Book Reviews

The Political Foundations of Justice

Justice Accused: Antislavery and the Judicial Process. By Robert M. Cover. *New Haven and London: Yale University Press,* 1975. Pp. xii, 322. $15.00.

Reviewed by Eugene D. Genovese†

Professor Cover apparently intended this impressive and disturbing book primarily as a contribution to a deeper understanding of the historical development of the law and of the recurring dilemma confronting those charged with enforcing unjust laws. In these tasks he has acquitted himself splendidly, even in the eyes of a critic who thinks he has fudged more than he meant to and perhaps more than he knows. Cover's finest achievement lies in the realm of intellectual and institutional history, for as David Brion Davis observes in a statement for the bookjacket (imagine: a careful, accurate assessment on a book jacket!)—"The result is interdisciplinary history at its best—an indispensable work for legal philosophers as well as for American historians."

Still glancing at the recent events in Vietnam, Cover brings a tough-mindedness tempered by a decent appreciation of human frailty to his painstaking and learned account of antislavery judges compelled, as they thought, to enforce proslavery legislation. His sketches of the radical and moderate abolitionists as well as the luminaries of the bench are, on the whole, well-balanced and compassionate while intellectually and morally rigorous. His effort commands respect and admiration, and his ideas and analyses deserve the widest reflection in and out of the legal and historical professions. Yet *Justice Accused* remains deeply disquieting in ways Cover probably did not intend and points toward some conclusions he may not like.

Cover tells us that his book is "the story of earnest, well-meaning pillars of legal respectability and of their collaboration in a system of

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oppression—Negro slavery."[1] Much of the challenge of this book is directed against the common claim that judges must be relieved of responsibility for the moral content of the specific laws they enforce. Cover argues that "a static and simplistic model of law" leaves a judge only four choices when caught between morality and the law: to apply the law against conscience; to follow conscience and be unfaithful to the law; to resign; or to find a way to cheat.[2]

For Cover, however, the judge has a legitimate role in determining what the law will become: he is an active agent in the working out of the law's moral content. The extreme formulations of both radical moralism and legal formalism obscure actual historical process, and carried far enough provide rationalizations for a deeper irresponsibility. Cover is careful, however, to dissect ideological, social, and professional history in order to reveal the psychological and institutional framework within which the judges found themselves. He thereby avoids, or at least holds to a minimum, anachronistic moral pronouncements and at the same time illuminates historical process and the probabilities of choice within it.

To his great credit, Cover is more concerned with teaching than preaching and provides an impressive account of the natural law tradition to which the antislavery judges fell heir and of the various constraints which confined the courts by the second quarter of the nineteenth century. Still, it is difficult for those of us who do not share Cover's apparent liberal ideology not to appreciate the force of Bentham's blast at natural law: "I see no remedy but that the natural tendency of such [a] doctrine is to impel a man, by the force of conscience, to rise up in arms against any law whatever that he happens not to like."[3] Cover also appreciates the force of the objection and skillfully tries to steer between its implications and a retreat into formalism. I am afraid, however, that the objection remains. For we know, as Cover surely does, that although judges can provide living space for themselves and defendants between the suffocating extremes of abstractions, this opportunity tells us little or nothing about the principles by which men ought to live within that space.

Among the virtues of *Justice Accused* is an account of the way in which "skeptical conservatism" and "rationalistic reform" converged to undermine the appeal to natural law by the beginning of the nineteenth century. "The most telling aspect of the American variant of constitutional positivism," Cover writes, "was the enthusiasm for writ-

1. R. Cover, Justice Accused (1975) [hereinafter cited to page only].
2. P. 6.
3. P. 24, *quoting* J. Bentham, Fragment § 19, at 110 (1823 ed.).

