns to natural law. Natural law doctrine is regularly asserted against every attempt of the social order to be salvific. When society organizes itself to stifle the spiritual aspirations of its citizens in a material vision of the good life, or to swallow up the mortality of the individual in the collective immortality of race or state, it is natural law doctrine that claims for creation the futility to which God has subjected it.

To be sure, different views of human nature entail different versions of natural law, and not all such versions will accord with Ellul's theology as well as the one here set forth. But the role of natural law as asserting the claim of the human person to be born, to marry, and to die in the usual way as against the attempt to organize society on a grand design is a familiar one, particularly in our time. Natural law as so conceived seems to accord with Ellul's understanding of human nature, and with his understanding of justice. It preserves creation in the state to which God has consigned it — a state of waiting with eager longing for the revealing of the sons of God.

4. *Natural law is discernible by reason.* Ellul finds in natural law certain institutions which he says are a part of creation as a tree is a part of creation. These reason should be able to discern as reason is able to discern a tree. I have carried natural law in another direction, perhaps related to Ellul's discussion of human rights — that of a limitation on the efficacy of social organization. This also reason should be able to discern, because reason is able to discern its own limits. If natural law is predicated on futility, as I have suggested it is, futility should not be hard for reason to discern.

5. *Natural law furnishes a guide or foundation for human law.* Ellul seems to suggest as much when he tells us it is for *homo faber* the appropriate technique of his trade — in that it is a condition of viability for the human legal order. Ellul's point is that viability is not good in itself, and, therefore, that a legal order that conforms to the natural law is not intrinsically better than one that does not, so that natural law can furnish no criterion for distinguishing good law from bad. This point of Ellul's seems sufficiently met by showing that natural law is just. In fact the viability and the justice of a legal order conformable to the natural law depend alike on its acceptance of the limits to which nature is subjected by the will of God.

## III

Natural law as thus formulated seems complementary to the theological jurisprudence Ellul has worked out, so that the failure, as I conceive it, of his attack on natural law does not at all detract from his positive contribution to Christian legal theory. The role he assigns to law in the Christian scheme of things — the maintenance of life and of the opportunity to accept God's offer of salvation — seems to go hand in hand with the role of natural law as I have suggested it: that of preserving man in the posture of eager longing to which he with all creation has been subjected by the will of God, and on which his hearing of the Word of God depends. Ellul's contribution — leaving aside its obvious value as spiritual reading for the Christian jurist who wishes to review the status of his own particular compromises with the world — seems most fruitful when viewed in the light of this connection with natural law. By introducing a Christian theology into a juridical universe dominated by the great human problems to which Christianity offers answers, Ellul furnishes a ground for effective and knowledgeable Christian participation in the shaping of the law.

ROBERT E. RODES, JR.

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JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW. By Edgar Bodenheimer. Cambridge: Harvard University Press, 1962. Pp. 402. \$8.75.

One does not have to search long to discover the thread that meaningfully ties together the materials that make up this important work by Professor Bodenheimer. It is obviously not the mere title that gives it coherence; nor is it the fact that it deals with problems traditionally regarded as "jurisprudential." It is rather the author's strong humanist bent which first surveys, sorts and selects the materials and then provides both focus and gleam to his judgmental eye. And there is no coyness or hesitance in disclosing the bent. For at the very outset — as if to sound a clear alert — the reader is told that "the theory and philosophy of the law must remain sterile and arid if they fail to pay attention to the human values which it is the function of the law to promote." (p. viii) With this norm for judging the author proceeds to scrutinize the various schools of legal philosophy — from early Greek and Roman times to the present.

Because of the vastness of the area involved and the obvious limitations of both time and energy to traverse it, the perspective that is provided is not unlike that which one obtains from a sightseeing airplane high over the throb and bustle of a big city — with a professional guide pointing out the high spots. Among them are the remnants of the old Greek and Roman structures, the classical models of the Natural Law period, the German Transcendental sector, the moving edifices of the Historical and Evolutionary schools, the functional structures of the Utilitarians, the skeletal-like forms of the Analytical Positivists, and the gay patches of neo-Natural Law and Value-Oriented earth.

The trip over (150 pages), the guide volunteers to sum up, and, as if to anticipate the questioning of his eager charges, proceeds to disclose which of the structures seem most impressive to him. Not a single one seems to satisfy him completely; most of them have some favorable as well as unfavorable features. The most significant of these structures

form valuable building stones in the total edifice of jurisprudence, even though each . . . represents only a partial and limited truth. As the range of our knowledge increases, we must attempt to construct a synthetic jurisprudence which utilizes all of the numerous contributions of the past, even though we may find in the end that our picture of the institution of law in its totality must necessarily remain incomplete. (p. 152)

To him, the least attractive are the flexible frames that were designed by the positivists, Kelsen and Ross. They are really not edifices at all, but rather formal façades, so flexible that they can be made to fit and equally dignify any structure, be it prison or castle. A legal philosophical structure, to be worthy of Bodenheimer's encomium must not concern itself primarily with façade, but with the kind of life that would be permitted within the structure's bounds. Unless it is designed to serve and otherwise accommodate human needs with justice and reason, it must fail utterly to qualify for acceptance. We can learn from the older structures, but only if they are reexamined with an eye towards determining the extent to which they were, at the time of their use, addressed to these ends. Even to pose such a norm for inquiry goes meaningfully beyond the efforts of those who, in the name of scholarship, believe their task to be done if the formulations of the past are described as if they were merely colorful floats in a gala parade.

The second part of Bodenheimer's work, captioned "Nature and Functions of the Law," is addressed to an examination of two basic human strivings — order and justice; to a characterization of law as a synthesis of these strivings; to a differentiation between law and power, administration, morals and custom; and, finally, to an evaluation of the benefits and drawbacks of the so-called rule of law. Here, too, the thrust is that of the humanist, with justice ultimately placed higher on a scale of values than order, and law viewed as an institution to keep under scrutiny lest it become too rigid — or go off on an autonomous life of its own, cut away from the human moorings to which it was originally tied.

Emotionally contagious and admirable as is the author's zeal to link humanist aims to law, it would have been even more admirable had greater pains been taken to make it more intellectually persuasive — especially to those who skeptically, if not cynically, view the problems of justice as chimerical because they are bottomed on arbitrary expressions of emotions or taste. At least exposure to the impressive current philosophical literature critical of this position would have been helpful to the student with a thirsty, critical mind. Instead, one finds such a conclusion as

The view propounded by Hans Kelsen and Alf Ross that justice is a purely "irrational" ideal cannot claim to have even a shadow of justification. (p. 186)

without as much indicating why — an approach which plays right into the hands of those who insist that rational justification, as such, is not possible.

