

REVIEWS

FULL RECOVERY OR STAGNATION? By Alvin H. Hansen. New York: W. W. Norton & Co., 1938. Pp. 345. \$3.50.

THE ECONOMICS OF LABOR. By Harry A. Millis and Royal E. Montgomery. New York: McGraw-Hill Book Co., Inc., 1938. Volume I, Labor's Progress and Some Basic Labor Problems. Pp. xvi + 584. \$3.75. Volume II, Labor's Risk and Social Insurance. Pp. xii + 453. \$3.00.

If YOU can forget for a while the melodrama of local and international politics, which makes it unlikely that the sweet reasonableness of professors will prevail, Professor Hansen's notable collection of recent papers is reassuring reading. And even if you are a complete pessimist about the shape of things to come, you should find a wistful pleasure in his picture of what might be, or what might have been, in the democratic world. For *Full Recovery or Stagnation?* belongs with and substantially supplements the recent barrage of tracts defending the faiths of democracy.¹ In most of those books the political or moral argument for democracy is weakened by a vague fatalism about the future of the economic system. Some lack economic analysis altogether; others accept or advance a variant of the proposition that the capitalist economy as we have known it is dead, and must be replaced by a regime of "planning." In either case the pamphleteers treat the economic side of the problem of democracy briefly and ambiguously, some without much concern for the more authoritarian implications of the slogan of "planning." But Hansen considers the economics of capitalism with persuasive concreteness.² What he says is that our brand of capitalism has not necessarily met its day of judgment:³ it follows that praise of political democracy is not yet idle talk.

The first section of *Full Recovery or Stagnation?* criticizes recent formulations of trade cycle theory, and gives Hansen a chance to state his own view of the problem, as background for the applied economics of the rest of the book. His analysis is an effective and critical restatement of conclusions which represent the upshot of recent work in the field.

"The essential characteristic of the business cycle," he says, is fluctuation in the output of durable goods.⁴ The purchase of durable goods has been financed in large part by the sale of securities, or by the creation of corporate surpluses and of reserves for depreciation and obsolescence. Many factors affect the output of capital goods, by influencing both the attractiveness of

1. See, e.g., AGAR, *THE PURSUIT OF HAPPINESS*; COUNTS, *THE PROSPECTS OF AMERICAN DEMOCRACY*; COYLE, *ROADS TO A NEW AMERICA*; LERNER, *IT IS LATER THAN YOU THINK*; MANN, *THE COMING VICTORY OF DEMOCRACY*; RAPPAHD, *THE CRISIS OF DEMOCRACY*.

2. Substantially the same economic point of view is forcefully put in ROGERS' *CAPITALISM IN CRISIS*, and *AN ECONOMIC PROGRAM FOR AMERICAN DEMOCRACY*, by GILBERT and others.

3. P. 328.

4. The term is used by Hansen, and in this review, as equivalent of the word "capital." Pp. 126-127; 268-269.

capital expenditure, and the availability of funds with which to finance it. Expected conditions of cost and price measure the profit that can be anticipated from the use of new durable goods and thus the demand for investible funds. These factors also influence the availability of funds for capital expenditure, by altering the propensity of the public to save, and prevailing rates of interest. Banking and financial laws and institutions, of course, also affect the availability of funds for investment, by controlling the machinery of banking and of security flotation, and the ability of corporations to set aside funds for capital expenditure. There seems to be nothing mystical or automatic about fluctuations in expenditure for capital goods; both booms and slumps are caused, aggravated, and cured by governmental policy as well as by business action. The first article of Professor Hansen's politics is that in order to minimize unemployment and to offset fluctuations in trade government must act to maintain and increase the amount of capital expenditure made by the community.

Of all the techniques available to a democratic government for fulfilling such a policy, Professor Hansen finds government spending the most practical and the most promising. In effect he recommends that the government never balance its budget. The pill is sweetened a little. A separate budget should be established for the investment activities of the government, perhaps on the Swedish model.⁵ But in the end people must recognize the fact that investment expenditure by the government, whether called pump-priming or a less alarming name, is the only effective weapon against depressions available to capitalist and democratic governments. Furthermore, such expenditure, or a modification of it, will probably continue on a large scale in periods of recovery, as a device for insuring and regularizing the expansion of physical output that measures welfare.

The quality of our recent economic history makes a permanent expansion of investment expenditure by the government almost inevitable, if full recovery is ever to be achieved and maintained. Pump-priming undertaken by business interests, and privately financed, has almost disappeared. But full employment has always depended on pump-priming. In the nineteenth century, booms followed the speculative expenditure of private funds on railway building, subsidized by federal land grants and other gratuities. High levels of employment during the twenties were supported, as Hansen points out,⁶ by great outlays for residential building, for public works and for foreign trade, as well as by the creation of several new industries. This decade, however, has found nothing but the government deficit to replace the more familiar and respectable pump-priming of earlier periods. Business expenditure for capital goods rose during the recovery of 1937, it is true, in proportion to the general rise in income. But such careful expenditure for replacement and expansion followed the rise in income, and did not lead it. Mass expenditure is needed to increase the national income sharply. So far in this decade such expenditure has been made only via government spending for relief, for armaments or for public works.

5. Pp. 324-325. See Myrdal, *That Wonderful Swedish Budget* (Sept. 1938) *FORTUNE* 65; Wigforss, *Financial Policy During Depression and Boom* (May, 1938) *ANNALS* 26.

