Book Reviews

Felix Frankfurter: The Enigma of H.N. Hirsch

The Enigma of Felix Frankfurter. By H. N. Hirsch. *New York: Basic Books, Inc.*, 1981. Pp. x, 253. $14.95.

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H. N. Hirsch[1] puts forth several enigmas of Felix Frankfurter without saying which he regards as *the* enigma of his title. Perhaps others will simply know which it is from Professor Hirsch's exegesis or from specific signals that I failed to perceive. On my reading it could just as well be "puzzling questions about Frankfurter's judicial performance"[2] as clashes within Frankfurter's personality—his being "witty, charming, warm, energized, [and] sparkling"[3] but also "nervous, arrogant, domineering," and given to "sycophantic flattery [and] obsessive concern with the motives of his judicial opponents mixed with high-pitched anger at their behavior and doctrines."[4]

Or it could be the polar disparity of responses Frankfurter drew from others. "He had scores of friends whom he loved and who loved him . . . . Few men in the twentieth century have had the devoted loyalty of so many."[5] Yet "[t]here is [to the contrary] his history of difficult interpersonal relationships. [His] tendency to domineer [sic] the individuals closest to him was so evident that it contributed to mental breakdown in his wife. . . ."[6]

Still again, it may be none of the above or any of the several other

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1. Assistant Professor of Government, Harvard University.
2. H. N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 5 (1980) [hereinafter cited by page number only].
3. P. 4.
4. P. 5.
5. Pp. 4-5.
6. P. 208.

particular enigmas Professor Hirsch spells out, but one of a different order, a single grand enigma he may count upon readers to synthesize for themselves, possibly something as simple as this: that pervasively in his thoughts and acts Felix Frankfurter was both good and bad.

None of these hypotheses satisfies. Ambivalence, intellectual and emotional, is a nearly universal trait. It is not the enigma of Felix Frankfurter but of the human race that everybody is, to borrow words from mathematicians, as much a vectorial sum of opposing magnitudes as an integral of homogeneous series. Why then should Professor Hirsch be struck and expect his readers to be struck that Felix Frankfurter, a man of so much talent, brains, and affection that fanciers of our species looked upon him as a collector's item, was not a monolith?

I do not mean merely to carp at the title. Indeed, whether or not the self-contradictions, paradoxes, and conundrums in his life can fairly be said to have made up *the* enigma of Felix Frankfurter, they are arresting—and revealing, too. So much so that one cannot quarrel with a conscientious biographer for choosing them as his central theme.

My grievance is not that. It has to do with Professor Hirsch's analysis and his judgment. The trace of naivete or humbug I thought I saw in advertising enigma as the paramount quality of the man Reinhold Niebuhr described as "the most vital and creative person I have ever known"[7] led me to wonder whether naivete or humbug pervaded the whole book.

Take the assertion that Frankfurter's tendency to dominate those closest to him "contributed to mental breakdown in his wife."[8] How in the world can Hirsch be "absolutely clear" about that? How can he dare to make any pronouncement at all about a relationship—this one truly enigmatic—between two people who may have had little understanding of it themselves, and who, until Hirsch came along, succeeded in keeping it private, despite the curiosity of scores, possibly hundreds, of Frankfurter watchers, some of them privileged, as Hirsch never was, to observe the menage at close range?

He rushes in nevertheless. To begin with, he loads his question. By referring to Marion's "nervous breakdown," her "mental breakdown," her "hospitalization," her being "institutionalized," and the like, Hirsch gives the impression that at some time or times during their marriage she suffered from a psychological disorder graver by far than the commonplace neuroses of our age of anxiety. If he meant to give that impression, he owed it to his readers to explain why. If not, he has committed a

7. *Quoted in* Wallace Mendelson's introduction to FELIX FRANKFURTER: THE JUDGE (W. Mendelson ed. 1964).

8. *See* p. 208.

calumny.

His answer is no more responsible than his question. The sources he cites to support a conclusion that Felix was to blame for Marion's emotional troubles simply do not bear him out. The first in both order and emphasis is a book on Frankfurter's diaries by Joseph Lash, whom Hirsch paraphrases and quotes as follows:

> Citing interviews with, among others, the late Alexander Bickel, Joseph Lash writes that "there were friends who thought that the neurasthenia that put [Marion] intermittently under psychiatric care in the Twenties was rooted in some inner resistance to her marriage, as if she were never able to resolve her problems of living with a dynamo—a Jewish one at that. . . ."[9]

Right off the bat, readers of this journal will recognize the quotation as three-tiered hearsay—what Lash said of what Bickel said of what others said about Marion and Felix. Beyond that, if we were to treat Lash's imputation to Bickel and others as if it were direct testimony of unchallengeable veracity, the passage would still do nothing for Professor Hirsch's thesis. Marion's "inner resistance to her marriage" and her inability to live with "a dynamo—a Jewish one at that" are as consistent with an hypothesis of blamefulness on her part as on his, or for that matter, of blamelessness on both sides, or of any other permutation one can construct.

If we look carefully at all the other support Hirsch offers for his condemnation of Felix's effect upon Marion's psyche, his thesis droops still more. Thus, he cites the statement Gardner Jackson made for the Columbia Oral History Collection:

> Felix told me he was very much worried about her and said that if I would only agree to have her take on the co-editorship of this book of letters [of Sacco and Vanzetti] with me, he thought, and the psychiatrist thought, that it would be a very great therapeutic value . . . .
> . . . [I]n the course of the case . . . I did become the confidant of Marion and received from her expressions of the difficulties she had encountered in having married a Jew, and the social pressure to which she was subjected, and her inner struggle against this complex of circumstances. More than that, of course, Felix, being the kind of human being he is, or was and still is pretty much, made for difficulties. He is such a vital, dynamic, aggressive personality that that in itself was a difficulty, let alone the fact of being Jewish.[10]

9. P. 83 (quoting J. LASH, FROM THE DIARIES OF FELIX FRANKFURTER 83 (1975)).
10. P. 84 (quoting statement of Gardner Jackson, Columbia Oral History Collection 295-96).

Let me break the thread for a moment. It was not Marion Frankfurter's way to have confidants. If, contrary to any suggestion in the writings of those who knew her best,[11] she ever did have a confidant, it was not Gardner Jackson. Moreover, even if we accept Jackson's bumblings as gospel and give them the utmost probative force they will bear, they too leave Professor Hirsch's thesis unsupported.

So does the other "evidence" Professor Hirsch adduces. He asserts, for example, that "correspondence between Frankfurter and Marion" shows that "Frankfurter dominated Marion . . . [, that] psychoanalysis gave her the strength to stand up to him. . . . [,and that] Marion herself accused Frankfurter of being insensitive to her problems."[12] But what he quotes from the letters themselves—from Felix's: "I have been thinking . . . to what extent . . . your mind is more inhibited . . . when I'm about"; [13] from Marion's: "[S]top worrying about me . . . . I appreciate what a triumph it is for you to discipline yourself to being calm and matter-of-fact for my sake . . . . That it's our problem instead of mine alone brings us only closer together"[14]—points quite the other way.

The only other "support" Hirsch comes up with is a letter written in 1933 to a doctor in London by Dr. Alfred Cohn, whom Hirsch correctly identifies as "one of Frankfurter's closest friends":[15]

> Mrs. Frankfurter has been psychoanalyzed . . . . Felix is sympathetic and is liable to be quixotic and not adequately critical . . . ; he may indeed go so far as to misinterpret . . . thinking she is going on gallantly when in fact she is on the verge of a break.[16]

Any first year law student beginning to have a sense of what is proof and what is not will know that Hirsch's whole essay on the relationship between Felix and Marion is dismissable on a demurrer.[17]

Would that every reader of *The Enigma* were given some such antidote to Hirsch's treatment of Felix's behavior toward Marion as Henry A. Murray's words on the subject. Dr. Murray, at one time head of the department of psychiatry of Harvard Medical School, met Marion in the late twenties as his patient. He soon became a close friend of both Frank-

11. *See, e.g.,* Kanin, *Trips to Felix,* in FELIX FRANKFURTER: A TRIBUTE 34 (W. Mendelson ed. 1964); Kanin, *FF Toward the End,* 51 VA. L. REV. 557 (1965).
12. P. 84.
13. P. 84.
14. P. 83.
15. P. 238 n.74.
16. P. 225 n.60.
17. For the unlikely errant non-lawyer coming upon this *Journal,* I should explain that a demurrer may be described as a so-what pleading. It amounts about to this: "We concede everything our adversary says but point out that it does not make a case."

