

BOOK REVIEW

LOUIS D. BRANDEIS: A LIFE,

BY MELVIN I. UROFSKY, NEW YORK: PANTHEON BOOKS, 2009.
PP. XIII, 955. \$40.00.

*Reviewed by Paul Brickner**

Dr. Melvin I. Urofsky has published an excellent and important biography of U.S. Supreme Court Justice Louis Dembitz Brandeis. Dr. Urofsky holds his Ph.D. from Columbia University and a J.D. from the University of Virginia. Additionally, Dr. Urofsky was for many years head of the history department at Virginia Commonwealth University in Richmond and was the university's director of the doctoral program in public policy and administration. He also serves, and has done so for many years, as the highly respected editor of the *Journal of Supreme Court History* published by the Supreme Court Historical Society.

Before serving nearly twenty-three years as an Associate Justice on the U.S. Supreme Court, Louis Dembitz Brandeis had a varied and interesting career. As a young lawyer, he became a famed reformer who took on important local matters that eventually became national issues. Consequently, he earned a national reputation as the "People's Attorney" or the "People's Lawyer."¹ Later in his career, Brandeis was active in the international movement to create a Jewish homeland in Palestine

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¹ MELVIN I. UROFSKY, LOUIS D. BRANDEIS AND THE PROGRESSIVE TRADITION 46–47 (Oscar Handlin ed., 1981).

and it became one of his most important causes.² Furthermore, while working on Woodrow Wilson's 1912 presidential election campaign, Brandeis became one of Wilson's most trusted advisors.³ Strong opposition caused President Wilson to abandon the idea of appointing Brandeis to his cabinet. Never one to seek public office, Brandeis nonetheless accepted President Woodrow Wilson's 1916 offer to appoint him to a seat on the Supreme Court of the United States. After his nomination, a heated confirmation battle ensued but Wilson strongly backed Brandeis.⁴ Following his confirmation, Brandeis, although a sitting justice, remained an important presidential advisor to both President Wilson and later to President Franklin D. Roosevelt—who called Brandeis “Isaiah.”⁵ Brandeis's distinguished judicial service lasted until 1939.

Dr. Urofsky's latest biographical enterprise is a thorough and comprehensive study that is an important addition to the ever-growing “Brandeisian bookshelf.” This is a study that will challenge for pre-eminence the now-classic 1946 Brandeis biography, *Brandeis: A Free Man's Life* by Professor Alpheus T. Mason.⁶ Mason's obituary in the *New York Times* called him “one of the country's foremost judicial biographers” and noted that his 1946 study of Brandeis, one of four works he authored on the justice, sold more than 50,000 copies “and remained on the best seller list for five months in 1947.”⁷ The book has never been issued in paperback, but was reprinted in a centennial fourth edition in 1956. Currently, numerous copies are available for sale through secondary used book sources. Many are reported as second printing before publication—a designation that suggests the book held a great deal of interest for many prospective readers.

Dr. Urofsky too has published and spoken extensively on Brandeis. With David W. Levy, he published five volumes of Brandeis's letters⁸ and one volume of Brandeis's family letters.⁹

² *Id.* at 87.

³ *See id.* at 46.

⁴ *See* A.L.TODD, JUSTICE ON TRIAL: THE CASE OF LOUIS D. BRANDEIS 69 (1964).

⁵ *Id.* at 261 (“F.D.R. leaned heavily on Brandeis for advice, and dubbed him ‘Isaiah’ for what he considered Brandeis’ prophetic ability.”).

⁶ *See generally* ALPHEUS THOMAS MASON, BRANDEIS: A FREE MAN'S LIFE (1946) (providing a thorough biography of Brandeis).

⁷ Joan Cook, *Alpheus Mason, An Ex-Professor and Author*, 90, N.Y. TIMES, Nov. 1, 1989, at D26.

⁸ *See generally* [1870–1907: Urban Reformer] 1 LETTERS OF LOUIS D.

In addition, he published a volume of letters from Brandeis to Justice Felix Frankfurter¹⁰ as well as two separate volumes on Brandeis¹¹ and a study of Zionism¹² that devotes much attention to Brandeis's role in the Zionist movement. Dr. Urofsky has developed over many years a degree of expertise on Brandeis that is unmatched by any other living author.

Since 1964, more than thirty studies of Brandeis have been published—a rather astounding number.¹³ One book, a study of American Jewish history by a high school teacher, David Gleicher, even uses Brandeis's fame in a lighthearted way in its title, *Louis Brandeis Slept Here: A Slightly Cynical History of American Jews*.¹⁴ Of course the title playfully employs the common inquiry about historic homes that we all grew up with, “Did George Washington sleep here?” (the Historical Marker Database actually lists 157 such locations in eleven states: Connecticut, Georgia, Maryland, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, Virginia and West Virginia).¹⁵ In a humorous way, Mr. Gleicher may have touched upon an important insight for American Jewish history because, when all is said and done, Brandeis may very well be the central figure in American Jewish history just as Washington is commonly seen as the central figure in all of American history.

BRANDEIS (Melvin I. Urofsky & David W. Levy eds., 1971); [1907–1912: People's Attorney] 2 LETTERS OF LOUIS D. BRANDEIS (Melvin I. Urofsky & David W. Levy eds., 1972); [1913–1915: Progressive and Zionist] 3 LETTERS OF LOUIS D. BRANDEIS (Melvin I. Urofsky & David W. Levy eds., 1973); [1916–1921: Mr. Justice Brandeis] 4 LETTERS OF LOUIS D. BRANDEIS (Melvin I. Urofsky & David W. Levy eds., 1975); [1921–1941: Elder Statesman] 5 LETTERS OF LOUIS D. BRANDEIS (Melvin I. Urofsky & David W. Levy eds., 1978).

⁹ See generally THE FAMILY LETTERS OF LOUIS D. BRANDEIS (Melvin I. Urofsky & David W. Levy eds., 2002).

¹⁰ See generally “HALF BROTHER, HALF SON”: THE LETTERS OF LOUIS D. BRANDEIS TO FELIX FRANKFURTER (Melvin I. Urofsky & David W. Levy eds., 1991).

¹¹ See generally MELVIN I. UROFSKY, A MIND OF ONE PIECE: BRANDEIS AND AMERICAN REFORM (1971) (detailing Brandeis's life as a lawyer, Supreme Court Justice, Zionist, etc.); UROFSKY, *supra* note 1.

¹² See generally MELVIN I. UROFSKY, AMERICAN ZIONISM: FROM HERZL TO THE HOLOCAUST (1975) (providing details on Louis Brandeis's role in the American Zionist movement).

¹³ See Appendix A at the end of this book review.

¹⁴ See generally DAVID GLEICHER, LOUIS BRANDEIS SLEPT HERE: A SLIGHTLY CYNICAL HISTORY OF AMERICAN JEWS (1997) (tracing the “history of American Jews, beginning in 1654” until today).

¹⁵ *George Washington Slept Here Markers*, THE HISTORICAL MARKER DATABASE, <http://www.hmdb.org/results.asp?SeriesID=9> (last visited May 6, 2011).

This is further bolstered by the creation of Brandeis University, founded in 1948, which was named after the late Justice. A private non-sectarian, but Jewish sponsored, institution, it now has more than 5,000 undergraduate and graduate students.¹⁶ Additionally, even though Brandeis supported both the University of Kentucky and its law school over the years, the University of Louisville named its law school after him in 1997. Furthermore, the U.S. Postal Service issued four stamps honoring U.S. Supreme Court Justices—one of which is a portrait of Brandeis. Perhaps Gleicher is indeed correct in asking if Brandeis slept here and insinuating that he has become the “George Washington of American Jewish history”—a rather odd attainment since Brandeis is generally considered to be a non-believer.

In the Beginning

Dr. Urofsky begins his Brandeis story with a description of his Louisville, Kentucky roots.¹⁷ His telling and that of the aforementioned biography by Mason seem almost identical. The story of Brandeis actually traces back to Europe where his family decided to emigrate from Prague after the failure of the liberal revolutions of 1848.¹⁸ Consequently, the family settled in Louisville in 1849. Brandeis was born there, but the family left America in 1872 and returned to Europe because of an economic downturn.¹⁹ For a long period, including those years when young Brandeis returned to Europe, Prague was a part of the Austro-Hungarian Empire.²⁰

While in Louisville, Brandeis attended the German-English Academy and the Louisville Male High School.²¹ During those years when they returned to Europe, the Brandeis family stressed or traveled primarily in German speaking countries.²² Brandeis attended school in Dresden, Germany at the Annen-Realschule.²³ He never attended college in America before

¹⁶ *Schools and Enrollment*, BRANDEIS UNIVERSITY, <http://www.brandeis.edu/about/facts/schools.html> (last visited May 6, 2011).

