Michigan Law Review

Volume 41 | Issue 2

1942

IF MEN WERE ANGELS: A REVIEW

E. Blythe Stason
University of Michigan Law School

IF MEN WERE ANGELS: A REVIEW*

E. Blythe Stason†

OCCASIONALLY one encounters a new book that is genuinely interesting because of the refreshing vigor with which it attacks an important and timely problem. Such a book is Jerome Frank's new volume, *If Men Were Angels*. Indeed in some of its chapters its vigor approaches violence, a fact which adds spice to the reading.

If Men Were Angels is a story of modern administrative law. Not that administrative law necessarily makes men think of angels. Indeed, in some breasts, the author tells us, it has aroused quite different emotions. "But," says the *Federalist*, No. 51, "if men were angels, no government would be necessary." And again, "If angels were to govern men, neither external nor internal controls on government would be necessary." In other words, if mankind could be remade in the image of angels, there would be no need of administrative law. But unfortunately men have not attained that rarefied estate, either in government offices or in private life. Consequently, we have administrative law with us in a large way. It has become as significant in the contemporary scene as the growth of chancery in early English jurisprudence. Moreover, we have high need of new books to educate us in its many intricacies. *If Men Were Angels* makes provocative reading. It not only contains plenty of good sense, but at the same time it contains its fair share of fallacies and a sufficient array of disputable assertions so that the reader may occasionally disagree with the author and thus avoid the dreadful inferiority complex attendant upon reading the Holmes-Pollock letters or the writings of the other greats of legal literature.

I have always thought that a book review should describe the book, and not merely serve as a springboard to help the reviewer air his own notions concerning the subject matter. Accordingly, I am going to examine *If Men Were Angels* virtually chapter by chapter.

The author opens his story by telling us that "government is human" and not an automatic mechanism producing results by the mere

*IF MEN WERE ANGELS; Some Aspects of Government in a Democracy. By *Jerome Frank*—United States Circuit Judge; formerly Chairman of the Securities and Exchange Commission; author, "Law and the Modern Mind," "Save America First." New York: Harper & Bros. 1942. Pp. xii, 380. $3.75.

† Dean and Professor of Law, University of Michigan Law School.—*Ed.*

turning of a crank. "The thorough awareness," he says, "that there is an unavoidable personal factor in government is the best way to reduce to a minimum the bad effects of that personal factor." (P. 5.) Again, "Properly interpreted, the phrase 'a government of laws and not of men' is still of inestimable value. Thus interpreted it means that the personal prejudices and predilections of government officers should be reduced, by statutory provisions and other means, to as narrow confines as is possible, having due regard to the practicable workings of the governmental functions involved." (P. 7.) In short, the author says, "What we, in a democracy, must insist upon is a government of laws well administered by the right kind of men." (P. 9.) In fact, the principal theme of the book may be said to be the "human" quality of government, meaning by that the "discretionary" powers exercised by government officials.

With this as his opener, Judge Frank tells us that in this complex modern world, in which government must regulate to an ever-increasing degree the activities of virtually all mankind, we must be prepared for many new adjustments in the relations between government, business, and industry. Recognizing great virtue in personal liberty, the author emphasizes the inevitability of further restrictions upon it. Liberty must give way, in the interest of public welfare, to the rules and orders of government experts familiar with the technology, the economics, and the social implications of modern life. We must, in fact, learn to reconcile the "expert state and the free state." (P. 18.) Moreover, not only must we take advantage of the expertness of technical assistants in government, but we must make government "efficient" by utilizing the procedural dispatch and effectiveness of administrative commissions. The author commends the report of the Attorney General's Committee on Administrative Procedure for its careful statement of the characteristics and reasons for growth of administrative agencies in contemporary regulatory processes.

Then in Chapter V, under the title of "Uncritical Criticisms," Judge Frank turns to a rather vigorous attack upon the critics of administrative agencies and particularly upon Dean Roscoe Pound's recent writings, notably the volume published in 1940 called *Contemporary Juristic Theory*. The 1938 report of the special Committee on Administrative Law of the American Bar Association, of which Dean Pound was chairman, also receives attention. In considerable detail the author marshals his own experiences as a member of the Securities and Exchange Commission to answer Pound's criticisms. He concludes that "Since Pound's derogatory blanket comments on federal administrative

agencies are thus unsupportable with respect to the SEC, serious doubt is thrown upon their correctness generally." (P. 53.) In addition to Chapter V, the author devotes an extended portion of an appendix to what he calls "Some Interesting Aspects of Roscoe Pound's Writings."

