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Of Standards for Extra-Judicial Behavior

Russell R. Wheeler*

THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES. By *Bruce Allen Murphy*. New York: Oxford University Press, 1982. Pp. x, 473. \$18.95.

I

Bruce Allen Murphy delved into reams of manuscripts and other sources to learn more of the policy objectives of Louis Brandeis and Felix Frankfurter and the extrajudicial means they used to achieve those objectives. This work led to three very good law review articles,¹ which received much less notice than they deserved. The same research effort then led to *The Brandeis/Frankfurter Connection: The Secret Political Activities of Two Supreme Court Justices*, which produced a spate of excited public commentary on what the book purported to reveal and not a little criticism of Murphy's methods and results.²

The book describes both jurists' backgrounds and the relationship between Justice Brandeis and Professor Frankfurter that helped Brandeis serve his commitments to Wilsonian Progressivism and to Zionism while on the Court. Murphy then recounts Justice Frankfurter's contacts with persons here and abroad in pursuit of various foreign and domestic policy goals, and then his efforts to influence appointments to the federal bench. In an appendix, Murphy attempts a chronological review of fluctuations in

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I am grateful to Ronald Collins for assistance as I began the preparation of this essay, to Gordon Bermant, A. Leo Levin, Helen Moriarty and Howard Whitcomb for a careful reading of a preliminary version and for helpful suggestions and comments, and to Carolyn McGinnis for deciphering the puzzles in successive revised drafts.

1. See Levy & Murphy, *Preserving the Progressive Spirit in a Conservative Time: The Joint Reform Efforts of Justice Brandeis and Professor Frankfurter, 1916-1933*, 78 MICH. L. REV. 1252 (1980) (examining Frankfurter's pre-New Deal collaboration with Brandeis to promote their political views); Murphy, *Elements of Extrajudicial Strategy: A Look at the Political Roles of Justices Brandeis and Frankfurter*, 69 GEO. L.J. 101 (1980) (discussing the tactics that Brandeis and Frankfurter used on the Court to influence nonjudicial public policy); Murphy, *A Supreme Court Justice as Politician: Felix Frankfurter and Federal Court Appointments*, 21 AM. J. LEGAL HIST. 317 (1977) (recounting Frankfurter's efforts to influence appointments to the federal bench).

2. See Cover, Book Review, NEW REPUBLIC, May 5, 1982, at 17; Frank, Book Review, 32 J. LEGAL EDUC. 432 (1982); Kurland, Book Review, LEGAL TIMES WASH., Apr. 12, 1982, at 10; Schlesinger, Book Review, N.Y. Times, Mar. 21, 1982, § 7, at 5, col. 1; Steinberg, Book Review, 68 A.B.A. J. 716 (1982); Woodward, Book Review, Wash. Post, Apr. 11, 1982 (Book World).

standards of extrajudicial behavior prior to 1916, when Brandeis joined the Court (pp. 345-63).

Arthur Schlesinger, Jr., credits *The Brandeis/Frankfurter Connection* with two contributions. First, he says it "makes us think hard about standards of judicial behavior."³ In addition, Schlesinger asserts that the book "makes us think realistically about the Court itself."⁴ Perhaps Schlesinger's assessment is too generous. If the book really does make us think hard about judicial behavior, the hard thinking does not follow from any searching inquiry that Murphy makes. Murphy looks at those standards (pp. 6-7, 247-75, 341-44), but not in great depth. Rather the thinking the book prompts about the Court and judicial behavior stems mainly from the mass of factual material Murphy provides.

A

The book's source of strength — its detailed description of events — also gives rise to major weaknesses: flimsy inferences and occasional factual errors. Professor Robert Cover of Yale Law School, for example, finds a pattern of inaccuracies and, more than that, he claims that "even those important assertions that restate evidence are the product of a selective method which ignores all but the most damning, conspiratorial interpretations."⁵ Schlesinger sees the same problem, albeit with a different twist. To him, the book is "disfigured by a host of minor errors" and Murphy "gives Brandeis and Frankfurter too much credit for decisions that were favored by other people and compelled by events."⁶

In one sense, such criticisms are not surprising, because Murphy's presentation largely lacks any overarching theme save that both Brandeis and Frankfurter labored off the bench to promote causes important to them. Yet the book is worth reading, not because of any overall picture it presents, but because of its fascinating extrajudicial short stories, describing incident after incident played out between the Harvard Law School, the United States Supreme Court, the White House, the Congress, and assorted other places. Such a book stimulates a natural tendency to probe for inaccuracies and for questionable interpretations.

It is not unduly charitable to say that Murphy's interpretations often are plausible. The problem is that he presents them as conclusive when his facts merely create an arguable case for them. A conspicuous instance of the line between the conclusive assertion and the arguable interpretation may be the aspect of the book that has achieved the most notoriety. Stated baldly, Harvard Law Professor Felix Frankfurter was on a retainer to United States Supreme Court Justice Louis Brandeis. Although Murphy cautions that "the Harvard professor cannot be viewed solely as Brandeis' agent" (p. 43), Frankfurter was, for all intents, Brandeis' "paid political lobbyist and lieutenant" (p. 10), "the scribe" (p. 153), "the right lieutenant" (p. 33) to do work that Brandeis, for reasons of propriety or appearance, could

3. Schlesinger, *supra* note 2, at 22.

4. *Id.* at 23.