ten constitutions—the almost compulsive mania for rendering the allocation of power explicit."[4] And he adds, "Above all, the tradition of positivism meant that the judge ought to be will-less."[5] (Cover's fine aesthetic eye closes here: he misses the irony that will-less is precisely what, in every slaveholder's fantasy, the perfect slave is supposed to be.) Here and in his valuable discussion of the threat that the passionate conflict over slavery posed to the independence of the judiciary, Cover implicitly confronts the latent antagonism between republicanism, with its prime value of freedom, and democracy, with its intrinsic tendency to surrender freedom for equality. Thus, in discussing the free and equal clause of the Virginia Constitution, he suggests that the reality and importance of slavery in Virginia "presented in the starkest form the question of whether judges act according to large principles or specific intentions."[6] Everyone knew, he acknowledges, that the framers had not intended to abolish slavery. But, he adds, "The question was, whether they had done something without knowing or intending it; whether the words of natural law, once 'declared,' have a life of their own."[7] Very well. But if I may paraphrase that shrewd proslavery extremist George Fitzhugh: carry out the doctrine implicit in your question and you will subvert every government on earth—especially, one might add, every democratic government. For the plain bias of an active judiciary is antidemocratic, the more so as it usurps the attractive role of defender of freedom. And only in America could the antithesis between democracy and freedom appear other than as intrinsic and fail to be brought out sharply even in the work of our best scholars.

This book, in its own way, nonetheless demonstrates the slimness of the thread by which freedom sustains itself in modern democratic society. The only justification for setting limits to the power of some men over others—unless we invoke God's Revealed Truth—is an agreed-upon sense of a good and decent life. Unfortunately, no such ideal, even were one arrived at as a collective judgment, could stand alone against the pressures of discrete material interests and the imaginative efforts of those trained "to distinguish." The rule of law and that mania for written constitutions which Cover derides represent brave efforts to institutionalize decency and good sense and to take full account of both man's creative potential and his withering capacity for evil. The irony, as Cover sharply asserts, is that these very brave

4. P. 27.
5. P. 29.
6. P. 50.
7. P. 51.

efforts also lay the foundations for a moral justification of passivity toward palpable injustice.

Nor, indeed, does the Revealed Word of God offer a secure way out for those imbued with republican or democratic principles or for anyone who values freedom in any meaningful sense of the word. Levi Lincoln made this point in his bullying remarks in one of the *Quock Walker* cases: he threatened the court with an appeal to God, who would invoke "the laws of reason and revelation."[8] But Revelation as a guide to social action requires—Protestant sensibilities notwithstanding—a Church to interpret it, if the same problems are not to reassert themselves in a different language. And since the Church, as any wise priest would freely admit, consists of fallible men, we end with the need to obey a positive law legitimately derived from an appropriate social consensus.

The only consistent justification for a hard abolitionist line could have been some variant of Hegel's powerful refutation of slavery's first principle,[9] a principle chillingly enunciated by Judge Thomas Ruffin of North Carolina in his famous 1829 opinion in *State v. Mann*.[10] But Judge Ruffin or no, slaveholders' consensus or no, the reduction of the slave to a thing—to a mere extension of the master's will—ran

8. P. 47. The *Quock Walker* cases, which according to "long-standing tradition" held that slavery violated the Massachusetts constitution, arose when Quock Walker, allegedly a slave, ran away to work for a neighbor. Pp. 44, 46. In one of the actions arising out of the incident, Levi Lincoln defended the neighbor in a suit by the master for damages. Caldwell v. Jennison (Mass. Super. Ct. of Judicature, 1781) (citation to the record of the case in Cushing, *The Cushing Court and the Abolition of Slavery in Massachusetts: More Notes on the "Quock Walker Case,"* 5 AM. J. LEG. HIST. 118, 121 n.6 (1961).

9. In his famous discussion of lordship and bondage in THE PHENOMENOLOGY OF MIND 228-40 (J.B. Baillie trans. 1967), Hegel argued that power over things would be insufficient to enable men to achieve self-consciousness and that men could only attain it through perception of their position in an adversary relationship. The master's self-consciousness depended upon his perception of power over his slave, a perception determined by the slave's assertion of independent will. The slave perceived not only his dependence upon the master but also the reverse, since the labor process exposed the degree to which the master depended upon the slave's work. Hegel argued that slavery made no sense, morally or politically, except on the assumption that one man could determine the will of another. Hegel pointed out, in summarizing his devastating critique of such pretensions, that such a surrender of will reduces to a logical absurdity since it can only be effected, if at all, through the willing alienation by one ostensibly without a will to alienate.

10. 13 N.C. (2 Deveraux) 263 (1829) (holding that the intentional wounding of a hired slave by the hirer could not constitute a crime). For Cover's discussion of the case, see p. 77. Confronted with the assertion that the slave's condition paralleled that of a child, Judge Ruffin put the matter bluntly:

> With slavery it is far otherwise. The end is the profit of the master, his security and the public safety; the subject, one doomed in his own person, and his posterity, to live without knowledge, and without the capacity to make anything his own, and to toil that another may reap the fruits. . . . Such services can only be expected from one who has no will of his own . . . .

