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“SLOW DANCE ON THE KILLING GROUND”:† THE WILLIE FRANCIS CASE REVISITED††

Arthur S. Miller* and Jeffrey H. Bowman**

*The time is past in the history of the world when any living man or body
of men can be set on a pedestal and decorated with a halo.*

FELIX FRANKFURTER***

The time is 1946. The place: rural Louisiana. A slim black teenager named Willie Francis was nervous. Understandably so. The State of Louisiana was getting ready to kill him by causing a current of electricity to pass through his shackled body. Strapped in a portable electric chair, a hood was placed over his head, and the electric chair attendant threw the switch, saying in a harsh voice “Goodbye, Willie.” The chair didn’t work properly; the portable generator failed to provide enough voltage. Electricity passed through Willie’s body, but not enough to kill him. He merely sizzled. Frantically, the attendant threw the switch back and forth, but to no avail. “Let me breathe,” Willie gasped. Finally, Sheriff E.L. Resweber ordered him taken back to his cell. At that time, what some call the majesty of the law swung into action. Could Louisiana, having bungled the first attempt, have a second chance to kill Willie?

Willie Francis’s case reached the United States Supreme Court, where he was represented by a young lawyer just beginning his law practice, J. Skelly Wright, now Judge Wright of the United States Court of Appeals for the District of Columbia Circuit, and by Bertrand DeBlanc, a Louisiana lawyer retained by Willie’s father. The Justices heard the case, agonized over the decision (at least, some of them said that they did), and allowed Willie to go to his death. The second attempt succeeded. This Article analyzes the case of *Louisiana ex rel. Francis v. Resweber*¹ almost forty years after the fact. We focus, first, on the legal maneuverings that ensued after the botched first effort; second, on the internal dynamics of the Supreme Court in its handling of the case; and, finally, upon Justice Felix Frankfurter’s abortive attempt to save Willie by secret political action, even though he had been

† W. HANLEY, *SLOW DANCE ON THE KILLING GROUND* (1931).

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* Leo Goodwin, Sr. Distinguished Visiting Professor of Law, Nova University; Professor Emeritus of Law, The George Washington University.

** J.D., The George Washington University.

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*** Frankfurter, *The Supreme Court and the Public*, 83 *FORUM* 329, 329 (1930).

1. 329 U.S. 459 (1947).

unwilling to do so as a judge. The context of these events is Louisiana in 1946-47 and concerns the treatment of, and the rights accorded to, a young black defendant under the Constitution. An appendix reproduces some heretofore unpublished documents—including letters, memos, and withdrawn concurring and dissenting opinions. Willie Francis's body has long since crumbled to dust, but the issues presented to the constitutional order are as alive today as in 1947.

Considering its unique place in Supreme Court history, it is odd that the *Francis* case has been ignored by constitutional law scholars and the nation's law reviews.² That oversight requires correction. Questions regarding such subjects as capital punishment, cruel and unusual punishment, the role of personal opinion in judicial decision making, secret extrajudicial political activities of Supreme Court Justices, and the role of the Supreme Court vis-à-vis state governmental authorities survive *Francis*. The troubled emotions created by the case were such that Justice Frankfurter, who cast the deciding vote in favor of the second attempt to execute, secretly tried to secure executive clemency from the Louisiana governor and, thus, to reverse the Court's decision.³ The case also is testimony to a shining moment of compassion in the otherwise uneventful judicial career of Justice Harold Burton—a Justice who almost without fail sided with the government in criminal cases.⁴

2. In the aftermath of the *Francis* decision, six law reviews discussed the case in commentaries, none of which devoted more than seven pages to it. See 4 LOY. L. REV. 84, 84-85 (1947); 31 MARQ. L. REV. 108, 108-11 (1947); 22 ST. JOHN'S L. REV. 270, 270-73 (1948); 20 TEMP. L. REV. 584, 584-86 (1946-47); 21 TUL. L. REV. 480, 480-86 (1947); 33 VA. L. REV. 348, 348-49 (1947). See also Note, *Double Jeopardy*, 7 NAT'L. B.J. 259, 262 (1948) (discussion of *Francis* limited to a single paragraph). In Jaffe, *The Judicial Universe of Mr. Justice Frankfurter*, 62 HARV. L. REV. 357 (1949), the *Francis* case apparently is considered a black hole in the Justice's universe as it went unmentioned in a 60-plus page survey of Felix Frankfurter's first 10 years on the Court. The same may be said for other analyses of his career. See, e.g., P. KURLAND, MR. JUSTICE FRANKFURTER AND THE CONSTITUTION 144 (1971) (discussion of *Francis* limited to statement that, when determining whether a confession by a 15-year-old lad is coerced, judges must divine the feelings of society from the evidence, making every effort to detach themselves from their merely private views). Biographers of other members of the 1946 Vinson Court make little mention, see, e.g., M. BERRY, STABILITY, SECURITY, AND CONTINUITY 65-66 (1978) (discusses the dialogue between Justices Frankfurter and Burton, to conclude that Burton's dissent was a "sensational exception" to his usual support of police authority in criminal cases); J. HOWARD, MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY 303, 438-39, 443 (1968) (discussion of *Francis* limited to Murphy's contention that when determining what is cruel and unusual punishment, judges must depend on their own consciences), or no mention, see, e.g., G. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION (1977); E. GERHART, AMERICAN'S ADVOCATE: ROBERT H. JACKSON (1958), of the *Francis* case. Two authors have discussed the case. See L. BAKER, FELIX FRANKFURTER 280-86 (1969) (concludes that Frankfurter "went through his own private hell" in reaching decisions such as *Francis*); B. PRETTYMAN, DEATH AND THE SUPREME COURT 90-128 (1961) [hereinafter cited as PRETTYMAN].

3. See *infra* notes 218-36 and accompanying text.

4. Justice Burton was a strong supporter of the government's position in criminal cases as demonstrated in the dissents he authored. See, e.g., *Haley v. Ohio*, 332 U.S. 596, 607-25 (1948) (Burton, J., dissenting) (believed that confession obtained from 15-year-old boy arrested for murder, after extensive questioning and without benefit of counsel, did not violate due

Viewing *Francis* through collected papers of some of the Justices⁵ reveals an early, as yet unchronicled conflict between Justices Black and Frankfurter over the application of the Bill of Rights to the States through the due process clause of the fourteenth amendment. In a memorable and controversial dissent in *Adamson v. California*,⁶ Justice Black for the first time publicly articulated his view that the fourteenth amendment was intended "to extend to all the people of the nation the complete protection of the Bill of Rights."⁷ Despite loud opposition from Justice Frankfurter and votaries in the cult of Frankfurter worship,⁸ Justice Black's incorporation theory was remarkably prescient. Although never accepting the theory of total incorporation, subsequent Supreme Court law-making, in effect, has made Black's *Adamson* dissent law.⁹ The Court has gone even further and adopted Justice Murphy's

process guarantees); *Ballard v. United States*, 329 U.S. 187, 203-07 (1946) (Burton, J., dissenting) (argued that fact that no women were members of grand jury did not render a woman's indictment invalid); *Duncan v. Kahanamoku*, 327 U.S. 304, 337-58 (1946) (Burton, J., dissenting) (supporting invocation of martial law and suspension of civil privileges in territorial Hawaii during wartime); *Estep v. United States*, 327 U.S. 114, 145-46 (1946) (Burton, J., dissenting) (maintained that a registrant indicted for violating a draft board order must submit to induction before seeking habeas corpus relief).

5. Secrecy, as Justice Frankfurter said, may well be "essential to the effective functioning of the Courts." Frankfurter, *Justice Roberts and the "Switch in Time"*, AN AUTOBIOGRAPHY OF THE SUPREME COURT 244 (A. Westin ed. 1963). However, that need only apply to the deliberations of the current members of the Court and not to the preservation of its papers for later historical and scholarly analysis. Other than opinions, the Justices' writings may include internal memoranda to other members of the Court, letters to friends, diary entries, etc. Although such writings may later occasionally prove embarrassing, they are nonetheless indispensable for the construction of hypotheses regarding judicial behavior. Professor Ernest J. Brown once remarked that "[w]e cannot explore the minds of Justices, and what they do not put on paper we do not know." Brown, *Quis Custodiet Ipsos Custodes?—The School-Prayer Cases*, 1963 SUP. CT. REV. 1, 32. It is hoped that members of the present Supreme Court will fully preserve their Court papers for future generations of scholars.

6. 332 U.S. 46 (1947) (fifth amendment privilege inapplicable to state criminal proceedings).

7. *Id.* at 89 (Black, J., dissenting). Black maintained that, based on the history of the fourteenth amendment, the amendment was intended to apply the entire Bill of Rights to the states. *Id.* at 71-74. He argued that Frankfurter's "natural law" theory that was employed to determine whether a right was sufficiently "fundamental" to be applied to the states, was too vague and granted the Court discretion that was not intended by the framers of the Constitution. *Id.* at 75.

8. See, e.g., Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 STAN. L. REV. 5 (1949) [hereinafter cited as Fairman] (detailed analysis of the congressional floor debates to conclude that the fourteenth amendment was not intended to impose the entire Bill of Rights upon the states); Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Judicial Interpretation*, 2 STAN. L. REV. 140 (1949) [hereinafter cited as Morrison] (comprehensive examination of Supreme Court precedent to assert that selective incorporation and natural law theory inherent in a due process analysis are more appropriate than total incorporation).

9. Justice Black's total incorporation theory has never commanded a majority. Recognizing this, Black reasserted his belief in total incorporation of the Bill of Rights into the fourteenth amendment but also expressed support for the selective incorporation theory "as an alternative." *Duncan v. Louisiana*, 391 U.S. 145, 164 (1968) (Black, J., concurring). Yet, because virtually all of the rights guaranteed by the Bill of Rights have been held applicable to the

Adamson dissent in which he said that rights in addition to those enumerated in the Bill of Rights were protected by the fourteenth amendment.¹⁰

Francis also demonstrates the progress made in the area of procedural safeguards for alleged criminals in the post-World War II years. Procedural irregularities which no doubt would not be tolerated today were both widespread and significant in *Francis*. The case, like *Korematsu v. United States*¹¹ and *United States v. Rosenberg*,¹² is a dark reminder of our recent legal past. Thus, to revisit *Francis* is to realize that not so long ago the United States Supreme Court sanctioned constitutional shortcomings which resulted in an execution of a teen-age black in Louisiana. There is substantial doubt whether Willie Francis would have had to face the chair twice today.¹³

I. THE BUNGLED ELECTROCUTION OF WILLIE FRANCIS

Willie Francis is an episode in American history which reads like fiction. Willie's arrest, trial, and electrocution were replete with constitutional errors, bad judgments, and simple bungling. Examples included questionably "free and voluntary" confessions made in the absence of counsel, loss of the alleged murder weapon, inadequate counsel, and the botched execution. The full extent of these mistakes is perhaps best seen in a chronological statement of the facts as compiled from the papers before the Supreme Court. From these papers, the *Francis* Court decided that "[o]n [the] record, we [can] see nothing upon which we could conclude that the constitutional rights of petitioner were infringed."¹⁴

Willie Francis, a resident of St. Martinville, Louisiana,¹⁵ was mistaken for the accomplice of a known drug dealer and arrested in nearby Port Arthur, Texas. Once in custody, the police realized their error and dropped

states under the fourteenth amendment through selective incorporation, the debate concerning total and selective incorporation has become largely academic.

10. See, e.g., *Roe v. Wade*, 410 U.S. 113, 164-65 (1973) (right to choose whether to bear children, derived from a right of privacy, is absolute in first trimester of pregnancy); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (right to use contraceptives); *Rochin v. California*, 342 U.S. 165, 172 (1952) (right to be free from bodily intrusions that are so offensive as to shock the conscience).

11. 323 U.S. 214 (1944) (executive order directing that Japanese-Americans be relocated to concentration camps was constitutional during state of war). See also *Hirabayashi v. United States*, 320 U.S. 81 (1943) (upholding convictions of Japanese-Americans for violating curfew while residing at wartime relocation centers).

12. 195 F.2d 583 (2d Cir.) (only death sentence for peacetime espionage in American history), cert. denied, 344 U.S. 838 (1952).

13. Cf. *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (all mitigating factors, including defendant's age and family history, should be considered before imposition of a death sentence).

14. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 466 (1947).

15. St. Martinville is a small town in the heart of "Cajun" country in the southwest portion of Louisiana. Once known as Le Petit Paris, it was settled in the last half of the 18th century by Acadians (French-speaking natives of Nova Scotia forced out by the English after 1750) and Royalist refugees from the French Revolution. Today, St. Martinville is perhaps best known for the oak tree near the center of town which was immortalized by Longfellow in his poem "Evangeline." See generally F. KNIFFEN, *LOUISIANA: ITS LAND AND PEOPLE* (1968).

charges but detained Francis and later charged him with the assault and robbery of a Port Arthur resident. Whether Francis was guilty of this crime was never determined. While in custody, Francis confessed to the November 8, 1944 slaying of a white man, Andrew Thomas, a popular and "well-loved"¹⁶ resident of St. Martinville. Despite an intensive police investigation, Thomas's murder had been unsolved for nine months. Willie's confession to the Port Arthur police, scrawled in a childish hand, consisted of some seventy-five words:

I Willie Francis now 16 years old I stloe the gun from Mr. Ogise at St. Martinville La. and kill Andrew Thomas November 9, 1944 or about the time at St. Martinville La. it was a secret about me and him. I took a black purse with card 1280182 in it four dollars in it. I all so took a watch on him and sell it in new Iberia La. That all I am said I throw gun away .38 Pistol¹⁷

In what might be called an example of "informal rendition," despite Louisiana's failure to request formally that Texas transfer Willie,¹⁸ Port Arthur police, having been alerted to the Thomas slaying, immediately transferred Francis to Louisiana authorities.¹⁹

According to Willie's Baptismal Certificate, he was born on January 12, 1929, and was fifteen at the time of the Thomas murder. Willie was one of fifteen children of a farm laborer who had an income of nine dollars per week.²⁰ What little education Willie had was gained in segregated, poor

16. The Weekly Messenger, St. Martinville, La., Nov. 10, 1944, at 1, col. 4. See also Appendix to Brief for Respondent at 94, Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947) (from record of Louisiana Pardon Board Hearing, testimony of Dist. Atty. L.O. Pecot) [hereinafter cited as Appendix to Respondent's Brief].

17. See "Voluntary Statement while In Custody", Appendix at A1. This statement was prefaced with the following:

I, Willie Francis being in the custody of Claude W. Goldsmith, Chief of Police of the City of Port Arthur, Jefferson County, Texas and having been warned by E.L. Canada, Justice of the Peace, Jefferson County, Texas, the person to whom the hereinafter set out statement is made by me, that I do not have to make any statement at all, and that any statement made by me may be used in evidence against me on my trial for the offense concerning which this statement is made, do here make the following voluntary statement in witness to the said, E.L. Canada to wit:

Id. Obviously, Francis did not write this preface.

18. See U.S. CONST. art. IV, § 2, cl. 2. This article provides:

A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the Crime.

Id.

19. Appendix to Respondent's Brief, *supra* note 16, at 94 (from record of Louisiana Pardon Board Hearing, testimony of Dist. Atty. L.O. Pecot). The Port Arthur, Tex., Chief of Police had been in St. Martinville two weeks prior to the arrest of Francis. While there, Sheriff Resweber had given the Port Arthur police chief an account of the Thomas case and requested that the chief apprehend any man from St. Martinville found in Port Arthur. *Id.*

20. Motion to Proceed In Forma Pauperis, Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947) (affidavits of Frederick & Willie Francis) (available in National Archives, Washington, D.C.).

quality schools in Louisiana. In addition, Willie had a speech problem described as "very bad. . . . He stutters."²¹ Despite his youth and background, no counsel was present during the confession in Texas or the "extradition" to Louisiana.²²

In the Louisiana police car on the way to St. Martinville, Willie allegedly made another "voluntary and complete confession"²³ of the Thomas slaying, this time to Louisiana authorities. In this confession, Willie wrote:

Yes Willie Francis confess that he kill Andrew Thomas on Nowember 8, 1944 i went to his house about 11:30 PM i hide backing his gorage about a half hour, When he came out the gorage i shot him five times, That all i remember a short story

Sinarely Willie Francis²⁴

(The discrepancy in confessed dates of the murder has never been explained—or even noted). Later, Willie showed police the culvert next to railroad tracks near the Thomas house where he had thrown the holster away, at which spot police recovered it.²⁵ Again, no counsel was present at any point through the course of these proceedings.²⁶

On the basis of the two confessions, Willie was formally arrested on August 8, 1945, for the murder of Andrew Thomas and indicted by a grand jury on September 5, 1945.²⁷ Despite the confessions, he pleaded "not guilty" to the charge of murder in open court on September 6, 1945.²⁸ At this arraignment, one month after his arrest and less than a week before the start of his trial, Willie first received legal counsel from two court-appointed attorneys who were members of the local bar.²⁹ Counsel for the defense would prove to be of little value for, in the next eight days, Willie Francis would be tried, convicted, and sentenced to death.

The trial of Willie Francis began on September 12, 1945, at 10:00 a.m. in the Sixteenth Judicial District Court, Parish of St. Martin, about two

21. Appendix to Respondent's Brief, *supra* note 16, at 87 (from record of Louisiana Pardon Board Hearing, testimony of Sheriff Gilbert Ozenne of New Iberia, La.). Ozenne, who was holding Francis in the New Iberia jail and who later took him to St. Martinville for the electrocution, *id.* at 84, made this observation in response to the question of whether in his opinion Francis appeared to be "normal." *Id.* at 87.

22. Record before the Supreme Court in Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947), at 2 [hereinafter cited as Record]; Appendix to Respondent's Brief, *supra* note 16, at 98 (from record of Louisiana Pardon Board Hearing, testimony of Dist. Atty. L. O. Pecot). All references to Record will be to page numbers in the bound version of United States Supreme Court Briefs & Records rather than to page numbers of the original record.

23. Appendix to Respondent's Brief, *supra* note 16, at 78 (from record of Louisiana Pardon Board Hearing, testimony of Sheriff E. L. Resweber).

24. Confession of Willie Francis, Appendix at B1.

25. Brief for Respondents at 8, Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947) [hereinafter cited as Respondent's Brief].

26. Record, *supra* note 22, at 2; Appendix to Respondent's Brief, *supra* note 16, at 98 (from record of Louisiana Pardon Board Hearing, testimony of Dist. Atty. L. O. Pecot).

27. Record, *supra* note 22, at 1 (from indictment of Willie Francis charging murder).

28. *Id.* at 2-3 (from minutes of court showing appointment of counsel).

29. *Id.* at 2.

miles from the murder site. It is impossible to know what actually transpired during the trial. No stenographic record was taken; the deputy clerk of court made only sketchy minutes. From those minutes, it appears that after all challenges for cause and peremptory challenges had been exercised by the prosecution and the defense, a jury of twelve white males and one alternate were selected from a pool of area residents. Willie's counsel made no motion for a change of venue.

The trial opened with the district attorney reading the indictment for murder and making an opening statement. Counsel for the defense then rose and "waived the right of their opening statement but reserved the privilege of making such statement at the conclusion of the State's case."³⁰ The prosecution then proceeded to call its witnesses and offer evidence until the court adjourned at 10:15 that night.

The prosecution resumed its case the next morning at 10 o'clock by calling its other witnesses. From the minutes, it appears that the prosecution's case rested almost exclusively on Willie's two confessions and witnesses testifying that the confessions were made voluntarily.³¹ Nobody saw the murder and the murder weapon itself could not be produced, because it had been "lost in transportation"³² after having been sent to the FBI in Washington, D.C. for ballistics tests.

After the prosecution rested its case subject to rebuttal, counsel for the defense rose and "announced to the Court that it had no evidence to offer on behalf of the accused and rested its case."³³ That was Willie's entire "defense." Willie's counsel failed to inform the jury that the gun had been "lost" and that police took no fingerprints. Moreover, the most telling flaw in the State's case went unmentioned. A next-door neighbor of Andrew Thomas had testified at the coroner's inquest that on the night of the murder, she had been awakened by shots and saw a car parked with its lights on outside the Thomas house.³⁴ Not only was this account inconsistent with Willie's confession that "i hide backing his gorage about a half hour," but Willie did not own or use a car.

Unsurprisingly, later that same day, the jury found Willie "Guilty as Charged."³⁵ On September 14, 1945, he was sentenced "to suffer death in the manner provided by law"³⁶ under the mandatory death penalty provision of Article 740-30 of the Criminal Code of Louisiana.³⁷ Willie's attorneys

30. *Id.* at 4 (from minute entries of trial: selection of jury, etc., Sept. 12, 1945).

31. Appendix to Respondent's Brief, *supra* note 16, at 81 (from record of Louisiana Pardon Board Hearing, testimony of Sheriff E. L. Resweber).

32. *Id.* at 99.

33. *Id.*

34. Record, *supra* note 22, at 5 (from minute entries of trial: verdict, Sept. 13, 1945).

35. *Id.*

36. *Id.* at 6 (from minute entries of trial: sentence, Sept. 14, 1945).

