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PORTRAIT OF THE JUDGE AS AN ACTIVIST: JEROME FRANK AND THE SUPREME COURT*

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The preeminent role of the United States Supreme Court in distributing political power, in shaping federal-state relations, and in promoting individual rights has assured a rich literature on its history. However, most constitutional studies treat the Court as if in a vacuum. Titles such as *Freedom and the Court*[1] and *Nine Men Against America*[2] suggest a Supreme Court divorced from all outside influence. Richer works, remembering Mr. Dooley's advice that "th' supreme coort follows th' iliction returns,"[3] portray the Court as a political institution responding to contemporary pressures.[4] Although sensitive to the impact of broad political forces, these works still describe a court removed from professional and institutional influence. Few studies recognize the contributions of the legal profession—counsel, the bar, law reviews, and lower courts—to the work of the Court.[5]

Although the pinnacle of the federal judicial system, the Supreme Court functions as an integral part of this system; yet, even the best study of the federal judiciary makes no effort to relate the Supreme Court to the lower levels of federal courts.[6] We know very

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[1] H. ABRAHAM, FREEDOM AND THE COURT; CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES (2d ed. 1967).

[2] R. GORDON, NINE MEN AGAINST AMERICA (1958).

[3] F. DUNNE, MR. DOOLEY ON THE CHOICE OF LAW 52 (E. Bander ed. 1963).

[4] *See* R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY (1941); P. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT (1970); F. RODELL, NINE MEN (1955); C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1922).

[5] *But see* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES (1941); F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT (1927); P. FREUND, THE SUPREME COURT OF THE UNITED STATES 145-70 (1949); C. JACOBS, LAW WRITERS AND THE COURTS (1954); M. SCHICK, LEARNED HAND'S COURT 328-47 (1970); B. TWISS, LAWYERS AND THE CONSTITUTION (1942).

[6] *See* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE

little about *how* other courts interact with, and exert influence on, the United States Supreme Court.

The few works focusing on courts other than the Supreme Court find state courts and judges more appealing, probably because the state supreme courts are, within their own province, the final arbiters of law.[7] In evaluating the social impact of law, a state's tort doctrine may be far more instructive than the nuances of federal patent law. Studies of the lower federal courts are infrequent, in part because the district and circuit courts generally operate within the parameters of United States Supreme Court decisions. Consequently, why study the understudies? From the perspective of what ultimately becomes law there seems to be no reason to do so. Lower federal decisions remain authoritatitve only when the Supreme Court does not speak. If the issue warrants attention, the Court will eventually hear it.[8] Final resolution by the Supreme Court blunts the impact of truly original, lower court judges. Their contributions are destined to be temporary.[9] As a result, the "inferior" role, assigned by the United States Constitution to the lower federal courts,[10] precludes the production of jurists of the stature of Lemuel Shaw, Oliver Wendell Holmes, or Benjamin Cardozo.

Nevertheless, it is necessary to examine the lower federal courts if one is to discover *how* law ultimately develops.[11] Inferior courts are a vital part of the process by which the Supreme Court reaches its conclusions. Intermediate appellate judges, especially, contribute to

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FEDERAL COURTS AND THE FEDERAL SYSTEM (2d ed. 1973). The authors focus extensive attention upon the federal courts, but their perspective is entirely jurisdictional. They measure the jurisdiction of each court—the Supreme Court, the courts of appeals, and the district courts—but make little effort to relate one level to another. On another front, constitutional law casebooks seldom include opinions of lower court judges. *But see* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1069 (9th ed. 1975) (*reprinting* Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917)).

[7] *See, e.g.*, L. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW (1957); J. REID, CHIEF JUSTICE: THE JUDICIAL WORLD OF CHARLES DOE (1967); Vines, *Political Functions Of A State Supreme Court*, 8 TULANE STUDIES IN POL. SCI. 51 (1962); JUDICIAL DECISION-MAKING (G. Schubert ed. 1963).

[8] *But cf.* United States v. Rosenberg, 195 F.2d 583 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952); Harper & Etherington, *What the Supreme Court Did Not Do During the 1950 Term*, 100 U. PA. L. REV. 354 (1951); Harper & Pratt, *What the Supreme Court Did Not Do During the 1951 Term*, 101 U. PA. L. REV. 439 (1953); Harper & Rosenthal, *What the Supreme Court Did Not Do in the 1949 Term—An Appraisal of Certiorari*, 99 U. PA. L. REV. 293 (1950).

[9] *But compare* Brandenburg v. Ohio, 395 U.S. 444 (1969), *with* Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917); *cf.* Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975).

[10] U.S. CONST., art. III, § 1.

[11] Gunther shows how a lower court judge may write an opinion whose formulation is so incisive and wise that the influence proves enduring. *See* Gunther, supra note 9; *cf.* D. FISCHER, HISTORIANS' FALLACIES (1970).

the maturation of judicial reasoning. Their opinions serve not only to crystallize and narrow legal issues, but also to articulate major strands of precedential and policy considerations. The work of a brilliant circuit court judge, willing to express the directions he thinks the Supreme Court should take, provides a vivid illustration of the interaction of two levels in the federal court system. Jerome N. Frank was such a judge.

Jerome Frank took his seat on the United States Court of Appeals for the Second Circuit after a distinguished private and public career.[12] As one of the principal formulators of American Legal Realism,[13] he is best known for his jurisprudence. Additionally, Frank had practiced corporate law in Chicago for fifteen years and in New York City for five more before assuming, in 1933, a position in Franklin D. Roosevelt's fledgling New Deal as general counsel to the Agricultural Adjustment Administration (AAA). A furor over the AAA's policies (with Frank seeking greater protection for sharecroppers, tenant farmers, and farm laborers) forced Frank's ouster, but this proved only a temporary displacement from the New Deal. In quick succession, Frank served as special counsel to the Reconstruction Finance Corporation, legal counsel to the Secretary of the Interior, and Commissioner of the Securities and Exchange Commission. When President Roosevelt named William O. Douglas to the Supreme Court in 1939, Frank succeeded Douglas as Chairman of the Securities and Exchange Commission. He was appointed to the Second Circuit in 1941.

Frank remained on the Second Circuit until his death in 1957. During this period the Second Circuit was one of the most illustrious courts in the nation's history. Among those sitting with Frank were Learned Hand, Augustus Hand, Charles E. Clark, and John Marshall Harlan—truly a formidable array of legal talent. In the midst of such company Frank developed a highly refined concept of his role in relation to the Supreme Court.

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[12] For biographical information and personal insights, I have relied principally upon W. VOLKOMER, THE PASSIONATE LIBERAL (1970); Wrigley, *The Jerome N. Frank Papers*, 48 YALE U. LIB. GAZETTE 163 (1974); and personal interviews with Frank's wife, Florence Kiper Frank. Also see *Symposium: Jerome N. Frank*, 24 U. CHI. L. REV. 625 (1957); and *Symposium: Jerome N. Frank*, 66 YALE L.J. 817 (1957) for useful collections on Frank.

[13] Legal Realism is "a conception of the science of law and of the administration of justice that sees significance in the unique elements of particular cases, judges rules by their consequences, and emphasizes the nonlogical and irrational factors in decision." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1890 (1961). For discussions of the movement, see J. FRANK, COURTS ON TRIAL (1949); J. FRANK, LAW AND THE MODERN MIND (1930); W. RUMBLE, AMERICAN LEGAL REALISM (1968); W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973); and S. Verdun-Jones, *The Jurisprudence of Jerome N. Frank*, 7 SYDNEY L. REV. 180 (1974).

One aspect of Frank's personality was his reforming zeal. He enjoyed reevaluating old customs and practices, and hoped to reshape them to meet current needs. As a judge he retained this fervor to redo, but it posed a dilemma. How could an intermediate appellate-court judge improve the law while operating within confines set by the Supreme Court? Frank's relation to the Supreme Court was much like that of an advocate—urging, persuading, coaxing, and cajoling the Court to move in desired directions. At the same time, he recognized the institutional limits imposed by his subordinate position, and gracefully accepted those bounds. Consequently, Frank developed methods to push the Court, while simultaneously bowing to its superior authority.

This Article will analyze Frank's relationship with the Supreme Court, which operated on two quite different levels. On a formal or institutional plane, Frank's judicial opinions provided a fulcrum by which he sought to influence the Supreme Court.[14] On an informal or personal level, Frank's correspondence with friends who were Supreme Court Justices afforded an alternative forum in which Frank could interact with Court personnel.[15] Demonstrating this process of interaction may help to dispel the notion that the Supreme Court operates in a vacuum. The Court relies to a marked extent upon the work of able lower court judges. The pressure that a circuit judge can, in different ways, exert on the Supreme Court clearly illustrates this potential.

I

FORMAL INTERACTION

> "What," someone once asked, "has posterity done for me, that I should think of posterity?"[16]

As a judge on a lower rung of the judicial ladder, how did Frank defer to authority without losing his ability to prod the Supreme Court? Frank's treatment of precedent reveals his concept of his role vis-à-vis the Supreme Court. Examining prior decisions posed squarely the tension between an adherence to tradition and a desire to reform.[17]

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[14] *See* notes 17-112 and accompanying text *infra*. In a forthcoming article I will assess the influence Judge Frank actually exerted upon the Supreme Court.

[15] *See* notes 104-67 and accompanying text *infra*.

[16] Anon. Y. Mous [Jerome N. Frank], *The Speech of Judges: A Dissenting Opinion*, 29 VA. L. REV. 640 n.10 (1943). A bibliography of Frank's work indicates that he wrote this article. S. SMITH, JEROME N. FRANK 1889-1956, A BIBLIOGRAPHY 15 (1967) (unpublished book in Yale Law School Library).

[17] For a fine analysis of various problems with stare decisis that confront lower courts, see

A. *Unexplored Terrain*

If, as a member of a Second Circuit panel, Frank confronted an issue not previously decided by either the Supreme Court or the Second Circuit, then obviously he enjoyed complete discretion in voting to resolve the question. Stare decisis did not fetter that discretion. If Frank wrote for the panel, a petition for a writ of certiorari necessarily implied a challenge to his opinion. However, when Frank wrote in dissent, he implicitly appealed to the Supreme Court, as the only body with power to modify the Court of Appeals judgment, to review the decision. Indeed, the Supreme Court is more likely to grant a writ of certiorari if a judge dissents below.[18] Merely writing separately calls special attention to the case. Writing as strong and cogent a dissent as possible enhances the likelihood of Supreme Court review, so Jerome Frank painstakingly elaborated his dissenting positions.[19] He also used a split among the circuits to his advantage, since a conflict between courts of appeals may tip the balance in favor of review.[20] On occasion, Frank emphasized the split and demonstrated precisely how the division existed, thus appealing to the Court to settle the matter.[21] In one criminal case, Frank explicitly appealed to the Court: he concurred "with the hope that the Supreme Court would review our decision and consider the question."[22]

B. *Familiar Territory: Second Circuit Precedent*

On issues previously decided by the Second Circuit, stare decisis bound Frank either to acquiesce, to distinguish, or to overrule. As a judge, he took seriously his obligation to confront decisions.[23] This posture carried a certain incongruity. Earlier in his career, Frank had ridiculed the quest of lawyers and judges for certainty in the law.[24] Although his jurisprudential writing depicted judges as hav-

Kelman, *The Force of Precedent in the Lower Courts*, 14 WAYNE L. REV. 3 (1967); *cf.* Wise, *The Doctrine of Stare Decisis*, 21 WAYNE L. REV. 1043 (1975).

[18] *See* Tanenhaus, Schick, Muraskin & Rosen, *The Supreme Court's Certiorari Jurisdiction: Cue Theory*, in JUDICIAL DECISION-MAKING 111, 123-24 (G. Schubert ed. 1963).

[19] *See, e.g.*, United States v. On Lee, 193 F.2d 306, 311 (2d Cir. 1951), *aff'd*, 343 U.S. 747 (1952).

[20] *See* SUP. CT. R. 19, 398 U.S. 1030 (1971).

[21] *See* Johansen v. United States, 191 F.2d 162, 163 (2d Cir. 1951), *aff'd*, 343 U.S. 427 (1952).

