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Book Reviews

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ADMINISTRATIVE LAW. By Kenneth Culp Davis.* St. Paul. West Publishing Company, 1951. Pp. xvi, 1024. $8.00.

This is the first adequate text on administrative law. Even so, as Mr. Davis modestly recognizes, it is not a "systematic statement of principles." It is no more than an attempt "to organize the problems," to summarize such law as lends itself to summarization, and to contribute to solution of some of the many uncertainties that obstruct systematic treatment of administrative law.[1]

The essentially tentative nature of this book results not from any deficiency of the author's, but rather from the immense difficulties presented by his subject. One who writes on administrative law is necessarily a pioneer; for behind him there are no outstanding works other than the now dated Report of the Attorney General's Committee (published in 1941) and the Pike & Fischer service, which, though indispensable, is not a text. The law review material in the field, much of it excellent in quality, is necessarily fragmentary.

Besides this textlessness — which exists in hardly any other important field of the law — administrative law is only by courtesy "horizontal": generalizations about administrative law, except the very broadest, are dangerous; for the answer to a problem usually depends almost exclusively on the agency concerned, the statutes under which it operates, and the precise nature of the proceeding before it.

Obstacles such as these are what make the practice of administrative law at once fascinating and frustrating — and what make Mr. Davis's text a welcome one despite its failure to hurdle them all.

Mr. Davis's approach is above all sensible and constructive. He rightly refuses to frame his text on the concepts which once seemed bulwarks against absolutism, but which, though still litigated with frequency in administrative appeals, are becoming less and less fruitful sources of results. For example, the companion dogmas of separation and delegation of governmental powers are treated briefly, without ridicule, but also without any suggestion that they are today capable of solving any but the most clear-cut

* Professor of Law, University of Minnesota.

[1] DAVIS, p. iii.

administrative abuses. Insofar as "delegation" remains a living issue — the extent to which subdelegation within agencies is permissible — Mr. Davis suggests a rule of reason coinciding with the rules long applicable to delegations by the President.[2] The suggestion is typical of Mr. Davis's thoughtful attempts to cut through the tangle the courts and the Congress have made in even the simpler areas of administrative law.

Such modest suggestions as this, however, by no means measure the full extent of Mr. Davis's contribution. His chapter on "Investigation," for example, is an admirable organization of a subject which is one of the obscurest in administrative law and yet one of the more important. Though the investigatory powers of agencies are barely recognized by the Administrative Procedure Act, their effect on the substantive rights of citizens is tremendous and they are restrained by few of the traditional safeguards.[3] Mr. Davis ably traces the fall and rise of agency "fishing expeditions" and makes a masterly effort to define the limits of judicial inquiry in enforcing administrative subpoenas.[4] One need not share his rather uncritical enthusiasm for unrestricted agency investigation[5] to appreciate the clarity of his summary and analysis.

Mr. Davis's gift for lucid summary of difficult issues is likewise demonstrated in his spirited defense of the "institutional decision."[6] He cuts to the heart of the *Morgan*[7] cases, examines the responses of several of the states to the first *Morgan* case, and provocatively discusses the merits and faults of the anonymous group decisions that are becoming standard in more and more agency adjudications. Mr. Davis favors even fuller use of, or at least experimentation with, group decisions, a view to which

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[2] *Ibid*, §§22-24.

[3] Mr. Davis' characterization of Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294 (1933), seems to me to elide its point (p. 134, n. 224). It is true, as Mr. Davis says, that the Supreme Court permitted the Tariff Commission to prevent a party's examination of "business facts"; but precisely those facts were what the inquiry — and the amount of the tariff — turned on. In short, the case holds that cross-examination on basic facts is solely a matter of agency grace in any proceeding labeled "investigation."

[4] DAVIS, §37.

[5] Which the courts seem to be approaching: Mr. Davis grandly concludes that "the Constitution has changed sides" concerning the safeguards surrounding agency investigation and is now "on the side of the democratic will" (p. 136).

[6] DAVIS, Chap. 8.