There is the tantalizing observation in the preface that

conclusions with respect to axiological questions are necessarily tentative in character and subject to reconsideration in the light of new findings and new experience. (p. viii)

— suggesting a cognitive status to ethical judgment, and a scientific, experimental format for linking ethics and law. But one looks in vain throughout the work for a glimpse of the format and for guidance as to how it could be concretely applied. How much more valuable it would have been to undertake an exploration along these lines than to expend energy and thought on such vacuous formulations as

It can be asserted as an invariable axiom . . . that no reliable form of society can be imagined in which individual action is not subject to some degree of social control. (p. 209)

or

The truly great systems of law are those which are characterized by a peculiar and paradoxical blending of rigidity and elasticity. (p. 266)

How much more valuable it would have been to develop the tantalizing suggestion than to devote space (pp. 238-244) to so pointless a "problem" as the distinction between law and administration; or to give unneeded currency to an intellectual old wives' tale, i.e., that inelasticity in law is attributable to the reliance upon "logic." (p. 174) With respect to the latter, how long must it take to establish the simple truth that it is not logic, as such, but *bad* logic, or the *misuse* of logic that might be the villain?

Part III, the final part of the book, which deals with an analysis of the sources and techniques of the law, is deserving of much praise. The focus is upon law as it comes unrefined from the legislative vat and undergoes refinement and distillation by the courts; the thrust is upon the nonformal materials which courts draw upon to make the refinement and distillation a function of objectively ascertainable factors rather than of fiat and caprice — however these factors defy precise measurement. The analysis is shrewd and discerning. Many so-called realists who have surveyed the judicial preserves by flying high over them are prone to report seeing virtually no bounds for whatever romps the judges wish to take. Bodenheimer flies lower, with keener eyes and better focus. His report of the variety of fences, hedges, and moats which hem the judge's freedom, and of the subtle configurations of the terrain which somehow draw and pull judicial decision-makers into expected pathways, would have warmed the heart of Karl Llewellyn, who expended much energy in detailing these phenomena. Not the least important of these pulls draws the judge, in leeway situations, towards the task of ascertaining the community's current sense of what *it* deems fair and just.

Because Bodenheimer seems to be addressing two separate audiences at the same time — the horizontal-survey and the vertical-depth audiences — the work suffers somewhat as a teaching vehicle. To move horizontally from the

early Greeks to the modern policy-science contingent in the space of 150 pages results necessarily in paper-thin summations (note the treatment, p. 105, of Max Weber in just four lines!) and in inevitable omissions (there is not even a mention of the works of Felix Cohen). By contrast, the vertical approach, permitting analysis in depth — as in the excellent chapter (XVI) on “The Non-formal Sources of the Law” — yielded many penetrating insights. Judging by the contrast between the two approaches in this single volume, it is not too much to conclude that the horizontal, not being a standing position, prevents a good mind from standing out and its product from standing up. And it encourages the student to deal much too lightly and too distantly with a subject that needs sorely to be integrated, in a vital way, with the very heartbeat of the law.

JULIUS COHEN

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THE LEGAL CONSCIENCE: Selected papers of Felix S. Cohen; edited by Lucy Kramer Cohen. Foreword by Felix Frankfurter. Introduction by Eugene V. Rostow. New Haven: Yale University Press, 1960. Pp. xvii, 505. \$12.50.

The dictum of Wordsworth that poetry “takes its origin from emotion recollected in tranquility” has a pertinence that reaches well beyond the regions of art. It sets the conditions and the problem that confront any constructive intellectual undertaking: the mind must retain the insights and the excitement that it derives from its original encounters with the world; then it must abstract and fasten the immediately significant features of these encounters, trace their more remote ramifications, and so grasp both their intrinsic meaning and their mutual relevance.

Felix Cohen was singularly well circumstanced to satisfy the conditions of this dictum: his temperament and training made reflection a natural state of mind, and his close experience with the activities of government made him vividly aware of the human impact of law. This collection of Cohen’s more important papers bears eloquent testimony to the fruitfulness of such a happy conjunction. Furthermore, by affording a synoptic view of the inquiries that he carried on simultaneously in varied fields, it permits a sharpened realization of the interests that animated his work, the results that this work achieved, and the further problems to which it points for its completion.

It is always dangerous to summarize and categorize the output of a man’s career: at the best this threatens unfairness to the growth of his mind and the shifts of his perspective; at the worst it obliterates his insights and destroys the balance between the elements of his thought. Courting these risks, I think it possible to discern two critical issues that constantly occupied Cohen. The first of these is the concern to make positive law a more effective instrument for the promotion of human values. The second is the concern to establish a theory of value that would be broad in its scope and sensitive to current problems.

There is no need to dwell on the first of these points. Cohen’s contributions

to a functional legal approach have entered so pervasively into the stream of American jurisprudence that a rehearsal of them would be supererogatory. In this context, the only facet that might perhaps be stressed is the unusual degree to which Cohen combined the attitudes of legal positivism and legal idealism. It is with the first of these tendencies that his name is primarily associated. Even in his positivistic guise, he was more a sympathizer than an adherent, more a detached counselor than an active advocate—at least, that is the impression that these writings give.

This would seem to be the role that was naturally forced upon him, for two reasons. In the first place, he had an inclusive and synthetic view of positivism: he recognized the merits of the legal realists, with their insistence on the necessity of improving the apparatus and the procedures of law; of the sociologists of law, with their emphasis on the consequences of law; of the jurisprudence of interests, with its stress on law as an agent for the compromise of antecedent interests; of legal analysis, with its efforts to clarify the concepts through which law works. None of these movements could claim Cohen as a committed participant, because he saw the partiality of each of them as well as he saw their merits.

In the second place, Cohen's detachment from positivism was dictated by his awareness of the legal significance and urgency of considerations of value. A positivist need in no sense deny the validity and importance of ideals: but he must be willing to postpone a thorough investigation of them all while he tends to occupy himself with those ideals which are obvious and urgent, and to concentrate on perfecting an apparatus that will extend his achievement. In short, the kind of positivism familiar to twentieth century America holds that we already have enough unrealized ideals to keep us busy for some time, and that we had better work toward those values that are clear and pressing instead of first trying to catalogue and analyze the whole realm of value. Cohen could not wholeheartedly subscribe to this procedure. He recognized that an inadequate grasp of the ends the law sought would be reflected in the means the law employed: as a result, the legal apparatus would be continually correcting the errors caused by its own omissions, and instead of lawyers pursuing justice we would have puppies chasing their tails. In short, Cohen felt that ideals pressed upon the law as urgently and insistently as did actualities.

It was this conviction that fed the second concern that emerges so clearly throughout these papers: the concern to broaden both the theory and the practice of morality, so as to bring it into closer touch with contemporary modes of thought and with current social issues. Cohen's treatment of this problem proceeded along two lines: he sought to put ethics on an empirical, rather than a rational or intuitive, basis; and he sought to shift the focus of moral attention from an individualistic to a social perspective.

In the first of these efforts, Cohen, as he acknowledged, was following in the footsteps of such men as John Dewey, D. W. Prall, and R. B. Perry. He insisted that values are discovered in experience: the ultimate facts of ethics are men's immediate perceptions of good and evil. He was at war with all a priori ethical doctrines, on the ground that they were static and absolute; they were, he held,



insensitive to changes in the actual, and immune to correction. I think that he was incorrect in these views, when they are interpreted as theoretical statements. But he was largely correct in arguing that such ethical doctrines do as a matter of fact tend to become inflexible. This inflexibility was the aspect of the matter that concerned him, as he felt that the pressing need in morality was to render it more appropriate to contemporary conditions of life. Most especially, Cohen felt that traditional ethics, with its roots in religion and rationalism, was too closely centered on man as an individual personality, with a consequent neglect of man as a social creature.

