



## **BOOK REVIEWS**

*James A Thomson \**

### **SWIMMING IN AIR: LIONEL MURPHY AND CONTINUING OBSERVATIONS ON AUSTRALIAN JUDICIAL BIOGRAPHY\*\***

### ***LIONEL MURPHY: A POLITICAL BIOGRAPHY***

**Jenny Hocking**

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Judicial hagiography is a new industry in [the Australian] Commonwealth. Until [1987], save for a few (usually dull) books on the lives of the more notable High Court judges, most members of the Australian judiciary were uncelebrated. They came upon the stage of public life, uttered their lines in muted undertones, and then departed, unnoticed by the great audience of public affairs. This cannot be said of the life of Lionel Murphy . . . . That is doubtless why, within months of his death, several books have emerged about him. More are planned.<sup>1</sup>

It is appropriate to ask why so many books have been written about Lionel Murphy, his life and works, and so few about the other 40 justices who have sat this [20th] century on the High Court of Australia? Even Barwick has had only two books - one by David Marr, which Barwick hated, and *A Radical Tory*, which [Barwick] wrote shortly before his death. We still await the definitive biography of the great Chief Justice Dixon. Other important judges, with interesting and varied lives, like Sir Victor Windeyer, have passed without the biographies which they clearly merited. Yet Lionel Murphy continues [in 1998] to exert fascination and call forth books that tell of [Murphy's] colourful life and important achievements.<sup>2</sup>

- Justice Michael Kirby

## INTRODUCTION

**W**as Lionel Keith Murphy<sup>3</sup> - at least from a perspective of judicial incarnation<sup>4</sup> - Oliver Wendell Holmes Jr?<sup>5</sup> Commonalities abound: films,<sup>6</sup> books,<sup>7</sup> judicial dissents,<sup>8</sup> unabashed admiration,<sup>9</sup> strenuous criticism<sup>10</sup> and an abbreviated (and, especially, by Holmes) epigrammatic and aphoristic judicial opinion writing style.<sup>11</sup> Perhaps, influence on the law<sup>12</sup> might also be added. However, in this judicial context<sup>13</sup> - where Murphy and Holmes had life tenure<sup>14</sup> - two obvious and large differences protrude. First is character. Holmes was the sceptical, detached Boston Brahmin<sup>15</sup> indulging (though not exclusively<sup>16</sup>) in the life of the intellect: vociferously reading books<sup>17</sup> and corresponding with young acolytes.<sup>18</sup> In stark contrast, Murphy revelled (though, again, not exclusively<sup>19</sup>) in the practical reality - winning, losing, negotiating and compromising - of party and parliamentary politics.<sup>20</sup> Second, and probably not unrelated to the first,<sup>21</sup> Murphy, but not Holmes,<sup>22</sup> was subject to removal proceedings.<sup>23</sup> Indeed, all of this should ensure one result: exceptionally good judicial biographies.<sup>24</sup> It has for Holmes.<sup>25</sup> Can it do so for Murphy?

Unfortunately, even on the premise stipulated in its sub-title, *Lionel Murphy: A Political Biography*<sup>26</sup> appears to have failed. Two levels of criticism have been advanced. Initially, from a general perspective, the weakness and, consequentially, subsequent biographers' tasks are clear.

Murphy crammed an extraordinary range of activities into his working life, and [*Lionel Murphy: A Political*

*Biography*] . . . covers these comprehensively. What is lacking is more of a sense of the man - his relationships with his wives, his other women, his friends, his enemies. Hocking's treatment does not really capture the potent mixture of talents and flaws that made up Murphy's powerful personality. This kind of full-blooded treatment is exhausting, but it is what takes biography from a chronicle of events to a human drama. It is what Robert Caro has done in the case of [US President] Lyndon Johnson - a subject whose larger-than-life character evokes some curious echoes of Lionel Murphy.<sup>27</sup>

Next, more detailed (perhaps, devastating) criticism has been advanced. For example:<sup>28</sup>

*[Lionel Murphy: A Political Biography]* can best be described as the life of Murphy through the eyes of his friends and those with their own personal and institutional interests to defend. As such it is a significant contribution to the hagiography that has been produced to shore up the reputation of the judge.

[T]he book *[Lionel Murphy: A Political Biography]*, like the film *[Mr Neal is Entitled to be an Agitator]*, depicts Murphy as a martyr to reactionary forces that throughout his career conspired to thwart his progressive work . . . .

More than 12 out of 20 [interviews on which the book is based] were with family or close political allies. None of Murphy's critics or the journalists and prosecution lawyers involved in the [Senate removal] inquiries were interviewed.

. . . .

There are surprising omissions in Hocking's account of Murphy's role in the Whitlam government, including his part in the Juni Morosi affair that rocked it. The last few days of Murphy's parliamentary career were marred by a series of questions from Senator Ivor Greenwood about [Murphy's] relationship with Morosi and her husband David Ditchburn, [Murphy's] wife Ingrid's employment with Ethiopian Airlines, of which Ditchburn was a

representative, and the circumstances in which [Murphy's] Filipino domestic employee was approved as an immigrant. Within a couple of days, Murphy decided to accept the High Court position already offered by Whitlam and never returned to parliament to answer the questions.

These events should have been mentioned. By ignoring them, Hocking bolsters her view that the reasons for Murphy's decision to join the Bench "lay in the Catholic tradition of good works, of a life in the public sphere". One can almost hear Murphy, who was not a hypocrite, chuckling in his grave.<sup>29</sup>

Of course, even with adequate evidence, in human affairs (including politics) causation, motivation and relevant antecedents are complex issues often subject to differing perceptions, views and interpretations. Therefore, large questions - to what extent did Murphy, for example as compared to Garfield Barwick,<sup>30</sup> cause or contribute to the 11 November 1975 dismissal of the Whitlam Government?<sup>31</sup> - are not susceptible to definitive resolution. But what about seemingly smaller, more discrete - "the reasons for Murphy's decision to join the [High Court] Bench"<sup>32</sup> - conundrums?

### JUDICIAL APPOINTMENTS

Formal processes and requirements for appointment as a Justice (or Chief Justice) of the High Court of Australia are embedded in section 72(i) of the Commonwealth Constitution and *High Court of Australia Act 1979* (Cth).<sup>33</sup> *Lionel Murphy: A Political Biography*<sup>34</sup> provides more substance:<sup>35</sup> background facts, details and circumstances as well as Prime Minister Whitlam's reasons for offering and Attorney-General Murphy's accepting an appointment to the High Court.<sup>36</sup> Four reasons are advanced for the latter: Murphy's "major legislative achievements were in place" by 1975; "[t]he [Whitlam] government's position was becoming increasingly untenable with an Opposition determined to regain office by any means;" family interests, including young children and "Murphy's frequent absences" from home on parliamentary and ministerial business; and Murphy's belief that he could "do more for the Australian people [on the High Court]."<sup>37</sup> Two reasons - in ascending order of significance - are given to explain Whitlam's decision to offer Murphy this judicial appointment: "to remove [Murphy] who was both precipitate and a potential leadership challenger" and "to strengthen the centralist perspective on the [High Court]."<sup>38</sup> Others reverse - in terms of priority

and importance - that order.<sup>39</sup> Of course, *Lionel Murphy: A Political Biography* also contains those reasons - Murphy's political blunders (perhaps, "disasters"<sup>40</sup>) including the ASIO raid, the Gair affair, the Loans affair, and the Juni Morosi affair,<sup>41</sup> and the antagonistic rivalry between Whitlam and Murphy<sup>42</sup> - but only gently and faintly ties them - through the phrase "precipitate and a potential leadership challenger" - back into the High Court appointment process. Indeed, if it is conceded that other potential appointees, for example, Maurice Byers,<sup>43</sup> could also have accomplished Whitlam's centralist objective,<sup>44</sup> more credibility attaches to those other reasons. Consequently, the result is stark. From Whitlam's perspective<sup>45</sup> Murphy's judicial appointment was in reality a removal. Incompetent politicians and rivals for political office or power, like Murphy, are despatched, albeit with their formal consent, to the High Court.<sup>46</sup> *Lionel Murphy: A Political Biography's* perspective ensures an opposite effect, for example, enhancing, not diminishing, Murphy's stature.

Obviously, resolution of such issues is beneficial. Historical accuracy is not the only consideration.<sup>47</sup> Better biographies of High Court justices ought to ensue. That will assist endeavours to more realistically appraise the High Court. For example, is it predominantly an institution of talent and merit? Using this empirical foundation to grapple with more normative speculations - ought, at least on balance, the High Court to be more politically astute and pragmatic than abstractly and rigorously intellectual? - focuses attention back on the appointment process, its formal requirements and practical operation. Is it satisfactory? Should it be modified? If so, how? Indeed, to the first two questions, Murphy's appointment has produced negative and affirmative responses<sup>48</sup> and, perhaps, contributed to an additional requirement - that the Commonwealth consult the States<sup>49</sup> - for High Court appointments.

