

ISRAEL LAW REVIEW

Vol. 2

July, 1967

No. 3

FELIX FRANKFURTER—*IN MEMORIAM*

By Benjamin Akzin

A year and more has gone since death claimed Felix Frankfurter, one of the most remarkable law teachers of his generation, a justice of the United States Supreme Court who has left a profound mark on that great tribunal, and a man who exercised outstanding influence on American life and society for an entire lifetime. In Jewish history too Frankfurter takes his place as one who for four decades took an interest in the destinies of his people and at times was actively involved in their unfolding. Among the members of this Review's editorial board, this writer is the only one to have known him personally, and this is why he feels impelled to add this brief essay to the many tributes and evaluations already written on the subject of Justice Frankfurter's fascinating personality.

To those who knew Frankfurter before he ascended the Supreme Court bench, one of his most notable characteristics was the intensity with which he both followed and participated in all significant events of his time. His was not a mere onlooker's curiosity, either dispassionate or faintly interested. He was essentially an *engagé*, a man deeply moved by problems and causes, and his attitudes toward them were definite commitments. Throughout his adult life Frankfurter tried to emulate his two favoured stereotypes—the New Englander and the educated Englishman—and to clothe his commitments in that cool, slightly Olympian style typical of both; but in this he never quite succeeded. The high-strung Jewish boy, born in Vienna, raised in New York's East End, and educated in that hothouse of serious, but emotion-ridden scholarship—the City College of New York—showed through all along. He showed through when passionately espousing political and social causes. He showed through in the work of the law professor who, in lectures and seminars, threw his fiery temperament in teaching his students to despise shoddy thinking but also to reject false doctrines, to respect accurate knowledge but not to lose sight of the wood for the trees, to master techniques but also to put legal techniques in the service of those social ends which he regarded as the true purpose of the legal process. And he still showed through during his years on the Supreme Court, where his combativeness sometimes clashed with that serenity which, in theory at least, is considered a hall-mark of that august

forum. In all these roles, it was the quality of tenseness, of intensity, of zest, of passion, that shone through the self-imposed intellectual discipline of the trained scholar and that constituted the very core of Frankfurter's personality.

In stressing these facets, I merely wish to emphasize some of the less-known sides of Frankfurter's character. By no means should they detract from his better-known quality of an unusually brilliant mind. Intellectually, Frankfurter's main attributes were an incisiveness of analysis, a sharpness of thought, and a precision of articulation, which put him on a level almost unique among his contemporaries. It was these attributes which mainly account for his unusually rapid career and for his early acceptance as an equal by all those leaders of the legal profession with whom he came into contact: Professors Ames and Beale and Gray, Henry Stimson who had an equally distinguished record as an attorney and as a statesman, Brandeis and Holmes. Indeed, what made his swift rise all the more remarkable was the fact that, by background, he was an outsider. His was not the position of an Oliver Wendell Holmes, "to the purple born" among the old families of Boston, nor even that of a Louis Dembitz Brandeis who, coming from Kentucky to Massachusetts, was already securely entrenched in American life. Frankfurter was a first-generation immigrant, reared in comparative poverty, and his English—for all its richness and excellence—held to the end a trace of a foreign accent. Not unlike Disraeli in English politics some two generations earlier, he had to climb all the distance from the periphery of his country's society to its top level before he could offer his full contribution to the country's future. In this climb, Ames, Stimson, Brandeis, Holmes were to him men to lean on at first, but it did not take long before the power of his intellect gained for him their friendship. The experience did not pass in vain: to the very end Frankfurter cultivated a strong pragmatic sense of human relations and knew how to make use of them. But the point is that very early in life Frankfurter became one of those few who exercised initiative and influenced their surroundings in a significant manner. While still a student, he was asked to collaborate with one of the greatest legal scholars of the day, John Chapman Gray, in preparing a book. Soon after accepting a staff position with Henry Stimson, then Federal Attorney for the Southern District of New York, Frankfurter became a man whose advice and judgment were sought after by his chief. Stimson soon moved on to Washington as a member of President Taft's cabinet and took Frankfurter with him. The young attorney thus became a member of the inner circle of American public life at a time when this circle was small and relations between its members were intimate. When recalled in 1914 to a professorial chair at Harvard, his reputation as both a dynamic and an astute adviser on current affairs was already solidly established.