furters, and continued to be one for the rest of their lives. For what it suggests of Felix's qualities and Marion's response to them, compare a single gentle question put by Dr. Murray with the totality of Hirsch's "demonstration":

> Has F.F.'s interest in human beings, his quest for mettle and fraternity . . . . [his] keeping up the . . . cords of fellowship [been surpassed by a still higher] degree of intimacy . . . reserved . . . for his love's center, his beautiful wife, Marion, whose mysterious inwardness of spirit, provided the balancing complementary pole to his expansive openness?[18]

Or compare what Tom Beasley, another viewer of Felix and Marion from inside their household, had to say. Mr. Beasley—*de jure* the Justice's messenger at the Court, *de facto* man Friday, *intendant général*, chauffeur, and sometime companion for both—saw incomparably more of the Frankfurters at unguarded moments than anyone else. Here, utterly at odds with Hirsch's judgment on their relationship, is his account, relayed by Garson Kanin, of outings they were able to have together during Felix's last months:

> Tom recalls these times happily: "They'd sit there . . . riding along, and holding hands, these two . . . loving people—and he'd point things out . . . as if [he] were a . . . guide—he'd get all excited . . . the way he did—all *involved*—and she'd—well, you know, she'd make all the right sounds."[19]

Enough on what Hirsch asserts Felix's ethos and behavior did to Marion. To those who said "Enough" several pages back, I apologize for so much length. My excuse is this: Hirsch surveys several other important character-revealing relationships in Felix Frankfurter's life, applying to them the same method—conscientious reading and analysis of every bit of relevant information he can lay his hands on—as he does to Felix in relation to Marion; to be made to follow a debate on every detail in Hirsch's discourse on each of these relationships—with women in general, with his father, mother, and brothers, with his mentor-elders, with his proteges, disciples, students, and law clerks, and with his peers at the Supreme Court—would tax the patience of the most tolerant reader, and so I have tried to pin down every strand of Hirsch's tapestry of Felix as a wife-traumatizer and leave methodical response to this part of the book at that.

18. Murray, *The Humanity of This Man*, in FELIX FRANKFURTER—A TRIBUTE, *supra* note 11, at 10, 14.

19. Kanin, *FF Toward the End*, *supra* note 11, at 560.

But a few unsystematic observations on the other relationships just have to be made. When, for example, Hirsch sets out a short paragraph of snippets from Frankfurter's personal writings—one from his 1911 diary and three others from a letter of 1924 to Marion—and concludes from them alone, a body of proof not only too small but also too ambiguous and too specifically focussed on particular women to be persuasive, that "Frankfurter's attitude toward women in general was quite condescending,"[20] I cannot let that get by. The fact is—and here I realize I am compulsively opposing say-I against says-he, no further documentation being available—that Frankfurter's attitude towards women ranged from Edwardian *gallanterie*, which he dealt out rather freely, to chivalric adoration, which he reserved for Marion.[21]

On Frankfurter's family relationship, I give Professor Hirsch this: *The Enigma* brings together more facts about Frankfurter and his family during his boyhood and his twenties than any other publication; and, without saying so explicitly, makes it clear that Felix was felicitously named, that happiness—which, a half-century later, Archibald MacLeish was to call "the quality above all others which distinguished . . . his life"[22]—took him early as a votary.

But Hirsch apparently cannot leave well enough alone. He not only refuses to take at face value Frankfurter's own words on his happiness as a boy and young man, but twists them into a construction that they simply will not bear. For example, he sees Frankfurter's comment to an interviewer for the Columbia Oral History Project, that "the greatest debt I owe my parents is that they left me alone almost completely," as an expression "of resentment at having been neglected."[23] And he finds in the "absence of letters in Frankfurter's files between him and his brothers" a suggestion of "less than complete harmony within the Frankfurter family."[24]

Not leaving well enough alone is also the main weakness in Hirsch's treatment of Frankfurter's relationship with his three mentors, Henry Stimson, Oliver Wendell Holmes, and Louis Brandeis. After drawing a charming picture of the younger man and the older men in unguarded communion with each other on law and life and whatever else their aspi-

20. P. 85.

21. I can hear Professor Hirsh saying: "How can *you* know all this?" My answer: I admit that all this is unknowable, but it is my belief, a belief arising from twenty-five years of close friendship with both Frankfurters. *See* Isenbergh, *Reminiscences of FF as a Friend*, 51 VA. L. REV. 564 (1965).

22. *Proceedings In the Supreme Court of the United States in Memory of Felix Frankfurter*, 382 U.S. xix (1965).

23. P. 16.

24. P. 216 n.8. Curiously, the book does not mention the Justice's sister Stella, doubtless an invaluable source of Frankfurteriana.

rations and good works brought to mind, *The Enigma* goes on to scrounge about, as it does in other spheres of Frankfurter's life, for some countervailing ignobility.

Hirsch seems to be satisfied that he found what he was looking for. In comparing two letters Frankfurter wrote in 1921, one to Stimson, the other to Holmes, he notes that "Frankfurter's tone to Holmes is much gentler than his tone to Stimson."[25] And then, although he has at hand information that provides simple, straightforward, and complete reasons, not in the least invidious, for this difference of tone, he tars it as "suggesting that the Justice was by now a more important relationship to Frankfurter."[26]

To say that Hirsch had information at hand explaining the gentler tone to Holmes is putting it kindly. How could he have been less than vividly aware that the very footnote[27] in which he suggests venality as a determinant of Frankfurter's loyalty to a friend reveals that the two letters that Frankfurter was answering were also different in tone? Holmes's was sympathetic, a statement of concern that Frankfurter had been unfairly criticized for supporting unpopular causes. Stimson's was, in Hirsch's own words, "a stinging rebuke."[28] Indeed, one could say it was an instance of the unfairness that had bothered Holmes, for it scolded Frankfurter for permitting his name to be used in support of a piece of Bolshevist propaganda that, in fact, Frankfurter had not endorsed. An independent explanation, also noninvidious, of Frankfurter's gentler tone to Holmes, an explanation that Hirsch ought to have known, is simply this: in 1921 Frankfurter was thirty-nine years old, Stimson was fifty-four, and Holmes was eighty.

Another aspect of his treatment of those two letters of 1921 may diminish faith in Hirsch's reliability even more than his unfounded leap to a suggestion that Frankfurter would dump Stimson as soon as he found Holmes "more important." Possibly, compassion for an author beset by a huge skein of curly threads he had to straighten could induce tolerant critics, if there are such, to condone resort to that spurious nasty explanation when a solid decent one was indicated. But Hirsch's explanation is not just spurious and nasty. Its efficacy with his readers depends upon his implanting in their minds the premise that Frankfurter's friendship with Stimson had waned.

The fact is that Frankfurter's friendship with Stimson continued undiminished until Stimson's death in 1950. Moreover, Hirsch reveals that he

25. P. 224 n.31.
26. *Id.*
27. P. 223 n.31.
28. P. 74.

knew this. Further on in *The Enigma*—enough further on so that a non-specialist reader could not be expected to relate the text back to what was said of the Stimson-Frankfurter exchange of letters in 1921[29]—Hirsch recounts that in 1932, Frankfurter, in his role as recruiter for the newly elected FDR, "began at the top, by arranging meetings between Roosevelt and Henry Stimson . . . [and] was instrumental in the appointment of Stimson as Roosevelt's secretary of war."[30] Still further on, he quotes the following entry from Stimson's diary, dated January 4, 1941, twenty years after the correspondence readers were invited to regard as evidence that Frankfurter's friendship with Stimson was already on the wane:

> [Frankfurter] gave me a . . . message as to my relations with the President [Roosevelt] and begged me to . . . seek out more opportunities for more talks with him . . . . I told him that I had been keeping away because I did not like to bother him. He said that was wrong—that he was a lonely man and that he was rather proud and didn't like to ask people to come to him but that he was sure that he would welcome my approaches if I would make them.[31]

I cannot leave what Hirsch barbarously calls "the mentor-mentee relationship"[32] without begging those who have stayed thus far to hear me out on one other feature of this part of the book. Hirsch reiterates as if it were as incontestable as the date of Frankfurter's birth that not only toward his mentors, but toward anyone whose goodwill he wanted, he was a sycophant. Thus, of Frankfurter's "political style" he says:

