Rutledge; Taney and Stone surely have little in common. One ends the book with a feeling that the great trait of the best judges is unselfishness, the capacity to see society clearly, without the distortion of vision that accompanies the drive to succeed, to persuade, to gain power. We trust the justices of our Supreme Court with some of the greatest powers of government; we do so because they are characteristically beyond the desire for power. Much of their labor is disclaiming the exercise of power. In a society of frantic grasping for influence, of shrill competing claims, of strident advertisement, the good judge is calm and quiet. In the troublesome days between 1935 and 1937 there was much discontent among the loquacious because judges were not more like legislators. But perhaps the reverse would be a more wholesome ideal for our time.

ARTHUR SUTHERLAND*

6 Professor of Law, Harvard University.

Freedom, Virtue, and the First Amendment. By Walter F. Berns. Baton Rouge: Louisiana State University Press. 1957. Pp. 264. $4.00.

Professor Berns, of the Yale Political Science faculty, has written an unusual book. In considering the function of the Supreme Court in American government,[1] he rejects the "libertarian" doctrine of "judicial restraint."[2] He also rejects the "libertarian" thesis that the freedoms of the Bill of Rights are ultimate and absolute values in our society.[3] He would have the Court exercise all its power to decree the good, the true and the beautiful.[4] Perhaps some day he will provide the touchstone so that we may all readily recognize these qualities. In the meantime we must accept on faith his assertion that the nine robed men in the marble palace in Washington could accomplish his objective if only they wanted to do so. Professor Berns's book bears all the earmarks of a revised doctoral dissertation: it is heavy without being weighty.

PHILIP B. KURLAND*

[1] See Kurland, The Supreme Court and Its Literate Critics, 64 Yale Review 596 (1958), of which this review was once a part.

[2] Cf. Hand, The Bill of Rights (1958).

[3] Cf. Douglas, The Right of the People (1958).

[4] Cf. Buckley, God and Man at Yale (1954).

* Professor of Law, The Law School, The University of Chicago.

Reflections on Hanging. By Arthur Koestler. New York: Macmillan Co., 1957. Pp. xxiii, 231. $4.50.

The Sanctity of Life and the Criminal Law. By Glanville Williams. New York: Alfred A. Knopf, 1957. Pp. xii, 350, xiii. $5.00.

Cosmologies of course affect views about the law; and views about determinism are particularly likely to affect ideas about punishment. Capital punishment is the most savage and primitive institution of the law except for war, however it may be rationalized to fit modern standards. There is no empirical evidence that it deters more than confinement does; and what empirical evidence there is—historical, statistical, and clinical—indicates that it has no more deterrent effect than confinement has. A considerable group of murderers, who have not acted for profit, are generally said to be the best group among all criminals, needing neither confinement for life nor critical reformation. The disposition toward retribution, which tends to appear in all punishment, appears in its most nearly isolated form in capital punishment. Yet the institution is not unpopular, and it seems to get some of its support as a result of religious views of sin, crime, retribution and vengeance.

It is the more striking to find that Mr. Koestler's otherwise rational attack on capital punishment for murder contains a passage which seems to give most of his case away. In saving "free will" he confines his attack to the mandatory death sentence of the traditional English law, with which he is particularly concerned. He says that discretion in sentencing preserves that regard for individual differences which his theory of undetermined choice, unintelligible like all theories of the sort, unintelligibly requires, and which unintelligibly satisfies his theory. Individualization consistent with equality is desirable so far as it is practically attainable, but its advantages are clarified by determinism. Determinism is required by any naturalistic view of things, and is indispensable, though of course not sufficient, for any rational treatment of such matters as education, human freedom and punishment. As Bertrand Russell says, in a passage that should be read as a whole: "When a man acts in ways that annoy us we wish to think him wicked, and we refuse to face the fact that his annoying behavior is a result of antecedent causes which, if you follow them long enough, will take you beyond the moment of his birth and therefore to events for which he cannot be held responsible by any stretch of imagination."[1] The sentence is only part of the author's admirable brief treatment of determinism.

