

REVIEWS

WHITE COLLAR CRIME. By Edwin H. Sutherland. New York: The Dryden Press, 1949. Pp. x, 272. \$3.00.

IN this study of "white collar crime" Professor Sutherland carries forward his researches into that rich, but largely unexplored, field—violation of law in the American business community. Professor Sutherland, as in his previous work, defines "white collar crime" as "crime committed by a person of respectability and high social status in the course of his occupation." Within this category he includes not only violations of law punishable by criminal process but also violations subject to other forms of restraint, including statutory injunction, cease and desist orders, civil damages, forfeiture and the like. Although increasing attention has been given to white collar crime in the past few years, largely due to the efforts of Professor Sutherland himself, this is the first systematic inquiry into that vital area of criminal law.¹

The picture which emerges is not a pretty one. It will come as a profound shock to those who accept uncritically the popular notion of the American business man as a paragon of social virtue and the pillar of society. Professor Sutherland writes in a mild semi-detached manner, from the viewpoint of an observing scientist. But he does not hesitate to call a crime a crime. Nor does he shrink from pressing the analogy between white collar crime and conventional crime. Some feeling of the atmosphere of the book may be gleaned from Professor Sutherland's remark, after noting that a group of large corporations had an average of four criminal convictions each: "In many states persons with four convictions are defined as 'habitual criminals.'"

Professor Sutherland's study has two main objectives. One is to depict the prevalence of white collar crime in the business community; the other is to "present some hypotheses that may explain all criminal behavior, both white collar and other." In the first of these tasks the book is reasonably successful; in the second, as Professor Sutherland is the first to admit, his efforts fall somewhat short of the mark. With a number of other issues—issues that stand forth sharply as a result of the data brought together in the study—Professor Sutherland unfortunately does not deal.

So far as concerns the prevalence of white collar crime the book is built primarily around an analysis of the records of America's 70 largest manufacturing, mining and mercantile corporations. The data is assembled from the public records of adverse decisions against these 70 corporations by the courts and the various law enforcing agencies. These decisions include violation of

1. Professor Sutherland's book includes the substance of his own previous articles in the field. For treatment of the subject by others see BARNES & TEETERS, *NEW HORIZONS IN CRIMINOLOGY* Part I (1943); MANNHEIM, *CRIMINAL JUSTICE AND SOCIAL RECONSTRUCTION* cc. 6-9 (1946); Ploscowe, *Crime in a Competitive Society*, 217 *ANNALS* 105 (1941). See also ARNOLD, *THE FOLKLORE OF CAPITALISM* (1937).

laws pertaining to restraints of trade; rebates; infringement of patents, trademarks and copyrights; misrepresentation in advertising; unfair labor practices and certain other labor matters; financial fraud and violation of trust; war regulations; and a few miscellaneous matters. The time span ranges from 1900 (or the subsequent origin of the corporation) to 1944, with 60% of the decisions occurring in the last decade of that period, that is from 1935 to 1944.

Professor Sutherland's findings are spectacular. He has discovered a total of 980 adverse decisions against the 70 corporations, of which 583 were rendered by courts (158 in criminal prosecutions) and 397 by administrative agencies. Of the 980 decisions Professor Sutherland excludes 201 cases of patent and trademark violation as not constituting strictly "evidence of criminal behavior," although about half of these "involved wilful appropriation of the property of others and might have resulted in penalties under state or federal laws if the injured parties had approached the behavior from the point of view of crime." This leaves 779 cases of "criminal behavior." With the exception of 11 settlements submitted to the courts for approval the figures do not include "hundreds of other cases" in which settlements were reached without court proceedings. The significance of the data is greatly enhanced by the well-known fact that, in the enforcement of any law, only a small fraction of the total number of cases ever reach the final stage of formal decision. Professor Sutherland further finds that of the 70 corporations, 30 were "either illegal in their origin or began illegal activities immediately after their origin" and that 8 others were "probably illegal in origin or in initial policies."

