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THE CHALLENGE OF THE WICKERSHAM DEPORTATIONS REPORT

FRANCIS FISHER KANE¹

It sometimes happens that in the discussion raised by a report the document itself sinks into the background and is overlaid by the articles written about it. Something of this sort has happened in the case of the Wickersham Deportations Report, and we are therefore glad to have this opportunity of bringing it afresh before the readers of the *Journal*.

The report, which can be obtained from the Superintendent of Documents, Washington, D. C., for the price of thirty cents, forms a pamphlet of modest size. There is first the Commission's statement, signed by nine of its eleven members and followed by shorter statements from the two dissenting members, Henry W. Anderson, and Kenneth MacKintosh. And then, filling most of the pamphlet, is the report of Reuben Oppenheimer of the Baltimore bar, who was retained by the Commission to make a detailed study of the enforcement of our deportation laws. The Commission approves Mr. Oppenheimer's report and finds the present deportation system radically defective. It lacks efficiency and works injustice to the alien. It results in cruel abuses and unnecessary hardships, and many aliens are deported, who, if their cases were heard by an impartial tribunal, would be allowed to remain in the country. This in brief is the substance of the Oppenheimer Report, which, approved, as it is, by the Commission, presents in no uncertain terms a challenge to our sense of justice and fair play.

THE COMMISSION'S STATEMENT

The Commission points out that Congress did not provide separate machinery for the enforcement of our deportation laws. The Department of Labor had to act on its own initiative, and naturally enough it turned to its inspectors to do the work. They were already enforcing our exclusion laws, and they were now charged with the new duty of enforcing deportation. Thus expulsion was treated as exclusion had been—an administrative process.

The result has been unfortunate for the alien, for he has not

¹Member of the Philadelphia Bar.

been properly protected in his rights. But it could hardly have been otherwise. A single agency—the Department of Labor—was charged with the execution of the law, and incidentally the determination of what are often troublesome issues of fact. In many cases a single man—an immigrant inspector—acts as detective, prosecutor, and judge, “three functions which,” in the words of the Commission, “we have found it safe in no other phase of life to entrust to any one individual.” To correct this anomaly and do justice to the alien, the Commission concludes that the determination of deportation cases should be placed in the hands of an impartial court or commission appointed directly by the President, and wholly disassociated from the work of discovering and prosecuting deportees.

The Commission points out that the Government gives foreign-born persons who have become citizens the right to have their rights determined by “the common processes of judicial action,” and it is equally important that the same fairness in the administration of the law should be extended to foreign-born persons who have not yet been naturalized. The Bills of Rights of the United States and the States extend their guaranties to “persons”, thus making these guaranties “rights of men and not privileges of citizenship.” A naturalized citizen acquires “substantive rights as a citizen by virtue of his naturalization, but the most temporary resident of the United States, owing allegiance to another government, is, while he is on our soil, given the equal protection of our laws, and it is not consistent with the spirit of our institutions or the express language of our Bills of Rights to deny the substance of these guaranties to resident aliens, either directly or indirectly, by adopting processes for their assurance which in effect diminish their efficacy to classes of persons not classified by the Constitution itself.” (*Commission's Statement*, p. 7.)²

The Commission says in its statement that from other studies made by it a “strong likelihood” now appears that the foreign-born among us “can be definitely exonerated from the charge that they are responsible for a disproportionate share of the crimes current in this country.”³ And the Commission further declares that as respects

²The reference figures in this article are to pages of the Commission's Report.

³The Commission says in its report on Crime and the Foreign-born that the impression as to an excessive criminal propensity among the foreign-born is at variance with the facts. The conclusion reached by the Commission's representative in her study of the subject was that in proportion to their respective numbers the foreign committed fewer crimes than the native born. *Report of the Wickersham Commission on Crime and the Foreign-born*, p. 4.

persons born in this country with one or both parents foreign-born, there is no reliable statistical basis for an opinion one way or the other. The actually foreign-born—the persons who have been born in other countries and who have come here as immigrants—show no greater criminality than the native born. So the Commission finds, and if it is right in its conclusion, it should follow that in deporting foreigners as such we are in no way solving the crime problem. Deport all our aliens tomorrow, and the proportion of criminals to total population would remain the same.⁴

The Commission thinks that the foreign groups among us may “naturally be apprehensive” of a body of law particularly aimed at them, which is non-judicial in character and which is surrounded by few of the safeguards “which,” as the Commission says, “in every country characterize the judicial determination of personal and property rights of great and sometimes tragic importance.” And this apprehension, the Commission adds, “is constant, for no foreign-born resident of the United States, whether he has been naturalized or not, can ever be sure that he will not suddenly be made the subject of an administrative process, carried on without his knowledge by telegraph between an inspector in the field and a bureau in Washington, which will find some irregularity in his entry or in his conduct, break the personal and property ties which he has established in the United States, and return him to the country from which he came, where he will not be welcome and where he has already found the conditions of life too hard to endure. Every claim by an alien, except the high prerogative claim of citizenship, may be thus adversely determined by a non-judicial administrative process, and, in the absence of an established appellate procedure, the protection of a *habeas corpus* proceeding is only rarely available through the employment of competent counsel. This situation prolongs and deepens the immigrant’s sense of insecurity and delays his mental and moral stabilization in the country which he is seeking to adopt” (p. 3).

THE STATEMENTS OF THE TWO DISSENTING MEMBERS

Mr. Anderson agrees with the majority of the Commission as

⁴As a fact only about a seventh of the aliens deported are expelled because of crime, the great majority being expelled for other reasons. In a total of 92,157 aliens deported during the years from 1921 to 1930 only 13,692 were classified by the Department of Labor as belonging to the “criminal and immoral classes.” And out of a total of 18,142 aliens deported in the fiscal year 1931 only 2,719 were so classified. See statistical tables printed on pp. 124 and 125 of the Commission’s Report. Also Annual Report of Commissioner General of Immigration for 1921, pp. 35 and 39.

to the defects in the present system, but finds himself unable to concur in all of Mr. Oppenheimer's conclusions. He cannot accept Mr. Oppenheimer's statement that "the apprehension and examination of supposed aliens are often characterized by methods unconstitutional, tyrannic, and oppressive," and that "there is strong reason to believe that in many cases persons are deported 'when further development of facts or proper construction of law' would have shown their right to remain." These statements, he thinks, are an indictment of those charged with the administration of the law, and not merely an indictment of the system. He therefore would have had the Commission transmit the findings solely as those of Mr. Oppenheimer, based upon his study of the facts. Mr. Anderson is not prepared to accept the findings as his own without a personal examination of the evidence, and such a personal examination was impossible.

Mr. Anderson, however, appears to accept Mr. Oppenheimer's conclusion as to the weakness of the present system. "It requires", he says, "no argument to demonstrate that as to matters involving vital personal rights and liberties the powers and duties of detection, prosecution, adjudication, and execution of judgment should not all be vested in one administrative agency of the Government. It is disturbing to be told that the principles and practices of the Inquisition and the star chamber have gained a foothold in our system of Government. If these principles and practices are admitted as to aliens, it is only a question of time when they will be applied as to citizens. They have no place in our American system." (p. 9 and 10).

On the other hand, Mr. Anderson does not recommend the creation of a separate board or commission. He thinks that the judicial work in connection with deportations should be done by the courts, additional judges being appointed, if necessary. He would leave the administrative features of the law, including investigation, detection, prosecution, and the enforcement of orders of deportation, with the Department of Labor as at present, and vest in the courts only the actual trial of the cases.

Kenneth MacKintosh, the other dissenting member, thinks that Mr. Oppenheimer's study was not sufficiently thorough and far reaching, and that the abuses which he cites have been over-emphasized. Mr. MacKintosh cannot bring himself to believe that the laws have been "so negligently or abusively administered as the report seems to indicate." And the removal of an alien is not to be viewed as a prosecution for crime; it is an administrative proceeding in which it is unnecessary to use all "the technical machinery available in a criminal

prosecution." He believes that with more care on the part of the enforcing personnel and a legislative grant of some discretion in hard cases, the situation can be adequately taken care of.

MR. OPPENHEIMER'S WORK, AND THE STUDIES MADE BY DR. CLARK
AND DR. VAN VLECK

Mr. Oppenheimer, the Commission tells us, is a graduate of Johns Hopkins University and the Harvard Law School. In addition to the active practice of his profession he has been engaged in legal and research work of various kinds, the results of which he has published from time to time in conjunction with Mr. Bernard Flexner and other collaborators. In the present instance, he made a careful study of the annual reports of the Commissioner General of Immigration, and the rules and regulations of the Department of Labor in the matter of immigration, as well as statistical information not included in its publications. The offices of the Secretary of Labor and Commissioner General of Immigration opened their doors to him as the representative of the Commission. He attended deportation hearings of various kinds, including both preliminary hearings and hearings on warrants of arrest, in ten different cities of the country, including New York, Chicago, and points along the Canadian and Mexican borders. He had interviews with immigration officials in Washington and in the cities where he attended hearings, and the officials whom he talked with included commissioners, assistant commissioners, district directors, immigrant inspectors and patrol inspectors in various localities. He had interviews also with representatives of organizations interested in immigration and with attorneys specializing in deportation cases. And he read the reports of the Congressional hearings in connection with the Immigration Act of 1924 and the proposed Deportation Act of 1926, as well as the reports of hearings on more recent bills having to do with the subject. But his main work was an intensive study of the files in no less than 453 deportation cases, involving 496 persons. The cases examined were for the fiscal year ending June 30, 1929, the year 1929 being selected as the most recent in which the material would be apt to be complete. Every twentieth case was studied for a portion of the year, and then every fiftieth, and tests were subsequently made which proved that the cases studied formed a really representative cross-section of the whole. It was a fact, for instance, that the percentages of the various nationalities in the 453 cases studied corresponded very closely with the percentages of the nationalities in the total number of cases for

the year. His report is in the main a careful analysis and study of the 453 cases studied, and as such it carries conviction to the reader. For after all is said and done, the actual records of cases speak more powerfully than any argument.

