

**BRANDEIS AND AMERICA.** Edited by Nelson L. Dawson.<sup>1</sup> Lexington, Ky: University Press of Kentucky. 1989. Pp. 163. \$20.00

*Thomas K. McCraw*<sup>2</sup>

If there were a Mount Rushmore for lawyers and judges, it would display, among other faces, the craggy features of Louis D. Brandeis. Indeed, Brandeis's achievements were so varied and formidable that he might qualify for the imagined Rushmore even if he had never served on the Supreme Court. Before his appointment to the Court by Woodrow Wilson, he had pioneered the role of public interest lawyer, anticipating by a half-century the careers of such figures as Thurgood Marshall in civil rights and Ralph Nader in consumerism. Meanwhile, he had made impressive reputations as a commercial lawyer, a muckraker, an almost unbeatable litigator, and a White House adviser in the inner circle of Wilson's New Freedom.

During his long tenure as a Justice (1916-1939), Brandeis achieved an eminence matched by only a handful of judges. The depth of his wisdom became legendary. Perhaps most important, he proved to be a methodological innovator. Through the years, he managed to push the Court inexorably toward his own ideal of sociological jurisprudence. In his relentless digging for more and more "facts" and in his reliance on academic studies from many disciplines, he foreshadowed the methods of many modern activists, despite his own commitment to judicial restraint.

Because of the power of his character and breadth of his activities, Brandeis fascinates scholars in several disciplines: law, history, political science, Jewish studies. Of the making of books about him there seems to be no end.<sup>3</sup> The pace of publication has accelerated

---

1. Publications editor, Filson Club Historical Society; author of *LOUIS D. BRANDEIS, FELIX FRANKFURTER, AND THE NEW DEAL* (1980).

2. Straus Professor of Business History, Harvard University.

3. See L. BAKER, *BRANDEIS AND FRANKFURTER: A DUAL BIOGRAPHY* (1984); *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS* (A. Bickel ed. 1957); R. BURT, *TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND* (1988); N. DAWSON, *LOUIS D. BRANDEIS, FELIX FRANKFURTER, AND THE NEW DEAL* (1980); D. DANIELSKI, *A SUPREME COURT JUSTICE IS APPOINTED* (1964); A. GAL, *BRANDEIS OF BOSTON* (1980); B. HALPERN, *A CLASH OF HEROES: BRANDEIS, WEIZMANN, AND AMERICAN ZIONISM* (1987); A. MASON, *BRANDEIS: A FREE MAN'S LIFE* (1946); T. MCCRAW, *PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN* (1984); L. PAPER, *BRANDEIS* (1983); P. STRUM, *LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE* (1984); A. TODD, *JUSTICE ON TRIAL: THE CASE OF LOUIS D. BRANDEIS* (1964); M. UROFSKY, *A MIND OF ONE PIECE: BRANDEIS AND AMERICAN REFORM* (1971).

since the appearance of the first volumes of his collected letters in 1971,<sup>4</sup> and the literature grows larger by the year.

The slender book under review here is a convenient introduction to and summary of existing scholarship, together with suggestions for future work. It consists of a brief literature survey by the editor, followed by six substantive essays. Each of the contributors is an experienced and able Brandeis scholar.

The first essay, by the lawyer and political scientist David Danelski,<sup>5</sup> is entitled "The Propriety of Brandeis's Extrajudicial Conduct." This piece is a well-structured and carefully reasoned analysis, focused on four episodes and addressed in explicit rebuttal to Bruce Murphy's sensationalized book of 1982.<sup>6</sup> Danelski begins with Brandeis's role in helping to draft a Democratic party manifesto in 1922 and finds this behavior "ethically questionable," even though Brandeis did it only at the request of the ailing former President Wilson. The second charge, and the most serious, pertains to a threat Brandeis allegedly made in 1934 to hold New Deal legislation unconstitutional if certain changes in policy were not forthcoming. Whereas the Murphy book had made much of this incident, Danelski finds the evidence—second- and third-hand hearsay—thin and dubious. The third charge, focusing on the arrangement Brandeis and Felix Frankfurter developed in which the Justice provided annual stipends to the Harvard professor, is the most subjective of the four. Whereas Murphy chose to characterize Frankfurter as Brandeis's "paid political lobbyist and lieutenant,"<sup>7</sup> Danelski finds a pattern of humanitarian help to a friend in need, together with a desire to keep the progressive spirit alive during the conservative 1920s. Danelski writes that while the arrangement was not "wrong," as the *New York Times* editorialized when Murphy's book appeared, "it was ethically questionable." The final charge pertains to Brandeis's general participation in the formulation of legislative policy. Here the evidence is clear that during the New Deal Brandeis frequently spoke with Frankfurter and a number of young New Dealers who frequented the Justice's Washington apartment. Brandeis did not always recuse himself from subsequent litigation deriving from some of the laws he had discussed. This behavior showed "an insensitivity to the separation of powers," and was sometimes "at least ethically questionable."