After giving this overall view of the crimes of his 70 corporations Professor Sutherland proceeds, chapter by chapter, to examine the records of the corporations in each sector of law enforcement mentioned above. These chapters are in part a further analysis of the statistics of adverse decisions and in part a running account of the nature of the violations. The specific findings confirm and illuminate the general picture. In the anti-trust field, for instance, Professor Sutherland states that 60 of the 70 corporations have been violators; that 73 per cent of these 60 corporations are recidivists, averaging 5.1 adverse decisions each; that "at least 48 of the 60 large corporations engaged in illegal restraint of trade almost continuously from their organization to the end of 1944"; that "probably" all of the 10 remaining corporations "have violated the anti-trust laws." In other sectors Professor Sutherland finds that 72 per cent of his 70 corporations have records of infringement of patents; that 60 per cent of the corporations which engage in advertising for sales purposes have adverse decisions from the Federal Trade Commission for misrepresentation in advertising, with an average of 3.5 decisions per corporation; that 62 per cent of the corporations have been found by formal decisions to have engaged in unfair labor practices in violation of the National Labor Relations Act, averaging 3.4 violations. And so on. For good measure Professor Sutherland adds a chapter on white collar crime by 15 public utilities, a form of enterprise not included in his main group of 70 corporations.

From this analysis Professor Sutherland reaches certain conclusions. He finds that "these crimes are not discreet and inadvertent violations of technical regulations" but "are deliberate and have a relatively consistent unity"; that "the criminality of the corporations, like that of professional thieves, is persistent: a large proportion of the offenders are recidivists"; that "the illegal behavior is much more extensive than the prosecutions and complaints indicate"; that "the businessman who violates the laws which are designed to regulate business does not customarily lose status among his business associates"; that "businessmen customarily feel and express contempt for law, for government, and for government personnel"; and that "white collar crimes are not only deliberate" but "are also organized."

Are these conclusions justified on the basis of the data Professor Sutherland presents? Certain limitations in the method and certain defects in the content of the book must be stated.

In the first place, and perhaps most significant, the bulk of the data is quantitative rather than qualitative. The 70 largest corporations are gigantic, rambling enterprises. They are subject to hundreds of statutes and thousands of administrative regulations. They have tens of thousands of employees, not all of whom can be kept under perfect control. Consequently it would not be surprising if these large corporations ran afoul of the law with a fair degree of frequency. It becomes important, therefore, to ascertain not only the existence of the violation but its character and significance in the whole operation of the corporation and in the enforcement of the law. Professor Sutherland does make some effort to show this, but the showing is mostly by way of illustration. A qualitative analysis would certainly impose an arduous burden, but more data of this nature would seem to be required before the picture can be complete.

Secondly, the book is marred by certain unfortunate errors of fact. In discussing the labor laws, for instance, Professor Sutherland mistakenly asserts that in 1932 the Norris-LaGuardia Act made collective bargaining obligatory upon the railways (the obligation was imposed by the Railway Labor Act of 1926); that during World War I collective bargaining was made mandatory under the "War Labor Act" (there was no such statute; the only obligation arose out of a Presidential proclamation); that the National Labor Relations Act was declared constitutional by the Supreme Court in 1936 (the correct date is April 12, 1937); that in 1937 Congress expanded the scope of the National Labor Relations Act (the NLRA was not amended until passage of the Taft-Hartley Act in 1947). Such errors naturally raise some doubts concerning the accuracy of the author's statements not subject to verification from extrinsic sources.

Thirdly, there are signs that Professor Sutherland does not at times fully appreciate some of the realities of law enforcement. For instance, he is consistently critical of the use of non-criminal sanctions against corporations, attributing this to the softness of legislators and administrators and to their

unwillingness to attach the stigma of crime to white collar offenses. To a certain extent Professor Sutherland is right. But it is also true that in many situations the criminal sanction is far too cumbersome for practical use and that effective enforcement requires additional and more flexible measures.

Again, by confining his study almost entirely to the 70 corporations Professor Sutherland neglects considerable material which would throw important light upon his problems. The accumulated experience of the National Labor Relations Board, the administrator of the Fair Labor Standards Act, the Office of Price Administration, the War Production Board, and a number of others would be of immense value.

