

JEROME FRANK—PORTRAIT OF A PERSONALITY

SIDNEY M. DAVIS†

THE ESSENCE of a man springs from the temper of his personality and the texture of his relationships, rather than from his logical system and arrangements of ideas. So it was with Jerome N. Frank.

Judge Frank spoke frequently of the human frailty of the judicial mind, but Jerome Frank exemplified the judicial capacity of the human mind. He felt keenly all that linked him with ordinary men because he had the sensitive quality of an extraordinary man. He was, in a sense not customarily associated with the phrase, a man among men. He saw the world about him as a world of the varieties of human experience, and nothing human was alien to him.

Emerson is reputed to have remarked that Thoreau's natural senses were more highly sensitized than those of average people; that it was because of this that he could live happily alone with Nature, his communion with her being so much more exquisite, so much more profound than that of other men. I gladly appropriate that idea to describe Jerome Frank in the world of men. His responses to human life and human beings seemed more highly developed than those of the rest of us. He reacted to them more violently, was excited by them more vigorously, reacting sometimes to the point where he could not resist the drive to express himself conversationally and in writing until he had explored to the limit whatever he found so stimulating.

He had no taste for half-way houses. When he wrote an opinion he allowed himself no resting place, but followed the trail of the idea he flushed until he had tracked it through the mazes of his multiplied reading and complex reasoning to its capture. Intellectually curious, critical of his own previously expressed views, unawed by authorities before whom the conventional and the time-serving bow, he made the search of judgment a pursuit of truth, and the expression of judicial opinion a self-revelation.

The judge was never more than the man, but the man was never less than the judge.

In him were inexhaustible springs of perception and humanity. The overflowing of his words was but one manifestation of his teeming mind and heart. Truly we can say of him, with Bouffon, the style was the man himself.

Whether the cup of death be a draught of unending forgetfulness, or whether it be but a stirrup cup proffered as we take leave of this Inn for another, we may be sure that Jerome Frank savored life to the last drop. Only

† Former Law Clerk to Judge Frank; Member of the New York and District of Columbia Bars; Adjunct Professor of Law at New York University School of Law.

two or three of his most intimate friends knew that he lived his last years in the shadow of the knowledge that a fatal disease was in his body which might take him at any time. He went about his work as though no such sentence were within him. And when the end came, it was not the chronic sickness which destroyed him but a sudden blow of another kind. As he lived well, so he died well.

In all men of genius there is an extra endowment of energy. What sparks this energy to action differs among them. Thus we have genius in many fields. The spark of Judge Frank's genius was his feeling for humanity, and he sought the expression of that genius within the operation and interpretation of the law.

He has left many writings. Soon the Law Reviews and writers of articles will be probing them, analyzing, comparing, measuring, trying to place him in some proper niche in our legal Parthenon. We are too close in time, and I was too close in personal relationship with him, to attempt a prediction of his future stature in the minds of men and lawyers. I should like, rather, to call attention to what has been called his creative approach to the law. We uncover the essence of men most skillfully when we reveal where they are most original. Judge Frank was most creative at those points where he departed from, rather than adhered to, the customary practices of the Bench.

He was firmly wedded, for example, to the view that a judge in his decisions is under obligation to lay bare the fullness of his thought as far as he can himself understand it—the complex of his biases, his predispositions, his intellectual premises, his social views, his economic predilections. A judicial opinion to him was more than a brief and dry appendage to a settled issue. It was more than an epitaph to an ended case. It was vastly more than a hurried, superficial, and all too often scamped restatement of the obvious, destined for burial among records, for citation in a discursive footnote, or for the cluttering of already over-dusty shelves. The end of a case was for him the renewal of the life of the issue that provoked it. The judge's opinion was an instrument for clarifying, for the perennial reexamination of legal principles in ever-changing context, and thus for furthering the progress of the law. He sought to clothe the bare bones of a decision with significance in the literal sense of that much abused word, which means a reading of the signs, a pointing to something that men may see ahead and approach more surely because the path has been set before them. He avoided the pat phrases, the trite formulae, the beguiling fictions, the illusions of certainty which abound in the law.

On occasion, when a case fired his imagination and kindled his enthusiasm, his opinion became a literary essay, written in his characteristically strong, clear and argumentative style, brimming with the exceptionally broad range of his learning, laced with his wit, and eloquent with the deep compassion stirred in him by the human beings involved in the disputes before him. He enlivened law with the breath of life.