Throughout this side of his work, Cohen is seeking to correct what he regards as a twofold provincialism in traditional moral theory. For, according to him, not only has such theory treated the isolated human being as the sole originator of moral action; it has also taken a narrow view of the human person, seeing him as guided preponderantly by egoistic and prudential considerations. This is again a somewhat foreshortened interpretation of the ethical tradition of the West. But if one reads it as referring primarily to the general moral tone of the years between the two World Wars, it is not altogether a straw man. I think that Cohen is clearly and profoundly right in his basic contention that modern moral theory has failed in its chief responsibility, which is to help men to lead meaningful and integrated lives as members of society. This theme is especially developed in the essay, "The Socialization of Morality," which is a passionate but reasoned plea that ethics turn its attention to the social conditions of life and to the values that men realize, or fail to realize, in their public activities. In sum, Cohen conceives ethics as properly concerned with the Good Society more than with the Good Man.

All of Cohen's considerations of moral questions were dominated by two major doctrines: socialism and utilitarianism. There are passages in some of the latest of these papers that indicate that he was beginning to have reservations about the first of these: as socialism became an actuality, it contradicted its own ideals; and in so doing it exhibited characteristics that ran directly counter to Cohen's deepest convictions. From utilitarianism, however, he never retreated. He did not assert it dogmatically; he recognized that there are alternative theories; and he acknowledged that it stood in need of correction and completion. But it still remained the keystone of his ethical thought.

As we read these essays in retrospect, with the advantages of leisure and hindsight, a strong feeling comes through that this commitment to utilitarianism was at once Cohen's strength and his weakness. It was his strength, in the sense that it kept vividly before him the idea that law is a means to an end, and that all of the conceptual and procedural apparatus of law should be made to justify itself by its effectiveness in promoting some human good. It was his weakness, in the sense that it deceived him into thinking that the ends to be properly sought by law are simpler and more obvious than is actually the case. Utilitarianism — like its offspring, pragmatism, positivism, and functionalism — is workable only under quite special and temporary conditions: those, namely, where the discrepancies between the actual and the ideal appear as clear and compelling. The prerequisites of a utilitarian are a sharp feeling for certain

goals that command allegiance and a faith that these can be readily achieved. The direct and forceful effort these prerequisites generate can easily have the effect of blurring the complexities and conflicts of the realm of values. The advocates of this school, in sum, are very apt to overestimate both the capacity of science to master the actual and the capacity of morality to procure agreement upon ideals.

As a consequence of this outlook, utilitarianism tends to regard ethical shortcomings as due to failures of intention more than intelligence. The corrective measures that it proposes emphasize persuasion rather than speculation. These tendencies are clearly manifest in the body of Cohen's work as here presented: he seemed to feel that if we could once clear away the dead weight of moral tradition and prejudice, and could return to the pure occurrence of values in experience, then we would attain a wide agreement upon the basic ends to be pursued; and if we would accept the democratic method of compromise, we could transform this shared experience into a common program. These expectations disguise the urgency of certain fundamental lines of inquiry, and so lead to their neglect. But these are understandable lacunae. No man can deal with the whole panorama of life's problems, especially when his career is as tragically short as was Felix Cohen's. The problem with which he was throughout chiefly occupied was the dual one of making lawyers aware of the values that their work forwards or impedes, and making ethicists aware of the real impact and outcome of the theories they propound. That is, he was deeply concerned to assure communication between the realms of the ideal and the actual. This communication is never an easy task. Given the intellectual temper at the time Cohen was working, what he accomplished along this line constitutes a major achievement. The ground he won remains as a permanent base for further efforts in this direction.

IREDELL JENKINS

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PHILOSOPHICAL ASPECTS OF CULTURE. By Bertram Morris. Yellow Springs, Ohio: The Antioch Press, 1961. Pp. xvi, 302. \$7.00.

Lawyers in great numbers are not likely to consult Bertram Morris's book on culture unless it is brought to their attention in legal periodicals. That it is worthy of serious consideration by thoughtful members of the profession there can be no doubt. Although there is only one entry in the index under the caption "Law," there are many passages in the book which are concerned with legal concepts, particularly in the field of constitutional law. The book as a whole represents an attempt to order the principal problems of contemporary society in the cultural context.

The title page bears the following quotation from Hobbes's *Leviathan*: "For moral philosophy is nothing else but the science of what is good, and evil, in the conversation, and society of mankind." (Part I, ch. 15) The book is a development of this theme. The wisdom of the past is taken into account, but the emphasis is on the implications of the findings of scholars and scientists of

our own time. It is not a treatise on moral philosophy but rather a summation of the lessons for our time for determining the wisdom of social action. Such wisdom all of us need, particularly the politicians in the tremendously critical present condition of the human race. Lawyers who become politicians or who advise or influence politicians need this wisdom, too. Morris attempts to impart this wisdom. He attempts to set up standards acceptable to reasonable men. How well he has succeeded it would be presumptuous to assert without careful weighing of the evidence, but he makes out a persuasive case for his position. At the very outset he tells us that his concern is with the metaphysical aspects of culture. What is culture? Is it one or many? Are there good cultures and bad cultures? Such crude questions might indicate what he states in a more sophisticated way.

The term "culture" as used by the anthropologists, a number of whom are quoted by the author, is used as a point of departure. The anthropological concept of culture involves the process of patterning, the organization of customs and institutions regarded as an entity. Morris has investigated in particular the institutions of contemporary society, with special emphasis on the United States, with a view to arriving at some tests or standards in accordance with which our institutions may be judged and, having been found wanting, improved.

Dissatisfactions and resentments find expression in many ways and at various levels, psychological, economic, political, moral, and religious. Morris, while not completely ignoring these various levels, addresses himself to the interaction of the various institutions which constitute our culture. Science, technology, and art are accorded special treatment, as will be seen below. A crucial notion of the author's is the distinction between the authentic or genuine type of culture and the spurious type. Again and again throughout the book specific distinctions between the authentic and spurious are referred to.

What is meant by "an authentic culture"? It might be characterized not too unfairly as a hypothetical model culture, an ideal, even, perhaps, a utopia, a kind of limit towards which mankind might aspire to approach but never reach. It will be noted that the author uses culture in the singular in his title, but in the book the word appears frequently in the plural, in the anthropological sense. How does one step (or, as some would say, leap) from the descriptive level of the anthropologist to the normative level of the moral philosopher? Here is that tiresome question again, how to get from the *is* to the *ought* without dogmatism or unwarranted assumptions? That such a step can be taken, as is well known, is frequently denied. Morris, however, attempts to do it. Whether any of his colleagues in the professional philosophical ranks will acknowledge that he has succeeded may perhaps be doubtful, but to the American lawyer and perhaps most Americans in general, with the commitments we have made or are prepared to make, what Morris has to say is illuminating and persuasive. He eschews dogmatism. I do not think he can fairly be accused of indulging in that. His sympathetic study of the anthropologists would seem to assure immunity from traditional forms of dogmatism, at least. But, of course, he has to make assumptions. In casting his net over the whole of contemporary society, he has to rely on the accuracy of the findings of the historians, the so-

ciologists, the psychologists, the anthropologists, the physicists, and many others. More to our purpose he embraces the basic assumptions of democratic society. He is definitely antitotalitarian. Few Americans will object to that. Most of us would agree, I think, that his assumptions are warranted. Many of them he supports with objective evidence so that their warrantability is not merely asserted but confirmed.

