

follow the uncoupling of African-American experience from the integrationist story. We might also consider why so many white people in the North eventually recognized the necessity of abolition without accepting the logic of racial equality. The emergence of scientific racism is only part of this story. Many stalwarts of the antislavery struggle—including Abraham Lincoln and Harriet Beecher Stowe—passionately believed that blacks were entitled to the promises of the Declaration of Independence, even as they suggested that the long-term future of African-Americans lay in colonies or nations

beyond the borders of the United States.

The major obstacle to realizing Hahn's ambitious agenda is political rather than intellectual. Many of the operating assumptions of American history rest on the foundation of the integrationist story. To question it requires a fundamental reassessment of the most sanctified episodes in the American past, like the founding and the Civil War, and a willingness to acknowledge that neither freedom nor inclusion was an inevitability of American life. A more radical approach might also complicate the efforts of those black politicians and leaders who

have deployed the integrationist story for progressive ends: leaders who, like Frederick Douglass and Barack Obama, determined that the benefits of embedding black experience in the unfolding story of American freedom offer more tangible rewards than a full accounting of America's past. From popular histories to the rhetoric of candidates and leaders, a revolution in our understanding of black history may be some time in coming. After all, in what seems more like a campaign pledge than an irony, the first black president has already urged us not to "lose sight of what we have in common." ■

In With Both Feet

by MICHAEL O'DONNELL

They called it a "Brandeis brief." When the great attorney Louis Brandeis wrote a legal brief in a constitutional case, it was short on legal theory and packed with so many facts that it required a sturdy binding and a solid arm for hefting. In 1908 the brief he submitted to the Supreme Court in *Muller v. Oregon*—he successfully defended that state's ten-hour workday for women laborers against an industry attack—became an instant legend, running to 113 pages and reading like an earnest encyclopedic entry on the ills of modern factory life. Such a document necessarily relied on interdisciplinary research, which was one of the Brandeis brief's main innovations. Economic data, labor reports, foreign sources, academic studies—the brief summoned an army of facts. This was highly unorthodox. Lawyers at the time were expected to make an argument, cite the pertinent cases and statutes and wrap things up.

When Brandeis joined the Supreme Court in 1916, at 59, he fashioned his opinions in the same exhaustive manner. He was officially the first justice to cite a law review article in an opinion, and unofficially the first to cite *Bakers Weekly* (in a case involving a law that standardized weights for loaves of bread). He once even cited *The Nation* in a dissent, if only for its convenient reproduction of one of Thomas Jefferson's speeches. One Thanksgiving his law clerk (and a future secretary of state) Dean Acheson was over for dinner, and Brandeis sounded off

Louis D. Brandeis

A Life.

By Melvin Urofsky.

Pantheon. 955 pp. \$40.

about the French, who were trying to renegotiate loans entered into during World War I. Acheson considered arguing a little with his boss by pointing out France's contributions to Western civilization but later admitted, "I knew he would floor me by quoting their export statistics for the same years, so I gave it up."

Like Dickens's Gradgrind, Brandeis wanted facts. He had a bathtub filled with clippings and articles—a reservoir of data waiting to be tapped. During his thirty-nine years as an attorney in private practice in Boston, he devised an arduous habit: upon taking on a new client, he holed up and learned everything he could about its business, and more important, its opponent's. A masterful cross-examiner, Brandeis was able on more than one occasion to trip up a hostile witness, wielding a better understanding of the opposing firm's affairs than its own president did.

As a constitutional matter a Brandeis brief—or opinion, or dissent—makes a certain amount of sense. After all, one of the ingenious hallmarks of the Constitution is its brevity: the text yields few ready answers and is frequently perceived by jurists as an invitation to make talismanic divinations. "Congress shall make no law respecting an establishment of religion"; "unreasonable searches and seizures" shall be prohibited; states shall deny no person "the equal protection of the laws." What do these vague, Olympian commandments from the First,



Justice Louis Brandeis (left) and Chief Justice William H. Taft leaving the White House, March 13, 1929

Fourth and Fourteenth Amendments mean, exactly? Is it an "establishment" of religion to display a cross on public property? To allow an invocation before a high school basketball game? To print "In God We Trust" on the currency? To a certain extent these types of questions can be answered by studying the bedrock and sediment of the common law: look for what courts have done in similar cases and analogize from that. But in a novel case facts can be more helpful than precedents, as Brandeis demonstrated many times over.

