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Alfred L. Scanlan

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THE PASSING OF JUSTICE MURPHY—THE CONSCIENCE OF A COURT

On July 19, 1949, death ended the brilliant career of Justice Frank Murphy, member of the Supreme Court of the United States from February, 1940, till the day of his unfortunate and premature demise. The loss which the nation suffered in the passing of this liberal, idealistic judge was great; just how great must await the belated verdict of an objective posterity. However, if this short, posthumous appraisal of his philosophy and the contributions made by him to our jurisprudence and to our constitutional development serves, in the slightest, to reveal his judicial philosophy and his real moral fiber, then the writer will be more than satisfied. In a sense this effort is a memorial, even a eulogy, if you will, to the late Justice Murphy. Nevertheless, its basic purpose is not so much to praise, but to appraise the place of Frank Murphy as he departs from the passing scene.

In general, his death was much lamented by the responsible press and the enlightened commentators of the nation. Their sorrow and their appreciation of Justice Murphy's character and abilities was shared, in general, by many persons of stature and achievement. On the other

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1. The writer anticipates that he will be accused of free and easy use of the word "liberal." It is a term admittedly of indefinite content. The writer, however, feels like the Englishman who, when asked to define an elephant, said that he couldn't, "but damn-well recognized one when he saw it." Justice Murphy's deep concern for minority rights and his protection of them against periodic oppressions by the majority, plus his high regard for the dignity of the individual and the basic political freedoms that should be accorded the individual, entitle him, in the opinion of the writer, to be classified properly as a "liberal."

2. See, e.g., the laudatory editorial in the N. Y. Times, July 20, 1949, p. 24, col. 3.


hand, the pathological bias of some of Justice Murphy’s journalistic traducers was unrestrained even in the hour of his death. To be a humanitarian is a sin, which in the eyes of some, warrants a stigma and a cross which must be carried even beyond the grave.5

However, the contrasting sorrows and satisfactions voiced at Justice Murphy’s death are, perhaps, appropriate, because most of his adult political life was a role which allowed of little mixed feeling toward him. He was either loved and admired, or ridiculed and hated. Therefore, let the chips fall where they may when this writer ventures to assert that cases and events make it very clear that Frank Murphy was “the conscience of the Supreme Court” on matters of civil liberty, individual freedom, and the right to dissent. In addition, it is believed that the record of his performance on the high bench warrants the judgment that he grasped, as few high judges have, the correct scope of the judicial function in a constitutional democracy. Those are high accomplishments to claim for any man. Let us see if the record substantiates the claim.

While his early education need not concern us long, it is interesting to note that after graduating from Michigan Law School Frank Murphy did graduate work at Lincoln’s Inn, London, and at Trinity College, Dublin. Perhaps this early study in a foreign country helped to shape his broad, catholic approach to the law, and assisted in formulating his firm belief in the universal dignity of the human personality. We quickly pass over Justice Murphy’s military service in World War I, although it is possible that his military experience then, plus his later army service in 1940, played a part in establishing his strong conviction concerning the supremacy of the civil authority over the military. At least

5 A thinly concealed dislike for Justice Murphy pervaded the editorial of a local paper. South Bend Trib., July 20, 1949, p. 8, col. 2. Its undisguised relief that there was one less “liberal” on the Court prompted this writer to a reply, which was published therein. South Bend Trib., July 23, 1949, p. 4, col. 7.
it is interesting to note that the Roosevelt appointee with the most military service was the most adamant in resisting military encroachment of civil jurisdiction.

However, it is with his service as a judge of the municipal court of Detroit that we begin to find unmistakable evidence of the humanitarian philosophy which he was later to bring with him to the Supreme Court. In the trial of Dr. Ossian Sweet and his family (Negroes) for murder of a ruffian member of a white mob which had attempted to break in and destroy the house which the defendants had purchased in what had been regarded as a “white” neighborhood, Frank Murphy was the presiding judge. His conduct of that trial, in a courtroom pulsating with unmasked racial hatred and ominous with threats of possible violence, led Walter White to remark: “Never had a trial been conducted with more scrupulous fairness than it was by Judge Frank Murphy....”

Thus, early in his career, and on the comparatively obscure level of the municipal bench, Murphy was already demonstrating his scrupulous concern for the substantive and procedural rights of minority groups, especially those who were the objects of deep prejudice and the victims of the oppressions and social passions of a temporary majority, or an alleged “anthropological elite.” With his rapid ascension into high places and great councils, that feeling for oppressed minorities was to grow in intensity and in the eloquence of expression through which it was publicly manifested.

Another interesting period in the pre-Supreme Court career of Justice Murphy was the term he served as Governor-General and first High-Commissioner of the Philippines. In that role he was called upon to guide the people of the Philippines through the birth pangs of their newly acquired semi-independence. His gentle understanding of the prob-

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6 WHITE, A MAN CALLED WHITE 77 (1948).
lems to be faced during this transition from a semi-backward colony to the beginnings of an independent state, earned for him the respect and affection of that people, and prompted the present Philippine Ambassador to the United States to comment, upon learning of Justice Murphy's death, that he was "one of the most highly respected and best-loved Americans ever to serve" in the islands.\footnote{7}{N.Y. Times, July 20, 1949, p. 26, col. 2.}

We can only surmise that Justice Murphy's experience in the Philippines helped to fashion the broad, ecumenical attitude displayed on the bench toward aliens and foreign petitioners for judicial redress, even if they were the hated generals of our defeated enemies.\footnote{8}{See, e.g., his dissent in Application of Yamashita, 327 U. S. 1, 66 S. Ct. 340, 90 L. Ed. 499 (1946). In addition, Justice Murphy was the sole dissenter in the Court's refusal to interfere with the execution of the Japanese war criminals by the Tokyo Tribunal. However, he wrote no dissenting opinion. Kido v. MacArthur, 335 U. S. 906, 69 S. Ct. 197 (1949).} Frank Murphy was no parochialist; and it seems certain that his tenure in the Philippines contributed in a good measure to his firm belief in the universality with which justice should be dispensed.

Recalled by President Roosevelt to run for Governor in the crucial state of Michigan, Frank Murphy was elected and served one term. It was during this time that he first received great national publicity, for it was his destiny to serve as Governor during the days of the crucial "sit-down" strikes in the automobile industry. It was at this time that he displayed a humanitarianism which refused to indorse the use of violence, the bayonet, tear-gas, and death in order to demonstrate the undeniable property rights of the General Motors Corporation. Firmly refusing force, he used persuasion to induce the "sit-down" strikers to leave the plants and finally settle the strike. It was a courageous decision. In making it he brought down upon his head an avalanche of diatribe from the conservative press and those who would place the abstraction of "property rights" over and above the human issues involved in a tense and danger-
ous situation. It perhaps cost him his re-election as Governor, but if the auto workers needed to be taught a lesson that lesson did not need to be written in blood. He thus placed principle above political advantage in a brave display of his humane philosophy in which the dry formalisms of a legal "right" were not allowed to obfuscate the fundamental moral and human values at stake. From this philosophy he never departed and, as examination of his judicial opinions will reveal, it was one of Justice Murphy's outstanding traits. Like St. Paul he believed in the maxim: "The letter killeth, but the spirit giveth life." The sit-down strike affair was thus the first real public demonstration of the sincere understanding with which Justice Murphy was to view the problems of labor and which was later to reveal itself in the pages of his opinions.

