THE
UNIVERSITY OF CHICAGO LAW REVIEW

VOLUME 26 WINTER 1959 NUMBER 2

MR. JUSTICE FRANKFURTER*

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TO COMMEMORATE in the *University of Chicago Law Review* the twentieth anniversary of the appointment of Mr. Justice Frankfurter to the Supreme Court is a singularly, or should I say trebly, appropriate act of dedication. In the first place, the Justice is by temperament and conviction preeminently a teacher. He himself enjoys telling of an incident not long after he went on the Court when in the course of an animated discussion at conference one of the brethren referred, not in entire forgetfulness, to the views just expressed by "Professor Frankfurter,"—to which the Justice interposed that he could not imagine a more honorable or flattering title.

The dedication is appropriate in the second place for the very reason that Mr. Justice Frankfurter has no provincial links to this locality or to this University. The dedication connotes the Justice's position in the great community of legal scholarship unbounded by place or school. Twenty-five years ago Oxford University recognized this position by conferring on Professor Frankfurter its degree of Doctor of Laws. Indeed, the University orator in composing the citation was able, with donnish wit, to suggest that the event had been foreshadowed by Vergil: "*Felix qui potuit rerum cognoscere causas.*" However that may be, whether the ascription of happiness to one who understands lawsuits is a Roman or only an Oxonian philosopher, surely no Supreme Court Justice has been more solicitous of the place of our law in the current of Anglo-American legal history or more watchful of contemporary developments in the law of England and the Commonwealth. And so Chicago exhibits no mere parochial pride in marking this anniversary but rather affirms the binding and widely flung ties of legal learning and the quest for law.

And in the third place it is appropriate and heartening that this *Review*

* This paper is based on an address delivered at the University of Chicago Law School on March 2, 1959. This article and the following one by Professor Sacks are printed in observance of the twentieth anniversary of Mr. Justice Frankfurter on the Supreme Court. See 26 U. of Chi. L. Rev. 1 (1958).

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chooses to honor a judge who is still at the height of his powers. The custom that such distinction should await extinction is surely honored in the breach. In England until recently it was a tradition that living authors were not to be cited as authority in judicial opinions. On one occasion the Lord Chief Justice, despite the tradition, could not refrain from citing Professor Holdsworth's History of English Law, but when he did so he referred to Professor Holdsworth as one "who is happily not an authority." The reporter of the decisions, in puzzling over this passage, concluded that it must have been a slip of the pen, and so when it was published it read "Professor Holdsworth who is unhappily not an authority." Mr. Justice Frankfurter is very happily an authority and very actively and unmistakably so.

What picture of Felix Frankfurter as a teacher can be conveyed to those who did not have the fortune to know him in the classroom? To describe the special qualities of a great teacher almost eludes the power of words; in this, testimonial evidence is much less effective than real evidence. Perhaps the most touching description of a great teacher that I have seen is the picture given of Willard Gibbs, the Yale mathematician, by his biographer, Muriel Rukeyser. She tells of Gibbs standing in front of a class, beside a blackboard on which an abstruse equation had been worked out, tears streaming down his face and the students gazing at the board with the look of those who had just seen angels. The sight of angels is an image that is denied to most students of the law, even I daresay at Chicago, and certainly at Harvard. But what we did see was the illumination created by an incandescent mind, sometimes by the darting gleam of fireworks.

Professor Frankfurter taught a course in Public Utilities known affectionately as the "Case of the Month Club." For him a case was not the illustration of some principle or point of law; to approach it thus would for him have been a sacrilege. A case was explored as a process, through the record, the briefs, the counsel, the judges, the statute, its legislative background, indeed the geography of the area involved, preferably to be reported on by a student who came from that locality. The law of Public Utilities was learned almost by osmosis as you breathed it in while absorbing the insights of lawyership.

