BOOK REVIEWS


Jerome Frank will be forever unhappy because a chord must be deployed in time to become a melody. He would like to be able to gush out his whole wisdom at once. Every book he writes is too short for him. Each contains a dozen average volumes. He can scarcely wait for page three to make the needed qualifications of the thesis announced on page one. Before we reach page two we are referred to footnotes in the rear as well as to footnotes on the page bottom. All these themes, though not confusing, must be absorbed simultaneously.

I heartily recommend Frank's notes, footnotes and eight appendices. Do not be a prude and read them sequentially. Read them all at once. It is like going to an intellectual Ringling's. You leave this book with the same sense of exhilaration and exhaustion. You scarcely know which impression you want to let dominate. The main ring is devoted to a defense of administrative agencies. In side rings we have defenses of the legal realists and the New Deal. Over there in that corner the lion tamer has caged Roscoe Pound. Over here in this corner the magicians are taking our government apart and putting it together again, but this time we are not so simple-minded about checks and balances, the tripartite division, and a "government of laws". A scientist would be amazed to hear the ballyhoo about "facts" because these are not the facts his laboratory knows. These are far more slippery animals: courthouse facts.

When Jerome Frank writes about foreign affairs (as in his treatise which gave the name to the isolationist committee, Save America First) or when he writes about Jewish problems (as in the Satevepost) one may admire his courage while questioning his authority. When he writes about administrative commissions and courtroom facts, however, he is playing in his home grounds. A case-hardened Chicago and New York lawyer who has matched wits and indentures with the best of them, he joined the New Deal for the duration and made his way to chairmanship of the S. E. C. while it still had to fight its way, landing finally in the Circuit Court of Appeals. An expert whose credentials will not be questioned has put a number of articles together and added some new ones to make this book.

It has long been one of Jerome Frank's contentions that only realists like himself with considerable courtroom experience really knew what the shouting was about. You could concede to the traditionalists that legal rules were definite, certain, and predictable, and give them aces and spades, and still win the juristic argument by showing how elusive the facts are. In order to predict a judicial decision we must multiply the law by the facts. No one on earth knows what the facts will be in the courtroom. Witnesses die or forget or are bludgeoned by the cross-examiner. The judge is more or less competent in admitting evidence. More or less registers on the jury's mind with varying degrees of vigor. The facts that get into the record are like something never seen on land or sea. Hence, a sophisticated trial lawyer is a quack who tells his client with certainty what the outcome of litigation will be.
This point was made in Frank's Law and the Modern Mind and has been forcibly elaborated here. It seems to me indeed his chief contribution, and a mighty constructive one, to the realist controversy now raging less hotly in legal circles. It is not that he exalts and cherishes uncertainty as some of his critics are here roundly scolded for having suggested. It is simply that he would have us recognize the inevitable measure of uncertainty in the nature of the case. Realism to him is a misleading label. He would rather describe himself and his fellows as "observationists" because they believe in trying to see what is there and studying it frankly. But in another breath he would rather dub us "experimentalists" because, having relaxed our servitude to the past without rebelling wildly against it, we are willing to devote ourselves to devising new mechanisms to meet new conditions. Unillusioned seeing plus venturing forth, description plus inventiveness—in a framework of democratic idealism—constitute the gospel according to Frank.

