Felix Frankfurter

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The Role of the Judge

Of all the members of the Supreme Court serving during his tenure, Justice Frankfurter has probably been the most acutely aware of that elusive concept called "the judicial function." This is a topic that has intrigued jurists and laymen alike. For those with a philosophic bent, examining the processes by which any individual reaches a decision and placing the judicial hierarchy in its proper relation to other co-ordinate branches of the government become of the utmost importance. In his writings both before and after his elevation to the Supreme Court and in his pronouncements issued both on the bench and off it, Justice Frankfurter has shown keen attention to the function of a judge in modern society.

His courtroom behavior and his conference room performance, his many individual opinions and his style for expressing such opinions, all are related to a broader interest in the judicial function. All must be summarily covered before passing on to a final evaluation of Justice Felix Frankfurter as the scholar on the bench.
“The Man Who Talks So Much”

During oral arguments of a recent case before the Supreme Court, a visitor to the imposing and impressive courtroom turned to the small boy beside her to explain that “the man who talks so much is Justice Frankfurter.” The Justice’s loquaciousness has drawn comment not only from this visitor but also from students of the Court. If he is prodigious in the quantity and intensity of his oral performance, his written contributions are no less diffuse and numerous. He freely uses all forms of communication to put across the points that he thinks are important. It is difficult to assess the work of some of his judicial compatriots because they have written or spoken so little; it is equally puzzling to deal with Justice Frankfurter because he has written or spoken so much. In a facetious introduction to a technical legal lecture before the New York City Bar Association, he disclosed that he had his wife “blue-pencil all my non-judicial writings.” “When I told that to

1 Heard in courtroom, February 26, 1957.
Justice Jackson," he continued, "he said, 'why don't you extend the censorship?'" 2 Doubtless others would echo this question.

I

A growing backlog of pronouncements was available when Professor Frankfurter became Justice Frankfurter. Although he is in many ways an enigma because of his prolificness, those who have been disappointed over his showing should find the fault to lie not in his past but in their premises. He defies classification in terms of "liberal" or "conservative" concepts—coffins, as Professor Louis Jaffe has called them. He is an exceedingly complex man as his myriad pre-Court and Court writings show. His long and intricate opinions often sound like professional lectures, which, in some sense, they are supposed to be. Justice Frankfurter's work includes a recurring theme and that is the justification for writing opinions at all and the functions of opinions after they are written. His perhaps too numerous contributions to the field of legal literature cannot be dissevered from this facet of his judicial performance.

The Justice has issued a warning to anyone who would attempt an appraisal of a jurist solely through his opinions. As an analyst of the Court, he had written that "inferences from opinions to the distinctive characteristics of individual justices are treacherous, except in so far as a man's genius breaks through a collective judgment, or his vivid life before he went on the bench serves as commentary, or as he expresses individual views in dissent or through personal writings." 3 Certainly the interaction of the conference room is beyond the ken of the ordinary observer. Changes noted on the margin of slip opinions, the nuances of inserting one word for another, subtle variations that do not appear in published opinions, all these must remain outside the area of knowl-

edge held by non-Court members. But as Justice Frankfurter himself has also reminded us, "a judge of marked individuality stamps his individuality on what he writes, no matter what the subject." 4

Soon after he came on the Court he indicated that when important shifts in constitutional doctrine were to be consummated, he thought that each justice should express his own feelings. The early practice of seriatim opinions he thought at times had real value. 5 Since then he has said on many occasions that "when the way a result is reached may be important to results hereafter to be reached, law is best respected by individual expression of opinion." 6 Respect for law prompts him to limit or clarify the more sweeping holdings that some of his more expansive brethren would perpetuate. The law is an on-going concern of society. Not only must it tie in with precedents, but it must also provide the seed-bed for future decisions. When language is not carefully chosen, when mistaken assumptions can be drawn from ambiguity, when dramatic exposition may end in ultimate confusion, Justice Frankfurter thinks that it is incumbent upon some member of the Court to mitigate the disastrous consequences that can flow from too absolute pronouncements.

On the rationale for dissent he has been quite clear. Justice Frankfurter often uses dissenting opinions to forewarn future justices that all is not as settled as appears in the majority opinions. The frequency with which concurring or dissenting opinions are cited instead of the supposed holding within any case suggests that the Justice's efforts are not completely in vain. In 1929, before any positive suggestion of his elevation to the Supreme Court may have intruded upon his objectivity, he wrote that by doing away with dissenting opinions, "American law, particularly constitutional law, is deprived of one of the most wholesome elements in its growth." 7

On becoming a member of the Court, Justice Frankfurter continued the campaign, begun as a professor, against crowding the

court's docket and in favor of allowing ample time for reflection. Both these conditions were prerequisites for the leisure necessary if worthwhile concurring or dissenting opinions were to be written, opinions that might help to focus attention on the continuity or changes being wrought in the law. The focusing process, against charges of repetition, might have to be repeated over and over again. In 1932 Frankfurter communicated with Stone, chiding him for an apology that his dissents only reiterated earlier views. "For Heaven's sake," he answered, "don't get the notion that you are 'repeating the old story' or, in the alternative that it does not need to be repeated. After all, you are an educator, even more so on the Supreme Court than you were off it. . . . The whole nation is your class. . . . Don't let yourself get weary of well-doing." This conception of a Supreme Court justice as educator has colored Justice Frankfurter's oral and written performance on the Court.

