REVIEWS


The President's Committee has received a well-deserved accolade of praise from the civilized, and of brickbats from the blood-fanatics, for its report on civil rights in America, of which more than a million copies have been reprinted. So far as I know, however, none of the commentators on this important document has noted that it is not the first in its field. Some 78 years before the landing of the Pilgrims, the first comprehensive report on the civil rights of Americans was completed. In the concluding paragraphs of his report, dated December 8, 1542, Fra Bartholomew de las Casas expressed some doubt as to "whether it could be worse to give the Indians into the charge of the devils of hell than to the Christians of the Indies." Unfortunately the world's mightiest government, in 1542, was not mighty enough to correct the abuses that Las Casas reported. A number of high-minded statutes outlawing various current forms of racial discrimination and oppression were promulgated, but they were not enforced. And because Spain, in its American dominions, could not assure equal justice to its people, the lands it ruled were blighted, and its imperial power slowly crumbled into the dust.

The President's Committee on Civil Rights follows the report of Las Casas to King Philip in its basic conception that a man has a right to liberty and to equal justice before the law, not because of his skin color, religion, or ancestry, but just because he is human. To be human, as both reports recognize, is to have potentialities of achievement and of contribution to the common good or the glory of God (depending upon one's language), and these potentialities are poisoned by intolerance. The manifestations of racial and religious intolerance which both these great documents recount are too clear to justify skepticism and too vivid to warrant retelling in poorer language. The documents speak for themselves. The question remains: What do we who read them do?

When Las Casas made his report, he may have had some doubt as to the reception that would be accorded by the King of Spain to his devastating criticism of Spanish lawlessness and racial bigotry in the New World. At any rate, the preface to his Briefest Report on the Destruction of the Indies expressly recognizes that, since the King can do no wrong, responsibility for the excesses reported must lie elsewhere:

"As divine Providence has ordained that in this world, for its government, and for the common utility of the human race, Kingdoms and Countries should be constituted in which are Kings almost fathers and pastors, (as Homer calls them), they being consequently the most noble, and most gener-"
ous members of the Republics, there neither is nor can be reasonable doubt as to the rectitude of their royal hearts. If any defect, wrong, and evil is suffered, there can be no other cause than that the Kings are ignorant of it; for if such were manifested to them, they would extirpate them with supreme industry and watchful diligence." 1

A similar assumption is made by the President's Committee on Civil Rights. The distinguished members of this committee are unwilling to assume that the President who appointed them, and to whom they report, can be responsible for the violations of civil rights that their report recounts. Prime responsibility for these conditions and for their cure is accordingly ascribed, by what lawyers call an "irrebuttable presumption," to the Congress of the United States, which did not appoint the Committee and which has few defenders among the readers of such reports. This may or may not be good politics, but is certainly not good law or good science.

Racial discrimination in the armed forces, for example, is roundly and justly censured by the President's Committee. 2 "The Marine Corps has 7,798 officers—all white," the Committee reports, with the effective pictorial representations that make this document almost unique among Government reports. And after a shocking list of discriminations in the armed forces, what does the President's Committee do? It recommends "the enactment by Congress of legislation, followed by appropriate administrative action, to end immediately all discrimination and segregation based on race, color, creed, or national origin, in the organization and activities of all branches of the Armed Services." 3 The fact remains that the President, as Commander-in-Chief of our armed forces, could abolish such discrimination and segregation by Executive order tomorrow. Congress has never imposed discrimination or segregation on the armed services by any statute, and there is no reason in the world why the President, in whose hands Congress has placed such matters, should continue to sanction discriminatory practices in the armed services until Congress gets around to passing legislation on the subject. Under these circumstances, the Committee's recommendation that "appropriate administrative action," which is possible now, should follow legislation, which is neither possible nor necessary, sounds suspiciously like a bit of election-year buck passing.

The same may be said of discrimination and segregation in the school, hospital, and recreation systems of the District of Columbia, which rest not upon any law but upon the decisions of the President and his subordinate executive officers. Segregation has been abolished in golf courses, tennis courts, swimming pools and theaters operated in the District of Columbia by the Department of the Interior, and segregation is insisted upon in similar facilities operated by the District Commissioners, not because of anything

1. MacNutt, Bartholomew De Las Casas, His Life, His Apostolate and His Writings 311 (1909).
3. P. 162.
in the law but because different subordinates of the same President have different ideas about racism. Segregation in the public institutions of the Nation’s capital could be abolished tomorrow by Executive order or by a series of letters or telephone calls from the President to various of his subordinates. Yet the President’s Committee sends its readers barking up a tree without possums when it recommends:

“The enactment by Congress of a law stating that discrimination and segregation, based on race, color, creed, or national origin, in the rendering of all public services by the national government is contrary to public policy.”

Does anyone really think that the President is now deterred from abolishing discrimination in activities of the Federal Government by lack of such a statement? Would such a statement by Congress today add substantially to the statement on the question of human equality which Congress made on July 4, 1776?

So it is with several other subjects on which, after a learned, powerful, and devastating account of current evils, the Committee ends up with perfectly irrelevant legal recommendations. Why in the world the President’s Committee should ask Congress to pass a law to eliminate race discrimination in the Canal Zone, when the President himself could do this tomorrow by a phone call to the Military Governor, has never been explained. There is certainly no reason for continued military government in Guam and Samoa, but this again is the result of a Presidential decision, not a Congressional decision. Only the Committee’s irrebuttable presumption that the President can do no wrong prevents it from noting that, however desirable legislation on these subjects may be, presidential action under existing law would be more effective and a great deal faster. Perhaps the Committee was actually unaware of the scope of Executive power and responsibility in these matters. Perhaps the Committee merely succumbed to the popular American battle-cry, “There ought to be a law,” which so often blinds us to the possibility or the importance of enforcing the laws we already have. Perhaps the Committee was merely being polite in not blaming the President who appointed it for the evils that it uncovered. Perhaps some of the members of the Committee really believe that Kings and Presidents can do no wrong. But whatever the explanation may be, the Report will send a good many letters to the wrong address.