Except for his almost disastrous qualification (in his Chapters VI and VII) on this matter (and his consideration of the murder penalty only), Mr. Koestler's book is—not quite logically—an effective attack on hanging in particular, and as Professor Edmond Cahn's American preface emphasizes, on capital punishment in general. Mr. Koestler deals with deterrence, confinement, and related matters effectively; though there is a useful complementary survey of some of the social arguments in the well known volume of The Annals of the American Academy published in 1952.[2]

[1] Russell, Why I Am Not a Christian 40 (1957).

[2] Annals 284 (Nov., 1952).

Incorporating such considerations as those developed by Professor Borchard and Judge Jerome Frank, Mr. Koestler makes an effective argument from the admitedly considerable chance of error in criminal trials. If we took seriously our expressed views about the burden of proof, we might begin to decrease this chance. There is a lack of "reasonable doubt" only in such cases as the Greenlease kidnapping or the son's demolition of the plane over Colorado for insurance on his mother, as they were reported, to recall two noteworthy recent examples. If we meant what we say we would at least want executions confined to cases equally clear. Our readiness to take chances, as Mr. Koestler observes, is apparently dependent in part on our love of drama and courtroom conflict. We take considerable chances on fact finding in courts, and that circumstance is an argument against the most completely irrevocable punishment.

Mr. Koestler's most pervasive and effective argument is the argument from cruelty. Here—as he says, against the advice of friends—he insists that the citizen who permits and pays for the rite, should know what it is. The cruelty to the one executed is one feature, by no means negligible. The effect on those members of the community who in various degrees know of and cooperate in the process is also to be observed. Dr. Franz Alexander, the most straightforward of all psychologists in dealing with punishment, pointed out effectively years ago that retributive impulses and related cruelty, appearing often in punishment, are means of expressing and strengthening human characteristics which need to be controlled, not stimulated, by law and psychiatry alike.

Though he mentions it, Mr. Koestler does not, as it seems to me, depend on the argument from "the sanctity of life." In an interesting New Yorker review, Mr. Rovere expresses the view that Mr. Koestler must, in practical effect, be depending on that argument.[3] He thinks therefore that Mr. Koestler finds himself in conflict with the views of Mr. Glanville Williams, a thoughtful English lawyer, expressed in a book criticizing the dogma, and given the title, The Sanctity of Life and the Criminal Law. Mr. Rovere indicates that he thinks Mr. Williams has the better of the two positions.

But are the two positions mutually inconsistent? Mr. Williams has an admirable statement of the case for voluntary controls of conception and birth. One chapter is devoted to birth control, one to voluntary sterilization, and two to abortion. Mr. Williams observes the increasing difficulties which increasing knowledge of genetics makes for simple arguments from eugenics; but he observes also that the arguments have by no means wholly lost their force, and that in his presentation they are in each case strongly reinforced by the arguments in favor of parents qualified not only to have sound children but to rear them soundly and to enjoy life while doing so. Mr. Williams has an excellent chapter, by contrast, in favor of facilitating artificial insemination,

[3] Rovere, 33 New Yorker, No. 30, at 149 (Sept. 14, 1957).

opposed by some on "sacred" grounds. He approves immunity for euthanasia with parental consent for infants for whom there is no prospect of anything approaching normal human life. He argues carefully but on conventional grounds for eliminating prosecutions for attempted suicide and for some but not all forms of participation in suicide. Where he comes closer to Mr. Koestler's theme is in his thoughtful and careful argument for legislation removing legal penalties for merciful euthanasia requested by a victim of a serious and severely painful disease, fatal and incurable by methods known or envisaged at the time, when the step is taken by one physician after consultation with another.[4]

Like Bertrand Russell, Mr. Williams may not have chosen the most descriptive possible name for his last book, and for the positions which he attacks. His argument may imply a case for putting to death the hopelessly and "criminally" insane, a possibility that Mr. Koestler simply dismisses. Nevertheless he says nothing inconsistent with Mr. Koestler's case against the general use of capital punishment. Conversely Mr. Koestler's argument against unavailing attempts to safeguard life by the cruel destruction of functioning lives has no bearing, it seems to me, on Mr. Williams's proposals. Mr. Williams's argument in these extreme cases is only for sanctioning agreement on the merciful end of lives. It is limited to cases in which pain or impairment of faculties has created a situation in which the subject can, so far as we know, never in the future function in any significant way as a live human animal ordinarily does.

