

Book Reviews

The Twice-Told Tale of Mr. Fixit: Reflections on the Brandeis/Frankfurter Connection

The Brandeis/Frankfurter Connection. By Bruce Allen Murphy.
New York: Oxford University Press, 1982. Pp. x, 473. \$18.95.

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By now, *Yale Law Journal* readers are familiar with this book; it has been serialized in the *Washington Post*,¹ editorialized about in the *New York Times*,² reported in numerous other newspapers and magazines, and fiercely rebutted by Professor Robert Cover in *The New Republic*.³ Louis D. Brandeis and Felix Frankfurter, according to Professor Bruce Allen Murphy, engaged in nonstop and semi-secret “extrajudicial political activities” throughout their tenures on the Supreme Court. Most notably, Brandeis provided funds to enable Frankfurter—then a Harvard law professor—to lobby for Brandeis’s private political agenda.

I read the *Washington Post* excerpts each day during early morning coffee, right after *Doonesbury* and *Mary Worth*. *Doonesbury*, some time around then, did very funny things with Alexander Haig’s “demonstrations” of the Soviet Union/Nicaragua connection. And *Mary*’s schizophrenic new tenant had distinct public and private identities. Each bit of his behavior was innocuous, but the whole pattern was sinister. *The*

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1. *Wash. Post*, Feb. 21, 1982, at A1, col. 1; *id.*, Feb. 22, 1982, at A1, col. 4; *id.*, Feb. 23, 1982, at A2, col. 1.

2. *Judging Judges, and History*, *N.Y. Times*, Feb. 18, 1982, at A22, col. 1; Margolick, *Letters Show Frankfurter a Secret Voice of Brandeis*, *N.Y. Times*, Feb. 14, 1982, at A1, col. 1. For a detailed discussion of the *Times*’s overstatement of Murphy’s theses, see Cover, *The Framing of Justice Brandeis*, *NEW REPUBLIC*, May 5, 1982, at 17-18.

3. Cover, *supra* note 2, at 17.

Brandeis/Frankfurter Connection combined elements of both.

Like Trudeau's Haig, Professor Murphy finds the most conspiratorial reading of every incident, invariably expressing himself in language that is tendentious and question-begging: letters and conversations are "marching orders";⁴ Frankfurter was "Brandeis's own surrogate,"⁵ his "operator in the field,"⁶ his "fifty-year old lieutenant";⁷ Frankfurter's "tentacles were known to reach into very nearly every government agency."⁸ Often, as we shall see, Murphy's interpretations outstrip the evidence he adduces, and he sensationalizes the material with editorializing almost as much as the *New York Times*, in a bit of unintended poetic justice, did to Murphy's own conclusions.

Out of his hundreds of sources, Murphy has nevertheless pieced together a cogent and interesting story. Professor Cover, pointing to several errors, claims that the book is "shoddy scholarship,"⁹ but this is not obviously so. Murphy undertook a large research task,¹⁰ and the particular errors noted by Cover appear merely to be the inevitable lapses of an historian juggling thousands of bits of information. Exaggerated as Murphy's account appears to be, it is clear that the Brandeis/Frankfurter connection was not nothing; their politicking cannot be conjured away.

But the question, familiar to devotees of *Mary Worth*, lingers: "What is so sinister about what they did?"

I. The Three Arguments

Murphy raises or implies three criticisms:

1. The Brandeis/Frankfurter activities violated the separation of powers principle, which requires that the branches of government be insulated from each other. Murphy, in his temperate moments, claims to be raising this as a question rather than a charge.¹¹ In other places, he gives a different impression: "[A]ttacks [on judges for overstepping their limits] by those crying to save the separation of powers are hardly new, but they are nonetheless compelling."¹² Brandeis "praised the American democracy for

4. B. MURPHY, *THE BRANDEIS/FRANKFURTER CONNECTION* 104, 191, 235 (1982) [hereinafter cited by page number only].

5. P. 53.

6. P. 92.

7. P. 99. "Lieutenant" is one of Murphy's favorite characterizations of the associates of both Justices.

8. P. 243.

9. Cover, *supra* note 2, at 17.

10. His list of sources includes 22 interviews, 53 sets of unpublished papers, 39 oral histories, 20 unpublished studies and a 10-page list of published books and articles; the book contains 87 pages of footnotes.

11. Pp. 11, 14-15, 342-44.

12. P. 13.

its separation-of-powers concept. This . . . is particularly interesting in light of Brandeis's later political behavior while serving on the Court."¹³

2. Brandeis and Frankfurter were hypocrites. While carrying on their activities, they "carefully nurtured" an image of political noninvolvement;¹⁴ they made "Ophelia-like protests"¹⁵ of their political innocence; Frankfurter was "no Reverend Dimmesdale,"¹⁶ for his "overt displays of hypocrisy were . . . much a part of his personality."¹⁷ Murphy's case for the charge of hypocrisy is overwhelming (though the malady, by his account, was much more acute in Frankfurter than in Brandeis).

3. Brandeis's and Frankfurter's political activities jeopardized the authority of the Court: "For if the Court is to serve the necessary societal function of resolving disputes among its citizenry, and thereby defusing much potential for violence and anarchy, it must avoid activities that risk seriously damaging the expectation that the courts will dispense justice without fear or favor."¹⁸ "Much like Caesar's wife, a Supreme Court justice must do more than refrain from personal involvement in political alliances; he or she must be perceived by the public as incapable of having considered such involvement in the first place."¹⁹ In other words, Justices must avoid not merely impropriety, but the very appearance of impropriety.²⁰

This is an interesting argument which, curiously enough, seems to run counter to the previous criticism of Brandeis and Frankfurter. For it suggests that the public confidence necessary to keep the Court viable requires Justices to pretend an indifference to political matters that few who have aspired to and attained the Supreme Bench can reasonably be expected to possess. Thus, the argument taken to its logical conclusion demands that irrepressibly political Justices be hypocrites.

This might suggest that Brandeis and Frankfurter were doing just the right thing by leading their political lives in secret. But Murphy adds an additional twist: since it is virtually impossible to keep secrets in government, the only way to guarantee the appearance of apoliticality is by actually *being* apolitical.²¹ Apolitical behavior is thus commended on the purely instrumental ground that it is the best warranty of the appearance of propriety. Arguing in this fashion, Murphy is able to reconcile agnosti-

13. P. 22.

14. P. 8.

15. P. 9.

16. P. 258.

17. P. 259.

18. Pp. 6-7.

19. P. 6.

20. P. 55.

21. Pp. 14-15, 343-44.

Mr. Fixit

cism about whether the Brandeis/Frankfurter activities were in absolute terms improper with the strong suggestion that even an erroneous public belief in their impropriety would suffice to make them improper.

These, then, are the arguments we must consider: the Separation-of-Powers Argument, the Hypocrisy Argument, and the Caesar's Wife Argument.

II. The Separation-of-Powers Argument

If we mean by "separation of powers" the formal arrangement that prevents one branch of government from usurping the legitimate functions of another, then the Brandeis/Frankfurter activities did not violate this principle of government. First of all, neither Brandeis nor Frankfurter acted *as Justices* when they lobbied, and—with one possible exception we shall look at in more detail—they made no use of the Court's power in their political efforts. In no way did their activities expand, or attempt to expand, the powers of the judiciary in political affairs. Frankfurter, Murphy tells us, once claimed "that he had a perfect right of citizenship to lobby on an issue that was 'absolutely unrelated to anything that could be the concern of the Supreme Court.' 'Certainly,' he continued, 'one does not cease to be a citizen of the United States, or become unrelated to issues that make for the well being of the world that may never come for adjudication before this Court, by becoming a member of it.'"²² Frankfurter was surely correct.

Secondly, in the same way that a Justice is not the judicial branch, lobbying for legislation is not the same as legislating, and recommending executive action is not the same as taking it. Thus, even if we accept Murphy's account at face value, Brandeis and Frankfurter did not impinge on the constitutionally-defined functions of the other branches. Their actions were, in constitutional terms, no different from a President's lobbying Congress to pass a bill, or a Senator's recommending a sympathetic crony for a job in an executive agency. Doubly, then, these activities do not amount to the judicial branch usurping powers of the other two branches.

A. *Partial Agency*

To say, moreover, that the Brandeis/Frankfurter activities violated the separation of powers merely begs the question of how separate the powers are supposed to be. A glance at *The Federalist* Number 47 can give us pause:

22. P. 309.

[Montesquieu] did not mean that these departments ought to have no *partial agency* in . . . the acts of each other. His meaning . . . can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.²³

This, of course, invites the question of how boundaries should be set around "partial agency" to ensure the appropriate separation of powers.

The important question in our context is how much "partial agency" a sitting Supreme Court Justice may assume in other branches. And, in general terms, the principle must be: only as much partial agency as interferes neither with the other branches' functioning nor with the Justice's duties.

Working out the particulars of this principle, of course, is much more difficult than stating it. On the executive-legislative side, we must draw a line between influence and interference: we must ask how much lobbying a Justice can do before it shades into covert power-mongering. On the judicial side, the question concerns the extent to which a Justice can "go political" without compromising his or her capacity to sit in judgment on a case before the Court.

Murphy details instances in which he suggests—or at least insinuates—that Brandeis and Frankfurter stepped over both lines in their practice of "partial agency." According to Murphy, Brandeis once used intermediaries to threaten the administration of President Franklin D. Roosevelt: " 'unless he could see some reversal of the big business trend, he was disposed to hold the government control legislation unconstitutional from now on.' "²⁴ At various times, both Brandeis and Frankfurter uttered what Murphy takes to be "advisory opinions."²⁵ Murphy argues:

Having an associate justice of the Supreme Court handy with an advisory opinion, pointing out and helping to rein in any language that promises to find disfavor with the Court, would surely create a situation in which those drafting the legislation would be willing to go right to the edge in the belief that their proposals would withstand judicial scrutiny.²⁶

Finally, Murphy raises the general suspicion that Brandeis and Frankfurter maneuvered restlessly and covertly to "plant" their ideas in the other branches of government by intellectual influence and by infiltrating

23. THE FEDERALIST NO. 47, at 338 (J. Madison) (C. Rossiter ed. 1961).

24. Pp. 140-41.

25. Pp. 142, 211.

26. P. 218.

Mr. Fixit

their disciples into the Roosevelt administration.

On the judicial side, Murphy suggests that Brandeis's extrajudicial involvement in the Sacco and Vanzetti defense interfered with the proper performance of his duties in that case.

Let us briefly examine these incidents.

B. *Interference with the Other Branches*

Murphy at one point paints a striking portrait of Brandeis and Frankfurter, "the prophet and the scribe":

A brilliant philosophizing oracle who dreamt a vast master plan for recreating American society and restructuring its government, Brandeis was a visionary prophet. A millionaire twice over when he came to the Court, he had the time, as well as the inclination, to conceive his plans. Frankfurter, on the other hand, had long been by necessity a pragmatist and a bit of a hustler. . . . Too busy doing what was expedient, solving today's problems today, he could much less than Brandeis afford to dream grand dreams. His income was limited, in large measure because his public-service work foreclosed the usual opportunities. . . . He was at heart a politician. He enjoyed developing important friendships, currying political favor, and constantly pressing for any advantage in the arena of political contest.²⁷

Frankfurter, according to another recent appraisal, relied heavily on "his ability to handle the men around him, a process he called *personalia*."²⁸ The brilliant, vivacious, and charming Frankfurter tirelessly maneuvered, sending out countless letters, memoranda, suggestions that Peter speak with Paul; he flattered and berated; he wheeled and dealt.

Brandeis, on the other hand, moved and shook. According to Murphy, his basic method of political operation was to hold audiences with government officials, squeeze them dry of information, and then let hints of his views be known. Secretly, he would send detailed ideas to Frankfurter, who would disseminate them in several ways: through the network of his students—"Felix's Happy Hot Dogs"—whom he had helped place in government jobs, through writing, through getting his students to write about them in the *Harvard Law Review*, or through "personalia." While Frankfurter pulled the strings, Brandeis reposed in dignity like the unmoved mover or, more accurately, the Plotinean One, creating the order of things by acts of pure emanation.

27. Pp. 250-51.

28. H. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* 12 (1981).

1. *The AAA Case*

On one occasion, however, Brandeis let "flash a glimpse of the formidable official powers available to him."²⁹ Brandeis's master plan for the New Deal was in tension with that of Roosevelt's Brain Trust. Brandeis's plan had four detailed elements: 1) massive government expenditures on public-works projects; 2) vast revisions in the federal income tax structure, to make it a much more progressive system, hitting hard the super-rich and indeed "eliminating this economic class entirely"; 3) reforming investment and banking practices; and 4) staffing the government with "lawyers of ability, training and the right attitude."³⁰ The plan was a child of the Progressive era: government should break up big business and let the forces of the free market regulate the fragments.

The Brain Trusters were "collectivists," who "believed in promoting bigness in the federal government and encouraging monopolistic rather than competitive businesses. They sought to provide central direction for the economy."³¹ It was this approach that Brandeis told members of the Administration he "was disposed to hold . . . unconstitutional from now on."³² According to Murphy, Brandeis issued this threat in April 1934, specifically to the Brain Trusters' proposed Agricultural Administration Act (AAA).

The two key questions about this incident are, of course, whether it happened and whether, if it did, it constituted a serious overstepping of the invisible line between judicial influence and interference. About the first, Cover has raised serious questions, based on some ambiguity in Murphy's sources and the hearsay nature of the evidence.³³ Murphy owes his readers a response to these questions.

About the second, I think no one will disagree that, if Murphy's facts are correct, this incident was a serious breach on Brandeis's part. To see exactly why, however, a bit more needs to be said. Suppose that Brandeis had indeed issued this "threat." Was it real? Murphy, throughout his argument, tends to blur the distinction between a single Justice and the entire Supreme Court. Thus, in a discussion of the social security law, Murphy writes that Brandeis used "fear" as one of his tools for lobbying the Administration, for "there was always the possibility that Brandeis might resort to declaring the policy unconstitutional if it was not adopted

29. P. 139.

30. Pp. 104-05.

31. P. 106. For a detailed account of the Brain Trust's philosophy and its conflicts with Brandeis and his associates, see E. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY* (1966).

32. Quoted at p. 141.

33. Cover, *supra* note 2, at 19-20.

Mr. Fixit

in accordance with his wishes.”³⁴

But the Social Security Act was signed in August 1935, at a time when anti-New Deal forces formed a majority in the Court no matter how Brandeis voted. For this reason, Brandeis had no political leverage of the sort that Murphy attributes to him. This is not to say that the threat was not improper; it sits just over the border between influence and interference. Nevertheless, since a single Justice holds no absolute constitutional veto power, political sophisticates such as the men to whom Brandeis was speaking are hardly likely to change their course for fear of one Justice’s displeasure. Murphy’s black-and-white picture is distorted—by, I suspect, the myopia that comes from too intent a focus on the subjects of his book. For surely, it distorts both the history of the New Deal and (more generally) the political toughness of the other branches of government to attribute to a single Justice such dictatorial veto-power. Murphy adduces no evidence that Brandeis’s “threat” changed the AAA legislation; indeed, a letter from Roosevelt indicates that the President did not take the threat seriously at all.³⁵

In April 1934, however, the situation was different. Only two pieces of Depression legislation had come before the Court. *Home Building & Loan Association v. Blaisdell*³⁶ was decided on January 8, 1934, and *Nebbia v. New York*³⁷ on March 5, 1934. Both were 5-4 decisions in favor of the legislation, with Brandeis in the majority. Thus, Brandeis’s threat regarding the AAA was deadly serious, for at that time Court-watchers in the Administration would have had reason to believe that Brandeis could single-handedly turn judicial vindication of New Deal programs into judicial nullification by switching his vote. Until *Panama Refining Co. v. Ryan*³⁸ was decided in January 1935, the threat by Brandeis would constitute a clear violation of the separation of powers. After it became obvious that Brandeis no longer held a decisive vote, such a threat, while still an impropriety, would have been a border-line case. And, it seems to me, the mere delivery of a Justice’s personal views, with no threat attached, does not violate the separation of powers at all.

