

1972

Book Reviews

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Recommended Citation

Book Reviews, 41 Fordham L. Rev. 479 (1972).

Available at: <https://ir.lawnet.fordham.edu/flr/vol41/iss2/7>

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BOOKS REVIEWED

A Dialogue Between A Philosopher and A Student of The Common Laws of England. By Thomas Hobbes. Edited and with an introduction by Joseph Cropsey. Chicago and London: The University of Chicago Press. 1971. Pp. vii, 168. \$7.50.

The famous English philosopher and political scientist, Thomas Hobbes of Malmesbury (1588-1679), is best known to most American lawyers as the author of *Leviathan* (1651), as an advocate of a monistic theory of sovereignty, and, through Jeremy Bentham and John Austin, as an early exponent of utilitarianism and analytical jurisprudence. Few members of the bar have any acquaintance with the *Dialogue*, a work first published by William Croke in 1681, two years after the author's death, and not reprinted since 1840, the date of its appearance in the collected English works of Hobbes edited by Sir John Molesworth. Yet the generally neglected *Dialogue* reflects Hobbes' mature views as a jurist or jurisprudent, if he can rightly be called such, since he never formally studied law, taught law, practiced law, or held judicial office. His knowledge of the laws of England, as reflected in the *Dialogue*, seems to have rested upon a concentrated course of reading of the statute books and Sir Edward Coke's *Institutes*, plus a smattering of the treatises of Littleton, Bracton, Bacon, Fleta, Fitzherbert (*Natura Brevium*), St. Germain, Lambarde, Staunford (*Pleas of the Crown*), Selden and perhaps others.¹

Some uncertainties surround the genesis, composition and publication of the *Dialogue*, the scheme of which probably derives from the well-known work of St. Germain, *Doctor and Student; or, Dialogues Between a Doctor of Divinity and a Student in the Laws of England*, first published in English in 1530-32. The editor appears to accept the statement by biographer John Aubrey that in 1664, in order to stimulate Hobbes to make a study of law, he furnished the philosopher with a copy of Sir Francis Bacon's *The Elements of the Common Laws of England*, Hobbes having been a secretary or amanuensis to Bacon in the early 1620's, and that this stimulation resulted in the writing by Hobbes of a treatise called *De Legibus* which was later published as the *Dialogue*.²

1. Probably few today would agree with J.E.G. de Montmorency that Hobbes "was a great jurist in the deepest sense of that term," much less that he "worshipped the common law" and that in dealing with legal material, "No source was too obscure, no legal record too dusty for him to use." *The Great Jurists of the World*. VI. Thomas Hobbes, 8 J. of the Soc'y of Comp. Legis. (N.S.) 51, 69-70 (1907). Cf. the comment of Daines Barrington who refers to Hobbes' comments on the Statute of Treasons, 25 Edw. 3, c. 2 (1350), in the *Dialogue* and states: "It appears by this *Dialogue*, that this very acute writer had considered most of the fundamental principles of the English law, and had read Sir Edward Coke's *Institutes* with great care and attention." *D. Barrington, Observations on the More Ancient Statutes from Magna Charta to the Twenty-First of James I*, Cap. XXVII 275 n.f (5th ed. 1796).

2. Cropsey, Introduction to T. Hobbes, *A Dialogue Between a Philosopher and a Student of the Common Laws of England* 5 (J. Cropsey ed. 1971) [hereinafter cited as *Introduc-*

The editor does cautiously state that Hobbes is, "to the best of our knowledge," the author of the *Dialogue* but the fact that Crooke, Hobbes' publisher, advertised in 1675 the receipt of a manuscript by Hobbes entitled "A Dialogue betwixt a Student in the Common Laws of *England*, and a Philosopher" would seem to confirm the authorship.³ Apparently nobody else has ever laid claim to authorship and the style is certainly characteristic of Hobbes.

Despite the 1675 announcement by Crooke, Hobbes wrote Aubrey in 1679, the year of his death, that Crooke would not get permission to publish the *Dialogue* (assuming *De Legibus* and the *Dialogue* are the same work) as the end was "imperfect."⁴ If Hobbes seriously intended to suppress the *Dialogue*, no charges of breach of trust were ever levelled against Crooke who in 1681 brought out the *Dialogue* bound in the same volume with Hobbes' *The Art of Rhetoric* (the title page reads, *The Art of Rhetoric, with a Discourse on the Laws of England*, reminiscent of the *De Legibus* designation).⁵ In 1681-82 Crooke also issued the *Dialogue* as one of a number of writings in two volumes entitled *Tracts of Thomas Hobbs's*.⁶ The abrupt ending of the *Dialogue* and Hobbes' characterization of "imperfect" have led to the prevailing view, not accepted by the editor, that the work as published was unfinished.⁷ On the point of suppression, it should be noted that Hobbes was sufficiently satisfied with his manuscript to supply a copy to "his great acquaintance"⁸ Sir John Vaughan, Chief Justice of Common Pleas (1668-1674), (Aubrey affirmed that "he much admired it")⁹ and apparently to Sir Matthew Hale, Lord Chief Justice of England, whose manuscript comments (not published until 1921) were critical of a purely analytical and logical approach to existing laws and political institutions.¹⁰ Professor Cropsey makes no reference to Hale's access to the manuscript (he died in 1676 so he saw the work in manuscript) or to his lengthy reflections (43 pages) on "Mr. Hobbes his Dialogue of the Lawe."