13 N.C. (2 Deveraux) at 266.

afoul of the slave's humanity and, in particular, of his very human capacity for killing and insurrection. The validity of Hegel's philosophical refutation of slavery's ultimate rationale was constantly confirmed in day-to-day master-slave relations and finally impressed itself even on the Southern courts. But Hegel's refutation cannot readily be divorced from the classical political economy that alone offered a coherent alternative doctrine of obligation, and that political economy, as Hegel clearly perceived, rested squarely on absolute (*i.e.*, bourgeois) property.[11] The Northern judges therefore did have an antislavery course open to them—one that need not have collapsed into the vagaries of natural law nor retreated into the complicity of an inflexible positivism. They might have taken their stand on the unanswerable ground that any recognition of man's property in man surrendered the entire ideological foundation of Northern society and thereby subverted its political system.[12]

The genius of American politics, however, has lain in its triumphant, if ultimately unstable, reconciliation of those conflicting doctrines put forward during Europe's Age of Revolution and largely interred on the Parisian barricades of the June Days of 1848: liberty, equality, and democracy in one neat package. Whereas European politics and ideology, increasingly divided over the "social—*i.e.*, class—question,"

11. Hegel's refutation of slavery in THE PHENOMENOLOGY OF MIND, *supra* note 9, and in his later work, PHILOSOPHY OF RIGHT (T.M. KNOX trans. 1953), was rooted in his analysis of the problem of freedom in modern society. He followed a distinguished line of classical English and Scottish economists and French Physiocrats in denouncing slavery as destructive to that civic resonsibility and participation which alone made freedom possible even for a ruling class. Thus in PHILOSOPHY OF RIGHT he observed, "A slave can have no duties; only a free man has them." *Id.* at 261.

The refutation of slavery also rested on the main point of the classical economists—that freedom of labor (or as Marx more cogently put it, the transformation of labor power into a commodity) alone fulfilled the demand for recognition of the inviolability of the human personality, and that freedom of labor could have no social force except in a society based on the bourgeois principle of absolute property. From this point of view, slavery was both a moral abomination and a denial of the entire moral basis of free society; it could not be tolerated as a mere peripheral unpleasantness or a "peculiar institution." When, therefore, the Southerners demanded that the Northern courts acknowledge the legitimacy of slavery—in any form, in any part of the country, or at any level of intensity—they demanded, as the abolitionists understood, unconditional surrender at the decisive level of struggle.

12. The slaveholders threatened to expose the limits of the brilliant reconciliation of freedom and equality sketched by classical political economy and brought to fruition in Hegel's philosophy. In bourgeois theory, freedom and equality are linked through the reduction of equality to its formal aspect as the confrontation of autonomous units in a free market. The deeper problem of the social content of equality, raised so sharply by Rousseau, is thereby circumvented. But once freedom of labor is attacked, so is the theory of absolute bourgeois property on which it rests. Thus, the Northern courts might have declared slavery in any form incompatible with the nature of American society and with the *raison d'être* of the legal system itself.

pitted liberals against democrats and steadily drove democrats to socialism, things were being ordered better in America.[13]

The price for that better ordering was suppression of the class question and, with it, a papering over of the chasm separating the republican commitment to liberty from the democratic commitment to equality and social justice. Thus, Northern bourgeois thought, especially legal thought, dared not take the high ground staked out by Hegel, for its class content could not be disguised. And besides—a small matter obscured by Cover—to take such a position would have unleashed secession and war. By rejecting such a solution, Northern society could take an easy view of its own first principles and avoid confrontation not only with itself, but with the slave states, increasingly organized as an alternative society with an alternative moral sensibility. Cover marvellously describes the growing transformation of the courts into a theatre for guerrilla politics, but his focus on the moral-formal dilemma within the North itself draws attention away from the deeper and more pressing political problem: the Northern courts were becoming irrelevant to a struggle between rival social systems that were advancing irreconcilable moral principles.