[22] United States v. Costello, 221 F.2d 668, 680 (2d Cir. 1955), *aff'd*, 350 U.S. 359 (1956). A former law clerk to Judge Frank has suggested that Frank's dissents were the effective equivalent of petitions for writs of certiorari. Personal interview with Philip B. Kurland, Professor of Law, University of Chicago Law School, Oct. 10, 1975.

[23] *See* B. Bittker, Preface to S. SMITH, *supra* note 16, at 5-6.

[24] *See generally* J. FRANK, LAW AND THE MODERN MIND (1930).

ing nearly unfettered discretion, his judicial position demanded that he abide by the customary rules of play.

A quirk in Second Circuit procedure enabled Frank to put additional pressure upon the Supreme Court to review certain Second Circuit decisions. The Circuit made no regular provision for en banc hearings until 1956, after Charles E. Clark became Chief Judge.[25] To prevent different panels from reaching conflicting results, thereby producing inconsistent decisions within the same circuit, the practice of deferring to earlier decisions of Second Circuit panels developed. Frank acquiesced in this practice even though he may have disagreed with the earlier decision or, perhaps, may not have even participated in it.[26] The absence of an en banc procedure meant that a majority of the entire Second Circuit might disapprove a decision, yet abide by it. Reversal was even more difficult, since presumably only the original panel could freely reconsider its prior decision. Although Frank opposed en banc hearings,[27] he found other routes to seek reversal.

Both Frank and Learned Hand viewed the Supreme Court as sitting partially to resolve *intra*-circuit as well as *inter*-circuit conflicts.[28] As a result, Frank might bow to the earlier decision while voicing doubts as to how warmly he embraced it: "Whatever we might now hold if this were for us a novel question, we need not consider, for the matter is governed in this circuit by our decision in . . . ."[29]

Frank employed less subtle techniques in pleading for Supreme Court overhaul of Second Circuit precedent. Occasionally, he expressly disapproved the earlier decision, although still following it, and solicited Supreme Court review.[30] In other cases, Frank considered intervening Supreme Court opinions treating subsidiary questions, and even comments by single Justices, as sufficient warrant to

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[25] *See* SCHICK, *supra* note 5, at 114-22. However, the Second Circuit sporadically heard cases en banc as early as 1945. *See* letter from Jerome N. Frank [hereinafter referred to as J.N.F.] to Felix Frankfurter, Sept. 6, 1945.

[26] *See* P. Beiersdorf & Co. v. McGohey, 187 F.2d 14 (2d Cir. 1951). Initially, Frank acquiesced in Second Circuit cases involving criminal law even though he disapproved the decisions. Later in his tenure, Frank refused to follow those precedents he deemed unjust. *See, e.g.*, United States v. On Lee, 201 F.2d 722, 726 (2d Cir.), *cert. denied*, 345 U.S. 936 (1953). United States v. Bennett, 152 F.2d 342, 349 (2d Cir. 1945) (Frank, J., dissenting), *rev'd*, 328 U.S. 633 (1946). *See also* letter from J.N.F. to Felix Frankfurter, July 9, 1956, at 3.

[27] *See* letter from J.N.F. to Felix Frankfurter, Sept. 6, 1945.

[28] *See* P. Beiersdorf & Co. v. McGohey, 187 F.2d 14 (2d Cir. 1951); Dickinson v. Mulligan, 173 F.2d 738, 742 (2d Cir. 1949), *rev'd*, 338 U.S. 507 (1950); M. SCHICK, *supra* note 5, at 116.

[29] Field's Estate v. Commissioner, 144 F.2d 62, 63 (2d Cir. 1944).

[30] *See* P. Beiersdorf & Co. v. McGohey, 187 F.2d 14 (2d Cir. 1951).

reject well-established Second Circuit decisions.[31] Thus, the presence of a higher tribunal and the possibility of reversal by that Court was justification for Frank's resistance to applicable Second Circuit precedent.

In *In re Luma Camera Service, Inc.*,[32] Frank went to extreme lengths by simultaneously following and parodying an earlier decision. Federal bankruptcy law allowed a trustee in bankruptcy to obtain a "turnover order" commanding individuals possessing property of the bankrupt to turn over such assets to the trustee. Failure to do so might result in imprisonment for contempt. Prior Second Circuit cases had sanctioned the presumption that an individual, once shown to be in possession of a bankrupt's property, remained in possession indefinitely. The rule sought to prevent fraudulent transfers. Frank perceived this as a fiction that operated very unjustly, but firm Second Circuit precedent held otherwise. In *Luma Camera Service*, Frank accepted the inevitable force of these earlier decisions, but not without expressing his disagreement.[33] Frank ridiculed the very result he reached, and implored the Supreme Court to accept the case for review and overturn these Second Circuit precedents:

> Although we know that Maggio cannot comply with the order [because he did not have the property], we must keep a straight face and pretend that he can, and must thus affirm orders which first direct Maggio "to do an impossibility, and then punish him for refusal to perform it." Our own precedents keep us from abandoning that pretense which, in this case, may well lead to inhumane treatment of Maggio and which, in other turnover cases, has brought about a revival of those evils of the debtors' prison which legislation like the Bankruptcy Act was supposed to abolish. . . . It is an open secret that Maggio is being punished as if for a crime, but we are precluded from so acknowledging.
>
> To eliminate the unfortunate results of the unreasonable fiction we have adopted, it will be necessary for the Supreme

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[31] *See* Commissioner v. Hall's Estate, 153 F.2d 172, 174 (2d Cir. 1946) (Frank, J., dissenting); United States v. Bennett, 152 F.2d 342, 349 (2d Cir. 1945) (Frank, J., dissenting), *rev'd*, 328 U.S. 633 (1946). In *Hall's Estate* Frank explained:

> Ordinarily, when a case has been decided by this court against my dissent, I do not again dissent when the same question again arises. But the fact that in the Fidelity-Philadelphia and Field cases, Mr. Justice Douglas, in concurring, indicated that the Supreme Court had not yet decided whether Heiner survived Hallock, persuades me that it is proper here once more to dissent for the reasons set forth in my dissenting opinion in Helvering v. Proctor [140 F.2d 87 (2d Cir. 1944)].

153 F.2d at 175 (footnote omitted).

[32] 157 F.2d 951 (2d Cir. 1946), *rev'd*, 333 U.S. 56 (1948).

[33] The opinion is marked by such language as "Were this a case of first impression . . . (157 F.2d at 953), "[W]ere we free . . . ." (*id.*), "we would hold . . . ." (*id.*).

> Court to grant certiorari and then to wipe out our more recent precedents.[34]

After such an impassioned plea, was there any doubt that the Supreme Court would grant certiorari? Indeed, one might ask if the Supreme Court enjoyed freedom of choice. Here was an opinion by an able judge, joined by Learned Hand, that cried out for reversal. Frank did not merely identify a split in the circuits. He sharply attacked the rule, intimated it was inhuman, and expressly sought Supreme Court review. Quoting Frank's parody of turnover proceedings, the Court granted certiorari and reversed.[35] Judge Frank did not reject the applicable precedent. His concept of his role as circuit judge dictated that he abide by prior rulings. But he also perceived his role as permitting him to place the onus upon the Supreme Court to correct the past errors of his own court.

C. *Familiar Terrain: Supreme Court Precedent*

Frank's attitude toward Supreme Court precedent reveals how a circuit judge may defer to a higher judicial authority while simultaneously exhorting the Court to adopt a desired position. When confronted by Supreme Court decisions, Frank felt duty-bound to adhere to them because he visualized his role as "merely a reflector, serving as a judicial moon."[36] He had little patience for those who would, either by subterfuge or simple act of will, refuse to follow higher authority.[37] It mattered not whether he agreed with those decisions:

> [W]here the [Supreme Court] has directly enunciated a specific rule we must then follow it, even if we think it wholly wrong. Thus I happen to feel very strongly that the Supreme Court has been wrong in [certain cases] . . . nevertheless I have felt that we are obliged to follow those rulings.[38]

There are methods by which lower court judges may ignore or disregard relevant but distasteful Supreme Court authority.[39]

[34] *Id.* at 955 (footnote omitted).

[35] *See* Maggio v. Zeitz, 333 U.S. 56, 59 (1948).

[36] Choate v. Commissioner, 129 F.2d 684, 686 (2d Cir. 1942).

[37] *Cf.* letter from J.N.F. to Felix Frankfurter, Mar. 13, 1945.

[38] J.N.F. Conference Memorandum, Jan. 15, 1945, in Duquesne Warehouse Co. v. Railroad Retirement Bd., 148 F.2d 473 (2d Cir. 1945) (Frank, J., dissenting). *See* Duquesne Warehouse Co. v. Railroad Retirement Bd., 148 F.2d 473, 485. *See also* Wallace v. United States, 142 F.2d 240, 243 (2d Cir.), *cert. denied*, 323 U.S. 712 (1944); Hammond-Knowlton v. United States, 121 F.2d 192 (2d Cir.), *cert. denied*, 314 U.S. 694 (1941).

[39] *See* Murphy, *Lower Court Checks on Supreme Court Power*, 53 AM. POL. SCI. REV. 1017 (1959). *See also* K. LLEWELLYN, THE COMMON LAW TRADITION 77-91 (1960) (identifying at least 64 techniques courts use in approaching precedent).

Frank's intellectual integrity precluded resorting to devious means to slight rules he disliked.[40] By temperament he was not inclined to give niggardly constructions to decisions he opposed, but instead opted for candor. His approach was to admit the binding force of the precedent, apply it fairly to the case at bar, but articulate reasons why the rule seemed misguided. Jerome Frank honed to a fine edge the art of following a Supreme Court case while criticizing its doctrine and urging the Court to reexamine it.[41] Typically, he acknowledged the effect of stare decisis but lamented the unjust consequences of the rule. Moreover, Frank described the old rule's deficiencies in detail, and suggested possible routes the Supreme Court could take to modify it. He might conclude with an explicit call for review by the Court. Such a plea was usually gratuitous, since Frank, by that point, had revealed his opinion that the Court should take the case.[42]

On occasion, Frank adamantly insisted that a doctrine needed overhaul or replacement. In *Hammond-Knowlton v. United States,*[43] he criticized the judicial doctrine requiring strict construction of statutes waiving sovereign immunity; however, the Supreme Court denied certiorari.[44] An identical issue reached Frank later,[45] but not before the Supreme Court had, by his own admission, reaffirmed that doctrine.[46] Nonetheless, while adhering to precedent, Frank again criticized the doctrine:

> [W]e must here, once more, follow the niggardly rule and deny to a

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[40] Professor Boris I. Bittker, a former law clerk to Judge Frank, has described how sincerely Frank took his obligation to be faithful to earlier decisions. *See* B. Bittker, *supra* note 23, at 5-6. My reading of Frank's opinions confirms Bittker's observations. I found no case in which Frank, through discreditable methods, avoided Supreme Court precedent to reach a desired end. The most my research unveiled was a fairly debatable claim that a Frank opinion silently challenged a Supreme Court decision. *Compare* Maggio v. Zeitz, 333 U.S. 56, 81, 85-89 (1948) (Frankfurter, J., dissenting), *with In re* Luma Camera Serv., Inc., 157 F.2d 951 (2d Cir. 1946), *rev'd,* 333 U.S. 56 (1948).

[41] *See* United States v. Roth, 237 F.2d 796, 801 (2d Cir. 1956) (Frank, J., concurring), *aff'd,* 354 U.S. 476 (1957); Republic of China v. National City Bank, 208 F.2d 627 (2d Cir. 1953), *rev'd,* 348 U.S. 356 (1955); United States v. Rosenberg, 195 F.2d 583 (2d Cir.), *cert. denied,* 344 U.S. 838 (1952); Roth v. Goldman, 172 F.2d 788 (2d Cir.) (Frank, J., concurring), *cert. denied,* 337 U.S. 938 (1949); Wallace v. United States, 142 F.2d 240 (2d Cir.), *cert. denied,* 323 U.S. 712 (1944); Picard v. United Aircraft Corp., 128 F.2d 632 (2d Cir.), *cert. denied,* 317 U.S. 651 (1942); Hammond-Knowlton v. United States, 121 F.2d 192 (2d Cir.), *cert. denied,* 314 U.S. 694 (1941).

