

BOOK REVIEW

A NEW BREED OF LAW BOOK?

LAW AND ADMINISTRATION. Carol Harlow and Richard Rawlings.
Weidenfeld and Nicolson, London, 1984 pp. 718. £15.95
(paperback)

*Reviewed by Edward Brunet**

I. METHODOLOGY

Carol Harlow and Richard Rawlings' unique new treatment of United Kingdom administrative law, *Law and Administration*,¹ should be measured against the monolithic nature of legal scholarship. American law book scholarship appears etched in stone; the casebook remains the prime ingredient of American legal education. Typical casebook authors select their cases to produce a variety of skills, including case synthesis, inductive reasoning, analytical thinking—the tools of the problem-solving lawyer.² The textbook, the other pillar of legal education writing, weaves together myriad authority to produce a coherent set of norms to aid both students and lawyers.³ For over a century, the casebook and textbook have been two main foci of serious legal writing designed to cover comprehensively particular fields of law.

The production of these archetype forms of scholarship continues

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1. C. HARLOW & R. RAWLINGS, *LAW AND ADMINISTRATION* (1984).

2. See, e.g., C. GREGORY, H. KALVEN, & R. EPSTEIN, *CASES AND MATERIALS ON TORTS*, xxi-xxii (3d ed. 1977); D. LOUISELL & G. HAZARD, *CASES AND MATERIALS ON PLEADING AND PROCEDURE* (5th ed. 1983). For a discussion of the educational virtues of the case method and casebook, see Dente, *A Century of Case Method: An Apologia*, 50 WASH. L. REV. 93, 95-98 (1974); Morgan, *The Case Method*, 4 J. LEGAL EDUC. 379, 380-81 (1952); Patterson, *The Case Method in American Legal Education: Its Origins and Objectives*, 4 J. LEGAL EDUC. 1, 20-21 (1951).

3. See, e.g., B. BITTKER & J. EUSTICE, *FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS* (4th ed. 1979); G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* (2d ed. 1975); R. LEFLAR, *AMERICAN CONFLICTS LAW* (3d ed. 1977).

unabated with surprisingly minor variation in form or style.⁴ To be sure, many serious scholars are writing normative books that critique specific legal problems.⁵ Recent emphasis on policy may mark the decline of the traditional research outputs, the casebook and treatise, and illustrates the resurgence of normative legal philosophy.⁶ Yet these policy works rarely serve the goal of broad coverage of an entire subject of law and, while necessary and valuable, do not compete with the textbook and casebook for those seeking systematic knowledge of a given field of law.

Henry Hart and Herbert Wechsler's *Federal Courts and the Federal System*⁷ broke casebook methodology ground by focusing more attention on the note materials than case selection. Its series of probing notes and challenging questions set a standard for subsequent casebook authors and troubled generations of law students seeking the elusive "right" answer. The style of this highly influential⁸ casebook bridged the gap between the casebook and the textbook.⁹ Yet little has occurred since its writing to combine the best of the vastly different appeals of the casebook and textbook style.

4. Accordingly, the various book publishers divide their lists of publications into "casebook" or "text" subheadings. See, e.g., Foundation Press, *University Casebook Series* (Summer-Fall 1984); Little, Brown and Co., *Law Books* (May 1984).

5. See, e.g., B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); C. FRIED, *RIGHT AND WRONG* (1978).

6. See Barnett, *Contract Scholarship and the Reemergence of Legal Philosophy* (Book Review), 97 HARV. L. REV. 1223, 1225-36 (1984); Stone, *From a Language Perspective*, 90 YALE L.J. 1149, 1150 (1981) (prestige of writing a treatise "has tarnished"); Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 633 (1981) (writing of positivistic treatise in decline).

7. H. HART & H. WECHSLER, *FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953).

8. Numerous commentators on the Hart and Wechsler casebook emphasized its utility beyond the classroom. See, e.g., Kurland, Book Review, 67 HARV. L. REV. 906, 906-07 (1954) (materials "so much more than a casebook . . . that they command recommendation to a wider audience than the students and faculty who might meet the book in the classroom"); McGowan, Book Review, 74 COLUM. L. REV. 1015, 1015 (1974) (first edition "a unique assemblage of legal materials"); Monaghan, Book Review, 87 HARV. L. REV. 889, 898 (1974) (book "deservedly achieved a reputation that is extraordinary among case-books and, indeed, rare even among learned treatises"); Monaghan, Book Review, 83 HARV. L. REV. 1753, 1753 (1970) (Hart and Wechsler book "prodded students and [teachers] to think over their heads about the deepest problems of the legal process") (quoting address by Kingman Brewster, Jr., President of Yale University awarding honorary degree to Professor Hart (June 9, 1969)). For Supreme Court citations to Hart and Wechsler, *FEDERAL COURTS AND THE FEDERAL SYSTEM*, see *Owen v. City of Independence*, 445 U.S. 622, 650 (1980); *Rose v. Mitchell*, 443 U.S. 545, 581 (1979) (Powell, J., concurring); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 672 n.19 (1979); *Swain v. Pressley*, 430 U.S. 372, 386 (1977) (Burger, C. J., concurring in part); *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 392 (1977) (Marshall, J., dissenting).

9. Kurland termed the note questions "the definitive text on the subject of federal jurisdiction in spite of its casebook label" and considered the book's questions textual "in the sense that Plato's Socratic dialogues constitute a text." Kurland, *supra* note 8, at 907.