> The most obvious manifestation of this style was his constant resort to flattery. He flattered Henry Morgenthau on their trip to Turkey; he flattered Stimson, Holmes, and Brandeis; he flattered Marion when she was ill; he flattered his colleagues at Harvard; he flattered FDR and the men around him; he flattered his brethren on the Court.[33]

And again: "It is difficult to avoid the conclusion that Frankfurter flattered those he felt would be useful to his cause."[34]

It is not at all difficult to avoid that conclusion. No more needs to be done than to look critically at what Hirsch reveals as his main source: a canard about Frankfurter that Max Freedman unwittingly—in the full

29. Hirsch's discussion of the Stimson-Frankfurter exchange of 1921 is at pp. 74-75; his account of Frankfurter's sponsorship of Stimson in 1932 is at p. 103.
30. P. 103.
31. P. 106.
32. P. 27.
33. P. 206.
34. P. 106.

sense of that word, alas[35]—gave currency to in 1967. In his book on the correspondence between Franklin Delano Roosevelt and Frankfurter, Freedman, otherwise a Frankfurterophile, makes much of the Justice's effusiveness in praising the President: "Frankfurter . . . laid on flattery with a trowel. Sometimes the flattery . . . may seem . . . repugnant."[36] Although Freedman goes on to say that "Roosevelt needed this praise and Frankfurter thought he deserved it," offering this addendum as "their defense, if any is needed," Hirsch quotes only the accusatory part of the passage, which he treats as confirmation by "the most ardent of Frankfurter's admirers" of his thesis that Frankfurter was a sycophant.

Hirsch's other "support" adds nothing to his case, and parts of it may even subtract. His very first allusion to Frankfurter's propensity to flatter,[37] as if it were a fact beyond contest, may put some readers off; the only underpinning he provides—Frankfurter's statement that he was revolted by "the boot-licking deference" paid to E.M. Harriman by his lawyers—is of no help to establish flattery as a frequent component of Frankfurter's own behavior toward others. And many of his other allegations that Frankfurter was a flatterer—there are at least twenty in the book—could affect his readers in the same way.

Sometimes—as when Hirsch cites a truly and deservedly reverential letter to Stimson[38] or Holmes[39]—the documentation he presents shows no flattery at all; sometimes—as when he reports that Frankfurter wrote to Stimson "without the usual flattery"[40]—it is not what the documentation shows but the absence of any documentation at all that may lose him part of his audience, and sometimes—as when he comments upon Frankfurter's reaction, noted above, to the servility of lawyers to E. M. Harriman, or Frankfurter's observations on the susceptibilty of Henry Morgenthau[41] and T. Reed Powell[42] to flattery, or Frankfurter's firing a secretary

35. I have argued elsewhere that by overstating and under-explaining Frankfurter's compliments to Roosevelt, Freedman let Frankfurter down; and that his "defense" seemed to concede merit in the charge of sycophancy when at worst Frankfurter was guilty of bad form in making immoderate statements of encouragement to his most admired friend, then burdened with the world's heaviest responsibilities. *See* Isenbergh, *Claims of History? Or What the Market will Bear?* 45 VA. Q. REV. 345, 351-52 (1968). Compare also Dean Acheson's observation in an unpublished letter dated December 16, 1968, to a fellow admirer of Frankfurter: "FF . . . thought of FDR as in his boyhood he thought of the Emperor Franz-Joseph and treated him in a way somewhere between Lord Melbourne's and Disraeli's treatment of Queen Victoria. It made me squirm but in a way—though not wholly—I understood it."

36. M. FREEDMAN, ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE 1928-1945, at 27 (1967).

37. P. 26.

38. P. 28.

39. Pp. 32-33.

40. P. 36.

41. P. 54.

42. P. 89.

who heaped flattery on him,[43] or even Frankfurter's making a joke about flattery[44]—neither the charge nor its documentation really bears upon the kind of buttering up to others for the purpose of advancing one's own causes that Hirsch attributes to him.

In Frankfurter's relationship with his proteges, disciples, students, and law clerks, Hirsch sees him as a snob and a Svengali—a snob because he devoted "most of his attention to the brightest,"[45] and a Svengali because he "was overly paternalistic and authoritarian toward them, sometimes ignoring their best interests."[46] Once again one must ask whether Hirsch's facts are accurate and whether, to the extent that they are, they prove what he says they do. Surely, Frankfurter "devoted . . . attention to the brightest," as what teacher would not, especially if he were himself one of the brightest at one of the brightest schools? But *most* of his attention? Of the hundreds of lawyers who owed their first jobs to Frankfurter—my figure derives from a moderate assumption of twenty a year for each of the twenty-five years he was a law professor—not more than one in five could have been on the Harvard Law Review and at or near the top of the class. The bald assertion that *most* of Frankfurter's attention went to the prize boys is not enough to make Hirsch's guess a fact. Even if it were a fact, the further fact that almost from the beginning Frankfurter had thrust upon him the role of finding the best young lawyers for the most challenging young lawyers' jobs would save him from a charge of gratuitous elitism.

To back up his allegation of "Frankfurter's paternalistic domination of . . . disciples,"[47] Hirsch offers only two pieces of evidence, both utterly lacking in probative force. The first—duly acknowledged as a paraphrase of a passage in Lash's book on Frankfurter[48]—is the opinion of "Mrs. Mark Howe, the wife of the man . . . [who] was instructed [by Frankfurter] to undertake the Holmes biography," that that undertaking "was . . . not good for him."[49] The second—it too is lifted with due acknowledgment from another source[50]—is also merely a statement of opinion, albeit of Mrs. Frankfurter's opinion, not that Frankfurter dominated anyone, but that his devotion could have harmful effects: "Even Marion recognized that Frankfurter's relationships were not always good for the

43. Pp. 89-90.
44. P. 208 n.15.
45. P. 98.
46. P. 88.
47. *Id.*
48. *See* J. LASH, FROM THE DIARIES OF FELIX FRANKFURTER 54-55 (1975).
49. P. 88.
50. Kanin, *Trips to Felix, supra* note 11, at 56.

recipient; Frankfurter's loyalty she once said, 'is sometimes a curse.' "[51]

If one looks into this citation further, it will inevitably lead to a feeling of having been had. For Garson Kanin's account, from which Hirsch draws the quotation from Mrs. Frankfurter, makes it plain that she was referring to Frankfurter's loyalty not to people but to activities, activities she thought imprudent for him to continue after having his stroke; and that the curse she was talking about was not upon others but upon Frankfurter himself. Once bitten, twice shy. For the rest of the book, it is hard to take any of Hirsch's judgments without suspicion.

It is not only the skimpiness and irrelevancy of what he offers as supporting data that deflate Hirsch's thesis that Frankfurter dominated the lives of younger men. History does—history known to anyone old enough to have read newspapers during FDR's years as President. Like many of my contemporaries I can easily muster up a list of, say, twenty lawyers who joined the New Deal with some encouragement or impulsion from Frankfurter and who went on to national prominence, but I cannot think of one of whom it can fairly be said that Frankfurter dominated his life. Nor, it seems, can Professor Hirsch. The "[s]cores of people [who] ended up in Washington through Frankfurter's influence or with his help"[52] are a recurrent topic throughout the book. Always they are, to quote one of Hirsch's own illustrative lists, "men like James Landis, Alger Hiss, Charles Wyzanski, and Thomas Corcoran,"[53] hardly a company suggesting susceptibility to domination by anybody.

Hirsch's treatment of Frankfurter's relationship with his brethren on the Court is a grand recapitulation. All the flaws of character he found in the relationship between boy Felix and his family, between young man Felix and Marion, between Felix at all ages and women in general, between neophyte Felix and his mentors, and between Professor Frankfurter and his students, Hirsch finds in the relationship between Justice Frankfurter and his judicial peers. So, if Hirsch's rhetoric worked, the picture of Frankfurter at the summit of his career that one would carry from the book is of a domineering, sycophantic, resentful, and manipulative egoist. I believe that Hirsch is dead wrong in all of this: in finding Frankfurter domineering when he was compassionate, sycophantic when he tried to make others feel better about themselves, resentful when, exceptionally, he held back expressions of affection, and manipulative when he meant only to be helpful.