The proper address for appeals to eliminate racial discrimination and other infringements of civil liberties in the armed services or the civil service of the United States, in the administration of outlying possessions now under military government, in the public services of the District of Columbia, or in federal housing projects or other service activities of the Federal Government is 1600 Pennsylvania Avenue. When action that may be taken in the White House has been taken, the recommendations that proceed from the White

5. P. 172.
House to Capitol Hill for legislation on the protection of civil rights will have both a more limited scope and a greater moral force.

Even in those large fields where Executive action could not by itself wholly eliminate the evils which the President's Committee reports, there are available lines of Executive action which would bring us a good deal nearer to the goals which the Committee so persuasively proclaims. For example, Section 2 of the Fourteenth Amendment to the Federal Constitution expressly declares that when the right to vote is denied (except for commission of a crime) to any portion of the adult population of any state the representation of that state in Congress shall be reduced proportionately. If this provision of the Constitution were enforced, the poll tax states would lose a large part of their Congressional representation, which is at present sizeable enough to kill most of the progressive legislation that the President's Committee recommends. But it is in the President, and in his subordinates in the Census Bureau and the Department of Commerce, that responsibility for submitting the population basis for Congressional reapportionment is vested. And no President of the United States, apparently, has ever attempted to enforce this provision of the Fourteenth Amendment. It may very well be that, if the President acted in the manner prescribed by the law of the land, Congress would refuse to accept the reapportionment he would be bound to formulate. But at least the first necessary step would have been taken to rectify one of the most glaring of our violations of the Federal Constitution, and the responsibility for not taking the final step would then be clearly fixed upon Congressmen unwilling to accept the Constitution as the supreme law of the land.

There is no field of legislation in which racial and religious intolerance has played a larger rôle than in our immigration laws. Anti-Catholic, anti-Semitic, and anti-Oriental prejudices are the dominant forces that have moulded our immigration laws for some decades. Yet even here there are many forms of discrimination that are primarily Executive in origin, that could be eliminated by Executive action. For example, one of the more subtle but most basic of our discriminations against Catholic and Jewish immigration is found in the assumption of our immigration authorities that the early settlers of America were nearly all Englishmen, as a result of which more than half of our immigration quotas are now assigned to the British Isles, which do not use them. This calculation is based largely upon the use of family names as an index of the national origins of our native-born population. Thus families bearing the name of Cabot are classified as of British descent, though we know, as an historical fact, that the original Cabots who first visited our land hailed from Italy and spelled their family name Caboto. We know, too, that most other foreign names are Anglicized within three or four generations of American life. The President and various Cabinet officers of his could admit to our shores thousands of victims of anti-Catholic and anti-Semitic persecution by simply correcting the distortions in our current basis of quota allocations, which are a heritage from days of anti-Catholic and anti-Semitic
hysteria. An act of Congress specifically authorizes such revision. But this, too, has never been enforced.

Of course, there are many other fields where Congressional responsibility is primary. The recommendations of the President's Committee for strengthened civil rights laws, anti-lynching legislation, fair employment legislation, self-government for the District of Columbia, elimination of racial discrimination from our naturalization laws and the elimination of segregation in federal-supported institutions (on which the Committee split) are powerfully presented and thoroughly justified. But these recommendations would carry greater force if they were not intermingled with evasive "buck slips" by which presidential responsibilities are covered up with the fiction that only Congress has the power to remedy our sins against the ideals of democracy on which this Nation was founded. The fact remains that Congressmen are human, with enough work to keep them busy even if they do not attempt also to do the President's work. Moreover every Congressman represents a small section of the United States with sectional prejudices that he cannot wholly disregard if he wishes to serve long enough to be effective. Only the President represents all the people of the United States, a people in which all minorities, added together, total the entire population. Only the President, therefore, can take the lead in a great campaign to bring the practices of our Federal Government into line with the ideals that have made our Nation great and honored as few nations in history have ever been honored by the peoples of the world.

The evils which demand remedy have been clearly charted by the President's Committee with respect to the place of the Negro in American life. Here the Committee was able to build on a vast body of scientific analysis of the wrongs that are suffered by our colored citizenry and the ways in which these wrongs tear down the society that inflicts them.

There is considerably less clarity in some of the Committee's references to other minorities.

The most tragic of our war-time blunders on the civil rights front was the wholesale arrest, exile, and unconstitutional imprisonment of thousands of American citizens whose only offense was to have been born of Japanese parents. Here for the first time, by executive order, we reverted to the barbarity of punishing children for the crimes of their grandfathers and second cousins. What was done in a war against Japan to persons of Japanese de-

scent can be done in a war against Russia or Italy or Spain to persons of Russian or Italian or Spanish descent. Thus the civil rights of all Americans have come to hang on international politics. Even the administrators who carried out our first racial proscriptions and the attorneys who defended them in the courts have confessed error. Yet on this most critical issue of civil rights the President’s Committee does little more than pussyfoot: “The proposed permanent Commission on Civil Rights and the Joint Congressional Committee might well study this problem.” Passing the buck to an agency that exists is bad enough, but passing the buck to two agencies that do not exist is the height of a discretion which is not the better part of valor.

