REVIEWS


WILLIAM DRAPER LEWIS as Director of the American Law Institute rendered the scientific study of law in this country a most significant service by bringing Ernst Rabel to the United States so that he could prepare a work on the conflict of laws of the civil-law countries paralleling the sections of the Restatement of the Conflict of Laws. This plan had to be abandoned when it was discovered that the differences between our system of law and that of the civil-law countries were too great to allow such minute, section by section, comparison. Instead, Rabel began the preparation of a systematic treatise in which he undertook a critical comparison of the rules of the conflict of laws of the different countries of the world and their application to specific problems. The present initial volume contains the family law: marriage, the personal effects of marriage, and the effects of marriage upon property, divorce and annulment, and parental relations (parent and child, illegitimacy, legitimation and adoption). It does not appear why the subject of guardianship, commonly included in the family law, was omitted in the present volume. The second volume, which seems to be well under way, is to deal principally with foreign corporations, torts, and the general problems of contracts.

The author is without question better qualified than any one else to write a comprehensive work devoted to a critical comparative study of the conflict of laws. As Director Lewis points out in the Foreword, Rabel combines in his person the broadest kind of scholarship with an extraordinary background of practical experience in the fields of comparative law, international law and the conflict of laws. Before the first World War he was one of the leading authorities on Roman law. The war made him realize the value of comparative law and before long we find him a leader, perhaps the foremost leader, in this field, so that when the Comparative Law Institute at Berlin was established, Rabel became its director. Under his guidance it became the best organized, the most comprehensive and most practical institute of its kind in the world. Rabel has been a judge both in Switzerland and in Germany, a member of the World Court at The Hague, a member of the German-Italian Arbitral Tribunal, and a member of the Council and Executive Committee of the Institute for Unification of Private Law in Rome.

In view of Rabel's extraordinary accomplishments one's expectations regarding the present enterprise were naturally aroused to the highest pitch. Now that the first volume lies before us, it is a great pleasure to record that these expectations have been fulfilled to the utmost. The author has dealt with one of the most intricate and confused subjects in the conflict of laws.

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As is well known, in the conflict of laws of this country marriage and divorce approach a state of anarchy, and the same situation prevails in other countries, many of which have substituted the national law of the parties or the national law of the head of the family for the law of domicile in the solution of these problems. In no other field of the conflict of laws does the notion of public order (public policy) enter in so many ways to prevent the application of the normal law. Hence the presentation of the law of all countries of the world would seem an impossible undertaking for any single individual. Rabel, however, does not hesitate to plunge into such a venture. In the Table of Statutes and International Conventions (pages 675-713) we find a formidable list of references to the codes, special legislation and international conventions of sixty-two States, not to mention those belonging to the Anglo-American group, reference to all of which is constantly made throughout the volume. Nor does the author content himself with simply referring to the texts of the codes, special legislation, treaties and international conventions (Hague Conventions, Montevideo Conventions, Scandinavian Conventions), but so far as their interpretation by the courts throws special light upon them, he also includes the court decisions. We find, therefore, frequent references to decisions by the courts of France, Germany, Italy, Austria, Belgium, the Netherlands, Poland, Spain and Switzerland. Apparently the author found it difficult to procure the decisions of the courts of Latin America, except those of Brazil.

Fortunately for the reader Rabel does not give this complicated mass of legislative and judicial materials in their raw state. His marvelous gifts for analysis and classification enable him to group them in an orderly manner and to deal with them without apparent difficulty. In addition to the conflict rules of the different countries Rabel gives the substantive background of the civil institutions to which the conflict rules relate. His deep insight into the origins and historical development of these institutions throws a new light upon many phases of the subject, showing frequently the insufficiency of the existing conflicts rules or the need of an entirely new approach to the subject.

We find in this latest work of Rabel a fine example of the comparative method, which goes far beyond mere textual comparison to find solutions corresponding to the underlying social objectives. Rabel does not pretend to have adequate knowledge of the substantive background of all fields of law, nor of the law of a particular field in all countries. His primary objective is to establish a critical comparative method which will enable others to carry on the work he has begun. The project is perhaps too vast for one man to complete, but even if Rabel's efforts were limited to the present volume, he should be satisfied to have made available to the Anglo-American legal profession a work pointing towards a fuller and more cosmopolitan development of our law.

It is a fortunate circumstance that the work should appear at the present
time when as a result of the war the political leadership of the world has unquestionably passed largely into our hands. Now that we have at long last abandoned our political isolationism, the legal profession must awake to the fact that our law has been bogged down by an attitude of legal isolationism. Our new position in the world makes it imperative that we become better acquainted with other legal systems. We cannot properly maintain our leadership if we remain ignorant of the legal order under which other countries live. We must assume our full responsibility in a common effort to bring some degree of order into the chaotic state of the law as it now prevails throughout the world.

In undertaking this new task we can do no better than to follow the example set by Rabel's breadth and depth of scholarship and by the accomplishments of his Institute of Comparative Law at Berlin. This Institute, which was liberally endowed by the Government, was divided into a number of sections, each of which was devoted to a particular system of law. The experts of each section were well qualified to give opinions in matters of legislation, conflict of laws and international trade, and it became customary for German courts to seek their opinion when confronted with a problem of foreign law. The results of research done at the Institute were published in a notable periodical.

We should follow Rabel's example by establishing institutes of comparative law in this country. A number of our law schools possess extensive collections of foreign law which, heretofore, have been put to little use. It is true that financial burdens might prevent any one law school from carrying on all the functions of Rabel's Institute, but each one could do the work of a section, one concentrating on Latin-American law, another on Slavic law, another on Chinese and Japanese law and so forth. They might jointly publish a review on comparative law. If our universities should be unable to carry out such a program, an endowed institute in Washington or New York would be an alternative. The ultimate and primary objective of these law institutes should be the development of our law along more cosmopolitan lines, and away from its isolationist character. Since a great deal was accomplished in Germany in the short period following World War I, there can be no doubt as to what we could accomplish with the whole-hearted support of the legal profession. The need is most urgent. Rabel's example should convince any sceptic of the practicality and value of such a venture.

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The comparative study of law, which was significantly stimulated in continental Europe by the first World War, notably in France, Germany, and Italy, will deserve presumably, even wider and more intensive attention in the near future. In devastated Europe, the need to establish bases of continental cooperation, to devalue the excesses of nationalism, to cultivate international legal understanding, and to secure adjustments facilitating the rehabilitation of a shattered economy, is more imperative than it was in 1918. In the English-speaking communities, and especially the United States, which, despite their large influence in the evolution of international law and their tremendous stakes in world trade, have hitherto displayed an aloof and sporadic interest in comparative consideration of foreign laws, holding their indigenous systems formally apart from such contamination, it seems no longer expedient nor even feasible to pursue the historic policy of isolation in this fundamental and very practical aspect of legal science. The war now ended has brought millions of our citizens into multifarious contacts with previously remote cultures; it has left us with many problems in all parts of the world; it has opened the way for an unprecedented epoch of international commerce by sea and by air. Under these conditions it becomes progressively more desirable to secure appropriate understanding of the laws and customs of those among whom we travel and trade. In particular, since these laws and customs will remain diversified and local, it is especially pertinent to be informed on the rules that govern the conflict of laws in their application to the relations arising in international commerce.

These obvious considerations render the attention that the field of international private law is attracting from the viewpoint of a comparison of the Anglo-American with civil law doctrines highly opportune. It is true, as Professor Nussbaum remarks, that, in this field, "international migration of legal theory has long been prevalent." The two volumes here reviewed, however they may contribute secondarily to this process of imitation and internationalization, have the primary value of providing incisive critiques, in which we may observe, respectively, the conflict rules of this country and those of England through the eyes of distinguished foreign scholars. These works are unexpected dividends of catastrophe—of the purblind Nazi policy that has driven out the leading jurists of Germany from that land which a hundred years ago was the preeminent home of legal science. It is more than coincidence that the authors, with Ernst Rabel (the first volume of whose monumental comparative survey of conflicts law is being authoritatively reviewed elsewhere in this Journal), were associated at Berlin, where Savigny once taught.
The first of these works, sponsored by the Columbia Council for Research in the Social Sciences, comes from Professor Nussbaum, the well-known authority on monetary legislation and commercial arbitration, a pioneer in the development of legal fact research in Germany, and the author of a standard work on international private law, published in Germany in 1932. He therefore brings to the subject a ripe experience, special interest in the subject, and, in addition, the benefit of first-hand study of the American scene, which, as he explains in the preface, has stimulated "a new picture of the whole." The object of the volume is to reproduce the picture in terms of American law. Inevitably, in doing so, the author has adverted to the comparable institutions and doctrines of the civil law.

