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Reappraising Brandeis: Comments on Recent Works.

Samuel Krislov

REAPPRAISING BRANDEIS: COMMENTS ON RECENT WORKS

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The last half-decade has seen a remarkable outpouring of works on Justice Brandeis.[1] That spate of biographies contrasts with the simultaneous neglect of Holmes, as well as others like Douglas where no full-scale effort has yet been mounted.

Why should this be so? The relationship with Frankfurter has attracted writers, and new materials have become available on this and other subjects. Then, too, Arthur Schlesinger has significantly revised our understanding of Brandeis's role in the New Deal years. Finally Mason's fine biography of Brandeis has never been considered superlative—in a class with his *Stone* book or Swisher's *Field* or Fairman's *Miller* or Beveridge's *Marshall*. After standing as the definitive biography for so long, the work has been dissected and evaluated and found to be vulnerable.

All of the above is true, but it is not enough to account for all the new interest. The onrush of Brandeisia, in my view, reflects a growing conviction that he is the most significant single architect of the modern Court. His programmatiac influence, which affected the Federal Reserve System, the Federal Trade Commission, the Securities Exchange Commission, and the federal unemployment program, constitutes an institutional contribution to American life of exceptional note. In addition to serving as a major advisor to the two most creative presidents of this century, he visibly influenced

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1. This essay will discuss the following recent works: L. BAKER, BRANDEIS AND FRANKFURTER: A DUAL BIOGRAPHY (1984); N. DAWSON, LOUIS D. BRANDEIS, FELIX FRANKFURTER AND THE NEW DEAL (1980); W. DOUGLAS, THE COURT YEARS: 1939-75 (1980); J. DURHAM, JUSTICE WILLIAM O. DOUGLAS (1981); ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE (M. Freedman ed. 1967); A. GAL, BRANDEIS OF BOSTON (1980); H. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER (1981); A. MASON, BRANDEIS: A FREE MAN'S LIFE (1946); B. MURPHY, THE BRANDEIS-FRANKFURTER CONNECTION (1982); L. PAPER, BRANDEIS (1980); M. PARRISH, FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS (1982); A. SCHLESINGER, THE POLITICS OF UPHEAVAL (1960); M. SILVERSTEIN, CONSTITUTIONAL FAITHS (1984); J. SIMON, INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS (1980); P. STRUM, LOUIS D. BRANDEIS, JUSTICE FOR THE PEOPLE (1984); M. UROFSKY, LOUIS D. BRANDEIS, AND THE PROGRESSIVE TRADITION (1981); Cover, *The Framing of Justice Brandeis*, 186 NEW REPUBLIC 17-21 (1982); McGraw, *Brandeis and the Origins of the FTC* in PROPHETS OF REGULATION (1984).

two major Justices even after leaving the Court. And, I shall suggest, yet a third major Justice may have modelled himself on Brandeis.

Brandeis remains a magnet for those who seek social reform without centralization, who wish to see a more equitable distribution of loaves and fishes without the creation of leviathan. He envisioned efficient, hard-nosed programs managed by public-spirited experts, who would foster an honorable and small-scale social system designed to enhance creativity and human dignity. The moral intensity of the man Roosevelt called "Isaiah", his personal disinterest, and his zeal for justice still remain appealing over the decades.

The growing perception of Brandeis's influence comes with a price. He was hardly a judicial recluse. He was quietly eager to give advice, even signalling through emissaries the proper way to reach him without violating judicial proprieties. Bruce Murphy's *The Brandeis-Frankfurter Connection* portrays Brandeis as the mastermind and coordinator of all the New Deal agencies, something full-time members of the Roosevelt administration failed to do for their own agencies, let alone others.

There has also been some diminution of Brandeis's reputation for depth and thoroughness. Brandeis's ability to master detail is undeniable. His ability to fathom financial statements, even falsified or misleading ones, is acknowledged by all. Not too surprisingly, though, he has been found to be less than an original economic theorist, something no Supreme Court Justice has claimed to be. Brandeis has also been seen as less a systematic thinker than a dogmatic pragmatist, a judge whose guideposts were more primitive, intuitive and stubborn than theoretically rich or empirically proven.

This survey is an attempt to strike the balance on the Brandeis tradition as reflected in recent writings on him and Frankfurter. Additionally, a few words (including an autobiographical effort) on Douglas's career are included because of his self-acknowledged discipleship and imitation of Brandeis, most conspicuously in the creation of the constitutional "right of privacy."

I

My mentor, A. T. Mason, had a strict regimen by which he combined brisk efficiency with an exceptional willingness to talk with students. Intellectual discussions were cut short only by necessity, but small talk ended quickly. I was given a special, identifiable knock. I could find him in the office more often after a stimulating discussion than a mundane one. He was working on the great Stone

biography, still the finest source for understanding the process of interactions among the brethren. To me the fascinating question was how Stone ended up in the Holmes-Brandeis camp. I kept pressing, until Mason pithily summarized his instinct on the matter: "He was pixilated by Holmes."

Naturally, we discussed Brandeis. In private Mason similarly encapsulated the unspoken premise of the Brandeis biography. "Brandeis's greatness was pre-Court." Once or twice he indicated his puzzlement and lack of empathy for Brandeis's Zionism. He recalled one hot summer day when the Justice took his shirt off. When the topic somehow turned to Zionism, Brandeis became incredibly animated, eyes flashing, talking of things that Mason felt were remote to him, perhaps inaccessible.

Mason's book has nonetheless held up well over the years. It does not have the advantages presented by Stone's exceptionally candid papers. But it is generally on any list of outstanding biographies and remains a model for other Brandeis scholars as well as a major scholarly resource for historians.