The President’s Committee gets even further from reality in its brief comments upon the Indian problem. In Arizona and New Mexico, Indians are not permitted to vote. This is a clear violation of the Fifteenth Amendment, which forbids racial discrimination in the franchise. Test cases are now pending in both states to force recognition of the constitutional voting rights of our Indian citizens. The President’s Committee, however, suggests that the cure for Indian disfranchisement lies in amendments to the state constitutions of Arizona and New Mexico, on which, of course, the Indians would not vote. One rather expects enemies of federal anti-poll tax legislation, for example to advance the argument that this is a problem properly dealt with by state or federal constitutional amendments. It is rather dismaying to find that line advanced by friends of democracy.

Equally remote from reality is the Committee's comment on the plight of our Alaskan natives, who, being robbed right and left of their sources of food and livelihood, are dying of tuberculosis at a rate over 30 times the national average. Recognizing these facts, the Committee comments: “The situation is such that federal officials are seriously considering a proposal made by the Governor of Alaska to appoint a public defender for those groups.” This statement is untrue; a suggestion to this effect was rejected by the Department of Justice more than a year ago and has not been heard from since. The Secretary of the Interior was authorized to protect Indian rights by act of Congress in 1849, but in 1946 Alaskan Indians were advised by the Secretary of the Interior that they could no longer expect his department to render legal assistance in their battles with white canning and mining interests. Is it likely that a local public defender could resist pressures to which even Cabinet officers bow? The fact is that one of the leaders in territorial moves to separate the Alaskan natives from their property is the

15. P. 159.
legal adviser of the Governor of Alaska, the Attorney General of the Territory. Comments upon our treatment of the natives who are held practically as serfs on the Pribilof Islands and denied all the usual rights of citizens, were discreetly eliminated from the Committee's final report.

Equally inadequate are the Committee's comments upon the problem of discrimination against the foreign born and their children, a discrimination which has been carried to its most fantastic extremes in the enlistment policies of the Navy's Intelligence Service, which has generally limited enlistments to third generation Americans.

The deficiencies of the Committee's report outside of the field of Negro problems are not the result of any lack of human sympathy, but rather a natural consequence of the prevalent failure to recognize that human intolerance takes many forms. The fact that intolerance towards Catholics or Jews does not ordinarily take the form of lynchings or Jim-Crow cars does not mean that such intolerance is unimportant. Intolerance towards the Negro does not express itself in bars to naturalization or immigration, as does intolerance towards the Oriental, nor in expropriation of Negro landholdings, as does intolerance towards the American Indian, but that does not mean that intolerance towards the Negro is unimportant. There is much that we have still to learn about the operation of intolerance, but it seems safe to say that all of its forms involve the acceptance of a non-human stereotype applied to a class of human beings. Such stereotypes are fashionable fictions which save us the trouble of learning to know other human beings as they really are. In large part they are outward projections of our own basic discomforts rather than factual descriptions. We say that a man works like a dog, meaning that he works very hard, or that he is as lazy as a dog, meaning that he doesn't work at all, and in the common speech of the South a member of the colored race is often substituted for the dog in both similes. This does not mean that we think lazy people work hard, but only that we accept the object of the simile as inhuman and thus mean to say that so-and-so is inhumanly industrious and that somebody else is inhumanly lazy. So, too, when people say that Jews are communists, in one breath, and, in the next breath, that they are international bankers, that they are "clannish" in sticking to themselves and that they push into company where they are not wanted, those who speak in this fashion do not mean really to assert that communists are bankers or that people who stay among their own kind are forcing their company on unwilling strangers. What an objective appraiser of such speech gathers is that the speaker does not like Jews, whether they are communists or capitalists, and whether they mix with other Jews or with non-Jews. And when General DeWitt condemned the Nisei with his famous remark: "The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken," the substance

of his statement was that he was afraid of these people whether or not they had done anything wrong.

We are all irritated at the sight of those we have wronged. That is why we have Jim-Crow cars and ghettos and restrictive covenants and segregated schools and concentration camps for the Nisei of the West Coast but not for those of Hawaii, who have been comparatively well-treated. That is why the Supreme Court, after putting a stop to the naturalization of Asiatics, in 1922,\textsuperscript{19} could so easily, a year later, uphold the anti-Japanese land laws, that the President's Committee condemns,\textsuperscript{20} with the bootstrap argument: "It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of, the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries." \textsuperscript{21}

The same sense of irritation at the sight of those whom we have wronged shows itself dramatically in laboratory proportions in our treatment of the American Indian. Deep in the American conscience is a sense of having wronged the original possessors of our continent. This twinge of national conscience may show itself in appropriations for aid to the starving Navajo, or in other humanitarian efforts. But most deeply it shows itself in a desire to believe that the Indian is, either physically or culturally, a dying race, unable to utilize white man's civilization, and therefore an obstacle in the road to progress. And so we think of the Indian, head bowed on a drooping horse at "the end of the trail." In the face of that stereotype, the fact that Indians are today the most rapidly increasing racial group of our population, trying to exercise rights of local self-government and all other rights of citizenship, and resisting all efforts to "emancipate" them from their reservation lands or other property, makes little impression. And so, because our ancestors wronged their ancestors, we can go blithely along legislating the Indians of Alaska or Nevada out of their lands, timber and fisheries, or abolishing their municipal governments and cooperatives,\textsuperscript{22} and not even a President's Committee on Civil Rights takes notice of these assaults on the basic rights of a helpless minority.

It is precisely because the wrongs we commit lead us to hate those we have

\textsuperscript{19} Ozawa v. United States, 260 U.S. 178 (1922); United States v. Thind, 261 U.S. 204 (1923).

\textsuperscript{20} P. 162.

\textsuperscript{21} Terrace v. Thompson, 263 U.S. 197, 220 (1923).