The *Dialogue* is in the form of an extended colloquy between a speaker called "Philosopher" and a speaker termed "Lawyer" in the text but "Student of the Common Laws" on the title page. The editor interprets this terminological difference as expressing Hobbes' view that members of the legal profession were never more than students of the law; they did not make law out of any

tion]. Some biographers state that the *Dialogue* was written "about 1666;" when published in 1681 Crooke described it as "'finished many years.'" J. Laird, *Hobbes* 35 (1934) [hereinafter cited as Laird]. The latest act of Parliament referred to in the text is dated 1662. Introduction 2.

3. Introduction 1-4.

4. *Id.* at 5.

5. *Id.* at 1.

6. *Id.*

7. *Id.* at 5-8.

8. *The Philosophy of Hobbes in Extracts and Notes Collated from his Writings* xxx (F. Woodbridge ed. 1903).

9. *Id.* at xx.

10. Hale's reflections are printed in 5 W. Holdsworth, *A History of English Law* 499-513 (3d ed. 1945). For Holdsworth's comments see *id.* at 482-85.

enriched reason but merely became versed in it. To a large extent the colloquy is a polemic directed against Sir Edward Coke who had crossed forensic swords with Bacon during the reign of James I. The Philosopher is thus identified with the views of both Hobbes and Bacon; the Lawyer with the views of Coke and, in some places, with those of Hobbes.¹¹ As one might expect, the Philosopher is given the best lines and the Lawyer at times seems reduced to the role of a "straight-man." Coke as the Lawyer undoubtedly would have produced a more persuasive script in defense of his deeply held views on the nature and function of the common law.

Besides Aubrey's intellectual "pump priming," what prompted Hobbes in the mid-1660's to revive issues which had agitated legal-political circles in 1615-16 with James I, Lord Chancellor Ellesmere, Attorney General Bacon and Coke as the chief antagonists? Coke had died in 1634, outliving Bacon by eight years, and there is no evidence that Hobbes had participated in the earlier controversy in any way. In fact, at the date of Coke's death, Hobbes had only a translation of *Thucydides* to his credit;¹² his first important publication *De Cive*, did not appear until 1642.¹³ Coke receives scant mention in *Leviathan*.¹⁴ The *Dialogue* devotes much space to the controversy over the relationship of law and equity in Stuart England or, more narrowly stated, whether after a judgment had been rendered in an action at common law, the aggrieved party might secure an injunction in the High Court of Chancery on equitable grounds staying entry of judgment and execution without incurring the penalties of *praemunire*. The views of Coke appear in the famous King's Bench cases of *Heath v. Rydley*¹⁵ and *Courtney v. Glanvil*.¹⁶ The jurisdiction of the Court of Chancery was sustained in a crushing report to James I engineered by Bacon entitled *Arguments Proving from Antiquity the Dignity, Power, and Jurisdiction of the Court of Chancery*.¹⁷ However, Coke in his *Institutes* continued to

11. Introduction 10-12. Leslie Stephen comments that in the *Dialogue* Hobbes' "especial aim was to confute Coke, as the worshipper of precedent." L. Stephen, *Hobbes* 61 (1904). The reader would have profited by more specific identification of the views of Bacon coupled with references to his works.

12. Laird 34.

13. *Id.* at 32. The *Elements of Law*, Hobbes' first systematic political work, circulated in manuscript in 1640, and in a sense, *De Cive* and *Leviathan* are revised and expanded versions of it. See the new introduction by M.M. Goldsmith to the second edition (1969) of *The Elements of Law, Natural and Political* (F. Tönnies ed. 1889).

14. Coke is mentioned by name and allusively in Chapter 26 of *Leviathan*—"Of Civil Laws." In some respects the *Dialogue* is an elaboration of this chapter.

15. 79 Eng. Rep. 286 (K.B. 1614).

16. 79 Eng. Rep. 294 (K.B. 1615).