With the publication of the pathbreaking *Law and Administration*, legal education now possesses a third type of book. *Law and Administration* is neither casebook nor textbook; it combines cases, doctrinal text, and normative policy in a novel fashion that no American law book has accomplished. The book weaves together case excerpts, rules, and administrative agency sociology to create a dynamic understanding of administrative law as an evolving process. Although *Law and Administration* principally covers the administrative law of the United Kingdom, its numerous comparisons to the law and policy of other nations rely heavily upon American administrative law and jurisprudence scholars. Harlow and Rawlings fashion materials of interest to administrative lawyers everywhere. Most chapters begin with non-case discussions of subtopics of administrative law, then switch to heavily but cogently edited excerpts of case opinions. The cases illustrate the authors' textual treatment and often refute or support the large number of scholarly theories discussed by Harlow and Rawlings. While neither cases nor text predominate, the book's force remains primarily textual. The authors are British law faculty at the London School of Economics, and in the United Kingdom the rule-oriented text and lecture remain the prime educational ingredients.¹⁰ Nonetheless, the presence of numerous case examples throughout *Law and Administration* makes the book a rare combination of clarity and vision, qualities extremely difficult to achieve in a field as diverse as administrative law.

A few illustrations clarify this methodology. In the opening chapters of *Law and Administration*, Harlow and Rawlings examine various comprehensive theories of administrative law. In Chapter One, "Red Light Theories," the authors present and assess the popular theory that administrative law aims at curbing or controlling the state through judicial review of agency abuse.¹¹ Professor Wade exemplifies the Red Light position: "The primary purpose of administrative law . . . is to keep the powers of government within their legal bounds, so as to protect the citizen against their abuse. The powerful engines of authority must be prevented from running amuck."¹² According to the Red Light theorists,¹³

10. See, e.g., Dworkin, *Legal Research*, 102 DAEDALUS, Spring, 1973 at 53-54 (contrasting the practical approach to legal research of the American lawyer to the more insulated, academic approach of his British counterpart); Folsom & Roberts, *The Warwick Story: Being Led Down the Contextual Path of the Law*, 30 J. LEGAL EDUC. 166, 166 (1979) (the British emphasize doctrinal curricula, rule memorization, and the abstract teaching of law from treatises); Twining, *Is your Textbook Really Necessary?*, 11 J. SOC. PUB. TCHRS. L. 81, 81 (1970) (expressing concern over the dominating position occupied by legal textbooks); Wilson & March, *A Second Survey of Legal Education in the United Kingdom*, 13 J. SOC. PUB. TCHRS. L. 241, 284-85 (1975) (British law student taught by formal lectures, tutorial, and written work).

11. C. HARLOW & R. RAWLINGS, *supra* note 1, at 12-34.

12. H. WADE, *ADMINISTRATIVE LAW* 5 (1st ed. 1961).

the courts are the primary source of administrative law. Harlow and Rawlings first explain the theory and dissect it with critical comments of their own and a broad range of other writers, ranging from Dicey to Laski.¹⁴ The chapter then switches focus by offering discussion and quotation from four carefully selected cases that help the reader measure the validity of the Red Light theory and its critics. The authors' case selection incorporates various landmarks in British judicial review of agency abuse, including *Ridge v. Baldwin*¹⁵ and *R. v. Commission for Racial Equality*.¹⁶ As is true with American casebooks, the selection of cases serves multiple goals. In addition to permitting analytical comparison to the Red Light theory, these cases force the reader to probe triggering mechanisms for judicial activism such as the troubled "administrative/judicial" distinction.

The contrasting second chapter, "Green Light Theories," illustrates the authors' policy-oriented approach and their novel methodology. The opening of every chapter contains extremely beneficial transition discussions that dissect prior chapters in order to highlight the precise purpose of the new chapter. For example, at the start of Chapter Two, the authors note that the Red Light theories of Chapter One view "English administrative law as an instrument for the *control* of power and for the protection of individual liberty, the emphasis being on the courts rather than on government and the state often being regarded in light of an intruder."¹⁷ In contrast, "Green light theory finds the 'model of government' more congenial,"¹⁸ views "the function of courts in checking executive action . . . a questionable activity"¹⁹ and considers the role of administrative law "not to act as counterweight to the interventionist state but to facilitate government action."²⁰ According to the Green Light theory, law aids rather than checks agency behavior by helping the agency be procedurally efficient in achieving its substantive goals. Green Light scholars engage in "functionalist studies," such as "interpreting concepts like 'discretion.'"²¹ Some Green Lighters consider courts as

13. Harlow and Rawlings include as Red Light theorists H. Wade, *ADMINISTRATIVE LAW* (5th ed. 1982), S. deSmith, *JUDICIAL REVIEW OF ADMINISTRATIVE ACTION* (1st ed. 1959), and A. Dicey. C. HARLOW & R. RAWLINGS, *supra* note 1, at 5-19. For an excellent review of the most recent editions of the Wade and deSmith books, placing each in the Red Light camp, see Galligan, *Judicial Review and the Textbook Writers*, 2 *OX. J. LEG. STUD.* 257 (1982).

14. C. HARLOW & R. RAWLINGS, *supra* note 1, at 1-25.

15. [1964] AC 40.

16. [1980] 1 WLR 1580.

17. C. HARLOW & R. RAWLINGS, *supra* note 1, at 35 (emphasis in original).

18. *Id.* at 35.

19. *Id.*

20. *Id.* at 39.

21. *Id.* at 41.

“obstacles to progress” and try to “minimize” judicial influence.²² Rather than the “firefighting” judicial role provided by Red Light theory, Green Lighters look attentively to the “firewatching” functions²³ of various legal institutions, including courts. The writers Harlow and Rawlings associate with the Green Light theory are William Robson,²⁴ Felix Cohen,²⁵ the French writer Duguit,²⁶ and J.A.G. Griffith.²⁷ Firewatching is deemed “more efficient” than firefighting.²⁸

Harlow and Rawlings themselves appear to prefer the Green Light position. The tone of the entire book forces this conclusion. They are particularly skeptical of judicial review rules in the excellent chapter entitled “Discretionary Justice?”²⁹ From the chapter’s beginning quotation of Gellhorn and Robinson—“our suspicion [is] that the rules of overruling judicial review have no more substance at the core than a seedless grape”³⁰—to its selection of cases clearly illustrating judicial discretion,³¹ Harlow and Rawlings exhibit by example what they later expressly confess: “There is considerable agreement today among public lawyers that judicial review of discretionary power is itself discretionary in character. The leading authorities cannot sustain the case that judicial review is

22. *Id.*

23. *See id.* at 44 (administrators prefer fire watching to fire fighting because it is more bureaucratically efficient).

