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### Book Review (reviewing Michael E. Parrish, Felix Frankfurter and His Times: The Reform Years (1982))

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**Felix Frankfurter and His Times: The Reform Years.**  
By Michael E. Parrish.\* New York: The Free  
Press; London: Collier Macmillan Publishers.  
1982. Pp. vi, 330. \$17.95.

This is a biography—of sorts—of Felix Frankfurter up to his appointment to the Supreme Court in 1939. I say “of sorts” because it is not a pure biography, if there is such a thing; it is a “life and times” book, with more “times” than “life.” An example is chapter 2, “The Making of a Reformer,” nominally about Frankfurter’s service as an assistant to the United States Attorney in Manhattan, Henry Stimson, during the latter part of Theodore Roosevelt’s administration and the early part of the Taft administration. The chapter is fifteen pages long. The first third is about Roosevelt and Stimson. Then Frankfurter appears for a few pages, although much of the discussion in these pages is of matters in the United States Attorney’s office with which Frankfurter apparently had no direct connection. The author says for example that, “During these years, Frankfurter participated in and witnessed the best and the worst of federal law enforcement . . . ,”<sup>1</sup> and discusses examples of both types. We do not learn, however, in which of these activities Frankfurter was actually involved. The chapter closes with a discussion of Stimson’s campaign for governor of New York in 1910. Although Parrish mentions in passing that Frankfurter was Stimson’s campaign manager, he does not discuss what Frankfurter did in that role.

The time between Frankfurter’s graduation from law school in 1906 and his appointment to the Supreme Court in 1939 included, among other excitements, Theodore Roosevelt’s Bull Moose movement and Woodrow Wilson’s New Freedom; the fight over Brandeis’s nomination to the Supreme Court; World War I, the Bisbee deportations, and the Palmer Raids; the Mooney case and the Sacco and Vanzetti case; the rise of Zionism; the Great Depression; the New Deal; and the Court-packing plan. Frankfurter played a role in all of these events, and Professor Parrish is determined to describe all of them to the

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1. M. PARRISH, *FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS* 33 (1982).

reader. Although his descriptions are vivid and interesting, they do not leave much space for the life of Felix Frankfurter.

The book makes almost no attempt to answer the two most interesting questions about Frankfurter's career. First, how was this foreign-born Jew able to achieve fabulous success as a public man in a much less tolerant era than today? Second, precisely what did Frankfurter accomplish? As to the first question, I think it obvious that America, despite genteel anti-Semitism and recurrent bouts of xenophobia, was, and is, a uniquely open society to people of talent, and that Frankfurter was greatly talented. He was extremely intelligent, an extraordinary teacher, and a very rapid and retentive reader who possessed first-rate powers of legal analysis; he had enormous energy, ambition, and self-confidence; he had an unusual gift for friendship, and was charming and outgoing. Professor Parrish *tells* us that he was intelligent, energetic, and charming, but he does not exhibit these characteristics to us, so his Felix Frankfurter is hard to imagine as a person. Parrish quotes a lot from Frankfurter's letters, but most of the quotations are commonplace. An exception is Frankfurter's description of some Supreme Court Justices as judges "who move in their own small narrow groove which gradually makes for comfort and gradually makes the rest of the world unknown and therefore unnatural."<sup>2</sup> I also liked Frankfurter's remark, concerning the procedural safeguards for people accused of crime, that "the worst of it is that protection for the accused does the least good where it is most needed,—namely where the passion of the community is aroused, and conviction comes not from the evidence but from the atmosphere."<sup>3</sup>

So we are given little concrete evidence of Frankfurter's considerable qualities, though an important exception is Parrish's discussion of Frankfurter's view of Franklin Roosevelt before Roosevelt became President.<sup>4</sup> Frankfurter's insight into Roosevelt's immense political gifts, an insight denied most other intellectuals of the time, is demonstrated with apt quotations. These glimpses of Frankfurter's qualities are rare, however.

We might have gotten a better picture if Professor Parrish had tried to explain what Frankfurter achieved by his whirl-

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2. Letter from Felix Frankfurter to Learned Hand (February 18, 1915), reprinted in M. PARRISH, *supra* note 1, at 69.

3. M. PARRISH, *supra* note 1, at 175.

4. *Id.* at 200-03.

wind of activity: what his impact was on policy, on people's lives (other than through changing policy), and on ideas. We learn—but this was well known before Parrish wrote his book—that Frankfurter placed many of his former Harvard Law School students in government jobs during the New Deal, that he advised and encouraged these (and other) proteges, and that he talked often and corresponded extensively with Roosevelt.<sup>5</sup> But we learn little of what Frankfurter actually said, and did, himself. We are told, for example, that the passage of the Securities Act of 1933 was “a vintage performance by Frankfurter,”<sup>6</sup> but we are not told of what this performance consisted beyond encouraging the efforts of his proteges, the actual draftsmen of the bill, and speaking about it to some members of Congress. Because we are not shown Frankfurter in action and because we are not given the feel of the man, his successes are made to seem mysterious—giving him something of a Svengali air, undeserved and unintended.

