

tively untrammelled administrative discretion, procedural forms are waste motion for the most part and judicial review is almost entirely ineffective. Here as elsewhere, form and substance cannot be neatly divorced from one another. Perhaps Professor Davis, now that he has thoroughly dealt with the possibilities of procedural ingenuity, will turn his attention to the central task of determining in concrete contexts the appropriate limits of administrative discretion.

ROGER C. CRAMTON*

* Assistant Professor of Law, University of Chicago.

The Elements of Law. By Thomas E. Davitt, S.J., Associate Professor of Jurisprudence, School of Law, Marquette University. Boston: Little, Brown & Co., 1959. Pp. xxl, 370. \$9.00.

The author's purpose is "to make the student aware of the relation between problems in law and their non-legal assumptions" (p. ix). Knowledgeable and percipient analyst and teacher that he is, he succeeds. No student can read this book and fail to grasp that state law presupposes a concept of its own purpose, and elementary guides for making just rules, so that governmental action in accordance therewith serves the end desired.

The student's thoughts will also be clarified in many particulars: the state is not the government nor a person over and above the human beings who compose it; the people are human beings; the common good is the good of human beings eventually enjoyed by individuals; the maker and applier of state laws—the government—is composed of human beings who make these laws for, and apply them to, human beings, and whose decisions are at best only the best judgment of human reason; *mala in se* are not *mala* aside from circumstances, and *mala prohibita* are not *mala* because *prohibita* but *prohibita* because *mala*; criminal law is grounded on the right of self-protection of human beings politically organized; capital punishment is justified if it serves a needed protective function, which is a question of fact not easily answered, requiring more research than has been given it; and even contract and title to property involve moral considerations.

The main theme of the book establishes the elementary guides, about which the author is very clear. There is, of course, the moral law, which is a succession of principles. Aquinas said that there is but one first principle (as did Hillel) from which all the others derive. There are derivative principles, called by the author "pattern demands" (p. 122), which all normal men "perceive without reasoning" (p. 122). These elementary guides are, however, "few in number . . . broad in scope" (p. 152); and "more particular and incisive directives are needed," (p. 123, n.7) which, though "drawn from . . . unchangeable premises . . . may change" (p. 126). These necessary, more particular, and incisive direc-

tives have "to be reached as a conclusion of a reasoning process" (p. 124); though some "require less reasoning and are more evident than others" (p. 124), all "can be reached only after some reasoning" (p. 125). They are not merely "logically deduced" (p. 112); "induction and research are often required" (p. 112); and "once reasoning enters . . . by that very fact the door is left open for other factors to enter. Philosophies and theologies of life enter (p. 126). By this analysis, the author brings the student to the "central problem" (p. 125, n.9).

This problem is "an epistemological one" (p. 125, n.9). Since "no one has been given divine insight into the precise solutions" (p. 47), the question is who is in the position to make "the best possible judgment" (p. 316, n.8) concerning these decisive moral principles. The author shows the student that this is the nub of the matter in saying that, "although it is bootless to struggle against the presence in law of morals in general, there is a vital and meaningful stand that can be taken regarding the presence of this or that code of morals in particular. It is on this terrain, rocky though it be, that an actual adversary can be met and perhaps profitably engaged. For it is here that the guiding principles of citizens' individual lives are encountered, regarding which law cannot be oblivious if it is to fulfill its purpose of working for the common good of those same citizens" (p. 45). Thus, while not indicating whose code of morals in particular is, or is most likely to be, the best possible judgment concerning these principles, nor how to go about finding out whose is, the author squarely exposes the student to the heart of the central problem.

At a few places, the student may be puzzled. One is the discussion of sanctions. The author says: "A valid law is possible without any penalty affixed" (p. 76). If he means a state law, the cases cited in footnotes 17 and 18 at page 77 do not support the statement.¹ Sanctions, he says, are "consequences of breaking or keeping a law" (p. 73) and are intrinsic and extrinsic. In speaking of intrinsic sanctions of state law, he states: "Even though no added rewards and punishments were affixed to statutes by their makers, nonetheless there are rewards and punishments that follow the very obeying or disobeying itself of a law independently of such additions. . . . A man who disobeys a speed law immediately incurs the penalty of being deprived of safe driving conditions. . . . On the other hand, he automatically enjoys the reward of safety" (p. 74). The student will not fail to apprehend, however, that the penalty of being deprived of safe driving conditions or the reward of safety follows the act just the same, whether there is a speed law or not, and, hence, is not a consequence of the act's being disobedience or obedience to a speed law when there is one. As extrinsic reward-sanctions of state law, the author mentions: "sums offered for the

¹ In *Jenkins v. State*, 14 Ga. App. 276, 80 S.E. 688 (1914), the court found that the legislature had affixed a penalty. In *State v. United States Express Co.*, 164 Iowa 112, 145 N.W. 451 (1914), the court used its equity powers and provided a penalty. As Judge L. Hand said in *Irving Trust Co. v. Maryland Casualty Co.*, 83 F.2d 168, 171 (2d Cir. 1936), if the legislature does not provide one, "courts will find a remedy." They not infrequently do.

arrest and conviction of criminals, remuneration for enlistment in military service, pensions to encourage working in public service, bounty for animals, and the like" (p. 73). The student will discern after a moment, though, that these might not be very meaningful were it not for the sanctions of such laws consisting in the actions beneficiaries can bring against officials if they fail to pay the rewards.