Then there were the seminars in Administrative Law and Federal Jurisdiction, where the intensity of a smaller group narrowed the gap over which the sparks traveled, and where the most recondite research became as exciting as the most recent Supreme Court advance sheets because it was felt that the voices of the past, if only they were unlocked, would have something vital to say to us about our urgent problems. Paging the reports, paging the statute books, even paging the statute books of the American colonies, was for many a student an enthralling adventure.

History was always a primary interest of Professor Frankfurter, but not history as inert knowledge. He viewed the study of history much as Holmes did, as a way of emancipating ourselves from fetters forged of our own mis-

understanding.[1] Two of his most notable law review articles were of this character. One, the study of jury trial for petty federal crimes, showed that the Constitution viewed historically allowed a classification of crimes that would tolerate trials without jury in a substantial group of cases.[2] This at a time when the enforcement of the Volstead Act posed serious problems of judicial administration for the federal courts on their criminal side. The other paper, curiously cognate to this, was an historical study of criminal contempt to determine whether jury trial might constitutionally be provided, and this at a time when the validity of the jury provision of the Clayton Act was actively in litigation.[3] It s interesting that in each instance the study demonstrated that constitutional history left scope to Congress to settle the issue without coercion by the supposed compulsion of the Constitution. In the article on petty offenses Professor Frankfurter concluded with words which, though written in 1926, could be matched in his opinions today. He said this:

> One can say with assurance, then, that so far as history is a guide, those multitudinous infractions of the detailed rules of modern society which we significantly group as police regulations need not be enforced with all the paraphernalia of jury trials. The profound reasons for a popular share in the administration of criminal justice did not cover this extensive range of petty offenses. Such is the verdict of the history that went into the Constitution. But it does not consider the influences which modify the sway of the common law in the application even of constitutional clauses rooted in its history. Still less are we here concerned with the wisdom of doing what the Constitution allows. American social policy suffers all too much from the dictation of abstract questions of constitutional powers. The historic availability of summary judgment is by no means proof of its desirability in the enforcement of a particular law. That is a problem for statecraft, whatever may be the opportunities which the Constitution affords. But Congress should know the alternatives which constitutionally are open to it. . . . If [this paper] be lacking in the definiteness of a yardstick, we can only conclude by saying that history presents a body of experience expressive of the judgment of its time, but does not save Congress nor the Supreme Court from the necessity for judgment in giving past history present application.[4]

As one reviews Professor Frankfurter's scholarly works one is impressed with their dominant concern for procedure in the large sense: that pioneering volume, *The Business of the Supreme Court*, the casebooks on federal jurisdiction

[1] Holmes employed a different metaphor: "When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal." The Path of the Law, in Collected Legal Papers 167, 187 (1920).

[2] Frankfurter and Corcoran, Petty Federal Offenses and The Constitutional Guaranty of Trial by Jury, 39 Harv. L. Rev. 917 (1926).

[3] Frankfurter and Landis, Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers, 37 Harv. L. Rev. 1010 (1924). See Michaelson v. United States, 266 U.S. 42 (1924), decided four months after the publication of the article.

[4] Frankfurter and Corcoran, op. cit. supra note 2, at 981.

and administrative law, the fruitful study of the labor injunction, and the courageous book which reflected the most painful experience of his life, *The Sacco-Vanzetti Case.* These were all studies of procedure in the context of very concrete issues which transcended procedure but which are made more tractable through the lawyer's contribution of a right structure for their solution.

Significant as his scholarly writings have been, it would be hard to place them higher in importance than his evocative powers with his students. What he said of Judge Cardozo, as Chief Judge of New York, will best convey what I mean. "One is told," he said, "that the same men were somehow or other better when he was chief judge than they were the next day, after he had ceased to be chief judge. That's a common experience in life. One man is able to bring things out of you that are there if they're evoked, if they're sufficiently stimulated, sufficiently directed.[5] It is fair to ask whether Frankfurter was not thinking of the formative influences on himself when he spoke of a common experience in life. Of these influences, beyond the intimacies of family life, one would have to include the teachers in the public schools of New York (his feeling for the public schools can be seen in the flag-salute cases and in the released time for religious education cases) and the Harvard Law School faculty, in particular Dean Ames who conveyed a deep sense of legal history and ethics under the rubric of Torts or Trusts, and the shade of James Bradley Thayer, the teacher of Brandeis and the colleague of Holmes, whose spacious view of constitutional powers and whose correspondingly guarded conception of judicial review has been high in the consciousness of Judge Learned Hand and of Mr. Justice Frankfurter. Then there was Henry L. Stimson, Frankfurter's chief as United States Attorney in New York and as Secretary of War in Washington, whose standards of austerity and integrity in the enforcement of the law are strongly reflected in the Justice's own outlook. And above all there was the long and intimate friendship with Holmes and Brandeis, of which the Justice's own unstinting tributes make it superfluous to speak.