Despite these shortcomings, however, Professor Sutherland presents a powerful case, certainly one that cannot readily be brushed aside. Moreover, his findings with respect to the prevalence of white collar crime conform to my own experience both at the National Labor Relations Board and at the Office of Price Administration. To give but one example: On the day when sugar rationing went into operation all business consumers of sugar were required to file with OPA a statement of their current inventories; future allocations were to take into account existing supplies. The same day OPA enforcement agents made a check of the actual inventories of a large sample of hotels, restaurants, and other consumers in a number of cities. The number of enterprises which had underestimated their inventories, in spite of the patriotic pressures of war, came as a shock and a revelation of the difficulties to come in OPA enforcement. The percentage of misrepresentation ran as high as 85 per cent in some cities and nowhere was lower than 35 per cent.

From experiences of this sort, as well as from the data presented by Professor Sutherland, I would conclude that the problem of white collar crime is, generally speaking, of the order of magnitude that Professor Sutherland depicts. In bringing this situation out into the open his book represents a contribution of first-rate importance.

Turning to the other phase of Professor Sutherland's study—the "theory of white collar crime"—the author's thesis is that "white collar crime has its genesis in the same general process as other criminal behavior, namely, differential association." And he goes on to say, "The hypothesis of differential association is that criminal behavior is learned in association with those who define such behavior favorably and in isolation from those who define it unfavorably, and that a person in an appropriate situation engages in such criminal behavior if, and only if, the weight of the favorable definitions exceeds the weight of the unfavorable definitions." Professor Sutherland realizes that this hypothesis is "not a complete or universal explanation of white collar crime or other crime," but he believes the theory "fits the data of both types of crime better than any other general hypothesis."

In developing this thesis Professor Sutherland makes some pointed observations. His emphasis upon the influence of the mores of the business community and upon the effect of competitive business relations seems well taken. So do his views upon the isolation of businessmen from criticism in the public

agencies of communication and upon the "less critical attitude of government toward businessmen than toward persons of lower socio-economic status." His brief discussion of the impact of "social disorganization," which he attributes to the growing complexity of business behavior, the rapid change in business practices, and the absence of effective government and public opposition to white collar crime, is also suggestive. On the other hand his dismissal of the "psychological characteristics" of white collar offenders as even a partial explanation of white collar crime seems to me to ignore the process of natural selection which brings to the top of the business community individuals possessing certain types of personality structure.

In any event, as Professor Sutherland readily concedes, his explanation of the extent of white collar crime barely scratches the surface. Much deeper probing into the structure of our economy, into the nature of our governmental process, into the character structure of business executives, and into the whole area of public opinion would be necessary before full insight into the problem can be achieved.

Professor Sutherland's book leaves many questions unanswered. His data on the prevalence of white collar crime shake the very foundations of our whole system of reformed and regulated capitalism. Is it possible, under the conditions that Professor Sutherland outlines, to make such a system work at all? The answer depends upon a far more exhaustive study of the administration and enforcement of economic regulation—a problem that has been shamefully neglected. We need to know much more about how far our economic regulations have been able to accomplish their purposes; which ones have been tolerably effective and which not, and why; what techniques are available for improving their effectiveness—techniques of drafting statutes and regulations, of making investigations, of getting the most out of investigating and prosecuting staffs, of the use of various sanctions, of the role of publicity.² We need to know also the possibilities of other methods for achieving compliance—such as public information and education—and the role of political factors. At present we do not have even a single study of the current operations of that most antiquated of all our governmental institutions, the Federal Department of Justice.

Professor Sutherland's survey poses a crucial problem for American democracy. It deserves the most careful and thoughtful consideration. It is to be hoped that many others will explore the paths he has opened.

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2. See, e.g., for a valuable study of the use of the statutory injunction in the enforcement process, Comment, *The Statutory Injunction as an Enforcement Weapon of Federal Agencies*, 57 *YALE L.J.* 1023 (1948).

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LOCAL GOVERNMENT LAW. By Jefferson B. Fordham. Brooklyn: The Foundation Press, Inc., 1949. Pp. xxx, 1060. \$8.00.

