
In this second edition the author tells us that the material in the casebook has been reorganized and brought up to date, that new chapters and sections have been added as well as extensive text material. Among other changes, in the chapter on the theoretical bases of conflict of laws more space has been devoted to governmental interests and policies, and a new section deals with false conflicts; the chapter on domestic relations has a new section on declarations as to status; and there is a new chapter containing an analysis of the time element in the conflict of laws.

The addition of the new section on declarations of status is to be welcomed. Har-Shefi v. Har-Shefi established the proposition that Order 15, Rule 17 of the Rules of the Supreme Court confers jurisdiction upon the English Divorce Court to make a declaratory order even though no other relief is sought. Analogous provisions exist in other jurisdictions. For example, section 15.2 of the Ontario Judicature Act, 1960 provides:

No action or proceeding is open to objection on the ground that a

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4 R.S.O., 1960, c. 197.
merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right, whether or not any consequential relief is or could be claimed.

In the English cases increasing use is being made of declarations. Declaratory relief is becoming the not unusual vehicle by which the validity of a foreign divorce⁵ or annulment⁶ may be tested. Similar, though more limited use of this procedure, has occurred elsewhere. In Mandel v. Mandel⁷ the Supreme Court of Victoria followed Har-Shefi v. Har-Shefi and granted a declaration of the validity of a bill of divorcement received by the wife at the Beth Din in Melbourne. So too in Khan v. Khan⁸ where the Supreme Court of British Columbia had no doubt that it had jurisdiction to make a declaration as to status without any order for ancillary relief, and granted the petitioner a declaration that there was not then a subsisting marriage as between the parties, predicated either on the basis that the marriage ceremony was invalid or upon the basis that, if it was valid, it had been dissolved by a talak divorce. In Januszkiewicz v. Januszkiewicz⁹ the Manitoba Court of Queen's Bench held that it had a right to make a declaratory judgment and that it could make a declaration as to the validity of a foreign divorce. In Alspector v. Alspector¹⁰ the Ontario Court of Appeal held that it had jurisdiction to declare simpliciter that a marriage was valid.¹¹ However, there seems to be no Ontario decision wherein the validity of a foreign divorce has been determined by way of declaratory proceedings. Presumably such a use of section 15.2 is not precluded by constitutional considerations.


⁸ Supra, footnote 3. Also see Sara v. Sara, supra, footnote 3.

⁹ Supra, footnote 3.

¹⁰ Ibid. Also, Friedman v. Smookler, ibid. See too Stockholder v. Stockholder, ibid.

The content and arrangement of any casebook is, of course, a matter upon which there may be reasonable differences of opinion. As we are told in the Preface, there has been a proliferation of Canadian conflicts cases and the process of selection has been most difficult in order to keep the casebook within reasonable size. We are also told that an effort has been made to include all the Canadian leading cases in the field as well as important English and American decisions considered relevant in Canada either from a doctrinal point of view or because they are basic common law decisions that have been followed by our courts or might be applied by them. This is appreciated and it is not the purpose of this review to discuss matters of this kind. Professor Castel’s approach seems logical and well conceived. While the traditional presentation of the first edition is continued in this second edition, it is continued it seems, as a matter of preference. For the author displays a full awareness of the new approach taken by some American courts. This is made clear in chapter 3, section 2 which discusses “Governmental interests and policies” and in the chapter on torts, chapter 13, section 3 which deals with “A new approach”. The text material and selected bibliographies contain many useful references. However, the following points, by way of examples, may be briefly mentioned. Chapter 7, section 1, dealing with “Marriage” contains no reference to Taczanowska v. Taczanowski and the line of cases which have considered this decision. Also, although in Chapter 5, section 1, which deals with “Domicile—General Considerations”, reference is made to the concept of a Canadian domicile for the purpose of the Divorce Act, 1968, and to the possibility that a person may at one and the same time have more than one domicile, this reasoning is not carried over to Chapter 7, section 4, which deals, inter alia, with “Matrimonial Causes, Domestic Jurisdiction”. In Chapter 14, section 1, there could be a more substantial exposition of the principle of submission to the jurisdiction in the case of in personam actions, and a reference perhaps to Re Dulles' Settlement (No. 2). Also in this section it would perhaps have been desirable to include a reference to The Fehmarn.

These comments are not intended to detract from the general high quality of this casebook. It seems clear that the body of prin-

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12 Pp. 43-57. Also here discussed are “False problems” or “False conflicts”.
13 Pp. 897-918.
15 Pp. 207-209.
16 Pp. 442-447.
17 [1951] Ch. 842. This decision is not referred to on p. 1036 where mention is made of Harris v. Taylor, [1915] 2 K.B. 580.
18 Pp. 950-951.
19 [1957] 1 W.L.R. 815.
principles known as the conflict of laws is undergoing a process of reappraisal. How, for instance, will the Canadian courts respond to the two recent decisions of the House of Lords, namely *Indyka v. Indyka*<sup>20</sup> and *Chaplin v. Boys*<sup>21</sup> Will the reasoning of *Chaplin v. Boys* be preferred to the new approach articulated by the New York Court of Appeals in *Babcock v. Jackson*?<sup>22</sup> During this period of rapid development it is good to have at hand, and it is accordingly a pleasure to welcome in this way, the second edition of Professor Castel's casebook, which should be of use and of interest to all those concerned with the Canadian conflict of laws.