The reader may see in this review the outline of a position about the relationships between traditional faith and theology on the one side, and science and the study of law on the other. Traditional faith and theology tend to be inconsistent with science not because we now know all about the mysteries of microcosm or macrocosm, but because the same man cannot consistently rely on the methods of religion at one point and the methods of science at another, in organizing his cosmology. The modern student will need to affirm flatly, for example, that capital punishment cannot be justified by original sin, by the supposed existence of uncaused choice, or by the hope that it will bring rehabilitation for a future life. Such a student will need to reject the view that problems about individuals' voluntary efforts toward controlling the size and quality of the population, or about euthanasia, can be solved by the argument from ignorance of a divine plan.

Plato's poetical and perhaps poetically intended analogies, unlike anything

[4] Mr. Williams' skillful use of the burden of proof as a protection for physicians makes it worthwhile to quote from the statute which he proposes: "It shall be lawful for a physician, after consultation with another physician, to accelerate by any merciful means the death of a patient who is seriously ill, unless it is proved that the act was not done in good faith with the consent of the patient and for the purpose of saving him from severe pain in an illness believed to be of an incurable and fatal character."

in Aristotle, were used by St. Thomas in his argument for individual and personal immortality. The argument depends on a transition from the "deathlessness" of nonliving abstractions to the "deathlessness" of the human being. No one has ever done better, and it is possible for a Thomist not to do so well, for example in defending the related but different faith in the resurrection of the body, against the charge of "absurdity." The limited defense is logically possible, but the implication commonly suggested that the argument thus restores this kind of faith to the world of reason is unwarranted. There is no evidence for the existence of a world in which final suffering can do anyone any good.

Faith and theology have both in my opinion a good deal to teach us about attitudes toward the world and man.[5] Their teaching on these subjects is only obscured by their characteristic modern western Christian cosmologies, Catholic and Calvinist. If we recognize that simple religious cosmological methods and simple religious cosmologies are obsolete, and that no effort to save them in the interests of social stability can succeed, we may be the more ready to learn from religion and faith some lessons in evaluation and human relations. These lessons can in principle at least survive in a society which has adjusted to the teaching of science. It is worth noticing that Mr. Koestler and Mr. Williams each supports his argument by an eloquent and rational passage on the teachings of Jesus.

Theology and law have long been associated, and an accurate understanding of the present status of theology would be a useful feature of education about law. Much that is said about punishment, and particularly capital punishment, is one illustration, but not the only one, of the need for correcting the influence of theological ideas and methods on the law. Mr. Koestler's treatment of free will and Mr. Williams's considerate but firm attitude toward religious doctrines about "the sanctity of life" are among other things good starting places for the student who wishes to clarify his thinking about the relationships between the two most ancient sets of ideas represented in any modern university.

It would not indeed be fair either to Mr. Koestler or to any particular modern believer to identify Mr. Koestler's position with any other person's. It is only a fragment of a theology that appears in his book. Mr. Williams observes on the surface at least the discreet attitude toward religion as a whole generally considered appropriate for a lawyer. Yet each treatment is so fascinating an expample of the interaction between various sets of ideas, as they appeared recently, for example, in controversy over capital punishment in Illinois, that it seems a good opportunity to call attention to the interrelationships which they disclose.

[5] Sharp, The Limits of Law, 61 Ethics 270 (1951); Sharp, Realism and Natural Law, 24 U. of Chi. L. Rev. 648 (1957).

It should be unnecessary to say that no single naturalist and no single believer is, so far as my experience goes, a consistent thinker or behaver. It should also be unnecessary to say that while religions today preserve cosmologies which make untenable arguments about punishment and capital punishment and euthanasia sound better than they are, no organized western religious doctrine today specifically advocates capital punishment. Finally by way of qualification, Mr. Williams makes a systematic effort to establish that his proposals are not inconsistent with the basic teaching of any modern religious group, an effort whose success will depend not so much on science as on the religious reactions of the groups in question.

MALCOLM SHARP*

* Professor of Law, University of Chicago Law School.