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PSYCHO-ENIGMATIZING FELIX FRANKFURTER

*Eugene Gressman**

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

Alas, poor Felix! I knew him; a fellow, a Justice of infinite ability, of most excellent intellect. And yet upon him did lie a most grievous psycho-judicial fault. 'Twas a fault that transformed Felix Frankfurter into something of a misfit, or at least a disappointment, on the Supreme Bench. In a nutshell, he failed miserably in his drive to manipulate and dominate his co-equal Brethren. So misdirected, so ineffectual, so counterproductive were those manipulative efforts that he was never able to achieve the true greatness or wield the statesmanlike influence that could have been his judicial destiny.

Let me make one thing perfectly clear at the outset. I do not make this assessment of Felix Frankfurter with a high degree of objectivity; nor do I view dispassionately Professor Hirsch's psychoanalytical explanation of what went wrong with Frankfurter's judicial career. I hope it is not impertinent to note that for five years, 1943 to 1948, I was a front-row observer of Frankfurter as he attempted to influence the diverse Brethren of the Court: during those years I served as law clerk to Justice Frank Murphy, whom Frankfurter called "The Saint." And during those years I came to know Frankfurter as the judicial *enfant terrible* now described in H.N. Hirsch's *The Enigma of Felix Frankfurter*.

Let me also put my exposure to Felix Frankfurter in the proper time perspective. The Justice's pre-Court life was an amazingly productive one, by any standard. Adviser to presidents and prime ministers, participant in the Paris Peace Conference of 1919, professor at the Harvard Law School for a quarter-century, a scholarly commentator on the Supreme Court and the judicial process, a governmental servant on varied occasions, and an active reformer and commentator with respect to many of the social, political, and legal issues of the Teens, Twenties, and Thirties, Frankfurter came to the Supreme

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Court in 1939 perhaps "better prepared for his task" than "anyone who has [ever] sat on this Court."¹ He came there fired with the zest of his triptych of personal heroes, Henry L. Stimson, Oliver Wendell Holmes, and Louis D. Brandeis. His enthusiasm was tempered only by his commitment to the doctrine of judicial self-restraint developed by Professor James Bradley Thayer, whose writings "influenced me most as to public law."²

But there was a darker side to all that dazzling background. During those pre-Court years, Frankfurter developed into what Hirsch calls "a textbook case of a neurotic personality" (p. 5), and fell prey to deep-seated anxieties about his identity and sense of self. Because of delays and difficulties in Frankfurter's psychological maturation, Hirsch argues that Frankfurter was led to develop "a compensating, 'idealized' self-image in which he exaggerated his political skills and talents," including a political style that emphasized "what he perceived as his ability to handle other people" (p. 5). But the self-image in this instance suffered from severe psychological distortions. Hirsch's thesis is that Frankfurter ascended to the Court in 1939 with a self-image grounded on three established life patterns: (1) a history of difficult interpersonal relationships, with a tendency to dominate anyone in a subordinate position to him; (2) a history of intense conflicts with any perceived enemies, augmented by an intense excitement at the chance to defeat them; and (3) a history of projecting his own failings onto others, while rationalizing and excusing his own behavior (pp. 208-10).

Enter this flawed Felix Frankfurter upon the Court scene in 1939. Enter Felix Frankfurter with a long history of viewing public life as warfare, "permeated by people who are in Holmes' phrase, fired with a zeal to pervert."³ In his many battles to drive out the perverted, he had consistently been able "to beat his opponents and to dominate every personal and professional situation in which he found himself — the various government bureaus in which he worked, the organizations to which he belonged, the Harvard Law School, the circle of advisors in the Roosevelt White House" (p. 6). He also entered with a kind of personality that "could not accept serious, sustained opposition in fields he considered his domain of expertise; he reacted to his opponents with vindictive hostility . . . a projection of his own self-doubt" (pp. 5-6).

1. *Proceedings in the Supreme Court of the United States in Memory of Mr. Justice Frankfurter*, 382 U.S. XIX, XLV (1965) (remarks of Warren, C.J.).

