

Remembering Marvin¹



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*Mr. Naftalis spoke at
the Frankel at 50
event on April 24,
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City.*

It's a privilege to say a few words about Marvin Frankel at this terrific program celebrating Marvin's landmark work: *Criminal Sentences: Law without Order*.

Marvin was a very special person, and he had a very special, indeed extraordinary, career. After returning from the Second World War as part of the "Greatest Generation," Marvin went to Columbia Law School as part of the storied class of 1948, which included other luminaries like Judge Jack Weinstein. And Marvin was the star there, serving as the Editor-in-Chief of the *Columbia Law Review*. He then entered government service, quickly rising to the Solicitor General's office where he made his first Supreme Court argument in 1952. All told, over the course of his career, Marvin argued twenty-one cases before the High Court over a fifty-year career—the second highest longevity record of any Supreme Court advocate. He returned to Columbia Law School as a member of the Law School faculty, and while a member of the faculty he wrote the brief in the Supreme Court in the landmark case of *New York Times v. Sullivan*.

As the story goes, Robert Kennedy saw an article of Marvin's in the *Columbia Law Review* and was so impressed that he nominated him to serve on the federal bench. Marvin served with great distinction as a Federal District Judge and was widely respected for his keen intellect and judgment and was generally thought of as one of the finest judges in the country. 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.

I was privileged to know Marvin for almost forty years—first as a teacher, then as a judge before whom I appeared, as co-author of one of his books, law partner, and always as a mentor and friend. I initially encountered him as a first-year law student when he was the young star of the faculty. He was our introduction at Columbia Law School. We idolized and idealized him. We called him Marvelous Marv after a Mets player of the day. He dazzled us with his wit and his incisive, keen mind. And the fact that he spoke as he wrote in paragraphs when all the rest of us had trouble speaking in sentences.

After Marvin went on the bench, I had the privilege to try cases in front of him, particularly when I was a young Assistant U.S. Attorney. Apart from the lucidity of his analysis, Marvin liked advocacy and wanted to always get it

right. He had the self-confidence of a perfectly secure person who would change his mind if confronted with a good 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. 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. 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."

After I left the U.S. Attorney's office, I was privileged to co-author with Marvin the book on the grand jury. When he called me, it took me ten seconds to accept because being asked to work with him was like being asked to play a round of golf with Tiger Woods or to play basketball with the 1969–70 Knicks. Working with him on the grand jury book was a great professional experience. He approached the project with an open mind and willingness to take a fresh look at institutions. He was open to hearing ideas from someone twenty years his junior. He was always like that. Even when he later became a senior partner at the firm, he was always open to the opinions of younger attorneys whom he regarded as valued colleagues. It was an amazing experience to witness his thoughtfulness and analysis in action.

So, one day I was with Marvin working in his chambers on the book, when one of his clerks, a young woman, came in and said, "Judge, I think we are making the wrong decision and here are the three reasons why." He listened, agreed, and said great, go ahead and rewrite the draft. I said, wow that young law clerk was smart—remind me of her name. Marvin said Mary Jo White. Some of you might have heard of her. Marvin and I were early observers of just how good she was.

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After Marvin decided to leave the bench, I was privileged to be one of the people who recruited him to join our firm. It was probably the best lateral move we ever made. He graced our masthead and firm for twenty years, where he was senior partner, a formidable advocate, and a great role model for everyone. He was like that to the end.

Marvin was stricken with a malignancy to his spine that rendered him unable to walk shortly before he was scheduled to argue the Ohio school vouchers case before the United States Supreme Court. He had won that case in the Sixth Circuit, and it was an issue he cared deeply about. Against his doctors' wishes, he checked out of the hospital and traveled to Washington with his doctor and wife and soulmate, Alice, to argue for the very last time before the

Supreme Court from a wheelchair. Eleven days later, Marvin passed away.

Marvin's life truly made a difference. He was a wonderful role model and mentor to me. He exemplified all that is good about our profession. As one of his Columbia colleagues, Arthur Murphy, told our class at our reunion a few months after Marvin's death—"if you thought way back [when he was teaching you], that you were in the presence of someone special . . . you were right to think so."

Note

¹ Portions of this speech were adapted from my earlier article, "A Tribute to Marvin Frankel," *Columbia Law Review* 102 (2002): 1753–1756.