5. Cover, *supra* note 2, at 19.

6. Schlesinger, *supra* note 2, at 5, 22.

not undertake himself. To help Frankfurter meet the expenses of fighting bureaucratic battles and educating the public, Brandeis, starting in 1916, provided him with monetary gifts. Later, from 1926 to 1938 — the year Frankfurter joined the Court — Brandeis gave Frankfurter an annual stipend of \$3,500 (pp. 40-42).⁷

As Murphy concedes in an endnote, other researchers already had disclosed the existence of the payments (p. 373 n.80). Several of Frankfurter's students, in fact, knew of the disbursements, which often funded research projects aimed at furthering Brandeis/Frankfurter goals.⁸ Nor is it news, as Murphy recognizes, that Brandeis and Frankfurter worked closely on the national political scene. Tugwell, for instance, referred to the team in 1934 (pp. 176, 416 n.96), and in 1946 Mason described Frankfurter as "tutor to the new administration [who] . . . in turn, sought light and guidance on general policy as well as on specific programs from Justice Brandeis."⁹

Despite these previous revelations, Murphy has, no doubt, contributed an important piece to this historical mosaic. An endnote typical of much of the book tells how: "This is the first exposition in print of the development and complete extent of both the financial fund and the requests that stemmed from it" (p. 373 n.80).

But how singular was this instance of Brandeis' extrajudicial behavior? Murphy relies on Mason's table listing the extensive gifts that the justice provided between 1890 and 1939 to numerous individuals and charitable causes (pp. 41, 373 n.82). The list shows, for example, that Brandeis gave relatives and friends over \$27,000 in 1925; \$177,000 in 1929; and \$71,000 in 1930 — all told over half a million dollars, about a third of the nearly \$1.5 million in gifts accounted for by Mason for the entire 49 years.¹⁰

The considerable extent of these gifts leads one to wonder whether Frankfurter, albeit Brandeis' "chief political lieutenant" (p. 170), was the only "lieutenant." Murphy describes Mason's list of gifts as "complete" (p. 373 n.82) even though by Murphy's own account it apparently is not.¹¹

7. Although Frankfurter viewed "himself as an employee being compensated for services rendered," p. 41, we are not told whether he regarded the payments as taxable income or whether the Justice Department or Senate Judiciary Committee learned of the payments at the time of his nomination to the Court.

8. Murphy concludes, "judging by the lack of knowledge evident in a personal [telephone] interview with one of these students *half a century later*, . . . many of Frankfurter's protégés will learn here for the first time about the true chain of inspiration to which they were responding." P. 86 (emphasis added). The "student" was Henry Friendly. P. 386 n.49. Another student, though — in Frankfurter's Federal Jurisdiction seminar in 1929-30 — recalled that Frankfurter "told me of the work he was doing for Justice Brandeis and the moneys he received, and the other students in the seminar also knew of these payments." Lewis H. Weinstein, Letter to the Editor, *HARV. L. REC.*, Apr. 16, 1982, at 11. The exchange proves nothing save the need for caution in making declarative statements.

9. A. MASON, *BRANDEIS: FREE MAN'S LIFE* 615 (1946).

10. *Id.* at 692.

11. It is doubtful that the total of almost \$1.5 million includes the money that Brandeis gave to Frankfurter, because Murphy's documentation of these gifts is evidently derived from correspondence to which Mason did not have access. In a star note, p. 101, Murphy explains how Mason was deprived of access to Brandeis-Frankfurter correspondence "during the thirties," but earlier he characterizes things more broadly: Mason wrote "without benefit of access to the very revealing correspondence Brandeis maintained with . . . Frankfurter while Frankfurter was a professor at Harvard." P. 8. In any event, Mason obviously did not write about

Was Frankfurter the only colleague who worked in response to Brandeis' requests and who, in turn, benefited from this considerable largesse, for himself or to support still other collaborators (pp. 84, 86)? Brandeis made "extensive use of intermediaries" (p. 73); Murphy constantly uses "lieutenant" to describe people who worked with both Brandeis and Frankfurter. He so describes, for but one example, Brandeis' allies in the leadership of the Zionist Organization of America (pp., *e.g.*, 31, 55-56, 65-66), an organization that received Brandeis' financial support (pp. 68, 381 n.104). It would in no way discount the uniqueness (pp. 39, 400) of the "Brandeis/Frankfurter connection" to learn that others received some of Brandeis' financial support with the understanding that they would pursue his objectives. It might, though, temper Murphy's description of the relationship as "extraordinary" (p. 43) or as "so unusual . . . [in] that it was designed to free Brandeis from the shackles of remaining nonpolitical while on the bench . . ." (p. 41). Answering the question might require manuscript searching even more prodigious than that Murphy undertook. As he implies in describing how he came across one source, even more material may await discovery (p. 218 n.*).

