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JEROME N. FRANK: SOME REFLECTIONS AND RECOLLECTIONS OF A LAW CLERK†

PHILIP B. KURLAND*

ONCE upon a time, but not so long ago, there was a great appellate court in this country. It sat not in Washington but in New York. Its senior member was Judge Learned Hand and its junior member was Judge Jerome Frank. The court was called "the Second Circuit."

The Second Circuit was a strange court. Every member of the court respected every other member of the court. Although disagreements in judgments were frequent, none accused another of treachery to a cause, intellectual dishonesty, chicanery or venality. None was jealous to occupy the middle chair, nor ambitious for high political office, nor eager to lead a faction because he could not lead the whole. If some were hopeful for appointment to the Supreme Court, the chosen path was by proof of capacity to fill the post and not by appeal to the electorate through the instrument of judicial opinions or public speeches. (Strangely, or perhaps not so strangely, none of this court was ever "raised" to the Supreme Court, whose vacancies were filled instead by Byrnes, Rutledge, Burton, Vinson, Minton, and Clark.)¹ Of the judges of this Second Circuit, vintage 1941-51, some were brilliant, and some were sound, and some were wise, and, at times, some were foolish. But they all measured up to a high standard of judicial capacity and they were all dedicated to the job which each had undertaken to perform: to administer justice under law. It was indeed a strange court, and we are not likely to see its equal for many a year.

The hymn of praise by Judge Frank to Judge Hand, for which these paragraphs are meant to serve as an introduction, is some evidence of the unusual nature of that court. It is hard to find an analogue to the feelings of Judge Frank for Judge Hand. It is certainly infrequent that so capable a judge as Frank speaks publicly and truthfully and with such whole-hearted admiration of a living colleague and yet retains his independence of judgment.² The explanation, of course, lies not only in the relationship between these men, but in the personality of the author of the tribute as well.

† This article is an introduction to the following article by the late Judge Frank.

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¹ "That Hand was never chosen must surely serve those, if any there be, who seek to be chosen and those who are there, as a temptation to reflection on the caprices of fortune." Frankfurter, Judge Learned Hand, in *Of Law and Men* 213, 218 (Elman ed., 1956).

² Cf. Hand, Thomas Walter Swan, in *The Spirit of Liberty* 209 (2d ed., 1953).

If, as Judge Frank has said, "a biography often is an unconscious autobiography,"³ it is not less true that a writer reveals himself in his writings though they do not take the form of biography. And so the reader may get a better glimpse of the man who was Judge Frank from what he has written in the accompanying article than can be found in any of the comments on Judge Frank and his work published in this Law Review or elsewhere.⁴ For example, one might conclude from reading the article that if Judge Hand "treats bright young men with warm generosity, and enjoys it when they disagree with him,"⁵ the same would be true of Judge Frank, as indeed it was—except that in Frank's case, the young man (or woman) need not have been bright in order to receive a warm welcome from him. Although he did not suffer fools gladly, neither did he indulge an intellectual snobbery. The friendship of the young was always very important to him. His chambers were the constant visiting place of law clerks of other judges and young men from the offices of the United States Attorney and of the Anti-Trust Division, which were housed in the same building. And during the 1944–45 term, Saturday luncheon with the Judge became an established custom, enjoyed by any of the law clerks (or judges) who cared to participate.

I can testify, too, that, like Judge Hand, Frank enjoyed disagreement expressed by novitiates. My very first meeting with him afforded such a conflict. Professor T. R. Powell had recommended me as an appropriate successor to Boris Bittker and Sidney Davis, in the days before Judge Frank settled down to the orthodoxy of taking all his clerks from a single law school: an orthodoxy which he had condemned in others. I already had a post for the following year as a law clerk at the Supreme Court, and so I entered the Judge's chambers for the interview with all the smug self-assurance which the editorship of a leading law review and the certainty of a future job could afford. He invited me to sit down and "say something . . . anything." I picked up the gauntlet and brashly told him that his article on Cardozo's style⁶ was 1) in poor taste because it was anonymous, and 2) displayed bad judgment because Cardozo's writing was pellucid and certainly better understood by students and lawyers than the cryptics of Holmes or the jargon of the psychologists whom the Judge quoted so freely. After an hour and a half of rather volatile and occasionally heated argument, I was asked how soon I could report for work.

In one way, however, his attitude toward the law clerk was very different from Judge Hand's. With Frank there was never a question of your working *for* him; you always worked *with* him. There was a job to be done which

³ P. 693, *infra*.

⁴ Consult, e.g., 66 Yale L.J. 817–832 (1957).

⁵ P. 669, *infra*.

⁶ See p. 672, n. 18, *infra*.

needed the best efforts of both and, so far as he was concerned, your contribution was as essential as his. As law clerk, you drafted memoranda for circulation among the other judges, subject first, of course, to his revision. You criticized his draft opinions and memoranda as vigorously as he had challenged yours. And each of you put the offerings of other judges through the wringer, no matter how exalted the writer of the opinion. Thus the law clerk, barely out of law school, was encouraged by Frank to say why and where Judge Learned Hand, the dean of the federal judiciary, had erred. It was Frank who had been appointed to the court by the President with the advice and consent of the Senate and so it was he who had the last word. But short of that point egalitarianism prevailed. Once, after I had prepared a draft of an opinion according to the dictates of the court, I reported to the Judge that the other law clerks and I disagreed with the position which the court was about to take. Thereupon Frank raised the matter again with his colleagues. I should like to be able to report that the judgment of the "puisne judges," as Judge Hand calls the law clerks, prevailed, but that was not so. We did, however, get our hearing.

