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## BOOK REVIEW

THE ENIGMA OF FELIX FRANKFURTER. By H.N. Hirsch.\* New York: Basic Books, Inc., 1981. Pp. 253.

*Reviewed by William F. Fox, Jr.\*\**

How would you describe a young man of Jewish origins who set foot in this country at the age of thirteen not speaking a word of English, worked his way through City College of New York, was first in his class all three years at the Harvard Law School, became an important civil servant, a preeminent American Zionist, a distinguished member of the Harvard faculty, an intimate of Franklin Roosevelt and ultimately was elevated to the United States Supreme Court where he participated in some of the most important developments of constitutional doctrine in the history of the Court? Words like "brilliant," "aggressive," "talented" and, perhaps, "upwardly mobile" spring to mind. By contrast, Dr. H.N. Hirsch has examined precisely this life history—that of Mr. Justice Felix Frankfurter—and has concluded: "neurotic."

I have a number of qualms about Hirsch's conclusion. I believe it is abrupt, overly-simplified, not necessarily supported by all the evidence and perhaps misdirected. For these reasons, a possible subtitle for this essay might be: "On the need for sensitivity in the construction of psychological biographies, particularly those of prominent and now deceased members of the Judiciary."<sup>1</sup>

Briefly stated, Hirsch has examined voluminous materials accumulated by Frankfurter and others (Frankfurter apparently refused to throw away as much as a scrap of paper, unlike Justice Black who demanded that his papers be destroyed upon his death), and has applied certain psychological theories developed primarily by Karen Horney and Erik Erikson.<sup>2</sup> He

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1. I use the term "sensitivity" because I cannot bring myself to argue for a categorical prohibition of such biographies. The mental processes of judges, like the mental processes of other public officials, should not be exempt from scrutiny. I would not urge the burning of Hirsch's book. I do urge his readers, however, to take note of the book's flaws.

2. Horney, in Hirsch's view, "is concerned with describing the particular type of neurosis that develops when an individual creates for himself an 'idealized' self-image to com-

concludes from the materials that Frankfurter was, through a large part of his professional career and, most importantly, during his years on the Supreme Court, a seriously neurotic individual. In Dr. Hirsch's words:

The central hypothesis of this study is that Frankfurter can only be understood politically if we understand him psychologically, and that we can understand him psychologically as representing a textbook case of a neurotic personality: someone whose self-image is overblown and yet, at the same time, essential to his sense of well-being. . . . Frankfurter could not accept serious, sustained opposition in fields he considered his domain of expertise; he reacted to his opponents with vindictive hostility.<sup>3</sup>

In reaching this conclusion, Dr. Hirsch has marshalled considerable information from both the vast storehouse of material left behind by Frankfurter, including the recently published and somewhat notorious diaries,<sup>4</sup> Frankfurter's voluminous correspondence and judicial opinions, biographies and other data concerning Frankfurter's contemporaries, and scholarly criticism about the Supreme Court during the Frankfurter years. Reviewed in terms of the breadth of the materials Hirsch considered, his study can hardly be faulted. Yet, for a study that purports to be an analysis of the behavior and mental processes of a prominent jurist, there is an unexplained dearth of information which could have been acquired from interviews or correspondence with people, still living, who knew and were associated with Frankfurter. Since the book attempts to explain the impact of Frankfurter's psyche on his interaction with other people, discussions with people who had observed his behavior would seem to be an obvious source of information.

It is difficult, of course, to directly confront Hirsch's conclusions without making an independent analysis of the mass of information available. But one should not lose sight of the fact that it was Frankfurter himself, writing in *Universal Camera Corp. v. NLRB*,<sup>5</sup> who required appellate courts reviewing actions taken by administrative agencies to examine "the record as a whole" and not just that evidence supporting the agency's final determination.<sup>6</sup> Hirsch states the obvious by noting that Frankfurter was a man of

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pensate for low self-esteem. . . . When a self-image is created and used for such purposes of compensation, certain psychological consequences [including 'self-hatred'] inevitably follow." H. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* 8 (1981).

Erickson developed the theory of stages of ego growth, at every stage of which, "the individual is faced with a form of psychological crisis." If these crises are not properly resolved, psychological problems arise. *Id.* at 7-8.

3. *Id.* at 5-6.

4. J. LASH, *FROM THE DIARIES OF FELIX FRANKFURTER* (1975).

5. 340 U.S. 474 (1951).

6. *Id.* at 487-88.