B

Murphy's inability to tell the story free of the unqualified inference coincides with his inability to tell the story free of the historiographical boast. Boosterism pervades the book, much more than the articles.¹² Thus, references are rarely to correspondence but rather to such self-promotions as a "newly discovered missive," "which remained hidden in Moley's unpublished papers" (p. 172) or "[n]ew evidence gleaned from various collections of unpublished letters [that] makes it possible for the first time in print to reconstruct the justice's efforts here" (p. 330). Throughout, Murphy reminds us that his information came from "a personal interview" (*e.g.*, p. 297) or "a confidential interview" (*e.g.*, p. 312) or "an interview for this volume" (p. 132). In reporting Brandeis' influence on Frankfurter's unsigned *New Republic* articles, Murphy specifies that "until now no volume has revealed the extent to which the true inspiration for many of these pieces was . . . Brandeis" (p. 89). Perhaps Murphy feared that if he did not broadcast the diligence of his efforts, scholars would not recognize what he had discovered, and all readers would not be impressed with his hard work.

The publisher may bear some fault for this belabored tone of secrets discovered.¹³ Oxford should have redirected at least some of its resources into the extra costs necessary to carry all notes at page bottom rather than book's end — and in editing them. Reliable documentation is everything to a book such as this, and the reader must have confidence that the notes have been carefully reviewed. Yet, one note cites twenty pages of an Alan Westin article to support the text's assertion that Brandeis, "contrary to the prevailing understanding . . . engaged an extensive literary network,

the payments to Frankfurter, although it is possible that the sources he used to construct the list of Brandeis's gifts included those to Frankfurter, but masked or aggregated with others.

12. See note 1 *supra*.

13. See, *e.g.*, the suggestions in Kurland, *supra* note 2, at 10; Cover, *supra* note 2, at 21.

anchored by Frankfurter, to disseminate his opinions . . ." (pp. 88-89, 387 n.60). Presumably Murphy meant to cite Westin's assertion that after 1916, "Brandeis said nothing in public about Court matters,"¹⁴ and then summarize his own reinterpretation. If that is what he meant to do, why does the book not do it that way? The language of another note is repeated almost word for word in the text where it is flagged (p. 105, 392 n.21). Another note citing literature "on the disparity between Frankfurter's religion and his desire for social status" (p. 425, n.56) is flagged at a passage in the text that bears on that point in, at best, a highly tenuous fashion (p. 207). Since Murphy treats the point at issue much earlier in the text (p. 34), the note's placement may have been a remnant of a previous draft. The index is also in occasional error: University of Virginia Law Professor G. Edward White, for example, is not the Louisiana-born Chief Justice (pp. 20, 473).

C

All this said — even if Murphy's description of the events is flawed factually or interpretively — he has added to our knowledge in two ways. First, he provides a documentation of numerous activities, and he fills in so many details as to provide a new picture of the lives of these two extraordinary individuals. Cover asserts that Schlesinger documented long ago that Brandeis was "perhaps the dominant influence in the 'Second New Deal.'"¹⁵ But Schlesinger himself credits Murphy with performing "a first-class job of research," and of "reconstruct[ing] episodes in the inner history of the Supreme Court, of the New Deal and of World War II (Washington sector), in new detail. . . ."¹⁶ Second, and this says something about the nature of scholarly inquiry, Murphy has provided a framework within which others can work. Understanding develops by interpretation and reinterpretation. An initial interpretation, even with flaws, is often the necessary impetus for further analysis that adds even more to our knowledge.

II

What Murphy does not provide, however, is any thorough analysis of the standards that should govern extrajudicial behavior. His work is full of shrug-of-the-shoulder references to the separation-of-powers doctrine, with the erroneous implication that the doctrine must apply to all the varieties of extrajudicial behavior revealed in the book (*see* pp. 5, 22, and especially p. 15). In an appendix, furthermore, he attempts an analysis of how norms of extrajudicial behavior have evolved. Nevertheless, on the strength of this book alone, one's thinking about what is proper and improper for justices to do extrajudicially is hardly advanced. It may well be that such advancement was not Murphy's primary goal (pp. 13-15).

I would like to pose several questions about extrajudicial behavior, mostly by Supreme Court justices, and use some of the book's rich data to explore how they might be answered.

14. Westin, *Out of Court Commentary by United States Supreme Court Justices, 1790-1962: Of Free Speech and Judicial Lockjaw*, 62 COLUM. L. REV. 633, 635 (1962).

15. Cover, *supra* note 2, at 18.

16. Schlesinger, *supra* note 2, at 5, 22.

One might first ask why justices should engage in extrajudicial activities. This phrasing is at odds with the common formulation: Why should they avoid them? To many, the latter question is answered sufficiently by a few descriptions of what judges have done off the bench — each followed by an exclamation point. A little reflection, however, will suggest benefits from several kinds of extrajudicial behavior, benefits that I summarize here and then discuss in more detail. First, the role of judges in political society may give them unique attributes to bring to other aspects of public policy. At a different level, they bring the special knowledge and perspective of those who have “been there” to debates over how our judicial institutions should be administered and who should be judges. In addition, judges have likely developed perspectives and some degree of political acumen before their appointments that could be put to extrajudicial service. And, by a similar token, an occasional extrajudicial role might maintain the breadth of a judge’s perspectives and inform the judicial mind.

To many, these statements do nothing but illuminate the threats that extrajudicial activity poses to the judicial function. That activity may, for example, deprive judges of the time and energy they need to decide cases fairly and explain their decisions clearly. Extrajudicial contact with a matter may inhibit the impartial consideration of that matter in the context of litigation. Similarly, the desire to stay in the graces of, for example, a President who might bestow the favor of an extrajudicial activity might prevent their considering other matters impartially. Finally, regardless of whether an extrajudicial activity affects justices’ behavior, it may create doubt — an ambiguity — in the minds of those who must have confidence that judges will be fair, those without whose confidence the judicial fiat stands in danger of disrespect.

