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The Brandeis/Frankfurter Connection: The Secret Political Activities of Two Supreme Court Justices

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BOOK REVIEW: A FLAWED TALE

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

*Reviewed by The Honorable Myron H. Bright**
*in collaboration with David T. Smorodin***

I. INTRODUCTION

My contemporaries and I attending law school in the late thirties and early forties looked upon the late Justice Louis D. Brandeis¹ as a giant in the law. Likewise, a succeeding generation of law students came to venerate Justice Felix Frankfurter² as a great judge, as well as an articulate exponent of judicial restraint. Professor Bruce Allen Murphy's³ controversial book, *The Brandeis/Frankfurter Connection: The Secret Political Activities of Two Supreme Court Justices*,⁴ presents these two "judicial heroes" in an altogether different light. Murphy chronicles the extensive extrajudicial, or in Murphy's terms "political," activities⁵ of the two men, including what has certainly been the most publicized revelation in Murphy's book: the relationship between Justice Brandeis and the then-Harvard Law School Professor, Frankfurter. According to Murphy, Frankfurter (dubbed "the Double Felix") became Justice Brandeis' paid political agent, enabling the Justice to engage surreptitiously in various political activities.⁶

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** Saint Louis University, A.B., 1978; J.D., 1981. Member of the Missouri and District of Columbia bars.

1. 1856-1941. Brandeis served on the Supreme Court from June 5, 1916 to February 1939.

2. 1882-1965. Frankfurter served on the Supreme Court from June 30, 1939 to August 28, 1962.

3. Assistant Professor of Political Science, Pennsylvania State University.

4. B. MURPHY, *THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES* (1982) [hereinafter cited as *CONNECTION*].

5. Murphy refers to all "informal, nonjudicial activities undertaken by members of the Court" as "political" activities. He refers to activities relating to the electoral process as "partisan." *Id.* at 365 n.3.

6. The New York Times gave the story front-page treatment. *See* N.Y. Times, Feb. 14,

Having read some of the many press accounts and reviews of the book,⁷ I approached the task of reviewing it with great interest and curiosity. After carefully reading the book and doing a modicum of primary and secondary research, I am convinced that the book does not live up to its well-orchestrated publicity campaign. Although Professor Murphy has collected some new and potentially valuable information regarding two of this country's celebrated jurists, the book fails as a serious, scholarly work because it is burdened by sensationalism and innuendo.

Murphy suggests that even if Brandeis and Frankfurter did not use their offices for personal gain, they nevertheless acted improperly. With nearly every turn of the page the reader is confronted with some purportedly new "bombshell" of a revelation concerning one or both of the men. My view of the book is that the bombshells simply do not explode. Indeed, the work, when stripped of exaggerated rhetoric, pejorative inferences, and unjustified conclusions, supports the view that Brandeis and Frankfurter were great men who vigorously exercised their rights of citizenship, within the bounds prescribed by their judicial duties, in a manner not contrary to the prevailing ethical standards for federal judges.

II. THE BRANDEIS-FRANKFURTER RELATIONSHIP

A. Brandeis' Background

Murphy begins his study with a general biographical section on Brandeis' life before he came to the Supreme Court. While this material is largely drawn from earlier Brandeis biographies, it is helpful in putting Brandeis' actions as a Supreme Court Justice in proper context.

Brandeis graduated first in his class from Harvard Law School in 1877. Only twenty years old, he practiced briefly in St. Louis before going into practice in Boston with Samuel Warren, a law school classmate. In spite of the anti-Semitism which made it impossible for Brandeis to become fully accepted into the world of Boston society, his law practice flourished. Brandeis, however, was not content with merely acquiring a fortune. As Murphy describes him, Brandeis was a "reflec-

1982, at 1, col. 3. See also the Times' editorial calling the financial arrangement "wrong." N.Y. Times, Feb. 18, 1982 at A22, col.1.

7. See, e.g., Cover, *The Framing of Justice Brandeis*, the *New Republic*, May 5, 1982 at 17 [hereinafter cited as Cover]; Danelski, *Brandeis and Frankfurter* (Book Review) 96 HARV. L. REV. 312 (1982) [hereinafter cited as Danelski]; Frank, Book Review, J. LEGAL EDUC. (1982); French, Book Review, 67 MINN. L. REV. 287 (1982) [hereinafter cited as French]; Schlesinger, Book Review, *An Ideological Retainer*, N.Y. Times, Mar. 21, 1982 § 7 at 5.

tive moralist, eager to educate others regarding proper goals for business, government, and even for society in general.”⁸ Brandeis opposed bigness, waste and inefficiency. To these ends, Brandeis assumed leadership positions in reform groups attacking dishonest government, battling monopolies, working for better labor relations and seeking sound conservation policies. In addition, Brandeis also became a leading advocate in the Zionist movement, calling for the creation of a Jewish homeland. His advocacy on behalf of society’s underprivileged earned Brandeis, a millionaire corporate lawyer, the sobriquet of the “People’s attorney.”⁹

A supporter of Woodrow Wilson, Brandeis became a valued advisor to the President although he held no official post. As Wilson stated, “I need Brandeis everywhere, but I must leave him somewhere.”¹⁰ In 1916 Wilson nominated Brandeis to the Supreme Court, sparking massive opposition, particularly from leaders of industry and finance. After months of confirmation hearings, Brandeis took the oath of office on June 15, 1916.

Justice Brandeis served on the Court for nearly twenty-three years. Ironically, Brandeis retired only a few weeks after President Roosevelt nominated Frankfurter to the High Court in 1939.

