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A Study in Style: Mr. Justice Frankfurter

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A STUDY IN STYLE: MR. JUSTICE FRANKFURTER

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THE CONCEPT OF "STYLE" is elusive. As E. B. White has asked, "Who can confidently say what ignites a certain combination of words, causing them to explode in the mind? Who knows why certain notes in music are capable of stirring the listener deeply, though the same notes, slightly rearranged, are impotent?"[1] Style, in the sense of "distinguished and distinguishing" writing, is recognizable but indefinable.

Consider these examples:

> No man has earned the right to intellectual ambition until he has learned to lay his course by a star which he has never seen, — to dig by the divining rod for springs which he may never reach.[2]

> My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law.[3]

> We have been educated to an awareness of the enormous role which the unconscious plays in ordinary life, and the best of judges are beginning to realize, as Mr. Justice Holmes did long ago, how profoundly important it is that a judge be on his guard lest he read "his conscious or unconscious sympathy with one side or the other prematurely into the law." When judges decide issues that touch the nerve center of economic and social conflict, the danger, in de Tocqueville's phrase, of confounding the familiar with the necessary is especially hazardous.[4]

Anyone who is reasonably familiar with legal literature would recognize those passages as products of, respectively, Holmes, Cardozo, Frankfurter.

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1. Strunk and White, THE ELEMENTS OF STYLE 52 (1959); See generally, MURRY, THE PROBLEM OF STYLE (1922).
2. HOLMES, *The Profession of the Law*, in SPEECHES 22, 24 (1913).
3. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112 (1921).
4. FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 23 (1938).

Mr. Justice Holmes voiced novel thoughts in coruscating phrases. He said that "any idea that has been in the world for twenty years and has not perished has become a platitude although it was a revelation twenty years ago,"[5] but his ideas were too original and too originally expressed to become mere platitudes.[6] They stimulate thought; they are not substitutes for it.

Legal writing, if not legal thinking, is buttressed by the authority of the past, whether statutes, decisions, treatises, or occasional papers. Good lawyers are not "bred up from their Youth in the Art of proving by Words multiplied for the purpose, that *White* is *Black,* and *Black* is *White,* according as they are paid."[7] We have not yet, we may hope, reached the state that Swift described in the Country of the Houyhnhnms:

> It is a Maxim among these Lawyers, that whatever hath been done before, may legally be done again: And therefore they take special Care to record all the Decisions formerly made against common Justice and the general Reason of Mankind. These, under the Name of *Precedents,* they produce as Authorities to justify the most iniquitous Opinions; and the Judges never fail of directing accordingly.[8]

We do, however, rely on our great authorities for support. Because the thrust of his thought was so true, the revelation of his words so flashing, no American judge ranks higher than Holmes in the pantheon of legal intellects.

The prose of Cardozo was not so crisp as that of Holmes. His occasional writings approach a point more by circumambience than by direct attack. Holmes could put in a sentence a thought that would take Cardozo a page, and yet Cardozo's graceful, old-fashioned English is a delight to read, and in its own gentle way, it is as unique as Holmes's. "Not for us the barren logomachy that dwells upon the contrasts between law and justice, and forgets their deeper harmonies."[9]

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5. HOLMES, *Law and Social Reform,* in THE MIND AND FAITH OF JUSTICE HOLMES 399-400 (Lerner ed., Modern Library 1953). In a similar vein Holmes also said, "I am immensely struck with the blind imitativeness of man when I see how a doctrine, a discrimination, even a phrase, will run in a year or two over the whole English-speaking world." HOLMES, *Law in Science and Science in Law,* in COLLECTED LEGAL PAPERS 210, 230 (1920).

6. It is impossible to imagine that anything Holmes ever said — certainly not if it was considered to be worth quoting — could be classified as a commonplace or as a dull, stale, or insipid truism, which is a definition of "platitude" in WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1934). Surprisingly enough, there is not a single line from Justice Holmes in the OXFORD DICTIONARY OF QUOTATIONS.

7. SWIFT, GULLIVER'S TRAVELS 281 (Heritage, 1940).

8. *Id.* at 282.

9. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 134 (1921). In reviewing a book by Cardozo, Frankfurter wrote, "The bar reads his opinions for pleasure, and even a disappointed litigant must feel, when Judge Cardozo writes, that a cause greater

With this fragment he breaks a page of simple declarative sentences to introduce a new idea that brings his thought to its climax. Like a cautious legal draftsman, he often used an excess of punctuation marks, but they are a characteristic we associate with him, and they serve as effective emphases; they slow us down the better to absorb the thought.