[7] Morgan v. U. S., 298 U. S. 468 (1936); Morgan v. U. S., 304 U. S. 1 (1938); U. S. v. Morgan, 307 U. S. 183 (1939); U. S. v. Morgan, 313 U. S. 409 (1941).

most administrative practitioners, I think, would not accede. Nevertheless, disagreement with Mr. Davis's conclusion should not obscure the originality and force of his presentation, which is well worth pondering.

Mr. Davis defines "bias" as "honest opinion."[8] In that sense, he is biased in favor of the fullest agency discretion, limited only by broad due process guarantees enforced by the courts. He is, indeed, biased in favor of bias in administrative officials. He thinks they cannot afford to be indifferent or neutral respecting the policies they are to administer, even though such administration is in large part through decisions which are in essence judicial. I cannot fully share Mr. Davis's belief in administrative "bias," for in practice it tends to produce decisions, some of immense importance, which are based only partially on the facts of record and which stem largely from some "policy," some "bias" in the administrative mind that cannot stand — and does not receive — analysis.

This "bias" of the author's, though an open and honest one, leads him to gloss over some of the faults and dangers of the federal administrative system. His discussion of the *Chenery*[9] cases[10] may very profitably be compared with the discussion in a Note in the Harvard Law Review.[11] The latter raises serious doubts about the present law governing administrative grounds of decision which Mr. Davis seems to disregard as unimportant. I think them worthy of careful discussion and I wish Mr. Davis had addressed himself to them. Mr. Davis's "bias" seems to make him partly unaware that administrative performance seldom equals administrative promise; that the "expertise" of administrators and staffs is sometimes fictional; that the existence of a sound procedural rule is no assurance it will be followed. A case in point is the CAB's prehearing conference, which Mr. Davis regards as exemplifying the "greatest success" among agency pretrial procedures.[12] In reality, the CAB's prehearing conference comes nowhere near measuring up to its promise.

It would be wrong to give the impression that Mr. Davis is exclusively, or even mostly, preoccupied with the philosophical aspects of his subject. On the contrary, most of his chapters are devoted to practical learning enlightened

[8] DAVIS, p. 373.
[9] SEC v. Chenery Corp., 318 U. S. 80 (1943); SEC v. Chenery Corp., 332 U. S. 194 (1947).
[10] DAVIS, §169.
[11] 62 Harv. L. Rev. 478 (1949).
[12] DAVIS, pp. 284-285.

by criticism which is always constructive in purpose and, so far as I am able to judge, almost always sound. Chapter 14, on res judicata, is a particularly brilliant one. It is much more than the dreary marshalling of facts and holdings it might have been. Mr. Davis examines the judicial doctrine of res judicata and then explores the degree to which it should be relaxed as applied to administrative proceedings. He combines his perceptive discussion of the cases with constant reference to the reasons why res judicata exists in any kind of proceeding. He rightly condemns[13] the unintelligent doctrine of the Maryland Court of Appeals that *no* administrative decision can ever be res judicata because no agency is "judicial." Obviously — and the matter would be much less obvious without Mr. Davis's analysis — the application of res judicata to administrative proceedings must depend not on agency labels but on agency functions; and the exact rule applied must approach or recede from the rigor of the judicial rule depending on the likeness or unlikeness of particular agency functions, purposes, and procedures to those of courts. I venture that any lawyer faced with a res judicata problem in administrative law would be wise to study Mr. Davis's Chapter 14.

In view of his book's many excellences, it is most unfortunate that Mr. Davis has felt impelled to patronize practicing lawyers and in so doing to take an emotional and protective attitude toward his subject. The time is long past when emotion about administrative law on either side does any good, but Mr. Davis adopts the unfortunate device of putting a chip on his reader's shoulder at the outset of his book and then promptly knocking it off. The lawyer who tries to approach administrative law with an open mind cannot help some feeling of resentment at this treatment; and the practitioner who uses the book — as he should — in an attempt to answer a client's problem will not be grateful for being characterized as an extraordinarily stupid "John Smith" in Sec. 5. "Mr. Smith" is a creature imagined by the author, described as a "typical practitioner" who has been at the bar for fifteen years or more, whose attitude toward administrative agencies and the law which governs them consists in blind condemnation, fear and even hysteria. In Sec. 6 "Mr. Smith" is metamorphosed into "the bar." Mr. Davis, then, affects to consider the bar as composed almost entirely of practitioners whose views on administrative law roughly parallel the views which an unusually

[13] *Ibid*, pp. 596-7.

dull Neanderthal man might be expected to take of steel-pointed arrows. It is not surprising — and it is hardly enlightening — that Mr. Davis manages to demolish "Mr. Smith's" opinions.