¹⁷ MELVIN I. UROFSKY, *LOUIS D. BRANDEIS: A LIFE* 3 (2009).

¹⁸ *Id.*

¹⁹ *Id.* at 21.

²⁰ *See id.* at 496–97.

²¹ *Id.* at 10–11.

²² *Id.* at 21–22.

²³ *Id.* at 22–23.

entering Harvard Law School in 1875, at the young age of 19.²⁴

Prague is now a part of the modern day nation of the Czech Republic. The Brandeis family was a part of the large German speaking population in Prague, rather than those for whom Czech was the native tongue—a Slavic language. The Germanic language tied the Brandeis family to German culture, including music. Urofsky diligently informs his readers of Brandeis's ties to Goethe and Schiller, which connote both German linguistic skills and cultural identity.²⁵ Brandeis at times used German in his letters, especially when writing to his brother, Alfred. In 1891, he married Alice Goldmark, an American woman who spoke German and English.²⁶

The German language and culture that Adolph Brandeis, young Louis's father, brought to America proved to be an entree for him into the American Midwestern population of German speaking farmers with whom he engaged in the wholesale grain business.²⁷ German immigration to the Midwest constituted a substantial part of the non-native born population. Before their official immigration into America, in the fall of 1848, the extended family sent Adolph on a "reconnaissance mission" to scout out their anticipated move to America.²⁸ Urofsky tells us that Adolph fell in love with America.²⁹ He started out as a farm worker in Ohio but then became an employee of a grocer in Cincinnati, an Ohio River city.³⁰ The extended family, consisting of three families made up of twenty-six members in all, moved in 1849 with many trunks, two pianos, and the trappings of a successful group of people well above the cut of most immigrants.³¹ Urofsky tells us that they were not part of the eastern European "huddled masses yearning to breathe free" language made famous by Emma Lazarus in her sonnet that now graces the Statue of Liberty in New York City's harbor.³² After a brief stay in Madison, Indiana, or another city along the Ohio River, the family moved further south to Louisville, also on the

²⁴ *Id.* at 25.

²⁵ *Id.* at 15, 35.

²⁶ *See id.* at 107, 114.

²⁷ *See id.* at 9.

²⁸ *Id.* at 4–5.

²⁹ *Id.*

³⁰ *Id.* at 6.

³¹ *Id.*

³² *Id.*

Ohio River.³³ There Louis was born in 1856³⁴ and he, interestingly, retained a soft Southern accent throughout his life.

*“[T]he inner man’s central personality:” Fighter and
Litigator*

Dr. Urofsky tells us that, “Brandeis remains one of the great justices in the nation’s history, the author of important opinions that continue to shape American jurisprudence.”³⁵ He also notes that, “[h]e wrote tens of thousands of letters in his lifetime, and although many of them survive, very few cast any light on the inner man.”³⁶ In making this statement, Dr. Urofsky overlooks important references to the central personality feature of Louis D. Brandeis: his fighting spirit. Although it may be obvious, lawyers like to fight and litigation is a form of sublimated combat. As a litigator and as a reformer, Brandeis was involved in fights and battles throughout his professional career. Even his ventures into politics were related to his fighting spirit, although the pugilistic nature of his political battles is more apparent than his legal activities and battles.

Thomas K. McCraw, Professor of History at the Harvard Graduate School of Business, has written a truly exciting study of Brandeis and three other important regulators in *Prophets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis, Alfred E. Kahn*.³⁷ The book which won the 1985 Pulitzer Prize in history casts much insight and “light on the inner man.”³⁸ Early on, McCraw quotes an 1878 letter by one of Brandeis’s Harvard Law classmates, William E. Cushing, to his mother.³⁹ The letter reports on Brandeis’s brilliance noting that even the professors were attentive to his classroom comments.⁴⁰ When a student could not locate his notebook, someone suggested in jest that he ask Brandeis, who knew everything.⁴¹ Remarkably, Brandeis told him to look on a particular window sill and it was

³³ *Id.* at 8.

³⁴ *Id.*

³⁵ *Id.* at xii.

³⁶ *Id.*

³⁷ THOMAS K. MCCRAW, *PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN* (1984).

³⁸ UROFSKY, *supra* note 17, at xii.

³⁹ MCCRAW, *supra* note 37, at 82–83.

⁴⁰ *Id.* at 83.

⁴¹ *Id.*

found there.⁴² Professor McCraw states, “[t]hus the Brandeis literature began as hagiography, and it continued in that vein for a hundred years, until the 1980s.”⁴³

The Greatness of Justice Brandeis

Justice Brandeis ranks as one of the half dozen or so greatest justices to have served on our high court. His enduring contributions to the law have often been through dissenting opinions that he wrote as an associate justice. Furthermore, his *The Right to Privacy* article, that he co-authored with his law partner Samuel Warren in a 1890 issue of the *Harvard Law Review*,⁴⁴ can be viewed as equaling or exceeding the importance of most of his work on the Supreme Court.

Justice Brandeis authored several important free speech opinions. In *Gilbert v. Minnesota*,⁴⁵ Brandeis dissented from the Court’s opinion that upheld a Minnesota statute which criminalized speech that discouraged young men from entering that state’s military or federal military service. He wrote, “[t]he right to speak freely concerning functions of the Federal Government is a privilege or immunity of every citizen of the United States which, even before the adoption of the Fourteenth Amendment, a State was powerless to curtail.”⁴⁶ In *Whitney v. California*,⁴⁷ Anita Whitney was found guilty under the state’s Criminal Syndicalism Act for speech that threatened society; Brandeis, joined by Justice Holmes, concurred in the decision to sustain the conviction.⁴⁸ Brandeis wrote:

Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature.⁴⁹

Whitney was overruled in 1969 in the *Brandenburg* case, a

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

⁴⁵ 254 U.S. 325, 334 (1920) (Brandeis, J., dissenting).

⁴⁶ *Id.* at 337.

⁴⁷ 274 U.S. 357 (1927), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

⁴⁸ *Id.* at 372 (Brandeis, J., concurring).

⁴⁹ *Id.* at 378–79.

decision that conformed in large measure to the thinking of Holmes and Brandeis on freedom of speech.⁵⁰

Brandeis wrote the majority opinion in *Erie Railroad Co. v. Tompkins*,⁵¹—a case little known outside the legal community but one of dubious distinction within it. It overruled Justice Story's landmark decision in *Swift v. Tyson*,⁵² and held that federal courts sitting in diversity jurisdiction had to follow state substantive law.⁵³

Although Dr. Urofsky points out errors by Brandeis, and is on occasion critical, his study often times seems to follow in the hagiographic mold. The largest failure of Urofsky is his willingness to see Brandeis in superlatives and as a larger than life judicial figure. However, readers should be able to navigate the pages without problem. His occasional snipes at other justices are part and parcel of his ongoing boosterish presentation of Brandeis—other justices simply do not quite measure up. Urofsky's admiration for Brandeis is transparent, even palpable, but it does not seriously detract from an otherwise excellent life and/or the analysis of a great life in the law and on the nation's highest court.

Dr. Urofsky tell us that Brandeis told Felix Frankfurter, then a Harvard Law Professor, that both John Marshall (known as the "Great Chief Justice") and Joseph Story had "outlived their usefulness because of a failure to grow."⁵⁴ Urofsky also comments on Holmes and Brandeis, noting that, "[a]bove all, Brandeis cherished facts, while Holmes hated them"⁵⁵—portraying Holmes in a slightly uncomplimentary manner. Holmes actually made such a statement himself, but he seemed to be saying that he did not need to bolster his opinions with the unduly large number of facts that Brandeis relished.⁵⁶ Urofsky tells us that Justice Hugo L. Black "certainly had a difficult time adjusting to the Court."⁵⁷ Although Brandeis thought William Howard Taft was an extremely able administrator as Chief Justice, Urofsky includes an unnecessary and demeaning comment Brandeis made about

⁵⁰ *Brandenburg*, 395 U.S. at 447.

⁵¹ 304 U.S. 64, 69 (1938).

⁵² *Swift v. Tyson*, 41 U.S. 1, 14 (1842), *overruled by Erie R.R. Co.*, 304 U.S. at 64.

⁵³ *Erie R.R. Co.*, 304 U.S. at 79–80.

⁵⁴ UROFSKY, *supra* note 17, at 566.

⁵⁵ *Id.*

⁵⁶ *Id.* at 567.

⁵⁷ *Id.* at 897 n.741.