The degree to which Mason understood not merely Brandeis's Zionism but even his Judaism has also been questioned directly or indirectly. Occasionally, too, critical comments on Mason's legal analyses have surfaced, perhaps reflecting Frankfurter's known preference for a different biographer from the one Brandeis chose to confide in. Inevitably, new material has come forward, both archival and in monographic work. Justice Brandeis's Court-era papers were not available to Mason. With the passage of time, new evidence has brought new issues to the fore. Questions about Brandeis's ethics have arisen of which Mason obviously had only glimmerings. Time too, provides perspective on the institutions Brandeis worked for, his jurisprudence and its consequences, his claimed loyalties, and even on his persona.

In the end Brandeis continues to control the agenda of his biographers with his landmark achievements, his massive letters and writings, and his significant legal decisions. They drive out the person because he withheld that even from his friends. Even the passion that everyone sensed to be so dominant in the man emerged so seldom that each book necessarily repeats the same few anecdotes. If Frankfurter was, as Harry Hirsch suggests, enigmatic, requiring deep-seated psychoanalysis to understand, Brandeis emerges as an almost mysterious, alien creature. Where, for example, Marion Frankfurter's problems are an open book, Alice Brandeis's were kept within the family. Frankfurter's ambitions were as open as his personality, expressed sometimes in denial as much as in affirma-

tion. Brandeis's discretion was remarkable, his sense of family and privacy sharply developed; his occasional displays of passion seemed all the more remarkable because their sources and causation remained mysterious and unrevealed.

Certainly any expectation of further revelation about Brandeis's personality is diminished by these recent works. Efforts to bring his Jewishness forward or to find some clue to his very being in his profound and unstinted commitment to Zionism have yielded a very low grade ore of understanding. A prominent constitutional historian has suggested that Brandeis's dogmatic-know-it-allism with respect to Zionism, which estranged him first from Weizmann and the non-American leadership and then from the rank and file of American Zionists, was somehow prototypic. Yet Brandeis previously had never even moved to the front of a movement, let alone led a schism. Only in his failure to understand ultimate human motivation—failures repeated in his equally beloved bank life insurance effort, in his perpetual underestimation of the role of emotion and symbolism—was his Zionism career representative.

Brandeis's failure as a Zionist leader is poorly captured in all of the work because the struggle continues to be treated in terms of the personality conflict between him and Chaim Weizmann. It was, however, embedded in a larger struggle with the Palestinian Kibbutz pioneers over the balance of power between themselves and the donors abroad. Previous patrons of the return to Zion like Montifiore and Rothschild had dominated policy. The new balance of power was to reduce donors to junior and preferably silent partners, with those taking physical risks calling the shots. The key issue—fiscal accountability—was also an issue of power. Weizmann personally had no trouble reaching agreement with Brandeis and was caught himself in the demands of the pioneers. Brandeis interpreted Weizmann's actions as a personal betrayal, misunderstanding the profound political advantage of physical danger as opposed to petty details such as cost accounting or even demonstrable honesty. By emphasizing rational use of funds in a cause that was fundamentally defensible on only emotional grounds, he demonstrated his lack of insight into human nature. His tactics and his appeals to the antiseptic values of the CPA left to his opponents all the appeals of symbolism and political dynamism, and quickly eroded his international and American support. That he remained as fervent and devoted and generous to the cause as ever is a measure of the emotional commitment within himself that he failed to recognize in others.

At heart, Brandeis completely misunderstood his fellow Zion-

ists. He assumed that efficiency and the proper handling of charitable funds was a primary aim in a movement whose basic aims in the 1920's were obviously Utopian and anything but cost-efficient. Brandeis was stirred by a sense of identity with his co-religionists, but that sense was personal and profoundly different from theirs. His biographers have struggled to understand the roots of his Zionism, which has remained elusive like so much of his psyche.

Strum suggests Brandeis projected his admiration for Athenian democracy on the embryonic Kibbutz movement in Palestine. Noting the frequent use of Zimmern's *The Greek Commonwealth* in Brandeis's speeches (but not his Zionist ones), Strum finds confirmation of her thesis in a 1914 trip to Palestine made by Brandeis and Zimmern—a voyage the Justice took only once in his lifetime. The emphasis on Athenian civic individualism, she suggests, paralleled his admiration for a somewhat mythical Palestinian homeland. This fanciful point correctly captures Brandeis's value system but the linkage is vague at best and does not explain the initial commitment, which after all was not to a place but to a cause.

Mason gives us Brandeis's own account. Impressed by the humanity, the ability to see the others' viewpoint, of Jewish manufacturers and workers in his garment industry experience, Brandeis was influenced further when he came in contact with Jacob De Haas, a Zionist leader who knew Brandeis's much-loved uncle. Nothing in these volumes improves on Mason's account.

Gil's delightful and useful monograph, *Brandeis of Boston*, is more allusive in its evidence and arguments. Brandeis, he suggests, came to Boston at a time Jews were seen as exotic rarities, even as counterparts of the Puritan tradition. But as waves of Eastern European immigrants arrived, anti-Semitism gradually eroded the standing of insiders like Brandeis. Brandeis made increasing use of the *Jewish Advocate* and other instruments of ethnic community power in the progressive cause, especially after 1910. He learned, Gil suggests, by observing (or opposing) the effective use of ethnicity in Boston politics and turned his skills to mobilize his people, thus coming to identify with them.