The motivation for this performance can doubtless be found in some of the reports and recommendations of the American Bar Association on administrative law, which were themselves emotional and ill-advised to say the least. It is significant that the volume and tone of such pronouncements have been considerably tempered in recent years. In any event, there is certainly no call to assume that the bar is wholly or even mostly unreconstructed, though some unregenerates may remain. It seems to me that the bar as a whole accepts — as it must — the fact that governmental regulation of economic life will continue, and will continue to be carried out through administrative agencies. The problem of the bar is not to fight these agencies or even to prevent their multiplication, but rather to make them work as they should. That problem cannot even be stated in "John Smith" terms; but the remainder of Mr. Davis's book goes far toward exposing its framework.

EDWARD G. HOWARD[14]

PHILOSOPHY OF DEMOCRATIC GOVERNMENT. By Yves R. Simon. Chicago. University of Chicago Press, 1951. Pp. 324. $3.50.

How is it possible to give, in a short compass, even a fairly adequate review of this book?

The author surely aims to dig deeply and to argue fairly about that little understood thing "democracy".

To Supreme Court Justice Douglas democracy seems to be a simple concept which he implies will lead us to the promised land.[1]

Democracy, however, cannot be defined and one of its champions, C. K. Allen, the author of "Democracy and the

[14] Of the Delaware, Maryland, and District of Columbia bars.

[1] Justice Douglas on March 22, 1948, made an address at the University of Florida, which address can be found in the Congressional Record of April 6, 1948, pages A2221 *et seq.* I pointed out in a letter published in 34 Am. Bar Ass'n. J. 1145-6 (Dec., 1948), the lack of philosophy in Justice Douglas' address and later in 4 Univ. of Florida L. Rev., No. 1 (Spring of 1951), reviewed a book by C. K. ALLEN, DEMOCRACY AND THE INDIVIDUAL, and in that again paid my respects to Justice Douglas.

Individual" calls attention to the great danger of man in the mass.

Professor Simon in Chapter V, "Democracy and Technology", gives a thoughtful if somewhat disturbing analysis of the modern mass worker which is free of the usual generalizations. Man he says seeks "distinction" and this distinction is not so much a desire for superiority as it is for uniqueness.[2] Here we must remember also that the material condition of the workers has greatly improved,[3] which is also pointed out by Ortega in his "Revolt of the Masses".

That men are lonely in great cities is nothing new.[4] But the mass worker of today, a mere cog in a great machine, not knowing to whom the product will go and with no sense of service, is a lonely, frustrated man whose psychology centers about recompense.[5] And this lonely and frustrated man is apt to become the victim of a totalitarian leader ". . . who knows how to give millions an intoxicating experience of integration in a community and of participation in its great work".[6]

The small individual farmer is praised for his way of life.[7] But farm youth migrates to the city[8] and mass production is here to stay.[9]

The author has no pet plan for these troubles but asks for ". . . never ending inquiry into difficulties which cannot disappear but can be defined with more and more precision".[10]

Unions come in for high praise and are said to help their members not only in collective bargaining but in extending a sense of brotherhood to individual workers.[11] Yet the danger of dictatorial power in a minority in unions is recognized.[12]

There is an important distinction between Fascism and National Socialism on the one hand and Communism on the other. The end of Fascism is *now* while the end of Communism is in the *future;* a rosy promise for a future Utopia.[13] I think the best criticism of Marx and Communism is in Chapter XIV of Isabel Paterson's "God of