I do not mean to suggest by all this that Judge Frank was not sensitive, extremely sensitive, to the criticisms of those whom he respected, especially if the criticism took the form not of private and direct communication to him but rather of public or indirect pronouncements to others. (When the criticism took the form of a letter, it was likely to involve the critic and the Judge in an unending chain of correspondence.) He was an easy target for the Washington rumor mongers who need not a thread of truth on which to construct a web of damning gossip. He was hurt, often and deeply, when a "friend" was reported to have said something behind his back which he would not say to his face, or when, in a Supreme Court opinion, he found an implicit criticism of himself rather than his judgment.

The association with the young may have been either the result or the cause of the youthfulness which was his almost all of his life. Indeed, he had not only a youthfulness about him but, in certain respects, a boyishness. He was a self-confessed hero-worshipper, although his heroes changed their positions in the hierarchy from time to time, except for Judge Learned Hand, who, after succeeding Holmes, always remained at the pinnacle. And he suffered from enthusiasms which too often committed him to actions which cooler judgment would not have permitted. This form of naïveté was especially pronounced with regard to people. He found it next to impossible to dislike anyone whom he got to know at all well. The converse was also true; there were few who knew him personally, as distinguished from knowing him through something he wrote alone, who did not like him. And those few may be only too easily explained by some instance in which Frank unwittingly hurt them, either through his writings or by an unwillingness to take action

when action was expected of him because it was so readily forthcoming from lesser men.

His enthusiasm about people was matched by his enthusiasm for the various theses he proposed in his legal writings, which flowed in such abundance after the appearance of *Law and the Modern Mind* in 1930. Semantics, psychiatry, realism and natural law, fact finding, the role of a court in interpreting legislation, better training for law students—on these and other subjects he has discoursed over and over again, and the reader will find them treated once more in this paper on Learned Hand. Although, in the fashion of almost all who write about jurisprudence, his writings have been repetitious, that was not because his breadth of interests was limited. There was no subject which he did not consider appropriate for his concern. He was an omnivorous reader, consuming all publications on which he could lay his hands and digesting most of what he consumed. I would wager that while he was living in New York City he borrowed books from the central branch of the New York Public Library at a faster rate than any other inhabitant of that metropolis.

His catholicity of taste was reflected even more in his conversation than in his writings. But then, it was as a conversationalist rather than as an author or lecturer that he was at his zenith. In conversation, Frank, as a true disciple of Holmes, found his best medium of expression.

Because his enthusiasm was better conveyed by word of mouth than in print, I imagine that Frank was a first rate teacher at the Yale Law School. I saw him work with a class only once. Sidney Post Simpson had asked me to conduct his graduate seminar at New York University based on his newly published *Law and Society*.⁷ I invited the Judge to one of the sessions, which incidentally, but only incidentally, was concerned with the controversy between Edward Coke and Francis Bacon. Frank's views on Coke were those which he has expressed in the following paper.⁸ He aroused such an interest in the students that a controversy raged which could not be stilled by the class bell. Students chose sides with Bacon or Coke as if the conflict were the most important issue of the day. It was a display by Frank of the teacher at his best, involving the students so thoroughly in the contest of ideas that they were forced to attack and defend on the basis of thought of their own. Nor shall I forget the Judge's very vivid description of Coke crawling on his hands and knees to secure the pardon of the King for having expressed his famous dictum of judicial independence.

It is not my place here to comment on Judge Frank's contributions to legal thinking. Others are more ready than I for that task. I should like to say about the paper which follows, however, that it was Professor Nicholas de

⁷ Simpson and Stone, *Law and Society* (1949).

⁸ P. 666, *infra*.

Belleville Katzenbach who conceived the idea and secured the permission of the Judge's estate to publish it here. When Mrs. Frank and Barbara Frank suggested that I be the one to prepare it for publication, I readily accepted the charge. I had a debt to pay. In addition to an unmeasurable obligation to the Judge, I had once defaulted on a suggestion that I help him collect the papers of Judge Learned Hand for publication in the form which Irving Dilliard ultimately adopted.⁹ I looked forward, too, to acting once again as the Judge's law clerk. On this latter score, I was disappointed. There is much that he has said in this article with which I disagree. I can recall with nostalgia the days when such disagreement would have resulted in many hours of fruitful debate—fruitful for me at least—with the possibility of convincing him that he should change his mind. Without such opportunity, the game lost its zest. I could not, and did not, undertake to substitute my opinions for his. The manuscript, except for minor changes and slight reorganization, remains as the Judge left it. I have filled in footnotes where the script indicated that footnotes were called for. In most instances those footnotes were to obvious sources; in others I exercised my discretion. The reader is warned, then, that the text is all Frank; the footnotes may be somewhat less than he would have provided.

⁹ *The Spirit of Liberty* (2d ed., 1953).