17. 21 Eng. Rep. 576 (Ch. 1616). For an appraisal of the significance of the dispute see Dawson, *Coke and Ellesmere Disinterred: The Attack on the Chancery in 1616*, 36 *Ill. L. Rev.* 127 (1941). The relevant cases and documents are printed in J. Smith, *Cases and Materials on the Development of Legal Institutions* 399-414 (1965). A popular treatment of the dispute appears in C.D. Bowen, *The Lion and The Throne: The Life and Times of Sir Edward Coke (1552-1634)* chs. 27-28 (1956). For Bacon's role in the dispute see 12

adhere to his views as to the supremacy of the common law courts and the question was again raised in the courts during the Interregnum and the Restoration.¹⁸ It is possible that the revival of the Coke-Ellesmere controversy influenced Hobbes in his choice of subjects to be included in the *Dialogue*. However, Professor Cropsey takes a broader view that the purpose of the *Dialogue* was the deflation of legists, a continuation of the deflation of divines pursued in earlier writings.¹⁹ The deflation of clergy and legists constituted an attempt to deprive private men of a political function that they could not exercise without a harmful usurpation.²⁰

Apparently no manuscript copy of the *Dialogue* exists and the text chosen for editing is that of the 1681 edition. A substantial number of emendations have been made where the text is obviously incorrect or where inaccurate citations to sources are given. Statutes and treatises or passages therein are identified in footnotes where necessary; some cross-references to *Leviathan* are also supplied. A few obscure or confused passages are treated in discursive footnotes. The bulk of the Introduction (48 pages) consists of a closely written description, analysis and evaluation of the text of the *Dialogue*, section by section and virtually speech by speech. The *Dialogue* is divided into seven sections or subjects ranging in length from eight to fifty-two pages. After a short opening section termed "Of the Law of Reason" the argument proceeds through the subjects of Sovereign Power, Courts, Crimes Capital, Heresie, Praemunire, and then concludes with a lengthy section on Punishments. Unfortunately the editor does not provide an index.

From virtually the first page of the *Dialogue*, Hobbes, speaking through the Philosopher, takes issue with the views of Coke, expressed in the *Institutes*, that reason was the life or soul of the law and that the laws of England represented an artificial perfection of reason achieved by long study, observation and experience. Hobbes admitted that knowledge of the law was an art but the art of one man or many could not be law. "It is not Wisdom, but Authority that makes a Law."²¹ No one can make a law "but he that hath the Legislative Power."²² The laws of England (not limited to the statute laws) had not been made by the professors of the law but by the Kings of England, consulting with the nobility and commons in Parliament. This draws an admission that to the gravity and learning of the judges in making laws Coke should have added the authority of the King in whom sovereignty resided. Few today would regard the common law as the epitome of reason yet the Hobbesian attack upon Coke's formulation obscures the hard fact that the judges by their judgments and decisions *did* make law and that these laws

The Works of Francis Bacon 245-54, 380-99 (Spedding et al. ed. 1869) and C. Friedrich, *The Philosophy of Law in Historical Perspective*, ch. x (2d ed. 1963).

18. *Crowley's Case*, 36 Eng. Rep. 514, 542 n.6 (Ch. 1818).

19. Introduction 17.

20. *Id.*

21. T. Hobbes, *A Dialogue Between a Philosopher and A Student of the Common Law of England* 55 (J. Cropsey, ed. 1971) [hereinafter cited as *Dialogue*].

22. *Id.*

were obeyed, not because they personified judicial reasoning but because they were made by judges sitting in Westminster Hall by virtue of letters patent from the King.

Perhaps conscious of this "hard fact," Hobbes, in the section headed "Of Sovereign Power," concedes that a distinction must be made between law makers in the sense of who "devises" or "pens" laws and who makes them effectual. With this distinction in mind the Philosopher asserts that "it is the King that makes the Laws, whosoever Pens them."²³ The Philosopher then goes on to discuss at length the sovereign's power to levy taxes and raise troops as a dictate of reason and seeks to compel the Lawyer to admit that "authority is law" according to Coke's formula that "reason is Law." The Lawyer rather woodenly reiterates word for word the passage from Coke on the artificial reason of lawyers.²⁴ This sets the stage for the Philosopher to repeat his own depreciation of the judicial initiative in making law, reaffirming, with some qualifications, the crucial importance of the King's reason. At this point the reader has the definite impression that the Philosopher and the Lawyer are talking at cross-purposes—the former having in mind acts of Parliament and executive acts, the latter the decisional law of the kingdom.

Toward the end of the section on Sovereignty, the Lawyer grants that the King is sole legislator and, perhaps more important, that he is sole supreme judge; for otherwise there would be no congruity of judgments with the laws. By the common law the King is the supreme judge over all persons and in all causes civil and ecclesiastical. The judges of both benches held office by royal letters patent, as did the bishops in judicial matters; the Lord Chancellor held office by virtue of the Great Seal received from the King.²⁵ This passage is consistent with the orthodox common law view that the King was the fountain-head of all justice although Coke probably would not have made the concession *in haec verba*.

