Society Update

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Frank Murphy and the Roosevelt Court

Professor Paul Moreno, the Society's Historical Advisor, was the keynote speaker at the Annual Membership Luncheon on October 28. The following is the text of his address.

Frank Murphy was the second Michigander and President Franklin Roosevelt's fifth appointee to the U.S. Supreme Court. He cemented a solid liberal majority on the Court following the constitutional revolution of 1937 when the Court accepted the New Deal. Murphy brought a liberal activism to the Court that made him a precursor to Earl Warren.[1] Murphy's liberalism often appeared to derive from his Catholicism, especially that of papal social teaching. But ultimately he displayed a very personal and idiosyncratic judicial style. Benjamin Cardozo called it *gefühlsjurisprudenz*, judgment based on subjective sentiment and feeling, rooted in the 20th century philosophy called "emotivism," which viewed moral judgments as expressions of an individual's preferences and dislikes.[2]

Murphy did not serve long on the Court, less than a decade, and he saw the Court assignment as a consolation prize for an unfulfilled political career. The Chief Justices who assigned opinions held Murphy in low regard, so he got few major roles. In 1945 Murphy told Felix Frankfurter that "as is done to useless horses, I have been put to pasture on the Court after a life of decency and truthfulness."[3] Almost all commentators agree that Murphy's talents did not mesh well with the judicial office, especially that of a high appellate tribunal.

Murphy's personality significantly shaped his political and judicial career. Analysts have the benefit of Sidney Fine's comprehensive, three-volume, two thousand-page biography.[4] Fine engaged in considerable "psychohistory," and concluded that Murphy had a "narcissistic" personality. Murphy said that he read no novels

"because no novel could be as exciting as my [own] life."[5] "It was essential for Frank Murphy to believe that the public position he held at any time was, figuratively speaking, the center of the universe," Fine wrote.[6] Many have claimed that Murphy was the first homosexual Supreme Court Justice. Considerable circumstantial, but no direct, evidence, supports this.[7] He was a lifelong bachelor and extremely close to his mother and sisters. He had a tremendous sense of destiny and a messianic streak like that of Woodrow Wilson. His personal relationships were certainly complicated. Despite his conspicuous concern for the downtrodden, he preferred to socialize with the well-heeled and celebrities. He enjoyed a reputation for honest government that few other big-city bosses possessed, yet he was rather careless and indulgent in his official financial affairs.[8] Despite the homosexual innuendos, he was something of a chick-magnet. For all his ideological passion, he could be cold and aloof. As Fine observes, "Murphy loved people in the mass more than he loved particular individuals."[9]

Murphy's grandparents emigrated from Ireland to Canada; family lore included martyrs to the cause of Irish independence. His father was a Fenian arrested and acquitted in Canada for his political activities. He was christened Michael Francis Murphy, but changed his name to Frank because his father told him that no great men ever had middle names.[11] Murphy attended public school in the thumb region of Michigan by Lake Huron. He was brought up on Jeffersonian-Bryanite Democratic politics. Murphy barely graduated from the University of Michigan Law School, earning several "Ds" and "Fs." But when he became Attorney General, U of M Law School Dean Henry Bates called Murphy "the best student I ever had," though he had given him a "C" in wills.[11]

Murphy was trained as an officer in the First World War, but arrived too late for combat. Upon his return he won his first political office as an assistant U.S. attorney. After some time in private practice he won a seat on Detroit's criminal "Recorder's Court." He established a reputation as compassionate or soft on crime. He became politically prominent by presiding over the murder case of Ossian Sweet, an African-American physician accused of killing a white member of a racist mob trying to drive his family out of their Detroit home. The other judges on the Recorder's Court tried to avoid the case, but Murphy saw it as "the opportunity of a lifetime to demonstrate sincere liberalism" and build political support.[12] With enthusiastic support from the city's black and immigrant population, he was elected mayor of Detroit in 1930. He battled for relief in this city that was especially hard-hit by the Depression.

Murphy's support for Roosevelt won him the office of Governor-General of the Philippines, where his Catholicism and support for Filipino independence made him very popular. Roosevelt solicited Murphy to run for Governor of Michigan in 1936. Michigan had been an overwhelmingly Republican state since the Civil War, voting for the Republican presidential candidate in every election until 1932. There were sessions of the Michigan legislature in the 1920s without a single Democratic member in either house. The state had 255 Republican newspapers to 16 Democratic. But Murphy managed to win by a narrow margin. He took office shortly after the Flint "sit-down strike" began, an episode that would do more than anything else to define his career, as well as American constitutional law.

In 1935 the conflict between the New Deal and the Supreme Court had reached a crisis point. The

Court had struck down several New Deal acts, especially those regulating industrial and agricultural production and labor. Congress responded with the "second New Deal," highlighted by the National Labor Relations Act, called the Wagner Act for its sponsor, New York Senator Robert F. Wagner. The act required employers to bargain exclusively with whatever independent was organization chosen by a majority of its employees.

A group of radical auto workers in Flint went further than the Wagner Act. When General Motors refused to recognize the United Auto Workers, instead of quitting work and picketing to prevent replacement workers from getting into the plant, they occupied it and refused to leave.[13] They could pelt besiegers with auto-part missiles and hold valuable plant machinery hostage to sabotage. The Governor (acting, it was commonly understood, at the behest of the President) made it clear that he would not use force to eject the strikers. He sent in the National Guard, but did so to protect the strikers against local law enforcement or vigilantes—the strikers regarded the Guardsmen as fellow "picketers." G.M. eventually obtained a court order to oust the trespassers, but Murphy refused to enforce it.[14] Within a week, G.M. responded to presidential pressure and the company and came to terms with the union. But the ramifications of the crisis would reverberate for years.