[42] On occasion Learned Hand also pointed to certiorari as the route to reverse law that he felt bound to follow. *See, e.g.,* Dickinson v. Mulligan, 173 F.2d 738, 742 (2d Cir. 1949).

[43] 121 F.2d 192 (2d Cir. 1941).

[44] 314 U.S. 694 (1941).

[45] *See* Wallace v. United States, 142 F.2d 240, 243 (2d Cir. 1944).

[46] United States v. Nunnally Inv. Co., 316 U.S. 258, 264 (1942).

> citizen a right to recover money which his government wrongfully obtained from him and which unjustly enriches it.[47]

Frank displayed no hesitation in following a doctrine he believed unwise or even unjust. Given his position as a judge on an intermediate tribunal, no other option existed. Although his duty bound him to accede to the views of the higher court, that duty did not prevent him from questioning the wisdom or the constitutionality of past rulings. This judicial style advanced the process by which old doctrines receive new scrutiny and are either approved or discarded; elaborating reasons that supported change contributed to the Supreme Court's understanding of the need to reconsider past decisions.[48]

But could not Frank have accomplished the same objective by writing a law review article articulating his views? The answer depends, in part, upon Frank's concept of the function of judicial opinions. His opinions were, to understate it, idiosyncratic. In the 1940's and 1950's only Jerome Frank would refer to *Gulliver's Travels* and *Alice In Wonderland,*[49] discourse on the history of science,[50] or describe recent advances in gestalt psychology[51]—all in the context of a judicial opinion. When he first ascended to the bench this style received much comment, often sharply critical. Felix Frankfurter and Jerome Frank exchanged a number of lengthy letters discussing the function of judicial opinions. One interchange captures the flavor. Frank wrote:

> My aims, so far as I can articulate them, in writing opinions, when they are "essayistic," are these: (a) To stimulate the bar into some reflective thinking about the history of legal doctrines, so that they will go beyond the Citator perspective of doctrinal evolution; (b) To induce them to reflect on the techniques of legal reasoning, (e.g., to consider the nature and value of stare decisis, or the use and value and limitations on the proper employment of fictions); (c) To recognize that the judicial process is inescapably human, necessarily never flawless, but capable of improvement; (d) To perceive the divers "forces" operative in decision-making, and the limited function of the courts as part of government.

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[47] Wallace v. United States, 142 F.2d 240, 243 (2d Cir. 1944) (footnotes omitted).

[48] This approach has been discussed by judges and scholars. *See, e.g.,* Wyzanski, *A Trial Judge's Freedom and Responsibility,* 65 HARV. L. REV. 1281, 1298 (1952); Kelman, *supra* note 17, at 11.

[49] Hammond-Knowlton v. United States, 121 F.2d 192, 204 n.35, 205 n.37 (2d Cir.), *cert. denied,* 314 U.S. 694 (1941).

[50] Perkins v. Endicott Johnson Corp., 128 F.2d 208, 217 n.25 (2d Cir. 1942), *aff'd,* 317 U.S. 501 (1943).

[51] Skidmore v. Baltimore & O.R.R., 167 F.2d 54, 68-69 (2d Cir.), *cert. denied,* 335 U.S. 816 (1948).

> And, underlying it all, is a strong desire, not easily curbed, to be pedagogic—not in didactic manner but in a way that will provoke intelligent questioning as to the worth of accepted practices in the interest of bettering these practices. The Holmes' approach was, of course, differently motivated. He wrote for the few. If what he said was over the heads of the many, he didn't care—or, rather, he preferred it that way. Don't misunderstand: I don't mean that I'm a Holmes, or that I can compete with him. I do aim to teach; he did not.[52]

Frankfurter responded:

> You are teeming with ideas and the world needs their expression. But that is no reason why you should take a simple case which Holmes would have disposed of in a page and a half and use it as a peg for an essay on mercantilism.[53]

Frankfurter intimated that another forum would provide a proper vehicle for Frank's views.[54] Frank's style and personality, however, were more assertive, and he rejected any armchair posture of legal reform. A generic law review discussion would not substitute for the concrete judicial opinion, which provided a fulcrum to propel the upper Court to reform its law. Frank preferred the occasion for change to be imminent, not deeply ensconced in the future. A letter to Learned Hand captures the creative spirit that Frank applauded in judges:

> Let me congratulate you on *The Evergreens v. Nunan.* It is, I think, the finest kind of inventive judicial product. For it involves a real flash of genius in the contrivance of new judicial tools. I know that you pretend to jeer at the idea that courts should do justice. But here, in the interest of doing greater justice, you have given the judiciary a perfected instrument.[55]

Frank perfected a "new judicial tool" in the technique of following while evaluating Supreme Court precedent. The apex of its use occurred in *United States v. Roth,*[56] the lower court decision in the famous Supreme Court obscenity case. By concurring separately in *Roth,* Frank revealed how cautiously he approached his task. Frank considered the federal legislation unconstitutional. Although the

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[52] Letter from J.N.F. to Felix Frankfurter, Nov. 13, 1942, at 3-4.

[53] Letter from Felix Frankfurter to J.N.F., Nov. 14, 1942.

[54] *Id.*

[55] Letter from J.N.F. to Learned Hand, Apr. 5, 1944.

[56] 237 F.2d 796, 801 (2d Cir. 1956), *aff'd,* 354 U.S. 476 (1957) (Frank, J., concurring). He had previously tried to persuade the Supreme Court to grapple with the constitutional issues arising from the obscenity prosecutions (Roth v. Goldman, 172 F.2d 788, 801 (2d Cir. 1949) (Frank, J., concurring)), but seven years had elapsed and the Court still had not dealt with these problems.

Supreme Court had never resolved the constitutional question, several decisions had assumed the statute's validity. Frank declined to describe earlier Supreme Court comments as merely dicta, even though this dodge might have produced the result he desired. The collective thrust of the Supreme Court cases tended to sustain the legislation. Frank therefore voted to uphold the convictions and contented himself with a concurrence.

But what a concurrence! It was a herculean effort! Filling twenty-seven pages in the *Federal Reporter,* Frank analyzed the constitutional issues with a coherence and lucidity that has not yet been surpassed. His insights included the recognition that the federal statute impinged on protected first amendment activity by punishing the mailing of material that induced thoughts or desires but not conduct.[57] Frank also argued that the legislation lacked a firm factual basis showing that reading obscene materials had an effect on conduct.[58] Moreover, he perceived a constitutional difference between regulation affecting adults and that affecting children.[59] In addition, Frank noted that the legislation burdened the judicial system with troublesome issues of legal process because it permitted prosecutors and juries to wield enormous discretion, and anomalously asked judges to serve as literary critics who would exclude true "classics" from prosecution. This last burden prompted Frank's wry query whether the task would produce a "Legal Restatement of the Canons of Literary Taste."[60] Drawing upon implications from past cases, Frank not only unraveled the constraint upon free speech posed by such statutes,[61] but also articulated an early statement of the void-for-vagueness doctrine.[62]

Frank's judicial effort in *Roth* identified and illuminated major

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[57] This anticipated a distinction between inciting conduct and abstract teaching or advocacy, made in the later Supreme Court decisions in Brandenburg v. Ohio (395 U.S. 444, 447-48 (1969)), Scales v. United States (367 U.S. 203, 228-30 (1961)), and Yates v. United States (354 U.S. 298, 318 (1957)).

[58] The Commission on Obscenity and Pornography recently confirmed this conclusion. COMM'N ON OBSCENITY AND PORNOGRAPHY REP. 23-27 (1970). An intervening Supreme Court opinion cited Frank's lower court concurrence. That opinion focused upon the lack of factual support for the position that obscenity produced antisocial conduct. *See* Memoirs v. Massachusetts, 383 U.S. 413, 431 (1966).

[59] This anticipated the Court's decision in Ginsberg v. New York, 390 U.S. 629, 634-43 (1968).

[60] 237 F.2d at 820.

[61] *Id.* at 826-27. Previously, obscenity was assumed to lie beyond the pale of first amendment protection. *See* Beauharnais v. Illinois, 343 U.S. 250 (1952).

[62] For general statements on the void-for-vagueness doctrine, see Baggett v. Bullitt, 377 U.S. 360 (1964); Note, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U. PA. L. REV. 67 (1960).

issues requiring resolution by the Supreme Court. That Frank anticipated so many later cases indicates how seminal was his effort. Another measure of Frank's contribution is that two succeeding Supreme Court opinions relied on his lower court concurrence, even though the Court in *Roth* followed a different route.[63]

D. *Impotent Zombies*

While striving to follow conscientiously the Supreme Court's lead, Frank on occasion refused to apply some of its decisions. When may a lower court judge disregard an explicit ruling of the highest tribunal?[64] At one point, the conventional wisdom decreed "never," for the task of lower court judges was simply to follow blindly the past rulings of higher courts.[65] More recently, that position has encountered resistance, partly as a consequence of the Supreme Court's increased willingness in the twentieth century to overrule its own decisions.[66] With some Supreme Court rulings destined to be overruled, should an intermediate court, in the interim, attempt to discern the likely future fate of past rulings? Or must the eulogy await a formal internment?

Diametrically opposed answers have been given to these questions. On one hand, Judge Hutcheson advanced the classic

[63] *See* Stanley v. Georgia, 394 U.S. 557, 566 n.9 (1969); Memoirs v. Massachusetts, 383 U.S. 413, 431 n.10 (1966). Frank also influenced two dissenting Justices. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 110 (1973) (Brennan, J., dissenting); Ginzburg v. United States, 383 U.S. 463, 486 (1966) (Douglas, J., dissenting).

[64] For a sampling of different attitudes, see Russell v. United States, 408 F.2d 1280, 1283 (D.C. Cir. 1969) (Bazelon, C.J.); Ashe v. Swenson, 399 F.2d 40, 46 (8th Cir. 1968) (Blackmun, J.); Blalock v. United States, 247 F.2d 615, 621 (4th Cir. 1957) (Sobeloff, J.); Spector Motor Serv., Inc. v. O'Connor, 181 F.2d 150, 153-54 (2d Cir. 1950) (Clark, J.); United States v. Girouard, 149 F.2d 760, 767 (1st Cir. 1945) (Mahoney, J.); Spector Motor Serv., Inc. v. Walsh, 139 F.2d 809, 813-18, 822-23 (2d Cir. 1944) (Clark, J., majority opinion, L. Hand, J. dissenting opinion); Ashe v. Swenson, 289 F. Supp. 871, 873 (W. D. Mo. 1967) (Oliver, J.); Abendschein v. Farrell, 11 Mich. App. 662, 680-85, 162 N.W.2d 165, 173-76 (1968) (Levin, J.); Predham v. Holfester, 32 N.J. Super. 419, 426-28, 108 A.2d 458, 462-63 (1954) (Jayne, J.); Kelman, *supra* note 16; Magruder, *The Trials and Tribulations of an Intermediate Appellate Court*, 44 CORNELL L.Q. 1 (1958); Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281 (1952); Note, *The Attitude of Lower Courts to Changing Precedent*, 50 YALE L.J. 1448 (1941); *cf.* Hopkins, *The Role of an Intermediate Appellate Court*, 41 BROOKLYN L. REV. 459 (1975).

[65] *See* United States v. Gold, 115 F.2d 236, 238 (2d Cir. 1940) (L. Hand, J.); Rothensies v. Cassell, 103 F.2d 834, 837 (3d Cir. 1939) (Clark, J.); Bullard v. Commissioner, 90 F.2d 144, 150 (7th Cir. 1937) (Lindley, J.); Ostrom v. Edison, 244 F. 228, 236 (D.N.J. 1917) (Rellstab, J.); Louisville & N.R.R. v. Western Union Tel. Co., 218 F. 91, 93 (E.D. Ky. 1914) (Cochran, J.).

