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BOOK REVIEW

THE ENIGMA OF FELIX FRANKFURTER. By H.N. HIRSCH.* New York: Basic Books, 1981. Pp x, 253. \$14.95.

Jerome Alan Cohen†

November 15, 1982, will mark the one hundredth anniversary of the birth of Felix Frankfurter. The Harvard Law School has scheduled a gathering of his law clerks and others to commemorate the occasion. Even in the absence of the sparkling Justice and some of his most articulate clerks, especially the late Alexander Bickel and Philip Graham, the program should be a lively one. H. N. Hirsch's interpretative biography¹ guarantees that there will be plenty to talk about, for it adds fuel to a fire that has burned brightly ever since "F.F." made his mark as a Harvard law student in the class of 1906—the debate over what he was "really like."

His contemporaries found it impossible to epitomize him. Will those denied the opportunity to know him find it easier? Frankfurter believed that, whatever his disappointments and frustrations of the moment, history would vindicate his role on the Supreme Court and his views of American public law. Indeed, he spent a good deal of time seeking to assure that result, assiduously recording his version of Court deliberations and fostering the scholarship of favored friends. Although Frankfurter often accused Justices Black and Douglas of writing for the anthologies rather than responsibly deciding cases, he thought of himself as writing for the ages, in judicial opinions, academic publications, and voluminous private correspondence, memoranda, diaries and recorded reminiscences. It is ironic,

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

therefore, that much of the work done by scholars since the Justice's death in 1965 has diminished his stature. It is especially ironic that much of the ammunition for Professor Hirsch's scholarly attack came from Frankfurter himself.

Yet these ironies are not surprising. As to the first, during his tenure on the Court many of the Justice's friends, despite their admiration for his learning and powers of reasoning, were concerned that he had come down on the wrong side of a number of the Court's significant decisions; to take only one contrasting example, Earl Warren, for all his unsophisticated analysis and lack of acquaintance with the Court's traditions, seemed to many to have judged more accurately the needs of his era. As to the second irony, surely Frankfurter was naive in believing that historians would not take him to task for the extent to which his private papers show him to have flattered his mentors, ridiculed his colleagues, and enhanced his own role in affairs; to take another contrasting example, Hugo Black, like a clever antitrust defendant, resisted the temptation to record the bulk of his thoughts and actions.

To the "treasure of words"² left us by Frankfurter, Professor Hirsch applies certain psychological theories, principally based on his understanding of the works of Karen Horney and Erik Erikson. He uses these theories in an effort to demonstrate that Frankfurter was a neurotic personality of a narcissistic nature who matured late and at the price of an idealized self-image that had helped this Jewish immigrant cope with the strains of his father's death and of career and marital decisions in the Brahmin world in which he sought acceptance. According to Hirsch, this ego-defensive, inflated personality had a "history of difficult interpersonal relationships"³ and a need to dominate others, was always in conflict with persons he identified as enemies who acted out of "ignorance or malevolence" rather than "disinterestedness" as did Frankfurter, and projected "his own characteristics onto others, while rationalizing his own behavior."⁴ The point of all this, in Hirsch's view, is that these personality traits influenced the Justice's judicial behavior, especially in the *Gobitis* flag salute case,⁵ which Hirsch sees as the watershed in the Justice's years on the bench. He asserts that Frankfurter's advocacy of judi-

2. *Id.* at ix.

3. *Id.* at 208.

4. *Id.* at 209.

5. *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940), *overruled by West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

cial self-restraint in that decision, and the general judicial philosophy that it reflected, "cannot be understood without reference to Frankfurter's need for acceptance and a sense of belonging"⁶ in the land that the Justice had adopted with a religious patriotism.

Such a crude summary does not begin to do justice to the author, who has written a serious and well-researched book that offers many interesting insights and is a good read despite its origins as a doctoral dissertation. Yet, like many other friends of Frankfurter, I came away from the book wondering whether Hirsch had done justice to the Justice. I leave it to those better qualified, such as Alan Stone, to judge the adequacy of Hirsch's invocation of Horney and Erikson,⁷ but I cannot refrain from noting that I found the book's frequent repetition of apparently oversimplified psychological stereotypes to be irritating.