“complex personality.”<sup>7</sup> With the volume of materials left behind by the Justice, it would not appear difficult, given Hirsch’s central hypothesis, to emphasize those materials which exemplify Frankfurter’s “darker side.”<sup>8</sup> Even without an independent examination, it is not unfair to note that Joseph Lash, examining many of the same materials but placing his primary emphasis on the Frankfurter diaries, was far more charitable. He concluded:

Although it is relevant to point to external factors of personality and politics that appear to have influenced Justice Frankfurter’s conception of the judicial function, we also believe that he developed that conception with such scholarship, coherence, and intellectual power that the corpus of his opinions represents a shaping energy in legal thought and practice.<sup>9</sup>

In essence, Hirsch’s book might best be read as an advocate’s brief for his argument. As such, it would be highly instructive to see a brief written for the other side arguing that Frankfurter was a brilliant, energetic, rational person who channelled his talents into a magnificent legal career.

For example, the evidence regarding Frankfurter’s possible contribution to Mrs. Frankfurter’s emotional troubles appears to be not quite so one-sided as Hirsch has interpreted it. Marion Frankfurter was a WASP married to a man who was rapidly accumulating “firsts”—first in his class at Harvard, the first Jew to be hired by the Hornblower firm, and a preeminent Zionist who succeeded in feeling at home in the then highly WASPish atmosphere of Harvard Law School. Mrs. Frankfurter, on the other hand, was a highly intelligent woman living in a time not very different from our own when women’s roles were being reexamined. The pressure inherent in combining two cultural backgrounds, as well as the difficulty in defining her own role vis-à-vis changing expectations for women, quite understandably resulted in emotional turmoil. She courageously sought psychiatric help in order to deal with her emotional difficulties—a not insignificant step at a time when such therapy was suspect and stigmatizing. Frankfurter quietly sought funds from Brandeis to help pay for her sessions. Her later behavior indicates that her therapy was a success. While early in her marriage she seemed intimidated by Frankfurter, she later developed enough self-assurance to snap back at him when he became overly condescending. On one occasion, she referred to him and his cohorts as “[y]ou curly captains of action,”<sup>10</sup> and on another occasion “scolded” him for his

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7. H. HIRSCH, *supra* note 2, at 5.

8. *Id.*

9. J. LASH, *supra* note 4, at 78.

10. H. HIRSCH, *supra* note 2, at 84.

gratingly patronizing flattery.<sup>11</sup>

Hirsch has concluded that Frankfurter was "quite condescending" toward women in general, and that his "dominating personality had a negative impact on his wife's psychological condition,"<sup>12</sup> implying that Frankfurter was something of a Simon Legree of the bed chamber. Perhaps he was; the evidence is mixed, and Mrs. Frankfurter would not be the first woman to feel ambivalent toward her husband. But there is also ample evidence in the materials Hirsch cites that Frankfurter himself was only one of many factors which contributed to her troubles. One may contrast Hirsch's categorical pronouncements on causation with statements by two of Mrs. Frankfurter's acquaintances. Partially based on interviews with Alexander Bickel, Joseph Lash suggested mildly that some friends who knew Mrs. Frankfurter "thought that [her emotional difficulties were] . . . rooted in some inner resistance to her marriage . . ." <sup>13</sup> Another friend catalogued some of the possible causes of Mrs. Frankfurter's mental distress as "having married a Jew, and the social pressure to which she was subjected, and her inner struggle against this complex of circumstances."<sup>14</sup> So Frankfurter was patronizing, and society was palpably anti-Semitic and insensitive to women. In 1981 this might be something of an indictment; in the 1920's it strikes me as far less surprising. Harvard Law School, it should be remembered, did not admit women until 1954.<sup>15</sup>

My point is this: Hirsch may be correct in suggesting that Frankfurter was a substantial cause of his wife's mental problems. It is also possible that Marion Frankfurter would have wholeheartedly agreed with Hirsch. Nevertheless, the evidence marshalled by Hirsch suggests that this need not be the *inescapable* conclusion to draw. There is evidence, for example, that Frankfurter and Louis D. Brandeis had an immensely enjoyable relationship,<sup>16</sup> suggesting perhaps that Frankfurter may have interacted well

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11. *Id.* Lash notes that Mrs. Frankfurter's energy level was simply not up to that of the Justice. Apparently she was given to commenting: "Do you know what it's like to be married to a man who is never tired?" J. LASH, *supra* note 4, at 30.