### INSIDE THE HIGH COURT<sup>50</sup>

Having entered the sanctum sanctorum a biography of Murphy might be able to reveal what occurred inside the High Court during his (10 February 1975 - 21 October 1986) tenure. Indeed, "special access [was obtained] to Murphy's personal papers held by Australian Archives."<sup>51</sup> Perhaps,<sup>52</sup> as a result *Lionel Murphy: A Political Biography* is able to provide some meagre glimpses.

Murphy . . . [joined] a bench renowned for its lack of collegiality . . . . [F]rom the day that Murphy arrived on the Bench Barwick simply refused to speak to him.

....

The move to the High Court required an immeasurable change in Murphy's working life . . . . The increasingly impatience and irascibility of . . . Garfield Barwick had over the years driven each of the justices into their respective chambers at the end of a day's sitting to work on their judgements in lonely isolation . . . . Judgements . . . reflected the failure to . . . consult with other justices . . . .

Despite [Murphy's] feelings of personal constraint, Murphy quickly left his mark on the judicial style of the bench in his interaction with his fellow justices . . . . Murphy's collegiate approach to court life was welcomed by those justices who had for years abided Barwick's personal hegemony and control over sittings and the allocation of cases among the justices. One of the High Court justices when asked how he was finding life on the bench with Murphy, relayed the sense of relief from the junior justices, that at last they had someone prepared to stand up to Barwick: 'Now we have a shop steward!'

....

It was Jacobs with whom Murphy had been closest on the bench, both intellectually and personally, and who had become a rare colleague.<sup>53</sup>

Would utilisation of other Justices' papers, especially those who simultaneously with Murphy constituted the High Court, provide not only other, even different, perspectives but also add new information about Murphy and the Court? Of course, even if a confident affirmative response was correct, there currently exists at least one major obstacle: the existence and availability of such papers and their content - for example, do they include draft opinions and exchanges of memoranda - is unpredictable and obscure.<sup>54</sup>

*Lionel Murphy: A Political Biography* does not disclose whether "Murphy's personal papers"<sup>55</sup> illuminate the internal decision making

processes either of one Justice or, co-operatively, several Justices.<sup>56</sup> Recitation, from reported decisions of a small portion of the cases where Murphy published an opinion, rather than elucidation of how he and other Justices developed, transformed and formulated ideas into reasons, arguments, conclusions and, eventually, decisions, is characteristic of *Lionel Murphy: A Political Biography*. Such synthesis and analysis of cases - the former approach - is already available and may be more qualitative in textbooks and other scholarly publications.<sup>57</sup> Biographies of judges might, therefore, attempt to pursue and elucidate the internal perspective.

### REMOVAL OF JUSTICES

Presumably, "Murphy's personal papers" do not contain exculpatory or incriminating evidence pertaining to the imbroglio - including two Senate Committees, a Commonwealth Parliamentary Commission of Inquiry, committal proceedings, two criminal trials and an appeal<sup>58</sup> - which swirled (from February 1984 to 21 October 1986) around Murphy and the removal question under section 72(ii) of the Commonwealth Constitution.<sup>59</sup> But what about other papers?

[T]he prosecution helpers . . . turned up in court [during Murphy's second criminal trial in the NSW Supreme] Court with great big tennis bags . . . with papers galore, ready to pounce on [Murphy] . . . [However, Murphy's defence lawyers closed their] case . . . . And that was it, these boys with their bags trouped outside . . . . So there were these great big bags of dirty papers taken out of the court and they just couldn't be used.<sup>60</sup>

Three questions, however, remain. First, could and ought a Murphy biography to have further investigated these matters? One response is unequivocal.

Another difficult aspect of the story was that several of Murphy's public supporters passed on damaging "off the record" material to journalists. After Murphy's death [on 21 October 1986 - a decade before *Lionel Murphy: A Political Biography* was published], they may well have been prepared to talk more frankly to a biographer.<sup>61</sup>

Secondly, might those "big bags of dirty papers" now "be used"?

The matters which would have been put to [Murphy in cross-examination at his second criminal trial] were . . . in . . . [the] “great big bags of dirty papers”. All of these papers were passed on to the [Commonwealth Parliamentary] commission of inquiry and subsequently the Hawke Labor government legislated to suppress their release for 30 years.

In these papers there is material about allegations of false evidence given in Murphy’s defence, which the commission was actively pursuing.<sup>62</sup>

If the *Parliamentary Commission of Inquiry Act* 1986 (Cth) was repealed those “dirty papers” could “be used.”<sup>63</sup> Indeed, following the posthumous publication in January 1999 of former Senator and Judge Jim McClelland’s<sup>64</sup> allegations,<sup>65</sup> that legislative action has been advocated.<sup>66</sup>

Thirdly, given that, even without such repealing legislation, other allegations - at least from “journalists” and Jim McClelland - might now be available, what ought to be done by Murphy biographers? Clearly, future evaluations of broad - Murphy’s character and stature - and narrower - should Murphy have been removed from judicial office and the adequacy of procedures used in such a process - issues must take into account and assess all new information. Antecedently, investigations need to be undertaken. In most circumstances that will be difficult, daunting and time-consuming. However, that must be done if biographies, including judicial biographies,<sup>67</sup> are to make a real contribution to the acquisition of knowledge about and understanding of the past and to dealing with the present and future.

## CONCLUSION

To move from hagiography, biographies of Australian judges (especially High Court Justices),<sup>68</sup> have to quantitatively and qualitatively improve.<sup>69</sup> Availability of personal papers, draft opinions and written or oral memoirs would assist. Ultimately, what is needed is more and better scholarship.

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\*\* For the precursor see Thomson, “Judicial Biography: Some Tentative Observations on the Australian Enterprise” (1985) 8 *UNSWLJ* 380. See also G Winterton, H P Lee, A Glass & J A Thomson, *Australian Federal Constitutional Law: Commentary and Materials* (LBC Information Services, Sydney 1999) 919-924 (updating the precursor’s judicial biographical bibliography). See also



Thomson, "Swimming in the Air: Melville W. Fuller and the [U.S.] Supreme Court 1888-1910" (1997) 27 *Cumberland L Rev* 140 n\*\* (noting derivation of the phrase "swim in the air"); S Novick, *Honorable Justice: The Life of Oliver Wendell Holmes* (Little, Brown and Company, Boston 1989) 31 (Chapter title - "Swimming in Air").

1 Kirby, "Foreword" in J A Scutt (ed), *Lionel Murphy: A Radical Judge* (McCulloch Publishing, Carlton, Victoria 1987) 4. Books on Murphy include Scutt (ed), *Lionel Murphy*; V G Venturini (ed), *Five Voices for Lionel: The First Five Lionel Murphy Memorial Lectures* (Federation Press, Annandale, NSW 1994); M Coper & G Williams (eds), *Justice Lionel Murphy: Influential or Merely Prescient?* (Federation Press, Annandale, NSW 1997); J Hocking, *Lionel Murphy: A Political Biography* (Cambridge University Press, Melbourne, Victoria 1997). Unpublished theses on Murphy include S Fink, *The Media, Law and Politics: A Preliminary Symbolic Case Study of Lionel Murphy (1982-1985)* (BA (Hons) thesis, Department of Political Science, Melbourne University 1985); S Calan, *Justice Murphy, Human Rights and Legal Thought on the High Court* (LL.B (Hons) thesis, University of Western Australia 1992). Compilations of Murphy's judicial opinions include A R Blackshield, D Brown, M Coper & R Krever (eds), *The Judgements of Lionel Murphy* (Primavera Press, Sydney, NSW 1986); J Ely & R Ely, *Lionel Murphy: The Rule of Law* (Akron Press, Sydney, NSW 1986).

2 Kirby, "Book Review" (1998) 72 *ALJ* 162 (reviewing Hocking, *Lionel Murphy*). For the Barwick literature see Thomson, "History, Justices and the High Court: An Institutional Perspective" (1995) 1 *Aust J Legal Hist* 281 (reviewing G Barwick, *A Radical Tory: Garfield Barwick's Reflections and Recollections* (Federation Press, Annandale, NSW 1995)). A Dixon biography is being written (see Merralls, "Biography of a Professional: Sir Owen Dixon" (Summer 1996) 99 *Victorian Bar News* 26) and there are biographical and scholarly analyses (including two theses) (see Winterton, Lee, Glass & Thomson, *Australian Federal Constitutional Law* 920). See also above \*\* (biographical literature on High Court justices).