His numerous dissenting expressions over the last two decades often obscure the fact that from his appointment to the Court in January, 1939, until the end of the Court's work in June, 1941, he had written but two dissents and these came fairly well along in the latter year. His other separate expressions were just as scarce. With the addition of more justices with a libertarian-activist bent, the Court set out on its course of protecting the individual above all else. Justice Frankfurter did in some respects then become the great dissenter. His exercise of this right was based on the philosophy of dissent expressed before going on the bench, a philosophy that he continued to expound now through his opinions. While fighting to curtail his colleagues' tendency to bring up cases of less than national importance, he has insisted that once a case is before the tribunal, he has a right

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to speak his mind—"the same considerations which made the case one of general importance for review here made it appropriate to spell out the grounds of dissents." 11 Dissents were used to point out faults in the Court’s procedure as well as fallacies in the substantive reasoning. Justice Frankfurter is a man with a good many deep convictions about constitutional law, the place of the Court in modern society, and last, but not least, the judicial function. His belief that dissents are vitalizing influences, that they provide wholesome elements to legal growth, and that though the Court is ultimately operated by majority rule each individual member must be true to his own conscience, prompted him in the middle years of his tenure to attack vigorously the actions being taken.

There are drawbacks, however, to appearing in print so often. Justice Jackson once noted that "each dissenting opinion is a confession of failure to convince the writer’s colleagues, and the true test of a judge is his influence in leading, not in opposing his Court." 12 Justice Frankfurter has been to the confessional often. In addition, prolificness, whether warranted or unwarranted, evokes a good deal of irritation from persons on and off the Court. Explanations for Frankfurter’s frequent contributions range from a superficial desire for vanity satisfaction to a deep-felt psychological need for articulateness. Not all discussion of the proliferation of opinions stems from personal irritation. Some of it is prompted by reflective concern for the welfare of the Court as a governmental institution putting into words the enduring interests of society. As one critic of the move away from unanimity to individuality, Carl B. Swisher, has put it, “When a judge speaks officially he speaks in the name of the law and his words carry a weight not derived from other positions in officialdom.” 13 Suggesting that for the general public, overtones of natural law, fundamental rightness, even deity, are found in Supreme Court pronouncements, Professor Swisher, as do many other qualified observers, seems to feel that, in the normal run of events, mono-

theism is to be preferred to polytheism. He finds that much personal responsibility for the present pantheon must rest with Justice Frankfurter. It is true that Frankfurter’s frequent expressions cause other members to take up the cudgels in defense of a favorite position. This cause and effect sees two or more opinions being written in a case when one would probably have served. The basic division then seems to be over the question of how beneficial or harmful to constitutional law is this proliferation.

Most persons who have occasion to use the reports of the Court would agree that quantity has often replaced quality. But are there not equal drawbacks in having but a single opinion for all nine men? As Alexander Pekelis says, “the very conception that a court—or a country—to be dignified, orderly, and authoritative, must speak as a unit assumes that harmony, progress, and order can be achieved only through unity or uniformity.” To present a false front of accord when there are deep cleavages present, to stifle individual expression on the theory that only in unity can the Court articulate the ethical underpinning of constitutional law, or to make greater the possibility of violent disagreement erupting by postponing its initial appearance, seems just as doubtful as writing opinions on picayune topics or the casting of personal aspersions in those opinions, which we sometimes find. In a different context, Justice Jackson once remarked that you can attain unanimity through eliminating dissent, but it will be the unanimity of the graveyard. However much some people may think the Supreme Court building looks like a mausoleum, its occupants are very lively spirits.

In our idealized picture of the Court, we see it translating into words and decisions what are inarticulate premises and feelings. We are attuned to “the spirit of the Constitution” and are pleased when nine men sitting in Washington are able, preferably through one voice, to give substance to the spirit. Yet in our sophisticated way, we reject any notion of an automaton, mechanically receiving the right answer to all questions merely by comparing a statute or behavior with the text of the Constitution. We recognize that judges are men, not gods, that they are heir to all the

sins of the flesh, that they are fallible. When, however, they exhibit their mortality and, either through egotism or genuine mistakenness, find that it takes more than one voice to give homage to "the spirit of the Constitution," we are slightly disgruntled. There is more than a little irony here.