12. H. HIRSCH, *supra* note 2, at 83.

13. J. LASH, *supra* note 4, at 31.

14. H. HIRSCH, *supra* note 2, at 84.

15. A faculty colleague of mine who had had Frankfurter as a teacher reports that he ran into Justice Frankfurter on a Washington street corner sometime shortly after the decision was made to admit women. When asked about the wisdom of the decision, Frankfurter replied to the effect that he supported the decision because he could think of no good reason to keep women out. This suggests at least a slight positive change in attitude on the Justice's part, even if it would not now endear him to the National Organization for Women.

16. Brandeis wrote to Marion: "You know how much Felix has been to us; half son, half brother; a bringer of joy, an enricher of life." H. HIRSCH, *supra* note 2, at 85. Discounting these statements by, perhaps, a factor of 50% to allow for the notoriously overblown

with some persons (*e.g.*, Holmes and Brandeis) and less well with others.

Such conflicting and contradictory evidence, at least as lawyers and judges might read the record, is normally a signal to proceed cautiously to judgment, to hedge rather than to be definitive. Thus, it is not Hirsch's discussion and suggestion of possible motivations for behavior that I find irritating, so much as it is his excessive use of categorical pronouncements (Frankfurter was neurotic; Frankfurter was a negative influence on his wife; Frankfurter was incapable of accepting dissent and criticism) based on a paper record containing much ambiguous material. Moreover, in one footnote, Hirsch steps over the line between scholarship and calumny. In perhaps the cheapest shot of the entire book, Hirsch characterizes Frankfurter as a "court Jew," a despicable term coined by Judith N. Shklar to describe Jews who identify with and aspire to ruling classes "[b]ecause they hate themselves, many Jews hate their social origins."<sup>17</sup> Hirsch applies this label to Frankfurter largely because of Frankfurter's close and occasionally cloying relationship with Franklin Roosevelt.

The psychological theories—principally those of Karen Horney and Erik Erikson—on which Hirsch bases his assessment of Frankfurter's neurosis are themselves subject to criticism for being overly broad and all-encompassing. They explain too much, and thus their effectiveness as an explanation for an individual's conduct is severely limited. As Hirsch applies Horney's theory to Frankfurter, the Justice was neurotic because he could not resolve "basic anxiety." Unable to resolve this basic anxiety, Frankfurter created an "idealized self" of a "narcissistic type" mainly evidenced, in Hirsch's view, by his energy and charm and, apparently, by his reluctance to suffer fools gladly.<sup>18</sup> Hirsch complements the Horney analysis with an examination of Erikson's stages of psychological growth, concluding that Frankfurter experienced basic anxiety because he was unable to fashion a realistic self-image over roughly a two-year period from 1917 to 1919—a point of time during which the image Frankfurter constructed for himself was "idealized and inflated."<sup>19</sup>

The theories of Horney and Erikson are rather deceptive. They are broad enough to allow an imaginative analyst to fit people into certain categories by disregarding information that does not support that categorization. To his credit, Hirsch recognizes this late in the book in a somewhat

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writing style of the age, we surely can conclude that Frankfurter and Brandeis got along immensely well.

17. *Id.* at 232 n.100 (quoting J. Shklar, *Book Review*, NEW REPUBLIC, Apr. 5, 1980, at 34-35).

18. H. HIRSCH, *supra* note 2, at 202-04.

19. *Id.* at 205.

grudging footnote that should have been greatly expanded upon: "There were, of course, elements of truth in Frankfurter's self-image: He *was* successful, he *was* good at handling men, etc. As Horney argues, the neurotic individual will idealize traits he does in fact possess. What is crucial, however, is the individual's exaggeration of and identification with those traits."<sup>20</sup> The same facts are easily subject to differing interpretations: Hirsch sees neurosis; I see an intelligent, dynamic personality. Similar conflicts in interpretation in the area of administrative procedure have been characterized as "one person's delay is another person's due process."<sup>21</sup>

Of course, Horney and Erikson explain a great deal. Both psychologists stress the underlying principle that psychological development occurs throughout the human lifespan and not merely in the first months or years after birth. Dr. Hirsch would have been derelict in attempting an analysis of the Frankfurter data without some underlying theoretical framework on which to test his assumptions and interpretations. If this aspect of the book is flawed, it is due, in part, to the fact that a single, comprehensive and unified principle of human behavior has not yet been constructed. Because we lack such a unifying structure, we have no sound notion of the range of "normal" behavior and, lacking this, we may tend to label the merely different as the "neurotic."

