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Variations on Some Themes of a Disporting Gazelle and His Friend: Statutory Interpretation as Seen by Jerome Frank and Felix Frankfurter

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In 1947, this Review published two lectures on statutory interpretation by Jerome Frank and Felix Frankfurter. Both jurists were concerned with a basic question: How constrained are judges when they interpret legislation? The answers each gives, while similar in some respects, differ strikingly. In arguing that interpretation necessarily involves a creative element, Frank analogizes the role of a judge in interpreting legislation to that of a performer in interpreting a musical composition. Although he argues that judicial creativity is constrained, Frank views statutory interpretation as "a kind of legislation." For Frankfurter, by contrast, in construing a statute, a judge is to disinterestedly carry out the purposes of the legislature. Judicial legislation oversteps the function of the courts. In this Essay, Professor Greenawalt examines these competing paradigms by contrasting them not only with each other, but also with certain illuminating opinions written by Frank and Frankfurter. While the opinions help to point out the limitations of each theory, Professor Greenawalt argues that the Frank and Frankfurter's accounts remain important voices in the contemporary debates about statutory interpretation.

INTRODUCTION

Statutory interpretation inevitably involves many elements. Theories of statutory interpretation offer accounts of the important elements and place them within a coherent whole.1 Part of the puzzle of statutory interpretation is how recipients should understand instructions that are cast as rules and are formulated in natural language. But anyone who studies this subject quickly realizes that one cannot come up with some grand theory for all human instructions, and simply apply that theory to law.2 What is crucial for statutory interpretation is the nature of law that is backed by the coercive power of the state, and the relationships be-

* University Professor, Columbia Law School; Editor-in-Chief, Columbia Law Review (1962–1963). I am very grateful to John Manning for his thoughtful suggestions, to Michael Dowdle for his excellent research assistance, and to Lewis Yelin and other members of the Law Review for their significant contribution in developing themes of the Essay and in editing its content.

1. In Statutory Interpretation: Twenty Questions (1999), I attempt to provide such a comprehensive account, although with much less than a complete theory.

2. I believe, however, that analysis of nonlegal instructions can illuminate issues about interpreting statutes. See Kent Greenawalt, From The Bottom Up, 82 Cornell L. Rev. 994 (1997). David Lyons, in conversation, has reminded me that typical legal rules are not formulated as instructions and has urged that they should not be so understood. I continue to believe that legal rules can well be understood as kinds of instructions, but I do not develop the argument here, since no important conclusions depend on it.
tween legislatures, executive agencies, and courts. Just how judges should interpret statutes depends greatly on how legislatures, agencies, and courts function; relations among these bodies may vary in different legal cultures or in one legal culture over time.

Within the United States, the centerpiece of theorizing about courts and legislatures has always been constitutional law. When, and why, are judges justified in relying on written constitutional provisions to strike down measures adopted by elected legislatures? The stark power of judicial review, the vague contours and ancient lineage of many important constitutional provisions, and the values of decent government and individual rights that constitutions reflect, have proved an irresistible attraction for scholars and judges reflecting on the place of courts. But statutory interpretation presents its own fascinating set of issues about how courts interpret binding, authoritative language. This Essay views some of those issues through the lens of two mid-century articles.

The 1947 Columbia Law Review published two lectures by distinguished judges about statutory interpretation. Felix Frankfurter had developed courses in statutory interpretation at Harvard Law School, and he interpreted statutes during nearly a quarter century on the Supreme Court. Henry J. Friendly wrote in 1964 that Frankfurter “fashioned a corpus of opinions on the reading of statutes that has not been matched in our time and does not seem likely to be in the future.” Frankfurter’s “Some Reflections on the Reading of Statutes” provides a balanced account of statutory construction from a time when Supreme Court Justices were comparatively undivided about how to perform that task. Jerome Frank was a leading legal theorist and Court of Appeals judge. His “Words and Music: Some Remarks on Statutory Interpretation,” draws out implications of an arresting analogy between musical performance and statutory construction. Both lectures move between reflections on what judges do to theoretical observations. Both focus on the extent to which judges are constrained not to rely on their own moral and political judgments.

The lectures differ in tone and substance. Frankfurter writes in an instructional or professorial vein, based partly on research (by himself and his law clerk) into hundreds of opinions. He avoids excess and evinces confidence in the detachment and objectivity of judges. Frank aims to engage the reader with his intriguing comparison, emphasizing

3. Henry J. Friendly, Mr. Justice Frankfurter and the Reading of Statutes, reprinted in Benchmarks 196, 233 (1967). Friendly was a brilliant successor of Jerome Frank on the Second Circuit Court of Appeals.
4. 47 Colum. L. Rev. 527 (1947). The oral lecture had been delivered on March 18, 1947, as a Benjamin N. Cardozo Lecture to the Association of the Bar of the City of New York.
5. 47 Colum. L. Rev. 1259 (1947). This paper was an expansion of his April 25 after-dinner talk for the Columbia Law Review.
6. My colleague, Louis Henkin, then Justice Frankfurter’s clerk, did much of the review of opinions.
the creativity and subjectivity of judging. A reader of the two pieces may miss how much they share. Both reject the idea that, in difficult cases, the main effort of judges should be to discern the precise linguistic significance of the provision whose meaning is contested. Both reject the idea that statutory interpretation comes down to a refined assessment of how legislators intended to deal with the exact problem that the court faces. Both claim that judges should be guided by the broad purposes of the legislature.

The lectures represent different strands of thought that contributed to the rise of the “legal process” approach to statutory interpretation in the 1950s and 1960s, an approach that once dominated thought about the subject and continues to have many adherents. Building upon Oliver Wendell Holmes, Jr., legal realists challenged formalist understandings of law, urged that law was social policy, and stressed the indeterminacy of legal results. Frank was a leading legal realist. He was the most prominent fact skeptic, claiming that the primary ingredient of uncertainty in law is the unreliability of factual determinations. Although the main body of his lecture is not a straightforward presentation of legal realist claims, its focus on the creativity of judges bears a realist imprint.

Frankfurter was a more direct forebear of legal process thinking. In courses he taught during the 1920s and 1930s, he developed conceptions of institutional competence and of the desirability of courts deferring to legislatures and to expert administrative agencies. He taught Henry Hart and others at Harvard who then became proponents of a legal process approach to statutory meaning. In his lecture, Frankfurter adopts a cooperative view of how legislators and courts may work together. According to William Eskridge and Philip Frickey, “the contention that statutes should be interpreted equitably and purposively achieved near unanimous acceptance in the law review literature written between 1938 and 1941.” This central tenet of legal process theory receives ringing endorsement by Frankfurter.


8. The Path of the Law, 10 Harv. L. Rev. 457 (1897), is the best summary of Holmes’s jurisprudential views.

9. See especially Jerome Frank, Courts on Trial (1949).

10. In a brief coda, Frank offers the central thesis of fact skepticism for which he is best known. See Frank, supra note 5, at 1272–78.

11. Eskridge and Frickey, Introduction, supra note 7, at lii, with citations.
When analyzing two lectures on the same topic, the reader is naturally drawn to compare their ideas. But here another comparison may be even more illuminating. Both Frankfurter and Frank were serious intellectuals and very influential practitioners of the art they discuss. A look at their performance as judges can provide insight into the ideas in their off-the-bench writings and some test of whether those ideas warrant adoption. Federal judges, of course, decide many statutory cases each year. A genuinely fair comparison of this sort would require analysis of a broad range of cases. I settle for a much more selective exercise, considering in depth one highly unusual case in which Judge Frank participated, treating more summarily an important statutory dissent of Justice Frankfurter's and a constitutional opinion that exemplifies his confidence in judicial detachment, and discussing briefly two cases in which our two authors both wrote opinions and disagreed about statutory meaning.

Neither lecture is systematic or seriously defends its positions against possible competitors. But the lectures hold more than historical interest. They raise questions about statutory interpretation that remain very much with us, and they stake out positions that, in their broad outlines, remain highly plausible. Although these positions now have powerful challengers, my own view is that the purposive approaches that Frankfurter and Frank defend better capture the appropriate role of courts than do any radically different alternatives. That does not mean I agree with every detail of what either author says, and I shall indicate my most serious reservations.

1. Perspectives on Our Authors

For readers of my generation and older, the names of Frankfurter and Frank—towering figures in mid-century American law—will be familiar, but younger readers may have less sense of their place in the American legal establishment at the time they wrote. Even readers for whom these are (or were) household names may be unaware of ways in which their careers intertwined. One need not possess any neat thesis about how personal background affects ideas to believe that practical experience and character may help explain intellectual stances.

Frankfurter came to New York in 1894 from Vienna as a twelve-year-old. At Harvard Law School, he accepted John Chipman Gray's skeptical ideas about legal doctrine and James Bradley Thayer's thesis that judges should exercise restraint in constitutional cases, not overturning legislative choices unless these are clearly unconstitutional. He worked in both the Taft and Wilson administrations, went to Harvard as a profes-

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12. Friendly, supra note 3, passim, provides a relatively full account of Frankfurter's performance in statutory cases.
14. See id. at 2.
sor,\textsuperscript{16} reentered the government during World War I,\textsuperscript{17} and returned to Harvard.\textsuperscript{18}

In his days at Harvard, Frankfurter pioneered the teaching of statutory subjects.\textsuperscript{19} He remained involved in liberal political causes, receiving occasional financial support from Justice Louis Brandeis, who called him "the most useful lawyer in the United States."\textsuperscript{20} With the coming of the New Deal, Frankfurter declined any formal position, but became a very close advisor to President Roosevelt. In 1939, when he was appointed to replace Benjamin Nathan Cardozo on the Supreme Court, Harold Ickes said the nomination was "the most significant and worth-while thing the President has done" (this more than six years into the Roosevelt Administration).\textsuperscript{21} In praise more directly on the topic of statutory construction, Judge Friendly said years later, "No judge before him . . . arrived at the task of statutory construction so well prepared. His whole legal life had been lived with statutes."\textsuperscript{22} The widespread expectation that Frankfurter would become the Court's leader was never fulfilled, however. By 1947—the date of our lecture—it was evident that most of the other Justices were not willing to follow his lead; but the bitterness of finding himself consistently out-of-step with a liberal majority in constitutional cases still lay ahead.

After graduating from the University of Chicago Law School in 1912, Jerome Frank became a leading expert on corporate reorganization in Chicago and then New York.\textsuperscript{23} In 1930, he published \textit{Law and the Modern Mind}, a striking realist and Freudian account of legal decisionmaking that suggests that the major ingredient of judicial decision is the judge's personality. With Frankfurter's help, Frank became General Counsel to the Agricultural Administration Agency\textsuperscript{24} and then served with the Reconstruction Finance Corporation and the Securities and Exchange Com-

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\item[\textsuperscript{16}] See id. at 40–41. There he expected to maintain an active involvement in public issues.
\item[\textsuperscript{17}] He was secretary and counsel to the President's Mediation Commission, which was designed to control strikes in industries vital to the war effort. See id. at 55. The Commission investigated both the massive deportation of striking miners from Bisbee, Arizona, and the trial of Tom Mooney, a labor organizer convicted of planting a bomb that killed several people. His work in highly controversial circumstances showed a deep concern for fair process and won him an undeserved reputation as a radical. See id. at 55–57.
\item[\textsuperscript{18}] See id. at 65.
\item[\textsuperscript{19}] See Friendly, supra note 3, at 198.
\item[\textsuperscript{20}] Urofsky, supra note 13, at 20, 25–28. Frankfurter's best known activity was his intense unsuccessful effort to gain a new trial for Nicola Sacco and Bartolomeo Vanzetti, anarchists convicted of killing two payroll guards. See id. at 22–24.
\item[\textsuperscript{21}] Id. at ix.
\item[\textsuperscript{22}] Friendly, supra note 3, at 197.
\item[\textsuperscript{23}] See Robert Jerome Glennon, The Iconoclast as Reformer: Jerome Frank's Impact on American Law 19–21 (1985).
\item[\textsuperscript{24}] See id. at 25.
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mission. In 1941, Roosevelt appointed him to the Second Circuit, where he served with an extraordinary group of judges.  

