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JOSEPH GUMINA*

INTRODUCTION

On the morning of July 1, 1949, three Los Angeles County deputy sheriffs stormed into the home of Antonio Richard Rochin who, they believed, was selling narcotics.[1] They forced their way into Rochin's bedroom where they found him and his wife half-dressed on the bed.[2] Two cellophane-wrapped pills sat in plain view on a nearby nightstand.[3] When one of the officers asked, "Whose stuff is this?," Rochin grabbed the pills and swallowed them.[4] All three officers jumped on him and tried to pry the capsules from his mouth.[5] Officer Jack Jones throttled Rochin's neck and shoved his fingers down Rochin's throat, but to no avail.[6] Rochin was then placed in handcuffs and taken to a hospital where, at the officers' direction, a doctor forced a tube in Rochin's mouth and administered an emetic solution, causing vomiting.[7] The officers retrieved the capsules and subsequent testing revealed them to contain morphine.[8] In Rochin's trial for possessing "a preparation of mor-

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1. Rochin v. California, 342 U.S. 165, 166 (1952), *overruled on other grounds by* Mapp v. Ohio, 367 U.S. 643 (1961).

2. *Id.*

3. *Id.*; MELVIN I. UROFSKY, FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES 161 (John Milton Cooper, Jr., ed., 1991).

4. *Rochin*, 342 U.S. at 166.

5. *Id.*

6. People v. Rochin, 225 P.2d 1, 1-2 (Cal. Ct. App. 1950), *rev'd*, 342 U.S. 165 (1952).

7. *Rochin*, 342 U.S. at 166.

8. *Id.*

phine," the two capsules were admitted over his objections and constituted the prosecution's primary evidence against him. He was convicted and received a sentence of two months in prison.[9]

After numerous appeals, the case arrived at the U.S. Supreme Court, where Rochin, the petitioner, argued that the methods of the Los Angeles County deputy sheriffs deprived him of due process of law under the Fourteenth Amendment.[10] The warrantless entrance into his home almost certainly constituted a violation of Rochin's Fourth Amendment right against unreasonable searches and seizures as well, but the Court in *Wolf v. Colorado* had expressly declined to apply the Fourth Amendment's exclusionary principle to state criminal proceedings.[11] The only issue before the *Rochin* Court, therefore, was the scope and nature of the protections provided by the Due Process Clause of the Fourteenth Amendment.[12]

The *Rochin* case concentrated the Court's attention once again on a debate that had raged among justices and legal scholars since the beginning of the century: the scope of "incorporation."[13] Ratified in 1868, the Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[14] Jurists and scholars in the first part of the twentieth century debated the extent to which this language "incorporates" the Bill of Rights so that its guarantees apply as forcefully to the states as they do to the federal government.[15] The origins of this "incorporation" debate trace back to *Gitlow v. New York*, in which the Supreme Court held that First Amendment free speech protections are enforceable against the states via the Due Process Clause of the Fourteenth Amendment.[16]

In the wake of *Gitlow*, two schools of thought emerged concerning the extent and nature of "incorporation." One theory, championed by Justice Hugo Black, advocated "total incorporation"—that is, a blanket incorporation of the first eight Amend-

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9. *Id.*

10. *See id.* at 168.

11. Wolf v. Colorado, 338 U.S. 25 (1949), *overruled in part by* Mapp v. Ohio, 367 U.S. 643 (1961). The Court would not incorporate the exclusionary rule as an essential corollary to the Fourth Amendment until nearly a decade later in *Mapp*.

12. *Rochin*, 342 U.S. at 168.

13. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 4.02 (4th ed. 2006).

14. U.S. CONST. amend. XIV, § 1.

15. DRESSLER, *supra* note 13, § 4.02.

16. Gitlow v. New York, 268 U.S. 652 (1925).

ments of the Bill of Rights via the Due Process Clause.[17] A competing theory, advanced by Justice Benjamin Cardozo and then his replacement on the bench, Justice Felix Frankfurter, provided that the Due Process Clause enshrines only "fundamental rights"—that is, "principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[18] This view is at once more restrictive and expansive than its "total incorporation" counterpart. While it does not automatically apply all the protections guaranteed in the Bill of Rights to the states, the "fundamental rights" doctrine recognizes the existence of implied rights—i.e., rights not specifically provided for in the first eight amendments.[19]

Justice Frankfurter wrote for a unanimous court in *Rochin*. His opinion provided his most meticulous explanation of the "fundamental rights" theory of the Due Process Clause of the Fourteenth Amendment—an answer, probably, to the challenge presented by Justices Black and Douglas in their stinging concurring opinions.[20] Two themes surface in Frankfurter's elucidation of "fundamental rights" that run through much of his due process jurisprudence. First and foremost is Frankfurter's general belief that fair process is the essence of justice, a belief that was reinforced by his experience as an immigrant and as a minority. Second is Frankfurter's recourse to reason and empiricism to adduce which "principle[s] of justice" have gained general acceptance in modern society.[21] These thematic threads have their origins in Frankfurter's early life: his early childhood in Austria, his upbringing by Jewish parents, and his unshakeable sense, as he rose through the echelons of American society, that he was forever an "outsider." This Article uses Frankfurter's *Rochin* opinion as a launching point to explore each of these threads.[22]

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17. DRESSLER, *supra* note 13, § 4.02; CLYDE E. JACOBS, JUSTICE FRANKFURTER AND CIVIL LIBERTIES 206-07 (Leonard W. Levy ed., Da Capo Press 1974) (1961).

18. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934), *overruled on other grounds by* Malloy v. Hogan, 378 U.S. 1 (1964).

19. DRESSLER, *supra* note 13, at 2-5.

20. JACOBS, *supra* note 17, at 202-03.

21. *Snyder*, 291 U.S. at 97.

22. This Article analyzes Frankfurter's life thematically, not chronologically. For a chronological presentation of all the events discussed in this paper, see appendix C.

I. ESSENCE OF LIBERTY

In *Rochin*, Frankfurter noted that the Due Process Clause embodies a civilized society's most basic "canons of decency."[23] Ten years earlier, he wrote that "[t]he history of liberty has largely been the history of observance of procedural safeguards."[24] Frankfurter's view of "fair procedure [as] the essence of justice"[25] is one that likely has its genesis in his early professional development, and may even have roots in his childhood. Much of Frankfurter's contribution to constitutional jurisprudence relates to due process, which is evidenced by his pivotal role in the "incorporation" debate. This section explores the ways in which Frankfurter's early career and experiences as an immigrant and a Jew might have caused him to assign special significance to due process as an indispensable ingredient of liberty.

A. *From Austria to America*

Felix Frankfurter was born in 1882 in Vienna, Austria, to Jewish parents, the third of six children.[26] Michael E. Parrish's biography of the Justice provides a colorful description of Vienna in the late 1800s:

> The Vienna of Emperor Francis Joseph, a city of bright cafés in a nation of peasants, nourished the genius of Sigmund Freud, Gustav Mahler, Hugo von Hofmannsthal, Ernest Mach, and Arnold Schönberg. During the second half of the nineteenth century, Hapsburg Vienna experienced a burst of intellectual and artistic creativity unsurpassed by any metropolis in the world. . . . Frankfurter's immediate contemporaries included the novelist, Robert Musil, the literary critic, George Lukacs, the theologian, Paul Tillich, and the philosopher Ludwig Wittgenstein. Yet this extraordinary cultural flowering took place within an economic, social, and political environment of unrelieved chaos and futility . . . .[27]

Exposure to the city's vibrant culture may have nurtured Felix's intellect, but it was his family, particularly his Uncle Solomon,

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23. Rochin v. California, 342 U.S. 165, 169 (1952), *overruled on other grounds by* Mapp v. Ohio, 367 U.S. 643 (1961).

24. McNabb v. United States, 318 U.S. 332, 347 (1943).

25. *See* H.N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 57 (1981).

26. *Id.* at 12; HELEN SHIRLEY THOMAS, FELIX FRANKFURTER: SCHOLAR ON THE BENCH 3-4 (1960).

27. MICHAEL E. PARRISH, FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS 7 (1982).

who ignited a love of learning in Felix.[28] Solomon Frankfurter had climbed the academic echelons of the universities of Vienna and Berlin,[29] and Felix and his siblings looked up to their Uncle as an example of academic accomplishment, sophistication, and successful cultural assimilation.[30] Felix's early education in Austria's primary school system, with its emphasis on deductive reasoning and precision of speech, also left a mark.[31]

From a young age, Felix showed an uncanny interest in politics. As he later recalled, "'certainly in the early teens, it became manifest that I was interested in the world of affairs. . . . It began very early.'"[32] This early development of Felix's political awareness meant that he was not completely naive to the anti-Semitism that characterized Vienna's social and political upheavals of the early 1890s. An economic recession coupled with widely publicized business scandals involving Jewish financiers caused the city's labor and merchant class to rally around Karl Lueger, a Christian Socialist politician who decried the power and influence of Vienna's "Jewish capitalists."[33] "Handsome Karl," as he was called, helped draft the platform of the United Christians, which called for limits on Jewish immigration and the exclusion of Jews from many sectors of the economy.[34] In 1894, Lueger was elected mayor of Vienna.[35] Anti-Semitism swept the city as its Jewish population became a scapegoat for all of Austria's economic and social woes.[36] Riots by uni-

28. *Id.* at 9.

