

1980

Preserving the Progressive Spirit in a Conservative Time: The Joint Reform Efforts of Justice Brandeis and Professor Frankfurter, 1916-1933

David W. Levy
University of Oklahoma

Bruce Allen Murphy
Pennsylvania State University

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Judges Commons](#), [Legal History Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

David W. Levy & Bruce A. Murphy, *Preserving the Progressive Spirit in a Conservative Time: The Joint Reform Efforts of Justice Brandeis and Professor Frankfurter, 1916-1933*, 78 MICH. L. REV. 1252 (1980). Available at: <https://repository.law.umich.edu/mlr/vol78/iss8/3>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

PRESERVING THE PROGRESSIVE SPIRIT IN A CONSERVATIVE TIME: THE JOINT REFORM EFFORTS OF JUSTICE BRANDEIS AND PROFESSOR FRANKFURTER, 1916-1933

David W. Levy and Bruce Allen Murphy***

On January 28, 1916, President Wilson sent the name of Louis D. Brandeis to the Senate for confirmation as a Justice of the United States Supreme Court. Wilson's act surprised many Americans and sparked one of the bitterest confirmation struggles in the history of the Republic. The nomination and the confirmation that followed also created a painful and highly personal dilemma for the new Justice. This dilemma led Brandeis to a private arrangement that opened an unusual and revealing chapter in the story of the extrajudicial activities of American justices. Even more important, the arrangement constitutes a noteworthy episode in the history of twentieth-century American liberalism.¹

I

For twenty years before his nomination, Brandeis had been a resolute and effective champion of social reform. In an era notable for its reformers, Brandeis had earned an impressive reputation among those who worked for change: nemesis of the traction magnates, relentless foe of monopoly, defender of conservation against the depredations of Ballinger and Taft, inventor of low-cost workingmen's insurance, chief prophet of industrial democracy, champion of progressive legislation in the courts, the "people's attorney" in their struggles against powerful interests. By 1916, Mr. Wilson's choice

* Associate Professor, Department of History, University of Oklahoma. B.A. 1959, University of Illinois; M.A. 1961, University of Chicago; Ph.D. 1967, University of Wisconsin. — Ed.

** Assistant Professor, Department of Political Science, Pennsylvania State University. B.A. 1973, University of Massachusetts-Amherst; Ph.D. 1978, University of Virginia. — Ed.

1. Many of the letters cited in this article have been reprinted in *I-V LETTERS OF LOUIS D. BRANDEIS* (M. Urofsky and D. Levy eds. 1971-1978) [hereinafter cited as *LETTERS*]. In this article, each citation to such a letter includes a reference to the location within that collection of the reprinted letter; the collection provides a reference to the location of the original letter.

Unless otherwise indicated, all letters cited in this article were authored by Louis D. Brandeis [hereinafter L.D.B.].

for the High Court had become the very symbol of social activism.²

Opponents seized upon that activist reputation in their effort to prevent confirmation. Brandeis, they charged, lacked the judicial temperament; he had none of that cool and level-headed judgment which should characterize a nonpartisan dispenser of justice. Senator John D. Works, who voted against confirmation, summed up the contention: "He is of the material that makes good advocates, reformers, and crusaders, but not good or safe judges."³ Even Brandeis's supporters tended to agree with the charge. "He is a radical and has spent a large part, not only of his public, but of his professional career, in attacking established institutions . . .," admitted one friend. "Undoubtedly he is a merciless antagonist, fighting his cases up to the limit . . ."⁴ Another supporter tried to convince the Senators that "[a] man can not be combative as he is, or aggressive as he is, fighting as he has been on the firing line during all his professional career, without making many enemies."⁵

Brandeis recognized that becoming a judge would ordinarily require leaving partisan interests and attitudes behind. In the sanctified tradition of the law — which Brandeis revered as much as anyone⁶ — a judge was characterized by impartiality, by distance from the battle, by living a life aloof from the fray. Amos Pinchot, Brandeis's trusted comrade-in-arms in several progressive crusades, saw the problem as clearly as Brandeis. On the day after Chief Justice White administered the oath to Brandeis, Pinchot confessed that "although I have done what I could in the fight for your confirmation and earnestly desired it — still, now that you are actually a Supreme Court Justice, I don't know whether to be sorry or glad. So far, I think that I am sort of sorry." Perhaps the new Justice might "escape the common fate of judges," but Pinchot was far from optimistic:

Taking it all together, I don't think it is unfair to say that, for the last ten years, you have been the most vital and disturbing element in our public life You have made more trouble for injustice than any other man. The passing of your work, both light cavalry and heavy artillery, the knowledge that no longer, when a cause needs a great

2. See A. LIEF, *BRANDEIS: THE PERSONAL HISTORY OF AN AMERICAN IDEAL* (1936); A. MASON, *BRANDEIS: A FREE MAN'S LIFE* (1946); M. UROFSKY, *A MIND OF ONE PIECE* (1971). See generally, A. GAL, *BRANDEIS OF BOSTON* 1-65, 96-136 (1980).

3. II *Nomination of Louis D. Brandeis: Hearings Before the Subcommittee of the Senate Committee on the Judiciary*, 64th Cong., 1st Sess. 371 (1916).

4. I *id.* at 620 (letter written by Arthur D. Hill).

5. *Id.* at 770 (statement of Asa P. French).

6. See M. UROFSKY, *supra* note 2, at 15-42; Levy, *The Lawyer as Judge: Brandeis' View of the Legal Profession*, 22 OKLA. L. REV. 374 (1969).

militant advocate, you will step forward as you have heretofore to fight the exploiters and debauchers of America's men, women and children, makes me feel pretty sad. As long as you were in private life, it seemed to me that, if any monstrous injustice should be attempted upon helpless people, they would not lack protection. You furnished to me personally, and to many people who are making the rather lonely fight against privilege, a kind of confidence that we will sorely miss.⁷

When the San Francisco reformer, Rudolph Spreckels, sounded the same note as Pinchot, Brandeis replied: "I have felt strongly what your telegram also indicates, — how much one must relinquish in order to avail of new opportunity."⁸

Brandeis received his first taste of standing aloof from the fray during the confirmation hearings. On the day of the nomination he told reporters, "I have nothing whatever to say; I have not said anything and will not."⁹ A few days later he asked Henry Brougham of the *Philadelphia Public Ledger* to refrain from rewriting and publishing his testimony before a Congressional committee because "it would amount practically to an interview, and I am avoiding interviews of all kinds at present."¹⁰ At the start of the long confirmation ordeal, administration strategists decided that the nominee should neither testify, nor publicly answer any of the charges against him. So Brandeis reluctantly returned to Boston and tried to content himself by digging information out of his files and channeling it to those managing his side of the hearing in Washington. "I am leaving the fight to others," he wrote his brother two weeks into the proceedings. "Now my feeling is rather — 'Go it husband, Go it bear' with myself as 'interested spectator.'"¹¹

The role of "interested spectator," however, was one with which Brandeis had little experience and, as it turned out, little patience. He chafed at being kept out of the fight. After nearly six weeks of reading the accusations of his enemies in the newspapers, he exploded:

It looks to me as if the Committee were beginning either to perpetrate an outrage or to make themselves and me ridiculous by these continued hearings.

7. Letter from Amos R.E. Pinchot to L.D.B. (June 6, 1916), reprinted in IV LETTERS, *supra* note 1, at 239 n.1.

8. Letter to Rudolph Spreckels (Feb. 10, 1916), reprinted in IV LETTERS, *supra* note 1, at 42.

9. A. MASON, *supra* note 2, at 465. For an account of the confirmation hearings see A. TODD, *JUSTICE ON TRIAL: THE CASE OF LOUIS D. BRANDEIS* (1964).

10. Letter to Henry B. Brougham (Feb. 8, 1916), reprinted in IV LETTERS, *supra* note 1, at 35.

11. Letter to Alfred Brandeis (Feb. 12, 1916), reprinted in IV LETTERS, *supra* note 1, at 54.

. . . .
. . . I have accepted the opinion that it would be unwise for me to go down to Washington and appear, but if the proceedings continue on the lines which have been taken, making it appear that we are defending ourselves or excusing our conduct, I think I would rather go down and testify.¹²

Edward McClennen, Brandeis's law partner and his chief spokesman at the hearings, shot back a calming letter. "Do not let the long continuance of this wear upon you," he soothed the restive nominee. "Do not let anything permit you to harbor the thought for a moment of responding to any suggestion that you testify."¹³ In the end, only the constant reassurance and adamant insistence of his friends kept Brandeis from flinging off the unfamiliar role of "interested spectator" and plunging into the accustomed one of "merciless antagonist."

If the confirmation hearings failed to convince Brandeis that his new position would require serious modification of his customary style, the lesson was driven home by two events during the following summer. Brandeis took the oath of office on June 5, and spent the next few weeks wrapping up affairs in Boston, disengaging himself from the many causes and associations that had occupied his life for so many years. He harbored the hope, however, that he might continue to lead the American Zionist movement, a crusade that had commanded his energies since he assumed the presidency of the Provisional Executive Committee for Zionist Affairs in August, 1914. By tireless attention to detail and by applying the same techniques he had so successfully employed in his previous reform efforts, Brandeis had helped transform the Zionist movement from an ineffective debating society into a powerful and aggressive instrument — efficient, unified, influential.¹⁴ And, as in earlier crusades, Brandeis had not avoided controversy. He had led the Zionists into a quarrel involving the proposed formation of an American Jewish Congress, a democratically elected body that would meet to discuss the major issues confronting the Jewish people. Wealthier American Jews, and their spokesmen in the effective and prestigious American Jewish Committee, bitterly opposed the Congress. By 1916, Brandeis and the Zionists had practically won the victory. Despite the resentment

12. Letter to Edward F. McClennen (Mar. 9, 1916), *reprinted in* IV LETTERS, *supra* note 1, at 113-14.

13. Letter from Edward F. McClennen to L.D.B. (Mar. 10, 1916), *reprinted in* IV LETTERS, *supra* note 1, at 114-15 n.4.

14. *See generally* J. DEHAAS, LOUIS D. BRANDEIS 51-97 (1929); Y. SHAPIRO, LEADERSHIP OF THE AMERICAN ZIONIST ORGANIZATION 1897-1930 at 53-134 (1971); M. UROFSKY, AMERICAN ZIONISM FROM HERZL TO THE HOLOCAUST 117-298 (1975).

and opposition of the "Jewish aristocracy," the Congress was poised at the point of embarking upon its duties.¹⁵

The American Jewish Committee invited Brandeis and others to a "conference" on July 16 at the Hotel Astor. The ostensible purpose of the gathering was to permit representatives of the Congress movement to appeal for unity within the Jewish Congress, to urge the holdouts to join the movement, and to assure them of a hearty welcome in the name of American Jewish solidarity. After Brandeis and the others spoke, they offered to withdraw to allow the assembled representatives to debate the proposal. But before they could leave, cries from the audience and a request from the chairman, Louis Marshall, persuaded them to stay. Members of the audience then unleashed a violent torrent of personal attacks upon the new Justice of the Supreme Court. The incident, which bore the marks of a premeditated ambush, was followed by a harsh editorial criticizing Brandeis in the *New York Times*.¹⁶ The episode proved extremely embarrassing for a man who had been on the Supreme Court for only six weeks and, Brandeis feared, embarrassing for the Court itself. Within a few days he resigned his official positions in the Zionist movement.¹⁷

The second event of the summer of 1916 that illustrated Brandeis's loss of freedom to act entirely of his own volition occurred only three weeks after the Hotel Astor ambush. President Wilson asked him to serve on the Mexican Arbitration Commission on border disputes; and the names of the appointees were released to the press. Before accepting, however, Brandeis thought it advisable to consult with Chief Justice White, and he hurried to Lake Placid for that purpose. White pressed Brandeis to decline the appointment and to concentrate entirely on judicial work because of the heavy load which the Court was facing in its upcoming term. Brandeis reluctantly told Wilson that he could not accept the new responsibility.¹⁸

15. Y. SHAPIRO, *supra* note 14, at 80-86; M. UROFSKY, *supra* note 14, at 171-88; Rischin, *The American Jewish Committee and Zionism 1906-1922*, in 5 HERZL YEARBOOK 65, 68-71 (1963); A. Roth, *Backgrounds and Origins of the American Jewish Congress* (1953) (unpublished rabbinic thesis, located at Hebrew Union College Library, Cincinnati, Ohio).

16. See N.Y. Times, July 18, 1916, at 8, col. 2; Y. SHAPIRO, *supra* note 14, at 94-96. The newspaper was owned and operated by Jews within the circle of the American Jewish Committee.

17. See Letter to Hugo Pam (July 21, 1916), reprinted in IV LETTERS, *supra* note 1, at 250-51. L.D.B. also resigned from his offices in several Jewish relief organizations. See IV LETTERS, *supra* note 1, at 252-53 n.1.

18. See N.Y. Times, Aug. 5, 1916 at 1, col. 4; Aug. 9, 1916, at 11, col. 3; Aug. 10, 1916, at 8, cols. 3, 4 and at 10, col. 1; Aug. 13, 1916, at 6, col. 4; Letter to Franklin K. Lane (Aug. 9, 1916), reprinted in IV LETTERS, *supra* note 1, at 254; Letter to Chief Justice Edward D. White (Aug.

And so it was that Brandeis entered upon his first term on the Court in October, 1916, trapped in a most uncomfortable situation. He possessed the temperament of a political activist; but his new circumstances — as the hearings, the Hotel Astor incident, and the Mexican Commission episode clearly indicated — prohibited activism. Those who knew Brandeis's reform career best, however, recognized his great talent for improvising new and untried mechanisms to solve seemingly insoluble problems. He had done it in the Boston gas fight (establishing the "sliding scale" which tied increasing corporate dividends to lower gas prices for consumers); he had done it in the fight against the insurance companies (inventing low-cost workingmen's insurance to be sold through Massachusetts Savings Banks); he had done it in the gigantic garment workers' strike of 1910 (introducing an industry-wide Board of Arbitration and the concept of the "preferred union shop" as an alternative to the open or closed shop).

In the present, most personal case, Brandeis succeeded in improvising yet another "mechanism." Although it did not entirely free him of his private dilemma, it at least enabled him to live the life of a judge and, at the same time, to wield a continuing and important political influence in the affairs of the nation. This newest mechanism — which worked with amazing effectiveness, but which raises some troubling and important questions for students of American judicial behavior — was a Harvard law professor named Felix Frankfurter.

II

In 1905, when Frankfurter was still a law student at Harvard, Brandeis came to Cambridge to deliver his address, "The Opportunity in the Law." Frankfurter sat in the audience and listened as the Boston reformer argued that legal training enormously enhanced one's opportunities to be useful in a democracy. Those lawyers who could resist the allure of the corporations and take up the struggle on behalf of the people, Brandeis said, would find unique opportunities to perform extraordinary services for the nation.

Whether or not the speech actually influenced Frankfurter, it certainly addressed a question that had plagued him. The debate over whether to enter private practice or public service raged in him for a long while. He accepted a position in a New York law firm when he

9, 1916), *reprinted in* IV LETTERS, *supra* note 1, at 255; Letter to President Woodrow Wilson (Aug. 14, 1916), *reprinted in* IV LETTERS, *supra* note 1, at 255.

graduated in 1906, but after a few weeks he took a substantial cut in salary to go to work for Henry L. Stimson as Assistant United States Attorney for the Southern District of New York. Three years later, Frankfurter followed Stimson back into private practice for a brief time, served as his administrative assistant while Stimson lost the New York gubernatorial contest in 1910, and came to Washington with him in the spring of 1911, when Taft appointed him Secretary of War. Frankfurter stayed in Washington until he joined the Harvard Law School faculty in September, 1914.¹⁹

Frankfurter was driven by relentless energy, a capacity for unending work, and a flashing, incisive intelligence. His special trait, however, was his wonderful ability to cultivate friends. Oliver Wendell Holmes, Jr. once remarked that Frankfurter had “walked deep into my heart”²⁰ — but dozens of others could have expressed the same sentiment. He had “a green thumb for friendships,” John Mason Brown once wrote: “His is a dancing spirit, possessed of that supercharge of zest which generates gaiety in others.”²¹ Few could resist his charm, his lively and endless talk, his capacity for intimacy. “As soon as he bounces in — he never walks, he bounces — the talk and the laughter begin,” Matthew Josephson observed, “and they never let up.”²²

In Washington, Frankfurter lived with a group of other bachelors in a house on Nineteenth Street. All of them bright, young, and dedicated to public service, their house became “a center of liveliness.” “The parties ran continuously,” Frankfurter remembered. “How or why I can’t recapture, but almost everybody who was interesting in Washington sooner or later passed through that house. The magnet of the house was exciting talk, and it was exciting because talk was free and provocative, intellectually provocative.”²³ Holmes called the place “The House of Truth,” and the name stuck.²⁴ It was there that Brandeis and Frankfurter first became acquainted. The Boston reformer made frequent trips to the Capitol after 1911 — to appear before the Interstate Commerce Commission on various railroad questions, to testify before Congressional committees, to lobby against the New Haven Railroad, to defend progressive legislation

19. See L. BAKER, FELIX FRANKFURTER 13-41 (1969); FELIX FRANKFURTER REMINISCES 17-76 (H. Phillips ed. 1960) [hereinafter cited as FRANKFURTER REMINISCES].

20. J. BROWN, THROUGH THESE MEN 174 (1952).

21. *Id.*

22. Josephson, *Jurist 1*, NEW YORKER, Nov. 30, 1940, 24, 25.

23. FRANKFURTER REMINISCES, *supra* note 19, at 106.

24. See *id.* at 106-07.

before the Supreme Court, to consult with Robert LaFollette and other insurgent Senators and Representatives. During those visits Brandeis was a regular guest at the House of Truth.

