

REVIEWS

SURVEY OF METROPOLITAN COURTS DETROIT AREA. By Maxine Boord Virtue. Ann Arbor: University of Michigan Law School, 1950. Pp. xxx, 315. \$5.00.

THIS interesting study of metropolitan courts was prepared for the University of Michigan Law School and the Section of Judicial Administration of the American Bar Association. The joint sponsorship is useful as insuring an approach at once scholarly, but also practically concerned with possibilities of improved law administration. Mrs. Virtue, the author, is a Yale-trained lawyer and student who spent two years in field study, analysis, and preparation of her manuscript. The result is a careful report of social data affecting an important area of local government.

As might be expected, what we see is a picture of overlapping activities which—to quote from the Foreword of Presiding Judge Jayne of the Wayne County Circuit Court—makes one wonder “that democracy works as well as it does.” The normal legislative propensity to create another court when business increases, rather than improve the efficiency of the courts at hand, is proverbial. So in the Detroit Metropolitan District we find a total of 145 courts. Naturally the most numerous are those on the lowest level, namely, the township justices, who number 104. The sober depiction of the facts here points unmistakably to the advantage of a businesslike structure for the courts with a directive head for the proper allocation of judicial activity. Judge Jayne suggests that court administration in a metropolitan district is a problem distinct from the administration of the courts in a state as a whole, and not to be solved by inclusion in any plan for statewide court integration. There is undoubted basis for concern lest differing problems be lumped together for a universal solution. Yet the idea of the integrated court for the Detroit area itself seems the clear solution if ever these infinite diversities are to be canalized for both business and judicial efficiency.¹ Whether such a court should also be integrated into the over-all state system is not so important as the primary step; it may well depend on local or even temporary administrative convenience.

The book has a wealth of useful information as to personnel, its capacity and training; as to caseload in the various types of court business, criminal, civil, probate, juvenile; as to the use of juries, of pre-trial conferences, and the like devices of trial; as to the relationship between the courts and other law enforcement and welfare agencies. In a brief review it is only possible to name these generally and to indicate their uses not only to legal reformers, but to social students generally. We have not yet begun to realize the wealth

1. See Clark & Clark, *Court Integration in Connecticut: A Case Study of Steps in Judicial Reform*, 59 YALE L.J. 1395 (1950); Clark & Clark, *A Proposal for Court Reform in Connecticut*, 24 CONN. B.J. 385 (1950).

of social material available from such studies as these. They are all too infrequent. Indeed the outstanding accomplishments of the amazingly complete federal system of judicial statistics are all too little appreciated and made use of by scholars.²

A usual reaction is that such studies tell us only what we already know. The thought seems untrue, as well as irrelevant. In fact, this type of information does tend to arouse connotative recollections in our breasts, so that we are led to exclaim, "Why that is just what I always thought." Such stirring of remembrance permits us to overlook, however, (1) the number of things we did not know, (2) the number of things we knew which were not so, and (3) the hazy, vaporous, and therefore inconsequential state of our knowledge upon what we thought we knew. And the idea is largely irrelevant, because no social reforms can be predicated on inexact guesswork. It is hard to the verge of impossibility to secure improvement on the basis of concrete, sorely-distilled facts; when we come to mere guesswork that is coin less valuable in our democratic process than frank resort to emotion, politics, or our other standard substitutes for facts. But to the reformer or student, there is no substitute for information such as we find here, as indeed the congressional committees are demonstrating in the use they now make of the federal data currently provided by the Administrative Office.³

It must be conceded, nevertheless, that the gathering of such material is an expensive, time-consuming process requiring also skill and judgment. In essence it must always be so. But I could wish that a successful study such as this could lead more immediately and easily to other such studies so urgently needed than has been customary in the past. I think we have failed to capitalize as we should upon the experience already had, limited as that unfortunately has been. In my judgment these projects tend to suffer from two combined defects: overcollection of unimportant details and diffidence in stating conclusions. These defects stem from desirable qualities found in the true scholar, largely resulting from his modesty lest he venture beyond his own evidence. But such modesty can be carried so far that the one who knows most says least about his subject and meanwhile diligently collects much data which he does not want, but which he fears another scholar may