29. *Id.*

30. *Id.* The struggle between ethnic heritage and assimilation is one that would characterize much of Frankfurter's life. This struggle came into focus during Frankfurter's courtship of and eventual marriage to Marion Denman, a Protestant of Brahmin background. HIRSCH, *supra* note 25, at 11. During the courtship, Frankfurter worried that his mother would reject Marion because she did not share his Jewish heritage. *Id.* at 59. He expressed his frustrations about the tenacity of these traditional prejudices in a letter to Marion:

> "Yes—I aspired to share life with you . . . . But alas! You in yourself were . . . a symbol—the symbol of differences in "race" and "faith" and all the other separating institutions born of the past. The thing goes deep, down to the very source of life, if it goes as it goes in those elders."

Id. at 53 (quoting Letter from Felix Frankfurter to Marion Denman (June 21, 1917) (on file with the Felix Frankfurter Papers, Manuscript Division, Library of Congress, Washington, D.C.)).

31. THOMAS, *supra* note 26, at 4.

32. HIRSCH, *supra* note 25, at 14 (quoting HARLAN B. PHILLIPS, FELIX FRANKFURTER REMINISCES 5 (1960)).

33. PARRISH, *supra* note 27, at 9.

34. *Id.*

35. *Id.*

36. *Id.* at 10.

versity students fueled by pan-German nationalism created an atmosphere of intimidation and fear for the city's Jews.[37]

In 1894, in search of better economic fortunes and a friendlier political climate, Felix, along with his mother and five siblings, sailed for the United States in steerage to join his father Leopold.[38] Not all of Vienna's Jews responded the same way to the crisis of the 1890s.[39] A majority, including Felix's Uncle Solomon, remained in the Hapsburg capital, hopeful that Handsome Karl's electoral success was not a harbinger of things to come.[40]

As a politically aware twelve-year-old, Felix experienced in Austria the fragility of freedom in the face of government aggression. He witnessed firsthand how easily societal prejudices and government excess could overwhelm basic notions of fair play and justice.[41] He and his family left Austria just as Jews in Europe began to experience the hostility of a new and savage brand of anti-Semitism, steeped in radical economics and pseudo-science.[42] As a former Austrian with at least one enduring tie to his homeland (his uncle), Felix was particularly affected by news of German atrocities against European Jews in the 1930s.[43] Frankfurter biographer Liva Baker explains that "[h]e could not help being mindful of the fact that had he lived in Europe [then], he would have lived only a boxcar ride from a concentration camp."[44] In 1933, he lobbied the Secretary of State to adopt a lenient policy with respect to granting asylum to victims of Nazi brutalities and petitioned on behalf of individual refugees, including his own Uncle Solomon.[45]

B. *From European Immigrant to Harvard Law Student*

Unfortunately, anti-Semitism was not unique to the Old World. Upon arriving in the United States in 1894, the Frankfurter family

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37. *Id.* at 9-10.
38. HIRSCH, *supra* note 25, at 13.
39. PARRISH, *supra* note 27, at 10.
40. *Id.*
41. *Id.* at 9-10.
42. *Id.* at 10.
43. LIVA BAKER, FELIX FRANKFURTER 200 (1969).
44. *Id.* at 197.
45. *Id.* at 198. In 1938, Frankfurter received a radiogram from a friend in Vienna saying that Nazi roughnecks had pulled his eighty-two-year-old Uncle Solomon from his bed and imprisoned him in a stable. *Id.* at 200. Frankfurter resisted the urge to call Roosevelt for help, fearing the appearance of political favoritism. *Id.* Instead, he worked directly through the State Department, and finally appealed to Lady Nancy Astor, who had good relations with the German Ambassador to London, to intervene. *Id.* at 200-01. She eventually secured Solomon's release. *Id.*

settled in New York City and ascended, with some difficulty, to the middle class. "Unlike many of the *shtetl* Jews from . . . Eastern Europe, who . . . engage[d] in radical politics" and clung stubbornly to Old World traditions, the Frankfurters were eager to assimilate into American society and assume mainstream social and economic values.[46] As soon as they had the means, they moved into the quiet middle-class neighborhood of Yorkville, putting some distance between themselves and the Yiddish-speaking Jews who crowded the Lower East Side.[47] Like many Jewish immigrant families, the Frankfurters believed that education held the key to success in the New World.[48] Felix's mother, in particular, encouraged her son's academic inclinations.[49] After graduating from City College of New York, Felix pursued a legal education at New York Law School, but eventually transferred to Harvard Law School.[50] There, he served as an editor of the *Harvard Law Review*[51] and graduated with the highest academic record since his mentor Louis Brandeis.[52]

C. *From Harvard Law to Public Service*

After graduating from Harvard Law School, Frankfurter applied for an associate position at the prestigious New York law firm of Hornblower, Byrne, Miller and Potter.[53] Frankfurter's Jewish heritage presented, for the first time, a real obstacle to his professional goals. Hornblower had never taken on a Jewish attorney as a matter of unspoken policy.[54] The young lawyer's outstanding academic record, however, overcame the firm's prejudices and Frankfurter became the firm's only Jewish attorney.[55] In his first week as an associate, he was approached by one of the partners who suggested that he change his name. Frankfurter declined.[56]

Outside the safe cloister of academia, Frankfurter could not escape the lingering specter of anti-Semitism.[57] Indeed, the reality of enduring prejudice against American Jews was brought home to

46. PARRISH, *supra* note 27, at 11.
47. *Id.*
48. *Id.* at 12.
49. *Id.*
50. *Id.* at 16.
51. BAKER, *supra* note 43, at 200.
52. *Id.* at 35-55.
53. PARRISH, *supra* note 27, at 22.
54. HIRSCH, *supra* note 25, at 22-23.
55. *Id.* at 23.
56. *Id.*
57. *Id.*

him during the difficult confirmation hearings of his mentor and fellow Jew, Louis Brandeis (and, to a lesser extent, during his own confirmation hearings).[58] Brandeis's confirmation faced staunch opposition from the President of Harvard University, A. Lawrence Lowell.[59] Lowell was a man who, in Frankfurter's estimation, represented the worst ethnic prejudices of the northeastern "Brahmin" elite (a class he both resented and envied).[60]

After a brief stint at Hornblower, Frankfurter accepted the offer of an apprenticeship with U.S. Attorney Henry L. Stimson.[61] Frankfurter's tutelage under Stimson had a profound impact on his conception of due process. His boss was, by all accounts, "'an incredibly effective and wholly scrupulous man.'"[62] When he executed a search, Frankfurter later recalled, "'not only wouldn't he do it without a search warrant, but he'd send youngsters like me . . . to see to it that the raiding officers kept within the limits of the search warrant.'"[63] Stimson's meticulous observance of the strictures of the Constitution impressed upon Frankfurter a firm belief that "the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law."[64] This belief no doubt informed Frankfurter's refusal to indulge the lawlessness of the Los Angeles County deputy sheriffs in *Rochin*. Even if their forcible extraction of the pills from Rochin's body advanced the aim of law enforcement, the method too closely resembled "the rack and the screw" to be permitted in a civilized society.[65]

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58. BAKER, *supra* note 43, at 35-55. Frankfurter was involved in the controversy over the appointment of Brandeis, a Jew, to the Supreme Court. In a letter to Henry L. Stimson, he remarked that "'the bitterness and passion round here is unbelievable.'" HIRSCH, *supra* note 25, at 48 (quoting Letter from Felix Frankfurter to Henry L. Stimson (Mar. 18, 1916) (on file with the Felix Frankfurter Papers, Manuscript Division, Library of Congress, Washington, D.C.)).

59. HIRSCH, *supra* note 25, at 92.

60. *Id.*

61. *Id.* at 24-25. He quickly ascended to the level of personal assistant, doing research for Stimson's antitrust cases and handling several immigration cases on his own. In assigning these cases to him, Stimson told Frankfurter, "You are likely to have more understanding of their problems than some of the other lads in the office." *Id.* at 25. As Frankfurter biographer H.N. Hirsch observed of the time, "the antitrust cases [Frankfurter] saw passing through the office began to raise Frankfurter's political consciousness and to crystallize his progressivism." *Id.*

62. *Id.* at 28 (quoting PHILLIPS, *supra* note 32, at 48).