Frankfurter and Frank exchanged hundreds of letters. Both were political liberals who rejected the conceptual jurisprudence of the conservative members of the Supreme Court in favor of a more pragmatic understanding of the relation of legal doctrine to social consequences. Both regarded judging as an art, and both greatly admired Learned Hand. Both were warm and charming in personal relations, devoted and loyal friends, but each also had a regrettable tendency to personalize disagreements. According to a biographer, Frankfurter "took the refusal of his colleagues to follow his lead as a personal affront and unfortunately allowed full play to his considerable talent for invective." Frank, a biographer has said, "bruised easily"; the "mildest chiding hurt him"; he was "extremely stubborn and unyielding in debate," and "his writing cut and stung, caricatured and satirized." Frankfurter once wrote to Frank, "Every time I have a brush with you I feel like a brute who has hurt a charmingly disporting gazelle."  

Frankfurter differed from Frank in his nearly thorough acceptance of judicial restraint on constitutional issues, and, more relevant for our purposes, in his confidence that judges engaged in "process jurisprudence" could be disinterested. The two had different views about judicial opinions as well: Frankfurter used complex and embroidered language; Frank favored a more direct style. These stylistic propensities exhibit themselves in the two lectures.

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25. These included Learned and Augustus Hand, as well as two former Yale Law School deans, Thomas Swan and Charles Clark. See id. at 103–04.
26. Frank called him "our wisest judge" in a book dedication, Frank, supra note 9, at v, and Frankfurter strongly urged his appointment to the Supreme Court, see Hirsh, supra note 15, at 162.
27. Frankfurter was adept at relations with mentors, whom he flattered, and with students and law clerks, whom he instructed. He proved less able at dealing with peers on the Supreme Court, whom he often antagonized by instructing them more than they wished. Soon after arriving on the bench, Frankfurter wrote to Justice Hugo Black, explaining to that former politician that judges

cannot escape the responsibility of filling in gaps which the finitudes of even the most imaginative legislation render inevitable. . . . They cannot decide things by invoking a new major premise out of whole cloth; they must make the law that they do make out of the existing materials with due deference to the presuppositions of the legal system of which they have been made a part.

Urofsky, supra note 13, at 46.
28. Id. at 47.
30. Id. at 24.
31. The Supreme Court Justice to whom Frank felt closest was William O. Douglas, among the most activist Justices in civil rights and civil liberties cases. See id. at 118–19.
32. Frank wrote an anonymous essay in a law review criticizing Benjamin Cardozo’s writing as not reflective of American speech. See Anon Y. Mous, The Speech of Judges: A Dissenting Opinion, 29 Va. L. Rev. 625 (1943). Calling "lucidity . . . the basic quality of
II. Words and Music

Because Frank's lecture, unlike Frankfurter's, has a tantalizing single theme to analyze, and because the case of Frank's on which I concentrate is so compelling, I begin with those.

If the December issue was published on time, Frank's essay appeared within days of the Second Circuit's decision of a troubling naturalization case, *Repouille v. United States*. Judge Frank, and his colleagues Learned Hand and Augustus Hand, had to apply the statutory phrase "good moral character" to decide if an alien resident should be granted citizenship. Learned Hand, writing the court's opinion, took community sentiments as the standard of "good moral character." Frank dissented, arguing that courts should look to ethical leaders or at least acquire solid factual information about community attitudes. *Repouille* starkly poses the question of how judges are to make moral assessments when they apply statutory law. The statutory standard of "good moral character" is, of course, atypical; but the case nonetheless provides a striking mirror for Frank's lecture. The lecture concerns judicial creativity and the case well reveals both Frank's willingness to undertake imaginative interpretation and his practical sense of constraint.

A. The Lecture

The heart of "Words and Music" is a comparison between a performer's interpretation of a piece of music and a judge's interpretation of legislation. Frank claims that the comparison yields insights beyond good judicial opinions, "he complained that Cardozo's opinions often obscured analysis. See id. at 104.

Frank's papers contain an unpublished parody of Frankfurter's style of writing that shows Frank did not find it congenial:

Mr. Justice Frankfurter delivered the opinion of the Court.

A semi-centennial, three decades and seven winter solstices preceding the present, our paternal progenitors gestated and regurgitated upon the western hemisphere (49° longitude 38° latitude) a pristine commonwealth, political, social, and economic, of our glorious and heterogeneous population proclaiming the universal hypothesis, proposition and thesis, that all male issue are politically and economically liberated and equal, pari-passu per capita and not per stirpes. Glennon, supra note 23, at 203 n.103.

Frankfurter, in turn, was less than enamored with Frank's style of opinions. Frank sometimes used opinions to write essays about matters not closely related to the precise legal issue in the case at hand. See id. at 104. After receiving a letter from Frank explaining his view that opinions should educate, Frankfurter responded, that there "is no reason why you should take a simple case which Holmes would have disposed of in a page and a half and use it as a peg for an essay on mercantilism." Id. at 105; see also id. at 87–89 (exchange between the two on Frank's legal arguments as a New Deal lawyer).

33. I understand this was a big "if" for many years of the Law Review's history.

34. 165 F.2d 152 (2d Cir. 1947).

35. Frank mentions two other papers containing similar comparisons, and proceeds to say, "I want, therefore, to assert my claim to priority." Frank, supra note 5, at 1260 n.9. One wonders why he sees his rightful claim as to priority. Granting that Frank thought of the comparison before he read the other papers, their writers presumably thought of the
those inherent in the more common idea that statutory interpretation is an art rather than a science, and defends the analogy to music against competing analogies such as architecture.\footnote{Frank draws heavily on the work of Ernst Krenek, “a brilliant modern musical composer,” who “criticizes those musical ‘purists’ who insist on what they call ‘work-fidelity.’”\footnote{Frank, supra note 5, at 1260 (quoting Ernst Krenek, uncited work).} According to Krenek, performers who try very hard to do everything just as the composer intended, fail to do justice to a work’s spirit. They end up producing “‘an unbearable caricature of the composition.’”\footnote{Id. at 1261 (quoting Ernst Krenek, uncited work).} Instead, a performer should aim to capture the spirit of a work as filtered through “‘the medium of [his] personal life.’”\footnote{Id. (quoting Ernst Krenek, uncited work).} The result is that different performers will perform scores somewhat differently. This does not mean any one performance will necessarily be better or worse than another, because variant interpretations may be “‘equally good . . . and satisfactory.’”\footnote{Id. (quoting Ernst Krenek, uncited work) (alteration in original).}

We can reduce Frank’s account of Krenek’s analysis to the following propositions: (1) Composers cannot completely control musical interpretation; the characteristics of performers will influence performance; (2) attempts by performers to stick too doggedly to every aspect of a composer’s design produce inferior performances; (3) performers are constrained to a considerable degree by what the composer has written, but they are well advised to reflect a composer’s essential objectives rather than replicate each detail of how the composer conceived of his work’s

\footnote{36. See id. at 1259–60. Frank’s attraction to the musical analogy almost certainly derived from his personal background: His mother was an accomplished musician who raised her son on music. See Glennon, supra note 23, at 15. The legal academy’s recent fascination with literary interpretation and its comparative disinterest in religious interpretation shows that scholars tend to choose fields as fruitfully analogous to law more because of their own interest in those fields than because the analogies are uniquely apposite. Whether Frank is right that personal background is as central for judging as he asserts in \textit{Law and the Modern Mind}, personal interest substantially affects lines of scholarship generally, and the analogies that legal scholars choose for law more particularly.

37. Frank, supra note 5, at 1260 (quoting Ernst Krenek, uncited work).

38. Id. at 1261 (quoting Ernst Krenek, uncited work). Wagner was so disappointed with interpreters who tried to follow his metronomic markings too faithfully, that he decided to dispense with such markings. Id.

39. Id. (quoting Ernst Krenek, uncited work).

40. Id. (quoting Ernst Krenek, uncited work) (alteration in original).}
being played; 41 and (4) the most wholesome outcome is different interpreters playing the same piece of music differently, importing something of their own feelings into their performances.

Before we turn to what Judge Frank says directly about statutory interpretation, it is worth asking how these propositions might relate to law. Proposition (1) concerning the inevitable effect of interpreters' personal characteristics is indisputably applicable in some circumstances. Interpreters cannot wholly escape their own special characters when they try to discern the meaning of what others have said. When meaning is straightforward in context, vastly different readers arrive at the same understanding. But when meaning becomes debatable, an interpreter's personality may influence judgment. 42 Proposition (2), about the undesirability of dogged reproduction of detail, and Proposition (3), about the desirability of interpretation that aims at essential objectives, are more controversial as applied to law. According to these propositions, judges should not stick slavishly to every literal aspect of statutory language; they should be guided by the spirit of a text. Proposition (4)'s welcome of a variety of performances is by far the most disquieting for an orthodox view of law; if this claim were true about law, wise interpreters would not "fight" the subjectivity of their own inclinations, but would give these inclinations relatively free rein.

In moving from musical performance to statutory interpretation, Frank says that judges should interpret a piece of legislation literally sometimes, but that often "so to construe a statute will yield a grotesque caricature of the legislature's purpose." 43 Judges should cooperate with a legislature by using "their imagination in trying to get at and apply what a legislature really meant, but imperfectly said ... ." 44 Judges should dis-

41. Frank does not concern himself, nor need we, with how much study performers should devote to the background of works or with exactly what aspects of musical interpretation are best left free and what aspects are best resolved for all performers by the composer. Many classical composers leave space for cadenzas that performers develop; but should performers regard themselves as free to alter rhythms the composer has noted or to deviate from the actual notes composers have written, if the spirit moves them or if they think some other notes are obviously superior? (Levinson and Balkin discuss the propriety of playing a note that Beethoven probably would have written had pianos of his time been capable of playing it. See Levinson & Balkin, supra note 36, at 1598-99.) Is there any limit on how far the performer's musical instrument should vary from that for which the composer wrote? We can leave these questions for musical critics and audiences; reviewing a book of essays entitled Authenticity and Early Music (N. Kenyon ed., 1988), Levinson and Balkin tell us just how controversial these issues have become. See Levinson & Balkin, supra note 36. Analogous questions about legal standards are of crucial significance for statutory interpretation. When those who make rules have not delegated subsequent judgment to interpreters by design, how far should interpreters draw on their own intuitions and values to resolve debatable issues?

42. A performer's personal character may always influence musical performance to some degree; that may not be true of all "either-or" interpretive judgments in law, though the quality of any written opinion reflects its author.

43. Frank, supra note 5, at 1262.

44. Id. at 1263.
cover meaning in all parts of a statute, not a single provision.\textsuperscript{45} Frank approvingly quotes one of Holmes’s aphorisms, that statutory meaning is "to be felt rather than proved."\textsuperscript{46}

According to Frank, differences in legal interpretation are no more avoidable than differences in musical performance.\textsuperscript{47} Interpretation is "inescapably a kind of legislation."\textsuperscript{48} Judicial creativity should be limited, "but, within proper limits, it is a boon not an evil."\textsuperscript{49} Were courts to honestly acknowledge their creative power, that might "well induce restraint in exercising it."\textsuperscript{50}

Frank is much more specific about the restraints on judges than about those on musical performers. If the legislature makes plain that it wants literal interpretation, judges should follow that lead.\textsuperscript{51} More generally, when the legislature employs relatively precise terms, judges have much less room for creativity than when a statute contains a vague and flexible standard.\textsuperscript{52} Because the legislature has the power to declare policy, judges should adhere to its will about that,\textsuperscript{53} eliminating their personal views of policy as far as possible.\textsuperscript{54} When they make assessments of value, judges should rely on the community’s sense of values.\textsuperscript{55} According to Frank, the responsibility of lower courts differs from that of the highest courts; the duty of an intermediate federal appellate court "is usually to learn, 'not the congressional intent, but the Supreme Court's intent.'"\textsuperscript{56}

Finally, Frank tackles the uncertainties of fact-finding. Fallible, subjective reactions of witnesses and of juries or trial judges render factual determinations unreliable. Frank ties this topic to what precedes it by talking of factual judgments as involving creativity beyond that of a musi-
cal performer, a kind of legislative power. However, if he is being candid, he does not believe that this function offers an appropriate opportunity for flexible judgment, since he thinks judges should try to find facts as accurately as possible.