\textsuperscript{22} As this is written a bill (S. 30) to grant lands of the Pyramid Lake Indians to white squatters at a small fraction of their value, overruling a series of court decisions adjudicating the land to be the property of the Indians, has passed the Senate unanimously and is pending in the House; a bill to turn over Indian fisheries to favored corporations (S. 1446, H.R. 3859), backed by the Secretary of the Interior, has been favorably reported; a bill to transfer the timber holdings of Alaskan natives to timber companies has been passed by unanimous consent, Pub. L. No. 385, 80th Cong., 1st Sess. (Aug. 8, 1947); and several bills to confiscate Indian land reserves and abolish Indian civic and municipal organizations are pending.
wronged and thus lead us to seek to avoid their sight, it is because these wrongs lead to chain reactions ending in the destruction of civilization, that the problems raised by the President's Committee are so vital. Oppression has not often destroyed the life of the oppressed, but it has always poisoned that of the oppressor. Vast gaps in the Committee's report which reflect vast gaps in popular understanding, will be filled by those who come after. But even if those gaps are far more serious than this reviewer believes them to be, the Committee will have deserved well of the country it has served. To have renewed the old American vision of a nation of nations, without aristocracy of ancestry or creed, is to have revivified our efforts to make that vision a reality.

FELIX S. COHEN †


PROFESSOR CARR'S monograph on the federal civil rights laws comes at a particularly opportune time. The epochal report of the President's Committee on Civil Rights (Mr. Carr was its executive secretary) has stimulated nation-wide discussion of the need to secure the fundamental rights of Americans. Professor Carr's exceedingly useful book furnishes the indispensable background against which can be evaluated current proposals to strengthen the Civil Rights Section of the Department of Justice and to furnish it with new statutory weapons.

Within ten years after the Civil War Congress had adopted three constitutional amendments and seven comprehensive statutes to protect the newly-acquired freedom of the Negro. Yet within an additional twenty years almost this entire effort had collapsed, largely because the United States Supreme Court refused to approve the program. Professor Carr's analysis of the debacle, like the rest of his book, is accurate and incisive.

The Supreme Court began its attack on the Reconstruction laws by holding that the "privileges or immunities" of United States citizens which the Fourteenth Amendment forbade the states to abridge referred only to privileges of national citizenship and then pumped all the meaning out of that term by an artificial and limited enumeration of the rights of citizens.¹ It then held that the Federal Government could not punish a lynching mob because the Fourteenth Amendment was directed only against state action and not against that of private persons.² Finally in Plessy v. Ferguson the

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² Slaughter House Cases, 16 Wall. 36 (U.S. 1873).

¹ United States v. Harris, 106 U.S. 629 (1883). This doctrine was reaffirmed in the better-known Civil Rights Cases, decided the same year, 109 U.S. 3 (1883).
court countenanced wide-spread discrimination against the Negro, even when performed under the authority of the State, by the fiction that segregation did not impute legal inferiority. As a result, the civil rights laws became moribund and were largely neglected until 1939, when Attorney General Murphy by administrative regulation created the Civil Rights Section of the Department of Justice.

The Section faced almost insuperable difficulties. Of the original seven civil rights laws, only two remained: 18 U.S.C. § 51, forbidding conspiracies to interfere with federal rights and 18 U.S.C. § 52, punishing deprivation of federal rights under color of law. Administratively, the Section was but a gesture, consisting of a half-dozen lawyers and fewer clerks, without regional offices or independent means of investigation, lacking prestige or power in the vast apparatus of the Department of Justice and compelled to rely on the grudging cooperation of the Federal Bureau of Investigation and local United States Attorneys. To cap it all, the massive influence of the southern bloc in the Democratic administration made politically impossible any forthright attack on the caste structure below the Mason-Dixon Line.

These factors compelled the Section to limit itself in the main to problems of peonage and lynching. Professor Carr describes in detail the obstacles in the path of federal prosecution of lynchers: the FBI, reluctant to cooperate in investigations lest it “endanger its good relations” with southern police departments; the animosity of Southern United States attorneys “deeply enmeshed in local politics”; the difficulty of getting indictments from southern grand juries and the even more formidable task of obtaining convictions from deeply-prejudiced juries hostile to federal “interference”; the “shockingly inadequate” penalties often imposed by federal judges (indicated by a $200 fine in an Illinois lynching murder case in which the defendants pleaded nolo contendere); and finally the dislike of the United States Supreme Court for 18 U.S.C. § 52, which a minority of the court described as “This shapeless and all-embracing statute [which] can serve as a dangerous instrument of political intimidation and coercion. . . .”

It is thus almost miraculous that the Section, even after the decision in the Screws case, which required the government to prove in lynching cases a “wilful,” i.e., a purposeful, effort to deprive a person of a specific constitu-
tional right, was able to obtain and uphold the conviction of a Florida constable who drowned a Negro farm hand.\(^7\)

Yet, despite these genuine difficulties, the record of the Section is a sorry one. Although it has received since its establishment from 8,000 to 20,000 complaints a year, in no year did it ever initiate more than 76 prosecutions. In 1943 only 61 prosecutions were begun and in 1944 only 64.\(^8\) The Section has not availed itself of its opportunities to bring or encourage civil actions to restrain persistent or chronic civil rights violations. It has not utilized the amicus curiae brief to bring the powerful support of the government to bear in important private civil rights cases.

During the nine years of the Section's timid and unimaginative life, private groups have put it to shame \(^9\) by winning without its help notable court decisions determining basic constitutional principles. Thus, *Hague v. CIO,\(^9\)* an injunction suit brought by the Congress of Industrial Organizations under 8 U.S.C. § 43, established that the rights of free speech, press and assembly are federal civil rights, protected by the Fourteenth Amendment. *Smith v. Allwright,\(^11\)* a damage suit brought by the National Association for the Advancement of Colored People under 8 U.S.C. § 31 and 8 U.S.C. § 43 outlawed the democratic white primary in Texas, thus making Negro suffrage effective. The host of cases brought by Jehovah's Witnesses\(^12\) have done much to strengthen the First Amendment; their most recent victory, *Marsh v. Alabama,\(^13\)* extended considerably the meaning of state action under the Fourteenth Amendment.