D. MENDES DA COSTA*

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This book is basically intended for use as a text on Canadian public administration; the authors however hope that it will promote an understanding of "the institutions and processes of public administration in Canada" and "stimulate further study."<sup>1</sup> As might be expected of a text the book attempts to cover the whole field of public administration from organizational theory to legal regulation of the administrative process. Reviewing a book such as this presents difficulties for a layman in the field of public administration who has read little, prior to this selection of materials, in organizational theory, communications or personnel administration. The obvious result is an inability to assess the choice of selections in most parts of the book or their value to the student of public administration. In fact the jargon of the writers on public administration and the quibbling of scholars in the field was almost a deterrent to finishing the book. Whether or not public administration or administration generally is an art or a science,<sup>5</sup> for example, seems a fruitless squabble and one would rather see an attempt to get into the actual work and problems of administrators. Yet on the whole the selections in the book seem to be the condensed so-called wisdom of those who have long travailed in business administration at "fixing" the holes in corporate management. While the techniques mentioned may be effective when the writers actually use them to advise management how to run its shop more efficiently, when condensed into articles

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<sup>20</sup>[1969] 1 A.C. 33.  
<sup>21</sup>[1969] 3 W.L.R. 322.  
<sup>22</sup>(1963), 240 N.Y.S. 2d 743.  
*P. ix.*

they remind one of the epigrams of the trial lawyer about how to pick a jury; in practice they worked very well for him but when he states them as truisms they are trite and offer little real insight into actual jury selection. So here, the authors of the selections, generally in the jargon of the behavioural sciences, tell one that an employee either needs controls and incentives from above before he will do a good job or that "man does not live by bread alone" and must be allowed to "fulfill himself" on his job. These two basic views of human nature permeate almost all of the essays included in Public Administration in Canada and depending on the individual author's emphasis colour the approaches to running a government department efficiently.

What is, perhaps, surprising about this tendency is not that it exists as it is probably inevitable, but that the writers seem to treat their conclusions as great new discoveries ignoring, for example, that Machiavelli in The Prince took the former approach and that the Pre-Raphaelites in the nineteenth century in reaction to the industrial revolution in England took the latter.

The impression which the selections in the book leave is that public administration involves an attempt to transplant the techniques of achieving efficiency in the "private sector" to the "public sector". Yet too little is made of the differences between the needs of the two areas; whereas in business the motivating force is profits, the motivating force of public agencies and officials may be power.

And too little is made of the immeasurable element of fairness in government administration. As a result most of the selections seem to be concerned with theorizing about the internal efficiencies of governmental departments and agencies while stating the need to consider their "objectives" but do not concern themselves sufficiently with the quality of the objectives. And in government administration it is the objectives, the success of which depends as much on the means by which they are attained as the attainment itself, that are peculiar.

That the administrative lawyer should understand the interworkings of governmental agencies and departments would seem

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6 A few of the essays do attempt to point to a difference between business and public administration. E.g. Hodgetts, "Challenge and Response: A Retrospective View of the Public Service of Canada", p. 40; Johnson, "Efficiency in Government and Business", p. 234.
7 E.g., Little and Mitchell, "The Program Budget: Planning and Control for the Public Sector", p. 188.
a truism for much of his concern must involve the balancing of a workable system with the fairness of the means used to achieve it. Most of the essays in this selection will not greatly assist him. One would have hoped to have seen more of what government agencies actually do. But several of the selections included are informative and useful; the essays by Hodgetts and Johnson both present the point of view of the civil servant and are worth reading; and several of the contributions of the editors are helpful. The essays which describe the internal workings of government departments are valuable despite the fact that one wishes that they had gone further. A few government publications which point up some of the flaws in the administrative process were wisely included. Finally the essays in the section entitled “Administrative Responsibility” are, if rather mundane, all necessary to give an introduction to the major problem of the relationship between government officials and the public. For the student all are useful and the two essays by Rowat should be read if only to demonstrate a few of the major gaps in the Canadian administrative process.

In reviewing a book of selected readings in which the editors have actually edited some of the essays included, it is perhaps necessary to check their editorial technique. This was done with one of the essays in Public Administration in Canada not because of conscientiousness but because of a blatant non-sequitur in the text. In the essay on “Subordinate Legislation” by Driedger the editors omitted Driedger’s reasoning (which followed his introduction of the issue) but failed to remove the “therefore” from the final sentence of the paragraph. The non-sequitur resulted in a comparison of the edited version of the essay with the original; the results of the comparison follow.