3 Born in Kensington, NSW 30 August 1922 - died in Canberra, ACT at 4.30 pm 21 October 1986. Justice of the High Court of Australia 10 February 1975 - 21 October 1986. For literature on and by Murphy see above fn 1 and generally below. Compare for similarities (not only in names but also in political and judicial ideology) William Francis Murphy (U.S. Supreme Court Justice 5 February 1940-19 July 1949) who wrote 130 court opinions, 20 concurrences and 69 dissents. See R D Lunt, *The High Ministry of Government: The Political Career of Frank Murphy* (Wayne State University Press, Detroit 1965); J Woodford Howard, *Mr Justice Murphy: A Political Biography* (Princeton University Press, Princeton, New Jersey 1968); S Fine, *Frank Murphy: The Detroit Years* (vol 1, University of Michigan Press, Ann Arbor 1975); S Fine, *Frank Murphy: The New Deal Years* (vol 2, University of Chicago Press, Chicago 1979); S Fine, *Frank Murphy: The Washington Years* (vol 3, University of Michigan Press, Ann Arbor 1984); Murphy, "Populist in the Pulpit" (1969) 78 *Yale LJ* 725; Daniels, "Tempering Justice with Murphy" (1985) 13 *Rev Am Hist* 257; Danelski, "The Riddle of Frank Murphy's Personality and Jurisprudence" (1988) 13 *Law & Soc. Inq.* 189; Thomson, "Mirages of Certitude: Justices Black

- and Douglas and Constitutional Law" (1992) 19 *Ohio Northern U L Rev* 67 at 76-77.
- 4 Compare judicial lineage. For example, John Marshall Harlan (U.S. Supreme Court Justice 28 February 1955-23 September 1971) was the grandson of John Marshall Harlan (U.S. Supreme Court Justice 10 December 1877-14 October 1911). On the grandson see T E Yarbrough, *John Marshall Harlan: Great Dissenter of the Warren Court* (Oxford University Press, New York 1992); D L Shapiro (ed), *The Evolution of a Judicial Philosophy: Selected Opinions and Papers of Justice John M. Harlan* (Harvard University Press, Cambridge, Massachusetts 1969); Bourguignon, "The Second Mr. Justice Harlan: His Principles of Judicial Decision Making" [1979] *Supreme Court Rev* 251; Dane "'Ordered Liberty' and Self-Restraint: The Judicial Philosophy of the Second Justice Harlan" (1982) 51 *U Cinn L Rev* 545; Beaney, "John Marshall Harlan: A Modern Conservative Justice" in D G Stephenson Jr. (ed), *An Essential Safeguard: Essays on the United States Supreme Court and Its Justices* (Greenwood Press, New York 1991) 121; "Centennial Conference in Honor of Justice John Marshall Harlan" (1991) 36 *New York Law School L Rev* 1-286; Cicia, "A Wolf in Sheep's Clothing?: A Critical Analysis of Justice Harlan's Substantive Due Process Formulation" (1996) 64 *Fordham L Rev* 2241. On the grandfather see L P Beth, *John Marshall Harlan: The Last Whig* (University Press of Kentucky, Lexington, Kentucky 1992); T E Yarbrough, *Judicial Enigma: The First Justice Harlan* (Oxford University Press, New York 1995); Thomson, "Swimming in the Air: Melville W. Fuller and the [U.S.] Supreme Court 1888-1910" (1997) 27 *Cumberland L Rev* 139 at 143-144 n 22 (references); Chin, "The Plessy Myth: Justice Harlan and the Chinese Cases" [1996] *Iowa L Rev* 151; O'Brien, "Justice John Marshall Harlan as Prophet: The Plessy Dissenter's Color-Blind Constitution" (1998) 6 *Wm & Mary Bill of Rights J* 753. For a contingent judicial lineage see M Urofsky & D Levy (eds), *"Half Brother, Half Son": The Letters of Louis D. Brandeis to Felix Frankfurter* (University of Oklahoma Press, Norman 1991); Urofsky, "The Brandeis-Frankfurter Conversations" [1985] *Supreme Court Rev* 299. Compare presidential lineage. For example John Quincy Adams (U.S. President 1825-1829) was the son of John Adams (U.S. President 1797-1801). See P C Nagel, *Descent from Glory: Four Generations of the John Adams Family* (Oxford University Press, 1983); P C Nagel, *John Quincy Adams: A Public Life, A Private Life* (Alfred A. Knopf, New York 1998); J J Ellis, *Passionate Sage: The Character and Legacy of John Adams* (W W Norton & Co, New York 1993). Benjamin Harrison (U.S. President 1889-1893) was the grandson of William Henry Harrison (U.S. President 4 March 1841 - 4 April 1841). See H E Socolofsky & A B Spetter, *The Presidency of Benjamin Harrison* (University Press of Kansas, Lawrence 1987); N L Peterson, *The Presidencies of William Henry Harrison and John Tyler* (University Press of Kansas, Lawrence 1989). Franklin Delano Roosevelt (U.S. President 1933-1945) was the nephew of Theodore Roosevelt (U.S. President 1901-1909). See F Freidel, *Franklin D. Roosevelt: A Rendezvous with Destiny* (Little Brown & Co, Boston 1990); H W Brands, *T.R.: The Last Romantic* (Basic Books, New York 1997).
- 5 Born in Boston, Massachusetts 8 March 1841 - died in Washington DC 6 March 1935. Justice of the U.S. Supreme Court 8 December 1902 - 11 January 1932. For biographical and other Holmes literature see G Edward White, *Justice*

*Oliver Wendell Holmes: Law and the Inner Self* (Oxford University Press, New York, 1993); J P Diggins, *The Promise of Pragmatism: Modernism and the Crisis of Knowledge and Authority* (University of Chicago Press, Chicago 1994) 342-359; D Rosenberg, *The Hidden Holmes: His Theory of Torts in History* (Harvard University Press, Cambridge, Massachusetts 1995); D H Burton, *Taft, Holmes, and the 1920s Court: An Appraisal* (Fairleigh Dickinson University Press, Cranberry, New Jersey 1998); S M Novick (ed), *The Collected Works of Justice Holmes: Complete Public Writings and Selected Judicial Opinions of Oliver Wendell Holmes* (vol 1-3) (University of Chicago Press, Chicago 1995) (vols 4-5 forthcoming); R A Posner (ed), *The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions and Other Writings of Oliver Wendell Holmes Jr.* (University of Chicago Press, Chicago 1992); Thomson, "Playing with a Mirage: Oliver Wendell Holmes, Jr. and American Law" (1990) 22 *Rutgers LJ* 123; Hirsch, "Searching Inside Justice Holmes" (1996) 82 *Virginia L Rev* 385; Grey, "Molecular Motions: The Holmesian Judge in Theory and Practice" (1995) 37 *Wm & Mary L Rev* 19; Grey, "Bad Man from Olympus" *New York Rev Books*, 13 July 1995 at 4; White, "The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations" (1995) 70 *New York U L Rev* 576; Weinberg, "Holmes' Failure" (1997) 96 *Mich L Rev* 691; Treanor, "Jam for Justice Holmes: Reassessing the Significance of *Mahon*" (1998) 86 *Georgetown LJ* 813 (Commentary 875-943); Dailey, "Holmes and the Romantic Mind" (1998) 48 *Duke L J* 429; Messinger, "The Judge as Mentor: Oliver Wendell Holmes, Jr., and His Law Clerks" (1999) 11 *Yale J Law and Humanities* 119; Seipp, "Holmes's Path" (1997) 77 *Boston U L Rev* 515; Luban, "The Bad Man and the Good Lawyer: A Centennial Essay on Holmes's *The Path of the Law*" (1997) 72 *New York U L Rev* 1547; Symposium, "*The Path of the Law* After One Hundred Years" (1997) 110 *Harv L Rev* 989-1054; Symposium, "*The Path of the Law* 100 Years Later: Holmes's Influence on Modern Jurisprudence" (1997) 63 *Brooklyn L Rev* 1-278; "Symposium: The Path of the Law Today" (1998) 78 *Boston J L Rev* 691-9670; "Symposium: Oliver Wendell Holmes, Jr: The Judging Years" (1994) 18 *Southern Illinois U L J* 283-415.

