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"DISCRETION" IN THE ANALYSIS OF ADMINISTRATIVE PROCESS

H. T. WILSON*

I. Introductory Remarks

I have been asked to contribute some thoughts on the administrative process as a political scientist interested in the behaviour of individuals as members of organized groups. During the past three years I have taught, jointly with a former professor of law at Osgoode Hall, a course titled "Seminar in Law and Administrative Discretion." In this course we endeavoured not only to present some of the outstanding research from the field of administrative law, but also to provide an introduction to the study of politics which focused upon concepts, theories and issues from organization theory and the behavioural and social sciences. One of the three books which students were requested to purchase and read carefully was Kenneth Culp-Davis' *Discretionary Justice,* a rather substantial effort by its author to come to grips with the problem of injustice in the administrative process.

Davis argues that the major source of injustice to individuals arises out of the exercise of arbitrary discretion by public officials. I want to consider Davis' argument in some detail in the pages which follow, because it seems to me that it is one which students of the law must necessarily confront enroute to an adequate understanding of the scope and limits of law as a device for modifying, regularizing and pre-defining ranges of permissible official behaviour in the interest of "justice" to affected parties. Much of what I have to say, following the presentation of his thesis and basic arguments, will take the form of an effort to indicate the shortcomings of his position which, I believe, fails to give adequate consideration to the nature of politics and the "political," such as it may be.

Section III is particularly concerned with the implications of Davis' argument for "administration" as a political process which, while it may fail to realize formally rational standards of judicial legalism, ought not, on that account alone, to be characterized as "irrational." This effort to suggest the limits of the legal decision as the embodiment of a particular type of rationality will serve to "locate" Davis in a tradition of thinking about the administrative process, and to point up the relevance for such an analysis of an opposed, but not necessarily contradictory, tradition more compatible with the nature of American-national politics.

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Section IV “outers” the analysis a bit further still, concerning itself not so much with weaknesses in Davis’ analysis as with the possible relevance of a body of research and scholarship necessarily beyond the ken of such a study. Here the emphasis, instead of being on “politics,” is upon “organization” as a manifestation of human rationality at work. I argue that any study of the administrative process which fails to consider what is in the final analysis the behaviour of individuals in organized groups, cannot possibly comprehend that which is minimally necessary for an understanding of administration as a human process carried out by individuals who orient their action to the performance of functions and roles in “typical” social settings.

A focus on “organization” is employed, among other purposes, to the end of suggesting some reasons why officials will often find it difficult if not impossible to orient their action to rules which predefine, that is, fix in advance, their range of permissible discretion. “Organization” is counterpoised against “action” in this formulation, the latter being defined as behaviour “rational” because meaningful to the actor and intended by him to realize particular objectives. A central consideration which concludes Section IV is the question: To whom is the law addressed?

A few acknowledged limitations and consequent disclaimers on the writer’s part are in order here. A point of view, indeed the intellectual and scholarly enterprise itself, is as readily conceivable as a limit to knowledge about the world as it is the basis for particular insights derived from one’s point of view. At its worst the intellectual’s “construction” of social reality may function as a “trained incapacity” which keeps him from giving proper attention to or even acknowledging the possible relevance of other points of view which serve as the basis for asking different questions from the ones with which he is concerned. Far from promoting the pages which follow as the “one best way” to view the administrative process, my remarks and observations are necessarily supplementary because they presume the existence of a body of knowledge from which Davis and numerous others have drawn which continues to be a part of that which, in the context of the analysis of the administrative process, remains most worthy of being known.

One more point: Davis is an American, and his frame of reference and large majority of examples are consequently drawn from United States experience. While I am not in the least in doubt about the conceptual and theoretical “relevance” of Davis’ analysis for any legal system fashioned out of the English common law heritage, I shall necessarily be countering Davis with examples similarly drawn from recent United States experience and will endeavour to

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locate him in one of two peculiarly American traditions of thought on these matters. I might also add that my own background is American and much of my graduate work, including my doctoral dissertation, dealt with problems and issues in American constitutional and administrative law. It seems to me that the issues raised by Davis, and the presuppositions which guide him in his definition of the problem and his recommendations for improvement, are too fundamental and essential to let the context act as a justification for limiting the readership, although I certainly would agree that this is often a fair complaint by students, faculty, practitioners and the public at large.

II. *Davis’ Thesis and General Argument*

It is an open question whether in the analysis of someone’s work the writer should compare that individual with a wide range of his contemporaries or should rather indicate the distance he has travelled from the point at which he began. This is an issue of considerable moment in the social sciences, where “progress” is often equated with an individual’s ability (or propensity) to incorporate into his own enterprise new approaches and perspectives on the verge of gaining relative respectability within the confines of his own discipline. The fact that legal education is presently experiencing a significant restructuring of its own foundations toward a conception of “evidence” which includes research findings from the social sciences as relevant data for consideration should indicate just how far challenges to the traditional categories of concern have gone.

While this is no place to go into these events in detail, it is difficult not to notice how closely tied such changes are to a redefinition by many practitioners, faculty and students of what the practice of law comprehends. If only a minority presently forward such a view, it nevertheless draws attention to a revised conception of the role of the law in a society where it increasingly innovates as often as it conserves, and (within the rule of law) attacks as often as it defends. As a subsidiary consideration, notice how this serves to raise the question of the role legal education and scholarship ought to play vis a vis the practicing professions.

Now this revised view of the profession, though it is often a manifestation of impatience with established ways of doing things, does not always lead to the request for substantial institutional changes, perhaps even the transcendence of accepted ways of defining and dealing with problems. Sometimes it leads to the claim that we must close the gap between ideal and practice by doing with more diligence what we have been doing, albeit haphazardly and chaoti-

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cally, all the time. Here the avowed concern is with realizing the ideals of a particular political system through its legal and judicial system where for various reasons the ideals, noble though they may be, are often more honoured in the breach than in the observance. Kenneth Culp-Davis' *Discretionary Justice*, while oscillating between these two possibilities, is far more in accord with the latter orientation than it is with the former.

Looked at from the standpoint of his own scholarly concerns as they have developed over a not inconsiderable period of time, Davis' essay is an extremely important contribution to what is (and should be) an ongoing controversy in the area of public administration and administrative law. To say that "Discretion is the better part of Davis," seen from the perspective of his own development, is not to exclude from consideration other questions raised, debated and studied by scholars in the social sciences which indicate the limits of his analysis and the extent to which such an effort pre-supposes certain things about the nature of human society and rationality which are unrealistic and perhaps even naïve. But it does suggest that any analysis of Davis' thesis in *Discretionary Justice* begins with the meaning he assigns to "discretion" in the administrative process.