The editors apparently decided that the legal form used by

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8 P. 40. 9 P. 234.
13 Ibid., p. 407.
14 A major omission from the select bibliography in the section is Davis, Administrative Law Treatise (1958).
16 P. 409.
Driedger should not be used in a book for public administration students; consequently they inverted the normal designation for "justice" which usually follows a judge's name, thus transforming "Duff J." into "J. Duff" and "Darling J." into "J. Darling". This is a mistake often converted in a joke by first-year law students ("Why are all judges named John, John?") and one could not fairly expect non-lawyers to be aware of it. But one could expect consistency; yet for some incomprehensible reason the editors decided to leave "Avory J." alone. The editors also decided to omit several of the footnotes in the original article and to renumber those which they included; in doing so they made several egregious blunders. Footnote 42 in the edited version refers back to footnote 41 but the quotation to which the former footnote refers is not the case cited in the latter; the editors unfortunately omitted the intervening footnotes among which was included a reference to the quoted case which immediately preceded. Several similar instances occur elsewhere in the essay. These examples might be termed quibbles but the editing also removed portions of the text which obscured or left incomplete the substantive argument of the essay. One example should suffice. The editors omit the final paragraph in the section concerning the "Laying Before Parliament" of regulations; the omitted paragraph described what actually occurs in Canada with regulations and is not only essential for an accurate picture but also relates thematically to a later essay and would have served as an excellent means in teaching of relating cabinet secrecy to other kinds of administrative secrecy. Other selections have not been checked;
hopefully this is the only one demonstrating this editorial sloppiness.

A layman in the field of public administration cannot adequately assess *Public Administration in Canada* as a teaching tool but some of the essays which it contains could usefully be recommended to students of administrative law. And if the book does anything at all, it points up the need for further studies of the administrative process in Canada.

PHILIP ANISMAN*

* * *


"Which laws get enforced depends on who is in power."


Recently Mr. Justice Black stated that "under our democratic system of government, law making is not entrusted to the moment-to-moment judgment of the policeman on his beat. Laws . . . are to be made by representatives chosen to make laws for the future, not by police officers whose duty is to enforce laws already enacted and to make arrests only for conduct already made criminal".1 In *Discretionary Justice: A Preliminary Inquiry*, Professor Kenneth Culp Davis demonstrates that it is not only legislatures, courts and regulatory agencies that make law, but also the policeman on his beat and, in fact, any government official who exercises discretionary power which may affect individuals. But Davis is not concerned simply to show the obvious, that discretion involves the power to make—or nullify—laws; his purpose is more ambitious—to rectify the imbalance in legal research and knowledge which has resulted in an overdeveloped "jurisprudence of statutes and judge-made law" and an underdeveloped "jurisprudence . . . of discretionary justice".2 "We need", Davis states, "a new jurisprudence that will encompass all justice, not just the easy half of it".3 To induce others to undertake this task Davis sets out "(1) to dispel the virtually universal impression that discretionary justice is too elusive for study, (2) to open up problems that seem susceptible of further research and thinking, and (3) to formulate a framework for further study".4 In all of these interlocking aims Davis succeeds admirably.

Davis' approach to discretion is both analytic and pragmatic; he recognizes that "where law ends tyranny need not begin" but

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2P. 233.
3Ibid.
4P. vii.
5P. 3.
discretion does and that discretion, depending on how it is exercised, may have either good or bad results. "A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction", and the exercise of that choice once the law and the facts are clear (the process of finding both of which also involves discretion) necessarily involves policy. Davis places his emphasis on the exercise of discretion which affects individuals; where it is arbitrary, unfair or applied unequally it is unjust but discretion is necessary to the development of the law and to its application in individual cases. In any event even if fixed rules were always desirable they are not always possible as legislators, especially in regulatory areas, more often than not just do not know enough to formulate them and must, therefore, delegate that power to an agency which can do so as it acquires experience. "The result is that perhaps the most significant twentieth-century change in the fundamentals of the legal system has been the tremendous growth of discretionary power". Courts exercise discretion daily in applying law to individuals and regulatory agencies do so in the manner in which they choose to formulate and promulgate rules; but far more instances of discretionary power occur in the process of enforcement of the laws and rules. In fact, "All along the line an enormous discretionary power is the power to do nothing". Discretionary power exists, always has existed and must continue to exist if the legal system is to achieve just results in individual cases. But it is also subject to abuse. An analysis of it must not overemphasize either aspect; Davis' argument is that the exercise of discretion should be guided so that the amount of injustice resulting from it is minimized.

The answer is, in broad terms, that we should eliminate much unnecessary discretionary power and that we should do much more than we have been doing to confine, to structure, and to check necessary discretionary power. The goal is not the maximum degree of confining, structuring, and checking; the goal is to find the optimum degree for each power in each set of circumstances.