In this book he champions that gospel especially in its relation to administrative commissions. Their wide use in hitherto uncharted seas is deeply significant for American government. The barrage of unfriendly criticism aimed at commissioners seeking to get their land legs is a cause for deep concern. Thus his keenly explorative mind—he is a kind of intellectual commando—involves Aristotle out of the ancient past and the High Commission out of the origins of our law to prove that administrative commissions are not the inventions of the devil, but are rather the appropriate agency for meeting what is in part a perennial problem of law—practical discretion in applying regulations—and what is in part a peculiar need of our day with its vast industrial conglomerations requiring some kind of supervision to avoid anarchic waywardness. He points out that those who do not like the newly needed supervision—as in the field of labor relations or securities marketing—complain about the procedure of the administrative agency. In similar manner enemies of the High Commission in an earlier century attacked its "high-handed" procedure, when in reality they were opposed to its heresy hunting. He shows how Aristotle, who is said to have originated the idea about a "government of laws not men", influenced Harrington who influenced the Founding Fathers. You will find the phrase in the Massachusetts Constitution and in Marbury v. Madison. He shows how well Aristotle actually knew the ineluctable role which the discretion of the individual judge must play. He points out that the prosecuting attorney in our system of law has far more scope for discretion as to whom to prosecute and thereby stigmatize under a variety of statutes, many loose and haphazard, than the S. E. C. which is bound within the four corners of an expertly drawn statute administered for the most part by experienced, learned, and well-disciplined lawyers. They would not think of using or blinking at a weapon like the third degree. They issue strict instructions to their staff to be most circumspect before initiating any moves. He points out indeed that the advance opinions which administrative agencies supply are able to provide precisely that "certainty" of the lack of which the traditionalists complain and which they accuse us "constructive skeptics" of regarding.

We are left by Frank with the sobering realization that our government is as good as we want it to be and that democracy is as its officials act. For as Frank says:

"... in the last analysis, the protection of the citizens from misuse of governmental power must be found in the selection of officers—judicial, executive or administrative—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. No statutes, no legal forms, no formal and external checks will, alone, serve the purpose. Indeed, such formalities, outwardly observed, are often the best protection of those men who dishonestly, or for other reasons, abuse their powers; for they use those outward observances to cloak their secret corruptions or arbitrariness . . .”

It is a curious irony that men like Frank and Thurman Arnold who are definitely concerned to perpetuate the system of individual initiative should be thought of as wild-eyed radicals. Frank believes this system is so much part of America that any direct assault upon it would lead to civil war which can be avoided by the kind of reconstructive measures the New Deal has in various areas been instituting. I should like to see his insight spread beyond America to produce reconciling formulae for the economies of the United Nations based on lend-lease and other existing collaborative machinery, and extending solidly into the peace.

Beryl Harold Levy.

1. Page 331. There are those who have gone so far as to insinuate that the “unbridled” discretion of commissions leads to “administrative absolutism” and that this is the Hitler not the democratic way. In that connection I cannot forbear from quoting from a recent unpublished paper by a brilliant Italian lawyer, Alexander H. Peckelis, who is one of the heads of the Research Project on Contemporary, Political and Legal Trends of the University in Exile. Here is his penitent confession supporting the faith of American progressives in the wisdom of existent government by administration:

“On the other side of the ocean we took . . . the stand for the Rechtsstaat against the rising discretion of the totalitarian administration. We learned, believed and taught that certainty, clarity and normativity were the only ideals towards which a legal system could strive. . . . We distrusted government, bureaucracy, judges and administrators, and we were engaged in the pursuit of that bluebird of legal happiness, the perfect law in the form of the perfect statute, which would assure the functioning of a justice independent of human whims. We saw the totalitarian parties, first, and then the totalitarian governments, destroy little by little . . . the perfect machine of legality we were building or which, at least, we thought we were building. And we defended it stubbornly, and we were satisfied that we accomplished a socially, morally, and politically useful mission. . . .

“A more careful consideration of Anglo-American legal history and a little more thorough investigation of the real tradition of these countries convinced us that so-called administrative despotism is all but new here, and that administrative discretion through government by unwritten law is centuries old among English-speaking peoples. Honesty required us to compare the record of these peoples with our own political and social record. And we could not help finding that notwithstanding the striking amount of discretion and the lack of legal certainty, of Cartesian clarity or Kantian normativity, civil and political liberties have been protected here not less but more than in our Rechtsstaat countries, and the people on the whole were certainly not less happy than those on the other side of the water.

“And we begin to ask ourselves whether the success of the totalitarian parties in Europe could not be explained precisely by our fidelity to the ideal of government by laws; . . . whether in the belief in the overwhelming importance of perfect legislation, we did not neglect the main social problems like the positive political education of individuals and the creation of an efficient system of recruiting and remuneration of judges and administrators; whether in short, for the sake of the preservation of certain ideals, we did not make their very defense impossible.”