The focus of Murphy’s book is on the relationship, or in Murphy’s terms “connection,” between Justice Brandeis and Professor Frankfurter. The book discloses the existence of a series of payments that Brandeis made to Frankfurter and labels the relationship between mentor and protege as a secret agency arrangement. According to Murphy, this arrangement enabled Brandeis, through his use of Frankfurter as a “political lieutenant,” to propagate and implement his views on the executive and legislative branches of government.

B. The Payments between Brandeis and Frankfurter

On November 19, 1916, Brandeis wrote to Frankfurter:

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.

. . . .

8. CONNECTION, *supra* note 4, at 17.

9. *Id.* at 24.

10. *Id.* at 28.

I am sending [a] check for \$250 on this account. Let me know when it is exhausted or if it has already been.¹¹

Frankfurter returned the check. Brandeis wrote requesting that Frankfurter reclaim the check, explaining:

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.¹²

This correspondence led to the opening of a fund in a Boston bank, which Murphy refers to as the "joint-endeavors-for-the-public-good fund."¹³ The yearly payments increased to \$1,000 in mid-1917, and continued for the next seven years. In 1925, Frankfurter appealed to Brandeis for additional financial help. Frankfurter explained that as a result of his wife's recent illness, he had incurred increased expenses. Frankfurter wrote to Brandeis:

After considerable self-debate, I have concluded that it is unfair to withhold from you a personal problem. To carry out the therapy prescribed by Dr. Salmon for Marion [Mrs. Felix Frankfurter] will mean the additional expenditure of about \$1,500 per academic year for this and the following year. There is little doubt that I could fill the gap through odd jobs for some of my New York lawyer friends. But I begrudge the time and thought that would take from intrinsically more important jobs—and so I put the situation to you. Marion knows, of course, of the extent to which you make possible my efforts of a public concern and rejoices over it. But I'm not telling her because her sensitiveness might be needlessly burdened where our private interests are involved.¹⁴

Brandeis deposited an extra \$1,500 and wrote to Frankfurter, "I am glad you wrote me about the personal needs . . . your public service must not be abridged."¹⁵ Thereafter, from 1926 until Frankfurter came to the United States Supreme Court, Brandeis deposited \$3,500 a year in the Boston account for Frankfurter's use.

Murphy does note that Brandeis, throughout his career, spent money for the public and over the years donated nearly \$1.5 million to

11. *Id.* at 40 (quoting letter from Brandeis to Frankfurter (Nov. 19, 1916)).

12. CONNECTION, *supra* note 4, at 40 (quoting letter from Brandeis to Frankfurter (Nov. 25, 1916)).

13. CONNECTION, *supra* note 4, at 41.

14. *Id.* at 42 (quoting letter from Frankfurter to Brandeis (undated)).

15. *Id.* at 42 (quoting letter from Brandeis to Frankfurter (Sept. 24, 1925)).

various causes, charities, and organizations.¹⁶ Brandeis lived a simple, unassuming life and considered that his wealth should be utilized in improving society. Murphy quotes Brandeis:

Some men buy diamonds and rare works of art, others delight in automobiles and yachts. My luxury is to invest my surplus effort, beyond that required for the proper support of my family, to the pleasure of taking up a problem and solving, or helping to solve it, for the people without receiving any compensation. Your yachtsman or automobilist would lose much of his enjoyment if he were obliged to do for pay what he is doing for the love of the thing itself. So I should lose much of my satisfaction if I were paid in connection with public services of this kind.¹⁷

The letters Murphy quotes do not reveal any secret, sinister, or hidden meanings. Brandeis liked and admired Felix Frankfurter. As Murphy notes, "other than his wife, Brandeis was closer to no other person [than Frankfurter]."¹⁸ Brandeis sought to reimburse Frankfurter for expenses incurred in "public matters" and "in the public interest." When Brandeis learned of Frankfurter's substantial medical obligations for Mrs. Frankfurter's illness and the likelihood that Frankfurter might have to curtail his public service work and seek funds from private law practice, Brandeis responded generously.

Murphy finds hidden meaning in almost every communication or action by Brandeis or Frankfurter, no matter how insignificant it appears to be.¹⁹ Under Murphy's interpretation, Brandeis' financial contributions to Frankfurter put the Brandeis-Frankfurter relationship on a "businesslike footing" and 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 by sending to Frankfurter a

16. CONNECTION, *supra* note 4, at 41. See A. MASON, *BRANDEIS: A FREE MAN'S LIFE* 692 (1946) [hereinafter cited as MASON].

17. CONNECTION, *supra* note 4, at 41 (quoting THE CURSE OF BIGNESS; MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS 266 (O. Fraenkel ed. 1934)).

18. CONNECTION, *supra* note 4, at 40.

19. For example, Murphy notes:

[Frankfurter] was extremely conscious of his Jewish background and appeared at times to many of his intimates to wish that he had been born a WASP. This desire was clearly evident to his law clerks, who noted at their yearly reunion dinners with the justice that it was Elliot Richardson [a former Frankfurter clerk], with his Brahmin family ancestry, who commanded Frankfurter's attention and open admiration.

CONNECTION, *supra* note 4, at 34. Precisely what Frankfurter's admiration for Elliot Richardson is supposed to demonstrate is unclear.

letter filled with 'suggestions' for various programs."²⁰ Frankfurter's letter outlining his financial problems over his wife's illness becomes a request for a "raise."²¹ Moreover, the contribution is magnified by Murphy, who attempts to equate Brandeis' \$3,500 annual contribution, a nominal amount in terms of Brandeis' status as a millionaire and his extremely modest style of living, to \$26,150 in 1981 dollars.²²

Murphy's inference that these pittance payments subjected the brilliance of Frankfurter to Brandeis' control is simply untenable. Murphy, himself, stated in a law review article preceding this book that "Brandeis never regarded Frankfurter as a mere employee, nor could he objectively do so. Brandeis never asked the professor to undertake projects or to act on suggestions that did not command Frankfurter's independent approval and allegiance."²³ The payments to Frankfurter for public service work represent only a minor example of Brandeis' belief in the dignity and worth of every man; and Brandeis devoted his life to these principles.