In the first two chapters of Discretionary Justice, Davis puts the functions and development of discretion into perspective.
The next three chapters discuss the means of controlling the exercise of discretion, namely, confining, structuring, and checking. The three methods of controlling the exercise of discretion to avoid unjust results complement each other; because legislatures often cannot provide the detail necessary for the day-to-day functioning of a regulatory agency, an agency may have wide discretionary powers. However as it performs its tasks a regulatory agency will acquire experience through the cases which it handles, both formally in adjudications and informally, in the process of which it will begin to formulate clearer standards for exercising its discretion. Once formulated these standards can be promulgated by the agency as rules and it is the rule-making procedure which Davis sees as the major method of confining discretion:

The hope lies in administrative clarification of vague statutory standards. The typical failure in our system that is correctible is not legislative delegation of broad discretionary power with vague standards; it is the procrastination of administrators in resorting to the rule-making power to replace vagueness with clarity. All concerned should push administrators toward earlier and more diligent use of the rule-making power. . .

And he advocates that the courts adapt the non-delegation principle to require rule-making by the agencies within a reasonable time. Even more important Davis suggests that agencies need not wait until they can formulate a general rule but should state how they will use their discretion as early as possible by means of hypothetical rules which would state a typical factual situation and the agency’s response to it. In other words the rule would be drafted as an adjudicatory opinion except for the fact that it would have only prospective application and would not arise out of an adjudication but would consolidate the agency’s knowledge from past experience; and it would be read in exactly the same way as a case. Initially this suggestion seems somewhat unnecessary; the result of such a rule would be no different than a published adjudicatory opinion, policy statement or even an advisory opinion. At least one agency, the Securities and Exchange Commission, has published advisory opinions and statements of policy with typical hypothetical situations for many years, which fact, incidentally, Davis does not mention. However adjudicatory


Chapter III. “Confining Discretion”.

Ch. IV. “Structuring Discretion”.

Ch. V. “Checking Discretion”.


opinions are always published *ex post facto* and advisory opinions and policy statements, while performing the same function as a "hypothetical rule" with regard to informing those who deal with an agency, are based only on the agency's knowledge which *ex hypothesi* is not sufficient to form a generalized rule. The procedure required by the Administrative Procedure Act, on the other hand, involves the promulgation of a proposed rule and an opportunity for interested persons to comment.\(^{25}\) Thus Davis' suggested hypothetical rule-making not only enables an agency to formulate standards earlier which could equally be accomplished by the other methods mentioned above, but the comments allowed by the rule-making procedure may educate the agency and better enable it to formulate a general rule.

Whereas the "purpose of confining is to keep discretionary power within designated boundaries . . . [the] purpose of structuring is to control the manner of the exercise of discretionary power within the boundaries".\(^{26}\) The methods advocated for structuring discretion are the traditional ones of open plans, policy statements, rules, findings, reasons, precedents and fair informal procedure.\(^{27}\) Both openness and "checking" are methods of avoiding arbitrariness;\(^{28}\) the latter may be accomplished by supervision whether by equals, superiors, administrative appeal boards, legislators, courts or an ombudsman.\(^{29}\) The methods of confining, structuring and checking discretion are interdependent; the rules which confine discretion, whether hypothetical or general, must be developed through prior structuring by means of adjudication, plans, policy statements, precedents, and openness of the reasons and results throughout the process provides its own check because it facilitates review by superiors, courts and legislators (who hopefully will clarify the statutes by amendment). As a result the scope of judicial review would be extended to encompass the exercise of much discretionary power.\(^{30}\) Thus although the methods suggested for controlling discretion are the traditional ones which have worked in the judicial and adjudicatory context, their application to discretion is highly innovative and provoking. Again the initial reaction to Davis' suggested methods of formalization of the exercise of discretion might be that they would not only increase the paperwork of administrators to an extent that would substantially reduce efficiency but would also result in a pro-

\(^{25}\) 5 U.S.C., s. 553.
\(^{26}\) P. 97.
\(^{27}\) P. 98.
\(^{28}\) Pp. 111-116, 142.
\(^{29}\) Pp. 142-157.
\(^{30}\) The Administrative Procedure Act, 5 U.S.C., s. 701(a) exempts such action from judicial review.
liferation of rules which would not clarify but rather hinder the lawyer's and the individual's ability to discover what "the law" is. Admittedly the work of administrators would be increased but efficiency can only be considered in light of the desired objectives; the use of rule-making would undoubtedly give some guidance where little or none now exists and increase predictability and consistency which have always been emphasized as major components of "justice". Moreover greater predictability would allow those concerned to plan their affairs so as to avoid litigation which is decidedly more costly than rule-making. And finally lawyers seem quite capable of burrowing through vast numbers of judicial decisions; not only would Davis' suggestions not create an insuperable chore but rather would, as said above, better enable them to advise clients. Nor can the increased scope of judicial review be criticized within the structure suggested by Davis; a limited review to check arbitrariness and mistakes of law is desirable at any level of the administration of justice and although at present there may be great difficulties in checking discretionary functions, within a formalized discretionary structure such difficulties would in many cases disappear.

Despite the fact that his scheme for controlling discretionary powers would formalize the administrative process Davis does not argue for greater formalization of decision-making. Although he uses "hearing" perhaps too narrowly to refer to formal adjudications, he recognizes that fairness in decision-making need not involve a trial-type hearing and, in fact, argues that it may be satisfied by something less provided some fundamental protection is granted. Nor does he suggest that all aspects or even any single aspect of his scheme must apply in all cases but rather that each discretionary power must be considered and only those aspects appropriate to its exercise be applied. Indeed, it is this balanced and sensible approach to the problem of discretion that makes Discretionary Justice so persuasive.