2. Note from Frankfurter to Judge Charles Wyzanski (Oct. 21, 1940), *quoted at* p. 128.

3. Letter from Frankfurter to Jerome Frank (Jan. 18, 1936), *quoted at* p. 18.

As Felix's appointment to the Court was being trumpeted, he envisioned himself, and was envisioned by many others, as a man of great expectations, as one with a manifest destiny. As Joseph P. Lash put it in his brilliant biographical introduction to Frankfurter's own diaries,⁴ "Frankfurter had come on the Court expecting that in time he would become its intellectual leader and that the authority he exercised in his seminar at Harvard would be replicated in the conferences of the Brethren." Or, as his disciples would have it, he came prepared to assume the mantle of one capable of giving us "an age of reason in American law" and to become "the crucial figure . . . in modern American constitutional law."⁵

Frankfurter's aspiration of becoming the *de facto* leader of the Court may have been influenced by the success in that role of Justice Brandeis.⁶ For years Justices Brandeis and Holmes had been giving Frankfurter inside information about life on the Court, and Frankfurter selected law clerks for both Justices. Brandeis, who also maintained an off-Bench role of advising presidents and others on high political matters,⁷ recounted to Frankfurter how adept he was at influencing some of his less talented Brethren (pp. 138-39). Brandeis did achieve a high and well-deserved degree of influence on the Court, although his techniques were probably quite different from Frankfurter's. Whatever the differences, Frankfurter must have learned from Brandeis that overtly influencing other justices was a proper if not necessary step in becoming a judicial leader. Felix needed no coaching, of course, in how to influence others. Had he not had vast experience and success in the pursuit of what he called "personalialia" — that "process of flattering, cajoling, helping, advising, and needling" — of which he was "so proud" (p. 138)? And was he not surreptitiously privy to the practical and vulnerable aspects of the Court's processes? With his brilliant mind and well-tempered pen, what more was necessary for him to become the Court's *de facto* leader?

But it was not to be. The Supreme Court simply cannot be manipulated or led by any member, however dazzling his mental brilliance, who has the psychological faults of a Felix Frankfurter.

4. Lash, *A Brahmin of the Law: A Biographical Essay*, in J. LASH, FROM THE DIARIES OF FELIX FRANKFURTER 75 (1975).

5. A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS, 39, 29 (1970).

6. See generally Murphy, *Elements of Extrajudicial Strategy: A Look at the Political Roles of Justices Brandeis and Frankfurter*, 69 GEO. L.J. 101 (1980).

7. See Levy & Murphy, *Preserving the Progressive Spirit in a Conservative Time: The Joint Reform Efforts of Justice Brandeis and Professor Frankfurter, 1916-1933*, 78 MICH. L. REV. 1252 (1980).

Frankfurter never understood how to operate, how to gain respect, when acting as but one of nine fiercely independent justices. His devotion to "personalia" techniques became counterproductive. As Hirsch has written:

The Supreme Court . . . was an environment unlike the ones in which Frankfurter had triumphed; he was formally committed to sharing power with strong-willed individuals who had ideas of their own. Frankfurter could not lead the Court and, much to his surprise, found himself faced with an opposing "bloc." He was thus confronted, late in life, with a serious challenge to his self-image; he reacted in a manner affecting both his relations with his colleagues and the content of his jurisprudence. [P. 6.]

Frankfurter the Putative Court Leader thus became a horse soon curried.

Hirsch places the rise and the fall of the attempted leadership coup in Frankfurter's earliest period on the Court, 1939-1943, when, following an initial brief moment of good feeling among the Roosevelt appointees, Frankfurter's incessant calls for "self-restraint" and "law as the embodiment of reason" began to grate on his Brethren's nerves. Some began to view these strident calls for "reason," which implied that "reason" had forsaken those who disagreed with him, as masks for the same misuse of personal convictions that he so readily ascribed to others. So often, it seemed, Frankfurter's perception of "reason" lay on the antilibertarian side of the constitutional ledger. And then there were always the strident "personalia" techniques carried over from earlier days, exhibited now in Court Conferences and in the constant outpouring of notes and memoranda and personal visitations. Whatever pretensions Felix had to become the *de facto* leader, they quickly sank in the psychological quicksands of his personality.