From this point of view the position of such judges as Story, Shaw, McLean, and Swan acquires greater dignity than Cover's valuable intellectual, institutional, and psychological critique would allow. Rarely does Cover take cheap shots, but I fear that he comes close to doing so in his repeated slighting of the argument from the principle of "Union." For example, he has Judge McLean asserting in effect that a judge ought not to explore the natural justice of slavery unless he is prepared to destroy the "social compact."[14] And later, Cover writes that McLean consistently appealed to the dichotomy between law and anarchy.[15] But I see no reason to read "anarchy" in so narrow a way as to suggest merely a congenital conservative fear of a breakdown in the social order. McLean and other judges, as Cover's own account shows, justifiably saw the Constitution as a bargain between North and South, and therefore between alternative moral principles. They also understood that those rival moral principles had potential armies and hordes of militants standing behind them. For these judges, then, the choice was by no means solely between the moral and the formal within their own society—and that choice was hard enough.

13. For an excellent historical introduction to these questions, see E. HOBSBAWM, THE AGE OF REVOLUTION: EUROPE, 1789-1848 (1962) and E. HOBSBAWM, THE AGE OF CAPITAL, 1848-1875 (1975).

14. P. 122.

15. P. 249.

In effect, the judges were refusing to assume responsibility for unleashing secession and a war to which their society was as yet unwilling to commit itself. Their impotence in the face of the enormity of the Fugitive Slave Law marked a confession that the resolution of the slavery question lay beyond the power of the courts, not merely in the formal sense of "I Cannot," but in the direct political sense of genuine powerlessness.[16]

The slaveholders were not fools, and their more militant leaders were not men readily hustled. They knew, and said, that enforcement of the Fugitive Slave Law was the critical test of Northern intentions. And they knew, as discerning Northerners knew, that any retreat from a strict, no-nonsense enforcement, no matter how ingenious the judicial creativity, would constitute an attack on the morality of slaveholding.[17] Indeed, were that not so, Cover would have had to look elsewhere for a historical problem to analyze. The weakness in Cover's searching analysis, therefore, lies in his failure to make a political and ideological assessment of the development of Southern society and its impact upon the Northern judiciary. I find his treatment the more distressing since he clearly sees that "Ruffin articulated better than any other judge the position that the master-slave relationship is a creature of force and force alone and that the law must reflect the cruel origins of the relationship."[18] Yet Cover does not offer an evaluation of the impact of this thinking on the Southern courts, much less on the Southern politicians and community leaders, whose commitment to the logic of slavery was probably "more advanced" than that of the courts themselves.

Thus, although Cover has to his credit the extraordinary achievement of laying bare, through penetrating historical analysis, the full force of the moral-formal dilemma and of suggesting a way out of it on his own chosen terrain of discourse, he by-passes the ultimate question of the terrain itself. What happens when two ranges of moral sensibility, rooted in antagonistic property systems, conflict and there-

16. When Cover speaks of the doctrine of "cannot" (he begins Chapter Seven with "The Judicial "Can't"), he appeals to a psychological model premised on conceptions of "conflict resolution." These conceptions do not especially illuminate his text and are open to sharp challenge from psychoanalytic (and other) points of view.

17. My view of antebellum Southern society is not shared by all historians. Since Cover avoids these issues, I do not know where he stands. But those who wish an elaboration of the view I am sketching here may consult E. GENOVESE, THE WORLD THE SLAVEHOLDERS MADE: TWO ESSAYS IN INTERPRETATION (1969) and, for an assessment of the ideological aspect of the law, E. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 25-49 (1974).

18. P. 77 n.*.

by challenge the very notion of "moral"?[19] Cover discusses selected Southern responses to the same moral-formal problem—that is, he traces the problems created by adherence to "Northern" principles within the South—but he is virtually silent about the decisive formation of an alternative moral view. The question I am raising bears only superficial resemblance to the one on which Cover concentrates. For, in essence, the slaveholders denied that slavery was immoral; they did not simply assert "property rights" against "human rights" and thereby agree to play the Northern game. And since the slaveholders possessed considerable regionally-based political and military power, their challenge differed qualitatively from that posed by internal dissidents. At that point, the Northern judicial system tottered on the brink of political irrelevance, as any judicial system must when the consensual basis of society collapses or is revealed as without foundation.