And yet a man is more than the sum of influences playing upon him. These do not so much instill as they evoke. The relation is not merely influence, but affinity. And so in the end we are brought back to the mysterious alchemy of the self. None of us can know another in the way we know ourselves. We cannot transcend the limitations of our own consciousness and project ourselves into the consciousness of another any more than we can jump out of our own skins, though to try to know another who is an altogether richer being than oneself is a healthy exercise in stretching one's mental and spiritual integument.

This digression on the nature of the self is perhaps as good an introduction as any to the judicial philosophy of Mr. Justice Frankfurter. The cardinal themes in that philosophy can be viewed under the aspect of those objects to which Justice ought to owe the profoundest respect. Of these there are three,

[5] Chief Justices I have Known, 39 Va. L. Rev. 883, 902 (1953), reprinted in Of Law and Men, 111, 134 (1956).

I would suggest, that are basic in the thought of Mr. Justice Frankfurter: first, respect for the integrity of the individual; second, respect for the structure of government with its distribution of what the military call roles and missions; and third, self-respect. Let me touch on each of these in turn.

First, the integrity of the individual. The philosophers put it that a man is a subject not an object. The British speak of the liberty of the subject. Bills of rights, with their due-process clauses, are yet another mode of formulation. Mr. Justice Frankfurter has never been fearful that adherence to those guarantees would weaken society's defenses. Twenty-five years ago while he was at Harvard, in his introduction to the Gluecks' early study of juvenile delinquency he wrote this:

> In the main our whole process of criminal justice is crude and amateurish, economically costly and morally cheap. But the center of gravity of our problems of crime lies outside the courtroom. The crucial difficulties are unrelated to defects in trial procedure, and we are doomed to deep disappointment if we look for substantial diminution of crime to departure from those essential safeguards of liberty that have been enshrined in our bill of rights.[6]

The integrity of the person is the principle which underlies his *McNabb*[7] opinion on the fruits of questioning an accused during a period of unlawful detention. The same principle can be discerned in the very different context of *Sibbach v. Wilson*,[8] where in a dissenting opinion he questioned the federal rule of civil procedure authorizing a compulsory physical examination for a party in a personal injury case. Such a requirement, he believed, touched so sensitively the interests of personality that it ought to await a clear authorization by the legislature and not be imposed by mere rule of court. He has found himself dissenting also from judgments upholding federal searches and seizures without a warrant: violation of the integrity of one's papers and effects, an extension of one's personality, is justified only under the strict safeguards of a specific warrant. In the *Harris* case, in a dissenting opinion, he said:

> If I begin with some general observations, it is not because I am unmindful of Mr. Justice Holmes' caution that "General propositions do not decide concrete cases. . . ." Whether they do or not often depends on the strength of the conviction with which such "general propositions" are held. A principle may be accepted "in principle," but the impact of an immediate situation may lead to deviation from the principle. Or, while accepted "in principle," a competing principle may seem more important. Both these considerations have doubtless influenced the application of the search and seizure provisions of the Bill of Rights. Thus, one's views regarding circumstances like those here presented ultimately depend upon one's understanding of the history and the function of the Fourth Amendment. A decision may turn on whether one gives that

[6] Introduction to Sheldon and Eleanor Glueck, One Thousand Juvenile Delinquents viii (1934).

