

shares his sympathies with the truly "rigged" and downtrodden and yet wonders how many doubtful characters got off on cleverly detected technicalities. A reviewer, of course, should soft-pedal judgment on the ethics of showmanship of the subjects of biographies, leaving such judgment to the curious reader; in the case of these particular volumes, however, subject matter and over-all writing effect are sometimes inextricably tangled and to separate moral from esthetic appraisal is often difficult.

Under reasons for reading biography and qualities a biography should have, the writing of Brown, Wallace, Noble, and Averbuch would qualify on many counts: human interest, drama, anecdotes, aliveness, and so on. There are even lessons to be drawn, though the codes are modern codes in two of the books, uncomfortable at times. The writing generally is competent or better, informal, journalistic, non-literary. This is modern writing about modern people for modern readers. The great legal biographies—the studies of Marshall and Holmes that every lawyer knows—are not going to be displaced by the new brisk reporting jobs. There is room on the shelf for the traditional and the new, a time for one and a time for the other. On most counts these three volumes acquit themselves adequately or better. They most certainly are not dull reading.

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The Public Philosophy. By Walter Lippmann. Boston: Little, Brown & Co., 1955. Pp. 189. \$3.50.

This book is indisputably a tract for the times. It states a disorder to be found at the very center of free government, and it proposes a remedy for the restoration of order. This disorder is not a superficial maladjustment nor a fleeting muddle, it goes to the heart of the matter, and the author identifies it with a process he calls "The Decline of the West." To arrest these distempers and to remove the causes of present discontents, Mr. Lippmann, recognizing that tinkering with, or repairs to, the machinery of government are not enough, proposes a political philosophy which he calls "The Public Philosophy." Hence the form of the argument requires that the philosophy be commensurate with and relevant to the disorder, while the test of the argument lies in the equivalence between the discord described and the vigor and cogency of the proposed restorative. Nothing less than "thoughts that breathe and words that burn" can reverse "The Decline of the West."

The fracture in the institutions of the West that brought on its present perils appeared during the First World War, and was revealed in what the author calls, "The Paralysis of Governments."<sup>1</sup> This is nothing less than an incapacity in foreign affairs, where government is unable to "wage war for

<sup>1</sup> P. 13.

rational ends" or "make a peace which would be observed or could be enforced,"<sup>2</sup> and an internal "functional derangement of the relationship between the mass of the people and the government."<sup>3</sup> Since these symptoms, already observable in the period of the First World War, have become accentuated and aggravated in the Second World War and the semi-war and pretense of peace following it, they give notice of some continuing and deepening political dissonance.

Democracies, Mr. Lippmann alleges, are immoderate in the conduct of war; they perversely refuse to prepare in the face of danger, yet once embarked upon the unprevented war they become so sedulously occupied with gaining victory that they as perversely refuse to think upon a program of peace that is founded upon the realities of international politics and principles related thereto. At first they substitute vain auto-suggestions for a program of peace, as after 1918 and 1945; later, when faced with the contradictions between their professed ideals and the actual decisions compelled by events, they simply improvise uneasily and without principles. The cause of this incoherency arises in part from the wartime relationship between government and people. Governments, in order to command the sacrifices necessary for war, present the enemy in the image of "evil incarnate, as absolute and congenital wickedness."<sup>4</sup> This creates a mood antithetical to peace negotiations. Moreover, the exertions needed for victory are so strenuous that not only must the danger be made imminent but the fruits of victory must be pictured in the idiom of a majestic vision to be entered upon immediately. Hence the disillusion and maladroitness of the democratic progress through the cycle of war and peace; the lethargy of pre-war peace is transformed to an intemperate war fury; while noble ideals of post-war peace are presented as too immediately realizable.