6. Ch. xviii, "Pump-Priming," *New and Old*, p. 290 ff.

If any lesson of the Great Depression is clear, it is that expenditure by the government for houses or hospitals is not less useful or less stimulating to business than comparable expenditure by private groups. Hansen emphasizes the importance of seeing to it that government funds are well spent, on projects which seem worth what they cost. Government expenditure of this type is more than a device for engineering recovery, especially if it is designed to stimulate spending by business; it adds directly to the real income of the community, as well as to its money income. It serves to increase mass consumption and mass welfare.

Of course the need for investment undertaken at the initiative of government would be reduced if investment by business would or could revive on a sufficient scale. But both luck and the structure of economic institutions seem likely to oppose any great revival of private pump-priming in the near future. Important capital consuming inventions have not appeared in fifteen years or more. With the end of immigration and the spread of birth control, the rate of population growth has declined sharply. Foreign trade, despite the energy and relative success of Secretary Hull, offers no outlet for investment on the scale required to support a boom. And the ossification of the price system tends to restrict even the amount of investment that business makes in response to government spending. Some of these factors of inflexibility and stagnation can be opposed directly, others must be offset by compensatory governmental action, if full recovery is to be achieved.

A program of investment, whether sponsored by the government or by private groups, is not enough to assure full recovery. Though full recovery should be easier to reach in a period of expansion supported by government expenditure, a successful program of recovery, Professor Hansen argues, requires that something be done about the decline of competition, the force for stagnation more nearly susceptible of control than the others. "The great danger in an enlarged program of public investment is that we are likely to rely too exclusively on it alone. If we are not constantly awake to the urgent necessity of achieving a balance in the cost-price-income structure, we shall greatly intensify our problem by choking off otherwise available private investment outlets . . . Above all it is of the utmost importance to break through the frozen structure of administered prices and preferential inter-corporate reciprocity (so inimical to price competition) in order that technical progress may have free play to tap an ever-widening circle of consumer demand, and thereby enable us to maintain a workable economy.⁷ . . . If private capitalism cannot solve its price problem, it will inevitably dig its own grave."⁸ The conclusion is strongly urged that the problem must be solved by making prices lower and more flexible, with a view to forcing costs as low as possible. Prices in general, he contends, should be responsive to competition, wages to the control of a mature system of collective bargaining, interest charges to direct action by governmental bodies.⁹

Hansen does not expressly indicate his choice of sides in the controversy about how to achieve price flexibility. In view of his position at large,

7. Pp. 327-328.

8. P. 301.

9. Pp. 286-287, 328.

however, there is little doubt that he would probably vote with most of his generation of economists for a price policy of modernized, imaginative and energetic trust-busting.¹⁰ Against this view that the best available policy for competition is to make it as competitive as possible, Burns and others contend that "attempts to restore competitive behavior by law offer no prospect for dealing with the developing element of monopolistic control in industry."¹¹ The conflict of counsel before the Temporary Economic Committee dramatizes the issue. Definite answers, if they are ever to be made, require both further study and further experiments in reforming and enforcing the laws and legal arrangements which affect competition. Meanwhile Hansen puts the case for lowered costs, and, by implication at least, for more competition.

Hansen's treatment of the price problem is the least developed part of his argument. His emphasis is on the central importance of monetary policy and government expenditure for bringing about and maintaining recovery. Wage policy, tariff policy, price policy, these and other branches of an economic program are in his view of vital importance, but to supplement and effectuate—and not to oppose—a primary policy of direct expansion. Thus he devotes two lucid chapters to the administration of social security funds, concluding that the present federal machinery operates as a deflationary drag on the economic system. He analyzes "the utter fallacy"¹² of the philosophy behind the N.R.A., and considers the government's disastrous monetary policy of 1937, which probably initiated and certainly prolonged the recession of 1937–1938. But in the argument of his book these matters are in a sense collateral. He is concerned with the ultimate question which economists must face—perhaps the only question worth asking them, in this tenth year of depression: can anything be done to make capitalist democracy work? His answer is forceful and affirmative, and it represents the view of a wide bloc of economic opinion. The key to it is an emphasis on the crucial importance of direct action to put men to work creating and accumulating capital resources.¹³

The work of Millis and Montgomery deals with the same problems of economic welfare, but in a different perspective, on a different scale, and with less striking success. Their two big, closely printed volumes purport to be comprehensive surveys of most of the current literature bearing on a great variety of labor problems. They have the heavy-footed quality of textbooks,

10. See ROGERS, *CAPITALISM IN CRISIS* (1938) ch. 2; Mason, Slichter, Gideonse, and others, in *Monopoly and Competition in Industry and Labor* (1939) 18 *ACAD. OF POL. SCI. PROC.* 123 ff.; Watkins, *The Monopoly Investigation* (1939) 28 *YALE REV.* 323; Fetter, *Planning for Totalitarian Monopoly* (1937) 45 *J. POL. ECON.* 95.

11. BURNS, *THE DECLINE OF COMPETITION* (1936) 526; cf. DENNISON and GALBRAITH, *MODERN COMPETITION AND BUSINESS POLICY* (1938) Pp. 79–85.

12. P. 287.

13. Hansen sees no *economic* reason for general pessimism about the future: "It is a mistake to assume, as some have, that public investment necessarily foreshadows the doom of private enterprise. Indeed, if reasonably full employment can, by these and other measures, be maintained, private investment outlets, while relatively smaller in relation to the total economy, may well grow absolutely. We may thus learn that there is nothing incompatible between the survival of private capitalism and a generous admixture of public investment." P. 329.

and something of the textbook's fear of exposing definite opinions, but there can be no doubt of their utility in collecting and reviewing a considerable share of the recent work about labor done by economists, statisticians and lawyers.