[7] McNabb v. United States, 318 U.S. 332 (1943).

[8] Sibbach v. Wilson and Co., 312 U.S. 1, 16 (1941) (dissent).

amendment a place second to none in the Bill of Rights, or considers it on the whole a kind of a nuisance, a serious impediment in the war against crime.[9]

And from the same case:

For me the background is respect for that provision of the Bill of Rights which is central to enjoyment of the other guarantees of the Bill of Rights. How can there be freedom of thought or freedom of speech or freedom of religion, if the police can, without warrant, search your house and mine from garrett to cellar merely because they are executing a warrant of arrest? How can men feel free if all their papers can be searched, as an incident to the arrest of someone in the house, on the chance that something may turn up, or rather, be turned up? Yesterday the justifying document was an illicit ration book, tomorrow it may be some suspect piece of literature.[10]

Even when the issue involves the procedure of a state rather than that of the federal court, with the corresponding latitude a state enjoys to admit or exclude illegally obtained evidence, to employ or not to employ its rules of evidence to keep out relevant and trustworthy evidence because of its origin, even here he has balked when the illegal source was grossly offensive to standards of decent official behavior. In the stomach pump case he said:

Due process of law, "itself a historical product," . . . is not to be turned into a destructive dogma against the States in the administration of their systems of criminal justice. However, this Court too has its responsibilities. Regard for the requirements of the Due Process Clause "inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses. . . ." These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," . . . or are "implicit in the concept of ordered liberty." . . .The Court's function in the observance of this settled conception of the Due Process Clause does not leave us without adequate guides in subjecting State criminal procedures to constitutional judgment. In dealing not with the machinery of government but 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. Words being symbols do not speak without a gloss. On the one hand the gloss may be the deposit of history, whereby a term gains technical content. . . . When the gloss has thus not been fixed but is a function of the process of judgment, the judgment is bound to fall differently at different times and differently at the same time through different judges. Even more specific provisions, such as the guarantee of freedom of speech and the detailed protection against unreasonable searches and seizures, have inevitably evoked as sharp divisions in this Court as the least specific and most comprehensive protection of liberties, the Due Process Clause.[11]

[9] Harris v. United States, 331 U.S. 145, 155, 157 (1947) (dissent).

[10] Id., at 163.

[11] Rochin v. California, 342 U.S. 165, 168–70 (1952).

This stomach pump case, you will recall, produced a great debate within the Court. Two concurring Justices took the position that the evidence dredged up by the stomach pump must be excluded under the specific guarantee of the privilege against self-incrimination. They bridled at what they regarded as the natural-law and subjective analysis of due process by Mr. Justice Frankfurter. But once the privilege against self-incrimination is applied beyond the sphere of oral testimony, there is no literal guide to its stopping place. The concurring Justices acknowledged that to compel an accused to stand up in court, to turn this way and that, or to put on an article of clothing before the jury would not violate the privilege against self-incrimination. But they would rule out the results of a scientific blood test if carried out without the consent of the defendant. What, then, of the cutting of a strand of hair? They would draw the line somewhere on the basis of physical integrity, and though they might draw it more restrictively, it is hard to see how the invocation of the privilege against self-incrimination furnishes that objective and unmistakable criterion that is lacking in the due-process clause.

The same fundamental respect for human integrity comes through the Justice's opinions on the question of the right to a hearing, as when a claim of insanity is made on behalf of a prisoner condemned to death.[12] Here again he found himself in a minority. Of a piece with this concern is the Justice's position on capital punishment. Again he sees the issue in terms of procedure. He said in testimony before the British Royal Commission on Capital Punishment a few years ago:

> I am strongly against capital punishment for reasons that are not related to concern for the murderer or the risk of convicting the innocent, and for reasons and considerations that might not be applicable to your country at all. When life is at hazard in a trial, it sensationalizes the whole thing almost unwittingly; the effect on juries, the Bar, the public, the judiciary, I regard as very bad. I think scientifically the claim of deterrence is not worth much. Whatever proof there may be in my judgment does not outweigh the social loss due to the inherent sensationalism of a trial for life.[13]

This is a rather different view of the issue of capital punishment than you will find expressed in the conventional discussions.