From this scene of "too little too late" and "too much too soon" in the conduct of war and foreign policy, Mr. Lippmann turns to consider "The Derangement of Powers"<sup>5</sup> between the governors and the governed. A distinction is made between "*The People*"<sup>6</sup> defined "as a community of the entire living population, with their predecessors and successors,"<sup>7</sup> and the people as voters. The author warns that the people "as the corporate nation"<sup>8</sup> and the people as an electoral body are not identical. This most critical distinction within the whole concept of democracy, redolent with political implications, might well have received extended treatment. In a sense it is the fundamental problem of the philosophy and mechanics of representative government. This is the

<sup>2</sup> Ibid.

<sup>3</sup> P. 14.

<sup>5</sup> Chap. III.

<sup>4</sup> P. 21.

<sup>6</sup> Italics in original.

<sup>7</sup> P. 32. Compare Edmund Burke's description of Society in "Reflections on the French Revolution."

<sup>8</sup> P. 33.

principal topic of this section of the book; this is the central concern of practical democracy.

The people, having acquired the power of governance, are, in Mr. Lippmann's opinion, now incapable of exercising it. "They can elect the government. They can remove it. They can approve or disapprove its performance. But they cannot administer the government."<sup>9</sup> In short, they can only give or withhold consent to being governed. But mass opinion, although unable to exercise the power of government, does dominate the government, and this leads to "a morbid derangement of the true functions of power."<sup>10</sup> The inability of "the people" to govern, the author asserts, arises not from the mechanism of representation but from an inability to discriminate the public interest. The "public interest may be presumed to be what men would choose if they saw clearly, thought rationally, acted disinterestedly and benevolently."<sup>11</sup> But can public policy ever be quite so detached from the subjectivities of communal living? Do not these rational men seeking the public interest possess a family resemblance to the eighteenth century law-of-nature political man seeking liberty in abstract principles? Public policy, in fact, as Mr. Lippmann recognizes, results from a balancing of choices, and the vulnerability of popular choices is that "the pressure of the electorate is normally for the soft side."<sup>12</sup>

Mr. Lippmann finds the essential derangement in the upset of the proper balance between the representative part and the executive. The representative part should make proposals of its own, veto proposals of the executive; in short, perform the function of consent to governance. But now this is reversed, for the executive rests on "a total dependence upon the assemblies and the mass electorate" while the assemblies or mass electorates having "acquired the monopoly of effective powers"<sup>13</sup> cannot, by their very nature, govern. Moreover, the executive has lost the imponderable "divinity that doth hedge a king" influence, so not only is it too enfeebled to initiate government but it is too undignified to compel a respectful awe. Hence an excess of haphazard political action accompanies a paralysis of government.

A distinction in the process of constitutional government based upon the difference between the political and the legal functions, instead of between the executive and representative parts, might have pointed more directly to "The Public Philosophy" remedy suggested in the second part of the book. The problem of controlling the power of government through law is not essentially altered by the substitution in modern times of political control of the executive for the medieval method of surrounding political power with legal frontiers. The medieval jurists recognized that government comprised two elements: a political and a legal. While they knew that political power could not be checked

<sup>9</sup> P. 14.

<sup>10</sup> P. 15.

<sup>11</sup> P. 42.

<sup>12</sup> P. 46.

<sup>13</sup> P. 57.

by law, they possessed the acuteness to provide a constitutional means for controlling power by surrounding it with legal limitations. Thus the conflict between law and politics took place on the terminal frontiers between them. Modern constitutional government must be exercised politically within its institutions through representative devices, and legally (or constitutionally) through the delimitations of the area of authority of the several governing bodies. A public philosophy designed to restore order to constitutional government must, therefore, suggest a system of public law institutions of limited legal competences through which the political power operates. Unless such a scheme of legal limitations so refines the actions of government that various intermediate authorities intercept the direct popular will and immediate political action, we are left in the hapless condition of beseeching assemblies and executives alike to be reasonable. But, as Mr. Lippmann points out, an assembly in the circumstances of government today cannot be reasonable; and a fortiori neither can the executive. This is the difference between popular and republican forms of government, and the crisis today arises somewhat from the fact that representative assemblies have become like popular assemblies. Nor is this only a current problem; it troubled Madison in 1787.<sup>14</sup>