How do the results of Murphy’s prodigious research help illuminate these purported benefits and costs?

III

Adjudication, especially constitutional adjudication, requires judges to participate in political society in a special way, applying fundamental norms to resolve controversial fact situations. This experience, building on judges’ pre-judicial experiences, arguably creates a unique political perspective and even political skills that might well be of value to the resolution of matters outside case-or-controversy fora. This view was held much more widely in the founding period than it is now. Many then agreed with George Mason, who told the constitutional convention that the judges’ “habit and practice of considering laws in their true principles, and in all their consequences,” laid a strong case that “further use be made of the Judges, of giving aid in preventing every improper law.”¹⁷ In fact, John Jay’s major contribution as Chief Justice was to show the dangers of too heavy a reliance on “further use” of judges as commission members and presidential advisers.¹⁸

17. 2 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 78 (rev. ed. 1937). The convention of course rejected the specific objective that Mason was advocating, *viz.*, a Council of Revision, with judicial membership.

18. Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 SUP. CT. REV. 123.

The basic notion of judges' obligation to render extrajudicial service has persisted, however, and it may help explain — Murphy makes clear it would hardly explain fully (pp. 304-08ff.) — why Frankfurter defended Jackson's service as special prosecutor at Nuremberg. Frankfurter, despite his public stance that Justices should not "tak[e] on other jobs," assured Jackson, not only of "the profound importance" of his mission, but that he "would discharge the task according to the finest professional standards both intellectually and ethically" (p. 306). One of Jackson's colleagues at Nuremberg states the position in a more blunt, if self-serving, fashion: Fourth Circuit Court of Appeals Judge John Parker proclaimed that Jackson's mission was justified because there are occasionally calls "for a judge to do something for his country which no one but a judge can do so well."¹⁹ Murphy, in fact, notes that Frankfurter succeeded in his extrajudicial tasks in part because, as a Justice, he was a "free agent. . . . While nearly everyone in Washington could be suspect of jockeying for a position and status, special attention would be paid to that 'impartial observer, Felix,' who had already reached the pinnacle of his career ambitions" (p. 189).

Obviously the degree to which judges can contribute extrajudicially *as judges* will vary with the task at hand and with the judge performing it. A desire to grace an important mission with an ornament of impartiality is not enough to justify involving judges in the task. For example, having justices serve on the commission to resolve the disputed presidential election of 1876 appears, in retrospect, to have been a poor idea. Given the venality of the age, and the Court's still-incomplete recuperation from the *Dred Scott* wound, it was unlikely that the justices' service could have helped resolve challenged election results at the end of the Reconstruction Era. The problem is captured in a Southern newspaper's editorial hope that "if Justice Bradley could withstand the party pressure that reached him [to sustain Reconstruction legislation on the bench], there does not appear to be any reasonable grounds for supposing that he will succumb to such pressure" on the commission.²⁰ I have serious doubts, for a contemporary example, that the Supreme Court Justices should be directed to set congressional salaries, despite the assertions by two members of the Senate leadership in 1982 that a constitutional amendment to that end would be "the wisest and most apolitical delegation of such compensation setting authority. . . ." ²¹

Few, however, would contest the basic assumption behind Canon 4 of the American Bar Association's Code of Judicial Conduct. The canon permits judges to write and lecture on the administration of justice, to appear before or consult with governmental bodies or officials on matters concerning the administration of justice, and to serve as members or directors of judicial improvement organizations. In these matters, asserts the commentary, a judge "is in a unique position to contribute," and it encourages judges to do so as their time permits.²² Procedural rule-making benefits

19. Parker, *The Judicial Office in the United States*, 23 N.Y.U. L. REV. 225, 237 (1948).

20. C. WOODWARD, REUNION AND REACTION 154 (1951) (quoting the Louisville Courier-Journal, Jan. 22, 1877).

21. See proposed S.J. Res. 164, 97th Cong., 1st Sess., 128 CONG. REC. S. 2022 (Mar. 11, 1982), and statements by Senators Stevens and Baker, *id.* at 2022-23.

22. CODE OF JUDICIAL CONDUCT Canon 4, & commentary, at 18-19 (1972).

from their involvement.²³ Their advice on jurisdictional matters, for which Alexander Bickel claimed they are “uniquely expert,”²⁴ is similarly beneficial. And much of the work that Brandeis and Frankfurter, along with colleagues and students, did during the 1920s involved the development of arguments for changes in federal jurisdiction, including the research that was eventually published as *The Business of the Supreme Court*²⁵ (pp. 84ff.). Even though judges are hardly infallible in shaping judicial administration policies, and although they certainly do not reflect all the perspectives that need to be brought to bear on the process, surely they should be heard.