24. *See id.* at 35-36 (quoting W. ROBSON, *JUSTICE AND ADMINISTRATIVE LAW* 421 (3d ed. 1951)); *see also* W. ROBSON, *THE GOVERNORS AND THE GOVERNED* (1964); W. ROBSON, *JUSTICE AND ADMINISTRATIVE LAW* (1st ed. 1928); Robson, *Justice and Administrative Law Reconsidered*, 32 *CURRENT LEGAL PROBS.* 107 (1979).

25. *See* C. HARLOW & R. RAWLINGS, *supra* note 1, at 36 (quoting Cohen, *The Problems of a Functional Jurisprudence*, 1 *MOD. L. REV.* 5 (1937)).

26. *See* C. HARLOW & R. RAWLINGS, *supra* note 1, at 37-39 (citing L. DUGUIT, *LAW IN THE MODERN STATE* (H. Laski trans. 1921)).

27. *See* C. HARLOW & R. RAWLINGS, *supra* note 1, at 41-47; *see also* Griffith, *The Political Constitution*, 42 *MOD. L. REV.* 1 (1979); Griffith, *The Crichton Down Affair*, 18 *MOD. L. REV.* 557 (1955); J. GRIFFITH & H. STREET, *PRINCIPLES OF ADMINISTRATIVE LAW* (1st ed. 1952).

28. C. HARLOW & R. RAWLINGS, *supra* note 1, at 44. *See* Jennings, *Courts and Administrative Law—The Experience of English Housing Legislation*, 49 *HARV. L. REV.* 426, 430 (1936). Given the Green Light attention to the role of government, Harlow and Rawlings provide excerpts from and discussion of various scholars who have contributed vision to the purpose of the state, including Jennings, C. HARLOW & R. RAWLINGS, *supra* note 1, at 40 (citing W. JENNINGS, *THE LAW AND THE CONSTITUTION* (1938)); Reich, *id.*, at 48-49 (citing C. REICH, *THE GREENING OF AMERICA* (1970)); Reich, *The New Property*, 73 *YALE L.J.* 733 (1964)); and Schonfeld, *id.*, at 50-51 (citing A. SCHONFELD, *MODERN CAPITALISM* (1965)).

29. C. HARLOW & R. RAWLINGS, *supra* note 1, at 311-47.

30. Gellhorn & Robinson, *Perspectives on Administrative Law*, 75 *COLUM. L. REV.* 771, 780 (1975).

31. *E.g.*, *Roberts v. Hopwood*, [1925] A.C. 578; *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp.*, [1948] 1 K.B. 223; *Bromley LBC v. Greater London Council* [1982] WLR 62; *Padfield v. Minister of Agriculture, Fisheries & Food*, [1968] 2 WLR 924; *Secretary of State for Educ. & Science v. Tameside MBC*, [1976] 3 WLR 641.

based on precise and clearly applicable rules."³² This leaning toward the Green Light—or at least a robust fear of an administrative law shaped mainly by judicial decisions—is revealed early in the book when the authors pronounce that “the trend of modern administrative law is toward controls which are internal and prospective.”³³

In contrast to the short case excerpts of the first chapter, Harlow and Rawlings selected only one case for the Green Light chapter. Nonetheless, inclusion of “the Skytrain Affair”³⁴ works very well and permits the reader to test comprehensively the theory earlier set out. In choosing a complicated “case” having legislative, judicial, bureaucratic, political, and business aspects, the authors have depicted the multifaceted nature of administrative law. Harlow and Rawlings offer an excerpt from Lord Denning’s holding in *Laker Airways, Ltd. v. Department of Trade*³⁵ that the Minister of Transportation’s “guidance” permitting only one air license per route without the consent of British Airways constituted *ultra vires* action,³⁶ together with critical commentary from law journal writers,³⁷ and the actual 1971 legislation.³⁸ Students must ponder the statute’s true meaning: it granted the Civil Aviation Authority (CAA) the task of licensing air routes, set out a procompetitive general policy to create at least one major non-nationalized British airline, and also permitted the politically appointed Minister of Trade the right to influence the CAA by giving the agency “directions”³⁹ or “guidance.”⁴⁰ After Laker Airways received a CAA license to run Skytrain to the United States, the new Labour government caused the administrative process to change course by issuing a new “guidance” that limited to one the number of British airlines serving the same route.⁴¹ By including the “guidance” in the materials Harlow and Rawlings permit readers to analyze the tension between static (and ambiguous) legislation and regulatory shifts accompanying changes of governments. Students see a process far more clearly with this full range of “case” materials than they would using only text or the case itself.⁴²

32. C. HARLOW & R. RAWLINGS, *supra* note 1, at 342.

33. *Id.* at 45.

34. *Id.* at 52-59.

35. [1977] Q.B. 643 (C. A.) (Denning, M.R.).

36. C. HARLOW & R. RAWLINGS, *supra* note 1, at 54-55.

37. *Id.* at 57-59.

38. *Id.* at 53.