Davis' general framework alone would have provided a valuable contribution to administrative law and to jurisprudence. But he does not stop with it; rather he considers its application to both general and particular areas of the administration of justice. He suggests, for example, that government lawyers in defending suits against the government should perform a "semi-judicial function" and not interpose technical defences which would prevent a suit being heard on the merits unless substantial policy reasons require it. Although this suggestion would seem to be contrary

31 P. 201.
33 Pp. 116-120.
to the traditional adversary system, it is difficult to disagree with it; that the government should in all of its activities encourage fairness and attempt to ensure the attainment of just results for individuals is undeniable. To demonstrate, in *R. v. Tarnopolsky, ex parte Bell* the government counsel might well not have raised the argument concerning finality in order to allow the issue of the jurisdiction of the Ontario Human Rights Commission to be determined by the court in the interests of justice.

Perhaps the greatest danger to the attainment of just results for individuals affected by government activities is uncontrolled or absolute discretion. Two general areas to which Davis gives special attention are the problems of government largesse and selective enforcement. Government grants and subsidies have usually been called privileges by the courts and therefore held not subject to the procedural safeguards given "rights." This somewhat conceptual analysis may lead to unfortunate results; an individual applying for a subsidy of great value will receive less legal protection than an owner of property of little value. Davis argues that the former should be entitled to "more legal protection" because of the greater value of his interest. Davis' argument may overstate the case. Although it is difficult to disagree with the basic point that an officer of the government who administers a subsidy is not the government itself and should be subject not only to internal but also to judicial control in the exercise of his discretionary powers, it would be somewhat unjust were the interests of both the applicant for a subsidy and the property owner to receive a different degree of legal protection; both should equally be protected from arbitrary actions of government officials. Nevertheless it may be that in the interests of efficiency in processing large numbers of relatively small claims, society is willing to accept a lesser quality of justice than for claims involving substantial amounts; if the quality of justice in small claims courts is less than that meted out in the superior courts, Davis has perhaps a valid point.

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37 An argument for prematurity might be made, however, on the basis that the jurisdictional point should have first been considered by the board of inquiry which could also have found jurisdictional facts. See generally Davis, *3 Administrative Law Treatise* (1958), ch. 21. But the argument based upon finality overlooked the real harm that might have been caused the relator in terms of adverse publicity despite the fact that he was represented by counsel. Many of the arguments for this position, although directed to others ends, are stated in *Newman, Due Process, Investigations, and Civil Rights* (1961), 8 U.C.L.A. L. Rev. 735, at pp. 755-758. To subject an individual to potential opprobrium without jurisdiction, even when he is represented by counsel, smacks of persecution and clearly is unjust, however reprehensible the individual may be.

38 Pp. 172-180.

39 P. 180.

40 P. 179.
Apparently a more frequent type of governmental largesse, totally within the discretion of minor officials, is the practice of selective enforcement of the laws. While some selective enforcement may be inevitable in that all offenders will not be detected or apprehended, instances involving "unevenness in conscious choices made by officers who are administering justice" need not occur and when they do they involve unequal justice, a contradiction in terms. Moreover as the enforcement process requires the frequent exercise of discretionary powers all of which are uncontrolled and secretly exercised, selective enforcement is perhaps the area of most abuse of discretion. Paradoxically, although Davis' argument is for greater clarity in the "discretionary process", as clarity increases either in the facts or the law, the most important decision and often the final one occurs at the initial stage of enforcement; thus the clearer the law, the greater the power of selective enforcement.

Davis' discussion of discretion throughout is illuminated by illustrations of what actually happens. His ability to pick just the right example, whether public housing or processing of unfair labour practices, in the final analysis irretrievably places Discretionary Justice among the truly excellent contributions to legal literature. As might be expected many of his choices illustrate instances of selective enforcement. His penultimate chapter, "Confining, Structuring, and Checking the Prosecuting Power", convincingly demonstrates that the discretionary powers of plea bargaining and selective enforcement by prosecutors need not be uncontrolled. The most interesting application of the methods of controlling discretion, however, is to the police. The police make law not necessarily by deciding the meaning of a statute but by deciding whether or not to enforce a particular statute despite the fact that they are required to enforce all the laws. Moreover their powers of selective enforcement are not only uncontrolled but the exercise of discretion to arrest or not to arrest in given in-

