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Book Review of Justices Black and Frankfurter: Conflict in the Court

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Book Reviews

JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT

By WALLACE MENDELSON. Chicago: University of Chicago Press, 1961. xi, 151 pp. $4.00.

THE Constitution provides that "the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts" as Congress may establish. During Marshall's tenure, the practice of rendering seriatim opinions fell off in favor of opinions "for the Court." Mr. Justice Frankfurter has sometimes remarked on the virtues of seriatim opinions,[1] but everyone would admit that different circumstances call for different Court practices respecting exposure of suppression of dissent and variation. The merit of separate opinions lies in their capacity to refine difficult problems, educate bar and public, expose the need for reform, and prepare the ground for change. On the other hand, when the differences of opinion are consistent and long standing, so that the Court appears divided into nearly equal "camps," we are led to wonder whether it continues to be "one Supreme Court." The current division of the Court has reached the point where law professors write about it for semi-popular magazines[2] and Professor Mendelson's book is a serious attempt to explain the root of that division.

The book discusses the effect of the times upon the transformation of the Court and the nature of the Court division in the areas of separation of powers, democracy and federalism. He closes his discussion of separation of powers by stating:

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[1]Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 487 (1939). And see Schmidhauser, THE SUPREME COURT: ITS POLITICS, PERSONALITIES AND PROCEDURES, 1960, pp. 106-7.

[2]Rodell, *Crux of the Court Hullabaloo,* N.Y. TIMES, May 29, 1960, § vi, p. 13; Jaffe, *The Court Debated—Another View,* N.Y. TIMES, June 5, 1960, § vi, p. 36; Black, *Mr. Justice Black, The Supreme Court, and The Bill of Rights,* HARPER'S, February 1961, p. 63.

> For Mr. Justice Black, plainly the essence of law is Justice — as he sees it. And he sees it with benign sensitivity to the plight of the "needy." The result is that a legal principle — *certiorari,* for example — is apt to mean one thing when "liberal" interests are at stake and something quite different with respect to "conservative" claims. In contrast, the essence of law for Mr. Justice Frankfurter is regularity and uniformity. To emphasize these — along with neutrality as the crux of the judicial function — and to leave the other elements of Justice largely to the lawmaking branches of government is to emphasize the Separation of Powers.[3]

It would seem from this that Frankfurter understands and believes in the separation of powers but that Black is an *ad hoc* judicial supremacist, driven by a bias for the "underdog." The argument is supported by such evidence as that presented on page 24:

> "In twenty-one Terms of Court (1938-58) more than sixty FELA decisions turned upon the sufficiency of evidence. Save in one case where plaintiff on the witness stand had all but repudiated his own claim, it does not appear that Justices Black or Douglas ever voted against a workman."

In a day when statistical analysis is often misused it would be unjust not to compliment Mendelson for his subordination of statistics to reason. He offers no charts, arithmetic means or algebraic equations. Such figures as he does offer compel universal agreement.[4]

One of the most celebrated separation-of-powers cases in the nation's history was *Youngstown Sheet and Tube Co.* v. *Sawyer.*[5] "Nowhere," says Mendelson, "are the differing approaches of Justices Black and Frankfurter more starkly revealed than in the *Steel Seizure* case."[6]

> Beginning with the same Separation premise Mr. Justice Black arrived at the same result. What happened in between

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[3]Mendelson, JUSTICES BLACK AND FRANKFURTER (1961), p. 41.

[4]Other such common-sense uses are found at *Id.*, pp. 21, 29, 33.

[5]343 U.S. 579 (1952).

[6]Mendelson, p. 10.