He was also a lifelong champion of the "living" Constitution—the view that if the Constitution is to endure, it must evolve to meet society's changing needs. Today this common-sense premise is hotly disputed by judges who seem to want to keep the gallows busy and the women in the kitchen. It was

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less controversial in Brandeis's time, although it didn't always carry the day. In *Olmstead v. United States* (1928), for instance, the Court held in a formalistic opinion that the police's use of a new evidence-gathering technology called wiretapping was not a search or seizure under the Fourth Amendment, since no doors were kicked in or papers removed. In his dissent, Brandeis uncharacteristically put aside facts to summon the kind of stirring eloquence that his colleague Oliver Wendell Holmes Jr. regularly brought to the bench:

The makers of our Constitution... knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Melvin Urofsky, an academic historian, has written an extraordinary biography of Brandeis that devotes equal attention to his careers as attorney, reformer and justice. Topping out at nearly 1,000 heavily annotated pages, it is surely one of the most comprehensive legal biographies published in recent years. But Urofsky paces the narrative crisply, and his judgments are as briskly dispensed as they are trustworthy, often after a quick and skilled survey of the voluminous Brandeis scholarship. For example, here is Urofsky on whether Brandeis encouraged Franklin Roosevelt to nominate William ("Wild Bill") Douglas to be his successor on the Court, as Justice Douglas later claimed: "No one has ever found evidence to back this up, and Douglas's memoirs are full of exaggerations, misrepresentations, and out-and-out falsehoods." Urofsky's learned, confident and persuasive book is now the standard life of his subject. In authority and heft, it is equal to a Brandeis brief.

Before he joined the Court, Brandeis operated as a sort of roving moralist, earning the enmity of Boston's financial community and the nickname "the people's lawyer." His reform causes—stopping a plan to run a trolley train through Boston Common; trust-

busting among the Morgan concerns; refereeing major labor disputes like the 1910 New York City garment workers' strike—allied him with progressive agitators like Wisconsin senator and presidential candidate Robert La Follette, whose invitation in 1924 to join the ticket Brandeis discreetly declined. In private practice, Brandeis often angled himself into the singular position of being "counsel to the situation" rather than advocate for one side or the other, working to find a solution that he deemed best for everyone. Urofsky observes that this arrangement may have been unethical at the time (it certainly would be today); and even if it reflected widespread trust in Brandeis's judgment, it caused all sorts of problems and conflicts of interest.

The most important reform effort of Brandeis's career concerned an issue that surfaced during last year's debate over healthcare. At the beginning of the twentieth century, life insurance policies provided a financial safety net analogous to modern health insurance. But "term insurance" policies for the laboring class were canceled without refund if the policyholder missed a single payment, on the dubious rationale that the worker had chosen to let the policy lapse. Brandeis devised an alternative called "savings bank life insurance," which offered policies through trusted

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community banks rather than insurance conglomerates. His efforts on this reform reveal a lifelong faith in markets, even while fighting for progressive change. Savings bank life insurance was not universal free insurance for all but an attempt to inject competition back into a complacent, monopolistic industry. This entrepreneurial bent also figured in Brandeis's push to help Woodrow Wilson tighten anti-trust laws early in Wilson's presidency. Monopoly was a type of cheating that offended Brandeis's sense of fair play. Urofsky explains that Brandeis's and Wilson's "progressivism lay in their desire to favor popular democracy against wealthy elites, but they wanted to do so with minimal governmental influence and regulation.... Both feared big government as much as big business."

Big government and big business: Brandeis frequently railed against "the curse of bigness." He represented labor unions, including the United Mine Workers, but also distrusted large ones, siding with management against the Boston Typographical Union. He cheekily advised a former clerk to reject a position at Harvard, telling him "anybody can be a good Dean of the Harvard Law School. Why not take some smaller school and do something with it?" He took pride in the Supreme Court's lean staffing, and opposed the Court's move from the Capitol to fancier digs in 1935. In their own way, these hedges all sought to keep things small, local and responsive to the people.

Urofsky contends that a similar small-d democratic ethos informed Brandeis's ardent Zionism. The first Jewish Supreme Court justice, Brandeis certainly suffered his share of anti-Semitism. To take the most appalling example, there is no official Supreme Court photograph for 1924 because Justice James McReynolds, a blazing bigot, refused to sit next to Brandeis as seniority dictated during that term. But Urofsky suggests, plausibly if creatively, that it was not anti-Semitism, religious fervor or cultural identity that led Brandeis to Zionism. Like the savings banks, Israel represented a chance to start over, applying American values and democratic principles on a smaller scale. If Brandeis was a capitalist, he was also a utopian, always on the lookout for the next small thing.