II

Stylistically, how do Justice Frankfurter's opinions compare with others? What is his own conception of their purpose? Shortly after he went on the Supreme Court, an appraisal was made by a newspaperman covering the Court's work.

Press excitement over the first opinions handed down by Justice Frankfurter cooled noticeably when the reporters began to read them. They were tough going . . . .

Big words do not necessarily strangle reporters. Most of them know a few themselves. But the job of converting big words into little ones for clear and quick newspaper reading, without losing a shade of the proper meaning, was an extra task that the reporters did not relish.15

Put briefly, Justice Frankfurter did not write to be understood by newspaper readers. His conception of a Supreme Court opinion is far different from this.

Justice Frankfurter's opinions are the repositories for some of the most exotic words in the English language. His interest in words, their history and slightest gradations in meaning, finds an outlet in his writings. It is not unusual to come across such brain-teasers as "palimpsest" or "gallimaufry" in the middle of a technical discussion. He also loves figures of speech that are colorful but at the same time meaningful. His references range from the nautical Plimsoll line to Elizabethan sonnets.16 A voracious reader, who, unlike Justice Holmes, does not find it necessary to

cover an entire book in order to extract its essence, his taste runs from works on *Jeremy Bentham and the Law* to *Einstein, His Life and Times*. In rhetorical form he at one time questioned, “How can we possibly lay claim to being a learned profession unless we have an avid interest in books and so order our lives that somehow or other we wrest time from the demands upon us to keep the mind alive as only books can?” Maintaining an interest in scholarly production (Mark DeWolfe Howe has recently said that “so many authors have expressed their gratitude to Mr. Justice Frankfurter that it is becoming almost a ritual of scholarship to acknowledge indebtedness”) he brings all these forces to bear in his composition.

It may be said of his style that it is dangerously attractive. His writing is so quotable that even those who disagree with his positions find it difficult to avoid the temptation of utilizing his elegance and eloquence. Tidiness and precision normally characterize his prose. He is agile in shifting ground in an argument, being able to bring about changes in ideas without appearing to do so. Justice Frankfurter’s opinions are at times dulling in their enormity and eternity of references. His elongated appendices, although of use in research and analysis, make difficult reading. Granting all this, are there any redeeming features that, while not dispensing with merited criticism, help to explain the situation? The Justice’s own impressions on the matter of opinion-writing should carry some weight. As he perceives it,

> style reflects the writer’s notions of the form in which an opinion should be cast or his desire to promote one purpose rather than another. . . . Again it makes a difference whether an opinion-writer consciously aims to be understood by the casual newspaper reader, or whether he has a strong sense of the educational function of an opinion within the profession, and more particularly among law teachers, or writes merely to dispose of the case.

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This latter alternative can be discounted in the case of Justice Frankfurter. If one recalls the newsman’s lament and the Justice’s own communication to Justice Stone on the importance of the educational function of opinions, there can be little doubt about what he considers the prime motivation for expression. He has not shaken the teacher’s prejudice that communicating information to the young, especially in the law schools, is of vital importance to the future of the nation.

Justice Frankfurter’s writings are not meant for those untrained in the law or its sister disciplines. Within that limitation he feels free to soar to unlimited heights in his use of allegorical or figurative references in his opinions. When he wishes to write for the general public, something he has done and continues to do quite successfully, he uses other media, such as articles and letters to newspapers, to transmit his message. In his off-the-bench contributions he can be as eloquent as any libertarian-activist member of the Court. In writing opinions for the Court, in contrast to writing for popular consumption, he is much more careful in what he has to say. Because of his style, his opinions cannot help but be emotive in part, but their major purpose is communicative and educational.

Even when using colorful language, he appears quite circumspect in what he has to say. Familiar with the innuendos of past opinions, possessing a fund of knowledge on their appearance and meaning, and seeing the exact shading that seems to elude some of the brethren, he strives in his own work for clarity of statement through the use of words with exact meanings. His interests span the world. If he finds a British or Australian case applicable, he does not hesitate to cite it, nor do foreign courts hesitate to cite him. Chief Justice Sir Owen Dixon of the High Court of Australia has said: “You will see Frankfurter’s name again and again in the reports of the constitutional decisions of the High Court. When you find in judicial writings repeated reliance upon the words of a contemporary judge, especially of another country, you may safely infer that his opinions tend to throw new light in dark places . . . .”

In the attempt to attain clarity, exactness, and precision of

statement and holding, there is a good deal of danger, however, in relying too heavily on comparative law. The examples taken may be selective and not representative. To be really meaningful, there must be comparable economic, social, and political conditions in which the decisions are rooted. Too easily to assume such comparableness is to disregard basic tenets of sociological jurisprudence with which he is familiar. This is one of the weakest links in Justice Frankfurter’s armor. Acknowledging that exactness is a prime requisite for a Supreme Court opinion, he seems tempted by his interests to include at times not really analogous foreign citations. His belief that opinions also have to be educational probably prompts him to extend the field of that education. At times he does it successfully, at other times not, often to the considerable annoyance of other members of the High Tribunal.