The successor of Holmes and Cardozo is the modern master of legal literary style. In his opinions, in his extra-judicial legal writing, in his occasional papers, Mr. Justice Frankfurter sets a standard to which the wise can repair.

When the Justice writes, he has a point to make, and he gets to it with graceful sentences that reveal a profound sense of history, an incredible erudition, an inexhaustible vocabulary, and the greatest sensitivity to the use of English possessed by any lawyer now writing.[10] Perhaps because English is his second language, he has a "feel" for words matched only by another master of English, who came to that language, as a writer, much later in life than did the Justice: Vladimir Nobokov. In the hands of a master, English is a rich language of subtleties and shadings in diction, far transcending the potentialities adumbrated in the pedestrian prose to which we have become inured.

A combination of words may or may not add up to a meaningful sentence.[11] But the right combination of the right words does add up to style; and with Justice Frankfurter, the sentential result is a stylish expression of genuine, meaningful thought.

Recognizing that legal terms are empty vessels to be filled with meaning, Justice Frankfurter draws on many sources to supply the need. "Words being symbols do not speak without a gloss." The concept of a "jury" in the Sixth and Seventh Amendments — "a body of twelve men who must reach a unanimous conclusion if the

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than his private interest prevailed." FRANKFURTER, *When Judge Cardozo Writes*, in LAW AND POLITICS 103, 106 (1939). In a frank, though personally inapplicable, comment Frankfurter said, "Incurably subdued by the materials of my profession, I seemingly cannot write a paragraph without 'if anys' and *a fortioris*. Here is the inevitable lawyer's writing — the dull qualifications and circumlocutions that sink any literary barque or even freighter, the lifeless tags and rags that preclude grace and stifle spontaneity." *Id.* at 104.

10. Some of Justice Frankfurter's unusual expressions inspired the first poem ever to be published in the Harvard Law Review: Field, *Frankfurter, J., Concurring*, 71 HARV. L. REV. 77 (1957). While he often uses unusual words, some of Frankfurter's most renowned phrases are built of old words used in new ways, of common words put to uncommon uses.

11. There is a tendency to believe that any sequence of words that "sounds" all right is meaningful, that collections of words followed by question marks are questions. In this connection, perhaps the apex of the impossible was reached during the presidential campaign of 1960 when there was serious discussion over whether the prestige of the United States had declined abroad. What is "prestige"? How is it measured? Where? Why? On the futility of such non-sense questions, of which there are many in the legal world, see WEINBERG, LEVELS OF KNOWING AND EXISTENCE 213-54 (1959).

verdict is to go against the defendant" — is relatively stable, but the same cannot be said of "due process," which "exacts a continuing process of application."[12]

In the course of solving constitutional problems, there is, indeed, a continuing process involved in understanding the symbolic concepts of the Constitution. To those who attempt to understand and probe the nature of "meaning," a judicial approach in terms of "absolutes" is unsatisfactory, if not incomprehensible.[13] While no one will agree with every opinion of Mr. Justice Frankfurter, for whatever the reason of the moment might be, the method by which he searches for a solution is a realistic one, a paradigm for practical judging. He