37. LA. CODE CRIM. LAW & PROC., ch. 1, art. 740-30 (Dart 1932 & Supp. 1942). Article 740-30 defined the offense of murder and provided that anyone committing that crime "shall be punished by death." *Id.* In *Roberts v. Louisiana*, 428 U.S. 325 (1976), the Supreme Court

did not appeal to any Louisiana appellate court. On March 29, 1946, Governor Jimmie Davis issued a death warrant setting May 3, 1946, for the execution. The warrant directed Sheriff E.L. Resweber, the Sheriff of St. Martin Parish, to carry out the execution of Francis by "causing to pass through the body of the said Willie Francis a current of electricity of sufficient intensity to cause death, and the application and continuance of such current through the body of the said Willie Francis until said Willie Francis is dead."³⁸

On the morning of his execution, Willie's arms, legs, and head were shaved by a fellow prisoner to allow the unhindered flow of electrical current. When the time came for his execution, Willie was led to a chamber in the local jail where the portable electric chair sat. Louisiana transported its machine from prison to prison rather than having a central place for executions.³⁹ Willie was strapped in the chair with the necessary wires and metal electrodes attached to his body. Sidney DuPois, a local barber in St. Martinville, witnessed the first attempt to execute and recalls that he was standing two feet from the electric chair on Willie's right. He remembers that just before a black hood with a slit enabling him to breath was placed over Willie's head, Willie turned and asked him how "little Sid," DuPois's nine-year-old son, was doing. DuPois responded, "Fine, Willie, just fine," to which Willie replied, "Well, you tell him to be a good boy now, ya hear."⁴⁰

A minute later, the portable generator was humming. Willie strained at the straps but did not die. At Willie's Pardon Board Hearing, the electric chair attendant offered this explanation of the chair's failure: "We set the chair up and it worked perfect and when you throwed the main switch on there the needle went back to zero. There was a shortage—a little wire was loose and the current went back into the ground instead of going into the nigger."⁴¹ Later, Willie would recall: "The electric man . . . could of been puttin' me on the bus for New Orleans the way he said 'goodbye,' and I tried to say goodbye but my tongue got stuck . . . and I felt a burnin' in my head and my left leg and I jumped against the straps. When the straps kept cuttin' me I hoped I was alive, and I asked the electric man to let me breathe. . . . They took the bag off my head."⁴²

The electric chair and generator had been installed by a prison official who was not an electrician and by an inmate from the Louisiana State Penitentiary who claimed to know something about electricity.⁴³ The wires

struck down a later version of a Louisiana death penalty statute because it did not permit consideration of mitigating circumstances surrounding the particular offense. *Id.* at 335.

38. Record, *supra* note 22, at 7 (from death warrant signed Mar. 29, 1946).

39. Appendix to Respondent's Brief, *supra* note 16, at 59 (from record of Louisiana Pardon Board Hearing, testimony of Warden Dennis J. Bazer).

40. Interview with Mr. Sidney DuPois, St. Martinville, La. (Sept. 24, 1982).

41. Appendix to Respondent's Brief, *supra* note 16, at 67 (from record of Louisiana Pardon Board Hearing, testimony of Capt. E. Foster).

42. *Louisiana: Sunday Heart*, TIME, July 15, 1946, at 22.

43. Appendix to Respondent's Brief, *supra* note 16, at 59 (from record of Louisiana Par-

ran from a truck containing the generator outside the jail through a window to a switchboard connected with the electric chair. After the chair was installed at about 8:30 a.m. on the day of the execution, it had been tested. No further test was made prior to the attempted electrocution, which occurred between 12:00 noon and 1:00 p.m. Later, evidence would surface that on the morning of the execution, the prison guard and his inmate assistant were "so drunk that it was impossible for them to know what they were doing."⁴⁴ Indeed, after the abortive effort, "the drunken executioner cursed Willie Francis and told him that he would be back to finish electrocuting him and if the electricity did not kill him, he would kill him with a rock."⁴⁵ This threat, however, went unfulfilled. Instead, Francis was taken from the chair and driven back to his jail cell in nearby New Iberia, Louisiana, where he was being kept for "safekeeping,"⁴⁶ while the Louisiana officials puzzled about what to do. That night, Willie's father went to the small local cemetery and smashed his son's unused gravemarker with a sledgehammer.⁴⁷

All the state officials were of one mind: Try again and do it right—kill Willie Francis. Only hours after the bungled execution, Governor Jimmie Davis⁴⁸ ordered a second execution for May 9, 1946. Before state officials

don Board Hearing, testimony of Warden Dennis J. Bazer). Although an electrician normally accompanied the chair, on this occasion, Bazer sent prison guard Capt. Foster and Vincent Venezia, an inmate, neither of whom were electricians. *Id.*

44. Brief in Support of Petition for a Writ of Habeas Corpus at 4, Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947) (quoting affidavit of Louis M. Cyr, see Appendix at C1). Under the execution statute in force at Francis's scheduled execution, there was no requirement that the operator of the chair be an electrician. See LA. CODE CRIM. L. & PROC., ch. 1, art. 570 (Dart 1943). Less than three months after Louisiana bungled the Francis execution, the execution statute was amended to provide that the operator of the electric chair "shall be a competent electrician who shall not have been previously convicted of a felony. . . ." Act of July 15, 1946, La. Acts, No. 149, § 1 (1946) *codified in* LA. CODE CRIM. L. & PROC., ch. 1, art. 570 (Dart Supp. 1949). Petitioner later unsuccessfully argued that this amendment indicated that the state believed that the failure of the execution resulted from the incompetence of the execution officials and that a hearing before Louisiana courts was necessary to reveal the state's considerations for changing the statute. The record of such a hearing was necessary, petitioner contended, to show that the Supreme Court erred in assuming that Louisiana had been "careful" when attempting to execute Francis. Brief in Support of Petition for Rehearing at 2-4; Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947).

45. Brief in Support of Petition for a Writ of Habeas Corpus at 4, Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947) (quoting affidavit of Louis M. Cyr, see Appendix at C1).

46. New Orleans Times-Picayune, May 16, 1946, at 16, col. 3.

47. Interview with Mr. Edmond Riggs, St. Martinsville, La. (Sept. 23, 1982).

48. Governor Davis was a curious figure on the Louisiana political scene. First elected Governor in 1944 as a reform candidate over the opposition of the Long machine, Davis's primary achievements prior to his election were as a country-western singer and for the composition of the song "You Are My Sunshine." Unable to succeed himself as Governor under Louisiana law, Davis wrote a number of gospel songs in the 1950's including "Down By The Riverside." Baton Rouge Morning Advocate, Sept. 24, 1982 at B3, col. 1. A segregationist, Davis successfully ran again for Governor in 1960 promising to "preserve the Southern way of life" and attacking his opponent for "consorting" with the NAACP. *The Musicman*, NEWSWEEK, Jan. 18, 1960, at 20-21.

could act upon the new death warrant, however, Francis's new attorney, Bertrand DeBlanc,⁴⁹ sought to have the second attempt cancelled by the Board of Reprieves and Pardons of the State of Louisiana⁵⁰ and by the Supreme Court of Louisiana,⁵¹ but both unanimously refused to do so. DeBlanc then petitioned the governor who also refused to cancel the second attempt.

On June 4, 1946, DeBlanc with James Skelly Wright, then a Washington, D.C. lawyer, filed a stay of execution and a petition for a writ of certiorari with the United States Supreme Court. Francis, they stated had "already been through the most gruelling [sic] experience known to man. Appropriate parts of his body had been shaved and straps and wires applied; he was seated in an electric chair and current run through his body."⁵² Wright and DeBlanc argued that review of the Louisiana Supreme Court's ruling was appropriate. On June 4, Justice Hugo L. Black issued a stay of execution⁵³

49. Upon a friend's recommendation, Francis's father asked Bertrand DeBlanc, a St. Martinville lawyer, to handle Willie's appeal after the failed first execution. Interview with Mr. Bertrand DeBlanc, St. Martinville, La. (Sept. 22, 1982). A graduate of Louisiana State University Law School, and a good friend of the victim, Andrew Thomas, DeBlanc had just returned from World War II. Despite the criticism of local residents, DeBlanc worked almost exclusively on the *in forma pauperis* Francis case for the next year. The Weekly Messenger, St. Martinville, La., May 17, 1946, at 8, col. 1.

50. Under the Louisiana constitution, the Governor had the power to grant reprieves, but he could not, on the basis of his own authority, grant pardons or commute sentences. For that, he needed the consent of the Louisiana Pardons Board which consisted of the Lieutenant Governor, the Attorney General, and the presiding judge of the trial court at which the conviction was had. LA. CONST. OF 1921, art. V, § 10.

51. State *ex rel.* Francis v. Resweber, 212 La. 143, 31 So. 2d 697 (1947) (per curiam). On May 15, 1946, the Supreme Court of Louisiana without oral argument and in a per curiam opinion, refused to grant Francis immunity from a second execution attempt and denied his writs of certiorari, prohibition, habeas corpus, and mandamus. The court decided that "the complaint made by the relator is a matter over which the courts have no authority." *Id.* at 150, 31 So. 2d at 699. The Louisiana court reasoned that "[i]nasmuch as the proceedings had in the district court, up to and including the pronouncing of the sentence of death, were entirely regular, we have no authority to set aside the sentence and release the relator from the sheriff's custody. And the court certainly has no authority to pardon the relator or to commute his sentence." *Id.*, 31 So. 2d at 699.

52. Petition for a Writ of Certiorari at 4, Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947).

53. Stay of Execution in Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947) (available in National Archives, Washington, D.C.). On June 4, 1946, before granting the stay, Justice Black circulated the following memorandum in a preliminary effort to discuss the matter with the Court:

A petition for stay has been filed with me in No. 1302, State of Louisiana, *ex rel.* Willie Francis, Petitioner, against the Sheriff of the Parish of St. Martin, Louisiana.

The Petitioner was sentenced to death, and the judgment was affirmed by the Supreme Court of Louisiana. The Sheriff attempted to execute him in accordance with the judgment, and for some reason the electrical apparatus failed to work. Petitioner now claims that to carry out the death sentence would be placing him twice in jeopardy for the same offense and that this is prohibited by the due process clause of the federal Constitution.

I shall wish to take it up with the conference at 11:00 this morning. H.L.B.

and the Court granted the petition for a writ of certiorari on June 10, 1946.⁵⁴

Before turning to an analysis of the internal dynamics of the Supreme Court in Willie's case, it is appropriate to ask: Was he guilty of murder? The fullest account to date of his ordeal, by Barrett Prettyman, maintains that he was. Prettyman twice quotes a scrawl, allegedly Willie's, on the wall of his cell: "I kill Andrew Thomas and today he is lying in a grave and I am not a killer but I wonder where I am going to be lying and in what kind of grave I don't know."⁵⁵ Whether this scrawl is probative evidence we do not say. Nor do we make any statement about Willie's two confessions. On the other hand, there is the previously mentioned testimony at the coroner's inquest of Mrs. Alvin Van Brocklin, Andrew Thomas's next-door neighbor. She testified that on the night of the murder she saw a car parked in front of the Thomas house—a car which in 1944 a fifteen-year-old black youth would not find easily accessible: "I could see the lights—there was a car parked in front of Mr. Thomas's with the lights on; as soon as I sat up on the bed I saw the car from my bed, we could see the lights of the car, the car was stopped there; we heard the shots."⁵⁶ Along these lines, there was speculation at the coroner's inquest that "somebody across the bayou might have had something to do with this"⁵⁷ as the result of some romantic entanglement involving Thomas. But Willie's guilt is emphatically not the issue here, as it was not in *Williams v. Georgia*,⁵⁸ an example of the Court's pusillanimous handling of a situation at least peripherally analogous to the *Francis* case.⁵⁹

Black, J., Memorandum for Conference (June 4, 1946) (available in Library of Congress, Black Papers, Box 283).

54. *Louisiana ex rel. Francis v. Resweber*, 328 U.S. 833 (1946). On the same day, the Court erroneously issued an order stating that it had denied certiorari. It was not until the next day that the Court admitted error and corrected the order. *N.Y. Times*, June 12, 1946, at 12, col. 5.

Because of both the death of Chief Justice Stone, *see infra* note 103 and accompanying text, and Justice Jackson's absence due to his participation in the Nuremberg War Crimes Trial, *see Kurland, Enter the Burger Court: The Constitutional Business of the Supreme Court, O.T. 1969*, 1970 SUP. CT. REV. 1, 2-3, only seven justices participated in the consideration of the petition for a writ of certiorari. Voting to grant certiorari were Justices Frankfurter, Murphy, and Rutledge. Justices Burton, Black, Douglas, and Reed voted to refuse certiorari. *See Burton Papers*, Box 143 (available in Library of Congress), *Douglas Papers*, Box 189 (available in Library of Congress). Yet, because only seven justices were available, the petition was granted on the basis of three votes rather than the usual "rule of four." *See R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE* 346-48 (5th ed. 1978).

55. PRETTYMAN, *supra* note 2, at 128.

56. Record of Coroner's Inquest before Dr. S.D. Yongue, Coroner of St. Martin Parish, La., at 4 (Nov. 8, 1944).

57. *Id.*

58. 349 U.S. 375 (1955).

59. In *Williams*, the black defendant was convicted of murdering a white man by an all white jury and sentenced to death. The United States Supreme Court recently had ruled that the use of color-coded identification tickets which classified prospective jurors' names on juror lists according to race, violated defendant's fourteenth amendment equal protection rights because this system excluded blacks from jury service. *See Avery v. Georgia*, 345 U.S. 559 (1952). Although, the *Avery* decision was not handed down until over two months after the conclusion

II. WILLIE FRANCIS BEFORE THE SUPREME COURT

A. *The Court's Opinion*

In a twelve-page brief on the merits to the Supreme Court, Wright and DeBlanc implicitly argued that a second attempt to carry out the death sentence would be placing Willie's life in jeopardy twice for the same offense.⁶⁰ Recognizing that although the fifth amendment⁶¹ did not expressly apply to the states, they urged that through "extension and interpretation of the due process clause of the Fourteenth Amendment," the fifth amendment should be held to bind Louisiana.⁶² Petitioners also argued that a second attempt to execute Willie would be cruel and unusual punishment proscribed by the eighth amendment⁶³ and, by similar extension, a violation of the due process clause of the fourteenth amendment.⁶⁴ Wright and DeBlanc posed this question: "How many tries does the State get before the due process clause of the 14th Amendment can be used to protect the petitioner from further torture?"⁶⁵ They provided their own answer: "The State of Louisiana had a right to execute this man but this right has been forfeited by subjecting the petitioner to the torture, both mental and physical, of being prepared for death, of being placed in the electric chair, of having electricity applied to his body."⁶⁶ Dramatically illustrating the point, Wright and DeBlanc attached to the brief five affidavits of witnesses describing the attempted execution in wrenching detail.⁶⁷ Even so, they did not bring the

of Williams's trial, it came a month before he filed his amended formal petition for a new trial. 349 U.S. at 379. The Georgia Supreme Court denied Williams's stay due to his failure to challenge the composition of the jury panel at the commencement of the trial. *Id.* At oral argument, the State conceded that the jury selection procedure used at Williams's trial violated his equal protection rights and that a new trial would be in order but for his failure to challenge the jury panel at trial. *Id.* at 382. The United States Supreme Court remanded, ruling that where state procedures allow federal questions to be raised at later stages in the case, as Georgia did, then a state court in the exercise of its discretion may not decline to hear the constitutional claim. *Id.* at 383.

60. Petitioner's attorneys did not raise an explicit double jeopardy argument until the reply and supplemental brief. See Reply and Supplemental Brief for Petitioner at 3-6, Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947).

61. The fifth amendment provides in pertinent part: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . ." U.S. CONST. amend V.

62. Brief for Petitioner at 4-7, Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947) [hereinafter cited as Petitioner's Brief]. The fourteenth amendment provides in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

63. Petitioner's Brief, *supra* note 62, at 7-8. The eighth amendment provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted." U.S. CONST. amend. VIII.

64. Petitioner's Brief, *supra* note 62, at 7-8.

65. *Id.* at 7.

66. *Id.* at 8.

67. Selected affidavits have been reproduced in the Appendix to this article. See Appendix at C1-2, D1. See also Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 480 n.2 (Burton, J., dissenting).

complete facts of the bungled execution to the Court's attention at that time. Only when Wright and DeBlanc later filed a desperate writ for habeas corpus did the Court become aware of all of the sordid details of how Louisiana had botched the execution.⁶⁸

Petitioner further argued that "[t]he trial of Willie Francis was a farce and travesty on justice."⁶⁹ Drawing extensively on the Court's decision in *Powell v. Alabama*,⁷⁰ and various state court decisions,⁷¹ Wright and DeBlanc contended that the Supreme Court of Louisiana had erred in holding that Willie's trial did not violate the due process clause of the fourteenth amendment.⁷² They urged the Supreme Court to reverse the Louisiana Supreme Court and to rule in one of three ways: (1) set Francis free; (2) remand the case to the trial court with instructions to resentence Francis to a punishment other than death; or (3) remand to the trial court for a retrial.⁷³ Exactly how much power the Supreme Court of the United States could have exercised was uncertain.

A divided Supreme Court upheld the ruling of the Louisiana court and sent Willie Francis back to the electric chair.⁷⁴ The plurality opinion, written by Justice Stanley Reed and joined by Chief Justice Fred Vinson and Justices Hugo Black and Robert Jackson, assumed the applicability of the fifth and eighth amendments to the states⁷⁵ but concluded that a second attempt violated neither amendment.⁷⁶

68. Petition for a Writ of Habeas Corpus at 4-5, *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947). For a discussion of how the electrocution was bungled, see *supra* notes 41-45 and accompanying text.

69. Petitioner's Brief, *supra* note 62, at 9.

70. 287 U.S. 45 (1932). In *Powell*, the so-called Scottsboro Boys Case, the Court for the first time held that defendants in criminal trials on capital crimes were entitled to an attorney. *Id.* at 71. The *Powell* trial court judge had appointed all members of the local bar to serve as defense counsel. When no defense attorney appeared on the morning of the trial, a local attorney was pressed into service. *Id.* at 53-59. The new defense counsel undertook his task with considerable reluctance and defendants were convicted. In *Francis*, the state of Louisiana distinguished *Powell* by observing that "the attorney appointed by the [*Powell*] Court was appointed on the morning of trial" while in *Francis*, counsel was appointed six days prior to trial and thus "had ample time for preparation and trial." Respondent's Brief, *supra* note 25, at 31 (emphasis in original).

71. See, e.g., *Williams v. State*, 192 Ga. 247, 257-58, 15 S.E.2d 219, 225 (1941) (meaningful counsel must be provided); *Wilson v. State*, 222 Ind. 63, 79, 51 N.E.2d 848, 854-855 (1943) (defendant entitled to adequate counsel in criminal case).

72. Petitioner's Brief, *supra* note 62, at 9-11.

73. *Id.* at 12.

74. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947).

75. Until *Francis*, the Court had rejected contentions that the eighth amendment was applicable to the states. See, e.g., *Collins v. Johnston*, 237 U.S. 502, 510-11 (1915); *O'Neil v. Vermont*, 144 U.S. 323, 332 (1892); *In re Kemmler*, 136 U.S. 436, 446 (1890). A majority of the Court did not expressly incorporate the eighth amendment into the fourteenth until 1962. See *Robinson v. California*, 370 U.S. 660 (1962). The fifth amendment guarantee against double jeopardy was not incorporated until 1969. See *Benton v. Maryland*, 395 U.S. 794 (1969).

76. 329 U.S. at 463.

Relying on *Palko v. Connecticut*,⁷⁷ Reed quickly dismissed the double jeopardy argument: "We see no difference from a constitutional point of view between a new trial for error of law at the instance of the state that results in a death sentence instead of imprisonment for life and an execution that follows a failure of equipment."⁷⁸ Using *In re Kemmler*⁷⁹ as support, the Court likewise rejected the "cruel and unusual punishment" argument, holding that the Louisiana state legislature adopted electrocution for a humane purpose, and that its will should not be thwarted because, in its desire to reduce pain and suffering in most cases, it may have inadvertently increased suffering to one particular individual.⁸⁰ Stating that "this case is without precedent in any court," the Court found that "the state officials carried out their duties . . . in a careful and humane manner."⁸¹ The Court reasoned that although the first attempt caused "mental anguish and physical pain," it was the result of "an unforeseeable accident" and not intentional.⁸² That, as will be shown, was a dubious conclusion. What Willie had suffered, Reed maintained, was no greater than the hardship a prisoner might experience from a fire in his cell block.⁸³ The comparison was hardly apposite: There is a substantial difference between being led to one's death and experiencing a fire.

Justice Felix Frankfurter cast the swing vote, writing a concurring opinion because he was unwilling to agree that the eighth amendment's pro-

77. 302 U.S. 319 (1937). Finding that the fifth amendment was inapplicable to the states, *Palko* held that giving the state the same right of appeal as the accused did not violate the due process clause of the fourteenth amendment. *Id.* at 328.

78. 329 U.S. at 463.

79. 136 U.S. 436 (1890). In holding that death by electrocution was not cruel and unusual punishment, *Kemmler* found that only those methods which involve torture or lingering death are constitutionally forbidden. *Id.* at 446.

80. 329 U.S. 456, 463-64 & n.4.

81. 329 U.S. at 462. Contrary to the Court's assertion that the case was without precedent, there had been other instances where an execution attempt had failed. Citing the examples of Daniel in the Lion's Den and the three men in the fiery furnace of Nebuchadnezzar, Bertrand DeBlanc pointed out to the Louisiana Pardon Board that failed executions often were regarded as instances of divine intervention. Address of B. DeBlanc to Louisiana Pardon Board, May 31, 1946, at 7.

DeBlanc also noted the 1889 case of the Englishman, John Lee. Lee had been placed on the hangman's scaffold three times only to have the trap fail each time. Subsequently, the Home Secretary granted Lee a reprieve. *Id.* at 6 (citing C. KENNY, *OUTLINE OF CRIMINAL LAW* (1936)). Finally, DeBlanc noted the 1894 Mississippi case of Will Purvis. After the first attempt failed because the noose slipped, allowing Purvis to fall to the ground uninjured, the sheriff immediately attempted to hang him a second time. The crowd witnessing the execution, however, so strongly opposed a second attempt that the sheriff returned Purvis to jail. On appeal, the Mississippi Supreme Court resented Purvis to death. Nevertheless, before the sentence could be carried out, a mob rescued Purvis from the second execution attempt and he then lived for a time with friends and relatives. Eventually, the governor pardoned Purvis. In 1920, another man confessed to the murder and the state legislature then voted to give Purvis \$5,000 as compensation. *Id.* at 8.

82. 329 U.S. at 464.