The mutual respect between the two men grew steadily. By November, 1911, Brandeis was soliciting suggestions from Frankfurter for amendments to the Sherman Antitrust Act; by April, 1912, Frankfurter was asking Brandeis to suggest appointees for the Children's Bureau and the Industrial Commission.²⁵ Their relationship, however, had not yet acquired the affectionate intimacy that would soon characterize it. Perhaps it was beneficial to their ultimate friendship that they did not know each other better in 1912 — Brandeis's support of Wilson and Frankfurter's support of Roosevelt in the presidential election of that year might have driven a wedge between them had they been closer.

With the election behind them, and Frankfurter sufficiently reconciled to the new administration to remain in the War Department, the men enjoyed increasingly frequent contact. Brandeis grew confident of Frankfurter's progressive instincts: "If the War Department seems to be going wrong on water power questions," he wrote to his conservationist friend, Philip Wells, "I hope you will discuss them fully with Frankfurter. He is thoroughly with us on conservation, and is so intelligent that I consider him a power for the right."²⁶ Brandeis was also impressed with Frankfurter's inside knowledge of Washington patronage; to one job-seeker in 1914, he wrote, "I presume you have written Felix Frankfurter, who has a faculty, rarely equalled, of hearing about 'possible opportunities' for men capable of doing good work." Soon Brandeis was referring to "the omnipresent Felix," and writing about "our good friends at the House of Truth."²⁷

When the Harvard Law School offered Frankfurter a professorship, it was natural that he would seek advice from Brandeis. Most of his other advisers — Holmes, Stimson, Herbert Croly, Theodore Roosevelt — warned against abandoning a promising career in government for the cramped life of a college professor.²⁸ But Brandeis,

25. See Letter to Felix Frankfurter [hereinafter F.F.] (Nov. 15, 1911), reprinted in II LETTERS, *supra* note 1, at 512; Letter to F.F. (Apr. 9, 1912), reprinted in II LETTERS, *supra* note 1, at 577-78. See also A. GAL, *supra* note 2, at 142-44.

26. Letter to Philip P. Wells (July 21, 1913), reprinted in III LETTERS, *supra* note 1, at 146.

27. Letter to Roger B. Hull (Jan. 31, 1914), reprinted in III LETTERS, *supra* note 1, at 242; Letter to Alice G. Brandeis (Jan. 21, 1914), reprinted in III LETTERS, *supra* note 1, at 236; Letter to Alfred Mitchell-Innes (Mar. 16, 1914), reprinted in III LETTERS, *supra* note 1, at 261-62.

28. See L. BAKER, *supra* note 19, at 41-42; FRANKFURTER REMINISCES, *supra* note 19, at 77-80.

who had already approached Dean Roscoe Pound about the possibility of hiring Frankfurter, urged him to accept the post. When Frankfurter expressed doubts about his qualifications, Brandeis simply answered that he should "let those who have the responsibilities for selecting you decide your qualifications."²⁹ Frankfurter took the job and remained a Harvard professor from September 1, 1914 until Franklin Roosevelt appointed him to the Supreme Court in 1939. And with Frankfurter now living in Cambridge and Brandeis practicing law across the river in Boston, their encounters were even more frequent.

Frankfurter's first extensive experience as one of Brandeis's lieutenants was not long in coming. He had taken up his teaching duties only one day after Brandeis accepted the leadership of the American Zionist movement. Brandeis's effort to attract bright, young Jewish intellectuals was a hallmark of his Zionist leadership. He wanted men, he said, who were willing to study all aspects of the Jewish problem and who would persuasively speak and write for the creation of a Jewish homeland in Palestine.³⁰ In March, 1915, Brandeis created an "Advisory Council" to serve as a brain trust for the movement. The "council" initially consisted of Julian W. Mack and Frankfurter, with others to be appointed later.³¹ Thereafter Frankfurter remained within the inner circle of advisers and movers in Brandeis's administration of American Zionism. Frankfurter performed his duties with tact, diplomacy, and promptness; and he gave such sound advice that Brandeis came increasingly to rely on his judgment.

Thus, when Brandeis embarked upon his duties on the Supreme Court in October, 1916, he knew his man well. He had grown to appreciate Frankfurter's lively good humor and vitality, to respect his high intelligence and steady good sense, to value his trustworthiness and diplomatic skills, and to marvel at his endless array of friends. Brandeis had also satisfied himself that Frankfurter's views on virtually all important political, social, economic and legal ques-

29. FRANKFURTER REMINISCES, *supra* note 19, at 17.

30. Letter to Richard J. H. Gottheil (Oct. 2, 1914), *reprinted in III LETTERS, supra* note 1, at 309; Letter to Alex Kanter (Nov. 14, 1914), *reprinted in III LETTERS, supra* note 1, at 357; Letter to Horace M. Kallen (Jan. 14, 1915), *reprinted in III LETTERS, supra* note 1, at 405; Letter to Stephen S. Wise (Mar. 2, 1915), *reprinted in III LETTERS, supra* note 1, at 454-55; Letter to Horace M. Kallen (Mar. 4, 1915), *reprinted in III LETTERS, supra* note 1, at 459-60; Letter to Benjamin Perlstein (Mar. 12, 1915), *reprinted in III LETTERS, supra* note 1, at 479-81; Letter to Bernard Flexner (Feb. 12, 1919), *reprinted in IV LETTERS, supra* note 1, at 378-81; Letter to Julian W. Mack (July 20, 1930), *reprinted in V LETTERS, supra* note 1, at 435-37.

31. *See* Letter to Julian W. Mack (Mar. 19, 1915), *reprinted in III LETTERS, supra* note 1, at 487.

tions were likely to agree with his own. The two men had developed a warm intimacy built on shared values, opinions, and respect: by 1916, letters to Frankfurter began "Dear Felix," and the reserved Brandeis addressed very few men in the world by their first names. On November 14, 1916, the day after his sixtieth birthday, Brandeis responded warmly to a greeting from Frankfurter's mother: "Your son has won so large a place in our hearts and brought so much of joy and interest into our lives that we feel very near to you who are nearest to him."³²

Five days later, in the week of Frankfurter's thirty-fourth birthday, and only one month into Brandeis's first term, the newest Justice wrote a fateful letter:

My dear Felix: You have had considerable expense for travelling, telephoning and similar expenses in public matters undertaken at my request or following up my suggestions & will have more in the future no doubt. These expenses should, of course, be borne by me.

I am sending check for \$250 on this account. Let me know when it is exhausted or if it has already been.³³

Frankfurter demurred and promptly returned the check; but on November 25, Brandeis and his wife sent it back, this time elaborating more fully on what he had in mind.

My dear Felix: Alice and I talked over the matter before I sent the check and considered it again carefully on receipt of your letter. We are clearly of opinion that you ought to take the check.

In essence this is nothing different than your taking travelling and incidental expenses from the Consumers League or the New Republic — which I trust you do. You are giving your very valuable time and that is quite enough. It can make no difference that the subject matter in connection with which expense is incurred is more definite in one case than in the other.

I ought to feel free to make suggestions to you, although they involve some incidental expense. And you should feel free to incur expense in the public interest. So I am returning the check.³⁴

Thus began a financial arrangement between Louis Brandeis and Felix Frankfurter that lasted until 1939. As the expenses of Frankfurter's efforts rose, so did the amounts of money sent by Brandeis. In mid-1917, the Justice placed \$1000 in a special account he set up for Frankfurter; he continued to deposit that sum yearly until 1925. In that year, he deposited \$1500. From 1926 until Frankfurter's nomination to the Supreme Court in 1939, Brandeis provided \$3500

32. Letter to Emma W. Frankfurter (Nov. 14, 1916), *reprinted in* IV LETTERS, *supra* note 1, at 265.

33. Letter to F.F. (Nov. 19, 1916), *reprinted in* IV LETTERS, *supra* note 1, at 266.

34. Letter to F.F. (Nov. 25, 1916), *reprinted in* IV LETTERS, *supra* note 1, at 266-67.

yearly in two installments for use as the professor deemed appropriate.³⁵

Frankfurter received these payments regularly and automatically: Brandeis simply instructed his secretary to deposit the money in Frankfurter's account. Once, in 1927, Brandeis forgot to make the payment, and was embarrassed when Frankfurter tactfully called the matter to his attention:

Yours of 31st just received. I am deeply chagrined at my oversight in not having Miss Malloch make the deposit of \$2000 on Jan. 1st/27. I am writing her by this mail & asking her to advise you immediately on making the deposit. Until further notice, it is my intention that \$1500 shall be deposited Oct. 1, and \$2000, Jan. 1 during each year for our joint endeavors through you. If, by any chance, the deposit is not regularly made please enquire of Miss Malloch or let me know.³⁶

Attempting to estimate the value of Brandeis's payments in terms of the value of today's dollars is, at best, a risky business. The value of money fluctuated so much during those twenty-three years that we can suggest only rough equivalencies. If, however, one multiplies the \$52,250 which Brandeis gave Frankfurter during this period by an average of five,³⁷ it emerges that, in today's dollars, the Justice paid the professor more than a quarter of a million dollars. Put another way, Brandeis's \$3500 contributions between 1926 and 1938 vary in value between \$11,500 and \$17,800 in present-day dollars.³⁸

In addition to the direct deposits to Frankfurter's account, Brandeis supplied money for special purposes. In April, 1920, for example, Brandeis offered to pay Frankfurter's expenses in attending the

35. There are numerous references to the financial arrangement between the two in L.D.B.'s letters to F.F.. For example, in addition to letters cited in notes 33-34 *supra* and notes 36, 39-41 *infra*, see the following letters from L.D.B. to F.F.: (May 3, 1917) (located in the Felix Frankfurter Papers, Manuscript Division, Library of Congress, Washington, D.C. [hereinafter cited as Frankfurter Mss.-LC]); (Jan. 3, 1923) (located in the Frankfurter Mss.-LC, *supra*); (Jan. 6, 1923) (located in the Frankfurter Mss.-LC, *supra*); (Mar. 17, 1925) (located in the Frankfurter Mss.-LC, *supra*); (Sept. 24, 1925), *reprinted in V LETTERS, supra* note 1, at 187-88; (Oct. 3, 1925) (located in the Frankfurter Mss.-LC, *supra*); (Dec. 27, 1925) (located in the Frankfurter Mss.-LC, *supra*); (Aug. 8, 1926) (located in the Frankfurter Mss.-LC, *supra*); (Oct. 2, 1926) (located in the Frankfurter Mss.-LC, *supra*); (June 5, 1927), *reprinted in V LETTERS, supra* note 1, at 292-93; (Aug. 15, 1927) (located in the Frankfurter Mss.-LC, *supra*); (Apr. 11, 1929) (located in the Frankfurter Mss.-LC, *supra*). In addition, see letter to Julian W. Mack (Jan. 12, 1922), *reprinted in V LETTERS, supra* note 1, at 43.

36. Letter to F.F. (June 2, 1927), *reprinted in V LETTERS, supra* note 1, at 290.

37. Computations based on the consumer price indices indicate that the value of money during the period ranged from a high of 6.2 times the present value of the dollar (in 1916) to a low of 3.4 times (in 1920). An average of these multipliers, however, reveals that money during the entire period was worth roughly five times its present value.

38. These figures were computed using the Consumer Price Indices given in the STATISTICAL ABSTRACT OF THE UNITED STATES (1957), and the STATISTICAL ABSTRACT OF THE UNITED STATES (1979).

Zionist Conference in London that year.³⁹ Similarly, in the fall of 1929, Brandeis promised Frankfurter \$2500 so that he could hire Wilbur G. Katz as a research aide in preparing a casebook on federal jurisdiction.⁴⁰ And from 1924 to 1939, Brandeis provided the money for a fellowship for graduate study under Frankfurter.⁴¹

Brandeis had frankly acknowledged from the start that the purpose of the payments was to permit the Justice "to feel free to make suggestions." And Brandeis believed in getting his money's worth. Between 1916 and the inauguration of Franklin D. Roosevelt in 1933, Frankfurter received a veritable torrent of suggestions and requests. They were advanced in hundreds of letters, several of which arrived at Cambridge almost every week (with some days seeing two or even three). The suggestions and requests were sometimes delivered in person when Frankfurter came down to Washington or when Brandeis passed through Boston. Sometimes they were made through intermediaries, and sometimes they were presented during the Frankfurters' visits with the Brandeises at their summer home on Cape Cod.

The Justice's suggestions to the professor ranged over the whole spectrum of Brandeis's reform interests: Zionism, politics, social legislation, public opinion, legal education, judicial reform, insurance, labor. This massive body of requests, suggestions and instructions, coming, as it did, during a period of war and general political conservatism, represents the persistent attempt of one progressive reformer to pass on the torch of American liberalism to a generation that must often have seemed discouragingly indifferent. This article will provide only a brief sampling of the sorts of suggestions and requests made by Brandeis and the efforts by Frankfurter to implement them in the face of a prevailing social conservatism during these sixteen years.

III

The Hotel Astor ambush and Brandeis's resignation from the official Zionist leadership did not sever his intimate connection with the movement. On the contrary, from 1916 until 1921, Brandeis was easily the most influential Zionist in the United States. Judge Julian

39. See Letter to Jacob deHaas (Apr. 17, 1920), reprinted in IV LETTERS, *supra* note 1, at 458.

40. See Letter to F.F. (Mar. 6, 1929), reprinted in V LETTERS, *supra* note 1, at 371-72; Letter to F.F. (Sept. 20, 1929), reprinted in V LETTERS, *supra* note 1, at 385-87.

41. See Landis, *Mr. Justice Brandeis and the Harvard Law School*, 55 HARV. L. REV. 184, 189 (1941).

W. Mack and Rabbi Stephen S. Wise, two of his most devoted followers, held the titular offices; but there was no detail so small, nor any policy question so large that Brandeis failed to pass upon it personally. Daily letters from Washington, from "the chief," the "invisible leader," charted the broad course and laid down the detailed marching orders for the movement. And in his tireless efforts to mold and direct American Zionism, Justice Brandeis found plenty for Professor Frankfurter to do.

Brandeis often chose Frankfurter as an envoy to convey particularly private and delicate views and messages. Frankfurter carried personal messages back and forth across the Atlantic Ocean between Brandeis and a host of English Zionists and Zionist sympathizers: Baron Edmond deRothschild, Chaim Weizmann, Arthur J. Balfour, Lord Eustace Percy (one of Frankfurter's former housemates), and Harold Laski.⁴² Brandeis also used Frankfurter to carry his messages and views to Americans, both Zionists and non-Zionists. When he learned that William C. Bullitt would be accompanying Wilson to the Versailles Peace Conference, for example, Brandeis assured Jacob deHaas, a leading Zionist functionary in New York, that "F.F. will make clear to him our position on Zionist matters."⁴³ In September, 1919, Brandeis instructed Frankfurter about enlisting Walter Lippmann's editorial influence in the movement:

As to Walter L. & Zionism: He could be of greatest use by writing with a view to securing the support of the American intellectual Jews. That is

1. their support generally for the movement
2. their special aid in carrying forward our American social views in Palestine.

. . . Walter's writing and thinking should be continuous to this end, & he should keep in frequent touch with Ben Flexner.⁴⁴

In addition to carrying messages, Frankfurter was also assigned important duties in the realm of Zionist policy formation. In January, 1918, Brandeis told Chaim Weizmann, the leader of the World Zionist Organization, that he would ask Frankfurter and Judge Mack to begin "the framing of charter provisions and regulations" relating to the future of Palestine.⁴⁵ A year later, in preparation for

42. See, e.g., Letter to Edward deRothschild (Aug. 10, 1917), reprinted in IV LETTERS, *supra* note 1, at 302-03; Letter to F.F. (June 5, 1919), reprinted in IV LETTERS, *supra* note 1, at 396-97.

43. Letter to Jacob deHaas (Nov. 28, 1918), reprinted in IV LETTERS, *supra* note 1, at 366.

44. Letter to F.F. (Sept. 25, 1919), reprinted in IV LETTERS, *supra* note 1, at 427.

45. Letter to Chaim Weizmann (Jan. 13, 1918), reprinted in IV LETTERS, *supra* note 1, at 334-35.

Brandeis's trip to Palestine, the Justice requested that Frankfurter and Ben Flexner prepare detailed "reports, surveys and recommendations" on Palestinian affairs — covering everything from the accounting system to public utilities, from labor problems to museums and music.⁴⁶ Eight months later, Brandeis suggested that a high level committee study his ideas for improving Palestinian education: "Talk this over with Laski, and when opportunity serves with Abe and Ben Flexner and others," Brandeis directed Frankfurter, "and when you are ready with your suggestions let deHaas have them."⁴⁷ Two months later, Brandeis listed ten Palestinian topics for Frankfurter to consider and present to the National Executive Committee.⁴⁸ In August, 1920, Brandeis returned from the London Zionist Conference, leaving Frankfurter behind in England. He promptly ordered Mack to "[c]able Flexner that action on all matters was postponed to meeting to be held Sept. 29th & suggest that he & Felix prepare, while on voyage over, fully a program for action — so that you may have in concrete form their suggestions when they arrive."⁴⁹

Besides using Frankfurter as an envoy and assigning him the responsibility for formulating policy suggestions, Brandeis also turned to him for dozens of other Zionist tasks. Frankfurter was given the job of monitoring the organization's publicity.⁵⁰ He was asked to review and edit sensitive correspondence.⁵¹ He was asked to consider, with Mack, how to involve the financier Jacob Schiff in Palestine work.⁵² It was Frankfurter who laid the groundwork, with British officials, for Brandeis's personal trip to Palestine, and it was only after Frankfurter's personal assurances concerning the propriety of the trip that Brandeis finally agreed to embark.⁵³ Frankfurter was asked to "jack up the Finance Committee [in New York] which

46. Letter to Bernard Flexner (Feb. 12, 1919), *reprinted in IV LETTERS, supra note 1*, at 378-81.

47. Letter to F.F. (Oct. 13, 1919), *reprinted in IV LETTERS, supra note 1*, at 431.

48. *See* Letter to F.F. (Dec. 4, 1919), *reprinted in IV LETTERS, supra note 1*, at 439-40.