Had the antislavery judge done other than swallow their scruples and enforce the law, they would have, consciously or not, moved the North sharply toward an internal polarization preparatory to waging an external war. One may devoutly wish they had done just that. But that wish is tantamount to a recognition of the judicial role as frankly political and extra-judicial, a recognition which the several types of abolitionists struggled to make everyone acknowledge. Cover makes this point obliquely when he brilliantly traces the way in which the antislavery judges, by their retreat into formalism, unwittingly took an opposite political position and isolated the abolitionists on a narrow terrain on which they could be smashed.[20] In other ways, too, Cover displays a sharp sense of political dialectics—for example, in his account of Garrisonian and anti-Garrisonian abolitionist strategies, tactics, and results.[21] It is the ultimate political question that he somehow drowns in his own version of legalism.

The last word, prefigured in the hand-wringing apologetics of Judge McLean, goes to the Chairman: on the terrain of irreconcilable class antagonisms—and therefore of conflicting moral visions—political

19. I have the uneasy feeling that Cover veers closer than he might wish to the viewpoint advanced during the happy days of the 1960s by the anarchist wing of the Left. I have yet to hear how, without the intervention of the Good Lord—whose Word somehow always means something different to me than it does to liberals and Quaker radicals—a case can be made for a moral standard on grounds other than historical consensus. But I have stated my views on this question in *Staughton Lynd as Historian and Ideologue* and *A Question of Morals* in E. GENOVESE, IN RED AND BLACK: MARXIAN EXPLORATIONS IN SOUTHERN AND AFRO-AMERICAN HISTORY (1971).

20. P. 221.

21. *See* pp. 150-58.

power does in fact, however disagreeable the thought, grow out of the barrel of a gun. The Civil War obviously could not solve the moral-formal dilemma, but it did solve the pressing historical problem posed by two societies within a single national-state, for it destroyed the social basis of the only alternative moral vision American liberalism has ever had to confront at home. The slaveholders, too, prefigured the Chairman. Noting the inability of Northerners and Southerners to appeal any longer to a common moral standard, they concluded: "The argument is exhausted; let every man stand to his arms."

Justice Brandeis: The Confirmation Struggle and the Zionist Movement

Letters of Louis D. Brandeis—Volume IV (1916-1921): Mr. Justice Brandeis. Edited by Melvin I. Urofsky *and* David W. Levy. *Albany, New York: State University of New York Press,* 1975. Pp. xxiii, 587. $32.00.

Reviewed by Michael Boudin†

This fourth volume of the letters of Louis D. Brandeis embraces only six years in a professional career that spanned six decades.[1] Yet in this brief period, from 1916 through mid-1921, there occurred two events of singular interest in Brandeis's life: the long and bitter struggle over the Brandeis nomination to the Supreme Court and Justice Brandeis's active leadership of the American Zionist movement during confirmation and his early years on the Court.

In the opening pages, the confirmation fight predominates. Brandeis was nominated by Woodrow Wilson in January, 1916, and the nomination was met almost at once by fierce opposition. Conservative Bostonians, boasting Harvard President A. Lawrence Lowell among them, petitioned the Senate against the nomination; editorials inveighed against Brandeis as a radical; and segments of the bar denounced Brandeis as unethical in character and unjudicial in temperament, in a campaign culminating in a letter of opposition signed by ex-President Taft and six other present or former presidents of the American Bar Association.[2]

As the parade of attacks followed inside the Senate committee

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1. Previous volumes encompass correspondence during 1870-1907, 1907-1912, and 1913-1915. The published letters are only a fraction of thousands. I LETTERS OF LOUIS D. BRANDEIS xvi (M. Urofsky & D. Levy eds. 1971).

2. Almost three years later Brandeis wrote to his wife:

> Had an experience yesterday which I did not expect to encounter in this life. As I was walking toward the Stoneleigh [Court apartment building] about 1 P.M., Taft & I met. There was a moment's hesitation, & when he'd almost passed, he stopped & said in a charming manner: "Isn't this Justice Brandeis? I don't think we have ever met." . . . He at once began to talk about my views on regularity of employment. . . . He spent a half hour in 809 [Stoneleigh], talking labor & War Labor Board experiences. Was most confidential—at one point put his hand on my knee.

IV LETTERS OF LOUIS D. BRANDEIS 370 (M. Urofsky & D. Levy eds. 1975) [hereinafter cited to page number only].

room and out, Brandeis at first professed detachment. "The hearings," he wrote his brother, "seems [*sic*] to be a fit method of clearing the atmosphere. However, it is not my fight."[3] Again: "[M]y feeling is rather—'Go it husband, Go it bear' with myself as 'interested spectator.' "[4] Actually, the letters show that Brandeis was an active participant, privately furnishing to his aides and supporters the facts needed to answer the successive charges against him growing out of his law practice and reform activities.