[66] *See* Blaustein & Field, *"Overruling" Opinions in the Supreme Court*, 57 MICH. L. REV. 151, 184-94 (1958); THE CONSTITUTION OF THE UNITED STATES OF AMERICA; ANALYSIS AND INTERPRETATION, S. DOC. No. 82, 92d Cong., 2d Sess. 1789-97 (1973) (lists of Supreme Court cases that have been overruled); *cf.* Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUP. CT. REV. 211.

common-law distinction between holding and dictum, and insisted that only explicit Supreme Court holdings could govern his actions.[67] "Holdings" mark the path lower court judges must follow; "trends" offer uncertain guidance through a dark thicket. On the other hand, some jurists—with Frank at the vanguard—urged that it served justice poorly to adhere to cases discredited by subsequent events, but not yet explicitly overruled.[68] Such adherence saddles litigants facing the application of obsolete decisions with the burden of carrying an appeal to the Supreme Court. Since the reasons for declining review may rest on the state of the Court's own docket rather than its approval of the obsolete ruling, the losing party suffers seriously. The dispute may turn on law that the Supreme Court would reject if it had considered the merits. To avoid this consequence, Frank argued:

> Legal doctrines, as first enunciated, often prove to be inadequate under the impact of ensuing experience in their practical application. And when a lower court perceives a pronounced new doctrinal trend in Supreme Court decisions, it is its duty, cautiously to be sure, to follow not to resist it.[69]

Those who agreed with Frank shared the general view that they need not follow discredited cases, but differed about how to assess whether a past ruling had been discredited. Learned Hand, for example, dissented from a Clark opinion (which Frank joined) that refused to abide by old Supreme Court rulings on a state's power to tax interstate commerce.[70] But Hand did not quarrel with the general approach urged by Frank.[71] In one dissenting opinion, Hand asserted:

> I agree that one should not wait for formal retraction in the face

[67] I don't regard the Supreme Court as set over me to direct my trend or tendency. It only binds me in the very act of decision, and when it is going in the wrong direction, I am not going to beat it to the wrong decision by trying to anticipate their next wrong turn.

Conference Memorandum of Judge Hutcheson, Jan. 15, 1945, in Duquesne Warehouse Co. v. Railroad Retirement Bd., 148 F.2d 473 (2d Cir. 1945).

[68] *See* Spector Motor Serv., Inc. v. Walsh, 139 F.2d 809, 814-18 (2d Cir. 1944) (Clark, J.); Barnette v. West Virginia State Bd. of Educ., 47 F. Supp. 251, 253 (S.D.W. Va. 1942) (Parker, J.), *aff'd*, 319 U.S. 624 (1943); Kelman, *supra* note 17, at 15-19; Wyzanski, *supra* note 48, at 1298-99; Note, *supra* note 64, at 1450-55.

[69] Perkins v. Endicott Johnson Corp., 128 F.2d 208, 217-18 (2d Cir. 1942) (footnotes omitted).

[70] Spector Motor Serv., Inc. v. Walsh, 139 F.2d 809, 822 (2d Cir. 1944) (L. Hand, J., dissenting).

[71] Learned Hand quoted with approval the language in the text from *Perkins*. *See* Picard v. United Aircraft Corp., 128 F.2d 632, 636 (2d Cir. 1942). Judge Clark also relied upon Frank's *Perkins* opinion in Spector Motor Serv., Inc. v. Walsh, 139 F.2d 809, 814 (2d Cir. 1944).

> of changes plainly foreshadowed . . . . Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant; on the contrary I conceive that the measure of its duty is to divine, as best it can, what would be the event of an appeal in the case before it.[72]

Thus, Hand reasoned that although explicit overruling is unnecessary, the "womb of time" is too speculative. Therefore, the problem is to assess the Supreme Court's likely reaction in the particular case, rather than to project its long-term direction.

Although Frank and Learned Hand shared similar positions in theory, they differed on the application of the general principle.[73] In several cases, Frank was more willing to identify a "new doctrinal trend." This difference stemmed largely from the posture of each judge. Preferring a more limited function for the judiciary,[74] Learned Hand eschewed strong judicial intervention by inferior court judges. Frank's reforming spirit and exuberant style favored a more assertive reexamination of accepted law and a more active quest for new doctrines.

How broad-gauged was the power claimed by Frank? Surprisingly, he set sharp limits to the "exhilarating opportunity," and carefully operated within them. A "new doctrinal trend"[75] grounded Frank's approach. This rubric demanded more than mere speculation about Supreme Court policy or likely court attitudes. Frank assumed an obligation to describe in detail the recent developments on which he based his belief that a Supreme Court case was no longer authoritative.[76] Whenever Frank refused to accede to a relevant High Court precedent, he set forth the intervening developments.[77] Frank's approach required the Supreme Court to gen-

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[72] Spector Motor Serv., Inc. v. Walsh, 139 F.2d 809, 823 (2d Cir. 1944) (L. Hand, J., dissenting).

[73] *See, e.g.*, Gardella v. Chandler, 172 F.2d 402, 407, 408 (2d Cir. 1949) (L. Hand & Frank, J.J.) (separate opinions); Helvering v. Proctor, 140 F.2d 87, 88, 89 (2d Cir. 1944) (L. Hand, J., majority opinion; Frank, J., dissenting opinion). *See also* Spector Motor Serv., Inc. v. Walsh, 139 F.2d 809, 823 (2d Cir. 1944) (contrasting Clark and Frank perspectives).

[74] *See generally* K. GRIFFITH, JUDGE LEARNED HAND AND THE ROLE OF THE FEDERAL JUDICIARY 83-181 (1973); L. HAND, THE BILL OF RIGHTS (1958); M. SCHICK, *supra* note 5, at 154-91; Hand, *Chief Justice Stone's Concept of the Judicial Function*, in THE SPIRIT OF LIBERTY 201 (J. Dilliard ed., 3d ed. 1963).

[75] *See* Duquesne Warehouse Co. v. Railroad Retirement Bd., 148 F.2d 473, 479 (2d Cir. 1945) (Frank, J., dissenting), *rev'd*, 326 U.S. 446 (1946).

[76] For an analysis of methods by which the Supreme Court may discredit its own rulings, see Kelman, *supra* note 17, at 15-28.

[77] *See* Gardella v. Chandler, 172 F.2d 402, 412-15 (2d Cir. 1949); Helvering v. Proctor, 140 F.2d 87, 89-91 (2d Cir. 1944) (Frank, J., dissenting); Perkins v. Endicott Johnson Corp.,

erate the initial impetus for change. If the Court had given no clue that a precedent had become suspect, Frank claimed no authority sua sponte to suppose it was. Even with regard to doctrines that Frank believed the Court would reexamine, and about which Frank possessed strong convictions, he obeyed the dictates of stare decisis.[78] For example, in *United States v. Rosenberg,*[79] the atomic spy case, Frank apparently considered the death sentence imposed by the trial judge to be excessively harsh, yet he contented himself with a plea to the Supreme Court to reconsider its earlier decisions denying appellate courts the power to modify trial court sentences.[80] Frank felt bound by a line of authority[81] that remained unimpaired, though criticized by law journals.[82] By "new doctrine" Frank meant legal rules and precepts and not merely changes in the social and political climate. For example, when cases challenged an 1896 decision that limited the fifth amendment privilege against self-incrimination to protection against punishment for crime,[83] Frank perceived the atmosphere of the 1950's as so vastly changed from the 1890's that the Court would not likely be willing to guard against social disgrace. Yet this kind of change did not permit Frank to ignore relevant authority.[84]

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128 F.2d 208, 216-19 (2d Cir. 1942), *aff'd,* 317 U.S. 501 (1943); *cf.* United States v. Grunewald, 233 F.2d 556, 574-75 (2d Cir. 1956) (Frank, J., dissenting in part), *rev'd,* 353 U.S. 391 (1957); Duquesne Warehouse Co. v. Railroad Retirement Bd., 148 F.2d 473, 486-87 (2d Cir. 1945) (Frank, J., dissenting), *rev'd,* 326 U.S. 446 (1946).

[78] *See* United States v. Roth, 237 F.2d 796, 801 (2d Cir. 1956) (Frank, J., concurring), *aff'd,* 354 U.S. 476 (1957); United States v. Scully, 225 F.2d 113, 119 (2d Cir.) (Frank, J., concurring), *cert. denied,* 350 U.S. 897 (1955); Republic of China v. National City Bank, 208 F.2d 627, 630 (2d Cir. 1953), *rev'd,* 348 U.S. 356 (1955); United States v. Rosenberg, 195 F.2d 583, 604-09 (2d Cir.), *cert. denied,* 344 U.S. 838 (1952); Triangle Publications, Inc. v. Robrlick, 167 F.2d 969, 980-81 (2d Cir. 1948) (Frank, J., dissenting); Kelman, *supra* note 17, at 7-10.

[79] 195 F.2d 583 (2d Cir.), *cert. denied,* 344 U.S. 838 (1952).

[80] *Id.* at 609 n.41.

[81] *Id.* at 604-07. Frank's original draft opinion disclaimed the power to modify a sentence "merely because to [the] court, the sentence seems unduly harsh." The published version deleted this sentence at the urging of the other two panel judges, who considered it a criticism of the trial judge. *See* letter from Harris B. Chase to Thomas B. Swan, Feb. 16, 1952; Conference Memorandum of Judge Swan, Feb. 15, 1952. In the published opinion Frank repeatedly implied the sentence was harsh.

[82] *See, e.g.,* Hall, *Reduction of Criminal Sentences on Appeal,* 37 COLUM. L. REV. 521-56, 762-83 (1937).

[83] Brown v. Walker, 161 U.S. 591 (1896).

[84] *See* United States v. Ullmann, 221 F.2d 760 (2d Cir. 1955), *aff'd,* 350 U.S. 422 (1956). This approach retains contemporary relevance. *See* Seidenburg v. McSorley's Old Ale House, 317 F. Supp. 593 (S.D.N.Y. 1970), where the district court refused to follow Goesaert v. Cleary, 335 U.S. 464 (1948). *Goesaert* upheld a prohibition on women serving as barmaids. McSorley's motto had been "Good Food, Raw Onions, No Women," and McSorley's had tried to argue that the presence of women gave rise to "moral and social problems." 335 U.S. at 466.

Although Frank set outer limits to his own discretion, troublesome questions about his approach remain. Does the search for a "new doctrinal trend" include counting noses on the Supreme Court? On closely divided issues, a single vote may spell the difference. Should intermediate judges bet upon Supreme Court Justices as though they were horses at the track? One federal case has been criticized for almost doing that. In *Barnette v. West Virginia Board of Education,*[85] Judge Parker held a compulsory flag salute statute unconstitutional despite a contrary Supreme Court case barely two years old.[86] Parker justified his action on the basis of several Court personnel changes and an explicit shift of position by three members of the earlier majority.[87] Although Parker's method was criticized as "an unseemly thing,"[88] actually he merely attempted to accurately assess the current state of the law. His opinion did not degenerate into an irreverent effort to measure the Justices's ideological leanings. He avoided crude political speculation on the positions of newly-appointed Justices, but relied solely upon the shifts in position as reflected in the published *United States Reports.*[89] Such shifts were presumably important even to Learned Hand. In Hand's scenario, the judge must gauge the Supreme Court's present reac-

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The district court rejected this analysis and reasoned that "[s]ocial mores have not stood still since that argument was used in 1948 to convince a 6-3 majority of the Supreme Court . . . ." 393 F. Supp. at 606.

[85] 47 F. Supp. 251 (S.D.W. Va. 1942), *aff'd,* 319 U.S. 624 (1943).

[86] *See* Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

[87] The developments, with respect to the Gobitis case, however, are such that we do not feel that it is incumbent upon us to accept it as binding authority. Of the seven justices now members of the Supreme Court who participated in that decision, four have given public expression to the view that it is unsound, the present Chief Justice in his dissenting opinion rendered therein and three other justices in a special dissenting opinion in Jones v. City of Opelika, 316 U.S. 584, 62 S. Ct. 1231, 1251, 86 L. Ed. 1691. The majority of the court in Jones v. City of Opelika, moreover, thought it worthwhile to distinguish the decision in the Gobitis case, instead of relying upon it as supporting authority. Under such circumstances and believing, as we do, that the flag salute here required is violative of religious liberty when required of persons holding the religious views of plaintiffs, we feel that we would be recreant to our duty as judges, if through a blind following of a decision which the Supreme Court itself has thus impaired as an authority, we should deny protection to rights which we regard as among the most sacred of those protected by constitutional guaranties.