> was quite different. He recognized nothing that might taint the pristine simplicity of the Separation of Powers. Mr. Justice Black understands the power of the elemental. His characteristic tools are the great, unquestioned verities. He draws no subtle distinctions. The niceties of the skilled technician are not for him. His target is the heart, not the mind. His forte is heroic simplicity. His opinions attain great power because they seldom bother with mundane considerations that baffle others — e.g., application of a winged principle in a less than ideal world; or the impingement of one vast Platonic truth upon another. In a word, Mr. Justice Black is an idealist. His wisdom is the wisdom of the great idea. He knows with Chesterton that "the center of every man's existence is a dream." He insists that we live up to our highest aspirations — and when we fail to do so he would save us from ourselves. Finally, it will appear, his idealism is deeply colored (some might say compromised) by sympathy for what the New Deal called the "forgotten man." In contrast, Mr. Justice Frankfurter is a pragmatist. His wisdom is the wisdom of experience. His forte is reason, not hallowed bias or noble sentiment. He has little confidence in the capacity of judges to sit in judgment upon the community, to erase its errors — if such they be. He counts more on man's ability to learn than to be taught. In the absence, then, of unusually compelling circumstances he accepts our compromises with eternity as the essence of the law — and leaves us free to grow with experience; to learn the lessons that come with self-inflicted wounds.[7]

A good deal of what is right with the book and a good deal of what is wrong with it is revealed in this paragraph. Its rightness lies in somehow grasping an approximate understanding of the nature of the conflict; its wrongness lies in failing to describe that conflict with precision.

By page 14 we already know that Frankfurter is the hero of the piece, but we are not helped to see the nature of the hero's soul by the identification of reason with experience nor the suggestion that to care for either reason or experience is to be a pragmatist. While pointing out that Frankfurter is more com-

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[7] *Id.*, pp. 13-14.

them, it is not sufficient as a distinction and, unfortunately for Mendelson's argument, the *Youngstown* case is not the best place to see their "differing approaches," for in that case they differ plicated than Black is a good beginning on a distinction between hardly more than in the fact that Frankfurter *is* more complicated. Black does lay out there a simplistic doctrine of the separation of powers and Frankfurter *does* say that the problem is more "complicated and flexible," but Frankfurter then stretches the art of statutory construction to the point where Congressional failure to approve a grant of power is the equivalent of a clear prohibition. Following this scheme, one would have to know everything Congress might have done and did not do to know what was the law. And a Congressional failure to pass, for example, some proposed anti-child labor law would be taken as an approval of child labor.

Let us be clear. The President had justified his action in the name of several "remove the difficulties" clauses in the Constitution coupled with affidavits establishing the existence of the difficulties. When Frankfurter says that the President may not take the action because Congress considered giving him the authority but failed to do so, he assumes that it was in the first place the property of Congress to give or withhold. The President had acted on a different principle. Frankfurter, then, does by circumlocution what Black does simply. He succeeds only in cloaking the issue. It may be that the rather mechanical doctrine of separation of powers is a weakness in our Constitutional foundation and that the Court can't render a "nice" decision on the question. If so, obfuscation by the Court may sometimes be salutary. I reserve to another time discussion of this possibility. For the moment it is enough to say that, if Frankfurter was conscious of the ground of his opinion in *Youngstown*, he is to be praised or condemned for "judicial statesmanship." If he was *not* aware of that ground, then the charge made by a law professor at an eastern university that Frankfurter is a precious pedant is not wholly bereft of evidence.

Mendelson's discussion of democracy makes it appear that the essential problem of democracy is a conflict between liberty and authority. It is perhaps true that democratic institutions lead a people to see such a conflict as the basic problem of politics. And since judges answer not their own questions but the questions pre-

sented to them by litigants, it might be that they appear from their decisions and opinions to conceive the problem in that way also. But in answering litigants' questions, judges are compelled to raise their own. And, to go a step further, the task of the academic commentator is to elevate the discussion — to take it beyond those limits which duty imposes upon the judge. I don't believe that "liberty v. authority" is the final question to ask about democracy nor about judicial practice nor about politics in general. A remarkable passage in Mendelson leads to the suspicion that he *does* so conceive the problem and that he is so contained by that understanding as sometimes to misconstrue the authorities he cites. The first two sentences of Mendelson's third chapter are:

> When Jesus enjoined his followers to render unto Caesar what was Caesar's due, he posed the most difficult problem of government. Where is the line between liberty and public authority?[8]

It is not mere pedantry to point out that Jesus was not then enjoining his followers, but confounding shysters, and that he was not posing a problem of government, but answering the problem of the relation between government in the narrow sense and government in the final sense. Finally, I cannot imagine anyone supposing that Jesus was dividing things between what belonged to Caesar and what belonged to personal whim.