2. Shafroth, *Federal Judicial Statistics*, 13 LAW & CONTEMP. PROB. 200 (1948); *Report of Committee on Judicial Statistics*, 7 FED. B.J. 292 (1946); 1949 REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 71-113; 1950 *id.* 67-74, 87-125. The effective New Jersey statistics follow the same model. WOELPER, ANNUAL REPORT OF THE ADMINISTRATIVE DIRECTOR OF THE COURTS OF THE STATE OF NEW JERSEY 1948-1949, 1-15; *id.* 1949-1950, 1-27; Vanderbilt, *Our New Judicial Establishment: The Record of the First Year*, 4 RUTGERS L. REV. 353 (1950); Vanderbilt, *The Record of the New Jersey Courts in the Second Year under the New Constitution*, 5 RUTGERS L. REV. 335 (1951).

3. The yearly reports to the Judicial Conference of the United States of its Committee on Judicial Statistics set forth various examples of increasingly extensive use of federal judicial statistics by congressional committees in connection with the creation of new judgeships or other housekeeping for the federal court system.

find instructive. To give him the support and confidence he needs, while at the same time to narrow the task within manageable limits, to save much time in preliminary planning as well as in the form and substance of the ultimate report would seem a task in fashioning principles of methodology of real challenge to a person of the rich experience which Mrs. Virtue now has. It would be well if some appropriate organization could now sponsor a study in the making of studies in court organization. The proper delimitation of the subject matter, the elimination of various nonessentials, the making of bold hypotheses leading eventually to definite conclusions—all these and more could be made subject to defined precepts so as to relieve the task of much of its drudgery, waste, and expense. For the material is so necessary if we are to get anywhere in efforts to improve the administration of justice.

CHARLES E. CLARK†

ESTATE AND GIFT TAXATION: CASES AND MATERIALS. By Boris I. Bittker. New York: Prentice-Hall, Inc., 1951. Pp. xviii, 494. \$7.00.

THE publication of Boris Bittker's cases and materials on estate and gift taxation reflects the recent trend toward a separate course to cover this particular branch of Federal taxation.¹ This development is an understandable one. Statutory and case law as well as supporting legislative, administrative and text materials in the field of federal taxation is now so extensive as to make inadequate the traditional survey course covering both income and estate and gift taxes.

As Professor Bittker makes evident in his preface, the estate and gift taxes are, in many respects, the answer to a teacher's dream. Within a relatively narrow and workable framework a student can look at a wide variety of interesting problems which are an intellectual challenge. The constant interplay of legislative, administrative, and judicial functions stands out clearly.

The history of graduated death taxes provides evidence of frequently conflicting social and political forces that have been reflected over a period of more than thirty years in the three main divisions of Government. Estate and gift tax receipts are of minor importance in relation to total federal revenues. But, since these taxes have their principal impact on the relatively very wealthy, they have seemed to some to symbolize much of the disagreement of our times on social and political policy. Of course, the imposition of progressive death taxes may represent a taxing philosophy which simply

†Circuit Judge, United States Court of Appeals, Second Circuit.

1. The book deals almost exclusively with the Federal law, although a short part is devoted to the problem of State jurisdiction to impose death taxes, and a useful publisher's supplement containing the current Federal law and regulations also has the death tax law of any one state chosen by the instructor.

believes that graduated taxes on transfers of accumulated wealth are a better source of revenue than other available alternatives. However, such taxes may be and traditionally have been justified as providing a socially desirable brake on excessive concentrations of inherited wealth. Whatever the cause, differences of opinion on taxing policy and the tendency to have changing political and social viewpoints reflected more rapidly in one branch of government than another have contributed to the coexistence of attitudes which are both friendly and hostile to progressive-rate death taxes. These conflicting views have been at the heart of much judicial, legislative, and administrative maneuvering and dispute. They have left a rich heritage of materials ideal for law school analysis and discussion, if not for the weary tax practitioner in search of certainty and truth for his clients.

The selection of cases and materials for a book such as this requires many difficult decisions if the work is not to grow too large for practical use. No two people would ever make the same choices, particularly if both have taught courses in the subject. It is, therefore, not worthwhile to pursue in minute detail the respects in which I would have chosen differently. Professor Bittker has covered most of the field. He has pointed up and developed problems presented in the cases by suggestions and questions in accompanying notes. Except for a few instances which I will note, I am not sure that any other selection would be markedly superior in total result. The important things are that the student should have in one place the bulk of what he will need for classroom use and that the teacher should have in orderly form the materials essential to a good course.

