In the previous chapter Justice Frankfurter's treatment of the Bill of Rights was considered in terms of history. A survey was made of his specific-generic breakdown of amendments. As indicated there, the due process clause of the Fifth Amendment is, for him, the most important flexible provision allowing accommodation between the demands of the past and the needs of the present. Extended discussion of the philosophy of due process in the light of history was, however, foregone in order that that topic could be taken up under the present heading. As Justice Frankfurter once noted, "in the attempt to endow history with drama, different periods are too often conceived as duels between hostile champions." ¹ Such has certainly been the situation for the last decade or so in the Black-Frankfurter debate on the meaning of the Fourteenth Amendment. In order to understand this debate,

it is necessary to recall that the "facts" of history appear simultaneously with and are an intrinsic part of the analysis that any individual follows. Selection of particular "facts" in any interpretive pattern can be useful in helping to clarify the philosophy of the interpreter. For Justice Frankfurter this is doubly true. His pattern was established many years before he became a member of the Supreme Court.

I

The New York Times, in editorializing on his appointment to that position, thought that the key to understanding his judicial philosophy lay in his deep reverence for those elements in the law that reconciled the freedom and dignity of the individual with the stability of society. "Over and over again he has stated his view of the law as an organic, growing thing, sharing in this respect the philosophy of two judges whom he seemed most to admire: Holmes and Brandeis."² Because he was deeply skeptical of panaceas or nostrums, the Times felt that the new Justice would provide a liberal view of constitutional interpretation. Frankfurter has partially fulfilled this expectation through his treatment of the due process clause. On the other hand, he has been equally insistent that, even for such an organic concept, there are basic historical limitations that must be observed.

Justice Frankfurter has eloquently recognized that "there is a deep need for harmony in man."³ But, to borrow musical terms, harmony presupposes definiteness in tonal and value progression so that playing the same notes with the same force will produce the same sound. One of life's contradictions is that no such automatic reproduction is ever possible. We must face the fact that "the versatility of circumstances often mocks [man's] natural de-

³ "Music is the instinctive learning of the soul. It is an essential need of life, for there is a deep need for harmony in man. It cuts across all boundaries and national differences. In music one finds a greater hope for one world than in all the political mechanisms." From a speech delivered at Tanglewood, Massachusetts, and reported in the New York Times, August 4, 1948.
sire for definiteness.” The due process clause of the Fifth and particularly of the Fourteenth Amendment comes as close to providing a mechanism for dealing with the versatility of circumstance as is to be found in the Constitution. In cases depending upon an interpretation of those clauses, the Court is called upon to give transient definiteness to judicial concepts, however logically contradictory that may sound. An exercise of judgment is called for, and “judgment is not drawn out of the void but is based on the correlation of imponderables all of which need not, because they cannot, be made explicit.” Certainly for Justice Frankfurter two such imponderables are, first, the heritage that historic experience has left the Court and, second, the pattern of past decisions, especially by justices whom he venerates. For him one of Holmes’ outstanding traits was the intellectual's distrust of exactitude and certainty when important legal controversies involving due process came before the Court. Frankfurter has simulated Holmes’ action by his insistence that in all due process cases matters of degree are involved and often degrees of the nicest sort.

Basically, then, what is the primary function of due process? In 1932 Professor Frankfurter noted that “alternative modes of arriving at truth are not—they must not be—forever frozen.” Almost a quarter of a century later he wrote that “‘Due process’ is, perhaps the least frozen concept of our law—the least confined to history and the most absorptive of powerful standards of a progressive society.” It is the Court’s means to arrive at approximate truth. It is the vehicle for growth and vitality in the law, allowing for reasonable differences and shifting necessities. This concept does not have a fixed nor finished content, since it merely expresses an intuitive approach to law as mirroring deeply held community ideals. The ideals themselves are composites of centuries of Anglo-American constitutional history and civilization, strengthened by the evolution of democratic faith.

Frankfurter's opinions often insist on the difference between his views held as an individual and those held as a jurist. In dealing with due process it has been hard for him to convince students of the Court that any such difference existed. To them, it is futile and perhaps not quite forthright, given his views expressed in pre-Court writings. Therein he wrote that through the use of due process the justices were able to read their own economic and social views into the neutral language of the Constitution.  

On one point the Justice has been consistent over the years. Someone must put meaning into the Constitution when due process is involved. Relatively unrestricted notions of policy do matter when the justices are called to give temporary definiteness to a constantly changing scene, although they may be individual judicial notions rather than those conditioned by purely personal considerations. One may heartily disagree with the cartography of any particular Court without changing the fact that the due process clause is the instrument that allows boundaries to be drawn between permissive and nonpermissive conduct. Many years ago Professor Frankfurter thought that the Court was using its power to centralize control over the states to an excessive degree. He therefore advised that "the due process clause ought to go." How different is this from the Supreme Court justice who finds due process "the most majestic concept in our whole constitutional system." The difference seems to lie in the fact that, as a scholar, Frankfurter thought members of the Court were infusing their personal judgments too openly into constitutional adjudication. He does, however, have to face somewhat of a problem. Current due process standards may be subjective, but is this really an evil? Justice Frankfurter's knowledge concerning the uses to which due process can be put have led him at times to curse subjectivity as an evil, while at other times, though not accepting it as a virtue, at least to recognize the necessity for its existence.