The plan of Volume I, primarily the responsibility of Professor Montgomery, is to consider whether the purchasing power of worker incomes has decreased or increased in the nineteenth and twentieth centuries; how workers have fared in comparison with other economic classes; why changes occur in real wages, and in the shares of the classes in the national income; and, finally, whether the prevailing and prospective standard of wages is socially adequate.¹⁴

The premise of Hansen's book is that important progress in the elimination of poverty can come only through increases in output—full and steady employment of resources, a high rate of capital accumulation, low prices and costs. Hansen concludes that unions function as factors of stability in the social and economic system,¹⁵ not with notable success as agencies for substantially improving the condition of the working classes. Insofar as wages are high and rigid, he finds them as inimical to the expansion of output as high prices for commodities.

At a less critical and sophisticated level, Professor Montgomery's book represents the same point of view and advances the same conclusion. During the last century there has been, he shows, a steady increase in the purchasing power of the working classes. He finds the main factor in that advance to be the increasing productivity of labor, that is, the increased ability of labor to produce goods and services. Such increases in the capacity of labor to produce result primarily from the increased use of capital goods in the processes of production.¹⁶

If the accumulation of capital is the major force operating to increase the real income of the community—of labor and of other groups as well—what is the effect of unionism and wage regulation on the welfare of the working classes? The authors defer to their forthcoming third volume a full inquiry into the economics of unionism. They will there consider the effect of unionism on the size of the national income, and the efficacy of union organization as a device for increasing labor's share of the national income. But in Professor Montgomery's discussion of wage theory, in Volume I, he takes the view that at most periods of the trade cycle increases in money wages reduce employment.¹⁷ And he necessarily agrees with Douglas' conclusion¹⁸ that unionism can increase the reward of labor, and has so increased labor's reward, to a narrowly limited extent, and then only in the early stages of a union's history, although it may later serve to preserve existing wage rates against reduction. Wage regulation, he finds, may be defended as a device for eliminating sub-standard wages.¹⁹ His position as to the desirability and effectiveness of wage

14. *THE ECONOMICS OF LABOR*, Vol. I, pp. 41-43.

15. "A country that does not have well established industrial relations based on responsible unionism is sitting on a volcano." P. 328.

16. Vol. I, pp. 206 ff.

17. Vol. I, pp. 181-198; p. 507.

18. Vol. I, pp. 212 ff; and see p. 194, n. 1.

19. Vol. I, Ch. vi, and p. 375.

regulation in general is somewhat obscure, but it seems fair to read the chapter as conceding the weaknesses of the doctrine that higher wages expand employment by increasing "purchasing power."²⁰

The second volume, written primarily by Professor Millis, seems less adequate and less imaginative than the first. Its topic is labor's risks and social insurance, and it starts with a survey of unemployment, as the chief of such risks. The analysis of what causes unemployment, especially the three meager pages on trade cycles, is a good deal more blurred, and less up-to-date, than the economic passages of Volume I. Professor Millis considers (and strongly approves) two classes of remedy for unemployment—public works and relief spending on the one hand, and social insurance on the other.²¹

Professor Millis' discussion of social insurance laws, both in the United States and abroad, seems factually accurate, and reviews encyclopedically the arguments for and against most of the devices used in such insurance. But the conclusions reached will be attacked in many particulars, especially in their reference to the economic problems implicit in such legislation and its administration. The authors accept, for example, the payroll tax as the principal method of financing unemployment and old age insurance. They disapprove of substantial contributions by the government either for old age or for unemployment insurance, but favor such contributions for health insurance. And their analysis of the problem of reserves is limited in scope and inconclusive.

Social insurance has become a major concern of government, and a major problem of economic policy. Until our system of social insurance is adequately organized, financed and administered the job of planning and reforming the social insurance laws must actively worry lawyers, economists and public officials. Professor Millis' volume collects some of the materials which anyone approaching the job needs for background, but it breaks no path toward a solution.

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GOVERNMENT CORPORATIONS AND FEDERAL FUNDS. By John McDiarmid. Introduction by Marshall E. Dimock. Chicago: The University of Chicago Press. 1938. Pp. xx, 244. \$2.50.

WHEN government enters the field of commercial enterprise and statesmen choose as an administrative vehicle the corporate form of organization, conflicting desiderata produce grave problems for the student and technician of public administration. Public *enterprise* is inherently different from other types of government activity. If the use of the corporation has any justification, it lies in the freedom of its directors, in matters of detailed policy, organization, personnel, and finance, to conduct its operations with that flexibility and resourcefulness which are expected of the best private entrepreneurs. Yet

20. See esp. pp. 182, n. 1, 375, 507-508. Cf. pp. 356-358. See note 12, *supra*.

21. The discussion extends to workmen's compensation and health insurance as well as to unemployment and old age insurance.

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public enterprise is also inherently different from its private counterpart. It is a product of public policy and must remain subject to the guidance and control of those who are responsible for formulating public policy. Within the framework of our federal system, public corporations must observe constitutional limitations on delegation of legislative power. They deal with public funds and must handle them with care. They are expected to maintain minimum personnel standards. Above all, they must function in the light of day and be accountable to their parent, the government (whether or not it is the sole or majority shareholder, and hence the legal owner), to a far greater degree than most large business corporations are accountable to their stockholders. Control has a two-fold aspect: it must prevent financial corruption and administrative malfeasance, and it must lay down and supervise the broad lines of policy.

