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COMMENTS

THE CULT OF THE ROBE: A DISSENT

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In a recent issue of *The Saturday Review of Literature*,[1] Judge Jerome Frank of the United States Circuit Court of Appeals dealt with a controversial and interesting topic under the attractive title *The Cult of the Robe*. Herein he analyzed the practical, symbolical and legalistic qualities of the robes adorning American judges. His conclusion is that such outer garment of the judiciary not only gathers dust and generates heat but it inclines the judiciary to follow the antiquated ways of the law. Figuratively and literally he would consign the judicial robe to the juristic attic along with other outmoded ceremonials and Latinized magic of traditional law. His rather severe indictment of the rituals of the courtroom accompanies an ardent plea for liberalism in judicial thinking and a defense of the dissenting opinion which permits the judge to express his individuality and to argue for changes in the old legal order made necessary by the current social and economic developments.[2]

Judge Frank would be the first to concede to the conservative opposition a "day in court" in defense of the ancient habiliments of the justices and a caveat against their elimination at least without a hearing, and I use the term, conservative, in its etymological sense of *conservare*—a plea for the preservation of forensic fashions of the past. At least unless the learned Judge proves convincingly that these fashions are harmful and that shirt-sleeved justice promises a higher order of juristic administration. Moreover the delightful democracy which pervades his thesis invites a brief and reasoned argument against it. Such an appraisal puts into practical operation his belief that the judge should descend to the pedestrian level and permit the intimate appraisal of his views by his fellowman.

The present paper attempts to phrase this conservative viewpoint, and first pays tribute to the lively and attractive style of Judge Frank, first evidenced in his trail-blazing book *Law and the Modern Mind* published about 1930. Like a legal Lochinvar from the West, he captured the effete East with his vigorous and critical comment regarding the standpatism of traditional law

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1. Saturday Review of Literature, October 13, 1945, at p. 12.

2. A typical passage of Judge Frank's scholarly paper is the following: "The judges are oracles of an impersonal higher law, a body of law absolute and infallible—so believed many who sponsored the judge's gown. Therefore, this garment of sacerdotal origin was appropriate, clothing its wearer with the dignity that befits the augur. Others, more skeptical of the law's divinity, nevertheless appreciated the public effect of priestly trappings. They were astute in this perception. In the minds of altogether too many persons the judicial garb with its priestly flutterings, inspires excessive awe. Hughes, as Secretary of State, was fallible; Van Devanter, as Solicitor for Interior, was not beyond criticism. But, clad in their solemn black silk, they automatically became, for most of the public, if not as sacred as Japan's Emperor, at least brushed with divinity." *Id.* at 12.

and his documented plea for legal liberalism. As a judge, his judicial opinions are gems of literary value that give temporary comfort even to the losing lawyer.

But in this instance Judge Frank's critique against the judicial robe seems to confuse incidental form and fundamental substance. His creation of a robe-tabu has gone far beyond the realistic effects of the juristic garment adorning our judges in action. The first argument against his position is strictly an *ad hominen* one. The direful consequences that trail judicial robes strangely and happily escaped Judge Frank in his own judicial experiences. After telling us that the robe smothers independence of judicial thinking and sets judicial minds in a static mold, Judge Frank informs us that no such transformation took place when he assumed the robe for the first time: "When I woke up one morning a federal judge, I found myself just about the same person who had gone to bed the night before an S.E.C. Commissioner."[3] And his many ardent admirers among the lawyers and laymen who have had the good fortune to attend Judge Frank's court or to read his judicial opinions or popular essays will agree that not alone on the morning after but during the four years of his judicial career, Judge Frank, fully robed, has remained the "same person" who served so ably as S.E.C. Commissioner and in other responsible frockless offices of the Government. All of which makes somewhat shaky or at least questionable his generalized contention that a judicial robe clogs the mind, curbs independence of thinking and serves only to conceal the multiple and feeble faults of our judiciary. Not so in the case of Judge Frank. He has in his own daily judicial actions lived an effective answer to his whole paper at least insofar as the subjective harms or evils of the robe are concerned.