63. *Id.* (quoting PHILLIPS, *supra* note 32, at 48).

64. McNabb v. United States, 318 U.S. 332, 347 (1943).

65. Rochin v. California, 342 U.S. 165, 172 (1952), *overruled on other grounds by* Mapp v. Ohio, 367 U.S. 643 (1961).

D. *The Sacco and Vanzetti Case*

In 1914, Frankfurter took a long hiatus from public service to accept a professorship at Harvard Law School. He remained there, with few interruptions, until his appointment to the Supreme Court in 1939.[66] It was during this period at Harvard that a case involving two Italian-American immigrants, Nicola Sacco and Bartolomeo Vanzetti, caught his attention. Frankfurter's campaign to get the two men's death sentences and convictions for murder thrown out showed a special affinity for underdog causes and a heightened sensitivity to due process concerns.

By the time Frankfurter learned of the case in 1927, Sacco and Vanzetti had already been convicted and their lawyer, William G. Thompson, was making a motion for a new trial, alleging prosecutorial misconduct.[67] His curiosity piqued, Frankfurter secured a court transcript.[68] Upon reading it, he concluded that various aspects of the case violated "'all . . . notions of Anglo-American procedure.'"[69] He authored an article for the *Atlantic Monthly* accusing the trial judge and prosecutor of playing on the jury's anti-immigrant sentiments.[70] Quoting passages directly from the trial record, he also suggested that the prosecutor had colluded with the government's ballistics expert to mislead the court and that the court interpreter had intentionally mistranslated the defendants' testimony to weaken their case.[71]

Harvard President, A. Lawrence Lowell (who, as already mentioned, had opposed Louis Brandeis's confirmation to the Supreme Court two decades earlier), was appointed by Governor Fuller of Massachusetts to head a committee considering clemency for the two convicts.[72] Under his leadership, the committee found that the trial had been just, "on the whole," and that clemency was not warranted.[73] President Lowell's involvement in the case on the side of

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66. BAKER, *supra* note 43, at 206-07.

67. *Id.* at 119.

68. *Id.*

69. HIRSCH, *supra* note 25, at 93 (quoting Letter from Felix Frankfurter to Walter Lippmann (July 13, 1927) (on file with the Felix Frankfurter Papers, Manuscript Division, Library of Congress, Washington, D.C.)).

70. *Id.*

71. Felix Frankfurter, *The Case of Sacco and Vanzetti*, ATLANTIC MONTHLY, Mar. 1927, *available at* http://www.theatlantic.com/unbound/flashbks/oj/frankff.htm.

72. N.E.H. Hull, *Reconstructing the Origins of Realistic Jurisprudence: A Prequel to the Llewellyn-Pound Exchange Over Legal Realism*, 1989 DUKE L.J. 1302, 1323 (1989).

73. *Id.*

the government personalized the controversy for Frankfurter.[74] He saw it as a contest between the forces of prejudice, for which Lowell was a perfect representative, and the forces of reason, championed by men like himself for whom race and creed were mere accidents of birth.[75]

This controversy over the fates of the two Italian-American immigrants touched a nerve with Frankfurter.[76] In correspondence with his Harvard colleagues, he confessed that his mind was "'wholly absorbed by the Sacco-Vanzetti case.'"[77] Frankfurter's involvement in the case was pivotal for him because it weaved together two distinct threads in his life: his evolving conception of due process, so heavily influenced by Stimson's example, and his ongoing experience as an immigrant and an American Jew.[78] His early life experiences gave him a unique appreciation for the importance of fair process to the survival of liberty. In this case, it was clear to Frankfurter that, by exploiting the defendants' "alien blood, their imperfect knowledge of English, [and] their unpopular social views," the district attorney had, with the connivance of the trial judge, "invoked against [the defendants] a riot of political passion and patriotic sentiment[ ],"[79] thereby violating their "'elementary constitutional right to a fair and impartial trial.'"[80] A quarter of a century later, Frankfurter would reiterate this belief that due process contained an inherent right to a fair and impartial trial in *Stroble v. California*.[81]

E. *U.S. Supreme Court Justice and Due Process Advocate*

Frankfurter's appreciation of the importance of due process as an indispensable pillar of freedom was apparent throughout his jurisprudence. In *Rochin*, he stated unequivocally that the guarantee of due process extends even to "'those charged with the most hei-

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74. HIRSCH, *supra* note 25, at 92.

75. *Id.* at 93.

76. *Id.*

77. *See id.* at 92 (quoting Letter from Felix Frankfurter to Roscoe Pound, Dean, Harvard Law School (Aug. 22, 1927) (on file with the Felix Frankfurter Papers, Manuscript Division, Library of Congress, Washington, D.C.)).

78. *Id.* at 91-94.

79. Frankfurter, *supra* note 71.

80. *Id.* (quoting the oral argument of Sacco and Vanzetti's attorney, William G. Thompson).

81. Stroble v. California, 343 U.S. 181 (1952).

nous offenses.'"[82] In the wiretapping case of *On Lee v. United States*, Frankfurter's dissenting opinion echoed Justice Holmes's sentiment that the clean administration of justice trumps (and, in many cases, serves) the "war against crime."[83] In *Irvine v. California*, another wiretapping case, Frankfurter's dissenting opinion again asserted the primacy of due process over law enforcement goals. He conceded that:

> Of course it is a loss to the community when a conviction is overturned because the indefensible means by which it was obtained . . . [violate] the commands of due process. . . . But the people can avoid such miscarriages of justice. A sturdy, self-respecting democratic community should not put up with lawless police and prosecutors.[84]

To be clear, Frankfurter did not, in every case, side with the criminal. Indeed, his expansive "fundamental rights" approach to the Due Process Clause of the Fourteenth Amendment was cabined by an abiding judicial restraint and humility that often compelled him to respect state judgments concerning the appropriate development and enforcement of state law.[85] But even in those cases where he declined to extend the "fundamental rights" notion, he did so with a full and, in some instances, burdensome appreciation of the attendant sacrifice of liberty. In *West Virginia State Board of Education v. Barnette*, the Court struck down a school board regulation compelling daily flag salutes, a practice that offended the religious beliefs of several Jehovah's Witness students.[86] The intensely personal, almost apologetic tone of Frankfurter's dissenting opinion suggests that his decision to side with the school board did not come easy:

> One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general liberta-

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82. Rochin v. California, 342 U.S. 165, 169 (1952) (quoting Malinski v. New York, 324 U.S. 401, 417 (1945), *overruled on other grounds by* Mapp v. Ohio, 367 U.S. 643 (1961)).

83. On Lee v. United States, 343 U.S. 747, 758 (1952) (Frankfurter, J., dissenting). "'[A] less evil that some criminals should escape than that the Government should play an ignoble part.'" *Id.* at 760 (quoting Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting)).

84. Irvine v. California, 347 U.S. 128, 149 (1954) (Frankfurter, J., dissenting).

85. *See, e.g.*, Wolf v. Colorado, 338 U.S. 25, 27 (1949), *overruled in part by Mapp*, 367 U.S. 643.

86. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

> rian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores.[87]

As Frankfurter expressed in a letter to Justice Stanley Reed, *Barnette* involved the weightiest questions of "'the realm which . . . touches the liberties of our people.'"[88] No doubt, his familiarity with the tribulations suffered by Jews in Europe and the United States heightened his sensitivity to hardships faced by other religious minorities. Ultimately, however, he concluded that the actions of the school board did not so "shock[ ] the conscience"[89] as to implicate the Due Process Clause. Frankfurter conceded that West Virginia's statute making flag salutes a mandatory part of daily classroom routine may have presented a valid argument for legislative reform.[90] In his view, however, the Court lacked the authority to rewrite statutes to fit its private notions of justice.[91]

Opinions like *Barnette* defy efforts to explain Frankfurter's due process jurisprudence solely in terms of his life experience. During his twenty-three years on the bench, Frankfurter attempted to divorce his judicial decision making from any personal views or biases that might have flowed from his experience as a young professional, immigrant, or Jew. In *Harisiades v. Shaughnessy*, for example, he set aside his personal sympathies as an immigrant to uphold the deportation of several resident aliens on the grounds of their former membership in the communist party.[92] Frankfurter defended his decision as an exercise of judicial restraint, respecting Con-

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87. *Id.* at 646-47 (Frankfurter, J., dissenting).

88. BAKER, *supra* note 43, at 269 (quoting Letter from Felix Frankfurter to Stanley F. Reed, Associate Justice, Supreme Court of the United States (Apr. 9, 1943) (on file with the Felix Frankfurter Papers, Manuscript Division, Library of Congress, Washington, D.C.)) (alteration in original).