On February 5, 1937, the same day that the Genesee County Court had granted G.M. the "writ of attachment," F.D.R. announced his plan to "pack" the Supreme Court. Many saw Murphy's refusal to enforce the court order and Roosevelt's attack on the Court as two sides of the same lawless coin. Within two months the Court would suddenly abandon its opposition to the New Deal, particularly when it upheld the Wagner Act on April 12.[15] Historians still debate whether the Court had caved in to political pressure, and some have argued that the Justices had responded to the sit-down strikes in particular.[16] They may have surmised that the Wagner Act offered a preferable way to manage industrial disputes. So future Justice Frank Murphy played a major role in the "constitutional revolution" of 1937.[17]

The Court-Packing Plan and the sit-down strikes provoked widespread outrage and crippled both President Roosevelt and Governor Murphy. Though peace came to Flint, the sit-down tactic spread across the nation to public chagrin.[18] However ambivalently Americans may have felt about unions and the Wagner Act, the lawless sit-down method had almost no defenders. (The Supreme Court would hold that they violated the Wagner Act in 1939.)

The sit-down strikes and general reaction against the New Deal (especially the intense "Roosevelt recession" that began in 1937) doomed Murphy's re-election bid in 1938. Roosevelt took care of his Michigan protégé as best he could, making him Attorney General at the end of 1938. Murphy preferred the post of Secretary of War, as a stepping-stone to succeeding F.D.R. in the White House. (This was a real prospect. Jim Farley reported that Murphy was third on Roosevelt's list of preferred successors in 1940.[19]) It seemed rather audacious to turn a Governor who had refused to enforce the law into the nation's chief law-enforcement officer. But Murphy had prepared for such a contingency. He produced a letter that he had written to John L. Lewis, head of the C.I.O., at the height of the sit-down crisis, saying that he would enforce the court writs if necessary. This "law-and-order" letter had no impact in 1937. It was, Fine writes, "a document for the record, that some time later might be cited as evidence of Murphy's belief in the sanctity

of the law."[20] It did the trick, and Murphy was easily confirmed.

Conservative Justice Pierce Butler died in November 1939, creating an opening in the "Catholic seat" on the Supreme Court. Murphy was an obvious choice, a Catholic (Pope Pius XII called him "the ranking American Catholic" in 1946) from the Midwest (Butler was a Minnesotan) and a confirmed liberal. But a series of rumors circulated as to why Roosevelt made the appointment. Some thought that Murphy had been an incompetent Attorney General and was being "kicked upstairs" to make room for Solicitor General Robert Jackson. His detractors claimed that he was "a poor administrator, who saw dangerous Reds in honest radicals, is 'queer' and inept and lacks any real ability," Arthur Krock reported.[21] Still more nefariously, some said that the President sought to abort Murphy's criminal investigations of powerful Democratic big-city bosses, whose support Roosevelt needed for re-election. Jackson and Justice Department attorney Gordon Dean thought that Roosevelt was indulging in spiteful retribution to the Court, "to demonstrate his 'complete contempt' for the Court, and because he could think of no 'worse punishment' to inflict on it" than Murphy, said Dean.[22] Murphy was very reluctant to take the Court seat and leave active politics. He had real doubts about his own ability, and said he was afraid that the Court was "beyond his grasp" and feared "that my work will be mediocre up there."[23] Roosevelt told him that the door would be open to future executive offices. And in the meantime he could engage in politics on the Court, "approving legislation for the people, preserving liberties—almost rewriting laws that will do it." The Senate confirmed him, 69-23, twelve days after the appointment, with no hearings.[24]

Murphy joined the most controversial and dysfunctional Supreme Court in American history.[25] Melvin Urofsky entitled his volume on the Stone and Vinson Courts (1941-53) *Division and Discord*.[26] These years were really "the Roosevelt Court," shaped by his eight appointees. F.D.R. assembled a Court that resembled "nine scorpions in a bottle."[27]

Hugo Black, Roosevelt's first nominee, was a populist demagogue, among the most radical members of the Senate. He barely survived the post-confirmation revelation that he was a member of the Ku Klux Klan.

William O. Douglas, who became the Court's longest-serving member, was a radical Legal Realist and activist, whom G. Edward White described as "the anti-judge."[28] Douglas' personality was also extremely off-putting.[29] One biographer called Douglas "one of the most unwholesome figures in modern American political history…. A liar to rival Baron Munchausen." Douglas claimed to have served in the Army in World War One and having recovered from polio to do so. He neither served nor had polio. "Apart from being a flagrant liar, Douglas was a compulsive womanizer, a heavy drinker, a terrible husband to each of his four wives, a terrible father to his two children, and a bored, distracted, uncollegial, irresponsible, and at times unethical Supreme Court Justice who regularly left the Court for his summer vacation weeks before the term ended."[30]

In 1939 Roosevelt appointed Felix Frankfurter, the renowned Harvard Law Professor and informal presidential adviser. Manipulative and haughtily professorial, Frankfurter also added to the toxic atmosphere of the Roosevelt Court. By 1943, with the arrival of Roosevelt's last appointee, Wiley Rutledge, the Court clustered in two ideological camps. On one side were those who believed in judicial self-restraint, lest the new liberal Justices repeat the sins for which they had condemned their conservative predecessors. This group, often called the "judicial process" or "process-restraint" school, was associated with Harvard and Frankfurter. On the other side were the Yale Realists, willing to use judicial power for progressive purposes now that liberals had taken over the Court. Frankfurter and Robert Jackson were the most prominent conservatives. Murphy would join Rutledge, Black, and Douglas, composing what Frankfurter called "the Axis."[31]