It was now, during the first thirteen years of his academic career, between 1914 and 1927, that Frankfurter acquired the name of a foremost and intrepid fighter for individual freedoms and social justice. His sponsorship of the magazine *New Republic*, his appearance in cases where social legislation

had to overcome the objection of being contrary to the constitutional doctrine of freedom of contract,¹ his reports on the Mooney case and the Bisbee deportation, and, finally, his advocacy of Sacco and Vanzetti, all fall within this period. These activities made Frankfurter a widely known, but also a very controversial figure: to the progressive and labour groups he appeared as their outstanding champion, to conservatives—as a dangerous and almost subversive radical.

It was during that time, also, that Frankfurter got involved in a different variety of extra-academic activities. Recalled during World War I to Washington to work for the government on industrial and labour relations, he now became as close—if not closer—to the inner circle of the Democratic administration as he had been to that of the previous Republican administrations. His knowledge and acumen were called upon in solving various problems, including diplomatic ones, both during the war and at the Paris peace conference. He became, to use a latter-day expression, a “trouble shooter” for the government. It was during the war years also that he was drawn by Louis Brandeis into the Zionist movement, and at the Paris peace conference he played an important part in securing international recognition for Jewish claims on Palestine. His most notable achievement in this respect was the exchange of letters between himself and Prince Feisal of the Hedjaz (later King of Iraq) in March 1919, brought about with the assistance of the famous Colonel T. E. Lawrence and containing a conditional Arab agreement to the Zionist programme. After returning home, Frankfurter continued for some time his Zionist activities, but withdrew to a more passive role in 1921, when differences arose between Justice Brandeis and his adherents and the group led by Dr. Weizmann, with the latter gaining ascendancy. Nonetheless, Frankfurter’s interest in Zionism remained unabated, and whenever the movement faced difficulties, he did his share both privately and in public to come to its assistance.² In time, he became quite close to Dr. Weizmann, by then the foremost Zionist leader and later the first President of Israel, both personally and in respect of many commonly held views and attitudes.

It would have been quite out of keeping with Frankfurter’s variegated interests and complex personality to leave out these “extraneous” activities of his when drawing a picture of his life and work. It was largely through these extracurricular activities that Frankfurter acquired his reputation of a forthright fighter for progressive causes and his influence on affairs. In this, he was a pace-setter for what has since become a fairly wide-spread pattern: that of a legal scholar who influences contemporary society not only as an attorney, a law teacher or a judge, but also as a statesman, a social crusader, and a

¹ *Bunting v. Oregon*, 243 U.S. 426 (1917); *Stettler v. O’Hara*, 243 U.S. 629 (1917); *Colyer v. Skeffington*, 265 Fed. 17 (1920); *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923).

² See Frankfurter’s article: “The Palestine Situation Restated” (*Foreign Affairs*, April 1931).

policy-making public official.³ An omission of this side of his life would result in too restricted and hence inadequate a picture. Not only was Frankfurter a forerunner of this type, but also its outstanding example, unrivalled in American life to this day in the extent of his interests and of his influence. After 1927, Frankfurter became more reticent in his public activities of this kind, but his influence continued growing and expressed itself, after 1932, especially in his role as the man whose advice was most eagerly sought and followed in bringing young legally trained talent to policy-making positions in the public service of the United States. Despite his own disclaimers, it is not unfair to regard Frankfurter as being to a large extent the spiritual father of the New Deal, in the sense of providing it with many of its ideas and with many of its personnel. But after this has been said, it is time to turn to the principal topic of this essay, namely to the evaluation of the ideas held by Frankfurter concerning the functions of law and of its main exponents—the lawyer, the law teacher, the legislator and the judge—in contemporary society.

2

Much comment has been aroused by the striking change that occurred when Frankfurter, the intrepid fighter of Sacco-and-Vanzetti fame, the “intellectual father of the New Deal”, ascended the Supreme Court bench and almost overnight became a “conservative” judge. One explanation often given is that with growing age he naturally became more moderate. There may be something in it. It isn’t always that age induces moderation. Exceptions abound, and can be found even in the history of the American judiciary. Still, in a great many cases age does produce this result. The adage: “Yesterday’s radical is today’s liberal and tomorrow’s conservative” is quite often correct, not only in the sense that a *doctrine* which was yesterday a radical innovation becomes an accepted truth today and may well appear dated tomorrow, but also in the sense that a *man* who yesterday was an impatient innovator may have evolved since into a mild well-wisher and, sated or saddened by continuing developments, may by tomorrow start looking back nostalgically to “the good old days”. Possibly some of this process also went on in Frankfurter’s mind. His sense of combativeness and of social injustice⁴ may have become dulled, and his sense for the fitness of things, never completely dormant (witness his life-long admiration for tradition-bound British ways), may have sharpened. But this alone hardly accounts for the change, and certainly not for its suddenness. We should not content ourselves with “psychologizing” Frankfurter; we should also approach him in terms of his own rational standards.