Similar cases which might be cited are *Steele v. Louisville R.R.,\(^14\) Sipuel v. Oklahoma,\(^15\) and Oyama v. California.\(^16\)* It was even left to a Senate Investigating Committee to discover and publicize the widespread campaign of intimidation against Negro voters in the Mississippi senatorial primary of July, 1946.\(^17\)

8. Professor Carr explains this gap between complaints and prosecutions in part by the policy of warning rather than prosecuting local officers and by the strategy of encouraging whenever possible state prosecution of local crimes. The smallness of the staff does not explain this gap, because in 1944 the Section requested and was given the responsibility of enforcing the criminal sanctions of five labor laws and the Soldiers and Sailors Civil Relief Act, because its regular civil rights case load allegedly was not sufficiently large for the existing staff.
9. Professor Carr cites the National Lawyers Guild, the National Bar Association and the National Association for the Advancement of Colored People, who described the Section as "lax and weak" and "supine before Southern mores and prejudices."
15. 68 Sup. Ct. 299 (1948).
16. 68 Sup. Ct. 269 (1948), a case brought by the Japanese-American Citizens League.
17. Report No. 1 of the Special Committee to Investigate Senatorial Campaign Expendi-
Yet, despite its limitations, the mere existence of the Section is an incalculable gain in the ever-continuing struggle to make our democracy real. The presence of the Section serves as a constant reminder that the Bill of Rights merely curtails federal activity and does not encourage it and that the federal government must forge and wield a sword to defend the civil liberties of its citizens. As President Truman has put it: "The extension of civil rights today means, not protection of the people against the Government, but protection of the people by the Government." 18

That sword is not merely another law. Although 18 U.S.C. §§ 51 and 52 need to be made more precise and the federal rights they protect spelled out with care, such amendments are no substitute for, or guarantee of, their effective enforcement. What is needed is a demonstration that the protection of civil rights will receive as much energy and funds as, for example, the federal employees loyalty program. The Civil Rights Section, as Professor Carr indicates, must be transformed into a division of the Department of Justice, adequately staffed, with regional offices throughout the country, with the power and the facilities for independent investigations, authorized to use all of the weapons of the law and not merely the grand jury indictment, and most important, directed by an attorney general with a burning passion for full equality in a free society.

Will Maslow


There are many different ways of writing any biography; there are many more ways of writing the biography of a subject so versatile as Roscoe Pound—botanist, battlefield hunter, lawyer, judge, law teacher, law school dean, law reformer, jurisprudent.

Dr. Sayre's approach is that of an old student who studied law under Pound when the latter was dean of the Harvard Law School. Moreover, Dr. Sayre himself became and still is a law teacher and a writer upon jurisprudence; naturally, therefore, he is chiefly concerned with Pound as teacher, administrator and jurisprudent. Indeed, he remarks that—aside from the

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1. One of the pleasantest features of Dr. Sayre's work is his account of the tramps of Pound and his friend, Omer F. Henley of Baltimore, over the Civil War battlefields. For a description of the joys of battlefield hunting see George Macaulay Trevelyan, Clio, A Muse in Clio, A Muse and Other Essays, Literary and Pedestrian 1, 27 (1913).
contacts of law school days—he talked with Pound only once and that was
during a brief chance encounter in Paris.

My own approach to Pound was quite different. I first met him in 1924
when we were fellow voyagers on the "Berengaria", journeying to London
for the meeting of the American Bar Association; he was, as I recall, in the
smoking room, singing or rather chanting that song of his with the intermin-
able number of verses—Dives and Lazarus—the life of the party then and
throughout the entire trip. Later I have seen, heard and visited with him at
many meetings of the American and other bar associations, and I even at-
tended some of his classes when my son was one of his students at the Harv-
ard Law School.

I contrast these approaches not to quarrel with Dr. Sayre's method but
to point up the fact that no matter how much one may think one knows of
some of the many facets of "the Dean", one is likely to learn from Dr. Sayre
not only more about these facets but about many others hardly suspected.

Dr. Sayre is not a professional biographer; he makes no attempt to drama-
tize his subject; his style is not brilliant and he is occasionally repetitious.
He has, however, had access to Pound's files, has communicated with many
of Pound's friends, former students and fellow workers, and has himself
studied with an understanding mind Pound's scattered but voluminous
writings.²

The result is a biography based upon all available material and covering
all phases of Pound's career—a biography which will attract few readers not
already interested in the subject but which will be of absorbing interest to
those who realize they know little and want to know more of Pound, as well
as those who think they know much but really know little.³ Indeed, the
greatest value of Dr. Sayre's biography will probably prove to be as source
material for a more definitive work on Pound's life that will some day be
written. This is true especially in two respects—the author's personal mem-
ories of Pound as a law teacher and the excerpts from letters about Pound
which he has appended to each chapter. The names of the writers of the
letters are not given ⁴ but apparently they are from Pound's old students,
fellow bar association workers, judges, and many others who have felt Pound's
influence. I am not sure but what they constitute the most valuable feature
of the volume, for they enable one to form one's own opinion of Pound, de-
derived from the testimony of a multitude of witnesses.

The factual details that Dr. Sayre gives of Pound's life are as revealing as
the analysis of Pound's legal philosophy or the estimate of his character.