83. *Id.*

hibition of cruel and unusual punishment was applicable to the States under the fourteenth amendment. Instead, Frankfurter believed that “great tolerance toward a State’s conduct is demanded of this Court”⁸⁴ and he approved a second attempt to execute only under the fourteenth amendment’s due process clause which itself “expresses a demand for civilized standards.”⁸⁵ Where he located those “civilized standards” remains completely mysterious. Frankfurter wrote that “a State may be found to deny a person due process by treating even one guilty of crime in a manner that violates standards of decency more or less universally accepted though not when it treats him by a mode about which opinion is fairly divided.”⁸⁶ What *that* statement means is also mysterious: What is “more or less”? Further, Frankfurter’s assertion means that law as an external standard of judgment does not exist. Rather, he viewed his task as sensing, apparently intuitively, the consensus of society.

Justice Frankfurter agreed with the plurality that since the first attempt had failed because of an “innocent misadventure,” the second would not violate these “standards of decency” and, thus would not be “repugnant to the conscience of mankind.”⁸⁷ As a result, he could not vote to alter the action of the state court. While expressing a “personal revulsion” at the idea of a second attempt to execute and the state’s “insistence on its pound of flesh,”⁸⁸ Frankfurter asserted, in an either-or statement, that if he voted to overturn the state court’s decision, he would be enforcing his “private view rather than that consensus of society’s opinion.”⁸⁹ That means, although he did not say so, that Frankfurter was accusing the dissenters of enforcing *their* private views, and also that he knew what they did not—how to determine a societal consensus. The contention that judges follow either the consensus of society or their own private views, at best, is a simplistic view of what judges do.

With relief from the Supreme Court not forthcoming, Frankfurter suggested that Francis’s hopes must lie in gaining “executive clemency” from the Governor of Louisiana.⁹⁰ As will be shown below, Frankfurter’s suggestion displayed willful ignorance about the ways in which state politicians act. Frankfurter again displayed this ignorance a quarter-century later, in *Baker v. Carr*,⁹¹ where he maintained that those who alleged harm from failure

84. *Id.* at 470.

85. *Id.* at 468.

86. *Id.* at 469-70.

87. *Id.* at 471 (quoting *Palko v. Connecticut*, 302 U.S. 319, 323 (1937)).

88. *Id.*

89. 329 U.S. at 471.

90. *Id.* at 470.

91. 369 U.S. 186 (1962). In *Baker*, petitioners sued in federal district court alleging that the demographic imbalance in voting power resulting from Tennessee’s failure to reapportion its voting districts “debas[ed] . . . their votes in violation of the Equal Protection Clause of the fourteenth amendment.” *Id.* at 194. The district court dismissed the complaint, holding that the election of state officials did not involve a federal question, but instead found appor-

to follow Tennessee's constitution should ask those same state officials to vote themselves out of office.⁹²

Justice Harold H. Burton, joined by Justices William O. Douglas, Francis Murphy and Wiley Rutledge dissented. They argued that the proposed second execution attempt, "[u]nder circumstances unique in judicial history," would be impermissibly cruel and unusual punishment.⁹³ Burton rejected the reasoning of both the plurality and Justice Frankfurter's concurrence that the accidental character of the first attempt placed the second attempt outside the parameters of cruel and unusual punishment.⁹⁴ He also disagreed with the plurality's application of a state intent test: "The intent of the executioner cannot lessen the torture or excuse the result. It was the statutory duty of the state officials to make sure that there was no failure."⁹⁵ As we will show, the facts surrounding the bungled execution display such a wanton disregard of reasonable carefulness that the requisite intent, particularly under Justice Frankfurter's views of due process, should have been held to be present. Echoing Francis's petition for a writ of certiorari, Burton asked "[h]ow many deliberate and intentional reapplications of electric current does it take to produce cruel, unusual and unconstitutional punishment?"⁹⁶

Burton also implied that there were serious mental effects attendant to a second trip to the electric chair.⁹⁷ Many have since recognized the mental suffering of prisoners awaiting execution. The condemned prisoner undergoes a "fate of ever-increasing fear and distress."⁹⁸ The intensity of this anxiety is such that "the onset of insanity while awaiting execution of a death

tionment decisions were a political question to be left to the states. *Id.* at 196. The Supreme Court reversed, holding that a state apportionment plan was indeed subject to federal review. *Id.* at 198-204.

92. *Id.* at 270. (Frankfurter, J., dissenting). Frankfurter argued that questions of political structure were non-justiciable. *Id.* at 278. Because he believed that the Constitution did not provide "a judicial remedy for every political mischief, for every undesirable exercise of legislative power," *id.* at 270, Frankfurter maintained that relief was to be gained only by "[a]ppeal . . . to an informed, civically militant electorate. In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives." *Id.*

93. 329 U.S. at 472 (Burton, J., dissenting).

94. *Id.* at 477. Justice Burton argued that electrocution as a means of execution in Louisiana had been approved only to the extent that it eliminated suffering by causing an instantaneous death. *Id.* at 474. The statute did not provide for electrocution by interrupted or repeated applications of electricity at various intervals, but rather, it required a continuous application of current until death resulted. *Id.* at 475. Therefore, Burton contended that the state officials had failed to carry out their statutory duty to ensure that the execution was successful. *Id.* at 477.

95. *Id.*

96. *Id.* at 476.

97. *Id.* at 477. While Justice Burton recognized the mental anguish of any trip back to the executioner, the fact that Francis had been forced to endure the application of an electrical current made his case more clearly one of cruel and unusual punishment. *Id.*

98. *Trop v. Dulles*, 356 U.S. 86, 102 (1958), *quoted in* *Furman v. Georgia*, 408 U.S. 238, 289 (1972) (Brennan, J., concurring).

sentence is not a rare phenomenon.”⁹⁹ Or, as Samuel Johnson said in a famous sentence, “Depend upon it, Sir, when any man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully.”¹⁰⁰

B. *The Judicial Process in Willie Francis*

In an off-bench statement, Justice Frankfurter once asserted that “pitifully little of significance has been contributed by judges regarding the nature of their endeavor, and I might add, that which is written by those who are not judges is too often a confident caricature rather than a seer’s vision of the judicial process of the Supreme Court.”¹⁰¹ It is with that admonition in mind that we consider the judicial process that led to the Court’s decision in *Francis*. Reed’s plurality opinion, Frankfurter’s concurrence, and Burton’s sharp dissent show, of course, a deeply divided Supreme Court. The true extent of this division and also the inner dynamics of the Court in the case may be seen through the private papers of the nine Justices. Drafts of unpublished concurring opinions, proposed dissents, internal communications between the Justices, and conference notes all shed light on the difficulties the Court had in reaching its decision.

On November 23, 1946, five days after oral argument,¹⁰² the Court met in Saturday conference to consider the merits of No. 142, *Louisiana ex rel. Francis v. Resweber*. As was the custom of the Court, discussion began with the Chief Justice, Frederick M. Vinson. Vinson had not taken part in the consideration of the petition for certiorari, having only recently been named to the Court to replace Chief Justice Harlan Fiske Stone.¹⁰³ According to

99. *Solesbee v. Balkcom*, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting). In *Solesbee*, the Court upheld a state’s policy which permitted a panel of doctors appointed by the governor to determine the sanity of those awaiting execution. The Court reasoned that this was a valid exercise of the executive power to grant reprieves. *Id.* at 13. Frankfurter dissented maintaining that due process prevents execution of an insane person and that the defendant was entitled to a hearing on his claim of insanity. *Id.* at 24-25 (Frankfurter, J., dissenting). See also *People v. Anderson*, 6 Cal. 3d 628, 650, 493 P.2d 880, 895, 100 Cal. Rptr. 152, 167 (awaiting death is “brutalizing”), *cert. denied*, 406 U.S. 958 (1972); *District Atty. v. Watson*, 80 Mass. Adv. Sh. 2231, _____, 411 N.E.2d 1274, 1290-95 (1980) (Liacos, J., concurring) (prisoner suffered “raw terror and unabating stress” while awaiting death).

100. J. BOSWELL, *THE LIFE OF SAMUEL JOHNSON* 309 (W. Croker ed. 1846) (1st ed. London 1791).

101. F. FRANKFURTER, *OF LAW AND MEN* 32 (P. Elman ed. 1956). Frankfurter observed: Those who know tell me that the most illuminating light on painting has been furnished by painters, and that the deepest revelations on the writing of poetry have come from poets. It is not so with the business of judging. The power of searching analysis of what it is that they are doing seems rarely to be possessed by judges, either because they are lacking in the art of critical exposition or because they are inhibited from practicing it.

Id.

102. Little is known of the November 18, 1946 oral argument. No transcript or recording of the arguments exists in the National Archives or the Supreme Court Law Library in Washington, D.C. Nor was a summary of the argument prepared by *United States Law Week*.

103. Chief Justice Harlan Fiske Stone died on April 22, 1946. 327 U.S. at iii n.1 (1946).

notes of the conference taken by Justice Douglas, Vinson discussed petitioner's double jeopardy argument and indicated that "it was clear to him [that] [the Louisiana Supreme Court] should be affirmed."¹⁰⁴ Justices Black and Reed also voted to affirm.¹⁰⁵

When his turn came to speak, Justice Frankfurter began by noting that *Francis* was "not an easy case."¹⁰⁶ Frankfurter had voted to grant certiorari because, as he wrote later, it seemed "too serious a question for this Court to think too unimportant even to consider—particularly when one takes account of some of the really trivial cases that we do take."¹⁰⁷ Douglas noted that, after briefly discussing double jeopardy, Frankfurter turned his attention to the cruel and unusual punishment argument and using the earthy "test" of unconstitutionality that he derived from Justice Oliver Wendell Holmes,¹⁰⁸ found that "though [the second execution attempt] is hardly a defensible thing for the state to do, it is not so offensive as to make [him] puke."¹⁰⁹ Thus, Frankfurter voted to affirm the judgment of the Louisiana Supreme Court. Justice Douglas, who had voted to deny certiorari in the case,¹¹⁰ surprisingly also voted to affirm.¹¹¹ Justice Murphy voted to reverse and Justice Jackson to affirm.¹¹² Justice Rutledge then voted to reverse as did Justice Burton, who originally had objected to the granting of certiorari.¹¹³

As is the custom of the Supreme Court, if the Chief Justice votes with the majority, he assigns the case for an opinion to be written. In *Francis*,

President Truman appointed Vinson Chief Justice on June 6, 1946 and the Senate confirmed on June 20, 1946. 329 U.S. at iii n.1 (1946).

104. Douglas Papers, Box 189 (available in Library of Congress).

105. *Id.*

106. *Id.*

107. See Letter from Justice Frankfurter to Justice Burton (Dec. 13, 1946), Appendix at J2 (originally found at Burton Papers, Box 171, Library of Congress).

108. *Id.*

109. Douglas Papers, Box 189 (available in Library of Congress).

110. See *Lousiana ex rel. Francis v. Resweber*, 328 U.S. 833 (1946).

111. Douglas Papers, Box 189 (available in Library of Congress). Douglas's vote to affirm was surprising because, unlike Justice Burton, Douglas usually did not side with the government's position in criminal cases. For example, in all of the cases cited in note 4 *supra*, where Justice Burton had supported the government, Justice Douglas had voted against the government's position.

112. *Id.*

113. Justice Frankfurter later recalled:

When the petition for certiorari in the Willie Francis case first came before the Court, Mr. Justice Burton said it was plain that we ought not to take the case. I was strongly of the contrary view and argued my view as vigorously as I could. As we left the Conference Room, Justice Burton said to me, "Felix, as you know, most of the time I agree with you and certainly I can always understand why you take the position that you take. But for the life of me I can't see why a man of your intelligence should think that simply because something went wrong with an electric wire, for which nobody was responsible, the State of Louisiana cannot carry out a death sentence imposed after a fair trial."

Letter from Justice Frankfurter to *Harvard Law Review* (date unavailable), quoted in Note, *In Memoriam—Harold Hitz Burton*, 78 HARV. L. REV. 799, 800 (1965).

Chief Justice Vinson assigned the case to Justice Stanley Reed on November 25, 1946.¹¹⁴ On December 11, 1946, Reed circulated his first opinion for the Court. Reflecting the difficulty of the issues presented, Reed's opinion spawned a number of concurring and dissenting opinions. Originally, Justices Black¹¹⁵ and Jackson¹¹⁶ both wrote concurring opinions, as did, of course, Justice Frankfurter.¹¹⁷ There were also, early on, separate dissents by Justices Murphy,¹¹⁸ Rutledge,¹¹⁹ and Burton. Only Chief Justice Vinson and Justice Douglas abstained from drafting an opinion. During the next month, the seven separate opinions were eventually reduced to the Reed plurality opinion, the Frankfurter concurrence, and the Burton dissent.

Justice Reed circulated five different draft opinions to the Court.¹²⁰ In his early drafts, Justice Reed relied solely on the due process clause of the fourteenth amendment, saying that in order for the Court "[t]o determine whether or not the execution of the petitioner may fairly take place after the experience through which he passed, we must examine the circumstances in the light of the due process clause of the Fourteenth Amendment."¹²¹ Although Justice Reed's first plurality opinion would prove to be remarkably similar to his final plurality opinion, in both length and content, it differed as to the application of the due process clause of the fourteenth amendment. Not until his final draft did Reed state that he explicitly assumed that the fifth and eighth amendments were applicable to the states. This change came as a result of Justice Black's influence.

On January 3, 1947, one day after Reed circulated his third draft opinion to the Court, Black circulated a concurring opinion.¹²² Sharply criticizing the fourteenth amendment due process approach of Justice Frankfurter, Black argued that the fifth and eighth amendments were applicable to the states under the fourteenth amendment. While disagreeing with the constitutional reasoning of Justices Reed and Frankfurter, Justice Black nevertheless concurred with their result. Black wrote that he "share[d] most of the sentiments of those members of the Court who have so feelingly argued"¹²³ on behalf of Willie Francis. Yet, bound by his well-known concern for "fidelity to the constitutional text,"¹²⁴ Black concluded "I cannot agree with them that

114. Black Papers, Box 287 (available in Library of Congress).

115. See Appendix at 11-6 (available in Library of Congress, Black Papers, Box 287).

116. See Appendix at G1-4 (available in Library of Congress, Rutledge Papers, Box 147).

117. See Appendix at F1-4 (available in Library of Congress, Burton Papers, Box 171).

118. See Appendix at H1-4 (available in Library of Congress, Burton Papers, Box 171).

119. See Appendix at E1-3 (available in Library of Congress, Rutledge Papers, Box 147).

120. Justice Reed's five drafts were dated Dec. 11 & 12, 1946 and Jan. 2, 7, & 11, 1947. See Black Papers, Box 287 (available in Library of Congress).

121. See Justice Reed draft opinions of Dec. 11 & 12, 1946 and Jan. 2 & 7, 1947, at 2 (available in Library of Congress, Black Papers, Box 287).

122. See Appendix at 11-6.

123. *Id.* at 15.

124. See, e.g., *Katz v. United States*, 389 U.S. 347, 373 (1967) (Black, J., dissenting) (Black maintained that text of fourth amendment did not prohibit eavesdropping); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 677-78 (1966) (Black, J., dissenting) (Black argued that written

any provision of the federal Constitution authorizes us to rule that any accidental failure fairly to carry out a valid sentence of death on the first attempt bars execution of that sentence."¹²⁵

Black's concurrence seems to mean that since there is nothing in the Constitution about a bungled execution, Louisiana could go forward. Surely, however, Black, had he so desired, could have found "fidelity" to the Constitution in the eighth amendment. That he did not means that he accepted without question the dubious validity of the *Francis* trial and refused to inquire into why the "accidental failure" took place.¹²⁶

Reflecting Justice Black's concerns and perhaps to keep his vote, Reed removed the offending language which indicated sole reliance on the due process clause of the fourteenth amendment and in a January 11, 1947, draft inserted the following:

To determine whether or not the execution of the petitioner may fairly take place after the experience through which he passed, we shall examine the circumstances under the assumption, but not without so deciding, that violation of the principles of the Fifth and Eighth Amendments, as to double jeopardy and cruel and unusual punishment, would be violative of the due process clause of the Fourteenth Amendment.¹²⁷

That same day, Black scrawled "I agree. H.L.B. Jan. 11-47" on his copy of this latest draft, and dropped his concurring opinion.¹²⁸

Apparently satisfied with the fourteenth amendment due process analysis of Reed's early drafts, Justice Frankfurter had circulated a concurring opinion on January 2, 1947, to convey the personal difficulties he had experienced in deciding *Francis*. Upon receipt of the January 11, 1947, Reed opinion, however, Frankfurter prepared a "Memorandum for the Conference" dated January 11, 1947. Frankfurter began by noting that "[i]n order that there be an opinion of the Court, I had hoped to join brother Reed's opinion in addition to expressing my own views."¹²⁹ This, however, was no longer possible. "The reason," he wrote, "I cannot do so, *inter alia*, is that I do not think we should decide the case even on the assumption that the Fifth Amendment as to double jeopardy is the measure of due process in the Fourteenth Amendment."¹³⁰ Frankfurter maintained that "[i]t makes for nothing

constitutions are to survive as originally written unless amended). See also Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 703 (1975) (asserting that very few of the constitutional rights now recognized have any firm foundation in a traditional model of judicial review and demonstrating that Black's pure interpretationist view prevents constitutional guarantees from developing and changing with social values).

125. Appendix at 15.

126. For a further discussion of Black's position in *Francis*, see *infra* notes 201-05 and accompanying text.

127. Reed, J., draft opinion of Jan. 11, 1947, at 2 (available in Library of Congress, Black Papers, Box 287).

128. *Id.* at back of page 7.

129. Frankfurter, J., Memorandum for Conference (Jan. 11, 1947) (available in Library of Congress, Frankfurter Papers, Box 23).

130. *Id.*

but confusion in the consideration of constitutional cases under the Due Process Clause to cite cases that construed the scope of the double jeopardy provision of the Fifth Amendment."¹³¹ Consequently, Justice Frankfurter concluded that he could not join in Reed's opinion.¹³² The groundwork was thus laid and the lines drawn for the classic Black-Frankfurter debate a few months later in *Adamson v. California*.¹³³

While Reed did not persuade Frankfurter to join the Court's opinion, he did convince Justice Jackson that he should drop his contemplated concurring opinion. On December 20, 1946, Jackson had circulated a draft concurring opinion which is noteworthy because it opened with a strong denunciation of the death penalty:

If I am at liberty, in the name of due process to vote my personal sense of "decency"; I not only would refuse to send Willie Francis back to the electric chair, but I would not have sent him there in the first place. If my will were law, it would never permit execution of any death sentence. This is not because I am sentimental about criminals, but I have doubts of the moral right of society to extinguish a human life, and even greater doubts about the wisdom of doing so. . . . A completely civilized society will abandon killing as a treatment for crime.¹³⁴

Like Frankfurter, Jackson believed that the Justices must suppress such personal feelings and predilections because "judges are servants, not masters, of society and it is society's laws that should govern judges."¹³⁵ That, he said, can hardly be accurate. It is "society's law" that was the very issue at bar: Did the Louisiana practice comport with the Constitution? What "society" (whatever that term might mean) said was to be weighed against the command of the fundamental law.

Like Black,¹³⁶ "unable to cite any constitutional backing for my prejudice against executing Francis" and finding that he could not "believe that the founding fathers ever intended to nationalize decency," Jackson concluded that he "must vote to leave the case to Louisiana's own law and sense of decency."¹³⁷ Jackson's constitutional methodology was dubious on two counts. First, why did Jackson signal his conclusion by using the emotive word "prejudice" when referring to his beliefs regarding execution? Second, if it means anything, the Bill of Rights is a command of legally concretized decency aimed at government's treatment of the citizenry. Jackson must have realized that Louisiana officials were incapable of acting with a "sense of decency." Surely he knew how little chance a black youth had from Louisiana state officials in 1947. In short, as did Justice Frankfurter, Jackson

131. *Id.*

132. *Id.*

133. 332 U.S. 46 (1947) (fifth amendment privilege against self-incrimination inapplicable to state criminal proceedings).

134. Appendix at G1.

135. *Id.*

136. See *supra* notes 97-99 and accompanying text.

137. *Id.* at G4.

wanted it both ways—to be seen as a “lawyer’s lawyer” and to be compassionate. That was intellectual dishonesty.

Justice Rutledge saw through Jackson’s disingenuous effort. Rutledge’s collected papers reveal in an undated, unsigned memorandum: “I consider it to be more than absurd for the prosecutor at Nuremburg to say that he doesn’t approve of capital punishment. If he didn’t approve, he should never have taken the job. The remarks at the bottom of page 1 about ‘the duty of prosecutors’ adds to rather than detracts from the absurdity.”¹³⁸ The latter reference is to a comment in Jackson’s concurrence that “[s]o long as society adheres to its policy of death penalties, it is for us in individual cases to apply the policy of the law, as it is the duty of prosecutors, whatever their personal convictions, to advocate it.”¹³⁹

The circulated dissents of Justices Murphy and Rutledge clearly rejected the judicial approach advocated by Jackson and Frankfurter that a judge could, and must, completely divorce personal views from judicial decision-making. Murphy wrote in his proposed dissent that “[t]o me, it is inhuman and barbarous to subject any person to the torture of two or more trips to the electric chair in the hope that one of them will result in the taking of the person’s life.”¹⁴⁰ He maintained that in the unique circumstances of *Francis*, “We have nothing to guide us in defining what is cruel and unusual apart from our own consciences. . . . Our decision must necessarily be based upon our mosaic beliefs, our experiences, our backgrounds and the degree of our faith in the dignity of the human personality.”¹⁴¹ Discussing the mental torture that Willie suffered, Murphy wrote that “[t]he mental anguish which characterizes preparation for execution must be repeated, an anguish that can be fully appreciated only by one who has experienced it.”¹⁴² The mental agony of a second attempt was such that it “makes the total punishment cruel and inhuman.”¹⁴³ The Justice particularly noted that “it is not without significance that this cruel and unusual punishment is about to be inflicted upon a helpless and inarticulate member of a minority group.”¹⁴⁴ Murphy’s views, unlike those of Frankfurter and Jackson, had the virtue of intellectual honesty.