³ Lawyers who became outstanding statesmen were of course no novelty in American history. From Jay through Marshall, Webster, Calhoun, Lincoln, and to Elihu Root, Taft, Stimson and Hughes, they were numerous. But Frankfurter was the first leading *academic* lawyer to enter this road.

⁴ This term is used in the sense employed by the late Professor Edmond Cahn in his *The Sense of Injustice*, N.Y.U. Press, 1949.

Thus viewed, Frankfurter's view of the law held in it two distinct components: law as an instrument of social policy was one thing; the function of a judge was another. It is up to the legal practitioner to pursue socially desirable ends by means of existing law; where this was inadequate to the purpose, it is his duty to press for law reform. The law teacher's task is to explain this to the lawyers of the future and, while guiding them through the intricacies of authoritative material and proper legal thinking, to warn them against becoming mere narrow-minded technicians. But though prodded and aided by the lawyer and the legal scholar, it is the politician, the law maker, and generally the public-spirited citizen, who should shoulder the *main* responsibility for keeping the law abreast of the times and of their requirements. From the vantage point of those decades when Frankfurter's social ideas were formed, the two decades immediately preceding and immediately following the First World War, these requirements were the enlargement of the non-conformist's liberties on the one hand, and the improvement of the socio-economic condition of the under-privileged groups of the population on the other. The former goal implied stricter limitations upon governmental power where it encountered dissident opinion. The latter—as broad an interpretation as possible of the powers of an enlightened government to enact and to carry out social legislation, and the provision of additional powers to this end whenever necessary. In the American context this meant, generally speaking, broadening the scope of federal against State power, permitting both to regulate property rights, but restricting them should these interfere with freedom of opinion, expression, and organization. And where Frankfurter took a stand as a citizen, as a teacher, as an attorney, or as a public official, he did it in the spirit of this conception. In so doing, he followed the basic philosophies of Holmes and Brandeis and applied in practice that theoretical concept of sociological jurisprudence which was worked out by his older Harvard colleague Roscoe Pound.⁵

Just to the judiciary Frankfurter assigned a far more modest role. One wonders whether this attitude toward the judiciary might not have been influenced by the part which courts had played in the main during the decades between the Civil War and the 1940s. American judges of that period took mostly a stand diametrically opposed to that advocated by

⁵ In practice Frankfurter went far beyond Pound. After their joint public intervention (together with other lawyers) following the *Abrams* case—*Abrams v. U.S.*, 250 U.S. 616 (1919)—in which they protested questionable practices of the Federal Department of Justice, Pound became rather reticent in taking up positions in public. In the *Sacco-Vanzetti* case the two men parted company rather pointedly, and in later years Pound became fairly conservative in his outlook (in which, some critics might say, he did no more than anticipate Frankfurter). Nevertheless, the basically sociological approach of Pound to law continued to serve as theoretical underpinning for all those on the American scene who looked upon law as a vehicle for social progress and not merely as a defence-mechanism for the existing order of things.

Frankfurter: they tended to protect property rights against socially-oriented legislation and regulations, but to interpret broadly governmental powers in the sphere of personal rights. It is possible that this attitude of theirs moved Frankfurter to expect improvement from political bodies, but to fear that nothing but further deterioration would ensue if courts were to be granted increased liberty of action. In this respect he differed from both Holmes and Brandeis who, even when on the bench, attempted to reform existing law through forward-looking judicial decisions; rather, he showed traces of the influence of that group of law teachers under whom he had studied—men like Beale, Wambaugh, Willistone—who, for all their brilliance, were inclined toward literal-mindedness where legal construction was concerned and therefore encouraged future judges-to-be to stick to established tradition.⁶