Turning to a slightly different category, Murphy devotes most of a chapter to Frankfurter's efforts to promote the judicial candidacies of certain individuals he thought particularly well qualified for the federal bench and to derail those of others (pp. 313-38; Brandeis also attempted to influence appointments, pp. 48-49). Frankfurter had developed a particular view of criteria that should — and that should not — govern judicial selection (pp. 316-17); it would be surprising to find a judge who has not. Judges know, in a way that others cannot, what the judicial office entails, what qualities it needs most, and what kinds of individuals would be appropriate for it. “Merit selection” commissions for state judicial nominations often include judges as members. In Missouri, where the system has been most rigorously probed, Watson and Downing report that of the commissioners, “the judges . . . have evidenced the greatest variety of perspectives on judicial selection.”²⁶ They bring the lawyer's knowledge to the task, but without attendant bar rivalries, and they surely have a special insight into what the job of judging entails. As with judicial administration innovations, sitting judges' perspectives on judicial selection are limited and hardly apolitical, and there are risks, described below, to their involvement. But there are benefits as well.

Judicial-related attributes aside, individuals who manage to get appointed to the bench, especially the highest bench in the land, presumably bring to their chambers more than legal experience and perspective. Almost by definition, they have been actively involved in the affairs of the day. Forbidding all extrajudicial service would, by definition, deprive the nation of the benefits of those personal attributes.

Forbidding extrajudicial activity is, in a sense, at odds with the democratic notion that political society benefits from the participation of its

23. See the discussion, and the literature cited therein, in W. BROWN, *FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES* (Federal Judicial Center 1981).

24. *Nonjudicial Activities of Supreme Court Justices and Other Federal Judges: Hearings on S. 1097 and S. 2109 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 138 (1969)* (statement of Alexander Bickel, Chancellor Kent Professor of Law and Legal History, Yale University) [hereinafter cited as *Nonjudicial Activities Hearings*].

25. F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* (1928).

26. R. WATSON & R. DOWNING, *THE POLITICS OF THE BENCH AND THE BAR* 337-38 (1969). The United States Judicial Conference's Advisory Committee on Judicial Activities has accepted “the premise that, as [federal] judicial selection processes become more institutionalized and with wider participation, judges have a responsibility [when asked specifically or by a general call for information] to communicate their recommendations and evaluations to the appointive authorities — the President and Senators — and their selection committees or commissions.” Advisory Opinion No. 59, Apr. 16, 1979.

members. Justice Douglas once expressed something of this view. In 1939, the Supreme Court decided *O'Malley v. Woodrough*,²⁷ upholding the constitutionality of legislation subjecting federal judges to the income tax. "As I entered my vote in the docket book," Douglas claimed, "I decided that I had just voted myself first-class citizenship. . . . Since I would be paying as heavy an income tax as my neighbor, I decided to participate in local, state, and national affairs, except and unless a particular issue was likely to get into the Court, and unless the activity was plainly political or partisan."²⁸ Douglas's assertion of cause and effect is somewhat disingenuous: even without *O'Malley*, one suspects, he would have decided to "register and vote; . . . fight to raise the level of the [Yakima] public schools [and] become immersed in conservation, opposing river pollution, advocating wildlife protection, and the like . . . [and] travel and speak out on foreign affairs."²⁹

Murphy makes a relatively compelling case that Brandeis' forceful efforts helped to move the New Deal away from the corporate-state mentality that it exhibited in its early years (pp. 185, 343 & *passim*). He documents that Frankfurter, while on the Court, played an important role in the establishment of various foreign policy efforts of the Roosevelt Administration that broke the isolationist hold dominant in the late 1930s and the early 1940s (pp. 227, 282, 302 & *passim*).

To say that we have no assurance that justices' activities off the bench will produce "contributions" is to miss the point entirely. We would not think of requiring such assurances before sanctioning the political activities of any nonjudge. Brandeis' role in turning the direction of the New Deal, or Frankfurter's in affecting American foreign policy, would not have unanimously been labelled "contributions" at the time, nor would they today. The test of the propriety of their action is not the degree of approval on the merits, but the costs, if any, to the Court — and to the system of justice generally — of Supreme Court justices' acting extrajudicially.

Finally, it may be that extrajudicial activity can also work to the advantage of the judicial process itself. Justice Douglas offered a stronger reason for exercising his "first-class citizenship" than his status as a taxpayer, a reason captured in his rather cavalier assertion that a "man or woman who becomes a Justice should try to stay alive; a lifetime diet of the law alone turns most judges into dull, dry husks."³⁰

Justice Rehnquist treated a tangential aspect of this question in explaining his refusal to disqualify himself from the Court's reconsideration of *Laird v. Tatum*³¹ because of his involvement as an executive department official in matters before the court. Apart from his specific involvement with the matter was the contention, as he summarized it, "that I should disqualify myself because I have previously expressed in public an understanding of the law and the question of the constitutionality of governmen-

27. 307 U.S. 277 (1939).

28. W. DOUGLAS, *GO EAST, YOUNG MAN: THE EARLY YEARS* 466 (1974).

29. *Id.*

30. *Id.* at 469.