39. Civil Aviation Act 1971, c. 75, § 4(3).

40. Civil Aviation Act 1971, c. 75, § 3(1).

41. DEPARTMENT OF TRADE, FUTURE CIVIL AVIATION POLICY, CMD. NO. 6400, (1975/1976).

42. Throughout LAW AND ADMINISTRATION, the selection of “case” materials serves to illustrate the text. The examples are sometimes judicial cases but, given the nature of administrative law

Law and Administration illustrates the pervasive use of discretion by agency personnel. Following the general description of the British ombudsman, the Parliamentary Commissioner for Administration (PCA),⁴³ Chapter Eight discusses ombudsmen's investigations into complaints about the handling of compensation following the Land Compensation Act of 1973,⁴⁴ which permitted compensation for individuals suffering personal upset and distress from forced housing moves.⁴⁵ Like much of modern administrative law in any country, this glimpse into the real world of agency activities depicts much informal discretion that, of course, is perceived as "law" by affected citizens. Judicial review is absent in this graphic display of ombudsman firewatching and agency discretionary reaction. Confronted with thousands of late claims for personal upset and distress, the appropriate local ombudsman attempted a variety of actions ranging from low profile meetings with administrative personnel or compromise offers to drop a particularly embarrassing investigation in return for agency compensation to a claimant to more

and the leaning of the authors to the Green Light position, see Harlow, *Administrative Reaction to Judicial Review*, 1976 PUB. L. 116, 121 (1976) (agencies react to adverse cases by seeking and obtaining legislative change), often consist of dispute studies rather than court opinions. For example, Chapter Six, "Firefighting to Firewatching: The Council on Tribunals," C. HARLOW & R. RAWLINGS, *supra* note 1, at 165-98, contains no judicial decisions. Harlow and Rawlings provide a detailed discussion of the history and experience of the Council's consultative and advisory function over British tribunal procedure. Harlow and Rawlings provide the reader with numerous illustrations of Council on Tribunal actions. *Id.* at 165-71. See generally Council on Tribunals, THE FUNCTIONS OF THE COUNCIL ON TRIBUNALS, CMND. NO. 7805 at 3, 4, 20 & 21-22 (1980) (emphasizing consultative and advisory function over procedure and recommending a more general advisory capacity covering administrative adjudication). See also R. WRAITH & P. HUTCHESON, ADMINISTRATIVE TRIBUNALS 196-221 (1973) (discussing supervision and control by Parliament and the Council on Tribunals); Yardley, *The Functions of the Council on Tribunals*, 1980 J. SOC. WELFARE L. 265, 271 (concluding that the Council has made substantial accomplishments in the field of tribunals). For comparison of the Council on Tribunals to its less influential American equivalent, the Administrative Conference of the United States, see B. SCHWARTZ & H. WADE, LEGAL CONTROL OF GOVERNMENT 174-84 (1972). Readers observe Council firewatching techniques such as questioning an agency response that defeated the Council's jurisdiction and informally discussing the lack of reasons for a particular agency decision with departmental personnel. Alternatively, we see examples of a Council without much overall power acknowledging that "existing arrangements for handling complaints are unsatisfactory," C. HARLOW & R. RAWLINGS, *supra* note 1, at 180, and ponder the sad tale of the Council's 1965-1982 attempt to consolidate various Rent Tribunals through the lame weapon of recommendations. The source of these illustrations is not judicial cases but the Council's own annual report. See COUNCIL ON TRIBUNALS, THE FUNCTIONS OF THE COUNCIL ON TRIBUNALS, CMND. NO. 7805 (1980).

43. C. HARLOW & R. RAWLINGS, *supra* note 1, at 227.

44. Land Compensation Act of 1973, c. 26, § 29 (1).

45. For an account on the history of the ombudsman in the United Kingdom, see F. STACY, THE BRITISH OMBUDSMAN (1971). For discussion of the PCA's interaction with courts and other bodies, see Bradley, *The Role of the Ombudsman in Relation to the Protection of Citizens' Rights*, 39 CAMBRIDGE L.J. 304 (1980).

public responses such as written findings of maladministration.⁴⁶ Harlow and Rawlings also provide the relevant departmental reactions to the various ombudsmen efforts. These discretionary reactions vary considerably, from the simple ignoring of the PCA plea for across-the-board notification, to the more complex written notification to the media concerning the procedure for filing claims. In describing governmental responses to repeated ombudsmen pleas for notice to potential claimants, Harlow and Rawlings paint an unusually clear picture of governmental bodies' use of discretion in everyday decisionmaking.⁴⁷

II. ORGANIZATION

Part I of this review concerned Harlow and Rawlings' weaving of text and case studies into a different style of administrative law book; the focus was on the distinctive methodology of *Law and Administration*. The organization of *Law and Administration* is also unique. While the first twelve chapters are novel in combining cases and text and integrating theory fully into legal principles, their contents are largely old stuff to the readers of administrative law: rulemaking, agency adjudication, judicial review, theories of administrative law, and legal institutions.⁴⁸ However, it is the combination of these rather "normal" chapters with the remaining seven chapters that gives *Law and Administration* a fresh scheme of organization as well as methodology. Chapters thirteen

46. C. HARLOW & R. RAWLINGS, *supra* note 1, at 239-40; see also Parliamentary Commissioner Act 1967, c. 13, § 10(3) (test of maladministration basis of PCA special report to Parliament); *R. v. Local Comm'r for Ad. for the North & East area of England, ex parte Bradford Metropolitan City Council*, [1979] 2 All E.R. 893, 898 (Ct. App.) (Denning, M.R.) ("maladministration" triggers jurisdiction of ombudsman to inquire and is an "open-ended [concept] concerning manner in which a decision is reached or discretion is exercised; but excluding the *merits* of the decision itself or of the discretion itself") (emphasis in original); J. BEATSON & M. MATTHEWS, *ADMINISTRATIVE LAW: CASES AND MATERIALS* 642-43 (1983). An example of maladministration offered in *LAW AND ADMINISTRATION* is the failure to inform an eligible tenant claimant of the possibility of filing a claim for personal upset after a series of dealings between the eligible potential claimant and the governmental body. C. HARLOW & R. RAWLINGS, *supra* note 1, at 234.