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*See, for example, Felix Frankfurter, "The Supreme Court and the Public," *Forum*, lxxxiii (June, 1930), 332–33.


*Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 174 (1951).*
II

In statement of principle, Justice Black stands far from Frankfurter in his treatment of the Fourteenth Amendment. There are, however, similarities in that neither man boldly desires to assert that many cases hinge on five individual philosophies incidentally coalescing on some point so that a case can be decided. In order to avoid the appearance of personal participation Justice Black has gone farther than Justice Frankfurter with his manjurist dichotomy, which does acknowledge that some change in treatment of situations can be obtained through the due process clause of the Fourteenth Amendment. Black has advocated what is known as “incorporation.” Desiring to protect civil rights in the most forceful manner possible, he believes this goal can best be attained by making the first eight amendments applicable against the states as against the federal government. Extended historical analysis has convinced him that the framers of the Fourteenth Amendment meant this addition to the Constitution to be the vehicle by which such application would become possible. Unlike Frankfurter, most of the provisions of the Bill of Rights are specific for Black, even to the First Amendment. By transposing them through the Fourteenth Amendment onto the states, he appears to desire a certainty in treatment of constitutional concepts, which admittedly cannot be gained by use of due process as a generic term. Supposed certainty in interpretation seems to Black equivalent to avoidance of the dangers inherent in judgment on the vague provisions of the Constitution. This, on the surface at least, is the rationale for his preoccupation with history to prove the specific nature of the Bill of Rights and to prove historically that the Fourteenth Amendment was meant particularly to have the Bill of Rights enforceable against state governments.

There are certainly many difficulties in the Black thesis and Frankfurter has pointed them out. For example, what part of the Fourteenth Amendment reaches down to the Bill of Rights for incorporation purposes? Or again, are all the amendments ap-
plicable, or is there some selectivity involved, necessitating the same type of judgment as a generic term. Black has been unable to give satisfactory answers to these and like questions. The reason is probably that he does not desire certainty *per se* in constitutional law, but only certainty when particular types of cases arise. His championship of the "preferred freedoms" doctrine, a subject that will be taken up in a subsequent chapter, was begun years before he made his incorporation proposals. Justice Black is deeply committed to the protection of civil rights. To justify the preferred position that he gives them, something more than personal choice seemed necessary. Justification on the basis of a variant natural law philosophy—Frankfurter's deep-felt convictions of the English-speaking people as expressed through due process—was supposedly uncongenial to the rest of Black's positions. Therefore he turned to the history of the Fourteenth Amendment in an effort to prove that his actions in elevating civil liberties protection against the states had been validated long ago. In that way he did not have to give reasons for his choices since they were predetermined and he could avoid the appearance of any personal involvement in holding state officials to account, since his actions were automatic responses to the defined specific clauses of the Bill of Rights.

Black is not alone in trying to conceptualize constitutional interpretation whereby legal terms are rigidified in terms of past legal experience. Most members of the Court, including Frankfurter, have taken part in such ventures. Once conceptualization has taken place, however, it becomes extremely difficult to revise the working bases for constitutional law. Conceptualization may, indeed, preclude development within a legal system of new techniques for meeting new problems that cannot be encompassed within time-honored patterns. It would be a very unusual person who would deny the great advance that the Bill of Rights represented at the time of its adoption or who would even question its present-day significance. But to suggest that the eighteenth-century ideals that are there incorporated represent the end-all and be-all of constitutional development is a refusal to face facts. The Supreme Court must deal with the problems of today in their own setting. As Charles P. Curtis has aptly remarked,
there is no reason why we should not encourage the Court to do better by us than Congress saw fit to propose to our forefathers. We do not want to get stuck in the eighteenth century. Why should the Court's standards of political behavior . . . be forever eighteenth century? What Black proposes is an escape into the past for fear of the future. It is a little like a taste for antique furniture.\footnote{Charles Curtis, \textit{Lions Under the Throne} (Boston: Houghton Mifflin Co., 1947), p. 289.}

Granting for the sake of argument that Black's historical analysis of the Fourteenth Amendment is beyond reproach, there are still difficulties in accepting incorporation. For one thing, the framers of the amendment certainly were not explicit in what they were doing if incorporation was to be the end result. Vast constitutional changes were hardly to be brought about by innuendo and indirection. A cardinal premise for legal interpretation is that attention must be focused on the words used rather than on the presumed intentions of the users. As for the Fourteenth Amendment, past Courts have repeatedly rejected incorporation proposals similar to Black's. The Court's own history cannot be totally ignored, and its pattern of interpretation should make some difference. Even if Black's scholarship is completely accurate, a second thought is required before established policies are overthrown. He must become aware that, however creditable his desire to protect civil liberties may be, there is more to constitutional government than protecting but one facet of life in an enormously complex scene.

