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FRANK MURPHY: THE WASHINGTON YEARS. By Sidney Fine.¹ Ann Arbor: University of Michigan Press. 1984. Pp. ix, 784. \$35.00.

*Michael E. Parrish*²

While they sat on the bench together listening to oral arguments during the 1944 Term of the United States Supreme Court, Felix Frankfurter scribbled a note to Frank Murphy which listed the latter's "clients":

"Reds"
Whores
Crooks
Indians and all other colored people
Longshoremen
M'tgors [Mortgagors] and other Debtors
R.R. Employees
Pacifists
Traitors
Japs
Women
Children
Most Men³

Frankfurter wrote only partly in jest. Frank Murphy epitomized for him the judge who decided cases with his heart, not his head, the judge who allowed his feelings of right and wrong to determine his vote without regard to something called "the rule of law," the judge who placed results above process. He was, in brief, the New Deal's version of James McReynolds. This perspective on Murphy, shaped by Frankfurter and his academic disciples, who espoused judicial restraint, "neutral principles," and other slogans intended to muffle the voices of judges in the nation's important policy debates, remained the orthodox one until the publication of J. Woodford Howard's judicial biography,⁴ which appeared in 1968 at the end of Earl Warren's tenure as Chief Justice. The constitutional revolution led by Warren and his brethren made judicial activism respectable again and encouraged a reassessment of those

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 3. S. FINE, *FRANK MURPHY: THE WASHINGTON YEARS* 259 (1984).
 4. J. HOWARD, *MR. JUSTICE MURPHY* (1968).

earlier practitioners such as Murphy, who had prepared the soil for the jurisprudence of the Warren era.

In his superb study of Warren published several years ago,⁵ G. Edward White suggested that the former Chief Justice stood alone among twentieth-century members of the Supreme Court in his "own reconstruction of the ethical structure of the Constitution."⁶ Warren, according to White, looked upon the nation's fundamental law as more than a framework of procedural rules allocating rights and powers. The Constitution rested upon certain ethical ideals that gave meaning to its language and which served as the foundation of American society as well—respect for the individual, fairness, decency, compassion. When deciding particular cases, he believed, the judge was obliged to "search for the 'Law beyond the Law,' to discern right from wrong 'in the midst of a great confusion,' and to discover the ethical path."⁷ Frank Murphy would have endorsed with enthusiasm this conception of the judicial role. During his brief tenure on the Court, which lasted from 1940 until 1949, an era marked by World War II and the beginnings of the Cold War, he alone among the Justices remained, as Osmond K. Fraenkel noted, "a consistent upholder of liberty."⁸

Murphy, who had served as Governor of Michigan during the sit-down strikes in the automobile industry and as Roosevelt's Attorney General, came to the Court at an important turning point in its history. In the wake of the "constitutional revolution" of 1937, the trauma of the Court-packing battle, and the appointment of four new Justices by Franklin Roosevelt, the Court groped for a new philosophy and a new institutional role. Judicial activism, equated with the notorious substantive due process of the *Lochner-Adkins* era, had been discredited. Few areas of economic and social life seemed beyond the reach of governmental controls following opinions such as *Parrish*,⁹ *Jones & Laughlin*,¹⁰ and *Steward Machine Co. v. Davis*.¹¹

The leading figures on the chastened Court—Hugo Black, Felix Frankfurter, and Harlan Stone—all espoused some form of judicial restraint which affirmed that the Justices had no special powers of constitutional exegesis and should therefore humble themselves before the majoritarian sentiments manifested in the decisions of

5. G. WHITE, *EARL WARREN: A PUBLIC LIFE* (1982).

6. *Id.* at 359.

7. *Id.* at 225.

8. S. FINE, *supra* note 3, at 404.

9. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

10. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

11. *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

Congress, the President, and the administrative bureaucracy. Black looked to the text of the Constitution, especially to the Bill of Rights, as the source of judicial limitation; Frankfurter, skeptical of this textual fundamentalism, argued that the limits flowed from history, precedent, and self-generated institutional prudence; Stone sought a formula that would restrict judicial intervention into the sphere of economic policy, but encourage it with respect to civil rights and liberties.¹²

Contradictions abounded. The fundamentalist Black, who would not tolerate governmental encroachments upon political speech, the press, or the free exercise of religion, did not read the first amendment's establishment clause in such an absolute fashion. Nor did he place the fourth amendment upon the same plane of constitutional respect as the first. Frankfurter, the apostle of judicial restraint and constitutional relativism, became an absolutist with respect to both the establishment clause and the fourth amendment. Stone, who advocated that the Justices show a tender regard for "discrete and insular minorities," did not extend such judicial protection to leaders of the Communist Party or Japanese-Americans.