After his defeat for re-election as Governor of Michigan, President Roosevelt appointed Murphy as Attorney General of the United States. While in that office he successfully presented charges of graft and corruption against the infamous Pendergast machine in Kansas City. He was successful also in securing the conviction of Federal Circuit Court Judge Manton for "selling" justice. In addition, he supported to the full the efforts of his able assistant attorney general, Thurman Arnold, in his many famous anti-trust suits. However, illustrative as these events are in revealing Justice Murphy's distaste for political corruption and economic monopoly, his proudest achievement as Attorney General was the creation of a Civil Rights Section in the Department of Justice. In his annual report for 1939, Murphy referred to this activity in the following statement:  

9 Doris Fleeson comments: "During tense weeks, by sheer moral force, he held willful men in conference—John L. Lewis, who has built an enduring union on the blood of martyrs, and attorneys for General Motors, one a du Pont son-in-law, who knew the strike was legally wrong and thought that a show of violence would put the public on their side. Few politicians have the intestinal fortitude to outlast such men." Chi. Daily News, July 23, 1949, p. 5, col. 3.

10 Konvitz, The Constitution and Civil Rights 64 (1947). It is unfortunate that his successors have adopted a policy of self-limitation on the Justice
The maintenance of civil liberties of the individual is one of the mainstays and bulwarks of democracy. It is fundamental that in the United States certain civil rights are guaranteed by the state governments, while others are assured by the Federal Government. In respect to the latter group the Department of Justice has an important function to perform. With that end in view, I caused to be organized a Civil Liberties Unit in the Criminal Division of the Department. One of the functions of this unit is to study complaints of violations of the Civil Rights Act and to supervise prosecutions under those statutes.

This concrete manifestation of the responsibility which Murphy felt the Federal Government owed to its citizens in the protection of their civil rights brought many appreciative acknowledgements and honors from various minority groups. But more important, this manifestation serves to indicate that the judicial preference for human rights over "states' rights," which Murphy later exhibited on the bench, was part of the core of his philosophy of life, and not a conclusion first drawn in the Olympian detachment of his Supreme Court office. If further evidence of Justice Murphy's pre-judicial convictions on the point are needed, we can recall the words of one of his speeches wherein he said:  

... this task of protecting civil liberties [is] ... made twice burdensome by the fact that there is little pleasure in enforcing liberty for those who would deny liberty to others if they were in power. It is not easy to detest an extremist philosophy and yet insist on the right of a man to advocate it freely. Yet, apparently we must do just this if we are to practice our faith in democracy ... We must never forget that the democratic way is not to crush the alien view but to let it be heard and to defeat it by demonstrating that our way of living contributes the most to human happiness.

Department which has left the Civil Rights Section at the point of impotency. Id. at 65.


12 White, op. cit. supra note 6, at 175.

13 Speech delivered over N.B.C., March 27, 1939, as quoted by Barnett, Mr. Justice Murphy, Civil Liberties and the Holmes Tradition, 32 Corn. L. Q. 177, 181 (1946).
What confidence in, and understanding of, the democratic process those words reveal! Democracy can only triumph by accenting the affirmative moral worth of its own attractive ideal; when it descends to the level of its totalitarian seducers, it risks its own suicide. Frank Murphy knew that, and, as we shall see, kept it always in mind during his tenure on the Supreme Court.

Thus, on the eve of his appointment to the Supreme Court, the events, deeds, and utterances in which he had participated up to that time would seem to entitle us to say that Justice Murphy was affected with a deep passion for the freedom of the individual, and that he possessed an acute sensitivity in his solicitude for the legal rights of unpopular minorities. Moreover, he seemed to accept the community of man and the universality of human nature. But above all, he appeared to be a man to whom the law was a concept second in importance to justice. Just what he conceived to be the permissible scope and function of the governmental power in the non-civil liberties fields, such as government regulation of business activity, perhaps we could not appraise too confidently. However, in at least one public utterance he indicated his personal realization that in the evolving industrial economy of our day, the power of government is not to be restricted to a limited and negative public power, but must be used positively as an instrument for human betterment. Indeed, even before his elevation to the Supreme Court, Murphy had made public his opinion that:

... the whole people shall enjoy equal opportunity for economic security and the immeasurable benefits of civil and political freedom.

However, the real story of Frank Murphy lies in the evaluation of his judicial work as a member of the Supreme Court of the United States from 1940 to 1949. To sum-

marize at the outset some of the characteristics which he demonstrated while serving as Associate Justice, we must say that he was a hard working judge, ranking second only to Justices Black and Douglas in the production of written opinions.\(^8\) As might have been expected, he specialized, in a sense, in writing the opinions in civil liberty cases and cases arising under the Federal Employers' Liability Act, the Fair Labor Standards Act, and similar statutes enacted in response to the growing demand for a minimum of economic security for the American worker. Political freedom and economic security were two themes which could always interest Frank Murphy. It must be admitted, however, that the intensity of his feeling, especially in civil liberty cases, sometimes resulted in opinions which were, in a large measure, appeals to emotion.\(^{17}\) However, his offenses in this regard, if indeed they were offenses, were the sins of the warm-hearted, and the emotions appealed to were always noble ones. To be a conscience, even of our highest judicial body, one must be permitted occasional resort to emotion and intuition with which to make more appetizing the often dry provender of logic. As Murphy himself put it, "as a judge I have no loftier duty or responsibility than to uphold . . . spiritual freedom to its farthest reaches."\(^{18}\) Such a function could not adequately be executed if confined to the sometimes limited and arid instruments of precedent and logic.

Murphy's position in the alignment of the Court on various issues is not hard to point out. He was part of the liberal wing composed of Justices Black, Douglas, the late Justice

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\(^8\) Frank, The United States Supreme Court 1948-1949, 16 U. of Chi. L. Rev. 1 (1948).