Although Professor Nussbaum's work is on a scale too exiguous to serve as a full-blown treatise on American conflicts law or to permit systematic comparison in detail with civil law doctrines, it gains thereby in incisiveness as a medium of suggestion and critique. The author is thus enabled to concentrate on strategic points, to develop them without pleonastic detail, and to limit himself to the more significant materials in the references—a task in which he has admirably succeeded. His observations, frequently penetrating and always readable, will challenge the American reader and have the practical value of bringing to bear on local issues theories and insights inspired by the methodical analysis characteristic of German scholarship as well as by European experience. It is of course not possible here to recapitulate many of the details of so succinct a resumé of a broad field. In this review, too long delayed by the exigencies of these parlous times, we must be satisfied to remark a few features that attract attention. From this point of view, the scope and arrangement of the work and the theoretical positions taken on central issues, as well as its basic premises, are of primary interest.

The work, like ancient Gaul, is tripartite. There is first a general part, then a part dealing with the "substantive" field of choice-of-law, and finally a part on procedure—a conventional arrangement. In the first part is found discussion of the object and name of the subject, a survey of the historical background, including two chapters devoted to the "internationalist" and "nationalist" theories and trends, followed by briefer references to the legislative materials and the literature, and a special account of "American" private international law. In the second part, an excellent conspectus of the basic theoretical problems is presented in the chapters devoted to the structure of choice-of-law rules, qualification, renvoi, the "preliminary" question, public policy, and frants legis, these topics being followed by more extensive consideration of the "personal law" and of the rules applicable to contracts. The third part, in certain respects the most useful because it deals with difficult and in part unexplored subject matter, covers the problem of "substance and procedure," the basic aspects of jurisdiction, foreign aspects of jurisdiction and procedure, foreign judgments, and proof of foreign law. There is in addition, a concise bibliography, a table of cases, and a subject index.
The observations invited by this table of contents are obvious. Broad substantive areas are practically or quite missing, perhaps a self-imposed, though unexplained, limitation in the plan. There is to be found, for example, one sentence on torts (without allusion to Hancock's monograph), the equivalent on workmen's compensation acts, meagre references to corporations, property, trusts, succession, bankruptcy, and a brief note to the Restatement for administration of estates. The arrangement is of course quite admissible, yet the writer would personally prefer (as the author would doubtless suppose, due to the American tradition) to have the treatment of the procedural questions precede the choice-of-law matter, partly on account of their significance in the American scene and partly since, with the author, he conceives these questions to be of primary importance and not merely supplemental to "substantive" law, as the old arrangement of Gaius' Institutes would suggest. Incidentally, the reviewer would classify the topic of "substance and procedure" with the questions relating to choice of law, while foreign judgments, properly described as a "hybrid" by the author, would under this distinction certainly include "substance" as well as "procedure". But these are doubtless venial matters.

In various respects, too many to be catalogued in this brief account, the author's treatment of the theoretical problems on which the continental literature has expended so much ink is suggestive. The distinction of "spatially conditioned internal rules," in contrast to conflict rules and internal law in general, adverted to from a variant viewpoint by the late Walter Cook, deserves study. It is apparently in close relation to the "substance vs. procedure" problem, treated by the author independently, and, though the reviewer quite agrees that such rules may be distinguished from the general conflict rules, the former nevertheless have a similar end—to state, in this case specifically, the applicable law. Contrary to Cook, the author finds "an unalterable kernel," "surrounded by a shifting penumbra," in the concepts of domicil and procedure, although the ensuing discussion of presumptions and burden of proof is apparently directed to demonstrating that these by virtue of their importance are not questions for the lex fori instead of ascertaining whether they contain the "unalterable kernel" of procedure (which conceivably is an element of all law).

In connection with the problem of qualification, the author—who properly rejects the doctrine of qualification by the lex causae together with the confusing idea of secondary qualification but, we believe, too simply accepts Bartin's tenet of qualification by the lex fori—introduces the interesting concept of "integration" to qualify his position. By this means, it is possible to slip over that pons asinorum of the qualifications puzzle—the statute of limitations. Under another and less precise name, this seems to lean toward the idea of a comparative technique, to which the author, though appreciative of the importance of comparative methods, objects on the ground of

1. P. 188.
2. P. 53.
impracticability. The comment on the much debated question of renvoi is
refreshing in its admission of the doctrine, qualified by adverse observations
on the peculiar but conveniently practical English development. Equally
suggestive is the treatment of the “preliminary” question and the problems
connected with the evasion or invasion of statutory regulation.

Even in this attenuated account, the treatment of contracts, jurisdiction,
and proof of foreign law deserves special mention. On the last of these
topics, there is a discussion in practical terms of the varying doctrines respect-
ing judicial notice, review of findings of foreign law, and presumptions. In
the relatively extensive treatment of the general theories of contracts, a
concise interpretation of the “proper law of the contract” doctrine, most
fully developed in the English cases, is given, and the practical advan-
tages of a much wider recognition of the ancient principle of “autonomy”
are stressed. The discussion of jurisdiction inter alia provides a most helpful
comparative analysis of the basic Anglo-American and civil law systems.
In both these highly important matters, the analysis leads to criticism of
the Restatement, stringent but not unwarranted.

In acceptance of the “nationalist” conception of conflict rules, the posi-
tion basically taken by the author, described as “realistic” on the flyleaf,
approximates that of the “local-law” school in this country. True, the
author rejects the position of this school on the ground that “rights created
under foreign law do exist,” a criticism that, it is apprehended, misconceives
the Holmesian character of “rights” as defined by the “local-law” theories
and, indeed, seems to suppose a notion that rights “exist” in a sense not
entirely dissimilar to that projected in the vested rights doctrine. But, on
the essential point, the author clearly indicates that the “nationalist” con-
ception is “the only hypothesis conforming to the facts,” and most inter-
estingly, and with apparent approval, emphasizes the “homeward trend”
in the courts.

The position is that conflicts law is a branch of local, as distinguished from
international law, a truism on which, as the author properly observes, there
is today almost general agreement. The difficulty in this is not that it is
improper to start from the lex fori in the consideration of conflicts problems,
but that, in a subject matter where the rules are largely liquid and in conse-
quence the prescriptions of the lex fori are for the most part to be determined,
it merely sets a framework for the problem. The analysis does not seem
squarely to meet this issue; on the contrary, the remarks on “penal” laws
suggest that characterization by reference to “international” standards as
defined by the lex fori is deemed unsatisfactory. As the author remarks,
there is a “distinct universalist trend,” but, as indicated above, although

3. P. 74.
4. P. 35.
5. P. 42.
6. P. 126.
7. P. 43.
appreciably mitigating his nationalist premise by a liberal attitude toward "autonomy" in transactions, he apparently rejects comparative techniques as a means to attain the international objectives of conflicts law.

This position, it would seem, ties in with the author's characterization of public policy as an "indispensable" reservation in all conflicts rules. It likewise is congruent with his approval of reciprocity as a condition for the recognition of foreign judgments and of resort to the lex fori in default of proof of the foreign law. These doctrines, necessary evils to be tolerated in extreme cases, reflect nationalistic prepossessions that, in the reviewer's judgment, do not deserve extensive encouragement. The exaggerated development of ordre public in French and Italian theory, the immense practical difficulties imposed by the reciprocity doctrine in the actual enforcement of judgments in the European complex, difficulties to which Great Britain succumbed in 1933 by accepting the principle of reciprocity, and the extraordinary results to which the presumption in favor of the lex fori at times lends itself, as well as the singular conception of conflicts rules as nonfederal law entertained by the Supreme Court under the Erie Railroad v. Tompkins doctrine, illustrate the dangers of nationalistic positivism. More generally, the conception that conflict rules should be interpreted in accordance with the peculiar notions of "internal" law and their scope basically restricted by nationalistic policies, appears in disharmony with the purpose of these very rules, as part of the lex fori, to derogate from the local law in dealing with foreign private relations.