Gil's book is thoroughly researched and modest in its writing. Later Brandeis biographers, however, have not been readily persuaded. Gil makes much of Brandeis's limited social life as years went on, his failure to penetrate the inner core of Boston clubdom even with the sponsorship of Samuel Warren (his partner and an authentic Brahmin). Yet as other authors point out, there was an unmistakable consensus among the Bostonian elite that Brandeis was rejecting them, rather than the other way around. He was an

unusual outsider indeed, who employed a future dean of the Harvard Law School as a junior lawyer, helped arrange for Oliver Wendell Holmes's professorship, and moved easily in the most rarified of literary and social circles. Certainly there is little evidence of affronts to Brandeis, and much stronger evidence of the polite but chilling sense of his reserve and self-assurance.

Brandeis's background even separated him from most of his fellow Jews. More than one work refers to Brandeis's background as Shabbatean, which is much like referring to Mennonites simply as Protestants. The Frankist sect from which both sides of Brandeis's family (and his wife's family) came emerged from the radical wing of Shabbati Zvi's pseudo-messianic following. Once Frank was in control he repudiated the founder's main teachings. Moving to Poland, he nominally converted to Christianity as camouflage for doctrines and practices heretical to both Judaism and Christianity. In Bohemia and Moravia, his followers did not convert, but formed links to both the Jewish and Christian communities. Brandeis's grandmother was a Wehle and among the most prominent of the Frankist families.[2]

Thus, Brandeis's upbringing was not merely the standard training of upper class continental Jews, drifting into a virtually non-religious humanism (the pattern of his wife's brother-in-law Felix Adler, the founder of Ethical Culture). It also reflected the influence of a mystic, charismatic leader who reveled in his ignorance of the traditions he had "surpassed."[3] The long and the short of it remains that Brandeis's Jewishness cannot be a key to much, because he can just barely be considered Jewish. While Zionism and the need to rescue German Jews after 1933 was a form of expiation for Frankfurter, who had a deep sense of Jewish commitment of a conventional sort, it was for Brandeis a very special and even artificial act. Symbolically, Frankfurter specified that Louis Henkin speak at his funeral and asked that he say the traditional *Kaddish*,

2. Frankists were excommunicated from Judaism in many parts of Europe, especially after Frank and his followers supported the infamous blood libel. In Bohemia and Moravia however, religious links persisted. Mason says the wives of Brandeis's grandfather and great-grandfather remained "orthodox" (probably meaning non-Frankist), and such "mixed" marriages were common in that part of Europe. However, his mother's "humanism" was typical of that stratum of Frankists generally. Since many of the Frankist teachings—including, as is common with many fringe religious sects, secret forms of sexual permissiveness—were dangerous, it is interesting to speculate about a lingering family tradition of discipline and secrecy.

3. Brandeis was aware of this background. It is tempting to read even more than is usual (and probably reasonable) into the famous occasion when he publicly espoused Zionism and thanked Nahum Sokolow "for reuniting me with my people."

while Brandeis ordered cremation, which is contrary to Jewish tradition.[4]

II

The biggest disappointment in these volumes is that they add very little to our understanding of Brandeis as a Justice. Mason's conclusion that Brandeis's greatness was pre-Court was a conclusion reached through a veil. Of course he did not regard Justice Brandeis as a weak figure, and there are positive claims made for his judicial achievements. Bickel's *Unpublished Opinions of Mr. Justice Brandeis*, however, gave us new glimpses of court craftsmanship in the making. The Mason biography of Stone and Walter Murphy's *Elements of Judicial Strategy* gave us a sense of how Court majorities are fashioned, a sense vulgarized but made familiar in the gossipy *The Brethren*. With access to Brandeis's papers, one expects some of the mysteries to become clear or at least clearer.

In general, few advances have been made. A few passionate and well-written chapters by Strum convey the Justice's involvement with civil liberties and economic issues. Mason describes the passion; Strum involves the reader and even identifies with those views. This success, of course, did not require and does not really draw upon new materials. One thoughtful review praises Paper's Supreme Court chapters, but to my taste they are generally less penetrating than Strum's and considerably less thorough than Mason's, although his treatment of the *Olmstead* case is quite fine. This is a disappointing harvest.

Brandeis's role on the Court is in need of reappraisal. In passing, one of the authors refers to Justice Brandeis in a minor descriptive clause as the *de facto* leader of the Court for over two decades. Not for several days did I react to this remarkable statement, and only then decide that it was both unusual and true. It is remarkable because task leaders on the Court have generally been members of the majority wing, usually a Chief Justice (e.g., Marshall or Hughes), or allied with the Chief Justice, (e.g., Brennan with Warren, Van Devanter or Sutherland with Taft), but, at any rate, a "representative member" of the largest group (e.g., Stewart or

4. Similarly, attempting to account for Brandeis's Zionism in terms of his political ambitions founders on the rocks of chronology and political realities. Attempts to suggest he turned to Zionism after being rejected for a cabinet post, when prominent community leaders suggested he was not a "representative" Jew, are inaccurate as to the timing of this commitment, and fail to grasp the basic unpopularity of the hyphenated-Americanism that Zionist affiliation entailed—not merely with the American public at the time but even with the bulk of the Jewish community. There were far easier, far safer, far more rewarding roads to Jewish community leadership for a man like Brandeis, with his skills and wealth.

Black). The claim that Brandeis occupied that role requires both a subtle restatement of the role of leader and and understanding of Brandeis's unique niche on the Court. Once again, he was an "outsider" who commanded the inside. Brandeis was not generally part of Taft's rump sessions that planned conservative positions in the 1920s, still less allied with the remaining foursome or the Hughes-Roberts twosome in the 1930s. The ingredients of his success deserve more attention than they have received.