49. Letter to Julian W. Mack (Sept. 1, 1920), *reprinted in IV LETTERS, supra note 1*, at 477-80.

50. *See* Letter to Jacob deHaas (Sept. 20, 1919), *reprinted in IV LETTERS, supra note 1*, at 425.

51. *E.g.*, Letter to Jacob deHaas (Oct. 15, 1919), *reprinted in IV LETTERS, supra note 1*, at 432; Letter to F.F. (Dec. 16, 1920), *reprinted in IV LETTERS, supra note 1*, at 518-19.

52. *See* Letter to Julian W. Mack (Dec. 2, 1919), *reprinted in IV LETTERS, supra note 1*, at 439.

53. *See* Letter to F.F. (May 19, 1919), *reprinted in IV LETTERS, supra note 1*, at 394-95; Letter to F.F. (June 5, 1919), *reprinted in IV LETTERS, supra note 1*, at 396-97; Letter to Alice G. Brandeis (Aug. 1, 1919), *reprinted in IV LETTERS, supra note 1*, at 419-20.

sorely needs it,"⁵⁴ to prod the Zionist leadership in Boston,⁵⁵ to draft important letters for Brandeis's signature,⁵⁶ to help handle the troublesome visit of Chaim Weizmann to the United States.⁵⁷ And when the tensions between the Weizmann and the Brandeis factions erupted in a schism in 1921, it was Frankfurter who journeyed to Cleveland to present the Brandeisians' case — standing for four hours before a shouting audience of Weizmann's hecklers.⁵⁸

Naturally, Frankfurter was most valuable to Brandeis's Zionist work when legal questions were involved:

Dear Felix: You will recall DeHaas' & my talk with you on General Counsel for the Z[ionist]. O[rganization]. & eventually counsel in the several states. Please consider this & discuss it with Mack, Flexner, [Howard] Gans, [Robert] Szold & others as occasion serves.

Meanwhile there are two matters which should receive immediate attention from the legal end.

- I. To make sure that the bill for incorporation [of the Zionist Organization of America] under the law of New York is in the best possible form & that steps are taken to ensure its passage as early in January as possible.
- II. To get ready a form or forms of bequest adequate in the several states, so that immediately after the act of incorporation is procured we may publish the forms and also prepare to utilize the occasion to get into touch with all Jewish lawyers in America, which you will recall we discussed also.

In both these matters there has been unconscionable delay in the past. Now we should have prepared not only the legal forms but the form of letter and the mailing list, so that we may act promptly after passage of the act.

DeHaas will send you herewith the files or part of files on each matter so that you can see what has been done

Please let DeHaas know what you think should be done about this.⁵⁹

Most of the duties Brandeis assigned to Frankfurter concerned the internal affairs of the Zionist movement. On several occasions, however, Brandeis asked him to represent Zionist interests in important national and international contexts. Brandeis arranged one

54. Letter to F.F. (Dec. 4, 1919), reprinted in IV LETTERS, *supra* note 1, at 439-40.

55. See Letter to F.F. (Jan. 18, 1920), reprinted in IV LETTERS, *supra* note 1, at 444.

56. See Letter to F.F. (Apr. 5, 1920), reprinted in IV LETTERS, *supra* note 1, at 455-56.

57. See Letter to F.F. (Mar. 2, 1921), reprinted in IV LETTERS, *supra* note 1, at 537-38.

58. See FRANKFURTER REMINISCES, *supra* note 19, at 180-81. It was another testimony to F.F.'s capacity for friendship that he and Weizmann remained fairly close: "There I was — four hours! But I don't think that Weizmann ever harbored any ill feelings toward me. Quite the contrary. We became after a while even closer friends than ever before. He was very eager to try to persuade me to move to Palestine." *Id.* at 181. See also note 73 *infra*.

59. Letter to F.F. (Oct. 7, 1919), reprinted in IV LETTERS, *supra* note 1, at 429.

such task in 1917 after America had finally entered the war. Henry Morgenthau, the former United States ambassador to Turkey, had urged a dramatic scheme upon his friend President Wilson. Morgenthau persuaded the President to send him to Europe to convince Turkey to sever its alliance with the Central Powers.⁶⁰ Since Palestine was a part of the Ottoman Empire, the "Morgenthau mission" carried enormous importance for the Zionists; they feared that Turkey would drop out of the war before the British could conquer the Holy Land and begin the process of establishing a Jewish homeland there.⁶¹ Using his influence with Wilson, and with Secretary of State Lansing and Secretary of War Baker, Brandeis arranged for Frankfurter to accompany Morgenthau.⁶² It was also agreed that Frankfurter and Morgenthau would write newspaper publicity for the mission and submit it to Brandeis and Lansing for approval.⁶³ Once embarked, the mission proved a fiasco. A group of Zionists, including Weizmann himself, met with Morgenthau in Gibraltar and quickly convinced him of the futility of the effort. Subsequently Frankfurter urgently cabled Washington that the mission was a complete failure and that Morgenthau should be recalled as quickly as possible.⁶⁴

The collapse of the Morgenthau mission and Allied military successes in the Middle East opened the way for the British to issue the crucially important Balfour Declaration in November, 1917. The Declaration announced the intention of His Majesty's government to help establish a national homeland for the Jews in Palestine.⁶⁵ As early as Lord Balfour's visit to America in April, 1917, the American Zionists had sought to generate public support for British intentions and to win the Wilson administration's approval of such a declaration. While Brandeis's role — interceding with Wilson directly — has been thoroughly reconstructed,⁶⁶ Frankfurter's part in the story

60. See I. FRIEDMAN, *THE QUESTION OF PALESTINE, 1914-1928*, 211-16 (1973); FRANKFURTER REMINISCES, *supra* note 19, at 145-53; Yale, *Ambassador Henry Morgenthau's Special Mission of 1917*, 1 *WORLD POL.* 309-10 (1949).

61. See M. UROFSKY, *supra* note 14, at 209-10.

62. Yale, *supra* note 60, at 310. Yale, something of an "insider" in Middle East affairs, recalled: "Interestingly enough it was Justice Brandeis, one of the leading American Zionists, who suggested that Mr. Frankfurter should accompany Mr. Morgenthau on his special mission." *Id.* (footnote omitted).

63. Letter to Jacob deHaas (June 7, 1917), *reprinted in IV LETTERS*, *supra* note 1, at 296.

64. See FRANKFURTER REMINISCES, *supra* note 19, at 151.

65. See L. STEIN, *THE BALFOUR DECLARATION* (1961); I. FRIEDMAN, *supra* note 60.

66. See L. STEIN, *supra* note 65, at 422-28; Adler, *The Palestine Question in the Wilson Era*, 10 *JEWISH SOCIAL STUDIES* 303 (1948); Parzen, *Brandeis and the Balfour Declaration*, 5 *HERZL YEARBOOK* 309 (1963); Lebow, *Woodrow Wilson and the Balfour Declaration*, 40 *J. MOD. HIST.* 501 (1968).

remains less clear. That he was close to the center of events and that he functioned, on the whole, as Brandeis's lieutenant cannot be doubted. He participated, with Brandeis, in important preliminary discussions with Balfour's staff in April;⁶⁷ he reported to Brandeis on his private discussions on Zionist affairs with Eustace Percy, one of Balfour's entourage.⁶⁸ Brandeis took Frankfurter along to a conference with Nahum Slouschz, a leading French Zionist, to explore the chances for gaining French approval of a British declaration.⁶⁹ Upon returning to America after the Morgenthau debacle in mid-summer, Frankfurter gave Brandeis "encouraging and enlightening" secret messages from Weizmann and Edmond deRothschild.⁷⁰ Frankfurter then promptly traveled back to Europe with messages from Brandeis and returned to the United States, all less than a month before the actual issuance of the Declaration. "It was a great satisfaction to hear yesterday from Prof. Frankfurter fully concerning your conference," Brandeis wrote Weizmann on October 8, "and to have this further evidence of your admirable management of our affairs. You can rely upon our hearty cooperation."⁷¹ Nearly twenty years later, in 1936, when it became important to convince the British of the American role in supporting the Balfour Declaration,⁷² Brandeis listed Frankfurter as one of the four men who would be likely to know all the details.⁷³

67. See Letter to Jacob deHaas (Apr. 24, 1917), reprinted in IV LETTERS, *supra* note 1, at 283.

68. See Letter to Jacob deHaas (Apr. 26, 1917), reprinted in IV LETTERS, *supra* note 1, at 284-85.

69. See Letter to Jacob deHaas (May 4, 1917), reprinted in IV LETTERS, *supra* note 1, at 286-87.

70. See Letter to Edward deRothschild (Aug. 10, 1917), reprinted in IV LETTERS, *supra* note 1, at 302-03.

71. Letter to Chaim Weizmann (Oct. 8, 1917), reprinted in IV LETTERS, *supra* note 1, at 314-15.

72. In 1936, after an enormous surge of Jewish immigration into Palestine, tensions developed between the Jews and Arabs residing in and around Palestine. These tensions culminated in a series of Arab riots and in a general strike called by the Arab Higher Committee. In an attempt to preserve order, the British halted further Jewish immigration into Palestine and appointed a Royal Commission to study the problem. Upon the urgings of numerous Jewish leaders in the United States and a personal appeal by Stephen Wise, President Roosevelt directed Secretary of State Cordell Hull to write a letter to the British government stating that the United States would regard suspension of the Jewish immigration as a breach of the Balfour Declaration. The British thereafter altered their policy, allowing the immigration to continue while the Commission completed its report. See M. UROFSKY, *supra* note 14, at 402-03.

73. See Letter to Robert Szold (Sept. 5, 1936), reprinted in V LETTERS, *supra* note 1, at 577-81. Similarly, in 1920, L.D.B. wrote to Rabbi Abba Hillel Silver, who was trying to prepare a summary of the differences among the various Zionist factions:

I venture to suggest that you consider with Judge Mack and with Prof. Frankfurter whether my apprehension in this respect is well founded. I include Prof. Frankfurter because he, of all Americans, is I believe the closest friend of Dr. Weizmann & he has

Frankfurter provided a special service for Brandeis at the Versailles Peace Conference in 1919. The Zionists' central aim at Versailles was to ensure that the promise of the Balfour Declaration would be implemented. Frankfurter attended the Conference, not as a part of the American delegation, but at the behest of the Zionist Organization of America. His chief duty was to draft the position papers for the Zionists and to work for the awarding of a mandate over Palestine to Great Britain. There was no secret about who had sent him. "Justice Brandeis and Judge Mack, were very anxious that I should go, to be, as it were, the American responsible for working with the British," he later recalled. He described his position as "holding a 'watching' brief for Zionists before the Peace Conference."⁷⁴ Frankfurter's biographer put the matter more succinctly: "At the Peace Conference he was Brandeis' eyes, ears, and spokesman."⁷⁵

Naturally, between Weizmann's defeat of the Brandeis-Mack leadership at the explosive Cleveland Convention of June, 1921 and the triumphant return to power of the Brandeis-Mack faction in 1931, the Justice's involvement in Zionist affairs was much diminished. He stayed in close communication with the other members of the faction, but he no longer had responsibility for day-to-day supervision of the movement. Therefore, throughout the 1920s, he made fewer Zionist requests of Frankfurter, and many of the requests he did make were inconsequential. He asked Frankfurter to provide letters of introduction for Solomon Rosenbloom's mission to Europe and Palestine,⁷⁶ to help shield Judge Benjamin-Cardozo from Jewish politics,⁷⁷ and to help find a suitable job for Alexander Sachs, a Zionist functionary retiring from the New York office.⁷⁸

personal knowledge, as no one else in America has, of most of my conferences with Dr. Weizmann.

Letter to Abba H. Silver (Oct. 24, 1920), *reprinted in IV LETTERS, supra* note 1, at 493-94.

74. FRANKFURTER REMINISCES, *supra* note 19, at 155. One of F.F.'s most important achievements at Versailles was to secure an exchange of letters with the Arab leader, Prince Feisal. In his letter, dated March 3, 1919, Feisal had written: "We Arabs look with the deepest sympathy on the Zionist movement. . . . [W]e will wish the Jews a most hearty welcome home." N.Y. Times, Mar. 15, 1919, at 7, col. 2. There is no evidence that F.F. undertook this particular diplomatic initiative at L.D.B.'s request.

75. L. BAKER, *supra* note 19, at 83. It should be noted that once he arrived in Paris, F.F. was drawn into various non-Zionist aspects of the negotiations, principally into helping to draw the charter for the International Labor Organization.

76. See Letter to F.F. (Jan. 12, 1922) (located in the Felix Frankfurter Papers, Harvard Law School Library, Cambridge, Massachusetts [hereinafter cited as Frankfurter Mss.-HLS]).

77. See Letter to F.F. (Jan. 1, 1927), *reprinted in V LETTERS, supra* note 1, at 258-59.

78. See Letter to F.F. (Sept. 15, 1921) (located in the Frankfurter Mss.-HLS, *supra* note 76).

But Brandeis's letters to Frankfurter did contain a number of substantial and significant Zionist assignments. A week after the Brandeis-Mack leadership fell from power, some of the deposed faction met in New York. There they listened as Brandeis outlined their work for the future. Frankfurter was not present, but Brandeis lost little time in explaining his first assignment:

Some immediate work was agreed upon which will require special attention from you: We must prepare & have ready for circulation in English, German and Hebrew — by July 15 — a full and persuasive statement of our case — for circulation widely abroad in advance of the Congress

. . . I don't see that anyone of our crowd except you can do this.⁷⁹

And in October, 1923, Brandeis resurrected some unfinished business:

There is one bit of Palestine work which I should like to have you undertake if you see no objection. You know that for years I have believed that an appropriate letter should go to a select body of Jewish lawyers calling attention to the possibility . . . of bequests for Palestine. There were 5 years of delay before anything was done. Then it was left to DeHaas to send out some letters. I don't know how much he has done of this. But whatever it was, it was nothing. The letter should have gone from our distinguished lawyers in distinguished form. I think one signed by you as chairman etc or something would be most effective.

You will know what to say, to whom to send it, who else should sign, etc. But this idea, which may win us much money & open the way to other support, should be appropriately followed up.⁸⁰

Brandeis also continued to use Frankfurter to relay messages and to reinforce messages he had delivered himself.⁸¹ In addition, he insisted that Frankfurter be kept informed of Zionist plans by receiving copies of letters from deHaas and others.⁸² Brandeis also expected Frankfurter to advise him on policy questions from time to time.⁸³ And when skilled diplomatic work was required, Brandeis automatically turned to the professor. In 1929, for example, Prime

79. Letter to F.F. (June 13, 1921), *reprinted in IV LETTERS, supra note 1*, at 565.

80. Letter to F.F. (Oct. 24, 1923), *reprinted in V LETTERS, supra note 1*, at 102-03.

81. *E.g.*, Letter to Jacob deHaas (Dec. 29, 1923), *reprinted in V LETTERS, supra note 1*, at 106-07. In addition, see the following letters to F.F.: (June 16, 1927), *reprinted in V LETTERS, supra note 1*, at 294; (Sept. 23, 1929), *reprinted in V LETTERS, supra note 1*, at 389-91; (Sept. 15, 1921) (located in the Frankfurter Mss.-HLS, *supra note 76*).

82. *See, e.g.*, Letter to F.F. (Apr. 6, 1923), *reprinted in V LETTERS, supra note 1*, at 90; Letter to F.F. (Feb. 15, 1927), *reprinted in V LETTERS, supra note 1*, at 271-72.

83. *See, e.g.*, Letter to Julian W. Mack and Stephen S. Wise (Nov. 3, 1921), *reprinted in V LETTERS, supra note 1*, at 27-28. For further examples, see the following letters to F.F.: (Feb. 25, 1924), *reprinted in V LETTERS, supra note 1*, at 116-17; (June 16, 1927), *reprinted in V LETTERS, supra note 1*, at 294; (Sept. 20, 1929), *reprinted in V LETTERS, supra note 1*, at 385-87.

Minister Ramsay MacDonald announced a trip to the United States. "I had not thought it important that I should see MacDonald," Brandeis wrote Frankfurter, "But I think it very important that you should. And if it proves that I am to see him, I want you present."⁸⁴

In short, Justice Brandeis entrusted a wide variety of Zionist tasks to Frankfurter over the years. From 1916 to 1921, when Brandeis controlled the movement, Frankfurter's assignments were numerous; on occasion, especially in the field of international diplomacy, they were extremely important. From 1921 to 1931, with the Brandeis-Mack faction out of power in the American Zionist Organization, Frankfurter's Zionist work was lessened; but by no means did it end. Brandeis still made regular requests, some of them involving significant aspects of Zionist politics and policy. And yet what is astonishing about the relationship of these two men is not that Brandeis, while a Supreme Court Justice, asked Frankfurter to undertake a large quantity of Zionist labor. What is astonishing is that Frankfurter's Zionist assignments comprised so small a portion of the work that Brandeis was sending his way.

IV

Zionism was not the only unfinished public business for Louis Brandeis when he ascended to the Supreme Court in 1916. At the time of his nomination he was nationally recognized as the nation's foremost courtroom champion of progressive social legislation. Since 1908, when Brandeis had submitted his monumental and path-breaking brief in *Muller v. Oregon*,⁸⁵ he had regularly appeared in defense of state laws regulating the hours of labor or attempting to set a minimum wage for workers. Serving as the unpaid counsel for the National Consumers League, and working closely with his sister-in-law, Josephine Goldmark, a researcher for the League, Brandeis filed his trademarked briefs — light on legal precedent, overwhelmingly persuasive on economic, sociological and medical data — and his string of victories was spectacular.⁸⁶

84. Letter to F.F. (Sept. 20, 1929), reprinted in V LETTERS, *supra* note 1, at 385-87. On October 4, L.D.B. did receive an invitation to meet MacDonald ("This I think is the result of Felix's cables to Harold [Laski]" he wrote Mack). And after arming himself with suggestions from Mack, deHaas, and F.F., L.D.B. met MacDonald on October 9. For another example of relying on F.F. for diplomatic tasks, see Letter to British diplomat Rennie Smith, Oct. 29, 1930, reprinted in V LETTERS, *supra* note 1, at 459. In reacting angrily to British policy in Palestine, L.D.B. wrote Smith, "The government's proposal seems to me unbelievably bad. If, as I hope, you have seen Frankfurter or Robert Szold, you will know my views."