When Frankfurter could not win Murphy over, he became the chief promoter of Murphy's reputation as an incompetent, clerk-dependent, political hack and bleeding-heart liberal. He quipped that Roosevelt had "tempered justice with Murphy" by his appointment. In 1944 he told Murphy that his list of clients consisted of "reds—whores—crooks—Indians and all other Colored people—longshoremen—mortgagors and all other debtors—railroad employees—pacifists—traitors—Japs—women—children—most men."[32] "Must I become a Negro rapist before you give me due process?" he asked.[33] On the point of judicial power in a democracy, Frankfurter asked him "What is the difference between you and Louis XIV, when you say 'I am the law, jurisdiction or no jurisdiction'?"[34]

Popular and academic commentators alike ex-

pressed dismay at the antics of the Roosevelt Court. Murphy got more than his share of the criticism. Historian Arthur Schlesinger wrote in 1947, "Murphy is a strange, complicated, self-dedicated figure. His egotism is vast and somewhat messianic…. His legal competence is questioned more often than that of any other Justice. Yet his devoted concern for individual rights has produced some of the most impassioned writing in recent Court history."[35] Murphy was deeply offended by the article, which he believed had been orchestrated by his brethren on the Court.[36] President Harry S Truman blamed his predecessor's personnel decisions. He told his wife, Bess, that Roosevelt's "Court appointments are somewhat disgraceful."[37] Murphy was still angling for an executive or diplomatic appointment in 1945, but former Justice James Byrnes reported that the President considered Murphy "a nut," so he stayed on the bench.[38]

Murphy wrote 130 majority opinions, 20 concurrences, and 69 dissents. About 1/3 of the total were technical tax cases. He is best known for his dissents. His Chief Justices, Harlan Fiske Stone and Fred Vinson, held Murphy in low regard and so did not assign him many important cases. Harlan Fiske Stone called him the "weak sister" on the Court.[39] Stone said that Murphy relied too much on his clerks and had to be reminded that "the job of the Court is to resolve doubts, not create them."[40] Murphy raised a lot of doubts in his maiden decision, *Thornhill v. Alabama*. (New Justices traditionally got to choose their first case.) Here the Court struck down a state law that prohibited picketing. The Court held that picketing was protected as "free speech" under the First Amendment. The case is notable because it stressed two of the principal features of post-New Deal liberal jurisprudence. It continued the "incorporation" of the Bill of Rights, by which the Court gradually applied the Bill of Rights (originally limited to the federal government) to the states. Murphy also emphasized the recent case of *U.S. v. Carolene Products*, which announced the "preferred freedoms" doctrine. The Court announced (in a footnote) that from now on it would assume the constitutionality of laws affecting "ordinary commercial transactions," but would apply a more stringent standard for laws affecting non-economic rights (particularly those of the Bill of Rights), and the rights of "discrete and insular minorities."[41] This signaled the agenda of modern liberal jurisprudence, which would reach its peak under Earl Warren. Murphy embraced it enthusiastically. Minorities, he said, were "the children he never had."[42]

The *Thornhill* doctrine proved very ephemeral, however. Labor law scholar Charles O. Gregory called it "one of the greatest pieces of folly the Supreme Court ever perpetrated."[43] Within a year the Court held that picketing *could* be enjoined if a strike produced an atmosphere of intimidation and violence.[44] Felix Frankfurter wrote this opinion, and Murphy joined in it, walking back his apparently anything-goes position. Several subsequent cases whittled away at the *Thornhill* doctrine, concerning "stranger picketing," secondary boycotts, and strikes for unlawful purposes. One commentator wrote that picketing was "a legal Cinderella," which a fairy-godmother Supreme Court had allowed to be a princess only until midnight. That fairy godmother would have been Frank Murphy.[45] In 1950, shortly after Murphy's demise, Justice Douglas lamented the final demise of the *Thornhill* doctrine.[46]

gefühlsjurisprudenz

judgment based on subjective sentiment and feeling, rooted in the 20th century philosophy called "emotivism," which viewed moral judgments as expressions of an individual's preferences and dislikes.

One critic called Murphy "utterly uncritical [in his] support for labor unions."[47] This aligned with the "Roosevelt Court" overall. The Court declared the complete exemption of unions from the antitrust and anti-racketeering laws. As constitutional scholar Edward S. Corwin put it, the Court was "setting up as a sort of superlegislature in the interest of organized labor…. Constitutional law has always had a central interest to guard. Today it appears to be that of organized labor."[48]

Murphy was at the center of one of the Roosevelt Court's most contentious cases, writing the opinion in the *Jewell Ridge* or "portal-to-portal" case. The United Mine Workers claimed that the 1938 Fair Labor Standards Act (largely the work of then-Senator Hugo Black) required employers to pay workers for the time that it took them to get to and from their jobs—it could take coal miners, for example, quite a while to get from the mine head to the coal seam. In the *Jewell*

Ridge case the Court overturned a Labor Department determination that it did not.[49] The U.M.W. retained Black's former law partner (and Klan Cyclops-mentor), Crampton Harris. Justice Jackson took umbrage that Black had not recused himself, and wrote a dissent that alleged that Senator Black had interpreted the F.L.S.A. in a way contrary to Justice Black. The "Jackson-Black feud" reignited when Chief Justice Stone died in 1946 and Jackson publicly denounced Black to prevent his elevation to the Chief Justiceship. This tirade instead convinced Truman not to promote Jackson, whom the President described as having "surely gone haywire."[50]