It may be objected that an analysis such as this is utterly wrong-headed, because it rests the distinction between proper and improper extrajudicial activity on the ability of the executive branch to make nice calculations of how the Court will vote. That misses the point, however. The real prob-

34. P. 177.

35. Roosevelt promised in the letter to have “a good long talk with [Brandeis] within the next few days.” In fact, Murphy notes, “there is no evidence that the promised conference occurred within the next month or so.” Roosevelt was not quaking. P. 141.

36. 290 U.S. 398 (1934).

37. 291 U.S. 502 (1934).

38. 293 U.S. 388 (1935).

lem in extrajudicial activism arises only when a Justice is in a position to interfere with the actions of the other branches by a threat—tacit or implicit—to foil their plans by exercising his power. A threat, however, is always relative to its audience. If a Supreme Court Justice says to someone utterly ignorant of the legal system: “Watch out, or I’ll throw you in jail,” the threat may be real even though the action is in fact impossible. But it is simply Court-watcher’s myopia to think that a Justice’s off-the-bench opinion could deflect the executive branch a jot, except under the most extraordinary circumstances (such as the situation after *Blaisdell* and *Nebbia*). Every executive action occurs in a maelstrom of political forces and powerful lobbying, each part of which is assessed in a hard-headed way. A Justice’s informal views do not even rise to the level of a threat, as Roosevelt’s laid-back response to Brandeis’s “declaration of war” amply demonstrates. Thus, the line may be roughly drawn as follows: a Justice’s genuine threat is clearly wrong; a Justice’s threat that requires nice calculation to determine its genuineness is also clearly wrong; a Justice’s threat under normal circumstances is wrong but harmless; and a Justice’s expression of opinion with no threat attached is not wrong at all. One Justice does not the Supreme Court make.

2. *Advisory Opinions*

Murphy similarly confuses a single Justice with the whole Court when he claims that Brandeis and Frankfurter issued “advisory opinions.” The ban on advisory opinions *by the Court* stems, of course, from the Article III “cases or controversies” requirement³⁹ and dates from the Court’s refusal in 1793 to advise President Washington. But an *individual Justice* is not bound by the cases or controversies requirement.

One of the oddest features of Murphy’s book is its appendix, in which he shows not only that this very distinction was well understood by the Court,⁴⁰ but also that there never has been a consistent standard against personal extrajudicial involvement by the Justices in public affairs: “the standard was established that, at least in times of crisis, members of the Court could, and even should, undertake any necessary informal extrajudicial tasks that might be useful to the nation.”⁴¹ Since Murphy also shows that the Framers never intended to exclude extrajudicial activities on separation-of-powers grounds, one can only wonder why he writes in the body of his book as if he were ignorant of the facts in his appendix. And, regarding his argument that “advisory opinions” by an Associate

39. See *Poe v. Ullman*, 367 U.S. 497, 509 (1961) (Brennan, J., concurring); *Muskrat v. United States*, 219 U.S. 346, 362 (1911).

40. P. 350.

41. P. 352.

Mr. Fixit

Justice would tempt legislative drafters to the brink, I can only reemphasize that Washington insiders know that one Justice's opinion does not the opinion of the Court make.

3. *Covert Lobbying*

Finally, let us turn to the particular contribution this book makes to historical scholarship, the revelation of covert lobbying by Brandeis and Frankfurter (jointly and severally). Murphy leaves little room to doubt that Brandeis and Frankfurter indeed engaged in "secret political activities," but his sensationalized and conspiratorial interpretation is not supported by the evidence he adduces.⁴² A few examples—the most extreme, but unfortunately not uncharacteristic—have to serve.

1. According to Murphy, Brandeis would send Frankfurter suggestions for law review articles in order to disseminate his views, and Frankfurter would farm them out to his students, who would write them for the *Harvard Law Review*. Now it is plain that this practice is subject to a very innocent interpretation: we have an unremarkable chain of intellectual influence. Teachers often suggest topics to students, and it is clear that the latter are not simply writing copy to the specifications of a professorial client. Murphy himself claims to recognize this,⁴³ but in fact he presents it as follows: "Waves of Frankfurter disciples were utilized as research assistants, *and even authors*, for producing useful articles."⁴⁴ Stravinsky, on this way of thinking, did not write *Pulcinella*; Diaghilev did, utilizing him as a composer.

2. Murphy also suggests that Brandeis once abused "the ethics of his position" by asking Frankfurter for "assistance" on an opinion. It turns out that the assistance consisted of supplying the title and location of one of Frankfurter's articles on the commerce clause and some data on the number of times the Court had reversed itself on commerce clause cases.⁴⁵

3. Brandeis, Murphy tells us, used Frankfurter to "educate" Roosevelt (then newly elected governor of New York) about his "views." Murphy's evidence is a letter to Frankfurter asking him to make two re-

42. This is to put the matter calmly, for Murphy's relentless editorializing ranges from an adolescent parenthetical crack, see p. 299, line 15, to some unbelievable innuendo about the Justices' international loyalties: "Certainly, few men had more impact on the creation of the state of Palestine than Louis D. Brandeis, a sitting justice of the United States Supreme Court." P. 64. "Clearly, the most concerned and effective representative of British interests in this country through that period was this United States Supreme Court justice." P. 282. Those with favorable memories of Frankfurter such as Isaiah Berlin, *Felix Frankfurter at Oxford*, in *PERSONAL IMPRESSIONS* 83 (1980), or Max Isenberg, *Reminiscences of Felix Frankfurter as Friend*, 51 *VA. L. REV.* 564 (1965), will find passages such as these hard to forgive.

43. P. 87.

44. P. 76 (emphasis added).

45. P. 83.

quests of Roosevelt: "(a) Far reaching attack on 'the Third Degree,' (b) Good counsel in N.Y.'s cases before our Court."⁴⁶ *Those* were Brandeis's "views"?

4. Brandeis tried to place sympathetic younger people in the executive branch, through Frankfurter's connections. Sometimes he had no one specific in mind. Murphy describes this by saying that he "turned the actual personnel matters over to his operator in the field, Felix Frankfurter."⁴⁷ Sometimes Brandeis did make recommendations. And Murphy describes this as follows: "The justice would not only select a candidate but often target exactly where that individual was to be placed in the administration."⁴⁸

5. Frankfurter also engaged in extrajudicial politicking. He took great care, however, to keep it separate from his judicial duties. You might think that this was admirable. But hear Professor Murphy: "Frankfurter discovered that the solution for compartmentalizing the two sides of his personality lay in a careful use of two distinct sets of lieutenants. . . . [T]he Justice used his law clerks only for judicial matters, and an entirely different group of protégés for carrying out his political endeavors."⁴⁹ Gasp. (Imagine what Murphy would have written had Frankfurter used his law clerks for private politicking, and his friends for judicial duties.)

6. Lastly, there are the now famous secret payments from Brandeis to Frankfurter. Brandeis wrote to Frankfurter in 1916: "My dear Felix: You have had considerable expense for traveling, telephoning and similar expenses in public matters undertaken at my request. . . . These expenses should, of course, be borne by me."⁵⁰ And again: "I ought to feel free to make suggestions to you, although they involve some incidental expense. And you should feel free to incur expense in the public interest."⁵¹

Quite simply, I fail to see what was wrong with this. Murphy says that Frankfurter was Brandeis's employee,⁵² but none of the evidence he cites supports this claim, and the fact that at times Brandeis would plead with Frankfurter to act on a suggestion when the latter had not⁵³ suggests just the opposite. The evidence suggests a relation of intellectually kindred spirits, not of principal and agent. And the fact that Brandeis wanted his—their—ideas out in the political arena, where they could form part of public debate, seems to me a worthy and admirable thing. As Murphy's

46. P. 100.

47. P. 92.

48. P. 113.

49. P. 270.

50. P. 40.

51. *Id.*

52. P. 41.

53. P. 75.

Mr. Fixit

appendix suggests,⁵⁴ it is well within the separation-of-powers conception of the Framers. Surely Cover is correct: "There is a distinction between an intellectual community and a political conspiracy."⁵⁵

In sum: unless one makes the question-begging and historically unwarranted assumption that extrajudicial lobbying by a Justice *just is* interference in other branches of government, Brandeis's and Frankfurter's activities were not improper under the separation-of-powers concept.

C. *Interference with Judicial Work*

We must still look at the other separation-of-powers argument, the claim that such lobbying interferes with the proper functioning of the Court (rather than, as in the previous argument, the proper functioning of the other branches). The basic idea is that the more heavily involved Justices are in extrajudicial activity, the more their judicial activities must be restricted to avoid conflicts of interest. In particular, if a matter comes before the Court in which Justices have been active, the Justices may not be able to sit on the case, and the country is deprived of their abilities.

Murphy suggests that this may have happened in the Sacco-Vanzetti case. Frankfurter was deeply involved as a publicist in their defense, and Brandeis was also very interested in the case. But when it came before the Court, Brandeis disqualified himself because a Mrs. Glendower Evans had been actively involved in the defense while living in his household. Murphy believes that the real reason for the recusal was the Brandeis/Frankfurter connection: "[Brandeis] had put himself into that compromising position . . . , thereby helping to deprive convicted men of a right to a fair hearing by the Court's most liberal member."⁵⁶ If he is right, then Brandeis's extrajudicial involvement did indeed interfere with his Court work.

But Murphy's own account suggests otherwise, for in the very next sentence he writes: "Some may wonder . . . whether the Justice would have felt compelled to step down if the only factor had been his secret contacts with Frankfurter about the case. His connection with Mrs. Evans . . . could have been the factor that did truly push the Justice to his decision."⁵⁷ So much for Murphy's "depriving convicted men of a right." Nevertheless, the general problem remains: If a Justice has been extraju-

54. P. 345.

55. Cover, *supra* note 2, at 21. Cover adds: "Louis Brandeis was not a President's pal, a crony, a man whose political influence depended upon sycophantic regime identification. He did not buy influence with personal loyalty. His extraordinary influence . . . came from his intellectual vision and his moral authority." *Id.*

56. P. 82.

57. *Id.*

dicially active in a matter that later appears before the Court, will he not be forced to recuse himself?

Strictly speaking, the answer is no, for except in special circumstances a Justice alone must decide when to recuse himself.⁵⁸ But, ethically, can a Justice sit on a case in which his impartiality has been compromised?

Suppose not. It still does not follow that he should refrain from political activity, provided that activity does not compromise his impartiality. And surely it need not. Brandeis, for example, despite his lobbying against the AAA, voted in favor of its constitutionality.⁵⁹ Earlier, in 1921, he voted against portions of a bill "despite his having earlier personally advised . . . on a strategy for securing initial passage of the measure in the Senate."⁶⁰

Brandeis, however, was an exceptional person. We may still think that a Justice cannot count on his own impartiality on matters in which he has been personally involved—he may not even *know* whether his judgment has been affected. And so the general problem remains.

Or does it? The argument presupposes a contrast between the politically active judge, biased by his own involvement, and an impartial one. But of course the *real* contrast is between a judge whose strong political opinions drive him into political action, and a judge *with the same opinions* who refrains from action. Surely, the latter is no more impartial than the former. Should the latter recuse himself as well? That would be absurd, for at least two reasons. First, it is utterly wrong to believe that Justices could be immune from such opinions—biases, if you will—about any matter of grave public interest. We would thus be faced with a permanently recused Court.⁶¹

Second, and more important, we do not *want* Justices without political beliefs. Constitutional interpretation requires a constitutional philosophy, and that means a political philosophy. Interpretation requires, in addition, the ability to relate that philosophy to the particulars of fact situations and legislative language. These two things together imply that a Justice's hermeneutic equipment must include political opinions both general and specific. These are prejudices, in the etymological sense of 'pre-judices': anterior judgments that form the stuff of judicial ability.⁶²

58. 28 U.S.C. § 455 (1976 & Supp. V 1981); see *Laird v. Tatum*, 409 U.S. 824, 830-39 (1971) (memorandum of Rehnquist, J.) (discussing denial of motion to recuse himself).

59. *United States v. Butler*, 297 U.S. 1 (1936); p. 142.

60. P. 54.

61. Even Fred Rodell, who yielded to no one in exposing the biases of the Court, never dreamt that it could do business in any other fashion. See F. RODELL, *NINE MEN* 30-31 (1955) (savagely attacking former railroad lawyers and pro-railroad politicians who formed majority striking down the Railroad Retirement Act).

62. "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." Laird

Murphy's own language reveals this, when he speaks of a "fair hearing by the Court's most liberal member." This can seem strictly funny, until we realize that generally we *can* make sense of the idea that liberal (or conservative) prejudices are compatible with a fair hearing. I am suggesting that with *no* prejudices a judge could not decide a case at all. Intuitions without concepts are blind.

Moreover, we do not expect Justices to keep their political views to themselves or to recuse themselves if those views foreshadow a case before the Court. Should Chief Justice Burger recuse himself from cases involving the rights of the criminal accused, because he has made speeches that are hostile to those rights? Should Justice Rehnquist, who has written a thoughtful essay suggesting that some cases with family members do not belong in court,⁶³ disqualify himself from hearing arguments about jurisdiction in such a case? Should Justice Marshall, a former litigator for the NAACP, refuse to hear civil rights cases?

Evidently, we are presented not with a binary choice between impartial and biased judging but with a continuum ranging over unexpressed belief, expressed belief, and lobbied-for belief. All are likely to have an effect on the Justice's decision, and so, *insofar as the belief is a principled one that reflects the Justice's constitutional-political philosophy*, and insofar as the Justice believes that he or she can render impartial judgment, recusal is neither required nor desirable. Recusal should be reserved for cases in which a Justice's bias is toward one of the litigants personally. And this locates the second boundary that the separation of powers draws around extrajudicial political activity: a Justice's extrajudicial politicking should not involve him with those who can reasonably be expected to be parties to future litigation of the matter unless the involvement is so marginal that no personal identification results. Murphy's evidence does not suggest that Brandeis's or Frankfurter's activities ever crossed this line.

This admittedly vague principle, together with the earlier injunction against a Justice's coercive interference with another branch, marks out an area of political activity consistent with the separation-of-powers principle. But a question remains: why not simply proscribe such activity altogether and thereby avoid all risk of overstepping these lines?

The first answer is that the Justices may have something important to add to political debate. The second answer, however, is more to the heart of the matter. Perhaps it would be better if, magically, the Supreme Court

v. Tatum, 409 U.S. 824, 835 (1972) (memorandum of Rehnquist, J.); see also Rehnquist, *Sense and Nonsense About Judicial Ethics*, 28 REC. A.B. CITY N.Y. 694, 708-13 (1973) (further developing argument that a Justice should not recuse himself because of previously expressed views on a class of cases before Court).

63. Rehnquist, *The Adversary Society*, 33 U. MIAMI L. REV. 1 (1978).

could be peopled with judges at once constitutionally wise and politically innocent. I have questioned whether this would in fact be better, but in any event it is impossible. The Justices are public men and women, and the political passions that move them will find expression, if not overtly, then covertly. It seems clearly better for it to be overt, for otherwise only obfuscation and hypocrisy can result. If, as I shall now argue, the deep purpose of the separation of powers is to canalize political passions in a beneficial way, then it might be said that the separation of powers *requires* an arena for extrajudicial activism. And, in that case, Justices will not need to be hypocrites about their extrajudicial activities. Judicial hypocrisy is the measure of failure in fulfilling the purpose of separating the powers. This brings us to Murphy's second criticism.