89. Rochin v. California, 342 U.S. 165, 172 (1952), *overruled on other grounds by Mapp*, 367 U.S. 643.

90. *See Barnette*, 319 U.S. at 651-52 (Frankfurter, J., dissenting).

91. *Id.* at 647-71. Over the years, Frankfurter made many friends among ranks of progressives and libertarian activists. In 1920, he helped found the American Civil Liberties Union (ACLU), which submitted amicus briefs in several of the cases discussed in this Article. His liberal allies were sorely disappointed, however, by his *Barnette* dissent. Roger Nash Baldwin of the ACLU said, "I recollect no decision of our former colleague Felix Frankfurter which dismayed us more than his labored defense of compulsory flag saluting." BAKER, *supra* note 43, at 270.

92. Harisiades v. Shaughnessy, 342 U.S. 580, 597-98 (1952) (Frankfurter, J., concurring).

gress's prerogative to proffer immigration policies.[93] Such policies, he explained, fall within the exclusive province of the legislature. It makes no difference whether the policies "have been crude and cruel" in the past, or "have reflected xenophobia in general or anti-Semitism or anti-Catholicism."[94] In *Korematsu v. United States*, Frankfurter again downplayed his identity as a member of a persecuted minority, voting to uphold the forced relocation and internment of Japanese Americans during World War II.[95] Although his concurrence in that case had little to do with the Due Process Clause of the Fourteenth Amendment, it provides a poignant illustration of his (sometimes regrettable) ability to set aside personal sympathies.[96]

Frankfurter at once acknowledged personal biases and insisted on their irrelevance to his judicial decision making. In *Haley v. Ohio*, for example, he stated that, although he personally opposed capital punishment and the subjection of minors to conventional criminal procedures, he would not base constitutional rules of due process on such privately held beliefs.[97] After voting in *Francis v. Resweber* to uphold the death sentence of Willie Francis, a young African American male,[98] he wrote an anguished letter to Justice Harold Burton, who had dissented. In this letter, Frankfurter explained his personal opposition to the death penalty and the reasons for his vote:

> 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. . . . Holmes used to express it by saying he would not strike down state action unless

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93. *Id.* at 596-97.

94. *Id.* at 597.

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

96. One could argue that *Barnette*, *Korematsu*, and *Harisiades* simply reflect Frankfurter's capitulation to yet another deep-seated bias: patriotism. Biographer Liva Baker wrote of Frankfurter: "[He] possessed an almost childlike patriotism. He could be aggressive about it, even arrogant, sometimes self-righteous. It was the patriotism of a man who had first seen America in the person of the Statue of Liberty at the impressionable age of twelve . . . ." BAKER, *supra* note 43, at 236.

97. Haley v. Ohio, 332 U.S. 596, 601-07 (1948) (Frankfurter, J., concurring). A cynic might note that he nonetheless voted with the majority in this case, overturning the conviction of a fifteen-year-old boy for first-degree murder based on the minor's coerced confession. Despite all his invocations of objectivity and judicial restraint, Frankfurter's resolution of the case nevertheless coincided with his personal views of criminal justice.

98. Francis v. Resweber, 329 U.S. 459, 470-72 (1947).

> the action of the state made him "puke." . . . And that being so, I cannot say it so shocks the accepted, prevailing standards of fairness not to allow the state to electrocute . . . .[99]

In deciding discreet issues of due process, Frankfurter was quite capable of stripping away his personal biases and placing his judicial "duty" above his identity as a libertarian, immigrant, and Jew. That said, a study of Frankfurter's childhood and early career nevertheless provides useful insights into the development of his due process jurisprudence. Frankfurter himself acknowledged that "'every man who writes, in large measure writes his autobiography.'"[100] Here, Frankfurter's "autobiography" can be found, not in his disposition of individual cases—he often approached individual cases with a conscious disregard for his own personal views—but in his *overall* fundamental rights approach.

This section has explored one aspect of that approach: Frankfurter's unwavering view that due process constitutes the very "essence of justice."[101] Even if on discreet questions, he was capable of detaching himself from personal biases, his underlying appreciation for the importance of due process in a free society was nonetheless inextricably rooted in experience. In his twenty-three years on the bench, Frankfurter devoted considerable time and energy to the development of Fourteenth Amendment due process jurisprudence. Of the cases that came before the Court bearing on the subject, he wrote opinions for more than a third. Among his contemporaries, he was one of the most prolific authors of such opinions, second only to Justices Harlan and Stevens.[102] The zeal with which he pursued the "incorporation" debate suggests that, for Frankfurter, the issue of fair process carried special significance. His experience as a Jew and as an immigrant heightened his sensitivity to abuses of individual liberty and made the issue of due process a centerpiece of his constitutional jurisprudence. His exposure to Henry Stimson as a young professional impressed upon him the

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99. UROFSKY, *supra* note 3, at 154-55 (quoting Letter from Felix Frankfurter to Harold Burton, Associate Justice, United States Supreme Court (Dec. 13, 1946) (on file with the Felix Frankfurter Papers, Manuscript Division, Library of Congress, Washington, D.C.), *in* MARK SILVERSTEIN, CONSTITUTIONAL FAITHS: FELIX FRANKFURTER, HUGO BLACK AND THE PROCESS OF JUDICIAL DECISION MAKING 160 (1984)).

100. THOMAS, *supra* note 26, at xi (quoting Felix Frankfurter, *Mr. Justice Brandeis*, 55 HARV. L. REV. 181, 181 (1941)).

101. *See* HIRSCH, *supra* note 25, at 57.

102. *See infra* app. A. See appendix B for a complete chart showing figures for every Justice, since the ratification of the Fourteenth Amendment, who wrote opinions on the Due Process Clause.

belief that effective law enforcement and the scrupulous observance of constitutional rights were compatible, indeed complimentary, goals. Frankfurter's transcendence of personal biases and personal identity in deciding discrete controversies does not negate the influence of these experiences on his most fundamental assumptions about the nature of liberty. Indeed, as the next section explains, even his insistence on dispassionate, objective judicial inquiry has roots in his experience.

II. Reason and Empiricism: The Fundamental Rights Doctrine

Justice Frankfurter's due process jurisprudence places a great deal of emphasis on reason and empiricism, values that have roots in his early development as a legal scholar and young professional. According to Frankfurter's fundamental rights doctrine, the strictures of the Due Process Clause must be understood in light of contemporary societal norms, which can only be ascertained by a reasoned and empirical study of existing law and practices across jurisdictions. In *Rochin*, Frankfurter began his elucidation of the fundamental rights approach with a quote from his predecessor on the bench, Justice Cardozo. He defined due process as "[a] summarized constitutional guarantee of respect for those personal immunities which . . . are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental' or are 'implicit in the concept of ordered liberty.'"[103]

Frankfurter went on to explain that the various guarantees of the Constitution have, through "the deposit of history," acquired varying degrees of rigidity and technicality.[104] Some provisions, such as the jury requirement of the Sixth and Seventh Amendments, have taken on specific, technical meanings.[105] Provisions that deal with basic human rights, however, lack such precision, requiring a continuing process of application and development.[106]

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103. Rochin v. California, 342 U.S. 165, 169 (1952) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934), *overruled on other grounds by* Malloy v. Hogan, 378 U.S. 1 (1964)); Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969), *overruled on other grounds by* Mapp v. Ohio, 367 U.S. 643 (1961).

104. *Rochin*, 342 U.S. at 169.

105. *Id.* at 169-70.

106. *Id.*

The Due Process Clause of the Fourteenth Amendment falls in this latter category.[107]

Justice Oliver Wendell Holmes, Jr., a mentor and idol of Justice Frankfurter,[108] famously said in his first of eleven lectures on the common law that "[the] felt necessities of the time, the prevalent moral and political theories, intuitions of public policy" and "even the prejudices [of] judges," play a greater role in shaping the law than immutable principles of natural law and syllogistic reasoning.[109] Echoing this sentiment, Frankfurter acknowledged in *Rochin* that the meaning (or the "gloss") of due process and other fundamental rights evolves with time.[110] He stated that, "When the gloss has thus not been fixed [by the deposit of history] but is a function of the process of judgment, the judgment is bound to fall differently at different times and differently at the same time through different judges."[111] Frankfurter's views on the transience of the law took shape long before he ever sat on the bench. In 1912, he said that, "'if facts are changing, law cannot be static. So-called immutable principles must accommodate themselves to facts of life . . . .'"[112]

How then should judges ascertain whether due process has been accorded in any given instance? According to Frankfurter, the Fourteenth Amendment casts upon the Court the responsibility to judge "the whole course of proceedings" in order to determine "whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples."[113] This judgment, he explained, "requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated."[114] Through adherence to reasoned and empirical study of historical precedent and contemporary societal norms, judges can avoid discretionary and judicial

107. *Id.* at 170.