Although Frankfurter's impact on policy is left obscure in Parrish's book, it is clear from other sources that Frankfurter was a “role model” for later generations of law professors. I have in mind, for example, the heavy litigation dockets of some of his successors at the Harvard Law School, such as Laurence Tribe and Alan Dershowitz. What is least clear from the book, however, and, to me at least, most interesting, is the question of his legacy to the world of ideas. Although many of the ideas with which Frankfurter is closely associated, such as the Interstate Commerce Commission, are outdated, his studies of federal jurisdiction, and in particular of the jurisdiction, processes, and workload of the Supreme Court, are enduring contributions to scholarship and the foundation and inspiration of much contemporary scholarship. But the scholarly side of Frankfurter's work is not emphasized in this book, probably because Parrish is not a lawyer. Of course, in speaking of Frankfurter's influence on the world of ideas, I am speaking just of the early Frankfurter covered in Parrish's book. Through his judicial writings, Frankfurter had enormous influence on thinking about federal jurisdiction, administrative and constitutional law, and criminal procedure—influence in particular as the consolidator of the tradition of judicial self-restraint that had originated with Thayer and Holmes, and as the transmitter of

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5. See ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE 1928-1945 (M. Freedman ed. 1967).

6. M. PARRISH, *supra* note 1, at 233.

that tradition to its modern expositors, almost all Frankfurter proteges, such as Henry Hart and Alexander Bickel.

Well, I find I have played the usual reviewer's game of taking the author to task for not writing a different book, so I should make clear that the book he did write, the "life and times" book I described at the outset, is a good book on its own terms. I read it with great enjoyment. I am no expert on Frankfurter, but I have admired him greatly since my first day in law school, when I read his sparkling, wrong dissent in *Sibbach v. Wilson & Co.*,<sup>7</sup> and I have read most of the published biographical materials on Frankfurter—the diaries with the introduction by Lash,<sup>8</sup> the reminiscences,<sup>9</sup> the Hirsch "psychobiography"<sup>10</sup> (full of interesting detail, though in my opinion wrongheaded, as everything in Frankfurter's life suggests robust mental health rather than the insecurities unconvincingly hypothesized by Hirsch), the overly sensationalized *Brandeis—Frankfurter Connection*,<sup>11</sup> and much else besides.<sup>12</sup> Although there is not a great deal that is new in Parrish's book, there is some new material—in particular a good discussion of why Frankfurter did not oppose Roosevelt's Court-packing plan; and there are some nice tidbits, including a slightly off-color quotation from Justice Holmes that I have never seen before and cannot forbear to quote because, as Holmes used to say, "it hits me where I live."

"I have a little case," he reported, "whether it will go or not I don't know. As originally written it had a tiny pair of testicles—but the scruples of my brethren have caused their removal and it sings in a very soft voice now."<sup>13</sup>

While I am retailing trivia I will quote another passage that caught my fancy. This is Chaim Weizmann, the leader of modern Zionism, complaining about Brandeis's and Frankfurter's

7. 312 U.S. 1, 16-19 (1940) (Frankfurter, J., dissenting).

8. J. LASH, *FROM THE DIARIES OF FELIX FRANKFURTER* (1974).

9. FELIX FRANKFURTER REMINISCES (H. Phillips ed. 1960).

10. H. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* (1981).

11. B. MURPHY, *THE BRANDEIS-FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES* (1982) reviewed in this issue at 287.

12. For some notable recent examples of specialized studies, see Hutchinson, *Felix Frankfurter and the Business of the Supreme Court*, O.T. 1946—O.T. 1961, 1980 SUP. CT. REV. 143; Schwartz, *Felix Frankfurter and Earl Warren: A Study of a Deteriorating Relationship*, 1980 SUP. CT. REV. 115. Of course, like most of the writing on Frankfurter, these essays relate to his judicial career rather than the early years covered in Parrish's book.

13. Letter from Justice Holmes to Felix Frankfurter, *reprinted in M. PARRISH, supra* note 1, at 162.

decision to live in America rather than the newly established Jewish homeland in Palestine:

"Brandeis," he lectured Frankfurter, "could have been a prophet in Israel—you [Frankfurter] have in you the makings of a Lasalle. Instead, you are choosing to be only a professor at Harvard and Brandeis only a judge in the Supreme Court."<sup>14</sup>

So there is much to amuse and entertain in the book. But there is also, from time to time, a false note struck—the counterpart in the intellectual sphere to trying to play complicated music on a piano that is out of tune. For example, of Frankfurter's better-known students, such as Dean Acheson, David Lilienthal, and Alger Hiss, Parrish writes, "Their conquests, in turn, expanded his [Frankfurter's] own empire within government, the legal profession, and the law schools. He bartered intellectual property the way other people bartered votes, real estate, and common stock."<sup>15</sup> The word "conquests" is surely off-key, even if we forget about Alger Hiss's inclusion in Parrish's list of Frankfurter proteges; "empire" is also off-key; "intellectual property" has no obvious referent; and the barter simile is banal.