III. The Hypocrisy Argument

To many readers, the most troubling aspect of Murphy's revelations is the hypocrisy of Brandeis and Frankfurter. These are, after all, two great and admired Justices, and it is unhappy indeed to discover vices in those we admire. Even those (like myself) who see nothing wrong in a measure of extrajudicial political activity must confront the fact that publicly both Justices (and especially Frankfurter) claimed to abhor the very activities in which they engaged. "Whenever Brandeis was asked to assist in obtaining a government appointment, to accept an honorary degree, to write an article or deliver a speech, he noted on the request 'Judicial Propriety Precludes,' or simply 'precluded.'"⁶⁴ Frankfurter spoke of the Court as a "monastery" and himself as a "political eunuch";⁶⁵ he wrote: "I have an austere and even sacerdotal view of the position of a judge on this Court, and that means I have nothing to say on matters that come within a thousand miles of what may fairly be called politics."⁶⁶

The fact of hypocrisy is important for compiling our calendar of saints and heroes, for judging Brandeis and Frankfurter *as men*. But is it important for judging them as Justices?

A. *Virtue and Vice in the Light of the Separation of Powers*

We can approach this question by looking once again at the doctrine of separation of powers. It is a mistake to analyze this doctrine in narrowly legal and constitutional terms, for the doctrine is a constitutional solution to a more complex moral and psychological problem. To quote Madison once again:

64. Pp. 8-9.

65. P. 9.

66. Pp. 259-60.

Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature?⁶⁷

Madison's idea reflects the characteristic eighteenth-century belief that human passions—particularly the dangerous political passion for glory—can be controlled only by self-interest. This view is a later outgrowth of a theory that passions may be controlled only by other passions. In the words of d'Holbach (which should be read side-by-side with *The Federalist* Number 51), “[t]he passions are the true counterweights of the passions; we must not at all attempt to destroy them, but rather try to direct them: let us offset those that are harmful by those that are useful to society.”⁶⁸ The later view added that self-interest is the passion most useful to society. It is “the passion of self-love upgraded and contained by reason,”⁶⁹ so by pitting one interest against another, a form of human action results that is “exempt from both the destructiveness of passion and the ineffectuality of reason.”⁷⁰ Interest, moreover, is calculable; in Helvétius's words, “[a]s the physical world is ruled by the laws of movement so is the moral universe ruled by laws of interest.”⁷¹

Madison, then, is claiming that the separation of powers solves (as much as an institution can) the problem of human vainglory, shackling passion in bonds of self-interest and then curbing interests by pitting them one against another. The doctrine is a reflection on man's avaricious nature, finding in human greed the solution to unadorned will to power. It is a Bad Man theory of government.⁷²

It does not, however, address the problem of the Good Man. In Brandeis and Frankfurter, the passions were unrestrainable by self-interest, for Brandeis had more money than he wanted and Frankfurter did not want money. Nor did they crave power in the obvious sense: they did not desire to rule. Their real passion, however, was potentially just as dangerous—it was the desire to manipulate history itself, the urge to play demiurge. “History,” Frankfurter wrote in 1957, “is the interplay of . . . anonymous propelling forces and of individuals, so that a few individuals may make the difference in the import and incidence, the triumph and deflec-

67. THE FEDERALIST NO. 51, at 322 (J. Madison) (C. Rossiter ed. 1961).

68. P. D'HOLBACH, *SYSTÈME DE LA NATURE* 424-25 (G. Olms trans. 1966) (1st ed. London 1770), quoted in A. HIRSCHMAN, *THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH* 27 (1977).

69. A. Hirschman, *supra* note 68, at 43.

70. *Id.* at 43-44.

71. 1 C. HELVÉTIUS, *DE L'ESPRIT* (Paris 1758), quoted in A. HIRSCHMAN, *supra* note 68, at 43.

72. See Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459-62 (1897).

tion, of these anonymous forces."⁷³ This is consistent with his opinion that judges must "pierce the curtain of the future . . . give shape and visage to mysteries still in the womb of time."⁷⁴ We can recognize in this the nineteenth-century view (of dismal memory) that historical progress is a quasi-natural process to be harnessed by farsighted men.

Obviously, Brandeis and Frankfurter had neither the messianic delusions nor the political power of the European apostles of history. They preferred to coach history from the sidelines. Even that ambition, however, can be dangerous. Madison believed that the chains of self-interest are the chains of common sense. Once they are broken, only one thing can save the soul of a man with Felix Frankfurter's profound self-confidence, and that is his own self-control, his human virtue.⁷⁵ Grant that a Justice's power is limited; it is nevertheless great in its own sphere, and for that reason the question of personal virtue is a politically significant one. When interest can no longer be counted on, virtue must take over; otherwise private vices assume public significance.

B. *The Vice of Hypocrisy*

Some vices, of course, are unlikely to affect a Justice's duties: a Justice's mistreatment of his wife makes him a worse man but not a worse Justice. Gross appetites, pomposity, and physical cowardice are vices of the person, not of the judge. Moral cowardice, however, and mean-spiritedness, and bigotry, and anger, are vices of the judge, for they are all components of judgment. What, then, about hypocrisy?

I believe that hypocrisy is a vice of the judge and not merely of the human being. Judges, and preeminently Justices of the Supreme Court, interpret and articulate the standards that govern our conduct. Hypocrites, however, profess (and profess to abide by) standards that they do not in fact observe. A judge's hypocrisy thereby calls into question his own understanding of the role of standards in human affairs.

To see this more clearly, it is useful to contrast hypocrisy with another way in which conduct can diverge from professed standards. No one abides by traffic laws all the time; driving would be less safe and efficient if everyone did abide by them. Because they understand this, police do not rigorously enforce the laws. It is not, moreover, hypocrisy for a person to support the control of traffic while at the same time running an occasional

73. P. 200.

74. F. FRANKFURTER, *The Judicial Process and the Supreme Court*, in *OF LAW AND MEN* 39 (1956).

75. Learned Hand wrote: "Well of course [Frankfurter has] got a very passionate nature, and that is rather an initial handicap for a judge . . . [though] not if he has the faculty of adding to it supreme self-restraint. He's learned a good deal of it. But he hasn't it." Quoted at p. 251.

red light. All this shows is that a regime of laws must leave life livable, and an inflexible regime cannot. Standards must bend to sanity.

In such instances a judge may profess the standard while recognizing that it requires some free play. Portia, in *The Merchant of Venice*, calls the trait of character that enables us to act in this way “mercy” and contrasts it with the strict, rulebound legalism that Shylock calls “justice.”⁷⁶ The word “mercy” is a bit misleading, because it carries connotations of supererogation (rather like “forgiveness”), whereas mercy in the sense I am describing is *part* of legal justice, while rulebound legalism is not. I will nevertheless stay with the the term “mercy.” My point is then that for a judge to profess a standard while applying it mercifully is not the same as hypocrisy. Indeed, I believe that it is the *opposite* of hypocrisy. Let us see why.

Obviously, the letter of the law cannot specify when enforcing the letter of the law is not good sense.⁷⁷ That judgment must be left to judicial discretion, and what I am calling “mercy” is really the common sense that must underwrite judicial discretion. The hypocritical judge, however, lacks just this virtue. For his secret violation of a standard is complemented by public espousal of it: he holds up the standard as inviolate, and, by claiming personally to follow it unswervingly, in effect rejects the proposition that the law must accommodate particular cases. Rochefoucauld said that hypocrisy is the homage that vice pays to virtue.⁷⁸ To the extent that is so, hypocrisy is a useful flaw. But Rochefoucauld should have added that hypocrisy cannot pay virtue’s homage to vice, namely mercy. By its nature, hypocrisy pretends to *pure* compliance, and thus demands it of others. Where mercy reconciles ideal standards with the human world, hypocrisy opens a moral distance between them—and that is why it is a defect of character, above all in a judge.

A hypocritical judge, moreover, divides the world into those who are bound by articulated standards and those—principally himself—who are not. In two ways, then, the hypocritical judge threatens the uniformity of law: by denying the divergence between standards and behavior at the same time that he lives it himself, he introduces a gap between meaning and use into his own pronouncements; at the same time he sets himself apart from the rest of us as a one-person elite who is beyond his own law. Since he will not bend standards to common sense, but only to his own

76. Compare W. SHAKESPEARE, *THE MERCHANT OF VENICE* act IV, scene i, lines 184-205 (Portia’s speech in court of justice scene); with act III, scene iii, lines 4-10 (Shylock’s speech prior to court of justice scene). The importance of this contrast in *The Merchant of Venice* was pointed out to me in a paper by my student Mykel Hitselberger.

77. This problem is discussed extensively in M. KADISH & S. KADISH, *DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES* 37-65 (1973).

78. F. DUC DE LA ROCHEFOUCAULD, *MAXIMES*, No. 218, at 86 (F. Green ed. 1946) (Paris 1665).

will, the hypocrite creates a moral discontinuity between his judgments and his actions; both become suspect. It is this discontinuity, and not "judicial impropriety," that is troubling in Frankfurter and Brandeis.

I do not wish to overstate the conclusion of these reflections. Obviously, Brandeis and Frankfurter were not immoderate or inflexible in their judicial opinions; as Philip Kurland rightly says, "Frankfurter was never able to accommodate to the notion of the Constitution's grand clauses as fixed and unbending formulas that meant the same thing regardless of the circumstances that called forth their application."⁷⁹ The argument that hypocrisy is unable to pay virtue's homage to vice may hold only of the particular standard that is being maintained hypocritically. A person can be hypocritical about some matters and not others. Thus, it is principally in his judgments about "politically active" brethren that we find a curious and injudicious brittleness in Frankfurter. Yet this is a flaw not unconnected with jurisprudential issues.

C. *Hypocrisy and Technocratic Elitism*

When we are confronted by hypocrisy as blatant as Brandeis's and Frankfurter's, it is natural to seek an explanation, a way of reading their judgments and actions that will remove the discrepancy between them. H. N. Hirsch is helpful here. He argues that Brandeis and Frankfurter both believed "that the executive and legislative should be given wide latitude in the formulation of social and economic policy," a view that in turn derives from a belief "in the efficacy of scientific expertise and the need for experts in government."⁸⁰ This view, which underlies their urging of judicial self-restraint, can also explain their political activism, their attempts to ensure that expert opinion such as their own and that of their intellectual fellow-travelers would indeed inform the decisions of the other branches. Add to this the Caesar's wife argument, according to which judicial self-restraint becomes credible only if judges are believed to be politically quiescent, and you get an explanation of their hypocrisy.

But, if this argument is sound, then judicial self-restraint, extrajudicial activism, and hypocritical disclaimers all derive from an elitist and technocratic view of the executive and legislative functions. For that reason, even though judicial self-restraint and extrajudicial self-restraint are quite distinct, the Justices' hypocrisy about the latter calls into question their justification for the former.

I am not, I hasten to add, supporting Murphy's fantastic hypothesis

79. P. KURLAND, *MR. JUSTICE FRANKFURTER AND THE CONSTITUTION* 75 (1971).

80. H. HIRSCH, *supra* note 28, at 129-30. For an example of this, see Brandeis's famous dissent in *New State Ice Co. v. Liebman*, 285 U.S. 262, 284-85, 304-11 (1931) (states have right to experiment with new policies in scientific spirit).

that judicial self-restraint was merely a tactic to cover up the Justices' political activities.⁸¹ Rather, my point is that their views about judicial activism on the bench are part and parcel of the rigidity induced by their hypocrisy concerning their own off-the-bench activism, and both derive from the same dubious and elitist theory of government. The elitism of hypocrisy, its espousal of standards that bind everyone but the hypocrite, flows naturally from the hypocrisy of elitism, the disclaimers by which the machinations of the experts are hidden for the public's own good. Judicial self-restraint is supposed to prevent appointed judges from interfering with elected officials. If, however, judicial self-restraint is complemented by expert sovereignty rather than democratic process, its most compelling justification disappears. For even Supreme Court Justices are more accountable than consultants and self-styled policy scientists.

IV. The Caesar's Wife Argument

It is an old refrain that an overly active Supreme Court might "generate such widespread political reaction that the Court would be destroyed in its wake."⁸² As Frankfurter wrote in *Baker v. Carr*, "The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements . . ."⁸³ Murphy's Caesar's wife argument is a variant of this refrain. The individual Justices, no less than the Court itself, must be publicly perceived as beyond politics, beyond having considered engaging in politics, a thousand miles beyond what may fairly be called politics. Otherwise, the public will lose confidence in the impartiality of Court decisions, and the authority of the Court will collapse, creating great potential for violence and anarchy.

At first glance this argument looks spurious and even offensive. By instructing the Justices to look better than they really are, the argument seems to license deception. The public must be made to believe like children that the Court's opinions are brought by the stork. The obvious reply is, why should we have more confidence in the Court's detachment than the Court deserves? Or, put the other way around, why not permit us to maintain our confidence in the Court in full knowledge of what the Court is really like? Instead, the Caesar's wife argument seems to mandate hypocrisy in the name of the public good.

81. Pp. 268-69.

82. Monaghan, *Constitutional Adjudication: The Who and the When*, 82 YALE L.J. 1363, 1366 (1973).

83. *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

A. *Instrumental Propriety*

Of course, Professor Murphy does not claim to be recommending hypocrisy. As I mentioned, he turns the Caesar's wife argument on its head and makes it a criticism of Brandeis and Frankfurter: since the appearance of propriety is of the utmost importance, and the only way to maintain this appearance (in the age of Woodward and Armstrong) is really to *be* proper, apolitical behavior is necessary—not because politicking is bad, but because being seen to politick is. I do not find this argument persuasive.

In the first place, it is topsy-turvy. Ordinarily, we object to the appearance of impropriety because it suggests the existence of real impropriety. Now, however, political behavior is improper only because of how it looks. This creates an odd circularity. Political behavior is improper because avoiding it is essential to maintaining the appearance of propriety, which includes the appearance of apoliticality, because political behavior is improper. Surely one needs independent reasons for thinking that political behavior is improper; how else can the argument get off the ground?

Secondly, Murphy's idea that judges must not engage in covert behavior because they will get caught is scarcely a reason to condemn the behavior. It amounts to saying that the only thing wrong with covert politicking is that it cannot be covert enough.

Murphy's variation on the Caesar's wife argument, which recommends "ethics" only as the simplest way of keeping up appearances, should be rejected. The argument becomes powerful only in its pure form as a straightforward recommendation of judicial hypocrisy. For clearly, it was on the basis of considerations such as maintaining public confidence in the Court that Brandeis and Frankfurter chose to act politically under the mask of hypocrisy. They must, one supposes, have accepted the Caesar's wife argument, for why else would they have chosen the path of hypocrisy?

B. *Shklar's Defense of Hypocrisy*

In a recent and characteristically thoughtful essay, the well-known political theorist Judith Shklar has pointed out an intimate connection between hypocrisy and democratic politics and in effect has endorsed hypocrisy.⁸⁴ Her defense is the best I know for the Caesar's wife argument; I trust, then, that it will not take us too far afield to consider its merits. I do not believe that her defense will stand up; seeing why it will not, however, helps pinpoint the real source of disquiet with the Brandeis/Frankfurter

84. Shklar, *Let Us Not Be Hypocritical*, 108 DAEDALUS 1 (1979).

activities.

Shklar uses four arguments. The first is an attack on *anti*-hypocrisy—the urge to unmask—as a political principle; it is not germane to our present inquiry, and I shall not pursue it. The second is a claim that political persuasion, and hence the attainment of democratic consensus, requires hypocrisy. The third is a variant of Rochefoucauld’s thought that hypocrisy is vice’s homage to virtue: hypocrisy makes the public world better, more civil, and more enduring than would a frankness that poisons the air with private vice. And the fourth is a version of the Caesar’s wife argument itself. Let us examine the last three arguments.