While Mr. Oppenheimer was making his study there were two other investigations being made, one by Dr. Jane P. Clark of Columbia University, and the other by Dr. William C. Van Vleck, the Dean of the George Washington University Law School. Both resulted in notable contributions to the study of deportation enforcement. The fruit of Dr. Clark's labor is an interesting volume of some five hundred pages, entitled "The Deportation of Aliens from the United States to Europe." As the title indicates, the author confined her study to deportations across the seas to Europe; she also omitted from her study seamen's cases, "reshipments foreign" and "voluntary departures." Hers is the credit of having first put our deportation statutes together in an intelligible, readable form. She states the law, substantive and procedural—the deportation statutes, as they have been passed, and the means of enforcing them—and she does not stop there. Her book is also a study of deportation *enforcement*. She herself made an intensive study of 518 cases handled by the Bureau—of cases running between July 1, 1925, and January 1, 1926, as well as fifty cases handled in the first six months of 1930. Her purpose in passing to the later year was that she might note the effects of the Act of March 4, 1929, which gave deportation a new and graver aspect, in that it made it a felony for the alien once deported to reenter, or attempt to reenter the country. In the first group studied she read every case in the files, omitting cases in the categories mentioned. In the second group she studied every twenty-fifth case until fifty cases were examined.

Dr. Van Vleck's study has only recently been published by the Commonwealth Fund under the title "The Administrative Control of Aliens". It is a more condensed volume than that of Dr. Clark. It is a lawyer's thoughtful study of the enforcement of our exclusion and deportation laws. It is a strong and pithy work, most interesting and without an unnecessary word from beginning to end. The author read the files in no less than 633 deportation cases. Consequently in the three studies—Mr. Oppenheimer's, Dr. Clark's, and Dr. Van Vleck's—more than 1600 files were gone over and examined—a sufficient number, we should think, to satisfy the reader. Working independently of each other, they all three reached substantially the same conclusions as to the evils of the present system. Their recommenda-

tions too, are much the same, although of course in the matters of detail there are differences of opinion that might have been expected.

MR. OPPENHEIMER'S REPORT

Mr. Oppenheimer starts with a statement of the general considerations which led to the enactment of our deportation laws and which now must underlie any intelligent study of their enforcement. He reminds us of the several classes of deportable aliens, the time limitations imposed in the statutes, and the ameliorative provisions in the laws and regulations. Then in his second chapter he plunges into his subject, and, following the deportation process through from its beginning to its end, tells us what he found to be true in practice as to each step in the proceedings. Later he points out the objectionable features in the present law or lack of law, and submits his recommendation that a separate court or commission be established to hear and decide deportation cases, their prosecution being left with the Department as at present. In a final chapter he summarizes his findings as well as his suggestions for improvement in the enforcement of the law.

We shall endeavor in the present article to give the reader, step by step, the facts as Mr. Oppenheimer found them, for on those facts and on them alone, rest the value, and the challenge, of the report.

Mr. Oppenheimer does not attack the personnel of the immigration service, which he finds to be on the whole "honest, zealous, and hard working." "Although some instances of individual dishonesty are reflected in the large turn-over, it is believed that the great majority of men in the service are free from even the suspicion of corruption. The work entailed is difficult, and, particularly among immigrant inspectors and immigration patrol inspectors, is not confined to the ordinary working hours of the average government employee. Members of the border patrol particularly are exposed to hardships of various kinds, including personal risk" (p. 49).

"Each branch of the service manifests considerable *esprit de corps*, and zeal, particularly in the investigation and prosecution of suspects." But here the weakness—the inherent evil—of the present system is apparent, and Mr. Oppenheimer feels compelled to add that although there are noteworthy exceptions, "the general attitude of the field personnel, as indicated by the cases examined and many personal interviews throughout the country, is that of detective and prosecutor; the primary interest is to deport as many aliens as possible" (p. 49). (See also what Mr. Oppenheimer has to say on

page 154 as to the effects of the system on the individual official.)

DETECTION AND APPREHENSION OF SUSPECTS

Mr. Oppenheimer begins by telling us of the various ways in which the information as to "suspects" reaches the government. Hospitals furnish the names of aliens who have become "public charges"; prisons, the names of those who have committed crime, and may therefore be deportable. Or, the information as to a particular alien here unlawfully may be furnished by an individual citizen—perhaps by another alien. Indeed the information often comes in the form of an anonymous letter, written by a kind friend—sometimes a member of the alien's family, who wishes to get rid of him.⁵ In the regulations of July 1, 1907, there was a provision especially cautioning officers "not to lend their aid in causing the arrest of aliens upon charges arising out of personal spite or enmity, unless the truth of such charges is clearly established." This injunction was omitted from the regulations after 1911, and now anonymous communications are one of the chief sources of information relied on in deportation cases (p. 52). It would seem to the present writer unfortunate that the provision was dropped from the regulations.

Mr. Oppenheimer found that some of the inspectors have undercover men or stool pigeons at strategic points, such as large factories which employ a large number of aliens. Dr. Clark, on the other hand, thinks that inspectors are generally so busy following up complaints that come through existing channels that they are not tempted to employ such additional means of securing information. The employment of informers is at best an unsavory practice, and it is hard to justify it, where the only end in view is the deportation of an alien. This, however, is the present writer's comment—not Mr. Oppenheimer's. Check-ups, Mr. Oppenheimer tells us, are made of boarding houses, restaurants, and pool rooms, where aliens are known to congregate; persons who seem to the inspectors to be aliens are stopped and interrogated, and if their answers give rise to suspicion they are taken to the immigration station for further questioning and examination. "These check-ups are made without search warrants, or warrants of any kind. Often all the persons present are detained until further examination" (p. 55).

Mr. Oppenheimer also found that recently such check-ups had been undertaken on a larger scale and that there had been raids upon

⁵Dr. Clark says that a district director told her that in his opinion 90% of the cases reported were "spite cases." *Deportation of Aliens*, note on p. 324.

meetings and gatherings of various kinds, the raids being generally undertaken for the apprehension of seamen who had been in this country longer than permitted. The department had received complaints from American seamen to the effect that there were not enough jobs on boats for citizens, and that aliens were apt to get vacant berths, owing to their willingness to accept lower wages.

Mr. Oppenheimer speaks in this connection of raids "upon meetings or institutions where seamen are apt to congregate, such as dance halls, seamen's missions and institutes"—in one case "a church was giving a dinner." But unlike the Red "raids of 1920, no violence had been used by the immigration authorities other than the forcible detention of all present" (p. 56).

It is only fair to the government to note that such raiding seems to have been discontinued since the filing of Mr. Oppenheimer's report. Dr. Clark in her book speaks of raids that were made in New York. She thinks that they were traceable to the economic depression—the desire on the part of the American citizen to possess himself of what jobs are offered. And there was raiding in Chicago as late as the fall of 1931. But Mr. Oppenheimer in an article published in the "New Republic" of January 13, 1932, thinks that such raids will be no longer ordered by the Department. It is to be hoped that this is so and that the practice has definitely been abandoned.

Raiding as a method of enforcing the criminal law can seldom, if ever, be justified; it involves the arrest of innocent persons with the guilty. And as a means of enforcing deportation it is open to the additional objection that it inevitably increases the anti-alien prejudice that may exist in the particular community—a prejudice which the government should seek to allay rather than inflame.

THE PRELIMINARY EXAMINATION

Neither the statutes nor the regulations of the Department make any general provision for the preliminary examination of the suspect, and yet, as Mr. Oppenheimer says, it has come to be regarded as the basic feature of the entire deportation proceeding. Of the aliens involved in the 453 cases intensively studied, over 85% were so interrogated before the warrant of arrest was issued.

Under the law the warrant of arrest can be issued only by the Secretary, or an Assistant Secretary of Labor, in Washington, and in the great majority of cases the application for the warrant is telegraphed to Washington. The inspector telegraphs merely the name of the suspect and a code word or words designating the statu-

tory provision which the suspect is believed to have violated. On this alone the warrant is issued, the inspector sending later a follow-up letter, which usually consists of a report of the preliminary examination. Two officials in Washington are kept busy in passing on warrant applications, and for the year ending June 30, 1929—the year of Mr. Oppenheimer's cases—there were more than 20,000 warrants issued. Under these circumstances it is easy to see how the granting of warrants has become largely automatic. Only in rare instances is there an exercise of discretion on the part of the Secretary or Assistant Secretary. Even the application and issuance by telegraph takes time, and the suspect is usually taken into custody in advance of the warrant if a case is made out against him on preliminary examination. If he were not held in custody, he would in many cases disappear. In one district where the courts had expressly ruled that there could be no arrest without a writ, Mr. Oppenheimer was told by an inspector how he had visited an alien and examined him, and then departed without making the arrest. He had returned later with the warrant and been met by the alien's wife "who thanked him in all good faith for having given her husband an opportunity to leave the city" (p. 65). Arrests without warrant are expressly allowed by statute where the alien is actually on his way across the border, or still on his way to final destination in the interior of the country, and it is wholly illegal to arrest on mere suspicion without warrant an alien who has already taken up his residence in the United States.

To return to the preliminary examination of the suspect, it is as Mr. Oppenheimer points out, "a private hearing. The alien is not permitted to have counsel or other representation. There are present the alien and the immigrant inspector. In many cases the same inspector acts as examiner and stenographer, or examiner and interpreter, or in his own person combines all three functions. At these examinations detailed questions are asked the supposed alien as to the manner and time of his entry, his present circumstances, and a number of other matters which the inspector may deem relevant" (pp. 59-60).