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"The Economics of Public Utility Regulation" is a monumental volume intended chiefly for use as a college textbook.

Believing that the economics of regulation can best be taught by the "case method," the author has reproduced the substance of many court and commission decisions set forth in his well known book of cases. And yet, this is more than a recitation of legal opinions. Attention is also given to the history of utility industries, the economic characteristics of utilities, the jurisdiction of federal and state governments, regulatory devices, and numerous special problems including a lengthy chapter on public ownership. Indeed, one is impressed by the courageous and patient thoroughness with which almost every concept and fact related to the utility field is examined.

Controversial topics enliven nearly every page. We find the author, for example, indorsing the Holding Company Act of 1935, condemning the excesses of private utility propaganda, upholding public ownership both for its own sake and as a regulatory device, approving T. V. A. and other New Deal power projects, condemning Smyth v. Ames, and approving temporary rates. From this it might appear that the book is radically anti-private ownership and management, but nothing could be farther from the truth. Every page reveals the author's profound knowledge of the utility industry and his deep appreciation of the problems and merits of private ownership. Where private utilities are criticized, it is done only after judicious consideration of a large body of evidence.

Consider, for instance, his treatment of holding companies, a subject which shook the nation with controversy only a few years ago. After describing holding-company structures, the author attempts to formulate a judgment. Before stating his own conclusion, the author first considers the alleged advantages from three points of view—that of management and control, that of operating companies and the consumer, and that of investment and the investing public. The disadvantages to various groups are then painstakingly reviewed. Finally (after 10 large, closely printed pages) the author concludes that "there was no economic defense or justification for the holding-company system" as it existed and performed in the 1920's. The approach is at once scholarly and convincing.

A large part of the book (230 pages) deals with the basic question of valuation. The present-fair-value concept enunciated in Smyth v. Ames comes in for extended criticism. After considering the subject from various standpoints, Dr. Barnes concludes that "the present-fair-value method has not been an equitable method of regulation under the circumstances that have prevailed in the past and does not promise greater fairness for the future." With this few students will disagree except, probably, a majority of the justices on the Supreme Court.

But what are the alternatives? Of the various suggestions—prudent investment, reproduction-cost, the Washington sliding-scale plan, increment-cost, maximum profits—Dr. Barnes argues for what he calls a "Modified Prudent-Investment Program." This is the usual prudent-investment formula with modifications designed to be more attractive to common stocks, to provide incentives to both the utility and its consumers, and to permit planned administration of a utility's income. The most serious criticism of the proposal, the author believes, has to do with its constitutionality. On

I. CASES ON PUBLIC UTILITY REGULATION (1938).
the basis of today’s ruling precedents, Dr. Barnes concedes that the proposal might encounter insuperable difficulties before the Supreme Court.

The book is unquestionably a major contribution to the literature on the subject. Readers will admire its wholesome admixture of conservatism and progressivism. Its judiciousness engenders respect for honest and efficient private management while giving unqualified indorsement to a program of stringent control, public ownership, and even government competition. The book’s usefulness is enhanced by a detailed table of contents, an extended bibliography, list of cases, and index. Several factual errors were noted, especially in the final chapter, but these are too minor to detract from the sound scholarship manifested throughout the study. The reviewer’s chief fear is that its ponderousness will cause undergraduates to retire to bed or bar before unearthing the precious nuggets of which there are so many.

John H. Ferguson.


This solid and well written book by the Dean of the Graduate Division of the School of Social Sciences of the American University focuses its attention on the process whereby the labor market in Sweden is governed “by the joint functioning of public and private authority”. It is obvious that in discussing this process due attention must be paid to its most salient features, the collective contract and the Labor Court. While Dean Robbins disclaims any attempt to make “a comprehensive analysis of the law of collective contracts in Sweden” (there being no such work as yet even in Swedish), or “to write an exhaustive study of the Labor Court”, he has succeeded admirably in sketching for Americans a graphic picture of the means whereby Sweden has achieved stability, order and collaboration in labor relations. Moreover, this picture is up to date for the author made a prolonged stay in Sweden and was able to view the effect of war on the Swedish labor system.