Brandeis's letters concerning the confirmation battle are of a piece: organized, impersonal, stuffed with facts, forceful in substance but spare in style. Most are to Edward McClennen, a Brandeis partner and trial lawyer, who was stationed in Washington during the hearings and conveyed information to the committee and to other Brandeis defenders. As new allegations were made, Brandeis answered them; he suggested new lines of inquiry or tactics; and he played at least a limited role in mobilizing support and counterattacks.[5]

Brandeis became less patient as the Senate investigation spun out over four months, but with few exceptions,[6] his letters to McClennen retained the same even tone. Despite his involvement, many of the letters in this period from January through May of 1916 concern other subjects, including Zionism, reform activities, and family matters. Ultimately, Brandeis's confirmation was recommended by the subcommittee (in a 3-2 vote) and by the full committee (10-8); the Senate confirmed the nomination in June, 1916 (47-22).

Despite detailed notes to the letters prepared by the editors, neither the broad outlines of the campaign for confirmation nor the details of successive skirmishes can be gleaned fully from the correspondence.[7] In this struggle, Brandeis played only a part; and the open clash in the hearing room and press was matched by a subterranean

3. P. 39.

4. P. 54.

5. Among the more colorful examples is a chart, prepared with Brandeis's encouragement (p. 59), showing the common Boston social and financial links or loci of the 55 signers of the Lowell protest (Somerset Club, State Street offices, Back Bay residents, etc.). Brandeis himself forwarded the contents to Walter Lippman (p. 80), who produced a powerful *New Republic* editorial indicting "the most homogeneous, self-centered and self-complacent community in the United States" (quoted in part, p. 81). The chart itself, limned in a sinister spiderweb fashion, is reproduced in A. MASON, BRANDEIS: A FREE MAN'S LIFE 485 (1946).

6. *E.g.*, p. 166.

7. The volume contains nothing so ambitious as, for example, Joseph Lash's recent masterful introduction to the Frankfurter diaries. J. LASH, FROM THE DIARIES OF FELIX FRANKFURTER (1974). But the editors' notes following most of the individual Brandeis letters range from one line identifying biographies to thumbnail sketches, occasionally quite lengthy, of surrounding events.

flux of political pressures and extraneous ambitions and interests.[8] The letters do cast more light on the individual episodes in Brandeis's earlier career which gave rise to the charges of misconduct against him. But the underlying litigation or public controversies were themselves tangled and prolonged, and no sequences of letters and annotations can go far toward illuminating the Warren will dispute, the Ballinger-Pinchot battle, the contest over the New Haven railroad, the liquor dealers' legislation in Massachusetts, and the other episodes raked up and raked over during the four month Senate inquiry. The editors' notes make the letters comprehensible, but without far more background no reader can even begin to frame judgments of his own.[9]

Despite its intrinsic interest for lawyers, in this collection of letters the confirmation struggle is merely an overture. The resonating theme of the correspondence, and its main fascination, is quite a different subject: Brandeis's role as a central figure in the Zionist movement during his early years on the Court. The remarkable story is worthy of a novelist and even the phlegmatic style of the letters cannot entirely conceal the drama.

When the letters in this volume commence in January, 1916, Brandeis had been serving for a year and a half as chairman of an American Zionist group formed at the outbreak of the European war. Brandeis himself was not then or afterwards a practicing Jew. He was a latecomer to Zionism, having begun to give the subject serious interest only from about 1912. Many members of the new organization who selected him as chairman in the summer of 1914 may have expected that his national reputation as a reformer would be his main contribution. Instead, Brandeis dominated the organization from the outset and swiftly emerged as a power in the American movement. The letters reveal why.[10]

8. The letters provide glimpses. Early on, Brandeis reported to Norman Hapgood:

> Jacob Billikopf expressly asked "Do you object to my bringing pressure on [Senator] Reed of Missouri to confirm nomination". I have thought it best not to answer this; but Billikopf is a first rate man,—the head of Jewish charities there [in Kansas City], and could be relied upon to be loyal.

P. 32.

9. Much of that background is provided in Mason's biography, *supra* note 5, which devotes chapters to several of these matters. A. TODD, JUSTICE ON TRIAL (1964) is devoted entirely to the confirmation proceedings.