3

On Frankfurter's role on the bench much has been written by specialists who have delved into his opinions much more deeply than the present writer has done,⁷ and no attempt will be made here to add to the existing analyses of Justice Frankfurter's opinions. Only their subjective evaluation will be offered here, for whatever it may be worth, and even this in the context of the views which were held by him prior to his joining the Supreme Court. That his performance on the bench disappointed many of his former followers cannot be doubted; but this disappointment is largely besides the point. What matters is to know whether Frankfurter's judicial opinions represent a sharp break from his formerly-held views or whether they can be explained as a mere development of his life-long tenets, perhaps with a change of emphasis not unnatural in the circumstances explained above. This writer believes that, if one considers the dichotomy which existed in Frankfurter's view between the essentially dynamic role of the lawyer, the teacher, the politician, and the more static role he assigned all along to the judge, no fundamental inconsistencies will be found in his attitudes. Whether his basic assessment of the role of the judiciary in modern society, especially in that of

⁶ A certain change seems, though, to have taken place in Frankfurter's views in this respect. In his early writings one may detect a tendency to allot to courts a larger place in adapting law to new conditions. See, in this sense: A. M. Bickel, "Applied Politics and the Science of Law: Writings of the Harvard Period", in: W. Mendelson (ed.), *Felix Frankfurter—A Tribute*, N.Y., 1964, p. 164 ff.

⁷ In addition to W. Mendelson, *op. cit.*, see particularly: C.E. Jacobs, *Justice Frankfurter and Civil Liberties*, U. of California Press, 1961; L. L. Jaffe, "The Judicial Universe of Mr. Justice Frankfurter" (1949) 62 Harv. L.R. 353-412; W. Mendelson, *Justices Black and Frankfurter: Conflict in the Court*, U. of Chicago Press, 1961; H. S. Thomas, *Felix Frankfurter: Scholar on the Bench*, Johns Hopkins Press, 1960. See also: M. O. Forkosh (ed.), *Essays in Legal History in Honor of Felix Frankfurter*, N. Y., Bobbs-Merrill, 1966, pp. 29-73, 289-319, 337-49. Excerpts from Justice Frankfurter's principal opinions up to 1949 are assembled in: S. J. Konefsky, *The Constitutional World of Mr. Justice Frankfurter*, N.Y., Macmillan, 1949.

the English-speaking world, was correct or otherwise, is a different question. Nor am I prepared to argue that Frankfurter's views concerning the judiciary, formed at a time of relatively progressive legislatures and a conservative judiciary, were still reasonably applicable at a period when legislatures in the United States turned conservative and took a jaundiced view of anything smacking of non-conformism while judges began to show greater readiness to move with the times. However that may be, the total effect of Frankfurter's position on the bench was undoubtedly to strengthen conservatism.

There was also a second element involved in Frankfurter's stand. All along, and already in his years as government adviser and as law teacher, Frankfurter was an advocate of "strong government". He did not favour the exercise of governmental powers at the expense of express constitutional limitations or of essential human and social rights, but within these limits he looked askance at any attempt, by the judiciary or otherwise, to tamper with the legislator's and the executive's essential prerogative to govern efficiently and to meet the challenges of the day. At the time Frankfurter ascended the bench, he began to be concerned about the increasing tendency of liberal jurists to set ever-narrowing limits to governmental power in dealing with recalcitrant or asocial individuals and groups, a tendency which, he feared, might threaten that very effectiveness of government which he regarded as essential. If legislatures, in the wake of public opinion, chose to set narrower limits to governmental authority, just as when they—within constitutional limits—chose to broaden it, well and good. But when legislatures remained silent on this point, judges, in his view, should be careful not to interpose additional difficulties in the workings of governmental machinery; they should rather adhere to old-established doctrine. This attitude of Frankfurter's, so it seems to this writer, largely explains his extremely cautious use of the weapon of constitutional review of legislation as well as his strong advocacy of *stare decisis*. If, incidentally, it was the less enlightened State that benefited from this attitude of his as against the more enlightened Federal Union or municipality, this was just too bad, but the remedy lay, in his view, with the constituent and legislative authorities and with those social forces to which Constitution-makers and legislators should be sensitive, not with the judicial arm. Hence his characteristic adherence to *stare decisis* and to those doctrines which were protected by it: *stare decisis*, to him, was not only a means to maintain *legal* stability; it was, above all, a means to maintain sound government in the face of possible judicial encroachment. One might say that he never overcame the fear of "nine evil old men", not even when the composition of the Supreme Court changed beyond recognition and when he, himself, had joined it.