The weakness of free government has provoked what Mr. Lippmann calls the "totalitarian counterrevolution." Significantly, "The adversaries of Liberal Democracy"<sup>15</sup> are types of direct and unrepresentative government: Jacobinism and Leninism—the rule of the many that is inevitably the rule of a self-appointed few, and the rule of the few, acknowledged and avowed, over the many. To meet the internal weakness of democracy and to overcome its alien enemies, Mr. Lippmann proposes in the second part of his book "The Public Philosophy."

Although there are many statements of public philosophy, the author declares the "fundamental principle common to all of them" to be Cicero's assertion that law is the bond of civil society. He specifies this to mean, "that all men, governors and the governed, are always under, are never above, laws; that these laws can be developed and refined by rational discussion, and that the highest laws are those upon which all rational men of good will, when fully informed, will tend to agree."<sup>16</sup> This, of course, is natural law, and Mr. Lippmann so affirms.<sup>17</sup> And natural law is not something to be shunned; it is not politically leprous. But the concept requires some specificity if it is to avoid the taint of speciousness. The schools of natural law are numerous; it has been professed to support the status quo (notably in the seventeenth century), as well as to justify revolution (notably in the eighteenth century). These protean shapes do not deny the existence of a generic archetype; but when we rely upon the idea of natural law to accomplish a purpose in political society, whether

<sup>14</sup> The Federalist No. X.

<sup>16</sup> P. 160.

<sup>15</sup> Chap. VII.

<sup>17</sup> P. 101.

that be of stability or of renovation, it must be shown to have a contingent fittingness.

Natural law, in the traditional eighteenth century sense accepted in this book, presented two stark institutions over and against each other: the State and the People. It showed no hospitality toward intermediate institutions; it found no place in its contractual system for the corporate associations that offered a horizontal resistance to the pyramidal thrust of the State. It might well be asked whether the derangement of powers was not implicit in the democratic natural law of the eighteenth century. Assuming that natural law, in its most generic form, speaks to our condition, yet only its institutional correlations can contend with our situation. Reference to the stoic cosmopolitan administration of Alexander's empire,<sup>18</sup> which was topped with divinity, and to the Roman lawyers<sup>19</sup> is not enough to make the public philosophy intelligible in terms of the present crisis. This will not luminously dispel what Mr. Lippmann graphically calls "The Eclipse of the Public Philosophy."<sup>20</sup>

Examples of the public philosophy are ventured in a chapter entitled, "The Renewal of the Public Philosophy."<sup>21</sup> The first refers to the theory of property, and the inconsistency to be found in Blackstone between his assertion of the Roman dominium of sole and despotic control, and the social derivation of title and rights. Mr. Lippmann suggests that the social theory of property conforms to the public philosophy.<sup>22</sup> This appears to be somewhat repugnant to the natural law theories of property expressed by Locke, Pufendorf and Rousseau. But theories of property do not touch the central issue of the derangement of power. A more pertinent inconsistency in Blackstone might produce fruitful reflection, namely that between the solemn declaration of government limited by natural law with the equally emphatic, if less solemn, statement of unlimited parliamentary supremacy.

Another example selected to elucidate the public philosophy is the right of freedom of speech.<sup>23</sup> Socrates, Milton, and J. S. Mill are all vouched for the usual warranties. "The borderline," Mr. Lippmann declares, "between sedition and radical reform is between the denial and the acceptance . . . of the public philosophy; that we live in a rational order in which by sincere inquiry and rational debate we can distinguish the true and the false, the right and the wrong."<sup>24</sup> As the statement of a principle this is excellent, but as an elucidation of the public philosophy it falters. For the purpose surely of the public philosophy is to create such a rational order. Unless the public philosophy can create a political habitation it cannot be more than a spirit afloat. Formalism as a method for analysis, as an instrument for making distinctions, as a means for

<sup>18</sup> Pp. 105-107.

