

BOOK REVIEWS

LEVIATHAN AND NATURAL LAW. By F. Lyman Windolph. Princeton Univ. Press, Princeton, N. J., 1951. Pp. 147. \$2.50.

Traditional natural law doctrines involve essentially a theory of positive law based on natural law. The author of "Leviathan and Natural Law" proposes a "theory of natural law on the basis of positivism."¹ He is well aware of the inadequacies of a purely positivist philosophy of law and keenly conscious of the claims of the natural law school. Nevertheless he starts with a strictly positivist analysis of legal phenomena and thus continues the positivist divorce between morality and politics.² Assuming that the "primary fact in politics is the existence of the government,"³ he asks, catechism-like, "Who made the government?" and answers "the sovereign"—that "individual or group (however large or small) possessing at a given time and in a given state the absolute and unlimited power to kill and confiscate."⁴ Morality and politics, being "independent realms,"⁵ it is "bad politics to make righteousness the test of legality."⁶ The sovereign speaks through Law. However unrighteous the sovereign's commands, his courts must remain deaf to appeals to the corrective function of natural or moral law. Thus, the "essential characteristic of the political sovereign is the power to confiscate and condemn without a hearing."⁷ If the American "sovereign" abolished today the Fifth and Fourteenth Amendments by the same process with which yesterday it enacted them, the "threatened citizen" could look "nowhere for protection,"⁸ tomorrow.

Upon these familiar tenets of positivism, Mr. Windolph builds his theory of natural law. The question is whether he can do so after divorcing *a vinculo*, morality and politics. Has he not, like Descartes, "thrown out the baby with the bath water"? He condemns as "monstrous and inhuman" the "error of Thrasymachus" which, rejecting "all faith in a moral universe," asserts "justice is whatever the sovereign commands."⁹ Still, "we need not argue that politics is a branch of ethics."¹⁰ The implication of inconsistency is avoided however, by the suggestion that the subject, threatened by the unrighteous sovereign, may, and indeed sometimes must, rebel. Rebellion successful, is revolution. The sovereign's will may be

1. Foreword, p. ix.

2. P. 20.

3. P. 3.

4. Pp. 2, 3.

5. P. 20.

6. P. 6.

7. P. 37.

8. P. 8.

9. P. 26.

10. P. 118.

changed or the sovereign himself may be forcibly overthrown.¹¹ Prompted by the dictates of morality, revolution restores righteousness. There is here no confusion between morality and politics, because the "right of revolution" is moral, not political.¹² The conditions of its exercise are not among the *data* of politics.

This is the substance of the theory as the present reviewer understands it. It rests upon the validity of the author's assumptions. These will not go without challenge. It might be said that the existence of man rather than the "existence of the government" is the "primary fact in politics" and that before Mr. Windolph's "Who made the government?" comes a more fundamental "Who made Man?" The answer gives politics its ethical prolegomena. The American Declaration of Independence offered such an answer. Men are "created" by a divine "Creator." They are "endowed by their Creator" with certain rights. These rights are "unalienable" because man, as creature, cannot discharge his duties to his Creator without them. To make these rights "secure" men "institute" governments. They are still men when they do so, still the creatures of a divine Creator. The acts of men in administering government thus established, are none the less human actions. The moral law, therefore, does not go into a state of suspended animation meanwhile. Indeed, as the author says,¹³ "moral considerations are completely relevant whenever human actions are involved." If so, why divorce politics and morality? Why suggest that the correction of the sovereign's unrighteousness is a function solely of revolution?

Some will place Mr. Windolph's theory against the facts of recent history. The Nazi "sovereign" of the Third Reich, 1933-1945, like Kreon of old,¹⁴ did no "legal wrong" when, for instance, the genocide of the Jewish people was attempted through "law." In that instance the sovereign's commands were clear, certain and consistent. The victims of Belsen and Buchenwald could not, under the theory proposed, logically assert in Nazi courts that the laws against them were "not laws, but perversions of law." The sovereign had abolished the guarantees of the Weimar Constitution, and the "threatened citizen" never had the chance to recover righteousness through revolution. How then, could the "individual" or "group" which undoubtedly possessed the "absolute and unlimited power to kill and confiscate" in Hitler's Germany, be called to account for "crimes against humanity" in the Nuremberg Tribunal of 1945 which proceeded as a "court of law"? Would not the defendants' acts, under Mr. Windolph's positivist natural law be guilty, not of "crimes," but merely of "sins"?