85. 208 U.S. 412 (1908).

86. See, e.g., *W. C. Ritchie & Co. v. Wayman*, 244 Ill. 509 (1910); *Ex parte Hawley*, 85 Ohio St. 494 (1912); *Hawley v. Walker*, 232 U.S. 718 (1914); *Miller v. Wilson*, 236 U.S. 373

At the time of his nomination, Brandeis had several of these cases pending. He and Goldmark were working both on briefs to defend Oregon's ten-hour law for men in *Bunting v. Oregon*,⁸⁷ and on the highly controversial Oregon minimum wage cases, *Stettler v. O'Hara*⁸⁸ and *Simpson v. O'Hara*.⁸⁹ He had already successfully argued the minimum wage cases in Oregon state courts and the *Stettler* case before the United States Supreme Court (where a reargument was ordered) when his nomination required him to retire from the cases. Naturally, he chose Frankfurter to finish these tasks. The Harvard professor succeeded Brandeis as unpaid counsel for the National Consumers League and — once again with Josephine Goldmark — started preparing the cases for trial. There is no written evidence that Brandeis and Frankfurter consulted about the cases, but it is scarcely conceivable that the two men did not discuss them in detail. It is not surprising, therefore, that when Frankfurter presented the briefs and made the arguments before the Supreme Court (Brandeis, of course, withdrawing from consideration of the cases), he followed Brandeis's earlier strategy precisely.⁹⁰ The contemporary constitutional authority Thomas Reed Powell, like many commentators since, pointed out that Frankfurter's minimum wage brief "follows the model set by Mr. Brandeis in the brief on behalf of the state in *Muller v. Oregon*."⁹¹

Brandeis's willingness to take such cases while still in private practice reflected his reformer's faith in the efficacy of social legislation. He preached industrial cooperation; but he always believed that "the people" needed positive laws to aid them in their unequal struggle against "the interests." This faith had led him not only to defend the labor laws of various states, but to fight for passage of social legislation as well — first in Massachusetts and, as his fame and influence as a lawyer spread, in Washington, D.C. His interest in framing and securing such laws did not disappear in 1916, nor did his influence with the progressive Senators and Congressmen who had so often turned to him for advice in the past.

Justice Brandeis used Felix Frankfurter as a conduit to convey

(1915); *Bosley v. McLaughlin*, 236 U.S. 385 (1915). See J. GOLDMARK, *IMPATIENT CRUSADER* 143-79 (1953).

87. 243 U.S. 426 (1917).

88. 69 Or. 519, 139 P. 743, *affd. per curiam*, 243 U.S. 629 (1914).

89. 70 Or. 261, 141 P. 158 (1914), *affd. per curiam, sub nom. Stettler v. O'Hara*, 243 U.S. 629 (1917).

90. The Court sustained the Oregon ten-hour law for men in a five to three decision. 243 U.S. 426 (1917). The Court split four to four on the minimum wage law, thereby sustaining it.

91. Powell, *The Oregon Minimum-Wage Cases*, 32 POL. SCI. Q. 296 (1917).

specific legislative proposals to such congressional progressives as Senators Thomas J. Walsh (Montana), Burton K. Wheeler (Montana), George W. Norris (Nebraska), Robert F. Wagner (New York), and Robert M. LaFollette (Wisconsin), and Representatives R. Walton Moore (Virginia) and Fiorella LaGuardia (New York). At Brandeis's urging, Frankfurter would follow up the original ideas by steadily supplying information and encouragement to the lawmakers.

Indeed, so anxious was Brandeis for progressive legislation that once, in the mid-1920s, he stepped back from making specific proposals through Frankfurter and hatched an ambitious scheme for the wholesale mass-production of such laws. He laid the plan out for Frankfurter on New Year's Day, 1925, and carefully explained the professor's role:

You will recall our asking John M. Nelson (with E. Keating) to dine to talk over election results. I set forth to him my views (a) the need of a general staff of thinkers, who shall be divorced from office & the political task of putting things over. (b) the need of developing a body of doers, by setting men to the accomplishment of local tasks within their capacities.

He stated as to (a) at this time his favorable inclination, as he had himself thought vainly about what he ought to put through if, by chance, the Progressives had succeeded [in the election of 1924]. Last week he telephoned for a[n] appointment, said he was wholly convinced of (a), that he had been talking over the whole situation with two men of high character & public spirit in the House. One a good Republican, the other a good Democrat. That he was pretty sure that they could form, in the next Congress, a coalition which could control the House & that they (the three) wanted to develop the (a) project etc., Nelson putting himself & associates in the background. He wanted me to pick out men for the general staff whom he could call on etc. after March 4. I told him of you (of course confidentially) & that I would ask you to think up the men to ask. It seems to me that we ought to be able to find a group of men willing to be the politico-economic thinkers, who would, in privacy, think out what it is wise to do, why & how.⁹²

Six weeks later, Brandeis arranged for a face-to-face meeting between Nelson and Frankfurter; and by the end of May, the professor was ready with a full report for the Congressman.⁹³

In general, however, Brandeis felt more comfortable (in this as in

92. Letter to F.F. (Jan. 1, 1925), *reprinted in V LETTERS, supra* note 1, at 155-56. John M. Nelson was a LaFollette Republican from Wisconsin. He served in the House from 1906 to 1919 and again from 1921 to 1933.

93. *See* Letter to F.F. (Feb. 21, 1925), *reprinted in V LETTERS, supra* note 1, at 165-66; Letter to F.F. (June 2, 1925), *reprinted in V LETTERS, supra* note 1, at 174-75.

other things) with an approach focusing on specifics. Over the years he bombarded the professor with concrete legislative proposals aimed at accomplishing narrow progressive goals. He demonstrated his concern for the plight of injured railroad workers, for example, by making this suggestion to Frankfurter in 1928:

Hasn't the time come for legislation bringing the RR's under compensation acts? If so this simple device might be suggested to John B. Andrews. Have Congress pass an act making it optional for RR's in any state that has the requisite compensation law, to elect to come under it in respect to its interstate operations; & wherever it does elect, make the state aid apply to all accidents happening within the state.⁹⁴

There is no evidence that Frankfurter acted on this proposal, although Brandeis mentioned it again in 1930,⁹⁵ but it is possible that the professor conveyed the idea orally to Washington contacts.

The pair obtained better results when Brandeis turned to one of the most persistent of labor grievances, the indiscriminate issuance of injunctions against workers during labor disputes. For years talk had circulated about an effective bill against labor injunctions, and Brandeis had scrutinized the various drafts and suggestions. On February 11, 1928, he wrote to Frankfurter:

Senator [Henrik] Shipstead was in last evening. His Anti-injunction bill is the result of his intimacy with Andrew Furuseth who almost lives at the Shipsteads [*sic*]. If the injunction bill (which I haven't seen) is not drawn as it should be, you can doubtless get it changed, as you deem wise. For the subcommittee of the judiciary consists of Tom Walsh, Norris and [John J.] Blaine. Furuseth is also intimate with the LaFollettes — breakfasts there every Sunday.⁹⁶

As it turned out, the bill, drawn by the self-taught labor leader Furuseth, had so many flaws that even friends of the principle of restricting injunctions could not support it. Given Brandeis's intimacy with young LaFollette, Walsh, Blaine (of Wisconsin) and Shipstead, it is not surprising that Frankfurter was called to Washington in May to help in the redrafting. Norris introduced the new bill on May 29, and after additional refining and amendment, it served as the basis for the Norris-LaGuardia Act of 1932.⁹⁷

94. Letter to F.F. (March 16, 1928), reprinted in V LETTERS, *supra* note 1, at 329-30. John B. Andrews was secretary of the American Association for Labor Legislation.

95. See Letter to F.F. (May 15, 1930) (located in the Frankfurter Mss.-LC, *supra* note 35).

96. Letter to F.F. (Feb. 11, 1928), reprinted in V LETTERS, *supra* note 1, at 322-23.

97. See Letter from George Norris to F.F. (May 5, 1928) (located in the Frankfurter Mss.-LC, *supra* note 35); Letter from F.F. to George Norris (June 21, 1928) (located in the Frankfurter Mss.-LC, *supra* note 35); Letter from George Norris to F.F. (Mar. 27, 1931) (located in the Frankfurter Mss.-LC, *supra* note 35); Letter from F.F. to George Norris (Mar. 30, 1931) (located in the Frankfurter Mss.-LC, *supra* note 35). For a clear account of the history of this legislation, see I. BERNSTEIN, THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER, 1920-1933, 391-415 (1960).

But Brandeis's interest in securing liberal legislative measures was not confined to labor laws. The Justice was deeply disturbed by the federal and state invasion of civil and political liberty during World War I. "I think the failure to attempt such redress as against government officials for the multitude of invasions during the war and post-war period is also as disgraceful as the illegal acts of the government and the pusillanimous action of our people in enacting the statutes which the states and nation put on the books," he wrote Frankfurter in June, 1926. "Americans should be reminded of the duty to litigate."⁹⁸ Three weeks later he was ready with a concrete suggestion:

Wouldn't it be possible to have some one in Congress move for a Claims Commission to make reparations to American citizens for the outrages incident to the Jan 20 [1920] Palmer raids? An article on the Sedition law reparations would prepare the way. And the move for appointment of the Commission might lead to diplomatic representations by foreign nations who have settled their debts & by Russia, when it is recognized.⁹⁹

Given Congress's constitutional power to shape the jurisdiction of the federal courts¹⁰⁰ and Brandeis's dissatisfaction with the existing jurisdictional standards, it was inevitable that the Justice would put Frankfurter to work on that legislative project as well. Through Frankfurter, Brandeis forwarded legislation designed to limit the diversity of citizenship jurisdiction of the federal courts. After floating the idea by various Congressmen (always asking Frankfurter to pass along his book, *The Business of the Supreme Court*,¹⁰¹ in order to further educate the lawmakers), Brandeis reported to the professor in March, 1928, that he had finally found a receptive ear in Congress:

R. Walton Moore is an "old Virginian of the best type" — now in his fifth term in Congress — formerly commerce counsel for the Southern carriers. When he dined with us Thursday, he volunteered the suggestion that the diversity of citizenship jurisdiction should be abridged. That led to my telling him I would ask you to send him your "Business" & his saying that with a little pushing (which he was ready to give) he thought a bill or bills could be put through, raising the jurisdictional amount & otherwise bringing abridgement. In the course of the talk, it was suggested that you & associates might be willing to

98. Letter to F.F. (June 25, 1926), reprinted in V LETTERS, *supra* note 1, at 225-26.

99. Letter to F.F. (July 16, 1926), reprinted in V LETTERS, *supra* note 1, at 229.

100. See *Turner v. Bank of North America*, 1 U.S. (4 Dall.) 8 (1799).

101. Authored by F.F. and his colleague James M. Landis, the book examined the development of the federal court system under the successive federal Judiciary Acts that had existed prior to 1925. The work attempted to illustrate how political and economic developments were reflected in the frequently changing procedures of the courts.

draw the desirable bills. I suggest now that you merely send him "Business" with a letter saying that you do so at my suggestion. I think he will answer, asking you to draw some bills etc. & furnish data. When the time comes for work on your part, [Henry J.] Friendly can, I think, be drafted by you.¹⁰²

When the Congressman reacted as anticipated, Brandeis sent Frankfurter the specifics:

R.W. Moore writes me that he has written you asking for draft or drafts of bill or bills . . . I should think limiting diversity of jurisdiction: (a) By raising the limit to \$10,000 — might escape serious opposition; (b) By excluding foreign corporations which have a usual place of business within the state (excepting interstate RR, telegraph & telephone companies) might get reasonable support. I make the exceptions only in order not to have the combined opposition of the utilities. What amendments are prepared, ought to be each by a separate bill & each bill as short as possible. I assume you will write Friendly.¹⁰³

Once drafted, these measures were submitted, by Moore, to the House Committee on the Judiciary, but they got no further.

The Supreme Court's decision in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*,¹⁰⁴ one month later, intensified the efforts of Brandeis and Frankfurter to restrict the jurisdiction of the federal courts. The case highlighted some of the problems caused by diversity of citizenship jurisdiction. The Brown & Yellow Taxi Company enjoyed a monopoly of service from the Louisville railroad station. Knowing that it would lose in the Kentucky *state* courts if challenged by the rival Black & White Company, it rechartered itself in Tennessee and brought suit in *federal* court to preserve its monopoly. Under the prevailing doctrine of *Swift v. Tyson*,¹⁰⁵ the federal courts were not bound to follow the state's common-law monopoly rules. Thus when the case came to the Supreme Court, a six-man majority upheld the arrangement. Brandeis joined Holmes in a vigorous dissent.

But he did more than that. Responding to a Frankfurter inquiry, Brandeis sent specific legislative suggestions and instructions designed to overturn the decision of his brethren on the Court:

I think it would be an excellent idea to draft a bill to correct the alleged rule acted on as to general law in the Black & White taxi case. The

102. Letter to F.F. (Mar. 4, 1928), reprinted in V LETTERS, *supra* note 1, at 326-28. Friendly was a former F.F. student who was serving as L.D.B.'s law clerk for the 1927-1928 Term. At the urging of L.D.B. and F.F., Friendly became an expert in the diversity of citizenship question. See Friendly, *The Historical Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928).

103. Letter to F.F. (Mar. 16, 1928), reprinted in V LETTERS, *supra* note 1, at 329-30.

104. 276 U.S. 518 (1928).

105. 41 U.S. (16 Pet.) 1 (1842).

draft bill should go to Sen. Tom Walsh. He sat through the reading of the opinions, seated in a front seat, & seemed much interested.

2. Another bill should be drawn, correcting the court's error in construction of the Fed Statutes as to what is a fraud on its jurisdiction. Such action as was taken in the Black & White Case, ought to be prohibited whether strictly a fraud or not. That bill should go to Judge [R. Walton] Moore.

3. Another bill should be drafted to put an end to removals, where there is a several controversy. That provision is being construed as removing the whole cause — an obvious injustice to those defendants who want to remain in the State Court, & to the pl[ainti]ff. That bill also should go to Judge Moore.¹⁰⁶

Two days later, Frankfurter sent the corrective measure to Senator Walsh with a letter denouncing the doctrine of *Swift v. Tyson* and suggesting that the *Black and White* case “shows that there are no limits to this abuse, and plainly calls for remedial legislation by Congress.”¹⁰⁷ Walsh responded that he would gladly introduce the bill, and he did so a week after receiving it.¹⁰⁸ Though Frankfurter continued to advise regarding strategies to defend the bill in Senate hearings, it never passed.

On the same day that Frankfurter received Brandeis's suggestions for new diversity jurisdiction statutes, he also got an invitation from Senator Norris to join a legislative drafting session dealing with the same general area. This gave him another opportunity to push the Brandeis proposals.¹⁰⁹ Despite Brandeis's prediction that “the Norris-Walsh-Blaine connection should be fruitful in coming years,”¹¹⁰ little came from their efforts. Frankfurter sent Norris six proposed measures and supporting memoranda designed to restrict federal jurisdiction, but Congress never acted. The professor was reduced to reminding Norris, over the next decade, of the need for the legislation.¹¹¹ Finally, in 1938, the Supreme Court eliminated much of the need for such laws with its ruling in *Erie v. Tompkins*, which

106. Letter to F.F. (Apr. 21, 1928), reprinted in V LETTERS, *supra* note 1, at 336-37.

107. Letter from F.F. to Senator Thomas Walsh (Apr. 23, 1928) (located in the Frankfurter Mss.-LC, *supra* note 35).

108. See Letter from Senator Thomas Walsh to F.F. (Apr. 27, 1928) (located in the Frankfurter Mss.-LC, *supra* note 35); S. 433, 70th Cong., 1st Sess. (1928).

109. See Letter from George Norris to F.F. (Apr. 21, 1928) (located in the Frankfurter Mss.-LC, *supra* note 35).

110. Letter to F.F. (May 19, 1928) (located in the Frankfurter Mss.-LC, *supra* note 35).

111. For examples, see the following letters from F.F. to George Norris: (May 15, 1929); (Jan. 5, 1932); (Mar. 10, 1932); (Apr. 13, 1932); (Feb. 18, 1936); (Mar. 4, 1936); (Apr. 2, 1936) (all located in the Frankfurter Mss.-LC, *supra* note 35). In addition, see the following letters from George Norris to F.F.: (Mar. 11, 1932); (Apr. 6, 1932); (Feb. 22, 1936); (Mar. 24, 1926) (all located in the Frankfurter Mss.-LC, *supra* note 35).

overturned the *Swift* doctrine.¹¹² Fittingly, the *Erie* decision was written by Louis Brandeis.

Brandeis's suggestions and requests to Frankfurter relating to the executive branch of the government were fewer. During the Wilson administration, of course, the Justice had his own wide-ranging contacts in Washington and did not need Frankfurter's assistance in presenting his proposals. Then, because of the vast gulf between the views of the two men and the Republican administrations of the 1920s, there were few opportunities for fruitful lobbying. Nevertheless, on several occasions Frankfurter's contacts in the executive branch proved useful.