The 1939-1943 period was also marked by increasing numbers of collegial rebuffs of Frankfurter's notions of "self-restraint." He increasingly found himself dissenting, or at best concurring. Most galling of all was the Court's dramatic reversal in *Barnette* of his earlier majority opinion in *Gobitis*, which had sustained the constitutionality of compulsory flag salutes.⁸ He did not take these defeats lightly. He reacted toward those who rejected his leadership and his professed judicial ideals by adding bitterness, sarcasm, and insults to his "personalia" approaches to his colleagues. As Hirsch puts it, he reacted "in a manner that had become a familiar part of this psycho-

8. See *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940), *overruled in* *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943). For a summary of the compulsory flag salute controversy in the Court, see J. LASH, *supra* note 4, at 68-73 n.4.

logical makeup . . . in a domain where he had every reason to anticipate complete success; and [where] he had no choice but to remain where he was and fight it out" (p. 176).

Frankfurter came out of this early but critical period with an established and personalized judicial style and with hardened ideological commitments. The style was so personalized that it antagonized rather than influenced; the commitments to judicial "self-restraint" were too rigid and too questionable to pick up many converts among his colleagues. Frankfurter thus was confronted with an impressive array of opponents, primarily Justices Black, Douglas, Murphy, and eventually Rutledge. Those four colleagues, whom Frankfurter loved to call "The Axis" (p. 168), were intractable and formidable opponents. For them he reserved some of his more vituperative assessments, such as "part fanatic, part demagogue," "the most cynical, shamelessly immoral character I've ever known," "crafty on the job," "quite devoid of play and humor," "indecent," "unscrupulous," "as extreme a case of self-love as I have experienced," "malignant," and "momser" (a Yiddish term he himself once identified as carrying connotations of "bastard").⁹ In somewhat more elegant phraseology, he repeatedly attacked the Axis, collectively and individually, as quite lacking in judicial "self-restraint," motivated by "self-willed self-righteous power-lust," and "undisciplined by adequate professional learning and cultivated understanding."¹⁰

Frankfurter did not address these remarks directly to the Axis member who had strayed from the righteous paths of "self-restraint." Far from it. Save perhaps for Douglas, "whose putative political ambitions during the forties became [for him] an obsessive concern" (p. 177), he treated the members of the Axis with overweening, sycophantic flattery. Such flattery, Hirsch notes (pp. 5, 32, 142), is a typical neurotic habit that Frankfurter retained all his life. To take the one instance with which I am quite familiar, he pelted Justice Murphy throughout their judicial association with such fawning notes as, "You represent the ways of reason and fairness," "I wish I could say that I respect everyone around the [Conference] table as much as I do you, as a dean of conviction," and "I think no one has a keener — a more fastidious regard for the dignity and public prestige of our Court than you."¹¹

Yet Murphy well knew that behind his back, and often in discus-

9. *See, e.g.*, p. 182.

10. *See, e.g.*, p. 181.

11. Copies on file with the author.

sions with law clerks of other Justices, Frankfurter would cast sarcastic aspersions upon Murphy's opinions, training, motivations, and devotion to the ways of reason, fairness, and "self-restraint." Much of his low perception of Murphy's talents has been preserved for posterity in diaries and other written memorabilia. It was in a letter to Harold Laski, written after Murphy's death (p. 244 n.14), that Frankfurter made his final bow to his St. Frank: "Poor Frank Murphy! He was a strange mixture of mystic aspirations and as extreme a case of self-love as I have experienced. His deep fear of coming on the Court was well-founded and I think it's fair to say his decade in it was unabated inner tension." So much for the "dean of conviction"!

Even those whom Frankfurter perceived as allies or potential allies in his struggle for personal judicial supremacy were not immune from caustic critique. Save for Hughes, Frankfurter viewed all the Chief Justices under whom he served as shallow, superficial, out of their depth, and incapable of chairing an efficient Conference. And poor Earl Warren! Whatever high hopes Frankfurter may have had for him at the beginning, his unrestrained and ill-tutored liberalism quickly dashed those hopes. "By 1957," Hirsch writes, "Frankfurter was referring to Warren's work as 'dishonest nonsense'" (p. 190).¹²

The non-Axis colleagues, whom Frankfurter also frequently lobbied, were treated with disdain when they refused to bend to his entreaties. He described one as a vegetable, another as exceptionally innocent and ingenuous. Yet to their faces he doubtless described them as intellectual giants, as well-rounded judicial beings. Only a Frankfurter as flawed as the one portrayed in *The Enigma of Felix Frankfurter* could fantasize that judicial influence and greatness can be built upon the sands of insincerity.