Brandeis's extreme detachment and avoidance of recrimination with those he could not persuade was one key ingredient. He made his peace with Taft, who had bitterly opposed his nomination, when they accidentally met in the street just after Taft's confirmation as Chief Justice. They repaired to Brandeis's office for a relaxed and boisterous conversation. Brandeis respected the integrity of Van Devanter and Sutherland, and the ability of the former. He never replied to McReynold's venom, which was perhaps a good tactic but more probably just Brandeis's way of dealing with malice. He was discreet about his colleagues except when talking to Frankfurter. He detached himself from situations in a manner which offended Harold Laski, Weizmann, and various Boston opponents, but generally enthralled people he worked with for any length of time. In short, he generally knew how to avoid giving unnecessary offense.

We now know—and some of the authors perceive its significance—that Brandeis was not only the inspirer of Frankfurter and Landis's *The Business of the Supreme Court* but that portions of his letters to Frankfurter are inserted in the volume much as other letters miraculously appeared in *The New Republic*. The book was the outline of a program for simplifying, intensifying and strengthening the Court as an institution. Resistance to that jurisdictional simplification continues, but movement has also occurred toward his program.

Brandeis was remarkably successful in another respect. The *Ashwander* opinion capped his quiet drive to make Thayer's abnegation impulses into clear and decisive rules. The "cautionary rules" were of course culled from Supreme Court decisions but they were scattered throughout the *U.S. Reports*. Compiled into a tough statement of judicial limitations they look like a decalogue. Frankfurter's observation at the time that it was a truly significant opinion looks better all the time. Yet it was done with quiet inevitability, not with a sense of earthshaking innovation.

Brandeis himself felt—and Mason seems to agree—that too much attention was paid to dissenting opinions where Holmes,

Stone, Cardozo, and he simply left a trail of crumbs for other Justices to follow, while not enough attention was paid to his many majority opinions. In those, as well as in dissent, he helped lay the foundation for today's civil liberties doctrine. In technical administrative law cases Brandeis was able to establish a pragmatic primacy for individual freedom over property rights, a distinction that lies at the base of post-*Carolene Products* Supreme Court doctrine. By taking on complex economic issues and using his technical legal skills to handle involved matters, he earned the trust that he later expended in cases closer to his heart.

Brandeis's view of federalism was, as scholars have recognized, more complex than popularizers realize. Much less of a national supremacist than Holmes or Frankfurter, Brandeis had more in common with Black (and, for all of his inconsistencies, with Douglas). The vision of local control that led him to defend social experimentation and to enunciate *Erie v. Tompkins* remains to be evaluated as a program for maintenance of federalism. Unfortunately, recent works have not intelligently assessed the results except in highly general terms.

All in all, this is a formidable list for any Justice to accomplish. Sorting out the relative contributions of Hughes, Holmes and Brandeis to the burgeoning of civil liberties has yet to be seriously attempted. The forging of a new approach to state power in a more centralized national order was the contribution of Brandeis and Stone in the 1930s and of Stone, Frankfurter, and Black subsequently. The development of a richer tradition of abnegation, the unobtrusive legitimation of the use of law review articles and other evidence *contra* English tradition, all define a leader who nudged from within. He was a judicial architect and statesman, not merely a technical craftsman of rare abilities, but also a seer for his court as well as for society.

III

Undoubtedly the major change in these works is the new evidence of Brandeis's off-Court involvement. Two issues arise: the extent of the influence and the issue of propriety.

As indicated above, the influence of Brandeis in the "second New Deal" was adumbrated by Arthur Schlesinger, Jr. in his definitive history of FDR's administration. After the Moley-Tugwell-Berle group had exhausted their program, and much of it had been repudiated by both experience and the Supreme Court, the Brandeis-Frankfurter team came to the fore. Schlesinger suggests that by 1935, Brandeis had more influence on policy than at any other

time in his life. This persisted until after the 1936 election. During these years he was able to help mold the federal program for unemployment and also much of the Social Security legislation.

How effective was the collaboration? The portrait that emerges from Bruce Murphy's over-publicized and inaccurate *Connection* is that of Brandeis's office as a second White House. It is interesting to think of running the country in one's spare time from the Supreme Court. Certainly Brandeis and Frankfurter had great influence with Roosevelt. Yet neither was consulted on the Court-packing plan, nor did they achieve programmatic or administrative control of any specific agency.

Frankfurter's success in placing proteges was legendary. Brandeis was often consulted and usually was also eager to provide names. The network was extensive, even extraordinary. The Justice and the Professor were able to command respect, envy and influence. This is meaningful and important, but hardly the infiltration of some cadre of disciplined conspirators.

Many of these proteges were, of course, Harvard law students of Frankfurter's, still learning to spread their wings. Once in bureaucratic roles they often espoused views in variance with those of their sponsors. The initial recommendation often was based on sheer ability and perhaps the presence of some personal chemistry. But the Brandeis-Frankfurter letters contain constant laments over deviation from the path of righteousness. Given the imprecision of that path, even long-standing allies seemed to fall in and out of grace. They perhaps might seek Brandeis's delphic advice at points of personal passage, on taking or losing a post, or in moments of organizational crisis when Brandeis appears to have retained his genius for pinpointing the source of problems. There is little evidence, however, of either Brandeis or Frankfurter being involved in regular, continuous consultation on routine matters by even the most faithful or junior of the proteges. Instead, the genius of Brandeis and Frankfurter was most evident at the legislative drafting stage. With Brandeis generally providing the broad vision, Frankfurter supervising and criticizing, and Corcoran and Cohen doing the translation from concept to statutory language, a team of immense talent structured major social institutions.[5]

The best appraisal of the Brandeis-Frankfurter influence on the

5. A side issue of some importance is that Frankfurter was abroad during the bulk of the time that the Securities and Exchange Act was drafted; Bruce Murphy claims to have been told by Corcoran that Brandeis critiqued the actual drafts. Other authors quote Corcoran's emphatic denials of even discussing strategy, and it seems not only out of character for Brandeis, but downright imprudent, and therefore highly improbable.