In the last chapter the Court is divided into an "activist" camp and a camp devoted to "restraint." The latter is explained by saying that, "Mr. Justice Frankfurter is deeply humilitarian."[9] Good heavens! Is it really possible for someone to be doctrinaire or militant at the business of humility? I should hope that barbarism does not take hold and further encumber legal and political texts. Every wise man is, in a sense, humble, but I shall not suffer it to appear that Frankfurter has elevated humility to a science. One is reminded of the story about the several priests who were out-boasting each other regarding the virtues of their several orders. They went from good works to piety to learning, but the last priest topped them all by declaring that his order was "terrific on humility." What could have led a man of Mendelson's

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[8]*Id.*, p. 42. *Cf.* Matt. 22:15-22.

[9]Mendelson, p. 124.

competence to say such a thing? Is there in liberal democracy an underlying mood which glorifies meekness? It is not mere fussiness about words that brings forth this complaint. As one of Frankfurter's favorite authorities, Alice, knows, "Words matter." Let us examine with some care a few of Mendelson's words:

> To those for whom the Supreme Court's first concern is Justice, a great judge on that bench is an activist, one who does not readily permit "technicalities" to frustrate the ultimate. It follows, of course, that in so far as activism prevails the Court is the final governing authority. For, to that extent, its basic job is to impose justice upon all other agencies of government, indeed upon the community itself. But what is Justice? Not so long ago, activists among the "nine old men" found it in a modified (read perverted) "leissez faire" called rugged individualism. Modern activists see it as a humane and virile libertarianism. Holmes facetiously suggested that its roots are in one's "can't helps."
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> All this is unacceptable to those who take the most modest view that the Court's chief concern is *justice under law*. For them, the great judge is the humilitarian, the respecter of those "technicalities" which allocate among many agencies different responsibilities in the pursuit of Justice. In this view, the Court's special function is to preserve a constitutional balance between the several elements in a common enterprise. It maintains the ship, others set the course.[10]

These two paragraphs are a summary of Mendelson's views on the court division. Black is said to be a man who actively attempts to insure justice to every litigant and who believes he knows what justice is. Frankfurter is said to admit that others know as much about justice as he does and that, anyhow, his task is *justice under law*. The latter phrase is so important as to call for italics. The suggestion is that Plato and Black favor a "philosopher-king" and that Aristotle and Frankfurter favor the "Rule of Law."[11] In with the active go Marshall, Field, Peckham, Fuller and Sutherland[12] while the restrained include Taney, Waite,

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[10] *Id.*, pp. 117-18.

[11] *Id.*, p. 121.

[12] *Id.*, p. 116.

Holmes, Brandeis, Learned Hand, Stone and Cardozo.[13] The distinction between the active and the restrained is seen by Mendelson as equivalent to a distinction between "idealism" and "pragmatism."[14] Activism, idealism, justice, Plato, Marshall and Black are seen in opposition to restraint, pragmatism, the rule of law, Aristotle, Taney and Frankfurter. This comes hard to someone who favors Frankfurter over Black, holds both Plato and Aristotle in awe, looks with suspicion on both "idealism" and "pragmatism," finds Marshall highly satisfactory and cannot bring himself to forgive Taney the *Dred Scott* decision.

Black and Frankfurter both believe in the rule of law. Black would be surprised to hear the contrary said of him by someone who on another page says "Judges, after all, must be more than mimics. Greatness on the bench, as elsewhere, is creativity."[15] It is, in fact, in the name of law that Black deplores the "creativity" of his brethren in the due process cases. Does the word "activist" adequately describe what he stands for? The due process clause of the Fourteenth Amendment is a good place to see. Black insisted in *Adamson* v. *California* that the Court's traditional interpretation of the due process clause "appropriate[d] for [the] Court a broad power which [it is] not authorized by the Constitution to exercise."[16] That broad power is the power "periodically to expand and contract constitutional standards to conform to the Court's conception of what at a particular time constitutes 'civilized decency' and 'fundamental liberty and justice.' "[17] Who is more "restrained" — the judge who treads lightly on Congress and the States or the one who reads the Constitution literally and insists that it imposes strict duties on the Congress, the States and the Court? Who is more "active" — the judge who would make a ruling on the applicability of the first eight amendments once and for all because he says he believes that the Fourteenth Amendment meant to apply them to the States, or the judge who brings down upon the Court a continuing torrent of individual cases which cannot be decided

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[13]*Id.*, p. 115.