Despite Brandeis's many reforms, his chief legacy is his work on the Court. He essentially invented the law of privacy ("the right to be let alone"), broadened the First Amendment's protection of unpopular political speech, dissented vigorously when conservatives struck down New Deal legislation and strengthened

the Court as an institution by joining his conservative brethren in opposing Roosevelt's cynical Court-packing plan. For these achievements Brandeis is one of the four or five great jurists of the twentieth century. He happened to serve alongside two others, Holmes and Benjamin Cardozo, and one of the pleasures of Urofsky's book is its gentle and generous chronicle of Brandeis and Holmes's improbable friendship.

Holmes, the elder of the two, was for thirty years a reassuring liberal presence on a Court increasingly bent on inventing rights for the business community. With each annual Court photograph, his impressive mustaches seemed to grow a little broader, like two outstretched arms spread wide in the embrace of reason. Whereas Brandeis emphasized facts and championed social reform, the utilitarian and amoral Holmes dealt in abstractions. He didn't even read the newspapers. If Holmes was the more principled voice for judicial restraint in their many joint dissents—Brandeis's opinions occasionally betray his sympathy for the progressive laws his conservative colleagues were attacking—that is because Holmes had no opinion on the questions of the day, except as a philosophical matter. (Louis Menand contends in *The Metaphysical Club* that Holmes's experiences as a Union soldier during the Civil War destroyed his "belief in beliefs.") Nevertheless, the friendship was a warm one. The two walked home from Court together many evenings, sometimes arm in arm, and

when Brandeis circulated opinions for his colleagues' votes, Holmes's "returns" were chummy and encouraging. "A sockdolager," or "I am in it with both feet," he might write. When the Senate voted to confirm Brandeis's nomination to the Court after a difficult fight spearheaded by industry bigwigs he had humbled, he received a telegram from Holmes that read simply, "Welcome."

By temperament, Brandeis was passionate but mild-mannered, idealistic but pragmatic, frugal but not austere. Like many crusaders, he was mostly humorless and occasionally an insufferable moralist. When his law clerks tried to arrange a reunion to celebrate his twentieth year on the bench, Mrs. Brandeis squelched the idea, saying, presumably at her husband's request, that he would much prefer it if each of them "would sit down and write the Justice a letter telling him what we had been doing for the advancement of mankind." Brandeis once complained that he could have turned more decisions his way had he horse-traded like the other justices, but "I would have had to sin against my light, and I would have hated myself." Urofsky, who clearly admires his subject but knows how to call a foul, sees "a certain sanctimony" in this protestation from a savvy political operator who advised presidents and cabinet secretaries. Then again, perhaps Brandeis didn't need to play politics. Even if it took a generation or two, most of his dissents were eventually adopted by the full Court as the law of the land. ■

Icons and Zombies

by STUART KLAWANS

Times Square was just lighting up when I stepped out of the screening of *Breathless*. Under a black-and-white movie sky—a mottled screen of rain clouds, backlit by the last dim afternoon sun—billboards and video displays had sparked up their colors for the night, cars' headlights were starting to flare down the avenue, and the window glow of delis and storefronts had splashed onto the sidewalks. People were wading and kicking through the light on this still-damp evening as they jockeyed past one another at the intersections, with me among them hurrying on my way past one, two, three newsstands and down into the Fiftieth Street subway station, where a trumpeter on the platform was playing "Nature Boy." He switched to the theme from *The Godfather* as the train came in, and this made perfect sense. The

screening of *Breathless* had ended—a preview of the restored print, with improved subtitles, that has been prepared to commemorate the film's fiftieth anniversary—but I felt I was still in a movie, even while chasing around outside.

To me, and I suspect to most cinephiles, this is the rush that makes moviegoing addictive: the sensation that the film's world was so full that it has spilled into the sights and sounds beyond the theater's doors. You may judge the power of the drug by the fact that it cannot be copped very often. From *Breathless*, as everyone surely knows by now, you get a shot of the pure stuff, especially now that the image has been cleaned up and is available again on a real screen.

Once more you can look down on the Champs-Élysées from the vantage point of a rooftop or upper-story window and see