Martin Wolff's recent treatise is in certain respects a more exhaustive and systematic counterpart for the British scene. The author, a recognized specialist in the civil law (in both senses) and by repute a brilliant lecturer, in 1933 anticipated this noteworthy contribution to the literature of private international law by the publication of a useful compendium of the subject in German. As the preface explains, the present work, purporting to deal with English private international law, draws on foreign legal systems for the consideration of questions unresolved or left in doubt by the English decisions. This mode of comparative treatment has the peculiar advantage of dealing with the subject matter on the specific plane of a particular system, but the fragmentary character of the English materials in the present field impairs their value as a vehicle for general comparative purposes. Nevertheless, the author has managed to surmount this difficulty admirably, principally by means of systematic arrangement and by the inclusion of a wealth of illustrative cases drawn from continental law, principally German, French, and Italian, which will be found of exceptional value as they are excellently selected and not infrequently accompanied by challenging, if concise, analysis. This employment of comparative materials is a definite

8. P. 238.
enrichment of the English literature; how far the exposition represents or will affect conservative British doctrine is a matter to be left discreetly to reviewers on the other side of the Atlantic. In any event, to the extent that this doctrine is paralleled in the United States, the work will be of special interest to American students of the subject, even though, it must be noted, there are few references to the situation in this country, with which the author is apparently unfamiliar, and the observations in most of these need to be taken cum grano salis.10

The work includes seven parts, respectively dealing with the scope and history of private international law, the jurisdiction of English courts, the general rules on choice of law, the law of persons and family law, the law of obligations, the law of property, including bankruptcy, and succession upon death. As is apparent, this is a comprehensive arrangement, with a heavy emphasis on the problems of choice of law. Its chief inadequacy would appear to be the relatively limited treatment of jurisdiction, which is considered almost exclusively in terms of British practice, and the even more cavalier treatment of other procedural aspects of foreign litigation. It is notable that for the most part these are dealt with (so far as they are considered) in connection with the general rules of choice of law. This is also true of foreign judgments, a topic intimately related in Anglo-American practice to jurisdiction. The extensive materials assembled on this comprehensive scheme constitute a paradise for the student, but are enough to paralyze a reviewer. The most that can be attempted in this connection is to record certain general impressions inspired by perusal of the volume, susceptible here of being but imperfectly supported by particulars, and to append on certain points such observations as the author’s views suggest.

In the first place, the discussion of the general problems of choice of law in Part III deserves special remark for its clear and comprehensive treatment of various theoretical issues to which specialists in this field have been so frequently devoted. Here will be found acute discussion of the main themes—the nature of conflicts rules, points of contact, including especially domicile and nationality, law evasion, classification of legal rules and institutions, renvoi, the “preliminary” question, application of foreign law, and the exceptions thereto on grounds of public policy. The related questions of the purposes and national or international character of conflicts rules are dealt with in Part I in the first two chapters, which contain an unusually sane and lucid discussion of the fundamental issues. In these the author, positing the avoidance of injustice as the basic purpose of this branch of law, discards successively the vested rights theory on somewhat technical grounds (without remarking that it begs the question) and also the “comity” doctrine for the very sound reasons that the application or nonapplication of foreign laws is not a matter of state concern and that, to quote the text, such conceptions

10. E.g., pp. 36, 72, 100, 115, 174, 244.
"are dangerous because they tend to make the application of foreign law and the recognition of foreign judgments dependent on 'reciprocity'—as if the valueless decisions pronounced by corrupt or ignorant judges in Ruritania could be rendered innocuous in England by the fact that the courts of Ruritania recognize wise decisions pronounced by English judges." 11

The third view, that the purpose of the subject is to secure "harmony" of law, the author regards as sound but inadequate. While the national character of conflicts rules is recognized and the preference of legislatures and courts for their own laws is remarked and to some degree justified on the ground of the difficulties involved in ascertaining foreign law, 12 emphasis is laid upon the desirability in the development of the rules of conflicts law, "to contribute to the attainment of a substantially international character in conflict rules, bearing in mind the ideal of the so-called harmony of laws." 13 This is generous, if not explicit, recognition of the need, even for national purposes, of a comparative approach.

In the more detailed treatment of these theoretical issues, special attention should be directed to the helpful remarks on variations in the meaning of apparently identical terms for points of contact, the careful analysis of renvoi, defining the situations in which the principle of reference has been justifiably utilized, despite academic opposition, and of the analogous "preliminary" question, with the conclusion that the conflict rules, not of the forum, but of the law governing the "principal" question should be applied in the interests of uniformity. Similarly, the discussion of the principles governing the application of foreign municipal law provides a salutary emphasis on the need to interpret the applicable law in its context; more dubious is the author's proposition that foreign law that has been repealed cannot be applied even if the modern rule is not pertinent, an unsupported restriction which may work serious hardships in the lives of refugees from lands that have drastically revolutionized their legal systems. The argument that, when the Russian law is selected by the conflicts rule, the old law of Czarist Russia cannot apply to determine the rights of individuals who fled the Soviet regime, since "it is nowhere in force" 14 seems sophistic. On the other hand, the discussion of the "substance and procedure" problem is not satisfying; after pointing out that no formula has been evolved to recognize the character of a given rule, the distinction is accepted in the sense that:

"Only such foreign rules—even though framed as procedural rules—should be applied by the English court as are so closely connected with the applicable substantive rules of the foreign country that

11. P. 15.
otherwise the foreign substantive law would be, as it were, adulterated.” 15

The application of this formula in what follows to the principal situations disputed is prejudiced by the assumptions: (1) that the distinction between substance and procedure presents the same problems in reference to the local law as it does in determining the limits within which the foreign law is to be applied; and (2) that therefore it is necessary to ascertain the intrinsic character of legal rules by an undiscovered touchstone. It would seem that the analysis presented requires the subject to lift himself by his own bootstraps.

This is closely related to the interesting theory of classification presented. The author starts with the assumption that, in a conflicts case, a judge applying foreign internal law should apply all foreign legal rules embodied in the particular classification of the foreign law, e.g., as succession upon death. Then, after referring to various situations that demonstrate Bartin's discovery of the lack of identity in such classifications in different legal systems, he considers the possibilities: (1) of classification by the lex fori, —Bartin's solution—rejected because it leads to absurdities, (2) of classification by means of comparative or analytical studies as advocated by Rabel and Beckett, to which the author objects that such substitution of comparatively derived concepts for those in which the diverse, applicable foreign laws are couched is impossible of accomplishment and would falsify the laws applied, and (3) of classification by reference to the lex causae, to the legal system of which the legal rule forms part, which the author accepts. Apart from the curious manner in which he endeavors to meet the "vicious circle" objection to this solution, it is of interest to note that in certain situations it is abandoned on account of its absurd consequences. It breaks down on the pons asinorum—the statute of limitations conundrum. The weak point in the argument is of course the assumption that the solution of conflicts problems is to be found in a mere logical classification of legal rules, whereas, as Rabel has clearly pointed out in his recent work, the matter before the court in a conflicts case is an actual situation. Hence, the entire problem of classification is misconceived, and what remains is the interpretation of conflicts rules and of the applicable law consistently with what Hancock has described as "conflict of laws policies."

The foregoing illustrates a second impression of the reviewer that the author's facility in analysis is sometimes betrayed by the fascination of that summum ius, by which the logic of the law is driven to paradox. A second illustration may be found in the interesting situation supposed on page 210, in which an Italian couple, domiciled in England, there obtain a divorce and both remarry in England. The husband and the second wife having acquired a domicile in Italy, the question arises on the wife's claim to a portion of the husband's movable property in England on his death. The solu-

15. P. 232.
tion suggested is that the second wife is not entitled to a statutory portion, since the applicable Italian law does not recognize her as lawfully married, nor the first wife, since English law could not admit that she was not divorced. This is verily a judgment of Solomon!

Unfortunately, it is not possible in this account even to attempt to do justice to the other and more specific parts of this stimulating work. We recommend it to the student of the subject as a source of suggestion, challenge, and comparative information. In addition to the usual lists of cases and statutes, it contains a valuable general bibliography and special bibliographies at the end of each chapter. It is printed in the distinctive style of the Oxford Press, and but few typographical errors have been noted, e.g., “Chili” and “Mainmort.”