Cardinal Newman once said that word "God" constituted a theology in itself. The divorce of morality from politics constitutes a Jurisprudence in itself. So also does the attribution of the "unalienable" character of

11. Pp. 15, 32.

12. P. 30.

13. P. 119.

14. P. 26.

human rights to man's creation by God. The theory of "natural law on positivist bases" may square with the former; it is far apart from the latter. There is little support for the Positivist in the natural law theory of the Declaration of Independence which but restates a tradition running through Blackstone, Mansfield, Coke, Fortescue, and Bracton, back to the very beginnings of the common law and beyond. It might be noted too, that the "forgotten Amendment" to the Constitution—the Ninth—embodies the natural law philosophy of the Declaration. If "the enumeration of certain rights" in the Constitution, "shall not be construed to deny or disparage others retained by the people," these retained rights must exist in virtue of *some other law*, superior to the Constitution. A *right* is the product of *law*. The paradox of authentic and original American Constitutional Law is the self-limitation of the American "sovereign" by moral or natural law. The Constitution of the United States does not embody Jean Bodin's theory of sovereignty. It does not divorce morality and politics.

That a lawyer of Mr. Windolph's acknowledged eminence felt called upon to try to find a place for "natural law" even in a positivist "frame of reference" proves that the current revival of interest in natural law doctrines is not merely academic. After generations of contemptuous neglect resulting in the amoral legalism of Holmes which is discussed in one of the best chapters of "Leviathan and Natural Law,"¹⁵ the traditional doctrines again command attention. As Etienne Gilson has said, "The natural law always buries its undertakers."¹⁶ The old doctrines are indeed treated with candor and moderation by Mr. Windolph. We may doubt, however, that Aquinas may be cited in favor of the author's positivist view of the sovereign's absolutism,¹⁷ especially after Aquinas' unmistakable declaration that "if, in any point a human law departs from the law of nature, it is no longer a law but a perversion of law,"¹⁸ an assertion which Mr. Windolph thinks "results in confusion."¹⁹ Again, the question whether moral or natural law is normative of man-made law is not helped by repeating the positivist question-begging tautology—"there can be no legal rights against the authority that makes the law upon which the right depends."²⁰ Mr. Windolph's strictures on Blackstone's definition of municipal law,²¹ likewise fail to note that the concluding words "commanding what is right and prohibiting what is wrong" are to be read with Blackstone's previous acceptance of the natural law. As Hammond says,²² "that the rights and wrongs of municipal law must necessarily be consistent with the law of nature is merely a logical corollary to the doctrine of this section." Of course, Blackstone's definition will not meet with the approval of those who

15. Ch. 8.

16. GILSON, *THE UNITY OF PHILOSOPHICAL EXPERIENCE* 306 (1937).

17. Foreword, p. viii.

18. *Summa Theologica*, Ia, IIae, qu. 95 art. 2.

19. Text, p. 131, Notes and Commentary, note to Text, p. 29.

20. Text, p. 23.

21. 1 *BL. COMM.* 125.

22. *Ibid.*, p. 125.

divorce morality and politics, natural law and positive law. But if Mr. Windolph agrees that "legality is not the test of righteousness,"²³ and that there is no such principle as that "the state can do no moral wrong,"²⁴ it would seem that logically his "natural law" should have a wider and a deeper function than that which he apparently allows it.