1. Shklar discusses the connection between hypocrisy and persuasion by reflecting on the character of Benjamin Franklin:

He was a shrewd calculator who took it for granted that the politics of persuasion required hypocrisy. The only alternative, as he well knew, was force That a public man should try to make himself acceptable to his fellow-citizens did not strike Franklin as despicable; on the contrary, he carefully taught himself to hide much of his native character. . . . Here is hypocrisy as a conscious act in response to a situation that demands it. Persuasion is not natural; it requires a great deal of effort, and in a man as superior to his fellows as Franklin was, it takes exactly what he described. It was a mark of Franklin’s greatness that he always knew what was called for and could do what he thought right A democratic “social fabric” would “come undone” just as quickly as any other if everyone were always “wholly frank with everyone.”⁸⁵

No public program wins by sheer merit alone: a good idea’s time has come only when it is linked with persuasion. That is, after all, what politics is all about.⁸⁶ If, therefore, a man of Franklin’s “superiority” is to press his political program in democratic councils, he must do what he must to make himself palatable. Unmasked politicians can hope for nothing better than acrimonious defeat. Nor is this principle sheer manipulativeness, for Franklin was seeking to establish a genuine democratic will, not to ram his ideas down unwilling throats.

Shklar’s Franklin must surely remind us of Brandeis and Frankfurter, two men of the highest ability, with strong ideas about the needs of the republic, who proceeded masked only so that their ideas could obtain, in Franklin’s words, influence in public councils without arousing resentment based on their source. As a consequence of this wise hypocrisy, sound policies and good government appointments were made. What bet-

85. *Id.* at 16-17.

86. See Luban, *On Habermas on Arendt on Power*, 6 PHIL. & SOC. CRITICISM 79, 86-88 (1979).

ter justification could be offered?

At one point, Shklar writes, "Franklin was, by any standards, a great man. He always knew that about himself."⁸⁷ Similarly, Brandeis and Frankfurter were great men and knew that about themselves. Unfortunately, however, many who think they are great are not. Should they, too, utilize deception and hypocrisy to realize their foolish policies in practice? Being a great persuader (shall we say "a Great Communicator"?) does not always go hand in hand with having good ideas. Not every influential hypocrite is a Franklin. Shklar's argument depends for its force on the example she chooses, on the fact that Franklin not only "knew" that he was great, but *was* great. The fallacy of her argument is that it relies exclusively on the wisdom of hindsight, which is *by definition* unavailable at the moment a Franklin lures his fellows into following his ideas. Seen after the fact, we can all discover that a policy was great, and its proponent foresighted. Before the fact, no one can know that, including the proponent. Shklar mistakes practical wisdom for prophecy.

Hypocrisy recommends itself to those who know they are great, those who—like Franklin, Brandeis and Frankfurter but also like their epigones—want to rest their hand on the throttle of history. Many of us, however, have no trust in prophets, and believe neither that history exists to second their motions, nor that the wisdom of foresight is identical with prediction—that it is, in other words, merely the wisdom of hindsight minus a few years. We will find Franklin's "spirit of cool calculation without any claim to humility"⁸⁸ less appealing.

What, then, do we say to those who, like Franklin, Brandeis, and Frankfurter, know that their opinions are right? Shall we tell them not to act as they must? Perhaps not; they will not listen in any event. We can tell them only that they are acting as a self-proposed elite, and that, no matter what the verdict of history, we shall admire their genius but not their hypocrisy.

2. Shklar's next argument may be dealt with briefly. It is that public hypocrisy, the pretense of virtue, is more civilized than candid vice:

It is, for example, no longer acceptable to make racist and anti-Semitic remarks in public in America; yet in private conversation, racism and anti-Semitism are expressed as freely and as frequently as ever. Many a Southerner used to sneer at this display of hypocrisy. Now even he, like many a Northerner, is down to a few code words at election time. Would any egalitarian prefer more frankness? Should our public conduct really mirror our private, inner selves?

87. Shklar, *supra* note 84, at 16.

88. *Id.*

Mr. Fixit

Often our public manners are better than our personal laxities.⁸⁹

Once again, however, Shklar's example is persuasive for the wrong reason. The reason we prefer not to hear a racist sentiment publicly expressed is that its expression is itself a racist act and hence morally wrong. Shklar's example is unique and not transferable to other varieties of hypocrisy, because candid racist remarks are "performative" utterances: a revelation of racism is an act of racism. That fact, rather than our preferring not to know that public officials are racists, is the justification of hypocrisy.

In particular, the argument does not apply to the Brandeis/Frankfurter activities. For, unlike racism, these are not evil on independently specifiable grounds. Indeed, had Brandeis and Frankfurter come out of the closet with their political activity, a step might have been taken toward public recognition that judicial politicking is not really a vice after all.

3. Finally, Shklar offers the Caesar's wife argument itself, in a form generalized so that it includes not merely the Supreme Court, but all the institutions of American government:

[R]epresentative democracy must, like any form of government, maintain its legitimacy by reinforcing the ideological values upon which it is based. Not only must these be invoked on all possible occasions, but they must serve as the justification for specific policies No one can hope to govern without reference to these values. It is neither psychologically feasible nor politically possible to evade them when every utterance is sure to receive close public scrutiny. That means that those engaged in governing must assume at the very least two roles, one of pursuing policies and another of edifying the governed in order to legitimize these plans. . . . There is nevertheless a built-in tension; for the disparity between what is said and what is done remains great. . . . No one lives up to a collective ideal. . . . Without ancestor worship or divine providence to rely on, modern liberal democracy has little but its moral promise to sustain it. That is why it generates both political exigency and the interplay of hypocrisy and vocal antihypocrisy.⁹⁰

To take the example at hand: the Court's legitimating ideological ideal is to dispense justice—impartial justice untainted by political favoritism. If the public did not believe in this ideological ideal, the Court (so the argument goes) would lose its legitimacy and authority. Now in point of fact, as has been demonstrated by the Court-watchers from Fred Rodell to

89. *Id.* at 19.

90. *Id.* at 13-14.

Woodward and Armstrong and Professor Murphy, the Court's dynamics are highly political. The Court must nevertheless reinforce the ideological values upon which its authority rests, and that means among other things the exaggerated posture of insulation from politics. This, then, is the Caesar's wife argument, deriving exigent hypocrisy as a consequence of the fragile nature of democratic legitimacy.

The key to this argument, I believe, is that it tacitly but unequivocally divides the nation into two sorts of people, which I shall call the Ins and the Outs. The Outs are the anonymous millions for whom the Court's legitimacy and authority rests on the myth that the Justices are apolitical. The Ins are those of us—Professors Shklar and Murphy, the legally and politically sophisticated, the hard-headed Court-watchers—who know that the apolitical Court is a myth and who realize that its democratic legitimacy comes from elsewhere. The virtue and depth of Shklar's analysis is that it explains where the Court's legitimacy comes from: the fact that we respect and adhere to it as an institution—"we" in this case meaning Ins and Outs together. The Outs, however, respect it for the wrong reason, and the Ins respect it because it is legitimate, that is, because it has the loyalty of the Outs. The justification of hypocrisy by the Caesar's wife argument is simply the view that hypocrisy is required to preserve the Outs' respect of the Court.

The Caesar's wife argument, and Shklar's generalization of it, are intended for the Ins. One cannot believe with the Outs that the Court is apolitical and simultaneously believe with Shklar that it only pretends to be apolitical to reinforce a norm. If an Out became convinced of Shklar's theory, he would either change into an In by virtue of believing the theory or else lose faith in the Court. And not every Out can become an In, for then the entire nation would believe that the Court's legitimacy derives from an appearance of detachment which in fact appears to no one.⁹¹

It follows that, if institutions are to maintain their legitimacy, not everyone can believe Shklar's theory. Some Outs must be left out. And so, the theory divides the nation into Ins and Outs, normatively as well as descriptively: not only *are* there two sorts of people, but it is better that way.

The outcome of these dialectical twists and turns is that the Caesar's wife argument suffers from the same fatal elitism of utilitarianism that Bernard Williams was the first to criticize.⁹² Utilitarians confront the fact

91. It is not logically impossible, however, for there to be a nation of Ins who do not *know* that they are all Ins, and who therefore believe that hypocritical institutions are legitimate because they think that there are Outs out there to be fooled.

92. Williams, *A Critique of Utilitarianism*, in J. SMART & B. WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 138-40 (1973).

Mr. Fixit

that it will be better if most people are not utilitarians. We are more likely to do the utilitarian best thing if we do not act out of belief in utilitarianism but rather out of a nonutilitarian sense of loyalty or duty.⁹³ Or people may simply be happier if they have nonutilitarian projects to pursue.

For this reason, the utilitarian must cultivate a world of Ins and Outs—the select few social planners who keep the utilitarian faith, and the vast majority of subjects who are better off on utilitarian grounds not even knowing that utilitarianism exists.⁹⁴ In the same way, the Caesar's wife argument advocates hypocrisy so that policymakers can make policy as they think it should be made while maintaining public confidence that they are doing something else. The Ins know the value of keeping up appearances. And the Outs must be fooled for their own good.

V. Judicial Ethics or Technocratic Reformism?

It is not surprising that the political activities of Brandeis and Frankfurter should share some of the vices (and the virtues as well) of utilitarianism. For the Justices, like the utilitarians, were social reformers who believed that moral progress could be made through enlightened problem-solvers who govern through scientific expertise.⁹⁵ The assumptions in-

93. A special case of this utilitarian argument is set out and criticized by Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 PHIL. & PUB. AFF. 160, 171-74 (1973).

94. Williams has remarked in discussions that this was the actual situation of British colonial administrators in India. Many of them were utilitarians, but rather than trying to "convert" the Indians, they decided that their utilitarian projects would better be realized if the Indians remained Hindus.

It may be thought that this argument caricatures the utilitarian position, but the division into Ins and Outs comes directly out of Sidgwick:

Thus, on Utilitarian principles, it may be right to do and privately recommend, under certain circumstances, what it would not be right to advocate openly; it may be right to teach openly to one set of persons what it would be wrong to teach to others; it may be conceivably right to do, if it can be done with comparative secrecy, what it would be wrong to do in the face of the world. . . . These conclusions are all of a paradoxical character: there is no doubt that the moral consciousness of a plain man broadly repudiates the general notion of an esoteric morality, differing from that popularly taught; and it would be commonly agreed that an action which would be bad if done openly is not rendered good by secrecy. We may observe, however, that there are strong utilitarian reasons for maintaining generally this latter common opinion. . . . Thus the Utilitarian conclusion, carefully stated, would seem to be this; that the opinion that secrecy may render an action right which would not otherwise be so should itself be kept comparatively secret; and similarly it seems expedient that the doctrine that esoteric morality is expedient should itself be kept esoteric. Or if this concealment be difficult to maintain, it may be desirable that Common Sense should repudiate the doctrines which it is expedient to confine to an enlightened few. And thus, a Utilitarian may reasonably desire, on Utilitarian principles, that some of his conclusions should be rejected by mankind generally; or even that the vulgar should keep aloof from his system as a whole. . . .

H. SIDGWICK, *THE METHODS OF ETHICS* 489-90 (7th ed. 1907). Sidgwick apparently did not believe that the closed and stratified society this argument contemplates is objectionable; the fact that we think so may have something to do with being vulgar.

95. See p. 21 (describing Brandeis as "problem-solver"). For a discussion of the Justices' belief in the power of scientific reason over judicial superstition, see A. BICKEL, *THE SUPREME COURT AND*

volved in this position are three: that history is the unfolding of processes through "homogeneous, empty time"⁹⁶ so that gradual historical progress is achievable,⁹⁷ that good government is a kind of *techné* in which experts utilize their knowledge and foresight to solve public problems in such a way that the results can be objectively confirmed by the "verdict of history,"⁹⁸ and that the populist goals so central to American political life can be achieved by talented and well-meaning administrators acting from above. These three assumptions—the belief in progress, in expertise, and in benevolent paternalism—are the components of American liberalism, virtually unchanged from the Progressive era, through the New Deal, to the present.⁹⁹ I shall call this view technocratic reformism. It is, I believe, the view of Brandeis and Frankfurter.

Frankfurter, Murphy tells us, was first drawn to Brandeis when, in 1905, Frankfurter heard him address the Harvard Ethical Society on *The Opportunity in the Law*: "Brandeis told the next generation of elite lawyers to consider the advantages of working for the people, rather than for rich corporations. Only by struggling against economic irregularities, he said, could their legal training be used to lessen the prospect of class warfare."¹⁰⁰ The reference to class war is a bit startling to contemporary ears but was something of a commonplace in the early years of the century. It helps place the origins of the Justices' technocratic reformism in the belief that capitalism could be saved only if the elite worked to give it a human face. Technocratic reformism was born in a rejection of socialism on the left and Social Darwinism—"Mr. Herbert Spencer's Social Statics"—on the right.¹⁰¹ Both Social Darwinism and the mechanistic socialism of the era shared the same nineteenth century premise that human affairs are governed by quasi-natural historic forces, generating progress by invisible hand mechanisms. Technocratic reformers also believe in progress but not in invisible hands. Frankfurter wrote: "There is no inevitability in history

THE IDEAL OF PROGRESS 14-40 (1970); P. KURLAND, *supra* note 79, at 1.

96. W. BENJAMIN, *Theses on the Philosophy of History*, ILLUMINATIONS 261 (1969) (Thesis XIV).

97. For a deep criticism of the concept of progress in history, see H. ARENDT, *THE LIFE OF THE MIND: WILLING* 152-59 (1978); W. BENJAMIN, *supra* note 96, at 261.

98. This I described above as the view that the wisdom of foresight is simply the wisdom of hindsight minus a few years. For a criticism of this view of government, see H. ARENDT, *THE HUMAN CONDITION* 220-30 (1958); J. HABERMAS, *The Classical Doctrine of Politics in Relation to Social Philosophy*, in *THEORY AND PRACTICE* 41 (1973).

99. This set of views, it should be noted, has very little to do with classical liberalism as a political theory. The New Dealers wanted a label for their program. They rejected "progressivism" because it suggested a return to outmoded policies, and "socialism" because of its un-American connotations. Finally, they settled on "liberalism" to rob their conservative opponents of one of their own rhetorical identifications—and it has been "liberalism" ever since. See Rotunda, *The "Liberal" Label: Roosevelt's Capture of a Symbol*, 17 *PUB. POL'Y* 377 (1968).

100. P. 35.

101. A. BICKEL, *supra* note 95, at 15-16.

except as men make it,"¹⁰² and this modification of the progressivist assumption lies at the root of his and Brandeis's belief in expertise.¹⁰³

This is surely not the place to explore the defects of the beliefs in progress and expertise, which have in any event been lambasted by social theorists since the 1930's. For the problems we have been considering arise from the third assumption, that populist goals may be achieved by proxy—by the best and the brightest working from above. The problem is that this assumption is drastically at odds with the democratic temper of American politics (I am tempted to say, of *any* legitimate politics). The benevolent paternalist can solve this problem only by operating behind the scenes, by hypocritically invoking democratic ideals on all occasions (as Shklar tells the story), by lobbying the elite of Ins on behalf of the Outs who must not know what is happening.¹⁰⁴

Professor Murphy worries about Supreme Court improprieties in the post-Watergate era.¹⁰⁵ Via Watergate, the Nixon administration has come to symbolize covert "unethical" actions by those in high office—actions that usurp other governmental powers and violate public trust.¹⁰⁶ Nixon has led us to mistrust the personal ethics of high public officials.

If my argument is sound, the real problem with the political activities of Brandeis and Frankfurter is not that they violated "judicial ethics." It is rather that their elitist behavior, with its inevitable hypocrisies, is associated with technocratic reformism. And, if Watergate symbolizes our loss of trust in the ethics of public officials, two other events mark the end of our seventy-year-old faith in technocratic reform.