The constraints that Frank sketches on judicial creativity leave doubt as to whether he embraces one aspect of the musical analogy, namely Proposition (4), that it is actually desirable that different judges reach different interpretations. If different interpretations are inevitable, one might initially think that desirability is beside the point—we don’t worry too much about whether salt water is desirable—but lurking in the background is a critical question about how a judge understands her task. I return to this question after discussing Frank’s position in Repouille.

B. The Decision

Repouille was denied citizenship because he had deliberately killed one of his children. Under the Nationality Act, an applicant for citizenship had to show himself to have been a person of “good moral character” for the five years preceding the filing of his petition. Repouille had killed his son approximately four years and ten months before applying, under circumstances described thus by Learned Hand:

[H]e had deliberately put to death his son, a boy of thirteen, by means of chloroform. His reason for this tragic deed was that the child had “suffered from birth from a brain injury which destined him to be an idiot and a physical monstrosity mal-

57. See id. at 1272.
58. See id. at 1273–74.
59. I was a bit surprised to find here a passage that struck me when I read Frank’s Courts on Trial, supra note 9, and to learn that the story it tells had already appeared in another book. The passage concerns a judge who decided legal issues favorably for the plaintiff, but then ruled for the defendant on the facts. The judge later told Frank, one of the defendant’s lawyers,

“[T]he plaintiff was urging a rule of law which you thought was wrong. I thought it was legally right but very unjust. So I decided to lick him on the facts. And by giving him every break on law points during the trial, I made it impossible for him to reverse me on appeal, because I knew the upper courts would never upset my findings of fact.” That judicial conduct was not commendable.

Id. at 1275 (quoting Jerome Frank, If Men Were Angels 98–99 (1942)).

Frank does not discuss exactly why the “judicial conduct was not commendable.” If jury nullification is an accepted part of our system, is there no room for judge nullification, or is judge nullification unforgivable in the manner that a performer’s blatant disregard of a composer’s musical notes might be indefensible? I am not sure whether Frank’s comment here represents his full view or is a caution that he, an appellate judge, is hardly advocating wanton disregard of law by other judges. The troubling issue of outright judicial nullification of legal standards accomplished by intentional misfinding of facts is peripheral to the main themes of “Words and Music,” and I do not discuss it further here. See generally Kent Greenawalt, Conflicts of Law and Morality 359–68 (1987) (discussing the problems raised by the power of a judge or jury to nullify substantive law).

60. Repouille v. United States, 165 F.2d 152, 155 (2d Cir. 1947) (citing 8 U.S.C.A. § 707(a)(3)).
formed in all four limbs. The child was blind, mute, and deformed. He had to be fed; the movements of his bladder and bowels were involuntary, and his entire life was spent in a small crib." Repouille had four other children at the time towards whom he has always been a dutiful and responsible parent; it may be assumed that his act was to help him in their nurture, which was being compromised by the burden imposed upon him in the care of the fifth. The family was altogether dependent upon his industry for its support.61

At Repouille's criminal trial for manslaughter in the first degree, the jury convicted him of manslaughter in the second degree and recommended the utmost clemency. The judge gave him a suspended sentence.62

Hand took the jury's action as showing that it "did not feel any moral repulsion at [the] crime" and "wished to exculpate the offender."63 Hand said,

[W]e all know that there are great numbers of people of the most unimpeachable virtue, who think it morally justifiable to put an end to a life so inexorably destined to be a burden to others, and—so far as any possible interest of its own is concerned—condemned to a brutish existence, lower indeed than all but the lowest forms of sentient life.64

Nonetheless, noting a Massachusetts case in which a similar act brought a life sentence, Hand concluded, "we feel reasonably secure in holding that only a minority of virtuous persons would deem the practice morally justifiable, while it remains in private hands, even when the provocation is as overwhelming as it was in this instance."65

Here is much of Frank's dissent:

The district judge found that Repouille was a person of "good moral character." . . . My colleagues, although their sources of information concerning the pertinent mores are not shown to be superior to those of the district judge, reject his finding. And they do so, too, while conceding that their own conclusion is uncertain, and (as they put it) "tentative." I incline to think that the correct statutory test (the test Congress intended) is the attitude of our ethical leaders. That attitude would not be too difficult to learn . . . . But the precedents in this circuit constrain us to be guided by contemporary public opinion about which, cloistered as judges are, we have but vague notions. (One recalls Gibbon's remark that usually a person who talks of "the opinion of the world at large" is really referring to "the few people with whom I happened to converse.")

61. Id. at 152–53.
62. See id. at 153.
63. Id.
64. Id. Court memoranda indicate that Learned Hand was originally inclined to admit Repouille to citizenship. See Gerald Gunther, Learned Hand 633 (1994).
65. Repouille, 165 F.2d at 153.
Seeking to apply a standard of this type, courts usually do not rely on evidence but utilize what is often called the doctrine of "judicial notice," which, in matters of this sort, properly permits informal inquiries by the judges. However, for such a purpose (as in the discharge of many other judicial duties), the courts are inadequately staffed, so that sometimes "judicial notice" actually means judicial ignorance.

But the courts are not utterly helpless; such judicial impotence has its limits. . . . I see no good reason why a man's rights should be jeopardized by judges' needless lack of knowledge.

I think, therefore, that, in any case such as this, where we lack the means of determining present-day public reactions, we should remand to the district judge with these directions: The judge should give the petitioner and the government the opportunity to bring to the judge's attention reliable information on the subject, which he may supplement in any appropriate way. All the data so obtained should be put of record. On the basis thereof, the judge should reconsider his decision and arrive at a conclusion. Then, if there is another appeal, we can avoid sheer guessing, which alone is now available to us, and can reach something like an informed judgment.66

Because Frank accepts many of Hand's formulations of the relevant standards for decision, we need to explore some puzzling nuances in Hand's opinion before attending to Frank's objections. Drawing from an earlier case,67 Hand said that the statutory test is "whether 'the moral feelings, now prevalent generally in this country' would 'be outraged' by the conduct in question: that is, whether it conformed to 'the generally accepted moral conventions current at the time.'"68 Despite its sensitivity and appealing incertitude, the opinion bulldozes subtleties of moral judgment and feeling. "Character" differs from the morality of single acts, and "outrage" is not the same as judgments of moral unjustifiability.

The statutory requirement for citizenship is "good moral character," yet Hand and Frank treat as decisive the quality of one central act. A person might have a good moral character, although he committed one seriously immoral act nearly five years ago.69 Perhaps Hand and Frank did not think immigration officials were equipped to make a serious evaluation of the whole character of applicants, but neither offers that explanation.

In concentrating on single acts, Hand equates (1) whether an act fails to conform to "accepted moral conventions" with (2) whether an act

66. Id. at 154–55 (Frank, J., dissenting) (footnotes omitted).
67. In United States v. Francioso, 164 F.2d 163 (2d Cir. 1947), Hand had written that a man who had illegally married a niece did not lack good moral character in remaining with her and their four children. See id. at 164.
68. Repouille, 165 F.2d at 153 (quoting Francioso, 164 F.2d at 163).
69. No doubt, some acts are so vicious that we would be unlikely to say that someone who commits them has a good character, but that is not obviously true about Repouille's act.
“outrages” prevalent feelings. But the two standards are far from symmetrical in coverage. A man suffering a painful terminal illness who is too incapacitated to take his own life begs his daughter to help him die; after much agonizing, she does so. What is the community’s attitude? Some people think such aid is deeply wrong morally, others believe it is justified, while many others are perplexed about what is right or acceptable to do. One might find that only “a minority of virtuous persons” deem the act morally justifiable (what Hand says about Repouille’s act) but also that only a minority definitely regard it as morally unjustifiable.

The more important problem about Hand’s equating of outrage and nonconformity with moral conventions concerns the people who do consider an act to be morally unjustifiable. Someone might regard all euthanasia as seriously unjustifiable, yet acknowledge that others disagree and that any adult child faced with this plea from a loved parent would feel a powerful pull to help. Told what had happened, this outsider, and many others, might conclude that the daughter had acted wrongly but not feel outrage. According to community sentiments, an act might be seriously unjustifiable, but not outrageous. Hand finally phrases his judgment in terms of attitudes about moral justifiability; but an inquiry about likely “outrage” better captures the concern about moral character.

Without separately addressing what the exact standard of moral judgment should be, Frank proposes two ways to apply that standard other than by intuitive judicial discernment. His main expressed worry is that Hand’s approach gives judges too much discretion, since judges intuiting community sentiments will have little rein on their own sentiments. Frank’s preferred solution—to rely on ethical experts—may in part be a means to move to a more enlightened morality, but it is mainly a way to restrain judicial discretion. Frank’s alternative suggestion, that judges

70. The outsider might say, “she committed a serious moral wrong, but many people of good moral character would do the same.” If one outsider might have this attitude, so might many members of the community. Because of such nuances in various moral attitudes, I think Hand’s conclusion that the jury wished to exculpate Repouille is too simple. The jury did not acquit outright. The actual conviction may have represented a compromise. Whether or not it did, most jurors may have thought Repouille had committed a serious moral wrong, but was nonetheless more to be pitied than condemned. They may also have been moved by the need of his family for “his industry.” Repouille, 165 F.2d at 153.

71. If people feel moral outrage at an action, they usually do not think persons of good moral character would commit it.

72. In our postmodern, fractured culture, it is hard to imagine who would generally be regarded as moral experts; Frank’s proposal seems to founder on this difficulty, if not others. Correspondence between Learned Hand and Justice Frankfurter reveals that they were markedly less sanguine than Frank about what this approach might accomplish. Hand wrote to Frankfurter on December 9:

I assume that he expected the district judge, sua sponte [on his own initiative], to call the Cardinal, Bishop Gilber, an orthodox and a liberal Rabbi, [Protestant theologian] Reinhold Niebuhr, the head of the Ethical Cultural Society, and [literary critic] Edmund Wilson; have them all cross-examined: ending in a
acquire factual evidence about community morality, clearly represents an effort to supplant intuition with social science in the interests of curbing discretion and inducing sound judgment.  

C. The Lecture in Light of the Decision: Critique

Frank’s *Repouille* dissent tells us a good deal about his attitude as a judge to some of the themes of his lecture, and the case’s troubling issues help us to sift the wheat from the chaff in Frank’s off-the-bench remarks. I shall first discuss Frank’s expressed view that appellate judges should predict Supreme Court resolutions, before turning to the most subjectivist potentialities of the musical analogy and the bounded creativity of judges.

1. Intermediate Appellate Courts. — Frank’s lecture suggests that the duty of intermediate federal courts is to learn “the Supreme Court’s intent.” Frank does not recognize that this wrinkle either makes the musical analogy inapplicable for most judges or makes the analogy much more complex than Frank presents. One would need to think of an original composer (the legislature) and an original interpreter/secondary composer (the highest court), with the lower court judges aiming to be more faithful to the secondary composer than to the original composer, if they perceive a difference. If lower court judges could predict the attitudes of the highest court, they would have a duty to follow its likely response to a statute even before it has interpreted the statute.