But Judge Frank would doubtless admit that he is not alone in surmounting the smotherings of the silken covering that adorns our judges in action. Without leaving Judge Frank's circuit the sterling independence of Judges Learned Hand, Augustus Hand, Knox, Clancy and Leibell—to name but a few—is well known in legal circles. Without discarding the continuity of precedents, which Judge Frank states to be so necessary, the Judges of the Second Circuit have not forgotten, in the words of Dean Pound, that "the law must be stable and yet it cannot stand still".[4]

For fifty years Oliver Wendell Holmes wore judicial robes, first as Justice, later as Chief Justice of the Massachusetts Supreme Court and for thirty years Justice of the United States Supreme Court. Judge Frank in his *Law and the Modern Mind* places Justice Holmes on the highest pinnacle of judicial excellence. To him the "Yankee from Olympus" was America's only completely adult jurist and today the Holmesian philosophy is the spearhead of legal liberalism in America. Yet this independent jurisprudence of Holmes was developed while he wore judicial robes for half a century. In the *Holmes-Pollack Letters*, the Justice sings the praises of soft-collars; he probably was

3. *Id.* at 12.

4. POUND, THE INTERPRETATIONS OF LEGAL HISTORY (1923) 1.

uncomfortable and stuffy in his judicial robes. But the point of importance to note on the intellectual side is that he penned his opinions in shirt sleeves far removed from the "robe-ism" that Judge Frank fears. *The Cult of the Robe* has ballooned a minor matter of dress into the inflated theory that judicial garb curbs and cabins the inner spirit of a great judge. Paraphrasing familiar words, the judicial robe does not make the judge, nor unmake him.

A dissent must be registered against Judge Frank's very broad peroration, bidding a long farewell to forensic frocks and robing rooms: "Unfrock the judge, have him dress like ordinary mĕn, become in appearance like his fellows, and he may well be more inclined to talk and write more comprehensively. Plain dress may encourage plain speaking."[5] This sentence, typical of the undertone and argument of Judge Frank's entire paper, is exceedingly difficult to follow when we reflect upon the course of current judicial decisions in the Supreme Court of the United States, a Court substantially reformed in recent years with the advent of eight new Justices. These Justices still wear judicial robes at every session save only for the day mentioned by Judge Frank, when Mr. Justice Black absentmindedly appeared on the bench minus his robe. Although burdened and weighted by their robes which allegedly prevent freedom of judicial action and individualism of decisions by the judiciary, the United States Supreme Court, robed though they are, have produced a greater number of divided opinions than any other Supreme Court in the same short span of years. In the 1943 term over 175 dissenting votes were recorded and over 50% of the cases decided with full opinions disclosed a divided Court. The tendency of the Supreme Court to multiply the number of opinions, both in concurrence and in dissent, has grown appreciably in the last few years.[6]

Certain it is that the argument against the robe as a barrier to judicial independence at least stops at the door of the robing room of our highest judicial tribunal. "The robe," says Judge Frank, "gives the impression of uniformity in the decisions of the priestly tribe."[7] If there is one quality that the robed Supreme Court in Washington does *not* possess—it is uniformity or "the impression of uniformity".

So much for the *subjective* aspects of the robe. Judge Frank makes a strong argument against the *objective* effects of "robe-ism" because of its sinister, undemocratic, fearsome consequences to all persons who come in contact with our courts. The learned Judge contends that the robe tends to frighten the litigants, causes honest witnesses to give the impression that they are not telling the truth, upsets young lawyers and makes a fetish of formalism.[8] True, an ordinary witness is not quite "at home" in the courtroom; and it is suspected that he would not be at perfect ease even if the judicial robe is discarded. It is not the robe that frightens him; it is because he is called

5. Frank, *supra* note 1, at 80.

6. Kennedy, *Portrait of the New Supreme Court I* (1944) 13 FORDHAM L. REV. 1-16; Kennedy, *Portrait of the New Supreme Court II* (1945) 14 FORDHAM L. REV. 8-36.

7. Frank, *supra* note 1, at 13.

8. *Id.* at 13.

upon to speak in public with the critical eyes of a hostile attorney ready to confuse him by cross-examination. Moreover, a judge who is kindly at heart does not become a tyrant through the wearing of his mantle of authority. An overbearing jurist does not shed a deeply imbedded arrogance through the simple expedient of removing the judicial gown.