41 P. 169.
42 See e.g. Cook, Merger Law and Big Business: A Look Ahead (1965), 40 N.Y.U.L. Rev. 710, and Buxbaum, Book Review (1968), 68 Col. L. Rev. 1618, at pp. 1621-1622. See also Davis, pp. 198-205. Ch. VI is entitled "The Practice of Selective Enforcement Interlocked with the Theory of Privilege".
43 Pp. 77-80.
44 Pp. 205-207.
46 Pp. 80-96.
47 See supra, text at footnote 1, et seq.
stances is left to the policeman on the beat, usually without guidelines from superior officers, and often leads to different results in similar situations. To confine the discretion of individual police officers Davis recommends the use of a rule-making procedure like that in the Administrative Procedure Act, that is, involving the publication of proposed rules, and an opportunity for the public to comment. This procedure would facilitate the attainment of most of “the objectives of a good program for reform of police practices” and better enable legislatures to achieve the rest. The objectives enumerated by Davis are worth setting out:

... (1) to educate the public in the reality that the police make vital policy, (2) to induce legislative bodies to redefine crimes so that the statutory law will be practically enforceable, (3) to rewrite statutes to make clear what powers are granted to the police and what powers are withheld, and then to keep the police within the granted powers, (4) to close the gap between the pretenses of the police manuals and the actualities of police behaviour, (5) to transfer most of the policy-making power from patrolmen to the better qualified heads of departments, acting on the advice of appropriate specialists, (6) to bring policy-making out into the open for all to see, except when special need exists for confidentiality, (7) to improve the quality of police policies by inviting suggestions and criticisms from interested parties, (8) to bring the procedure for policy determination into harmony with the democratic principle, instead of running counter to that principle, (9) to replace the present police policies based on guesswork with policies based on appropriate investigations and studies made by qualified personnel, and (10) to promote equal justice by moving from a system of ad hoc determination of policy by individual officers in particular cases to a system of central policy determination and a limitation of the subjective judgment of individual officers to the application of the centrally determined policy.

Davis seems to see only two alternatives in the area of police discretion, secret ad hoc determinations by individual officers or open policies through rule-making; there clearly is a third, secret policy determinations by superior officers. Although the third would not accomplish many of the objectives set forth, it may provide a reasonable transitional position. Revolutionary as Davis' suggestions may be, their desirability cannot be doubted; however, as a police officer need never report instances of non-arrest,
supervision would be virtually impossible. But Davis does not expect an immediate restructuring and perhaps with the re-education and further investigation and studies recommended, substantial improvement is not beyond the possible.

If the above has seemed little more than a precis of Discretionary Justice—and an inadequate one at that—, it is because its contents are worth repeating, because hopefully an outline of its contents will induce others to read it and because although it is provoking and stimulating there is little in it with which this reviewer at least wishes to take issue. Nevertheless a few quibbles must be mentioned. Davis cites judicial overruling of precedent as an example of necessary discretion and states that the House of Lords up until 1966 was the "only highest court of any nation in the world that formally pretended that it could not change the law." This is not true; Canada has the rather dubious distinction of having maintained the pretense even longer. That this "outstanding example of unduly narrow discretion at high levels" has often led to unfortunate results is obvious; but hopefully the Supreme Court's recent acceptance of the House of Lords' position will lead to an improvement.

It is perhaps surprising that Davis does not mention the means by which the courts have attempted to supervise the exercise of discretion by government officials such as the exclusionary rules concerning illegally obtained evidence and other rights granted to accused persons. In this regard although police do often pursue illegal policies one wonders what a court would do with an illegal police policy embodied in a rule such as the sample rule given by Davis. If police enforcement necessitates the use of informers the requirement that such a policy be put into a formal rule would probably force the police either to stop using violators as informers or to allow them to go free after their usefulness is finished. Need the police then publish guidelines on how they select informers?

Similarly Davis does not mention the fact that the courts have on occasion taken unreviewable agency discretion into account where a refusal by an agency to act would leave an individual without a remedy. And judicial review of the agency's exercise

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55 Pp. 95-96.
56 A. P. 37.
60 See e.g., Lockhart, Kamisar and Choper, Constitutional Law: Cases, Comments, Questions (1967), pp. 581-765.
61 P. 96.
of discretion would not meet this argument unless any refusal by the agency to grant a remedy in such circumstances would be held to be arbitrary.\textsuperscript{63}

Finally, Davis’ basic thesis is constantly reiterated, namely, that “the goal is to find the optimum degree for each power in each set of circumstances”\textsuperscript{64} and that the method of controlling discretion is to confine, structure and check it. While the repetitiousness is slightly annoying early in the book it becomes less so as one reads further and in the final chapter is used to excellent effect,\textsuperscript{65} for there Davis ties together all of his suggestions and arguments and shows their interrelationship, recreating the excitement felt when initially encountering them.

\textit{Discretionary Justice} will undoubtedly stimulate the further studies which Davis believes necessary\textsuperscript{66} and which his tentative solutions suggest.\textsuperscript{67} Hopefully this will occur not only in the United States but also in Canada where many instances of unnecessary and uncontrolled discretionary powers are as much in need of study as those Davis cites. Canadian policemen exercise uncontrolled discretionary powers of selective enforcement\textsuperscript{68} and illegal exercise of their discretion to obtain evidence is usually not controlled by the courts.\textsuperscript{69} Canadian judges exercise an unstructured discretion in sentencing which may lead to different results in similar cases\textsuperscript{70} and even decisions regarding the granting of bail

\textsuperscript{63} This might be a possible solution to the problem in \textit{Vaca} as the General Counsel would then be left without discretion not to prosecute unfair representation cases and the pre-emption doctrine could be applied without depriving the grievor of a remedy. See \textit{Vaca} v. \textit{Sipes}, \textit{ibid.}, at p. 921 (concurring opinion of Fortas J.). See also Davis’ discussion of the procedures followed by the National Labour Relations Board’s General Counsel with regard to unfair labour practice complaints, pp. 205-207.

