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If Men Were Angels (Book Review)

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IF MEN WERE ANGELS. By Jerome Frank. New York: Harper and Brothers, 1942, pp. vii, 380.

"If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed, and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."[1]

The traditional fear of government abuse of the sovereign power, basic in the conventional American political philosophy, is generally expressed in the demand for "a government of laws and not of men."[2] The many and various meanings attributed to that phrase have left unimpaired the fundamental concept identified thereby, that the ultimate security of the people against tyranny of government lies in the imposition and maintenance of pre-determined and precisely defined legal limitations or restraints upon the exercise of governmental power. The relatively simple social organization in operation at the end of the eighteenth century did not require any greater governmental control or regulation than even a strict interpretation of the Federal Constitution would permit. But the modern industrial civilization and the complexity of social problems it has engendered have so broadened the necessary scope of government function and so loosened the bond of restraint upon government power that the ancient securities against government despotism require re-evaluation.

In this his latest essay on government and law,[3] *If Men Were Angels,* Judge Jerome Frank has undertaken a restatement of the principle of government limitation in general, and a defense of the contemporary system of administrative government in the light thereof, in face of mounting criticisms that the government of the United States is no longer "a government of laws, and not of men." The latter phrase, states the author, whatever its various connotations, discloses fundamentally "a desire to avoid, as far as practicable, the intrusion of the 'personal' element in government. It means that government officers are the public's servants, and must not follow their own caprices."[4] Or, in other words, it is, ultimately, the public will which constitutes the effective limitation upon the exercise of government powers. "But we dare not push the literal meaning of that (quoted) phrase too far. If we do, we lose sight of the fact that government, too, must, unavoidably, be administered by human beings. Government is not and cannot be made into a piece of automatic machinery."[5] Indeed, continues the author, the emphasis upon the mechanical aspects of government tends to obscure the need for honest, diligent and competent administrators. "The thorough awareness that there is an unavoidable personal factor

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[1] THE FEDERALIST, No. 51. Quoted, FRANK, IF MEN WERE ANGELS, pp. vii, 9.

[2] Judge Frank devotes a chapter (XII) to "The Historic Meaning of a 'Government of Laws'."

[3] Earlier works by the author: LAW AND THE MODERN MIND (1930); SAVE AMERICA FIRST (1938).

[4] P. 1.

[5] P. 2.

in government is the best way to reduce to a minimum the bad effects of that personal factor."[6] We must avoid the extremes: "to insist that we can have a pure 'government of laws' . . . is likely to lead to concealed, and, therefore, corrupt or tyrannical 'personal government.' . . . to insist, that if we have a government made up of 'good men', we need not bother about legal restraints on their activities, is to insure unconcealed 'personal government'—dictatorship. What we, in a democracy, must insist upon is a government of laws well administered by the right kind of men."[7]

With this introduction, Judge Frank proceeds to argue that the essential, truly reliable, safeguards against despotic government are present in the current administration of the Federal Government, *viz.,* a personnel of highly competent public officials sensitive and responsive to the demands of the public. "To the freedoms inherent in a real democracy most of the men in our national government are devoted. And that signifies that they are devoted to those efficiencies which go with such a democracy. And when they say that they want our democratic government to be made up of decent, honest, God-fearing men to whom absolutism is nauseating, they are surely not to be charged with a secret or open hankering for 'personal government' or with advocacy of the autocracy of the Nazis or Fascists. Yet many of them have recently been denigrated in just that way."[8] At this point the foregoing discussion of political ideology degenerates into the author's particular theme—the defense of the administrative government—for, he continues, "And such charges have, with particular vehemence, been leveled at the members of the federal commissions and so-called administrative agencies."

After a brief summary of the necessities for an administrative branch of government and a statement of the advantages of the administrative system, quoted at length from a report on "Administrative Procedure in Government Agencies" by an Attorney-General's committee, Judge Frank engages in a one-sided debate with the critics of the New Deal administrative agencies. The author has selected as his opponent Dean Roscoe Pound because, as he asserts: "To answer Pound . . . is to answer virtually all the critics of those agencies, for his comments are typical." However, whereas most of the comments by Dean Pound, referred to by the author, are directed toward the methods and aim of the present administrative government in general, Judge Frank limits his rebuttal primarily to a defense of the Securities and Exchange Commission of which he was formerly chairman.