It is also banal to point out that Frankfurter died on the same day that Malcolm X was gunned down<sup>16</sup>—an example of the author's fondness for juxtapositions that do not bear slight, let alone intermediate or strict, scrutiny. Frankfurter "never learned to drive an automobile, but he defended Tom Mooney, communists-anarchists during the worst days of the Red Scare, and Sacco and Vanzetti a few years later."<sup>17</sup> At the risk of seeming obtuse, I am moved by this passage to ask what the apparent incongruity is in not learning to drive yet defending anarchists and other left-wingers. And here is an incongruous antithesis: "Despite Frankfurter's boundless energy, Washington in 1911 remained an indolent Southern village with little automobile traffic."<sup>18</sup>

Writing as he does for effect, Professor Parrish frequently fails to be precise. What does he mean, for example, when he says, "Regarded as oracles, judges received extraordinary veneration from professors and students who aspired to become oracles themselves"?<sup>19</sup> What does it mean to call Frankfurter

14. Letter from Chaim Weizmann to Felix Frankfurter (August 27, 1919), reprinted in M. PARRISH, *supra* note 1, at 146.

15. M. PARRISH, *supra* note 1, at 2.

16. *Id.* at 3.

17. *Id.* at 6.

18. *Id.* at 41.

19. *See id.* at 18.

"one of the group's only bachelors"?<sup>20</sup> What is a "Jewish Brahmin"?<sup>21</sup> Is Frankfurter "less of a Brahmin and more of a Jew than he had imagined"?<sup>22</sup> What is "rapid demographic movement,"<sup>23</sup> and what impression is meant to be conveyed by describing a Frankfurter audience as a "cheering mob"?<sup>24</sup> What does it mean to say of Harold Ickes that his "paranoia exceeded only his idealism"?<sup>25</sup> Actually, it means that the only one of Ickes's qualities that was slighter than his paranoia was his idealism, though this is not what Parrish intended.

At times Parrish's insensitivity to language verges on a more serious sin, surprising in a historian—lack of a historical sense. For example, Parrish speaks of Dean Roscoe Pound of the Harvard Law School, circa 1920: "Like many of the decade's notable business tycoons, Roscoe Pound believed that more was better. . . [and] that Harvard could become the General Motors of American law schools—the biggest and best in all fields of legal education."<sup>26</sup> I put aside the fact that this owlish Nebraskan (now I am sounding like Parrish)—this botanist turned Germanic legal scholar—was unlike any business tycoon I have ever read about. I point out simply that, in the 1920's, the newly formed General Motors was not the biggest and best of anything and could not have been the model in Pound's mind.

Anachronism abounds in the book, as when the author, after quoting some mild anti-Semitic utterances by Colonel House, remarks, "even House's venom paled in comparison with the labor turmoil that greeted Frankfurter upon his return from Europe."<sup>27</sup> The word "venom," applied to House's remarks,<sup>28</sup> would be inapt today; it is ludicrous in the context of 1919; and the comparison with labor turmoil is quite absurd. You will not be surprised when I tell you that the last sentence in the book is: "Forty-four days later, Hitler absorbed all of

20. *See id.* at 29.

21. *See id.* at 52. Parrish uses the phrase to describe Brandeis.

22. *See id.* at 78.

23. *See id.* at 151.

24. *See id.* at 121.

25. *See id.* at 225.

26. *Id.* at 151.

27. House said, "the objection to Lippman is that he is a Jew, but unlike other Jews he is a silent one"; and "the Jews from every tribe have descended in force, and they seem determined to break in with a jimmy if they are not let in." *Letters from Colonel House to William B. Wilson* (September 20 & October 3, 1917), reprinted in M. PARRISH, *supra* note 1, at 86-87.

28. *See* M. PARRISH, *supra* note 1, at 87.

Czechoslovakia.”<sup>29</sup>

I don't want to leave the impression that I think this is a silly book, because I don't, although it has a silly streak which I am sure engaged more of my attention than it should have. I am still wondering how many of the typographical errors in the book really are just typographical errors—for example, “futility,” “principle” for “principal,” “alters” for “altars,” “imprimature.” It is an interesting and lively book, but it is froth rather than pith.

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29. *Id.* at 278.

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