108. Lawrence S. Wrightsman & Justin R. La Mort, *Why Do Supreme Court Justices Succeed or Fail? Harry Blackmun as an Example*, 70 MO. L. REV. 1261, 1267 (2005).

109. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1, 35 (1881), *available at* http://biotech.law.lsu.edu/Books/Holmes/claw03.htm (last visited May 7, 2007).

110. *Rochin*, 342 U.S. at 168-70.

111. *Id.* at 170.

112. THOMAS, *supra* note 26, at 172 (1960) (quoting Felix Frankfurter, The Zeitgeist and the Judiciary, Address at the Harvard Law Review Twenty-fifth Anniversary Dinner (Mar. 30, 1912)).

113. *Rochin*, 342 U.S. at 169.

114. *Id.* at 172.

caprice, while "reconciling the needs both of continuity and of change in a progressive society."[115]

Applying this approach in *Rochin*, Frankfurter observed that recent case law rejected the proposition that "due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained."[116] In particular, he referenced "the series of recent cases [that] enforced the constitutional principle that the States may not base convictions upon confessions, however much verified, obtained by coercion."[117] Coerced confessions, he explained, violate not only the Fifth Amendment's proscription against self-incrimination, but also the Due Process Clause because they "offend the community's sense of fair play and decency."[118] Similarly, the admission of "real" evidence forcibly extracted from a suspect's body to obtain a conviction violates due process. As Frankfurter put it: "It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach."[119]

As empirical evidence of society's disapprobation of such methods, Frankfurter noted that all California judges who expressed themselves in the *Rochin* case have condemned the conduct of the three Los Angeles County deputy sheriffs in the strongest possible terms.[120] The means by which Rochin's conviction was obtained did "more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically."[121] The forcible extraction of the capsules from Rochin's stomach and their subsequent admission into evidence "is conduct that shocks the conscience,"[122] or as Holmes might have put it, "makes [one] puke."[123]

Frankfurter reiterated this "scientific" approach to due process two years later in *Irvine v. California*, when he dissented from the

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115. *Id.*
116. *Id.*
117. *Id.* at 172-73.
118. *Id.* at 173.
119. *Id.*
120. *Id.* at 174.
121. *Id.* at 172.
122. *Id.*
123. UROFSKY, *supra* note 3, at 154-55 (quoting Letter from Felix Frankfurter to Harold Burton, Associate Justice, Supreme Court of the United States (Dec. 13, 1946) (on file with the Felix Frankfurter Papers, Manuscript Division, Library of Congress, Washington, D.C.)).

majority's affirmation of a conviction based on evidenced obtained through illegal home wiretapping.[124] In his dissent, he echoed much of his *Rochin* opinion, observing that the Fourteenth Amendment is not a "mechanical yardstick" and that judicial deliberations over due process should include an "empiric[al] process" and a case-by-case "judgment upon variant situations by the wisdom of experience."[125] In this way, the content of the due process guarantee evolves and is slowly revealed through the disposition of cases over time.[126]

Frankfurter's approach stands in stark contrast to the certainty and finality of Justice Black's "total incorporation" view, which reads most of the Bill of Rights into the Fourteenth Amendment's Due Process Clause.[127] Black wrote in a dissenting opinion in 1947 that he arrived at this view through a study of "the historical events that culminated in the Fourteenth Amendment," including the "expressions of those who sponsored and favored, as well as those who opposed its submission and passage."[128] This historical examination persuaded him that, "one of the chief objects that [the Due Process Clause was] intended to accomplish was to make the Bill of Rights applicable to the States,"[129] thereby overruling the 1833 precedent of *Barron v. Baltimore*, which held that the Bill of Rights, by its own terms, applied only to the federal government.[130]

Frankfurter's reading of the Due Process Clause was not so restrained by "original intent" as Black's, and his approach did not provide an easy bright-line rule to guide courts. In *Wolf v. Colorado*, he noted that although "a tidy formula for the easy determination of what is a fundamental right . . . may satisfy a longing for certainty," it ignores the movements and progress of a free society.[131] Frankfurter may have learned this distaste for formula from

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124. Irvine v. California, 347 U.S. 128, 142 (1954) (Frankfurter, J., dissenting).

125. *Id.* at 147. Again, Frankfurter seems to be channeling his mentor, Justice Holmes, who famously said, "The life of the law has not been logic: it has been experience." HOLMES, *supra* note 109, at 1.

126. JACOBS, *supra* note 17, at 207.

127. *Id.* at 206-07.

128. Adamson v. California, 332 U.S. 46, 71 (1947) (Black, J., dissenting), *overruled in part by* Malloy v. Hogan, 378 U.S. 1 (1964).

129. *Id.* at 71-72.

130. Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

131. Wolf v. Colorado, 338 U.S. 25, 27 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

his mentor, Justice Holmes, who once observed that "'[t]o rest upon a formula is a slumber that, prolonged, means death.'"[132]

A rigorous dissenting opinion in *Solesbee v. Balkcom* provides perhaps the best illustration of Frankfurter's empirical approach to due process questions.[133] Justice Black, writing for the Court, upheld a Georgia statute allowing the governor to unilaterally determine the sanity of persons to be executed, without a hearing or judicial review.[134] Frankfurter began his dissenting analysis by plumbing the common law, and concluded that a prohibition against executions of the insane "carries . . . impressive credentials of history."[135] An empirical analysis of society's contemporary attitudes towards such executions lent further support to this prohibition.[136] He detailed his factual findings in an extensive appendix showing that "not a single State . . . [had] uprooted the heritage of the common law which deemed it too barbarous to execute a man while insane."[137]

A. *Origins in Academia*

As already mentioned, Frankfurter's view of the Due Process Clause began to take shape well before he joined the Supreme Court bench in 1939. Seven years before his confirmation, he wrote a letter to the *New York Times* congratulating the Supreme Court for its recent decision in the *Scottsboro* case.[138] The letter evidenced an already completely formed "fundamental rights" theory:

> "The more heinous the charge," Frankfurter declared, "the more important the safeguards which the experience of centuries has shown to be essential to the ascertainment of even fallible truth.
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> . . . .
>
> . . . The Supreme Court [in the *Scottsboro* case] has declared only that the determination [of guilt or innocence] must be made with due observance of the decencies of civilized procedure."[139]

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132. Kovacs v. Cooper, 336 U.S. 77, 96 (1949) (Frankfurter, J., concurring) (quoting OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 306 (1920)).

133. Solesbee v. Balkom, 339 U.S. 9, 14-26 (1950) (Frankfurter, J., dissenting), *abrogated by* Ford v. Wainright, 477 U.S. 399 (1986).

134. *Id.* at 14 (majority opinion).

135. *Id.* at 17 (Frankfurter, J., dissenting).

136. *See* JACOBS, *supra* note 17, at 201-03.

137. *Solesbee*, 339 U.S. at 22.

138. BAKER, *supra* note 43, at 266. *See generally* Powell v. Alabama (*Scottsboro*), 287 U.S. 45 (1932).

139. *Id.* at 266-67 (quoting Felix Frankfurter, *A Notable Decision, The Supreme Court Writes a Chapter on Man's Rights*, N.Y. TIMES, Nov. 13, 1939, at E1).

Frankfurter's reliance on reason and empiricism to ascertain society's ever-changing standards of decency has its origins in his early intellectual development. From a young age, Felix showed a strong predisposition towards intellectual pursuits. As a toddler in Austria, he idolized his Uncle Solomon, who had achieved some distinction as a scholar and librarian at the University of Vienna.[140] When the Frankfurters moved to the New World, they encouraged Felix's academic proclivities. For immigrant Jews, an education carried with it the promise of upward mobility and the possibility of acceptance by mainstream society.[141] Felix's mother often preached about the necessity of academic achievement in America's cutthroat society.[142] Frankfurter took it to heart.[143]

An appreciation for the value of education was a central part of Frankfurter's judicial philosophy. Through scientific study of society, he believed that human nature could evolve and change for the better. "'The fundamental assumption of civilization,'" he wrote, "'is the conscious ability to modify and enlarge human nature.'"[144] This tremendous faith in the power of education to change and uplift societal norms explains Frankfurter's aversion to Justice Black's rigid formulation of "due process" as encompassing only the rights enumerated in the first eight amendments of the Bill of Rights. Frankfurter believed that due process is "not a stagnant formulation of what has been achieved in the past but [rather] a standard for judgment in the progressive evolution of the institutions of a free society."[145]

B. *Brandeis's Influence: Empiricism*

One of Frankfurter's primary influences, Justice Brandeis, had all but invented the use of empiricism in law. In 1908, Brandeis represented Oregon in the Supreme Court case of *Muller v. Oregon*.[146] The case involved the challenge of an Oregon statute limiting a woman's work day to ten hours.[147] In defending the statute, Brandeis submitted a legal brief containing extensive data collected