The Bittker book sensibly begins with an introduction that puts estate and gift taxes in their historic, economic and social setting. The introduction briefly explores the policy considerations for and against death taxation; compares various forms and modifications of inheritance, estate and other transfer taxes; and discusses points of strength and weakness in such taxes in terms of their effect on economic incentives, saving and spending practices, and dispersion of wealth. The revenue potentialities are briefly explored and inherent administrative problems are pointed out. Such a discussion can be most valuable, particularly since it may serve to make the student aware of underlying policy considerations in tax law-making which tend to be obscured by technical problems. As Professor Bittker points out in the preface, the student will soon enough, as a practicing lawyer, become embroiled in the intricacies of so-called "estate planning" which he may find inimical to dispassionate study of policy. Indeed, it is made clear that this book is intended for a basic course and is not designed at any point as a text for estate planning.

The introduction seems to fail in its task of brief survey in only one respect worth mentioning. It does not bring out adequately the limitation on the taxes' revenue potential caused by the tax exemption for trust property passing from generation to generation. However, the effect of this exemption

on uniformity of tax burden is pointed out. Although valid statistical analysis is not readily available, the effect on total revenues of successive tax-free life estates may be at least as important as that of charitable trusts and foundations.

The method of organization of Bittker's book is new. The first part provides, in about forty pages, a quick outline of the gift tax. Thus, as the estate tax discussion unfolds in the second part, the student will already have in mind the main structure of the related gift tax and principal points of reference and comparison. Detailed problems of the gift tax are postponed to be taken up in conjunction with their counterparts in the estate tax. For example, the materials and discussion relating to the estate tax effects of antenuptial and post-nuptial property settlements, particularly those incident to separation and divorce, are intertwined with the analysis of the corresponding gift tax problems. This is a particularly successful application of the technique of combined discussion.

As an approach to the subject, it seems to be considerably better than the more customary separate treatment of the two taxes. It serves particularly to play up the important points of similarity and dissimilarity in transfer concepts and the overlapping that pervades the two tax structures. Still further help to a student of federal taxation might result, without the material getting too bulky, if some note material were added throughout to identify related income tax rules, particularly where they contrast with either transfer tax concept.

The second and principal part of the book is made up of five chapters embracing the following: (1) the gross estate, (2) the net estate (*i.e.*, the allowable deductions, including the marital deduction), (3) computation of tax, (4) administrative procedure and (5) apportionment. The third part deals with State jurisdiction to tax.

The organization of the main chapter, relating to the gross estate, does not follow the structure of the estate tax law entirely. The basic provisions of sections 811(a) and (b) of the Internal Revenue Code, relating primarily to the probate estate, are taken up in order. Then, with a good deal of logic although the treatment is new so far as I know, there follow joint interests and community property covered under section 811(e), with some material descriptive of the main outlines of the marital deduction. This deduction was part of the 1948 plan designed primarily to equate tax burdens between community property and common law property dispositions of a substantially similar nature. The material that follows relates to *inter vivos* transfers: first, transfers in contemplation of death under section 811(c)(1)(A), second transfers subject to powers to amend or revoke under section 811(d) and finally transfers taking effect at or after death, under the remaining portions of section 811(c).

Since the Revenue Act of 1950 eliminated much of the importance of the contemplation-of-death provision, most of the material on this subject could

now be eliminated by condensing it into a descriptive note. Publication was evidently too far advanced when Congress changed the law to permit revision in this edition. This illustrates a major peril of case book compilation in the tax field.

As to *inter vivos* transfers intended to take effect in possession and enjoyment at or after death, the author has deliberately retained much of the material that culminated in the *Church* and *Spiegel*² decisions. Though rendered obsolete by the Technical Changes Act of 1949, these decisions provide a fascinating chapter in tax history, rich with examples of legislative, judicial and administrative law making and remaking. But it seems questionable whether voluminous material, however challenging, which is no longer a part of the operating body of the law can justify so much space. A detailed note and references to the best of the extensive literature on the matter might be almost equally adequate. Then more space could be devoted to an analysis of the 1949 amendments and such matters as the changed relationship between sections 811(c) and (d), for the latter subsection is largely duplicative of section 811(c)(1)(B) and (C). Typical of relevant material which could be added here would be some portions of the new Bureau regulations and such decisions as those in the *Higgs*³ and *Pruyn*⁴ cases.