47. Throughout this fascinating saga, governmental bodies were caught in a difficult position. The relevant legislation created both substantive liability to persons suffering distress and a deadline for filing claims without any provision for notice to potential claimants. Land Compensation Act of 1973; see C. HARLOW & R. RAWLINGS, *supra* note 1, at 228. Most ombudsmen efforts requested the governmental bodies to provide the notice function for clear reasons of convenience. The ensuing situation constitutes a fairly typical one for a governmental body faced with inadequate legislation: should it rectify the situation by the "rule" of costly across-the-board notice, continue to deny claims filed late because of inadequate notice, or use discretion to decide claims on a selective enforcement case-by-case basis?

48. To be sure, the heavy dose of agency discretion added to these chapters is unusual in major British or American books concerning administrative law. Cf. M. ADLER & A. BRADLEY, *JUSTICE, DISCRETION AND POVERTY* 55-90 (1976) (discussing role of discretion in British benefit programs); Bradley, *Research and Reform in Administrative Law*, 13 J. SOC'Y PUB. TCHRS. L. 35 (1974) (atypical focus on the nature of discretion as employed in administrative agencies).

through nineteen provide a careful look at how administrative bodies operate when engaging in the processes of compensation, planning, and discretionary decisionmaking in the areas of immigration and social welfare. In a very real way, the contents of *Law and Administration* consider administrative law as having legal and administrative content; the first twelve largely procedural chapters detail the impact of law upon agencies, and the last seven chapters describe significant processes characteristic of governmental bodies. The style and tenor of the last seven chapters are that of the law and society movement. American readers will find the focus on the behavior of bureaucrats and processes of administration not unlike the writing of Rabin.⁴⁹

The two parts of the book mesh quite well. The legal foundation provided by the first part of the book allows the reader more fully to understand the subsequent examinations of particular activities of administrative law. Most of modern traditional administrative law regulates agency procedure. Knowledge of procedure is important for what it provides—understanding of the procedures governing agency action—and for what it omits—explanation of important agency policy goals and the broad discretion inevitably present in the actions of government authorities.

Decades of graduates of the standard administrative law course that lacked coverage of non-procedural administrative law have worked on unfamiliar administrative agency issues with little procedural content. The drafting or challenge of Environmental Protection Agency regulations concerning solid waste requires the implementation of particular substantive policies and not the procedural niceties that preoccupy the typical administrative law book. Knowledge of procedure is essential to ensure the successful implementation of agency action, but the hurdles of procedural safeguards are usually overcome readily. Lawyers familiar only with procedure offer employers little help on everyday issues concerning a specific agency.

This analytical distinction between substantive and procedural administrative law has troubled American teachers of the subject. Writing in 1959, Arthur S. Miller urged administrative law teachers to integrate substantive policy into an essentially procedural course.⁵⁰ In 1975 Gellhorn and Robinson called for a reevaluation of the academic contents of

49. See, e.g., R. RABIN, *PERSPECTIVES ON THE ADMINISTRATIVE PROCESS* vii (1979) (stressing administrative process and functions); cf. C. HARLOW & R. RAWLINGS, *supra* note 1, at xxiii (“[W]e do not intend to convey a monolithic vision of a ‘state’ serviced by faceless Weberian bureaucrats.”).

50. See Miller, *Prolegomenon to a Modernized Study of Administrative Law*, 12 J. LEGAL EDUC. 33, 34-35 (1959).

administrative law.⁵¹ They criticized past administrative law courses for focusing on procedure and neglecting the substantive policies of agencies and called for the development of "at least some rudimentary understanding of what the agency does [and] of the substantive policy issues involved."⁵² Two years later, Rabin wrote of the shift in administrative law teaching from judicial review and procedure to examination of the substantive law and policy underlying agency action.⁵³ With the publication of Breyer and Stewart's *Administrative Law and Regulatory Policy*,⁵⁴ American administrative law students and their teachers could use a casebook that melded the substantive and procedural elements of administrative law.⁵⁵ The Breyer and Stewart book merits critical acclaim;⁵⁶ it was the first American administrative law casebook to acknowledge organizationally the deficiency of other casebooks that cover only procedural matters.

Adherents to the old-style administrative law books may proclaim that "substantive" administrative law should be ignored because its content is too specific, expansive, varied, and constantly evolving. Nonetheless, the presence of significant unifying substantive policies implemented by agencies merits coverage in administrative law teaching materials. The anti-monopoly theory of economic regulation⁵⁷ dominates numerous agencies. Numerous other agencies are concerned with external cost regulation. Various benefactory agencies distribute monetary benefits to the underprivileged. The existence of such similarities in policy justifies efforts to include in modern administrative law books "substantive" administrative law principles along with the relevant "legal" procedure. Breyer and Stewart made a major contribution to administrative policy study by beginning the complicated task of categorizing the work of ad-

51. See Gellhorn & Robinson, *supra* note 30, at 771.

52. *Id.* at 786.

53. See R. RABIN, *supra* note 49, at 7-14; Rabin, *Administrative Law in Transition: A Discipline in Search of an Organizing Principle*, 72 NW. U.L. REV. 120, 130, 137 (1977). For similar views from a United Kingdom perspective see McAuslan, *Administrative Law, Collective Consumption and Judicial Policy*, 46 MOD. L. REV. 1, 20 (1983).

54. S. BREYER & R. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* (1979).

55. True, Gellhorn, Book Review, 93 HARV. L. REV. 1384, 1388-89 (1980), rightly points out that the Breyer and Stewart work is not completely "substantive"; it deals with much of the contents of its "procedural" competitors and employs an organization making substantive policy subservient to traditional administrative procedure.

56. For generally positive reviews of *ADMINISTRATIVE LAW AND REGULATORY POLICY*, see Estreicher, Book Review, 9 HOFSTRA L. REV. 315 (1980); Gellhorn, *supra* note 55.