Rutledge, and himself. This wing of the Court accepted, along with the conservative wing headed by Justices Frankfurter, Jackson, Burton, and Chief Justice Vinson, the Holmesian concept of the proper function of the judge, i.e., that a judge should not substitute his concepts of public policy for that embodied in the collective mandate of the representatives of the people, and thus be led to frequent and unjustifiable rulings in favor of the unconstitutionality of statutes. Unlike the conservative wing, however, the Black, Douglas, Murphy, Rutledge alignment did not carry over this attitude of judicial "self-restraint," but on the contrary became very "activistic," when examining state or national action which injected itself into the field of civil liberties.

Leaving aside the merits of this difference of judicial approach for a while, we can say that Justice Murphy was the most firm of the liberal four in his adherence to their mixed philosophy of judicial "activism" and judicial "self-restraint." His record in upholding civil liberties since 1941 was one hundred per cent, while his support of the Government’s power to regulate business activity was as regular as that of his three liberal brothers, and, in addition, his pro-labor position has been characterized as "the most extreme on the Court."

Having identified Justice Murphy as the left wing member of the liberal branch of the Court, it should be fruitful to examine in more detail the application of his philosophy to the specific types of constitutional questions which have been presented to the Court for decision. Since the writer

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19 Justice Rutledge died not long after Justice Murphy. He passed away on September 10, 1949. His loss to the Court and to the country was great indeed. The writer is profoundly sorry that the limitations of time and space do not permit further eulogy of that great judge.

20 Schlesinger, The Supreme Court: 1947, Fortune, January, 1947, p. 73. Professor Schlesinger, loyal Harvard man that he is, gives the Frankfurter view a bit the best of it. When he calls the latter "a beloved teacher," he gives himself away. Felix Frankfurter was a great teacher. Whether he was "beloved" is another story.

21 Pritchett, op. cit. supra note 11, at 259. See also, Curtis, Lions Under the Throne 204 (1947).
has asserted, and it has been conceded in many quarters, that Murphy was the "conscience of the Court" on matters of civil liberties, more extended discussions of that phase of Justice Murphy's judicial career should be permissible. We have commented earlier on the paradox demonstrated by the liberal wing of the Court in being judicially "self-restrained," save on matters of civil liberty where, in direct contradiction, they became very cautious and inquisitive in passing upon the constitutionality of governmental action which might jeopardize the fundamental political freedoms of the citizen. One author has labeled this phenomenon as the "paradox in the Holmes tradition," since Justice Holmes had demonstrated the same apparent lack of consistency in dealing with questions of personal liberty, as opposed to those involving the constitutionality of legislative regulation of economic activities.

Correctly appraised the paradox is easy to resolve, and the judges who adhere to it, like Murphy and Holmes, must be absolved of inconsistency. After all, when judges refuse to substitute their concepts of public policy for those of the people by promiscuously overturning duly enacted measures of the state or national legislatures, they are assuming that the legislature, the body composed of the elected representatives of the people, is entitled to govern according to the rules of democracy. However, when those same representatives of the majority pass legislation which attempts to restrict minority groups in the exercise of their rights, they are cutting at the basic root of democratic government, which is nothing else than the right to dissent. We defer to legislative supremacy only because we assume they have proved their right to it by their victory in the competitive market place of contesting political theories, parties, and

22 Barnett, Mr. Justice Murphy, Civil Liberties and the Holmes Tradition, 32 CORN. L. Q. 177 (1946).
28 SPITZ, PATTERNS OF ANTI-DEMOCRATIC THOUGHT 6 (1949). See also, for an excellent book review of this stimulating work, Saturday Review of Literature, July 16, 1949, p. 13.
groups. When they curtail or restrict the competitive nature of the arena of the political struggle by attempted restraints on free speech, press, assembly, or the practice of religion, they erase the major premise of democratic government from which all else flows. Some have said that this special judicial safeguarding of our civil liberties and the political rights embraced in the Bill of Rights is an aristocratic, as opposed to a democratic, function.\textsuperscript{24} Correctly understood, it seems valid to say that it is the \textit{sine qua non} of democracy to protect the free competition of ideas, lest in restricting that we forfeit all.

Justice Murphy was possessed of that philosophy. He was willing to afford a wide scope to federal and state powers of regulation. In the \textit{American Power and Light} case,\textsuperscript{25} involving the question of the constitutionality of the "death sentence" provision of the Public Utility Holding Company Act, he indicated the permissible sweep of at least one important federal power when he said: "... the federal commerce power is as broad as the economic needs of the nation."\textsuperscript{26}

Moreover, like his colleagues Black and Douglas, Justice Murphy took a tolerant attitude in regard to state taxation and regulation of economic enterprise, and usually could be found siding with those Justices who would sustain state action along these lines.\textsuperscript{27} But while Murphy was willing to give the Commerce Clause "the most liberal interpretation ... since John Marshall,"\textsuperscript{28} and while, along with Justice Black, he was a "complete and consistent supporter of

\textsuperscript{24} See Viereck, \textit{Conservatism Revisited} (1949). The eminent poet, Mr. Viereck, is not disapproving of this hyper-solicitude for the Bill of Rights. He merely is using the word aristocratic in a broader sense than is usually afforded it—that is, in the sense of preserving and conserving political freedom rather than economic and financial power.

\textsuperscript{25} American Power and Light Co. v. S. E. C., 329 U. S. 90, 67 S. Ct. 133, 91 L. Ed. 103 (1946).

\textsuperscript{26} 329 U. S. at 104.

\textsuperscript{27} Pritchett, \textit{op. cit. supra} note 11, at 89.

\textsuperscript{28} New Republic, August 1, 1949, p. 5, col. 1.
state power," nevertheless, his devotion to the canon of legislative supremacy did not unduly influence him in his approach to the problem of civil liberties. As has been said of Holmes, Justice Murphy believed that there were:

... some manifestations of the human spirit ... so precious that in specific instances he found no justification for legislative restrictions, tolerant though he was of the legislative judgment.

Justice Murphy balked when the power of regulation was the thinly concealed disguise for the hand of oppression.

For instance, to Frank Murphy, unrestricted freedom of speech and press was of paramount importance in the hierarchy of constitutional values. He recognized that the way to refute noxious doctrines is to expose them and argue them down. In that way only can we preserve unimpaired the avenues of thought-exchange which are the necessary sinews of the democratic state. Thus he supported the doctrine that peaceful picketing was free speech; that a semi-Fascist, defrocked priest had the right to utter his diatribes of racial hatred in the face of a hostile crowd; that newspaper editors are not to be found guilty of contempt for articles critical of a court; that unions are not to be prohibited from supporting candidates for election via the medium of the press and the pamphlet. There are other less extreme examples of Murphy's devotion to the principle of free speech and of a free press. All illustrate his unshakeable faith that democracy is built upon the full and peaceful interchange of competing ideas. To allow freedom even for speech that

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29 Frank, Mr. Justice Black: The Man and His Opinions 154 (1949); see also, Scanlan, Book Review, 25 Notre Dame Lawyer .... (1949).
30 Frankfurter, Mr. Justice Holmes and the Supreme Court 49 (1938). It is interesting to note that this comment is made of his hero by Justice Frankfurter, and yet the gentleman often forgets that same creed in his rigid adherence to the doctrine of legislative supremacy, even if it means intrusion into the broad sphere of civil liberties.
is loathsome to us is the true test of the sincerity of our democratic convictions. Justice Murphy met that test.