Another place where there is some uncertainty is the discussion of obligation. Though, as he mentions, the terms are often used synonymously, the author points out that "obligation is broader than duty. Obligation covers why I ought to do what is right regarding both myself and others. Duty is usually limited to why I ought to do what is right regarding others only" (p. 78). This is in the chapter on "Obligation of Man-made Law." While he will grasp easily that state law does a great deal about one's doing or not doing what is right regarding others, the student may wonder what, in the light of the first and fourteenth amendments, it has to do with one's doing or not doing what is right regarding himself only; and he will find it a little odd that this chapter is not on "duty" rather than on "obligation."

The author explains that duty, though related to sanction, is not in itself sanction. There are moral-law duties and state-law duties which, while they are interrelated, are not to be confused. Doing or omitting an act may be a moral-law duty without being a state-law duty; if a moral-law duty is enforced by state law, it is a state-law duty; but then there are not two duties, only one. For the state law does not create any duty. It only recognizes and enforces the moral-law duty. The existence of the duty is held to be independent of the state-law penalty. This seems dubious in the light of the following statement in the chapter on "Crime": "Crimes, like any wrongful conduct, may be contrary only to the demands of a man's nature. As such they are natural crimes. Or they may be a violation of a statute or judicial decision in which case they are also legal crimes. The kidnap-murder of a child is a natural crime even though there were no legislation covering it. The statute that recognizes it as a crime and makes it punishable by imprisonment or death constitutes it a legal crime" (p. 170). Apparently then, when a state law enforces a moral-law duty, there are two duties: a moral-law and a state-law duty. The state-law duty is not independent of but is dependent upon the state-law penalty. If so, as the author adumbrates, another question about duty arises. It seems to follow from his analysis and exposition that, if there is no moral-law duty to do or omit doing an act, but a state law does affix a penalty to doing or omitting it, there is no duty at all to do or omit the act. Yet the question may nag at the student's mind whether, notwithstanding the lack of a moral-law duty, there is not nevertheless a state-law duty. The view that there is no such duty is predicated on the theory that "unjust law is no law" (p. 82). The author says that "to the philosopher of law" such a state-law is "no true law" (p. 83). In fact, as con-

trusted to theory, "the actual situation is: what may be considered morally bad law by philosophers is taken to be legally valid law by lawmen until it is repealed or overruled" (p. 83). This does not quite answer the question.²

ORVILL C. SNYDER*

² It may be instructive to note experience with the somewhat similar theories that a statute judicially held unconstitutional is to be viewed as if it was never enacted, and that an overruled judicial precedent never was law. See SNYDER, PREFACE TO JURISPRUDENCE 355, 359-60, 418-19, 428 (1954).

* Professor of Law, Brooklyn Law School.

Bank Credits and Acceptances. By Wilbert Ward and Henry Harfield. New York: The Ronald Press Company, 4th ed., 1958. Pp. vii, 277. \$7.00.

The appearance of a new edition of *Ward & Harfield* would at any time be an event of some importance for the student and practitioner in the field of letters of credit. However, the many changes in letter of credit operations produced by the upsurge of domestic and foreign trade following the conclusion of World War II and the need for a cogent and comprehensive analysis of these changes make its advent especially welcome at this time.¹

Unfortunately, the book itself does not live up to expectations. By and large, the authors fail to shed much light on the new situations which have arisen in this area, and their analysis of the practices which have developed in the last decade is in many instances inadequate and in some cases actually misleading.

One example of the many deficiencies in the book is found in the discussion of the conformity of the bill of lading to the documentary specifications laid down in the letter of credit. Although most credits invariably call for a "clean" bill of lading from the seller, the meaning of this term is far from clear. While most definitions, especially those advocated by the banking community, refer to a clean bill of lading as being one which contains nothing in the margin which qualifies the document itself,² such definitions are for the most part too broad. They do not grapple in any way with the real problem of the carrier's claused or superimposed notations and the fact that the carrier is seldom so careless as to his liability to fail to note every defect possible in the goods delivered to him and to qualify the bill accordingly.³

¹ The third edition of *Ward & Harfield* was published in 1948.

² This type of definition for the most part reflects the position adopted by the U.S. banking community in the 1920's. See Draper, *What is a "Clean" Bill of Lading?—A Problem in Financing International Trade*, 37 CORNELL L. Q. 56, 57 (1951).

³ Especially since the inclusion of disclaimer clauses relieving the carrier from liability for damages arising from his own negligence or fault is made unlawful by the Harter Act and the Carriage of Goods by Sea Act, 27 Stat. 445 (1893), 46 U.S.C. §§ 190, 191 (1958); 49 Stat. 1207 (1936), 46 U.S.C. § 1309 (1958).