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# BRACK CRAVEN AND THE UNIVERSITY OF NORTH CAROLINA SCHOOL OF LAW

DICKSON PHILLIPS†

He was Duke<sup>1</sup> and Harvard<sup>2</sup> by blood, and his loyalties to those two great institutions ran strong and deep until his death; but during the last ten years of his life, Brack Craven came frequently in his lighthearted moments to refer to the law school at Chapel Hill as “my school.” This reflected the development of a relationship that the editors of this *Review* have asked me to try to capture in this issue devoted fondly to his memory. It is a sad task I undertake, but one that for the sake of his memory and of our friendship I am honored to attempt.

The bare details of the relationship—important as framework but merely suggestive of the essence—are soon recounted. He taught Constitutional Law here during the summer sessions of 1967, 1970 and 1974. He contributed generously to the school’s development fund. He wrote for its law review.<sup>3</sup> In eight of the eleven years he was on the court of appeals, he took a law clerk from among its graduates.<sup>4</sup> When he grinned, calling it “my school,” he was doing what sensitive souls are given to doing—masking deeply felt affection in a throw-away allusion.

He came to the law school relationship with an already developed respect and appreciation for the University at Chapel Hill. As a deep-caring North Carolinian, he understood all that this University has meant to his state in keeping alive through its good and dark periods of the spirit a creative, progressive, tolerant residuum of faith and hope. As have many Tar Heels whose direct loyalties to educational institutions lay elsewhere, he

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1. A.B. 1939.

2. L.L.B. 1942.

3. Craven, *Paeon to Pragmatism*, 50 N.C.L. REV. 977 (1972).

4. Actually, there was a total of nine clerks during this period: Michael A. Almond, class of 1975, of the Charlotte Bar; Thomas B. Anderson, Jr., class of 1970, of the Durham Bar; Jimmy Dean Cooley, class of 1973, of the Winston-Salem Bar; Martin N. Erwin, class of 1967, of the Greensboro Bar; Claude Q. Freeman, Jr., class of 1968, of the Charlotte Bar; Elizabeth Gibson, class of 1976, law clerk to United States Supreme Court Associate Justice Byron White; Samuel Hollingsworth, Jr., class of 1967, deceased; David M. Moore II, class of 1969, of the Greensboro Bar; and Henry N. Patterson, Jr., class of 1966, of the Greensboro and Raleigh Bars. An earlier graduate, Thomas M. Starnes, class of 1962, of the Morganton Bar, served for two years as Judge Craven’s clerk while he was United States District Judge.

considered this great old public University—historic guardian of his state's best hopes and impulses—also to be "his" University in a way transcending the ephemeral old school loyalties that spice life for many in North Carolina. On this base of affection for the University at large, he developed special ties of affection with the students he taught and with the community of legal scholars into which he was introduced at this law school. I like to think that these ties enriched the last decade of his life in ways very precious to him.

His relationship with the students was a warm and happy one. They responded to the open friendliness of his manner and to the respect he showed them not only with the appreciation that law students could be expected to feel in having an esteemed, active judge of a major court as teacher, but with genuine personal affection. In a time when dubious motives underlay the efforts of many in the over-forty age bracket to identify with the turbulent young of the day, there was never any question in my mind about the basis of his relationship. Neither lonely heart purchasing fleeting affection with compliance, the currency of the time, nor would-be guru in search of a flock, nor bewitched believer in the special capability of this generation to green society—Brack simply liked young people and they knew it. This was not half-baked sentimentality. He knew as well as anyone that this particular generation was afflicted with considerable pretentiousness and arrogance and that many of its individual members were, in consequence, not notably lovely types. The wellsprings of his empathy with the youth of that strange time ran deeper than the personal attractiveness and unattractiveness of individual members of the generation. He seemed to me to be one of those—Dr. Frank Graham is the archetype for Chapel Hill—who measure the young of their time in terms of the most prized remembrances of their own youths: the bright promise, the idealism, the enthusiasm and the confidence of their own growing-up times. Such people simply downplay the underside of the universal experience of the maturing process—its brashness and irresponsibility and volatility—not because they are unaware of it, but because they choose to exalt the other. That, in any event, is the way I search Brack's heart—undoubtedly complex here as in all things—on the matter. It explains for me not only his consummate friendliness and respect in relationships with individual young people, but also the emotion with which he challenged formal suggestions of his peers that the young lawyers of this day were as a group somehow professionally deficient<sup>5</sup> and, to a considerable extent, the outrage that he felt about the

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5. In registering strong opposition to the "Clare Report," which recommended special requirements for practice in the federal courts and in which he detected what he thought were unjustified denigrations of the professional abilities of contemporary young lawyers, Judge Craven said, in part:

Vietnam War.<sup>6</sup> From this relationship with students in which he found so much pleasure and satisfaction grew many ties of affection that came to bind Judge Craven to the law school.

