To say that Mr. Pusey's biography is worthy of its subject is to bestow high but deserved praise. In addition to the clarity of its exposition, which has already been noted, the thoroughness and care with which the work has been prepared merit especial commendation. These volumes do far more than bring together the commonly known facts about the great Chief Justice. They constitute an authoritative interpretation of his life and times and as such they should occupy a high place in the estimation not only of the lawyer but of the student of history and government as well.

*Charles B. Nutting**

LAW AND SOCIAL ACTION—SELECTED ESSAYS. *By Alexander H. Pekelis.* Ithaca: Cornell University Press, 1950. Pp. xi, 272. $3.50.

Adam, the baby, and the man from Mars, as a distinguished philosopher once observed, are the three figures to whom our western society has most often turned in seeking a fresh and unprejudiced appraisal of its distinctive institutions. For the rest of us, most established practices are accepted uncritically because long familiarity and the normative force of the actual blind us to possible alternatives. We in America have been particularly fortunate in having received upon our shores a succession of itinerant observers whose freshness of approach to our scenes was strengthened by a vivid awareness of scenes in other plays. To the company of Las Casas, De Tocqueville, Lord Bryce, André Siegfried, and many others, not all of whom returned from what they found, there must now be added the gallant figure of Alexander Pekelis.

Here was a man who had lived under the four mightiest dictatorships of his generation and had seen three of them crumble to dust. He had gone to school in Russia under the dictatorship of the Romanoff dynasty, and was deprived of his Russian citizenship under the more efficient and more ruthless dictatorship of the Communist dynasty. In Mussolini's Italy he obtained a law degree and taught jurisprudence for a while. Shortly after he had fled to France, that unhappy land fell to the Nazi invader. Fleeing from his fourth dictatorship, he reached the shores of a free America and, since Senator McCarran's various anti-immigration bills had not yet received Congressional approval, he was admitted to our country. He was allowed to study at Columbia Law School, to teach at the New School of Social Research, and to help every oppressed minority that needed help, for a few brief years. An airplane accident in Ireland in 1946 deprived the world of a man who, as Max Ascoli says in his introduction to this volume, "had an amazingly disturbing power to assimilate the culture of any country . . . and . . . gave back to every school, with compound interest, everything he had received from it."[1]

* Vice-Chancellor of the University of Pittsburgh.

1. P. x.

Coming to American shores with the experience of four dictatorships, Pekelis found the key to our social and legal development in "the fundamental pluralistic traits of American society"—in the fact that "the United States is not a monolithic block, or a mere aggregate of individuals and not even a 'melting pot.' "[2] Government, for us, is not a system of commands emanating from a single sovereign. Rather, it is a loose constellation of national, state, and municipal authorities, within each of which several different agencies and even different legal systems (strict law, equity, and administration) compete for respect. And enveloping these "official" governments are a host of voluntary organizations exercising, in a variety of fields, the powers of "private governments."

In the realm of choice among these various authorities, Pekelis finds the essence of American freedom. And this freedom is implemented when people assert their rights not merely as atomic individuals, but as members of the many overlapping independent organized groups that constitute our society. If these groups should be destroyed or deprived of their strength, each of us would be helpless against an omnipotent state. In his program of action for the Commission on Law and Social Action of the American Jewish Congress—which might have been a program of action for the National Association for the Advancement of Colored People or the Association on American Indian Affairs or the Japanese-American Citizens League or any one of a hundred other groups dedicated to the protection of minority rights—Pekelis sums up his pluralistic political philosophy:

> "The Jewish cause in the United States thus depends on the traditional American aversion to a leveling centralized government and to the compulsory uniformity of all members of a society. It partakes of all the difficulties and complexities inherent in a pluralistic conception of society and—which may be but another way of putting it—a pluralistic conception of human personality. . . . It claims our right to be, at the same time, loyal, devoted, and selfless members of a great variety of overlapping groups—American citizens and citizens of the world; American Jews and members of a world Jewish community; citizens of a state and citizens of a village; members of a political party and members of a religious association. This is a right unthinkable in a simplified, monolithic society, a right dreaded by all kinds of totalitarian tyrants but truly inestimable to free men. . . ."[3]

Pekelis, of course, is not the first visitor to be struck by the fragmentation of social and political power in our land, by the rivalries of federal, state, and municipal governments, by the conflicts inherent in our "separation of powers," and by the traditional American distrust of all government and all laws, which reflects itself not only in our journalism and public opinion

2. P. 223.
3. P. 224.

but also in our extraordinarily high crime rate. But while other foreign observers have seen only inefficiency, anarchy, or youthful rebellion in these patterns—Shaw called our constitution a "conspiracy against government"—Pekelis has had the wisdom to see the connection between this disorganization of governmental power and the high degree of freedom that Americans enjoy (even in times of panic and hysteria). Where else in the world would a government issue a special commemorative stamp, as the United States has recently done, to honor at their final encampment those old men who as boys took up arms to destroy that government by force and violence?