Even more annoying to one who knew Frankfurter is the incomplete factual characterization upon which the psychological interpretation is based. I agree with Norman Dorsen that "[t]he book contains little to balance the many excerpts from Frankfurter's more spiteful or self-aggrandizing letters. These leave the impression of an unrelievedly harsh and self-centered personality—an impression difficult to reconcile with abundant evidence that throughout his life Frankfurter made and retained many close friends."⁸ The Justice was an extraordinarily warm, usually joyful, outgoing, empathetic person who devoted great amounts of time to welcoming, drawing out, and assisting others, including those he could in no way have considered useful objects of manipulation.

Dangers are inherent in a study that does not claim to be exhaustive but nevertheless generalizes as though it were. For example, although clearly right about Frankfurter's penchant to see himself as a man of principle while viewing his opponents in a less attractive light, Hirsch would appear to be in the realm of half-truth when arguing that Frankfurter had a "tendency to domineer the individuals closest to him."⁹ To say that Frankfurter dominated his law clerks seems simply off the mark, and one wonders what the author meant by this. Frankfurter solicited his clerks' opinions, jostled with them endlessly, gave them considerable responsibility, and, at the an-

6. H. HIRSCH, *supra* note 1, at 212.

7. For an illuminating evaluation of Hirsch's resort to psychology, see Stone, Book Review, 95 HARV. L. REV. 346 (1981).

8. Dorsen, Book Review, 95 HARV. L. REV. 367, 372 (1981).

9. H. HIRSCH, *supra* note 1, at 208.

nual birthday party and dinner with past and present clerks, loved nothing better than spirited debates at high decibel levels. The decisions, of course, were his to make, but his decisionmaking style did not seem domineering, at least in contrast to that of his brethren. Chief Justice Warren, for example, had limited patience for the arguments of his clerks, cutting them off occasionally with the genial remark that "well, fellows, I've got to be wrong sometimes;" and a few months into the 1955 Term the Chief, whom Frankfurter considered "something of a martinet," ordered his clerks not to exchange ideas with Frankfurter, for he suspected the little Justice of trying to undermine his position by brainwashing his staff.

One must also doubt the author's statement that "[i]t is absolutely clear that Frankfurter dominated his wife and that this affected her profoundly."¹⁰ Surely the Justice's strong personality affected "Mrs. F." profoundly, but the author might also have said that she, no lightweight either in intellect or personality despite her emotional problems, had a similar effect upon him. Not only in words but also in deeds the Justice showed great respect for his wife, displaying sensitivity to her criticisms and often deferring to her judgments. After she became bedridden in the early 1950's, he became something of a homebody, contrary to his inclinations, in order to stay close to her. Hirsch's treatment merely skims the surface of a complex interaction that undoubtedly could tell us much about the Justice. Had his approach been less exclusively bookish, Hirsch could have learned much more about the Justice's relationship with his wife and about his entire life, through interviews with a multitude of available sources. Given the author's psycho-legal orientation, he might even have discovered whether F.F., in failing to have children, had followed the precedent of his mentor Holmes!

Of course, interviewing could have provided Hirsch with additional evidence for his thesis as well as some colorful anecdotes. The following tidbits are merely illustrative.

—In mid-1955, when a clerk who had witnessed Earl Warren's first two years on the Court was asked why Justice Black had so quickly prevailed over Frankfurter in the contest for influencing the new Chief, he replied: "It's very simple. Felix irritates. Hugo soothes."

—Nothing irritated F.F. more than what he regarded as Black's pretentious references in judicial opinions to Livy,

10. *Id.*

Plutarch and other sages, as though Frankfurter held the patent on learned quotations—a classic case of the pot calling the kettle black.

—If Frankfurter was occasionally uncharitable in his written appraisals of colleagues, he was sometimes even more devastating in person. He said more than once that Fred Vinson's death shortly before Court argument in the public school desegregation cases was the only evidence he had ever had of the existence of a divine being. And he was capable of dismissing Justice Douglas with: "He thinks democracy is picking his nose in public."

—Frankfurter's treatment of his clerks could be cited not so much to demonstrate a need to dominate as to suggest his divided allegiance to Holmes and Brandeis—one of Hirsch's sub-themes. Frankfurter liked to think that his clerks had the same degree of leisure that he claimed had been enjoyed by the clerks of Mr. Justice Holmes, while more often keeping their noses to the grindstone in the manner of the originator of the Brandeis brief.

—If seeking to document self-deception, one could add Frankfurter's statement, made to me in '56 Term, that one of the reasons he agreed to join the Court in 1939 was that he wanted to show an anti-semitic world that the President of the United States had placed great confidence in a Jew.