This faith in the competition of ideas as the indispensible cornerstone of our democracy was exemplified by Justice Murphy when he approached the problem of legislative action and the constitutional principle of freedom of religion. Frank Murphy had enough faith in his religion and in Christianity in general, to know that it could withstand the challenge of error, heresy, and totalitarian slavery. Truth in religion, like democracy in politics, will prevail in the market place of ideas, unless its defenders forfeit it by the failure to stand up and speak for it, or take the equally fatal alternative of persecuting those who challenge it. In the blood of martyrs grows the seed of a church, be it Christian or Communist. Frank Murphy was not one to forget it. In a concurring opinion in *Martin v. Struthers*, wherein the Court struck down a city ordinance which made it unlawful for anyone distributing literature to ring a doorbell or knock on a door, he said:

> I believe that nothing enjoys a higher estate in our society than the right given by the First and Fourteenth Amendments freely to practice and proclaim one's religious convictions ... The right extends to the aggressive and disputatious as well as to the meek and acquiescent. The lesson of experience is that—with the passage of time and the interchange of ideas—organizations, once turbulent, perfervid and intolerant in their origin, mellow into tolerance and acceptance by the community, or else sink into oblivion.

Thus, Justice Murphy, himself a deeply religious and pious man, never lost his patient tolerance even of the most bitter attackers of his own faith, such as were the Jehovah's Witnesses, whose right to speak, practice, and propagandize their unorthodox religion he defended to the last.

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36 319 U. S. at 149.
37 See *Prince v. Massachusetts*, 321 U. S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944). In a lone dissent Justice Murphy condemned a statute which made it a misdemeanor for an adult to permit a child to sell religious literature. An
His religion was deep enough, his faith strong enough to tolerate and protect the opponents of that faith. He understood that Catholicism, and Christianity in general, have withstood the vicissitudes of time and events not because they were the popularly held beliefs of strong, but temporary majorities, but because, possessing the hard kernel of Divine Truth, the bleatings of the harmless fanatics or the terrifying blows of the determined totalitarian enslavers of Man and Nature, fell equally impotent against an indestructible idea. With such a philosophy it is easy to see why Justice Murphy could not approve legislation which prevented people from ringing door bells in the sincere propagation of their religious views; or legislation which taxed the sale of religious literature; or which forced children to salute a flag when their view of God told them not to; or which required a license for the distribution of religious reading matter. Neither could a man of such convictions feel compelled to object when a majority of his brothers on the Court said the First Amendment prevents the teaching of religion in public schools on school time. Perhaps, in the latter case, Frank Murphy knew in his heart that the truant officer never can be an adequate substitute for the spirit of the Lord. We may not approve of the McCollum decision, but it shouldn't be hard to trace the premises on which Frank Murphy's assent to it rested.

It is not surprising, in view of Justice Murphy's faith that Christianity and democracy will prevail by the sheer, inexorable force of their own truth and virtues, that he became the special protector of various minority groups whose views and status have, from time to time, incurred the oppressive condemnation of a temporary majority. We have mentioned his special solicitude for the vexatious extreme position—nevertheless, it is another example of Justice Murphy's passionate regard for religious liberty.  

Jehovah’s Witnesses. Equally the objects of his judicial custody were American Negroes. His defense of their rights flowed from his faith in democracy, of course. But even more catalytic here was his concept of the equality of human dignity as the basis of our Christian civilization. Thus, he dissented from the majority holding in *Akins v. Texas* that the intentional limitation of one Negro to a jury satisfied the requirements of the Fourteenth Amendment. He disagreed also from the holding in *Screws v. United States*, which limited the criminal provisions of the federal civil rights laws. He saw clearly that the semantically appealing slogan of “states’ rights” was too often used as a facade behind which “human rights” were obliterated. Deference to the legislative will of a geographical minority is misplaced when it violates the letter and spirit of the fundamental law of the national majority—the Constitution. As he himself put it:

Too often unpopular minorities, such as Negroes, are unable to find effective refuge from the cruelties of bigoted and ruthless authority. States are undoubtedly capable of punishing their officers who commit such outrages. But where, as here, the states are unwilling for some reason to prosecute such crimes the federal government must step in unless constitutional guarantees are to become atrophied.

We mentioned before the fact that Justice Murphy usually lent a sympathetic ear when labor’s right to organize or bargain collectively was the issue before the Court. Yet even here, when labor unions also attempted to discriminate, Murphy was quick to challenge them. His pro-labor bias did not lead him into the hypocrisy of sanctioning racial bigotry. So, in *Steele v. Louisville & Nashville R. R. Co.*, he concurred in a unanimous opinion of the Supreme Court which struck down attempts by the Railroad Brother-

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41 325 U. S. at 138.
hood to exclude Negroes. The Court held that the union, the exclusive bargaining agent under the Railway Labor Act, must represent all members of the trade or craft without hostile discrimination. Justice Murphy was not content to rest the decision, as the remainder of the Justices did, on grounds of statutory interpretation alone, but went further in a reminder that grave constitutional issues were raised, saying: 48

The Constitution voices its disapproval whenever economic discrimination is applied under authority of law against any race, creed or color. A sound democracy cannot allow such discrimination to go unchallenged. Racism is far too virulent today to permit the slightest refusal, in the light of a Constitution that abhors it, to expose and condemn it wherever it appears in the course of a statutory interpretation.

An appeal to the emotions? Perhaps the emotionalism, let us say, of a man whose democratic instincts flowed from the deep wells of his Christianity. When we remember that discrimination against the civil liberties or the economic opportunities of any legitimate minority is the opening wedge against liberty itself, we can discern the hard substance of long range logic and reason deep in the bottom of the cup of emotionalism that Frank Murphy often raised.