In preparing this review I sought comments from several of the two Justices' law clerks. Joseph L. Rauh, Jr.,²⁴ one of Frankfurter's former clerks, disputed Murphy's interpretation of the "connection" and put the entire money issue in proper perspective:

As far as the money passing from Brandeis to Frankfurter is concerned, that seems to me of no significance whatever. Here was an elderly millionaire thinking of Frankfurter as his half-brother-half-son who was always short of money because he was doing good things (and *not* taking private money-making cases) and because his wife had psychiatric troubles. I don't think Frankfurter did one thing differently because of the Brandeis money he accepted than he would have done anyway. To me it was a beautiful relationship between two loving progressive-minded people and did not call for agreement on policy questions between them. I think Frankfurter and Brandeis rather disagreed on a good

20. CONNECTION, *supra* note 4, at 41.

21. *Id.* at 41.

22. *Id.* at 42.

23. Levy and Murphy, *Preserving the Progressive Spirit in a Conservative Time: The Joint Reform Efforts of Justice Brandeis and Professor Frankfurter, 1916-1933*, 78 MICH. L. REV. 1252, 1302 (1980). Indeed, John French, a former law clerk to Justice Frankfurter, queried: "[W]hat new and undisclosed insights propelled Professor [Murphy] from the scholarly reserve of 1980 to the florid sensationalism of 1982[?]." French, *supra* note 7, at 290.

24. Joseph L. Rauh served as Frankfurter's first law clerk in 1939-40. He is presently a partner in the Washington, D.C. law firm of Rauh, Silard and Lichtman, P.C.

many things in the early New Deal.²⁵

Willard Hurst,²⁶ a former law clerk for Justice Brandeis, echoed these sentiments:

I see nothing wrong when a judge renders some financial help to a well liked younger man. The book conveys the notion that it has uncovered something hitherto buried; in fact the facts of these payments were there for anyone to read several years earlier in the Brandeis letters.²⁷

C. *Murphy's Use of Innuendo*

While Murphy's interpretation of the payments from Brandeis to Frankfurter seems flawed, the rest of the book does contain some interesting details relating to the extrajudicial activities of Brandeis and Frankfurter. The really disturbing aspect of the book is the way in which Murphy and his publisher, the Oxford University Press, have distorted the meaning and importance of these details.

The distortion begins with the book's cover. Although book reviewers do not often focus their attention on a book's cover, this reviewer must note the initial effect conveyed by the jacket cover. The word "connection" in the title is emblazoned across the top of the cover, printed in red, spelled out "C-O-N-N-E-C-T-I-O-N." The conspiracy idea (e.g., *The French Connection*²⁸) is further enhanced by a particularly unflattering drawing of the two black-robed Justices who are made to look like a pair of criminals.²⁹ These two caricatures are located immediately beneath the book's subtitle: "The Secret Political Activities of Two Supreme Court Justices." Any lingering doubts about the tone of the book are relieved by the jacket's sensationalistic description of the book:

In 1976, Bruce Murphy discovered 300 never-before-published letters in the Library of Congress from Supreme Court Justice Louis D. Brandeis to Harvard Law School Professor Felix Frankfurter. Permission to see these letters had been repeatedly denied Alpheus Mason, Brandeis's author-

25. Letter from Joseph L. Rauh, Jr. to Judge Myron H. Bright (Dec. 22, 1982).

26. William Hurst served as Brandeis' law clerk in 1936-37. He is presently a professor at the University of Wisconsin Law School.

27. Letter from Willard Hurst to Judge Myron H. Bright (Dec. 3, 1982).

28. R. MOORE, *THE FRENCH CONNECTION* (1969).

29. This reviewer is not alone in his view of the book's front cover. In his letter to me, Joseph Rauh remarked that "the outrageous picture on the front . . . makes Brandeis and Frankfurter look like Al Capone and a mob lieutenant . . ." Letter from Joseph Rauh, Jr., to Judge Myron H. Bright (Dec. 22, 1982).

ized biographer, by Frankfurter himself, literary executor of the Brandeis estate.

Reading these letters, Murphy knew that a startling story was waiting to be told, not the standard story documenting the significant contributions of these two men to American law, but a story of the second lives they led, in secret, for nearly fifty years behind the seats of government power.

. . . .

Although only a few of the participants to these events are still alive, some, now in their twilight years, agreed finally to talk about what happened, only because if they did not tell the story soon, it might never come to light.³⁰

To be sure, the credit or blame for a book's cover cannot be laid solely on the author. Undoubtedly, Murphy had little, if any, input on the cover's design. In this case, however, it is possible to judge a book by its cover, and the cover's sinister, sensationalistic, and conspiratorial tone is echoed throughout the book by Murphy's use of style and language to warp and exaggerate.

Murphy sets the tone of his book through the repeated use of certain catchwords. Murphy casts people as "contacts," "allies," "agents," "surrogates," and especially, "lieutenants." As an example, in describing Brandeis and Frankfurter at the dawn of the New Deal, Murphy writes, "Fortunately for Brandeis, he and his fifty-year-old lieutenant, Felix Frankfurter, had long been preparing for the possibility that Franklin D. Roosevelt would one day be in the White House."³¹ By my rough count, Murphy refers to people as Brandeis' "lieutenant" nearly forty times throughout the text of the book, usually referring to Frankfurter, but also referring to many others, even including Brandeis' own daughter.³² Murphy also has a propensity to overdramatize, stating on numerous occasions that some detail or event "has never before appeared in print." Whether these statements are true or not,³³ they serve only to detract from Murphy's scholarship.