140. HIRSCH, *supra* note 25, at 13; PARRISH, *supra* note 27, at 9, 12.
141. PARRISH, *supra* note 27, at 12.
142. *Id.*
143. *Id.*
144. HIRSCH, *supra* note 25, at 41 (quoting Letter from Felix Frankfurter to Henry L. Stimson (May 19, 1913) (on file with the Felix Frankfurter Papers, Manuscript Division, Library of Congress, Washington, D.C.)).
145. Malinski v. New York, 324 U.S. 401, 414 (1945).
146. Muller v. Oregon, 208 U.S. 412 (1908).
147. *Id.* at 416.

from multiple sources.[148] In what became known as the "Brandeis Brief," he presented sociological information on the impact of long work days on women.[149] The Court held for Oregon, and the Brandeis Brief became the standard for future Supreme Court presentations.[150]

In 1909, Brandeis gave a lecture at the Harvard Ethical Society, entitled "The Opportunity in the Law."[151] Frankfurter attended the lecture and immediately took a liking to the seasoned Supreme Court litigator, who shared both Frankfurter's cultural heritage and political leanings.[152] By 1910, the two had begun corresponding regularly.[153] When Frankfurter moved to Washington several years later, he became Brandeis's protégé and confidant.[154]

Brandeis's influence can be seen throughout his protégé's due process jurisprudence. Frankfurter's reliance on reason and empiricism to adduce societal norms recalls the logic of the "Brandeis Brief," looking beyond the syllogism for guidance in deciding cases. Frankfurter adopted the "paradigm of the scientific expert."[155] In a concurring opinion to *Haley v. Ohio*, for example, Frankfurter invoked "expert" knowledge in attempting to ascertain the "pervasive feeling of our society"[156] on whether a confession obtained from a minor was, in this case, the product of a deliberate and responsible choice.[157]

C. *Bisbee and Mooney Affairs: Disinterested Reason*

Beyond raw empiricism, Frankfurter's due process opinions are rife with appeals to disinterested reason. In *Rochin*, for example, Frankfurter stated that "'due process of law' requires [in each case] an evaluation based on a *disinterested* inquiry"[158] and that these considerations are "deeply rooted in *reason*."[159] Frank-

148. *Id.* at 419.

149. David W. Levy, *Brandeis, the Reformer*, 45 BRANDEIS L.J. 711, 716 (2007).

150. Louis Brandeis, Encyclopedia Britannica Online, http://www.britannica.com/eb/article-9016209/Louis-Brandeis (last visited Nov. 10, 2007).

151. HIRSCH, *supra* note 25, at 32.

152. *Id.* at 31-32.

153. *Id.* at 32.

154. *Id.* at 33-34.

155. UROFSKY, *supra* note 3, at 149.

156. Solesbee v. Balkcom, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting), *abrogated by* Ford v. Wainwright, 477 U.S. 399 (1986).

157. Haley v. Ohio, 332 U.S. 596, 603 (1948) (Frankfurter, J., concurring).

158. Rochin v. California, 342 U.S. 165, 172 (1952) (emphasis added), *overruled on other grounds by* Mapp v. Ohio, 367 U.S. 643 (1961).

159. *Id.* at 171 (emphasis added).

furter's involvement in the Bisbee and Mooney labor disputes, more than two decades earlier,[160] helped shape this view. He emerged from these controversies with a clear conception of justice as the triumph of reason and neutrality over passion and prejudice.[161]

In the Bisbee controversy, the residents of a mining town had, through an act of vigilantism, expelled a group of striking mine workers.[162] On July 12, 1917, the town's sheriff and a large armed force sequestered the strikers and, without court authorization, deported them to the desert for two days without food.[163] When the War Department learned of the deportation, it relocated the strikers to a neighboring town until the dispute could be resolved.[164] Serving on President Wilson's Mediation Commission, Frankfurter was dispatched to Bisbee to conduct an investigation into the incident.[165] There, he prepared a detailed report, identifying what he believed to be the primary source of tension: the lack of "democracy in labor relations."[166] Armed with this report, the commission created a disinterested body to hear labor grievances so that disputes could be resolved without recourse to strike or lockout.[167] Frankfurter later observed of the commission's approach that "'[i]t did not put anybody in jail. . . . It did not take any vengeance on the perpetrators'"[168] but, by setting forth a reasoned, fair-minded examination of the incident, was able to instill in the vigilantes a "sense of shame."[169] The report was helpful, therefore, "in 'stirring up a different state of mind and generating different feelings'" in Bisbee.[170] The Bisbee affair reinforced Frankfurter's faith in the power of disinterested, reasoned exposition to change minds and produce wise outcomes.

In the Mooney controversy, a labor agitator had been sentenced to death for setting off a bomb in San Francisco, killing

160. HIRSCH, *supra* note 25, at 55-56.
161. *Id.* at 57-58.
162. BAKER, *supra* note 43, at 66.
163. *Id.*
164. *Id.*
165. *Id.* at 67.
166. *Id.*
167. *Id.*
168. *Id.* at 68 (quoting Letter from Felix Frankfurter to Lawrence Hackett (Jan. 6, 1921) (on file with the Felix Frankfurter, Manuscript Division, Library of Congress, Washington, D.C.)).
169. *Id.*
170. *Id.*

nineteen people in the summer of 1916.[171] Frankfurter, on behalf of the President's Mediation Commission, prepared a report alleging that the conviction had been obtained "on the basis of perjured testimony."[172] President Wilson urged California's governor to grant a new trial, but the governor would only commute the sentence to life imprisonment.[173]

Because of his public defense of the labor agitator, Frankfurter earned a reputation for radicalism.[174] Former President Theodore Roosevelt, who saw eye-to-eye with Frankfurter on few issues, denounced what he called the jurist's "Bolshevik influences."[175] In a letter published in the *Boston Herald*, Roosevelt accused Frankfurter of "'taking, on behalf of the Administration an attitude which seems to be fundamentally that of Trotsky and the other Bolsheviki leaders in Russia.'"[176] The wording of Frankfurter's response to Roosevelt, again, reveals his strong attachment to the notion of "disinterested" and "reasoned" judgment: "'I think if you knew all the facts, I think if you inquired of those who see fairly, and without blind passion, in San Francisco you would find that I pursued the inquiry in a thorough-going, judicial, and if I may say so, sensible way . . . .'"[177]

Frankfurter's emphasis on empiricism and detached reason in his due process jurisprudence stems from a rigorous academic tradition reaching back to his boyhood days in Austria.[178] His mother's encouragement nurtured a love of academia and a belief in the power of education to elevate the human condition.[179] The influence of his friend and mentor Justice Brandeis reinforced Frankfurter's scientific approach to the law, particularly regarding questions of due process. His involvement in the Bisbee and Mooney controversies brought home to him the importance of disinterested and reasoned inquiries, especially since "standards of jus-

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171. *Id.* at 69.

172. HIRSCH, *supra* note 25, at 56.

173. *Id.*

174. *Id.* at 56-57.

175. *Id.* at 56.

176. *Id.* at 57 (quoting Letter from Theodore Roosevelt to Felix Frankfurter (Dec. 19, 1917)).

177. *Id.* (quoting Letter from Felix Frankfurter to Theodore Roosevelt (Jan. 7, 1918) (on file with the Felix Frankfurter Papers, Manuscript Division, Library of Congress, Washington, D.C.)).

178. THOMAS, *supra* 26, at 4.

179. PARRISH, *supra* note 27, at 11-12.

tice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia."[180]

CONCLUSION

Justice Holmes wrote that "[t]he life of the law has not been logic: it has been experience."[181] Frankfurter's experience as a young professional, immigrant, and Jew played as much a part in shaping his approach to due process as did logic or syllogism. His early exposure to anti-Semitism in Austria gave him a keen appreciation for the importance of fair play in a free society. This appreciation was reinforced by his life as an American Jew. Under Henry L. Stimson's tutelage, he discovered that due process and effective law enforcement were not necessarily mutually exclusive goals. His tireless work on the Sacco and Vanzetti case demonstrated that, for him, due process was not merely an academic question; it was a matter of vital importance about which he held deeply personal beliefs.