Taft that he had “a first-rate second-rate mind.”⁵⁸ Urofsky is unkind to Justice Joseph McKenna as well, and questioned his competency to sit on the nation’s highest court.⁵⁹ This negative imputation toward Justice McKenna also seems both unfair and unnecessary considering that McKenna had suffered a stroke while on the high bench.⁶⁰ If this stroke was the basis of his difficulty, Urofsky should have clearly noted that fact. Furthermore, McKenna was very conscious of his limited credentials when he was appointed to the Court and he actually did take law courses at Columbia Law School before officially taking his seat⁶¹—a move that certainly showed a high degree of character, responsibility, and devotion to duty.

Dr. Urofsky also slights another great jurist, Benjamin Nathan Cardozo, by suggesting, “Cardozo never became a great Supreme Court Justice, although he wrote several important opinions.”⁶² Cardozo’s exemplary record as Judge and Chief Judge of the New York State Court of Appeals prior to joining the high bench and his lectures and authorship of *The Nature of the Judicial Process* made him an arguably great Supreme Court Justice at the moment he took his oath of office.⁶³ Dr. Urofsky’s comment that “Cardozo had the intellectual ability to become a great justice”⁶⁴ seems patronizing rather than complimentary. Cardozo’s appointment was supported by the legal profession as the man most suited to replace the great Justice Oliver Wendell Holmes and President Hoover appointed Cardozo despite the fact that he would be the third New Yorker and second Jewish member on the Court. His appointment was made despite the customary desire to keep the Court broadly representative of the nation.

Predictably, Urofsky downplays negatives about Brandeis. He does not relate that Brandeis’s friend, Justice Holmes, wrote in a lighter vein that Brandeis could roast him on a fire in the cause of some principle.⁶⁵ Such a comment suggests the coldness of Brandeis’s personality, that he was something of a cold fish.

⁵⁸ *Id.* at 573.

⁵⁹ *Id.* at 595.

⁶⁰ KENNETH JOST, *THE SUPREME COURT A TO Z* 294 (4th ed. 2007).

⁶¹ *Id.*

⁶² UROFSKY, *supra* note 17, at 677.

⁶³ *Id.* at 676–77.

⁶⁴ *Id.* at 677.

⁶⁵ 2 HOLMES—POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874–1932, at 13 (Mark DeWolfe Howe ed., 7th prtng. 1946).

As for Justice William O. Douglas, Brandeis's successor, Urofsky questions Douglas's claim that Brandeis, before his retirement, had recommended him to President Franklin D. Roosevelt. Urofsky states that Douglas's memoirs are full of "exaggerations, misrepresentations, and out-and-out falsehoods."⁶⁶ He does suggest, however, that Brandeis certainly would have approved Douglas's freedom of speech and right to privacy positions, but adds that "[m]any other aspects of Douglas's long tenure on the high court . . . would have filled him with dismay."⁶⁷ Instead of giving some examples of Justice Douglas's purported mischievous personality, however, Urofsky merely directs the reader to Bruce A. Murphy's book, *Wild Bill: The Legend and Life of William O. Douglas*.⁶⁸ Citing Douglas for authority after attributing exaggerations, misrepresentations, and falsehoods to him seems inappropriate. Furthermore, citing to a work by Professor Bruce A. Murphy is perhaps equally inappropriate. U.S. Court of Appeals Judge Myron H. Bright and David T. Smorodin reviewed an earlier book by Bruce A. Murphy, *The Brandeis/Frankfurter Connection: The Secret Political Activities of Two Supreme Court Justices* in 1983⁶⁹ and their review is so troublesome that any future work or opinion of Professor Murphy should have been viewed with suspicion.

Urofsky also repeats some of Brandeis's negative comments on Justice McReynolds in his discussion of McReynolds's extreme anti-Semitism.⁷⁰ Although he is generally complimentary of Justice John Hessin Clarke,⁷¹ Urofsky elsewhere calls Clarke's opinion in the *Milwaukee Leader* case "intemperate."⁷² While it is easy to say that the opinion of Justice Clarke was intemperate, many would disagree. For example, both Brandeis and Holmes

⁶⁶ UROFSKY, *supra* note 17, at 750.

⁶⁷ *Id.* at 751.

⁶⁸ *Id.* at 900 (citing BRUCE ALLEN MURPHY, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS* (2003)) (*Wild Bill* is an account of former Supreme Court Justice William Douglas's life prior to and during his tenure on the high court. Overall, this is not a flattering account of Douglas's life—Murphy criticizes both his personal lifestyle and some of his judicial opinions).

⁶⁹ See generally Myron H. Bright & David T. Smorodin, *A Flawed Tale: The Brandeis/Frankfurter Connection: The Secret Political Activities of Two Supreme Court Justices*, 16 LOY. L.A. L. REV. 205, 206 (1983) (book review) (concluding that Murphy's book "fails as a serious, scholarly work because it is burdened by sensationalism and innuendo").

⁷⁰ UROFSKY, *supra* note 17, at 479–80.

⁷¹ *Id.* 461–62.

⁷² *Id.* at 564; see U.S. *ex rel.* Milwaukee Soc. Democratic Publ'g Co. v. Burleson, 255 U.S. 407 (1921).

filed separate dissents, neither called the majority opinion “intemperate” and Urofsky never explains his assertion.

Dr. Urofsky notes that the decision, per Justice Oliver Wendell Holmes, in *Buck v. Bell*,⁷³ upheld involuntary sterilization but he does not set forth that the compulsory sterilization was for being unfit, which in Carrie Bell’s case was for being retarded. He fails to directly mention that Brandeis concurred in the decision containing the now infamous quote, “[t]hree generations of imbeciles are enough.”⁷⁴ Only Justice Pierce Butler dissented.⁷⁵ Just as the opinion is viewed as a negative mark on the record of Justice Holmes, so too it is a negative for Brandeis and the other concurring justices and Dr. Urofsky shies away from a subsequent discussion of this negative aspect of Brandeis’s record.

Urofsky further discusses the dynamic of the Court during Brandeis’ tenure but at times leaves the readers hanging. For example, he tells us that Justice Butler never visited with the Brandeises at their traditional Monday afternoon gatherings but does not explain why.⁷⁶ That the overtly anti-Semitic Justice McReynolds also did not attend needs no explanation. Concerning Justice McReynold’s anti-Semitism, Urofsky explains that Brandeis did not recognize McReynolds’s prejudice during their encounters when McReynolds was Attorney General under President Wilson.⁷⁷ He continues by explaining that McReynolds detested Brandeis and later Cardozo because they were Jewish. Indeed, he tells us that McReynolds even refused to sit next to Brandeis as required by protocol for the 1924 Supreme Court photograph⁷⁸—consequently, there is no 1924 official Supreme Court photograph. Furthermore, McReynolds refused to sign the congratulatory letter from the other Justices to Brandeis on his retirement.⁷⁹ Thus, McReynold’s failure to attend Brandeis’s gatherings is understandable without explanation, but why Justice Butler never visited is rather intriguing, but disappointingly there is not an explanation provided by Urofsky.

In a way, the little slights and uncomplimentary asides about

⁷³ 274 U.S. 200 (1927); see UROFSKY, *supra* note 17, at 575.

⁷⁴ *Buck*, 274 U.S. at 207.

⁷⁵ *Id.* at 208 (Butler, J., dissenting).

⁷⁶ *Id.* at 723.

⁷⁷ *Id.* at 479.

⁷⁸ *Id.*

⁷⁹ *Id.*

other justices are insignificant. But they also seem to be an expression of Dr. Urofsky's identification with the subject of his biography. It is a largely insignificant blemish on this excellent volume, since most readers are used to reading biographies written by admirers of the biographee. We know biographers can be a little too quick to praise and a little too slow to criticize.

Justice William O. Douglas, who succeeded Brandeis on the Supreme Court, also had high praise for his predecessor. In a review of the A.L. Todd book on Brandeis's confirmation battle, Douglas wrote:

Brandeis was a militant crusader for social justice whoever his opponent might be. He was dangerous not only because of his brilliance, his arithmetic, his courage. He was dangerous because he was incorruptible. His crusades in public causes were not made for fees; he contributed his services, and he reimbursed his law associates in Boston for the time he spent on these sorties *pro bono publico*. He and his wife were not socially or politically ambitious. There was therefore no way of seducing them into "respectability." No network of corporate affiliations or retainers or directorships could tempt him or still his voice.⁸⁰

Clearly Justice Douglas's stated admiration for Brandeis was based on the same characteristics or qualities that Douglas hoped others would say about him when the time came for his career to undergo study. Was Douglas objective? Yes. But his comments are also an example of the psychological phenomenon known as projection. Douglas wrote of Brandeis as being courageous and incorruptible, someone who could not be seduced by retainers or directorships, and a man who could not be bought off. The characteristics Douglas saw and admired in Brandeis were perhaps characteristics that Douglas wished others would see in him—and that he saw in himself.

