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Jonathan L. Entin

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# IN MEMORIAM:

## JOHN P. FRANK

(November 10, 1917 – September 7, 2002)

Jonathan L. Entin<sup>†</sup>

John P. Frank was one of the great scholar-practitioners in the American legal profession. At the top of his list of major cases was *Miranda v. Arizona*,<sup>1</sup> and he served as a close advisor to Thurgood Marshall in the litigation campaign that culminated in *Brown v. Board of Education*.<sup>2</sup> He was a leading figure in the American Law Institute for many years<sup>3</sup> as well as a prominent member of various committees concerned with the jurisdiction and procedure of the federal courts.<sup>4</sup>

At the same time, Mr. Frank was a prolific author. He wrote eleven books, including a strikingly original constitutional law casebook,<sup>5</sup> an acclaimed study of the Supreme Court,<sup>6</sup> a call for major changes in the American legal system,<sup>7</sup> and a widely praised

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<sup>†</sup> Professor of Law and Political Science, Case Western Reserve University.

<sup>1</sup> 384 U.S. 436 (1966).

<sup>2</sup> 347 U.S. 483 (1954).

<sup>3</sup> See John P. Frank, *The American Law Institute, 1923–1998*, 26 HOFSTRA L. REV. 615, 615 n.\* (1998) (noting Mr. Frank's leadership roles in the ALI, including a quarter-century as a member of its council).

<sup>4</sup> See, e.g., Bench-Bar Proposal to Revise Civil Procedure Rule 11, 137 F.R.D. 159 (1991); *Transcript of the "Alumni" Panel on Discovery Reform*, 39 B.C. L. REV. 809 (1998); John P. Frank, *The Rules of Civil Procedure—Agenda for Reform*, 137 U. PA. L. REV. 1883 (1989).

<sup>5</sup> JOHN P. FRANK, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* (1950 & 1952 revision). The book was divided into two parts. Part I was organized chronologically, tracing the Supreme Court's decisions on important doctrinal matters within specific time periods and ending in 1930. Part II covered the period beginning in 1930 and was organized topically. This organizational scheme anticipated the approach taken in a widely respected modern casebook, although that book does not refer to Mr. Frank's work. See PAUL BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* (4<sup>th</sup> ed. 2000). In fairness, it should be noted that Dean Brest and his colleagues have different pedagogical goals than did Mr. Frank.

<sup>6</sup> JOHN P. FRANK, *MARBLE PALACE: THE SUPREME COURT IN AMERICAN LIFE* (1958).

<sup>7</sup> JOHN P. FRANK, *AMERICAN LAW: THE CASE FOR RADICAL REFORM* (1969). This book was based on a series of lectures at the dedication of the Earl Warren Legal Center at the University of California, Berkeley. Mr. Frank returned to this subject 13 years later. See John P. Frank, *Radical Reform: Same Song, Second Verse*, 33 HASTINGS L.J. 1045 (1982).

assessment of Abraham Lincoln's legal career.<sup>8</sup> He also wrote many influential articles. Among them were the first systematic analysis of the Supreme Court confirmation process,<sup>9</sup> a classic piece about equal protection,<sup>10</sup> a landmark analysis of judicial ethics,<sup>11</sup> and a series of overviews of the Supreme Court that were the precursor for both the *Harvard Law Review's* annual Supreme Court issue and the University of Chicago's *Supreme Court Review*.<sup>12</sup>

Educated at the University of Wisconsin, where he earned B.A. and LL.B. degrees as well as an M.A. in history before his twenty-third birthday, and at Yale University, where he completed the J.S.D., he clerked for Justice Hugo L. Black and taught briefly at Indiana University before joining the faculty of Yale Law School in 1949. He formally left academia in 1954, moving to Arizona and joining the Phoenix law firm Lewis & Roca, where he remained for nearly half a century until his death on September 7, 2002, but he continued as an active scholar to the end. His last book was published in 2000.<sup>13</sup>

Mr. Frank met the future Justice Marshall in connection with an effort to desegregate restaurants near the Indiana University campus in Bloomington.<sup>14</sup> After moving to Yale, he became heavily involved with the litigation campaign against segregation. He was one of the principal authors of an extraordinary amicus brief in *Sweatt v. Painter*,<sup>15</sup> the 1950 case that effectively outlawed seg-

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<sup>8</sup> JOHN P. FRANK, *LINCOLN AS A LAWYER* (1961).