With the advantages the author has thus taken to himself, he is extraordinarily effective in his refutation of the "critics". He proves, *inter alia,* that the governing rules of SEC proceedings *are* readily accessible; that statements of the issues, the evidence, the findings of fact *are* made in proceedings before that commission; that contested hearings *are* conducted in public; that decisions therein *are* published, and that these *do* form precedents guiding the commission's future adjudications. He refers to the limitations on the discretionary power of administrative boards imposed by the statutes governing them,

[6] P. 5.
[7] P. 9.
[8] P. 13.

to the opportunity for judicial review of their decisions, and to the conscientiousness and competence of administrative personnel and their devotion to the cause of democracy, as proof that the derogatory phrase "administrative absolutism" is a vituperative characterization that is not consonant with the facts, and is, indeed, employed by the critics of administrative government to conceal their ignorance of the realities.

The author's argumentation is excellently detailed. He leaves no room, within the relatively narrow issues he has framed, for an effective surrebutal, and is therefore, under the circumstances, exceedingly persuasive. When Dean Pound, according to Judge Frank, intimates that administrative boards are under the influence or "juristic realists"—"who entertain ideas subversive of the fundamentals of American democracy," [9] the author undertakes an extensive analysis of Realist Jurisprudence; identifies the known "juristic realists"; indicates they are not a homogeneous group espousing a common political or economic philosophy; and that, moreover, only two of them have ever been members of any federal administrative agency. If administrative procedure manifests the realist influence, it does so in the technique by which administrative tribunals determine the facts of cases brought before them.

The author devotes three chapters to the importance of the facts in the administration of law. Whatever the divergent concepts provoked by the term,[10] "Law" as a reality is measured by its application to facts. Judicial decisions are the product of two factors: the legal precepts and the facts to which they are applied. However precisely formulated the legal precepts, the "correctness" of the decision depends upon the accuracy with which the facts are determined. From the fallibility of witnesses, the partisanship of counsel, the inexperience of jurors, to the confusing technicalities of jury charges and the deception of the "general verdict", the author details the pitfalls to an accurate determination of the facts in the conventional court trial.

Administrative tribunals "are at least as mindful as the courts of the inherent difficulties of fact finding in cases where the testimony is in conflict," [11] but they "have made distinct contributions to trial procedure which move in the direction of improved accuracy in ascertaining the actual facts of cases." [12] An administrative commission, such as the SEC, need not rely on the competence and ethics of counsel to produce the true facts. It employs a trained staff of investigators, accountants, analysts, engineers, and other specialists to procure evidence that may be offered at the trial, subject, of course, to cross-examination and the usual objections as to competence and relevancy.[13] Furthermore, because of their specialized experience, the commissioners, themselves, are more proficient in the task of comprehending the facts and drawing the proper inferences, than the common lay jury. Finally, the commission will ordinarily not take refuge in a general verdict but will render findings of fact which, as part of the record, may then be subject to judicial review. "The

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[9] P. 54.

[10] Judge Frank has forsworn the use of the word "law" whenever possible, pp. 56, 66.

[11] P. 121.

[12] P. 122.

[13] *Ibid.*

administrative agencies, by coming closer than the courts to the actual facts of the cases before them, are coming closer to deciding cases justly." [14] But "the antithesis between courts and commissions should not be too sharply drawn", admonishes the author.[15] Adjudication and administration are still separable functions. "As dispute-deciding is a function of fundamental importance, it would be a misfortune if its dispatch were impeded by adding to the duties of the judges extensive administrative and regulatory duties of the sort which administrative bodies are now designed to perform." [16] On the other hand, the efficiency of the administrative process would be seriously impaired were it saddled with all the traditions and technique of the courts.