[2] SIMON, 311, 312.
[3] *Ibid*, 313, 321.
[4] *Ibid*, 308.
[5] *Ibid*, 311.
[6] *Ibid*, 309. See, too, 276, 278, 279.
[7] *Ibid*, 300, 306, 322.
[8] *Ibid*, 319.
[9] *Ibid*, 312, 318.
[10] *Ibid*, 318.
[11] *Ibid*, 305, 317, 319.
[12] *Ibid*, 138.
[13] *Ibid*, 2, 4, 116, 134.

the Machine" where she compares it to the theory of a perpetual motion machine. The Communists' theory that the State will eventually "wither away" is also discussed in Journal of the History of Ideas VI, 468 and VII, 113.

The difficulty of saying who is a "good" man is great, yet the author says "one single vice causes a man to be bad; a man is not good unless he possesses all the virtues". But there is no evidence that the candidates elected by these bad men have, as a rule, been failures.[14] Again in most societies criminals are in the minority and the non-criminal element together with the minority who are on the whole morally good are sufficient to form a democratic society,[15] even though wretchedly weak characters "make up the overwhelming majority of men".[16] There may be a little more to add for democratic strength.[17]

The shift in the "liberal" position is referred to[18] and also the 18th Century idea of "progress" in which the author seems to have but little belief.

We appear to have no absolute line to follow, nevertheless we must always strive and continue to improve existing conditions. But as to the "end" of law or government, it seems to me we are not wise enough to define it.

On the legal side Dean Pound of the Harvard Law School in his "Interpretations of Legal History" suggested his engineering interpretation by which great judges should be guided in their constructive opinions and decisions. But I tried in a review of that book to show the error in his suggestion. The engineer in designing a bridge knows where it is to begin and the "end" to which it goes while the judges could not know the end. This point is touched on in the book now being reviewed.[19]

The author takes the position that authority or government is not a "necessary evil" but is unqualifiedly good; a

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[14] *Ibid*, 81.
[15] *Ibid*, 83.
[16] *Ibid*, 117.
[17] *Ibid*, 92, 93. See also: *Ibid*, 110, 117, 145, 205, 214, 216, 219, 228, 315. Though reluctant to introduce a note of levity in this review, the argument of Anatole France's character Abbe Coignard in THE REINE PEDAUQUE, Chapter XVIII, seems apposite. Approaching a town the Abbe discussed with his disciple the paradox of the inhabitants of a town being usually greedy persons filled with passions and in many cases debauched, who nevertheless set up authority over them in the town to prevent them from doing the very things they want to do. From this he drew the conclusion that as no logical reason could be assigned for such conduct the city, therefore, must be a divine institution.
[18] SIMON, 6.
[19] *Ibid*, 123, 137, 197, 291.
INTERPRETATIONS OF LEGAL HISTORY by ROSCOE POUND (Macmillan, 1923). My review of this book is published in 9 Virginia L. Rev. 666 (1923).

position which I think is too strongly stated. He gives the case of the necessity for choice between one of two alternative courses of action about which sensible persons may differ. In such cases authority must decide and to that extent authority is necessary. But where is State power to be stopped? Here, I think, is one of the real defects in this book for the author gives no adequate treatment at all of majority rule and minority rights.[20] That we have deliberately destroyed the safeguards against concentrated power and the protection of minorities which the framers of the Constitution and of the first ten amendments provided is, I think, tragic but the author merely refers to it in passing.[21]

The author gives an interesting account of the change which occurred in Proudhon's thought. Proudhon began as a philosophic anarchist, that is, he opposed government in any form. Later he concluded that the State was inevitable and fearing the increase in its power his thoughts turned towards counteracting its power and he concluded that the institution of private property would help towards this.[22]

Jefferson's Declaration of Independence referred to the rights of "life, liberty and the pursuit of *happiness*" but in his later draft of the Fifth Amendment he had changed this to "life, liberty and *property*".

Now it seems to me that the extent to which in this country, (especially of late) property rights have been attacked and seriously injured is a matter for grave consideration and as I see it the result has been reached by a combination of sophistical reasoning in the Supreme Court's opinions on constitutional questions, together with the unlimited power of taxing incomes given to the Federal Government by the 16th Amendment.