Moreover, psychological analysis which places such emphasis on neurosis tends to lose sight of the fact that neurotics can make substantial contributions. Indeed, brilliance may go hand in hand with neurosis. In other words, Hirsch may be right; Frankfurter may have been neurotic, and a substantial part of his behavior may be explainable in terms of his neurosis. But does that or should that be allowed to diminish his enormous contributions to our modern American legal system? I think not; I think we can forgive a lot in a genius.

There is yet another reason why I would urge discretion in creating psychological profiles of jurists. Judges, and particularly judges in the Anglo-American legal system, are among the few public officials who must decide important, closely-argued cases and who must articulate their reasoning in the form of written opinions. These opinions, in the common law tradition, constitute a substantial part of our jurisprudence. The art of opinion writing often reaches its highest level, and certainly has its most significant impact, in those decisions crafted by the United States Supreme Court. At

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20. *Id.* (emphasis in original).

21. STAFF OF SENATE COMM. ON GOVERNMENTAL AFFAIRS, 95TH CONG., 1ST SESS., STUDY ON FEDERAL REGULATION 4 (Comm. Print 1977).

least in theory, justices are expected to be cool, cloistered, dispassionate referees. Perhaps the worst criticism of any judge is that he or she is "result oriented"—that is, that the judge decides which party should win and then goes back and cobbles up wholly spurious reasons to support that result.

Being somewhat unfamiliar with contemporary legal scholarship, Hirsch explains many of Frankfurter's actions on the Court—*e.g.*, the flag salute cases, and his continuous jurisprudential feuds with Justices Black and Douglas—in terms of his need to dominate or his sycophancy. In other words, Frankfurter's neurosis dictated his position on a case or a constitutional doctrine, and his opinions merely lent lip service to those predetermined conclusions. In this respect, Hirsch disregards the classic distinction between what Professor Brest refers to as "justification" (whereby a judge explains his or her decision by articulating rational and logical grounds supporting the decision; if the judge cannot identify such grounds, he or she must seek another result) and "rationalization" (whereby a judge merely advances any reasons, however spurious, for an earlier-arrived-at result).<sup>22</sup> Hirsch also fails to understand that lawyers developed a theory of jurisprudence in the mid-1930's which was similar to his hypothesis and now has been almost wholly discounted. That theory held that judicial decisions may be explained *only* in terms of judges' "personalities, emotions, biases and intuitions."<sup>23</sup> We now know that, no matter what other factors intrude on a judge's decision-making function, he expresses himself on the basis of the language of the written opinion because that opinion is the controlling document. Indeed, in perhaps the most intrusive book written about the Supreme Court's decision-making, the authors constantly noted that virtually all the alleged politicking and chicanery was devoted to one purpose—to insure that the published opinion was written in a certain way.<sup>24</sup>

Accordingly, scholars have a duty, in my opinion, to analyze the work product of judges first on the basis of the opinion. Only when all such explanations made on the basis of the opinion fail may we seek refuge in psychological analysis. To do otherwise, *i.e.*, to place the psychological analysis first, is to render legal scholarship meaningless because opinions can then be understood only on the basis of a knowledge of the psycholog-

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22. P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 3-4 (1975) (quoting R. WASSERSTROM, THE JUDICIAL DECISION 25-30 (1961)).

23. *Id.* at 3 (citing J. FRANK, LAW AND THE MODERN MIND (1930); Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929)).

24. R. WOODWARD & S. ARMSTRONG, THE BRETHERN (1978) *passim*.



ical quirks of the individual judge. As even psychologists concede, purely random behavior is not susceptible of organized analysis.

The centerpiece of Hirsch's study is the position Frankfurter took in two crucial flag salute cases. In the earlier opinion, *Minersville School District v. Gobitis*,<sup>25</sup> Frankfurter wrote the majority opinion refusing to declare unconstitutional a state statute requiring public school students to salute the American flag. While obviously severely troubled by what he referred to as the conflict between "the liberty of conscience and the authority . . . to safeguard the nation's fellowship,"<sup>26</sup> Frankfurter declared the statute to be within the state's legislative authority. For this, he was roundly criticized by some of his closest former associates,<sup>27</sup> although his opinion could be explained largely in terms of his long-standing principle of deference to legislative action.<sup>28</sup>