Frank’s dissent in *Repouille* casts strong doubt on the rigor with which he followed this prescription. He says nothing to indicate that Supreme

“survey.” Oh, Jesus! I don’t know how we ought to deal with such cases except by the best guess we have.

Gunther, supra note 64, at 631–32 (quoting Letter from Learned Hand to Felix Frankfurter (Dec. 9, 1947)). Frankfurter wrote back, two days later:

It really is fantastic to assume that the kind of confused ethical judgments you would get from Jerry’s imagined panel of experts would be a dependable basis for a judicial judgment on such an issue.... Jerry too often is just a learned child—if, indeed, learning is the product of a voracious appetite for reading without considering the contents of books both backwards and forwards—backwards, by placing them in the movement of ideas, and forwards, by viewing new ideas with proper skepticism in determining their implications. Jerry too often reminds me of Holmes in the reverse. You remember Holmes’ remark: “I don’t know facts; I merely know their significance.” Jerry knows a helluvah lot of books, but not their significance.

Id. at 632 n.* (quoting Letter from Felix Frankfurter to Learned Hand (Dec. 11, 1947)).

73. One might counter that Frank’s treatment of the issue as one of factual proof would put more authority in the hands of district court judges and thus open the way for more diverse perspectives. But Frank does not suggest that a district judge’s conclusion would be insulated from review.

74. Indeed Hand himself made clear he did not like the “good moral character” standard; he claimed only that his approach was the best he could do with that standard. See Gunther, supra note 64, at 631–32.
Court authority supports either the "ethical leaders" or the "fact-finding" approach. And he offers the ethical leaders approach as preferable though it was a more radical departure from his own court's approach, and I would have guessed, not very likely to win Supreme Court approval. Just how appealing is this predictive model of how courts lower than the highest relevant court should resolve legal issues? We can distinguish between cases reasonably likely to get to the Supreme Court (or other highest court) and those unlikely to do so. For those likely to reach the highest court, the main problem is the kind of help the lower court will give the reviewing court. Suppose judges on a lower court, in a case in which they are not directly constrained by higher court precedents, believe that the judges on the superior court will probably decide one way, but they think a different way is more compelling. If they decide based on an estimate of what the higher court will do, they will have to take into account not only the corpus of decisions of that court, but also the political inclinations of recent appointees. In an extreme case, the "correct" decision for a court of appeals could change between the time of argument and the time of decision, if the President happens to appoint a conservative to replace a liberal on the Supreme Court. This feature might be eliminated if one said that all predictions should be based only on the highest court's legal decisions; but even this modified predictive approach gives too little scope to the lower court. In correspondence with Frank, Justice Frankfurter emphatically rejected Frank's conception of the role of the lower court judge. He said, "This business of anticipating what this Court will do grossly misconceives the nature of the deliberative process here and improperly deprives this Court of the illumination to which we are entitled when an issue is not foreclosed . . . ." If lower court judges are virtually certain that the Supreme Court would take the case and reverse the decision that the lower court judges think best, those judges have a powerful reason not to force the party that will finally win to continue the litigation to another level. However, when the highest court's decision is uncertain, the judges below should decide as they think best, giving due regard to authoritative precedents and to coherence with what the highest court has decided.

75. Frankfurter's ridicule of that approach in correspondence with Learned Hand is suggestive in this regard. See supra note 72.

76. One strategy Frank commonly employed to express his views, while being faithful to Supreme Court doctrine, was to vote according to the implications of Supreme Court doctrine, but to urge that prevailing doctrine be overruled. One notable case in which he employed this technique was United States v. Roth, 237 F.2d 796, 801 (2d Cir. 1956), aff'd, 354 U.S. 476 (1957), a famous obscenity case. See Glennon, supra note 23, at 111. Plainly, Frank himself did not think lower court judges were engaged only in estimates of what higher courts would do.

77. Glennon, supra note 23, at 112 (quoting Letter from Felix Frankfurter to Jerome Frank (July 17, 1956)).
For most cases decided by the federal courts of appeals, the judges can be nearly sure that the Supreme Court will not grant review. In these cases, judges should aim to develop a sensible body of law within a circuit and among the courts of appeals of various circuits. It might be claimed on behalf of Frank's approach that prediction of Supreme Court results in these cases could best unify the circuits and would be fairest to litigants. But if the Supreme Court's view is itself uncertain, various estimates about it are not likely to lead judges on courts of appeals to agree. And it is not apparent why it is fair to award decision to a party the judges who are deciding the case—the effective final judges for that case—believe should lose, because these judges estimate uncertainly that judges on a superior court would probably decide the other way if they ever took the case, which they will not.

Cases the Supreme Court will not take raise sharply another problem: the relevant time of the decision to be predicted. Suppose judges say to themselves: "It is inconceivable that the Supreme Court will take this case, but we think most Justices, if they considered the issue now, would decide against Party A. However, we think Party A should win, and if we so decide, we think there is a good chance other circuits will follow suit. Perhaps the Supreme Court will decide this legal issue in another decade or so. At that point in time, given all we expect to happen, we believe parties in the position of A will probably win if we decide in A's favor." The whole idea of faithfulness to results under the present Supreme Court is substantially undermined if that Court is highly unlikely to review a case.

When a lower court is not constrained by precedential authority or by clear statements of legal rules, its role is not mainly to guess what the highest court will do. The best way for it to build a sound body of law is for it to decide according to its own views of the most apt legal decision.

2. The Most Subjectivist Implications of the Musical Analogy. — Recall that Krenek suggested the desirability of different performers rendering different interpretations of a score, each interpretation reflecting the personality of the performer. Frank does not quite endorse this feature of the musical analogy as an aspect of statutory interpretation, but neither does he explicitly disavow it. Even if judges inevitably reach decisions that reflect their personalities, their attitude about how to decide should differ from that of the sophisticated performer.

It is fine if Sir Thomas Beecham plays Mozart symphonies slowly and Arturo Toscanini plays them quickly; if the New York Philharmonic plays them on modern instruments and The English Concert plays them on period instruments. No one suffers (much), and when people become aware of various styles of playing, they can choose the performances they wish to hear. Legal rules are different. Someone is coerced to behave in a particular way because of the way a rule is construed. Further, the doctrine that courts announce serve as precedents for future cases. These realities put judges in a position unlike that of musical performers.
Of course, judges can no more run away from their own essences than can the performer, but what attitude should they bring to their task? The performer, according to Krenek, can say to herself something like this: "The composition leaves some room for individuating interpretation. I will give the best performance of which I am capable if I give voice to my own individual sentiments within the bounds set by the composer." The performer should not ask herself: "How would most other competent performers choose to perform this piece?"; or "What reasoned arguments can I make that my interpretation is more faithful to the original composition than any other interpretation?" The performer might feel that her interpretation is the best possible, but, if she has gasped Krenek's message, she will understand that other interpretations are as valid as hers and that the choice between them does not come down to reasoned argument that favors one over the other.78

When the judge faces the analogous questions, should she care how other competent judges would be likely to interpret? Should she care whether she has reasoned arguments in favor of her interpretation? The traditional aspiration has been that judges decide on the basis of reasons that have persuasive force for other judges. According to this aspiration, a judge should not rest content with deciding according to her deeply held intuitive feelings, as might the performer; the judge should test a tentative answer against the perspectives of other judges and against the power of competing arguments.

In respect to these genuinely difficult questions about judicial performance, Frank's lecture is markedly unclear. He offers us an arresting and intriguing analogy that suggests that subjective individual reactions by interpreters are desirable as well as inevitable, but he fails to comment directly on the most subjectivistic implications of the musical analogy and on whether they should guide the deliberations of the wise judge.

When we look at Frank's opinion in Repouille, we see that he did not accept the most radical subjectivistic implications of the musical analogy. Both of Frank's recommended approaches carry forward the idea that judges should follow community values and not impose their own. A comparison with a different criticism of Hand's opinion is striking. The legal philosopher Edmond Cahn challenged Hand's approach precisely

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78. Of course, some interpretations may be "off the wall," and reasoned argument may explain why those are not good. Musical performers who devote substantial study to the origin of a work and its evolution in prior performances may consider interpretations unacceptable that would not seem to be so for someone who read a musical score for the first time. The critical point is not the breadth of the range of performances that are "equally good," but that some significant range of this sort exists.

A reading of Levinson and Balkin, supra note 36, makes clear that many of those involved in discussion of whether musical compositions of a former time should be played on period or modern instruments do not have the casual, "let one hundred flowers bloom," attitude that I take in the text. This is not the place to defend my belief that, with the technology of modern recording, we are enriched by having both kinds of performances.
on the basis that it left too little scope for the judges' own convictions.\textsuperscript{79} Writing in the \textit{Columbia Law Review}, Cahn objected to judges hiding behind community sentiments that were nearly impossible to discern and might not be very enlightened.\textsuperscript{80} Cahn wrote that judges should have the courage to make moral decisions when the law calls for that.\textsuperscript{81} The judges in \textit{Repouille} should have applied the vague statutory term with their "own moral principles"; a judge should exercise "such influence as he [can] to raise the morals of the marketplace to a level approaching his own."\textsuperscript{82} One might have imagined that Cahn had read Krenek and accepted some of the more radical aspects of the musical analogy. Even Cahn did not suppose that various views about good moral character were equally satisfactory (Krenek's idea about many performances), but he apparently hoped that if thoughtful judges decided for themselves what was good moral character, the rich mixture of opinions could contribute to increasing enlightenment about what acts are morally unjustifiable or outrageous. In comparison with Cahn, the Frank of \textit{Repouille}, who aims to prevent judges making intuitive personal judgments, seems downright conservative.

Frank, as a judge, followed the practice of trying to adopt legal alternatives and present reasons that would have persuasive force for other judges. In his lecture, he makes no argument that \textit{this aspiration} in law is misguided, however hard it may be to fulfill. An approach to law that incorporates all elements of Krenek's recommendations about musical performance is at odds with the idea of law and legal reason. No doubt, some argument can be made for the vitality of a system in which judges rest legal conclusions firmly on their own subjective personalities; but since Frank neither advanced such an argument in his lecture nor adhered to such a practice as a judge, I need not respond to that possibility here.

The respect in which Frank's dissent in \textit{Repouille} does conform to his lecture is in his creativity in achieving an approach that will best carry out the spirit of the statute with which he deals. Frank says that his "ethical leaders" approach is what Congress intended. To make the opinion of ethical leaders controlling on how to apply a statutory standard would have been a novel approach. The phrase "good moral character" was initially to be applied by officials of the Immigration and Naturalization

\textsuperscript{79} See Edmond N. Cahn, Authority and Responsibility, 51 Colum. L. Rev. 838 (1951) [hereinafter Cahn, Authority]; see also Edmond Cahn, The Moral Decision: Right and Wrong in the Light of American Law 310 (1955) [hereinafter Cahn, Moral Decision] ("Judge Hand's approach attempts to return the task [of evaluating moral character] to the community, and the attempt proves vain. . . . The act of individual judgment must belong to him who bears the name of judge.").

\textsuperscript{80} See Cahn, Authority, supra note 79, at 846; see also Cahn, Moral Decision, supra note 79, at 304.

\textsuperscript{81} See Cahn, Authority, supra note 79, at 851 ("What the community needs most is . . . moral leadership . . . .").

\textsuperscript{82} Id. at 844.
Service; judges would get involved only on review. Presumably, each INS officer was not to assemble a panel of ethical leaders. It seems unlikely that any member of Congress actually considered this possibility for courts and regarded it as prescribed by the statute.\textsuperscript{83} If Frank is honest in his comment about the intent of Congress, what he must mean is that this approach best carries out the basic values lying behind the statute, not that it carries out a specific understanding about how judges would determine "good moral character." That sense of the relation between legislatures and courts corresponds with the lecture's recommendation that judges should implement the fundamental objectives of statutes.