Thus in a continuous stream from May 5, 1941 to January 14, 1957, there flowed from his pen opinions which had the powerful individual flavor of the man who wrote them. They early won wide recognition. They were recognized to be masterpieces of tight reasoning, proceeding inexorably from major and minor premises to logical conclusions. If they were sometimes long in quantity, they were always rich in quality. They reflect a judge who was wise, a lawyer who was master of his craft, and, most distinctly of all, a man who combined learning with wit, and perception with taste.

If we would try to distinguish more exactly the lineaments of the man they reveal, we must always bear in mind what judge Frank would undoubtedly add if he were alive, to wit, that what we find in them is but what we are prepared to find, thus leaving each of us free to criticize, to amend, and to enrich according to the play of mind on mind.

Judge Frank suffered no divorce of thought from action, of idea from deed. He believed that ideas have consequences. Thus he was a pragmatist in the cleanest sense of that word. He accepted its responsibilities. He boldly exercised his capacity for thought, but equally boldly he was a man of action. Dostoevsky once remarked that when a man of action becomes a thinker, he is a relatively insignificant one. This dictum was not borne out in Judge Frank's case. When he passed from the active world of government administration to the reflective chambers of a judge of the Court of Appeals, he proved as truly a master of thought as he had previously revealed himself to be the master of action. This disparity illuminates the cleavage between two contrasting philosophies of life, perhaps the deepest of all contrasts, that between the mystic and the pragmatist, the mystic who conceives of thought as self-contained, and the pragmatist who sees it as an instrument for action.

In the Temple of the Law which houses so many idols of precedent and echoes with so many ancient dogmas, he could not but become an iconoclast. A dogma seemed to him like a fetter on the mind, and, like Jefferson, there was that in his blood which cried out to strike all fetters from the minds of men. The past, he believed, could err, and he was not one to perpetuate the errors of the past on the single ground that they were hoary. If traditional facts withered in the searching light of his scrutiny, he did not hesitate to say so despite the protests of those who cried that he was a despoiler of revered altars.

He saw all things in a state of flux, movement as the secret of the orderly procedure of the stars, stability not as immobility but as the achievement of the dynamism of motion—the dynamic stability of the airplane in flight. He saw society in like terms, accepting no institution as fixed, no concept as final. Men change, and their institutions are transitory.

The test by which he measured them was the test of fact. Justice Douglas has observed that Judge Frank "had a passion for what William James called

the 'wild fact,' that obstinate rock upon which brittle theories break,"¹ that winged stone against which no Goliath of traditional assumption is armed. Frank believed that he was what he was, however he might have become that way, and that he had become that way partly through his own efforts, and partly through events and forces over which neither his inherited blood nor his own efforts had any control. He gave this fact its own prerogatives, never allowing himself to be tongue-tied by authority of any kind. His assertion of his freedom rested upon his claim to question—the mark of the truly skeptical mind, never to be confused with the cynical which does not question but scoffs. It was not in him to dismiss any proposition with a sneer. What he could not accept he demolished brick by brick, enjoying the demolition and shouting an invitation to join the fun.

His chief motivation, however, was not to destroy, but to construct and reconstruct. His work, when he stepped beyond the argued case and the immediate judgment to explore its implications, was essentially a free and creative reshaping of old ideas to reveal their essence and to release their power. Like one who removes a diamond from the earth in which it was buried, he uncovered an idea and then turned it over and over in his mind as the diamond polisher turns the precious stone, examining its every facet, catching the play of light on it from every angle.

The versatility of his mind revealed itself not only in his judicial opinions but also in his non-judicial writings. In 1930, at the age of 41, he wrote *Law and the Modern Mind*, which burst upon the world of the law with an impact which is still felt. It opened new windows and brought new light and fresh air to the stale and musty study of jurisprudence. It offered a humanist conception of law to replace an artificial and mechanical one. It reflected the influence of American pragmatism, and rejected that of Hegelian metaphysics. It suggested an approach to law and the idea of law based upon rationalist conceptions and a full utilization of the empirical knowledge which modern intellectual disciplines, especially psychiatry, have to offer. It explored the wide areas of uncertainty in law, and exposed the grand illusion that our legal system was, or could be, certain and sure.

Judge Frank followed this, in 1938, with a treatise on economics, *Save America First*, which contained a deft and devastating attack on the economics of Marxism and a re-affirmation of his belief that men must make their own destiny. This book reflected his earlier views as to the separability of American politics and economics from those of Europe, views which he discarded as no longer valid even before the onset of World War II.

¹ Address, Judge Jerome N. Frank Memorial Meeting, held under the joint auspices of the Association of the Bar of the City of New York and the New York County Lawyers Association, at the New York County Lawyers Association on May 23, 1957.