In summary, both Black and Frankfurter rely heavily on historical data to substantiate their contentions regarding the Fourteenth Amendment, due process, and incorporation proposals. Both protagonists look to the past in an effort to explain the present. Justice Black with his more specific concept of all first eight amendments would bind the states to a respect for the federal absolutes of the 1790's—absolutes as he himself interprets freedom, liberty, etc. Justice Frankfurter, on the other hand, with his dual approach to the Bill of Rights has refused to acknowledge that even specific amendments thereof are automatically transported into the generic Fourteenth Amendment. Confusion over his position stems from the fact that a double set of factors is in-
History and the Fourteenth Amendment

volved: (1) the initial specific-generic split within the Bill of Rights; (2) the wholly generic due process clause of the Fourteenth Amendment. Only by a survey of selected cases can the substantive nature of the due process be made evident and the differences in application of the Black and Frankfurter approaches exemplified.

III

Relating the specific terms of the Bill of Rights to the Fourteenth Amendment, Frankfurter admits that “each specific Amendment, in so far as embraced within the Fourteenth Amendment, must be equally respected.” His difference with Justice Black comes over the reasons why the ideals enshrined in certain amendments should be embraced while others are not. As far as the generic terms of the Bill of Rights are concerned, he takes an ambivalent position. There is little doubt that he finds freedom of speech, press, and religion protected against state action by the Fourteenth Amendment. This protection comes, however, not because of any absolute understanding as to the meaning of freedom, but because freedom of speech and other freedoms are characteristic of the civilized standards of English-speaking people protected by the legal term “due process of law.”

Comparing due process of law as found in the Fifth and Fourteenth Amendments he stated that “of course the Due Process Clause of the Fourteenth Amendment has the same meaning. To suppose that ‘due process of law’ meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection.” The paradox is that, in practice, Frankfurter himself has elaborately rejected such an identification. It is inconsistent to claim that the clause of the Fifth Amendment, which acts primarily as a fluid, supplementary mechanism to specific prohibitions in the protection of federal civil rights, is of the same range as the clause of the Fourteenth Amendment, which acts as a guarantee against state violation of civil rights

solely on its ability to encompass selectively both specific and
generic terms found in the Bill of Rights.

Which of the specific and generic guarantees does Justice
Frankfurter think so vital that they have become an integral part
of due process of law in the long course of its historical evolu-
tion? Cases involving coerced confessions, double jeopardy, self-
incrimination, unreasonable searches and seizures, right to coun-
sel, and the freedoms of the First Amendment have been mainly
responsible for the statement of his views concerning their rela-
tion to due process. All these cases require some element of judg-
ment on the part of Supreme Court justices. Especially is this so
for those concerned with coerced confession. Legal systems can-
not cope with the problems of free will and determinism; there-
fore, any line between voluntary and involuntary confessions will
be very thin. Justice Jackson once remarked, in an opinion joined
by Justice Frankfurter, that “custody and examination of a
prisoner for thirty-six hours is ‘inherently coercive.’ Of course it
is. And so is custody and examination for one hour. Arrest itself
is inherently coercive, and so is detention.” 14 Other considerations
than mere length of time under questioning are the decisive
factors in determining whether due process has been violated.
Since ours is an accusatorial rather than an inquisitorial system,
society carries the burden of proving guilt through evidence in-
dependently secured, but such a burden does not preclude all
questioning of an accused when judicial safeguards are provided.

In Malinski v. New York 15 the question was raised as to the
voluntariness of a confession obtained from a suspect held in-
communicado by the police for a ten-hour span. Although it was
established that Malinski was not physically assaulted, Justice
Douglas, in the opinion of the Court, found that the prisoner’s
apprehension that he might be beaten was evidence enough to
void the confession as coercively obtained. Justice Frankfurter
concurred, but in his opinion he was at some pains to disavow
Douglas’ innuendoes concerning the direct and automatic ap-
pliability of the entire Fifth Amendment to the states.

15 324 U.S. 401 (1945).
the Fourteenth Amendment placed no specific restrictions upon the administration of their criminal law by the States. Congress in proposing the Fourteenth Amendment and the States in ratifying it left to the States the freedom of action they had before that Amendment excepting only that after 1868 no State could . . . "deprive any person of life, liberty or property without due process of law," nor deny to any person the "equal protection of the law." These are all phrases of large generalities. But they are not generalities of unillumined vagueness; they are generalities circumscribed by history and appropriate to the largeness of government with which they are concerned.16

These phrases of large generalities were meant to serve as vehicles for the protection of civil rights. Overlaying the states with Amendments First through Eight would not necessarily accomplish this protection. Looking back to the drafting of the Fifth Amendment, Justice Frankfurter was convinced that due process had then, and had at the time of the adoption of the Fourteenth Amendment, a singularly unique purpose: it was to express a demand for civilized standards of law. It was not a stagnant, rigid formula but a criterion for judgment. He was willing to admit that due process had in the instance of Malinski been violated; he was unwilling to agree that due process would always be violated in similar situations.

The best way to give full consideration to Justice Frankfurter's constitutional and historical philosophy in this area is to quote from the Justice himself. The excerpt given below is a lengthy one, but it contains many of his insights concerning due process, history, and the judicial function.