Similarly, the unpublished dissent of Justice Rutledge stressed Willie’s mental torture and also dealt with the negligence test seemingly established by the plurality in *Reed*’s opinion.¹⁴⁵ Justice Rutledge rejected the distinction drawn between “an unforeseeable accident” and intentional torture by the

138. Undated, unsigned memorandum (available in Library of Congress, Rutledge Papers, Box 147.)

139. Appendix at G1.

140. Appendix at H1.

141. *Id.* By using the term “our own consciences,” Murphy anticipated Chief Justice Warren’s valedictory: “in this Court . . . we have no constituency. We serve no majority. We serve no minority. We serve only the public interest as we see it, guided only by the Constitution and our own consciences.” Retirement of Mr. Chief Justice Warren, 395 U.S. at xi (1969).

142. Appendix at H2.

143. *Id.*

144. *Id.* at H4.

145. See *supra* note 82 and accompanying text.

state.¹⁴⁶ The subjective motivation of Louisiana in attempting the first execution was of no significance in determining whether its action was cruel and unusual punishment.¹⁴⁷ "I do not think the element of torture is removed," Rutledge wrote, "because the state acts carelessly rather than deliberately."¹⁴⁸ Instead, he believed that "[t]orture, for the victim, is not a matter of the executioner's state of mind. It may be inflicted as much by carelessness and bungling or taking a chance as by design."¹⁴⁹ Recognizing the mental agony undoubtedly suffered by a death-row prisoner, Rutledge concluded that "Willie Francis cannot be electrocuted again without undergoing a second time the death pangs he already has suffered and which now I think the state has no right to reinflct."¹⁵⁰ That the Louisiana officials did act "carelessly," at the very least, cannot be doubted.¹⁵¹

The dissenters soon coalesced around Burton's dissenting opinion. On December 20, 1946, Justice Douglas, after Burton agreed to modify his dissent, reversed his original vote cast at the November 23, 1946 conference and became the first to join Burton.¹⁵² By the end of 1946, Murphy and Rutledge also had dropped their dissents and joined Burton. In a New Year's Eve note to Burton, Rutledge revealed the narrowness and uncertainty which at that point still surrounded the Court's consideration: "Please allow me to join in your opinion. It's a good job, right, and I hope will induce the change in the additional necessary vote."¹⁵³

The "additional necessary vote" to which Rutledge referred most likely was Frankfurter's, who remained the swing Justice. Although he had voted with the then majority at conference, Frankfurter's strong verbal disapproval of capital punishment is evident in a series of letters between him and Burton. This correspondence provides insight into the distress which Justice Frankfurter claimed to have undergone in *Francis*.

In a December 13, 1946, letter to Burton, Frankfurter revealed grave misgivings regarding his vote in the case, indicating that he had read Burton's dissent and "reflected upon it with sympathy."¹⁵⁴ "I have to hold on to myself not to reach your result," Frankfurter wrote. "I am prevented

146. Appendix at E1-2.

147. *Id.* Justice Stevens later echoed Rutledge's beliefs in *Estelle v. Gamble*, 429 U.S. 97, 108 (1976) (Stevens, J., dissenting). Stevens maintained that the existence of a constitutional violation, rather than the intent of the individual causing it, was the proper focus of constitutional adjudication. *Id.* at 116.

148. Appendix at E1.

149. *Id.* at E2.

150. *Id.* at E3.

151. See *supra* notes 43-44 and accompanying text.

152. Justice Burton recorded in his diary that on December 20, 1946, he "conferred with Justice Douglas and got his consent to my dissent in #142 as modified at his suggestion." Burton Diary (Entry of Dec. 20, 1946) (available in Library of Congress, Burton Papers, Box 171). The modification to Burton's draft dissent consisted of several minor word changes.

153. Rutledge-Burton Memorandum (Dec. 31, 1946) (available in Library of Congress, Burton Papers, Box 171). Burton spent considerable time perfecting his dissent. See Burton Diary (entries of Dec. 12, 15-17, 19-20, 24, 1946, Jan. 8, 12, 1947) (available in Library of Congress, Burton Papers, Box 171).

154. Appendix at J1.

from doing so," he continued, "only by the disciplined thinking of a lifetime regarding the duty of this Court in putting limitations upon the power of a State, when the question is merely the power of a State under the limitations implied by the Due Process Clause."¹⁵⁵ Frankfurter thus intimated that the four dissenters, in his opinion, had engaged in undisciplined thinking. The Justice then went on to quote with approval Justice Oliver Wendell Holmes, who "used to express [the relationship between the Supreme Court and the States] by saying that he would not strike down State action unless the action of the State made him 'puke.'" ¹⁵⁶

Frankfurter concluded that *Francis* had failed to meet the Holmes "test." "I cannot say that [a second execution attempt] so shocks the accepted, prevailing standards of fairness and justice not to allow the State to electrocute after an innocent, abortive first attempt," Frankfurter wrote Burton, "that we, as this Court, must enforce that standard by invocation of the Due Process Clause."¹⁵⁷ By failing to disclose how he ascertained "the accepted prevailing standards of fairness and justice," Frankfurter's conclusion consisted purely of his personal views. Nevertheless, again revealing the asserted difficulty he had in reaching his decision, Frankfurter found that "after struggling with myself—for I do think the Governor of Louisiana ought not to let Francis go through the ordeal again—I cannot say that reasonable men could not in calm conscience believe that a State has such power."¹⁵⁸ By invoking the test of the "reasonable man," Frankfurter incorporated tort law into the Constitution. Moreover, to apply such a test, he also necessarily took the position that the Justices could and should act as a little lunacy commission to determine the reasonableness and rationality of actions of state governmental officers.¹⁵⁹ "And when I have that much doubt," Frankfurter continued, "I must, according to my view of the Court's duty, give the State the benefit of the doubt and let the State action prevail."¹⁶⁰ Why, one is forced to ask, should the state have the "benefit of the doubt"? On that question Frankfurter was silent except to say that abstract principles of federalism outweighed the facts of the bungled execution.¹⁶¹ Frankfurter, in short, exalted a political theory over a teenager's life.

Curiously, Frankfurter ended the letter by complimenting Burton for listen-

155. *Id.*

156. *Id.* See *supra* notes 108-09 and accompanying text.

157. *Id.* at J1-2.

158. *Id.* at J1.

159. This approach, of course, is not novel. The Court often has used a rational basis or reasonableness test in equal protection decisions and, indeed still does. See, e.g., *Clements v. Fashing*, ____ U.S. ____, 102 S.Ct. 2836 (1982) (state constitutional provision which renders a public official ineligible to run for state legislative office where the term of his currently held office will not expire until the legislative term begins meets rational basis standard); *Plyler v. Doe*, ____ U.S. ____, 102 S.Ct. 2382 (1982) (state statute denying free public education to undocumented children of illegal aliens not rationally related to state interest in preserving limited resources for the education of its lawful residents).

160. Appendix at J2.

161. 329 U.S. at 469-71 (Frankfurter, J., concurring).

ing to his conscience: "it is one of the most cheering experiences since I have been on this Court to have you, who [have] felt so strongly against taking the case at all, come out in favor of reversal as a result of your own conscientious reflections."¹⁶² Thus, Frankfurter implicitly accused Burton of ignoring his duty to the Court because he chose to follow his conscience.

In a note responding to Frankfurter dated December 26, 1946, Burton took a novel approach in attempting to place *Francis* outside the boundaries of Frankfurter's due process analysis with its deference to the state courts. Burton asked Frankfurter to "consider that in enforcing the 14th Amendment against these state officials we are enforcing not only the *federal* amendment *but also* the *express* language of the *state* legislature."¹⁶³ The Louisiana statute provided:

Every sentence of death imposed in this State shall be by electrocution; that is, causing to pass through the body of the person convicted a current of sufficient intensity to cause death, and the application and continuance of such current through the body of the person convicted until such person is dead.¹⁶⁴

Justice Burton noted that the statutory language prohibited a second execution and that this view had "not been interpreted to the contrary by the Louisiana Supreme Court as that Court merely said that it was an executive matter and that it declined to look at it."¹⁶⁵ In support of his contention that the statute prohibited a second execution, Burton argued that the statute did not provide for electrocution by interrupted or repeated applications of electric current so that the victim would recover complete consciousness before being submitted to the next shock.¹⁶⁶ Rather, the statute expressly prescribed the application of a current of sufficient intensity to cause death and for the continuance of that application until death resulted.¹⁶⁷ Thus, Burton's implicit message was that Frankfurter could, by his own conception of due process, save Willie Francis without failing to pay the deference he deemed due to the Louisiana authorities.

Frankfurter responded to Burton's entreaty with a December 31, 1946, "Dear Harold" letter, in which he continued to maintain that "[w]hatever scope the State Court gives to a state law is binding upon us even though the State Court gave it a scope which we think it should not have given or failed to give it a scope which we think it should have given. All this is purely a State question beyond our purview."¹⁶⁸ For Frankfurter, the issue

162. Appendix at J2.

163. Letter from Justice Burton to Justice Frankfurter (Dec. 26, 1946) (available in Library of Congress, Frankfurter Papers, Box 38).

164. LA. CODE CRIM. L. & PROC., ch. 1, art. 569 (Dart 1932 & Supp. 1942).

165. Letter from Justice Burton to Justice Frankfurter (Dec. 26, 1946) (available in Library of Congress, Frankfurter Papers, Box 38).

166. *Id.*

167. *Id.*

168. Letter from Justice Frankfurter to Justice Burton (Dec. 31, 1946), Appendix at K1 (available in Library of Congress, Burton Papers, Box 171).

remained: "whether, under the circumstances in which the State court found no violation of State law, there is a transgression of the Due Process Clause."¹⁶⁹ "I cannot bring myself to think that if I were to hold there was," Frankfurter wrote Burton, "I would not be enforcing my own private view rather than the allowable consensus of opinion of the community which, for purposes of due process, expresses the Constitution."¹⁷⁰ Yet, enforcing his "own private view" is precisely what Frankfurter did. While stressing a duty to some indefinable, unascertainable "consensus of opinion of the community," Frankfurter nonetheless asserted that he was deeply disturbed by his vote in *Francis*. He concluded the letter to Burton with these words: "I am sorry I cannot go with you, but I am weeping no tears that you are expressing a dissent."¹⁷¹

As with Justice Jackson, Frankfurter wanted it both ways. He knew his was the critical vote, yet relied on something he did not and could not know to send Willie to his death—the "consensus of opinion in the community." Furthermore, had the "community," however defined (as it was not by Frankfurter), been aware of the actual facts of the bungled execution, not revealed to the Supreme Court until Wright and DeBlanc filed a motion for a writ of habeas corpus on May 8, 1947, could it accurately be said that under Frankfurter's test, "reasonable men" would not have wanted to "puke"? Surely, Frankfurter knew that societal consensus was merely a convenient verbal counterpane under which he could hide his personal predilections.

On January 2, 1947, Justice Frankfurter circulated a concurring opinion joining in the Reed decision. Before his opinion was circulated to the Court, however, Frankfurter met with Justice Burton to explain his decision.¹⁷² On January 11, 1947, Justice Frankfurter notified the Court that he would be unable to agree with the supporting rationale of the plurality opinion written by Justice Reed.¹⁷³ Nevertheless, Frankfurter did not disagree with the Court's ultimate conclusion—Willie Francis must go back to the electric chair. Thus, while the Court's decision would not be announced for another two days, Frankfurter had effectively sealed the fate of Willie Francis. Not unlike Frankfurter's concurrence¹⁷⁴ in Justice Black's opinion for the Court in *Korematsu v. United States*,¹⁷⁵ it was a decision that the cult of Frankfurter worshippers, and legal academia generally, have swept into the dustbin of

169. *Id.*

170. *Id.*

171. *Id.*

172. Justice Burton's first diary entry for January 2, 1947 states: "Conferred with Justice Frankfurter as to my dissent in [*Francis*]. He has written an opinion concurring with majority." Burton Diary (entry of Jan 2, 1947) (available in Library of Congress, Burton Papers, Box 171).

173. Frankfurter, J., Memorandum for Conference (Jan. 11, 1947) (available in Library of Congress, Frankfurter Papers, Box 23).

174. *Korematsu v. United States*, 323 U.S. 214, 224-25 (1944) (Frankfurter, J., concurring).

175. 323 U.S. 214 (1944) (executive order directing that Japanese-Americans be relocated to concentration camps constitutional during state of war).

history. Thus, the reputations of both Black and Frankfurter survive *Korematsu* and *Francis*.

On January 29, 1947, Wright filed a petition for rehearing with the Court arguing that, by amending the electrocution statute¹⁷⁶ the State of Louisiana had effectively conceded that the failure of the first execution attempt resulted from the incompetence of execution officials.¹⁷⁷ In 1947, just as today, the Rules of the Supreme Court provided that a petition for rehearing would not be granted "except at the instance of a Justice who concurred in the judgment or decision and with the concurrence of a majority of the Court."¹⁷⁸ Justice Frankfurter did not vote to grant Wright's petition and, thus, on February 10, 1947, the Court entered an order denying the petition.¹⁷⁹

Similarly, on May 8, 1947, the last day of oral argument for the October 1946 term and the eve of Francis's execution, Wright and DeBlanc filed a petition for a writ of habeas corpus and moved the Court to stay execution. Wright obviously pinned this last-ditch attempt at a reprieve on changing Frankfurter's mind. In his concurring opinion, Frankfurter had intimated that if the execution had failed as a result of intention or wanton recklessness, due process would be denied: "The fact that I reach this conclusion [affirming the Louisiana Court] does not mean that a hypothetical with a series of abortive attempts at electrocution, or even a *single willfull attempt*, would not raise different questions."¹⁸⁰ Yet, as he learned when Wright filed the petition for habeas corpus, that is precisely what did occur in the bungled execution. Pointing to recently discovered evidence detailing the drunken state of the executioner, Wright argued that the first execution was "a disgraceful and inhuman exhibition"¹⁸¹ constituting "sadistic or wantonly reckless torture."¹⁸² Consequently, he contended that the attempt fell directly within Frankfurter's due process exception.

Again, Justice Frankfurter failed to act. Although oral arguments were to begin at noon, they were temporarily postponed because, as noted by an entry in Justice Burton's diary:

At 11:50, the court went in conference to consider the Willie Francis petition filed by LeBlanc [sic] and a motion for an original writ of Habeas Corpus filed by Wright, a D.C. Attorney. We opened court at noon and immediately recessed to confer. We returned at 1 and announced decision denying both procedures (Murphy dissent, Rutledge opinion that it should be reheard) without prejudice in other tribunals.¹⁸³

176. For a discussion of the change in the Louisiana electrocution statute see *supra* note 44.

177. Petition for Rehearing at 2-4, *Louisiana ex rel. Francis v. Resweber*, 330 U.S. 853 (1947).

178. SUP. CT. R. 58.

179. *Louisiana ex rel. Francis v. Resweber*, 330 U.S. 853 (1947).

180. 329 U.S. at 471 (Frankfurter, J., concurring) (emphasis added).

181. Petition for a Writ of Habeas Corpus at 4, *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (quoting affidavit of Louis M. Cyr, see Appendix at C1).

182. *Id.* at 8.

183. Burton Diary (entry of May 8, 1947) (available in Library of Congress, Burton Papers, Box 171). Burton noted that when Bertrand DeBlanc flew in from New Orleans on the morning of the oral argument, Burton took him to see Justice Black. *Id.* The Court denied leave to file the habeas corpus petition with these words:

The other tribunals to which Burton referred were the Louisiana courts and the governor, and perhaps the federal district court.

In its brief opinion accompanying the denial of the habeas corpus motion, the Supreme Court relied on *Ex Parte Hawke*,¹⁸⁴ for its ruling that Willie's motion for habeas corpus first must be filed in the federal district court and then wind its way to the Supreme Court through the federal court system. However, as Wright and DeBlanc pointed out:

Should petitioner seek to vindicate his rights, or even to assert his claims of right, in the courts of Louisiana, state or federal, and should that court deny his relief, he could be electrocuted before he or his counsel could possibly seek even *supersedeas* in that court, particularly if a bond were to be required; and thereby petitioner would die without having had this Court's judgment upon the question that it has already indicated is decisive.¹⁸⁵

The Supreme Court and Frankfurter remained unmoved. Thus, on Friday, May 9, 1947, Willie Francis was sent to the electric chair for a second time—this time with lethal effect. Left standing alone, sobbing on the courthouse steps on that Friday before Mother's Day, was Willie's aged mother. Exalted notions of due process could not console her at that moment.¹⁸⁶

III. JUSTICE FRANKFURTER AND THE DUE PROCESS CLAUSE

Justice Frankfurter asserted in his decisive concurrence that Supreme Court Justices should not enforce their private views but, rather, should determine "the consensus of society's opinion which, for purposes of due process, is the standard enjoined by the Constitution."¹⁸⁷ That would be a noble senti-

On motion for leave to file petition for a writ of habeas corpus. May 8, 1947. The petition for leave to file an original petition for writ of habeas corpus is denied for reasons set forth in *Ex parte Hawke*, 321 U.S. 114. In view of the grave nature of the new allegation set forth in this petition, the denial is expressly without prejudice to application to proper tribunals. Mr. Justice Murphy is of opinion that the petition should be granted. The petition for writ of certiorari and the application for stay are denied. Mr. Justice Rutledge is of the opinion that the application in No. 140, Misc. should be treated as a petition for rehearing in No. 142 of October Term, 1946, 329 U.S. 459; so regarded, the petition should be granted; the judgment in No. 142 should be vacated; and that cause remanded to the Supreme Court of Louisiana for further proceedings to determine the issues of fact presented by the petition. Mr. Justice Douglas took no part in the consideration or decision of these applications.

Louisiana *ex rel.* Francis v. Resweber, 331 U.S. 786, 786-87 (1947).

184. 321 U.S. 114 (1944) (defendant must exhaust all state remedies and then petition a federal district court for habeas corpus relief before resorting to the Supreme Court).

185. Petition for Writ of Habeas Corpus at 10, Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947).

186. Pittsburgh Courier, May 17, 1947, at 20, col. 7.

187. 329 U.S. at 471 (Frankfurter, J., concurring). Stressing that under the due process standard, personal views should not be imposed, Frankfurter also wrote "[w]e cannot escape acknowledging that [the problem of a second attempt] involves the application of merely personal standards of fairness and justice very broadly conceived. They are not the application of merely personal standards but the impersonal standards of society which alone judges, as

ment were it accurate, but it is not. Frankfurter left unanswered the question as to how he ascertained the "consensus of society's opinion"¹⁸⁸ in a case for which there was no precedent. He vouchsafed no clue as to how the Justices could divine public opinion on due process questions. Further, Frankfurter failed to indicate whether the society he referred to was the United States as a whole, the State of Louisiana, or perhaps only St. Martinville, Louisiana.

Although he made no mention of how the Court should have determined the societal consensus, by no means would Frankfurter have accepted a poll of public opinion as an acceptable barometer. Indeed, if such a poll had been taken, Willie Francis probably would have avoided a second trip to the electric chair. It was reported that in the week after the first electrocution attempt, the Governor of Louisiana was "deluged with an unprecedented flood of mail. . . . Thousands of letters, telegrams and postcards poured in from all parts of the United States urging clemency for Willie Francis."¹⁸⁹ One can only infer that Frankfurter and his four colleagues had their personal radar finely tuned to "society's" wavelength and thus were able to pick up signals that the dissenting Justices could not.

The difficulty with the Frankfurter position is in large part caused by a problem inherent in the nebulousness of due process. As the opinion of Justice Reed illustrates, it is difficult to define with precision when a particular action violates the cruel and unusual punishment clause found in the Bill of Rights.¹⁹⁰

the organs of law, are empowered to enforce." *Id.* at 470. How he could reconcile that with his acceptance of Holmes's "puke" test, see *supra* notes 108-09 and accompanying text, remains completely mysterious.

188. *Id.* at 471. As recognized by Justice Black, modern technology has "not yet produced a gadget which the Court can use to determine what traditions are rooted in the [collective] conscience of our people." *Griswold v. Connecticut*, 381 U.S. 479, 519 (1965) (Black, J., dissenting). Although Black emphasized that the Supreme Court "certainly has no machinery with which to take a Gallup Poll," *id.*, some have attempted to determine scientifically such social "traditions" and concerns. See, e.g., Cohen, Robson, & Bates, *Ascertaining the Moral Sense of the Community*, 8 J. LEGAL EDUC. 137 (1955) (proposing model to assess community standards from detailed interviews and to measure variance from standards imposed by legislature).

189. *New Orleans Times-Picayune*, May 12, 1946, at 9, col. 4. "Letters, telephone calls and telegrams from Maine to California continued today to flood into Governor Jimmie Davis' office here asking for clemency for Willie Francis, whose escape from the electric chair Friday apparently resulted in a mass wave of hysteria for him across the nation." *New Orleans Times-Picayune*, May 9, 1946, at 6, col. 3. One of those telegrams came from Father Flanagan of Boystown, Omaha, Neb., who wired "[D]eeply interested in saving life of Willie Francis now in death cell at New Iberia, La. Would you, dear governor, use your power of authority to commute death sentence. May God direct you to do his holy will." *New Orleans Times-Picayune*, May 8, 1949, at 16, col. 3.