*The Combative Spirit: The Central Personality
Characteristic*

The Brandeis revealed in his letters unlocks the personality of the man. The accolades published by admiring authors are important as well, including the fact that Brandeis had the highest academic record at Harvard Law School⁸¹—a record that

⁸⁰ William O. Douglas, *Louis Brandeis: Dangerous Because Incorruptible*, N.Y. TIMES, July 5, 1964, at BR3.

⁸¹ A.L. TODD, *supra* note 4, at 40–41.

still stands—but the combative spirit of Brandeis is central to understanding the man and his career.

When Harvard Law School offered Brandeis a teaching position, his mother and other family members urged him to accept. But Brandeis explained his declination to his brother Alfred: “I really long for the excitement of the contest, that is, a good prolonged one covering days or weeks. There is a certain joy in the draining exhaustion and backache of a long trial, which shorter skirmishes cannot afford.”⁸²

As mentioned previously, lawyers like to fight and it is a professional hallmark. Many younger attorneys have attributed their calling to identification with the profession acquired from television shows such as *L.A. Law* and *Ironsides*. Bellicosity epitomizes the primary personality trait of trial attorneys and it is a controlled or sublimated form of human aggression. The surgeon’s human aggression expresses itself in the cutting edge of the scalpel. The trial attorney’s human aggression expresses itself in cutting-edge cross examination and devastating closing arguments. Law reviews wish to publish articles about the cutting edge of the law, rather than historic or purely informative presentations. Even Professor McCraw, who scrutinizes Brandeis’s business thinking, notes that one of the qualities that made Brandeis “one of the most effective advocates the United States has ever produced” was his “love of combat.”⁸³

On another occasion Brandeis wrote, I would “rather fight than eat.”⁸⁴ These two statements: (1) the longing for prolonged contests versus skirmishes, and (2) fighting as more important than eating—quoted from letters to his brother—say it all. They are the keys that open us to the mindset and thinking of Louis Brandeis.

Brandeis enjoyed many good fights and battles throughout his career. He fought long and arduous battles in the courtroom on behalf of his clients and in public forums throughout the country on behalf of public interest causes. Brandeis fought in the courtroom, in the legislature, in the Congressional arena, and in the newspapers. He was a skilled and able fighter.

Professor McCraw points out that Brandeis was a highly successful trial attorney who knew how to find a winning ground.

⁸² UROFSKY, *supra* note 1, at 6.

⁸³ MCCRAW, *supra* note 37, at 85.

⁸⁴ LEONARD BAKER, BRANDEIS AND FRANKFURTER: A DUAL BIOGRAPHY 91 (1984).

He fought hard and gained an early reputation as an able advocate. This enabled him to pick and chose his battles. Urofsky seems to favor Brandeis too much by suggesting that after his initial success he did not seek out public causes: "Brandeis never went looking for reform work; causes seemed to find him. He did not have that inborn zeal of a crusader, for whom every perceived injustice must be fought."⁸⁵

There are two problems with Dr. Urofsky's analysis. First, he dismisses the crusader's zeal that is fully apparent in Brandeis. Second, by serving public causes without charge, he demonstrated some of the zeal of a crusader, and essentially advertised that he was a willing advocate for the right causes. That causes seemed to find him was due, in large part, to the fact that he was a well regarded litigator,⁸⁶ and because he made it known that he would work without fee for certain public interest causes. Once that became known, it is self-evident that causes would seek him out and find him. Just as money talks, the availability of free legal services speak with clarity that carries a long distance.

*Brandeis Unmasked: the Curse of Bigness and the
Frankenstein Monster*

Professor McCraw strips away much of the hagiography that surrounds Brandeis. He tells us that "[t]he rabbit-from-hat character of all three of Brandeis' celebrated victories foreshadowed the kinds of arguments he would make later against big business."⁸⁷ He continues by adding that Brandeis, in his arguments against big business, "often substituted slogans for careful analysis."⁸⁸ He also notes that, "Brandeis never made the transition from muckraker to administrator,"⁸⁹ although Charles Francis Adams, father of the Massachusetts Railroad Commission, did make that transition. He points out that Brandeis declined the seat offered to him on the Federal Trade Commission (FTC) at a crucial moment in 1914.⁹⁰ Even worse, he accuses Brandeis of "sloganeering" and refusing to rethink the

⁸⁵ UROFSKY, *supra* note 17, at 83.

⁸⁶ MCCRAW, *supra* note 37, at 85 (describing Brandeis as one of the finest litigators our nation has produced).

⁸⁷ *Id.* at 94.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

trust problem so that the FTC institutionalized a “confused and contradictory regulatory program, one that stood almost no chance of working.”⁹¹ One of Brandeis’s law clerks, James M. Landis, was a key player in establishing the Securities and Exchange Commission (SEC). Landis, who later became Dean of Harvard Law School, served on the SEC as a Member and Chairman.⁹² That agency, which recently has been faulted in regard to contemporary banking problems and the Bernard Madoff scandal, has generally been held in high regard⁹³ whereas the FTC never achieved the same high status. Professor McCraw notes that Brandeis’s analysis of a muckraking book demonstrated his “characteristic focus on the small businessman rather than on the consumer.”⁹⁴ Brandeis championed individualism and opportunity for entrepreneurs and small businessmen, but he showed little concern for consumers. He fought against many forms of the “curse of bigness,” but especially against big business.⁹⁵ McCraw describes him as a “merciless muckraker.”⁹⁶ He also states that “Brandeis offered regulatory solutions grounded on a set of economic assumptions that were fundamentally wrong.”⁹⁷ Brandeis was essentially a “David versus Goliath” fighter for whom bigness was the ultimate evil and a ready target.

Brandeis’s dissenting opinion in *Louis K. Liggett Co. v. Lee* objected to the Supreme Court’s reversal of a Florida Supreme Court decision.⁹⁸ The Florida high court had upheld a tax on chain stores that levied increased taxation with an increase in the number of stores and the number of counties in which the store operated.⁹⁹ The Supreme Court reversed the Florida decision on the ground that the Anti-Chain Store Law denied corporations equal protection of the law.¹⁰⁰

Brandeis’s language discloses his intense feelings about what

⁹¹ *Id.*

⁹² *See id.* at 153.

⁹³ *Times Topics: Bernard L. Madoff*, N.Y. TIMES, Feb. 16, 2011, available at http://topics.nytimes.com/top/reference/timestopics/people/m/bernard_l_madoff/index.html.

⁹⁴ MCCRAW, *supra* note 37, at 94.

⁹⁵ *Id.* at 82.

⁹⁶ *Id.* at 83.

⁹⁷ *Id.* at 84.

⁹⁸ *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 541 (1933) (Brandeis, J., dissenting).

⁹⁹ *Id.* at 531–32 (majority opinion).

¹⁰⁰ *See id.* at 536.

he called the “curse of bigness.”¹⁰¹ Brandeis wrote: “There was a sense of some insidious menace inherent in large aggregations of capital, particularly when held by corporations.”¹⁰² Brandeis continues by stating that, “[a]ble, discerning scholars . . . show that size alone gives to giant corporations a social significance not attached ordinarily to smaller units of private enterprise.”¹⁰³ Finally, Brandeis reveals the intensity of his emotions when he speaks of the “Frankenstein monster:” “Such is the Frankenstein monster which states have created by their corporation laws.”¹⁰⁴ Mary Shelley’s 1818 immortal novel, *Frankenstein; Or, The Modern Prometheus*,¹⁰⁵ became a major American horror motion picture in 1931, directed by James Whale¹⁰⁶ and remarkably, the film became intertwined with the jurisprudence of the U.S. Supreme Court two years later through the 1933 dissent of Justice Brandeis. For Brandeis, corporate bigness was a ferocious monster that reminded him of Shelley’s Frankenstein. Dr. Urofsky does not tell us anything about Brandeis’s Frankenstein reference or whether Brandeis read the book or saw the motion picture. Leonard Baker, however, has interestingly noted: “Brandeis opposed passive entertainments, such as movies, already three decades old in the 1920s, and radio, just becoming popular. He never owned an automobile, hiring one if necessary.”¹⁰⁷ Clearly, Brandeis was something of an ascetic but perhaps Brandeis’s reference to the Frankenstein monster was a throwback to the sloganeering of his days as a practicing attorney. It might prove effective to a jury of lay persons, but seems less persuasive and misplaced as an argument of a justice writing for the Supreme Court.

Several of Brandeis’s law clerks became law professors. One, Paul A. Freund of Harvard Law School, in writing about Brandeis pointedly said, “he never tired in the fight.”¹⁰⁸ He was still fighting in 1931.

¹⁰¹ MCCRAW, *supra* note 37, at 82.

¹⁰² *Louis K. Liggett Co.*, 288 U.S. at 549 (Brandeis, J., dissenting).