Judicial review 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 people even towards those charged with the most heinous offenses. These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopeia. But neither does the application of the

16 Ibid., p. 414.
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 idiosyncracies of a purely personal judgment. The fact that judges among themselves may differ whether in a particular case a trial offends accepted notions of justice is not disproof that general rather than idiosyncratic standards are applied. An important safeguard against such merely individual judgment is an alert deference to the judgment of the state court under review.17

There has been evidence aplenty that judges do, in fact, differ among themselves as to whether a particular case offends "accepted notions of justice." Thus for some, Frankfurter included, historic due process does not always require the states to provide indictment by grand jury, or a jury trial, when the amount of suit at common law exceeds twenty dollars. These are specific requirements only for the federal government.

The states are under another compulsion, the compulsion of due process. Due process, then, is equivalent to "notions of justice," but it is justice under law. And law is here defined as the evolution of understanding concerning the historic rights attributable to individuals, whether these rights be implicitly or explicitly protected. Indeed, Justice Frankfurter has said that "Due process is that which comports with the deepest notions of what is fair and right and just. The more fundamental the beliefs are the less likely they are to be explicitly stated."18 In the case from which these views were taken, the particular point under discussion was whether an insane person or one who claimed insanity could be executed. Justice Frankfurter held that such an execution would violate due process. He, among all the justices, has most staunchly maintained this position.19

The second case identifying the substantive content that Justice Frankfurter gives to due process is Louisiana v. Resweber.20 The rather garish facts of this case often cause the statement of

17 Ibid., pp. 416–17.
principle contained in the Supreme Court opinions to be overlooked. Justice Reed announced the judgment of the Court, which was that constitutional prohibitions against cruel or unusual punishment or double jeopardy were not violated by proceeding with the execution of a death sentence by electrocution after an accidental failure of equipment had rendered a previous attempt unsuccessful. Justice Frankfurter concurred. Reed's opinion went into the general characteristics of due process and the uses to which it had been put with respect to the states. Although Louisiana's attitude toward Resweber might be vengeful, it was not illegal. Due process was not now, and had not ever been, a straitjacket into which state punitive measures could be pushed by stringent, judicially created conditions.

Justice Frankfurter took up the gauntlet thrown down by Justice Burton in a heated dissent. Referring to the due process and equal protection sections of the amendment as "broad, in-explicit clauses of the Constitution," he found that they had historic antecedents that "run back to Magna Carta." But he also found that due process and equal protection "contemplate no less advances in the conceptions of justice and fairness by a progressive society." 21 Advance is the key word in this quotation. While quite agreeing that the Bill of Rights was of the utmost importance for the federal government, and that at the time of drafting the first eight amendments the safeguards that they contained were great strides forward in the protection of individual rights, Justice Frankfurter nevertheless pointed out that "some of these safeguards have perduring validity. Some grew out of transient experience or formulated remedies which time might well improve." 22 All that the Fourteenth Amendment required was that the states be not oblivious to the dignity of man. This was, however, requiring a great deal. Determining what is the dignity of man is no easy business, as Frankfurter is the first to admit. During 1950 on a visit to Great Britain, he testified before the Royal Commission on Capital Punishment and made mention of the Resweber case as one that "told on my conscience a good deal. . . . I was very bothered by the problem,

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22 Ibid., pp. 467-68.
it offended my personal sense of decency to do this. Something inside of me was very unhappy, but I did not see that it violated due process of law.” 23 Frankfurter’s vote in Resweber probably did cause him a good deal of personal anguish in view of his deep humanitarian instincts, but he has come to accept the fact that due process of law is meant primarily to maintain the integrity of the legal system. It is not to be used as a crutch for a particular defendant. It is this acceptance that sets him off from his brethren in so many cases that otherwise would find him voting in a more activist vein.

IV

Justice Black’s incorporation proposals cannot be mentioned without treating the case of Adamson v. California.24 Almost forgotten in the glare of battle between Justices Black and Frankfurter, which broke out clearly in this controversy, is the fact that Justice Reed delivered the opinion of the Court. Briefly, he declared that the provisions of a California law that permitted the failure of a defendant to explain or to deny evidence against him to be commented upon and considered by court, counsel, and jury did not amount to a violation of due process of law. Even granting for sake of argument that the prohibition against self-incrimination had been made applicable to the states, California’s action was not equivalent to forcing self-incrimination in the traditional sense in which that concept was understood.

Justice Douglas joined Justice Black in an exasperated and protracted dissent. Taking violent exception to mention of natural law in the concurring opinion of Justice Frankfurter, they felt that the “decision and the ‘natural law’ theory of the Constitution upon which it relies degrade the constitutional safeguards of the Bill of Rights and simultaneously appropriate for this Court a broad power which we are not authorized by the Constitution to exercise.” 25 To prove this assertion, Justice Black

25 Ibid., p. 70.
appended to his opinion an elaborate history of the Fourteenth Amendment. His position in the Adamson case can be questioned on at least two counts. In the first place, the weakness of his historical exposition has been demonstrated in an extended study by Charles Fairman and Stanley Morrison, leading the latter to conclude that “the real significance of Adamson v. California is that four of the judges are willing to distort history, as well as the language of the framers, in order to read into the Constitution provisions which they think ought to be there. It is particularly regrettable that the great talents of Mr. Justice Black should be so misdirected.”