Frank Murphy displayed far greater consistency in his jurisprudence than Black, Frankfurter, or Stone. He believed that the Constitution had been intended to protect personal liberty and that the Justices had a special obligation to defend freedom at a time when, because of economic calamity and war, the coercive powers of government had grown dangerously large. For Murphy, freedom also meant more than the absence of physical restraint by government. It presupposed an environment of economic security and opportunity that made it possible for ordinary citizens to have greater choice about their lives. Unlike Frankfurter, for instance, he saw nothing contradictory in the Justices affirming broad governmental powers with respect to workmen's compensation or fair labor standards, but curbing governmental powers over speech, press, and political association. From his perspective, both sanctioned greater personal freedom, the ultimate constitutional value.

With the exception of cases such as *Thornhill v. Alabama*¹³ and *Schneiderman v. United States*,¹⁴ Murphy seldom had the opportunity to express his jurisprudence as the view of the Court. More frequently, he found himself compelled to write concurring opinions

12. *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

13. *Thornhill v. Alabama*, 310 U.S. 88 (1940).

14. *Schneiderman v. United States*, 320 U.S. 118 (1943).

or dissents. And what a record of dissent he compiled. Had Murphy's views prevailed, the Supreme Court would have:

—Overruled *Olmstead v. United States*,¹⁵ and placed sharp restraints upon wire-tapping and electronic surveillance by the federal government in the 1940's rather than the 1960's.

—Declared invalid the military's expulsion of the Japanese-Americans from the West Coast.

—Overruled *Caminetti v. United States*,¹⁶ which had turned the Mann Act into an engine of government repression far beyond the white slave traffic.

—Prevented the executions of Japanese Generals Yamashita and Homma, who had been condemned by vengeful, drumhead military tribunals.

—Granted conscientious objectors a decent measure of due process *before* they were inducted into the armed services and subjected to criminal prosecution.

—Prevented Louisiana from electrocuting Willie Francis after the first attempt failed.

—Placed clear restraints upon the witch-hunting activities of the House Un-American Activities Committee.

—Declared "separate-but-equal" unconstitutional in the late 1940's.

"The dominant lesson of our history," wrote John P. Frank, "is that the courts love liberty most when it is under pressure least."¹⁷ Mr. Justice Murphy was a notable exception.

In this, the third and concluding volume of his biography of Murphy, Sidney Fine reconstructs an absorbing portrait of judicial behavior on the nation's highest court during the Second World War and the early days of the Cold War. Fine has tapped a rich lode of manuscript materials, including the judicial papers of Murphy, William O. Douglas, Felix Frankfurter, Wiley Rutledge, Hugo Black, Robert Jackson, and Harlan Stone. Thanks to this volume and the earlier work of Alpheus T. Mason,¹⁸ we probably know more about this particular epoch in the Court's life than about any other. We can speak with confidence about why certain issues were resolved the way they were, about the give-and-take process of opinion writing, and about personal relationships among the Justices.

15. *Olmstead v. United States*, 276 U.S. 609 (1928).

16. *Caminetti v. United States*, 242 U.S. 470 (1917).

17. Quoted in S. FINE, *supra* note 3, at 465.

18. A. MASON, HARLAN STONE: PILLAR OF THE LAW (1956).

Much that Fine tells us about Murphy and his brethren adds a few brush strokes to an old canvas. We witness the decline of Felix Frankfurter's influence after the notorious decision in the first flag salute case,¹⁹ and the slow rise of Hugo Black's with regard to questions of the first amendment and criminal justice in the states. In painful detail, Fine recounts the growing bitterness between the Black-Douglas-Murphy faction and the one led by Frankfurter and Jackson, a conflict rooted in jurisprudential differences as well as personal vanity and egotism. The rancor among Roosevelt's Justices (Black, Reed, Frankfurter, Douglas, Murphy, Jackson, and Rutledge) made that of the "old" anti-New Deal Justices seem mild by comparison.

The main surprises in the volume concern Justices Douglas and Jackson. The former emerges as a clever opportunist (a view long sponsored by Frankfurter) who always kept one judicial eye trained on his future political career. The latter is found to be perhaps the most reactionary member of the Court with respect to the question of racial segregation.

On three notable occasions discussed in depth by Fine, Justice Douglas attempted to straddle issues in an effort to appease both the political Left and Right. In *United States v. Bethlehem Steel Co.*,²⁰ the Justices enforced a series of World War I contracts made between the federal government and the steelmaker despite allegations that the agreements, which yielded the company extraordinary profits, had been made under "duress" and were "unconscionable" as a matter of law. Douglas voted in the majority to enforce the agreements, but he also filed a last-minute concurrence which argued that the agreements had contained an implied promise Bethlehem would achieve certain production efficiencies before reaping the profits. Without convincing evidence on this point, they could not collect the extraordinary profits. But because the lower courts had resolved this point the other way, Douglas argued, he felt bound by their decision. Douglas's concurrence outraged Murphy, who had earlier rejected that analysis of the contracts, although he, too, believed the profits to be excessive. "The Bethlehem case," he told Frankfurter, "first put me wise to Bill Douglas."²¹

A year later, when a narrow majority on the Court overturned the government's effort to strip Communist Party leader William Schneiderman of his citizenship and deport him,²² Douglas again

19. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

20. 315 U.S. 289 (1942).