30. CONNECTION, *supra* note 4, at back cover.

31. *Id.* at 99.

32. *Id.* at 169.

33. Professor Danelski observes that Murphy is sometimes inaccurate in claiming that some item has never before appeared in print. For example, writes Danelski, Murphy claims on page 218 that Frankfurter's involvement in the drafting of the Lend-Lease Bill in 1941 has never before appeared in print, but this is untrue. Danelski, *supra* note 7, at 314. See J. BLUM, FROM THE MORGENTHAU DIARIES: YEARS OF URGENCY, 1938-1941, at 213-15 (1965); see also L. BAKER, FELIX FRANKFURTER 249-50 (1960). Moreover, Danelski notes that the financial arrangements between Brandeis and Frankfurter had previously ap-

As previously mentioned, Murphy makes frequent use of the "bombshell" method of writing. Here is one of Murphy's revelations reprinted in full:

On another occasion, when the newly appointed solicitor for the Department of Interior, Nathan Margold, journeyed to Brandeis's apartment for a conference, he was given this sage advice: "Take [your] time about everything and be sure what [you are] doing before [you do] it." Yet, Brandeis's assistance was hardly limited to providing his allies with general homilies. As Margold made clear in his report to Felix Frankfurter of another meeting with Brandeis, the justice was also willing to serve as a sounding board on specific policy matters.

I had a long talk with Justice Brandeis yesterday who approved of my method of procedure and who gave me some invaluable suggestions as to how to conduct myself in my new and very trying position.³⁴

This story appears harmless and inconsequential. The fact that a beneficent judge advised a young lawyer on how to conduct himself hardly seems to warrant comment. Murphy, however, makes use of any tiny detail in his effort to demonstrate that Brandeis "privately attempt[ed] to direct the course of the executive policies in the New Deal."³⁵

In addition to style and language, Murphy subjects many facts to exaggerated and strained interpretations in order to portray Brandeis or Frankfurter in an unfavorable light. In one section Murphy discusses the importance of Justice Frankfurter's office arrangement in enabling the Justice (the "double Felix") to engage in presumably devious extrajudicial behavior:

Perhaps seeking to recreate the style and image of Brandeis, and to manage the double workload, Frankfurter, the super pragmatist who lacked his mentor's mental dexterity, devised some artificial means for creating and maintaining

peared in several books and articles. Danelski, *supra* note 7, at 312. See, e.g., 4 LETTERS OF LOUIS D. BRANDEIS 266-67, 458 (M. Urofsky & D. Levy eds. 1975).

John French calculates that "ninety percent of Murphy's alleged secrets were known to many at the time they arose and that ninety-nine percent of them have gradually made their way into published literature long since." French, *supra* note 7, at 289.

34. CONNECTION, *supra* note 4, at 119 (quoting Letter from Nathan Margold to Felix Frankfurter (Mar. 27, 1933) (brackets in quoted material)).

35. CONNECTION, *supra* note 4 at 118.

the psychological and physical separation between his two worlds. . . .

This arrangement, which has never before been described in print, became evident during an interview with [Philip] Elman, Frankfurter's sole law clerk from 1941 to 1943. The justice's correspondence and diary entries during the period are filled with accounts of political discussions held with visitors from all quarters, during teas and luncheons in his Court chambers. Yet, to my amazement, I discovered that Elman had very little knowledge of either the identities or the missions of these visitors. Interviews with later law clerks confirmed that they were treated similarly. Even today these men remain unaware of the full extent of their boss's extrajudicial behavior. Yet how was it that the justice was able to screen his closest assistants from the constant flood of political visitors coming to see him?

Concealing this activity from his law clerks was made possible by an ingenious arrangement of the justice's chambers. Each justice of the Court is provided with a suite of three offices: a secretarial-reception area, which opens to the hall, a middle office for the law clerk, and the innermost chamber for the justice himself. This last room is larger than the others and comes complete with fireplace, library, and adjoining shower facilities. But Frankfurter switched offices, giving his law clerk the luxurious innermost space and placing himself in the middle office that linked the other two. This made it possible for Frankfurter to receive his visitors without their having to pass through the work area of this law clerk, and for him to have direct access to his secretary should he want to use her services for non-Court-related matters, without the law clerk ever seeing or hearing much.

Frankfurter's efforts to separate fully his law clerk from any of his political activities went to extraordinary lengths. Elman reports that over the years he served as the justice's law clerk he and Frankfurter rarely discussed anything at all of a political nature. The only approved topics of conversation between them were judicial business and personal affairs.³⁶

36. *Id.* at 270-71.

Murphy's description differs markedly from that of Elman's.³⁷ In a letter to me, Elman stated:

Bruce Murphy's book depicts Frankfurter during these war years as a "Double Felix," leading two separate, compartmentalized lives wholly insulated from each other, a public life on the bench and a secret life off, doing all he could to conceal his outside activities, etc. I wish he had expressed that thesis when he interviewed me in July, 1979. I would have told him it was nonsense. Everyone around the Court, not only the Justices but the law clerks, secretaries, deputy marshals, etc., was fully aware of the stream of VIP's who came to visit Frankfurter. I knew of it more than anyone else, not only because of the large amount of time we spent together (I was then unmarried, and was not only his law clerk but his chauffeur, frequent dining companion, etc.), but because the Justice regarded me as his junior partner, surrogate son, and confidant. We talked about everything, politics in and outside the Court, Washington gossip, national and foreign news developments, etc.

Murphy's comments on page 271 about me and the Justice and what we talked about are flatly untrue. I will give him the benefit of the doubt, and assume he based them on something I said which he misunderstood or tore out of context.

