

# Felix Frankfurter and His Times: The Reform Years

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## BOOK REVIEW

FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS. *Michael E. Parrish*.<sup>1</sup> New York: The Free Press. 1982. Pp. vi, 330. \$17.95 (cloth).

*To love the beautiful, to desire the good, to do the best.*<sup>2</sup>

This first-rate historical study of Felix Frankfurter, by recognizing at the outset that Frankfurter is not a botanical specimen to be fitted into existing classifications, escapes the trap that has claimed most recent studies of the subject. Frankfurter is not to be justified or condemned by the standards of others; he is in a class by himself. One can make a simple division between Frankfurter the “liberal” professor and adviser to presidents, and Frankfurter the “conservative” Justice of the Supreme Court, only if one views the world as black or white. Frankfurter marched to his own drum, which often put him out of step with his peers, his superiors, and his subordinates. He was neither a leader nor a follower, but a doer. A member of no group or cult, he was without the power of numbers and had only the power of persuasion—which he was not always able to invoke effectively. Appropriately, therefore, the book opens with the most important fact about Felix Frankfurter—he is an individual and an individualist:<sup>3</sup>

“The point is,” Felix Frankfurter once remarked, “that I haven’t any crowd—that’s why Max Eastman in his *Liberator* (or *Masses*) calls me ‘bourgeois’ and Fred Fish thinks me ‘dangerous.’ I verily believe I’m an occasional target because I worship no sacred cow, and because I do regard it the business of the mind to inquire, altho neither advocating nor expecting any sudden or upsetting changes, and loving what America means passionately.” This skepticism and refusal to become identified with a particular creed or, as he put it, “any crowd,” defined the core of Frankfurter’s liberalism for half a century and made him the despair of radicals and reactionaries alike.<sup>4</sup>

Frankfurter had no crowd during his lifetime and certainly none has formed since his death. November 15, 1982, marked the centenary of his birth. It was noted only by small celebrations at his two cherished alma maters, the City College of New York and the Harvard Law

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<sup>1</sup> Professor of History, University of California at San Diego.

<sup>2</sup> Motto of Moses Mendelssohn.

<sup>3</sup> See also K. WEINTRAUB, *THE VALUE OF THE INDIVIDUAL* xvii (1978).

<sup>4</sup> M. PARRISH, *FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS I* (1982) (footnote omitted).

School. His educational experiences were precious to him. But this is a meager acknowledgement of the life of a man who had

commanded the awe, devotion, hatred, and paranoia normally reserved for presidents, generals, movie stars, and eccentric millionaires, although he never held an elective office, dispensed little official patronage, and died nearly penniless. This owl-like, fastidious little man, who charmed Oliver Wendell Holmes, terrified proper Bostonians, dismayed businessmen, and often incurred the wrath of civil libertarians, played a central role in the history of modern American liberalism because he trafficked in its newest form of power—the trained intelligence required to govern society.<sup>5</sup>

Thus, in the first two pages of his book, Parrish displays a keener insight into the man and his life than do those academics with their dreary psychobiography and muckraking who believe that behavior of which they do not approve must be evil or conservative, or at best, neurotic.<sup>6</sup> Although the public's interest in this figure has diminished, Frankfurter appears frequently in academic articles and books as either the protagonist or more commonly, the antagonist. Books written about other justices—for example, Earl Warren or Harlan Fiske Stone—will often measure the subject against Frankfurter.<sup>7</sup>

For better or worse, Frankfurter produced thousands of records, papers, and letters that he exchanged with secretaries of state and children of his friends, Supreme Court justices and neophyte lawyers, and clerics and physicians. Common to all his correspondence was evidence of real concern about the subject of that communication as well as its recipient. These documents have been given a home in the Library of Congress, in the Harvard Law School, and at the Hebrew University of Jerusalem, and are open to scrutiny and study by scholars and academics. Political scientists, historians, and academic lawyers will be mining this lode for years to come.

Michael Parrish, a historian by trade, previously authored an interesting study of one aspect of the New Deal in *Securities Regulation and the New Deal*.<sup>8</sup> His volume on Frankfurter is the first of two, tracing his life until his Supreme Court appointment in 1939. It thus covers the period least known to modern scholars, a period surrounded by myth and of which insightful analysis is always welcome.

Parrish's history of the life and times of Felix Frankfurter is in the style of Ronald Steel's *Walter Lippmann and the American Century*.<sup>9</sup> It is not quite as good a narrative, probably because it is cramped, even though

<sup>5</sup> M. PARRISH, *supra* note 4, at 2.

<sup>6</sup> *See, e.g.*, H. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* (1981).

<sup>7</sup> *See, e.g.*, A. MASON, *HARLAN FISKE STONE* (1956); E. WHITE, *EARL WARREN* 172-90 (1982).

<sup>8</sup> M. PARRISH, *SECURITIES REGULATIONS AND THE NEW DEAL* (1970).

<sup>9</sup> R. STEEL, *WALTER LIPPMANN AND THE AMERICAN CENTURY* (1980).

it will fill two volumes. Both the times and the character require more development. But like Steel, Parrish tells the story without bias toward his subject and the various movements of the time. He fully depicts all of the blemishes as well as the good aspects. But for all its merits, it is a dull book about an exciting person.