I shall save my main comments about judicial creativity until we have examined the same issue in Justice Frankfurter's lecture. However, I need here to examine a possible objection that \textit{Repouille} is not fairly representative of Frank's overall approach, because "good moral character" is obviously an open-ended standard, under which Congress delegates to executive officials and judges the determination on subsequent occasions of what falls under the standard. Perhaps \textit{Repouille} may be a poor example of what Frank thinks about how judges should decide the scope of legal rules that leave no evident room for such broad discretion.

A full answer to this objection would require an extended examination of Frank's statutory opinions. It is a partial answer, however, that the objection somewhat misconceives the precise legal issue in \textit{Repouille} and that Frank's sense of creativity in accord with fundamental legislative purpose is also revealed in one of the two cases in which he and Justice Frankfurter wrote and disagreed.

The issue that divided Frank from his colleagues was not whether \textit{Repouille} actually satisfied the statutory standard; it was how judges were to decide that question. The standard of "good moral character" is itself flexible and open-ended, embracing changes in application as values change; but there is no reason to suppose that Congress intended the method of deciding that question to be similarly flexible. Frank disagreed with his colleagues about method. Perhaps members of Congress had no definite view about how courts should apply the standard, but that determination—the issue that divided the judges in \textit{Repouille}—is much more like a typical decision about what rule to adopt than like the application of a flexible legal standard.

Judge Frank similarly tried to satisfy underlying Congressional objectives in a copyright case in which he dissented, and saw the Supreme Court affirm the decision of the majority in an opinion by Justice Frankfurter.\textsuperscript{84} Copyright law provided an initial protection for twenty-eight

\textsuperscript{83} Nor does it seem likely that this is what one would predict the Supreme Court would decide.

\textsuperscript{84} See M. Witmark & Sons v. Fred Fisher Music Co., 125 F.2d 949, 954 (2d Cir. 1942) (Frank, J., dissenting), aff'd, 318 U.S. 643 (1943). Frank's reasoning persuaded Justices Black, Douglas, and Murphy, 318 U.S. at 659, the three Justices then generally most sympathetic to the plight of the poor and oppressed.
years and a renewal period for another twenty-eight years. If the author was alive, he had the right to renewal; otherwise the right went to his widow, children, executor, or next of kin. One of the composers of the song “When Irish Eyes Are Smiling” had assigned both his original copyright and his renewal rights to that song (along with sixty-eight others) for $1,600. When the time for renewal came, the composer applied for a renewal and assigned his interest to another publisher.

The central issue was whether the original assignment of renewal rights, made long before the renewal period, was valid. In general, people can assign their rights and interests to others. The controlling statute did not mention assignment of renewal rights, but did not explicitly preclude it either. The precise legal analysis was complex, depending on the relation of that statute to its predecessors and to earlier judicial decisions. Some language in committee reports suggested that the reason for having a renewal period—rather than just a longer original copyright period—was to protect authors in their old age; but the reports did not clearly indicate that assignment was to be barred. Both courts held the original assignment was valid, finding insufficient indication that such assignments were not to be allowed.

Frank wrote an impassioned dissent. The aim of Congress, as evidenced by the reports, was to protect authors from their own bad judgment in selling their rights too soon, for too little money. He wrote, “We need only take judicial notice of that which every schoolboy knows—that usually, with a few notable exceptions ... authors are hopelessly inept in business transactions and that lyricists ... often sell their songs ‘for a song.’” The point of a separate renewal period was to prevent authors from selling all their rights in the first instance. Frank supported his reading of the statutory language and history by relying on the constitutional basis for copyright: the encouragement of individual authors. Against the court’s reliance on broad legal policies that favored the alienation of rights, Frank responded in part with a long exegesis on limitations to principles of laissez-faire.

Although Frank here made an argument from the history of copyright law and the legislative history of the Copyright Act of 1909, his most powerful claim is that if authors can assign their renewal rights long before the renewal period, the existence of a renewal period will not afford authors and songwriters adequate protection. Frank’s interpretation focuses more on his sense of the statute’s purpose than on either its precise language or the specific intent of the enacting Congress. As we shall see, Justice Frankfurter thought Frank was reaching too far.

85. See Witmark & Sons, 125 F.2d at 955, 958.
86. See id. at 950.
87. Id. at 955.
88. See id. at 963.
III. JUSTICE FRANKFURTER’S REFLECTIONS

The importance of Justice Frankfurter’s lecture lies partly in its subtle view of the interpretive process, offered at a time when members of the Court were not sharply divided over how judges should interpret statutes.\textsuperscript{89} I summarize the themes of his lecture, draw from some of his opinions, and then comment on his claims about the restrained freedom of judges.

A. The Lecture

Frankfurter develops an approach to interpreting statutes when “between two readings, neither . . . comes without respectable title deeds.”\textsuperscript{90} Although Frankfurter draws from the opinions of three great Justices—Holmes, Brandeis, and Cardozo\textsuperscript{91}—the views that he presents reflect his own perspectives at least as much as theirs.\textsuperscript{92}

Frankfurter comments on the judge’s task and the judicial function before addressing more specific aspects of statutory interpretation. Most of what he says can be classed under three themes. (1) Statutory interpretation is a complex art, neither reducible to literalism nor to judgments about the opinions of legislators. It demands a sensitive feel for the purposes of legislation. (2) Judges, despite a realm of freedom in legislative interpretation, do not legislate. (3) Text is very important in statutory interpretation. In respect to his first theme, Frankfurter agrees broadly with Frank. His remarks on the other themes diverge in letter or spirit from Frank.

Having pointed out that the problem of interpreting meaning can arise with any texts written in natural language, Frankfurter notes that statutes, adopted by many legislators, are not “an expression of individual thought to which is imparted the definiteness a single authorship can

\textsuperscript{89} Four years later in \textit{Schwegmann Brothers v. Calvert Distillers Corp.}, Justice Jackson challenged what had become the standard use of legislative history. See 341 U.S. 384, 395–97 (1951) (Jackson, J., concurring) (“Resort to legislative history is only justified where the face of the Act is inescapably ambiguous, and then I think we should not go beyond Committee reports . . . .”).

\textsuperscript{90} Frankfurter, supra note 4, at 527–28.

\textsuperscript{91} According to Frankfurter, these Justices shared an essential similarity of attitude and appraisal of the relevant. See id. at 531. The reader may perceive Frankfurter’s reference to the great Justices as an indication of his modesty. But Frankfurter relied on a similar technique in some of his annoying instructions to his fellow Justices. In a 1956 memorandum proposing changes in Court procedures, he wrote,

\begin{quote}
\[\text{\textit{seven before I came on the Court I had good reason to believe that the course of proceeding leading to adjudication was not all that it might be. My grounds for feeling that the deliberative process was inadequate derived from intimacies I had enjoyed over the years with Justices Holmes, Brandeis, and Cardozo.}}\]
\end{quote}

Urofsky, supra note 13, at 60–61. The device of referring to the three great Justices was not only a way to acquire distance; it enlisted revered voices of the past behind views that Frankfurter favored.

\textsuperscript{92} See Friendly, supra note 3, at 196.
give.” At times, they are purposefully ambiguous or formulated with a generality that allows decisions based on future circumstances.

In the closest he comes to any overall formula, Frankfurter comments (in a mouthful) “that the troublesome phase of construction is the determination of the extent to which extraneous documentation and external circumstances may be allowed to infiltrate the text on the theory that they were part of it, written in ink discernible to the judicial eye.”

Treating statutory interpretation as an art, Frankfurter concludes from the hundreds of cases in which the three Justices construed statues that the “area of free judicial movement is considerable.” As Cardozo said, the meaning must be sought in all the parts of a statute together and “in their relation to the end in view.” Judges must attend to affiliated statutes and to the “temper of legislative opinion.” Frankfurter rejects the English refusal to look to legislative history as barring material that is logically relevant to meaning, understood in light of purpose. In accord with his general emphasis on context, Frankfurter writes, “in the end, language and external aids, each accorded the authority deserved in the circumstances, must be weighed in the balance of judicial judgment.”

Frankfurter accompanies his focus on statutory purpose and flexibility of judgment with remarks that emphasize the constraints under which judges lie. The judge must exhibit “not only personal impartiality but intellectual disinterestedness.” He must carry out formulated policies, not choose capriciously or according to “private notions of policy.” Almost certainly referring to legal realists like Frank, Frankfurter says, “There are not wanting those who deem naive the notion that judges are expected to refrain from legislating in construing statutes.” But, for Frankfurter, the judicial function and competence are radically different from those of the legislature.

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93. Frankfurter, supra note 4, at 528.
94. See id.
95. Id. at 529.
96. Id. at 533.
97. Id. at 538 (quoting Panama Refining Co. v. Ryan, 293 U.S. 388, 439 (1935) (Cardozo, J., dissenting) (internal quotation marks omitted)).
98. Id. at 539.
99. See id. at 541.
100. Id. at 544.
101. Id. at 529.
102. Id. at 532. Like Frank, Frankfurter quotes Bishop Hoadley about the power to interpret, but cautions that “one does not subscribe to the notion that [interpreters] are lawgivers in any but a very qualified sense.” Id. at 533.
103. Id. at 535. After quoting Holmes that “the meaning of a sentence is to be felt rather than proved,” Frankfurter remarks, “[Holmes] would shudder at the thought that by such a statement he was giving comfort to the school of visceral jurisprudence.” Id. at 551–52 (quoting United States v. Johnson, 221 U.S. 488, 496 (1911)).
104. See id. at 534.
If Frankfurter has any particular art in mind when he calls statutory interpretation an art, it is apparently the art of translating. He compares statutory words to "words in a foreign language." If judges have a "duty of restraint" as "merely the translator of another's command", observance of this duty "depends on self-conscious discipline.

Related to his theme of restraint is Frankfurter's attention to text. Although he never suggests the exclusion of other criteria of meaning, Frankfurter stresses the centrality of the statutory language. The text is the starting point of construction. Judges "must not read in by way of creation," and they "must not read out except to avoid patent nonsense or internal contradiction." Frankfurter's sense of the priority of text is summed up well by his comment that when the legislature has expressed a policy in a statute, judges must add or subtract "from the explicit terms which the lawmakers use no more than is called for by the shorthand nature of language."

Frankfurter briefly explains his avoidance of the term "legislative intent": "We are not concerned with anything subjective. We do not delve into the minds of legislators or their draftsmen, or committee members." Expressing reservations about Cardozo's suggestion that judges aim to decide as Congress would have chosen, Frankfurter says:

thus to frame the question too often tempts inquiry into the subjective and might seem to warrant the court in giving answers based on an unmanifested legislative state of mind. But the purpose which a court must effectuate is not that which Congress should have enacted, or would have. It is that which it did enact, however inaptly, because it may fairly be said to be imbedded in the statute, even if a specific manifestation was not

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105. Id. at 533.
106. Id. at 534.
107. Henry Friendly notes that Frankfurter's title is about the "reading" of statutes, and that Frankfurter used to tell students to "(1) Read the statute; (2) read the statute; (3) read the statute!" Friendly, supra note 3, at 201-02 (emphasis added).
108. Whether a text should be read with the minds of ordinary people or experts depends on for whom a statute was written. See Frankfurter, supra note 4, at 536. "Words of art bring their art with them," the coloring they have received throughout history. See id. at 537. Because of the different roles of constitutions and statutes, "words in a constitution may carry different meanings from the same words in a statute . . . ." Id.
109. Id. at 533. Judges should not rectify omissions in a statute, "whether careless or calculated," even if "later wisdom . . . recommend[s] the inclusion." Id. at 534. Noting a case in which Justice Holmes declared that an airplane is not "a motor vehicle," Frankfurter remarks, "we assume that Congress uses common words in their popular meaning, as used in the common speech of men." Id. at 536 (quoting McBoyle v. United States, 283 U.S. 25, 26 (1931)).
110. Id. at 535.
111. Id. at 539. He quotes Holmes, who, across a wide range of legal problems, rejected the idea that subjective intent matters, for the proposition that "intention is a residuary clause intended to gather up whatever other aids there may be to interpretation beside the particular words and the dictionary." Id. at 538 (quoting unpublished letter from Oliver Wendell Holmes) (internal quotation marks omitted).
thought of, as is often the very reason for casting a statute in very general terms.\textsuperscript{112}

\subsection*{B. The Cases}

Because Frankfurter recommends a delicate appraisal of a variety of factors, his judicial opinions do not lend themselves easily to examination of whether he has been faithful to his reflective expressions about statutory interpretation.\textsuperscript{113} However, his opinions do provide a sense of how he translates abstractions into concrete results in his own work.