One such appraisal, while worthy of note, would not be conclusive. However, the charge in some form or another has been leveled by innumerable commentators on constitutional development. The general consensus of opinion seems to be that although accolades are usually due daring innovations they are not warranted for Supreme Court justices who must interpret, not create, constitutional terms.

As a second reason for close scrutiny of Black’s Adamson opinion, it is suggested that his condemnation of Frankfurter’s mention of natural law places him very much in the position of the man in the glass house who decided to throw stones. His plea for “judicial self-restraint” and abstention from natural law concepts is not entirely without contradictions. Protection from testimonial compulsion, whether framed in Fifth or Fourteenth Amendment terms, requires judicial definition and interpretation. Black’s substitute for Frankfurter’s adherence to a twentieth-century variant natural law position is the Bill of Rights, in some respects perhaps the eighteenth century’s most complete expression of a natural law philosophy. However specific the Bill of Rights is and however specifically the Fourteenth Amendment made it applicable to the states, some judgment is needed to put theory into practice. Black’s insistence on the validity of eighteenth-century philosophy as found in the Bill of Rights means that he must think it of enduring and timeless quality,

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certainly one of the basic conditions for any natural law concept. To prefer eighteenth-century natural law philosophy is one thing; to deny the implications of such a preference is quite another.

Justice Frankfurter's concurring opinion was framed to meet certain objections posited by Justice Black. He met head on the contention that the Court was exercising too much discretionary power in its dealing with due process by returning once again to a statement of political and legal history surrounding that concept. Justice Frankfurter then went on to say that due process concepts had many characteristics usually attributed to natural law thinking. This reference did not enter his opinion by accident. Considering his specific-generic catalog of constitutional terms, he subsumes under natural law the flexible provisions that, although not completely definable, have, nevertheless, an enduring vitality for the American system of government.

In a recent article he referred to natural law as "not much more than literary garniture" and "not a guiding means for adjudication." 28 It is unfortunate that he feels constrained to retract his former comparison between due process and natural law, for candidness would surely require admission that "notions of justice of English-speaking peoples" comes very close to being a modern statement of a very old theme. In any event, the importance of the Adamson case lies in the forceful statement of principle concerning the historical interpretation to be given the Fourteenth Amendment, not in the novelty of the positions, since these can be traced back for many years. In some degree it is true that violent disagreement in the Adamson case over the historical meaning of the Fourteenth Amendment only highlights the depth of the problem involved instead of producing any solution. But it is equally true that even restatement tells much about the philosophic approaches of those concerned.

V

The "warped construction of specific provisions of the Bill of Rights" against which Justice Frankfurter warned in the Adamson

case came somewhat to pass in *Rochin v. California*.

*Rochin* was forcefully administered an emetic that made him disgorge morphine tablets swallowed in an effort to keep them from state officers. The tablets were admitted in evidence at Rochin's trial. In a concurring opinion, Justices Black and Douglas held that this action amounted to self-incrimination. In order to do this, however, they had to expand a concept that most cases and commentators have limited to testimonial utterances. Mechanical incorporation of the Bill of Rights concept was unable to avoid the vagueness of due process in this instance. Fundamental safeguards for individual liberty were at stake, but, instead of the "civilized standards" test that Justice Frankfurter proposed, Black and Douglas blithely shifted the meaning of self-incrimination and then continued to insist that they were applying it in a way that had been historically defined.

Justice Frankfurter delivered the opinion of the Court in the *Rochin* case, and he based his ruling on due process grounds. Many years previously he had written: "I deem a requirement as to the invasion of the person to stand on a very different footing from questions pertaining to the discovery of documents, pretrial procedure and other devices for the expeditious, economic and fair conduct of litigation." The invasion of the person in Rochin's case could not be fitted into any specific category of prohibited actions found in the Bill of Rights. Justice Frankfurter thought that "in dealing with human rights, the absence of formal exactitude, or want of fixity of meaning is not an unusual or even regrettable attribute of constitutional provisions." Inequities such as those in the case at hand could thus be taken care of without distorting the Constitution. Words are symbols, and the symbol of due process was quite adequate, since it covered that which offended a sense of justice without trying to define just what that intangible is.

Given Justice Frankfurter's feeling about personal inviolability as expressed in the *Rochin* case, his vote in the more recent case of *Beithaupt v. Abrams* is difficult to explain. The controversy

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30 *Sibbach v. Wilson & Co.*, 312 U.S. 1, 18 (1941).
dealt with the legality of blood tests made to determine intoxication on an unconscious man. Since Warren and Black, along with Douglas, dissented from the Court's holding that due process was not violated, Justice Frankfurter was the senior member in the majority and had the privilege of assigning the opinion. It is somewhat odd that he assigned the task to Justice Tom Clark instead of writing himself in view of the fact that the dissenters relied heavily on the Rochin decision. Remaining silent in the majority, Frankfurter of course gave no indication as to his reasons for arriving at what appears to be two conflicting positions.

