

## A TRIBUTE TO MARVIN FRANKEL

*Gary P. Naftalis\**

I first met Marvin Frankel some thirty-eight years ago as a fledgling law student. Marvin was our introduction to Columbia, charged with instructing half of us in legal method—those whose surnames began with A through L—and the other half from the back end of the alphabet in administrative law.

Marvin was one of the young (early 40s) stars of the faculty, a member of the fabled class of 1948, and a formidable presence in the classroom. He dazzled us with his intellect, wit, and eloquence. Marvin spoke—as he wrote—in complete paragraphs with a grace and style that resonated in his later judicial opinions. He stressed the importance of critical thinking and reasoning and preached that law was—and should be—a noble profession. At the same time, Marvin was impatient with fuzzy thinking and sloppy thinkers. He never suffered fools gladly, whether they be law students or lawyers who appeared before him.

There was always a self-deprecating and iconoclastic side to Marvin. No individual or institution was immune from his penetrating criticism—even the *Columbia Law Review*. Early in the academic year, Marvin advised us that not being selected for *Law Review* was no big deal and would only disqualify us from the shabby and genteel poverty of being a professor at Harvard, Yale, and Columbia Law Schools. Those who did not qualify would then have to satisfy themselves with being wealthy and esteemed partners at major law firms, public officials, and federal judges. What Marvin did not disclose in his advice to us was how fiercely proud he was of serving as Editor-in-Chief of the *Columbia Law Review*. In fact, a photo of the 1948 Administrative Board featuring, inter alia, Jack Weinstein, Arthur Murphy, and Marvin, was prominently displayed in his office at the firm.

It is only slightly hyperbolic to say that watching Marvin teach was like watching Willie Mays play center field—elegant, effortless, and commanding. Since none of us could realistically dream of playing major league baseball, we transferred our hero worship to Marvin. We all wanted to be just like Marvin when we grew up.

My first year was Marvin's last at the Law School. As the story goes, an article he published in the *Columbia Law Review* caught the attention of Senator Robert Kennedy, who recommended Marvin for the Southern District bench. There, Marvin quickly established himself as one of the finest judges in the land. His judicial opinions mirrored the keen reasoning, skepticism, and elegance that had characterized his teaching. Yet, what I remember best about Marvin was his desire to get it right and his respect for advocacy as a means to that end. Marvin had strong views, but

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\* LL.B. Columbia Law School, 1967. Partner, Kramer Levin Naftalis & Frankel LLP.

also an open mind. He was never shy about telling lawyers what was the correct answer to the question at hand. That approach could—and did—intimidate the diffident practitioner. Yet Marvin never cast his positions in concrete; he was a good listener and would change his stated views if presented with a compelling argument.

A case I tried before Marvin as a young Assistant U.S. Attorney illustrates the point. It involved the prosecution of an IRS agent who had paid off an allegedly corrupt IRS inspection official (actually an undercover agent) to provide him with a confidential investigative file. The defendant was indicted on bribery and gratuity charges, and his defense was entrapment. While the jury was deliberating, Marvin advised counsel that, on reflection, he had concluded there was no factual basis for a gratuity charge; the defendant was either guilty of bribery or was entrapped. He proposed giving a supplemental instruction to that effect. I passionately protested. Marvin then sternly announced that if the jury convicted on the gratuity count, he would assuredly overturn it. An hour later, the jury found the defendant guilty of only that offense. Marvin immediately invited defense counsel to file a motion to set the verdict aside. I glumly labored over the next week or so on the seemingly Sisyphean task of drafting a brief that would convince the Judge that his repeated public pronouncements were erroneous. To my surprise, shortly thereafter Judge Frankel published a detailed, carefully reasoned decision upholding the conviction. As he told me later, “You were right and I was wrong, so I changed my mind.”