---

4. LETTERS OF LOUIS D. BRANDEIS (M. Urofsky and D. Levy eds. 1971- ). Five volumes of the letters have appeared so far, with two more in the offing.

5. Mary Lou and George Boone Centennial Professor, Stanford University.

6. B. MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES (1982).

7. *Id.* at 10.

It seems clear, then, that Brandeis sometimes behaved in a way he would not have countenanced in others. Space does not permit Danelski to go much beyond this—to discuss, for example, some of the rampantly extrajudicial activities of other members of the Court from John Marshall to Abe Fortas.<sup>8</sup> Danelski does conclude, correctly in my view, that Brandeis's transgressions, while serious, will not appreciably diminish his place in history.

The second essay in the collection, on Brandeis and the New Deal, is by editor Nelson Dawson. It is a good survey and analysis, centered on the way in which Brandeis's program for recovery was funneled into policy discussions via Frankfurter and other proteges such as James Landis and Thomas Corcoran. My own judgment here is that Frankfurter was a more independent force than Dawson suggests, that his relationship with Brandeis was much like Hamilton's with Washington, in which the voluble junior man often invoked the authority of the silent senior (the "aegis," as Hamilton put it) to further his own ends.

Be that as it may, Dawson's argument may impute to Brandeis a more thorough and coherent recovery program than in fact existed even in the Justice's own mind. Certainly Dawson errs in characterizing Brandeis's program as "Keynesian," merely because it called for public works. The essence of Keynesianism, in the context of national depression, was deficit spending. Brandeis's plan to augment public works and pay the bill with increased taxation would have amounted to a mere transfer of funds, not a creation of new money. Thus it entirely missed the Keynesian point. Keynes himself insisted on deficit financing ("loan expenditure," as he called it) as the indispensable source of an autonomous spending multiplier that would break the spiral of depression.

Despite a generally insightful evaluation of the New Deal, Dawson underestimates the importance of both the Securities Exchange Act, which he calls "peripheral," and of the Public Utility Holding Company Act, about which he mistakenly says "enforcement in the future proved ineffective." Dawson's essay is strongest in its vivid depiction of Brandeis's opposition (and Frankfurter's opportunistic equivocation) toward the Court-packing plan.

The third essay, "Brandeis, Judaism, and Zionism," by the Israeli scholar Allon Gal,<sup>9</sup> is the longest in the collection, and the one presenting the most significant new information. Gal's research is broad and imaginative, his focus sharp, his categories useful. Eng-

---

8. See W. Cibes, Jr., *Extra-Judicial Activities of Members of the United States Supreme Court, 1790-1960*, (unpublished Ph.D. diss., Princeton University, 1975).

9. Professor of History, Hebrew University, Jerusalem.

lish is not Gal's first language, and the essay occasionally becomes difficult to follow, but this derives as much from the complexity of the subject as from Gal's style.

Brandeis became a Zionist only in his middle fifties, after a lifetime of inattention to his own ethnicity. Gal identifies the source of Brandeis's conversion as disappointment with the recent performance of the Brahmin and Yankee cultures into which he had partially assimilated. Disillusioned with twentieth-century Yankees, Brandeis began to perceive a similarity between Jewish values and those of the early New England Puritans whom he so admired.

In the prospect of further Jewish settlement and development of Palestine, Brandeis saw a modern opportunity to fulfill the City Upon a Hill mission of the first American Puritans. He lavished financial support on Jewish developmental efforts in Palestine, and in 1933, during the very first week of Hitler's regime, Brandeis urged that all Jews must leave Germany. Overall, Gal speaks of Brandeis's "deep yearnings for an ethnic identity," and of Zionism as a fusion of his efforts to contribute "to the betterment of society" and to belong "to a primordial group."