12. Rochin v. California, 342 U.S. 165, 169-70 (1952). This is an echo of Holmes's oft-quoted statement, "We live by symbols . . ." in *John Marshall,* in SPEECHES 87, 90 (1913). Probably the most famous treatment of symbolism in language, although "symbol" is used in a restricted sense, is OGDEN & RICHARDS, THE MEANING OF MEANING (1923). As Justice Frankfurter has pointed out (in *The Early Writings of O. W. Holmes, Jr.,* 44 HARV. L. REV. 717, 718 (1931)), Holmes explored the nature of meaning a half-century before Ogden and Richards wrote their great book. His understanding of "meaning" made possible THE COMMON LAW (1881). He said, "We must think things not words," in an address in 1899 (HOLMES, *Law in Science and Science in Law,* in COLLECTED LEGAL PAPERS 210, 238 (1920)) and repeated the thought again in 1913 (HOLMES, *Law and the Court,* in SPEECHES 98, 100 (1913)). On symbolism, see HAYAKAWA, LANGUAGE IN THOUGHT AND ACTION 24-37 (1949); KORZYBSKI, SCIENCE AND SANITY 76-84, *passim* (4th ed. 1958); MORRIS, SIGNS, LANGUAGE AND BEHAVIOR 23-27, *passim* (1955); SAPIR, LANGUAGE 127-56 (1921); WHITEHEAD, SYMBOLISM, ITS MEANING AND EFFECT (1927); BOAS, *Symbols and History,* in LANGUAGE: AN ENQUIRY INTO ITS MEANING AND FUNCTION 102 (Anshen ed. 1957). On the problem of meaning in law, see CURTIS, ITS YOUR LAW 42-81 (1954); LEVI, AN INTRODUCTION TO LEGAL REASONING, *passim* (1949); LLOYD, INTRODUCTION TO JURISPRUDENCE 32-52 (1959); ROSS, ON LAW AND JUSTICE 111-23 (1959); FRANKFURTER, *Some Reflections on the Reading of Statutes,* in OF LAW AND MEN 44 (1956); Williams, *Language and the Law,* 61 L.Q. REV. 71, 179, 293, 384 (1945), 62 L.Q. REV. 387 (1946).

13. This is not meant to disparage the stimulating and challenging contribution made by those who espouse "absolutes" in law. The leading exponent of "absolutes" is Mr. Justice Black, and the leading explanation of his stand is in Black, *The Bill of Rights,* 35 N.Y.U. L. REV. 865 (1960) where he said: "It is my belief that there are 'absolutes' in our Bill of Rights, and that they were put there on purpose by men who knew what words meant, and meant their prohibitions to be 'absolutes.'" *Id.* at 867. For a sympathetic view of this position, see C. L. Black, Jr., *Mr. Justice Black, the Supreme Court, and the Bill of Rights,* Harper's Magazine, Feb. 1961, p. 63. Professor Black says that in a "purely logical sense" it does not matter whether we talk in terms of "absolutes" or "balancing," since a definitional qualification is involved however a Bill of Rights problem is approached; that we balance interests in determining what goes into a right or what comes out of it; but that the "absolute" approach gives a firmer basis to constitutional guarantees because if they are "absolute," it will take strong justification for over-riding them. There is undoubtedly some sound psychology in this view, but as a justification for a theory of constitutional interpretation, it is almost a reversion to the view that judges find law instead of make it, that the constitutionality of a statute is found by laying the statute next to the Constituion. See also BLACK, JR., THE PEOPLE AND THE COURT 87-119, *passim* (1960). Compare, HAND, THE BILL OF RIGHTS 63 (1958); Bickel, *Mr. Justice Black: The Unobvious Meaning of Plain Words,* The New Republic, Mar. 14, 1960, p. 13. A recent historical study of the Supreme Court reached this conclusion: "There are those on the modern Court — Justices Black and Douglas are the leading exemplars — who would resolve constitutional uncertainties with large, bold, pioneering strokes of the pen. If this is the proper model for judicial governance, then history is indeed an untrustworthy guide." MCCLOSKEY, THE AMERICAN SUPREME COURT 227 (1960).

has told us that doubts and difficulties "arise frequently when the Court is obliged to give definiteness to 'the vague contours' of Due Process or, to change the figure, to spin judgment upon State action out of that gossamer concept. Subtle and even elusive as its criteria are, we cannot escape that duty of judicial review."[14]

The Flag Salute Cases[15] have rested in quiescence for some years now and may, perhaps, bear a calm re-examination. The problem involved was whether all public school children in a jurisdiction could be required to salute the national flag. In the *Gobitis* case, the Court, per Mr. Justice Frankfurter, said yes, with only Mr. Justice Stone dissenting. Three years later, after some changes in the Court's composition, and with some vote switches, that decision was overruled. In writing for the Court in *Barnette,* Mr. Justice Jackson said, "Symbolism is a primitive but effective way of communicating ideas."[16] (He seemed to be speaking, not of words, but of flags, crowns, maces, and other such objects.) The state's attempt to foster national unity through saluting (or worshipping, as Jehovah's Witnesses may have felt) a symbolic flag was an unwarranted interference with religious freedom. The dissent of Mr. Justice Frankfurter begins with the most poignant phrase in all judicial utterances:

> One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should whole-heartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our