6 On Murphy see *Mr Neal is Entitled to be an Agitator* (Film Art Doco Ltd, Melbourne 1991) (58 minute documentary film co-authored by J Hocking and D Dellora) (reviewed by B A Hocking, "Justice Lionel Murphy as more than celluloid hero" (1993) 9 *Aust J Law & Society* 134). On Holmes see *The Magnificent Yankee* (Metro-Goldwyn-Mayer 1950) (noted in White, "The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations" (1995) 70 *New York U L Rev* 576 at 596 n 96 and in R M Mennel & C L Compston (eds), *Holmes and Frankfurter: Their Correspondence, 1912-1934* (University Press of New England, Hanover, New Hampshire 1996) xxxii n 78); Messinger, "Legitimizing Liberalism: The New Deal Image Makers and Oliver Wendell Holmes, Jr." [1995] *J Supreme Court History* 57 at 66-69, 71-72..

7 On Murphy see above fn 1. On Holmes see above fn 5. Books on Holmes (but not, as yet, Murphy) include compilations of Holmes' diary, letters and speeches. See Thomson, "Playing with a Mirage: Oliver Wendell Holmes, Jr. and American Law" (1990) 22 *Rutgers LJ* 123 at 126-127, 168-171. See also above fn 5.

- 8 On Murphy see Blackshield, "Introduction" in R Blackshield et al (eds), *The Judgments of Justice Lionel Murphy* xviii-xix (indicating that "Murphy took part in 632 decisions" of which in "123 cases . . . [Murphy] made no *separate* statement of his own" and in "105 cases" he made very brief concurrences (including concurrences with 6 dissenting judgments) and in "404 cases . . . Murphy made separate statements of his own views" where "[i]n 275 of these cases he supported the unanimous or majority view [and] in 129 cases he dissented." Therefore, by "[a]dding [to these 129 dissents] the two partially dissenting joint judgments, and the six concurrences in a dissent . . . [Murphy] dissented in 137 out of 632 cases - or just over one-fifth of the total") (emphasis in original). It has been suggested that "[t]his . . . average of nearly 22% dissenting opinions . . . [is] hugely higher than that of any other High Court Justice and well up in the league of American dissenters." Kirby, "Lionel Murphy and the Power of Ideas" (1993) 18(6) *Alternative LJ* 253 (footnote omitted). See also Pannam, "Two Views on the Judgments of Lionel Murphy" (Autumn 1987) 60 *Vic Bar News* 19 at 21 (suggesting that "[a]s Murphy became older and more senior in the hierarchy of the High Court . . . [h]is influence on the other members of the Court appears to have grown . . . [and Murphy] was more frequently in the majority"). On Holmes see Thomson, "Playing with a Mirage: Oliver Wendell Holmes, Jr. and American Law" (1990) 22 *Rutgers LJ* 123 at 127 nn 17-18 (indicating that Holmes' 975 opinions on the US Supreme Court included "873 for the Full Court . . . 30 concurring opinions and 72 dissenting opinions"). On the honorable and powerful place dissenters occupy in American jurisprudence see Thomson, "Learned Hand: Evaluating a Federal Judge" (1995) 22 *Northern Kentucky L Rev* 763 at 792 n 201 (citing references).
- 9 On Murphy see, eg, Hocking, *Lionel Murphy: A Political Biography*; Williams, "Revitalising the Republic: Lionel Murphy and the Protection of Individual Rights" (1997) 8 *Public L Rev* 27; J M Williams, *The Protection of Rights Under the Australian Constitution: A Republican Analysis* (PhD thesis, Law Program, Research School of Social Sciences, Australian National University, May 1997) 320-360; Kirby, "Lionel Murphy - Jurist and Man" (Sept-Oct 1986) 19 (1-2) *Aust J Forensic Sciences* 51; Kirby, "Murphy - Bold Spirit of the Living Law" (unpublished paper, Inaugural Lionel Murphy Memorial Lecture delivered at the University of Sydney Law School 28 October 1987); Kirby, "Book Review" (1987) 61 *ALJ* 314; Kirby, "Bold Spirit of the Law: Justice Michael Kirby defends Lionel Murphy" (1988) 32(3) *Quadrant* 16; Kirby, "Lionel Murphy and the Power of Ideas" (1993) 18 *Alternative LJ* 253; Kirby, "Foreword" in Scutt (ed), *Lionel Murphy* 4; Kirby, "Lionel Murphy's Legacy" in Coper & Williams (eds), *Justice Lionel Murphy* 275; Kirby, "Book Review" (1998) 72 *ALJ* 162; Ely, "Murphy and the Rule of Law" (29 October 1987) *Age* at 11; Neal, "Lionel Murphy: An Appreciation" (1986) 11 *Legal Service Bulletin* 245; Turnbull, "History will look kindly on Lionel Murphy" *Bulletin* 4 November 1986 at 39; Turnbull, "Miscarriage of justice against Murphy" *Bulletin*, 16 July 1985 at 37; Turnbull, "A Radical on the High Court" *Bulletin* 19 March 1977 at 38; Coper, "Why Murphy's flame must not be allowed to die" *Sydney Morning Herald*, 20 August 1986 at 13; Sharma, "Tragedy of Justice Murphy" (November 1986) 1 (7) *Lex Et Juris* 12; Blackshield, "Lionel Murphy: Return to the Court" (1986) 76 *Arena* 28; Eggleston, "The Life of Lionel Keith Murphy: A defender of agitators" *Age*, 22 October 1986 at 10; Fitzgerald, "Lift

While You Climb" (1995) 11 *QUTLJ* 1 at 3 (characterising Murphy as "one of the most important members of the High Court in the last twenty-five years"); Scutt (ed), *Lionel Murphy*; Coper & Williams (eds), *Justice Lionel Murphy*. Justice Michael Kirby was appointed as the inaugural Chairman of the Australian Law Reform Commission and a Deputy President of the Australian Conciliation and Arbitration Commission in 1975 "following a chance meeting with Murphy in the lift of the [Commonwealth] Attorney-General's Building in Canberra". Hocking, *Lionel Murphy: A Political Biography* 183. For another lift encounter see Cockburn, "Lionel Murphy and me: the true story" *Canberra Times*, 13 February 1988. On Holmes see, eg, Thomson, "Playing with a Mirage: Oliver Wendell Holmes, Jr. and American Law" (1990) 22 *Rutgers LJ* 123 at 123 n 1, 129 n 26 (references); White, "The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations" (1995) 70 *New York U L Rev* 576 at 588-599, 592-596.

10 On Murphy see, eg, Coper & Williams, "Preface" in Coper & Williams, *Justice Lionel Murphy* vii at viii (claiming that this book subjects "the Murphy phenomenon" to "critical examination"); Cooray, "The democrat who overruled the people" *The Age*, 5 October 1987 at 11; Cooray, "Lionel Murphy: The Rule of Law: A Review" (1987) 31(8) *Quadrant* 24; Cooray, "The Allegations against Mr Justice Murphy" (1987) 104 *South African Law Journal* 635; Cooray, "A Response to Michael Kirby" (April 1988) 33 (4) *Quadrant* 57; Goldsworthy, "Commentary" in Coper & Williams (eds), *Justice Lionel Murphy* 259-274; Howard, "Essays from Murphy's idolaters" *Age* (Saturday Extra), 28 August 1987 at 4. See also Kirby, "Lionel Murphy and the Power of Ideas" (1993) 18 *Alternative LJ* 253 at 254 (noting "the almost universal disdain, even contempt and scorn, in which [Murphy] was held within the established legal profession during his judicial service, and on his death"); G Negus, *4th Lionel Murphy Memorial Lecture* (National Library Canberra 13 November 1990) 2 ("The legal profession . . . loved to hate [Murphy]"); P Kelly, *The Unmaking of Gough* (Angus & Robertson, Sydney 1976) 97 (noting that "the Murphy appointment left a deep impact on the Liberals. There are many of them [in 1976] still working against Murphy and prepared to lay money that he will not survive on the High Court bench"). On Holmes see, eg, Thomson, "Playing with a Mirage: Oliver Wendell Holmes, Jr. and American Law" (1990) 22 *Rutgers LJ* 123 at 123-124 n 2 (references); White, "The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations" (1995) 70 *New York U L Rev* 576 at 591, 596 n 97 (references).