The discussion of powers of appointment, which follows section 811(c), is brief. This is just as well, since section 811(f) is now also faced with probable obsolescence through pending legislation, which may even be law before this review appears.⁵ Moreover, since any new law will not bring back to life the problems of the *Grinnell*⁶ and *Rogers*⁷ cases, these decisions should be not reprinted in any subsequent edition.

Life insurance and other death benefits have raised tricky and complicated estate and gift tax problems. The material in this book, though not sufficient, is probably as adequate as any that has previously appeared. Space should be devoted to analysis of the nature and uses of life insurance contracts, including beneficiary clauses and provisions governing values and assignments. The tax problems incident to ownership, transfer and valuation of insurance all justify more detailed explanation. Somewhat related, as a practical matter, are the problems incident to joint and survivor annuities, death benefits under employee pension plans and similar contractual rights in survivors. The

2. *Commissioner v. Church's Estate*, 335 U. S. 632 (1949); *Spiegel's Estate v. Commissioner*, 335 U.S. 701 (1949). (The Spiegel estate itself was relieved of the effect of this decision by the Technical Changes Act of 1949, §7(c) and this section was later amended to also relieve the Church estate by Pub. L. No. 761, 81st Cong., 2d Sess., Sept. 6, 1950).

3. *Higgs' Estate v. Comm'r.*, 184 F. 2d 427 (3d Cir. 1950).

4. *Pruyn's Estate v. Comm'r.*, 184 F. 2d 971 (2d Cir. 1950).

5. H. R. 2084, 82d Cong., 1st Sess., passed by the House May 7, 1951.

6. *Helvering v. Grinnell*, 294 U.S. 153 (1935).

7. *Rogers' Estate v. Commissioner*, 320 U.S. 410 (1943).

whole of this area is of increasing importance and as yet lacks really adequate treatment in a book for law school instruction.

One other matter of content perhaps deserves comment. Estate tax computations can be most complicated, particularly in connection with the credits for gift tax and deductions for property previously taxed. The marital deduction has added further complexities. It would be most helpful to give some examples of how these technical provisions work. For example, sample computations of gift tax credits could serve to clarify their operation and make clear the important matter of how and in what circumstances the credit will provide less than a full offset for the gift tax previously paid. A mere reading of the statutory material will not serve as a substitute for actual computations as a method of showing the purpose, operation and limitations on the relief these deductions and credits provide from double or too frequent taxation of property transfers.

The publication of materials such as these will make a contribution to the further development of law school courses dealing entirely with estate and gift taxes. Fairly frequent revision would seem to be a necessary condition to their continued usefulness. Professor Bittker's book had to face the problems of experimentation inherent in being a pioneer in this field. It has also appeared at a time when the fairly short useful life of any edition has been cut further by an even more than the usual quota of unpredictable legislative obsolescence. It is to be hoped that, having done the first job of organization, Professor Bittker will take up the task of an early revision which will continue and increase the usefulness of the work.

ADRIAN W. DEWIND†

HUGO BLACK. By Charlotte Williams. The Johns Hopkins Press, 1950.
Pp. vii, 208. \$3.50.

THIS "examination of the official career" of Justice Hugo Black is offered as "a step toward" an understanding of "movements in the mainstream of juristic thought." I'm not sure what this means, but I presume that some understanding of Justice Black must be involved in it. This book is an exceedingly short step in that direction. It begins with an account of the furor provoked by Black's appointment to the Supreme Court in 1937 and ends with an account of the furor provoked by Justice Jackson's ill-tempered and ill-advised charges against Black in 1946. There is not much in between.

After getting Black seated on the Court, Miss Williams goes back to examine his public career in Alabama, but her research must have been confined to an examination of *Who's Who*. She notes that he was a Birmingham police judge, relates one probably apocryphal tale about his treatment of a usurious

†Member of the New York Bar.

installment seller, philosophizes a bit on the problems of police judges generally, and concludes: "One has only to concede that Hugo Black at the age of twenty-four was a young man of normal humane instincts and common intelligence to be certain that the experience of this period of his life furnished a basis for the framework of his maturer views. He early came to the conclusion that criminals were generally not made by some inherent strain of vicious propensity but by poverty and its attendant frustrations."