Criticism of the Court over its myriad opinions has probably had an effect upon the way in which they are now written. Since the advent of Earl Warren’s Chief Justiceship, opinions for the Court have been more general and vague. Because the Court is more conscious of the need for unanimity, and in order to gain the greatest consensus possible, broad generalizations have become frequent. Alexander Bickel, a former law clerk of Justice Frankfurter, has interestingly noted that current opinions have the “vacuity characteristic of desperately negotiated documents.”

Not all those who advocated cutting down on the number of opinions foresaw this untoward turn of events. Broad generalization often means, in addition to inexactness, absoluteness. These are two fatal sins for Justice Frankfurter. The fact that they have appeared together with more frequency in recent years accounts somewhat for the number of his concurring and dissenting opinions.

Another reason for his frequent appearance in print is his dislike for *per curiam* opinions. As a scholar in his annual articles on the Court he excoriated their use, finding that they did not give sufficient direction to the lower courts and bar and that often, by mere citation of cases, they confused rather than clarified the

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situation. He thought it far better that review be denied entirely if the Supreme Court, through specifically spelling out the grounds for its decision, could not edify the profession. Justice Frankfurter has carried this conviction with him to his work on the Court. While the writer's personality has a great deal to do with it, to account for his style and opinions as mere ego-satisfaction or as an off-shoot of vanity is far too simple an explanation.

Perhaps the overriding distinguishing characteristic of Justice Frankfurter's opinions is the amount of space he gives to speculation on the nature of the judicial function after the particular points at issue have been decided. Of all the justices since Cardozo he typifies the deepest philosophic approach to the problem. Others may use Supreme Court opinions as tracts for the propagation of political theories; he uses them as vehicles of expression for the distillation of a lifetime's preoccupation with the essence of a judge's role and tasks. His observations on this topic are provocative and profound. Being included in official writings, they have the aura of having been pronounced from the bench and thus psychologically seem to carry more weight. If the function of an opinion is to communicate and educate on the technical points of law, it is no less important to Justice Frankfurter as the means to familiarize the lower courts and bar with the agony of judging, an agony that is at the core of the judicial function for him.

III

Justice Frankfurter has quoted approvingly Justice Holmes' aperçu to the effect that law becomes more civilized as it becomes more self-conscious. But he has also recently complained that, with the notable exceptions of Justices Holmes and Cardozo,

The power of searching analysis of what it is that they are doing seems rarely to be possessed by judges, either because they are lacking in the art of critical exposition or because they are inhibited

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cite|loc.

See, for example, Frankfurter and Landis, “The Supreme Court at October Term, 1928,” loc. cit.

See, for example, Frankfurter and Landis, “The Supreme Court at October Term, 1928,” loc. cit.

THE ROLE OF THE JUDGE

from practicing it. The fact is that pitifully little of significance has been contributed by judges regarding the nature of their endeavor . . . .26

Following in the steps of his predecessors, Justice Frankfurter is not inhibited in discussing this subject. For any practicing jurist, a discussion of the judicial function must contain a large measure of introspective material. As is fashionable, terms have been coined to cover this type of performance, and we now speak of introspective or psychological jurisprudence.

If there is one word that Justice Frankfurter uses more than any other, even than "self-restraint," it is "disinterestedness." Of course, the two are intimately related in his judicial philosophy, but it is telling that his drive to transcend personal limitations should loom so large in his perspective. Knowing his intense and vivid interest in so many topics, one may surmise that he reacts quickly to policy decisions. He must struggle hard not to become a partisan and allow his partisan feelings to be translated into his opinions. Perhaps his honest recognition of this temptation prompts him to insist that strict observance of the law be put before the strongest of personal sympathies or biases. In any event, he has reiterated the disinterestedness theme times without number.

He is realist enough to acknowledge that "of course, individual judgment and feeling cannot be wholly shut out of the judicial process." The main point, however, is that "if they dominate, the judicial process becomes a dangerous sham." 27 A jurist's conception of the scope and limits of his role can exert both intellectual and moral force on the development of the law. As for Justice Frankfurter, "the duty of Justices is not to express their personal will and wisdom. Their undertaking is to try to triumph over the bent of their own preferences and to transcend, through habituated exercise of the imagination, the limits of their direct experience." 28 Although he does not always conform to this ideal

in practice, his theoretical attachment to what he has called “dominating humility” must be understood as background for discussion of the judicial process.