Taken together, Hirsch's epithets present a character who exploits his fellow man, gives little but demands much, and declaims but does not

51. P. 88.
52. P. 109.
53. P. 98.

listen. As an observer, beneficiary, and—how shall I put it—occasional not-so-gently bruised victim of his way of dealing with others, a way combining personal tenderness and intellectual ferocity as I had never seen them combined elsewhere, I long ago resolved the enigma or enigmas of Felix Frankfurter quite differently from Professor Hirsch. A few months after Frankfurter's death, I exposed my resolution as follows:

> FF's double life was no secret. While he never flaunted his love affair with humankind, Mrs. F and his close friends knew all. But lawyers in general did not, a circumstance of ironic effect in that the decent respect they showed for his privacy had unfortunate consequences for FF. By and large, lawyers saw Mr. Justice Frankfurter very much as Harvard Law School students had seen Professor Frankfurter. On the bench as in class, he was a mental juggernaut . . . . It is easy to understand why on occasion a performance of FF which struck some as magnificent struck others as nasty.
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> That this forensic Genghis Khan could be a doting uncle at home was unbelievable to those who knew only the public figure . . . . Conversely, the thousands—and there *were* thousands, so vast was his embrace—exposed only to his gentler side thought the many tales of Felix *fulminans* were a calumny.
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> . . . FF, more consistently than any other person I have ever encountered, gave everyone his due. If you had any merit . . . he saw it. If you had faults . . . FF was not only sensitive to them, but sympathetic and really interested in how they affected your life and the lives of others. If you were not much on your own either way, but represented a class of similar plebes, FF treated you as an ambassador, so to speak, of your economic or spiritual or racial or ethnic country, always according you a respect you did not deserve. And if you were just a run-of-the-mill nonentity, FF warmed you with his affection, because, after all, you were alive, and he loved life in any form.[54]

Hirsch's far different view, his seeing pursuit of self-interest where I saw love of humanity, sets the tone, direction, and value of *The Enigma.* For it is Frankfurter in relation to other people rather than Frankfurter coming to grips with law, government, and politics that Hirsch makes his main focus. This is quite appropriate, too, for a book that announces itself as an application of "psychological theory to biography" in an attempt to reach an accurate psychological assessment of its subject.[55] But if the inferences Hirsch draws from his study of Frankfurter's most psyche-revealing relationships are as mistaken as I have tried to show them to

54. Isenbergh, *supra* note 21, at 565-67.
55. Pp. 6-7.

be—that is to say, if his starting materials are hopelessly skewed—there is no point in going on to his analytical and evaluative next steps.

Those nevertheless willing to go on may share some of the doubts I have about the theoretical aspects of his exegesis. Acknowledging that "choice of a psychological theory for the biographer poses a difficult problem," Hirsch resolves it by embracing "ego psychology," which he describes as one of several "clinically tested theories" to be viewed "as complementary to . . . Freudian analysis, rather than as a refutation," and also "as a general intellectual movement within clinical psychology developed, at least in part, in reaction to the often overwhelming problem of evidence in Freudian theory."[56]

On its derivation—from Erik Erikson and Karen Horney—Hirsch is more specific, as he is on its application. Every act and attitude of Frankfurter he considers, every one of Frankfurter's successes, failures, joys, sorrows, affections, hostilities, worries, serenities, engagements, indifferences, and sensitivities, he presents as an instance of development or disintegration of "self-image"—the Horneyan term[57]—or formation or diffusion of "identity"—the Eriksonian.[58] If the formularized portrait that emerges has any vitality, it is the vitality of a toad—all warts, no flesh and blood, no spirit, some darting cleverness in self-preservation, and otherwise no concern for fellow creatures or their world.

Hirsch's grand conclusion about Frankfurter, expressed in the language readers of *The Enigma* become familiar with early in the book, is this:

> Frankfurter can only be understood . . . psychologically . . . as representing a textbook case of a neurotic personality: someone whose self-image is overblown and yet . . . [someone who] for several . . . years . . . could not decide who and what he was and thus . . . was led to develop a compensating, "idealized" self-image in which he exaggerated his political skills and talents. His political style . . . resulted from that self-image . . . .
>
> . . . Because his self-image was inflated, and because his psychological peace rested upon that self-image, Frankfurter could not accept serious . . . opposition . . . .
>
> . . . He was . . . confronted [at the Supreme Court], 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.[59]

56. P. 215 n.14.

57. *See, e.g.*, p. 7. There must be at least a hundred references to Frankfurter's "self-image" in the book. I gave up counting about halfway through. My total then was 63.

58. *See, e.g.*, p. 7. If there are fewer references to Frankfurter's "identity" than to his "self-image," it cannot be by many.

59. Pp. 5-6.

Justice Tom Clark, Frankfurter's colleague on the Court for eighteen years, has given a quite different explanation of how and why Frankfurter affected not only the colleagues and jurisprudence Hirsch refers to but, in Clark's words, "the quality of his day":

> He did it not only through his scholarship, his dedication to the law, and his judicial self-restraint but also through his conversations, his lively wit, and his warm friendship.
> . . . [H]e was truly a man who understood the "still, sad music of humanity."[60]

Justice John Harlan has given a still different explanation of what he calls Frankfurter's "enduring . . . enrich[ment of] the law" and his "profound impact on the contemporary scene":

> [O]ne of the things that shines brightly and consistently throughout the whole of Mr. Justice Frankfurter's judicial work is a fierce determination to keep his own ideologies and predilections out of the decision of cases. Whether the result arrived at in any *cause célèbre* might turn out to be "liberal" or "conservative" in popular estimation was of no concern to him whatever. One could point to many instances where he felt compelled to decide a case quite contrary to his personal tastes.
>
> The objectivity for which Mr. Justice Frankfurter unceasingly strove was something grander than impartiality of the kind that comes simply from faithful adherence to precedent or pure reason. He brought to bear on his judgments a deep understanding of the nature and values of our federalism; a scrupulous observance of the boundaries between the executive, legislative, and judicial branches of the government; a dispassionate approach to the conflicting forces always present in a dynamic economy; and a sensitive regard for the balance that must ever be achieved in a free society between individual rights and governmental power. All of these things were at once nourished, tempered, and brought into perspective by wide-ranging scholarship; respect for the views of others and open-mindedness in debate; the kind of humility which in the quest for progress seeks to link the promise of the future with the lessons of the past; and the sort of intellectual integrity which in the search for truth relentlessly sets itself against plausible self-deceptions. The end product was professional excellence of high degree and uncommon wisdom which reflected itself not alone in Mr. Justice Frankfurter's decisions on great legal issues but also in the eagerness of many in fields other than the law to obtain his advice.[61]

60. Clark, *My Brother Frankfurter*, 51 VA. L. REV. 549, 549 (1965).
61. Harlan, *The Frankfurter Imprint as Seen by a Colleague*, 76 HARV. L. REV. 1, 2 (1962).

Because Justice Harlan's observations also bear on another theme of *The Enigma*, less central and pervasive than Frankfurter's psyche but important nevertheless, one more short detour has to be taken. When I asserted that Hirsch, quite appropriately, pays more attention to Frankfurter's persona than to his deeds,[62] I did not mean to suggest that the book is inadequate on Frankfurter's career. On the contrary, Hirsch provides a solid compendium of Frankfurter as lawyer, teacher, guru, scholar, and adviser of presidents. But with respect to Frankfurter as a Justice of the Supreme Court, Hirsch is beyond the pale of disciplined scholarly discourse. He reveals himself as unqualified for the elementary juridical analysis prerequisite to appraisal of a Justice's work.

The judicial performance that Justice Harlan admired because it reflected "determination to keep [Frankfurter's] own ideologies . . . out of the decision," "scrupulous observance" of separation of powers, and "respect for the views of others," Hirsch dismisses as pervasively tainted by excessive "judicial self-restraint," excessive because "stretched" to such a "degree [that] he ignored . . . his own belief system."[63] Hirsch seems to think that when Frankfurter took judicial positions contrary to "his own thinking [and] commitment," it had to be in "anger," anger arising from "his attitude toward his liberal opponents."[64] It never occurs to him that Frankfurter could have taken those positions because he believed that an honest reading of the Constitution required him to, and because he had taken an oath prescribed by a federal statute to decide cases "agreeably to the Constitution and laws of the United States"[65]—not agreeably to "values that were . . . important to him."[66]

To return to Hirsch's major theme—if skewed facts and mechanically applied theory have not deviated his "quest for an accurate psychological assessment,"[67] perhaps a subtler but yet more basic impetus has: as he makes clear almost from the beginning of the book, H. N. Hirsch does not like Felix Frankfurter. The result is that although, as I have noted, he occasionally dashes off brief perfunctory lists of Frankfurter's endearing qualities—"vibrant personality: witty, charming, warm, energized, sparkling . . . [with] scores of friends whom he loved and who loved him"[68]—whenever he comes to what he calls "the darker side to [Frankfurter's] character,"[69] he invariably dwells on it, expatiates on it, and

62. *See supra* p. 1029.
63. P. 210.
64. *Id.*
65. 28 U.S.C. § 453 (1976).
66. Pp. 210-11.
67. P. 7.
68. P. 4.
69. P. 5.

makes it vivid with detail. Indeed, if asked now to guess which of the enigmas of Felix Frankfurter Hirsch had in mind for his title, I would say it was that "darker side," which he perceives as a neuroticism of extraordinary intensity and pervasiveness.