This concession as to judicial supremacy leads into the two principal themes of the next section, "Of Courts," that (1) the King was supreme judge and that (2) the court of equity, the High Court of Chancery, was the supreme court of the realm. Hobbes rejects the common law view, based largely upon custom and adopted by Coke, that would favor King's Bench as a "supreme court of review." The Philosopher is made to demonstrate that from the standpoints of history and reason the High Court of Chancery has the best claim to be the ultimate court of revision. This involves a showing (1) that the statutes contrary to this claim have been misconstrued by Coke or are in a state of confusion, (2) that the King by appointing judges did not alienate his judicial supremacy, and (3) that the customary jurisdictional privileges or claims of certain courts could not limit the royal prerogative of judicial appointment. The argument is climaxed by the proposition that "there was a

23. *Id.* at 59.

24. *Id.* at 61-62. In connection with this see Sir Edward Coke (1552-1633): *His Theory of "Artificial Reason" as a Context for Modern Basic Legal Theory*, 84 L.Q.R. 330 (1968).

25. *Dialogue* 68.

necessity of a Higher Court of Equity, than the Courts of Common-Law, to remedy the Errors in Judgment given by the Justices of Inferior Courts."²⁶ In reading this section of the *Dialogue* one has the haunting fear that Hobbes did not fully grasp the relation of law and equity in the English law, despite his crash program of legal education and despite the airing of opposing views in the controversy of 1615-16. Brushing aside the argument that it would be unlawful to remove a cause from one court to another if this resulted in a change in the method of trial (by a judge instead of a jury), Hobbes fiercely denounced resort to custom to determine the powers or jurisdiction of any court:

I deny that any Custome of its own Nature, can amount to the Authority of a Law: For if the Custom be unreasonable, you must with all other Lawyers confess that it is no Law, but ought to be abolished; and if the Custom be reasonable, it is not the Custom, but the Equity that makes it Law.²⁷

The section closes on a note of unreality as Hobbes proposes (1) that statutory language itself be subject to review in a court of equity to prevent the literal reading of statutory provisions from interfering with legislative intent and (2) that bishops ought to be appointed chancellors as being commonly the most able and rational men. Needless to say, the Lawyer recoils from the last uncharacteristic proposal.

What qualities in the opinion of Hobbes would make a good judge? A passage in *Leviathan* provides the answer:

The things that make a good judge or good interpreter of the laws are, first, a *right understanding* of that principal law of nature called *equity*, which, depending not on the reading of other men's writings but on the goodness of a man's own natural reason and meditation, is presumed to be in those most that have had most leisure and had the most inclination to meditate thereon. Secondly, *contempt of unnecessary riches and preferments*. Thirdly, *to be able in judgment to divest himself of all fear, anger, hatred, love, and compassion*. Fourthly, and lastly, *patience to hear; diligent attention in hearing; and memory to retain, digest, and apply what he has heard*.²⁸

What of the role of lawyer as opposed to the judges? In one colloquy in the *Dialogue* the Lawyer gives six reasons, taken from the *Institutes*, for the increased volume of suits in the King's courts, one being the multitude of attorneys. After remarking that Coke had no mind to attribute any fault to his own profession, the Philosopher or Hobbes proceeds to the following strictures:

And lastly for the multitude of Attorneys, it is the fault of them that have the power to admit, or refuse them. For my part I believe that Men at this day have better learn't the Art of Caviling against the words of a Statute, than heretofore they had, and thereby encourage themselves, and others, to undertake Suits upon little reason.

26. *Id.* at 94-95.

27. *Id.* at 96.

28. T. Hobbes, *Leviathan*, ch. 26, at 223 (H.W. Schneider ed. 1958). Compare this with Bacon's famous essay "On Judicature" as to which Sabine commented: "The essay seems to be full of oblique references to Coke, whom Bacon doubtless regarded as the type of a bad judge." G. Sabine, *A History of Political Thought* 451 (3d ed. 1961).

Also the variety and repugnancy of Judgments of Common-Law do oftentimes put Men to hope for Victory in causes, whereof in reason they had no ground at all. Also the ignorance of what is Equity in their own causes, which Equity not one Man in a thousand ever Studied, and the Lawyers themselves seek not for their Judgments in their own Breasts, but in the precedents of former Judges, as the Antient Judges sought the same, not in their own Reason, but in the Laws of the Empire. Another, and perhaps the greatest cause of multitude of Suits is this, that for want of Registering of conveyances of Land, which might easily be done in the Townships where the Lands ly, a Purchase cannot easily be had, which will not be litigious. Lastly, I believe the Covetousness of Lawyers was not so great in Antient time, which was full of trouble, as [it has] been since in time of Peace, wherein Men have leisure to study fraud, and get employment from such Men as can encourage to Contention. And how ample a Field they have to exercise this Mystery in is manifest from this, that they have a power to Scan and Construe every word in a Statute, Charter, Feofment, Lease, or other Deed, Evidence, or Testimony.²⁹

The sixth section, "Of Praemunire," while ostensibly a discussion of offenses not capital (it follows sections on capital crimes and heresy), is actually a continuation of the section "On Courts." This short section is largely an assault upon the construction placed by Coke upon the Statute of Praemunire, 27 Edward 3, c. 1 (1353) to the effect that the High Court of Chancery, among other courts within the realm which proceeded "by the rule of another law" or drew the party *ad aliud examen*, was prohibited from defeating or impeaching judgments given in the common law courts. Actually this is a rather truncated version of the 1615-16 controversy omitting all reference to Statute 4 Henry 4, c. 23 (1425) (Statute of Simple Prohibition), of equal importance to Coke's argument, *Heath v. Rydley*,³⁰ *Courtney v. Glanville*³¹ and the certification of practice by Bacon and the King's counsel.³² To Hobbes, resort to the Court of Chancery for relief on equitable grounds against a judgment at common law could not be *praemunire* since it tended neither to the disherison of the King or of the people, nor to the subversion of the law of reason, i.e., the common law, nor to the subversion of justice nor to any harm to the realm.