Much stress is laid by the government on the importance of this preliminary examination, and as Mr. Oppenheimer points out, the facts that make the alien deportable are, in the great majority of cases, known only to the alien himself. This is particularly true in cases of unlawful entry, and the law properly puts upon the alien the burden of showing "that he entered the United States lawfully, and the time, place and manner of such entry," it being provided

that in presenting such proof the alien shall be entitled to the production of his immigration visa, if any, or of other documents concerning such entry, in the custody of the Department of Labor. Immigration Act of 1924, sec. 23. If the alien has been smuggled into the country, the government would never be able to run down the smugglers unless it were possible to examine the alien freely as to the circumstances surrounding his entry—the persons concerned in the smuggling, and how much was paid the guilty parties. The smuggling of aliens—Europeans now as well as Chinese—into the country, has become a serious evil, and racketeering of the worst kind has developed against unfortunate aliens who either were smuggled into the country, or who having come in without such assistance are nevertheless unlawfully here and therefore subject to deportation. Fine work has been done, before and since the publication of the Wickersham Report, by the Department in running down and punishing smugglers and racketeers, and this work would not have been possible if the inspectors could not have examined the aliens and obtained the facts.

But, as Mr. Oppenheimer's report shows, the inspector does not content himself with asking the alien about his entry and the circumstances connected with it. The inspector goes into the entire case—whatever it may be—against the alien, and examines the alien on what he, the inspector, conceives to be the facts, whether the charge be that the alien entered unlawfully or whether the cause for deportation is something quite unconnected with his entry—his having previously committed crime, his having at the time he entered been a person likely to become a public charge, his having subsequently become a public charge, his being a person who believes in or advocates the overthrow of the government by force, etc. All grounds for deportation are deemed proper subjects for the inspector to dig into at the preliminary investigation. And Mr. Oppenheimer shows by the instances he cites that the examination is often a persistent cross-examination of the alien, leading questions being asked, documents and oral statements of others being put before the alien and he being asked how he can explain them and satisfy the government that he is not a fit subject of deportation. See the instances cited on pp. 68-73 of the Report. Indeed, says Mr. Oppenheimer, the questioning often follows a number of other lines, such as relations of the aliens with persons of the opposite sex, his supposed bootlegging activities, and the like. Detailed questions as to sexual morality are

frequently asked even when the previous answers have indicated that the alien is deportable on other grounds.

Page 69 of the Report.

"In many cases," says Mr. Oppenheimer, "the questions shown on the record are restricted to building up a case for deportation. In others, the questioning brings out that the suspect is a United States citizen, or, if he is an alien, that he is lawfully here. But in a large proportion of the cases examined and observed the nature and persistency of the questions can only be described as inquisitorial. In such cases the only limits of the scope of the examination are the limits of the examiner's curiosity" (p. 69).

When possible the examination is reported by a stenographer employed by the local office, but in many cases this is impracticable and the inspector makes notes which he afterwards dictates to a typist in narrative form. In the cases studied by Mr. Oppenheimer the proportion of stenographic to narrative reports was about six to one. The reports in stenographic form are not necessarily a record of everything that was said; they often represent only such part of the hearing as the examiner wishes to have reported. This is apparent on the face of the reports as sent to Washington, for there are abrupt breaks in the testimony, or statements inserted by the inspector to the effect that unnecessary testimony was excluded. Often it is evident that the testimony so kept off the record was irrelevant or repetitious, but sometimes it was evident to Mr. Oppenheimer, in reading the particular report, that the omission was material. And the suspicion of such *lacunae* in the typewritten reports was borne out by what occurred in Mr. Oppenheimer's presence at hearings he attended.

Many aliens do not speak our language, or they speak it so imperfectly that an interpreter must be employed. In places along the southern border, or in cities where there are a large number of aliens speaking one language, the inspector may be able to interpret the alien's testimony and transcribe it in English. This had happened in approximately one third of the preliminary examinations in the cases studied by Mr. Oppenheimer. It is in the discretion of the inspector to say whether an interpreter is necessary, and there were cases where interpreter was not used and where there was a strong indication that the alien did not understand the questions that were asked him. "In others," as Mr. Oppenheimer points, "although there had been no interpreter at the preliminary examination, one had been

used at the subsequent hearing under the warrant, the alien being then represented by an attorney" (p. 64).

"There is strong indication that at the time of the preliminary examination in a majority of cases the suspect is being forcibly detained. Most of the examinations are made in the district headquarters to which the suspect has been taken. Undoubtedly he goes under show of authority, believing that he must" (p. 65). In most cases, thinks Mr. Oppenheimer, it is an easy matter for the inspector to get the questions answered. The alien usually has "no glimmer of perception of the legal objections" which an attorney might raise. "In most cases, whether they know that they are subject to deportation or not, these suspects are confronted by a man obviously invested with some kind of authority, often wearing the uniform of his office and generally conducting himself as one entitled to obtain the information for which he asks. Many of the suspects come from countries where authority speaks with even a stronger voice than it does in the United States, and where failure to answer inquiries from Government officials would involve much more serious consequences." At a place on the southern border Mr. Oppenheimer was told by a Government official that Mexicans "are anxious to give the answers which they think are expected, whether true or not," and even when the answers will result in deportation, "so that sometimes they must be guarded against themselves" (p. 66).

"In a very few cases the alien is too frightened to answer the questions put to him, or has been advised by some one that the way to escape deportation is to say nothing, or for other reasons maintain silence. These occasions, however, are too insignificant in number to be considered. In almost every case the suspect answers all the questions put to him" (p. 66).

This brings us to two matters not yet spoken of—the absence of an attorney at the preliminary examination, and the usual insufficiency of the warning given the alien that what he says may be used against him afterwards. The advantage taken of the alien in not giving him an opportunity to have a lawyer present is not an invasion of his constitutional rights. So the courts have held, and a lawyer is never present, if the government can avoid it, at the preliminary examination.

As to the second matter, Mr. Oppenheimer tells us that less than half of the suspects in the cases studied by him, where the report was stenographic, were advised at the beginning of the examination that anything they said could be used against them in subsequent pro-

ceedings. "While the proportion of such warnings increased after the passage of the Act of March 4, 1929, which provided criminal penalties for aliens entering unlawfully, only approximately one-third of the suspects after the passage of the Act were so warned."

* * * * *

"In the cases studied for the year ending June 30, 1929, approximately 60 per cent of the suspects who were given preliminary hearings were not told at the beginning of the preliminary examination that any statements made by them were not then required to be given by any law but were and should be voluntary on their part—in other words, that they did not have to talk if they did not want to" (p. 67).

The present rules require that such notice shall be given, but not necessarily at the beginning of the examination. Finally, the warning when given, Mr. Oppenheimer found, is often so phrased that the alien very likely fails to understand it. Mr. Oppenheimer gives two forms in which he says the warning is apt to be given. He suggests an improvement on them, modelled on an English form (p. 172). The improved form would read:

"You are advised that I am an immigrant inspector of the United States and wish to question you as to your right to be in and remain in the United States. You are not obliged to say anything unless you wish to do so, but whatever you say may be used against you."

The writer of the present article wonders what would be the result if this form were adopted, but with *and* substituted for *but* in the last sentence. In that case would any alien speak except one who came here lawfully and knew himself entitled to remain in the country? We are afraid not.

Finally, Mr. Oppenheimer says, there is a strong indication that it is customary, at least in some localities, for the person and effects of the suspect to be searched by the immigrant inspector in connection with the preliminary examination. There is little reference to searches in the typewritten reports, although occasionally there may be a mention of papers or other articles found on the suspect's person. But Mr. Oppenheimer's surmise that such searches are made was confirmed by what the inspectors told him and by what he himself observed. He says the following happened in his presence:

An alien was brought into the immigration station for preliminary examination. No warrant of arrest or other warrant had been issued. The examining inspector told Mr. Oppenheimer, off the record, that he had gone through the papers and effects of the alien at his room and found some documents which were very helpful.

An interpreter was present, who was also an immigrant inspector, and the stenographer was an employee of the office. The alien answered all questions put to him. He admitted that he had entered the country recently without having an unexpired visa, and without being inspected, so that he was obviously deportable. According to the alien's story, he had been brought over in an automobile through a designated port of entry, and the immigrant inspector had merely overlooked him, although if he had been inspected he would have been excluded. The alien's story, while certainly showing that he was deportable, did not satisfy the examining inspector, because it reflected upon the efficiency of the Immigration Service. The inspector told the stenographer to stop taking notes, and instructed the interpreter to tell the alien that he (the examining inspector) knew the alien was lying, that if he told the truth it would "go easy with him," but if he persisted in his lies "something terrible" would be done to him. The alien persisted in his story. At the conclusion of the examination, the examining inspector told the alien to stand up, and, in Mr. Oppenheimer's presence, proceeded to search the alien's pockets. The inspector then told Mr. Oppenheimer that the alien would be detained at the station and would be subjected to another examination to "make him tell the truth" (p. 78). At the time of this preliminary examination no search warrant had been issued by any court or by any administrative body having authority to do so.

On the broad question of the proper practice in such cases, Mr. Oppenheimer rightly says, considerations of "practical expediency cannot be urged to defeat constitutional rights. Fundamental provisions for the protection of individual liberty mean nothing if they can be waived at the discretion of a government department."