14. Haley v. Ohio, 332 U.S. 596, 602 (concurring opinion). "The dominant chord in Mr. Justice Frankfurter's judicial philosophy is cosmological. He sees the legal and political system as an order of decision-making competences: and the Supreme Court — the court par excellence — as a moderator." Jaffe, *The Judicial Universe of Mr. Justice Frankfurter,* 62 HARV. L. REV. 357 (1949). See also Freund, *Mr. Justice Frankfurter,* 26 U. CHI. L. REV. 205 (1959); Mendelson, *Mr. Justice Frankfurter — Law and Choice,* 10 VAND. L. REV. 333 (1957); Pollack, *Mr. Justice Frankfurter: Judgment and the Fourteenth Amendment.* 67 YALE L.J. 304 (1957); Sacks, *Mr. Justice Frankfurter,* 26 U. CHI. L. REV. 217 (1959).

15. Minersville School District v. Gobitis, 310 U.S. 586 (1940), and West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943). For contemporary comments on these cases, see the following notes: As to *Gobitis,* 12 GEO. WASH. L. REV. 70 (1943), 42 MICH. L. REV. 319 (1943), 17 TEMPLE L.Q. 465 (1943), 92 U. PA. L. REV. 103 (1943); as to *Barnette,* 26 CORNELL L.Q. 127 (1940), 29 GEO. L.J. 112 (1940), 39 MICH. L. REV. 149 (1940), 6 MO. L. REV. 106 (1941), 18 N.Y.U.L. REV. 124 (1940), 14 So. CAL. L. REV. 57 (1940), 14 TEMPLE L.Q. 545 (1940), 15 WASH. L. REV. 265 (1940).

16. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 632 (1943). Without attempting to take a vote, it seems rather certain that most commentators agree with *Barnette.* For recent ringing affirmations, see CAHN, THE MORAL DECISION 181 (1955), and GELLHORN, AMERICAN RIGHTS 96-100 (1960). Compare CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 259-60 (1958).

> judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. As a member of this Court I am not justified in writing my private notions of policy into the Constitution . . . I cannot bring my mind to believe that the "liberty" secured by the Due Process Clause gives this Court authority to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship by employment of the means here chosen.[17]

Answering Mr. Justice Jackson, Frankfurter said, "We are told that symbolism is a dramatic but primitive way of communicating ideas. Symbolism is inescapable. Even the most sophisticated live by symbols . . . . The significance of a symbol lies in what it represents. To reject the swastika does not imply rejection of the Cross."[18]

The dissent closes in this way:

> Of course patriotism cannot be enforced by the flag salute. But neither can the liberal spirit be enforced by judicial invalidation of illiberal legislation. . . . The tendency of focusing attention on constitutionality is to make constitutionality synonymous with wisdom, to regard a law as all right if it is constitutional. Such an attitude is a great enemy of liberalism. . . . Reliance for the most precious interests of civilization . . . must be found outside of their vindication in courts of law. Only a persistent positive translation of the faith of a free society into the convictions and habits and actions of a community is the ultimate reliance against unabated temptations to fetter the human spirit.[19]

Even those who disagree with the ultimate point in the dissent are not likely to take exception to this statement of a faith. Nor would most critics contradict the Justice's version of the religion-state history in this country.[20] But the idea "that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a

17. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 646-47 (1943) (dissenting opinion).

18. *Id.* at 662 (dissenting opinion). The transition here from the general concept to the specific symbol is a highly effective stylistic device. One of the finest of recent English writers, from the standpoint both of style and of content, was George Orwell, and his translation of a well-known passage from ECCLESIASTES into modern officialese is, as it was intended to be, a fair illustration of how not to write. The original: "I returned, and saw under the sun, that the race is not to the swift, nor the battle to the strong, neither yet bread to the wise, nor yet riches to men of understanding, nor yet favor to men of skill; but time and chance happeneth to them all." The translation: "Objective consideration of contemporary phenomena compels the conclusion that success or failure in competitive activities exhibits no tendency to be commensurate with innate capacity, but that a considerable element of the unpredictable must inevitably be taken into account." Quoted in STRUNK & WHITE, THE ELEMENTS OF STYLE 17 (1959).

19. 319 U.S. at 670-71.