11 On Murphy see, eg, Blackshield, "Lionel Murphy and Judicial Method" in M Coper & G Williams (eds), *Justice Lionel Murphy* 224, 241-242; Winterton, "Murphy: A Maverick Reconsidered" (1997) 20 *UNSWLJ* 204 at 205-206 ("[A]ny radicalism in Murphy's judgments was principally methodological. 'Murphy wrote briefly, in simple language, and used sub-headings . . . There is a take-it-or-leave-it quality to many of Murphy's judgments'); Byers, "A Personal View of Mr Justice Murphy" (Autumn 1987) *Bar News: J NSW Bar Assoc* 5 at 6 ("pithy legal certainties in which [Murphy's] judgments abound"); J Hocking, *Lionel Murphy* 247-248 (suggesting that Murphy "introduced a new style of writing from the bench with a simplicity, clarity and concision hitherto unknown. His judgments were clear and forceful . . . extraordinarily succinct, at times disconcertingly so"), 254 (noting Murphy's use of non-sexist language as

part of his realization "that language matters" and is "symbolic"); Gibbs, "Ceremonial Sitting" (1986) 67 ALR xxix at xxx (noting that Murphy's "judicial method was one which did not command universal assent"); Sundberg, "Two Views on the Judgements of Lionel Murphy J." (Autumn 1987) 60 *Vic Bar News* 16 at 17 (characterising Murphy's "prose [as] direct, firm and clear"); Pannam, "Two Views on the Judgements of Lionel Murphy" (Autumn 1987) 60 *Vic Bar News* 19 at 20-21 (noting that Murphy's opinions were "free of . . . turgid stylistic techniques" and that "[a]s Murphy became older and more senior in the hierarchy of the High Court his style altered [for example his] dissents were not as exasperated"); Weisbrot, "Judging Murphy's Words and Deeds" (1987) 10 *UNSWLJ* 201 at 204 (noting that "Murphy's writing differed from his colleagues not only in political orientation but also in clarity of expression"). On Holmes see, eg, White, "The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations" (1995) 70 *New York U L Rev* 576 at 589 (referring to "Holmes's penetrating but cryptic style of opinion-writing with its emphasis on getting beyond doctrinal slogans to philosophical assumptions and its indifference to . . . elaborate syllogistic reasoning"); R A Posner, *Law and Literature* (Harvard University Press, Cambridge, Massachusetts, rev ed 1998) 266-273 (discussing Holmes' dissenting opinion in *Lochner v New York* (1905) 198 US 45 at 74). "Holmes' majority and dissenting opinions alike are remarkable not only for the poet's gift of metaphor that is their principal stylistic distinction, but also for their brevity, freshness, and freedom from legal jargon; a directness bordering on the colloquial; a lightness of touch foreign to the legal department; and an insistence on being concrete rather than legalistic - on identifying values and policies rather than intoning formulas. The content is sometimes formatistic, the form invariably realistic, practical . . . [s]ome of Holmes's best opinions, notably the *Lochner* dissent . . . owe their distinction to their rhetorical skill rather than to the qualities of their reasoning; often they are not well reasoned at all. In part at least, Holmes was a great judge *because* he was a great literary artist." Posner, "Introduction" in Posner (ed), *The Essential Holmes* xiii, xvii (footnote omitted, emphasis in original). See generally Symposium, "Judicial Opinion Writing" (1995) 62 *U Chicago L Rev* 1363-1520.

12 On Murphy see, eg, Coper & Williams (eds), *Justice Lionel Murphy*; Kirby, "Lionel Murphy and the Power of Ideas" (1993) 18 *Alternative LJ* 253 (suggesting that "many of the judicial opinions written by Lionel Murphy (often in dissent) are being accepted today in Australia as legal orthodoxy"); Winterton, "Murphy: A Maverick Reconsidered" (1997) 20 *UNSWLJ* 204 at 207 (suggesting that Murphy may have forestalled, rather than given impetus to, subsequent developments in Australian constitutional law); Zines, "Lionel Murphy and the Concept of the Australian Nation" in Coper & Williams (eds), *Justice Lionel Murphy* 1 at 2 (concluding that "in relation to most aspects of constitutional law it is difficult to describe Lionel Murphy as either influential or prescient. Some principles he expounded have been rejected by all other judges past and present . . . In other cases [Murphy's] view may eventually prevail but he was not the first to expound it"); Campbell, "Lionel Murphy and the Jurisprudence of the High Court Ten Years On" (1996) 15 *U Tas L Rev* 22 (suggesting that "[i]f there is a Murphy [judicial] legacy it is a complex and elusive one with many and varied strands"). On Holmes see, eg, Thomson, "Playing With a Mirage: Oliver Wendell Holmes, Jr. and American Law" (1990)

22 *Rutgers LJ* 123 at 123-124, 129, 164-166 (noting various phases in and assessments of Holmes' influence); White, *Justice Oliver Wendell Holmes* 485-487 (arguing, for example, that "without [Holmes'] contributions the emergence of significant protection for dissident speech in American society would have been indefinitely delayed").

13 Murphy, but not Holmes, was (from 1962 to 1975) an elected (in contrast to a s  
15 of the Commonwealth Constitution appointed) Senator and a Minister of the  
14 Crown (from 1972 to 1975) appointed by the Governor-General.

Murphy was appointed on 10 February 1975 before the 1977 amendment to  
section 72 of the Commonwealth Constitution reduced High Court Justices  
tenure from life to 70 years of age. See Hocking, *Lionel Murphy: A Political  
Biography* 285 (suggesting incorrectly that Murphy was "the last justice  
appointed to life tenure on the [High Court] bench"); Kirby, "Lionel Murphy's  
Legacy" in Coper & Williams, *Justice Lionel Murphy* 275 at 281 (noting that  
"Lionel Murphy was one of the last of the 'lifers'"). For Holmes see U.S.  
Constitution article III s 1 (Supreme Court Justices "shall hold their office  
during good behaviour").

15 For elaboration see White, *Justice Oliver Wendell Holmes* 20-23, 482-484.

16 See, eg, L Baker, *The Justice From Beacon Hill: The Life and Times of Oliver  
Wendell Holmes* (Harper Collins, New York 1991) 8 (noting that Holmes made  
"more or less regular trips to a Washington [DC] burlesque house"); White,  
*Justice Oliver Wendell Holmes* 485, 602 (discussing friendship and "love"  
letters between Holmes and Clare Castletown).

17 See, eg, White, *Justice Oliver Wendell Holmes* 23 (noting "Holmes' omnivorous  
reading" and "dogged pursuit of books"), 33 ("reading and writing [were] the  
principal intellectual pursuit of [Holmes'] college years"), 107 (noting that  
among Holmes' "primary interests [was] his reading").

18 See, eg, White, *Justice Oliver Wendell Holmes* 354-377, 606 (discussing  
Holmes' relationships with young, progressive intellectuals, such as Harold  
Laski and Felix Frankfurter, and the effects on Holmes' reputation and judicial  
decisions).

19 See eg Kirby, "Lionel Murphy's Legacy" in Coper & Williams, *Lionel Murphy*  
289 (noting that Murphy read "the *Scientific American*"); Wran, "Murphy the  
Barrister" in Scutt, *Lionel Murphy* 15 (indicating that "Murphy . . . had the  
biggest library" in Wentworth Chambers which "was arguably the most  
complete private library in Phillip Street").

20 See, eg, Hocking, *Lionel Murphy: A Political Biography*; Scutt (ed), *Lionel  
Murphy*; Venturini (ed), *Five Voices For Lionel*.

21 See, eg, Marr, "Diamond Jim has one last swipe at his mates" *Sydney Morning  
Herald* 23 January 1999 at 1-2 (relating the Labor Party's and Murphy's  
tradition of "automatic loyalty" to friends whether "right or wrong").

22 For the US see, eg, US Constitution article I s 2 cl. 5 (House of Representatives  
has "the sole power of impeachment"), article I s 3 cl. 6 (Senate has "the sole  
power to try all Impeachments"); M Gerhardt, *The Federal Impeachment  
Process: A Constitutional and Historical Analysis* (Princeton University Press,  
Princeton 1996); M Volcansek, *Judicial Impeachment: None Called For Justice*  
(University of Illinois Press, Chicago 1993). See below fn 58 (discussing *Nixon  
v United States*).