His method for determining authenticity in a culture, our culture, or any culture whatever, is what he calls the method of internal criticism. An example that he uses may make this notion clear. One of our prominent institutions in the technological sphere is represented by that omnipresent artifact known as the automobile. Automobiles and the rise thereof are certainly important factors in our culture. As everyone knows, as these artifacts became more numerous, swifter, more powerful, they also became less usable in places where there were inadequate roads. The criticism of the roads attributable to the new cars is an example of internal criticism of a culture. From the interaction of the various institutions in a society, tensions and frictions or obstacles arise. Corrections must be made if there is to be continuance of the workings of the society. These interactions, in other words, bring about internal criticism, some of it almost automatic, some of it conscious and deliberate, in the various levels — scientific, technological, artistic, philosophic, religious, political, legal, educational. These various levels, represented by institutions, are to be found in what Morris calls a viable culture. In this connection another of the author's concepts should be noted, that is, the cultural focus. The cultural focus designates the primary concern of a people or nation in one institution or set of institutions rather than another. An example would be the concentration of the Spartans on military institutions, resulting in a militaristic society. The genuine or authentic culture is that in which the several institutions fit together harmoniously in a pattern or configuration so that the culture itself may be characterized as the "genius" of a society. These notions Morris attributes to several well-known ethnologists, and he states that "genius" is an appropriate term for marking the passage from a descriptive to a normative point of view. The cultural focus is "that institution or set of institutions that marks the genius of a people." (p. 17) The ideal state of affairs, the anthropological equivalent of the philosopher's schemes from Plato onwards, is the genuine culture, that is, one in which there is nothing without spiritual meaning and all important parts of the general functioning entail no sense of frustration. This conception taken over from the scientists is the key to the development of the author's social ethics.

The author characterizes the spurious culture as follows:

On the other hand, a spurious culture is a malfunctioning culture. It is full of hypocrisy, lowered sensitivities, frustrations, and general debilitation. It is a mixture of inchoate and incompatible ideals, incapable of sustaining for long any direction in activities. It encourages ideals it cannot support. Its appeals consequently are to social loyalties, but its springs of action are narrowly expedient and opportunistic. Its powers derive from the inculcation of fears; its enthusiasms are avoidances; its emotions, sentimentalities; and its artistic creations decorative exaggerations of the obvious, the horrors of emotional derangements, or abstractions devoid of any responsible connection

with pulsating life. Finally, its spiritual orientation is one of gaudy ritual, obtrusively separating the sabbatical from the quotidian.(p. 29)

These words are more than a denunciation of existing society. They outline the various maladjustments, including literature and the arts, which receive extended considerations in later pages of the book.

The foregoing sketch is given here merely to indicate the author's point of view. It cannot do justice to his argument. It is by way of introduction to the discussion of matters of professional concern to lawyers. In what follows such matters will be considered.

It is the author's position that doing and knowing are not enough to make the genius of a society effective. Knowledge is not a sufficient principle of moral action. (p. 124) In addition to science and industry there must be art in order to take into account the feelings or sentiments of human beings. The esthetic dimension is "indispensable to the good life." (p. 125) Lawyers will recall that in our own time the courts have given recognition to this dimension.<sup>1</sup>

It is in Part Three of the Book, entitled "The Institutions of Power," that will be found the passages of greatest interest to lawyers. An entire chapter is devoted to "Liberty, Spurious and Genuine." Is it possible to achieve in the midst of our vast technological civilization "a mass culture, viable, authentic, and satisfying?" Morris regrets the pessimistic views of famous modern philosophers whose concept of freedom he believes to be realizable only in a society of and for an elite. He speaks of two general categories of freedom: the felicitic and the social. The former is exemplified by "the primary freedoms": "freedom of enquiry, including speech, movement, associations, as well as religious beliefs." (p. 150) The latter is distinguished from felicitic freedom "in the fact that it does not share the earthier optimism that private vices are public virtues." (p. 155) Morris calls attention to "the factors which require the rise of a new theory of freedom." (p. 155) These are the effects of giant industry and the socio-moral factors. He refers to the lack of effective antitrust legislation. (p. 156) He comes to the conclusion "that since the lone individual cannot combat the policies of corporate enterprise, whether monopolistic or oligopolistic, there is need to make those policies responsible ones through the combined strength of individuals in their social capacities, and not just in their personal ones." (p. 161) The end to be served thus "is to arrive at policies that maximize the freedom of the many rather than of the few." (p. 161) He continues:

This end is achievable if and only if freedom is regarded as objective, corrigible, and rational. Freedom is objective when there are live options which increase men's power to advance the civil state. It is corrigible in that actions which detract from civil life permit nevertheless a return through discussion and criticism to the old option or to a new one which enhances civil life. It is rational in that the aim is constantly to seek new harmonies within institutional life consonant with the urgencies of knowledge, as well as the practical and fine arts . . . Moral freedom is committed to the search

1. The most memorable instance of such recognition in recent years is expressed in *Berman v. Parker*, 348 U.S. 26 (1954), where the court sustained the validity of the redevelopment program of the District of Columbia.

for a measure in which man the producer, man the distributor, and man the consumer can express human qualities in these capacities as well as in the more commonly recognized expressional aspects of human life. The conditions of such freedom are those arrangements which permit men to live at peace with themselves and with some dignity in their relations with others. (p. 161)

Further:

Social freedom is freedom *from* the oppressions of ill-devised or antiquated institutions and it is freedom *for* the creation of those institutions that provide greater liberation for men collectively within the bounds of an authentic culture and distributively so far as it is not destructive of that culture. Any society which consistently silences freedom of discussion and of criticism and prohibits freedom of association thereby removes the conditions for establishing an authentic culture and the kind of power-relations which can sustain it. (p. 162)

Following the chapter on freedom is one on "The Political Dimension," which is also of great interest to lawyers. In the course of his discussion of politics he emphasizes that democracy is doomed unless the great majority have the capacity of being educated "to the point where they are sound judges of a policy, whether or not they are capable of formulating policy." (p. 174)

The third and last chapter in Part Three is entitled "The Cultural Context." This is the moral philosopher's exposition and commentary on the "democratic faith." (p. 178) The difficulties of government by consent of the governed are elucidated and the significance of bills of rights explained, with special reference to our own constitutional provisions. The author repeatedly uses the phraseology of the Constitution. It is in this chapter that will be found (and it is the only one) a citation of a court decision. This unique distinction is accorded *Sweezy v. New Hampshire*.<sup>2</sup> The author quotes with approval the words of Chief Justice Warren:

To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation. No field of education is so thoroughly comprehended by man that new discoveries cannot be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study, to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die. (p. 181)

The exposition of the law and economic activity in the cultural context that is developed by the author is the most valuable for lawyers and students of the law. Here he asserts that "reflection shows that the economic cannot really be autonomous and that in principle it is rightly subordinated to a higher law, whether we call it the wealth of nations, the public welfare, or just plain justice." (p. 184) In this connection he affirms the moral principle, "that is, the

2. 354 U.S. 235 (1957).

positive social relation that enlists the whole man in a whole society." This principle "is not capable of being made concrete except in a genuine culture." (p. 185) Hence arises the importance of the entire cultural context for legislation and the determination of legal issues. If the cultural context is disregarded distortions and worse — plain injustice — will inevitably follow.