21. Quoted in S. FINE, *supra* note 3, at 346-50.

22. *Schneiderman v. U.S.*, 320 U.S. 118 (1943).

sought to straddle a controversial question. He filed another concurring opinion which agreed that the prosecution had failed to establish fraud in the case, but also noted that Congress could prohibit the naturalization of Communists if it desired to do so. Murphy again expressed to Frankfurter his shock at Douglas's "skulduggery" in seeking to appease the nation's anti-Communist sentiments while at the same time blocking the Schneiderman deportation.²³

Finally, in the infamous *Screws* case,²⁴ Douglas wrote an opinion which sustained the constitutionality of key provisions in the Civil Rights Act of 1870, but reversed the conviction of the immediate defendant, a Georgia sheriff, who had beaten to death his Negro prisoner. Douglas's opinion relied on the argument that the judge had failed to instruct the jury that Claude Screws could be convicted only if the prosecution proved that he intended to "willfully" deprive his prisoner of a right protected by the Constitution. Murphy wrote a scathing dissent which noted that "knowledge of a comprehensive law library is unnecessary for officers of the law to know that the right to murder individuals in the course of their duties is unrecognized in this nation."²⁵ In his judgment, Douglas was once again attempting to mollify two important constituencies for his political future—the liberal, civil rights wing of the Democratic Party as well as the lily-white, segregationist bloc in the South.

Murphy was prepared as early as the 1948 *Sipuel* case²⁶ to declare "separate-but-equal" educational facilities unconstitutional. But not Justice Jackson, who voted against granting certiorari in the case and admonished his brethren that "every discussion of [the] race problem makes it worse."²⁷ Jackson also voted to deny certiorari in the landmark case of *Shelley v. Kraemer*²⁸ with the blunt observation: "I would deny and you'll wish you had."²⁹

Gossip columnists and reporters poked fun at Murphy's sexual peccadillos and at his juvenile efforts to participate in the war effort by taking basic military training. Much to the chagrin of Chief Justice Stone, he insisted on wearing a military uniform to the Court when the Justices met in Special Term to hear the pleas of the Nazi saboteurs. His colleagues on the bench mocked his intelligence and

23. S. FINE, *supra* note 3, at 414-15.

24. *Screws v. United States*, 325 U.S. 91 (1945).

25. S. FINE, *supra* note 3, at 400-01.

26. *Sipuel v. Board of Regents*, 332 U.S. 631 (1948).

27. S. FINE, *supra* note 3, at 563.

28. 334 U.S. 1 (1948).

29. S. FINE, *supra* note 3, at 565.

his religion behind his back. When Henry Wallace asked Harlan Stone in 1943 if Murphy had "grown" in his job, Stone replied "He can no more grow than that stone."³⁰ Justice Roberts and Judge Learned Hand referred to him as "the Saint," "St. Francis," or "Jesus, Lover of My Soul."³¹ But the Murphy who emerges in this fine biography was a Justice of unusual courage. He took seriously his oath to defend the Constitution and did a better job in that respect than any of his colleagues. He was not among those Justice Jackson had in mind when he penned the following ditty in 1941:

Come you back to Mandalay
And hear what the judges say
As they talk as brave as thunder
And then run the other way.³²

ON COURTS AND DEMOCRACY: SELECTED NON-JUDICIAL WRITINGS OF J. SKELLY WRIGHT. Edited by Arthur Selwyn Miller.¹ Westport, Conn.: Greenwood Press. 1984. Pp. xvi, 291. \$29.95.

A "CAPACITY FOR OUTRAGE": THE JUDICIAL ODYSSEY OF J. SKELLY WRIGHT. By Arthur Selwyn Miller. Westport, Conn.: Greenwood Press. 1984. Pp. xiv, 242. \$29.95.

*Ernest van den Haag*²

In Arthur Selwyn Miller, Judge J. Skelly Wright found an ideal biographer, who shares his understanding, or, I would contend, misunderstanding, of the nature of law and of the role of judges. In turn Professor Miller has found an ideal person to write the foreword in Judge Frank M. Johnson, Jr., with whom he shares not only a misunderstanding of the function of law, but also a remarkable inability to command the English language. A few in-

30. *Id.* at 249.

31. *Id.* at 262, 266.

32. *Id.* at 263.

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