When Davis uses the term discretion, he has in mind a phenomenon whose character as it stands must necessarily be problematic in a rule of law representative system unless . . . . This "unless" is the key to understanding how far Davis has come from where he began. Three references to discretion in the early pages of the book indicate both the scope and limits of his conception of the administrative process. Because discretion is Davis' "master" concept, I shall take the liberty of quoting them in full.

If all decisions involving justice to individual parties were lined up on a scale with those governed by precise rules at the extreme left, those involving unfettered discretion at the extreme right, and those based on various mixtures of rules, principles, standards, and discretion in the middle, where on the scale might be the most serious and most frequent injustice? . . . I think the greatest and most frequent injustice occurs at the discretion end of the scale, where rules and principles provide little or no guidance, where emotions of deciding officers may affect what they do, where political or other favoritism may influence decisions, and where the imperfections of human nature are often reflected in the choices made.\(^5\)

I think that in our system of government, where law ends tyranny need not begin. Where law ends discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness.\(^6\)

A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction.\(^7\)

Only the last statement satisfies the requirements of a formal definition, albeit a relatively brief one. Davis goes on to explain his references to "effective" and "inaction" as an effort to indicate the scope of the problem. The definition covers not only action which might later be deemed "legal" but that which is patently illegal or of questionable legality as well. It also comprehends the fact

\(^5\) *Davis*, *supra*, note 1 at V.
\(^6\) *Id.* at 3.
\(^7\) *Id.* at 4.
that officers usually exercise discretion by not acting. Finally, discretion “is not limited to substantive choices but extends to procedures, methods, forms, timing, degrees of emphasis, and many other subsidiary forms.”

Notice in the three statements how Davis moves from what is clearly an academic reference to discretion as a problem along a continuum to a view of discretion seen from the point of view of the situation. This corresponds to the movement from relative abstractness to specificity. To title a book “Discretionary Justice” is to suggest the possibility that discretion may be positively necessary to securing justice in the administrative process rather than unalterably opposed to it. To refer to all discretion which takes place in the absence of specific mechanisms justifying, and perhaps even requiring, its exercise as “unfettered,” is to define it as bad discretion because it is illegal even though it may be necessary to justice.

Rather than leaving the situation to chance, Davis asserts that the problem of discretion needs to be covered by law in advance of its exercise. This point is significant, for it constitutes a recommendation for the extension of formalized and systematized codification on a rather substantial scale. Discretion for Davis is “good” when it is legal, that is, when its exercise conforms to statutory or regulatory provisions which guide public officials. The ideal for Davis is a situation in which a formally rational and systematic codification has eliminated as much “unfettered” discretion (regardless of its outcome) as is possible, while incorporating that which is necessary in given situations into procedural and substantive provisions which establish its legality and justify its exercise. While this may suggest the limits of predefinition as a device to contemplate in advance the possible range of situations in which administrative action might be called for, Davis does go to some effort to indicate how bureaux, agencies, and departments and any other administrative units ought ideally to go about the process of legalizing that discretion which is felt necessary if the organization is to carry out its mandate effectively.

Davis formerly treated discretion as a category of administrative action alongside rules and adjudication. The fact that he now admits of its possible legitimacy on the grounds that it is often necessary in the interests of administrative justice does not mean that he has gotten beyond rather traditional ways of dealing with it as a problem. One reason for this can be found in his discussion of the “three components” present in the exercise of discretion: facts, values and influences. It serves to demonstrate a propensity evident in the first reference to discretion cited earlier, namely, a tendency to characterize administrative discretion occurring in the absence of specific provisions as potentially non-rational because “political,” and “emotional” in character.

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8 Id.


10 Davis, supra, note 1 at 55-56, 103.

11 See, for instance, Davis, Administrative Law, Cases — Texts — Problems (Chicago: West Publishing Co., 1965) and compare to Davis, Discretionary Justice, supra, note 1 at 4.
When we isolate what we regard as the exercise of discretion, we find three principal ingredients — facts, values and influences. But an officer who is exercising discretion seldom separates these three elements; most discretionary decisions are intuitive, and responses to influences often tend to crowd out thinking about values.\(^{12}\)

In this statement the formal rationality which is prescribed as an approach to the resolution of the problem of discretion is merged with the scholarly conceit which forwards academic distinctions like the fact-value dichotomy as part of a criticism of the necessarily emotive subjectivity of an individual in a situation where rationality is as likely to be exercised in the absence of provisions as it is in their presence. There are places in the book where Davis seems to realize this, as, for instance, when he asserts that:

Even when rules can be written, discretion is often better. Rules without discretion cannot fully take into account the need for tailoring results to unique facts and circumstances of particular cases. The justification for discretion is often the need for individualized justice. This is so in the judicial process as well as in the administrative process.\(^{13}\)

But here Davis is once again speaking of discretion through rules, as opposed to rules which either strictly forbid or fail to leave room for the exercise of discretion. This problem of rationality as it appertains to administrative action will be brought up again further on, in the analysis of the nature of politics and the political in rule of law representative systems, as well as in the discussion of public officials as situated political actors.

There is a process of reasoning inherent in Davis' argument which one is tempted to call dialectical because it poses problems at the extremes and forwards their resolution in terms of what seems to be a synthesis rather than simply a golden mean. For example, unfettered discretion is intolerable, given the injustice it is responsible for. But the ideal of a rigidly formal legal system which has eliminated all discretion is equally undesirable, and we should not even aim to realize such a situation given the fact that discretion is often necessary to justice in the administrative process. That which is simultaneously desirable and realizable, given the character of our legal system, is an alternative which synthesizes the need for discretion with a continuing commitment to legalism and the rule of law. The result: rules which provide for the exercise of discretion in advance of situations which may require it in the interests of justice.

Now clearly it is not unfair to suggest that we are dealing with another conception of discretion as a situated phenomenon here, and that the definition may have been extended to the point where it is inaccurate if not meaningless to term it discretion \textit{per se}.\(^{14}\) But I would not want to go quite this far, for I can conceive of situations where it might be good to have an official aware of the boundaries of permissible action (or inaction) in the exercise of his duties and responsibilities at the same time that his response is not rigidly specified.

\(^{12}\) Discretionary Justice, supra, note 1 at 5.

\(^{13}\) \textit{Id.} at 17. Compare to his statement about discretion as "a tool, indispensable for individualization of justice," "our principal source of creativeness in government and law," yet a tool which if not properly used "can be a weapon for mayhem or murder," \textit{Id.} at 25-26.