During the war, for instance, Brandeis used Frankfurter to persuade Colonel Edward M. House to seek the Justice's advice on the perplexing problems of wartime mobilization.¹¹³ The Colonel's request enabled Brandeis to begin his long memorandum, "You have asked my opinion of the . . . War Industry Board and Committees. . . ."¹¹⁴ This advice eventually resulted in the creation of the War Labor Policies Board in 1918. After an intense effort to draft Brandeis to head the Board, the appointment went instead to one of the Justice's friends — Felix Frankfurter.¹¹⁵

In 1929 President Hoover established the National Commission on Law Observance and Enforcement to study the entire system of administering criminal justice in the United States. Hoover sent for Brandeis in March to discuss the Commission, and the Justice immediately reported to Frankfurter: "What he needs & so far has failed to think of is a man for chairman — someone, who besides other qualities, can dramatize the situation. If you can think of the right man, wire me."¹¹⁶ Frankfurter responded over the next few weeks with a series of names for chairman, for members of the Commission, and for positions on the legal staff.¹¹⁷ A number of the men proposed by Frankfurter were eventually appointed. The chairmanship, however, went to Brandeis's old foe from the Pinchot-Ballinger

112. 304 U.S. 64 (1938).

113. See 13 Edward M. House Diaries 11 (Jan. 9, 1918), Edward M. House Manuscripts, Sterling Library, Yale University, New Haven, Connecticut.

114. Letter to Edward M. House (Jan. 9, 1918), reprinted in IV LETTERS, *supra* note 1, at 332-34.

115. See L. BAKER, *supra* note 19, at 77-78; A. MASON, *supra* note 2, at 524-26.

116. Letter to F.F. (Mar. 17, 1929), reprinted in V LETTERS, *supra* note 1, at 374.

117. See the following letters to F.F.: (Mar. 13, 1929), reprinted in V LETTERS, *supra* note 1, at 372-73; (Apr. 3, 1929), reprinted in V LETTERS, *supra* note 1, at 375; (Apr. 21, 1929), reprinted in V LETTERS, *supra* note 1, at 377; (Apr. 28, 1929), reprinted in V LETTERS, *supra* note 1, at 378-79.

conservation controversy of 1910, former Attorney General George Wickersham. Undeterred, Brandeis wrote a number of suggestions for the investigation and sent them to Frankfurter, to be passed on to Wickersham.¹¹⁸

Brandeis also availed himself of the opportunity, through Frankfurter, to lobby a rising star on the political horizon, Franklin D. Roosevelt. Fully aware of the already intimate relationship between Frankfurter and the New York gubernatorial candidate, Brandeis asked the professor to carry a message: "If, as I expect, Roosevelt is elected, I should like through you to put in early two requests: (a) Far reaching attack on 'the Third Degree', (b) Good Counsel in N.Y.'s cases before our Court."¹¹⁹ After Frankfurter offered to arrange a meeting, Brandeis responded that "If I should chance to see Franklin Roosevelt, I should not hesitate to talk with him about my two requests. But I think it entirely unnecessary that I should see him."¹²⁰ When a conference could not be arranged, Frankfurter presented Brandeis's proposals in person to the Governor-elect.¹²¹ Needless to say, this first triangular discussion of public policy presaged a promising arrangement that would be perfected in the 1930s.

Many of the political proposals made by Brandeis and pushed by Frankfurter during this period suffered a similar fate. Although their joint efforts — to defend experiments in social legislation, to limit injunctions against labor, to suggest new federal responsibilities, to reform the judicial system and establish a "brain trust" of progressive intellectuals — were pregnant with possibilities for the future, they achieved little in the short run. The years of war and of conservative Republican leadership were generally unhappy ones for American progressives. Although the progressive impulse never entirely disappeared,¹²² and although Brandeis and Frankfurter were at the center of efforts to keep that spirit alive, the accomplishments of the reformers were meager.

Brandeis realized that the 1920s offered little but frustration for progressive reform. Everywhere he saw rampant materialism accomplishing "the gentle enslavement of our people."¹²³ "If my his-

118. See, e.g., Letter to F.F. (June 15, 1929), reprinted in *V LETTERS*, *supra* note 1, at 380-81.

119. Letter to F.F. (Nov. 4, 1928), quoted in *V LETTERS*, *supra* note 1, at 364 n.2.

120. Letter to F.F. (Nov. 14, 1928), reprinted in *V LETTERS*, *supra* note 1, at 363.

121. See *ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE — 1928-1945*, 39-40 (M. Freedman ed. 1967).

122. See Link, *What Happened to the Progressive Movement in the 1920's?*, 64 *AM. HIST. REV.* 833, 844-47 (1959). In addition, see the sources cited in note 262 *infra*.

123. Letter to F.F. (Nov. 8, 1925), reprinted in *V LETTERS*, *supra* note 1, at 192-93.

tory isn't wrong," he wrote to Frankfurter out of the depths of the Coolidge administration, "we are now passing through the first experience in 50 years of actual retreat in social, political, economic progress as evidenced by legislation. Heretofore we had times of unrest, and reactionary administrations or reactionary public opinion, but never actual retreat."¹²⁴

The Justice's advice to reformers in a time of political "retreat" was twofold. First, he counselled patience. Once, in 1927, when his brother sent a discouraged report about the lack of progress in the family's attempts to improve the University of Louisville and called into question the Justice's steadfast optimism, Brandeis replied, "When I said our project is 'irresistible,' I didn't mean that obstacles would vanish in the winking of an eye, and walls tumble before the blowing of the horn." Meaningful reform, he pointed out, required "patience, persistence and tact. But with these, and time, I am convinced there is good reason to expect a worthy achievement."¹²⁵ When affairs at the University worsened, he repeated the message: "Don't be discouraged. The future has many good things in store for those who can wait, and have patience and exercise good judgment."¹²⁶

The second response that Brandeis recommended, in the face of the anti-reform sentiment of the 1920s, was the relentless, remorseless effort to educate the public. As he explained to Frankfurter during their campaign to eliminate the practice of domestic espionage:

It may take a generation to rid our country of this pest, but I think it probably can be done, if the effort is persistent and we are prepared for action when, in the course of time, 'the day' comes Knowledge—detailed & put into effective usable forms is the foundation onto which to build. The machinery for collecting the data must be perfected.¹²⁷

In short, in a time of political conservatism, the dedicated progressive should be neither discouraged nor idle. While awaiting a better day, the crucial task was to gather social data, put it into "usable forms," and lay it before the public so that when the better day came, reformers would find the public informed, prepared and ready to act.

124. Letter to F.F. (Feb. 26, 1926) (located in the Frankfurter Mss.-LC, *supra* note 35).

125. Letter to Alfred Brandeis (Jan. 16, 1927), *reprinted in V LETTERS, supra* note 1, at 261-67.

126. Letter to Alfred Brandeis (Nov. 29, 1927), *reprinted in V LETTERS, supra* note 1, at 315.

127. Letter to F.F. (June 23, 1926), *reprinted in V LETTERS, supra* note 1, at 224-25.

V

Brandeis was willing to follow his own advice; and in his personal efforts to "educate" Americans, he used Felix Frankfurter to the fullest measure. Brandeis felt constrained to confine his own public remarks to judicial opinions; and he politely declined countless invitations to give speeches and interviews. Nevertheless, through Frankfurter, he managed to maintain a running commentary on virtually all aspects of American life. The Harvard professor's contacts on such liberal organs as the *New York World*, the *Boston Herald*, the *Nation*, and the *Survey*, opened a vast audience of potentially educable citizens to the Justice. Over the years, Brandeis quietly sent Frankfurter scores of suggestions for articles and editorials, and the professor worked diligently, and with remarkable effectiveness, to get a large number of these ideas before the public.

No publication offered Brandeis better opportunities for disseminating his views than the *New Republic*. Frankfurter was a trustee for the magazine, and Herbert Croly, the journal's editor, was one of the professor's closest friends. Brandeis especially valued this connection because of the *New Republic's* enormous influence.¹²⁸ Not content merely with sending Frankfurter dozens of suggestions for articles, the Justice kept a close watch on the magazine's editorial philosophy, and occasionally even attempted to define its general direction and approach:

A. If the N.R. is to justify by its influence & results the sacrifices made for it — it must be — in the period ahead of us — more concrete in its undertakings.

B. It must be more a journal of fact — than of opinion; which latter is apt to be regarded as mushy. That is — it must make its opinions tell through facts, which by their selection & method of presentation argue themselves. And in the end, facts must be presented stripped for action.

C. Its task of improving affairs must be accomplished by directing thought, & propelling influence persistently against specific evils.¹²⁹

Later, when Croly announced three special issues — one on education, another on the teaching of English literature, and a fall literary number — Brandeis exploded. "The editor," he told Frankfurter, "must seek to hold the readers' interest, not by diversions, but by skillful presentation of the varieties of experience of the pilgrims plodding the weary way." He was annoyed by the *New Republic's* apparent lack of direction: "The pathfinder must possess and exer-

128. For the development of the *New Republic* see C. FORCEY, *THE CROSSROADS OF LIBERALISM: CROLY, WEYL, LIPPMANN AND THE PROGRESSIVE ERA, 1900-1925* (1961).

129. Letter to F.F. (Dec. 1, 1920), reprinted in IV LETTERS, *supra* note 1, at 514-15.

cise insight, judgment, decision. There must be neither deviation nor dissipation, no pleasing 'abstecher' [excursions] to explore interesting ruins, to gather rare flowers, or even to kill a noxious animal Every article must follow the same general direction. And the direction must be pursued without change."¹³⁰

Thus, Brandeis was more than just an anonymous contributor to the *New Republic*; he was very nearly a member of its editorial staff, *in absentia*. And like the other editors, Brandeis poured forth his suggestions for the journal — but he poured them forth through Felix Frankfurter. Between September 4 and October 2, 1922, for instance, Brandeis sent Frankfurter his "last will and testament" before submerging himself in the work of the Court for the coming October term. The documents were extensive memoranda on issues that Brandeis thought merited serious editorial treatment by the *New Republic*: prohibition, capitalism, transportation, labor-saving devices, general economic problems.¹³¹ Although he told Frankfurter that the exercise was merely to "clarify my own mind as to what was desirable," and that therefore he was not sending his ideas directly to Croly, nevertheless, "[i]f, and so far as, you may deem the views expressed valuable and you have the opportunity to present them personally at any meeting of the N.R. board . . . , I have of course no objection to your doing whatever your judgment dictates."¹³² Naturally, Frankfurter wasted little time in bringing the sheaf of papers to Croly's attention; and soon the ideas contained in Brandeis's letters began appearing in print. For example, Brandeis's comment to Frankfurter that "the N.R. should not let Sec[retar]y [of Labor, James J.] Davis' idea of normalcy — 1,500,000 unemployed & 1,500,000 part employed — pass unnoticed," was translated, three weeks later, into the *New Republic* editorial "'Normalcy' in Unemployment."¹³³ Another of Brandeis's memoranda — proposing a plan for preventing debilitating coal and rail strikes — was published in the *New Republic* as an unsigned article.¹³⁴

In the following years, Brandeis maintained a rapid-fire diagno-

130. Letter to F.F. (Sept. 6, 1922), reprinted in V LETTERS, *supra* note 1, at 62-63.

131. See the following letters to F.F.: (Sept. 4, 1922), reprinted in V LETTERS, *supra* note 1, at 59; (Sept. 24, 1922), reprinted in V LETTERS, *supra* note 1, at 64; (Sept. 25, 1922), reprinted in V LETTERS, *supra* note 1, at 65; (Sept. 30, 1922), reprinted in V LETTERS, *supra* note 1, at 65-71.

132. Letter to F.F. (Oct. 2, 1922), reprinted in V LETTERS, *supra* note 1, at 71-72.

133. For L.D.B.'s comment, see Letter to F.F. (Sept. 15, 1922) (located in the Frankfurter Mss.-LC, *supra* note 35); for the journal's editorial, see "'Normalcy' in Unemployment, 32 NEW REPUBLIC 163 (1922).

134. For L.D.B.'s suggestion, see Letter to F.F. (Sept. 4, 1922), reprinted in V LETTERS, *supra* note 1, at 59-62; for the journal's version of the letter, see *What to Do*, 32 NEW REPUBLIC 136 (1922).

sis of daily events, together with suggestions to Frankfurter of topics that might be worthy of treatment in one or more of the liberal periodicals. During the debate over the Judiciary Act of 1925, for example, Brandeis wrote out his personal reflections on the work of the Supreme Court; those reflections, closely paraphrased, appeared in the February 25, 1925 issue of the *New Republic*.¹³⁵ Similarly, Brandeis urged Frankfurter to press his journalist friends to publish the Justice's analyses of the 1924 Immigration Act,¹³⁶ the McNary-Haugen bill on agricultural surpluses,¹³⁷ the character of Charles Lindbergh,¹³⁸ the stubborn silence of Coolidge on the Teapot Dome scandal,¹³⁹ and the high quality of Hoover's new Attorney General.¹⁴⁰ Through Frankfurter Brandeis also suggested articles or editorials on the plight of the impoverished farmers,¹⁴¹ the danger of big money influencing the Pennsylvania elections,¹⁴² the inaccuracy of government unemployment figures,¹⁴³ and the need for lifting the morale of presidential candidate Al Smith's supporters.¹⁴⁴

Since many of Brandeis's ideas for liberal periodicals required additional research, he often contented himself with the suggestion and let Frankfurter choose the author. But sometimes Brandeis had ideas about who the author should be:

Wouldn't it be worthwhile (if W.D. Lane is not already writing for the Nation) that V[illard, editor of the *Nation*] get him to write. The Nation, the N.R. & the Survey ought to avail of his knowledge of the coal problem already acquired, & make it possible for him to develop the authority on the subject & see it through. It's a long pull. But we need such experts on fundamental problems and there ought to be such cooperation of publications.¹⁴⁵

Three months later, the *Survey* did begin a three-part series by Win-

135. L.D.B. suggested that the Supreme Court remained esteemed because its workload had been kept to one which nine men could handle. See Letter to F.F. (Feb. 6, 1925), reprinted in V LETTERS, *supra* note 1, at 160. The journal's paraphrase appears at 42 NEW REPUBLIC 3-4 (1925).

136. See Letter to F.F. (June 3, 1924), reprinted in V LETTERS, *supra* note 1, at 131-32.

137. See Letter to F.F. (Dec. 5, 1926), reprinted in V LETTERS, *supra* note 1, at 251.

138. See Letter to F.F. (May 25, 1927), reprinted in V LETTERS, *supra* note 1, at 287-88.

139. See Letter to F.F. (Mar. 4, 1928), reprinted in V LETTERS, *supra* note 1, at 326-28.

140. See Letter to F.F. (Mar. 1, 1929), reprinted in V LETTERS, *supra* note 1, at 370-71. L.D.B.'s praise of that Attorney General, William D. Mitchell, was incorporated in an editorial, *A Fine Appointment*, 58 NEW REPUBLIC 84 (Mar. 13, 1929).

141. See Letter to F.F. (Jan. 24, 1926), reprinted in V LETTERS, *supra* note 1, at 203-05.

142. See Letter to F.F. (June 25, 1926), reprinted in V LETTERS, *supra* note 1, at 225-26.

143. See Letter to F.F. (Mar. 29, 1928), reprinted in V LETTERS, *supra* note 1, at 333-34.

144. See Letter to F.F. (Sept. 2, 1928), reprinted in V LETTERS, *supra* note 1, at 352.

145. Letter to F.F. (Nov. 9, 1921), reprinted in V LETTERS, *supra* note 1, at 30.

throp Lane on the problems of the coal industry.¹⁴⁶ In a similar fashion, some of the views outlined by Brandeis on tax-exempt securities appeared in a *New Republic* article on that topic, authored by Edward S. Corwin of Princeton,¹⁴⁷ and Frankfurter himself followed up on some of Brandeis's proposals by preparing and signing an article on prohibition.¹⁴⁸ Brandeis also suggested to Frankfurter that someone discuss the Coolidge administration's "debauching [of] the judiciary with inexcusable appointments,"¹⁴⁹ President Coolidge's handling of the unemployment problem,¹⁵⁰ and the Interstate Commerce Commission's recent railroad rulings.¹⁵¹

In other suggestions to Frankfurter, Brandeis went beyond simply proposing a topic for treatment in one of the liberal periodicals. He provided an extensive outline of the analysis he thought should be used in pursuing the idea. For example, after reporting to Frankfurter that he had encouraged Charles Merz, then a *New Republic* staffer, to take up the question of domestic espionage, Brandeis proceeded to explain to Frankfurter where the data might come from and the point of view the articles should take:

If Croly thinks well of this suggestion & the articles — & takes them if written — it seems to me important that the attack on espionage be not confined to industrial espionage. That is merely one bad application of a practice. The fundamental objection to espionage is (1) that espionage demoralizes every human being who participates in or uses the results of espionage; (2) that it takes sweetness & confidence out of life; (3) that it takes away the special manly qualities of honor & generosity which were marked in Americans.

It is like the tipping system an import from Continental Europe & the Near East only a thousand times worse. If Croly takes up the fight for its eradication — the immorality — the ungentlemanliness — should be made the keynote, & not the industrial wrong or infringement of liberty as in the Red Campaign.

*It is un-American. It is nasty. It is nauseating.*¹⁵²

Ten weeks later the *New Republic* began a seven-part series on the problem of domestic espionage.¹⁵³ Other articles Justice Brandeis

146. See *Miners in Distress*, 47 SURVEY 786 (1922); *Breaking the Miners*, 47 SURVEY 887 (1922); *Black Avalanche*, 47 SURVEY 1002 (1922).

147. Compare Letter to F.F. (Jan. 4, 1923), reprinted in V LETTERS, *supra* note 1, at 83, with Corwin, *Tax-Exempt Securities*, 33 NEW REPUBLIC 243 (1923).

148. Compare Letter to F.F. (Sept. 25, 1922), reprinted in V LETTERS, *supra* note 1, at 65, with Frankfurter, *What Has Prohibition Done to America?*, 32 NEW REPUBLIC 305 (1922).