Beginning with a very brief survey of industrial relations as a problem in government, the book then proceeds to trace the evolution of the Collective Contract, and to indicate its present trends. Approximately the second half of the book is devoted to the Labor Court and its jurisdiction. The last chapter presents some implications for the future.

As the author points out, present labor relations in Sweden are the result of an evolutionary process which began about the middle of the nineteenth century with the disintegration of the guild system. In the eighties the workers who had been kept in comparatively servile status began to “organize for the purpose of collective bargaining”. In 1899 the Confederation of Swedish Labor Unions Landsorganisationen i Sverige (familiarly referred to as LO), was organized. The employers, hostile at first, subsequently accepted the principle of unionism as a means whereby, through collective contracts, the labor market could be stabilized for definite periods. Although the employers were not in such need of organization as the employees, they also availed themselves of the right of associa-

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tion (one of the rights of free men) and in 1902 the Swedish Employers' Federation, the Svenska Arbetsgiareföreningen (familiarly called SAF) was formed for the express purpose of dealing with the unions. While these two organizations were not the first they are now the largest. Since in union there is strength, their formation sounded the death knell of individualism for employers and employees alike. By 1940 the conditions of employment of over a million persons, or one-sixth of the population, were governed by more than eleven thousand small collective contracts between unions and employers. A collective contract, in the author's words, "is a written agreement concerning conditions of employment and matters related thereto between one or more labor leaders on one side, representing the interests of the worker, and an employer, or one or more associations of employers, on the other side, representing the interests of management". Since it is a contract, it imposes mutual legal obligations providing for the conditions of employment, the relations between the parties, and certain means of implementing the contract itself. This contract is not a contract of employment, but it sets up certain requirements for individual labor contracts binding on the employers who are parties to the collective contract. Furthermore, provision is made for negotiations and arbitration of possible disputes. Most collective contracts are made for one year subject to renewal, and renewal is automatic unless due notice to the contrary is given.

Until the Labor Court began its work in 1929 the ultimate sanction behind collective contracts was the strike or lockout. This Court concerns itself with adjudication leaving conciliation and arbitration to the conciliation service or the means provided in the contract. It assumes jurisdiction, of which it is its own judge, only over those disputes which are jural in character, disputes over legal rights (Rättsvister), and not disputes about interests (Intressetvister) which have not been defined by contract or statute as legal rights. Nor will the Labor Court take jurisdiction until other available remedies have been exhausted. But where jurisdiction is assumed, the court proceeds to judgment, awarding damages to the employer, the employers' association, the employee, or the union, as the case may be, and this judgment is final. If the dispute, however, be nonjural in character, the parties are left free to settle it in their own way using such sanctions as the strike and lockout as may seem necessary. But it is worthy of note that even where sanctions are applied violence is deplored and rarely used. The most significant characteristics of the government of labor relations in Sweden appear to be collaboration, public-private control, and a minimum of state intervention.

It is impossible in this review to consider the Collective Contracts Act of 1928, the Collective Bargaining Act of 1936, the Basic Agreement of 1938 creating the Labor Market Board, the Index Wage Agreements, and many other matters discussed by the author. In view of the space which Dean Robbins has allotted to the Labor Court, however, an additional word about that institution seems not disproportionate. There are seven judges, two selected from nominees of LO and two from nominees of SAF, who must possess special competence in the collective contract system, although, in accordance with a concept met elsewhere in Swedish law, they need not be law-trained. The other three members of the court obviously must represent neither interests of employers nor employees. The chairman and vice-chairman are the law members who must possess both legal learning and judicial experience. The remaining neutral member need not possess these qualifications but must be well versed with conditions of
employment, employment contracts, and related matters. The chairman and four members constitute a quorum, provided the judges representing the unions and the employers' associations be equal in number. A plurality of the court may make a decision. Perhaps because of the composition of the court, or the present distinguished chairman, it has functioned without the delays and other annoyances which plague American law. From 1929 to 1939 the Labor Court decided nineteen hundred and seventy cases, of which three hundred and eight were instituted by employers or employers' associations, while sixteen hundred and fifty, or over five times as many, were brought by the unions or individual workers, who originally opposed its creation.