The mingling of a thoughtful, introspective, highly intelligent appellate judge and a good law faculty is, under any circumstances, likely to be an interesting phenomenon. When that mingling occurs during a period of deep questioning by legal scholars, judges and the public about the proper role of the judiciary in the processes of government, interesting interactions are guaranteeable. Brack Craven was such a judge, this was such a law faculty, and such were the times during which he served on occasion as visiting professor here. Many philosophical crosscurrents were in play during Brack's involvement with the community of academic lawyers during those tumultuous years starting in the mid-60's. Some of these gave special color to his relationship with this school, so that any fair summing up must touch upon them. As should be expected, the accounting will not be of sweet intellectual accord on all points. The issues were weighty and fundamentally important, and attitudes and convictions about them were accordingly diverse and strongly held. Brack found here what should be expected on any good law faculty—some kindred spirits and some spirits in respectful but fundamental disagreement with his own deep convictions. This was good for him as a judge, I am bound to think. I know he thought so and am satisfied that in this opportunity to test his convictions with equally keen and serious minds in disagreement as well as agreement, he found another ground of attachment to the school. He took genuine pride in any scholarly contribution made by a member of this law faculty to the public discourse on these matters, reading them carefully and indulging occasionally in what he considered the collegial responsibility of taking issue with the author—not as judge, but as an interested, sometime faculty colleague.<sup>7</sup>

He was, of course, terribly concerned with the tension that he and all judges of his ilk experience in attempting to achieve the just result in a particular case within the constraints of general principle. Given his bent of mind and heart, he must surely have begun wrestling with this quite early on

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My colleagues and I tend to agree that both [the young men and young women lawyers appearing before the court] are generally better than the average middle-age lawyers. Not once in my nine and a half years on the Fourth Circuit has a younger lawyer won the kudos of worst argument of the year.

Letter from Judge Craven to Warren C. Stack, Esq., copy to the writer (Dec. 30, 1975). An adaptation of Judge Craven's position appears in *Personal Viewpoint: Leaving Advocacy Alone*, 62 A.B.A.J. 777 (1976).

6. His outrage was openly expressed in many contexts, but perhaps was most interestingly recorded in his opinion in *Lawton v. Tarr*, 327 F. Supp. 670 (E.D.N.C. 1971) (sitting by designation as District Judge).

7. For a specific occasion, see note 19 *infra*.

as a state trial judge. By the time he taught here he had lived with it on the appellate bench, where latitude more fully exists to stretch old principle, create new, or even deliberately to "rise above" any, and it had come to be almost an obsession with him. As all who knew him will, I think, surely agree, his instinctive impulse for resolving the tension in particular cases was in the direction of achieving the just result. He might express this in a pungent aphorism emphasizing his impatience with arcane dogma no longer worthy to be applied as principle in a system supposedly having human welfare as its ultimate goal<sup>8</sup> or in a more reasoned and systematic statement of his judicial philosophy.<sup>9</sup> But the incipient dangers in this approach clearly haunted him.<sup>10</sup> It was for this reason, I always thought, that he seemed so bent on reassuring himself by talking and writing it out.

In any event, this tension was clearly on his mind a good deal, and he inevitably brought it with him into his law teaching experience. In this setting, these attitudes are likely to encounter widely differing responses, and so they did here. His all-out espousal of the just result in the individual case as the proper lodestar for the good appellate judge was congenial to some of his faculty colleagues, but it flatly worried others. The latter included faculty members honestly concerned about what they perceived to be a mounting anti-intellectual bias among students strongly conditioned by contemporary ideas and events. Sensing themselves already in a close battle to hold the line of rigorous intellectual discipline in the law school, some feared that Brack's more vigorous assertions of the rightful primacy of heart over mind in the judicial process lent dangerous encouragement to this bias. Of course Brack himself was not in any sense anti-intellectual and could not have intended to encourage it in others. Equipped with high intelligence that permitted him to move easily in his analysis and opinion writing within and around doctrinal constraints while maintaining their essential integrity,<sup>11</sup> he

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8. Those closest to him will undoubtedly recall their own favorites among the many variations on the basic theme. One that perhaps best sums up the essential attitude underlying the impulse was a favorite of some of the very closest: "There are no *legal* problems, only *people* problems to some of which there may be legal solutions."