² Franklyn C. Setaro in 1942 published a bibliography of the writings of Pound
which listed 256 "Books and Major Papers in the Law Alone". Shorter articles, including
those on free masonry and botany, bring the total to 773.

³ Unfortunately there are many inexcusable typographical errors for which Dr.
Sayre is not responsible.

⁴ Some interesting letters—including an extended correspondence with Justice
Holmes—are included in the text. The name of the writer of each of these is given.
Pound was born in Lincoln, Nebraska, in 1870. Lincoln was at that time almost within sight of the receding frontier; when he was nine years old he saw the Pawnee Indians marched through the streets of Lincoln on their way to their new home in the Indian territory. Pound's father, Stephen Pound, was a graduate of Union College at Schenectady and had moved to Lincoln from New York State in 1866; he practiced law at Lincoln before and after his service first as probate and then as district judge. Stephen Pound was a respected and trusted member of his community; indeed, he seems to have been typical of all that was counted best and that was most conservative in the Lincoln of his day; probably his most nearly radical step was to become a Republican shortly after the party was organized.

Pound's mother was also a native of New York State; she had attended Lombard College and continued her studies at the University of Nebraska when, after her marriage, she came to Lincoln; she taught school both in New York State and in Nebraska and was noted for her remarkable memory.

Pound received his academic education in Lincoln, at the University of Nebraska, majoring in botany—the subject in which he later obtained his M.A. It was with the thought that he would pursue his studies in the sciences that Pound went to Cambridge in the fall of 1889; originally he had been attracted to Harvard by the fame of Dr. Asa Gray. Gray had died before Pound's arrival at Cambridge and he concluded that he had had enough science at Nebraska and, no doubt influenced by the suggestion of his father, entered the Harvard Law School, where he remained for one year.

Pound practiced law in Lincoln for fifteen years and was between times a commissioner of the Supreme Court of Nebraska for two years. Neither as a lawyer nor as a judge does Pound seem to have hit his stride. In a frontier town like Lincoln the trial of cases was the community drama; the ethics of the bar were low, as only results counted; consequently Pound came to detest trial practice. Nor was the work on the Nebraska Supreme Court entirely congenial. There was little opportunity for the philosophical approach. Even when the opportunity came the judges were unsympathetic and the bar hostile. Pound's experiences at the bar and on the bench were a part of his education—little more.

Pound's heredity and early environment explain many of his characteristics: his photographic memory, his thirst for encyclopedic knowledge, his scientific approach, his frontier stamina and forthrightness, his understanding of both the bar and the bench.

Probably the most important effect of Pound's heredity and early environment has been upon his point of view. Dr. Sayre places him a little right of center; I should place him at center. True, he has been a life-long Republican; but he advocated the federal abolition of child labor—filing a brief in

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5. Pound was at one time director of the Botanical Survey of Nebraska and has written extensively on the subject. A fungus, "Roscoepoundia", has been named in his honor. P. 69.
Hammer v. Dagenhart⁶ and supporting a child labor constitutional amendment; he aided in the confirmation of Brandeis; he disapproved of the conviction of Sacco and Vanzetti; he defended Felix Frankfurter when, during Frankfurter’s professorship at the Harvard Law School, he was under attack; unhesitatingly and consistently Pound has blazed the way for law reform regardless of the opposition of the conservative members of the bar.

Dr. Sayre does not make out a strong case for Pound in his pre-Harvard days as either a teacher of law or a law school dean. At Nebraska, Northwestern and Chicago, Pound seems to have been more concerned with learning than with teaching. Indeed, Pound’s teaching at these institutions was merely a part of his preparation; he must be judged by his thirty-seven years at Harvard.

In appraising Pound’s work at Harvard, Dr. Sayre finds that before Pound began to teach at the law school there had been two periods of the school: “. . . the time of the great text writers and those who were great teachers through the lecture and text method. . . . With the case method . . . Harvard entered upon a well-recognized second phase of leadership.”⁷ In bringing into law school teaching a sociological approach Pound “. . . in his teaching at Harvard and elsewhere and by his influence generally throughout the world, brought not only a third period to the Harvard Law School, but in a more sweeping sense than was true of the preceding periods, he brought this new view to the profession everywhere in this country and other countries.”⁸

Pound’s other major contribution to the law school Dr. Sayre finds in the new teachers he brought in: Manley O. Hudson, Thomas Reed Powell, Edmund M. Morgan, Warren A. Seavey and Francis Bohlen.

The only criticism of Pound which Dr. Sayre notices is that Pound has been unsympathetic with “various devices for smaller classes or for more intimate relations between instructors and students.”⁹ In his interesting, if not entirely pertinent, reply, Dr. Sayre calls no name but may be suspected of grimacing at a certain law school: “After all, the Harvard Law School has a magnificent tradition of stimulating instruction on the part of its faculty and of cooperative search for knowledge on the part of its students. . . . Dean Pound did not want to destroy or seriously risk this great trust in the name of every helter-skelter, untried device that well-intentioned men might propose for the unconscious purpose of indulging their own laziness or increasing their opportunities for uplift work in legal or political affairs at Washington, . . .”¹⁰

Dr. Sayre discusses at length Pound’s philosophy of jurisprudence. Lack of space does not permit either a synopsis or an extended comment upon this

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7. P. 229.
discussion. With a consciousness of over-simplification it may be said that Dr. Sayre finds the essence of Pound's philosophy in his quotation of "the famous statement of William James . . . 'since all demands conjointly cannot be satisfied in this poor world' our aim should be 'to satisfy as many as we can with the least sacrifice of other demands.'" 11 " . . . Pound remains the pragmatist, refusing to say in an ultimate sense whether the individual emphasis or the social emphasis should always be followed." 12 "His later writings do not essentially qualify this when they dwell at greater length upon the development of the law in keeping with the recognized objectives of civilization at the given time." 13