"It is no defense for the use of despotic methods, at least in our country, to say that they accomplish results. The enforcement of our deportation laws, important as they are, must be subordinated to the protection of constitutional rights. One of the purposes of the deportation laws is to protect Americans and American institutions; that protection is endangered when the laws are illegally enforced." (p. 137)

And in this connection, it is to be remembered that the number of cases investigated by the Bureau of Immigration is much larger than the number of actual deportations. At the present time over 100,000 suspects are being investigated annually. The warrant cases investigated in connection with warrant proceedings during the year 1930 numbered 115,396, while the number of actual deportees was

only 16,631. The reports of the cases in which deportation is not recommended do not go to Washington.

THE WARRANT HEARING

The next step in the proceeding is, Mr. Oppenheimer points out, "in the nature of a show-cause hearing." The suspect has in most cases been thoroughly examined; he is now given an opportunity to rebut what he has said. And in cases where the deportation will be to Europe the government uses the hearing as an opportunity for procuring the data on which to base the application for a passport. For Mexico passports are not needed. Nevertheless in many cases the facts as to the cause or causes for deportation are more fully developed at the warrant hearing.

Generally the testimony at the hearing is reported by a stenographer, but, as in preliminary examinations, Mr. Oppenheimer found that the stenographer would be stopped and some of the questions and answers not reported, particularly when no attorney was present. And of course it was at the discretion of the inspector whether an interpreter should be used, although if an attorney were present, he might insist upon one being called in. For over one-half of the aliens in the cases intensively studied the inspector in charge of the warrant hearing was the same inspector who conducted the preliminary examination, and in over ten per cent of the cases the inspector in charge of the warrant hearing acted as examiner, interpreter, and stenographer. In some of the cases the same inspector apprehended the suspect, took the preliminary examination, presided at the warrant hearing and acted as interpreter and stenographer at either the preliminary examination or the warrant hearing, or both (p. 83).

The rules provide that at the warrant hearing the alien shall be allowed to inspect the warrant, and advised that he may be represented by counsel.⁶ But only one-sixth of the suspects in the cases studied were in fact represented by attorneys, the practice in this respect varying in different parts of the country. Mr. Oppenheimer found that in many cases the alien, on being asked whether he wishes to have counsel, replies that he does, but that he has not got the necessary money. "Sometimes he asks the inspector if counsel would do him any good, and is told in reply either that he must make the

⁶Dr. Van Vleck points out that the rule says nothing about the accompanying evidence. The alien therefore sees only the charge; no bill of particulars is furnished him, let alone is he told how the complaint against him reached the inspector. *Administrative Control of Aliens*, pp. 99, 100.

decision for himself or that if the facts to which he has already sworn are true an attorney would only be a waste of funds." At some hearings attended by Mr. Oppenheimer the alien, when he asked for advice as to whether he should procure a lawyer, was definitely discouraged from employing one. Where there were philanthropic organizations that might furnish representation, the alien generally did not know of their existence, and the cooperation between such organizations and the government had not gone far enough to do much good.

As in conducting the preliminary examination, Mr. Oppenheimer found that the inspector in charge acts in the main as prosecuting official, his principal interest being to see that the government's case is properly substantiated. As a rule he does not regard it as part of his duty to bring out reasons which might be advanced against deportation, even where the ignorance or stupidity of the suspect shows that he is incapable of realizing the importance of any defenses, he may have. "On the other hand," says Mr. Oppenheimer, "there are cases where the inspector, from a sense of fairness, does just this." And where the alien requests that he be allowed to remain in this country for a certain length of time in order to straighten out his affairs, the inspector sees that the request and the evidence supporting it are included in the record (p. 87).

At the conclusion of the warrant hearing, the inspector dictates and signs a recommendation to the Department, either that a warrant of deportation be issued, or that the warrant of arrest be cancelled. In approximately ninety-five per cent of the cases studied by Mr. Oppenheimer, the inspectors recommended deportation.

Dr. Van Vleck's study was not confined to the matter of deportation enforcement. He discusses the statutes themselves, the various causes of deportation, the various issues that have to be determined, and the evidence relied on by the government. He devotes separate sections to special types of cases—public charges within five years, aliens who have committed crime before entry, aliens who are shown afterwards, the proof being dangerously "retroactive," to have been "likely to become" public charges at the time they entered and who are for this reason deportable, prostitutes or persons connected with prostitution, "Red" cases, and, finally, the cases of entry without inspection. Dr. Van Vleck's comments on the files he examined is enlightening, and, in almost every instance, the facts as found by him are corroborative of Mr. Oppenheimer's findings. And as respects the manner in which preliminary examinations and warrant hearings are

conducted, Dr. Van Vleck's findings are even more condemnatory than Mr. Oppenheimer's of the present system.

THE BOARD OF REVIEW

This is a non-statutory body appointed by the Secretary of Labor, and its function in deportation cases is wholly advisory. The reports in cases as they reach Washington are sent to the Chairman of the Board and by him referred to his fellow members to be read by them and approved or disapproved, as the case may be. The file in each case goes back to the Chairman with an accompanying memorandum from the member expressing his opinion as to what should be done, and the Chairman then expresses his approval or otherwise of the memorandum, and sends the record to the Assistant Secretary who has charge of deportation cases for his final decision as to whether the alien shall be deported or the warrant cancelled. The findings and recommendations of the Board are not published, nor are they public records. The actual file, however, is open to the alien and his counsel.

In a small minority of cases an oral hearing is requested, and Mr. Oppenheimer finds that in such cases it is almost always granted. Three members sit at the hearings which are held in a room in the Department marked "Court Room" and furnished as a court, but the hearings are regarded as hearings of the Secretary and therefore not public hearings in the judicial sense. They are informal; in many cases neither the government nor the alien is represented by counsel; even when the alien is represented no one necessarily appears for the government. "The Board feels," says Mr. Oppenheimer, "that it is acting in the dual capacity of representing the government in the enforcement of the law while deciding the questions of law and fact brought before it" (p. 92).

The work of the Board is not confined to deportation cases. It hears appeals in exclusion proceedings; it passes on fines imposed on steamship companies and other carriers; it considers applications for permits and for registration under the Act of March 2, 1929. The volume of matters coming before it is large. In the gross, the number of cases considered for the year ended June 30, 1929, was 36,861, and for the year ended June 30, 1930, 50,701.⁷

Even in deportation cases the Board necessarily combines ad-

⁷Since Mr. Oppenheimer made this study the Department has organized two additional Boards of Review. There are therefore three times as many persons as formerly to read and pass upon the records in cases.

ministrative with judicial work. The facts found may be, and often are, simple of ascertainment.

The question is how does the Board meet this dual responsibility—the duty of administering the law as an arm of the executive, and the duty of passing on cases judicially as a court? Mr. Oppenheimer answers:

“There are many indications in the files that the board, even though it is the creature of and subordinate to the Secretary of Labor, feels its quasi-judicial responsibility. In particular, the summaries of the cases given by the Board are clear, succinct, and generally fair. This fairness is often continued in the weighing of conflicting evidence and in many cases a judicial tendency is apparent. On the other hand in many of the cases there is also apparent the checking of this embryonic development by the realization that the Board is an agency of an executive branch of the government, and that the duty of the Department and its agency is to enforce the laws to the fullest possible extent.” (p. 94)

Mr. Oppenheimer points out the limitations on the Board's freedom and efficiency as a judicial body—the incompleteness of the records in the cases coming before it, the absence, except in a very few cases, of counsel to advise it, the lack of a body of precedents such as would exist if its decisions were printed and published, the lack of even of such discretion as a court would have in the exercise of its powers, the political pressure, which, though often courteously resisted, “does not,” to use Mr. Oppenheimer's words, “tend to make easier the exercise of the Board's difficult functions”, and finally its dual responsibility as an administrative and judicial body. As respects the larger part of its work—the determination of relatively easy questions, the findings of the Board as a whole are satisfactory, although such simple cases may sometimes involve incidental considerations of much seriousness. An alien may be deportable because of an illegal entry, and yet he may have resided here previously for a long period—it being the last entry which under the decision of the Supreme Court must be taken as *the* entry—and he may also have an American family. In such a case the issue of fact may be simple enough, but the indirect consequences so serious as to call for at least a suspension of the proceedings, if not an abandonment of the case. Under the law as it stands, the alien must be deported, and the board is not to be blamed for recommending deportation. The issue is clear and the law must be enforced. But as respects the other class of cases—those that present difficult questions of fact, and questions of mixed law and fact—Mr. Oppenheimer's conclusion, from an examination of the files, is that the Board's work is not so satisfactory.

Among examples Mr. Oppenheimer cites the following: An alien "had lawfully entered the country over four years before he was arrested. An officer of the State sanatorium had certified that the alien had become a public charge, having contracted tuberculosis, and that a complete cure was not possible. In a later report, however, the same official stated that the alien had left the institution in an excellent condition. At the warrant hearing the alien, when asked if he had any reason to offer why he should not leave the sanatorium, answered:

"A. Yes. If I am being deported because I became a public charge here, I would like to pay back to the State all that they spent on me. I am working now and I will be able to pay it back little by little. Just show me a way that I can pay it back, week by week, or month by month, and I will pay it all back. I don't want to go back to Cyprus. It will be like suicide for me to go back there."

"The alien further testified," notes Mr. Oppenheimer, "that he had never been sick before coming to this country and had not been taken sick here until two years after he had entered. He was deported." (p. 98)

In another case the alien had been legally admitted to this country in September, 1923. He testified that he had been afflicted with tuberculosis for the first time in 1928 and that no other member of his family had been affected. The certificate from the city division of tuberculosis, issued in June, 1928, stated that:

"This patient has been in the United States for considerably less than five years. The development of a process so extensive and the evolution of tuberculosis makes it positive that the disease was existent at the time of entrance."

This man was also deported (pp. 98, 99).