57. See generally R. POSNER, *ECONOMIC ANALYSIS OF LAW* 251-70 (2d ed. 1977) (public utilities and common carriers are regulated to control profit, entry, and price structure); Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT SCI. 335, 336, 350-56 (1974) (exploring and suggesting modifications to the anti-monopoly and public interest theories of agency behavior).

ministrative agencies.⁵⁸

The organization and contents of *Law and Administration* should satisfy proponents of the "substantive" administrative law style and, at the same time, intrigue the more numerous administrative law teachers wedded to a basic course emphasizing procedure. Unlike Breyer and Stewart, Harlow and Rawlings do not distinguish between procedure and substance. Yet they adopt an analytical scheme of organization as fresh as that begun by Breyer and Stewart. By including careful examination of the administrative process, Harlow and Rawlings reject the one-dimensional focus characteristic of the more doctrinaire works of deSmith,⁵⁹ Wade⁶⁰ or Craig.⁶¹

Because chapters thirteen through nineteen emphasize the actual process work of agency officials, *Law and Administration* necessarily depicts some aspects of substantive law. For example, Chapter Fourteen, "Planning and Participation,"⁶² specifically covers planning as "an output function of government comparable to rulemaking or rule-application."⁶³ The chapter also focuses on the control of development through local plans and broader, more central control mechanisms of Cabinet or Minister direction and deals extensively with the form and effect of citizen participation in planning decisions.⁶⁴ The emphasis upon the process of administration is, accordingly, presented in tandem with the exercise of substantive planning law.

The concluding two chapters focus on welfare or "social assistance." These chapters critically evaluate substantive policies⁶⁵ and, at the same time, probe the use of agency discretion in administering relatively vague legislation. Not surprisingly, Harlow and Rawlings uncover the presence of discretion "seen by administrators to be inefficient," and opposed by welfare attorneys. Yet they show that some amount of discretion may be

58. ADMINISTRATIVE LAW AND REGULATORY POLICY devises five modes of regulating businesses; natural monopoly regulation through cost of service ratemaking; allocating governmental largesse through use of a "public interest" yardstick; standard setting; historical price regulation; and licensing. S. BREYER & R. STEWART, *supra* note 54, at 18. Breyer subsequently refined and explained more fully these regulatory tools in S. BREYER, REGULATION AND ITS REFORM 36-155 (1982).

59. S. DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION (J. Evans 4th ed. 1980).

60. H. WADE, ADMINISTRATIVE LAW (5th ed. 1982).

61. P. CRAIG, ADMINISTRATIVE LAW (1983).

62. C. HARLOW & R. RAWLINGS, *supra* note 1, at 419-56.

63. *Id.* at 419.

64. *Id.* at 437-56.

65. LAW AND ADMINISTRATION describes British social assistance as "designed to provide enough money to make ends meet without difficulty." C. HARLOW & R. RAWLINGS, *supra* note 1, at 578 (quoting R. LISTER, SUPPLEMENTARY BENEFIT RIGHTS 17 (1974)).

essential to provide a measure of "discretionary justice"⁶⁶ and avoid an inflexible, overly legalistic system. As is true throughout *Law and Administration*, these chapters seek to determine if enough structured discretion exists to permit a humane and flexible administrative scheme that is able to maneuver through flexible rules yet is protected against excess discretion.⁶⁷ The integration of discretion into this and prior chapters provides consistent reminders of the often discretionary fashion in which administrators implement theory and forces the reader to assess the positive as well as the negative aspects of discretion.

III. CRITIQUE

It is extremely difficult to be critical of so fine a book as *Law and Administration*. Already termed "the most stimulating, searching and significant publication on administrative law for many years,"⁶⁸ the book represents a scholarly triumph of the first rank, particularly in the methodology and scheme of organization. *Law and Administration* seems the most thoughtful treatment of British administrative law published in some time.

A few notes of cautionary doubt, however, are merited. First, it is unclear exactly how administrative teachers and lawyers will use *Law and Administration*. Academics could surely assign the book for an elective course or seminar in administrative law designed primarily for advanced students. Indeed, *Law and Administration* contains enough general theory and traditional treatment of administrative law to be entirely appropriate for use in a seminar in an American law school. Both novice and more advanced students will surely profit from using *Law and Administration*. Teachers desirous of using the book for a first course in Administrative Law may want to think twice before assigning the book. While it makes excellent use of cases to develop and exemplify text, it is not a casebook attempting to make available to students the bread-and-butter materials relating to the essential subtopics of administrative law.⁶⁹ At the same time, it is not a textbook that spells out administra-

66. C. HARLOW & R. RAWLINGS, *supra* note 1, at 588-89. See also Titmuss, *Welfare 'Rights,' Law and Discretion*, 42 POL. Q. 113, 126-27 (1971).

67. LAW AND ADMINISTRATION explores "structuring discretion" at length. C. HARLOW & R. RAWLINGS, *supra* note 1, at 134-55. These pages probe the notion of using rulemaking to supply administrators with helpful "guidelines" or "factors" to be systematically employed in the exercise of discretion. The example of the Oregon Parole Board's guidelines illustrates "structured discretion." *Id.* at 135-42.

68. Hutchinson, Book Review, 134 NEW L.J. 770, 771 (1984).

69. British professors seeking such a book might do better to assign the recent Beatson and Matthews casebook. See J. BEATSON & M. MATTHEWS, *ADMINISTRATIVE LAW: CASES AND MATERIALS* (1983).

tive law rules in a coherent fashion. Doctrine, while present throughout *Law and Administration*, is not its focus; this is a book of theories and processes, not rules. These pragmatic cautions do not deprecate the overall worth of the piece, and the book could be used as the primary assigned reading by a professor willing to rework class lectures around it.