New Deal is Dawson's little monograph. The style is a bit crabbed and the organization occasionally mysterious, but there is judgment and balance throughout its few pages. Essentially Dawson concludes that the personal influence of the two exceeded their ability to shape developments. They placed their proteges well from the beginning, but Frankfurter's willingness to spend the 1933-34 academic year in Oxford indicates a sense that he was not relinquishing decisive power. The period of their greatest power after 1935, was in fact a period of great frustration. The victories in Social Security and unemployment, and others like the ensconcement of Thurmond Arnold in the Anti-Trust Division of the Justice Department, were significant but not fundamental.

Strum and Dawson both accept the proposition that Brandeis's recovery program was a comprehensive, radical plan for restructuring American industry. They defend him against charges of utopianism. They also record his frustration with the continued failure to implement his plan. Whether judged by that comprehensive standard or even in absolute terms, Dawson's conclusion is that the Frankfurter-Brandeis team experienced more defeat than failure and felt time running out on them.

Most of the authors emphasize Schlesinger's more power-oriented approach over Dawson's programmatic assessment. Indeed they make no particular assessment of the relative contribution of Brandeis as between the Wilson and Roosevelt years.[6] The exception is Bruce Murphy who attributes immense and pervasive influence to the Brandeis-Frankfurter team.

The Murphy volume implies, insinuates, denigrates, but never assesses. A smarmy disclaimer toward the end of the book suggests that there is no intention to discredit the Justices but every page attempts to do just that. Robert Cover demonstrated Murphy's inability to read sources, but virtually every other book has a different statement repudiating or vigorously questioning Murphy's use of data. These cut to the heart of his imputation of influence. The evidence in his book for a sustained day-to-day influence is scanty, and his ability to judge evidence is seriously in question.

Nevertheless, Murphy has been successful in raising and focusing on serious questions about the norms expected of a Justice with respect to off-Court activity. The lurid tone of his book and the popular reviews generated widespread interest. The focus on "ethi-

6. Strum even throws in Brandeis's casual relationship with Truman to suggest yet a third President who might have been influenced by the Justice. This trivialization of evidence could be carried further. Hoover was in fact indebted to Brandeis in his career, but when Hoover consulted him on the Depression Brandeis was unable to influence him at all.

cal" behavior when the issues are largely propriety, prudence and demeanor is only partly of Murphy's making. But it leads to a moralism that is not justified by circumstances. There is no charge of cupidity or personal aggrandizement, and Murphy's most serious allegations have failed to hold up.[7]

We must not lose sight of the fact that the articulated norms of today are so stringent precisely because of the efforts of Brandeis and Frankfurter. Murphy acknowledges this but also suggests that their departure from their articulated norms involved hypocrisy. Their behavior did suggest some possible tensions between aspirations and reality. Brandeis had a penchant for evading his self-imposed monkishness so long as the proper formalities were observed. Frankfurter clearly did things he publicly deplored (much as he denied missing class at Harvard), and was obviously troubled by some of his contradictions. Freedman reports that a bitter argument with Hand over Jackson's role in Nuremberg altered Frankfurter's views about extrajudicial activities, and this reappraisal must have further troubled him.

It must also be borne in mind that the off-court activity of Brandeis and Frankfurter was quite modest by historical standards. Justices have never insulated themselves from political life. In modern terms Stone, Taft, Vinson, Douglas, Byrnes, and Fortas are among those who retained active, advisory political roles, much as Frankfurter did, and much more overtly than Brandeis. Presidents often put confidants on the Court, and giving advice to Presidents is a powerful narcotic; withdrawal symptoms are clearly evident in newspapers and memoirs.[8]

As a passionate and socially involved person, yet capable of extraordinary objectivity and great institutional loyalty, Brandeis developed a careful code, not to evade but to live within those constraints. As to Court business, Brandeis was extraordinarily discreet, confiding only to Frankfurter his inevitable frustrations. His occasional departures—the famous message to FDR blurted out to Corcoran after the *Schechter* decision, and the unfortunate partici-

7. Murphy suggested that Brandeis did not recuse himself over the Lever Act when he "helped on strategy." Critics have demonstrated that Murphy extrapolated from published sources and failed to do elementary checking. On this matter he falls far below any reasonable line of professional care. He was also wrong about Brandeis's role in drafting SEC legislation. He also suggested that Brandeis was forced to recuse himself in the Sacco-Venzetti case because of his involvement with Frankfurter. This is highly questionable, since Brandeis gave a convincing reason that did not involve Frankfurter.

8. Brandeis was rather more directly involved with Wilson than with Roosevelt, even helping to write a pro-Wilson manifesto in 1920. It is not inconceivable, though, that he thought this an obligatory and harmless gesture for an exhausted and terminally ill friend and benefactor.

pation in Hughes's letter on the Court plan which Frankfurter properly found so indefensible—are remarkably few and occurred during periods of frustration. Occasional and intermittent advice of a generalized nature left him uncommitted as to specifics that would have endangered his ability to be (or to appear to be) dispassionate. Brandeis obviously did not feel he had to curb his enthusiasm for causes or even programs so long as he avoided the specific statute or concrete administrative action. His decision rules were, it would appear, sharp and decisive. His private involvement was kept vague enough to avoid involving him in a litigation-prone situation. His public participation was even more restrictive, avoiding so far as practicable any intimation of involvement.

Murphy's treatment of Frankfurter suggests that his articulated standards were even more severe and that his violations, particularly with respect to service to Roosevelt, were obvious even to himself. Thus he actively advised the Treasury Department on the wording of wartime tax measures. Frankfurter must have excused a good deal of this on patriotic grounds.