10. In AMERICAN ZIONISM FROM HERZL TO THE HOLOCAUST (1975), Melvin Urofsky—one of the editors of the letters—describes the conference that elected Brandeis:

> So far everything had gone according to expectations: a relief fund inaugurated, a well-known personality to head it, and now they would let him get some of his rich friends to give more. Then the script suddenly changed. Brandeis, pleading his ignorance of the many organizations represented, asked the assembly to stay on and meet with him that evening and the following day. He needed to know more about

A typical Brandeis directive, among many addressed to his new office staff in the organization, appears early in the volume[11] and is succeeded by many more. In numbered paragraphs (*"First," "Second,"* etc.), Brandeis approved the selection of named members of a negotiating committee; declined a speaking engagement; requested information on arrival dates of two persons; enclosed correspondence concerning a prior meeting in Louisville; reported on another in Cincinnati; directed that 500 copies of an article and 24 specified books or pamphlets on Zionist matters (and "a bill for the same") be sent to the organizer of the Cincinnati meeting; reported on organizing efforts in Cincinnati and the prospects of forming a local bureau ("which they would doubtless be able to finance themselves"); reported on meetings in Rochester and Buffalo and directed further action; and—in a paradigmatic concluding paragraph—asked for reports from "all of our societies" of their condition on December 29th, "and when these reports are obtained, we must endeavor to secure a monthly report for submission in connection with the monthly financial reports."[12] As Brandeis wrote elsewhere, "A cleared desk is about as essential to comfortable living as a hair cut."[13]

Many such letters are paired with others, only slightly more personal in tone, to trusted lieutenants including Felix Frankfurter, to peers in the movement including Judge Mack, and to individuals around the country and abroad. Others touch on Brandeis's assistance in achieving Wilson's support for the Balfour Declaration, favoring in principle a "national home" for the Jewish people in Palestine. Later letters report on Brandeis's post-war trips to Palestine and Western Europe.[14]

As the letters begin with Brandeis triumphing in the confirmation battle and establishing his leadership in the Zionist movement, so they conclude with Brandeis in defeat. In June, 1921, the Brandeis-Mack leadership was effectively deposed by American adherents of Chaim Weizmann, the European Zionist leader. The causes of the

> them, their leaders, their memberships, their administrative arrangements. For the next day and a half, Brandeis sat patiently in a crowded hotel suite, absorbing fact after fact . . . .

Id. at 121.

11. P. 5.

12. Brandeis, relentless in maintaining financial discipline in the Zionist movement, was himself generous to the movement, and to other causes. Mason's biography, *supra* note 5, at 692, records gifts between 1890 and 1939 of almost $1.5 million, of which over $600,000 was for Jewish charities and Zionist causes.

13. P. 480.

14. When Brandeis became a Justice, he resigned from the offices he held in the Zionist organizations and continued his leadership with less prominence but equal assurance.

fissure were seismic strains—in philosophy, in personality, in style—reflected throughout the letters; but symbolically, the precipitating issue was the Brandeis faction's opposition to creation of a new fund for Palestine which, contrary to Brandeis's view of sound financial policy, commingled investments and contributions and divided responsibility for fund management.[15]

Although the confirmation fight and the Zionist movement are the main subjects of the correspondence, numerous other letters are of casual interest or more.[16] Other letters exchanged with relatives illuminate aspects of Brandeis's character including his deep feeling for his family and a vein of sentimentality that contrasts with virtually all of his other correspondence. Very few of the letters refer to the Supreme Court or make any substantive comment about its processes or decisions.[17]

One cannot fully reflect on these letters without comparing them with the letters of Justice Holmes, principally his splendid correspondence with Sir Frederick Pollock and with Harold Laski.[18] The two Justices were among the greatest ever to serve on the Court, they were contemporaries and friends, each wrote powerful and persuasive opinions, and their votes often coincided. But the letters themselves provide little but contrasts.

On the surface, Holmes's style in letter writing is witty and entertaining, abounding in metaphor and well-turned phrases. The substance is speculative, literary, anecdotal, and historical, in a word, civilized. With Brandeis there is little that does not relate to current events, and the language is unadorned. Where (rarely) he displays his erudition or embellishes his prose, it is almost always subordinate to his larger purpose to persuade, encourage, instruct or uplift.[19]

15. Less than 10 years later Brandeis's adherents found themselves back in power. As he himself wrote in anticipation, "The Romans of the great days occasionally lost a campaign. They never lost a war . . . because they never permitted a war to end until they won." A. MASON, *supra* note 5, at 463.