I would, however, agree that there is probably good cause for labelling Davis' view of the process "discretion on a one way ratchet," as Hart and Sacks have done.\footnote{H. Hart and A. Sacks, The Legal Process (tent. ed. 1958) at 160-180. A forthcoming reconstruction of the problem of discretion as necessarily concerned with the character of the tasks or functions officials are performing as situated actors is J. Jowell's Law and Bureaucracy in the City (in press), a significant advance over such a view of discretion.} This is not only warranted from Davis' first reference to discretion cited earlier, where it is conceived of (in its "unfettered" form) at one end of a continuum with specific rules at the other, but also in his discussion of the way an administrative organization provides for the exercise of discretion necessary to its acting effectively and with justice to affected parties.\footnote{Discretionary Justice, supra, note 1 at 55-56. Also Davis, Confining and Structuring Discretion (1970), 23 Journal of Legal Education 56, and the comments by Judge Friendly and Professor Reiss which follow at 63-76.}

While the case against unfettered discretion is dealt with by reference to specific examples which presume that codification and systematization would eliminate them, the problem of the opposite extreme is handled for the most part in Davis' analysis of the obsolescence and consequent danger implicit in adherence to the extravagant version of the rule of law doctrine and the legislative principle of non-delegation in the absence of specific standards. It is in this chapter that Davis' partial liberation from some of the traditional notions and presuppositions of administrative process under the common law becomes evident. It is a necessary complement to the chapter which precedes it because it deals with the problem posed by the opposite extreme.

While Davis is not arguing that these doctrines were never relevant, it is clear that continued reliance upon them is as much a threat to administrative justice as is the existence of unfettered discretion. As a matter of fact, reliance upon either or both doctrines in the contemporary context effectively amounts to the same thing. Far from being an unrealizable prescriptive ideal, they are to some extent responsible for the exercise of the very unfettered discretion which they proscribe so completely. This is because these doctrines fail to acknowledge the possibility of "good" discretion altogether, treating it instead as a problem which can (and should) be eliminated through better definition of standards.\footnote{Davis, Discretionary Justice, supra, note 1 at 46-51, where he suggests the limits to such a view, even in its most sophisticated form. See, for instance, Henry J. Friendly, The Federal Administrative Agencies (Cambridge, Massachusetts: Harvard University Press, 1962).}

Davis puts it this way:

My opinion is that, paradoxically, today's excessive discretionary power is largely attributed to the zeal of those who a generation or two ago were especially striving to protect against excessive discretionary power. If they had been less zealous they would have attempted less, and if they had attempted less they might have succeeded. They attempted too much — so much that they could not possibly succeed — and they were decisively defeated. They tended to oppose all discretionary power; they should have opposed only unnecessary discretionary power.\footnote{Discretionary Justice, supra, note 1 at 27.}

These two doctrines were developed by conscientious people, including legal philosophers and judges, whose worthy purpose was protection against governmental excess. But both doctrines grossly overshot, and both have been decisively defeated. The worst of it is that milder and sounder opposition to excessive discretionary power became identified with the extravagant version of the rule of law and with the
non-delegation doctrine and was largely pulled down in the defeat of those two doctrines. And our legal system has not yet recovered its balance.\textsuperscript{19}

The basic technique for synthesizing the good from each extreme position is rule-making, and the key element in Davis' reconstruction of administrative law is the rule. Two points need to be made before discussion is carried any further. First, rules are not restricted to generalizations from experience in Davis' definition, but comprehend the anticipation of situations which might arise exhypothese.\textsuperscript{20} Second, the relevant agency provides its own procedural and substantive constraints in the form of rules establishing necessary discretion, while external agencies remain in the background as a check on their action.

After stating that "a rule need not be in the form of an abstract generalization; a rule can be limited to resolving one or more hypothetical cases, without generalizing,"\textsuperscript{21} Davis goes on to defend his reasoning. If we are really interested in confining discretion as early as possible in the history of an agency or bureau (and Davis really is), then this "practical need" must override all other considerations. Davis argues that the typical administrator "has formulated in his own mind — and perhaps even in his files — some firm answers to significant hypothetical cases on each side of a line that must be eventually drawn," and therefore requiring him to postpone making a rule "until he is prepared to hazard an abstract generalization is falling far short of doing the clarifying he can safely do." In short, "a rule need not contain any generalization."\textsuperscript{22} Davis is not excluding rules as generalizations and formal adjudication from agency policy making. He is only arguing that rules as hypotheticals must be included as a legitimate and necessary tool in the interests of justice.

Clearly Davis' concern is with the ways an agency, steering between the nondelegation doctrine and "unfettered" discretion, provides for the discretion it needs within its own developmental process. Rules as either generalizations or hypotheticals may be procedural or substantive in character or an admixture of both, but in any case the procedure for attaining rules remains "one of the greatest inventions of modern governments."\textsuperscript{23} Davis is here speaking more of the theory of the rule-making procedure than anything else, for in few aspects of the administrative process is the gap between ideal and reality greater.\textsuperscript{24}

\begin{itemize}
  \item\textsuperscript{19} Id. at 28.
  \item\textsuperscript{20} Id. at 59-64.
  \item\textsuperscript{21} Id. at 60.
  \item\textsuperscript{22} Id.
  \item\textsuperscript{23} Id. at 65.
\end{itemize}
This idea of an agency developing a rule-orientation to protect itself, including its discretion, relies on two of three techniques for improving justice in the administrative process: confinement and structuring.\(^{25}\) In both instances the agency is legislating for itself by building its own discretion into its experience as a limit to the realm of decisional choice in subsequent situations. It is to be carefully distinguished from the third technique — checking — which is carried out by agencies external to the one in question and conforms to the standard support for institutional checks and balances where any exercise of governmental power is involved. By confining discretionary power Davis means “eliminating and limiting” it, “fixing the boundaries and keeping discretion within them.”\(^{26}\) Ideally “self-confinement” should take the following form in an agency’s development:

When legislative bodies delegate discretionary power without meaningful standards, administrators should develop standards at the earliest feasible time, and then, as circumstances permit, should further confine their own discretion through principles and rules. The movement from vague standards to definite standards to broad principles to rules may be accomplished by policy statements in any form, by adjudicatory opinions, or by exercise of the rule-making power” (emphasis mine).\(^{27}\)

Although the two may overlap, “structuring” means something more specific for Davis because it appertains to techniques of controlling “the manner of the exercise of discretionary power within the boundaries” set by confinement. To impart “structure” to the exercise of discretionary power is to “regularize it, organize it, produce order in it,”\(^{28}\) again in the interests of justice to affected parties. Not surprisingly: “Administrative rule-making is an especially important tool both for confining discretionary power and for structuring it.” But in each case the rule performs a distinct function confining discretionary power by establishing limits on it, structuring discretionary power by specifying “what the administrator is to do within the limits.”\(^{29}\) While some discretionary power remains beyond the scope of any techniques aimed at structuring it, Davis cites openness as “the natural enemy of arbitrariness and a natural ally in the fight against injustice” and argues that the most useful ways of structuring include: “open plans, open policy statements, open rules, open findings, open reasons, open precedents, and fair informal procedure.”\(^{30}\)

III. Discretion, Rules and Politics

This type of rule-making procedure, which becomes a most significant part of an agency’s policy formulation process in Davis’ argument, is an ideal whose realization in practice is not something the agency can guarantee no

\(^{25}\) Johnston refers to this recommended procedure of self-control as “a two-step process,” supra, note 24 at 177. Davis devotes chapters 3 and 4, at 52-141, to the analysis of confinement and structuring. See also Davis, Confining and Structuring Discretion, and comments by Friendly and Reiss, supra, note 16.