Mr. Oppenheimer did find other cases where the Board had recommended a cancelation of the warrant although the inspector had recommended deportation. But such cases of fairness to the alien were apparently outnumbered by others in which there was a leaning in favor of the government. And Mr. Oppenheimer reminds us how the claim that the alien was likely, at the time he entered, to become a public charge is used as a catch-all when there is a wish to deport and no other possible ground exists. (See p. 99 for an example.)

If an alien is found to have entered this country for an immoral purpose he is deportable, and it becomes the duty of the Board to state what the immoral purpose was. In two cases where the alien was deportable on other grounds the Board nevertheless found that the entry had been for an immoral purpose. One was the case of a Mexican woman who at the time of her last entry had three children,

two of whom had been born in this country. The Board found that she had entered for an immoral purpose because she was not married to the father of her children. In the other case the alien, also a woman, had been three years in this country when apprehended. She had been living with the father of her children seven years, in Mexico and here, and she had had no sexual relations with any other man. She had two children by the man with whom she had lived and both children were born in Texas. She was deported to Mexico. As Mr. Oppenheimer points out, Mexicans often live together without being legally married, sometimes through ignorance and sometimes because the expense of marriage in Mexico is too heavy. And a large part of the Mexican entries are into Texas, where common law marriages are recognized (p. 100).

Another case, cited by Mr. Oppenheimer, the alien, a seaman, had deserted his ship as early as 1919 and had evidently been living in this country ever since, so that he was not deportable on the ground of illegal entry or because he had stayed here longer than the time permitted. The charge against him was that he was assisting a prostitute. In the preliminary examination he testified that he was living with a woman not his wife. Later, he denied that the woman had practiced prostitution since he had been living with her, and he testified that he regarded her his wife and intended to marry her legally and become an American citizen. The case arose in Texas, where as has been said, common law marriage is recognized. The alien was ordered deported.

WRITS OF HABEAS CORPUS

Mr. Oppenheimer reminds us that the only possible court review under the present system is that obtained by applying for a hearing under a writ of habeas corpus before a Federal court. The application for the writ can be made at any time before deportation, but the scope of the review obtained is so narrow as greatly to diminish its value to the alien. The number of writs applied for is insignificant. The figures given by Mr. Oppenheimer show only a few hundred writs taken out during the three years preceding 1931. In 1930 there were 19 writs pending at the beginning of the year, 302 new writs applied for during the year, and 95 writs pending at its close. There were as many as 16,631 aliens deported in the year (pp. 112-113).

The small number of applications to the courts is attributed by Mr. Oppenheimer to absence of counsel, lack of funds, and a realization of the limited scope of the review. Its limitations are well known,

the rule being that, in the absence of proof that the proceedings have been unfairly conducted, the courts will not disturb the decision of the Secretary of Labor to deport, provided there is evidence on which it may be based. The courts will not consider the character or weight of the evidence, and the question of how the evidence shall be interpreted is wholly for the Secretary. As Congress has made deportation an administrative matter, it is not for the courts to interfere with the decision of the executive unless palpably illegal.

As Mr. Oppenheimer puts it, the decisions of the courts in deportation cases mark out "the periphery beyond which neither Congress nor an executive branch of the Government can act without violating due process of law" (p. 45). The courts may intervene only when the executive has not kept within the bounds allowed it. And yet how must this seem to an intelligent alien whose application is turned down by the court? He was arrested without warning, and examined privately by an inspector, with no chance to employ counsel until after the warrant had issued, and without any real, judicial hearing of the facts, his case is determined by the authority that arrested him, and by it he is to be deported. But, say the courts, deportation is not punishment for crime. They, with fine irony, say to the alien relator: "You are an alien—you are here unlawfully—but you are not a criminal. You do not have a criminal's rights. You have only the "due process" right granted to 'persons' by the Fifth Amendment. You do not have the other rights guaranteed in our Constitution. They belong only to criminal defendants."

And yet, as Dr. Van Vleck points out, the analogy between the two processes—the deportation of an alien and the prosecution of a defendant for crime is inescapable. It is constantly recurring as one reads the records, it cannot be put aside. The two processes are step by step alike—alike in the charges upon which they are instituted, the nature of the issues involved, the purposes sought, and the effects upon the persons involved. "The courts have reiterated that the proceedings to expel are not criminal but administrative. These words are mere labels, which the courts have used time and again as solving words with little or no discrimination. As is usually the case with such words, they have solved nothing except to furnish a verbal justification for the decision of the case at hand." (*Administrative Control of Aliens, Van Vleck, p. 219.*)

Dr. Van Vleck in his trenchant manner traces the steps one by one in a deportation proceeding and supposes the steps to be taken with the same lack of constitutional safeguards in a criminal case.

Would any civilized court approve of the inevitable disregard of human rights? Of course no court would lend its sanction to such lawlessness. But we salve our conscience by labeling deportation an *administrative* proceeding.

DETENTION

The rules provide that "pending the determination of the case, in the discretion of the immigration officer in charge," the suspect may be

"taken into custody or allowed to remain in some place deemed by such officer secure and proper; except that, in the absence of special instructions" an alien "confined in an institution shall not be removed therefrom until a warrant of deportation has been issued or is about to be served." (p. 89)

And the statute provides that the suspect

"may be released under a bond in the penalty of not less than \$500 with security approved by the Secretary of Labor, conditioned that such alien shall be produced when required for a hearing or hearings in regard to the charge upon which he has been taken into custody, and for deportation if he shall be found to be unlawfully and within the United States." *Immigration Act* of 1917, sec. 20.

In the cases studied by Mr. Oppenheimer over one-half of the aliens arrested were detained in jails—presumably the county jails of the country. Only about ten per cent had been kept at immigration stations. As Mr. Oppenheimer says, arrangements for the detention of suspects in an immigrant station are possible only in large cities where quarters have been provided by the government; in other cases the district office has to make arrangements with the county jail or city jail for the detention of suspects, the charge varying from \$0.60 to \$1.00 a day.⁸ Though the conditions at immigrant stations vary, the quarters are generally clean and comfortable. "Where local jails are used the nature of the accommodations give rise to complaint, particularly when the suspected aliens are kept with prisoners convicted of major crimes" (p. 89).

This seems to the present writer much too mild a reference to a very serious abuse, if it be true that the government is at present

⁸In February, 1932, the writer was informed that the Federal government owned or rented buildings with quarters for the detention of aliens at Ellis Island, Gloucester, N. J., San Francisco, Seattle, Boston, New Orleans, Honolulu, El Paso, and San Pedro, California. It was expected that there would be quarters ready in the near future at Galveston and Detroit. No information was available as to the precise number of aliens detained in county jails, or the different classes to which the aliens belonged.

placing in county jails over one-half of the aliens awaiting deportation—the county jail that has been well described as “the blackest spot in the American penal system”—the county jail, with its often over-crowded cells, its degrading influences, and, frequently, its most inhuman management. Dr. Clark very properly dwells upon this evil detail of deportation. As she says, the story of the county jail everywhere “has been made old by the telling, but conditions continue with little improvement.” Only a small number of the aliens arrested for deportation have in fact committed crime, and yet they are placed by the government in prison cells, it may be, with the worst criminals. A person whose only offense, from the moral point of view, consisted in having illegally remained in the United States beyond the time allowed him, or in having illegally entered the country to see a relative, is placed in jail and brought in contact, possibly, with drug addicts and prostitutes. Dr. Clark says that the immigration officials do try to keep women and children from going to jail pending deportation, but she notes cases of women and children kept in prison for illegal entry only. The situation is immeasurably worse at border points. In 1924 Dr. Hastings Hart found that counties in fourteen states bordering directly on Canada and Mexico had a ratio of seventy-seven prisoners for each million inhabitants, while the ratio for the remaining thirty-four states was fifty-three per million, the border state ratio being forty-five per cent greater than that for the other states. Since the passage of the Act of March 4, 1929, the disproportion is doubtless even greater. (*Deportation of Aliens*, pp. 398-399.)

The Secretary of Labor has from time to time called attention to this evil, and it is Congress, not the Department, that is to blame. Congress will not appropriate the needed money.

In a case that came to the notice of the writer a young Pole had been confined in idleness in county jails for thirteen months, although a state court had regarded him a proper subject of parole. He had come in 1923 to this country from one of the mining districts of France, where his family had been since 1913. A young man, seventeen years old, he went to Michigan and got a job in a furniture factory at Grand Rapids—later in a packing house. Work was slack and he was laid off. In the following weeks of idleness, during which he went on motor trucks to Toledo and back again seeking employment, he fell in with bad company and was arrested for breaking into an empty house. His savings had gone and he had been in actual want for weeks. He and an older man—an American citizen—were arrested for the burglary. The older man secured counsel and was

acquitted, but the young Pole was unrepresented and pled guilty, receiving a sentence of from one to five years in a State reformatory. At the end of the year, the authorities would have paroled him, but he was detained by the immigration authorities for a time at the reformatory and later in a Michigan jail, and then afterwards in the Philadelphia County Prison. Finally, when over a year had elapsed, his case came to the attention of the Pennsylvania Prison Society, and, after hearing on writ of habeas corpus, he was released on his own recognizance to appear within sixty days to be deported, if the government was able in the meantime to secure a passport for him. A passport was later obtained and the young man deported to Poland. The immigration authorities had done their best to secure the passport earlier, and could not be blamed for the delay. They, however, kept in jail for more than a year a young man whom the Michigan authorities thought fit for parole, and who would have been released under parole and had his liberty, had he not been an alien and therefore deportable under the Federal law. It would seem that under the circumstances the government might well have released the young man on his own recognizance, he not being able to furnish bail with the surety required. Instead of that he was kept in county jails for thirteen months while the government tried to get a passport for him. The courts differ in different districts as to what is a reasonable time under such circumstances to keep a man in jail, but thirteen months was certainly an unreasonable time under the circumstances. So thought the judge who heard the case on habeas corpus.