47 F. Supp. at 253. Parker's opinion, relying in part upon the importance of the constitutional guarantee at stake, raises the question whether intermediate court judges should be more willing to find a "new doctrinal trend" if "preferred freedoms" are in jeopardy. *Cf.* Chief Justice Stone's famous footnote four in United States v. Carolene Prods., 304 U.S. 144, 152-53 n.4 (1938).

[88] *See* Magruder, *supra* note 64, at 4.

[89] The true objection to Parker's opinion may be that he stated the emperor wore no clothes. By focusing upon particular Justices he stressed the human element in constitutional adjudication, much to the distress of those who believed the "cult of the robe" should be invincible. *See also* J. FRANK, *The Cult of the Robe,* in COURTS ON TRIAL 254-61 (1949).

tion to the issue at bar. In close cases, he can intelligently assess the situation only by examining the prior votes of individual justices.[90]

Even though lower court judges may unquestionably identify a "trend," their analysis may fail because the court merely made a false start, or changed its mind, or deferred consideration to a later time. Indeed, the seemingly ordained "trend" may never be consummated. In a 1922 case, *Federal Baseball Club v. National League of Professional Baseball Clubs of Baltimore, Inc.*,[91] the Supreme Court held that because major league baseball was not interstate commerce, the sport was exempt from the Sherman Antitrust Act. By the time that a fresh challenge reached the Second Circuit twenty-seven years later, the Supreme Court had completely altered its conception of interstate commerce.[92] This shift led Frank to describe the *Federal Baseball Club* case as an "impotent zombi."[93] When the Court finally reexamined its holding, the anticipated overruling did not materialize.[94] Instead, the Court deferred to Congress. Its prior interpretation of the Sherman Act was an established aberration, in which Congress had acquiesced. Congress, should it desire, could easily remove the inconsistency. Even an "impotent zombi" may escape its deserved burial. No degree of caution will eliminate that factor of uncertainty. Once committed *not* to await the formal overruling, intermediate judges necessarily face the danger of being reversed or ignored.

Felix Frankfurter criticized Frank for his effort to identify Supreme Court "trends." To Frankfurter, that process deprived the Court of the independent judgment of lower courts. In corresponding with Frank he remarked:

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[90] Parker's effort to count noses was unusual only because he published his tabulation. *See also* Liles v. Oregon, 96 S. Ct. 1749 (1976) (Stevens, J., concurring in denial of certiorari); Gautreaux v. Chicago Housing Auth., 503 F.2d 930, 935-36 (7th Cir. 1974) (T. Clark, J., sitting by designation), *aff'd sub nom.* Hills v. Gautreaux, 96 S. Ct. 1538 (1976). Other judges, including Frank, have privately used nose counts to predict the result when an appeal is taken. *See* Conference Memorandum of Judge Clark, Mar. 13, 1950, at 2, in Spector Motor Serv., Inc. v. O'Connor, 181 F.2d 150 (2d Cir. 1950); Conference Memorandum of Judge Frank, Mar. 13, 1950, in Spector Motor Serv., Inc. v. O'Connor, 181 F.2d 150 (2d Cir. 1950); M. SCHICK, *supra* note 5, at 150.

[91] 259 U.S. 200 (1922).

[92] *Compare* Carter v. Carter Coal Co., 298 U.S. 238 (1936), *limited by* United States v. Darby, 312 U.S. 100, 123 (1941); *and* Federal Baseball Club v. National League, 259 U.S. 200 (1922); *and* Hammer v. Dagenhart, 247 U.S. 251 (1918), *overruled*, 312 U.S. 100 (1941), *with* Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948); *and* United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944); *and* Wickard v. Filburn, 317 U.S. 111 (1942); *and* United States v. Darby, 312 U.S. 100, 123 (1941).

[93] Gardella v. Chandler, 172 F.2d 402, 409 (2d Cir. 1949).

[94] *See* Flood v. Kuhn, 407 U.S. 258 (1972); Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953).

> We have a right to expect, and are badly in need of, such illumination and discriminating discussion from Courts of Appeals and, more particularly, from a judge like you. After all, while you are what the Constitution calls "an inferior court" and therefore must duly respect the superior, your brain is yours and is to be exercised. You are not intellectually enslaved where your superior hasn't commanded. It is the duty of this Court to be clear in its commands. You are a free agent until the command is clear.[95]

Frankfurter underestimated the illumination provided by Frank's approach. Delineating a "trend" is purportedly an effort to follow what the Supreme Court will do. Because the Court had not yet reached that point, Frank actually urged a particular course on the Court. By tying that step to the Court's own precedent, Frank subtly minimized both his role and the departure from the past practice.

When lower courts anticipate changes in Supreme Court rulings, their decisions pressure the Court. Once an inferior court disregards a relevant Supreme Court decision, the losing party will assuredly petition for review, squarely confronting the High Court with a challenge to its earlier ruling. Although denial of certiorari implies no position on the merits[96] in these cases, such denial leaves standing an explicit rejection of an earlier ruling. Because a conflict in the circuits often prompts Supreme Court review, surely such a repudiation carries equal importance. When prior ruling weakened through intervening events deserves discarding, the Supreme Court is the proper court to declare its own decision overruled. Lower court repudiation very likely advances the time for reexamination, and thus influences the Supreme Court's decision-making process.[97]

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[95] Letter from Felix Frankfurter to J.N.F., July 17, 1956, at 2-3. *See also* letter from J.N.F. to Felix Frankfurter, Mar. 17, 1945; letter from J.N.F. to Felix Frankfurter, July 19, 1956. Frank accepted Frankfurter's invitation to be a "free agent." "I shall remember that statement in writing an opinion in which I'm now engaged, on the federal obscenity statute." Letter from J.N.F. to Felix Frankfurter, July 19, 1956. *See* United States v. Roth, 237 F.2d 796, 801, 806 (2d Cir. 1956) (Frank, J., concurring) *aff'd*, 354 U.S. 476 (1957). *See also* notes 56-62 and accompanying text *supra*.

[96] *See* Maryland v. Baltimore Radio Show, 338 U.S. 912, 917 (1950) (opinion of Frankfurter, J., respecting Supreme Court's denial of certiorari); United States v. Carver, 260 U.S. 482, 490 (1923).

[97] In Spector Motor Serv., Inc. v. Walsh, 139 F.2d 809 (2d Cir. 1944), Judge Clark, joined by Judge Frank, refused to follow older Supreme Court cases dealing with state taxation of interstate commerce. Subsequently, the Court granted certiorari (322 U.S. 720 (1944)), but ducked the constitutional issue and remanded. Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101 (1944). On remand, Judges Clark and Frank adhered to their initial position, and again prompted Supreme Court review. Spector Motor Serv., Inc. v. O'Connor, 181 F.2d 150 (2d Cir. 1950). Facing the constitutional issue, the Court rejected the position of Clark and Frank. Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951). Judge Frank's reasoning in Helvering v. Proctor (140 F.2d 87, 89 (2d Cir. 1944) (dissenting opinion)), that an earlier

Frank traveled a final avenue in his journey to move the Court forward:[98] the creative application of Supreme Court decisions. When new rulings signaled potentially fundamental shifts in the High Court's doctrines, Frank might affirm and encourage the Court to expand these rulings. *McNabb v. United States*,[99] decided in 1943, marked the beginning of the Supreme Court's effort to harness police interrogation practices. Along this tortuous path, Frank exhorted the Court with several opinions championing the ideals embodied in *McNabb* and reading its principle broadly.[100]

Frank warmly received *Griffin v. Illinois*,[101] which held that an indigent was entitled to receive a free trial transcript to aid in his appeal. At the first opportunity, in *United States v. Johnson*,[102] Frank

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Supreme Court decision had been silently overruled by a later case, was adopted in Commissioner v. Church (335 U.S. 632 (1949), *rev'g*, 161 F.2d 11 (3d Cir. 1947)), where the Court embraced Frank's reasoning and overruled its earlier decision. The overruling came on a petition for a writ of certiorari to a different circuit because, for unknown reasons, the Commissioner did not seek Supreme Court review in *Proctor*.

[98] One obvious route—certification of a question by the court of appeals to the Supreme Court—would immediately bring a case before the High Bench. Yet Frank never urged this procedure. However, one letter to Felix Frankfurter did raise this possibility. *See* letter from J.N.F. to Felix Frankfurter, undated, Frank papers, on file at Yale, box 53, file no. 321. On occasion, Learned Hand used a different technique to draw the attention of the Supreme Court. When confronted by a High Court opinion he thought unsound, Hand might give it an extreme interpretation, making almost a caricature of the rule. This method of ridicule normally prompted Supreme Court review, although in one case the Court apparently did not realize Hand's tongue-in-cheek spoof. *See* M. SCHICK, *supra* note 5, at 146-47. *See also* letter from Charles E. Clark to J.N.F., Jan. 26, 1951, referring to Learned Hand's practices. There is no evidence that Frank ever resorted to this technique.

Subtle pressures may interfere with the smooth functioning of the Court. The dynamics of small-group decision-making preclude those not privy to the conferences from knowing when the Court will choose to intercede. Opponents of the proposed National Court of Appeals—including present and past Supreme Court Justices—offer assurances that no outsider can know when and why the Court will take a case. *See, e.g.*, Brennan, *Chief Justice Warren*, 88 HARV. L. REV. 1 (1974); Brennan, *Justice Brennan Calls National Court of Appeals Proposal "Fundamentally Unnecessary and Ill Advised,"* 59 A.B.A.J. 835 (1973); Warren, *Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group's Composition and Proposal*, 59 A.B.A.J. 721, 724 (1973); Warren, *Let's Not Weaken the Supreme Court*, 60 A.B.A.J. 677 (1974). They argue that the High Court must retain unfettered discretion and complete control over its own docket. Although broad political considerations occasionally determine whether the Court will plunge into a controversy, through experience it has developed tools to avoid untimely disputes. *See* Naim v. Naim, 350 U.S. 891 (1955); A. BICKEL, THE LEAST DANGEROUS BRANCH 111-98 (1962); Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

[99] 318 U.S. 332 (1943).

[100] *See* United States v. Leviton, 193 F.2d 848, 857 (2d Cir. 1951) (Frank, J., dissenting), *cert. denied*, 343 U.S. 946 (1952); United States v. On Lee, 193 F.2d 306, 311 (2d Cir. 1951) (Frank, J., dissenting), *aff'd*, 343 U.S. 747 (1952); *In re* Fried, 161 F.2d 453 (2d Cir. 1947); *cf.* United States *ex rel.* Caminito v. Murphy, 222 F.2d 698 (2d Cir.), *cert. denied*, 350 U.S. 896 (1955).

[101] 351 U.S. 12 (1956).

[102] 238 F.2d 565, 567 (2d Cir. 1956) (Frank, J., dissenting).

relied upon *Griffin* to challenge a prevailing federal practice that permitted the trial judge to deny an indigent leave to appeal:

> The Griffin doctrine represents an important step forward in the direction of democratic justice. My colleagues, regarding it as a bold step, shudder away from applying that doctrine to a case like that at bar. . . .
>
> Yet Griffin, splendid though it is, is not exceptionally bold. We still have a long way to go to fulfil what Chief Justice Warren has called our "mission" to achieve "equal justice under the law," in respect of those afflicted with poverty.[103]

Central to Frank's conception of his relation to the Supreme Court was his effort to accept graciously the constraints of his inferior court position while vigorously pushing the High Court to reexamine old doctrines. His faithful adherence to higher authority revealed a giant intellect who accepted completely his role as a subordinate judge. In his view, the intermediate judge could facilitate the Supreme Court's work. While his carefully-crafted opinions illuminated the legal issues, Frank went considerably further in accenting areas that needed Supreme Court attention. His technique of following while criticizing precedent, epitomizes this approach. Frank did not hesitate to disregard High Court rulings so long as he could identify a "new doctrinal trend" based squarely upon more recent Supreme Court opinions. When a new Court decision had potentially far-reaching effects, and the policy direction met with Frank's approval, he would craft an opinion that fleshed out the possible implications. In so doing, he provided helpful nutrients enriching the soil for young doctrine.

The net effect of Frank's devices unquestionably heightened the pressure on the High Court to respond. Although some might deem these approaches unwelcome interference with the Supreme Court's discretion, no evidence suggests that the Court itself thought so. No decision rebuked Frank for using any of these judicial tools, and Frank's private correspondence with individual Justices generally contains no hint of disapproval.[104] Nor should these facts seem surprising. In the hands of an able judge like Frank, his skills aided, rather than impeded, the High Court in keeping abreast with current social needs.