<sup>9</sup> John P. Frank, *The Appointment of Supreme Court Justices: Prestige, Principles and Politics*, 1941 WIS. L. REV. 172, 343, 461.

<sup>10</sup> John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131 (1950), updated and reprinted at 1972 WASH. U. L.Q. 421.

<sup>11</sup> John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605 (1947). See also John P. Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROBS. 43 (1970). Then-Justice Rehnquist, Mr. Frank's frequent political adversary before his appointment to the bench, relied heavily on these articles in defending his casting of the decisive fifth vote in *Laird v. Tatum*, 408 U.S. 1 (1972), rejecting a challenge to government surveillance of Vietnam War opponents that had been put in place while he was serving in the Justice Department and about which he had contemporaneously made favorable public statements. See *Laird v. Tatum*, 409 U.S. 824 (1972).

<sup>12</sup> John P. Frank, *The United States Supreme Court: 1946-47*, 15 U. CHI. L. REV. 1 (1947); John P. Frank, *The United States Supreme Court: 1947-48*, 16 U. CHI. L. REV. 1 (1948); John P. Frank, *The United States Supreme Court: 1948-49*, 17 U. CHI. L. REV. 1 (1949); John P. Frank, *The United States Supreme Court: 1949-50*, 18 U. CHI. L. REV. 1 (1950); John P. Frank, *The United States Supreme Court: 1950-51*, 19 U. CHI. L. REV. 165 (1952); John P. Frank, *The United States Supreme Court: 1951-52*, 20 U. CHI. L. REV. 1 (1952); John P. Frank, *Fred Vinson and the Chief Justiceship*, 21 U. CHI. L. REV. 212 (1954).

<sup>13</sup> JOHN P. FRANK, *INSIDE JUSTICE HUGO L. BLACK: THE LETTERS* (2000).

<sup>14</sup> See Jonathan Entin, *Bound for Distinction*, VIEW MAG. (Appleton Post-Crescent), May 13, 1979, at 3, 4.

<sup>15</sup> 339 U.S. 629 (1950).

regated law schools,<sup>16</sup> and continued to advise Marshall as the *Brown* cases moved toward the Supreme Court.<sup>17</sup>

Despite his enormous achievements, Mr. Frank was an exceedingly modest person. For example, he could have argued *Miranda* himself but urged one of his partners, John J. Flynn, to do so because “[t]his case will make your reputation. I have already argued before the Supreme Court.”<sup>18</sup> Similarly, he asked another of his partners, Mary Schroeder, to argue *Memorial Hospital v. Maricopa County*,<sup>19</sup> which struck down a one-year residency requirement for nonemergency hospitalization or medical treatment for indigents.<sup>20</sup> He was actively involved in writing the briefs and preparing for oral argument in both cases, however.<sup>21</sup>

Moreover, Mr. Frank was an exceptionally generous mentor to young lawyers. His research assistant while he was working on the *Sweatt* amicus brief was a first-year student named Leon Higginbotham, who later became chief judge of the United States Court of Appeals for the Third Circuit and a respected scholar in his own right. Mr. Frank made sure that Higginbotham was able to attend the oral argument and even paid for his train trip to Washington for the occasion.<sup>22</sup> He was also instrumental in bringing Mary Schroeder to Lewis & Roca at a time when opportunities for women lawyers were limited, to put it kindly, and helped to advance a career that has brought her to the position of chief judge of the United States Court of Appeals for the Ninth Circuit.<sup>23</sup> Another person whom Mr. Frank assisted is Janet Napolitano, who

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<sup>16</sup> See generally Jonathan L. Entin, *Sweatt v. Painter, the End of Segregation, and the Transformation of Education Law*, 5 REV. LITIG. 3 (1986).