If Men Were Angels (1942) was a defense of modern governmental institutions and developments which again stressed the human factor in the administration of laws and the making of policy. It was rooted in his own experiences as a government administrator, and was a ringing reply to the critics of the new administrative agencies which proliferated in the New Deal.

In *Fate and Freedom* (1945) Judge Frank set out his larger views on philosophy and the philosophy of history. It was a frontal attack on the twin concepts of fate in history and determinism in philosophy. It presented his own pluralistic and open-minded ideas of a philosophy for free men. It suggested that freedom must be rooted not only in a system of laws, but in the minds of the men who dare to think freely. Slaves alone can live in a deterministic world; free men must seek, if they are to achieve, their own fate.

Courts on Trial (1949) represents perhaps the most inclusive and penetrating assessment of our trial system ever written. It is in many ways a new approach to the administration of justice. In it, Judge Frank developed in full, for the first time, his jurisprudence of "fact skepticism," thus advancing far beyond his earlier and more limited position in *Law and the Modern Mind*.

To *Courts on Trial* he brought both his essential skepticism and his emphasis upon the effects of individual strength and weakness in any situation. He turned the spotlight of his mind on the fact-finding process in the courts in relation to the persons involved, which he regarded as the predominant consideration in the decision of a case. How, he asked, can one "prophecy what the courts will do" in a particular case in the light of the adversary, and therefore partisan, position of counsel, and the inability of witnesses accurately to observe, recollect and narrate, the judge himself being but a witness of the witnesses. The trial of an issue of fact was to him an often untrustworthy reconstruction of prior events. This combination of human fallibility and conscious partisanship, he held, makes the court's task of getting facts so hazardous as to be almost impossible.

In *Courts on Trial*, he raised a question unasked before about a system unquestioned for several hundred years. His contribution lies in the fact that, once asked, this question will not be silenced until men somewhere find its answer.

His was a spontaneous and exuberant power, giving him, and others, joy in the exercise of it. There was nothing of the ascetic in him. He was a gay man, an effervescent man who never sacrificed one part of his human nature to another, a "full man" as Bacon would say. Pragmatist and iconoclast, he was nonetheless a consistent and constructive skeptic, above all a creator. Precisely because he took nothing for granted, he discovered much that was hidden. He did not break idols solely for the fun of it; he did it to open the way to truth. "When half-gods go, the gods arrive."²

² 9 Emerson, Complete Works 85 (Riverside Ed., 1884).

Outside of his reading in the law itself, it was characteristic of him that he read most widely in the fields of psychiatry and economics, for these are what we may call the human disciplines, the study of man as an individual, the study of man in relation to other men in a business civilization.

If he had a bias, it was humanism; if he had a faith, it was that men must be free. His preoccupation was with the releasing of the constructive powers of men. Thus he was passionately devoted to social and economic equality, and thought much on how men might suppress war, by what means the human spirit might be elevated, how men could be brought to seek truth more unselfishly, by what means liberty could be more surely secured. Democracy he saw as necessarily founded in justice, and his mind was forever restless in its quest for the answer to the riddle of synthesizing freedom with government.

The question he put to every thinker, past and present, was "What have you to tell me that can throw light on how man can live with man to their mutual advantage under conditions in which they both are free?" His thought ran with Emerson's advice to young Oliver Wendell Holmes, Jr.: "Hold him [Plato] at arm's length. You must say to yourself: 'Plato, you have pleased the world for 2,000 years: let us see if you can please me.'"³

Such an attitude did not bespeak arrogance. It came naturally out of his sense of his own dignity as a human being. He knew himself to be, as other men, subject to illusions, and, as far as lay within him, he tried to strip himself of the illusions he recognized, without ever becoming disillusioned.

It is not easy to recapture something of the excitement of Jerome Frank. He was more than this, more than all that has been written put together. He was a practitioner of the art of living. His was the supreme talent of fully using all his talents. He could mock despair yet endure it. He could acknowledge the majesty of truth yet question what men glibly called true. He could live in the moment, yet extract from it all it had for him before it was past. He was keenly aware of his time, yet he lived for the timeless. He was a man of his own age who spoke with the voice of the ages.

If "we live by symbols" as Holmes observed, then the most powerful of those symbols must be memories of those men who either adventured into the farther reaches of the human mind, or who greatly stirred men's hearts. Judge Frank achieved both of these. We shall not soon forget him. Of him we can say that he sought earnestly, thought greatly, lived creatively, and shared with other men that which warmed and enlightened his spirit.

³ Frankfurter, ed., Mr. Justice Holmes 192 (1931); Howe, Justice Holmes: The Shaping Years 54 (1957).