Desirability of freedom to be enterprising does not eliminate the obligation to remain public. A balance must somewhere be struck between these objectives. It is evident that government activity of this nature, if it is to be efficient, warrants greater freedom than traditional administrative agencies. Successive Presidents and Congresses have recognized this need by establishing since the turn of the century almost two score public corporations for carrying on semi-commercial or commercial operations, and their action has been paralleled in Great Britain and the British Dominions and on the European continent in a host of cases.¹ The precise limits of freedom in each case, however, and the machinery of control, have been determined largely by accident. It is only in very recent years that students, here and abroad, have sought to draw from the large and growing experience some rational guide to administrative organization and procedure for government commercial activity.

To this search for administrative principle Mr. McDiarmid has made a valuable contribution. Under the guidance of Professor Dimock (now of the Department of Labor), whose case studies on the Panama Railroad Company and Inland Waterways Corporation have made him a leading authority in the field, he has focussed his attention on a single and central aspect of the problem, the conditions surrounding the use of government funds by federal business corporations. His book is well organized. After a chapter on the broad issue of financial freedom and a sketch of the origins, organization, and powers of each of the twentieth century specimens, he treats of sources of funds in general and then deals in turn with the group of agencies supervised by the Farm Credit Administration, with the Tennessee Valley Authority, and with the Reconstruction Finance Corporation. Other New Deal corporations are handled more briefly. The book's usefulness is enhanced by a short summary at the close of each chapter.

The core of this study is the problem of financial control to prevent corruption. Mr. McDiarmid is at his best when dealing with the often difficult relationships between the various corporations and the General Accounting Office under the leadership of General McCarl. He brings together and unravels a mass of complex material from published and unpublished decisions of the Comptroller-General and from cumbrous and ambiguous statutes and execu-

1. It is interesting to note that National Socialist Germany and the Labor Government in New Zealand are almost alone in restoring to direct departmental management public businesses previously operated by government corporations.

tive orders, resolving them into an orderly pattern as lucid as the material permits. His best chapter, on the T.V.A., tells in hitherto unrevealed detail of the historic quarrel between the authority and General McCarl's office. It is a tale of fundamental conflict between men anxious to show that public enterprise can successfully "go places and do things" and a man to whom the rigid rules of accountability, excellent in their place to prevent speculation by unhurried bureaucrats in old-established routines, must also be applicable to the Authority—"applicable first because they are applicable, and applicable secondly because they are good and wholesome." The lesson is amply proved by Mr. McDiarmid—that some alternative control mechanism must be sought. His conclusions in this connection deserve serious consideration. They favor continuous internal preaudit (comptrolling) by officers within each corporation itself, and a periodic efficiency audit by specially qualified outsiders (on the model of F.C.A. supervision of its subsidiary corporations), who might make recommendations to Congress, or in any case regular post-audits either by a reorganized General Accounting Office without comptrolling functions or some other agency free from the traditions of rigid insistence on legalistic formalism built up by that Office under General McCarl.

Like many monographs written with Ph.D. requirements in mind, this work is weakest in what it omits. The student in search of a degree all too frequently leans over backward to force out irrelevancies, to confine his study to a given discipline, a given topic, and a given aspect of that topic, no matter how intertwined in reality is his object of devotion with the material excluded. Something of that sort seems to have happened here. For example, in considering the question of sources of funds, Mr. McDiarmid twice lists a group of *a priori* objections to annual appropriations (pp. 53 and 215), including the danger of "political interference in the details of administration." We are told that the T.V.A., the outstanding example of a government corporation thus financed, "has had little difficulty in securing funds and in remaining free from congressional interference in management matters." Yet there is in fact ample evidence of attempts to hamstring the Authority through curtailment of appropriations, attempts which were successful both last year and this. Analysis of this issue with the same skill with which Mr. McDiarmid handled the quarrel with General McCarl would have been welcome.

Two important economic problems are also passed over far too lightly. The author disposes of the much mooted question of government guaranty of public corporation bonds on very dubious (or at least very arguable) grounds (p. 66). He forgets that the consideration of efficiency depends upon the corporation being otherwise completely self-sustaining, that savings in interest may convert a doubtful risk into certain economic success (this factor is frequently the chief ground for the adoption of public rather than private enterprise), and that the alleged compensatory reduction in general government credit is extremely questionable. How far government guaranty impairs corporate freedom depends upon the precise conditions of control which accompany it. Mr. McDiarmid also assumes too unhesitatingly the desirability of letting government corporations use surplus earnings for capital expansion. If the principle of the undistributed surplus tax has some justification as a means of preventing private corporate managers from guiding the flow of

investment without recourse to an outside check (whether it be the free capital market or Congressional policy), this consideration may also apply to public corporations. The point at least deserves treatment.

Finally, one might hope from the title for some discussion of the broad issue of standards for the supply and use of funds as a matter of policy. The Farm Credit Administration suggests a type of intermediate machinery between Congress and the operating corporations which might aid in formulating such standards. It could assist the overworked legislators in their proper task of broad guidance while insulating the corporations from political interference in the worse sense. Realistic treatment of public administration demands consideration of political issues as well as of administrative controls to prevent corruption. Mr. McDiarmid treats the latter so competently that the reader is necessarily disappointed by his choice not to deal with the former.