Not for a moment do I concede that Hirsch comes close to supporting his grand conclusion: that Frankfurter was "a textbook case of a neurotic personality."[70] But if I were to grant this *arguendo* (and also that dubious gathering of data and application of theory have not by themselves ruined the book), I would still have to count *The Enigma* as a dangerous failure. A failure because it conceals too much: if Frankfurter was superlative in his neuroticism, he was also superlative in his humanity. Dangerous because it may mislead the unwary: someone who has not looked into any of the writing[71] on Frankfurter, writing not in the least notable for silence about his foibles but overwhelmingly eulogistic in its prevailing tone, runs the risk, on reading Hirsch's elaborate caricature, decked out as it is in the caparison of scholarship, of confusing it with the character of Felix Frankfurter.

70. P. 5; *see also* p. 210.

71. *See, e.g.*, FELIX FRANKFURTER: A TRIBUTE, *supra* note 11; J. LASH, *supra* note 48; *Proceedings in the Supreme Court of the United States, in Memory of Felix Frankfurter*, 382 U.S. xix (1965); *In Memoriam: Felix Frankfurter*, 51 VA. L. REV. 547 (1965) (symposium); Articles, 76 HARV. L. REV. 1 (1962).

Slave Law: History & Ideology

The American Law of Slavery, 1810-1860: Considerations of Humanity and Interest. By Mark Tushnet. *Princeton, N.J.: Princeton University Press*, 1981. Pp. 262. $20.00 (paper, $9.50).

Alan Watson†

A book review frequently reveals as much about the reviewer as about the book. In reviewing an avowedly Marxist work on the American law of slavery, I feel compelled to express something about myself. I am not an expert on the American law of slavery but I do know something about Roman slave law. And while I think that I am not a Marxist, I share an interest with them in certain problems, namely the relationship between law and society and the evolution of legal rules. I believe that Marxism has in general been badly served by its legal scholars, whose work is rich in theory but poor in historical legal knowledge and attention to detail. Finally, I would contend that it is difficult to write with insight and accuracy about law and society unless one takes a long-term view, often extending over centuries, and unless one also bears in mind analogous situations and conditions in other societies.

This last contention should be expanded. The impact of purely local and contemporary conditions and ideology on legal change can be estimated accurately only if one adopts a broader perspective. To give a very recent example: In a work celebrating the tercentenary of Stair's *Institutions of the Law of Scotland*,[1] F.H. Lawson explains Stair's omission of any treatment of criminal law in terms of Scotland and of Stair's interests. The explanation seems convincing and fully satisfactory until one notices that similar seventeenth century *Institutes* from Germany, France, Holland, Belgium, and elsewhere frequently also omit discussion of criminal law. Even for Scots law no explanation is likely to be wholly convincing unless the phenomenon is examined in other contexts. This point is especially relevant for a book, like Mark Tushnet's,[2] that is largely concerned with ideology. If, for a rule or attitude prevailing in the ante-bellum

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1. Lawson, *Stair from an English Standpoint*, in STAIR TERCENTENARY STUDIES 234 (D.M. Walker ed. 1981).

2. M. TUSHNET, THE AMERICAN LAW OF SLAVERY, 1810-1860 (1981) [hereinafter cited by page number only].

South, he provides explanations based on economic conditions, then the explanations are at best only partially satisfactory if similar rules or attitudes existed in a time and place where economic conditions differed.

The first chapter sets out Tushnet's conceptual framework describing the slave system that existed in the South between 1810 and 1860. His theory is complex, subtle, and ideologically determined. The primary material conditions that shape interpretations of the world, he suggests, are the social relations of production. The exchange of labor power for a wage is the basic transaction of bourgeois society. The first characteristic of bourgeois social relations is that they are partial: the employer is concerned with the employee's life only insofar as it affects the employer's system of production. By contrast, the slave-owner purchases the slave, not just the slave's labor. The fundamental social relationship of a slave society is total, engaging the full personalities of the slave-owner and the slave.

Southern slave-owners, claims Tushnet, participated in not only a nascent slave society but also a mature bourgeois society. Moreover, they were constrained by their economic ties to bourgeois societies and, more particularly, by the political ties the federal union imposed. These ties suppressed open expression in Southern slave law of the assumptions that people in a slave society need in order to interpret their world. This world had a dual aspect: it was at the same time a world of both totalistic and partial relationships. It was, in fact, a self-contradictory world.

This dichotomy, he continues, was reflected in the law. Southern slave law attempted to allocate control over the slavery relationship to "sentiment," the individual and group morals of the master class. Had this allocation been complete—although it could not be—it would have completely removed the regulation of slavery from the law. Commercial dealings, on the other hand, were regulated by law. "In a sense slave law asserted jurisdiction only over market transactions, leaving other relationships to be regulated by sentiment. Thus the law/sentiment dichotomy was not coincidentally related to the market relations/slave relations dichotomy, but was rather structurally derived from it."[3]

Tushnet finds a second salient characteristic of Southern slave law in the unsuccessful attempt to confine the content of slave law solely to the situation of slaves. But this "categorization" repeatedly failed because of the contradictions in Southern slave society:

> The fundamental structure of slave society required the allocation of law to market relations, but because Southern slavery was part of a

3. Pp. 36-37.

> world capitalist system, the concept of law inevitably shaped the ideology of master-slave relations. Thus, Southern judges were trying to develop a law of slavery when only social control through sentiment could have yielded a stable result. Categorization attempted to confine slave law to the slave setting, but the enterprise was incompatible with the logic of slavery, which entirely denied the relevance of law to that setting.[4]

All in all I find the first chapter well argued. But, as I hope to show, Tushnet's Marxist perspective, explaining legal phenomena by reference to the dualistic nature of the Southern economy, is fundamentally unconvincing. The law/sentiment dichotomy, which Tushnet links to the Southern economic dichotomy (mature bourgeois/nascent slave society), has existed elsewhere without the economic dichotomy—notably in ancient Rome, which was a mature slave society but scarcely even a nascent bourgeois society. Furthermore, the characteristic of repeated but failing attempts at categorization has surfaced frequently in legal history, and is specifically linked with neither slavery nor a self-contradictory society.

I would like to deal briefly with Tushnet's second characteristic. The problem of categorization exists in any legal system that develops, largely without legislative intervention, a response to a new institution. Law develops mainly by borrowing; in the case of borrowing from within the legal system, this means development by analogy. But the analogy may not be easy to apply and may have to be used differently in different situations. Indeed, different analogies may have to be drawn. The legal position of the monk developed in the Middle Ages in just this way. The best analogy for the monk was thought to be to the Roman slave; thus, the monk, like the slave, could not be a party to a law suit, could not witness a will, could with the consent of his superior hold property as if it were his own, was not to be cruelly punished by his superior, and so on. But the analogy was the product of time and was by no means thought complete; in some matters the correct analogy for a monk was held to be to the Roman *filius familias*, a son of any age under the power of his father.[5] The categorization of slave law, however, always presents particular problems. There is no way to avoid the fact that the slave is property, and yet also has volition. In some circumstances the most satisfactory analogy will be with a thing, while in other contexts a free person will be the more apt comparison.

In the second chapter Tushnet analyzes four cases from Southern state

4. P. 42.

5. *See* NICOLAS EVERARDI (1462-1532), LOCI ARGUMENTORUM LEGALES, at locus 24 (Frankfurt am Main 1648).

appellate courts to demonstrate his thesis. He attempts to show that these cases reveal a continuing but not wholly successful attempt by courts to distinguish between law and sentiment as modes of regulating social interactions involving slaves. The further removed from a commercial transaction are the circumstances, the more Tushnet perceives sentiment replacing law as the mode of regulation. The cases also show, he argues, that the primary method of harmonizing law and sentiment was the attempted use of rigid categories to confine the law of slavery to slaves. If one considers his thesis only from the local and temporal standpoint of the South between 1810 and 1860, it would be hard to disprove. He expressly claims that the "structural parallelism, market/plantation and law/sentiment . . . lurks beneath the surface of the cases. It occasionally emerges, but in the end it cannot sustain itself."[6] Against this type of argument, with its built-in ambiguity, it would be futile to produce contradictory evidence from the same place and time. In order to refute Tushnet's Marxist explanation of categorization and the law/sentiment dichotomy, one must either show that the analysis of the four cases he thinks support his thesis is inaccurate or implausible, or demonstrate the existence of similar rules and attitudes at times and in societies where his ideology could have no explanatory value.