[14]*Id.*, p. 98.

[15]*Id.*, p. 114.

[16]332 U.S. 46, 70 (1947).

[17]*Id.*, at 69.

without reviewing intricate sets of facts and comparing them with the whole *corpus* of the common law?"[18]

While a written text does not have a "tone of voice or the gloss that personality puts on speech,"[19] there seems to me a distinct flavor of disapprobation when Mendelson says the "activist" believes that his "basic job is to impose Justice . . . on the community." The root of that disapprobation is a strong suspicion of the idea of justice itself and of "idealism." In a passage designed to characterize the "activist" tradition, Mendelson quotes, without identifying, "[o]ne of Mr. Justice Black's ardent supporters" as saying " 'As procedure is the instrument, not the master of law; so law is the instrument, not the master of justice.' " Mendelson comments that, "Law, then, is simply a tool to be manipulated in accordance with the judge's vision of right and wrong."[20] There is some truth in Mendelson's comment on what "Black's ardent supporter" said. But insofar as there is truth in it, Frankfurter would agree with both the view of Black's supporter and Mendelson's comment on that view. To be a stickler for procedure is not to prefer "regularity" to justice[21] but simply to recognize that regularity is an essential attribute of human justice.

There seem to be constant overtones in Mendelson's book which imply that Frankfurter is virtually a legal positivist. Respect for law — and hence for the making of the law — is perfectly consistent with a zeal for justice. It is only in the peculiarly modern understanding of natural rights that scholars see justice and nature as subversive of law, enemies of the people's legislation. How curious it is for Mendelson to identify Black with Plato and justice and to set them — all three — over against law. Maybe Black does see things that way. If so, Mendelson is, despite his clear showing of preference for Frankfurter, really in essential agreement with Black and not necessarily with Franyfurter, for the latter seems to reflect, if not to recover, the traditional view

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[18]See Charles L. Black, Jr., *op. cit.* note 2, *supra,* at p. 68.

[19]Frankfurter in Von Moltke v. Gillies, 332 U.S. 708, 730 (1948).

[20]Mendelson, p. 116.

[21]This seems to be Mendelson's suggestion. See the passage quoted from p. 41, note 3 *supra.*

of the relation between law and justice. According to that view, any system of laws which has a great deal of stability, clarity and consent is better than lawlessness, but justice is the external standard by which, ultimately, the laws are judged.

But in the *Adamson* case, Black had disputed the Court's claim that it had an external standard. He said that the Court's stand there threw it back upon irrational preference. With respect to Frankfurter, who denied Black's charge, Mendelson says:

> He does not try to hide, or apologize for, the discretionary element in adjudication. Nor would he eliminate it with mechanistic rules. Rather, he would exercise it humbly — not in accordance with his own heart's desire, but by the guidance of an external standard. This takes several forms but ultimately its essence is the reasonable man. Who is this creature? He is the same old pragmatic genius who made the common law one of the world's two great legal systems. He is simply a device whereby judges, when the law leaves room for doubt, seek out the common sense, the accepted values, the conscience of the community.[22]

It is true that Frankfurter sometimes uses the word "pragmatic,"[23] and it might be said that commentators are justified in using in their description of a man's views whatever words the man himself uses. But, in examining Frankfurter's usage of the word "pragmatic," the context does not show that he has subordinated himself to pragmatism. It is one thing to say that the resolution of certain problems involves "pragmatic considerations"; it is quite another thing to describe someone as a "pragmatic jurist."

While Frankfurter appears to use the word "pragmatic" casually, Mendelson seems to use it as a label which is meant to describe the content of Frankfurter.[24] The whole tone and temper

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[22]Mendelson, pp. 73-74.