The fourth section of the *Dialogue*, "Of Crimes Capital," is in the nature of a review of the irrationalities and inanities of English criminal law with respect to treason and felonies, spiced with frequent criticism of Coke's views as set forth in the *Institutes*. As to a denial by Coke that a traitor is in legal understanding the King's enemy, the Philosopher remarks: "This is not an Argument worthy of the meanest Lawyer."³³ Apart from downgrading the common law and Coke it is difficult to see how the section advances the basic argument of the *Dialogue*. The fifth section, "Of Heresie," is a digression on the irrationality of imposing punishment, really capital punishment, for the

29. Dialogue 83-84 (footnote omitted).

30. 79 Eng. Rep. 286 (K.B. 1614).

31. 79 Eng. Rep. 294 (K.B. 1615).

32. J. Smith, Cases and Materials on the Development of Legal Institutions 403 (1965).

33. Dialogue 105.

holding of a doctrine or belief as such. Coke's treatment of the offense is again the basis of the criticisms levelled. The seventh or last section, "Of Punishments," makes the point that there is no natural or rational connection between the offense and the punishment; punishments in English law are excessively harsh and irrationally vengeful. Taking the passage in the *Dialogue* that "the Punishing of Offences can be determined by none but by the King, and that, if it extend to life or member, with the Assent of Parliament,"³⁴ Professor Cropsey remarks:

Hobbes is in the position of a Parliamentarist modifying the punitive prerogatives of the monarch by appearing to reassert the sole sovereignty of the monarch against the encroachments of that Parliamentary activist, Sir Edward Coke. Why he should have undertaken a polemic against Coke thus becomes clearer: Coke's doctrine, and therefore the common law, was menacing to the civil order in England in visibly depreciating the prerogative while weakening the crown additionally through making the legal system unreasonably vengeful, and to that extent odious and unendurable.³⁵

The next subject is pardoning, with the Philosopher's thought that Coke and the common law, in their punitive state, would restrict the King's power of pardoning at every possible point.

The *Dialogue* closes with an abrupt transition to a discussion of the laws of property, giving rise to the doubts as to whether the work was left unfinished.

What interest has the *Dialogue* for today's reader? Hobbes, Coke and Bacon are still central figures in the fields of legal history, jurisprudence and political science. While the subject of *praemunire* may be confined in interest to academics,³⁶ the broader subject of the relation of law and equity still attracts the attention of practitioners and students of the law. From the standpoint of jurisprudence the book is a striking example of the clash of the historical and analytical schools. For political scientists interested in concepts of sovereignty the work supplements *Leviathan* and is of particular interest in the role ascribed to Parliament. Those interested in the history of law reform may even find in Hobbes the seeds of later changes such as the fusion of law and equity, registration of titles to land and a systematic penal code.³⁷

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34. *Id.* at 140.

35. Introduction 41. See also M. Cattaneo, *Hobbes's Theory of Punishment*, *Hobbes Studies* 275 (K.C. Brown ed. 1965).

36. A Doctoral Dissertation in progress at Loyola University of Chicago by J. Dennis Lamping is tentatively entitled "Sir Edward Coke: His Interpretation of 'In Other Courts.'" See also E.B. Graves, "Studies on the Statute of Praemunire of 1353," Unpublished Doctoral Dissertation, Harvard University, 1928; E.B. Graves, *The Legal Significance of the Statute of Praemunire of 1353*, in *Anniversary Essays in Medieval History by Students of Charles Homer Haskins* 57 (1929).

37. See H. Maine, *Lectures on the Early History of Institutions* 397-98 (7th ed. 1914).

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Medical Jurisprudence. By Jon R. Waltz and Fred E. Inbau. New York: Macmillan Co. 1971. Pp. xiv, 398. \$10.95.