- 23 See eg Commonwealth Constitution s 72(ii) (High Court Justices “[s]hall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity”); Thomson, “Removal of High Court and Federal Court Judges: Some Observations concerning Section 72(ii) of the Australian Constitution” *Australian Current Law* (June 1984) 36033-36047 (Part I), (July 1984) 36055-36061 (Pt II) (reprinted in Department of the [Commonwealth] Parliamentary Library Occasional Paper No. 2 of 1984); Current Topics, “Interpretation and determination of judicial ‘misbehaviour’ under section 72 of the Commonwealth Constitution” (1984) 58 *ALJ* 309; Evans, “Parliament and the Judges: The Removal of Federal Judges Under Section 72 of the Constitution” (1987) 2(2) *Legislative Studies* 17; Parliamentary Commission of Inquiry, “Re The Honourable Mr Justice Murphy: Ruling on Meaning of ‘Misbehaviour’” (1986) 2 *Aust Bar Rev* 203. See below fn 58 (Murphy trials and parliamentary removal proceedings); see also Editorial, “Inquiry no answer to [Justice Ian] Callinan queries”, *The Australian*, 16 June 1999 at 12; Grattan, “Judging by the plot so far ...”, *Sydney Morning Herald*, 18 June 1999 at 15; Burrell, “Howard hits out against ‘political vendetta’ on judge”, *Australian Financial Review*, 18 June 1999 at 28.
- 24 In this respect Hocking, *Lionel Murphy: A Political Biography* might be (unfavourably) compared, for example, with G Gunther, *Learned Hand: The Man and the Judge* (Alfred A Knopf, New York 1994) reviewed in Thomson, “Learned Hand: Evaluating a Federal Judge” (1995) 22 *Northern Kentucky L Rev* 763.
- 25 See above fn 5 (references).
- 26 Initial reviews include Kirby, “Book Review” (1998) 72 *ALJ* 162; Griffin, “Lionel Murphy Revisited” (1997) 71(12) *Law Institute J* 20; Piggott, “Book Review” (1998) 20 *U Qld LJ* 133; Bacon, “Partial portrait” *The Weekend Australian Review*, 11-12 October 1997 at 26; Sexton, “Portrait doesn’t do Murphy justice” *Sydney Morning Herald*, 8 November 1997 at 13. Other summations of Murphy’s life include Guilliat, “Murphy: How he rose to power” *Age*, 8 July 1985 at 11; Guilliat, “Murphy: To the High Court bench - and Surpeme Court dock” *Age*, 9 July 1985 at 11; Obituary, “An Outstanding parliamentarian, minister and jurist” *Canberra Times*, 22 October 1986 at 2; Schauble, “The Life of Lionel Keith Murphy: Triumphs and tempests” *Age*, 22 October 1986 at 11; Obituary, “Justice Murphy: controversy and achievement” *Sydney Morning Herald* 22 October 1986 at 17; Obituary, “The fighter for causes” *Daily Telegraph*, 22 October 1986 at 4; Ackland, “The Murphy I Knew” *National Times on Sunday*, 2 November 1986 at 13; Brennan, “Murphy - the final judgment” (1986) 60 *Law Institute J* 1315.
- 27 Sexton, “Portrait doesn’t do Murphy justice” *Sydney Morning Herald*, 8 November 1997 at 13 (referring to R Caro, *The Years of Lyndon Johnson: The Path to Power* (Alfred A Knopf, New York 1982); R Caro, *The Years of Lyndon Johnson: Means of Ascent* (Alfred A Knopf, New York 1990)). Despite the adjective “comprehensively” Sexton makes two criticisms. First, “Hocking uncritically accepts the view that legislation [especially the *Murphy Family Law Act* 1975 (Cth) and *Trade Practices Act* 1975 (Cth)] is a solution to many social and economic problems.” Secondly, there is not a realistic appreciation by Hocking of how Murphy’s successes as Attorney-General were largely



overshadowed by his involvement in some of the more spectacular disasters of the Whitlam Government.” Sexton, “Portrait doesn’t do Murphy justice” *Sydney Morning Herald*, 8 November 1997 at 13.

28 Other examples include Hocking’s acceptance of the “nonsense” promulgated by “Sydney solicitor Morgan Ryan” that he had effectively ceased legal practice in “the 1950s” (Bacon, “Partial portrait” *The Weekend Australian Review*, 11-12 October 1997 at 26) and the “dirty papers” (see below fn 60-66).

29 Bacon, “Partial protrait” *The Weekend Australian Review*, 11-12 October 1997 at 26. See Hocking, *Lionel Murphy: A Political Biography* 224 (“Catholic tradition”), 353 (list of interviews). Bacon’s other articles on Murphy include Bacon, “Diamond Jim: how I perjured myself” *Weekend Australian*, 23-24 January 1999 at 1; Bacon, “Ryan and the repercussions” *National Times on Sunday*, 7 September 1986 at 1; Toohey, Bacon & Marr, “What the Murphy team had found” *National Times on Sunday*, 7 September 1986 at 1; Bacon, “The judge and the phone taps: what the issues are” *National Times*, 17-23 February 1984 at 3; Bacon, “Solicitor-General calls for follow up on tapes affair” *National Times*, 24 February - 1 March 1984 at 7; Bacon, “Phone tap questions remain unanswered” *National Times* 11-17 May 1984 at 8; Bacon, “The High Court Judge and The Magistrate” *National times*, 8-14 June 1984 at 3; Bacon, “Chief Magistrate says he was leaned on” *National times*, 27 July - 2 August 1987 at 3; Bacon, “The Tapes: unexplored questions” *National times*, 2-8 November 1984 at 27; Marr & Bacon, “Temby rejects advice to charge Murphy again” *National Times*, 2-8 May 1986 at 5; Marr & Bacon, “The judge who would not take the oath” *National Times*, 2-8 May 1986 at 10; Toohey & Bacon, “Questions Lionel Murphy should answer” *National Times*, 9-15 May 1986 at 8; Bacon, “Murphy prepares for the next round” *National Times*, 6-12 December 1985 at 5; Bacon, “Murphy Forces Gather” *National Times*, 19-25 July 1985 at 4; Bacon, “Roads To Judgment” *National Times* 12-18 July 1985 at 3; Bacon, “Murphy Versus The Crown” *National Times*, 28 June - 4 July 1985 at 3; Bacon, “Murphy: The High Court judge with a case to answer” *National Times*, 19-25 April 1985 at 3; Bacon, “The amazing Lionel Murphy Show” *National Times* 5-11 April 1985 at 14; Bacon, “Judge Foord - New Allegations” *National Times*, 26 October - 1 November 1984 at 3; Marr & Bacon, “The Murphy Affair: Judge versus Judge” *National Times*, 5-11 October 1984 at 3; Bacon, “Behind The Murphy Affair” *National Times*, 31 August - 6 September 1984 at 4; Bacon, “New tapes help explain Briese’s actions” *National Times*, 10-16 August 1984 at 5; Bacon, “Untangling the Briese affair” *National Times*, 3-9 August 1984 at 4; Bacon, “Awkward Silence” (September/October 1987) 101 *Australian Left Review* 16. For an unfavourable assessment of such newspaper articles see Brown, “Themes in an Inquisition: Justice Murphy and the Liberal Press” (1987) 10 *UNSWLJ* 60.

30 See, eg, Thomson, “History, Justices and the High Court: An Institutional Perspective” (1995) 1 *Aust J Leg Hist* 281 at 287-288, 301-302 (discussing Barwick’s 1975 advice to the Governor-General).

31 Despite providing some discussion of Murphy’s role, for example, in strengthening the Senate and its committee system and the ASIO, Gair and Loans affairs (see below fn 41), *Lionel Murphy: A Political Biography* does not directly confront this question.