Tushnet first analyzes an 1858 North Carolina case, *Ponton v. Wilmington & Weldon Railroad Co.*[7] Ponton hired his slave out to the railroad company to work as a brakeman on a freight train. The train was shunted onto a siding, the switchman negligently failed to return the rails to the correct position, and the following passenger train thus was also shunted onto the siding, causing a collision in which Ponton's slave was killed at his station. Judge Ruffin's per curiam opinion for the North Carolina Supreme Court denied Ponton damages because of the fellow-servant rule: a master is not liable to a servant for injuries arising from the negligence of a fellow servant if the master has used ordinary care in the employment of the fellow servant.

The starting point of Tushnet's argument is the rationale for the fellow-servant rule offered by Judge Lemuel Shaw in an 1842 Massachusetts case, *Farwel v. Boston and Worcester Railroad Corp.*[8] Shaw had claimed that (1) a servant's compensation is adjusted to take account of risks, including that of negligence of a fellow servant, and (2) when an employee found himself working beside another employee who was careless, the former could inform the employer and if the employer failed to act the employee could leave his service. Thus, notes Tushnet, Shaw pro-

6. Pp. 44-45.
7. 51 N.C. (6 Jones) 245 (1858).
8. 45 Mass. (4 Met.) 49 (1842).

vided both a contract and a tort rationale for the fellow-servant rule.[9] In *Ponton*, however, Judge Ruffin relied only on the contract rationale: "[T]he servant when he engages to serve undertakes, as between him and his master, to run all the ordinary risks of the service . . . ."[10] Tushnet finds it "striking" that Ruffin invoked only the contract rationale and said nothing about the tort rationale, although Ruffin was relying heavily on established authority. Tushnet's explanation is that the servant behavior posited by the tort rationale would in this instance have breached a basic assumption of slave society: it would require a slave, the servant, to initiate contact with a free man, the master. In reality such slave-initiated contact happened often, Tushnet states, but the law could not take cognizance of it. Thus, *Ponton* treats law and sentiment as separate spheres of regulation.

But Tushnet's argument from silence is not convincing. That sort of argument is persuasive only when particular and strong reasons seem to impel the discussion that is omitted. Such reasons are absent here. On the contrary, use of the so-called tort rationale in *Ponton* would in fact have been quite inappropriate, for a reason having nothing to do with the servant's status as a slave. The tort rationale, relying on the servant's ability to inform his master of the negligence of his fellow servant, has no relevance where, as in *Ponton*, the servant and fellow servant do not work together, for in such a case the servant has no way of knowing that his fellow servant is careless.

It is, of course, true that the injured servant in *Farwel* did not work beside his negligent fellow servant, and that Shaw was using the tort rationale as a general justification for the fellow-servant rule. Fellow servants can often guard against each other's misconduct: "By these means, the safety of each will be much more effectually secured, than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other."[11] But there is no secure basis here on which Tushnet can erect an argument from silence. To begin with, in attempting to establish new law, the judge may make use of an argument of general principle. But once the law is established, as was the fellow-servant rule by the time of *Ponton*, the general principle need not be spelled out in every subsequent case, especially where the principle is unnecessary and does not obviously fit the facts of the case. Second, as a general justification for the fellow-servant rule, the rationale is weak because frequently, as in *Farwel* and *Ponton*, the injured and negligent servants are not em-

9. I am uneasy with Tushnet's characterization since it appears that Shaw thought both rationales were in contract.

10. 51 N.C. (6 Jones) at 246.

11. 45 Mass. (4 Met.) at 59.

ployed in the same department of duty. Shaw naturally discussed this objection but dismissed it on the ground that it would be extremely difficult to establish a practical rule whose application depends on a lack of such division of departments. Shaw then continued:

> Besides, it appears to us that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability, because the servant has better means of providing for his safety, when he is employed in immediate connexion with those from whose negligence he might suffer; but because the *implied contract* of the master does not extend to idemnify the servant against the negligence of any one but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract express or implied. The exemption of the master, therefore, from liability for the negligence of a fellow servant, does not depend exclusively upon the consideration, that the servant has better means to provide for his own safety, but upon other grounds.[12]

Thus, since Shaw himself recognized the weakness of this rationale, it is only to be expected that a judge of Ruffin's ability would not use it in an instance where it was particularly inappropriate and where another perfectly good rationale was available. Third, this so-called tort rationale was so unsatisfactory that many subsequent cases, of which *Chicago and Northwestern Railroad Co. v. Moranda*[13] is perhaps the best known, held that an employer would be liable for an injury to a servant caused by a fellow servant in a different department of duty. Judge Ruffin showed good sense in not using the rationale when it was not necessary. In sum, no far-reaching conclusion can be drawn from Ruffin's omission of what Tushnet calls the tort rationale.

If Tushnet's analysis is unconvincing here, then his failure to persuade the reader has serious implications for his general theory. The case does not treat law and sentiment as separate spheres of regulation. Yet Tushnet claims that this separation was the primary aim of all Southern slave law. This claim would be hard to prove or disprove, however, because as Tushnet himself states, the effort usually failed. Judge Ruffin himself had only qualified success at maintaining the separation, and the dichotomy between law and sentiment (in this case) was implicit and not directly revealed. Since in any event the claim would be so hard to establish, it is unfortunate that the principal case adduced at best cannot be

12. *Id.* at 60-61.
13. 93 Ill. 302 (1879).

probative and may in fact be irrelevant.

Tushnet's second case is *Gorman v. Campbell*,[14] decided by the Georgia Supreme Court. Tushnet argues that "[w]hen conditions that allowed a court to separate market relations and slave relations were less forceful than in *Ponton*—when the judges were less talented than Judge Ruffin, or the fact setting less obviously market oriented—the line between law and sentiment blurred. *Gorman v. Campbell* . . . is a good illustration."[15] Gorman hired out his slave, London, to work as a steamboat hand for Campbell. Custom barred slaves from working in the water to remove obstructions, but London was so working in the captain's presence for about half an hour when the log on which he was standing began to move. The captain then called to him several times and London jumped to another log, but that log moved downstream and London was drowned. Judge Lumpkin, writing for the Georgia Court, found for Gorman on the ground that the captain was negligent in a contract of bailment.

Tushnet finds the case interesting because of an approach Judge Lumpkin did not take, an approach that would have kept out what Tushnet perceives as a strain of sentiment in a relationship that under the traditional dichotomy would have been regulated by law. He argues that the court could have developed a "fellow-servantlike approach" from its insight that the relationship between owner and hirer was contractual:

> The price of hiring a slave, it could be said, necessarily reflected the various risks inherent in the enterprise. In particular, although the contract might have specified the owner's intention that the slave would be used for enumerated purposes, as a boathand for example, the price would reflect the unavoidable fact that the cost of confining the slave, a person with a mind and a will, to those purposes would be great.[16]

This argument is over-stated. A fellow-servant approach could not have been taken, of course, because the captain was the direct representative of the hirer: his relationship with the slave was that of an employer, not a fellow employee. Whatever risks the law might regard as inherent in the enterprise and so reflected in the price of hiring or of wages, the risk of negligence by the hirer or the employer has never been one.

But perhaps this misunderstands Tushnet. His argument may be that the court could have proceeded to the same result by *analogy* to the fellow-servant doctrine. The price of the hire, under this view, would reflect the supervisory costs of confining a slave to the tasks envisaged by the

14. 14 Ga. 137 (1853). *See* pp. 50-54; *see also* pp. 3-5.
15. Pp. 50-51.
16. P. 51.

contract. This argument also fails, however. The very existence of the custom precludes assumption of this particular risk. The slave's being in the water is barred simply because it is dangerous and hence costly to the master. The slave derives no advantage from being in the water, unless he otherwise expects some punishment from the hirer or hopes for some benefit, again from the hirer. In the absence of a disaster, the hirer can only gain from having the slave work in the water: Hence the existence of the custom and its application against the hirer. Certainly the slave has volition, but its exercise may not be free. Even if it were, the point is scarcely of relevance. The slave is not a party to the contract; rather, he is the object of the contract and must be used in accordance with its express or implied terms. Technically, this is not a hire of services (*locatio operarum*) but a hire of a thing (*locatio rei*).