One case that reveals his appraisal of relevant considerations is \textit{Schwegmann Brothers v. Calvert Distillers Corp.}\textsuperscript{114} The dispute involved the scope of the Miller-Tydings Act exception to the Sherman Act prohibition on “contract[s] . . . or conspirac[ies], in restraint of trade.”\textsuperscript{115} In order to support prices during the Depression, many states adopted so-called “Fair Trade Acts,” which allowed manufacturers to agree with retailers that the retailers would not sell products to consumers below an agreed minimum price.\textsuperscript{116} The state acts also contained non-signer provisions; if a manufacturer contracted with some retailers, other nonsigning retailers could not charge below the agreed price.\textsuperscript{117} For transactions covered by the Sherman Act, the state laws violated federal antitrust law in two ways: by allowing private agreements to fix prices \textit{and} in forcing nonsigners to go along. The Miller-Tydings Act provided that the Sherman Act would not render illegal “‘contracts or agreements prescribing minimum prices for . . . resale’” when these are lawful “under local law.”\textsuperscript{118} Justice Douglas wrote for the majority that the statutory language validated only the actual agreements to set prices, not the coercive application of those prices to nonconsenting retailers.\textsuperscript{119}

Justice Frankfurter dissented. He argued that the statutory text, which legalized contracts forbidden by the Sherman Act, obviously made legal the effects of those contracts under local law, including effects on nonsigners.\textsuperscript{120} Frankfurter pointed out that states early recognized that fair trade laws were ineffective without nonsigner provisions, and that every state law had such a provision.\textsuperscript{121} He proceeded to make a power-
ful case that this understanding was clear in the crucial House Report and in floor debate.\textsuperscript{122} Given the backdrop of state fair trade laws and the materials of legislative history, Frankfurter concluded that the "purpose" of Congress was clearly indicated; it was the Court's responsibility to follow it.

In employing various criteria of interpretation and in emphasizing Congressional purpose, Frankfurter's dissent in \textit{Schwegmann Brothers} fits his "Reflections." However, to this reader, his simplistic textual argument, that a law that validates price-fixing contracts evidently validates the effects of those contracts on nonsigners, is strained. Justice Douglas's reading of the face of the statutory language is much more natural. If this judgment is correct, Frankfurter's view in \textit{Schwegmann Brothers} is in some tension with his lecture. A critic might say that Frankfurter is adding to the statutory words, that is, he is adding a consequence for nonsigning retailers that Congress failed to enact—a tactic he cautioned against in his "Reflections."\textsuperscript{123} A defender of the Justice's dissent might respond that he just happens to read the language differently than I do, or that the language itself must be understood in its historical context,\textsuperscript{124} or that the ambiguity of the statutory language entitles Frankfurter to use legislative history to resolve the ambiguity. Whatever one might finally conclude about the text of the Miller-Tydings Act and Frankfurter's conclusion in \textit{Schwegmann Brothers}, Henry Friendly demonstrates persuasively that Frankfurter's emphasis on text in his opinions varied substantially.\textsuperscript{125} He strongly attacked any "plain meaning" rule that foreclosed examination of legislative materials, and he occasionally reached results hard to justify by the statutory text.\textsuperscript{126}

Frankfurter refers to purpose in \textit{Schwegmann Brothers}, rather than specific intent, but if one referred to the opinion one would be hard put to say just what is the difference between these two in context. The most straightforward distinction between purpose and specific intent is that specific intent concerns the legislature's desired resolution of a particular legal issue, whereas purpose involves broader or more ulterior objectives.

\textsuperscript{122} See id. at 399. Frankfurter does not remark on the fact that few members of Congress went out of their way to emphasize that by enlisting one willing retailer, a manufacturer could coerce scores of unwilling retailers.

\textsuperscript{123} See Frankfurter, supra note 4, at 535.

\textsuperscript{124} More specifically, a reader aware of the history of fair trade acts would understand the language to give effective protection of those acts by reaching nonsigners. In this way, perceived purpose can affect how one reads language in the first place. This argument about the language itself is not the one that Frankfurter makes.

\textsuperscript{125} See Friendly, supra note 3, at 202–06, 217–19.

\textsuperscript{126} See, e.g., Commissioner v. Acker, 361 U.S. 87, 94–95 (1959) (Frankfurter, J., dissenting) ("[I]f Congress chooses by appropriate means for expressing its purpose to use language with an unlikely and even odd meaning, it is not for this Court to frustrate its purpose. The Court's task is to construe not English but congressional English.").
of legislation.\textsuperscript{127} In his lecture, Frankfurter emphasizes a rather different dichotomy, that between an inquiry into the subjective attitudes of legislators and an objective inquiry to discover purpose as an aspect of the statute. In a passage I have quoted above,\textsuperscript{128} Frankfurter goes well beyond a position that any subjective attitudes must be consistent with the statute if they are to help determine meaning; he claims that the inquiry into meaning is not at all about subjective states of mind. \textit{Schwegmann Brothers} affords us an opportunity to explore this claim in greater depth.

We need initially to disjoin the distinction between specific and broad from the distinction between subjective and objective. One might conceive legislative purposes as the broad purposes actually entertained by legislators rather than as somehow objectively embedded in the statute. And one might conceive of specific intent as an objective inquiry into what relevant materials reveal about precise objectives.

One truth that \textit{Schwegmann Brothers} reveals is that on some occasions it is hard to differentiate narrow aim from broader purpose. I do not mean only that in an ascending order from most specific to broadest objectives, it is hard to draw the line where specific intent ends and purpose begins. I mean that on occasion what one treats as a broader purpose is virtually indistinguishable from the resolution of the more specific issue. In his opinion, Frankfurter finds a purpose to validate nonsigner aspects of fair trade laws—but that is indistinguishable from a specific intent to validate the creation of a minimum price for nonsigners, the precise issue in the case. Everything Frankfurter says in his opinion could easily be subscribed to by a Justice who thought the overarching inquiry should be about specific legislative objectives.\textsuperscript{129} Anyone who says it is acceptable for judges to comb legislative history for purpose but not specific intent has a lot of explaining to do. Perhaps purpose should matter more than narrower objectives if the two are in conflict, but given the intertwining of purpose and specific intent in many instances, one cannot plausibly contend that judges should consistently inquire about one and never inquire about the other.

The distinction between objective and subjective is more elusive. There are three important points. First, we may assume that Frankfurter takes his opinion as establishing an objective purpose; but the very arguments he makes can comfortably be taken as showing that members of Congress who thought about the problem conceived the act (subjectively) as validating the state nonsigner clauses. Second, nowhere in his lecture, or anywhere else as far as I know, does Justice Frankfurter explain how an objective purpose differs from a judgment about subjective atti-

\textsuperscript{127} Usually "purpose" is some broader objective, but it is possible to have an ulterior objective that is no more general than one's direct objective. I oversimplify in the text in assuming that a purpose is a broader objective.

\textsuperscript{128} See supra text accompanying note 111.

\textsuperscript{129} Indeed, Justices Black and Burton did join his opinion, and they could have joined it with that understanding.
It is reassuring to hear that judges are not plumbing the depths of legislators’ psyches, but what exactly are they doing in its stead? Third, one can develop an objective account of purpose, or specific intent; but doing so is not so simple and does not obviously evade all subjective inquiry. One might say, for example, that purpose is determined by the conventional weight of legislative materials or by what a hypothetical “reasonable legislator” would take as a purpose. But these two candidates for objective approaches may not successfully divorce themselves from appraisals of subjective attitudes. I explore this problem at length elsewhere, but, briefly, the conventional weight of various sources reflects what judges have considered to be very powerful evidence of the objectives of legislators who have been most involved with particular legislation; and one would expect the weight of sources to wax and wane, depending on their connection to the attitudes of legislators and their staff members. How a reasonable legislator reacts to problems put before a legislature will depend considerably on how most people in that position would react. Under these objective approaches, the inquiry may no longer be what a discrete number of actual legislators believed on a single occasion; but neither approach provides answers about meaning that somehow ascend from the subjective attitudes of real people.

Justice Frankfurter’s willingness to read statutory language in light of his overall evaluation of congressional policy was shown in one of the cases in which he and Frank disagreed. The crucial question was the method of calculating overtime pay under the Fair Labor Standards Act. The Act provided that no employee should work in excess of forty hours a week unless receiving at least “one and one-half times the regular rate at which he is employed.” The double aim of the provision was to reduce unemployment and the physical strain on workers by making it expensive for employers to use workers overtime. The specific issue the judges addressed was “the regular rate” for longshoremen, who had irregular patterns of work. According to a collective bargaining agreement, longshoremen were paid straight time rates for work from 8:00 A.M. to 5:00 P.M. Monday through Friday and from 8:00 A.M. to noon on Saturday. Work during other hours was paid as “overtime” (at about one and one-half the straight time rate), whether or not the total hours of work exceeded forty. If we put aside some nuances, the “regular rate” could be taken to be the straight time rate for work during ordinary hours or the average hourly pay for hours a longshoreman worked during the week. Under the latter approach, some “overtime” pay given for working off

131. See Bay Ridge Operating Co. v. Aaron, 334 U.S. 446, 477 (1948) (Frankfurter, J., dissenting). The court of appeals decision is at 162 F.2d 665 (2d Cir. 1947).
hours would figure in the "regular rate" against which overtime for working extra hours would be paid.\footnote{132}{The line-up of parties was interesting. The government represented the employer, because the work had been done during the war, and the government was footing the bill. The union agreed with the government that "straight time" represented the regular rate; dissidents within the union wanted the higher amount. Why did the union go along? Probably because it feared that it would get less attractive terms for off-hours work if that was going to be part of "the regular rate" against which overtime would be calculated. (Possibly union leaders were not primarily concerned with the welfare of their workers.)}

Drawing from Supreme Court precedents, Judge Frank had written that the "regular rate" was an "actual fact," based on wages paid. So called "overtime" paid for off-hours work should contribute to the regular rate. The Supreme Court agreed. Noting that “[t]he statute contains no definition of regular rate of pay and no rule for its determination,”\footnote{133}{Bay Ridge Operating, 334 U.S. at 460.} the Court said "the purpose was to require judicial determination as to whether in fact an employee receives the full statutory excess compensation . . . . [T]he most reasonable conclusion is that Congress intended" the formula adopted by the court of appeals.\footnote{134}{Id. at 463-64.}

Justice Frankfurter dissented on the ground that the decision sapped the principle of collective bargaining, a principle underlying the Fair Labor Standards Act.\footnote{135}{See id. at 482. According to Friendly, supra note 3, at 219, Frankfurter's most original contribution to the theory of statutory interpretation was the idea that each statute must be read in terms of the policy of others. Although Frankfurter does not here refer to other statutes, his sense of the importance of collective bargaining is undoubtedly based on many legislative efforts.} According to Frankfurter, the majority treats the statutory language as "parts of a cross-word puzzle."\footnote{136}{Id. at 478.} For him, the test should have been whether the collective agreement reflected the distinctive conditions of the industry. "Regular rate" in any industry "must be interpreted in the light of the customs and practices of that industry."\footnote{137}{Id. at 482-83.} By failing to establish an arithmetic rule, Congress left "regular rates" to be agreed upon voluntarily by parties.\footnote{138}{Id. at 486.} Frankfurter criticizes the Court's approach as unduly formalistic: producing untoward consequences that are said to be "compelled by a mere reading of what Congress has written."\footnote{139}{Id. at 484.} In this instance, Frankfurter's approach is decidedly more policy-oriented than Frank's, trying to accommodate Congress's larger purpose to promote collective bargaining and accepting a conclusion that the way to calculate "regular rate" could change industry by industry. It does not follow that Frank is more of a formalist. He was writing for his entire court and considered himself constrained by Supreme Court authority; and his result actually helped the "little man"
at odds with the "establishment" of employers and union—an outcome that may well have appealed to his own sensibilities.