32 Bacon, “Partial portrait” *Weekend Australian Review*, 11-12 October 1997 at 26.

- 33 High Court Justices “shall be appointed by the Governor-General in Council” (Commonwealth Constitution s 72(i)) and the Commonwealth Attorney-General “shall . . . consult with [State] Attorneys-General in relation to [such an appointment]” before it is made. *High Court of Australia Act 1979* (Cth) s 6. See generally Thomson, “Appointing Australian High Court Justices: Some Constitutional Conundrums” in H P Lee & G Winterton (eds), *Australian Constitutional Perspectives* (Law Book Co, Sydney 1992) 251.
- 34 Compare discussions of the appointment of individual U.S. Supreme Court Justices. See, eg, Thomson, “Prologue to Power: Selecting Supreme Court Justices” (1986) 12 *Dayton L Rev* 71 at 72 n 4 (citing references); O’Brien, “Filling William O. Douglas’s Seat: President Gerald R Ford’s Appointment of Associate Justice John Paul Stevens” [1989] *Yearbook: Sup Ct Hist Soc* 20; Kramer, “The Case of Justice Stevens: How to Select, Nominate, and Confirm a Justice of the United States Supreme Court” (1990) 7 *Const Comm* 325; A Kaufman, *Cardozo* (Harvard University Press, Cambridge, Massachusetts 1998) 455-471. On the appointment process see, eg, Symposium, “Essays on the Supreme Court Appointment Process” (1988) 101 *Harvard L Rev* 1146; Ross, “The Supreme Court Appointment Process: A Search for a Synthesis” (1994) 57 *Albany L Rev* 993; Gerhardt, “Toward a Comprehensive Understanding of the Federal Appointments Process” (1998) 21 *Harvard J Law & Pub Policy* 467.
- 35 Hocking, *Lionel Murphy: A Political Biography* 220-227.
- 36 For other examples see Thomson, “Appointing Australian High Court Justices: Some Constitutional Conundrums” in Lee & Winterton, *Australian Constitutional Perspectives* 251 n 2, 253 n 11 (citing references); Kirby, “What is it Really Like to be a Justice of the High Court of Australia?” (1997) 19 *Sydney L Rev* 514, 515.
- 37 Hocking, *Lionel Murphy: A Political Biography* 220-221, 224.
- 38 Hocking, *Lionel Murphy: A Political Biography* 221. See also P Kelly, *The Unmaking of Gough* (Angus & Robertson, Sydney 1976) 93-94 (suggesting that Prime Minister Whitlam’s “main concern about appointing [Justice Hope from the NSW Supreme Court] to the High Court was a doubt about [Hope’s] centralist credentials”).
- 39 See, eg, A Reid, *The Whitlam Venture* (Hill of Content, Melbourne 1976) 203-208; Bacon, “Partial Portrait” *Weekend Australian Review*, 11-12 October 1997 at 26; Barwick, *A Radical Tory* 232; McNicoll, “Sir Maurice turns the other cheek” *Bulletin*, 10 September 1985 at 64; Guilliat, “Murphy: To the High Court bench - and the Surpeme Court dock” *Age* 9 July 1985 at 11; Negus, “4th Lionel Murphy Memorial Lecture” (delivered at the National Library, Canberra 13 November 1990) 4; Kelly, *The Unmaking of Gough* 93-97.
- 40 Sexton, “Portrait doesn’t do Murphy justice” *Sydney Morning Herald*, 8 November 1997 at 13.
- 41 For discussion of these events see generally Hocking, *Lionel Murphy: A Political Biography*; A Reid, *The Whitlam Venture*; G Sawyer, *Federation Under Strain: Australia 1972-1975* (Melbourne University Press, Carlton, Victoria 1977); P Kelly, *The Unmaking of Gough*; P Kelly, *November 1975: The Inside Story of Australia’s Greatest Political Crisis* (Allen & Unwin, St Leonards, NSW 1995).
- 42 See, eg, Hocking, *Lionel Murphy: A Political Biography* 107 (noting that “Murphy viewed Whitlam as too close to the right-wing of the [Labor] Party . . .

Whitlam, on his part, was deeply suspicious of Murphy's ambition . . . [and] theirs was never to become a close relationship").

43 It has been suggested that Sir Maurice Byers (in 1974 and 1975 the Commonwealth Solicitor-General) "name was put on the short list . . . and finally the decision was made to appoint Byers . . . [who] was notified of the decision [to appoint him to the High Court. However,] almost on the eve of the [public] announcement, Byers was contacted [and told that he would not be appointed] . . . The position was to be filled by . . . Lionel Murphy who had been experiencing a series of rocky reversals in the Senate." McNicoll, "Sir Maurice turns the other cheek" *Bulletin*, 10 September 1985 at 64. However, this is not consistent with two Cabinet Ministers' recollections. Guilliatt, "Murphy: To the High Court bench - and the Supreme Court dock" *Age*, 9 July 1985 at 11. On Byers see *Who's Who in Australia 1998* (Information Aust Group Pty Ltd, Melbourne, 34th ed 1998) 308-309; "Personalialia" (1973) 47 *ALJ* 751, (1981) 55 *ALJ* 109-110. Mason, "Commanding Legal Advocate Always Quick with a Smile" *Canberra Times*, 9 February 1999 at 9; Milburn, "Milestones" *Age*, 27 January 1999 at 18; Obituary "Sir Maurice Byers Kt CBE QC" (1999) 73 *ALJ* 380; Sackar, "Vale: Sir Maurice Byers Kt CBE QC" (Feb 1999) 58 *Stop Press: Australian Bar Association Newsletter* 6.

44 Given the independence of mind and decisionmaking offered by the security of judicial tenure, is prognostication of a potential or prospective appointee's eventual performance possible? Does the rarity of unexpected or different judicial performances (from those expected at the time of appointment) reinforce the possibility of achieving the appointor's desired objective and, therefore, accomplishing an intellectual (if not numerical) form of court-packing? For discussions see Thomson, "Prologue to Power: Selecting [U.S.] Supreme Court Justices" (1986) 12 *U Dayton L Rev* 71 at 82-83.

45 G Whitlam, *The Whitlam Government 1972-1975* (Penguin Books, Melbourne 1986) 626-627 (noting that Whitlam "was . . . impressed with Murphy's claims [to a High Court appointment] in view of [Murphy's] extraordinary success in piloting the Trade Practices Bill and the Family Law Bill through the Senate without a Senate majority"). See also Barwick, *A Radical Tory* 232 (recording Whitlam's telephone response on 10 February 1975 to Barwick's assertion that Murphy was "neither competent nor suitable for the position" of High Court Justice: "But [Murphy] managed to have the Family Law Act [1975 (Cth)] passed").

46 Of course, there has been an opposite movement: from judicial office into politics. For example, Evatt from the Australian High Court into the Commonwealth Parliament and executive and Hughes and Byrnes from the U.S. Supreme Court into presidential and State politics. See, eg, P Crockett, *Evatt: A Life* (Oxford University Press, Melbourne 1993); D Day (ed), *Brave New World: Dr H. V. Evatt and Australian Foreign Policy* (University of Queensland Press, St Lucia 1996); M Pusey, *Charles Evans Hughes* (McMillan Co, New York, 2 vols 1951); D Robertson, *Sly and Able: A Political Biography of James F. Byrnes* (W W Norton & Co, New York 1994).

47 Possible deficiencies or inaccuracies in Hocking, *Lionel Murphy: A Political Biography* are identified in book reviews. See above fn 26 (citing initial reviews), fn 27 (criticisms), fn 28 (other examples). Compare the differing views as to whether Murphy accepted the appointment as a High Court Justice

- on the condition that he be appointed Chief Justice if that office became vacant. Affirmative responses are in Barwick, *A Radical Tory* 232 (noting, however, that “on the material . . . [available in 1995] no firm conclusion can be drawn”); Kelly, *The Unmaking of Gough* 95. Denials are in Hocking, *Lionel Murphy: A Political Biography* 331 n 2 (referring to Whitlam and Jim Cairns’ denials).
- 48 See, eg, Barwick, *A Radical Tory* 231, 233 (arguing that Murphy’s appointment “does illustrate the need to make . . . changes . . . to the authority of the Executive to appoint the judiciary”). For other post-1975 proposals see, eg, *Final Report of the Constitutional Commission* (Australian Government Publishing Service, Canberra, vol 1 1988) 398-402; Discussion Paper, *Judicial Appointments: Procedure and Criteria* (Attorney General’s Department, Canberra, September 1993); Report by Senate Standing Committee on Legal and Constitutional Affairs, *Gender Bias and The Judiciary* (Senate Printing Unit, Canberra May 1994) 76-91.
- 49 See above fn 33 (quoting *High Court of Australia Act 1979* (Cth) s 6). For a discussion see Thomson, “Appointing Australian High Court Justices: Some Constitutional Conundrums” in Lee & Winterton, *Australian Constitutional Perspectives* 251, 267-268.
- 50 See generally Thomson, “History, Justices and the High Court: An Institutional Perspective” (1995) 1 *Aust J Leg Hist* 281 at 283-286, 296-300.
- 51 Hocking, *Lionel Murphy: A Political Biography* xi, 350 (“Australian Archives, Lionel Murphy Personal Papers, Canberra, CRS M132, CRS M133, CRS M134, CRS M138”).
- 52 There is no referencing to primary or secondary sources other than one citation to the Doug McClelland interview on 21 June 1996. Hocking, *Lionel Murphy: A Political Biography* 247, 332 n10.
- 53 Hocking, *Lionel Murphy: A Political Biography* 227, 247 (footnote omitted), 264. But see Armstrong, “The changing role of Justice Lionel Murphy” *Bulletin*, 20 March 1984 at 32, 34 (observing that “Barwick and Murphy were antagonistic on the [High Court] bench (although not when off it, according to a barrister who observed them”).
- 54 Some locations are provided in Thomson, “History, Justices and the High Court: An Institutional Perspective” (1995) 1 *Aust J Leg Hist* 281 at 292-293 n 2 (Barwick papers and interviews), 299 n 51 (Griffith and Latham papers); Merralls, “Biography of a Professional: Sir Owen Dixon” (Summer 1996) 99 *Victorian Bar News* 26 (Dixon papers and diary). Compare the much greater and more publicly accessible access to U.S. Supreme Court Justices papers. See, eg, Thomson, “History, Justices and the High Court: An Institutional Perspective” (1995) 1 *Aust J Legal Hist* 281, at 286, 297-298 (citing references); Thomson, “Inside the [U.S.] Supreme Court: A Sanctum Sanctorum?” (1996) 66 *Mississippi LJ* 177.
- 55 Hocking, *Lionel Murphy: A Political Biography* xi.
- 56 Compare the vast literature on the U.S. Supreme Court’s internal decisionmaking processes. See, eg, Thomson, “Inside the Supreme Court: A Sanctum Sanctorum?” (1996) 66 *Mississippi LJ* 177; Kozinski, “Conduct Unbecoming” (1999) 108 *Yale LJ* 835; Chemekinsky, “Opening *Closed Chambers*” (1999) 108 *Yale LJ* 1087; Garrow, “‘The Lowest Form of Animal Life’? Supreme Court Clerks and Supreme Court History” (1999) 84 *Cornell L Rev* 855; Drahozal, “The ‘Arrogance of Certainty’: Trust, Confidentiality, and

the Supreme Court" (1998) 47 *Kansas L Rev* 121; E Lazarus, *Closed Chambers: The First Eye Witness Account of the Epic Struggles Inside the [U.S.] Supreme Court* (Times Books, New York 1998); Barrett, "Reading the Stop and Frisk Cases: A Look Inside the Supreme Court's Conference" (1998) 72 *St Johns L Rev* 749; Cross, "The Justices of Strategy" (1998) 48 *Duke L J* 511.

