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1975

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Recommended Citation

Alexander M. Bickel, Political Philosopher, 1975 Supreme Court Review 419 (1975)

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ROBERT H. BORK

ALEXANDER M. BICKEL,
POLITICAL PHILOSOPHER

It is hardly surprising that with his book *The Morality of Consent* Alexander M. Bickel moved from constitutional scholarship into explicit political philosophy. That would seem a natural, indeed almost an inevitable, progression for scholars of the Constitution. The wonder is less that Bickel developed in that way than that so many academic scholars of the Constitution do not. There is, of course, political feeling implicit in much constitutional writing, but too often it is disguised as legal analysis; it colors and distorts constitutional judgment rather than informing it.

This book, published posthumously, was Bickel's first foray into the realm of political philosophy. He came equipped, as the book makes evident again and again, with the intellectual apparatus of a profound lawyer as well as the historical learning that earned him an appointment at Yale as Chancellor Kent Professor of Law and Legal History, and an ease with political science that could easily have qualified him for a chair in that department as well.

The Morality of Consent needs to be seen in perspective. It is not a definitive work; it is not the full statement of Alex Bickel's political thinking. It was intended as a ranging shot in the task Bickel had set for himself: the reconstitution of a conservative intellectual tradition in this country. He was not entirely satisfied with the label "conservative." Although he applies it to himself here, at various points in the book he modifies it by referring to his views

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as "Whig in the English eighteenth-century sense." And he also claims, rightly, that it is he, rather than those whose thought he opposes, who is entitled to the name of "liberal," by which he meant liberal in the classical, European sense. The effort to find an appropriate label is confusing. Some idea of what Bickel meant may be gleaned from the fact that he thought *The Federalist* an example of the best American conservative thought, as Edmund Burke was of the English variety. In this sense, Bickel's conservatism was a habit of mind and a quality of spirit that rejected the doctrinaire, the derivation of conclusions about a highly complex, somewhat irrational, flesh-and-blood world from large abstractions and grand principles. He displayed instead the qualities of thoughtfulness about experience, prudence, modesty of ambition for political solutions to problems, respect for established values and institutions. He quotes approvingly from Burke concerning abstract theories of individual rights: "distinctions of rights . . . these metaphysical distinctions; I hate the very sound of them."

The distinction between those who reason from experience and those who reason from abstract principle, and the serious dangers posed by the latter, is a major theme of this book. Indeed, it opens with the observation: "Two diverging traditions in the mainstream of Western political thought—one 'liberal,' the other 'conservative'—have competed, and still compete, for control of the democratic process and of the American constitutional system. . . ." The liberal tradition or model is "contractarian" and "rests 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. . . ." The Whig [or conservative] model, on the other hand, begins not with theoretical rights but with a real society, whose origins in the historical mists it acknowledges to be mysterious. The Whig model assesses human nature as it is seen to be."

These days the contractarian model is having all the best of it, particularly in the academic world. Bickel alludes to some examples of that tradition but does not take direct, specific issue with those writers here, as undoubtedly he would have been required to do had he lived to develop the intellectual foundations of his own position. This book is not an explicit attack upon the premises of contractarianism. It is an excellent example of the opposed mode of argument, and it does suggest why contractarianism is to be

feared: "It is moral, principled, legalistic, ultimately authoritarian." In our time, it is also egalitarian, a fact that, Alex Bickel thought, poses special danger for freedom and safety in society. Egalitarianism requires not only an equal chance in social and political processes but equal results obtained from those processes. That in turn requires that the state control institutions once thought of as private, as areas for the play of individual and group initiatives, in order to ensure that they produce equality of outcomes. Of necessity, this effort expands the state enormously and drains the strength of centers of private power so that the individual is without buffer institutions that deflect and moderate the direct power of the state. The upshot will not be equality; it may, both Alex Bickel and Edmund Burke warn, be tyranny.

There is too much richness of insight in this book for summary in brief compass. The book does not accomplish the restoration of a conservative intellectual tradition—Bickel knew that to be a work of enormous magnitude—but it is a noteworthy first step. He succeeds in setting much of the framework in place and in displaying the mode of thought appropriate to that tradition. It is hard to believe the work will not prove seminal, that the tradition will not be elaborated by others.