F.D.R. had told Murphy that on the Court he could be "almost rewriting laws," and he did so in this case. But with millions of dollars of potential back-pay liability at stake, Congress explicitly overruled the *Jewell Ridge* decision. In May 1947 it declared that the F.L.S.A. "has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation," which would be ruinous to interstate commerce.[51] The act went on to cut off lawsuits under the F.L.S.A., one of the few occasions in which Congress exercised its power to limit the jurisdiction of the federal courts.[52] Justice Jackson said that "the Supreme Court has never had such a rebuke at the hands of Congress."[53] With the Court acting like what *Newsweek* called "Santa Claus to labor unions," the same Congress also made significant revisions to the Wagner Act in the 1947 Taft-Hartley Act.[54]

The war gave the uncertain new Justice a sense of his mission: to protect unpopular minorities. Murphy always possessed this inclination, but it clashed with his patriotism and keen desire to promote the war effort. He trained to be an Army officer during the war. It was not technically illegal for him to remain on the Court and serve in the Army so long as he was inactive. But it struck many as improper, and he embarrassed some of his brethren when he dramatically appeared in Court in uniform.[55] His dual status compelled him to recuse himself in one of the most contentious cases to arise out of the war, the trial of several Nazi saboteurs by a military commission. In the first case involving the relocation of Japanese-Americans, he allowed Felix Frankfurter to talk him into dropping his dissent.

Murphy began his crusade in defense of minority rights in an opinion that overturned the revocation of the naturalization of Russian-born William Schneiderman, because he had been a member of the Communist Party when he applied for citizenship in 1927. Murphy held that Congress had not intended to apply the law to the particular facts of this case, involving "doctrinal utterances and academic or theoretical exhortations," rather than holding the law itself unconstitutional. Murphy admitted that he was uncertain about the legalities. It was clearly a result-oriented and personal decision.[56] He wrote to his brother that their "forebears are here as the result of the old world's passion for exile of all those who did not conform to certain religious and political beliefs. Now after having one faith all my life—tolerance and justice toward

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those I have had least in common with—at this juncture I am not going to start the trek of exile back to the old world." Editorial opinion was mixed, but the law reviews uniformly panned the opinion. It widened and intensified the divisions on the Roosevelt Court.[57] In this case Murphy seemed to find his voice. As one biographer put it, he "was becoming reconciled to his position by converting it into a pulpit."[58]

One commentator suggested that Murphy acted boldly in the Schneiderman case to atone for having let Frankfurter talk him out of dissenting in the first Japanese-American relocation case, *Hirabayashi v. United States*.[59] That case limited itself to upholding a curfew order; it did not address the relocation. The Court upheld that program in 1944 in *Korematsu v. United States*, a decision that will live in infamy. It provided the occasion for one of Murphy's most memorable opinions, in dissent. Murphy said the exclusion program that "goes over 'the brink of constitutional power' and falls into the ugly abyss of racism."[60] Murphy conceded that civilian judges must not scrutinize military judgment too closely, but asserted that this program had no rational basis. It derived completely from "misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices." The Justices need not defer to sociological buncombe disguised as military discretion. He warned that the program mimicked "the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy." We ought not "adopt one of the cruelest of the rationales used by our enemies." He concluded, "I dissent, therefore, from this legalization of racism."[61]

Korematsu was Murphy at his best and his worst. He was on the side of the angels, and wrote vividly and courageously. But the opinion also smacked of what a later day would call "virtue-signaling," a self-righteous display of personal offense and moral superiority. As a dissent, the opinion was of no real consequence—had it been the majority opinion, the government surely would have ignored it and exposed the Court's fecklessness in wartime. Justice Jackson's dissenting opinion better recognized that the decision did more than injustice to the Japanese-Americans; it implicated the Court in a grave threat to the constitutional system.

African-Americans were the largest and most oppressed "discrete and insular minority" group in America, and Murphy championed their rights as well.[62] His experience in Detroit had taught him that the idea "that Negroes have constitutional rights in our big cities is purely a fiction."[63] During World War II the Court put down an attempt by all-white railroad unions to drive blacks out of desirable jobs. Progressive and New Deal labor legislation had empowered racially discriminatory unions, so in these cases two liberal interest groups—organized labor and blacks—two of his children--were at odds. The Court held that all unions had a "duty of fair representation." Though they did not have to admit blacks as members, they could not blatantly bargain away their interests. Murphy concurred, but said that the Court had dodged "a grave constitutional issue." He thought that the Court overlooked "the utter disregard for the dignity and well-being of colored citizens," which raised Fifth Amendment issues.[64] He denounced "the cloak of racism surrounding the actions of the [white union] in refusing membership to Negroes." "No statutory interpretation can erase this ugly example of economic cruelty against colored citizens of the United States."[65] One commentator noted that "judicial activism was never clearer" than in this opinion.[66]

Religious minorities also attracted Murphy's solicitude. The principal cases that applied the religious freedom clauses of the First Amendment to the states involved the Jehovah's Witnesses. The Witnesses were a radical sect that regarded almost all participation in public life as an idolatrous offense against God. One scholar describes them as "millenarian, eschatological, gnostic, prophetic, theocratic, sectarian, missionary, and evangelical."[67] They proselytized loudly and offensively against mainstream religions, especially the Roman Catholic Church. Murphy, in keeping with his principle of "tolerance and justice toward those I have least in common with," included the Witnesses among his adopted minority children. One commentator quipped that if Murphy were ever canonized, it would be by the Witnesses.[68] Murphy had joined all of the Justices but Chief Justice Stone to uphold Pennsylvania's compulsory flag-salute law in 1940.[69] Three years later Murphy joined a new majority in striking down a West Virginia flag-salute law. Many believed that the Justices had reacted to news stories about persecution of the Witnesses. Murphy was just following his gut. "I write the law as my conscience bids me," he wrote in 1946.