20. *Id.* at 652-61.

degree as the courts"[21] is more difficult to apply. Judicial self-restraint may reasonably be effectuated in different ways, depending on whether the legislation in contest deals with economic or libertarian policies. Because the public schools were the entree into American society for Justice Frankfurter,[22] as for so many others, it would be quite reasonable for him to be sympathetic toward the efforts of school authorities to inculcate good citizenship into their scholars.[23] After all, a government has a right to work for its own preservation. Where its actions apply evenly and are not designed specifically to interfere with religious freedom, may the oddities and vagaries of religious sects claim precedence? There must be some limits to the exemptions allowed religious sects in the "name" of religious freedom. The problem, basically, is in drawing the line. There are times when majorities have privileges and minorities have duties. Local governments do not — nor could they — compel students to attend public schools, although the alternative may be a burden on parents which they may, if they choose, bear; but if students attend public schools, they will generally have to comply, in their conduct, in their studies, in their recreation, with what the majority deems proper — consistent, always, with our constitutional guarantees. So we have nine men, of divergent views, to fill in the outline of the permissible penumbra, to determine how abstract words apply to concrete situations, to substitute a constant for a variable in the legal equation that the Court must solve.

It was not possible to decide a case involving church-state controversy in 1940 or 1943 by asking what the Founding Fathers had in mind when they adopted the First Amendment.[24] (In any event the Founders were not thinking of state action.) Their general ideas are, of course, pertinent for some purposes, but words do not have "fixed meanings;" in fact, it may require some explanation if we even say that words *have meanings* at all.[25] "General propositions do not

21. *Id.* at 649, quoting Mr. Justice Holmes in Missouri, Kansas & Texas Ry. v. May, 194 U.S. 267, 270 (1904).

22. See FRANKFURTER (WITH PHILLIPS), FELIX FRANKFURTER REMINISCES 3-5, 9-11 (1960).

23. See THOMAS, FELIX FRANKFURTER: SCHOLAR ON THE BENCH 45-59 (1960).

24. This aid to interpretation would not be so often used if we accepted Mr. Justice Black's view that, "To my way of thinking, at least, the history and language of the Constitution and the Bill of Rights . . . make it plain that one of the primary purposes of the Constitution with its amendments was to withdraw from the Government all power to act in certain areas — whatever the scope of those areas may be." Black, *The Bill of Rights,* 35 N.Y.U.L. REV. 865, 874-75 (1960).

25. Quine would not use the word "meaning" at all. He feels that the word is used in two senses: the having of meaning, or significant sequence, and the alikeness of meaning, or synonomy. QUINE, FROM A LOGICAL POINT OF VIEW 47-64 (1953). Wittgenstein said, "When I think in language, there aren't 'meanings' going through my mind in addition to the verbal expressions: the language is itself the vehicle of thought." WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 107e (1953).

decide concrete cases."[26] They do not do so because they cannot be automatically applied; some intellectual effort is involved in deciding whether or how they ought or ought not to govern the resolution of a controversy.

Those who rely strongly on historical arguments to fill in the vague contours of constitutional concepts may be distressed by a recent work of historical scholarship where the author concluded that "the generation which adopted the Constitution and the Bill of Rights did not believe in a broad scope for freedom of expression, particularly in the realm of politics."[27] Yet the "bold statement" that there shall be no law abridging the freedom of speech or press, "not the narrow understanding, was written into the fundamental law. . . . But there is no evidence to warrant the belief, nor is there valid cause or need to believe, that the Framers possessed the ultimate wisdom and best insights on the meaning of freedom of expression. It is enough that they gave constitutional recognition to the principle of freedom of speech and press in unqualified and undefined terms. That they were Blackstonians does not mean that we cannot be Brandeisians."[28]

History is interesting; it is not necessarily persuasive, certainly not where subsequent events have given a term new connotations which it may not have had a hundred or more years ago. But all of those events are in themselves history, and precedents which appear to be in point deserve consideration. Indeed, one of Justice Frankfurter's strongest points in his *Barnette* dissent was that this case overruled a series of cases decided by eminent Justices, where all of the decisions were in line with the *Gobitis* decision. The Supreme Court may not and should not be bound by its precedents, but strong "reasons" are normally required to override precedential history. Those reasons may not persuade concurrence by critics, or all of the Justices, in the overruling, but they need satisfy only a majority of Justices to result in "law" for the litigants before the Court — and, by imaginative extension, "law" for the rest of us, too.