How is the great power of the majority to be in any way counteracted? The author says that skill and the possession of property will act as forces against the majority and "It thus seems that conservative worries about the waste caused by the equalitarian rule of universal suffrage are excessive".[23]

My own view is that universal suffrage is, on the whole, the best, for no conceivable selected "elite" of voters would have the character sufficient to restrict their use of power.

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[20] SIMON, 99, 207.

[21] *Ibid*, 136.

In this connection see *Should We Revive the Constitution?* by Donald R. Richberg, 38 Am. Bar Ass'n. J. 35 (Jan. 1952). See also my article *The Constitution and Socialism* published in 12 Md. L. Rev. 1 (1951).

[22] SIMON, 134.

[23] *Ibid*, 96.

However, to regard the decisions of a majority of voters as always determining the rightness of particular questions is simply childish. Thus though I believe in the jury system, I know that verdicts of juries are often wrong. On important and difficult questions where solid reasoning is necessary much can be said for Ibsen's Dr. Stockmann who said "The majority is never right".[24]

The author's discussion of "equality of opportunity" shows that even this principle must be closely examined. The principle arose apparently with the Saint-Simonists who were both rationalistic and anti-democratic.[25] Their plan was the abolition of inheritance but the author discusses the ultimate position to which this would lead. If all were to have equal opportunity then such opportunity apparently would begin at birth with "pools" of children having hired nurses in charge of them and the family as such would then come to an end. Even with the suppression of inheritance, a doctor's son, for instance, who wanted to be a doctor would enjoy facilities not possessed by say the son of a coal miner.[26] Again the granting of scholarships to qualified students is good provided the student himself takes advantage of the opportunity and is willing to leave the environment to which he was born. But if those in charge of public education put pressure on young men and thereby force a change in environment this again ". . . looks like an orderly slaughter of the goods procured by integration in the family and other small units".[27]

Equality of opportunity within proper limits is a principle which I think is correct. But how far is it to go? If a family conserves its property, if its members by foresight, self-sacrifice or ambition want to send its children to private schools where an education superior to the public school education can be obtained it would be folly to prevent them.

The author's discussion of "profit" in trade or business seems to incline him toward the view that there is something immoral about it. As to traders, even when there is no "sophistication", a trading transaction he says is questionable because there is no "measure" of the amount which

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[24] SOME REFLECTIONS ON JURISPRUDENCE by W. W. BUCKLAND (University Press, Cambridge, 1945) p. 17 — "He (Krabbe) tells us that the majority opinion has the highest claim to represent the nation, that it is in some way sacrosanct. He treats what is in fact a rather clumsy way, used for lack of a better, of finding out what legislation is desirable as having some necessary infallibility about it."

[25] SIMON, 224.

[26] *Ibid*, 225, 227.

[27] *Ibid*, 229.

the trader may gain in the transaction while on the other hand real wealth like food and shelter can be measured by a person's reasonable needs.[28] For a writer who has a just aversion to bureaucracy one wonders how this "profit" motive is to be controlled.[29] The classic view is that a trader who buys goods at one place where there is an over-plus and sells them at another where there is a shortage has performed a legitimate and important operation.

Does the author believe in that old cliche of "production for use" which must mean State control? If the profit motive is ethically wrong it can only be controlled in two ways; one way would be State control and the other would be a change in the moral nature of man.[30]

The author continues his criticism of the "profit motive"[31] and then winds up with this, "Such a system rules out the infuriating disorders, so intensely resented by the men of the Twentieth Century, resulting from non-distribution of the available product."[32] What, I wonder, does he mean by this?

The author's discussion of "Sovereignty in Democracy", (Chapter III), is certainly a full and labored one. Sovereignty, he says, has become entangled with historical instances of its application and as a result the textbooks on political science are apt to be unsound.[33] The simplest illustration of sovereignty in democracy is the New England Town Meeting where at one moment a certain number of farmers in their fields are different in quality from the same farmers later acting in an assembly for the community's affairs.

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[28] *Ibid*, 239.