Second, like most books, this one has a few internal problems that, while not at all detracting from the major influence the book should have, frustrate the readers and merit mtpicking. In spots the authors cite authority without offering citation.⁷⁰ Some of the few footnotes relegated to the end of the book seem digressive and not directly supportive of text.⁷¹ Also, a number of seemingly critical points of policy are articulated and then, surprisingly, handled too briefly in an underdeveloped fashion. For example, following their rich and detailed elaboration of the Red and Green Light theories, Harlow and Rawlings present the views of those writers associated with an intermediate non-polarized position seeking a balanced role for courts and administration.⁷² The few pages devoted to this fertile area of research are fascinating reading, but frustrating for one seeking the complete theoretical formulation clearly sought by the authors. Similarly, the short subsection "Retreat from Rules?" concluding the chapter on rulemaking and discretion explores the limits of rules because "people regulate their behaviour by reference to group ethos and the approval of their fellows rather than by 'the law.'" ⁷³ Harlow and Rawlings whet readers' appetites for a detailed investigation of this meaty subject by quoting from sociologist Albert Reiss and explaining how agency personnel can sometimes play games as well with rules as with discretion.⁷⁴ Three pages of such treatment, however, hardly scratch the surface of possible sociological solutions to the dilemma of achieving an optimal balance of uniform fairness of rules and the individualized treatment from discretion.

70. See C. HARLOW & R. RAWLINGS, *supra* note 1, at 56, 101.

71. See, e.g., *id.* at 649 (note 10 to "Chapter 2: Green Light theories"). The text reference to note 10 refers to the consensus between Green and Red Light theorists about the need for a more "sophisticated system of administrative law." *Id.* at 47. Note 10, rather than supporting the text or providing examples of this consensus, takes the readers on an interesting detour to authorities writing "on the history of concern for the individual inside the Labour Party." *Id.* at 649; see also *id.* at 101 (textual statement that in ouster cases certiorari is only available for jurisdictional error followed by no authority).

72. *Id.* at 47-51. Harlow and Rawlings include this scholarship in the middle ground: L. SCARMAN, *ENGLISH LAW—THE NEW DIMENSION* (1974); D. YARDLEY, *PRINCIPLES OF ADMINISTRATIVE LAW* (1981); Bradley, Book Review, 1 *LEGAL STUD.* 329 (1981); Winkler, *Law, State and Economy: The Industry Act 1975 in Context*, 2 *BRIT. J. LAW & SOC'Y*, 103 (1975).

73. C. HARLOW & R. RAWLINGS, *supra* note 1, at 162.

74. *Id.* at 162-64 (quoting Reiss, Book Review, 68 *MICH. L. REV.* 789, 794-95 (1970) (reviewing K. DAVIS, *DISCRETIONARY JUSTICE* (1969))).

Third, for a book that consistently offers readers up-to-date cases and jurisprudence, *Law and Administration* surprisingly omits consideration of one of the most important recent developments in administrative theory—privatisation or deregulation. The fact that governments in Britain and the United States have implemented deregulation schemes with fervor⁷⁵ strangely receives little attention from Harlow and Rawlings. There exists a rich and varied literature on deregulation theory.⁷⁶ Breyer's influential book *Regulation and Its Reform*⁷⁷ sets out a comprehensive analytic scheme yielding an appropriate regulatory (or deregulatory) mechanism for various public problems.

Detailed treatment of privatisation or deregulation would have enhanced the critical theoretical foundation of *Law and Administration's* opening chapters. The process of privatisation or deregulation is primarily legislative and policy-based in nature, not judicial. Given its positivist nature, including privatisation could have enhanced the Green Light theory. Furthermore, introduction of a detailed section on privatisation would have reinforced the treatment of discretion that Harlow and Rawlings include in most chapters of *Law and Administration*. To the extent that an industry is deregulated it may be that some portion of agency discretion is eliminated. Yet, if an agency is delegated the task of deciding the appropriate type of deregulatory response, it may be assigned a significant measure of discretion. The question currently confronting policymakers and ministers focuses on the converse issue: what

75. See, e.g., Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified throughout 49 U.S.C. (1982)); Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (codified throughout Titles 11, 45 & 49 U.S.C. (1982)); British Aerospace Act 1980, c. 26 (privatizing aircraft manufacturer); Telecommunications Act 1984, c. 12 (privatizing formerly-nationalized telecommunications conglomerate); *Competition is the spur*, The Sunday Times (London), July 1, 1984, at 16, col. 1 (editorial summarizing Thatcher administration policy of privatisation, or selling to public shares of formerly nationalized industries, and outlining forthcoming challenges); ABA COMMISSION ON LAW & THE ECONOMY, FEDERAL REGULATION: ROADS TO REFORM 25 (1979) (urging reliance on competitive market rather than regulation where possible). Recent British privatisation efforts have varied from the completed sales of formerly nationalized British Aerospace, British ports, Britoil, Enterprise Oil, British Petroleum, and National Freight to the planned sales of British Telecom and British Airways.

76. See e.g., K. HAYWARD, GOVERNMENT AND BRITISH AEROSPACE: A CASE STUDY IN POSTWAR TECHNOLOGY POLICY (1983); J. LEGRAND & R. ROBINSON, PRIVATISATION AND THE WELFARE STATE (1984); R. LITAN & W. NORDHAUS, REFORMING FEDERAL REGULATION (1983); R. NOLL & B. OWEN, THE POLITICAL ECONOMY OF DEREGULATION: INTEREST GROUPS IN THE REGULATORY PROCESS (1983); A. OGUS & C. VELJONOVSKI, READINGS IN THE ECONOMICS OF LAW AND REGULATION 233-51 (1984); W. ROBSON, NATIONALIZED INDUSTRY AND PUBLIC OWNERSHIP (2d ed. 1962); Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives and Reform*, 92 HARV. L. REV. 547 (1979); Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT SCI. 335 (1974); Stewart, *Regulation, Innovation and Administrative Law: A Conceptual Framework*, 69 CALIF. L. REV. 1256 (1981).