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THE ADMINISTRATIVE PROCESS (Storrs Lectures on Jurisprudence, Yale School of Law, January, 1938). By James M. Landis. New Haven: Yale University Press, 1938. Pp. 160. \$2.00.

Reviewed by Thomas T. Cooke†*

THIS series of lectures by Dean Landis of the Harvard Law School pleads the case of the administrative tribunal as an "instrument of public power." The author necessarily argues that the administrative tribunal, combining the functions of accuser and prosecutor with those of a judge and jury, to which the former are fundamentally antagonistic, must be widely employed in these fields to replace prosecution by the Executive, adjudication by the Courts,¹ and to a great extent policymaking by the Congress.

One of Dean Landis's chief merits is his candor in readily conceding what has often been concealed by apologists for the administrative tribunal, to wit,

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*These lectures have been the subject of extended comment elsewhere by students of government. The following reviews represent the views of members of the Bar who have practiced before the administrative tribunals.—(ED.)

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1. As Chief Justice Hughes has well said [Address before Federal Bar Association, 1931]:

"The power of administrative bodies to make findings of fact which may be treated as conclusive, if there is evidence both ways, is a power of enormous consequence. An unscrupulous administrator might be tempted to say, 'let me find the facts for the people of my country, and I care little who lays down the general principles'."

Compare his statement in *Crowell v. Benson*, 285 U. S. 22, 57 (1932) that "finality as to facts becomes in effect finality in law."

that it is a fourth branch of government in that it exercises all three of the great powers of government—legislative, executive and judicial. He minces no words, therefore, in asserting that the proper function of an administrative tribunal of the type of the Securities and Exchange Commission (as contrasted with the National Labor Relations Board and the Federal Trade Commission which are concerned with industry as a whole) is not merely to correct particular abuses but is to *govern* a particular industry. On the other hand, as might be expected from the emphasis on efficiency, it is apparent from these lectures that Dean Landis takes very lightly the widespread criticism of the administrative tribunal as violating first principles of justice in combining in one body the accusing, prosecuting and judicial functions.

Dean Landis's basic premise is the "inadequacy of a simple tripartite form of government to deal with modern problems". (p. 1). Legislatures are insufficiently compact, are not in permanent session, are unable to deal effectively with multitudinous and shifting factual situations, and their policies and objectives as contained in statutes are too often inadequately expressed by reason of the inevitable compromises required. Judges, especially those appointed for life, have an antiquated viewpoint and do not sufficiently sympathize with such modern legislative objectives as the rigid control of business enterprise in the alleged interest of the public; they are unable to specialize and become expert in narrow fields, cannot make independent investigations but must decide upon the record made by private parties, and have so much else to do that they cannot with expedition handle the cases in a particular specialized field. Judges, furthermore, have not the power (considered necessary to the effective realization of industrial control) to make rules and regulations to implement statutes which contain only very general policies and standards.

Although your reviewer does not believe that the courts could not be adequately implemented to handle effectively much of the work of a judicial nature now being performed by administrative tribunals, or subordinate employees thereof, most critics of the administrative tribunals do not insist that their judicial functions be placed in the existing courts. They merely insist, in the interest of obtaining reasonably unbiased arbiters, on the elementary precaution that the accusing and prosecuting and the judicial functions respectively shall be exercised by persons not under a common control. A separation such as obtains in the case of the Treasury Department and the Board of Tax Appeals, though not ideal, has escaped the very great criticism of such administrative tribunals as the National Labor Relations Board. There would, of course, be no objection to the administrative "judges" and the administrative accusers and prosecutors confining themselves to a few specialized fields so that the necessary expertness could be obtained. Although a large part of Dean Landis's argument is based upon the unwisdom of leaving enforcement to private initiative, as the only alternative to the administrative tribunal, nothing remains of the point when a public accusing and prosecuting agency is established. With administrative "judges" and administrative accusers and prosecutors, newly appointed for relatively short terms, the "antiquated viewpoint" argument for whatever it is worth, disappears. Of course, the independent accusing and prosecuting agencies could make rules and

regulations and do the necessary independent investigation, subject to the acceptance thereof by the administrative bodies exercising the quasi-judicial function. With such a procedure, acceptance of the substantial evidence rule in subsequent judicial review would have far greater support in reason.

It is true that by the proposed separation of the accusing and prosecuting functions from the judicial functions something would be lost which for reasons of elementary justice ought to be lost, but which is vital in Dean Landis's scheme of things. For it is a scheme which puts all its emphasis upon the importance of the rounding out of vaguely formulated legislative policies by administrative tribunals with decided views of their own, and the effective enforcement of this substitute for legislative policy in the management of industry, but which deemphasizes the concept of justice to individuals in particular controversies.

Although Dean Landis speaks at length of the inability of the courts to supply the necessary remedial sanctions for the effective realization of "governmental" policy, is it not plain that with a sufficient number of specialized courts or administrative "judges" and specialized public accusing and prosecuting agencies there would be little difficulty in imposing most of the sanctions now employed by the administrative tribunals? The real difference in method does not so much inhere in a difference between the nature of judicial and administrative remedies or sanctions. It lies in the means of determining whether these remedies or sanctions ought to be imposed, and the method of the administrative tribunal is certainly unjustified in the light of our firmly-established conceptions of justice. For the administrative tribunal, which both initiates the proceeding and prosecutes it, becomes, by reason of its judicial powers, a judge in its own cause, a result which has been condemned from time out of mind.