Wolf v. Colorado\(^3^3\) and Irvine v. California\(^3^4\) adequately present Frankfurter's views concerning the degree to which due process equals the protection against unreasonable searches and seizures that is given by the Fourth Amendment. While in federal cases he is one of the staunchest supporters of strictly applying the specific prohibitions of the Fourth Amendment, when comparable situations come up from states under terms of due process, another factor enters in, and that is his extreme deference to state judges in working out their own procedures. In the Wolf case, Frankfurter held for the Court that evidence seized in a search without warrant could be admitted in evidence at the state trial of an abortionist even though such evidence would have been excluded from federal proceedings. He followed a course that is very characteristic, that of citing numerous justices before him who had voted in similar cases the way he was now voting.

The case of Palko v. Connecticut,\(^3^5\) one of the most extensive discussions and rejections of incorporation proposals before Frankfurter came on the bench, was reverently cited. "That decision speaks to us with the great weight of the authority, particularly in matters of civil liberty of a court that included Mr. Chief Justice Hughes, Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice Cardozo, to name only the dead."\(^3^6\) Justice Cardozo in


\(^3^4\) 347 U.S. 128 (1954). For a discussion of these cases see Emerick Handler, "The Fourth Amendment, Federalism, and Mr. Justice Frankfurter," *Syracuse Law Review*, viii (Spring, 1957), 166–90.

\(^3^5\) 302 U.S. 319 (1937).

the Palko case had spoken of the process of inclusion and exclusion by which certain concepts were encompassed within due process while others were not considered basic enough to warrant equal treatment. Frankfurter on many previous occasions had accepted the inclusion-exclusion terminology. In the Wolf case he made his acceptance very explicit indeed, saying, "basic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities." The human desire for harmony and definiteness might call for a rejection of the inclusion-exclusion approach to due process, but all that such a rejection would accomplish would be to attempt satisfaction for the unsatisfiable longing for certainty, losing sight thereby of the fact that the law must deal with the evolving movements of a free society.

In the Irvine case, Justice Frankfurter dissented from the Court’s holding that evidence secured against a gambler through use of concealed microphones located at various places in his home was admissible in a state court. Remarking that "observance of due process has to do not with questions of guilt or innocence but the mode by which guilt is ascertained," Frankfurter tried to explain how he could stand on opposite sides of the line in two cases as similar as Wolf and Irvine.

Empiricism implies judgment upon variant situations by the wisdom of experience. Ad hocness in adjudication means treating a particular case by itself and not in relation to the meaning of a course of decisions and the guides they serve for the future. There is all the difference in the world between disposing of a case as though it were a discreet instance and recognizing it as part of the process of judgment, taking its place in relation to what went before and further cutting a channel for what is to come.

Justice Frankfurter apparently did not make his distinction between empiricism and ad hocness clear to some of his compatriots. They chided him upon the difference in result between a slight and severe shock to the judicial conscience. They also questioned whether an empiric or an ad hoc approach would help shape the

87 Ibid.
conduct of local police at all. Some of these comments were extreme in implication, but they did pinpoint Justice Frankfurter’s difficulty regarding search and seizure and the due process clause. The only thing that could be added is his insistence on due process as an historic term protecting basic liberties, which may change with time and circumstances. In this sense, a severe shock may very well have different repercussions and ramifications than a mild shock upon the judicial conscience.

The very recent case of Frank v. Maryland in which Justice Frankfurter upheld a health inspection official’s entry into a house without a warrant has occasioned a good deal of comment. This decision is, however, not at variance with his other votes. Leaving aside the community’s legitimate interest in sanitary conditions and the fact that the procedure followed to gain entrance had long been established within the state, Justice Frankfurter was mainly concerned with showing that the protection against unreasonable searches and seizures was to protect individuals from having evidence that could be used in subsequent criminal proceedings taken from their dwellings. This is the exact emphasis used in discussing self-incrimination, whether in the Fifth Amendment proper or in its transcribed version in the Fourteenth. In each instance, history is relied upon to prove that the dual protections are limited to criminal cases. Since no criminality was involved under the contested ordinance, references to the concept of unreasonable searches and seizures were inappropriate.

Litigations concerned with right to counsel also become involved in the debate over the Fourteenth Amendment. Foster v. Illinois, decided the same day as the Adamson case, displays once again the various positions. In the majority opinion Justice Frankfurter held that, although the record in a state court did not disclose an offer of counsel upon a plea of guilty to burglary and larceny by mature defendants, they were not denied a fair trial and had not suffered violation of due process of law. Taking into account that the men involved were both over thirty years old and both were mentally competent, he could find no extenuating circumstances that would allow the Court to overrule the state

40 352 U.S. 134 (1947).
decision, especially in view of the fact that the men had been advised of their rights of trial and of the consequence of a plea of guilty. Due process was, after all, itself, an "historical product" and should not, therefore, "furnish opportunities hitherto un­contemplated for opening wide the prison doors of the land." 41

The dissenting quartet of the Adamson case remained intact. Justice Black's opinion almost vibrates with the intensity of his feeling.