Directly connected with this attitude is what might be called Frankfurter's "double standard" in dealing with the common law and with statutes. Where common law, i.e. essentially judge-made law, is concerned, judges, in Frankfurter's view, may continue what their predecessors have started and may

enjoy a fairly wide latitude in developing in the light of changing conditions those rules which their predecessors had formulated. Similar latitude may be allowed to the judiciary when applying formulas which the legislator and especially the Constitution-maker had left deliberately vague. But where the Constitution-maker and the legislator have clearly enunciated their purpose, let the judge treat the law thus laid down with scrupulous respect. This view was concisely expressed by Frankfurter years after joining the Supreme Court:

“In the realms where judges directly formulate law because the chosen lawmakers have not acted, judges have the duty of adaptation and adjustment of old principles to new conditions. But where a policy is expressed by the primary law-making agency in a democracy, that is by the legislature, judges must respect such expressions by adding to or subtracting from the explicit terms which the lawmakers used no more than is called for by the shorthand nature of language”.⁸

In the same article, be it noted, Frankfurter takes a stand on the disputed point of using legislative material—discussions in the legislature and what the French call *travaux préparatoires*—in interpreting statutes. Here, respect for the legislature and its acceptance as principal factor in laying down the law overcame Frankfurter’s attachment to British tradition. After all, the reluctance of British judges to consider legislative debates and similar sources when interpreting statutory law is not unconnected with the fact that British courts have never become quite reconciled to the theory of parliamentary supremacy in the field of law and still regard statutory law as an interloper in the essentially judicial function of laying down the law—an interloper to be obeyed since it cannot be helped, but no more. However, where the statute does not speak for itself but has to be interpreted, the judge reverts to his sovereign role of interpreting it in the light of his own understanding and checked by nothing else than the canons of interpretation laid down by other judges, *but not in the light of anything said or written about the statute prior to its formal enactment*. Frankfurter did not share this sceptical attitude toward legislation and legislator. Hence, he was fully prepared to consider the legislator’s views even when expressed in a less formal manner in the course of parliamentary debates and *travaux préparatoires*.

4

The same respect for the legislator as the principal and essentially dynamic participant in the law-making process, *and one fully entitled to his dynamism*, is reflected in Frankfurter’s attitude toward judicial review of legislation. This attitude, formed at a time when congressional legislation was responsive to the social ends advocated by him and appeals to the Constitution were intended to slow down progress, has survived into the period of his

⁸ F. Frankfurter, *Some Reflections on the Reading of Statutes*, Ass’n of the Bar of the City of New York, 1947, p. 15 f.

own service on the bench, when the trend was largely reversed. Frankfurter's admirers might call it a victory of strict legal logic and of judicial objectivity over personal views; Frankfurter's critics might see in it a victory of routine thinking no longer capable of evaluating new circumstances or even a deliberate surrender to the fashions of the day. Both would point, critically or admiringly as the case may be, to the contrast afforded by Mr. Justice Black and Mr. Justice Douglas, to whom the social effect of a questioned rule seemed to constitute the overriding consideration in all circumstances.

Following his line of reasoning, Frankfurter could not help it if State legislatures, sometimes admittedly retrograde, benefited from this attitude in those domains which the Constitution left to their exclusive or concurrent jurisdiction. Whenever the question of constitutionality was raised, Frankfurter's rulings showed that in his opinion the presumption lay in favour of the legislature, and as between Union and State—in favour of the State, *since it is to the latter that the United States Constitution assigns residual powers*. If the effect of this construction, at a time of a conservative majority in Congress and a still more conservative composition of State legislatures, was to strengthen conservatism—that was the business of the legislators and of the enlightened public (including, first and foremost, lawyers and law teachers), but not the business of the courts.

If we accept the basic premise outlined above, we shall be able to understand Frankfurter's attitude when it came to applying general expressions in the Constitution, such as the commerce clause, the general welfare clause, the full faith and credit clause, and the due process clause. Their very vagueness makes them powerful potential instruments in the hands of those who wish to curtail legislatures and executives. Therefore, they should be applied with extreme caution. The commerce clause, if restricting State powers on the one hand, provides means of action for Congress and President on the other; its advantages and disadvantages, to a mind like Frankfurter, appeared balanced, and therefore his attitude toward it was fairly benevolent. This writer recalls, from his Harvard days in the early 'thirties, that in his seminar Frankfurter favoured a rather broad construction of the commerce clause, though it seems that later, on the bench, when he began being concerned over States' rights, he became more circumspect in this regard. On the other hand, the full faith and credit clause curtails the freedom of action of the State vis-à-vis other States, and the due process clause restricts the freedom of both Union and States. Therefore Frankfurter views both with extreme caution. He applies them within the limits of stare decisis, but does not hide his reluctance.