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Hard on the heels of Messrs. Mortimer Adler, Robert M. Hutchins, and Stringfellow Barr—not to mention Harvard’s own Dr. Eliot of the original five-foot shelf—comes now the Harvard Law School. It has graced with its official imprimatur a List of Books. This list is presented less pretentiously, however, than those in vogue at the University of Chicago and at St. John’s College. It does not purport to encompass the world’s great literature. In fact, out of ninety listed books, only No. 89 (“The Bible”) and No. 90 (“Shakespeare”) are announced as chosen because of their place in the literature of the world; and even this tacked-on twosome is rather apologetically explained—“should be familiar to all lawyers,” “part and parcel of a lawyer’s expression of his ideas and arguments,” “read by Lincoln.”

No, this list was drawn up for a specific and none too subtle practical purpose. As stated, that purpose was to answer requests from servicemen “for advice on books which will help them decide about the desirability of entering the legal profession or which will be of value in preparation for the study of law.” But farther along in the introduction, the list-compilers let slip that “a considerable number of users of this list will, we hope, study at the Harvard Law School. . . .” That is plainer talk. And I trust I may be forgiven just a touch of Ivy League chauvinism when I add that if any potential law-student should be lured to the law by reading these books or should prepare

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* A copy of this list will be sent free to any serviceman on request. Address the Secretary, Harvard Law School, Cambridge (38), Mass. The list was also published in (1945) 58 Harv. L. Rev. 589.
for the law by reading these books, I hope he goes to the Harvard Law School too.

To criticize any list of books put together for any purpose is something like shooting a sitting bird. It is not quite sporting, for any fool can do it. But the Harvard Law School's list of books is not a sitting bird. It is a dead bird. I write rather in the spirit of autopsy than in the spirit of sport.

That the list should be loaded with Harvard Law names is, if not too terribly modest, at least understandable and a little cute. There are, for instance, two dull tomes by former Dean Roscoe Pound and one by current Dean James M. Landis; there are two titles by Felix Frankfurter, "a former member of the Faculty, now Associate Justice of the United States Supreme Court" (and none by any other present member of the Court); there are two by Zechariah Chafee, Jr. and one by John M. Maguire, Professors Chafee and Maguire having compiled the list; there is, cutest of all, *The Centennial History of the Harvard Law School, 1827-1927*. But even the strong can be forgiven for flexing their muscles, the famous for showing their medals.

What matters is that the entire list, Harvard books and non-Harvard books, is a sort of wishful memorial to an intellectual and legal past. Strikingly symbolic is the number of titles harking back with an almost tangible nostalgia to England and to English law. Here—on a list intended to give United States youngsters in the year 1945 a yen to go into the legal game and perhaps some feeling for it—are three histories of England, one of them subtitled *A Survey of Six Centuries, Chaucer to Queen Victoria*; here, too, are biographies, autobiographies, memoirs, of British lawyer after British lawyer—Harris, Haldane, Hall, Parry, Parry again; here, actually, is a novel by Trollope and two novels by Dickens, with this note appended to the Pickwick Papers: "Don't be discouraged by the dull opening chapter, but skim fast until you reach the ball at Rochester." And this, remember, is not Mortimer Adler naming the great books nor a women's club recommending "important" reading; it is Harvard out to catch law students.

Even within the confines of its two most patent prejudices—toward Harvard Law and toward English law—the list looks belligerently backward. There is, for instance, an Englishman who was once connected with Harvard and who has written some rather important and provocative books about English and American law and government. His name is Harold Laski and no title by him sullies the list. There is a graduate of the Harvard Law School whose penetrating if unorthodox comments on legal and social problems might have stirred up more interest in many a young mind than any dozen conventional volumes. But the list is clean of *The Folklore of Capitalism* and *The Symbols of Government* by Thurman Arnold. Louis Brandeis—dead and deified—made the list, but with a far more cautious contribution than his great work, *Other People's Money*. Not, mind you, that economics was ruled out; Harvard boldly recognizes its relation to law. And so good gray Frank Taussig, a name familiar to generations of college economics
students, scored twice. But Thorstein Veblen's many brilliant tracts were all apparently rated with Other People's Money as fare a little too strong for the unstable young.

Inevitably, in a list of four score and ten, there could not but creep in a few live books by lively writers—by Charles Beard and Carl Becker and Benjamin Cardozo and Carl Sandburg and others. Yet, even where it gets away from Harvard and from England, the list is stultified from start to finish by its anxious avoidance of the critical, the exciting, the unstuffy, and by its head-down insistence on the traditional, the old-fashioned, the safe. To take one small example: since fiction studs the list, there might have been substituted for one of the older "classics" James Reid Parker's intimate picture of a New York law firm in action in Attorneys at Law—except of course that Mr. Parker is as irreverent as he is perceptive. To take a far more significant example: there seems no excuse for omitting from a list of ninety, or of nine, Jerome Frank's profound and sparkling psychological shocker, Law and the Modern Mind—except of course that exposure to Judge Frank's ideas could not but spur the possibly-pre-law lads into doing a bit of thinking on their own.

Here, in fact, is the crux of the whole matter. The list is clearly not designed to stimulate boys to think; it is designed to induce them to accept. Evidence of this authoritarian intent exudes from cover to cover of the little pamphlet, and omissions and inclusions could be multiplied ad infinitum to prove the point. But fortunately the point is as good as stated, however unwittingly, in the introduction. The compilers explain the listing of certain books as intended to "produce an appetite for intellectual work and the solution of difficult problems." The number of books presented for this purpose, out of a total of ninety, is precisely four. Four. Let the compilers speak for themselves from here on: "Law students and lawyers are confronted with many stimulating problems, which can be solved only after hard thinking, carefully planned. Hence, it is worth while to get well acquainted with a book about [my italics] some man who accomplished large results by steady thinking about something important. There are few such books by anybody who thought about law. . . ." So the four volumes supplied to "produce an appetite for intellectual work" are a life of Darwin, a life of Pasteur, a sketch of Maitland, and Graham Wallas' The Art of Thought. Comment seems slightly superfluous.

That the list is almost a caricature of the authoritarian approach to law is not primarily the fault of Professors Chafee and Maguire. They live and work in an atmosphere where authoritarianism is king; they must adapt themselves to that atmosphere to be happy and at home in their jobs and they must adapt their list to that atmosphere to get it approved by their fellows. The fault lies deeper. It lies in the type of legal education and the attitude toward law which has long been sponsored by the Harvard Law School. This might as well be said bluntly. For the Harvard Law School, which back in the last century proudly led the procession toward the reform
of legal education and in so doing acquired a prestige probably greater than that of any professional institution in the country, has for decades been coasting on its withering laurels until today—in the United States of 1945—the Harvard Law School is behind the legal times; it is out-of-date.

I believe this can be proved with something approaching mathematical precision. Consider these facts: (1) Professor Felix Frankfurter, when he taught at Harvard, was rated by both insiders and outsiders as the "radical" of the Harvard Law faculty; (2) Mr. Frankfurter's views on law and government, as anyone who has followed them closely knows, have not changed one iota since he left Harvard for the Supreme Court; (3) the climate of opinion at the Harvard Law School has not changed either, except in so far as the loss of Professor Frankfurter in itself meant a slight shift backward; (4) Justice Frankfurter, since Justice Roberts' retirement, has been almost unanimously rated as the Supreme Court's most "conservative" member. In short, the Harvard Law School's bow is some lengths back of the Supreme Court's stern. Yet the Supreme Court chances to be the institution which sets the course of United States law. What has happened is that United States law, moving slowly but surely forward toward an ever more inquiring and practical approach to legal problems, has simply left the well-nigh stationary Harvard Law School behind.

Nor is the Harvard Law School alone back there, all barnacled up with the past. What is true of Harvard is true in considerable degree of the whole of United States legal education, on which Harvard has set its seal so heavily. I do not even except my own school, Yale, although Yale today is so much more in tune with the legal times than Harvard that Yale Law students and Harvard Law students seem almost to speak a different language, and that the reaction of almost any Yale Law graduate to Harvard's list of pre-law books would be a loud—and completely informed—guffaw. But Yale itself in the immediate tomorrow may well be hard put to regain its pre-war momentum, to avoid slipping slowly back into something too close to Harvard's authoritarian mold.