Yet one who recognizes blemishes in Frankfurter, from both personal experience and published sources, is left with the feeling that Hirsch magnifies them out of proportion and presents a skewed portrait. We may question why Hirsch should do so. Norman Dorsen has suggested that the book reveals "considerable evidence that Hirsch is personally hostile to Frankfurter," in large part because of his subject's abandonment of religious Judaism.¹¹ Surely it is perverse for Hirsch to brand Frankfurter "in many ways—but especially in his relationships with FDR—a perfect example of the 'court Jew.'"¹² Frankfurter's toadying to FDR was certainly unattractive, but not because he was trying to pass himself off as a neo-Brahmin or distance himself from his background. Moreover, Hirsch's attempt to explain away Frankfurter's active Zionism comes off feebly, and it is not irrelevant to note that the Justice disapproved of those

11. *Id.* at 373, 374 n.25.

12. *Id.* at 232 n.100.

who sought to conceal their Jewish origins by Anglicizing their names, not only because this demonstrated lack of courage and candor but also because it repudiated the American dream he cherished.

Professor Dorsen's suggestion of personal hostility¹³ is intriguing. This would not be the first time that a biography tells as much about the observer as the observed. Yet, on the basis of the book alone, I regard the suggestion as merely an hypothesis, one that deserves a Harvard undergraduate seminar paper—not a Ph.D. dissertation—that would apply to Hirsch some of the psycho-historical techniques that he applied to Frankfurter. In the absence of such a study, however, I prefer to attribute the book's failure to present a balanced portrait to a more common biographical phenomenon—the tendency to collect and interpret data in a way that will support the thesis one seeks to sustain, even at the cost of not dealing with the full complexity of a life one claims to address.

If Hirsch's intent had been to blacken Frankfurter's reputation rather than present an explanation of his judicial behavior, it is unlikely that he would have passed over in a sentence the fact that from 1916, the year that Brandeis became a Supreme Court justice, until 1939, the year that Frankfurter joined him on the Court, Brandeis regularly sent Frankfurter money to pay for his "expenses in public matters undertaken at my request or following up my suggestion."¹⁴ Hirsch merely characterizes this as "an unusual arrangement" and moves on, thereby demonstrating insensitivity not only to ethical questions that would have been recognized as serious even in that era but also to merchandising possibilities.

Bruce Allen Murphy's book,¹⁵ in contrast, by further documenting the revelations made in previously little-noted publications, became an overnight sensation,¹⁶ stimulating a heated public debate over the propriety of a judge's secret financing of political activities. That debate has thus far largely ignored the propriety of Frankfurter's own conduct as secret recipient of the funds during his tenure as a law professor whose professional work focused on scholarship, popular writing and teaching concerning the Supreme Court and the role of Justice Brandeis. To his credit, Professor Dorsen, in a

13. Dorsen, *supra* note 8, at 373-74.

14. H. HIRSCH, *supra* note 1, at 44 (quoting Frankfurter).

15. B. MURPHY, *THE BRANDEIS/FRANKFURTER CONNECTION* (1982).

16. See, e.g., "Judging Judges and History," *N.Y. Times*, Feb. 18, 1982, at A22, col. 1; "Letters Reveal Brandeis Political Fund," *Wash. Post*, Feb. 15, 1982, at A17; "Letters Show Frankfurter a Secret Voice of Brandeis," *N.Y. Times*, Feb. 14, 1982, § 1, at 1.

footnote to his review of Hirsch, terms the matter "disturbing" and tactfully asks "whether Frankfurter's independence was affected by a financial relationship with a major subject of his scholarship."¹⁷ If, as is reported, Frankfurter tried to prevent researchers from gaining access to his correspondence with Brandeis,¹⁸ this may have been among the reasons, for Frankfurter must have known that there was even less to be said in justification of the recipient of this expense money than of the donor.

Despite its flaws, this volume is a stimulating contribution to scholarship that is certain to elicit substantial responses. One wonders how it and Frankfurter will look on the two hundredth anniversary of his birth.

17. Dorsen, *supra* note 8, at 368-69 n.6. See generally Glekel, "The Frankfurter Retainer—Ethical Implications for Bar," N.Y.L.J., Mar. 24, 1982, at 1.

18. According to Alpheus T. Mason, Brandeis' biographer, Frankfurter did not permit him to see the correspondence with Brandeis, asserting that the letters were "court papers." N.Y. Times, Feb. 14, 1982, § 1, at 1 n.8.