The same emphasis on fair procedure as the Court's fundamental concern is to be found in his opinions on administrative law. An alien against whom a deportation order has been issued ought, he felt, to be able to invoke the declaratory judgment procedure and not be confined to habeas corpus; the alien ought, that is, to be able to challenge the order even though not in custody, provided that the governing statutes are susceptible of a reading either way.[14] Once more he was in dissent.

[12] Caritativo v. California, 357 U.S. 549, 550 (1958) (dissent); Solesbee v. Balkcom, 339 U.S. 9, 14 (1950) (dissent).

[13] Of Law and Men 77, 81 (1956).

[14] Heikkila v. Barber, 345 U.S. 229, 237 (1953) (dissent).

The whole subject of standing to challenge administrative action received full-scale treatment in one of his most massive and deeply felt opinions, that in the *Joint Anti-Fascist Committee* case:

> Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. At least such is the conviction underlying our Bill or Rights. That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.[15]

A procedural guarantee which is at the core of the rule of law, of Dicey's Rule of Law if you please, is the suability of public officials for illegal actions which they have taken or threatened. How to reconcile this essential of the rule of law with the traditional doctrine of sovereign immunity from suit has been the subject of some of the Justice's most important and revealing opinions. When issues of fundamental human liberty are discussed, the problem of immunity of the sovereign or suability is frequently overlooked, but to me, and I surmise to the Justice, it is at the very core of the guarantee of liberty. It is fitting therefore that one of the two opinions the Justice delivered on his first opinion day twenty years ago was on this theme, and another of his massive dissents, in the *Larson* case,[16] was in protest against an extension of sovereign immunity.

I have said nothing thus far of the liberty of speech which many would regard as the cornerstone of respect for integrity of the individual. Surely no one can read Mr. Justice Frankfurter's opinion in the Michigan obscenity case[17] striking down a law which made the test of legality for all distribution the effect of the printed matter on the susceptibilities of youth, or his concurring opinion in the *Sweezy* case[18] setting up the freedom of the academic lecture room against an attenuated claim of the internal security of the state, no one can read these opinions without recognizing his sensitivity to freedom of expression. But he has not been prepared to regard this freedom in as absolute terms as some of his brethren, as, for example, in the case of contempt of court by newspapers in the Los Angeles Times-Harry Bridges affair.[19] This is not the occasion to deal in detail with the issue of freedom of speech and the press. I can do no better

[15] Joint Anti-Fascist Refuge Committee v. McGrath, 341 U.S. 123, 149, 171–72 (1951) (concurring).

[16] Keifer & Keifer v. RFC, 306 U.S. 381 (1939); Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 705 (1949) (dissent).

[17] Butler v. Michigan, 352 U.S. 380 (1957).

[18] Sweezy v. New Hampshire, 354 U.S. 234, 255 (1957) (concurring).

[19] Bridges v. California, 314 U.S. 252, 279 (1941) (dissent).

for present purposes than to quote from a recent piece by Philip Toynbee, the English literary critic, which appeared in a recent issue of the London *Observer* and which could some day find its way into an opinion of Mr. Justice Frankfurter. I quote this with the thought that it will be sufficient to illuminate the issue of freedom of expression as seen by an observer with the disinterestedness of distance and with another professional background. What Philip Toynbee wrote with specific reference to obscenity and the law could be taken *mutatis mutandis* as a more general commentary on our problem.