One further indication of Justice Murphy’s proclivity for piercing the protective veil of arid legalisms, when on the trail of those who would restrict the American Negro to the status of the “half-citizen,” can be found in the second Sipuel case. 44 Here the Supreme Court held that by ordering the regents to admit a qualified Negro applicant to the University of Oklahoma Law School where she was to remain until a separate law school was established and ready to function, the Oklahoma county court did not depart from the Supreme Court’s mandate in the first Sipuel case, 45 wherein it had been decided that a Negro applicant

48 323 U. S. at 209.
to a professional school could not be discriminated against and
denied admission solely because of color. Frank Mur-
phy joined informally with his close colleague, the late
Justice Rutledge, in a dissent which indicated that had
both lived, further judicial permutations of the fallacious
"separate but equal" maxim would have had at least two
dissenters. When that fantastic fiction is finally wiped
away,\footnote{For the true picture of how what is sometimes termed as constitutionally
"separate but equal" proves to be sociologically, economically, professionally, and
realistically "separate but grossly unequal," see \textit{Sprigle, In the Land of Jim
Crow} 50-55 (1949).} Justice Murphy's spirit will, perhaps, rest easier.

No picture of Justice Murphy's deep concern over
"racism" as a debilitating factor in the moral structure of
our society could be complete without mentioning his defense
of the much persecuted Japanese-American groups. For in-
stance, while he concurred reluctantly in \textit{Hirabayashi v. United
States},\footnote{\textit{Hirabayashi v. United States}, 320 U. S. 81, 63 S. Ct. 1375, 87 L. Ed.
1774 (1943).} upholding the Army curfew order applicable
to all Americans of Japanese ancestry, he publicly pro-
claimed the prickings of his sensitive conscience and the
uneasy apprehensions that must have possessed him, when
he said:\footnote{320 U. S. at 111.}

\begin{quote}
Today is the first time, so far as I am aware, that we have
sustained a substantial restriction of the personal liberty of
citizens of the United States based upon the accident of race
or ancestry. Under the curfew order here challenged no less
than 70,000 American citizens have been placed under a special
ban and deprived of their liberty because of their particular
racial inheritance. In this sense it bears a melancholy re-
semblance to the treatment accorded to members of the Jewish
race in Germany and in other parts of Europe. The result is
the creation in this country of two classes of citizens for the
purposes of a critical and perilous hour—to sanction discrim-
ination between groups of United States citizens on the basis
of ancestry. In my opinion, this goes to the very brink of
constitutional power.
\end{quote}
Nor was it long before Justice Murphy's voice was again raised against the Court's relaxation of its vigilance toward executive and legislative action which might advance the ugly curse of racism. In *Korematsu v. United States,* when the majority of the Court sustained the Army evacuation and exclusion order barring Japanese-Americans from the West Coast, Justice Murphy refused to go further along a road that very well might terminate in the twin disasters of military supremacy over civil authority and constitutionally permitted discrimination against any minority group, racial or religious, who might be the particular objects of hate of some future majority. Justice Murphy said that the order was not based on any demonstrated need, but upon:

... an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices.

The Court, in his opinion, had exceeded the "brink of constitutional power" and had fallen into the very ugly abyss of racism. While subsequent liberal and courageous decisions, such as the racial restrictive covenant rulings, have perhaps softened the fear in some quarters that the Court was tolerating damaging intrusions in the field of civil liberties, nevertheless, the chilling words of Justice Murphy's dissent in the *Korematsu* case should not be forgotten.

Further evidence of Justice Murphy's protective attitude toward minorities who are the unpopular targets of the transitory majority appears from examination of cases involving the rights of aliens. For instance, he took up the cause of the Japanese alien in *Oyama v. California,* where-

50 323 U. S. at 231.
51 Shelley v. Kraemer, 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948), and Hurd v. Hodge, 334 U. S. 24, 68 S. Ct. 847, 92 L. Ed. 1187 (1948). This writer, among many others, has discussed these cases. Scanlan, *Racial Restrictions in Real Estate—Property Values Versus Human Values,* 24 NOTRE DAME LAWYER 157 (1949).
52 332 U. S. 633, 68 S. Ct. 269, 92 L. Ed. 249 (1948).
in the Court struck down as unconstitutional a prima facie presumption under the California Alien Land Law that conveyances of title, where the consideration was paid by the agent ineligible for citizenship, were not gifts but were for the benefit of the alien. While the majority was content only to outlaw the presumption under the statute, Justice Murphy, along with Justice Rutledge, condemned the statute as outright racial discrimination and unconstitutional. Justice Murphy also raised the novel point that our international obligations were involved: 53

And so in origin, purpose, administration and effect, the Alien Land Law does violence to the high ideals of the Constitution of the United States and the Charter of the United Nations. It is an unhappy facsimile, a disheartening reminder, of the racial policy pursued by those forces of evil whose destruction recently necessitated a devastating war. It is racism in one of its most malignant forms.

Again in Takahashi v. Fish and Game Commission, 54 Justice Murphy went further than the majority in outlawing a California statute which denied fishing licenses to persons ineligible for citizenship, condemning it as discriminatory in intent as well as in effect.

Murphy's phobia for protection of minority rights carried over into other fields. In passing, we can recall his refusal to compound the attenuated judicial interpretations of the Mann Act to embrace unfortunate members of the Mormon sect that ran afoul of that congressional attempt to "purify interstate commerce." 55 Even more fundamental are his views toward unpopular political minorities, even those of the totalitarian mold. He wrote an opinion in the Bridges case, 56 wherein the Court refused to permit the deportation of the alien labor leader, Harry Bridges, for alleged membership in the Communist party. This opinion went further than the majority holding, which merely had decided the case on

53 332 U. S. at 673.
54 334 U. S. 410, 422, 68 S. Ct. 1138, 92 L. Ed. 1478 (1948).
the grounds that the evidence of Bridges' affiliation with the Communist party was unsatisfactory. Murphy felt that the deportation statute was unconstitutional in denying due process and abridging the First Amendment. Extreme conclusions—yes; but the hysteria of a "witch-hunt" is extreme in its own good measure, and could violently provoke the democratic serenity of Murphy's philosophy.

Again, in Schneiderman v. United States, Justice Murphy was vigorous in his defense of what he regarded as the political liberty of even an alien. In this denaturalization case, based on the charge that Schneiderman had been a Communist at the time of his admission to this country, Murphy pointed out that this was a proceeding to revoke citizenship after twelve years, and that the burden of proof was on the Government to prove the case "by . . . evidence which does not leave the issue in doubt." In other words, he would impose a test which is apparently identical with that of criminal law where a man's guilt must be proved beyond a reasonable doubt. When we recall that the loss to liberty, property, and economic and social opportunities is often equally as great in the case of deportation as in many criminal convictions, the similarity of the tests is not unjustifiable.