\(^{26}\) Discretionary Justice, supra, note 1 at 55.

\(^{27}\) Id. at 55-56.

\(^{28}\) Id. at 97.

\(^{29}\) Id.

\(^{30}\) Id. at 98.
matter how diligently it undertakes to carry out his recommendations. The absence of any reference to the "politics" of a process which by Davis' own admission involves "facts, values and influences," points up one of the most glaring weaknesses of this study, not because his recommendations are unfeasible but because without some appreciation of the political element in decision-making, no realistic account of actual agency behaviour can be given. Failure to do what Davis claims to be necessary is "explained" as either wilful intransigence or plain stupidity on the part of public officials.

Yet Davis does fit into one of two major perspectives on the administrative process which I shall endeavour to present and distinguish. Situating Davis in a tradition of thinking is not done here with an eye to discrediting or discounting his views, but rather as an aid to comprehending the significance for his analysis of the situation of his background and basic presuppositions about administrative process.31

Grant McConnell, in the context of a discussion of "self-regulation" of business by business a few years ago,32 suggested the existence of two traditions of analysis of the American administrative process. The first was "political," "sought solutions by reorganization," and tended to view administration as a problem of power which could be resolved only by the incorporation of administrative activity "outside" the purview and control of the President into the Executive branch. The second was "legal," rejected "mere changes in the administrative structure, and sought reforms of procedure" designed to make administrative agencies function more like "real" courts.33 If the political approach saw the so-called "independent" agencies as a "headless fourth branch of government" posing a problem for executive authority, the legal approach tended to tie confidence in Article III judicial courts to the effort to faithfully respond to and interpret the popular will embodied in the national legislature.34

Emphasis on legal procedures has characteristically been tied in the American administrative law context to faith in the representative character of Congress as an institution embodying the values of pluralism which is and/or should be supreme over the Executive Branch in domestic political affairs. This view leads characteristically to the claim that Congress is doing the best it can, and that, given the pressures and constraints under which it operates, political issues must be dealt with there and not in the administrative

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31 This distinction between "understanding" and "reducing" someone's work is a most significant one in the sociology of knowledge. See, for example, Karl Mannheim, Ideology and Utopia (London: Routledge & Kegan Paul, 1936) and Robert Merton, Social Theory and Social Structure (New York: Collier Macmillan, 1957) at 456-509.


33 Id., at 283.

process per se, where the important thing becomes the development of standards, principles and rules at all costs.\textsuperscript{35}

This point of view, which clearly comprehends Davis' analysis of the problem of unfettered discretion, espouses a residual belief in the rigid dichotomy of politics and administration bequeathed contemporary analysis by populism but especially by progressivism. The language of facts and values remains prominent in studies which presume such a narrow conception of politics and the political, as a number of commentators have pointed out.\textsuperscript{36} McConnell formulates the problem most perceptively in terms of the difference between the development of standards seen as a technical problem and a focus on the extent to which it is "politically possible to develop the needed standards." "At this point, where the issues of procedure encounter the issue of structure, the problem of criteria and the problem of power meet."\textsuperscript{37}

There is absolutely no comprehension of power as a problem for administrators in Davis. Again with reference to the independent agencies, it is impossible to make sense of their behaviour and policies lacking a willingness to view such agencies as "open systems" subject to an immense amount of external control, direction, and criticism.\textsuperscript{38} While all three "branches" of the American federal government have been and continue to be involved significantly in shaping the destiny of such agencies, this is especially true for Congress. Perhaps the most glaring indictment of the political naïveté of the "legal" approach is its perception of Congress as representative, responsible, and the embodiment of all that is great in the theory of American political pluralism.\textsuperscript{39} The truth is that practically every instance of agency corruption can be equalled or bettered by "relationships" between members of important committees and subcommittees of the national legislature and special interest groups.\textsuperscript{40}

\textsuperscript{35} Davis seems to assume this in \textit{Discretionary Justice, supra}, note 1 especially at 38-39. But see Friendly, \textit{The Federal Administrative Agencies, supra}, note 17 at 13-18.


\textsuperscript{37} McConnell, \textit{supra}, note 32 at 287.

\textsuperscript{38} H.T. Wilson, \textit{The Regulation of Standard Radio Broadcasting, 1934-1952} (unpublished dissertation) at 1-34.


\textsuperscript{40} See H.T. Wilson, \textit{The Regulation of Standard Radio Broadcasting, 1934-1952} (unpublished dissertation) at 74-127 and Bernard Schwartz, \textit{The Professor and the Commissions} (New York: Alfred Knopf, 1959), the latter being a rather impassioned but nevertheless accurate account in the form of a case study of Schwartz' personal involvement in the problems of commission regulation.
Indeed, the so-called “life cycle” of these independent commissions from birth to growth to maturity to inevitable decline can be explained only by direct reference to the gradual “symbiosis” between members of Congress and special interests. The “political” analysis of agency decline, to the point where they eventually come to serve mainly as “fronts” for legitimizing industrial and business self-regulation (read no regulation), contrasts strikingly with Davis’ recommendations about the way agencies should ideally go about providing for the exercise of “good” discretion. Davis is operating as if it were possible to isolate “politics” with the people’s representatives, leaving administration as a technical matter to be worked out through legal (or legal- ized) procedures which are modelled on the courts, but with an added dose of responsibility thrown in in the form of external checks on the process of self-limitation through rules which confine and structure discretion while they announce policy in the form either of generalizations or hypotheticals.

The view that discretion constitutes a problem of administrative responsibility soluble by better and clearer “definition of standards” is a “legal” approach not only because of its naïve (or non-existent) conception of power and politics in rule of law democracies, but because it tends to conceive of “definiteness” solely in terms of vagueness, with a clearer meaning discoverable in the technical search for the “intent” of the legislation. Wayne A. R. Leys, responding to this view of discretion in terms of definiteness, argued thirty years ago that inherent in the difficulties of administrative law specialists like Ernst Freund was their failure to comprehend the political ramifications of the problem of definiteness as appertaining to ambiguity as well as “vagueness.”