More astounding to the conservative is Judge Frank's assertion that the honest witness gives the impression of not telling the whole truth by reason of the emotions produced by the garb of the judge on the bench. This is hardly the place to analyze the causes of perjury, real or imagined, but it is not very convincing to assert that the flowing folds of the judge's attire contribute greatly to a witness's tendency to depart from the truth. It might be suggested that this badge of authority would act as a deterrent. But most debatable of all is the Judge's contention that the robe has somewhat the same effect upon the young lawyer who is scared by the frocked judge. Robe or no robe, a young lawyer in his callow years of practice is not at ease in the court room. His skill and confidence come slowly with the years; they cannot be accelerated through the disrobing process argued for by Judge Frank. May I note an example of this attitude among young lawyers in the making? The Fordham University School of Law operates a Practice Court which allows the law students to try cases after the manner and style of their lawyer-brothers. These cases are frequently presided over by graduate-judges from the federal and state courts. These judges in the past have appeared without robes, not because we favored the robeless viewpoint, but in order to lighten the impedimenta of our guest-judges. While these judges are objectively sympathetic and helpful and without robes, our youngsters at first suffer courtroom jitters in the presence of a real judge. Isn't it possible that a realistic evaluation of the inherent authority of the judiciary rather than mental disturbances over the presence of a robe accounts for the attitude of litigant, witness or lawyer in the surroundings of a real courtroom? I have noticed that this initial fear of our law students wears away during the progress of the trial not because of the "no-robe" technique accidentally followed in our Practice Court but because the young lawyer in the making gains confidence and poise on his feet.

One last point of the dissent remains to be mentioned: A temperate plea for the retention of the robe, its symbolism and its importance as a bit of traditional formalism that does no harm, as we have attempted to prove above, but on the other hand does real good. Judge Frank concedes freely that there is reason, purpose and benefit in the soldiers' and sailors' distinctive garb. Form plays an important part in the efficiency of the Army and Navy. So it is in the law. I accept the criticism of Judge Frank that form may submerge substance and so develop into a very substantial evil. He states it in the following words:

"The robe of the judge is an antique garment, awkward, impractical, and, to the dispassionate eye, of no esthetic value. It is of a piece with the 'Hear ye! Hear ye!' that opens court sessions, along with the quaint medieval Latin and the obsolete Norman French often incorporated in judicial opinions."[9]

9. *Id.* at 12.

We probably could abandon the double-talk of the court officer announcing the opening of the court. It must be conceded that law would not end if the gownless judge entered the courtroom without any opening cry or without the lawyers, witness or spectators arising in respect to the judge. Judge Julian Mack, mentioned by Judge Frank, frequently discarded his robe when presiding at a trial. He also held trials in his chambers seated on a level with the witnesses and the lawyers. These are democratic leanings which merit approval provided that it is remembered that Judge Mack was a great judge and that his greatness consisted of something more durable than taking off his gown, or even his coat, in the heat of a summer judicial session. Judge Frank has convincingly satisfied the opposition that there are doubtless physical objections to the wearing of gowns or wigs particularly in the summer months. It is interesting to note that *The Law Quarterly Review*, staid English law periodical, states that the English judges have no scruples about removing their wigs on very hot days.[10] A more terrifying argument against the physical effects of such headpiece was written down in 1664 by Pepys when he said: "Thence to Westminster to my barber's to have my Periwigg he lately made me cleansed of its nits, which vexed me cruelly that he should put such a thing into my hands."[11] Our objection to the elimination of the change in forensic fashions is solely based upon Judge Frank's contention that they effect the intellectual activities of the judiciary.

Chief Judge John T. Loughran, recently elevated to the highest judicial office in New York State, tells amusingly about one of his first cases before a Justice of the Peace in his home town of Kingston, New York.[12] The Justice was a cobbler and held court in his cobbler shop. Without robe, without coat and in red flannel undershirt, he dispensed rural justice. The particular trial in which Judge Loughran was interested, involved the charge of larceny of house shutters which resulted finally in a victory for his client.

Both Mr. Loughran and his opponent had been interested in the J.P.'s intentness in keeping, as they thought, a precise record of the proceedings. During the trial it was noted that he was making constant notations upon a sheet of paper before him. It appeared that he was periodically making dots on one side of the sheet or the other. The young counsel naturally assumed that these notations recorded incisive points of fact or law developed during the trial. At the end of the case they ventured to ask the shirt-sleeved Justice to interpret his crude recordations. They were indeed disappointed to learn that their forensic skill had not greatly occupied the thoughts of the cobbler-jurist. It developed that while they were immersed in the examination and cross examination of the witness and their spirited summation, the Justice of the Peace was engaged in counting the automobiles that passed his window.

10. (1945) 61 L. Q. REV. 32-33.

11. *Id.* at 33.

12. This story is delightfully told by Chief Judge Loughran's former law partner, Surrogate James A. Delehanty of New York County in his tribute to Judge Loughran, *John T. Loughran—The Lawyer* (1935) 4 FORDHAM L. REV. 170.