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[103] 238 F.2d at 572 (footnote omitted) (Frank, J., dissenting opinion). *See* United States v. Branch, 238 F.2d 577 (2d Cir. 1956) (Frank, J., dissenting); United States v. Farley, 238 F.2d 575 (2d Cir. 1956) (Frank, J., dissenting in part).

[104] *But cf.* letter from Felix Frankfurter to J.N.F., July 17, 1956, at 2-3.

II

INFORMAL INTERACTION: ON BARKING UP TREES AND DISPORTING GAZELLES

During his pre-court public career Frank developed strong friendships and intellectual associations with several persons who later ascended to the Supreme Court. These personal relations continued after Frank donned judicial robes, and the remaining correspondence provides a fascinating study of the informal ways in which two levels of the federal judiciary can interact.[105]

Frank was closest to William O. Douglas and Felix Frankfurter. Douglas and Frank shared many insights about the legal system and, with others, spearheaded the Legal Realism movement.[106] Their friendship blossomed, especially as each assumed key positions in the budding New Deal. It was Douglas who persuaded Franklin D. Roosevelt to appoint Frank as a Commissioner of the SEC[107] and who later suggested that F.D.R. name Frank to the Second Circuit.[108] Through the New Deal years the friendship of Douglas and Frank matured; a personal relationship grew from shared philosophic and ideological perspectives.[109]

Frank enjoyed a less intimate relationship with Felix Frankfurter. While still a Harvard Law School professor, Frankfurter had played a key role in assembling talented persons to work in Roosevelt's administration[110]—one of whom was Frank. While in private practice in New York City, Frank wrote Frankfurter at Cambridge:

> I know you know Roosevelt very well. I want to get out of this Wall Street racket, anyhow. The crisis seems to me to be the equivalent of war and I'd like to join up for the duration.[111]

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[105] Since some of the interaction derives from friendship rather than from Frank's position as circuit judge, others in the legal profession—perhaps notable law professors—may relate to Supreme Court Justices in similar ways.

Frank's relations with Supreme Court Justices included meetings, dinners, and a host of social engagements that facilitated ongoing friendships. The following portrait of their interactions rests largely upon letters—a colder, more formal, and less spontaneous type of communication. One senses that Frank and the Justices were more candid when they met in person. *See* letter from Felix Frankfurter to J.N.F., Aug. 25, 1944.

[106] *See* note 13 *supra*.

[107] *See* W. DOUGLAS, GO EAST, YOUNG MAN 267 (1974).

[108] *See id.* at 423.

[109] *See id.* at 374-76, 423-24; Douglas, *Jerome N. Frank*, 10 J. LEGAL ED. 1 (1957); Douglas, *Jerome N. Frank*, 24 U. CHI. L. REV. 626 (1957); J. FRANK, IF MEN WERE ANGELS (1942) (dedication of book "To Mr. Justice William O. Douglas . . . .")

[110] *See generally* ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE (M. Freedman ed. 1967).

[111] W. VOLKOMER, *supra* note 12, at 9, *quoting* Columbia Univ. Oral History Project.

That led, fairly promptly, to Frank's appointment as general counsel to the Agricultural Adjustment Administration and began a relationship keynoted by prolific correspondence. Over the next twenty-five years Frank and Frankfurter exchanged hundreds of letters.[112]

Frank's relations with Hugo Black and Robert Jackson were cordial, but less familiar than those with Douglas and Frankfurter. Once again, the New Deal tied the knot binding the men together. With Black, a United States Senator from Alabama, and Jackson, the United States Attorney General, shared political concerns set the backdrop for friendly personal relations. These four future Justices provided the nucleus of Frank's informal association with High Court personnel.[113]

Once on the bench, Frank's contacts with Supreme Court Justices assumed a myriad of forms. Correspondence ranged over many topics that had nothing to do with the business of the courts. Frank might share with Black observations on broad political events, with Douglas reminiscences about SEC days, or with Frankfurter comments on the Zionist movement.[114] The letters canvassed a broad spectrum of topics, with a heavy emphasis upon the world of ideas. More germane to the legal system, Frank often exchanged views with Frankfurter on recent books.[115] With Black, Frank debated the merits of trial judges using special verdicts to check jury discretion.[116] To certain Justices, Frank also sent letters recommending applicants for law clerk positions.[117] Usually blessed with his seal of approval, a number of Frank's law clerks later clerked for Justices. Frank's gregarious personality brought him in contact with many persons clerking for fellow members of the Second Circuit.[118] Frank also evaluated their performance for friends on the Supreme

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[112] *See generally* correspondence between Frank and Frankfurter.

[113] Frank had friendships with other Justices as well. For instance, he was on a first-name basis with Justice Reed, and also knew Justice Harlan, who had been on the Second Circuit before his elevation to the Supreme Court.

[114] *See generally* Frank's correspondence with Hugo L. Black, William O. Douglas, Felix Frankfurter, and Robert Jackson.

[115] *See* letter from J.N.F. to Felix Frankfurter, June 10, 1947.

[116] *See* letter from Hugo L. Black to J.N.F., Mar. 9, 1949. This dialogue had a public dimension to it: Frank had written an opinion on special verdicts. *See* Skidmore v. Baltimore & O.R.R., 167 F.2d 54 (2d Cir.), *cert. denied*, 335 U.S. 816 (1948). *See also* Amendments to Fed. R. Civ. Pro. (strengthening ability of judges to control verdicts) (Mr. Justice Black's statement opposing submission to Congress), 374 U.S. 865, 867-68 (1963).

[117] *See, e.g.*, letter from J.N.F. to Hugo L. Black, May 27, 1943.

[118] Frank often took lunch in the courthouse cafeteria with his law clerks and with clerks for other judges who cared to join them. Because of his accessibility, he became acquainted with many of those who clerked for colleagues on the Second Circuit.

Court. Conversely, Justices might write Frank—as did Mr. Justice Reed—soliciting prospective clerks.[119]

On one occasion Frank tried to persuade several Justices to lower their barrier against public comment on legislation. After several Supreme Court cases had broadened the scope of habeas corpus remedies challenging state court convictions, proposed federal legislation sought to nullify those decisions.[120] Writing to Black, Douglas, and Frankfurter, and personally seeing Chief Justice Warren, Frank urged that the Justices express disapproval of the bill's attempt to undo Supreme Court rulings.[121] Nothing came of it, as Black and Frankfurter both thought that public comment would exceed the proper bounds of their judicial office.[122]

Frank's relations with the Justices provoked a minor dispute with Charles Clark, his Second Circuit colleague. For some time Clark and Frank had split over the Circuit's so-called "harmless error" rule. While Clark supported it, Frank crusaded against it as particularly unjust.[123] The dispute erupted after Clark became convinced that

> [Jerry] has been down lobbying with the Supreme Court law clerks against what he likes to term the dreadful "Second Circuit rule" of harmless error, and that the law clerks are all emotionally upset—so much so that it is confidently believed the Supreme Court only awaits an appropriate vehicle for Felix to write a scathing condemnation of us for our brutality.[124]

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[119] *See, e.g.*, letter from Stanley Reed to J.N.F., Dec. 30, 1946.

[120] *See Developments in the Law—Federal Habeas Corpus,* 83 HARV. L. REV. 1038, 1055 (1970).

[121] *See* letter from J.N.F. to Hugo L. Black, Sept. 11, 1956; letter from J.N.F. to William O. Douglas, May 22, 1956; letter from J.N.F. to Felix Frankfurter, Sept. 11, 1956; letter from J.N.F. to William O. Douglas, Sept. 11, 1956.

[122] *See* letter from Felix Frankfurter to J.N.F., Sept. 14, 1956.

On the topic of extrajudicial roles of Justices, see G. GUNTHER, *supra* note 6, at 61; A. MASON, HARLAN FISKE STONE 262-89, 698-720 (1956); ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE (M. Freedman ed. 1967); THE DIARIES OF FELIX FRANKFURTER (J. Lash ed. 1975); Landever, *Chief Justice Burger and Extra-Case Activism,* 20 J. PUB. L. 523 (1971); (Murphy, *In His Own Image: Mr. Chief Justice Taft and Supreme Court Appointments,* 1961 SUP. CT. REV. 159; Swindler, *The Chief Justice and Law Reform, 1921-1971,* 1971 SUP. CT. REV. 241; Note, *Extrajudicial Activity of Supreme Court Justices,* 22 STAN. L. REV. 587 (1970).

[123] *See* Frank's dissenting opinions in United States v. Antonelli Fireworks, Co., 155 F.2d 631, 642 (2d Cir.), *cert. denied,* 329 U.S. 742 (1946); United States v. Bennett, 152 F.2d 342, 346 (2d Cir. 1945), *rev'd sub nom.* Bihn v. United States, 328 U.S. 633 (1946); United States v. Mitchell, 137 F.2d 1006, 1011 (2d Cir. 1943), *cert. denied,* 321 U.S. 794 (1944); United States v. Liss, 137 F.2d 995, 1001 (2d Cir.), *cert. denied,* 320 U.S. 773 (1943); Keller v. Brooklyn Bus Corp., 128 F.2d 510, 513 (2d Cir. 1942). *See also* M. SCHICK, *supra* note 5, at 267-76.

[124] Letter from Charles E. Clark to Learned Hand, Nov. 21, 1945, in M. SCHICK, *supra* note 5, at 272.

After Clark voiced to Frank his objections at a court conference, Frank denied that he had "improperly engaged in propaganda activities with the Supreme Court law clerks."[125] To support his position, Frank sent Clark two letters from Supreme Court clerks explaining what had transpired. The letters reflect that Frank had been in Washington and had taken lunch with several clerks at the Supreme Court. During lunch, they had discussed the "harmless error" rule, but the clerks did not seriously think that Frank had sought to lobby them. Rather, the topic had a "social and intellectual" interest to them and, anyway, Frank's responses did not differ from his published opinions.[126]

Returning the two letters to Frank, Clark denied knowledge of the lobbying accusation, but continued:

> It is my understanding that you have sent copies of your [recent "harmless error"] opinion to various persons in or about the Supreme Court, and that this was done in previous cases. This does seem to me inappropriate. I think volunteered suggestions or pressure, direct or indirect, from us to our superiors in our cases which they are called upon to review is undesirable.[127]

Frank responded:

> Since I've been on the bench, I've frequently sent copies of my opinions on diverse subjects—patents, contracts, etc.,—to Douglas, Black, and Frankfurter, each of whom is an old friend. They receive all our opinions in any event, so that my sending copies of particular opinions merely calls attention to them. No one of these justices has ever thought the practice improper. I did the same with [the "harmless error" case]. Surely you don't think I was putting "pressure" on Black, whose views on harmless error are directly opposed to mine, as shown in his dissent in Bollenbach's case.[128]

In sending opinions to friends on the Supreme Court, Frank thought the practice similar to any other intellectual exchange. Articles, books, and speeches were fit subjects to send to Justices, and judicial opinions merely extended the interaction. While on the SEC Frank had developed the habit of sending, to friends on the Supreme Court, those opinions that he thought would be of interest.[129] He continued this practice while on the Second Circuit. Frank

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[125] Letter from J.N.F. to Charles E. Clark, May 15, 1946.

[126] *See* letter from Herbert Prashker to J.N.F., undated, Frank papers, on file at Yale, box 65, file no. 741; letter from Eugene Nickerson to J.N.F., May 14, 1946.

[127] Letter from Charles E. Clark to J.N.F., May 15, 1946.

[128] Letter from J.N.F. to Charles E. Clark, May 16, 1946 (referring to United States v. Antonelli Fireworks, 155 F.2d 631, 642 (2d Cir. 1946) (Frank, J., dissenting)).

[129] Letter from J.N.F. to William O. Douglas, May 16, 1940; letter from J.N.F. to

customarily forwarded copies of his opinions shortly after issuance and before the period within which to petition for certiorari had elapsed. Thus, Douglas, Black, or Frankfurter might soon have been asked to vote on whether to grant review on those very opinions.

