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The Brandeis-Frankfurter Connection

Harlon L. Dalton
Yale Law School

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Off the Bench and Into the Mire: Judging Extrajudicial Behavior


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, 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 "artwork," 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

† Associate Professor of Law, Yale University.

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by Murphy’s slightly more subtle appeals to the mistrust and fear of officialdom that our recent history seems to justify. 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.” 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. 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. On the other
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.  

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.  

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.  

Such letters indeed followed, although Murphy greatly overstates the

6. P. 40.  
7. Id.  
8. P. 41.
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

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.\textsuperscript{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. \textit{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.\textsuperscript{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)\textsuperscript{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.\textsuperscript{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...
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doing free the latter "from the shackles of remaining nonpolitical while on the bench?"\textsuperscript{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).\textsuperscript{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"\textsuperscript{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."\textsuperscript{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."\textsuperscript{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."\textsuperscript{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-

\textsuperscript{16} P. 41.
\textsuperscript{17} Cover, supra note 4, at 18-19.
\textsuperscript{18} P. 84.
\textsuperscript{19} P. 43.
\textsuperscript{20} Id.
\textsuperscript{21} P. 9.

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, 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 Code 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-

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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.").
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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. 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, 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. Some commentators have suggested that when controversies are controversial, judges should remain silent lest they embroil the court and diminish respect for it. 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. 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 demogoguery 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. 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. 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
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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? 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. 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.” 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.” 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. However, in his eagerness to tie Justices Brandeis and Frankfurter to the subsequent political activities of their protegés, 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. 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.

35. See p. 77.


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).
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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. 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. 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. 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.” In addition, it severely restricts financial activities and limits “civic and charitable” efforts. 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.

The free reign thus given to quasi-judicial conduct, as against extrajudicial and political activity, 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.

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, 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, 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, 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).


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.

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later pass on the scope or constitutionality of the bill or amendment should it be enacted, 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 status 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 seems 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

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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.