¹⁰³ *Id.* at 564–65 (footnote omitted).

¹⁰⁴ *Id.* at 567.

¹⁰⁵ MARY WOLLSTONECRAFT SHELLEY, *FRANKENSTEIN; OR, THE MODERN PROMETHEUS: THE 1818 TEXT* (James Rieger ed., 1974); *see* Terrence Rafferty, *Horror: Shelley’s Daughters*, N.Y. TIMES, Oct. 26, 2008, at BR12.

¹⁰⁶ *See* EPHRAIM KATZ, *THE FILM ENCYCLOPEDIA* 1460–61 (3d ed. 1998).

¹⁰⁷ BAKER, *supra* note 84, at 184; UROFSKY, *supra* note 17, at 356.

¹⁰⁸ Paul A. Freund, *Mr. Justice Brandeis*, in MR. JUSTICE 177, 182 (Allison Dunham & Philip B. Kurland eds., rev. ed. 1964).

The Shortcoming of Urofsky's LOUIS D. BRANDEIS: A LIFE

The major shortcoming of Brandeis's analysis of our modern economic society is that he often identified with his clients who often were small and medium sized businessmen. As a result, he looked upon big business from a skewered perspective and lacked some of the objectivity that we would expect from a justice of Brandeis's caliber. As seen demonstrated above in the discussion of *Louis K. Liggett Co.*, Brandeis wrote an overly emotional dissent bringing up visions of the "Frankenstein monster."¹⁰⁹ Justice Stone joined in his dissent, but Justice Cardozo dissented separately. Today we are accustomed to major regional and national chains, whether they are drug stores, department stores, home improvement stores, hardware stores, or clothing stores. We see them as giants, but not as Frankenstein-like monsters.

The major shortcoming of Dr. Urofsky's life of Brandeis is that he identifies with Brandeis, just as Brandeis identified with his clients. As a result, he is a little too restrained in accepting criticism of Brandeis and a little too willing to withhold criticism that he might otherwise share. The process of identifying with the subject of a biography is always an obstacle for a biographer. Urofsky does an excellent job, but his close identification with Brandeis harms his objectivity. Brandeis may have graduated from Harvard Law School with the highest grade point average ever achieved there, but that does not mean that he earned the highest marks on every Supreme Court case in which he played a part. His winning record as a litigator and advocate does not mean that he was always right in his arguments in court and before agencies such as the FTC. Although many of the legal principles expressed in his dissents later became the law of the land, his dissenting opinions were not necessarily correct.

*Brandeis's Most Enduring Jurisprudential Achievement:
The Right to Privacy*

Brandeis's first important fight, his entry into the public arena, came in the form of an article that he wrote with his law partner Samuel Warren entitled *The Right to Privacy*.¹¹⁰ Sam Warren was Brandeis's classmate at Harvard Law School—Brandeis was

¹⁰⁹ 288 U.S. at 567 (Brandeis, J., dissenting).

¹¹⁰ Warren & Brandeis, *supra* note 44, at 193.

first in the class, Warren second. Warren urged Brandeis to return to Boston from St. Louis and to go into law practice together. They became law partners in 1879¹¹¹ and Warren urged Brandeis to write the article with him.

They were motivated to write the article as a result of unwarranted journalistic coverage of a private family event. Their article developed the idea of a “right ‘to be let alone’” first enunciated by Thomas McIntyre Cooley,¹¹² who became the first Chairman of the Interstate Commerce Commission, was Chief Justice of the Michigan Supreme Court, and served as the Dean of the University of Michigan Law School. Brandeis and Warren collaborated and produced an article that, in time, became the most famous article published in an American law review.¹¹³

Although Justice Brandeis used some of the article’s thinking in his famed dissent in the *Olmstead v. United States* case, Brandeis, while mentioning privacy in *Olmstead*, did not directly address privacy as a constitutional right in the article, the *Olmstead* dissent,¹¹⁴ or in any other case that he heard as a Supreme Court Justice. It remained for Justice William O. Douglas to take the next step and bring the right to privacy into an area of law that was directly protected by the U.S. Constitution. The Constitution does not specifically address privacy in any of its provisions or even mention the word. Justice Douglas’s language, referring to “emanations” and “penumbras” has been subject to some ridicule.¹¹⁵ He was, however, on the right course. Had he used more convincing language his opinion might have achieved a more substantial place in constitutional law.¹¹⁶

For example, Justice Douglas could have stated that, although

¹¹¹ Deborah K. Paulus, *Reflections on Takings: The Watuppa Ponds Cases*, 17 W. NEW ENG. L. REV. 29, 52 (1995).

¹¹² Warren & Brandeis, *supra* note 44, at 195 (citing THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 29 (1880)).

¹¹³ See GREAT AMERICAN LAW REVIEWS 16 (Robert C. Berring ed., 1984) (*The Right to Privacy* is reprinted within).

¹¹⁴ See *Olmstead v. United States*, 277 U.S. 438, 471, 478–79 (1928) (Brandeis, J., dissenting), *overruled by* *Katz v. United States*, 389 U.S. 347 (1967), *and* *Berger v. New York*, 388 U.S. 41 (1967).

¹¹⁵ J. Christopher Rideout, *Penumbra Thinking Revisited: Metaphor in Legal Argumentation*, 7 J. ASS’N LEGAL WRITING DIRECTORS 155, 157–60 (2010). Holmes referred to penumbras, but not emanations, in his *Olmstead* dissent, see *Olmstead*, 277 U.S. at 469–71 (Holmes, J., dissenting).

¹¹⁶ Brandeis made a reference in *Olmstead* to the underlying purpose of rights. See *Olmstead*, 277 U.S. at 478–79 (Brandeis, J., dissenting).

not expressly laid out in the Constitution, the right to privacy could be found by legal analysis. The Fifth Amendment's right to silence and the Fourth Amendment rights were designed to protect pieces of paper from search or seizure without a search warrant and also to protect the material which was spoken, thought, printed, or written on the papers. Unless published or made available to others, the thoughts and writings were intended by the Amendments to be protected as private writings and private thoughts; and in other words—they were protected by a privacy right.

Brandeis's Earliest Fights in the Public Arena or in Court

Brandeis engaged in early fights over traction and transportation in his local community. These were his earliest battles. They tied in, eventually, to his concern over railroads and monopolies, particularly the New Haven Railroad and the influence of banking tycoon J.P. Morgan.¹¹⁷ Interestingly, there is no picture in Urofsky's book of J.P. Morgan who was one of Brandeis's major opponents in his railroad regulation cases—particularly involving the New Haven Railroad.

Moreover, there is no individual picture of William Howard Taft, who was another major opponent of Brandeis' during his Pinchot-Ballinger battle. Taft is shown in a group picture of the Supreme Court taken while he was Chief Justice. Taft seemed to bridge the gap of their past rivalry and opened the door towards a cordial relationship when the two men served together on the high court.

Dr. Urofsky also neglected to include the papers of Alpheus T. Mason in his bibliography. As mentioned earlier, Mason, a Princeton University politics professor, authored four books on Brandeis. His papers are housed in Princeton's Mudd Manuscript Library¹¹⁸ and they consist of 20.20 cubic feet (twenty-four boxes, seventeen cartons).¹¹⁹ They include materials on Brandeis, Wilson, Stone, and Taft and Mason further authored works on Stone, Taft, and the Supreme Court.

¹¹⁷ See L. S. Zacharias, *Repaving the Brandeis Way: The Decline of Developmental Property*, 82 NW. U. L. REV. 596, 608 (1988).

¹¹⁸ *Mudd Manuscript Library, Alpheus Thomas Mason Papers, circa 1925–1979: Inventory*, PRINCETON UNIV. LIBRARY, <http://diglib.princeton.edu/ead/getEad?id=ark:/88435/3t945q774> (last visited May 17, 2011).

¹¹⁹ *Id.*

“His Religion”

Professor McCraw in his superb study on Brandeis and other regulators notes that, despite the mass of scholarship about Brandeis, a few mysteries remain.¹²⁰ As McCraw wrote: “[W]hy, having never paid much attention to religion or to his own ethnicity, would Brandeis in his middle fifties suddenly embrace Zionism with such zeal that he became the national leader of the movement?”¹²¹ Professor McCraw carefully avoids saying that Brandeis “never paid much attention to” *his* religion, although he does use the word “his” in referring to Brandeis’s ethnicity.¹²² Brandeis “came from a family of assimilated German Jews who never attended religious services and who celebrated Christmas as a secular holiday for the exchange of gifts.”¹²³ Brandeis never studied Hebrew, had religious schooling, or had a bar mitzvah.¹²⁴ For him, “religion was a matter of ethical conduct.”¹²⁵

He was “nonobservant” of religious belief and practices “to the end of his life.”¹²⁶ Furthermore, “[h]e never attended synagogue and continued to set up Christmas trees in his home, a practice which, according to one of his daughters, had ‘no religious significance whatsoever.’”¹²⁷

Professor Philippa Strum tells us, however, that while on a Zionist trip to Palestine, Brandeis visited two synagogues and even prayed at one.¹²⁸ Professor Strum also noted that Brandeis once visited a synagogue in Pennsylvania.¹²⁹

He went so far as to break a lifelong habit of staying away from synagogues, visiting the synagogue in Rehovot and going twice to the synagogue in Zichron Yaacov . . . praying with the congregation on Saturday morning and giving a speech at the end of the service. (The only other time he ever set foot in a synagogue was during a 1916 Zionist convention in Pittsburgh).¹³⁰

¹²⁰ McCRAW, *supra* note 37, at 83.