Law studies are reportedly on the rise in medical schools. Eleven medical schools in the United States have separate divisions of legal medicine, and approximately 42 offer courses which range from short lecture series to seminars. Of the 42 schools, 27 offer the course as an elective, while 15 make it a requirement.¹

Medical Jurisprudence by Professors Jon Waltz and Fred Inbau is a sound contribution to the development of the study of legal medicine, and will undoubtedly be used by students in many of these programs. Its intended audience is primarily the student and practitioner of medicine, not the lawyer. Since medical malpractice and courtroom testimony are frequent concerns of the medical student, the subjects most commonly covered in legal medicine courses in medical schools are professional liability, problems relating to patient's consent to diagnostic, therapeutic, and investigational procedures, and medical testimony in court. Of the various topics, the subject of medical malpractice is, not surprisingly, closest to the physician's heart, for it involves his reputation and his pocketbook. Medical malpractice suits have substantially increased in the past decades and continue to grow both in number and in the dollar amount of the claims.² *Medical Jurisprudence* is aimed primarily at this interest. With the exception of 38 pages covering the physician and the criminal law, and 8 pages covering the physician as a courtroom witness, this text is devoted to an analysis of medical malpractice.

In Part I of the book, "The Physician and the Civil Law,"³ the physician is introduced to the litigation process, laws concerning licensing, and the private canons of professional and inter-professional conduct. Of particular importance to the modern physician is the authors' treatment of medical malpractice liability insurance.⁴ Part II, "The Physician and the Criminal Law,"⁵ contains a discussion of medical questions which frequently arise in criminal litigation, such as the estimation of time of death and the interval between injury and death. The criminal laws pertaining to abortion, homicide, and the failure to report criminally inflicted injuries and the habitual use of narcotic drugs are also touched upon briefly. Part III, "The Physician in Court,"⁶ describes what is required of a physician as a courtroom witness.

1. Beresford, *The Teaching of Legal Medicine in Medical Schools in the United States*, 46 *J. Med. Ed.* 401, 401-02 (1971).

2. J. Waltz & F. Inbau, *Medical Jurisprudence* 38-40 (1971) [hereinafter cited as Waltz & Inbau]; Halberstam, *The Doctor's New Dilemma—"Will I Be Sued?"*, *N.Y. Times*, Feb. 14, 1971, § 6 (Magazine), at 8.

3. Waltz & Inbau 3-326.

4. *Id.* at 302-08. See also Franklin, *What Should Be in a Malpractice Insurance Policy*, 14 *Clev.-Mar. L. Rev.* 478 (1965); Hirsch, *Insuring Against Medical Professional Liability*, 12 *Vand. L. Rev.* 667 (1959); Uthhoff, *Medical Malpractice—The Insurance Scene*, 43 *St. John's L. Rev.* 578 (1969).

5. Waltz & Inbau 329-66.

6. *Id.* at 369-76.

Although the range of topics is broad, this book is essentially a discussion of the principles of the law of torts and evidence in a medical context. As would be expected of such a textbook, it is essentially expository rather than argumentative in approach. While the title, "Medical Jurisprudence," is ambitious, one would not expect when seeing its relatively small size—398 pages set in large type—that it would cover all points of contact between law and medicine. It does not. The authors fail to include current topics of interest, such as legal regulation and liability of hospitals and health facilities, the activities of the physician in adoption, artificial insemination, contraception, sterilization, sex-change surgery, overtreatment and undertreatment, suicide prevention, and public health.

The need for a book which thoroughly analyzes the law as it relates to medical developments is apparent. With the discarding of charitable and governmental immunity, the question of hospital liability takes on new meaning for the physician. Formerly a hospital was little more than a housekeeping facility, a place where the patient was bedded and fed. Today only minor procedures are carried on in the physician's office. The physician has grown increasingly dependent on the hospital's technicians and facilities. The hospital is becoming the "community health center" or as is sometimes said, "the doctor's workshop."

The modern hospital is a vast, complex operation, and it is increasingly difficult for people who work there to fully understand and appreciate the duties and responsibilities of their colleagues. At one time hospitals argued that they had no control over the physician. Today the law recognizes a duty to supervise.⁷ While insurance covering all members of the health team diminishes the importance of these problems, legal and administrative issues remain. The issue of respondeat superior is complex. In the case of a nurse's negligence, some courts take the position that even though a nurse is acting under a physician's order, responsibility under respondeat superior falls upon the hospital as well as the physician since nurses have a duty to report to the hospital administration.⁸ In the case of an anesthesiologist's negligence, the question arises whether the physician or the hospital decides upon the anesthesiologist or the use of anesthesia.⁹ In the usual case, the hospital denies control and the physician says that he has little control and less choice. Under the traditional view, now in dispute, the surgeon is said to be "captain of the ship."¹⁰

The emergency room provides a wide area of litigation. Even a private hospital may be held liable for refusing to care for an individual in an emergency situa-

7. See, e.g., *Darling v. Charleston Community Memorial Hosp.*, 33 Ill. 2d 326, 211 N.E.2d 253 (1965), cert. denied, 383 U.S. 946 (1966). "Just where the courts will draw the line on the extension of joint and several liability imposed on the private physician and the hospital is difficult to predict at this point." Ludlam, *Physician-Hospital Relations: The Role of Staff Privileges*, 35 *Law & Contemp. Prob.* 879, 884 (1970).