31. 409 U.S. 824 (1972) (memorandum of Rehnquist, J.).

tal surveillance." Rehnquist's response serves as a reminder that justices of the Supreme Court are drawn from the legal political community in part because they are among its more prominent members. He noted numerous justices who, before they went on the bench, played roles in matters that presented themselves to the Court in the case-or-controversy context, and reasoned that it

would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.³²

The question remains whether certain kinds of extrajudicial activities might similarly enhance a justice's work on the Court. Judging in a democracy is a vital process, and the nation has some interest in knowing that its judges are not permanently cut off from the juices that flow through society. Moreover, it may be that justices see the opportunity for such involvement as an advantage. The reaction of one of Brandeis' law clerks, J. Willard Hurst, to Murphy's book is instructive: "The Supreme Court deals with matters of important public policy," and thus, he said, "[y]ou want people sophisticated in the affairs of the country, not the naive or simple-minded. . . ."³³ To seek extrajudicial outlets may be a natural inclination of the kind of people appointed to the Court. *The Brandeis/Frankfurter Connection* certainly leaves the suspicion that both justices may have seriously reconsidered joining the Court if all extrajudicial involvement could, somehow, have been proscribed: They would have been different persons, at least, frustrated by the proscription. Would the nation have benefited from either of those possibilities? This is, to me, the kind of realistic thinking that Schlesinger says the book promotes³⁴ and that serves us well even if it puzzles us. The puzzlement is captured in Murphy's simple conclusion that both men "found it impossible to curb their political zeal after their appointments to the bench" (p. 9). Is it realism or irresponsibility to accept that inability in some justices? "Perhaps it is time," Murphy suggests, "that we question more realistically what we can and cannot expect from those who sit on our highest Court" (p. 8).

IV

In *O'Malley*, the case that Justice Douglas claimed liberated him for a life beyond the purple curtain, Justice Frankfurter wrote that judges' "particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering."³⁵ Judges do have a "particular function in government," which takes precedence over any other function. The benefits that extrajudicial activities may bring to

32. 409 U.S. at 835.

33. Margolick, *2 Justices' Friends Back Secret Role*, N.Y. Times, Feb. 21, 1982, § 1, at 27, col. 1.

34. See note 3 *supra* and accompanying text.

35. *O'Malley v. Woodrough*, 307 U.S. 277, 282 (1939).

American political life must be weighed against the burdens those activities may impose on that "particular function."

Weighing those burdens, to be sure, requires a profound judgment. It also requires, much more than commentators have been willing to acknowledge, answers to basically empirical questions, *i.e.*, questions of fact that can, in principle at least, be proved wrong. We are short on facts and long on suspicions about the consequences of extrajudicial activities.

The facts needed to inform our judgment are of various types. Some can come only from the judges and those who work directly with them. For example, what *is* the impact of extrajudicial activity on judges' time demands and work habits? Although there have been some efforts to measure how judges spend their time, there has been no focus on extrajudicial activities' impact on their judicial work and such a focus would surely be seriously blurred.³⁶ Our sense of the costs that discrete extrajudicial activities may extract is likely to derive largely from specific examples. Chief Justice Warren, for instance, insisted that he would not give up his judicial duties during the investigation of the Kennedy assassination. After he left office, he told a television interviewer that he "would run back and forth between [the Court and the commission offices across the street]. I don't believe I left my work before midnight any night for ten months."³⁷ What the impact of the extra burden was on his Supreme Court activities one can only surmise.

Murphy provides a more revealing example. Although Brandeis' extrajudicial work evidently had no effect on his Court workload (pp. 53, 54), Frankfurter's did. During Frankfurter's pre- and early-World War II involvement in all manner of foreign policy matters, his rate of opinion production did not decline. Murphy, however, concludes from interviews with Frankfurter clerks that he delegated a larger share of his judicial work to his law clerks during the period from 1941 to 1943 than he did before or after it. Save for those years, Frankfurter himself prepared the initial drafts of his judicial opinions. From 1941 to 1943, however, his law clerk did so in every case but one (pp. 273-75). Although any difference in the final product has evidently eluded observers of the Court, the shift in work patterns was arguably an abdication of judicial responsibility to pursue extra-

36. I am aware of only one serious effort, to calculate how justices allocate their time. See Hart, *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959). It involved, by the author's admission, "guesswork in part," *id.* at 84, and, more than that, estimates expressed in averages, which say little about the capacity of nonfungible justices to allocate their time. In any event, Hart's concern was not the amount of time drained away by extrajudicial activities. An analysis in 1972 of the United States Court of Appeals for the Third Circuit revealed that 40 percent of the judges' time was devoted to matters unrelated to cases — mainly court administration activity. The study could not say — it would have been imprudent to ask — what amount of time went to the full range of extrajudicial activities. See Federal Judicial Center, *A Summary of the Third Circuit Time Study* (Federal Judicial Center 1974).

37. Transcript of "A Conversation with Earl Warren," in *Brandeis [University] Television Recollections*, taped May 3, 1972, WGBH, Boston, p. 21, quoted with permission of Dr. Abram L. Sachar.

Justice Hughes' arbitration of the Guatemala-Honduras boundary dispute, although successful, led him to counsel against similar assignments to justices because of "the draft upon time and energies." THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES 167 (D. Danelski & J. Tulchin eds. 1973).

judicial goals. But what of the benefits — if that is what they were — that the arrangement allowed, especially since, if Murphy is to be believed, Frankfurter may have influenced some important events in ways in which others could not?