149. Letter to F.F. (Feb. 22, 1928), reprinted in V LETTERS, *supra* note 1, at 323-25.

150. See Letter to F.F. (Mar. 29, 1928), reprinted in V LETTERS, *supra* note 1, at 333-34.

151. See Letter to F.F. (July 21, 1929), reprinted in V LETTERS, *supra* note 1, at 381.

152. Letter to F.F. (Nov. 26, 1920), reprinted in IV LETTERS, *supra* note 1, at 510-11 (emphasis original).

153. See Howard, *The Labor Spy* (pts. 1-2), 25 NEW REPUBLIC 338, 362 (1921); *id.* (pts. 3-

outlined to Frankfurter covered such diverse topics as the "closed shop,"¹⁵⁴ the economic difficulties of the merchant marine,¹⁵⁵ and the deficiencies of Herbert Hoover as Secretary of Commerce.¹⁵⁶

The sheer volume of Brandeis's suggestions for sympathetic newspapers and magazines was staggering. Once, in March, 1921, Croly fell behind in implementing some of Brandeis's ideas, and he sent his regrets to Washington, through Frankfurter. Brandeis replied understandingly: "I am sorry Croly was bothered about supposed delay in acting on suggestions. He must not let himself be hereafter."¹⁵⁷ But before the month was out, Brandeis had fired off to Frankfurter four brand new proposals for Croly to ponder.

If Justice Brandeis used Frankfurter to "educate" the general public through the popular press, he also used him to enlighten the legal community. Probably no person in the United States was better situated to influence legal opinion than Frankfurter; and Brandeis unhesitatingly tapped the professor's boundless energy, his many contacts among leading legal minds, and even the bright young students in his seminars. Again and again Brandeis pointed out legal problems, suggested and even outlined articles, and virtually collaborated with Frankfurter in encouraging certain lines of discussion in legal journals. And once more, Frankfurter proved himself an effective and tireless conduit for Brandeis's ideas.

In the first place, Brandeis discovered that he could amplify his prior judicial opinions through Frankfurter. After his monumental dissent in the *Olmstead* wiretap case,¹⁵⁸ for example, Brandeis suggested to Frankfurter that "some reviewer . . . will discern that in favor of property the Constitution is liberally construed — in favor

7), 26 NEW REPUBLIC 13, 39, 62, 98, 129 (1921). The series, which later appeared in book form as *THE LABOR SPY* (1921), was written by Sidney Howard, the man L.D.B. had suggested should be the author. The editor's introduction leaves no doubt as to L.D.B.'s influence:

The spy system "is a system based on the negation of honor and good faith in human relationships, and is bound to breed dishonor and bad faith wherever it is introduced.

There is very little room, if any, for private espionage in a republic. It violates every sound tradition and every sound instinct of republican government. For it introduces into the inner circles of western life an attitude of mind that belongs to the intrigue and conspiracy of an Oriental court . . . Loyalty to American ideals is incompatible with this practice. It is 100 per cent un-American."

Id. at 338.

154. See Letter to F.F. (Nov. 26, 1920), reprinted in IV LETTERS, *supra* note 1, at 510-11.

155. Compare Letter to F.F. (Sept. 20, 1921), reprinted in V LETTERS, *supra* note 1, at 15, with Clapp, *The American Transportation System*, 30 NEW REPUBLIC 72-75 (Mar. 15, 1922).

156. See Letter to F.F. (May 20, 1923), reprinted in V LETTERS, *supra* note 1, at 95-96; Letter to F.F. (Jan. 6, 1926), reprinted in V LETTERS, *supra* note 1, at 199.

157. Letter to F.F. (Mar. 2, 1921), reprinted in IV LETTERS, *supra* note 1, at 537-38.

158. *Olmstead v. United States*, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

of liberty, strictly."¹⁵⁹ On another occasion, after he had joined Holmes in dissent, Brandeis advised Frankfurter: "In connection with the Craig Contempt case, this point arising incidentally should receive separate treatment. The absurdity of the running of a municipal utility being committed for years to a Federal Court, in a state which is the financial center of America & where probably nearly all the utility's securities are held."¹⁶⁰ In one instance, when Brandeis joined the majority in striking down a federal child labor law,¹⁶¹ he hastened to explain to Frankfurter how the decision should be interpreted:

The N[ew]. R[epublic]., The Survey & like periodicals should not be permitted to misunderstand yesterday's decisions on the Child Labor and Board of Trade¹⁶² cases & should be made to see that holding these [acts] invalid is wholly unlike holding invalid the ordinary welfare legislation. That is that we here deal (1) with the distribution of functions between State & Federal Governments [and] (2) with the attempt at dishonest use of the taxing power.¹⁶³

Through Frankfurter, Brandeis also launched a concerted attack on the Supreme Court's use of *per curiam* opinions and opinionless denials of *certiorari*. Brandeis strongly believed that the Court had an obligation to issue brief, separate opinions when employing those judicial devices, and he detested the Court's long tradition of magisterial silence in such cases. One weapon against the silence was to attempt to speak through Frankfurter's access to the influential *Harvard Law Review*. In October, 1926, for example, Brandeis wrote Frankfurter:

The HLR should not miss, or fail to treat adequately No. 230, Industrial Com[mission] v. Terry & Tench Co., in which we reversed N.Y. C[ourt of]. A[ppeals]. (Cardozo) in a P.C. — !! The significance of the decision, in connection with some other recent ones on the same general subject might be made clear.¹⁶⁴

The appropriate note soon appeared in the *Review*.¹⁶⁵ Six months later, Brandeis alerted Frankfurter that "in June or Nov. [issue of the *Harvard Law Review*] there should be an expansive note — or an

159. Letter to F.F. (June 15, 1928), reprinted in V LETTERS, *supra* note 1, at 344-45.

160. Letter to F.F. (Nov. 20, 1923), reprinted in V LETTERS, *supra* note 1, at 104-06. The case was *Craig v. Hecht*, 263 U.S. 255 (1923).

161. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

162. *Hill v. Wallace*, 259 U.S. 44 (1922).

163. Letter to F.F. (May 16, 1922), reprinted in V LETTERS, *supra* note 1, at 53 n.3.

164. Letter to F.F. (Oct. 15, 1926), reprinted in V LETTERS, *supra* note 1, at 235-36. The case was *State Indus. Bd. of New York v. Terry & Tench Co.*, 273 U.S. 639 (1926).

165. 40 HARV. L. REV. 485 (1927).

article apropos P.C. in Pinkerton Case.”¹⁶⁶ Similarly, in December, 1927, a disgusted Brandeis complained to Frankfurter that “[a]mong yesterday’s shower of P.C.s are several worthy of H.L.R. notes — and one, Standard Oil Co. v. City of Lincoln, which should be blazoned in an article.”¹⁶⁷

Brandeis registered objections to the Court’s *per curiam* and *certiorari* practices by having Frankfurter arrange not only commentary on some of the cases, but also an article directly criticizing the practices. To insure that the professor would obtain necessary data, Brandeis directed his clerk “to send . . . from time to time instances of P.C.’s & of Certs granted or denied that deserve study.”¹⁶⁸ Beginning in July, 1927, Brandeis began pushing for a general article on each problem: “The subject of Certiorari, and of Per Curiam ought to get full treatment after intensive study. These should be treated each in a separate article when the time comes. Possibly some of your students may as a result of this year’s seminar be able to take up the matter.”¹⁶⁹ Brandeis waited three more months before raising the issue again: “Some day you must have an article in H.L.R. reviewing the Cert. work since Feb 13 1925 act, and another article on the P.C.’s.”¹⁷⁰ Finally, in 1928, Frankfurter and James M. Landis published “The Supreme Court Under the Judiciary Act of 1925” in the *Harvard Law Review*.¹⁷¹ And in early 1929, Frankfurter included revealing statistics in his annual review of the Supreme Court’s work.¹⁷² But rather than satisfying Brandeis, these articles merely whetted the Justice’s appetite for more thorough studies of *per curiam* and *certiorari* practices. In praising Frankfurter’s review of the 1928 Term, Brandeis revealed both his dogged persistence and his true purpose — educating his fellow judges:

October Term 28 Business [of the Supreme Court] is grand. If any of my brethren read it thoughtfully, they will find many problems to be solved. I hope that, with your enlarged numbers in the Seminar, you will be able to have made or started the comprehensive studies of Per

166. Letter to F.F. (Apr. 20, 1927) (located in Frankfurter Mss.-LC, *supra* note 35). The case was *Pinkerton v. Wengert*, 274 U.S. 712 (1927).

167. Letter to F.F. (Dec. 6, 1927), *reprinted in* V LETTERS, *supra* note 1, at 315-16. The case was *Standard Oil Co. v. City of Lincoln*, 275 U.S. 504 (1927). For the arguments, see 114 Neb. 243, 207 N.W. 172 (1926). The case was discussed briefly at 41 HARV. L. REV. 777-78 (1928).

168. Letter to F.F. (Nov. 13, 1927), *reprinted in* V LETTERS, *supra* note 1, at 309-10.

169. Letter to F.F. (July 29, 1927) (located in Frankfurter Mss.-LC, *supra* note 35).

170. Letter to F.F. (Oct. 29, 1927), *reprinted in* V LETTERS, *supra* note 1, at 305-06.

171. 42 HARV. L. REV. 1 (1928).

172. See Frankfurter, *The Business of the Supreme Court at October Term, 1928*, 43 HARV. L. REV. 33 (1929).

Curs. and of Certs. In connection with the former, consideration should be from what the form of P.C. should be — obviously, more should be said than at present. And consideration should also be given as to whether the reasons for denial of a Cert. should not be stated in general terms.¹⁷³

Brandeis by no means confined his requests for legal articles to the problems of *per curiam* and *certiorari* practices. He flung his ideas at Frankfurter, sometimes two or three at a time:

1. [I]t would be well to have made clear to the states, how they could avoid in tax cases the enjoining of their tax collections through suits in federal court — by removing the possibility of the claim there is no adequate remedy in the state courts, if the tax is paid etc. There ought to be a whole article devoted to this subject, so that even those who need the Kindergarten course could understand. And copies of the [Harvard Law] Review should go to the high state taxing officials & the Att[orne]ys General etc.
2. I think there ought to be worked out also an article showing how, by appropriate changes in state criminal administration, the excuse for going into federal Equity courts for injunction because of claim of irreparable damage, due to multiplicity of suits & oppressive penalties, before the final adjudication of validity, could be obviated.
3. By careful work on these & cognate lines, with state cooperation which seems now procurable, the whole illegitimate brood of such resorts to equity & the federal courts could be stamped out.
4. In 87 etc.¹⁷⁴ I have endeavored to make clear, as a matter of statutory construction the 'occupying the field' doctrine. I think the states could be taught, by a similar ABC article that, if they wish to preserve their police power, they should, through the 'state block' in Congress, see to it in every class of Congressional legislation that the state rights which they desire to preserve be expressly provided for in the acts.¹⁷⁵

Brandeis also asked Frankfurter to write about the abuses of the "contempt of court" power,¹⁷⁶ about the heavy reversals against the 2nd and 8th Circuit Courts,¹⁷⁷ and about other legal topics as well.

Brandeis also used Frankfurter to protest the flooding of the Court's dockets with what he viewed as spurious cases:

I am inclined to think that the most copious & futile of the single wastes of our Court's efforts have been in the Federal Liability Cases both (a) before the Sept 6, 1916 Act, on writ of error and (b) since, in granting certioraris. It might be worthwhile to put one of your jurisdiction sharps on that enquiry.¹⁷⁸

173. Letter to F.F. (Dec. 21, 1929) (located in Frankfurter Mss.-LC, *supra* note 35).

174. *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605 (1926).

175. Letter to F.F. (Nov. 30, 1926), *reprinted in V LETTERS, supra* note 1, at 247-48.

176. *See* Letter to F.F. (Aug. 15, 1926) (located in Frankfurter Mss.-LC, *supra* note 35).

177. *See* Letter to F.F. (June 2, 1927), *reprinted in V LETTERS, supra* note 1, at 290.

178. Letter to F.F. (May 2, 1926), *reprinted in V LETTERS, supra* note 1, at 221.

The Justice objected to the Court's practice under federal law of re-examining the decisions from the states' highest courts in this area. Frankfurter was unable to take up the issue speedily, and Brandeis grew more insistent: "I hope next year your Seminar will produce an article demonstrating the futility of our Grants of Certiorari's in Federal Em[ployer]. Liability Cases (1916-1927 Terms)."¹⁷⁹ Finally, Frankfurter included the statistics that demonstrated the point in his annual review article in the *Harvard Law Review*. The professor's statement that "[w]ithout undue dogmatism, it may be asserted that petitions for *certiorari* seeking review of Federal Employers' Liability cases are too readily granted,"¹⁸⁰ was backed by even greater authority than his readers could have suspected.

Not even as prolific a writer as Felix Frankfurter could alone have kept up with Brandeis's suggestions for legal articles; and the professor regularly passed particular ideas on to other writers and scholars. In this way, Charles Warren came to discuss early American attempts to amend the Constitution.¹⁸¹ Similarly, in his book, *The Investor Pays*, Max Lowenthal, a former Frankfurter student, dealt with some of the questions surrounding court patronage in the appointment of receivers in bankruptcy proceedings — an idea initially suggested by Brandeis to Frankfurter.¹⁸² Frankfurter also relayed Brandeis's helpful bits of information or suggestions to aid the legal work and writing of such men as Thomas R. Powell, C.C. Burlingham, Emory Buckner, Augustus Hand and Cuthbert Pound.¹⁸³

Often Brandeis simply spelled out an idea and offered a general suggestion to Frankfurter about what sort of an author should pursue the topic. During the Sacco-Vanzetti case, for example, Brandeis suggested that Frankfurter put "the appropriate man" on a study of the pardoning power in America,¹⁸⁴ and "some one with the competence" to collect American *causes celebres*.¹⁸⁵ He also proposed that Frankfurter locate "[s]ome political science man with a historical sense & style" to compare Prussia and Massachusetts in the area of

179. Letter to F.F. (Mar. 16, 1928), reprinted in V LETTERS, *supra* note 1, at 329-30.

180. See Frankfurter, *supra* note 172, at 52 (1929).

181. For L.D.B.'s original suggestion, see Letter to F.F. (June 16, 1922), reprinted in V LETTERS, *supra* note 1, at 52-53. For Warren's address to the Massachusetts Bar Association, see Warren, *The Early History of the Supreme Court of the United States in Connection with Modern Attacks on the Judiciary*, MASS. L. Q., Dec., 1922, at 1.

182. See Letter to F.F. (July 14, 1928), reprinted in V LETTERS, *supra* note 1, at 348.

183. See, e.g., Letter to F.F. (Jan. 10, 1926), reprinted in V LETTERS, *supra* note 1, at 200-01; Letter to F.F. (Jan. 24, 1926), reprinted in V LETTERS, *supra* note 1, at 203-05.

184. Letter to F.F. (July 28, 1927), reprinted in V LETTERS, *supra* note 1, at 297-98.

185. *Id.*

municipal authority,¹⁸⁶ and “some economist & government men” to examine the tax status of philanthropic foundations.¹⁸⁷ “Couldn’t you get started through your men a series for the HLR covering the danger of arbitrariness etc. in the several federal Depts & Bureaus?,” Brandeis wrote in June, 1926.¹⁸⁸ On another occasion, he suggested that “one of your seminars” might examine the possibility of establishing “official reviewers” to avoid patronage and ease the duties of judges.¹⁸⁹

But Brandeis also often suggested particular writers by name, leaving to Frankfurter the job of pursuing the assignment with the designated author. He asked Frankfurter to get James M. Landis to write an article for the *Harvard Law Review* on the Jurisdiction Act of 1925,¹⁹⁰ and he asked Frankfurter to collaborate with Henry J. Friendly and Landis in an exploration of the business of the lower federal courts.¹⁹¹ He proposed H.L. Shattuck for a taxation question.¹⁹² On June 23, 1926, he suggested that Frankfurter get two Harvard Law School professors — John M. Maguire and Edmund M. Morgan — to analyze the problem of domestic espionage by public servants.¹⁹³ Two days later, Brandeis suggested that Harvard professors Francis H. Bohlen and John Dickinson write articles in the *Harvard Law Review* “bearing on the redress for the invasion of civil and political rights through arbitrary etc. governmental action, by means of civil suits.”¹⁹⁴

One of Brandeis’s most successful efforts to educate the legal community grew out of his attempts to convince congressional progressives to curtail federal court jurisdiction.¹⁹⁵ The Justice flooded Frankfurter with ideas to develop:

Re curtailing jurisdiction on ground[s] of diversity of citizenship. Why should a plaintiff ever be permitted to sue in a federal court of the District of which he is a citizen & resident? Why should he be entitled to sue an alien in a federal court? Why should a consolidated & domesticated corporation ever have a right (under the diversity of citizen-

186. Letter to F.F. (Jan. 24, 1926), reprinted in V LETTERS, *supra* note 1, at 203-05.

187. Letter to F.F. (Dec. 21, 1926), reprinted in V LETTERS, *supra* note 1, at 255.

188. Letter to F.F. (June 22, 1926), reprinted in V LETTERS, *supra* note 1, at 224.

189. Letter to F.F. (July 14, 1928), reprinted in V LETTERS, *supra* note 1, at 348.

190. See Letter to F.F. (Mar. 8, 1925) (located in Frankfurter Mss.-LC, *supra* note 35); Frankfurter & Landis, *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System: Part VII. The Judiciary Act of 1925*, 40 HARV. L. REV. 834 (1927).