The sad fact is that there does not exist in the United States today one thoroughly first-rate fast-moving progressive law school. There has not been one since Hutchins and Clark and Douglas and Arnold and Sturges and Hamilton and others gave Yale, back in the twenties and thirties, the impetus to break loose from Harvard's apron-strings and set forth on an intellectual adventure of its own. That adventure in legal education stressed a constant spirit of radical inquiry, a skepticism of legal rote and ritual, an avidity for the facts beneath the words, and withal a desire to build the law into a better servant of the public good. The conventionalists of legal education tried to laugh this upstart attitude down; they called it destructive, unscholarly, unsound. They could scarcely guess that in a few short years this sacrilegious "functional approach" would dominate the thinking of the United States Supreme Court and, through the Court, would dominate American law.
Nor have the traditionalists yet accepted the fact that stares them in the face. And so they continue to ply their students with vague general principles and empty concepts, with case-names to memorize and rules to learn, with precedents and precedents and more precedents piled like burnt offerings on the altar of the legal past. Professors Chafee and Maguire say that in compiling the Harvard list they "searched for authoritative . . . books;" their search succeeded. But what price authority—be it on the reserved shelf of the library or in the lecture-room? Isn't there somewhere an underlying conflict between the very idea of intellectual authority, with its overtones of obeisance to the thoughts of others, and the ideal of intellectual freedom which can only be sparked to life by the show-me spirit of unaccepting inquiry and fanned into flame by the encouragement of independent thinking?

Yes, any fool can criticize a list of books. But so can any fool learn to use a library—to look up rules and cases when he needs them. In my simple way, I should have supposed that the chief aim of legal, or pre-legal, education would be to help men learn how to use their own minds.


Although both of the books which are the subject of this review deal with international claims of individuals and juristic persons arising from wrongful acts of States, the specific problems considered and the approaches, purposes and conclusions of the respective authors differ.

Dr. Goldschmidt's book, which can roughly be divided into three parts, is an analysis of the basic legal problems connected with the right to compensation of the victims of Germany's racial persecutions. In the first section ¹ the author seeks to establish a foundation based on existing rules of international law for the claims of those persecuted.

There is little or no question as to the right to compensation of those who were not citizens of Germany. But where the persecuted individual is (or was at the time of his persecution) a German citizen, substantial questions are raised since, in the absence of specific provisions in treaties, international law is not generally viewed as affording relief for damages inflicted by a State on its own citizens. The reason is that from the standpoint of international law the claims for compensation belong to the State of which the victim is a citizen—even though the proceeds of the recovery are almost

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invariably turned over to the individual—and a State cannot assert an international claim against itself. Dr. Goldschmidt seeks, however, to base Germany’s duty to make reparations on principles and rules which would apply equally to German citizens and those who are nationals of other States. His argument is that the law of nature compels every State to respect certain fundamental rights of the individual, such as the rights to freedom and to property, generally called human rights; that the duty of the State to respect human rights has been codified in many laws, and has been recognized by courts, both in common-law and civil-law countries, even in the absence of specific legislative enactment; that the law of nature is a part of international law, and that, therefore, every State is internationally bound to respect human rights of both citizens and aliens in its territory. In support of this view he refers to the numerous interventions by the great powers in the domestic affairs of backward countries during the nineteenth century which have been justified on the ground that human rights of the inhabitants had been violated by the sovereign. He also refers to the treaties for the protection of minorities of race, language, and creed—which expressly codified the principle of the protection of human rights and were accepted by many European countries after the first World War. Germany did not sign any treaty of this kind, with the exception of the German-Polish Convention of May 15, 1922, which only applied to Upper Silesia and was to last fifteen years. But in her note to the allied Powers of March 29, 1919, Germany declared that she was prepared to treat the minorities within her territory according to the principles established by the Minorities Treaties. According to the author, the acknowledgment by the Allied Powers of that declaration internationally obligated Germany to grant to her minorities the treatment established by the Minorities Treaties.

In addition to asserting the right to compensation of victims of persecution from their own country, Dr. Goldschmidt takes the position that individuals are subjects of international law and therefore directly entitled to file international claims for the violation of their human rights resulting from Germany’s racial measures.

In the second part of his book the author examines the different types of agencies and procedures which have been created for the adjudication of international claims for damages. He thinks that mixed tribunals or mixed claims commissions, established under agreements of the United Nations with Germany, whereby the latter would have the right of appointing her own judges or arbitrators, would prove unsatisfactory. Arbitral tribunals, adjudicating ex aequo et bono, would also be inadequate. Claims should be adjudicated according to well-established rules of substantive international law by a permanent international court before which Germany should appear as a party and to which individual claimants should have direct access.

“The proposal,” the author states “must be correctly understood. What is

3. P. 170.
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wanted is not a court, permanent in the sense of the World Court, but one
that commands the continuous service of judges, possesses appropriate
judicial implementation, keeps strictly within the legal domain, and applies
the law without regard to considerations of political adjustment, negotia-
tion, conciliation, or external influence."

In the third part of the book, dealing with the substantive rules of inter-
national law which such a court should apply, Dr. Goldschmidt treats two
different questions. The author first analyzes the special problems arising
from the particular nature of the German regime. He argues that in view of
the totalitarian character of the Nazi regime, of the relationship between
government and Nazi party, of the total subservience of the individual to
the government, and of Germany's influence abroad through puppet gov-
ernments and subsidiary organizations, Germany should be made to pay
for the wrongful acts not only of government officers but also of members
of the Nazi party and in general of individuals who took advantage of the
racial measures and should also make reparation for the acts of puppet gov-
ernments and foreign subsidiary organizations. The author then examines
several problems connected with the valuation of losses resulting from racial
measures and various international rules relating to reparation and restitu-
tion in kind, payment of interest, effect of contributory negligence, etc.

This brief summary shows the great importance of Dr. Goldschmidt's
stimulating work. It is not a reflection on the author's intellectual integrity
but, on the contrary, a frank acknowledgment of his argumentative ability,
to say that his book reads like a learned and well-organized brief, written by
a skilful and experienced lawyer in support of his client's case. If we go to
some length in criticizing the author's views, it is only because we recognize
the importance of his contribution to the study of one of the most trouble-
some and controversial problems of our time.

We fully sympathize with the view that claims of German citizens, sub-
jected by their government to racial persecution, should be satisfied, when-
ever this is compatible with the reparation of losses inflicted by Germany on
foreign nations and their citizens. We question, however, the soundness of
the author's approach. A preliminary objection might be raised against the
dissociation of the problem of the victims of racial persecutions from that
of the others who were also victims of Germany's political persecutions.

A more serious basis for objection lies in the author's effort to base the
right to compensation of German citizens on controversial legal theories,
dubious legal precedents, and vague commitments by Germany. The argu-
ments adduced by the author to demonstrate that existing rules of interna-
tional law afford a ground for compensation are tenuous and unconvincing
at best. So-called human rights are generally disregarded by municipal laws
unless a foundation for their protection can be found in specific provisions
of positive law. The idea that the law of nature is part of international law

has been discarded since the end of the nineteenth century; the few dicta in its favor are not controlling. The theory advocated by some lawyers that general rules of international law protect human rights finds no support in international practice. Its advocates are at a loss in attempting to delineate the precise nature of these human rights. The so-called interventions on humanitarian grounds were generally limited to diplomatic representations and are now a thing of the past. The truth seems to be that in the absence of specific provisions to the contrary in international agreements, and where its own rights and citizens are not affected, a State has no international rights, in principle, to interfere with the domestic affairs of another, and that, except for a few well-known exceptions, international law does not set limits to the power of a State to treat its citizens residing in its own territory as it pleases. Likewise, it must be admitted that Germany before the war never was held to be subject to international obligations concerning her minorities other than those resulting from her treaty with Poland of 1922.

Finally, it is highly controversial whether individuals have ever as yet been granted the status of international subjects. There are a few instances in which it has been argued that individuals enjoyed certain rights directly flowing from international rules, but, with a few exceptions governed by specific provisions of particular treaties, there is no known instance in which an individual was given access to international jurisdiction for claims against his own government. Furthermore, oppressive measures and other objectionable practices of totalitarian countries were purposely carried out in such a way that existing rules of international law could not afford a remedy against them. An attempt to stretch existing rules of international law in order to support the case of the German victims of racial persecutions would only weaken their position, for it would give the impression that no better argument in their favor can be found. It would also have some harmful effect on the whole fabric of international law, for attempts at distorting the meaning and precise contents of the present rules of international law create serious doubts of their existence and thus result in skepticism as to the legal validity and binding force of the law of nations. It seems more proper to admit that persecution of its own citizens by a State is an evil for which at present there is no legal remedy in international law. The existence of evils for which there is no legal remedy is a phenomenon which is common to every system of law, just as every legal system undergoes continuing change tending to eliminate its defects.