Recent evidence of Justice Murphy's defense of political minorities occurred in MacDougal v. Green where the Court refused to strike down an Illinois election statute which required that a certain number of signatures on an election petition be from at least fifty different counties. The majority denied the "equal protection of the laws" argument of the petitioner, candidate for Governor of the State of Illinois on the ticket of Henry Wallace's Progressive Party. Justice Murphy joined Justices Douglas and Black in dissent as they pointed out the fact that merely because

57 320 U. S. 118, 63 S. Ct. 1333, 87 L. Ed. 1796 (1943).
58 320 U. S. at 135.
the federal Constitution sanctions some political disproportionate representation, there was no justification for allowing the states to create additional ones.⁶⁰

Departing from consideration of Justice Murphy and the problem of minority protection, and turning to the field of criminal law and procedure, we find a similar concern for individual rights exhibited by the Justice when appraising the fairness of criminal proceedings. And it is not surprising that one who was quick to preserve the rights of political, social, or religious dissenters and non-conformists should also demonstrate a solicitude for the rights of criminals. After all, fair procedure in a criminal trial is one of the essential features of the Bill of Rights. Its place in the tradition and political history of our nation is so well known that comment on it is unnecessary. Add to that the recent use by police states of the criminal law as a cruel and effective instrument for ferreting out and crushing the spirit of democratic opposition, and we can rejoice and applaud when our courts and judges go to extreme lengths in demanding fair criminal procedure, whether in the station house or in the court house.

Fundamental, of course, in ensuring fairness of trial in the criminal proceeding is the necessity of a democratic jury system. We find that Justice Murphy gave his assent to this proposition on several occasions. In Fay v. New York ⁶¹ he dissented from a majority holding which sanctioned a New York "blue ribbon" jury panel under which women and laboring people were systematically excluded. In his dissent he decried a standard of jury selection which was "apparently of an economic or social nature, unjustified by the democratic principles of the jury system." ⁶²

Turning to other phases of criminal law, we can point out additional examples of Justice Murphy's firmness in resisting

⁶⁰ 69 S. Ct. at 4.
⁶² 332 U. S. at 299.
the slightest possible encroachment on the Anglo-Saxon ideal of fair criminal procedure. In a dissent in *Adams v. McCann* \(^{63}\) he refused to recognize an accused's right to waive a jury trial in a federal court. In *Trupiano v. United States* \(^{64}\) he joined the majority in giving a broad, protective interpretation to the Fourth Amendment's guarantee against unreasonable search and seizure. He argued similarly in a dissenting opinion in *Harris v. United States*, \(^{65}\) and again in *Wolf v. Colorado*. \(^{66}\) Moreover, it is interesting to note that, while Murphy deferred usually to administrative "expertise" when petitioners raised the claim of administrative action beyond the scope of their statutory authority, \(^{67}\) nevertheless, when the administrative action seemed to him to have invaded the broad sphere of the Fourth Amendment, a different answer was reached. Thus, in *Oklahoma Press Publishing Company v. Walling*, \(^{68}\) he dissented from a majority ruling that the Fair Labor Standards Act Administrator had the authority to issue subpoenas for the production of a newspaper's books and records. Justice Murphy's great concern for civil liberties could not permit him to sanction the use of non-judicial subpoenas by administrative agents.

Other incidental manifestations of Justice Murphy's devotion to the ideal of fair criminal procedure are found in his dissent in *Malinski v. New York*, \(^{69}\) where he attacked the use of the third degree. His condemnation of wire-tapping was vigorous, as we see in *Goldman v. United States*; \(^{70}\) his habit of strictly construing penal statutes is illustrated in *Chatwin v. United States*, \(^{71}\) where he construed the "Lind-
bergh" federal kidnapping law narrowly so as not to have it encompass Mormons, who had taken a young girl without the consent of her parents across state lines for the purposes of a "celestial" marriage. Moreover, in refusing to apply the Mann Act to voluntary prostitution within the District of Columbia, he once again indicated his firm resistance to the extension of a general federal power to the point where local "affairs" became interstate crimes.\footnote{United States v. Beach, 324 U. S. 193, 65 S. Ct. 602, 89 L. Ed. 865 (1944).}

One final important case must be appraised before concluding the examination of Justice Murphy's concept of the relationship of the Bill of Rights and American criminal law. In Adamson v. California,\footnote{332 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903 (1947).} a five-Justice majority sustained a California statute which permitted comment by the prosecution upon the accused's failure to explain or deny the evidence against him. They felt that the Fourteenth Amendment did not embrace the self-incrimination provisions of the Fifth Amendment. Justice Murphy, with the remaining three judges, felt otherwise, and was of the opinion that all of the guarantees found in the Bill of Rights applied against the states by virtue of the Fourteenth Amendment. In fact, Justice Murphy, along with Justice Rutledge, wanted to go even further and, in addition to carrying over "the specific guarantees of the Bill of Rights" and applying them to the states via the Fourteenth Amendment, foresaw that:\footnote{332 U. S. at 124.}

Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights.

A judge with Murphy's heedfulness of fair procedure is led inexorably to the conclusion that a double standard Bill of Rights is an anachronism in this democratic day. If the standards of restraint upon the powers of government in this area are valid when applied to the Federal Government,
they should be equally mandatory when reviewing transgressions of fair criminal procedure on the part of the states. Not only logic, but the legislative history of the Fourteenth Amendment re-enforce that judgment.\textsuperscript{75} However, it must be admitted that Justice Murphy's desire to build even further on this base, while understandable from humanitarian considerations, would present further uncertainty and a greater possibility of a wave of certiorari petitions which would consume precious time which the Court can ill afford to spare. On the other hand, in the difficult field of criminal procedure the sympathies of even a liberal judge are often strained severely. Justice Black, normally a friend of individual liberty, strays from the reservation of freedom once in a while.\textsuperscript{76} It is an area of the law which presents the difficult problem of whether we really can afford to the criminal dregs and cut-throats of our society the fairness of criminal procedure of which we boast. Justice Murphy would afford that fairness. Like Thurman Arnold he saw that a fair criminal trial is a consequence of a societal security in which men can tolerate contradictory social values.\textsuperscript{77} When the criminal trial has become a mere form or relic of the tolerance of an earlier day, the goose-step and the commissar are the ideals of the hour. It is not always easy to keep the vision of such a nightmare in mind when its potentialities speak only through the petitions of murderous felons. Yet it must be done if the substance of our Bill of Rights is to be preserved unimpaired. Here Frank Murphy was a good preserver.

\textsuperscript{75} Flack, The Adoption of the Fourteenth Amendment (1908). And see the exhaustive appendix to Mr. Justice Black's dissenting opinion in Adamson v. California, 332 U. S. 46, 92, 67 S. Ct. 1672, 91 L. Ed. 1903 (1947).

\textsuperscript{76} We observe this especially in Mr. Justice Black's tendency to support the government in the search and seizure cases. For example, see Harris v. United States, 331 U. S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399 (1947). Undoubtedly, his experience as Senator in charge of more than one famous congressional investigation and the memory of the great difficulties in securing information necessary for the purposes of government, have played a part in shaping his attitude on this matter. See Frank, op. cit. supra, note 29, at 63 et seq.

