

THE GREAT TRADITION—JEROME FRANK

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How and when and where I first met Jerome Frank I can not now recall. The place was New Haven or New York or Washington; the time, the beginning of the thirties; the occasion, gone beyond my recollection. But such vagaries are of no importance; for his was the kind of personality which asserts itself before his presence is noted. In speech or in print his words have a pervasive quality; his stream of ideas mingled with that of the hearer or reader and something emerged which initially neither had in mind. I can think of no one whose literate output has been more fungible. Jerome Frank was a person one seemed always to have known and one who, for me, could never disappear from the scene.

I first heard of him some time in the twenties. He was described to me by a colleague as "our sort of a practicing lawyer"—whatever these two amorphous terms may mean. He had become adept at the art of advocacy without ceasing to be the intellectual adventurer. Rumor had it that he was a superb technician and yet was master of his arsenal of techniques. He had the knack of putting a case within its setting, of finding within its framework novel issues and of operating alike upon the levels of legal law, industrial fact and public policy. When later I had an opportunity to observe and appraise his craftsmanship, the evidence proved the hearsay.

A little later came a more intimate contact. He had written a book called *Law and the Modern Mind* and The New Republic had asked me to review it. For me the drive of the book was more significant than its detail. His reach for the next idea and the next and the next was too intense to allow precision of statement. His argument I can not now recite; nor do I remember the content of my review. But the "and" in his title—which he must have used for the lack of anything better—must have bothered him; for the thesis of the book is that as an intellectual discipline the law is not a thing apart; it cannot be penned in by boundary lines nor insulated against other excursions of the mind. The law is, like the wanderer Ulysses, "a part of all that it has met" and in its development "all experience is an arch where through gleams that untraveled world whose margin fades forever and forever when we move." If the book put its stress upon psychology or even upon the psychoanalytic it was not because Jerome Frank gave pre-eminence to the ways of the mind over those of the economy, the political order or the culture. It was rather that this trail for the moment had captured his interest and zest. His theme, an old one, yet freshly stated, was that of law as a pervasive thing which was to be understood only within the context of its intellectual world.

There linger in the mind a host of meetings. I recall an occasion on which I arrived in New Haven from Washington dusty and tired, and dropped in to

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Mory's for dinner. A call came from the corner, and as I walked over to join Jerome Frank he almost shouted, "Say, Hammy, I have made a remarkable discovery. The Jews do have a strain of Semitic blood." On a similar occasion and in the same hostelry I told him that on the train coming up I had read his article in the *Virginia Law Review* on "The Style of Mr. Justice Cardozo" and found it exciting. The piece had been published anonymously and, in admitting authorship, he said "I had a hell of a good time doing it." At another time I was stopping at the Gramercy Park Hotel in New York. With me there was a German learned in the law who a few years earlier had fled the Hitler regime. So I called Jerry—nothing would give him greater pleasure . . . a deadline had to be met before midnight . . . he would have to deny himself . . . maybe he could drop in for fifteen minutes . . . yes, he would linger for a cocktail if half an hour would be sufficient. He came, lingered for the cocktail, stayed for dinner and left after midnight. I am sure it was only half-way hooky from judicial work which he played; for, although he maintained the utmost discretion, I am quite sure that a number of his questions had to do with a case on which he was then writing an opinion. This habit of getting help without ever asking for it, and without taking you into the secrets of the bench was a superb skill. Few judges can practice it without giving the show away. Nor can I forget a moment in his chambers when he shouted with glee "Did you see that priest going out? He is alike a Jesuit and a pragmatist."

The great want in our acquaintance is that I never had an opportunity to argue a case before him, but through presence in his courtroom I had occasion to watch him at his craft. He was quick to sense and to avoid the irrelevant; even quicker to follow an argument in point, however novel it might have been. On a number of occasions, when arguing before a judge whose reach was a single octave I have longed for the subtlety, the intellectual curiosity and the zest for the trail which Jerome Frank always displayed on the bench. Once, when examining a distinguished ethnologist, I asked, "During those two years you spent in Africa, did you learn anything about the Indians of California?" The witness began with "Yes" when an interruption came from the bench, "Isn't this going a bit far afield?" I replied, "I don't think so, but I will yield to the superior wisdom of Your Honor. However, I would like to have an opportunity sometime to explore the matter with you in chambers." To this the reply was "Very well, you shall have it." A few minutes later, when a recess was called, I remarked to a colleague, "I feel cheated that Jerry wasn't sitting. He, the witness and I would all have had a grand hour or two on comparative anthropology."

Not so long ago Jerome Frank's publisher issued a new edition of *Law and the Modern Mind*, and again The New Republic asked me to review it. My task got no further than a reading of the preface. In it the author stated that he had made no change in the text as originally published. Without looking further, I notified the editors that I stood upon my former review. All of his life Jerome Frank was a trail blazer rather than a writer of classics. Always the new venture called before the old had been completed, and his drafts,

whether of opinions, articles or books, lack that definitive statement and artistic touch which only the taking of great pains can give. He could not, to save his life, have revised *Law and the Modern Mind*. That represented a stage in his development and he found it impossible to return. A revision would not have done. He would have had to write a new book, and that book would probably have been on another subject. The kinship which in his later years he felt with the author of the earlier book was only that of the continuity in personality.

Jerome Frank realized that judicial tasks, however well done, are not everlasting; they need to be done over to meet the unanticipated needs of a later period. The German composer, Karl Orf, was recently asked, "Is it true that you are writing incidental music to *A Midsummer Night's Dream*?" "Quite correct," said Orf. "But did not a chap named Mendelssohn do that more than a hundred years ago?" "Yes," said Orf, "And a grand job, but that was then and this is now." Jerome Frank was ever conscious of the "then" but he recognized, as few jurists do, that "this is now."

It may be presumptuous for anyone to recite another person's articles of faith. But the personal and judicial creed of Jerome Frank is plainly written in his opinions and books. He held it basic that a lawyer should be a good, in fact a superb, technician, but insisted that he should be the master, not the servant, of his bundle of techniques. To him the law was an instrument of justice which can work with only a degree of perfection. A capacity to read and to collate cases was to him a necessary legal skill. But he regarded the judicial habit of deciding cases on the basis of Points and Authorities as a mischief-making device. Its use was an attempt to stretch likeness further than it would go, and to base a judgment upon the stereotype of former decisions. To him even the leading cases were points in the development of a doctrine, and to him it was important to ask whence that doctrine came, the circumstances which had attended its origin, the mutations through which it had gone, and its current relevancy. In his opinions in admiralty, in contract and in public control he presented striking histories of the sweep of doctrine down the decades and of its imperfect expression in case law. I never heard him speak of "eternal principles" or of "values which are everlasting," but he did recognize that there are objectives which are enduring, and that they must, as change and rust get in their work, be newly adapted to the infinite variety of the changing circumstances of life. If law must not break with the past, it must not neglect its duty to the present. In a deft process of accommodation there must alike be continuity and novelty. For these and like reasons Jerome Frank is to be numbered among the common-law judges and is to be ranked high among modern jurists. For these reasons he stands in the great tradition.