This decision is another example of the consequences which can be produced by substitution of this Court's day-to-day opinion of what kind of trial is fair and decent for the kind of trial which the Bill of Rights guarantees. This time it is the right of counsel. We cannot know what Bill of Rights provision will next be attenuated by the Court.42

Justice Black spoke almost exclusively in terms of the Bill of Rights. He did not bother to belabor his incorporation proposals but tacitly assumed that his position had been made perfectly clear in the past. In the Adamson and Foster cases he came closest to having these proposals accepted by the majority of the Court. Missing by just one vote in 1947, the Black tide slowly turned with changes in Court personnel and now, a little over a decade later, the recession has reached the point where only Justices Black and Douglas, and perhaps Chief Justice Warren, are definitely committed to the plan of making the first eight amendments completely and wholly binding upon the states.

Justice Frankfurter's reading of Fourteenth Amendment history has won out for the time being over the interpretation of his more activist brethren. Certainly this is true in right to counsel cases. In a relatively recent controversy the legality of an Ohio statute making "in camera" hearings by fire authorities standard procedure was challenged on the ground that the due process clause of the Fourteenth Amendment required the presence of counsel for the person under interrogation. The Court rejected this contention. Justice Frankfurter concurred. Since even the specific Sixth Amendment required assistance of counsel only in criminal

41 Ibid., p. 139.
42 Ibid., p. 140.
cases, he thought that even "the utmost devotion to one's profes­sion and the fullest recognition of the great role of lawyers in the evolution of a free society cannot lead one to erect as a constitu­tional principle that no administrative inquiry can be had in camera unless a lawyer be allowed to attend." 43

The dissenting opinion of Justice Black illustrates in another form the illusory precision of incorporation proposals. As with bills of attainder and self-incrimination, historic terms were distorted. The administrative hearing under the Ohio statute was treated as if it were a criminal proceeding in the constitutional sense. If the law is to be looked upon as a science of words, words to be used in their exact meanings, with all the precision that human utter­ance can give, then there does seem to be some difficulty in equating nonlegal conceptions with legal phraseology. Black was quite explicit in giving his reasons for such equalization.

It may be that the type of interrogation which the Fire Marshall and his deputies are authorized to conduct would not technically fit into the traditional category of formal criminal proceedings, but the substantive effect of such interrogation on an eventual criminal prosecution of the person questioned can be so great that he should not be compelled to give testimony when he is deprived of the advice of his counsel.44

Once again Black the humanitarian has outvoted Black the his­torian and lawyer.

VI

Giving substantive meaning to due process entails infinite shades of interpretation for infinite circumstances. Justice Frankfurter's positions in several important fields have been cursorily surveyed. One could go on further to extended treatment of the relation of due process to almost any of the clauses in the Bill of Rights or to general notions inherent in a legal system. How far, for instance, is freedom of speech or freedom from censorship

protected by due process? Can racial discrimination be handled under this concept as well as under equal protection? These and other like questions would have to be answered if a complete appraisal of Frankfurter's philosophy in terms of the historical meaning of the Fourteenth Amendment were undertaken. Suffice it so say that he follows an empiric course and still holds fast in all due process cases to an opinion offered many years before he came to the Supreme Court. “Legal schemes often derive importance from what they do not formulate. Freedom for future needs is thus allowed.”

Much has been made of the supposed equivocation in Justice Frankfurter's treatment of due process. His gradual inclusion and exclusion of Bill of Rights guarantees on the basis of "civilized standards of behavior" has brought forth the charge that he fosters uncertainty in constitutional law. Held up for praise is the supposed certitude of the Black-Douglas interpretation. Accepting for the moment the Black-Douglas thesis, there is no assurance that here, too, equivocation will not be evident; it will be evident on the level of the Bill of Rights itself and may through incorporation also be removed to the level of the Fourteenth Amendment. With their emphasis on making specific most of the first eight amendments, Justices Black and Douglas presuppose that terms contained therein can be given a constant, defined historical meaning. Regardless of the amount of historical material that can be marshaled to their support, it is evident that all justices must frame constitutional definitions somewhat in terms of their own personal and experiential structures. When material is not originally encompassed within a definition (or is afterwards fitted in by mutilating the definition itself), self-effacement will not distort the fact that a discriminating choice has been made.

Again accepting for the moment the position that equivocation is a part of the Frankfurter treatment, is there any reason initially to remove that process one step from the Bill of Rights?

46 See, for example, Railway Mail Association v. Corsi, 326 U.S. 88 (1945).
If the difficulty attendant on arriving at specific definitions for all Bill of Rights terms is recalled, and if the Frankfurter insistence on the use of generic terms as constitutional safety-valves is reconsidered, then some light is shed on his desire to have “inclusive and exclusive” associated with the due process clause of the Fourteenth Amendment. Feeling himself constrained by history to admit that certain prohibitions are specific, Justice Frankfurter wishes to avoid the artificially contrived difficulty of making the entire Bill of Rights a rigid construct. More important, since historic due process is for him anything other than a technically confining legal technique, he desires above all to allow free play and choice through the Fourteenth Amendment.