Arguing against definiteness as an “adequate criterion” of good judgment, Leys suggested:

The crucial philosophical criticism of Freund’s analysis is that it gives a misleading appearance of simplicity to the concept of definiteness. Philosophical controversies have long since sensitized students of philosophy to the indefiniteness of ‘definiteness.’ ‘Indefinite’ may mean (1) ‘vague,’ ‘without limits,’ or it may mean (2) ‘ambiguous,’ ‘capable of referring to several set limits but not certainly specifying any one limit.’

Leys points out that legislatures are indefinite in their language “for more than one reason.” While it may be an oversight, “a recognition of their own lack


42 Discretionary Justice, supra, note 1 at 55-57. While there is some recognition of agency regulation as a political problem at 48-49, Davis remains committed to the view that self-control through confinement and structuring will allow the agency to resolve through rules those issues the legislature is unable or unwilling to resolve. But this is quite different from the realization that the regulating agencies themselves are subject to political pressures from members of the legislature as well as interest group representatives.

of skill and experience," an indication that this is a subject "which can never be dealt with in general rules," or even evidence of an unwillingness "to spend the time required to hit the nail on the head," it may be something other than simple vagueness. The legislature may be passing the buck, its vagueness purposeful "ambiguity" given its inability to "muster a clear majority in favour of a clear standard."44 There may, in short, be no vagueness at all, but rather a political reason for indefiniteness. Leys offers an alternate classification system, distinguishing three classes of discretionary power:

(1) technical discretion, which is freedom in prescribing the rule but not the criterion or end of action,
(2) discretion in prescribing the rule of action and also in clarifying a vague criterion — this is the authorization of social planning;
(3) discretion in prescribing the rule of action where the criterion of action is ambiguous because it is in dispute — this amounts to an instruction to the official to use his ingenuity in political mediation.45

The reason I have elaborated on Leys' argument at such length has to do with the position taken by those who espouse the legal approach to resolving the problem of discretionary power. Freund's position conceives of discretion as a purely technical problem where the criterion or end of action is given in vague standards, leaving the administrator to "fill in the gaps." Freund is trapped in the nondelegation doctrine to the extent that the failure of the legislature to forward clear criteria is thought to be remediable by the legislature, who must take action given the fact that: "A statute confers discretion when it refers an official for the use of his power to beliefs, expectations or tendencies instead of facts" (emphasis mine). According to Freund:

It is possible to distinguish roughly three grades of certainty in the language of statutes of general operation: precisely measured terms, abstractions of common certainty, and terms involving an appeal to judgment or a question of degree. The great majority of statutes operate with the middle grade of certainty.46

To the extent that Freund is arguing that the legislature's failure means administrators must view their task as one of "arriving at a definite standard," he too is beyond both the extravagant version of the rule of law and the nondelegation doctrine. This suggests that from the standpoint of Leys' analysis Davis and Freund have very much in common. Indeed, except for Davis' broadened conception of what a rule is and how one develops a body of rules which confine and structure discretion, both tend to view the administrative process as a technical problem in achieving more definite standards. But while Freund conceives of discretion ideally as a situation in which the administrator limits himself to providing rules where the criterion of action is assumed not

44 Id.
45 Id. at 18.
46 Ernst Freund, The Use of Indefinite Terms in Statutes (1921), 30 Yale Law Journal 437; Freund, Administrative Powers over Persons and Property (Chicago: University of Chicago Press, 1928) at 71. A recent study recommends restoring the rule of law by allowing the U.S. Supreme Court to return to the Schechter rule, thereby giving it the power to declare "invalid and unconstitutional any delegation of power to an administrative agency that is not accompanied by clear standards of implementation." See Theodore Lowi, The End of Liberalism (New York: Norton, 1969) at 298. One page later he expresses his gratitude to Davis' Administrative Law Text (1965) for an appreciation of the value of rule-making, but the traditional conception of the rule as a generalization.
to be in dispute, Davis does suggest that more may be required of the administrator than simply "technical discretion" as Leys defines it.

At the same time, Davis' commitment to formalization and systematization seeks to turn discretion in clarifying a *vague* criterion as well as "prescribing the rule of action" (type 2) into a *technical* matter through strategies of confinement and structuring. This is one reason for his insistence that rules be seen as hypotheticals, and not simply as generalizations from prior experience. It is because he realizes that there is more to discretion than the statement of specific rules as generalizations that he seeks to incorporate the middle type of discretion into his effort to steer between the Scylla of unfettered discretion and the Charybdis of the extravagant version of the rule of law and the non-delegation doctrine.

I want to conclude this part of the analysis with a brief discussion of Leys' third class of discretion, which is concerned with the purposeful ambiguity of legislation, and therefore the decidedly *political* character of "discretion" in the administrative process. Davis' viewpoint, presuppositions, and approach make it impossible for him to see the political system as dispenser of symbolic reassurance as well as tangible benefits to affected parties. Yet one of the most important observations to be made about the character of democratic politics is the extent to which gaps between ideal and reality need to be understood as *functionally necessary given* the rule of law. By failing to comprehend this aspect of political life, Davis' plea for justice, however much it claims to be aimed at impartiality based upon the development of standards of procedural fairness, is unable to account for the behaviour of officials in the situated context of administrative action where symbolic reassurance is as "real" to relevant general publics as the tangible benefits accruing to special interests organized for political action.

Murray Edelman has developed this argument in considerable detail and with great sophistication in the process. Edelman considers himself a "realist" in the sense that he harbours no illusions about the public interest as anything else but a rationalization, a temporary "resultant of forces" in Pendleton Herring's words. He sees *publics*, not a general public with a general interest, when he surveys the political scene. Indeed, it is the very characteristics of technological society which simultaneously suggest the limitations of the people's elected representatives and the fact that agitation

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47 This is Davis' criticism of Friendly's position in *The Federal Administrative Agencies*, supra, note 17 at 21-22. See Davis, *Discretionary Justice*, supra, note 1 at 47-51.

48 See Davis, *Discretionary Justice*, supra, note 1 at 64 No. 12 below, for his response to Judge Friendly's skepticism about rule-making, where rules are defined to mean generalizations from past experience.