> The smut-hounds are guilty of elevating personal prejudice above both art and freedom. The art-heretics are guilty of elevating art above life, the part above the whole, the by-product above the living process of creation. It is the old argument which divided some of us at the time of Monte Cassino, when a few held that the monastery should be spared even at the cost of soldiers' lives while the same majority considered this to be the most odious of blasphemies. Suppose that after an air raid a man had lain buried under St. Paul's in such a way that he could be rescued only by the demolition of the whole cathedral. Who but a monster would have hardened his heart against the victim's cries rather than against the man-made monument above him? And just as there is a lunatic fringe of art lovers, so there is a lunatic fringe of libertarians who hold that the freedom to talk or print is, in all circumstances, sacrosanct. They would protest against any action being taken to prevent the publication of anti-Semitic pamphlets in modern Germany or of incitements to race-violence in Notting Hill. It is another heresy which prefers the part to the whole and attempts to deal with the complexity of life by a single supreme simplicity.[20]

A "single supreme simplicity" is exactly what Mr. Justice Frankfurter is wary of.

This is a convenient point at which to turn to the second kind of respect in the Justice's philosophy: respect for the structure of government and the assignment of roles and missions. If a judge could think only of respect for integrity or personality, all would be peace and quiet in the dovecote. As soon as you introduce such considerations as the federal system, the relation of courts to legislatures, the limits of effective judicial action, and the congeries of cautions known as political questions, you have indeed set the cat among the chickens. The *Francis*[21] case from Louisiana is an illustration. That was the case of the unfortunate criminal defendant who, upon being placed in the electric chair pursuant to a death sentence, found that the current failed and that the electrocution was therefore frustrated, and who maintained that to be subjected to a second ordeal would violate the guarantee against double jeopardy and cruel and unusual punishment as well as the standard of due process of law. Mr. Justice Frankfurter, with his avowed and deeply felt repugnance toward capital punishment, must surely have felt sympathy for the defendant's claim, and yet he was unable to find in the clauses of the Constitution a ground for preventing

[20] Toynbee, Two Kinds of Extremism, The Observer, p. 20, c. 5–6 (Feb. 8, 1959).

[21] Francis v. Resweber, 329 U.S. 459, 466 (1947) (concurring).

a second attempt on the part of the state. He more than implied in his opinion that the case ought to commend itself as one for executive commutation.

The most vexing problem of judicial review in terms of the structure of government is the question of a double standard or a preferred position for certain constitutional guarantees. Mr. Justice Frankfurter has resisted the claim for any such priorities, though he has described approvingly a scale of values which he discerned in the opinions of Mr. Justice Holmes. He said this in writing of Holmes:

> Social development is an effective process of trial and error only if there is the fullest possible opportunity for the free play of the mind. He therefore attributed very different legal significance to those liberties which history has attested as the indispensable conditions of a free society from that which he attached to liberties which derived merely from shifting economic arrangement.[22]

This is not the occasion to examine the myriad judgments arrived at by Mr. Justice Frankfurter in this troubled area. Doubtless no two thinkers would stand in complete agreement, given the complexity of the issues. But it may be important to notice the frank and ever-present concern of the Justice that the issues be seen in the full on their several levels, and his cognate concern lest a purely private judgment of preference be taken as a constitutional command. To avoid this he relies heavily, may it not be too heavily, on the teachings of history. Now history can show us a number of things. First, it can show us specific events: what was done, for example, about habeas corpus in the Act of 1679. In the second place, history can give us a narrative; it can tell us what was the practice regarding jury trial for contempt in the centuries preceding our Constitution. But when history is called on to furnish a guide to the priority of values, I wonder whether it is being given a burden heavier than it can bear alone. Here, as it seems to me, history becomes the creative art of the historian. Santayana has spoken of an "estimate of evolution" as "a sort of retrospective politics," engaged in as one "might look over a crowd to find his friends."[23] From Lord Acton has come a similar warning against confounding the historian with the history:

> Whatever a man's notions of these later centuries are, such, in the main, the man himself will be. Under the name of History, they cover the articles of his philosophic, his religious and his political creed. They give his measure, they denote his character: and, as praise in the shipwreck of historians, his preferences betray him more than his aversions. Modern history touches us so nearly, it is so deep a question of life and death, that we are bound to find our way through it, and to owe our insight to ourselves.[24]

I wonder whether history does not have to yield here to philosophy. History or

[22] Article on Holmes in 21 Dictionary of American Biography 417, 424 (1944), reprinted in Of Law and Men 158, 175 (1956). See also Frankfurter, Mr. Justice Holmes and the Constitution 51 (1938).