[29] *Ibid*, 206, 252.

[30] In HISTORY AS THE STORY OF LIBERTY by BENDEDETTO CROCE (W. W. Norton and Company, 1941) the famous author referring to economic reforms says that even if things improve because of them ". . . evil has not for that reason been rooted up, it remains in the heart in its ancient or in some newer form. It cannot be conquered with economic means but solely with moral means." See following pages in that book: 56, 62, 162, 256, 272, 277, 280, 311.

In THE RECONSTRUCTION OF HUMANITY by PITIRIM A. SOROKIN (Beacon Press, 1948) the author pleads for improvement in our moral character and suggests methods by which he hopes something can be accomplished in that respect.

Again in CIVILIZATION ON TRIAL by ARNOLD J. TOYNBEE (Oxford University Press, 1948) the author takes a pessimistic view of the attempt to improve our moral natures, for he concludes that the endowments of human beings ". . . with original sin and with natural goodness will be about the same on the average as they always have been."

[31] SIMON, 249.

[32] *Ibid*, 315.

[33] *Ibid*, 144.

This agrees with the "Coach Driver" theory that the coach driver is the mere servant of those being driven who direct his movements.[34] The flaw in the coach driver theory is that it assumes all the passengers in the coach to be of one opinion. Yet as government is necessary, laws properly passed must be obeyed by those opposed to them, otherwise anarchy or secession would follow. And this obedience to laws is an "ethical" command.[35]

Then follows a discussion of the "transmission" theory of government, and a highly theoretical discussion of the divine power of the Pope as distinguished from the divine power of kings as laid down by King James, and the works of Cajetan, Bellarmine and Suarez are discussed.[36] However, the "transmission" theory is not distinctly democratic: It is a general political concept. The author follows Aquinas in saying that basically sovereignty resides in the whole people and that democracy alone admits of non-transmission of power.[37]

Democracy is said never to transmit the whole of the transmissible powers and so remains in varying degrees a "direct" democracy.[38]

But when power is lawfully transmitted by democracy the agent who holds the power should exercise it according to his own views and it is not "ethical" to try by propaganda to force him to follow another course.[39] Any other course on the part of the holders of transmissible powers than to carry out their own views is treachery and pressures which come to them come, in most cases from minorities, may lead not to direct democracy but to oligarchic situations.[40]

I have thus tried to point out the outlines of the author's consideration of "Sovereignty in Democracy" without attempting any criticism of its subtle distinctions thinking perhaps that those whose work lies in this field will want to make a thorough study of this book.

Historically our democracy came into being as a reaction against the authority of kings and it took the form of opposition to the enroachments of government. On the other hand "French democracy soon gave birth to what was often described as the first embodiment of the modern totalitarianism, i.e., the Jacobin rule".[41]

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[34] *Ibid*, 147-151.
[35] *Ibid*, 145, 149, 153.
[36] *Ibid*, 158-177.
[37] *Ibid*, 158, 181.
[38] *Ibid*, 184.
[39] *Ibid*, 185.
[40] *Ibid*, 188.
[41] *Ibid*, 128, 133.

Forces in opposition to democratic absolutism are "external to the State apparatus" and include property[42], the free church, the free press, private schools, independent labor unions and free enterprise.[43] Labor unions cannot be free in such Jacobin democracy as is illustrated in the modern dictatorships.[44]

To sum up, the author gives us no blueprint for a plan which we should attempt to carry out. His points are argued thoroughly and authorities from Aristotle and Aquinas to the present time are considered.

The foreword tells us that democracy is on the defensive and that the pragmatic argument in its favor is not enough.

Realizing, as I do, that ideas are always important, I yet ask how we can do more than to say that our system of ideas is one based on "life, liberty and property" and that we endeavor to enforce these principles in Courts of Justice pursuant to law. I wonder what more can be expected of us and how we can influence other peoples who seem to desire slavery under the iron hand of totalitarian rulers.

WALTER H. BUCK*

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[42] *Ibid*, 134.
[43] *Ibid*, 137, 138.
[44] *Ibid*, 97, 98.
* Of the Baltimore City Bar.