All too many public officials are unwilling to admit mistakes, fearing they will be perceived as foolish or indecisive. Such concerns were alien to Marvin. He had the intellectual self-confidence of the truly secure person, who was committed to reaching the right result, even if it meant publicly admitting that his prior view was incorrect. And Marvin could be persuaded to alter his position even if the advocacy was coming from a prosecutor half his age.

Marvin's passion for justice was not limited to the cases that were litigated in his courtroom. He authored five books (and a host of articles and speeches) in which he incisively critiqued subjects as diverse as disparities in criminal sentences, the shortcomings of the adversary system, the proper relationship between church and state, and the utility and fairness of the grand jury. Marvin never reflexively accepted the status quo. He scrutinized legal institutions with a thoughtful and skeptical eye. And when he identified systemic flaws, he proposed concrete reforms.

Marvin enlisted me to assist him in writing one of his books: *The Grand Jury: An Institution On Trial*. Despite its venerable history and enshrinement in the Bill of Rights, the grand jury had not previously received any meaningful scholarly attention. After studying the grand jury for the better part of a year, Marvin concluded fundamental reforms were necessary, including, most significantly, the right of grand jury witnesses

to have counsel—a procedural guarantee vigorously resisted by prosecutors content with the status quo.

Working with Marvin on the first significant examination of the institution (and the prosecutors who controlled it) was an exhilarating professional experience. We vigorously debated the issues, and he actively encouraged me to disagree with him and challenge his positions. Although I was the decidedly junior member of the team, he treated me as a colleague, and my ideas with respect. This pattern was repeated when Marvin joined our firm. He always viewed younger partners and associates as valued colleagues.

Working with Marvin did, however, have its drawbacks. He had a rather peculiar view of a working lunch. Towards the end of the grand jury project, he asked me to come to chambers to have lunch and go over the latest drafts. I had never dined with the Judge before and was pleased to have been invited. I headed down to Foley Square filled with great anticipation about our upcoming meal, which I imagined would be celebratory in tone. Upon entering chambers, Marvin offered me a Diet Shasta, a most forgettable soft drink of modest popularity in the mid-1970s. I accepted and waited for the rest of our repast. It soon became evident that none was forthcoming and that a diet soda was Marvin's idea of lunch—although, I must admit, he graciously offered me seconds.

For the last twenty or so years of his life, Marvin graced our law firm with his presence. He led our litigation department and was senior partner of the firm. But it was the law and the great social issues of the day, particularly international human rights, that dominated his attention. Marvin was a lawyer of choice, often called upon to undertake sensitive and challenging assignments, including arguing some twenty-one cases before the United States Supreme Court.

Apart from his legal acumen, Marvin was a great source of wisdom and moral authority in the firm. His views were invariably grounded in principle, never in self-interest. He espoused positions because he believed they were right irrespective of how they affected him economically or otherwise. As a result, his opinions carried great weight—and not simply on legal issues. He was always there to offer sage advice on professional, ethical, and personal matters. When I had a problem, I would turn to Marvin.

Marvin remained a courageous and determined advocate to the end. Only days before his death, he made his final appearance before the U.S. Supreme Court in the Ohio school vouchers case. Marvin had successfully challenged the constitutionality of the Ohio law before the Sixth Circuit and he cared deeply about the issue. Shortly before the day of argument, Marvin was stricken with a malignancy that rendered him permanently unable to walk. Disregarding medical advice, he left the hospital and traveled to Washington, accompanied by his physician and his beloved wife and soul mate Alice, to fulfill his professional commitment. On February 20, 2002, Marvin argued from a wheelchair some fifty years

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*COLUMBIA LAW REVIEW*

[Vol. 102:1753]

after the date of his first appearance before the Court—a longevity record surpassed only by Dean Erwin Griswold. Eleven days later, Marvin passed away.

Marvin Frankel lived large in the law and in life. As a teacher, judge, scholar, and indomitable advocate, he exemplified all that is good about our profession. His life truly made a difference. He was a role model and mentor to me and many others, inspiring us with both his words and deeds. I was privileged to have known him.