The author is to be congratulated on the completion of a difficult and eminently worthwhile task. He has brought together many different aspects of culture and explained how they interact and provide a basis for determining rationally and morally the "burning issues" of our common life.

ROGER PAUL PETERS

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LE DROIT NATUREL (3 ANNALES DE PHILOSOPHIE POLITIQUE). By H. Kelsen, Ch. Perelman, A. P. d'Entrèves, B. de Jouvenel, N. Bobbio, M. Prélôt, Ch. Eisenmann. Paris: Presses universitaires de France, 1959. Pp. 229. NF. 9.60.

The principal contribution to this potpourri is a critique of the notions of justice and natural law by Hans Kelsen.<sup>1</sup> Bergson's dictum that a philosopher has one insight into reality, which he repeats with endless amplifications, receives fresh confirmation.<sup>2</sup> Many of the more specific points Kelsen raises may also be found in earlier works.<sup>3</sup> But this critique is a particularly compact and thorough examination. It is Kelsen at his best: precise, dry, shrewd, persistent. For theoreticians of justice from Aristotle to Utz he prepares an astringent and antiseptic treatment. He cuts into them with a surgeon's skill. He leaves them their senselessly beating hearts.

Kelsen reduces all propositions concerning justice to a single form, always found to be "empty."<sup>4</sup> "Treat like cases alike, unlike cases differently": this is the formula which constitutes the "supreme norm" in most attempts at a rational theory of justice. It is, Kelsen finds, "not a demand of justice, but of logic." (p. 52) It is an empty form because it leaves open the determination of what is a like case, what an unlike case; it cannot itself determine its application. Other sources, such as the positive law, must fill in the content, and there is no compelling rational criterion by which this essential task may be performed. Similarly,

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1. The essay is translated into French from German by Etienne Mazingue.

2. "A philosopher worthy of the name has never said more than a single thing." HENRI BERGSON, *LA PENSÉE ET LE MOUVEMENT*, OEUVRÉS (1959 ed.) 1350, where the significance of this aphorism is developed at length.

3. See Hans Kelsen, *Naturrecht und positives Recht: Eine Untersuchung ihres gegenseitigen Verhältnisses*, 2 *REVUE INTERNATIONALE DE LA THÉORIE DU DROIT* 71, 76-77 (1927); KELSEN, *GENERAL THEORY OF LAW AND STATE* 8-14 (1949); KELSEN, *WHAT IS JUSTICE?* (a collection of earlier essays), esp. 130-136, 153-171, 295-301 (1957).

4. The parallel with Kant's empty transcendental principles of cognition is explicitly drawn in *Die Philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus* (1929), which appears as an Appendix to *GENERAL THEORY OF LAW AND STATE*. See p. 436 thereof.

such another historic formula as "To each his own" is empty because it does not determine what is one's "own." In every case, in every system, the supreme norm of justice is found to be logical, empty, dependent on other sources for content. In filling in the content different norms of justice conflict, without, it is implied, there being any way to choose rationally among them. (p. 58) No kind of justice is rationally better than any other kind of justice. Absolute justice is an irrational ideal (p. 63), and in the desire to avoid the absolute, no rational system of sorting out kinds of justice is left standing.

A similar conclusion is reached as to the natural law. After raising a host of stinging objections to the content of various natural law theories, Kelsen faces the question, Is there any rational criterion which may be used to defend or to criticize a given society, legal order, or law? The answer must be, No. Any criterion is subjective, personal, nonrational. To invoke a moral law to explain a moral decision is to invoke an illusory absolute — God, nature, reason — in order to evade responsibility for one's own act. (p. 120)

It appears at times in this analysis that "rational" is used in a special sense. When absolute justice is found unattainable, and the supreme norms are found empty, it would seem to be implied that there could be "full" or "fertile" norms which would determine their own application and do so rationally. Rationality here seems to be the quality of a system where a superior category can account for a lower category. There is, however, an obvious difficulty in this use of rational. If justice is an irrational ideal because it does not itself determine its application, the difficulty inheres in every general concept.<sup>5</sup> As general propositions do not decide cases, so general propositions do not describe particular situations of fact. An intuitive element enters into any particular judgment. What, then, can be the meaning of a Kelsenian rational system?

The basic contrast in analysis between "rational" or "scientific" and "personal" is even more puzzling. (pp. 87, 120) It receives its most dramatic form where the author contrasts the demonstrations of "science" (p. 119) with the realm of personal judgment, or where, as in *What is Justice?*, he arraigns the natural law doctrine before "the tribunal of science."<sup>6</sup> What is this "science" of which he speaks? It seems to be some impersonally knowing knowledge, an intussuscepted vestige of some earlier deity of rationalism. All acts of knowledge are, in fact, personal, are they not? And knowledge exists only in persons. Is there any difference here between saying "science" and saying "I, Hans Kelsen"? To be sure, when one is scientific one attempts to base one's view on experience; one seeks a rule of some generality, likely to be accepted by others with similar experience; one attempts to achieve a range of prediction. Still, the scientific assertion is personal. There seems little need to create an entity "science" in order to preserve modesty or to avoid one's responsibility for one's own conclusions.

There is, it is true, a greater conscious commitment of the person in a moral

5. Kelsen distinguishes a "general norm" from an "abstract concept" as follows: "The abstract concept defines the elements or the qualities which a concrete object possesses when the concept applies to it. The concept does not determine that the object *ought* to possess the properties. Unlike a norm, the concept does not constitute a value." (p. 8) (my translation)

6. *WHAT IS JUSTICE?* 153 (1957).



judgment than in a judgment usually labeled "scientific." As a man is, so his end appears to him. Classical writers speak of "heart," where Kelsen says "emotion."<sup>7</sup> But what Kelsen has done is to separate categorically what he terms the "rational" and what he calls "emotional" or "the will"; and in so doing he divides the human judgment in such a way that no moral judgment can be rational in his sense. Concepts, he states definitely, are "the function of the rational component" of our consciousnesses. Moral norms are the function of "the emotional components." (p. 9) Under this definition, a norm can never be rational; indeed, it should not be expressible in rational concepts. How is it, then, that "supreme norms" — e.g., To each his own — find expression in forms which, if empty, are said to be rational?