According to Murphy, Frankfurter pettifogged on the issue in letters and speeches. Once again, however, Murphy undermines his own credibility. He accuses Frankfurter of disingenuousness in denying a Forrestal *Diaries* entry. Frankfurter's denial addresses whether he and Justice Murphy sent messages to the Philippine delegate to the U.N. urging partition of Palestine. The diary, Murphy asserts, actually accuses Frankfurter of lobbying the Philippine President. A look at the *Diaries* (p. 358), however, shows precisely the contrary. It is difficult to condone such carelessness when the incident is vaunted as the main example of the Justice's dishonesty.

By far the most publicized allegation, Murphy linked annual payments by Brandeis to Frankfurter after the latter experienced financial difficulties, largely due to Marion Frankfurter's psychological problems. Brandeis proffered the sums so Frankfurter would not have to resort to legal moonlighting and could continue to work for social causes, which often required travel and other out-of-pocket expenses. The subsidy, routinely paid once a year by Brandeis's secretary, ended when Frankfurter became a Justice.[9] Murphy's thesis earmarks this as an attempt by Brandeis to subvert the limits on political activity by Justices. Frankfurter was his chosen instrument and the hired hand.

This interpretation seems at odds with what we know of the

9. Baker, who gives the fullest account, suggests it really was not annual but rather occasional until 1925; Strum is ambiguous, while Murphy clearly states it was consistently paid from 1916 on.

two men as individuals and their interaction. As Cover points out, even Murphy argued in an early paper that the context of the friendship suggested the innocence of the arrangement. The facts suggest that both viewed the matter solely as an appropriate act of friendship: the arrangement was not secret; Justice Brandeis retained the records; and Frankfurter preserved the relevant papers.

Frankfurter was quixotic if not perverse about money. He turned down a $1500 payment for his significant research in the landmark Cleveland Crime Study, shortly before requesting sums from Brandeis. He believed a professor should not moonlight. He could easily have sold his skills to a law firm. His peculiar attitude toward money is reflected in his failure to provide for his widow, an act so outlandish that it provides much better support for Hirsch's psychoanalytic view of Frankfurter than anything found in that biography. The man who tutored rich students for free in his law school days never exhibited cupidity, as opposed to fascination with power and social position.

More than that, for all of their essential harmony of views, Frankfurter had strong differences with Brandeis (as well as extraordinary personal independence in other aspects of his life such as his role at Harvard) that would seem to preclude the role Murphy suggests. His siding with Holmes (and the conservatives) in the famous *New Republic* critique of *Meyer v. Nebraska* put him at odds with Brandeis on a question at the core of Brandeis's being. On the Court-packing fight Frankfurter pulled his punches, but conveyed his unhappiness with Brandeis's role. Both agreed to disagree, but Brandeis was at the least equally conciliatory.

In short, like almost everyone except Bruce Murphy, I see no evidence of evil in the Brandeis-Frankfurter connection and only an occasional violation of proprieties by either Justice. Some of those were serious but not out of line with the behavior of their immediate contemporaries. The higher line they espoused is now firmly established as expected behavior.

Brandeis's institutional analysis was generally wiser and more perceptive than his concept of propriety. It came, to be sure, in a generation when emphasis on public behavior was primary; it was then far worse for a judge to be observed in a restaurant with a woman not his wife than to abuse witnesses in court. Brandeis correctly fathomed that probity is essentially personal, and that each Justice had to work his or her own way on these matters.[10]

10. This obvious point has been driven home to me not just from service on a judicial disciplinary commission, but from recent experience at a Washington dinner. At the cocktail hour a distinguished court of appeals judge, whom I have known slightly for many years,

Given the highly individualized natures of the Justices and the intricacies of their temperaments, criticizing Brandeis becomes a bit of a fool's game. Fundamentally though, I conclude that the current judges have it sized up better.[11] Less circumspection in public appearances and greater abstention from private arm-twisting seems a sounder practice. Why should not liberal judges, with reasonable circumspection, speak to the underlying issues of the era, while avoiding the tactical skirmishes of the day? We are told often of the magnificent objectivity and circumspection of the English judge, but it is rare for a week's coverage of the London *Times* not to include a speech by a judge calling for stronger family ties, stricter punishment or some other buttress of conventional values. If Brandeis found it easy to permit a new edition of *Other People's Money* in 1934, why should he not also have written a book expressing his distaste for the values of the 1920s?

On the obverse side, we have good deeds, patriotic service, presumably selfless contributions done by the Justices in stealth. There is no possible corrective, no right of criticism if the society would have evaluated those stealthy good deeds differently and negatively. Arguing as I do, that it is propriety or even institutional prudence, but not ethics, that is fundamentally at stake, I am painfully aware of the artificial nature of the boundary.

IV

When Brandeis retired from the Court in 1939 he was succeeded by William O. Douglas. Frankfurter had taken his seat a

indicated it would be improper to answer my question about the date of decision for a well-publicized case. We proceeded to have dinner at which a Supreme Court Justice, to illustrate a point, told us of a minor case that would be announced in 48 hours, presumably relying on both our discretion and the relative obscurity of the case.