50 Pendleton Herring, *Public Administration and the Public Interest* (New York: McGraw-Hill, 1936). Glendon Schubert, in the context of an analysis of various academic uses of the "public interest" concept in the political theory of American public administration, depends heavily on Leys' three classes of discretion, equating type one with the "rationalist" approach, type two with the "idealist" approach and type three with a "realist" approach to politics. It is in this sense, then, that Edelman is a "realist." See Schubert, *The Public Interest* (Glencoe: The Free Press, 1960), at 25-29.
about a public issue begins to subside at precisely the point in time in which it would need to increase in intensity if the interests of law enforcement were really to be served. Edelman would focus on organization and specialized competence, both premised on immediate pecuniary interests, as the key factors distinguishing “groups” of persons exhibiting various degrees of concern and/or interest regarding the operation of the political system.  

He would be the first to criticize the position that there is a general public whose interest is to be served by government against special interests whose concerns are unalterably opposed to the public’s welfare. He would take a decidedly political view of the reasons behind legislative indefiniteness and the subsequent performance of functions by administrative officials as actors in a system where much of what they do is necessarily symbolic in character yet a functional necessity which cannot realistically be conceived of as a “deviation” or an exercise in pure arbitrariness. Edelman would see the administrator’s job to lie in “prescribing the rule of action when the criterion of action is ambiguous because it is in dispute,” in other words “an instruction to the official to use his ingenuity in political mediation,” but with the added proviso that his job may necessarily include the odd mortification process or degradation ceremony in the interests of symbolic reassurance to specific and peripheral publics.

Edelman’s relatively cynical view of the administrative process, and of politics generally, is not something which has totally escaped Davis’ attention. As a matter of fact, there is a point in the study where Davis explicitly mentions this general position as defeatist when it is taken to “cover” any efforts to improve the process, and I agree with him. Edelman’s analysis of the “symbolic functions of politics” depends heavily upon what he calls the “game” theory of law enforcement in his chapter on the administrative system. I believe Edelman’s analysis is probably quite accurate, and that much reform, whether by reorganization or improvement of legal procedures, might readily be absorbed into the symbolic functions of a rule of law representative system.

The “problem” of discretion in Davis links up with the character of law enforcement in Edelman where the latter argues that democracy and “the rule of law” is impossible where laws are enforced as if each were a fiat, “the command of the sovereign” in the Austinian formulation, rather than “a virtuous generalization around which a game can be played.” Concrete legal objectives are ordinarily pursued as though administrators and potential defiers were involved in a game with rather clear rules. The basic rule is

51 Edelman, supra, note 48, 22-43 at 23-29. For a cogent criticism of interest group theory, see Lowi, supra, note 46, especially at 296-97.

52 Erving Goffman, Embarrassment and Social Organization (1956), 62 American Journal of Sociology 264, and Harold Garfinkel, Conditions of Successful Degradation Ceremonies (1956), 61 American Journal of Sociology 420 convey the consequences for parties to such events. The study of regulation by “independent” commission, seen in this light, has a “mission impossible” aura to it, such that if agency members are “caught” by congressmen at critical points in legislative careers, the latter will disavow all knowledge of the collusion and compromise to which they themselves might formerly have been a party.

53 Davis, Discretionary Justice, supra, note 1 at 164-166.
that a fairly large proportion of the instances of non-compliance will not be detected or penalized. Automobile drivers and policemen are both aware that most speeders will not be caught or fined, and both adapt their behaviour to this assumption: drivers speed when the chance of being caught is slight or considered worth taking. Policemen stop some but not all violators, and let some of these off with a warning. As long as the game is played in this way, both drivers and policemen accept the order of things fairly contentedly; drivers paying occasional fines complainingly but without massive political protest, policemen noticing a certain amount of modest surpassing of the posted limits without further action.\textsuperscript{54}

Edelman goes on to notice what happens, given the symbolic character of politics and the necessary gap between the law and its enforcement, when a police officer takes his job too seriously. Officer Muller’s “difficulty” contrasts rather strikingly with Davis’ discussion of selective enforcement to quite different ends.\textsuperscript{55} While I appreciate Edelman’s analysis, it seems to me that it does indicate a problem to which persons interested in political affairs (not just “experts,” appointees, and elected officials) might readily address themselves. I can understand Davis’ concern about this problem, and, while I do not necessarily believe that it can be fundamentally resolved in the ways he recommends, I do think his concern is not reducible solely to the sort of political naiveté which Edelman has allegedly revealed.

It strikes me that implicit in a good part of Edelman’s analysis is a rather severe naiveté of his own about the character of politics, which often takes the form of playing down the fact that there may be real conflicts of interest implicit in the answer to the question: Who gets the tangible benefits and who gets the “symbolic reassurance” time and time again? Seen in this light the idea of politics and law enforcement as a “game” only has meaning from the standpoint of the detached observer with no real stakes in the immediate outcome. Put another way, Edelman’s example, cited above, is far from “typical,” except to the extent that it constitutes what might be termed a middle-class game. Speeding in a car, as well as cheating on income tax returns (another of his examples) are, after all, middle-class “crimes.” You’ve got to have a car in the first case, and be “in the know” about the internal revenue scene (or be able to hire somebody who is) in the second to get away with them. Compared to the kind of situations members of the various “under-classes” find themselves in, especially with the police, Edelman’s examples lose their humorous quality. He seems to have realized this to some extent in a subsequent effort.\textsuperscript{56}

Sometimes one gets the impression that this is what motivates Davis’ attack on “selective enforcement.” For the most part, however, it appears to this writer that Davis’ criticism of law enforcement is less concerned with power disparities and consequent discrimination given the unequal bargaining power of some in the rule of law “game” than with the fact that occasionally these groups manage to “get away with” something (like gambling or prostitution, for example), or with the fact that organized and well heeled special


\textsuperscript{55} Davis, \textit{Discretionary Justice, supra}, note 1 at 170-72, and Edelman, \textit{supra}, note 49 at 45.

interests expecting "justice" in their noble battle with government, have been "disappointed" by the exercise of unfettered discretion.

IV. Position, Roles and Organization

At this point I want to shift my focus of concern from weaknesses in Davis' analysis to a supplement to it. Instead of looking at administrative processes as necessarily "political" I want to concentrate in this section on the structure within which administrative behaviour takes place, and the extent to which the fact of purposeful organization must be considered in any assessment of the problem (as well as proposed "solutions") inherent in effective law enforcement. Edelman's view of law enforcement as a game in constitutional and representative political systems is premised fundamentally on a picture of human interaction (as well as "socialization") taken from George Herbert Mead.