190. In rejecting Francis's argument that the psychological strain of preparing to face a second execution subjected him to a lingering, and therefore, cruel and unusual punishment, Justice Reed stated: "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely." 329 U.S. at 464. Thus, Reed found that electrocution did not violate the constitutional guarantee against cruel and unusual punishment. *Id.* Based on this standard, he concluded that the unforeseeable events which caused the first execution

As Justice Murphy candidly said in his withdrawn draft dissent, it is impossible to discern when a particular state action is circumscribed by due process, absent the application of personal views.¹⁹¹ Prior to Justice Frankfurter's 'consensus of society' definition, Justice Benjamin Nathan Cardozo had formulated a generally accepted definition of this elusive due process concept. In *Snyder v. Massachusetts*,¹⁹² Cardozo held that a state may enforce its own notions of fairness in the administration of criminal justice unless "in so doing it offends some principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental."¹⁹³ Frankfurter's version of the due process standard articulated in *Francis* did not improve or clarify the Cardozo model. In fact, both so-called standards are covert invitations to the Justices to legislate what Chief Justice Earl Warren called in his frank valedictory, their "own consciences."¹⁹⁴

Frankfurter allegedly sought to formulate an objective standard against which could be measured particular factual situations, but his standard falls of its own weight. It was instead something quite different—a subjective standard. In *Adamson v. California*,¹⁹⁵ the focal point of the famous debate between Justices Frankfurter and Black, Black accurately asserted that Frankfurter's "natural-law-due-process formula" provided the Court with a "license . . . to roam at will in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain of the States as well as the Federal government."¹⁹⁶ Similarly, as early as 1948, soon after *Francis*, one commentator saw through the Frankfurter standard, asserting that:

attempt to fail did not, as a matter of constitutional law, add to the inherent cruelty of the second execution. *Id.* Justice Reed's tortured distinction between pain inherent in the means of execution and pain actually suffered by an individual illustrates the difficulty of determining, and the Court's unwillingness to define, the exact scope of the phrase "cruel and unusual."

191. See Appendix at H1.

192. 291 U.S. 97 (1934). *Snyder* held that a state criminal defendant's right to due process under the fourteenth amendment was not denied where the judge, jury, and counsel for both parties viewed the scene of the crime outside the accused's presence. *Id.* at 108-10.

193. *Id.* at 105. Even Cardozo recognized, however, that "[w]e may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own." B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 13 (1921). For an instructive analysis which maintains that elimination of purely personal preference inherent in a flexible concept of due process can be avoided by the use of institutionalized methods of rational inquiry see Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 *YALE L.J.* 319 (1957). See also Black, *The Bill of Rights*, 35 *N.Y.U. L. REV.* 865 (1960) (asserting that the Bill of Rights' guarantees with respect to the federal government are absolute and should never be abridged on the ground that a superior public interest justifies such abridgement); Frankfurter, *Memorandum on 'Incorporation' of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 *HARV. L. REV.* 746 (1965) (asserts that the Court has never "incorporated" any specific guarantee of the Bill of Rights into the fourteenth amendment but rather that the fourteenth amendment prevents intrusion upon certain rights and liberties because of their "fundamental" nature).

194. Retirement of Mr. Chief Justice Warren, 395 U.S. at xi (1969).

195. 332 U.S. 46 (1947). *Adamson* declined to incorporate the fifth amendment privilege against self-incrimination into the fourteenth amendment. *Id.* at 50-51.

196. *Id.* at 90 (Black, J., dissenting). For a discussion of Justice Black's incorporation theory, see *supra* notes 6-10 and accompanying text.

Tentatively, it can be argued that Frankfurter's objective standard is a way of expressing two things: his own set of values for his society and his own conception of the safe limits of his function. Some things he believes in strongly enough to use his power to protect them. Others he may believe in but not strongly enough to risk the charge of abuse of office.¹⁹⁷

So much, one might say, for Frankfurter's *verbal* opposition to capital punishment. So much, moreover, for the mental anguish he claimed to have suffered in making his decision in *Francis*.

In his opinion in *Rochin v. California*,¹⁹⁸ Frankfurter found that the forcible use of a stomach pump by police officers is conduct "that shocks the conscience . . . [and is] too close to the rack and screw."¹⁹⁹ Whose "conscience," his or society's, he did not say. Black again criticized the Frankfurter approach as allowing Justices to "roam at will in the limitless area of their own beliefs," reading their ideas of good social policy, which Black called "natural law," into the fourteenth amendment.²⁰⁰ Indeed, how the opinions by Frankfurter in *Francis* and *Rochin* can be reconciled, insofar as judicial neutrality is concerned, is a mystery.

Perhaps the most powerful early critique of Frankfurter's beliefs concerning the breadth of the fourteenth amendment due process analysis is found in the unpublished Black concurrence in *Francis*. Evaluating the Frankfurter approach, Black found it constitutionally wanting and characterized it as "mystic natural law which is above and beyond the Constitution, and which is read into the due process clause so as to authorize us to strike down every state law which we think is 'indecent,' 'contrary to civilized standards,' or offensive to our notions of 'fundamental justice.'"²⁰¹ Indeed, he went on, "[i]f the due process clause means that, we must measure the validity of every state and federal criminal law by our conception of national 'standards of decency' without the guidance of constitutional language."²⁰² Recognizing the ultimately "subjective" nature of Frankfurter's concurrence, Black wrote: "Conduct believed 'decent' by millions of people may be

197. Braden, *The Search for Objectivity in Constitutional Law*, 57 YALE L. J. 571, 588-89 (1948).

198. 342 U.S. 165 (1952).

199. *Id.* at 172.

200. *Id.* at 175. Black believed that the incorporation of the Bill of Rights into the fourteenth amendment would obviate the need to apply varying standards. Justice Frankfurter rejoined:

We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. . . . To practice the requisite detachment and to achieve sufficient objectivity no doubt demands of judges the habit of self-discipline and self-criticism, incertitude that one's own views are incontestable and alert tolerance toward views not shared. . . . These are precisely the presuppositions of our judicial process. They are precisely the qualities society has a right to expect from those entrusted with ultimate judicial power.

Id. at 170-72. See also *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting) ("To kill a man who has become insane while awaiting sentence offends the deepest notions of what is fair and just and right.').

201. Appendix at 12.

202. *Id.* at 14.

believed 'indecent' by millions of others. Adoption of one or the other conflicting views as to what is 'decent,' what is right, and what is best for the people, is generally recognized as a legislative function."²⁰³ To place the courts in such a role was unacceptable to Black. "Our courts move," he continued, "in forbidden territory, when they prescribe their 'standards of decency' as the supreme rule of the people."²⁰⁴ A constitutional fundamentalist, Black concluded that "[i]f the Constitution had declared that the Supreme Court of the United States should ordain 'standards of decency,' I should, of course, be forced to undertake that monumental task. But it has not. I cannot expand 'due process' so as to make it include that."²⁰⁵

Of course, what Black did not say was, first, by what criteria he determined that the eighth amendment was incorporated into the fourteenth amendment's due process clause and, second, what standard he used to determine whether an act constituted cruel and unusual punishment. By convincing Justice Reed to incorporate the eighth amendment into the fourteenth, but without providing him with an adequate justification for doing so, Black's behavior was as faulty as Frankfurter's.

Yet not only Justice Black but even Frankfurter had difficulties with his own due process standard. In *Haley v. Ohio*,²⁰⁶ for example, decided a year after *Francis*, Frankfurter provided the swing vote in another 5-4 decision. This time, however, Frankfurter concluded that a confession made by Haley, a fifteen-year-old black youth, but without the benefit of counsel, had been coerced and that its admission into evidence violated due process.²⁰⁷ On the basis of that confession, Haley had been convicted of first degree murder and sentenced to life imprisonment. In *Haley*, Justice Burton also changed from his position in *Francis*. In dissent, Burton reverted to his judicial philosophy of supporting the government in criminal cases²⁰⁸ by arguing that the Court should place a greater trust in the law enforcement community. He concluded that the five-hour midnight interrogation of Haley, by relays of police, and unrepresented by counsel, was not unreasonable and, thus, not a violation of the due process clause of the fourteenth amendment.²⁰⁹

Again authoring a concurrence, Frankfurter disagreed with Burton's conclusion, but not without struggling, once more, with the question of due process. Frankfurter wrote that application of the due process standard "[e]ssentially . . . invites psychological judgment that reflects deep, even if inarticulate, feelings of our society. *Judges must divine that feeling as*

203. *Id.*

204. *Id.*

205. *Id.*

206. 332 U.S. 596 (1948).

207. *Id.* at 601 (Frankfurter, J., concurring).

208. *See supra* note 4 and accompanying text.

209. 332 U.S. at 617 (Burton, J., dissenting). In *Von Moltke v. Gilles*, 332 U.S. 708 (1948), although recognizing the constitutional guarantees accorded to criminal defendants, Justice Burton also emphasized that it was "equally important [for the Court] to review with sympathetic understanding the judicial process as constitutionally administered by our courts." *Id.* at 741 (Burton, J., dissenting).

best they can. . . .”²¹⁰ Frankfurter continued, the “Court must give the freest possible scope to the States in the choice of their method of criminal procedure. But these procedures cannot include methods that may fairly be deemed to be in conflict with deeply rooted feelings of the community.”²¹¹ Frankfurter acknowledged that it was difficult to make definite the “vague contours”²¹² of the due process clause. Yet, while “this is a most difficult test to apply,” Frankfurter decided that “apply it we must, warily, and from case to case.”²¹³ As in *Francis*, Frankfurter appeared to be troubled by his decision in *Haley*. Justice Burton again sought to change Frankfurter’s mind. Frankfurter declined, but not without reservation, in a letter to Burton exactly one week before the Court’s decision was announced:

You charged my conscience last Saturday for an independent reconsideration of the *Haley* case. Accordingly, I put in the whole of yesterday on that case—reading the entire record, rethinking the problems that it raises, worrying about it (I am still worrying about it) and sleeping on it. For it is one of those cases which for me is a case of inherent difficulty in view of the inherent difficulties of applying the concept of ‘due process’ to state convictions. The upshot of the best understanding of my judicial duty in a situation like this is that I find it necessary to write an opinion of my own, setting forth as candidly as I can why the admission of the confession of Haley under the circumstances in which it was made falls short of the requirements that judicially we have a right to attribute to what due process implies.²¹⁴

For the fifteen-year-old Haley, Frankfurter concluded that the “deeply rooted feelings of the community” dictated a reversal of the youth’s conviction for

210. *Haley*, 332 U.S. at 603 (Frankfurter, J., concurring). In possible reference to *Francis*, Frankfurter again stated his opposition to the death penalty, especially where 15-year-old boys were involved, but also reiterated his unwillingness to impose these views upon the states:

A lifetime’s preoccupation with criminal justice, as prosecutor, defender of civil liberties and scientific student, naturally leaves one with views. Thus, I disbelieve in capital punishment. But, as a judge I could not impose the views of the very few states who through bitter experience have abolished capital punishment upon all the other States, by finding that “due process” proscribes it. Again, I do not believe that even capital offenses by boys of fifteen should be dealt with according to the conventional criminal procedure. It would, however, be bald judicial usurpation to hold that States violate the Constitution in subjecting minors like Haley to such a procedure.

Id. at 602-03 (Frankfurter, J., concurring).

Writing for the *Haley* Court, Justice Douglas recognized that “[a]ge 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. . . . This is the period of great instability which the crisis of adolescence produces.” *Id.* at 599. Justice Frankfurter, in another context, also realized that “[c]hildren [have] a very special place in life which the law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State’s duty toward children.” *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring).

211. 332 U.S. at 604 (Frankfurter, J., concurring).

212. *Id.* at 602.

213. *Id.* at 604.

214. Letter from Justice Frankfurter to Justice Burton (Jan. 5, 1948) (available in Library of Congress, Frankfurter Papers, Box 38).

murder and the penalty of life imprisonment.²¹⁵ At the time of the murder of Andrew Thomas, Willie Francis was also fifteen. For Francis, however, Frankfurter found that the "consensus of society" condemned the youth to a second trip to the electric chair.

One of Frankfurter's idolators has opined that Frankfurter's opinion in *Francis* "stands as a personal monument to judgment over feeling."²¹⁶ That sentiment does not withstand rigid scrutiny. Willie Francis went to his death uncomplainingly, because Frankfurter exalted principles of political theory, of federalism and judicial self-restraint, instead of giving content to the Constitution. By asserting that societal consensus was the standard of due process, Justice Frankfurter conveniently forgot that the Bill of Rights and the fourteenth amendment at the very least are constitutional commands against majoritarianism.

It is simply not enough to speak of "society" and the "consensus of society's opinion" as if those terms meant something precise—which emphatically they do not.²¹⁷ If the terms had some exact meanings in Frankfurter's mind, he never revealed them. Nor did he ever disclose how he determined that societal consensus. The only possible conclusion is that Frankfurter used the terms as a means of covering up his personal predilections, and thus must be held to be hoist on his own petard.

IV. THE EXTRAJUDICIAL INTERVENTION OF JUSTICE FRANKFURTER

Justice Frankfurter clearly was frustrated by the result of his and the Court's decision in *Francis*. He would later say that the case "told on my conscience a great deal. . . . I was very much bothered by the problem, it offended my personal senses of decency to do this. Something inside of me was very unhappy, but I did not see that it [the second execution attempt] violated due process of law."²¹⁸ As a result of his dissatisfaction, Frankfurter sought to overturn the Supreme Court's *Francis* decision in an extraordinary example of extrajudicial intervention. Operating through a Harvard classmate and influential member of the Louisiana bar, Monte E. Lemann, Frankfurter secretly tried to secure executive clemency for Willie Francis from the Governor of Louisiana. Throughout this attempt, Justice Frankfurter's activities and involvement were kept secret from the Governor of Louisiana, the Board of Reprieves and Pardons of the State of Louisiana and, apparently, from all but one of Frankfurter's fellow Justices. Yet, while

215. In *Haley*, Frankfurter seems to have considered Haley's age in reaching his decision. While he maintained that it would be improper for the Court to hold states in violation of the constitution for subjecting minors to ordinary criminal procedures, he also declared that he did "not believe that even capital offenses by boys of fifteen should be dealt with according to the conventional criminal procedure." 332 U.S. at 602-03 (Frankfurter, J., concurring).

216. PRETTYMAN, *supra* note 2, at 120. Prettyman is a former clerk of Justice Frankfurter.

217. See *supra* note 188.

218. F. FRANKFURTER, *OF LAW AND MEN* 98 (P. Elman ed. 1956). Frankfurter, in a self-serving statement, remarked that "[t]here was no question about [Francis's] guilt." *Id.* Frankfurter made this statement during the summer of 1953 while he was a witness before the [British] Royal Commission on Capital Punishment.

seeking this political reversal of the Court's action, Frankfurter voted to deny attempts made by counsel for Francis to have the Supreme Court reconsider its decision. It is difficult to reconcile Frankfurter's vote as a Justice with his secret extrajudicial activities. Did he think he wore the dual hats of Justice and private citizen and could keep these activities separate? Surely it perverts the judicial process for a Justice to try to reverse a Supreme Court decision by secret efforts to manipulate state politics. Would it not have been more honest for Frankfurter to vote for his self-asserted conviction that Willie should not take a second trip to the electric chair? Indeed, he could have done so by employing his own test of due process of law upon learning the sordid details of the bungled execution.²¹⁹

On February 3, 1947, three weeks after the issuance of the Court's opinion in *Francis*, Frankfurter wrote Monte Lemann in New Orleans, soliciting his assistance in commuting the death sentence of Willie Francis to life imprisonment. Frankfurter headlined the letter "Strictly Confidential" and also sent a copy to Justice Burton with the following note: "HFB, For your information, FF."²²⁰ "I have little doubt that if Louisiana allows Francis to go to his death," Frankfurter warned, "it will needlessly cast a cloud upon Louisiana for many years to come, and, what is more important, probably leave many of its citizens with disquietude."²²¹ In addition to this warning of possible racial discontent, Frankfurter cited policy and equitable considerations as support for clemency. Frankfurter noted that "in New York, when there is a real division in the Court of Appeals, such as there was here, the death sentence is as a matter of course commuted to life imprisonment. There is no formal law about it but it is a settled tradition."²²² Moreover, he asked "[i]s there any possible reason for saying that, if Francis is allowed to go to his death instead of imprisoned for life, the restraints against crimes of violence will be relaxed?"²²³

The strain which *Francis* apparently had inflicted upon Frankfurter is visible in the letter's conclusion: "This cause has been so heavily on my conscience that I finally could not overcome the impulse to write you."²²⁴ Although quite unwilling himself to do so officially by voting with Burton, Frankfurter ended by asking whether the State of Louisiana could show "humaneness" and "compassion" in granting clemency. "It is difficult for me to believe that clemency would not be forthcoming, whatsoever may be the machinery of your state for its exercise," Frankfurter wrote, "if leading members of the bar pressed upon the authorities that even to err on the side of humaneness in the Francis situation can do no possible harm and might

219. See *supra* note 68 and accompanying text.

220. Letter from Justice Frankfurter to Monte Lemann (Feb. 3, 1947), Appendix at L1 (available in Library of Congress, Frankfurter Papers, Box 38). The papers of the other justices examined in researching this article do not reveal a copy of this letter.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

strengthen the forces of goodwill, compassion, and wisdom in society.”²²⁵

Frankfurter showed the same total lack of understanding of how state politicians are likely to act as he displayed fifteen years later in *Baker v. Carr*.²²⁶ In *Baker*, the key legislative reapportionment decision, Frankfurter’s dissent, in essence, told those complaining about Tennessee’s disproportionately overrepresented “rotten boroughs” to “sear” the consciences of state legislators and ask them to vote themselves out of office.²²⁷ For Frankfurter to have expected that Louisiana authorities might be convinced to exercise “humaneness” was equally naive.

Despite doubts over the prospects of success for the clemency plea,²²⁸ Lemann wrote Louisiana trial court Judge James Simon on April 19, 1947. Lemann first called the judge’s attention to English practice which would have dictated against a second execution.²²⁹ Noting that “the English are not soft people and have a deserved reputation for the recognition of fundamental human rights,”²³⁰ Lemann recommended that the Louisiana Pardon Board decide against a second electrocution for Francis. With an oblique reference to Justice Frankfurter, Lemann impressed upon the judge the importance of the case which they were considering: “I realize that the eyes of the world are in a sense upon us in this case, because I have myself had communications from lawyers of high standing, for whose opinion I have great respect, one of whom wrote me recently that he felt it would be a serious blot upon our State if Francis was permitted to be executed.”²³¹ “These considerations,” he continued, “do not, of course, relieve the Pardon Board of its responsibility of reaching its own decision, but I imagine that you and the other members of the Board will feel as much influenced as I have been by opinions so entitled to respect.”²³² Lemann then pleaded that “[w]here at the very least there is so much room for doubt as to what is the proper course to adopt, the further punishment of Francis is not as important as adherence to the highest standards of decency and humaneness which a large and informed body of public opinion feels would be betrayed by Francis’s execution.”²³³

It is ironic that Lemann’s plea to Judge Simon, made at Frankfurter’s request, cannot be reconciled with the concurring opinion of Frankfurter in *Francis*. Lemann’s argument that clemency was warranted by the “highest standards of decency and humaneness” and a “large and informed body

225. *Id.*

226. 369 U.S. 186 (1962). For a discussion of *Baker* see *supra* notes 91-92.

227. *Id.* at 266 (Frankfurter, J., dissenting). According to Frankfurter, the “[a]ppeal for relief . . . must be to an informed, civically militant electorate. Relief must come through an aroused popular conscience that sears the conscience of the people’s representatives.” *Id.* at 270.

228. See Letter from Monte Lemann to Judge Simon (Apr. 19, 1947), Appendix at M1 (available in Library of Congress, Frankfurter Papers, Box 38).

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

of public opinion” is obviously incompatible with Frankfurter’s conclusion that a second attempt would not be “repugnant to the conscience of mankind” or the “consensus of society.”

On April 23, 1947, Frankfurter circulated to his fellow Justices a copy of Lemann’s letter to Judge Simon. The accompanying note from Frankfurter clearly indicates that, other than Burton, they had been told nothing of the letter’s conception and history: “Dear Brethren: Monte Lemann is, I suppose, unexcelled at the Louisiana Bar. He happens to be an old and close friend and so it is natural for him to send me the enclosure. I thought it might interest the Brethren. F.F.”²³⁴ Frankfurter did not mention his role in generating Lemann’s letter; nor, apparently, did Burton enlighten the other seven. The obvious question is this: If Frankfurter’s extrajudicial actions to try to save Willie’s life were proper for a Supreme Court Justice, why the secrecy?

On April 22, 1947, Frankfurter wrote a letter of appreciation to Lemann: “You could not have made a better plea for saving Francis from execution than your letter to Judge Simon. While, as I wrote you, I felt almost heart-broken that [Francis’s lawyer] should have been so unimaginative as not to accept your offer of appearing before the Pardon Board, your letter may perhaps be more effective than a formal association as counsel for Francis.”²³⁵ “For more than forty years, if I can count straight,” Frankfurter continued, “you have chided me for excessive enthusiasm about this or the other thing. If I tell you that Marion [Frankfurter’s wife] is as impressed as I am by your whole procedure in connection with the Willie Francis case, you cannot charge me with excessive appreciation.”²³⁶ Thus, it is plain that Frankfurter saw nothing improper in trying to do politically what he would not do judicially.

Despite the best efforts of Frankfurter and Lemann, on April 22, the same day on which Frankfurter had written his optimistic letter to Lemann, the Louisiana Pardon Board refused for the third time to commute Willie’s death sentence to life imprisonment. As has been said, it was not necessary for Frankfurter to seek a political reversal of the Court’s decision in *Francis*. On two occasions, he could have acted on petitions filed by Skelly Wright requesting that the Court reconsider its decision. Yet, Frankfurter inexplicably opposed both the petition for rehearing and petition for a writ of habeas corpus filed by Wright and DeBlanc in the aftermath of the Court’s January 13th decision.

Justice Frankfurter’s attempt to secure executive clemency for Willie Francis had been foreshadowed in his concurring opinion. While “strongly drawn”²³⁷ by the sentiments expressed in Justice Burton’s dissent, Frankfurter never-

234. Frankfurter, J., Memorandum to Supreme Court (Apr. 23, 1947) (available in Library of Congress, Burton Papers, Box 171; Douglas Papers, Box 189).

