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Book Reviews

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BOOK REVIEWS

THE QUEST FOR EQUALITY. By Robert J. Harris. Baton Rouge: Louisiana State University Press, 1960. Pp. xiv, 173. $4.00.

Originally delivered as the 1959 Edward Douglas White Lectures at Louisiana State University, *The Quest for Equality* is powerfully persuasive, the more so because it is the outcome of scholarly investigation by a native southerner. Robert Harris, now professor of political science at Vanderbilt University, here takes a new look at the equal protection clause of the fourteenth amendment.

Interpreting the clause first in the context of political theory, Professor Harris goes back to the origins of Anglo-American constitutionalism. From them he distills two basic and enduring ideas: (1) the duty of government to protect all persons in their civil rights; (2) the equality of all persons in their civil rights. Meticulous examination of the congressional debates on civil rights from 1866 through 1875 convinces him that the framers of the fourteenth amendment intended that Congress have positive power to enforce this dual concept of equality before the law and protection by the government.

Judicial interpretation of the fourteenth amendment has developed at great variance with the theoretical foundations and legislative background. The net effect has been to make the Supreme Court and not Congress the major organ for protecting civil rights. The Court has further distorted the intentions of the framers by confining the prohibitions of the due process and equal protection clauses to official action by the states and by limiting congressional enactments to correction of discriminatory state action. As Professor Harris sees it, this contraction of the fourteenth amendment by restrictive judicial opinions is quite contrary to the expectations of the framers. The fourteenth amendment was aimed against private oppressions as well as partial and unequal laws. And, if the states failed to offer primary protection, Congress was vested with secondary power to protect the Negro and other persons against official or private discriminations.

Professor Harris is at his best—which is superb—as he analyzes the continuum of court opinions. He gives one chapter to "Equal Protection as a Shield for Economic and Other Interests" but this he regards in the nature of "judicial digression." The central core of the equal protection clause is its application to discriminations based on race or color. His treatment of Justice Brown's now

celebrated opinion in *Plessy v. Ferguson*[1] is scathing: "an opinion redolent with sociological speculation, permeated with theories of social Darwinism, and carrying overtones of white racial supremacy as scientific truth. . . . a compound of bad logic, bad history, bad sociology, and bad constitutional law."[2] On the other hand, he assesses Justice Harlan's dissent as "sound logic, accurate history as far as it went, correct constitutional law, and, above all these, high moral assumptions and aspirations."[3]

"The Judicial Burial of Jim Crow" dates from about 1935 in a succession of cases involving all-white juries, restrictive covenants, primaries and elections, higher education, and finally the public schools. "Whatever may be said in criticism of the Court's decisions involving equal rights must be tempered by an acknowledgement that these decisions are backed by impressive precedents, are warranted by the text of the Constitution, and are an expression of the revolutionary ideas of the American Republic as borrowed from the Stoic philosophers, the Christian Fathers, and John Locke, and as given vitality by Jefferson and other American Revolutionaries."[4] *Brown v. Board of Educ.*[5] he regards as a great decision but a poor opinion. From a legal standpoint, the Court's opinion would have been less vulnerable to criticism if it had simply held that the "equal but separate" formula, when applied by a state or its officials, was not in accord with precedents before or after 1896. Thus the reversal of *Plessy v. Ferguson* as an isolated and erroneous opinion would have "combined both the concept of constitutional growth through judicial interpretation and an adherence to precedent in the orderly development of the organic law. . . ."[6]

The Professor has a cultivated wit and a flair for felicitous expression; his good writing makes good reading. *The Quest for Equality* is not charged with emotional overtones, neither is it entirely dispassionate. The author is both intrepid and reasonable in his convictions—that the equal protection clause should be returned to its intended role in the American tradition of equality; that, if the states fail to observe it, Congress ought to enforce it as the supreme law of the land.

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1. 163 U.S. 537 (1896).
2. HARRIS, THE QUEST FOR EQUALITY 98-101 (1960).
3. *Id.* at 102.
4. *Id.* at 153.
5. 347 U.S. 483 (1954).
6. HARRIS, *op. cit. supra* note 2, at 149.

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CONFIDENTIALITY AND PRIVILEDGED COMMUNICATION IN THE PRACTICE OF PSYCHIATRY, REPORT No. 45. New York: Publications Office, Group for the Advancement of Psychiatry, 1960. Pp. 32. $.50.

The Group for the Advancement of Psychiatry (called "GAP"), an independent group comprising about two hundred psychiatrists, has published since its formation in 1946 some forty-six reports upon various topics. The GAP reports represent the position and outlook of psychiatry, insofar as GAP conceives it, on the subject under consideration. The reports are formulated by a committee, but they reflect the considered judgment of all GAP members. Most of its members serve on one of twenty working committees which direct their efforts toward the study of various aspects of psychiatry.

Report No. 45, formulated by the committee on psychiatry and law, is a 32-page report entitled *Confidentiality and Privileged Communication in the Practice of Psychiatry.* The report is intended to stimulate the medical and legal professions to review the concept of confidentiality in the physician-patient relationship, and to consider the extent of the legal right of privileged communication in psychiatric treatment. The report contends that Wigmore's four criteria justifying privilege are amply met in the special nature of the psychiatrist-patient relationship. As confidentiality is a *sine qua non* for successful therapy, GAP believes that the social value which effective psychiatric treatment has for the community far outweighs the potential loss of evidence resulting from the withholding of testimony by psychiatrists about their patients. The report presents an interesting discussion in support of its conclusion.[1]

Other GAP reports of special interest to the legal profession include: Commitment Procedures, Psychiatrically Deviated Sex Offenders, Criminal Responsibility and Psychiatric Expert Testimony, Homosexuality with Particular Emphasis on this Problem in Governmental Agencies, Considerations Regarding the Loyalty Oath as a Manifestation of Current Social Tension and Anxiety, Psychiatric Aspects of School Desegregation, and Psychological and Medical Aspects of the Use of Nuclear Energy.

The work of GAP is laudatory. It takes courage for people in a profession to rise above its bailiwick and to take a cross-discipline approach to its problems. For psychiatrists, as for other groups, there is always lurking the contempt and wrath of one's own colleagues. We recall, for example, the criticisms directed by lawyers against the Supreme Court for trying to understand and apply in

1. See also Slovenko, *Psychiatry and a Second Look at the Medical Privilege,* 6 WAYNE L. REV. 175 (1960); Slovenko, *The Physician and Privileged Communications,* 110 J. LA. S. MEDICAL SOC'Y 39 (1958).

the school desegregation case the findings of psychiatrists and sociologists. Since its formation, the GAP members have worked closely with such other specialists as anthropologists, biologists, economists, statisticians, educators, lawyers, nurses, psychologists, sociologists, social workers, and experts in mass communication, philosophy and semantics.

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