"Leviathan and Natural Law" is an important and thought-provoking book. It is noteworthy that its author, unlike others,²⁵ who appear alarmed by the "theological implications" they think acceptance of natural law doctrines involves, is not frightened by such specters. Indeed, all of us, whatever our degree of agreement or disagreement with Mr. Windolph's interesting thesis, will sincerely applaud the sentences with which he concludes:

" . . . government of the people means a government ordained and established by a democratic sovereign. Government by the people means a government either purely democratic or republican in form. Government for the people means a government conducted in accordance with the developing principles of natural justice. If the last is an illusion, or comes generally to be regarded as an illusion, the first and second will surely perish from the earth."²⁶

The question remains, however, whether "natural law" as Mr. Windolph conceives it is strong enough to prevent the catastrophe.

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SEX AND THE LAW. By Morris Ploscowe. Prentice-Hall, N. Y., 1951. Pp. 310. \$3.95.

Judge Ploscowe brings between covers a much needed orderly survey and commentary on American laws of marriage, annulment, divorce, illegitimacy and sex crimes. What are his findings and what meaning do they have in terms of present day American democratic society? In succeeding chapters there is reiterated in sharp relief the inescapable fact that legal sanctions alone against human instinctual drives, sexual or aggressive, meet neither the needs of the individual nor insure the stability of the social group. This fact has a sobering cogency in our time of social ferment, marked by a moral shift and lessened repression, by community reaction to an awareness of diminishing strength of the group conscience, heretofore reinforced by supernatural and authoritarian sanctions, and by a turn to

23. Text, p. 26.

24. *Id.*, p. 24.

25. Howe, *The Positivism of Mr. Justice Holmes*, 64 Harv. L. Rev. 529, 530 (1951). Gerhart, *The Doctrine of Natural Law*, 26 N.Y.U.L. Rev. 76, 119, 118 (1951).

26. P. 125.

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and clamor for more government regulation and control of social life, more secular law, more severe punishments and more policemen. This trend has found expression in a growing public reactive anxiety and awareness of what is said to be an increasing incidence of delinquency and crime associated with sexuality, much of which has emerged in disguised form, in fact and in fantasy. In both the incidence is high, if in the former we are to accept Kinsey's statistics on licit and illicit male sexuality in America, and in the latter if we ponder the deluge of exhibitionism, violence, sadism, the masquerade of sexual perversity in whole pages of gossip columns, in modern mass advertisements, of Hollywood, show business, comic books and crime fiction which dominate the cultural scene.

In the face of Judge Ploscowe's array of facts it would be hard to question the wisdom of his counsels for legislative change. Thus if the institution of marriage is to be less a legitimization of copulation and more truly an enhancement of individual growth and social maturity, many legal and administrative practices will have to be changed. Marriage is too easy, especially for the immature, the physically and mentally unfit. The divorce rate is in good measure the result of legal indifference to unwise marriages. The chapter on divorce is an engaging commentary on the folklore of self-deception. In point is the basic premise of the law that an action in divorce must be a contest; that it requires a punishment-for-sin, and reward-for-virtue adjudication. Action for divorce should be on a grown-up level of negotiation. The law requires it to be a ritualistic connivance of perjury and fantasy in which the important psychological and social issues are unwelcome. Divorce courts ignore the disciplines that have been dealing with domestic problems for years: family case work, psychiatry, marriage counseling, probation, etc. Ploscowe recommends the use of such disciplines and only after experts in such fields despair and after a probationary period of separation should a divorce be granted.

The common law of illegitimacy is discriminatory and barbaric and it cannot prevail if a democratic system of law is to have real meaning. Only one state (Arizona) has made a complete break with the common law and has subscribed to the rule that every child of natural parents is legitimate and entitled to equality before the law. New legislation is required in regard to the evidentiary aspects of paternity adjudications. "The Lord Mansfield Rule should be relegated to the limbo of forgotten law." Ploscowe speaks reassuringly that judges and juries know how babies are made, but this rule is a prissy injunction against the admission of testimony with respect to when and to access or non access, before the judgment of legitimacy is rendered. The time is at hand when the use of established scientific methods should no longer be left to bias or caprice. For example, legislative amendment to evidentiary law is needed in respect to the use and acceptance of blood grouping tests which are unassailable as a method of paternity determination by exclusion.