These personal beliefs were not themselves the source of Frankfurter's due process jurisprudence. Rather, he searched for truth outside of himself, through empirical analysis and "scientific" inquiry. Even this aspect of his judicial philosophy, however, was rooted in experience. His approach to ascertaining the norms and social values that define due process using objective, "scientific" means represents the culmination of Frankfurter's academic pursuits and the influence of his friend and mentor Louis Brandeis. That Frankfurter's "fundamental rights" approach to the Due Process Clause of the Fourteenth Amendment was more a product of his psychology and his experience, than it was a formula of logic, can be seen in its many contradictions and paradoxes.[182] It is at once restrictive, in that it does not automatically incorporate the entire Bill of Rights, and expansive, in that it recognizes the possible existence of unenumerated rights (such as the right to privacy).[183] It at once gives judges license to enact social consensus and fashion new rights out of whole cloth, and exhorts judges to show humility and restraint in the exercise of that power.[184] Frankfurter was never one to insist upon rigid consistency in any event. It

180. Malinski v. New York, 324 U.S. 401, 417 (1945).
181. HOLMES, *supra* note 109, at 1.
182. *See* UROFSKY, *supra* note 3, at 148-49.
183. *See* JACOBS, *supra* note 17, at 199.
184. *See id.*

seemed to him that Justice Black's blanket rule of "total incorporation," was an attempt to freeze "'due process of law' at some fixed stage of time and thought."[185] The changing values of society and progress of the human race would be lost on such a formulation. Constitutional adjudication, Frankfurter wrote in *Rochin*, is not "a function for inanimate machines," but for judges.[186]

185. Rochin v. California, 342 U.S. 165, 171 (1952) *overruled on other grounds by* Mapp v. Ohio, 367 U.S. 643 (1961).

186. *Id.*

APPENDIX A
TEN MOST PROLIFIC WRITERS OF SUPREME COURT DUE PROCESS OPINIONS[187]

Justice	Period of Service (AJ/CJ)	Years of Service	Due Process Cases Heard	Due Process Opinions Authored	Percentage of Due Process Cases in Which Opinions Were Authored	Due Process Dissents Authored
Harlan II	1955-1971	16	245	112	46%	57
Stevens	1975-	—	284	117	41%	57
Frankfurter	1939-1962	23	278	100	36%	30
Douglas	1939-1975	36	497	175	35%	87
Rehnquist	1972-1986 / 1986-2005	33	338	113	33%	45
Brennan	1956-1990	33	549	174	32%	78
Black	1937-1971	34	440	138	31%	59
Stewart	1958-1981	23	418	128	31%	33
T. Marshall	1967-1991	24	370	102	28%	66
B. White	1962-1993	31	467	120	26%	41

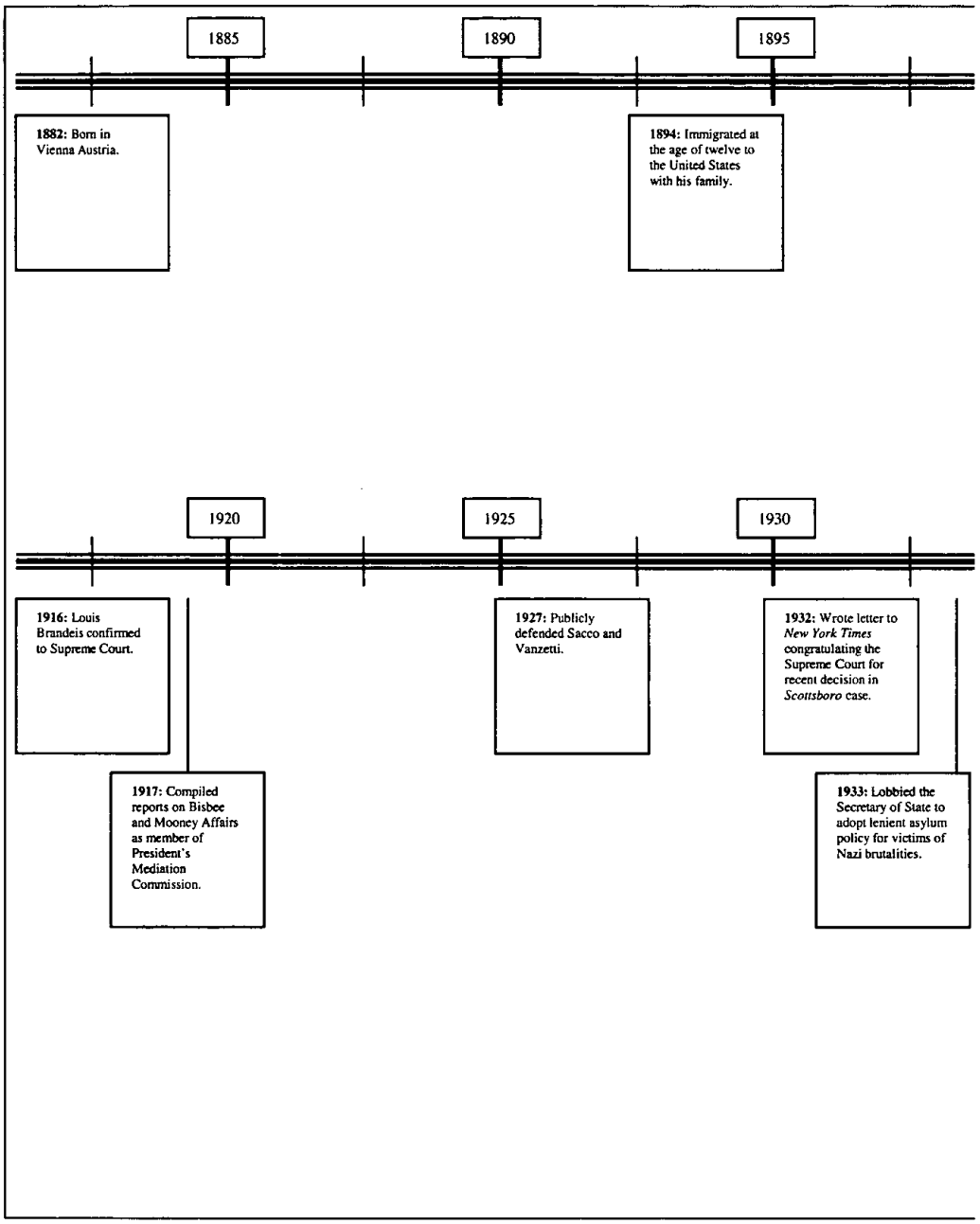
187. Note that Justice Frankfurter's lead of Justices Douglas and Rehnquist for the "Percentage of Due Process Cases in which Opinions Were Authored" may fall within the margin of error of the survey.

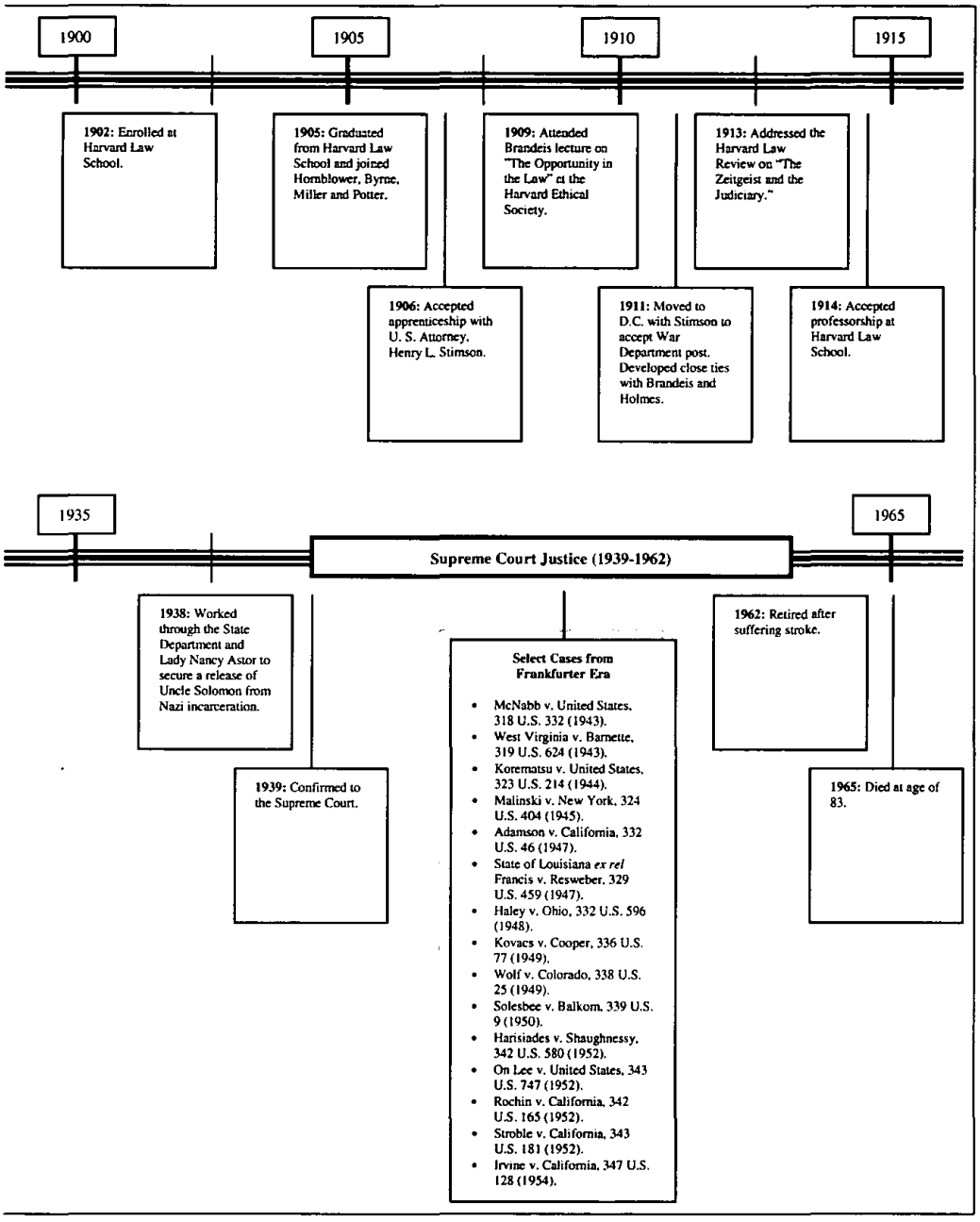
APPENDIX B
NUMBER OF FOURTEENTH AMENDMENT DUE PROCESS OPINIONS PER JUSTICE (1868-PRESENT)[188]