11. One of the difficulties in analyzing "off-Court activity" is that it is a hodgepodge. Few quarrel with judges suggesting names for judgeships or other legal posts. Similarly, advice during war crises or participation in international issues that are unlikely to involve the Court have not been widely disapproved. A substantial amount of Brandeis's Court-time involvement with Wilson and Frankfurter's with Roosevelt falls under this heading. Much of this consultation was the tapping of organizational expertise. Their open Zionist involvement, as well as that of Judge Mack, was also seen as the equivalent of commitment to the United Nations or the Sons of Norway. Conversely, involvement in partisan politics and ambition for office seems the clearest threat to Court independence. Even so, Hughes, Field, and Douglas are only a few of the great Justices who were involved in serious presidential speculation. Aiding in political campaigns is also objectionable; both Justice Brandeis and Frankfurter, especially the latter, have lapsed there. In general the Justices now frown on taking on other duties for reasons of burden as well as propriety, so that the matter has been muted, though not mooted. The Justices have moved a bit the other way with respect to discussion of public issues. So long as they avoid discussion of specifics and personalities, they seem to feel that public issues, particularly those impinging on judicial matters, are fair game. Douglas was outspoken and *sui generis*, but among others Warren, Burger, Stevens, Brennan, Black and Blackmun have felt free to address policy issues in public forums.

few days earlier but Brandeis's infirmities kept the two from sharing many of the joys of collegiality. Both Frankfurter and Douglas were self-described Brandeis disciples. As history unfolded, the two became both ideological and personal foes, disagreeing acutely on everything but perhaps especially on those matters most precious to Brandeis himself. The personal antipathy of Frankfurter and Douglas was in part a product of their failure to agree on new solutions to the new constitutional riddles that surfaced with the resolution of the older issues.

The works on Frankfurter and Douglas are worlds apart in approach and sophistication. Aided by Frankfurter's own collections, letters and reminiscences his biographers give us meaty material. Justice Douglas's own autobiographical efforts have been so popular that apparently biographers have been discouraged from competing. Simon demonstrates decisively, however, that the misleading image Douglas has projected necessitates a full-scale biography.

The Frankfurter works are solid achievements precisely because each is purposive and limited, rather than a full-scale book hiding in a monograph fighting to free itself. Parrish's fine first volume is more nearly a full-scale effort but it is devoted mainly to Frankfurter's intellectual and policy affiliations and their roots. It is thoughtful, careful and useful. The projected second volume is eagerly awaited.

Harry Hirch's *Enigma* has some of the aura of controversy that surrounds Bruce Murphy's work. To an outsider it is difficult to see why it arouses so much emotion. The volume is meticulously researched and highly informative. The thesis is simple, even simple-minded. Frankfurter, he suggests, did not resolve formative conflicts—with his parents, over his Jewishness and physical stature, and with his wife's ambivalence and reluctance to marry—and these unresolved issues conditioned his mature relations. (In explaining this much to an acutely perceptive law professor social-scientist, I elicited the penetrating and definitive, "what else is true?")

Hirsch, however, ventures beyond this typical Eriksen analysis. He suggests that Frankfurter went on the Court fully expecting to be its leader. When unexpected challenges to his dominance emerged, the fault-lines in his personality cracked. He abandoned his liberalism and became a conservative due to the discrepancy between his self-image and the realities imposed by the challenges to his leadership.

On the whole, this thesis seems unconvincing for psychological

and historical reasons as well as in terms of legal doctrine.[12] In a sense, Mark Silverstein's *Constitutional Faith* solidly refutes Hirsch from the standpoint of legal analysis. After a somewhat stultifying and tedious set of introductions to law, the courts, and what not, Silverstein gets down to serious writing. His thesis is that Justices bring well-developed mind sets, "constitutional faiths," to the Court. Frankfurter's, he concludes, was no more malleable than Black's. He finds that Frankfurter's distrust of judicial activism was a consistent value also expressed in pre-Court years, not one he developed in hostility to Douglas or Murphy.

Neither Hirsch nor Silverstein deal directly with the Brandeisian influence on Frankfurter. Hirsch seems to suggest that as a Justice, Frankfurter departed from the Brandeis path, while Silverstein indirectly indicates that Frankfurter had always had potentially significant differences with his friend and mentor. In particular, Frankfurter seems to have placed even greater weight on the expertise of the professional, the scientific and dispassionate engineer of consensus. Brandeis, too, reflected this faith in rationalist fact-finding which was after all, part of the *Zeitgeist*. Yet he seems to have recognized more fully than did Frankfurter the pragmatics of choice, the existentialist need to act on a hunch or a simple weight-of-the evidence test (rather than objective, established social decision theory).

Douglas has not yet attracted the same caliber of biographers or biographies. Durham's *Justice William O. Douglas* is a competent enough treatment but too hurried. In a little over a hundred pages, he attempts to outline a many-faceted life, analyze his achievements as a Justice, and still squeeze in fifty pages on Douglas as conservationist and world citizen. Douglas' own writing looms far more luminous and vivid by comparison.

Simon's book, though a bit journalistic, tells us why Douglas's books have such a powerful appeal. As Simon works through the details of Douglas' life, it becomes the chronicle of a man who romanticized virtually every detail, and who found it necessary to embellish even the most extraordinary aspects of his remarkable life. It is tempting to say that Simon's book should have been written by Hirsch, that Douglas's is a biography that can only be written as psychobiography. It is only fair to say that whatever weaknesses

12. Psychologically it is interesting enough to note that Frankfurter's Harvard Law School experience was remarkably parallel to his Supreme Court pattern. He was a favorite when he came to Cambridge and left as an embattled faculty member with especially bitter thoughts about his erstwhile ally Roscoe Pound. Far from driving him to conservatism the experience seems to have made him more forthright and open in his academic and social liberalism.

the book has, Simon succeeds in establishing Douglas's own unreliability, a contribution that any biographer should be proud of.

Many of the anecdotes we know so well are doubtful, including the different versions of where or how Douglas was almost killed riding the rails. Far from taking a strong stand for the realists at Columbia, Douglas bargained well for himself, first to stay and later to go to Yale in a clear career advance. Little airing of progressive attitudes was publicly evident until the New Deal offered good opportunities for progressives. There is nothing discreditable about those years of struggle, indeed there is much that reflects well enough on the young Douglas. It is merely that on most matters he wove a story well beyond reality.