As Dean Landis concedes, the very initiation of a complaint frequently if not usually does great harm to the defendant. No administrative tribunal can afford to admit that it has unjustly initiated complaints in any substantial number of cases. It must, therefore, in order to preserve its reputation, convict with regularity those against whom it has initiated complaints. Nor can one be accused of undue scepticism who is unwilling to believe what is assumed by Dean Landis—that uniform care by government agencies in the investigation of complaints will greatly minimize this danger. (pp. 94-95). Overzealous belief in the policy of the statute being administered,² common to some of the most prominent of the administrative agencies, undoubtedly arises in large part from constant exercise of the functions of searching out violations and thereafter prosecuting the complaints.

The sacrifice of justice in particular cases is "justified" by the alleged necessity of "positive solutions" in connection with social and economic problems of the day. So urgent, it is claimed, is the necessity in these connections that Dean Landis cries down the "passive adjudication" of the courts, as distinguished from the active adjudication of the administrative tribunals.

2. Or what is assumed to be the policy. *E.g.*, does not the National Labor Relations Board assume that its duty or privilege is to advance the cause of unionism, not merely to protect freedom of association among employees?

(p. 20). But however great the necessities of enforcing "governmental" policies directed to social and economic ends, it can hardly be argued that the necessities are greater than the necessity of enforcing the criminal law. Yet no one has suggested that accusation, prosecution and adjudication in criminal cases be blended in one tribunal. To assimilate, as the author does, the obtaining of pleas of guilty by a public prosecutor to the functioning of an administrative tribunal is without justification. (p. 107). The former, unlike the latter, must rely upon the inherent appeal of his case to third parties without interest in its result and does not prosecute with the left hand while holding in the right hand the absolute power to convict.

For reasons of state derived from the exigencies of sovereign government the courts have traditionally accorded great freedom of action to the Executive power when engaged in such activities as the collection of taxes and the expulsion of those alleged to be aliens. Summary, and hence necessarily arbitrary, methods, have, it must be admitted, been judicially sanctioned. In other less exigent fields, however, the rise of democracy has resulted, to a greater or less degree, in the doing away with such summary and arbitrary methods. Apparently Dean Landis would reverse the process in broad fields wherein social and economic legislation operates. He speaks of the fact that it has been customary to regard those alleged to be aliens as possessing no rights but merely privileges. (p. 93). May it not well be asked whether it is not the essence of Dean Landis's argument that the businessman be placed in a similar position by according great freedom of action to the administrative tribunals which can accuse, prosecute and condemn him without effective review by any impartial tribunal?

In the light of current judicial failure to restrict in any substantial degree the disposition of public moneys, the only substantial check remaining upon the redistribution of wealth by taxation would appear to be at the ballot box. It is apparently Dean Landis's argument that this ought to be the only real check upon the control of our economic life by administrative tribunals, despite the fact that the members thereof are not elected officials, for his suggestions with respect to the existence of other checks can hardly be taken very seriously. (pp. 98 *et seq.*).

Dean Landis not only defends the combination of the essentially antagonistic functions of accuser, prosecutor and judge in the administrative tribunal, but seemingly argues for a doctrine which could easily result in vast extensions of power for such tribunals. The making of rules and regulations is not to be confined to the mere filling in of the details pursuant to reasonably definite policies and standards laid down in the statute. The administrative tribunal is to "catch and feel the pace of the galvanic current that sweeps through the statute as a whole" (p. 67), as evidenced by the preamble and the vague and general policies set forth in the body of the statute; it is to make all "rules and regulations" it conceives necessary to effectuate the broad policy thus arrived at. Indeed, those who aspire to become effective administrative officials are warned against paying too much attention to the statute, and it is even suggested by the Dean that one of the best administrators he has ever known never read the statute under which he operated, at least other than casually. (pp. 75-76).

Although it is currently suspected, and not without reason, that at least one of the most prominent of the recently created administrative tribunals habitually employs the process of having subordinates comb through the record in order to find evidence to support predetermined findings, and although Dean Landis admits that the members of administrative tribunals by reason of lack of "time and opportunity" customarily delegate their judicial duties to subordinates (p. 105) who are, by and large, not overly competent (pp. 104-5), he deplores the fact that the courts, although accepting the findings of administrative tribunals upon ordinary facts if sustained by substantial evidence, will not permit their findings upon jurisdictional and constitutional facts to become final if against the weight of the evidence. He incorrectly paraphrases the Federal Constitution which he says "*expressly* makes findings of fact by a jury of inexperienced laymen, if supported by substantial evidence, conclusive" (p. 125) and is claimed to prohibit the giving of the same effect to findings of fact made by "a highly trained and especially qualified administrative agency." (p. 125). In fact, the Federal Constitution merely provides (Seventh Amendment) that in suits at common law "no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law", and in criminal cases that the accused shall enjoy the right to a trial by an "impartial jury" (Sixth Amendment). Under these provisions the Federal courts have had no difficulty in holding that jury verdicts may be set aside when clearly insupportable by the required weight of the evidence. Nor is it easy to find any reason (except the extremely poor one from the standpoint of justice that the adoption of a contrary rule would swamp the courts as presently manned) why the findings of an administrative tribunal deciding upon its own case, even if actually made by itself and not by unauthorized and inexperienced subordinates, should have any greater weight than those of a competent and experienced equity judge who somehow finds the "time and opportunity" personally to hear all the witnesses in the case even if it takes months of his time, and whose findings are reviewable on appeal as to the weight of the evidence.