A judge's judicial administration work — in which the judicial perspective is essential but not sufficient — presents this matter of costs and benefits in sharper contrast. We accept as elementary the normative proposition that each judge should dispose of the cases before him or her as fairly, quickly, and economically as possible. Such case disposition may not be achievable simply if each judge tries hard to do so. The administrative and organizational arts — securing resources, devising procedures, promoting cooperation, and assessing what works — are necessary to the objective, surely, in any large court system, and judges must perform them. The administration of justice is a systemic need that may deserve a judge's time at the expense of prompt attention to an individual case or set of cases.

Perhaps the most frequently asserted cost of judges' extrajudicial activity is bias — the inability to do justice because an extrajudicial contact creates a partiality to one side that affects the judge's decision. What of it when judges are asked to decide questions on the bench that bear a relatively distinct relationship to matters that they touched off the bench, perhaps in a lecture, perhaps in an informal consultation with a government official? Brandeis, Murphy shows, participated in cases that presented questions he had tried to influence off the bench, but he voted in a manner that one would not predict if extrajudicial lobbying foretold judicial behavior. In 1921, “[b]y voting with the Court against the [Lever Food Control] act, after having privately told [Food Administrator] Herbert Hoover how to get it enacted, Brandeis seemingly demonstrated . . . the separation that existed between his judicial and political roles” (p. 55). Another example is *United States v. Butler*,³⁸ which declared the Agricultural Adjustment Act unconstitutional. As Murphy says, “[d]espite all his [extrajudicial] admonitions and warnings that he would help dismantle the AAA from the high bench, Brandeis, in dissent, voted to uphold the constitutionality of the act” (p.142).

The late Alexander Bickel took up a related aspect of this question during Senate Judiciary Committee hearings in the wake of the Fortas affair: [A] judge is supposed to have an open mind, or at least a mind reachable by reasoned briefs and arguments. If he goes on public record concerning issues that are likely to come before him in his judicial capacity, he thereby at least appears to close his mind, to make himself less reachable by reasoned briefs and arguments. And in some measure every man who goes on record in this fashion does in fact close his mind.³⁹

Here we have some clear questions about how human beings behave. Was Bickel right, for example, in the basic message of his hyperbolic assertion that “[n]othing is more persuasive to ourselves than our own published prose”?⁴⁰

Answers to that question have been consistently intuitive, perhaps re-

38. 297 U.S. 1 (1936).

39. *Nonjudicial Activities Hearings*, *supra* note 24, at 142.

40. *Id.*

flecting larger policy objectives. English judges in the eighteenth century justified their practice of giving advisory opinions with the claim that they could change their minds "without difficulty"⁴¹ if arguments at bar showed an earlier advisory opinion to be in error. Vermont Congressman Israel Smith told his colleagues in 1802 that "nothing gives [a judge] greater pleasure than to have it in his power to correct an error, which he may discover in a former opinion."⁴² Smith, though, was arguing for abolition of the separate circuit courts created by the Federalist Judiciary Act of 1801,⁴³ one effect of which would be to restore the justices' dual service as circuit judges. The justices themselves, however, had never wanted the onerous burden of traveling about the circuits. Ten years earlier, in making their case, they told Congress that

appointing the same men finally to correct in one capacity the errors which they themselves may have committed in another, is a distinction unfriendly to impartial justice, and to that confidence in the Supreme Court which it is so essential to the public interest should be reposed in it.⁴⁴

Justice Blair put the question when the Court reviewed one of the circuit's decisions. He recused himself but announced that he held "the impressions which my mind first received," adding parenthetically, however, that he did not know if those impressions persisted "whether through the force of truth, or from the difficulty of changing opinions, once deliberately formed."⁴⁵

It takes nothing from the eloquence of the phrasing — nor the sincerity of the writers — to observe that the debate has not come very far in almost 200 years. Is our knowledge — not suspicion, but knowledge — about the factors that may create extrajudicial bias much more today than it was in the eighteenth century?

The ways in which extrajudicial activity might warp a judge or justice are varied. Impartial decisionmaking might be frustrated by prior contact with an issue off the bench, or perhaps by a justice's desire to please those in a position to award opportunities for extrajudicial service. In fact, the major objection to the first serious instance of a justice's extrajudicial service — Jay's serving as ambassador to Great Britain — was not that he would be unable to decide cases fairly because of any diplomatic contacts with litigated issues. Rather it was that justices would decide cases as the President wished in order to earn prestigious extrajudicial appointments.⁴⁶ The same thought shows itself in Frankfurter's opposition to judges who run for office from the bench, namely Douglas. Douglas's votes on cases, Frankfurter

41. *Sackville's Case*, 2 Edens Ch. 371-72 (1760).

42. 7 ANNALS OF CONGRESS 706 (1802). Federalist James Bayard saw it differently: To assume a justice would not "be gratified" by an affirmance of an earlier decision "is estimating the strength and purity of human nature upon a possible, but not on its ordinary scale." 7 ANNALS OF CONGRESS 618.

43. Act of Feb. 13, 1801, ch. 4, 2 Stat. 89 (1801).

44. Letter of the Justices to the Congress, Nov. 7, 1792, reprinted in 1 AMERICAN STATE PAPERS 52.

45. *Penhallow v. Duane*, 3 U.S. (3 Dall.) 54, 109 (1795).