In his bitterness and frustration at having failed to lead the way to the promised land of "self-restraint," Frankfurter attacked even the institution of the Court itself. He made his anger crystal clear for all posterity to read, as he did so often with all his innermost tensions. Thus, in the so-called "quinquennium letter" of 1946 to Justice Murphy,¹³ Frankfurter expressed "what he thought about the period [1941-1945 terms] just closed" in the following terms:

1. Never before in the history of the Court were so many of its

12. See Schwartz, *Felix Frankfurter and Earl Warren: A Study of a Deteriorating Relationship*, 1980 SUP. CT. REV. 115. The late Chief Justice once told me, shortly before his death in 1974, that his greatest burden as Chief Justice had been trying to cope with Frankfurter.

13. This letter, dated June 10, 1946, is reproduced in at least two biographical works: J. HOWARD, MR. JUSTICE MURPHY 389 (1968); J. LASH, *supra* note 4, at 264 n.4.

members influenced in decisions by considerations extraneous to the legal issues that supposedly controlled decisions.

2. Never before have members of the Court so often acted contrary to their convictions on the governing legal issues in decisions.

3. Never before has so large a proportion of the opinions fallen short of requisite professional standards.

It would relieve me of much unhappiness if I did not feel compelled to have these convictions. But they are based on a study of the history of the Court which began from the day I left the Law School just forty years ago and on first-hand detailed knowledge of what has been going on inside the Court during the last thirty-five years.

Of all earthly institutions this Court comes nearest to having, for me, sacred aspects. Having been endowed by nature with zestful vitality, I still look forward hopefully to the era which will open on the first Monday of October next.

Ever yours,
FF.

I dare say that no other member of that "near sacred" institution ever imposed such "self-inflicted wounds" upon a projected self-image. The letter is a perfect example of what Hirsch is talking about in this psycho-biography of Frankfurter: It is an angry attack upon the integrity of the institution for which he professed so much love but could not dominate, and shows an "obsessive concern with the motives of his judicial opponents, mixed with high-pitched anger at their behavior and doctrines" (p. 5). In this one letter, which may well have been sent to other members of the Court, Frankfurter reveals his idealized objective self-image, while projecting onto his opponents all the evils of personalized, unrestrained judicial activism. What he could not control or dominate, he turned into an unmitigated evil. And evil, he seemed to think, must be exposed and exorcised at every opportunity.

Perhaps a personal recollection or two at this juncture would not be amiss. The commencement of my "Axis" clerkship in the summer of 1943 coincided with the termination of the 1939-1943 period that Hirsch feels was decisive in Frankfurter's judicial development. By the end of the 1942 Term, "[t]he lines of battle [within the Court had] been sharply drawn; positions [had] been elaborated; sides had been chosen and stances taken" (p. 176). Frankfurter's hopes of becoming a *de facto* leader had been hopelessly dashed. His remaining nineteen years on the Court, which Hirsch quickly dismisses in a twenty-four-page chapter entitled "Dénouement" (p. 177), may then be seen as "the inevitable result of his behavior in the early forties" (p. 177). He was to spend the rest of his judicial days fighting, re-fighting, and in-fighting the old battles long since lost. He was to

fight with all the “psycho-personalia” weapons at his command — lecturing, criticizing the Court, and casting aspersions upon the abilities and motivations of those whom he could not dominate. He would continue, in other words, to “react to adversaries as he had throughout his life — with heated anger and frustration, with attacks on their integrity and motives, with a search for vindication” (p. 177).

Thus, when I arrived at my clerkship post in mid-1943, Frankfurter’s relationships with his colleagues and the content of his jurisprudence had taken final form. My initial indoctrination into what Frankfurter would have called the goings-on inside the Court came not from my Justice, but from the related experiences of other law clerks who were either leaving or staying on for another term. The law clerk network has always provided a candid and objective insight into such goings-on. The network of that era was no exception. From the experienced clerks of that vintage, particularly those who had served “Axis” Justices, I received my first insight into the judicial character of Felix Frankfurter. I recorded in my personal diary of that period, for example, on September 8, 1943, the following law clerk’s characterization of Frankfurter:

Frankfurter: A thoroughly brutal and ruthless individual. Cuts you in two with the greatest ease. Ha[s] a razor-sharp mind and wit. Is likely to try to pry into the inner-office secrets of other justices to find out what’s what. One must be on [one’s] guard at all times when talking with him. Better play dumb or he will chew you up.¹⁴

This description was not far wide of the mark.