8. *Monk v. Doctors Hosp.*, 403 F.2d 580, 583 (D.C. Cir. 1968); *Stone v. Sisters of Charity*, 2 Wash. App. 607, 610, 469 P.2d 229, 231 (Wash. Ct. App. 1970); see *Waltz & Inbau* 105.

9. See *Waltz & Inbau* 105. See generally *Seneris v. Haas*, 45 Cal. 2d 811, 291 P.2d 915 (1955).

10. E.g., *Honeywell v. Rogers*, 251 F. Supp. 841 (W.D. Pa. 1966); *Collins v. Hand*, 431 Pa. 378, 246 A.2d 398 (1968); see *Waltz & Inbau* 114-16.

tion.¹¹ Moreover, the role of the emergency room in health care is taking on added significance in view of the growing inaccessibility of the private practitioner. An emergency room may be operated by a "professional organization of physicians," but the independent contractor defense may not stand up. Frequently emergency rooms are understaffed and lack modern facilities.¹²

The authors' discussion of emergency treatment is limited to the old bugaboos frightening the good samaritan. Fear of a malpractice suit for care in emergencies amounts to what Professor Plant calls a "legal spook."¹³ Although there has not been a single discoverable suit adjudicated against any person involved in a "good samaritan" act, many states have passed such laws in response to pressure from medical organizations.

Although the number of malpractice suits are on the increase, one may wonder about the physician's concern. The physician may be sued, but he is a party in name only: the real defendant is the insurer, at whose expense the physician ought to be only too happy to see his patient compensated. The settlement or judgment is not out of his pocket (although the premiums are), and his practice is hurt not one whit from a malpractice suit. The malpractice suit may be a blow to self-esteem, but little else. Physicians and particularly specialists seem to be immune from the effects or stigma of a malpractice suit because their services are in short supply.

It is also interesting to note that notwithstanding the publicity surrounding medical malpractice suits, there is apparently no follow-up of the cases by medical associations. Members are rarely disciplined. When asked who has made the greatest contribution to the practice of medicine, one wit answered, "Melvin Belli, the California lawyer." Self-policing within the profession has not substantially improved since the day Hippocrates observed, "There is no punishment for the malpractice of medicine."

The number of malpractice suits, although increasing, has been given all too extensive publicity.¹⁴ Insurance companies do not complain; playing on the physician's fears makes it easier to ask higher premiums. While beclouded by publicity, the fact remains that the malpractice case constitutes a small part of the lawyer's work. Indeed many lawyers refuse to handle a negligence case against a physician. The lawyer seeks the friendship of the medical community; he needs the physician as an expert witness in personal injury and workmen's compensation cases, which constitute some 70 percent of all trial practice. The

11. E.g., *Wilmington Gen. Hosp. v. Manlove*, 54 Del. 15, 174 A.2d 135 (1961); *O'Neill v. Montefiore Hosp.*, 11 App. Div. 2d 132, 202 N.Y.S.2d 436 (1st Dep't 1960). Contra, *Birmingham Baptist Hosp. v. Crews*, 229 Ala. 398, 157 So. 224 (1934). See generally Powers, *Hospital Emergency Service and the Open Door*, 66 Mich. L. Rev. 1455 (1968).

12. "Most hospitals have emergency rooms. Too many of them are staffed by a nurse who is elsewhere in the hospital when a patient arrives in shock, or by a doctor who is 'on call' Translated that often means 'at home.'" *Life*, Nov. 6, 1970, at 26. See also *Wall St. J.*, Oct. 5, 1971, at 1, col. 6.

13. *Hospital Physician*, July 1966, at 11.

14. See, e.g., Bradbury, *The Doctor Has a Bad Day in Court*, *Life*, Sept. 13, 1968, at 75; Halberstam, *supra* note 2; *Medical World News*, Oct. 24, 1969, at 34.

lawyer does not wish to jeopardize this work by an occasional malpractice case.

Among the physicians sued, anesthesiologists, orthopedists and surgeons head the list. The rapport between them and their patients tends to be thin, and their errors tend to be obvious. At the other end of the spectrum is the psychiatrist, who is rarely if ever sued for malpractice in psychotherapy.

The exhaustive report of Senator Abraham Ribicoff's committee investigating medical malpractice concludes that to a large extent, malpractice suits are the indirect result of the breakdown of the traditional patient-physician relationship.¹⁵ The main cause for poor medical care today is the pressure of heavy case loads; the physician in the United States is usually well trained. Standard of care is measured by the circumstances, and the circumstances include the fact that the physician has a heavy case load. The physician is not held responsible in tort for his complicity in keeping down the supply of available physicians.¹⁶ Despite America's wealth, medical care in this country is poor for the great mass of people. It costs more while providing less satisfaction and poorer treatment for millions.¹⁷

Another issue blown out of proportion in medico-legal discussions is that of consent to treatment. The authors devote 27 pages to it.¹⁸ In medical practice, consent is perfunctorily given. The instinct for survival compels a person to sign almost any kind of consent form put before him. However, it is not so much the threat of a tort suit that dissuades the physician from treating a person without his consent. There are other considerations. Without the patient's consent, the physician is not likely to get paid. Moreover, confronted with a heavy case load, the physician has a ready excuse to avoid treating an untoward patient even when faced by appeals of family members.