His understanding of the “civilized standards of English-speaking people” involves no more self-assertion or personal preference than do the Bill of Rights choices of Justices Black and Douglas. This is not to say that the choices that he does make will not be anathema to certain groups. It does, however, allow conjecture that the main distinction between Justices Black and Frankfurter is the latter’s open admission that change and advance are necessary and possible in constitutional law without giving up all the benefits of continuity with the past. He then proceeds to furnish the reasons to prove his contention. Justice Frankfurter is not as candid as some would desire in recognizing his judicial influence in shaping that advance—but none of his fellows on the bench are overanxious to announce the fact that all constitutional interpretation contains a sizable amount of individual leaven.

The philosophies of history followed by Justices Black and Frankfurter are, in many respects, individualized manifestations of broader streams of jurisprudential thought. Much of current legal thought stems from orthodox historical jurisprudence of the nineteenth century, which denied jurists any creative role in formulating or applying the law. Legal precepts had binding force, for they were the expressions of principle discovered through human experience. The only task of the judge was to articulate these principles in the technical language of the courtroom. With the turn of the twentieth century, social standards of justice, which were the implicit bases for expressions of principle,
took the limelight from the evolutionary emphasis of the historical school. In the United States, Roscoe Pound spearheaded the drive for the newer sociological approach. Once new ways of looking at legal materials became prevalent, there was a proliferation of speculative theories concerning the nature of legal phenomena. Legal realism and advanced analytical studies took on stature in the early decades of this century.

Justice Frankfurter utilizes an approach to constitutional interpretation drawn from many sources. From historical jurisprudence he takes the evolutionary views; from sociological jurisprudence, a fundamentally pragmatic attitude; from analytical jurisprudence, word skepticism and a disbelief in the fixity of concepts. The outcome of such an amalgam is a developmental view of the law that will by sympathetic to legislative attempts at revamping the content of vague constitutional provisions. Determining which are the vague provisions is done by historical research. Out of this position, however, grow several contradictions.

In the first place, Justice Frankfurter wants the flexibility traditional in the English system of government. This he attempts to gain through use of due process. But he also wants legislative responsibility, which would entail a full code of behavior in the Benthamite sense. This is almost an impossible combination, but it is a combination that he has tried to work out. In treating the flexible, generic provisions of the Constitution, he displays his Anglophile tendencies to their greatest extent. This may be mere personal preference, but others certainly not of Anglophile persuasion have also pointed out that “in a sense the United States has no written constitution. The great clauses in the Constitution . . . contain no more than an appeal to the decency and wisdom of those with whom the responsibility for their enforcement rests.” 48 Justice Frankfurter would prefer the legislature to have such responsibility. But he is wise enough to know that because “in a sense the United States has no written constitution,” and because no code of law can be entirely self-contained, the Supreme Court along with the legislature must act, and Justice

Frankfurter acts largely through due process. He thereby impliedly rejects the limited role of the judge and legislator advocated by the historical school of jurisprudence. He accepts instead the more positive sociological and analytical interpretation.

A second apparent contradiction springs from the fact that rejection of the fixity of concepts would seem to rule out any proclivity toward a traditional "natural law" orientation. Yet Justice Frankfurter speaks of due process as enveloping the "eternal verities" of English-speaking peoples. Probably the clue to clearing up this misunderstanding lies in the fact that any description of social forces at work in a particular era and the way these forces interact is apt to be couched in terms of timeless abstractions. It is in this sense that Justice Frankfurter follows what may be called a natural law course. As long ago as 1913 he wrote that "if facts are changing, law cannot be static. So-called immutable principles must accommodate themselves to facts of life, for facts are stubborn and will not yield. In truth, what are now deemed immutable principles once, themselves, grew out of living conditions." 49 In trying to arrive at the consensus of society in the meaning of due process, Justice Frankfurter is utilizing the very essence of abstract notions and general concepts—immutable principles—in order to bring them up to date. 50 His metapsychotic method is, no doubt, open to question, but it is one facet of much current thinking about human perception in general. Jung's theory that long-range values of mankind can be distilled partly from the collective unconsciousness of the human race and the radically empirical, undifferentiated field consciousness that modern Confucian, Buddhist, and Hindu thought attribute in common to all persons are two manifestations of the same theme. 51

Both Justices Black and Frankfurter came to maturity in the period when legal realism put many general principles under


attack. Neither has completely escaped from the climate of opinion current in their developmental period. For this reason it is often difficult for them and others of their generation to feel comfortable in invoking universal principles of fundamental law. Justice Black has felt more at home with the stricter version of the historical school whereby the creative role of the judge is underplayed. Justice Frankfurter, on the other hand, has passed beyond strict adherence either to historical jurisprudence or to the legal realism in which he was raised. If, in trying to use history as one means of isolating the ultimate values in human personality and society, Justice Frankfurter appears to contradict himself in many instances, it is suggested that he is working on the frontiers of legal thought and that any advanced post is liable to the dangers of heavy frontal assault. But it is only by such expeditions, however tenuous they may be, that knowledge of the terrain ahead is gained.