46. A Jeffersonian paper complained that it was necessary that Jay be in the country were he needed to preside over any impeachment proceedings, but also "that he should be above the bias which the honor and emoluments in the gift of the executive might create, . . ." *Aurora General Advertiser* (Philadelphia), May 10, 1794.

feared, were determined by "whether they might help or hurt his chances for the presidency." He was "writing for a different constituency" (p. 267).

Others might respond that these are meaningless questions, because regardless of whether justices actually become tainted, the citizenry will perceive the judges as biased, and the Court will lose the public support essential to acceptance of its decisions. Murphy stresses the importance of public opinion, but he writes as if the public has the same level of knowledge of the justices' work (and of sources such as his book, p. 151) as do those who follow the Court closely. He asserts, for an example, that in the early twentieth century, "a forgiving public [had] recently acquiesced for the first time in over forty years to a close advisory relationship between a Supreme Court justice (William Moody) and a president (Theodore Roosevelt)" (p. 17). The evidence suggests, though, that the public knows little of what the justices do on the bench,⁴⁷ and it is likely that they know less of extrajudicial activities, even when publicly reported. There certainly appears to be little basis for Murphy's apparent speculation that, although President Nixon's forced resignation had little long-term effect on the prestige of the presidential office, efforts to bar Fortas, Douglas, or Haynsworth, from the Court "may permanently lessen public confidence in the Court itself, and hence compromise the ability of the entire judicial branch to have its decisions accepted as law" (p. 14).⁴⁸

Even if John Q. Citizen is unaware of what the justices do — on or off the bench — the Court does have a constituency of those who follow public events, and, more particularly, various segments of the legal community.

47. The visibility of the Supreme Court is not easy to measure, but probably it is lower than might be inferred from popular opinion polls that appear in the press — based on forced-choice responses to questions about which people may in fact have no information. Walter Murphy and Joseph Tanenhaus set about the task of measuring the Court's visibility in the 1960s, and found that, in 1964 and in 1966, less than half their respondents even attempted to answer an open-ended question seeking to learn what "the Supreme Court in Washington has done that you have disliked . . . liked . . . ?" Murphy & Tanenhaus, *Public Opinion and the United States Supreme Court*, in *FRONTIERS OF JUDICIAL RESEARCH* 273, 276-77 (J. Grossman & J. Tanenhaus eds. 1969). To a question about the Supreme Court's constitutional role, less than 40 percent could give answers that could be coded according to one of ten broad functions — e.g., "interpret the Constitution," or "settle basic questions." Furthermore, this survey was conducted in a period of heightened and presumably visible Supreme Court activity. On the other hand, as Murphy and Tanenhaus note, open-ended questions may underestimate visibility because people have difficulty remembering what they do know. Moreover, visibility increased with education. Murphy & Tanenhaus, *supra*, at 276-86.

Nevertheless, given these measures of visibility of the Court's basic functions, one can wonder how visible to the public are a justice's speech, lecture, or visit with the president.

48. In listing the problems encountered by Fortas, Haynsworth, and Douglas, Murphy also cites "the frequent criticism of" Chief Justice Burger, but I am unaware of any serious claim that he should not be on the Court and thus do not include him among those about whom such claims were made.

As to Murphy's worries: In 1975 Murphy and Tanenhaus resurveyed those in the original study, *see* note 47 *supra*, who had displayed some knowledge of the Court. Although their object was obviously not to test Bruce Murphy's statement about the effects of questionable extrajudicial activity on support for the Court, their conclusion is revealing: "In the aggregate, diffuse support [*i.e.*, general trust or confidence] for the Supreme Court, despite tremors that shook the entire political system, proved comfortingly resilient." Tanenhaus & Murphy, *Patterns of Public Support for the Supreme Court: A Panel Study*, 43 *J. POL.* 24, 29 (1981).

That constituency's attitude toward the Court probably influences the Court's effectiveness, by setting a climate of trust, or distrust, regarding the Court's ability to reach its decisions free from the pressure of improper influence. A controversial matter off the bench — regardless of whether it affects judicial performance — creates an ambiguity, a doubt, that a justice can have a partisan position on one issue (in, for example, a speech off the bench) but maintain a dispassionate, neutral position on the bench on another issue. This doubt is possible even if the two sets of issues are completely distinct for the judge, and probable if they are not.

Although Brandeis voted to sustain the Agricultural Adjustment Act after lobbying against it (p. 142), he may have committed a serious error just the same, simply by threatening a judicial rebuke to the Act. He failed "to observe the most basic stricture for the judiciary, that against using the power of judicial office to further political goals" (p. 141). And, as Murphy wisely observes, Brandeis' action may have led the officials with whom he consulted to believe that they had persuaded a justice how to vote in a case (p. 142). What would be the effect, for another example, on trust in the Court if it were known that one of its members was lobbying actively for the appointment of certain individuals to the bench? There is presumably a limit to how much of this kind of ambiguity the Court's constituency will tolerate before it begins to discount the authority of the judicial fiat.

The implications of this speculation, however, tend to becloud what the speculation is about, *viz.*, empirical questions. How, in fact, does extrajudicial activity affect judges' work on the bench — their ability to decide cases without prejudice — or public confidence in the Court? I do not pretend that we have the methodological tools to answer those questions, but I think we would elevate the debate if we recognized the kinds of questions they are. Murphy's contribution to the debate, however, is significant. He has provided much grist for the mill.