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Review of "Law and Politics: Occasional Papers of Felix Frankfurter, 1913-1938," Edited By Archibald MacLeish and E.F. Prichard, Jr.

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question and should be reserved for "men trained and skilled in coping with practical human affairs" (273).

But time grows late and even now a disillusioned public gathers at the office door. Sneak out the back way, boys, and will someone please warn the lawyers at Yale that amongst them is a layman boring from within.

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LAW AND POLITICS. Occasional Papers of Felix Frankfurter, 1913-1938. Edited by Archibald MacLeish and E. F. Prichard, Jr. New York: Harcourt, Brace & Co., 1938. Pp. 352. $3.00.

In 1936 Professor Frankfurter, Harvard Law '06, wrote: "More and more, the ablest of [the young]—in striking contrast to what was true thirty years ago—are eager for service in government."[1] In this revolutionary trend, the young law officer of the Bureau of Insular Affairs was thirty years ahead of the market which, as Byrne Professor of Administrative Law at Harvard, he helped later to supply. No doubt, he never consciously sized up the marketability of the various careers available to him and to his students. Rather his sense for latent issues—which Mr. MacLeish, in a fine foreword, terms his journalistic gift—spotted the exceptional importance in American life of "that eternal and world-wide affinity between politics and law."[2] His life-long attention to "public law" is striking on two counts. First, such concentration of aim would seem to run counter to his boundless curiosity and humanistic cultivation, traits revealed only by an occasional distant reference in his writing. (Professor W. P. M. Kennedy has implied that politics and law are of transcendent importance in Canada because its culture is thin and derivative;[3] may not the same have been true of us, to some extent, during Professor Frankfurter's formative years?) In the second place, his constant focus on crucial, topical questions does not gibe with his insistence that research should be disinterested, almost idly curious inquiry, remote from social objectives.[4] Although Professor Frankfurter, like every decent scholar, did his best to be objective once he had set his problem, I am sure it was not mere chance that made him ask related and socially significant questions in administrative law and criminal law administration, in social legislation, and in the role of the Supreme Court in enforcing the constitutional divisions of power.

The essays in this volume, skillfully chosen to avoid repetition, and carefully edited to avoid technicalities and footnotes, give glimpses of his work in all these fields except for criminal law, which is represented only indi-

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1. P. 249, The Young Men Go to Washington.
2. Stout, *Public Service in Great Britain* (1938) 62.
3. Some Aspects of the Theories and Workings of Constitutional Law (1931) 99.
4. P. 287 et seq., The Conditions for, and Aims and Methods of, Legal Research.

rectly, through inclusion of "The Case of Sacco and Vanzetti."[5] These intellectual raiding parties into the no-man's borderland of law and politics are remarkable for their élan of execution and constant shrewdness in discovering the outposts of social danger. Today these exploratory raids are being followed up by an immense infantry of scholars. For Professor Frankfurter had the leader's ability not only "of piercing the future by knowing what questions to put and what direction to give to inquiry,"[6] but also of winning attention to these questions in his students, colleagues, and friends. He succeeds by making his students into his colleagues and friends, and vice versa. The foreword by Mr. MacLeish, a former student, is in itself a single but appealing instance.