In the copyright case involving the assignment of renewal rights, Frankfurter concluded that Frank had ranged too far beyond the language and evident purpose of the Copyright Act, in asserting that authors could not assign renewal rights prior to the renewal period.\textsuperscript{140} For the five Justices in the majority, Justice Frankfurter began with the Act, emphasizing that its explicit words did not limit assignability of the author's renewal interest.\textsuperscript{141} After surveying the relevant history of copyright law and the language of the committee report on which Frank mainly relied, Frankfurter wrote, "The report cannot be tortured, by reading it without regard to the circumstances in which it was written, into an expression of a legislative purpose to nullify agreements by authors to assign their renewal interests."\textsuperscript{142} Frankfurter was yet more caustic about Frank's "judicial notice" of the nature of authors:

We are asked to recognize that authors are congenitally irresponsible . . . . We do not have such assured knowledge about authorship, and particularly about song writing, or the psychology of gifted writers and composers, as to justify us as judges in importing into Congressional legislation a denial to authors of the freedom to dispense of their property possessed by others.\textsuperscript{143}

In this case, Frankfurter, like Frank, interprets the statutory language in light of broad policies. For Frankfurter, the guiding policy is one that individuals can assign their legal rights when they choose. It would take a clear indication by a legislature that it means to contravene that policy; neither the 1909 statute nor the relevant committee reports did that.

Frankfurter's confidence in judicial detachment is perhaps nowhere better displayed than in a remarkable opinion applying the due process clause. During most of Frankfurter's quarter century on the Supreme Court, Justices debated the constitutionality and wisdom of a flexible approach to due process, under which practices were unconstitutional if they violated the standards of fundamental decency of English-speaking peoples.\textsuperscript{144} As an aspect of his claim that the Bill of Rights applied in full force against the states, Justice Black, in 1947, complained that the prevailing flexible due process formula gave judges "boundless power under 'natural law' periodically to expand and contract constitutional standards

\textsuperscript{141} See id. at 647.
\textsuperscript{142} Id. at 655.
\textsuperscript{143} Id. at 656–57.
\textsuperscript{144} The exact formulation of the standard varied; a version that paid less attention to the cultures of English-speaking peoples was whether a claimed right was "implicit in a concept of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 325 (1937), overruled by Benton v. Maryland, 395 U.S. 784 (1969).
to conform to the Court's conception of what at a particular time constitutes 'civilized decency' and 'fundamental liberty and justice.'

In a concurrence in that case, and in a succession of subsequent cases, Frankfurter defended the view that judges could be trusted to make disinterested decisions under the due process formula. Frankfurter wrote for a majority in a case holding that the state could not use evidence of narcotics obtained by forcibly pumping the defendant's stomach and making him vomit. He wrote:

"There is from our decisions no immediate appeal short of impeachment or constitutional amendment. But that does not make due process of law a matter of judicial caprice. The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case "due process of law" requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, on a judgment not ad hoc and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.

Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience. . . . [T]his course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

The first of these strikingly juxtaposed paragraphs holds out substantial hope of restraint, but what exactly is the restraint on individual judgment? Frankfurter is confident that judges can apply the "shock the con-

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145. Adamson v. California, 332 U.S. 46, 69 (1947) (Black, J., dissenting), overruled in relevant part by Malloy v. Hogan, 378 U.S. 1 (1964). The issue was a prosecutor's comment on a defendant's failure to take the stand, a violation of the privilege against self incrimination under interpretations of the Fifth Amendment. The majority said that due process did not preclude such comment on a defendant's silence. See id. at 58.

146. See id. at 68 (Frankfurter, J., concurring) (stating that "[t]he fact that judges among themselves may differ whether in a particular case a trial offends acceptable notions of justice is not disproof that general rather than idiosyncratic standards are applied"); see also, e.g., Wolf v. Colorado, 338 U.S. 25, 27 (1949) (Frankfurter, J.) ("The real clue to the problem confronting the judiciary in the application of the Due Process Clause is not to ask where the line is once and for all to be drawn but to recognize that it is for the Court to draw it by the gradual and empiric process of 'inclusion and exclusion'.") (quoting Davidson v. New Orleans, 96 U.S. 97, 104 (1877).

147. See Rochin v. California, 342 U.S. 165 (1952), overruled on other grounds by Mapp v. Ohio, 367 U.S. 643 (1961). At this stage the "exclusionary rule" had not been applied to most illegal state searches, yet the Court held that in this instance the state could not use the evidence.

148. Id. at 172 (citation omitted).
science” test disinterestedly, but all his rhetoric about the “spirit of science” and “detached consideration” does not provide much of a guide about how judges can rise above their own personal evaluations.\footnote{149}

A critic might doubt the aptness of this example for our topic. After all, it involves constitutional, not statutory, interpretation, and its legal issue is unusual. However, Frankfurter’s belief that judges can attain disinterestedness is not limited to constitutional cases. The passage I have quoted is fairly representative of his overall view. Indeed, Frankfurter here expresses his confidence in circumstances in which it is most difficult to suppose that judges can rise above personal reactions. The question whether conduct “shocks the conscience” resembles the inquiry about “moral outrage” in Repouille.\footnote{150} With his Freudian views about judicial behavior, Frank had little doubt that judicial personalities play a significant part in such evaluations. His response was to suggest methods that would minimize their effect. Frankfurter sees less need to curb judges in this way, because he trusts their ability to act wisely and disinterestedly.

Someone might respond that disinterestedness may be unattainable in the settings of Rochin and Repouille, but is attainable in respect to more mundane legal issues. That, of course, is possible. But if Frankfurter’s view seems startlingly unrealistic for the circumstances he addresses, that at least sows seeds of doubt about its accuracy for cases in which it is much harder to say whether personal reaction or detached legal analysis is doing the work of decision.

\section*{IV. Contemporary Relevance}

Has the legal community passed beyond these lectures from a half century ago, or do they have something to say to us today? Certainly the questions they address have not faded away. The central issues about statutory interpretation, such as the importance of text, the place of purpose, and the constraints on judges, continue over time. Formulations and perspectives shift, but these are not the sorts of issues that will ever be decisively resolved once and for all. Certainly, also, the views of Justice Frankfurter, and to a lesser extent Judge Frank, continue to influence sitting judges. Many present judges were taught by students of Justice Frankfurter whose theory of statutory interpretation largely coincided with his. “Legal process” thinking is not as dominant as it once was, but it has had a substantial influence on how leading members of the profession conceive of statutory interpretation. The typical arguments put forward by many of the Supreme Court’s present Justices could easily flow from the

\footnote{149. In a perceptive article, Sanford Kadish suggested criteria that judges might use to apply the flexible due process formula in many cases. See Sanford H. Kadish, Methodology and Criteria in Due Process Adjudication—A Survey and Criticism, 66 Yale L.J. 319, 344–58 (1957).}
\footnote{150. See supra Part II.B.}
pen of Justice Frankfurter, though no one has embraced his distinctive style of writing.

Evaluating how the lectures of Frankfurter and Frank stand as possible bases for a modern theory of statutory interpretation is a bit more difficult. My own view is that with some appropriate picking and choosing from elements in the lectures, and with some additional elaboration on the vital subject of how far courts should defer to administrative judgments, one can build an approach that remains plausible and defensible, and is probably preferable to each of its two main competitors.

For this exercise, I count both Frank and Frankfurter as adopting purposive approaches that give some respect to the text. One main competitor is textualism, which gives overriding significance to a natural reading of the text. As the other main competitor, I include recommendations to judges to rely heavily on their own moral appraisals or to make pragmatic forward-looking judgments when they interpret statutes.

This conclusion is not the occasion for a detailed evaluation of these issues, but I sketch what such an evaluation might look like. I remind the reader of the major points on which Frank and Frankfurter agree and disagree: In some respects the antidote for the excesses of one is found in the views of the other. I suggest vulnerabilities of a purposive approach that have led to its challenge. I then ask whether the main competitors have even greater weaknesses, and whether one may reasonably adopt a chastened, more refined version of a purposive approach.

On certain basic themes, Frankfurter and Frank agree. Judges are constrained by the language a legislature has chosen, and by the purposes that lie behind the language, but the art of statutory interpretation is far from mechanical and involves much more than stringing words together according to their dictionary meanings. The art is one that cannot be captured in formulas; it must be exhibited and observed in context.

Frankfurter stresses the priority of text more than Frank. Frank writes about legislative intent as if it rests on mental states legislators had; Frankfurter rejects talk of legislative intent and of judges relying on the subjective attitudes of legislators. The most important differences are in

153. Frankfurter makes more of an effort than Frank to exhibit instances in which able judges have interpreted statutes well, but his account of opinions by Holmes, Brandeis, and Cardozo does not give enough of the facts and the competing arguments for the reader to grasp what is especially skillful in what the judges do and say. Better in this respect is Gunther's book about Learned Hand, which does provide enough detail to give one a sense of how Hand, greatly admired by both Frank and Frankfurter, interprets statutes. See Gunther, supra note 64, at 466–73. Friendly provides an illuminating picture of Frankfurter's own statutory work. See generally Friendly, supra note 3.
the subtle question of the degree of constraint under which judges lie and in the capacity of judges to be disinterested.

Matters of degree are hard to pin down, but Frankfurter implies that judges are under more constraint than Frank believes. Both authors say statutory interpretation is an art, but Frankfurter’s chosen art is translation; Frank’s is musical performance, understood in a way that emphasizes the performer’s creativity. Frankfurter talks of limited freedom, but not creativity. Frank argues that judges do legislate and that it would be better if they were candid about this. Frankfurter emphasizes the difference between judicial and legislative functions; he says judges are lawyers only in “a very qualified sense,”154 and he later talks about judicial expansion of meaning “which properly deserves the stigma of judicial legislation.”155 Frank tantalizes the reader with the subjectivist implications of his musical analogy, but he never endorses the idea that judges should self-consciously indulge their own inclinations to the degree that is proper for musical performers. One cannot imagine Frankfurter employing the analogy or raising such an idea in the minds of readers. His two barbed remarks aimed at legal realists are a lucid sign that he believes authors like Frank have gone too far in that direction.

Closely related is the subject of disinterestedness. Frank has no doubt that judicial personalities will play a significant role. Frankfurter is much more hopeful about the degree of detachment judges can achieve.

If one were trying to build a defensible modern view out of Frank and Frankfurter, one would disavow the most subjectivist aspects of Frank’s analogy to musical performance. Judges interpreting statutes must strive for reasons they believe do (or should) have persuasive force for other judges. They cannot allow themselves to resolve cases solely on the basis of some “authentic” personal reaction to the statutory materials. That is to say, interpersonal reasons carry more force in statutory interpretation than in musical performance (if Krenek is right about the latter).156

One would need to find a middle ground between Frank’s excessive emphasis on the judicial personality and Frankfurter’s faith in judicial detachment. At least in their determinations of law, judges often agree,

154. Frankfurter, supra note 4, at 533.
155. Id. at 540.
156. An arresting modern analogy is the strike zone in major league baseball. Various umpires have developed personal strike zones that vary considerably, and league officials want greater uniformity. I assume that if an umpire defends calling a strike zone that varies from the rulebook strike zone, he does so in terms of what makes the game better, given shared ideas about the value of the game, not just what makes the game most appealing to him.