If, instead of following this procedure of setting up a line between propositions which are functions of will and those which are functions of reason, we stick to the ordinary sense of "rational," it will be observed that our moral judgments may be called as rational as our scientific ones. What distinguishes the "rational" from the "irrational" is not the absence of emotion, will, or the person, but the presence or absence of a process aimed at eliminating or diminishing arbitrariness. Moral and scientific propositions, distinguished from one another by their uses, are not distinguished by the procedure used in reaching them reasonably. We cannot be under the illusion that moral propositions differ from scientific ones by the presence of personal commitment; in making moral propositions we cannot ignore the value and use of rules, theory, discourse, and dialogue.

There is another related difficulty in Kelsen's procedure. It arises from his making a rigorous separation between natural law theory and the function it serves.<sup>8</sup> Such a distinction between the description of reality implied by a moral doctrine and the uses to which this doctrine is put may once have seemed plain good sense. But does such a distinction give sufficient weight to the context in which moral propositions function? Such propositions are never in the air. They are never inert texts, to be construed abstractly and alone. They are communications made by men to men. Their context and function do not destroy the descriptive properties of propositions, but do control them. They are incomplete symbols, misread if read alone. Their meaning is to be found, not merely by inspecting their content, but by ascertaining to whom they were addressed, from whom they were addressed, the object of their being communicated, and the other propositions they balanced, supplemented, or denied. Kelsen proceeds on quite contrary assumptions.

Looked at in particular contexts, natural law theory appears with a variety of meanings. To recall some examples, natural law functioned for some medieval theologians as a way of affirming that certain rules of conduct were not dependent on biblical revelation and could not be treated as dispensable or alterable by ecclesiastical authority. Eighteenth century reformers used natural law propositions to criticize the royal and clerical Establishment. Nineteenth century jurists

7. Cf. ST. AUGUSTINE, *CONFESSIONS*, bk. 1:1; PASCAL, *PENSÉES*, pt. 2, 17:5.

8. Kelsen's critique of the "function" of natural law is at p. 109, based on a text of A. P. d'ENTRÈVES, *NATURAL LAW* 46 (1951), where d'Entrèves says, "The real significance of the notion of natural law seems to lie more in its function than in the doctrine itself."

often employed natural law assertions to vindicate the status quo. What is meant by "natural law" in each one of these contexts depends, in part, on the purpose of the persons invoking it. Kelsen views such changes in the meaning of natural law as evidence of the emptiness of the term. Are the changes not, rather, evidence that meaning and function are to be considered together? To pluck out a proposition by itself, hold it up by itself to the light, shake it, turn it about, and hope to wring from it what it means does not seem a way likely to be very fruitful in understanding.

This caution applies, of course, equally to an understanding of Kelsen. What is the purpose of his critique? Is it to open the way to a Kantian faith or a neoorthodox trust in the Scripture that reason is so relentlessly shown to be impotent? The answer given by Kelsen on the plane of theory is found in *What is Justice?*: "'My' justice, then, is the justice of freedom, the justice of peace, the justice of democracy — the justice of tolerance."<sup>9</sup> Like Montaigne observing warring dogmatists and fearing the passions of bigotry, Kelsen seems to deny moral reason for the sake of tranquility and tolerance. His ends are noble. At all costs he will extirpate the dogmatism which attends any absolute assertion of moral rules. He will vindicate the autonomy of moral choice. Yet when his propositions are understood in this context of his purposes, they should involve him, not in a comparison of emotions, but in rational discourse.<sup>10</sup> As long as we are human beings, this imperfect tool must be the means of tolerant communication of what we find to be the needs and ends of free men.

The second essay, and the next most interesting contribution to this collection, is by Charles Perelman. Perelman does situate natural law propositions in a context, and does give much weight to their way of functioning. He asks, For what purposes do we call an act just, a rule just, a man just? His conclusion, in brief, is this: A just act supposes a rule and a situation to be corrected: the act is a correction, a conforming to the rule, a rejection of inequality. A just rule supposes an exercise of reason, the rejection of sheer force and sheer arbitrariness. The just man is the man of conscience, the man who rejects inhumanity. (pp. 142-145) Perelman rightly emphasizes that in the Western tradition the just man is patterned on a model: a just God. The Judaeo-Christian tradition fuses mercy with justice in the attributes of God. Citing Bergson's *The Two Sources of Morality and Religion*, Perelman maintains that the prophetic model of the Just Man led Western culture to pass from the justice of a closed society, to the justice of an open society, a society whose justice has been consciously considered relative to an ideal justice. (p. 142) Rationalism has now located within us the divine model, our conscience. Perelman, in short, writes in a catholic and irenic spirit, without the cutting skill and sting of Kelsen.

A. P. d'Entrèves, the third contributor, has written an essay rich in suggestions, but all too brief. Taking a functional approach, he considers the natural law as an attempt to answer three persistent problems: What is law? Why is law obligatory? What criterion measures the value of a law? (p. 148) In dis-

9. *Op. cit. supra* note 6, at 22.

10. Cf. Jacques Maritain, "Truth and Human Fellowship," in MARITAIN, *ON THE USE OF PHILOSOPHY* 19-20 (1961).

curring the natural law approach to the first question, he notes that the analogy of law with a game happily ends the close association of law with sanction, but fails to provide for a "value-judgment" on the content of the law. (p. 150)

Bertrand de Jouvenel, in a rambling discourse, concludes with Montaigne that all things are relative, but makes two exceptions: *le sentiment de l'obligation* and the rule do not do unto another what you would not have done to you. (p. 172) The natural law is functionally conceived as inciting moral protest when the "other" is hurt. (p. 174)

Norbert Bobbio sets out six familiar arguments against "the natural law," including the ones that there is no agreement on the meaning of nature, that no values can be derived from facts, and that today the principles of social construction are "unnatural." At the same time he asserts a belief in a morality superior to positive law, a morality whose origin or criterion he does not specify. (p. 190)

Marcel Prélôt contributes what is, in effect, a delayed book review of Robert Jacquin's *Taparelli*, a life of a nineteenth century Italian Jesuit said to have been "the principal Catholic theoretician of natural law" of his time. (p. 192) In the faint praise and severe criticism bestowed on Taparelli by Prélôt one may observe the sad condition of Catholic scholarship of the mid-nineteenth century after approximately a century of separation from a university environment.

The concluding essay by Charles Eisenmann boldly marches up to the problem of how the natural law, conceived of as a body of "extra and suprapositive juridical rules" relates to the practical tasks of legal writer, judge, and legislator. Rather curiously, Eisenmann takes a static view of the law to be described by the legal writer, so that in this cataloguing task of "pure description" of "facts," natural law has no part. (p. 218) In contrast, Eisenmann sees the legislator as having a creative role, and the judge as having one when the law has "gaps" or is "unclear." As a creator, the judge or legislator may consult the natural law. But as to what the natural law actually is that may thus provide the answers, Eisenmann preserves a discreet doubt. (p. 227)

JOHN T. NOONAN, JR.

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MORALITY AND MODERN WARFARE. Edited by William J. Nagle. Baltimore: Helicon Press, 1960. Pp. 168. \$3.95.

NUCLEAR WEAPONS: A CATHOLIC RESPONSE. Edited by Walter Stein. New York: Sheed and Ward, 1962. Pp. 151. \$3.50.