Justice	Period of Service (AJ/CJ)	Years of Service	Due Process Opinions Authored
Samuel Nelson, N.Y.	1845-1872	27	0
Robert C. Grier, Pa.	1846-1870	23	0
Nathan Clifford, Me.	1858-1881	23	1
Noah H. Swayne, Ohio	1862-1881	18	1
Samuel F. Miller, Iowa	1862-1890	28	7
David Davis, Ill.	1862-1877	14	0
Stephen J. Field, Cal.	1863-1897	34	18
Salmon P. Chase, Ohio	1864-1873	8	0
William Strong, Pa.	1870-1880	10	4
Joseph P. Bradley, N.J.	1870-1892	21	9
Ward Hunt, N.Y.	1872-1882	9	0
Morrison R. Waite, Ohio	1874-1888	14	7
John M. Harlan, Ky.	1877-1911	33	51
William B. Woods, Ga.	1880-1887	6	1
Stanley Matthews, Ohio	1881-1889	7	4
Horace Gray, Mass.	1882-1902	20	11
Samuel Blatchford, N.Y.	1882-1893	11	1
Lucius Q. C. Lamar, Miss.	1888-1893	5	12
Melville W. Fuller, Ill.	1888-1910	21	31
David J. Brewer, Kan.	1889-1910	20	26
Henry B. Brown, Mich.	1890-1906	15	16
George Shiras, Jr., Pa.	1892-1903	10	11
Howell E. Jackson, Tenn.	1893-1895	2	0
Edward D. White, La.	1894-1910 (1910-1921)	26	52
Rufus W. Peckham, N.Y.	1895-1909	13	21
Joseph McKenna, Cal.	1898-1925	26	77
Oliver W. Holmes, Mass.	1902-1932	29	95
William R. Day, Ohio	1903-1922	19	53
William H. Moody, Mass.	1906-1910	3	7
Horace H. Lurton, Tenn.	1909-1914	4	6
Charles E. Hughes, N.Y.	1910-1916 (1930-1941)	16	44
Willis Van Devanter, Wyo.	1910-1937	26	38
Joseph R. Lamar, Ga.	1910-1916	4	12
Mahlon Pitney, N.J.	1912-1922	10	46
James C. McReynolds, Tenn.	1914-1941	26	54
Louis D. Brandeis, Mass.	1916-1939	22	50
John H. Clarke, Ohio	1916-1922	5	9
William H. Taft, Conn.	1921-1930	8	24
George Sutherland, Utah	1922-1938	15	34
Pierce Butler, Minn.	1923-1939	16	57
Edward T. Sanford, Tenn.	1923-1930	7	14
Harlan F. Stone, N.Y.	1925-1941 (1941-1946)	21	65
Owen J. Roberts, Pa.	1930-1945	15	31
Benjamin N. Cardozo, N.Y.	1932-1938	6	20
Hugo L. Black, Ala.	1937-1971	34	138
Stanley F. Reed, Ky.	1938-1957	19	39
Felix Frankfurter, Mass.	**1939-1962**	**23**	**100**
William O. Douglas, Conn.	1939-1975	36	175
Frank Murphy, Mich.	1940-1949	9	20
James F. Byrnes, S.C.	1941-1942	1	2
Robert H. Jackson, Pa.	1941-1954	13	37
Wiley B. Rutledge, Iowa	1943-1949	6	17
Harold H. Burton, Ohio	1945-1958	13	15
Frederick M. Vinson, Ky.	1946-1953	7	12
Tom C. Clark, Tex.	1949-1967	17	56
Sherman Minton, Ind.	1949-1956	7	9
Earl Warren, Cal.	(1953-1969)	15	40
John M. Harlan, N.Y.	1955-1971	16	112
William J. Brennan, Jr., N.J.	1956-1990	33	174
Charles E. Whittaker, Mo.	1957-1962	5	7
Potter Stewart, Ohio	1958-1981	23	128
Byron R. White, Colo.	1962-1993	31	120
Arthur J. Goldberg, Ill.	1962-1965	2	15
Abe Fortas, Tenn.	1965-1969	3	14
Thurgood Marshall, N.Y.	1967-1991	24	102
Warren E. Burger, Va.	(1969-1986)	17	61
Harry A. Blackmun, Minn.	1970-1994	24	98
Lewis F. Powell, Jr., Va.	1972-1987	15	24
William H. Rehnquist, Ariz.	1972-1986 (1986-2005)	33	113
John Paul Stevens, Ill.	1975-	—	117
Sandra Day O'Connor, Ariz.	1981-2006	25	41
Antonin Scalia, Va.	1986-	—	28
Anthony M. Kennedy, Cal.	1988-	—	19
David H. Souter, N.H.	1990-	—	19
Clarence Thomas, Ga.	1991-	—	13
Ruth Bader Ginsburg, N.Y.	1993-	—	12
Stephen G. Breyer, Mass.	1994-	—	11
John G. Roberts, Md.	2005-	—	0
Samuel A. Alito, Jr., N.J.	2006-	—	0

188. In May 2007, the figures on this chart were calculated by entering the following search command on LexisNexis for each Justice in the database "U.S. Supreme Court Cases, Lawyer's Edition": *"date aft 1867 and WRITTENBY ('Justice's Name') and CORE-TERMS (Fourteenth Amendment) and Due Process."* Justice Powell's opinions on due process were calculated by entering the following search command on LexisNexis: *WRITTENBY (Powell) and "due process" /10 "fourteenth amendment" and CORE-TERMS (process).*

APPENDIX C
TIMELINE OF REFERENCED EVENTS IN FRANKFURTER'S LIFE




1900
1905
1910
1915
1902: Enrolled at Harvard Law School.
1905: Graduated from Harvard Law School and joined Hornblower, Byrne, Miller and Potter.
1906: Accepted apprenticeship with U. S. Attorney, Henry L. Stimson.
1909: Attended Brandeis lecture on "The Opportunity in the Law" at the Harvard Ethical Society.
1911: Moved to D.C. with Stimson to accept War Department post. Developed close ties with Brandeis and Holmes.
1913: Addressed the Harvard Law Review on "The Zeitgeist and the Judiciary."
1914: Accepted professorship at Harvard Law School.
1935
1965
Supreme Court Justice (1939-1962)
1938: Worked through the State Department and Lady Nancy Astor to secure a release of Uncle Solomon from Nazi incarceration.
1939: Confirmed to the Supreme Court.
Select Cases from Frankfurter Era
• McNabb v. United States, 318 U.S. 332 (1943).
• West Virginia v. Barnette, 319 U.S. 624 (1943).
• Korematsu v. United States, 323 U.S. 214 (1944).
• Malinski v. New York, 324 U.S. 404 (1945).
• Adamson v. California, 332 U.S. 46 (1947).
• State of Louisiana ex rel Francis v. Resweber, 329 U.S. 459 (1947).
• Haley v. Ohio, 332 U.S. 596 (1948).
• Kovacs v. Cooper, 336 U.S. 77 (1949).
• Wolf v. Colorado, 338 U.S. 25 (1949).
• Solesbee v. Balkom, 339 U.S. 9 (1950).
• Harisiades v. Shaughnessy, 342 U.S. 580 (1952).
• On Lee v. United States, 343 U.S. 747 (1952).
• Rochin v. California, 342 U.S. 165 (1952).
• Stroble v. California, 343 U.S. 181 (1952).
• Irvine v. California, 347 U.S. 128 (1954).
1962: Retired after suffering stroke.
1965: Died at age of 83.