“There is a good deal of shallow talk,” Justice Frankfurter has written, “that the judicial robe does not change the man within it. It does.” 29 This expression does not necessarily make him a devotee of the Cult of the Robe nor does it make him stand at variance with such thinkers as Jerome Frank, who believes that much harm is done by allowing myths to surround jurists, 30 or with Justice Black, who insists that “judges . . . like all the rest of mankind . . . may be affected from time to time by pride and passion, by pettiness and bruised feelings, by improper understanding or by excessive zeal.” 31 It is precisely because these things can be true that Justice Frankfurter insists on self-restraint. It is precisely because judges are human that they must limit their power. It is precisely because they are the ultimate judicial voice of the nation that they must be humble in their task. Feeling these propositions so deeply, he apparently believes that anyone who takes on the judging function must become more acutely aware of the responsibilities reposing upon him. In this sense, as he sees it, the robe does change the man. It is not because judges can do no harm that he insists on the robe’s transforming qualities; it is because judges can do too much harm that leads him to hope for transformation in its donning.

Perhaps both the strength and weakness of Justice Frankfurter’s position lie in the self-consciousness with which he works. He is quite convinced that the Court and its members are only a part, albeit an important part, of our government. On the other hand, he appears as convinced that the Court should try to transmit those values that make that type of government possible. His insistence on law as an inclusive reality not primarily meant to ameliorate the difficulties of a particular litigant is one facet of his solution for the situation when these major themes appear in imminent conflict. It is in working out the total solution that the

agonies of judging becomes for him at times almost unbearable.

Deference to the legislature, attempted objectivity, and proclamation of enduring ideals that cannot be encompassed within any pat formula, are a trio of very difficult propositions with which to work. Justice Frankfurter's opinions discussing the judicial function and the way he, as a representative jurist, conceives of the communication between people and Court often seem to contain "gossamer concepts." The strength of his position is in facing the hardships involved and in trying to put them into words for the edification of the profession; the weakness is his inability successfully to carry the entire burden. If he carries us but part of the way to an understanding of the judicial function, it is a good deal further than most of his brethren have ventured in print, and it is a good deal further than most commentators would be able to go without the insights that he has presented them.

IV

The early, vigorous attacks upon the fiction that judges were not human did not come from the modern, ultrarealist school of jurisprudence but from the group that championed a sociological interpretation of law. Roscoe Pound, Thomas Reed Powell, and to some extent Felix Frankfurter refused to believe that differing social, economic, and political backgrounds did not affect judges or that their variant educations, social affiliations, and environments could be completely discounted in evaluating their work. They were interested in determining how far jurists followed what would be their expected course of actions on the basis of these factors and how far some of them were able to put these factors behind them. In other words, they were interested in judicial motivation. Unlike some determinists who accounted for all behavior in terms of economic interest, they realized that any motivation was much more complex. They were actually talking about the psychology of judges and judging. For those so concerned, looking at their own psychological reactions did not seem remiss.
As a teacher, Frankfurter explicitly mentioned on more than one occasion that psychological factors and a judge's unconscious play an enormous part in understanding the judicial process. How that unconscious was formed and what factors went into any individual's psychological make-up were held important. While individual configurations were basic, sociological jurisprudence also had another element, which shows up to some degree in Justice Frankfurter's opinions. This element was that most individuals who were to become judges had at least some common denominator of background, some common identification with society. Each individual's Gestalt was, therefore, formed not only by particular experiences, but also by communal experiences as expressed in mores, customs, and beliefs. When Justice Frankfurter attempts to work with the standards of justice, concepts of ordered liberty, inarticulate major premises, he is in a way trying to limit the range of personal experience and concentrate on the communal. Thus perhaps he is being as consistent as possible with the two major strains of sociological jurisprudence, psychological analysis, and community interpretation. At least these are two of his major concerns in Haley v. Ohio.\textsuperscript{32}

Justice Frankfurter's opinion in that case has been called by Professor Herman Pritchett "perhaps the most remarkably frank and courageous analysis of the personal basis of judicial decisions ever included in a Supreme Court opinion."\textsuperscript{33} The opinion is one of the most perfect examples of introspective, psychological jurisprudence. Justice Frankfurter's self-consciousness over the need to explore the judicial function in order to avoid bias and approach objectivity is here turned in the direction of self-analysis. While it is one of the most perfect examples of this type of thought, it did not appear on the scene unforeshadowed or totally unexpected. It is in some ways the extreme extension of a judicial philosophy that finds self-restraint basic and in other ways the logical outgrowth of sociological jurisprudence.

In the Haley case, the defendant was a young Negro boy of fifteen. He had been subjected to five hours of continuous ques-

\textsuperscript{32} 332 U.S. 596 (1948).

tioning in the middle of the night by police in connection with a burglary and murder. No counsel was present. After the ordeal of oral examination was completed, the lad was not arraigned for several days nor was he allowed to see members of his family. The Court held that even though there was token recognition of constitutional rights in the confession that was signed, the way in which it was obtained and the personal facts surrounding the defendant invalidated a subsequent conviction. Four justices dissented. Justice Frankfurter held the pivotal position and through his concurrence allowed Justice Douglas to announce the judgment of the Court.