THE OBJECTIONABLE FEATURES OF THE PRESENT SYSTEM

Mr. Oppenheimer stresses as objectionable features in the present system, (1) the illegal searches and seizures that so often accompany arrests, (2) the inquisitorial character of the examination to which aliens are subjected, (3) the lack of safeguards protecting them, (4) the despotic power given the Government, and (5), curiously enough, the denial to the Government of anything but the most limited discretion in the execution of that power.

Mr. Oppenheimer reminds us how the Fourth Amendment, guaranteeing against unreasonable searches and seizures, came to be part of our organic law, and how important it is that the spirit of the amendment, as well as its letter, should be respected.⁹

⁹Since the filing of the Commission's Report the matter of arrest without warrant in deportation cases has called forth criticism in at least one of the large cities of the country. In Los Angeles a sub-committee of the Bar Association made an investigation of no less than fifty-three cases where it

Mr. Oppenheimer says that the injustice of the preliminary examination lies not alone in the failure to apprise the alien of his rights, or in the extortion of a statement from him. The injustice may lie also in the persistent cross-examination of an ignorant person by an over-zealous inspector—an examination privately conducted and held under such circumstances as necessarily place the person at the inspector's mercy. A preliminary examination under these conditions may be a very real Star Chamber proceeding. And Mr. Oppenheimer aptly quotes the following passage from Dean Wigmore's book on Evidence:

"The system of 'inquisition,' properly so called, signifies an examination on mere suspicion, without prior presentment, indictment, or other formal accusation; . . . and the contest for one hundred years centered solely on the abuse of such a system. In the hands of petty bureaucrats, whether under James the First, or under Philip the Second, or in the twentieth century under an American republic, such a system is always certain to be abused. . . . No doubt a guilty person may justly be called upon at any time, for guilt deserves no immunity. But *it is the innocent that need protection*. Under any system which permits John Doe to be forced to answer on the mere suspicion of an officer of the law, or on public rumor, or on secret betrayal, two abuses have always prevailed and inevitably will prevail; First, the petty judicial officer becomes a local tyrant and misuses his discretion for political or mercenary or malicious ends; secondly, a blackmail is practiced by those unscrupulous members of the community who through threats of inspiring a prosecution are able to prey upon the fears of the weak or the timid. (4 Wigmore on Evidence, 2d Ed., sec. 2251.)"

One of course thinks of the racketeering already alluded to which the government is now commendably trying to suppress. Could there be a better illustration of the second abuse mentioned by Dean Wigmore—the blackmail "practiced by those unscrupulous members of the community who through threats of inspiring a prosecution are able

appeared that aliens had been illegally arrested and held, in some cases, in station-houses for a number of days, during which they were not allowed to see their friends or employ counsel. The cases were mainly directed against Japanese, but a certain proportion of the aliens were Europeans, and some of the arrests involved considerable hardship. The Committee exchanged letters with the local Commissioner and found from its investigation that the arrests had been made without warrant, the alleged inadequacy in the present law being the excuse for what had been done. The Committee in its report found that the excuse was "merely the old indefensible excuse that the end justifies the means—a casuistry which while urged by law enforcers as a justification for lawless law enforcement, tends to bring all law and its enforcement into universal disrepute and contempt." See Report dated April 29, 1931, of the Sub-Committee of Constitutional Rights Committee of the Los Angeles Bar Association on Alleged Illegal Law Enforcement in connection with the Deportation of Aliens.

to prey upon the fears of the weak or the timid"? By granting to officials excessive powers—powers to be exercised by them without proper checks and limitations—the door has been opened to the unscrupulous blackmailer to prey upon his victims. This alone should be reason enough for seeking a modification of present deportation practice.

A despotic power is given to the government, and, most curiously, no discretion is given in its exercise. The government cannot turn to the right hand or the left. It must in a machine-like manner carry out the law, quite irrespective of the hardship and suffering involved (p. 148).¹⁰

Mr. Oppenheimer reminds us that even in the criminal law there are provision for pardon and probation, even in the case of serious offenses. And many of the aliens we deport have lived in this country for a long period; some have come over as children, some have married Americans and have had American children born to them. "It is inconceivable that there should be no power analogous to that of pardon or probation in a process through which over 16,000 persons, exclusive of their dependents, are affected in one year. Yet the law gives no such power" (p. 149).

Not that hardship and suffering necessarily follow deportation. They are perhaps the exception, not the rule. For, in a very large proportion of the cases the alien is in effect only inconvenienced by not being able to live and work where he desires. This, as Mr. Oppenheimer points out, is particularly true of cases arising on the Mexican border, where there is always a large element shifting from side to side of the boundary as economic opportunity and personal inclination may dictate. But in many cases there is actual suffering—suffering which may not appear on the typewritten records. Mr. Oppenheimer points out that it is not conceived to be the duty of the immigrant inspectors to make inquiry as to the results of deportation, al-

¹⁰The Commissioner General in his report for the year ending June 30, 1931, points to the large number of voluntary departures—no less than 11,719 during the year—as a refutation of the charge that the service is over zealous in its enforcement of the law that it seeks to win favor of the public by a reckless deportation of aliens. While the Department undoubtedly does exercise a wise discretion in many cases in allowing aliens voluntarily to depart as an alternative to deportation, it must be remembered that "voluntary departure" presupposes that the alien has the means at hand for leaving the country. To the immigrant who came from Europe, the situation is quite different from the alien who can start across our Southern or Northern border and so reach his home. This fact—that the alien who leaves voluntarily must pay for his transportation home—must not be overlooked, and it would be interesting to know what proportion of the voluntary departures are to Canada and Mexico.

though in some cases they do make such inquiries and record the facts, with a view to obtaining an allowance of voluntary departure for the alien, or in some other way mitigating the law's harshness. "There appears, however, even from the records studied a substantial minority of cases where amelioration of the law was either not possible or was not effected and where real and unnecessary hardship resulted" (p. 127).¹¹

There are cases where the deportee seems in every way a desirable resident, and where the irregularity of his entry might well be overlooked. In such cases it might be well, if a wise exercise of discretion were possible, to allow the man to remain in the country. Mr. Oppenheimer speaks of having found several such cases among those which were studied by him (p. 128). To the writer of the present article, it would seem that in many cases where a re-entry is contemplated, there being no reason why the man should not be allowed to come back to his home in this country after a "voluntary departure," it would be wise to cut the Gordian knot and allow the alien to remain here, if he can pass the examination of the inspectors. This would prevent the needless breaking up of families by requiring a wage-earning and self-supporting husband and father to incur expense and leave the country voluntarily in order that he may return a qualified immigrant. Such a case recently came to the writer's attention where the enforcement of the deportation law was worse than unnecessary. The man was a Jamaican negro. He had been a sailor and had overstayed his leave, and married an American woman. Later two children had been born to him in this country. He was a respectable laboring man, but as he was here unlawfully, he was arrested by the immigration authorities. He was mercifully allowed to depart voluntarily to Jamaica, the idea being that he could return and support his American family in this country. But the arrest by the immigration authorities lost him his job, and his wife and children had to be otherwise supported. One may well ask why this was necessary, and why, especially at a time of unemployment like the present, the man should not have been allowed to remain in the coun-

¹¹The Commissioner General in his report for 1931 recommended that non-quota status be given dependent parents over sixty years of age of citizens of the United States. He also recommended legislation placing the husbands of American citizens on an equality with wives of American citizens, as respects the issuance of non-quota visas, and Congress at its last session in effect approved this recommendation by passing an act (Public Law 277), providing that if an alien man married a citizen wife prior to July 1, 1932, the alien husband shall be given a non-quota status. If the marriage was on or after July 1, 1932, the husband is given first preference within the quota.

try and by his own labor continue to support his American family.

Mr. Oppenheimer refers to another class of cases in which the immigrant legally came here as a child, and has become deportable because of a subsequent act, or because of conditions that have arisen subsequently—as, for instance, where the head of the family has become a public charge. Mr. Oppenheimer cites a case in which the alien had come to the country when he was only three years of age. He had been educated in a public school, and later, as a man, been convicted of a crime involving moral turpitude. The case found its way into court under a writ of habeas corpus. In its opinion, the court said in part:

“In these deportation cases I can not help but feel the intent and spirit justifies a more strict and severe interpretation from the point of view of an alien, in the case where an alien himself had made application for entry to this country, and has been received, and then displayed that kind of ingratitude toward the hospitality of the country by violating its laws; in that case I believe a severe interpretation of the statute should be made and the applicant shipped back from whence he came; but should the same interpretation, the same approach, be taken when the person involved never made application for admission to this country but was brought here a baby in arms by his parents, and from the very beginning becomes largely a product of our own surroundings, a product of our own environments, our own school system, our own everything? This petitioner came here when he was three years of age, educated in our public schools, brought up in the city atmosphere and surroundings which this Government has itself provided and accorded. Now after that end of it he violates our laws and we are to proceed upon the strict ordeal of the statute and send him back to the country of his nativity, where he has no relatives, with all members of his family here; from every point of view that isn't deportation, it is exile.”