The first, of course, is the Vietnam War, in which—particularly after the publication of the Pentagon Papers—it became manifest that the best and the brightest could not be counted on for either common sense or elementary morality. Indeed, since the Pentagon Papers themselves revealed that the experts were deliberating not about questions of policy, but about "image-making" and hoodwinking the public, the Papers amount to

102. Quoted in P. KURLAND, *supra* note 79, at 1.

103. Recall the previously cited letter Frankfurter wrote about history's "anonymous propelling forces" and the "few individuals [who] may make the difference." *Supra* pp. 1693-94.

104. P. KURLAND, *supra* note 79, at 1 ("When 'elite' became a word of opprobrium, we entered a world totally foreign to Frankfurter's ethos."). The problem is that the word "elite" has always been a word of opprobrium in America. Brandeis's ethos, as well, directed him to solve problems as he saw fit without much concern for the levelling niceties of received opinion—this, indeed, was the gravamen of the charges surrounding his private practice as "lawyer for the situation," which contributed in part to his difficulties in being confirmed to the Supreme Bench. See Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683 (1965).

105. Pp. 13-15, 344.

106. For a discussion of Nixon's violations of the separation of powers, see Quint, *The Separation of Powers Under Nixon: Reflections on Constitutional Liberties and the Rule of Law*, 1981 DUKE L.J. 1.

a *reductio ad absurdum* of technocratic hypocrisy.¹⁰⁷

The second event was the beginning of the Black Power movement, which brought with it the expulsion of well-educated, well-meaning whites from the forefront of civil rights activities. Nothing symbolized more strikingly that reform could no longer flow unproblematically from above, that benevolent paternalism was now off the agenda. This event, of course, was felt immediately only on the American left, which drew from it conclusions about the inadequacy of liberalism.¹⁰⁸ Its repercussions were wider, however, for it spelled the beginning of the end for the old New Deal coalition whose support had made technocratic reformism possible.¹⁰⁹ To the extent that the old liberal agenda was a humane one—and it would wrong Brandeis and Frankfurter to suggest that their vision was not humane—its wreck is to be regretted. To the extent that the agenda dried up democracy-from-below and treated the old coalition as the British administrators treated their Hindus, it is not.

Former Treasury Secretary Henry Morgenthau, Professor Murphy tells us, once referred to Frankfurter as “Mr. Fixer.”¹¹⁰ That, in a word, is the substance of Murphy’s criticism of both Frankfurter and Brandeis. If my argument is correct, the real criticism is not of their ethics, but of their boundless faith in expertise to solve the public’s problems. It is not a criticism of Mr. Fixer, but of the all-purpose technological wizard—Mr. Fixit.

Conclusion: Mr. Fixit and Mr. Clean

That brings us to the present. No consideration of *The Brandeis/Frankfurter Connection* would be complete without taking note of the fact that its publication was itself a political event.

The federal judiciary is currently undergoing one of the most severe attacks in its history, as the Right, whose resurgence followed upon the breakup of the old New Deal coalition, seeks to strip the judiciary of the ability to erect roadblocks to its program. The key villains identified by this attack are “activist” judges. The substance of the charge is, politically speaking, beside the point, because in essence it is a complaint about federal judges using their power to enact a liberal agenda.

In this climate, Professor Murphy’s book fuels the belief that liberals who attain the Federal bench simply cannot keep their hands off. It does

107. See H. ARENDT, *Lying in Politics: Reflections on the Pentagon Papers*, in *CRISES OF THE REPUBLIC* 3 (1972).

108. See K. SALE, SDS 276-77 (1973).

109. See Lasch, *Liberalism in Retreat*, in *LIBERALISM RECONSIDERED* (D. MacLean & C. Mills eds. forthcoming); Skocpol, *The Legacies of New Deal Liberalism*, in *id.*

110. P. 291.

Mr. Fixit

not matter that the Brandeis/Frankfurter activities were extrajudicial, nor that both Justices were proponents of judicial self-restraint. The *New York Times* editorial begins: "These are difficult days for those who like their heroes liberal, wise and ethical."¹¹¹ Echoing the Caesar's wife argument, the *Times* continues, "[o]ur courts need all the moral authority they can muster to ward off today's Congressional attacks."¹¹² Not Mr. Fixit, but Mr. Clean, is needed.

There is no evidence in his book that Professor Murphy objects to the *substance* of Brandeis's and Frankfurter's political agenda, and it is thus not a little ironic that his scholarship has aroused interest primarily because of its resonance with their adversaries' suspicions. Yet it is primarily Murphy's discussion of events in terms of an "ethics" for which no real justification is provided that allows this use of his findings. I have suggested that nothing in principle is wrong with Supreme Court Justices laying their political principles on the table and arguing for them, out in the open, in the chambers of government. For the opposite of an overt political agenda is not no agenda but rather a hidden one obvious only to astute Court-watchers and other Ins. A politically expressive judge, of course, is no Mr. Clean, but without the veil of hypocrisy, Mr. Fixit disappears as well. We are, I suspect, well quit of both.

111. *Judging Judges, and History*, *supra* note 2. The rest of the editorial speaks almost entirely of Brandeis; presumably, the fact that Frankfurter is not remembered as a "liberal" Justice would interfere with the heroic simplicity of the editorial analysis.

112. *Id.*

Off the Bench and Into the Mire: Judging Extrajudicial Behavior

The Brandeis/Frankfurter Connection. By Bruce Allen Murphy.
New York: Oxford University Press, 1982. Pp. x, 473. \$18.95.

Harlon L. Dalton†

Bruce Allen Murphy's book about the relationship between Louis D. Brandeis and Felix Frankfurter and about their secret political activities bears roughly the same relationship to penetrating legal biography as does a coloring book to a pointillistic painting. Coloring book "art" is created by connecting dots to form an image and filling in that image with color. Although pointillistic art also uses dots and color, the dots actually constitute, rather than merely outline, the sought after image, and color actually determines, rather than merely fills in, what is seen.

In *The Brandeis/Frankfurter Connection*,¹ the author uses relatively few dots and purposefully locates them on the canvas. He then traces a bold outline—Brandeis is Gepetto; Frankfurter, his marionette; money serves as the strings; the performance is designed to circumvent ethical norms. That outline permanently frames what is viewed and how it is to be analyzed. To be sure, Murphy, with the reader's help, fills in the outline with color— anecdotes, thankfully brief snatches of bad psychohistory, a description of the layout of Brandeis's chambers—but ultimately such color proves irrelevant, or at any rate nonessential, to the basic image presented.

The goal of the coloring book is to entertain, to involve, to foster a sense of creativity (albeit a false one), and to lead to the discovery of a not very hidden image. A mandatory feature of the genre is that the buyer joins in the artistic enterprise. In so doing the consumer also buys into the "art-work," and thus loses the capacity to criticize the principal artist's vision. This vision, however, turns out to be not visionary at all but rather a routine rendering of a stock pattern or image. In Murphy's book, the reader is led on just such a course—to connect the dots and fill in the image—in part by the author's persistent urgings, but in larger measure

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1. B. MURPHY, *THE BRANDEIS/FRANKFURTER CONNECTION* (1982) [hereinafter cited by page number only].

Extrajudicial Behavior

by Murphy's slightly more subtle appeals to the mistrust and fear of officialdom that our recent history seems to justify.² The impressionable reader loses the capacity to see the joint enterprise for what, and how little, it truly is.

A large part of our lay appreciation of pointillistic art comes from trying to figure out how and why it works. We approach the canvas to explore the dabs of paint, then recede to a proper viewing distance to remind ourselves of the artist's overall conception. We may feel a bit manipulated—up close it is just dots—but we accept the work on its own terms as art, not because the artist has co-opted us, but in large part because he has hidden nothing from us and indeed has fairly invited our close inspection of the medium as well as the message. The last thing Bruce Allen Murphy invites us to do is to look critically at his particular form of historical rendering, or to cast a critical eye at the subject matter of his book. And perhaps for good reason, because the former is problematic and disappointing, and the latter infinitely more complicated than Murphy's work would lead us to believe.

Two themes dominate the book: that first Brandeis, then Frankfurter, engaged in injudicious political activity while on the bench, and that during the twenty-plus years in which Brandeis was a Justice and Frankfurter was not, the Harvard professor served as Brandeis's "paid political lobbyist and lieutenant."³ In Part I, I would like to focus on the second theme, the "connection" between the two men that, together with a fair amount of huckstering, has won for the book considerable attention in the press.⁴ In Part II, which is devoted to the ethical issues flagged by the book, I will return to the first theme.

I. The Justice and His "Lieutenant"

The principal flaw in Murphy's presentation is that he does not prove, nor even fail in a valiant attempt to prove, that the much publicized connection existed in anything like the form he suggests. It is hardly news that Brandeis and Frankfurter had a close and enduring personal and professional relationship during the period in question. Nor is it a revelation, despite the ballyhoo in and about the book, that Brandeis supplemented Frankfurter's Harvard salary for two decades.⁵ On the other

2. Murphy begins *The Brandeis/Frankfurter Connection* by recounting the classically tragic tale of Abe Fortas, thus making perfectly clear the biases that are to guide us as we move from dot to dot, from incident to incident. Pp. 3-5.

3. P. 10.

4. Robert Cover develops this latter point in *The Framing of Justice Brandeis*, *NEW REPUBLIC*, May 5, 1982, at 17.

5. Murphy admits as much in a footnote. P. 41 n.80.

hand, the suggestion that there was something venal in all this—a suggestion Murphy implicitly but unconvincingly disavows in his concluding chapter—is new and startling. It is also highly irresponsible, absent a respectable grounding in fact.

What was the money for? In a November, 1916 letter establishing the financial arrangement, Brandeis wrote:

My dear Felix: You have had considerable expense for travelling, telephoning and similar expenses in public matters undertaken at my request or following up my suggestions and will doubtless have more in the future no doubt. These expenses should, of course, be borne by me. I am sending [a] check for \$250 on this account. Let me know when it is exhausted or if it has already been.⁶

After Frankfurter returned the check, Brandeis tendered it once again, saying, in part:

In essence this is nothing different than your taking travelling and incidental expenses from the Consumers League or the New Republic—which I trust you do. You are giving your very valuable time and that is quite enough. It can make no difference that the subject matter in connection with which the expense is incurred is more definite in one case than in the other. I ought to feel free to make suggestions to you, although they involve some incidental expense. And you should feel free to incur expense in the public interest. So I am returning the check.⁷

Taken at face value, these letters are subject to a range of interpretations, most of them reasonably benign. They reflect a wealthy man's concern that his decidedly poorer comrade-in-arms is bearing the financial brunt of worthwhile activities of mutual interest. Simply put, Brandeis, a millionaire philanthropist, found in the similarly progressive Frankfurter a worthy cause. But, says Murphy:

What makes this particular contribution to Felix Frankfurter so unusual is that it was designed to free Brandeis from the shackles of remaining nonpolitical while on the bench and to permit him to engage freely in political affairs simply by sending to Frankfurter a letter filled with 'suggestions' for various programs.⁸

Such letters indeed followed, although Murphy greatly overstates the

6. P. 40.

7. *Id.*

8. P. 41.

Extrajudicial Behavior

specificity and programmatic nature of the suggestions they contained. Whether and to what extent Brandeis thereby wielded political influence and the propriety of so doing are important questions. Murphy deserves credit for making it possible for us to think about them; however, his focus on Brandeis's payments to Frankfurter taints and distorts that inquiry. As the first letter quoted above makes evident, Brandeis made "suggestions" to Frankfurter even before a financial arrangement existed, suggestions Frankfurter apparently "follow[ed] up." The simple truth is that Brandeis did not have to pay Frankfurter, or anyone else for that matter, to listen to or pursue his ideas. He was an extraordinary and extraordinarily respected social thinker who inspired awe in many and commanded the attention of all. Frankfurter, for his part, was by temperament more likely to give of his considerable talent than to sell it; indeed, that is why Brandeis, if he is to be believed, shared the wealth.

Nevertheless, we are asked to conclude that Frankfurter somehow was bought. Murphy does supply what could be a motive. In his rendering, however, it is *the* motive, and it doubles as specific intent as well. We are told that in October, 1916, scarcely four months after taking the oath of office,

Brandeis *realized* that it would be impossible for him to continue . . . [political] abstinence. The problem was how to remain influential in politics without violating any standards of judicial propriety. . . . Brandeis *decided* that to act freely in the political sphere he would need a lieutenant, one who would be his "eyes and ears" and one who could help implement his programs. . . . Fortunately for the justice, there was a friend and ally uniquely qualified for the job in every way, . . . Felix Frankfurter.⁹

To be sure, this describes a possible *consequence* of the close relationship between the Justice and the professor. Murphy's transformation of that consequence into an animating force is stunning. Using verbs that imply purposiveness,¹⁰ the author enters into the subject's head without having to rely on expressions or manifestations of the latter's actual mental state. Similarly, he utilizes nouns that characterize and caricature rather than describe.¹¹

Murphy also elects to anchor his argument in assertions rather than in solid (or even debatable) proof. For example, we are told that "[a]s the expense of the lobbying effort rose, so did the amount of money sent by

9. P. 33 (emphasis added).

10. See *id.* Another such verb is "orchestrated." See p. 12.

11. For example, having said that Brandeis needed a "lieutenant," Murphy uses that term throughout the book to refer to Frankfurter. See, e.g., pp. 33, 89.

Brandeis for these purposes. In mid-1917 he placed \$1000 in the special account, and then replenished that amount in each of the next seven years."¹² Yet Murphy offers no proof whatsoever that in 1917 Frankfurter incurred greater lobbying expenses than in 1916 (when Brandeis gave him only \$250) or that such expenses rose, fell, or remained constant over the next seven years. Murphy continues:

By this time, Frankfurter quite naturally came to depend on the payments. *More than this, the financial aspects of his relationship with Brandeis led Frankfurter to view himself as an employee being compensated for services rendered.* Accordingly, when the need arose, he had no qualms about asking the justice for a 'raise' in 1925.¹³

The italicized sentence is a naked assertion, and a critical one at that, unsupported by anything that precedes or follows. As for the concluding sentence, Frankfurter's painfully awkward letter advising Brandeis "after considerable self-debate" of his need for \$1500 per year to cover therapy for his wife (she had suffered a nervous breakdown)¹⁴ is scarcely susceptible to so harsh or mercenary a reading.

When shorn of the corrupting influence of loose talk about money, the connection between Brandeis and Frankfurter is endlessly fascinating. Theirs is a story of professional and political kinship, paternal and filial bonding, complex and occasionally conflicting loyalties, and mutual identification and admiration, the latter doubtless a rare and comforting experience for persons of such supreme talent and ego. Unfortunately, Murphy plumbs little of this, not only because he has taken too much to heart Deep Throat's dictum to "follow the money," but also because he seems not to appreciate the complexity of the human psyche. Too often Brandeis and Frankfurter are painted in two dimensions when three or four are necessary for minimal comprehension.¹⁵ This failing is especially acute in a book that rests so heavily on subjective desires and motivations.

Finally, even if we understood perfectly what made our heroes tick and what they meant to each other, there would remain the question of what they did together. Regardless of their motivations and purposes, to what extent did Frankfurter in effect serve as Brandeis's surrogate and in so

12. P. 41.

13. *Id.* (emphasis added).

14. P. 42.

15. Pp. 249-54. In a long passage intended to account for "the different approaches of Brandeis and Frankfurter toward extrajudicial politics," p. 249, Murphy demonstrates that he can flesh out his subjects, thus making his general failure to do so all the more galling. That failure not only leaves the reader uncertain as to what the protagonists are really like; it also restricts one's capacity to assess Murphy's characterizations of their motives and to develop alternative explanations for their conduct.

doing free the latter “from the shackles of remaining nonpolitical while on the bench?”¹⁶ In frustration, I report that it is hard to say. Some answers are easy. For example, Brandeis never used Frankfurter to influence the outcome of pending cases; these they never discussed. Other matters, however, are more problematic. Murphy asserts, with seeming support, that on occasion Brandeis engaged in legislative drafting through the medium of Frankfurter and others. Professor Cover’s scholarly examination of Murphy’s sources, however, casts considerable doubt on the author’s conclusions (and, more generally, on his reliability).¹⁷ Similarly, though Brandeis’s views on the merits of pending legislation were sometimes passed along to receptive ears, Murphy’s insistence on discussing such “lobbying” in the most hyperbolic terms makes it difficult to determine its true nature and magnitude. It is probably fair to say that Brandeis delighted in suggesting to Frankfurter topics deserving scholarly exploration and that he was not averse to citing articles he helped inspire. Murphy’s insistence on labeling Brandeis “virtually a collaborator”¹⁸ in such scholarship, however, tends to becloud and causes one to wonder how steep is the author’s slant.