Believing that due process is a concept spun from societal values, Justice Frankfurter began by admitting that it was subtle and elusive as a criterion of judgment. Nevertheless, he stated, "we cannot escape the duty of judicial review. . . . The only way to avoid finding in the Constitution the personal bias one has placed on it, is to explore the influences that have shaped one's unanalyzed views in order to lay bare prepossessions." 34 Having established his intention to undertake such a self-analysis, he passed on to the next phase of the opinion.

The jurist in participating in judicial endeavors involving due process not only has to psychoanalyze himself, he has to try in a way to psychoanalyze society. This again is partially the motivation for Justice Frankfurter's concern with the inarticulate major premises of a community or with the conception of ordered liberty that guides a people. To tell whether the confession of a youth of fifteen was coerced or freely given was not a matter of mathematical determination.

Essentially it invites psychological judgment that reflects deep, even if inarticulate, feelings of our society. Judges must divine that feeling as best they can from all the relevant evidence and light which they can bring to bear for a confident judgment of such an issue, and with every endeavor to detach themselves from their merely private views.35

He concluded that these may be unsatisfactory tests because of their inherent vagueness, but such as they were, he thought the

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The Court must be guided by them and apply them when applicable, as in this case.

It would be difficult to find a more complex approach to the topic of the judicial function, but its very complexity may indicate that Justice Frankfurter has come very close to the core of judicial phenomena. In an extremely able discussion on this whole area of legal thinking, Carl B. Swisher has written that “as in so many aspects of life, deep probing eventually takes us close to the realm of the mystical, to a realm where mere intellectualization and logical phrasing fail us, leaving us to feelings and perceptions that make their appearance from we know not where but which nevertheless have for us compelling weight.” Justice Frankfurter’s philosophy does have touches of the mystical, but it is a communal mysticism that tries to articulate social feelings and perceptions. Even though the articulation must be done by an individual, the attempt is made, to borrow scientific terms, to have him act as a conductor rather than as a transformer. To be sure, at times there will be short-circuits, but such occurrences are bound to happen in even the simplest electrical system (or, for that matter, in even the simplest thought patterns).

The judicial philosophy of Justice Frankfurter, then, is an amalgam from many sources. Sociological insights that extend into the newer range of psychology as these relate to legal matters become central to his idealization of the judicial function. His fundamental self-conscious effort to remove personal bias, though this can never be done completely, is companion to the thinking of others. Ranyard West has said that

in most of our lives we shall live on, fighting and striving to adjust ourselves to reality, in total inability to divest ourselves of the many fixed prejudices to which, as normal men, we are heir. It is because of its discovery of the depth and universality of these prejudices formed through unconscious fantasy-identifications, that modern psychology can give confident and insistent support to the maxim . . . that no man can form an objective and unbiased judgment of a situation in which he is emotionally involved; that no man can safely be admitted a judge in his own cause.37

36 Swisher, The Supreme Court in Modern Role, p. 178.
It was a poet long ago who reminded us that "No man is an island, entire of itself; every man is a piece of the continent, a part of the main." Deep and universal prejudices and fantasy-identifications do exist. The jurist in sitting in judgment on others may be psychologically sitting in judgment upon himself; he may in reality be a judge in his own cause. Justice Frankfurter once refused to sit on a case in which he thought himself emotionally involved, saying, "reason cannot control the subconscious influence of feelings of which it is unaware." There are risks involved in turning to the mystical and unconscious for guidance and in trying to transcend personal prejudices and fantasy-identifications in the search for absolute purity from subjective factors, a purity that is unattainable. The risks, however, are no higher, in terms of the judicial function, than are those attendant on other, supposedly simpler, approaches to the problem.

V

As a professor, Frankfurter commented favorably upon the fact that "the pressure upon the Court's time is also giving rise to a tendency to be less patient with arguments. The generous habit of American courts of listening to counsel for the maximum time allowed, is yielding to the necessity of saving time by refusing to hear arguments where the Court feels no doubt about the result." For all his emphasis on conserving the strength of the judiciary, his behavior in questioning counsel or in rapid-fire exchanges with colleagues cannot be traced exclusively, or even primarily, to this source. Here, if anywhere, his personal traits come most clearly to the fore, and it is here that what has been called his irritating inner conviction of his own righteousness seems to become most pronounced.

For the generation in which he has served the Court, his technique has been the Socratic one, a technique that he utilized so

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88 John Donne, Devotions Upon Emergent Occasions (1624).
90 Frankfurter and Landis, "The Supreme Court at October Term, 1928," loc. cit., p. 36.
successfully in his “formal” teaching. The adjective “formal” is necessary because he thinks that a Supreme Court justice is an educator in many ways, as his philosophy of opinion-writing testifies. This conviction is translated over into his public appearances on the bench. One explanation of his vigorous questioning is that he is anxious to keep members of the bar on their toes. Apparently believing for a long time not only that the students would be better educated in having to formulate answers of their own, but also that the teacher would gain a clearer conception of what his charges were driving at through having them struggle with formulation, Justice Frankfurter has continued to insist on precise explanations from lawyers appearing before him. His manner of doing so has not been above reproach.