The Swedish achievement in labor relations is a noteworthy one. Regardless of what may take place in the future, the fact remains that Sweden, a capitalist constitutional democracy, has created a practical means of governing labor relations in which neither labor unions nor employers' associations are suppressed, nor private authority replaced by state power. It would seem, therefore, that totalitarianism need not be the necessary result of a systematic organization of a labor market.

In the opinion of this reviewer, Dean Robbins has made an important contribution to the literature of the labor question. It is to be regretted that he does not draw more comparisons between Swedish labor relations and those of the United States. He writes clearly, reasonably, and with a marked sense of balance. While not recommended as light summer reading, his work is recommended most emphatically to political and labor leaders alike and, incidentally, to newspaper columnists. Students of labor problems may be expected to read it without urging.

Theodore S. Cox.


For some time writers on administrative law have taken up their pens as though they were swords and have leaped into the fray in vigorous attack or equally vigorous defense. Perhaps such vigor is a symptom of a healthy jurisprudence, but the fight has begun to get tiresome. Now with our change-over to a war economy, administration has very nearly swallowed up everything else. The urgency of getting things done has brought us to accept procedures that would not be countenanced in times of peace. With this the desire to thrash out the tough problems of administrative adjudication has somewhat died down. Perhaps this is just as well; for when these matters are again brought up for disposition, our judgments, with the heat of argument abated, will be more sober; and with the experience gained in the meantime, we may view this vast, perplexing body of law in better perspective.

Now comes a book called "The Judicial Function in Federal Administrative Agencies." With the words of this title in mind, one may take up the book with the fear that it is an untimely fanning of the fires. But it is not that. The book is essentially a survey and an appraisal, in which most of the problems of administrative adjudication are discussed with appropri-
ate criticisms and recommendations, but without undue attention to the contro-
versial issues. The mood is not argumentative; and whatever the merits
of the position taken on any particular question, the authors made me feel
that theirs was the sober judgment of objectivity.

It may seem to the reader that the authors' emphasis is at times rather
strangely placed. In general outline their approach seems perfectly reason-
able, as indicated in the table of contents as follows: (I) Methods (a survey
of formal procedure and a brief discussion of informal settlement; II)
Policy (methods of expression of administrative policies and the control
over agencies by other governmental branches and non-governmental influ-
ences); (III) Sanctions (judicial and non-judicial); (IV) The Courts
(judicial review—methods of and constitutional aspects); and (V) Conclu-
sions (including but by no means confined to the prosecutor-judge prob-
lem). It is a fact, however, that relatively little is said about some of the
more commonly discussed problems, in particular, those centering about the
administrative hearing, and more than a third of the book is devoted to
"Sanctions." I suspect that this amounts to an intentional effort to counter-
act the recent high-lighting of certain controversial issues at the expense of
others equally important. I am not disposed to criticize such an effort.