The same is true of his description (pp. 270-271) of the layout of the Justice's chambers, which Murphy proudly tells us "has never before been described in print" (p. 270). The simple fact is that in January 1939 when he joined the Court, long before we were at war, the Justice felt that the best arrangement of the three-room chambers was for him to be in the middle, with his law clerk on one side and his secretary on the other. That arrangement suited his style and the way he worked. He did not like the old arrangement, where he had to go through the secretary's office in order to talk to his law

37. Professor Philip Elman served as Frankfurter's law clerk during the 1941 and 1942 Supreme Court terms. Elman is presently a professor at the University of Hawaii School of Law at Manoa.

I met Professor Elman purely by chance in November 1982, when I visited the University of Hawaii School of Law and had the opportunity to lecture a group of his students. In visiting with Elman, I mentioned that I was in the process of writing this review, and we discussed Murphy's book at some length. Subsequently, Elman graciously sent me his views on the book in the form of a letter and suggested that I contact some of Brandeis' and Frankfurter's former clerks.

clerk; the Justice couldn't function effectively unless he had his law clerk right next door. And it's as innocent as that; and everyone who visited Frankfurter during his many years at the Court knew it, and thought nothing of it. Murphy's pointing to the physical arrangement of the office as proof of the "Double Felix" is as absurd as his statement that "Elman had very little knowledge of either the missions or the identities of these visitors [to the chambers]." I spent much time chatting with them when, as frequently happened, they were waiting for the Justice who was busy elsewhere in the Court.

Well, I could go on and on. What happened here, I suggest, is that Murphy at some point developed his "Double Felix" thesis, and selectively chose or ignored facts in such a way as to support the thesis. Had he told me that was his thesis, I would have had an opportunity to demolish it. As it was, I had no idea that my sometimes too-brief responses to his innocent-sounding questions would be twisted and distorted.³⁸

In summary, I find that my views of Murphy's scholarship³⁹ are in substantial agreement with those expressed by H. Thomas Austern,⁴⁰ one of Brandeis' former clerks, who observed in a letter to me:

I found the book highly provocative, full of unsupported innuendos, and flamboyantly exaggerated. The heat it engendered led me initially to believe I might respond. But in order to track down his innuendos, it would have required a trip to Louisville and to Cambridge, for which I had neither the time nor the energy.⁴¹

IV. JUDICIAL ETHICS

A. *Extrajudicial Activities*

Murphy's basic contention is that "Brandeis and Frankfurter wielded, in camera, enormous political influence through their exten-

38. Letter from Philip Elman to Judge Myron H. Bright (Nov. 18, 1982).

39. This reviewer notes the masterful efforts of Professor Cover, whose review of *THE BRANDEIS/FRANKFURTER CONNECTION* demonstrated that many of Murphy's allegations were either completely unsubstantiated or based upon multiple hearsay. Cover concluded that Murphy's book is "a combination of shoddy scholarship and commercial exploitation." Cover, *supra* note 7, at 17.

40. H. Thomas Austern served as Brandeis' law clerk in 1930-31. He is presently counsel for the Washington, D.C. law firm of Covington & Burling.

41. Letter from H. Thomas Austern to Judge Myron H. Bright (Dec. 22, 1982).

sive off-the-bench . . . activities.”⁴² This contention amounts to a contradiction in terms: “in camera” suggests judicial conduct exercised in private, but Murphy concedes that the activities under scrutiny were “off-the-bench” and clearly not judicial. Murphy also concedes in a concluding chapter of his book that “both Brandeis and Frankfurter should properly be classified among those justices who were best able to separate their political views from their judicial decisions.”⁴³ Unfortunately, this concession comes after three hundred and forty-one pages in which Murphy, seemingly, had done his best to impugn the motives, intentions, and probity of the two men.

The book might have served as an important analytical study of the relationship between decisionmaking and the extrajudicial activities of Supreme Court Justices, but Murphy devotes very little space to a critical examination of Brandeis’ and Frankfurter’s judicial behavior. Murphy’s view of proper judicial behavior is contained in his introduction:

By tradition, those who join the judiciary recognize an implicit *quid pro quo* in the judicial appointment. Given life tenure and relative freedom from partisan political pressure, they are asked, in return, to renounce voluntarily those activities that compromise or appear to compromise the public’s belief in the integrity and political independence of the judiciary. They are to behave so as to confirm the portrait of Supreme Court justices as thoughtful, disinterested, and largely apolitical persons of the highest character, sitting at the pinnacle of the American legal system, exercising their powers of judicial review (or refusal to review) based not on personal political philosophy, but on the requirements of justice and constitutional government.⁴⁴

After he constructs his elaborate thesis that Brandeis and Frankfurter acted improperly, Murphy concludes: “[t]hat there will always be those who can transcend rules without bringing about the predicted harm is not an argument for dispensing with the rules.”⁴⁵ Yet, it is far from clear that either Brandeis or Frankfurter “transcended” any rules, and as Murphy himself demonstrates in the book’s brief appendix, many Supreme Court Justices have engaged in significant extrajudicial

42. CONNECTION, *supra* note 4, at 341.

43. *Id.* at 342.

44. *Id.* at 6.

45. *Id.* at 343.

activities.⁴⁶

Murphy simply assumes that the actions of Brandeis and Frankfurter were "against the rules," but while it is true that the present ethical guidelines for federal judges severely restrict extrajudicial activities,⁴⁷ the guidelines applicable to Justices Brandeis and Frankfurter were far different. Nothing in the American Bar Association's old Canons of Judicial Ethics barred a judge from carrying out the normal obligations of citizenship.⁴⁸ Nor did the Canons prohibit social intercourse with elected or appointed public officials. In particular, the American Bar Association's old Canons did not expressly bar a judge

46. Murphy notes that Chief Justices Jay and Marshall served as special envoys to negotiate treaties with England and France, respectively. During the War of 1812 several justices engaged in extensive extrajudicial activities. Justice Thomas Todd participated in strategy meetings with Congressional leaders. Following the war, Justice Story drafted legislation and lobbied for its passage. Chief Justice Salmon P. Chase even helped draft and secure ratification of the fourteenth amendment. Throughout the nineteenth century several Justices ran for political office, and several others openly supported candidates. *Id.* at 345-63.