57 See, eg, G Evans (ed), *Labor and the Constitution 1972-1975: The Whitlam Years in Australian Government* (Heinemann, Melbourne 1977); G Sawer, *Federation Under Strain: Australia 1972-1975* (Melbourne University Press, Victoria, 1977); L Zines, *The High Court and the Constitution* (Butterworths, Sydney, 4th ed 1997); Coper and Williams (eds), *Justice Lionel Murphy*.

58 See, eg, Report to the Senate, *Senate Select Committee on the Conduct of a Judge* (Commonwealth Parliamentary Paper no. 168/1984); Report to the Senate, *Senate Select Committee on Allegations Concerning A Judge* (Commonwealth Parliamentary Paper no. 271/1984); Parliamentary Commission of Inquiry, *Special Report* (Commonwealth Parliamentary Paper no. 443/1986); *Parliamentary Commission of Inquiry (Repeal) Act 1986* (Cth); *R v Murphy* (1985) 158 CLR 596; *R v Murphy* (1986) 5 NSWLR 18; *R v Murphy* (1985) 63 ALR 53; *Murphy v Lush* (1986) 60 ALJR 523; "Parliamentary commission of inquiry into Justice of High Court" [1986] 14 *Legal Reporter* 10. For commentary see, eg, Blackshield, "The 'Murphy Affair'" in Scutt (ed), *Lionel Murphy* 230; Blackshield, "Lionel Murphy: Return to the Court" (1986) 76 *Arena* 28; Evans, "Australian Senate: Inquiries into the conduct of a judge" (July 1985) 66(3) *Parliamentarian* 115; Evans, "The 'Murphy affair' produces conflict between Parliament and the courts" (April 1986) 67(2) *Parliamentarian* 47; Evans, "The 'Murphy Affair' ends and the Senate President acts on freedom of speech" (January 1987) 68(1) *Parliamentarian* 15; Brown, Hogg, Boehringer & Tubbs, "The Murphy case: Some Issues" (1985) 10 *Legal Service Bulletin* 153; Brown, Hogg, Boehringer & Tubbs, "Re-presenting Justice Murphy: A contemporary inquisition" (1986) 11 *Legal Service Bulletin* 147; Lee & Morabito, "Removal of Judges - The Australian Experience" [1992] *Singapore J Legal Studies* 40; Morabito "Are Australian Judges Accountable?" (1994) 1 *Canberra L Rev* 73; Campbell, "Suspension of Judges from Office" (1999) 18 *Aust Bar Rev* 63, 70-72; J B Thomas, *Judicial Ethics in Australia* (LBC Information Services, Sydney, 2nd ed, 1997), 178-188. See also above fn 29 (Bacon articles). Litigation challenging the constitutional validity of the *Parliamentary Commission of Inquiry Act 1986* (Cth), on the basis that only the Senate and House of Representatives (and not parliamentary committees or inquiries) could constitutionally make decisions or reach conclusions about s 72(ii) removal matters, was discontinued by Murphy on 28 July 1986. Compare *Nixon v United States* (1993) 506 U.S. 224 (holding that controversies concerning Senate impeachment trial procedures are non-justiciable where Senate appointed a 12 member committee which received evidence and submitted it to the Senate where Nixon was convicted); Note, "*Political Question Doctrine*" (1993) 107 *Harvard L Rev* 293; Brown, "When Political Questions Affect Individual Rights: The Other United States v Nixon" [1993] *Supreme Court Review* 125; Gerhardt, "Rediscovering Nonjusticiability: Judicial Review of Impeachments After Nixon" (1994) 44 *Duke LJ* 231.

59 See above fn 23 (citing references).

- 60 Hocking, *Lionel Murphy: A Political Biography* 304 (quoting interview with Sir Clarrie Harders on 4 April 1996 who was one of Murphy's defence lawyers for Murphy's second criminal trial).
- 61 Bacon, "Partial Portrait" *Weekend Australian Review* 11-12 October 1997 at 26. For such material, see below fn 64, 65, 66.
- 62 Bacon, "Partial portrait" *Weekend Australian Review* 11-12 October 1997 at 26.
- 63 Hocking, *Lionel Murphy: A Political Biography* 304.
- 64 James Robert McClelland (Labor Party senator 1971-1978; Judge NSW Industrial Commission 1978-1980; Chief Judge NSW Land and Environment Court 1980-1985) and Murphy were friends and colleagues. See J McClelland, *Stirring the Possum: A Political Autobiography* (Penguin Books, Ringwood 1989); Obituary, "Champion of justice and probity" *Australian* 18 January 1999 at 14; Kelly, "Diamond Jim: gem of a mind sparked a brilliant career" *Australian*, 18 January 1999 at 1; Jackson, "Diamond Jim: a dazzler to all around him" *Australian*, 18 January 1999 at 2.
- 65 See, eg, Bacon, "Diamond Jim: how I perjured myself" *Weekend Australian*, 23-24 January 1999 at 1; Ackland, "Diamond Jim well aware of the flaws of a Labor saint" *Sydney Morning Herald*, 22 January 1999 at 13; Marr, "Diamond Jim has one last swipe at his mates" *Sydney Morning Herald*, 23 January 1999 at 1; Marr, "How Diamond Jim Saved His Mate" *Sydney Morning Herald*, 23 January 1999 at 33; Editorial, "Time for truth about Murphy" *Sydney Morning Herald*, 1 February 1999 at 12; McGregor, "Truth not in question" *Australian*, 28 February 1999 at 2; Milne, "Lionel Murphy's dark legacy lingers on", *The Australian*, 3 May 1999 at 15.
- 66 See, eg, Editorial, "Time for truth about Murphy", *Sydney Morning Herald*, 1 February 1999 at 12.
- 67 Compare major literary biographies, for example, L Edel, *Henry James* (J.B. Lippincott Co, Philadelphia, vols 1-5 1953-1972); M Holroyd, *Bernard Shaw* (Random House, New York, vols 1-4 1988-1992); M Holroyd, *Lytton Strachey* (Holt, Rinehart and Wilson, New York, vols 1-2 1967-1968), L Thompson, *Robert Frost* (Holt, Rinehart and Winston, New York, vols 1-3 1966-1976) (vol 3 with R Winnick); H Lee, *Virginia Woolf* (Chatto & Windus Ltd, London 1996).
- 68 See above fn \*\* (bibliographies of Australian judicial biographies).
- 69 For literature on the writing of judicial biographies see, eg, Thomson, "Playing with a Mirage: Oliver Wendell Holmes, Jr. and American Law" (1990) 22 *Rutgers LJ* 123 at 130 n 31 (citing references); Howard, "Alpheus T. Mason and the Art of Judicial Biography" (1991) 8 *Constitutional Commentary* 41; Spillenger, "Lifting the Veil: The Judicial Biographies of Alpheus T. Mason" (1993) 21 *Reviews American Hist* 723; White, "The Renaissance of Judicial Biography" (1995) 23 *Reviews American Hist* 716; Gerhardt, "The Art of Judicial Biography" (1995) 80 *Cornell L Rev* 1595; "Symposium: National Conference on Judicial Biography" (1995) 70 *New York U L Rev* 485-809; Jeffries, "The Athlete as Judge" (1999) 66 *U Chicago L Rev* 495 at 495-496 (discussing, with examples, three types of judicial biography: "judicial biography as intellectual history"; "life and judicial times" biographies and "pre-judicial history" biographies); Posner, *Law and Literature* 357-377.