Because he is keenly aware that the living law is more than a series of Congressional commands, Pekelis is able to supply American liberals with guides for action in the many situations where Congressional action is either impossible or ineffective. His essay on *The Dormant Power of American Cities* calls attention to the great range of municipal powers that can be brought to bear upon social problems long before national opinion has crystallized to a point where a national solution is feasible. It is noteworthy that within a few years the drive which Pekelis inaugurated for municipal legislation on unfair employment practices was successful in a large number of American cities.

Recognizing that American courts are as much law-making bodies as are legislatures, Pekelis offers a series of acute observations on the process of law reform through test cases. But these observations are not dispassionate. They carry the fire of prophecy as well as the skill of a first-rate lawyer probing the soft points in the enemy's legal armor. Many of the test cases that these essays discuss in the future tense have been carried through to victory in the few, brief years that have passed since the writing of these essays. Because of these essays, or because of the inspiration which Pekelis gave to fellow-workers, or because of the briefs from which some of these essays have been excerpted, racial intolerance has suffered a series of significant defeats in an otherwise conservative Supreme Court. The author's demonstration of the essentially governmental character of political parties, state universities, real estate associations, and other so-called private organizations lays the foundation for an increasing application of constitutional safeguards to situations where such organizations seek to impose an inferior status upon any race or creed.

The fact that many of the prophecies with which this volume abounds have been translated into reality does not rob the book of interest. Rather it emphasizes the importance of the insights and the techniques with which Pekelis operates and their potential applicability to new legal problems. The basic approach is best put in his own words:

> "Most people in areas of impairment of civil liberties do not know how to ask for their rights."[4]

4. P. 183.

"Assertion must precede recognition . . . awareness and assertion of rights can become the condition of their existence. Secrecy and deviousness are incompatible with assertion."[5]

"But recognition does not always follow assertion, and almost never does so *at once.* If minorities want to conquer the right to collective action they must be ready for financial and physical sacrifices—and for setbacks and defeats. No change can be accomplished with a previous license, and no revolution, however peaceful, with a declaratory judgment obtained in advance."[6]

"On the other hand, short-range defeats are often long-range victories. The defeat of a righteous cause in a court often becomes an impelling argument for legislative or social change and results in a political victory."[7]

Underlying this willingness to risk short-range defeats there runs an echo of the faith of the old Hebrew prophets:

"We believe that the fate of the oppressed and persecuted, of those who suffer and have no other hope than justice, is preferable to the fate of the oppressors and persecutors and of those who are continuously tempted by might and power to forsake right and justice."[8]

The political pluralism of Pekelis has profound significance for jurisprudence as well as for practical programs of law-reform. In the historic competition between courts of law and courts of equity, which has so much in common with the inter-departmental rivalries of Washington today, Pekelis finds an important key to Anglo-American freedom. No agency, no magistrate, is indispensable; heads or jurisdictions may be cut off whenever they become intolerable. In the end, the choices among competing purveyors of government are made by the consumers of that ineffable commodity. And if the jury system, as Pekelis (following De Tocqueville) observes, has not proved to be the most infallible method of law-execution, it has at least turned out to be the most effective method of public legal education yet tried.[9] It may be, however, that the jury system is important to us only because our jurymen have enough disrespect for courts to form their own judgments in disregard of the instructions or ill-concealed wishes of the man in the robe. Certainly, in most other countries, as Pekelis observes, where guaranties of jury trial appear in statutes or constitutions, these guaranties are commonly disregarded in practice. In some Latin-American states, for example, where the right to jury trial is proclaimed in the constitution, the authorities have never drawn up a list of jurors. And,

5. P. 191.
6. P. 192.
7. *Ibid.*
8. P. 219.
9. P. 65.

when jury trial was abolished by government decree in Germany in 1924, nobody apparently raised an objection. Juries, local draft boards, and local school boards, are part of the pluralist pattern. And it is because political authority is so widely decentralized, Pekelis thinks, that it is possible to have large areas of discretion scattered about without running into a monolithic dictatorship or the "intolerable paternalism" of a "tyrannic government by experts."[10]

Although its advocates and its critics have traditionally regarded administrative law as a foreign importation, Pekelis makes a very persuasive case for the proposition that American administrative agencies are far more important than their Continental counterparts and more deeply rooted in the soil of judicial practice. At least since the rise of equity, we are told, Anglo-American courts have exercised much broader discretion (*e.g.*, in deciding when care is "reasonable" or when a contract is "contrary to public policy") and a great deal more power (*e.g.*, in forcing a defendant to pay a judgment, through "supplementary proceedings") than is exercised by Continental courts. Consequently, when commissions decide whether trade practices are "fair" or "reasonable" and issue "cease and desist" orders, they are behaving in ways characteristic of Anglo-American courts, and the use of such agencies must be viewed not as a departure from judicial practice but rather as a form of judicial specialization.

Because our courts are so much more important in the law-shaping and administrative process than Continental courts, Pekelis thinks that we need to outgrow the tradition that arguments about the social desirability of legislation should be addressed only to legislatures. In his essay on *A Jurisprudence of Welfare*, probably the most important essay of the volume, Pekelis makes an eloquent plea for a more conscious appreciation of the social considerations which enter into every judicial decision and which divide or multiply the force of every lawyer's argument.