Her treatment of Black's experience as a county prosecuting attorney is even less rewarding. His election to that position is recorded (in the wrong year), it is pointed out that the office "offered an opportunity for experience and rough and tumble trial practice not to be found elsewhere," and then comes another glittering conclusion: "That Black was an apt student in the courses his new law school had to offer was soon apparent and what he learned there has often been evidenced in his later life."

Black then moves on, in Miss Williams' account, to service in the Army, followed by an association in private practice with his brother which was so successful that "the firm of Black and Black was concerned in almost every field of litigation and was well known throughout the state" (a particularly remarkable achievement, in view of the fact that Black's only lawyer brother died before Black entered law school), and thence to the United States Senate.

Black's career in the Senate receives more fulsome treatment—to the extent that the *Congressional Record*, records of committee hearings, and occasional newspaper articles provide the details. Since these sources were most ample on Black's chairmanship of the Congressional committees investigating government mail contracts and lobbying, these aspects of his legislative experience are stressed, with consequent neglect of his greatest legislative achievement, the Fair Labor Standards Act. And even here the account is incomplete and discernment is lacking. Thus, Miss Williams' description of the litigation arising out of Black's use of dragnet subpoenas of Western Union telegrams in the lobbying investigation is limited to two district court cases involving attempts to enjoin compliance with the subpoenas and omits the more important decision of the Court of Appeals of the District of Columbia, holding that it had no jurisdiction to prevent use of the information so acquired.¹ It seems unlikely that more complete research would have brought greater understanding, however. From her entire study of Black's legislative career, with its emphasis on Black as investigator, Miss Williams is able to learn only that by the time her subject went to the Supreme Court he had demonstrated that he was "alert and ambitious . . . of pronounced social, political and economic views, positive, uncompromising and self-assured." When she later notes that Justice Black appears less solicitous about the guaranty against unreasonable searches and seizures than about other provisions of the Bill of Rights, her only explanation is that, "Possibly, like the public generally, he

1. *Hearst v. Black*, 87 F. 2d 68 (D. C. Cir., 1936).

is influenced by the fact that almost always when the provisions of the Fourth Amendment are before the court they are being invoked by some flagrant law violator who has been 'caught with the goods'."

Armed with this sort of understanding of Black the man, Miss Williams then proceeds to a similarly unperceptive examination of Black the judge. Thus, from Black's reluctance to find unconstitutionality in state systems of taxation and economic regulation, she concludes that he is a strong "states' rights" man. When she finds him displaying a similar tolerance for federal legislation, she is at pains to justify his departure from "theoretical consistency" by pointing out that his vote, in any case, is usually for the "little man". That Black may read the constitution to restrict judicial interference with any legislative experimentation with the economy occurs to Miss Williams only dimly. His assault on the doctrine of "substantive due process" escapes her entirely.

A similar "inconsistency", similarly explained by Black's devotion to the "little man", is demonstrated by comparing a line of cases in which he voted to uphold administrative rulings with two cases where he voted to reverse the Interstate Commerce Commission, once where it had permitted railroads to charge higher rates out of Chicago on grain shipments that came in by barge than on those which came in by rail,² and once where it had granted to a railroad a certificate of convenience and necessity for motor truck operation without the showing—required by the I.C.C. from non-railroad applicants—of inadequacy in the service of existing motor carriers.³

The "little man" theory also explains Black's "leaning toward the laborer's side of judicial controversies." When "labor becomes Goliath as in the case of the United Mine Workers⁴ or the American Federation of Musicians,⁵ Black does not hesitate to espouse the cause of its adversary." No explanation is offered for his votes in favor of the same Goliaths in other cases.⁶

And so it goes until Miss Williams can conclude that, "It is probable that Justice Black belongs to the school of thought which holds that every judge, consciously or unconsciously, writes into his opinions his own economic, social and political ideas."