Mead argues that human beings develop not only their conceptions of "society" but their definitions of "self" from the learned yet relatively natural process of "mutual role taking." Taking the role of the other needs to be viewed as an active rather than a passive process, however, for it occurs in concrete situations where the individual's "construction" of social reality is an effort to respond to the perceived wishes of other persons who are "significant" to him. His "socialization" comprehends not only the process of his becoming a "person" to himself; it presupposes that social life is a situated phenomenon involving continuous self (and other) definition on the part of the individual concerned. Somewhere early on this process of self and world definition in terms of significant others is "generalized" and perceptions of what "society" requires emerge.

This does not mean that significant others are no longer relevant to the individual's process of reality construction, nor does it mean that this process becomes any less active than it was before. It remains fundamentally situational in character, in the sense that the situation constitutes the immediately relevant phenomenon within which interaction between persons occurs and must be analyzed. It is active because interaction with others requires individuals to simultaneously interpret the meanings of others' actions and construct their own line of activity. Groups are dynamic ongoing networks made up of persons engaged in the effort to make sense of something. That this includes making indications to oneself, that is, engaging in self-interaction, is crucial to an understanding of what reality construction means.

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59 Hans Gerth and C. Wright Mills, Situated Actions and Vocabularies of Motive (1940), 5 American Sociological Review.
Individuals must act, indeed, only individuals can and do act, and whatever constructs or "typifications" they may possess for encountering and interpreting their situated social reality in no way eliminates the need for such activity. Herbert Blumer, Mead's foremost disciple, explains the implications of such a view of human action:

It means that the human individual confronts a world that he must interpret in order to act instead of an environment to which he responds because of his organization. He has to cope with the situations in which he is called upon to act, ascertaining the meaning of the action of others and mapping out his own line of action in the light of such interpretation. He has to construct and guide his action instead of merely releasing in response to factors playing on him or operating through him. He may do a miserable job in constructing his action, but he has to construct it.60

The possibility that such an enterprise could conceivably be interpreted by social scientists as non-rational is one of the major reasons why the scholar's cognitive interest in social phenomena needs continually to be perceived as a situated and therefore a limiting interest in fact.61 This is a matter I shall discuss in some detail further on.

First, however, I want to argue that administrative action takes place in a formally organized setting and that therefore organization needs to be counterpoised against action and reality construction because formal organization is a conscious effort to structure, and consequently to delimit, the range of possible interpretations of the behaviour of others as well as possible responses in the form of lines of action. Virtually absent from Edelman's analysis, save for a general appreciation of the problem, is the fact of formal organization in political life, and the effect it must necessarily have on the individual called upon either to enforce the law or to make sense of it to himself and to others. By formal organization I mean what is broadly termed "bureaucracy" in lay as well as intellectual and professional circles today, a "system of roles graded by authority" whose members in role are characterized by being "peculiarly goal orientated."62 Formal organization is a conscious rational effort to realize group objectives in effective and/or responsible ways by attempting to minimize the search by group members for appropriate, expected or even prescribed (required) behaviours.63


Any effort at design of this sort is formal in the sense that it seeks to 
predetermine what is thought by particular individuals to constitute the most 
"rational" way of co-ordinating human actions toward the attainment of 
objectives for which their technical skills and managerial and professional 
competences are presumably required. It is in this sense that bureaucracies 
may usefully be conceptualized as "structured fields." This is not to ignore 
the point made earlier, namely, the fact that only individuals act, that formal 
organizational principles are prescriptions or expectancies rather than descriptions 
of the way a particular group functions. Again citing Blumer:

Instead of accounting for the activity of the organization and its parts in terms 
or organizational principles or system principles, it seeks explanation in the way in 
which the participants define, interpret, and meet the situations at their respective 
points. The linking together of this knowledge of the concatenated actions yields a 
picture of the organized complex. Organizational principles or system principles 
may indeed identify the limits beyond which there could be no concatenation of 
actions, but they do not explain the form or nature of such concatenations. True, a 
given organization conceived from organizational principles may be imposed on a 
corporate unit or corporate area, as in the case of a reorganization of an army or an 
industrial system, but this represents the application of somebody's definition of 
what the organization should be.

Having made these points, let me attempt to enumerate what might be 
termed basic "building blocks" in a theory of organizational behaviour. Such 
an effort should make it possible to comprehend the implications of formal 
organization for the administrative process and for law enforcement in 
particular. As "a system of roles graded by authority," bureaucracies are 
"structured fields" which attempt to integrate specialization with a principle 
of authority expressed in a hierarchy of superior-subordinate relationships.

As subsets of the more generic category "groups," formal organizations are 
collective situations where sheer numbers alone frequently justify resort to 
such structuring techniques. The basic unit of analysis in the study of formally organized groups is the position or office, defined as a prescribed or actual location in a particular group. Positions are further defined by reference to roles, those behaviours appropriate to, expected of or prescribed for the 
occupant of a given position in a group.

Expectations may be precisely specified, in which case we speak of tasks, 
which collectively constitute a job description for a particular position.

64 Presthus, supra, note 62 at 98-99, for instance.
65 Blumer, supra, note 60 at 58. He goes on: "The point of view of symbolic interactionism is that large-scale organization has to be seen, studied, and explained in terms of the process of interpretation engaged in by the acting participants as they handle the situations at their respective positions in the organization." Id. (Emphasis mine)
67 See, for example, Theodore Caplow, Organizational Size (1957) 1 Administrative Science Quarterly 484; and Richard Hall et al, Organizational Size, Complexity and Formalization (1967) 32 American Sociological Review 903.
Routinized tasks carried out with little or no discretion with respect to sequence, pace, etc., may be a part of any position in any group. However, when one’s role is virtually exhausted by his job description, this is usually an indication of a relatively low status position in formal organizations. The further up the hierarchy one goes the more likely it is that positions whose roles are social and discretionary in character rather than task routinized and formally specific. This is usually because the occupants of such positions are called upon to exercise varying amounts of “authority” over others, as well as responsibility for the actions of others and for their own decisions. As a matter of fact, the absence of job descriptions often makes an evaluation of the performance of higher echelon personnel difficult if not impossible, giving substance to Peter’s principle of incompetence as an approach to the analysis of the dysfunctions of hierarchy in organized groups.

Victor Thompson has suggested, in two highly significant studies, how increasingly irrational from the standpoint of formal rationality bureaucratic organization is. Once capable of coordinating individuals carrying out routine specialized tasks involving little if any discretion, bureaucracy is increasingly incapable of absorbing and efficiently coordinating the efforts of highly specialized persons whose work is made more difficult by hierarchy and the formal model generally. As “line” administrators and executives become more dependent (as does the organization as a whole) on professionally and technically trained “staff” personnel representing the social process of specialization outside the organization, techniques and “structures” appropriate to the management and control of non-discretionary specialized tasks defined organizationally become less and less “rational”.