16. These include correspondence with Albert Einstein, Zechariah Chafee, and—in addition to the Zionist movement correspondence—Felix Frankfurter.

17. Among the few such references, one deserves quotation. To his wife, he wrote: "[T]he U[nited]. S[tates]. S[upreme]. C[ourt]. goes merrily on. The main discussion at luncheon was of shirts, where, when & how satisfactory ones may be secured . . . ." P. 554.

18. HOLMES-POLLOCK LETTERS (M. Howe ed. 1941); HOLMES-LASKI LETTERS (M. Howe ed. 1953). There is also published correspondence between Holmes and diplomat Lewis Einstein (HOLMES-EINSTEIN LETTERS (J. Peabody ed. 1964)), and between Holmes and Chinese jurist John C. H. Wu (JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 151-208 (H. Shriver ed. 1936)).

19. In a letter to his brother concerning Government attempts at economic regulation during the war, Brandeis wrote: "This price fixing job is about the hardest economic problem ever tackled. The world has been at it from time to time for thousands of years—never with great success. . . . Send to the Library for Abbott's 'The Common People of Ancient Rome' (Scribners 1911) & read the chapter 'Diocletian's Edict & the

If Holmes's letters express the imagined temper and tenor of conversation at an 18th century dinner table, Brandeis's letters are the office correspondence of a busy executive—at times, indeed, the dispatches of a military commander. While these letters can be read for information and instruction, they cannot—unlike Holmes's—be read for sheer pleasure.[20] Reading Brandeis's fact-filled letters, one is reminded occasionally of those reports on New England textile mills that Brandeis urged Holmes to spend his summer reading. There is little humor in the Brandeis letters.

Another contrast in these letters is deeper and more provoking. Holmes needs no defense for indulging himself in the omnivorous reading and spacious reflection that inform his letters. Still less is any excuse required for Holmes's enduring resolve as a Justice not to take part in the active struggles of the world outside the Court. The dangers for the Court latent in Brandeis's multiple extracurricular ventures are obvious.[21]

Yet, whatever the prudence of Brandeis's course, no one reading this volume can easily withhold a sense of admiration for his driving commitment to public affairs and his unrelenting impulse to ameliorate, to improve, to reform, to create. Even if one shares Holmes's skeptical doubts about what he called "betterment," there is a heroic quality in Brandeis's efforts virtually distinct from his particular causes and beliefs. As Holmes himself wrote: "[T]he mode in which the inevitable comes to pass is through effort. . . . And although with Spinoza we may regard criticism of the past as futile, there is every reason for doing all that we can to make a future such as we desire."[22] Those words could fittingly have been addressed to the Brandeis letters.

High Cost of Living.' " P. 308. Brandeis's own prescription in the letter, evoking a strong sense of déjà vu, was public "education & exhortation" and a seven-month, two-hour daylight savings law to reduce coal consumption. *Id.*

20. Consonantly, Holmes's published correspondence includes both the letters by Holmes and the letters to him, while the Brandeis letters follow the more common practice and contain only those written by him. The editors of the Brandeis letters do their best to fill the gap with their annotations, occasionally including actual quotations from the correspondents' letters. Nevertheless, the effect is often like listening to one side of a telephone conversation; the sense of symmetry is impaired even when comprehension is not.

21. Although Brandeis's Zionist activities dominate this volume, they are only one example of his involvement or readiness to be involved in public affairs outside the sphere of the Court's business. For instance, one letter in this volume expresses to Frankfurter Brandeis's wish for a private conference with John L. Lewis to instruct the labor leader on economic policy ("If it could come about in a happy way to have him call on me, I should like to tell him to go light on rate of wages & to insist upon regularity of employment." (p. 559)). More intriguing, although double hearsay, is the statement elsewhere by Frankfurter to Franklin Roosevelt concerning a proposed bill limiting the fees of private counsel in suits against the Government: "Between ourselves, L.D.B. passed on that bill before I submitted it to you." ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE 191 (M. Freedman ed. 1967).

22. O. HOLMES, *Ideals and Doubts,* in COLLECTED LEGAL PAPERS 303, 305 (1920).