The constitutional law of religious freedom really

took off with the 1947 case, *Everson v. Ewing Township*. The Court had incorporated the "free exercise" provision of the First Amendment in a 1940 case involving the right of Jehovah's Witnesses to proselytize.[70] In *Everson* it held that the "no establishment" clause also applied. *Everson* involved a subsidy given by a New Jersey town for the transportation of students to Catholic schools. Justice Black announced that the establishment clause imposed a "wall of separation between Church and State," using a phrase from an 1802 letter by President Thomas Jefferson to a group of Connecticut Baptists. In years ahead secularists would repeat that phrase so often as to eclipse the actual text of the First Amendment. Curiously, Black held that the transportation subsidy did not breach this wall. Justice Jackson for the dissenters pointed out that he could not reconcile the "wall of separation" standard with the result in the case. In the long run this decision would prove a Pyrrhic victory for the religious, as the Court would build up the wall of separation to a near-total prohibition of any public support for religion. Ultimately, insofar as morals legislation had a religious basis, it would do away with the states' "police power" to legislate for the morals part of the "public safety, health, welfare, and morals."

Finally, Murphy made a prescient comment in his dissent in *Adamson v. California* in 1947. In this case the Court held that the self-incrimination provision of the Fifth Amendment did not apply to the states. It reiterated an earlier point by Justice Cardozo that only those provisions of the Bill of Rights that were "implicit in the concept of ordered liberty" would be "incorporated." Justice Black objected that this doctrine of "selective incorporation" gave too much discretion to judges to pick and choose which rights they favored. He claimed that the Fourteenth Amendment intended to incorporate *all* the provisions of the Bill of Rights, no more and no less. Murphy in turn caviled at Black's "total incorporation" doctrine. He said, "I agree that the specific guarantees of the Bill of Rights should be carried over intact" by the Fourteenth Amendment. "But I am not prepared to say that the [Fourteenth Amendment] is… limited by the Bill of Rights. Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of… due process despite the absence of a specific provision in the Bill of Rights."[71] This position, known as "total incorporation plus," took hold decades later, as the Court protected unenumerated rights such as "privacy."[72]

Many other cases show Murphy expressing his intuitive sense of justice in the defense of the unpopular. He strenuously objected to what he thought were vindictive cases against Communist union organizer Harry Bridges and Japanese General Yamashita (the "Tiger of Malaya"). And, much like Earl Warren in the *Brown* case, he sought to make his opinions short, simple, and "understandable by every American."[73] Dissenting in a case that permitted a death-row inmate to be sent to the electric chair a second time after the first attempt had misfired, he told his brethren in conference, "We have nothing to guide us in defining what is cruel and unusual apart from our own consciences…. Our decision must necessarily be based upon our mosaic of beliefs, our experiences, our backgrounds and the degree of our faith in the dignity of the human personality." Indeed, Murphy went beyond his own personality and projected it into others'. He called the prisoner's anticipation of a second execution attempt "an anguish that can be fully appreciated only by one who has experienced it." Only by those who have experienced it, and by particularly sensitive souls like his own, who had not.[74]

In 1949 Frank Murphy's untimely death at age 59, along with Justice Rutledge's nearly simultaneous passing, effectively ended the "Roosevelt Court." Harry Truman's four Justices moved the Court in a markedly more conservative direction, and reduced the liberal "Axis" to just Black and Douglas. But in the 1950s and especially after 1962 Chief Justice Earl Warren would revive liberal jurisprudence, and turn many of Murphy's dissents into majorities. But few of the Warren Court decisions acknowledged Murphy.[75]

Many have blamed Murphy's jurisprudential weakness for this neglect. As one commentator wrote near the end of his life, "If any Justice uses the 'gastronomical' approach to decisions—that is, votes by the nausea or pleasure he gets from hearing the case—it is Murphy."[76] This accorded with the skeptical Realist view that decisions could depend on what a judge had for breakfast on any given day, or Holmes' famous statement of his standard of unconstitutionality: "Does it make you puke?"[77] One historian called Murphy "a thoroughgoing liberal who had little use for technical questions and believed that the objectives of law should be justice and human dignity. Even more than Douglas and Black, Murphy cared little for precedent and openly relied on what one commentator has called

'visceral jurisprudence.'"[78] But many Warren Court decisions displayed equally result-oriented and gut-based *gefühlsjurisprudenz*. Warren himself often told counsel to cut through the legalities, asking, "Yes, but is it *fair*?"