9. As in Craven, *Personhood: The Right to Be Let Alone*, 1976 DUKE L.J. 699, and Craven, *supra* note 3. While both of these articles dealt with constitutional themes in which the tension and the impulse toward its resolution were undoubtedly at their strongest, a more general philosophy of judging seems implicit in them.

10. See, e.g., the peroration with which he formally concluded his *Paeen to Pragmatism*. Craven, *supra* note 3, at 1014-15.

11. This statement surely needs no exhaustive documentation. A single good example would be Judge Craven's dissenting opinion in the first round of a particularly difficult *Erie* doctrine case in which the full court sitting en banc on second rehearing came ultimately to his original view of the right result. *Atkins v. Schmutz Mfg. Co.*, 401 F.2d 731 (4th Cir. 1968) (dissenting opinion), *rev'd on rehearing en banc*, 435 F.2d 527 (4th Cir. 1970), *cert. denied*, 402 U.S. 932 (1971).

simply assumed that students and others could recognize his occasional hyperbole for what it was, and that there was no great danger involved in openly revealing his insights into the essential pragmatism of the process. In this he may of course have miscalculated. We have insisted on maintaining the primacy and essential stability of general principle largely because not all judges are as just (or as bright) as Brack Craven was.

On one occasion I ventured to suggest to him that maybe the malleability of principle was a thing to be learned in due time and in the crucible of experience by the best and brightest of our students, but that it was pretty heady wine for general consumption by the rank and file at this stage in their development. To which he grinned me a quizzical grin and remarked that he couldn't believe that the dean of his law school would actually conspire to conceal ultimate wisdom from his students. End of that exchange.

Another time, seeking to slip up on his blind side with a scriptural quote, I was moved to cite the admonition about not behaving in a way that might cause weaker brethren to fall into error.<sup>12</sup> This time the look was one of mock horror as he professed himself "shocked that a presbyterian elder would stoop to quoting and probably misquoting scripture out of context." End of that one. He never relented.

In more profound terms this all involved the question of the appropriate role of the judiciary—particularly the federal judiciary—in our governmental structures. During Brack's association with the law school here, debate about the appropriate amount of judicial activism<sup>13</sup> had spread from the political hustings to the law journals, where some of legal academe's legitimate heavyweights were joining battle. Some of our best were concluding that inspired judicial activism at all levels had been and would presumably continue to be essential to the full realization of individual rights and rightful expectations in view of executive and legislative defaults and impotence,<sup>14</sup> and that increasing appellate court dominance of the details of

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12. *Romans* 14:13-21 (not exactly misquoted, just liberally paraphrased).

13. This is admittedly a worrisome term, both because of the pejorative uses to which it is frequently put these days and because of its looseness even in respectable usage. It may signify either a general judicial willingness at both appellate and trial court levels to be "active" in the interpretive process at the expense of a general stability of principle; or, within the system of courts, an increasing appellate intrusion into control of the trial process at the expense of trial court discretion; or, at the trial court level, an increased dominance by the judge at the expense of the adversaries in defining the issues and moving the process along. It is with the first two of these phenomena that the commentators cited in notes 14-17 *infra* are dealing. For an excellent recent exposition of the third, see Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975).

14. Among the many that could be cited, one sufficiently representative for the non-technical purpose at hand—and certainly among the most prestigious—would be Professor Archibald Cox's latest book, A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* (1976). While the book deals essentially with constitutional adjudication by this

the process at trial court expense was also to be applauded.<sup>15</sup> Others equally entitled to respect were saying that the logical end of such attitudes was an elitist judicial oligarchy completely unintended by the Founders,<sup>16</sup> and that increasing appellate court dominance should be deplored as equally unintended and dangerous.<sup>17</sup> Brack worried a lot about all this, and I think he was always anxious not to be typed in any of the easy categories that debates of this kind inevitably spawn.<sup>18</sup> He saw the force of the elitist, oligarchic concern, and, when it was expressed not by demagogues but by serious scholars for whom he felt personal as well as professional respect, it stung him.<sup>19</sup>