The argument with Dean Pound out of the way, we embark upon the most interesting portion of the book. Chapter VII bears the intriguing title "Courthouse Facts." It is a discussion of fact-finding techniques and capabilities of courts of law. The author finds them bad, in fact very much worse than they are generally supposed to be. He feels that all courts, and especially courts sitting with juries, are extremely unlikely to reach accurate decisions on the fact issues laid before them. The prejudices and fallibility of witnesses, the influence of counsel, the attitudes of the judges, the lack of capacity of the jury, the extent of discretionary power exercised by the jury in rendering general verdicts, and by the courts when sitting without a jury—all of these factors reduce to a low minimum the accuracy with which "courthouse facts" are found. Judge Frank paints a rather sad picture of court litigation—a picture which may be a little on the pessimistic side, but which unfortunately contains not a little of just criticism.

In passing, and rather parenthetically, the author devotes a fair measure of quite unflattering attention to law schools and particularly to the inadequacy of legal education in the procedural subjects. "Our leading law schools are staffed by professors of whom the majority have had little or no experience in *trial* courts; many of them know nothing of the actual workings of the courts except what they have learned from reading upper court opinions. Of the numerous contingencies affecting the 'facts,' and of the immense importance of the trial judge in the administration of justice, such men have but the scantiest awareness. That lack of information on those subjects is deplorable." (P. 105.) In short, the law professors are deplorably unaware of the importance of facts and fact-finding. Presumably, therefore, they fail to give proper instruction to the next generation of lawyers, although, the author says, "these teachers return with smug satisfaction to the halls of learning. Toward the devising of means of curing the curable defects in official fact-finding, they do nothing." (P. 106.) In other words, the fact-finding process of the courts is very bad, and the law professors are too ill-informed to be aware of the true state of affairs, much less to do anything to improve it. However true these strictures may be of *some* law professors, I think they are unfair if applied indiscriminately to all or any large percentage of the profession. Indeed, the author himself notes certain exceptions, i.e., E. M. Morgan, E. R.

Sunderland, and Leon Green. I could name him many more who do not deserve the blanket condemnation.

After exploring the defects of "courthouse facts," we are next taken to the fact-finding processes of administrative agencies. These agencies, we are told in a chapter entitled "How Commissions Find Facts," have made a distinct contribution to trial procedure in the way of improved accuracy in ascertaining the actual facts of cases. There can be no question that this is true. The well-implemented administrative agency has its corps of technicians, its accountants, its engineers, its economists, as well as its legal staff. It has a wealth of reports and information upon which to rely. Pursuant to the provisions of the statute under which it is created, it continuously informs itself concerning the businesses subject to its jurisdiction. It has the personnel and the materials for competent fact-finding. All this Judge Frank points out very effectively, especially as regards the Securities and Exchange Commission. He contends (p. 127): "The administrative agencies, by coming closer than the courts to the actual facts of the cases before them, are coming closer to deciding cases justly." The chapter concludes (pp. 146-147):

> ". . . administrative agencies, in general, are just as painstaking and impartial in their fact finding as are courts. They have, in addition, the advantage of expert investigative staffs to assist in preparing and presenting cases before them. Knowing well the characters and abilities of the men who compose those staffs, they can place in them a degree of reliance and confidence that a judge frequently cannot place in the opposing advocates on whose presentation of the evidence he must largely rest his decision. The administrative agency, therefore, is an instrument of government which has in it great powers of good; instead of leaving the public interest to be served adventitiously by the private parties, it offers an affirmative and purposeful way of insuring that, to a considerable extent, the relevant facts will be brought out, the public interest made clear and justice done."

Judge Frank's experience with the Securities and Exchange Commission is such that he knows whereof he speaks. Nevertheless, an outside observer may perhaps be permitted one cautionary word: While it is true that administrative agencies are wonderfully well equipped with materials for decision and technical assistants upon whom they can rely in reaching decisions, it is equally true that the tremendous burden of case decision resting upon most of the important agencies is such that the commissioners themselves are unable to devote the same extended personal consideration to the facts of their cases as is nor-

mally devoted by trial courts to the facts of cases tried before them in which they have personally listened day after day to the testimony from the lips of witnesses. Normally an administrative hearing is held before an examiner. The testimony reaches the commission only after predigest by "review attorneys." The responsible officials are thus to a substantial degree isolated from the sources of factual information so necessary to accurate decision on fact issues. A large reliance is placed upon anonymous assistants to make honest, unbiased, and accurate reports upon the all-important facts. Again, the "personal" element enters. In other words, there may still be room for improvement in this phase of administrative procedure.

In discussing the administrative fact-finding function, Judge Frank offers some exceedingly interesting and valuable suggestions concerning the possibility of use of declaratory rulings by the agencies. He would improve the administration of justice by opening the door to declaratory rulings in advance of action, thus minimizing the hazards to which business is subjected by the uncertainties in the mass of contemporary statute law and administrative regulations. Unfortunately, and this the author does not point out, there are very few administrative agencies, either state or federal, that are at present *empowered* to give declaratory rulings, and practically none that are actually *required* to give them on request by interested parties. The Attorney General's Committee on Administrative Procedure recognized this fault in existing statutes, and both majority and minority bills contain corrective provisions. The use of the declaratory procedures in administrative law should certainly be expanded.

