

JEROME N. FRANK

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To capture so gay and volatile a spirit as Jerome Frank within the confines of dull prose is at best a difficult task. When the occasion is that of a sudden and inexplicable disruption of strong professional and personal ties of many years' standing it becomes quite literally impossible. So I shall not attempt this, but shall set forth only fragments of memory which may perhaps be of utility to a more competent biographer.

My first acquaintance with Jerry Frank came more than a quarter century ago when his *Law and the Modern Mind* fell like a bomb on the legal world. Law professors went around saying, "It just isn't so—but—I wonder. . . ." At that time at Yale we had a considerable passion for experimenting. So we must have this iconoclast with us—as we did, with mutual pleasure, for a couple of years, in his capacity as visiting lecturer, until he was drawn off to Washington by the New Deal, with a considerable portion of the faculty in his train. After a lapse of a busy decade and a half that relationship with the Law School was renewed and formed one of the most cherished of his responsibilities during the last ten years of his life. On that extraordinarily active final day of work—just a day before the quick onset of his fatal illness—he closed a round of busy court activities with a three-and-one-half-hour session with the boys in his famous seminar on "Fact Finding."

Our close association on the court covered a period of fifteen years. These were indeed busy times. Jerry carried his full share of the work and more, while also writing extensively—books, articles, essays, and all sorts of monographs and miscellany. The skill and expedition with which he dispatched his judicial stint was the amazement of us all. Recollection brings back incidents often humorous, at times grim, of problems and responsibilities shared or divided, of battles serious and absorbing. These intellectual combats must loom large in retrospect, for the inner life of a vigorous appellate court is that of controversy. The lay picture of judges as solemn oracles, inanimate except when they expound immutable legal propositions free of any shadow of doubt, is of course not that of the judges themselves, where doubt and debate are their life. Of course this must be so, for it is the debatable case which gives us our excuse for being. At least two-thirds, perhaps more, of our appeals are so clear to us that we quickly decide them and they pass at once from memory.

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But the remaining core is what arouses judicial effort in courts such as ours where traditionally discussion is free and disagreement is honored.

Of our glorious battles I would speak of two aspects here. First, Judge Frank, although a gladiator of unusual power and adroitness, never seemed to harbor permanent spite of any form whatsoever. Indeed, I doubt if he realized how heavy was the impact of his intellectual blows. He was of a vast kindness and good humor; so after a morning of almost mortal combat he would appear at lunch with new and lively tales of men and events or reports on the latest philosophical books which he read so voraciously. And as all his friends know, the stimulus of his conversation was unforgettable. Second, the most consistent of his struggles was that involving respect for the individual—personalized as against mass judicial action. If we differed, he and I, it tended to be here, where he felt that my aspirations for a uniform procedure, impartial as to all, were likely to rest heavily on some poor person not prepared therefor, and that such a person must be protected, whatever future inconsistencies might come back to trouble us. And this led to probably his greatest single contribution, namely, his passion for the defense of civil liberties. This is so well known and so extensively developed in his opinions that I need not detail it here; I may add that alone among judges, I think, he always carefully considered and *answered* every communication from a prison inmate in our circuit—a real and ever increasing task.

Nothing in his life was finer than his last years, when, as we have now learned, he faced an incurable disease. This was known at most to only one or two of his nearest friends; to the rest of us he was still as infectiously gay, as charming, as hard working as ever he had been. How little, after all, do we know of the crushing burdens which may be resting on those with whom we daily work! The courage of these last weeks fills us with awe. We can only pay tribute, which must, alas, be quite belated.