¹²¹ *Id.*

¹²² *See id.*

¹²³ C. BERNARD RUFFIN, PROFILES OF FAITH: THE RELIGIOUS BELIEFS OF EMINENT AMERICANS 232 (1997).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 233.

¹²⁷ *Id.*

¹²⁸ PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 244–45 (1984).

¹²⁹ *Id.*

¹³⁰ *Id.*

Dr. Urofsky tells us that Brandeis never set foot in a synagogue prior to 1914.¹³¹ The precise details and minor discrepancies aside, Brandeis certainly was not a regular at religious services.

Brandeis and religion is a cumbersome topic to describe. Professor Strum's reference to Brandeis's "habit of staying away from synagogues" is a peculiar usage.¹³² While church or synagogue attendance might be described as habitual, non-attendance is merely non-attendance, rather than a habit. Apparently, he stayed away out of conviction or, more precisely, out of a lack of religious conviction. In addition, his "praying with the congregation"¹³³ in the small city of Zichron Yaacov seems inconsistent with the portrait of Brandeis as a non-believer who did not belong to or attend a synagogue or a church. His daughter Elizabeth described him as "completely non-religious, a non-observant Jew."¹³⁴

Those who knew him well said that he was "puzzled by people who relied on God and religious institutions." Late in life, he told an acquaintance, "I do not understand what you mean by experiencing God's presence. I have faced many trials, had to make grave decisions, tasted of the sweet and bitter, was depressed and elated, worked and studied, and thought and meditated. I have lived through many a moment in which, according to the faithful, God should have spoken and helped." He found no evidence of divine intervention in his life. "I sensed no power outside myself working along me with," he continued.¹³⁵

The idea of this secular minded lawyer praying in Zichron Yaacov is an oddity. Dr. Urofsky tells us that "Brandeis indeed had no Jewish background."¹³⁶ Urofsky also seems to stumble when he writes of Brandeis and "his religion,"¹³⁷ a usage that Professor McCraw avoids. All of those usages will leave many readers scratching their heads. When Urofsky writes of "his religion" or of "Brandeis's religion" his meaning, at the least, is unclear, since he is writing about a man who was raised with no religion, who was a non-believer, who practiced no religion, and who did not attend service.¹³⁸ Was Urofsky referring to

¹³¹ UROFSKY, *supra* note 17, at 418.

¹³² STRUM, *supra* note 128, at 244.

¹³³ *Id.* at 245

¹³⁴ UROFSKY, *supra* note 17, at 407.

¹³⁵ RUFFIN, *supra* note 123, at 233.

¹³⁶ UROFSKY, *supra* note 17, at 542.

¹³⁷ *Id.* at 52.

¹³⁸ *Id.* at 52, 402, 407, 442.

Brandeis's ethical and moral beliefs by his usage? Probably not. Was he referring to the Jewish religion as "his religion?" This is probable. However, this seems like some sort of posthumous compulsory conversion of a churchless man, of a man who had a "habit" of staying away from synagogues, into a congregant of a religion in which he did not believe.

Dr. Urofsky tells us, "[i]t might well be said that . . . Louis, subscribed to the Judaism of the prophets, with its exalted moral teachings and idealism, and not to the Judaism of the priests, with its emphasis on rules and rituals."¹³⁹ It might well be said that this is certainly stretching the concept of religion beyond the breaking point in order to include Brandeis as something of a follower of, or a subscriber to, a religion which held no meaning for him. Ethnic pride doth make strange bedfellows.

In the end, the mystery remains why Brandeis, a non-believer, became an ardent Zionist, unless ethnic pride was something of a factor. Dr. Urofsky provides no answer. A respect for the biblical prophets and idealism would not call for one to be devoted to and to work for the establishment of a Jewish nation in Palestine. Zionism can be viewed from two distinct perspectives. One is the religious component of a "return to Zion,"¹⁴⁰ while the other views it as another in the rise of many nation states in the late nineteenth century and early twentieth century.¹⁴¹ During Brandeis's life, nationalism was then on the rise throughout Europe.

The turning point for Brandeis seems to have been a meeting with the editor of a Jewish newspaper, Jacob de Haas, an English immigrant.¹⁴² At this meeting, de Haas talked to Brandeis about savings bank insurance, one of Brandeis's favorite projects.¹⁴³ When they were done, de Haas asked Brandeis if he was related to Lewis Dembitz.¹⁴⁴ When Brandeis told him that he was, de Haas described Dembitz as a "noble Jew."¹⁴⁵ Brandeis changed his own middle name from David to Dembitz, because he so revered his uncle.¹⁴⁶ His uncle Lewis Dembitz, unlike many of the

¹³⁹ *Id.* at 19.

¹⁴⁰ WALTER LAQUEUR, A HISTORY OF ZIONISM: FROM THE FRENCH REVOLUTION TO THE ESTABLISHMENT OF THE STATE OF ISRAEL, at xv (2003).

¹⁴¹ *See id.*

¹⁴² UROFSKY, *supra* note 17, at 399.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 18.

Brandeis clan, was an observant Jew who practiced his religious faith. Louis called Uncle Lewis, “a living university.”¹⁴⁷ He was a published author on Judaism and secular legal matters.¹⁴⁸ Urofsky even tells us that he translated Harriet Beecher Stowe’s *Uncle Tom’s Cabin* from English into German¹⁴⁹ and predicted an eclipse using his own calculations. In addition, he was a delegate at the 1860 Republican convention that nominated Abraham Lincoln.¹⁵⁰

Perhaps de Haas’s choice of language in referring to Uncle Lewis Dembitz as a “noble Jew” struck a personal chord with Brandeis that enabled de Haas to preach to Brandeis his Zionist message and to win him over as one more convert to the Zionist movement. Certainly de Haas’s approach to Brandeis had a missionary tone, rather than being merely conversational. At the conclusion of the Passover Seder, the book that is used during the service, the Haggadah, concludes the service with a wishful prayer, “next year in Jerusalem.”¹⁵¹ Similarly, the same prayer is repeated at the conclusion of the service on Yom Kippur, Judaism’s most important High Holy Day (other than the Sabbath).¹⁵² Since there was no religious motivation for Brandeis to be attracted to Zionism, the hook that brought him into the Zionist fold must have been ethnic in nature. The rise of nationalism among many European groups that did not have a distinct nation became pronounced in the early 1900s. The breakup of the Austro-Hungarian Empire led to the establishment of new nation-states and the idea of a nation, or homeland, for the Jewish people was part of the same nationalistic thinking.¹⁵³

Brandeis was impressed with the Jewish eastern European

¹⁴⁷ *Id.* at 17.

¹⁴⁸ See generally LEWIS N. DEMBITZ, *JEWISH SERVICES IN SYNAGOGUE AND HOME* (1898); LEWIS N. DEMBITZ, *KENTUCKY JURISPRUDENCE* (1890); 2 LEWIS N. DEMBITZ, *A TREATISE ON LAND TITLES IN THE UNITED STATES* (1895).

¹⁴⁹ UROFSKY, *supra* note 17, at 18.

¹⁵⁰ *Id.* at 10.

¹⁵¹ See *Hallel-Nirtzah: Conclusion of the Passover Seder*, CHABAD.ORG, http://www.chabad.org/holidays/Passover/pesach_cdo/aid/1739/jewish/Hallel-Nirtzah.htm (last visited May 6, 2011).

¹⁵² See *Yom Kippur Synagogue Services*, ACADEMY BJE, <http://www.bje.org.au/learning/judaism/holydays/YomKippur/services.html> (last visited May 17, 2011).