<sup>17</sup> See, e.g., John P. Frank, *Can the Courts Erase the Color Line?* 21 J. NEGRO EDUC. 304 (1952).

<sup>18</sup> Adam Liptak, *J.P. Frank, 84, a Lawyer in Landmark Cases, Dies*, N.Y. TIMES, Sept. 10, 2002, at A23.

<sup>19</sup> 415 U.S. 250 (1974).

<sup>20</sup> See Mike Fimea, *Frank Leaves Legacy: Made a Mark Personally, Professionally*, ARIZ. REPUBLIC (Thurs. wkly. ed.), Sept. 19, 2002, at 3.

<sup>21</sup> See *Miranda*, 384 U.S. at 438; *Mem'l Hosp.*, 415 U.S. at 251. He also took a leading role in *Miranda*'s appeal following his conviction at a retrial where his unlawfully obtained confession was excluded. See *State v. Miranda*, 450 P.2d 364 (Ariz.), cert. denied, 396 U.S. 868 (1969).

<sup>22</sup> See John Q. Barrett, *Teacher, Student, Ticket: John Frank, Leon Higginbotham, and One Afternoon at the Supreme Court—Not a Trifling Thing*, 20 YALE L. & POL'Y REV. 311 (2002).

<sup>23</sup> See Fimea, *supra* note 20; Liptak, *supra* note 18. For Mr. Frank's perspective, which (typically) does not mention his own role in Judge Schroeder's career, see John P. Frank & Janet Napolitano, *Judge Mary M. Schroeder: Twenty Years*, 31 ARIZ. ST. L.J. 705 (1999). For more on Ms. Napolitano, see *infra* text accompanying note 24.

was recently elected governor of Arizona after serving as the state's attorney general and as the United States attorney there.<sup>24</sup>

My own connection to John P. Frank was much more limited. He and his wife, Lorraine, hosted a 1974 meeting at which I was introduced as the executive director of the Arizona Civil Liberties Union. When my wife took a faculty position at Lawrence University in his hometown of Appleton, Wisconsin, we lived upstairs from a couple who had known his parents for many years. I wrote a profile of him for the local newspaper to mark the twenty-fifth anniversary of *Brown*.<sup>25</sup> His example helped to inspire me to attend law school. He wrote me a highly complimentary letter after my article on *Sweatt* appeared<sup>26</sup> and contributed an affectionate essay to a special issue of this law review honoring his former Yale colleague (and *Sweatt* amicus brief coauthor) Thomas Emerson.<sup>27</sup>

Last summer, I asked him to write the book review that follows. He provided an elegant essay several weeks before the editors' deadline. As befits this modest man, he nowhere refers to his own work about some of the events discussed in the book under review,<sup>28</sup> although we thought that his writing on the subject made him the most suitable person to undertake the project. He died about a month after finishing this piece. We are honored to publish the last work of this extraordinary man.

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<sup>24</sup> See Lindsey Collom, *Noted Valley Attorney John P. Frank, 84, Dies*, ARIZ. REPUBLIC, Sept. 8, 2002, at 1B; Liptak, *supra* note 18; Chip Scutari & Robbie Sherwood, *Napolitano Is the Next Governor*, ARIZ. REPUBLIC, Nov. 11, 2002, at 1A.

<sup>25</sup> See Entin, *supra* note 14.

<sup>26</sup> See Entin, *supra* note 16.

<sup>27</sup> John P. Frank, *Tom Emerson: The Constructive Advocate*, 38 CASE W. RES. L. REV. 537 (1988). Happily for me, this piece appeared immediately following my own essay. See Jonathan L. Entin, *The Law Professor as Advocate*, 38 CASE W. RES. L. REV. 512 (1988).

<sup>28</sup> JOHN P. FRANK, CLEMENT HAYNSWORTH, THE SENATE, AND THE SUPREME COURT (1991).