The doctrine of "separation of powers" finds a corollary in the tradition that the same officer must not be both prosecutor and judge. Administrative commissions do, of course, enact rules, prosecute violations thereof and adjudicate the issues therewith arising. The classical three powers of government are thus vested in a single agency. To the protest that such a combination of powers leads inevitably to despotism, the author counters with an historical and critical analysis of the doctrine of separation of powers to establish that the doctrine has never required, and cannot accomplish, a "water-tight" compartmentation of government or the exclusive allocation of these powers to separate offices. The pressing problems of contemporary society require solutions by government action possible only through a fusion of government powers. The concentration of such powers in administrative agencies, asserts the author, is neither without precedent nor contrary to the Federal Constitution. The inhibitions on the unlawful usurpation of government still inhere in the system of "checks and balances" maintained by the Constitution. Ultimately, and here again is expressed Judge Frank's main theme, "Legal formalities cannot prevent abuse of government powers." [17] "Here, as elsewhere, in the last analysis, the protection of the citizen from misuse of government power must be found in the selection of officers . . . who are honest, well-trained, intelligent, conscientious; imbued with the love of liberty; controlled not only by the ethical attitudes of the community, but by self-discipline. . . ." [18]

In this essay the author has produced neither a text on the federal administrative system nor a treatise on political philosophy. He has merely undertaken a defense of the administrative government against criticisms of its merits and of its conformity with American political ideals. Those who doubt the efficiency of administrative government have been convincingly answered. If there be any who protest that an administrative department of government violates the doctrine of separation of powers, that the operation of administrative agencies is unconstitutional, or that the government must and can be solely "a government of laws", they have been thoroughly refuted. These issues the author has successfully met. As a judge upon them the reader must render a verdict in his favor. But an uncomfortable feeling may persist that the facts upon

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[14] P. 127.
[15] *Ibid.*
[16] P. 139
[17] P. 330.
[18] P. 331.

which such judgment will be based are "courtroom facts" and not the paramount realities.

However true it may be that the mere formalities of legal restraints upon government will not thwart a dictatorship, it remains equally obvious that a reliance upon the political integrity and administrative competence of government personnel will not insure the liberties of democracy. Granted that a dependence on the people is a primary control, experience still teaches mankind the necessity of auxiliary precautions against demagoguery. Conceding that a compromise of the extremes is to be sought and maintained, the emphasis of the stricture is still upon the "government of laws". One cannot resist the impression that Judge Frank has misplaced that emphasis. It is to be expected that the disciples of a new order will in their struggles against the restrictions of tradition exaggerate the inefficiencies of the past and minimize the vices of the future. But it is in the very enthusiasm of the creation of a new order that the threat to the virtues of the past and the danger of inefficiencies in the future are born. The demand for a flexible government responsive to the will of the people must never displace the demand for a stable government responsive to the principles of constitutional limitations.

Of course,—"If men were angels . . ."

G. ROBERT ELLEGAARD.*

FEDERAL INCOME GIFT AND ESTATE TAXATION. By Rabkin and Johnson. Albany: Matthew Bender & Co., 1942, pp. i–vi, 1–28, 101–4130.

Here is a fresh approach to the study of federal taxation from the point of view of the lawyer. It is comparable to the "Hornbook Series" of texts long available to lawyers and law students in other fields of law. The book invites comparison with the current tax services, Montgomery's Handbooks and Paul and Merten's authoritative treatment of the *Law of Federal Income Taxation* in six volumes and a 1939 voluminous supplement[1] of over 3100 pages. The authors have succeeded amply in satisfying the need for just such a book for lawyers and tax practitioners.

The book reads like a collection of studies on all aspects of the tax law and the material is arranged so that each chapter is given a unified treatment of the particular subject matter instead of the patchwork, all-inclusive material found in the tax services. As a matter of fact the chapter on Partnerships was the basis of a law review article that was published in the April, 1942 issue of the *Harvard Law Review*. Other chapters in the book could quite readily be similarly presented separately as scholarly studies of the particular subject matter involved.

The arrangement of the material is novel yet orderly, and not bizarre. The first group of chapters is concerned with Tax Patterns and the five chapters

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[1] A revision of this work by Mertens has been announced for current publication.