Another of the long discussions in the book is devoted to the "locality rule,"¹⁹ namely, that "a medical man has the obligation to his patient to possess and employ such reasonable skill and care as are commonly had and exercised by reputable, average physicians in the same general system or school of practice in the same or similar locality."²⁰ The locality rule made it well-nigh impossible to prove a case of negligence. If the standard of care is standard in the locality, then the physician from that locality is needed as a witness, but it is difficult to obtain a physician from the same locality to testify against a colleague. The

15. Staff of the Subcomm. on Executive Reorganization of the Senate Comm. on Gov't. Operations, 91st Cong., 1st Sess., Study on Medical Malpractice: The Patient Versus the Physician 1 (Comm. Print 1969).

16. Kessel, *The A.M.A. and the Supply of Physicians*, 35 *Law & Contemp. Prob.* 267 (1970).

17. S. Greenberg, *The Quality of Mercy* (1971). See also Lewis, *Physician, Heal Thyself*, *N.Y. Times*, Oct. 2, 1971, at 31, col. 1; *id.*, Oct. 4, 1971, at 39, col. 1.

18. Waltz & Inbau 152-77.

19. *Id.* at 64-74.

20. *Id.* at 64 (footnote omitted) (emphasis deleted). See W. Prosser, *The Law of Torts* § 32, at 164 (4th ed. 1971); McCoid, *The Care Required of Medical Practitioners*, 12 *Vand. L. Rev.* 549 (1959).

rule, first incorporated into the standard of care some 90 years ago in a Massachusetts case,²¹ has been relaxed through the years by various devices.

One needs little boldness to predict the demise of the locality rule. While it may linger a bit longer as to the general practitioner, the standard for the specialist is generally held to be the same as that of other specialists within the field, regardless of where or the type of community in which they practice.²²

Several reasons account for the demise of the rule. A geographical concept is inappropriate when people move about as frequently as they do in this country. Many physicians have attended schools outside the locality where they ultimately practice. The requirements for board certification of specialists are nation-wide requirements. Physicians not only read national publications but are increasingly attending national conferences. In short, the "locality" is now the entire country.

The authors' discussion on forensic investigation and pathology is innovative in a medico-legal course textbook. In some countries a course in forensic medicine in law or medical school is devoted almost entirely to medical-legal investigation; it has been ignored in United States schools. The assassination of President Kennedy, the killing of civil rights workers in Mississippi, and the Attica prison riot have forcefully pointed out the need for a kind of "medical ombudsman" who can be relied upon for a competent, impartial medical examination. The need for documentation of external wounds prior to any alteration by therapeutic endeavors arose in the case of the assassination of President Kennedy. As the authors tell us, if proper notation had been made of the exit bullet wound in the front of the President's neck prior to the tracheostomy incision, much subsequent confusion would have been avoided regarding the course of the bullet.²³ The report on the deaths at Attica by medical examiner John F. Edland cut through the confusion and distortion that had prevailed.²⁴

Since this book purports to be a scholarly work, one is surprised by its cook-book ending, consisting of some do's and don'ts that "may serve the purpose of rendering a physician's courtroom experience less unpleasant than originally anticipated" and "will also enhance the effectiveness of his testimony."²⁵ The suggestions include: be prepared; confer with the lawyer calling you as a witness; do not be nervous or frightened; be courteous; do not be patronizing or smug; avoid esoteric terminology; tell the truth, no more or no less; maintain composure; do not answer a question to which objection has been made until the judge has announced his ruling; do not volunteer information from the witness stand. Judging from these suggestions, one would think that here the authors might well have heeded their own advice to speak no more than is necessary.

21. *Small v. Howard*, 128 Mass. 131 (1880), overruled, 354 Mass. 102, 235 N.E.2d 793 (1968).

22. E.g., *Blair v. Eblen*, 461 S.W.2d 370 (Ky. Ct. App. 1970); *Naccarato v. Grob*, 384 Mich. 248, 180 N.W.2d 788 (1970); *Silberstein v. Berwald*, 460 S.W.2d 707 (Mo. 1970). *Contra*, *Campbell v. United States*, 325 F. Supp. 207 (M.D. Fla. 1971); *Sims v. Silvey*, 246 So. 2d 394 (La. Ct. App. 1971).

23. *Waltz & Inbau* 330.

24. *Newsweek*, Oct. 11, 1971, at 67.

25. *Waltz & Inbau* 373.

Except for the ending, however, this book gives a splendid overview of many aspects of legal medicine. Students of medicine as well as law are fortunate in having it available.

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