A central need of modern education, he insists, is "to narrow the appalling chasm between those who, in schools and research centers, study our community and those who, in legislative committees and courts, shape its life."[11] The usual arguments against judicial consideration of social policy are dissected with devastating results. Now and then one wishes that Pekelis would recognize that most of what he is urging has been said before by Bentham, Holmes, M. R. Cohen, and some of their followers. But this is forgivable in a writer who is unwilling to limit himself to a legal audience. Indeed Pekelis is modest enough to insist that the "jurisprudence of welfare" which he urges "is no answer to the problems of our time . . . but rather a mode of inquiry."[12] And with that conclusion few of the Benthamites or realists whom he dismisses rather cavalierly would want to quarrel.

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10. P. 17.
11. P. 14.
12. P. 40.

As an ex-editor of the Columbia Law Review, Pekelis would be the first to admit that these essays do not come up to usual law review standards of scholarship: viz., less than 5% of the acreage covered by these pages is devoted to footnotes. But if scholarship includes the ability to see beyond the years and the even rarer ability to see through the academic walls that separate one department of knowledge from another and all of them from the arena of social struggle, then this volume deserves to be considered a brilliant contribution to legal scholarship.

What Pekelis has to say is said with a verve and richness that is rare in legal exposition. His writing is two-dimensional, not in the mechanical sense in which most law review articles and all law review case notes are two-dimensional, leaving the reader in doubt at each numbered cross-road whether to read ahead horizontally or to descend vertically, but in the very real sense that each of his sentences points not only to preceding and succeeding sentences in a linear argument but to something outside and unsaid. The richest sentences of these essays carry echoes of what has been said somewhere else in other contexts, and the suggested analogy, parallel, or contrast adds to our understanding.

> "Concrete cases cannot be decided by general propositions—nor without them."[13]

> "Inertia . . . is a good servant and a bad master. Sky-scrapers cannot be built without inertia—or by it alone."[14]

> "Jurisprudence of welfare is thus no lawyer's farewell to arms. It is one thing to recognize that law is too serious a business to be left to lawyers, and that even if there are legal problems there are no strictly legal answers to them. It is quite another to pretend to solve problems by saying: 'It's simple; it is somebody else's business.' "[15]

> "Law without a knowledge of society is blind; sociology without a knowledge of law, powerless."[16]

What grips the mind in these and a hundred other flashes of insight is no facile exaggeration but a deep sense of polarities and of balance. The rhythm of the author's thought has a contagious quality. It leads the reader, again and again, to stop reading and to think for himself, to go beyond the immediate argument to seminal insights that illuminate fields the author never knew.

The legal reader will regret that antipathy to footnotes was carried to the point of omitting not only the citations for most quotations but even the times and places at which several of the essays first appeared. But most

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13. P. 20.
14. P. 22.
15. P. 40.
16. P. 257.

lay readers, I suppose, will rejoice at the lack of footnote interruptions. And lawyers and laymen alike will admire the skill with which the editor has excerpted from briefs and topical statements words that will give forth light and power long after time has disposed of the particular issues to which they were addressed.

Students of law and lovers of freedom owe a great debt to Milton R. Konvitz and Alvin Johnson for rescuing these essays from obscure places and putting together a volume that will influence law and social action in this country for decades to come.

*Felix S. Cohen**

FOR BETTER OR WORSE. *By Morris L. Ernst and David Loth.* New York: Harper and Brothers, 1952. Pp. v, 245. $3.00.

"In the last ten years eight million Americans have walked out of court with a divorce decree, to face . . . what? The procedure by which they were able to get a court order dissolving their marriage gave them no idea. . . .

". . . [M]ost of the divorced couples are entering a new life of which they know even less than they knew of marriage. Aside from a few magazine articles, a few sociological studies, a novel or two, there has been no literature to tell them what the world of divorce has in store for them."[1]

Thus begins a well-written and interesting story of what happens after divorce and what can be done to improve the situation. The authors draw upon two sources of information: (1) scores of letters written to them by divorced persons who, at the request of the authors, describe their experiences, attitudes and feelings, and (2) their many years of counseling experience—the one as a practicing attorney and the other as an official of a family service agency. The authors do not claim that these correspondents are typical of divorced people nor especially representative of any segment of society, but rather that they offer experience from which many others may profit. Though the authors reportedly base their discussion chiefly on the information presented in the letters from their correspondents, it is evident to the careful reader that their conclusions rest upon a broader and richer experience.

Pointing out the hypocrisy that exists in 95 per cent of the divorces granted (the uncontested) and the contempt most people have for our divorce courts, the authors say:

> "It will not solve our problem to broaden the grounds for granting a divorce, or to restrict them, unless our solution bears some genuine relationship to the real reasons for the failure of a particular marriage.

* Member of the Washington, D.C., Bar.

1. P. 1.