WHEN Professor Abbott compiled his casebook on municipal corporations a half-century ago,¹ he began it with a definition of the subject which excluded all units of local government save that urban entity known variously as city, town, borough or village. And he filled the book with a collection of cases which were classified under headings referring to "Creation," "Boundaries," "Officers," "Powers," "Contracts," "Ordinances," "Taxation" and "Liabilities," but which were of essentially three types: (1) those devoted to a reading of state constitutions and statutes to determine whether the municipal corporation was properly created or was authorized to exercise a questioned power, (2) those devoted to an examination of municipal ordinances to determine whether they were properly enacted or whether they authorized municipal officials to exercise a questioned power, (3) those devoted to an exploration of the limits of municipal liability in contract and tort.

Subsequent editors of coursebooks in this field have, for the most part, confined themselves to reshuffling the order of the cases without reconsidering the scope of the subject. The three published works currently in use—those of Stason,² Tooke³ and Seasongood⁴—are *casebooks* in the most literal sense of that term, conceived within the limits of the same restrictive definition as was employed by Abbott. While they take due account of such latter-day developments as municipal merit systems and the Bankruptcy Act's provisions for municipal debt adjustment, they could as well have employed his organizational pattern. The only real innovation since Abbott was the addition of chapters on federal-municipal relations in the latest editions of Tooke and Seasongood.

It is not surprising, therefore, that interest in the course languishes to such an extent that nearly half the law schools either omit it from the curriculum entirely or use it only occasionally to fill a gap in a summer schedule.⁵ Vested interests aside, the decline in the popularity of the traditional course will be mourned by no one familiar with the stuff of which it was made. But to reject the traditional approach to a study of local government is not to decide that the subject is unimportant or even that it is not important enough to be entitled to time in the law school curriculum.

True, it cannot match the romantic appeal of studies in national powers and policies, nor can students and teachers derive from it the exalted feeling of personal omnipotence which comes from academic review of the work of

1. ABBOTT, *CASES ON PUBLIC CORPORATIONS* (1898).

2. STASON, *CASES AND MATERIALS ON THE LAW OF MUNICIPAL CORPORATIONS* (2d ed. 1946).

3. TOOKE & McINTIRE, *CASES AND MATERIALS ON MUNICIPAL CORPORATIONS* (3d ed. 1942).

4. SEASONGOOD, *CASES ON MUNICIPAL CORPORATIONS* (2d ed. 1941).

5. Of 130 current law school catalogues examined, 52 do not list the course and 5 list it for summer term only.

Presidents, Supreme Courts and Congresses. But most of the governmental problems encountered by most law school graduates, whether as lawyers or as functioning citizens, are those of state and local government. And nothing contained in present curricula is of much assistance in the solution of such problems.

Dean Fordham proffers a new coursebook as a "fresh approach" to the subject—a book "prepared on the assumption that the conventional course in municipal corporations has been too narrowly projected at the expense of ad hoc and non-urban general function units; that it has dealt with municipal organization, powers, procedures and responsibilities more or less in the abstract and without stress upon functions and objectives; that certain substantive areas, such as finance, personnel, intergovernmental relations, and local lawmaking, have not received adequate attention."⁶ The approach is both fresh and sensible and the improvement upon previous efforts is substantial.

The first three chapters, comprising roughly a quarter of the book, consider the structure and powers of all types of local units below the state level, the manner of their creation, alteration and dissolution, and the relation of such units to each other, to the state and to the federal government. By avoiding the temptation to include pages of cases to establish points made as effectively in a paragraph of text, Dean Fordham in some 250 pages presents a comprehensive picture of our present system of local government, of the difficulties inherent in the multiplicity of units, and of the available methods of change. The only serious shortcoming in this part of the book is the treatment given the subject of judicial control of local units. A brief note listing the various methods by which judicial review may be obtained and one case involving a taxpayer's suit is hardly adequate in an area where the extraordinary writs have their greatest utility.

A chapter on Personnel deals briefly but adequately with the present significance of the officer-employee dichotomy and with problems arising under constitutional salary limitations, statutory merit systems and retirement plans. There is an excellent section on the legal devices available to bring local officials to account, and the progress and effectiveness of unionization among public employees is presented in a manner which permits critical appraisal of current dogma on the subject. But, while there is a section entitled Selection and Tenure, the all-important "selection" problem is scantily dealt with. The section contains only one case holding that after a city council had confirmed a mayoral appointment it could not renege, a paragraph on nepotism, a paragraph on residence requirements, and a case and a four-page note on *de facto* officers. Even when supplemented with a case from a preceding chapter which explores the intricacies of proportional representation, these materials are not sufficient for consideration of a subject so vital in terms of competence and responsibility of public officials.