This writer vividly recalls that, when teaching at Harvard, Frankfurter used to insist that the due process clause was meant originally as a purely procedural safeguard and that the substantive meanings given to it by successive generations of lawyers lacked justification. His real attitude toward the clause came out during a visit which this writer paid him, a few years

before his retirement from the Supreme Court. "Do you have a due process clause in Israel?" asked the Justice. Upon my explaining that, in the absence of a formal Constitution, Israel has no constitutional provision of that import, but that Israel's judges try to read into their country's statutes and regulations some restraints akin to "due process" which they attribute to the common law or to natural justice, Frankfurter replied with feeling: "Well, when you write a constitution, for God's sake don't put into it a due process clause!"

His preoccupations with the requirements of effective government have led Frankfurter generally to uphold the power to tax, both of the Union and of the States. The explicit authority granted to the Union in the United States Constitution and his concern for the ability of governments to carry out their tasks, all seemed to him to point the same way. As a corollary, he was inclined to interpret rather broadly the general welfare clause and to advocate judicial self-restraint when tempted to interfere with what the competent political agencies regarded as necessary in pursuing the country's welfare.

In no field is Frankfurter's preoccupation with effective government as manifest as in his treatment of matters impinging upon national security. It is my guess that his early experience as government adviser in World War I days exercised a lasting influence on his thinking in this respect. Already in his teaching days he used to explain the need for courts to avoid interfering with governmental activities when these bear an emergency character; Abraham Lincoln and the Civil War cases served as his main illustration. Judicial self-restraint vis-à-vis security measures continued to mark his work on the bench to an increasing extent. To many observers it appeared that in this domain he came dangerously near to neglecting constitutionally guaranteed civil liberties.

The record of Justice Frankfurter in civil liberty cases is a mixed one. Professor Jaffe's analysis of his attitude might be not unfairly summarized as implying that Frankfurter tends to uphold civil liberties (including the non-admissibility of evidence illegally obtained) *except* when this requires to deny the constitutionality of legislation. When the issue of constitutionality is involved, Frankfurter recommends judicial self-restraint so as to prevent encroachment by the courts on legislation. This summary appears to be eminently fair. It may lead one to ask, however, whether its real significance is not in implying that in the hierarchy of constitutional principles Frankfurter was ready to subordinate civil liberties to the principle of separation of powers.

Concern with effective government and the maintenance of public order again show in Frankfurter's attitude toward labour cases. An early protagonist of organized labour, Frankfurter continues to advocate, when on the bench, the right of labour to organize, strike and picket in support of its demands, but he strongly upholds the power of public authorities reasonably to regulate these as well as other activities, and most emphatically so when these activities reach the point of coercion.

What this writer regards as the most questionable group of opinions delivered by Justice Frankfurter is that which deals with the place of religion. In the flag allegiance cases, *Minersville School District v. Gobitis*⁹ and *West Virginia State Board of Education v. Barnette*,¹⁰ he upholds the power of the public authorities to demand allegiance to the flag in public schools in the face of a claim of religious scruples. On the other hand, in *Everson v. Board of Education*¹¹ and again in *Illinois ex rel. McCollum v. Board of Education*¹² he prohibits the use of free public transportation of parochial schools and the use of public school premises for religious teaching as impinging on the "establishment of religion" clause in the First Amendment to the United States Constitution. Why these latter acts constitute "establishment of religion" is just as unclear as why disregarding religious scruples when demanding a pledge of allegiance does not constitute interference with that free exercise of religion which is guaranteed in the very same amendment. Either of these groups of opinions is difficult to explain in itself. To reconcile the two groups with one another is more difficult still. If we confine our analysis of these opinions to rational considerations only, it is possible that concern for the principle of national security brought Frankfurter to the position he took in the flag cases, the idea being that early inculcation of patriotism is the surest foundation of loyalty in later life. But if so, this is a blatant exception to Frankfurter's general disposition to deal with cases pragmatically, on the basis of specific facts, rather than on the basis of broad principles: the argument that national security is substantially involved in a routine ceremony at the public school level is indeed far-fetched, especially if we consider that in many an American jurisdiction requirements of national security have been ignored in respect of matters far more sensitive; that oaths have been dispensed with in court proceedings for religious reasons, and that provision has been made for exempting ministers of religion and conscientious objectors from military service.