On the theory that any study of a subject, however superficial, is better than none, this book might have some value if it were the first book about Justice Black. But, though there is nothing here to indicate that Miss Williams is aware of it, her book is not the first. It follows, by nearly two years, John Frank's book on the same subject.⁷ Perhaps my feeling that Miss

2. *ICC v. Inland Waterway Corp.*, 319 U.S. 671 (1943).

3. *ICC v. Parker*, 326 U.S. 60 (1945).

4. *United States v. United Mine Workers*, 330 U.S. 258 (1947).

5. *United States v. Petrillo*, 332 U.S. 1 (1947).

6. *United States v. American Federation of Musicians*, 318 U.S. 741 (1943); *United Mine Workers v. United States*, 338 U.S. 871 (1949).

7. FRANK, MR. JUSTICE BLACK (1949).

Williams has contributed nothing to an understanding of Justice Black which is not better presented in Frank's book may be attributed to the fact that Frank is a friend and colleague of mine. But I am sure that Miss Williams would have better understood her subject if she had read Frank's book before writing her own.

VERN COUNTRYMAN†

LAW AND SOCIAL ACTION: SELECTED ESSAYS OF ALEXANDER H. PEKELIS.
Edited by Milton R. Konvitz: New York: Cornell University Press,
1950. pp. 269. \$3.50.

THESE essays reflect, in some measure, the accomplishments of a remarkable refugee lawyer-scholar during the scant five years between his arrival in the United States and his death in 1946. During this period his adaptability to Anglo-American legal traditions was clearly revealed. In 1943, at the end of his first year of study, he was elected Editor-in-Chief of the Columbia Law Review. The following year, the Review established for him the office of Graduate Editor-in-Chief. The publication of his proposal for "A Supreme Court Year Book," his evaluation of "The Supreme Court Today," and his illuminating comparative law studies on "Legal Techniques and Political Ideologies" and "Administrative Discretion and the Rule of Law" proved his creative ability.

Soon afterwards, in his lecture on "A Jurisprudence of Welfare," Pekelis brilliantly challenged the courts to assume more positive responsibility for social progress. Then, in 1945, a happy coincidence afforded Pekelis the opportunity to apply his jurisprudential premises to the day-by-day work of legal counsel. He became consultant to the Commission on Law and Social Action of the American Jewish Congress, which was embarking upon a program to influence legal developments for greater protection of the rights and status of minority groups.¹

Characteristically, when asked to articulate a plan of action Pekelis responded with a philosophical essay, "Full Equality in a Free Society." He described and analyzed the situations in which the techniques of social research, community pressure and legal action could be invoked and he articulated the basic justification for their employment to secure for all peoples the objective which gave the title to his essay.

Most of the other essays, were written in the short year and a half which ended with Pekelis' death. Significantly, all of them, more than half of which are excerpts of briefs or legal memoranda, arose out of immediate and long-range problems faced by the Commission on Law and Social Action. From

†Associate Professor of Law, Yale University Law School.

1. See Comment, *Private Attorneys-General: Group Action in the Fight for Civil Liberties*, 58 YALE L.J. 574 (1949).

them emerges some measure of the man: his passionate concern for justice, his deep faith in the responsiveness of the law to basic social problems, his great facility in choosing and fashioning legal concepts and techniques, and his magnificent ability to strike the heart of a matter illuminating it with the sciences and arts.

Writing on "Private Governments and the Federal Constitution," Pekelis expounded a theme with what then seemed daring but which today—so swift has been the development of public thinking—seems commonplace. To him social power was so concentrated in the hands of corporations, trade unions, colleges, universities, and other "private governments" that they should be compelled to cease discrimination on grounds of race or creed or color. He argued for a broad reach of the Constitution itself. Where evils were deemed beyond the Constitution's positive thrust, he sought the extension of its principles through affirmative legislation.