Frank's response to Clark insisted that this practice merely "call[ed] attention" to his opinions and did not pressure the Justices. The dynamics of such an exchange pose more difficult problems. When Frank sent a dissenting opinion, he clearly put himself on record as favoring reversal. In sending Bill Douglas a copy, was not Jerry Frank "calling attention" to a case that he hoped Douglas would vote to review? Moreover, was not Frank expressing his position on the substantive issues and hoping, by the force of his reasoning, to persuade Douglas ultimately to adopt his views? Frank retorted that the published opinion spoke for itself, and since each Justice received copies of all Second Circuit opinions, Frank's notes had little effect on the Justices. However, Frank's mailing marked those cases in which he had a strong interest. By forwarding only a select number, he automatically accented them as unusual. The cases themselves concerned topics about which Frank had firm views, such as in the area of "harmless error."

In a number of instances Frank acted beyond simply mailing a copy of an opinion. In one letter he expressed to Frankfurter the fervent hope that the Court would soon address itself to an issue raised in a Frank concurrence.[130] Other letters to Douglas demonstrate poignantly how Frank sought to influence the Supreme Court. For example, in one he commented: "Denial of certiorari in the Rubenstein case was disappointing. I enclose another in which I'm making a similar effort in what I think is a stronger case for defendant."[131] Frank thus expressed disappointment to Douglas that the Court had not responded, and intimated that the Justice might amend the error by urging review in the next case. The enclosed opinion, although not identified, appears to have been *United States v. Bennett*,[132] in which Frank dissented, once again challenging the Second Circuit's "harmless error" doctrine. The Supreme Court granted certiorari, and reversed in an opinion by Douglas in which he quoted directly from Frank's dissent.[133]

William O. Douglas, Mar. 29, 1940; letter from J.N.F. to Stanley F. Reed, Feb. 4, 1939; letter from J.N.F. to Felix Frankfurter, Feb. 3, 1939.

[130] Letter from J.N.F. to Felix Frankfurter, July 25, 1956 (referring to United States v. Masiello, 235 F.2d 279, 285 (2d Cir.) (Frank, J., concurring), *cert. denied sub nom.* Stickel v. United States, 352 U.S. 882 (1956)).

[131] Letter from J.N.F. to William O. Douglas, Nov. 16, 1945.

[132] 152 F.2d 342 (2d Cir. 1945).

[133] Bihn v. United States, 328 U.S. 633, 637 (1946).

One sequence illustrates graphically how Frank saw himself working in concert with the Supreme Court. He wrote to Douglas:

> I have written three dissenting opinions objecting to the manner in which my colleagues . . . use the "harmless error" doctrine so as (I think) to supersede the jury. I did so in *Keller v. Brooklyn Bus Corp.*, 128 F.(2d) 510; I did so again in *United States v. Liss*, 137 F.(2d) 995; in that case, certiorari was denied. I have again dissented on that score in *U.S. v. Mitchell*, 137 F.(2d) 1006; that dissent and my recent dissent on rehearing in that case I enclose. Judging from the failure to grant certiorari in the *Liss* case, I'm barking up the wrong tree. If so, I'll quit barking.[134]

Once again Frank exhorted his friend to push for review. Perplexed by the failure of his efforts, Frank asked Justice Douglas whether he should continue to dissent. Given the close, personal relationship between the two, it is reasonable to read this letter as Jerry's request to Bill for an explanation why the Court had not responded. There is no indication that Justice Douglas responded to Frank's plea. When the Supreme Court denied certiorari in *United States v. Mitchell*,[135] Frank promptly dashed off another letter to Douglas. In a most outspoken fashion, Frank chastised the Supreme Court for its insensitive refusal to hear the case.

> I'm bothered that certiorari was denied yesterday as to *United States v. Mitchell*, 137 F.(2d) 1006, 138 F.(2d) 831. . . . I don't see much point in my continuing to dissent against the views of my five colleagues concerning harmless error, although I feel sure that defendants in criminal suits aren't getting fair trials and that, with the Supreme Court's indifference to the matter, innocent persons are likely to be convicted in this Circuit because of lack of such fairness.[136]

Frank bluntly told Douglas how exasperated he was that the Supreme Court had not reacted more swiftly.

Unusual interaction between Frank and friends on the Supreme Court came in two exchanges with Douglas and Frankfurter. To Douglas, he suggested a slight modification in an official Supreme Court opinion.[137] To Frankfurter, he expressed puzzlement at the meaning of a memorandum denying certiorari in a case. Frank called upon him to add a line to his memorandum explaining more clearly his position—an invitation Frankfurter declined.[138]

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[134] Letter from J.N.F. to William O. Douglas, Nov. 22, 1943.
[135] 137 F.2d 1006 (2d Cir. 1943).
[136] Letter from J.N.F. to William O. Douglas, Mar. 29, 1944.
[137] Letter from J.N.F. to William O. Douglas, Jan. 8, 1945.
[138] Letter from J.N.F. to Felix Frankfurter, May 13, 1952.

Frankfurter believed Frank was teasing him for his oblique memorandum:

> If your inquiry . . . is serious and not a leg-pulling operation, I must draw on Holmes's remark while Chief Justice of the Massachusetts Supreme Judicial Court: "May I suggest to the gentlemen of the Bar," he said one day, "a more extensive reading of French novels. It will cultivate in them the art of innuendo."[139]

Frank responded that he honestly found the memorandum obscure, as did several other lawyers with whom he had discussed the case. As for French novels, Frank commented irreverently: "I know what is popularly supposed to happen often in French novels; that's what you and I think the Court did to Leviton."[140] Again Frankfurter avoided comment. Although he thought his memorandum clear, he recognized that others did not:

> [W]hen you tell me that you and "several lawyers who are really intelligent" thought that what I wrote was meant as an intimation that certiorari was properly denied, rather than the opposite, I must act on the wisdom of the Talmud. The Talmud says that if, when you are stone sober, a man tells you that you are drunk, knock his teeth out; if two men tell you that, laugh at them; but if three men tell you that, go to bed.[141]

In overtly pushing the Supreme Court, Frank did not simply seek to win support for his own strongly-held views. To a remarkable degree, he tried to divorce the ideas themselves from the fact that he espoused them. Pride of authorship did not torment him to write his friends.[142] He passed judgment on issues and cases that only remotely reinforced his own efforts. At least five Supreme Court Justices received letters from Frank applauding particular opinions.[143] Commenting upon Supreme Court decisions allowed

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[139] Letter from Felix Frankfurter to J.N.F., May 14, 1952.

[140] Letter from J.N.F. to Felix Frankfurter, May 19, 1952.

[141] Letter from Felix Frankfurter to J.N.F., undated, Frank papers, on file at Yale, box 53, file no. 321.

[142] Judge Learned Hand once quoted a Frank opinion for the seminal idea that the court of appeals should "recognize 'a pronounced new doctrinal trend' which it is our 'duty, cautiously to be sure, to follow not to resist.' " Picard v. United Aircraft Corp., 128 F.2d 632, 636 (2d Cir.) (L. Hand, J.), *cert. denied,* 137 U.S. 651 (1942), *quoting* Perkins v. Endicott Johnson Corp., 128 F.2d 208, 218 (2d Cir. 1942) (Frank, J.). Frank then attributed the idea to Hand, rather than to himself. Gardella v. Chandler, 172 F.2d 402, 409 n.1 (2d Cir. 1949) (Frank, J., concurring), *quoting* Picard v. United Aircraft Corp., 128 F.2d 632, 636 (2d Cir. 1942) (L. Hand, J.).

[143] To Justice Jackson, Jerry wrote: "Just a line to thank you for your brilliantly conceived and splendidly worded opinion in *D'Oench v. F.D.I.C.*" Letter from J.N.F. to Robert H. Jackson, Mar. 10, 1942. To Hugo, "Your splendid opinion in *Leyra* raises hopes that a majority of your Court will more frequently follow you, especially in civil liberty cases." Letter

Frank an opportunity to support positions he liked and, perhaps, to bolster the resolve of Justices whose spirits might be flagging.

How did Supreme Court Justices react to the fairly unusual practice of a personal friend on the lower court commenting upon their opinions and sending along some of his own? The correspondence between Frank and the Justices reveals the extent to which mutual support and admiration are critical ingredients in judging, as in most activities. The Justices exhibited no uneasiness at Jerry forwarding copies of his opinions and they actively welcomed his favorable criticism. As Justice Jackson wrote: "Your line commenting on my opinion . . . is the more appreciated because I am so lonely among my associates. It is comforting to know that in some parts there is an interest in the subject."[144] A similar theme emerged in a letter from Frankfurter:

> Naturally enough I could be confident that you would approve of *Bollenbach.* [In which the Supreme Court finally reversed the Second Circuit's harmless error rule]. Sofar [*sic*] as doing his job is concerned, a judge must not give a damn about approval or disapproval but humanly it is comforting to know one is not a solipsistic fool.[145]

Frank's notes offered encouragement and support to the Supreme Court Justices. As these replies reflect, waging battle may prove a lonely task. There is comfort in knowing that others—persons whom you respect—share your perspective. Encouragement may strengthen the courage to persevere.

No Justice returned Frank any substantive comments upon his opinions.[146] Frankfurter wrote: "If I say nothing about the opinion which you were good enough to enclose, it is because, as you indi-

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from J.N.F. to Hugo L. Black, June 17, 1954. To Felix, "Your *Bethlehem* opinion is surely one of the best ever delivered. The Magi and the star must have guided you." Letter from J.N.F. to Felix Frankfurter, Mar. 10, 1942; *see, e.g.*, letter from J.N.F. to John Marshall Harlan, Feb. 9, 1955; letter from J.N.F. to William O. Douglas, Nov. 27, 1941. On occasion Frank would prepare a detailed critique of a Supreme Court opinion. *See* letter from J.N.F. to Robert H. Jackson, Mar. 30, 1949.

[144] Letter from Robert H. Jackson to J.N.F., Mar. 13, 1942.

[145] Letter from Felix Frankfurter to J.N.F., Feb. 5, 1946.

[146] Frankfurter, however, once commented on the form of a Frank opinion:

> I hope I may regard your opinion in *United States v. Monroe,* decided November 14th, as a good augury—an augury of your abandonment of dividing an opinion into two parts, the facts and then the legal discussion. I do not have to tell you that that was an old way of reporting Supreme Court opinions. And while I am not one of those who thinks wisdom was born with us and all that was old is bad, I, for the life of me, saw no benefit from your reversion to that old style. Quite the contrary. To my way of thinking an opinion is an organic whole and not an appropriate subject for dichotomy. So, please do not weary of the well-doing in the *Monroe* case . . . .

Letter from Felix Frankfurter to J.N.F., Nov. 19, 1947.

cate, the case may well be brought here."[147] Frankfurter, quite predictably, demonstrated a marked sensitivity to the boundaries placed upon him by his office—a sensitivity he attributed to his "stodgy views on judicial propriety."[148] Yet, he often approved Frank's habit of forwarding opinions, and noted that they "[g]reatly interested" him,[149] or gave "me, as is usually true, pleasure and enhanced my knowledge."[150] On one occasion after Frank feared he had perhaps offended Frankfurter, Felix dismissed the fear with the explicit assurance to Jerry that no letter of his had ever offended him.[151] Once an appeal ended, Frankfurter expressed his opinion on the merits;[152] during the period when an appeal might be taken, Felix's comments carefully hedged his substantive beliefs.[153]

Frank's candid criticism of Supreme Court actions won the approval of Justice Jackson. In one letter, Frank, hoping "you will not take it amiss," quoted to Jackson a paragraph from a recent letter to Frankfurter criticizing a Supreme Court decision.[154] Jackson responded:

> Of course I do not take amiss what you wrote to Felix about Michelson. I think the most wholesome kind of results come from free and informal criticism. I said to my colleagues when the Maggio bankruptcy problem was pending that it was a strange code of ethics which will allow us to have a law clerk just out of law school advise us but would condemn so sensible a move as my going over to New York with you fellows who are working with a problem and talking it over. We move here in such an atmosphere of unreality that it is a wonder that we do as well as we do, especially since so many of us have never moved in the real atmosphere of combat in the lower courts.[155]

Frank's notions on relating to Supreme Court personnel comport with his views on other intellectual matters. He possessed an unquenchable thirst for the exchange of ideas and an indefatigable willingness to correspond and thus attempt to identify points of agreement, of conflict, and of adaptability. Just as he criticized the efforts of his superiors,[156] so, too, did he enjoy receiving their comments on his opinions.[157] Frank did not single out Supreme Court

[147] Letter from Felix Frankfurter to J.N.F., Jan. 11, 1944.