\textsuperscript{64} P. 4.

\textsuperscript{65} Ch. VIII, “Summary and Perspective”.

\textsuperscript{66} Pp. 232-233.

\textsuperscript{67} \textit{Ibid.}, \textit{passim}.


\textsuperscript{69} See e.g. Cross, Evidence (3rd ed., 1967), pp. 266-267.

\textsuperscript{70} See pp. 133-141; Commission of Enquiry into the Administration of Justice on Criminal and Penal Matters in Quebec, \textit{op. cit.}, footnote 68, p. 27. (“Some judges have taken the trouble to offer the guilty [poor] person the opportunity of paying his fine in instalments; other judges have not done this.”)
which determine the liberty of the individual pending trial are largely unchecked and unstructured.\textsuperscript{7} The police often take this fact into account and choose the courts in which they wish to prosecute a case.\textsuperscript{72} And Canadian prosecutors also engage in plea bargaining.\textsuperscript{73} Finally, does the Canadian Parole Board provide or even write reasons for its decisions to grant or not to grant parole?\textsuperscript{74}

Nor is the usefulness of \textit{Discretionary Justice} limited to the administration of criminal justice; Canadian regulatory agencies have been delegated as great powers to formulate the standards which they apply as have agencies in the United States.\textsuperscript{75} How many of the numerous agencies in Canada publish guidelines indicating how they exercise their discretion in individual cases? How many agency heads or cabinet ministers do not know how their subordinates do so?\textsuperscript{76} Has the Combines Investigation Branch ever issued guidelines concerning its prosecution or pre-merger clearance policies clarifying the statements of its director?\textsuperscript{77} Has the Canada Council issued guidelines outlining the standards on the basis of which it distributes grants?\textsuperscript{78} Clearly the kinds of studies which are necessary in the United States are at least as necessary in Canada.\textsuperscript{79}

Although \textit{Discretionary Justice} may have some effect in the United States,\textsuperscript{80} unfortunately one cannot have the same hope for

\textsuperscript{7} \textit{Ibid.} See also \textit{R. v. Botting}, [1966] 2 O.R. 121 (Ont. C.A.) where the court refused to consider whether a magistrate's discretion was arbitrarily exercised. And "many judges in Canada ... have admitted freely that they are more sympathetic to the accused who appears before them without having been subject to detention". Commission of Enquiry into the Administration of Justice on Criminal and Penal Matters in Quebec, \textit{op. cit.}, \textit{ibid.}, p. 39.

\textsuperscript{72} \textit{Ibid.}, p. 31. It has been suggested that the London police were picking their judges during the recent controversy concerning sentencing on shoplifting cases. See \textit{e.g.}, McGuire, "Carroll praises judges for shoplift sentences", \textit{The London Free Press}, Dec. 17th, 1968, p. 1, col. 3.


\textsuperscript{74} \textit{Ibid.}, pp. 126-133.

\textsuperscript{75} See \textit{e.g.} The Securities Act, 1966, S.O., 1966, c. 142, ss 7-9, 61; Broadcasting Act, S.C., 1967-68, c. 25, ss 16-18.

\textsuperscript{76} See \textit{e.g.} Stevens, "Simonett denies Cabinet veto of OWRC on up-stream sewage". The Globe and Mail, March 26th, 1969, p. 5, col. 1, at col. 3.


\textsuperscript{79} Pp. 232-233.

\textsuperscript{80} See \textit{e.g.} "FTC Allows Filing of Objections, Comments Before Approving Acquisitions, Divestitures", \textit{The Wall Street Journal}, May 26th, 1969, p. 4, col. 3; "FTC Approves Acquisition Request; Uses New Procedure For First Time", 413 \textit{ATTR A-18} (June 10th, 1969); "FTC Plans to Relax Rules Covering Access To Its Private Files", \textit{The Wall Street Journal}, June 23rd, 1969, p. 6, col. 4; "FTC Plans to Publicize Clearance
Canada. While creative scholarship in the United States is turning to the difficult problems of controlling discretion, Canadians are still fighting "the disputes of the thirties". And our "strong tradition of administrative secrecy" helps to keep us there. Of the ten Securities Commissions in Canada only one regularly publishes its decisions and it usually does not publish decisions favourable to an accused; moreover the decisions which appear regularly in the Weekly Bulletin of the Ontario Securities Commission concerning "primary distribution" offer no guidance as to what the Commission considers "the public interest" involves. Nor are the "reasons" of the Canadian Radio-Television Commission any more illuminating. These agencies are the exceptions; most agencies do not publish their decisions at all. How many in Canada do not write reasons? Nor have the courts encouraged written reasons. When the situation in Canada is such concerning formal adjudications, how much progress can be expected for informal proceedings?