¹⁵³ THEODOR HERZL, *THE JEWISH STATE (DER JUDENSTAAT)* 27 (Harry Zohn trans., 1970); UROFSKY, *supra* note 12, at 12. See generally THEODOR HERZL, *OLD NEW LAND* (Lotta Levensohn trans., Markus Wiener Publishers 1997) (1960) (literary work epitomizing Zionist ideals of a Jewish state).

workers that he met while working on labor disputes in New York's garment district. He was also impressed by a book on Greek civilization, *The Greek Commonwealth: Politics & Economics in Fifth-Century Athens* by the idealist Sir Alfred Eckhard Zimmern.¹⁵⁴ Urofsky tells us that "[t]he Brandeises never denied their Jewishness," but that only Lewis Naphtali Dembitz practiced it.¹⁵⁵ Here too, we meet a confusion of religion and ethnicity. There is some reason to believe that Louis Brandeis was not open about his ethnicity. As mentioned earlier, William Cushing, a fellow Harvard Law classmate, wrote admiringly of Brandeis and his brilliance¹⁵⁶ but he also mentioned that Brandeis "ha[d] a rather foreign look, and is currently believed to have some Jew blood in him."¹⁵⁷ This comment, quoted similarly by Mason in his biography,¹⁵⁸ suggests that Brandeis was not open about his ethnicity. After going to school together for two or three years, whether or not Brandeis had some "Jew blood" in him should not have been a matter of speculation by a friend and law school schoolmate.

Was Brandeis a Great Justice?

Justice Brandeis is widely regarded as one of our great Supreme Court Justices. He came to the Court with a remarkable background as a litigator and reformer. He also had an important record as a scholarly law student and co-authored a seminal article that created an entire new chapter in the common law of America. With one exception, his reformer role is less significant in terms of his later service on the Court, because his role was that of a superb advocate. His goal was to win for his client or his cause, despite a desire to be counsel to the situation. Professor McCraw has pointed out that Brandeis was wrong in some of his economic thinking.¹⁵⁹ For example, he won a victory before the Interstate Commerce Commission (ICC) by persuading

¹⁵⁴ See generally ALFRED ZIMMERN, *THE GREEK COMMONWEALTH: POLITICS & ECONOMICS IN FIFTH-CENTURY ATHENS* (4th ed., rev. ed. 1924) (analyzing Greek civilization—including its geography, politics, economy, and the City of Athens).

¹⁵⁵ UROFSKY, *supra* note 17, at 18.

¹⁵⁶ MCCRAW, *supra* note 37, at 83 (footnote omitted). Urofsky speaks of the friendship between Brandeis and Cushing, and he quotes from the letter Cushing wrote to his mother describing his classmate Brandeis. UROFSKY, *supra* note 17, at 30–31.

¹⁵⁷ MCCRAW, *supra* note 37, at 83.

¹⁵⁸ MASON, *supra* note 6, at 3.

¹⁵⁹ MCCRAW, *supra* note 37, at 139, 142.

that body that railroads should be denied rate increases, since they could save a million dollars a year by following the formula of scientific management. This proved incorrect, as shown by the ICC's granting several years later of all the rate increases that were requested.¹⁶⁰ Brandeis may have been one of the very best litigators in the United States, but litigation involves an advocacy role. Its accomplishments are often inapplicable to the judicial decision making process. In one important instance, his advocacy has enriched our judicial heritage. His work as an advocate before the Supreme Court in an early case, undoubtedly laid a foundation for several judicial dissents that eventually became the foundation of important areas of the law.

The Brandeis Brief: Muller v. Oregon

The exception was his advocacy in *Muller v. Oregon*,¹⁶¹ the 1908 case that upheld state legislation limiting the hours of female employees. In his brief, Brandeis provided the Court not only with legal argument and authority, but also with sociological, medical, and scientific data.¹⁶² Such briefs became known as "Brandeis Briefs." Their effectiveness reached a pinnacle in 1954 when the Supreme Court decided *Brown v. Board of Education*.¹⁶³ Similarly, the impact of *The Right to Privacy* expanded into family life and contraception and matters of sexual orientation. Whether these matters or this development in the law could be foreseen by Brandeis is unknown.

The Brandeis Briefs, over the years, have enriched the legacy and heritage of the entire body of Supreme Court literature. Without the Brandeis Briefs and its introduction of sociological, medical, and business data into the mix of traditional legal authority, the Supreme Court might not have fully achieved its role as a co-equal branch of our government. The Brandeis Briefs enriched legal literature and took Supreme Court decisions beyond the mundane and purely technical style of decision making. The Supreme Court decision of today is not a mere legalistic writing, but a work that encompasses the richness of our society and learning.

¹⁶⁰ *Id.* at 93–94.

¹⁶¹ 208 U.S. 412 (1908).

¹⁶² *See id.* at 419 n.1.

¹⁶³ *See* 347 U.S. 483 (1954).

Great Decisions:

Brandeis can be rated as a great justice because of his decisions and several important dissenting opinions.

No Federal Common Law:

He wrote an opinion overruling Justice Story's early decision in *Swift v. Tyson*¹⁶⁴ in *Erie Railroad Co. v. Tompkins*.¹⁶⁵ This important case is relatively unknown to people outside the legal profession.

Freedom of Speech:

He supported freedom of speech in *Gilbert v. Minnesota*¹⁶⁶ and *Whitney v. California*.¹⁶⁷ His important dissents, often with Justice Oliver Wendell Holmes, in the area of free speech, help mould our current outlook in this important area of the law.

Search and Seizure:

His dissenting opinion in *Olmstead v. United States*¹⁶⁸ became the law of the land in 1967 when *Katz v. United States*¹⁶⁹ overruled *Olmstead*. In *Olmstead*, Brandeis argued persuasively that wiretap evidence should be excluded from evidence when it is attained without a search warrant. Brandeis argued that the Fourth Amendment required a search or seizure involving a wiretap to be based upon a search warrant.¹⁷⁰

Brandeis did not have the graceful writing style of Justices Holmes, Cardozo, and Justice Robert H. Jackson. He did not write with the majesty of the great Chief Justice Marshall. But his words conveyed the depth of his beliefs and could be quite effective, even if overly didactic at times. Judge Posner has compared his writing style to that of a "sledgehammer" and a

¹⁶⁴ 41 U.S. 1 (1842), *overruled by* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

¹⁶⁵ *Erie R.R. Co.*, 304 U.S. 64

¹⁶⁶ 254 U.S. 325, 334 (1920) (Brandeis, J., dissenting).

¹⁶⁷ 274 U.S. 357, 372 (1927) (Brandeis, J., concurring), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

¹⁶⁸ 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting), *overruled by* *Katz v. United States*, 389 U.S. 347 (1967), and *Berger v. New York*, 388 U.S. 41 (1967).

¹⁶⁹ *Katz*, 389 U.S. at 352–53.

¹⁷⁰ *See Olmstead*, 277 U.S. at 479 (Brandeis, J., dissenting).

“jackhammer.”¹⁷¹

In the revised edition of *Law and Literature*, Posner writes, “[o]f Brandeis, one may say with more justice than T. S. Eliot said of Milton, that his style has had a bad influence on his successors.”¹⁷² He quotes from Brandeis’s dissent in the *Olmstead* case and then offers an explanation.

The jackhammer style (sentences of roughly equal length, starting the same way, and full of lists—“their beliefs, their thoughts, their emotions”¹⁷³ and so on—and repetition, notably of “they” and of “their”) conveys a distracting sense of Brandeis’s own excitement, making readers wonder whether he may not have been projecting onto the long-dead framers his own vision of a just society. A hectoring style, it grabs the interlocutor by the lapels and shouts in his face, demanding assent rather than engaging in a discussion. A discordant style in which to celebrate the classical liberal ideal of personal autonomy, it is also easily imitable and is the model for the windy jeremiads found in so many modern judicial dissents.¹⁷⁴

Judge Posner continues by comparing Brandeis’s style with the style of Justice Jackson. He calls Jackson’s style “at once more rational (less “rhetorical”) and more pungent.”¹⁷⁵ The Jackson quote ends with his famous line, “[w]e are not final because we are infallible, but we are infallible only because we are final.”¹⁷⁶ In a footnote, he quotes from Jackson’s second flag-salute case, which he calls “one of the most eloquent majority opinions in the history of American law.”¹⁷⁷

Judge Posner continues: “[A]s with Marshall and Holmes, the aphorism toward which the passage builds gains force from the low-keyed manner in which it is introduced. These judges are masters of cadence and timing.”¹⁷⁸ Similarly, in a footnote,¹⁷⁹ Judge Posner compares Holmes’s writing style to that of Brandeis

¹⁷¹ RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 292 (1988); RICHARD A. POSNER, *LAW AND LITERATURE: REVISED AND ENLARGED* 276–77 (rev. & enlarged ed. 1998) [hereinafter *REVISED AND ENLARGED*].

¹⁷² *REVISED AND ENLARGED*, *supra* note 171, at 276.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 277.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* (quoting *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring)).

¹⁷⁷ *Id.* at 277 n.26; see *W. Va. State Bd of Educ. v. Barnette*, 319 U.S. 624 (1943).