Dr. Sayre classes Pound's contribution to law reform as his greatest achievement. This, I think, is a sound view. In our time no other law teacher or jurisprudent has had so large a following among practicing lawyers and judges in active service. No award of the American Bar Association Gold Medal for distinguished service to American jurisprudence has been more generally approved than that made to Pound in 1940. This was a recognition not only of the quality but of the quantity of Pound's work. This work began with an address (dramatically described by John H. Wigmore) before the American Bar Association in 1906, titled "The Causes of Popular Dissatisfaction with the Administration of Justice", and still continues. Pound's last work has taken many forms—participation in the Cleveland Crime Survey, in the Restatements of the American Law Institute, membership on the Hoover Commission, tireless work on American Bar Association committees, a multitude of articles in law reviews and elsewhere and of addresses before bar associations and other gatherings.

Dr. Sayre seems to consider Pound's contribution to the Administrative Procedure Act as his magnum opus of law reform. Here again I am inclined to agree. Even this, however, may eventually be overshadowed by Pound's work to better the administration of justice in China—an undertaking in which, at the age of seventy-seven, he is currently engaged. 14

It is not difficult to explain the ready acceptance of Pound's views by lawyers and judges. They have learned to trust the accuracy of his factual statements. He presents his views simply—without any pretense of super-sophistication or any affectation of weird nomenclature. He is obviously familiar with the approach of the bar and the methods of the bench. He is

11. P. 343.
12. P. 345.
13. P. 346. Dr. Sayre finds Pound's legal philosophy expressed in four of his books: SPIRIT OF THE COMMON LAW (1921) (lectures at Dartmouth College, 1921); INTRODUCTION TO THE PHILOSOPHY OF LAW (1922) (Storrs lectures at Yale University, 1921); INTERPRETATIONS OF LEGAL HISTORY (1923) (lectures at Cambridge University, 1922); LAW AND MORALS (1926) (McNair lectures at the University of North Carolina, 1923). See p. 341.
transparency mentally honest, not only personally disinterested but un-
swayed by devotion to any cult. He is never more than a little left of center;
he never attempts to lead a forlorn hope, although he is always in the advance
guard preparing the way for the main assault.

It has been many years since I read it but I seem to remember that Ma-
caulay wrote that the successful man is not he who does the unusual thing
but he who does the usual thing with unusual effectiveness. This almost
describes Pound as a law reformer. He voices for the empiricists of the bar
and bench the changes they would themselves propose if they were ade-
quately informed and entirely uninhibited.

WALTER P. ARMSTRONG †

DEMOCRACY, THE THRESHOLD OF FREEDOM. By Harold F. Gosnell. New

In his new book, Mr. Gosnell, an old timer in the field of quantitative
analysis, treats two cornerstones of popular government, suffrage and repre-
sentation. He seeks to make "government, or some aspects of it," scientific.
In the implementation of this purpose, he is interested in evolving behavior
patterns from the attitudes of various groups who have benefited, and still
are benefiting, from suffrage extension. Because of this purpose, he attempts
to correlate with certain social and psychological data the attitudes of repre-
sentatives and voters, as well as the chances for success of different systems
of representation.

Hand in hand with this "scientific" endeavor—some times explicitly, more
often implicitly—appears the premise on which the author rests his advocacy
of democracy: the belief that in the long run democracy not only gives the
voter an opportunity for intelligent choice, but also provides for peaceful
change of any given set of social institutions. He admits that the goals of
democracy are never reached by an automatic reliance on the working of
the democratic process. Time and again—especially in his initial chapters
on suffrage as well as in his conclusion—the author stresses the fact that
effective suffrage presupposes a long and arduous term in the school of polit-
cal education and that suffrage is only the "threshold," not the ultimate
realization of democracy.

At times it seems that the author is somewhat less sure of the validity of
his own premise. There are blockhead politicians who, with evil devices
such as gerrymandering, deflect the popular will. There are also antiquated

† Member, Tennessee Bar Association (Pres. 1936); Member, American Bar Association
(Pres. 1941–2); Member, Association of the Bar of the City of New York; Honorary Member,
Canadian Bar Association.
institutions such as the "jungle ballot," which, by expecting the impossible of the voter, lead to the discrediting of the whole system. Mr. Gosnell expects these imperfections may be overcome; he occasionally doubts, however, that judgments by voters even fully educated in responsible citizenship achieve the democratic goal.

With his optimism tempered by these doubts, Mr. Gosnell has found it wiser to throw overboard the traditional theories of representation sponsored not only by Hobbes, whom he quotes disparagingly, but also by Spinoza, Rousseau and the minor luminaries of nineteenth and twentieth century political philosophy. Thus, in effect, he shifts the focus of interest from representation as a unifying force to a sceptical and extremely subjective definition of representation which concentrates on a psychological, and to some degree sociological, relationship between voter and representative. Such a psychological approach might be appropriate for an analysis of a system of representation based upon a restricted, and therefore fairly homogenous, electorate, such as prevailed in the early nineteenth century. While he is given to analytical treatment of various concepts and interrelationships, Mr. Gosnell makes no attempt to determine the differences which distinguish the United States middle class system of representation from the system of a fully developed mass democracy. In the middle class system of representation political parties, motivated solely by desire for victory at the polls, exist cheek by jowl with a limited number of predominately social and economic organizations, while in a mass democracy political and economic groups blend. This omission is significant, because in a mass democracy representative bodies have been more or less relegated to a back seat and the representative quality, so to speak, has come to be vested in the parties, rather than the assembly or the individual representatives.