"For a *large* class of cases — though not for all — in which we employ the word 'meaning' it can be defined thus: the meaning of a word is its use in the language." *Id.* at 20e. "How do I know this colour is red? — It would be an answer to say: 'I have learnt English.'" *Id.* at 117e. Wittgenstein has been highly influential and it seems reasonable that, aside from words which are basically undefinable (*e.g.*, if, but, a, the), we can really say very little more than that we do play "language-games;" but when we are using words which are not "object words," to use Russell's terminology (RUSSELL, MY PHILOSOPHICAL DEVELOPMENT 145-55 (1959); see also RUSSELL, HUMAN KNOWLEDGE: ITS SCOPE AND LIMITS 57-158 (1948)), and the words are not directly referable to any *thing*, we should recognize that inherent ambiguity is unavoidable. We should realize the limitations of language.

26. Holmes, J., in Lochner v. New York, 198 U.S. 45, 76 (1905).

27. LEVY, LEGACY OF SUPPRESSION vii (1960).

28. *Id.* at 309. Compare Wyzanski, *History and Law*, 26 U. CHI. L. REV. 237 (1959).

While the criticism has been made that the Supreme Court has been too "result-oriented,"[29] it is difficult to see how a question of significance could be decided without giving consideration to the consequences which a decision one way or the other will have. Indeed, this is probably the reason for declining to review "political questions."[30] All constitutional questions are in some degree political, but this label is attached only in cases where the Court does not feel in command of the consequences which a decision would bring about.

Logic, except in a formal sense, decides no case. It may "flatter that longing for certainty . . . in every human mind" and it may be traditional to cast opinions in syllogistic form, but "certainty generally is illusion"[31] and tradition may here be followed only because no suitable alternatives seem to be available. Logic is a system of thought, not a thing; it is a means, not an end.

Legal rules and principles are abstractions. To be useful they must grow out of experience — they could not be otherwise imagined — and they must be stated in some form that bears a reasonable relation to life as we know it. There must be a correspondence between the structure of our legal language and the structure of our non-verbal world.[32] In some ways a slavish devotion to logical form has hampered the development of law. It does not conform to experience to say that something must be either A or not-A, that something cannot be both A and not-A,[33] yet we continue to say it. It depends on how we look at people, things, events. The same room may "be" hot to one person and cold to another. A particular defendant may not really be guilty or not guilty; he may be a bit of both. In tort law the concept of comparative negligence is a recognition of this non-Aristotelian outlook. There are legal horizons which cannot be approached by a straight path. The problems are too complicated. The greatest judges recognize this. They weigh all of the factors involved, being fully aware that there is no purely legal controversy, that law is only a facet of life. Gunnar Myrdal was indeed a suitable authority to cite when the effect of segregation on school children was at issue.[34]

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29. Griswold, *Of Time and Attitudes — Professor Hart and Judge Arnold,* 74 HARV. L. REV. 81, 91 (1960).

30. For a suggestion that if the Court is to play a significant role in guarding American political liberty, it must decide "political questions," see FRANK, MARBLE PALACE 197 (1958). See also Gomillion v. Lightfoot, 81 S. Ct. 125 (1960). The political field of yesterday may furnish grist for the Court's mill today.

31. HOLMES, *The Path of the Law,* in COLLECTED LEGAL PAPERS 167, 181 (1920).

32. See KORZYBSKI, SCIENCE AND SANITY 55-98, *passim* (4th ed. 1958); JOHNSON, PEOPLE IN QUANDARIES 112-42 (1946).

33. See WEINBERG, LEVELS OF KNOWING AND EXISTENCE 81-95 (1959).

34. Brown v. Board of Education, 347 U.S. 483, 495 n.11 (1954). See Greenberg, *Social Scientists Take the Stand,* 54 MICH. L. REV. 953 (1956).

Candid judges tell us where their ideas come from.[35] They ought to be praised, not derided, when they do. Only when we know what has gone into decision-making can we intelligently agree or disagree,[36] and then our reaction will be as much emotional as intellectual, not that the two responses can be separated.