From the reports of his law clerks and in view of the admiration, one might almost say adoration, with which they view him, his relationships with those intimately connected with his work may not be as strained as are some of his public clashes. For a variety of reasons, Justice Frankfurter has managed to capture the devotion of the younger men who have worked with him. Indeed, his former law clerks from all over the country gather for a formal dinner in his honor at Washington at least once during the year, usually about the anniversary of his elevation to the Supreme Court. This personal interest in younger people reaches back to his days at Harvard when promising students frequented his home. The Frankfurters are childless, so that in many ways his family position and his interests are reminiscent of another Supreme Court justice who, being without heirs, took into his confidence and comradeship many students and novitiates in the law. The tradition of Oliver Wendell Holmes has more meaning for Felix Frankfurter than can be captured in the law reports.

Granted all the warmth and charm of personal camaraderie, and the educational value to be derived from strict questioning, still and all Justice Frankfurter at times appears to forget himself when participating in such an activity. His garrulousness has been commented upon in many quarters. His interest in so many matters, from the sweep of national affairs to the human side of personal gossip, has also been noted. Being irrepressible in speech, he is often given to outbursts of enthusiasm or outrage. In the
heat of an argument, his satirical or biting remarks tend to offend more than he perhaps really means them too. It has been said of him that he has “only half-mastered the old Boston art of being rude graciously.” 41 The rapidity with which he throws out questions, the intenseness with which he receives the answers, and his almost total immersion into the subject matter of the law, joined with his wide range of interests, make him a leader in any questioning that the Court may do. It also makes him prone to overstep the line between intense inquiry and invective. For those on the sidelines, his sharp and cutting comments may be interesting and enjoyable. For those to whom they are directed, his excursions into sarcasm can be extremely painful.

Justice Frankfurter’s annoyance that concise answers are not always available for the questions that he asks may partially be caused by the fact that the questions are not always fully comprehensible. An extreme example, no doubt, but an example of this possibility, nevertheless, came in questioning of counsel for the Little Rock School Board over the implications of previous Court decisions and the Board’s desire to postpone integration. Given below is a question that he asked counsel as it appears on the stenographic record:

Justice Frankfurter: Mr. Butler, why aren’t the two decisions of this court, the first one, which laid down as a Constitutional requirement that this court unanimously felt compelled to agree upon, and the second opinion recognizing that this was a change of what had been supposed to be the provisions of the Constitution, and recognizing that and the kind of life that has been built under the contrary conception said, as equity also has said, you must make appropriate accommodation to the specific circumstances of the situation instead of having a procrustean bed where everybody’s legs are cut off or stretched to fit the length of the bed, and who is better to decide that than the local United States Judges, why isn’t that a National policy? 42

No one could deny that this is a mighty one-sentence question. It was an impromptu question that Justice Frankfurter did not

41 Quoted in Current Biography (1941), p. 307.
have time to revise. But it was the query that counsel was expected to answer. The Justice’s irritation at supposed lack of competence on the part of members of the bar might be lessened somewhat if he went back to the stenographic records for a quick survey.

The Court’s records and the reports in *United States Law Week* give many examples of the Justice’s oral performance. Picking out but recent instances, one can gain the flavor of his remarks. The Justice’s tendency to be less than patient with arguments not coming directly to the point or with those that try to make the issues under consideration more complex than necessary was reflected in his questioning of a lawyer at a recent term of the Court. After counsel had been explaining his case for fifteen minutes or so, Justice Frankfurter broke through to ask, “Is that all there is to this case?” The reply was, “No, sir. There’s a heap to this case.” “As you state it,” came the rejoinder, “it’s so simple that I’m suspicious. . . . What is the milk in the coconut?” Or again, when the government’s legal staff was arguing that the Army’s completely arbitrary decision to discharge a serviceman with less than an honorable discharge, because of activities before induction, was not judicially reviewable, the whole Court came to arms. After extended repartee, the Justice, furious at the way things were going, told the government’s representative that “You need not take this extreme position.” Later, after another assertion of executive discretionary power, he asked angrily, “Are you going to argue that, too? What is there you are not going to argue?”

One may surmise that for all his deference to the executive after considered judgment, this blatant claim for completely unreviewable, let alone uncontrollable, action was more than he could stomach.

Justice Frankfurter’s intonation does not alone inform counsel of his pleasure or displeasure with their performance. He swings to and fro in his chair, looks at the ceiling of the courtroom as if for divine guidance and patience, and, if all else fails, leans back in his chair so that he is hardly visible to persons in the courtroom and suffers a trying martyrdom. John Mason Brown has sug-

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43 These two examples were taken from an article by Anthony Lewis, “High Drama in the High Court,” *New York Times*, October 26, 1958.
gested that Frankfurter has the face of an actor. The reference to acting is not completely out of place because, in his eagerness to get to the heart of a matter, he can exhibit quizzical, disdainful, sensitive, or sincerely modest countenances.