In the two chapters dealing with local finance and creditors' remedies against

6. P. vii.

local units, Dean Fordham gets to his specialty and, I suspect, his first and enduring love. Despite an inexplicably skimpy section on local taxation, this is by all odds the best compact treatment of the entire subject yet published, and the problems of local budgeting, revenues and borrowing are of sufficient current importance to justify the 260-odd pages devoted to them.

In his presentation of the materials on the organization and powers of local units and on the manner in which such units are staffed and financed, Dean Fordham goes far toward remedying many of the deficiencies which he noted in previous works. Since he also observed that one of the shortcomings of the conventional approach was its consideration of such matters in the abstract rather than in connection with functions and objectives, it is surprising that his book presents an opportunity to appraise local government in terms of function only in the chapter on Community Planning and Development.⁷ This is inadequate for two reasons: First, even though "planning" is broadly conceived to extend to such matters as public housing, cultural and recreational facilities, utility services, and stimulation of private enterprise, the manner in which local units function as implements of or obstacles to state policy in fields of education, health and welfare is at least as important as the manner in which they function as "planning" agencies. Second, no consideration is given to the relationship of such planning to budgeting processes, nor is there any examination of the extent to which the multiplicity of local units blocks effective discharge of the planning function.

I will confess to some bewilderment about the remaining three chapters. I do not understand why there should be sixty pages devoted to Law Making by Local Bodies when there is only an occasional passing reference to more important problems of executive administration and management. Nor do I perceive the need for those vestiges of Abbott, separate chapters on Contracts and Local Government Responsibility in Tort. The materials on contracts could be condensed into a brief note of the sort used effectively elsewhere in the book, and existing doctrine on governmental tort liability could be presented more effectively in the section dealing with civil liability of government officials and employees.

My objection to omission of materials on administration doubtless goes to matters of conception rather than execution. Dean Fordham has undertaken a study of local government *law*—law which "is to a peculiar degree among public law areas, lawyer's law"⁸—and, although cases and statutes give way to his own text in approximately one-third of the book, that text is drawn largely from "legal" sources. I would broaden the study to include materials which give some insight into the way the law works and some understanding of problems of government which are not solved by passing statutes and de-

7. There is also a chapter on Regulation of Business and Private Conduct, but it is made up of materials dealing with the extent of the regulatory power rather than with problems arising from its exercise at local levels—a matter already covered in courses on constitutional law.

8. P. vii.

ciding cases. Is a statute providing for geographical consolidation of local units on majority vote of the electors in each unit concerned a workable device for eliminating archaic boundaries? To what extent can the same result be achieved by the use of special purpose districts or other devices to effect "functional consolidation"? If counties are saddled by constitutional provision with a multiple-headed governing body, and attempts to amend the constitution to provide for a single chief executive prove unavailing, what other methods may be used to achieve centralized administrative authority and responsibility? Although social scientists have not distinguished themselves in this field, they and their practicing brethren have made some contributions which are helpful in attempting to answer these and similar questions.⁹

One more observation goes also to matters of conception. I believe that the limitation of the study to "local" government is unfortunate. As this book clearly reveals, a study of local units is a study of a part of the apparatus through which the governmental power of a state is exercised. If the allocation of such power to local units is justifiable at all, it must be because it is exercised more efficiently or more responsibly at the local level. But before any judgment can be made on that score, a study of the rest of the apparatus is essential. A stronger case for municipal "home rule" can be made in Connecticut, where the state constitution preserves small-town control of the state legislature against all apparent methods of change short of revolution, than in a state where the inhabitants of the larger cities are fairly represented. An appraisal of state government is similarly relevant to other questions concerning allocation of powers and division of revenues with which much of this book deals.

While it is the function of a reviewer to identify important inadequacies in the work reviewed, he serves no useful purpose by belaboring them. Despite what seem to me to be serious shortcomings, Dean Fordham's book can be used to fashion a course which should stimulate greater interest and further work in a neglected field.