Periodically, Murphy seems to attempt to correct some of his excesses. Thus, despite suggesting throughout his work that Frankfurter was little more than Brandeis’s intellectual “gofer,” Murphy concedes that “the Harvard professor cannot be viewed solely as Brandeis’s agent, in that he became involved in a wide circle of issues and *causes célèbres* on his own and in which the justice expressed no strong interest.”¹⁹ Similarly, notwithstanding his characterization of Brandeis as the self-conscious designer of a mechanism to circumvent the ethical strictures of his judicial role, Murphy acknowledges that “[m]ore than just being concerned about public appearances . . . Brandeis was genuinely worried about conflicts of interest.”²⁰ And in presenting in appendix form a “survey of justices in politics from 1789 to 1916,” a study that shows his subjects to be more the rule than the exception, Murphy gives the lie to his claim in the introductory chapter that the extrajudicial behavior of Brandeis and Frankfurter surpassed in range and extent “similar endeavors by all but a handful of Supreme Court justices throughout the Court’s history.”²¹ This backing and filling suggests that buried beneath this sensationalized tract there is a more than competent and better than decent historian yearning to breathe free. One has the sense that were it not for the prior success of Bernstein-

16. P. 41.

17. Cover, *supra* note 4, at 18-19.

18. P. 84.

19. P. 43.

20. *Id.*

21. P. 9.

Woodward-Armstrong, *The Brandeis/Frankfurter Connection* would be a much less flawed book.

II. Extrajudicial Activity and Judicial Ethics

In taking on two of the giants of our industry, at least one of whom virtually has been canonized, Murphy may well have provided an impetus for their admirers to push hard on received wisdom about judicial ethics. If so, he will have succeeded in focusing attention on deeply disturbing issues of governance that we in the legal profession are loath to address when left to our own devices.

A dozen years ago, the Court experienced a series of closely-spaced shocks: the Senate's refusal to elevate Abe Fortas to the position of Chief Justice, in large part because of his continuing role as Lyndon Johnson's political adviser; Fortas's resignation in the face of revelations about his financial and other ties to the Wolfson Foundation; the threat to impeach Justice Douglas, fueled by his financial arrangements with the Parvin Foundation; and the fate of nominees Haynsworth and Carswell. In response, the bench and bar lurched into action, largely to forestall legislative oversight or reform, and produced inter alia a new Code of Judicial Conduct,²² the first major revision since the original Canons were adopted in 1924. To be sure, that spate of activity was reflected in the legal literature, but the resultant writings tended merely to evaluate pending proposals and suggest alternative means for responding to the crisis rather than to reconceptualize basic problems. Moreover, even promising beginnings became unfulfilled ends as the need to "do something" seemed to pass.

A. *How to Think About Judicial Ethics*

Perhaps a useful starting point is to ask why we even care about judicial ethics. Which ideals do we seek to achieve, which specters to avoid? What kind of a judiciary are we anxious to promote and safeguard? The primary answer—that the judiciary should be independent of other institutions, interests, and persons—is no less profound because of its obviousness and generality. As an ideal, it is enshrined in the first Canon of the Code²³ adopted in 1972 and is rooted in the functions we ask our courts to perform—as arbiters of private disputes, rationalizers of public controversies, enunciators of legal principles, elaborators of public values, and guardians against the occasional majoritarian tyranny of coordinate branches of government.

When we move beyond judicial independence, it is almost easier to de-

22. CODE OF JUDICIAL CONDUCT (1972) [hereinafter cited as CODE].

23. *Id.* Canon 1 ("A Judge should uphold the integrity and independence of the judiciary.").

Extrajudicial Behavior

fine our concerns negatively. We fear that judicial impropriety tarnishes a court's image and limits its ability to command adherence to its pronouncements. We worry about whether judges who engage in political and other extrajudicial activities will shirk their judicial tasks and foster intracourt tensions that inhibit open and honest debate and, where appropriate, consensus formation. We suspect that when judges are identified with particular causes and concerns, litigants will cater to those predilections and preferences. Worse, we sense that political activism by judges may tempt litigants to seek favors from their erstwhile political confederates.

Once we have elaborated a core of concerns, we can begin to ask ourselves what kinds of extrajudicial activities ought to trigger alarms. But lest the above list be thought complete, or even satisfactorily illustrative, I hasten to add that there are non-ethical judicial ideals we might espouse that should affect what we view as ethically permissible. For example, we might wish our judges to be bold, or creative, or perhaps politically savvy. We might want them to be worldly, at least to the point of understanding the contexts in which real-world controversies arise, so that they might accurately gauge the efficacy of alternative remedies. And we might prefer that judges be thoughtful—literally full of thought—even to the point of having anticipated and worked through many of the issues likely to come before them. Insofar as these various traits are desirable and are linked to continued contact with the world outside the judicial cloister, it is folly to settle on a conception of judicial ethics that does not nurture them.

Whatever the elements of the value matrix against which we would choose to measure extrajudicial conduct, certain activities would surely be judged plainly wrong. Judges ought not engage in partisan politics, save to the limited extent necessary to further their own election. Nor should judges function as political advisers; they should not take on tasks that are essentially executive in character or involve themselves directly in the legislative process.²⁴ Judges should not discuss with outsiders cases pending before the court or decide cases in which they have an interest, or have previously been involved, or the merits of which they have prejudged. With one possible exception,²⁵ these activities are prohibited by the Code of Judicial Conduct. But when it comes to the tougher issues, many of which are spotlighted by the activities of Brandeis and Frankfurter, the Code is woefully deficient.

24. See *infra* p. 1722.

25. See *infra* p. 1721.

B. *Judicial Participation in Public Debate*

To what extent may judges engage in public debate on controversies that have not crystallized into a case? Obviously, the greater the likelihood that a case will ensue, the more nervous extrajudicial comment makes us. But if we assume a set of circumstances somewhere in the middle, the question does not admit of an easy answer.²⁶ Some commentators have suggested that when controversies are controversial, judges should remain silent lest they embroil the court and diminish respect for it.²⁷ Although this proposition seems responsive to some of the values touched on above, it does not necessarily deserve our ardent embrace. Certainly few would argue that courts ought not decide actual cases just because they involve controversial issues.²⁸ And although a nice distinction can be made between looking for trouble and dealing with it when it is placed at one's door, that distinction begs the question of whether it is sometimes appropriate for judges to involve themselves in out-of-court controversies. It may well be that when public debate is fractious and issues hopelessly distorted, and when people and institutions dependent on the electorate find the pull toward demagoguery irresistible, politically sheltered judges ought to step onto the public scene and give reason a voice.

Judges, of course, often address public controversies in the classroom and in law journals.²⁹ This differs from the conduct just discussed only in form and forum. Moreover, when a judge writes an article in hopes of bringing harmony to a troubled area of the law, the parallel to intervention in tangled public debate is reasonably close.³⁰ To the extent that we

26. Of the public issues to which Brandeis and Frankfurter devoted enormous energy, the one Murphy treats most extensively and sympathetically, Zionism, was not likely to come before the Court. Other controversies into which the Justices waded, however, including the evil of corporate bigness against which Brandeis frequently inveighed, did, to no one's surprise, come before the Supreme Court.

27. Typically the suggestion is implicit. See McKay, *The Judiciary and Nonjudicial Activities*, 35 LAW & CONTEMP. PROBS. 9, 19, 25 (1970) (concluding that judges should refrain from nonjudicial activities that "impair the dignity and prestige of the judicial office," and that judicial service on public commissions dealing with "highly visible and sensitive" issues inevitably "diminish[es] the prestige of the Court," but failing to consider whether public commentary on highly visible and sensitive issues similarly diminishes prestige). But see Note, *Extrajudicial Activity of Supreme Court Justices*, 22 STAN. L. REV. 587, 601-03 (1970) (explicitly opposing public commentary and proposing "a monastic life for judges").

28. Lon Fuller is one of the few to advocate such a course. In *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-95 (1978), he asserts that certain kinds of "polycentric" cases, which he likens to spider webs because of the interconnectedness of many parties and issues, are inherently unsuited to adjudication.

29. The Code provides in pertinent part: "[A judge] may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice." CODE, *supra* note 22, Canon 4(A). Similarly, "[a] judge may write, lecture, teach, and speak on non-legal subjects . . . if such avocational activities do not detract from the dignity of his office or interfere with the performance of his judicial duties." *Id.* Canon 5(A).

30. In a thoughtful and candid treatment of this subject, Louisiana Supreme Court (now Fifth Circuit) Judge Albert Tate, Jr., admits penning an article in an attempt to lead a recalcitrant bar and

Extrajudicial Behavior

view the two activities differently, I wonder how successfully the distinction can be justified in terms of values served and genuine risks avoided. Pushing the point a step further, should a distinction be made between writings (or lectures or speeches) intended to clarify the law and writings intended to undermine received wisdom, especially when the received wisdom is traceable to decisions rendered by one's own court?³¹ And does the answer turn in part on whether the assault is oblique or frontal, on the quality of the reasoning or the merit of the result?

C. *Judicial Participation in Issue-Oriented Politics*

A similarly hard issue is whether judges should be free to engage in issue-oriented political activities, in, say, the struggle for civil rights, human rights, or environmental integrity.³² Having recently strolled along the Chesapeake & Ohio Canal, I confess great warmth toward Justice Douglas for his prodigious efforts in preserving the towpath. It may be that his decisions in environmental cases were affected by his direct involvement in the issue, but so too, in reverse, were the decisions of those of his brethren whose direct environmental experience was limited to mowing the lawn. Canon 5(A) encourages judges to engage in "avocational" activities such as "the arts, sports, and other social and recreational activities" so long as they neither "detract from the dignity of . . . [the judicial] office [n]or interfere with the performance . . . of [their] judicial duties."³³ The accompanying commentary asserts that "[c]omplete separation of a judge from extrajudicial activities is neither possible nor wise; he should not become isolated from the society in which he lives."³⁴ If these are wise words, should they not apply as well to matters that matter, to the things we call political rather than avocational?

D. *Judges as Mentors*

A third troublesome issue, one that is often insensitively handled in *The*

oblivious bench to accept certain rule changes. Tate, *The Propriety of Off-Bench Judicial Writing or Speaking on Legal or Quasi-Legal Issues*, 1978 J. LEGAL PROF. 17.

31. Murphy accuses Brandeis of indirectly doing the latter by urging Frankfurter to write a law review article paralleling his dissent in *Olmstead v. United States*, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting). See p. 88.

32. It is difficult to tell where the Code deals with this question. Canon 5, which deals with extrajudicial activities, does not address issue-oriented politics. Canon 7 states: "A judge should refrain from political activity inappropriate to his office." Its text seems to focus on partisan politics but includes a general proscription on political activity: "A judge should not engage in any . . . political activity [other than the minimum needed to serve as a delegate to a state constitutional convention or for election to judicial office] except on behalf of measures to improve the law, the legal system, or the administration of justice." This proscription seems broad enough to prohibit involvement in issue-oriented politics as well. CODE, *supra* note 22, Canons 5, 7, 7(A)(4).

33. CODE, *supra* note 22, Canon 5(A).

34. *Id.* commentary.

Brandeis/Frankfurter Connection, is the serious potential for abuse inherent in the special relationship between judges and former law clerks, between professors and favorite students. Murphy is aware that such relationships can be heartfelt, broadly reciprocal, multi-dimensional, and dynamic.³⁵ However, in his eagerness to tie Justices Brandeis and Frankfurter to the subsequent political activities of their protégés, Murphy repeatedly characterizes the least effort by one of the Justices to further the career of a former clerk or student as a cynical attempt to create a network of loyal disciples, thereby extending his political influence. Political statements and actions taken by former clerks or students that are consistent with what Murphy takes to be the wishes or interests of their mentors are said to reflect continued enthrallment with the Justices and their political views.³⁶ Yet the professional parent-child relationship, like the personal one, is infinitely richer and more complicated than Murphy's account would suggest. Children grow up and, in the process, even as they replicate their elders, proclaim and exhibit independence; parents respond in a variety of ways, but the wisest among them adjust to such changes and enter into a multiple-bonded relationship in which similarities and differences, approval and disapproval, all wash together.

I take it that none of us would prohibit judges from providing career advice and letters of recommendation for former clerks. Nor would we bar them from keeping abreast of the activities of these subordinates-turned-peers. Yet, unless a judge regularly selects clerks who remain total ciphers—a prospect that would cause us to wonder about the judge or the quality of her judicial output—there is a substantial risk that keeping up with them will cause the judge to interact with policymakers, political actors, and potential litigants. That risk, it seems to me, must be borne. To be sure, there is a line between genuine mentoring (or peer friendships for that matter) and influence-peddling, but there is no good reason to draw the line hard against the formation and continuation of meaningful relationships.³⁷

35. See p. 77.

36. See, e.g., pp. 112-14, 117-20, 220-21, 234-35, 272.

37. The Code speaks to this problem at a level of generality that is not especially helpful except to convey a tone:

A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

CODE, *supra* note 22, Canon 2(B).

E. *Reliance on Outside Legal Experts*

Judges, of course, regularly benefit from the professional development of former law clerks. It is not unheard of for a judge to appoint a former clerk as counsel for an indigent in a proceeding in which there is no provision for state- or loser-paid attorney's fees.³⁸ It is also not unheard of for a judge to consult with a former clerk on a point of law, particularly if the clerk has entered academe. Murphy takes the Justices to task for using former clerks as resources, though the expertise sought typically was political rather than legal.³⁹ He does not, however, pinpoint the impropriety, a failing that masks what turns out to be a rather complicated ethical problem. Assuming that it would have been improper for the Justices to engage directly in political activities, it would seem at first blush that it was improper for them to do so through their former clerks. But that depends in part on why, if at all, direct political involvement by judges is bad. To the extent we scorn such involvement because it may give rise to the appearance of impropriety—the public may conclude that judges are biased, inflexible, or otherwise flawed even when objectively they are not—then subterranean activity may be quite acceptable. To the extent we view surreptitiousness as itself undesirable, however, a paradox results. It is acceptable for *X* to engage in certain activity so long as *Y* is kept ignorant of it; it is wrong for *X* to take steps to insure that *Y* will remain ignorant; therefore, it is wrong for *X* to engage in the activity. This paradox crops up, unexplored, throughout *The Brandeis/Frankfurter Connection* as Murphy criticizes Brandeis for exercising extreme discretion in pursuing extrajudicial activities and criticizes Frankfurter for not being discreet.⁴⁰ Of course there are at least two ways out of this box—to conclude that political activity by judges is inherently evil or to conclude that secrecy is acceptable. My goal here is neither to support nor to attack either escape route, but simply to point out the lurking difficulty.

The dilemma posed by Brandeis's use of Frankfurter's scholarly talents while the latter was a professor is similar. If judicial reliance on outside research or analysis involves no inherent impropriety but risks the appearance of impropriety, then so long as a judge maintains the secrecy of the link, no ethical harm is done. If we believe, however, that parties to a

38. There is, I take it, no necessary harm in this, though I would not be anxious to have a judge's former clerk as my adversary. From the former clerk's perspective, however, any possible advantage may scarcely be worth the near-paralyzing fear of disappointing the judge.