47. In the wake of criticism of Chief Justice Warren's having served as the head of the commission investigating President Kennedy's assassination and of the revelations that led to Justice Fortas' resignation, the Judicial Conference of the United States, the governing body of the federal court system, promulgated in 1973 the first comprehensive code of ethics for federal judges, the Code of Judicial Conduct for United States Judges. The Judicial Conference adopted, with only minor modifications, the American Bar Association's Code of Judicial Conduct, as amended in 1972.

These new codes tightened the ethical constraints applicable to judges. The present Canon 4 permits a judge to speak, write, lecture, teach, and participate in other activities concerning the law, the legal system and the administration of law, but the commentary and annotations to Canon 4 indicate that it is to be narrowly construed. The literal application of Canon 4 would seem to restrict a judge from speaking or writing about proposed legislative action on matters outside of judicial administration.

The present Canon 5 requires a judge to avoid some extrajudicial activities and bars service on a governmental commission, unless the judge is appointed by Act of Congress. The commentary to present Canon 5 explains:

Valuable services have been rendered in the past to the states and the nation by judges appointed by the executive to undertake important extra-judicial assignments. The appropriateness of conferring these assignments on judges must be reassessed, however, in light of the demands on judicial manpower created by today's crowded dockets and the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial. Judges should not be expected or permitted to accept governmental appointments that could interfere with the effectiveness and independence of the judiciary.

48. American Bar Association Canon 33, as adopted in 1924, provided:

It is not necessary to the proper performance of judicial duty that a judge should live in retirement or seclusion; it is desirable that, so far as reasonable attention to the completion of his work will permit, he continue to mingle in social intercourse, and that he should not discontinue his interest in or appearance at meetings of members of the Bar. He should, however, in pending or prospective litigation before him be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or friendships constitute an element in influencing his judicial conduct.

from giving advice on government or from expressing or pursuing his view on the political issues of the day.⁴⁹ A judge needed only to avoid partisan politics, avoid the appearance of impropriety, maintain political independence, and ensure that his off-the-bench activities did not interfere with his judicial duties.⁵⁰ Neither Justice Brandeis nor Justice Frankfurter was required to give up those privileges of citizenship which did not interfere with or reflect upon his impartiality in deciding cases that came before the Court.

Interestingly, both Brandeis and Frankfurter indicated views about judges and citizenship in cases deciding Congress' power to levy income taxes against a judge's salary. In *Evans v. Gore*,⁵¹ the Court held invalid the levying of an income tax against the salary of a sitting judge. The Court held that such a tax violated the constitutional provision that prohibits the compensation of judges from being reduced during their service in office.⁵² Justice Brandeis concurred with the dissent of Justice Oliver Wendell Holmes. Justice Holmes wrote:

The exemption of salaries from diminution is intended to secure the independence of the judges, on the ground, as it was put by Hamilton in the *Federalist*, (No. 79), that "*a power over a man's subsistence amounts to a power over his will.*" That is a very good reason for preventing attempts to deal with a judge's salary as such, *but seems to me no reason for exonerating him from the ordinary duties of a citizen, which he shares with all others. To require a man to pay the taxes that all other*

49. American Bar Association Canon 23, as adopted in 1924, provided:

A judge has exceptional opportunity to observe the operation of statutes, especially those relating to practice, and to ascertain whether they tend to impede the just disposition of controversies; and he may well contribute to the public interest by advising those having authority to remedy defects of procedure, of the result of his observation and experience.

50. American Bar Association Canon 28, as amended in 1950, provided:

While entitled to entertain his personal views of political questions, and while not required to surrender his rights or opinions as a citizen, it is inevitable that suspicion of being warped by political bias will attach to a judge who becomes the active promoter of the interests of one political party as against another. He should avoid making political speeches, making or soliciting payment of assessments or contributions to party funds, the public endorsement of candidates for political office and participation in party conventions.

He should neither accept nor retain a place on any party committee nor act as party leader, nor engage generally in partisan activities.

Moreover, American Bar Association Canon 14, as adopted in 1924, provided:

A judge should not be swayed by partisan demands, public clamor or considerations of personal popularity or notoriety, nor by apprehension of unjust criticism.

51. 253 U.S. 245 (1920).

52. U.S. CONST. art. III, § 1.

men have to pay cannot possibly be made an instrument to attack his independence as a judge. I see nothing in the purpose of this clause of the Constitution to indicate that the judges were to be a privileged class, free from bearing their share of the cost of the institutions upon which their well-being if not their life depend.⁵³

This dissenting view became the law of the land in *O'Malley v. Woodrough*.⁵⁴ In determining that the income tax laws could apply to judges' salaries, Justice Frankfurter, writing for the majority, said that to subject judges to general taxes "is merely to recognize that judges are also citizens"⁵⁵

Yes, judges pay taxes and judges are citizens. Justices Brandeis and Frankfurter expressed that view, and obviously followed that view of the dictates of good citizenship. Emphasizing this point, W. Graham Claytor, Jr.,⁵⁶ who served as a law clerk for Justice Brandeis, wrote in a letter to me:

I never knew anyone to be more honest or even straightlaced in his avoidance of anything that could be called a conflict of interest or in any way an impropriety. At the same time, Justice Brandeis had always been very interested in everything that went on in the world, and he certainly did not lose this interest when he was appointed to the Supreme Court. Neither he nor Frankfurter felt that appointment to the Court meant that one had to withdraw from the human race, and certainly I feel the same way most strongly. His relationship with Professor Frankfurter was a long and warm one; they had many similar interests and there was certainly no secret that they freely discussed those interests, both orally and in letters. Justice Holmes also was not one to withdraw from life because he was on the Court.⁵⁷

Murphy's book questions the propriety of specific extrajudicial activities of Brandeis and Frankfurter. A few of these activities will be examined in detail in the following sections.