VERN COUNTRYMAN†

A CONTRACT BY CONTRACT ACCOUNT OF THE CONSTRUCTION OF ALFRED OHNER'S APARTMENTS. By A. A. Mueller. Privately published in mimeographed form for Contracts I, Yale Law School.

Most law books are a bore, either in style or contents. Here is one that, any way you look at it, is original, refreshing. The book contains hard thinking wrapped up in a seductively colloquial or anecdotal manner.

For here Mueller, who was a businessman before he became a law teacher, tells, in American, the story of a businessman's tangles with legal-business

9. *E.g.*, TENNESSEE VALLEY AUTHORITY, COUNTY GOVERNMENT AND ADMINISTRATION IN THE TENNESSEE VALLEY STATES (1940); LANCASTER, GOVERNMENT IN RURAL AMERICA (1937); MILLSAUGH, LOCAL DEMOCRACY AND CRIME CONTROL (1936).

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difficulties. As each chapter of troubles unfolds, Mueller inserts appropriate court opinions and excerpts from legal writings, together with enlivening bits from such poets as George Herbert, Lewis Carroll and Robert Browning. Since Mueller's businessman is engaged in putting up a building, this book includes the text of a standard construction contract and recent writings on the economics of the building industry.

Mueller's thinking is hard and clear because he never uses those ponderous words that, all too easily, serve as escapes from thinking. The reader need not cut through any "heavy coat of hog wash."¹ One could base on this one slender volume two thirds of an excellent law school curriculum.

JEROME FRANK†

LAW AND THE EXECUTIVE IN BRITAIN: A COMPARATIVE STUDY. By Bernard Schwartz. New York: New York University Press, 1949. Pp. viii, 388. \$5.50.

THE task which Professor Schwartz has set for himself in this book is to acquaint Americans with the important developments in British administrative law since the publication of Lord Hewart's *New Despotism* in 1929. He does not, however, merely describe British administrative law but he also acutely and critically compares it with American administrative law.

A lawyer who visits another country to carry out research in comparative law will ordinarily find a collection of up to date works on the topic. Administrative law is, however, the Cinderella of the British legal system. For no law degree is it a required subject; indeed, it is believed that only two law schools teach it at all to their first law degree students. It nowhere appears in the curriculum of the professional examinations for barristers and solicitors. Not surprisingly, there is no textbook nor casebook, whether up to date or otherwise, purporting to cover the field. There are no investigations of the workings of administrative tribunals comparable with the monographs of the Attorney-General's Committee on Administrative Procedure. Such books as there are are polemical and deeply tinged by the writer's political colour. Due weight should be given to these facts in assessing the merit of Professor Schwartz's book, which is the most comprehensive book on delegated legislation and administrative justice in Britain yet published.

Of course, any comparative study must begin with the basic similarities and differences in the legal systems under examination. In his first chapter, therefore, the author suggests that twentieth century States may be divided into two groups, the power States and the law States, Britain and the United States both being members of the second group. If then we are also part of "the common-law world" our administrative law problems are the same. But are they? It is at this crucial stage in the argument that Professor Schwartz and

1. The phrase is from Hexter, Book Review, 64 POL. SCI. Q. 300, 302 (1949).

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I differ. "The central and most characteristic feature of our Anglo-American polity . . . is embodied in the now almost axiomatic concept of the rule or supremacy of law."¹ But in no legal sense, certainly not in the three versions of it laid down by Dicey, is the Rule of Law characteristic of British public law. There is only one dominant characteristic—the supremacy of Parliament. The author later concedes that Dicey's "principles are imperfectly articulated" but substitutes no more precise definition. English law has no Fifth and Fourteenth Amendments. The fact that the courts must always acknowledge the validity of a British statute has a further important consequence: the great importance of statutory interpretation and the danger of drawing any general conclusions from decisions which so often rest on the interpretation of the particular statute under which the executive is acting.