London worked in the presence of the captain, at work he should not have been doing. The captain did not use the required ordinary diligence, since he should not have permitted the slave to perform work regarded as dangerous. As Judge Lumpkin states, "to neglect to exercise authority to forbid a thing, is to permit it."[17] Tushnet claims, however, that the basis of the court's decision had nothing to do with contractual relations:

> Unfortunately for Judge Lumpkin, the slave's supervisor, after observing the slave attempting to free the boat from the place where it was grounded, ordered the slave to stop. At that point, no harm to the slave had occurred. Only after the slave had defied his supervisor's order did the log on which the slave was standing give way. Although the facts as stated in the opinion are ambiguous, they suggest that a jury could have concluded that the supervisor gave the order in time for the slave to have escaped injury. The supervisor then might not have exercised the proper level of care for the half-hour before he gave the order to stop, but that failure would not have a sufficiently close causal connection to the injury to make the employer liable.[18]

I can understand none of this. The law at that time made a sharper distinction between contract and tort than we use today, and Lumpkin's decision seems to be based on contractual relations. The contract was one of hire. The hirer breached an established custom of the trade, since slaves were not to be used in the water. Hired property was thus used in a forbidden way and damage ensued from that very use. A break in the chain of causation would have been irrelevant; if the slave had fallen off the log entirely as a result of his own negligence, the hirer would still

17. 14 Ga. at 142.
18. P. 52.

have been liable because the use was prohibited.

The issue in the case was precisely the one addressed by Lumpkin: If a hired slave undertakes work, not at the command but with the knowledge of the hirer, that is forbidden because it is dangerous, precisely what steps must the hirer take in order to satisfy the standard of care imposed by the contract? Tushnet claims that the rules adopted in *Gorman* can be justified only because humanity demands it: "In *Gorman*, the rules of law were rhetorically justified by reference to contract and sentiment, and were analytically justifiable only by reference to sentiment."[19] On the contrary, it seems to me the rules were justifiable by and in fact based on contract.

The third case Tushnet discusses is *State v. Mann*,[20] from North Carolina in 1829. A slave, Lydia, was hired out to John Mann for a year. She committed some small offense, for which Mann was going to punish her. She ran off, Mann called on her to stop, she did not, and Mann shot and wounded her. Mann was charged with assault and battery, and the jury instructed to convict if the "punishment . . . was cruel and unwarrantable, and disproportionate to the offense committed by the slave . . . ."[21] Writing for the North Carolina Supreme Court, Judge Ruffin reversed the jury's conviction. At one point Tushnet quotes Ruffin extensively to demonstrate the latter's refusal to accept the prosecution's analogy of punishment of child by parent, pupil by tutor, and apprentice by master. Then Tushnet states:

> The analogy to other domestic relations was rejected, then, because children and apprentices could learn from the consequences of "headstrong passions" and because society would not suffer if parents were punished for using excessive force to discipline their children, whereas slaves would understandably rebel if their "passions" went unchecked and the relation of master to slave would be undermined if the state intervened. Judge Ruffin relied on a court's inability to draw lines between proper and excessive discipline to show just how disruptive it would be to allow criminal prosecutions under any circumstances . . . .[22]

This passage, I think, contains several misunderstandings of Ruffin. First, Ruffin's argument about moderate punishment of free persons was not that they could learn from the consequences of headstrong passions and that society would not suffer if parents were punished for using ex-

19. P. 53.
20. 13 N.C. (2 Dev.) 263 (1829). *See* pp. 54-65.
21. *Id.* at 263.
22. Pp. 60-61.

cessive force. Rather, Ruffin argued that the end in view in punishing the free youth is his happiness. He is born to equal rights with his governor, who has the duty of training him for the station he will assume among free men. The natural means to this end is moral and intellectual instruction, to which the right of moderate punishment is added to make instruction effective. If moderate punishment fails, Ruffin states, it is better to leave the free youth to his own headstrong passions and ultimate correction by the law. Second, contrary to Tushnet, Ruffin does not reject the analogy because "slaves would understandably rebel if their 'passions' went unchecked."[23] Instead, for Ruffin the end of slavery "is the profit of the master, his security and the public safety . . . ."[24] Moral and intellectual instruction cannot convince the slave "what . . . the most stupid must feel and know can never be true—that he is thus to labor upon a principle of natural duty, or for the sake of his own personal happiness . . . ."[25] The right of moderate punishment alone is unavailing because the punishment is not for the purpose of aiding moral instruction. As Ruffin says: "Such obedience is the consequence only of uncontrolled authority over the body. There is nothing else which can operate to produce the effect. The power of the master must be absolute, to render the submission of the slave perfect."[26]

Third, Tushnet exaggerates when he states that Ruffin showed how disruptive it would be to permit criminal prosecutions by pointing to the inability of courts to draw the line between proper and excessive discipline. But Ruffin does say it is difficult to know where a court might properly begin: all powers of a master would probably be swept away if the power of the master was to accord with justice. Ruffin's main argument for excluding criminal prosecutions of masters is that "[t]he slave, to remain a slave, must be made sensible," and must understand "that there is no appeal from his master," whose "power is in no instance usurped; but is conferred by the laws of man at least, if not by the law of God."[27] In fact, Ruffin later suggests that the legislature might intervene to restrict the powers of masters.[28]

Although the point Tushnet is trying to make here seems confused, he is again making much of the distinction between law and sentiment:

> I have argued in the opening sections of this chapter that Southern slave law strove to suppress overt recognition of the dichotomy of

23. P. 60.
24. 13 N.C. (2 Dev.) at 266.
25. *Id.*
26. *Id.*
27. *Id.* at 267.
28. *Id.* at 268.

> sentiment and law. *State v. Mann* shows why: to talk about the dichotomy was, given the nature of Southern slave law, to force the law to appear abhorrent.[29]

But it is precisely here that Tushnet's Marxist analysis reveals itself as fundamentally sterile. The economic conditions of the American South—a mature bourgeois society combined with a nascent slave society—should not be seen as the source of the decision and of Ruffin's arguments in *Mann*. Rather, the facts of life in any society, of whatever economic profile, that accepts slavery would compel a decision like *Mann*. Slavery exists for the benefit of the master, and moral education cannot teach the slave otherwise; hence the master must have very extensive powers of punishment that the slave cannot question. The slave must obey without challenging the master. If the law is to intervene at all to restrict cruel treatment, it will do so only with the utmost circumspection.

A comparison with ancient Rome is revealing. Through the long centuries of the Roman Republic, when the legal system was fully mature, there were no legal restrictions whatsoever on the power of the master arbitrarily to punish and even to kill his own slave. With the Empire came some restrictions, but even the Christian emperor Constantine decreed that there would be no investigation where a slave died after a beating by his master, "whether the punishment was simply inflicted or apparently with the intention of killing the slave."[30] Again, when slaves tried to accuse or inform against their masters, "the assertion of such atrocious audacity will be repressed at the very outset, a hearing will be denied them, and they will be crucified."[31] The lawmakers went a long way to keep law out of relations between master and servant. But Rome was not a society beset, in Tushnet's economic sense, by an internal contradiction. It was a mature slave system. It is also worth noting that the Roman jurists thought slavery contrary to morality. As Justinian defines it, "[s]lavery is an institution of the law of nations by which, contrary to nature, a person is subjected to the domination of another."[32]

Tushnet's fourth and last case is an 1818 decision from Louisiana, *Jourdan v. Patton*.[33] Jourdan's slave put out the one good eye of Patton's slave. The trial court, finding Jourdan liable, ordered him to pay Patton the value before injury of the now worthless slave, the slave's medical expenses, and a lump sum and monthly payments for maintenance of the slave. The court further held that the slave was to remain forever in Pat-

29. P. 62.
30. 9 CODE THEOD. 12.2.
31. *Id.* at 5.1.1.
32. INST. JUST. 1.3.2.
33. 5 Mart. 615 (La. 1818). *See* Pp. 66-70.

ton's possession. The Louisiana Supreme Court reversed: once the full value of the slave was paid, title would pass to Jourdan. Hence the award for maintenance failed.