\textsuperscript{77} Arnold, The Symbols of Government 130 (1935).
One final broad category of cases completes examination of Justice Murphy's civil liberty philosophy. And it really is the field of "civil" liberty. The writer has reference to cases dealing with the exercise of jurisdiction by military authorities. The primacy of the civil authority over that of the military is a traditionally accepted political premise which lies deep at the roots of our democratic government. Furnishing one of the more popular dissatisfactions with British rule out of which came the American Revolution, it withstood even the terrible calamity of the Civil War. However, in our day some observers detect a weakening in the conviction with which it is asserted in certain quarters. The holdings in the Japanese exclusion cases ante, the difficult struggle to preserve civilian control over the Atomic Energy Authority, the "hush-hush" military security bills which are rushed through Congress without open debate—all reflect a diminution in the devotion to the ideal of civil supremacy over our military authorities.

If this is so, Justice Murphy is not numbered among those who are losing faith in that ideal. In Duncan v. Kahanamoku, he voiced fervent objections to the exercise of military jurisdiction over civilian offenders long after the danger of invasion of Hawaii had passed. While the majority reached the same result, they did so on grounds of the statutory interpretation of the Organic Act of Hawaii. Justice Murphy, rarely content to rest with statutory results when he believed fundamental constitutional principles were involved, claimed that the military trials: were forbidden by the Bill of Rights of the Constitution of the United States, which applies in both spirit and letter to Hawaii.

We have mentioned previously Justice Murphy's dissatisfaction with the Court's deference to the curfew and exclu-
sion orders of the military authorities on the West Coast. His distrust of military jurisdiction was not confined purely to domestic restrictions, however. For instance, in the Application of Yamashita, where a Japanese general brought habeas corpus to test the legality of his conviction before a military commission for violations of the “law” of war, Justice Murphy refused to join in the majority’s opinion that the mode of military procedure in this case was not reviewable by the civil courts. Joining with Justice Rutledge, he reminded all that:

... in the sober after glow will come the realization of the boundless and dangerous implications of the procedure sanctioned today. No one in a position of command in an army, from sergeant to general, can escape those implications. Indeed, the fate of some future President of the United States and his chiefs of staff and military advisers may well have been sealed by this decision... Indeed, an uncurbed spirit of revenge and retribution, masked in formal legal procedure for purposes of dealing with a fallen enemy commander, can do more lasting harm than all of the atrocities giving rise to that spirit.

Justice Murphy stuck to his refusal to sanction the loose and precedent-setting procedures of military tribunals, and in Application of Homma he repeated his dissent of the Yamashita case. Finally, in the attempt by the Japanese war criminals to have the Supreme Court review their convictions by the international Tokyo Tribunal, he dissented without writing any opinion. The latter tribunal, while not strictly a military court, had been set up under a decree of the Supreme Commander for the Allied Powers in Japan, General MacArthur.

In concluding our investigation of Justice Murphy’s reactions to the relationship between the civil and the military, we should mention the Selective Service Act cases. In Falbo

82 327 U. S. at 28.
v. United States.\textsuperscript{85} we find him to be the sole disserter from a majority holding that a draft order of the Selective Service Board was not reviewable, and that it was merely an intermediate step in a process which would not reach its conclusion until the selectee actually was accepted by the Army. Justice Murphy felt that the rule which requires exhaustion of one's administrative remedies was not applicable where, as he pointed out,\textsuperscript{86} it stripped a man of his only defense to a criminal prosecution for evasion of the Selective Service Act. The same philosophy was reflected in his dissent in Cox v. United States,\textsuperscript{87} where he disagreed with a majority ruling which upheld, as supported by substantial evidence, a draft board's refusal to classify some Jehovah's Witnesses as ministers of religion. Once again we see Justice Murphy, usually a staunch defender of administrative finality in matters of fact, rejecting the "substantial evidence" rule when civil rights were in jeopardy. It is interesting to note, however, that Justice Murphy's views in these Selective Service decisions were, to all intents and purposes, adopted in two cases decided after the war had been concluded and the tides of nationalism, which, it seems, unavoidably must prevail in periods of wartime, had subsided.\textsuperscript{88} Perhaps we can speculate that the dangerous decisions rendered in the Japanese curfew and exclusion cases might have gone the other way had they been decided after the actual war had been terminated.

Justice Murphy, himself a former soldier, like another great soldier-judge, Oliver Wendell Holmes, did not allow any misconceived romanticism or servile respect for military

\textsuperscript{85} 320 U. S. 549, 64 S. Ct. 346, 88 L. Ed. 305 (1944).
\textsuperscript{86} 320 U. S. at 559.
\textsuperscript{87} 332 U. S. 442, 68 S. Ct. 115, 92 L. Ed. 59 (1947).
\textsuperscript{88} Estep v. United States, 327 U. S. 114, 66 S. Ct. 423, 90 L. Ed. 405 (1946), where the Court held the order of the Board to be judicially reviewable in a criminal prosecution against a selectee who had reported for induction but refused to submit to induction. Any distinction between the Estep and Fablo cases would seem to be one without a difference. See also Gibson v. United States, 329 U. S. 338, 67 S. Ct. 301, 91 L. Ed. 331 (1946).
glory and authority to mislead him into sanctioning the slightest impairment of the principle of civil supremacy over military authority, or to forget that the ultimate overseer in maintaining that hierarchy of constitutional values should always be the Supreme Court. The role of custodian of the people's liberties has no finer duty than that discharged here.

Before concluding this evaluation of Justice Murphy's philosophy of law, we might once again briefly recall his attitude in the broad field of cases lying outside the sphere of civil liberties. We have already adverted to the wide scope he was willing to give to the federal and state regulatory powers, whether based on the commerce and taxation powers of the federal government or residing in the inherent police powers of the individual states. In addition, it should be pointed out that Justice Murphy was a firm defender of extensive and effective anti-trust legislation. The limitations of time and space prevent detailed discussion of his contribution to the precedent-making decisions in the fields of trade regulation in general and anti-trust law in particular. Suffice to say, Frank Murphy stood firm with the three other members of the liberal quartet, Black, Douglas and Rutledge, in refusing to tolerate any slight cracks in the legislative dikes which have been erected against monopoly. One quotation from his dissent in Bruce's Juices v. American Can Company serves to illustrate Justice Murphy's views in this general field. In that case the majority refused to permit a buyer to defend an action for the price of goods by showing that the seller had engaged in price discriminations against the buyer in violation of the Robinson-Patman Act. Justice Murphy, in whose philo-

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89 Note 25 supra.
90 See, e.g., the Yellow Cab decision wherein Justice Murphy interpreted the sweep of the monopoly section of the Sherman Act to embrace any "appreciable amount of interstate commerce." United States v. Yellow Cab Co. et al., 332 U. S. 218, 225, 67 S. Ct. 1560, 91 L. Ed. 2010 (1947).
phy the giant equity of the public interest would always adumbrate the dry legalisms of law suits between individuals, spoke thusly:

We should pause long before sanctioning the recovery of discriminating prices which Congress has found inimical to the nation's welfare. We should be on guard against the use of the judicial process to augment the subtle destruction of small business contrary to the legislative will, and the erosion of the barriers which Congress has erected against the flood-tide of monopoly. To that end, therefore, we should reverse the judgment below and allow courts to give full effect to the Robinson-Patman Act.