39. To be sure, some activities, legislative drafting for one, blur the distinction. With Professor Frankfurter always available, Justice Brandeis of course had no need to rely on former clerks for research assistance. The ethics of using former clerks in that capacity, however, strikes me as no different from the ethics of relying on an outside researcher with whom a judge has had no prior formal connection. See *infra* p. 1720.

40. See, e.g., pp. 10-11, 55, 343-44.

dispute should have an opportunity to test and challenge any datum that could appreciably affect a judge's decision, then secrecy is inappropriate. Whether we accept either of these propositions and, if so, how broadly we would extend them, is of course debatable. My point is simply that these issues should be debated and clearly understood, if not resolved, before we attempt to judge the conduct of Brandeis and Frankfurter or, more importantly, to fix standards for the future.

In considering whether resort to outside legal experts is inherently improper, one should draw a distinction between general consultation and that connected with an actual case. The former is difficult to distinguish from acceptable and indeed desirable continuing professional education, as when a judge attends a judicial institute. A further distinction should be drawn between case-specific consultations in which the expert is told or can determine the identity of the case and/or the parties to it, and consultations that are blind. In the latter, there is little risk that the expert will be influenced by personal interests or be tempted to exploit confidential information. But even in such circumstances, whether the *judge* is likely to be unduly, or perhaps even duly, influenced by the expert is a key concern. Of course we do not worry about whether judges will be mesmerized by Wigmore, but perhaps that is because litigants can fairly anticipate that possibility and have full access to his treatise. The argument for allowing resort to live legal experts is in part premised on the notion that a judge, even in isolation from contending adversaries, is equipped to evaluate the expert's offerings. On the other hand, while it is true that judges and legal scholars share a common language and a general framework, the very fact that a judge has chosen to reach out casts some doubt on her capacity to sort out independently the matter at issue.

The proposition that disputants should have an opportunity to challenge every possible determinant of their case is similarly thorny. Quite obviously we do not permit counsel to cross-examine a judge's law clerks or professional siblings to determine if one of them has led the judge astray. Yet there is much force, some of it of constitutional origin, in the notion that litigants have a right to meet arguments marshaled against them. Even from the perspective of the bench, one might argue that subjecting expert legal opinion to the adversary process will improve the court's ultimate product. That alone, however, would not justify a rule banning *ex parte* contact with outside scholars since, even absent such a rule, a judge could give the parties notice and an opportunity to be heard.⁴¹

41. The difficulty of these issues is reflected in the fact that a special committee of the Association of American Law Schools, appointed to review the proposed Code, divided sharply over a draft provision prohibiting *ex parte* resort to legal experts. See Weckstein, *Introductory Observations on the*

F. *The Code's Distinction Between Extrajudicial and Quasi-Judicial Activity*

This brief survey of some of the ethical issues raised by *The Brandeis/Frankfurter Connection* suggests a number of problems deserving scholarly attention. In my view, any attempt to parse them should take into account the Code of Judicial Conduct, not because it adequately deals with most of the questions worth pursuing, but because it draws a fundamental distinction that radically, and I think erroneously, frames how lawyers think about such questions.

In essence, the Code distinguishes "extra-judicial" and "quasi-judicial" activities, condemning the former while encouraging the latter. Thus, Canon 5 prohibits a judge from serving as a fiduciary (except on behalf of a family member), from acting as an arbitrator or mediator, and from practicing law or accepting governmental appointments "on matters other than the improvement of the law, the legal system, or the administration of justice."⁴² In addition, it severely restricts financial activities and limits "civic and charitable" efforts.⁴³ On the other hand, Canon 4 permits, and in the accompanying commentary encourages, judges to speak, write, lecture, teach, appear at public hearings, make funding recommendations, and serve on boards, so long as the focus of their activity is the law, the legal system, or the administration of justice. It also permits judges to "otherwise consult with an executive or legislative body or official" on matters concerning the administration of justice.⁴⁴

The free reign thus given to quasi-judicial conduct,⁴⁵ as against extrajudicial and political activity,⁴⁶ is, it strikes me, unjustified. The assumption that participation in law-related activities is not political or does not raise the same risks as political activity is facile, if not false.⁴⁷ When the Chief

Code of Judicial Conduct, 9 SAN DIEGO L. REV. 785, 787-90 (1972). The Code as ultimately enacted by the ABA provides, in pertinent part:

A judge should . . . neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

CODE, *supra* note 22, Canon 3(A)(4).

42. CODE, *supra* note 22, Canon 5(G).

43. *Id.* Canon 5(B).

44. *Id.* Canon 4(B).

45. The term is something of a misnomer since the Code characterizes serving as an arbitrator as "extra-judicial" despite its adjudicative quality, *see id.* Canon 5(E), yet presumably treats all speeches on law-related topics, no matter how far removed from the business of courts, as "quasi-judicial." *See id.* Canon 4(A).

46. I have in mind issue-oriented political activity, which could fall either under Canon 5 (which discourages extrajudicial activities) or Canon 7(A)(4) (which prohibits most political activity). *See supra* note 32.

47. The Tentative Draft of the Code explicitly made a similar distinction in the Commentary

Justice sounds a clarion call to end the "reign of terror in American cities" caused by crime and proposes inter alia a broadening of pretrial detention and a narrowing of the availability of habeas corpus,⁴⁸ and when that call is immediately picked up by the President who appoints a task force that makes recommendations that include the Chief Justice's proposals,⁴⁹ it is difficult to separate quasi-judicial activity from politics. Similarly, were a judge to support or oppose a bill regulating or deregulating an industry, an observer would be forgiven for viewing the act in "political" rather than "legal" terms. More troubling still is the prospect of a judge of the chairperson's choice testifying before a congressional committee on the evils (or virtues) of, say, busing as a remedy in school desegregation suits. I am not suggesting that judges should not be permitted to engage in public debate on law-related topics. I merely question distinguishing law-related topics from others. It might be argued that whatever the dangers, the rewards of having learned judges address legal issues tip the balance. On many such topics, however, most judges have less to offer than is comfortable to admit. This of course would not justify gagging judges altogether, but it does suggest that when a balance is being struck, presumptive expertise ought not be given heavy weight.

Whatever the appropriate rule regarding public commentary, the Code's invitation to judges to involve themselves in executive and legislative decision-making on law-related issues poses a serious threat to the cardinal value of judicial independence. Even though the invitation does not extend, I take it, to statute drafting, particularly when the proposed statute is intended to overrule a prior court decision,⁵⁰ were a judge to couch such a proposal in terms of the administration of justice—by, for example, withdrawing from courts the power to order affirmative action in primary discrimination suits or to adjudicate claims that affirmative action plans are not being implemented—she would be free under the Code to draft and lobby away. Moreover, she could simply "otherwise consult with" a sympathetic legislator and thereby propose legislation through a back channel. To be sure, it would be improper for the judge to

accompanying Canon 3:

This Canon authorizes but does not require a judge to consult with legislative and executive bodies and officials, and to testify before legislative committees, on matters affecting judicial administration. It does not permit such consultations or appearances concerning matters other than judicial administration, *because such matters may become partisan or political.*

CANONS OF JUDICIAL ETHICS Canon 3 commentary (Tentative Draft May 1971) (emphasis added).

48. See N.Y. Times, Feb. 9, 1981, at A1, col. 4.

49. See N.Y. Times, Aug. 18, 1981, at A1, col. 4; Feb. 11, 1981, at A1, col. 5.

50. The California Judicial Commission, however, recently refused to censure a state supreme court justice for drafting and submitting to a legislative committee a state constitutional amendment banning affirmative action by state and state-supported agencies and programs. See L.A. Times, Feb. 24, 1982, § 1, at 3, col. 1.

Extrajudicial Behavior

later pass on the scope or constitutionality of the bill or amendment should it be enacted,⁵¹ but even at the proposing stage there seems to be an overlapping and intertwining of responsibilities that run contrary to the structure of our government and undermine the roles we ask the judiciary to fill. And the same is true, though admittedly to a lesser extent, of unfettered (save that it be law-related) judicial involvement in the executive's or the legislature's sphere, even when it does not rise to the level of drafting or lobbying.

Finally, in giving especially favored status to activities directed at the administration of justice, the drafters of the Code of Judicial Conduct may well have made a serious error. Here, of course, the presumption of special expertise is clearly warranted. But it is precisely when the administration of justice is at issue that judges can be expected to be least dispassionate and most self-interested. Can, for example, the views of Supreme Court Justices and circuit court judges on the prospect of a national court of appeals remain unaffected by their individual and institutional concerns about workload, job content, and status? Can judges' views on the conferral or withdrawal by legislatures of their jurisdiction ever be unalloyed? Can the Chief Justice's vigorous eleventh hour lobbying to dissuade Congress from giving bankruptcy judges anything approaching Article III status⁵² be viewed wholly on the merits? Moreover, the further we move away from matters directly affecting the courts' work, the more it is that activities designed to further the administration of justice look just like activities directed toward general law reform, which in turn shade into political activities generally. Thus, for example, a judicial call for grand jury reform is hard to distinguish, despite its better than arguable relationship to the administration of justice, from a judicial proposal to alter the Federal Communication Commission's fairness doctrine. I hasten to add that where the judiciary has a true institutional interest in the administration of justice read narrowly (or court administration read broadly), it should be able to protect that interest and express and support its views. But I tend to think that on such matters one voice is better than many and

51. Indeed, it would seem improper for a judge to sit in judgment of a statute whose passage she played any appreciable role in furthering. Murphy takes Brandeis to task for allegedly doing just that, pp. 54-55, though as Professor Cover demonstrates, *supra* note 4, at 19-20, the single example offered by Murphy rests on a severely strained reading of Brandeis's involvement. It would seem equally inappropriate for a judge to pass on a statute that she actively opposed. *But see infra* note 52 (discussing Chief Justice Burger's actions).

52. *See* Klee, *Legislative History of the New Bankruptcy Law*, 28 DE PAUL L. REV. 941, 954-57 (1979). Subsequently, the Chief Justice participated in the Court's consideration of whether the bankruptcy judges created by the statute he opposed, could, consistent with Articles I and III, conduct plenary proceedings involving claims by and against a bankrupt's estate. A plurality answered in the negative; two Justices concurred in that view when, as in the case there at bar, the collateral action involved only state law issues. The Chief Justice and two other Justices dissented. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 102 S. Ct. 2858 (1982).

a formal public channel better than an informal or private one. There is much to be said for channeling true quasi-judicial activity through judicial conferences or their equivalent, assuming they are democratic and allow for the expression and publication of minority views.

Conclusion

One cannot read *The Brandeis/Frankfurter Connection* without being struck by how amazingly accomplished both men would have been (or were, depending upon how much of Murphy's speculation and construction one credits) as social thinkers, politicians, and statesmen. I found myself repeatedly thinking that they pursued the wrong careers and then recalling that they were pretty fair Justices as well. This brings me to the concluding point: in contemplating what kinds and degrees of extrajudicial involvement are tolerable (or desirable), should we make allowances for extraordinary people? The question would be simple were we to assume that those who violate ethical rules necessarily disturb the values underlying them. But that is not so, as Murphy concedes in his concluding chapter:

My contention that Brandeis and Frankfurter wielded, in camera, enormous political influence through their extensive off-the-bench political activities does not accuse either man of deciding cases before the Supreme Court to suit his own perception of political rectitude. Ironically (but likely not coincidentally), both Brandeis and Frankfurter should properly be classified among those justices who were best able to separate their political views from their judicial decisions. Brandeis was clearly able to make the distinction between what he would like to see come about and what he had a right to help bring about with his from-the-bench vote. Within expected limits of human frailty, he generally respected this distinction. And Frankfurter is perceived by many students of the Court as even more concerned than Brandeis that the court not expand its powers.⁵³

So, the question remains: when presented with a born politician or statesman (like Frankfurter and Brandeis, respectively) who also happens to be splendidly suited by training, experience, temperament, and intellectual gifts to serve on the Court, and whom we can trust to respect the Court as an institution and the core values on which it is premised, should we allow this prodigious talent to be set loose rather than stifled, maximized rather than squandered? Seductive as is the prospect of Louis Brandeis in the role of philosopher king, I share what I take to be Murphy's negative

53. Pp. 341-42.

Extrajudicial Behavior

response. Perhaps it is because the Brandeises are too few and far between, and through a door opened wide enough for them would pour a thousand lesser characters. Perhaps it is a sense that one great judge is counterbalanced by two, or three, or ten lousy ones. Or maybe it is simply the recognition that even a Brandeis, left uncontrolled, is a threat to much we hold dear. And as I answer in the negative I cannot help but feel that there is, in all of this, something rather sad.

Israel and Palestine: Assault on the Law of Nations?

Israel and Palestine: Assault on the Law of Nations. By Julius Stone. Baltimore: Johns Hopkins University Press, 1981. Pp. xiii, 223. \$17.50.

Anthony D'Amato†

Despite the critical importance of the Israel-Palestine problem and the complexity of the legal issues surrounding it, there is a dearth of writing on the central issues of international law involved, and the little that is there is marred by selectivity and bias. Perhaps scholars fear that any fair characterization of their opponents' contentions will be cited out of context, like a quote from a critic in a theater advertisement. Opposing views are caricatured or ignored. And since the criticism scholars justly receive is equally one-sided and negative, the writer may feel relieved of the burden of fashioning truly persuasive counterarguments.

One opens Professor Julius Stone's latest book with a hopeful feeling: is this at last a good piece of scholarship on the Middle East? Stone's credentials, as he states in this book, are impressive:

The present writer's concern with the sociology of international law—to the relation of its socioeconomic, political, and psychological substructure to its surface manifestations, is of long standing. It goes back to his Master of Laws thesis about "The Doctrine of Sovereignty and the League of Nations" at the University of Leeds in 1930, and has continued through books on *Legal Controls of International Conflict* . . . and other writings. He has also contributed much in the last decade to the literature on particular legal aspects of the Arab-Israel conflict.¹

The "socioeconomic, political, and psychological substructure" Stone examines turns out to be simply the 1973 Arab oil boycott. He argues that

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1. J. STONE, ISRAEL AND PALESTINE: ASSAULT ON THE LAW OF NATIONS 6 (1981) [hereinafter cited by page number only].

this Arab “weapon” so tainted majorities voting for anti-Israel resolutions in the General Assembly of the United Nations (U.N.) that those resolutions amount to an assault on the law of nations. By calling for self-determination for Palestinian Arabs and the establishment of a Palestinian state, the resolutions, Stone contends, have created a nonexistent problem.

I. The Arab Oil Weapon and the U.N. “Assault on the Law of Nations”

Before the boycott, there was no problem of a separate Palestinian homeland, Stone insists, because Palestinian Arabs had their natural homeland in Jordan.² The problem was created by General Assembly resolutions passed after 1973 by states “under extreme duress such as threats of deprivation of essential oil supplies.”³ Since such coercion “must be unlawful” when used to compel the foreign policy of sovereign states, the Arab oil boycott “was an invasion of the sovereign prerogatives of the third states by the use of coercion no less extreme than most conventional military aggressions.”⁴ The oil boycott, Stone concludes, was “economic aggression, *stricto sensu*,”⁵ and thus “probably constituted a threat or use of force forbidden by Article 2(4) of the [U.N.’s] charter.”⁶

One need not be an expert in socioeconomic substructures to know that the oil boycott has undoubtedly influenced nations toward a pro-Arab position since 1973. But was the boycott illegal? Was it a threat or use of force in violation of the most fundamental prohibition in the U.N. Charter?