Over the ensuing five years, I was privy to numerous confirmations of that candid law clerk’s assessment, an assessment that now seems explainable in Hirsch’s psychoanalytical terms. I saw Frankfurter time and again flex his intellectual muscles to dominate and virtually terrorize lawyers attempting to argue in the Courtroom. On a few occasions I inadvertently overheard snatches of his shrill, table-pounding lectures to his brethren in Conference, as his cries emanated through the thick walls of the Conference room. And I knew from the many weary complaints of my Justice that Frankfurter frequently reduced Conference discussions to little more than stream-of-consciousness soliloquy. As Justice Rehnquist, himself a Jackson law clerk during the Frankfurter era, recalls it,

Harlan Stone and Felix Frankfurter had notorious reputations for championing their own views at great length. That they nonetheless apparently failed, in spite of their very notable abilities, to win many

14. Copy of diary on file with the author.

converts in conference supports the conclusion that the power of persuasion is a subtle skill, dependent on the quality rather than quantity.¹⁵

And Frankfurter was anything but subtle in the Conference or Courtroom.

I cannot hope to tell of all the notes, letters, and conversations that passed between Frankfurter and Murphy in those five years. Murphy rather enjoyed sharing with me many of Frankfurter's notes. The vast majority of those I saw could fairly be described as miniature sardonic lectures. Typical were notes exhorting Murphy not to confuse himself with God in rendering his decisions, or to stop delivering soap-box orations in the course of drafting his civil liberties opinions, or to abandon his personal (rather than judicial) predilections to vote in favor of Reds, Whores, Crooks, Traitors, Japs, Women, Children, and other assorted "clients."¹⁶ While written in a rather elegant and self-effacing style, the missives usually managed to convey a sense of professorial critique of Murphy's capacities as a judge. They had the air of patronizing advice from an intellectual superior, what the Germans might call *Herablassung*. Murphy would sometimes cast on my desk several notes from "F.F." with the remark, "Here, read today's mail from the Little Professor."

Neither I nor Murphy could discover what Frankfurter hoped to accomplish with this endless chain of condescending admonishments. They were not the normal kind of collegial notes that appellate judges write about each other's draft opinions. For the most part, Murphy discarded them with a smile and ascribed them to what he felt were Frankfurter's duplicitous and crafty machinations. If the notes were really designed to reform or change Murphy's ideological commitments, they were futile. If they were designed to change a Murphy vote or position in a given case, they utterly failed. But if they were written to annoy, insult, or display Frankfurter's "personalia" techniques, perhaps they hit their mark. Murphy treated them all as petty annoyances. Some of them he did view as insulting, and some stirred him to anger. One especially angry reaction, I recall, occurred when Murphy read the gratuitous insults to the Court contained in Frankfurter's above-quoted "quinquennium letter."¹⁷

15. Rehnquist, *Chief Justices I Never Knew*, 3 HASTINGS CONST. L.Q. 637, 648 (1976). See Powell, *What Really Goes on at the Supreme Court*, 66 A.B.A.J. 721, 722 (1980).

16. Frankfurter's complete list of Murphy's "clients" appears in Gressman, *The Controversial Image of Mr. Justice Murphy*, 47 GEO. L.J. 631, 640 (1959).

17. See note 13 *supra* and accompanying text.

After reading Hirsch's slender but documented analysis, I now perceive those notes and outbursts to be but tiny brush strokes in a larger neurotic portrait. They had no real *raison d'être*. They bore no relation to the collegial processes. They had no effect in changing Murphy's judicial commitments or *modus operandi*. They were quite inadequate and improper as tools for teaching the judicial trade. They neither reflected nor illustrated the precepts for wise exercise of the judge's prerogative, such as deep humility and respect for differing views, about which Frankfurter spoke so movingly on other occasions.¹⁸ Indeed, these humorless diatribes were quite foreign to the exercise of the Supreme Court's functions and processes. They were but neurotic outpourings of a brilliant but flawed personality.