The aversion to cite Murphy was probably more a matter of rhetoric and style. Murphy's opinions were "too extreme, too emotional, too sweeping, too unqualified to invoke in the Warren Court years," one critic notes. They were too close for comfort. To cite Murphy would expose "the fact that they were just as instrumentalist in their decision-making as Murphy had been."[79]

As G. Edward White, the premier judicial biographer, observed, Murphy resembled Warren, but "the same posture that invoked ridicule in Murphy was the source of Warren's strength as a judge."[80] Warren had more gravitas and understatement. One biographer concluded that Murphy was "fundamentally an emotionalist rather than a craftsman."[81] The Murphy style would emerge again with a later Catholic Justice, Anthony Kennedy. Kennedy shared much of the vanity, pomposity, and inflated self-importance often attributed to Murphy.[82] Whatever his religious beliefs or sexual orientation, Murphy surely would have followed Kennedy's path in the abortion and homosexual rights cases, given his solicitude for those he perceived as victimized minorities. In particular, when one reads the famous "mystery passage" in the 1992 *Casey* case, the quintessential expression of modern liberal *gefühlsjurisprudenz*, one cannot help but hear an echo of Frank Murphy. "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[83] Similarly, Frank Murphy himself remains something of a mystery to the historian.

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End Notes

[1] John H. Pickering, "A Tribute to Justice Frank Murphy," *University of Detroit Mercy Law Review* 73 (1996), 704; James R. Kerr, "The Neglected Opinions of Mr. Justice Murphy," *Detroit College of Law Review* 1 (1977), 7-66.

[2] Benjamin Cardozo, *The Nature of the Judicial Process* (Yale, 1921), 106; Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*, 2d ed. (Notre Dame, 1984), 14-34.

[3] David J. Danelski, "The Riddle of Frank Murphy's Personality and Jurisprudence," *Law and Social Inquiry* 13 (1988), 193.

[4] *Frank Murphy: The Detroit Years* (Michigan, 1975); *Frank Murphy: The New Deal Years* (Chicago, 1979); *Frank Murphy: The Washington Years* (Michigan, 1984). In subsequent citations I will use the subtitles of these volumes.

[5] Fine, *The Detroit Years*, 197.

[6] Fine, *The Washington Years*, 236.

[7] Fine, *The Washington Years*, 9. Greg Zipes, *Justice and Faith: The Frank Murphy Story* (Michigan, 2021), 126; Howard, *Mr. Justice Murphy*, 206-11. Deb Pryce and Joyce Murdoch, *Courting Justice: Gay Men and Lesbians v. the Supreme Court* (Basic, 2001), 18-21, add nothing to Fine except today's allegedly superior "gaydar." Chad Graham, "Closet Case," *The Advocate*, 19 Jun. 2001, p. 16.

[8] Zipes, *Justice and Faith*, 68

[9] Fine, *The Detroit Years*, 85; Howard, *Mr. Justice Murphy*, 167.

[10] Richard D. Lunt, *The High Ministry of Government: The Political Career of Frank Murphy* (Wayne State, 1965).

[11] Fine, *The Detroit Years*, 26.

[12] Howard, *Mr. Justice Murphy*, 27. Zipes observes that Murphy's conductof the Sweet trial bolstered African-Americans' confidence in the judicial system, which would culminate in the *Brown* case. If so, this was another significant contribution to liberal judicial power. Zipes, *Justice and Faith*, v.

[13] The organizers did not use the machinery of the Wagner Act because they were only a small minority of the workforce and could not have won a legitimate representation election, and because they assumed the act would be invalidated—see below.

[14] Technically, the Court issued a "writ of ejectment,"

Continued on pages 12-13.

2021 Annual Membership Luncheon

Society member John J. Lynch, III, (R) with guests for the table he hosted.

Judge Michael Brown (L) and Society Board member John G. Fedynsky.

Jacobs & Diemer table host Tim Diemer (L) with new Board member Mark Bendure.

Retired Third Circuit Judge William Giovan (L) with former Justice Clifford Taylor.

Justice Megan Cavanagh with WMU Cooley Law School Professor Gerald Fisher.

Justice Elizabeth Clement and new Society Board member John Pirich.

Justice Brian Zahra and Phil DeRosier at the table hosted by Dickinson Wright.

Justice Richard Bernstein and Michelle C. Ruggirello of Kienbaum Hardy Viviano Pelton & Forrest P.L.C.

Jane Sullivan Colombo and Ravynne Gilmore from the Court's Public Information Office.

Court of Appeals Judge Michael Riordan and State Bar President-Elect James Heath.

Cynthia Filipovich and Mark McInerney at the Clark Hill table.

Chief Justice McCormack and Jana Simmons.

ordering the strikers out, which the Sheriff read to them on 2 Feb. His order ignored, the Judge then issued a "writ of attachment" on 5 Feb., ordering the Sheriff to bring the strikers to his courtroom to explain their contemptuous failure to vacate. Murphy and the Sheriff, a loyal Democrat, made no effort to attach anyone.

[15] *N.L.R.B. v. Jones & Laughlin Steel Co*., 301 U.S. 1 (1937), was the first of five decisions commonly called the "Labor Board Cases."

[16] Jim Pope, "Worker Lawmaking, Sit-Down Strikes, and the Shaping of American Industrial Relations, 1935-58," *Law and History Review* 24 (2006), 1-93; Howard, *Mr. Justice Murphy*, 156.

[17] On the other hand, had Murphy enforced the order and precipitated an ugly bloodletting, this might have made the same impression on the Court.

[18] A group of Michigan National Guardsmen used the sit-down to demand pay for their service in the Flint strike.

[19] Fine, *The Washington Years*, 30.

[20] Fine, *Sit-Down*, 301; "Nomination of Frank Murphy," 13 Jan. 1939, Hearings before a Subcommittee of the Judiciary Committee of the United States Senate, 76th Cong., 1st Sess. (G.P.O., 1939).

[21] Arthur Krock, "In the Nation," *New York Times*, 26 Mar. 1940, p. 16.

[22] Fine, *The Washington Years*, 131.

[23] Fine, *The Washington Years*, 133.