235. Letter from Justice Frankfurter to Monte Lemann (Apr. 22, 1947) (available in Library of Congress, Frankfurter Papers, Box 38).

236. *Id.*

237. 329 U.S. at 471 (Frankfurter, J., concurring).

theless believed that the political solution of executive clemency was constitutionally more attractive than the judicial solution of mitigation of a sentence of death.²³⁸ This approach was consistent with Frankfurter's life-long philosophy regarding the role of the courts in the federal system, but was inconsistent with his verbalized sentiments about the death penalty.

Throughout his career, Felix Frankfurter advocated judicial self-restraint, believing in a quiescent judiciary that leaves litigants no other option than to try to influence the political process. The theory of judicial self-restraint has had an immense influence, as witness the many cases that have cited another major proponent of the theory, Alexander Bickel.²³⁹ But that approach is fatally flawed when the political process does not adequately meet the demands or aspirations of numerous people and groups. In 1962, in his dissent in *Baker v. Carr*,²⁴⁰ Frankfurter told voters in urban areas of Tennessee that they should not invoke the Constitution to get rid of the state's rotten borough system, which ensured dilution of the black vote.²⁴¹ Rather, they should go to the state legislature and ask that it enforce the state's constitution²⁴²—in other words, ask the legislators from the rural areas to vote themselves out of office. Thus, in both *Francis* and *Baker*, Frankfurter exalted form over substance. If Willie Francis were to avoid the electric chair, it would have to be as a result of compassion on the part of Louisiana officials and not Supreme Court decree.

How could the politically astute Frankfurter²⁴³ possibly have seriously entertained much hope for the success of his extrajudicial enterprise? Justice Douglas later would write in his judicial autobiography that he considered Louisiana of the 1940's to be "dominantly racist, at least as far as its leaders

238. *Id.* at 470.

239. For examples of Bickel's work on judicial restraint see, A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970); A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962). For examples of cases citing Bickel and expressing notions of judicial restraint see, *University of Cal. Bd. of Regents v. Bakke*, 438 U.S. 265, 411-12 n.8 (1978) (Stevens, J., concurring in part and dissenting in part) (believed that the Court should have refrained from considering the university's special admissions program as a constitutional question and instead should have decided the case on statutory grounds); *Arlington Heights v. Metropolitan Hous. Corp.*, 429 U.S. 252, 268 n.18 (1977) (only in extraordinary circumstances should a court call members of a legislative or administrative body to the witness stand, because to do so constitutes judicial intrusion into the workings of other branches of government); *Holt v. Richmond*, 459 F.2d 1093, 1099-1100 (4th Cir. 1972) (court refused to look into the motives of city councilmen with respect to the division of the city into voting districts).

240. 369 U.S. 186, 266 (1962) (Frankfurter, J., dissenting). For a discussion of *Baker*, see *supra* notes 91-92.

241. *Id.* at 300.

242. *Id.* at 270.

243. See generally B. MURPHY, *THE BRANDEIS/FRANKFURTER CONNECTION, THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES 9-10* (1982) [hereinafter cited as MURPHY] (while Frankfurter was a professor at Harvard Law School, Justice Brandeis enlisted him as a paid political lobbyist and lieutenant; they worked together for over 25 years placing a network of disciples in positions of influence and labored for enactment of desired programs).

were concerned."²⁴⁴ Further, the black population in those oppressive times had very little, if any, political power.²⁴⁵ Clearly, a black youth convicted of slaying a white man stood little chance of securing executive mercy in such an adverse environment. Deeply troubled by the consequences of his decisive vote and enmeshed in an intellectual swamp, Frankfurter's attempt to gain clemency for Willie Francis can only be recognized for what it was: a pitiful attempt by a jurist to assuage his conscience for allowing a youth to be put to death in the name of abstract principles of federalism.

A further, and perhaps more important, criticism is that the learned Justice Frankfurter, by deferring to state officers on constitutional issues, was drawing on his "personal and private notions" of judicial propriety. Far from having "requisite detachment" and "sufficient objectivity," he chose one set of values over another. Abstract notions of federalism prevailed over the due process rights of Willie Francis, even though *Frankfurter's own test* dictated that constitutional rights should predominate. Frankfurter never divulged the source of, nor adequately defined what he called, "the limits that bind judges." Perhaps his views about the political process were deeply influenced by his "intense patriotism."²⁴⁶ He simply was unable to perceive flaws in the "democratic" system, unable to grasp the simple facts that politicians do not vote themselves out of office, or that black youths in Louisiana in the 1940's were not likely to be accorded even the rudiments of due process when caught up in criminal-law matters. In both instances, he could well have applied the "Little Abner" principle that "any fool kin plainly see . . .," classically stated in another context by Chief Justice Taft: "All others can see and understand this. How can we shut our eyes to it?"²⁴⁷

The legal wrangling over Willie Francis ended when, after learning that the Supreme Court had denied the writ of habeas corpus, Willie told Bertrand DeBlanc that he was prepared to die and did not want to pursue the matter further. He told DeBlanc, "No, don't go back. I'm ready to die.

244. W. DOUGLAS, *THE COURT YEARS* 123 (1980). Douglas was describing the political situation which faced J. Skelly Wright, Francis's attorney.

245. Only in the wake of the Court's decision in *Smith v. Allwright*, 321 U.S. 649 (1944), did blacks in the Deep South begin to participate in primary elections. Black voter turnout, however, remained quite limited. In the 1946 Mississippi Democratic primary, approximately 3,000 out of the 5,000 registered black voters went to the polls. *Primaries: White Supremacy*, NEWSWEEK, July 15, 1946, at 30. Yet, according to the 1940 Census, there were 1,074,578 black residents in Mississippi. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1959, 16TH CENSUS REPORTS, Population Vol. II. The low voter turnout was no doubt attributable to the venomous discouragement of state officials. In one recorded example, U.S. Sen. Bilbo of Mississippi, in the week before the Democratic primary, inflamed his audience with these words: "White people will be justified in going to any extreme to keep the nigger from voting. You do it the night before the election—I don't have to tell you any more than that. Red-blooded men know what I mean." *Primaries: White Supremacy*, NEWSWEEK, July 15, 1946, at 30.

246. H. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* 33 (1980).

247. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 37 (1922). *Drexel* held unconstitutional a tax on 10% of the net profits of any company using child labor. *Id.* at 44.

I'm ready to go. I don't want you to do nothing."²⁴⁸ A number of questions survive the *Francis* case including: (1) why didn't Willie want to continue the litigation? After all, the Supreme Court, in denying the writ of habeas corpus, had done so "without prejudice" to his pursuing the remedy elsewhere; and (2) would a federal district court have had jurisdiction to entertain a petition for a writ of habeas corpus in Willie's case? We will never know the answer to the first question with certainty. As to the second, the answer seems clear: Yes, a federal court would have had jurisdiction.²⁴⁹ And that's the final tragedy of Willie's "slow dance on the killing ground."

CONCLUSION

As a judge on the United States Court of Appeals for the District of Columbia Circuit, James Skelly Wright would maintain that "[t]he ultimate test of the Justices work must be goodness. . . ."²⁵⁰ If that is the test, then the Supreme Court in *Francis* surely failed it. Two Justices, Frankfurter and Jackson,²⁵¹ were opposed to capital punishment in general and, in particular, were repulsed by the notion of a second trip to the electric chair for Willie

248. Interview with Bertrand DeBlanc, Esq., Lafayette, La., Sept. 25, 1982. In discussing Willie's decision not to pursue further litigation, DeBlanc recalls that, on the day before the second electrocution, he "went to see Willie and he was there with his head shaved, and I said 'Look, I can go back and try again on the question of negligence.' But [Willie] said, 'No, Mr. Bertrand. No, don't go back. I'm ready to die. I'm ready to go. I don't want you to do nothing.' So I said, 'O.K. Are you sure?' And he said, 'No. No. I don't want you to do nothing.' So, I didn't. . . . Before that, Father Charles Hannigan had seen Willie and told him 'Willie, at 12 o'clock sharp they're going to pull that switch and you're going to be on the chair and you're going to die just like this [snap of fingers].' And he said, 'The minute you die, Willie, you're going to be walking to the Lord. And when you meet him now, Willie, he'll be there to welcome you.' " *Id.*

249. The habeas corpus statute applicable to state prisoners is 28 U.S.C. § 2254 which reads in pertinent part as follows:

The Supreme Court, a Justice thereof, a circuit judge, or a *district court* shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254 (1976) (emphasis added).

A case in which a federal court declared that state court sentences can be a proper issue for habeas corpus relief is *Spinkelink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979), *reh'g denied*, 441 U.S. 937 (1979). The *Spinkelink* court stated that where a death sentence has been imposed and it can be shown that the facts and circumstances clearly do not require such a sentence and that to carry out such a sentence would be shocking to the conscience, then federal court intervention is proper. *Id.* at 606 n.28.

One question remains: Did Willie's lawyers have a duty to explain to Willie and his father (because Willie was a minor) that either of them could have sought habeas corpus relief in federal district court?

250. Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 *Harv. L. Rev.* 769, 797 (1971) (criticizes Bickel's value-neutral approach).

251. For a discussion of Justice Jackson's position on *Francis*, see *supra* notes 134-37 and accompanying text.

Francis. Yet, allegedly guided by ideas of judicial self-restraint, they did not act and, instead, hoped for a political solution which never came.

Perhaps as a result of his experience in *Francis*, Judge Wright likely would have reached a different conclusion from Justices Frankfurter and Jackson: "The judicial process forces a judge to take the short run into account. The consequences of his decision are thrust before his eyes, and so he must bend principles in order to produce a result he can live with."²⁵² The judiciary, at times, must be an active participant in social affairs, particularly when the executive and legislative branches are paralyzed by concern over their own tenure and individual careers. In 1967, the President's Commission on Law Enforcement and Administration of Justice concluded that "there is evidence that the imposition of the death sentence and the exercise of dispensing power by the courts and the executive follow discriminatory patterns. The death sentence is disproportionately imposed and carried out on the poor, the Negro and the members of unpopular groups."²⁵³ Thus, in these circumstances, the courts must protect the rights of minorities which have become submerged in, and thus denied by, the political processes of government.

Judge Wright described well the judicial role when he ruled that *de facto* segregation in the public schools of the District of Columbia was unconstitutional.²⁵⁴ After acknowledging that "great social and political problems [are better] resolved in the political arena," he went on to say "[b]ut there are social and political problems which at times seem to defy such resolution. In such situations, under our system, the judiciary must bear a hand and accept its responsibility to assist in the solution where constitutional rights hang in the balance."²⁵⁵

252. Wright, "No Matter How Small," 58 MASS. L.Q. 9, 11 (1973) [hereinafter cited as Wright]. Judge Wright argues that it is only the courts, acting through judicial review, that can strike a balance between the long term policies of the executive and legislative branches and the short term need for an individualized determination of justice. Wright maintains that the courts, because they are available to all, are the most democratic institution. Thus, he maintains that access to the courts must be expanded to protect rights which are not adequately addressed in the political arena. *Id.* at 11-13.

253. The Challenge of Crime in a Free Society, President's Commission on Law Enforcement and Administration of Justice 143 (1967). Similarly, Justice Douglas quoted with approval a study of capital punishment in Texas which concluded that "[a]pplication of the death penalty is unequal: most of the executed were poor, young, and ignorant." *Furman v. Georgia*, 408 U.S. 238, 250 (1972) (Douglas, J., concurring) (quoting Koeninger, *Capital Punishment in Texas, 1924-1968*, 15 *Crime & Delinq.* 132, 141 (1969)).

254. *Hobson v. Hansen*, 269 F. Supp. 401, 503-11 (D.D.C. 1967), *aff'd sub nom.* *Smuck v. Hansen*, 408 F.2d 175 (D.C. Cir. 1969), *appeal dismissed*, 393 U.S. 801 (1969).

255. 269 F. Supp. at 517. See also Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1 (1968). Judge Wright maintained that "[I]f the legislature simply cannot or does not act to correct an unconstitutional status quo, the Court, despite all its incapacities, must finally act to do so." *Id.* at 6. The point again is not that the courts will or should have to shoulder the entire burden, but that they do what they can in such situations. The resolution of many problems takes the cooperative action of all branches of government. When the political branches are stymied, the judiciary is the only recourse.

Later, writing about Clarence Gideon, the plaintiff in *Gideon v. Wainwright*,²⁵⁶ Judge Wright concluded that "[t]he judiciary is different from the political process. It is in the nature of courts that they cannot close their doors to individuals seeking justice."²⁵⁷ In 1947, however, the United States Supreme Court did close its doors, and therein lies the final tragedy of *Francis*.

By holding the controlling vote, Felix Frankfurter held Willie Francis's life in his hands. He could have saved Willie, but he chose not to do so. That, it is emphasized, was *not* because he had no discretion in the matter. Yet, in exercising his admitted discretion, he chose to exalt *his* political theory of federalism. Consequently, Willie again walked the last mile. As a result, his case stands as a monument, not unlike the *Japanese Exclusion Cases*,²⁵⁸ to what the Supreme Court should not do.

Were *Francis* an aberration, it might merit the oblivion into which it has been swept. But it is not. The same sort of attitude evident in 1947 today pervades a Supreme Court dominated by Nixon appointees. In both *Rummel v. Estelle*²⁵⁹ and *Hutto v. Davis*,²⁶⁰ savage sentences were upheld by

256. 372 U.S. 335 (1963) (sixth amendment provision that a criminal defendant has the right to be assisted by counsel applied to the states through the fourteenth amendment).

257. Wright, *supra* note 252, at 10.

258. *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943). For a discussion of the Japanese Exclusion Cases see *supra* note 11. See also Rostow, *The Japanese-American Cases—A Disaster*, 54 YALE L.J. 489 (1945) (these cases are a major breach in the principle of equality for all by their acceptance of ethnic differences as a justification for discrimination).

259. 445 U.S. 263 (1980). Proving that a sentence is disproportionate, however, is extremely difficult. In *Rummel v. Estelle*, 445 U.S. 263 (1980), the petitioner had been convicted previously of two separate felonies. The first conviction was for the fraudulent use of a credit card to obtain \$80 worth of goods. The second conviction involved passing forged checks in the amount of \$28. Upon his third conviction for obtaining \$120 by false pretenses, the petitioner received a mandatory life sentence under the Texas recidivist statute. *Id.* at 205-06. The *Rummel* Court found that the state's interest in dealing in a harsher manner with repeat offenders justified the mandatory life sentence. *Id.* at 284. Accordingly, *Rummel* held that the penalty imposed under the recidivist statute did not constitute cruel and unusual punishment under the eighth and fourteenth amendments. *Id.* at 285.

260. 454 U.S. 370 (1982) (per curiam). In *Davis*, the Court denied petitioner's writ of habeas corpus holding that a sentence of 40 years imprisonment and a \$20,000 fine was not so disproportionate as to constitute cruel and unusual punishment for the crimes of distributing marijuana and possession of 9 ounces of marijuana with the intent to distribute. *Id.* at 375. Disregarding the prosecuting attorney's acknowledgment that the sentence was grossly unjust and the Virginia legislature's subsequent, but nonretroactive, reduction of the maximum penalty for these offenses, the *Davis* majority ruled that the length of sentences was "purely a matter of legislative prerogative." *Id.* at 373 (quoting *Rummel v. Estelle*, 445 U.S. 263, 274 (1980)). Permitting a reviewing court to consider the nonviolent nature of the crime, to examine less restrictive means to accomplish the legislative purpose, or to compare the sentence imposed to that imposed by other states for the same or similar crime, the *Davis* Court reasoned, would sanction 'an intrusion into the basic line drawing process' that is the province of the legislature and not the courts. *Id.* at 374 (quoting *Rummel v. Estelle*, 445 U.S. 263, 275-76 (1980)). Accordingly, *Davis* intimated that successful challenges to the proportionality of a sentence would be "exceedingly rare." *Id.* at 374 (quoting *Rummel v. Estelle*, 445 U.S. 263, 272 (1980)).

Supreme Court Justices, led by Justice William Rehnquist, who like Frankfurter exalt political theory over substance. Rehnquist and his intellectual colleagues, however, have not always prevailed. In January, 1982, Justice Sandra O'Connor slipped the traces and joined a five-Justice majority in negating a death penalty for an Oklahoma teenager—about the same age as was Willie Francis.²⁶¹ Similarly, in June, 1982, another death sentence was overturned, this time of an accomplice who was said not to have participated in or intended a Florida murder.²⁶²

Whatever the merits of those decisions, the point stressed here is simple, yet profound: Justice Frankfurter was dead wrong when he concurred in the *Francis* case. The very facts of the bungled execution should have made him “puke.” More egregiously, he was wrong in his conception of a judge’s duty as a member of the Supreme Court of the United States.

In this Article we have focused almost entirely upon the opinion and subsequent judicial action of Justice Frankfurter. We do not mean to suggest, however, that only Frankfurter is vulnerable for what happened in *Francis*. The four plurality Justices, Hugo L. Black in particular, also may be criticized for voting as they did. The difference between them and Frankfurter, however, is manifest: With the exception of Justice Jackson, the *Francis* plurality’s members did not assert a lifelong aversion to capital punishment. Furthermore, those in the plurality did not try to reverse extrajudicially what they had done judicially.²⁶³

As for Justice Black, his behavior in the case remains mysterious. A few months after *Francis*, he and Frankfurter squared away in another 5 to 4 decision, *Adamson v. California*.²⁶⁴ This time Black voted with the dissenters.

261. *Eddings v. Oklahoma*, 455 U.S. 104 (1982). *Eddings* held that the eighth and fourteenth amendment guarantees against cruel and unusual punishment require the sentencing judge to consider as a mitigating factor any evidence of defendant’s character, record, and circumstances surrounding the offense before imposing a death sentence. *Id.* at 110-12. The Court vacated *Eddings*’s death sentence because the sentencing judge failed to consider his turbulent childhood as a mitigating factor. *Id.* at 116.

262. *Emmund v. Florida*, _____ U.S. _____, 102 S. Ct. 3368 (1982) (eighth and fourteenth amendments preclude imposition of death penalty on a defendant convicted of murder under the felony murder doctrine where the defendant did not intend to kill nor actually killed).

263. Further examples of Frankfurter’s interventions into politics, usually directed toward the federal government, include his efforts in 1940 to persuade Pres. Roosevelt to appoint Henry L. Stimson as Secretary of War, see MURPHY, *supra* note 243, at 196-200; his campaign for passage of the Lend-Lease Act of 1941, see *id.* at 216-20; his campaign to mobilize American government and industry for the war effort, see *id.* at 220-33; and his failure in efforts to have Learned Hand appointed to the U.S. Supreme Court, see *id.* at 318-19. Of course, Frankfurter was not the only justice who has engaged in extrajudicial political actions. See, e.g., *id.* at 268 (extrajudicial activities of Justice Brandeis); McKay, *The Judiciary & Non-Judicial Activities*, 35 LAW & CONTEMP. PROBS. 9, 27-36 (1970) (more than half the Justices who have sat on the Court have engaged in extensive nonjudicial activities); Miller, *Public Confidence in the Judiciary: Some Notes & Reflections*, 35 LAW & CONTEMP. PROBS. 69, 78-79 (1970) (Justices have acted as close presidential advisors, treaty negotiators, heads of presidential commissions, among other nonjudicial activities).

264. 332 U.S. 46 (1947).

Adamson dealt with the question of whether a prosecutor's comment on a defendant's failure to testify violated the fifth amendment. In another opinion for the Court by Justice Reed, the Court held that the guarantee of the fifth amendment against self-incrimination did not apply to the states through the fourteenth amendment.²⁶⁵ Black seized the opportunity to assert in dissent that the fourteenth amendment incorporated *all* of the Bill of Rights, a position for which he has been roundly criticized.²⁶⁶

As previously noted, Black persuaded Justice Reed to change his plurality *Francis* opinion to make the eighth amendment applicable to the states; but he was not willing to go the full mile and join Justice Burton's dissent.²⁶⁷ Why he would not do so in *Francis*, but quite willingly took the extra step in *Adamson*, is an unexplained mystery. Surely the facts of Willie Francis's case were more compelling than those in *Adamson* to find a violation of a specific provision of the Bill of Rights.²⁶⁸ After all, a few years later, in *Trop v. Dulles*,²⁶⁹ Black went along with Chief Justice Warren's formulation that "evolving standards of decency" were the means by which cruel and unusual punishment was to be determined.²⁷⁰ By accepting the *Trop* standard, Black acted contrary to his withdrawn concurring opinion in *Francis* where he criticized Frankfurter's so-called standard. Certainly, the "evolving standards of decency" are every bit as nebulous as Frankfurter's "consensus of opinion in society."

265. *Id.* at 53. The *Adamson* majority reasoned that the doctrine of federalism dictated that the responsibility of determining the privilege of state citizenship should be left to the states and that the privilege against self-incrimination was not inherently a privilege of national citizenship. *Id.*

266. See Fairman, *supra* note 8, at 139 (history overwhelmingly refutes Justice Black's contention that the fourteenth amendment was intended to impose the first eight amendments on the states); Morrison, *supra* note 8, at 171-73 (fatal flaw in Justice Black's total incorporation position was his dislike of natural law).

267. See *supra* notes 122-28 and accompanying text.

268. The defendant in *Adamson* was forced to choose between testifying, which would allow the prosecution to raise his prior conviction, or not testifying, which would give the prosecution the opportunity to comment on the defendant's silence. *Francis*, on the other hand, involved a 15-year-old black youth's second trip to the electric chair.

269. 356 U.S. 86 (1958). The *Trop* Court held that denationalizing a citizen for his desertion from military service in time of war constituted cruel and unusual punishment. *Id.* at 103. Writing for the majority, Chief Justice Warren maintained that the eighth amendment must draw its meaning from "the evolving standards of decency that mark the progress of a maturing society." *Id.* at 101. Using this standard, *Trop* found denationalization to be a form of punishment more primitive and inherently more cruel than torture. *Id.* The *Trop* Court further concluded that this punishment was unusual both because the federal government had not imposed this sanction until 1940 and because only two countries in the "civilized" world imposed denationalization as a penalty for desertion. *Id.* at 101 n.32, 103. Thus, the Court declared that "[w]hen it appears that an Act of Congress conflicts with [constitutional provisions], we have no choice but to enforce the paramount commands of the Constitution. . . . We cannot push back the limits of the Constitution merely to accommodate the challenged legislation." *Id.* at 104.