Thompson argues that it is precisely this gap between ability and formal authority which compels administrators to use bureaucracy as a device to shore up and defend the legitimacy of their prerogatives in the face of mounting evidence to the contrary. This suggests that it is formal rationality rather than the (re) discovery of principles of humanistic and/or democratic management and administration which is compelling the substantial modification (or extinction) of bureaucratic practices and procedures in

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69 This is discussed in Richard Cyert and Kenneth MacCrimmon, “Organizations,” in The Handbook of Social Psychology, Volume 1 (Reading, Massachusetts: Addison-Wesley, 1968) at 576-578, where the authors distinguish between “programmed” and “discretionary” components in organizational role definition.

70 Lawrence Peter, The Peter Principle (New York: William Morrow, 1969). Victor Thompson, supra, note 66 at 66-73 indicates how dysfunctional hierarchy as an institutionalized dominance mechanism can be when one is trying to assess managerial performance.

numerous types of organized group contexts.\textsuperscript{72} It was something which Max Weber, so often maligned for his "narrow" view of bureaucracy, fully anticipated in his law of increasing rationalization, so crucial to any comprehension of the meaning of his work.

That bureaucracy is increasingly threatened with obsolescence in some organizations does not necessarily imply that such a response will be forthcoming in the administrative processes of government and the public sector generally. There is a strong conviction among many that bureaucracy and formal organization is the best guarantee against the irresponsible exercise of power.\textsuperscript{73} To the extent that legislation takes the form of enabling statutes aimed at establishing administrative organizations in government, it directly partakes of the same kind of rationality as that which is embodied in tables of organization and manuals of procedure. While in both cases the intention is to redefine and formalize, Davis' concern is with the effective control of official discretion through the agency's generation of rules confining and structuring it over time. Davis appreciates the need to focus on the situation in which administrative action does or does not occur, but he does not realize that individuals called upon to enforce the law or to act in any administrative capacity whatsoever have job descriptions and organized group relationships as well as legislation to contend with.

If it was once possible to structure work settings in industry on Taylor's premise that "a man is a horse" so far as the organization was concerned, continued perception of certain administrative personnel as task specialists carrying out relatively non-discretionary jobs is absurd as well as patently dangerous. Davis recognizes this in his frequent references to selective enforcement by police officers, whose power in given situations is often far in excess of their abilities and sense of discrimination and judgment. But he fails to realize that it may well be the nature of the situation rather than the character and level of education of police personnel which makes his remedy far from a sure thing.\textsuperscript{74} Police admittedly have an immense amount of potential discretion, and it may be wise to endeavour to control it in the ways he has suggested. But Davis is too ready to reduce the actions of police officers, as well as other administrators, to irrationality and emotions in the absence of formally rational predefinitions of the situation.

The process of reality construction referred to earlier suggests just how actively rational human interaction is, especially when rationality is seen to lie in the actor's intention to put means in the service of particular goals or

\textsuperscript{72} Victor Thompson, Bureaucracy and Innovation; H.T. Wilson, The Dismal Science of Organization Reconsidered (1971) 14 Canadian Public Administration 82.

\textsuperscript{73} This is especially the case in university administration. See, for instance, H.T. Wilson, "The Academy and its Clients," Report to the Federal Commission on Relations between Universities and Governments (Ottawa, 1970) and an abbreviated version published under the title of Academic Bureaucracy (1971), 78 Queen's Quarterly 343.

\textsuperscript{74} While a passing nod is made to politics, power and conflicts of interest which may be structured into the system (at 24), Davis for the most part holds firm to a belief that formalization can provide the basis for rational law enforcement, given the fact that the "median education" of policemen is 12.4 years. Discretionary Justice, supra, note 1 at 89-90.
principles rather than in his success in these endeavours. Rationality defined by reference to the consequences of individual (and collective) actions rather than to the intent and effort of actors is characteristically a problem for academics, and anyone else not participating in the immediate situation, are bound to have unless they are careful when assessing its meaning for them. The idea that the formally organized group carrying out the role requirements of its positional incumbents constitutes rationality per se, while the individual is nothing more than a bundle of needs, impulses and emotions, gives the lie to continuing efforts to adjust him to the organization by isolating and atomizing his "problems" by reference to subjectivity and "values". It may be just as "reasonable" to speak of the inherent conflict between the individual and the organization as it is to speak of "mutual adjustment" and a "natural harmony of interests." 

A final point suggests itself here, and arises out of the question: To whom is the law addressed? On the basis of available knowledge about the outstanding characteristics of contemporary technological societies I would want to argue that ultimately the law is addressed neither to the citizen nor to the law enforcement officer, but rather to legal and other specialists who continue to be its interpreters and arbiters. This is not to argue that administrators in formally organized and relatively closed contexts do not and cannot comprehend the limits to action contained in rules confining and structuring their discretion. But I would have to distinguish clearly between the relatively stable social settings in which most governmental agencies regulate and administer (or give the appearance of same) and law enforcement by the police. Even though Davis gives not inconsiderable attention to the police in his study, it seems to me that it is in this area of the so-called "administrative process" that his recommendations for improvement are least likely to bear fruit. On the other hand, it is precisely in the relatively stable areas of the administrative process that political influences and factors are adequately comprehended by Davis will likely continue to make control of unfettered discretion very difficult. Finally, the absence of any recognition of the limits posed by organization as a technique for coordinating and directing human action, and the fact of conflicts within organizations in the public sector, suggest that even in allegedly "client-centered" bureaucracies (welfare, urban development, poverty) Davis' discretion-based approach may have limited value.

The belief that natural justice is best guaranteed by resort to formally rational techniques of law-making is one to which Max Weber drew attention over half a century ago in the context of a critical analysis of the costs as

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75 See Blumer's injunction to social scientists involved in "research," Id. at 51.
76 As Karl Mannheim did in Man and Society in an Age of Reconstruction (London: Routledge & Kegan Paul, 1940), 55-75 at 57-58. Also see H.T. Wilson, Rationality and Decision in Administrative Science (unpublished paper).
78 See Peter Blau, The Dynamics of Bureaucracy (Chicago: University of Chicago Press, 1955) and Blau and Scott, supra, note 63 at 59-86.
well as the benefits of "progress" in the West. The effort to anticipate and
define in advance the behaviour appropriate to public officials can be self-
defeating when the limits of such an endeavour and the contribution of other
points of view are not given proper consideration. To the extent that Davis' 
view of the administrative process, and the role of law in shaping it, does not admit of the sorts of considerations raised here and elsewhere, his analysis of 
the problem of discretion is, to paraphrase a colleague, necessarily analogous to that of a man armed with a flashlight in search of the nature of darkness. 
The closer he gets to it the more he chases it away.