The book reveals a man of extraordinary intellect, vitality, and ambition—ambition not so much for place as for power and the opportunity to influence the decisionmakers. It was the combination of talent and *chutzpah* that created his opportunities to partake in major governmental decisions during this period. Frankfurter had heroes, most of whom he admired because of their ability to put their intelligence to work in seeking solutions to social problems. Certainly Holmes, Stimson, and Brandeis were not noted for their great human warmth; it was their cold-blooded patriotic dedication to service, *noblesse oblige* if you will, that attracted him. Yet Frankfurter was an exuberant and sentimental person who could also find heroes in the two Roosevelts. One senses that, for the most part, an acute and highly developed intelligence was a necessary condition for friendship. But Frankfurter also knew that an admirable intelligence was often to be found in the unschooled and untutored who knew about life through living it.

One of Frankfurter's primary attributes was his extraordinary vitality, in abundance until the day he fell ill. No one who ever tried to keep up with him, whether on a short walk through what seemed the entire State of Connecticut or chasing down authorities for propositions in opinions, will gainsay the dynamism of the man. James Madison must have been like this when he put together a nation and then made it work by telling Jefferson how to do it. Rather than new or stale formulae, Frankfurter had analysis and energy in good supply, and in the right combination, to help steer the ship of state.

His roles were many: trustbusting in the United States Attorney's Office for the Southern District of New York under Stimson; War Department official in World War I; campaign manager in Stimson's campaign for governor; adviser to F.D.R.; Zionist activist under Brandeis; law professor at Harvard; civil liberties fighter for Sacco and Vanzetti, and Tom Mooney and Zechariah Chafee's tenure at Harvard; critic of judicial abuses of authority; draftsman of New Deal legislation. As a professor, Frankfurter was no scholar, but he was knowledgeable about almost everything in and out of the law. He put his wisdom to work for the causes he supported. He was not an originator, a discoverer, or a synthesizer. He was a problem-solver, and the problems that he solved were real rather than theoretical.

The book reveals the exciting adventures of one who played an important role in the transition of the United States from a primarily market state to a service state. Frankfurter's theory of how government

should work was that it should reflect the will of the people, with adequate protection for minority interests against the tyranny of the majority. He did not think that free market theory as a system of governance was to be rejected because it suffered obvious deficiencies. Nor did he find perfection in a socialist system—Marxist or otherwise—that subordinated freedom to bureaucratic control. Laski had never convinced him. The world wars and the great depression had caused untold miseries, and Frankfurter believed that government must alleviate them when the private sector could not. Even if government could accomplish what private enterprise could not, capitalism—and not state capitalism—offered the greatest potential for enhancing the liberties of the greatest number.

This book is essentially historical, concerned largely with events in the life of the nation and in the life of Felix Frankfurter. Parrish must be given credit for a first-rate historical study. But, as biography, something is missing for which Parrish cannot be blamed. For he did not and could not capture the elusive nature of the quality of the man apart from his deeds.

It has been said that "biography should be a man's conversations, not his deeds." It is the deeds that are recorded here. The man himself cannot be encapsulated. The qualities that make a man such as this are evanescent: "those qualities of the man himself," as Archibald MacLeish put it, "which must necessarily vanish with him or, at the latest, with the memories of his friends. . . . It was the man himself, the indescribable, inexhaustible, various, vehement, creative, understanding man who had the courage to be whole and happy in a tragic age."<sup>10</sup> Thus, if Frankfurter was a disciple of Holmes, it was not Holmes the jurist who set the standard. Rather, it was Holmes the man who believed that the worth of life was in the living of it. Yet, this was as true for Frankfurter as for Holmes:

[I]f a man is a specialist, it is most desirable that he should also be civilized; that he should have laid in the outline of the other sciences, as well as the light and shade of his own; that he should be reasonable, and see things in their proportion. Nay, more, that he should be passionate, as well as reasonable—that he should be able not only to explain, but to feel; that the ardors of intellectual pursuit should be relieved by the charms of art, should be succeeded by the joy of life become an end in itself.<sup>11</sup>

Although it is not given to many to know "the joy of life [as] an end in itself," it was given to Felix Frankfurter. For Frankfurter, as for Holmes, "to live is to function. That is all there is in living."<sup>12</sup>

<sup>10</sup> MacLeish, *Felix Frankfurter: A Lesson of Faith*, 1966 SUP. CT. REV. 1, 4-5.

<sup>11</sup> O.W. HOLMES, *The Use of Law Schools*, in COLLECTED LEGAL PAPERS 47-48 (1921).

<sup>12</sup> O.W. HOLMES, *Justice Holmes' First and Only Radio Address*, in JUSTICE OLIVER WEN-

If we were truly to celebrate the life of Felix Frankfurter, it would not be in a catalogue of his deeds, but in a catalogue of his joys: his joy in whatever he was doing, his joy in thinking, his joy in encouraging others, his joy in battle but, most of all, his joy in his friendships. No man invested more in his friends both great and small, and no man had a greater return on such investment. He was an original, inimitable spirit, and to learn what he did is not to learn what he was. But we should be grateful for what Parrish has given us and we can look forward to the next volume, which will reveal the acts of the man in the robe, as this one has revealed the acts of the man in the gown.

*Philip B. Kurland\**

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DELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 142 (H. Shriver ed. 1936) (footnote omitted).

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