Mr. Oppenheimer says that in a considerable number of the cases studied for the year 1929 it was apparent that deportation had resulted in the separation of families, and that the individuals affected were American citizens. In such cases the husband was forced to leave an American wife; in others an alien woman was sent away from an American husband; in many cases children were involved. “It is difficult,” says Mr. Oppenheimer, “to state even an approximate figure as to the number of deportations in which such separation results.” The proceeding is primarily concerned with the alien, and while inquiries are often made as to his family, there are probably many cases where the family comprises American citizens but the facts do not appear in the record. The fact is that the file in most cases closes with the recommendation of the Board of Review and

an entry of execution upon the warrant, and whether or not the alien takes his family with him is left to the imagination. In some cases, however, adds Mr. Oppenheimer, the alien in his examination does testify that if he is deported he cannot take his family with him because he could not support them if he did. What happens to the family left in America does not appear. What happens to the man deported, no one knows. He is sent to another land. It is as good as if he had never existed. We hear no more of him or from him—no new trial need be looked for upon the discovery of new evidence. In this respect deportation resembles capital punishment. The man deported is as good as dead so far as the government is concerned.

It will be remembered that under the Act of March 4, 1929, an alien, once expelled, is barred from re-admission. There is no exception; deportation means perpetual banishment. In this Annual Report for the fiscal year 1930 the Commissioner General recommends that the Secretary of Labor be authorized to permit aliens heretofore or hereafter arrested and deported to apply, in highly meritorious cases, for re-admission. In the same report the Commissioner General recommends that the Secretary of Labor be given authority to admit aliens in cases of hardship. Mr. Oppenheimer says that while the question of admission of aliens is not within the scope of his report, it would seem to him only right that if discretion should be given in the admission of immigrants who have not yet landed, at least the same discretion should be allowed in the expulsion of aliens who may have spent most of their lives in this country. "The absence of discretionary power, both in the deportation of aliens and the readmission of aliens who have been heretofore deported, has had results which should not be tolerated in a civilized country" p. 149).¹²

Mr. Oppenheimer points out that as respects approximately 9% of the aliens deported in the cases studied for the year 1929, there was affirmative evidence that the alien had an American husband, wife or child. "Upon this basis, it can conservatively be estimated that over 1,100 Americans were directly affected by deportation dur-

¹²A bill approved by the President on May 25, 1932, and therefore part of the present law, contains a section declaring that despite the provisions of the Act of March 4, 1929, as amended, an alien, if otherwise admissible, shall not be excluded from the United States after the expiration of one year from the date of deportation, if prior to his reembarkation at a place outside of the United States, or prior to his application in foreign contiguous territory for admission to the United States, the Secretary of Labor, in his discretion, shall have granted such alien permission to reapply for admission. To this extent there has been a softening of the harsh provisions of the Act of 1929.

ing the year ended June 30, 1929. In the fiscal year 1930, upon the same basis, over 1,500 Americans were involved" (p. 130).

Three cases, described in full by Mr. Oppenheimer, illustrate the kind of hardship that may result under the present law (pp. 131, 132).

"A Mexican had legally been admitted to this country in 1923, having paid the head tax. He was a foreign laborer, had married an American, and had eight children born in Texas. One day he went fishing, and, in wading the Rio Grande, crossed to and landed upon the Mexican side. Upon his return shortly thereafter he was apprehended and deported. He subsequently wrote from Mexico that his wife and children needed him for their care and support. Under the law he can never re-enter this country.

"In another case the alien, a Scotchman, had entered this country in 1920 and had obtained his first citizenship papers. He was convicted here for a violation of the Mann Act and served a term of a few months in prison. Afterwards he made a visit to Canada, returning without inspection in 1928. He was ordered deported to England because he had last entered this country without a visa and because of his conviction of the offense mentioned before his re-entry. Just before he was deported he wrote the following letter:

R. R. . . ., Box . . .,
Dayton, Ohio.

'The Immigration Department,
Washington, D. C.

'Dear Sir:

Owing to the fact that I left the States last summer for Canada and did not apply for a new permit on my return I am informed that I am to be deported. Such being the case I wish to draw to your attention that I have a child born in Pittsburgh, Pa., who is now 7 years old, and not having any relations over here or any money I wish to ask you what is to become of my child. Surely you cannot expect to leave such a young child here and to fight the world alone. I have always taken care of the child myself since he was 15 months old. This is the first time I have ever been away from him. During my life this is the first crime I have committed and I wish to ask you for a little consideration concerning my child. As far as being deported I do not mind, but I do care what is to become of my boy's future. On the other hand if my boy was old enough to take care of himself it would be a different thing. The question is what is to become of my boy? I have nothing. Will you kindly allow him to go with me. Just a child 7 years old. Trusting my appeal will approve of your favor.

Yours respectfully,

"In another case, the alien, a Mexican, had first come to this country in 1915 and had been working here ever since, with the exception of a few short trips to Mexico. He had never been arrested or imprisoned but was technically deportable. He had an American wife and two children, one of whom was born in this country.

"After his deportation, the alien wrote the following letter to the President:

'Lista de Correos,
Veracruz Ver. Mexico.

'Mr. Herbert Hoover,
President of the United States of America,
White House, Washington, D. C.

'Dear Sir: Pardon my nerve, but you are the only one that can help me in my status under the immigration law. My name is ————. I was born in Merida, Yucatan and immigrate in the United States in the years of 1915 after my parents' death. Rised in New Orleans. Married in 1919 and I has two children now, a boy and girl, they are natives of New Orleans.

'I am deported from New Orleans last November, until I get my paper straight. But after all this time of suffering I found out that I am not registered in this country. I am a man without country. I will be 30 year old this Monday.

'The immigration commissioner of New Orleans say I cannot get back to my wife and children any more. Kindly please help me or give me a chance to be American citizen. I feel as I were one. I can't help my children from here, there is nothing for me here, no parents, no job, no way to get back to my children. I had been an honest working man, always in New Orleans, La., and rised there. I believed myself American citizen all that time I resided there.

'Please can I work in the ships or something. I must help my children so they can have a little education. I am not citizen here either, so please give me a chance. I like to get back home. I am seaman also if I could be recommended to get a job in a ship. I am willing to give service if necessary just to get by my children.

'Kindly let me know if there is any hops to get a chance to be American and be by my family.

'Respectfully, yours, for service,
(Signed) ————.'

"There was no hope. The President has the right under the law to pardon any offender against the Federal laws, no matter how serious the crime, but neither he nor any one else is given the power to allow a deported alien such as this to rejoin his American family."

(Pp. 131, 132.)

THE RECOMMENDATION OF AN INDEPENDENT COURT OR COMMISSION

Mr. Oppenheimer makes several recommendations as respects departmental practice which, if adopted, would undoubtedly aid in a fairer administration of the law. But it is his recommendation for an out-and-out change in the deportation system that is of paramount importance. Let us see what his proposition is.

There must, he says, be a complete alteration in the machinery used. The investigation and prosecution of cases can be left with the Department, but the hearing and decision cases must be vested in a body of men especially fitted for judicial work. They should, as a court, have unfettered opportunity to review the prior processes that have been set in motion in the cases coming before them; they should see that due process of law has been fully observed; they should have full liberty of action and be in no way answerable for their decisions to the department of the government which is charged with the actual work of deportation (p. 158). Here of course is the crux of the problem. The evils of the present system are due, as he believes, to a subjection of judicial to administrative functions—a subjection that will inevitably exist as long as the entire work is done under the Secretary of Labor, his department acting as detective, investigator, arresting officer, prosecuting attorney, judge and jury, court of appeals, and finally as sheriff in the ultimate execution of the law. The present system must be put aside and something better put in its place.

Mr. Oppenheimer thinks that the Federal courts should not be asked to do the work. True, the questions involved in deportation are more important than many which the courts are now called upon to adjudicate, and a Federal court could be depended on to develop the facts and apply the law properly in the individual case. The alien would have the full hearing to which he is entitled. A Chinaman may be deported through court proceedings. Why, Mr. Oppenheimer asks, should the benefit of court hearings be given to suspected members of a class that is entirely excluded, when members of other classes against whom no such discrimination is made are forced to have their rights adjudicated by administrative machinery alone?

Despite the weight of this argument, Mr. Oppenheimer does not believe that the Federal courts should be cumbered with the duty of hearing deportation cases. They are already far too heavily burdened. The number of deportations is large; it is steadily increasing. During the last fiscal year over 20,000 warrants of arrest were issued from Washington. To transfer the work to the courts might lead

to serious delay in the carrying out of deportations. To ask our judges to do the work would not be fair.

Furthermore, Mr. Oppenheimer says we must not overlook the fact that there is an administrative element in deportation. Particularly, must we not overlook this element if we are asking for a larger power of discretion than exists at present. One tribunal, passing upon all deportations, should be able, much better than the courts, to pass on simple cases administratively, and one tribunal, much better than the courts, should be able to evolve the necessary principles to guide it in the exercise of the discretion we are asking for. And furthermore, the proper adjudication of deportation cases will be advanced by a familiarity, not only with the law, but with the general conditions on which the law operates. Consequently Mr. Oppenheimer, and, through him, the Commission, much prefers a separate court or commission to the Federal Courts.

Mr. Oppenheimer points to the Interstate Commerce Commission, the Federal Trade Commission, and the Board of Tax Appeals. They all have been successful. Why not then a Board of Deportation Appeals? It would seem a logical development of the present system. The Department has already found it necessary to create a Board of Review and the Board has already shown judicial tendencies, although their growth has been tempered by the subordinate position which the Board occupies in the Department. Its growth has been hampered by being tied to the Department. "The next step in development seems clear—the dichotomy should be complete. The Board of Review lifted out of its place in the Department of Labor and should be made an independent tribunal" (p. 161).

Mr. Oppenheimer points out that under the English law the Home Secretary is given the power to make an order of deportation if he deems it to be conducive to the public good, and, although deportation problems are by no means as serious in Great Britain as in the United States, there have already been protests against the broad powers exercised by the Home Secretary. Whether or not as the result of these protests, it would appear that the British Home Office has considered whether it should not voluntarily recommend the creation of an independent tribunal to hear appeals from the Secretary's decisions. In our own country there is at the present time, and for some time to come there will be, ample work for an independent tribunal, and if at any time we reach the happy point where deportation is no longer a problem, the existence of the board can be brought to an end by Congress (p. 162).