270. *Id.* at 101.

Thus, both Frankfurter and Black are susceptible to criticism for their positions in *Francis*. Frankfurter failed to apply his own test of due process and also tried to do secretly what he was unwilling to do judicially. Black failed to take the opportunity to do precisely what he later did in *Adamson*. Willie Francis is long since dead; his bones lie mouldering in some forgotten Louisiana grave. In one sense, however, he still lives.²⁷¹ His case posed many of the issues that constitutional commentators are debating today. Yet, for some inexplicable reason commentators fail to mention his case; instead, it is quietly relegated to an intellectual limbo. Willie Francis is no Lazarus; he cannot be resurrected from the grave. Surely, however, what Justice Jackson once called the "moral judgments of history"²⁷² can hold the plurality in this case, particularly Black and Frankfurter, to account for what by almost any criterion is a dark page in American history.

271. After this article had been sent to the printer, an event occurred which was eerily similar to the bungled execution of Willie Francis. On April 22, 1983, confessed murderer John Louis Evans III, age 33, died in the Alabama electric chair, 14 minutes after the first of three separate 30-second jolts of electricity were administered to him.

Evans, the seventh convict to die since the United States Supreme Court lifted its ban on executions, was escorted to the electric chair in Holman Prison, Atmore, Ala., on a stormy Friday night. After the warden read the death warrant, Evans delivered his final statement. The guards then placed an electrode-filled cap upon his head, braced his head to the chair by a chin strap and a black belt across his forehead, and placed a black veil over his face. At 8:30 p.m. 1,900 volts rushed into Evans as his body arched against the straps. White smoke came from beneath the veil and from one leg, Evans quivered, and then fell back into the chair as the current subsided. Two doctors examined Evans, expecting to pronounce him dead, but instead found a heartbeat. A guard reattached the power lines and an electrode that had fallen away when one leg strap had burned through.

At 8:33 p.m., the second jolt surged through Evans and again his head and leg smoked. After the charge had finished, the doctors examined Evans but again found a heartbeat. Suddenly, Russell Canan, Evans's attorney, who had remained silent after the first failed attempt exclaimed, "Commissioner, I ask for clemency. This is cruel and unusual punishment."

Prison Commissioner Fred Smith conveyed Canan's request over a previously opened telephone line to the office of Alabama Gov. George C. Wallace. However, at 8:40 p.m., before any reply was received, the guards administered a third electric charge to Evans. For the third time, Evans's head and leg smoldered. The doctors again examined him and Canan again requested clemency to attempt to cancel any fourth attempt. Finally, it was announced that the Governor had denied clemency and at about the same moment, 8:44 p.m., the doctors pronounced Evans dead. See Harris, *Witness to 3 Deaths of a Man*, Chicago Sun-Times, May 1, 1983, at 9, col. 1.

The United States Supreme Court had cleared the way for the execution when, at approximately 7 p.m. on April 22, by a 7-2 vote, it overturned a stay of execution issued the previous night by U.S. District Judge Emmett Cox. Cox had entered the stay three hours before Evans was scheduled to be executed on April 21 because the judge believed he did not have sufficient time to consider Evans's newest appeal. The Supreme Court majority claimed it understood the difficult position in which Cox was placed when he received Evans's appeal only six and one-half hours before the scheduled execution. Nevertheless, the Court found that this was an insufficient reason to postpone the execution. See Chicago Tribune, Apr. 23, 1983, § 1, at 4, col. 5.

272. *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting).

APPENDIX A

VOLUNTARY STATEMENT WHILE IN CUSTODY

The State of Texas }
County of Jefferson }

August 5, 1945 AD

I, Willie Francis, being in the custody of Claude W. Goldsmith, Chief of Police of the City of Port Arthur, Jefferson County, Texas and having been warned by E. L. Canada, Justice of the Peace, Jefferson County, Texas, the person to whom the hereinafter set out statement is by me made, that I do not have to make any statement at all, and that any statement made by me may be used in evidence against me on my trial for the offense concerning which this statement is made, do here make the following voluntary statement in writing to the said, E. L. Canada, to wit:

I Willie Francis now 14 years old I stole the gun from Mr. Egise at St. Martinville La and kill Andrew Thomas November 9, 1944 or about the time at St. Martinville La it was a secret about me and him. I took a black for
New so. will card 1280.182 in it
four dollars in it I all so took a water on him and sell it in New Iberia La. That all I am said I throw ~~it~~ gun away 35 Astor

Willie Francis
Witnesses to statement
E. L. Canada J.P. Precinct # 2 Jeff Co Texas
Claude W. Goldsmith - Chief of Police Port Arthur, Tex

APPENDIX B

My Willie Francis confess
that he kill Andrew Thomas
on November 8, 1944 I went
to his house about 11:30 PM
I hide backing his garage
about a half hour, When he
come out the garage I shot him
five times.
That all I remember a short story
Sincerely Willie Francis

APPENDIX C

STATE OF LOUISIANA

PARISH OF IBERIA

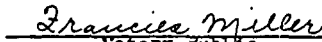
BEFORE ME, the undersigned authority, personally came and appeared LOUIE M. CYR, who after being by me first duly sworn did depose and say that:

On the day following the attempted electrocution of Willie Francis, George Etie came into my office, and in the course of conversation the subject of the Willie Francis electrocution came up. In the conversation that followed George Etie stated that he had witnessed the electrocution and that, while he had witnessed several other executions, this was the most horrible thing he had ever seen. George Etie stated that the executioner and other persons connected with the carrying out of the execution were so drunk that it was impossible for them to have known what they were doing. Mr. Etie stated that as soon as the switch was pulled he knew from having witnessed previous executions that something was wrong as Willie Francis did not react to the current as others he had seen. That Willie Francis' nose began to flatten on his face and in a short while it was so flat that it was impossible to detect that he did have a nose on his face, and his lips began to swell and continued to do so until they were many, many times their normal size. That the current was left on for a period of approximately three minutes, and during this entire time, Willie remained conscious and suffered intense pain. That the pain was so great it caused Willie Francis to jump and kick and at times the reaction from his body caused the electric chair, which weighed between two hundred fifty and four hundred pounds, to be lifted from the floor as much as six inches. That at the time the switch was finally taken off the electric chair had made a full quarter turn from the position it had originally occupied. Mr. Etie further stated to me that the sole reason for the failure to carry out the execution was because of the drunken

condition of those in charge of carrying it out, and that he had never in all of his life witnesses such a disgraceful and inhumane exhibition. Mr. Etie further stated to me that, as soon as the switch controlling the current that went through Willie Francis was taken off, the drunken executor cursed Willie Francis and told him that he would be back to finish electrocuting him, and if the electricity did not kill him, he would kill him with a rock. In addition to the above, Mr. Etie stated to me that on the preceding morning, which was the morning of the attempted electrocution of Willie Francis, the executioner and other persons with him visited several saloons in New Iberia, and while drinking therein extended open invitations to various individuals to go with them to attend the electrocution.


Louis M. Cyr

SWORN TO AND SUBSCRIBED BEFORE ME at New Iberia, La.,
this 19th day of March, 1947.


Francis Miller
Notary Public

APPENDIX D

STATE OF LOUISIANA

PARISH OF ST. MARTIN

Before me the undersigned authority personally came and appeared IGNACE DOUCET, a resident of the Parish of St. Martin, who after being duly sworn did depose and say:

My name is Ignace Doucet. I am a resident of the Parish of St. Martin. I was in St. Martinville, La. at the Parish Jail on May 3, 1946 and I witnessed the attempted electrocution of Willie Francis. During the morning I saw a man working on the apparatus. He took down the whole mechanism and put it back again. Then he said it was working O.K. He seemed to be the man in charge of seeing to it that the machine was in proper working order. Also there during the morning was a very big man, very tall who appeared to be one of the officials and he was also fooling around with the apparatus. Also another man who seemed to be an official was a man I recognized as one by the name of Dwyer. I did not know this man Dwyer but I heard them call him by this name. The three men Dwyer, the man who was working on the apparatus and the large tall man were all drinking in the jail. They were drinking from what apparently was a liquor bottle. It was from a flask. I do not know what was in the bottle but I do know that the man called Dwyer was pretty tight. He looked pretty much intoxicated. The Sheriff had to call him down because of the way he was carrying on. As to the other two men I do know that they were drinking, and that they were drinking during the whole last part of the morning. I heard some of the persons in the jail pass the remark that this man Dwyer was drunk. I do not know whether Dwyer was an official but I do know that he acted like he was one of the officials. I saw them put Willie Francis on the chair and strap him in. The man who pulled the switch to electrocute the prisoner Willie Francis was the same tall large man whom I saw drinking with the other two. I do not know what one put

Willis Francis in the chair.

WITNESSES

M. A. D. Dwyer

Ignace Doucet
IGNACE DOUCET

Sworn to and subscribed before me this 3rd day of April, 1947 at Catahoula Lake, St. Martin Parish, La. in the presence of the above witness.

Bertrand DeBlanc
BERTRAND DE BLANC
Notary Public for the Parish of St. Martin, Louisiana

APPENDIX E

Withdrawn, W.R.
Curted with 1st
Burton's dissent
12/31/46. W.R. 12/14

SUPREME COURT OF THE UNITED STATES

No. 142.—OCTOBER TERM, 1946.

State of Louisiana, ex rel. Willie Francis, Petitioner, v. E. L. Resweber, Sheriff of the Parish of St. Martin, Louisi- ana, et al.	}	On Writ of Ceritorari to the Supreme Court of the State of Lou- isiana.
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[December —, 1946.]

MR. JUSTICE RUTLEDGE, dissenting.

No one would hold, I think, that Louisiana would be free deliberately to place a convicted man in the electric chair, turn on the current, cut it off before death, remove him and later reelectrocute him. That would be sheer torture. Due process outlaws this barbarism in our scheme, whether as ~~contravening the most elementary standards of decency in dealing with persons charged with crime~~, *Malinski v. New York*, 324 U. S. 401, or as incorporating the commands against cruel and unusual punishments and punishing a man twice for the same offense. See *In re Kemmler*, 136 U. S. 436. Here this trinity comes to the same thing.

under the rule of *Twining v. New Jersey*, 211 U.S. 78, and

I do not think the element of torture is removed because the state acts carelessly rather than deliberately. This is the crucial question. The majority say the failure was due to accident.¹ I find no basis for this ~~in~~ in the rec-

¹ The Court also regards what occurred in this case as equivalent to what happens when the state secures a new trial. *Palko v. Connecticut*, 302 U. S. 319. The analogy is one I neither accept nor understand.

The *Palko* case held "that kind of double jeopardy . . . [which is] so acute and shocking that our policy will not endure it" within the protection of the due process clause of the Fourteenth Amendment. 302 U. S. at 328.

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ord, except that the failure was not intended or foreseen. Even so, it was not shown to be due to causes over which the state had no control. Its duty is to see that such failures do not occur. It has no right to take chances with faulty or antique equipment, low current or any other risk likely to produce such horror. Torture, for the victim, is not a matter of the executioner's state of mind. It may be inflicted as much by carelessness and bungling or taking a chance as by design. The facts of this electrocution are more consistent with such a cause than any other,² if only by the absence of any showing that the failure was due to factors beyond the state's control. That showing at the least should be compelled in such a case as this, before a second or perchance a third electrocution is attempted.

I do not think the states are free to take chances in any way with such a consequence as took place here. I am unwilling to indulge the presumption on this record that it did not do so. Men's lives should not hang upon a thread so slender. I know of no way to force the states to forego such risks and the horrors both of cruel and of multiple punishments they entail, other than by applying strictly

² The state stated in its answer to the petition for habeas corpus that there was a "latent electrical defect." In its brief submitted to this Court it also has attached a record of the testimony given at a hearing before the Louisiana Pardon Board on May 31, 1946. It appears from the uncontradicted testimony that a portable electric chair was used. The electric chair was installed in the St. Martin Parish Prison by a prison inmate, an assistant to the electrician at the penitentiary where the chair is normally kept and from where it was brought for the purpose of this execution. It was installed about 8:30 a. m. on the day of the execution. The wires ran from a truck outside the prison through a window to the switchboard connected with the electric chair. After the chair was installed it was tested. No further test was made prior to the actual electrocution, which occurred between 12:00 noon and 1:00 p. m. There was also testimony that the cause of the partial or total failure of the electricity was that a wire had come loose. The wire was apparently one between the truck and the switchboard.

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the constitutional prohibitions against them. Willie Francis cannot be electrocuted again without undergoing a second time the death pangs he already has suffered and which now I think the state has no right to reinflct. Needless to add, I am in substantial agreement with the views expressed by my brothers, MURPHY and BURTON.

APPENDIX F

SUPREME COURT OF THE UNITED STATES

 No. 142.—OCTOBER TERM, 1946.

State of Louisiana, ex rel. Willie Francis, Petitioner, v. E. L. Resweber, Sheriff of the Parish of St. Martin, Louisi- ana, et al.	} On Writ of Certiorari to } the Supreme Court of } the State of Louisi- } ana.
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[January —, 1947.]

MR. JUSTICE FRANKFURTER, concurring.

This case serves to illustrate why it has been the tradition of the Court, throughout its history, for more than one opinion to be written even when there is agreement in result. So long as law is not merely the expression of will or desire, but represents the effort of reason to discover justice, just so long will there be occasions when the same destination will be reached by different roads of the mind. Burke has somewhere said that he could not think of English law without English Law Reports. It is still the exception in the highest courts of Great Britain and the Dominion (apart from the Privy Council, for reasons not here relevant), to have a single opinion for the tribunal rather seriatim expressions. From the beginning, it has been true of this Court that the more difficult and delicate the issues in a case, the more numerous have been opinions in elucidating a decision. When one deals with intricate and subtle concepts of law, differences of formulation become highly important. A decision does not exhaust its force in adjudicating the immediate controversy. The words used become part of the judicial process in deciding future cases. Therefore judges must be alert against giving verbal hostages to the future. And so, differences in

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phrasing do not merely reflect different literary tastes. They touch the very nerve of a judge's function.

This case as a good illustration why, from time to time, individual concurrences cannot properly be avoided. We are dealing here with a question the answer to which must exclude unintended implications. The problem, to be sure, is an old problem. But its subtleties constantly reappear. The problem is the judicial content of "due process" as guaranteed by the Fourteenth Amendment.

MR. JUSTICE REED and MR. JUSTICE JACKSON agree that, in the situation before us, Louisiana has not transgressed the limitations imposed by the Due Process Clause. Yet MR. JUSTICE JACKSON finds himself unable to subscribe to what MR. JUSTICE REED says about due process. I quite agree with my Brother JACKSON that due process is not the application of a merely personal standard of right and justice, that the "civilized standards" which judges are empowered to enforce are the impersonal standards which law expresses. But I read what MR. JUSTICE REED has written to mean what I understand MR. JUSTICE JACKSON to mean by what he has written. Accordingly, I join MR. JUSTICE REED's opinion by finding in it the gloss of MR. JUSTICE JACKSON's opinion.

The freedom of the States in making and enforcing their criminal laws was only very narrowly restricted by the Due Process Clause of the Fourteenth Amendment. The nature of the restriction has been variously expressed, but always in terms that admonish against confounding the personal views of judges with their representative duty as organs of justice. When the standards for judicial judgment are not narrower than "immutable principles of justice which inhere in the very idea of government", *Holden v. Harding*, 169 U. S. 366, 389, "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions", *Hebart v. Louisiana*, 372 U. S. 312, 316, "immunities . . . implicit in the concept

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of ordered liberty." *Palko v. Connecticut*, 302 U. S. 319, 324-325. great tolerance toward a State's conduct is demanded of this Court.

"The controlling principles" which guide consideration here of State court decisions challenged under the Due Process Clause were recently stated. See Mr. Chief Justice Stone in *Malinski v. New York*, 324 U. S. 401, 438, in connection with the concurring opinion in that case, *ibid.*, 412, 416-417. They bear repetition. "Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses. These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia. But neither does the application of the Due Process Clause imply that judges are wholly at large. The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment." 324 U. S. 401, 416-417.

I cannot bring myself to believe that, for Louisiana to leave to executive clemency, rather than to require, mitigation of a sentence of death duly pronounced upon conviction for murder because a first attempt to carry it out was an innocent misadventure, offends a principle of justice "rooted in the traditions and conscience of our people". See *Snyder v. Massachusetts*, 291 U. S. 97, 105. Short of the compulsion of such a principle, this Court must abstain from interference with State action no matter how strong one's personal feeling of revulsion against a State's insistence on its pound of flesh. One must be on guard against finding personal disapproval rooted in more or less

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universal condemnation. Strongly drawn as I am to some of the sentiments expressed by my Brother BURTON I cannot rid myself of the conviction that were I to hold that Louisiana would transgress the Due Process Clause if the State were allowed, in the precise circumstances before us, to carry out the death sentence, I would be enforcing my private view rather than that consensus of opinion which, for purposes of due process, is enjoined by the Constitution.

The fact that I reach this conclusion does not mean that a hypothetical situation, which assumes a series of abortive attempts at electrocution or even a single, cruelly willful attempt, would not raise different questions. When the Fourteenth Amendment first came here for application the Court abstained from venturing even a tentative definition of due process. With wise forethought it indicated that what may be found within and without the Due Process Clause must inevitably be left to "a gradual process of judicial inclusion and exclusion, as the cases presented from decision shall require, with the reasoning on which such decisions may be founded." *Davidson v. New Orleans*, 96 U. S. 97, 104. This is another way of saying that these are matters which depend on "differences of degree. The whole law does so as soon as it is civilized." Holmes, J., in *LeRoy Fibre Co. v. Chi. Mil. & St. P. Ry.*, 232 U. S. 340, 354. Especially is this so as to questions arising under the Due Process Clause. A finding that in this case the State of Louisiana has not gone beyond its powers is for me not the starting point for abstractly logical extension.

APPENDIX G

SUPREME COURT OF THE UNITED STATES

 No. 142.—OCTOBER TERM, 1946.

State of Louisiana. ex rel. Willie Francis, Petitioner, v. E. L. Resweber, Sheriff of the Parish of St. Martin, Louisi- ana, et al.	}	On Writ of Certiorari to the Supreme Court of the State of Lou- isiana.
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[December —, 1946.]

MR. JUSTICE JACKSON, concurring.

If I am at liberty, in the name of due process, to vote my personal sense of "decency." I not only would refuse to send Willie Francis back to the electric chair, but I would not have sent him there in the first place. If my will were law, it would never permit execution of any death sentence. This is not because I am sentimental about criminals, but I have doubts of the moral right of society to extinguish a human life, and even greater doubts about the wisdom of doing so. Throughout the ages that penalty has been exacted, but it never prevented, and it is doubtful if it ever diminished, the crime it penalized. And as it now exists, it is the unspoken but real cause of more reversals of convictions than any errors of trial judges. A completely civilized society will abandon killing as treatment for crime.

But judges are servants, not masters, of society and it is society's laws that should govern judges. So long as society adheres to its policy of death penalties, it is for us in individual cases to apply the policy of the law, as it is the duty of prosecutors, whatever their personal conviction, to advocate it. If this is our duty as to sentences in federal courts, it is even more imperative that we observe it when, as federal judges, we deal with judgments rendered by courts of several states.

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Willie Francis was convicted of murder in conformity with the laws of Louisiana. The trial proceedings are not here for review and we must assume validity of the conviction. On that conviction he was lawfully sentenced to death and a death warrant duly issued. Its terms were that a current of electricity should be passed through his body until he was dead. That sentence and warrant admittedly are within the power of the State. When it was attempted to carry out the command of the law, some of the gadgets went wrong and most likely no current reached his body. At all events, the warrant is still unexecuted. Now, it is said that the short circuit not only cut off the electric current but also cut off the power of the State of Louisiana over the matter and turned on the power of the federal Constitution in its stead.

There is a world of difference to me between what a State in decency ought to do and what we as matter of constitutional law may compel it to do. And nothing demonstrates the lack of fixed standards of due process by which we are assuming to direct the conduct of state courts more than the opinions in this case which wage a battle over the catchword "decency."

The writer for the Court, guided by "national standards of decency," arrives at a conclusion which permits what to another is "repugnant to a civilized sense of justice." "inhuman and barbarous" and violates the "first principles of humanitarianism." A third proposes "elementary standards of decency" which brings him to a result exactly opposite the one reached by those who use as guide "national standards of decency." While I should not want to be thought less zealous for decency, either national or elementary, than my colleagues, I doubt if the word or concept affords either an objective or intelligible test of due process. If it is to be useful at all, it must mean that there is a judicial decency as there has long been recognized to be a "judicial discretion," a disciplined and impersonal

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STATE OF LOUISIANA *v.* RESWEBER. 3

decency which expresses society's will and the policy of the law—a quite different thing from personal bias or dislike. We may have become rather licentious about "decency."¹

I suppose many persons would feel that the Louisiana authorities might decently accept the short circuit or other accident which frustrated the execution as a basis for commutation of the death sentence. The question is whether we have any power to compel the state to do so. If we had the power, I should have no objection to exercising it. But I think we may not say that the states must conform to one uniform "sense of decency" of which we can speak only in four or five inharmonious voices.

But it is said there is an unconstitutional double punishment here. Not, of course, that Willie Francis can die two deaths—but the fear of death, the mental state of anguish induced by its imminence, counts as one, so it seems.