Our clues to judges' minds are not likely to be found in opinions written for the Court. They are "symphonies not solos."[37] To carry a majority so much may be left out or put in that we do not get the writer's personal views. Concurring and dissenting opinions are valuable in understanding judges; they have been of the highest importance in the development of constitutional law; they are not to be lightly scorned. For law is impersonal only in a sense. "Equal justice under law" suggests that two persons caught up in similar controversies will be treated the same way in court. *Stare decisis* aims toward this mark. But it is an imperfectly realized ideal.[38] Some lawyers are better than others; that makes a difference. A jury may like one litigant but not another; that makes a difference. A rich corporation is not a pauperous individual; that makes a difference. And there are times, as T. R. Powell pointed out, when "the difference might make a difference."[39] While we strive for an idealized consistency, we must be mindful that certainty is unattainable; it is not

35. In a short concurring opinion in Kingsley Int'l Picture Corp. v. Regents, 360 U.S. 684, 691 (1959), involving censorship of the movie "Lady Chatterley's Lover," Justice Frankfurter quoted from D. H. Lawrence on pornography, noted an English case of 1868 on censorship, quoted from a Report of the Select Committee on Obscene Publications to the House of Commons (1958), cited recent Parliamentary Debates, plus the usual quota of federal and state cases. In Justice Frankfurter's great lecture on *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217 (1955), the citations range from landmark cases to Isaiah Berlin's HISTORICAL INEVITABILITY; from old admiralty cases not even cited in Gilmore and Black's ADMIRALTY to recent cases from this country, Canada, South Africa, New Zealand, Australia, and England; from nineteenth century biographies to JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA and an unpublished letter of Thomas Jefferson.

36. The recent per curiam practice has, of course, been much criticised. See *e.g.*, Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 3-5 (1957); Note, *Supreme Court Per Curiam Practice: A Critique*, 69 HARV. L. REV. 707 (1956); Comment, *Per Curiam Decisions of the Supreme Court: 1957 Term*, 26 U. CHI. L. REV. 279 (1959). "In cases of first impression Lord Mansfield's often-quoted advice to the business man who was suddenly appointed judge, that he should state his conclusions and not give his reasons, as his judgment would probably be right and the reasons certainly wrong, is not without its application to more educated courts." Holmes, *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1 (1870), reprinted in 44 HARV. L. REV. 725 (1931).

37. FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 13 (1938).

38. The overruling of a precedent previously relied upon as controlling is an exception, but an exception which arises out of a judicial desire to do "justice," no doubt, as in the *Barnette* case. Whether such a case is an instance of *"Equal* justice *under law"* raises a nice question which has no particular answer, so perhaps it ought not to be asked.

39. POWELL, VAGARIES AND VARITIES IN CONSTITUTIONAL INTERPRETATION 36 (1956).

necessarily even desirable. Judges are not automatons, and to a great degree they tell us what the "law" is. Half of the litigants in our courts — and some of our professional critics — are always going to be disappointed. This is part of the price we pay for the "rule of law."

All of this is not to say that Mr. Justice Frankfurter is always "right" in his decisions. "Right" and "wrong" are inapt adjectives to apply to judicial decisions. His method is meritorious. His approach is proper. It is futile quibbling to complain that he, or any other judge, is not consistent in applying his judicial standards. The "inconsistency" or rightness or wrongness which critics sometimes find is not in a judge or in his decisions; it is in the critics. It is a conclusion which they draw, based on their own experience and understanding. It is satisfactory to say, "A lemon is yellow," if we know that the yellowness is in our own perception and is not in the lemon.[40] So it is with consistency and inconsistency or "right" and "wrong" in the criticism of judicial decisions. Life is a process of change and it is, in any case, as true now as it was in Emerson's day that "A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines."[41] The most we can ask of a judge is that he be intelligent and that he should try to take an informed, impartial, temperate course in adjudication. Elaborate exegeses have their place, but there is always an unexplainable residue; explanations must come to an end somewhere.

Mr. Justice Frankfurter follows in the tradition of three of our greatest judges: Holmes, Brandeis, Cardozo. He was their friend; he is their intellectual heir. He has surpassed Mr. Justice Cardozo, because Cardozo had too little time to leave his special imprint on constitutional law. He has surpassed Mr. Justice Brandeis, because Brandeis's thoughts were more enduring than the diction of their expression. If he still stands in the intellectual umbra of Mr. Justice Holmes, so do we all; and he acknowledges it proudly.

It takes time and literary style for even the ablest judges to make a lasting impression on the Supreme Court's history. Mr. Justice Frankfurter has had both in abundance. For this we may be grateful.

40. See JOHNSON, PEOPLE IN QUANDARIES 112-42 (1946).
41. EMERSON, *Self-Reliance* in COMPLETE ESSAYS AND OTHER WRITINGS 145, 152 (Modern Library 1940).