Already during Mr. Justice Frankfurter's tenure on the Supreme Court, a majority of his colleagues began moving away from the views which he held and defended so eloquently. Since his retirement, the Court moved away even further from these concepts, intent on furthering by judicial means a more equal and more equitable society.^{12a} Under the guidance first of Chief Justice Vinson and then of Chief Justice Warren, both men of practical politics before they became judges, the Court has assumed, perhaps more decisively than ever before, the task of supplementing existing law and of participating in the creation of a new social framework. At times, this task is undertaken in aid of the Executive and of Congress, stepping in where

⁹ 310 U.S. 586 (1940).

¹⁰ 319 U.S. 624 (1943).

¹¹ 330 U.S. 1 (1947).

¹² 333 U.S. 203 (1948).

^{12a} Possibly, the Court has moved too far from these concepts, especially in the field of criminal law. A swing back to Frankfurter's position of self-restraint may be due soon. Cf. A. T. Mason "Understanding the Warren Court" (1966) 81 Pol. Sci. Q. 523-63.

these cannot or do not care to act directly; at other times going beyond or even against the inclinations of these agencies. All this is done in the guise of interpretation or reinterpretation, but looking at the process from the outside one cannot deny that we face a creative, and not merely an interpretative, activity. Never, since the formative period of English law which came to an end with Lord Mansfield and since the brief period of judicial statesmanship in America under John Marshall, did the courts engage in policy making as openly as does the U.S. Supreme Court today. Even the acrimonious debate which tends to accompany many of the Court's contemporary decisions can be understood more readily in this context: a policy-making body is apt to be more torn by dissension, and to invite more dissension, than a mere law-applying agency.

Mr. Justice Frankfurter was with the Court during the first phase of this period. His role was one of holding it back, lest it innovate too stormily. This role, from a broader perspective, is as necessary as that of a forward-pushing element. It fulfills, *mutatis mutandis*, the same function as does a moderate opposition in a radical parliament; except that on the Court the lines between majority and minority, necessarily affected by legal reasoning of a high professional standard and stemming from the influence of differing jurisprudential schools, were drawn less clearly and less consistently, than between opposing wings in a legislature.

Was Frankfurter happy over the Court's active—or over-active—role? Obviously, not. The sometimes very sharp language of his dissents makes this quite clear. But if given the choice between a politically active Court moving forward somewhat neglectful of the duty of judicial self-restraint and a Court which—as in the days of McReynolds, Sutherland and Van Devanter—pressed reactionary politics on the country, it is a safe guess that he would have preferred the present position.

5

It remains to take a look at Frankfurter's activity as a legal scholar and teacher. This writer believes that, in the perspective of time, this will prove the most significant facet of his career, more significant than his service on the bench. After all, he did not figure among those great American judges who, like Marshall, Story, Taney, Bradley, Holmes and Brandeis, opened new vistas for American law, or who, like Stone and Cardozo, used their opinions as vehicles for deep-surgic legal research, or who, like Vinson and Warren, deliberately blended judicial decisions with practical statesmanship. But as an outstanding teacher in the country's foremost Law School, as a man who trained an entire generation of lawyers, public officials, judges, and more law teachers, Frankfurter's influence was a deep and lasting one. This so much more, since, in his teaching capacity, Frankfurter did not shackle himself by self-imposed restraints—as later on the bench—but threw himself into the task with all he had to give.

A characteristic of Frankfurter's at the University was that he had come to it from practical work, and not, as is the case of so many academic jurists, from long theoretical study. Very learned as he was in the body of American, and to a lesser extent of English decisions, fully at home as he was in Federal statutory law and in the vast jungle of Federal regulations, he did not care particularly about the theory behind it all. He approached his material from the point of view of its *effect*. Upon closer scrutiny, we might say that this emphasis on "effect" resolved itself into two main interests: interest in the effectiveness, the workability, of a given legal precept; and interest in the positive or negative contribution which a precept could be expected to make to a socially desirable goal. He was essentially a pragmatist, not a theorist.

