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THE MORALITY OF CONSENT. By Alexander M. Bickel. New Haven and London: Yale University Press. 1975. Pp. vii, 156.

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that many of the decisions cannot withstand such careful scrutiny. Professor Brest then points us toward other grounds for decision or other possible results and assists us in moving toward a more logical and humane set of constitutional interpretations.

I would like to note in conclusion that although I have given high praise to Brest's new casebook (and although I expect to continue using this casebook for the next several years), I do not mean to imply that the other casebooks in the field are inadequate. In fact, we are fortunate in having a number of intelligently assembled casebooks in the constitutional law field and two of those have been improved through new editions that have been published this fall. I have used the eighth edition of Gunther and Dowling for a number of years, and Gerald Gunther's revision of this casebook is a substantial improvement of an already fine teaching tool.⁸ Like Professor Brest, he has placed the procedural material at the end of his volume and has combined substantive due process with the right to privacy. The fourth edition of Lockhart, Kamisar, and Choper⁹ continues to be the most comprehensive casebook in the field, and it is always the first book to which I turn when searching for an answer to any specific question.

THE MORALITY OF CONSENT. By Alexander M. Bickel.¹ New Haven and London: Yale University Press. 1975. Pp. vii, 156.

*Reviewed by Albert Broderick, O.P.*²

The morning's *Washington Post* editorial proclaimed do's and don'ts for a President looking for a Supreme Court nominee, reminding us that for the first time in half a century no member of academia sits on the Court. It is easy to forget that Justice Douglas was appointed as a professor from Connecticut, not as a lawyer from his beloved Washington state, and that

8. G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* (9th ed. 1975).

9. W. LOCKHART, Y. KAMISAR, & J. CHOPER, *CONSTITUTIONAL LAW, CASES—COMMENTS—QUESTIONS* (4th ed. 1975).

1. Professor Bickel, now deceased, was a Sterling Professor of Law at Yale Law School when he prepared this book.

2. Professor of Law, Catholic University of America. A.B., 1937, Princeton University; LL.B., 1941, S.J.D., 1963, Harvard University; D. Phil., 1968, Oxford University.

four professors sat together on Roosevelt's Court—Stone, Frankfurter, Rutledge and Douglas. If the late distinguished author of *The Morality of Consent* had not departed our scene, undoubtedly his name would have been circulating on many recommended lists—as it was the last time around. This book, Professor Bickel's last, is evidence of the law profession's great loss at his death—the loss of a professor from Connecticut, not necessarily of a prospective member of “The Least Dangerous Branch” (which Bickel called the Court in an earlier, better study³).

The great puzzle about this book is whether Bickel designed it as an analysis of the American constitutional process, or whether he offered it as a tract in political philosophy and ethics. As the former, it is worth reading. As political philosophy, or ethics, it is thin fare. The book is worth reading chiefly because of Bickel's two chapters on the first amendment, a field in which he proved himself a master—both as a student of the Court and as a practitioner before it in recent celebrated litigation (e.g., the *Pentagon Papers* and *DeFunis* cases). One may disagree with him here and there as to how he distinguishes recommending judicial activism to establish reporters' privilege (*Branzburg*), and striking down “benign” racial quotas (*DeFunis*), and resists it elsewhere. His exposition of the conflict model of our constitutional system, and of the firm institutional grounding of first amendment decisions, is particularly choice.

A chapter on citizenship is dreary. It extols the undoubted fact that constitutional development of civil rights since the Civil War has fallen within the frame of “due process” and “equal protection” of persons, rather than of “privileges and immunities” of citizens. This is true, and one may think admirable. It is small wonder that Bickel, a former resident alien, should feel this keenly. However, the essay goes far afield in arguing why this should be so, to the extent of identifying the central issue in the *Dred Scott* decision as “citizenship” rather than racism (pp. 36-40), and of sniping at Chief Justice Warren and Justice Black for inappropriate decisional utterances on citizenship (p. 53).

Other aspects of the book also present difficulty. A major problem arises from Bickel's division of political man into two groups, “contractarian,” “majoritarian” liberals, and conservative “Whigs” (with whom he associates himself). He defines the first as resting on “a vision of individual rights that have a clearly defined, independent existence predating society and are derived from nature and from a natural, if imagined, contract” (p. 4),

3. A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

leading one to think of George Bernard Shaw's setting up a straw man so that he may knock it down. The Whig model, "on the other hand, begins not with theoretical rights but with a real society"; it assumes that "the values of such a society evolve, but as of any particular moment . . . are taken as given"; it "is flexible, pragmatic, slow-moving, highly political" and "rests on a mature skepticism" (*id.*). This Whig model, according to Professor Bickel, "places enormous reliance on the political marketplace . . . a marketplace of ideas, but one where ideas and the vote are not the only bargaining units" (pp. 4-5). By contrast, the "contractarian model . . . is committed not to law alone but to a parochial faith in a closely calibrated scale of values. It is moral, principled, legalistic, ultimately authoritarian. It is weak on pragmatism, strong on theory" (p. 5).

As one reads this high level *divisio*, one wonders about its import. One concern, of course, is where one must fit oneself and whether there is no other place to go. More fundamentally, however, one is left to try to understand what Bickel was about. At times, he seems to be referring to law as a process:

Law is more than just another opinion; not because it embodies all right values, or because the values it does embody tend from time to time to reflect those of a majority or plurality, but because it is the value of values. Law is the principal institution through which a society can assert its values (*id.*).

If that is all Bickel is about, if his principal concern is merely judicial methodology, then his classification of political positions can be dealt with in the context of judicial activism as opposed to inactivism. Such an understanding would explain why Bickel, a former Frankfurter law clerk, would identify his (and the "Whig") position with judicial flexibility, while making Justice Black a clear "majoritarian"—the very model of a liberal "contractarian" (pp. 8-9).

However, when Bickel discusses Edmund Burke (citing him through biographers and commentators rather than from Burke's own writings), he appears to be writing as a philosopher rather than a jurist. One can only wish that he had stuck to the latter, for in going beyond law as process to the content of ideas which are to operate within the legal process, he opts for Burke's ideas. Such second-hand presentation of philosophy is hardly satisfactory. One obvious flaw is that in embracing Burke, Bickel never makes clear which Burke he is taking. It might be the Burke who wrote that

[t]he lines of morality are not like the ideal lines of mathematics. They are broad and deep as well as long. They admit of exception,

they demand no definitions. These exceptions are not made by the process of logic; but by the rules of prudence.⁴

Or it might be the Burke who viewed the mass of men as “a swinish multitude”⁵ and who confused human society with a particular state, “equat[ing] the notion of an established form of social life with the notion of an established set of institutional arrangements.”⁶

Writing as a lawyer, Bickel may postulate boundaries in identifying the limits of permissible civil disobedience and protest, even in an open-ended constitutional system like our own, and this may be necessary if only to insure the continued existence of a particular system. He may also fairly conclude that “whoever is in power in government is entitled to give effect to his preferences” (p. 142). But he offers little here as a philosopher, to help enlighten those preferences. When, finally, we understand this, we can settle back and enjoy a “process” book of considerable interest.

4. E. BURKE, AN APPEAL FROM THE NEW TO THE OLD WHIGS 19 (1891).

5. A. MACINTYRE, A SHORT HISTORY OF ETHICS 228 (1971).

6. *Id.* at 229.