Mr. Frankfurter's book on Marshall, Taney, and Waite, not here reprinted, is fine.[7] On the other hand, his essays on Holmes, Brandeis, and Cardozo are weak.[8] One may share Professor Frankfurter's contagious enthusiasm for these three justices, his friends, and yet feel that handsome exegesis should be coupled with critical revaluation. Mr. Samuel Seabury recently praised the often precious and conservative legalism of Mr. Justice Cardozo in terms which the writer of essays on law-and-politics could hardly approve: "Our lady of common law," Mr. Seabury said, "never had a more faithful devotee in her services [than Cardozo]. He rendered in this field the service which again demonstrated the dynamic character of the common law which serves to remind us how much better off we would be if rules of conduct were governed more by judicial adjudication and less by ill-considered statutory enactments."[9] This could be no service to the same Mr. Frankfurter who shares Mr. Justice Holmes' laissez faire views toward "social" legislation, and Mr. Justice Brandeis' usual preference for legislation over adjudication in setting rules of conduct. For Mr. Justice Holmes, these views stem from a cynic's faith in an elusive brand of nineteenth-century determinism; for Justices Brandeis and Frankfurter, they stem from an equally untested faith in popular wisdom operating through majority rule. In consequence, Professor Frankfurter's faith gets in the way of his perspective both in analyzing Brandeis and Cardozo, who share it, and in analyzing Holmes, who happened through the accidents of the minority position on the Court to reach similar conclusions from his different premise. But that same faith shows its positive side in dealing with judges who have neither Holmes' cynicism nor Brandeis' humanity. For without that driving faith, Professor Frankfurter's scholarly preoccupations would have left him no time for the biting attacks on Taft as Chief Justice,[10] on Coolidge and Kellogg,[11] and on various illiberal deci-

5. Reprinted from (March, 1927) The Atlantic Monthly 140-188.
6. P. 291, The Condition for, and the Aims and Methods of, Legal Research.
7. *The Commerce Clause under Marshall, Taney, and Waite* (1936).
8. Pp. 61-126.
9. Address at Memorial Service, Nov. 30, 1939, as reported in N. Y. Times, Dec. 1, 1939, p. 23: 1.
10. See p. 37, Taft and the Supreme Court; and p. 41, The Same Mr. Taft, both reprinted from The New Republic.
11. P. 135. Karolyi, Kellogg, and Coolidge, reprinted from The New Republic.

sions.[12] Without that faith and the courage to follow its lead, his shrewd sensing of issues, his journalistic gifts, and the comforting warmth of friends of all views and social classes would have served merely to warn him from entering in 1927 the already long embittered fight over Sacco and Vanzetti. His topical essay on their case remains to this day capable of stimulating both emotion and reflection because fiercely liberal and democratic convictions are harnessed to the sharply critical observations about evidence and the judicial process.

"I can express with very limited adequacy," he wrote in 1938, "the passionate devotion to this land that possesses millions of our people, born, like myself, under other skies, for the privilege that this country has bestowed in allowing them to partake of its fellowship."[13] Mr. Justice Frankfurter has bravely earned the ideal resources of America which we who are natives inherit in spendthrift trust.

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THE LAW OF TRUSTS. By Austin Wakeman Scott. Boston: Little, Brown & Co., 1939. Four volumes. Pp. 2981. $35.

This treatise on trusts is an outstanding contribution to the law in this field. Its thoroughness of discussion, with the presentation of conflicting views, its compactness of treatment, and its informality and clarity of style will make it an invaluable aid for anyone engaged with trust problems—student, teacher, practitioner or judge.

The book's relationship to the American Law Institute's Restatement of Trusts, for which the author served as reporter, give the book added significance. The entire treatise, except the last part of the third volume, follows the sectional order of the Restatement, including that part of the Restatement of *Restitution* prepared by the author. The author injects additional material at various points through the use of sections which are numbered similarly but with the addition of "A," in order to preserve uniform correspondence with the Restatement. This method of treatment will lend great weight to the force of the Restatement of Trusts in that the reasons and cases upon which the Restatement is based are made generally available for examination for the first time. At the same time there appear to be some disadvantages to this approach. It probably tends to confine the limits of the treatment, and at times it seems that a particular problem could have been comprehensively treated as a whole with greater advantage than was possible by dividing the treatment to match the relevant part of the Restatement. The matter of tort responsibility in the chapter on Liability to Third Persons may be cited as an instance in point.[1]

There will undoubtedly be some who will feel that more statutory

12. E. g., P. 129, Press Censorship by Judicial Construction; and p. 218, Labor Injunction Must Go, both reprinted from The New Republic.

13. P. 198, America and the Immigrant.

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1. Secs. 269.2, 270.2, 271A.2.