<sup>19</sup> Pp. 107-109.

<sup>20</sup> Chap. VIII.

<sup>21</sup> Chap. IX.

<sup>22</sup> P. 122.

<sup>23</sup> Pp. 124-34.

<sup>24</sup> P. 132.

precision of terms contributes to clarity and gives *ordonnance* to a scheme of thought. But formalism, lacking in embodiment, cannot be a solution to concrete problems. Formalism is the deadly virus affecting this exposition of the public philosophy. Even a section entitled, "Constitutionalism Made Concrete"<sup>25</sup> repeats again the idea that the "first principle of a civilized state is that power is legitimate only when it is under contract."<sup>26</sup> This requires an institutional clarification bottomed upon much comparative constitutional history and law before it can be usable for present purposes.

The concept of natural law unavoidably raises the tension between law and morals, which is discussed under the sign of "The Two Realms."<sup>27</sup> References are made to this tension under various aspects: existence and essence, the law and the prophets, balance of powers, church and state. We are warned that the "root of the error is the confusion of the two realms,"<sup>28</sup> and told that reconciliation rests upon the use of "the technique of the balance of power."<sup>29</sup> When it "is used as an instrument of aggression and defense" among rivals it is bad; but when it "intends to regulate all the rivalries," and "is used as the structural principle of public order in the good society" it can claim moral sanction.<sup>30</sup>

Since the public philosophy as here presented is more of a mood than a system of law or government, a reliance upon education becomes its most assured support. Several passages<sup>31</sup> affirm the necessity for exhortation of the public philosophy to secure intellectual allegiance to it.

The incommensurateness between the crisis described and the program for overcoming it creates a genuine disappointment. This vexing hour needs more than a tract for the times to arrest attention and intimate a principle of health. It requires grave works with apposite erudition that project a *modus operandi* into the tangled thickets of government. The remedies to our present distempers do not lie in the eighteenth century origins of our harassed political systems, but in the associational societies that lie behind the eighteenth century. Crevices in our system of government, and the resultant derangement of power, have their origins in eighteenth century modes of government which do not fit our society, which politically exhibits qualities of mass democracy while in substance it is becoming increasingly associational. And the stress between the social and economic facts of association and political institutions devised under eighteenth century auspices for a society of individuals distorts the eighteenth century organization of power. An inquiry into these distempers ought to propose institutional answers; appeals to sentiment, in the late eighteenth century manner, are not enough. Such an inquiry should probe deeply into the history of public law. It should traverse areas of complex

<sup>25</sup> Pp. 166-71.

<sup>26</sup> P. 167.

<sup>27</sup> Chap. X.

<sup>28</sup> P. 142.

<sup>29</sup> P. 159.

<sup>30</sup> *Ibid.*

<sup>31</sup> Pp. 94-96, 113, 138-40, 161, 177.

constitutional theory in medieval western Europe: the fifteenth century Englishman Fortescue; the sixteenth century French writers like de Seyssel and Charondas; the theory of offices in the writings of the Italians, Bartolus and Alciatus; the seventeenth century German writers like Hugo, Althusius, Nettlebladt and Besold. It should look closely at administrative practices. And in the seventeenth century struggle between the State and the Estates in Austria and the Empire, and in the nineteenth century struggle between the State and Nationalism in central Europe, such an inquiry would find much that is relevant to domestic as well as to international problems today. From such and similar sources will be recaptured the public philosophy with a correlative scheme of institutions of government.

While we appreciate Mr. Lippmann's warning signals, we must even more regret that they are not likewise beacons to light our laborious way through the history and philosophy of public law so that at length the public philosophy, that lies embedded therein, would become a body of intelligible principles with which we could master the political mischances of our time.

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