The Commission might be known as The Board of Alien Appeals; the name is unimportant. It would sit in Washington, but appoint subordinate officials to conduct warrant hearings in the different localities. They could issue warrants of arrest and conduct warrant hearings; they would be responsible to the Board of Alien Appeals in Washington. By providing that warrants of arrest may be issued by local officials the present situation would be relieved under which the local officials are confronted with the alternative of arresting a man without warrant or letting him escape before their very eyes.

It might be found advisable, says Mr. Oppenheimer, for the Board to have a corps of representatives to send into the districts from time to time to secure uniformity in the work of the examining officials. And the members of the Board of Alien Appeals might occasionally find it advisable to leave Washington and see cases conducted. Here there would be an analogy in the work to the Board of Tax Appeals. Care would have to be taken of course to appoint the proper kind of subordinates, and see that when appointed they acted independently and fairly, and with requisite dispatch. Where the amount of work required it the local officials would be paid on a full time basis, but this might not be necessary in other places. In presiding at the warrant hearings the local officers would act impartially for they would be representing the Board. They would see that due process of law had been observed, and that the reasons that might exist for the aliens not being deported were sufficiently developed. They could also consider the hardship which deportation might entail either to the alien or his family, and report the facts to the Board, so that it would have the necessary information upon which to exercise discretion. The records would be sent to Washington, as at present, and where the facts and law were clear, the case could be automatically disposed of. On the other hand, the Board itself would consider carefully the cases involving doubtful questions, or cases calling for an exercise of discretion.

With the requisite number of subordinate officials, the work of the Board could probably be handled adequately by five or seven members. The reports of the Board would be published, and form a body of case law, valuable not only for the determination of other deportation proceedings, but also as a basis for the study of immigration facts. The Board would not publish all its decisions; those in which the facts were clear, and where there was no exercise of discretionary power, could be omitted from its reports. And cases involving details of an intimate nature might be published under letters

rather than the names of the persons involved, as is done in English court reports (pp. 163-5).

Mr. Oppenheimer adds that an appeal to the Federal courts, as in the case of the Board of Tax Appeals, as well as the existing right at all times to a writ of *habeas corpus* would be available to the alien. Probably the number of applications for *habeas corpus* would be less than under the present system. The Board should be allowed to work out its own organization. Consideration of technique should not obscure the necessity for calling such a tribunal into existence (p. 166).

The execution of the warrant of deportation should remain in the hands of the Department of Labor, but with the qualification that the Board of Alien Appeals might designate the manner of the execution. "This would cover the privilege of "reshipment foreign," as well as the designation of the country to which the deportation is to be effected. The Board would therefore have the power to see that the deportees were not sent back to countries where their lives would be in danger for their political opinions" (p. 166).

It ought not, Mr. Oppenheimer thinks, to be difficult to draw the provision granting the desired discretion. In effect the law should state "that deportation need not be carried out if the alien is found to be a desirable resident of the United States, or if deportation would inflict hardship upon American citizens, or is otherwise found to be inadvisable under all the circumstances. Under such a power the warrant of deportation could be suspended and further residence in this country could be made conditional upon good behavior or the fulfillment of certain conditions. The provision would only embody in the deportation process a power analogous to that of pardon or probation. As a corollary of this power, there should be authority to permit aliens theretofore or thereafter arrested and deported to apply in meritorious cases for readmission" (pp. 166-167).

The exercise of the discretion would be vested in the Board of Alien Appeals, and Mr. Oppenheimer thinks that the fear of political pressure being exerted on the Board need be no greater than the fear of such pressure being exerted on any Federal court or other existing independent tribunal. "We do not deny our Federal judges the right to place a prisoner on probation because of apprehension that they may be annoyed by political pressure. Indeed, any argument as to the danger of outside pressure in connection with the giving of discretionary power in deportation matters is only another reason for the creation of the independent tribunal advocated" (p. 167). Obviously the

discretion would be exercised in a comparatively small minority of cases, and the Board would lay down and follow guiding principles in the exercise of the discretion granted it.

Finally, Mr. Oppenheimer refers to the troublesome matter of attorneys. He believes that the existing philanthropic organizations interested in aliens could be brought into further cooperation, if the officials conducting the warrant hearings could inform suspects, definitely, after telling them in proper cases that they may be represented by counsel, that they can have the aid of counsel gratis if they wish it through such organizations. There is need, and great need for the right sort of attorneys, and the right sort will not interfere with deportation processes unless the rights of aliens require it. In many cases the attorney would arrange for bail, or convince the government that a release on the man's own recognizance should be allowed. "Certainly every effort should be made to prevent the necessary jailing, sometimes for months, of persons who are accused of no crime. Here again attorneys could prevent expense for the government and hardship for many individuals" (p. 170).

Dr. Clark, in discussing the need for a better system, contents herself with saying that there should be vested in the courts or somewhere else a review of the facts and law in deportation cases. She says a statutory authorization of powers of review might be made in favor of the present Board of Review in the Department, but the final power of decision would then rest in the hands of the Secretary of Labor. And an entirely separate administrative Board might be set up by Presidential appointment, similar to the Interstate Commerce Commission, the Federal Trade Commission, and the Board of Tax Appeals, and this suggestion she prefers as it would secure a procedure for review unbiased by the exigencies of administration. "A full hearing by a kind of administrative court would then be granted to determine the rights of an alien before he is sent from the country. Such a tribunal should be composed of men with legal and, if possible, social training, and they should take into account social as well as legal factors in the cases before them. Social agencies may well consider the possibility of providing counsel or other representation before such tribunal, and indeed at all stages of the proceedings. It seems obvious that many aliens, without sufficient funds, and entirely without understanding of the nature of the proceedings against them, need more adequate representation that is often given them today."

"Such a tribunal would in time establish its own procedure and safeguards. But always on general questions of law, appeal to a court of law should be available, as under present circumstances.

"The findings of this board, and indeed the whole record, should be public rather than as the proceedings are at present. In order to have such public proceedings, the record should be very complete and contain social as well as legal data. Records should never contain re-phrasing or omissions by the inspector but testimony of the alien at all stages of the procedure should be inserted in the record *in toto* so that there may be no opportunity for misinterpretation." (*Deportation of Aliens*, p. 490.)

Gladys Harrison, in an article in the American Bar Association Journal for February, 1932, somewhat critically analyzes Mr. Oppenheimer's argument for a separate commission. The proposed tribunal would lack "the regulatory features" of the Interstate Commerce Commission, the Federal Trade Commission, and the Board of Tax Appeals, and its work, unlike that of these bodies, would not be that of applying the law "to complex fact situations of a nature not readily dealt with except by experts in the particular field." Deportation proceedings, as she sees them, "have to do with individual men and women, in quite commonplace situations, confronted by a peril which affects their most elementary rights." She thinks that for aliens, "unprivileged as a group and always the ready objects of popular distrust, the best that can be hoped, and the least that should be asked, is average justice; and centralized and specialized justice will be regarded with suspicion. There can be little doubt that a special tribunal, especially if it were called a board and its judicial function somewhat in doubt, would be a target of attention for propagandist groups whose attitude is hostile to aliens generally. Such groups have heretofore focused attention upon Congress, which is the proper place for the determination of policies of immigration and exclusion, and they have indorsed the vigorous and at times extravagant enforcement of deportation laws by administrative officials. But the decisions of the federal courts, which have frequently on habeas corpus proceedings thrown out warrants based on insufficient records or indefensible construction of the statutes, have escaped their criticism, no doubt because no basis existed for disputing their judicial propriety. A 'board' dealing solely with aliens would be far more exposed to political pressure in respect to appointments to its personnel and even in respect to its decisions." (*American Bar Association Journal*, February, 1932.)

Dr. Harrison for these and other reasons thinks that Henry W. Anderson in his minority report was more logical in his preference for the Federal courts. She suggests too a way out from adding so greatly to their burdens. Why should not the Federal judges be empowered to appoint commissioners or referees when necessary to conduct hearings in deportation cases and make findings, subject to the approval of the court? The thing is done in other cases. "The usefulness of such auxiliary officers and proceedings to the court is abundantly demonstrated in other fields of law, as in bankruptcy proceedings. It is refreshing also to think that such a plan would do away with the difficult questions as to the limits of administrative law which have complicated deportation enforcement for forty years." (*American Bar Association Journal* for February, 1932—p. 100.)

But whether or not the Wickersham Commission is right in expressing its preference for an independent commission—whether the commission is right in not recommending that the task be placed upon the Federal courts—the fact remains that the present system of deporting aliens stands condemned as utterly unsatisfactory and unjust. Something better must be put in its place, if we are to meet the challenge of the Commission. We must not suffer its report to be pigeon-holed and forgotten.

In Sir Thomas More's "Utopia" there is an interesting passage telling how the Utopians treat their bondmen, who, it may be remembered, were persons who had committed crime in Utopia or other lands. After observing that bondmen born in other countries sometimes come to Utopia willingly, Sir Thomas More quaintly says that such as come are nevertheless kept at labor and in bonds, but that the Utopians "handle hardest," their own citizens, whom they judge to be more desperate, and to have deserved greater punishment, "because that being so Godly brought up to virtue in so excellent a Commonwealth, they could not for all that be restrained from misdoing."

This, we admit, was Utopian—a superior kind of goodness and intelligence that can hardly be expected in this work-a-day world. We in the United States need not go so far; we may not feel compelled to treat the foreigner *better* than the native born. But we should at least treat him as well.