In this academic setting he was, of course, simply encountering in a different dimension the same interplay of opposing philosophies that he

very special political institution so that no blanket endorsement of a general brand of judicial activism at all levels and in all matters is necessarily implied, the essential theme is boldly advanced. Certainly it must be assumed that those who advocate adoption of this approach by the highest court realize and welcome the inevitability of its exercise throughout the system as it takes hold at the top. It can hardly be expected that judges of the lower federal courts who approve activism of this kind by the highest court will not assume an obligation on their part to follow suit, especially given the fact that theirs may be the final word in any case. Some of the most interesting contributions to the debate in the law journals have in fact been those by judges of lower federal courts. In addition to Judge Craven's, *supra* notes 3 & 9, the list would include J. Skelly Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint*, 54 CORNELL L. REV. 1 (1968).

15. Carrington, *The Power of District Judges and the Responsibility of Courts of Appeals*, 3 GA. L. REV. 507 (1969). This article was in major part a direct riposte to the opposing views of Professor Charles Alan Wright earlier expressed in Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751 (1957).

16. Again, many could be cited, but one sufficiently representative and particularly pertinent for this piece is Strong, *Bicentennial Benchmark: Two Centuries of Evolution of Constitutional Processes*, 55 N.C.L. REV. 1 (1976). It is pertinent not alone for its high quality but for the fact that it is the work of the esteemed senior constitutional scholar on this faculty during Judge Craven's tenure here, Cary C. Boshamer University Distinguished Professor Frank R. Strong.

17. Wright, *supra* note 15. While this classic appeared at an earlier time than that under direct discussion here, its force had clearly carried into that time. See note 15 *supra*.

18. How well he succeeded may perhaps best be gauged by the assessments of his two great friends, Chief Judge Clement F. Haynsworth, Jr. and Senator Sam J. Ervin, Jr., that appear in this issue of the *Review*.

19. I use the term "stung" with some hesitancy, but advisedly. He was sensitive enough to fear in himself the temptation to assume the role that Judge Learned Hand, in referring to those of his day bent toward judicial activism, called "Platonic Guardian." L. HAND, *THE BILL OF RIGHTS*, 73-74 (1958). The term stuck in Brack's craw as it apparently does in that of every scholar and judge who feels in himself any stirrings of an activist philosophy. See, e.g., A. COX, *supra* note 14, at 116; J. Skelly Wright, *supra* note 14, at 12. Dean Strong used it effectively in the closing portions of his published *Bicentennial Benchmark* lecture, Strong, *supra* note 16, at 114-115, to highlight in sober fashion his own misgivings about the ultimate implications of judicial activism in constitutional interpretation. Upon reading this piece, Brack was moved to the point of writing to Dean Strong and other constitutional law colleagues on this faculty a vigorous defense of the opposing viewpoint. See text accompanying note 7 *supra*. He took his philosophy and his collegial relationships equally strongly.

encountered (and prized) on his own court. He was always seeking, and here was another arena for testing and working out a way to proceed through the maze. I believe that to a large extent this was the reason he tried to keep up this relationship, though the sheer logistical problem of meeting class schedules while handling his judicial work came finally to be a tremendous burden.<sup>20</sup> If this be true, I am glad that we were able to provide the opportunity he sought to nourish mind and heart.

The last time I saw and talked to him was in the law school. He had come during the spring of 1977—as he never once failed at my request to come—to do a little chore for us. This time it was to meet with my Appellate Review Seminar. Characteristically, he interrupted a visit with his son's family in Durham on his way from court in Richmond to home in Asheville to do this. Equally characteristically, he quickly broke through my well-laid plan for discussing certain technical aspects of defining the scope of review to get to the pragmatic heart of things as he saw it. "Don't worry too much about the technical aspects of the process," he said, in effect, to my eager craftsmen, "The most important thing to do on an appeal is somehow to *make us care*." Incurrable to the end.

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20. During his last session with us in the summer of 1974, he told me that he thought he simply could not teach any more and that he had realized this during his previous tour in 1970 but wanted to come back one more time. This statement reminded me of the old story from World War II times about the paratrooper who, when asked by a friend if he really enjoyed jumping out of airplanes, said that he didn't, but that he liked being around people who did enjoy it enough to keep at it himself. Brack said that this was generally accurate if it were understood that his loss of enjoyment in teaching stemmed entirely from the difficulty of doing it while handling his share of the case load burden that had now developed on the court.