In Anglo-American countries, because of both their juridical traditions and the peculiarities of their legal systems, legal change is largely effected by judicial process. In civil-law countries the change is mainly effected by acts of legislation. International law also undergoes continuing changes,

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5. For an analysis of the unfair advantage taken by the fascist regime of the present structure of international law see SERENI, THE ITALIAN CONCEPTION OF INTERNATIONAL LAW (1943), 304-11.
but in view of its loose structure and of the absence of judicial and legislative bodies with general authority, changes usually take place through agreements between States.

The contractual freedom granted by international law to the States is much broader than that granted to its subjects by any municipal legal system. By treaty a State may even consent to its disappearance, as in the case of the Congo Free State which by the Treaty of Cession and Annexation of November 28, 1907, agreed to be annexed by Belgium. There is, therefore, no reason why Germany should not consent now, by a treaty with the United Nations, to make reparation to her citizens for wrongs for which thus far there has been no international redress. In this respect, there is a striking analogy between the problem of reparations to German citizens who were victims of persecution and that of the punishment of German war criminals. Damage inflicted upon German victims of racial persecutions cannot properly be classified as war damage. Further, as pointed out above, existing international law does not support claims of German citizens to reparation. Likewise, war criminals, in the broad meaning which this expression is now acquiring, are not only those who violated the rules of war but, more generally, all persons who participated in the many atrocities, not necessarily connected with war, perpetrated by Germany. Punishment of war criminals, as defined above, while necessary and justified on moral and political grounds, similarly may not be based on existing rules of international law. By providing for reparation and retribution respectively for these two groups, international agreements will not merely proceed to the liquidation of the state of war, but also to the adoption by the various nations of certain principles which will play a permanent and important role in the organization of the international community.

The conclusion of treaties with Germany binding her to grant compensation to some of her own citizens and to hand over others of them to the United Nations for proper treatment, apart from being in accord with the present state of international law, would indicate that international law is undergoing a significant evolution and is now adopting principles consonant with the ideals of the better part of mankind. The problem of reparations to German citizens, as well as that of the international control of retribution for persons guilty of especially revolting crimes, are in fact merely aspects of the broader problem of the international protection of certain basic human rights, irrespective of the nationality of the individuals protected. The growing interest in this problem is evidenced by the numerous efforts which are being made towards the enactment of an international bill of rights and by the reference to human rights in the United Nations Charter.

As pointed out by Dr. Goldschmidt, international agreements providing for the compensation of German victims should also create one or more international agencies for the adjudication of claims, to which individuals should be given direct access. These agencies should be part, we add, of a whole system of international judicial and administrative agencies to be
created after the war. This question should not raise serious difficulties. A more difficult problem, as the author points out, is that of establishing precise rules of substantive international law governing the valuation, compensation and collection of claims. The idea that the subject matter is covered by the so-called “general principles of law recognized by the civilized nations” is a fallacy. In this field there are many conflicts between the principles adopted by the chief systems of municipal law. Contributory negligence is in general a bar to recovery in the United States; it only operates to mitigate damages in most European countries. On the problem of causal connection, legal systems are at great variance. Different rules as to liability, liquidation of damages and related problems are adopted by international courts, depending on the nationality of the judges and on the States involved in the controversies. The establishment of precise rules on this subject would constitute an outstanding contribution to the development of international law.

Mr. Wormser’s book is of an entirely different character. The author is a distinguished member of the New York bar who intended to write, as stated in the first page of his book, “a practical guide for laymen and lawyers to—the kind of war damage claims that may be brought—the rules which govern their allowance—the method of presentation, proof and determination, with particular regard to the treatment of claims after World War II.” The book is divided into six parts. Part one,6 “Presentation and Prosecution of International Claims,” briefly outlines the nature of the international claims presented by States on behalf of their citizens, the various types of international procedures for their settlement and the problems connected with their proof. In part two,7 “Prerequisites and Defenses to Diplomatic Interposition,” the author explains that, according to the great weight of authority, a State may not interpose its diplomatic protection for a claimant who was not its citizen at the time when the claim arose and when it was presented. He then considers the effect on the claim of the claimant's failure to exhaust local remedies and of his waiver of diplomatic protection, and also a few other defenses such as laches, estoppel and contributory negligence. Part three,8 “Substantive Basis of Claims,” analyzes the various types of acts of violence from which war damage may arise. The author classifies them as acts of private individuals, groups, and bands (such as mob violence and brigandage), acts of the civil government and its agents (such as unlawful arrest, expropriation of property and breach of government contracts), and acts of the military, which range from sequestration of property to physical violence and comprise acts of regular and revolutionary forces. Part four,9

7. Pp. 31–70.
"Measuring Damages," reviews the various principles governing liquidation of damages to property and persons, including the rules regulating the award of punitive, indirect, and speculative damages, of interest, costs, legal fees, and compensation for currency losses. Part five,¹⁰ "A Review of the Claims Settlements After World War I," briefly outlines the various measures relating to the treatment of enemy property and war claims enacted in connection with the first World War and the various methods adopted for liquidating war claims, with special reference to the United States practice. The sixth part,¹¹ "Conjectures on Claims Settlements After World War II," analyzes the special problems in the field of compensation of claims which may result from the possible postponement of the signature of the treaty of peace for many years after the end of hostilities, from the difference in legal and economic conceptions among some members of the United Nations (which may result in different views in the matter of the settlement of war claims), and from the need of reconciling compensation of private claims with the payment of reparations to the allied governments. In the concluding pages of the book the author points out that while it might not be possible to secure full reparation for the claims of citizens of the United Nations, at least partial compensation may be obtained by utilizing for that purpose enemy assets seized or blocked by the Allies. Several valuable documents such as the provisions of treaties concerning the treatment of war claims after the first World War, are published in appendices.¹² Others—mainly statements by the United States Department of State, dealing with claims—are interspersed in the text.

This brief outline shows that the book, in keeping with the author's express purpose, contains useful information for a person who has suffered war damage and who wants to know whether and how he may claim compensation. Notwithstanding his strictly practical approach to the problems considered the author shows that he is well acquainted with the general principles governing the subject matter. The influence of the ideas expounded by Professor Borchard in his standard book, The Diplomatic Protection of Citizens Abroad, is clearly felt. Moore's and Hackworth's Digests of International Law, the Harvard Draft Conventions on Neutrality and Responsibility of States, and Whiteman's Damages in International Law, have been usefully consulted. The book is chiefly based on international practice and since the avowed purpose of the author is to offer assistance to United States citizens for claims against foreign governments and to aliens having claims against the United States, the rules enunciated by the author are almost exclusively based on the views expressed by the United States Government or by mixed international tribunals and commissions to which it was a party.

¹⁰ Pp. 229–53.
¹² Pp. 279–396.
The purpose of the book is to deal with war damages resulting from both hostilities between states and civil wars. Since liquidation of war claims is partly governed by rules covering the general field of damages, the author also refers to cases dealing with damages which were not the result of acts of war. Furthermore he considers certain classes of claims: for instance, from mob violence, default in payment of government bonds, and, more generally, for breach of government contracts, which have only a remote and indirect connection with typical war damages.

The book will prove useful reading for every person interested in a correct and orderly exposition of the main problems relating to the collection of war claims. The author has been able to expound in an elementary, though precise way the basic rules governing a subject which so far had been within the exclusive domain of the so-called experts. As he aptly remarks, "International law is no vague, nebulous subject," and a book like his, which deals with an international problem in legal terms, but in a way which is nevertheless understandable to a large number of readers, is a welcome addition to the literature of the law of nations.

The books of Messrs. Goldschmidt and Wormser constitute valuable contributions to the study of the problem of reparation of damages in international law, the importance of which can hardly be underestimated.

ANGELO PIERO SERENI†
STANLEY GOLDSTEIN‡


The late Senator Norris is one of those men, so sweet, so noble, and, at the same time, so effective, whose life we are tempted to study in the hope of finding the answer to the question, How did he get that way? His autobiography, dictated in his last days, not only does not contain the answer; it does not even raise the question. Superficial and sentimental, it is the least memorable achievement of one of the most memorable men of our time and place.