Firm believer in the efficacy of full and vigorous anti-trust enforcement though he was, Justice Murphy rebelled somewhat when he imagined that the protective enclave of the First Amendment would be infringed thereby. Thus he dissented in the Associated Press case, wherein the Associated Press was found guilty of violating the Sherman Act by conspiring through its by-laws and other practices to exclude and discriminate against non-member competitors. In his separate dissent he remarked on the fact that the Sherman Act was being applied against the press for the first time, and went on to remind all that:

The tragic history of recent years demonstrates far too well how despotic governments may interfere with the press and other means of communication in their efforts to corrupt public opinion and destroy individual freedom. Experience teaches us to hesitate before creating a precedent in which might lurk even the slightest justification for such interference by the Government in these matters.

Thus, while a sympathetic friend of the collective efforts of the people's representatives to use the full power of government against the economic and financial abuses of a monopoly minority, he balked when the slightest specter of the opinion-controlling police state crossed his judicial path.

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92 330 U. S. at 766.
94 326 U. S. at 51.
Further demonstration of this wise caution was found in the field of administrative law. We have previously adverted to the fact that he was willing to forget his tolerance of administrative fact-finding finality when a deportation case was involved. Similarly in *National Broadcasting Company v. United States*,\(^9\) he betrays the same apprehensions lest political and personal rights be infringed. In that case the majority upheld the power of the Federal Communications Commission to issue so-called "chain-broadcasting" regulations, which prohibited the granting of radio broadcasting licenses to applicants having certain corporate and financial relations with the networks. Justice Murphy dissented,\(^9\) and, although his opinion did not specifically indicate it, we may surmise it was his usual anxiety over possible invasions of the "free speech" principle that prompted him to depart from the deference he ordinarily demonstrated toward administrative power of regulation.

**Conclusion**

A critic of Roger Williams once had to admit of that pioneer founder of Rhode Island, that he "had the root of the matter in him."\(^9\) The same thing can safely be said of Justice Murphy. Like Roger Williams in his day, he saw that a Constitution, the fundamental law of a nation, could only be interpreted by the power that created it originally, namely, the sovereign people acting in a political capacity. For that reason Justice Murphy, true to the Holmes tradition, allowed wide reign to the power of government. He would not interpose his personal prejudices and predilections to stop the great social experiments that have to be carried out by a democratic government in the Twentieth Century, if that government is to continue to exist. Yet, as

\(^9\) 319 U. S. at 227.
\(^97\) Cotton Mather, as quoted in I FARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT 75 (1927).
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one astute observer has pointed out, it is a matter of considerable controversy how far government economic regulation and planning is compatible with the maintenance of our civil and political freedoms. Justice Murphy demonstrated he was alive to this fact: that liberty can be lost by government action just as well as by its non-use.

Thus, as we hope these pages have recalled, Justice Murphy was ever vigilant in protecting the great political freedoms of speech, religion, press, and thought. Perhaps it was in good measure because of his leadership that, in a period when governmental activity and planning in America reached its greatest intensity, there has been a vigorous protection of civil rights by the Court. Perhaps never before since the days of the great Jefferson have the principles of freedom of speech, press, and religion been more venerated and protected by our high Court. Never before have the political and economic rights of the American Negro been looked after with such scrupulous caution. The hypocrites who distort the terms "liberty" and "states' rights" to serve as a clever masquerade behind which to oppress the Negro and the "poor white," to give, for example, the national tidelands oil resources to the money changers, and to attack the public power developments of the nation, could take a leaf from the book of Justice Murphy and some of his colleagues, if they are really concerned about preserving human freedom.

One major criticism has been directed against Justice Murphy's "judicial activism" in serving the cause of civil liberties. Essentially, this criticism amounts to this: for the Court to play the role of an active protector of civil liberties is undemocratic. It tends to shift responsibility for the preservation of minority rights away from the legislature, the representatives of the people. Moreover, say some, it

99 COMMAGER, MAJORITY RULE AND MINORITY RIGHTS 71 (1943).
is undemocratic in that it often results in overturning legislation which the state legislatures, representing their electorates, have passed. The answer to this multiphrased objection is not difficult and has been referred to at some length earlier in this article. We sanction the decisions of the rule of the majority when they come from the duly and democratically elected representatives of the people. When that majority will tries to undercut or impair the basic principles upon which it rests, namely, the free play of opposing views, practices, parties, etc., then the Court, as guardian of the Bill of Rights, must step in. We will not tolerate democracy to be destroyed in its own name. Justice Murphy grasped that. The majority must be left free to govern; but the minorities must be left free in their efforts to become a majority. Moreover, sectional prejudices cannot be allowed to override the letter and spirit of the Constitution. To these principles Justice Murphy's career on the bench was successfully dedicated.

With the passing of Justice Murphy and his close colleague, Justice Rutledge, the so-called Roosevelt Court has suffered a bitter blow. Fate has taken this great team of humanitarians. What their respective successors will be like is open to grave speculation. It is hoped, however, that at least one of them will step forward to occupy the role of the late Justice Murphy as special custodian of oppressed minority groups, the vigilant watch dog of the First Amendment. Justice Murphy was the conscience of the Court. More than that, he was a great American in the Jeffersonian mold. His contributions to the judicial heritage of a free people will be long remembered. American Catholics can

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100 The reaction to the appointments of Tom C. Clark, former Attorney General of the United States, and Sherman Minton, former United States Senator from Indiana and Judge of the United States Court of Appeals, to succeed the late Justices Murphy and Rutledge has been of a mixed nature. Of the two, in the opinion of the writer, the proved liberal Minton gives the greater promise of stepping into the shoes of Murphy as the strident, humanitarian voice on the Court.
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well be proud of him, and agree with him that: "In the scheme of democracy, as in the code of Christianity, all men are on a common level of dignity and importance." ¹⁰¹

This is a truth that can stand much re-emphasizing in these days of insecurity and fear. Justice Murphy never forgot it; let us not.

Alfred L. Scanlan

¹⁰¹ As quoted in the Chicago Sun-Times, July 20, 1949, p. 12, col. 6.