[23] Santayana, Reason in Science, in The Life of Reason 401–402 (rev. ed., 1955).

[24] Acton, A Lecture on the Study of History 73 (1905).

historians may suggest, to be sure, some lessons about the effectiveness of institutional arrangements. But would it really matter, for constitutional law, if a historian argued persuasively that English literature had its greatest flowering during a period of the licensing of books and plays?

A philosophy, of course, need not be merely personal. In large terms our professed philosophy is that of representative self-government, a secular state, a division of authority, and the protection of minority rights. While important variances within these very broad conceptions are inevitable, we are not without safeguards against excessively personal judicial judgments. One safeguard is the practice of deciding no more than is necessary to the case—in constitutional law to decide, if possible, on a non-constitutional rather than a constitutional ground.The whole tenor of the Supreme Court's decisions in the last few years in the field of internal security reflects this caution, by giving to the legislature or to the executive an opportunity for sober second thought. And this practice, it must be clear to any reader of the opinions of the Court, is particularly congenial to, and characteristic of, Mr. Justice Frankfurter. Another safeguard is craftsmanship—the careful articulation of the grounds of decision and a reexamination from time to time of the assumptions on which rules and doctrines rest. If the unexamined life is not worth living, the unexamined premise is not worth its implications.

This is the meaning of the third and final form of respect of which I have spoken, namely self-respect, and I shall let Mr. Justice Frankfurter describe it in his own words from the *Larson* case on sovereign immunity.

> Case-by-case adjudication gives to the judicial process the impact of actuality and thereby saves it from the hazards of generalization insufficiently nourished by experience. There is, however, an attendant weakness to a system that purports to pass merely on what are deemed to be the particular circumstances of a case. Consciously or unconsciously the pronouncements in an opinion too often exceed the justification of the circumstances on which they are based, or contrariwise, judicial preoccupation with the claims of the immediate leads to a succession of *ad hoc* determinations making for eventual confusion and conflict. There comes a time when the general considerations underlying each specific situation must be exposed in order to bring the too unruly instances into more fruitful harmony. The case before us presents one of those problems for the rational solution of which it becomes necessary, as a matter of judicial self-respect, to take soundings in order to know where we are and whither we are going.[25]

One is reminded of the moving and profound story told of Gertrude Stein on her death bed. She was heard to murmur, "What is the answer?", and when there was an awkward and prolonged silence there came from her lips another murmur "In that case, what is the question?"

Some of Mr. Justice Frankfurter's greatest opinions have inquired into and reformulated "the questions"—his opinions, for example, on standing to

[25] Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 705–706 (1949) (dissent).

challenge administrative action, on review of negative orders in administrative law, on sovereign immunity, on inter-governmental relations. The value of these opinions makes one all the more regretful that the volume of the Court's business requires that these explorations be undertaken only now and then, and against undue pressure of time. The full potentialities of the Court for the clarification and advancement of fundamental law may well entail a more selective granting of review and more systematic procedures within the Court for consultation, interchange, and collaborative endeavor leading toward persuasive and scholarly exposition. Mr. Justice Frankfurter, at all events, places his ultimate faith in articulated reason, though he has no illusions about the fragile instrument that reason is. As he has more than once put it, "How slender a reed is reason, how recent its emergence in man." He must have relished the innuendo of President Lowell of Harvard in awarding an honorary degree to William Morton Wheeler, the eminent entomologist, with this citation: "Profound student of the social life of insects, who has shown that they also can maintain complex communities without the use of reason."

For an infusion of a modicum of reason into its relationships the human hive, in its less recalcitrant moments, looks to its teachers and its judges. Mr. Justice Frankfurter has shown, for many more than his twenty years of judicial service, how this highest of human enterprises can be carried on at once without illusion and with buoyancy, courage, and faith.