We are all under sentence to die. Just how much of terror is added by having the unknown hour of death's call made determinate by a court, I don't know. I suppose it varies with temperament and perhaps with one's

¹ The term was used, but I think in this limited sense, in the *Malinski* case, 324 U. S. 401, 417, in which opinion was so individual that five opinions were required. The length to which the individualism of our standards of due process may carry us has classic illustration in that case. One of the Justices whose support was necessary to override the New York Court of Appeals thought the prosecutor used words "indicative of a desire to appeal to racial and religious bigotry," the defendant being a Jew. He severely castigated a judicial "attitude of indifference and carelessness in such matters." 324 U. S. 401, 433, 434. The trial judge was Samuel S. Liebowitz, a Jew distinguished, among other service to civil liberties, for risking his life in defending the Scottsboro negro cases. Cf. *Norris v. Alabama*, 294 U. S. 587; *Patterson v. Alabama*, 302 U. S. 733; 294 U. S. 600. The same theme of racial bias is introduced here, but I find no more basis for it than in the *Malinski* case.

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confidence as to what he has to answer for, but I am willing to assume without experience that imminent death under such circumstances is as harrowing as my colleagues say it is. Perhaps it is not only cowards who die many times before their deaths.

But if those are right who say that the Constitution forbids repeating the anguish of imminent execution, we may be inviting some unexpected results. Stays or reprieves frequently are given on the very eve of execution. A stay, a reprieve, a grant of a new trial—any delay after execution was so close at hand as to cause anguish—may have an element of prolonging or repeating the ordeal. These, perhaps, are not very great hazards and can be dealt with when reached, but they are quite as substantial as the prospect of four or five attempts at execution or the deliberate adoption of a policy of executing in stages, none of which are very probable or very hard for us to deal with if they should occur.

It is hard to resist the temptation to label anything we do not like as unconstitutional. But I am unable to cite any constitutional backing for my prejudice against executing Francis and, hence, must vote to leave the case to Louisiana's own law and sense of decency. I cannot believe that the founding fathers ever intended to nationalize decency; in fact, the purpose of adopting a federal instead of a unitary form of government was to allow each state to retain some individuality in such matters.

APPENDIX H

SUPREME COURT OF THE UNITED STATES

 No. 142.—OCTOBER TERM, 1946.

State of Louisiana, ex rel. Willie Francis, Petitioner, <i>v.</i> E. L. Resweber, Sheriff of the Parish of St. Martin, Louisi- ana, et al.	}	On Writ of Certiorari to the Supreme Court of the State of Louisi- ana.
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[December —, 1946.]

MR. JUSTICE MURPHY, dissenting.

A second attempt by the State of Louisiana to take the life of the petitioner would be repugnant to a civilized sense of justice. To me, it is inhuman and barbarous to subject any person to the torture of two or more trips to the electric chair in the hope that one of them will result in the taking of that person's life.

More than any other provision in the Constitution, the prohibition of cruel and unusual punishment depends largely, if not entirely, upon the humanitarian instincts of the judiciary. We have nothing to guide us in defining what is cruel and unusual apart from our own consciences. A punishment which is considered fair today may be considered cruel tomorrow. And so we are not dealing here with a set of absolutes. Our decision must necessarily be based upon our mosaic beliefs, our experiences, our backgrounds and the degree of our faith in the dignity of the human personality.

My views rest in part upon a realization of the ruthless punishments which were so prevalent prior to the establishment of this nation. Crucifixion, burning at the stake, breaking on the wheel and countless other forms of slow and tortuous death were far too common in the old world; and even the early history of the new world was not without similar instances. It was a natural revulsion against

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such inhumanities that lead to the insertion of the constitutional prohibition of cruel and unusual punishments. That provision is a command to us to mount guard against all forms of torture. It does not outlaw punishment, not even capital punishment. But it does require that punishment be kept within the confines of common decency and humanity. That is the heritage given us by the framers of the Constitution. And it is to the credit of our nation's sense of tenderness that we have gradually given substance to that heritage by retreating from the early and crude forms of punishment.

For my part, the case resolves itself simply into a question of whether it is cruel and inhuman to subject an individual to the risks of two or more attempts to pass electricity through his body. I am compelled to answer that question in the affirmative. Such punishment is far different from that applied to those who suffer death at the first attempt. The mental anguish which characterizes preparation for execution must be repeated, an anguish that can be fully appreciated only by one who has experienced it. And physical pain may accompany the unsuccessful attempt. It is that mental anguish and physical pain which, added to the further suffering preceding the final and successful extinction of life, makes the total punishment cruel and inhuman. This process, moreover, could go on indefinitely, dependent upon the number of times that the executioner bungles his ugly task. The time to call a halt is when the first attempt fails after inflicting a substantial amount of anguish or pain. Any further attempt, in my opinion, partakes of punishment of a cruel and inhuman nature.

It is said, of course, that death is the penalty exacted of the petitioner, and until death actually occurs the punishment has not been carried out. But that misses the whole point of this case. Capital punishment may be imposed, as here, in such a manner as to be cruel and

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STATE OF LOUISIANA *v.* RESWEBER 3

unusual punishment. Louisiana has attempted once to take petitioner's life and has failed. Unless we are to discard the first principles of humanitarianism, Louisiana must not be allowed an endless opportunity to take that human life. And it is not without significance that this cruel and unusual punishment is about to be inflicted upon a helpless and inarticulate member of a minority group. The need for utilizing the highest humanitarian ideals is never greater than in a case of this nature.

APPENDIX I

SUPREME COURT OF THE UNITED STATES.

No. 112, October Term, 1946.

State of Louisiana, ex rel. Willie Francis, Petitioner)	On Writ of Certiorari to the Supreme Court of the State of Louisiana.
)	
v.)	
E.L. Rasmeyer, Sheriff of the Parish of St. Martin, Louisiana, et al.)	

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WAS

[January _____, 1947.]

Mr. Justice BLACK concurring.

I agree with Mr. Justice REED that this Court cannot under the Constitution hold that Louisiana authorities are barred from electrocuting the petitioner after a prior unsuccessful attempt to electrocute him failed because of a mechanical accident. But because I cannot accept all the constitutional criteria set out as the basis for this conclusion, I find it necessary separately to express my views.

Since there is no contention in this case that petitioner has been denied procedural due process, Chambers v. Florida, 309 U.S. 227, it is my view, for reasons hereinafter discussed, that the only basis for decision should be consideration of whether the Eighth Amendment's prohibition against cruel and unusual punishment, and the Fifth Amendment's ban against double jeopardy, have been made applicable to the States by the Fourteenth, and if so, whether Louisiana's execution of petitioner would violate either of them. The failure of the electrocution apparatus was purely accidental and not because of any desire of the State or any of its agents to prolong or aggravate the painful agonies which nearly always are associated with anticipation of imminent death. In view of these admitted facts, I do not believe that the electrocution of petitioner after failure of the first attempt constitutes double jeopardy or "cruel and unusual punishment" within the meaning of those terms as used in the Fifth and Eighth Amendments. Historically, the double jeopardy provision was intended to prevent two punishments for the same offense. No support can be found for an argument that its purpose was to prevent execution of a single sentence because a first effort to carry it out had been accidentally frustrated. And I agree with what I understand to be the conclusion of

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Justice Reed that the circumstances here fall short of showing that "wanton infliction of pain" which would amount to "cruel and unusual punishment." The cases he cites support those interpretations of provisions of the Fifth and Eighth Amendments which are involved. Therefore I agree that the judgment of the Louisiana court should be affirmed.

I think there is ample support for holding that the Fourteenth Amendment was intended to and does prohibit states from legalizing double jeopardy and cruel and unusual punishment to the same extent as the Fifth and Eighth Amendments prohibit federal laws of that kind. But I do not reach that conclusion by reference to a mystic natural law which is above and beyond the Constitution, and which is read into the due process clause so as to nullify or to strike down every state law which we think is "indecent," "contrary to civilized standards," or offensive to our notions of "fundamental justice." While the Bill of Rights was held inapplicable to the States prior to the Fourteenth Amendment,^{1/} since its adoption this Court has held that it made certain selected Bill of Rights safeguards applicable to the States,^{2/} although declining to apply other Bill of Rights safeguards.^{3/} The First Amendment, safeguarding freedom of speech, press and religion, has been literally and emphatically applied to the States in its very terms. Board of Education v. Barnette, 319 U.S. 227. History not only supports the conclusion that a purpose of the Fourteenth Amendment was to protect the people's freedom to speak or write their own views and to practice their own religion, but it shows pretty conclusively, I think, that the Amendment was clearly intended to prohibit states from subjecting people to cruel and unusual punishments or double jeopardy. When the proposed Fourteenth Amendment was submitted to the Senate by the spokesman of the committee that considered and helped to frame it, he not only declared that it would protect the people against infractions of the Bill of Rights specified safeguards; he also enumerated them, expressly designating "cruel and unusual punishments." Cong. Globe, 39th Congress, 1st Session, 2765-2766. And in advocating adoption of the Amendment to the House as it then read, the very man who framed important parts of the Amendment, who steered it through the committee and the House, declared

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that its purpose was to curb state violations of the Bill of Rights, saying among other things that, "Contrary to the express letter of the Constitution 'cruel and unusual punishments' have been inflicted under state laws within the Union upon citizens not only for crimes committed but for sacred duty done, for which and against which the Government of the United States had provided no remedy and could provide none." Id. 2542-2543. The foregoing are but some of many such expressions spread through the congressional debates on the Fourteenth Amendment which evidence a purpose to protect all persons from state invasions of the freedoms guaranteed by the Bill of Rights. Agreement that the Amendment would accomplish this purpose seems to have been recognized by all. See Flack, The Adoption of the Fourteenth Amendment, (1908) Chap. II. And that this was its purpose was the common understanding of the times. Ibid. Chaps. III, IV, V. There is no good reason that I can perceive, nor is there any good reason suggested in any of the opinions in this case, why the process, heretofore followed, of selecting the provisions of the Bill of Rights to be applied to the States, should discriminate against the constitutional protections against cruel and unusual punishment and double jeopardy. I therefore consider these Bill of Rights provisions applicable to the States, but not for the reasons given in other opinions announced today in this case.

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I cannot agree that the due process clause of the Fourteenth Amendment, or that Amendment itself, empowers this Court to strike down every state law, or state executive action, or state court judgment under state law, which may "offend ^{National} standards of decency in the treatment of criminals." If the due process clause means that, we must measure the validity of every state ^(without the guidance of Constitutional language) and federal criminal law by our ^{own} "standards of decency" ^{Conduct believed} "decent" by millions of people may be believed indecent" by millions of others. Adoption of one or the other conflicting views as to what is "decent," what is right, and what is best for the people, is generally recognized as a legislative function. Our courts move, I think, in forbidden territory, when they prescribe their "standards of decency" as the supreme rule of the people. If the Constitution had declared that the Supreme Court of the United States should ordain "standards of decency," I should, of course, be forced to undertake that monumental task. But it has not. I cannot expand "due process" so as to make it include that.

The other meaning of due process here suggested, while in different words, when analyzed, turns out to vest a similar unbounded grant of legislative power to the Court by the Court. It is said, and it has been said before, that we as a Court can, under the due process clause, strike down any law which is "contrary to the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." If this be construed to mean that we are to abide by those "fundamental principles of ~~liberty~~ liberty and justice" expressed in the specific grants and limitations of state and federal power enumerated in the Constitution, I agree. For since Marbury v. Madison, 1 Cranch 137, the practice has been firmly established for better or worse, that courts can strike down legislative enactments which are in conflict with these provisions of the Constitution. But when this vast power of courts to invalidate statutes is so enormously expanded by any formula which makes ~~the courts~~ this Court's policy views the supreme law, I cannot go along.

Both "our standards of decency" and the "fundamental principles" criteria formulas, as here used, rest on the unarticulated assumption that the due process clause adopted the natural law concept that there is a higher law ~~than~~ than the Constitution, a law which as I understand the concept,

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courts alone can make, interpret and cause to be enforced. While I can accept the long-established Marbury v. Madison doctrine that courts can strike down statutes which conflict with specific constitutional mandates, I am not willing to read into such procedural words as due process of law a meaning which has in the past and will inevitably in the future result in leaving courts free to substitute their ideas of natural justice for the considered policies of state and federal legislatures. To pass upon the constitutionality of statutes by looking to the particular standards enumerated in the Bill of Rights and other parts of the Constitution is one thing; to invalidate statutes because of application of "natural law," deemed to be above and undefined by the Constitution is another. "In the one instance, courts proceeding within clearly marked constitutional boundaries seek to execute policies written into the Constitution; in the other they roam at will in the limitless area of their own beliefs as to reasonableness and actually select policies, a responsibility which the Constitution entrusts to the legislative representatives of the people." Power Commission v. Pipeline Co., 315 U.S. 575, 601-602, note 4. In a number of cases cited below,¹⁷ I have rejected the view that the due process clause opened the way for judicial invalidation of statutes by invocation of this Court's natural law views, stated in terms such as "reasonable," "decent," "arbitrary and capricious," "fair play," "fundamental principles of liberty," "common and fundamental ideas of fairness and right," "the concept of ordered liberty," "the universal sense of justice." I cannot now hold Louisiana's law unconstitutional for possible conflict with these concepts.

I share most of the sentiments of those members of the Court who have so feelingly argued that a defendant who has once been compelled to suffer the imminence of death by electrocution should not be put through them again. But I cannot agree with them that any provision of the Federal Constitution authorizes us to rule that an accidental failure fairly to carry out a valid sentence of death on the first attempt bars execution of that sentence.

NOTES

1/ See Harron v. Baltimore, 7 Pet. 243; Ex parte Watkins, 7 Pet. 560, 574.

2/ See Board of Education v. Barnette, 319 U.S. 227.

3/ Collins v. Johnston, 237 U.S. 502, 511; Drantley v. Georgia,

for:
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Milk Wagon Drivers
315 U.S. 455, 474;
321-326;
325 U.S. 226, 261, 271-272;
784, 788.

4/ See Chambers v. Florida, 309 U.S. 227; Folk v. Clover, 305

U.S. 419, 423, 428;

Milk Wagon Drivers v. Meadowmoor Dairies, 312 U.S. 287, 301; Betts v. Eady,

315 U.S. 455, 474; International Shoe Co. v. Washington, 326 U.S. 310, 322,

321-326; Feldman v. U.S., 322 U.S. 487, 494, 495; Williams v. North Carolina,

325 U.S. 226, 261, 271-272; Southern Pacific R.R. v. Arizona, 325 U.S. 761,

784, 788.

APPENDIX J

Supreme Court of the United States
Washington, D. C.

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

December 13, 1946

No. 142, Louisiana v. Resweber

Dear Harold:

I read your opinion in the Willie Francis case and have reflected upon it with sympathy. I have to hold on to myself not to reach your result. I am prevented from doing so only by the disciplined thinking of a lifetime regarding the duty of this Court in putting limitations upon the power of a State, when the question is merely the power of a State under the limitations implied by the Due Process Clause and not involving a conflict between the legislative power of a State and that of Congress. Holmes used to express it by saying that he would not strike down State action unless the action of the State made him puke. I have tried ^{in more elegant but more formal terms} to express the extremely limited nullifying power of the Court vis-a-vis State action in what I wrote in Malinski (324 U. S. 401, 412-416), which the majority of the Court recognized in the language of Chief Justice Stone as the "controlling principles upon which this Court reviews on constitutional grounds a State court conviction for crime." Malinski v. New York, 324 U. S. 401, 438.

Since every case that comes here from a State court has behind it the full power of the State, the Francis case is here as though the State of Louisiana had authorized by statute the doing precisely of what transpired here. For the construction placed upon the State statute by the Louisiana Supreme Court is binding upon us. In other words, we must assume for purposes of constitutionality: ^{that} ~~as though~~ the Louisiana statute had spelled out that in case, (through an unexpected, innocent happening,) the electrocution did not succeed, at least a second attempt to produce death may be made. For such, and such alone, in view of the relation of the United States to States and of this Court to State courts, is the exact legal situation before us.

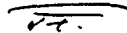
And that being so, I cannot say that it so shocks the accepted, prevailing standards of fairness and justice not to allow the State to electrocute after an innocent, abortive first attempt, that we, as this Court, must enforce that standard by

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invocation of the Due Process Clause. As you will recall, I felt strongly that we should bring the case here, because it seemed to me too serious a question for this Court to think too ^{case} important even to consider - particularly when one takes account of some of the really trivial cases that we do take. But after struggling with myself - for I do think the Governor of Louisiana ought not to let Francis go through the ordeal again - I cannot say that reasonable men could not in calm conscience believe the State has such a power. And when I have that much doubt I must, according to my view of the Court's duty, give the State the benefit of the doubt and let the State action prevail.

But neither can I withhold my satisfaction that you have written in dissent. For me it is one of the most cheering experiences since I have been on this Court to have you, who felt so strongly against taking the case at all, come out in favor of reversal as a result of your own conscientious reflections.

Faithfully yours,



Mr. Justice Burton

APPENDIX K

Supreme Court of the United States
Washington, D. C.

CHAMBERS OF
JUSTICE FELIX FRANKFURTER

December 31, 1946

Dear Harold:

1. As to No. 142: I think I can say without the slightest exaggeration that, knowing the care that you give to the writing of your opinions, I try to bring the same kind of care to their consideration. And, in a case like that of Willie Francis, my high regard for the quality of your work is reenforced by my feelings regarding the duty of States not to fall short of the standards which it is within the competence of this Court to enforce.

As you know, I felt very strongly that we should take this case and I am very glad that we did, though I do not come out your way.

The considerations which you derive from State law do not seem to me to make a difference. When a case comes here from a State court, it comes as though that which the State court did had actually been written into a State statute. Whatever scope the State court gives to a State law is binding upon us even though the State court gave it a scope which we think it should not have given or failed to give it a scope which we think it should have given. All this is purely a State question beyond our purview. The manner in which a State court treats a State statute is relevant only if a claim is made that in enforcing the State law a State court denied the equal protection of the laws. And so, the issue for me remains whether, under the circumstances in which the State court found no violation of State law, there is a transgression of the Due Process Clause. I cannot bring myself to think that if I were to hold there was, I would not be enforcing my own private view rather than the allowable consensus of opinion of the community which, for purposes of due process, expresses the Constitution. I am sorry I cannot go with you, but I am weeping no tears that you are expressing a dissent.

2. As to No. 37: I strongly favor your suggested modification of your dissent as formulated on the bottom of p. 1 of your memorandum. Apparently the Thiel case was decided on a wrong assumption.

Happy New Year!

Ever yours,
F.F.

Mr. Justice Burton

APPENDIX L

H. C. H.
In your jurisdiction
Fi

February 3, 1967

Strictly Confidential

Dear Monte:

A good many years ago I told friends in California that if a half dozen of the leaders of their bar would take the responsibility of persuading their Governor to clean up the Mooney mess, they would be true to the best traditions of our profession and save their State much future misery. The Willie Francis case does not, of course, remotely raise the kind of issues that the Mooney case did. But I have little doubt that if Louisiana allows Francis to go to his death, it will needlessly cast a cloud upon Louisiana for many years to come, and, what is more important, probably leave many of its citizens with disquietude. I do not know whether you know that in New York, when there is a real division in the Court of Appeals, such as there was here, the death sentence is as a matter of course commuted to life imprisonment. There is no formal law about it but it is settled tradition.

Is there any possible reason for saying that, if Francis is allowed to go to his death instead of imprisoned for life, the restraints against crimes of violence will be relaxed? Am I wrong in recalling an appeal to the then Governor of Louisiana for clemency by E. H. Farrar when his own son was the victim?

This cause has been so heavily on my conscience that I finally could not overcome the impulse to write to you. It is difficult for me to believe that clemency would not be forthcoming, whatever may be the machinery of your state for its exercise; if leading members of the bar pressed upon the authorities that even to err on the side of humaneness in the Francis situation can do no possible harm and might strengthen the forces of goodwill, compassion, and wisdom in society.

Ever yours,

Monte H. Lemann, Esq.

APPENDIX M

April 19, 1947

Hon. James D. Simon
St. Martinville, Louisiana

Dear Judge Simon:

I am taking the liberty of writing you with respect to the Willie Francis case, in which I have been much interested, and which is now before the Pardon Board.

The five to four division in the Supreme Court of the United States shows how close the case must be considered upon purely technical grounds. But what has impressed me most in my consideration of the case is the fact that where a similar question has arisen else here, the view has always been taken that considerations of humanity should preclude execution. I am referring particularly to the practice in England, which I understand to be well settled. This has impressed me especially because the English are not soft people and have a deserved reputation for the recognition of fundamental human rights.

Yesterday, at a meeting of a Committee of the Louisiana Law Institute, I brought up the Francis case for informal discussion at lunch with those seated near me. Professor Ray Forrester, of the Tulane Law School, and Mrs. Daggett, of the faculty of the Louisiana State University Law School, both said that they felt strongly that Francis should not be executed.

It does not seem to me to be a determining factor whether electric current passed through Francis' body or not. The controlling circumstances would be the fact that he was exposed to the ordeal of an abortive execution.

I realize that the eyes of the world are in a sense upon us in this case, because I have myself had communications from lawyers of high standing, for whose opinion I have a great respect, one of whom wrote me recently that he felt it would be a serious blot upon our State if Francis was permitted to be executed. These considerations do not, of course, relieve the Pardon Board of its responsibility of reaching its own decision, but I imagine that you and the other members of the Board will feel as much influenced as I have been by opinions so entitled to respect. Wherever the very least there is so much room for doubt as to what is the proper course to adopt, the further punishment of Francis is not as important as adherence to the highest standards of decency and humanness which a large and informed body of public opinion feels would be betrayed by Francis' execution.

I hope you will forgive me for writing you, but I felt that I would be more comfortable with my conscience if I did so. I am sending copies of this letter to the other members of the Pardon Board, whom I do not know as well as I know you, and to my friend, Mr. Culligan, as well as to Mr. DeLiane, who has appeared as attorney for Francis.

With personal regards, I am

Sincerely,

(sgd.) Monte E. Lenam

cc Hon. Fred S. DeLiane
Hon. J. Emilio Ferrer
Hon. E. H. Culligan
Mr. Bertrand DeBlanc