It is not an autobiography at all, but, for the most part, an account, already better written by Mark Sullivan and other contemporary historians, of the cornerstone struggles for democracy that George Norris fought—the reduction of tariffs and the elimination of tariff corruption, exemplified by the fight on the Payne-Aldrich Act; the democratization of the national legislature through the overthrow of Speaker Cannon, and the rationalization of the law-making process through the "lame duck" amendment and

13. P. x.
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the unicameral state legislature in Nebraska; the purification of the judiciary in the Archbald impeachment, and of the legislature in the unseating of Newberry and Vare; the war against industrial peonage through the outlawry of the “yellow dog” contract, and the war on agricultural peonage through a series of historic efforts, beginning with County Judge Norris’ refusal to foreclose farm mortgages, running through the lost Hetch Hetchy fight, and culminating in TVA and REA; and the battle, still to be won, for a free franchise for black (and poor white) Americans.

It is not easy to recall any legislator in American history, excepting perhaps J. Q. Adams and R. M. La Follette, Sr., who did so much, and did it all so relentlessly, for his country. But when he writes about it, we want him to tell us, in so far as he can understand it, what made him do it, rather than what he did. It is more Norrises that we need so desperately, more men of capacity, persuasion, and persistence, to whom citizenship is a sacrament. We want to know, maybe naively, how we can produce them; or, at least, the circumstances under which they were produced. George Norris seems to have had no idea; not even any wonderment.

As an Ohio farm boy, born in rural poverty and near-illiteracy to a life of consuming toil, he might, for all he is able to tell us, have flowered like his fellow-Ohioan, Rockefeller. The same homely virtues were practiced by their mothers and imparted to them both. Instead, he flowered into a prairie radical, provincial (“isolationist” is the current term) in his democratic patriotism; unaware, until late in his life, that the misery of Europe, Africa, and Asia, was also the misery of America. His genre, the genre of Altgeld, Bryan, LaFollette, the genre of the 8-hour-day, of Jane Addams, and of Populism, at once anti-capitalistic and ruggedly individualistic, has never been fully studied or understood. His story adds nothing to our understanding.

Nowhere is there an insight, or even the sign of a concern with insight, into the real world of heroism, the world inside a man’s heart. In the deepest sense of knowing, George Norris did not know what he was doing. He played entirely by ear, and always played well. He is the finished masterpiece of his kind, and the art is as sybillic as ever.

Not only is there no insight; there is no analysis, not even any reverie or commentary, on the central issues of the limits of government, or its purposes, or of man’s nature, his rights, the source of his rights, or his destiny. Issues like war, reformism, collectivism, fascism are as such unmentioned. Neither the New Freedom nor the New Deal appears as such. And the men whom we want to know better, and whom Norris knew so well, men like Bryan, Wilson, Lodge, La Follette, both Roosevelts, Harding, Hoover, are literally unmentioned, except in passing.

What Norris seems to be saying to us, in his total inability to tell us how he got that way, is that being that way involves a kind of bone-headed simplicity. Until his middle forties, and long after he was a seasoned member of Congress, he believed (as he tells us again and again) in the sanctity of the
Republican Party, to the point (again, as he tells us) of going along with the Party on the assumption that the Party must be right, though every fact and every instinct told him it was not only wrong, but venal. Twenty years after Lincoln's death he actually sprang at the throat of a man who was thankful that Lincoln had been shot.

Independence was forced on him, forced through his bone-headedness, by a long succession of infantile discoveries. It wasn't until 1926, when he was 55 years old, that he broke publicly with the Party, going into Pennsylvania to campaign for Vare's Democratic opponent. After that it was easy to support Smith and Roosevelt, and to oppose the latter on any given issue. And it wasn't until a year or two before his death in 1944 that his independence reached perfect purity, when, fighting for the abolition of the poll-tax, he tore himself away from his liberal supporters to oppose the anti-lynching bill on the ground that it would revive the Reconstruction.

George W. Norris is not only the America that was; he is the America that must be, an America where, in a terrorized world, a man can still spit in the eye of his constituents, his employers, his enemies, and, when he has to, his friends. The Norris who voted in the Senate against the declaration of war in 1917, and went back to Nebraska, where he was being lynched in effigy, to fight his own people and win is the symbol of human freedom inside human society. We will never know how he got that way; and maybe we should be satisfied that he was that way and that his works and his faith may move us by example, even if he was able to leave no hint behind him.

MILTON MAYER†


Control over the transportation systems of the country is control over agriculture, industry and commerce. The growth of monopoly in the fields of transportation presents a very grave and real danger to America.

Mr. Wiprud, an authority on transportation, has brought to his study of monopolistic practices in transportation a tremendous store of information and a genuine insight into the economic and social implications of the problem. He brings something more: a conviction that free enterprise and the competitive system can be made to work again in America, a spirit of optimism that characterizes all those of the Brandeis school of thought, an honest concern with freedom for individual initiative.

Whether the optimism is justified will have to be subjected to political, economic and social tests. At this precise moment, the “free enterprise liberals” are under attack from right and left alike. They are being accused

† University of Chicago.
of standing at "dead center," of seeking to thwart inevitable changes, of
endeavoring to compel retention of an economic system essentially wasteful. They are unpopular with both monopolists and collectivists. Mr. Wiprud clings to moral standards in a period that thinks all too highly of expedients.

At the outset, the author paints a picture of the existing crisis in transportation. Since all the adroit arguments of railroad propagandists are unavailing to conceal the patent fact that many shortages on the military and civilian fronts today arise from the shortsighted policies of the transportation companies, and since the present crisis is obvious to everyone, Mr. Wiprud has chosen an admirable starting point.

He proceeds to picture the stifling of air transport, the impediments imposed upon motor carriers, the delay in building pipelines, the interference with the use of the public-controlled waterways, and the conspiracy to maintain unjustified high rates upon the rail lines of America. He discloses, with a wealth of understatement, the frantic efforts of the major railroads to obtain control over every competing means of transportation for the purpose of "integration," an euphemism for rate-rigging, customer-gouging, and the continuation of discriminations against the western and southern states.

Wiprud's study of the various unofficial bureaucracies established by the transportation companies to enforce their monopolistic and discriminatory policies is a major contribution to the subject. The author has analyzed all the major cases and legislative enactments since the "freight association" scheme was thought up by the monopolists. He traces the policies of Congress and of the various states and the decisions of the federal courts in actions brought under the Sherman Anti-Trust Act. He reaches the conclusion that the carriers are not filing rates in accordance with the intent of the statutes, but that the rates are being made collusively, enforced through a multiplicity of bureaus, conferences, associations and boards that have no status before the Interstate Commerce Commission and the courts. The maps and charts in the Appendix, graphically illustrating the bureaucratic control unofficially exercised over American transportation, are invaluable.

Those pages of Mr. Wiprud's book dealing with the necessity for competitive rate making by transportation units are of special interest to those who have followed the half-century-old fight of the western and southern states to obtain relief from discriminatory freight rates that strangled industry and interfered with the normal and profitable development of their economies. His entire basic thesis has been upheld by the United States Supreme Court in the recent opinion accepting jurisdiction over the suit of the State of Georgia against the principal rail lines. Injunctive process against non-competitive rate making is one aspect of the relief asked in Georgia's petition.

The conclusions reached by the author are significant: (1) Government policy must be directed toward obtaining more, better, and cheaper transportation. (2) All sections must have modern transportation without discrimi-
nation. (3) Competition must continue as the keystone of our governmental policy. (4) Each mode of transportation must be permitted to realize its full potential for service. (5) Vested interests must not be allowed to block attainment of an enlarged transportation service.

Establishment of a more clear-cut policy by the Congress and enlargement of the Interstate Commerce Commission's activities are urged by Mr. Wiprud as necessary to carry out this program. About the first of these there can be no doubt; but whether the ICC with its long history of rail domination, procrastination and lack of boldness can be revitalized is debatable.

*Justice in Transportation* is a book of unusual significance and importance at the present time. The reconversion period will be the test of whether America can readjust its economy upon a system of free enterprise. It cannot do so unless and until transportation becomes free enterprise, until the strangle hold of monopoly has been broken, and until every section of our common country is free to develop every potential resource, human and natural. Arne Wiprud knows his subject, and his book deserves its fine reception.