77. S. BREYER, REGULATION AND ITS REFORM (1982).

is the appropriate amount of discretion to be exercised when achieving and implementing deregulation or privatisation?⁷⁸ True, Harlow and Rawlings do provide readers a tidbit on the nature of economic regulation by briefly discussing and quoting from the "corporate state" writings of Winkler and Reich.⁷⁹ This, however, is far from the detailed treatment on privatisation the book could have used. Failure to cover this important set of fashionable issues marks a missed opportunity.

Lastly, it is possible that some readers will fault Harlow and Rawlings' treatment of positivism. The unrelenting nature of their criticism⁸⁰ makes the authors appear to be particularly skeptical of positive law and perhaps equally skeptical of existing normative doctrine relating to administrative law. Throughout *Law and Administration* Harlow and Rawlings express cynicism regarding the efficacy of specific rules of judicial review, cast doubt on procedural reform as a means to improve administrative law, and criticize those supporting contrary normative theories. They are quick to condemn a narrow version of positivism that unrealistically separates positive law from any political or social context.⁸¹

Nonetheless, it would be inaccurate to consider *Law and Administration* a nihilist work critical of all existing positivist doctrine and normative scholarship in administrative law. Harlow and Rawlings display hope that law can aid the ongoing process of administration by providing a means to help administrators in the effective implementation of their varied tasks. This simple normative thought relates to the Green Light position thoughtfully set out at the beginning of *Law and Administration* and convincingly reiterated throughout the book. While the authors never expressly call for wholesale adoption of the Green Light theory, they seem optimistic that some accommodation between legal principles and an appropriate amount of administrative and judicial discretion can advance the present state of administrative law. They clearly advocate "structuring discretion"⁸² and appreciate that "rules are introduced to

78. Cf. *Motor Vehicle Mfrs. Ass'n v. State Farm Ins. Co.*, 463 U.S. 29, 41 (1983) (agency seeking to rescind rule must rationally explain reasons for change); Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393 (1981) (elaborating two models of policymaking).

79. C. HARLOW & R. RAWLINGS, *supra* note 1, at 50-51 (quoting Winkler, *Law, State and Economy: The Industry Act 1975 in Context*, 2 BRIT. J. L. & SOC'Y 103, 117-18 (1975) and C. REICH, *supra* note 28, at 117-18).

80. Hutchinson's generally positive review of LAW AND ADMINISTRATION faulted its "lack of any obvious constructive perspective" and termed it "largely a critical and comprehensive assault on administrative law and scholarship." Hutchinson, *supra* note 68, at 771.

81. See C. HARLOW & R. RAWLINGS, *supra* note 1, at 4-6 (citing and quoting from P. NONET & D. SELZNICK, *LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW* 57 (1978)).

82. C. HARLOW & R. RAWLINGS, *supra* note 1, at 134-44 (citing K. DAVIS, *DISCRETIONARY JUSTICE* (1971)); R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 31 (1977).

eliminate arbitrariness,"⁸³ yet understand that some administrative discretion is essential "in order to cater for the needs of the individual"⁸⁴ and provide a workable system of administration.⁸⁵ Rules will not regularly resolve the toughest decisions faced by administrators in the trenches of administrative law. Conversely, rules aid the fair, equitable, and similar solutions of more numerous easy decisions.

Harlow and Rawlings consistently provide a scholarly jurisprudential foundation for the law-discretion dilemma so central to understanding and improving administrative law. They contrast Dworkin's notion of "weak discretion"⁸⁶ with Jowell's conception of discretion that varies from "strong" to weak.⁸⁷ In addition to clarifying judicial review of administrative action, these jurisprudential discussions help the reader appreciate the broad scope inherent in adoption of a system relying on administrative discretion.

Harlow and Rawlings' introduction of a heavy dose of jurisprudence in a major study of administrative law is a significant accomplishment. Administrative law represents a burgeoning body of positive law through the continually increasing promulgation of administrative rules. At the same time, administrative law includes elastic notions of judicial review⁸⁸ and huge amounts of bureaucratic discretion. The ingredients of this body of law are ideal for further jurisprudential attention.

IV. CONCLUSION

Articulation of a few criticisms fails to detract from the overall luster of *Law and Administration*. The publisher lauds its own *Law in Context* series, of which *Law and Administration* is the latest addition, and boldly refers to the series as "a new departure in scholarly legal writing" originating in "a desire to broaden the study of law, using material from other social sciences, from business studies and from any other discipline that helps to explain the operation *in practice* of the subject under discussion."⁸⁹ I confess to picking up *Law and Administration* with a

83. C. HARLOW & R. RAWLINGS, *supra* note 1, at 145.

84. *Id.*

85. *See id.* at 130-34.

86. *Id.* at 132 (citing R. DWORKIN, *supra* note 82, at 31-32).

87. *Id.* at 133 (citing Jowell, *The Legal Control of Administrative Discretion*, 1973 *PUB. LAW* 178, 179-80).

88. Harlow and Rawlings discuss ambiguous rulings of judicial review in Chapter 11, entitled "Discretionary Justice?" C. HARLOW & R. RAWLINGS, *supra* note 1, at 310-47 (citing Gellhorn & Robinson, *supra* note 30, at 780 ("rules governing judicial review have no more substance at the core than a seedless grape").

89. *LAW AND ADMINISTRATION*, rear cover (emphasis in original). Another admirable book in this series that mixes cases and text, although not to the degree of *LAW AND ADMINISTRATION*, is P. MCAUSLAN, *LAW AND PLANNING* (1975).

healthy skepticism after chancing on this promotional polemic. Few books could deliver on this brash sales pitch. *Law and Administration* satisfies its publisher's assertions with panache.