In this respect he differed markedly from the other outstanding leader of the Harvard law faculty—Roscoe Pound, with whom he shared a fundamental concern for the social consequences of the law. Pound was pre-eminently a legal theorist who liked to mould the immense mass of legal material—American and foreign, modern and ancient—within his grasp into theoretically tenable categories and to explore specific problems and solutions with reference to these categories. To this end, Pound relied heavily on the legal theorists of continental Europe, and on "jurisprudence", or "legal philosophy" as a branch of the science of law.¹³ Similarly theoretical in their approach among outstanding American teachers of the period, though on a somewhat narrower basis, were men like Hohfeld and Llewellyn. Frankfurter, on the other hand, was averse to classification and to theoretical generalizations. I am almost tempted to say that he felt no need for a legal theory after that which he had learned at the feet of his teacher Gray. Though a man of unusually wide intellectual curiosity and cultural interests, devoted to a universal humanistic and literary outlook in the Holmesian tradition, where law was concerned he rarely stepped out of the familiar home grounds of American and English law. In consequence, there were few contrasts as vivid at Harvard Law School as those between the graduate seminars held by Frankfurter and Pound respectively. The whole atmosphere as well as the method of teaching were totally different. And once these two men, so different from one another in background and in scholarly approach (though not in temper: both were rather quick-tempered), parted ways over the treatment to be accorded to the Sacco-Vanzetti affair, they never again came really close.

Frankfurter's approach was mirrored in his writings too. His published works did not go much into theory, not even into the theory of legal pragmatism. None of them, except his lecture, "Some Reflections on the Reading of Statutes", already quoted above, contains a very explicit exposition of his

¹³ On Pound, see: J. Stone, "Law and Society in the Age of Roscoe Pound" (1966) 1 *Is.L.R.* 173–221.—In a way, younger teachers and graduate students at Harvard Law School tended to divide between "Frankfurterites" and "Poundites". It is only fair to admit that this writer belonged to the camp of Pound-followers. He hopes that this fact does not unduly colour the present essay.

doctrinal views. It is noteworthy that most of his writing was done in the form of articles rather than of books, and that the latter were relatively short. One might say that the process of lengthy writing was a bit too slow for Frankfurter's ever-moving, ever-bubbling thought. This, perhaps, is why, in the case of his two most extensive studies, he found it advisable to share the work with a younger colleague or disciple. But in each of his writings he took up a specific topic, always one of great practical import, dealt with it concisely, clearly and exhaustively, so as to leave little to say even to the most meticulous academic scholar.¹⁴

Nothing that has been written here can express adequately that intellectual effervescence, that permanent being-on-one's-toes feeling, which permeated his classes, seminars, and private conversations. It was a never-ceasing challenge. He certainly did not suffer fools gladly. Only the best, those who knew how to combine solid and detailed knowledge with a quick, sharp and analytical mind and with a sense of devotion to social values, could feel at ease with him. And these formed an élite which went out the length and breadth of the country, there to perpetuate Frankfurter's work, to serve as intellectual yeast that fermented and modernized the structure of American law. They are found today among the older group of practising attorneys, law teachers and judges throughout the United States, but more especially along the Atlantic coast. In the early 'thirties, when many of his disciples descended on Washington in the wake of Franklin Roosevelt, they were sometimes derisively called, with a hint to his name, "the hot dogs", and considered to be dangerous radicals. By now, they are not so "hot" any more, but have cooled off considerably. Changing conditions caused many of them to modify their attitudes, as even their teacher's attitude had undergone certain changes. But the *methods* which he taught them, those of incisive analysis based upon careful mastery of detail, upon a sense of the practical, and upon a deep awareness of the link between law and society—these methods have become part and parcel of their personality and are being transmitted by them to succeeding generations of American law students. Herein lies what is probably the greatest and most lasting contribution of Felix Frankfurter to American law.

¹⁴ Frankfurter's most significant works are: *Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury* (with Th. G. Corcoran) (1926) 39 Harv. L.R. 917-1019; *The Case of Sacco and Vanzetti*, Boston, Little Brown, 1927; *The Business of the Supreme Court* (with J. Landis), N. Y., Macmillan, 1928; *The Labor Injunction* (with N. Greene), N.Y., Macmillan, 1930; *The Public and Its Government*, Yale U. Press, 1930; *The Commerce Clause under Marshall, Taney and Waite*, U. of North Carolina Press, 1937. And see three volumes of collections of Frankfurter's papers and addresses: *Law and Politics*, N.Y., Harcourt, 1939; *Of Law and Men*, N. Y., Harcourt, 1956; *Of Law and Life and Other Things that Matter*, Harvard U. Press, 1965. And further see the volume: *Felix Frankfurter Reminisces*, N.Y., Reynal, 1960.