Perhaps therefore in fashioning new "instruments of public power" to deal with modern problems your reviewer may be excused for preferring less of the alleged expertness and "efficiency" of the administrative tribunal, with its indefensible combination of powers, and more of the simple justice and wise restraint inherent in the constitutional concept of the separation of powers—especially as efficient realization of such governmental policies as have been actually authorized by the elected representatives of the people may be attained without the sacrifice of these vital qualities.

Reviewed by George Nebolsine†

AN IMPORTANT obstacle to the understanding of the administrative process is the unbridged chasm between Administrative Law theory and the practical workings of administrative bodies. The greater part of the learned writings

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on Administrative Law focuses attention upon the treatment of the orders of administrative bodies by the courts without touching the momentous and seldom reviewed run-of-the-mill practice arising before these important bodies. One of the reasons for this lack of correlation is the exceedingly rapid growth, both in number and importance, of administrative agencies, which has projected the administrative process in the last few years from the relatively narrow fields of utility and fiscal regulation and the control of aliens into the almost limitless fields of agriculture, manufacturing, distribution and finance.

A splendid effort to overtake and to subdue to analysis some of the numerous empirical developments in administrative practice is contained in the Storrs Lectures, delivered at the Yale Law School by the former Chairman of the Securities and Exchange Commission, Dean Landis. These Lectures, now published, constitute an unpretentious work, comprising some 160 pages. But their content is of great significance to administrators, practising lawyers and teachers alike, for they contain a fresh and spirited analysis of current administrative techniques and a thoughtful discussion of many of the author's own experiences as an administrator.

Dean Landis' stress upon the task confronting the administrator in doing a job efficiently focuses attention upon the techniques available to the administrator. His expositions of how practical problems, presented to the Securities and Exchange Commission in the administration of the many Acts assigned to it, were met, is the unique contribution of this work. He also brings his experience to bear in recommendations for the protection of the administrative process from the destructive forces that endanger it. Two of these are: too broad a statutory discretion in the Act setting up such an agency, which invariably subjects it to the play of almost irresistible political and economic pressures in the formulation of its policies, and excessive rigidity and timidity in routine staff administration of an Act.

The work should be read by all students of the administrative process. It should be of great help to administrators in illustrating how action can be taken by an imaginative use of the tools provided in the statutes; it should be of interest to practising lawyers in providing an insight into an enlightened administrator's mental processes; it should also be of value to the academic world in hastening a change in teaching method in Administrative Law, away from the reconciliation of court decisions bearing upon the powers of administrative bodies to a study of the techniques employed by administrative agencies and their fitness to serve the ends sought.

The author views with unbounded confidence the utility of the administrative process in dealing with problems of governmental regulation of various types of business activity. Such a point of view comes with entirely good grace from Dean Landis. If more administrators had his record of constructive and intelligent administration, no one would question it. But enthusiasm must be tempered by a realization that our administrative agencies, in the long run, will be operated by people of average ability, and many of the fears expressed by members of the legal profession with respect to the use of the broad powers now vested in such bodies are based fundamentally upon this realization.

On this practical plane it may be suggested that a fuller exposition of different methods of formal and informal fact finding is desirable. There is, unfortunately, a residuum of resistance on the part of administrative officials to checking technical information and facts with outside experts, be these facts used in connection with the formulation of broad policy or the drafting of rules and regulations. Effective techniques for achieving greater cooperation between those charged with the responsibility of administering regulatory statutes and outside experts are needed.

No reader of the work can escape the conclusion that the administrative process makes enormous demands upon the administrator. Sound legal craftsmanship alone on the part of administrators is not sufficient. Executive ability and an intimate knowledge of the business regulated are essential. Since the great majority of administrators are lawyers, a heavy responsibility devolves upon our law schools to keep their training in line with the requirements of this growing branch of law.

THE RISE OF A NEW FEDERALISM. By Jane Perry Clark. New York: Columbia University Press, 1938. Pp. xviii, 347.

THIS is that best of all statements of a problem — the kind that points the way to further and vital research. Professor Clark has investigated, as carefully as illuminatingly, the way in which the states have been led to cooperation with the federal government by the problems of recent years. Her discussion covers a wide area. Cooperative research, the exchange of personnel, the loan of federal funds, grants-in-aid, the operation of statutes like the Wilson and Webb-Kenyon Acts, the checks and controls upon the relations of the two sorts of government — these are samples only of the material she surveys. It is not easy in any brief way to summarise her results. It is clear that the volume of cooperation is far wider, and also more intense, than the student is normally led to imagine. It is clear, also, that the stage is set for a continuing, if not orderly, growth of the process she describes. The picture is one of an emerging pattern of relations which may well, as Professor Clark has seen, develop, in time, a new federalism in which the central government becomes something like the guardian of standards in areas of activity in large part administered by local governments. What seems to be developing, largely through the device of the grant-in-aid, is an area of decentralization in which the state is nothing so much as the agent of the central government. The likeness of this pattern, in the broad, to the relation of local and central government in Great Britain is not the least interesting of the results that emerge from Professor Clark's analysis.