Levinson and Balkin point out that the analogy may be helpful for a detached view of what transpires within a discipline, even if the analogy is not helpful within the discipline about how to resolve problems. See Levinson & Balkin, supra note 36, at 1655 n.232. Like Frank, I am concentrating on the musical analogy as it bears on the judicial task, not on whether it illuminates the work of judges as seen from the outside.
and they agree because of a shared sense within the legal community about the strength of arguments. But no one who thinks carefully can doubt that social class, race, gender, national origin, sexual preference, and more personal factors affect judicial outlooks. This idea has been a mainstay of critical theorists of various stripes during the last two decades. When cases are difficult, when good arguments can be made on both sides, the idea that detachment will somehow get judges to the right result seems naive. The mix of the personal is inevitably greater than Frankfurter acknowledged. Justice Frankfurter's opinions do not convey the sense that he willfully injected his personal views more than his judicial philosophy allowed; but one cannot resist the sense that the personal had a larger part than he recognized.\footnote{157}

Frankfurter's lecture emphasizes statutory text to a greater degree than does Frank, but his own judging indicates how crucial is a statute's historical and legal context. Any defensible theory of interpretation must respect the text, though we should recognize that no abstract formulation is likely to be very helpful about how far judges should rely on other criteria to adopt a reading that is less natural on its face than a competing interpretation.\footnote{158} What both Frankfurter and Frank clearly reject is any view that makes a parsing of the text with dictionary in hand the decisive inquiry in most cases.

Frankfurter and Frank agree that judges should take their policies from Congress, and they should aim to carry out those policies consistent with the statutory language.\footnote{159} Frankfurter's lecture emphasizes legislative purposes over specific intent about outcomes. Frank does not focus on this dichotomy, and his copyright opinion makes a specific intent argument from a committee report—namely that the focused aim was not to allow authors to make early assignments of renewal rights.\footnote{160} But

\footnote{157. For example, despite his general philosophy of restraint, Frankfurter was quite ready to overturn what he deemed to be establishments of religion and illegal searches. See, e.g., Jones v. United States, 362 U.S. 257, 260–62 (1960) (Frankfurter, J.) (search and seizure); McCollum v. Board of Educ., 333 U.S. 203, 212–13, 215–17 (1948) (Frankfurter, J., writing separate opinion) (establishment). There was no evident reason in his views about the judicial role why review in these domains should be more active than review in free speech and free press cases, where Frankfurter typically exercised greater restraint. See, e.g., Dennis v. United States, 341 U.S. 494, 525–26 (1951) (Frankfurter, J., concurring); see also, e.g., Beauharnais v. Illinois, 343 U.S. 250, 261, 266–67 (1952) (Frankfurter, J.); Bridges v. California, 314 U.S. 252, 281–85 (1941) (Frankfurter, J., dissenting).

\footnote{158. Friendly is instructive on this point. See Friendly, supra note 3, at 212–19.

\footnote{159. Frank's exposition of the predictive responsibilities of the lower court judge should be rejected. Both Repoussél and the copyright case cast strong doubt on whether Frank as a judge really sought always to reach the result he thought the sitting, or a future, Supreme Court would be likely to reach. He regarded himself as constrained by precedent, but within those constraints, he appeared to aim for what he regarded as the best result. In any event, whatever Frank believed and practiced, lower courts, within the boundaries of what the Supreme Court has decided, should aim for the best resolutions they can, not try to guess what a majority of Justices will decide.

\footnote{160. See supra text accompanying note 87.}
Frank’s Repouille opinion and much of the rest of his copyright opinion indicate that Frank was prepared to draw upon legislative purposes to develop judicial resolutions that had not been specifically in the minds of members of the legislature. (Almost certainly, members of Congress did not assume that courts would call ethical leaders to elaborate what was “good moral character.”)

I have already suggested that, insofar as the distinction between purpose and specific intent is one between general or broad objectives and the envisioned resolution of specific legal issues, one cannot reasonably say that judges should look at legislative materials to discern purposes but not specific outcomes. Purpose and specific resolutions are often tangled together, as in Schwegmann Brothers, and judges lack any solid reason to avert their eyes about specific resolutions if they are to pay attention to broad purposes. There is room for difference of judgment about how seriously judges should take isolated statements about specific resolutions, about how purpose and specific intent should be regarded when the two seem to conflict, and about whether the significance of specific intent should diminish as time passes from a statute’s adoption. A full theory must come to grips with these subtle problems. There is also a crucial question about how far judges should draw purposes from the entire corpus of legislation, rather than specific statutes. On behalf of judges doing so is the idea that the law as a whole should be rational and coherent; against such an approach is the claim that each Congress is unique, and its writ should run only in respect to subjects it has actually legislated.

Frankfurter’s blithe assumption that his inquiry into purpose is objective and does not involve assessment of legislators’ states of mind deserves either rejection or development. A modern theory of purposive interpretation needs to explain just how and to what degree assessments of purpose rest on assumptions about attitudes of legislators or of people who might be legislators.

A final point about purposive interpretation ties closely to what I have said about detachment and personal factors. Modern scholars are more skeptical about the objectivity of purposive approaches than were either of our judges. One concern is that when interpreters give great weight to broad legislative purposes, they fail to give due regard to the compromises that make up so much of the legislative process. The more pervasive concern is that reasonable judges can disagree about purposes and about how they may be effectuated. Judges giving weight to purposes may implement their own notions of good policy, while attribut-

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161. In one of the most powerful defenses of use of legislative history, Stephen Breyer writes of it as an aid to discerning legislative purpose. See Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. Cal. L. Rev. 845 (1992). In each of his five major case illustrations, what the judges discerned could easily be called a specific intent. See id. at 848–61.

162. See Easterbrook, supra note 151, at 540–44.
ing them to the legislature. In sum, telling judges that they must adhere to the legislature’s purposes, not their own private notions of policy, is less of a restraint than either Frank or Frankfurter seemed to believe. In the few cases at which we have looked, self-conscious legislative compromise does not loom as central, although the statutory formula of “regular rate” and the omission of language about assignment of renewal rights in the copyright statute could have been the products of disagreements over more specific statutory language. The influence of personal ideas of policy seems evident to me in Frank’s Repouille and copyright opinions, and in Frankfurter’s strong emphasis on collective bargaining as the basis for determining a “regular rate.”

The specific problem of compromise is whether judges should seek to give effect to various compromises or seek to impart more rational purposes to unclear provisions. Richard Posner once proposed that judges should decide in accord with how the legislature would have resolved a problem. He used the analogy of a subordinate who had not clearly received the command of a military superior. This “military command” approach, which resembled language of Cardozo’s against which Frankfurter cautioned, allows judges to work imaginatively with specific statutory language, but it is faithful to compromises. It does not encourage judges to assume that the legislature is rationally purposing rational purposes. A competing approach is Jonathan Macey’s suggestion that when statutory language is unclear, judges do best to interpret it to achieve stated public-regarding purposes, not partially concealed private interests. Because it will build a better law and encourage legislators to act responsibly, I prefer this approach to one that asks judges to discern compromises that are not clearly carried out by a statute’s terms.

The concern that a focus on purpose is not as much of a restraint as Frankfurter and, to a lesser extent, Frank suggest is more intractable.

163. I do not doubt that a strong policy in favor of collective bargaining existed. But I do doubt that it should have won out against a policy of establishing a settled procedure for determining “regular rates” that would best protect workers and discourage overtime work.


165. See supra text accompanying note 112.

166. This presumption of rationality is found in a famous passage of Hart and Sacks. See Hart & Sacks, supra note 7, at 1125 (“The statute ought always to be presumed to be the work of reasonable men pursuing reasonable purposes reasonably . . . .”). In context, it is clear that the presumption is not a descriptive generalization but a premise for sound judicial decision-making.

One can say that purpose is something of a constraint. Most judges are conscientious. Most judges do not deliberately seek to manipulate notions of legislative purpose to cover their reliance on personal notions of policy. And judges who try to be faithful to legislative objectives do often resort to premises other than their own preferred notions of policy. This is hardly a full guarantee against the influence of the personal, but no such guarantee is possible.

A reasonable appraisal of any approach must assess its virtues against those of its competitors. What of influential views that differ significantly from those of our two judges?

One response to the concern that judges inevitably implement their own ideas of justice and public welfare has been to embrace that technique of decision explicitly. Ronald Dworkin has recommended that judges read statutes and constitutional provisions in light of their own moral assessments. Richard Posner, though rejecting the place of such moral reasoning in legal decisions, now tells judges to be pragmatic—to decide self-consciously in terms of social desirability. William Eskridge and other evolutionists claim that as statutes age, judges should decide in ways that reflect modern assessments of value as well as the legislature's original purposes.

Under these approaches, judges should candidly face and accept their responsibility to make crucial evaluations when they decide difficult cases. Still, these approaches differ from the most subjectivist implications of the musical analogy. Judges should make determinations and arguments that they believe should have persuasive power for other judges, but without supposing that reference to legislative purpose and surrounding legal materials will provide a great deal of restraint.

The approach of Justice Antonin Scalia and other New Textualists is substantially different. For them, constraint is paramount, but constraint cannot be found in the vagaries of broad purpose. Judges should not try to cooperate freely with the legislature in achieving its broad objectives; they should accept the language the legislature has adopted, and let legislators correct their own mistakes.

Those modern writers who suggest that judges explicitly give weight to modern evaluation—including, to a degree, their own—are correct that candid judges cannot hide completely behind the purposes of legis-

168. See especially Dworkin, supra note 152, at 313–99. This is only one aspect of Dworkin's full theory. He also emphasizes that judges should decide in accord with coherence with existing law, and should give conventional weight to sources of legislative history.


171. See, e.g., William N. Eskridge, Dynamic Statutory Interpretation (1994).

172. See Scalia, supra note 151.

173. See, e.g., Easterbrook, supra note 151.
latures and the values of “the law.” Frankfurter, especially, makes it sound too easy for judges to forego personal notions of policy. But both our judges rightly understood that, in the main, judges should take legislative objectives as their guide in statutory interpretation and that judges are usually capable of distinguishing objectives reflected in legislation from objectives they would adopt as legislators. No one really doubts that evident purposes should assist judges in discerning statutory meaning. Rather, the real issues are how much an assessment of purpose should count against a judge’s sense of the natural reading of the language and against his or her own evaluation of justice or of a desirable legal rule for the future. The question of judicial evaluation cannot be wished away by saying judges should rely on legislative purposes, rather than their own. Judges should, on occasion, make evaluations of justice and welfare even if these cannot be fairly cast as carrying out the legislature’s objectives. But Frank and Frankfurter are right that the usual approach should be to seek legislative purpose and be guided by it. In comparison with any approach that suggests that judges should typically resolve difficult cases on the basis of their own moral appraisals or sense of desirable policy, the “purpose approach” better respects the proper competence of the legislature and offers a healthy, if incomplete, restraint on judicial discretion.

Turning to the New Textualism, the idea that the “natural” reading of language constrains judges much more than attention to purpose is itself illusory. The faithful pursuit of “natural” meaning creates unnecessary tension between legislatures and courts, as judges keep finding that legislatures have not implemented their purposes with sufficiently explicit language.

When one surveys the field of modern competitors, the major claims that Frank and Frankfurter share remain defensible starting points for an approach to statutory interpretation that respects the variant roles of legislators and judges and constrains judges more appropriately than do the alternatives.