About three years later, the Court decided *West Virginia Board of Education v. Barnette*,<sup>29</sup> and overruled *Gobitis*. Two justices who joined the *Gobitis* opinion, Black and Douglas, changed their vote to join the new *Barnette* majority. Frankfurter wrote a blistering dissent which began with one of the most striking and perhaps ill-tempered lead sentences in Court history.<sup>30</sup>

It is entirely possible to explain these two opinions as a dramatic statement of the differences between Frankfurter on the one hand and Black and Douglas on the other hand on the highly important issue of judicial restraint. It is possible that Frankfurter in later years would not claim *Gobitis* as his favorite opinion. Hirsch, however, sees these two cases as Frankfurter's "denouement":

The *Barnette* case marks a clear transition for Frankfurter and for the Court. The lines of battle have been sharply drawn; positions have been elaborated; sides have been chosen and stances taken. . . . Psychologically, the period marked off by *Barnette* and the end of the 1942 term produced in Frankfurter a sense of being under seige . . . . [h]e would react in a manner that had become a familiar part of the psychological makeup. The reac-

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25. 310 U.S. 586 (1940).

26. *Id.* at 591.

27. Harold Laski, a long time Frankfurter friend, stated, "How wrong I think Felix is." J. LASH, *supra* note 4, at 69.

28. Frankfurter's "principle" was forged in large part out of his disgust with the Supreme Court's overturning of much New Deal legislation.

29. 319 U.S. 624 (1943).

30. "One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution." *Id.* at 646.

tion would be particularly bitter . . . .<sup>31</sup>

Hirsch moves too quickly to this conclusion, in my opinion, because he is not fully versed in the case law. In 1945 in *Guaranty Trust Co. v. York*,<sup>32</sup> Frankfurter brought some desperately-needed pragmatism to the doctrine enunciated in *Erie Railroad Co. v. Tompkins*<sup>33</sup> (which requires that federal courts sitting in diversity cases apply substantive state law). *Erie* forced lower federal courts to grope through the impenetrable maze of “substantive” versus “procedural.” While the test Frankfurter propounded—state law applies to matters which are “outcome determinative”—is arguably flawed, he did render a significant improvement on his mentor Brandeis’ *Erie* opinion. *York* does not strike me as the work of a neurotic “under seige.”

In addition, it was in the mid-to-late forties and early fifties that Frankfurter battled with Black over the now famous “incorporation” dispute. Justice Black argued that the due process clause of the fourteenth amendment incorporated the Bill of Rights by reference and thus made the entire Bill of Rights applicable to the states. At their high point, Black’s forces were only able to command four votes<sup>34</sup> and the method of “selective” incorporation, propounded in part by Frankfurter, has prevailed to this day.<sup>35</sup>

While it is indisputable that both Black and Frankfurter felt deeply about their respective positions, and while it is undeniable that much politicking went on behind the scenes, I find it difficult to attribute any appreciable part of this dispute to Frankfurter’s putative neurosis. One might better view the battle over incorporation as a magnificent jurisprudential dispute between two giants of the law waged over several years. The debate, as evidenced by the published opinions, is simply too logical and well reasoned to be the work of a madman. I view the incorporation debate as one of the monumental controversies of the modern Court. Hirsch is either ignorant of the importance of the battle or has chosen simply to ignore it because it appears not to fit into his central thesis of Frankfurter the neurotic.<sup>36</sup>

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31. H. HIRSCH, *supra* note 2, at 176.

32. 326 U.S. 99 (1945).

33. 304 U.S. 64 (1938).

34. *See* *Adamson v. California*, 332 U.S. 46 (1947) (Black, J., dissenting).

35. As Joseph Lash points out, though, Frankfurter enjoyed only a “pyrrhic victory” since the Court has selectively incorporated virtually all the important provisions of the Bill of Rights. J. LASH, *supra* note 4, at 81. *See, e.g.*, the list of incorporated provisions set out in *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968).

36. My reading of the Hirsch book reveals only a single, somewhat sarcastic reference to the dispute: “He again avoided the terminology of his opponents—as well as their claim

In the final analysis, I must be somewhat conciliatory. I believe Hirsch's book is flawed but not entirely inappropriate. It does shed light on Frankfurter's character in the same way, I suppose, that a *roman à clef* sheds light on important public figures, because such books need not be entirely constrained by the truth. I cannot condemn Dr. Hirsch for writing. I only wish he had been a little less quick to judge.

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that the entire Bill of Rights should be incorporated into the due process clause of the Fourteenth Amendment—and instead used justification . . . ." H. HIRSCH, *supra* note 2, at 196.