The most significant part of the book, as I have intimated, is the
chapter on sanctions. No body of common-law principle ever received
special treatment under such a title. Prior to the development of adminis-
trative law, existing sanctions were not numerous and had come to be taken
for granted. If the common-law lawyer sometimes thought about and dealt
with matters which could be designated by that term, his vocabulary prob-
ably did not include the word itself. That term seems to be the only ade-
quate one, however, to cover the many and various means an administrative
body has of enforcing its will upon others. The use of administrative
judicial sanctions—"(1) penalties and rewards for the specific conduct
involved, including imprisonment, deportation, fines, penalty taxes, mon-
etary rewards, withdrawal of benefits, formal threat of prosecution, publicity,
and withdrawal of license; (2) prescription of action, including prevention
and commands to perform or cease from performing specified acts, and (3)
reparational awards"—is carefully surveyed, and proper reference is made
to less formal sanctions—"that cluster of controls which is designated super-
vision and which includes inspections, investigation, consultation, education,
advice, cooperation, and the like. . . ." While this survey in its details
does not make exciting reading, one cannot but be impressed with the
thought that, while we have been so concerned with safeguarding persons
from arbitrariness in formal administrative adjudication, "most of the actual
power of administrative agencies lies in sanctions which do not involve
judicial procedure."

In discussing the role of the courts, the authors outline the various
methods of access to the courts as they developed during the growth of
administrative tribunals, with comments upon the relative extent of control
by the courts in each instance. The outstanding feature of the modern stat-
utory appeal, it is stated, is the appellate character of the procedure. The
significance of this type of procedure is, of course, that findings of fact, if
supported by evidence, are conclusive and objections in the courts are
limited to those urged before the agency itself.

The prosecutor-judge problem is relegated to the "Conclusion," but is,
evertheless, adequately treated. It is recognized that there is no single
solution to the problem; that it is desirable to have a more complete separa-
tion of functions in some places, but that it is desirable not to have such
separation in others; that "in many of the agencies there can be no separa-
tion of function if they are to carry out the purpose for which Congress
created them."

Messrs. Chamberlain, Dowling, and Hays have made a contribution
which must not fail to gratify the student who seeks an unimpassioned
survey and analysis of this large and untidy branch of administrative law.

Olin L. Browder, Jr.†

Administrative Law—Its Growth, Procedure and Significance.

This little book is a series of lectures delivered by Roscoe Pound under
the auspices of the University of Pittsburgh, and at a meeting of the Alle-
gheny County Bar Association in the fall of 1940, with a preface by John
H. Wigmore.

In the course of the lectures the Dean summarizes the history, devel-
opment and philosophy of administrative bodies, discussing the doctrines
of the supremacy of law, supremacy of the state, the nature and definition
of law itself, and restating his belief in judicial supremacy. He rambles
pleasantly over his great store of knowledge of legal history to justify the
growth and maintenance of the doctrine of the separation of powers in the
American Constitution. To him the lawyer is the man who practices
learnedly in the courts. He decries the "give it up legal and political
philosophies" of the skeptical realist who would abandon our time-honored
forms and turn government over to untried administrative processes.

Greatly to the edification of his hearers he refights the battle of judi-
cial review of arbitrary action by administrative bodies to see that they
conform to the appropriate standards of judicial fairness. He analyzes
fairly, philosophically, and with his usual grasp of historical data the objec-
tions to judicial justice, expounding its faults, but pointing out that its
future lies in the fact that it made possible in reality "a government of the
people, by the people, and for the people".‡ Successfully defending the
legal order for lawyers and law students, he concludes by pointing out that
leading critics of the legal process have been destroyed by the absolutism
which they themselves advocated.‡ One cannot finish reading these learned
lectures without a conscious feeling that real safety of the body politic lies
in the tested constitutional procedures of government of laws and not of
men; that if we will but conform to our time-honored judicial forms and
philosophy, new problems can be safely met and solved within the tradi-
tional pattern.

After reading this delightful set of lectures, if one's eye should chance
to fall upon the headlines of the daily papers carrying stories which, except
for minor details, might well have been published in 1066 A. D. or 45 B. C.,
he might be inclined to wonder what one millenium of Anglo-Saxon proc-
esses and two millenia of legal philosophy have contributed to the solution
of the real problems of law, the reduction of social inequalities without

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1. Page 111.
2. Page 127.
violence. If he were very philosophically inclined, he might even wonder whether or not the "give it up" legal philosophy is a bit too conservative. Perhaps it would be better if we "threw it overboard" and conducted some real experiments with what few new ideas and forms are available in the administrative processes.

Frederick K. Beutel†

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