This eagerness has not only caused trouble for him in the press due to the complaints of members of the bar, but it has also caused some estrangement among the brethren. His passion for direct statement of position recently led him into an exchange with Chief Justice Warren. Warren had been questioning an attorney for some time when Frankfurter began to interrupt, rephrasing the Chief Justice's questions. Warren's annoyance mounted as the interruptions mounted. He finally roared, "Let him answer my question! I want to hear the answer to my question," indicating that only confusion could result from dual interrogation. The response was not long in coming: "Confused by Justice Frankfurter, I presume!" His apparently irritating habits do not show up solely in oral questioning; they also make their appearance in the way in which decisions are announced. Members of the Court have complained that in expounding an opinion on the requisite Mondays he has not followed the text of the written version but has inserted or extrapolated materials.

One may only conjecture as to the sources of annoyance among the justices when they meet for conference. While the Court carries on the tradition of each member's shaking hands with all his colleagues before any official function commences, the ritual, while probably beneficial, cannot alleviate all differences or animosities. One may be sure that if Justice Frankfurter's loquacity and curiosity show up in his treatment of counsel, thus causing some discomfort to others, they are no less apparent in the seclusion of the Conference Room, and, perhaps, with multiplied negative effects. Depending upon the ability of the Chief Justice to keep his charges in order—Justice Frankfurter has served under Hughes, Stone, Vinson, and Warren—meetings of the conference may run late while he pursues some particularly

interesting intellectual point or while he lectures on some delicate point of legal history. This tendency to continue as a teacher is probably of value on the bench. In the Conference Room with men who are his equals, it may cause difficulties.

Justice Frankfurter has a tendency to procrastinate in the writing of opinions, often producing most of his work near the end of a term. One reason for this is his desire to seek out all relevant materials, much as he searches in minor form during the conferences, and to take what he considers the necessary time in weighing them. Along with others who have been called ten o'clock scholars, he may be partially responsible for extending the term of the Court a week or two. If so, it fits in the pattern that surrounds the agony of judging that is central to his conception of the judicial function. John P. Frank has said that "the occupational hazard of judging for Justice Frankfurter is making up his mind and getting things done. This is worth comment because is it more than one man's psychological quirk; it is symptomatic of the plight of the intellectual liberal in our time, torn between opposing absolutes." He identifies the agony of judging as a hazard and—it is believed mistakenly, at least for Justice Frankfurter—attributes it to a clash of absolutes. Intellectual suffering is not necessarily a negative if it serves to cleanse or purify. Agony can be a very real prelude to triumph over adversity. It is in the attempt to dispose of absolutes that creativity appears, a creativity that has as its source a community mystic and that involves the long and wearisome process of self-examination and attempted transcendence. Although such a process may take a little longer time, expediency can hardly be the main criterion by which to judge judicial performance.

While Justice Frankfurter has had his share of contentions with other members of the Court—contentiousness indeed seeming to be a personal characteristic of many of the justices in the decades of the 1940's and 1950's—his relations on the whole have been satisfactory. On Justice Owen Roberts' retirement, the initial wording of a letter of appreciation was drafted by Stone, but was changed by Justice Black, to whom it was first given.

His deletion of all complimentary references so emasculated the draft that Justice Frankfurter with others refused to sign it, thinking that it was far better in these circumstances to follow the maxim that silence is golden rather than to damn by indirection. Of those members with whom he has served, Frankfurter appears to have found most intellectual companionship with Stone and Justice Robert Jackson. At present, he and John Marshall Harlan often find themselves in agreement.

In 1932 Frankfurter had written to Stone, "Why people should resent constant criticism upon their labors—particularly people who have ultimate power—I have never been able to understand. But perhaps the answer is that they have ultimate power." In the legal realm, members of the Supreme Court do hold ultimate power. Since he became a member of that tribunal, Justice Frankfurter has had to stand much criticism, and he has done it graciously, as long as the criticism itself was kept within the bounds of the courteous. While he has received his share of brick-bats, he has also garnered his portion of accolades. On the occasion of his seventy-fifth birthday, many magazines and newspapers around the country noted appreciatively his contributions to public law. More recently, former Senator John W. Bricker, certainly not of the same political or social persuasion as the Justice, contributed his salute. Recognizing that perhaps their difference in political philosophy had made him aware of Frankfurter's profound understanding of the judicial function and remarking on his "honest search for Congressional intent, a decent respect for state legislatures and state judiciaries, and an aversion to the adjudication of issues which are prematurely raised, basically trivial or essentially political in character," Senator Bricker concluded with the hope that the Court would have many more years of service from him. Others would join in this wish.