Admittedly the situation shows signs of improving; the Ontario Securities Commission attempts to issue policy statements as soon as it acquires sufficient experience and the Quebec


See the Bulletins of the Ontario Securities Commission.

The applications come to the Commission under S.O., 1966, c. 142, s. 59 as am. 1968, c. 123, s. 21. No judicial review is available from the Commission's decisions in such cases, s. 29(1). It should be noted that the appeal to the court under the Securities Act, 1966, is a full appellate review rather than the limited review power exercised with the prerogative writs, s. 29(5).

See e.g. Decision CRTC 69-95, "Public Announcement", March 28th, 1969 ("As a result of this examination the Commission finds that it cannot make the certification . . . required. . . ."); Decision CRTC 69-93, "Public Announcement", March 28th, 1969, p. 1 ("Reasons: In the opinion of the Commission, the proposed increase in night-time power and change of site will provide a satisfactory service to listeners in the area.").

See e.g. Dobson and Dobson v. City of Edmonton et al. (1959), 19 D.L.R. (2d) 69, at p. 75 (Alta S.C.).

The Statutory Powers Procedure Act, 1968-69, supra, footnote 32, s. 14, will require written reasons.

Securities Commission has recently stated its intention to publish a weekly bulletin similar to that of the Ontario Commission. The first volume of the reports of the Commission of Enquiry into the Administration of Justice on Criminal and Penal Matters in Quebec is generally forward-looking and attempts to set out a framework within which all governmental agencies involved will consistently and fairly exercise their discretionary powers. And one court at least has indicated a willingness to consider not only the office of a government official but the functions he performs, when deciding whether the prerogative writs lie. These examples perhaps indicate a start; but they are not enough. The Quebec Commission of Enquiry seems to overemphasize the impact of an overall philosophy and does not pay sufficient attention to methods of controlling the exercise of discretion. (The Commissioners would do well to read Discretionary Justice.) It is not enough that only a few agencies publish policy statements and written reasons for formal adjudications; where other legitimate considerations do not outweigh the reasons for desiring publication, all agencies should do so. And despite the fact that the Ontario Court of Appeal laudably looked at the power exercised by the "institutional head" it went on to make an arbitrary distinction between a prisoner's status as a person and his status as an inmate which left absolute discretion to an institutional head to-place a prisoner in solitary confinement but required that the prisoner be granted a hearing before being subjected to corporal punishment. In doing so it ignored the fact that the Regulations treated both types of punishment equally. But worse, the court held that a directive of the Commissioner which required a hearing before any punishment could be ordered against a prisoner was not legally binding on an institutional head. In doing so the court in effect granted subordinates in the penal system powers of discretion which had already been confined and structured by their superiors. The court cited no authority and gave no reasons for its conclusion that the statute did not contemplate the directive's enforcement despite the fact that the Penitentiary Act explicitly authorized the


91A See e.g. 17 C.F.R., s. 200. 80 (c).

92 Supra, footnote 91, at pp. 377-378.

93 The relevant portions of the Regulations are reproduced as "Schedule A", ibid., at p. 381.

94 The relevant directive is reproduced, ibid., at p. 383, as "Schedule B".

95 Ibid., at pp. 378-379.
Commissioner to make such rules. Although the Commissioner was subject to the regulations in making rules, there is no reason to treat the Commissioner's "directive" differently than a "regulation" of the Canadian Radio-Television Commission. The attitude of the court toward rule-making is paralleled by the aristocratically paternalistic recommendation of the McRuer Commission.

The above discussion is not intended as a deterrent to reading *Discretionary Justice*; rather it is intended to demonstrate the necessity for Canadians of reading the book. *Discretionary Justice* is the product of fine scholarship, a vast knowledge of administrative agencies and officials and of how they work, both refined through creative intelligence. The ideas in it can be applied in the Canadian context and that they need to be is obvious. The flyleaf of the book states that "*Discretionary Justice* is must reading for practising attorneys; political scientists; teachers of law, jurisprudence, and philosophy; and for intelligent laymen interested in the subject". Statements on flyleaves concerning the merits of a book are usually exaggerated; this one is not.

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96 S.C., 1960-61, c. 53, s. 29(3).
97 S.C., 1967-68, c. 25, s. 16. The definition of "regulation" in the Regulations Act would include Commissioner's directives. R.S.C., 1952, c. 235, s. 2(a)(i). The Commissioner's directives are, therefore, required to be published in the Canada Gazette. Ibid., s. 6(1). Are they? Even if they are not they remain valid, Ibid., s. 6(3), and clearly the institutional head was aware of them. Will the court now consider whether the internal supervisory structure of the penitentiaries is sufficient to ensure observance of the Commissioner's directives?
98 Philip Anisman, of the Faculty of Law, University of Western Ontario, London, Ont.