53. *Evans v. Gore*, 253 U.S. 245, 265 (1920) (Holmes, J., dissenting) (emphasis added).

54. 307 U.S. 277 (1938).

55. *Id.* at 282.

56. W. Graham Claytor served as Brandeis' law clerk in 1937-38. He is presently the President of the National Railroad Passenger Corporation (Amtrak).

57. Letter from W. Graham Claytor, Jr. to Judge Myron H. Bright (Dec. 29, 1982).

B. Brandeis' Influence on Others

Murphy plays up the fact that Brandeis encouraged Frankfurter to publish articles and books on legal matters, often suggesting topics and modes of analysis. Brandeis donated money to support the research of Frankfurter, as well as that of other scholars. In addition, Brandeis suggested topics and views for student articles in the *Harvard Law Review*. Through his many friends and admirers, Brandeis also suggested ideas for articles in newspapers and magazines of general circulation. Murphy makes this critical observation:

Thus, contrary to the prevailing understanding that Brandeis made no extrajudicial policy statements in the 1920s, either in print or in public speeches, it is clear that while the justice was restrained by his own sense of ethics from personally using such extrajudicial forums, he repeatedly engaged an extensive literary network, anchored by Felix Frankfurter, to disseminate his opinions on a wide variety of topics.⁵⁸

Murphy goes on to suggest a further likely impropriety:

These indirect literary efforts served to amplify many of the themes that the justice had explored in his formal judicial opinions and in his informal conversations with members of Congress. Thus it was that Brandeis, who was in a favorable position to observe where the law did not seem to serve justice, was able to perceive a needed reform, devise an analysis to support it constitutionally and jurisprudentially, command the introduction of this new analysis into the main currents of legal academic thought, orchestrate its publication in prestigious law reviews, have the abstract ideas then drafted into legislative proposals, and, if all else failed, cite all these independent efforts, as he deliberated with fellow justices on the country's highest bench, as mandate and intellectual authority to use the formal power of the Supreme Court to change the law. Quite naturally, we cannot know for sure what arguments Brandeis did offer his brethren during the deliberative process, but we do know that his formal decisions and dissents, which would logically be expected to rely on those same arguments made in deliberation, did cite the tidal wave of informed opinion his own lieutenant had helped generate.⁵⁹

58. CONNECTION, *supra* note 4, at 88 (footnote omitted).

59. *Id.* at 89.

The work of the Supreme Court stands open for all the world to see and to criticize. Under both the present and past codes of judicial conduct, these jurisprudential activities call for approbation, not condemnation. The commentary to Canon 4 of the present Code of Judicial Conduct for United States Judges states:

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that his time permits, he is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law.⁶⁰

I have never heard anyone claim that a judge violates any ethical precepts by promoting the better understanding of the law. Murphy's argument that these publications could have been used to influence his brethren on the Court further strains credulity. As Willard Hurst, one of Brandeis' clerks noted, "it is absurd to think that a topic suggestion which might blossom into a law review article or a *New Republic* think piece could sway votes on the Court."⁶¹

C. Brandeis' Efforts to Create a Jewish Homeland (Zionism)

Brandeis' dedication to seeking a Jewish homeland has been examined and discussed in many works. To Murphy, Brandeis' efforts, among other things, amounted to lobbying, misuse of influence, and meddling in foreign policy. Although Murphy admits that "[c]ertainly, few men had more impact on the creation of the state of Palestine than Louis D. Brandeis,"⁶² he chooses to portray Brandeis' involvement with the Zionist movement both in the United States and abroad as somehow clandestine.

In his treatment of Brandeis' Zionist involvements, Murphy, as he does throughout the book, confuses "private" with "secret." Brandeis' Zionist activities were not secret. Murphy's book contains no great revelations of a heretofore untold story; Brandeis' official biographer, Alpheus Thomas Mason, detailed Brandeis' Zionist conduct. According to Mason, Brandeis "kept a captain's hand on the tiller of American

60. CODE OF JUDICIAL CONDUCT FOR UNITED STATES JUDGES Canon 4, Commentary (1973).

61. Letter from Willard Hurst to Judge Myron H. Bright (Dec. 3, 1982).

62. CONNECTION, *supra* note 4, at 64.

Zionism”⁶³ Judge Henry J. Friendly⁶⁴ recalled in a letter to me Brandeis’ Zionist activities:

The only outside activities of Justice Brandeis of any moment which I recall from my clerkship were his Zionist interests. During that term, 1927-28, he was on the outs with the official leadership of the Zionist Organization of America but this did not decrease his interest in and financial support of the Jewish immigrants to Palestine. Around every fifth Sunday a group of men would come down to visit him and discuss Zionist matters and particularly how he should channel his beneficence. The group consisted of Professor Frankfurter; Judge Julian Mack; Robert Szold, a distinguished New York attorney and brother of Henrietta Szold, the founder of Hadassah; and occasionally Rabbi Stephen Wise. The Justice invited me to attend whenever I wished but, since I was not actively interested in Zionism and rather looked forward to my Sundays off, I never accepted.⁶⁵

It is ironic that Murphy chastises Brandeis’ Zionist activities, probably Brandeis’ most public extrajudicial activity. Certainly there was nothing that could be considered partisan about this activity, and the likelihood of any litigation reaching the Supreme Court involving the Palestine question was virtually nil. Brandeis believed that Jews and Arabs could live in amity.⁶⁶ He also foresaw the dangers of Nazism: in 1933 he stated, “the Jews must leave Germany.”⁶⁷ Brandeis’ Zionist activities show him exercising his rights of citizenship while at the same time taking no steps to compromise the Court.