191. See Letter to F.F. (May 11, 1927) (located in Frankfurter Mss.-LC, *supra* note 35).

192. See Letter to F.F. (May 13, 1925), reprinted in V LETTERS, *supra* note 1, at 171-72.

193. See Letter to F.F. (June 23, 1926), reprinted in V LETTERS, *supra* note 1, at 224-25.

194. Letter to F.F. (June 25, 1926), reprinted in V LETTERS, *supra* note 1, at 226-27.

195. See notes 100-12 *supra* and accompanying text.

ship provision) to enter or removed [*sic*] to the federal court?¹⁹⁶

Ten months later, Brandeis expanded on these questions in another letter to Frankfurter:

With the rising tide against overloading federal courts, would it not be well to make some preparatory move toward reducing the civil jurisdictions? I suppose diversity of citizenship can't be wholly gotten rid of, in ordinary cases, but some nibbling might be done. How would it do to try to increase the limit from \$3000 to \$6000, or even higher? To take away removal in suits of shippers under interstate com[merce] laws (*So. Pacific v. Stewart* 245 U.S. 359, 362), similar to provision in Employer's Liability Act? Or even to further take away original jurisdiction? To reduce jurisdiction re national banks? Nibbling would do a lot of good, if persisted in.¹⁹⁷

Obviously, the Justice was seeking a forum beyond that presented by his impassioned dissents in cases like *Black & White Taxi Co.*¹⁹⁸ Finally, Frankfurter put his Federal Jurisdiction seminar on the problem and produced two articles which fully explored the area.¹⁹⁹ The articles persuasively advocated the legislation that Senators Norris and Walsh had introduced and that Brandeis and Frankfurter had indirectly drafted.²⁰⁰ The circle was completed in 1938, when Brandeis, writing for the majority in *Erie v. Tompkins*, cited one of the articles written by Frankfurter.²⁰¹ Thus Brandeis had influenced the content of articles in law journals to support a law which he and Frankfurter supported, and then used those articles to help persuade his colleagues on the Court to overturn the disfavored common-law rule. It was a classic example of how Brandeis's public "education" program was supposed to work.

VI

Inspiring articles in law journals was one way that Brandeis used Frankfurter to enlighten and to school the American legal community. But Brandeis was not content solely to leave his imprint on the

196. Letter to F.F. (Apr. 2, 1925), reprinted in V LETTERS, *supra* note 1, at 170.

197. Letter to F.F. (Feb. 1, 1926) (located in the Frankfurter Mss.-LC, *supra* note 35).

198. *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 532 (1928) (Brandeis, J., dissenting). See note 104 *supra* and accompanying text.

199. See Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499 (1928); Frankfurter, *Distribution of Judicial Power Between Courts of the United States and Courts of the States*, 99 N.J. BAR ASSN. J. 128 (1928).

200. See notes 106-09 *supra* and accompanying text.

201. 304 U.S. 64, 73 (1938). On the general question of the weapons available for influencing policy, see W. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* (1964). (The authors are grateful, in this connection, for suggestions from Professor James Eisenstein). For more on the public policy work of L.D.B. and F.F., see B. MURPHY, *JUSTICES AS POLITICIANS: THE EXTRAJUDICIAL ACTIVITIES OF JUSTICES LOUIS D. BRANDEIS AND FELIX FRANKFURTER* (publication forthcoming).

current generation of lawyers and judges. He understood that permanent reform required long-range efforts that would touch future generations of lawyers. For that reason he embarked upon some major efforts to improve the quality of legal education in the United States.²⁰² And once again Felix Frankfurter proved himself an invaluable lieutenant.

Brandeis's interest in legal education long antedated his association with Frankfurter. Indeed, Brandeis offered a course at Harvard Law School during the year that Frankfurter was born. His early article, "The Harvard Law School," filled with warm praise of the educational system which he had so recently experienced firsthand, appeared when Frankfurter was only six years old.²⁰³ Brandeis's relations with his *alma mater* had always been intimate. He helped found the Harvard Law School Association in 1886 and the *Harvard Law Review* in 1887. For many years he served as secretary of the Association and treasurer of the *Review*. Brandeis was a member of the Committee of Visitors to the Law School for a quarter of a century up to 1916 and, in that capacity, suggested curriculum changes and even evaluated instruction.²⁰⁴

His solicitude for Harvard did not flag after 1916. With Frankfurter a member of the faculty, Brandeis kept well informed about developments at the school. He was well versed in the internal politics of the faculty. He knew the names of the brightest students. Occasionally, he even scrutinized copies of Frankfurter's seminar papers and final examinations. "The examination papers are interesting," he once wrote Frankfurter. "Perhaps it is fortunate that we [judges] don't have to pass annual exams."²⁰⁵

One of Professor Frankfurter's most important services to Brandeis was to select each year a promising Harvard graduate to serve as Brandeis's law clerk. Brandeis specifically asked Frankfurter to send him young men who planned to pursue careers in legal education. "[O]ther things being equal," he instructed, "it is always preferable to take some one whom there is reason to believe will become a law teacher."²⁰⁶ Among the clerks Frankfurter sent, many became distinguished teachers. And Brandeis always felt regret about those who did not: "The satisfaction I had in having [Robert] Page and

202. See Urofsky, *Louis D. Brandeis on Legal Education*, 22 AM. J. LEGAL HIST. 189 (1978).

203. Brandeis, *The Harvard Law School*, GREEN BAG 10 (1889).

204. See Landis, *supra* note 41.

205. Letter to F.F. (June 16, 1922), reprinted in V LETTERS, *supra* note 1, at 52-53.

206. Letter to F.F. (Jan. 28, 1928), reprinted in V LETTERS, *supra* note 1, at 319-20.

[Henry J.] Friendly with me is a good deal mitigated by the thought of their present activities." Both men had rejected teaching for private practice. There was still hope, however, that Friendly "may reform and leave his occupation."²⁰⁷

Brandeis harbored a vision of what Harvard Law School should be, and he tried, through Frankfurter, to bring that vision into reality. His picture was spawned in part by his own happy remembrance of the School and in part by his general hatred of "the curse of bigness." He desperately wanted to keep Harvard Law School small, the way he remembered it; and that desire put him directly athwart the ambitions of Dean Roscoe Pound, who, like many another administrator, viewed expansion as a measure of success. When Dean Pound publicly presented his expansion plans in 1924, Brandeis politely registered "grave apprehensions." He told Frankfurter that there should be "frank recognition of the fact that numbers in excess of 1000, and the proposed 350 seats lecture halls & lectures, are irreconcilable with H.L.S. traditions & aims."²⁰⁸ And when Frankfurter moved to head off Pound's plans, Brandeis laid out the strategy in detail:

As to method of limitations: I think there should be strong insistence that in consideration of the subject, the questions should be definitely segregated:

- (a) whether limitation to, say, 1000 is desirable.
- (b) if so, the mind of man may be then put solely upon devising or selecting the best, or least objectionable means.
- (c) if not, the mind should proceed to devise the means which will make numbers least harmful.

. . . .

I have no definite views as to methods of selection. A field for wide research & inventive thought is open. A few things seem clear:

- (a) Limitations must *not* be effected by raising tuition fees.
- (b) The method must ensure national representation, geographically & in respect to colleges.
- (c) Provision must be made for star men (undergraduates) of other law schools.
- (d) Provision must be made for teachers of or those definitely preparing for teaching at other law schools.²⁰⁹

Brandeis also urged Frankfurter to press upon Harvard a mission better than reckless expansion. Brandeis proposed that Harvard should become a beacon of enlightenment to the nation's other law

207. Letter to F.F. (Oct. 13, 1929), reprinted in V LETTERS, *supra* note 1, at 403-04.

208. Letter to F.F. (Oct. 9, 1924), reprinted in V LETTERS, *supra* note 1, at 143-44.

209. Letter to F.F. (Oct. 25, 1924), reprinted in V LETTERS, *supra* note 1, at 146-47.

schools. He presented Frankfurter with the details of his alternative plan:

[M]ake frank avowal of a purpose to aid in building up the lesser schools. Then aid in placing H.L.S. resources at their disposal so far as possible, i.e., create a new kind of exchange-professorships — i.e., H.L.S. professors who will go out, as legates, temporarily to aid in developing lesser schools & there teach and take in exchange the local professors who shall come for a year or so to H.L.S. to *learn*.

Also arrange that picked students from such lesser schools may enter, not only postgraduate H.L.S. classes, but the higher undergraduate classes. Of course, I see the difficulties of putting such an alternative scheme into operation. But it is 'constructive — not destructive.' Be the mother church for the new & worthy legal education & legislation.²¹⁰

Brandeis then reported regularly to Frankfurter about his efforts to spread his views among other Harvard alumni: Oliver Wendell Holmes, Edward T. Sanford, Augustus Hand, and Julian Mack. Regarding Mack, Brandeis reported, "Told him I wanted not a bigger H.L.S., but 20 Harvard Law Schools . . ." ²¹¹

But Brandeis's interest in Harvard was never confined merely to criticizing plans to make it bigger. He was full of suggestions to Frankfurter for improving the educational process, and he was willing to back his suggestions with financial contributions. He proposed a comprehensive index to the *Harvard Law Review* and offered to help finance the project.²¹² He proposed a far-reaching reform of the moot court system.²¹³ In April, 1922, Brandeis suggested a new course in federal procedure, and Frankfurter introduced it in the fall of 1924. A few years later Brandeis provided a special fellowship to fund the preparation of a case book for the course.²¹⁴ For fifteen years after 1924, Brandeis gave generously to the support of a post-graduate fellowship for students to work with Frankfurter.²¹⁵ And when Pound and Frankfurter developed a plan for two new professorships at the Law School, Brandeis consulted Frankfurter about the plan and then promptly pledged \$10,000 to

210. Letter to F.F. (Oct. 9, 1924), *reprinted in V LETTERS, supra note 1*, at 143-44.

211. Letter to F.F. (Jan. 1, 1925), *reprinted in V LETTERS, supra note 1*, at 155-56.

212. *See* Letter to F.F. (Feb. 3, 1922), *reprinted in V LETTERS, supra note 1*, at 43-44.

213. *See* Letter to F.F. (Jan. 29, 1922) (located in the Frankfurter Mss.-HLS, *supra note 76*).

214. *See* Letter to F.F. (Apr. 2, 1922), *reprinted in V LETTERS, supra note 1*, at 48; Letter to F.F. (Apr. 6, 1923), *reprinted in V LETTERS, supra note 1*, at 90; Letter to F.F. (Mar. 6, 1929), *reprinted in V LETTERS, supra note 1*, at 371-72; Letter to F.F. (Sept. 20, 1929), *reprinted in V LETTERS supra note 1*, at 385-87.

215. *See* Landis, *supra note 41*, at 189.

help fund it.²¹⁶ It was no wonder that, on the Justice's seventieth birthday, friends could think of no gift that would please him more than a \$50,000 endowment to the Harvard Law School to establish the Brandeis Research Fellowship. Two weeks after the gift was announced, Brandeis wrote to Frankfurter that he expected to be asked to suggest suitable projects for the fund: "If I am," he warned the professor, "I shall submit them to you for consideration before sending anything in."²¹⁷

Because Brandeis wanted to see "20 Harvard Law Schools," rather than a single enormous one, he tried to help create another one in Louisville, Kentucky. During the 1920s Brandeis took an active interest in building a first-rate university in his old hometown.²¹⁸ Most of the labor he assigned to his brother Alfred and to members of Alfred's family. When it came to the law school at Louisville, however, Brandeis turned to Frankfurter. "Please find out, when you conveniently can, about what, if anything, could be done with & for the Law School of Louisville University (in a modest way)," he began in October, 1924. "I should like to help, if there seems promise."²¹⁹ After early discussions with Frankfurter on how to improve the school, the two men settled on Robert N. Miller, one of Frankfurter's Harvard classmates, to supervise the day-to-day operations. Brandeis continued to consult with Frankfurter on large questions of policy regarding Louisville, and after a long conference with Miller and University of Louisville president Arthur Y. Ford, Brandeis reported to Frankfurter, "I have made it clear to both that you are the Supreme Adviser, & that Miller comes through you."²²⁰

In addition to his activities on behalf of the law schools at Harvard and Louisville, Brandeis also worked through Frankfurter to encourage bright young men to enter careers as professors of law. Again and again he encouraged Frankfurter to guide promising students into teaching: "Had you thought of making an attempt now to start Malcolm Sharp at teaching law somewhere?"²²¹ "If [Nathan R.] M[argold]. concludes not to remain at Harvard, dont [sic] let him tie himself up with an agreement to return to practice, until I shall have had an opportunity to suggest his name for a teaching job I

216. See Letter to F.F. (Dec. 19, 1922), reprinted in *V LETTERS*, *supra* note 1, at 80.

217. Letter to F.F. (Nov. 30, 1926), reprinted in *V LETTERS*, *supra* note 1, at 247-48.

218. See B. FLEXNER, MR. JUSTICE BRANDEIS AND THE UNIVERSITY OF LOUISVILLE (1938).

219. Letter to F.F. (Oct. 18, 1924) (located in the Frankfurter Mss.-HLS, *supra* note 76).

220. Letter to F.F. (June 2, 1925), reprinted in *V LETTERS*, *supra* note 1, at 174-75.

221. Letter to F.F. (Jan. 1, 1925), reprinted in *V LETTERS*, *supra* note 1, at 155-56.

have in mind. (Not Louisville)."²²² "My impression is that [Harry] Shulman is too good in mind, temper, and aspirations to waste on a New York or other law offices Can't you land him somewhere in a law school next fall? You will recall that Yale needs men; and [Prof. Walton H.] Hamilton thinks that the right man there would find no opposition on the score of anti-Semitism."²²³ In fact, Brandeis was perfectly willing to raise his occasional efforts to a general principle: "[I]f ever you have a first class man available whom H.L.S. wont [*sic*] take," he instructed Frankfurter, "let me know. I may find him a desirable berth in some other law school."²²⁴

At one point, however, Brandeis felt compelled to draw the line. Building up the other law schools was fine; but not if it meant Harvard's losing Frankfurter. In 1929, Yale was considering an offer to Frankfurter. Brandeis intervened directly, decisively, and without hesitation. He reported to Frankfurter that he had informed Walton Hamilton that he thought "a serious wrong" would be done if Frankfurter were lured from Harvard: "Yale L.S. should be helped & encouraged in its commendable efforts — but not by weakening the going concern at Cambridge."²²⁵ Short-circuiting Yale's overtures to Frankfurter without consulting him was, of course, a remarkable thing for Brandeis to do. Under normal circumstances it would have been considered bold effrontery. That Brandeis did it, and that he thought nothing of telling Frankfurter, reveals the primacy of Harvard in Brandeis's thinking about legal education. But it also shows a good deal about the relationship that had developed between these two men.

By the end of the 1920s, Frankfurter had become a fixture in Brandeis's private and public life. The Justice was entirely content that Frankfurter remain at Harvard and that what Brandeis had called "our joint endeavors through you"²²⁶ continue without interruption. The professor had become indispensable to the Justice, a presence always receptive to suggestions and responsive to instructions. To some extent, no doubt, Brandeis unconsciously regarded Frankfurter as an alter ego, and, as such, it seemed perfectly appropriate to enter into negotiations over a possible new job for his friend.

The plain fact was that Brandeis had come to rely on Frank-

222. Letter to F.F. (Feb. 11, 1928), reprinted in V LETTERS, *supra* note 1, at 322-23.

223. Letter to F.F. (Oct. 13, 1929), reprinted in V LETTERS, *supra* note 1, at 403-04.

224. Letter to F.F. (Jan. 28, 1928), reprinted in V LETTERS, *supra* note 1, at 319-20.

225. Letter to F.F. (Feb. 27, 1929) (located in the Frankfurter Mss.-HLS, *supra* note 76).

226. Letter to F.F. (June 2, 1927), reprinted in V LETTERS, *supra* note 1, at 290.

furter. The professor's energetic responses to Brandeis's requests enabled the Justice to perform the duties of a judge without surrendering the social activism which was so much a part of him. Through Felix Frankfurter, Brandeis could still participate in vital movements and important reform efforts. In supporting Zionism, in defending social legislation, in drafting new laws, in reforming judicial procedures, in shaping public opinion, and in helping to improve legal education, Brandeis made unstinting use of the professor. But even that enormous range of responsibilities did not exhaust Frankfurter's capacity. And the Justice could think of many other tasks for the professor to undertake.

VII

Over the years, Brandeis bombarded Frankfurter with dozens of miscellaneous requests. Many were trivial and easily performed. For example, when Brandeis received inquiries about the location of some quotation of his, he asked Frankfurter to discover the source.²²⁷ Brandeis requested Frankfurter's aid in preparing a new edition of his collection of articles, *Business — A Profession* (1914); when the edition went to press in 1925, it was Frankfurter who had written the "Supplementary Notes."²²⁸ Brandeis asked Frankfurter to help arrange a lecture tour for visiting British diplomat Rennie Smith,²²⁹ to help find a job for Ray Stevens,²³⁰ to get George S. Knapp, editor of *Labor*, involved in Al Smith's campaign,²³¹ and to provide advice on philanthropic matters.²³² In 1925 he wrote Frankfurter about his daughter's engagement: "Will you kindly send Alice a list of any persons (and addresses) here or abroad, whom you or Marion think we might be likely to forget in making up our list for

227. See, e.g., Letter to F.F. (Jan. 26, 1926), reprinted in V LETTERS, *supra* note 1, at 205-06; Letter to F.F. (July 28, 1927), reprinted in V LETTERS, *supra* note 1, at 297-98.

228. See Letter to Alice H. Grady (Mar. 5, 1924), reprinted in V LETTERS, *supra* note 1, at 119; L. BRANDEIS, *BUSINESS — A PROFESSION*, at lviii (1925) (*Supplementary Notes* by F. Frankfurter).