The chapter on rape erects a sound frame of reference for the assessment of forced sexual relations. Judge Ploscowe points out that intuition

of courts and juries exerts a larger influence in rape prosecutions than the letter of the law; only some 20% of statutory cases being convicted. But social policy with respect to rape cannot be left to chance local circumstance or to the individual character problems of the prosecutor, judge or juror. The modern law of rape has gone far beyond the reach of common law concepts limiting it to the brutal violation of the person and to the abnormality inherent in sex play with children. These should be the limiting basis of modern law of rape. Under present rules of law too many boys under 21 are branded as felons for having intercourse with girls 16 or 17, who may or may not be accomplished prostitutes. *Vis haud ingrata*. Simple fornication is not rape.

In the chapter on homosexuality, sodomy and crimes against nature the author is on solid ground. In no area of sexual life is there a better expression of the fact that pious legislation does not change human behavior. The law dealing with sexual deviations has the character of a barbaric exorcism not unlike flagellation for the expulsion of demons. It has little utility beyond a permissive orgy of sadistic sacrifice of scapegoats and the invitation to mischief, including blackmail. Modern society should be ready to accept the fact that most fixed deviations of sexual expressions are matters of psychopathology and benign from a social welfare standpoint; that changes in behavior can be achieved only through the influence of religion, psychiatry, social work and education. To be sure, children and minors must be protected against sexual advances, either homosexual or heterosexual, but a great deal more will be achieved in the matter if we are mindful that the deterrent effect of law is less than implied and that the law only waits for the commission of the offense and acts afterwards. Premature sex experience of the minor is *per se* harmful, but this is not the central issue after the fact; much if not more harm can be added by the morbid excitement of both law and those adults immediately involved. Hence the handling of the case more often compounds the child's problem of psychic mastery and recovery.

Judge Ploscowe's analysis of the psychopathic sex offender laws should be absorbed by every legislator. The single aim of such legislation is the isolation of the potential sex killer, which has not been met before nor will it be by the recent sex offender enactments. Such laws have been promulgated more as wish fulfillments; worse, they place upon the shoulders of the psychiatrists the entire task of discrimination, prediction and judgment. Worse still, such laws provide no implementation. They do not underwrite the more expensive, sober, tedious business of scientific investigation, research and treatment, nor provide facilities and inducements to attract inquiring minds to the problem.

In the introduction of this book Roscoe Pound makes the observation that in the United States there is no well organized provision for creative law making, no machinery for the preparation of legislation imperatively called for in Judge Ploscowe's monograph. Pound advises that, "There is need of permanent bodies, with security of tenure, adequate facilities,

competent investigators, opportunities for dealing with questions as wholes rather than in detached local fragments and scientific spirit and method."

Judge Ploscowe's book should be read by every lawyer, judge, legislator, psychiatrist, social worker and educator. It is a first step and guide to a more rational and realistic approach to the legal problems of group security and control of sexual life.

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THE *CY PRES* DOCTRINE IN THE UNITED STATES. By Edith L. Fisch. Matthew Bender & Co., Inc., Albany, N. Y., 1950. Pp. 275. \$10.00.

The years since the turn of the century have been stirring ones for charitable trusts in this country, and have seen enormous growth in their size and comprehension. A combination of powerful forces, increased wealth, increased taxation, and a wider vision of this country's needs, among them, have led to this growth. Size has been accompanied by her inevitable hand maiden, criticism.¹ It is not enough, say the critics, that charitable trusts should exist; more, they must exist for useful purposes.

One tool to help render charitable trusts useful is the ancient *cy pres* doctrine, defined by Miss Fisch as "a saving device applied to charitable trusts so that when the precise intention of the settlor cannot be carried out his intention can be carried out as nearly as possible." Obscurely born in antiquity, it is available to modern courts to rescue or remodel charitable trusts which must otherwise fail, and consequently ought to form a powerful weapon in any equity court's armory. It has remained for Miss Fisch to give us a full dress treatment of it in all its ramifications in the United States.