[23]Cassell v. Texas, 339 U.S. 282, 292 (1950); Brock v. North Carolina, 344 U.S. 424, 428 (1953).

[24]Mendelson, at pp. 13, 40, 47, 61, 67, 73, 115. For another author's similar usages, see Thomas, FELIX FRANKFURTER, SCHOLAR ON THE BENCH (1960) at pp. 171, 216, 221, 225, 234, 235, 317, 322, 333, 364. Compare p. 225 with p. 367 in Miss Thomas' book. For a comment by Frankfurter on labels, see: Phillips, ed., FELIX FRANKFURTER REMINISCES (1960), pp. 256-57.

of the book is one which suggests that something like moral relativism or legal positivism is the basis of Frankfurter's method. Perhaps in the final analysis some highly sophisticated brand of relativism is the root of Frankfurter's jurisprudence. For example, he often refers to "history." But "history" is everything that happened — good and evil. It cannot judge but must *be* judged. Some *standard* must be applied *to* history. As far as the "conscience of the community" is concerned, there is no such thing. A community as such has no conscience. The phrase is a euphemism, a cloak. It requires explanation. If the phrase means "the accepted values," we are compelled to ask, whose values? Everyone's? The majority's? When? In 1789? Right now? Not to speak of the effect upon the law of the poverty of the 1930's, but simply to refer to the glutted present, can one say that the "accepted values" supply a sure standard? Cannot the community "accept" its values from a McCarthy? If "normal times" be offered as the "base-year" for values, we are driven to ask the criterion by which normality is established. If "conscience of the community" means the community's "better self," can we avoid deciding what is better and what is worse?

This is a book review and therefore not the place to supply a critique of Frankfurter's use of the term "conscience of the community." It is conceivable that Frankfurter means no more by it than Mendelson, in which case his "judicial restraint" is a nice name for judicial neglect and he skips, case by case, from visceral jurisprudence to moral relativism to apology. But to say that would be to level a most severe accusation. Moral duty forbids bringing down upon Frankfurter and the Court and the Constitution such a damnation until every conceivable alternative has been explored. We are not unaware of the charming irresponsibility open to commentators in law reviews[25] but we cannot fail to offer at least the outlines of what such an exploration would entail.

How does the phrase "conscience of the community" come to appear in the Reports in the first place? It would be the "vainest show of learning" to recite to a law review audience a history

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[25]See Frankfurter, *The Zeitgeist and the Judiciary*, reprinted from SURVEY for January 1913 in Elman, ed., LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER, p. 3. (See the first paragraph.)

with which it may be presumed to be familiar and therefore we shall not go through an account of the Court's traditional stand on the due process clause of the Fourteenth Amendment in the *Hurtado, Twining, Palko* and *Adamson* cases. And it would be presumptuous to argue the correctness of that stand in a few pages. And, while acceptance of that stand is the precondition without which all that follows is moot, we rest here on the flat assertion that the Court's traditional stand is correct and Black's reading of the *Globe* for the 39th Congress is faulty. The Bill of Rights, as such, still does not apply to the States. The United States and the States are free to abandon old processes and adopt new ones. The range of freedom of the United States is severely narrowed by the first eight Amendments. The freedom of the States is restricted by very few specific limitations. The general restriction is that the processes employed must be due. The question is, what is due to a person?

"Essential fairness" is the answer, but Black says that judges can only explore their viscera to find it, and Frankfurter answers that the plain meaning of the words of the Fourteenth Amendment and the intention of its framers compel the judges to look anyhow. They do not, says Frankfurter, look inside to their viscera. They look outside. To what? To the conscience of the community. But the expression of that conscience, *par excellence,* is the legislative authority, and it is that authority which is to be *measured* by due process. So we look to history. But history is full of processes. The judge must select some and exclude others. Why does he prefer, say, an adversary proceeding to ordeal by fire? It cannot be because ordeal by fire is older and adversary proceedings newer – that is, it cannot be what has "evolved" – because then the latest process to be adopted would be due process and reliance upon that history which antedates breakfast would be mere reaction. It cannot be because ordeal by fire "shocks the sensibilities" because, quite obviously, whatever has been adopted by the voice of the people does not shock the people's sensibilities. If the people *choose* ordeal by fire it is due process. It will not do to turn to what "English-speaking peoples" consider due, for so to turn would be to deprive the several jurisdictions among English-speaking peoples of their freedom to adopt and abandon processes. Or, to put it another way, the several jurisdictions *are* the English-speaking peoples and to look to those peoples for a

standard means to look also to the jurisdiction which has elected ordeal by fire as its process.