229. See Letter to F.F. (June 28, 1925) (located in the Frankfurter Mss.-HLS, *supra* note 76).

230. See Letter to F.F. (Oct. 27, 1925) (located in the Frankfurter Mss.-HLS, *supra* note 76). Ray Stevens had been a one-term Congressman from New Hampshire and had helped to pass President Wilson's antitrust and trade commission bills. His nomination to the Federal Trade Commission was rejected by the Senate, however, and for several years he sought public service work. L.D.B. helped to place him as an adviser to the government of Siam. See Letter to F.F. (Nov. 8, 1925), reprinted in V LETTERS, *supra* note 1, at 192-93; Letter to F.F. (Nov. 29, 1925), reprinted in V LETTERS, *supra* note 1, at 195-96. In the 1930s, President Roosevelt appointed him to the Federal Trade Commission.

231. See Letter to F.F. (Sept. 25, 1928) (located in the Frankfurter Mss.-HLS, *supra* note 76).

232. See Letter to F.F. (Feb. 11, 1928), reprinted in V LETTERS, *supra* note 1, at 322-23.

Elizabeth's wedding announcement."²³³ And two years later: "Elizabeth and Paul [Raushenbush] will be ready for jobs in the fall. Let them know if you hear of anything promising. Their address is 4000 Pine St., Phila."²³⁴

Not all of Brandeis's supplementary requests, however, were so easily dispatched. In September, 1926, Frankfurter found this assignment in his mail:

I should like to stimulate the U. of Louisville to strive to collect . . . for the Railroad Library:

- (a) The com[mit]tee reports & reports of hearings in both House & Senate which led to the enactment of the Interstate Commerce Act.
- (b) The com[mit]tee reports & reports of such hearings which led to each amendment.
- (c) (If feasible) such com[mit]tee reports & reports of hearings on proposed amendments, not adopted.

I suppose the Harvard Law School Library contains a large part of this material, or, in any event, that you have data which will cover a list of at least (a) and (b). Could you have made for me (in duplicate) a list of these documents to be striven for; — and also, have noted thereon the Kentuckians, if any, who were members of the House and the Senate Com[mit]tees on Interstate Commerce at the times of the several hearings etc.?²³⁵

Because Brandeis's parental concern for the system of Savings Bank Insurance he had devised for Massachusetts in 1906 continued after his appointment to the Court, Frankfurter did not escape requests in this area either. Brandeis's former private secretary, Alice H. Grady, now controlled the system, and Brandeis regularly offered his advice on even the most minute details of the program. Frankfurter was asked to send data to Miss Grady,²³⁶ to intercede with journalist friends to secure publicity for Savings Bank Insurance,²³⁷ to promote enthusiasm for the scheme among the Harvard faculty,²³⁸ and to encourage the Cambridge Savings Bank to open an insurance department.²³⁹

After Frankfurter began studying crime, first in Cleveland and then in Boston,²⁴⁰ Brandeis literally flooded him with suggestions for

233. Letter to F.F. (May 13, 1925), *reprinted in V LETTERS, supra* note 1, at 171-72.

234. Letter to F.F. (Jan. 10, 1927) (located in the Frankfurter Mss.-HLS, *supra* note 76).

235. Letter to F.F. (Sept. 21, 1926) (located in the Frankfurter Mss.-HLS, *supra* note 76).

236. *See* Letter to F.F. (July 14, 1928), *reprinted in V LETTERS, supra* note 1, at 348.

237. *See* Letter to F.F. (Feb. 9, 1928), *reprinted in V LETTERS, supra* note 1, at 321; Letter to F.F. (June 15, 1928), *reprinted in V LETTERS, supra* note 1, at 344-45.

238. *See* Letter to F.F. (Oct. 10, 1929), *reprinted in V LETTERS, supra* note 1, at 402.

239. *See* Letter to F.F. (Nov. 15, 1929), *reprinted in V LETTERS, supra* note 1, at 410-11.

240. *See* L. BAKER, *supra* note 19, at 109-12.

presenting and augmenting his findings. The suggestions ranged from one considering the philosophical underpinnings of such investigations,²⁴¹ to another proposing that particular topics be included in the study,²⁴² to a third, after the report had been completed (and sent to Brandeis for his comments before publication), describing how to implement the findings without losing the enthusiasm and high resolve of the moment.²⁴³

Some of these random requests were vitally important, and none more so than those relating to Brandeis's work on the Supreme Court. Brandeis heartily subscribed to the time-honored tradition of secrecy regarding the work of the Court. He carefully instructed each of his law clerks "that whatever he sees, hears or infers is to remain confidential as to everyone, now & forever."²⁴⁴ His old friend Norman Hapgood once complained that Brandeis "never talks to me about the important issues anymore."²⁴⁵ But if Brandeis ever bent this principle of silence about the High Court, it was in conversations with Felix Frankfurter. So confident was Brandeis of the Harvard professor's discretion and good judgment that he was sometimes willing to discuss actual cases the Court had decided, and even the personalities and philosophies of his brethren.²⁴⁶ Brandeis, for his part, used Frankfurter as a sounding board and, occasionally, as a critic of his judicial opinions.

There is even evidence that Brandeis sometimes used Frankfurter as a research assistant while preparing to write a particular opinion. This was certainly true when the Justice wrote to Frankfurter: "Thanks for references to your articles. Are you able to give me the data as to our overruling ourselves in cases under the Commerce Clause?"²⁴⁷ Brandeis needed the references to support his impas-

241. See Letter to F.F. (Nov. 9, 1926), reprinted in V LETTERS, *supra* note 1, at 243-44.

242. See the following letters to F.F. (July 6, 1921), reprinted in V LETTERS, *supra* note 1, at 3; (July 2, 1926), reprinted in V LETTERS, *supra* note 1, at 227-28; (Aug. 24, 1927), reprinted in V LETTERS, *supra* note 1, at 300.

243. See Letter to F.F. (Sept. 29, 1921), reprinted in V LETTERS, *supra* note 1, at 17-18.

244. Letter to F.F. (Oct. 7, 1928), reprinted in V LETTERS, *supra* note 1, at 358-59.

245. Letter from Norman Hapgood to Franklin D. Roosevelt (undated) (located in the Roosevelt Library, Hyde Park, New York).

246. See, e.g., the following letters to F.F. (Dec. 6, 1920), reprinted in IV LETTERS, *supra* note 1, at 517; (Apr. 19, 1921), reprinted in IV LETTERS, *supra* note 1, at 550; (Mar. 6, 1925), reprinted in V LETTERS, *supra* note 1, at 167-68; (Mar. 14, 1926), reprinted in V LETTERS, *supra* note 1, at 209-10; (Feb. 26, 1927), reprinted in V LETTERS, *supra* note 1, at 272-73; (July 9, 1927), reprinted in V LETTERS, *supra* note 1, at 295-96; (Dec. 6, 1927), reprinted in V LETTERS, *supra* note 1, at 315-16; (Feb. 21, 1929), reprinted in V LETTERS, *supra* note 1, at 367-68. In addition, see a document entitled "Conversations Between Louis D. Brandeis and Felix Frankfurter" (unpublished notes of conversations between L.D.B. and F.F., located in the Frankfurter Mss.-LC, *supra* note 35).

247. Letter to F.F. (Dec. 21, 1926), reprinted in V Letters, *supra* note 1, at 255.

sioned dissent in *Di Santo v. Pennsylvania*,²⁴⁸ where he wanted to uphold state police power even if it required overruling earlier commerce clause decisions. In support of his position, Brandeis cited an article co-authored by Frankfurter²⁴⁹ and nearly a dozen earlier instances in which the Court overruled itself in that field.²⁵⁰

Brandeis's willingness to turn to an outsider for help in the extremely sensitive area of drafting a judicial opinion reveals — if more evidence were needed — the intimate relationship which had grown up between the two men, and the extent to which, under Brandeis's direction, they functioned as a team on behalf of the preservation and furtherance of American liberalism.

VIII

By the time Franklin Roosevelt became President on March 4, 1933, subtle changes were appearing in the Brandeis-Frankfurter relationship. Brandeis was seventy-six years old and fully cognizant of the need to conserve his strength. For almost a decade he had warned the Zionists that they could no longer rely upon him for day-to-day advice and that while he might be willing to study Palestinian conditions during the summers, and to offer occasional advice on large policy matters, his age simply required him to retire from active leadership.²⁵¹ In the week of Roosevelt's election, Brandeis assured his daughter, "I am as usual, but the auto men are right. Old machines are unreliable and the maintenance cost high."²⁵²

In addition, the return of the Brandeis-Mack faction to power in the Zionist movement in 1931, and the return of the Democrats to power in 1933, opened up to Brandeis even more direct channels for whatever suggestions and opinions he cared to offer. He communicated directly to the officers of the American Zionist Organization, and they consulted him regularly. He knew virtually all of the chief New Dealers personally, and they all had resort to him with regularity. Suddenly the corridors of power were bustling with men sympathetic to Brandeis's purposes; his need to rely so heavily on a discreet and diplomatic go-between diminished. Frankfurter's location at

248. 273 U.S. 34, 37 (1927) (Brandeis, J., dissenting). The case was argued on October 27, 1926. The Court rendered its decision on January 3, 1927.

249. See 273 U.S. at 42 n.3 (citing Frankfurter & Landis, *The Compact Clause of the Constitution — A Study in Interstate Adjustment*, 34 YALE L.J. 685 (1925)).

250. See 273 U.S. at 43 n.4.

251. See, e.g., Letter to Jacob deHaas (June 5, 1927), reprinted in V LETTERS, *supra* note 1, at 291-92; Letter to F.F. (Sept. 23, 1929), reprinted in V LETTERS, *supra* note 1, at 389-91.

252. Letter to Elizabeth B. Raushenbush (Nov. 2, 1932), reprinted in V LETTERS, *supra* note 1, at 513.

Harvard had become something of a liability — Brandeis himself was now placed much closer to progressive political and legal talent.

For his own part, Frankfurter was doubtless glad to be freed from some of the responsibilities Brandeis had assigned to him over the years. At the time of Roosevelt's inauguration, after all, he was fifty-two years old. Through his monumental scholarship and courageous reform work, he had earned his own reputation as a leading liberal strategist and sage. Even the most casual observer of American politics knew that Frankfurter enjoyed a close personal relationship with the new president and that the New Deal was staffed by his former students. Frankfurter "used" them in the same ways Brandeis had used him: each week the professor fired off dozens of notes and phone calls instructing, urging, encouraging, making his own suggestions and requests. Although the arrangement between Brandeis and Frankfurter continued after 1933, the changes had already begun.

Students of judicial ethics and of extrajudicial behavior will certainly find in this relationship some troubling philosophical problems. After all, Frankfurter argued cases before the Supreme Court during these years, while regularly receiving money from one of its Justices — and that Brandeis disqualified himself from participating in these cases (for reasons other than Frankfurter's appearances) is not entirely sufficient to avoid the obvious questions of propriety that are involved. The problem is especially curious, when one remembers that Brandeis was so terribly cognizant of the need to avoid entanglements that might impair his judicial impartiality. In 1916, Brandeis had consulted with Chief Justice White about his personal financial investments — he did not want to run the risk of having to disqualify himself because of a possible conflict of interest.²⁵³ Brandeis also took the unusual precaution of scrupulously refusing honorary degrees from colleges and universities, lest the awarding institution someday appear as a litigant and his objectivity appear compromised.²⁵⁴ Yet it must have been clear to Brandeis that Felix Frankfurter dealt every day — and often at Brandeis's direct behest — with issues and causes and even with Congressional legislation that might easily arrive at the High Court for final adjudication. Whether his partnership with Frankfurter, his cash "invest-

253. See Letter to Chief Justice Edward D. White (June 29, 1916), reprinted in IV Letters, *supra* note 1, at 241-42.

254. See, e.g., Letter to Charles E. Clark (Mar. 12, 1930), reprinted in V LETTERS, *supra* note 1, at 421; Letter to Stephen S. Wise (Jan. 19, 1936), reprinted in V LETTERS, *supra* note 1, at 563-64.

ment" in him, constituted an "entanglement" which might impair judgment is not a question easily answered.

In at least one instance the danger must have been brought home to Brandeis rather directly. In 1927 Frankfurter enlisted in the cause of the two condemned radicals, Sacco and Vanzetti. On June 2, Brandeis wrote to him: "I have realized that S[acco]. V[anzetti], inter alia, must have made heavy demands for incidental expense, as well as time, & meant to ask you when we meet [sic] whether an additional sum [of money] might not be appropriate this year. Let me know."²⁵⁵ On August 15, Brandeis did deposit an additional \$500 into Frankfurter's account.²⁵⁶ Six days later, only hours before the two men were executed, their desperate lawyers journeyed to Cape Cod to beg Brandeis to issue a stay. The Justice felt unable even to hear their arguments, and declined to admit the visitors into his cottage.²⁵⁷

There is no evidence that Brandeis, despite his normal sensitivity to the requirements of judicial propriety, was much troubled by the questions raised by his relationship with Frankfurter. In part this freedom from moral doubt was reinforced by the intimacy of the two men. Brandeis once referred to Frankfurter as "half brother, half son,"²⁵⁸ and he probably regarded his payments to Frankfurter in the same way as those he regularly made to less affluent members of his family. Certainly Brandeis never regarded Frankfurter as a mere "employee," nor could he objectively do so. Brandeis never asked the professor to undertake projects or to act on suggestions that did not command Frankfurter's independent approval and allegiance. Frankfurter also embarked on reform activities on his own initiative: the crime surveys in Cleveland and Boston,²⁵⁹ the work on behalf of Tom Mooney²⁶⁰ and Sacco and Vanzetti²⁶¹ all were begun without

255. Letter to F.F. (June 2, 1927), reprinted in V LETTERS, *supra* note 1, at 290.

256. See Letter to F.F. (Aug. 15, 1927) (located in the Frankfurter Mss.-HLS, *supra* note 76).

257. See N.Y. Times, Aug. 22, 1927, at 1, col. 8. L.D.B. was tied to the defense in the Sacco-Vanzetti case by other bonds. His wife and a daughter were active on the two condemned men's behalf, and so was the family's intimate friend and frequent houseguest, Elizabeth Glendower Evans. L.D.B. probably would have felt constrained to disqualify himself from taking any part in the case even without his tie to F.F.

258. Letter to F.F. (Sept. 24, 1925), reprinted in V LETTERS, *supra* note 1, at 187-88.

259. See text at notes 240-43 *supra*.

260. It was President Wilson who first turned F.F.'s attention to the Mooney case. Mooney had been convicted and sentenced to death in California for the murder of numerous people who died when a bomb exploded at a Preparedness Parade in San Francisco on July 22, 1916. After Mooney had been sentenced, it was established that his conviction rested on perjured testimony. Mooney was not released until 1939. See FRANKFURTER REMINISCES, *supra* note 19, at 130.

261. See text at notes 255-57 *supra*. Mrs. Elizabeth Glendower Evans first alerted F.F. to the Sacco-Vanzetti matter. See FRANKFURTER REMINISCES, *supra* note 19, at 209-10.

prompting from the Justice. In no sense, therefore, could Brandeis think of Frankfurter as being "on a salary," taking money in exchange for the unquestioning performance of assigned duties.

And if Brandeis was untroubled about the arrangement because of strong ties of friendship, probably he was also relieved from doubt because of the nature of Frankfurter's work. To Brandeis, the reform efforts that Frankfurter undertook seemed so obviously in the public interest that it was a matter of clear social importance that the work be continued, guided, and facilitated. No shred of evidence survives to suggest that Brandeis ever asked Frankfurter to perform tasks intended to enhance Brandeis's personal reputation, increase his financial holdings, or discredit some personal opponent. This nobility of purpose — as Brandeis perceived it — must have gone a long way toward quieting any nagging doubts about the propriety of the arrangement.

Whatever verdict is rendered on the matter of judicial propriety, one conclusion remains clear: for sixteen years, in an environment of social and political conservatism, Louis D. Brandeis and Felix Frankfurter had combined their efforts to further a wide range of traditional, progressive causes. Much of what they attempted, of course, ended in disappointment; failure was preordained in the atmosphere of war and "normalcy" in which they functioned. The surprising thing, however, is not that they did not always achieve their purposes, but that two individuals were able to accomplish so much. Historians are only beginning to explore the links between the progressive impulse of the first years of the century and the flowering of reform in the 1930s.²⁶² It should be clear, however, that Brandeis and Frankfurter played a substantial role in preserving the spirit of American liberalism during the intervening years.

When Brandeis died in October, 1941, the *Harvard Law Review* decided to dedicate a special issue to his memory. Felix Frankfurter, then an Associate Justice of the Supreme Court himself, prepared a short memorial to introduce it.²⁶³ In general, Frankfurter struck the appropriate note, and he struck it in typically moving and eloquent language: "Our present task," he wrote, "is to fortify ourselves by

262. See O. GRAHAM, AN ENCORE FOR REFORM 4-23 (1967); Glad, *Progressive and the Business Culture of the 1920s*, 53 J. AM. HIST. 75 (1966); Link, *supra* note 122, at 844-47, 850; Maxwell, *The Progressive Bridge: Reform Sentiment in the United States Between the New Freedom and the New Deal*, 63 IND. MAGAZINE HIST. 83 (1967); McCraw, *The Progressive Legacy*, in PROGRESSIVE ERA 181 (L. Gould ed. 1974).

263. See Frankfurter, *Mr. Justice Brandeis*, 55 HARV. L. REV. 181 (1941).

his example, by his passionate dedication of great gifts to great purposes, by his use of the versatile resources of law for the liberation and enrichment of the potentialities of man."²⁶⁴ Frankfurter recalled the hallmarks of Brandeis's work: the painstaking thought, the meticulous care and investigation, the consistent engagement with the complexity of society. He opened his final paragraph, however, with a remarkable assertion: "A man so immersed in affairs as Louis D. Brandeis must have closed the door on many of his interests when he went on the bench. But one is tempted to believe that judicial office was most fitting for his nature."²⁶⁵ The statement encompasses a world of irony. No one knew better than the writer himself how few were the interests that Brandeis abandoned after 1916. And no one had done more to reconcile for Justice Brandeis the conflicting demands of his private nature and his judicial office.

264. *Id.*

265. *Id.* at 183.