It is difficult to praise too highly the zeal and accuracy which have gone into the compilation of this account; certainly there exists no better survey of the important theme involved. But, perhaps rightly, Professor Clark has

scrupulously refrained from any discussion of the tendencies she has analysed. She is content to dwell upon the major administrative consequences of the relation — leaving a judgment upon their value to the reader. She retails the advantages and disadvantages of the scheme as it has developed; she does not judge them. Looking at the pattern as a whole, one is tempted above all to emphasize what Professor Clark herself calls its “haphazard and unplanned” nature. Important though the cooperation is, it rarely touches those areas in which the problems of federalism are likely to be of decisive importance. Taxation, commerce, agriculture, labour standards, education, in these, at least, there is either little cooperation, or, alternatively, little clear direction about the purposes involved. There is little realization of the degree to which the issues a government must face need to be tackled on a single plane. There is still a good deal of jealousy, the danger of grave corruption, even constitutional limitations to be overcome. There is the thorny question of how far the federal grant-in-aid breaks down the initiative of the state-government. There is the complicated problem of the very different standards at which the performance of the work is secured in states which approach so differently all the issues involved in the subject-matter of cooperation. There is the pressure involved on the budgets of different states in their effort to earn the grants the federal government is prepared to bestow. There is the danger, even, that federal entrance into a particular field may actually discourage a state government from the proper performance of an important function.

The impression Professor Clark’s valuable summary of the evidence seems to imply is twofold. On the one hand, the problem is one of time; on the other, it is a problem of the quality of personnel. Granted the range and intensity of the issues involved, it seems at least dubious whether the scale of the problems now confronted by the United States leaves the division of functions a satisfactory one. This is especially the case in financial terms. The cost of modern services is so great that many of the states, granted their taxable resources, can hardly well afford them. To provide them on a proper scale, may well mean power without effective responsibility in the coming years, if the federal government is to sponsor the due payment of funds without full control over their expenditure. The fact, moreover, that in so many states the work depends upon officials who owe their posts to the spoils system makes a continuing maintenance of adequate standards of administration both delicate and complicated; and that the more since, in such circumstances, the subject-matter of cooperation is far more likely to be the victim of pressure groups; this has, for example, been true of electric power projects in many areas of the United States. The machinery of cooperation is, further, excessively complicated; and to work with reasonable smoothness it almost certainly requires the delegation of quasi-legislative powers to the executive which it is doubtful whether Congress or the state legislatures would be willing to grant, even if the Supreme Court were prepared to allow them to do so. What, in fact, is at bottom involved is the immense issue of whether the technique of federalism is suited to the government of the United States in the age of giant industry and the problems to which it gives rise. Not unnaturally, Professor Clark has hinted at, rather than dealt with, so

momentous a problem. It is, however, implied in every page of her book. Until it is faced, discussion of such details as she makes is of fascinating interest. But it is conducted upon a plane where, from the angle of the next generation, it cannot help appearing a little like a performance of *Hamlet* without the Prince.

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ROLLS OF THE JUSTICES IN EYRE, BEING THE ROLLS OF PLEAS AND ASSIZES FOR YORKSHIRE IN 3 HENRY III (1218-19). Edited for the Selden Society by Doris Mary Stenton. London: Bernard Quaritch, 1937. Pp. lvi, 540.

FROM the eyre of 1218-19 there survive only the roll of pleas and assizes heard at Lincoln, printed in volume 53 of the Selden Society's publications,¹ and the three Yorkshire rolls which form the subject of the present book. Though they are of independent importance as the most complete record we possess of judicial business in the shires during that critical year, the chief reason for making these rather than other eyre rolls available is the fact that cases from them were cited by Bracton in his treatise, and they thus form a minor but not unimportant source of the *De Legibus*. Contrary to the contemporary Lincolnshire roll, and that of Worcestershire for 1221, the Yorkshire rolls do not bear Bracton's characteristic markings, though it is not due to this that the majority of the cases cited from them cannot be identified, but rather to the incomplete form in which the roll of civil pleas has survived. The record of crown pleas, on the other hand, is complete, and presents the only existing evidence of the actual way in which the first itinerant justices who visited the shires carried out the Council's instructions in regard to suspected criminals who would have been sent to the ordeal had it not been forbidden by the Lateran Council of 1215. The third roll printed is a memoranda roll on which were noted matters requiring further thought or action, and the facts of those cases which were adjourned to Westminster for judgment. This throws valuable light upon the jurisdiction of justices itinerant by illustrating matters they considered to be beyond their immediate competence. In general, cases adjourned to Westminster were postponed either because the parties were persons of position or because semi-political issues were involved, though an occasional intricate case clearly demanded further counsel.

Unfortunately, little insight into Bracton's method is to be gained from the present volume. The cases cited in his treatise which can now be identi-

1. ROLLS OF THE JUSTICES IN EYRE, BEING THE ROLLS OF PLEAS AND ASSIZES FOR LINCOLNSHIRE 1218-19 AND WORCESTERSHIRE 1221 (Selden Society, 1934). See Woodbine, Book Review (1935) 44 YALE L. J. 1284.

fied on the rolls, though interesting to see in their setting among the pleas that were passed over, are not of particular importance and are too few to permit any adequate reconstruction of the plan which prompted Bracton's selection. Though this is disappointing, the rolls nevertheless present a good number of interesting cases, both civil and criminal, to which attention should be called but upon which it is quite impossible to comment here.

The three rolls have been edited with the utmost care and precision and provided with an illuminating introduction. They are published in a most attractive form. Legal historians will be grateful to both the Selden Society and its editor for making them available.

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