In order to illustrate these crucial distinctions, let us examine in somewhat greater detail the chapter of the book which deals with the occupations of representatives. The author dwells on two facets of the problem: the measure and significance of the identity of occupation between constituent and legislator, and the meaning of "the over-representation of lawyers" in legislatures.

As to identity of occupation, the author reaches the conclusion that the demand for identity seems to coincide with extremism—a thesis which he seeks to prove by a number of examples from recent legislative reports. But has professional identity any real meaning in present day society? While it is clear that a representative tries for propaganda purposes to bestow on himself a profession which will in some degree identify him with the rank and file of his constituents, yet in mass democracies this identity has become a pure fiction. At present, to an increasing degree, people are elected to the

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1. The book contains an interesting and exhaustive discussion of the origins of representation. No attempt is made, however, to sketch the evolution and transformation of this institution and to define its present role.
legislature because of their professional affiliation with the party itself or with certain groups, such as trade unions, etc., with which the party is closely associated.2

In striking contrast to the habits and opinions of the nineteenth century, in all European parliaments since World War I the ascendency of the professional political organizer, together with the professional representatives of interest groups, has been an acknowledged fact. Characteristically enough, when difficulties arise in our period, they come from the survival of independent members in the representative bodies, who are not connected with organizations.3 Investigation of the problems of professional stratification can therefore be significant only upon inquiry as to the kinds of interests represented in the legislature—a question which bears little relation to the description which the individual representative may wish to give in the official year book as to his professional status.

As to the United States in contrast to Europe, account must be taken of the predominance of the lawyer-representative. The author gives greater weight to the lawyer's "occupational influences in solving primary group conflicts" than to middle class control of American politics. The lawyer in America may, however, be compared to the medieval cleric. It is suggested that professional training made them both most eligible for public office. But professional background does not, in fact, give much indication as to what ultimate role lawyers are destined to have within the political framework. This depends to some extent on skill and inclination, but probably still more on the individual and the group ties which make it possible for a lawyer to run for office and to maintain himself in office. While election expenses remain as high as they are—except for the independently wealthy who can afford to run for pleasure and for glory—many people who seek public office cannot bear the financial burden alone. Any arrangement in solution of this problem may be of a strictly personal nature, but it may also involve closer ties with some local or national interest group. It is suggested that such ties might often be a more significant explanation of the representative's behavior than the most refined *tableau psychologique* of the representative-voter relation.

The American lawyer's survival as the dominant legislative type is the

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2. The author cites the German Economic Party, with its preponderance of bakers, innkeepers and house owners as a "clear and concise case in point" for the electorate's inclination toward standards of professional identity. This party was, however, a flare-up of independent middle class resistance against big business and the working class. At the height of its power, in 1928, it received only 4.5% of the vote and thus constitutes a rather unrepresentative exception to the rule here described. P. 222 n.4.

3. Thus, for example, after the 1945 British elections, a number of ex-service men without any professional affiliation with the party machines or with special interest groups found themselves in financial difficulties, because after entering Parliament they were without any regular outside income. See the New Statesman and the Nation, January 26, 1947. Some of them who tried to make a living by using their confidential parliamentary information were censured for breach of privilege, and one was even ousted from Parliament. See The Times (London), October 30, 1947, p. 3, col. 2, and October 31, 1947, p. 4, col. 6.
outcome of a specific socio-political constellation and is not, as the author
seeks to imply by assigning him an umpire's role in solving primary group
conflicts, necessarily concomitant with the survival of his individual inde-
pendence. Investigation on this point, neglected probably because of the
difficulties attendant thereon, might be rewarding.

Similar criticism may be made of the author's discussion of initiative and
referendum. Here too a distinction must be made. Strongly organized polit-
ical parties have a tendency to "mediatise" this institution and to use it as
one line of strategy in a concerted plan of political action. This tactic has
been demonstrated in Weimar Germany and recently in the Swiss Confedera-
tion (as distinct from the individual cantons and communities). In the
United States initiative and referendum statutes—except where a referen-
dum is made necessary by the rigidities of constitutional provisions—have
remained a subordinate instrument in the hands of special interest groups
who want to bring a point before the public for decision, subject to possible
modification by the courts or assemblies, and later reconsideration by the
people. This diffuse character of American legislation on initiative and refer-
endum, which deprives it of any long range political effect, makes the answer
to the traditional question of whether these statutes have a progressive or a
conservative character relatively irrelevant.

In view of the differences between the American type of representative
institutions and mass democracy, the reviewer tends to come to the conclu-
sion that the author's aptly coined phrase of suffrage as the threshold, not
the throne, of democracy may have a more profound significance than the
author himself would admit. As long as there are legal inequalities and tech-
nical limitations upon the full expression of popular will—as long as there is
only a moderate degree of popular participation in the electoral processes,
the halcyon days of the representative system will last. The real problem of
representative democracy arises only when democracy has become fully rep-
resentative, with all groups in the community able to throw their weight
around. The author assumes that, once democracy in the formal sense has
been established, it is the framework within which social conflicts are peace-
fully solved and power peacefully transmitted. But to the reviewer it seems
that the full representation of groups now under-represented might bring
into the open all the possibilities for conflict deriving from fundamental
societal antagonisms, and thus jeopardize the author's thesis. The United
States is now on its way from a middle class representative system to a full
fledged mass democracy and is slowly coming to the point at which legal in-
equalities are giving way, at which underprivileged groups are becoming con-
versant with the mysteries of the ballot box, and at which political parties
motivated solely by desire for election success and using patronage accord-
ingly are transforming themselves into more rigid political factors. Shall we
be cynical and say that it may not happen in our lifetime, or shall we be brave
and brace ourselves for the trials which it will inevitably bring?

OTTO KIRCHHEIMER

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