Simon indicates that Douglas's adherence to a Brandeisian perspective was a late development and perhaps as superficial as it was sudden. That seems unfair. Whether in any sense Douglas derived his viewpoint from Brandeis, the parallels in their thinking were remarkable. His regulatory approach at the SEC involved aggressive structural reform of business but strong opposition to centralized bureaucracy. On the Court he was consistent in that direction, as well as maintaining a federalist viewpoint that was less nationalistic than Frankfurter's or Stone's (and far less than that of Jackson). In his environmentalism emphasis and in staking out the right of privacy as his primary contribution to constitutional law, Douglas followed his own impulses while remaining fully conscious of the parallels with Brandeis. Methodologically, his insistence on economic evidence and his piercing legal mind were also points of kinship, although his later indifference to craftsmanship increasingly marked him as different from Brandeis, who honed his later decisions as carefully as his first ones.

If in his years as a Justice he was less lavish in his homage to Isaiah, he paid him far more devotion in the deed, in his choice of issues. Keen observers of Douglas's intellectual growth such as Leon Epstein and Thomas Emerson accept the Justice's attribution of influence from Brandeis. Simon's judgment seems more a product of a leery skepticism and less a source for new or genuine information. In short, if Douglas was not a Brandeisian, he could hardly have done much more to convince us he was one.

Functionally, neither Douglas nor Frankfurter played the role on their Courts that Brandeis did. Douglas did not try to conciliate very often nor was he an institutional visionary. Frankfurter tried to assume the mantle, but he was, as he had been at Harvard, both too episodic and too abrasive to be unifying a force for long-range

goals; unlike Brandeis he lacked the skills of self-effacement, patience, and grace in the face of defeat.

The Justice who filled the vacancy, Justice Black, was like Brandeis, a majority leader from a minority wing, even from the extreme wing, of the Court. For a brief period he was slightly outflanked (and protected) by the Rutledge-Murphy team, but even then he was not a Justice of the center as most task leaders have been. He asserted his control of the rules (rather than habitual, conventional deference) by dissenting from per curiam decisions, much as Brandeis refashioned opinion writing by the quieter, but still frowned-upon practice of citing law reviews. Black also developed long-range doctrinal approaches after involved contemplation, careful evaluation, and testing. He used courtesy as both a weapon and a shield; his fierce obedience to judicial proprieties was unsparing, even stretching to punishment of his own family for minor incursions. Although he mastered neither economics nor history he aspired at least to the latter. (His son makes it clear that he believed in his historical writing in *Adamson* and was deeply offended by what he thought was a Frankfurterian plot to discredit him through the famous Fairman refutation.)

These clothes fit the man. I am not suggesting they were Brandeisian hand-me-downs. At the same time, Black had been subject to withering and even public scorn by Chief Justice Stone, and seared to his very soul by the public outcry over the Ku Klux Klan membership. In remodeling himself to live down these slurs he could not have seen himself as the aloof scholar skewering others with pithy erudition. But he had a granite-like, patient devotion to an individualistic America. Silverstein's portrait of Black's constitutional faith continuously reminds us that Black's view of social realities was essentially Brandeisian. As important as their differences on legal method were, there were also important points of congruence, particularly in their perception of economic royalties.

The conventional view is that the Holmes-Brandeis tradition disintegrated with the emergence of new issues before the Court. There is much truth to this. This disintegration is clearest with respect to Holmes's influence. Once his most significant contribution—judicial restraint in economic issues—ceased to be problematic, his personal appeal and influence diminished and has continued to diminish. But Brandeis introduced a broader judicial agenda on which disagreements continue, often in his name. He also was a significant institutional innovator. His legacy to the Court is neither substantively nor institutionally inferior to his Wilson year accomplishments.

What of the extra-Court legacy? The institutions created in the Wilson and Roosevelt eras are social monuments and contribute to a decentralized pluralistic society. If bank insurance is a failure and the FTC has not fulfilled its promise, the Federal Reserve System, the SEC, and the unemployment system have become anchors for economic and social stability. Brandeis is in a class with the leading founding fathers as an architect of the American system.

Brandeis was also the spiritual father of an important stream of leftist thought and action in America. Here the verdict is not so favorable. When the Brandeis plan for recovery failed and when no important champion of the Brandeisian vision emerged, that wing of the American left disintegrated. Both *Survey* and *Collier* have gone the way of good magazines, and the *New Republic* is primarily concerned with foreign policy. The consumer movement is split between those developing finer tastes in consumption and those who wish a more radical transformation of American society than Brandeis would have been happy with.

As Dawson suggests, failure to achieve primary goals at times of maximum power is particularly demoralizing. Was that failure due to the inadequacy of the analysis, as Schlesinger suggests, or the inherent improbability of achieving large-scale structural reform through elite intrigue? That historical failure still requires clarification. But the lack of public, vocalized, and integrated thinking has contributed to the disintegration of that stream of progressive thought. For a while Brandeisian ideas were reintroduced into the campaign rhetoric of Eugene McCarthy and George McGovern by Richard Goodwin. Their shock-value and novelty attracted attention. The failure to generate a sustained analysis, however, has left the Brandeis approach orphaned. For those purposes it does not matter whether it was flawed *ab ova* or has degenerated because successors have failed to maintain it.

Based on these works, then, a new balance sheet should be tallied. Brandeis's greatness was both pre-Court and on-Court. His influence off-Court during the New Deal years was significant, but his inability to convert that power into programmatic change represents a profound final failure as a social reformer. His self-imposed public reticence weakened his—and his causes'—political and ideological influence for the future. Perhaps not coincidentally, that same period also marks his biggest mistakes on Court.