Hirsch has provided a believable explanation of Frankfurter's judicial behavior and has grounded the explanation on the newer behavioral hypotheses concerning the effects of personality traits upon one's judicial or political behavior. In Frankfurter's case, this behavioral analysis is made all the more acceptable by its heavy reliance on Frankfurter's own written testimony. Frankfurter was a constant dynamo in action; he never ceased reading, talking, writing. His correspondence, his scribbled notes, and his diaries all provide rich evidence of his psychological problems. In effect, Felix Frankfurter has drawn his own neurotic portrait.

But the personality faults revealed by this portrait are used by Hirsch only to explain Frankfurter's judicial behavior, not to assess his judicial importance or legacy. I would suggest, however, that there may well be a nexus between Frankfurter's personality traits and his surprisingly limited judicial legacy. He wrote beautifully and voluminously about the judicial process and judicial restraint. But he wrote and wrote and wrote the same themes over and over, all in a futile effort to stem the groundswells of modern activist jurisprudence. Much of his best judicial writing never rose above the concurring, plurality, or dissenting levels. Some of his majority opinions have been overruled or severely undermined, and time has dimmed the significance of others.¹⁹ His talents were great, but the impact of those talents on Supreme Court jurisprudence appears not

18. See, e.g., Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781, 787 (1957).

19. Professor Kurland's summary of Frankfurter's opinions in the constitutional law area reveals that many were of the concurring and dissenting variety, or have otherwise been rejected by the Court. P. KURLAND, *MR. JUSTICE FRANKFURTER AND THE CONSTITUTION* (1971). I also recall that during my five-year tenure as a law clerk, Frankfurter spent so much time criticizing the work of his colleagues and writing concurring, separate, and dissenting opinions that he was unable to carry his share of preparing majority opinions. He was notori-

so great.²⁰

My question, which I cannot answer definitely, is whether Frankfurter's personality diminished his stature as a judge. Why did not his well-articulated theories of judicial restraint win the support of his Brethren? Was it because they intuitively perceived his position to be but a manifestation of his idealized self-image, a mask for what they felt was a cramped view of the Bill of Rights? Did Frankfurter pursue his shrill "personalia" techniques too far and too often, to the point where the victims simply stopped listening and heeding what he was trying to say? Did his judicial behavior stunt the great impact that his great talents truly deserved?

Frankfurter, who sometimes adopted a baroque and convoluted style, once wrote that "[a] man's achievements are to be measured by subtracting from what now exists that which he has added to what preceded him."²¹ I think that says that one's achievements are measurable by what one has achieved. Applying that measure to Felix Frankfurter, he added much and achieved much in the world outside the Supreme Court. And he added significant chapters to the jurisprudential world that preceded him. But there is an unfinished factor in this equation. Given the bountiful talents of a man like Felix Frankfurter, why did not those talents reach their full judicial potential? Why was he not more influential? Why did he not contribute more to the growth of constitutional law and other areas in which he was so talented? Those unanswered questions would appear to be the ultimate enigma of Felix Frankfurter.

ous for writing the fewest number of majority opinions, and the preparation of even those few were often deferred until near the end of the term.

In his 23 years on the Bench, Frankfurter wrote a total of 725 opinions — 263 majority opinions, 171 concurring opinions, and 291 dissenting opinions. He thus turned out an average of 11.3 majority opinions per term. See Remarks of Chief Justice Warren, *supra* note 1, at XLIV (1965).

20. *But see* A. BAUSTEIN & R. MERSKY, *THE FIRST ONE HUNDRED JUSTICES* 37 (1978). That little book, chock full of interesting statistics about the Court and the Justices, contains the results of a 1970 rating of the first hundred Justices made by 65 academics in law, history, and political science. Felix Frankfurter was rated among "The Twelve Greats" of all time, although one dissenter rated him a failure because of his preoccupation with judicial restraint and because he "used his brilliance to restrict the development of law." *Id.* at 44.

Others in the "great" category were John Marshall, Joseph Story, Roger B. Taney, John M. Harlan (the elder), Oliver Wendell Holmes, Jr., Charles Evans Hughes, Louis D. Brandeis, Harlan F. Stone, Benjamin N. Cardozo, Hugo L. Black, and Earl Warren.

21. This sentence appeared in Frankfurter's eulogy to the legal historian Holdsworth. See Frankfurter, *Professor Sir William Holdsworth*, 30 A.B.A.J. 81 (1944). The sentence was reproduced in the *New Yorker* magazine under the satirical heading "The Legal Mind at Work." See *NEW YORKER*, Mar. 25, 1944, at 82.