A classic example of this approach to major social problems is illustrated by the recently concluded controversy involving the Stuyvesant Town housing project in New York City. When this project for 8,700 families finally conceded that it was determined to exclude Negroes, suit for an injunction was commenced. The project's land area had been assembled by exercising the City's condemnation power and a real estate tax exemption was granted for the more than \$100,000,000 of value added by construction. Pekelis argued that the enterprise should be regarded as governmental in character, and hence subject to the Fourteenth Amendment. Lightly regarded when first made and, indeed, rejected by the trial court and by a unanimous decision of the intermediate New York court, this argument failed only by a four-to-three vote in the Court of Appeals.² But, as Pekelis often reminded, law is not always made in the courts. The Stuyvesant Town litigation so completely dramatized the issues that an aroused public opinion secured the enactment of state-wide legislation prohibiting discrimination in future housing projects built with public assistance.³ Finally this pressure brought about a New York City local law forbidding discrimination in filling vacancies in such housing even though constructed before its enactment.⁴

Another example of Pekelis' pioneering work is his brief challenging the application of the New York Daily News for an FM radio license. While civil libertarians stood mute for fear lest they violate their own principles, Pekelis urged that since a choice must be made among applicants, constitutional guarantees of free speech and free press could not preclude inquiry into the charge that biased and prejudiced news accounts concerning Jews and Negroes demonstrated the applicant's untrustworthiness to disseminate fair and objective radio programs. The Federal Communications Commission upheld this

2. *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E. 2d 541 (1949).

3. N.Y. CIVIL RIGHTS LAW § 18-a (Supp. 1950).

4. NEW YORK CITY ADMINISTRATIVE CODE, tit. A, § 384-16.0 as amended March 14, 1951. See also Comment, *Race Discrimination in Housing*, 57 YALE L.J. 426 (1948).

contention.⁵ Today it has won acceptance by the doughtiest champions of civil liberties.⁶

When California school authorities segregated children of Mexican and Latin American descent, Pekelis, in a brief filed by the American Jewish Congress, argued, that the "equal but separate facilities" doctrine⁷ should be repudiated. The Court reversed on the narrower ground that the school district had acted *ultra vires* the state legislation.⁸ To the Court Pekelis' brief seemed to raise a daring if not dangerous argument. It unquestionably laid the intellectual basis for challenging compulsory race segregation, whether in schools or transportation, as itself importing and creating inequality.⁹ A portion of the brief is printed under the title "Compulsory Racial Segregation and the Constitution."

Dim prospects of securing a Federal fair employment practices law and of favorable action in some important industrial states combined to discourage proponents of such legislation. As a result Pekelis turned his attention to "The Dormant Power of American Cities" and developed a doctrinal basis for the exercise of municipal police power to prevent discrimination in employment. In the few years since, more than a dozen local laws have been enacted to deal with the problem.¹⁰

No aspect of the law affecting rights of minorities was beyond Pekelis' concern, and it is amazing upon how many aspects he touched in so short a time. A syndicated column in the New York Daily News seemed likely for a time to lead to a boycott by the Jewish community. Faced by this classical torts problem, Pekelis, in "Group Sanctions against Racism," urged that minorities are entitled to protect themselves by open self-help so long as the law provided no remedy against group-libel. The case for group-libel legislation is trenchantly considered in two essays, "Protection of Civil Liberties" and "Full Equality in a Free Society."

As one who worked beside Pekelis in the last year and a half of his life, it is sometimes difficult for me to separate memories of him during those crowded days from the impressions conveyed by reading these essays. It is therefore impossible for me to estimate whether these few pages will kindle in the stranger the fire they caused to burn when uttered by Pekelis who,

5. FCC Dkt. No. 6175; File No. BI-PH-87, April 8, 1948.

6. See Comment, *Radio Program Controls: A Network of Inadequacy*, 57 *YALE L.J.* 275 (1947).

7. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

8. *Westminster School Dist. of Orange County v. Mendez*, 161 F. 2d 774 (9th Cir. 1947).

9. Cf. *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Henderson v. United States*, 339 U.S. 816 (1950).

10. The following cities have passed ordinances relating to discrimination in employment: Chicago, Cincinnati, Cleveland, Milwaukee, Minneapolis, Philadelphia, Phoenix, Richmond (Cal.), St. Louis, Youngstown. See also Elson and Schanfield, *Local Regulation of Discriminatory Employment Practices*, 56 *YALE L.J.* 431 (1947).

with boundless energy and joy, sought to use the freedom he found in this land to make all men free. Yet I venture that whoever may read these pieces will be moved by them and will recognize that their author demonstrated the rare qualities of a seminal mind and the equally rare phenomenon of the philosopher man of action.

SHAD POLIER†

†Member of the New York Bar; Chairman, Commission on Law and Social Action of the American Jewish Congress.