Professor Schwartz lucidly contrasts the wide powers of delegated legislation entrusted to the British executive with the much narrower powers of the American executive. This account, though substantially accurate, does leave the reader with the impression that this power is rather more oppressive than is the case. For instance, to provide that an executive order "shall be conclusive" seems menacing, but if the order concerns title to property and its purpose is to avoid upsetting vested property rights, then it becomes defensible. Moreover, it is the cumulative effect of safeguards of delegated legislation that must always be considered. Whereas judicial control of delegated legislation is tighter in America than in Britain, there is no American counterpart to the common British statutory requirement that orders shall be laid before Parliament where a Scrutiny Committee examines all such delegated legislation and reports any objectionable use of the power to the House of Commons. The report of the Donoughmore Committee in 1932 contained a detailed account of delegated legislation and proposals for reform. It is to be regretted that Professor Schwartz did not concentrate on the trend of delegated legislation since 1932 in order to decide how far the Committee's warnings have been heeded. Instead only a quarter of his examples are of powers exercised since that date. Not only have subsequent statutes omitted completely some of the more objectionable delegations, *e.g.*, "that an order shall have effect as if enacted in the Act," but control by Parliament has been much improved and facilities for publication greatly increased. There has also been a tendency, not mentioned in the book, to make prior consultation with affected interests compulsory.

In his description of administrative justice, the author leans heavily on the Donoughmore Report. There are two main divisions of administrative adjudication in Britain, the exercise of regulatory functions (usually involving a large policy element) when the decision is given nominally by the Minister but in fact by some unknown civil servant, and the determination of State-citizen disputes arising out of the vast social service schemes. The author criticises severely the executive bias of the first-named type (and few will dis-

1. P.2.

agree with him). On the other hand the social service tribunals usually have a hierarchy of appeal courts and their procedures seem less open to criticism. Rather deceiving is the statement (qualified in a footnote, p. 82) that this second type of tribunal "deals with a comparatively small proportion of the disputes which have been committed to the Executive for determination." However, while statistics are not available, there can be no doubt that there has been a substantial trend away from administrative adjudication by Ministers.

The author examines the objections to judicial control of the administrative process and brushes them aside in a very convincing manner. The following points on the British system call for comment. It is suggested that review is largely by certiorari and prohibition rather than mandamus because the Crown Proceedings Act provides that mandamus shall not lie to the Crown or its agents.² This means only that mandamus cannot lie against an officer of the Crown to enforce a duty owed by him to the Crown—it does lie to a Crown servant in respect of all other duties and is in fact extensively used as a means of judicial control. It is further suggested that whereas certiorari in England does not now lie for the review of facts, there is historical justification for that review being within its scope.³ One would have wished that the author had given us his authority for this.

In the succeeding chapter Professor Schwartz rightly stresses that review in Britain is focussed almost entirely on *ultra vires*. Most important is his demonstration of the comparative inability of the English courts to review on the ground of unreasonableness. This chapter is marred, however, by his drawing unwarranted general conclusions from decisions based on the wording of particular statutes. For instance he argues that the courts may review executive decisions which are protected by "conclusive-evidence" clauses, and cites *Rex v. Minister of Transport*⁴ in support. There, an enactment that "an order made by the Minister under this sub-section shall be final and not subject to appeal to any court" did not prevent judicial review. Why? Solely because the court held that "appeal" had a narrower meaning than "quashing for excess of jurisdiction" with the result that the court reviewed for excess of jurisdiction. Had the statute laid down that "this order shall not be questioned in any court whatsoever" then it would not have been reviewable at all.⁵

The account of natural justice is excellent. No one reading it can fail to be convinced of the superiority of the procedures of the American administrative tribunals. The comparisons are most apt, and the criticisms of the British procedures well informed and timely. That the right to legal representation is sometimes denied by statute might have been also noted.

English courts may review executive decisions whenever there has been an excess or abuse of jurisdiction. Ascribing to English law an allegiance to an undefined Rule of Law which it does not owe, Professor Schwartz declares

2. P. 157.

3. P. 159.

4. [1927] 2 K.B. 401.