Tushnet comments:

> The defendant's liability was predicated on some theory analogous to failure to supervise his own slaves, which suggests some indifference to the harm they might do. That indifference, the trial court surely concluded, might well carry over to the maintenance of a useless slave. It then made sense to leave the injured slave with his longtime owner and to force the defendant to assume only the costs of maintenance, but not the actual care. The latter course would, it seems, have been dangerous to the slave.[34]

Surely this is nonsense on various levels. First, Tushnet has no right, without evidence or argument, to posit the theory on which the trial court based liability. In fact, Tushnet in this case is demonstrably wrong—the rule was simply taken from Spanish and French law, which in turn had taken it from Roman law. There is every indication that in Roman law the rationale was not failure to supervise. Indeed, the Louisiana rule is so much a transplant that it retains from Roman law an option in the defendant to surrender the wrongdoing slave instead of paying damages.[35] This is impossible to justify if the basis of liability is failure to supervise. Second, how does the rule itself suggest the master's indifference to harm that his slaves might do? If a legal system had a rule, postulated on a failure to supervise, of liability for damage of animals, one would not say that when an animal caused damage and made the owner liable, the existence of that rule suggests that the owner was indifferent to harm caused by his animals. Third, the likelihood that Jourdan would be indifferent to the welfare of the blind slave has no place in the legal analysis. As a purely practical matter it is, of course, reasonable to assume that Jourdan would be relatively indifferent. The slave had no economic value to him, had performed no previous services for him, and would have been thrust upon him purely as a result of a legal decision. But this indifference, contrary to Tushnet's suggestion, cannot be discovered as a result of legal argument. Tushnet confuses legal rules with social realities. The judge is to decide in accordance with legal rules. In *Jourdan* the judge fails to do so, and perhaps for that he should be honored, but Tushnet's previous discussion has (seemingly) been based upon legal rules. Tushnet goes so far as to claim that it may have been dangerous to hand over the worthless slave to

34. P. 66.
35. DIGEST OF THE CIVIL LAWS tit. 6, art. 22 (1808).

Jourdan. Dangerous it may have been, but could the judge any more properly have taken that danger into account than a present-day judge could order that an individual with no police record be locked up on the ground that psychiatrists think it is likely that he will commit crimes in the future?

The Louisiana Supreme Court, as Tushnet rightly stresses, recognized that "principles of humanity" would lead one to suppose that the mistress of years' standing would treat her "miserable, blind slave" with more kindness than would Jourdan.[36] The Court nonetheless said that these principles could not be taken into account, for the law clearly required that the slave be handed over to Jourdan. But no tension between slave society and bourgeois society can justifiably be discerned here. The same conflicting claims of principles of humanity and legal rules exist in any slave-owning society, even one without a hint of bourgeois modes of production. Roman law again provides examples. For instance, the jurist Paul writes:

> If you killed my slave, I do not think that personal feelings should be taken into account, [as] for instance if someone killed your natural son [who is someone else's slave] whom you would be willing to buy at a high price, [you should receive] only what he would be worth to everyone . . . .[37]

Humanity finally won out in a situation Javolenus discusses:

> An owner left a legacy of five gold pieces to his slave: "Let my heir give to my slave Stichus whom I have ordered in this will to be free the five gold pieces which I owe him according to my account books." Namusa writes that the reply of Servius was that nothing was given as a legacy to the slave because a master could not owe his slave anything. I think that following the intention of the master a natural rather than a civil debt is to be looked for. And that is the rule we follow.[38]

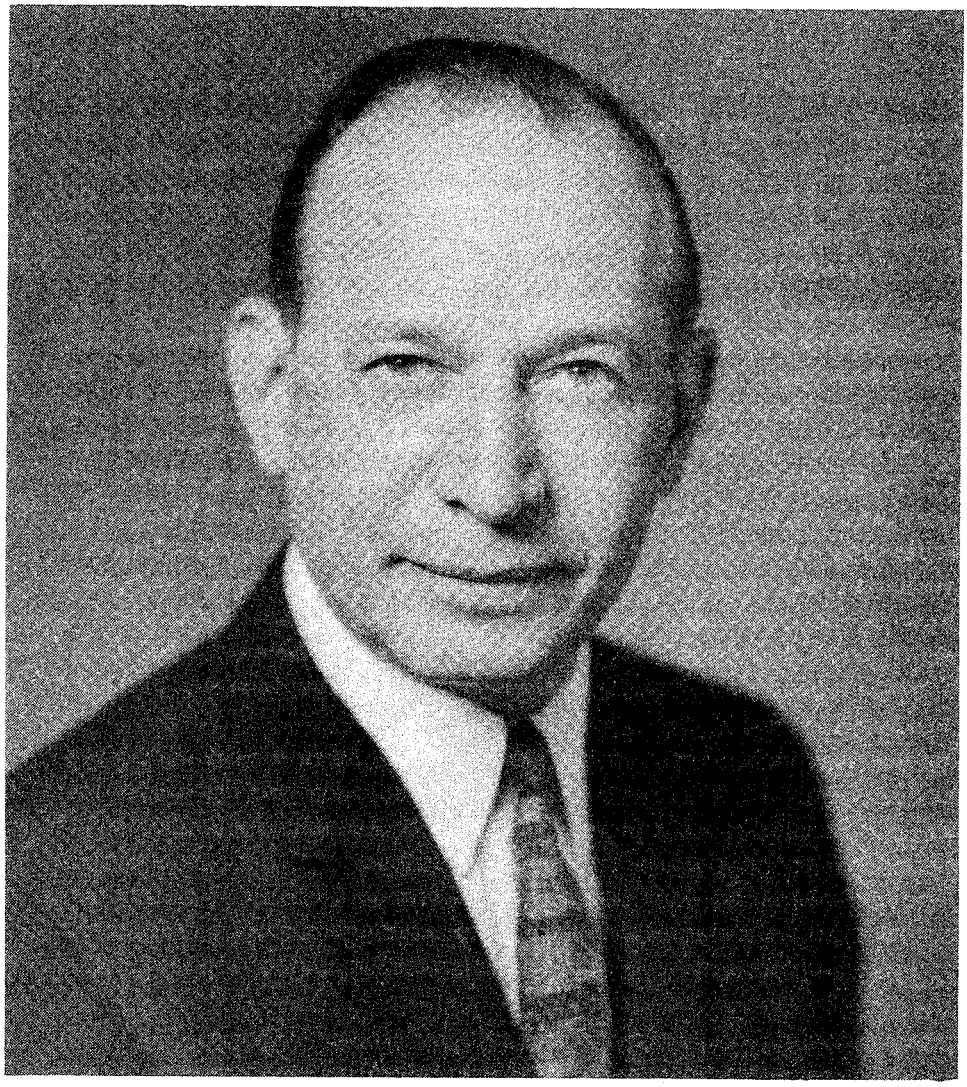
Examples of such tensions in Roman law abound.

The heart of Tushnet's book, I believe, consists of the conceptual framework in chapter 1, and the four cases analyzed in chapter 2 to illuminate the ideological underpinnings of Southern society. Yet, as I hope I have demonstrated, the cases are analyzed wrongly in legal terms, and a correct analysis cannot lead to Tushnet's result. Furthermore, the last two

36. 5 Mart. at 617.
37. DIG. JUST. 9.2.33. pr.
38. *Id.* at 35.1.40.3.

cases illuminate tensions inherent in any slave society. They disclose nothing about the particular ideological underpinnings of Southern society except that the South contained slaves.

If the cases chosen by Tushnet do not support or illustrate his conceptual framework, then we may ask whether the framework is valid or necessary. A simpler version, along the following lines, might well suffice. In all slave systems, law and sentiment will each regulate some aspects of slavery. The more the issue involves master and slave, the more in general the law will not intervene; the more the issue involves the master (or a person acting in place of the master) and a third party, the more the law will regulate the parties' behavior. There will be a continuous tension in law between the treatment of the slave as property and the recognition that he is human or at least has volition. Such a thesis is sound, I believe, though it does not tell one very much. But it cannot be accepted by a Marxist, who must have a theory akin to Tushnet's. If the primary material conditions that shape ideology are the social relations of production, then the South, being both a mature bourgeois society and a nascent slave society, would of necessity have contained an inner contradiction revealed particularly in slave law. Tushnet's failure in his analysis of the cases, however, should mean that the book will convince only those predisposed to believe the theory.



ABE FORTAS (1910-1982)

The Editors wish to dedicate this issue to the memory of Justice Abe Fortas.