The dangers and possible consequences of nuclear weaponry have been discussed from many viewpoints, ranging from the careful rationality of Herman Kahn<sup>1</sup> to the sincere naïveté of Seymour Mehlman.<sup>2</sup> However, the major aspect of this entire problem, the moral question of nuclear warfare, has, until recently,

1. HERMAN KAHN, *ON THERMONUCLEAR WAR* (1960).

2. SEYMOUR MEHLMAN, *THE PEACE RACE* (1961). Professor Mehlman's idea is that by putting our "unused industrial capacity" to work we can produce an enormous amount of

been relatively untreated in print, and, we may conjecture, even in conversation and private thought. Now, in two books, one American and the other British, some Catholic thinkers have attempted to grapple with the essential moral problem of nuclear war. The American book, *Morality and Modern Warfare*, is a symposium edited by William J. Nagle and consists of nine articles and a bibliography, all by prominent American Catholics.<sup>3</sup> Four of the articles were originally published elsewhere and, with the five original contributions, represent a varied spectrum of ideas concerning the relation of modern warfare to morality. The articles range over political, technical, strategic, and legal questions, but aside from Professor Gordon C. Zahn, whose pacifist position seems repudiated by all of the other writers, there is a general core of agreement concerning the applicable principles of natural law: (1) A defensive war in a just cause is not inadmissible provided all other just means to avoid war have been attempted; (2) in this war the means used must be proportionate to the ends involved.

It is with this second principle that we are most concerned here. As applied to the modern facts of nuclear weapons, this principle has two corollaries. The first is that unlimited war for any purpose is immoral. Thus, as Pius XII put it, "Should the evil consequences of adopting this method of warfare ever become so extensive as to pass utterly beyond the control of man,<sup>4</sup> then indeed its use must be rejected as immoral. In that event it would no longer be a question of defense against injustice and necessary protection of legitimate possession, but of annihilation, pure and simple, of all life within the affected area. This is not lawful on any title." The second corollary is that it is not permissible to kill noncombatants directly. To appreciate this corollary we must consider briefly the history of the noncombatant. From the Middle Ages until World War I, the weapons of war had relatively little destructive power and could be aimed with great discrimination. Thus it made sense to assert that noncombatants should be spared in the legitimate effort to destroy combatants. With the development of long-range cannon and then of aerial bombardment, weapons achieved a destructive power and, more important, a lack of discrimination

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goods. With these goods we could carry on a vast foreign aid program in the underdeveloped countries. Since the Soviets also have a great stake in these nations they would have to at least partially match our expenditures from their much smaller resources. Therefore they would not be able any longer to keep up their expensive military machine and would have to negotiate an enforceable disarmament agreement with the U.S.

3. After the Introduction by William J. Nagle, the articles are "The Political Context," by James E. Dougherty; "Technology, Strategy and National Military Policy," by John K. Moriarty; "Morality and Security: The Forgotten Equation," by Thomas E. Murray; "Theology and Modern War," by John Courtney Murray, S.J.; "Morality of Nuclear Armament," by John R. Connery, S.J.; "The Hydrogen Bombing of Cities," by John C. Ford, S.J.; "Social Science and the Theology of War," by Gordon C. Zahn; and "Nuclear Warfare and the Law of Nations," by William V. O'Brien. There is a seventeen-page bibliography, "The Moral Problem of Modern Warfare," prepared by Noel J. Brown.

The articles by Fathers Ford and Connery were originally published in *Theology Digest*. The articles by Mr. Murray and Father Murray were originally addresses delivered at meetings of the Catholic Association for International Peace.

4. The only argument in Father Murray's otherwise excellent article which I find difficult to accept is his contention that H-bombs "do not 'escape from the control of man'; their blast and fire effects, and their atmosphere-contamination effects, have been fairly exactly measured." (p. 81)

completely new in history. Thus in a legitimate effort to destroy combatants many noncombatants might be injured. So long, however, as the intention was not to injure noncombatants and the injury was only the incidental effect of legitimate action, the use of modern weapons of war was not proscribed. Parallel to the increase in the destructiveness and lack of discrimination of weapons but becoming noticeable somewhat earlier, was the blurring of the distinction between combatant and noncombatant.<sup>5</sup> When wars ceased to be fought by groups of mercenaries or small, closely-knit national armies presenting one or at very most a few social classes, and began to be fought by large conscript armies maintaining not only psychological but economic ties with the home front, it became difficult to draw a distinction between the combatant who sighted the cannon and either the factory worker who manufactured it or the farmer who grew the army's food. Both of these developments reached their zenith in World War II, when noncombatants not only were injured in legitimate attacks, but also were the direct object of terror attacks.

The advent of nuclear weapons, it should be noted, has changed this picture drastically. First, although it might be argued that no drastic change in the methods of warfare was caused by the development of low kiloton weapons, the development of relatively light megaton weapons combined with virtually unstoppable missiles made a tremendous difference. These weapons could wreak havoc on a scale so much greater than the raids in World War II that they were not merely a simple extrapolation but a different thing entirely.<sup>6</sup>

A second development, however, which is too often ignored has also occurred: the development of these enormous destructive weapons may have conclusively broken the chain connecting strategic fighting forces with the home front. Thus, in a relatively short nuclear war it is very hard to argue that the civilian population can give either moral or material support to the military. When such wars are fought out of stockpiles by highly trained professional forces, the distinction between combatants and noncombatants returns again.

The problem of the noncombatant runs through the greater part of *Morality and Modern Warfare*. It is most evident, however, in the debate between Fathers John R. Connery and John C. Ford on the morality of hydrogen bombing of cities. On the surface it would appear difficult to call any war limited which involves the use of hydrogen weapons against an enemy's cities. Father Connery takes the view that under certain conditions one can do just this. He reaches this conclusion by granting (as indeed he must) that the loss of civilian life must be unavoidable and balanced by a proportionate good to the attacker (who of course must be the defender in a just war) and asserting that in some situations this is possible. Father Ford, however, points out that the enormous slaughter of completely innocent noncombatants in a hydrogen bomb attack upon a city is not only out of proportion to any possible gain but is so huge as to prevent the existence of the "intention" not to injure noncombatants.

Father Ford's point is treated at far greater length in the British work,

5. Probably the American Civil War was the first "total war" in this sense.

6. In World War II the total explosive weight dropped by allied airplanes upon Germany was approximately 2.2 megatons.

*Nuclear Weapons: A Catholic Response*. Published originally in Great Britain as *Nuclear Weapons and Christian Conscience*, it consists of six essays by five leading British Catholics, four of whom are philosophers.<sup>7</sup> These essays, rather than representing varied opinions or examining separate facets of the same problem, form a completely integrated moral argument for unilateral nuclear disarmament. In contradistinction to the much more pragmatic American work, the British thinkers avoid, so far as possible, the practical considerations examined in *Morality and Modern Warfare*. They do not argue over whether deterrence does or does not deter or over whether nonviolence can be of any effect against a modern totalitarian government. Nor are they interested in whether the possession of nuclear capabilities and even the waging of nuclear war may be a more or less practical expedient than unilateral nuclear disarmament. Their argument does not focus on the disadvantages of their own enslavement or of suffering enormous casualties in order to prevail, but rather on what they might be forced to do to avoid these eventualities. It is not being killed which they find inadmissible, but killing on such a huge scale. Thus their contention that the waging of modern nuclear war and hence the possession of nuclear weapons are immoral, and therefore inadmissible under any circumstances, whatever the consequences, applies to the United States as well as to Great Britain despite the great differences in the strategic situation between the two nations. Their argument can be broken down into four propositions.