5. See pp. 169-70 for another error due to the same cause.

that the scope of review extends to matters of law though not of fact.⁶ This is not so. Only if a statute expressly so provides, *e.g.*, the Income Tax Acts, is there an appeal even on a question of law. The absence of a substantial evidence rule and the close similarity between *Crowell v. Benson* and the English cases on jurisdictional facts should be of interest to American lawyers. They will perhaps count their blessings when they read in the final chapter of the vast emergency powers assumed by the British executive during the recent war. They should not, however, be unduly alarmed by *Liversidge v. Anderson*.⁷ The House of Lords was careful to point out that the words "if the Secretary of State has reasonable cause to believe" were given a subjective interpretation only in the light of the particular war emergency. It must not be thought that similar words in a peace time statute will exclude judicial review.

Although the book is written for American readers, I believe that valuable though it is to them, it will be even more valuable to the British. American administrative law is so much more developed than the British that there is little for the American lawyer to learn from British experience—except to be on guard against a weakening of judicial control. Cannot Marshall Plan Aid include "administrative law"?

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MATERIALS AND PROBLEMS ON LEGISLATION. By Julius Cohen. Indianapolis: The Bobbs-Merrill Co., Inc., 1949. Pp. xiv, 567, and Supp. 69 pages.

PROFESSOR COHEN may not have produced the most scholarly of the recent spate of casebooks on legislation. His may not be the most valuable as a teaching tool, though there is much to be said for it there. But it is easily the most interesting.

The author has made himself something of a sitting duck for reviewers. Two years ago he set up a standard against which his book can be judged by publishing an article saying what he thought a course on legislation should be.¹ Surprisingly he has succeeded in measuring up to his own goals. But even more of a surprise is that in the process he has managed to give the feel of what a legislature is like and how the legislative process works.

The secret of this book is simple. Instead of quoting long essays in which other people have described what the legislature does and how it does it, Professor Cohen has, for the most part, let us watch it actually at work. Thus the problems of pertinency and of self-incrimination in hearings before investigatory committees are raised by quoting excerpts from the Howard Hughes

6. Pp. 280, 282, 297.

7. [1942] A.C. 206.

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1. Cohen, *On the Teaching of Legislation*, 47 COL. L. REV. 1301 (1947).

hearings. And while a student Comment from this *Journal* presents a scholarly discussion of lobbying and its regulation, the lesson is brought home in the excerpts from the hearings in which Senator Wheeler extracted unwilling admissions of what the railroad lobby had done in an effort to influence legislation. The section on the parliamentary tactics involved in lawmaking is highlighted by a neat little problem showing the variety of procedural moves by which a group in the Nebraska Legislature prevented passage of an urgent bill.

In keeping with the author's desire to make his book concrete is his use of the fact problem as a pedagogical device. Taking federal pure food and drug legislation as his example, he gives us the text of several laws and bills, and something of their history and the problems which they created. It then becomes easy, in almost every context, to illustrate what he is saying and to provide a springboard for classroom discussion by setting forth problems, to be answered by the student, which require the application of the general principles learned to a particular set of facts. Thus discussion on "gauging the efficacy of proposed legislation" is likely to be awfully difficult in a vacuum. But problems requiring the student to gauge the comparative efficacy of three proposed bills in remedying specific flaws in the 1906 Food and Drug Act can produce quite meaningful discussion. This technique is used with a nice consistency, and seems the book's chief virtue.

It has of course its shortcomings. There is still that same absence of discussion of the selection of legislators, the composition of the legislature, and the forces which sway a legislature in a particular direction which has been criticized so justly elsewhere.²

And here too is exemplified the classic dilemma in the teaching of legislation: the work of state legislatures is too important to be ignored yet too varied to be presented in a manner of value to a law student who may go to any of 48 states. Professor Cohen has given problems on the state level principally in terms of Nebraska, in which state he teaches. What he has is interesting and instructive, but not adequate preparation for the student who ends up in New York or Texas. But since no one else has solved this problem satisfactorily, one must not criticize Cohen too heavily.

There are other matters of detail and personal preference: I thought, for example, that devoting almost one third of the book to statutory interpretation was grossly out of proportion, and that many of the old cases which so painstakingly applied the "canons of construction" might well be omitted. But these are matters of opinion. Suffice it to say that the student studying legislation from this book should learn a lot, and, what is more, should have a tremendous amount of fun.

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2. Emerson, Book Review, 58 *YALE L.J.* 1414, 1417-8 (1949).

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