After criticizing the courts and commending commissions for their respective fact-finding abilities, Judge Frank turns to a discussion of the general subject of discretion in administrative law. This is the most original contribution of the book. We have long needed a careful and extended discussion of the proper place of administrative discretion in modern government. The author discusses the subject from both an historical and a practical point of view. He explores the meaning of the phrase "government of laws and not of men," so commonly encountered in our constitutional literature. Does it mean that no administrative discretion is permissible? The author traces the phrase to its source to get light from the fountain head. It is found in the Bill of Rights in the Massachusetts Constitution of 1780, but that instrument was drafted by John Adams, who in turn was deeply influenced by Harrington's *Oceana*, published in 1666 and dedicated to Oliver Cromwell. That book popularized the phrase "government of laws" in English-

speaking countries. But Harrington reached back to Aristotle and through Aristotle to Plato, and therefore Judge Frank explores the thoughts of those worthy ancients. It is clear that Aristotle, when he used the expression "government of laws," meant it sensibly rather than strictly. He did not intend wholly to exclude administrative discretion. At least that is indicated in his *Politics* in which he said, "But some things can, and other things cannot, be comprehended under the law, and this is the origin of the vexed question whether the best law or the best man should rule. For matters of detail about which men deliberate cannot be included in legislation. Nor does anyone deny that the decision of such matters must be left to man." So, since Aristotle did not decry the conferring of limited discretionary powers upon administrators, it is fitting that we in this more enlightened age should also take a sensible and practical view of the matter, recognizing that administrative discretion is necessary in contemporary government and that it is not a violation of the spirit of the clause enjoining "government by laws and not by men." Certainly this is sound.

Finally we come to Judge Frank's concluding chapters, which seem to the reviewer to detract measurably from an otherwise very worthy discussion of administrative law. The author speaks of "Coke and the Flank Attack" and "Old Whine in New Bottles," these being the titles of the second and third chapters from the end of the book. Those who criticize administrative *procedure* are said to be engaging in a "flank attack" on the *substantive* provisions of government regulation of business. They are "in large measure motivated by an unexpressed desire to cripple the enforcement of certain acts of Congress" (p. 249). Although this may be true of some persons, it assuredly is not true of all. Many intelligent persons are sincerely endeavoring to make their contribution to the improvement of administrative procedure. They have no ulterior motives and they should not be undiscriminately condemned. The authors of the Report of the President's Committee on Administrative Management are ardent supports of most of the recent Congressional legislation, but at the same time were quite vitriolic in their attack on the independent administrative commissions. They were not attempting a "flank attack." For the past quarter century in this country many intelligent and forward-looking members of the profession have devoted a large portion of their strength and energy to the reform of court procedure and they have accomplished great good. No one would seriously contend that these persons were engaged in a "flank attack" upon the criminal laws of the land, or the civil laws that are enforced through the courts. By the same token it is unjust to charge all those who have

been and are endeavoring in a sincere and constructive manner to explore critically and thus to help improve administrative procedure with the ulterior motive of making a flank attack on the substantive provisions of contemporary regulatory statutes. No new departure in government can hope to be free from flaws. Administrative procedure is no exception. Contributions to its improvement should be welcomed, not condemned.

A word or two of conclusion: A reviewer has no difficulty in taking advantage of the author. He can always think of other phases of the subject which he would have chosen for treatment. For example, I would like to learn more about Judge Frank's views concerning government personnel and how to improve the civil service. The report of the President's Committee on Civil Service Improvement (the Reed Committee report) is quite as significant as the report of the Attorney General's Committee on Administrative Procedure. It is probably no exaggeration to say that the most vital need of government today is improved personnel, particularly in the responsible positions on and under important administrative boards and commissions. Judge Frank says that the personal factor in government is absolutely unavoidable. That being true, we should leave no stone unturned to make it a favorable rather than a dangerous factor. The author could discuss this subject with the wisdom he has acquired on the Securities and Exchange Commission. He hints at the problem in his first chapter but virtually ignores it thereafter.

Then always one can find grounds for criticism of style and format. The author has used italics too generously. Presumably he has italicized the important statements, and yet looking back over my own underlining, I find that I have marked as significant more unitalicized than italicized material. Most readers prefer to pick the important passages themselves.

Also it is unfortunate that the author has attacked Dean Pound so vigorously. Doubtless there is a fundamental disagreement between the two, but there is still room in America for honest and healthy difference of opinion. Each man has made and is making an important contribution to American jurisprudence. I believe it would be more dignified to minimize personalities.

However, these grounds of criticism cannot minimize the genuine value in the new book on administrative law. *If Men Were Angels* is a very useful, thought-provoking, and stimulating study of the subject by an excellently qualified observer who is at the same time a brilliant writer.