David W. Levy<sup>10</sup> is the author of the fourth essay, "Brandeis and the Progressive Movement." Levy, the biographer of Herbert Croly and the co-editor of Brandeis's collected letters, is well qualified to write on this subject. His essay—which, chronologically and topically, should have come first in the collection rather than fourth—is an extraordinarily concise and well-informed piece that links Brandeis's background and anti-modern temperament with his approach to progressive reform. Levy focuses first on Brandeis, then on the progressive movement, then on the intersection of the two. He asks what can be learned about each through consideration of the other, and provides richly informative answers.

Levy argues that Brandeis's distinctive aesthetic defined much about his attitude toward reform. Brandeis hated bigness in all areas, especially business and government. He despised modern conveniences such as telephones and automobiles, and kept his horse and buggy until Washington authorities forced them off the road in the middle 1920s. He especially detested conspicuous consumption and pretentiousness. Levy's description of Brandeis makes one certain that, could the old Justice have witnessed the degradation of Wall Street in the 1980's—the America of Tom Wolfe's *Bonfire of the Vanities*—he would have responded with despairing melancholy.

---

10. David Ross Boyd Professor of American History, University of Oklahoma.

In the fifth piece, "Brandeis and the Living Constitution," Philippa Strum<sup>11</sup> surveys the overall influence of Brandeis's jurisprudence. Her essay is ably argued, but disappointing in its brevity and uncritical tone. (This topic, which would seem to call for the most thorough analysis of any of the six included here, is about a third shorter than the next shortest in the collection, and only half the length of Gal's analysis of Brandeis's Zionism.) Strum does trace the roots of Brandeis's judicial approach, helpfully contrasting it with that of his fellow Great Dissenter Holmes. She praises Brandeis's sociological jurisprudence and quest for the "facts."<sup>12</sup> Yet, considering the short length of her essay, Strum cannot give much more than a superficial analysis of Brandeis's years on the Court, and what she does give is more a celebration than a critical analysis. Overall, Strum serves the reader better in her biography of Brandeis<sup>13</sup> than in this relatively superficial appraisal.

The same is true of the final item in the collection, "The Brandeis Agenda," by Melvin I. Urofsky.<sup>14</sup> Like Strum's essay, Urofsky's bears lingering marks of its origin as an oral presentation. And like Strum, he has presented more insightful commentary on Brandeis in his earlier work as biographer and co-editor of the Brandeis letters. Even so, Urofsky is such a well-informed analyst of Zionism, legal history, and American politics that his views are worthy of attention. His essay contains a useful evaluation of the recent Brandeis literature, together with a foreshadowing of what is to come. He emphasizes that much work remains to be done, particularly in four areas: reform, Zionism, the law, and Brandeis's personal life. For each of these categories, Urofsky poses specific questions that merit additional study.

As the authors of this collection make clear, in their own prodigious prior work as well as in their essays here, Brandeis represents an inexhaustible vein of research and interpretation. A man full of paradox, he bridged the old and the new. With one foot planted in the nineteenth-century commonwealth of his imagination, he strode with the other into the media-dominated modern era. Yet the new twentieth-century world offended him because it had succumbed, in both business and government, to "the curse of bigness." Despite his backward-looking economics,<sup>15</sup> he was a distinctly modern crusader who used novel means to serve traditional

---

11. Professor of Political Science, City University of New York.

12. Here Strum would have benefited from reading Bryden, *Brandeis's Facts*, 1 CONST. COMM. 281 (1984).

13. P. STRUM, *LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE* (1984).

14. Professor of History, Virginia Commonwealth University.

15. See T. McCRAW, *PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS*

ends. This is one of the traits that made him such an enigmatic personality.

Nor were Brandeis's activities and interests confined to purely legal matters. He worked tirelessly for such causes as regularized employment, savings bank life insurance, and American Zionism. The moral force with which he invested all of his work made him one of the most compelling personalities of his time, and he had a profound influence on peers and proteges alike.

For scholars and students, Brandeis will remain, along with a handful of others in the American pantheon—John Marshall, Oliver Wendell Holmes, Woodrow Wilson, Franklin D. Roosevelt, Martin Luther King, the four Mount Rushmore presidents—an endlessly challenging figure through whom to explore our national identity. For that task of continued learning, this little book provides a splendid introduction.

---

D. BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN (1984), Chapters 2-4; and McCraw, *Louis D. Brandeis Reappraised*, 54 *THE AMERICAN SCHOLAR* 525-36 (1985).