1) The hydrogen bombing of enemy cities will result in such enormous and indiscriminate casualties that it is morally inadmissible under any circumstances.

2) No nuclear war could possibly be fought without hydrogen bombing these cities.

3) Since it is immoral to fight a nuclear war, it is immoral to threaten and to retain the capability to do so.

4) Since modern nuclear weapons exist for no purpose other than either fighting or threatening to fight a nuclear war, they are inadmissible and it is immoral to possess them.

Of these principles, the second is the one which is given least attention in the essays and which coincidentally is the most vulnerable. It is true that, say, five years ago a nuclear war would inevitably have resulted in the hydrogen bombing of cities and hence would have been morally inadmissible. But just as technology can make warfare immoral by vastly increasing the scope of its destructiveness, so technology can make it moral again by increasing the discrimination of weapons. Although unclassified figures have not yet been released, there seems to be no doubt that there has been a trend in more modern strategic American nuclear weapons toward reducing, not increasing, the size of the warhead. Moreover, as the basic ideas of counterforce strategy become more and more assimilated into strategic doctrine, it becomes more and more likely

7. Following a Foreword by T. D. Roberts, S.J., titular Archbishop of Sygdea, the articles are "Introductory: The Defence of the West," by Walter Stein; "War and Murder," by G. E. M. Anscombe; "Conscience and Deterrence," by R. A. Markus; "Conscience in Commission," by P. T. Geach; "The Witness of the Church," by Roger Smith; and "Prudence, Conscience and Faith," by Walter Stein.

that even a nuclear war can be fought morally. We may go back to Clausewitz for this insight. "War," as he put it, "is a continuation of diplomacy by other means." The purpose of war is not to destroy the enemy but to reach a just settlement. The so-called "finite deterrence" strategy which threatens massive destruction of enemy cities and slaughter of noncombatants in the event of an attack upon the United States is, by this token, clearly immoral and cannot be made moral by a possibly lesser chance of having to be invoked. A counterforce strategy aimed solely at combatants and their weapons, however, is in the tradition of limited warfare with the greatest possible sparing of the innocent. We note beginnings of this type of strategy in Defense Secretary McNamara's "save the cities" policy.<sup>8</sup> This, however, goes only half the way and very likely is still immoral, since the destruction of vast numbers of noncombatants even in retaliation for similar damage in the U. S. would still have to be accounted immoral.

On the other hand, the reservation of the "right" to H-bomb enemy cities in retaliation is probably not necessary for the waging of nuclear war. Thinkers such as Herman Kahn have already concluded that the destruction of enemy cities is under any circumstances immoral, and that the discriminating use of force is still possible. One might then ask, how can a war successfully be waged if the enemy is free to destroy American cities and the United States is not free to destroy theirs? We must here remember that, as Pius XII put it, "the solid probability of success" is relevant in deciding whether a just war may be fought. We also note, however, that success does not mean the annihilation of the enemy but merely the application of sufficient limited force to force him to agree to a just peace. It is therefore quite important that the vast majority of Soviet forces are located away from cities where they might in fact be destroyed in counterforce attacks. Moreover, the larger part of the technology required to produce further nuclear weapons is also located far from concentrated districts of population, as is the greater part of the Soviets', or of any nation's, transportation network.<sup>9</sup> Thus it would seem, at least at present, that a just war might morally be fought with counterforce tactics. That is not to say that such a war would be without vast numbers of casualties,<sup>10</sup> but rather that in such a war the means used might still be proportionate to the ends.

One might of course argue that although a counterforce war might be morally fought today, simple enemy action could make this impossible. The Soviets

8. Secretary McNamara has said: "In any case, our large reserve of protected firepower would give an enemy an incentive to avoid our cities and to stop a war. Our new policy gives us the flexibility to choose among several operational plans, but does not require that we make any advance commitment with respect to doctrine or targets. We shall be committed only to a system that gives us the ability to use our forces in a controlled and deliberate way, so as best to pursue the interests of the United States, our Allies, and the Rest of the Free World." From a speech by Honorable Robert S. McNamara before the Fellows of the American Bar Foundation Dinner, Edgewater Beach Hotel, Chicago, Illinois, Saturday, February 17, 1962, News Release No. 239-62, Department of Defense, Office of Public Affairs.

9. Nor is fallout an enormous problem. First of all, on all but hardened missile sites air bursts can be used which produce negligible local fallout. Secondly, as "cleaner" weapons are developed, even fallout from ground bursts may be held to permissible limits.

10. Estimates of the total casualties in World War II run around 30 million deaths.

might follow the example of Genghis Khan, who was able to capture many Chinese cities by the simple expedient of forcing huge numbers of captives to march before his armies to the city gates, secure in the knowledge that the peaceful Chinese would not slaughter so many innocent people. Thus the Soviets might build gaseous diffusion plants within their cities and station their missile bases so close to metropolitan areas that it would be impossible to destroy one without destroying the other. There are very good reasons why the Soviet Union would not, however, choose these tactics, even though they might guarantee that we could not morally fight against them. First of all they are dangerous. The closer nuclear weapons' bases are to cities, the more likely some type of accident or sabotage can take place and the greater the damage resulting from such an event. Moreover, holding their own cities, in a sense, as hostage might for various other reasons not appeal to the leaders of the Soviet Union. At least we can say that we would have to weigh their adoption of such tactics before renouncing nuclear war against military bases as immoral. Moreover, even then, the development of missiles with extremely small warheads and precise terminal guidance might make even the destruction of gaseous diffusion plants and military bases within cities a moral possibility. Although it is fair to say that such weapons are not technically possible today, they may very well be by the time the Soviet Union or any other nation deliberately mixes its military with its nonmilitary objectives, and until that time it would seem that the chain of argument in *Nuclear Weapons: A Catholic Response* is missing an essential link.

The third proposition put forth by *Nuclear Weapons: A Catholic Response* also deserves careful scrutiny even though it is examined at some length there. If it were impossible morally to fight a nuclear war, a very strong argument might be made that it would then be immoral to possess deliberately the means of doing so and a fortiori sincerely to threaten the use of these means. On the other hand, this is not so clear as might appear, since it is possible that under certain circumstances one might incur a risk of an event occurring where he might not actually be permitted to bring about the eventuality directly. This might conceivably be so if the risk of harm were to be proportionate to the end legitimately desired even though the harm, if certain, would not be.

The basic moral problem of deterrence has received far too little attention. A careful examination under the established principles of the natural law needs still to be made. Both *Morality and Modern Warfare* and *Nuclear Weapons: A Catholic Response* can be said to have helped in the beginning of this process.

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