[24] Fine, *The Washington Years*, 69, 131-37; Zipes, *Justice and Faith*, 203; Pickering, "A Tribute to Justice Frank Murphy," 707; Robert H. Jackson, *That Man: An Insider's Portrait of Franklin D. Roosevelt*, ed. John Q. Barrett (Oxford, 2003), 25; Melvin I. Urofsky, "The Roosevelt Court," in *The Achievement of American Liberalism*, ed. William H. Chafe (Columbia, 2003), 65; McMahon, "Constitutional Vision and Supreme Court Decisions," 28.

[25] C. Herman Pritchett, *The Roosevelt Court: A Study in Judicial Politics and Values, 1937-47* (Macmillan, 1948), 12-14.

[26] Melvin I. Urofsky, *Division and Discord: The Supreme Court Under Stone and Vinson, 1941-53* (South Carolina, 1997).

[27] Noah Feldman, *Scorpions: The Battles and Triumphs of F.D.R.'s Great Supreme Court Justices* (Twelve, 2010).

[28] G. Edward White, T*he American Judicial Tradition: Profiles of Leading American Judges*, expanded ed. (Oxford, 1988), 369.

[29] Bruce Allen Murphy, *Wild Bill: The Legend and Life of William O. Douglas* (Random House, 2003).

[30] "The Anti-Hero," *New Republic*, 24 Feb. 2003, p. 27. See also Mark Pulliam, "Revisiting William O. Douglas," *Law and Liberty*, 22 Jun. 2020.

[31] Fine, *The Washington Years*, 246-51.

[32] Danielski, "The Riddle of Frank Murphy's Personality and Jurisprudence," 194.

[33] Melvin I. Urofsky, "The Failure of Felix Frankfurter," *University of Richmond Law Review* 26 (1991), 182; Fine, *The Washington Years*, 259.

[34] Eugene Gressman, "The Controversial Image of Mr. Justice Murphy," *Georgetown Law Journal* 47 (1959), 653.

[35] "The Supreme Court: 1947," *Fortune* 35 (1947), 76.

[36] Howard, *Mr. Justice Murphy*, 424.

[37] To Bess Truman, 11 and 14 Jan. 1946, in *Dear Bess: The Letters from Harry to Bess Truman, 1910-59*, ed. Robert H. Ferrell (New York, 1983), 525-26.

[38] Fine, *The Washington Years*, 235. Truman may have resented Murphy's prosecution of his mentor, Tom Pendergast, the Kansas City Democratic boss, for tax evasion. Zipes, *Justice and Faith*, 272.

[39] J. Woodford Howard, Jr., *Mr. Justice Murphy: A Political Biography* (Princeton, 1968), 267.

[40] Kerr, "Neglected Opinions," 55.

[41] *U.S. v. Carolene Products*, 304 U.S. 144 (1938).

[42] Fine, *Washington Years*, 372.

[43] *Labor and the Law*, 2d ed. (New York, 1958), 328.

[44] *Milk Wagon Drivers v. Meadowmoor Dairies*, 312 U.S. 287 (1941).

[45] Hugh Douglas Price, "Picketing—A Legal Cinderella," *University of Florida Law Review* 7 (1954), 143.

[46] Sidney Fine, "Frank Murphy, the Thornhill Decision, and Picketing as Free Speech," *Labor History* 6 (1965), 119.

[47] Kerr, "Neglected Opinions," 13.

[48] Edward S. Corwin, *The Constitution and What It Means Today*, 7th ed. (Princeton, 1941), vii-viii.

[49] *Jewell Ridge Coal Corp. v. United Mine Workers*, 325 U.S. 161 (1945).

[50] To Bess Truman, 11 Jun. 1946, in *Dear Bess: The Letters from Harry to Bess Truman, 1910-59*, ed. Robert H. Ferrell (Norton, 1983), 525.

[51] 61 Stat. 84 (1947).

[52] Henry Hart, "The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic," *Harvard Law Review* 66 (1953), 1383.