She has done an excellent job. Beginning *ab ovo*, she has traced the history of the doctrine abroad and in this country up to the present, recording the obstacles to its acceptance and classifying each state alphabetically as to acceptance, with very complete citations for all twenty-nine which have adopted it. Courts in five states have rejected it; in some others statutes have specifically authorized its use; and in nine states neither courts nor legislatures appear to have decided the matter.

Having traced the "reception" of the doctrine, Miss Fisch proceeds to break down the requirements for its application.² In her belief, an earlier reluctance to resort to this saving device except where the terms of the trust were literally impossible, is giving way to a willingness to apply it whenever doing so will best serve the essential purposes of the settlor and of society.³ The author leaves you in no doubt whatever that her sym-

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1. 198 HARPER'S 28 (March 1949); N.Y. Times Magazine, April 3, 1949, pp. 16-17.

2. Chap. 5.

3. P. 143.

pathies lie with greater liberality; nay, that she believes the modern trend vital to justify the favors shown by legislatures and the public upon charitable trusts.⁴

But with all this benevolence on the parts of courts and legislatures, the fact remains that many groups are suspicious of the way charitable trusts are in fact being administered. The CIO and the Textile Workers Union of America, resentful of Mr. Royal Little's manipulation of Textron and its subsidiaries, wrote an imposing brief strongly raking abuses of a favored position by charitable trusts used purely as a cloak for business manipulations; not to discount the force of their arguments, one must still remember that what really worried them was the chronic unemployment of the New England textile industry. Others, too, from different standpoints, have pointed out the apathy, dormancy, and lack of point in the administration of such trusts.⁵

Certainly Miss Fisch is right in pointing out that a prime weakness of the law as it stands is that only the trustees or the Attorney General of the state where the trust is domiciled have standing to petition the courts for application of the doctrine.⁶ Sleepy and complacent (the CIO would add, devious or wicked) trustees are unlikely to do so; and a busy Attorney General is unlikely ever to know what's going on in the charitable trusts which are ostensibly under his supervision. In 1943 New Hampshire, whose citizens will surely not resent my saying that it is hardly a "welfare state," enacted a statute requiring registration of all public trusts together with annual reports, and authorizing the Attorney General to investigate suspiciously dormant or dubious charitable funds. It is too early to pass final judgment on the workings of this statute, but Miss Fisch reports that it waked up the trusts and set them in useful motion. Very likely similar statutes are part of the wave of the future.

However there remain some crucial questions unanswered; they may be unanswerable. For instance, when does it become "impossible" to carry out the purposes of a given trust? If the intended charity is illegal or ceases to exist, the answer is easy; but closer cases are not so clear, and need not be left to the imagination. Suppose in the nineteenth century an Hibernian settlor leaves a New England university of some repute (even in Chicagoland) a sum of money to provide scholarships for Massachusetts men named O'Toolihan, and suppose that the only O'Toolihan present is a very poor student and not expected to survive the next exams; can the income be turned over to a top-notch Californian named Murphy—or Mendoza? Or again, suppose vast funds left to this same university for Greek and Latin prizes, and only a very few persons now take the classics; can the university arrange to divert these funds to "mere" physicists and mathematicians who are worthy and in need? These examples are not hypothetical; rather, they typify a current and very real problem. The difficulty

4. Preface, v.

5. 198 HARPER'S 28 (March 1949); LOOK MAG., Feb. 19, 1952.

6. P. 202.

with them is not that performance according to the terms of the trust is "impossible" but that it is undesirable. I venture to state that in many courts so long as there is one Boston O'Toollihan he will get his scholarship, however undeserving he may be. Those courts may, after all, be right in the end, for if courts begin to interfere in cases which fall short of "impossibility" it will become exceedingly hard to draw a line for them to stop at, and conceivably private charitable trusts as we know them might end. Still, one can't help a wistful wish that Murphy could get the scholarship.

If Miss Fisch has not been able to answer this, and some other questions, that is not to say that she has not written a full, scholarly, and useful book, which is both particular where it needs to be and general enough throughout to show us the wider implications of the developing doctrine of cy pres.

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