[148] *Id.* Aug. 25, 1944.

[149] *Id.* May 4, 1946.

[150] *Id.* Aug. 11, 1955.

[151] *Id.* Feb. 24, 1945.

[152] *Id.* May 8, 1944.

[153] *See* letter from Felix Frankfurter to J.N.F., Aug. 11, 1955.

[154] Letter from J.N.F. to Robert H. Jackson, Mar. 30, 1949.

[155] Letter from Robert H. Jackson to J.N.F., Apr. 6, 1949.

[156] *See, e.g.,* letter from J.N.F. to William O. Douglas, Jan. 8, 1945.

[157] *See, e.g.,* letter from J.N.F. to Felix Frankfurter, May 10, 1944; letter from Felix Frankfurter to J.N.F., May 8, 1944.

Justices. He often wrote other circuit judges praising recent opinions,[158] and he solicited comments from his brethren on the Second Circuit in cases on which they were not sitting.[159]

Frank's habits reflected his legal philosophy. In 1930, he stunned the legal world with the publication of *Law and the Modern Mind.* Even though it was a first book by an unknown writer, it had a profound impact upon contemporary legal thinking.[160] In *Courts on Trial*[161] and in other writings,[162] he tried to de-mystify the law and to explode the myth that judges were deities rather than humans. Decisions came not from Olympus, but from experience.[163] He argued that it is self-defeating for judges to pretend that they are immune from influence. Accurate appreciation of the decision-making process demands recognizing the array of disparate forces affecting a judge.

Frank's tactics raise squarely the legitimacy of subjecting Supreme Court Justices to these pressures. As expressed by Justice Jackson, it seems highly incongruous for Justices to enjoy a dialogue with neophyte law clerks—on the ground that they help hone the rough edges of judicial opinions—and yet be denied access to, and interaction with, the Jerome Franks of their generation. Denying

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[158] In addition to those on the Second Circuit, such judges included David Bazelon, Stanley Fuld, and Calvert Magruder. *See generally* Frank papers, on file at Yale University.

[159] *See* M. SCHICK, *supra* note 5, at 103.

[160] Personal interview with Professor Myres McDougal, Yale Law School, Aug. 13, 1974. *See* Arnold, *Judge Jerome Frank,* 24 U. CHI. L. REV. 633, 634-38 (1957).

[161] J. FRANK, COURTS ON TRIAL (1949).

[162] *See, e.g.,* Frank, *The Cult of the Robe,* 28 SAT. REV. OF LITERATURE, Oct. 13, 1945, at 12.

[163] Frank's philosophy is illustrated by contrasting it to the position of Justice Felix Frankfurter. In one exchange Frankfurter wrote to Frank:

> One of these days I would like to take a twenty mile walk with you and really wrestle with you on what the business of being a judge really is. You are a great admirer of Holmes, but it seems from time to time you disregard his major premise that we are not God. In my more modest way, I would say that we are not even Congress.

Letter from Felix Frankfurter to J.N.F., June 27, 1956.

Frank replied:

> Your (God-like) remarks about my acting God-like were perhaps merely teasing, meant to get a rise out of me. I confess they did nettle me a trifle. For, after all I've written in the past 26 years, to the effect that judges are human and therefore finite and fallible, I'm the last person to believe that I'm Deity or anything like Him (or Her or them).
>
> . . . .
>
> In ten years of teaching at Yale Law School, I've done my best to disabuse students of the far too prevalent idea that—in terms of legal rules or doctrines—judges can always or usually do, or should do, as they please—although . . . trial judges in non-jury cases have an immense, largely uncorrectible, power to so "find" the facts as to yield a desired result. I repeatedly go after those students who, undemocratically, show scant respect for the separation of powers.

Letter from J.N.F. to Felix Frankfurter, July 9, 1956, at 2-3.

exchanges with the brightest and most experienced minds is an odd way to produce the soundest opinions. This prohibition rests on the fear that personal friendship may interfere with the independence of the Justice. Lower court judges are keenly aware of how a higher court handles their opinions. At the beginning of his career, Jerome Frank kept a tally of those cases in which petitions for certiorari were filed.[164] Conversely, Supreme Court Justices evinced sensitivity to the feelings of the inferior courts. Shortly after Frank ascended to the Second Circuit, Justice Douglas penned him congratulations that the Supreme Court had followed the first two of Frank's opinions that reached the High Court:

> Jerry at Bat!
> 2 hits
> 2 runs
> no error . . .[165]

Jerome Frank, in particular, displayed marked sensitivity to criticism by the Supreme Court.[166] After an exchange with Felix Frankfurter that led Frank to defend himself once more, Frankfurter replied: "Every time I have a brush with you I feel like a brute who has hurt a charmingly disporting gazelle."[167] Naturally, Frank was pleased when the Supreme Court sustained his position.[168] Therein lies the dilemma: upper court sensitivity to the feelings of a friend on an inferior bench is compounded when that judge earmarks a particular decision as an important one.

Frank's tactics apparently did not jeopardize the independence of any Supreme Court Justice. Nor should this result seem surprising. A Justice would abdicate his judicial oath if he lost his freedom of movement. This loss would occur if a Justice favored Jerome Frank's sensitivity over his best judgment for the proper disposition of a case. Such a consequence demeans the character of men reared

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[164] *See* List, Frank papers, box 179, file no. 13.

[165] Letter from William O. Douglas to J.N.F., Apr. 29, 1942 (referring to Valentine v. Chrestensen, 316 U.S. 52 (1942) and Prudence Realization Corp. v. Geist, 316 U.S. 89 (1942)). In *Valentine*, Frank distinguished commercial and non-commercial speech. On appeal, the Supreme Court accepted Frank's reasoning and embraced the distinction for the first time. 316 U.S. 52 (Douglas, J., concurring). Mr. Justice Douglas's note is all the more interesting because he later repudiated the very doctrine that his note to Jerry had applauded. *See* Cammarano v. United States, 358 U.S. 498, 514 (1959); Bigelow v. Virginia, 421 U.S. 809 (1975) (Justice Douglas joined Court opinion that further undermined commercial/non-commercial distinction).

[166] *See* Kurland, *Jerome N. Frank: Some Reflections and Recollections of a Law Clerk*, 24 U. CHI. L. REV. 661, 663 (1957).

[167] Letter from Felix Frankfurter to J.N.F., Apr. 29, 1943.

[168] *See* letter from J.N.F. to William O. Douglas, Jan. 8, 1945.

as attorneys in the adversary system and committed to a job whose essence is resolution of conflict.

On the other hand, did the Justices benefit from Jerome Frank's input? By sending copies of his judicial opinions, Frank contributed little except the injection of his own personality and ideology.[169] He labored fastidiously with opinions before issuing them; consequently, the printed version constituted as strong a legal argument as Frank could make. No private letter or memorandum elaborated the legal issues more fully than the printed opinion. In a private letter a judge may accent the importance of a case in a form that he would be reticent to include in a formal opinion. However, Jerome Frank spoke freely and candidly in judicial opinions and his correspondence with the Justices rarely mentioned aspects not contained in the reported version. Those that did were usually confidential personal characterizations.[170]

Frank's notes approving recent opinions, urging hearing for a case, or commenting upon the performances of other judges—on both the High and lower courts—gave support to the values and the attitudes of Supreme Court Justices. Waging war became less lonely with an able mind like Frank's sharing the effort. Frank broadly supported an ideological position that insisted on re-examining old concepts to produce a more just legal order. At a time when the Supreme Court began to develop sensitivity to issues of civil liberty, Jerome Frank expressed the inherent need to do so. He persistently urged compelling reasons for prompt judicial action in defense of basic liberty.

III

POSTSCRIPT: ON SOLIPSISM

Since this kind of correspondence between a lower court judge and Supreme Court Justices has seldom been published,[171] one is tempted to conclude that Frank's relations with the Justices were atypical. However, many other persons probably had relationships

[169] United States Supreme Court Justices automatically received copies of all Second Circuit opinions. At least one—Frankfurter—read them regularly. *See* M. SCHICK, *supra* note 5, at 113, 239; letter from Felix Frankfurter to J.N.F., Nov. 19, 1947.

[170] *See* letter from J.N.F. to Felix Frankfurter, Mar. 13, 1945.

[171] Professor Gerald Gunther has recently published letters between Justice Holmes and Judge Learned Hand focusing upon first amendment doctrine. Gunther argues forcefully that Holmes refined his theories under constant prodding from Learned Hand. While both Holmes and Hand had authored judicial opinions on the subject, their correspondence did not concern specific pending decisions. *See* Gunther, *supra* note 9. *See also* A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW (1956).

similar, though not identical to, Judge Frank's.[172] Because few persons possess either the physical stamina or intellectual drive of Jerome Frank they could not be identical. He devoted enormous energy to the world of ideas, of which the law constituted only a part for him. Another reason suggests that Frank's interaction was idiosyncratic: the fortuity of the New Deal thrust together many persons who ultimately assumed high judicial position. When Frank reached the Second Circuit, he was on a first-name basis with a majority of the Supreme Court Justices. The bounds of judicial propriety make candid exchanges, such as those between Frank and the Justices, unlikely except between persons who had previously developed close, personal bonds. Frank had forged these bonds through his prior political activities and the range of his intellectual interests.

Although few persons interact with Supreme Court Justices in Frank's dramatic style or with his persistence, many people might share friendships with Justices. Gallup polls, *New York Times* editorials, and billboards reading "Impeach Earl Warren," are public evidence of reaction to Supreme Court decisions. Justices regularly receive congratulatory notes on their opinions. Friends at the bar or on the bench also forward critical appraisals of particular opinions.[173] Similarly, Justices often share with each other personal reactions to draft opinions.[174] Individual friendships and ideological alignment must generate an array of informal and candid judgments on the Court's actions. In this connection, one wonders how often nose-counting occurs at the Supreme Court level. To what extent do doctrinal strategies shape the dynamics of the Court's decision-making process? How often does a Justice vote to deny certiorari because he fears full review would produce a decision with which he would disagree? Do Justices rely on one line of reasoning rather than another because they hope to secure the critical vote of a pivotal Justice?

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[172] *See* J. LASH, FROM THE DIARIES OF FELIX FRANKFURTER 49 n.* (1975) (weekly exchanges between then Professor Frankfurter and Mr. Justice Stone).

[173] At the court of appeals level, Frank's papers on file at Yale contain many letters commenting upon his opinions. Often these letters came from counsel in the case or other interested observers.

[174] *See* A. BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS (1957); Totenberg, *Behind the Marble, Beneath the Robes,* N.Y. Times Magazine, Mar. 16, 1975, at 15; Freund, *An Analysis of Judicial Reasoning,* in LAW AND PHILOSOPHY: A SYMPOSIUM 288 (S. Hook ed. 1964); Heineman, Book Review, 88 HARV. L. REV. 678 (1975); *cf. Judicial Secrecy: A Symposium,* 22 BUFFALO L. REV. 797 (1973); Powell, *Myths and Misconceptions About the Supreme Court,* 61 A.B.A.J. 1344 (1975).

Further research is necessary to document the informal interactions Supreme Court Justices enjoy with friends that relate to their performance as Justices. Although he injected his personality into the judicial process, Frank does not appear to have hampered performance or jeopardized independence on any given issue. In his friendships he exhorted Justices to persevere, and in his letters he endorsed a generally libertarian position. Support for this position came exactly when the Supreme Court began to grapple with new issues of civil liberties. In this context, Frank's opinions and letters illustrate how intelligent judges might offer protection to individual rights. There is absolutely no proof that Frank's efforts changed a single vote, but even "stodgy" Mr. Justice Frankfurter, who did not "give a damn about approval or disapproval," found it "comforting to know one is not a solipsistic fool."[175]

[175] Letter from Felix Frankfurter to J.N.F., Feb. 5, 1946.