**ELLIS ARNALL†**

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In 1942 some seventy thousand Americans of Japanese descent were evacuated from the West Coast, and imprisoned without indictment or hearing. As Carey McWilliams, Eugene Rostow, and others have shown,1 this operation was inspired not by military necessity but by racial prejudice. Many of those who were shocked by such a policy of racial discrimination may have found some comfort in official statements that the evacuees' relocation centers were not concentration camps, but were conducted in the most humane and democratic manner. Yet Commander Leighton's record of the Poston camp will hardly cheer the tender-minded. The camp had been hastily erected "on the hot dust" of Arizona waste land. Barrack-rooms 20 by 25 feet were to house from five to eight people, men, women and their children indefinitely.2 These "apartments," as Commander Leighton calls them, were furnished with an army cot, a blanket and a sack which could be filled with straw "to make a mattress" for each person. Besides "bare boards, knot-holes through the floor and into the next apartment [and] heaps of dust" there was nothing else.3

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1. See McWILLIAMS, PREJUDICE (1944); Rostow, The Japanese American Cases—A Disaster (1945) 54 Yale L. J. 489; Our Worst Wartime Mistake (Sept. 1945) 191 Harper's 193.
3. Ibid.
Nor was the climate more hospitable. There were dust storms and summer temperatures between 108° and 124° in the shade.4 “In November . . . the nights had turned very cold with the thermometer dropping to freezing. . . . Although stoves had been ordered long ago, they had not arrived. Neither was there any weather-stripping, wall-board, or material to cover the cracks through which the wind came slicing easily. Clothing, or clothing allowances, had been promised, but had not been forthcoming, and there was considerable physical suffering among old persons, invalids and children . . . .” 5

Living for the “residents” was not made easier by “the fact that there was not enough food,” 6 “the failure of garbage collecting, . . . the periodic interruption of the water supply,” 7 the absence of insulin for diabetics, 8 and the lack of mosquito screens which “had been in the warehouse for months, but had not been released until the mosquito season was over.” 9 The food served in the Caucasian mess halls—Aryan was not a popular word—was “vastly superior” to that of the evacuees.10 How much the camp’s supply officer had to do with such imperfections is not clear. He is described by the author as a man who wanted “to kill.” 11 Leighton comments more generally that “although the Government could not get materials to improve the physical conditions of the evacuees . . . they were able to build twelve miles of fence around the three units [of the camp]—serving to make the place seem more than ever like a concentration camp.” 12 The soldiers with their jeeps, their machine guns, and their weapon carriers who guarded Poston must have enhanced that impression.

Theoretically the evacuees were not obliged to work. However all but a very few signed an enlistment for the “War Relocation Work Corps” upon their arrival. As a voluntary labor contract between free American workers and their government, this enlistment form, as summarized by Leighton, is worth quoting in full:

“I swear loyalty to the United States and enlist in the War Relocation Work Corps for the duration of the war and 14 days thereafter in order to contribute to the needs of the nation and in order to earn a livelihood for myself and my dependents. I will accept whatever pay, unspecified at the present time, the War Relocation Authority determines, and I will observe all rules and regulations.”

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5. P. 154.
7. P. 114.
8. Ibid. “There were few surgical instruments and none for dentistry.” Ibid. This was in August, the hospital had been open since June, evacuees had been in the camp since May.
11. P. 139.
12. P. 154. Leighton fails to specify whether or not it was a barbed wire fence.
"In doing this I understand that I shall not be entitled to any cash or allowances beyond the wages due me at the time of discharge from the Work Corps; that I may be transferred from one relocation center to another by the War Relocation Authority; that medical care will be provided, but that I cannot make a claim against the United States for any injury or disease acquired by me while in the Work Corps; that I shall be subject to special assessments for educational, medical and other community service as may be provided for in the support of any dependents who reside in a relocation center; that I shall be financially responsible for the full value of any Government property that I use while in the work corps; and that the infraction of any regulations of the War Relocation Authority will render me liable to trial and suitable punishment. So help me God.” 13

The pay, as finally determined by the War Relocation Authority, was $12 per month for common labor, $16 per month for clerical work, and as high as $19 per month for professional activities.14

Facts like these should be known, and had Commander Leighton written his book in the spirit of a fact-finding report he would deserve his readers’ gratitude. However as a psychiatrist and anthropologist Commander Leighton had a more ambitious purpose. To him and his sponsors the camp appeared as a “challenge to democratic principles” and an opportunity to study the governing of men in a test tube. The camp was to be an experiment in self-government, and the “methods of social science” were to be used to discover what makes self-government tick. Consequently about one fourth of the book gives a detailed history of the relations between the camp administrators and their flock represented by an elected council. It is impossible to retrace in this review the maze of moves and countermoves, of broken administration promises and growing evacuee resentment. Universal tension led to a strike of the residents, and the factual part of the book concludes with the somewhat calmer aftermath of this strike. As for “self”-government, suffice it to say that the Council, hard-pressed by their hungry constituents, never succeeded in gaining access to the account books.15 And while the Council was ultimately permitted to assume “some executive functions,”16 policy decisions were made by Caucasians only. It is difficult to imagine any other form of self-government in a prison. But nobody—not even such sophisticated gentlemen as the book reviewers of the New York Times and the New York Herald Tribune—seems to have been alarmed by the paradox.17

15. P. 117.
16. P. 223.
Commander Leighton's scientific study of the camp culminates in a rather formidable collection of Principles and Recommendations. Principle 9, for instance, holds: "The members of an administrative body are human beings and react to stress along the same general lines as do other people." In the four pages of comment on this principle we read that "the point it is desired to make here is that the administrator, whether he stands by or interferes, should know what he is doing. He should use his judgment and not be misled by his own reactions to the stresses playing on him." As an example of the book's Recommendations we quote from Recommendations 19, 20 and 26. "Every administrator should learn to control his prejudices and intolerance, as a pilot must learn to control his fear of falling. . . . prevention is easier than cure . . . work what is workable and change what is changeable . . . ." Other conclusions seem more profound because they are laid down in a more technical jargon. Only a few, notably those concerned with "Systems of Belief Under Stress," add modern psychological insight to plain common sense. Even those are not new to a psychologist, but merely apply established principles to peculiar facts.

Despite the harmlessness of its recommendations The Governing of Men is a depressing and an evil book. For it flaunts a so-called scientific detachment which has been the most reliable ally of tyranny everywhere in the world. When Commander Leighton was requested to associate himself with the administration of the camp he had to make a political and a moral decision. He had to ask himself: Does this project serve my country? And, is it right or wrong? He seems not to have been aware of this question. "It was not a matter of who was right or who was wrong," he explains in his Introduction, it was a matter of studying the "general characteristics of human nature." There are indications that Commander Leighton is a good and a compassionate man, or to put it in his words, a people-minded rather than a stereotype-minded scientist. At the outset of his research into the governing of men he seems to have disapproved of the imprisonment of his innocent fellow-Americans. But the atmosphere of a concentration camp is poisonous.

Poston, like every fascist climate, bred universal suspicions, hatreds, ever present fear of informers, and inevitably corrupted even the detached. Commander Leighton soon became more accomplished in the practice of that indifference to the sufferings he had helped to cause, which Proust has called the one true, terrible and lasting form of cruelty. He learned to deplore that "there were a few staff members who were at times carried away by their generous sympathy for persons in an unfortunate situation."

And when the residents enraged by their belief that babies had died from dehydration caused by heat— a belief shared by camp physicians— threatened to
transfer newly arrived air coolers by force from the Caucasian personnel mess to the non-Caucasian infants' ward, Leighton's sympathies were with "the more level heads" who managed to keep the protests verbal.

As a psychiatrist Leighton knows what it meant to sensitive human beings, to lawyers, poets, and college-girls, to be at the mercy of bullying petty subalterns who believe that a Jap is a Jap. He knows what a concentration camp does to the souls of children and adolescents—American children and adolescents. He knows that they will be marked for life. Yet he can speak of "indignation . . . out of all true proportion," and remark, in passing, that "in the course of time the strain on the conscientious and responsible members [of the staff] became very great and probably worse than anything suffered by the majority of the Poston residents."

If Commander Leighton should ever be annoyed by feelings of guilt, a contingency for which there is no evidence in his book, he will undoubtedly find solace in the routine justification that he was in no position to prevent the evil of the camp, and that he only used an inevitable, if sorry result of war for good ends. A German doctor who advanced science by medical experiments on the inmates of Belsen would agree with him.

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23. P. 108. Leighton's sympathies were with those "Administrators whose heads held dreams of building the community of Poston," (p. 73) and he seems to have reacted with hostility when the War Relocation Authority began to emphasize a policy of resettlement for the evacuees instead of one of "community building" in camps, (p. 152).
25. P. 150.

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