¹⁷⁸ *Id.* at 277.

¹⁷⁹ *Id.* at 277 n.24.

and praises Holmes while also quoting from his *Olmstead* dissent. Judge Posner states: “With Brandeis’s dissent compare Holmes’s characteristically terse and eloquent dissent describing the government’s illegal wiretapping as ‘dirty business,’ and stating, ‘We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part.’”¹⁸⁰ Posner adds, “[n]otice the legal-realist flavor of ‘We have to choose, and for my part . . .’”¹⁸¹ Elsewhere, he calls Chief Justice Marshall and Justice Holmes “probably the two greatest judges in our history.”¹⁸² Brandeis’s writing style might have been more of an expression of his background as a trial attorney and advocate and a reflection of his lack of judicial experience prior to joining the high court. Nevertheless, he did quite well for himself.

The Pre-eminent Study: Mason or Urofsky?

For someone who wants to read about Brandeis, this reviewer would recommend Professor Thomas K. McCraw’s *Prophets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis, Alfred E. Kahn*.¹⁸³ The book is extremely well written, even exciting, and it is not too lengthy. Additionally, Brandeis is only one of four subjects in this scholarly and highly readable study that is primarily about regulation and deregulation. For those who want a more thorough exposition of the life and career of Louis D. Brandeis, the lengthy studies by Alpheus T. Mason and Melvin I. Urofsky are the best choices. Both are well written scholarly endeavors. Mason’s writing style, however, is significantly better than Urofsky’s.

Both authors have published several books on Brandeis. Mason, a political scientist, knew Brandeis. He had access to Brandeis’s correspondence and papers, but not all of his Supreme Court papers. Justice Frankfurter actually kept them from him. Frankfurter disliked Mason and similarly opposed Mason’s interest in writing a biography of Justice Cardozo.¹⁸⁴ Mason’s

¹⁸⁰ *Id.* (quoting *Olmstead v. United States*, 277 U.S. 438, 469–71 (1928) (Holmes, J., dissenting), *overruled by Katz v. United States*, 389 U.S. 347 (1967), and *Berger v. New York*, 388 U.S. 41 (1967)).

¹⁸¹ *Id.* (quoting *Olmstead*, 277 U.S. at 469–71).

¹⁸² *Id.* at 275.

¹⁸³ MCCRAW, *supra* note 37.

¹⁸⁴ Paul Brickner, *Kaufman’s Cardozo: Judicial Biography as Legal History*, 88 GEO. L.J. 1895, 1895 n.4 (2000) (reviewing ANDREW L. KAUFMAN, *CARDOZO*

book is businesslike, direct, and to the point. It leaves out much of the Brandeis family life that modern historians include in biographical studies. Since it was published in 1946, it cannot bring us up to the moment on all of Brandeis's dissents that have been adopted by the Supreme Court. Nonetheless, this reviewer finds Mason's endeavor, *Brandeis: A Free Man's Life*, a more successful study.

Urofsky's book is excellent. It is well written and thoroughly researched. Some readers will find Dr. Urofsky's coverage of Mrs. Brandeis's mental health issues too lengthy. She had to be hospitalized at times for her problem. Her illness impacted their daughters but her problem largely lifted after Brandeis was appointed to the Supreme Court and the couple moved to Washington, D.C. A modern day opinion by a psychiatrist would have been welcome, even though the basis for such opinion would be letters and other writings rather than one based on interviews and treatment. Brandeis's interest in Zionism, and the movement to create a Jewish homeland in Palestine, was intense and continued as a major extra-judicial activity for Brandeis after he joined the high court. He was introduced to Zionism by Jacob de Haas, a British Zionist who moved to America in 1908, and soon became committed.¹⁸⁵ However, Dr. Urofsky's study presents much more coverage of Brandeis and Zionism than most readers will wish to read.

Whether one reads either the Mason book or the Urofsky book, he or she will be treated to a work of substantial scholarship and meaningful learning. One could not go wrong, if time permits, in reading both. Both are important studies of an excellent jurist, one who still ranks among the greatest Justices who have served on the Supreme Court of the United States.

(1998)). Mason also authored a noted biography of Justice Harlan Fiske Stone. See generally ALPHEUS THOMAS MASON, *HARLAND FISKE STONE: PILLAR OF THE LAW* (1956).

¹⁸⁵ See UROFSKY, *supra* note 17, at 415.

APPENDIX A:
BOOKS ABOUT BRANDEIS PUBLISHED SINCE 1964

Since the 1964 publication of A.L. TODD, *JUSTICE ON TRIAL: THE CASE OF LOUIS D. BRANDEIS* (1964), books, in whole or in part about Justice Brandeis, have been published in astounding numbers. These include: EZEKIEL RABINOWITZ, *JUSTICE LOUIS D. BRANDEIS, THE ZIONIST CHAPTER OF HIS LIFE* (1968); IRIS NOBLE, *FIREBRANDS FOR JUSTICE: A BIOGRAPHY OF LOUIS DEMBITZ BRANDEIS* (1969); CATHERINE OWENS PEARE, *THE LOUIS D. BRANDEIS STORY* (1970); ELLEN NORMAN STERN, *EMBATTLED JUSTICE: THE STORY OF LOUIS DEMBITZ BRANDEIS* (1971); MELVIN I. UROFSKY, *A MIND OF ONE PIECE: BRANDEIS AND AMERICAN REFORM* (1971); 1–5 *LETTERS OF LOUIS D. BRANDEIS* (Melvin I. Urofsky & David W. Levy eds., 1971–78); G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* (1976); ALBERTA EISEMAN, *REBELS AND REFORMERS: BIOGRAPHIES OF FOUR JEWISH AMERICANS: URIAH PHILLIPS LEVY, ERNESTINE L. ROSE, LOUIS D. BRANDEIS, LILLIAN D. WALD* (1976); ALPHEUS THOMAS MASON, *THE SUPREME COURT FROM TAFT TO BURGER* (1979); ALLON GAL, *BRANDEIS OF BOSTON* (1980); NELSON L. DAWSON, *LOUIS D. BRANDEIS, FELIX FRANKFURTER, AND THE NEW DEAL* (Archon Books 1980) (1975); BRUCE ALLEN MURPHY, *THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES* (1982); LEWIS J. PAPER, *BRANDEIS* (1983); PHILIPPA STRUM, *LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE* (1984); THOMAS K. MCCRAW, *PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, AND ALFRED E. KAHN* (1984) (winner of the 1985 Pulitzer Prize in history); LEONARD BAKER, *BRANDEIS AND FRANKFURTER: A DUAL BIOGRAPHY* (1984); DAVID C. GROSS, *A JUSTICE FOR ALL THE PEOPLE: LOUIS D. BRANDEIS* (1987); BEN HALPERN, *A CLASH OF HEROES: BRANDEIS, WEIZMANN, AND AMERICAN ZIONISM* (1987); JESSE H. CHOPER, *THE SUPREME COURT AND ITS JUSTICES* (1987); ROBERT A. BURT, *TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND* (1988); GENE TEITELBAUM, *JUSTICE LOUIS D. BRANDEIS: A BIBLIOGRAPHY OF WRITINGS AND OTHER MATERIALS ON THE JUSTICE* (1988); *BRANDEIS AND AMERICA* (Nelson L. Dawson ed., 1989); “HALF BROTHER, HALF SON”: *THE LETTERS OF LOUIS D. BRANDEIS TO*

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FELIX FRANKFURTER (Melvin I. Urofsky & David W. Levy eds., 1991); PHILIPPA STRUM, *BRANDEIS: BEYOND PROGRESSIVISM* (1993); STEPHEN W. BASKERVILLE, *OF LAWS AND LIMITATIONS: AN INTELLECTUAL PORTRAIT OF LOUIS DEMBITZ BRANDEIS* (1994); *BRANDEIS ON DEMOCRACY* (Philippa Strum ed., 1995); SUZANNE FREDMAN, *LOUIS BRANDEIS: THE PEOPLE'S JUSTICE* (1996); PAUL D. CARRINGTON, *STEWARDS OF DEMOCRACY: LAW AS A PUBLIC PROFESSION* (1999); EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* (2000); *THE FAMILY LETTERS OF LOUIS D. BRANDEIS* (Melvin I. Urofsky & David W. Levy eds., 2002); TREVOR PARRY-GILES, *THE CHARACTER OF JUSTICE: RHETORIC, LAW, AND POLITICS IN THE SUPREME COURT CONFIRMATION PROCESS* (2006); ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., [THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910–1921] 9 *THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES* (2007); GERALD BERK, *LOUIS D. BRANDEIS AND THE MAKING OF REGULATED COMPETITION, 1900–1932* (2009).