Stone fails to consider the widespread use of economic muscle by other powers to influence U.N. votes in particular and foreign policy generally. The United States, for instance, has for many years “bought votes” in the U.N. through its foreign aid programs; it has prohibited grain sales to the Soviet Union from time to time, in hopes of changing the latter’s policies;

2. Stone writes:

[T]he origins and present position of the Arab state of Jordan in Palestine rebut the very claim that the Palestinian people lack a homeland. Not only did the state of Jordan arise in Palestine over Jewish protest at the expense of the home allocated for the Jewish nation; it also inexorably became, by the same course of history, a Palestine Arab state. . . . With or without the West Bank, Jordan is unambiguously Palestinian territory; and the vast majority—something over 60 percent—of its inhabitants consists of Palestinian Arabs. Moreover, the number of Palestinians within this extended Jordan constituted a majority of all Palestinians.

P. 23.

3. P. 36.

4. P. 37.

5. P. 36.

6. P. 38. The Charter of the United Nations states that: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” U.N. CHARTER art. 2, para. 4.

it has engaged in many acts of apparent "economic aggression." Yet no one claims that these actions were illegal; and even if such food or oil boycotts were questionable, perhaps as human rights violations, they still would not necessarily constitute a threat or use of force under Article 2(4). Though Stone claims that the oil boycott is economic aggression, as that term was used by "many participating States" in the discussions leading up to the 1974 U.N. Resolution on the Definition of Aggression,⁷ the resolution itself omits any mention or intimation of economic aggression. The states arguing for the inclusion of such boycotts in the definition of "aggression" lost.⁸

The U.N. resolutions decried by Stone did focus world attention on the Palestinian Arabs, but it is wrong to conclude that through these resolutions the new holders of oil wealth created the Palestinian problem. Prior to 1973, the Palestinian Arabs were simply ignored by the other Arab states.⁹ The unprecedented wealth accruing to some Arab states as a result of the formation of the Organization of Petroleum Exporting Countries did not suddenly sensitize them to the plight of the Palestinian Arabs. Nor were these states lying in wait, *pace* Stone, to use their new boycott to coerce other nations to aid the Palestinians. Rather, the very human problem of the Palestinians could simply no longer be ignored.¹⁰

II. The Palestinian "Problem" and the Jordanian "Solution"

The real reason a "problem" was created for Israel after 1973 was that the Palestinian Arabs became identified as an entity. The General Assembly resolutions, whatever their legal effect, helped create the aura of inchoate nationhood for the Palestinians.

As long as the Palestinian Arabs could be dealt with as a large group of

7. P. 37.

8. Stone mentions that the Soviet Union, in particular, has long called for inclusion of "economic aggression" in the definition of aggression. Pp. 36-37. But he fails to mention that the Soviets have also wanted to include "cultural aggression" in the list of proscribed activities. In fact, the Soviets may have simply tried to overwhelm the enterprise of defining aggression by universal inclusivity.

9. In 1970, Professor Michael Reisman called attention to the problem:

The only group in the contemporary Middle Eastern situation with a legitimate grievance is the Palestinian Arabs. By a complex convergence of circumstances, they have been denied the opportunity for self-determination and for twenty years have lived in the most degraded conditions. Despite constant expressions of verbal sympathy, they have been despised by the other Arab peoples and have learned to despise themselves An equitable solution to the problem of the Palestinian Arabs is not only an exigent moral demand but also a crucial requirement for increasing stability in the Middle East.

M. REISMAN, *THE ART OF THE POSSIBLE* 44 (1970).

10. Inconvenient as it may be for Stone's oil-boycott thesis, the General Assembly's first Palestinian resolution was Resolution 2672, of December 8, 1970, which recognized that the "people of Palestine are entitled to equal rights and self-determination." The war of October 1973 and the terrorist activities of the Palestine Liberation Organization (PLO) beginning in 1970 also contributed to increased world attention to the plight of the Palestinian Arabs.

stateless persons, they could be moved around and relocated among the various states in the Middle East. Israel has consistently been willing to negotiate with other states, no matter how indirect their interest in the Palestinians. Israel adopted this stance during and after the Camp David talks, when it was willing to address the fate of the Palestinians, as long as the Palestine Liberation Organization (PLO) was not present.

Stone's book parallels in legal language this real-world finessing of the Palestinians. His approach reduces international law to a law among nations; non-national groups such as the Palestinians have no status in such a scheme. Trying to give them one creates the problem. In Stone's view, the sovereign prerogatives of Israel have to be given the same status as is given to the prerogatives of Lebanon, Jordan, Syria, Egypt, and the other established states in the area. No one else has any standing. Legally speaking, the Palestinians do not exist. To pretend that they do is to assault the law of nations.

III. The Legal Framework of the Mandate Regime

The central unresolved issue in the Arab-Israel conflict is what to do with the Palestinians in the West Bank and the Gaza Strip. Stone's solution cedes these lands to Israel; Palestinian Arabs who do not like Israeli rule can move to Jordan. Although Jordan administered the West Bank from 1948 to 1967, it acquired no title, according to Stone, since its entry was illegal. Hence, Jordan's claim to the West Bank is no better than Israel's, and Israel is "under no obligation to hand 'back' automatically the West Bank and Gaza to Jordan or anyone else."¹¹ This chain of reasoning is valid only if one interprets "anyone" as *any other state*. The only title superior to Israel's lies not with some other state but with the Palestinian Arabs themselves. If they do not count under the "law of nations," Israel's occupation and control over the West Bank and the Gaza Strip is not defeasible by any superior right.

Stone's "solution" seems prescient. Israel's incursion into Lebanon in the summer of 1982 and its successful dispersal of the PLO have shifted attention eastward to Jordan. Prime Minister Begin seems determined to annex the West Bank and to expel discontented Palestinians to Jordan. This policy would be abetted by the historical treatment of Jordan in Stone's book.

Under Stone's interpretation, there were two claimants to the territories removed from Turkish hegemony after the first World War: the "Jews" and the "Arabs."¹² The Balfour Declaration of 1917 committed the Brit-

11. P. 52.

12. P. 14.

ish government to "the establishment in Palestine of a national home for the Jewish people."¹³ This "Palestine" in 1917 comprised 46,399 square miles on both sides of the Jordan River. Stone calls this a "minute fraction" of the total land to be taken from Turkey and argues that "that tiny fraction was then reduced by four-fifths in 1922, to create in Palestine what is now called the State of Jordan, leaving the share of the Jewish people . . . as 10,871 square miles—or about one two-hundredth of the entire territory distributed."¹⁴ Because the State of Jordan "arose as a last-minute encroachment on the already small allocation to the Jewish nation,"¹⁵ its formation was intended to provide a "reserve of land for Arabs across the Jordan."¹⁶ Hence Jordan has a "duty . . . as an Arab state in Palestine to accommodate the Palestinians."¹⁷

Stone's reconstruction is a castle of sand in the Sahara. In the first place, there were, in addition to the Arabs and Jews, other claimants to the territories removed from Turkey. The Kurds, Armenians, Assyrians, and Chaldeans all received promises of autonomy from the Allies.¹⁸ Promises were made by many governments on many levels as various religious-ethnic groups chose (and sometimes switched) sides in the waning years of World War I.

Nor did the Balfour Declaration "allocate" Palestine to the Jews, as Stone claims. By its terms, it allowed for a Jewish national home "in" Palestine. The declaration goes on to assert that it is "clearly understood that nothing shall be done which may prejudice the civil and religious rights of the existing non-Jewish communities in Palestine."¹⁹

Stone also fails to mention that when the state of Jordan was provided for in 1922, the Turkish territories had not yet been given over to the Allies. This cession occurred only in 1923 with the Treaty of Lausanne.²⁰ All pre-1923 maneuverings represent at best statements of intent, not binding commitments. When the Allied powers met in the League of Nations, they decided that the initial plan to include all of the land formerly under Turkish hegemony in one mandate proved unworkable and decided on administrative grounds to split the lands east of the Jordan River from the Mandate. This effectively gave Jews a smaller area to which they might emigrate. Nonetheless, one cannot conclude that this solution bound

13. P. 146.

14. P. 17.

15. P. 23.

16. P. 22.

17. P. 23.

18. See R. STAFFORD, *THE TRAGEDY OF THE ASSYRIANS* 74-81 (1975). The Assyrians later claimed the British reneged on their promise of a homeland. *Id.* at 74.

19. P. 146.

20. P. 152.

the state of Jordan to admit Palestinian Arabs from the other side of the river to provide room for Jewish emigration.²¹

Moreover, the figures given by Stone—the Jews only received one two-hundredth of the land of the former Turkish territories—are quite misleading. Presumably, the Zionists could have received a much larger area had they wanted to settle in an uninhabited part of those vast territories. Neither Jews nor Arabs were much interested in the expanses of desert land included in Stone's statistics.

The new Palestine Mandate was also a most unusual arrangement. All the other mandates set up by the League of Nations were trust arrangements designed for the welfare of the "inhabitants" of the territories. But the Palestine Mandate explicitly envisaged immigration to the newly created territory. Consequently, a unique and intractable problem arose for the British authorities in Palestine. Throughout the 1920's and 1930's, increasing Jewish immigration led to rioting by Palestinian Arabs which had to be suppressed by military force. Though the British responded by restricting Jewish immigration, the situation continually worsened. The end of World War II brought another wave of Jewish immigrants, most of them illegal. Britain could no longer contain the problem. A U.N. partition resolution was passed in 1947, giving fifty-seven percent of Palestine to the Jews, who represented one-third of the population. The partition, however, was never implemented. The British pulled out, Israel proclaimed its statehood, the Arab nations invaded, and by 1949 Israel had won a military victory and additional territory in Palestine. Hundreds of thousands of Palestinians became refugees.

For quite divergent reasons, neither the Palestinian Arabs nor the Israelis have wanted to focus on or give legal credit to the history of Palestine as a League of Nations Mandate. To the Arabs the entire history of the Middle East in the twentieth century is of Jewish encroachment upon their homeland. The Balfour Declaration, the Mandate, the declaration of the existence of Israel, and the periodic wars from 1948 to 1982 are symptomatic of Western interference, usurpation, and conquest.

On the other hand, Stone's book echoes the current Israeli downgrading of the history of the Mandate. For the more that history is cited, the more legitimate appear the claims of Palestinian Arabs to the West Bank, the Gaza Strip, and East Jerusalem. Palestinian Arabs, after all, inhabited those territories in 1922, when the Mandate was created; additionally, the Mandate was intended to protect the Arabs as well as to provide a homeland for Jews. Stone's strategy, like the Israeli government's, seems plain:

21. There is some force, though, to the argument that with the splitting-off of Jordan, a stronger Jewish claim could be made to the remaining territory.

if Israel intends to annex the West Bank, the Gaza Strip, East Jerusalem, or other territories, the less said about the international law of the Mandate the better.

IV. Nature of the Palestinian Claims

Both sides are wrong. The Arabs are being monumentally foolish, and Stone is betraying a life of scholarship to peddle a political position. All of it seems of a piece. The PLO has steadfastly refused to recognize the legitimacy of the state of Israel,²² thus giving the Israelis a ready and effective excuse not to negotiate. As a result, the PLO has undercut its own claim to legitimacy and has set back the cause of the Palestinian Arabs. And the Palestinian Arabs, instead of basing their legal defense on the terms of the Mandate, or even those of the Partition, have rallied behind self-determination as their international-law banner. Unfortunately, however, "self-determination" is a most elusive, undefinable, and, ultimately, unhelpful concept. There are hundreds of minority enclaves in nations throughout the world, each proclaiming a right of self-determination and a right to an independent "homeland."²³ But the problems of such claims are as intractable as they were for President Lincoln in 1861, when he denied self-determination to the South. Self-determination, in short, has an emotional ring, but as a legal concept it is about as helpful as the term "people's democracy."

The Palestinian Arabs have not suffered at the hands of international law in the twentieth century, despite their emotional assertions to the contrary. In 1917 the Ottoman Empire had been sovereign over Palestine for four hundred years. If the Turks had decreed that Jews from all over the world could immigrate to Palestine, the Palestinian Arabs could not have objected under recognized principles of international law. With the defeat of Turkey in World War I, sovereignty passed to the Allied Powers. They could have annexed the Arab lands. Instead, they created mandates that soon became independent Arab nations. Since the Allies had the power to annex these lands, they had the power to attach conditions to the mandates' independence. If one of the conditions of the eventual independence of Palestine was a mandate regime that allowed for Jewish immigration, again there could have been no legal complaint.

Nor do the Palestinian Arabs have any legal basis to complain about the U.N. partition plan of 1947. Even though the partition gave fifty-seven percent of Palestine to the Jews, who numbered only one-third of

22. PLO chief Yassir Arafat reaffirmed as recently as 1980 that "[t]he destruction of Israel is the goal of our struggle." P. 20.

23. Hannum & Lillich, *The Concept of Autonomy in International Law*, 74 AM. J. INT'L L. 858 (1980).

the population, the General Assembly was providing for future Jewish immigration to Palestine. With the withdrawal of Great Britain as Mandatory administrator, it was inevitable that the Jews would set themselves up a state. Perhaps the Palestinian Arabs should have done the same. That they failed to do so is no argument against the wisdom or legality of Israel's action.

The Palestinian Arabs would be better advised to stand on international law as it is, and not as they would have it be. A scrupulous insistence on the Mandate as furnishing the best title to Palestine, a recognition that Israel has the same right to exist as any nation, a repudiation of terrorist tactics aimed at innocent civilians, and a willingness to live in peace with Jews in the Middle East would go far toward establishing the legitimacy of the Palestinian claims to the West Bank and the Gaza Strip.

V. Stone's Statism

When one picks up a book by a scholar who has been an authority on international law since 1930, one is entitled to expect something more than a partisan plea. To be sure, Stone mentions the Mandate, but only in passing.²⁴ He also mentions, briefly, most of the other legal arguments that have been advanced in support of the Palestinian position. When those arguments are poor, Stone attacks them frontally; when they are sound, he resorts to "fairness" in support of the Israeli position.

My principal objection to Stone's work, however, is of a different order. He trades on an eighteenth-century conception that "inter-national law" is a law solely and exclusively among sovereign nations. In that view only nations have rights, duties, or standing. The journalists, politicians, and public relations personnel who retain that older concept of international law constitute Stone's target audience. To them he waves credentials, festoons Latinisms, reiterates legal buzz words, and switches between law and "fairness" with the ease of an amateur magician.

Professor Stone trades upon the veneer of legal respectability that exists for the position that nations are the exclusive subjects of international law. He ignores such crucial twentieth-century developments as the recognition given to minority groups by the Permanent Court of International Justice in the early 1920's,²⁵ the status of international organizations and their personnel,²⁶ and the recent developments in the international law of human rights that accord significant standing to individuals vis-à-vis gov-

24. Pp. 121-23, 132-33.

25. See N. FEINBERG, *LA JURISDICTION DE LA COUR PERMANENTE DE JUSTICE DANS LE SYSTÈME DE LA PROTECTION INTERNATIONALE DES MINORITÉS* 73-97 (1931).

26. See *Advisory Opinion, Reparations for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174.

ernments.²⁷ Stone's partisan purpose is transparent: the State of Israel is to be considered an entity, entitled to a full and equal share of international rights, whereas the Palestinian Arabs are a nondescript collection of individuals causing trouble for the legitimate states of the Middle East.

Stone's position denies Palestinian Arabs both their human rights and their status as a beneficiary of the Mandate regime. The position amounts to a defense of statism, and herein lies its real danger. In the last few years, Israeli policies have become increasingly expansionistic. Prime Minister Begin has publicly expressed a desire to absorb the West Bank and has annexed the Golan Heights. His armies presently occupy the southern half of Lebanon. The post-World War II international legal order was erected to stop this sort of territorial expansionism, but statist policies can become intoxicating as they succeed. Statism can build up a self-justifying momentum, though it truly constitutes an assault upon the law of nations. For Professor Stone to justify a statist position so late in the twentieth century is equivalent to Machiavelli's softly advising the King to be more ruthless.

27. See H. LAUTERPRACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 3-19, 27-47, 61-72 (1950); D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110 (1982).