D. Justice Frankfurter

This reviewer will not undertake to comment extensively on Murphy’s characterization of Justice Frankfurter’s extrajudicial contacts with the Roosevelt administration. Murphy chronicles these activities in detail and labels them improper. Undeniably, Frankfurter’s activities prior to and during the Second World War were extraordinary, when viewed by today’s standards. But during the war several Justices were actively involved with parts of the war effort.

63. MASON, *supra* note 16, at 593.

64. Judge Henry J. Friendly served as Brandeis’ law clerk in 1927-28. Judge Friendly presently serves as a United States Senior Circuit Judge for the Second Circuit.

65. Letter from Judge Henry J. Friendly to Judge Myron H. Bright (Dec. 6, 1982).

66. MASON, *supra* note 16, at 594-95.

67. *Id.* at 596.

Two of Frankfurter's former law clerks furnished me with invaluable insights into Frankfurter's activities. These recollections dispel Murphy's charge of misconduct. Philip Elman wrote:

As I told you, I served as Justice Frankfurter's law clerk during the 1941 and 1942 terms, when — like everyone else in Washington, including other members of the Court, particularly Byrnes, Douglas, Jackson, Murphy, and Reed — Frankfurter believed the country's and his own highest priority was to win the war. To a far greater degree than the others (except of course for Byrnes, who resigned to become the nation's economic czar), Frankfurter was in a unique position to help the President: because of his close personal ties to FDR and Eleanor; his World War I experience; and, most of all, his friendship with leaders like David Ben Gurion, Lord Halifax, Jean Monnet, Henry Stimson, John McCloy, and many more.

And Frankfurter *did* go to war, committing as much of his time and energy to that effort as he could, and yet not at the expense of his judicial responsibilities. Anyone familiar with his work on the Court during that period knows — and Bruce Murphy agrees — that Frankfurter was as active a Justice then as ever. It was in this period that — as is shown by his opinions in *Bridges v. California*, *West Virginia v. Barnette*, *SEC v. Chenery*, *McNabb v. U.S.*, *Kirschbaum v. Walling*, *NBC v. U.S.*, to mention a few — Frankfurter established the dominant strands of judicial philosophy for which he is best known.⁶⁸

Joseph Rauh added:

Any opinion I give is prejudiced, but my view is that Frankfurter didn't do anything wrong. He did not engage in extracurricular activities on matters that would come before the Court and, equally importantly, he was one of the few men in the world with both the position and the wisdom to advise and propel Roosevelt into stopping Hitler.⁶⁹

V. CONCLUSION

Professor Murphy's book ignores the ethical standards in place during Brandeis' and Frankfurter's tenure on the Court. The only standard that interests Murphy is taken from an entry in Frankfurter's

68. Letter from Philip Elman to Judge Myron H. Bright (Nov. 18, 1982).

69. Letter from Joseph L. Rauh, Jr. to Judge Myron H. Bright (Dec. 22, 1982).

diary: "When a priest enters a monastery, he must leave — or ought to leave — all sorts of worldly desires behind him. And this Court has no excuse for being unless it's a monastery."⁷⁰ This arcane entry in terms of Frankfurter or Brandeis means nothing. Neither engaged in extrajudicial activity for profit, glory, wealth or private gain of any kind. The public good, as each saw it, dictated their conduct.

The monastery concept cannot and should not be accepted literally. The Court is a monastery only in the sense that judges work in virtual seclusion. But judges ought not to live a monastic life, separate from the world around. The wise judge needs to know as much as possible about our society in understanding the complex legal problems dealing with almost every facet of modern life that comes to the Court. Too often, the great press of increasing caseloads tends to force judges to withdraw from society. This is an unfortunate side effect of the modern business of judging. Moreover, the present code of conduct may well be overly restrictive in barring judges from commenting about crucial problems, not in litigation, or from participating in non-partisan, nonlitigious, organizations that seek solutions for the pressing problems facing our society.

In commenting on Brandeis' extraordinary relationships with Wilson and Roosevelt, and also on Frankfurter's relationship with Roosevelt, one must observe that extrajudicial contacts travel a two-way street: Wilson sought advice and guidance from Brandeis; Roosevelt sought advice from both Brandeis and Frankfurter. It may be that advice from a judge has a special quality. A judge serves no political constituency and can seldom seek any personal gain. These presidents obviously desired, and perhaps needed, that quality of advice. As a result of the action of the Judicial Conference of the United States taken in 1973, this two-way street of communication may well be roadblocked for the foreseeable future. Yet, given the quality of counsel furnished by Brandeis and Frankfurter, it is safe to say that the country would have been the loser had there been such a roadblock during their tenure.

Perhaps the best way to conclude this review is to quote part of a letter to me from Judge Charles E. Wyzanski, Jr.,⁷¹ who knew both men well. Judge Wyzanski wrote that Brandeis and Frankfurter, "like

70. CONNECTION, *supra* note 4, at xiii.

71. Judge Charles E. Wyzanski is a former student and colleague of Frankfurter's. Judge Wyzanski presently serves as a United States Senior District Judge for the District of Massachusetts.

the rest of us, had their faults. Oh if we only had their virtues.”⁷²

Unfortunately, Murphy's book is neither a fair appraisal of their virtues nor of their faults.

72. Letter from Judge Charles E. Wyzanski, Jr. to Judge Myron H. Bright (Dec. 19, 1982).