It is true that in the realm of property relationships, almost unlimited legislative discretion is feasible, but it is a mistake to suppose that property relationships are the sum of human affairs. Therefore, while it may be true the Court's doctrine of "substantive due process of law" was for the most part the equivalent of doctrinaire *laissez-faire* economics[26] it does not follow that rejection of *laissez-faire* in favor of judicial restraint requires a categorical rejection of substantive due process of law. *No* process can be a lack of due process just as much as can the *wrong* process. And so, while mere change in the realm of property relationships can perhaps be met with equanimity, it will not do to speak of the Court's task in general as the task of striking a balance between change and stability.[27] Stability *is* an essential element of the law, and change there *will* be, and courts as well as legislatures *are* concerned with striking a balance. But life, liberty or property may not be taken without due process of law, and what is due is not immanent in what has been nor in what is coming to be.

There *is* a sense in which one may speak of the "conscience of the community." That is, there is a wish common to men in society that somehow justice be done. The Constitution leaves it largely to the legislature to declare what belongs to whom. But certain limits are set upon the legislature. Some of them are specific, but a permanent and comprehensive embodiment of justice in law is not available here below, and one of the limitations in the law of the Constitution points beyond law proper to law in the largest sense: that is the due process clause. It commands that legislative innovations shall not run counter to what is, by nature, right. To know what is by nature right is to be very wise, and wisdom is the preserve of the few. Reason is *not* that "old pragmatic genius, the Reasonable Man"; that is, it is not the excellence which is immanent in the coming-into-being of what is. "Reason" and "experience" are not interchangeable terms.

The "conscience of the community" is a vague undefined wish for justice and its expression in the due process clause refers its

[26]Mendelson, p. 2.

[27]*Id.*, pp. 114-15.

specific application to the wisdom and expertise of judges. History is a hodge-podge of right and wrong which cannot judge but must be judged. Knowingly or not, when Mr. Justice Frankfurter refers to the "conscience of the community" to find due process he simply returns to the arbitrament of a vague wish what that wish had referred to him. He is our hired conscience. If he does not know what he is doing, then he is hiding from himself the truth of Mr. Justice Black's accusations that he is drawing his judgments out of his viscera, and it would be better for him to pretend that the due process clause means what Black says it means. If he is aware of what he is doing, then his language is a shroud over the unpalatable fact that he is doing what the community has commanded him to do – employing his wisdom and expertise to choose between the ordeal by fire and the adversary proceedings which the history of the communities of English-speaking peoples sets before him. Why need such a fact be shrouded? Because the heart of the community cries out for justice. But the intellect has been schooled by a thousand law schools and departments of philosophy and political science to the doctrine that there is no such thing.

What justifies the community in vesting such a duty and the judge in accepting it? Well, the judge is a student of the law. The law does not present the final answer, for, in the hard cases – the due process cases – the law is the very thing to be judged. But the law everywhere *points* to justice, and a life spent in its study prepares the ground for an understanding of justice. If that understanding were to be reached it could not be reduced to a plain formula to be conveyed like a title to real property, for the admission that it is the product of life-long study is a denial that it can be so conveyed. The "conscience" of the many require it; the wisdom of only a few can apply it. The law cannot judge itself. It points beyond itself to that by which it is judged. The law stands in need of something, and that something is a thing to which judges may apply themselves. We shall not attempt to resolve the question as to whether or not Frankfurter is aware that "history" and the "conscience of the community" are shrouds to cover the nakedness of judicial judgment, but we would suggest that the thing by which the law is judged and to which judges may apply themselves is political philosophy.

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