[53] Urofsky, Division and Discord, 144.
[54] Richard E. Morgan, "The Portal-to-Portal Pay Case," in *The Third Branch of Government: Eight Cases in Constitutional Politics*, ed. C. Herman Pritchett and Alan F. Westin (Harcourt, 1963), 69.
[55] Howard, *Mr. Justice Murphy*, 275.
[56] Fine, *The Washington Years*, 417.
[57] Liss, "The Schneiderman Case," 514, 518-20.
[58] Howard, *Mr. Justice Murphy*, 339.
[59] Liss, "The Schneiderman Case," 516.
[60] *Korematsu v. United States*, 323 U.S. 214 (1944), 233. Murphy was the first Justice to introduce the term "racism" into constitutional law. His (repeated) reference to the absence of martial law was significant. Justice Black, who wrote the majority opinion upholding the program, claimed that it could have been accomplished by the suspension of the writ of habeas corpus.
[61] Ibid., 239-42.
[62] Justice Frankfurter had claimed that Jews were "the most vilified and persecuted minority in history" in his *Barnette* dissent, 319 U.S. 624 (1943), 646.
[63] Danelski, "The Riddle," 400; Fine, *The Washington Years*, 397.
[64] "Dignity," like "racism," was a new term to constitutional law, apparently introduced by Justice Frankfurter the previous year, *McNabb v. United States*, 318 U.S. 332 (1943), 343. I am grateful to Matt Frank of Princeton University for this reference.
[65] *Steele v. Louisville & Nashville Railroad*, 208-09. *Steele* was decided the same day as *Korematsu*, and preceded it in the *U.S. Reports*, so was technically the first case to use the term "racism."
[66] Howard, Mr. Justice Murphy, 352.
[67] William M. Wiecek, *The Birth of the Modern Constitution: The U.S. Supreme Court, 1941-53* (Cambridge, 2006), 217.
[68] This quip has been attributed to several sources, especially John Roche, "Mr. Justice Murphy," in *Mr. Justice*.
[69] *Minersville School District v. Gobitis*, 310 U.S. 586.
[70] The "incorporation" trend, begun in the 1920s, abated in the late 1940s and picked up again under Warren in the 1960s. Stephen Gardbaum, "New Deal Constitutionalism and the Unshackling of the States," *University of Chicago Law Review* 64 (1997), 509, 541.
[71] *Adamson v. California*, 332 U.S. 46 (1947), 124.
[72] Fine, *The Washington Years*, 503.
[73] Fine, *The Washington Years*, 162.
[74] Arthur S. Miller and Jeffrey H. Bowman, "'Slow Dance on the Killing Ground': The Willie Francis Case Revisited," *DePaul Law Review* 32 (1982), 22.
[75] Douglas was the exception. He had always been the most supportive of Murphy, who when Attorney General had recommended his appointment to the Court. Lunt, *The High Ministry of Government*, 201.
[76] Wesley McCune, *The Nine Young Men* (Greenwood, 1969 [1947]), 151.
[77] Dan Priel, "Law Is What the Judge Had for Breakfast: A Brief History of an Unpalatable Idea," *Buffalo Law Review* 68 (2020), 899-930; Phillipa Strum, *Louis D. Brandeis: Justice for the People* (Harvard, 1984), 361; Richard A. Posner, "The Rise and Fall of Judicial Self-Restraint," *California Law Review* 100 (2012), 544.
[78] Urofsky, "The Roosevelt Court," 70.
[79] Kerr, "The Neglected Opinions of Mr. Justice Murphy," 49, 61.
[80] G. Edward White, *Earl Warren: A Public Life* (Oxford, 1982), 359.
[81] Howard, *Mr. Justice Murphy*, 486.
[82] Mark Tushnet, "Understanding the Rehnquist Court," *Ohio Northern University Law Review* 31 (2005), 199.
[83] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), 851.

To watch this year's luncheon and hear this speech as well as the report from President Carl Herstein and Chief Justice McCormack's welcome from the Court, please visit our website at

www.micourthistory.org

for a link to our YouTube channel, or search "Michigan Supreme Court Historical Society" from YouTube. You will also be able to watch some of the previous luncheons, portrait dedications, investiture ceremonies, and other special events.

Chief Justice Bridget McCormack welcomed attendees and brought greetings from the Michigan Supreme Court.

Society President Carl W. Herstein addresses the attendees at the Annual Membership Luncheon at the Detroit Athletic Club on Thursday, October 28, 2021.

All photos by David Trumpie Photography.

The Society's Board of Directors includes front row left-to-right: Peter Ellsworth, former Justice Stephen Markman, President Carl Herstein, Gregory DeMars, John Pirich, and Lori Buiteweg. Back row left to right: Mark Bendure, Judge Denise Langford Morris, and John Fedynsky. Not pictured are: Judge Fred Borchard, former Justice Michael Cavanagh, Judge Avern Cohn, Bruce Courtade, Julie Fershtman, Joseph Gavin, Deborah Gordon, Matthew Herstein, John Jacobs, former Justice Mary Beth Kelly, Mary Massaron, Shenique Moss, Lawrence Nolan, Judge Angela Sherigan, Judge Victoria Valentine, Jill Wheaton, and Janet Welch.

Justice Elizabeth Welch's election in 2020 makes her the 115th justice on the Michigan Supreme Court. She succeeded Justice Stephen Markman, who is now on our Board of Directors.

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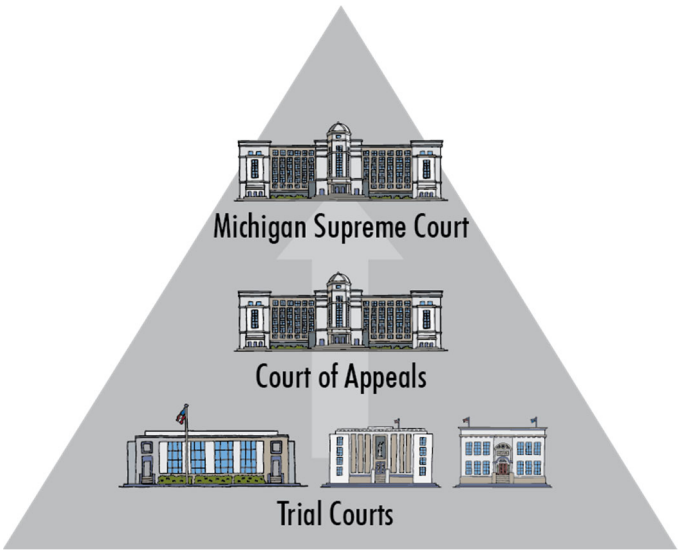

Hear ye! Hear ye!

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Mission Statement

The Michigan Supreme Court Historical Society, a non-profit 501(c)(3) corporation, collects, preserves, and displays documents, records, and memorabilia relating to the Michigan Supreme Court and the other Courts of Michigan, promotes the study of the history of Michigan's courts, and seeks to increase public awareness of Michigan's legal heritage. The Society sponsors and conducts historical research, provides speakers and educational materials for students, and sponsors and provides publications, portraits and memorials, special events, and projects consistent with its mission.

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